Sacrificing Justice for “Simplicity”: Inequitable Protection of Medical Providers in Malpractice Cases Exacerbated By Abandoning the Substantial Factor Test

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SACRIFICING JUSTICE FOR “SIMPLICITY”: INEQUITABLE PROTECTION OF MEDICAL PROVIDERS IN MALPRACTICE CASES EXACERBATED BY ABANDONING THE SUBSTANTIAL FACTOR TEST

“The medical malpractice system is totally out of control. Everybody in the system knows it. And it’s not just the outrageous judgments, it’s not just the fact that some people get millions of dollars, others get nothing, and the [only] people who get rich are lawyered, it’s just that it causes doctors to practice defensive medicine.”

I. INTRODUCTION

The American justice system is often depicted by the symbolism of a scale: the balance between opposing parties and the pursuit of truth and fairness. However, that balance is often faltered by unfair practices and advantages of one party of a controversy over the other. Medical malpractice claims raised in this country are fraught with unequal protections for doctors and medical institutions in a variety of ways that increase difficulty for victims to file claims, much less obtain relief.


4 See Stephen Daniels & Joanne Martin, Plaintiff’s Lawyers, Specialization, and Medical Malpractice, 59 VAND. L. REV. 1051, 1063-64 (2006) (explaining medical malpractice attorneys accept well below ten percent of cases brought to them). Medical malpractice cases are expensive due to the time consuming and costly nature of the screening process necessary to determine if the case is worth pursuing. See id. at 1063. An attorney also needs to consider the costs of preparing the case, litigating the case, the cost of their own time, and a possible referral fee to the lawyer who sent them the case. See id. at 1064; see also Philip G. Peters, Jr., Doctors & Juries, 105 MICH. L. REV. 1453, 1489 (2007) (noting almost all medical defendants are represented by attorneys with significant malpractice experience). Around sixty-two percent of medical malpractice victims are represented by attorneys with relatively little experience. See Peters, Jr., supra at 1489. In addition,
Throughout history, the procedures of medical malpractice claims have been debated, and protections for doctors and hospitals have steadily increased through legislation and court-declared decisions.5 Recent developments in medical malpractice jurisprudence and legislation have significantly increased the protections of doctors and hospitals in medical malpractice claims: most notably, the Restatement (Third) of Torts’ abolishment of the substantial factor test for causation for multiple cause tort cases.6 Although the Restatement makes clear that medical malpractice claims are outside the scope of this Restatement section, some states have followed this lead in medical malpractice cases, while others have held true to the substantial factor test derived from precedent.7 But what happens when the ideologies of scholars and the courts clash with those of practitioners in the medical malpractice field?8 This Note will first explore the history of medical malpractice defendants often benefit from their experienced liability insurers who can identify and exploit strategic litigation methods. See id.

5 See Mass. Gen. Laws Ann. ch. 231, § 60L (West 2012) (explaining medical malpractice guidelines for litigation in Massachusetts cases). It is common practice in about half of the states to require medical malpractice victims to undergo a screening process through a medical tribunal before pursuing litigation. See David H. Sohn & B. Sonny Bal, Medical Malpractice Reform: The Role of Alternative Dispute Resolution, NCBI (Dec. 13, 2011), https://perma.cc/QEK5-6RUS (explaining medical tribunal process). Charitable immunities statutes, lax requirements on medical malpractice insurance, lobbying power of doctors and hospitals, state caps on medical malpractice recoveries, and complex litigation ridden with jury bias in favor of doctors are all examples of protections afforded to doctors and hospitals. See discussion infra Part III, Section a (discussing protections of doctors and hospitals). Courts have begun to declare the use of the but-for test over the substantial factor test, setting new and damaging precedent. See, e.g., Doull v. Foster, 163 N.E.3d 976, 990-92 (Mass. 2021) (abolishing substantial factor test in most negligence cases); Asher v. OB-Gyn Specialists, P.C., 846 N.W.2d 492, 498-99 (Iowa 2014) (extending adoption of but-for causation to medical malpractice cases); Thompson v. Kaczinski, 774 N.W.2d 829, 839 (Iowa 2009) (adopter Restatement (Third) but-for causation approach).

6 See Restatement (Third) of Torts: Phys. and Emot. Harm § 26 (Am. L. Inst. 2010) (restricting causation analyses and abolishing substantial factor test). The new structure for causation states “[t]ortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. Tortious conduct may also be a factual cause of harm under § 27.” Id. Comment j of Section 26 discusses the use of the substantial factor test and determines it has not “withstood the test of time.” Id. at cmt. j. The drafters of the Restatement claim that the substantial factor test has been “confusing” and “misused” over the years after its adoption in the Restatement of Torts and the Restatement (Second) of Torts. Id.

7 See id. (noting medical malpractice liability is outside scope of Restatement); see also Doull, 163 N.E.3d at 990-92 (abolishing substantial factor test in most negligence cases); Asher, 846 N.W.2d at 498-99 (extending adoption of Restatement (Third) of Torts § 26 to medical malpractice cases); Estate of Frey v. Mastroianni, 463 P.3d 1197, 1206-07 (Haw. 2020) (utilizing substantial factor test for medical malpractice causation); Fussell v. St. Clair, 818 P.2d 295, 296-99 (Idaho 1991) (applying substantial factor test in medical malpractice claims with more than one cause).

8 See Brief of Amicus Curiae, Mass. Acad. of Trial Att’y’s at 13, Doull v. Foster, 163 N.E.3d 976 (Mass. 2021) (No. SJC-12921) (arguing abolition of substantial factor test will lead to injustice). The Massachusetts Academy of Trial Attorneys argues that the substantial factor test provides a simple test for trial judges to instruct and for juries to apply. Id. This argument from
malpractice and the ways in which victims have been unfairly disadvantaged, and then engage in a deeper analysis of the causation tests for medical malpractice and why states should decline to follow the judicial trend of implementing the Restatement’s tests in medical malpractice claims.9

II. FACTS

The following subsections detail what medical malpractice claims are, as well as the two most commonly used tests for determining causation in medical malpractice claims.10 Definitional understanding of what a medical malpractice claim is, as well as both the but-for test and substantial factor test, will help guide the analytical discussion in Part IV.11 It is important to note that medical malpractice claims are a niche subsection of the more broad area of negligence and should be treated with special attention.12

A. Medical Malpractice Claims

Medical malpractice occurs when “a hospital, doctor or other health care professional, through a negligent act or omission, causes an injury to a practicing trial attorneys is in direct opposition to the stance of the scholars of the Restatement (Third) who suggest eliminating the test altogether. See Restatement (Third) of Torts: Phys. and Emot. Harm § 26 (Am. L. Inst. 2010) (eliminating substantial factor test).

9 See sources cited infra note 26 (defining but-for test of causation); sources cited infra note 29 and accompanying text (defining substantial factor test of causation); see also But-for Test, Legal Information Inst., https://perma.cc/2LPM-2GVX (last visited Oct. 25, 2021) (explaining but-for test to determine causation in tort law); What’s the difference between “but for” and “substantial factor” causation?, U.S. Law Essentials (Feb. 14, 2015), https://perma.cc/53SS-7LC8 (analyzing differences between but-for test and substantial factor test); John D. Rue, Note, Returning to the Roots of the Bramble Bush: The “But For” Test Regains Primacy in Causal Analysis in the American Law Institute’s Proposed Restatement (Third) of Torts, 71 Fordham L. Rev. 2679, 2681-82 (2003) (discussing abolition of substantial factor test in new Restatement); Doull, 163 N.E.3d at 980 (declaring abolition of substantial factor test following Restatement’s recommendation).

10 See sources cited infra note 12 and accompanying text (comparing negligence and medical malpractice); sources cited infra note 13 (defining medical malpractice); sources cited infra note 26 (defining but-for causation test); sources cited infra note 29 and accompanying text (defining substantial factor causation test).

11 See sources cited infra note 12 and accompanying text (comparing negligence and medical malpractice); sources cited infra note 13 (defining medical malpractice); sources cited infra note 26 (defining but-for causation test); sources cited infra note 29 and accompanying text (defining substantial factor causation test).

12 See Heather Morton, Medical Liability/Medical Malpractice Laws, Nat’l Conf. of State Leg. (July 13, 2021), https://perma.cc/63HD-4WWK (discussing specifics of medical malpractice). The difference between medical malpractice and general negligence is that medical malpractice requires the existence of a doctor-patient relationship and the presence of a duty of care, whereas negligence does not require this specific relationship. See id.
patient. The negligence might be the result of errors in diagnosis, treatment, aftercare or health management.\textsuperscript{13} Medical malpractice accounts for approximately 250,000 deaths per year, making medical error the third leading cause of death in the United States, trailing behind cancer and cardiovascular disease.\textsuperscript{14} Of all medical malpractice claims filed, only about 7% make it to trial, and plaintiffs win about 21% of those claims.\textsuperscript{15}

Medical malpractice claims are a certain type of negligence claim and therefore have separate and specific elements to satisfy in addition to the traditional negligence elements.\textsuperscript{16} A medical malpractice claim must satisfy the following criteria: 1) a doctor-patient relationship existed, 2) the doctor, medical professional, or medical institution failed to conform to good medical practice, and 3) the doctor, medical professional, or medical institution’s negligence caused the plaintiff’s injury.\textsuperscript{17} The four legal elements that are needed to prove the doctor, medical professional, or medical institution’s negligence are: 1) a professional duty was owed to the patient, 2) there was

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\textsuperscript{13} See What is Medical Malpractice?, AM. BOARD OF PROF. LIABILITY ATT’YS, https://perma.cc/ZBV8-YKW3 (last visited Oct. 21, 2021) (explaining medical malpractice claim); see also Johnston v. Stein, 562 N.E.2d 1365, 1367 (Mass. App. Ct. 1990) (quoting Brune v. Belinkoff, 235 N.E.2d 793, 798 (Mass. 1968)) (“The essence of a complaint of medical malpractice is that the physician engaged by the plaintiff departed from the standard of care and skill of the average member of the profession practicing the specialty, taking into account the advances in the profession.”).

\textsuperscript{14} See Bill Hathaway, Estimates of preventable hospital deaths are too high, new study finds, YALENEWS (Jan. 28, 2020), https://perma.cc/WC3K-XZXX (detailing study on hospital deaths in U.S.). Since the emergence of COVID-19, the list of leading causes of death shifted over the past year. See Krutika Amin, et al., COVID-19 preventable mortality and leading cause of death ranking, KFF (Apr. 21, 2022), https://perma.cc/CK59-SDVG (citing shift in causes of death). Over the course of 2021, COVID-19 was added to the list and shifted positions many times depending on the strength of variants and the social distancing measures in place. See id.

\textsuperscript{15} See Michael R. Canady, The Verdict Is In: Surviving a Medical Malpractice Trial, AM. ASS’N FOR PHYSICIAN LEADERSHIP (Jun. 11, 2018), https://perma.cc/2HTW-8BZC (discussing medical 10% to 20% of the cases brought to trial with weak evidence, and only 50% of cases with strong evidence of negligence. See Peters, Jr., supra note 4, at 1464 (analyzing cases won with weak versus strong evidence of negligence). Only about 2% of victims of medical malpractice ever file a claim, and out of that two percent, about 95% settle out of court. See US Medical Malpractice Case Statistics, JUSTPOINT (Nov. 23, 2021), https://perma.cc/KHY6-AS6Q (citing settlement data). In one of the most recent studies available, it was found that plaintiffs received a settlement payment in 91% of the cases in which medical care was deemed to be negligent, in 59% of the cases in which the liability was deemed unclear, and in 21% of the cases in which the medical case was defensible. See Philip G. Peters, Twenty Years of Evidence on the Outcomes of Malpractice Claims, NCBI (Dec. 2, 2008), https://perma.cc/8XF6-GMXH (citing settlement data).

\textsuperscript{16} See Morton, supra note 12 (describing difference between medical malpractice and negligence). The difference between medical malpractice and general negligence is that medical malpractice requires a doctor-patient relationship to have existed and a duty of care to have been present, whereas negligence does not require this specific relationship. See id.

\textsuperscript{17} See B. Sonny Bal, An Introduction to Medical Malpractice in the United States, NCBI (Nov. 26, 2008), https://perma.cc/PY5X-8XB0 (introducing elements of medical malpractice).
\end{footnotesize}
a breach of this duty, 3) an injury was caused by the breach, and 4) there were resulting damages. 18

Causation is a finding of fact for the jury to determine. 19 Jurors listen to expert witnesses’ accounts of the incident during the trial which can be extensive and very complex in a medical malpractice claim due to the unfamiliar terminology and medical procedures. 20 Once the presentation of witnesses and experts concludes, the judge instructs the jury on how to determine causation. 21 There are multiple ways to prove the causation element of negligence, but two of the main tests instructed are the “but-for” test, and the “substantial factor” test. 22

Discussed in detail below in Part III, Section a, with medical malpractice claims come many protections afforded to healthcare professionals

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18 See sources cited supra note 17 (discussing elements to medical malpractice claims).
19 See Am. Law of Torts, Negligence, Applications, and Related Torts, § 11:8 Questions of fact and law, n.1 (2021) (“Generally, causation … in support of a negligence claim, is a question of fact for the jury’s determination.”). A finding of fact is a determination of a fact that is at issue in the case and has been presented by either or both litigants and the determination of its validity is made by the jury in a jury trial. See Question of fact, LEGAL INFO. INST., https://perma.cc/ICM2-QAFM (last visited Apr. 2, 2022). The judge is instructed to weigh the strength of the evidence and the credibility of the testifying witnesses to make their factual determination. Id.
21 See How Courts Work, Steps in a Trial, Instructions to the Jury, A.B.A. (Sept. 9, 2019), https://perma.cc/VY2P-JM7C (explaining how jury instructions work); Giles & Waites, supra note 20 (noting jury instructions are given after closing arguments of parties); Scott C. Cifrese, Comment, Going Beyond Fussell v. St. Clair: Revising Causation Language and a Possible End of the “But-For” Test, 30 IDAHO L. REV. 91, 91 (1993) (explaining “the finder of fact must determine whether the defendant’s conduct was a cause of the plaintiff’s injury”). Once a trial has concluded, the judge reads instructions to the jury. See Jury Instructions, LEGAL INFORMATION INSTITUTE, https://perma.cc/VZQ3-U3Z9 (last visited Apr. 2, 2022) (explaining how jury instructions are read). The judge explains that the instructions are the governing law in the jurisdiction, and the jury must use them to determine if the defendant is liable for the injury caused to the plaintiff. See id. The instructions give definitions of important terms the jury will need to decide on. See id. An example is the instruction of substantial factor in determining cause: “The law defines cause in its own particular way. A cause of [injury] [damage] [loss] [or] [harm] is something that is a substantial factor in bringing about an [injury] [damage] [loss] [or] [harm].” See Cause—Substantial Factor Test, West’s Committee on California Civil Jury Instructions, Sept. 2021 (citing example of substantial factor instruction).
22 See sources cited infra note 26 (defining but-for test of causation); sources cited infra note 29 and accompanying text (defining substantial factor test of causation); Rue, supra note 9, at 2684-85 (explaining existence of but-for test and substantial factor test); David W. Robertson, Causation in the Restatement (Third) of Torts: Three Arguable Mistakes, 44 WAKE FOREST L. REV. 1007, 1008-09 (2009) (explaining existence of but-for test); Robertson, supra at 1017 (describing existence of substantial factor test).
and hospitals. These include, but are not limited to, malpractice statutes and tribunals, absent malpractice insurance requirements for doctors, and charitable immunities statutes. Each of these protections, in addition to many more discussed infra, make it more difficult for medical malpractice victims to obtain relief.

B. But-For Test of Causation

When implementing but-for causation, the fact-finder’s task is to determine if the injury would have occurred without the defendant’s act, and if the answer is yes, then the defendant is not a cause of the injury to the plaintiff. The jury must follow a five-step process to implement this test: (1) identify the plaintiff’s injury, (2) identify the defendant’s negligent act or omission, (3) imagine the defendant had not committed the negligent act, (4) determine if the harm would have occurred anyway, and (5) answer the hypothetical but-for question. If the answer to the hypothetical but-for question is yes, then the harm would have occurred regardless of the defendant’s act, and the defendant is not a but-for cause of the injury.

C. Substantial Factor Test of Causation

In the substantial factor test, if the fact-finder determines that the defendant’s conduct, or lack of conduct, was a substantial contributing factor of the injury, then the defendant is a cause of that injury. The court in

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23 See discussion infra Part III, Section a (discussing many protections afforded to defendants in medical malpractice claims).
24 See discussion infra Part III, Section a (stating examples of protections afforded to doctors and healthcare facilities).
25 See discussion infra Part III, Section a (explaining difficulties plaintiffs face in medical malpractice cases); see also Doull v. Foster, 163 N.E.3d 976, 998 (Mass. 2021) (Lowy, J. concurring) (explaining defendants have more “tools unavailable to plaintiffs” in medical malpractice claims).
26 See Rue, supra note 9, at 2685 (describing but-for test); David W. Robertson, The Common Sense of Cause in Fact, 75 TEX. L. REV. 1765, 1779 (1997) (“The but-for test … ask[s] whether the particular injuries probably would still have occurred had the particular negligent conduct not been engaged in.”).
27 See Rue, supra note 9, at 2685-86 (explaining five-step process of but-for test).
28 See id. (explaining how to determine defendant’s liability under but-for test). An example of the but-for test application is if a defendant leaves a banana peel in their entranceway, and plaintiff comes along and slips on the peel. See What’s the difference between “but for” and “substantial factor” causation?, supra note 9. If the defendant had not left the peel on the ground, then the plaintiff would not have slipped, so therefore the defendant’s conduct was the “but-for” cause of the plaintiff’s injury. See id.
29 See Keeton, et al., Prosser and Keeton on the Law of Torts § 41, at 267-68 (5th ed. 1984) (explaining substantial factor test); Robertson, supra note 26, at 1779 (noting substantial factor test “appeals forthrightly to instinct”). An example of the substantial factor test application would be
Johnston v. Kosmos Portland Cement Co. noted that the substantial factor test does not apply if:

(1) the tortious act “merely creates an incidental condition or situation in which the accident otherwise caused results in such injury,” (2) the act is one “from the commission of which no generally injurious results can reasonably be foreseen,” or (3) “where a secondary efficient cause intervenes to break the chain of causation and so becomes the sole proximate cause of the injury.”

A factor is “substantial” if it is “1. Of, relating to, or involving substance; material . . . . 2. Real and not imaginary; having actual, not fictitious, existence . . . . 3. Important, essential, and material; of real worth and importance.”

III. HISTORY

Explored below are the various medical malpractice protections both doctors and medical institutions enjoy, as well as a brief history on the complicated subject of tort law causation. A condensed history of the complicated subject of tort law causation, the but-for test, and the substantial factor test origins follow. Further, the American Law Institute’s (ALI) Restatements are briefly explained, as well as four state courts decisions, two if a plaintiff worked in a factory and developed cancer, alleging the cancer resulted from asbestos poisoning. See What’s the difference between “but for” and “substantial factor” causation?, supra note 9. The defendant factory owner would question whether the factory’s asbestos was a substantial factor in causing the cancer, or if other factors contributed more significantly. See id. If it is determined that the factory owner’s asbestos was a substantial factor of the cancer, then the defendant would be liable under the substantial factor test. See id.

See Rue, supra note 9, at 2692 (quoting Johnston v. Kosmos Portland Cement Co., 64 F.2d 193, 194-95 (6th Cir. 1933)) (explaining what does not count as substantial factor).


See discussion infra Part III, Section a (discussing medical malpractice protections). Tort law causation has many different nuances and there are multiple theories that dictate how to analyze the issue of causation. See generally Michael Moore, Causation in the Law, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 3, 2019), https://perma.cc/48XK-AB55 (discussing causation and various tests).

See discussion infra Part III, Section c (explaining history of but-for test); discussion infra Part III, Section d (explaining history of substantial factor test). Tort law causation is extremely complex, evidenced by the many publications discussing its intricacies, and would take voluminous pages to fully explain. See generally Moore, supra note 32 (noting complexities of tort causation); Rue, supra note 9, at 2682 (expanding upon complexities of tort causation). The histories detailed below are base level understandings to better comprehend the argument for medical malpractice cases specifically. See discussion infra Part III, Sections b, c, d (explaining brief history of tort law causation, but-for test, and substantial factor test).
advocating for but-for causation and two advocating for substantial factor causation in medical malpractice cases.\(^{34}\)

A. Medical Malpractice Protections

Over time, many protections have been granted to doctors, medical professionals, and medical institutions against medical malpractice claims.\(^{35}\) An example is the Massachusetts governing statute for medical malpractice claims, G.L. ch. 231, § 60B, established in 1975 with its latest amendment effective as of 2006.\(^{36}\) For a victim of medical malpractice to file a claim in the courts, they must first make their case to a medical tribunal.\(^{37}\) If approved by this tribunal, the victim may proceed in filing their claim, but if the tribunal rules against them, the victim must pay six thousand dollars to continue their claim.\(^{38}\)

Once a victim has statutory standing to file their claim, the next potential roadblock in their path is a charitable immunities statute.\(^{39}\) Charitable


\(^{35}\) See e.g., MASS. GEN. LAWS ch. 231 § 60L (2012) (providing guidance on medical malpractice claims in Massachusetts); HAW. REV. STAT. § 671-11 (2013) (providing guidance on medical malpractice claims in Hawaii); IDAHO CODE c. 10 § 6 (2015) (providing guidance on medical malpractice claims in Idaho); IOWA CODE c. 147.135 (2020) (providing guidance on medical malpractice claims in Iowa).

\(^{36}\) See MASS. GEN. LAWS G.L. ch. 231, § 60B (providing example of medical malpractice statute).

\(^{37}\) See id. (describing medical malpractice tribunal). “Every action for malpractice, error or mistake against a provider of health care shall be heard by a tribunal consisting of a single justice of the superior court, a physician . . . and an attorney . . . .” Id.; see also HAW. REV. STAT. § 671-12 (requiring plaintiffs present claim to medical panel for review before filing); IDAHO CODE § 6-1001 (requiring prelitigation screening before filing medical malpractice claim).

\(^{38}\) See MASS. GEN. LAWS ch. 231, § 60B (advising fee if medical tribunal rules against claim).

“If a finding is made for the defendant . . . the plaintiff may pursue the claim . . . only upon filing bond in the amount of six thousand dollars . . . payable to the defendant or the defendants . . . if the plaintiff does not prevail in the final judgment.” Id.

\(^{39}\) See MASS. GEN. LAWS c. 231, § 85K (discussing charitable immunity cap for nonprofit medical institutions); HAW. REV. STAT. § 662D-2 (describing volunteer immunities for nonprofit hospitals); IOWA CODE § 504A.101 (explaining nonprofit director and volunteer immunities). While not all states have a charitable immunity statute in place, those that do not instead often have
immunities statutes have existed for hundreds of years and have increased in popularity. These statutes limit the cause of action against a nonprofit organization by fixing a maximum monetary award. Approximately forty-nine percent of medical institutions in the United States are considered nonprofit organizations even if they have operating revenues in the billions of dollars.

Doctors are individually afforded several protections in litigation, including no requirement to have medical malpractice insurance in forty-three states. While this may first seem like an advantage to an injured patient, in reality, it is a protection to health care providers because if a doctor does not have insurance, and they are found liable and cannot afford the judgment, the victim is left only with what the uninsured doctor can provide. In addition, doctors across the country have influential lobbying power resulting in a significant impact on healthcare legislation. Finally,
it is difficult for medical malpractice victims to find credible, local doctors to testify against the defendants in their cases because of the risk to reputation and the strong bonds within the profession.  

The litigation process of medical malpractice claims alone is often a significant hurdle for victims to face. Medical malpractice claims are notoriously complex and difficult to understand, requiring the use of extensive medical expertise to explain the issues of the case to the jury. Studies have further shown that juries have biases in favor of doctors and medical institutions, which is often reflected in the verdicts of medical malpractice cases. The unfair distribution of legal resources available to victims in comparison to their physician counterparts is significant and pays a costly toll on the quality of their representation.

B. Tort Law Causation

In order to establish a claim of negligence, it is a deeply rooted principle that the plaintiff bears the burden of proving causation. There are two widely accepted sub-parts of causation in tort law that must be satisfied to...
carry the day: cause-in-fact and proximate cause.\(^{52}\) Cause-in-fact is the truly factual component of the two requirements because it corresponds with scientific or factual notions of causation.\(^{53}\) Cause-in-fact questions are those that are left to the jury to determine.\(^{54}\) Proximate cause is a more policy-oriented question of causation determining if the act or omission is too remote from its effect to be considered a cause at all.\(^{55}\) Proximate cause is often described as whether or not the harm to the victim was foreseeable to the defendant, and if it was not foreseeable, the defendant cannot be held liable.\(^{56}\) Proximate cause is often left to the jury to decide, and is usually only instructed to be determined if factual cause has first been found.\(^{57}\)

There are two main competing tests for causation in tort law, the but-for test and the substantial factor test.\(^{58}\) The but-for test of causation “emerged unchallenged from the mists of time” and was the original test for

\(^{52}\) See sources cited infra notes 53-54 and accompanying text (defining cause-in-fact); sources cited infra notes 55-57 and accompanying text (defining proximate cause); Moore, supra note 32 (citing both cause-in-fact and proximate cause requirements); Rethinking Actual Causation in Tort Law, 130 Harv. L. Rev. 2163, 2163-64 (2017) (discussing both “actual cause” and “proximate cause”).

\(^{53}\) See Moore, supra note 32 (explaining cause-in-fact). “Whether cigarette smoking causes cancer, whether the presence of hydrogen or helium caused an explosion, are factual questions to be resolved by the best science the courts can muster . . . [are] ‘cause-in-fact’ questions.” Id. (alteration in original).

\(^{54}\) See Question of Fact, supra note 19 (explaining questions of fact left to jury). A question of fact is left for the jury to determine, as the trier of fact, while a question of law is left up to the judge to determine and resolve. See id.

\(^{55}\) See Moore, supra note 32 (defining proximate cause). There is no single, clear definition of proximate cause, but it is often described as follows:

[A] proximate cause cannot be remote from its putative effect; it must be a direct cause of the effect; it must not involve such abnormality of causal route that is freakish; it cannot be of harms that were unforeseeable to the actor; its connection to the harm cannot be coincidental; it must make the harm more probable; etc.

Id.

\(^{56}\) See id. (explaining application of proximate cause). There are multiple tests that can be used for proximate cause, but one that is well known is the foreseeability test. See id. The rule asks “was it foreseeable to a defendant at the time that she acted that her act would cause the harm that it in fact caused?” Id. There are two policies justifying this universal test for proximate cause including the unfairness of punishing someone for harms unforeseeable to them or the inability to gain deterrence by punishing the acts. See id.; see also Doull v. Foster, 163 N.E.3d 976, 983 (Mass. 2021) (quoting Leavitt v. Brockton Hosp., Inc., 907 N.E.2d 213, 220 (Mass. 2009)) (stating legal or proximate cause “means that the harm must have been ‘within the scope of the foreseeable risk arising from the negligent conduct’”).


causation in torts cases. However, a new test for causation emerged at the beginning of the twentieth century: the substantial factor test.

The question of cause-in-fact is for the jury to determine, in other words, was the defendant’s negligence in fact a cause of the plaintiff’s injury, is often where the but-for test is administered as a way for the jury to determine liability. It is argued that the substantial factor test correlates to proximate cause, not cause-in-fact. However, substantial factor does not always come into play in proximate cause and can be used to determine cause-in-fact. It also seems apparent that many courts deal with the issue of causation as an all-encompassing concept and do not break it down into the cause-in-fact and proximate cause language.

C. But-For Test History

The but-for test requires juries to perform counterfactual reasoning when determining liability of defendants. Counterfactual reasoning is a

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59 See Rue, supra note 9, at 2684 (discussing history of but-for test).
60 See id. (discussing emergence of substantial factor test); sources cited supra note 29 and accompanying text (defining substantial factor test of causation).
61 See Moore, supra note 32 (discussing “dominant definition of cause-in-fact”). The but-for test is “by far the dominant explicit test for cause in fact” and is sometimes called the “necessary condition” test because it requires that the negligent conduct have been necessary to the victim’s injury or harm. Id.
63 See Moore, supra note 32 (describing application of substantial factor test). The substantial factor test was used as a way to substitute the but-for test for cause-in-fact determinations by the first two Restatements of Torts. See id.
64 See generally Estate of Frey v. Mastroianni, 463 P.3d 1197, 1206-08 (Haw. 2020) (explaining test used for causation). The Hawaii Supreme Court stated that its substantial factor test for causation applies to both factual cause and legal cause interchangeably, not effectively defining a difference between the two. See id. at 1207-08 (using both factual and legal cause language); see also Fussell, 818 P.2d at 295. In contrast, the Idaho Supreme Court established that its substantial factor test applies only to proximate cause, with no mention of factual cause or cause-in-fact issues. See Fussell, 818 P.2d at 295 (citing proximate but not factual cause).
65 See Rethinking Actual Causation in Tort Law, supra note 52, at 2164 (concluding but-for analysis requires counterfactual reasoning); Strassfeld, supra note 58, at 345-46; Doull v. Foster, 163 N.E.3d 976, 997 (Mass. 2021) (“But-for causation . . . begins not with what was, but with what might have been . . .”); Barbara A. Spellman and Alexandra Kincannon, The Relation Between Counterfactual “But For” and Causal Reasoning: Experimental Findings and Implications for Jurors’ Decisions, 64 LAW & CONTEMP. PROBS. 241, 243 (2001) (describing counterfactual mechanics of but-for test); John Morris, Note, Dirty Harriet: The Restatement (Third) of Torts and the Causal Relevance of Intent, 92 TEX. L. REV. 1685, 1687 (2014) (noting “the orthodox tort principle that the essence of cause-in-fact rests in counterfactuals”). Conduct must be a factual cause of harm
type of “what if” thinking, requiring the jury to determine an outcome had something not occurred. To illustrate, a jury could be asked “but for the defendant’s negligent act [like not diagnosing an illness], would the harm to the plaintiff [like contracting complications from the illness] have still occurred?” This kind of an inquiry insists the jurors think back in time, erase an event that took place in reality, and determine what would have happened had that event not occurred.

D. Substantial Factor Test History

The substantial factor test “mirrors the analysis of but-for causation.” The test embodies the core principle of tort law that only those actors who meaningfully contributed to the harm or injury should be considered liable, just as the but-for test does. The substantial factor test was first used in the judicial setting in Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co., where a fire from the railway’s engine had combined with a fire of unknown origin and burned the plaintiff’s property. Because the fire of unknown origin would have certainly burned the plaintiff’s property before the railway engine fire, the but-for test was left unworkable. The court determined that the instruction to the jury should read that if the fire was a “substantial factor in causing the plaintiff’s damage,” then the creator of the

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67 See Doul, 163 N.E.3d at 983 (examining but-for test application).

68 See sources cited supra note 65-66 and accompanying text (explaining counterfactual nature of but-for analysis).

69 See Doul, 163 N.E.3d at 996-97 (discussing similarities of causation tests); see also Bostic v. Georgia-Pacific Corp., 439 S.W.3d 332, 342 (Tex. 2014) (claiming but-for and substantial factor tests “lead to the same result”).

70 See Doul, 163 N.E.3d at 997 (clarifying both tests designed to find causation of harm).

71 179 N.W. 45, 46 (Minn. 1920).

72 See id. at 45-47 (discussing facts of case).

73 See id. at 46 (inferring property would have burned either way). “In some circumstances, and particularly where there are multiple independent causes, the but for test is unworkable – in other words, it is practically impossible for the plaintiff to prove by the usual means that the same injury would not have occurred had the defendant’s wrongdoing not taken place.” Hillel David, et al., Proving Causation Where the But For Test is Unworkable, McCagueBorlack, 219 (Jul. 22, 2005), https://perma.cc/NX2T-DAWR.
fire should be liable. The test was later articulated by the Restatement of Torts by the American Law Institute.

1. Sufficient Causes and Multiple Causes

The original case employing the substantial factor test, Anderson above, was a case of multiple sufficient causes. In other words, both fires would have been sufficient to cause the damage to the property, leaving the but-for test of causation unworkable. However, the substantial factor test has also been employed in regular multiple cause cases throughout the history of state courts’ jurisprudence. It has been noted as an easier way to establish who should be liable for causation when there are multiple causes of the harm and the but-for language does not encompass a workable instruction.

2. Toxic Torts

The substantial factor test is frequently used in toxic torts cases. Toxic tort cases involve a plaintiff’s claim that they were exposed to a chemical or a dangerous substance that injured them or caused a disease. These include asbestos cases where it is often difficult for the plaintiff to point to a sole distributor or provider of asbestos that caused their illness. Multiple courts use this reasoning to avoid an unjust determination of liability in cases

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74 See Anderson, 179 N.W. at 46 (upholding liability instruction from trial court).
75 See Rue, supra note 9, at 2690 (addressing ALI’s adoption of substantial factor).
76 See 179 N.W. 45 at 46 (discussing both fires); Rue, supra note 9, at 2687-88 (explaining circumstances of fires).
77 See Anderson, 179 N.W. at 46 (describing multiple potential causes of damages). But for the defendant’s fire, the property damage still would have occurred, therefore the requirement of but-for causation was not able to be satisfied. See Rue, supra note 9, at 2688 (explaining failure of but-for test).
79 See Doull v. Foster, 163 N.E.3d 976, 998 (Mass. 2021) (noting state considered substantial factor test “useful” in multiple cause cases); Fussell, 818 P.2d at 299 (distinguishing multiple cause cases from single cause cases requiring substantial factor).
80 See David E. Bernstein, Getting to Causation in Toxic Tort Cases, 74 BROOK. L. REV. 51, 51-52 (2008) (discussing application of substantial factor test to toxic torts); Doull, 163 N.E.3d at 984 (citing Massachusetts, California, and Texas use of substantial factor causation test for toxic torts claims).
82 See Doull, 163 N.E.3d at 985 (“[I]t is nearly impossible for a plaintiff or a jury to determine with any certainty which exposures were necessary to bring about the harm and which were not.”).
where it is extremely difficult to ascertain if a party directly caused the harm in question. 83

E. ALI Restatements Formation of Substantial Factor

The American Law Institute is a body of lawyers, judges, scholars, and legal professors created to “produc[e] scholarly work to clarify, modernize, and otherwise improve the law.” 84 The substantial factor test was depicted in the Restatement of Torts and the Restatement (Second) of Torts. 85 In the 2010 publication of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm, scholars decided to abolish the use of the substantial factor test altogether. 86

1. The Traditional View

The concept of substantial factor was introduced by the Restatement of Torts in 1934 in Section 431 titled “Legal Cause; What Constitutes.” 87 The comments for this section of the Restatement make it clear that to be

83 See id. at 984 (mentioning “a number of courts” recognize difficulty in proving but-for causation in toxic torts).
84 See About ALI, A.L.I, https://perma.cc/3YSV-Y7X5 (last visited Oct. 28, 2021) (discussing formation and purpose of ALI). The ALI produces Restatements of the Law which are deemed by many scholars and legal professionals to be immensely influential in courts, legislatures, legal scholarship, and education. See id. Founded in 1923, there has been debate over why the group formed and what the exact goals of the organization were. See Rue, supra note 9, at 2689.
85 See RESTATEMENT OF TORTS § 431 (AM. L. INST. 1934) (depicting first version of substantial factor test); RESTATEMENT (SECOND) OF TORTS § 431 (AM. L. INST. 1965) (mirroring first Restatement substantial factor test). The test has been used successfully and without error in many jurisdictions across the United States. See Doull v. Foster, 163 N.E.3d 976, 996 (Mass. 2021) (Lowy, J., concurring) (citing long history of successful use of substantial factor test); Estate of Frey v. Mastroianni, 463 P.3d 1197, 1207 (Haw. 2020) (noting courts consistently apply substantial factor test). However, there have been competing views by scholars on whether the substantial factor test or the but-for test is best applied to negligence cases. See, e.g., Green, supra note 66, at 556-57 (criticizing but-for test); Rue, supra note 9, at 2684 (explaining Restatement changes to but-for test are “well-advised”); Tory A. Weigand, Tort Law—The Wrongful Demise of But For Causation, 41 W. NEW ENG. L. REV. 75, 76 (considering demise of but-for test “troubling”).
87 See RESTATEMENT OF TORTS § 431 (AM. L. INST. 1934) (providing causation requirements). The section provides:

The actor’s negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

Id.
liable for the harm caused, the defendant’s conduct must be a substantial factor of that harm.\textsuperscript{88} This section originally depicted the substantial factor concept that courts enforced in their decisions regarding causation.\textsuperscript{89}

The Restatement (Second) of Torts came out in 1965 and provided an identical substantial factor section to the prior Restatement.\textsuperscript{90}

2. Restatement (Third) of Torts

It was not until 2010 when the Restatement (Third) of Torts changed the structure of causation and made a significant departure from traditional torts principles.\textsuperscript{91} For the first time, the new Restatement (Third) created separate sections for factual cause and scope of liability, and abolished the substantial factor and proximate cause language.\textsuperscript{92} Chapter 6 of the new

\textsuperscript{88} See \textit{Restatement of Torts} § 431, cmt. a-d (AM. L. INST. 1934) (explaining requirements of causation). In addition, Section 433 titled “Considerations Important in Determining Whether Negligent Conduct is a Substantial Factor in Producing Harm” provides:

The following considerations are in themselves or in combination with one another important in determining whether the actor’s conduct is a substantial factor in bringing about harm to another: (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it; (b) whether after the event and looking back from the harm to the actor’s negligent conduct it appears highly extraordinary that it should have brought about the harm; (c) whether the actor’s conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; (d) lapse of time.

\textsuperscript{89} See \textit{Restatement of Torts} §§ 431, 433 (AM. L. INST. 1934) (outlining original ALI depiction of substantial factor test).

\textsuperscript{90} See \textit{Restatement (Second) of Torts} § 431 (AM. L. INST. 1965) (proscribing same elements as first Restatement). The Restatement (Second) added comment (e) noting that the rules in this section are equally applicable to conduct that was intended to cause harm and where it is such as to result in strict liability. See \textit{Restatement (Second) of Torts} § 431, cmt. e (AM. L. INST. 1965) (adding additional guidance to intentional or strict liability torts). Otherwise, the sections are the same and depict the same meanings. See \textit{Restatement (Second) of Torts} § 431 (AM. L. INST. 1965) (providing same section as first Restatement).


\textsuperscript{92} See \textit{Restatement (Third) of Torts: Phys. and Emot. Harm Ch. 5: Scope Note} (AM. L. INST. 2010) (introducing restructuring of causation sections); id. at § 26 (discussing factual cause and abolition of substantial factor); id. at Ch. 6 Special Note on Proximate Cause (expressing desire to rid torts of “proximate cause” terminology). Section 26 titled “Factual Cause” provides: “Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause when the harm would not have occurred absent the conduct. Tortious conduct may also be a factual cause of the harm under § 27.” \textit{Restatement (Third) of Torts: Phys. and Emot. Harm} § 26 (AM. L. INST. 2010).
Restatement (Third) is titled “Scope of Liability (Proximate Cause)” and has a special note on proximate cause.93

F. States Causation Decisions

Following the recent changes made by the Restatement (Third) of Torts, some jurisdictions have decided to forego their own precedent and follow the ALI’s lead by abandoning the substantial factor test.94 This is a significant change because the Restatement claims that medical malpractice is a specialized area of negligence liability outside the scope of the third Restatement.95 Others, however, have decided to hold true to their precedents and continue to apply the substantial factor test in medical malpractice, defying the new Restatement (Third).96

1. States Using But-For Causation

   i. Massachusetts: Doull v. Foster

   In Doull v. Foster,97 the Massachusetts Supreme Judicial Court determined that a judge had properly instructed the jury of a medical malpractice case in applying the but-for causation test in their deliberations on liability.98 In addition, the majority abolished the substantial factor test for causation in medical malpractice cases altogether.99 The court reasoned that

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93 See Restatement (Third) of Torts: Phys. and Emot. Harm Ch. 6 Scope of Liability (Proximate Cause) (Am. L. Inst. 2010) (addressing special note on proximate cause language and replacement terminology). The special note makes clear that the Restatement (Third) is removing the proximate cause language and umbrella terminology of “legal cause” that the previous two Restatements utilized. See id. at Special Note on Proximate Cause (abolishing previously used terminology in causation). The ALI also supports the elimination of the term “proximate cause” in future Restatements. Id.

94 See Doull v. Foster, 163 N.E.3d 976, 990 (Mass. 2021) (holding but-for test will replace substantial factor in negligence cases involving multiple cases); Asher v. OB-Gyn Specialists, P.C., 846 N.W.2d 492, 497-98 (Iowa 2014) (holding courts should apply Restatement (Third) approach to causation over substantial factor).


98 See id. at 982 (holding but-for test was appropriate instruction in deciding liability).

99 See id. at 990-91 (eliminating substantial factor test in most negligence cases). The court decided to replace the substantial factor test in multiple sufficient causes negligence cases with the standard proposed in the Restatement (Third) of Torts. See id.
it was making a return to traditional tort principles and clarifying “confusing” causation tests troubling juries in multiple cause tort cases. The court went on to note that the Restatement (Third) of Torts had also eliminated the substantial factor test, and that many states have followed this lead, although the court did not mention any specific states or describe what kind of actions this applies to. In addition, as noted by the concurring opinion, the court did not cite to any cases where the substantial factor test had led to an erroneous result or had been misapplied.

The concurrence, authored by Justice Lowy and joined by Justice Gaziano, rejected the position taken by the majority in abolishing the substantial factor test in multiple cause cases. Justice Lowy noted that the majority “abandons decades of precedent in an attempt to clarify confusion that does not exist.” Further, Justice Lowy warned that abandoning the substantial factor test in cases with more than one cause of an injury will “inure to the detriment of plaintiffs with legitimate causes of action while not clarifying the existing law of causation.”

ii. Iowa: Asher v. OB-Gyn Specialists, P.C.

In Asher v. OB-Gyn Specialists, P.C., the Iowa Supreme Court extended its holding from Thompson v. Kaczinski, stating that the state courts would abolish the substantial factor test in favor of the Restatement (Third) of Torts’ test in its application to medical malpractice cases as

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100 See id. at 982-83 (claiming but-for test is “long-standing principle”); see also id. at 987 (stating substantial factor test leads to confusion).
101 See id. at 990 n.20 (noting two-thirds of jurisdictions require but-for causation in “majority of cases”).
102 See Doull, 163 N.E.3d at 998 (Lowy, J., concurring) (noting majority abandons “steady and successful practice” of applying substantial factor test). It was also noted in the amicus curiae brief submitted by the Massachusetts Academy of Trial Attorneys that the Massachusetts Defense Lawyers Association did not point to a single case in Massachusetts jurisprudence that yielded an erroneous result as a consequence of utilizing the substantial factor test. See Brief of Amicus Curiae, Mass. Acad. of Trial Att’y’s at 22, Doull v. Foster, 163 N.E.3d 976 (2021) (SJC-12921) (noting no cases cited as erroneous substantial factor cases).
104 See id. at 996 (Lowy, J., concurring); Michael Gentithes, Precedent, Humility, and Justice, 18 TEX. WESLEYAN L. REV. 835, 889 (2021) (noting importance of precedent).
105 See Doull, 163 N.E.3d at 996 (Lowy, J., concurring) (expressing concern for plaintiffs of negligence cases moving forward).
106 846 N.W.2d 492 (Iowa 2014).
107 774 N.W.2d 829 (Iowa 2009).
well. In Thompson, the court determined that the substantial factor test was a “source of significant uncertainty and confusion” and decided to adopt the Restatement (Third) of Torts’ new test for causation, abandoning the substantial factor test. The court in Asher equated medical malpractice cases with ordinary negligence cases and therefore determined that the substantial factor test was no longer applicable.

2. States Using Substantial Factor Test for Causation

i. Hawaii: Estate of Frey v. Mastroianni

In Estate of Frey v. Mastroianni, the Hawaii Supreme Court determined that the substantial factor test was the proper standard for determining causation in medical malpractice cases. The court referenced the two-prong Mitchell Test, which is implemented to prove that the defendant’s conduct is the cause of the harm to the plaintiff if: “(a) the actor’s conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which [the actor’s] negligence has resulted in the harm.” The court proceeded to reaffirm the rejection of other tests for causation including the but-for test. The court cited to Knodle v. Waikiki Gateway Hotel, Inc., where they reasoned the

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108 See Asher, 846 N.W.2d at 498 (explaining medical malpractice actions are negligence causes of action). The court opines that nothing in the Restatement (Third) of Torts suggests that its approach to causation does not apply to medical malpractice claims. Id.
109 See Thompson, 774 N.W.2d at 836 (alleging confusing and inconsistent use of substantial factor test); id. at 839 (discussing adoption of Restatement’s approach to causation). The Restatement (Third) of Torts addresses factual cause and scope of liability separately, doing away with the substantial factor language altogether. See id. at 837.
110 See Asher, 846 N.W.2d at 498 (equating medical malpractice and negligence cases in context of substantial factor test).
111 463 P.3d 1197 (Haw. 2020).
112 See id. at 1207 (holding substantial factor as test for causation).
113 See id. (explaining two-pronged test of causation). The Mitchell Test was coined in Mitchell v. Branch, a case in which there was a car accident that had two individual causes of injury. See Mitchell v. Branch, 363 P.2d 969, 972 (Haw. 1961) (explaining injuries caused by accident). One of the defendants argued that it would be inconsistent for them to have been liable based on cause as there was a superseding cause that occurred after their conduct that was the sole cause of the injury. Id. at 975. The court concluded that there could be multiple legal causes of injury, and the best and most workable test to determine which defendant was a legal cause was the Mitchell Test, or two-prong substantial factor test, derived from the Restatement of Torts and Prosser on Torts. Id. at 972-73.
114 See Estate of Frey, 463 P.3d at 1207 (“As we have consistently applied the substantial factor test, we have rejected other tests for legal causation, particularly the widely-used “but-for” rule under which the defendant’s conduct is a cause of the event if the event would not have occurred but for that conduct.”).
115 742 P.2d 377 (Haw. 1987).
substantial factor test is “sufficiently intelligible to furnish an adequate guide in instructions to the jury, and that it is neither possible nor desirable to reduce it to any lower terms” and is therefore the touchstone of causation, opposed to the but-for test.\(^\text{116}\)

\[\text{ii. Idaho: Fussell v. St. Clair}\]

In Fussell v. St. Clair,\(^\text{117}\) the Idaho Supreme Court held that the causation instruction to the jury in a multiple cause case should not have required the plaintiffs to prove that “but for” any negligence of the doctor, the injury would not have occurred.\(^\text{118}\) The court changed the model jury instruction language for causation when there are multiple or concurrent causes to include the “substantial factor” language.\(^\text{119}\) The court determined that this test would be used for all multiple or concurrent cause cases, leaving the but-for test applicable to single cause cases only.\(^\text{120}\) This test was later reaffirmed in the medical malpractice case of Newberry v. Martens,\(^\text{121}\) where the Idaho Supreme Court reasoned that the substantial factor test “strikes a fair balance between the claimant and the defense.”\(^\text{122}\)

Justice Boyle, in his concurring opinion in Fussell, went even further with the causation test analysis by claiming that he would abandon the but-for test altogether.\(^\text{123}\) Justice Boyle claimed that the but-for instruction “causes significant confusion and should be altogether discarded” and the but-for instruction “makes a difficult causation question even harder.”\(^\text{124}\) In his opinion, doing away with the but-for test would eliminate the heightened

\(^\text{116}\) See Knodle, 742 P.2d at 390 (discussing adequacy of substantial factor test).
\(^\text{118}\) See id. at 298 (discussing error with “but for” causation instruction). In this case, a child suffered brain damage at birth because of a prolapsed umbilical cord and subsequently died as a result. Id. at 296. The parents of the child alleged that the doctor was negligent during delivery when they artificially ruptured the mother’s fetal membranes when the child’s head was too high, causing the prolapsed umbilical cord and mishandled delivery when the prolapsed cord was discovered. Id. The case was appealed by the parents of the child after a verdict for the doctor was rendered based on a “but-for” causation standard instruction. Id.
\(^\text{119}\) See id. at 299 (providing revised instruction utilizing “substantial factor” language).
\(^\text{120}\) See id. (distinguishing case from single cause case and but-for instruction).
\(^\text{121}\) 127 P.3d 187 (Idaho 2005).
\(^\text{123}\) See Fussell v. St. Clair, 818 P.2d 295, 302 (Idaho 1991) (Boyle, J., concurring) (expressing desire to completely eliminate but-for test from jurisprudence even with limited application).
\(^\text{124}\) See id. at 302 (Boyle, J., concurring) (mentioning confusing nature of but-for test); id. at 305 (explaining exacerbation of difficulty in answering causation question).
evidentiary burden placed on plaintiffs, as well as ease the prejudice toward plaintiffs in negligence cases.\footnote{\textit{See id.} at 305 (Boyle, J., concurring) (expressing concern for plaintiff’s burden in negligence cases with but-for test); \textit{id.} at 303 (noting increased prejudice to plaintiff in but-for instruction cases). A concern about the burden on plaintiffs in negligence cases, specifically medical malpractice cases, has been discussed by justices in other states as well, not just in Idaho. \textit{See} Doull \textit{v.} Foster, 163 N.E.3d 976, 998 (Mass. 2021) (Lowy, J., concurring) (explaining unfairness of but-for test in negligence cases).
\textit{See sources cited supra} note 26 (explaining but-for test of causation); sources cited \textit{supra} note 29 and accompanying text (explaining substantial factor test of causation).}

\footnote{\textit{See} \textit{RESTATEMENT (THIRD) OF TORTS: PHYS. AND EMOT. HARM} \textsection{26 cmt. j (AM. L. INST. 2010) (discussing elimination of substantial factor test in factual cause); \textit{Rue, supra} note 9, at 2716-17 (discussing elimination of legal cause phrase rejecting first two Restatements use of substantial factor); \textit{RESTATEMENT (THIRD) OF TORTS: PHYS. AND EMOT. HARM} \textsection{26 cmt. n (AM. L. INST. 2010) (stating medical malpractice is outside scope of Restatement).}}

The issue at hand is determining which causation test is best suited for medical malpractice claims with multiple causes.\footnote{\textit{See} \textit{RESTATEMENT (THIRD) OF TORTS: PHYS. AND EMOT. HARM} \textsection{26 (AM. L. INST. 2010) (distinguishing factual cause from legal or proximate cause); \textit{id.} at CH. 6 \textit{SCOPE OF LIABILITY} (PROXIMATE CAUSE) (distinguishing proximate cause from factual cause). This is the first time the Restatement has made a distinction between factual cause and proximate, or scope of liability, cause. \textit{See id.} The Supreme Court of Hawaii in \textit{Estate of Frey} is an example of a state that does not do a fair job of distinguishing between factual cause and proximate or legal cause in their jurisprudence. \textit{See generally} \textit{Estate of Frey v. Mastroianni, 463 P.3d 1197 (Haw. 2020).} The court in this case references the Mitchell test, discussed above in footnote 113, as a two-step analysis to determine whether the defendant’s conduct was the “legal” cause of the plaintiff’s harm. \textit{id.} at 1206-07. Later in the opinion, the court explains that the Mitchell test “contemplates a factual determination that the negligence of the defendant was more likely than not a substantial factor in bringing about the result complained of.” \textit{id.} at 1207 (quoting \textit{McKenna v. Volkswagenwerk Aktiengesellschaft, 558 P.2d 1018, 1022 (Haw. 1977)).} Although referencing the first part of the two-prong test, it still confuses the inquiry and makes it more difficult for juries to understand the difference and make a correct finding. \textit{See sources cited supra} notes 53-54 (discussing factual cause); sources cited \textit{supra} note 55-57 (discussing proximate cause).}

\footnote{\textit{See sources cited} \textit{supra} note 20 (discussing need for medical experts due to complexity surrounding medical malpractice claims).}

IV. ANALYSIS

The issue at hand is determining which causation test is best suited for medical malpractice claims with multiple causes. The Restatement (Third) of Torts proposes eliminating the substantial factor test in almost all cases, including negligence cases with multiple causes, but does specify that medical malpractice is out of this Restatement’s scope.\footnote{\textit{See} \textit{RESTATEMENT (THIRD) OF TORTS: PHYS. AND EMOT. HARM} \textsection{26 (AM. L. INST. 2010) (discussing elimination of substantial cause test in factual cause); \textit{Rue, supra} note 9, at 2716-17 (discussing elimination of legal cause phrase rejecting first two Restatements use of substantial factor); \textit{RESTATEMENT (THIRD) OF TORTS: PHYS. AND EMOT. HARM} \textsection{26 cmt. n (AM. L. INST. 2010) (stating medical malpractice is outside scope of Restatement).}} What the Restatement does do, which many state courts do not, is highlight a difference between factual cause and legal or proximate cause.\footnote{\textit{See} \textit{RESTATEMENT (THIRD) OF TORTS: PHYS. AND EMOT. HARM} \textsection{26 (AM. L. INST. 2010) (discussing elimination of substantial factor test in almost all cases, including negligence cases with multiple causes).} One aspect that sets medical malpractice cases apart from other multiple cause negligence cases is their inherent complexity.\footnote{\textit{See sources cited} \textit{supra} note 20 (discussing need for medical experts due to complexity surrounding medical malpractice claims).} The counterfactual reasoning utilized by the but-for test does not make a jury’s task any simpler in determining
liability. Advocates on both sides of the debate have helped shape the conversation and determine which test is utilized in different jurisdictions. In concluding this Note, a suggested test, along with a model jury instruction, will be proposed for states to apply to their medical malpractice jurisprudence.

A. Advocacy Standpoint Calls for Substantial Factor Test

It is often necessary to defer to advocacy practitioners when making decisions that impact real victims. In many cases, attorneys, as well as justice and trial lawyer associations, have filed amicus curiae briefs in support of plaintiffs who are advocating for the use of the substantial factor test in medical malpractice causation cases, as well as in toxic tort cases. The goal of these briefs is to promote the administration of justice and advance the interests of those who seek redress within the court system for their injuries.

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130 See Rethinking Actual Causation in Tort Law, supra note 52, at 2164 (acknowledging counterfactual reasoning has “well-recognized problems”). It has been discussed ad nauseam that but-for analyses do not work for certain scenarios, like multiple sufficient causes, but there are other analytical issues that the test produces. See id. at 2165. For example, the but-for test “accords causal status to a wide range of legally irrelevant actions.” Id. at 2166.


132 See sources cited infra Part IV, Section f and accompanying text (discussing proposed test for causation in medical malpractice).

133 See Doull v. Foster, 163 N.E.3d 976, 996 (Lowy, J., concurring) (Mass. 2021) (“Abandoning the substantial contributing factor instruction in circumstances where there is more than one legal cause of injury will, in my view, insure to the detriment of plaintiffs with legitimate causes of action while not clarifying the existing law of causation.”); see also Brief of Amicus Curiae, Mass. Acad. of Trial Att’ys at 13, Doull v. Foster, 163 N.E.3d 976 (Mass. 2021) (No. SJC-12921) (arguing in favor of victim-plaintiffs’ attorneys’ perspective to ensure fairness).


The Academy’s purpose is to uphold and defend the Constitutions of the United States and the Commonwealth of Massachusetts; to promote the administration of justice; to uphold the honor of the legal profession; to apply the knowledge and experience of its members so as to promote the public good; to reform the law where justice so requires; to advance the cause of those who seek redress for injury to person or property;
For example, in *Doull*, it was clear that the plaintiff, the injured party, was advocating for the substantial factor test whereas the defendant, the alleged negligent party, was advocating for the but-for test. The Massachusetts Academy of Trial Attorneys found it necessary to file an amicus curiae brief in support of the injured plaintiff in order to uphold justice and promote fairness for not only *Doull*, but for all other injured medical malpractice victims in the future as well. In their brief, the Academy noted the continued success of the substantial factor test in Massachusetts jurisprudence, and the harms that could arise if the but-for test was chosen and utilized instead.

In contrast, the Massachusetts Defense Lawyers Association filed an amicus curiae brief in favor of the defendant-doctor, arguing in favor of the abolition of the substantial factor test and advocating for implementation of the but-for test. Negligent actors in medical malpractice suits often seek protection behind a rigid and impracticable test when it is utilized in this type of litigation. This is why plaintiffs, the injured parties, advocate for the substantial factor test whereas defendants, the allegedly negligent doctors steadfastly to resist efforts to curtail the rights of injured individuals; and to help them enforce their rights through the courts and other tribunals in all areas of law.

*Id.* at 11.

136 See *id.* at 13 (advocating for substantial factor test instruction). The Massachusetts Academy of Trial Attorneys argued that the substantial factor test was utilized in Massachusetts for many years and led to no error or jury confusion in its application, and that it embodies the legal principles applicable to more factual scenarios than alternative tests. See *id.* *But see* Brief of Amicus Curiae, Mass. Defense Lawyers Ass’n at 21-22, *Doull* v. Foster, 163 N.E.3d 976 (Mass. 2021) (No. SJC-12921) (advocating for but-for test). The Massachusetts Defense Lawyers Association claims there is confusion surrounding the substantial factor test and the but-for test would be a return to “concepts central to the law of torts.” *Id.* at 7.

137 See Brief of Amicus Curiae, Mass. Acad. of Trial Att’y’s at 32, *Doull* v. Foster, 163 N.E.3d 976 (Mass. 2021) (No. SJC-12921) (arguing adoption of Restatement (Third) approach would complicate and confuse jurors). In turn, if the instructions to the jury are complicated and confusing, victims of malpractice would not receive the justice they deserve if the causation standards are misunderstood. *Id.*

138 See *id.* at 16-22 (explaining substantial factor test is rooted in Massachusetts law). The Academy goes on to note that the concerns about the substantial factor test, such as a “relaxation” of traditional proximate cause standards, have not occurred in Massachusetts cases. *Id.* at 22-25.


140 See discussion *supra* Part II, Section a (explaining protections doctors and hospitals have in medical malpractice cases); Brief of Amicus Curiae, Mass. Acad. of Trial Att’y’s at 29-32, *Doull* v. Foster, 163 N.E.3d 976 (Mass. 2021) (No. SJC-12921) (explaining substantial factor test works in more situations than but-for test). The Academy noted that “the theoretical and practical flaws in the ‘but for’ test are palpable in more complex situations,” which can include medical malpractice cases with multiple causes. *Id.* at 30.
and hospitals, commonly advocate for the but-for test.\textsuperscript{141} When the but-for test is applied to medical malpractice cases, in addition to all of the other legal protections afforded to defendants in such cases, the barriers against plaintiffs approach an insurmountable limit.\textsuperscript{142} Scholarly publications, like the ALI Restatements, must weigh these policy considerations as they draft very persuasive tort law guidelines, including medical malpractice law, and should implement a substantial factor recommendation for causation in these cases.\textsuperscript{143}

\section*{B. Misplaced Authority on Restatement Third of Torts}

As discussed, some states have followed the lead of the Restatement (Third) on abolishing the substantial factor test in negligence cases, where other states have continued to implement the substantial factor test even in the face of the Restatement’s changes.\textsuperscript{144} However, it is specifically stated by the writers of the Restatement (Third) that medical malpractice cases are outside of the scope of the currently written Restatements.\textsuperscript{145} The available

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\textsuperscript{141} See sources cited supra note 131 and accompanying text (distinguishing arguments between amicus curiae for plaintiff and defendant).

\textsuperscript{142} See discussion supra Part II, Section a (discussing all protections defendants receive in medical malpractice cases). See generally Brief of Amicus Curiae, Mass. Acad. of Trial Att’ys at 31-38, Doull v. Foster, 163 N.E.3d 976 (Mass. 2021) (No. SJC-12921) (explaining substituting but-for test for substantial factor test would complicate jury instructions and confuse jurisprudence); Brief of Amicus Curiae, Mass. Defense Lawyers Ass’n at 6-7, Doull v. Foster, 163 N.E.3d 976 (Mass. 2021) (No. SJC-12921) (advocating against plaintiff’s desire for substantial factor test).

\textsuperscript{143} See About ALI, supra note 84 (discussing goal of clarifying the law through Restatements); Frequently Asked Questions: Who comprises ALI’s membership and leadership?, THE AM. L. INST., https://perma.cc/X75A-S4E2 (last visited Jan. 15, 2023) (discussing diversity of ALI members). Because the main goal of the ALI is to clarify the law, and because they claim to have a diverse group of judges, lawyers, and scholars work on their projects, the ALI should take all practitioners’ opinions into consideration when deciding how to unify utilization of the law. See Frequently Asked Questions: Who comprises ALI’s membership and leadership?, supra.

\textsuperscript{144} See Doull v. Foster, 163 N.E.3d 976, 990 (Mass. 2021) (holding but-for test will replace substantial factor in negligence cases involving multiple causes); Asher v. OB-Gyn Specialists, P.C., 846 N.W.2d 492, 498-99 (Iowa 2014) (holding courts need to apply Restatement (Third) approach to causation over substantial factor); Estate of Frey v. Mastroianni, 463 P.3d 1197, 1207 (Haw. 2020) (stating use of substantial factor test in negligence cases); Fussell v. St. Clair, 818 P.2d 295, 295 (Idaho 1991) (rejecting application of but-for test in multiple cause cases).

\textsuperscript{145} See RESTATEMENT (THIRD) OF TORTS: PHYS. AND EMOT. HARM § 26 cmt. n (AM. L. INST. 2010) (stating medical malpractice is outside scope of Restatement). Although the previous Restatements have explicitly not included guidance on medical malpractice negligence law, the ALI has begun to draft a “Miscellaneous Provisions” section to the Restatement (Third) of Torts that specifically addresses medical malpractice. Restatement of the Law Third, Torts: Miscellaneous Provisions, THE AM. L. INST., https://perma.cc/PJ8D-J835 (last visited Jan. 15, 2022). Adding more merit to the claim that the Restatement has not addressed medical liability, the ALI states: “[t]his Restatement addresses topics not covered in another part of the Restatement Third of Torts
Restatements are the only true guide for states to utilize when deciding cases of negligence, so it is understandable that states would rely on them for guidance.\textsuperscript{146} Nevertheless, states should not be relying on the Restatement (Third)’s approach to causation because medical malpractice cases are unique and require their own separate parameters.\textsuperscript{147}

The Restatement was specifically written to unify the area of torts with traditional negligence concepts as a clarifying source for courts, practitioners, and scholars.\textsuperscript{148} Although medical malpractice cases are negligence cases within the area of tort law, there are extreme differences that place the subsection outside of the scope of the Restatement (Third) as currently written.\textsuperscript{149} The Restatement (Third) qualifies medical malpractice as a “specialized area of negligence liability” and takes no position on the matter, leaving it to future Restatements to develop.\textsuperscript{150} Therefore, it is clear from the intent of the Restatement (Third), in conjunction with the absence of reference to the specialized area of law to date, that medical malpractice jurisprudence should not rely on the concepts and theories used within its guidance.\textsuperscript{151}

\textbf{C. Difference Between Factual and Proximate Cause}

As previously discussed, according to traditional tort principles, there is a difference between factual cause and proximate cause.\textsuperscript{152} In order for courts to properly apply causation standards, each needs to be explained that either require updating since publication of the Restatement Second or were not previously addressed but should be covered in a modern torts Restatement.” \textit{Id.}

\textsuperscript{146} See \textit{About ALI}, supra note 84 (describing purpose of Restatements is to “clarify, modernize, and otherwise improve” tort law).

\textsuperscript{147} See supra note 95 and accompanying text (explaining area of medical malpractice is outside scope of current Restatement).

\textsuperscript{148} See sources cited supra note 84 and accompanying text (describing purpose of Restatements of the Law).

\textsuperscript{149} See sources cited supra note 17 and accompanying text (explaining elements of medical malpractice and negligence claims).

\textsuperscript{150} \textsc{Restatement (Third) of Torts: Phys. and Emot. Harm} § 26 cmt. n (Am. L. Inst. 2010) (demonstrating absence of position on medical malpractice cases). Although the comment corresponding to § 26 is titled “Loss of opportunity or chance,” the Restatement makes it clear that these concepts are a part of the overarching area of medical malpractice law, specifically indicating medical malpractice is entirely outside of the Restatement’s current scope. \textit{Id.}

\textsuperscript{151} See \textit{id.} (leaving unpublished a standardized test). As previously stated, the ALI has also begun drafting a separate “Miscellaneous Provisions” section of the Restatement (Third) specifically designated to medical liability, implying that it has not been covered previously by the Restatements. See supra note 145 and accompanying text (discussing miscellaneous provisions of Restatement).

\textsuperscript{152} See sources cited supra Part III, Section b and accompanying text (discussing differences between factual and proximate or legal cause); see also sources cited supra note 53-54 & 55-57 and accompanying text (defining factual cause and proximate cause).
distinctly to the jury and require separate jury instructions.\textsuperscript{153} Confusion in jury deliberations often stems from a misunderstanding of the law and how it is applied.\textsuperscript{154} In order to aid the jury in making reasonable and justified causation determinations, a differentiation of factual and proximate or legal cause is necessary.\textsuperscript{155}

The substantial factor test and the but-for test are options for causation standards when determining factual cause.\textsuperscript{156} In almost all single cause cases, the but-for test is the most simple, efficient, and logical way to determine factual cause.\textsuperscript{157} However, there are limitations to the but-for analysis and its efficacy, thereby requiring the use of the substantial factor test in certain circumstances.\textsuperscript{158} An additional exception to the but-for analysis

\textsuperscript{153} See How Courts Work, Steps in a Trial, Instructions to the Jury, supra note 21 and accompanying text (describing how jury instructions work). “The judge will point out that his or her instructions contain the interpretation of the relevant laws that govern the case” and therefore should explain both parts of causation: factual cause and legal or proximate cause. \textit{Id.}

\textsuperscript{154} See Brief of Amicus Curiae, Mass. Acad. of Trial Att’y’s at 32, Doull v. Foster, 163 N.E.3d 976 (Mass. 2021) (No. SJC-12921) (explaining that adoption of Restatement (Third) will cause confusion). The but-for test suggested by the Restatement (Third) would complicate the law and lead to unnecessary jury confusion. \textit{See id.} The Restatement itself points out that the but-for test’s application to certain scenarios can cause confusion and result in error. \textit{See id.} The but-for test and sections 26 and 27 of the Restatement invite confusion and complex explanations of the law and how it is applied. \textit{See id.}

\textsuperscript{155} See How Courts Work, Steps in a Trial, Instructions to the Jury, supra note 21 and accompanying text (describing how jury instructions work). The objective of jury instructions is to inform the jury on the law, and guide them on the proper way to deliberate the facts of the case presented to them. \textit{Id.} In order to do so most effectively, the judge alerts the jurors that the instructions are the interpretation of the relevant laws and that they are required to adhere to them in deliberations. \textit{Id.} Therefore, if there are separate and clear instructions for both proximate or legal cause and factual cause, the jury will be able to make the best-informed deliberations. \textit{See id.; see also RESTATEMENT (THIRD) OF TORTS: PHYS. AND EMOT. HARM § 29 cmt. b (AM. L. INST. 2010) (“Jury instructions that separate [factual cause and proximate or legal cause] of the case facilitate focus on the appropriate matter.”).}

\textsuperscript{156} See sources cited supra note 22 and accompanying text (introducing but-for and substantial factor test); \textit{see also} discussion supra Part II, Section b (defining but-for test); discussion supra Part II Section c (defining substantial factor test).

\textsuperscript{157} See Brief of Amicus Curiae, Mass. Acad. of Trial Att’y’s at 29-32, Doull v. Foster, 163 N.E.3d 976 (Mass. 2021) (“The ‘but for’ test … is harmless, and perhaps even proper in a case where there is a single alleged cause of harm with no contributing causes …”); \textit{Rue, supra} note 9, at 2681 (“Classically, cause-in-fact was determined using the ‘but-for’ test.”). It has been said that the but-for test is “both simple enough for everyday application in lawyers’ offices and busy trial courts and at the same time comprehensive enough to solve the recurrent types of occasionally quite challenging causation difficulties.” \textit{Rue, supra} note 9 at 2686 (quoting David W. Robertson, \textit{The Common Sense of Cause in Fact}, 75 TEX. L. REV. 1765, 1770 (1997)). The but-for test is useful in many situations, including single cause cases, and many cases where there are multiple known causes. \textit{Id.}

\textsuperscript{158} \textit{See Rue, supra} note 9, at 2683 (discussing exceptions to but-for test efficiency). There are multiple exceptions to the but-for test application, including multiple sufficient causes, toxic torts cases, environmental torts cases, loss of chance in medical malpractice, and butterfly effect cases that limit liability for an admitted tortfeasor. \textit{Id.}
should remain in a medical malpractice case with multiple, often unknown, causes.\textsuperscript{159}

Proximate cause, or legal cause, is a completely separate component of causation and should be distinguished by the judge to the jury during jury instructions.\textsuperscript{160} It has been argued in the past that substantial factor is a method of determining proximate causation, not factual causation.\textsuperscript{161} However, the new Restatement’s definition of proximate cause, titled scope of liability, provides a better and more effective description of determining if the harm done was within the scope of the defendant’s liability.\textsuperscript{162} The substantial factor test should be reserved for factual causation in medical malpractice cases with multiple causes, and a scope of liability question should be reserved for the legal or proximate causation.\textsuperscript{163}

1. Unknown Multiple Factors

The following example is demonstrative evidence as to the reasonableness of using substantial factor over but-for for factual cause in a situation where there are multiple factors, some unknown.\textsuperscript{164} Hospital patients are usually seeking assistance from doctors because they are already ill, injured,

\textsuperscript{159} See id. at 2683 (claiming substantial factor test used for loss of chance in medical malpractice). Loss of chance is a way to determine causation based on the loss of a statistical chance of survival or recovery that a patient experienced due to a doctor’s negligence. See Weigand, supra note 85, at 100 (explaining loss of chance theory). Medical malpractice cases with multiple unknown or unspecifiable causes should also be determined using substantial factor instead of but-for causation. See Estate of Frey v. Mastroianni, 463 P.3d 1197, 1207 (Haw. 2020); Fussell v. St. Clair, 818 P.2d 295, 299 (Idaho 1991).

\textsuperscript{160} See sources cited supra note 153 and accompanying text (explaining importance of distinguishing factual and legal or proximate cause).

\textsuperscript{161} See sources cited supra note 57 and accompanying text (reciting Washington proximate cause jury instruction on substantial factor); see also RESTATEMENT (THIRD) OF TORTS: PHYS. AND EMOT. HARM § 29 cmt. a (AM. L. INST. 2010) (“The ‘substantial factor’ requirement for legal cause in the Second Restatement of Torts has often been understood to address proximate cause...”).

\textsuperscript{162} See RESTATEMENT (THIRD) OF TORTS: PHYS. AND EMOT. HARM § 29 cmt. b (AM. L. INST. 2010) (discussing scope of liability instructions to jury). “Courts should craft instructions that inform the jury that, for liability to be imposed, the harm that occurred must be one that results from the hazards that made the defendant’s conduct tortious in the first place.” Id. It is proposed that the jury be instructed on determining if the harm that was caused was within the scope of the defendant’s liability rather than if it was a proximate cause of the harm. Id.

\textsuperscript{163} See sources cited supra note 79 (discussing states using substantial factor for multiple cause cases); see also sources cited supra note 162 and accompanying text (explaining scope of liability test).

\textsuperscript{164} See Doull v. Foster, 163 N.E.3d 976, 997 (Mass. 2021) (Lowy, J., concurring) (explaining substantial factor is more effective with multiple cause cases); Estate of Frey, 463 P.3d at 1207 (choosing substantial factor test for multiple cause cases); Fussell, 818 P.2d at 299 (holding jury should have been given substantial factor test causation instruction).
or require medical attention for some preexisting condition. For example, in *Doull v. Foster*, Ms. Laura Doull was seeking advice and medical treatment from her nurse practitioner, Ms. Anna C. Foster, regarding perimenopause-related symptoms. Thus, Ms. Doull was seeking assistance with a preexisting condition.

After being prescribed medication for her symptoms, Ms. Doull returned to Ms. Foster three times complaining of shortness of breath. This is considered another preexisting symptom in addition to Ms. Doull’s original perimenopause complaints, the medication prescribed, her history of asthma, and her history of allergies. Ms. Doull then had a “seizure-like event” where she was diagnosed with a pulmonary embolism, or blood clot in the lungs, and was diagnosed with chronic thromboembolic pulmonary hypertension. Ms. Doull endured surgery in an attempt to remove the blood clots, and was then prescribed various medications to battle her newly acquired heart disease. Unfortunately, in 2015, Ms. Doull succumbed to her many detrimental health conditions. Every single one of these conditions, diseases, and ailments can be considered a cause of her failing health and eventual injury at issue in the case—her death.

Each additional disease, condition, or ailment creates a more complicated causation issue and a lesser likelihood of the jury parsing out exactly what was the sole cause of the injury at issue in the case, or in other words, what the “but-for” causes were. The jurors are required to find no liability of the defendant if they conclude that Ms. Doull would have succumbed to...

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165 See, e.g., *Doull*, 163 N.E.3d at 980 (describing patient had perimenopause symptoms); *Fussell*, 818 P.2d at 296 (explaining patient was pregnant); *Asher v. OB-Gyn Specialists, P.C.*, 846 N.W.2d 492, 494 (Iowa 2014) (indicating patient’s need for delivery of baby); *Estate of Frey*, 463 P.3d at 1201 (discussing patient ingested substance, fainted, and hit head).

166 See *Doull*, 163 N.E.3d at 980 (discussing factual background of Ms. Doull’s medical conditions).

167 See id. (noting preexisting perimenopause symptoms).

168 See id. (explaining Ms. Doull’s resulting complications to medicines prescribed). Each time Ms. Doull visited the practice with her shortness of breath complaints, she was physically examined but diagnosed with a symptom of her other long-standing conditions. *Id.*

169 See id. (discussing Ms. Doull’s preexisting health conditions in addition to present complaints).

170 See id. (noting Ms. Doull’s newly discovered condition caused by pulmonary embolism). “[C]hronic thromboembolic pulmonary hypertension [is] a rare disease where pressure in the pulmonary artery increases and causes the heart to fail.” *Id.*


172 See id. at 981 (concluding Ms. Doull had passed away due to complications with health conditions).

173 See id. (noting causes of Ms. Doull’s declining health and eventual death).

174 See id. (describing all medical conditions); sources cited supra note 26 (defining but-for causation test).
her health conditions regardless of Ms. Foster’s actions. All of these causes combined, coupled with a stringent but-for causation test, pose an unreasonably narrow intellectual burden on the jury.

D. Complexity of Medical Malpractice Cases

The main goal of the justice system is to reach a fair and just outcome for all parties involved in a lawsuit. When it comes to medical malpractice claims, the stakes are even higher because it is noted to be one of the most complex areas of law with causation being the hardest element to prove. This requires a thorough examination of interests for both plaintiffs and defendants involved in these lawsuits, thereby ensuring fairness for those injured and seeking redress.

As noted above, toxic torts cases are also considered to be a very complex area of the law requiring special accommodations. The complexities lie in determining what the actual cause of the injury was, which is a very difficult and weighty task for the jury. Implementing a but-for analysis in these sorts of “byzantine” fact patterns provides unequal advantage to defendants over plaintiffs who can utilize empty chair defenses by blaming a party for the cause who is not on trial. Due to this difficulty, the substantial factor test is often used to aid the jury in determining which of

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175 See sources cited supra note 26-28 and accompanying text (explaining use of but-for causation test and implementation to issues).

176 See Doull, 163 N.E.3d at 997-98 (Lowy, J., concurring) (discussing concerns of but-for test in multiple cause cases).

177 See sources cited supra note 2 (describing scales of justice in American court system). Oftentimes, the scales of justice representing both sides of a court case are held by Lady Justice who is blindfolded to show impartiality. See Figures of Justice Information Sheet, supra note 2 (explaining scales of justice). This is intended to show that “justice is blind” and decisions are to be made fairly and without bias. See Booker, supra note 2 (explaining purpose of blindfolded Lady Justice).

178 See In Medical Malpractice, “Causation” is Often the Most Difficult Element to Prove, supra note 48 (emphasizing difficult area of law and causation issues).

179 See generally Peters, Jr., supra note 4, at 1456 (discussing use and effect of experts in medical malpractice cases).

180 See discussion supra Part III, Section d, Subsection 2 (discussing history and intricacies of toxic torts). The substantial factor test is often utilized in these complex and difficult cases. See sources cited supra note 80 (discussing toxic tort causation).

181 See KAREN A. GOTTLIEB, TOXIC TORTS PRACTICE GUIDE § 3:1 (2d ed. 2022) (introducing causation in toxic torts). This introduction is a brief overview of the complexities of the causal component of toxic torts and what goes into proving what caused the injury. See id. Knowledge of scientific causal factors, expert advice, OSHA standards, and investigation of disease patterns are all a part of understanding toxic tort causation. See id.

the sources of toxicity caused the injury to the plaintiff.\textsuperscript{183} One can argue that medical malpractice cases, like toxic torts, are inherently complex, and require the use of the substantial factor test.\textsuperscript{184}

Causation on its own is difficult enough to prove in a regular case of negligence.\textsuperscript{185} There are many intricacies that can arise, creating problems for plaintiffs in proving defendants’ liability.\textsuperscript{186} Causation in medical malpractice, like toxic torts, can be nearly impossible to prove, often leaving victims with small scale settlements or no compensation for their injuries.\textsuperscript{187} During surgeries or medical procedures, there are a whole host of risks and complications that are inherent to medical care itself.\textsuperscript{188} Because so many things can go wrong, and potentially contribute to the injury, it can be extremely difficult for a victim to prove the doctor was a factual cause of the injury.\textsuperscript{189} By adopting a substantial factor test, victims would have a better

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\textsuperscript{183} See Bernstein, supra note 80, at 74 (explaining use of substantial factor test to determine causation in toxic torts cases). “When a plaintiff was exposed to a single toxin from multiple sources, to prove causation by a specific defendant the plaintiff must show that the actions of that defendant were a ‘substantial factor’ in causing the alleged harm.” Id. at 51-52. A defendant can only be held liable for the harm if the plaintiff proves by a preponderance of the evidence that the exposure to the defendant’s product was a substantial factor in causing the harm. Id. at 52.

\textsuperscript{184} See sources cited supra note 47-48 and accompanying text (discussing complexity of medical malpractice cases). “Medical malpractice is one of the most complex areas of the law. Often, proving ‘causation’ is the most difficult part.” In Medical Malpractice, “Causation” is Often the Most Difficult Element to Prove, supra note 48; see also Fussell v. St. Clair, 818 P.2d 295, 299 (Idaho 1991) (“[T]he jury should have been instructed that proximate cause was established if the jury found that Dr. St. Clair’s negligence was a substantial factor in causing the [injury] . . .”); Estate of Frey v. Mastroianni, 463 P.3d 1197, 1206-07 (Haw. 2020) (requiring use of substantial factor in medical malpractice cases).

\textsuperscript{185} See Moore, supra note 32 (discussing nuances to tort law causation). There is no simple, clear, or unified definition of causation in the law which makes it a difficult part of negligence to prove. See id.

\textsuperscript{186} See Rethinking Actual Causation in Tort Law, supra note 52, at 2164 (discussing intricacies of determining proximate cause based on analyses of actual causation). “As might be expected, inquiries into the nature of proximate causation are difficult, in part because of the thorny moral issues they raise and the byzantine exercises in line drawing they require. No less complicated, however, are analyses of actual causation . . .”. Id.

\textsuperscript{187} See Peters, supra note 15 (discussing chances of plaintiff winning in medical malpractice cases); sources cited supra note 184 and accompanying text (describing difficulty in proving causation); sources cited supra note 181 and accompanying text (describing challenges in toxic torts complexities).

\textsuperscript{188} See Hathaway, supra note 14 (distinguishing preventable from unpreventable harm); see also In Medical Malpractice, “Causation” is Often the Most Difficult Element to Prove, supra note 48 (describing what can go wrong in medical care situations). “In the case of a surgery, there are a number of complications a patient can develop” that are either known or unknown and can occur within the standard of care, or as a result of deviating from that care. In Medical Malpractice, “Causation” is Often the Most Difficult Element to Prove, supra note 48.

\textsuperscript{189} See In Medical Malpractice, “Causation” is Often the Most Difficult Element to Prove, supra note 48 (“[I]t is often difficult to prove within a reasonable degree of medical certainty that a bad surgical outcome was ‘caused’ by negligence of the surgeon.”).
opportunity of proving to the jury that while there may have been other factors that led to the injury, the doctor themself was a substantial factor in causing that harm.\textsuperscript{190} Utilizing the substantial factor test levels the playing field for victims of medical malpractice who are already at a severe disadvantage compared to their well-equipped opposing party, and carry an extremely difficult burden to prove causation in the first place.\textsuperscript{191}

Compare a medical malpractice suit to a typical toxic tort scenario where a plaintiff worked for several factories over their thirty-year career that used asbestos materials.\textsuperscript{192} The plaintiff later develops lung cancer, becomes ill, and sues each asbestos factory they worked for.\textsuperscript{193} Causation will be extremely difficult to prove because this injury occurred some-time after the plaintiff stopped working, and there are multiple factories that could have contributed to, or did contribute to, the harm.\textsuperscript{194} The jury will likely be instructed to determine which factories were a substantial factor in causing the cancer to determine liability.\textsuperscript{195} The same should be true in a medical malpractice case where a patient has multiple causes contributing to their harm (i.e., previous illness or injury, complications with surgery or procedures, a

\textsuperscript{190} See Doull v. Foster, 163 N.E.3d 976, 998 (Mass. 2021) (Lowy, J., concurring) (discussing substantial factor test’s positive impact on fairness to victims). “An instruction on the substantial contributing factor test . . . focuses the jurors[*] attention directly on what ought to determine legal responsibility: the conduct of the parties.” Id.; see also Fussell v. St. Clair, 818 P.2d 295, 297 (Idaho 1991) (explaining multiple causes in case required use of substantial factor test). The court discusses that there were multiple factors in this case that caused the harm, a prolapsed umbilical cord and the doctor’s conduct, and the jury deserved to weigh both of those causes by using the substantial factor test. Id.

\textsuperscript{191} See sources cited supra notes 35-50 (discussing advantages defendants have over victim plaintiffs in medical malpractice matters). This does not mean factual cause should be found just because they are doctors. See Moore, supra note 32 (laying out requirements for factual causation). What it does mean is that the burden of proof on plaintiffs is already so high that a workable and functional test helps prove their case. See Stein, supra note 51, at 1217 (explaining burden of proof is on plaintiff in medical malpractice); Doull, 163 N.E.3d at 998 (Lowy, J., concurring) (discussing burden on plaintiff exacerbated by but-for test).

\textsuperscript{192} See Bernstein, supra note 80, at 55-56 (giving example of plaintiff exposed by multiple defendants).

\textsuperscript{193} See id. at 55 (discussing causation example of multiple cause asbestos exposure).

\textsuperscript{194} See id. (explaining causation issues when multiple causes are involved). “[A]n additional causation issue arises when multiple defendants are responsible for exposing the plaintiff to a harmful substance.” Id. “Assuming the plaintiff is able to show that his disease was more probably than not caused by asbestos exposure, he still has to prove that a particular defendant’s asbestos-containing product was a ‘proximate cause’ of that injury to recover damages from that defendant.” Id.

\textsuperscript{195} See id. (“[P]laintiffs must provide sufficient evidence for a jury to conclude that exposure to the defendant’s asbestos or asbestos-containing product was a ‘substantial factor’ in promoting the disease.”).
negligent provider), and therefore the substantial factor test should be used to fairly conclude if the doctor themselves was a cause of the harm.\(^{196}\)

**E. Counterfactual Reasoning**

A common claim about the substantial factor analysis is that it is confusing and jurors need to be instructed on a simpler but-for test to determine causation in negligence claims.\(^{197}\) However, many have criticized the but-for analysis as unnecessarily confusing and complex due to its counterfactual reasoning roots.\(^{198}\) The implementation of counterfactual reasoning into the challenging role of the jury creates misunderstanding and requires complex theoretical thinking.\(^{199}\)

A comparison of the two tests is demonstrative: as noted in the concurrence from *Doull v. Foster*,

The substantial contributing factor test is positive in outlook: it frames causation to have a juror start by considering what actually happened, and whether the defendant’s actions played a part in producing the result. But-for causation, on the other hand, begins not with what was, but with what might have been: in order to determine whether what occurred was the product of the defendant’s action, the jury must determine how the sequence of events would have played out in the absence of this conduct.\(^{200}\)

\(^{196}\) See sources cited supra note 165 (giving examples of patient’s previous ailments leading them to seek medical treatment).

\(^{197}\) See *Doull v. Foster*, 163 N.E.3d 976, 987 (Mass. 2021) (stating substantial factor test leads to confusion); RESTATEMENT (THIRD) OF TORTS: PHYS. AND EMOT. HARM § 26 cmt. j (AM. L. INST. 2010) (claiming substantial factor is “confusing” and “misused” after adoption in previous Restatements).

\(^{198}\) See *Green*, supra note 66, at 605 (describing speculative nature of but-for test); *Doull*, 163 N.E.3d at 997 (Lowy, J., concurring) (noting difficulty of applying but-for test to multiple causes); *Rethinking Actual Causation in Tort Law*, supra note 52, at 2166-72 (describing relevant inaccuracies and analytical challenges to counterfactual reasoning); *Fussell v. St. Clair*, 818 P.2d 295, 302 (Idaho 1991) (Boyle, J., concurring and specially concurring) (describing but-for test as confusing and suggesting it be discarded). Justice Boyle advanced the argument by stating problems inherent with the but-for test are so great that it would “introduce a fruitless inquiry into multiple cause cases.” *Id.* at 305.

\(^{199}\) See *Rethinking Actual Causation in Tort Law*, supra note 52, at 2166-71 (explaining case against but-for causation).

\(^{200}\) 163 N.E.3d at 997 (Lowy, J., concurring) (citations omitted); see also *Fussell*, 818 P.2d at 305 (Boyle, J., concurring and specially concurring) (proposing abolition of but-for test in multiple cause cases). Justice Boyle provides a similar comparison of the two causation tests that may be helpful in demonstrating their differences:
With single cause cases, counterfactual reasoning rarely poses an issue, but with multiple causes, the but-for counterfactual analysis permits the jury to think hypothetically, speculating on what could have been. This type of reasoning runs counterintuitive to reality, requiring jurors to ignore the factual scenario of the case and determine something that did not happen, could have indeed happened.

Allowing a jury to make up a fictional scenario with multiple causes of an injury can lead to invalid and unjustified conclusions about who or what truly caused the injury. With cases as complex as medical malpractice, the terminology and procedures are already difficult enough to understand. It is essential to make the deliberation process as simple and effective as possible, and adding in counterfactual analysis to an already confusing set of facts can lead to wild speculation and unsupported conclusions.

The “but for” test seemingly takes the inquiry from the actual facts, i.e., whether defendant physician’s actions caused the baby’s brain damage and death, to the unanswerable world of hypothetical “but for” considerations, i.e., if the physician had not acted in the way he did would the baby have died anyway. Since the physician did act in a certain way and the baby did die, it seems unexplainable that we should further complicate a difficult causation question by pondering the hypothetical world of what might have happened if the defendant’s action had not occurred. In my view, causation should focus on the actual facts of the case and not be distracted by such unanswerable questions as created by the “but for” test.

Fussell, 818 P.2d at 305-06.

201 See Doall, 163 N.E.3d at 997 (Lowy, J., concurring) (comparing causation tests and commenting on efficacy). Even with single cause cases, an argument has been made that the but-for counterfactual reasoning analysis is inadequate and faces deep analytical problems. See Rethinking Actual Causation in Tort Law, supra note 52, at 2165 (citing issues with but-for test in single cause cases). Counterfactual analysis is arguably incredibly over-inclusive as it is being used to completely replace and reimagine events other than the single event at issue. Id. at 2169; see also Morris, supra note 65, at 1715 n.8 (describing counterfactual reasoning as overinclusive). Not only is the single cause of the injury being taken out of the equation, but the jury must then speculate and assume all other unrelated effects ended up playing out the same way, or in a completely different way. See Rethinking Actual Causation in Tort Law, supra note 52, at 2169. This leads to an analysis that encapsulates much more than the single cause that is at issue in the case. See id.

202 See sources cited supra note 198 and accompanying text (commenting on but-for test and its counterfactual application to multiple cause claims).

203 See Rethinking Actual Causation in Tort Law, supra note 52, at 2171 (discussing dangers with hypothetical scenarios in counterfactual reasoning). “By requiring . . . that all prior events be held fixed . . . we seem to contemplate a hypothetical scenario in which all the antecedent conditions are in place for [someone to act] negligently, but in which [the person suddenly acts] non-negligently regardless.” Id.

204 See sources cited supra notes 20 and 48 (discussing inherent complexity of medical malpractice cases and necessity of expert witnesses).

205 See supra note 198 (discussing dangers of counterfactual reasoning in causation issues within medical malpractice claims).
F. Proposed Test and Instruction for Medical Malpractice Cases

To accommodate the complexity of medical malpractice litigation, promote fairness to victims, and aid the jury in the simplest and most effective deliberations process, the substantial factor test should be used.206 A proposed model jury instruction that encapsulates the most comprehensible explanation of causation and identifies the relevant test can be derived from caselaw and legal scholars examined in this Note.207 The substantial factor test is simple enough for juries to understand, and allows them to employ common-sense reasoning to a complex set of facts presented to them.208 The best tactic seems to differentiate between factual and legal or proximate cause, use the substantial factor language for factual cause, and use the foreseeability test somewhat supported by the Restatement (Third) for proximate cause.209 A sample instruction to encapsulate all of these factors, presumably following an instruction on negligence as a whole, would be as follows:

In order to find a defendant was the cause of the harm sustained by the plaintiff, you will need to determine both factual and proximate cause.210 Factual cause can be ascertained with the following test: if the defendant’s conduct was a substantial contributing factor in causing the harm to the plaintiff, they are considered a factual cause.211 Substantial simply means that a reasonable person would consider the conduct to have contributed to the harm; it must be more

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206 See sources cited supra note 124 and accompanying text (discussing complicated nature for but-for causation test); sources cited supra note 133 (discussing importance of fairness to medical malpractice victims); source cited supra note 154 and accompanying text (explaining confusion in jury deliberations attributed to but-for causation test).

207 See Brief of Amicus Curiae, Mass. Acad. of Trial Att’y’s at 13, Doull v. Foster, 163 N.E.3d 976 (Mass. 2021) (No. SJC-12921) (discussing applicability of substantial factor test to more factual scenarios than but-for).

208 See id. (explaining applicability of substantial factor test to wide range of cases); sources cited supra note 198 and accompanying text (discussing difficulty for jury to apply but-for test to all cases).

209 See discussion supra Part IV, Section c (discussing importance of differentiating factual and legal cause to juries); sources cited supra note 79 (explaining substantial factor test useful in multiple cause cases); Moore, supra note 32 (explaining foreseeability test for proximate cause); RESTATEMENT (THIRD) OF TORTS: PHYS. AND EMOT. HARM § 29 cmt. d (AM. L. INST. 2010) (discussing foreseeability use in negligence cases).

210 See discussion supra Part IV, Section c (discussing importance of differentiating factual and legal cause to juries); RESTATEMENT (THIRD) OF TORTS: PHYS. AND EMOT. HARM § 29 cmt. b (AM. L. INST. 2010) (stressing clarification is needed for jury on both proximate and factual cause).

than a trivial or remote factor and does not need to be the only cause of the harm.\textsuperscript{212} For proximate cause, you must determine if the harm suffered resulted from the risks that made the defendant’s conduct tortious.\textsuperscript{213} In other words, if the defendant could have reasonably foreseen the harm caused when engaging in the tortious conduct, they are liable for causing that harm.\textsuperscript{214}

V. CONCLUSION

Medical malpractice cases are a beast of their own that raise separate and individual issues unlike traditional negligence cases. The best way to properly inform juries, reach the most equitable outcomes, and utilize common-sense understanding in medical malpractice negligence cases is to employ the substantial factor test as opposed to the traditional but-for test for causation. Medical malpractice cases are already confusing and difficult for jurors to analyze and reach a verdict. Victims of medical malpractice, facing the already daunting task of litigation and burdens of proof, will achieve fairer and more just outcomes with the implementation of the substantial factor test. Hospitals and medical professionals do not need yet another tool to escape liability for their wrongdoings.

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\textsuperscript{212} See Doull, 163 N.E.3d 976, 997 n.2 (citing to BLACK’S LAW DICTIONARY 1728 (11th ed. 2019)) (defining substantial as “1. Of, relating to, or involving substance; material. . . 2. Real and not imaginary; having actual, not fictitious, existence. . . 3. Important, essential, and material; of real worth and importance.”).


\textsuperscript{214} See \textit{id.} (describing foreseeability involved in determining proximate or legal cause); sources cited \textit{supra} note 56 (explaining foreseeability test for proximate or legal cause).