

Health Law: Quality & Liability

Prof. Thaddeus Pope

Medical Malpractice -
But For Causation

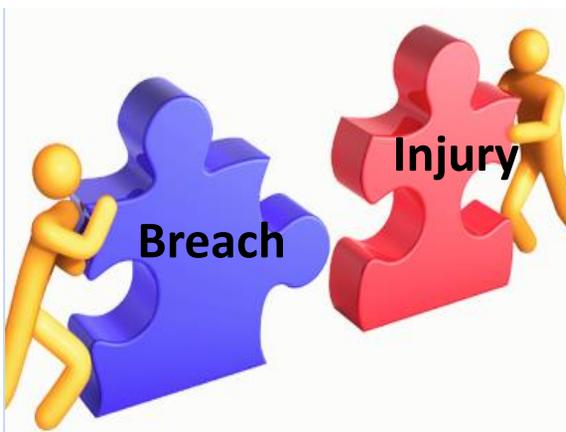
Causation

PTF is suing because
she is injured

PTF **already** established
that DEF breached the
applicable SOC

BUT

Is the injury the
result of the
malpractice



2 types

“But for”

Lost chance

**But for
causation
Definition**

Main type of
causation in
the law

Rest. 3d 26

Conduct is a factual
cause of harm when the
harm would probably
not have occurred
absent the conduct.

But for (without)
DEF’s negligence

PTF would not be
injured

Sine qua
non

Not enough that
DEF negligence
increased the
risk of harm

DEF negligence
must be **most
likely** cause

Probability is sufficient

Never sufficient

Speculative

Merely possible

**But for
causation
Consequences**

> 50% chance that
injury came from
DEF negligence

→ 100% damages

50% or < 50% chance
injury from DEF
negligence

→ 0% damages



But for causation

Math problems

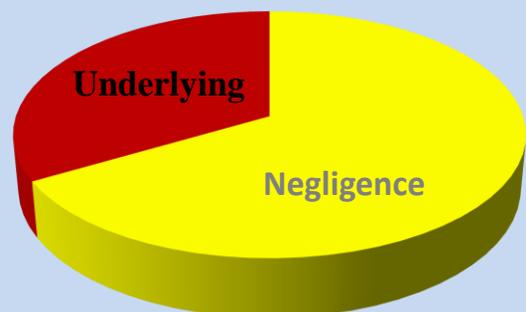
Negligence **increases** risk of adverse outcome

Adverse outcome obtains

Was injury **probably** the result of DEF negligence (as opposed to alternative cause, e.g. underlying illness)

Baseline risk death **10%**

After DEF negligence risk of death **30%**



Dies. Why? 30% chance death most of that from negligence

1% → 3%

Risk from
negligence >
other risk

30% → 70%

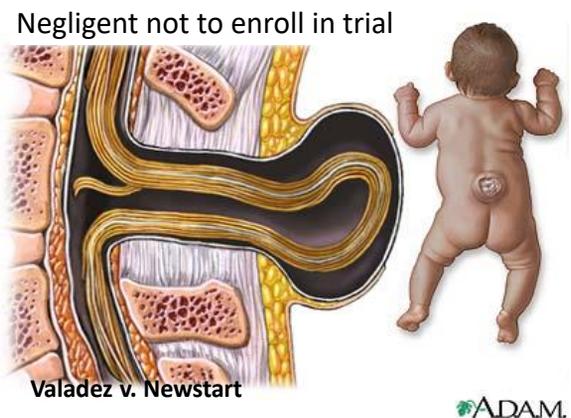
Risk from
negligence >
other risk

40% → 70%

Risk from
negligence <
other risk → no
but for causation

Often no
statistics, just
expert opinion
on probability

**But for
causation
Cases**



But even if
experimental
treatment works,
denial did not
“cause” injury

Assume no breach
and were enrolled
in trial

Then what?

w/o negl.

___ % in
prenatal
surgery
group

with negl.

___ % in
prenatal
surgery
group

“But for”
causation is
always
sufficient

Let’s move from
“but for” to
“lost chance”
causation