29

# RECENT COURT DECISIONS

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## Confusing Jury Instructions Leads to Revision of Causation Standard

*Mitchell v. Gonzales*, 54 Cal. 3d 1041, 819 P.2d 872, 1 Cal. Rptr. 2d 913 (1991).

In this case, the California Supreme Court rejected the use of a "but for" test for causation for tort liability. The Mitchells sued the Gonzaleses, claiming that their negligence resulted in Damechie Mitchell's drowning. The Gonzaleses took Damechie to a lake. Damechie's mother warned the Gonzaleses that her son could not swim. At the lake, several children including Damechie rented a paddle boat. Apparently, Damechie fell off the boat and drowned because of horse play. Damechie's parents sued the Gonzaleses failing to supervise their child.

Over the Mitchells' objection, the court instructed the jury that there must be "but for" causation. Under the state's standard jury instructions, a cause must, in natural and continuous sequence, produce an injury and without which the injury would not have occurred. The requested alternative instruction would require that the cause be a substantial factor in the injury. The jury found that the Gonzaleses were negligent, but concluded that there was no causation to support the Mitchells' claim. Because the "but for" instruction was likely to cause confusion, the court of appeals reversed the decision against the Mitchells and the supreme court agreed, holding that the instruction was faulty and prejudiced the outcome of the case.

Initially, the court found that the instruction was erroneous. It began by noting that the courts had already denied the use of the "but for" test when there was concurrent causation. The court went on to discuss the problems that were inherent in the definition itself. First, the instruction included the term "proximate." This term was ambiguous since it suggested that a cause must be temporally or physically near the result. Second, studies showed that jurors did not understand the instruction. In contrast, the substantial factor test was comparatively clear and encompassed a test of actual cause that juries could understand.

Next, the court determined that the instruction was prejudicial to the Mitchells. First, the court noted that the conflict in the evidence was not great. The evidence showed that the Gonzales parents did not supervise the children, their son engaged in horse play that lead to the drowning, and the son failed to call for help. Second, the jury vote as to liability demonstrated that the instruction affected their conclusion. On the issue of breach of duty, the jury substantially agreed that the Gonzaleses breached their duty. By similar majorities, the jury decided that there was no causation. Thus, the instruction affected the result of the suit. Third, the court noted the Gonzales' attorney had directed the jury to the causation issue and Damechie's inability to swim in closing arguments. This argument highlighted the potential effect of the jury instruction on the result. Finally, the court noted that none of the other instruction given to the jury mitigated the effect of the erroneous instruction.

## Hawaii Adopts Market Share Theory

*Smith v. Cutter Biological, Inc.*, 823 P.2d 717 (Haw. 1991).

In a detailed discussion of the various theories for proving who caused an injury in a negligence case, the Hawaii Supreme Court approved the use of market share liability. Smith, the plaintiff in the case, sued several manufacturers of Antihemophilic Factor Concentrate (AFT) after he became infected with acquired immune deficiency syndrome (AIDS). Smith was a hemophilic and received AIDS-infected AFT to enable his blood to coagulate properly in 1983 or 1984. The manufacturers made the AFT from donated blood. Because Smith could not identify the manufacturer of the tainted AFT, the trial court granted judgment for the manufacturers. Smith appealed, and the federal court of appeals certified the issue of causation to the Hawaii Supreme Court for a determination of whether state recognized market share liability. The supreme court concluded that Smith could use a theory of market share liability to pursue his claim for negligence.

Although a state statute prevented the application of strict product liability to Smith's claims, it did not preclude actions for one's own negligence or willful misconduct. The manufacturers argued that the exception required proof of individual causation. The court rejected this argument on two grounds. First, the argument would have left no room for cases in which there were several tortfeasors. Second, the legislative history of the law did not support the manufacturer's argument.

Having found the statute did not preclude the claim, the court next addressed whether state tort law recognized a negligence claim without an identification of a specific tortfeasor. The manufacturers argued that cases based on tainted blood were different from other cases recognizing some form of market share liability. First, the number of companies was small. Second, the product was not inherently defective as was diethylstilbestrol (DES), the source of many market share cases. The court rejected both arguments, but only after finding other theories of joint liability should not be available.