



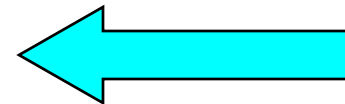
Chapter Five: Cause in fact

Duty

Breach

Causation

Actual cause, or cause in fact



Proximate cause

Damages

Chapter Five: Cause in fact

The plaintiff must show that **but for** the defendant's negligence, the harm s/he suffered would not have occurred.

Chapter Five: Cause in fact

- 1) Burden on the plaintiff
- 2) In a civil case, that means “more likely than not”
- 3) Need not disprove all possible scenarios
- 4) Test is whether, based on the evidence, the finder of fact is *reasonably certain* that among all the possible alternative causes, the defendant’s negligence caused the harm.
- 5) Fact that the defendant’s conduct increased the risk of specifically this type of harm may meet the burden of producing evidence. See n. 5, n. 6 p. 358

Chapter Five: Cause in fact

Alberts v. Shultz:

- Plaintiff may recover damages for a lost chance of a better outcome by showing, to a reasonable medical probability, the defendant's medical malpractice caused the loss of a chance, and the harm that might have been avoided in fact occurred.
- Recovery is measured by the percentage value of the plaintiff's chance for a better outcome

Chapter Five: Cause in fact: Arguments against the *Alberts* position

Falcon v. Memorial Hospital (Mich. 1990) n. 6, p. 366

1. Abandon's truth seeking function of tort law.
2. No rational justification for holding defendants who did not cause the plaintiff's injury liable.

Fennel v. Southern Maryland (Md. 1990)

1. Plaintiffs who survive nonetheless recover damages!
2. Confusing to jury
3. Makes no sense to allow full recovery on a 51% showing, then.
4. Impact on the cost of medical services

Chapter Five: Cause in fact

Alberts v. Shultz:

Open issues:

Does the theory apply outside the area of medical malpractice?

Can the theory be used by defendants to reduce the plaintiff's recovery where there was a better than even chance of recovery?

Chapter Five: Cause in fact

A toxic gas escapes from defendant's plant and a town of 5000 people suffers exposure. In an unexposed community, 2 out of 100,000 people will suffer from a particular disease. After exposure, 5 out of 100,000 people would be expected to develop the disease.

1) All 5000 people sue. Can they recover damages for the increase -- more than double -- of the chance that they will be sick, measured by 3/100,000 of the ultimate cost of treatment?

Does the logic of *Albert* apply to allow recovery?

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“This claim must not be confused with cases in which, as a result of the tortious conduct of one party, another party suffers exposure to something harmful, which may, in the future, lead to an injury.”

Chapter Five: Cause in fact

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2) All 5000 people sue. Can they recover damages for their emotional distress?

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MetroNorth: just exposure

Potter v. Firestone, note 4 p. 276 : not unless feared event is probable, or defendant reckless

Chapter Five: Cause in fact

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3) All 5000 people sue. Can they recover damages for their medical monitoring expenses?

Trend: if it is medically reasonable.

Chapter Five: Cause in fact

How courts have responded to “enhanced risk” cases?

- No immediate recovery for the future consequences, unless there is a physical injury, and the future consequences can be shown to be probable (but see *Petriello*, n. 6 p. 347)
- Recovery allowed for medical surveillance, whether or not there has been an immediate personal injury.
- Statute of limitations and single recovery rule waived, to allow plaintiffs to sue if the feared, future consequence eventuates.
- When it does, plaintiff will still have to show actual causation (see *Stubbs, Alberts*).

Chapter Five: Cause in fact

2. Joint and Several Liability

How joint and several liability works:

If defendants are jointly and severally liable, each defendant is liable for the entire judgment, although plaintiff can only recover the judgment once.

Allocation of liability is left to the tortfeasors

- rights of contribution
- rights of indemnity

Effect: Risk of insolvency is placed on the tortfeasors!

Chapter Five: Cause in fact

2. Joint and Several Liability

When are multiple defendants jointly and severally liable?

- When the negligence of each is a but for cause of the injury, the negligent acts combine to cause a single injury -- *concurrent tortfeasors*.
- When they act in pursuance of a common plan to commit a tort -- *acting in concert*.
- When the negligence of each is a but for cause of some injury to the plaintiff, and the defendants fail to meet the burden of showing a basis for apportionment. (*no basis for apportionment*)

Chapter Five: Cause in fact

2. Joint and Several Liability

When are multiple defendants *not* jointly and severally liable?

When the negligence of each causes a distinct injury to the plaintiff:

- distinct harms
- successive injuries
- apportionable injuries

Chapter Five: Cause in fact

2. Joint and Several Liability

Statutory reforms:

1. Abolish
2. Abolish where defendant is less than, for example, 50% at fault
3. Abolish for non-economic damages
4. Abolish where plaintiff himself / herself is at fault
5. Abolish, but retain for specific areas

For our purposes: the Uniform Comparative Fault Act (yet to come)

Assignment

Friday: 368-373, 374-391