



Massachusetts Adopts “But For” Factual Causation Standard in Multiple Defendant Tort Actions.

By: Melissa M. Hanlon, Beth G. Catenza & Trevor J. Brown

In *Doull v. Foster*, the Massachusetts Supreme Judicial Court clarified the standard for factual causation in multiple defendant tort actions, abandoning the “substantial contributing factor” test and adopting “but for” causation. 487 Mass. 1 (2021). The Supreme Judicial Court’s decision is a significant development in Massachusetts decisional law, providing clarity to the standard by which juries will determine factual causation in almost all multiple defendant tort actions, including medical negligence cases.

In the underlying case, the plaintiffs’ decedent was treated with hormone-replacement drugs. She ultimately developed pulmonary issues and died of an underlying clotting disorder. Suit was brought against two providers; among other points, the suit alleged that the clotting disorder was caused by the hormone-replacement therapies which led to the decedent’s premature death. The trial court instructed the jury using a “but for” standard for factual causation. While the jury found both defendants separately and individually negligent, the jury further held that the negligence was not the “sole/but-for” cause of the decedent’s harm. Following the verdict, the plaintiffs filed a motion for a new trial, which was denied. The plaintiff appealed; the Supreme Judicial Court transferred the case from the Appeals Court on its own motion.

While the plaintiffs raised a number of points on appeal, the main issue was whether the “substantial contributing factor” test may (or must be) used instead of the “but for” test in the jury instructions concerning factual causation where the case involves multiple

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alleged tortfeasors and/or multiple causes of an alleged injury. Under “but for” causation, a defendant is said to have caused the plaintiff’s injuries if “but for” their negligence, an injury probably would not have occurred. Conversely, under the “substantial contributing factor” test, a defendant can be considered a cause of the harm at issue where their conduct was not a necessary “but for” cause, but was a “substantial factor” in bringing about the harm.

In its decision, the Supreme Judicial Court found no error in the trial judge’s instructions, holding that the “but for” standard for factual causation is appropriate for almost all multiple defendant tort actions (save toxic tort actions). In a lengthy opinion, the Court explicitly rejected the “substantial contributing factor” test in favor of the “but for” test. Moreover, the Court went to great lengths to lay out how juries should be instructed on factual causation in negligence cases involving multiple potential causes of harm and/or multiple defendants.

The Court discussed at length that while the “substantial contributing factor” test had its basis as an alternative causation test, that it has not withstood the test of time – a fact noted in the most recent Restatement [Third] of Torts. Originally conceptualized as an alternative theory of causation, the “substantial contributing factor” test was meant to avoid an unjust result where multiple causes could not be said to be the “but for” cause of the harm at issue, but each would have been sufficient to cause the harm – the Court used the example of two fires that come together to cause property damage. Despite this focus, the Court noted that rather than offering clear guidance as to causation, the “substantial contributing factor” test allowed factfinders to “engage in fuzzy headed thinking” about causation by conflating and collapsing “the concepts of factual and legal causation” leading juries to skip the factual causation inquiry altogether.

Concluding that “the substantial contributing factor test should no longer be used in most negligence cases,” the Supreme Judicial Court’s decision is a major development in Massachusetts law. Instructing a jury on the question of causation is difficult, particularly when there are multiple defendants and/or multiple possible causes of the harm at issue. That said, the “but for” test should provide greater clarity to juries versus the less precise “substantial contributing factor test.”

Moreover, the *Doull* opinion brings Massachusetts in line with other jurisdictions. The Court noted in its opinion that over two-thirds of jurisdictions require proof of “but for” causation in the majority of cases. This includes New Hampshire, which has long required that in the context of medical negligence, that in order to meet their burden, a plaintiff must adduce competent expert medical testimony by which the jury can conclude that “that but for a defendant’s negligence an injury probably would not have occurred.” See, e.g., *Bronson v. Hitchcock Clinic*, 140 N.H. 798, 802-03 (1996).

Taken together, this development should allow juries to more easily determine questions of factual causation. While a defendant can only be held liable if their conduct is both the cause in fact of the injury as well as the legal cause of the injury (commonly referred to as proximate causation) – and *Doull* speaks squarely to the first prong – the impact of this decision cannot be understated.

Indeed, this shift is particularly acute for the defense of medical providers – given that there are oftentimes multiple defendants named in medical negligence actions, the “but for” causation test should more accurately allow factfinders to determine whether an individual defendant factually caused the harm at issue. For medical providers named as defendants, the application of the “but for” tests should also allow for a more consistent application of the law.

Sulloway & Hollis has long been a leader in medical malpractice defense, hospital and physician advocacy, and health law litigation, with notable successes in meeting the legal needs of health care providers and institutions across New England. If you have questions about this decision or other matters, please contact Melissa M. Hanlon, Beth G. Catenza or Trevor J. Brown at mhanlon@sulloway.com, bcatenza@sulloway.com, tbrown@sulloway.com or (603) 223-2800.

Meet the Authors



Melissa M. Hanlon is a Member at Sulloway & Hollis. She represents hospitals and medical care providers in Maine and New Hampshire at the trial and appellate levels, and before numerous administrative boards and agencies in connection with professional licensure and disciplinary issues. Melissa can be reached at 603-223-2800 or Email: mhanlon@sulloway.com



Beth G. Catenza is a Member at Sulloway & Hollis and concentrated her practice in advising and defending healthcare providers in matters involving patient care and other unique issues confronting the healthcare industry. Beth can be reached at 603-223-2800 or Email: bcatenza@sulloway.com



Trevor J. Brown is an Associate at Sulloway & Hollis. Mr. Brown serves clients on a variety of matters in the Litigation Department, including insurance defense, medical malpractice defense, state taxation and general commercial litigation. Trevor can be reached at 603-223-2800 or Email: tbrown@sulloway.com