UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 45 | Number 3 Article 27

4-1-1967

Torts -- Medical Malpractice -- Rejection of "But for" Test

Dan B. Dobbs

federal courts should adopt the independent application of this test[23] which enables a more realistic evaluation of the taxpayer's motives and the statutory intent in determining the deductibility of interest.

WILLIAM H. THOMPSON

Torts—Medical Malpractice—Rejection of "But for" Test

In *Hicks* v. *United States*[1] a navy doctor failed to test for bowel obstruction in a patient who complained of severe abdominal pains. The patient, treated only for a "bug," died some eight hours later, suffering from a strangulation of the intestine. On the basis of expert testimony, the doctor was found to have been negligent in failing to diagnose the obstruction. There was also testimony that if a correct diagnosis had been made, an immediate operation would have saved the patient's life. Testimony apparently was not given to indicate whether an immediate operation could have been performed or to indicate what dangers such an operation would have involved, if any.[2] On the basis of this testimony the Court of Appeals for the Fourth Circuit held that the trial judge was compelled to find negligence and "cause in fact" and to award a verdict to the plaintiff. The evidence of cause in fact is probably sufficient to meet the orthodox tests, but the court apparently rejected the usual test of cause in fact, saying that

> When a defendant's negligent action or inaction has effectively terminated a person's chance of survival, it does not lie in the defendant's mouth to raise conjectures as to the measure of the chances that he has put beyond the possibility of realization. If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable.[3]

[23] The close family relationship will continue to pose a problem if it appears the taxpayer was "borrowing" his own money. In this situation the realities of a loan obligation may not be present.

[1] 368 F.2d 626 (4th Cir. 1966).

[2] The patient suffered from diabetes as well as from an "abnormal congenital peritoneal hiatus with internal herniation. . . ." *Id.* at 629. It seems doubtful that a layman could estimate the likelihood or non-likelihood of the patient's survival under these conditions, especially without knowing whether qualified personnel were on hand to operate. Compare George v. City of New York, 253 N.Y.S.2d 550 (Sup. Ct. 1964) where a barium enema penetrated the bowel wall; an operation was immediately performed, but the patient died. Nevertheless, the testimony in *Hicks* that an operation would probably have been successful is no doubt sufficient evidence of cause.

[3] 368 F.2d at 632.

This test evidently means that the defendant is liable, not only if his negligence in fact caused the injury suffered, but also if his negligence eliminated some "substantial" "chance" the plaintiff might have had of escaping injury even where actual causation cannot be shown.[4]

It is usually said that to hold a defendant liable for his negligence, a plaintiff must prove that the negligence was a "cause-in-fact" of the harm.[5] This cause-in-fact requirement is established when the plaintiff shows that, "but for" the defendant's negligent act the plaintiff would not have been injured.[6] If, on the other hand, the plaintiff would have been injured even without the defendant's negligent conduct, it is said that the negligence is not a cause-in-fact of the harm and the plaintiff may not recover. The "orthodox" view is that the plaintiff must prove facts showing causation, just as he must prove the other elements of his case, by a greater weight of the evidence. As with other matters of proof, this means that he must prove facts showing "but for" causation is more likely than not.[7] Courts sometimes depart from this orthodox view and hold that "causation" is sufficiently established if it is shown that defendant's negligence *may* have caused harm—that is, if the defendant's negligence reduced plaintiff's chances of escaping an injury.[8] This is the kind of view applied in *Hicks* to medical mal-

[4] Even a "substantial" chance may be less than a likely chance. A 10% chance may be "substantial," though it falls far short of any likelihood. The defendant has terminated the chance, whatever it is, and that seems to be enough under the court's test, so long as the chance is "substantial." The orthodox "but-for" test requires more than the termination of a ten percent or even a forty per cent chance; it requires a *likelihood* that the plaintiff would have avoided injury "but for" the defendant's negligence. This orthodox rule is sometimes abandoned; but there is, perhaps, a tendency to stay with it in malpractice cases. See Malone, *Ruminations on Cause-in-Fact,* 9 STAN. L. REV. 60, 87, n.66 (1956).

[5] See, *e.g.,* Waugh v. Suburban Club Ginger Ale Co., 83 App. D.C. 226, 167 F.2d 758 (1948); RESTATEMENT (SECOND), TORTS §§ 281, 431, 432 (1965).

[6] RESTATEMENT (SECOND), TORTS § 432 (1965); PROSSER, TORTS 242 (3d ed. 1964).

[7] See Bockman v. Butler, 224 Ark. 125, 271 S.W.2d 918 (1954) (recognizing that probability "will suffice," but holding that no one should mention this to the jury); Silvers v. Wesson, 122 Cal. App. 902, 266 P.2d 169 (1954).

[8] The Fourth Circuit had earlier applied this view in a case not involving malpractice; Gardner v. National Bulk Carriers, Inc., 310 F.2d 284, 91 A.L.R.2d 1023 (4th Cir. 1962), *cert. denied,* 372 U.S. 913 (1963). On this point generally, see Malone, *Ruminations on Cause-in-Fact,* 9 STAN. L. REV. 60 (1956).

practice cases, although it is probably correct, as Professor Wex Malone has supposed, that the plaintiff in medical malpractice cases "must usually establish the causal probabilities beyond peradventure."[9] Certainly there are decisions that clearly reject the very liberal view in *Hicks*,[10] though perhaps there are other malpractice cases that at least do not require "certainty."[11]

The "but for" test of cause-in-fact, plus the traditional rule that puts upon the plaintiff the burden of proving this cause, has many potentialities for injustice. As a result, courts have more or less admittedly done away with the cause-in-fact requirement—or at least with the "but for" test—in several lines of cases. These are primarily cases involving two or more wrongdoers or at least two or more "causes" of the plaintiff's harm.

One line of such cases is quite familiar: two drivers of automobiles are negligent and together cause a collision in which plaintiff is injured. Even if the acts of negligence are separated in time, the drivers may be called "concurrent tortfeasors" in many cases and they will be held liable together for the plaintiff's injuries, at least if those injuries are not separable and capable of being attributed in a certain part to each wrongdoer.[12] In such cases it is clear enough that one of the wrongdoers may be paying for injury he did not "cause" in fact under the "but for" test. A second line of cases

---

[9] *Id.* at 86.

[10] Silvers v. Wesson, 122 Cal. App. 902, 266 P.2d 169 (1954): "It may well be that the chances of a patient's living longer . . . might, by early observation and treatment, be increased from ten percent to forty percent. But that is certainly not proof that such early observation and treatment would probably result in curing a cancer. . . ." In this case the doctor negligently (it is assumed) failed to examine cystoscopically, and accordingly did not discover a bladder tumor for two years. The court denied recovery on the ground that, even if the doctor had examined earlier, the cancer might have been incurable by that time anyway. Harries v. United States, 350 F.2d 231 (9th Cir. 1965) (must be probability or better formula, as in *Silvers* case). Sturm v. Green, 398 P.2d 799 (Okla. 1965) (no tests made, but no evidence whether they would have revealed deficiency, therefore failure to give tests is not shown to be causal of patient's death; court also held "no negligence.")

[11] *E.g.*, Price v. Neyland, 115 App. D.C. 355, 320 F.2d 674, 99 A.L.R.2d 1391 (1963); Walden v. Jones, 289 Ky. 395, 158 S.W.2d 609, 141 A.L.R. 105 (1942).

[12] Watts v. Smith, 375 Mich. 120, 134 N.W.2d 194 (1965), 44 N.C.L. REV. 249 (1965). The argument is largely gaged in terms of what injuries are "indivisible." See Maddux v. Donaldson, 362 Mich. 425, 108 N.W.2d 33 (1961). But see Caygill v. Ipsen, 27 Wis. 2d 578, 135 N.W.2d 284 (1965) (no joinder of defendants allowed where plaintiff alleged accidents five months apart in separate counties.)

is similar, but goes further. In the second line two defendants are negligent, and the plaintiff is injured as the result of the negligence of one of them, but no one is able to say which. For example, two hunters fire shotguns in the direction of the plaintiff. A pellet from one of the guns strikes the plaintiff. Both defendants are held liable,[13] though clearly enough one of them is not causal of any harm at all to the physical person of the plaintiff. A third line of cases may go even further. A fire is set by lightning and without negligence; if allowed to burn, it will (probably) harm the plaintiff's home. Another fire is negligently set by defendant. It combines with the first fire and the combined fire burns plaintiff's home. Under some cases[14] at least, defendant will apparently be held liable, even though the plaintiff would have suffered the same harm anyway. In cases like the shotgun-firing cases, each defendant is either the cause of the harm or the cause of obscuring the facts about causation. If both *A* and *B* fire, one of them hit the plaintiff and should be liable for that reason; the other, by firing, has made it impossible for us to know which fired the pellet that caused the harm. For this reason we feel justified in holding both liable.[15] Similar feelings prevail in the multiple automobile collision situation. The fire situation, however, goes further, where one fire is not set by anyone's fault. In such a situation, defendant's conduct in setting the fire is not causal under the "but for" test nor does it obscure the liability of anyone else, as in the hunter cases. These cases, then, reflect a certain amount of judicial agreement that at least in some circumstances cause in fact or "but for" is not an element to be insisted upon.

In other kinds of cases, however, where there is only one alleged cause of the plaintiff's harm, the results are mixed. There are cases in which courts have, in one way or another, eliminated the cause-in-fact requirement altogether, either by ignoring the problem[16] or by so enlarging the defendant's duty that he is liable if he causes

[13] Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) (a leading case, rejecting the "concert of action" theory used in some cases.)

[14] Anderson v. Minneapolis, St. P. & S. St. M.Ry., 146 Minn. 430, 179 N.W. 45 (1920).

[15] See PROSSER, TORTS 243 n.24 (3d ed. 1964), and cases cited note 16 *infra*.

[16] See Rice v. Norfolk So. R.R., 167 N.C. 1, 82 S.E. 1034 (1914), where defendant negligently allowed drains to stop up; this created a pond. Later plaintiff, who lived in the vicinity, got malaria. A recovery was allowed.

the plaintiff to lose the "chance" of escaping injury or death.[17] Thus, for example, if the master of a ship does not make a reasonable effort to find the seaman who has fallen overboard, the master is liable, even though it is not at all probable that the seaman could be saved. In such a case, the defendant has a duty to use care to increase the seaman's chances, and it is enough for liability that the defendant's negligence is a cause-in-fact of the seaman's loss of a *chance.*[18]

On the other hand, there are many cases in which courts have been over-insistent upon proof of cause-in-fact. An establishment dealing with radioactive material negligently fails to provide its employees sufficient protection and they get cancer, but recovery may be denied because the employee has no means of proving causation.[19] Or the defendant sprays a tobacco crop from the air, and witnesses see a substance falling from the airplane over plaintiff's commercial fish ponds; later the fish jump and then die; but recovery is denied because causation is not proved by these facts.[20] Or the defendant negligently stores flammables and a fire breaks out nearby and spreads to the plaintiff's premises; but recovery is denied because causation is not proved by these facts.[21] Or defendant's defective machine spouts oil in plaintiff's eye, which burns and within 24 hours gets much worse; but recovery is denied because causation is not proved by these facts.[22] Some of these cases, at least, evince an impossibly strict notion of the value of circumstantial evidence.[23]

---

[17] Malone, *Ruminations on Cause-in-Fact,* 9 STAN. L. REV. 60 (1956) is an excellent discussion.

[18] Gardner v. National Bulk Carriers, 310 F.2d 284, 91 A.L.R.2d 1023 (1962), *cert. denied,* 372 U.S. 913 (1963).

[19] Mahoney v. United States, 220 F. Supp. 823 (E.D. Tenn. 1963), *aff'd,* 339 F.2d 605 (6th Cir. 1964).

[20] Wall v. Trogdon, 249 N.C. 747, 107 S.E.2d 757 (1959); *cf.* Western Geophysical Co. v. Martin, 253 Miss. 14, 174 So. 2d 706 (1965) (well suddenly contaminated after underground blasts, cause not proved).

Inferences might be drawn against plaintiff on the causal issue if he does not produce all the evidence he has. In *Western Geophysical, supra,* the plaintiff did not examine the pump in his well. This clearly aided the court in holding against him. The court said, "This inference [of causation] is unnecessary because if the shot did cause the damage the [plaintiff] could have offered more direct proof. . . ." *Id.* at 31, 194 So. 2d at 715.

[21] Maharias v. Weathers Bros. Moving & Storage, 257 N.C. 767, 127 S.E.2d 548 (1962); a slight shift in the plaintiff's emphasis may get a different result: Chicago, M.S.P. & P.R.R. v. Poarch, 292 F.2d 449 (9th Cir. 1961).

[22] Reason v. Singer Sewing Mach. Co., 259 N.C. 264, 130 S.E.2d 397 (1963).

[23] See the language of the Hicks case itself on this point, *supra* note 4

Apart from such objections to these restrictive cases, however, it may be said that where the defendant's negligence has created a risk of the harm that in fact came about, and where the negligence obscures relevant evidence about causation, all doubts ought to be resolved against the negligent defendant, just as in the case of the two hunters.

Another reason for allowing recovery in some of these cases is that the "but for" test itself does not make a great deal of sense. The "but for" test asks us to determine the "fact" of causation by asking us to speculate about what would have happened if the defendant had not been negligent. If the defendant had not splashed hot lead upon the plaintiff, would plaintiff have contracted cancer?[24] If the defendant had not neglected to provide a life guard at a swimming pool, would the plaintiff's decedent have drowned?[25] In neither case can a "factual" answer be given; we can only speculate about what might have been, and there is no way to verify our guesses. We might as well ask what an elephant would have been if it had not been an elephant. Surely this is a kind of question that is unrewarding for a practical profession.

The speculative and sometimes misleading character of the "but for" test may be quickly illustrated. Suppose defendant owns a partly rotted tree, dangerous because it is likely to fall of its own

---

and accompanying text, and the similar views expressed by Judge Sobeloff in Gardner v. National Bulk Carriers, Inc., 310 F.2d 284 (4th Cir. 1962), *cert. denied*, 372 U.S. 913 (1963). Where there are two tortfeasors or combined forces causing a single harm, this reasoning, or something like it, seems well accepted. See notes 12-14 *supra*. A less radical view would not resolve all doubts against the wrongdoer, but would do so only in situations where some policy about the wrongdoer's duty would dictate. *Cf.* Malone, *Ruminations and Cause-in-Fact*, 9 STAN. L. REV. 60 (1956).

Post hoc ergo propter hoc is, of course, fallacious, if we speak in absolute terms. But in practical affairs, like law, we speak in terms of probabilities, or even a good guess about probabilities. And we prove cause-in-fact by showing facts that will allow reasonable men to guess about probabilities; certainty is not required.

[24] Kramer Service, Inc., v. Wilkins, 184 Miss. 483, 186 So. 625 (1939) (blow on the head; skin cancer at point of blow, causation not established). Smith v. Leech Brain & Co., [1962] Weekly L.R. 148 (Q.B.) (causation established).

[25] Young Men's Christian Ass'n v. Bailey, 107 Ga. App. 417, 130 S.E.2d 242 (1963) (causation established); Justice v. Prescott, 258 N.C. 781, 129 S.E.2d 479 (1963) (causation not established, *semble*). Of course, if the question is the orthodox "but for" question, the variation in facts in various cases may justify a difference in results, since circumstantial evidence will be strong enough in some cases to justify a good guess about "but for" causation and not strong enough in others. The point here, however, is that it is necessarily a *guess*.

weight upon a passerby. It does fall on a passerby, but because it was blown down by an unforeseeable wind, a wind so strong that it would have blown down even a sound tree. The defendant is negligent, and the unforeseeability of the wind will not properly affect his liability, since the result itself—injury to the passerby—was foreseeable.[26] The "but for" test, however, tempts one to say that there is no cause-in-fact; even a carefully braced tree might have blown over in the strong wind. Yet we do not know that the tree would have been braced if defendant had not been negligent; it might have been chopped down.[27] If we assume that, if defendant had not been negligent, he would have braced the tree, the injury would have occurred anyway, and the negligence in not bracing the tree is not a cause-in-fact. But we assume that defendant would have chopped the tree down had he not been negligent, then clearly his failure to do so is a cause in fact of the harm, for the harm would not have occurred if no tree was there. There seems little negligence-law policy in favor of either assumption about what might have happened without defendant's negligence.[28] Thus the "but for" test seems to take us into speculation and metaphysics.

A more ordinary case may make the same point. In a well-known case,[29] the defendant stopped his truck at a light and when the light changed made a right turn. He did not signal the turn and he ran into a boy who had pulled up between the right side of the truck and the curb, evidently because the boy was not expecting the truck to turn right. Judge Edgerton—a great judge—said that defendant's failure to give a turn signal was not a "but for" cause, since there

[26] The defendant may be held even though he does not foresee "the particular injury precisely as in fact it occurred." Boone v. North Carolina R.R., 240 N.C. 152, 81 S.E.2d 380 (1954). And one is sometimes held liable where an act of God strikes. See Harris v. Norfolk S.R.R., 173 N.C. 110, 91 S.E. 710 (1917). And see Lawrence v. Yadkin River Power Co., 190 N.C. 664, 130 S.E. 735 (1925).

[27] Dean Page Keeton of the University of Texas School of Law used this illustration for a similar point at the Torts Roundtable of the Association of American Law Schools, December 1962.

[28] It can be argued that one should assume either a minimum change of conduct that would qualify as non-negligent or any change in conduct that would eliminate causation. Such assumptions would minimize the chance that defendant's negligence is causal and would maximize his freedom of conduct. This may be thought to be more consistent with negligence law and the risk principle. But if so, we are into problems beyond practical jury solution.

[29] Waugh v. Suburban Club Ginger Ale Co., 83 D.C. App. 226, 167 F.2d 758 (1948).

was no evidence that the boy, from a position to the right of the truck, could have seen such a signal. Yet one cannot be sure that a hand signal will not catch someone's eye,[30] or the noise of a light signal will not catch an ear. To ask the plaintiff, injured in a way defendant risked, to "prove" such a matter is to ask the impossible.

Perhaps one might feel that the problems in *Hicks* should not be solved by adverting to causation doctrines at all, but that they should be solved instead by considering the defendant's duty.[31] It might be said, for example, that the defendant doctor is under a duty to use care to maximize the patient's chances of survival. If this formula is used, it is clear that defendant's negligence caused the loss of something to which the patient was entitled—maximum chances. He may or may not have "caused" the loss of the patient's life, but he certainly caused the loss of some of the chances at keeping it. At least in some areas of tort law, this approach seems to have been followed.[32]

Clearly enough, the rule stated in *Hicks* rejects the orthodox "but for" test, and substitutes in the malpractice situation a liberal approach already applied in a few other situations. The defendant is held, not only if he caused the death or injury, but also if he caused the loss of plaintiff's chance of escaping death or injury. Presumably this rule applied only when the defendant is shown to have been negligent and to have created a risk of the kind of injury that in fact did occur. The effect of *Hicks* is likely to be great, although it is difficult to be sure, since the cause problem is so often ignored. In any event the decision seems sound. It might be argued that it is inappropriate to extend a liberalization into the medical malpractice field;[33] but this seems wrong. Physicians are already highly insulated from their negligence by the rule that they are liable only when their

[30] See also Rouleau v. Blotner, 84 N.H. 539, 152 Atl. 916 (1931).

[31] See Green, *The Causal Relation Issue in Negligence Law,* 60 MICH. L. REV. 543 (1962), reprinted in GREEN, THE LITIGATION PROCESS in TORT LAW, 249 (1965).

[32] See RESTATEMENT (SECOND), TORTS § 324, and comment *g* (1965). The comment indicates that if one gratuitously rescues another from a trench filled with poisonous gas, he cannot return him to the trench, thus "worsening" the victim's position. The duty, once undertaken, is not to worsen the position, even though it is clear that defendant's acts have not "caused" any loss to the plaintiff he would not have suffered anyway. See also Gardner v. National Bulk Carriers, Inc., 310 F.2d 284 (4th Cir. 1962), *cert. denied,* 372 U.S. 913 (1963).

[33] See Malone, *Ruminations on Cause-in-Fact,* 9 STAN. L. REV. 60, 85-88 (1956).

colleagues testify against them.[34] Thus, *Hicks* seems to be an important and desirable step.

DAN B. DOBBS*

[34] This is the rule for most cases, see PROSSER, TORTS § 32 (3d ed. 1964). In a few cases res ipsa loquitur will apply, *e.g.* Beaudoin v. Watertown Mem. Hosp., 32 Wis. 2d 132, 145 N.W.2d 166 (1966) (vaginal operation, patient woke to find blisters on her buttocks).

* Associate Professor of Law, University of North Carolina.