Unedited transcript of

New But for Standard in Massachusetts Torts: Causation Background and What Led to Doull

from **"1st Look" at the New "But For" Standard in Massachusetts Torts**

Recorded 04/15/2021

Speaker(s)

Stesha A. Emmanuel, Esq., McCarter & English LLP, Boston

>>: And good morning, everyone. This would be the moment in which I would hear you respond back to me with good morning, but we only see my face and I can't hear you nor see you, so hello. I'm very excited to be here with you today. So we're going to focus again on just the background for this part of the CLE. In the Doull case, it's really significant because the Supreme Judicial Court addressed two primary questions, the first being, in a case involving multiple tortfeasors and multiple causes of the injuries, whether substantial contributing factor may or must be used in lieu of the but-for causation jury instruction. The second question they addressed was whether the court should adopt the factual cause of harm standard in the Restatement Third of Torts. As you see here on this slide, really, we want to take a step back and look at the concept of causation from the beginning. So whether you attended law school a year ago, five years ago, or haven't crossed the threshold of the law school classroom in over 20 years, we all remember, and in fact, were required to take a torts class. And it was there that you were introduced to the guiding principle of torts, negligence. Now, the application of negligence taught universally is quite simple. You have four factors, duty, breach of duty, causation and damages. And while, for a moment, you begin to think, well, Stesha, I already know all of this, why are we going through the background? It becomes really significant as you review what happened in Doull and what led up to the shift in terms of the burden carried by the parties and the causation analysis. And it also just serves as a reminder that words matter, terminology matters, definitions matter. So under the causation element, you have two different tests, both that need to be applied to establish

liability. And we can go back as far as 1935, and even further before that. But in 1935, the Wainwright case v. Jackson, the Supreme Judicial Court held that the general rule is that one cannot be held liable for negligent conduct unless it is casually - or causally, excuse me - related to the injury of the plaintiff. Makes sense. So what are those two causation elements? The first is actual cause, which is also referred to as factual causation. My colleague later will dive a little bit deeper into the different terminology used and the interchangeability between the two words. And again, it kind of echoes to what I had just previously said, which was the powers of your words matter, terminology matters. So under actual cause, an act or an omission is not regarded as a cause of an event if a particular event would have occurred without that action. A plaintiff is required to show that the harm would not have occurred in the absence of, which is the but-for, the defendant's conduct. In other words, the but-for test says that an action is a cause of an injury if but-for the action, the injury would not have occurred. Thus, the prevailing question under actual cause, would the harm has occurred if the defendant hadn't acted in the way that they - in the manner that they did? If the answer is no, the injury would not have occurred, then the action caused the harm. And that is textbook tort law. Now, moving to proximate cause, which is also known as legal causation or foreseeability, under that element, and simplified proximate cause essentially acknowledges that, while a defendant's actions may have technically caused an injury, the prevailing question, and thus the analysis, is whether the injury was so unforeseeable that it would be unfair to hold a defendant liable. Stated differently, was it foreseeable that the actions or inactions of the defendant would have resulted in the harm sustained? Next slide, please. The substantial contributing factor standard to determine factual causation, and as you will recall, in the past few minutes that I was talking about the different elements, we didn't hear those words, substantial contributing factor. So in this picture, we have the dog who trying to enjoy his morning and drink his coffee. And there are multiple fires happening, there's fire A, B, C and D. And the question becomes, well, which of the fires will ultimately lead to a very bad day for the dog trying to enjoy his coffee? If all of the fires started at the same time, but in different areas of the room, is there a way to distinguish liability? Again, fire A, B and C, and we'll start to look at the size of the fires. Does fire B have less liability than fire D because it is a smaller flame and it's not as big as D? All

of the fires can and will destroy the house independent of each other, so really, where is the line of causation drawn? And this is the classic example that was presented in the Anderson v. Minneapolis case back in 1920. And the but-for analysis could not be cleanly applied. In that case, you had the plaintiffs whose property was damaged by a fire. The plaintiff alleged that the fire stemmed from sparks from a railroad company's railroad cart. The defendant, in turn, said, well, the plaintiff, one, could not trace the fire back to a specific railroad cart, excuse me. Two, that the weather conditions were not optimal and it amplified the spread of any fire and three, that there were preexisting fires nearby, and that the wind likely carried the embers to the plaintiff's property. And so there, the court began to go into an analysis of whether or not but-for could be applied here. And the court gave a variety of different options for the jury, including an instruction on whether they could determine that the fire set by the defendants - excuse me - an instruction on whether the fire set by the defendant's engine was in material or substantial factor, and that is where substantial factor first kind of came into play. The court effectively held that the defendant here, a railroad company, could not escape liability because of combined fires. So if the jury was to credit the defendant's position that, hey, there was a pre-existing fire that combined with our fire, and so you can't really figure out the actual causation, the court said, whoa, whoa, whoa, wait a minute, as it appears that the railroad's fire was a material element entering into the destruction of the property, then they could be held liable. So the prevailing consensus was that factual cause, i.e. the but-for test, was not sufficient under the fire fact patterns. Thus substantial factor grew teeth, and it was determined that when each of the two or more causes is sufficient, standing alone to cause plaintiffs harm, courts usually drop the but-for test so far as they rely on any test of causation - excuse me - so far as they rely on any test of causation at all when the but-for test falls, that they may invoke this substantial factor test. Next slide, please. And that language is filed in the restatement, and before we go into the restatement, it's first to ask the most two obvious questions. One, what is a restatement? And two, why is it important? The American Law Institute, founded in 1923, authors the restatements. The restatements were created to provide guidance to courts and others applying existing law. Their goal was to provide a clear instruction on common law and its statutory element, and reflect the law as it presently stood. After the initial

restatement of torts, also known as the first restatement, the second and third restatements' purpose was to promote clarity and to correct any errors in the earlier restatement, but also to reflect the changes of the common law and sometimes promote more desirable before. The clear influence and power of restatements are readily apparent. Even in 1924, before the first restatement, Benjamin Cardozo - you might know his name and who he is - made the following proclamation about restatements. And he said, quote, "when finally it goes out under the name and with the sanction of the institute, after all of this testing and retesting, it will be something less than a code, but something more than a treatise. It will be invested with the unique authority not to command, but to persuade. It will embody a composite thought and speak a composite voice. Universities and the bench and the bar will have a part in its creation. I have great faith in the power of such a restatement to unify our law." So I'm not going to read the slide for you, but again, when you look at both the first restatement and the second restatement, they use the words substantial factor in their definition of actual - or if you want to call it factual - cause. Next slide, please. A contributing factor standard. So what happened? For decades, the but-for standard was applied in single defendant and single cause matters. It was widely accepted that the substantial contributing factor was appropriate in matters where there were, again, multiple causes and/or tortfeasors. One of the seminal cases in the Commonwealth, O'Connor v. Raymark, which is not listed here, outlines the principles of causation, including substantial contributing factor. Interestingly, the O'Connor case parallels the classic example that we just went over with the separate fires both burning and destroying the house. However, the focus is on asbestos. Now, to avoid repetition as much as possible, I only note the O'Connor decision. However, I am more than certain my colleague will go over O'Connor during the toxic tort portion of this program. However, it's just, again, to echo that prior to the Dole decision - the Doull decision, the Commonwealth accepted the substantial contributing factor standards and that it was appropriate. Next slide, please. And again, as by way of example, in 2018 - which is two years before the Third Restatement, which we have not gone over just yet - the Supreme Judicial Court in the Matsuyama case held the following. That the substantial contributing factor test is useful in cases which damage - in which damage has multiple causes, including but not limited to cases with

multiple tortfeasors in which it may be impossible to say for certain that any individual's conduct was but-for cause of the harm, even though it can be shown that the defendant, in the aggregate, caused the harm. But remember, Matsuyama was not a multiple tortfeasors case. So while the SJC admonished the trial's court use of the words, substantial contributing factor, in the jury instructions, the court ultimately concluded that the trial judge appropriately defined substantial contributing factors and avoided jury confusion because the trial court defined substantial and clearly focused the jury's attention on the idea that the defendant's negligence, if any, had to be the but-for cause of the plaintiff's losing their fair chance of survival. Nearly eight years and numerous cases later, and despite the third research - Third Restatement, the appellate courts had consistently upheld the use of the substantial contributing factor. Again, it's not on this slide, but one such case can be found, for example, could also be found in the Bonoldi v. DJP Hospitality, Inc. And that's at 90 Mass. App. Ct. 1104, and that was in 2016. And while it's a 128 decision, it's a great way to, again, do the comparison because it lays out what the actual jury instruction was. Next slide, please. So now we've done the analysis and we understand, OK, I use but-for in these circumstances. I can use the substantial contributing factor jury instructions in these examples or instances. So what changed in the Restatements that led to the Doull decision? Next slide. Ah, the gentleman here is just as perplexed as us, so let's dive in and figure out what actually happened. Next slide. So first, the change in course with the elimination of the substantial contributing factor language. So in the Third Restatement, you have here first commentary. And the commentary, again, talked about, well, there's the likelihood of confusion about using the word substantial because the fact-finder could either determine that "substantial" was a more stringent approach or analysis than the traditional but-for analysis or that it was less. Next slide, please. And so under Sections 26 and 27, the Restatement redefined what is actual or factual causation. And here, if you do the comparison between the Third Restatement and the prior two Restatements, what you'll notice is that there is an absence of the word "substantial." And so under Section 26, the Restatement concludes that tortious 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 cause of harm under Section 27. Well

what does Section 27 says, right here? So under Section 27, the Restatement notes that when describing the effects of multiple causations, it concludes that if multiple acts occur, each under 26 alone would have been a factual cause and would have been a factual cause of the physical harm. At the same time, in the absence of other acts, each act is regarded as a factual cause of the harm or essentially the but-for. Next slide, please. And that brings us to the meat of the matter and why we are all here today - is to discuss Doull v. Foster. So in a medical malpractice matter, the trial - the trial judge, excuse me, used but-for causation principles when instructing the jury. And on appeal, the Supreme Judicial Court use this opportunity to clarify two competing causation standards and concluded that one, but-for - the but-for causation analysis must be employed in multiple causation matters. It should also note that it should be employed in multiple tortfeasors matters as well. And one of the second - the second principle that came out of the decision is the elimination of the substantial factor, which sometimes is also referred to as the substantial contributing factor analysis with rare exceptions, which again, my colleague will go over once we get to the toxic tort portion of this program. Moreover, the SJC reasoned that the adoption of the third restatement would reduce confusing terminology, ensure that jurors properly separated conduct that had no impact that caused harm, and avoided conflicting jury instructions, because, again, you begin to see a pattern when you go through case law of parties on both sides in which a judge would use a but-for jury instruction and that would be brought up on appeal because the party is saying, well, substantial contributing factors should have been used and the inverse. And so here with Doull, the court was trying to eliminate what they viewed as confusing and also taking in the guidance of the restatement. One of the other significant lines in which the court notes in Doull is that the basis for using substantial contributing factor in the first place, outside of the asbestos context, was really because the restatement used it. And now that the statements had eliminated this substantial contributing factor, the court thought it was prime time to eliminate what is - what could be seen as a blurred line between factual and legal causation. Next slide. So where do we go from here? That's a great question. That is what we are going to address today - what we are going to do about jury instructions and how do we distill down for our clients and for the courts and then, of course, for the fact finders. How you apply a but-for standard

when you have multiple causes, you have multiple tortfeasors, and, essentially, you do have to silo out the but-for analysis for each cause. And so my colleagues will likely take over and again, explain it a little bit more in the medical malpractice platform, as well as the exceptions to this whole dual decision in asbestos litigation where you could still use the substantial contributing factor. But, of course, the caveat that the court did leave an open invitation, that they may also decide whether or not they want to continue using substantial contributing factor there as well. Hopefully you are able to reflect fondly on what you first learned about causation and how it has moved throughout history. And I'm happy to provide additional materials that we - that I based a lot of my presentation on and my understanding of the trajectory on offline. So feel free to email me. Thank you so much for your time.