

SUBSTANTIAL FACTOR

The most hotly contested medical issue in a toxic tort case usually involves causation. Did a defendant's product, process or chemical "cause" or "contribute" to the plaintiff's injury? A recent U.S. Ninth Circuit case, *Kennedy v. Southern California Edison Company*ⁱ, held that the causal contribution of the individual defendant need only be more than "negligible" or "theoretical." The *Kennedy* court reversed a unanimous jury verdict for the defendants entered after a five-week trial, and remanded the case for a new trial, because the district court refused to give an adequate jury instruction on causation. Although involving California tort and products liability law, the court's reasoning is, for the most part, applicable to Louisiana causation issues since it analyzes the "substantial factor" test familiar to Louisianaⁱⁱ.

Only 43 years old, Ellen Kennedy died of chronic myelogenous leukemia (CML) in 1996. Her husband and four children filed suit in federal court against Southern California Edison Company (Cal Edison) and Combustion Engineering, Inc., based on alleged corporate misconduct during Mr. Kennedy's employment from 1982 to 1990 as a machinist for Cal Edison at the company's nuclear power plant. Mr. Kennedy asserted federal jurisdiction under the Price-Anderson Actⁱⁱⁱ and sought wrongful death damages, alleging his wife's terminal CML resulted from Cal Edison's negligence in exposing her to radiation from the plant. Kennedy also sued Combustion Engineering, Inc. for the alleged faulty production of nuclear fuel rods under a products liability cause of action. The suit alleged Mr. Kennedy came in contact with microscopic particles of radioactive material ("fuel fleas") from the power plant, which he carried home on his clothing, hair and tools. These fuel fleas, which exceeded maximum allowable dosages for radiation according to federal regulations, then came in contact with Mrs. Kennedy and caused her CML.

Twice before trial, Kennedy claimed a *Rutherford*^{iv} instruction - necessary when multiple potential causes of the sued-upon injury exist - was required since the defendants raised other possible causes of Mrs. Kennedy's CML, none of which was attributable to either of the defendants. Both requests were denied. In *Rutherford*, a products liability action brought by the estate of a worker who had been exposed to asbestos-containing products and subsequently died of lung cancer, the California Supreme Court cited four factors in asbestos-related cancer cases that necessitated a departure from standard jury instructions on causation. The *Rutherford* court commented that

plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability^v was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that actually produced the malignant growth.^{vi}

Without proper guidance, a juror might conclude that the asbestos plaintiff needed to prove that fibers from the defendant's product were a substantial factor actually contributing to the development of the plaintiff's cancer. This would be, in many cases, a medically impossible

burden, even with the greatest possible effort by plaintiff, because of the inherent uncertainty regarding the cellular formation of an asbestos-related cancer. Thus, the *Rutherford* court held that in addition to the standard causation instructions, the jury must also be instructed that

the plaintiff need not prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's risk of developing cancer.^{vii}

In *Kennedy*, the court, applying California products liability and tort law, had to decide whether *Rutherford* is applicable in single-defendant cases (the court considered the two defendants as one since neither argued the other was an independent source of causation). The court held *Rutherford* applies in single-defendant hazardous substance cases where the defense of alternative possible causes is raised.

The court found little relevant distinction between a case with multiple defendants, each of whose products may have been a substantial factor in causing the plaintiff's injury, and a case in which a single defendant argues that the plaintiff cannot show causation because other potential sources exist that may have been the legal cause of the harm. In both instances, the defendant is claiming the plaintiff cannot prove it is responsible for his injury when multiple other potential causes exist, whether it be another defendant or something outside the lawsuit, such as cigarette smoking or radiation from the sun in the case of CML. Failure of the district court to give the *Rutherford* instruction (contoured to properly fit this non-asbestos situation) was error requiring reversal and remand for a new trial.

The court examined the meaning of the term "substantial factor",^{viii} finding the standard relatively broad, requiring only that the contribution of the individual cause be more than negligible. Thus, a force which plays only an "infinitesimal" or "theoretical" part in bringing about injury is not a substantial factor, but a very minor force that does cause harm is a substantial factor. Applying that analysis to the facts of *Kennedy*, the court wrote:

[A]ll the jury need have concluded, if given a *Rutherford* instruction, was that it was more probable than not that there was more than a negligible probability that Mrs. Kennedy's cancer was caused by radiation from [the power plant]. We believe the jury would have reasonably so found.

It would not be unreasonable for a juror to conclude that a one in one hundred thousand chance of developing a fatal cancer was more than a mere theoretical possibility. Presented perhaps more concretely, if the entire U.S. population were exposed to the amount of radiation in appellee's hypothetical upon which its expert based his statistical opinion, than approximately 2,500 people would contract CML. While this number is relatively small, it is more than "negligible." (emphasis supplied - page references not available).

Louisiana courts handling toxic tort claims have struggled with the same cause-in-fact issues decided by the *Rutherford* and *Kennedy* courts.^{ix} California's experience in this area provides helpful guidance.

- i 219 F.3d 988 (9th Cir. 2000).
- ii In *Perkins v. Texas and New Orleans Railroad Company*, 243 La. 829, 147 So.2d 646 (1962) the Louisiana Supreme Court wrote:

It is fundamental that negligence is not actionable unless it is a cause in fact of the harm for which recovery is sought. It need not, of course, be the sole cause. **Negligence is a cause in fact of the harm to another if it was a substantial factor in bringing about that harm.**

The burden of proving this casual link is upon the plaintiff. Recognizing that the fact of causation is not susceptible of proof to a mathematical certainty, the law requires only that the evidence show that it is more probable than not that the harm was caused by the tortious conduct of the defendant. Stated differently, it must appear that it is more likely than not that the harm would have been averted but for the negligence of the defendant.

243 La. at 835-836, 147 So. 2d at 648. (emphasis supplied).

- iii 42 U.S.C. §2011 et seq. Price-Anderson provides federal jurisdiction over lawsuits for injuries arising out of a “nuclear incident” and, generally applies the “law of the state in which the nuclear incident involved occurs.”
- iv *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203 (1997).
- v Louisiana requires medical causation be proved only by a preponderance of the evidence, i.e., more probable than not. *Lasha v. Olin Corp.*, 625 So.2d, 1002 (La. 1993).
- vi *Id.* at 1219.
- vii *Id.* at 1223.
- viii For an exhaustive review of the use of the “substantial factor” test to satisfy the cause-in-fact inquiry, see David W. Robertson, “The Common Sense of Cause-In-Fact”, 75 *Tex. L. Rev.* 1976 (1997).
- ix *Lilley v. Board of Supervisors of Louisiana State University*, 98-1277 (La.App. 3 Cir. 3/24/99), 735 So.2d 696, *writ denied*, 99-1162 (La. 6/4/99), 744 So.2d 629; *Quick v. Murphy Oil Company*, 93-2267 (La.App. 4 Cir. 9/20/94), 643 So.2d 1291, *writ denied*, 94-2583 (La. 1/6/95), 648 So.2d 923; *Egan v. Kaiser Aluminum & Chemical Corporation*, 94-1939 (La.App. 4 Cir. 5/22/96), 677 So.2d 1027, *writ denied*, 96-2401 (La. 12/6/96), 684 So.2d 930.