Torts Tutorial Chapter 2 - Causation

INTRODUCTION

This program is designed to provide a review of basic concepts covered in a first-year torts class and is based on DeWolf, Cases and Materials on Torts. (http://guweb2.gonzaga.edu/~dewolf/torts/text). You have accessed the tutorial for Chapter 2, "Causation." Prior to doing these exercises you should read the relevant material in DeWolf, Cases and Materials on Torts. A brief overview of this Chapter is provided below.

OVERVIEW

The General Concept. "Proximate cause" is both a philosophical concept as well as a policy determination of whether imposition of liability is appropriate. Most jurisdictions define proximate cause as a combination of but-for cause + legal cause.

A. "But-For" Causation

1. *The Traditional Burden of Proof*

The plaintiff must show first that the defendant's breach of duty more probably than not was a "but-for" cause (or "cause in fact") of his injury, that is, that the plaintiff would not have been injured if the defendant had not committed

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the breach of duty.

2. *Modifying the But-for Cause Requirement*

a. *Excusable Inability to Identify the Injury-Causing Actor*. The plaintiff may be permitted to proceed despite failing the "more probably than not" standard where (a) his injury was caused by one of two or more negligent defendants, all of whom have been brought into the courtroom [alternative liability]; (b) the joint conduct of the defendants produced the injury [concert of action]; (c) the defendants' industry assigned the task of insuring safety to a body under its control [enterprise liability]; or (d) the defendants negligently manufactured an identical product, and plaintiff cannot identify the supplier except in terms of market shares for the total amount of the product sold [market share liability]. Where the market share theory is used, the plaintiff is limited to a judgment for the percentage of the injury represented by the defendant's market share.

b. *Loss of a Chance*. If the plaintiff would probably have suffered the injury anyway, but the defendant's conduct deprived plaintiff of a chance to avoid the injury, the plaintiff may argue for the opportunity to prove that his injury be defined in terms of a lost chance. Not all jurisdictions recognize this theory, nor do they agree on how it is to be implemented.

c. *Multiple Redundant Causes*. Where multiple defendants have contributed to an injury in a cumulative way (e.g. asbestos exposure), such that the defendants might plausibly claim that (individually) their conduct probably made no difference in producing the ultimate outcome, the court may shift the test from "but-for" causation to the test of whether the defendant's conduct was a "substantial factor" in causing the injury.

B. "Legal Cause": The Policy Consideration

Even where the defendant's negligence was a but-for cause of the plaintiff's injury, the plaintiff must also be prepared to show that the relationship between the defendant's conduct and his injury is "proximate" enough to make imposition of liability appropriate, i.e. "fair." This is a policy judgment that is difficult to formulate into precise rules. Most cases do not raise the "legal cause" issue because, where a breach of duty can be shown to be a "but-for" cause of the plaintiff's injury, imposition of liability seems appropriate. However, a defendant may escape liability if it appears that (a) the defendant's conduct did not increase the risk of the kind of injury the plaintiff suffered, but was connected to it by *mere chance;* (b) *a superseding tortfeasor (such as a drunk driver or car thief*) behaved so reprehensibly and unforeseeably that the "chain of causation" was broken; or (c) the plaintiff was so remote in time and/or space from that which made the conduct negligent that the injury to the plaintiff can be said to be *unforeseeable.*

. It needs to be understood that the foreseeability limitation only applies to the fact of injury to the plaintiff; it doesn't apply to the extent of injury. Thus, under the so-called "eggshell plaintiff" rule, a defendant cannot limit liability to what a person of normal constitution would have sustained. If the defendant negligently bumped into the plaintiff and is admittedly liable for some degree of injury, it is no defense to point out that a catastrophic result (like permanent brain damage from a fall) was not foreseeable.

Jurisdictions differ over whether to impose a rule of foreseeability based upon the Cardozo approach or the Andrews approach (in the *Palsgraf case).* Cardozo thought that the "zone of danger" limited the extent to which the defendant owed a duty of care. Thus, a plaintiff found outside the foreseeable zone of danger would be owed no duty of care and consequently could not claim negligence. On the other hand, Andrews thought that negligence was a determination of the nature of the defendant's act, regardless of who might be affected; however, foreseeability limited the extent to which liability could fairly be extended. The determination of which injuries were proximately caused by a defendant's negligence required for Andrews a pragmatic evaluation of the relationship between negligence and injury.

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EXERCISE

Each question gives you a fact pattern, and then you must choose an answer that best reflects the law as you understand it. Be careful to read the question and the suggested answers thoroughly. Select your answer by clicking on it. If you give an incorrect answer, you will be given feedback on what was wrong with your answer. By clicking on the feedback you will be taken back to the question to try again. Once a correct answer is selected, click on the feedback to go to the next question.

You may begin the exercise by click on a question number below. Throughout the tutorial three Shortcut Buttons will be located in the bottom right-hand corner of each page. The Return Button  brings you back to this page allowing you jump to questions of your choice if you prefer. The Information Button  takes you to the Torts Glossary. The Home Button  takes you to the Torts Tutorial Home Page.

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Question #1

In order to establish proximate cause, the plaintiff must prove:

(1)More probably than not, the plaintiff's injury would not have occurred but for the defendant's negligence.

(2)The defendant's negligence was a legal cause of the plaintiff's injury.

(3)More probably than not, the defendant's negligence was a substantial factor in causing the plaintiff's injury.

(4)The defendant's negligence was both a but-for AND legal cause of the plaintiff's injury.

Torts Tutorial Chapter 2 - Causation

Question #1

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This answer is only partially correct. Try again.

Torts Tutorial Chapter 2 - Causation

Question #1

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Torts Tutorial Chapter 2 - Causation

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(4)The defendant's negligence was both a but-for AND legal cause of the plaintiff's injury.

That's incorrect. The "substantial factor" test is sometimes used as a substitute for the "but-for" test. But in any case it isn't a complete test for proximate cause. Try again.



Torts Tutorial Chapter 2 - Causation

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(4)The defendant's negligence was both a but-for AND legal cause of the plaintiff's injury.

That's correct. Both "but-for" cause AND legal cause must be established in order for the plaintiff to recover.

Question #2

Eddie Haskell was carrying a load of 2x4's home to do some repairs on his house. The 2x4's were sticking out of the rear of his trunk, and he negligently failed to attach a red flag or other warning device to them. Sam Malone ran into Eddie from the rear and the protruding 2x4's pierced Sam's windshield and injured him. In order to recover from Eddie, Sam would be required to prove, in addition to Eddie's negligence:

(1)That Eddie was negligent, and Sam's injury would not have occurred but for the accident;

(2)More probably than not, if the flag or warning device had been attached, Sam would have avoided the collision

(3)Eddie was probably the sole cause of the injury;

(4)More probably than not, Sam was not at fault

Torts Tutorial Chapter 2 - Causation

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(4)More probably than not, Sam was not at fault

That's incorrect. We already know that Sam would not have been injured but for the accident; what we need to know is whether the accident and subsequent injury would have occurred BUT FOR EDDIE'S NEGLIGENCE. Try again.

Torts Tutorial Chapter 2 - Causation

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That's correct. This is the "but-for" element of proximate cause: would the injury have occurred but for the defendant's negligence?

Torts Tutorial Chapter 2 - Causation

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(4)More probably than not, Sam was not at fault

That's incorrect. It's not necessary for Sam to prove that Eddie was the SOLE cause of the injury. Eddie only has to show that Sam was *a* proximate cause of the injury. Try again.

Torts Tutorial Chapter 2 - Causation

Eddie Haskell was carrying a load of 2x4's home to do some repairs on his house. The 2x4's were sticking out of the rear of his trunk, and he negligently failed to attach a red flag or other warning device to them. Sam Malone ran into Eddie from the rear and the protruding 2x4's pierced Sam's windshield and injured him. In order to recover from Eddie, Sam would be required to prove, in addition to Eddie's negligence:

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(4)More probably than not, Sam was not at fault

That's incorrect. Whether Sam was at fault or not doesn't affect the determination of whether Eddie's negligence was a proximate cause of Sam's injury. Try again.

Question #3

Diana Deft was walking home from her job as a county prosecutor. She passed a bar where two men were out on the sidewalk arguing. As she attempted to pass by them, she was knocked over and suffered serious injuries. The bartender knows the two men and will testify that they agreed to step outside to "settle their differences like men." However, no witnesses can testify as to which one actually knocked Diana over. If Diana sues both men, she would be well advised to argue:

(1)Alternative liability, as in *Summers v. Tice*;

(2)Concert of Action

(3)That she is excusably ignorant of the defendant's identity

(4)Either (1) or (2)

Torts Tutorial Chapter 2 - Causation

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This answer is only partially correct. Try again.

Torts Tutorial Chapter 2 - Causation

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Torts Tutorial Chapter 2 - Causation

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That's incorrect. Excusable ignorance is not enough to shift the burden of proof to the defendants. Each of the exceptions to the "but-for" cause requirement has distinct elements. Try again.

Torts Tutorial Chapter 2 - Causation

Diana Deft was walking home from her job as a county prosecutor. She passed a bar where two men were out on the sidewalk arguing. As she attempted to pass by them, she was knocked over and suffered serious injuries. The bartender knows the two men and will testify that they agreed to step outside to "settle their differences like men." However, no witnesses can testify as to which one actually knocked Diana over. If Diana sues both men, she would be well advised to argue:

(1)Alternative liability, as in *Summers v. Tice*;

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(3)That she is excusably ignorant of the defendant's identity

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That's correct. Alternative liability applies because she can establish that both actors were negligent, and she has both actors in the courtroom. Also, concert of action applies because both men agreed to engage in the negligent act that resulted in her injury.

Question #4

Mike Matthews is only 17 years old, but he looks 28. To drown his sorrows, he visited four drinking establishments, each of which served him two margaritas. On his way home from the fourth establishment, he lost control of his car and injured Linda Leffler. Linda obtains the police report showing that Mike's blood-alcohol content was well above the legal limit. IN a suit against Mike Matthews Linda's best argument to establish causation would be:

(1)Alternative Liability

(2)Concert of Action

(3)Market Share Liability

(4)The Substantial Factor Test

Torts Tutorial Chapter 2 - Causation

Mike Matthews is only 17 years old, but he looks 28. To drown his sorrows, he visited four drinking establishments, each of which served him two margaritas. On his way home from the fourth establishment, he lost control of his car and injured Linda Leffler. Linda obtains the police report showing that Mike's blood-alcohol content was well above the legal limit. IN a suit against Mike Matthews Linda's best argument to establish causation would be:

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That's incorrect. Alternative Liability applies when we don't know who did what. But here the evidence from the friends establishes that each bar sold two margaritas. Thus, we know the identity of the tortfeasors and their respective contributions. Alternative liability wouldn't help Linda. Try again.

Torts Tutorial Chapter 2 - Causation

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That's incorrect. In order to establish concert of action the plaintiff has to show that the defendants entered into some kind of agreement to engage in the conduct that injured the plaintiff. Under these facts, each bar acted separately. Try again.

Torts Tutorial Chapter 2 - Causation

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That's incorrect. In a market share liability case, the plaintiff usually is injured by only one actor, but doesn't know which actor did the thing that caused her injury. In this case we know who did what (according to the testimony of the friends, each bar sold two margaritas). The problem is that we don't know how those acts of negligence combined to produce the injury. Try again.

Torts Tutorial Chapter 2 - Causation

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(4)The Substantial Factor Test

That's correct. In this case the injury was produced by an accumulation of the effects of several different negligent tortfeasors, none of which could be said to be a "but-for" cause. Hence, to avoid the injustice of having each defendant escape liability, the court would probably allow the plaintiff to establish causation against any defendant whose negligence was a "substantial factor" in causing the injury.

Torts Tutorial Chapter 2 - Causation

Question #5

Paul Penrose died from cyanide poisoning. In his stomach was found a partially digested capsule with acetaminophen, an aspirin-substitute. The label can no longer be discerned, and no one knows what brand of capsule he took. Paul's heirs want to sue the manufacturers of acetaminophen capsules, alleging that they negligently produced a capsule that was non-tamperproof. Investigation has revealed that three domestic manufacturers and one foreign manufacturer produce capsules sold in the United States. Although the foreign company's share of the market is quite small they are still subject to the jurisdiction of the United States Courts. Paul's best argument for recovery would be:

(1)Alternative Liability

(2)Concert of Action

(3)Enterprise Liability

(4)Market Share Liability

Torts Tutorial Chapter 2 - Causation

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(3)Enterprise Liability

(4)Market Share Liability

That's correct. So long as plaintiff can show that each of the manufacturers acted negligently (by failing to make their capsules tamperproof), and all can be brought into court, then alternative liability can be applied. This theory didn't work in Sindell v. Abbott Laboratories because the plaintiff was unable to bring them all in. However, on these facts there is nothing to suggest that they couldn't all be made defendants.

Torts Tutorial Chapter 2 - Causation

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(1)Alternative Liability

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(3)Enterprise Liability

(4)Market Share Liability

That's incorrect. There is nothing in the fact pattern to suggest that the manufacturers agreed among themselves to do some negligent act. Thus, concert of action would probably be unavailable. Try again.

Torts Tutorial Chapter 2 - Causation

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(3)Enterprise Liability

(4)Market Share Liability

That's incorrect. Enterprise liability applies in situations where the defendant's have the ability to control the industry standards. That was true, for example, in *Hall v. Dupont*, where the defendants were blasting cap manufacturers whose trade association could have adopted adequate safety standards to prevent the plaintiff's injury, but negligently failed to do so. Here, as in the *Sindell* case, the defendants' industry is controlled not by themselves but by a federal regulatory agency, the FDA. Thus, enterprise liability would probably be unavailable.

Torts Tutorial Chapter 2 - Causation

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(1)Alternative Liability

(2)Concert of Action

(3)Enterprise Liability

(4)Market Share Liability

That's incorrect. Although market share liability would probably apply in this case, it would be less desirable because the plaintiff is usually only entitled to collect the individual market share against each of the manufacturers (several liability--see *Brown v. Superior Court*). Instead, plaintiff should seek a recovery against each defendant that would entitle him to collect his entire damages from any of the liable defendants (joint and several liability). Try again.

Torts Tutorial Chapter 2 - Causation

Question #6

Bill and Buck were driving across the Wyoming River in their pickup truck. Due to a defect in the steering mechanism, their truck swerved to the right and caused them to be thrown over the edge of the bridge into the river, where Buck drowned. In suing the car manufacturer for Buck's death, Buck's heirs would want to establish:

(1)That but for the defect, Buck would have lived.

(2)That, more probably than not, Buck lost a chance of survival due to the defect in the steering mechanism;

(3)That the defect was a substantial factor in Buck's death

(4)That the manufacturer should be subject to enterprise liability

Torts Tutorial Chapter 2 - Causation

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(3)That the defect was a substantial factor in Buck's death

(4)That the manufacturer should be subject to enterprise liability

That's correct. Of course in addition to proving "but-for" cause, Buck's heirs would also be required to show that the defendant's negligence was also a legal cause of the injury. Fortunately that should not be difficult based on these facts.

Torts Tutorial Chapter 2 - Causation

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(3)That the defect was a substantial factor in Buck's death

(4)That the manufacturer should be subject to enterprise liability

That's incorrect. A loss of a chance theory is desirable for the plaintiff when the evidence would show that the plaintiff probably would have suffered the same injury even if the defendant hadn't been negligent. In this case, Buck has a strong case of showing that, but for the defect in the car, he would not have been injured at all. Thus a "loss of a chance" theory would not work to his advantage. Try again.

Torts Tutorial Chapter 2 - Causation

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(3)That the defect was a substantial factor in Buck's death

(4)That the manufacturer should be subject to enterprise liability

That's incorrect. The "substantial factor" test applies in the case of multiple redundant causes. Here Buck wants to argue that the manufacturer was the cause of his injury, and has no need of a substantial factor test. Moreover, because the but-for test would work satisfactorily in this case, the judge would probably refuse to give a "substantial factor" instruction. Try again.

Torts Tutorial Chapter 2 - Causation

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(1)That but for the defect, Buck would have lived.

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(3)That the defect was a substantial factor in Buck's death

(4)That the manufacturer should be subject to enterprise liability

That's incorrect. The "enterprise liability" theory only applies in the case of multiple defendants where the identity of the particular defendant causing the injury is unknown. Try again.

Torts Tutorial Chapter 2 - Causation

Question #7

Cynthia Colbert stopped at her neighborhood convenience store to buy a pack of cigarettes. She had her three-month-old son in the backseat of the car, and she left the engine running with the air conditioner on. While she was standing in line at the counter, Wayne Neutron, recently released from prison, jumped into the car and drove down the street at high speed. After several miles of driving, Wayne ran a red light and struck Myrtle Beech, who was in a crosswalk. Myrtle now sues Cynthia. Cynthia's best defense argument on the issue of proximate cause would be:

(1)The failure to remove her keys from the car was not a but-for cause of the injury;

(2)The fact that Wayne happened along at just that moment was "mere chance";

(3)The injury to Myrtle was unforeseeable;

(4)The thief was a superseding cause of the accident.

Torts Tutorial Chapter 2 - Causation

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(2)The fact that Wayne happened along at just that moment was "mere chance";

(3)The injury to Myrtle was unforeseeable;

(4)The thief was a superseding cause of the accident.

That's incorrect. If Cynthia had not left her keys in the car, it is very improbable that the thief would have stolen it. The fact that her negligence was a BUT-FOR cause of the injury does not, however, mean that it is necessarily a LEGAL cause. Try again.

Torts Tutorial Chapter 2 - Causation

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(1)The failure to remove her keys from the car was not a but-for cause of the injury;

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(3)The injury to Myrtle was unforeseeable;

(4)The thief was a superseding cause of the accident.

This is incorrect. "Mere chance" is a defense where the defendant's negligence made no difference as far as the *risk* of the plaintiff being hurt. (E.g. *Berry v. Sugar Notch*). Granted, here it is a highly unlikely that on any given day a car--even with the keys in it--will be stolen. Nonetheless, the legal cause requirement for increased risk is met because the defendant's negligence increased the risk that the car would be stolen. For example, suppose leaving keys in the car caused the risk to jump from 1:5,000 (without keys) to 1:500 (with keys). That is an enormous increase in risk, even though the chance of the car being stolen is relatively quite small. Try again.

Torts Tutorial Chapter 2 - Causation

Cynthia Colbert stopped at her neighborhood convenience store to buy a pack of cigarettes. She had her three-month-old son in the backseat of the car, and she left the engine running with the air conditioner on. While she was standing in line at the counter, Wayne Neutron, recently released from prison, jumped into the car and drove down the street at high speed. After several miles of driving, Wayne ran a red light and struck Myrtle Beech, who was in a crosswalk. Myrtle now sues Cynthia. Cynthia's best defense argument on the issue of proximate cause would be:

(1)The failure to remove her keys from the car was not a but-for cause of the injury;

(2)The fact that Wayne happened along at just that moment was "mere chance";

(3)The injury to Myrtle was unforeseeable;

(4)The thief was a superseding cause of the accident.

That's incorrect. None of these answers is very good, but this one is probably worse than at least one of the answers. Foreseeability goes to the question of whether or not the plaintiff's injury arose from the type of risk that made the defendant's conduct negligent. The fact that Myrtle was far removed from Cynthia's act of negligence is not decisive, since the very thing that makes it negligent to leave one's keys in the car--the risk that the thief will injure someone on the street--is the risk that materialized in this case. Try again.

Torts Tutorial Chapter 2 - Causation

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That's correct. Although it's not likely to win, Cynthia could argue that the thief's actions broke the chain of causation between her initial act of negligence and the ultimate injury. The issue of superseding cause is usually left to the jury to decide on the instruction that defines a proximate cause as one which "in a direct and unbroken sequence leads to the plaintiff's injury." Here Cynthia could probably argue that the chain of causation was broken by the theft and the high speed chase. Although there's no guarantee that this argument would win, it would be a legally acceptable argument.

Torts Tutorial Chapter 2 - Causation

Question #8

Harry Hughes was driving down Third Avenue in a large station wagon. As he approached the intersection with Poplar St. he planned to turn right. The light turned yellow, and he had time to stop, but he continued without stopping. As he turned he was struck by an ambulance driven by the Pine City Fire Department. They were responding to a fire at the corner of Poplar and Thirtieth Ave., some three miles away. The fire truck was not seriously damaged, but it took several minutes to untangle the cars and make sure no one was hurt. Shortly after they got to the fire an explosion occurred, blowing out the windows of building across the street and injuring people inside. If the injured people sue Harry, he would win if he could convince the jury:

(1)Even if the fire department had not been delayed, the explosion might have happened anyway.

(2)The explosion was an intervening cause of the plaintiffs' injuries.

(3)The plaintiff's injuries were not a foreseeable consequence of his negligence

(4)The timing of the explosion was mere chance.

Torts Tutorial Chapter 2 - Causation

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(3)The plaintiff's injuries were not a foreseeable consequence of his negligence

(4)The timing of the explosion was mere chance.

That's incorrect. As in the *Reynolds* case, where the lady fell down the unlighted stairs, it is not enough that it *might* have occurred even without the defendant's negligence. The plaintiff need only establish that, more probably than not, it would not have happened but for the defendant's negligence. A 49% possibility that the defendant's negligence didn't make any difference would not prevent the plaintiff from proving but for cause. Try again.

Torts Tutorial Chapter 2 - Causation

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(4)The timing of the explosion was mere chance.

This is incorrect. An INTERVENING cause is not enough to break the chain of causation; the cause must supersede the defendant's negligence, breaking the chain of causation. If the explosion was in fact a superseding cause of the injury, then Harry would not be liable; but that's not the finding assumed in this answer. Try again.

Torts Tutorial Chapter 2 - Causation

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That's correct. The defendant could argue that his negligence was not a proximate cause of the injury, since the injury was not reasonably foreseeable. How could it be foreseen that by driving negligently, a fire truck would be delayed, which in turn would cause an explosion several blocks away? Under the Cardozo view, the explosion victims would not be in the zone of danger created by Harry's negligence. While Andrews would probably support a jury verdict that found the injury reasonably foreseeable, the facts here assume that the jury found they were not foreseeable.

Torts Tutorial Chapter 2 - Causation

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That's incorrect. True, it was highly unlikely that the gas would explode, but the negligence of the defendant did increase the risk, however slightly, that an emergency vehicle would be unable to reach its destination in time. Thus, so long as it was a but-for cause, it would also be a legal cause of the injury--at least in terms of the "mere chance" argument. Try again.

Question #9

Dan Deerdorph and Howard Kosol are radiologists. Paula Prince is referred to them to examine her lungs for possible signs of cancer. Both Deerdorph and Kosol examine the X-ray of her lungs, but both negligently fail to recognize a spot on the X-ray indicating cancer. By the time a correct diagnosis is made, Paula is unable to take advantage of a treatment that if begun earlier probably would have cured her. Which of the following arguments would Paula want to make?

(1)The "loss of a chance" doctrine should apply.

(2)Deerdorph and Kosol are multiple redundant causes of her injury.

(3)Deerdorph and Kosol were both but-for causes of her injury.

(4)The Alternative Liability principle should apply.

Torts Tutorial Chapter 2 - Causation

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That's incorrect. In this case the plaintiff would want to argue that, more probably than not, through the use of reasonable care she would have avoided the injury altogether. The facts state that with an earlier diagnosis Paula probably would have been cured. Thus, she meets the but-for test and has no need to argue loss of a chance.

Torts Tutorial Chapter 2 - Causation

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That's incorrect. Multiple redundant causes are present where the subtraction of an individual defendant's conduct probably wouldn't make any difference in the ultimate outcome, but collectively the defendants' conduct caused the plaintiff's injury (e.g., the asbestos cases). In this case, if either of the defendants had acted with reasonable care, the plaintiff would have avoided the injury. Therefore, the defendants' conduct is not redundant, and the multiple redundant cause doctrine (leading to the substantial factor test) would not apply.

Torts Tutorial Chapter 2 - Causation

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That's correct. Since either Deerdorph or Kosol could have prevented the injury by using reasonable care, both would be but-for causes of the injury. Paula should be able to obtain a judgement against both doctors for the full amount of her damages.

You have **completed** the questions for Chapter 2. You will now be returned to the menu.

Torts Tutorial Chapter 2 - Causation

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That's incorrect. The alternative liability theory applies in cases where you don't know which of two or more actors caused the plaintiff's injury (e.g. *Summers v. Tice*). Here, however, in this case the plaintiff knows what each defendant did. Try again.

END

Find more exercises at the Torts Home Page by clicking the Home Action Button