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The Element of Proximate Cause in a Personal Injury Lawsuit: Analysis, Complicating Factors, and Changing Jury Instructions

Introduction

The element of proximate cause in a personal injury case is analyzed, assessed, and argued at all stages of the litigation. It is contemplated by both sides at the time a claim is realized, at the pleadings stage of a lawsuit, while shaping and conducting discovery, during dispositive motions, and at trial. To be successful, a plaintiff must prove that the actions of the defendant, who owes that plaintiff a duty, must be sufficiently related to the plaintiff's injuries such that the law considers that defendant to have caused the injuries in a near or immediate and related manner. If the defendant's actions or omissions are seen to be too remote to the injuries, then those actions or omissions are not a proximate cause of the injuries. While the term "proximate cause" sounds as though it is easily definable, it nevertheless is the element in a lawsuit that can cause both plaintiff and defense attorneys significant consternation. This Monograph discusses the current status of Illinois law related to the element of proximate cause, including changes in jury instructions and developments in case law, as well as alternate arguments and defenses that defendants can make to show that their actions were not the cause of the plaintiff's alleged injuries and damages.

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Proximate Cause and Jury Instructions

Most litigation attorneys agree that the subject of proximate cause is one of the most confusing areas of the law and one of the most difficult concepts to convey to a jury. Even though we have used the Illinois Pattern Jury Instructions (IPI) in this state for more than 60 years, it is not unusual for attorneys representing plaintiffs and defendants to argue at length during a jury instruction conference about exactly how the proximate cause instruction should be read to a jury. A look at the long and convoluted history of how a jury is instructed on this issue is illustrative of the problem.

Prior to the adoption of the IPI by the supreme court in 1961, a judge's role in instructing a jury was significantly different from what it is today. Rather than instructing the jury on the law as they do now, judges used to read arguments to juries that were prepared by the litigants' counsel. The IPI were adopted by the supreme court in order to accurately instruct juries as to the law of a case. The original IPI were supplemented in 1965, 1977, and 1981, and they were completely rewritten for the 2000 edition because of significant changes in the law as a result of tort reform, as well as to further simplify the instructions.

The IPI instruction regarding proximate cause was significantly modified recently in August 2021. This modification followed previous modifications in 2007 and 2009. Prior to the August 2021 adoption of the new Illinois Pattern Jury Instruction, Civil No. 15.01, which defines proximate cause, juries were given a combination of instructions, including IPI Civil No. 12.04, IPI Civil No. 12.05 and IPI Civil No. 15.01, when the litigation involved issues of proximate cause and negligence by an entity other than the defendant or the intervention of an outside agency. The pre-August 2021 version of IPI Civil No. 12.04, titled "Concurrent Negligence Other Than Defendant's," read as follows:

> More than one person may be to blame for causing an injury. If you decide that a [the] defendant[s] was [were] negligent and that his [their] negligence was a proximate cause of injury to the plaintiff, it is not a defense that some third person who is not a party to this suit may also have been to blame.
> [However, if you decide that the sole proximate cause of injury to the plaintiff was the conduct of some person other than the defendant, then your verdict should be for the defendant.][1]
>
> The Notes on Use for this instruction read:
>
> This instruction should be used only where negligence of a person who is not a party to the suit may have concurred or contributed to cause the occurrence. This instruction may not be used where the third person was acting as the agent of the defendant or the plaintiff. Where two or more defendants are sued and one or more may be liable and others not liable, use IPI 41.03.
>
> The second paragraph should be used only where there is evidence tending to show that the sole proximate cause of the occurrence was the conduct of a third person.[2]
>
> Before August 2021, IPI Civil No. 12.05 titled "Negligence-Intervention of Outside Agency" read as follows:
>
> If you decide that a [the] defendant[s] was [were] negligent and that his [their] negligence was a proximate cause of injury to the plaintiff, it is not a defense that something else may also have been a cause of the injury.
> [However, if you decide that the sole proximate cause of injury to the plaintiff was something other than the conduct of the defendant, then your verdict should be for the defendant.][3]

The Notes on Use for this instruction stated, "The second paragraph should be used only where there is evidence tending to show that the sole proximate cause of the occurrence was something other than the conduct of the defendant."[4]

Finally, before the August 2021 revision, IPI Civil No. 15.01, titled "Proximate Cause—Definition," read as follows:

> When I use the expression "proximate cause," I mean a cause that, in the natural or ordinary course of events, produced the plaintiff's injury. [It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury.][5]

These three civil Illinois Pattern Jury Instructions—12.04, 12.05 and 15.01—were the proximate cause instructions used for over twenty years. In August 2021, the supreme court withdrew IPI Civil No. 12.04 and IPI Civil No. 12.05 and rewrote IPI Civil No. 15.01. The new IPI Civil No. 15.01, now titled "Proximate Cause—Definition and Use," reads as follows:

> When I use the expression "proximate cause," I mean a cause that, in the natural or ordinary course of events, produced the plaintiff's injury. [It need not be the only cause, nor the last or nearest cause, it is sufficient if it combines with another cause resulting in the injury.]
>
> [If you decide that a [the] defendant[s] was [were] negligent and that his [their] negligence was a proximate cause of injury to the plaintiff, it is not a defense that [something] [or] [someone] else may also have been a cause of the injury. However, if you decide that the defendant's conduct was not a proximate cause of the plaintiff's injury, then your verdict should be for the defendant.][6]

According to the Committee Comments for the new instruction, the rewrite was considered and performed, "with the intent of harmonizing the proximate cause instructions formerly found in IPI Civil No. 12.04, 12.05, and 15.01 into one proximate cause instruction to avoid unnecessary confusion and consternation."[7] The first paragraph of IPI Civil No. 15.01 was not altered. Further, the Committee Comments state:

> The second paragraph in this instruction merges the concepts previously conveyed in IPI 12.04, 12.05 into one proximate cause instruction because "Nomenclature aside, the sole proximate cause theory is simply one way a defendant argues that a plaintiff failed to carry its burden of proof on proximate cause—specifically, by arguing that the negligence of another person or entity, not a party to the lawsuit, was the only proximate cause of the plaintiff's injuries." *Douglas v. Arlington Park Racecourse, LLC*, 2018 IL App (1st) 162962, ¶36.[8]

Multiple Nonparty Causes and the "Sole" Proximate Cause Conundrum

The August 2021 revisions to the jury instructions appear to have been spurred, at least in part, by the Illinois Appellate Court First District's opinion in *Douglas v. Arlington Park Racecourse, LLC*. The former "sole proximate cause" jury instruction, IPI Civil No. 12.04, along with an associated special interrogatory, was the subject of a divided appellate court ruling in *Douglas* in 2018. The appellate court's opinion in *Douglas*, although clarifying the overall proximate cause analysis to some extent, highlighted the perceived confusion caused by various interpretations of the word "sole."

In *Douglas*, the primary plaintiff was a jockey who fell from his horse at Arlington Park Racecourse after another competitor bumped his horse during a race. The plaintiff jockey suffered permanent injuries that left him paralyzed from the chest down. He and his wife brought suit against Arlington Park, Churchill Downs, Inc. (Arlington Park's owner), Martin Collins Surfaces and Footings, LLC (manufacturer of "Polytrack," the track's synthetic horse racing surface), and Keenland Ventures, PT (distributor of the synthetic racing surface). Prior to trial, the plaintiffs settled their product liability claims against Martin Collins and Keenland Ventures. They proceeded to trial against Arlington Park and Churchill Downs.[9]

The plaintiffs' theory at trial was that the defendants were negligent in their maintenance of the synthetic track surface such that, at the time the plaintiff jockey hit the track surface, he experienced an out-of-specification "pocketing" effect in the synthetic material which dramatically increased the impact on his spine, resulting in his paralysis.[10] The defendants raised a number of defenses in response to the claims against them. Among the defenses raised were two that addressed sole proximate causation. The defendants argued: 1) the other jockey's negligence during the race was the sole proximate cause of the injury, and/or 2) that Martin Collins' negligent failure to provide maintenance instructions for the Polytrack surface was the sole proximate cause of the injury.[11]

Over the plaintiffs' objection, the trial court instructed the jury using the long form of IPI Civil No. 12.04 then in effect, which stated:

> More than one person may be to blame for causing an injury. If you decide that the defendants were negligent and that their negligence was a proximate cause of injury to the plaintiffs, it is not a defense that some third person who is not a party to the suit may also have been to blame.
>
> However, if you decide that the sole proximate cause of injury to the plaintiff was the conduct of some other person other than the defendant, then your verdict should be for the defendant.[12]

The court also allowed the defendants to present the jury with a special interrogatory focused on the second paragraph of the aforementioned jury instruction. The special interrogatory stated: "On the date of the accident and at the time and place of the accident in question in this case was the conduct of some person other than the defendants the sole proximate cause of the plaintiffs' injuries? [Yes or No]."[13]

After deliberating, the jury returned a defense verdict and answered "yes" to the special interrogatory.[14] During post-trial proceedings, the plaintiffs argued that the sole proximate cause issue should not have been brought to the attention of the jury. The plaintiffs argued that, since the defendants identified *two* potential alternative causes of the injury, then neither could be the "sole" proximate cause. The trial court agreed. The court further found that the special interrogatory's reference to "some person other than the defendants" was vague. The trial court reasoned, therefore, that these two potential errors unfairly prejudiced the plaintiffs, warranting a new trial.[15] The defendants were granted leave to appeal the trial court's post-trial ruling pursuant to Supreme Court Rule 306(a)(1).[16]

The First District's majority framed its opinion as addressing this question: "[I]s the sole proximate cause theory and jury instruction available in a negligence action if a defendant argues more than one nonparty actor was the sole proximate cause of plaintiff's injury?"[17] Two of the three justices answered in the affirmative, thereby ruling that any number of nonparty actors may constitute the "sole" proximate cause of a plaintiff's injury.[18]

The majority first addressed the propriety of IPI Civil No. 12.04, "Concurrent Negligence Other Than Defendant's," in this circumstance.[19] In so doing, it reviewed the logic behind the concept of "sole proximate cause." Although sometimes referred to as the "sole proximate cause defense" or the "empty chair defense," the opinion cautioned that

no burden ever shifts to the defense: "the burden of proving proximate cause in a negligence action remains, at all times, on the plaintiff."[20] The concept of *sole* proximate cause is, at its core, one way for a defendant to argue that it was 0% responsible for a plaintiff's injury.[21] In making this argument or raising this defense, a defendant may suggest that a nonparty tortfeasor is 100% responsible for the plaintiff's injury. The court questioned whether there should there be any difference if a defendant wants to blame multiple nonparties for the plaintiff's injury. The court concluded that the number of nonparty tortfeasors is irrelevant to the crucial point at the root of the defense: that the defendant's level of contribution to the plaintiff's injury is 0%. A defendant, the court reasoned, may argue that the plaintiff failed to prove that his or her negligence was a proximate cause of the plaintiff's injuries because any number of other non-parties were—individually or collectively—100% the cause.[22] For example,

> (1) Non-Party A's negligence was the sole proximate cause of the plaintiff's injuries; (2) Non-Party B's negligence was the sole proximate cause; or (3) the negligence of Non-Party A and Non-Party B, collectively, was the sole proximate cause.[23]

According to the court, a defendant should be entitled to the sole proximate cause jury instruction so long as some evidence in the record supports the theory, regardless of how many nonparty individuals or entities the defendant wishes to blame.[24]

The *Douglas* majority found support for its conclusion in two Illinois Supreme Court decisions, *Nolan v. Weil-McLain* and *Ready v. United/Goedecke Services, Inc.*[25] *Nolan* was an asbestos case in which the plaintiff sued 12 companies for causing his mesothelioma. Eleven of the defendants settled before trial. At trial, the remaining defendant intended to present evidence that exposure to the 11 settling companies' products was the sole proximate cause of the plaintiff's condition. The court barred the defendant from presenting the evidence, and the jury found the defendant liable. The supreme court ultimately ruled that the circuit court relied on erroneous appellate court decisions that prevented defendants from introducing evidence of other asbestos exposures in support of a sole proximate cause defense. *Nolan* reiterated that the sole proximate cause defense "focuses the attention of a properly instructed jury . . . on the plaintiff's duty to prove that the defendant's conduct was *a* proximate cause of plaintiff's injury."[26]

The *Ready* case involved a fatal construction accident. Two of the construction entity defendants settled prior to trial. The plaintiff went to trial against the last remaining defendant.[27] The trial court barred the defendant from introducing evidence of the conduct of two settling parties: the project's general contractor and the decedent's employer. The defendant was found liable at trial. The supreme court again reversed the trial court's ruling as to a sole proximate cause defense. Although the conduct of the settling nonparties was unrelated, the court found that the excluded evidence supported a sole proximate cause theory.[28]

The majority in *Douglas* found that *Nolan* and *Ready* "inescapably support the conclusion that the sole proximate cause theory is available to a defendant, even when that defendant is claiming that more than one nonparty actor's negligence was the sole proximate cause of plaintiff's injuries."[29] The *Douglas* decision specifically rejected *Clayton v. County of Cook* and *Abruzzo v. City of Park Ridge*, two First District opinions declaring that a defendant may not assert a sole proximate cause theory when the defendant targets two or more nonparty entities as the "sole" proximate cause.[30] The court addressed *Clayton's* and *Abruzzo's* focus on the use of the word "sole," and its ordinary connotation with the "singular." Although acknowledging that *Clayton's* and *Abruzzo*'s reasoning was "logical," the majority nevertheless espoused a more expansive view. Citing two online dictionaries, the majority found that "sole" may also refer to membership in a group, to the exclusion of all other groups. "The paramount attribute of the word 'sole,'" it reasoned, "is its exclusivity, not its number."[31] In light of *Douglas* and *Nolan*, the majority saw no reason to limit a defendant to

blaming a single non-party, "even when the evidence points to the conduct of multiple nonparties as comprising 100% of the cause of the plaintiff's injuries."[32]

The majority held that the trial court was originally correct when it provided the jury with the sole proximate cause instruction in IPI Civil No. 12.04. Sufficient evidence in the record suggested that both the other jockey and Martin Collins were 100% responsible for the accident, so the instruction was appropriate.[33] So, too, was the special interrogatory.[34] The trial court thus erred when it changed its mind post-trial.[35]

The dissent in *Douglas* sharply disagreed with the majority's conclusions. Initially, it distinguished *Nolan* and *Ready* because neither trial court allowed the sole proximate cause instruction. So, although the concept of multiple nonparties comprising the sole proximate cause was discussed, the supreme court did not tackle the question of the appropriate form of jury instruction.[36] More troubling to the dissent was the unrelated nature of the conduct of the two nonparties (the other jockey and horse bumping the plaintiff during a race and the turf manufacturer failing to adequately instruct Arlington Park on track maintenance).[37] In *Nolan*, the defense theory was that the 11 nonparties all allegedly did the same thing: exposed the plaintiff to asbestos. Their conduct was a single "cause."[38] In addressing *Ready*, the dissent argued the supreme court took a different tack. Although the settling general contractor and the plaintiff's employer performed different acts, the dissent found that the supreme court discussed the two settling entities' conduct "collectively." It took this to mean that *Ready*, like *Nolan*, "boil[ed] down to a single type of 'conduct' that is potentially 'the sole proximate cause.'"[39]

The dissent in *Douglas* further took issue with the majority's view of the definition of "sole." It found "simply absurd" the idea that multiple distinct individuals could form a "collective singular" and thus constitute a sole proximate cause of a plaintiff's injury. It pointed to the language of the instruction, which refers to "the" sole proximate cause of injury and "some other person" as targeting only one particular cause, not multiple.[40]

The dissent agreed that evidence suggested that the other jockey was the proximate cause of the plaintiff's injury, as well as evidence that suggested Martin Collins was the proximate cause of the injury. In this circumstance, the dissent reasoned, the sole proximate cause instruction was inappropriate. The two independent nonparties each could be 100% responsible for the injury. But they were not a collective "sole," and the theories of their liability were different. In the absence of the instruction, the defendants were still free to argue to the jury that 100% of the cause was attributable to others. Introduction of IPI Civil No. 12.04 and the special interrogatory, in the dissent's view, simply confused the issue.[41]

The divided *Douglas* opinion did not lead to consensus about the sole proximate cause instruction. The case of *Doe v. Alexian Brothers Behavioral Health Hospital*,[42] another First District decision issued 13 months later, illustrates the point. In *Alexian Brothers*, a jury's answer to a sole proximate cause special interrogatory was inconsistent with its verdict. Although the jury apportioned fault 20% to the defendant hospital and 80% to a third-party defendant former hospital employee, it also answered "yes" to the interrogatory asking whether the third-party defendant was the sole proximate cause of the plaintiff's injuries.[43]

In addressing jury confusion, the *Alexian Brothers* court discussed *Douglas* and specifically rejected it. The court commented that "*Douglas* highlights that 'sole proximate cause' is not well understood even in the legal community."[44] It then extensively quoted the *Douglas* dissent and agreed that "'sole proximate cause' cannot apply to more than one party."[45] The court seemed to go out of its way to make this pronouncement, since the defendant in *Alexian Brothers* was not pointing to multiple other nonparties in association with its sole proximate cause argument.[46]

Unlike in *Douglas*, IPI Civil No. 12.04 was never given to the jury in *Alexian Brothers*. The appellate court agreed with the trial court's refusal to give the instruction because the Illinois Supreme Court Committee on Jury Instruction's "Notes on Use" for the instruction dictated that it not be used when a party to the action (as opposed to nonparties in *Douglas*) is alleged to be the sole proximate cause of the injury.[47] But, said the court, "[w]hen a defendant presents a sole proximate cause defense, it necessarily follows that there will be a sole proximate cause instruction."[48] Without IPI Civil

No. 12.04, there was no instruction. The special interrogatory therefore stood alone and, in the court's view, "undoubtedly" had "a confusing effect" on the jury.[49] The First District ordered a new trial.[50]

Condition Versus Cause in Premises and Motor Vehicle Cases

The element of proximate cause under Illinois law contains two distinct requirements: cause in fact and legal cause.[51] To satisfy the first requirement of cause in fact, there must be reasonable certainty that the defendant's conduct caused the injury.[52] When there are multiple factors that may have combined to cause the injury, the defendant's conduct must have been a material element and a substantial factor in bringing about the injury.[53] As for legal cause, this is satisfied only if the defendant's conduct is so closely tied to the plaintiff's injury that the defendant should be held legally responsible for it.[54]

Illinois courts draw a distinction between a condition and a cause, which is consistent with the two-prong definition of proximate cause.[55] If the defendant's alleged negligence does nothing more than furnish a condition by which the injury is made possible, and that condition, combining with an intervening act, causes an injury; then the two acts are not concurrent, and the creation of the condition *is not the proximate cause* of the injury.[56] An intervening act is a new and independent force that breaks the causal connection between the original alleged negligence and the injury; and thus it becomes the cause of the injury.[57] The test to be used is whether the defendant reasonably might have anticipated the intervening act – not the injury—as a natural and probable result of the defendant's alleged negligence.[58]

The condition versus cause analysis frequently is encountered in premises liability cases. For premises liability cases involving falls that are claimed to be caused by slips or trips due to an issue with the premises, plaintiffs often will allege that building code violations existed when they were injured. However, violations of building codes do not—by themselves—establish proximate cause. Defendants can defend against these allegations by demonstrating that the alleged violation is simply a condition—and not the cause in fact—of a plaintiff's injuries.

In *Strutz v. Vicere*, the plaintiff slipped and fell on the back staircase at his apartment, which was owned by the defendants.[59] The plaintiff was the only witness to his fall. The plaintiff told his wife immediately after the accident that he fell over the railing but also told paramedics that he was walking backwards and slipped and fell.[60] The plaintiff sustained multiple fractures to his cervical spine and ultimately died as the result of his injuries three weeks later.[61] The plaintiff's estate retained an architect who opined that the staircase's spiral design violated Chicago's building code.[62] Additionally, the architect opined that the stairs were dangerous because the treads were too small, the riser heights and tread widths were uneven, a handrail on the wall side was absent, the handrail present was too low and uneven, and the area was inadequately lit.[63]

The trial court granted summary judgment in favor of the defendants, and in affirming the summary judgment, the First District held that "the possibility that the allegedly unreasonably dangerous staircase had caused [plaintiff] to slip and fall is insufficient to establish the necessary causal relationship between [defendants'] alleged negligence and [plaintiff's] injuries."[64] The court further held that violations of an ordinance or failure to comply with building codes by themselves do not establish proximate cause.[65]

Similarly, in motor vehicle cases, plaintiffs may allege that issues with the roadway, such as lack of warning signs or inoperative traffic control devices, were the proximate cause of a collision. However, in applying the condition versus cause analysis, Illinois courts often have held that those types of circumstances did nothing more than furnish a condition that made the plaintiff's injury possible but were not the proximate cause of the injury.

In *Thompson v. County of Cook*, a vehicle passenger died after the driver, who was intoxicated, veered off the road while driving through a curve. The passenger's estate sued the county alleging that it was negligent in failing to

adequately warn motorists of the curve in the road where the accident happened.[66] In that area, a speed limit sign was present, but there was no separate sign warning of the curve.[67] In applying the condition versus cause analysis, the Illinois Supreme Court held that the roadway "provided nothing more than a location where [the driver's] negligence came to fruition."[68]

The case of *Quirke v. City of Harvey* represents an extreme example of the condition versus cause analysis. In *Quirke*, a recently terminated employee of an electric company climbed up a utility pole and threatened to electrocute himself.[69] During that time, the electric company and the municipality decided to turn off the power line service by that utility pole, which was a major power line supplying electricity to many traffic signals and streetlights.[70] While the power was disconnected, the plaintiff was involved in an accident when another driver entered an intersection without stopping first due to the lack of lighting and a non-operating traffic control device. The plaintiff sued the municipality, the electric company, the former employee, and the other driver.[71] The trial court granted summary judgment in favor of the municipality and the electric company, and in affirming the summary judgment ruling, the First District held that it was not reasonably foreseeable that a driver would proceed through an intersection without stopping when the intersection has been rendered dark due to an emergency power shutdown.[72] Therefore, the lack of lighting and non-operating traffic lights were considered conditions and not the cause of the accident.

Intervening Act as a Defense to Proximate Cause

Whereas a condition often precedes any action on the part of a defendant in relation to determining the proximate cause of an incident that leads to a plaintiff's injuries, an intervening act is on the opposite end of the temporal spectrum. Intervening acts occur after a defendant's act or omission in the timeline leading up to the incident. An intervening cause is a defense that can often be overlooked by defense counsel in a proximate cause analysis. Intervening causes can break the causal chain between the defendant's alleged act or omission and the plaintiff's alleged injury. Where there is an intervening cause, the defendant's original act or omission is no longer the proximate cause of the alleged injury.

To constitute proximate cause, the injury must be of the natural and probable result of the defendant's negligence and of such character that an ordinarily prudent person ought to have foreseen it would probably occur, but it is not necessary that the negligent person might have foreseen the precise form of the injury.[73] An intervening and efficient cause is a new and independent force which breaks the causal connection between the original wrong and the injury, and therefore, it becomes the direct and intermediate cause of the injury.[74] However, the intervention of an independent act will not break the causal chain if the intervening act was foreseeable.

For example, a criminal act might not break the causal chain if the criminal act was foreseeable by the defendant.[75] In *Ney v. Yellow Cab*, an owner of a vehicle that was struck by a stolen taxicab sued the taxi company.[76] The taxi company claimed the criminal act of the thief was the intervening cause and moved to dismiss. The Illinois Supreme Court found that because one of defendant's employees had left the door unlocked with the key in the ignition, it was arguably foreseeable the cab may be stolen. The court found the issue of proximate cause was a decision for the jury.[77] In *Neering v. Illinois Central Railroad*, the Illinois Supreme Court held that an assault at a train station by a vagabond was foreseeable considering the condition of the train station.[78]

In *First Springfield Bank and Trust v. Galman,* the Illinois Supreme Court addressed the issue of what is foreseeable.[79] In *Galman*, a trucker illegally parked his truck in an area where parking was allowed at other times. An 18-year-old student crossed the street in front of the truck even though there was a crosswalk available. The student was hit by a car while crossing the street and sued the trucker and his employer, alleging the truck blocked his view.[80] The

supreme court found the truck driver's actions were the cause in fact, but not the legal cause.[81] The court found the injury was not the type that a reasonable person would see as the likely result of his actions.[82]

In *Empress Casino Joliet Corporation v. Averus*, the First District recently provided a detailed analysis of the intervening cause doctrine and how it is applied.[83] The case involved a fire that severely damaged the Joliet Empress Casino in 2009. The plaintiff Empress Casino Joliet (Casino) filed suit against the defendant Averus alleging that Averus was negligent in failing to properly clean the ducts of the casino.[84]

Averus performed cleaning services to the casino, which included the removal of cooking grease and other combustible residue from the ductwork above the kitchen.[85] A welding contractor, Jameson, was preparing to weld a piece of sheet metal ductwork to the existing ductwork for a range exhaust hood that was being relocated in the kitchen area.[86] No one performed a "fire watch," and no one took precautions for "hot work."[87] The welder was aware grease was present in the ducts.[88] While welding, the grease inside the duct work caught fire.[89] The welding contractor's employee told the police that the ducts had accumulated nearly 15 years of cooking grease and for that reason the fire was uncontrollable.[90] The casino claimed Averus was negligent for failing to remove this grease.

Averus claimed that any allegedly negligent act on its part merely furnished a condition and was not the proximate cause of the fire.[91] Averus alleged the acts of the welder who welded the ductwork in the presence of grease without a fire watch, fire extinguisher, or fire blanket present constituted an intervening cause that broke any causal connection between any alleged act on Averus' part and the casino's damages.[92] The trial court granted summary judgment to Averus, in part, on the argument that its actions only involved a condition, and not a cause of the accident.[93]

The appellate court noted it is well-established law in Illinois that if the negligence charged does nothing more than furnish a condition by which the injury is made possible, and the act that causes the injury is a subsequent independent act of a third person, the creation of the condition is not the proximate cause of the injury.[94] The appellate court agreed with the trial court that Averus' conduct was not the legal cause of the injury, but merely created a serious condition to exist.[95] If Averus was negligent in not cleaning the inaccessible ductwork, the independent acts of other actors served as legal cause of the injury.[96] It was not reasonably foreseeable that an individual would observe grease present in a duct, and nevertheless proceed to apply fire to that duct in the form of welding in the absence of any fire prevention equipment and despite expressly acknowledging that such work was dangerous.[97]

Proximate cause is generally a question of fact.[98] However, where a defendant can show as a matter of law that the intervening act was unforeseeable, the defendant may prevail on summary judgment.[99] Courts have stated that where reasonable people may differ on issues of causation, the issue should never be determined as a matter of law.[100] The United States Court of Appeals for the Seventh Circuit, applying Illinois law, stated that where it cannot be determined as a matter of law that the intervening acts were not foreseeable, it is a question for the jury.[101]

In *Mack v. Ford Motor Company,* the First District provided an example of how the court addresses these issues. The case involved a pedestrian who was struck and killed by another car while helping to move to the highway shoulder a disabled car that was manufactured and sold by the defendant.[102] The trial court found that the defendant had, at most, created a condition, not a legal cause of the accident. On appeal, however, the court found that the defendant's conduct was more than a mere condition.[103] The appellate court found that the conduct placed the plaintiff in a position of danger, and the stopped vehicle led to her death.[104] The court stated that, to escape liability pursuant to this theory, the defendant must show that the intervening act was unforeseeable as a matter of law.[105] The appellate court reversed the trial court and found that the jury should decide the issue of causation.[106]

When the intervening cause defense is available, it is appropriate for defense counsel to file a motion for summary judgment. The intervening cause determination is one that can be made as a matter of law.[107] Many attorneys raise

intervening cause as an affirmative defense. In theory, this should not be necessary because where a defendant denies causation, that defendant is always allowed to challenge causation.[108]

The issue that arises for defense counsel if summary judgment is denied is whether or not they still have the right to raise the intervening cause defense at trial. The Illinois Pattern Instructions on proximate cause do not include the defense of intervening cause.

As set forth above, the first sentence of Illinois Pattern Instruction 15.01, titled "Proximate Cause-Definition and Use," reads: "When I use the expression proximate cause I mean a cause that in the natural and ordinary course of events, produces plaintiff's injury."[109] Immediately thereafter, a bracketed sentence follows and reads: "It need not be the only cause, nor the last or nearest cause, it is sufficient if it combines with another cause resulting in the injury."[110] Since the August 2021 revisions, a second bracketed paragraph to the instruction can be included, and if there is an intervening cause defense, defense counsel must request that it be included, particularly the second sentence. It reads:

> [If you decide that a [the] defendant[s] was [were] negligent and that his [their] negligence was a proximate cause of injury to the plaintiff, it is not a defense that [something] [or] [someone] else may also have been a cause of the injury. However, if you decide that the defendant's conduct was not a proximate cause of the plaintiff's injury, then your verdict should be for the defendant.][111]

The Notes on Use state that "This instruction in its entirety should be used when there is evidence of a concurring or contributing cause to the injury or death."[112]

Since the intervening cause defense is part of proximate cause analysis, it must be considered by whoever is determining proximate cause. It is incumbent on defense counsel to ensure that the trier of fact is provided with the defense and the tools needed to interpret and decide it. To this end, defense counsel may also consider submitting a non-IPI instruction on intervening cause as the intervening cause defense, as set forth in the case law, is not fully contained in any IPI instruction. This instruction may give the jury a more complete understanding of the analysis. Even if the trial court does not allow the instruction, tendering the instruction will build the record for a possible appeal.

Complications in Proximate Cause Analyses in Medical Malpractice Cases

One final area of personal injury law where significant focus is placed on the element of proximate cause is in medical malpractice cases. To prevail in a medical negligence claim, a plaintiff must show: (1) the standard of care in the medical community by which the physician's treatment was measured; (2) that the physician deviated from the standard of care; and (3) that a resulting injury was proximately caused by the deviation from the standard of care.[113]

A defendant being sued for medical negligence is permitted to present evidence, if any exists, that a nonparty medical provider was the sole proximate cause of the plaintiff's injuries, so long as the defendant medical provider was also not clearly a cause of the injuries. This is often referred to as the "empty chair" defense. In the context of medical negligence actions, the Illinois Supreme Court in *Leonardi v. Loyola University of Chicago* affirmed that a pleading which denies that an injury was the result of or caused by the defendant's conduct is sufficient to permit the defendant to raise the sole proximate cause defense.[114] In other words, a defendant doctor or healthcare provider can argue that there is an entirely separate culpable party responsible for the plaintiff's injuries as long as they have some supporting evidence.

In *Leonardi*, Michela Lopez went into premature labor and went to Loyola University Medical Center where she was under the supervision of Dr. Tierney.[115] Due to complications that occurred during delivery, Lopez underwent a difficult childbirth and decompensated while in the hospital. She subsequently died about four years later.[116] Dr. Tierney died

after plaintiff filed suit. Dr. Tierney's estate then reached a settlement with the plaintiffs who dismissed the estate from the lawsuit.[117] The case continued to trial against the hospital and various individual physicians, all of whom denied they were negligent.[118] At trial, the defendants asserted that Dr. Tierney was the sole proximate cause of the decedent's injuries.[119] The jury returned a verdict for the defendants.[120] The Illinois Supreme Court upheld the verdict and gave the following reasoning:

> In any negligence action, the plaintiff bears the burden of proving not only duty and breach of duty, but also that defendant proximately caused plaintiff's injury. The element of proximate cause is an element of the plaintiff's case. The defendant is not required to plead lack of proximate cause as an affirmative defense. Obviously, if there is evidence that negates causation, a defendant should show it. However, in granting the privilege of going forward, also called the burden of production, the law in no way shifts to the defendant the burden of proof.
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> *** The sole proximate cause defense merely focuses the attention of a properly instructed jury *** on the plaintiff's duty to prove that the defendant's conduct was a proximate cause of plaintiff's injury.[121]

The *Leonardi* decision recognized the defendant's right not only to rebut evidence tending to show that the defendant's acts were negligent and the proximate cause of the claimed injuries, but also to endeavor to establish that the conduct of a third person, or some other causative factor, was, in fact, the sole proximate cause of the plaintiff's injuries, assuming some competent evidence is presented.[122] The "some evidence" standard is a recognition of the existence of a "factual question," which must be left to the jury to resolve.[123] The evidence may be slight, but a reviewing court may not reweigh it or determine if it should lead to a particular conclusion.[124]

After *Leonardi*, the Illinois Supreme Court decided *McDonnell v. McPartlin*, where it further clarified the *Leonardi* decision in finding that not only can a defendant assert the "empty-chair" defense against a nonparty physician but also the defendant is not required to demonstrate that the nonparty physician's conduct was professionally negligent.[125] However, this clarification had no real impact because the "empty-chair" defense is of no use if the defendant medical provider is a cause of the plaintiff's injuries. Given the relationship between negligent conduct and proximate cause, "there is a pronounced tendency when considering one to include the other."[126] In *McDonnell*, the court reasoned that "[t]he second paragraph of IPI Civil No. 12.04 properly reflects a defendant's right to attempt to negate a single element of the plaintiff's medical negligence claim, i.e., the element of proximate cause."[127]

In *Tabe v. Ausman*, the issues involved a spinal compression and possible faulty MRI.[128] The defendant doctors argued at trial that a nonparty neuroradiologist was the sole proximate cause of the plaintiff's injury.[129] The trial court allowed the defendant doctors to give the long form IPI Civil No. 12.04 even though no evidence was presented that the doctors relied on the neuroradiologist.[130] The jury found for the defendant doctors and issued a general verdict.[131] When multiple defenses are raised, a general verdict rendered by a jury creates a presumption that the jury found in favor of the winning party on every defense raised – also known as the "two-issue" rule.[132] The "two-issue" rule forecloses any claim of prejudice that arises from an allegedly erroneous instruction when no special interrogatories are answered by the jury to explain their verdict.[133] However, the trial court granted a new trial believing that it erroneously permitted the defendant doctors to give the sole proximate cause instruction.[134]

Without special interrogatories in *Tabe*, there was no resolution by the jury as to whether the plaintiff proved negligence based on the MRI films disclosing a nerve compression. The First District reasoned that it was unable to determine whether the sole proximate cause instruction made any difference.[135135] "If there was no negligence, then instructing on sole proximate cause did not matter."[136136] As a result, the First District ruled that a new trial was not

warranted based on the sole proximate cause instruction because the jury might well have concluded that the defendant doctors were not negligent in returning its general verdict in their favor.[137]

Another example of the "two-issue" rule in a medical negligence case is *Robinson v. Boffa*.[138] In *Boffa*, the defense asserted two proximate cause defenses. The first proximate cause defense was that the decedent's preexisting health problems, which were extensive, caused the decedent's death. The defendant testified that the decedent died from multisystem organ failure, beginning with the decedent's impaired kidney function.[139] The second proximate cause defense was the failure of another provider to precisely pinpoint the location of a tumor on a colonoscopy report.[140] The defendant argued that the colonoscopy report misled him as to the precise location of the tumor during the first surgery and should have been identified by the other provider.[141]

The plaintiff argued that the trial court erred in admitting evidence of the decedent's medical history and allowing the defendant to argue that another doctor was the proximate cause of the decedent's death.[142] The appellate court found no error in the trial court's instruction to the jury of the defendant's proximate cause defense or in the defense arguing the decedent's medical history was a proximate cause because the defendant is not required to plead lack of proximate cause.[143] The appellate court also found that defense counsel presented competent evidence through the defendant that the sole proximate cause of the decedent's death was some other causative factor, namely, the decedent's preexisting medical condition.[144]

Lastly, the "lost chance" or "loss of chance" theory in medical malpractice actions is when a plaintiff alleges her medical providers have negligently deprived the plaintiff of a chance to survive or recover from a health problem, or where medical malpractice has lessened the effectiveness of treatment or increased the risk of an unfavorable outcome to the plaintiff.[145] The plaintiff only has to establish a lost chance of survival, not that she would have survived absent the provider's negligence.[146] The plaintiff does not need to prove that she would have enjoyed a greater than 50% chance of survival or recovery in the absence of the alleged malpractice.[147] As it relates to the element of proximate cause, the lost chance doctrine does not relax or lower a plaintiff's burden of proving causation. Rather, the doctrine comports with the traditional proximate cause standard, requiring that the plaintiff prove that the defendant's negligence more probably than not caused the plaintiff's injury.[148]

In *Holton v. Memorial Hospital*, the defendant hospital in a medical malpractice trial sought to prove that there was no medical negligence involved in causing the plaintiff's injuries, which included paraplegia and related medical problems, as a result of treatment for what was mistakenly believed to be a cancerous tumor.[149] In addition to that claim, the defendant sought to blame the damages on the conduct of several physicians who had settled the claims brought against them and were not parties at trial.[150] The supreme court brushed this argument aside thusly:

> A defendant is not automatically entitled to a sole proximate cause instruction wherever there is evidence that there may have been more than one, or concurrent, causes of an injury or where more than one person may have been negligent. Instead, a sole proximate cause instruction is not appropriate unless there is evidence that the sole proximate cause (not 'a' proximate cause) of a plaintiff's injury is conduct of another person or condition.[151]

In *Aguilera v. Mt. Sinai Hospital Medical Center*, the plaintiff alleged through two expert witnesses that an earlier CT scan of the decedent would have triggered the necessity of surgical intervention and potentially saved his life.[152] The plaintiff's experts admitted that a neurosurgeon would have been required to decide whether an operation was necessary. At trial, two other neurosurgeons testified that "even with an earlier CT scan, surgery would not have been appropriate."[153] The jury found in favor of the plaintiff, but the trial court entered judgment *non obstante veredicto* (*n.o.v.*) because the plaintiff presented no evidence to show that the decedent's treatment would have been any different had the

omitted steps been taken.[154] In affirming, the appellate court found that, "[t]he absence of expert testimony that . . . an analysis of an earlier CT scan would have led to surgical intervention or other treatment that may have contributed to the decedent's recovery create[d] a gap in evidence of proximate cause fatal to the plaintiff's case."[155]

In 2021, the Illinois Supreme Court affirmed the *Holton* decision in the case of *Bailey v. Mercy Hospital & Med. Ctr.*, again recognizing the lost chance doctrine, and reiterating that the doctrine is consistent with traditional concepts of proximate cause.[156] The supreme court confirmed that proximate cause is still a necessary element that a plaintiff must prove and that these newer doctrines, such as the lost chance doctrine, do not relax, lower, or otherwise alter a plaintiff's burden of proving causation.[157]

Conclusion

A complete understanding of the proximate cause element in a personal injury case is necessary for a defense attorney to analyze both liability and the arguments and defenses available. The recent changes in the IPI and the regular evolution of case law requires constant vigilance, review, and analysis. To wit, the jury instructions on proximate cause changed considerably without notice or hearing in the last year with the loss of IPI Civ. No. 12.04 and 12.05 and the revisions to IPI Civ. No. 15.01. Couple those significant changes with the appellate court and supreme court opinions in the last four years that have touched on the issue of sole proximate cause alleged among multiple parties, the analysis of condition versus cause, and the lost chance doctrine, and the opportunity to misunderstand and misapply prevailing law exists if a defense attorney misses a new opinion. There is no question that "proximate cause" will continue to be a battleground element in personal injury cases in which both plaintiffs and defendants will argue and push to gain the upper hand on behalf of their clients.

(Endnotes)

1 Illinois Pattern Jury Instruction, Civil No. 12.04 (2009).

2 *Id.*

3 IPI Civil No. 12.05 (2009).

4 *Id.*

5 IPI Civil No. 15.01 (2009).

6 IPI Civil No. 15.01 (2021).

7 *Id.*

8 *Id.*

9 *Douglas v. Arlington Park Racecourse, LLC*, 2018 IL App (1st) 162962, ¶¶ 3-5, 13.

10 *Douglas*, 2018 IL App (1st) 162962, ¶¶ 8-9.

11 *Id.* ¶ 10.

[12] *Id.* ¶¶ 15-16.

[13] *Id.* ¶ 17.

[14] *Id.* ¶ 18.

[15] *Id.* ¶ 19.

[16] *Id.* ¶ 20.

[17] *Id.* ¶ 1.

[18] *Id.* ¶ 60.

[19] *Id.* ¶¶ 34-64.

[20] *Id.* ¶ 35.

[21] *Id.* ¶ 36.

[22] *Id.* ¶ 37.

[23] *Id.*

[24] *Id.* ¶¶ 35, 37.

[25] *Id.* ¶¶ 39-45 (discussing *Nolan v. Weil-McLain*, 233 Ill. 2d 416, 444 (2009); *Ready v. United/Goedecke Services, Inc.*, 238 Ill. 2d 582, 591 (2010)).

[26] *Id.* ¶¶ 39-40, *citing*, *Nolan*, 233 Ill. 2d at 419-45.

[27] *Ready*, 238 Ill. 2d at 372-73.

[28] *Douglas*, 2018 IL App (1st) 162962, ¶¶ 41-43.

[29] *Id.* ¶ 44.

[30] *Id.* ¶¶ 47-57. *See also Clayton v. County of Cook*, 346 Ill. App. 3d 367 (1st Dist. 2003); *Abruzzo v. City of Park Ridge*, 2013 IL App (1st) 122360.

[31] *Id.* ¶¶ 57-58.

[32] *Id.* ¶ 60.

[33] *Id.* ¶¶ 63-64.

[34] *Id.* ¶¶ 72-74.

[35] *Id.* ¶¶ 86-87.

[36] *Id.* ¶ 123.

[37] *Id.* ¶ 125.

[38] *Id.* ¶ 123.

[39] *Id.* ¶¶ 123-24.

[40] *Id.* ¶¶ 126-29.

[41] *Id.* ¶¶ 133-34.

[42] *Doe v. Alexian Bros. Behavioral Health Hosp.*, 2019 IL App (1st) 180955.

[43] *Alexian Bros.*, 2019 IL App (1st) 180955, ¶¶ 17-21.

[44] *Id.* ¶ 33.

[45] *Id.*

[46] *Id.*

[47] *Id.* ¶ 15.

[48] *Id.* ¶ 34.

[49] *Id.* ¶ 36.

[50] *Id.*

[51] *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 455 (1992); *Young v. Bryco Arms*, 213 Ill. 2d 433, 466 (2004); *Brettman v. Virgil Cook & Son, Inc.*, 2020 IL App (2d) 190955, ¶ 91.

[52] *Young*, 213 Ill. 2d at 446.

[53] *Id.*

[54] *Id.*

[55] *Brettman*, 2020 IL App (2d) 190955, ¶ 93.

[56] *Id.* ¶ 93.

[57] *Id.*

[58] *Id.*

[59] *Strutz v. Vicere*, 389 Ill. App. 3d 676, 677 (1st Dist. 2009).

[60] *Id.*

[61] *Id.*

[62] *Id.* at 680.

[63] *Id.*

[64] *Id.* at 681.

[65] *Id.*

[66] *Thompson v. County of Cook*, 154 Ill. 2d 374, 380 (1993).

[67] *Thompson*, 152 Ill. 2d at 380.

[68] *Id.*

[69] *Quirke v. City of Harvey*, 266 Ill. App. 3d 664, 666 (1st Dist. 1994).

[70] *Quirke*, 266 Ill. App. 3d at 666.

[71] *Id.* at 667.

[72] *Id.* at 670.

[73] *Neering v. Illinois Central Railroad*, 383 Ill. 366, 381 (1943).

[74] *Neering*, 383 Ill. at 381; *Ney v. Yellow Cab*, 2 Ill. 2d 74, 79 (1954).

[75] *Ney*, 2 Ill. 2d at 79.

[76] *Id.* at 76.

[77] *Id.* at 83-84.

[78] *Neering*, 383 Ill. at 381.

[79] *First Springfield Bank and Trust v. Galman*, 188 Ill. 2d 252 (1999).

[80] *Galman*, 188 Ill. 2d at 254-55.

[81] *Id.* at 259.

[82] *Id.* at 260-61; *See also Smith v. Hancock*, 2019 IL App (4th) 180704 (where collision is unavoidable for one party, that party is entitled to summary judgment on the issue of proximate cause); *Arnold v. Norfolk Southern Railway Co.*, 2016 IL App (4th) 150655 (sole proximate cause of railroad crossing collision was not the absence of lights and gates but plaintiff's failure to look and yield to the approaching train).

[83] *Empress Casino Joliet Corp. v. Averus*, 2020 IL App (1st) 192071.

[84] *Empress Casino Joliet Corp.*, 2020 IL App (1st), ¶ 1.

[85] *Id.* ¶ 5.

[86] *Id.* ¶ 6.

[87] *Id.*

[88] *Id.* ¶ 9.

[89] *Id.* ¶ 6.

[90] *Id.* ¶ 22.

[91] *Id.* ¶ 9.

[92] *Id.*

[93] *Id.* ¶ 1.

[94] *Id.* ¶ 45.

[95] *Id.* ¶ 50.

[96] *Id.*

[97] *Id.*

[98] *Davis v. Marathon Oil*, 64 Ill. 2d 380, 395 (1976).

[99] *Id.*

[100] *Wright v. General Motors*, 479 F.2d 52, 53 (7th Cir. 1973).

[101] *Id.*

[102] *Mack v. Ford Motor Co.*, 283 Ill. App. 3d 52 (1st Dist. 1996).

[103] *Mack*, 283 Ill. App. 3d at 61.

[104] *Id.*

[105] *Id.* at 57.

[106] *Id.* at 61.

[107] *Galman*, 188 Ill. 2d at 263.

[108] *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 94 (1995).

[109] IPI Civ. No. 15.01 (2021).

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Purtill v. Hess*, 111 Ill. 2d 229, 241-242 (1986).

[114] *Leonardi*, 168 Ill. 2d at 92-94.

[115] *Id.* at 88.

[116] *Id.* at 91.

[117] *Id.*

[118] *Id.*

[119] *Id.* at 91-92.

[120] *Id.* at 91.

[121] *Id.* at 93-94.

[122] *Id.* at 101.

[123] *Tabe v. Ausman*, 388 Ill. App. 3d 398, 405 (1st Dist. 2009).

[124] *Leonardi*, 168 Ill. 2d at 100.

[125] *McDonnell v. McPartlin*, 192 Ill. 2d 505, 511 (2000).

[126] *McDonnell*, 192 Ill. 2d at 522.

[127] *Id.* at 521.

[128] *Tabe*, 388 Ill. App. 3d at 399-402.

[129] *Id.* at 401.

[130] *Id.* at 401-402.

[131] *Id*, at 401.

[132] *Id.* at 398-99; *See also Great American Insurance Co. of New York v. Heneghan Wrecking & Excavating*, 2015 IL App (1st) 1333, ¶ 5.

[133] *Strino v. Premier Healthcare Associates, P.C.*, 365 Ill. App. 3d 895, 904-905 (1st Dist. 2006).

[134] *Tabe*, 388 Ill. App. 3d at 401-402.

[135] *Id*. at 404-405.

[136] *Id.* at 404.

[137] *Id.* at 405.

[138] *Robinson v. Boffa*, 402 Ill. App. 3d 401 (1st Dist. 2010).

[139] *Robinson*, 402 Ill. App. 3d at 408.

[140] *Id.*

[141] *Id.*

[142] *Id.* at 408-409.

[143] *Id.* at 407-408; *See also Leonardi*, 168 Ill. 2d at 94.

[144] *Robinson*, 402 Ill. App. 3d at 408.

[145] *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 111 (1997).

[146] *Holton*, 176 Ill. 2d at 106-107.

[147] *Id.* at 119.

[148] *Bailey v. Mercy Hospital and Medical Center*, 2021 IL 126748, ¶ 50.

[149] *Holton*, at 99-104.

[150] *Id.* at 132-34.

[151] *Id.* at 134; *See also Abruzzo v. City of Park Ridge*, 2013 IL App (1st) 122360, ¶ 62 (citing *Holton*, 172 Ill. 2d at 134).

[152] *Aguilera v. Mount Sinai Hospital Med. Ctr.*, 293 Ill. App. 3d 967, 969-70 (1997).

[153] *Aguilera*, 293 Ill. App. 3d at 975.

[154] *Id.*

[155] *Id.*

[156] *Bailey*, 2021 IL 126748, ¶ 56.

[157] *Id.* ¶¶ 8, 56.

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