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# CASENOTES

## THE "SUBSTANTIAL FACTOR TEST" FOR CAUSATION: JUEDEMAN V. MONTANA DEACONESS MEDICAL CENTER

Randall C. Lester

### I. INTRODUCTION

A critical issue in any negligence action is the determination of whether the defendant's act is reasonably connected to the plaintiff's injury.<sup>1</sup> More aptly put, causation is a necessary element of any negligence case.<sup>2</sup> Although causation is usually framed in terms of proximate cause,<sup>3</sup> Montana has recently recognized the "substantial factor" test as an alternative.<sup>4</sup> The substantial factor test was not introduced to abolish proximate cause, but to offer an alternative test under certain factual circumstances. In *Juedeman v. Montana Deaconess Medical Center*,<sup>5</sup> the Montana Supreme Court affirmed a district court decision refusing to instruct the jury as to the substantial factor test. The purpose of this case note is to examine the recent *Juedeman* case and other related decisions, and to analyze those circumstances which will allow the use of a substantial factor instruction.

### II. BACKGROUND

For the purpose of instructing the jury on causation, a proximate cause definition is ordinarily considered appropriate.<sup>6</sup> A standard instruction on proximate cause states: "The proximate cause of an injury or damage is that cause which in a natural and continuous sequence, unbroken by any new or independent cause, pro-

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1. W. PROSSER & P. KEATON, HANDBOOK ON THE LAW OF TORTS § 41 (5th ed. 1984).

2. E.g., R.H. Schwartz Constr. Specialties, Inc. v. Hanrahan, \_\_\_ Mont. \_\_\_, \_\_\_, 672 P.2d 1116, 1117 (1983) (stating "it is axiomatic that negligence requires the existence of a duty, a breach of that duty and harm caused by that breach").

3. W. PROSSER & P. KEETON, *supra* note 1, § 41.

4. *Rudeck v. Wright*, \_\_\_ Mont. \_\_\_, \_\_\_, 709 P.2d 621, 628 (1985); *Kyriss v. State*, \_\_\_ Mont. \_\_\_, \_\_\_, 707 P.2d 5, 8 (1985). It should be noted that the terms "substantial factor" and "legal cause" are often used interchangeably. For purposes of uniformity, the term "substantial factor" will be used throughout this note.

5. \_\_\_ Mont. \_\_\_, 726 P.2d 301 (1986).

6. *Rudeck*, \_\_\_ Mont. at \_\_\_, 709 P.2d at 628.

duces the injury or damage, and without which it would not have occurred.”<sup>7</sup> Bench and bar commonly refer to proximate cause as the “but for” test.<sup>8</sup> According to the “but for” test, “[t]he defendant’s conduct is a cause of the event if the event would not have occurred but for that conduct; or conversely, the defendant’s conduct is not a cause of the event, if the event would have occurred without it.”<sup>9</sup>

An unjust result may occur if the jury is instructed in terms of the “but for” test when two causes concur in producing an injury and when either cause alone would have been capable of causing the same injury.<sup>10</sup> In this situation, a tortfeasor might successfully argue that the same injury would have occurred despite his negligence.<sup>11</sup> This potential problem may be best illustrated by the use of an example:<sup>12</sup> motorcycle drivers X and Y simultaneously drive by an individual riding a horse. The horse is frightened by the excessive speeds and close proximity of the motorcycles and throws the rider, injuring him severely. Although the acts of both X and Y are responsible for the injury, it cannot be said that the injury would not have occurred “but for” each of their acts. In other words, X could argue he was not the proximate cause of the injury because the same injury would have occurred despite his negligent act, and Y would advance the same argument. As a result, both or all defendants may avoid liability because the “but for” test can logically absolve them all.

Use of the substantial factor test would avoid such a result. A common jury instruction implementing the substantial factor test states: “A legal cause of an injury is a cause which is a substantial factor in bringing about the injury.”<sup>13</sup> Montana recently recognized the use of such an instruction when two or more factors may be substantial causes of the plaintiff’s injury.

In *Rudeck v. Wright*,<sup>14</sup> the Montana Supreme Court approved of the above stated substantial factor instruction. Prior to *Rudeck*, there were indications that a substantial factor instruction would

7. *Id.*

8. *Rudeck*, \_\_\_ Mont. at \_\_\_, 709 P.2d at 628. See also W. PROSSER & P. KEETON, *supra* note 1, § 41.

9. *Rudeck*, \_\_\_ Mont. at \_\_\_, 709 P.2d at 628.

10. *Id.* at \_\_\_, 709 P.2d at 628.

11. See *Kyriss*, \_\_\_ Mont. at \_\_\_, 707 P.2d at 8.

12. W. PROSSER & P. KEETON, *supra* note 1, § 41 (implementing the facts of *Corey v. Havener*, 182 Mass. 250, 65 N.E. 69 (1902)).

13. See *Juedeman*, \_\_\_ Mont. at \_\_\_, 726 P.2d at 305; *Kyriss*, \_\_\_ Mont. at \_\_\_, 707 P.2d at 7; *Rudeck*, \_\_\_ Mont. at \_\_\_, 709 P.2d at 628. See also CALIFORNIA JURY INSTRUCTIONS § 3.76 (7th ed. 1986); and, MONTANA PATTERN INSTRUCTIONS, No. 2.07 (1987).

14. \_\_\_ Mont. \_\_\_, 709 P.2d 621.

be appropriate under proper circumstances.<sup>15</sup> However, *Rudeck* is the first Montana case to expressly approve such an instruction.<sup>16</sup>

The *Rudeck* decision was the result of a medical malpractice claim in which the defendant surgeon failed to remove a piece of surgical gauze, a lap mat, from his patient.<sup>17</sup> Two surgical nurses assisted the surgeon during the operation and were responsible for the lap mat count.<sup>18</sup> Following the operation, the patient's health was poor and he failed to recover in a satisfactory manner. Still under the care of the operating physician, the patient was referred to a radiologist who failed to detect the presence of the lap mat despite the fact that x-rays revealed the lap mat's presence.<sup>19</sup> Approximately five months after the operation, the patient died due to complications caused by the lap mat. In a subsequent trial against the operating surgeon,<sup>20</sup> the court allowed a substantial factor instruction. The jury found against the operating surgeon. On appeal, the Montana Supreme Court approved of the instruction.

The court preferred the substantial factor test because more than one cause concurred in causing the decedent's death.<sup>21</sup> The court stated that the substantial factor rule was not intended to be a permanent replacement for the traditional proximate cause rule. Instead, the court reasoned that the proximate cause rule was inapplicable under the particular facts of the case.<sup>22</sup> However, the appropriateness of the substantial factor rule in *Rudeck* is debatable since the court excluded evidence of concurrent negligence by the surgical nurses and evidence of subsequent negligence by the radiologist.<sup>23</sup> The court held "that such evidence was irrelevant during the trial on the issue of whether [the operating surgeon's]

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15. See *Moen v. Peter Kiewit & Sons Co.*, 201 Mont. 425, 441, 655 P.2d 482, 490 (1982).

16. Although Montana case law has phrased the traditional proximate cause test in various ways, causation tests prior to *Rudeck* appear to always include the "but for" test in one form or another. See, e.g., *Northwestern Nat'l Casualty Co. v. Phalen*, 182 Mont. 448, 460, 597 P.2d 720, 726-27 (1979); *Bensley v. Miles City*, 91 Mont. 561, 567, 9 P.2d 168, 171 (1932).

17. *Rudeck*, \_\_\_ Mont. at \_\_\_, 709 P.2d at 623.

18. *Id.*

19. *Id.*

20. Prior to trial, the radiologist and hospital negotiated a settlement with the plaintiff. *Id.* at \_\_\_, 709 P.2d at 624.

21. *Id.* at \_\_\_, 709 P.2d at 628-29.

22. *Id.* at \_\_\_, 709 P.2d at 629. See also *Dvorak v. Matador Serv., Inc.*, \_\_\_ Mont. \_\_\_, \_\_\_, 727 P.2d 1306, 1311 (1986) (holding that a demonstration of proximate cause is a necessary element of a strict liability claim).

23. *Rudeck*, \_\_\_ Mont. at \_\_\_, 709 P.2d at 627-28.

negligence caused the injury and death of [the patient]."<sup>24</sup> Nevertheless, *Rudeck* held the substantial factor test was the proper test under the circumstances at hand.

In *Kyriss v. State*,<sup>25</sup> the court made it clear that causation would not always be determined in terms of proximate cause. The *Kyriss* decision was also the result of a medical malpractice case in which a prison inmate at the Montana State Prison consulted a prison physician regarding an ingrown toenail on his right foot.<sup>26</sup> After removal of the toenail, the patient's foot failed to heal and contracted an infection. As the condition grew steadily worse, the patient consulted with the prison medical staff on a substantial number of occasions.<sup>27</sup> Still, the patient's condition continued to decline and approximately 3 ½ months following the operation, it became necessary to amputate the lower portion of the defendant's right leg.<sup>28</sup> In a later medical malpractice trial, the jury was instructed as to the substantial factor test and entered a verdict against two prison physicians.<sup>29</sup> On appeal, the use of the instruction was affirmed.

The majority in *Kyriss* reasoned that the factual situation was well suited for a substantial factor instruction because there were two causes which may have concurred in producing the injury and either cause acting alone could have caused the same injury.<sup>30</sup> The defendant argued that the actual cause of the amputation was a pre-existing condition of arteriosclerosis in the patient's right leg and that the amputation would have been necessary in any event.<sup>31</sup> In contrast, the plaintiff alleged the amputation was caused by negligent medical treatment. In affirming the use of a substantial factor instruction, the court reasoned a proximate cause instruction would be inadequate and stated:

Under the "but for" rule, it could be argued, and indeed was argued in the district court and here on appeal, that the amputation would have occurred in any event, and not only "but for" the negligent treatment by the doctors.

If two causes concur to bring about an injury and either cause would have been sufficient for the result, some test for tort liability other than the "but for" rule is needed. In the case of

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24. *Id.* at \_\_\_\_, 709 P.2d at 628.

25. \_\_\_\_, Mont. \_\_\_\_, 707 P.2d 5 (1985).

26. *Id.* at \_\_\_\_, 707 P.2d at 9.

27. *Id.* at \_\_\_\_, 707 P.2d at 9-11.

28. *Id.* at \_\_\_\_, 707 P.2d at 11.

29. *Id.* at \_\_\_\_, 707 P.2d at 6.

30. *Id.* at \_\_\_\_, 707 P.2d at 8-9.

31. *Id.* at \_\_\_\_, 707 P.2d at 9.

two such concurring causes, the proximate cause instruction fails because a jury so instructed would face an impossible task: It cannot then find the negligence of one party a cause "without which the injury would not have occurred." It was in grappling with this facet of tort causation that courts developed the "substantial factor" test.<sup>32</sup>

The "but for" test would have allowed the physicians to argue that even if their treatment was negligent, they were not the proximate cause of the amputation. In effect, the substantial factor test removed this defense. Importantly, *Kyriss* recognizes that a substantial factor instruction is appropriate if an injury may have been substantially caused "by two or more actors or factors."<sup>33</sup> Therefore, use of the instruction is not always limited to instances where there are two or more tortfeasors responsible for the injury. Following the logic of *Kyriss*, a pre-existing condition acting alone with the negligence of a single tortfeasor is sufficient.

Other jurisdictions have previously recognized the substantial factor test in one form or another.<sup>34</sup> Currently, there is no doubt that Montana also recognizes the use of the substantial factor test if the appropriate circumstances exist. The vital current issue, therefore, is what circumstances will permit the use of a substantial factor instruction.

### III. JUEDEMAN V. MONTANA DEACONESS MEDICAL CENTER

#### A. *Facts and Procedure*

On June 5, 1981, Clarice Juedeman was convalescing at the Montana Deaconess Medical Center.<sup>35</sup> She was 71 years old and recovering from colon surgery performed nine days earlier. At the time of surgery, a catheter was inserted in her right internal jugular vein.<sup>36</sup> The catheter served several purposes, including feeding

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32. *Id.* at \_\_\_\_, 707 P.2d at 8 (quoting *Anderson v. Minneapolis, St. Paul and Sault St. Marie Railway Co.*, 146 Minn. 430, 179 N.W. 45, (1920) *aff'd.*, 185 N.W. 299 (1921)).

33. *Id.*

34. Although it is difficult to determine a precise majority/minority rule, it is clear that a number of jurisdictions recognize a similar form of the substantial factor test. See *Vesely v. Sager*, 5 Cal. 3d 153, 163, 486 P.2d 151, 158, 95 Cal. Rptr. 623, 630 (1971); *McGee v. Cessna Aircraft Co.*, 139 Cal. App. 3d 179, 190-91, 188 Cal. Rptr. 542, 550-551 (1983); *LeJeune v. Allstate Ins. Co.*, 365 So. 2d 471, 477 (La. 1978); *McEwen v. Ortho Pharmaceutical Corp.*, 270 Or. 375, 418, 528 P.2d 522, 543 (1974); *Clark v. Leisure Vehicles, Inc.*, 96 Wis. 2d 607, 617, 292 N.W.2d 630, 636 (1980). See also *Streich v. Hilton Davis*, \_\_ Mont. \_\_\_\_, \_\_\_\_, 692 P.2d 440, 450 (1984) (Morrison, J., concurring) (stating "[a]ll legal authorities now recognize that, where there are concurrent causes, a legal cause [substantial factor] instruction should be given").

35. *Juedeman*, \_\_ Mont. \_\_\_\_, \_\_\_\_, 726 P.2d 301, 302 (1986).

36. *Id.*

and medicating the patient.<sup>37</sup> Under the orders of her attending physician, the catheter was removed on June 5, 1981.<sup>38</sup> Shortly thereafter, Clarice Juedeman became comatose and died eleven days later.<sup>39</sup>

The personal representatives of Clarice Juedeman's estate brought a wrongful death and survivorship action against the Montana Deaconess Medical Center.<sup>40</sup> The plaintiffs' primary contention was that the hospital negligently removed the catheter.<sup>41</sup> Expert testimony indicated that Juedeman possibly suffered an "air embolism" at the time of removal.<sup>42</sup> Simply stated, an air embolism is caused when a small amount of air enters the circulatory system at the point of removal and eventually travels to the brain causing severe damage to the patient.<sup>43</sup> The defendant contended that pre-existing conditions caused Juedeman's death.<sup>44</sup> Juedeman was diabetic and suffered from hypertension and atherosclerotic heart disease.<sup>45</sup>

The plaintiffs specifically alleged that the defendant negligently removed the catheter because of the patient's upright position at the time of removal. Expert testimony indicated the chances of an air embolism are greater if the patient sits upright at the time of removal.<sup>46</sup> However, evidence also demonstrated that other surgeons do not suggest placing the patient in a flat position.<sup>47</sup> Witness testimony conflicted as to whether the patient was sitting upright<sup>48</sup> or in a semi-reclined position.<sup>49</sup> An additional question of fact was the length of time between the catheter removal and when the patient displayed adverse symptoms. If the injury was caused by an air embolism, the symptoms would be apparent within one minute of removal.<sup>50</sup> Witness testimony conflicted as to this point and indicated the time lapse may have been as short as 30 seconds,<sup>51</sup> or as long as ten minutes.<sup>52</sup> A time lapse

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37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at \_\_\_\_, 726 P.2d at 301-02.

41. *Id.* at \_\_\_\_, 726 P.2d at 306.

42. *Id.* at \_\_\_\_, 726 P.2d at 304.

43. *Id.* at \_\_\_\_, 726 P.2d at 306.

44. *Id.* at \_\_\_\_, 726 P.2d at 305.

45. *Id.* at \_\_\_\_, 726 P.2d at 304.

46. *Id.*

47. *Id.*

48. *Id.* at \_\_\_\_, 726 P.2d at 302.

49. *Id.* at \_\_\_\_, 726 P.2d at 303.

50. *Id.* at \_\_\_\_, 726 P.2d at 304.

51. *Id.* at \_\_\_\_, 726 P.2d at 302.

52. *Id.* at \_\_\_\_, 726 P.2d at 303.

of longer than one minute would preclude the possibility of an air embolism.<sup>53</sup>

Following the presentation of evidence, the court denied the plaintiff's proposed substantial factor instruction.<sup>54</sup> Instead, a traditional proximate cause instruction was utilized.<sup>55</sup> The jury returned a verdict in favor of the hospital.<sup>56</sup> The plaintiffs appealed from the adverse verdict and contended that the substantial factor instruction should have been given.

The plaintiffs' theory suggested that the proximate cause instruction might allow the defendant to escape liability even if the catheter was negligently removed. Plaintiffs argued that two causes may have concurred in bringing about the injury: (1) the patient's pre-existing condition; and, (2) the negligent removal of the catheter.<sup>57</sup> If both causes concurred in causing the injury and either acting alone could have caused the same injury, neither cause could be termed a proximate cause under the given definition because the definition requires that a proximate cause be one "without which [the injury] would not have occurred."<sup>58</sup> Following this logic, it was conceivable that both possible causes might be excluded from the realm of proximate cause.

### B. *The Court's Opinion*

In a 5-2 decision, the Montana Supreme Court affirmed the lower court's decision, holding that the substantial factor instruction was properly denied.<sup>59</sup> The *Juedeman* court distinguished *Kyriss* because it found no evidence demonstrating two concurring causes which produced the injury.<sup>60</sup> The majority stated that it was a proper function of the trial court to determine whether the facts of the case warranted the use of a substantial factor instruction.<sup>61</sup>

Judge Gordon R. Bennett authored a dissenting opinion,<sup>62</sup> in

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53. *Id.* at \_\_\_\_, 726 P.2d at 304.

54. *Id.* at \_\_\_\_, 726 P.2d at 305 (the substantial factor instruction stated: "[a] legal cause of an injury is a cause which is a substantial factor in bringing about the injury").

55. *Id.* (The proximate cause instruction stated: "[t]he proximate cause of an injury is that cause which in a natural and continuous sequence, unbroken by any new and independent cause, produces the injury, and without which it would not have occurred").

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at \_\_\_\_, 726 P.2d at 307.

60. *Id.* at \_\_\_\_, 726 P.2d at 306-07.

61. *Id.*

62. *Id.* at \_\_\_\_, 726 P.2d at 308 (Bennett, J., dissenting) (Judge Gordon R. Bennett sat for Justice Hunt).



which Justice Morrison concurred.<sup>63</sup> In contrast with the majority, Judge Bennett believed that the evidence may have suggested two concurrent causes.<sup>64</sup> Therefore, he concluded the plaintiff was entitled to a substantial factor instruction, along with additional instructions explaining the substantial factor test.<sup>65</sup>

### C. *Analysis and Practical Implications*

The crucial factor in *Juedeman* was the majority's belief that it was "not a case in which two causes concurred or might have concurred to bring about the condition of the patient and in which either one of them operating alone would have been sufficient to cause the identical result."<sup>66</sup> Instead, the majority believed that the record suggested the injury was caused by *either* the patient's pre-existing condition *or* the removal of the catheter. Either cause may have been responsible, but the majority saw no evidence that both acted concurrently. This view placed the facts of *Juedeman* in direct contrast with the facts of *Kyriss*, where the court did find that two causes may have concurred in causing the injury.<sup>67</sup> Therefore, the majority reasoned the substantial factor instruction was properly denied under the facts contained in the record.

The court offered some guidance in determining the role of the trial judge by adopting section 434 of the Restatement (Second) of Torts.<sup>68</sup> Under that section, the trial judge determines whether there is a reasonable issue of fact for the jury to decide in terms of substantial factor. Since the majority believed the evidence in *Juedeman* presented no reasonable issue of fact as to whether two

63. *Id.* at \_\_\_\_, 726 P.2d at 310 (Morrison, J., concurring).

64. *Id.* at \_\_\_\_, 726 P.2d at 309 (Bennett, J., dissenting).

65. *Id.* at \_\_\_\_, 726 P.2d at 309-10.

66. *Id.* at \_\_\_\_, 726 P.2d at 306.

67. *Id.* at \_\_\_\_, 726 P.2d at 307.

68. The entire section reads as follows:

Functions of Court and Jury. (1) It is the function of the court to determine

(a) whether the evidence as to the facts makes an issue upon which the jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff;

(b) whether the harm to the plaintiff is capable of apportionment among two or more causes; and

(c) the questions of causation and apportionment, in any case in which the jury may not reasonably differ.

(2) It is the function of the jury to determine, in any case in which it may reasonably differ on the issue,

(a) whether the defendant's conduct has been a substantial factor in causing the harm to the plaintiff, and

(b) the apportionment of the harm to two or more causes.

RESTATEMENT (SECOND) OF TORTS § 454.

causes concurred in causing the injury, it was appropriate for the trial judge to refuse a substantial factor instruction. This follows the general rule that "[a] trial judge will not be held in error for refusing to give instructions . . . where it is not applicable to the evidence . . . ."<sup>69</sup>

*Juedeman* helps define when a substantial factor instruction will be allowed. Although it is difficult to completely reconcile *Juedeman* with *Kyriss* and *Rudeck*, certain guidelines have emerged which help to clarify when the substantial factor test is appropriate. First, the record must demonstrate that the injury was caused by two or more causes acting in a concurrent manner. *Juedeman* does not alter the holding of *Kyriss*, in that one of the causes may be a pre-existing injury. Therefore, the causes must have a concurrent effect, but need not occur simultaneously in time. Second, although not an issue in *Juedeman*, the court adheres to the requirement that either cause, acting alone, be sufficient to cause the same injury.<sup>70</sup> Undoubtedly, this must also be reflected in the trial record.

Two additional factors should be considered as persuasive. First, the substantial factor test was initially "developed primarily for cases in which application of the 'but for' rule would allow each defendant to escape responsibility because the conduct of one or more others would have been sufficient to produce the same result."<sup>71</sup> A persuasive argument for the use of a substantial factor instruction exists if the "but for" test may unjustly allow a defendant relief from liability solely because some other tortfeasor or cause would have brought about the same result. This is essentially what the substantial factor test is designed to avoid. Secondly, if the case involves multiple tortfeasors or causes, a substantial factor instruction may communicate the element of causation to the jury in a more precise and comprehensible manner. Courts and commentators have noted the confusion which is often caused by the concept of "proximate cause."<sup>72</sup> A substantial factor instruction helps to remove this needless confusion in cases involving multiple tortfeasors or causes.

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69. *Doble v. Lincoln County Title Co.*, \_\_\_ Mont. \_\_\_, \_\_\_, 692 P.2d 1267, 1271 (1985) (citing *Wollan v. Lord*, 142 Mont. 498, 504, 385 P.2d 102, 106 (1963)).

70. *Juedeman*, \_\_\_ Mont. at \_\_\_, 726 P.2d at 306.

71. *Rudeck*, \_\_\_ Mont. at \_\_\_, 709 P.2d at 628.

72. See, e.g., *State Comp. Ins. Fund v. Industrial Accident Comm'n*, 176 Cal. App. 2d 10, \_\_\_, 1 Cal. Rptr. 73, 80 (1959) (stating "[t]he concept of proximate causation has given courts and commentators consummate difficulty and has in truth defied precise definition"). See also W. PROSSER & P. KEETON, *supra* note 1, § 42.

## IV. CONCLUSION

The "substantial factor" test is now recognized as part of Montana tort law. However, it is not intended to permanently abolish the traditional proximate cause rule and a litigant is entitled to a substantial factor instruction only if certain circumstances exist. The required circumstances were recently viewed fairly strictly in *Juedeman*, and they must be supported by the trial record.