

**PROOF OF CAUSATION**  
**SELECTED CAUSATION TRENDS BEFORE THE SUPREME**  
**COURT**

Presented by:

**CHARLES R. "SKIP" WATSON, JR.**

Co-Authors:

**KIRSTEN M. CASTAÑEDA**  
**SUSAN A. KIDWELL**

LOCKE LIDDELL & SAPP LLP  
100 Congress Avenue, Suite 300  
Austin, Texas 78701  
(512) 305-4791  
[cwatson@lockeliddell.com](mailto:cwatson@lockeliddell.com)

State Bar Of Texas  
**18<sup>TH</sup> ANNUAL ADVANCED CIVIL**  
**APPELLATE PRACTICE COURSE**  
September 9-10, 2004  
Austin

**CHAPTER 20**



---

# LOCKE LIDDELL & SAPP LLP

---

## CHARLES R. "SKIP" WATSON, JR.

**PHONE:** 512/305-4791

**E-MAIL:** cwatson@lockeliddell.com

### AREAS OF PRACTICE

Of counsel attorney specializing in civil appellate law and civil trial law.

### CERTIFICATION

Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization, 1987

Board Certified in Civil Trial Law by the Texas Board of Legal Specialization, 1987

### EDUCATION

J.D., Texas Tech School of Law, 1977; Law Review, Associate Editor, 1976 – 1977;

Awarded Best Law Review Comment published in Texas by State Bar of Texas,

Business Law Section, 1977; Moot Court Competition Winner, 1975

B.A., Abilene Christian College, 1975; Debate Society; Campus Advance

### PROFESSIONAL HISTORY

Of Counsel for the law firm Locke Liddell & Sapp LLP, June 2004 – present

Mullin, Hoard & Brown, Amarillo, Texas, 2000 – May 2004

Carr, Fouts, Hunt & Wolfe, Amarillo, Texas, 1996 – 2000

Hinkle, Cox, Eaton, Coffield & Hensley, Amarillo, Texas, 1994 – 1996

Culton, Morgan, Britain & White, Amarillo, Texas, 1981 – 1993

Templeton & Garner, Amarillo, Texas 1978 – 1981

Seventh Court of Appeals of Texas, 1977 – 1978

### PROFESSIONAL AFFILIATIONS

Supreme Court of Texas Advisory Committee, 1999 – 2004

Chair, Appellate Section, State Bar of Texas, 2002 – 2003

Chair, drafting committee of "Standards for Appellate Conduct" 1995 – 2002

Course Director, State Bar Advanced Civil Appellate Practice Course, 2004

Course Director, State Bar Advanced Appellate Practice Course, 1994

Pattern Jury Charge Committee, Business, Consumer, Employment Law, 1991 – 2001

Texas Center for Legal Ethics, Board of Trustees, 2002 – 2004; Advisory Council, 1998 – 2001

Grievance Committee, District 13, 1990 – 1994, Chair 1993 – 1994

U.S. District Court Advisory Group, Northern District of Texas, 1992 – 1997

Author, Report on Cost and Delay in U.S. District Courts for Western Divisions

Course Director, State Bar Advanced DTPA – Consumer Law Course, 1989

Chair, Consumer Law Section, State Bar of Texas, 1987 – 1988

---

# LOCKE LIDDELL & SAPP LLP

---

## CHARLES R. "SKIP" WATSON, JR.

### PUBLICATIONS AND PRESENTATIONS

*Appellate Professionalism,*

Advanced Appellate Course, State Bar of Texas, 1996, 2001

*Perfecting Appeal: Post Verdict Motions,*

Advanced Civil Trial Course, State Bar of Texas, 1994

Advanced Appellate Course, State Bar of Texas, 1993

*The Court's Charge to the Jury,*

Advanced Civil Trial Course, State Bar of Texas, 2002, 2003

University of Texas School of Law, Appellate Course, 2000

Advanced Appellate Course, State Bar of Texas, 1991, 1992, 1994, 1998

*Summary Judgments and Special Exceptions,*

Advanced Civil Trial Course, State Bar of Texas, 1990

*Rescuing the Record on Appeal,*

Advanced Appellate Course, State Bar of Texas, 1990

*Good Faith and Lenders,*

Texas Association of Bank Counsel, 1989

*Defending Deceptive Trade Practices Claims,*

18 Texas Tech Law Review 77 (1987)

*The McFadden Act and Remote Electronic Banking,*

8 Texas Tech Law Review 771 (1977)

### CIVIC ACTIVITIES

Airport Board, City of Amarillo

Texas Aviation Historical Society

Texas Tech Law School Foundation

Texas Supreme Court Historical Society

### ADMITTED TO PRACTICE

United States Supreme Court, 1981

Fifth Circuit Court of Appeals, 1980

Eighth Circuit Court of Appeals, 1980

Ninth Circuit Court of Appeals, 2002

Tenth Circuit Court of Appeals, 1993

D.C. Circuit Court of Appeals, 1993

Federal Circuit Court of Appeals, 2002

Northern District of Texas, United States District Court, 1978

Western District of Texas, United States District Court, 1989

Southern District of Texas, United States District Court, 1990

Supreme Court of Texas, 1977

### GENERAL

Born in San Antonio, Texas, on September 17, 1948

# TABLE OF CONTENTS

	<b>PAGE</b>
SELECTED CAUSATION TRENDS BEFORE THE SUPREME COURT.....	1
Why Bother? .....	1
Scope .....	2
Why Causation?.....	2
What is it?.....	2
1. Producing Cause.....	2
2. Proximate Cause.....	3
Themes—I know it when I see it, or do I? .....	4
1. Proof of Causation .....	4
a. Can any inference withstand review? .....	4
2. Experts do not know it when they see it.....	7
3. Legal Causation, Factual Causation, and Attenuation —they all look alike .....	8
On the Horizon.....	13



# PROOF OF CAUSATION

## SELECTED CAUSATION TRENDS BEFORE THE SUPREME COURT

by Charles R. “Skip” Watson, Jr.<sup>1</sup>

### Why Bother?

Success in the Court of Appeals requires identifying one, occasionally two, dispositive issues. Gone are the days when thorough but indiscriminate briefing of multiple favorable issues will result in the court choosing the one it deems important. The law is now so complex that even experienced justices and law clerks lack the depth and breadth of knowledge required to pick truly dispositive issues for advocates. Discern then persuade.

Success in the Supreme Court requires identifying recurrent themes in issues important to the individual justices. Gone are the days when identifying dispositive issues will result in error correction by the Supreme Court. Knowing what has been dispositive in the Supreme Court should win below, but it rarely results in a petition for review grant. That is the art of predicting what the Court will do next in the development of its areas of interest. It requires thinking like the justices most likely to persuade a consensus to grant and write. Discern from their perspective.

Areas of interest to the Supreme Court are not necessarily new or emerging theories of recovery, defenses, or even interpreting the Legislature’s latest effort at rewriting common law. More often than might be expected, the Court revisits and rewrites areas of law distilled to settled principles in the opinions of prior generations of justices. New fact patterns raise anew the same competing principles that eventually resulted in the balance and acceptance of imperfection known as settled law.

Because the competing principles rarely change, they can be identified and their development can be readily understood from precedent. When a new generation reopens the debate, the risk/benefit analysis of each level of analytical advance or retrenchment can be predicted. The difference is what is important to the new eyes rebalancing the competing interests. Predicting what is deemed important by the current Court can transform a hopeless petition for review into the next year’s Supreme Court highlights presentation.

---

<sup>1</sup> The author wishes to especially acknowledge the contributions of Kirsten M. Castañeda, Associate (Dallas office) and Susan A. Kidwell, Associate (Austin office) for their research and analysis in preparing this paper.

## Why Causation?

Causation is the uncontrolled intersection of multiple Supreme Court trends. Previously upheld on the basis of inferences so weak as to be a scintilla, causation 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.

## Scope

This paper addresses the recent reemergence of causation as an area of interest in the Supreme Court of Texas. It is not intended to be a comprehensive survey of causation case law. For that reason notable cases are not included. Instead, it will identify recurring themes and developing trends. The desired result is recognition, preservation, and persuasive presentation of dispositive error otherwise overlooked in the Courts of Appeals. In the Supreme Court it just might result in petitions granted and trends extended.

## What is it?

Causation is a constituent element of most causes of action.

Texas recognizes two forms of causation:

- (1) Producing cause; and
- (2) Proximate cause.

**1. Producing Cause**, or factual causation is the first element of proximate cause. *Williams v. Steves Indus., Inc.*, 699 S.W.2d 570, 575 (Tex. 1985); *Riojas v. Lone Star Gas Co.*, 637 S.W.2d 956, 959 (Tex. App.—Fort Worth 1982, writ ref’d n.r.e.).

**“Factual Causation” or “Cause in Fact”** isolates the conduct that was a substantial factor in bringing about the damages. It means that no harm would have resulted without the conduct. *Nixon v. Mr. Property Management Corp.*, 690 S.W.2d 546, 547 (Tex. 1985). Thus, the damages must have resulted from the conduct. *McKnight v. Hill & Hill Exterminators*, 689 S.W.2d 206, 209 (Tex. 1985). It is commonly referred to as “but for” causation because there must be proof that but for the conduct, the damaging event would not have occurred. *El Chico Corp. v. Poole*, 732 S.W.2d 306, 313 (Tex. 1987). It need not be the sole cause. *Id.*; *Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456, 459 (Tex. 1992).

In recent years it has been defined as “an efficient, exciting, or contributing cause, which in a natural sequence produced injuries or damages complained of.” *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995). The conduct must have been a substantial factor in bringing about the injury. *Id.* The Supreme Court may now actually refer to it as “substantial factor.” See *IHS Cedars Treatment Center of DeSoto, Tex., Inc. v. Mason*, \_\_\_ S.W.3d \_\_\_, 2004 WL 1396194 (Tex. June 18, 2004) No. 01-0926, (Slip. Op. at 7). The term “legal cause” is now part of “cause in fact,” as it refers to policy considerations and how far removed conduct can be, and still be recognized as actionable. *Id.* Whether the legal cause element of cause in fact is only the substantial factor requirement, or includes the natural sequence requirement, is not entirely clear.

**2. Proximate Cause** consists of two concepts:

- (a) Cause in fact; and
- (b) Foreseeability.

Both must be present. *Farley v. M.M. Cattle Co.*, 529 S.W.2d 751, 755 (Tex. 1975).

“**Cause in Fact**” is defined under “**Producing Cause**” above.

“**Foreseeability**” means that the actor “should have anticipated the danger of his act to others.” *Nixon v. Mr. Property Management*, 690 S.W.2d 546, 549. The evolution of the concept in Texas can be seen by comparing *Motsenbocher v. Wyatt*, 369 S.W.2d 319, 323 (Tex. 1963) with *Brown v. Edwards Transfer Co., Inc.*, 764 S.W.2d 220, 224 (Tex. 1988):

[T]he injury be of such a general character as might reasonably have been anticipated and that the injured party be so situated with relation to the wrongful act that the injury might reasonably have been foreseen.

Foreseeability does not require that the actor foresee the particular injury that ultimately occurs, *Trinity River Authority v. Williams*, 689 S.W.2d 883, 886 (Tex. 1985), nor, does it require that the actor anticipate precisely how the injury will grow out of a particular situation. *Clark v. Waggoner*, 452 S.W.2d 437, 440 (Tex. 1970). Instead, it requires that the results of the action be what would ordinarily have been anticipated.

In Texas, foreseeability does not equate to “legal cause.” In *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 472 (Tex. 1991), the Supreme Court used the term to distinguish a cause that factually is a “substantial factor” in producing the harm, rather

than in the “philosophical sense” which includes being in the wrong place at the right time to be injured. That distinction was clearly confirmed in *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775-776 (Tex. 1995). See the discussion under “Producing Cause” above.

### **Themes—I know it when I see it, or do I?**

Two obvious themes have emerged as the Court of the 90’s began to correct perceived excesses of the 80’s. Each has many manifestations and numerous sub-issues. They frequently overlap:

- Heightened proof requirements regarding inferences drawn from circumstantial evidence, and expert conclusions; and
- Elimination of remote and attenuated causes.

Both types of error appear to be preserved by simple “no evidence” objections and points in post-verdict motions. Causation is therefore frequently the issue at the heart of standard of review and scope of review decisions.

Both themes have blurred previously settled law without overruling prior precedent. As a result, authority can be found for most any position. What matters is the position the Court wants to take.

Underlying both themes is a steady erosion of the jury’s role in deciding contested issues. Ultimate issue determinations are increasingly reserved for the appellate courts, whether in determining the sufficiency of causation evidence, or deciding the legal policy reserved for the courts in the vague notion of “substantial factor” or other concepts describing remote causes.

#### **1. Proof of Causation**

Gone are the days when evidence of causation can be assumed. Inferences from circumstantial evidence that would previously have supported the causal nexus between events and injury are now tightly controlled and closely scrutinized. Experts’ conclusory statements that x caused y are now subject to multiple challenges. The lessons are in the cases.

##### **a. Can any inference withstand review?**

The swing can be illustrated by comparing earlier cases with current opinions. A good early example is *Farley v. M.M. Cattle Co.*, 529 S.W.2d 751 (Tex. 1975).

Farley, a 15-year old cowboy, was herding cattle. When a calf broke from the herd, 15-year old Farley and another boy attempted to herd it back by engaging in a dangerous maneuver called “laning.” Their horses were intentionally reined to collide at full speed just in front of the cow, presumably causing it to turn prior to impact. The other boy, Beebe, reined his horse away to avoid the accident, but Farley’s horse collided into Beebe’s. Farley was thrown and seriously injured.

An issue was whether the evidence presented at trial was sufficient to raise a fact issue as to proximate cause.

Particularly instructive was whether a “dangerous” horse’s failure to obey a command to turn at the last minute could be inferred to supply causation. The problem was whether there was “evidence from which reasonable minds could draw an inference that either a known dangerous horse or the failure of the foreman to supervise the activities of the young cowboys was the cause in fact of the collision in question.” *Id.* at 755. The plaintiff was not required to exclude all possibility that the accident occurred other than as he alleged, but he must show only that the greater probability is that either the nature of the horse or the failure to supervise caused the collision. There was no direct evidence of either.

The testimony was that Farley was a good cowboy who knew how to get out of a tight situation if his horse was responsive to reining. That testimony *supported an inference* that Farley tried to rein the horse at the last moment to avoid the collision, and that the horse did not respond. This evidence apparently made it more likely that Farley reined in time, making the collision the horse’s fault, rather than reining too late, or not at all.

The Supreme Court held that the trial court erred in directing a verdict for defendant because “the inferences arising from the direct evidence were sufficient to allow the case to go to the jury.” *Id.* at 757.

The dissent argued that there was no evidence to support negligence or proximate cause. The majority, it said, simply piled assumption upon assumption to say that the evidence supports an inference. “This approach should make it fairly easy to find evidence of proximate cause in any case.” *Id.* at 759. On this record, “one hypothesis is as likely as the other, because we simply do not know and cannot reasonably determine from the evidence what probably caused the accident.” *Id.* at 760.

Inferences such as those made in *Farley* ceased in the 90’s. For example, in *Browning Ferris v. Reyna*, 865 S.W.2d 925 (Tex. 1993), the issue of whether contact between a competitor and the party seeking to terminate a rival’s contract was

sufficient to show the parties' contract difficulties were caused by willful tortious interference. The Court declined to convert suspicion into an inference:

[W]hile circumstantial evidence may be used to establish any material fact, we are not empowered to convert mere suspicion or surmise into some evidence. Where there is real evidence, we must uphold the jury verdict, but in cases such as this where there is only real suspicion, we must overturn it.

*Id.* at 928 (citations omitted).

That theme was emphasized two years later in *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179 (Tex. 1995).

A default judgment against a shopping center developer enabled an anchor tenant to get out of its lease. The developer sued the firm for the deficiency and its investment after it defaulted on the construction note and lost the shopping center through foreclosure.

The issue was whether there was evidence of a causal nexus between the malpractice and the damages awarded for loss of the investment and the loan deficiency.

The Court held the developer failed to show the firm's actions were a producing cause of the foreclosure. The only evidence was testimony that a sale or refinancing could have been accomplished with the tenant in the center. This, the Court held, does no more than create a "mere surmise or suspicion," which is no evidence. *Id.* at 182. The loss of the tenant "is not the same thing as the *loss of the suit* . . . . As a matter of law, [the law firm] was not a producing cause of the foreclosure." *Id.*

In *Lozano v. Lozano*, 52 S.W.3d 141 (Tex. 2001)(per curiam), legal sufficiency of circumstantial evidence supporting more than one reasonable inference implicated more than what may be inferred. It implicated the role of the jury. In a case involving aiding or assisting interference with a parent's possessory rights, a plurality opinion authored by former Chief Justice Phillips, surprisingly interpreted circumstantial evidence that would support more than one reasonable inference as legally sufficient to permit the jury to decide which inference "is more reasonable." *Id.* at 148. The present Court could easily follow the separate opinion of Justices Hecht and Owen, which cautioned that if neither of the reasonable inferences "is more likely than the other," the jury should not be allowed to merely pick one. *Id.* at 158. Justice Hecht argued for an inference to be drawn, it must be "more probable than other inferences." *Id.*

In *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598 (Tex. 2004), the Court appeared to be back on theme. It held that the mere fact that a pickup caught fire while driving down the road is no evidence that the cause of the fire was a product defect existing at the time it left the manufacturer.

One aspect of future inferences from circumstantial evidence may be signaled by *Nissan Motor Co. v. Armstrong*, \_\_\_ S.W.3d \_\_\_ (Tex. Aug. 27, 2004). In an unintended acceleration case, a lengthy opinion by Justice Brister held that the sheer number of reported incidents does not raise an inference that the accident occurred from something other than driver error. Rather than reversing on the reasonableness of the inference, the Court reversed based on error in admitting the reported incidents as evidence. Harm was tied to the emphasis placed on the evidence in argument.

In the future, watch for the equal inference rule to once again become equated to a scintilla of evidence, that is, no evidence. The Court may increasingly substitute its view of what is a reasonable inference for the jury's. Clearly, the admissibility of evidence from which inferences are drawn has been reborn as a source of reversible error.

## **2. Experts do not know it when they see it.**

The junk science wars were fought over experts' opinions on causation. The Supreme Court's determination to rein-in expert opinions on causation extends far beyond qualifications and reliability. Experts must satisfy specific requirements before their opinions will constitute evidence of causation.

Recent cases illustrate the restraints placed on expert testimony while revealing the unique relationship experts frequently share with circumstantial evidence. Indeed, as often as not, expert opinions of causation are based on their analysis of the circumstances.

In *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598 (Tex. 2004), the plaintiff's expert failed to rule out causes of the pickup fire other than a factory defect. Moreover, the expert only "suspected" that the unaltered electrical system caused the fire. That was not good enough.

But, *Tarrant County Water Dist. v. Gragg*, \_\_\_ S.W.3d \_\_\_, 2004 WL 1439646 (Tex. June 25, 2004), the trial court had determined construction of a reservoir "significantly changed flooding characteristics" of a ranch's watershed sufficiently to cause flood damage that would not have otherwise occurred during heavy rains. Evidence consisted of testimony by longtime residents that it flooded more than it used to, comparisons of flooding in years with comparable rains, and expert testimony. Finding the evidence legally sufficient, the Supreme Court deferred

to the trial court's resolution of the issue in favor of the ranch owner. *Gragg* may be an aberration.

In *Nissan Motor Co. v. Armstrong*, \_\_\_ S.W.3d \_\_\_ (Tex. Aug. 27, 2004), an unintended acceleration judgment was reversed for erroneous admission of prior reported incidents, in spite of Nissan's failure to preserve error in permitting testimony by plaintiff's unqualified expert. Thus, it appears some evidence supported the judgment because the admissible evidence likely caused an improper judgment. The case was remanded, apparently.

Watch for *Tamez v. Mack Trucks, Inc.*, 100 S.W.3d 549 (Tex. App.—Corpus Christi 2003, pet. granted) (to be argued October 2, 2004). *Tamez* involves expert testimony concerning the cause of the post-crash fire that engulfed the driver of an overturned tanker truck. The Court of Appeals reversed a summary judgment granted after the trial court excluded an expert report and in spite of the report of another expert. It held that, under *Gammill*, the first expert provided the requisite link between his observations and his conclusions concerning the truck's fuel system. He also successfully discounted other possible causes, thereby precluding summary judgment. The second expert's conclusory statements were properly disregarded. *Tamez* should give the Supreme Court an opportunity to pick up where it left off in *Ridgway* and to address the point that was waived in *Nissan*. How far it will go in precluding expert opinion on causation is unclear. At a minimum it appears that the admissibility of the circumstantial evidence reviewed by the expert may now become an area of close scrutiny.

### **3. Legal Causation, Factual Causation, and Attenuation—they all look alike**

Far more intriguing, and challenging, is the Supreme Court's evolving analysis of multiple causes and causes too removed from the injury to support liability. The academic and legal debate over the elements of causation has been reignited in Texas.

For example, in *Bell v. Campbell*, 434 S.W.2d 117 (Tex. 1968) both factual, or "but for" causation and foreseeability were addressed in the context of a third driver who ran over persons at the scene of a collision involving two prior motorists. The Court acknowledged that no injury would have occurred "but for [the first two drivers'] negligence, which created the condition that made the condition that made the second condition possible. The active and immediate cause of the second collisions, however, was an entirely independent agency, [the third consideration]."

But the case appears to have turned on foreseeability—the first two drivers "could not reasonably foresee that the manner in which they operated their vehicles prior to the first collision might lead to serious injury or deaths of persons not even in

the zone of danger as a result of their being struck by another automobile which was some distance away at the time.” So, the injuries from the second collision were not proximately caused by the negligence of the driver in the first collision.

Foreseeability is not where the Court exercised its policy role in deciding what the limits of “but for” causation, which, like, the “Butterfly Effect,” can stretch the imagination. The current evolution of “legal cause,” as the policy limits are termed, is but a repeat of past academic and judicial battles. The best summary of the progression of this dispute is likely Justice Cornyn’s concurring opinion in *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 777-785 (Tex. 1995) (Cornyn, J., concurring).

To oversimplify Justice Cornyn’s analysis of the origins of the debate, by the turn of the last century the “Legal Realist” school of thought viewed cause in fact as a purely factual inquiry while proximate cause “was a policy determination that legal responsibility for damages should not be limitless.” *Id.* at 778. The ALI’s Restatement of Torts rejected the bifurcated approach for a governed approach called “legal causation.” *Id.* To be a legal cause, the wrongful act “must be a substantial factor in bringing about the harm.” *Id.* Legal causation expanded simple cause in fact, but stopped short of considering the policy considerations incorporated in the proximate cause concept advocated by the Realists. *Id.* Prosser recognized that both ad hoc judicial policy considerations and fact considerations were inevitably involved in both cause in fact and proximate cause. *Id.*

Initially Texas adopted the Realists’ proximate cause analysis, requiring both cause in fact and foreseeability (presumably for policy determinations). *Id.* at 779, citing *Hopson v. Gulf Oil Corp.*, 237 S.W.2d 352, 355 (Tex. 1954), and *Baumler v. Hazelwood*, 347 S.W.2d 560, 564 (Tex. 1961).

“Substantial factor” was later added to “but for” to satisfy the cause in fact standard. *Missouri P.R.R.G. v. American Statesman*, 552 S.W.2d 99, 103 (Tex. 1977). W. Page Keeton criticized “substantial factor” as scarcely a “test”. *Prosser and Keeton on Torts*. Sec. 41, at 267 (5<sup>th</sup> ed. 1984). Justice Cornyn viewed substantial factor as tending to “merge the policy-based rationales for limiting liability with the cause in fact inquiry.” *Allbritton* at 779.

If substantial factor has become a policy-based legal causation second factor after “but for” in factual causation, it is ill-defined. *Id.* at 783.

Things began to get blurry in the 90’s when the Court began to emphasize “substantial factor” considerations. In *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470 (Tex. 1991), Perez was driving a Highway Dept. truck with a flashing arrow sign. He stopped the truck because the sign was allegedly malfunctioning. While he was

stopped, a van driver who had fallen asleep at the wheel hit the sign, which hit Perez. Perez later died from his injuries. The trial court granted summary judgment for the sign manufacturer because it concluded, as a matter of law, that there was no causal connection between the sign defect and Perez's injury.

The issue was whether, as a matter of law, there was no causal connection between the sign defect and the injury.

The Court held that "Negligent conduct is a cause of harm to another if, in a natural and continuous sequence, it produces an event, and without the negligent conduct such event would not have occurred." The Court quotes, without adopting, the discussion of "legal cause" in section 431 of the Restatement (Second) of Torts. This section states, in part, as follows: "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 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 defendants' conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have occurred."

In short, Perez's injury was "too remotely connected" to defendant's conduct to constitute legal cause. The trial court "correctly held that the defect, whether under a products liability or negligence theory of recovery, was not a legal cause of the accident and resulting injuries and death." The case emphasizes the Restatement's requirement that the factual or, but for cause, be a "substantive" factor in bringing about the event.

Then in *Union Pump Co. v. Allbritton*, 898 S.W.2d 773 (Tex. 1995), a pump caught fire at Texas plant and ignited the surrounding area. Plaintiff helped put out the fire; approximately two hours later, the fire was extinguished but there was a problem with a nitrogen purge valve. Upon returning, plaintiff took a short cut over pipe that was wet with foam from fire extinguishing efforts. She was injured when she slipped. Plaintiff sued the pump manufacturer for negligence, gross negligence, and strict liability. The trial court granted summary judgment for the pump manufacturer.

The issue was whether the defective pump was, as a matter of law, too remote to constitute legal causation. The plaintiff contended that but for the pump fire, she would never have walked over the pipe rack, which was wet with water or firefighting foam, and she would never have been injured.

Negligence, of course, requires showing of proximate cause, while strict liability only requires showing of producing cause. Proximate cause is cause in fact, plus foreseeability. Producing cause is an “efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of.” Both proximate cause and producing cause require showing of *cause in fact*: that defendant’s conduct or product be a “substantial factor in bringing about the plaintiff’s injuries.” “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*.” Thus, legal causation in the form of “substantial factor,” was applied to exclude a remote cause in both causes of action, meaning it applied to both proximate cause and producing cause.

The Court recognized that a line must be drawn between immediate and remote causes. It attempts to fix this line by applying a “practical test, the test of common experience, to human conduct when determining legal rights and legal liability.” The opinion indicates that the Court draws the line between “where legal causation *may* exist and where, as a matter of law, it *cannot*” exist.

Ultimately, the Court followed both *Lear Siegler* and *Bell*. Forces generated by the fire had “come to rest.” The fire did no more than “create the condition” that made plaintiff’s injuries possible. Therefore, plaintiff’s injuries are “too remotely connected with [defendant’s] conduct or pump to constitute a legal cause of her injuries.” It held there was no legal causation as a matter of law. The majority opinion was authored by Justice Owen.

The opinion’s importance is heightened by Justice Cornyn’s concurring opinion which would hold that the pump was cause-in-fact of plaintiff’s injuries, but not legal cause. In his view, the majority opinion conflates foreseeability with cause-in-fact analysis, as was done in *Lear Siegler*. To Justice Cornyn, the majority’s expansive view of cause-in-fact obscures proper causal analysis. Thus, the majority made a clear choice. Justice Cornyn is no longer on the Court. Justice Owen is.

Also in 1995, the Court wrote *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472 (Tex. 1995). A volunteer at Boys Club, who had been convicted of misdemeanor offense of driving while intoxicated, sexually abused several boys. The suit alleged it negligently accepted the volunteer without investigation or screening, negligently failed to supervise him, failed to disclose material information about him, and made various misrepresentations regarding his characteristics. Summary judgment was granted for Boys Club.

The issue was whether Boys Club proved, as a matter of law, that its conduct was not the cause in fact of the boys’ injuries. The Court focused on the issue of

whether the Boys Club's failure to investigate, screen, or supervise the volunteer proximately caused the injuries alleged.

The Court held the proximate cause is cause in fact, plus foreseeability. "[E]ven if the injury would not have happened but for the defendant's conduct, the connection between the defendant and the plaintiff's injuries simply may be too attenuated to constitute legal cause."

In application, the volunteer's presence at the club was not due to breach of any duty to screen or investigate (because misdemeanor convictions would not have precluded the volunteer from working at the club). His presence was but a "preliminary condition" in the course of events that made his sexual assaults possible. There was no evidence that the volunteer assaulted the boys at the club's premises.

In holding that there was no evidence that Boys Club's alleged failure to supervise was a producing cause of the boys' injuries, the Boys Club's failure to investigate, screen, or supervise its workers was not the cause in fact of plaintiffs' injuries, as a matter of law. Also, the conduct was not foreseeable (DWI convictions would not predict sexual assaults). So, defendant's conduct was not the proximate cause of the boys' injuries on either prong of proximate causation.

Regarding the DTPA claims, the Court concluded that the alleged misrepresentations were not the producing cause of the boys' injuries, because there was not an "unbroken causal connection" between the misrepresentations to the grandmother and the boys' injuries. The causal connection was broken by grandparents' long-term, independent relationship with the volunteer. The misrepresentations at most furnished an attenuated condition that made the injury possible, thus, they were not the cause.

In another child abuse case, *Perry v. S.N.*, 973 S.W.2d 301 (Tex. 1998), the issue was whether plaintiffs could maintain an action for negligence per se based on violation of Family Code's requirement to report child abuse to state authorities.

The answer was no. The Court considered whether the injury resulted directly or indirectly from the statutory violation. Here, the connection between defendant's conduct and plaintiff's injury was "significantly more attenuated" than in other cases involving negligence per se.

The final merger of legal causation into factual causation may have occurred in *IHS Cedars Treatment Center of DeSoto, Tex., Inc. v. Mason*, \_\_ S.W.3d \_\_, 2004 WL 1396194 (Tex. June 18, 2004).

There, Mason and Thomas were patients at a psychiatric hospital. Both asked for and received early discharge. Twenty-eight hours later Thomas flew into a rage while driving her Corvette at high speed with Mason as a passenger. In the midst of the episode, Thomas swerved to miss a dog in the road, lost control and flipped the car. Mason was paralyzed.

The issue was whether a breach of duties by caregivers proximately caused injuries to Mason. In an opinion by Justice Wainwright, the Court again held that to show proximate cause, it is not enough that the harm would not have occurred had the actor not been negligent. Negligence must have been a “substantial factor” in bringing about the plaintiff’s harm. There can be no cause-in-fact where negligence only “creates condition” which makes injuries possible. Defendant’s conduct may be too attenuated from resulting injuries to be “substantial factor” in bringing about the harm.

The Court again reasoned that “merely creating the condition that makes harm possible falls short as a matter of law of satisfying the substantial factor test.” When two separate and sequential tortuous incidents join to lead to injury, causal link between the first event and the injury is often too remote to be legally significant. It held that the plaintiffs’ harm is too attenuated from caregiver’s conduct to be cause in fact of injuries. Therefore, *as a matter of law*, defendant’s conduct was not “the” proximate cause of plaintiff’s injuries. Expert testimony only supported the contention that caregivers created the remote condition. Thus, testimony was “no evidence” of proximate cause. Justice Wainwright remains on the Court.

### **On the Horizon**

Watch for *Texas Elec. Co-op v. Dillard*, \_\_\_ S.W.3d \_\_\_, 2003 WL 1884296 (Tex. App.—Tyler 2003, pet. granted) (argued April 16, 2004). It may determine whether the next area of attention is the role of inferential rebuttal causation issues.

Cattle were loose on the road. Bumstead (TEC driver) hit a cow, killing the cow. Shortly thereafter, Brown (another driver) hit the cow’s carcass; Brown’s car then hit Dillard’s car, killing Dillard. Texas Electric Co-op pleaded that the owner’s failure to keep the cattle off the road was the *sole proximate cause* of Dillard’s death. The trial court gave a jury instruction on *unavoidable accident* but not on sole proximate cause. The jury found that Bumstead’s negligence caused Dillard’s death.

The issue is whether the trial court erred in not giving the sole proximate cause instruction.

The Court of Appeals viewed the test for cause in fact as whether negligent act or omission was a substantial factor in bringing about an injury. It is a complete

defense to negligence if conduct of a third party was the *sole proximate cause* of an injury, regardless of whether the third party was negligent. An *unavoidable accident* is an event not proximately caused by the negligence of any party to it. “An unavoidable accident instruction is proper only when there is evidence that the event was proximately caused by a non-human condition and not by the negligence of any party to the event.”

Dillard maintained that because the jury determined that Bumstead was negligent, it must have determined that it was not an unavoidable accident. The Court of Appeals responded “it is also reasonable that the jury could have determined that human conduct other than that of Bumstead triggered the series of events that caused Kenneth Dillard’s death.”

The Court of Appeals held that the trial court erred in refusing to submit sole proximate cause instruction requested by Texas Electric Co-op; “TEC was entitled to have the jury consider whether the actions of the unidentified owner set in motion the sequence of events leading to the death of Kenneth Dillard. It is good practice to explain to the jury each litigant’s theory of the case and then *let the jury choose* which theory to accept.”

When compared to IHS, it is likely the Court of Appeals will be reversed. The Supreme Court will likely hold, as a matter of law, the cattle owner could not have proximately caused the injuries. At most, the cattle owner created a condition. Its conduct was too attenuated to be a substantial factor.

In summary, causation is no longer an overlooked, or even assumed, element of a cause of action. It is the link between a wrongful act and the recovery of damages. Therefore, the sufficiency of the evidence establishing causation will be subject to the closest scrutiny.

It is the “ill-defined second element of producing cause” identified by Justice Cornyn’s concurrence in *Allbritton* that bears watching. Regardless of whether the policy choices it encompasses are referenced as “substantial factors,” injuries that “naturally flow” from the act, or being outside “the scope of danger” or “protection,” one thing is clear. Judicial policy is created in cause analysis. It is where “the law-making function of the courts is most frequently employed.” *Allbritton*, 898 S.W.2d at 777. No one should be surprised whenever the Supreme Court employs causation for just that purpose.