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# Cause-in-Fact in Missouri: A Return to Normalcy

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# Notes

# Cause-In-Fact in Missouri: A Return to Normalcy

*Callahan v. Cardinal Glennon Hospital*[1]

"[E]veryone is really responsible to all men for all man and for everything."[2]
Dostoyevsky

## I. INTRODUCTION

In order to establish liability in most tort actions, a plaintiff must show that the defendant "caused" the injury or harm in question.[3] Not only must the defendant's conduct be the "cause-in-fact" of the harm, but it also must be the "proximate cause" of the plaintiff's harm.[4] This Note focuses on the cause-in-fact requirement discussed in the Missouri Supreme Court case, *Callahan v. Cardinal Glennon Hospital*.[5] In *Callahan*, the court dispelled much of the confusion that has plagued Missouri cause-in-fact analysis.[6] The court clearly expounded the test for cause-in-fact questions.[7] Furthermore, the court explained the exception to the basic test, and clarified Missouri law regarding this essential element of tort liability.

## II. FACTS AND HOLDING

In *Callahan v. Cardinal Glennon Hospital*, Daniel Callahan ("Danny") and his parents filed a medical malpractice suit against Cardinal Glennon Hospital ("Cardinal Glennon") and St. Louis University.[8] On November 4, 1978, when Danny was about three months old, he received the live polio

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1. 863 S.W.2d 852 (Mo. 1993).

2. FYODOR DOSTOYEVSKY, THE BROTHERS KARAMAZOV 344 (Modern Library College ed. 1950) *cited in* ARNO C. BECHT & FRANK W. MILLER, THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES 25 n.36 (1961).

3. Rose v. Thompson, 141 S.W.2d 824, 828 (Mo. 1940) (citing Shunk v. Harvey, 223 S.W. 1066, 1068 (Mo. 1920)).

4. Branstetter v. Gerdeman, 274 S.W.2d 240, 245 (Mo. 1955).

5. 863 S.W.2d 852 (Mo. 1993).

6. *See infra* notes 125-35 and accompanying text.

7. *See infra* note 143 and accompanying text.

8. *Callahan*, 863 S.W.2d at 857.

vaccine, Orimune.[9] On November 30, 1978 his mother discovered a red spot on his perineum, the area between the anus and the genitalia.[10] Two days later, after the red spot developed into a boil and Danny began running a fever, his parents took him to Cardinal Glennon.[11] On this initial visit to the hospital, Danny was first examined by nurse Williams, and then by a pediatric nurse practitioner, Debra Schwarz.[12] Schwarz diagnosed the boil as a perirectal abscess, determined that Danny's fever was caused by this abscess, and prescribed the antibiotic Oxycillin as treatment.[13] Furthermore, she instructed Danny's parents to soak the boil in warm water, treat the fever with Tylenol, and take Danny to see his pediatrician, Dr. Fetick, on the following Monday.[14]

During this visit, no cultures were taken of the abscess to determine whether it contained gram positive or gram negative bacteria.[15] Danny's mother testified that no one but nurse Williams and nurse Schwarz examined Danny.[16] Dr. Venglarcik, the supervising physician at the time of Danny's initial examination, testified that although he did not remember examining Danny, his signature appeared on Danny's chart.[17]

Danny's parents administered the treatment as instructed and, except for the onset of vomiting, the child's condition remained unchanged.[18] On Monday, December 4, 1978, Mrs. Callahan and Danny visited Dr. Fetick, who examined the abscess and advised Mrs. Callahan to keep Danny on the hospital's recommended regimen.[19] The next day, Danny's parents noticed that his legs appeared to be floppy, and Mr. Callahan called Cardinal Glennon

9. *Id.* at 856.

10. *Id.* at 857.

11. *Id.*

12. *Id.* A pediatric nurse practitioner is "a registered nurse with special skills in assessing the physical and psychological status of [pediatric] patients." STEDMAN'S MEDICAL DICTIONARY 1073 (25th ed. 1990).

13. *Callahan*, 863 S.W.2d at 857. A perirectal abscess is an abscess adjacent to the rectum. *See* STEDMAN'S MEDICAL DICTIONARY 1169 (25th ed. 1990).

14. *Callahan*, 863 S.W.2d at 857.

15. *Id.* Bacteria are either gram positive or gram negative. The antibiotic Oxycillin is only effective for gram positive, not gram negative bacteria. *Id.*

16. *Id.*

17. *Id.* At the time Dr. Venglarcik was a resident physician employed by St. Louis University. *Id.*

18. *Id.*

19. *Id.*

to explain his son's condition.[20] He was informed that babies with fever are less active and Danny did not need to come to the hospital.[21]

The next morning, when Danny's legs remained floppy and his eyes began to roll back into his head, Mrs. Callahan again took Danny to Cardinal Glennon, where physicians determined that Danny's legs and left arm were paralyzed.[22] A physician incised and drained the abscess, and cultures showed that four types of gram negative bacteria were present.[23] Despite treatment, Danny's arm and legs remained paralyzed and he was diagnosed as a permanent triplegic.[24]

At trial, the plaintiff's two expert witnesses testified that St. Louis University and Cardinal Glennon negligently caused Danny's paralysis.[25] They theorized that the gram negative organisms released endotoxins that suppressed Danny's immune system and made him susceptible to the live polio in the Orimune vaccine he received.[26] Furthermore, the experts testified that if the abscess had been incised and drained as it should have been on Danny's first visit to the hospital, the correct antibiotic would have been prescribed. As a result, his immune system would not have been suppressed, and Danny would not have acquired poliomyelitis, paralytic polio.[27]

Some of the defendants' experts contested this theory and presented evidence that, in rare instances, children develop vaccine-induced polio.[28] One expert, Dr. Schwartz, testified that during the 1980s approximately one in 400,000 people receiving the polio vaccine for the first time developed polio.[29] The defendants produced evidence to show that Danny's symptoms were consistent with such rare cases.[30]

The jury found for the plaintiff, Daniel Callahan, and awarded him $16 million in compensatory damages.[31] Cardinal Glennon entered into a settlement agreement with the Callahans, but St. Louis University appealed to

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20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 858.
28. Callahan v. Cardinal Glennon Hosp., No. 60685, 1992 WL 251555, at *2 (Mo. Ct. App. Oct. 6, 1992).
29. *Id.*
30. *Id.*
31. *Id.* at *3.

the Eastern District of the Missouri Court of Appeals.[32] In addition to seven other points of error, St. Louis University alleged that the plaintiff had failed to present sufficient evidence of causation.[33] Finding that the plaintiff had presented enough evidence to satisfy the substantial factor test for causation, the Court of Appeals affirmed the judgment.[34] Subsequently, the Missouri Supreme Court granted transfer.[35]

In the process of affirming the trial court's judgment, the Missouri Supreme Court sought to clarify the perceived confusion in Missouri causation analysis.[36] Overruling in part its decision in *Jackson v. Ray Kruse Construction Co.*,[37] the court held the "but-for" test for causation applies in all tort cases, with one narrow exception.[38] In cases that involve two independent torts, each sufficient by itself to cause the injury, the "but for" test will not apply.[39] Instead, the substantial factor test for causation will be utilized.[40]

## III. LEGAL BACKGROUND

### *A. Causation: Terminology and Definitions*

Whether the theory of liability is negligence, products liability, strict liability, or intentional tort, the element of causation is essential to any tort plaintiff's prima facie case.[41] Indeed, "[i]t would be obviously opposed to any possible conception of justice that any one should be required to answer for a harm

32. *Id.*
33. *Id.* at *1.
34. *Id.* at *6.
35. *Id.*
36. *Callahan*, 863 S.W.2d at 860-63.
37. 708 S.W.2d 664 (Mo. 1986).
38. *Callahan*, 863 S.W.2d at 862-63.
39. *Id.* at 861.
40. *Id.*
41. *See, e.g.*, MAI 17.01 [1980 Revision] (providing that "[y]our verdict must be for plaintiff if you believe . . . as a direct result of such negligence plaintiff sustained damage."); MAI 19.01 [1986 Revision] (providing that "such negligence directly caused or directly contributed to cause damage to plaintiff."); MAI 23.02 [1990 Revision] (providing that "defendant thereby caused plaintiff bodily harm."); MAI 25.04 [1978 Revision] (providing that "plaintiff was damaged as a direct result of such defective condition."). Note that the terms "direct result" and "directly cause" refer to the element of causation. *Callahan*, 863 S.W.2d at 863.

unless he had actually *caused* it."[42] While this principle may seem to be rooted in common sense,[43] determining "cause," in the legal sense, is often a very complex proposition.

The initial hurdle that one must overcome in understanding tort causation is the terminology. Despite attempts to clarify the wording, uncertainty and confusion abound in "the legal use of causal language."[44] The words cause, causation, cause-in-fact, proximate cause, and legal cause are not standard referents but are fluid concepts that have different meanings for different individuals.[45]

Legal scholars often begin explanations of causation by attempting to differentiate the legal definitions from the philosophic definitions of cause.[46] In a philosophic sense, the cause of an event is the "sum of all [its] antecedents."[47] Every event has causes that reach back to the beginning of time, and no one occurrence can be said to be *the* cause of an event.[48] However, the philosophical definition of cause is rather useless for legal analysis, as it would impose "infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation.'"[49] Thus,

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42. Francis H. Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233, 234 (1908) (emphasis added).

43. *See Callahan*, 863 S.W.2d at 862 ("Any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with. Mere logic and common sense dictates that there be some causal relationship between the defendant's conduct and the injury or event for which damages are sought.").

44. H.L.A. HART & A.M. HONORE, CAUSATION IN THE LAW 1 (1959).

45. "[R]ules of legal cause have been seen as no more than linguistic devices that courts manipulate to explain results suiting their fancy." ROBERT E. KEETON, LEGAL CAUSE IN THE LAW OF TORTS viii (1963).

46. *See, e.g.*, BECHT & MILLER, *supra* note 2, at 1; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 264 (5th ed. 1984); Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 104 (1911).

47. Smith, *supra* note 46, at 104 (citing JOHN STUART MILL, A SYSTEM OF LOGIC 378-83 (9th Eng. ed. 1956) (1852)).

48. BECHT & MILLER, *supra* note 2, at 12; 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 20.2, at 1110 (1956).

49. KEETON ET AL., *supra* note 46, at 264 (quoting North v. Johnson, 59 N.W. 1012 (Minn. 1894)). As Judge Andrews stated:

> [a]ny philosophical doctrine of causation does not help us. A boy throws a stone into a pond. The ripples spread. The water level rises. The history of that pond is altered for all eternity. It will be altered by other causes also. Yet it will be forever the resultant of all causes combined. Each one will have an influence.

Palsgraf v. Long Island R.R., 162 N.E. 99, 103 (N.Y. 1928).

courts have avoided any such notions of cause.[50] Despite the legal rejection of philosophic definitions of cause, such principles provide insight into legal doctrines of causation.

In a tort cause of action, in order to prove a causal connection between an allegedly tortious act and an injury, one must show two things: (1) causation-in-fact and (2) proximate cause.[51] These two components are often referred to, collectively, as "causation."[52] Causation-in-fact, the factual component of causation, is defined as that which "produces an event and without which the event would not have occurred."[53] In other words, the defendant's conduct will be considered a cause-in-fact of the plaintiff's harm if it produced the harm and if, in the absence of defendant's conduct, the harm would not have resulted.[54] The legal component of causation, referred to as proximate cause (or legal cause), limits legal responsibility "to those causes [-in-fact] which are so closely connected with the result and of such significance that the law is justified in imposing liability."[55] Determinations of proximate cause involve notions of public policy, justice, and convenience, and through this doctrine "the law arbitrarily declines to trace a series of events beyond a certain point."[56] This Note focuses on cause-in-fact analysis.[57]

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50. *See* Smith, *supra* note 46, at 104 (stating that this "view cannot be adopted as a working rule by courts" because "no tortfeasor would be regarded as the cause of any damage.").

51. Koerber v. Alendo Bldg. Co., 846 S.W.2d 729, 730 (Mo. Ct. App. 1992) (citing Branstetter v. Gerdeman, 274 S.W.2d 240, 245 (Mo. 1955)).

52. *See Koerber*, 846 S.W.2d at 730 n.3 (stating that some courts refer to causation as including causation-in-fact and proximate cause).

53. BLACK'S LAW DICTIONARY 221 (6th ed. 1990).

54. *See* KEETON ET AL., *supra* note 46, at 265-66.

55. KEETON ET AL., *supra* note 46, at 264. Proximate cause is necessary in order to limit the potentially infinite liability possibilities of cause-in-fact. *Id. See Callahan*, 863 S.W.2d at 865 (stating that "[p]roximate cause requires something in addition to a 'but for' causation test because the 'but for' causation test serves only to exclude items that are not causal in fact; it will include items that are causal in fact but that would be unreasonable to base liability upon because they are too far removed from the ultimate injury or damage. For example, carried to the ridiculous, 'but for' the mother and father of the defendant conceiving the defendant bringing him into their world, the accident would not have happened.").

56. *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).

57. Note that some courts use the term "proximate cause" to refer to both cause-in-fact and proximate cause.

### B. Cause-In-Fact: Historical Tests

Historically, common law courts have utilized two primary tests in determining whether or not one's conduct should be characterized as a cause-in-fact of the harm. These tests are the "but for" (or *sine qua non*) test and the "substantial factor" test.[58] The former has ancient roots, while the latter was created in the early twentieth century.[59]

The but-for test states that the defendant's conduct may be characterized as a cause-in-fact of the plaintiff's harm if, but for the commission of defendant's acts, the damage would not have happened.[60] In short, the but-for test is a test for necessary causes.[61] At early common law, satisfying the but-for test was thought to be both necessary and sufficient in establishing a causal connection in a tort action.[62] However, courts now employ proximate cause analysis in addition to cause-in-fact analysis.[63]

Missouri courts have historically applied the but-for test in order to determine questions of causation-in-fact.[64] Articulating the test, the Missouri

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58. KEETON ET AL., *supra* note 46, at 265-68.

59. *See infra* notes 76-80 and accompanying text; *see also* Smith, *supra* note 46, at 109 n.22 (stating that "[a]t an early day the 'but for' rule prevailed").

60. BECHT & MILLER, *supra* note 2, at 13 (noting that in using the but for test, one must set up hypothetical situations, or "parallel series," in order to test the proposition that if X would not have happened then, the result Y would not have occurred). Some would equate but for cause with the philosophic definition of cause. This, however, was rejected by Becht and Miller. *See* BECHT & MILLER, *supra* note 2, at 25-26.

61. BECHT & MILLER, *supra* note 2, at 15.

62. *See* Bohlen, *Contributory Negligence*, *supra* note 42, at 234-35 ("The primitive conception of a sufficient legal cause was a *causa sine qua non*."). "[B]ut if [cause-in-fact] stood alone the scope of liability would be vast indeed, for 'the causes of causes [are] infinite'—'the fatal trespass done by Eve was cause of all our woe'. . . . To be sure [proximate cause] is only one of the devices used to limit the fact and the extent of liability for negligence." HARPER & JAMES, *supra* note 48, at 1108.

63. *See supra* notes 55-56 and accompanying text. Legal scholars have attacked the but-for test for various reasons. Becht & Miller opine that the test has "many shortcomings unless it is used with great care." BECHT & MILLER, *supra* note 2, at 15. They assert the but-for test only detects necessary causes as of the time the test is applied, and that the test gives different answers depending on the degree of detail with which the facts, whose causes are all being investigated, are described. BECHT & MILLER, *supra* note 2, at 15-16. Furthermore, they claim the but-for test is incapable of distinguishing between causes the defendant could have prevented and those he could not have presented. BECHT & MILLER, *supra* note 2, at 18.

64. This use of the but-for test in Missouri can be traced from the nineteenth century up to the present day. *See* Reed v. Missouri Pac. Ry., 50 Mo. App. 504, 506

Supreme Court stated that "[a] causal connection must be established between the negligence charged or submitted and the loss or injury sustained, such that the injury would not have happened *but for* the negligence, and also that the negligence was not only a cause but was a proximate cause."[65]

However, courts soon discovered that the but-for test contains one inherent flaw.[66] This flaw manifests itself in a fact situation where two or more independent torts, each individually capable of creating the harm in question, concurrently produce the injury.[67] Many call such a situation a "two fires" case, after a line of decisions including *Kingston v. Chicago & N. W. Railway Co.*,[68] in which a fire negligently started by the defendant merged with an equally strong fire of unknown origin, subsequently damaging plaintiff's property.[69] Using the but-for test in such a case would produce absurd results. For example, assuming there are two identifiable defendants, each one could plead the other's negligence and argue that but for defendant's negligence, the harm still would have occurred.[70] In effect, neither defendant would be the but-for cause, and both wrongdoers would escape liability.[71] Recognizing that such results would "make a wrongdoer a favorite of the law," the *Kingston* court held the defendant liable for the damages. [72]

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(Mo. Ct. App. 1892); Dickson v. Omaha & St. Louis Ry., 27 S.W. 476, 478 (Mo. 1894); Plefka v. Knapp, Stout & Co., 46 S.W. 974, 975 (Mo. 1898); Kane v. Missouri Pac. Ry., 157 S.W. 644, 648 (Mo. 1913); Coble v. St. Louis-San Francisco Ry., 38 S.W.2d 1031, 1036 (Mo. 1931); Kimberling v. Wabash Ry., 85 S.W.2d 736, 741 (Mo. 1935); Branstetter v. Gerdeman, 274 S.W.2d 240, 245 (Mo. 1955).

65. *Branstetter*, 274 S.W.2d at 245 (emphasis added).

66. KEETON ET AL., *supra* note 46, at 266.

67. KEETON ET AL., *supra* note 46, at 266.

68. 211 N.W. 913 (Wis. 1927). *See* Anderson v. Minneapolis, St. P. & S. Ste. M. Ry., 179 N.W. 45, 49 (Minn. 1920) (applying a rule that if defendant's negligence was a material element, i.e., substantial factor, defendant would be held liable, despite that defendant's negligence concurred with another unknown force to produce the harm). *See also* Cook v. Minneapolis, St. P. & S. Ste. M. Ry., 74 N.W. 561, 566 (Wis. 1898) (holding that the railroad which set one fire was not liable for the damages by the united fires because the origin of the other fire was not identified, and implying that if both fires had been of known responsible origin, each wrongdoer would be liable for the entire damage). On identical facts, the *Anderson* court repudiated the *Cook* rule that liability cannot attach to the defendant if one fire was of natural origin. HARPER & JAMES, *supra* note 48, at 1123 n.7.

69. *Kingston*, 211 N.W. at 914.

70. *Id.* at 915.

71. *Id.*

72. *Id.*

Sixteen years prior to *Kingston*, Jeremiah Smith, in *Legal Cause in Actions of Tort*,[73] addressed the two fires problem in but-for analysis.[74] Smith found such situation to be an *exception* to the but-for test,[75] stating that "[t]he defendant's tort must be distinctly traceable as one of the substantial efficient antecedents; as having had a substantial share in subjecting plaintiff to the damage."[76] However, instead of recognizing the two fires situation as an exception to the but-for test, courts used this language to fashion an entirely new test, the substantial factor test, for causation-in-fact.[77]

In its original form, the substantial factor test stated that the defendant's conduct should be found to be a cause-in-fact of the resulting harm if the conduct was a material element or a substantial factor in bringing about the harm.[78] For example, in the *Kingston* case, one would test for causation-in-fact by asking whether the defendant's fire was a substantial factor in destroying the plaintiff's property. If the defendant's fire was a small brush fire that merged with a raging forest fire, a jury could conclude that the defendant's fire was not a substantial factor and free the defendant from liability.[79]

While courts originally formulated this substantial factor test for the narrow purpose of dealing with "two fires" problems, it was eventually applied much more broadly, largely due to the Restatement of Torts' application of the test.[80] In 1934, the Restatement adopted the following substantial factor test in section 431, which applies to all causation questions:

> The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a *substantial factor* in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.[81]

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73. Smith, *supra* note 46.

74. Smith, *supra* note 76, at 109.

75. Smith, *supra* note 76, at 109 n.20.

76. Smith, *supra* note 76, at 109.

77. KEETON ET AL., *supra* note 46, at 267-68.

78. KEETON ET AL., *supra* note 46, at 267.

79. *See Kingston*, 211 N.W. at 915 ("It is also conceivable that a fire so set might unite with a fire of so much greater proportions, such as a raging forest fire, so as to be enveloped or swallowed up by the greater holocaust, and its identity destroyed, so that the greater fire could be said to be an intervening or superseding cause."). One would reach the same result as the *Kingston* court by using the substantial factor test, as opposed to intervening cause analysis.

80. *Callahan*, 863 S.W.2d at 861.

81. RESTATEMENT OF TORTS § 431 (1934) (emphasis added).

The Comment to this section reads: "[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 . . . ."[82] Read alone, this appears to displace the but-for test completely. However, section 432 of the Restatement clearly retains the but-for test. Section 432 states:

> (1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if it would have been sustained even if the actor had not been negligent.
> (2) If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be held by the jury to be a substantial factor in bringing it about.[83]

Therefore, after 1934, a conflict in terminology existed. The term substantial factor could either mean the narrow test developed to deal with a shortcoming in the but-for test, or it could mean, in the much broader sense of the Restatement, a test to determine all causation-in-fact problems.[84] Prosser adopted the former meaning, stating that 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."[85] In contrast, Missouri courts opted for the latter meaning of substantial factor.[86]

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82. *Id.* at cmt. a.

83. *Id.* § 432. Note that Subsection (1) requires defendant's conduct to be a "but for" cause before it could be considered a substantial factor. Subsection (2) recognizes the "two fires" problem and grants an exception to Subsection (1). Sections 431 and 432 are identical in the First and Second editions of the Restatement of Torts. *See* RESTATEMENT (SECOND) OF TORTS §§ 431-432 (1965).

84. *Callahan*, 863 S.W.2d at 861.

85. KEETON ET AL., *supra* note 46, at 268. Prosser recommended an alternative to substantial factor which would be an exception to the but for rule. "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." KEETON ET AL., *supra* note 46, at 268.

86. *See infra* notes 91-94.

### C. Missouri Cause-In-Fact Testing

Prior to the creation of substantial factor testing, Missouri courts utilized but-for analysis.[87] However, in *Giles v. Moundridge Milling Co.*,[88] the Missouri Supreme Court stated that the but-for test applied and then quoted favorably from Restatement sections 431 and 432.[89] Then in the 1972 case *Ricketts v. Kansas City Stock Yards Co.*,[90] the court announced that "Missouri [had] adopted the Restatement standard that actionable negligence must be a substantial factor."[91]

After adoption of the broad substantial factor test, Missouri courts applied it inconsistently. Some courts implemented the but-for test without mentioning substantial factor terminology;[92] other courts reiterated the Restatement substantial factor test without using but-for terminology.[93]

In *Jackson v. Ray Kruse Construction Co.*,[94] the Missouri Supreme Court embarked on a novel excursion into causation-in-fact rules when it intimated that the substantial factor test did not include a but-for analysis.[95] In *Ricketts*, the Missouri Supreme Court had adopted the Restatement substantial factor test, which, by definition, incorporates a but-for analysis.[96]

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87. *See supra* notes 64-65 and accompanying text.

88. 173 S.W.2d 745 (Mo. 1943).

89. *Id.* at 750. It is unclear whether the *Giles* court adopted the Restatement "substantial factor" test. The court first found that the applicable test was but for citing a previous Missouri case and RESTATEMENT OF TORTS § 432(1). Then, the court quoted from § 431 and stated that "[t]hat is the American Law Institute's definition of legal or proximate cause." Finally, the court quoted from § 432(2). *Id.* Nowhere did the court hold that this is the Missouri test.

90. 484 S.W.2d 216 (Mo. 1972).

91. Ricketts v. Kansas City Stock Yards Co., 484 S.W.2d 216, 222 (Mo. 1972) (citing Bean v. Ross Mfg. Co., 344 S.W.2d 18, 28 (Mo. 1961)). The *Ricketts* court provides rather unpersuasive authority for the proposition that Missouri had adopted the Restatement substantial factor test. Although it cites *Bean*, the *Bean* court applied Illinois law, and did not mention that this was the test in Missouri.

92. *See, e.g.*, Hills v. Ozark Border Elec. Coop., 710 S.W.2d 338, 341 (Mo. Ct. App. 1986) (Southern District); Delisi v. St. Luke's Episcopal-Presbyterian Hosp., 701 S.W.2d 170, 175 (Mo. Ct. App. 1985) (Eastern District); Robbins v. Jewish Hosp., 663 S.W.2d 341, 345 (Mo. Ct. App. 1983) (Eastern District).

93. *See, e.g.*, Metzger v. Schermesser, 687 S.W.2d 671, 672-73 (Mo. Ct. App. 1985) (Eastern District); Searcy v. Neal, 509 S.W.2d 755, 762 (Mo. Ct. App. 1974) (Kansas City District).

94. 708 S.W.2d 664 (Mo. 1986).

95. *Callahan*, 863 S.W.2d at 861.

96. But for is retained except for a two fires type case. *See supra* note 86 and accompanying text.

Therefore, when the court implied that but-for testing was not necessary, it misapplied and misunderstood its own precedent.[97]

In *Jackson*, twelve-year-old plaintiff and accident victim Kimberly Ann Jackson brought suit against the owner and operator of the parking lot adjacent to the apartment building where Kimberly and her parents lived.[98] Kimberly alleged that because of the defendant's failure to maintain the parking lot in a reasonably safe condition, she sustained injuries when a bicyclist collided with her while she stood in the lot.[99] The plaintiff's expert witness maintained that speed bumps should have been installed so as to slow the speed of vehicles on the parking lot and that such speed bumps are standard safety devices.[100] In addition, the evidence showed that children often rode their bikes down the parking lot hill at high speeds and complaints had been made about such conduct.[101]

The court concluded that "the jury could have believed" that the recommended speed bumps "could have greatly reduced the chance of an accident, either by slowing down the bicycle or shifting its direction."[102] However, the court did not state that if the speedbumps had been installed, the accident would not have occurred. Finding its conclusion consistent with the substantial factor test, the court reversed the trial court's judgment in favor of the defendant.[103]

Judges Donnelly, Welliver, and Robertson filed separate dissenting opinions in *Jackson*.[104] Judge Donnelly found the evidence did not support the inference that plaintiff's injuries would not have occurred but for the failure to install speed bumps.[105] Furthermore, citing the Restatement of Torts (Second) section 432(1), he stated that even the substantial factor test requires overcoming the but-for hurdle.[106] Concluding his arguments, Judge

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97. *See supra* notes 86, 94 and accompanying text.

98. *Jackson*, 708 S.W.2d at 665.

99. *Id.* at 665-66.

100. *Id.* at 666.

101. *Id.*

102. *Id.* at 668.

103. *Id.* at 669.

104. *Id.* at 670-77.

105. *Id.* at 671 (Donnelly, J., dissenting).

106. *Id.* Judge Donnelly also found that the substantial factor test was "developed as a framework for analysis for the relatively infrequent situation in which two causes concur to bring about an event and either one of them, operating alone, would have been sufficient to cause the plaintiff's injury. PROSSER & KEETON ON TORTS, 268 (5th ed. 1984)." *Id.* In a footnote, the majority disputed this characterization of the substantial factor test: "We do not agree . . . . The substantial factor test, rather, was intended to demonstrate that the precipitating cause (here the actions of the cyclist) is not necessarily the only legally sufficient cause. A cause which meets the substantial

Donnelly poignantly stated that "[i]t must be obvious to those who care that the majority is bent on making *the need for compensation* the overwhelming function of the law of torts in Missouri."[107]

Judge Welliver characterized the majority opinion as one that "abdicates the judicial function of deciding as a matter of law whether the case should have been submitted to the jury."[108] However, he opined that duty, not causation, was the central issue of the case, and that the scope of defendant's duty did not involve placing speed bumps in the parking lot.[109] Finally, Judge Robertson squarely asserted that there existed no evidence to refute the conclusion that even if speed bumps had been installed, this accident would still have occurred.[110]

With the *Jackson* decision, the court effectively relaxed the requirements of causation-in-fact.[111] Missouri courts of appeals interpreted the language of the majority in *Jackson* as doing away with the but-for requirement.[112] For instance, in *Schneider v. Union Electric Co.*,[113] the court stated that the jury could have found that implementing safety precautions would have "greatly reduced the chance of an accident."[114] The court did not discuss whether the accident would still have occurred if the safety measures had been provided. Similarly, in *Goff v. St. Luke's Hospital*,[115] the Missouri Supreme Court's opinion was similarly devoid of any but-for analysis.[116] After mentioning that the plaintiff's witnesses had testified the lack of red blood cells in the plaintiff's husband "contributed to" and was "a major cause of death," the court simply concluded that the test of causation was satisfied.[117]

Then, in *Wollen v. DePaul Health Center*,[118] the Missouri Supreme Court recharacterized its *Jackson* decision and apparently reinserted but-for analysis into the causation-in-fact equation. The court announced that in

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factor test is a cause in fact." *Id.* at 669 n.6.

107. *Id.* (emphasis original).

108. *Id.* at 672 (Welliver, J., dissenting).

109. *Id.* at 673-74 (Welliver, J., dissenting). The questions of duty and proximate cause are really one in the same. KEETON ET AL., *supra* note 46, at 274.

110. *Jackson*, 708 S.W.2d at 676-77 (Robertson, J., dissenting).

111. Pollard v. Ashby, 793 S.W.2d 394, 409 (Mo. Ct. App. 1990) (Smith, J., dissenting). *See Callahan*, 863 S.W.2d at 861.

112. *See infra* text accompanying notes 116, 166-69.

113. 805 S.W.2d 222 (Mo. Ct. App. 1991) (Western District).

114. *Id.* at 228. Notice the similarity in reasoning with *Jackson*. *See supra* note 105 and accompanying text.

115. 753 S.W.2d 557 (Mo. 1988).

116. *Id.* at 563.

117. *Id.*

118. 828 S.W.2d 681, 683 (Mo. 1992).

*Jackson*, it "considered situations where, while cause could not absolutely be proven, it [was] 'more likely than not' that 'but for' the negligence of the tort-feasors the injury would not have occurred."[119] Since the plaintiff in *Wollen* could only allege that the defendants' negligence might have contributed to decedent's death, this negligence could not be a substantial factor.[120]

## IV. INSTANT DECISION

In *Callahan v. Cardinal Glennon Hospital*, the Missouri Supreme Court began its analysis of the causation requirement with a question: Does Missouri law still include a but-for test, and, if so, when does the test apply?[121] The court recognized that confusion about the answer to this question had arisen since the advent of the substantial factor test.[122]

Tracing the roots of this confusion, the court identified several reasons for the decline of the but-for test.[123] First, the court noted the substantial factor test has become popular among lawyers and judges because, using such a test, it becomes easier to communicate the idea of multiple causes.[124] Second, decisions such as *Jackson v. Ray Kruse Construction Co.*,[125] intimated that the substantial factor test does not include but-for analysis.[126] Finally, the court opined that the confusion regarding when, and if, to use the but-for test largely stems from the different meanings of substantial factor employed by the Restatement (Second) of Torts and Prosser.[127]

The court noted that section 432 of the Restatement (Second) mandates that conduct is not a substantial factor unless it meets the but-for test, a requirement in every situation except the narrow, two fires type case.[128] Thus, the court found that confusion initially arose because, while all cases require substantial factor testing under the Restatement, the vast majority are

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119. *Id.* at 683. Recall that but-for language does not appear in the *Jackson* opinion. *See supra* notes 105-06 and accompanying text.

120. *Id.* Note that the reason why the plaintiff in *Wollen* could only allege that the defendant's negligence may have contributed to the death was that this case involved a cause of action for loss of chance. For comprehensive coverage of loss of chance in Missouri, *see* Robert S. Bruer, Note, *Loss of a Chance as a Cause of Action in Medical Malpractice Cases*, 59 MO. L. REV. 969 (1994).

121. *Callahan*, 863 S.W.2d at 860.

122. *Id.* at 861.

123. *Id.*

124. *Id.*

125. 708 S.W.2d 664 (Mo. 1986).

126. *Callahan*, 863 S.W.2d at 861.

127. *Id.*

128. *Id.*

still required to meet the but-for test as well.[129] The court noted that Prosser's approach differs from the Restatement in that a but-for test must be met in all cases except the two fires situation.[130] In the two fires situation, the substantial factor test applies.[131] Comparing the two approaches, the court concluded that when Prosser refers to a substantial factor case, he refers only to a two fires case.[132] On the other hand, when the Restatement refers to a substantial factor case, it is referring to all cases, including the two fires scenario.[133]

Having investigated the problem, the court warned that confusing the approaches of the Restatement and Prosser could, by eliminating the use of the but-for test, "fritter[] away a meaningful causation test" to the point where causation-in-fact would no longer be required.[134] The court stated that "'but for' is an absolute minimum for causation because it is merely causation in fact."[135] Attempting to impose liability on a defendant, absent a showing of actual causation, attempts to connect the defendant with an injury that he did not produce.[136]

Addressing lawyers and judges who have found the but-for test difficult to apply, the court asserted that multiple causes can be tested easily with the but-for causation test.[137] After testing this assertion against several hypothetical fact patterns,[138] the court concluded by noting that applying the

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129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* This statement may be an exaggeration. Both the Restatement approach and Prosser's approach utilize a but-for test. The danger lies in courts using Restatement substantial factor language without understanding that such a test includes but for analysis. *See supra* text accompanying note 86.

135. *Callahan*, 863 S.W.2d at 862.

136. *Id.*

137. *Id.*

138. The court illustrated the use of but-for with the following hypotheticals. The court stated that if Dr. Venglarcik knew of Danny's presence at the hospital and knew of his condition, but either failed to see Danny or failed to drain the abscess, then his negligent conduct would meet the but-for test. *Id.* "If nurse Schwartz failed to inform Dr. Venglarcik of Danny's presence and condition . . . and the doctor had no other source of this information," the nurse's conduct would also satisfy the but-for test. *Id.* Finally, if the doctor had another source of information about Danny's presence and condition and if the nurse failed to inform the doctor, the nurse's conduct would fail to meet the but-for test, "absent a convincing policy argument that this situation should be treated as a 'two fires' case." *Id.*

but-for test is not inconsistent with multiple causal circumstances.[139] The court stated that whether or not one defendant meets or does not meet the but-for test has no effect on the remaining defendants.[140] Individual defendants "rise or fall on their own 'but-for' causation test."[141]

Finally, answering its initial question, the court held that the but-for test for causation applies in all cases, except two fires cases.[142] Examining the facts of the case, the court noted that the plaintiff's experts testified that if the abscess had been treated properly, Danny's immune system would not have been suppressed, and Danny would not have developed paralytic polio.[143] Taking this testimony in the light most favorable to the plaintiff, the court concluded that causation was a question for the jury, and the jury believed that the plaintiff would not be paralyzed but for the actions of St. Louis University and Cardinal Glennon.[144] Therefore, the court denied St. Louis University's point of error asserting the plaintiff had failed to present sufficient evidence of causation.[145]

## V. COMMENT

The decision in *Callahan v. Cardinal Glennon Hospital* can be viewed in at least three ways. First, *Callahan* can be seen simply as a correction of *Jackson v. Ray Kruse Construction Co.*, which courts interpreted as eliminating the but-for test from causation analysis. Second, *Callahan* indicates a shift in the Missouri Supreme Court's allocation of functions between judge and jury. Finally, the decision reflects a change in the court's view of tort compensation theories.[146]

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139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 862-63.
143. *Id.* at 864.
144. *Id.* at 864-65.
145. *Id.* at 865.
146. In addition to these effects of *Callahan*, there should be minor changes in trial procedure. The terminology employed by courts will have no impact on jury instructions. The Missouri Approved Instructions (MAI) deals with causation by instructing that the defendant's conduct must "directly cause" or "directly contribute to cause" plaintiff's injury. MAI 19.01 (1986). Thus, there will be no need to change substantial factor language to but-for language. However, the change from substantial factor to but-for could affect closing arguments. *Callahan*, 863 S.W.2d at 863.

### A. Application of Callahan

Before examining the practical and theoretical impacts of *Callahan*, its application can be observed in a later case, *Washington v. Barnes Hospital.*[147] In *Washington*, the plaintiff went to Barnes Hospital after experiencing abdominal pain associated with her pregnancy.[148] Upon her arrival, a nurse examined the plaintiff and noted that the plaintiff had a firm uterus, which usually indicates an abruption.[149] After several ultrasounds and signs of fetal distress, physicians performed an emergency Caesarian section, resulting in delivery of twins.[150] However, one of the twins had experienced a total abruption, producing permanent brain damage.[151] The plaintiff alleged that the defendants were negligent in failing to diagnose the abruption and perform the Caesarian section in a more timely fashion, causing damage to the child.[152]

Applying the *Callahan* but-for test, the court found that in order to establish causation, the plaintiff had to show that, but for the defendant's negligence, the child would have been delivered before the abruption, thus sparing him from oxygen deprivation.[153] The majority stated that, at most, one could say that an earlier delivery "might or might not have made any difference."[154] Thus, the court concluded, the evidence presented by the plaintiff's experts was insufficient to satisfy the but-for test.[155]

Under the *Jackson* regime, the evidence presented in *Washington* may very well have been sufficient to reach the jury on the issue of causation.[156] As the court stated in *Jackson*, the jury "*could have* believed a speed

147. No. 93-62364, 1993 WL 478944 (Mo. Ct. App. November 23, 1993).

148. *Id.* at *2.

149. *Id.* ("An abruption is a separation of the placenta from the wall of the uterus. A complete abruption deprives the baby of its source of oxygen while in the uterus."). *Id. at* *2 n.1.

150. *Id.* at *3.

151. *Id.*

152. *Id.* at *4.

153. *Id.* at *7.

154. *Id.* at *8.

155. *Id.* The court reversed the judgment in favor of the defendant. The dissent believed that the evidence of causation was sufficient to let the jury decide the issue. *Id.* at *10.

156. *See* Dale C. Doerhoff, *Supreme Court Adopts "But For" Causation Rule and Other Recent Developments in Missouri Cases*, 50 J. Mo. Bar. 5 (1994) (analyzing the *Washington* decision and stating that "before *Callahan*, any proximately related causal event was arguably a substantial factor.").

bump . . . *could have* greatly reduced the *chance* of an accident . . . ."[157] Applying this standard in *Washington*, the court might have concluded that the jury could have believed that an earlier Caesarian section could have reduced the chance of oxygen deprivation.[158] Thus, the causation question belonged to the jury.[159] However, in *Washington*, the but-for test performed its function and resulted in dismissal of an action against a defendant whose conduct was not "determinative of the outcome;"[160] under the uncertain, speculative causation approach in *Jackson*, the result may have been different.[161]

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157. Jackson v. Ray Kruse Constr. Co., 708 S.W.2d 644, 668 (Mo. 1986) (emphasis added).

158. *Washington*, 1993 WL 478944 at *8.

159. *Id.*

160. *See* Doerhoff, *supra* note 157, at ** (stating that "in most cases the 'but for' test excuses conduct which is not determinative of outcome").

161. For an interesting application of the *Callahan* but for test to a punitive damages claim, *see* Vaughn v. North American Systems, Inc., 869 S.W.2d 757 (Mo. 1994). The *Vaughn* court held that the plaintiff's punitive damage claim failed because the but-for test was not satisfied. *Id.* at 759-60.

In *Vaughn*, the plaintiff brought a products liability action against the defendant, the manufacturer of Mr. Coffeemaker. She claimed that her Mr. Coffeemaker started a fire in her home and caused property damage. *Id.* at 758. Her coffeemaker had an electric clock that would only function while the unit was plugged in, and it also came with instructions to unplug the coffeemaker when not in use. *Id.* The coffeemaker could be switched off and remain plugged in, thereby allowing the clock to run continuously. *Id.* at 759.

On May 16, 1986, the plaintiff turned her coffeemaker on, filled it with vinegar to clean it, and left the coffeemaker on while she took a shower. *Id.* at 758. Unattended, the coffeemaker started a fire which damaged the plaintiff's home. *Id.* The jury awarded the plaintiff $15,000 in actual damages. *Id.*

For her punitive damages claim, the plaintiff pointed out the contradictory messages of the defendant. *Id.* at 758-59. On the one hand, the coffeemaker instructions warned that, for fire safety reasons, users should unplug their coffeemakers when not in use. *Id.* at 758. On the other hand, the presence of a clock which only functions when the coffeemaker is plugged in encourages users to keep their coffeemakers plugged in while not in use; and constitutes a "trap for the unwary." *Id.* at 759.

However, as the court correctly concludes, this plaintiff did not fall into this trap. *Id.* The plaintiff "did not leave the coffeemaker switched off and plugged in." *Id.* Rather, she "left the coffemaker switched on while cleaning it with vinegar." *Id.* The court found that "[t]he fact that this coffeemaker was equipped with an electric clock is irrelevant to the occurrence of this fire. It could have no causal relationship in fact." *Id.* Prior Missouri decisions have required that punitive damages "have some reasonable relation to the injury inflicted and the cause thereof!" *Id.* However, after discussing this standard, the *Vaughn* court cited *Callahan* stating that the but for test

### B. *The First Impact of Callahan: Dispelling Confusion*

With its decision in *Jackson v. Ray Kruse Construction Co.*, the Missouri Supreme Court thoroughly confused itself and other Missouri courts. Although the court in *Jackson* did not explicitly state that but-for testing no longer applied in determining causation-in-fact, the opinion leaves one wondering exactly what the court intended to do.

The court failed to use but-for language and used very equivocal wording when stating the bases for the causal connection in the case. Then, after stating that "[t]he law deals with probabilities," the court concluded by finding its opinion "consistent with Missouri cases applying the 'substantial factor' test of causation."[162] In a footnote the court listed the Missouri cases dealing with the substantial factor rule; however, each of the cases cited includes a but-for test in its substantial factor analysis.[163] In the same footnote, the court referred the reader to Restatement (Second) of Torts section 431 substantial factor test.[164] However, the court failed to cite section 432, which explicitly incorporates but-for analysis into the Restatement substantial factor test.[165] Based on this analysis, there is little wonder that numerous

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is "an absolute minimum for causation." *Id.* Finding that the plaintiff's punitive damages claim did not satisfy the but-for test, the court affirmed the trial court's denial of punitive damages relief. *Id.* at 759-60.

Considering the facts of this case, the use of the but-for test has both an analytic and common sense appeal. What the plaintiff was using as her basis for punitive damages (i.e., the presence of an electric clock on the coffeemaker) had absolutely nothing to do with how the accident occurred in this case. But for the presence of the clock, this accident would still have happened in the same fashion. However, application of the but-for test to a punitive damages claim seems theoretically flawed. Simply put, punitive damages are not *caused* by anything. It seems odd to inquire whether but for the actions of defendant, plaintiff would have suffered punitive damages. In the final analysis, for the sake of definitional clarity, it may have been wise for the court to utilize the "reasonable relation" standard as opposed to but-for.

162. *Jackson*, 708 S.W.2d at 668-69.

163. *Id.* at 669 n.6. *See also* Todd v. Watson, 501 S.W.2d 48, 52 (Mo. 1973); Ricketts v. Kansas City Stock Yards Co., 484 S.W.2d 216, 222 (Mo. 1972); Champieux v. Miller, 255 S.W.2d 794, 797 (Mo. 1953); Stumpf v. Panhandle E. Pipeline Co., 189 S.W.2d 223, 227 (Mo. 1945); and Giles v. Moundridge Milling Co., 173 S.W.2d 745, 750 (Mo. 1943).

164. *Jackson*, 708 S.W.2d at 669 n.6.

165. *See supra* note 86 and accompanying text. *See also* RESTATEMENT (SECOND) OF TORTS § 432(1) (1965). Prosser identifies three distinct and conflicting meanings of the term "substantial factor:" (1) some courts use it to refer solely to a two fires type case; (2) some courts use the substantial factor test as a synonym for proximate cause; (3) other courts use substantial factor as a substitute for but for testing, which he calls a "blending" of but for and the requirement of proof. KEETON

courts interpreted the opinion in *Jackson* as completely eliminating the but-for requirement.[166]

The confusion of *Jackson* is exemplified by the appellate court opinion in *Callahan v. Cardinal Glennon Hospital.* The Eastern District of the Missouri Court of Appeals, citing *Jackson*, stated a cause is legally sufficient if it is a substantial factor in bringing about the harm, and "[a] cause which meets the substantial factor test is a cause in fact."[167] In addition, the court announced it "[found] nothing . . . that suggests the substantial factor test should be replaced by the 'but for' test on medical causation issues."[168] This latter statement demonstrates a misunderstanding of cause-in-fact testing. The Restatement substantial factor test, which Missouri adopted, includes the "but for" test as a component.[169] The suggestion that these two tests are mutually exclusive is wholly incorrect.[170]

In *Callahan*, the Missouri Supreme Court dispelled the confusion and misinterpretation surrounding cause-in-fact analysis.[171] After this decision, there will be no question as to when to use the but-for and substantial factor tests.

### *C. The Second Impact of Callahan: Reallocation of Judge and Jury Functions*

As Judge Welliver recognized in his dissent in *Jackson*, the court had effectively "abdicate[d] the judicial function of deciding as a matter of law whether the case should have been submitted to the jury."[172] Also dissenting, Judge Donnelly declared that the majority "neuters the much-used

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ET AL., *supra* note 46, at 268.

The court in *Jackson* seems to have accomplished, as Prosser stated, a blending of the substantive but for requirement with the requirement of proof, preponderance of evidence. As Prosser predicted, using such a test "leads often to confusion." *See* KEETON ET AL., *supra* note 46, at 264.

166. *See, eg.*, cases cited and discussed in notes 114-20 and accompanying text.

167. Callahan v. Cardinal Glennon Hosp., No. 60685, 1992 WL 251555, at *5 (Mo. Ct. App. Oct. 6, 1992) (quoting *Jackson*, 708 S.W.2d at 669 n.6).

168. *Id.* at *6.

169. *See supra* note 86 and accompanying text; *See also* RESTATEMENT (SECOND) OF TORTS § 432(1) (1965).

170. In prior decisions of the Eastern District, the court utilized a but for test. *See, e.g.*, Delisi v. St. Luke's Episcopal-Presbyterian Hosp., 701 S.W.2d 170, 175 (Mo. Ct. App. 1985); Robbins v. Jewish Hosp., 663 S.W.2d 341, 345 (Mo. Ct. App. 1984).

171. *Callahan*, 863 S.W.2d at 861.

172. *Jackson*, 708 S.W.2d at 672 (Welliver, J., dissenting).

concept that it is the duty of a trial court to direct a verdict for the defendant where causation is a matter of pure speculation and conjecture."[173] After *Jackson*, almost all questions of causation were to go to the jury, and motions for summary judgment and directed verdict on the issue of causation would nearly always fail.

By reinstating the but-for test, the *Callahan* court reallocated the functions of judge and jury. On motions for summary judgment and directed verdict, the trial court now has a clear test to apply. If the pleadings or evidence fail to demonstrate that the defendant's conduct in question was determinative of the plaintiff's harm, the defendant's motion should be sustained.[174]

### *D. The Third Impact of Callahan: Changing Theories of Tort Compensation*

Viewing *Callahan* more broadly, the Missouri Supreme Court, deviated from a line of 1980s tort cases,[175] characterized by Judge Welliver as elevating the need for compensation as the primary function of the law of torts

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173. *Id.* at 671 (Donnelly, J., dissenting).

174. *See* KEETON ET AL., *supra* note 46, § 45 (Functions of Court and Jury).

175. *See* Lippard v. Houdaille Indus., 715 S.W.2d 491, 493 (Mo. 1986) (holding that plaintiff's comparative fault is not an issue in a products liability claim); Jackson v. Ray Kruse Constr. Co., 708 S.W.2d 664 (Mo. 1986); Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371 (Mo. 1986); Firestone v. Crown Center Redevelopment, 693 S.W.2d 99, 110 (Mo. 1985) (abolishing the doctrine of remittitur in Missouri); Chandra v. Sprinkle, 678 S.W.2d 804, 808 (Mo. 1984) (holding that no privilege from discovery exists under Missouri law for factual statements made during peer review of a doctor); Fowler v. Park Corp., 673 S.W.2d 749, 754 (Mo. 1984) (concluding that defendant had a duty to ensure that the one to whom he entrusts his chattel is competent to operate it and that defendant must inquire as to the entrustee's competence); Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434 (Mo. 1984); Johnson v. Pacific Int'l Express Co., 662 S.W.2d 237 (Mo. 1983); O'Grady v. Brown, 654 S.W.2d 904, 911 (Mo. 1983) (holding that Missouri's wrongful death statute "does provide a cause of action for the wrongful death of a viable fetus"); Wynn v. Navajo Freight Lines, 654 S.W.2d 87 (Mo. 1983); Virginia D. v. Madesco Inv. Corp., 648 S.W.2d 881 (Mo. 1983); Wolfgeher v. Wagner Cartage Serv., 646 S.W.2d 781, 785 (Mo. 1983) (construing the term "accident" in Missouri's Workers Compensation statute to include any job related injury); Bass v. Nooney Co., 646 S.W.2d 765, 772-73 (Mo. 1983) (abandoning the impact rule and permitting recovery for negligent infliction of emotional distress if: "(1) the defendant should have realized that his conduct involved an unreasonable risk of causing the distress; and (2) the emotional distress or mental injury must be medically diagnostic and must be of sufficient severity so as to be medically significant").

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in Missouri.[176] Judge Welliver described these cases and this decade in tort law as the advent of what "M.A.T.A. [Missouri Association of Trial Attorneys] thought to be the coming of the Great society, and others, thought to be this Court's contribution to the Tort Crisis."[177]

If Judge Welliver's characterization is accurate, he would welcome *Callahan* as a positive step in delivering Missouri from "the Sargasso Sea of the crisis of tort," by reinstating the but-for test.[178] By doing so, the court halted the trend interpreting *Jackson* to ease a plaintiff's burden on the issue of causation-in-fact.[179] A plaintiff must, at minimum, satisfy the but-for test in order to recover against a defendant.[180] By retaining this minimal hurdle, the court stopped the decline in the application of cause-in-fact analysis.[181]

The decision in *Callahan* responds to the fears expressed by Judge Welliver in *Jackson*. Tort recovery requires but-for compensation. Only then may the plaintiff be compensated. Thus, in deciding *Callahan* the court moved away from the theory that the primary function of tort law is to serve the need of compensation.

## VI. CONCLUSION

In *Callahan v. Cardinal Glennon Hospital*, the Missouri Supreme Court clarified cause-in-fact analysis in Missouri. Recognizing prior confusion, the court clearly asserted that the but-for test shall be utilized in all tort cases except the narrow two fires situation. The repercussions of *Callahan* extend well beyond mere clarification of the law of cause-in-fact. In effect, the court altered the allocation of functions between the trial court and the jury, and signalled a perceptible change in its overall theory of tort compensation.

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176. *Jackson*, 708 S.W.2d at 671 (Donnelly, J., dissenting).

177. *Lippard*, 715 S.W.2d at 505 (Welliver, J., dissenting) (from what Judge Welliver titled as the "Epilogue—to Gustafson").

178. *Id.*

179. *See Pollard*, 793 S.W.2d at 409 (Smith, J., dissenting).

180. *Callahan*, 863 S.W.2d at 862.

181. *Id.* at 861.