"A ROUGH SENSE OF JUSTICE" MEETS "PRACTICAL POLITICS": CAUSATION IN THE TEXAS SUPREME COURT

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I. INTRODUCTION

> What we . . . mean by the word "proximate" [cause] is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.[1]

The significance of jury trials in civil cases has largely eroded under the domination of appellate courts.[2] As lamented by legal scholars, "the

[1] Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting), quoted by Justice Cornyn in his discussion of the history of causation doctrine in *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 n.1 (Tex. 1995), *abrogated by Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007).

[2] Leon Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 486 (1956) ("Yet the history of jury trial is everywhere the same—a constant struggle on the one hand to preserve the integrity of the political ideal of laymen's justice, and the equally persistent struggle on the other to subject the jury to strict control by the court . . . with the development of highly integrated court

causation issue can present a golden opportunity for a reviewing court to substitute its judgment for the judgment of the jury."[3] One scholar criticizes the Texas Supreme Court for "tak[ing] full advantage of this opportunity by modifying both the causation standards used in tort cases and the analytical process through which the fact finder's causation finding is reviewed."[4]

Perhaps Justice John Cornyn in his *Allbritton* concurrence opinion did not mean to imply that the Texas Supreme Court should endeavor to impose simple "rough justice" or its own "practical politics" over the next several years as the court wrestled with causation issues.[5] But looking back seventeen years later, there is more than a little irony in his quoting this excerpt from the landmark *Palsgraf* decision when one considers that of the thirty-one major causation opinions the court has issued since *Allbritton*, only four decided the causation issue in favor of the plaintiff.[6] The remainder found a way to benefit the defendant, most overturning jury verdicts, and many overturning courts of appeals' decisions that found sufficient evidence of causation.[7] In the seventeen-year period prior to *Allbritton*, the Texas Supreme Court decided causation cases much less frequently, and the plaintiff/defendant split was in favor of plaintiffs, but not overwhelmingly so.[8] Almost as startling to those who learned that Texas

systems under the complete dominion of appellate courts, both trial courts and jury have fallen under the control of the higher courts, and jury trial in current civil cases has lost most of its significance . . . the significance of jury trial in civil cases has become so largely that of a symbol.").

[3] William V. Dorsaneo, III, *Judges, Juries, and the Reviewing Courts*, 53 SMU L. REV. 1497, 1527 (Fall 2000) (citations omitted).

[4] *Id.* (referencing the court's decision in *Allbritton*, 898 S.W.2d at 773).

[5] This article does not necessarily reflect the views of other lawyers at Haynes & Boone, LLP. The authors gratefully acknowledge the extensive assistance of Josh Borsellino and Layne Keele in the writing of this Article.

[6] As will be seen, this numerical comparison is not meant to represent sophisticated statistical analysis, but it is intended to make a point more qualitative rather than quantitative. This numbers breakdown of pre- and post-*Allbritton* causation decisions was not the result of a mathematical process utilizing tools such as regression analysis or the careful exclusion of other explanations for why plaintiffs have fared so poorly over the last seventeen years. But the case outcomes in the two seventeen-year periods before and after *Allbritton* differ so radically as to suggest that more is at work than random outcomes.

[7] Pertinent post-*Allbritton* cases are discussed in detail in Part VI–VII, *infra*.

[8] In the seventeen years prior to *Allbritton*, the court decided a total of nineteen cases involving causation, with twelve of those in favor of plaintiffs. Of the "major" influential causation cases during this time period, over two-thirds favored plaintiffs (i.e., seven cases out of the ten major cases). This period included what was considered an overtly plaintiffs-friendly court

common law highly valued stare decisis and that the Texas Supreme Court was an appellate court of limited jurisdiction with no ability to weigh sufficiency of evidence, the court in the last few years has repeatedly resorted to causation grounds to reverse jury verdicts in ways that seem to ignore the Texas Constitution's limitation precluding the court from simply re-weighing evidence to reverse.[9] If Dean Green thought jury trials lost their significance in 1956, fifty-six years later he would conclude they have been scheduled for elimination in this state and became a symbol of futility. As will be seen, causation grounds have been a favored device to disregard jury findings. This more recent focus by the court on the causation arena has not gone unnoticed:

> Causation is the uncontrolled intersection of multiple Supreme Court trends . . . . [C]ausation should now be the source of a "no evidence" objection in every charge conference, and the subject of a separate section in every post-verdict motion. It is also the one place the courts are expected to make policy on a case-by-case basis. . . . Two obvious themes have emerged as the Court of the 90's began to correct perceived excesses of the 80's. . . . Underlying both themes is a steady erosion of the jury's role in deciding contested issues.[10]

which included Justices William Kilgarlin, Oscar Mauzy, Lloyd Doggett, Franklin S. Spears, C.L. Ray, Jr., Robert M. Campbell, James P. Wallace, Eugene A. Cook, Ted Robertson, and Jack Pope, among others.

[9] TEX. CONST. art. I, § 15; art. V, §§ 6, 10; *but see* William Powers, *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699, 1719 (1997) ("The court is shifting more of the normative work in tort litigation away from juries and toward judges, but the court is not accomplishing this, as many lawyers think, by abandoning the traditional standard of no evidence review."). Given the last decade and half or so, this may be a questionable conclusion given the increasingly blurry line between "no evidence" and "sufficient evidence," especially when the court engages in causation analysis.

[10] Charles R. Watson, Jr., et. al, *Proof of Causation: Selected Causation Trends Before the Supreme Court*, 18th Annual Advanced Civil Appellate Practice Course 1, 2–4 (2004) (hereafter cited as "*Causation Trends*"). In their paper presented at the 2004 Advanced Civil Appellate Practice Course, authors Charles R. "Skip" Watson, Kirsten M. Casteneda, and Susan A. Kidwell alerted readers to the mounting tsunami of reversals by the court based on causation grounds. *Id.* The paper also predicted the court's discarding of the Pattern Jury Charge's long-standing definition of "producing" cause, which occurred in *Ford Motor Co. v. Ledesma*, 242 S.W. 3d 32 (Tex. 2007), discussed in detail in Part VI.A.1.c, *infra*. The *Causation Trends* paper anticipated that the court might start referring to "but-for" causation as "substantial factor" causation in light

II. SCOPE OF THIS ARTICLE

The purpose of this Article is to review what the court has been up to in its decisions invoking causation grounds since *Allbritton* was decided in 1995. We start with a background discussion of causation doctrine in Texas tort law, with a special focus on the debate between Deans Green, Keaton, and Prosser. Next follows an overview of the court's causation decisions in the seventeen years prior to 1995. We then discuss *Allbritton*, especially excerpts from Justice Cornyn's *Allbritton* concurrence, which has proven more influential than the majority opinion. We proceed to discuss in some detail the thirty-one Texas Supreme Court cases decided since *Allbritton* that were decided on causation grounds. Finally, we preview one pending case in the court that could result in yet another jury verdict reversal on causation grounds.

The *Allbritton* opinions (majority and concurrence) appear to signal an opening of the floodgates in terms of the court's willingness to resort to causation analysis to overturn jury verdicts (or turned a trickle into a torrent), though one could argue that process really started two years earlier with Justice Hecht's majority opinion in *Dresser Industries v. Lee*.[11] Because of the detailed doctrinal discussion in Justice Cornyn's *Allbritton* concurrence, the authors use that opinion as the dividing line, while acknowledging that the line perhaps could be moved a couple of years earlier. Indeed, Professor Dorsaneo moves the date back to *Pool v. Ford Motor Co*., 715 S.W.2d 629 (Tex. 1986), to mark greater involvement by the court in weighing evidence to overturn disfavored jury verdicts or intermediate courts of appeal.[12] The authors certainly agree that, as Justice Gonzales noted in a dissent after *Pool*, this decision opened the door for the court to re-weigh evidence in a way that improperly sidesteps the constitutional prohibition.[13] The irony is that the language and approaches from these pre-*Allbritton* opinions (often decided in favor of plaintiffs)

of its decision in *IHS Cedars Treatment Center of DeSoto, Texas, Inc. v. Mason*, 143 S.W.3d 794 (Tex. 2004): "It is the '*ill-defined* second element of producing cause' identified by Justice Cornyn's concurrence in *Allbritton* that bears watching." *Causation Trends*, 3, 14 (emphasis added); *see also* Dorsaneo, *supra* note 3, at 1520.

[11] 880 S.W.2d 750 (Tex. 1993) (discussed in detail *infra*, Part IV.B.9).

[12] Dorsaneo, *supra* note 3, at 1520.

[13] *See* Lofton v. Tex. Brine Corp., 777 S.W.2d 384, 387 (Tex. 1989) (Gonzales, J., dissenting) ("[M]y fear that *Pool v. Motor Co.* . . . would be used by this court to second guess the courts of appeals has been realized.").

were used in *Allbritton* and after to reverse jury verdicts for plaintiffs, or to prevent plaintiffs' cases from ever reaching a jury.

III. OVERVIEW OF "CAUSATION" DOCTRINE IN TEXAS PRIOR TO *ALLBRITTON*

The court issued ten major causation decisions in the seventeen years preceding *Allbritton*.[14] Of the ten, plaintiffs won seven and lost three of those cases.[15] Additional causation cases decided in that time period are also discussed below. Three of the ten major decisions arguably provided the license for later courts to second-guess juries through the device of causation analysis: *Lofton v. Texas Brine Corp*., *El Chico Corp. v. Poole*, and *Havner v. E-Z Mart Stores, Inc*.[16] Another, *Lear Siegler, Inc. v. Perez*, provided much of the language and reasoning used in *Allbritton* and since to justify Texas judicial activism in the causation arena.[17]

This time period includes opinions by the so-called activist plaintiffs-oriented court, which included Justice William Kilgarlin, and later opinions by a court in transition (which from 1992 to 1995 had a growing majority somewhat hostile to the Mauzy/Doggett/Kilgarlin tort approach).[18] In a law

[14] This seventeen-year period is referred to as the "pre-*Allbritton*" period.

[15] *See* discussion *infra* Part IV.B. Two of these were decided shortly after a Republican-affiliated block attained a working majority on the court: *General Motors Co. v. Saenz*, 873 S.W.2d 353 (Tex. 1993) and *Dresser*, 880 S.W.2d at 750. *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292 (Tex. 1983) is not included in the list, though perhaps it should be. Though Judge Spears spoke in *Corbin* in terms of "proximate cause," this is actually a duty case; it highlights the problem of shifting the concept of "foreseeability" back and forth between duty and proximate cause. *Id.* at 296 ("[T]he foreseeability of the harmful consequences resulting from the particular conduct is the underlying basis for liability."). The "Kilgarlin Court" would do this even more obviously in *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987), discussed in detail *infra* Part IV.B.4.

[16] *Lofton*, 777 S.W.2d at 384; *El Chico*, 732 S.W.2d at 306; Havner v. E-Z Mart Stores, Inc, 825 S.W.2d 456 (Tex. 1992).

[17] 819 S.W.2d 470 (Tex. 1991).

[18] For simplicity's sake we refer to this as the "Kilgarlin" court, mainly because it relies on Kilgarlin's writings on duty to compare the decisions of that court to the more recent court. During this time period, the justices included Oscar Mauzy, Lloyd Doggett, Franklin S. Spears, C.L. Ray, Jr., Robert M. Campbell, James P. Wallace, Eugene A. Cook, Ted Robertson, and Jack Pope, among others. It could have easily been referred to as the "Mauzy" court or some other sobriquet (its critics might like to refer to it as the "60 Minutes" court based on the broadcast story about financial contributions to the court at the time of the *Pennzoil v. Texaco* appeals, but of course 60 Minutes later did a similar exposé on the "Phillips" court. *60 Minutes: Is Justice for*

review article published two years after *Allbritton*, then-Dean (now President) William Powers hinted that Justice Kilgarlin and his colleagues would approve of a later (presumably equally activist) court making policy decisions in the duty arena, since they did much the same.[19] The cases Powers cited, as well as the articles authored by Justice Kilgarlin, focused on legal duty issues; Powers did not cite any significant causation opinions from the 1981 to 1994 time period to support his thesis, and his discussion of the post-Kilgarlin court also focused on duty cases (and he cited *Allbritton* as a "duty" case).[20] Powers also posited that tort scholars Keeton, Prosser, and Green would have approved of extensive judicial involvement in the legal duty arena.[21] That may be a stretch, as Parts III.A and III.B

Sale? (CBS television broadcast, Dec. 6, 1987)). Chief Justice Phillips, in a 1999 interview, was asked:

> Can you see if people are reading about court decisions and saying, 'Well the court has really gone in this direction in the last ten years. Decisions are more in favor of certain interests and money—and contributions from those interests have also increased in this time period.' Can you see how that leads to the perception that a court can be bought, not an individual justice, but a court?

Chief Justice Phillips responded, "Certainly it does. And I think that is one of the strongest arguments against the system of judicial selection we have." Frontline, *Justice for Sale: Interview Tom Phillips*, (1999), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/phillips.html. Karl Rove's early influence on the Texas Supreme Court judicial campaigns as a political consultant is undeniable. *See* Viveca Novak, *Under the Influence*, The American Prospect, (Sept. 19, 2011), *available at* http://prospect.org/article/under-influence ("One of the earliest strategists on the state-court front was a consultant whose unrelenting methods would become the stuff of legend. In 1988, Karl Rove helped engineer the election of the first Republican chief justice of Texas's then deeply blue high court by demonizing plaintiffs' lawyers.").

[19] Powers, *supra* note 9, at 1719.

[20] *See id.*

[21] *See id.* The Powers article was no doubt in part a response to articles like the one in the *Texas Lawyer* in September, 1995: Walt Borges, *The Courts Big Chill, The Texas Supreme Court All But Froze Out Plaintiffs in 1995*, Texas Lawyer, Vol. 11, No. 25, September 4, 1995 ("In 1985, the heyday of a wholly Democratic Supreme Court, plaintiffs were rolling. They won sixty-nine percent of the cases, while defendants came out on top twenty-eight percent of the time . . . . In 1995 cases that fit this profile, plaintiffs won just sixteen percent of the time . . . . The statistics highlight the huge differences between the plaintiff-friendly 1985 court and the current court, which is likely to become more conservative with the retirements of Justices Jack Hightower and Bob Gammage."); s*ee also* Elliott and Elder, *Hyperactive Supreme Court Continues to Extend Power*, Texas Lawyer, Vol. 13, No. 20, 1997 (preceding by a month President Power's article) ("[In 1997,] the Texas Supreme Court was quietly pursuing its own brand of tort reform, taking for itself power that formerly belonged to juries, trial judges and intermediate courts of

illustrate. The issue Powers does not address, and which this article attempts to examine, is whether the post-*Allbritton* Court decisions in the causation arena are really about duty, or are actually a majority's particular view (weighing) of the causation evidence in disagreement with a jury's.[22]

The ghost haunting this discussion is *Palsgraf*, including the majority opinion and dissent. The holding denied the plaintiff recovery for her damages suffered on the railroad platform and placed a limit on the defendant's negligence liability.[23] The dissent argued for expanded liability to compensate the plaintiff.[24] The Cardozo majority opinion decided *Palsgraf* as a legal duty case; Judge Andrews' dissent argued the proper approach was a proximate cause analysis (but loaded with all sorts of duty concepts).[25] Ever since, the lines between the two—duty and causation—have often been blurred. As will be seen, the fuzzy line dividing the legal duty/causation dichotomy is used by Justice Cornyn in *Allbritton* (and by the court since then) as license to set aside jury verdicts on causation grounds without ostensibly running afoul of the prohibition against

appeals . . . . Throughout the 1990's, the court has whittled away at jury discretion, sometimes turning fact issues into legal ones that can be reviewed on appeal.").

[22] There has been an almost century-long debate—triggered by *Palsgraf*—about whether and why it matters that the tort policy-making judicial function occurs more appropriately under the rubric of "legal duty" or "proximate cause" (or its variants like "substantial cause"). *See, e.g.*, Leon Green, *Jury Trial and Proximate Cause*, 35 TEX. L. REV. 357 (1957); *see also* Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1009–12 (July 1988) ("Given such rampant confusion about the meaning of and relationship between causation and responsibility, the soil was ripe for the emergence, during the fourth quarter of this century, of the tort theories of the libertarians, the legal economists, and the Critics. . . . The confusion of the factual issue of causation with the policy issue of moral or legal responsibility goes deeper than the failure to distinguish the second and third elements of the liability analysis.") (This article is cited several times by Justice Cornyn in his *Allbritton* concurrence; oddly, the main thrust of the article and many of its supporting points actually argue against the approach taken by both the majority and concurrence in *Allbritton*). It is not necessarily "wrong" for the judicial normative decision-making to occur under the "proximate cause" heading instead of the "legal duty" heading, but we suggest that there is something remarkably odd, and perhaps indicative of an invasion of the jury's function, for that judicial policy-making to occur in *both* areas, simultaneously, with unprecedented frequency, and in ways that are not candid about the long-term effect on jury verdicts.

[23] Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928).

[24] *Id.* at 105 (Andrews, J., dissenting).

[25] *Id.* at 99, 103–04.

weighing evidence.[26] This blurring of lines is made easier by the wild card of foreseeability. To paraphrase the U.S. Supreme Court in *Carter v. Atlanta & St. Andrews Bay Railway Co.*, the concept of foreseeability is the elusive butterfly that alights on legal duty or legal causation depending on the deciding majority.[27]

A. President Powers, Dean Prosser, and Dean Keeton

Powers disagreed with critics' assessment that the Texas Supreme Court was improperly weighing evidence to overturn jury verdicts.[28] Powers argued that the court was merely doing what prior courts had done in the tort arena—properly deciding issues of legal duty:

> There is a perception—an accurate perception—that the Texas Supreme Court is increasingly willing to overturn jury verdicts in tort cases. There is also a perception—an *inaccurate* perception—that the court is doing this by changing the no evidence standard of review. . . . The court is shifting more of the normative work of tort litigation away from juries and toward judges, but the court is not accomplishing this, as many lawyers think, by abandoning the traditional standard of no evidence review.[29]

Powers noted that the court is "assigning more questions of policy to the court than to the jury . . . . [T]he court is accomplishing this, not by changing the no evidence standard of review, but by attending more carefully to the question of duty."[30] Dean Green confirms the

[26] As will be seen, sometimes the appearance of weighing the sufficiency of evidence cannot be avoided. *City of Keller v. Wilson*, despite Justice Brister's scholarly exegesis and vigorous nod to Article I, § 15, is an example of improperly weighing evidence, at least according to the concurrence by Justice O'Neill. 168 S.W.3d 802, 833 (Tex. 2005) (O'Neill, J., concurring). Professor Dorsaneo also strongly suggests the court *is* impermissibly weighing evidence, at least in *Allbritton* and cases that follow it. Dorsaneo, *supra* note 3, at 1498 ("[The] companion developments [after *Allbritton*] have shifted the locus of the decision-making process away from juries and ultimately toward the appellate courts").

[27] 338 U.S. 430, 437–38 (1949) (Frankfurter, J., dissenting) (comparing the attempt to apply the concept of "proximate cause" to "catching butterflies without a net").

[28] Powers, *supra* note 9, at 1699–1700.

[29] *Id.* at 1699, 1719 (citations omitted).

[30] *Id.* at 1700.

appropriateness of appellate courts deciding duty questions: "Defining legal duties has always been a proper role for courts."[31]

Powers proceeded to analyze the divergent approaches of Dean Keeton and Green.[32] Keeton preferred to deal with the duty issue in terms of proximate cause and leave much of the issue to a jury to determine, while Green preferred a duty-risk approach where judges considered duty in terms of risks and scope of liability.[33] "The difference is that, under Keeton's approach, more of the work is done under the rubric of proximate cause; under Green's approach, more of the work is done under the rubric of duty."[34] But as far as the jury's role, Powers noted that the difference in the two approaches involves the allocation of power in the litigation process.[35] According to Powers, because duty is an issue for the court, and breach and proximate cause are issues for the jury, Green's approach (duty) gives more power to the court, and Keeton's approach (proximate cause) gives more power to the jury.[36]

As will be seen, Green would not have agreed that his approach assigned more power to the court or took decision-making away from the jury. Consistently, for over four decades, he lamented the impact proximate cause (and its conflation with legal duty) had on diminishing the role of juries. As will also be seen, in the last thirty-four years, the Texas Supreme Court has not confined its policy-making role to the legal duty issue, but

[31] *Id.* Of course, the Powers article was written before *City of Keller*. And this formulation practically begs the question: Is the Texas Supreme Court getting around the prohibition on weighing the sufficiency of the evidence, at least in causation cases, by sidestepping the evidentiary issue and re-casting the issue as a "legal" or even "legal duty" issue, where it simply disagrees with the jury's (and court of appeals') view of the evidence? This is exactly what Justice Hecht accused the majority of doing, twice, in *Lofton v. Texas Brine Corp*., 777 S.W.2d 384, 388 (Tex 1989) (Hecht, J., dissenting) ("The Court cannot hold that the evidence in this case is factually sufficient to support the judgment. Article V, § 6 of the Texas Constitution makes the court of appeals' determination of the factual insufficiency of the evidence in a case 'conclusive'. . . . Twice this Court has reversed the court of appeals for failing to review the evidence by the proper legal standards." Justice Hecht proceeds with even harsher words for the majority.); *see also* dissent by Justice Gonzales, 777 S.W.2d at 387 ("The court of appeals has twice found the evidence factually insufficient; we have no jurisdiction to review it."), and concurrence in *Pool v. Ford Motor Co*., 715 S.W.2d 629, 638 (Tex. 1986) (Gonzales, J., concurring).

[32] Powers, *supra* note 9, at 1702.

[33] *Id.* at 1702.

[34] *Id.* at 1703.

[35] *Id.*

[36] *Id.*

also frequently reversed jury verdicts by deciding policy or duty issues under the guise of proximate cause, a development that would no doubt have greatly displeased both Keeton and Green.[37]

At least one prominent legal scholar—William Dorsaneo—strongly criticized Powers' conclusion that the court's approach has been an "appropriate exercise of the Texas Supreme Court's law-question jurisdiction."[38] Dorsaneo further believed that Green would not have approved of "the court's increasing tendency to overturn jury verdicts or to otherwise minimize the jury's role in the tort litigation process," or "an appellate court's use of a particularized duty analysis in tort cases as a doctrinal device to shift power away from the jury and the trial judge to the appellate courts."[39]

Powers noted that the Keeton approach, with its emphasis on proximate cause, prevailed for many years in Texas, in large part due to the influence of Charles Prosser, especially in the Restatement (Second) of Torts.[40] Powers wrote:

> The Keeton-Prosser model assigns most questions to juries; the deferential legal sufficiency standard of review protects the jury's answers to those questions. It is not surprising that plaintiffs are enamored of this combination. Conversely, it is not surprising that defendants are leery of it. In fact, that combination is loosening its grip on Texas law, but not because the Supreme Court is in the process of abandoning the traditional standard for review for legal sufficiency points of error. What is really happening is that the court is reinvigorating the concept of duty, and the court is doing this for intellectually sound reasons. . . . By articulating more particularized duty rules, the court has clearly affected the relative power of judges and juries. . . . My point instead is that the court has accomplished these

[37] *See* discussion *infra* Parts IV–VII.

[38] Dorsaneo, *supra* note 3, at 1521. Professor Dorsaneo's landmark article is discussed in more detail in Part V.D, *infra*.

[39] *Id*. at 1521–22.

[40] Powers, *supra* note 9, at 1703–04. Keeton and Prosser were well aware of many of the problems with the "proximate cause" formulation: "The word 'proximate' is a legacy of Lord Chancellor Bacon, who in his time committed other sins." W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS, Ch. 7, § 42 (Fifth ed. 1984).

> changes [putting more power into the hands of the courts] through the substantive concept of duty, not by altering the standard of review.[41]

In light of Powers' comment, it makes sense to ask if the court has gone far beyond simply focusing on legal duty. When for various reasons it cannot or does not decide a case based on pure legal duty concepts, is it now actively second-guessing juries in the causation arena—often in ways that smack of weighing evidence?[42] Powers himself seemed to invite this inquiry: "I focus on cases that involve the relationship between duty and breach, not cases involving the relationship between duty and proximate cause, even though Green and Keeton themselves were more interested in the second relationship."[43]

This was one of Green's greatest fears: that the amorphous and difficult concept of proximate cause (and its gauzy companions like substantial factor) would be used by activist appellate judges to wrest even more power away from juries, far beyond what he viewed as the appropriate role of the courts in deciding legal duty concepts.

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[41] Powers, *supra* note 9, at 1704, 1710. President Powers also recognized there was potential danger in the courts recent re-focus on duty rules:

> Are we better served by broad duty rules or narrow duty rules? . . . [I]t would be a mistake for the court to hold that, because all mixed questions of law and fact have some normative aspects, all of them are, *ipso facto*, questions of duty for the court. Whatever theoretical appeal such a claim might have, it would have the pernicious effect of turning every negligence or product defect finding into a duty issue reviewable de novo by appellate courts. It would similarly make every negligence and product defect case potentially subject to resolution at the summary judgment stage because every claim of negligence or product defect could be decided as a matter of law.

Powers, *supra* note 9, at 1714–15 (citations omitted).

[42] Dorsaneo answered with an emphatic "YES!" *See* Dorsaneo, *supra* note 3, at 1535–36.

[43] Powers, *supra* note 9, at n.20. President Powers also noted that the Texas Pattern Jury Charge appears to have adopted the Prosser-Keeton approach: "Negligence (that is, breach) is defined broadly as the care of a person of ordinary prudence. 1 State Bar of Texas, Texas Pattern Jury Charges PJC 2.1 (1996). Proximate cause is defined roughly as cause in fact plus foreseeability." Powers, *supra* note 19, at 1699 n.15. He also noted that "producing cause" in products liability law does not include foreseeability. "Both of these questions are normally left to the jury." *Id.* Perhaps not, as will be seen in *Allbritton*.

B. Dean Green and Professor Thode

Green despised the term proximate cause and for a number of reasons. One author quotes at length various descriptions by Green of the concept: "But his more important early reading was connected with his almost monomaniacal focus on the bundle of confusions that travelled under the label 'proximate cause.' Green hated the proximate cause concept in its own right. Indeed, he must have expended considerable energy thinking up new ways to insult it."[44]

Included in those "insults":

- "[Proximate cause] is a parasite which has sucked the blood of the judicial process so completely in some areas that its present usage only betrays the paralysis of rational thought on the part of the profession."[45]
- "The proximate cause issue is the product of a century of professional bombast and buncombe utilized to create and define a counterfeit concept . . . ."[46]
- "[T]he hunt for proximate cause and intervening agencies is very much like the old sport of 'snipe hunting' with unsuspecting victims always left holding the bag."[47]
- As employed in many cases, "it is much like a backhanded blow in the face to one who has always been held in affection."[48] "The court could not resist flexing its knees to the proximate cause obsession."[49]
- The proximate cause doctrine, with all of its variations in meaning, is the most imprecise and most confusing of all tort-law doctrines. . . . But it had and still has all the qualities of a habit-forming drug, and is now reached for to relieve the pain of

[44] David Robertson, *The Legal Philosophy of Leon Green*, 56 TEX. L. REV. 393, 403 (1978).

[45] *Id.* at 403 n.52 (citing Leon Green, *Proximate Cause in Connecticut Negligence Law*, 24 CONN. B.J. 24 (1950) (footnote omitted)).

[46] *Id.* at 403–04 n.52 (citing Leon Green and Allen E. Smith, *Negligence Law, No Fault and Jury Trial—II*, 50 TEX. L. REV 1297, 1307 (1972)).

[47] *Id.* at 404 n.52 (citing Leon Green, *Illinois Negligence Law IV: Proximate Cause*, 40 ILL. L. REV. 1, 28 (1945) (footnote omitted)).

[48] *Id.* (citations omitted) (citing Green, *supra* note 47, at 24).

[49] *Id.* (citing Leon Green, *Identification of Issues in Negligence Cases*, 26 SW. L. J. 811, 823 (1972)).

> reasoning out the simplest case, though good reasons are had in abundance.[50]

Green strongly preferred allowing the jury to decide tort issues and viewed the appellate judges' assumption of the jury and trial judges' functions to be an "unacceptable manifestation of [the] distrust" in the trial court's ability to manage this role.[51] To Green, use of the proximate cause term mainly provided a mechanism for appellate judges to simply re-weigh the evidence to second guess jury decisions:

> In Texas, particularly, by putting "foreseeability" into the definition of proximate cause and giving a proximate cause issue or issues to the jury, the appeals courts give themselves a basis for taking the decision of the issue of negligence from the jury without appearing to have done so.[52]

Green used a four-part analysis for negligence actions: causal connection, duty, breach, and damages. Causal connection is stripped bare of all the policy considerations that get loaded up on proximate cause, and instead, the inquiry is simply: did the defendant's conduct contribute to the plaintiff's harm?[53] While the trial court plays a gate-keeping role on this threshold issue, most of the public policy functions that infect the terms proximate cause or substantial cause concepts are mainly confined to the duty issue, where Green acknowledges there is some limited role for the

[50] *Id.* at 404 n.53 (citing Green, *supra* note 22, at 358); s*ee also* Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 576 (1962) ("The *only cause issue* is the connection between the defendant's conduct and the victim's injury—and all the environmental details so generally treated as causes are merely the circumstantial data that throw light on that issue and the other issues in the case. If they could be dealt with rationally the analysis of a negligence case would lose its mysteries, and most of the *metaphysical* jargon of negligence law—particularly that of causation—could be cut away as is done with *other parasitical growths*.") (emphasis added).

[51] James Treece, *Leon Green and the Judicial Process: Government of the People, By the People, and for the People*, 56 TEX. L. REV. 447, 455 (1978) (citing Leon Green, *Jury Trial and Proximate Cause*, 35 TEX. L. REV. 357 (1957)).

[52] Treece, *supra* note 51, at 456 (citing East Tex. Theatres, Inc. v. Rutledge, 453 S.W.2d 466, 469 (Tex. 1970) ("no evidence that the alleged injuries were proximately caused by any act of commission or omission of the defendant"); *see also* Genell, Inc. v. Flynn, 358 S.W.2d 543, 547 (Tex. 1962) ("no evidence to support the judgment of the trial court").

[53] Treece, *supra* note 51, at 459 n.35; Green, *The Submission of Issues in Negligence Cases*, 18 MIAMI L. REV. 30 (1963); Green, *supra* note 50, at 543; Green, *supra* note 49, at 812–814 (Green preferred not to even use the term "causation.").

courts—certainly more so than on the causation issue. Causation is a simple factual inquiry:

> Green is quite careful to state that the causal issue as he urges that it be phrased and used does not raise questions of responsibility or culpability. It is a simple issue, simply phrased. It deals with facts . . . . The duty issue is the second issue for consideration of the judge. As used, "duty" is an imprecise term, describing a basic decision that the judge must make in every tort case in order to resolve the "law" question that every case presents.[54]

Green feared judges would use proximate cause to ignore juries: "Most courts that use 'proximate cause' analysis share this decision with juries. This practice is incredibly wasteful and inefficient, because it leads appellate courts to substitute their judgment for that of the jury on the proximate cause issue with great frequency."[55] He noted continuing tension between the two concepts as used in the courts: "The war between the duty-risk concepts and causation doctrines continues unabated, and probably will never be resolved . . . . The two methods of dealing with tort cases are mutually exclusive, and the attempt to make use of both in the same case frequently results in confusion and erroneous decision."[56] Green further noted: "As indicated earlier, the courts developed the causation doctrines before the duty-risk concepts were developed, and before the several issues required to be supported by the plaintiff in a negligence case had been clearly formulated, and before the respective functions of judge and jury had been delineated."[57]

In the same article, Green dissected a then-recent Texas Supreme Court opinion, *Genell, Inc. v. Flynn*.[58] Green criticized the court for using the foreseeability issue in reversing the causation finding of the jury and showed that the court was impermissibly weighing evidence when it launched into its foreseeability analysis.[59] A key portion of his discussion bears lengthy repetition in light of *Allbritton*:

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[54] Treece, *supra* note 51, at 461.

[55] *Id.* at 466 (citations omitted).

[56] Leon Green, *Duties, Risks, Causation Doctrines*, 41 TEX. L. REV. 42, 42–44 (1962).

[57] *Id.* at 62.

[58] *Id.* at 70 (discussing *Genell, Inc. v. Flynn*, 358 S.W.2d 543 (Tex. 1962) (involving a plaintiff injured trying to open a door admittedly maintained negligently)).

[59] *Id.* at 71–72.

> No point will be made here of the court's action in utilizing the negligence foreseeability formula as a test of proximate cause. That has been recognized as error, but error lived with so long that to correct it at this late date would upset the profession. Hence it will be assumed that proximate cause is a legitimate issue in the case to be tested by the foreseeability formula. *Is it an issue of law for the court, or an issue of fact for the jury?* As generally used, proximate cause is an issue of law for marking the extent of a defendant's duty. In Texas it is more frequently an issue of fact for the jury, if supported by evidence. Apparently this is the sense in which proximate cause is here used by the court. But the supreme court has no jurisdiction to decide an issue of fact. Only if there is *no evidence* to support the issue may the court's jurisdiction be invoked, and its power exercised. Hence the court in order to have an issue of law to pass upon is forced to say there is no evidence to support the issue of proximate cause. It so held, and justifies its holding by the recital of the facts of the case.
>
> But here the court is on shaky ground. First, the court concedes the defendant's negligence, which itself was based on foreseeability of some harm, not the particular harm, which the victim suffered as a result of defendant's conduct. If there is enough foreseeability to support the defendant's negligence, why not enough or at least some evidence to support the proximate cause issue which is tested by the same formula applied to the same facts?
>
> Second, the use of the "no-evidence" test to determine whether the jury finding of proximate cause should be affirmed is highly confusing. There is no dispute in the evidence that Rory's injury was factually caused or contributed to by defendant's negligently maintained door. The only challenge to the judgment below is that aspect of proximate cause involving "foreseeability" of injury to Rory. This involves the application of a standard by the jury whose judgment Texas courts have consistently held must stand unless the contrary appears so clearly "that reasonable men cannot differ." To speak of testing the jury's judgment in terms of "no evidence" seems wholly

> inconsistent with the jury's exercise of its function on the undisputed facts of the case, and also a repudiation of the court's self-restraint in allowing the jury's judgment to stand.[60]

Green concluded: "Although by virtue of this precedent the assignment of 'no evidence of proximate cause' may well become a life-saver by which a losing defendant below can obtain the supreme court's judgment on the facts of his case, causation doctrines have been used for many other purposes no more legitimate."[61]

Green wrote another law review article in response to a judicial opinion on proximate cause he found particularly troubling.[62] After the Texas Supreme Court decided *Biggers v. Continental Bus Systems*,[63] he wrote:

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[60] *Id*. at 72–73.

[61] *Id.* at 74. Dean Green elsewhere wrote about the judicial reaction to the empowering of juries and attempts to circumscribe the role of judges:

> The courts could not and did not accept this defeat and surrender of power. They performed an exceedingly clever maneuver. In order not to offend the rule against comment on the weight of evidence, they simply transmuted specific circumstances into questions of law . . . . So it is that principles, theories, doctrines, rules and formulas of law, procedural and substantive, have been spun and refined without limit; and there seems to be no way to bring to an end this upward-spiraling process of lawmaking and law-refining . . . . It can be said with assurance that the appellate courts have now secured control of all the essentials of jury trial.

Green, *supra* note 2, at 485–86.

[62] Green, *supra* note 22, at 357.

[63] 298 S.W.2d 79 (Tex. 1956). The *Biggers* case involved a multi-car accident in which the plaintiffs' decedent's car was hit from behind while slowing down for a car in front, and pushed into the path of an oncoming bus. *Id.* At 368. The passengers in the car were killed immediately and the jury found that both the bus driver and the car that rear-ended the plaintiffs' decedent's car "proximately caused" the accident. *Id.* On appeal, the appellate court held there was "no evidence" to support the jury's finding on the issues of proximate cause. *Id.* at 79. The Texas Supreme Court initially affirmed the appellate court, though eventually granted a rehearing and remanded the case back to the appellate court. *See* Biggers v. Cont'l Bus Sys., Inc., 303 S.W.2d 359 (Tex. 1957). On remand, the First Court of Appeals affirmed the trial court's judgment in favor of the plaintiff. Cont'l Bus Sys., Inc., v. Biggers, 322 S.W.2d 1 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.). The court concluded that "as to the element of causation," it could not say that "the jury's verdict is clearly wrong, manifestly unjust or shocking to the conscience." *Id.* at 9. In reaching this conclusion, the court explained, "[w]e feel the jury was warranted by the evidence in concluding that the failure to apply the brakes and excessive speed substantially contributed to the collision. This is all that is necessary to establish legal causation." *Id.* at 10.

> Without reference to the correctness of the decision, the opinion of the majority of the Supreme Court demonstrates several propositions: (1) Texas appellate courts for all practical purposes have taken over the functions of jury trials in negligence cases. (2) The useless and confusing terminology of "proximate cause" produces more and more trouble for litigants and the courts. (3) The courts have failed to develop an understandable and reliable formula for the analysis of negligence cases.[64]

Showing great prescience for an article written over fifty years ago, Green also noted:

> The taking over of the jury's function in negligence cases by appellate courts has been steadily progressing everywhere but, I believe, in no other American jurisdiction at such a pace and so completely as in Texas . . . . The fact is that jury trial in negligence cases is now more completely dominated by appellate courts than at any other time in the history of common-law jurisprudence.[65]

Green's main criticism of *Biggers* was the conversion of a question of fact into a question of law, which could be abused to give "the appellate courts . . . every opportunity to examine the evidence and to substitute their own conclusions for those of the jury."[66] The problem persists because, as Green noted, "There is nothing to prevent this invasion of the jury's province except the self-restraint of the judges themselves."[67] He further stated:

> When doctrines lack precision and rationality they blur the functions of court and jury. In the confusion that results anything can happen, and one of the things that does happen is a taking over of more and more power by the judges themselves . . . . [Proximate cause] has made possible the transfer of the complete and ultimate power of

[64] Green, *supra* note 22, at 357.

[65] *Id.*

[66] *Id.* at 358.

[67] *Id.*

> decision in these cases to the highest court, without the realization of what has been done . . . .[68]

Green then laid out, again, his four-part analysis of negligence cases, with the first being a showing of the causal relation between defendant's conduct and plaintiff's injury.[69] "Causal relation was so clear as not to be an issue at all in the *Biggers* case."[70] Given the negligence per se of the excessive speed of the bus, the court resorted to proximate cause to revisit the duty issue already decided once excessive speed and violation of statute were clear.[71] The court found that the bus's excessive speed did "nothing more than furnish the condition."[72] Green conceded this reading had been employed previously in Texas law, though he questioned the dismissiveness of the phrase.[73]

Green then concluded: "But the point here to be emphasized is that this transmutation of the negligence issue into 'proximate cause' by employing the heart of the negligence formula gives the court another opportunity to take over the jury's function if it so desires."[74]

In another article, Green addressed the "substantial factor" phrase, which included key parts of what he called orthodox negligence analysis, i.e., whether the defendant's conduct contributed to the victim's injury (the causal relation issue).[75] Green next analyzed duty:

> [The 'substantial factor formula's'] value for the judge in performing his function, or its value for a jury passing on the issue, is slight, to say the most . . . . The fact that "substantial" cannot be defined, further analyzed or broken down into lesser terms, frets . . . all those who do not keep

[68] *Id.* at 358–59.

[69] *Id.* at 359.

[70] *Id.*

[71] *Biggers*, 298 S.W.2d at 85.

[72] *Id.* at 82.

[73] Green, *supra* note 22, at 361. The court in *Allbritton* would repeat this canard almost word for word in excusing the defendant's conduct there. *See* Union Pump Co. v. Allbritton, 898 S.W.2d 773, 776 (Tex. 1995), *abrogated by* Ford Motor Co. v. Ledesma, 242 S.W.3d 32 (Tex. 2007) ("Legal cause is not established if the defendant's conduct or product does no more than *furnish the condition* that makes the plaintiff's injury possible.") (emphasis added).

[74] Green, *supra* note 22, at 362.

[75] Green, *supra* note 50, at 546. ("Somewhere along the line of defendant's conduct the doing of something which contributed to the victim's injury must be found.") *Id.*

> in mind the necessities of the procedural apparatus of the litigation process.[76]

He described the term substantial factor as merely a "highly seductive 'decoy.'"[77]

Green was not alone in his position. Professor Thode similarly criticized the intrusion of appellate courts on jury decisions, and the improper conversion of questions of fact into questions of law.[78] Thode agreed that the following four-part test (very similar to Green's four-part test) was a better approach than proximate cause:

> (1) Is there a factual connection between plaintiff's injury and defendant? (2) Does the legal system's protection extend to the interest that plaintiff seeks to vindicate; and if some protection is afforded what standard of care does the legal system impose on the defendant? (3) Was that standard of care breach by defendant? (4) What are the damages?[79]

The trial and appellate courts' public policy setting function takes place not in causation analysis, but in the second part, when the legal system's protection is determined: "This is a policy decision in purest form."[80] Like

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[76] *Id.* at 554.

[77] *Id.* at 557. In the same article, Green described the landmark *Palsgraf* decision as follows:

> The trouble with *Palsgraf* is that the issue to which Judge Cardozo is talking is not clearly formulated. Causal relation in the case is clear . . . . That there was a duty to Mrs. Palsgraf as a waiting passenger is clear, but whether defendant's duty included the risk that befell her is seemingly what [legal scholars A.M. Honore and H.L.A. Hart] think is involved, and that on this basis Judge Cardozo decided that the risk was determined on the basis of 'foreseeability.' Despite some of the language in [Justice Cardozo's] opinion, that interpretation is not consistent with his opinions [in other cases] . . . . In *Palsgraf* the important fact is that the *highest appellate court*, after all the evidentiary data and arguments were in, and after consideration of all the factors involved, simply decided that the injury suffered by Mrs. Palsgraf *was not a risk within the scope of any duty owed her* as a passenger.

Id. at 566 n.72.

[78] E. Wayne Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1, 1 (1977).

[79] *Id.* These mirror Green's analysis. *See* Green, *supra* note 50, at 546.

[80] Thode, *supra* note 78, at 10, 14 ("Up to this point it is clear that the court, not the jury, makes the decision about the scope of the legal system's protection.").

Green, he criticizes the use of proximate cause in the factual causation analysis, stating that the definition of proximate cause is "intertwined with issues that are irrelevant to whether the factual [causation] connection exists."[81] "For example, whether the result was foreseeable has absolutely nothing to do with whether the factual connection exists."[82]

One of Thode's best contributions was his identification of the inconsistency that occurred after the jury's application of proximate cause, when the case proceeded to the appellate court(s):

> Whatever the definition [of proximate cause], the jury is not let in on the secret in any understandable way that it is deciding the scope of the legal system's protection when it decides that the defendant's conduct was or was not a "proximate cause," a "substantial factor" or a "legal cause" of plaintiff's injury. But the story is not yet complete. When the case reaches the appellate court with an attack on the jury's decision on "proximate cause" or "substantial factor" or "legal cause," the appellate court must determine the correctness of the jury's finding. In doing so, the appellate court usually makes the decision on a policy basis—asserting and applying one or more policies that the jurors had not been instructed were the keys to the issue. In fact, the jury was told nothing about these policies. Thus, the appellate decision about whether the jury was right or wrong in its application of the defined phrase is made by giving that phrase an entirely different content than that found in the definition the jury applied.[83]

Thode, like Green, disliked the conflation of foreseeability in the duty issue (often impliedly or expressly included in the negligence/ordinary care

[81] *Id.* at 12.

[82] *Id.* at 12–13 (citations omitted).

[83] *Id.* at 15 (citing Stoneburner v. Greyhound Corp., 375 P. 2d 812, 816 (Or. 1962) ("The foregoing instruction [on proximate cause] is talking about ultimate legal liability—not about causation. The jury, however, is not in on this secret.")). This is certainly true of Justice Cornyn's concurrence in *Allbritton*, which fails to even hint how the jury could have been better-guided to reach this result. Union Pump Co. v. Allbritton, 898 S.W.2d 773, 777–85 (Tex. 1995) (Cornyn, J. concurring), *abrogated by* Ford Motor Co. v. Ledesma, 242 S.W.3d 32 (Tex. 2007).

definition) with the use of foreseeability in the proximate cause instruction or issue.[84]

For both Green and Thode (and of course other like-minded scholars) the causation issue should be stripped of concepts like "proximate" or "legal" cause when submitted to the jury—these public policy concepts are better dealt with in the legal duty element.[85] Of course, one aspect of the Green approach is that the appellate court's policy-making function is more confined by being limited to the second (duty, or sometimes called duty-risk) element, instead of the appellate courts flitting about between the separate elements of duty and causation, seemingly doing whatever is necessary to overturn the jury's verdict.

Thode recognized with some satisfaction that late in his career even Dean Prosser came around to much of Green's view. Prosser, in "*Palsgraf Revisited*," supplies additional reasons for favoring the duty-risk analysis (over the proximate cause formulations):

> Direct causation, the scope of the risk, the unforeseeable plaintiff, the last human wrongdoer, the distinction between cause and condition, limitations of time and space, substantial factors, natural and probable consequences, mechanical systems of multiple rules, and all the rest of the rigmarole of "proximate cause," all have been tried and found wanting in situations that inevitably arise to which they do not and cannot provide a satisfactory solution. There is no substitute for dealing with the particular facts, and considering all the factors that bear on them, interlocked as they must be. In this respect Leon Green has been for a quarter of a century a voice crying in the

[84] *See* Trammell Crow v. Gutierrez, 267 S.W.3d 9, 11 (Tex. 2008) (holding that the property manager had no duty to protect the decedent from unforeseeable crimes); Thode, *supra* note 78, at 20 ("Many, if not most, proximate cause jurisdictions use foreseeability as the prime jury test to determine the legal cause [public policy/scope of protection] aspect of proximate cause."). Thode in this section went on to cite the Texas case of *San Antonio & A.P. Ry. v. Behne*, 231 S.W. 354 (Tex. Comm. App. 1921), where the legal duty issue was decided by use of an appropriate negligence per se standard, nevertheless the court held as a matter of law that the risk resulting in harm to the plaintiff was not a foreseeable risk. In other words, there was a legal duty, but really, there was not! This would not be the last time a Texas high court forced to affirm a legal duty issue and finding of breach nevertheless used the "foreseeability" concept to negate that very legal duty.

[85] Thode, *supra* note 78, at 24 (citing Green, *supra* note 50, at 548).

> wilderness; as one of the original scoffers at his doctrine, I make him belated obeisance.[86]

C. Professor Dorsaneo

Professor Dorsaneo remarked on a court that departed from longstanding rules applied to evidentiary review and duty and causation.[87] He also viewed *Allbritton* as a low-water mark in terms of the court's inability to refrain from improperly weighing evidence. Dorsaneo strongly disagreed with Powers that the post-*Allbritton* court had simply been properly deciding cases in the duty area.[88]

D. Causation: A Troublesome yet Enduring Concept

Extensive causation literature from these renowned scholars cautioned of the dangers that the terms proximate cause and substantial factor carry for jury verdicts and courts of appeals, and at a minimum, serve as a blinking yellow warning light that whenever the state's highest court starts mucking around in the causation arena, there is at least a danger it is really simply substituting its own view of the evidence for the jury's.

Concepts like proximate cause, substantial factor, and producing cause, with all of their problems, have been around Texas jurisprudence for almost a century. There was rampant confusion along with inconsistent approaches in Texas appellate courts well prior to *Allbritton*, especially with the use of terms proximate cause, legal cause, cause in fact, substantial factor and foreseeability, as well as more than a little disorientation in how those issues were allocated between jury and judge.[89] This confusion made it surprisingly easy for the Texas Supreme Court in the seventeen years prior to *Allbritton* to reverse findings of lower court opinions that went against a plaintiff.[90] These cases in turn opened the door for *Allbritton* (and later

[86] *Id.* at 33 (citing William Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953)). Thode noted Dean Prosser was "not completely converted." *Id.* at 33 n.127.

[87] Since much of Professor Dorsaneo's remarkable article, *Judges, Juries, and the Reviewing Courts*, focused on the shifting standard of evidentiary review in the Texas Supreme Court and on *Allbritton*, the article is discussed in more detail in Part V.D below. *See* William Dorsaneo, *Judges, Juries, and the Reviewing Courts*, 53 SMU L. REV. 1497, 1498–1501 (2000).

[88] *Id.*

[89] *See* discussion *infra* Part IV.

[90] *See* discussion *infra* Part IV.

cases) to step into this breach of confusion and increase the frequency that jury verdicts were overturned using a causation analysis.[91]

IV. SEVENTEEN YEARS OF "CAUSATION" DECISIONS PRIOR TO *ALLBRITTON*

A. Introduction

Of the ten major causation decisions issued by the court in the seventeen years preceding *Allbritton*, plaintiffs won seven and lost three.[92] Additional causation cases decided in that time period are also discussed below, with the court ultimately splitting down the middle, finding in favor of the plaintiff in five of those ten additional cases.[93] Confirming Green's worst fears, the language in these pre-*Allbritton* cases arguably provided an opportunity for later courts to second-guess juries through the device of causation analysis.

*B. The Major Pre-*Allbritton *Cases*

1. *McClure v. Allied Stores of Texas, Inc.*, 608 S.W.2d 901 (Tex. 1980).

In *McClure*, the court of civil appeals reversed a jury verdict in favor of the plaintiff.[94] In an opinion by Justice Denton, the Texas Supreme Court reversed and remanded.[95] After a failed attempt at a peaceful arrest, two shoplifters were aggressively pursued by two security guards in a crowded mall area.[96] In the midst of the pursuit, Petitioner was knocked down by one of the shoplifters and sustained injuries to her head and neck, and dislocated her right shoulder.[97] Petitioner brought suit against the shoplifters, security guards, and the store for her injuries.[98]

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[91] *See* discussion *infra* Parts V–VII.

[92] *See* discussion *infra* Part IV.

[93] *See* discussion *infra* Part IV.

[94] *McClure v. Allied Stores of Tex., Inc.*, 608 S.W.2d 901, 903 (Tex. 1980).

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

The court closely examined the issue of proximate cause, noting that both elements of foreseeability and cause in fact must be present.[99] The court briefly struggled with the element of cause in fact, but ultimately concluded that "[t]he plaintiff is not required to distinguish all possible inferences, but must only show that the greater probability was that the negligent pursuit probably caused the injury."[100] After considering the evidence, the court found that the security guards failed to abide by the proper policies and procedures for apprehending shoplifters as required by the store and that their actions were a proximate cause of the petitioner's injuries.[101] Holding that the jury's finding of proximate cause was supported by some evidence, the court reversed and remanded in favor of petitioner.[102]

2. *Nixon v. Mr. Property Management Co., Inc.*, 690 S.W.2d 546 (Tex. 1985).

In *Nixon*, the court reversed summary judgment in favor of the owner and manager of property where a young girl was dragged into a vacant apartment and raped.[103] The court held there was some evidence that the property owner's failure to secure the apartment could have proximately caused the rape.[104] The dissent argued that the apartment was merely the location where an inevitable crime occurred.[105]

The *Nixon* majority had little trouble finding a duty, since a Dallas city ordinance set minimum standards or responsibilities for owners of apartments, in terms of securing doors and windows, and the property manager admitted one purpose of the statute was to prevent the very crime committed.[106] The majority then turned to proximate cause, and held there was some evidence of cause-in-fact and foreseeability, placing emphasis on the existence of prior incident reports at the apartment complex:

> Finally, we turn to the question of foreseeability. Foreseeability means that the actor, as a person of ordinary intelligence, should have anticipated the dangers that his

[99] *Id.*

[100] *Id.* at 904.

[101] *Id.*

[102] *Id.*

[103] *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 547 (Tex. 1985).

[104] *See id.* at 549.

[105] *See id.* at 555 (McGee, J., dissenting).

[106] *See id.* at 549 (majority opinion).

> negligent act created for others. Usually, the criminal conduct of a third party is a superseding cause relieving the negligent actor from liability. However, the tort-feasor's negligence will not be excused where the criminal conduct is a foreseeable result of such negligence. . . . The evidence is replete with instances of prior violent crimes occurring at [the apartments]. This record certainly provides evidence that further acts of violence were reasonably foreseeable. Evidence of specific previous crimes on or near the premises raises a fact issue on the foreseeability of criminal activity.[107]

The dissent began by focusing on the cause-in-fact element of proximate cause, stating, "In *Kerby v. Abilene Christian College* this court adopted a 'but for' test to determine cause in fact. Under *Kerby*, the alleged negligence is not a cause in fact unless 'but for the conduct the accident would not have happened.'"[108] The dissent concluded its but-for analysis: "A missing or unlocked door at the Chalmette Apartments was not a cause in fact of R.M.V.'s rape. Under the facts presented here, the criminal's fortuitous choice of venue is not sufficient to satisfy the but-for test announced in *Kerby*."[109]

The dissent might have had more success persuading others on the court had it focused more on the evidentiary tool of the substantial factor test, which the majority referenced in passing ("Cause in fact denotes that the negligent act or omission was a substantial factor in bringing about the injury and without which no harm would have been incurred.").[110] This would be the successful approach later in cases like *Allbritton* and *Ledesma*.[111]

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[107] *Id.* at 549–50 (citations omitted).

[108] *Id.* at 555 (McGee, J., dissenting) (citations omitted).

[109] *Id.* at 556.

[110] *Id.* at 549. In the context of the majority's opinion, it appears to be using substantial factor as a synonym for the but-for test, and not as an additional element or requirement. In *Missouri Pacific Railroad*, the court uses substantial factor to mean, "a concurring cause and such as might reasonably have been contemplated as contributing to the result . . . ." Miss. Pac. R.R. v. Am. Statesman, 552 S.W.2d 99, 104 (Tex. 1977). Applying this definition, the Court reversed a jury finding of no proximate case as a matter of law; the plaintiff's contributory negligence barred recovery as a matter of law. *Id.* at 106. The dissent strongly implied the majority was weighing the sufficiency of the evidence. *Id.* at 106 (Reavely, J. dissenting).

[111] *See* discussion *infra* Parts V and VI.A.1.c.

3. *City of Gladewater v. Pike*, 727 S.W.2d 514 (Tex. 1987).

In *City of Gladewater v. Pike*, the family of a deceased boy brought a claim for negligence and mental anguish damages against the City of Gladewater for failing to maintain records of the identity and locations of individuals buried in a city cemetery.[112] The family claimed that the City's negligence in maintaining proper records caused the misplacement of their deceased two-year old brother and son.[113] The jury found in favor of the family and awarded the family actual and exemplary damages.[114] The court of appeals affirmed.[115] The Texas Supreme Court granted review to determine (1) whether the evidence supported a finding of negligence; and (2) whether exemplary damages were appropriate.[116] The City appealed the jury's finding of proximate cause.[117]

The court thoroughly analyzed the two elements of proximate cause (cause-in-fact and foreseeability).[118] In applying the element of foreseeability, the court determined that the injury was foreseeable.[119] The purpose of maintaining burial records is to know where bodies are interred in order to avoid the very problem encountered in this case.[120] Because the City failed to keep those records, the family was unable to locate the young boy's body.[121] Proceeding to its cause-in-fact analysis, the court cited *McClure*, stating, "The [plaintiffs] are not required to distinguish all possible inferences, but must only show that the greater probability was that the lack of record keeping probably caused the injury."[122] The court interestingly described proximate cause as: "[A] result of endeavors by the courts to evade, when possible, the 'metaphysical and philosophical niceties' in the time-worn discussion of causation."[123] Ultimately, the court

[112] 727 S.W.2d 514, 516–517 (Tex. 1987).

[113] *Id.*

[114] *Id.* at 516.

[115] *Id.*

[116] *Id.* at 517.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.* at 517–18.

[121] *Id.* at 518.

[122] *Id.*

[123] *Id.* (citing Springall v. Fredericksburg Hosp. & Clinic, 225 S.W.2d 232, 235 (Tex. Civ. App.—San Antonio 1949, no writ).

concluded that the City's failure proximately caused the plaintiff's injury and affirmed the lower court's award of actual damages.[124]

4. *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987).

El Chico Corp. v. Poole adopted a negligence standard for dram shops in the state.[125] In addressing the dram shop's duty, the court stated, "More recently, we said duty is the function of several interrelated factors, the foremost and dominant consideration being the foreseeability of the risk."[126]

Turning to causation, the court again relied on the same foreseeability it utilized in the duty analysis, as well as cause in fact: "Cause in fact is 'but-for cause' meaning the negligent act or omission was a substantial factor in bringing about the injury and without which no harm would have been incurred."[127]

The dram shop argued that the cause in fact test was not met because any duty does not accrue until the patron is intoxicated, and the intoxication is the actual cause of the accident, not the additional [duty-violating] drinks.[128] The court stated:

> [Defendants] misread the [plaintiffs'] cause in fact burden. The plaintiff must prove it is more probable than not that but for the licensee's conduct, the accident would not have occurred. In *Farley*, we noted the plaintiff need not exclude all possibility that the accident occurred other than how he alleges, but instead must only prove the greater probability is that the defendant's conduct was a cause of the accident.[129]

Since the manager testified to awareness that some patrons drive to the restaurant, become intoxicated and then leave by the same means, evidence

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[124] *Id.*

[125] *See*, 732 S.W.2d 306, 315 (Tex. 1987).

[126] *Id.* at 311 (citations omitted).

[127] *Id.* at 313 (citation omitted). It is entirely possible that the term "substantial factor" is again being used as synonymous with the "but-for" test. However, the conjunctive language tied to the "without which" language gives pause, unless the court was being redundant.

[128] This metaphysical dilemma would more recently bedevil a differently-composed Texas Supreme Court in *F.F.P. Operating Partners v. Duenez*, 47 Tex. Sup. Ct. J. 1068 (Tex. 2004) (opinion withdrawn and substituted on other grounds by F.F.P. Operating Partners v. Duenez, 237 S.W.3d 680 (Tex. 2007)), in perhaps one of the saddest chapters for the court since the Republic.

[129] *El Chico Corp.*, 732 S.W.2d at 313.

of foreseeability was present and the court held that the issue of proximate cause was for the jury.[130]

The majority opinion noted that the very same week this opinion was issued, the legislature adopted the Dram Shop Act, superseding any common law action with "a much more onerous burden" than adopted in the case.[131] "This act, however, does not by its terms govern a cause of action arising or accruing before its effective date."[132] In language supporting Power's thesis about the Kilgarlin court and duty, the *El Chico* court determined: "The creation of new concepts of duty in tort is historically the province of the judiciary."[133] Arguably, the treatment of causation in *El Chico* would have more lasting consequences.

5. *Lofton v. Texas Brine Corp.*, 777 S.W.2d 384 (Tex. 1989).

In a very controversial decision having strong implications for how the court handles the constitutional prohibition against weighing evidence, the Texas Supreme Court reversed (for the second time) a court of appeals that had concluded that the trial evidence was insufficient to support proximate cause.[134] In this opinion, the majority held that the court of appeals improperly credited the testimony of an interested witness.[135] The dissents argued that the court was improperly attempting to influence the factual

[130] *Id.* at 314. As Dean Green predicted before *Poole*, the use of "foreseeability" in both proximate cause (for the jury, according to the court) and duty (where appellate courts frequently become engaged) later allows for judicial mischief in the very causation issue the *Poole* court stakes out for the jury.

[131] *Id.* In a later case, the court explained this new burden imposed by the Dram Shop Act by saying:

> Neither the purpose nor the language of the Act makes a dram shop automatically responsible for all of the damages caused by an intoxicated patron, regardless of a jury's determination of the dram shop's proportion of responsibility. Instead, pursuant to Chapter 33, a dram shop is responsible for its proportionate share of the damages as determined by the jury.

FFP Operating Partners, L.P. v. Duenez, 237 S.W.3d 680, 682 (Tex. 2007).

[132] *El Chico Corp.*, 732 S.W.2d at 314.

[133] *Id.*; *see* William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699, 1713.

[134] *See* Lofton v. Tex. Brine Corp., 777 S.W.2d 384, 386 (Tex. 1989).

[135] *See id.*

sufficiency determination of the court of appeals (twice), despite the court's lack of authority to do so.[136]

In the first appeal, without argument, the court reversed the court of appeals' finding of insufficient evidence of proximate cause and held that the court of appeals' opinion failed to detail all of the relevant evidence and to state in what regard the evidence greatly outweighed the jury's verdict.[137] On remand, the court of appeals again held that the irrefutable fact that the plaintiff's vehicle jumped in front of the defendant's eighteen-wheeler less than two seconds before the accident in heavy fog negated causation.[138] The court held that the opinions changed little, if any, on remand: "In essence, nothing has changed."[139] The irrefutable evidence came from an interested witness, the truck driver.[140] The plaintiff's expert testified that portions of the driver's testimony were impossible to reconcile with the physical evidence.[141] The opinion went on to discuss the specific testimony in detail, and then concluded: "We lack jurisdiction to determine the factual sufficiency of this evidence. We hold only that the court of appeals may not, as it has thus far done, substitute its own judgment for that of the fact finder. Accordingly, we reverse."[142]

Predictably there were two dissents, one by Justice Gonzales and one by Justice Hecht. Justice Gonzales joined in Justice Hecht's dissent, and separately wrote:

> I agree with Justice Hecht's opinion but write separately to note that my fear that *Pool v. Ford Motor Co.* would be used by this court to second guess the courts of appeals has been realized. . . . We are now swamped with requests to second guess the courts of appeals, that is, to make rulings on sufficiency grounds. . . . Either way, this court is becoming entangled in the review of cases on sufficiency grounds; this is clearly unconstitutional.[143]

[136] *See id.* at 387–88 (Gonzalez, J., dissenting & Hecht, J. dissenting).

[137] *Id.* at 385.

[138] *Id.* at 386.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.* at 387 (internal citations omitted).

[143] *Id.* at 387–88 (Gonzales, J., dissenting) (citations omitted). In *Pool*, the trial court rendered judgment for the plaintiffs, and the court of appeals reversed. Pool v. Ford Motor Co., 715 S.W.2d

Justice Hecht's dissent was not nearly so kind:

> The Court cannot hold that the evidence in this case is factually sufficient to support the judgment. . . . Stymied by the constitution, the Court cannot decree the result it rather plainly wants to see in this case. To accomplish the desired end, the Court must keep reversing the judgment of the court of appeals until it reaches a result that the Court approves. Always the ground for reversal is that the appeals court either cannot or will not follow the law. For this Court to hold that an appeals court has not conducted its factual insufficiency analysis in a lawful manner, simply to coerce that court into changing its conclusion, is to usurp the constitutional prerogative of the court of appeals.[144]

Justice Hecht had even harsher words for the majority:

> The Court may not agree with the constitutional delegation of the exclusive power to review the factual sufficiency of evidence to the court of appeals; indeed, I suspect rather strongly that it does not. . . . The Court rightly holds that the court of appeals may not substitute its judgment for the finder of fact. Likewise, the Court is constitutionally forbidden to substitute its judgment for the court of appeals.[145]

The dissents appear correct: The majority was inappropriately engaging in weighing evidence to second guess the court of appeals' sufficiency findings. This opinion, more than any other, appears to give license (though

629, 631 (Tex. 1986). The plaintiffs alleged that the court of appeals improperly exercised its fact jurisdiction to undermine the jury verdict and the plaintiffs' right of trial by jury. *Id.* at 633. Upon review—and after a detailed discussion of the courts of appeals' fact jurisdiction—the court stated that "[t]he right of courts of appeals to review for factual sufficiency must continue undisturbed." *Id.* at 634-35. However, to allow the court to determine whether the courts of appeals properly exercised its fact jurisdiction, when reversing on insufficiency grounds, the court instructed courts of appeals to "detail the evidence related to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust." *Id.* at 635. Justice Gonzales noted that in trying to prevent the court of appeals from second guessing the jury, the court's opinion could instead allow the court to improperly interfere with the fact jurisdiction of the courts of appeals. *Id.* at 637 (Gonzalez, J., concurring).

[144] *Lofton*, 777 S.W.2d at 388 (Hecht, J., dissenting) (citations omitted).

[145] *Id.* at 388–89.

often without being cited) to later, defense-oriented court majorities to use various similar devices (like proximate cause and substantial factor) to second-guess courts of appeals finding the evidence sufficient to support verdicts for the plaintiffs.[146]

6. *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470 (Tex. 1991).

In perhaps the other most important of the pre-*Allbritton* cases, Justice Gammage for the majority held against the plaintiff, reversing a court of appeals' opinion finding some evidence of legal cause, and held that the trial court properly concluded that there was a lack of legal cause between the sign defect and the injury to the Plaintiff.[147]

The plaintiff was driving a truck pulling a flashing arrow sign behind sweeping operations.[148] The plaintiff stopped and a van driven by a sleeping driver struck the sign, which in turn struck the plaintiff, who subsequently died of his injuries.[149] The trial court granted the sign manufacturer's summary judgment that its conduct did not cause the accident.[150] There was some evidence that the sign was defective, and another driver testified that the day prior he had to stop and fix the sign when he was pulling it.[151] The plaintiff's contention was that the sign malfunctioned the day of the accident, and so the driver had to get out to fix it.[152] The court of appeals found there was some evidence of causation.[153] Assuming that the sign was defective, the court found no legal causation.[154]

Justice Gammage quoted the Restatement (Second) of Torts:

> In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent. . . . [T]his is necessary, but it is

[146] *See, e.g.*, Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 30–31 (Tex. 1994), *superseded by statute as recognized in* U-Haul Int'l, Inc. v. Waldrip, No. 10-0781, 2012 WL 3800220 (Tex. 2012) (Justice Cornyn's requirement that trial courts and courts of appeals detail the evidence supporting punitive damage findings).

[147] Lear Siegler, Inc. v. Perez, 819 S.W.2d 470, 471 (Tex. 1991).

[148] *Id.*

[149] *Id.*

[150] *Id.* at 470–71.

[151] *Id.* at 471.

[152] *Id.*

[153] *Id.*

[154] *Id.* at 472.

> not of itself sufficient. The negligence must also be a substantial factor in bringing about the plaintiff's harm. The 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. . . .[155]

Finding the sleeping driver dispositive of the causation issue, the opinion continued:

> We recognize there may be cases in which a product defect or a defendant's negligence exposes another to an increased risk of harm by placing him in a particular place at a given time. Nonetheless, there are certain situations in which the happenstance of place and time is too attenuated from the defendant's conduct for liability to be imposed. . . . We conclude that these particular circumstances are too remotely connected with the [defendant's] conduct to constitute legal cause.[156]

Unfortunately, whether any argument was made as to foreseeability and the likelihood that defects in a manufacturer's sign (used to warn drivers of hazards) could put a driver at harm is unknown. Perhaps no foreseeability argument was made, since the issue was producing cause in this products case. As will be seen, after Justice Cornyn's concurrence in *Allbritton*, a foreseeability argument would have a place in the producing cause calculus.[157]

7. *Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456 (Tex. 1992).

The Texas Supreme Court reversed the appellate court's no evidence holding regarding causation in a case in which the store clerk was raped and murdered.[158] The identity of the assailant was unknown, and it was not clear whether the clerk left the store of her own volition or was dragged from the store following a robbery.[159] The court of appeals held that there was no

[155] *Id.* at 472 (citing to RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965)).

[156] *Id.*

[157] *See* discussion *infra* Part IV.

[158] Havner v. E-Z Mart Stores, Inc., 825 S.W.2d 456, 457 (Tex. 1992).

[159] *Id.* The majority clearly viewed this factual dispute to be an ideal matter to be resolved by the jury.

evidence tending to prove that, had the store installed silent alarms and initiated other security measures, the crime would have been avoided.[160] The court reversed, noting that even though the exact circumstances leading to the crime were unknown, there was some evidence supporting the plaintiff's theory, and the plaintiff was not required to negate all other possible causes.[161] As noted by the dissent, this approach effectively shifted the burden of proof to the defense.[162]

8. *Travis v. City of Mesquite*, 830 S.W.2d 94 (Tex. 1992).

The Texas Supreme Court reversed a court of appeals' decision affirming summary judgment in favor of police officers and the City of Mesquite.[163] The case involved a high-speed pursuit proceeding the wrong direction on a one-way street.[164] The suspect collided head-on with another car, and the individuals who were injured sued.[165] The court of appeals (and the dissent in the Texas Supreme Court) argued that the officers' conduct could not have proximately caused the accident as a matter of law.[166] The majority disagreed, noting that the officers pursued the suspect even though they recognized the dangers associated with such a high speed pursuit.[167]

9. *Dresser Industries, Inc., v. Lee*, 880 S.W.2d 750 (Tex. 1993).

Justice Hecht wrote for the majority, and in many ways seemed to be picking up where he left off in his dissent in *Lofton*.[168] The majority held

[160] *Id.* at 458.

[161] *Id.* at 460.

[162] *Id.* at 462 (Cornyn, J., dissenting).

[163] Travis v. City of Mesquite, 830 S.W.2d 94, 100 (Tex. 1992).

[164] *Id.* at 96.

[165] *Id.*

[166] *Id.* at 97 (majority opinion), 105 (Cook, J., dissenting).

[167] *Id.* at 98–99. There were also issues of immunity in the case. *Id.* at 99. Just a year after his opinion in *Lear Seigler*, Justice Gammage wrote for a majority applying a "foreseeability" test and finding sufficient evidence to raise a fact issue on proximate cause. Lear Siegler, Inc. v. Perez, 819 S.W.2d 470, 471 (Tex. 1991). Perhaps he was more comfortable applying foreseeability concepts in straight negligence cases like *Travis*, than he was in products cases like *Lear Seigler*. Later, in *Allbritton*, Justice Cornyn would not be so reticent in applying foreseeability concepts to producing cause concepts in the producing liability context. Union Pump Co. v. Allbritton, 898 S.W.2d 773, 774 (Tex. 1995), *abrogated by* Ford Motor Co. v. Ledesma, 242 S.W.3d 32 (Tex. 2007).

[168] Dresser Indus., Inc., v. Lee, 880 S.W.2d 750, 750 (Tex. 1993).

that, despite a prohibition on the plaintiff employee seeking recovery from the employer due to the Workman's Compensation Act, the third-party defendant was entitled to a jury instruction on sole cause based on the employer's conduct.[169] The third-party defendant was also entitled to submit the worker's contributory negligence based on the majority's view of the evidence on this point.[170] A strong dissent from Justice Doggett began:

> In this case a manufacturer provided no warnings of any kind whatsoever concerning its product, which is lethal if inhaled over an extended period of time. In its defense, the manufacturer says its product was so dangerous that the decedent's employer should have provided the warning. Additionally, the manufacturer alleges that the deceased worker, who it contends was too ignorant to have understood a warning anyway, should have discovered the defect himself. Today's opinion rewrites the product safety law of Texas to deny protection to those who have "only an eighth grade education," by assuming that such people would "not pay attention to warning labels."[171]

10. *General Motors Corp. v. Saenz*, 873 S.W.2d 353 (Tex. 1993).

One month after *Dresser*, the court reversed a court of appeals' decision affirming a trial court's judgment on a verdict in favor of the plaintiff.[172] Although General Motor's warning labels were inadequate, the court found that causation was negated by the plaintiff's failure to read these inadequate warnings.[173] Much of the disagreement between the majority and dissent revolves around a presumption historically indulged in warning cases: that an adequate warning would have been read.[174] Marking the virtually complete upheaval in the composition in the court, the dissent takes on an almost shrill tone reminiscent of Justice Hecht's tone in *Lofton*; the dissent

[169] *Id.* at 752.

[170] *Id.* at 755.

[171] *Id.* at 755 (Doggett, J., dissenting).

[172] *See* Gen. Motors Corp. v. Saenz, 873 S.W.2d 353, 361 (Tex. 1993).

[173] *Id.* at 360.

[174] *Id.* at 363–64 (Doggett, J., dissenting).

accused the majority of taking "the next step in the dismemberment of Texas consumer product safety law."[175]

*C. Other Pre-*Allbritton *Causation Cases*

The Texas Supreme Court continued to shape its and the lower courts' treatment of causation by granting review to a significant number of other cases during this seventeen-year timeframe. Not surprisingly, the pattern of these cases somewhat resembled the court's decisions in the more well-known and highly cited cases discussed above. Throughout the 1980s and 1990s, the court frequently revisited the lower courts' causation decisions and reversed.[176] In the early to mid-1980s, plaintiffs enjoyed a plaintiff-friendly environment wherein the court seemed to require only minimal proof to satisfy a plaintiff's causation burden.[177] During this time, it appeared that any evidence presented by a plaintiff would be accepted by the court as some legally sufficient evidence.[178] After enjoying a long stretch of plaintiff-friendly decisions, the beginning of the 1990s marked a slight transition wherein the court granted review to three malpractice claims involving causation, finding in favor of the defendants in all three.[179] Overall, the late-1980s and early-1990s experienced a less static and predicable outcome for plaintiffs on the issue of causation, with the decisions split nearly down the middle.[180] By the mid-1990s, it appeared the court might return to the plaintiff-friendly trend reminiscent of the 1980s.[181] The return was short-lived, however. *Allbritton*, decided in 1995, marked the start of the new development in defendant-friendly causation decisions.[182] Even more importantly, regardless of the shift in composition on the court (arguably resulting in plaintiff-friendly or defendant-friendly outcomes), these cases—much like the pre-*Allbritton* cases above—show the court's slow evolution toward revisiting and reversing lower courts' decisions on the issue of causation.

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[175] *Id.* at 362.

[176] *See* discussion *infra* Part IV.C.1.

[177] *See* discussion *infra* Part IV.C.1.

[178] *See* discussion *infra* Part IV.C.1.

[179] *See* discussion *infra* Part IV.C.3.

[180] *See* discussion *infra* Part IV.C.3.

[181] *See* discussion *infra* Part IV.C.4.

[182] Union Pump Co. v. Allbritton, 898 S.W.2d 773, 774 (Tex. 1995), *abrogated by* Ford Motor Co. v. Ledesma, 242 S.W.3d 32 (Tex. 2007).

1. Early to Mid-1980s: The Court Meddles More Frequently in Causation Decisions

Perhaps in 1980 Justice Spears understood the direction the court would take in the years following its decision in *Schaefer v. Texas Employers' Insurance Association*. He disagreed with the majority's causation holding, stating, "The effect of the majority's opinion is that the opinion testimony of an expert as to 'probable cause' can be ignored by an appellate court if the court reaches an opposite conclusion based upon its own evaluation of the evidence."[183] Spears lamented that the majority's ruling would in effect require the plaintiff to scientifically exclude all other reasonable explanations in order to prevail.[184] Post-*Allbritton*, this would become the accepted doctrine: A plaintiff must exclude all other reasonable explanations.[185]

In *Schaefer*, the jury found that the plaintiff suffered from an occupational disease that caused him permanent disability.[186] The court of appeals reversed the jury verdict, finding that the expert testimony failed to establish a causal connection between the complained-of injury and the plaintiff's occupation.[187] The court affirmed the court of appeals' ruling, holding that the expert presented by the plaintiff assumed that the plaintiff was infected with a particular type of bacteria, and that such bacteria was present at the plaintiff's place of employment.[188] The court found that these critical assumptions suggested a possibility of a causal connection between the injury and the plaintiff's employment, and that such evidence could not support a finding of causation.[189] The court explained:

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[183] Schaefer v. Tex. Employers' Ins. Ass'n, 612 S.W.2d 199, 205 (Tex. 1980) (Spears, J., dissenting).

[184] *Id.* at 207 ("What is most disturbing about the majority's opinion is the retreat from the rule often announced by this court, i.e., the existence of direct medical testimony of a probable causal relationship between an occupational disease and the employment obviates the necessity for this court to concern itself with the scintilla rule or drawing inferences.").

[185] *See, e.g.*, BIC Pen Corp. v. Carter, 346 S.W.3d 533, 542 (Tex. 2011) (concluding that evidence of a manufacturing defect and evidence of an accident involving the defective product is insufficient to show causation); Jelinek v. Casas, 328 S.W.3d 526, 537–38 (Tex. 2010) (concluding that the mere possibility of causation is insufficient, and instead, the causal link must be proven with reasonable certainty).

[186] *Schaefer*, 612 S.W.2d at 200.

[187] *Id.* at 201.

[188] *Id.* at 204–05.

[189] *Id.*

> The fact that proof of causation is difficult does not provide a plaintiff with an excuse to avoid introducing some evidence of causation. To ignore the substance of [the plaintiff's expert's] testimony and accept his opinion as "some" evidence simply because he used the magic words "reasonable probability" effectively removes this Court's jurisdiction over any case requiring expert opinion testimony. Under such view, so long as an expert states the words "reasonable probability," in giving his opinion, there would be some evidence. The question would then be solely one of sufficiency of the evidence over which this Court has no jurisdiction.[190]

Justice Spears unknowingly predicted the near-approaching trend of using causation to improperly evaluate evidence. The court decided several other causation cases near the time of *Nixon* and *El Chico Corp.* (in the mid-1980s and discussed above), and like those cases, all ultimately favored the plaintiff.[191] For example, in *Morgan v. Compugraphic Corp.*, the trial court granted the plaintiff a default judgment against the non-answering defendant.[192] The court of appeals reversed the default judgment, holding that the plaintiff had presented no competent evidence of proximate cause.[193] The court reversed the judgment of the court of appeals and held that at a default judgment hearing, the plaintiff is not required to prove proximate cause, but instead must present *some* competent evidence of a causal nexus between the event complained of and the party's alleged injuries: "Even if the defendant's liability has been established, proof of this causal nexus is necessary to ascertain the amount of damages to which the plaintiff is entitled."[194]

The court's requirement of some evidence of a causal nexus appears much easier to satisfy than the court of appeal's original requirement of proving proximate cause. In evaluating the evidence plaintiff presented to show causation, i.e., her own lay testimony, the court stated: "Lay testimony is adequate to prove causation in those cases in which general experience and common sense will enable a layman to determine, with

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[190] *Id.* at 205 (internal citations omitted).

[191] *See* discussion *supra* Part IV.

[192] Morgan v. Compugraphic Corp., 675 S.W.2d 729, 730 (Tex. 1984).

[193] *Id.*

[194] *Id.* at 732 (internal citations omitted).

reasonable probability, the causal relationship between the event and the condition."[195] The court concluded that plaintiff had produced evidence that allowed the trier of fact to properly infer that the defendant's act caused the plaintiff's injury.[196]

2. Mid 1980s: Causation in Products Liability Cases—The Interference Continues

A few years later—during the mid-1980s—the court also heard and decided several products liability cases involving causation issues. In the first of three back-to-back cases decided by the court (in 1984, 1985, and 1986), the court developed a comparative causation analysis for products liability cases.

In *Duncan v. Cessna Aircraft Co.*, the plaintiff brought a wrongful death action against an aircraft manufacturer following an airplane crash, and the jury rendered a verdict in favor of the plaintiff.[197] The trial court rendered a judgment notwithstanding the verdict in favor of the defendant, while the court of appeals reversed and remanded for a partial new trial.[198] The Texas Supreme Court adopted a pure comparative causation scheme, in which a plaintiff's contributory negligence was compared to the defendant's product or conduct.[199] Explaining its holding, the Court stated:

> Comparative causation is especially appropriate in crashworthiness cases where the product defect causes or enhances injuries but does not cause the accident. The conduct which actually causes the accident, on the other hand, would not cause the same degree of harm if there were no product defect. Rather, it is a combination of factors that causes plaintiff's injuries. The jury is asked to apportion responsibility between all whose action or products combined to cause the entirety of the plaintiff's injuries.[200]

[195] *Id.* at 733.

[196] *Id.*

[197] Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 417 (Tex. 1984).

[198] *Id.*

[199] *Id.* at 423.

[200] *Id.* at 428.

However, in this case, the court reversed and rendered in favor of the plaintiff, holding that the defendant failed to preserve its contribution claim.[201] Chief Justice Pope dissented from what he called a "far-ranging opinion"—while he agreed with the majority's adoption of comparative fault, he disagreed with the result, arguing that a remand was proper to allow the defendant to assert its contribution claim.[202]

In the second products liability case during this time period, *First International Bank v. Roper Corporation*, the court reversed and remanded a take-nothing judgment against the plaintiff.[203] Because this case was initially tried in February 1983, a year before the court's decision in *Duncan*, the court did not apply the comparative causation analysis discussed therein.[204] Instead, the jury was instructed that "if an act or omission of any person not a party to the suit was the sole cause of the occurrence, then no act, omission, or product of any party to the suit could have been a cause of the occurrence."[205] The plaintiff argued that the "sole cause issue poisoned the jury verdict, because it was a comment on the weight of the evidence and because it improperly inserted negligence into a products liability case."[206] The court, relying on *Acord v. General Motors Corp.*, agreed and reversed and remanded for a new trial:

> The record on its face shows this error to have been harmful. The evidence at trial clearly established that Mariann suffered injuries from the accident. Yet, in response to the damages issues, the jury found that Mariann suffered no compensable injuries. In addition, we reiterate the message of *Acord*. In a closely contested products liability case, it is error to burden the jury with excess instructions which emphasize extraneous factors to be considered in reaching a verdict . . . . The sole cause instruction, however, singled out the acts of the parents and highlighted the question of the parents' negligence. The

[201] *Id.* at 434. *Duncan's* common-law contribution scheme was short-lived, however, because the legislature overhauled the contribution statutes in 1987 with a new scheme that applied to the cases previously governed by *Duncan*. *See* Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1, 5 (Tex. 1991).

[202] *Duncan*, 665 S.W.2d at 437–39 (Pope, J., dissenting).

[203] First Int'l Bank in San Antonio v. Roper Corp., 686 S.W.2d 602, 602 (Tex. 1985).

[204] *Id.* at 603.

[205] *Id.*

[206] *Id.*

> result, as forecast by the court in *Guadiano*, was that the jury's attention was diverted from the pivotal issues of the case. The trial court thus committed harmful error by submitting the instruction because it was a comment on the weight of the evidence and the case as a whole.[207]

Because of the contamination of the sole cause instruction, the court reversed the judgments of the lower courts and remanded the case for a new trial.[208]

In *Magro v. Ragsdale Bros., Inc.*, the court decided the last of the back-to-back products liability cases, and reinstated the jury verdict in favor of the plaintiff.[209] There, the jury rendered a verdict in favor of the plaintiff, and the court of appeals—finding insufficient evidence of producing cause—reversed and remanded for a new trial.[210] The court reversed the court of appeals' ruling and reinstated the jury verdict.[211] The court found no evidence of a "laxity in judgment" by the plaintiff that would rebut the plaintiff's evidence that the defendant failed to warn of a dangerous condition.[212] The court further found that considerable testimonial evidence supported the jury's finding of producing cause, and thus producing cause was established as a matter of law.[213]

3. Early 1990s: Malpractice Cases—A Brief Encounter With Defendant-Friendly Causation Decisions

Beginning in 1989, the Texas Supreme Court continued to mold the treatment of causation as it began a slow shift away from the plaintiff-friendly causation decisions of the 1980s. Though the outcome was different (i.e., the defendants prevailed), the court's practice of revisiting the lower courts' decisions on causation continued, perhaps foreshadowing the *Allbritton* and post-*Allbritton* decisions to come. In three malpractice

[207] *Id.* at 605 (relying on Acord v. Gen. Motors Corp., 669 S.W.2d 111, 116 (Tex. 1984)). Note that the court did not apply the comparative causation analysis announced in *Duncan* because this case was initially tried in February 1983, a year before the court's decision in *Duncan*.

[208] *Id.*

[209] Magro v. Ragsdale Bros., Inc., 721 S.W.2d 832, 833 (Tex. 1986).

[210] *Id.*

[211] *Id.*

[212] *Id.* at 834.

[213] *Id.* at 834–35.

cases (two medical and one legal), the court decided in favor of the defendants—albeit for very different reasons. In *McKinley v. Stripling* (one of the medical malpractice cases), the plaintiffs failed to request that a proximate cause issue be submitted to the jury.[214] The jury awarded the plaintiffs damages, but the court of appeals reversed because of the plaintiffs' failure to request a proximate cause finding.[215] The court found that the plaintiffs, having failed to submit a proximate cause question, waived the issue, and that in the absence of proximate cause, the plaintiffs could not recover.[216] As such, the judgment of the court of appeals was affirmed.[217]

In *Millhouse v. Wiesenthal* (the legal malpractice case), the defendant too enjoyed a favorable judgment, though for reasons very different from *McKinley*.[218] In *Millhouse*, the plaintiff sued his former attorney for malpractice after the attorney filed an untimely motion for extension of time to file a brief with the court of appeals, and the court of appeals affirmed the trial court's judgment against the plaintiff.[219] The trial court granted summary judgment in favor of the former attorney, finding that the former attorney's alleged negligence was not the cause of the plaintiff's loss of the appeal.[220] The court of appeals affirmed the trial court's judgment.[221] The court began its analysis by stating that in cases of appellate legal malpractice, "the determination of causation requires determining whether the appeal in the underlying action would have been successful."[222] The Court continued that in such cases, the causation issue is a question of law.[223] The court justified its decision as follows:

> The question of whether an appeal would have been successful depends on an analysis of the law and the procedural rules. [The plaintiff's] position that the jury should make this determination as a question of fact would

[214] McKinley v. Stripling, 763 S.W.2d 407, 409 (Tex. 1989).

[215] *Id.* at 407.

[216] *Id.*

[217] *Id.*

[218] *See* Millhouse v. Wiesenthal, 775 S.W.2d 626, 626–27 (Tex. 1989).

[219] *Id.* at 626.

[220] *Id.*

[221] *Id.*

[222] *Id.* at 627.

[223] *Id.* at 627–28.

> require the jury to sit as appellate judges, review the trial record and briefs, and decide whether the trial court committed reversible error. A judge is clearly in a better position to make this determination. Resolving legal issues on appeal is an area exclusively within the province of judges; a court is qualified in a way a jury is not to determine the merits and probable outcome of an appeal. Thus, in cases of appellate legal malpractice, where the issue of causation hinges on the possible outcome of an appeal, the issue is to be resolved by the court as a question of law.[224]

Because the court held that causation was an issue of law in appellate legal malpractice cases, the trial court's judgment was affirmed.[225] In his dissent, Justice Mauzy stated his belief that this holding "gives the appearance that the bench is in the position of protecting the bar."[226] In his opinion, appellate legal malpractice claims should be treated no differently than any other professional malpractice claims, and the trial court should submit the issue of causation to the jury.[227]

The court similarly held in favor of the defendants in a medical malpractice claim a few years later. In *Kramer v. Lewisville Memorial Hospital*, the decedent's heirs brought a failure-to-diagnose medical malpractice claim against a hospital and several hospital employees.[228] The trial court refused the plaintiffs' loss-of-chance jury instructions, and the jury found for the defendant hospital.[229] The court of appeals affirmed the verdict.[230] The Texas Supreme Court explained that several jurisdictions had adopted the loss-of-chance doctrine, which uses a relaxed causation approach, allowing the case to be submitted to the finder of fact based on evidence that the defendant's negligence increased the chances of the ultimate harm.[231] The court refused to adopt this doctrine, holding that the benefits of deterrence of medical malpractice that might be gained from

[224] *Id.* at 628.

[225] *Id.*

[226] *Id.* at 629 (Mauzy, J., dissenting).

[227] *Id.*

[228] Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397, 399–400 (Tex. 1993).

[229] *Id.* at 399.

[230] *Id.*

[231] *Id.* at 401–04.

adopting the doctrine did not justify scrapping the traditional concept of causation.[232]

4. Mid-1990s: The Practice of Meddling in Causation Solidifies

The court's meddling in jury decisions on causation continued up to *Allbritton* in 1995. In *Sysco Food Services, Inc. v. Trapnell*, the court reversed the trial court's summary judgment due to a fact issue on causation.[233] The decedent's heirs sued several food manufacturers in a product liability case, and the trial court granted summary judgment in favor of the defendants, holding that there was no issue of material fact on the issue of causation.[234] The court of appeals reversed, and the Texas Supreme Court affirmed.[235] The court held that the evidence produced by the defendants (including an affidavit from the doctor who treated the decedent that stated that the products probably caused or contributed to the plaintiff's death) raised a fact issue on causation, precluding summary judgment.[236]

The court similarly reversed the jury's causation conclusion, this time for the defendant, in *Haynes & Boone v. Bowser Bouldin, Ltd*.[237] There, a client sued a law firm for malpractice and Texas Deceptive Trade Practices Act ("DTPA") violations in connection with the firm's handling of the client's suit against a shopping center tenant.[238] On appeal, the firm did not contest that the underlying litigation was mishandled, but it argued that damages from a later foreclosure on the shopping center were not recoverable.[239] The firm argued that its conduct was not a producing cause under the DTPA.[240] The Texas Supreme Court quoted the definition of producing cause from *Rourke v. Garza* ("efficient, exciting, or contributing cause, which in the natural sequence, produced injuries or damages

[232] *Id.* at 406–07.

[233] Sysco Food Servs., Inc. v. Trapnell, 890 S.W.2d 796, 801 (Tex. 1994).

[234] *Id.* at 797.

[235] *Id.*

[236] *Id.* at 800–01.

[237] *See* Haynes & Boone v. Bowser Bouldin, Ltd., 896 S.W.2d 179, 183 (Tex. 1994), *abrogated by* Ford Motor Co. v. Ledesma, 242 S.W.3d 32 (Tex. 2007).

[238] *Id.* at 180.

[239] *Id.* at 181–82 (citing Rourke v. Garza, 530 S.W.2d 794, 801 (Tex. 1976), *abrogated by* Ford Motor Co. v. Ledesma, 242 S.W.3d 32 (Tex. 2007)).

[240] *Id.* at 182.

complained of, if any.").[241] Since the claimed damages for foreclosure were a result of the foreclosure and not the mishandled litigation, the court characterized them as consequential damages.[242] It defined consequential damages as "those damages which result naturally but not necessarily from the acts complained of."[243] The court found that the evidence showed that the foreclosure actually resulted from an inability to make interest payments on the debt and that the tenant intended to leave the shopping center well before foreclosure.[244]

> The only evidence that the center would have survived came from Rudy Bouldin, the principle of [the plaintiff], who testified that with Blockbuster as a tenant a sale or refinancing could be accomplished, and from [the plaintiff's] real estate expert, who testified that banks rarely foreclose on commercial property when other options are available. This evidence is so weak as to do no more than create a mere surmise or suspicion of its existence and in legal effect, is no evidence.[245]

COURT'S CAUSATION CASES IN 17 YEARS PRIOR TO *ALLBRITTON*

Case	Texas Supreme Court	Reversed the Court of Appeals' Finding of Sufficiency
McClure v. Allied Stores of Texas, Inc., 608 S.W.2d 901 (Tex. 1980).	Plaintiff	YES
Nixon v. Mr. Property Management Co., Inc., 690 S.W.2d 546 (Tex. 1985).	Plaintiff	YES
City of Gladewater v. Pike, 727 S.W.2d 514 (Tex. 1987).	Plaintiff	NO

[241] *Id.*

[242] *Id.*

[243] *Id.* (citation omitted).

[244] *Id.*

[245] *Id.* (citation omitted).

Case	Texas Supreme Court	Reversed the Court of Appeals' Finding of Sufficiency
El Chico Corp. v. Poole, 732 S.W.2d 306 (Tex. 1987).	Plaintiff	NO
Lofton v. Texas Brine Corp. 777 S.W.2d 384 (Tex. 1989).	Plaintiff	YES
Lear Siegler, Inc. v. Perez, 819 S.W.2d 470 (Tex. 1991).	Defendant	YES
Havner v. E-Z Mart Stores, Inc., 825 S.W.2d 456 (Tex. 1992).	Plaintiff	YES
Travis v. Mesquite, 830 S.W.2d 94 (Tex. 1992).	Plaintiff	YES
Dresser Industries, Inc., v. Lee, 880 S.W.2d 750 (Tex. 1993).	Defendant	YES
General Motors, Co. v. Saenz, 873 S.W.2d 353 (Tex. 1993).	Defendant	YES
Schaefer v. Texas Employers Insurance Association, 612 S.W.2d 199 (Tex. 1980).	Defendant	NO
Morgan v. Compugraphic Corp., 675 S.W.2d 729 (Tex. 1984).	Plaintiff	YES
Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 432 (Tex. 1984).	Plaintiff	NO
First International Bank v. Roper Corp., 686 S.W.2d 602 (Tex. 1985).	Plaintiff	YES
Magro v. Ragsdale Brothers, Inc., 721 S.W.2d 832 (Tex. 1986).	Plaintiff	YES
McKinley v. Stripling, 763 S.W.2d 407 (Tex. 1989).	Defendant	NO

Case	Texas Supreme Court	Reversed the Court of Appeals' Finding of Sufficiency
Millhouse v. Wiesenthal, 775 S.W.2d 626 (Tex. 1989).	Defendant	NO
Kramer v. Lewisville Memorial Hospital, 858 S.W.2d 397 (Tex. 1993).	Defendant	NO
Sysco Food Services, Inc. v. Trapnell, 890 S.W.2d 796 (Tex. 1994).	Plaintiff	NO
Haynes & Boone v. Bowser Bouldin, Ltd., 896 S.W.2d 179 (Tex. 1994).	Defendant	YES
TOTAL	Plaintiff-12 Defendant-8	YES-12 NO-8

*D. Conclusion to Pre-*Allbritton *Case Discussion*

By the time *Dresser Industries* and *Saenz* were decided, the perceived pro-defense jurists on the court were in the majority.[246] But it is not until *Allbritton* that much of the undoing of the causation work done by the pro-plaintiff Kilgarlin court begins in earnest. That new majority was aided by the lack of rigor in the causation analysis employed by the Kilgarlin court, not the least of which is the sliding of foreseeability like a hockey puck from one end of the arena (duty) to the other end of the arena (causation), which was exacerbated by the use of loose terms like "substantial factor" and further aggravated by the occasional blatant encroachment on the court of appeals' factual sufficiency jurisdiction. It will be seen in the next Part whether the pro-defendant majority is any more virtuous—constitutionally or intellectually.

[246] *See* discussion *supra* Part IV. In the seventeen-year pre-*Allbritton* period, plaintiffs won in the court only slightly more than defendants.

V. *ALLBRITTON*

A. Majority Opinion

Union Pump Co. v. Allbritton involved a suit for personal injuries sustained by Allbritton, an employee of Texaco Chemical Company's facility in Port Arthur, Texas.[247] A pump manufactured by Union Pump Company ("Union") caught fire and ignited the surrounding area.[248] After the fire was extinguished, Allbritton was asked to accompany another employee to block a nitrogen purge valve.[249] To get to the valve, the employees walked over an above-ground pipe rack, rather than going around it.[250] Upon reaching the valve, the employees were told that it was not necessary to block it off.[251] Instead of walking around the pipe rack, the employees again walked across it.[252] While returning across the pipe rack, Allbritton hopped or slipped off, injuring herself.[253] There was evidence that the pipe rack was wet because of the fire, and Allbritton was wearing hip boots and other firefighting gear when the injury occurred.[254] Allbritton sued Union, alleging negligence, gross negligence and strict liability.[255] Allbritton alleged that but for the pump fire, she would not have walked across the pipe rack and the injuries would not have occurred.[256] The trial court granted summary judgment for Union, finding that there was no issue of material fact concerning proximate or producing cause.[257] The court of appeals reversed and remanded on the proximate and producing cause issues.[258]

[247] Union Pump Co. v. Allbritton, 898 S.W.2d 773, 774 (Tex. 1995), *abrogated by* Ford Motor Co. v. Ledesma, 242 S.W.3d 32 (Tex. 2007).

[248] *Id.*

[249] *Id.*

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] *Id.*

The Texas Supreme Court reversed the judgment of the court of appeals and rendered a take-nothing judgment against the plaintiff.[259] The court first described causation:

> Negligence requires a showing of proximate cause, while producing cause is the test in strict liability. Proximate and producing cause differ in that foreseeability is an element of proximate cause, but not of producing cause. Proximate cause consists of both cause in fact and foreseeability. Cause in fact means that the defendant's act or omission was a substantial factor in bringing about the injury which would not otherwise have occurred. A producing cause is an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of, if any. Common to both proximate and producing cause is causation in fact, including the requirement that the defendant's conduct or product be a substantial factor in bringing about the plaintiff's injuries.[260]

The court next explained the limits of legal causation in Texas as follows:

> At some point in the causal chain, the defendant's conduct or product may be too remotely connected with the plaintiff's injury to constitute *legal causation*. As this Court noted in *City of Gladewater v. Pike*, 727 S.W.2d 514, 518 (Tex. 1987), defining the limits of legal causation eventually mandates weighing of policy considerations . . . . Drawing the line between where legal causation may exist and where, as a matter of law, it cannot, has generated a considerable body of law . . . . As this Court explained in *Lear Siegler*, the connection between the defendant and the plaintiff's injuries simply may be too attenuated to constitute legal cause. Legal cause is not established if the defendant's conduct or product does no more than furnish the condition that makes the

[259] *Id.* at 774.

[260] *Id.* at 775 (internal quotations and citations omitted).

> plaintiff's injury possible. This principle applies with equal force to proximate cause and producing cause.[261]

Applying the doctrine of foreseeability to a products liability case, the court found that Allbritton had failed to raise a material factual issue on causation:

> Even if the pump fire were in some sense a "philosophic" or "but for" cause of Allbritton's injuries, the forces generated by the fire had come to rest when she fell off the pipe rack. The fire had been extinguished, and Allbritton was walking away from the scene. Viewing the evidence in the light most favorable to Allbritton, the pump fire did no more than create the condition that made Allbritton's injuries possible. We conclude that the circumstances surrounding her injuries are too remotely connected with Union Pump's conduct or pump to constitute a legal cause of her injuries.[262]

B. Justice Cornyn's Concurrence

Justice Cornyn's concurrence found there was cause-in-fact, but not legal cause.[263] He stated the majority "conflates foreseeability and other policy issues with its cause-in-fact analysis," and criticized the majority as taking an expansive view.[264] Justice Cornyn engaged in far more scholarship than the majority, ostensibly tracing the "development of causation" both nationally and in the state.[265] He elaborated on the "ill-defined second element in producing cause" (i.e., foreseeability), citing conflicting definitions of producing cause used by Texas courts.[266] But then he went on to apply a foreseeability analysis to both cause in fact and

[261] *Id.* at 775–76 (internal quotations and citations omitted).

[262] *Id.* at 776.

[263] *Id.* at 777 (Cornyn, J., concurring).

[264] *Id.*

[265] *Id.*

[266] *Id.* at 783 (quoting Peeler v. Hughes & Luce, 868 S.W.2d 823, 828 (Tex. App.—Dallas 1993), *aff'd*, 909 S.W.2d 494 (Tex. 1995) ("Producing cause is equal to proximate cause without the element of foreseeability.")). Justice Cornyn continued, "But this description is unfortunately intertwined with the following shorthand definition: 'Proximate cause consists of two elements: (1) cause in fact, and (2) foreseeability.'" *Id.* (citing Mo. Pac. R. Co. v. Am. Statesman, 552 S.W.2d 99, 103 (Tex. 1977)).

producing cause, which in some ways is more expansive than the majority's adoption of the substantial factor test.[267] His opinion was more obviously weighing the evidence than even the majority; and Justice Cornyn signaled a greater willingness to weigh in on the evidence in causation cases in the future.

While it is perhaps unfair to criticize any attempt at reciting a history of causation doctrine as selective and incomplete, given the richness of that history, Justice Cornyn's exposition of the Realists' views of proximate cause, and especially that of Leon Green, is in at least some ways incorrect.[268] He places Green in the camp of those who thought that proximate cause should be layered onto the causation analysis: "For the Realists, then, cause-in-fact was a purely factual inquiry, while proximate cause was a policy determination . . . ."[269] As we have seen, Green most vehemently disagreed with that proposition. Justice Cornyn went on to discuss some of the views of the post-Realists, summing up: "These debates [about the proper components and amount of policy analysis belonging in the "causation" element] continue today, and the precise content and structure of the causal analysis is, to say the least, unsettled."[270]

Justice Cornyn's historical discussion continued, noting that "[m]ore recently, this Court has used the Realists' bifurcated causal analysis in negligence law, in which proximate cause is viewed as consisting of two elements: 'cause-in-fact' and 'foreseeability.'"[271] Justice Cornyn then stated, "Even more recently, we have perhaps demonstrated the pervasive influence of post-Realist scholars, describing the cause-in-fact analysis as requiring satisfaction of both the 'but for' and the 'substantial factor' tests."[272] He finished by stating, "The addition of this vague new

[267] *See id.* at 785.

[268] Green would probably not have agreed he belonged in the group called "legal realists." Robertson, *supra* note 44, at 399–400.

[269] *Allbritton*, 898 S.W.2d at 778.

[270] *Id.*

[271] *Id.* at 779 (noting that cause-in-fact and foreseeability are "two distinct concepts" and defining cause-in-fact in terms of the "but-for" test) (citations omitted).

[272] *Id.*; *see also* Mo. Pac. R. Co. v. Am. Statesman, 552 S.W.2d 99, 103 (Tex. 1977) (setting forth the first definition of cause-in-fact that required both tests to be satisfied). Neither the majority nor concurrence notes that the phrase "substantial factor" actually appears in *Palsgraf*. After the *Palsgraf* dissent noted there was little to guide one in applying the concept, though "there are some hints to guide us. The proximate cause, involved as it may be with many other causes, must be, at the least, something without which the event would not happen. The court must ask itself whether the cause was a natural and continuous sequence between cause and effect.

'substantial factor' doctrine, in theory at least, tends to merge the policy-based rationales for limiting liability with the cause-in-fact inquiry."[273]

Justice Cornyn then came to the core of his concurrence:

> This evolution of Texas law, paralleling developments throughout the United States, has caused two particular areas of uncertainty relevant to the case at hand. First, Texas law is unclear as to what degree (if any) it has retreated from the fact/policy delineation in its two-prong causal analysis. While the Court's opinion today appears to reject this bifurcated analysis, I believe that it remains an important and useful part of Texas law. Second, our cases have never clearly defined how the second prong of its proximate cause analysis in negligence cases applies to the producing cause analysis of products liability law. *The Court's opinion undertakes only one analysis, thereby implying that causation in negligence and causation in products liability are treated the same.* To the contrary, I contend that, like the limitations imposed by foreseeability in negligence law, the second part of a complete causal analysis in products liability law imposes policy-oriented limitations consistent with the underlying purposes of products liability law itself, as I explain below.[274]

Justice Cornyn proceeded to analyze earlier Texas cases that treated the causation question as far more fact-oriented and hardly at all a policy question, preferring the but-for test to substantial factor language.[275] He also noted the Restatement's confusion regarding the but-for test and he determined that for Prosser, substantial factor and but for were usually the same thing and both were purely factual inquiries.[276] He also portrayed the

Was the one a *substantial factor* in producing the other? . . . Or by the exercise of *prudent foresight* could the result be *foreseen*?" *Palsgraf*, 162 N.E. at 354 (emphasis added). From this quote it appears Judge Andrews, at least, used these terms almost interchangeably, and not as separate prongs or tests to be met. It also appears from this quote that "continuous sequence" analysis is really proximate cause analysis applied to products liability.

[273] *Allbritton*, 898 S.W.2d at 779 (internal citations omitted).

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

[275] *Id.* at 779–82.

[276] *Id.* at 780.

Missouri Pacific case as introducing the substantial factor prong, but in actuality the case simply applies the but-for test.[277]

He continued by examining the court's approach in *Lear Siegler*. There, the court relied on the following definition of legal cause from the Restatement (Second) of Torts:

> The negligence must also be a substantial factor in bringing about the plaintiff's harm. The 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 the word in the popular sense, in which there always lurks the idea of responsibility . . . .[278]

According to Justice Cornyn, the court—though acknowledging that Texas had not adopted the Restatement (Second) of Torts in its entirety—proceeded to ignore the "important differences between the Restatement's and Prosser's formulations," and instead applied the Restatement's legal cause definition, concluding that "these particular circumstances are too remotely connected with Lear Siegler's conduct to constitute legal cause."[279] After further discussion and analysis of *Lear Siegler*, Justice Cornyn summed up his view of that case:

> First, the context of the Court's analysis is consistent only with an inquiry into "foreseeability." In *Lear Siegler*, the Court notes the plaintiff's argument that the malfunction of the defendant's sign was a "but for" cause of the injury, but then concludes that the defendant's conduct was too attenuated "to constitute legal cause." The Court did not reject the plaintiff's cause-in-fact contention, but merely noted that legal cause required more: the defendant's conduct, even though a cause-in-fact, cannot be too remote from the injury complained of. This is simply the traditional foreseeability analysis applied in negligence law.[280]

[277] *Id.* at 780–81.

[278] *Id.* at 781.

[279] *Id.* at 781 (citing Lear Siegler, Inc. v. Perez, 819 S.W.2d 470, 472 (Tex. 1991)).

[280] *Id.* at 782 (citation omitted). Justice Cornyn did not comment on this engrafting of the foreseeability element onto strict products liability causation, where it had not previously existed.

Justice Cornyn then concluded this section of his opinion criticizing the court's departure from the traditional approach to causation analysis, stating:

> This overview of our cases reveals that this Court has never abandoned the distinction between the fact-based analysis of the cause-in-fact inquiry and the policy-based foreseeability inquiry. By interweaving the broad definition of "substantial factor" found in the *Restatement* with the narrow scope of the "substantial factor" test in Texas cause-in-fact analysis, the Court's opinion today obscures this important issue and departs substantially from the traditional approach to causal analysis in Texas law.[281]

In a section he labeled "The Ill-Defined Second Element in Producing Cause," and after acknowledging that products liability law does not include the foreseeability element present in negligence law, Justice Cornyn wrote:

> The fact that a court may not be directly concerned with foreseeability as an element in the causal analysis does not, however, undermine the soundness of a two-prong approach to causation in other contexts . . . the court should still consider whether the policies or principles at the heart of the cause of action dictate further limitation on liability.[282]

Justice Cornyn called this a "policy-based limitation inherent in producing cause" as if producing cause and proximate cause had always been one and the same.[283] He went on to criticize the prior formulations of producing cause as being proximate cause minus foreseeability.[284] Clearly for Justice Cornyn, foreseeability is and should be a component of both, and a judicially controlled policy decision at that.[285] For him, producing cause has a second prong that incorporates the policy-heavy inquiry.[286] Though he gave this second prong almost no definition or any guidance to trial courts

[281] *Id.*

[282] *Id.* at 782–83.

[283] *Id.* at 783.

[284] *Id.*

[285] *Id.*

[286] *Id.* (stating "our oft-repeated definition of producing cause is unnecessarily vague . . .").

on how to apply, he concluded: "Obviously, one cannot sketch all the contours of this element of producing cause in a single opinion. Nonetheless, there is ample precedent in Texas law to conclude that a policy-based aspect of causation in products liability should and does exist."[287]

After concluding that both the cause-in-fact and substantial-factor tests are satisfied, Justice Cornyn then applied a foreseeability analysis to "decide whether the pump defect meets the second prong of both the proximate cause and producing cause."[288] And it is at this juncture that it is clear that Justice Cornyn simply preferred his view of the evidence over any potential jury's view:

> In this case, the injury to Allbritton was not foreseeable. Allbritton's injuries were the result of a needlessly dangerous shortcut taken after the crisis had subsided.[289] . . . Foreseeability allows us to cut off Union Pump's liability at some point; I would do so at the point the crisis had abated or at the point that Allbritton and Subia departed from their usual, safe path.[290]

Of course, this is the classic form of evidence-weighing that Green and others feared happens anytime the court engages in proximate cause or substantial factor analysis. Justice Cornyn also asserted that the products liability claim failed for similar reasons, i.e. foreseeability.[291]

So as a result of both the majority and concurrence in *Allbritton*, a new element was engrafted into both negligence and products liability law through the causation element: substantial factor, or what Justice Cornyn calls a vague element of producing cause, a policy-based inquiry laden with foreseeability. Either way, justices on the Texas Supreme Court after

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[287] *Id.* at 784.

[288] *Id.* at 785.

[289] *Id.* Justice Cornyn does not explain why he did not trust a jury to properly allocate fault on the plaintiff for her carelessness, as the dissent suggests should have happened. Is it a fear that a jury might not agree with his view of the evidence?

[290] *Id.* There was some evidence they *were* taking their "usual" path. *See id.* at 774 (majority opinion) ("Subia admitted that he chose to walk over the pipe rack rather than taking a safer alternative route because he had 'a bad habit' of doing so.").

[291] *Id.* at 785. Though he proceeds to couch his "producing cause" analysis in terms of "natural and continuous sequence" and "scope of protection," the die (or pump) has been cast: no foreseeability equals no products liability either. *Id.*

Allbritton had a green light to overturn jury verdicts using this new causation analysis untethered by limits on their ability to review the sufficiency of the evidence.

C. Justice Spector's Dissent

In dissent, Justice Rose Spector argued that the evidence established that at the time the plaintiff was injured, the forces generated by the fire had not come to rest, and thus the pump defect was both a but-for cause and a substantial factor in bringing about Allbritton's injury, and was therefore a cause in fact.[292] According to Justice Spector, the majority had used the doctrine of causation to bar Allbritton from any recovery due to her own negligence. According to Justice Spector, "a jury should be allowed to allocate comparative responsibility."[293]

D. More From Professor Dorsaneo

Much has been written over the years about the evolving scope of Texas Supreme Court appellate review, and Professor Dorsaneo agreed with the consensus that the evolution has been an enlargement.[294] However, he did not believe the "basic rules of evidentiary review [had] been abandoned," but instead that "subtle changes [had] been made in the application of the no-evidence standard of review."[295]

Dorsaneo described his article's purpose as follows:

> The purposes of this paper are to . . . [discuss the appellate standard of evidentiary review] and to describe and to criticize the recent treatment of the duty and causation issues in tort litigation in the Texas Supreme Court. The court has not acknowledged that the standards of evidentiary review applied to jury findings have been changed and one prominent scholar has concluded

[292] *Id.* at 785–86 (Spector, J., dissenting).

[293] *Id.* at 786.

[294] Dorsaneo, *supra* note 3,at 1498.

[295] *Id.* at 1501 (citing W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 478–79 (1998)); *see also* Provident Am. Ins. Co. v. Castaneda, 988 S.W.2d 189, 203–12 (Tex. 1998) (Gonzales, J., dissenting); Philip J. Hardberger, *Juries Under Seige*, 30 ST. MARY'S L.J. 1, 141 (1998) ("For almost a decade, the Phillips/Hecht Court has ignored, trivialized, or written around jury verdicts.").

> otherwise, but an examination of the court's recent jurisprudence reveals that significant changes have been made in the application of the no-evidence standard of review traditionally applied by Texas courts in assessing the probative value of evidence to support jury findings.[296]

Professor Dorsaneo confirmed Dean Green's worst fears about proximate cause now obtained:

> During roughly the same ten-year period, the Texas Supreme Court has otherwise modified the respective roles of judges, juries, and reviewing courts in Texas by revising its treatment of duty and causation issues in tort cases. These companion developments have shifted the focus of the decision-making process away from juries and ultimately toward the appellate courts.[297]

Dorsaneo further noted that ideally, "as long as the fact finder fulfills its responsibilities, a reviewing court is not permitted to prefer its own conclusions regarding what happened over the conclusions reached by the fact finder."[298] He then emphasized the important role of the review standard in protecting the sanctity of the jury verdict:

> The scope of review is an important prophylactic against the intentional or inadvertent invasion of the jury's province as the fact finder. The tendency to weigh the evidence is difficult to resist if the scope of review is not limited to the favorable evidence, including reasonable inferences favoring the finding or the findings. If the direct evidence and reasonable inferences that support the verdict must be viewed through the prism of the entire record of the evidence, including some strong evidence supporting

[296] Dorsaneo, *supra* note 3, at 1498 (citing to the "provocative" article by Powers, *supra* note 9, at 1719). Not surprisingly, Dorsaneo starts his paper with a Dean Leon Green quote: "There is nothing to prevent . . . invasion of the jury's province except the self-restraint of the judges themselves." *Id.* at 1497 (quoting Green, *supra* note 2, at 358). Dorsaneo next quotes Green's lament that: "Somehow everything in life conspires against courage." *Id.* (quoting Leon Green, *Must the Legal Profession Undergo a Spiritual Rebirth?*, 16 IND. L.J. 15, 28 (1940)).

[297] Dorsaneo, *supra* note 3, at 1498.

[298] *Id.* at 1502 (citation omitted).

> the party who challenges the verdict, the evidence supporting the verdict may be more easily discounted.[299]

Dorsaneo identified three significant procedural developments that impacted no-evidence review: (1) an "unfortunate and misguided rearticulation of the scintilla rule;" (2) an increasing application of "the principle that undisputed evidence cannot be disregarded" (the problem posed in *City of Keller*); and (3) the redirection of the probative value of expert testimony as a question for the court rather than for the jury (this is discussed in Part VI.A.2).[300] Dorsaneo's discussion of the undisputed evidence problem anticipated the *City of Keller* decision:

> Although Justice Hardberger's explanation concerning the court's motives or ideology is too harsh, it is arguable that the court's rejection of some verdicts has been based on . . . misapplications of the principle that undisputed evidence cannot be disregarded by the fact finder.[301]

Dorsaneo brilliantly tied these evidentiary issues to *Allbritton*: "In summary judgment cases, the so called 'equal inference' rule can have a beguiling surface appeal and arguments that the evidence is undisputed are more difficult to refute when the actual dispute concerns the existence of conflicting inferences."[302] Dorsaneo concluded with a reiteration of the role of the Texas Supreme Court vis-à-vis the courts of appeals[303] and with a

[299] *Id.* at 1503 (citations omitted).

[300] *Id.* at 1507 (citations omitted).

[301] *Id.* at 1514 (citations omitted).

[302] *Id.* at 1519 (citing to *Allbritton* and stating: "Both the majority and the concurrence seem to forget that the fact finder should decide the proximate causation issue, regardless of whether the issue is couched in terms of an assessment of whether the conduct or product in question was a 'substantial factor' or in terms of the 'foreseeability of the harm,' if reasonable minds could differ about these matters under the evidence.").

[303] *Id.* ("Although it is widely recognized that [Texas's factual insufficiency standard] is imprecise, it is an obvious safeguard against judgments that are supported by some evidence, but that should not be permitted to stand, in the interest of justice. In the Texas procedural system, insufficient evidence rulings are assigned to trial judges and the courts of appeals, but not to the Supreme Court"). *Id.* Dorsaneo identifies two reasons for this limitation in the Supreme Court's review: (1) the court should be concerned with "significant legal questions," not particularized review of individual cases, since "error correction" is for the courts of appeals; and (2) the high court should "respect and defer to the lower courts," because they are better suited to deal with fairness issues in individual cases. *Id.*

criticism of the court for its "unhealthy skepticism about how courts of appeals have been doing factual sufficiency reviews":

> Unfortunately, in recent years, the Texas Supreme Court has developed an unhealthy skepticism about how the courts of appeals have been doing factual sufficiency reviews. Commencing with *Pool v. Ford Motor Company*, to allow the high court to determine if the correct standard of factual sufficiency review has been applied, courts of appeals were required to detail the evidence relevant to the issue and clearly state why the finding is so against the weight of the evidence . . . . [Strict scrutiny review] has nothing to do with preserving respect for the fact finding process or the fact finder. It arguably demonstrates instead that the high court has more confidence in its own ability to decide individual cases than juries, trial judges, and the courts of appeals. As a practical matter, however, a particularized review of individual cases by the court is neither wise nor possible for the court to conduct. It is also not within the court's job description.[304]

According to Dorsaneo, the Texas Supreme Court incorporated the element of foreseeability into the definition of proximate cause during the early 1900s for two important reasons:

> [T]o avoid as far as possible the metaphysical and philosophical niceties in the age-old discussion of causation, and to lay down a rule of general application which will, as nearly as may be done by a general rule, apply a practical test, the test of common experience, to human conduct when determining legal rights and legal liability.[305]

Because the Texas Supreme Court determined that foreseeability had no place in the strict products liability determination, a different causation standard called producing cause developed.[306] The two causation standards

[304] *Id.* at 1520 (citations omitted).

[305] *Id.* at 1528 (quoting City of Dallas v. Maxwell, 248 S.W. 667, 670 (Tex. Comm'n App. 1923, holding approved)).

[306] *Id.* Foreseeability has no place as far as the causation element; however, it did become part of the duty calculation in warning cases.

differed in one important respect: there was no place for foreseeability in producing cause.[307]

Dorsaneo then comes to *Allbritton*:

> In [*Allbritton*], however, another element was added to the formula. Based on earlier cases that used the term *substantial factor* as part of the analytical process, first as *a synonym* for the but for element, and second, as a way of describing proximate or legal cause, the [*Allbritton*] majority *radically changed causation analysis* by adding a *vague substantial factor*/responsibility component to the cause in fact component of general causation analysis.[308]

Much of Dorsaneo's criticism of *Allbritton* focused on its embracing of the Section 431 of the Restatement (Second) of Torts (stating negligence must be a "substantial factor" in plaintiff's harm, and in the term substantial "lurks the idea of responsibility"):

> By embracing the Restatement comment, the court's opinion both raised the causation standard applicable in negligence and strict liability cases and rendered the causation standard considerably less intelligible. . . . The inclusion of a substantial factor/responsibility element to the causation standard does not help juries perform their function because it is vague and opaque, although it does unfortunately enable a reviewing court to discount a jury's causation finding on the basis of the court's conclusion that the connection between the wrong and the harm is too attenuated or remote to hold the defendant responsible.[309]

He was not finished criticizing the *Allbritton* decision:

> The majority's reasoning process substitutes a new causation standard that applies with "equal force to proximate and producing cause" and allows a reviewing court to reject a causation finding on the basis of the court's decision that the defendant should not be held responsible. Although the addition of [*Allbritton's*] substantial factor

[307] *Id.* (citation omitted).

[308] *Id.* at 1528–29 (citations omitted).

[309] *Id.* at 1529–30.

> component has a more obvious effect on producing cause, which otherwise has no separate responsibility component, the addition of a recondite, subjective responsibility component to proximate causation issue has the same effect . . . . A reviewing court can conclude that the causal connection is too weak if the court does not want the defendant to be held responsible, even if the harm was reasonably foreseeable.[310]

Echoing Dean Green, Dorsaneo concluded:

> As a result, the arcane quality of the new approach makes it much easier for a reviewing court to substitute its judgment for the jury's decision, and much more difficult for anyone else to demonstrate why the reviewing court exceeded the scope of its judicial power."[311]

Dorsaneo summed up the core problem as it also affects the duty issue:

> In other words, the principles of evidentiary review that are designed to constrain judges from usurping the role of the fact finder will become largely irrelevant in the decision-making process if the trial or reviewing courts can bypass the fact finder by conducting a detailed foreseeability assessment of the risk of harm and concluding that no duty exists under the particular facts of the case being decided.[312]

E. Professor Robertson

Professor David W. Robertson, very shortly after *Allbritton* was decided, discussed the history of the substantial factor term in Texas jurisprudence.[313] Cause-in-fact, or but-for causation, is a perfect issue for juries to decide.[314] The substantial factor test was originally intended as a relaxation of the rigors of the but-for or cause-in-fact analysis, and was

[310] *Id.* at 1530–31 (citations omitted).

[311] *Id.* at 1531.

[312] *Id.* at 1533 (citation omitted).

[313] *See generally* David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765 (June 1997).

[314] *Id.* at 1769.

applied three different ways, causing even further confusion: (1) in the narrowest usage, "the term describes a cause-in-fact test that is useful as a substitute for the but-for test in a limited category of cases"; (2) "in a looser and potentially confusing usage, the substantial factor test is treated as more or less interchangeable with the but-for test"; and (3) in the third usage, "'substantial factor' describes an approach to the issue of legal causation or ambit of duty, a matter that should be kept entirely distinct from the cause-in-fact issue."[315]

Of course, in *Allbritton*, both the majority and the concurrence appear to use all three meanings, but then it became clear by the holding that the intent is to engraft the policy-making function onto the term, allowing the court to intervene to reverse jury causation verdicts when the court would otherwise be constrained by the evidentiary review rules. Robertson noted that in the third usage, substantial factor was used as a substitute, or as synonymous, with proximate cause (and as we've seen, anytime the court stirs around the term proximate cause, it is probably using a duty analysis to sidestep the constraint on sufficiency review).[316] "Using [substantial factor] in the different context of legal cause—and there giving it a different meaning—is not conducive to clarity."[317] He viewed one of the dangers as adding another element to a plaintiff's claims and burden of proof: "But once the "substantial factor" term is running loose in the negligence law vocabulary, it can easily turn into an independent . . . hurdle that the plaintiff must overcome . . . ."[318] That appears to be what the *Allbritton* Court intended.

[315] *Id.* at 1776 (citations omitted).

[316] *Id.* at 1780.

[317] *Id.*

[318] *Id.* at 1781 (citation omitted).

IV. CAUSATION OPINIONS SINCE *ALLBRITTON*

COURT'S CAUSATION DECISIONS IN SEVENTEEN YEARS SINCE *ALLBRITTON*

Case	Texas Supreme Court	Reversed the Court of Appeals' Finding of Sufficiency
Ford Motor Co. v. Ridgway, 135 S.W.3d 598 (Tex. 2004).	Defendant	YES
Borg-Warner Corp. v. Flores, 232 S.W.3d 765 (Tex. 2007).	Defendant	YES
Ford Motor Co. v. Ledesma, 242 S.W.3d 32 (Tex. 2007).	Defendant	YES
Leitch v. Hornsby, 935 S.W.2d 114 (Tex. 1996).	Defendant	YES
Volkswagen of America v. Ramirez, 159 S.W.3d 897 (Tex. 2004).	Defendant	YES
Tarrant Regional Water District v. Gragg, 151 S.W.3d 546 (Tex. 2004).	Plaintiff	NO
General Motors Corp. v. Iracheta, 161 S.W.3d 462 (Tex. 2005).	Defendant	YES
Cooper Tire & Rubber Co. v. Mendez, 204 S.W.3d 797 (Tex. 2006).	Defendant	YES
Mack Trucks v. Tamez, 206 S.W.3d 572 (Tex. 2006).	Defendant	YES
Guevara v. Ferrer, 247 S.W.3d 662 (Tex. 2007).	Defendant	YES
IHS Cedars Treatment Center v. Mason, 143 S.W.3d 794 (Tex. 2004).	Defendant	YES

Case	Texas Supreme Court	Reversed the Court of Appeals' Finding of Sufficiency
Providence Health Center v. Dowell, 262 S.W.3d 324 (Tex. 2008).	Defendant	YES
Dallas County v. Posey, 290 S.W.3d 869 (Tex. 2009).	Defendant	YES
Lee Lewis Construction, Inc. v. Harrison, 70 S.W.3d 778 (Tex. 2001).	Plaintiff	NO
Dillard v. Texas Electric Cooperative, 157 S.W.3d 429 (Tex. 2005).	Plaintiff	YES
Trammell Crow Central Texas, Ltd. v. Gutierrez, 267 S.W.3d 9 (Tex. 2008).	Defendant	YES
Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Development & Research Corp., 299 S.W.3d 106 (Tex. 2009).	Defendant	YES
Columbia Rio Grande Healthcare, L.P. v. Hawley, 284 S.W.3d 851 (Tex. 2009).	Defendant	YES
Nabors Drilling, U.S.A., Inc. v. Escoto, 288 S.W.3d 401 (Tex. 2009).	Defendant	YES
Del Lago Partners, Inc. v. Smith, 307 S.W.2d 762 (Tex. 2010).	Plaintiff	NO
Transcontinental Insurance Co. v. Crump, 330 S.W.3d 211 (Tex. 2010).	Defendant	YES
Jelinek v. Casas, 328 S.W.3d 526 (Tex. 2010).	Defendant	YES
BIC Pen Corp. v. Carter, 346 S.W.3d 533 (Tex. 2011).	Defendant	YES

Case	Texas Supreme Court	Reversed the Court of Appeals' Finding of Sufficiency
Merck & Co. v. Garza, 347 S.W.3d 256 (Tex. 2011).	Defendant	YES
Lancer Insurance Co. v. Garcia Holiday Tours et al., 345 S.W.3d 50 (Tex. 2011).	Defendant	NO
Coastal Transport v. Crown Central Petroleum, 136 S.W.3d 227 (Tex. 2004).	Defendant	YES
Wal-Mart Stores, Inc. v. Merrell, 313 S.W.3d 837 (Tex. 2010).	Defendant	YES
Whirlpool Corp. v. Camacho, 298 S.W.3d 631 (Tex. 2009).	Defendant	YES
City of San Antonio v. Pollock, 284 S.W.3d 809 (Tex. 2009).	Defendant	YES
Thota v. Young, 366 S.W.3d 678 (Tex. 2012).	Defendant	YES
Centocor, Inc. v. Hamilton, 372 S.W.3d 140 (Tex. 2012).	Defendant	YES
TOTAL	Plaintiff-4 Defendant-27	YES-27 NO-4

A. Introduction

Since *Allbritton*, the Texas Supreme Court has taken a significant number of cases that addressed sufficiency of the evidence with respect to causation. An overwhelming majority of these resulted in jury verdicts being reversed[319] and judgment being rendered in favor of the defendant. These opinions are divided into four relatively arbitrary and sometimes overlapping groups: defect cases, expert cases, mental health cases, and others.

[319] The authors recognize that, technically, the court addresses courts of appeals' dispositions, and does not reverse jury verdicts. The authors use this phrase to signify instances in which the court reversed a court of appeals' disposition affirming a judgment entered on a jury verdict.

1. Defect Cases

a. Ford Motor Co. v. Ridgway, 135 S.W.3d 598 (Tex. 2004).

The plaintiff filed suit against a car manufacturer after sustaining serious injuries when his car caught fire while he was driving.[320] The plaintiff alleged both negligence and strict liability claims.[321] The trial court granted no-evidence summary judgment in favor of the defendants on all of the plaintiff's claims, and the court of appeals affirmed on the negligence claim but reversed and remanded on the strict liability claim.[322] In responding to the summary judgment motion, the affidavit of the plaintiff's expert stated that he "suspect[ed]" the electrical system was the cause of the fire.[323] The plaintiff could not identify any defect in the truck at the time it left the manufacturer.[324] Citing this dearth of evidence, the Texas Supreme Court reversed the judgment of the court of appeals and rendered a take-nothing judgment in favor of the defendants.[325] This case is discussed in more detail in the Part of this paper addressing expert causation testimony below.[326]

b. Borg-Warner Corp. v. Flores, 232 S.W.3d 765 (Tex. 2007).

In this case, the plaintiff alleged that he contracted asbestosis as a result of grinding brake pads—including some manufactured by the defendant—over the course of thirty years.[327] The plaintiff presented evidence that: (1) he inhaled respirable asbestos fibers while grinding pads; (2) some of the pads he ground were the defendant's; and (3) he contracted asbestosis.[328] Although the court nominally "recognize[d] the proof difficulties accompanying asbestos claims," it held that the plaintiff did not present necessary evidence of "the approximate quantum of Borg-Warner fibers to which Flores was exposed" or of what percentage of those fibers

[320] Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 599–600 (Tex. 2004).

[321] *Id.* at 600.

[322] *Id.*

[323] *Id.* at 600–01.

[324] *Id.* at 601.

[325] *Id.* at 602.

[326] *See infra* Part VI.A.2.a.

[327] Borg-Warner Corp. v. Flores, 232 S.W.3d 765, 766 (Tex. 2007).

[328] *Id.* Although the court noted that Flores was a long-time smoker, it credited the testimony that Flores's breathing difficulties were the result of asbestosis. *Id.* at 768.

came from the defendant's products.[329] Thus, the plaintiff could not prove that exposure to this particular defendant's products were a "substantial factor" in causing the asbestosis (citing to *Lear Seigler* quoting *Allbritton*).[330] In reversing a jury verdict and rendering judgment in favor of the defendant, the court referred to "substantial-factor causation, which separates the speculative from the probable," and stated that "a plaintiff must prove that the defendant's product was a substantial factor in causing the alleged harm."[331]

c. Ford Motor Co. v. Ledesma, 242 S.W.3d 32 (Tex. 2007).

Ledesma involved a product liability claim against a car manufacturer.[332] The plaintiff (Ledesma) sued Ford Motor Company after crashing the truck he was driving.[333] The primary focus of the trial was whether the truck's rear axle separated prior to the accident, or whether it separated as a result of the accident.[334] Ledesma alleged that the separation occurred prior to the accident and caused him to lose control of the truck.[335] In support of his theory, Ledesma presented his own account of the accident, as well as the testimony of two expert witnesses.[336] The jury found in favor of Ledesma and awarded him more than $200,000, which was affirmed by the court of appeals.[337]

On appeal to the Texas Supreme Court, Ford complained that the jury was improperly instructed on the definitions of manufacturing defect and producing cause.[338] After finding that the court's instruction regarding what constitutes a manufacturing defect was reversible error, the court next addressed whether the jury had been properly instructed regarding producing cause.[339] The trial court, following Texas Pattern Jury Charge

[329] *Id.* at 772.

[330] *Id.*

[331] *Id.* at 773. The "substantial factor" language should be considered in light of the other tests for asbestos exposure and causation (like the *Lohrmann* test argued for by amici). Indeed, the opinion spends a great deal of time on the scientific literature on asbestos. *See id.* at 770–71.

[332] Ford Motor Co. v. Ledesma, 242 S.W.3d 32, 35–36 (Tex. 2007).

[333] *Id.* at 35.

[334] *Id.* at 36.

[335] *Id.*

[336] *Id.*

[337] *Id.* at 36–37.

[338] *Id.* at 41.

[339] *Id.*

70.1, instructed the jury: "'Producing cause' means an efficient, exciting, or contributing cause that, in a natural sequence, produces the incident in question. There may be more than one producing cause."[340] Ford claimed that this definition was an incorrect statement of Texas law, and that a valid definition would state that producing cause "means that cause which, in a natural sequence, was a substantial factor in bringing about an event, and without which the event would not have occurred. There may be more than one producing cause."[341] Ford requested the trial court to use this definition.[342] While agreeing with Ledesma that there may be more than one producing cause, and despite acknowledging a long line of cases in which the court had previously seemed to sanction the first sentence of the given instruction (the court's convoluted way of admitting that it had endorsed this very definition that had been provided to Texas juries for the past forty years), the court nevertheless found that the given instruction constituted reversible error.[343] The court explained its decision as follows:

> [W]e have . . . described a producing cause as one "that is a substantial factor that brings about injury and without which the injury would not have occurred," the definition Ford asks us to adopt.
>
> To say that a producing cause is "an efficient, exciting, or contributing cause that, in a natural sequence, produces the incident in question" is incomplete and, more importantly, provides little concrete guidance to the jury. Juries must ponder the meaning of "efficient" and "exciting" in this context. These adjectives are foreign to modern English language as a means to describe a cause, and offer little practical help to a jury striving to make the often difficult causation determination in a products case.
>
> Defining producing cause as being a substantial factor in bringing about an injury, and without which the injury would not have occurred, is easily understood and conveys the essential components of producing cause that (1) the cause must be a substantial cause of the event in issue and

[340] *Id.*

[341] *Id.* at 45.

[342] *Id.*

[343] *Id.* at 45–46.

> (2) it must be a but-for cause, namely one without which the event would not have occurred. This is the definition that should be given in the jury charge.[344]

Oddly, while citing to *Rourke v. Garza*,[345] Justice Willett included no discussion of this case,[346] in which the court held that "there was no error in the submission or definition" of the precise definition of producing cause which the *Ledesma* court found to be erroneous.[347]

In light of *Ledesma*, the Texas Pattern Jury Charge ("PJC") definition of producing cause was changed as follows:

> "Producing cause" means ~~an efficient, exciting, or contributing~~ a cause that~~, in a natural sequence,~~ was a substantial factor in bringing about the ~~produces the~~ [*occurrence*] [*injury*] [*occurrence or injury*], and without which the [*occurrence*] [*injury*] [*occurrence or injury*] would not have occurred. There may be more than one producing cause.[348]

While producing cause is a less stringent legal standard than proximate cause, *Ledesma* set off a vigorous debate within Texas legal circles as to whether the definition of proximate cause should be changed to comport with *Ledesma*'s rationale. While the definition of proximate cause was ultimately not changed, the following PJC comment was added:

> Caveat. In *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007), the court held that the definition of "producing cause" should contain the "substantial factor" language. In light of that holding and previous supreme court cases discussing the similarities between producing and proximate cause (*see, e.g.*, *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995)), the

[344] *Id.*

[345] 530 S.W.2d 794, 801 (Tex. 1975).

[346] *Ledesma*, 242 S.W.3d at 45 n.46.

[347] *Rourke*, 530 S.W.2d at 801.

[348] Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Malpractice, Premises, Products* PJC 70.1 (2008). The comments on "producing cause" were also revised to reflect that the source of this new definition came from *Ledesma*, and the reference to *Hartzell Propeller Co. v. Alexander*, 485 S.W.2d 943, 946 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.) was removed. *See id.*

> definition of "proximate cause" may need to be modified to include the "substantial factor" language as follows:
>
> "Proximate cause" has two parts:
>
> 1. a proximate cause is a substantial factor that [*in a natural and continuous sequence*] brings about an event and without which the event would not have occurred; and
>
> 2. a proximate cause is foreseeable. "Foreseeable" means that a person using ordinary care would have reasonably anticipated that his acts or failure to act would have caused the event or some similar event.
>
> There may be more than one proximate cause.
>
> The phrase "in a natural and continuous sequence" is bracketed because it is unclear whether those words remain necessary in light of the "substantial factor" language and the apparent deletion of "in a natural sequence" from the analysis of "producing cause" in *Ledesma*. *Ledesma*, 242 S.W.3d at 46. The Committee has also attempted to make the language more understandable to the average juror.[349]

Although *Ledesma* dealt only with the pattern jury charge regarding producing cause in the context of products liability, the same definition of producing cause will presumably apply to all causes of action that use the producing cause standard, such as claims under the DTPA. In fact, PJC 102.7 and 102.8, which pertain to causes of action under DTPA §§ 17.50(a)(3) and 17.50(a)(2) respectively, were also revised to reflect *Ledesma*'s new definition of producing cause.[350]

One also might reasonably question whether the substantial factor definition moves producing cause standard closer to the proximate cause standard by implicitly requiring an attenuation analysis—which, in most cases, probably parallels a foreseeability analysis—in determining

[349] Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business, Consumer, Insurance, Employment* PJC 100.9 (2008).

[350] *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business, Consumer, Insurance, Employment* PJC 102.7, PJC 102.8 (2008).

producing cause. Note that, at least historically, producing cause was considered to be proximate cause without a foreseeability analysis.[351]

Following the *Ledesma* decision, the 14th District Court of Appeals in Houston took a shot at the court's new substantial-factor requirement.[352] In the *Crump* case,[353] the appellate court upheld a jury verdict in favor of a plaintiff based on a worker's compensation claim where the trial court submitted the same jury charge definition of producing cause rejected by *Ledesma*.[354] The appellate court reasoned that worker's compensation claims were different than products liability claims because, for public policy reasons, "a workplace injury need not be the sole or primary cause in bringing about the disability or illness; rather, as long as the occupational injury is a producing cause of the disability or illness, there is a sufficient causal link under the workers' compensation scheme."[355] The appellate court specifically addressed *Ledesma*—and distinguished it—stating:

> In *Ledesma*, the Supreme Court determined the correct definition of "producing cause" in a products liability action as being a substantial factor in bringing about an injury, and without which the injury would not have occurred. We find *Ledesma* distinguishable and inapplicable to this appeal because it is a products liability case which requires the cause to be a substantial factor of the event in issue, a requirement absent from a workers' compensation case.[356]

The Texas Supreme Court reversed the court of appeals, holding that the definition of producing cause in workers' compensation cases is "a substantial factor in bringing about an injury or death, and without which the injury or death would not have occurred."[357]

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[351] *See* Union Pump Co. v. Allbritton, 898 S.W.2d 773, 775 (Tex. 1995), *abrogated by* Ford Motor Co. v. Ledesma, 242 S.W.3d 32 (Tex. 2007).

[352] *See* Transcon. Ins. Co. v. Crump, 274 S.W.3d 86, 99–100 (Tex. App.—Houston [14th Dist.] 2008), *rev'd*, 330 S.W.3d 211 (Tex. 2010).

[353] *See infra* Part VII.A.2.

[354] *Crump*, 274 S.W.3d at 95–96, 100.

[355] *Id.* at 100.

[356] *Id.* (internal citation omitted).

[357] Transcon. Ins. Co. v. Crump, 330 S.W.3d 211, 223 (Tex. 2010); *see also* Cont'l Cas. Co. v. Baker, 355 S.W.3d 375, 386 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (noting that the producing cause definition lacked the "substantial factor" component and holding that this

2. Expert Cases.

Since *Allbritton*, one area in which the Texas Supreme Court has been very active is in the sufficiency of expert testimony regarding causation. Commentators discussing the court's handling of expert testimony have noted that the issue arises most often in conjunction with causation.[358] In fact, these commentators identified twelve challenges to an expert's reliability that have proven successful.[359] Below is a discussion of the court's treatment of expert testimony on causation, highlighting the court's frequent evaluation of sufficiency of the evidence and touching on the cases that have shaped the court's methods of assessing experts and causation. That discussion is then followed by a more detailed description of the facts underlying the court's decision in several cases, which serve to illustrate and substantiate the concepts discussed previously.

a. The Trends in the Court's Evaluation of Expert Testimony on Causation

The court has frequently found that expert testimony on causation was too unreliable to be admissible or that, if admissible, it was too unreliable to constitute legally sufficient evidence to sustain a verdict or survive summary judgment. For instance, in *Mack Trucks v. Tamez*, the court held that the proffered expert testimony was too conclusory to be reliable (and therefore admissible):

> [The expert's] testimony did no more than set out "factors" and "facts" which were consistent with his opinions, then conclude that the fire began with diesel fuel from the

incorrect definition in the charge constituted reversible error); Shenoy v. Jean, No. 01-10-01116-CV, 2011 Tex. App. LEXIS 10212, at *23 (Tex. App.—Houston [1st Dist.] Dec. 29, 2011, pet. denied) (requiring the substantial factor component to establish cause in fact in a healthcare liability claim).

[358] *See* Manuel López, Scott Michelman, Nan Leverett, & David A. Chaumette, *Experts and Causation: Evaluating Reliability Under Daubert/Robinson*, *in* 22ND ADVANCED CIVIL APPELLATE PRACTICE COURSE ch. 24 (Sept. 4–5, 2008).

[359] *See id.* at 5–9. Those twelve challenges are: (1) the expert missed critical facts; (2) the expert relied on the *post hoc* fallacy; (3) the expert relied on insufficient epidemiological studies; (4) the expert lacks supporting studies or tests; (5) the expert relied on anecdotal evidence or isolated case reports; (6) the expert failed to rule out alternative causes; (7) the expert is testifying outside of his field; (8) the expert makes an unsupported jump from the facts; (9) the expert has the facts wrong; (10) the expert testimony does not "fit" the case; (11) the expert will not assist the trier of fact; and (12) the expert testifies falsely.

> tractor. The reliability inquiry as to expert testimony does not ask whether the expert's conclusions appear to be correct; it asks whether the methodology and analysis used to reach those conclusions is reliable. The trial court was not required to accept his opinions at face value just because [the expert] was experienced in examining post-collision fuel-fed fires.[360]

To be admissible, expert testimony must be "relevant and based on a reliable foundation."[361] "Scientific testimony is unreliable if it is not grounded in the methods and procedures of science, and amounts to no more than a subjective belief or unsupported speculation."[362] Similarly, the testimony is unreliable, and should therefore be excluded, if "there is simply too great an analytical gap between the data and the opinion proffered."[363] In *Mendez*, the court held that the district court abused its discretion in admitting the expert testimony of three witnesses, holding that either the experts were not qualified or their testimony was not reliable.[364] The court reversed the court of appeals (which had affirmed a judgment on a verdict for the plaintiff) and rendered judgment for the defendant.[365]

It is clear from the court's treatment of the admissibility of expert testimony that there is a substantive reliability component to admissibility which overlaps with sufficiency of the evidence. This relationship is demonstrated in the court's discussion in *Mendez* (which dealt with admissibility), as well as from the court's repeated references in *Mendez* to the standards applied in *Havner*, a case that dealt with sufficiency rather than admissibility.[366] Because the question of admissibility with regard to

[360] Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 581 (Tex. 2006) (citation omitted); *see also* City of Keller v. Wilson, 168 S.W.3d 802, 813 (Tex. 2005) ("After we adopted gate-keeping standards for expert testimony, evidence that failed to meet reliability standards was rendered not only inadmissible but incompetent as well.") (citations omitted).

[361] Cooper Tire & Rubber Co. v. Mendez, 204 S.W.3d 797, 800 (Tex. 2006).

[362] *Id.* (internal quotations omitted).

[363] *Id.* (quoting Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 727 (Tex. 1998).

[364] *Id.* at 801–08.

[365] *Id.* at 808.

[366] In fact, the court noted in *Mendez* that Rule 702 provides only for the admission of evidence that will actually assist the trier of fact. *Id.* at 801. The court has stated in subsequent cases dealing with sufficiency—but not admissibility—that where an expert's testimony is conclusory or speculative, it cannot assist the trier of fact. This would technically appear to be a statement that the evidence was erroneously admitted (which would require a trial objection and

expert evidence necessarily involves a substantive review of the evidence for reliability, some argument might be made that where an expert's testimony regarding causation is undisputedly admissible it should be legally sufficient to support a verdict. The court has rejected that notion.

In *Merrell Dow Pharmaceuticals, Inc. v. Havner*, the Texas Supreme Court ruled that admissible expert testimony on causation does not necessarily equate to legally sufficient evidence to support a jury verdict (that is, even admissible expert testimony, which is in theory based on a reliable foundation, may not equate to more than a scintilla of evidence of causation).[367] In *Havner*, the plaintiffs argued that, once ruled admissible, expert testimony automatically supplied some evidence needed to support a jury's finding of causation against the defendants.[368]

The Texas Supreme Court disagreed.[369] The court declared that "an expert's bare opinion will not suffice. The substance of the testimony must be considered."[370] The court discussed its holding in *Schaefer v. Texas Employers' Insurance Association*, where it held "that there was no evidence of causation because despite the 'magic language' used, the expert testimony was not based on reasonable medical probability but instead relied on possibility, speculation, and surmise."[371] As the court put it, "even an expert with a degree should not be able to testify that the world is flat, that the moon is made of green cheese, or that the Earth is the center of the solar system."[372] *Havner* makes clear that admissibility does not equal sufficiency. In other words, even where an expert has proffered a properly-admitted opinion that the defendant's conduct caused the plaintiff's injury, the plaintiff's case could still be subject to summary judgment, a judgment notwithstanding the verdict, or a no-evidence review.

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the application of an "abuse of discretion" standard of review). The court has held, however, that an objection is not necessary to preserve a complaint on appeal about the legal sufficiency of an expert's testimony, if the speculative or conclusory nature of the testimony is evident in the face of the record. Coastal Transp. Co. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227, 233 (Tex. 2004). And, in any event, as discussed below, the court has framed the same issue (speculation or conclusory testimony) as both a question of admissibility and a question of sufficiency.

[367] Merrell Dow Pharm. v. Havner, 953 S.W.2d 706, 730 (Tex. 1997).

[368] *Id.* at 711.

[369] *Id.*

[370] *Id.* (citation omitted).

[371] *Id.* at 711–12 (citing Schaefer v. Tex. Emp'rs' Ins. Assoc., 612 S.W.2d 199, 204 (Tex. 1980)).

[372] *Id.* at 712 (quoting E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 558 (Tex. 1995)).

Ford Motor Co. v. Ridgway further confirmed that admissible expert testimony on causation is not necessarily legally sufficient.[373] In *Ridgway*, the admissibility of the expert's affidavit was not challenged. Thus, it may be presumed that the expert was qualified and his testimony was based on a reliable foundation (that is, that the requisites of admissibility were met). Nevertheless, the court found the expert's testimony—that "a malfunction of the electrical system in the engine compartment is suspected of having caused this accident"—to be insufficient to create a fact issue on causation.[374] The testimony amounted to "no more than a scintilla and, in legal effect, . . . no evidence."[375] The court reversed the appellate court, which had in turn reversed the trial court's summary judgment in favor of the defendant.[376]

The court reached a similar conclusion in *Coastal Transport Co. v. Crown Central Petroleum*.[377] In *Coastal*, the causation testimony of the plaintiff's expert was admitted without objection.[378] But the court stated that, "when expert testimony is speculative or conclusory on its face[,] then a party may challenge the legal sufficiency of the evidence even in the absence of any objection to its admissibility."[379] Because, on the face of the record, the expert's testimony was conclusory and lacked any explanation, the court held the testimony to be legally insufficient.[380]

The court applied the *Coastal* standard in its reversal in *Wal-Mart Stores, Inc. v. Merrell*.[381] There, the parents of the decedents filed an action against Wal-Mart after their children died in a fire allegedly caused by a halogen lamp purchased at Wal-Mart.[382] The trial court granted Wal-Mart's

[373] Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 602 (Tex. 2004).

[374] *Id.* at 600–01.

[375] *Id.* at 601.

[376] *Id.* at 602.

[377] 136 S.W.3d 227 (Tex. 2004).

[378] *Id.* at 232–33.

[379] *Id.* at 233.

[380] *Id.* The *Coastal* court noted that hearsay evidence was formerly considered to be incompetent to support a verdict even if it was admitted without objection. A 1983 amendment to the Texas Rules of Evidence changed this, so that hearsay admitted without objection is competent for the purposes of legal-sufficiency review. *Id.* at 232 n.1; s*ee also* Gen. Motors Corp. v. Iracheta, 161 S.W.3d 462, 471 (Tex. 2005) (holding expert's testimony unreliable and insufficient). In *Iracheta*, the court appeared to reject proffered expert testimony on the basis that the testimony was not credible and conflicted with other expert testimony. *Id.* at 465–72.

[381] 313 S.W.3d 837, 839 (Tex. 2010).

[382] *Id.* at 838.

motion for summary judgment, and the court of appeals reversed, holding that the plaintiffs produced evidence on each element of their cause of action.[383] Wal-Mart appealed, stating that evidence demonstrating the element of causation was absent, and that the plaintiffs failed to provide proof that the lamp caused the fire (or that the lamp was even purchased from Wal-Mart).[384] The plaintiffs' expert testified that the lamp's halogen bulb exploded, which allegedly caused the fire, but failed to explain or adequately disprove alternative theories, making his own theory speculative and conclusory.[385] While the plaintiffs' expert discussed the dangers of halogen lamps, "[e]vidence that halogen lamps can cause fires generally . . . does not establish that the lamp in question caused *this* fire."[386] The court, finding plaintiffs' expert testimony legally insufficient to support causation, reversed the court of appeals' judgment.[387]

In *Volkswagen of America, Inc. v. Ramirez*, the court again held admissible expert testimony insufficient to support a jury's verdict.[388] After examining the admissible testimony of the plaintiffs' expert, Cox, the court held that the "opinions of the cause of the accident are conclusory on their face and are therefore no more than a mere scintilla of evidence."[389] The court stated that Cox's opinions "merely raise a suspicion or surmise of the cause of the accident and fall short of the burden of proving causation."[390] Thus, the court found no evidence of causation despite the plaintiffs' expert's admissible opinion.[391] Chief Justice Wallace Jefferson and Justice Harriett O'Neill disagreed, arguing in dissent that, "[w]hile Cox's causation testimony is neither ironclad nor exhaustive, it is surely *some* evidence . . . ."[392] The dissent accused the majority of setting "a dangerous precedent that threatens to fundamentally alter the nature of no-evidence review" and of failing to indulge every reasonable inference in favor of the plaintiff.[393]

[383] *Id.* at 839.

[384] *Id.*

[385] *Id.* at 839–40.

[386] *Id.* at 840 (emphasis in original).

[387] *Id.*

[388] 159 S.W.3d 897, 912 (Tex. 2004).

[389] *Id.* at 911.

[390] *Id.* at 912.

[391] *Id.*

[392] *Id.* at 916 (Jefferson, J., dissenting) (emphasis in original).

[393] *Id.* at 917.

The *Volkswagen* dissent may have been right. Nowhere has the court been more willing to disregard evidence that arguably supported a jury verdict than in the realm of expert testimony. The court's treatment of such testimony in repeatedly holding that an expert's testimony could not assist a fact finder arguably offered a prelude to the new "reasonable juror" standard discussed in *City of Keller*.[394]

In *Whirlpool Corp. v. Camacho*, the Texas Supreme Court reversed the appellate court's affirmance of the trial court's judgment in favor of the plaintiffs based on the plaintiffs' expert testimony.[395] The Camachos sued Whirlpool after a fire destroyed their home and killed their son.[396] The Camachos, through their expert, claimed that the defective design of a clothes dryer allowed accumulated lint to be drawn to the dryer heater where it ignited and then lit the clothes in the dryer on fire and spread to the house.[397] Because the original dryer was destroyed in the fire, and the scene of the fire was dismantled before testing could be done, the plaintiffs' expert conducted his testing on a sample dryer.[398] Whirlpool argued that the Camacho's theory failed to explain why t-shirts in the plaintiffs' dryer did not completely burn.[399] The jury chose to believe the plaintiffs' expert and found in the plaintiffs' favor, judgment was entered on the verdict, and the appeals court affirmed.[400]

Despite the jury's finding of a design defect, based on the plaintiffs' expert testimony, the supreme court held that the expert testimony amounted to no evidence supporting the jury's verdict.[401] The court found that Camachos' expert did not personally test his theory; he neither performed tests, had tests performed, did calculations to determine or testified about what size particles of lint he believed could have been drawn into the heater box, test or otherwise calculate or determine the maximum size or weight of lint particles that could have been drawn into the heater box, determine and know the length of time it took for various sizes of ignited lint particles to self-extinguish, nor know how much heat was

[394] *See* City of Keller v. Wilson, 168 S.W.3d 802, 814 (Tex. 2005).

[395] 298 S.W.3d 631, 633–34 (Tex. 2009).

[396] *Id.* at 634.

[397] *Id.* at 635–36.

[398] *Id.* at 640.

[399] *Id.* at 641.

[400] *Id.* at 636.

[401] *Id.* at 643.

generated by ignited lint particles.[402] He denied having seen "any testing anywhere that found that a smoldering piece of lint can have a sufficient heat release, both in terms of temperature and longevity, to cause a tumbling drum load to itself reach smoldering temperatures."[403]

The court rejected the Camachos' argument that the objective evidence supported their expert's theory, pointing to "partially charred tee-shirts inside the dryer, an investigator's report noting severe damage to the interior of the dryer drum, testimony that damage to the laundry room indicated the fire could not have started beneath the floor, and [plaintiff] Margarita's testimony that she saw fire coming from the drum of the dryer."[404] The court flatly rejected this objective evidence, somehow finding that "these facts are consistent with and support a conclusion that fire was in and around the dryer, not that the fire originated as [plaintiffs' expert] said it did."[405] Accordingly, the court concluded that the plaintiffs' expert's testimony was "subjective, conclusory, and . . . not entitled to probative weight."[406]

Finally, the *City of San Antonio v. Pollock* case involved a claim that benzene from a closed municipal waste disposal site migrated through the soil to a nearby home, thus causing the plaintiffs' minor daughter to contract leukemia.[407] The jury found that the landfill was a nuisance and that the City was negligent and acted with malice.[408] The jury awarded damages for past and future physical pain, past medical care, future medical care, property damages, and exemplary damages, totaling damages of nearly $20 million.[409] The trial court reduced the award for future medical expenses but otherwise rendered judgment on the verdict.[410] The court of appeals reversed the exemplary damages and affirmed in all other respects.[411]

The supreme court examined the testimony of two experts: a landfill management expert that testified that the plaintiffs' daughter was exposed

[402] *Id.* at 642.

[403] *Id.*

[404] *Id.* at 643.

[405] *Id.*

[406] *Id.*

[407] 284 S.W.3d 809, 812 (Tex. 2009).

[408] *Id.* at 815.

[409] *Id.*

[410] *Id.*

[411] *Id.*

to benzene *in utero* at high levels, and a medical expert who testified that such exposure to benzene *in utero* could, in fact, cause leukemia.[412] Although the City "insist[ed] that it [was] not challenging the reliability of [both experts'] testimony, even conceding that it agree[d] with much of their methodology," the City challenged the experts' "ultimate opinions."[413] The court disposed of the landfill management expert's testimony by noting that the expert had tested ambient levels of benzene in a nearby well some five years after the plaintiffs' daughter's exposure, rather than ambient benzene levels in the air near the home itself.[414] Therefore, the court found that the landfill expert's opinion "is the kind of naked conclusion that cannot support a judgment."[415] Next, the court disposed of the plaintiffs' medical expert because that expert testified that some of the plaintiffs' daughter's "chromosomal anomalies" resulted from benzene, though her other anomalies "were unrelated to benzene exposure."[416] Therefore, the court found that the medical expert's "testimony was conclusory and cannot support liability" even if the expert was never objected to at trial.[417] The court then reversed the court of appeals' judgment and rendered a take nothing judgment against the plaintiffs.[418]

b. A Closer Look at the Facts

i. *Leitch v. Hornsby*, 935 S.W.2d 114 (Tex. 1996).

In *Leitch*, the court reversed a jury verdict, finding that no evidence supported the jury's determination of proximate cause.[419] An employee was injured in lifting a 65-pound cable spool.[420] The employer negligently had not provided proper safety equipment, including lift belts.[421] The court concluded, however, that there was no evidence at trial that a lift belt would have prevented the employee's back injury:

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[412] *Id.* at 818–19.

[413] *Id.* at 818.

[414] *Id.* at 818–19.

[415] *Id.* at 819.

[416] *Id.* at 820.

[417] *Id.*

[418] *Id.* at 821.

[419] Leitch v. Hornsby, 935 S.W.2d 114, 119–20 (Tex. 1996).

[420] *Id.* at 116.

[421] *Id.*

> [Plaintiff] Hornsby's treating physician testified that lifting the cable reel caused Hornsby's back injury. However, in response to a question about whether Hornsby's injury could have been prevented by the use of a lift belt, Hornsby's treating physician testified: "I would be unable to comment. I don't think there is anything that would be available to say yes or no in that respect." This testimony is no evidence of causation.[422]

Although the employee's co-worker testified that the injury would have been prevented, the co-worker was not a properly qualified expert witness.[423] Interestingly, Justice Greg Abbott's concurrence stated that the co-worker's answer "that the 'lift belt would have eliminated this injury,' would establish proximate cause if [he] had been a properly qualified expert witness."[424] In other words, Justice Abbott apparently believed that, had this opinion been *admissible*, it would have been *sufficient*, a position that the court has since rejected, as discussed below.

Justice Abbott also wrote separately to further explain why the court's reversal did not exceed its constitutional limitations on factual review.[425] He acknowledged the constitutional limitations, but continued:

> The limitations on this Court's ability to review evidence do not mandate, however, that we abstain from reviewing a jury's verdict when a party fails to offer *any* evidence on an element of a cause of action. Simply because a party presents several days of testimony for the jury's consideration does not mean that this Court is exceeding its constitutional limitations by requiring that the testimony amount to a scintilla of evidence in support of the legal elements of the cause of action. While jurors are vested with the authority to evaluate the evidence and weigh the credibility of witnesses, some legally sufficient evidence must nevertheless exist to support their verdict.[426]

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[422] *Id.* at 119.

[423] *Id.*

[424] *Id.* at 122 (Abbott, J., concurring).

[425] *Id.* at 120.

[426] *Id.* (emphasis original).

Notably, the author of the court of appeals' decision finding sufficient causation evidence was Justice Phil Hardberger, who has since criticized the "motives" and "ideology" of the Texas Supreme Court.[427] The court of appeals deferred to the jury's resolution of the "partially conflicting testimony to the degree that Dr. Geibel testified that safety belts do not necessarily prevent lifting injuries."[428]

ii. *Volkswagen of America, Inc. v. Ramirez*, 159 S.W.3d 897 (Tex. 2004).

Perhaps no case demonstrates the intersection between the court's evolving standard of evidentiary review and its approach to causation better than this one. The plaintiffs sued a car manufacturer, alleging that a defect in a car caused an accident.[429] In the first trial, the jury returned a unanimous verdict in favor of the defendant.[430] The trial court rendered a take-nothing judgment in favor of the defendants but subsequently granted a motion for new trial.[431] In the second trial, the jury returned a $17 million verdict for the plaintiffs.[432] The Corpus Christi Court of Appeals affirmed.[433] The alleged defect in the car was a wheel axle that separated from the car.[434] The plaintiffs argued that the separated wheel was the "proximate cause" of the accident, while the defendant argued that it was the result of the accident.[435] There was also videotape testimony of a witness at the scene who saw the tire blow up before the car crossed the median and collided with the plaintiffs' car.[436] The court found that the testimony of the plaintiffs' accident reconstruction expert, who was unable

[427] *See* Dorsaneo, *supra* note 3, at 1514; *see also* Phil Hardberger, *Juries Under Siege*, 30 St. Mary's L.J. 1, 141 (1998).

[428] Leitch v. Hornsby, 885 S.W.2d 243, 248 (Tex. App.—San Antonio 1994), *rev'd*, 935 S.W.2d 114 (Tex. 1996).

[429] Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 901 (Tex. 2004).

[430] *Id.*

[431] *Id.*

[432] *Id.* at 902.

[433] *Id.* at 903.

[434] *Id.* at 901–02.

[435] *Id.* at 902.

[436] *Id.* Note how the court characterizes this evidence: "[A]t trial the [plaintiffs] showed a videotaped *interview* of an *unidentified* witness at the scene of the accident who *purported* to see the Passat's tire blow up before it crossed the median and collided with the Mustang." *Id.* (emphasis added). No weighing of evidence, indeed.

to identify any studies, publications or peer reviews that supported his position that the alleged defect was the cause of the accident, should have been excluded, and thus, the plaintiffs were left with no evidence of causation (the expert did cite his significant accident reconstruction experience and "the laws of physics"):

> It is far from clear how the detached wheel could "follow the vehicle" in the wheel well as it crossed the median. However, even more concerning in light of our jurisprudence is that [Plaintiffs' expert] performed no tests and cited no publications to support his opinion that the wheel was traveling at a higher velocity than the Passat which, by principles of physics, kept the wheel in the well. . . . Here, [Plaintiffs' expert] does not close the "analytical gap" . . . .[437]

The court reversed and rendered a take-nothing judgment in favor of the manufacturer.[438]

In dissent, Chief Justice Jefferson (joined by Justice O'Neill) argued that the expert testimony was sufficient on causation.[439] "Reasonable jurors could have accepted Volkswagen's theory and rejected Cox's (as they did in the first trial), or accepted Cox's and rejected Volkswagen's (as they did here), but unlike the jury, *this Court lacks constitutional authority to weigh conflicting evidence*."[440] The dissent questioned the majority's equating of the expert testimony in the case with the paltry evidence presented in *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227, 231 (Tex. 2004):

> By equating [the expert's] testimony here with the paltry testimony at issue in *Coastal*, the Court sets a dangerous

[437] *Id.* at 906. The court likewise disposed of the videotaped eyewitness statement about what happened by ruling that the trial court abused its discretion in admitting the evidence since it was hearsay not falling within the "excited utterance" exception, even though it was made in an interview at the scene while the "Jaws of Life" were being used to extract the injured parties. "The evidence shows that some time had passed . . . . During the interview, the witness was composed . . . . These facts combined show that the witness had time to ponder the event to give considered testimony after the stress of the excitement of the accident had subsided." *Id.* at 909.

[438] *Id.* at 912.

[439] *Id.* at 913–14 (Jefferson, J., dissenting).

[440] *Id.* (emphasis added). The dissent agreed with the exclusion of the videotaped witness's statement. *Id.* at 914.

> precedent that threatens to fundamentally alter the nature of no evidence review . . . . A court may decide as a matter of law that the former examples [i.e., "the moon is made of green cheese"] are "no evidence," but when more than a scintilla of objective evidence supports an expert's conclusions in a technical area in which judges have no particular expertise, and when that expert's methodology is not challenged on appeal, the question becomes one of factual, and not legal, sufficiency.
>
> Rather than indulging every reasonable inference in favor of the jury's finding, the Court adopts a contrary approach, tipping the scale in the opposite direction to dismiss as "conclusory" expert testimony that supports the verdict. This Court is constitutionally bound to conduct only a legal—not factual—sufficiency review. *See* TEX. CONST. art. V, § 6 . . . . While a jury or court of appeals may find [the expert's] testimony *factually* insufficient on causation, it is at least *some evidence*.[441]

iii. *Tarrant Regional Water District v. Gragg*, 151 S.W.3d 546 (Tex. 2004).

In *Gragg*, the court found sufficient evidence that the defendant District's construction and operation of a reservoir was the cause of increased flooding on the plaintiff's property.[442] The court examined the evidence of causation.[443] Interestingly, the court pointed to, among other things, evidence that the flooding after the reservoir was constructed exceeded the flooding before its construction:

> [T]he issue is significantly changed flooding characteristics that occurred despite similar circumstances so that it can be inferred that the reservoir was to blame. Here, the District's own modeling showed that the number and duration of floods at the Ranch in the 1990s, after the reservoir's construction, were higher than in the 1940s, a period of comparable rainfalls. Similarly, Troy Lovell, another of the

[441] *Id.* at 917–18 & n.3 (citations omitted) (emphasis in original).

[442] Tarrant Reg'l Water Dist. v. Gragg, 151 S.W.3d 546, 549 (Tex. 2004).

[443] *Id.* at 552–54.

> District's expert witnesses, also testified that flood-gauge data showed flooding in the Gragg Ranch's vicinity in 1993 and 1995 lasting twice as long as floods in 1952, 1959, 1962, and 1965 that occurred in periods of similar rainfall. Although the District's experts attributed the increase in flooding during the 1990s, as opposed to the 1940s, to the construction of various flood-control projects in the interim, those projects were in place before 1959.[444]

Some might argue that, in its discussion of this evidence, the court fell victim to the post hoc fallacy. In other words, logic would say that causation is not demonstrated merely because the property's flooding characteristics differed in the 1990s from the 1940s, 1950s, and 1960s. Certainly, where the correlation in time between two events is very close, or where the correlation is repeatedly demonstrable, this would seem to be greater evidence of causation (although not absolute proof). But evidence that flooding characteristics changed between the 1960s and the 1990s (and a reservoir was built in the interim), without more, might seem to a later court an extremely weak indicator of causation.[445] "We hold that the evidence in this case supports the trial court's findings that the extensive damage the Gragg Ranch experienced was the inevitable result of the reservoir's construction and of its operation as intended."[446]

The court also sidestepped the attack on the "reliability" of plaintiff's expert testimony on causation, finding other sources that supported the trial court's findings.[447] The court has since rejected attempts to prove causation by demonstrating a temporal correlation where the temporal relationship between the injury and the alleged cause is much closer than it was in *Gragg*.[448]

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[444] *Id.* at 553–54.

[445] The *Gragg* court cited some evidence of causation other than a temporal correlation, such as an eyewitness who claimed that, when the reservoir's gates were opened, the water in the river near Gragg's ranch moved much faster. *Id.* at 553. Although a temporal relationship may not ultimately *prove* causation, it could generally be considered as some evidence of causation. *Id.*

[446] *Id.* at 555.

[447] *See id.* at 552–53.

[448] *See, e.g.*, Guevara v. Ferrer, 247 S.W.3d 662 (Tex. 2007) (discussed in more detail *infra* notes 471–78).

iv. *General Motors Corp. v. Iracheta*, 161 S.W.3d 462 (Tex. 2005).

In an opinion in many ways anticipating the court's *City of Keller* opinion later that same year, the court is by this time unapologetic in its weighing of the evidence to reverse a court of appeal's finding of factually sufficient evidence. In a products liability case, the jury found in favor of the plaintiffs, and the court of appeals affirmed the judgment.[449] The Texas Supreme Court reversed and rendered, finding that the plaintiffs' experts offered contradictory testimony on causation, and that this contradictory testimony was fatal to the plaintiffs' claims.[450] The key issue in *Iracheta* was whether improper gasoline leaking ("siphoning") occurred in the fuel system at the rear or at the front of the vehicle, causing a lethal explosion.[451] The court effectively conducted a credibility analysis, pointing to conflicts *between* the testimony of the two experts and *internal conflicts* in the testimony of the each expert.[452] The court concluded:

> [Plaintiff] attempts to borrow from each of her experts pieces of opinion[s] that seem to match, tie them together in an ill-fitting theory, discard the unwanted opinions, disregard the fact that the experts fundamentally contradicted themselves and each other, and then argue that this is some evidence to support the verdict. Inconsistent theories cannot be manipulated in this way to form a hybrid for which no expert can offer support.[453]

The court rejected the experts'—and the plaintiff's—attempts to reconcile the testimony and explain the apparent conflicts.[454] Of course, even conflicting evidence is some evidence, so that a factual sufficiency review should have been precluded. The opinion suffers from the exact same problem that worried Chief Justice Jefferson in *Ramirez*.[455]

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[449] Gen. Motors Corp. v. Iracheta, 161 S.W.3d 462, 464 (Tex. 2005).

[450] *Id.* at 465–66, 472.

[451] *Id.* at 464.

[452] *See id.* at 465–70.

[453] *Id.* at 472 (citing Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 911 (Tex. 2004)). Apparently "manipulation" of inevitable inconsistencies between any two experts and the "discarding of unwanted opinions" is permitted in a "legal sufficiency" review finding for a defendant.

[454] *Id.*

[455] *Ramirez*, 159 S.W.3d at 916–17 (Jefferson, J., dissenting).

v. *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797 (Tex. 2006).

The plaintiffs sued a tire manufacturer in strict liability following a car accident.[456] The jury found for the plaintiffs, and the court of appeals affirmed.[457] On appeal, the defendant contended that the plaintiffs' experts were not qualified to testify regarding causation.[458] The court found that none of the three experts were qualified to testify regarding the alleged tire separation defect.[459] The supreme court held that the plaintiffs' theory of "wax contamination" of the skim stock was nothing more than a "naked hypothesis untested and unconfirmed by the methods of science and was legally insufficient to establish a manufacturing defect," and found that none of the plaintiffs' experts possessed sufficient specialized training or experience to testify competently in support of this theory.[460] Consistent with its approach in *Ramirez* and *Iracheta*, the court reversed and rendered in favor of the defendant.[461] Given prominence in the opinion is the substance of the opposing expert opinions on "wax migration," which the court seemed to weigh favorably in favor of the defendant (or else why would the court even mention it?).[462]

vi. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572 (Tex. 2006).

A truck manufacturer was sued for negligence and strict liability following a truck crash resulting in the death of the driver.[463] The defendant moved to exclude the plaintiffs' causation expert and moved for summary judgment.[464] The trial court excluded the plaintiffs' expert and granted the defendant's summary judgment motion.[465] The court of appeals reversed the trial court's ruling, holding that it abused its discretion in excluding the

[456] Cooper Tire & Rubber Co. v. Mendez, 204 S.W.3d 797, 799 (Tex. 2006).

[457] *Id.*

[458] *See id.* at 800.

[459] *See id.* at 807.

[460] *Id.* at 805, 807.

[461] *Id.* at 808.

[462] *Id.* at 804.

[463] Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 575 (Tex. 2006).

[464] *Id.* at 576.

[465] *Id.*

expert's testimony.[466] The Texas Supreme Court held that the expert's testimony was properly excluded.[467] The court found that the various "factors and facts" set forth by the expert in support of his opinion were not probative evidence that the diesel fuel that caused the fire was caused by any defect.[468] The court found that the expert could not testify to any methodology that he used to reach the conclusion that the fire was caused by any defect.[469] Lacking such a methodology, the court found the expert's opinions to be unreliable, and the court affirmed the decision of the trial court.[470]

vii. *Guevara v. Ferrer*, 247 S.W.3d 662 (Tex. 2007).

The court of appeals affirmed a plaintiff's verdict in a personal injury case, stating Arturo "did not suffer from any of his post-accident injuries prior to the accident," that he was not in bad health prior to the accident, and that "[n]o great length of time passed between the accident and [Arturo's] death during which he was not in the hospital or receiving care at home."[471]

The court, in reversing the court of appeals, found that non-expert evidence could be sufficient to establish causation only where the causal connections "are within a layperson's general experience and common sense."[472] The court held that injuries which manifested themselves immediately after the accident in question were sufficiently within the scope of a layperson's general experience and common sense to sustain a verdict for the plaintiff, but that the same could not be said regarding injuries which were diagnosed later in time.[473] For those injuries, expert testimony was required.[474]

After *Guevara*, plaintiffs may be uncertain as to whether their claims will require expert testimony to causally connect their injuries to the defendant's breach. The answer to what falls within "general experience

[466] *Id.*

[467] *Id.* at 576–77.

[468] *Id.* at 580.

[469] *Id.* at 580–81.

[470] *Id.* at 581.

[471] Guevara v. Ferrer, 247 S.W.3d 662, 665 (Tex. 2007) (alterations in original).

[472] *Id.* at 668.

[473] *Id.* at 669–70.

[474] *See id.* at 668.

and common sense" may be somewhat arbitrary and difficult to anticipate. And, as some of the foregoing cases show, even expert testimony is laden with potential pitfalls in this court.[475] The *Guevara* court distinguished an earlier case that had credited evidence of a temporal relationship between the injury and the alleged cause.[476] In *Morgan v. Compugraphic Corp.*, the Texas Supreme Court stated:

> Morgan had always been in good health prior to returning to work from her vacation. Upon returning to her job, she worked with her face two inches from a typesetting machine which, it is admitted by default, was leaking chemical fumes. Soon after resuming her employment, that is, soon after being exposed to the fumes emanating from the typesetting machine, Morgan experienced problems with "breathing and swelling and the like." . . . Morgan developed symptoms such as watering of the eyes, blurred vision, headaches and swelling of the breathing passages. We believe this evidence establishes a sequence of events from which the trier of fact may properly infer, without the aid of expert medical testimony, that the release of chemical fumes from the typesetting machine caused Morgan to suffer injury.[477]

The court in *Guevara* dismissed *Morgan* by stating, "Competent proof of the relationship between the event sued upon and the injuries or conditions complained of has always been required. In *Morgan*, we merely applied the rule to a particular set of facts."[478]

3. Mental Health Cases.

a. *IHS Cedars Treatment Center v. Mason*, 143 S.W.3d 794 (Tex. 2004).

A physician, a nurse, and a mental health facility were sued for negligence by a patient who had been discharged from the facility.[479] The

[475] *See supra* Part VI.A.2.a.

[476] *Guevera*, 247 S.W.3d at 666.

[477] Morgan v. Compugraphic Corp., 675 S.W.2d 729, 733 (Tex. 1984).

[478] *Guevera*, 247 S.W.3d at 666.

[479] IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason, 143 S.W.3d 794, 796 (Tex.

plaintiff, Mason, voluntarily checked into the facility and remained there for three weeks.[480] She and another patient, Thomas, were discharged after requesting to be released, but prior to their scheduled discharge date it was clear they intended to spend time together immediately upon discharge.[481] Twenty-eight hours after being discharged, Thomas, Mason, and another passenger were involved in a single-car accident after Thomas experienced a "psychotic episode" and flipped her car.[482] Mason was paralyzed and subsequently sued the health care providers for negligent discharge.[483] The trial court granted summary judgment in favor of the defendants on the ground that their negligence, if any, was not the proximate cause of Mason's injuries.[484] A divided court of appeals reversed and remanded the case for trial.[485]

The Texas Supreme Court, citing *Lear*, *Siegler*, and *Allbritton*, reversed the judgment of the appellate court and affirmed the trial court's grant of summary judgment in favor of the defendants, stating, "Our precedents establish that merely creating the condition that makes harm possible falls short as a matter of law of satisfying the *substantial factor* test."[486] The court invoked the "substantial factor" language of *Allbritton*, and applied a causation (rather than duty) analysis in discussing the "attenuation of the causal connection between conduct and liability"—that is, whether the alleged breach of duty could be considered the "legal cause" of Mason's injuries.[487] The court further explained that "Thomas's speeding and psychotic episode and swerving the car to miss the dog in the road caused Mason's injuries, not negligent treatment or negligent discharge."[488] Describing its view of the evidence as focusing on "the unfortunate appearance of a dog in the road," the court concluded: "Often, as in this case, the causal link between conduct and injury will be too remote to be

2004).

[480] *Id.*

[481] *Id.* at 796–97.

[482] *Id.* at 797.

[483] *Id.*

[484] *Id.*

[485] *Id.* at 797–98.

[486] *Id.* at 800 (emphasis added).

[487] *Id.* at 799.

[488] *Id.* at 801.

legally significant when *two separate and sequential tortious incidents* join to lead to the injury."[489]

The court was correct that Thomas' speeding, psychotic episode, *and* car-swerving caused the wreck that injured Mason. But that does not foreclose the possibility that negligent treatment or negligent discharge *also* could have caused the injuries. The Dallas Court of Appeals held that some of the defendants should have foreseen that Mason had developed an unhealthy relationship with Thomas, that Thomas was dangerous, and that Mason's association with Thomas was likely to put her in harm's way.[490] The appeals court would have left the proximate cause issue to the jury.[491] That court also conducted a duty analysis—something that the Texas Supreme Court never reached because it addressed foreseeability and causal attenuation under its causation analysis.[492]

b. *Providence Health Center v. Dowell*, 262 S.W.3d 324 (Tex. 2008).

Lance Dowell was taken to the emergency room with a superficial, self-inflicted injury to his wrist.[493] Dowell, distraught over problems with his girlfriend, threatened to kill himself and was taken to the hospital.[494] He was released by the hospital after promising that he would not try to kill himself, that he would stay with his parents, and that he would attend a follow-up psychological assessment.[495] Thirty-three hours after being discharged from the hospital, Dowell hanged himself.[496] His parents sued

[489] *Id.* at 800 (emphasis added). The court also rejected the proffered expert testimony. "[The expert's testimony] does no more than support Mason's contention that [defendants] created the condition that caused her injuries. This falls short of being evidence of proximate cause." *Id.* at 803. Of course, the use of the canard, "does no more than create the condition," is a signpost that the court is engaged in weighing evidence.

[490] *See* Mason v. IHS Cedars Treatment Ctr. of DeSoto Tex., Inc., No. 05-98-00832-CV, 2001 Tex. App. LEXIS 5494, at *13 (Tex. App.—Dallas Aug. 15, 2001), *rev'd*, 143 S.W.3d 794 (Tex. 2004).

[491] *See id.* at *14 ("It should be up to a jury to decide whether the effect of Ramos's conduct was a substantial factor that operated to bring harm to Mason or whether the connection between Ramos's conduct and Mason's injuries was too remote to warrant liability.").

[492] *Id.* at *23–24.

[493] Providence Health Ctr. v. Dowell, 262 S.W.3d 324, 325 (Tex. 2008).

[494] *Id.*

[495] *Id.*

[496] *Id.*

the hospital and several members of the medical staff that authorized his release.[497] The jury found in favor of the plaintiffs, and the court of appeals affirmed.[498]

On appeal to the Texas Supreme Court, the defendants argued that any negligence was not, as a matter of law, a proximate cause of Lance's death.[499] The court agreed with the defendants, finding that "several things defeat causality."[500] First, the court cited the undisputed evidence that the hospital could not have held Lance involuntarily and that Lance would not have consented to being held at the hospital.[501] Second, the plaintiffs' expert did not testify that hospitalization would have prevented the suicide.[502] Third, the court found:

> Lance's discharge from the ER was simply too remote from his death in terms of time and circumstances. After Lance's release, his mother watched him carefully and checked him repeatedly. She took him to a family retreat where he would be surrounded by people who would support him. She called to hear him assure her he was okay. Lance's brother did what he could to lift Lance's spirits and be sure that he would be in a group. They saw no cause for alarm in Lance's weekend behavior, and no one reported anything unusual to them. If Lance had followed the written discharge instructions to "[s]tay w/ parents", then as the Dowells' expert conceded, it is doubtful he would have committed suicide. And if he had been hospitalized, the Dowells' expert could not rule out the possibility that he still would have killed himself.[503]

The court, relying on *IHS Cedars*, found that "Lance's inability to cope with personal crises led to his death."[504] The court concluded:

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[497] *Id.*

[498] *Id.* at 327–28.

[499] *Id.* at 328.

[500] *Id.*

[501] *Id.*

[502] *Id.*

[503] *Id.* at 328–29.

[504] *Id.* at 329.

> [T]he defendants' negligent conduct was their failure to comprehensively assess his risk for suicide. Because there is no evidence that Lance could have been hospitalized involuntarily, that he would have consented to hospitalization, that a short-term hospitalization would have made his suicide unlikely, that he exhibited any unusual conduct following his discharge, or that any of his family or friends believed further treatment was required, the defendants' negligence was too attenuated from the suicide to have been a substantial factor in bringing it about.[505]

Accordingly, the court reversed the judgment and rendered judgment for the defendants.[506] Justice Wainwright, concurring in part and dissenting in part, concurred in the reversal of the court of appeals, but argued that remand was proper.[507] He believed that reversal was required because the trial court improperly refused to submit a proportionate responsibility question to the jury.[508] Wainwright stated, "If Lance's actions apart from the act of committing suicide violated an applicable standard of care (such as negligence), a jury should have weighed such actions in assigning proportionate responsibility."[509]

Justice O'Neill, joined by Chief Justice Jefferson and Justice David Medina, dissented, arguing that the plaintiffs presented expert testimony showing that the suicide assessment conducted at the emergency room was incomplete and cursory, and that it breached the applicable standard of care.[510] The dissent stated that to reach its desired result, the majority "constructs new legal hurdles that are insurmountable, particularly when, as here, the provider's alleged negligence results in death."[511] Justice O'Neill argued that the new causative element added by the majority that requires a showing that the patient would have followed appropriate medical advice

[505] *Id.* at 329–30.

[506] *Id.* at 330.

[507] *Id.* (Wainwright, J. concurring in part and dissenting in part).

[508] *Id.* at 331.

[509] *Id.* at 332.

[510] *Id.* at 333 (O'Neill, J., dissenting).

[511] *Id.*

had it been given, is an impossible standard that can never be met, as any such testimony would necessarily be excluded as speculative.[512]

c. Dallas County v. Posey, 290 S.W.3d 869 (Tex. 2009).

In *Posey*, the parents of a young man sued the county after their son, Bryan, was arrested and left alone in a room with an inoperative, corded telephone, which he used to commit suicide.[513] After Bryan's arrest for assault, county police officers filled out the standard prisoner intake form, which included a "Suicide Screening Form."[514] The officers filled out most of the form, but left blank a question that inquired whether the officers believed Bryan was a "medical, mental health, or suicide risk."[515] Bryan was later placed in a holding cell with a broken corded telephone.[516] The phone also contained exposed wires, and Bryan laced the receiver through the loose wires to create a loop and strangle himself.[517]

The plaintiffs sued the county claiming negligence in failing to assess their son's suicide risk and in placing him in a cell with a defective, corded telephone.[518] In an attempt to avoid liability through governmental immunity, the county filed a plea to the jurisdiction.[519] Chapter 101 of the Texas Civil Practices and Remedies Code, however, states that governmental immunity is waived for "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law."[520] Finding an adequate causal nexus between the placement of the defective corded phone and the death of the son, the trial court found the county had waived governmental immunity under Chapter 101, and denied its plea to the jurisdiction.[521] The appellate court affirmed,

[512] *Id.* at 334.

[513] Dallas Cnty. v. Posey, 290 S.W.3d 869, 871 (Tex. 2009) (per curiam).

[514] *Id.*

[515] *Id.*

[516] *Id.*

[517] *Id.* at 872.

[518] *Id.* at 871.

[519] *Id.*

[520] *Id.*; TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2) (West 2012).

[521] *Posey*, 290 S.W.3d at 871.

finding "without the corded telephone being in the cell, Bryan Posey would not have died by hanging himself with the telephone's cord."[522]

On appeal, the court examined whether there was a proximate cause created by a causal nexus "between the condition of the [county's] property and the injury."[523] The court reasoned that "[t]his nexus requires more than mere involvement of property; rather, the condition must actually have caused the injury."[524] Reversing the appellate and trial courts, the Texas Supreme Court determined:

> there was no causal nexus between the condition of the exposed wires and the injury. . . . [T]he exposed wires here did not cause the injury; they instead constituted no more than a condition of the property that was then used by [Brian] Posey to form a ligature for suicide. The requisite nexus between the condition complained of and the harm was thus not established.[525]

Accordingly, and "without hearing," the court found that the county had not waived its immunity, vacated the court of appeals' judgment and dismissed the case.[526]

4. Other Causation Cases.

a. *Lee Lewis Construction, Inc. v. Harrison*, 70 S.W.3d 778 (Tex. 2001).

In *Lee Lewis*, the court briefly addressed the question of whether a general contractor's negligence in failing to use adequate safety protection proximately caused the fatal fall of a subcontractor's employee.[527] The court held the evidence legally sufficient to support proximate cause.[528] The more troublesome question for the court was one of duty.[529] The majority found that the general contractor exercised a level of control over its subcontractor

[522] *Id.* at 872.

[523] *Id.*

[524] *Id.*

[525] *Id.*

[526] *Id.*

[527] Lee Lewis Constr., Inc. v. Harrison, 70 S.W.3d 778, 782 (Tex. 2001).

[528] *Id.*

[529] *Id.* at 783–84.

sufficient to raise a duty to exercise reasonable care for the safety of the subcontractor's employees.[530] Justice Hecht's concurrence, in which Justice Owen joined, argued that the court should hesitate in independent contractor cases to impose a duty on the independent contractor's employer.[531] He worried that the court, by finding a duty based on the general contractor's retention of control over job safety, "punished the general contractor who tried to protect workers by controlling job safety and exonerated the general contractor who stood aside and let them fend for themselves."[532] Justice Hecht concurred in the result, however, because he found gross negligence in this case, and believed that to be sufficient to impose liability on the employer of an independent contractor who retained control over the safety of the contractor's employees.[533]

b. *Dillard v. Texas Electric Cooperative*, 157 S.W.3d 429 (Tex. 2005).

A truck driver for Texas Electric Cooperative ("TEC") hit a cow in the road, leaving it dead in the opposite lane of traffic.[534] A few minutes later, Brown, traveling the opposite direction, hit the dead cow, losing control of her vehicle and colliding with Dillard's vehicle, killing Dillard and injuring his wife and daughter.[535] Dillard sued TEC, alleging negligence in operating an overloaded truck and failing to warn oncoming motorists of the accident.[536] TEC contended that the accident was caused solely by the conduct of the unknown person who allowed the cows to be on the roadway.[537] TEC requested that the definition of proximate cause include the following sentence: "There may be more than one proximate cause of an event, but if an act or omission of any person not a party to the suit was the 'sole proximate cause' of an occurrence, then no act or omission of any other persons could have been a proximate cause."[538] The trial court refused

[530] *Id.* at 784.

[531] *See id.* at 788–89 (Hecht, J., concurring).

[532] *Id.*

[533] *Id.* at 799.

[534] Dillard v. Tex. Elec. Coop., 157 S.W.3d 429, 430 (Tex. 2005).

[535] *Id.*

[536] *Id.* at 430–31.

[537] *Id.* at 431.

[538] *Id.* This requested instruction was taken from Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: General Negligence & Intentional Personal Torts* PJC 3.2 (2010).

to provide this instruction.[539] TEC also requested that the following unavoidable accident instruction be included in the definition of proximate cause: "An occurrence may be an 'unavoidable accident,' that is, an event not proximately caused by the negligence of any party to it," and the trial court granted this request.[540] The jury found for Dillard, but the court of appeals reversed, concluding that the trial court's refusal to provide instructions requested by TEC constituted reversible error.[541] The Texas Supreme Court granted the plaintiff's petition for review to determine the inferential rebuttal jury instruction issue.[542] Justice O'Neill, writing for the court, found that the trial court's refusal to include the sole proximate cause instruction was not reversible error:

> [J]urors need not agree on what person or thing caused an occurrence, so long as they agree it was not the defendant. If some jurors here blamed the cattle (unavoidable accident or sudden emergency) and the rest blamed the unknown cow owner (sole proximate cause), their differences would be irrelevant—they would properly return a unanimous defense verdict. Just as jurors may find against a defendant without agreeing on which precise acts were negligent, they should be able to find the opposite without agreeing on the precise reason. The trial court's instruction presented that alternative to the jury, and TEC was entitled to nothing more.[543]

Accordingly, the court reversed the judgment of the court of appeals and remanded the case to the court of appeals for consideration of TEC's remaining issues.[544]

c. *Trammell Crow Central Texas, Ltd. v. Gutierrez*, 267 S.W.3d 9 (Tex. 2008).

This negligence case was decided on foreseeability grounds, but it was decided as a "duty" case rather than one of proximate cause. A movie-goer

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[539] *Dillard*, 157 S.W.3d at 431.

[540] *Id.* (citing Tex. PJC 2.4 (Proximate Cause) & Tex. PJC 3.4 (Unavoidable Accident)).

[541] *Id.*

[542] *Id.*

[543] *Id.* at 434.

[544] *Id.*

had just exited the theater and was on his way to his car when he was shot and killed.[545] The decedent's survivors sued the property manager, claiming that the property had inadequate security.[546] The parties presented competing theories at trial, the plaintiffs claiming that the attack was a robbery, and the defendant characterizing the attack as revenge for the decedent's having provided information to the police regarding a series of burglaries.[547] The jury found in favor of the plaintiffs, and the trial court awarded over five million dollars in damages.[548] A divided en banc court of appeals affirmed.[549]

The Texas Supreme Court, however, held that the property manager had no duty to protect the decedent from unforeseeable crimes, and that, even if this was a robbery, the murder was not foreseeable.[550] The court concluded that ten robberies on the property in the preceding two years, including three involving guns, were insufficient and too dissimilar.[551] The court's concluding statements convey the impression that the court was convinced that this was not a random crime:

> Even viewing the attack on Luis as a robbery, as we presume the jury did, the circumstances of this attack are extraordinary. The assailant opened fire from behind at long range without making any prior demand. After missing with the first shot, the attacker proceeded to shoot Luis four times from behind before taking his wallet. Nothing about the previous robberies committed at the Quarry Market put Trammell Crow on notice that a patron would be murdered as part of a robbery on its premises. Thus, Luis's death was not foreseeable, and Trammell Crow did not have a duty to prevent the attack.[552]

Four justices concurred, arguing that this type of attack may have been generally foreseeable, but that the defendant's security measures were

[545] Trammell Crow Cent., Ltd. v. Gutierrez, 267 S.W.3d 9, 11 (Tex. 2008).

[546] *Id.*

[547] *Id.* at 11–12.

[548] *Id.* at 12.

[549] *Id.*

[550] *Id.* at 17.

[551] *Id.* at 16–17.

[552] *Id.* at 17.

reasonable (and, therefore, sufficient) given the relatively small risk of such an attack.[553]

d. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Development & Research Corp.*, 299 S.W.3d 106 (Tex. 2009).

In *Akin Gump*, the court reviewed the award of damages in the plaintiff's favor resulting from the defendant law firm's alleged malpractice and negligence, which resulted in a significant loss to the plaintiff in the underlying representation.[554] The plaintiff retained Akin Gump to recover money owed by a customer.[555] The plaintiff contended that the law firm negligently failed to request certain jury questions, which caused the plaintiff to lose the underlying trial.[556] The jury found the law firm liable for the compensation that it failed to recover, as well as for the attorneys' fees and expenses that the client had paid in the underlying action.[557] The trial court awarded the plaintiff roughly $700,000 in damages plus over $200,000 in attorneys' fees the plaintiff had previously paid to Akin Gump.[558] The court of appeals reversed the award of attorneys' fees and expenses to the client but affirmed the remainder of the judgment.[559]

The court then reversed the court of appeals' affirmance of the damages, finding rather vaguely that "none of the evidence [the plaintiff] cites is legally sufficient to prove collectability of damages" in the underlying suit.[560] The court decided there was "legally insufficient evidence" to support that damages in the underlying case would have been collectible or that the defendant's negligence proximately caused the entire amount the jury awarded as damages for attorney's fees and expenses.[561] The court therefore rendered a take nothing judgment on the plaintiff's claims, and remanded only the issue of collectible attorneys' fees because the court

[553] *Id.* at 17–19 (Jefferson, J., concurring).

[554] Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp., 299 S.W.3d 106, 109 (Tex. 2009).

[555] *Id.* at 110.

[556] *Id.* at 111.

[557] *Id.*

[558] *Id.*

[559] *Id.*

[560] *Id.* at 118.

[561] *Id.* at 111.

found there was evidence that the attorneys' negligence caused *some* amount of damages, but not the full $200,000 awarded by the jury.[562] The court specifically remanded the issue of the attorneys' fees and directed the appellate court to suggest a remittitur, or if "the court of appeals determines that suggestion of remittitur is not appropriate or is unable to successfully suggest a remittitur, then the part of the case involving liability and attorney's fees and expenses . . . should be remanded for new trial."[563]

e. *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851 (Tex. 2009).

In *Columbia Rio Grande Healthcare*, Ms. Hawley suffered from ruptured diverticuli, and her primary care physician sent her to the defendant hospital for the removal of part of her colon.[564] An examination of the removed colon tissue revealed that Ms. Hawley had cancer, but the hospital did not inform Hawley of this fact, and she did not discover it for another year.[565] She sued the hospital for negligence, and the key issue in the case was whether she would have had a greater than fifty percent chance of survival had the hospital told her of the cancer (and had she begun treatment at that point).[566] The jury found that the hospital's negligence was a proximate cause of the plaintiff's injuries, and the appellate court affirmed.[567] Sufficiency of the causation evidence (the chance-of-survival issue) was a hotly contested in trial, and on appeal, and the defendant requested the following jury the instruction:

> You are instructed that [the plaintiff] must have had greater than a fifty percent (50%) chance of survival on November 28, 2000 for the negligence of [the defendant] Rio Grande Regional Hospital to be a proximate cause of injury to [the plaintiff].[568]

[562] *Id.* at 123–24.

[563] *Id.* at 124.

[564] Columbia Rio Grande Reg'l Healthcare, L.P. v. Hawley, 188 S.W.3d 838, 843 (Tex. App.—Corpus Christi 2006), *rev'd*, 284 S.W.3d 851 (Tex. 2009).

[565] *Id.*

[566] *Id.* at 844–45.

[567] *Id.* at 843–44.

[568] *Id.* at 862; Columbia Rio Grande Healthcare, L.P. v. Hawley, 284 S.W.3d 851, 859 (Tex. 2009).

The trial court refused to give that instruction and the appellate court affirmed, stating that the trial court had wide latitude in determining the proper instructions and because the defendant "failed to produce any precedent from a Texas court endorsing a loss-of-chance instruction, much less any precedent holding that a trial court abuses its discretion in refusing to give such an instruction."[569]

The defendant then appealed to the Texas Supreme Court, complaining principally about the form of the trial court's jury instructions.[570] The first issue addressed was whether the trial court should have instructed the jury on the "new and independent cause" claim the hospital argued existed as a result of another doctor's failure to review the pathology reports.[571] The court noted that "[n]ew and independent cause is a component of the proximate cause issue . . . [which is] not reasonably foreseeable, that destroys the causal connections, if any, between the act or omission inquired about and the occurrence in question."[572] While the court held that the hospital's pleadings were sufficient to support the instruction regarding "new and independent cause," it was not error to refuse to submit that instruction because the hospital failed to show that such a cause was "not reasonably foreseeable."[573]

The next issue was whether the trial court was required to submit a jury instruction informing the jury that, in order for the hospital's negligence to be the proximate cause of Hawley's injuries, she must have had a greater than fifty percent chance of survival when the cancer was first discovered.[574] The trial court declined to give the instruction, and the court of appeals affirmed, holding that this concept was "inherent in the jury charge," because the loss-of-chance rule is not a separate hurdle for plaintiffs but is merely an application of the ultimate "preponderance of the evidence" standard of proof.[575]

The Texas Supreme Court examined the "loss of chance" instruction first.[576] The court held that proof that a patient lost *some* chance of avoiding a medical condition or of surviving the cancer because of defendant's

[569] *Columbia Rio Grande Reg'l Healthcare*, 188 S.W.3d at 863.

[570] *Columbia Rio Grande Healthcare*, 284 S.W.3d at 855.

[571] *Id.* at 856.

[572] *Id.* (citation omitted).

[573] *Id.* at 857, 859.

[574] *Id.* at 859.

[575] *Columbia Rio Grande Reg'l Healthcare*, 188 S.W.3d at 864.

[576] *Columbia Rio Grande Healthcare*, 284 S.W.3d at 859.

negligence is not enough for recovery of damages.[577] The testimony as to the plaintiff's loss of chance was inconsistent and the parties contested her probability of a cure or survival had she been immediately diagnosed and treated.[578] The court held that the loss of chance instruction would have provided the jury with the proper standard required by law to apply in making its findings on a hotly contested causation issue.[579] The requested instruction would have assisted the jury, was an accurate statement of applicable law, and was supported by the pleadings and evidence.[580] Therefore, the court held that the trial court abused its discretion by refusing to give the chance of survival instruction.[581]

The court thus concluded that:

> [u]nless the jury applied the law as expressed in [the defendant's] proposed instruction, it could have found that because she lost at least some chance of reduced medical treatment and survival, even if that chance was much less than fifty percent, the hospital's negligence proximately caused injury to her."[582]

The court then stated that "the refusal to give the requested instruction on loss of chance was reasonably calculated to and probably did cause the rendition of an improper judgment."[583] The court of appeals was thus reversed and the case was remanded for new trial.[584]

f. *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401 (Tex. 2009).

Following a twelve-hour graveyard shift on the job, Robert Ambriz was involved in a car accident in which he crossed the highway median.[585] His survivors sued Ambriz's employer, Nabors Drilling, for wrongful death, alleging that the defendant caused him to fall asleep at the wheel and failed

[577] *Id.* at 861.
[578] *Id.*
[579] *Id.* at 862.
[580] *Id.*
[581] *Id.*
[582] *Id.*
[583] *Id.*
[584] *Id.* at 865–66.
[585] Nabors Drilling, U.S.A., Inc. v. Escoto, 288 S.W.3d 401, 404 (Tex. 2009).

to provide necessary fatigue training.[586] The jury returned a verdict for plaintiff for nearly $6 million, holding Ambriz fifty-seven percent responsible and Nabors Drilling forty-three percent responsible.[587] The trial court then entered a judgment notwithstanding the verdict.[588]

The court of appeals reversed the judgment, holding first that the defendant "had a duty because it was aware of the dangers of fatigue, knew of Ambriz's fatigue prior to the accident in question, but nonetheless permitted him to drive home to the foreseeable peril of himself and others."[589] Despite the court of appeals' language limiting the question to "these particular circumstances," the court of appeals' opinion arguably opened the door to a significant expansion of the concept of duty, particularly with its focus on the defendant's having "permitted" Ambriz to drive.[590] How far would the duty extend? Must the employer take the employee's keys away? The dissent argued that the employer owed no duty under the circumstances.[591]

The appellate court also addressed causation and found the evidence both legally and factually sufficient to support the jury's verdict.[592] It held that the experts' testimony was reliable and admissible, and that the defendant's negligence did "much more" than merely provide a condition that made the injuries possible: "its conduct was *instrumental* in causing the fatigue, and the subsequent accident in question."[593]

The Texas Supreme Court answered these questions when they forcefully overturned the appellate court and reinstated the trial court's judgment.[594] The court distinguished this case from its previous holdings imposing liability on employers where "supervisors put clearly intoxicated workers on the road."[595] The court stated that "[u]nlike intoxication, there is no quantitative physical measure of fatigue that could be used to determine

[586] *See id.*

[587] *Id.*

[588] *Id.*

[589] Escoto v. Ambriz, 200 S.W.3d 716, 726 (Tex. App.—Corpus Christi 2006), *rev'd sub nom.* Nabors Drilling, U.S.A., Inc. v. Escoto, 288 S.W.3d 401 (Tex. 2009).

[590] *See id.*

[591] *Id.* at 735 (Castillo, J., dissenting).

[592] *Id.* at 728.

[593] *Id.* at 728–29 (emphasis added).

[594] Nabors Drilling, U.S.A., Inc. v. Escoto, 288 S.W.3d 401, 413 (Tex. 2009).

[595] *Id.* at 411 (referring to D. Hous., Inc. v. Love, 92 S.W.3d 450, 452 (Tex. 2002) and Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 308 (Tex. 1983)).

whether an employee is impaired."[596] Moreover, the court said, "Nabors did nothing to affirmatively create a risk of fatigue-related, off-duty accidents. Nabors merely established a shift work schedule and allowed its employees to decide for themselves if they were too tired to drive following their shifts."[597] Perhaps most importantly—though not admitted as such—the court stated that a "duty to protect the public from fatigued employees would impose a substantial burden on employers, which we do not believe can be reasonably justified."[598] Because the court held that "Nabors owed no duty to prevent injuries resulting from fatigue," it did not address any other causation issues and reinstated the trial court's judgment notwithstanding the verdict.[599]

VII. MOST RECENT TEXAS SUPREME COURT CAUSATION DECISIONS

The Texas Supreme Court has reinforced its defendant-friendly trend in its most recent causation, proportionate responsibility, and duty opinions rendered in 2010, 2011, and 2012.[600]

A. 2010: The Court's Causation Analysis Continues to Favor Defendants

1. *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762 (Tex. 2010).

Del Lago Partners, Inc. v. Smith presents another duty and causation case, this time involving premises liability. A fight erupted between fraternity members and a wedding party at the defendant's resort, and one of the injured patrons sued the defendant for inadequate security and for failing to prevent the fight.[601] After a plaintiff's verdict, the majority in the court of appeals held that the resort owed a duty to the injured patron (because the injury was foreseeable) and that the plaintiff presented

[596] *Id.* at 410.

[597] *Id.* at 411.

[598] *Id.*

[599] *Id.* at 413.

[600] *See* Centocor, Inc. v. Hamilton, 372 S.W.3d 140, 143 (Tex. 2012); Del Lago Partners, Inc. v. Smith, 307 S.W.3d 762 (Tex. 2010); Transcon. Ins. Co. v. Crump, 330 S.W.3d 211 (Tex. 2010); Jelinek v. Casas, 328 S.W.3d 526, 530 (Tex. 2010); *see also* Minton v. Gunn, 355 S.W.3d 634 (Tex. 2011) (Though not strictly a causation decision, it indirectly is because of the causation chain required in a malpractice claim.).

[601] *Del Lago Partners, Inc.*, 307 S.W.3d at 765–67.

sufficient evidence that, had the resort maintained adequate security in the bar, the injury could have been prevented.[602]

The dissent in the appellate court argued that no duty existed.[603] It accused the majority of using "generic, undefined, unspecified past events" in its foreseeability analysis, and of improperly examining the event history in the resort as a whole—rather than just in the bar—to determine the existence of security in the bar.[604] In distinguishing another case, the dissent also stated that, although foreseeability is a factor in the context of both duty and proximate cause, duty is typically a legal question whereas proximate cause is generally a fact question.[605] So "[t]he methods and standards of review are different."[606]

The Texas Supreme Court upheld the jury verdict and affirmed the appellate court's judgment.[607] The defendant "principally argue[d] that it had no duty to protect [the plaintiff] from being assaulted by another bar customer."[608] The court noted that the defendant:

> observed—but did nothing to reduce—an hour and a half of verbal and physical hostility in the bar. From the moment the wedding party entered, there was palpable and escalating tension. [The defendant] continued to serve drunk rivals who were engaged in repeated and aggressive confrontations."[609]

Therefore, the court found that the defendant "had a *duty* to protect [the plaintiff] because [the defendant] had actual and direct knowledge that a violent brawl was imminent between drunk, belligerent patrons and had ample time and means to defuse the situation."[610] The court concluded that the defendant's "duty arose not because of prior similar criminal conduct but because it was aware of an unreasonable risk of harm at the bar that

[602] Del Lago Partners, Inc. v. Smith, 206 S.W.3d 146, 159, 163 (Tex. App.—Waco 2006), *aff'd*, 307 S.W.3d 762 (Tex. 2010).

[603] *Id.* at 167 (Gray, C.J., dissenting).

[604] *Id.* at 165–67.

[605] *Id.* at 167, 167–68 n.4 (distinguishing Dickinson Arms-Reo, L.P. v. Campbell, 4 S.W.3d 333, 345, 349 (Tex. App.—Houston [1st Dist.] 1999, pet. denied)).

[606] *Id.* at 168 n.4.

[607] Del Lago Partners, Inc. v. Smith, 307 S.W.3d 762, 777 (Tex. 2010).

[608] *Id.* at 767.

[609] *Id.* at 769.

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

very night."[611] The court therefore affirmed the judgment and jury findings.[612]

While the court seemed willing to expand the scope of duty and causation in the context of premises liability (especially when alcohol is one of the contributing factors), the court was not so willing to expand duty/causation in the employment context, as discussed in the *Escoto* case above.[613]

2. *Transcontinental Insurance Co. v. Crump*, 330 S.W.3d 211 (Tex. 2010).

In *Crump*, a widow was awarded death benefits under workers' compensation for her husband's death after Transcontinental contested her claim.[614] The plaintiff's husband sustained a knee injury at work and received workers' compensation benefits following the injury.[615] The husband's condition began deteriorating after his knee injury became infected, and he eventually died eight months after the injury.[616] The jury found that the knee injury was the "producing cause" of the plaintiff's husband's death.[617]

Transcontinental appealed, arguing that the evidence was insufficient to prove that the knee injury was really the producing cause of the death.[618] The husband obtained a kidney transplant fifteen years before the knee injury, and Transcontinental contended that the natural consequences of being immunosuppressed for decades caused his death, *not* the knee injury.[619] Transcontinental argued that the trial court submitted a faulty definition of "producing cause," which was actually rejected by the Texas Supreme Court in *Ledesma*.[620] Transcontinental also argued that the plaintiff's experts had failed to base their opinions on reliable foundations,

[611] *Id.*

[612] *Id.* at 777.

[613] *See infra* text accompanying notes 589–593.

[614] Transcon. Ins. Co. v. Crump, 274 S.W.3d 86, 90 (Tex. App.—Houston [14th Dist.] 2008), *rev'd*, 330 S.W.3d 211 (Tex. 2010).

[615] *Id.*

[616] *Id.*

[617] *Id.* at 95.

[618] *See id.* at 96.

[619] *Id.* at 90, 94.

[620] Transcon. Ins. Co. v. Crump, 330 S.W.3d 211, 223 (Tex. 2010).

and that its own expert's testimony was uncontroverted regarding the real cause of death (the kidney transplant).[621]

Focusing on Transcontinental's faulty charge argument, the court of appeals noted that courts must "liberally construe workers' compensation legislation to carry out its purpose of compensating injured workers and their dependents."[622] Therefore, the appeals court stated that a "workplace accident or disease is considered to be a producing cause even if it is not a substantial factor in bringing about the injury, disability, or illness."[623] The court then stated that "a workplace injury need not be the sole or primary cause in bringing about the disability or illness; rather, as long as the occupational injury is a producing cause of the disability or illness, there is a sufficient causal link under the workers' compensation scheme."[624] Taking direct aim at the *Ledesma* decision, the 14th District Court of Appeals stated:

> An unrelated condition or injury may even be the primary factor in causing an employee's disability or death and still not preclude a recovery of workers' compensation benefits. In addition, a pre-existing condition will not preclude compensation under the system as long as a workplace accident contributed to the injury in some amount.[625]

The court of appeals affirmed the judgment from the trial court.[626]

The principal issues before the Texas Supreme Court on appeal were: (1) whether the trial court erred in submitting a jury charge that omitted a but-for component in its definition of "producing cause;" and (2) whether expert medical causation testimony from a treating physician relying on differential diagnosis is reliable and legally sufficient.[627] Because it was the party appealing the administrative decision, Transcontinental had the burden to prove, by a preponderance of the evidence, that Crump's knee injury in 2000 was not a producing cause of his death.[628] Despite Transcontinental's objections, the court found that Crump's expert's

[621] *Transcon. Ins. Co.*, 274 S.W.3d at 96.

[622] *Id.* at 99.

[623] *Id.* at 100.

[624] *Id.*

[625] *Id.* (citation omitted).

[626] *Id.* at 90.

[627] Transcon. Ins. Co. v. Crump, 330 S.W.3d 211, 213 (Tex. 2010).

[628] *Id.* at 214.

testimony was based on a reliable foundation and was admissible at trial to prove that the 2000 injury was a producing cause of Crump's death.[629]

The court then turned to the other issue: whether the trial court's definition of producing cause was legally incorrect and constituted reversible error.[630] After comparing the standards for producing cause and proximate cause, and considering whether the definition for producing cause as set forth in *Ledesma* (a products liability case) should extend to a workers' compensation case, the court held the following to be the definition of producing cause in workers' compensation cases: "[A] substantial factor in bringing about an injury or death, and without which the injury or death would not have occurred."[631] Because the definition given to the jury lacked the but-for component, the court concluded that it was "incomplete, and therefore an erroneous statement of the law of producing cause."[632] In doing so, the court extended the "substantial" factor requirement in *all* "producing cause instructions," even beyond products liability cases. The court next considered Transcontinental's argument that the error in the definition was reversible error and held that "[b]ecause the definition submitted here lacked the but-for component, and because its omission in this case constitutes harmful error, we remand the case for a new trial."[633]

3. *Jelinek v. Casas*, 328 S.W.3d 526 (Tex. 2010).

In the medical malpractice case *Jelinek*, the plaintiffs brought suit as the personal representatives of the estate of Eloisa Casas against a hospital and two doctors after Ms. Casas' death at the hospital.[634] Casas was admitted to the defendant hospital for abdominal surgery.[635] Prior to being admitted, Casas was diagnosed with metastic colon cancer.[636] When Casas was admitted for the small intestine issues, it was determined that she had a serious medical emergency involving her colon cancer, and the doctors at

[629] *Id.* at 220.
[630] *Id.*
[631] *Id.* at 223.
[632] *Id.* at 225.
[633] *Id.* at 227.
[634] Jelinek v. Casas, 328 S.W.3d 526, 530 (Tex. 2010).
[635] *Id.*
[636] *See id.*

the hospital performed an invasive surgery.[637] During the surgery, the doctors determined that Casas was also suffering from an E. coli infection.[638] The doctors placed Casas on two antibiotics aimed at defeating the E. coli and other potential infection.[639] The initial prescription for these two antibiotics expired while Casas was in the hospital recovering from her surgery, and the hospital staff inadvertently failed to renew the medications.[640] Therefore, Casas went four days without the antibiotics.[641] By the time the oversight was discovered, the incision cite from surgery was emitting a foul odor, indicative of infection.[642] Casas was placed back on the antibiotics, though she later developed a staphylococcus infection and died approximately four months after she was placed back on the antibiotics.[643]

Casas' husband and son then sued the hospital and the attending physicians, claiming that the defendants' negligence caused Casas to "suffer grievous embarrassment and humiliation, as well as excruciating pain the remainder of her life . . . ."[644] The plaintiffs' expert testified that the attending physicians were negligent "in failing to discover that the antibiotics were not being given to Casas . . . result[ing] in a prolonged hospital stay and increased pain and suffering" experienced by Casas.[645] The plaintiffs non-suited their claims against the doctors, and proceeded to trial against the hospital.[646] The jury found that the negligence of the hospital and its doctors proximately caused injury to Casas, of which ninety percent was attributable to the hospital, and ten percent was attributable to the two attending physicians.[647] The trial court entered judgment on the verdict, and the hospital appealed.[648]

On appeal, the hospital argued that the evidence was insufficient to support the finding that the hospital's negligence proximately caused Casas'

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[637] *Id.*

[638] *Id.*

[639] *Id.*

[640] *Id.*

[641] *Id.*

[642] *Id.*

[643] *See id.*

[644] *Id.*

[645] *Id.* at 531.

[646] *Id.*

[647] *Id.* at 532.

[648] *See id.*

injuries.[649] The appellate court rejected that argument and affirmed the judgment.[650]

The Texas Supreme Court addressed two key issues on appeal: the legal sufficiency of the causation evidence and the sufficiency of the plaintiffs' expert report.[651] The court highlighted that, while the hospital admitted error in allowing the antibiotics to lapse, the plaintiff still had the burden to show that the hospital's negligence caused its injury.[652] The court, citing to its discussion of legal sufficiency in *City of Keller v. Wilson*, further stated that when evidence equally supports two alternatives, neither alternative may be presumed.[653]

The plaintiffs' claim was "predicated on the presence of an infection—treatable by the lapsed antibiotics—that caused [Casas'] pain and mental anguish above and beyond that caused by the cancer, the surgery, and the other known infections."[654] While the lay testimony of Casas' family accurately described Casas' suffering and discomfort, it could not precisely identify the cause of her suffering.[655] Expert testimony was essential to connect the prescription lapse to an infection that caused Casas' pain that she otherwise would not have experienced.[656] The plaintiffs' expert, relying on Casas' symptoms indicating an infection, testified that the hospital's negligence in allowing her prescription to lapse caused Casas' additional pain and suffering.[657] However, he also conceded that Casas' symptoms were consistent with infections not treatable by the lapsed antibiotics.[658] Thus, the plaintiffs' expert established that while it is possible that Casas had an infection treatable by the lapsed antibiotics, it was equally possible that Casas had an infection not treatable by the lapsed antibiotics.[659] The mere possibility of causation is insufficient; instead, the causal link must be

[649] *Id.*

[650] *Id.*

[651] *Id.*

[652] *Id.*

[653] *Id.*; City of Keller v. Wilson, 168 S.W.3d 802, 813 (Tex. 2005) ("When the circumstances are equally consistent with either of two facts, neither fact may be inferred.").

[654] *Jelinek*, 328 S.W.3d at 533.

[655] *See id.* at 535.

[656] *Id.* at 534.

[657] *Id.* at 535.

[658] *Id.*

[659] *Id.* at 536–37.

proved with reasonable certainty.[660] Finding that the plaintiffs failed to prove causation, the court reversed the court of appeals in favor of the defendants.[661]

B. 2011: The Defendant-Friendly Trend Continues

1. *BIC Pen Corp. v. Carter*, 346 S.W.3d 533 (Tex. 2011).

In *BIC Pen*, the plaintiff sued on theories of design defect and manufacturing defect of a cigarette lighter after her five-year-old son accidentally set fire to the dress of his six-year-old sister.[662] The jury found both design and manufacturing defects.[663] The court of appeals upheld the plaintiff's verdict on the basis of design defect (finding no federal preemption) without considering the manufacturing defect claim.[664] The Texas Supreme Court held that the design defect was preempted, so that it could not support the verdict, and then remanded to the court of appeals to address other arguments that the parties made, including causation.[665]

On remand, the court of appeals overturned the award of exemplary damages, but affirmed the $3 million award of actual damages based on the plaintiff's claim that a manufacturing defect caused the plaintiff's injuries.[666] Testing was conducted on the "fork force" and "sparkwheel rotation force" of the lighter based on 1995 and 1997 specifications.[667] Testing conducted by BIC revealed that the lighter met the 1997 specifications for fork force and sparkwheel rotation force, but failed to meet the 1995 specifications for fork force or sparkwheel rotation force.[668] The court of appeals found that, given the tests conducted by BIC and the testimony of Carter's expert witness (that only the 1995 specifications applied), there was sufficient evidence from which the jury could have concluded that the 1995 specifications applied and the lighter deviated from

[660] *Id.* at 537–38.

[661] *Id.* at 538.

[662] BIC Pen Corp. v. Carter, 346 S.W.3d 533, 536–37 (Tex. 2011).

[663] *Id.* at 537.

[664] *See id.*

[665] *See id.*

[666] *Id.*

[667] *Id.* at 540–41.

[668] *Id.*

those specifications.[669] Additionally, the court found that a reasonable juror could have found that the lighter's defect was a substantial cause of the injuries based on the circumstances of the case (the five-year-old was playing with the lighter when he accidentally set fire to the six-year-old's dress and the lighter failed to comply with BIC's specifications).[670]

The Texas Supreme Court disagreed, reversing and rendering judgment for the manufacturer.[671] The court delivered its opinion on June 17, 2011, concluding that no evidence supported the finding that a manufacturing defect caused the injuries.[672] BIC argued, and the court agreed, that *even if* the lighter deviated from specifications, the plaintiff failed to prove that the deviation was a producing cause of the injuries.[673] Specifically, the court stated that "evidence that components of a product deviated from manufacturing specifications, an accident occurred, and the deficient parts were involved in the accident is *insufficient* evidence to support a causation finding."[674] The plaintiff failed to demonstrate a causal link between sparkwheel force and an increased ability of children to operate the lighter.[675] And even more importantly, because the lighter was not intended to be inoperable by children, the court stated that the plaintiff had the burden to prove that the son "would not have operated the lighter *but for* the manufacturing defects, regardless of his age and physical and mental conditions."[676] Finding that the plaintiff failed to do so, the court concluded that the evidence presented was legally insufficient to support the finding that manufacturing defects in the lighter were a cause-in-fact of the injuries.[677]

2. *Merck & Co. v. Garza*, 347 S.W.3d 256 (Tex. 2011).

In *Merck & Co. v. Garza*, the plaintiffs sued Merck & Co. for design defect and marketing defect, alleging that its prescription drug Vioxx

[669] *See id.* at 541–42.
[670] *Id.* at 542.
[671] *Id.* at 546.
[672] *Id.* at 533, 545.
[673] *Id.* at 541.
[674] *Id.* at 542 (emphasis added).
[675] *Id.* at 543.
[676] *Id.* at 544 (emphasis added).
[677] *Id.* at 545.

caused Garza's death.[678] Garza visited his cardiologist after experiencing pain and numbness in his left arm.[679] The cardiologist gave Garza a one-week sample supply of Vioxx for his pain.[680] One week later, Garza returned to the doctor for test results and was allegedly given more Vioxx by another physician.[681] Garza died of a heart attack less than three weeks later, and the plaintiffs (Garza's wife and children) sued Merck.[682] The jury rendered a verdict in favor of the plaintiffs, and Merck appealed.[683]

The appellate court held that under *Merrell Dow Pharmaceuticals, Inc. v. Havner*, the plaintiffs were required to prove both general and specific causation.[684] Under specific causation, "if there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty."[685] Merck argued that the plaintiffs' evidence on specific causation was insufficient because the plaintiffs did not rule out, with reasonable certainty, Garza's preexisting cardiovascular disease as the most plausible cause of Garza's heart attack.[686]

The appellate court initially reversed and rendered judgment in favor of the defendant, holding that the evidence was legally insufficient to support a finding that plaintiffs negated, with reasonable certainty, Garza's preexisting heart condition as a plausible cause of his death.[687] On rehearing, the appellate court vacated its earlier judgment, withdrew its earlier opinion, and substituted an opinion.[688] In its substituted opinion, the court of appeals held that the plaintiffs' evidence from clinical trials was legally sufficient to support a finding of general causation under the

[678] Merck & Co. v. Garza, 347 S.W.3d 256, 259–60 (Tex. 2011).

[679] *Id.* at 259.

[680] *Id.*

[681] *Id.* at 259–60.

[682] *Id.* at 260.

[683] *Id.*

[684] Merck & Co. v. Garza, No. 04-07-00234-CV, 2008 Tex. App. LEXIS 3470, at *3 (Tex. App.—San Antonio, May 14, 2009), *withdrawn*, 277 S.W.3d 430 (Tex. App.—San Antonio, 2008), *rev'd* 347 S.W.3d 256 (Tex. 2011).

[685] *Id.* (quoting Merrel Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 720 (Tex. 1997)).

[686] *Merck*, 2008 Tex. App. LEXIS 3470, at *3.

[687] *Id.* at *7–8.

[688] Merck & Co. v. Garza, 277 S.W.3d 430, 433 (Tex. App.—San Antonio 2008), *rev'd*, 347 S.W.3d 256 (Tex. 2011).

Havner's mandate.[689] In direct contrast to its earlier opinion, the court again relied on *Havner* to hold that the plaintiffs had met their burden of offering evidence excluding other causes of Garza's heart attack with reasonable certainty (based on the same evidence that the court previously found to be legally insufficient).[690]

The Texas Supreme Court reversed and rendered in favor of Merck, holding that the Garzas failed to present reliable evidence of general causation.[691] In so doing, the court clarified its ruling in *Havner*, that "when parties attempt to prove general causation using epidemiological evidence, a threshold requirement of reliability is that the evidence demonstrate a statistically significant doubling of the risk."[692] Moreover, the studies must show a doubling of the risk of injury for patients taking the drug *under substantially similar conditions*, e.g., dosage and duration, and that plausible causes of the injury that could be negated are excluded with reasonable certainty.[693] Once the plaintiff clears that hurdle, the court must then examine the soundness of the studies' findings using the totality of the evidence test.[694] This examination ensures reliability and identifies potential biases that may have skewed the studies' results.[695]

In essence, *Havner* established—and the court here confirmed—rigorous requirements to show general causation and scientific reliability, comprised of two levels of inquiry: (1) first, the plaintiff must satisfy *Havner*'s threshold requirements of general causation; and (2) second, the court must examine the soundness of the findings using the totality of the evidence test.[696] Ultimately, the court determined that the studies cited by the Garzas did not meet the standards of reliability as established by *Havner*, and thus failed to satisfy the first level of inquiry.[697] Rounding out the analysis, the court stated, "The totality of the evidence cannot prove general causation if it does not meet the standards for scientific reliability established by *Havner*."[698] The court held that the Garzas failed to present

[689] *Id.* at 435–36.

[690] *Id.* at 436–37.

[691] Merck & Co. v. Garza, 347 S.W.3d 256, 259 (Tex. 2011).

[692] *Id.* at 265.

[693] *Id.* at 265–66 (emphasis added).

[694] *Id.* at 266.

[695] *Id.*

[696] *Id.*

[697] *Id.* at 267.

[698] *Id.* at 268.

reliable evidence of general causation and reversed the judgment of the court of appeals.[699]

3. *Lancer Insurance Co. v. Garcia Holiday Tours*, 345 S.W.3d 50 (Tex. 2011).

In a case of first impression, the Texas Supreme Court held that a bus driver's transmission of tuberculosis ("TB") to his passengers was not an accident resulting from the use of the tour bus so as to trigger coverage under the tour bus company's business owner's policy.[700]

In *Lancer Insurance Co. v. Garcia Holiday Tours*, high school band members brought suit against Garcia Holiday Tours after contracting TB from an infected bus driver.[701] The insurance company (Lancer) denied coverage, contending the nexus between the injuries and the use of the bus was too remote to trigger coverage.[702] The trial court rendered summary judgment that the carrier owed a duty to indemnify the insured.[703] The court of appeals agreed that policy may provide coverage, but reversed and remanded to the trial court to determine whether the passengers contracted the disease while on the bus.[704] The Texas Supreme Court ultimately agreed that the causation nexus was too attenuated and reversed in favor of the defendant.[705]

The passengers argued that the bus caused their injuries because: (1) the closed bus environment forced passengers to breathe bacteria emitted by the driver; and (2) the bus's air conditioning system re-circulated the contaminated air.[706] Lancer countered by arguing that the bus's relationship to the infectious disease was too attenuated because the bus and its air conditioning system "merely furnished the condition for, rather than caused" the injury.[707]

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[699] *Id.*

[700] Lancer Ins. Co. v. Garcia Holiday Tours, 345 S.W.3d 50, 51–52 (Tex. 2011).

[701] *Id.* at 52.

[702] *Id.* at 54.

[703] *Id.* at 51–52.

[704] *Id.* at 53.

[705] *See id.* at 52.

[706] *Id.* at 56.

[707] *Id.*

The court determined that "the vehicle's use must be a producing cause or cause in fact of the accidental injury" to invoke coverage.[708] The court applied the same definition of "producing cause" as the cases discussed above, stating that "the use must have been a substantial factor in bring[ing] about the injury, which would not otherwise have occurred."[709]

It concluded that because the bus did not produce or increase the potency of the bacteria, and because exposure could have occurred in any other enclosed, air-conditioned location, "[t]he bus itself was not a *substantial factor* in causing the passenger's injuries."[710]

C. 2012: Defendants Enjoy Continued Favor in the Court

1. *Thota v. Young*, 366 S.W.3d 678 (Tex. 2012).

The Fort Worth Court of Appeals decided a medical negligence case in favor of the plaintiff, and the defendant appealed.[711] In *Young v. Thota*, the decedent's widow brought claims against the decedent's cardiologist and the cardiologist's employer.[712] The decedent suffered from a blood disorder and required a cardiac catheterization to evaluate his heart condition.[713] His cardiologist performed the operation, and the decedent was discharged that afternoon.[714] That same day, the decedent returned to the hospital after complications and bleeding caused by a tear from the procedure performed that morning.[715] The tear was repaired, but it caused severe subsequent medical problems for the decedent, resulting in his death three years later.[716] The decedent's widow brought claims for negligence, and in response, the defendants presented two alternative theories: (1) the decedent's injuries were the result of an unavoidable accident; or (2) the decedent's injuries were the result of a new and independent cause or the result of pre-existing

[708] *Id.* at 57.

[709] *Id.*; *see, e.g.*, Ford Motor Co. v. Ledesma, 242 S.W.3d 32, 46 (Tex. 2007).

[710] *Lancer Ins. Co.*, 345 S.W.3d at 58 (emphasis added).

[711] Young v. Thota, 271 S.W.3d 822 (Tex. App.—Fort Worth 2008), *rev'd*, 366 S.W.3d 678 (Tex. 2012).

[712] *Id.* at 827.

[713] *Id.* at 826.

[714] *Id.*

[715] *Id.* at 827.

[716] *Id.*

conditions or subsequent conditions.[717] Defendants also asserted a counterclaim against the decedent for contributory negligence and failure to mitigate his damages.[718] Specifically, the defendants contended that the injuries were a result of decedent's pre-existing conditions and his failure to follow discharge instructions.[719] The trial court submitted instructions on the defendants' negligence, the decedent's contributory negligence, and inferential rebuttal instructions on new and independent cause and unavoidable accident.[720]

The plaintiff appealed the decision, claiming that the court erred in submitting the decedent's contributory negligence and in submitting instructions on unavoidable accident and new and independent cause.[721] In evaluating the plaintiff's argument on contributory negligence, the court discussed the differences between contributory negligence and mitigation of damages, stating that "[c]ontributory negligence goes to the proximate cause of the original incident," whereas the mitigation of damages "arises from the injured party's separate duty to act reasonably in reducing his damages."[722] Here, the injury was the tear in the decedent's artery and who caused it.[723] Though the doctor alleged the decedent's negligence in failing to promptly return for treatment, he provided no evidence of the decedent's negligence in *causing* the tear.[724] As such, the court concluded that the decedent's negligence potentially increased his damages, but did not cause his injury, and that the trial court erred in submitting the issue of the decedent's contributory negligence to the jury.[725] Accordingly, after conducting a harm analysis, the court reversed the take-nothing judgment and remanded for a new trial.[726]

The Texas Supreme Court reversed the court of appeals, holding that the presumed harm analysis does not apply to a "broad-form submission in a single-theory-of-liability case when the negligence charge includes both an

[717] *Id.*

[718] *Id.*

[719] *Id.*

[720] *Id.*

[721] *Id.* at 827–28.

[722] *Id.* at 30 (quoting Hygeia Dairy Co. v. Gonzalez, 994 S.W.2d 220, 226 (Tex. App.—San Antonio 1999, no pet.).

[723] *Id.* at 832.

[724] *Id.* at 832–33 (emphasis in original).

[725] *Id.* at 841.

[726] *Id.*

improper defensive theory of contributory negligence and an improper inferential rebuttal instruction."[727] The court determined that even if the plaintiff was correct—that the trial court erred by submitting a jury question on the plaintiff's contributory negligence—the presumed harm analysis is inapplicable because the two separate answer blanks allowed a specific determination as to whether the defendant was negligent.[728] As such, no *Casteel* problem existed, and the court of appeals erred in applying the *Casteel* presumed harm analysis.[729] The court clarified the situations in which the presumed harm analysis is appropriate:

> [I]n instances where the appellate court cannot determine 'whether the improperly submitted theories formed the sole basis for the jury's finding' because the broad-form question mixed valid and invalid theories of liability, or when the broad-form question commingled damage elements that are unsupported by legally sufficient evidence.[730]

The court then engaged a more traditional harmful-error analysis to determine whether the charge error was in fact harmless.[731] When looking at the instruction on contributory negligence, the court considered the entire charge.[732] It ultimately determined that because the potential negligence of plaintiff and defendant are entirely separate, including the plaintiff's, contributory negligence would not affect the verdict and was thus immaterial.[733] In examining the new and independent cause instruction, the court concluded that its "review of the entire record provides no clear indication that the new and independent cause instruction, if erroneous, probably caused the rendition of an improper verdict."[734] As such, it too

[727] Thota v. Young, 366 S.W.3d 678, 680 (Tex. 2012).

[728] *Id.* at 691–92.

[729] *Id.*

[730] *Id.* at 693 (quoting Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378, 389 (Tex. 2000)) (citation omitted).

[731] *See id.*

[732] *Id.* at 694.

[733] *Id.*

[734] *Id.* at 696.

was harmless.[735] The court reversed and remanded the case to consider plaintiff's remaining issues.[736]

2. *Centocor, Inc. v. Hamilton*, 372 S.W.3d 140 (Tex. 2012).

Plaintiff, Patricia and Thomas Hamilton (Hamiltons) sued Centocor, Inc. (Centocor) a prescription drug manufacturer, for alleged injuries caused by the prescription drug Remicade.[737] The Hamiltons claimed that Centocor provided "inadequate and inappropriate warnings" of potential side effects of the drug.[738] The jury found in favor of the Hamiltons, awarding them $4.6 million in damages.[739] The court of appeals, while reversing the award of future pain and mental anguish, affirmed the remainder of the trial court's judgment, holding that the expert evidence was sufficient to prove that Centocor caused the plaintiffs' injuries.[740]

The Texas Supreme Court reversed.[741] The court first determined that the learned intermediary doctrine applied to all of the Hamiltons' claims, thereby relieving Centocor of any duty to warn the Hamiltons directly about the potential side effects.[742] The court then examined whether Centocor's warning to the intermediary (prescribing physicians) was sufficient.[743] In so doing, the court evaluated the physicians' testimony that they were aware of the potential risk, and chose to prescribe the drug in spite of the risk, stating, "[W]hen the prescribing physician is aware of the product's risks and decides to use it anyway, any inadequacy of the product's warning, as a matter of law, is not the producing cause of the patient's injuries."[744] Focused on the Hamiltons' complete lack of causation evidence, the court concluded, "Because the Hamiltons failed to meet their burden of proof on the causation element of their claims, as a matter of law, their claims fail."[745]

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[735] *Id.*

[736] *Id.*

[737] Centocor, Inc. v. Hamilton, 372 S.W.3d 140, 143 (Tex. 2012).

[738] *Id.*

[739] *Id.*

[740] *Id.*

[741] *Id.* at 173.

[742] *Id.* at 143, 167.

[743] *Id.* at 170.

[744] *Id.*

[745] *Id.* at 173.

The sheer number of causation cases heard by the court over the past seventeen years (since *Allbritton*) is remarkable. Causation is certainly on the court's radar. The court's most recent decisions illustrate its willingness to evaluate/weigh causation evidence to overturn lower courts' decisions. With a case currently pending, the court has yet another opportunity to substitute its judgment for that of the lower court and engage in (what some might classify as) causation "mischief."[746]

VIII. PENDING CASE: *RIO GRANDE REGIONAL HOSPITAL INC. V. VILLARREAL*

The family of Hermes Villarreal sued the Rio Grande Regional Hospital, Inc. and Columbia Rio Grande Healthcare, L.P. on a medical negligence (medical malpractice) theory for the wrongful death of Mr. Villarreal who committed suicide while a patient in Defendants' hospital.[747] Villarreal suffered from insomnia, anxiety, and severe, unrelenting headaches.[748] He was admitted to Defendants' hospital in April of 2005 for evaluation and treatment, and was hospitalized until the time of his death on April 19, 2005.[749] Villareal died from self-inflicted wounds caused by a razor given to him by one of Defendants' nurses.[750] The plaintiffs claimed that the nursing staff breached the standard of care by providing a razor to Villareal and by failing to adequately monitor and check on him.[751]

Defendants challenged the two components of causation (cause-in-fact and foreseeability), asserting that Villarreal's death was a tragic but unforeseeable event, and that the hospital's actions were not a substantial factor in causing Villareal's death.[752] Refusing to re-weigh the evidence and substitute its judgment for the jury's, the court of appeals concluded that Villareal's injuries and death were foreseeable.[753] It further stated, "[B]ecause of the dangerous situation created by its employees, [defendants] should have anticipated that [Villareal] would sustain some

[746] *See generally* Rio Grande Reg'l Hosp., Inc. v. Villarreal, 329 S.W.3d 594 (Tex. App.—Corpus Christi 2010, pet. granted).

[747] *Id.* at 598.

[748] *Id.* at 599.

[749] *Id.* at 600, 603.

[750] *Id.* at 603.

[751] *Id.* at 604.

[752] *Id.* at 605–06.

[753] *Id.* at 615–16.

type of injury as a result of the complained-of negligent actions committed by [defendants'] employees."[754]

The defendants further asserted that their actions were not the cause-in-fact of Villareal's death, arguing that merely furnishing a condition that made the injuries possible is insufficient to establish the cause-in-fact component of proximate cause.[755] The court rejected this argument, stating that based on its review of the record, defendants' employees "did far more than simply furnish a condition that made [Villareal's] injuries possible."[756] The court concluded that the jury was reasonable in its conclusion that the defendants' actions were a substantial factor in Villareal's death.[757]

The court also rejected the defendants' argument of intervening and superseding cause, stating that "[t]he negligence of one does not excuse the negligence of another and where both the actor's negligent conduct and that of a third person bring about the injury, the rule of concurrent causation applies."[758] That rule provides that all individuals who contribute to the injury are liable.[759] Because the court already concluded that Villareal's suicide was foreseeable, it determined that Villareal's "suicide, at best, would be considered a concurrent cause" that "does not absolve [defendants] of liability in this matter."[760] Ultimately, the court found that the evidence supporting the jury's verdict was legally sufficient, and overruled the defendants' issues on appeal.[761]

The key causation issues facing the Texas Supreme Court are: (1) whether "the court of appeals nullif[ied] the 'same character of conduct or injury' requirement in determining foreseeability by allowing liability based on a more general anticipation of 'some type of injury;'" and (2) whether "the court of appeals impermissibly expand[ed] the scope of cause-in-fact in a respondeat superior negligence claim by considering 'system-wide' evidence encompassing acts and omissions by non-employees."[762]

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[754] *Id.* at 616.

[755] *Id.*

[756] *Id.*

[757] *Id.* at 617.

[758] *Id.* at 617–18.

[759] *Id.* at 618.

[760] *Id.* at 618–20.

[761] *Id.* at 620.

[762] Petition for Review (Tex. Argued Feb. 9, 2012) (No. 10-0927), 2010 WL 8770036, at *xv–xvii.

IX. CONCLUSION

The Texas Supreme Court has not much hesitated to reverse jury verdicts or courts of appeals based on the court's view of the "causation" evidence. This trend dramatically accelerated after *Allbritton*. This approach tended to benefit plaintiffs before *Allbritton*, and to hugely benefit defendants following *Allbritton*. Lack of restraint, loose language and hardly thoughtful application of causation concepts before *Allbritton* gave license (or at least devices and terminology) to the court post-*Allbritton* to reverse jury verdicts earlier courts would have likely upheld. On occasion, the post-*Allbritton* causation decisions were no more rigorous or disciplined in analysis than some of those preceding *Allbritton*. This occurred against a background of increasingly partisan judicial politics.

If French Philosopher Auguste Comte is correct that "demography is destiny," then the political destiny of the Texas Supreme Court is almost certain change in the next ten years.[763] By 2020, the Anglo base of the Republican Party will be less than 12 million out of 28 million Texas residents; and Hispanics and Blacks combined will be over 53 percent of the population in Texas.[764] Even traditional undervoting by these core Democratic constituencies should not prevent Democratic candidates from again becoming a majority of the Texas Supreme Court by 2020 or 2022.

If the current ongoing judicial fights over the Legislature's recently drawn House, Senate and Congressional districts teach anything, it is that the state's changing demographics may have long-term and startling consequences for partisan elections in this state.[765] Since supreme court justices run state-wide, the state's changing demographics cannot be frustrated in those elections by incumbency-protection tricks used in redistricting.

What is the favorite tool of the current entrenched majority to overturn jury verdicts could become, in a decade or so, a very differently-composed

[763] *See* Cal Jillson, LONE STAR TARNISHED: A CRITICAL LOOK AT TEXAS POLITICS AND PUBLIC POLICY 51 (Taylor & Francis Group 2012) (based on data from the Texas State Data Center and Office of the State Demographer).

[764] *Id.* at 52 tbl.3.1.

[765] *See* Perry v. Perez, 132 S. Ct. 934, 944 (2012) (rejecting election maps drawn by a Texas federal court that favored certain candidates to address partisan redistricting benefitting Republican candidates); *see also* Tex. v. Holder, No. 11-1303, 2012 WL 3671924, at *37 (D.D.C. Aug. 28, 2012) (holding that Texas failed to show that the U.S. Congressional and State House redistricting plans will not have a degenerating effect and were not enacted with discriminatory purpose).

partisan majority's favorite device to uphold them, or even reverse pro-defendant verdicts. The Texas Supreme Court has not appeared constrained or even much bothered by limitations in the Texas Constitution on the permissible scope of its evidentiary review, or by decades of tort formulations calculated to make "causation" findings largely the province of the jury. The court's more recent willingness to take and decide causation cases is breathtaking, even when compared to the court's most activist "plaintiffs-oriented" period. What this means for stare decisis in this state is anybody's guess. Worst case, the Texas Constitution's unequivocal right to trial by jury could continue the slide to becoming the completely empty talisman Dean Green lamented.

How much future supreme courts will perceive themselves constrained by the court's recent decisions is also anybody's guess. The danger, of course, is that future courts take away from the recent causation decisions the lesson that *every* aspect of a jury's decision in tort cases, and not just the "duty" issue, is really a question of public policy for the court. They may infer that it is permissible to weigh the sufficiency of the evidence, as long as that function is disguised as something else, like "legal cause," "substantial factor," "expert qualifications," "proximate cause," or "foreseeability." One thing is certain: the Texas Supreme Court's approach to causation over the last one-third century provides ample precedent for later activist courts to second-guess juries, trial courts, and courts of appeals based on different views of the weight of the causation evidence. This is "practical politics" run amuck, and does not bode well for even a "rough sense of justice."