



Causation: Giving Teeth to the “Substantial Factor” Analysis

• Introduction

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Manufacturers of dozers, backhoes, forklifts and other similar pieces of equipment are well-acquainted with the traditional but-for causation standard. Indeed, there is little doubt that a plaintiff in the typical equipment-related personal injury case will not succeed unless he can prove that a defendant’s product actually caused the plaintiff’s injury. Equipment manufacturers, however, are gradually becoming the center of the ever-widening circle of asbestos litigation. Manufacturers should understand that the causation standard in this arena is substantially different from the but-for standard to which those manufacturers are accustomed. Indeed, in some jurisdictions the traditional causation standard has become so diluted that it is now approximating the often-vilified causation concepts of enterprise liability and market share liability. This article provides an overview of the differing approaches to proximate causation and the dangers of eviscerating the requirement that every claimant establish a link between the allegedly negligent conduct or defective product and the ultimate injury. Without requiring some level of causation, defendants could be held responsible for a variety of actions, regardless of whether such actions had any connection to the ultimate injury.

Although the concept seems straightforward and logical – the defendant’s conduct must cause the injury – courts have wrestled with the application of causation all the way back to Judge Cardozo’s opinion in *Palsgraf v. Long Island Railroad Co.*^[1] In recent years, proximate cause has become even more difficult to apply in the context

of the ever-changing world of product liability.^[2] With toxic tort exposure difficult to trace, courts have struggled with defining the scope of causation in the face of claimants’ alleged injuries. The most prevalent test that courts apply today is the “substantial factor” analysis. Black’s Law Dictionary defines the “substantial-factor test” as “[t]he principle that causation exists when the

defendant's conduct is an important or significant contributor to the plaintiff's injuries." [3] The Comments to Restatement (Second) of Torts § 431 (1965) explain that "[t]he word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have occurred." [4] In application, however, courts tend to apply a much more basic definition of the test. And the difficulty of this test is that the definition swallows the concept: to satisfy the substantial factor test, the claimant must demonstrate that the defendant's conduct was a substantial factor in causing the injury. [5] With such flexibility in the practical definition of what actually constitutes a "substantial factor," courts apply varying requirements to satisfy the causation standard. The variance among applications is especially apparent with sympathetic plaintiffs who are suffering from a debilitating disease. If a plaintiff has documented evidence of contracting a particular disease but cannot definitively relate the disease back to a specific product, courts often employ varying versions of the substantial factor analysis to avoid leaving the claimant without a viable defendant. Although construction-related asbestos is the classic example of a product involving the causation conundrum, the difficulty of applying the substantial factor analysis also pervades claims involving ACMIE products such as fertilizers, pesticides, chemical treatment of fence posts, and equipment engine components.

- **Courts apply different standards to the "substantial factor" test, depending on the jurisdiction.**

In the context of toxic torts, courts have varied greatly in what is considered "substantial" for the purposes of legal causation. Perhaps the most common scenario in which this question arises is in asbestos exposure cases, where the latency period of asbestos-related diseases, combined with a plaintiff's typical exposure

history from multiple potential sources spanning several years, if not decades, often makes causation a complex and difficult issue. Some states have taken a broad view[6] of what constitutes a substantial cause, finding that “each and every exposure,” however small, constitutes a substantial factor in causing an asbestos-related illness. California courts, for example, have described the substantial factor standard as a “relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. Thus, a force which plays only an infinitesimal or theoretical part in bringing about injury, damage, or loss is not a substantial factor, but a very minor force that does cause harm is a substantial factor.”[7] The Supreme Court of California even warned that “undue emphasis should not be placed on the term ‘substantial.’”[8] Under this approach, the exposure only need be a “substantial factor in contributing to the aggregate dose of asbestos,” such that “the mere fact that comparable levels could be found in the ambient air does not render the exposure ‘negligible or theoretical.’”[9] Likewise, several jurisdictions have equated the “substantial factor” analysis to “but for” causation.[10] Essentially, as long as the injury would not have occurred “but for” the defendant’s conduct or product, the claimant satisfies the substantial factor analysis. The trouble with such an approach, however, is that in theory, the birth of a tortfeasor could be considered a “but for” cause of the ultimate injury the tortfeasor inflicts. Consequently, unless strictly applying the “but for” analysis, such approach could lead to a finding of proximate causation that is far in excess of reasonable logic.

- **Courts have recently attempted to curtail the broad definition of “substantial” to preclude liability where plaintiffs can prove only a mere “possibility” that a defendant caused the injury.**

Several courts have recently taken a strict approach[11] to causation by adhering more closely to the definition of the substantial factor test as set forth in the Restatement and Black’s Law Dictionary, both of which require plaintiffs to produce evidence that a defendant’s conduct is a significant and important cause of the alleged injury or illness.[12] In *Betz v. Pneumo Abex L.L.C.*,[13] the

Supreme Court of Pennsylvania thoroughly analyzed the substantial factor causation requirement in the context of an asbestos exposure case. As is common in such cases, the plaintiffs offered an expert to testify that “each and every fiber of inhaled asbestos was a substantial contributing factor to any asbestos-related disease.” The Supreme Court of Pennsylvania ultimately rejected this opinion for its lack of scientific basis and its failure to meet the substantial factor causation standard. The court recognized that the “dose is a central concept in toxicology – ‘the dose makes the poison’ is the oldest maxim in the field.”[14] Although the expert opined that asbestos is a dose responsive disease, such that each fiber contributed to causing the illness, he simultaneously ruled out exposure to asbestos fibers in ambient air as a substantial factor in causing an asbestos-related illness.[15] The court reasoned that the expert’s “any-exposure opinion is in irreconcilable conflict with itself. Simply put, one cannot simultaneously maintain that a single fiber among millions is substantially causative, while also conceding that a disease is dose responsive.”[16] The court also expressed its concern that the effective result of the “any exposure” approach is “to subject the defendants to full joint-and-several liability for injuries and fatalities in the absence of any reasonably developed scientific reasoning that would support the conclusion that the product sold by the defendant was a substantial factor in causing the harm.”[17] The court concluded by stating, “Certainly a complete discounting of the substantiality in exposure would be fundamentally inconsistent with Pennsylvania law.”[18] The Sixth Circuit has likewise rejected the “any exposure” theory as contrary to the substantial factor causation standard.[19] Applying Kentucky law on causation, the Sixth Circuit found that such an argument lacks merit because it “would make every incidental exposure to asbestos a substantial factor.”[20] In *Martin v. Cincinnati Gas & Electric Company*, the Court expressly rejected the plaintiff’s expert’s opinion that “every exposure to asbestos, however slight, was a substantial factor” in causing the plaintiff’s mesothelioma.[21] As the Court explained, such an argument, if accepted, “would render the substantial factor test ‘meaningless.’”[22] In *Moeller v. Garlock Sealing Technologies*,[23] the Sixth Circuit Court of Appeals found that plaintiff’s causation theory was insufficient to establish

that any asbestos from a Garlock product was a substantial cause of the plaintiff's mesothelioma. In *Moeller*, the plaintiff claimed that "he worked with Garlock gaskets 'every day'" for several years, from about 1962 to 1970.[24] The Sixth Circuit specifically rejected plaintiff's theory that any and all exposure to asbestos counted as a contributing factor to causing plaintiff's injuries. The Sixth Circuit found that plaintiff's cumulative exposure argument failed to establish that "exposure to Garlock gaskets in and of itself was a *substantial* factor in causing [the plaintiff's] mesothelioma." [25] The Court further rejected the plaintiff's argument that the evidence was sufficient to allow the jury to infer that his exposure to Garlock gaskets was a substantial factor in causing his injuries. Quoting the *Lindstrom* case, the Sixth Circuit noted that such an inference required the plaintiff to produce "evidence of substantial exposure for a substantial period of time to provide a basis for the inference that the product was a substantial factor in causing the injury." [26] This must be done by showing "a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural." [27] The Sixth Circuit found that merely contributing to an alleged injury was insufficient to establish causation: "While [plaintiff's] exposure to Garlock gaskets may have contributed to his mesothelioma, the record simply does not support an inference that it was a *substantial* cause of his mesothelioma." [28] Considering plaintiff's significant level of exposure from other sources, and his unquantified amount of exposure from Garlock gaskets, the Court found the evidence insufficient to infer that "Garlock gaskets ***probably, as opposed to possibly,*** were a substantial cause of [plaintiff's] mesothelioma." [29] As summarized by the Sixth Circuit,

On the basis of the record, saying that exposure to Garlock gaskets was a substantial cause of [plaintiff's] mesothelioma ***would be akin to saying that one who pours a bucket of water into the ocean has substantially contributed to the ocean's volume.*** [30]

Interestingly, some Kentucky state courts, employing the same substantial factor causation standard as the Sixth Circuit, have reached the opposite conclusion, finding that the each and every

exposure theory is sufficient to create an issue of material fact that must be decided by a jury.[31]

- **Failing to give meaning to “substantial factor” results in application of alternative liability.**

Although courts in different jurisdictions have interpreted and applied the phrase “substantial factor” in varying manners, the concept of “substantial” must have some meaning. Granted, even the most liberal jurisdictions require each claimant to establish that he or she actually sustained some exposure to the defendant’s product. The question is what level of exposure qualifies as sufficient to demonstrate that the defendant’s product was a “substantial factor” in causing the alleged injuries.

By not requiring a true substantial connection between the alleged product defect and the alleged injury, some courts are implicitly endorsing forms of liability that are widely considered inequitable in the legal field: market share liability and enterprise liability. Market share liability involves the concept of holding a fungible product manufacturer liable according to the defendant’s individual percentage of the product market, regardless of fault in causing the injury. The concept applies when the plaintiff is unable to identify which defendant’s product caused the alleged injury. Similarly, under enterprise liability, the plaintiff can recover damages from each

manufacturer that operates in a given industry with industry-wide safety standards when the plaintiff is unable to identify the specific manufacturer of the product that caused the alleged injuries. The purpose of market share and enterprise liability is to compensate innocent plaintiffs and the “belief that the costs of such injuries are best allocated to defendants that have the resources (or insurance) to pay for them.”[32] When faced with the concept of adopting market share liability, however, courts in many jurisdictions have flatly rejected the notion.[33] In fact, pursuant to a recent survey, courts in only six states have adopted market share liability in any respect.[34] Likewise, courts in many jurisdictions have rejected enterprise liability as well.[35] The New Jersey court in *Namm v. Charles E. Frosst & Company* held that adoption of enterprise liability would “of necessity, result in total abandonment of the well

settled principle that manufacturers are only responsible for damages caused by a defective product . . . “[36]

Even though courts typically reject notions of market share and enterprise liability, failing to give meaning to the phrase “substantial factor” effectively adopts such a form of alternative liability. Lack of causation typically comes up in two scenarios: (1) where the plaintiff cannot establish which product actually caused a known disease such as mesothelioma; and (2) where the particular disease has no known etiology. The lack of product identification can often occur due to intermingled ubiquitous products. In the context of chemical exposure to agricultural chemicals, such as pesticides or fertilizers, a claimant often will not know which defendant’s product actually caused

the harm because products are amalgamated. Likewise, certain diseases such as nodular lymphoid hyperplasia have no known causes, but plaintiffs nonetheless attempt to assert that a particular product caused the disease.

Whether due to the intermingling of fungible products or simple failure to establish the cause of a particular injury, identifying the product that actually led to the injury can be difficult if not impossible. Consequently, a plaintiff in such a position typically asserts a claim against any defendant that manufactured a product to which the claimant was exposed, regardless of the level of exposure. Under a strict interpretation of “substantial factor,” the court should dismiss those defendants against whom the plaintiff can only establish a tenuous connection. Merely being a manufacturer of a product that may have caused an injury does not establish that the defendant actually manufactured the product that was a “substantial factor” in causing the alleged injury.

But if courts interpret “substantial factor” to mean merely a “possibility” of a causal connection, defendants that simply operate in the market or industry and produce a product to which the claimant sustained infinitesimally small or questionable exposure may be subject to liability for that reason alone. Without requiring the claimant to establish a true substantial connection between each defendant’s product and the injury, courts are bypassing the substantial factor analysis, even though the same courts would

never directly adopt market or enterprise liability. Failing to give teeth to the substantial factor test effectively eviscerates the purpose of the causation element of any product liability action and imposes alternative liability akin to market share or enterprise liability on manufacturers.

[1] *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

[2] See Joseph Sanders, William C. Powers & Michael D. Green, *The Insubstantiality of the "Substantial Factor" Test for Causation*, 73 Mo. L. Rev. 399 (2008).

[3]

Black's Law Dictionary 1566 (9th ed. 2009). Black's defines the "substantial-factor" test and the "substantial-cause" test synonymously. By comparison, the "but-for test" is defined as "[t]he cause without which the event could not have occurred." *Id.* at 250.

[4] Restatement (Second) Torts § 431 (1965) cmt. a.

[5] *Id.* § 431.

[6] See, e.g., *City of Mobile v. Havard*, 268 So. 2d 805 (Ala. 1972); *Winschel v. Brown*, 171 P.3d 142 (Alaska 2007); *Bockrath v. Aldrich Chem. Co., Inc.*, 980 P.2d 398 (Cal. 1999) (quoting *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 978 (Cal. 1997)); *Reigel v. SavaSeniorCare L.L.C.*, No. 10CA1665, 2011 Colo. App. LEXIS 2042, 2011 WL 6091709 (Colo. App. Dec. 8, 2011); *Craig v. Driscoll*, 781 A.2d 440 (Conn. App. Ct. 2001); *Weakley v. Burnham Corp.*, 871 A.2d 1167 (D.C. 2005); *Montalvo v. Lapez*, 884 P.2d 345 (Haw. 1994); *Fussell v. St. Clair*, 818 P.2d 295 (Idaho 1990); *Thacker v. UNR Indus., Inc.*, 603 N.E.2d 449 (Ill. 1992); *Bartholomee v. Casey*, 651 A.2d 908 (Md. Ct. Spec. App. 1994); *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367 (Minn. 2008); *Fisher v. Swift Transp. Co.*, 181 P.3d 601, 615 (Mont. 2008); *Kudlacek v. Fiat S.P.A.*, 509 N.W.2d 603, 611-12 (Neb. 1994); *Price v. Blaine Kern Artista, Inc.*, 893 P.2d 367, 370 (Nev. 1995); *James v. Bessemer Processing Co.*, 714 A.2d 898, 908-09 (N.J. 1998); *Hairston v. Alexander Tank & Equip. Co.*, 311 S.E.2d 559, 565-66 (N.C. 1984); *Lasley v. Combined Transp., Inc.*, 261 P.3d 1215, 1219

(Or. 2011); *Barabin v. AstenJohnson, Inc.*, No. C07-1454RSL, 2010 U.S. Dist. LEXIS 136241, 2010 WL 5137898 (W.D. Wash. Dec. 10, 2010); *Hudnall v. Mate Creek Trucking, Inc.*, 490 S.E.2d 56, 58 (W. Va. 1997); *Fandrey ex rel. Connell v. Am. Family Mut. Ins. Co.*, 680 N.W.2d 345, 352 (Wis. 2004).

[7] *Bockrath*, 980 P.2d at 403-04 (quoting *Rutherford*, 941 P.2d at 1220, 1214) (internal quotation marks and citations omitted).

[8] *Rutherford*, 941 P.2d at 969.

[9] *Jones v. John Crane, Inc.*, 132 Cal. App. 4th 990, 1000, 35 Cal. Rptr. 3d 144, 151 (Ct. App. 2005) (quoting *Rutherford*, 941 P.2d at 1214, 1220) (emphasis in original).

[10] The following states have adopted a “but for” causation analysis or some other alternative form of proximate causation. *Robertson v. Sixpence Inns of America, Inc.*, 789 P.2d 1040 (Ariz. 1990); *Ouachita Wilderness Institute, Inc. v. Mergen*, 947 S.W.2d 780 (Ark. 1997); *Hudson v. Old Guard Ins. Co.*, 3 A.3d 246 (Del. 2010); *John Crane, Inc. v. Jones*, 586 S.E.2d 26 (Ga. Ct. App. 2003); *Rando v. Anco Insulations, Inc.*, 16 So. 3d 1065 (La. 2009); *New Orleans & N.E.R. Co. v. Burge*, 2 So.2d 825 (Miss. 1941); *Trull v. Volkswagen of Am., Inc.*, 761 A.2d 477, 482 (N.H. 2000); *Wilcox v. Homestake Mining Co.*, 619 F.3d 1165, 1166-67 (10th Cir. 2010) (applying New Mexico law); *Mack v. Altmans Stage Lighting Co.*, 98 A.D.2d 468, 470-71 (N. Y. App. Div. 1984); *Miller v. Diamond Res., Inc.*, 703 N.W.2d 316, 320 (N.D. 2005); *Christian v. Gray*, 65 P.3d 591, 602 (Okla. 2010); *Contois v. Town of W. Warwick*, 865 A.2d 1019, 1023 (R.I. 2004); *Rife v. Hitachi Constr. Mach. Co.*, 609 S.E.2d 565, 569 (S.C. Ct. App. 2005); *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991); *Wilkins v. Lamoille County Mental Health Servs., Inc.*, 889 A.2d 245, 251 (Vt. 2005); *McCauley v. Purdue Pharma L.P.*, 331 F. Supp. 2d 449, 461 (W.D. Va. 2004).

[11] *Murphy v. Sarasota Ostrich Farm/Ranch, Inc.*, 875 So.2d 767 (Fla. Dist. Ct. App. 2004); *Earle v. Porter*, 40 N.E.2d 381 (Ind. 1942); *Spaur v. Owens-Corning Fiberglass Corp.*, 510 N.W.2d 854 (Iowa 1994); *Roberson v. Counselman*, 686 P.2d 149 (Kan. 1984); *Bailey v. N.Am. Refractories Co.*, 95 S.W.3d 868 (Ky. Ct. App. 2001); *Crowe v. Shaw*, 755 A.2d 509 (Maine 2000); *O’Connor v. Raymark Indus., Inc.*, 518

N.E.2d 510 (Mass. 1988); *Brisboy v. Fiberglass Corp.*, 418 N.W.2d 650 (Mich. 1988); *Giles v. Moundridge Milling Co.*, 173 S.W.2d 745, 750 (Mo. 1943) (citing Restatement (Second) of Torts 4312 Restatement Torts, p. 1160); *Horton v. Harwick Chem. Corp.*, 653 N.E.2d 1196, 1202 (Ohio 1995); *Takach v. B. M. Root Co.*, 171, 420 A.2d 1084, 1087 (Pa. 1980); *Zarecky v. Thompson*, 634 N.W.2d 311, 316 (S.D. 2001); *Georgia-Pac. Corp. v. Bostic*, 320 S.W.3d 588, 597 (Tex. App. 2010); *Holmstrom v. C.R. England, Inc.*, 8 P.3d 281, 292 (Utah 2000); *Killian v. Caza Drilling, Inc.*, 131 P.3d 975, 985 (Wyo. 2006).

[12] See, e.g., *Dixon v. Ford Motor Co.*, 47 A.3d 1038 (Md. Ct. Spec. App. 2011).

[13] *Betz v. Pneumo Abex L.L.C.*, 44 A.3d 27 (Pa. 2012).

[14] *Id.* at 31 (quoting Bernard D. Goldstein, *Toxic Torts: The Devil Is In the Dose*, 16 J.L. & POL'Y 551, 551 (2008)).

[15] See *id.* at 55.

[16] *Id.* at 56.

[17] *Id.* at 57 (quoting *Gregg v. V-J Auto Parts Co.*, 943 A.2d 216, 226–27 (Pa. 2007)).

[18] *Id.* at 58.

[19] See *Martin v. Cincinnati Gas & Electric, Co.*, 561 F.3d 439 (6th Cir. 2009); *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005).

[20] *Martin*, 561 F.3d 439.

[21] *Id.* at 443 (quoting *Lindstrom*, 424 F.3d at 493.)

[22] *Id.*

[23] *Moeller v. Garlock Sealing Technologies*, 660 F.3d 950 (6th Cir. 2011).

[24] *Id.*

at 955. The plaintiff alleged that the removal, as opposed to the installation, of gaskets caused asbestos dust, but the Court found that the plaintiff failed to establish how many or how frequently he removed

Garlock gaskets. *Id.*

[25] *Id.* (emphasis in original).

[26] *Id.* (quoting *Lindstrom*, 424 F.3d at 492).

[27] *Id.* (quoting *Lindstrom*, 424 F.3d at 492).

[28] *Id.* (emphasis in original).

[29] *Id.* (emphasis added).

[30] *Id.* (emphasis added); see also *Betz v. Pneumo Abex L.L.C.*, 44 A.3d 27, 40 (Pa. 2012).

[31] See, e.g., *White v. Cardinal Indus. Insulation Co.*, No. 2005-CA-002182-MR, 2007 Ky. App. Unpub. LEXIS 406, 2007 WL 1193281 (Ky. Ct. App. Apr. 13, 2007); *Branon v. General Electric Co.*, No. 2004-CA-000568-MR, 2005 Ky. App. Unpub. LEXIS 508, 2005 WL 179122 (Ky. Ct. App. July 29, 2005).

[32] John S. Gray & Richard O. Faulk, *Negligence in the Air? Should "Alternative Liability" Theories Apply in Lead Paint Litigation?*, 25 Pace Envtl. L. Rev. 147, 150 (Winter 2008).

[33] Examples of states rejecting market share liability are as follows: *Nutt v. A.C. & S. Co.*, 517 A.2d 690 (Del. Super. Ct. 1986); *Tidler v. Eli Lilly & Co.*, 851 F.2d 418 (D.C. Cir. 1988) (applying District of Columbia and Maryland law); *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324 (Ill. 1990); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986); *Starling v. Seaboard Coast Line R. Co.*, 533 F. Supp. 183 (S.D. Ga. 1982); *Gorman v. Abbott Laboratories*, 599 A.2d 1364 (R.I. 1991).

[34] Gray & Faulk, *supra* note 32, at 162.

[35] Examples of states rejecting enterprise liability are as follows: *Zaft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984); *Namm v. Charles E. Frosst & Co.*, 427 A.2d 1121 (N.J. App. Div. 1981); *Cummins v. Firestone Tire & Rubber Co.*, 495 A.2d 963 (Pa. Super. Ct. 1985).

[36] *Namm*, 427 A.2d at 1129.

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