"A ROUGH SENSE OF JUSTICE" OR "PRACTICAL POLITICS"?
Recent Texas Supreme Court Opinions on Causation

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CHAPTER 3

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> What we…mean by the word 'proximate' [cause] is that, because of convenience, of public policy, of *a **rough sense of justice***, the law ***arbitrarily*** declines to trace a series of events beyond a certain point. This is not logic. It is ***practical politics***.

Judge Andrews' dissenting opinion in *Palsgraf v. Long Island R.R. Co*., 162 N.E. 99, 103 (N.Y. 1928) (emphasis added), quoted by Justice Cornyn in his discussion of the history of causation doctrine in *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 776 n.1 (Tex. 1995) (Cornyn, J., concurring).

> Yet the history of jury trial is everywhere the same—a constant struggle on the one hand to preserve the integrity of the political ideal of layman's justice, and the equally persistent struggle on the other to subject the jury to strict control by the court…with the development of highly integrated court systems under the *complete domination of appellate courts*, both trial courts and jury have fallen under the control of the higher courts, and *jury trial in current civil cases has lost most of its significance**...the significance of jury trial in civil cases has become so largely that of a symbol.***

Leon Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 486 (1956) (emphasis added).

> As Dean Green was fond of arguing and lamenting, the causation issue can present a golden ***opportunity for a reviewing court to substitute its judgment for the judgment of the jury***. Unfortunately, in *Union Pump Company v. Allbritton*, the Texas Supreme Court has taken full advantage of this opportunity by modifying ***both*** the causation standards used in tort cases and the analytical process through which the fact finder's causation finding is reviewed.

William Dorsaneo, *Judges, Juries, and the Reviewing Courts*, 53 SMU L. REV. 1497, 1527 (Fall 2000) (citations omitted) (emphasis added).

I. Introduction

Perhaps Justice Cornyn (and the *Allbritton* majority, which also quoted the same excerpt from *Palsgraf*) did not mean to imply that the Texas Supreme Court should endeavor to impose simple "rough justice" or its own "political will" over the next several years as the court wrestled with

"causation" issues.[1] But looking back fourteen years later there is more than a little irony in quoting of this excerpt from the landmark decision in *Palsgraf*, when one considers that in the twenty-nine causation opinions the Court has issued since *Allbritton,* only nine decided the causation issue in favor of the plaintiff.[2] The rest managed to find a way to benefit the defendant, most overturning jury verdicts, and many overturning courts of appeal decisions finding *sufficient evidence* of causation.[3] And almost as startling (at least to those who learned that Texas common law highly valued *stare decisis* and that the Texas Supreme Court was an appellate court of limited jurisdiction with no ability to weigh sufficiency of evidence), the Court in the last few years has repeatedly resorted to causation grounds to reverse jury verdicts in ways that sometimes seem to ignore the Texas Constitution's limitation precluding the Court from simply re-weighing evidence to reverse.[4] If Dean Green thought jury trials "lost their significance" in 1956, fifty years later he would conclude they have all but been eliminated in this state. "Causation" grounds have been a favored culprit the last few years.

This focus by the Court on the causation arena has not gone unnoticed. In their paper presented at the 2004 Advanced Civil Appellate Practice Course, "Selected Causation Trends Before the Supreme Court," (hereafter cited as "*Causation Trends*") authors Charles R. "Skip" Watson, Kirsten M. Casteneda and Susan A. Kidwell alerted practitioners to the mounting tsunami of reversals by the Court based on causation grounds:

> Causation is the uncontrolled intersection of multiple Supreme Court trends…[C]ausation should now be the source of a "no evidence" objection in every charge conference, and the subject of

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[1] This paper does not necessarily reflect the views of other lawyers at Haynes and Boone, LLP. The authors gratefully acknowledge the extensive assistance of Haynes and Boone associate Vinny Circelli in the writing of this paper.

[2] The *Allbritton* opinions, majority and concurrence, appear to signal an opening of the floodgates in terms of the Court's willingness to resort to causation analysis to overturn jury verdicts (or turned a trickle into a torrent), though one could argue that process really started two years earlier with Justice Hecht's majority opinion in *Dresser Industries v. Lee*, 880 S.W.2d 750 (Tex. 1993) (discussed in detail *infra*, pp. 24-25). Because of the detailed doctrinal discussion by Justice Cornyn in his *Allbritton* concurrence, the authors use that opinion as the "dividing line," while acknowledging that line perhaps could be moved a couple of years earlier. Indeed, Professor Dorsaneo moves the date back to *Pool v. Ford Motor Company*, in terms of greater involvement by the Court in weighing evidence to overturn disfavored jury verdicts or intermediate courts of appeal. William Dorsaneo, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. 1497, 1520 (Fall 2000). The authors certainly agree that this decision, as Justice Gonzales noted in a dissent after *Pool*, opened the door for the Court to merely re-weigh evidence in a way that improperly sidesteps the Constitutional prohibition. *See Lofton v. Texas Brine Corp.*, 777 S.W.2d 384, 387 (Tex. 1989) (Gonzales, J., dissenting) ("[M]y fear that *Pool v. Motor Co.* ...would be used by this court to second guess the courts of appeals has been realized.")

[3] Pertinent post-*Allbritton* cases are discussed in detail *infra,* pp. 45-60. The cases overturning courts of appeals decisions finding sufficient evidence of causation are: *Guevara v. Ferrer*, 247 S.W.3d 662 (Tex. 2007); *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007); *GMC v. Iracheta*, 161 S.W.3d 462 (Tex. 2005); *Volkswagen of Am. v. Ramirez*, 159 S.W.3d 897 (2004); *Marathon Corp. v. Pitzner*, 106 S.W.3d 724 (Tex. 2003); *Sw. Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269 (2002); *Merrell Dow Pharms. v. Havner*, 953 S.W.2d 706 (Tex. 1997); *Leitch v. Hornsby*, 935 S.W.2d 114 (Tex. 1996). Other Post-*Allbritton* cases decided by the Texas Supreme Court which at least tangentially touch on causation, but are not discussed in detail in this article, are: *Columbia Med. Ctr. v. Hogue*, 51 Tex. Sup. Ct. J. 1220 (Tex. 2008); *LMB, Ltd. v. Moreno*, 201 S.W.3d 686 (Tex. 2006); *Western Investments, Inc. v. Urena*, 162 S.W.3d 547 (Tex. 2005); *Alexander v. Turtur and Assocs*., 146 S.W.3d 113 (Tex. 2004); *Sw. Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269 (2002); *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473 (Tex. 2001); *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217 (1999); *Texarkana Mem'l Hosp. v. Murdock*, 946 S.W.2d 836 (Tex. 1997).

[4] TEX. CONST. art. I, §15; art. V, §§6,10; *see also* William Powers, *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699, 1719 ("The court is shifting more of the normative work in tort litigation away from juries and towards judges, but the court is not accomplishing this, as many lawyers think, by abandoning the traditional standard of no evidence review.")

> a separate section in every post-verdict motion. It is also the one place the courts are expected to make policy on a case-by-case basis…Two obvious themes have emerged as the Court of the 90's began to correct ***perceived excesses*** of the 80's…***Underlying both themes is a steady erosion of the jury's role in deciding contested issues***.

Causation Trends, at 1-4 (emphasis added).[5] *See also*, Dorsaneo, *Judges, Juries, and Reviewing Courts*, 55 SMU L. REV. at 1520.

II. Scope of This Paper

The purpose of this Paper is to review what the Court has been up to in its decisions invoking "causation" grounds since *Allbritton* was decided in 1995. It will start with a background discussion of the causation doctrine in Texas tort law, and then an overview of the Court's causation decisions in the fourteen years prior to 1995. We then discuss *Allbritton*, especially excerpts from Justice Cornyn's *Allbritton* concurrence. Next, we discuss the Court's jurisdiction, and historical strictures on the Court which were thought to prevent it from simply re-weighing the evidence and reversing based on "insufficiency" of evidence. Of course, the Court's recent decision in *City of Keller*, with Justice Brister's re-casting of the long-standing Justice Calvert divisions between "no evidence" and "sufficient evidence," provides an important backdrop for what the Court has been doing in the "causation" arena.[6] We then proceed to discuss in some detail the most pertinent of the twenty-nine Texas Supreme Court cases decided since *Allbritton* which, to varying degrees, were decided on "causation" grounds. There follows a preview of pending cases in the Court which could result in more reversals of jury verdicts on "causation" grounds. And finally, we identify some possible future trends and areas of more potential "causation" mischief.

III. Overview of "Causation" in Texas Prior to *Allbritton*

There were eight major causation decisions issued by the Court in the fourteen years preceding *Allbritton*.[7] Of the eight, plaintiffs won five and lost three (two of these were decided shortly after the pro-Defendant block attained a working majority on the Court: *General Motors v. Saenz*, 873 S.W.2d 353 (Tex. 1993) and *Dresser Industries, Inc. v. Lee*, 880 S.W.2d 750 (Tex. 1993)).[8] Additional causation cases decided in that time period are also discussed below. Three

[5] The paper also predicted the Court's very recent discarding of the Pattern Jury Charge's long-standing definition of "producing" cause in the recent *Ford Motor Co. v. Ledesma*, 242 S.W. 3d 32 (Tex. 2007) decision, discussed in detail *infra*, pp. 53-55. The *Causation Trends* paper anticipated that the Court may start referring to "but for" causation as "substantial factor" causation in light of its decision in *IHS Cedars Treatment Center of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794 (Tex. 2004): "It is the '*ill-defined* second element of producing cause' identified by Justice Cornyn's concurrence in *Allbritton* that bears watching." *Causation Trends*, pp. 3,14 (emphasis added).

[6] Professor Dorsaneo all but predicted this result five years earlier, and the majority opinion spends time answering Professor Dorsaneo's earlier criticisms.

[7] This fourteen year period will be referred to as the "pre-*Allbritton*" period.

[8] *Corbin v. Safeway Stores, Inc*., 648 S.W. 2d 292 (Tex. 1983) is not included in the list, though perhaps it should be. Though Judge Spears spoke in *Corbin* in terms of "proximate cause," this is actually a duty case; it highlights the problem of shifting the concept of "foreseeability" back and forth between duty and proximate cause ("…[T]he foreseeability of the harmful

of the eight arguably provided the license for later courts to second-guess juries through the device of causation analysis: *Lofton v. Tex. Brine Corp*. 777 S.W.2d 384 (Tex. 1989); *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987); and *Havner v. E-Z Mart Stores, Inc*, 825 S.W.2d 456 (Tex. 1992) Another, *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470 (Tex. 1991), provided much of the language and reasoning used in *Allbritton* and since to justify judicial activism in the causation arena.

Of course, this time period includes opinions by the so-called "activist" "plaintiffs-oriented" court which included Justice Kilgarlin, and later opinions by a court in transition which from 1992-1995 had a growing majority somewhat hostile to the Mauzy/Doggett/Kilgarlin tort approach.[9] In a law review article published two years after *Allbritton*, then-Dean (now Chancellor) William Powers hinted that Justice Kilgarlin and his colleagues would approve of a later (presumably equally activist) court making policy decisions in the "duty" arena, since they did much the same. William Powers, *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699, 1719 (1997). The cases Dean Powers cited, as well as the articles authored by Justice Kilgarlin, focused on "legal duty" issues; Dean Powers did not cite any significant "causation" opinions from the 1981-1994 time period to support his thesis, and his discussion of the post-Kilgarlin court focused on duty cases (and he cited *Allbritton* as one). Dean Powers also posited that tort scholars Keeton, Prosser and Green would have approved of extensive judicial involvement in the "legal duty" arena.[10] The issue he does not address, and which this paper attempts to examine, is whether the same could be said of the Court's recent decisions in the "causation" arena.[11]

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consequences resulting from the particular conduct is the underlying basis for liability." *Id.)*. The "Kilgarlin Court" would do this even more obviously in *Poole*, discussed in detail *infra*, pp. 20-21.

[9] For simplicity's sake we refer to this as the "Kilgarlin" court, mainly because Dean Powers relies on Kilgarlin's writings on duty in comparing the decisions of that court to the more recent defense-oriented court. It could have easily been referred to as the Mauzy court or some other sobriquet (its critics might like to refer to it as the "60 Minutes" court, but of course 60 Minutes later did a similar expose on the "Phillips" court).

[10] The Powers article was no doubt in part a response to articles like the one in the Texas Lawyer in September, 1995: Borges, *The Courts Big Chill, The Texas Supreme Court All But Froze Out Plaintiffs in 1995*, Texas Lawyer, Vol. 11, No. 25, September 4, 1995 ("In 1985, the heyday of a wholly Democratic Supreme Court, plaintiffs were rolling. They won 69 percent of the cases, while defendants came out on top 28 percent of the time…In 1995 cases that fit this profile, plaintiffs won just 16 percent of the time...The statistics highlight the huge differences between the plaintiff-friendly 1985 court and the current court, which is likely to become more conservative with the retirements of Justices Jack Hightower and Bob Gammage."); s*ee also* Elliott and Elder, *Hyperactive Supreme Court Continues to Extend Power*, Texas Lawyer, Vol. 13, No. 20, 1997 (preceding by a month Dean Powers' article) ("…[In 1997] the Texas Supreme Court was quietly pursuing its own brand of tort reform, taking for itself power that formerly belonged to juries, trial judges and intermediate courts of appeals...Throughout the 1990's, the court has whittled away at jury discretion, sometimes turning fact issues into legal ones that can be reviewed on appeal.")

[11] The authors are well aware of the almost century-long debate about whether and why it matters that the tort policy-making judicial function occurs more appropriately under the rubric of "legal duty" or "proximate cause" (or its variants like "substantial cause"). *See e.g.*, almost any article by Leon Green; *see also* Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1009-1012 (July, 1988) ("Given the rampant confusion about the meaning of and relationship between causation and responsibility, the soil was ripe for the emergence, during the fourth quarter of this century, of the tort theories of the libertarians, the legal economists, and the Critics….The confusion of the factual issue of causation with the policy issue of moral or legal responsibility goes deeper than the failure to distinguish the second and third elements of the liability analysis") (This article is cited several times by Justice Cornyn in his *Allbritton* concurrence; oddly, the main thrust of the article and many of its supporting points actually argue *against* the approach taken by both the majority and concurrence in *Allbritton*). It is not necessarily "wrong" for the judicial normative decision-making to occur under the "proximate cause" heading instead of the "legal duty" heading, but we suggest

The ghost haunting all of this is *Palsgraf,* including the majority opinion and dissent. The holding denied the plaintiff recovery for her damages suffered on the railroad platform, and placed a limit on the defendant's negligence liability. The dissent disagreed, and argued for expanded liability to compensate the plaintiff. The Cardozo majority opinion decided *Palsgraf* as a "legal duty" case; Judge Andrews' dissent argued the proper approach was a "proximate cause" analysis (but loaded same with all sorts of "duty" concepts). Ever since the lines between the two—duty and causation—have often been blurred. As will be seen, the fuzzy line dividing the legal duty/causation dichotomy is used by Justice Cornyn in *Allbritton* (and by the Court since then), as license to set aside jury verdicts on causation grounds without ostensibly running afoul of the prohibition against weighing evidence.[12] This blurring of lines is made easier by the wild card of "foreseeability." To paraphrase the U.S. Supreme Court in *Carter v. Atlanta & St. A.B. Ry*., 338 U.S. 430, 437-38 (1949) (comparing the attempt to apply the concept of "proximate cause" to "catching butterflies without a net"), the concept of "foreseeability" is the elusive butterfly that alights on "legal duty" or "legal causation" depending on the deciding majority.

A. Powers, Prosser, Keeton, Green, Thode, Dorsaneo and Causation

1. Powers, Prosser and Keeton

In response to critics asserting that the Texas Supreme Court was improperly weighing evidence to overturn jury verdicts, Dean Powers argued that the Court was merely doing what prior courts had done in the tort arena—properly deciding issues of "legal duty":

> There is a perception-an accurate perception-that the Texas Supreme Court is increasingly willing to overturn jury verdicts in tort cases. There is also a perception-an inaccurate perception-that the court is doing this by changing the no evidence standard of review.
>
> . . .
>
> The court is shifting more of the normative work of tort litigation away from juries and toward judges, but the court is not accomplishing this, as many lawyers think, by abandoning the traditional standard of no evidence review.

Powers*, Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. at 1699-1700.

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that there is something remarkably odd, and perhaps indicative of an invasion of the jury's function, for that judicial policy-making to occur in *both* areas, simultaneously, and with unprecedented frequency, and in ways that are not candid about the effect on jury verdicts.

[12] As will be seen, sometimes the appearance of weighing the sufficiency of evidence cannot be avoided. *City of Keller*, despite Justice Brister's scholarly exegesis and vigorous nod to art. I, § 15, is an example, at least according to the concurrence by Justice O'Neill. 168 S.W.3d 802, 833 (O'Neill, J., concurring) (Both the majority opinion and concurrence in *City of Keller* are discussed in detail *infra*, pp. 33-34). Professor Dorsaneo also strongly suggests the Court *is* impermissibly weighing evidence, at least in *Allbritton* and cases that follow it. Dorsaneo, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. at 1498 ("[The] companion developments [after Allbritton] have shifted the locus of the decision-making process away from juries and ultimately toward the appellate courts"). One also can't help but wonder if the Court is only appearing to do indirectly—new definitions, new requirements, new standards—what it is really doing but otherwise prohibited from doing directly: second guessing juries and courts of appeals in their weighing of the evidence in order to assure defense-oriented outcomes.

Dean Powers noted that the Court is "assigning more questions of policy to the court than to the jury…the court is accomplishing this, *not* by changing the no evidence standard of review, but by attending to the question of *duty*." *Id*. (emphasis added). "*Defining legal duties has always been a proper role for courts*." *Id*. (emphasis added).[13]

Dean Powers proceeded to analyze the divergent approaches of Dean Keeton and Leon Green. Keeton preferred to deal with the "duty" issue in terms of "proximate cause," and leave much of the issue to a jury to determine. Leon Green preferred a duty-risk approach, where judges considered "duty" in terms of risks and scope of liability; "Green was primarily interested in moving issues about the *scope* of a defendant's liability out of the proximate cause issue and into the duty issue…" *Id.* at 1702. "The difference is that, under Keeton's approach, more of the work is done under the rubric of proximate cause; under Green's approach, more of the work is done under the rubric of duty...." *Id.* at 1703. But as far as the jury's role, Dean Powers noted:

> This difference is not just about analytical structure, it is also about allocating power in the litigation process. Duty is usually an issue for the court; breach and proximate cause are usually issues for the jury. The crucial difference is that Green's approach assigns more power to the court; Keeton's approach assigns more power to the jury.

Id.

As will be seen, Green would not have agreed that his approach assigned more power to the court and took decision-making away from the jury. Consistently, for over four decades, he lamented the impact the concept of "proximate cause" (and its conflation with legal duty) had on *diminishing* the role of juries. And as will also be seen, in the last twenty-eight years the Texas Supreme Court has not confined its policy-making role to the "legal duty" issue, but also frequently reversed jury verdicts by deciding policy or "duty" issues under the guise of "proximate cause," a development that would have no doubt greatly displeased both Keeton *and* Green. At least one prominent legal scholar has strongly criticized Dean Powers' conclusion that Green would have agreed that the Court recently was simply performing proper legal duty analysis:

> I disagree with Dean Powers' assessment that what is happening in Texas is restricted to an appropriate exercise of the Texas Supreme Court's law-question jurisdiction. I also believe that Dean Green would not have approved of what Dean Powers calls the court's

[13] Of course, the Powers article was written before *City of Keller*, discussed below. And this formulation practically begs the question: Is the Supreme Court getting around the prohibition on weighing the sufficiency of the evidence, at least in causation cases, by sidestepping the evidentiary issue and re-casting the issue as a "legal" or even "legal duty" issue, where it simply disagrees with the jury's (and court of appeals') view of the evidence? This is exactly what Justice Hecht accused the majority of doing , twice, in *Lofton v. Texas Brine Corp*., 777 S.W.2d 384, 388 (Tex 1989) (Hecht, J., dissenting) ("The Court cannot hold that the evidence in this case is factually sufficient to support the judgment. Article V, section 6 of the Texas Constitution makes the court of appeals 'determination of the factual insufficiency of the evidence in a case "conclusive"…Twice this Court has reversed the court of appeals for failing to review the evidence by the proper legal standards." Justice Hecht proceeds with even harsher words for the majority.); *see also* dissent by Justice Gonzales, 777 S.W.2d at 387 ("The court of appeals has twice found the evidence factually insufficient; we have no jurisdiction to review it."), and concurrence in *Pool v. Ford Motor Co*., 715 S.W.2d 629, 638 (Tex. 1986) (Gonzales, J., concurring).

> increasing tendency to overturn jury verdicts or to otherwise minimize the jury's role in the tort litigation process.
> …
> It is unlikely, however, that Dean Green would have approved of an appellate court's use of a particularized duty analysis in tort cases as a doctrinal device to shift power away from the jury and the trial judge to the appellate courts.

Dorsaneo, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. at 1521-22 (citations omitted).[14]

Powers noted that the Keeton approach, with its emphasis on "proximate cause," prevailed for many years in Texas, in large part due to the influence of Charles Prosser, especially on the Restatement (Second) of Torts.[15] Powers, *Judge and Jury*, 75 TEX. L. REV. at 1703. Quoting Powers:

> The Keeton-Prosser model assigns most questions to juries; the deferential legal sufficiency standard of review protects the jury's answers to those questions. It is not surprising that plaintiffs are enamored of this combination. Conversely, it is not surprising that defendants are leery of it. In fact, that combination is loosening its grip on Texas law, but not because the supreme court is in the process of abandoning the traditional standard for review for legal sufficiency points of error. *What is really happening is that the court is reinvigorating the concept of duty*, and the court is doing this for intellectually sound reasons…By articulating more particularized duty rules, the court has clearly affected the relative power of judges and juries…My point instead is that the court has accomplished these changes [putting more power into the hands of the courts] through the substantive concept of duty, not by altering the standard of review…

Id. at 1704 (emphasis added).[16]

[14] Professor Dorsaneo's landmark article is discussed in more detail *infra*, pp. 17-18, 43-44.

[15] Keeton and Prosser were well aware of many of the problems with the "proximate cause" formulation: "The word 'proximate' is a legacy of Lord Chancellor Bacon, who in his time committed other sins." *Prosser and Keeton on Torts*, Ch. 7, § 42 (Fifth ed. 1984).

[16] Dean Powers also recognized there was potential danger in the courts recent re-focus on duty rules: "…Are we better served by broad duty rules or narrow duty rules?…[I]t would be a mistake for the court to hold that, because all mixed questions of law and fact have some normative aspects, all of them are, ipso facto, questions of duty for the court. Whatever theoretical appeal such a claim might have, it would have the *pernicious effect of turning every negligence or product defect finding into a duty issue reviewable de novo by appellate courts*. It would similarly make *every* negligence and product defect case potentially subject to *resolution at the summary judgment* stage because every claim of negligence or product defect could be decided as a matter of law." Powers, *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699 (1997) (emphasis added).

In light of Dean Powers comment, it now makes sense to ask if the Court has gone far beyond simply focusing on "legal duty?" When for various reasons it cannot or does not decide a case based on pure "legal duty" concepts, is it now actively second-guessing juries in the causation arena—often in ways that smack of weighing evidence?[17] Dean Powers himself seemed to invite this inquiry: "I focus on cases that involve the relationship between duty and breach, not cases involving the relationship between duty and proximate cause, even though Green and Keeton themselves were more interested in the second relationship." Powers, *Judge and Jury*, 75 TEX. L. REV. at n. 21.[18]

This was one of Leon Green's major fears: that the amorphous and difficult concept of "proximate cause" (and its amorphous companions like "substantial factor") would be used by activist appellate judges to wrest away even more power away from juries, far beyond what he viewed as the appropriate role of the courts in deciding "legal duty" concepts.

2. Green

Dean Leon Green despised the term "proximate cause" and for a number of reasons. One author quotes at length various descriptions by Green of the concept:

> But his most important early reading was connected with his almost monomacal [sic] focus on the bundle of confusions that traveled under the label "proximate cause." Green hated the proximate cause concept in its own right. Indeed, he must have expended considerable energy thinking up new ways to insult it.

David Robertson, *The Legal Philosophy of Leon Green*, 56 TEX. L. REV. 393, 403 (1978).

Included in those "insults":

> "[Proximate cause] is a *parasite* which has sucked the blood of the judicial process so completely in some areas that its present usage only betrays the *paralysis of rational thought* on the part of the profession." *Proximate Cause in Connecticut Negligence Law*, 24 Conn. B.J. 24 (1950) (footnote omitted). "The proximate cause issue is the product of a century of *professional bombast* and buncombe utilized to create and define a *counterfeit concept*…" Green and Smith, *Negligence Law, No Fault and Jury Trial—II*, 50 TEX. L. REV 1297, 1307 (1972). "[T]he hunt for proximate cause and intervening agencies is very much like the old sport of '*snipe hinting'* with unsuspecting victims always left holding the bag."

[17] Dorsaneo answered with an emphatic "YES!" *See* Dorsaneo, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. at 1535-36.

[18] Dean Powers also noted the Texas Pattern Jury Charge appears to have adopted the Prosser-Keeton approach: "Negligence (that is, breach) is defined broadly as the care of a person of ordinary prudence. 1 State Bar of Texas, Texas Pattern Jury Charges PJC 2.1 (1996). Proximate cause is defined roughly as cause in fact plus foreseeability." Powers, *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699. He also noted "producing cause" in products liability law does not include foreseeability. "Both of these questions are normally left to the jury." *Id.* Perhaps not, as will be seen.

> *Illinois Negligence Law IV: Proximate Cause*, 40 ILL. L. REV. 1, 28 (1945) (footnote omitted). As employed in many cases, "it is much like a *backhanded blow in the face* to one who has always been held in affection." Id., 24. "The court could not resist flexing its knees to the *proximate cause obsession*." Identification of Issues in Negligence Cases, 26 SW. L. J. 811, 823 (1972).

Id. at 392-393 n.52 (emphasis added).

Robertson also quoted these Green excerpts:

> The "proximate cause" doctrine, with all of its variations in meaning, is the most imprecise and most confusing of all tort-law doctrines….But it had and still has all the qualities of a habit-forming drug, and is now reached for to relieve the pain of reasoning out the simplest case, though good reasons are had in abundance. Green, *Jury Trial and Proximate Cause*, 35 TEX. L. REV. 357, 358 (1957).
> . . .
>
> "There is a sort of pretension to philosophic learning implied in seeking the solution of a difficult problem through a search for 'a" 'the," or "the sole", or some other of the numerous variants of the proximate cause concept." *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471 (1950).

Id. at 393 n.53; s*ee also*, Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 576 (1962) ("The *only cause issue* is the connection between the defendant's conduct and the victim's injury—and all the environmental details so generally treated as causes are merely the circumstantial data that throw light on that issue and the other issues in the case. If they could be dealt with rationally the analysis of a negligence case would lose its mysteries, and most of the *metaphysical* jargon of negligence law—particularly that of causation—could be cut away as is done with *other parasitical growths*.") (emphasis added).

Professor Treece noted Dean Green's strong preference for jury's deciding tort issues:

> Dean Green's writings taken as a whole express a strong personal preference for continuing the use of the jury to decide issues in tort cases…
> . . .
>
> [Green] finds the practice of shifting the power of decision from the trial courthouse to the appellate courtroom, the taking over of the jury's and trial judge's functions by appellate judges, to be the most unacceptable manifestation of this distrust."

James Treece, *Leon Green and the Judicial Process: Government of the People, By the People, and for the People*, 56 TEX. L. REV. 447, 455 (1978) (citing Leon Green, *Jury Trial and Proximate Cause*, 35 TEXAS L. REV. 357 (1957)).

Use of the "proximate cause" term appeared to Green mainly to provide a mechanism for appellate judges to simply re-weigh the evidence to second guess jury decisions:

> In Texas, particularly, by putting "foreseeability" into the definition of proximate cause and giving a proximate cause issue or issues to the jury, the appeals courts give themselves a basis for taking the decision of the issue of negligence from the jury without appearing to have done so.

Treece, *Leon Green and the Judicial Process*, 56 TEX. L. REV. at 456 (citing *East Texas Theatres, Inc. v. Rutledge*, 453 S.W.2d 466, 469 (Tex 1970) ("no evidence that the alleged injuries were proximately caused by any act of commission or omission of the defendant") *Genell, Inc. v. Flynn*, 358 S.W.2d 543, 547 (Tex. 1962) ("no evidence to support the judgment of the trial court").

Green used a four part analysis for negligence actions: causal connection, duty, breach and damages. Causal connection is stripped bare of all the policy considerations which get loaded up on "proximate cause;" the inquiry is simply: did the defendant's conduct "contribute" to the plaintiff's harm? (Green preferred not to even use the term "causation"). Treece, *Leon Green and the Judicial Process*, 56 TEX. L. REV. at 459 n.38; Green, *The Submission of Issues in Negligence Cases*, 18 MIAMI L. REV. 30 (1963); Green, *The Causal Relation issue in Negligence Law*, 60 MICH. L. REV. 543 (1962).; Green, *Identification of Issues in Negligence Cases*, 26 SW. L. J. 811, 812-814 (1972). While the trial court (less so the appellate courts) plays a gate-keeping role on this threshold issue, most of the public policy functions that infect the terms "proximate cause" or "substantial cause" concepts are mainly confined to the "duty" issue, where Green acknowledge there is some, limited, role for the courts, certainly more so than on the causation issue. Cause is a simple factual inquiry:

> Green is quite careful to state that the causal issue as he urges that it be phrased and used does not raise questions of responsibility or culpability. It is a simple issue, simply phrased. It deals with facts…The duty issue is the second issue for consideration of the judge. As used, "duty" is an imprecise term, describing a basic decision that the judge must make in every tort case in order to resolve the "law" question that every case presents.

Treece, *Leon Green and the Judicial Process*, 56 TEX. L. REV. at 461.

Green feared judges would use "proximate cause" to ignore juries:

> Most courts that use "proximate cause" analysis share this decision with juries. This practice is incredibly wasteful and inefficient,

> because it leads appellate courts to *substitute their judgment for that of the jury* on the proximate cause issue with great frequency.

Id. at 466 (citations omitted) (emphasis added).

Green noted continuing tension between the two concepts as used in the courts:

> The war between the duty-risk concepts and causation doctrines continues unabated, and probably will never be resolved…The two methods of dealing with tort cases are mutually exclusive, and the attempt to make *use of both in the same case* frequently results in confusion and erroneous decisions.

Leon Green, *Duties, Risks, Causation Doctrines*, 41 TEX. L. REV. 42, 43 (1962)

> As indicated earlier, the courts developed the causation doctrines before the duty-risk concepts were developed, and before the several issues required to be supported by the plaintiff in a negligence case had been clearly formulated, and before the respective functions of judge and jury had been delineated.

Id. at 62.

In the same article Green dissected a then-recent Texas Supreme Court opinion, *Genell, Inc. v. Flynn*, 358 S.W.2d 543 (Tex. 1962) (involving a plaintiff injured trying to open a door admittedly maintained negligently); Green criticized the court for using the "foreseeability" issue in reversing the causation finding of the jury. He showed the court was impermissibly weighing evidence when it launched into its "foreseeability" analysis; a key discussion bears lengthy repetition in light of *Allbritton*:

> No point will be made here of the court's action in utilizing the negligence foreseeability formula as a test of proximate cause. That has been recognized as error, but error lived with so long that to correct it at this late date would upset the profession. Hence it will be assumed that proximate cause is a legitimate issue in the case to be tested by the foreseeability formula. Is it an issue of law for the court, or an issue of fact for the jury? As generally used, proximate cause is an issue of law for marking the extent of a defendant's duty. In Texas it is more frequently an issue of fact for the jury, if supported by evidence. Apparently this is the sense in which proximate cause is here used by the court. But the supreme court has no jurisdiction to decide an issue of fact. Only if there is no evidence to support the issue may the court's jurisdiction be invoked, and its power exercised. Hence the court in order to have an issue of law to pass upon is forced to say there is no evidence to support the issue of proximate cause. It so held, and justifies its holding by the recital of the facts of the case.

> But here the court is on shaky ground. First, the court concedes the defendant's negligence, which itself was based on foreseeability of some harm, not the particular harm, which the victim suffered as a result of defendant's conduct. If there is enough foreseeability to support the defendant's negligence, why not enough or at lease some evidence to support the proximate cause issue which is tested by the same formula applied to the same facts?
> Second, the use of the "no-evidence" test to determine whether the jury finding of proximate cause should be affirmed is highly confusing. There is no dispute in the evidence that Rory's injury was factually caused or contributed to by defendant's negligently maintained door. The only challenge to the judgment below is o that aspect of proximate cause involving "foreseeability" of injury to Rory. This involves the application of a standard by the jury whose judgment Texas courts have consistently held must stand unless the contrary appears so clearly "that reasonable men cannot differ." To speak of testing the jury's judgment in terms of "no evidence" seems wholly inconsistent with the jury's exercise of its function on the undisputed facts of the case, and also a repudiation of the court's self-restraint in allowing the jury's judgment to stand.

Id. at 72-73.

Green concluded this article as follows:

> Although by virtue of this precedent the assignment of "no evidence of proximate cause" may well become a life-saver by which a losing defendant below can obtain the supreme court's judgment on the facts of his case, causation doctrines have been used for many other purposes no more legitimate.

Id. at 74.[19]

[19] Dean Green elsewhere wrote about the judicial reaction to the empowering of juries and attempts to circumscribe the role of judges:

> The courts could not and did not accept this defeat and surrender of power. They performed an exceedingly clever maneuver. In order not to offend the rule against comment on the weight of evidence, they simply transmuted specific circumstances into questions of law,…So it is that principles, theories, doctrines, rules and formulas of law, procedural and substantive, have been spun and refined without limit; and there seems to be no way to bring to an end this upward-spiraling process of lawmaking and law-refining…it can be said with assurance that the appellate courts have now secured control of all the essentials of jury trial.

Leon Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482,485-86 (1956).

Dean Green wrote another law review article in response to a judicial opinion on proximate cause he found particularly troubling. After the Texas Supreme Court decided *Biggers v. Continental Bus Systems*, 298 S.W.2d 79 (Tex 1956), he wrote:

> Without reference to the correctness of the decision, the opinion of the majority of the supreme court demonstrates several propositions: (1) Texas appellate courts for all practical purposes have taken over the functions of jury trials in negligence cases. (2) The useless and confusing terminology of "proximate cause" produces more and more trouble for litigants and the courts. (3) The courts have failed to develop an understandable and reliable formula for the analysis of negligence cases.

Leon Green, *Jury Trial and Proximate Cause*, 35 TEX. L. REV. 356, 357 (1956-1957).

Showing great prescience for an article written over fifty years ago, Green also wrote:

> The taking over of the jury's function in negligence cases by appellate courts has been steadily progressing everywhere but, I believe, in no other American jurisdiction at such a pace and so completely as in Texas…The fact is that jury trial in negligence cases is now more completely dominated by appellate courts than at any other time in the history of common-law jurisprudence.

Id.

Green's main criticism of *Biggers* was the use of a common device: "conversion of a question of fact into a question of law;" this could be abused to give "the appellate courts with every opportunity to examine the evidence and to substitute their own conclusions for those of the jury." *Id*. at 357-358. "There is nothing to prevent this invasion of the jury's province except the self-restraint of the judges themselves." *Id*.[20]

> When doctrines lack precision and rationality they blur the functions of court and jury. In the confusion that results anything can happen, and one of the things that does happen is a taking over of more and more power by the judges themselves…[Proximate cause] has made possible the transfer of the complete and ultimate power of decision in these cases to the highest court, without the realization of what has been done...

Id.

[20] On remand, in *Continental Bus Sys., Inc., v. Biggers*, 322 S.W.2d 1 (Tex. Civ. App.—Houston 1959, writ ref'd n. r. e.), the First Court of Appeals affirmed the trial court's judgment in favor of the plaintiff. The Court concluded that "as to the element of causation," it could not say that "the jury's verdict is clearly wrong, manifestly unjust or shocking to the conscience." In reaching this conclusion, the Court explained, "[w]e feel the jury was warranted by the evidence in concluding that the failure to apply the brakes and excessive speed substantially contributed to the collision. This is all that is necessary to establish legal causation."

Green then laid out, again, his four part analysis of negligence cases, with the first being a showing of the causal relation between defendant's conduct and plaintiff's injury. "Causal relation was so clear as not to be an issue in *Biggers*." *Id.* at 359. Given the negligence *per se* of the excessive speed of the bus, the court resorted to "proximate cause" to revisit the duty issue already decided once excessive speed and violation of statute were clear. The court found that the bus's excessive speed did "nothing more than furnishing the occasion of the collision." Green conceded this reading had been employed previously in Texas law, though he questioned the dismissiveness of the phrase.[21]

Green then concluded:

> But the point here to be emphasized is that this transmutation of the *negligence* issue into "proximate cause" by employing the heart of the negligence formula gives the court another opportunity to take over the jury's function if it so desires.

Id. at 362 (emphasis added).

In another article, Dean Green addressed the "substantial factor" phrase which included key parts of what he called "orthodox" negligence analysis: "Did the defendant's conduct contribute to the victim's injury (the causal relation issue)?…Somewhere along the line of defendant's conduct the doing of something which contributed to the victim's injury must be found." Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 546 (1961-1962). Green next analyzed "duty": "[The 'substantial factor formula's'] value for the judge in performing his function, or its value for a jury passing on the issue, *is slight*, to say the most…The fact that "substantial" cannot be defined, further analyzed or broken down into lesser terms, frets…all those who do not keep in mind the necessities of the procedural apparatus of the litigation process." *Id.* at 554. He described the term "substantial factor" as merely a "highly seductive 'decoy.'" *Id.* at 557.[22]

3. Thode

[21] The court in *Allbritton* would repeat this canard almost word for word in excusing the defendant's conduct there. *See Allbritton*, 898 S.W.2d 773, 776 (Tex. 1995) ("Legal cause is not established if the defendant's conduct or product does no more than *furnish the condition* that makes the plaintiff's injury possible") (emphasis added).

[22] In the same article, Green described the landmark *Palsgraf* decision as follows:

> The trouble with *Palsgraf* is that the issue to which Judge Cardozo is talking is not clearly formulated. Causal relation in the case is clear…That there was a duty to Mrs. Palsgraf as a waiting passenger is clear, but whether defendant's duty included the risk that befell her is seemingly what [legal scholars Honore and Hart] think is involved, and that on this basis Judge Cardozo decided that the risk was determined on the basis of "foreseeability." Despite some of the language in [Justice Cardozo's] opinion, that interpretation is not consistent his opinions [in other cases]...In Palsgraf the important fact is that the *highest appellate court*, after all the evidentiary data and arguments were in, and after consideration of all the factors involved, simply decided that the injury suffered by Mrs. Palsgraf was not a risk within the scope of any duty owed her as a passenger."

Green, *The Causal Relation Issue*, 60 MICH. L. REV. at 566 n.72.

Professor Thode was a disciple of Green's, agreeing that a better approach than proximate cause was a four part test very similar to Green's four part test:

> …there are four basic issues that in some manner must be decided in plaintiff's favor in order for the plaintiff to obtain judgment. They are: (1) Is there a factual connection between plaintiff's injury and defendant? (2) Does the legal system's protection extend to the interest that plaintiff seeks to vindicate; and if some protection is afforded what standard of care does the legal system impose on the defendant? (3) Was that standard of care breach by defendant? (4) What are the damages?

E. Wayne Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1, 1 (1977).[23]

The trial and appellate court's public policy setting function takes place not in causation analysis, but in part (2), when the legal system's protection is determined: "This is a policy decision in purest form." *Id.* at 10; *see also id.* at 14 ("Up to this point it is clear that the court, not the jury, makes the decision about the scope of the legal system's protection."). Like Green, he criticizes the use of "proximate cause" in the factual causation analysis:

> The factual connection issue, if presented at all by such an instruction, is not presented to the jury in a clear-cut manner. The above definition [of proximate cause] is intertwined with issues that are irrelevant to whether the factual [causation] connection exists. For example, whether the result was *foreseeable* has absolutely nothing to do with whether the factual connection exists.

Id. at 12-13 (citations omitted) (emphasis added).

One of Thode's best contributions was his identification of the hocus pocus[24] that occurred *after* the jury's application of proximate cause,[25] when the case proceeded to the appellate court(s):

> Whatever the definition [of proximate cause], the jury is not let in on the secret in any understandable way that it is deciding the scope of the legal system's protection when it decides that the defendant's conduct was or was not a "proximate cause," a "substantial factor" or a "legal cause" of plaintiff's injury. But the story is not yet complete. When the case reaches the appellate court with an attack on the jury's decision on "proximate cause" or "substantial factor" or "legal cause," the appellate court must determine the correctness of the jury's finding. In doing so, the

[23] These mirror Green's analysis test. *See* Green, *The Casual Relation Issue*, 60 MICH L. REV. at 546.

[24] *See* Bingham, *Some Suggestions Concerning 'Legal Cause' at Common Law*, 9 Colum. L. Rev. 16, 23 (1909).

> appellate court usually makes the decision on a policy basis—asserting and applying one or more policies that the jurors had *not been instructed* were the *keys to the issue*. In fact, the *jury was told nothing* about these policies. Thus, the appellate decision about whether the jury was right or wrong in its application of the defined phrase is made by giving that phrase *an entirely different* content than that found in the definition the jury applied.[26]

Id. at 15 (citing *Stoneburner v. Greyhound Corp*., 375 P. 2d 812, 816 (Ore. 1962) ("The foregoing instruction [on proximate cause] is talking about ultimate legal liability—not about causation. The jury, however, is not in on this secret.")).

Thode, like Green, disliked the conflation of "foreseeability" in the duty issue (often impliedly or expressly included in the "negligence/ordinary care" definition), with the use of foreseeability in the "proximate cause" instruction or issue. Thode, *Tort Analysis*, 1977 UTAH L. REV. at 20 ("Many, if not most, proximate cause jurisdictions use *foreseeability* as the prime jury test to determine the *legal* cause [public policy/scope of protection] aspect of proximate cause.") (Thode in this section went on to cite the Texas case of *San Antonio and A.P. Ry. v. Behne*, 231 S.W. 354 (Tex. Comm. App. 1921), where the legal duty issue was decided by use of an appropriate negligence *per se* standard, yet nevertheless the court held as a matter of law that the risk resulting in harm to the plaintiff was not a *foreseeable* risk. In other words, there was a legal duty, but really, there wasn't! As will be seen, this wouldn't be the last time a Texas high court forced to affirm a legal duty issue and finding of breach nevertheless used the "foreseeability" concept to negate that very legal duty).

For both Green and Thode (and of course other like-minded scholars), the causation issue should be stripped of concepts like "proximate" or "legal" cause when submitted to the jury—these public policy concepts are better dealt with in the "legal duty" element. Thode, *Tort Analysis*, 1977 UTAH L. REV. at 24 (citing Green, *The Causal Relation in Negligence Law*, 60 MICH. L. REV. 543, 548 (1962)). Of course, one aspect of the Green approach is that the appellate court's policy-making function is more confined by almost always being limited to the second [duty, or sometimes called "duty-risk"] element; this element is clearly identified as a proper place where judicial policy-making occurs, instead of the appellate courts flitting about between the separate elements of "duty" and "causation," whatever is necessary to overturn the jury's verdict.

Thode recognized with some satisfaction that late in his career even Prosser came around to much of Green's view:

> Dean Prosser, in "*Palsgraf Revisited*," supplies more reasons for favoring the duty-risk analysis [over the proximate cause formulations]:
> "Direct causation, the scope of the risk, the unforeseeable plaintiff, the last human wrongdoer, the distinction between cause and condition, limitations of time and space, *substantial factors*,

[26] This is certainly true of Justice Cornyn's concurrence in *Allbritton*, which fails to even hint how the jury could have been better-guided to reach this result. *Allbritton*, 898 S.W.2d at 777-85.

> natural and probably consequences, mechanical systems of multiple rules, and all the rest of the rigmarole of "proximate cause," all have been tried and found wanting in situations that inevitably arise to which they do not and cannot provide a satisfactory solution. There is no substitute for dealing with the particular facts, and considering all the factors that bear on them, interlocked as they must be. In this respect Leon Green has been for a quarter of a century a voice crying in the wilderness; as one of the original scoffers at his doctrine, I make him belated obeisance."

Thode, *Tort Analysis*, 1977 UTAH L. REV. at 33 (emphasis added) (citing William Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953)).[27]

4. Dorsaneo

Since much of Professor Dorsaneo's remarkable article focused on the shifting standard of evidentiary review in the Supreme Court, and on *Allbritton*, the article is discussed in more detail in the two sections below on *City of Keller* (decided four years later but which Professor Dorsaneo anticipated) and *Allbritton*. He described the article's purpose:

> The purposes of this paper are to…[discuss the appellate standard of evidentiary review] and to describe and criticize the recent treatment of the duty and causation issues in tort litigation in the Texas Supreme Court. The court has not acknowledged that the standards of evidentiary review applied to jury findings have changed and one prominent scholar has concluded otherwise [citing to the "provocative" article by William Powers, *Judge and Jury in the Texas Supreme Court*, 75 TEXAS L. REV. 1699, 1719 (1997)], but an examination of the court's recent jurisprudence reveals significant changes have been made in the application of the no-evidence standard of review traditionally applied by Texas courts in assessing the probative value of evidence to support jury findings. During roughly the same ten-year period, the Texas Supreme Court has otherwise modified the respective roles of judges, juries, and reviewing courts in Texas by revising its treatment of duty and causation issues in tort cases. These companion developments have shifted the locus of the decision-making process away from juries and ultimately toward the appellate courts.[28]

[27] Thode noted Dean Prosser was "not completely converted." Thode, *Tort Analysis*, 1977 UTAH L. REV. at 33 n.127 (citations omitted).

[28] Not surprisingly, Dorsaneo starts his paper with the Green quote that "There is nothing to prevent…invasion of the jury's province except the self restraint of the judges themselves." Dorsaneo, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. at 1497 (quoting Green, *Jury Trial and Proximate Cause*, 35 TEX. L. REV. 357, 358 (1957)). Dorsaneo next quotes Green's lament that: "Somehow everything in life conspires against courage." *Id.* (quoting Leon Green, *Must the Legal Profession Undergo a Spiritual Rebirth?*, 16 IND. L. J. 15, 28 (1940)).

William Dorsaneo, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. 1497, 1497-98 (Fall 2000).

As will be seen, Professor Dorsaneo remarked on a court that has departed from longstanding rules applied to evidentiary review and duty and causation. He also viewed *Allbritton* as a low water mark in terms of the court's inability to refrain from improperly weighing evidence. Professor Dorsaneo strongly disagreed with Dean Powers that the court simply has been properly deciding cases in the "duty" area.

5. So What?

One can legitimately ask at this juncture: why go into all this background? Proximate cause and producing cause with all of their problems have been around Texas jurisprudence for many decades, and as much as one might prefer the Green/Thode approach, tough! But there was rampant confusion along with inconsistent approaches in Texas appellate courts prior to *Allbritton*, especially as far as the use of the terms of "proximate cause," "legal cause," "cause in fact," "substantial factor" and "foreseeability," and more than a little disorientation in how those issues were allocated between jury and judge. As will be seen, this made it surprisingly easy for the Texas Supreme Court to step into this breach of confusion and increase the frequency that jury verdicts were overturned on the "causation" issue.

The extensive causation literature, as well as the pre-*Allbritton* cases, all caution of the dangers the terms "proximate cause" and "substantial factor" carry for jury verdicts and courts of appeals, and at a minimum serve as a blinking yellow warning light that whenever the state's highest court starts mucking around in the causation arena, there is at least a danger it is really simply substituting its own view of the evidence for the jury's.

IV. Fourteen Year History of "Causation" Prior to *Allbritton*

A. Introduction

Of the eight major causation decisions issued by the Court in the fourteen years preceding *Allbritton*, plaintiffs won five and lost three (two of these, *Dresser Industries Inc. v. Lee* and *General Motors v. Saenz*, were decided shortly after the pro-Defendant block attained a working majority on the Court).[29] Additional causation cases decided in that time period are also discussed below. Three of the eight, *Lofton v. Texas Brine Co.*, *El Chico Corp. v. Poole* and *Havner v. E-Z Mart Stores, Inc.,* arguably provided the license for later courts to second-guess juries through the device of causation analysis. Another, *Lear Seigler, Inc. v. Perez*, provided

[29] *Corbin v. Safeway Stores, Inc*., 648 S.W. 2d 292 (Tex. 1983) is not included in the list of eight, though perhaps it should be. Though Judge Spears speaks in *Corbin* in terms of "proximate cause," this is actually a duty case; it highlights the problem of shifting the concept of "foreseeability" back and forth between duty and proximate cause ("…the foreseeability of the harmful consequences resulting from the particular conduct is the underlying basis for liability." *Id.*). The "Kilgarlin Court" would do this even more obviously in *Poole*, discussed in detail *infra*, pp. 20-21.

much of the language and reasoning used in *Allbritton* and since to justify judicial activism in the causation arena.[30]

B. The Major Pre-*Allbritton* Cases

1. *Nixon v. Mr. Property Mgmt.*, 690 S.W.2d 546 (Tex. 1985)

In *Nixon* the Court reversed summary judgment in favor of the owner and manager of property where a young girl was dragged into a vacant apartment and raped. The Court held there was some evidence that the property owner's failure to secure the apartment could have proximately caused the rape. The dissent argued that the apartment was merely the location where an inevitable crime occurred.

The *Nixon* majority had little trouble finding a "duty," since a Dallas City ordinance set "minimum standards, responsibilities" for owners of apartments, in terms of securing doors and windows, and the property manager admitted one purpose of the statute was to prevent the very crime committed. The majority then turned to proximate cause, and held there was *some evidence* of "cause in fact" and "foreseeability," placing emphasis on the existence of prior incident reports at the apartment complex:

> Finally, we turn to the question of foreseeability. Foreseeability means the actor, as a person of ordinary intelligence, should have anticipated the dangers that his negligent act created for others. Usually, the criminal conduct of a third party is a superseding cause relieving the negligent actor from liability. However, the tort-feasor's conduct will not be excused where the criminal conduct is a foreseeable result of such negligence…The evidence is replete with instances of prior violent crimes occurring at [the apartments]. This record certainly provides evidence that further acts of violence were reasonably foreseeable. Evidence of specific previous crimes on or near the premises *raises a fact issue* on the foreseeability of criminal activity.

Nixon, 690 S.W.2d at 549-50 (citations omitted) (emphasis added).

The dissent began by focusing on the "cause in fact" element of proximate cause:

> In *Kerby v. Abilene Christian College*…this court adopted a "but for" test to determine cause in fact. Under *Kerby*, the alleged negligence is not a cause in fact unless "but for the conduct the accident would not have happened."

Nixon, 690 S.W.2d at 555 (McGee, J., dissenting) (citations omitted).

[30] As will be seen, though *Lear Seigler* was a Gammage opinion (he was almost invariably in the "Kilgarlin majority"), it decided for the defendant, and loosely used concepts like "substantial factor" that would become so important in cases like *Allbritton* and *Ledesma*.

The dissent concluded its "but for" analysis: "A missing or unlocked door at the Chalmette Apartments was not a cause in fact of R.M.V.'s rape. Under the facts presented here, the criminal's *fortuitous* choice of venue is not sufficient to satisfy the 'but for' test announced in *Kerby*." *Id*. at 556 (emphasis added).

The dissent might have been more persuasive to others on the Court had it focused more on the evidentiary tool of the "substantial factor" test, which the majority referenced in passing ("Cause in fact denotes that the negligent act or omission was a *substantial factor* in bringing about the injury and without which no harm would have been incurred." *Id.* at 549 (emphasis added)).[31] This would be the later Court's successful approach in *Allbritton* and *Ledesma*.

2. *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987)

El Chico Corp. adopted a negligence standard for dram shops in the state. In addressing the dram shop's "duty," the Court stated, "More recently, we said duty is the function of several interrelated factors, the foremost and dominant consideration being the *foreseeability* of the risk." *El Chico Corp*., 732 S.W.2d at 311 (citations omitted) (emphasis added).

Turning to causation, the court again relied on the same "foreseeability" it utilized in the "duty" analysis, as well as "cause in fact:"

> Cause in fact is "but for cause" meaning the negligent act or omission was a *substantial factor* in bringing about the injury and without which no harm would have been incurred.

Id. at 313 (citation omitted) (emphasis added).[32]

The dram shop argued that the cause in fact test was not met, because any duty does not accrue until the patron is intoxicated, and the intoxication is the actual cause of the accident, not the additional [duty-violating] drinks.[33] The court stated:

> [Defendants] misread the [Plaintiffs'] cause in fact burden. The plaintiff must prove it is more probable than not that but for the licensee's conduct, the accident would not have occurred. See *Farley*, 529 S.W.2d at 755-56. In *Farley*, we noted the Plaintiff need not exclude all possibility that the accident occurred other than how he alleges, but instead must only prove the greater

[31] In the context of the majority's opinion, it appears to be using "substantial factor" as a synonym for the "but for" test, and not as an additional element or requirement. In *Missouri Pacific Railroad Co. v. American Statesman*, 552 S.W.2d 99 (Tex. 1977) the Court uses "substantial factor" to mean, "a concurring cause and such that might have been *reasonably contemplated as contributing* to the result…" *Id*. at 104 (emphasis added). Applying this definition, the Court reversed a jury finding of no proximate case as a matter of law; the plaintiff's contributory negligence barred recovery as a matter of law. The dissent strongly implied the majority was weighing the sufficiency of the evidence. *Id*. at 106 (Reavely, J. dissent.)

[32] It is entirely possible that again the term "substantial factor" is being used as synonymous with the "but for" test, except the conjunctive language tied to the "without which" language gives pause, unless the Court was being redundant.

[33] This metaphysical dilemma would more recently bedevil two differently-composed Texas Supreme Courts in *F.F.P. Operating Partners v. Duenez*, 47 Tex. Sup. Ct. J. 1068, in perhaps one of the saddest chapters of the Court since the Republic.

> probability is that the defendant's conduct was a cause of the accident.

Id. at 313.

Since the manager testified to awareness some patrons drive to the restaurant, become intoxicated and then leave by the same means, evidence of foreseeability was present. The Court held that the issue of proximate cause was for the jury. *Id*. at 314. [34]

The opinion noted that the very same week the opinion issued the legislature had adopted the dram shop act, superseding any common law action, and with "a much more onerous burden" than adopted in the case. "This act, however, does not by its terms govern a cause of action arising or accruing before its effective date." *Id*. In language supporting Dean Powers' thesis about the "Kilgarlin" court and duty, the *El Chico* court determined: "The creation of new concepts of duty in tort is historically the province of the judiciary." *Id*.[35] Arguably, the treatment of causation in El Chico would have the more lasting consequences.

3. *Lofton v. Texas Brine Corp.* 777 S.W.2d 384 (Tex. 1989)

In a very controversial decision having strong implications for how the Court handles the Constitutional prohibition against weighing evidence, the Supreme Court again reversed a court of appeals, which had concluded that the trial evidence was insufficient to support proximate cause, reaching the same conclusion after an earlier reversal and remand by the Supreme Court. In this opinion, the majority held that the court of appeals improperly credited the testimony of an interested witness. The dissent argued that the Supreme Court was improperly attempting to influence the factual sufficiency determination of the court of appeals (twice), though the Court lacked jurisdiction to do so

In the first appeal, without argument the Court reversed the court of appeals finding of insufficient evidence of proximate cause, and held the court of appeals opinion failed to detail all of the relevant evidence, and to state in what regard the evidence greatly outweighed the jury's verdict. On remand the court of appeals again held that the "irrefutable fact" that plaintiff's vehicle jumped in front of defendant's eighteen-wheeler less than two seconds before the accident in heavy fog negated causation. The Court held that the opinions changed little, if any, on remand: "In essence, nothing has changed." *Id.* at 386. The "irrefutable" evidence came from an interested witness, the truck driver. Plaintiff's expert testified that portions of the driver's testimony were impossible to reconcile with the physical evidence. The opinion went on to discuss the specific testimony in detail, and then concluded:

> We lack jurisdiction to determine the factual sufficiency of this evidence. We hold only that the court of appeals may not, as it has

[34] As Dean Green predicted before *Poole*, the use of "foreseeability" in both proximate cause (for the jury, according to the court) and duty (where appellate courts frequently become engaged) later allows for judicial mischief in the very causation issue the *Poole* court stakes out for the jury.

[35] *See* Powers, *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. at 1713; *Poole*, 732 S.W.2d at 312, 315.

> done thus far, substitute its own judgment for that of the fact finder. Accordingly, we reverse…

Id. at 387. (citations omitted).

Predictably there were two dissents, one by Justice Gonzales, and one by Justice Hecht. Justice Gonzales joined in Justice Hecht's dissent, and separately wrote:

> I agree with Justice Hecht's dissent but write separately to note that my fear that *Pool v. Ford , Motor Co.,* 715 S.W.2d 629 (Tex. 1986) would be used by this court to second guess the courts of appeals has been realized…We are now swamped with requests to second guess the courts of appeals, that is, to make rulings on sufficiency grounds…Either way, this court is becoming entangled in the review of cases on sufficiency grounds; this is clearly unconstitutional.

Id. at 387-88 (Gonzales, J., dissenting) (citations omitted).

Justice Hecht's dissent was not nearly so kind:

> The Court cannot hold that the evidence in this case is factually sufficient to support the judgment. Article V, section 6 of the Texas Constitution…Stymied by the constitution, the Court cannot decree the result is rather plainly wants to see in this case. To accomplish the desired end, the Court must keep reversing the judgment of the court of appeals until it reaches a result that the Court approves. Always the ground for reversal is that the appeals court either cannot or will not follow the law. For this Court to hold that an appeals court has not conducted its factual insufficiency analysis in a lawful manner, simply to coerce that court into changing its conclusion, is to usurp the constitutional prerogative of the court of appeals.

Id. at 388 (citations omitted).

Justice Hecht had even harsher words for the majority:

> The Court may not agree with the constitutional delegation of the exclusive power to review the factual sufficiency of evidence to the court of appeals; indeed, I *suspect rather strongly that it does substitute its judgment for the finder of fact. ...The Court rightly holds that the court of appeals may not substitute its judgment for the fact finder. Likewise, the Court is constitutionally forbidden to substitute its judgment for the court of appeals.*

Id. at 388-89 (emphasis added).

The dissents appear correct: the majority was unfortunately engaging in weighing evidence to second guess the court of appeal's sufficiency findings. This opinion, more than any other, appears to give license (though often without being cited) to later, defense-oriented Court majorities to use various similar devices (like proximate cause and substantial factor) to second guess later courts of appeals finding the evidence sufficient to support verdicts for plaintiffs.[36]

4. *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470 (Tex. 1991)

In perhaps the other most important of the pre-*Allbritton* cases, Justice Gammage for the majority held against the plaintiff, reversing a court of appeals opinion finding some evidence of legal cause, and held that the trial court properly concluded that there was a lack of legal cause between the sign defect and the injury the Plaintiff.

Plaintiff was driving a truck pulling a flashing arrow sign behind sweeping operations. He had stopped and a van driven by a sleeping driver struck the sign, which in turn struck the plaintiff, who subsequently died of his injuries. Trial court granted the sign manufacturer's summary judgment that its conduct did not cause the accident. There was some evidence that the sign was defective, and another driver testified the day before he had to stop and fix the sign when he was pulling it. Plaintiff's contention was that the sign malfunctioned the day of the accident, and so the sign driver had to get out to fix it. The court of appeals found there was some evidence of causation. Assuming that the sign was defective, the court found no legal causation.

Justice Gammage quoted the Restatement (Second) of Torts:

> In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent…This is necessary, but it is not itself sufficient. The negligence must also be a *substantial factor* in bringing about the plaintiff's harm. The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense…

Id. at 472 (citing to Restatement (Second) of Torts § 431, cmt. a (1965)) (emphasis added).

Finding the sleeping driver dispositive of the causation issue, the opinion continued:

> We recognize there may be cases in which a product defect or a defendant's negligence exposes another to an increased risk of harm by placing him in a particular place at a given time. Nonetheless, there are certain situations in which the happenstance of place and time is too attenuated from the defendant's conduct for liability to be imposed….[W]e conclude that these particular circumstances are too remotely connected with the [defendant's] conduct to constitute legal cause.

[36] See also Moriel, and Justice Cornyn's requirement that trial courts and courts of appeals detail the evidence supporting punitive damage findings.

Id.

Unfortunately, we don't know what argument was made about "foreseeability" to the sign manufacturer of the likelihood a driver would be in harm's way while trying to fix a defective sign which was being utilized as a large warning to drivers to avoid an accident. Perhaps no foreseeability argument was made, since the issue was "producing cause" in this products case. As will be seen, after Justice Cornyn's concurrence in *Allbritton*, a "foreseeability" argument would have its place in the producing cause calculus.

5. *Havner v. E-Z Mart Stores, Inc*, 825 S.W.2d 456 (Tex. 1992)

The Supreme Court reversed the appellate court's no evidence holding regarding causation in a case in which the store clerk was raped and murdered. The identity of the assailant was unknown, and it was not clear whether the clerk left the store of her own volition or was dragged from the store following a robbery.[37] The court of appeals held that there was no evidence tending to prove that if the store had the missing silent alarms and other security measures, the crime would have been avoided. The Court reversed, noting that even though the exact circumstances leading to the crime were unknown, there was some evidence supporting the plaintiff's theory, and the plaintiff was not required to negate all other possible causes. The dissent argued that this approach effectively shifted the burden to the defense.

6. *Travis v. Mesquite*, 830 S.W.2d 94 (Tex. 1992)

The Court reversed a court of appeals decision affirming summary judgment in favor of police officers and the City of Mesquite. The case involved a high-speed pursuit proceeding the wrong direction on a one-way street. The suspect collided head-on with another car; those injured sued. The court of appeals (and the dissent in the Supreme Court) opined that the officers' conduct could not have "proximately cause" the accident as a matter of law; the majority noted that the officers pursued even though they recognized the dangers associated with such a high speed pursuit.[38]

Just a year after his opinion in *Lear Seigler*, Justice Gammage wrote for a majority finding sufficient evidence to raise a fact issue on proximate cause. He applied a "foreseeability" test.[39]

7. *Dresser Industries, Inc., v. Lee*, 880 S.W.2d 750 (Tex. 1993)

Justice Hecht wrote for the majority, and in many ways seemed to be picking up where he left off in his dissent in *Lofton*. The majority held that despite a prohibition on the plaintiff employee seeking recovery from the employer due to the Workman's Comp Act, the third party defendant was entitled to a jury instruction on "sole proximate cause," based on the employer's conduct,

[37] The majority clearly viewed this factual dispute to be an ideal matter to be resolved by the jury.

[38] There were also issues of immunity in the case.

[39] Perhaps he was more comfortable applying foreseeability concepts in straight negligence cases like *Travis*, than he was in products cases like *Lear Seigler*. Later, in *Allbritton*, Justice Cornyn would not be so reticent in applying foreseeability concepts to producing cause concepts.

and also was entitled to submit the worker's contributory negligence, based on the majority's view of the evidence on this point. A strong dissent from Justice Doggett began:

> In this case a manufacturer provided no warning of any kind whatsoever concerning its product, which is lethal if inhaled over an extended period of time. In its defense, the manufacturer says its product is so dangerous that the decedent's employer should have provided the warning. Additionally, the manufacturer alleges that the deceased worker, who it contends was too ignorant to have understood the warning anyway, should have discovered the defect himself. Today's opinion rewrites the product safety law of Texas to deny protection to those who have "only an eighth grade education," by assuming that such people would "not pay attention to warning labels.

Id. at 755 (Doggett, J., dissenting).

8. *General Motors v. Saenz*, 873 S.W.2d 353 (Tex. 1993)

One month after *Dresser*, the Supreme Court reversed a court of appeals decision affirming a trial court's judgment on a verdict in favor of the plaintiff. Although GM's warning labels were inadequate, the court found that causation was negated by plaintiff's failure to read these inadequate warnings. Much of the disagreement between the majority and dissent revolves around a presumption historically indulged in warning cases: that an adequate warning would have been read. Marking the almost complete change-over in the composition in the court, the dissent takes on an almost shrill tone reminiscent of Justice Hecht's in *Lofton*; the dissent accused the majority of taking "the next step in the dismemberment of Texas consumer product safety law."

C. Other Pre-Allbritton Causation Cases

1. *Schaefer v. Texas Employers' Ins. Ass'n*, 612 S.W.2d 199, 202-204 (Tex. 1980)

In a workers' compensation case, the jury found for the plaintiff. The court of appeals reversed the jury verdict, finding that the expert testimony failed to establish a causal connection between the complained-of injury and the plaintiff's occupation. The Court affirmed the court of appeal ruling, holding that the expert presented by the plaintiff assumed that the plaintiff was infected with a particular type of bacteria, and that such bacteria was present at the plaintiff's place of employment. The court found that these critical assumptions suggested a possibility of a causal connection between the injury and the plaintiff's employment, and that such evidence could not support a finding of causation. In explaining its holding, the Court stated:

> The fact that proof of causation is difficult does not provide a plaintiff with an excuse to avoid introducing some evidence of causation. To ignore the substance of [the plaintiff's expert's] testimony and accept his opinion as "some" evidence simply because he used the magic words "reasonable probability"

> effectively removes this Court's jurisdiction over any case requiring expert opinion testimony. Under such view, so long as an expert states the words "reasonable probability," in giving his opinion, there would be some evidence. The question would then be solely one of sufficiency of the evidence over which this Court has no jurisdiction.

Id. at 205 (internal citations omitted).

The dissent argued that the majority's ruling would require the plaintiff to scientifically exclude all other reasonable explanations in order to prevail.

2. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 432 (Tex. 1984)

The plaintiff brought a wrongful death action against an aircraft manufacturer following an airplane crash, and the jury rendered a verdict in favor of the plaintiff. The trial court rendered a j.n.o.v. in favor of the defendant, while the court of appeals reversed and remanded for a partial new trial. The Court adopted a pure "comparative causation" scheme, in which a plaintiff's contributory negligence was compared to the defendant's product or conduct. Explaining its holding, the Court stated:

> Comparative causation is especially appropriate in crashworthiness cases where the product defect causes or enhances injuries but does not cause the accident. The conduct which actually causes the accident, on the other hand, would not cause the same degree of harm if there were no product defect. Rather, it is a combination of factors that causes plaintiff's injuries. The jury is asked to apportion responsibility between all whose action or products combined to cause the entirety of the plaintiff's injuries.

Id. at 428.

However, in this case, the Court reversed and rendered in favor of the plaintiff, holding that the defendant failed to preserve its contribution claim. *Duncan's* common-law contribution scheme was short-lived, however, because the legislature overhauled the contribution statutes in 1987 with a new scheme that applied to the cases previously governed by *Duncan*. *See Stewart Title Guar. Co. v. Sterlin*g, 822 S.W.2d 1, 5 (Tex. 1991). Chief Justice Pope dissented from what he called a "far-ranging opinion" – he stated that while he agreed with the majority's adoption of comparative fault, he disagreed with the result, arguing that a remand was proper to allow the defendant to assert its contribution claim.

3. *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 732 (Tex. 1984)

The trial court granted a default judgment against non-answering defendant and severed case against remaining defendant that had filed an answer. The defaulting defendant appealed. The Court of Appeals reversed the default judgment, holding that the plaintiff had failed to offer any evidence of causation. The Court reversed the judgment of the court of appeals and held that at a

default judgment hearing, the plaintiff must present competent evidence of a causal nexus between the event complained of and the party's alleged injuries:

> Whether the event sued upon caused any injuries to the plaintiff is another matter entirely. The causal nexus between the event sued upon and the plaintiff's injuries is strictly referable to the damages portion of the plaintiff's cause of action. Even if the defendant's liability has been established, proof of this causal nexus is necessary to ascertain the amount of damages to which the plaintiff is entitled. This is true because the plaintiff is entitled to recover damages only for those injuries caused by the event made the basis of suit; that the defendant has defaulted does not give the plaintiff the right to recover for damages which did not arise from his cause of action. To hold, as we do, that a defaulting defendant does not admit that the event sued upon caused any of plaintiff's alleged injuries is entirely consistent with the rule that a judgment taken by default admits all allegations of fact set out in the petition, except for the amount of damages. Proving that the event sued upon caused the plaintiff's alleged injuries is part and parcel of proving the amount of damages to which the plaintiff is entitled. The causal nexus between the event sued upon and the plaintiff's injuries must be shown by competent evidence. We conclude that the mandate of Rule 243 that the court hear "evidence as to damages" makes it incumbent upon a party who obtains a default judgment in a personal injury action to present competent evidence of a causal nexus between the event sued upon and the party's alleged injuries.

Id. at 732 (internal citations omitted).

The Court remanded for consideration by the trial court of whether the plaintiff had presented evidence of causation to support the default judgment.

4. *First Int'l Bank v. Roper Corp.*, 686 S.W.2d 602 (Tex. 1985)

The Court reversed and remanded a take-nothing judgment against the plaintiff in a products liability case. The jury was instructed that "if an act or omission of any person not a party to the suit was the sole cause of the occurrence, then no act, omission, or product of any party to the suit could have been a cause of the occurrence." The plaintiff argued that the sole cause instruction poisoned the jury verdict, because it was a comment on the weight of the evidence, and because it improperly inserted negligence into a products liability case. The Court, relying on *Acord v. General Motors Corp.*, 669 S.W.2d 111 (Tex. 1984), agreed and reversed and remanded for a new trial:

> The record on its face shows this error to have been harmful. The evidence at trial clearly established that Mariann suffered injuries from the accident. Yet, in response to the damages issues, the jury found that Mariann suffered no compensable injuries. In addition,

> we reiterate the message of *Acord*. In a closely contested products liability case, it is error to burden the jury with excess instructions which emphasize extraneous factors to be considered in reaching a verdict. The questions in a pre-Duncan products liability case are: was there a defect; did the defect cause damage; and what are the damages. In this case the issue was whether the lawnmower was defective and whether that defect caused Mariann's injuries. The sole cause instruction, however, singled out the acts of the parents and highlighted the question of the parents' negligence. The result, as forecast by the court in Guadiano, was that the jury's attention was diverted from the pivotal issues of the case. The trial court thus committed harmful error by submitting the instruction because it was a comment on the weight of the evidence and the case as a whole.

Id. at 605.

5. *Magro v. Ragsdale Bros., Inc.*, 721 S.W.2d 832, 834 (Tex. 1986)

In a products liability case, the jury rendered a verdict in favor of the plaintiff. The Court of Appeals reversed and remanded for a new trial, holding that the causation evidence was factually insufficient to support the verdict. The Court reversed the court of appeals ruling and reinstated the jury verdict. The Court found that there was no evidence of a "lax in judgment" by the plaintiff that would rebut the plaintiff's evidence that the defendant failed to warn of a dangerous condition, and thus producing cause was established as a matter of law.

6. *McKinley v. Stripling*, 763 S.W.2d 407, 409 (Tex. 1989)

In a medical malpractice case, the plaintiffs failed to request that a proximate cause issue be submitted to the jury. The jury awarded plaintiffs damages, but the court of appeals reversed and rendered because of the failure to request a proximate cause finding. The Court found that the plaintiffs, having failed to submit a proximate cause question, waived the issue, and that in the absence of proximate cause, the plaintiffs could not recover. As such, the judgment of the court of appeals was affirmed.

7. *Millhouse v. Wiesenthal*, 775 S.W.2d 626, 627 (Tex. 1989)

The plaintiff sued his former attorney for malpractice after the attorney filed an untimely motion for extension of time to file a brief with the court of appeals, leading to an affirmance of an adverse judgment against the plaintiff in a fraud suit. The trial court granted summary judgment in favor of the former attorney, finding that the former attorney's alleged negligence was not the cause of the plaintiff's loss of the appeal. The court of appeals affirmed the trial court's judgment. The Court began its analysis by stating that in cases of appellate legal malpractice, the determination of causation requires determining whether the appeal in the underlying action would have been successful. The Court continued that in such cases, the causation issue is a question of law. The Court justified its decision as follows:

> The question of whether an appeal would have been successful depends on an analysis of the law and the procedural rules. [The plaintiff's] position that the jury should make this determination as a question of fact would require the jury to sit as appellate judges, review the trial record and briefs, and decide whether the trial court committed reversible error. A judge is clearly in a better position to make this determination. Resolving legal issues on appeal is an area exclusively within the province of judges; a court is qualified in a way a jury is not to determine the merits and probable outcome of an appeal. Thus, in cases of appellate legal malpractice, where the issue of causation hinges on the possible outcome of an appeal, the issue is to be resolved by the court as a question of law.

Id. at 628.

Because causation was an issue of law, there was not a material factual issue on causation, and the trial court's judgment was affirmed. The dissent argued that appellate malpractice law should be no different than any other malpractice case, and that the trial court should have the option of submitting the causation issue to the jury in such cases.

8. *Kramer v. Lewisville Mem'l. Hosp.*, 858 S.W.2d 397, 404 (Tex. 1993)

Decedent's heirs brought a failure-to-diagnose medical malpractice claim against a hospital and several hospital employees. The trial court refused the plaintiff's loss-of-chance jury instructions, and the jury found for the defendant hospital. The court of appeals affirmed the verdict. The court explained that several jurisdictions had adopted the "loss-of-chance" doctrine, which uses a relaxed causation approach, allowing the case to be submitted to the finder of fact based on evidence that the defendant's negligence increased the ultimate harm. The Court refused to adopt this doctrine, holding that the benefits of deterrence of medical malpractice that might be gained from adopting the doctrine did not justify scrapping the traditional concept of causation.

9. *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994)

Decedent's heirs sued several food manufacturers in a product liability case, and the trial court granted summary judgment in favor of the defendants, holding that there was no issue of material fact on the issue of causation. The court of appeals reversed and remanded. The Court affirmed the court of appeals' ruling, holding that the plaintiff's expert, which testified that the products *probably* caused or contributed to the plaintiff's death, provided sufficient evidence on causation.

10. *Haynes & Boone v. Bowser Bouldin, Ltd., 896 S.W.2d 179 (Tex. 1994)*

Client sued law firm for malpractice and DTPA violation in connection with firm's handling of client's suit against shopping center tenant. Firm on appeal did not contest that the underlying litigation was mishandled, but argued that damages from a later foreclosure on the shopping center were not recoverable. Law firm argued that its conduct was not a "producing cause" under the DTPA. The Texas Supreme Court quoted the definition of producing from *Rourke v.*

Garza 530 S.W.2d 794, 801 (Tex. 1976) ("efficient, exciting, or contributing cause, which in the natural sequence, produced injuries or damages complained of, if any.") *Id.* at 182.. Since the claimed damages for foreclosure were due to foreclosure the court characterized them as "consequential damages." *Id.* It defined consequential damages as "those damages which result naturally but not necessarily form the acts complained of." *Id.* (citation omitted). The Court found that the evidence showed that the foreclosure actually resulted from an inability to make interest payments on the debt and that the tenant intended to leave the shopping center well before foreclosure.

> The only evidence that the center would have survived came from Rudy Bouldin, the principle of [the plaintiff], who testified that with Blockbuster as a tenant a sale or refinancing could be accomplished, and from [the plaintiff's] real estate expert, who testified that banks rarely foreclose on commercial property when other options are available. This evidence is so weak as to do no more than create a mere surmise or suspicion of its existence and in legal effect, is no evidence.

Id.

D. Conclusion to Pre-*Allbritton* Case Discussion

By the time *Dresser Industries* and *Saenz* are decided, the pro-defense jurists on the court were in the majority.[40] But it is not until *Allbritton* that much of the undoing of the "causation" work done by the pro-plaintiff Kilgarlin court begins in earnest. That "new majority" is much aided by the lack of rigor in the causation analysis employed by the Kilgarlin court, not the least of which is the sliding of "foreseeability" like a hockey puck from one end—duty—to the other—causation, and the use of loose terms like "substantial factor," aggravated by the almost blatant occasional encroachment on the court of appeals' factual sufficiency jurisdiction. It will be seen in the next two sections whether the pro-defendant majority is any more virtuous, constitutionally or intellectually.

V. The Expanding Scope of Supreme Court Appellate Review

Much has been written over the years about the "evolving" scope of Texas Supreme Court appellate review, and, it is safe to say, the consensus is that the "evolution" has been an enlargement. Because the scope of appellate review impacts the Court's examination of causation evidence, a brief review of the evolution of Supreme Court review standards is warranted here.[41]

Under the Texas Constitution, the courts of appeals have final appellate jurisdiction over questions of fact. TEX. CONST. art. 5 § 6; *see also* Tex. Gov't. Code §§ 22.001, 22.225.

[40] In the fourteen year pre-Allbritton period, plaintiffs won in the Court only slightly more than defendants.

[41] This section builds upon the works of prior authors in this area, and the reader may wish to review the following articles: Hon. David E. Keltner, Matt D. Stayton, & Chris D. Kruger, *No Evidence Review: The Scope and Standard of Legal Sufficiency Review After* City of Keller, *in* Advanced Civil Appellate Practice Course 2008 (Sept. 4-5, 2008); W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L.J. 47, 274-76 (2006); W. Wendell Hall & Mark Emery, *The Texas Hold Out: Trends in the Review of Civil and Criminal Jury Verdicts*, 49 S. TEX. L. REV. 539, 559 (2008).

Traditionally, the Supreme Court has recognized its jurisdiction to review legal sufficiency (no evidence) challenges, but not to review challenges of factual sufficiency (insufficient evidence).

In 1960, then-Justice Robert W. Calvert penned his influential law review article, "'No Evidence' and 'Insufficient Evidence' Points of Error." *See* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361 (1960). Justice Calvert's distinctions between no-evidence and insufficient-evidence reviews, and his articulation of the proper circumstances for sustaining no-evidence reviews, occupied the status of gospel among courts and commentators alike. In 2005, however, the Court issued its decision in *City of Keller*, which revamped the no-evidence review standards and which many commentators "decrie[d] as an unconstitutional invasion of the jury's province." Thomas R. Phillips & Elizabeth A. Dennis, Foreword, *Judge & Jury Symposium*, 47 S. TEX. L. REV. 157, 161-62 (2005) (citing William V. Dorsaneo, *Evolving Standards of Evidentiary Review: Revising the Scope of Review*, 47 S. TEX. L. REV. 225 (2005)). In the years leading up to the *City of Keller* decision, commentators sensed that the Court was stirring the evidentiary-review waters. This section briefly reviews Justice Calvert's articulation of the no-evidence review process. It then examines the lead up to the Court's *City of Keller* decision. Finally, this section looks at the *City of Keller* opinion and its aftermath.

A. *Calvert*

In his 1960 article, Justice Calvert famously identified four situations in which a no-evidence point of error could be sustained: (1) the complete absence of evidence of a vital fact; (2) all evidence of a vital fact was inadmissible; (3) the evidence of a vital fact amounts to no more than a "mere scintilla"; (4) the evidence conclusively establishes the opposite of the vital fact. Justice Calvert posited that, in considering an argument that no-evidence supported the jury's verdict because the evidence amounted to no more than a scintilla, the Court should disregard all evidence and inferences contrary to the jury finding in question. Calvert, *"No Evidence" and "Insufficient Evidence"*, 38 TEX. L. REV. at 364. Instead, the Court should focus solely on whether any legally sufficient evidence supports the jury's verdict. *Id.* For some forty-five years, the Texas Supreme Court generally (or at least nominally) adhered to Justice Calvert's formulation of the no-evidence review standard.

B. Post-*Calvert*/Pre-*City of Keller*

In the lead up to *City of Keller*, commentators sensed that the Court was stirring the evidentiary-review waters. For instance, Wendell Hall noted that Court decisions in 1997 and 1998 subtly expanded the standard of review for legal sufficiency challenges. W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 478-79 (1998). Professor Dorsaneo agreed:

> Recently it has been suggested that the Texas Supreme Court may have fundamentally altered no-evidence review. Indeed, a critical article suggests that the Texas Supreme Court may prefer its own views about the outcomes of cases over the views of Texas juries. . . . [A]lthough the basic rules of evidentiary review have not been abandoned, subtle changes have been made in the application of the no-evidence standard of review.

Dorsaneo, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. at 1501.[42]

Professor Dorsaneo noted that, "as long as the fact finder fulfills its responsibilities, a reviewing court is not permitted to prefer its own conclusions regarding what happened over the conclusions by the fact finder." *Id.* at 1502 (citations omitted). He then emphasized the important role of the review standard in protecting the sanctity of the jury verdict:

> The scope of review is an important prophylactic against the intentional or inadvertent invasion of the jury's province as the fact finder. The tendency to weigh evidence is difficult to resist if the scope of review is not limited to the favorable evidence, including reasonable inferences favoring the finding or the findings. If the direct evidence and reasonable inferences that support the verdict must be viewed through the prism of the entire record of the evidence, including some strong evidence supporting the party who challenges the verdict, the evidence supporting the verdict may be more easily discounted.

Id. at. 1503 (citations omitted).

Dorsaneo then identified "three significant procedural developments" that "appear to have changed no-evidence review": an "unfortunate and misguided rearticulation of the scintilla rule"; an increasing application of the principle that undisputed evidence cannot be disregarded (the problem posed in *City of Keller*); and the redirection of the probative value of expert testimony as a question for the court rather than for the jury (this is discussed in Section VIII, *infra*). *Id.* at 1507-1516. Dorsaneo's discussion of the "undisputed evidence problem" anticipated the *City of Keller* decision: "Although Justice Hardberger's explanation concerning the court's motives or ideology is too harsh, it is arguable that the court's rejection of some verdicts has been based on . . . misapplications of the principle that undisputed evidence cannot be disregarded by the fact finder." *Id*. at 1514 (citations omitted).

Dorsaneo brilliantly tied these evidentiary issues to *Allbritton*: "In summary judgment cases, the so called 'equal inference' rule can have a beguiling surface appeal and arguments that the evidence is undisputed are more difficult to refute when the actual dispute concerns the existence of conflicting inferences." *Id.* at 1519 (citing to *Allbritton*, and stating: "Both the majority and the concurrence seem to forget that the fact finder should decide the proximate causation issue, regardless of whether the issue is couched in terms of an assessment of whether the conduct or product in question was a 'substantial factor' or in terms of the 'foreseeability of the harm,' if reasonable minds could differ about these matters under the evidence.").

[42] He cited to W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 478-79 (1998); *see also Provident Am. Ins. Co. v. Castaneda*, 988 S.W.2d 189, 295-07 (Tex. 1998) (Gonzales, J., dissenting); Philip J. Hardberger, *Juries Under Seige*, 30 ST. MARY'S L. J. 1 (1998) ("For almost a decade, the Phillips/Hecht Court has ignored, trivialized, or written around jury verdicts").

Dorsaneo concluded with a reiteration of the role of the Texas Supreme Court vis-à-vis the courts of appeals[43] and with a criticism of the Court for its "unhealthy skepticism about how courts of appeals have been doing factual sufficiency reviews":

> Unfortunately, in recent years, the Texas Supreme Court has developed an unhealthy skepticism about how the courts of appeals have been doing factual sufficiency reviews. Commencing with *Pool v. Ford Motor Company*, to allow the high court to determine if the correct standard of factual sufficiency review has been applied, courts of appeal were required to detail the evidence relevant to the issue and clearly state why the finding is so against the weight of the evidence . . . [Strict scrutiny review] has nothing to do with preserving respect for the fact finding process or the fact finder. It arguably demonstrates instead that the high court has more confidence in its own ability to decide individual cases than juries, trial judges and the courts of appeals. As a practical matter, however, a particularized review of individual cases by the court is neither wise nor possible for the court to conduct. *It is also not within the court's job description*.

Id. at 1520 (citations omitted) (emphasis added).

C. *City of Keller*

In the wake of Justice Calvert's article, courts and commentators generally accepted the notion that a legal sufficiency challenge (a no-evidence challenge) required a reviewing court to disregard all evidence contrary to a jury's verdict, while a factual sufficiency challenge (an insufficient-evidence challenge) required a reviewing court to consider all evidence. *See, e.g.*, *Grey Wolf Drilling Co., L.P. v. Boutte*, 154 S.W.3d 725, 733 (Tex. App.—Houston [14th Dist.] 2004). In *City of Keller v. Wilson*, 168 S.W.3d 802, 810-28 (Tex. 2005), the Texas Supreme Court adopted a different standard.

City of Keller involved an intentional takings claim, in which the plaintiffs had to prove that the city was "substantially certain" that its conduct would take or damage the plaintiffs' property for public use. After judgment on a jury verdict in the plaintiffs' favor, the city appealed. It pointed to its engineers' certifications as evidence that it was not substantially certain that its conduct would have a detrimental effect on the plaintiffs' land. The court of appeals refused to consider these certifications, stating that it could only review evidence supporting the verdict in a legal sufficiency challenge.

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[43] "Although it is widely recognized that [Texas's factual insufficiency standard] is imprecise, it is an obvious safeguard against judgments that are supported by some evidence, but that should not be permitted to stand, in the interest of justice. In the Texas procedural system, insufficient evidence rulings are assigned to trial judges and the courts of appeals, but not to the Supreme Court." Dorsaneo, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. at 1519. Dorsaneo identifies two reasons for this limitation in the Supreme Court's review: 1) the court should be concerned with "significant legal questions," not particularized review of individual cases, since "error correction" is for the courts of appeals; and 2) the high court should "respect and defer to the lower courts," because they are better suited to deal with fairness issues in individual cases. *Id.* at 1519-1520.

The Supreme Court reversed, holding that the appellate court should have considered these certifications and that the plaintiffs did not prove that the City disbelieved these certifications. *Id.* at 830. In writing for the majority, Justice Brister addressed the appropriate scope of review in legal-sufficiency challenges. He first noted that the Court had inconsistently stated this scope, sometimes referring to an inclusive review (one that considers all evidence) and using, at other times, an exclusive review (one that disregards contrary evidence). *Id.* at 809. He also cited to the Dorsaneo and Powers articles discussed above in recognizing that a number of leading commentators believed the two standards are materially different. *Id.* at 809 n.10.

After acknowledging the prevalence of the Calvert formulation for no-evidence challenges, Justice Brister reviewed several long-standing "exceptions" to the exclusive standard, such as contextual evidence, competency evidence, circumstantial evidence, conclusive contrary evidence, and evidence of consciousness. *Id.* at 811-818. He offered a fairly exhaustive look at the Court's application of each of these exceptions over recent years.

In the end, Justice Brister, for the Court, held that the inclusive scope and the exclusive scope are merely different paths to the same result, and that the differences between the two "are more semantic than real." *Id.* at 827. Justice Brister, "[h]aving noted the dual lines of authority stating the scope of no-evidence review, and the proper application and exceptions to each," turned to the question of which standard is correct, and decided that "the answer is both." *Id.* at 821-22.[44] Regardless of the label, a reviewing court must consider evidence that a reasonable juror could believe and disregard evidence that a reasonable juror could not believe. *Id.* at 827. "If the evidence at trial would enable reasonable and fair-minded people to differ in their conclusions, then jurors must be allowed to do so. A reviewing court cannot substitute its judgment for that of the trier-of-fact, so long as the evidence falls within this zone of reasonable disagreement." *Id.* at 822 (footnote omitted).

The most obvious difficulty in applying a "reasonable juror" standard is that reasonable minds will inevitably differ about what is reasonable. Reasonable minds will differ about what a reasonable juror could believe or must disbelieve, and about what inferences a reasonable juror could or could not draw. Justice Brister's majority opinion acknowledged—but effectively glossed over—this difficulty:

> While judges and lawyers often disagree about legal sufficiency in particular cases, the disagreements are almost always about what evidence jurors can or must credit and what inferences they can or must make. It is inevitable in human affairs that reasonable people sometimes disagree; thus it is also inevitable that they will sometimes disagree about what reasonable people can disagree about. This is not a new problem; Justice Calvert noted it almost fifty years ago….

Id. at 827-28.

[44] It may be argued that Justice Brister's version of "both" standards is actually "neither," but is instead a hybrid standard.

It is precisely this problem that disturbs *City of Keller*'s critics. If, in the end, all that matters is what a reasonable juror could or could not do, what are we to make of the Constitutional provision granting courts of appeal final jurisdiction over questions of fact? Whether the evidence is legally sufficient (and thus within the Supreme Court's province) now appears to be the same question as whether the evidence is factually sufficient (and thus beyond the Supreme Court's scrutiny).

The concurrence in *City of Keller* aptly illustrates the concept that reasonable minds differ regarding reasonable minds. Justice O'Neill's concurrence accused the majority of "crediting evidence the jury could reasonably disregard." *Id.* at 831. Specifically, Justice O'Neill pointed out that the plaintiffs presented some evidence that the city had "independent sources of knowledge that flooding was substantially certain to occur," including a letter sent on behalf of the plaintiffs. *Id.* at 831-32. She argued that the jury should be free to accept or reject the city's testimony that it relied on the engineers' certifications, and that the Court fashioned a new rule that "juries cannot disregard a party's reliance on expert opinions." *Id.* at 832-33.

D. The Aftermath

City of Keller arguably represents, in effect, an endorsement of the "inclusive" standard of review. Perhaps more importantly, the Court's emphasis on the "reasonable juror" standard may have signaled a shift to a single "sufficiency of the evidence" review standard.[45] In other words, the Court may have, as a practical matter, put an end to the distinctions between factual and legal insufficiency. *See* W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L.J. 47, 274-76 (2006).[46] Commentators have suggested that the standards adopted in *City of Keller* unconstitutionally invade the exclusive jurisdiction of the courts of appeals. For instance, Wendell Hall and Mark Emery contended that the Texas Constitution "cannot be easily reconciled with" *City of Keller*. "Some may conclude that *City of Keller* only addresses legal sufficiency challenges, but the reasonable juror standard seems to make the distinction between legal and factual sufficiency mean little. If reviews of legal and factual insufficiency have become indistinguishable, what does this constitutional provision mean?" W. Wendell Hall & Mark Emery, *The Texas Hold Out: Trends in the Review of Civil and Criminal Jury Verdicts*, 49 S. TEX. L. REV. 539, 559 (2008)).

Obviously, the elimination of the distinction between no-evidence and insufficient-evidence review standards impacts decisions in many different areas.[47] But the impact of this elimination

[45] The Court has since employed this "reasonable juror" language in describing the proper assessment of summary judgment and "all other motions rendering judgment as a matter of law." *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755-57 (Tex. 2007); *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *see also City of Keller*, 168 S.W.3d at 823 ("[T]he test for legal sufficiency should be the same for summary judgments, directed verdicts, judgments notwithstanding the verdict, and appellate no-evidence review.").

[46] It has, however, been suggested that *City of Keller* simply instructs a reviewing court to review the entire record "in order to determine what evidence is actually evidence." Keltner et al, *No Evidence Review*, Advanced Civil Appellate Practice Course 2008 (Sept. 4-5, 2008), at 11. Under this theory, once the Court has determined the contents of the record that may be properly considered as evidence, it then disregards any contrary evidence to determine whether legally sufficient evidence exists.

[47] Not everyone believes that the distinction between legal and factual insufficiency review has been eliminated. *See* Keltner et. al., *No Evidence Review*, *in* Advanced Civil Appellate Practice Course 2008 (Sept. 4-5, 2008) at 11.

warrants additional discussion with regard to causation, because it dovetails with the perception that the current Court has exhibited an eagerness to scrutinize evidence of causation in order to reverse jury verdicts favorable to plaintiffs. For instance, commentators have criticized the Supreme Court's *City of Keller* decision as clearing the way for increased judicial nullification of jury verdicts and increased policy-making. *See, e.g.*, Hall & Emery, *Texas Hold Out*, 49 S. TEX. L. REV. at 542. Similarly, many commentators contend that the Court's decisions tend to be policy-oriented in favor of defendants, *see, e.g.*, David A. Anderson, *Judicial Tort Reform in Texas*, 26 REV. LITIG. 1, 6-7 (2007), and that the Court has often used a causation analysis to accomplish its policy-oriented purposes. *See, e.g.*, Charles R. "Skip" Watson, Jr., *Proof of Causation: Selected Causation Trends Before the Supreme Court*, *in* Advanced Civil Appellate Practice Course 2004 at 14 (Sept. 9-10, 2004). If these commentators are correct—that is, if the Supreme Court exhibits a defendant-oriented policy preference and if *City of Keller* allows for a greater scrutiny of jury verdicts—then the *City of Keller* decision offers the Court greater means to, as one commentator put it, nullify the right to trial by jury.[48] R. Jack Ayres, Jr., *Judicial Nullification of the Right to Trial by Jury by "Evolving" Standards of Appellate Review*, 60 BAYLOR L. REV. 337 (2008).

Given the "reasonable juror" standard espoused in *City of Keller*, the most obvious means by which a court could "nullify" a jury verdict through a legal sufficiency challenge is to determine that the evidence at issue is either so weak that a reasonable juror must disregard it or else so strong that a reasonable juror must embrace it. As the *City of Keller* case itself demonstrated, reasonable minds may differ about what reasonable minds may believe. Or, as Hall put it, "[t]he reasonableness standard may empower judges to inject partisan beliefs about what reasonable jurors should conclude, at the expense of the role of actual juries." Hall & Emery, *Texas Hold Out*, 49 S. TEX. L. REV. at 542. Similarly, the *City of Keller* paradigm relegates *Pool* and its progeny (the judicial ping-pong matches) to obsolescence. "Rather than sending a case back to the court of appeals for factual sufficiency review, the "reasonable and fair-minded juror" standard [allows the Court to] simply review the evidence in issue, and . . . conclude that no reasonable and fair-minded juror could reach a certain verdict, and render judgment. Hall & Emery, *Texas Hold Out*, 49 S. TEX. L. REV. at 562.

Some have suggested that the Court's *City of Keller* opinion will put an end to the Supreme Court/Courts of Appeals ping pong matches such as *Poole* and *Lofton* (discussed above). If the legal and factual sufficiency review standards are now the same, then the Court is no longer "stymied by the constitution" (as Justice Hecht termed it in his dissent in *Lofton*) from reaching its desired result in a given case. Instead of remanding a case to the court of appeals for further factual sufficiency review, the Court can now "decree the result it . . . wants to see" simply by holding that no reasonable juror could reach a given verdict in the case. Hall & Emery, *The Texas Hold Out*, 49 S. TEX. L. REV. at 562. It could then render judgment without the need to remand, relegating the days of judicial ping pong matches to nothing more than "interesting legal history." *Id.*

[48] The accusation that the Court is now freely stepping into the exclusive constitutional domain of the courts of appeals is not just a product of the *City of Keller* opinion, although the Court's opinion in that case certainly fueled the fire. But, even prior to *City of Keller*, dissenting justices frequently accused the majority of engaging in unconstitutional factual review. *See, e.g.*, *Volkswagen of America, Inc. v. Ramirez*, 159 S.W.3d 897, 917 (Tex. 2004); *Sw. Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 275 (2002).

VI. *Allbritton*

A. Majority Opinion

Union Pump Co. v. Allbritton involved a suit for personal injuries sustained by Allbritton, an employee of Texaco Chemical Company's facility in Port Arthur, Texas. 898 S.W.2d 773, 774 (Tex. 1995). A pump manufactured by Union Pump Company ("Union") caught fire and ignited the surrounding area. *Id*. After the fire was extinguished, Allbritton was asked to accompany another employee to block a nitrogen purge valve. *Id*. To get to the valve, the employees walked over an aboveground pipe rack, rather than going around it. *Id*. Upon reaching the valve, the employees were told that it was not necessary to block it off. Instead of walking around the pipe rack, the employees again walked across it. *Id*. While returning across the pipe rack, Allbritton hopped or slipped off, injuring herself. *Id*. There was evidence that the pipe rack was wet because of the fire, and Allbritton was wearing hip boots and other firefighting gear when the injury occurred. *Id*. Allbritton sued Union, alleging negligence, gross negligence and strict liability. *Id*. Allbritton alleged that but for the pump fire, she would not have walked across the pipe rack and the injuries would not have occurred. *Id*. The trial court granted summary judgment for Union, finding that there was no issue of material fact concerning proximate or producing cause. *Id*. The court of appeals reversed and remanded on the proximate and producing cause issues. *Id*.

The Supreme Court of Texas reversed the judgment of the court of appeals and rendered a take-nothing judgment against the plaintiff. The Court first described causation:

> Negligence requires a showing of proximate cause, while producing cause is the test in strict liability. Proximate and producing cause differ in that foreseeability is an element of proximate cause, but not of producing cause. Proximate cause consists of both cause in fact and foreseeability. Cause in fact means that the defendant's act or omission was a substantial factor in bringing about the injury which would not otherwise have occurred. A producing cause is an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of, if any. Common to both proximate and producing cause is causation in fact, including the requirement that the defendant's conduct or product be a substantial factor in bringing about the plaintiff's injuries.

Id. at 775 (internal quotations and citations omitted).

The Court next explained the limits of legal causation in Texas as follows:

> At some point in the causal chain, the defendant's conduct or product may be too remotely connected with the plaintiff's injury to constitute *legal causation*. As this Court noted in *City of Gladewater v. Pike*, 727 S.W.2d 514, 518 (Tex. 1987), defining the limits of legal causation eventually mandates weighing of policy

> considerations…Drawing the line between where legal causation may exist and where, as a matter of law, it cannot, has generated a considerable body of law. As this Court explained in *Lear Siegler*, the connection between the defendant and the plaintiff's injuries simply may be too attenuated to constitute legal cause. Legal cause is not established if the defendant's conduct or product does no more than furnish the condition that makes the plaintiff's injury possible. This principle applies with equal force to proximate cause and producing cause.

Id. at 775-776 (internal quotations and citations omitted) (emphasis added).

Applying the doctrine of foreseeability to a products liability case, the Court found that Allbritton had failed to raise a material factual issue on causation:

> Even if the pump fire were in some sense a "philosophic" or "but for" cause of Allbritton's injuries, the forces generated by the fire had come to rest when she fell off the pipe rack. The fire had been extinguished, and Allbritton was walking away from the scene. Viewing the evidence in the light most favorable to Allbritton, the pump fire did no more than create the condition that made Allbritton's injuries possible. We conclude that the circumstances surrounding her injuries are too remotely connected with Union Pump's conduct or pump to constitute a legal cause of her injuries.

Id. at 776.

B. Justice Cornyn's Concurrence

Justice Cornyn's concurrence found there was "cause-in-fact," but not "legal cause." *Id*. at 777. He stated the majority "conflates foreseeability and other policy issues with its cause-in-fact analysis…," and criticizes the majority's as an "expansive view." *Id.* Justice Cornyn engaged in far greater scholarship than the majority, ostensibly tracing the "development of causation" both nationally and in the state. He elaborated on the "ill-defined second element in producing cause." *Id*. at 782. But then he went on to apply a "foreseeability" analysis to both cause in fact and proximate cause and producing cause which in some ways is more expansive than the majority's adoption of the "substantial factor" test. *Id*. at 785. His opinion was more obviously "evidence weighing" than even the majority; and Justice Cornyn signaled a greater willingness to weigh in on the evidence in causation cases in the future.

While it is perhaps unfair to criticize any attempt at reciting a history of causation doctrine as selective and incomplete, given the richness of that history, Justice Cornyn's exposition of the "Realists'" views of proximate cause, and especially that of Leon Green, is in at least some ways incorrect.[49] He places Green in the camp of those that thought that "proximate" cause" should

[49] Green would probably not have agreed he belonged in the group called "legal realists." Robertson, *The Legal Philosophy of Leon Green*56 TEX. L. REV. 393, 399-400 (1978).

be layered onto the causation analysis: "For the Realists, then, cause-in-fact was a purely factual inquiry, while proximate cause was a policy determination ..." *Id*. at 778. As we've seen, Dean Green most vehemently disagreed with that proposition. Judge Cornyn went on to discuss some of the views of the post-Realists, summing up: "These debates [about the proper components and amount of policy analysis belonging in the "causation" element]continue today, and the precise content and structure of the causal analysis is, to say the least, unsettled." *Id.*

Justice Cornyn's historical discussion continued:

> More recently, this Court has used the Realists' bifurcated causal analysis in negligence law, in which proximate cause is viewed as consisting of two elements: "cause-in-fact " and "foreseeability" [citations omitted](noting that cause-in-fact and foreseeability are "two distinct concepts" and defining cause-in-fact in terms of the "but for" test). Even more recently, we have perhaps demonstrated the pervasive influence of post-Realist scholars, describing the cause-in-fact analysis as requiring satisfaction of both the "but for" and the "substantial factor" tests.[50] See *Missouri P. R.R. Co. v. American Statesman*, 552 S.W.2d 99, 103 (Tex. 1977) (setting forth the first definition of cause-in-fact that required both tests to be satisfied). The addition of this *vague new* "substantial factor" doctrine, *see* W. Page Keeton et. al, *Prosser and Keeton on Torts*, §41, at 267 (Fifth Ed. 1984) (stating that this intuitive term "can scarcely be called a test") in theory at least tends to merge the policy-based rationales for limiting liability with the cause-in-fact inquiry.

Id. at 779 (some citations omitted) (emphasis added).

Justice Cornyn then came to the core of his concurrence:

> This evolution of Texas law, paralleling developments throughout the United States, has caused two particular areas of uncertainty relevant to the case at hand. First, Texas law is unclear as to what degree (if any) it has retreated from the fact/policy delineation in its two-prong causal analysis. While the Court's opinion today appears to reject this bifurcated analysis, I believe that it remains an important and useful part of Texas law. Second, our cases have never clearly defined how the second prong of its proximate cause analysis in negligence cases applies to the producing cause

[50] Neither the majority nor concurrence notes that the phrase "substantial factor" actually appears in *Palsgraf.* After the *Palsgraf* dissent noted there was little to guide one in applying the concept , though "there are some hints to guide us. The proximate cause, involved as it may be with many other causes, must be, at the least, something without which the event would not happen. The court must ask itself whether the cause was a natural and continuous sequence between cause and effect. Was the one a *substantial factor* in producing the other?...Or by the exercise of *prudent foresight* could the result be *foreseen*?" *Palsgraf,* 162 N.E. at 354 (emphasis added). From this quote it appears Judge Andrews, at least, used these terms almost interchangeably, and not as separate prongs or tests to be met. It also appears from this quote that "continuous sequence" analysis is really proximate cause analysis applied to products liability.

> analysis of products liability law. The Court's opinion undertakes only one analysis, thereby implying that causation in negligence and causation in products liability are treated the same. To the contrary, I contend that, like the limitations imposed by foreseeability in negligence law, the second part of a complete causal analysis in products liability law imposes policy-oriented limitations consistent with the underlying purposes of products liability law itself, as I explain below.

Id. at 789

Justice Cornyn then undertook to analyze earlier Texas cases, which treated the causation question as far more fact-oriented, and hardly at all a policy question, preferring the "but for" test to "substantial factor" language. He also noted the Restatement's confusion about the "but for" test and he determines that for Prosser, "substantial factor" and "but for" were usually the same thing, and both were purely factual inquiries. Id. at 780. He also portrayed the *Missouri Pacific* case as introducing the "substantial factor" prong, but in actuality the case simply applies the but for test.

He continued:

> In 1991, however, the Court arguably changed course once again, breathing life into the "substantial factor" standard of *Missouri Pacific*. In *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470 (Tex. 1991), the Court relied mainly on the definition of "legal cause" from the Restatement (Second):["] The negligence must also be a substantial factor in bringing about the plaintiff's harm. The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using the word in the popular sense, in which there always lurks the idea of responsibility . . . .["] *Lear Siegler*, 819 S.W.2d at 472 (quoting RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965)). Although the Court acknowledged that Texas had "not adopted the Restatement (Second) of Torts in its entirety," the Court did not take note of the important differences between the Restatement's and Prosser's formulations. Instead, the Court applied the Restatement's discussion of "legal cause" to the events before it, and concluded that "these particular circumstances are too remotely connected with Lear Siegler's conduct to constitute legal cause." *Lear Siegler*, 819 S.W.2d at 472.

Id. at 780-81.

After further discussion and analysis of *Lear Siegler*, Justice Cornyn summed up his view of that case:

> First, the context of the Court's analysis is consistent only with an inquiry into "foreseeability." In *Lear Siegler*, the Court notes the plaintiff's argument that the malfunction of the defendant's sign was a "but for" cause of the injury, but then concludes that the defendant's conduct was too attenuated "to constitute legal cause." The Court did not reject the plaintiff's cause in fact contention, but merely noted that legal cause required more: the defendant's conduct, even though a cause in fact, cannot be too remote from the injury complained of. This is simply the traditional foreseeability analysis applied in negligence law.[51]

Id. at 782.

Justice Cornyn then concluded this section of his opinion:

> This overview of our cases reveals that this Court has never abandoned the distinction between the fact-based analysis of the cause-in-fact inquiry and the policy-based foreseeability inquiry. By interweaving the broad definition of "substantial factor" found in the Restatement with the narrow scope of the "substantial factor" test in Texas cause-in-fact analysis, the Court's opinion today obscures this important issue and departs substantially from the traditional approach to causal analysis in Texas law.

Id. at 782.

In a section he labeled "The Ill-Defined Second Element in Producing Cause," and after acknowledging that products law does not include the "foreseeability" element present in negligence law, Justice Cornyn then wrote:

> The fact that a court may not be directly concerned with foreseeability as an element of causal analysis does not, however, undermine the soundness of a two-prong approach to causation in other contexts…the court should still consider whether the policies or principles at the heart of the cause of action dictate further limitation on liability.

Id. at 782-783.

Justice Cornyn called this "a policy-based limitation inherent in producing cause" as if producing cause and proximate cause had always been one and the same. *Id*. at 783. He went on to criticize the prior formulations of "producing cause" as being proximate cause minus foreseeability. Clearly for Justice Cornyn, he believes "foreseeability" is and should be a component of both, and a judicially controlled policy decision at that. *Id.* For him, producing cause has a second prong that incorporates the policy-heavy inquiry ("our oft-repeated definition

[51] Justice Cornyn did not comment on this engrafting of the foreseeability element onto strict products liability causation, where it had not previously existed.

of producing cause is unnecessarily vague…"). Though he gave this second prong almost no definition, or for that matter hardly any guidance to trial courts how to apply, he concluded this section: "Obviously, one cannot sketch all the contours of this element of producing cause in a single opinion. Nonetheless, there is ample precedent in Texas law to conclude that a policy-based aspect of causation in products liability should and does exist." *Id*. at 784.

After concluding that both the cause in fact and substantial factor tests are satisfied, Justice Cornyn then applied a "foreseeability" analysis to "decide whether the pump defect meets the second prong of both the proximate cause and producing cause." *Id*. at 785. And it is at this juncture that it is clear that Justice Cornyn simply preferred his view of the evidence over any potential jury's:

> In this case, the injury to Allbritton was not foreseeable. Allbritton's injuries were the result of a *needlessly dangerous shortcut* taken after the *crisis had subsided*.[52]…Foreseeability allows us to cut off Union Pump's liability at some point; I would do so at the point the crisis had abated or at the point that Allbritton and Subia departed from their *usual*, safe path.[53]

Id. (emphasis added)

Of course, this is the classic form of evidence-weighing that Leon Green and others feared happens anytime the court engages in "proximate cause" or "substantial factor" analysis.

Justice Cornyn also asserted that the products liability claim failed for "*similar* reasons," i.e. foreseeability.[54]

So as a result of both the majority and concurrence in *Allbritton*, a new element is engrafted into both negligence and products liability law through the causation element: "substantial factor," or what Justice Cornyn calls a vague element of "producing cause," a policy-based inquiry laden with "foreseeability." Either way, judges on the Texas Supreme Court after *Allbritton* had new ways to overturn jury verdicts, especially products liability verdicts, un-tethered by limits on their ability to review the "sufficiency" of the evidence.

C. Justice Spector's Dissent

In dissent, Justice Spector argued that the evidence established that at the time the plaintiff was injured, the forces generated by the fire had not come to rest, and thus the pump defect was both a "but for" cause and a substantial factor in bringing about Allbritton's injury, and was therefore a cause in fact. *Id*. at 785-786. According to Justice Spector, the majority had used the doctrine

[52] Justice Cornyn does not explain why he did not trust a jury to properly allocate fault on the plaintiff for her carelessness, as the dissent suggests should have happened. Is it a fear that a jury might not agree with his view of the evidence?

[53] There was some evidence they *were* taking their "usual" path. See majority opinion, *id*. at 773 ("Subia admitted that he chose to walk over the pipe rack rather than taking a safer alternative route because he had "a bad habit' of doing so.")

[54] Though he proceeds to couch his "producing cause" analysis in terms of "natural and continuous sequence" and "scope of protection," the die (or pump) has been cast: no foreseeability = no products liability either.

of causation to bar Allbritton from any recovery due to her own negligence. According to Justice Spector, "the jury should be allowed to allocate comparative responsibility."

D. More From Dorsaneo

According to Professor Dorsaneo, the Texas Supreme Court incorporated the element of foreseeability into the definition of proximate cause during the early 1900's for two important reasons:

> [T]o avoid as far as possible the metaphysical and philosophical niceties in the age-old discussion of causation, and to lay down a rule of general application which will, as nearly as may be done by a general rule, apply a practical test, the test of common experience, to human conduct when determining legal rights and legal liability.

Dorsaneo, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. at 1528 (quoting *City of Dallas v. Maxwell*, 248 S.W. 667, 670 (Tex. Comm'n App. 1923, holding approved)).

Because the Texas Supreme Court determined that foreseeability had no place in the strict products liability determination (at least as far as the causation element—foreseeability became part of the duty calculation in warning cases, for example), a different causation standard called "producing cause" developed. The two causation standards differed in one important respect: there was no place for foreseeability in "producing cause." *Id*

Dorsaneo then comes to *Allbritton*:

> In [*Allbritton*], however, another element was added to the formula. Based on earlier cases that used the term *substantial factor* as part of the analytical process, first as *a synonym* for the but for element, and second, as a way of describing proximate or legal cause, the [*Allbritton*] majority *radically changed causation analysis* by adding a *vague substantial factor*/responsibility component to the cause in fact component of general causation analysis.

Id. at 1528-1529 (citations omitted).

Much of Dorsaneo's criticism of *Allbritton* focused on its "embracing" of the Section 431 of the Restatement (Second) of Torts (stating negligence must be a "substantial factor" in plaintiff's harm, and in the term "substantial" "lurks the idea of responsibility"):

> By embracing the Restatement comment, the court's opinion both raised the causation standard applicable in negligence and strict liability cases and rendered the causation standard considerably less intelligible. Prior to [*Allbritton*] and Lear Seigler, Inc. v. Perez, cause in fact analysis under Texas law wan an objectively factual one designed to be performed by juries in a step-by-step

> process without reference to any separate notions of responsibility…Furthermore, because the method of reasoning has objective characteristics, juries can perform these functions sensibly and their determination can be subjected to a principled process of evidentiary review. *In other words, the inclusion of a substantial factor/responsibility element to the causation standard does not help juries perform their function because it is vague and opaque,* ***although it does unfortunately allow a reviewing court to discount a jury's causation finding on the basis of the court's conclusion that the connection between the wrong and the harm is too attenuated or remote to hold the defendant responsible.***

Id. at 1529-1530.

He was not finished criticizing the *Allbritton* decision:

> The majority's reasoning process substitutes a new causation standard that applies with "equal force to proximate and producing cause" and allows a reviewing court to reject a causation finding on the basis of the court's decision that the defendant should not be held responsible. Although the addition of [Allbritton's] substantial factor component has a more obvious effect on producing cause, which otherwise has no separate responsibility component, the addition of a recondite, subjective responsibility component to proximate causation issue has the same effect…A reviewing court can conclude that the causal connection is too weak if the court does not want the defendant to be held responsible, even if the harm was reasonably foreseeable….As a result, the arcane quality of the new approach makes it ***much easier for a reviewing court to substitute its judgment for the jury's decision, and much more difficult for anyone else to demonstrate why the reviewing court exceeded the scope of its judicial power.***

Id. at 1530-1531.

Professor Dorsaneo summed up the core problem as it also affects *the duty issue*: "In other words, the principles of evidentiary review that are designed to constrain judges from usurping the role of the fact finder will become largely irrelevant in the decision-making process if the trial or reviewing courts can bypass the fact finder by conducting a detailed foreseeability assessment of the risk of harm and concluding that no duty exists under the particular facts of the case being decided*." Id*. at 1533.

E. Robertson

Professor David W. Robertson, very shortly after *Allbritton* was decided, discussed the history of the "substantial factor" term in Texas jurisprudence. Robertson, *The Common Sense of Cause in*

Fact, 75 TEX. L. REV. 1765 (June 1997). Cause in fact, or "but for" causation, is a perfect issue for juries to decide. *Id*. at 1769. The "substantial factor" test was originally intended as a "relaxation" of the rigors of the "but for" or cause-in-fact analysis:

> The term "substantial factor" has come to have a number of different meanings in the jurisprudence. By using the term in three different senses, the Restatement (Second) of Torts has contributed to a nationwide confusion on the matter. In the narrowest and only fully legitimate usage, the term describes a cause-in-fact test that is useful as a substitute for the but-for test in a limited category of cases in which "two causes concur to bring about an event, and either cause, operating alone, would have brought about the event absent the other cause…"

Id. at. 1776 (citations omitted).

> In a looser and potentially confusing usage, the substantial factor test is treated as more or less interchangeable with the but for test…In a third usage, "substantial factor" describes an approach to the issue of legal causation or ambit of duty, a matter that should be kept entirely distinct from the cause in fact issue.

Id. (citations omitted).

Of course, in *Allbritton* both the majority and the concurrence appear to use all three meanings, but then it became clear by the holding that the intent is to engraft this policy-making function onto the term, allowing the court to intervene to reverse jury causation verdicts when the Supreme Court would otherwise be constrained by the evidentiary review rules. Robertson noted that in the third usage, "substantial factor" was used as a substitute, or as synonymous, with "proximate cause" (and as we've seen, anytime the court stirs around the term "proximate cause" it very well might be using a duty analysis to sidestep the constraint on sufficiency review). "Using[substantial factor] in the different context of legal cause-and there giving it a different meaning-is not conducive to clarity." *Id.* at 1780. He viewed one of the dangers as adding another element to a plaintiff's claims and burden of proof: "But once the "substantial factor" term is running loose in the negligence law vocabulary, it can easily turn into an independent…hurdle that the plaintiff must overcome…." *Id*. at 1781.

VII. Causation Opinions Since *Allbritton*

A. Introduction

Since *Allbritton*, the Supreme Court of Texas has taken a significant number of cases that addressed sufficiency of the evidence with respect to causation. A substantial number of these have resulted in jury verdicts being reversed[55] and judgment being rendered in favor of the

[55] The authors recognize that, technically, the Court addresses courts of appeals' dispositions, and does not reverse jury verdicts. The authors use this phrase to signify instances in which the Court reversed a court of appeals' disposition affirming a judgment entered on a jury verdict.

defendant(s). Many of these post-*Allbritton* causation cases are discussed elsewhere in this paper (*See e.g.*, *supra*, p.3 n.5) but what follows is a brief description of other post-*Allbritton* causation cases:

1. *IHS Cedars Treatment Ctr. v. Mason*, 143 S.W.3d 794 (Tex. 2004)

A physician, a nurse and a mental health facility were sued for negligence by a patient who had been discharged from the facility. The plaintiff, Mason, voluntarily checked into the facility and remained there for three weeks. She and another patient, Thomas, were discharged after requesting to be released, but prior to their scheduled discharge date; it was clear they intended to spend time together immediately upon discharge. Twenty-eight hours after being discharged, Thomas, Mason and another passenger were involved in a single-car accident after Thomas experienced a "psychotic episode" and flipped her car ("While driving her Corvette at a very high speed, Thomas flew into an angry rage."). Mason was paralyzed, and subsequently sued the health care providers for negligent discharge. The trial court granted summary judgment in favor of the defendants on the ground that their negligence, if any, was not the proximate cause of Mason's injuries. A divided court of appeals reversed and remanded the case for trial. The Supreme Court of Texas, citing *Lear Siegler* and *Allbritton*, reversed the judgment of the appellate court and affirmed the trial court's grant of summary judgment in favor of the defendants, stating, "[o]ur precedents establish that merely creating the condition that makes harm possible falls short as a matter of law of satisfying the *substantial factor* test." *Id.* at 800 (emphasis added). The Court invoked the "substantial factor" language of *Allbritton*, and applied a causation (rather than duty) analysis in discussing the "attenuation of the causal connection between conduct and liability"—that is, whether the alleged breach of duty could be considered the "legal cause" of Mason's injuries. *Id.* at 799. The Court further explained that "Thomas' speeding and psychotic episode and swerving the car to miss the dog in the road caused Mason's injuries, not negligent treatment or negligent discharge." *Id.* at 801. Describing its view of the evidence as focusing on "the unfortunate appearance of a dog in the road," the Court concluded: "Often, as in this case, the causal link between conduct and injury will be too remote to be legally significant when *two separate and sequential tortious incidents* join to lead to an injury." *Id*. at 800 (emphasis added).[56]

The Court was correct that Thomas' speeding, psychotic episode, *and* car-swerving caused the wreck which injured Mason. But that does not foreclose the possibility that negligent treatment or negligent discharge *also* could have caused the injuries. The Dallas Court of Appeals held that some of the defendants should have foreseen that Mason had developed an unhealthy relationship with Thomas, that Thomas was dangerous, and that Mason's association with Thomas was likely to put her in harm's way. *See Mason v. IHS Cedars Treatment Ctr. of Desoto Tex.*, 2001 Tex. App. LEXIS 5494, at *13-14 (Tex. App.—Dallas Aug. 15, 2001, pet. granted). The appeals court would have left the proximate cause issue to the jury. *See id.* at *14 ("It should be up to a jury to decide whether the effect of Ramos's conduct was a substantial factor that operated to bring harm to Mason or whether the connection between Ramos's conduct and Mason's injuries was too

[56] The Court also rejected the proffered expert testimony: "[the expert's testimony] does no more than support Mason's contention that [defendant's] created the condition that caused her injuries. This falls far short of being evidence of proximate cause." *Id*. at 803. Of course, the use of the canard, "does no more than create the condition," is a signpost that the Court is engaged in weighing evidence.

remote to warrant liability."). That court also conducted a duty analysis—something that the Supreme Court never reached because it addressed foreseeability and causal attenuation under its causation analysis.

2. *Ford Motor Co. v. Ridgeway*, 135 S.W.3d 598 (2004)

The plaintiff filed suit against a car manufacturer after sustaining serious injuries when his car caught fire while he was driving. The plaintiff alleged both negligence and strict liability claims. The trial court granted no-evidence summary judgment in favor of the defendants on all of the plaintiff's claims, and the court of appeals affirmed on the negligence claim but reversed and remanded on the strict liability claim. In responding to the summary judgment motion, the plaintiff's expert testified that he "suspected" the electrical system was the cause of the fire. The plaintiff could not identify any defect in the truck at the time it left the manufacturer. Citing this dearth of evidence, the Supreme Court of Texas reversed the judgment of the court of appeals and rendered a take-nothing judgment in favor of the defendants.

(This case is discussed in more detail in the section of this paper addressing expert causation testimony *infra*, pp. 61-62).

3. *Volkswagen of Am. v. Ramirez*, 159 S.W.3d 897 (2004)

Perhaps no case demonstrates the intersection between the Court's evolving standard of evidentiary review and its approach to causation better than this one. The plaintiffs sued a car manufacturer, alleging that a defect in a car caused an accident. In the first trial, the jury returned a unanimous verdict in favor of the defendant. The trial court rendered a take-nothing judgment in favor of the defendants but subsequently granted a motion for new trial. In the second trial, the jury returned a $17 million verdict for the plaintiffs. The Corpus Christi Court of Appeals affirmed. The alleged defect in the car was a wheel axle that separated from the car. The plaintiffs argued that the separated wheel was the "proximate cause" of the accident, while the defendant argued that it was the result of the accident. There was also videotape testimony of a witness at the scene who saw the tire blow up before the car crossed the median and collided with the plaintiffs' car.[57] The Court found that the testimony of the plaintiff's accident reconstruction expert, who was unable to identify any studies, publications or peer reviews that supported his position that the alleged defect was the cause of the accident, should have been excluded, and thus, the plaintiffs were left with no evidence of causation (the expert did cite his significant accident reconstruction experience and "the laws of physics"):

> It is far from clear how the detached wheel could "follow the vehicle" in the wheel well as it crossed the median. However, even more concerning in light of our jurisprudence is that [Plaintiff's expert] performed no tests and cited no publications to support his opinion that the wheel was traveling at a higher velocity than the Passat which, by principles of physics, kept the

[57] Note how the Court characterizes this evidence: "[A]t trial the [plaintiffs] showed a videotaped *interview* of an *unidentified* witness at the scene of the accident who *purported* to see the Passat's tire blow up before it crossed the median and collided with the Mustang." *Id.* at 902. No weighing of evidence, indeed.

> wheel in the well…Here, [Plaintiff's expert] does not close the "analytical gap…" [58]

Id. at 905-06.

The Court reversed and rendered a take-nothing judgment in favor of the manufacturer.

In dissent, Chief Justice Jefferson (joined by Justice O'Neill), argued that the expert testimony was sufficient on causation. "Reasonable jurors could have accepted Volkswagon's theory and rejected Cox's (as they did in the first trial) or accepted Cox's and rejected Volkswagen's (as they did here, but unlike the jury, *this Court lacks constitutional authority to weigh conflicting evidence*." *Id.* at 913-14 (emphasis added).[59] The dissent questioned the majority's equating of the expert testimony in the case with the paltry evidence presented in *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227, 231 (Tex. 2004):

> By equating [the expert's] testimony here with the paltry testimony at issue in Coastal, the Curt sets a dangerous precedent that threatens to fundamentally alter the nature of no evidence review…A court may decide as a matter of law that the former examples [i.e. "the moon is made of green cheese"] are "no evidence," but when more than a scintilla of objective evidence supports an expert's conclusions in a technical area in which judge's have no particular expertise, and when the expert's methodology is not challeneged on appeal, the question becomes one of factual, and not legal, sufficiency.
>
> Rather than indulging every reasonable inference in favor of the jury's finding, the Court adopts a contrary approach, tipping the scale in the opposite direction to dismiss as "conclusory" expert testimony that supports the verdict. This Court is constitutionally bound to conduct only a legal-not a factual-sufficiency review. *See* TEX. CONST. art. V, § 6 (other citations omitted)…While a jury or court of appeals may find Cox's testimony *factually* insufficient on causation, it is at least *some evidence*.

Ramirez, 159 S.W.3d at 917, 917 n.3 (Jefferson, C.J., dissenting).

(This case is discussed in more detail in the section of this paper addressing expert causation testimony *infra*, p. 62).

4. *Tarrant Reg'l Water Dist. V. Gragg*, 151 S.W.3d 546 (Tex. 2004)

[58] The court likewise disposed of the videotaped eyewitness statement about what happened by ruling that the trial court abused its discretion in admitting the evidence since it was hearsay not falling within the "excited utterance" exception, even though made in an interview at the scene while the "Jaws of Life" were being used to extract the injured parties. "The evidence shows that some time had passed…During the interview the witness was composed…These facts show that the witness had time to ponder the event to give considered testimony after the stress of the excitement of the accident had subsided." *Id*. at 909.

[59] The dissent agreed with the exclusion of the videotaped witness's statement.

In *Gragg*, the Court found sufficient evidence that the defendant District's construction and operation of a reservoir was the cause of increased flooding on the plaintiff's property. The Court examined the evidence of causation. Interestingly, the Court pointed to, among other things, evidence that the flooding after the reservoir was constructed exceeded the flooding before its construction:

> [T]he issue is significantly changed flooding characteristics that occurred despite similar circumstances so that it can be inferred that the reservoir was to blame. Here, the District's own modeling showed that the number and duration of floods at the Ranch in the 1990s, after the reservoir's construction, were higher than in the 1940s, a period of comparable rainfalls. Similarly, Troy Lovell, another of the District's expert witnesses, also testified that flood-gauge data showed flooding in the Gragg Ranch's vicinity in 1993 and 1995 lasting twice as long as floods in 1952, 1959, 1962, and 1965 that occurred in periods of similar rainfall. Although the District's experts attributed the increase in flooding during the 1990s, as opposed to the 1940s, to the construction of various flood-control projects in the interim, those projects were in place before 1959.

Id. at 553-54.

Some might argue that, in its discussion of this evidence, the Court fell victim to the *post hoc* fallacy. In other words, logic would say that causation is not demonstrated merely because the property's flooding characteristics differed in the 1990s from the 1940s, 1950s, and 1960s. Certainly, where the correlation in time between two events is very close, or where the correlation is repeatedly demonstrable, this would seem to be greater evidence of causation (although not absolute proof). But evidence that flooding characteristics changed between the 1960s and the 1990s (and a reservoir was built in the interim), without more, might seem to a later Court an extremely weak indicator of causation.[60] "We hold that the evidence in this case supports the trial court's findings that the extensive damage the Gragg ranch experienced was the inevitable result of the reservoir's construction and of its operation as intended." *Id*. at 555.

The Court also sidestepped the attack on the "reliability" of plaintiffs' expert testimony on causation, finding other sources that supported the trial court's findings.

The Court has since rejected attempts to prove causation by demonstrating a temporal correlation where the temporal relationship between the injury and the alleged cause is much closer than it was in *Gragg*. *See Guevara v. Ferrer*, 247 S.W.3d 662 (Tex. 2007) (discussed *infra,* p. 52-53).

5. *GMC v. Iracheta*, 161 S.W.3d 462 (Tex. 2005)

[60] The *Gragg* court cited some evidence of causation other than a temporal correlation, such as an eyewitness who claimed that, when the reservoir's gates were opened, the water in the river near Gragg's ranch moved much faster. Although a temporal relationship may not ultimately ***prove*** causation, it could generally be considered as some evidence of causation.

In an opinion in many ways anticipating the Court's *City of Keller* opinion later that same year, the Court is by this time unapologetic in its weighing of the evidence to reverse a Court of Appeal's finding of factually sufficient evidence. In a products liability case, the jury found in favor of the plaintiffs. The court of appeals affirmed the judgment. The Supreme Court of Texas reversed and rendered, finding that the plaintiffs' experts offered contradictory testimony on causation, and that this contradictory testimony was fatal to the plaintiffs' claims. The key issue in *Iracheta* was whether improper gasoline leaking ("siphoning") occurred in the fuel system at the rear or at the front of the vehicle, causing a lethal explosion after. The Court conceded there was a siphoning defect in the car. The Court effectively conducted a credibility analysis, pointing to conflicts *between* the testimony of the two experts and *internal conflicts* in the testimony of the each expert. *Id.* at 466-470. The Court concludes:

> [Plaintiff] attempts to borrow from each of her experts pieces of opinions that seem to match, tie them together in an ill-fitting theory, discard the unwanted opinions, disregard the fact that the experts fundamentally contradicted themselves and each other, and then argue that this is some evidence to support the verdict. Inconsistent theories cannot be manipulated this way to form a hybrid for which no expert can offer support.

Id. at 472 (citing *Ramirez*, 159 S.W.3d at 911).[61]

The Court rejected the experts'—and the plaintiff's—attempts to reconcile the testimony and explain the apparent conflicts. *See Iracheta*, 161 S.W.3d at 468-69, 472. Of course, even conflicting evidence is some evidence, so that a factual sufficiency review should have been precluded. The opinion suffers from the exact same problem that worried Chief Justice Jefferson in *Ramirez*.

6. *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797 (Tex. 2006)

The plaintiffs sued a tire manufacturer in strict liability following a car accident. The jury found for the plaintiffs, and the court of appeals affirmed. On appeal, the defendant contended that the plaintiffs' experts were not qualified to testify regarding causation. The Court found that none of the three experts were qualified to testify regarding the alleged tire separation defect. The supreme court held that the plaintiffs' theory of "wax contamination" of the skim stock was nothing more than a "naked hypothesis untested and unconfirmed by the methods of science and was legally insufficient to establish a manufacturing defect," and found that none of the plaintiffs' experts possessed sufficient specialized training or experience to testify competently in support of this theory. *Id.* at 805, 807. Consistent with its approach in *Ramirez* and *Iracheta*, the Court reversed and rendered in favor of the defendant. Given prominence in the opinion is the opposing expert opinions on "wax migration," which the Court seemed to weigh favorably in favor of the Defendant (or else why even mention it?). *Mendez* is discussed in more detail in the section of the paper dealing with expert opinion testimony *infra*, pp. 60-61.

7. *Dillard v. Tex. Elec. Coop.*, 157 S.W.3d 429 (Tex. 2005)

[61] Apparently "manipulation" of inevitable inconsistencies between any two experts, and the "discarding of unwanted opinions" is permitted in a "legal sufficiency" review finding for a defendant.

A truck driver for TEC hit a cow in the road, leaving it dead in the opposite lane of traffic. A few minutes later, Brown, traveling the opposite direction, hit the dead cow, losing control of her vehicle and colliding with Dillard's vehicle, killing Dillard and injuring his wife and daughter. Dillard sued TEC, alleging negligence in operating an overloaded truck and failing to warn oncoming motorists of the accident. TEC contended that the accident was caused solely by the conduct of the unknown person who allowed the cows to be on the roadway. TEC requested that the definition of proximate cause include the following sentence: "There may be more than one proximate cause of an event, but if an act or omission of any person not a party to the suit was the 'sole proximate cause' of an occurrence, then no act or omission of any other persons could have been a proximate cause." *Id.* at 431.[62] The trial court refused to provide this instruction. TEC also requested that the following unavoidable accident instruction be included in the definition of proximate cause: "An occurrence may be an "unavoidable accident," that is, an event not proximately caused by the negligence of any party to it."[63] The trial court granted this request. The jury found for Dillard, but the court of appeals reversed, concluding that the trial court's refusal to provide instructions requested by TEC constituted reversible error. The Supreme Court of Texas granted the plaintiff's petition for review to determine the inferential rebuttal jury instruction issue. Justice O' Neill, writing for the Court, found that the trial court's refusal to include the sole proximate cause instruction was not reversible error:

> …jurors need not agree on what person or thing caused an occurrence, so long as they agree it was not the defendant. If some jurors here blamed the cattle (unavoidable accident or sudden emergency) and the rest blamed the unknown cow owner (sole proximate cause), their differences would be irrelevant—they would properly return a unanimous defense verdict. Just as jurors may find against a defendant without agreeing on which precise acts were negligent, they should be able to find the opposite without agreeing on the precise reason. The trial court's instruction presented that alternative to the jury, and TEC was entitled to nothing more.

Id. at 434.

Accordingly, the Court reversed the judgment of the court of appeals and remanded the case to the court of appeals for consideration of TEC's remaining issues.

8. *Mack Trucks v. Tamez*, 206 S.W.3d 572 (Tex. 2006)

A truck manufacturer was sued for negligence and strict liability following a truck crash resulting in the death of the driver. The defendant moved to exclude the plaintiff's causation expert and moved for summary judgment. The trial court excluded the plaintiff's expert and granted the defendant's summary judgment motion. The court of appeals reversed the trial court's ruling, holding that it abused its discretion in excluding the expert's testimony. The

[62] This requested instruction was taken from Comm. on Pattern Jury Charges, State Bar of Tex., Texas Pattern Jury Charges—General Negligence & Intentional Personal Torts PJC 3.2 (2003).

[63] Tex. PJC 2.4 (Proximate Cause) & Tex. PJC 3.4 (Unavoidable Accident).

Supreme Court of Texas held that the expert's testimony was properly excluded. The Court found that the various "factors and facts" set forth by the expert in support of his opinion were not probative evidence that the diesel fuel that caused the fire was caused by any defect. The Court found that the expert could not testify to any methodology that he used to reach the conclusion that the fire was caused by any defect. Lacking such a methodology, the Court found the expert's opinions to be unreliable, and the Court affirmed the decision of the trial court.

9. *Guevara v. Ferrer*, 247 S.W.3d 662 (Tex. 2007)

The court of appeals affirmed a plaintiff's verdict in a personal injury case, stating "that Arturo 'did not suffer from any of his post-accident injuries prior to the accident,' that he was not in bad health prior to the accident, and that '[n]o great length of time passed between the accident and [Arturo's] death during which he was not in the hospital or receiving care at home.'" *Id.* at 665 (alterations in original). The Court, in reversing the court of appeals, found that non-expert evidence could be sufficient to establish causation only where the causal connections "are within a layperson's general experience and common sense." *Id.* at 668. The court held that injuries which manifested themselves immediately after the accident in question were sufficiently within the scope of a layperson's general experience and common sense to sustain a verdict for the plaintiff, but that the same could not be said regarding injuries which were diagnosed later in time. For those injuries, expert testimony was required.

After *Guevara*, plaintiffs may be uncertain as to whether their claims will require expert testimony to causally connect their injuries to the defendant's breach. The answer to what falls within "general experience and common sense" may be somewhat arbitrary and difficult to anticipate. And, as is discussed in Section VIII of this paper and some of the foregoing cases show, even expert testimony is laden with potential pitfalls in this Court. The *Guevara* Court distinguished an earlier case which had credited evidence of a temporal relationship between the injury and the alleged cause. In *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729 (Tex. 1984), the Supreme Court stated:

> …Morgan had always been in good health prior to returning to work from her vacation. Upon returning to her job, she worked with her face two inches from a typesetting machine which, it is admitted by default, was leaking chemical fumes. Soon after resuming her employment, that is, soon after being exposed to the fumes emanating from the typesetting machine, Morgan experienced problems with "breathing and swelling and the like." . . . Morgan developed symptoms such as watering of the eyes, blurred vision, headaches and swelling of the breathing passages. We believe this evidence establishes a sequence of events from which the trier of fact may properly infer, without the aid of expert medical testimony, that the release of chemical fumes from the typesetting machine caused Morgan to suffer injury.

Id. at 733.

The Court in *Guevara* dismissed *Morgan* by stating, "[c]ompetent proof of the relationship between the event sued upon and the injuries or conditions complained of has always been required. In *Morgan*, we merely applied the rule to a particular set of facts." *Guevera*, 247 S.W.3d at 666.

10. *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007)

Ledesma involved a strict liability claim against a car manufacturer. The plaintiff sued Ford Motor Company after crashing the truck he was driving. The primary focus of the trial was whether the truck's rear axle separated prior to the accident, or whether it separated as a result of the accident. Ledesma alleged that the separation occurred prior to the accident and caused him to lose control of the truck. In support of his theory, Ledesma presented his own account of the accident, as well as the testimony of two expert witnesses. The jury sided with Ledesma and awarded him more than $200,000, and this judgment was affirmed by the court of appeals.

On appeal to the Supreme Court of Texas, Ford complained that the jury was improperly instructed on the definitions of manufacturing defect and producing cause. After finding that the court's instruction regarding what constitutes a manufacturing defect was reversible error, the court next addressed whether the jury had been properly instructed regarding producing cause. The trial court, following Texas Pattern Jury Charge 70.1, instructed the jury: "'Producing cause' means an efficient, exciting, or contributing cause that, in a natural sequence, produces the incident in question. There may be more than one producing cause." *Id.* at 41. Ford claimed that this definition was an incorrect statement of Texas law, and that a valid definition would state that producing cause "means that cause which, in a natural sequence, was a substantial factor in bringing about an event, and without which the event would not have occurred. There may be more than one producing cause." *Id.* at 45. Ford requested the trial court to use this definition. While agreeing with Ledesma that there may be more than one producing cause, and despite acknowledging a long line of cases in which the Court had previously "seemed to sanction" the first sentence of the given instruction (the Court's convoluted way of admitting that it had endorsed this very definition that had been provided to Texas juries for the past forty years), the Court nevertheless found that the given instruction constituted reversible error. The Court explained its decision as follows:

> [W]e have…described a producing cause as one "that is a substantial factor that brings about injury and without which the injury would not have occurred, the definition Ford asks us to adopt…To say that a producing cause is an 'efficient, exciting, or contributing cause that, in a natural sequence, produces the incident in question' is incomplete and, more importantly, provides little concrete guidance to the jury. Juries must ponder the meaning of "efficient" and "exciting" in this context. These adjectives are foreign to modern English language as a means to describe a cause, and offer little practical help to a jury striving to make the often difficult causation determination in a products case. Defining producing cause as being a substantial factor in bringing about an injury, and without which the injury would not have occurred, is easily understood and conveys the essential components of

> producing cause that (1) the cause must be a substantial cause of the event in issue and (2) it must be a but-for cause, namely one without which the event would not have occurred. This is the definition that should be given in the jury charge.

Id. at 45-46.

Oddly, while citing to *Rourke v. Garza*, 530 S.W.2d 794, 801 (Tex. 1975), Justice Willett included no discussion of this case, in which the Court held that "there was no error in the submission or definition" of the precise definition of "producing cause" which the *Ledesma* court found to be erroneous. In light of *Ledesma*, the definition of producing cause was changed as follows:

"Producing cause" means ~~an efficient, exciting, or contributing~~ a cause that~~, in a natural sequence,~~ was a substantial factor in bringing about the ~~produces the~~ [occurrence] [injury] [occurrence or injury], and without which the [occurrence] [injury] [occurrence or injury] would not have occurred. There may be more than one producing cause.

PJC 70.1, Texas Pattern Jury Charges—Malpractice, Premises, Products (2008 ed.)

The comments on "producing cause" were also revised to reflect that the source of this new definition came from *Ledesma*, and the reference to *Hartzell Propeller Co. v. Alexander*, 485 S.W.2d 943, 946 (Tex. Civ. App.—Waco 1972, writ ref.'d n.r.e.) was removed. *See* PJC 70.1, Texas Pattern Jury Charges—Malpractice, Premises, Products (2008 ed.)

While "producing cause" is a less stringent legal standard than "proximate cause," *Ledesma* set off a vigorous debate within Texas legal circles as to whether the definition of proximate cause should be changed to comport with *Ledesma's* rationale. While the definition of proximate cause was ultimately not changed, the following comment was added:

> **Caveat**. In *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007), the court held that the definition of "producing cause" should contain the "substantial factor" language. In light of that holding and previous supreme court cases discussing the similarities between producing and proximate cause (*see, e.g. Union Pump v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995)), the definition of "proximate cause" may need to be modified to include the "substantial factor" language as follows:
>
> "Proximate cause" has two parts:
>
> 1. a proximate cause is a substantial factor that [in a natural and continuous sequence] brings about an event and without which the event would not have occurred; and
>
> 2. a proximate cause is foreseeable. "Foreseeable" means that a person using ordinary care would have reasonably

> anticipated that his acts or failure to act would have caused the event or some similar event.
>
> There may be more than one proximate cause.
>
> The phrase "in a natural and continuous sequence" is bracketed because it is unclear whether those works remain necessary in light of the "substantial factor" language and the apparent deletion of "in a natural sequence" from the analysis of "producing cause" in *Ledesma*. *Ledesma*, 242 S.W.3d at 46. The Committee has also attempted to make the language more understandable to the average juror.

PJC 100.9, Texas Pattern Jury Charges—Business, Consumer, Insurance, Employment, 2008 ed.

Although *Ledesma* dealt only with the pattern jury charge regarding producing cause in the context of products liability, the same definition of producing cause will presumably apply to all causes of action that use the producing cause standard, such as claims under the Deceptive Trade Practices and Consumer Protection Act. In fact, PJC 102.7 and 102.8, which pertain to causes of action under DTPA § 17.50(a)(3) and 17.50(a)(2), respectively, were also revised to reflect *Ledesma*'s new definition of producing cause. See PJC 102.7 and 102.8, Texas Pattern Jury Charges—Business, Consumer, Insurance, Employment, 2008 ed.

One also might reasonably question whether the "substantial factor" definition moves "producing cause" standard closer to the "proximate cause" standard by implicitly requiring an attenuation analysis--which, in most cases, probably parallels a foreseeability analysis--in determining "producing cause." Note that, at least historically, "producing cause" was considered to be "proximate cause" without a foreseeability analysis. *Allbritton*, 898 S.W.2d at 775.

Finally, it remains to be seen how the use of the phrase "substantial factor" might implicate the proportionate responsibility scheme of Chapter 33. Does the "substantial factor" requirement imply the existence of a responsibility threshold? In other words, if a defendant is determined to be 25% responsible for causing the plaintiff's injury, is the defendant's conduct or product a "substantial factor" in bringing about the injury? Or suppose a jury found that a defendant's product was a producing cause of the complained-of injury, but that the defendant was only 10% responsible under Chapter 33. Would those findings be inconsistent as a matter of law, given the "substantial factor" requirement? Note that Chapter 33 contemplates the assignment of responsibility to any party whose conduct "contributed in any way the harm for which recovery of damages is sought." TEX. CIV. PRAC. & REM. CODE § 33.003.

11. *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 774 (Tex. 2007)

In this case, the plaintiff alleged that he contracted asbestosis as a result of grinding brake pads—including some manufactured by the defendant—over the course of thirty years. The plaintiff presented evidence that he was inhaled respirable asbestos fibers while grinding pads, that some

of the pads he ground were the defendant's, and that he contracted asbestosis.[64] Although the Court nominally "recognize[d] the proof difficulties accompanying asbestos claims," *Id.* at 772, it held that the plaintiff did not present necessary evidence of "the approximate quantum of fibers to which Flores was exposed" or of what percentage of those fibers came from the defendant's products. Thus, the plaintiff could not prove that exposure to this particular defendant's products were a "substantial factor" in causing the asbestosis (citing to *Lear Seigler* and quoting *Allbritton*). In reversing a jury verdict and rendering judgment in favor of the defendant, the Court referred to "substantial-factor causation, which separates the speculative from the probable," and stated that "a plaintiff must prove that the defendant's product was a substantial factor in causing the alleged harm." *Id.* at 773.[65]

12. *VanDevender v. Woods*, 222 S.W.3d 430 (Tex. 2007)

In *VanDevender*, the Court declined to reach the constitutional issues before it, holding that the constitutional issues were "immaterial . . . unless the April 2000 injury caused [plaintiff's] disability...." *Id.* at 433. Because the court of appeals failed to address causation (instead holding for the defendant on the basis of the constitutional issues), the Court remanded to the court of appeals to first address the issue of causation. The Court noted that, even if it reversed on the constitutional issue, it would "still have to remand for consideration of [the] causation arguments." *Id.*

13. *Bic Pen Corp. v. Carter*, 251 S.W.3d 500 (Tex. 2008)

In *Bic Pen*, however, the Court did exactly what it said it would not do in *VanDevender*—it reversed on a constitutional issue (preemption) but remanded to the court of appeals to consider arguments that that court had not reached, including causation. The plaintiff in that case sued on theories of design defect and manufacturing defect. The court of appeals upheld the plaintiff's verdict on the basis of design defect (finding no federal preemption) without considering the manufacturing defect claim. The Supreme Court held that the design defect was preempted, so that it could not support the verdict, and then remanded to the court of appeals to address other arguments that the parties made, including causation. Thus, in *Bic Pen*, the Court appears to have disregarded the principles espoused in *VanDevender*.

14. *Providence Health Center v. Dowell*, 51 Tex. Sup. J. 935 (Tex. 2008)

Lance Dowell was taken to the emergency room with a superficial, self-inflicted injury to his wrist. Dowell, distraught over problems with his girlfriend, had previously threatened to kill himself, but upon being taken to the hospital, he calmed down and was released by the hospital after promising that he would not to kill himself, that he would stay with his parents, and that he would attend a follow-up psychological assessment. Thirty-three hours after being discharged from the hospital, Dowell hanged himself. His parents sued the hospital, and several members of the medical staff that authorized his release. The jury found in favor of the plaintiffs, and the

[64] Although the Court noted that Flores was a long-time smoker, it credited the testimony that Flores's breathing difficulties were the result of asbestosis.

[65] The "substantial factor" language should be considered in light of the other tests for asbestos exposure and causation (like the *Lohrmann* test argued for by amici). Indeed, the opinion spends a great deal of time on the scientific literature on asbestos. *See Id.* at 770-72.

court of appeals affirmed. On appeal to the Supreme Court of Texas, the defendants argued that any negligence was not, as a matter of law, a proximate cause of Lance's death. The Court agreed with the defendants, finding that "several things defeat causality." First, the Court cited the undisputed evidence that the hospital could not have held Lance involuntarily, and that Lance would not have consented to being held at the hospital. Second, the Plaintiff's expert did not testify that hospitalization would have prevented the suicide. Third, the Court found:

> Lance's discharge from the ER was simply too remote from his death in terms of time and circumstances. After Lance's release, his mother watched him carefully and checked him repeatedly. She took him to a family retreat where he would be surrounded by people who would support him. She called to hear him assure her he was okay. Lance's brother did what he could to lift Lance's spirits and be sure that he would be in a group. They saw no cause for alarm in Lance's weekend behavior, and no one reported anything unusual to them. If Lance had followed the written discharge instructions to "[s]tay w/ parents", then as the Dowells' expert conceded, it is doubtful he would have committed suicide. And if he had been hospitalized, the Dowells' expert could not rule out the possibility that he still would have killed himself.

Id. at 328-29.

The Court, relying on IFS, found that "Lance's inability to cope with personal crises led to his death." The Court concluded:

> …the defendants' negligent conduct was their failure to comprehensively assess his risk for suicide. Because there is no evidence that Lance could have been hospitalized involuntarily, that he would have consented to hospitalization, that a short-term hospitalization would have made his suicide unlikely, that he exhibited any unusual conduct following his discharge, or that any of his family or friends believed further treatment was required, the defendants' negligence was too attenuated from the suicide to have been a substantial factor in bringing it about.

Id. at 329-30.

Accordingly, the Court reversed the judgment and rendered judgment for the defendants. Justice Wainwright, concurring in part and dissenting in part, concurred in the reversal of the court of appeals, but argued that remand was proper. He believed that reversal was required because the trial court improperly refused to submit a proportionate responsibility question to the jury. Wainwright stated, "[i]f Lance's actions apart from the act of committing suicide violated an applicable legal standard of care (such as negligence), a jury should have weighed such actions in assigning proportionate responsibility." Justice O'Neill, joined by Chief Justice Jefferson and Justice Medina, dissented. The dissent argued that the plaintiffs presented expert testimony showing that the suicide assessment conducted at the emergency room was incomplete and

cursory, and that it breached the applicable standard of care. The dissent stated that to reach its desired result, the majority "constructs new legal hurdles that are insurmountable, particularly when, as here, the provider's alleged negligence results in death." Justice O'Neill argued that the new causative element added by the majority that requires a showing that the patient would have followed appropriate medical advice had it been given, is an impossible standard that can never be met, as any such testimony would necessarily be excluded as speculative.

15. *Trammell Crow v. Gutierrez*, 51 Tex. Sup. J. 1355 (Tex. 2008)

This negligence case was decided on foreseeability grounds, but it was decided as a "duty" case rather than one of proximate cause. A movie-goer had just exited the theater and was on his way to his car when he was shot and killed. The decedent's survivors sued the property manager, claiming that the property had inadequate security. The parties presented competing theories at trial, the plaintiff claiming that the attack was a robbery and the defendant characterizing the attack as revenge for the decedent's having provided information to the police regarding a series of burglaries. The jury found in favor of the plaintiffs, and the trial court awarded over five million dollars in damages. A divided en banc court of appeals affirmed. The Court held that the property manager had no duty to protect the decedent from unforeseeable crimes, and that, even if this was a robbery, the murder was not foreseeable. The Court concluded that ten robberies on the property in the preceding two years, including three involving guns, were insufficient and too dissimilar. The Court's concluding statements convey the impression that the Court was convinced that this was not a random crime:

> Even viewing the attack on Luis as a robbery, as we presume the jury did, the circumstances of this attack are extraordinary. The assailant opened fire from behind at long range without making any prior demand. After missing with the first shot, the attacker proceeded to shoot Luis four times from behind before taking his wallet. Nothing about the previous robberies committed at the Quarry Market put Trammell Crow on notice that a patron would be murdered as part of a robbery on its premises. Thus, Luis's death was not foreseeable, and Trammell Crow did not have a duty to prevent the attack.

Id. at 19.

Four justices concurred, arguing that this type of attack may have been generally foreseeable, but that the defendant's security measures were reasonable (and, therefore, sufficient) given the relatively small risk of such an attack.

16. *Lee Lewis Construction, Inc. v. Harrison*, 70 S.W.3d 778 (Tex. 2001)

In *Lee Lewis*, the Court briefly addressed the question of whether a general contractor's negligence in failing to use adequate safety protection proximately caused the fatal fall of a subcontractor's employee. The court held the evidence legally sufficient to support proximate cause. The more troublesome question for the Court was one of duty. The majority found that the general contractor exercised a level of control over its subcontractor sufficient to raise a duty

to exercise reasonable care for the safety of the subcontractor's employees. Justice Hecht's concurrence, in which Justice Owen joined, argued that the Court should hesitate in independent contractor cases to impose a duty on the independent contractor's employer. He worried that the Court, by finding a duty based on the general contractor's retention of control over job safety, "punished the general contractor who tried to protect workers by controlling job safety and exonerated the general contractor who stood aside and let them fend for themselves." *Id.* at 788-89 (Hecht, J., concurring). Justice Hecht concurred in the result, however, because he found gross negligence in this case, and believed that to be sufficient to impose liability on the employer of an independent contractor who retained control over the safety of the contractor's employees.

17. *Leitch v. Hornsby*, 935 S.W.2d 114 (Tex. 1996)

Here, the Court reversed a jury verdict, finding that no evidence supported the jury's determination of proximate cause. An employee was injured in lifting a 65-pound cable spool. The employer negligently had not provided proper safety equipment, including lift belts. The Court concluded, however, that there was no evidence at trial that a lift belt would have prevented the employee's back injury: "Hornsby's [the plaintiff's] treating physician testified that lifting the cable reel caused Hornsby's back injury. However, in response to a question about whether Hornsby's injury could have been prevented by the use of a lift belt, Hornsby's treating physician testified: 'I would be unable to comment. I don't think there is anything that would be available to say yes or no in that respect.' This testimony is no evidence of causation." *Id.* at 119. Although the employee's co-worker testified that the injury would have been prevented, the co-worker was not a properly qualified expert witness. Interestingly, Justice Abbott's concurrence stated that the co-worker's answer, "that the 'lift belt would have eliminated this injury,' would establish proximate cause if [he] had been a properly qualified expert witness." *Id.* at 122 (Abbott, J., concurring). In other words, Justice Abbott apparently believed that, had this opinion been *admissible*, it would have been *sufficient*, a position that the Court has since rejected, as discussed below.

Justice Abbot also wrote separately to further explain why the Court's reversal did not exceed its constitutional limitations on factual review. Justice Abbot acknowledged the constitutional limitations, but continued:

> The limitations on this Court's ability to review evidence do not mandate, however, that we abstain from reviewing a jury's verdict when a party fails to offer any evidence on an element of a cause of action. Simply because a party presents several days of testimony for the jury's consideration does not mean that this Court is exceeding its constitutional limitations by requiring that the testimony amount to a scintilla of evidence in support of the legal elements of the cause of action. While jurors are vested with the authority to evaluate the evidence and weigh the credibility of witnesses, some legally sufficient evidence must nevertheless exist to support their verdict.

Id. at 120.

Notably, the author of the court of appeals decision finding sufficient causation evidence was Justice Phil Hardberger, who has criticized the "motives" and "idealogy" of the Texas Supreme Court. *See* Dorsaneo, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. at 1514. The court of appeals deferred to the jury's resolution of the "partially conflicting testimony to the degree that Dr. Geibel testified that safety belts do not necessarily prevent lifting injuries." *Leitch v. Hornsby*, 885 S.W.2d 243, 248 (Tex. App.—San Antonio 1994, pet. granted).

VIII. Trends to Watch

A. Experts and Causation

Since *Allbritton* one area of causation in which the Supreme Court has been very active is in the sufficiency of expert testimony regarding causation. Commentators discussing the Supreme Court's handling of expert testimony have noted that the issue arises most often in conjunction with causation. *See* Manuel Lopez, Scott Michelman, Nan Leverett, & David A. Chaumette, *Experts and Causation: Evaluating Reliability Under* Daubert/Robinson, Advanced Civil Appellate Practice Course 2008 (Sept. 4-5, 2008). In fact, these commentators identified twelve challenges to an expert's reliability that have proven successful in the past.[66]

The Court has frequently found that expert testimony was too unreliable to be admissible or that, if admissible, it was too unreliable to constitute evidence legally sufficient to sustain a verdict or survive summary judgment. For instance, in *Mack Trucks v. Tamez*, 206 S.W.3d 572 (Tex. 2006), the Court held that the proffered expert testimony was too conclusory to be reliable (and therefore admissible): "[The expert's] testimony did no more than set out 'factors' and 'facts' which were consistent with his opinions, then conclude that the fire began with diesel fuel from the tractor. The reliability inquiry as to expert testimony does not ask whether the expert's conclusions appear to be correct; it asks whether the methodology and analysis used to reach those conclusions is reliable. The trial court was not required to accept his opinions at face value just because Elwell was experienced in examining post-collision fuel-fed fires." *Id.* at 581.[67]

To be admissible, expert testimony must be "relevant and based on a reliable foundation." *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006). Scientific testimony is unreliable if it is not grounded in the methods and procedures of science, and amounts to no more than a subjective belief or unsupported speculation. *Id.* (quotations omitted). Similarly, the testimony is unreliable, and should therefore be excluded, if "there is simply too great an analytical gap between the data and the opinion proffered." *Id.* (quotation omitted). In *Mendez*, the Court held that the district court abused its discretion in admitting the expert testimony of three witnesses, holding that either the experts were not qualified or their testimony was not

[66] Those twelve challenges are: (1) the expert missed critical facts; (2) the expert relied on the *post hoc* fallacy; (3) the expert relied on insufficient epidemiological studies; (4) the expert lacks supporting studies or tests; (5) the expert relied on anecdotal evidence or isolated case reports; (6) the expert failed to rule out alternative causes; (7) the expert is testifying outside of his field; (8) the expert makes an unsupported jump from the facts; (9) the expert has the facts wrong; (10) the expert testimony does not "fit" the case; (11) the expert will not assist the trier of fact; and (12) the expert testifies falsely.

[67] *See also City of Keller*, 168 S.W.3d at 813 ("After we adopted gate-keeping standards for expert testimony, evidence that failed to meet reliability standards was rendered not only inadmissible but incompetent as well.").

reliable. The Court reversed the court of appeals (which had affirmed a judgment on a verdict for the plaintiff) and rendered judgment for the defendant.

It is clear from the Court's treatment of the admissibility of expert testimony that there is a substantive "reliability" component to admissibility which overlaps with sufficiency of the evidence. This relationship is demonstrated in the Court's discussion in *Mendez* (which dealt with admissibility), as well as from the Court's repeated references in *Mendez* to the standards applied in *Havner*, a case that dealt with sufficiency rather than admissibility.[68] Because the question of admissibility with regard to expert evidence necessarily involves a substantive review of the evidence for reliability, some argument might be made that, where an expert's testimony regarding causation is undisputedly admissible, it should be legally sufficient to support a verdict. The Court has rejected that notion, however.

In *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997), discussed above for its holdings regarding epidemiological studies, the Texas Supreme Court ruled that admissible expert testimony on causation does not necessarily equate to legally sufficient evidence to support a jury verdict (that is, even admissible expert testimony, which is in theory based on a reliable foundation, may not equate to more than a scintilla of evidence of causation). In *Havner*, the plaintiffs argued that, once ruled admissible, expert testimony automatically supplied the "some evidence" needed to support a jury's finding of causation against the defendants.

The Texas Supreme Court disagreed. The Court declared that "an expert's bare opinion will not suffice. The substance of the testimony must be considered." *Id.* (citations omitted). The Court discussed its holding in *Schaefer v. Texas Employers' Ins. Ass'n*, where it held "that there was no evidence of causation because despite the 'magic language' used, the expert testimony was not based on reasonable medical probability but instead relied on possibility, speculation, and surmise." *Id.* (citing *Schaefer*, 612 S.W.2d 199, 202 (Tex. 1980)). As the Court put it, "even an expert with a degree should not be able to testify that the world is flat, that the moon is made of green cheese, or that the Earth is the center of the solar system." Id. at 711 (quoting *Robinson*, 923 S.W.2d at 558). *Havner* makes clear that admissibility does not equal sufficiency. In other words, even where an expert has proffered a properly-admitted opinion that the defendant's conduct caused the plaintiff's injury, the plaintiff's case could still be subject to summary judgment, a JNOV, or a no-evidence review.

Ford Motor Co. v. Ridgway, 135 S.W.3d 598 (Tex. 2004), discussed below for the equal inference rule, further confirmed that admissible expert testimony on causation is not necessarily legally sufficient. In *Ridgway*, the admissibility of the expert's affidavit was not challenged. Thus, it may be presumed that the expert was qualified and his testimony was based on a reliable

[68] In fact, the Court noted in *Mendez* that Rule 702 provides only for the admission of evidence that will actually assist the trier of fact. 204 S.W.3d at 801. The Court has stated in subsequent cases dealing with sufficiency—but not admissibility—that where an expert's testimony is conclusory or speculative, it cannot assist the trier of fact. This would technically appear to be a statement that the evidence was erroneously admitted (which would require a trial objection and the application of an "abuse of discretion" standard of review). The Court has held, however, that an objection is not necessary to preserve a complaint on appeal about the legal sufficiency of an expert's testimony, if the speculative or conclusory nature of the testimony is evident in the face of the record. *Coastal Transport. v. Crown Central Petroleum*, 136 S.W.3d 227 (Tex. 2004). And, in any event, as discussed below, the Court has framed the same issue (speculation or conclusory testimony) as both a question of admissibility and a question of sufficiency.

foundation (that is, that the requisites of admissibility were met). Nevertheless, the Court found the expert's testimony—that "a malfunction of the electrical system in the engine compartment is suspected of having caused this accident"—to be insufficient to create a fact issue on causation. The testimony amounted to "no more than a scintilla and, in legal effect, . . . no evidence." *Id.* at 599-601. The Court reversed the appellate court, which had in turn reversed the trial court's summary judgment in favor of the defendant.

The Court reached a similar conclusion in *Coastal Transport. v. Crown Central Petroleum*, 136 S.W.3d 227 (Tex. 2004). In Coastal, the testimony of the plaintiff's expert was admitted without objection. But the Court stated that, "when expert testimony is speculative or conclusory on its face[,] then a party may challenge the legal sufficiency of the evidence even in the absence of any objection to its admissibility." *Id.* at 233. Because, on the face of the record, the expert's testimony was conclusory and lacked any explanation, the Court held the testimony to be legally insufficient.[69] *See also GMC v. Iracheta*, 161 S.W.3d 462, 471 (Tex. 2005) (holding expert's testimony unreliable and insufficient). In *Iracheta*, the Court appeared to reject proffered expert testimony on the basis that the testimony was not credible and conflicted with other expert testimony. *Id.* at 468-472.

In *Volkswagen of America, Inc. v. Ramirez*, 159 S.W.3d 897 (Tex. 2004), the Court again held admissible expert testimony insufficient to support a jury's verdict. After examining the admissible testimony of the plaintiff's expert, Cox, the Court held that "the opinions of the cause of the accident are conclusory on their face and are therefore no more than a mere scintilla of evidence." The Court stated that Cox's opinions "merely raise a suspicion or surmise of the cause of the accident and fall short of the burden of proving causation." Id. Thus, the Court found no evidence of causation despite the plaintiff's expert's admissible opinion. Chief Justice Jefferson and Justice O'Neill disagreed, arguing in dissent that, "[w]hile Cox's causation testimony is neither ironclad nor exhaustive, it is surely some evidence." *Id.* at 916. The dissent accused the majority of setting "a dangerous precedent that threatens to fundamentally alter the nature of no-evidence review" and of failing to indulge every reasonable inference in favor of the plaintiff. *Id.* at 917.

The *Volkswagen* dissent may have been right. Nowhere have we seen the Court more willing to disregard evidence that arguably supported a jury verdict than in the realm of expert testimony. The Court's treatment of such testimony in repeatedly holding that an expert's testimony could not assist a factfinder arguably offered a prelude to the new "reasonable juror" standard discussed in *City of Keller*.

B. The *Post Hoc* fallacy

As discussed above, one of the most difficult aspects of proving causation is that it often requires circumstantial evidence, and requires a plaintiff to prove what would have probably happened without defendants (tortious) conduct. Consider, for example, a retaliatory discharge claim. Rarely does an employee have direct evidence (such as a prior admission) that the employer fired her because of a protected action. Instead, the employee generally relies on such circumstantial

[69] The *Coastal* Court noted that hearsay evidence was formerly considered to be incompetent to support a verdict even if it was admitted without objection. A 1983 amendment to the Texas Rules of Evidence changed this, so that hearsay admitted without objection is competent for the purposes of legal-sufficiency review. *Coastal*, 136 S.W.3d at 232 n.1.

evidence as the timing of the discharge in relation to the protected action (or the employer's learning of the protected action).

In contexts involving circumstantial evidence of causation, the Court has sometimes discussed the post hoc fallacy (*post hoc, ergo propter hoc*—after this, therefore because of this). This is a logical fallacy that assumes that two things correlating in time are causally related. As a matter of common sense, we learn at a young age to generally presume cause and effect when we see a strong temporal relationship between two events. And we understand that, the closer the temporal relationship, the stronger our assumption of a causal relationship. For instance, we would think that the case for retaliatory discharge is extremely rare where an employer fires an employee only minutes after learning of the employee's protected action. The case is less clear where there is a month between the two events, and very weak where there is a year between the events (without knowing anything more). Although *post hoc* reasoning is a logical fallacy—that is, one may sometimes be wrong in assuming a cause/effect relationship based on a temporal relationship—such a temporal relationship probably could be accepted as *some* evidence of a cause/effect relationship. On more than one occasion in the last few years, the Supreme Court has addressed the *post hoc* fallacy in causation cases. *See, e.g.*, *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546 (Tex. 2004) (discussed *supra,* pp. 48-49); *Guevara v. Ferrer*, 247 S.W.3d 662 (Tex. 2007) (rejecting attempt to prove causation of injuries through temporal relationship with accident) (discussed *supra*, p. 52-53); *see also Coastal Tankships U.S.A., Inc. v. Anderson*, 87 S.W.3d 591, 613 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (Brister, J., concurring) ("[P]ost-hoc-ergo-propter-hoc reasoning is sometimes correct, sometimes fallacious. Proximity in time may suggest proximate cause when the harm from exposure is immediate, direct, and obvious, such as coughing, watery eyes, or (in Anderson's case) headaches and nausea. But when the alleged harm is cancer, a birth defect, or BOOP—conditions whose development may be delayed, indirect, or largely unknown—something more is required.").

C. The Equal Inference Rule

One area in which the Supreme Court has been active in causation is the "Equal Inference Rule." This rule states that a jury could not reasonably infer an ultimate fact where the "meager circumstantial evidence" could give rise to "any number of inferences, none more probable than another." *Lozano v. Lozano*, 52 S.W.3d 141, 148 (Tex. 2001) (Phillips, C.J., concurring and dissenting). This makes sense—it could be viewed as a burden of proof question. Consider, for example, a situation in which a products-liability plaintiff has only circumstantial evidence to prove a necessary element of her claim, such as causation. She asks the jury to infer from the circumstantial evidence that the defendant's product malfunctioned and caused her injuries. If the evidence demonstrates that the defendant's product was one of two possible causes, and each possible cause was exactly equally likely to have caused the injury, the plaintiff has not carried her burden of proving her case by a preponderance of the evidence.

The difficulty with the equal inference rule arises in that a court relying on that rule must conclude that a reasonable juror could not differ as to the relative probability of the inferences. Perhaps this makes sense when the evidence is extraordinarily slight. But, in most cases, the rule should have little utility. As Dorsaneo put it, "in many cases, involving an ordinary amount of circumstantial evidence—i.e., the facts and circumstances surrounding an event or occurrence from which inferences may be drawn concerning what happened, whether an applicable standard

of care was violated or what caused harm to the claimant—the 'equal inference' rule will function as a blunt instrument to challenge the factfinder's inference whenever the opposing party has a competing factual theory that is reasonable." William V. Dorsaneo, III, *Changing the Balance of Power: Juries, the Courts, and the Legislature*, State Bar of Texas—Practice Before the Texas Supreme Court 6 (April 16, 2004), *available at* www.tex-app.org/articles/55947_01.pdf.

Rarely could it be said that, as a matter of law, two competing inferences to be drawn from circumstantial evidence are precisely equal, with neither more probable than the other. If a jury believes that the circumstantial evidence creates two possible inferences, but that one is slightly more probable than the other, is a court free to disregard the jury's determination? This was the issue that the Court tacked in *Lozano*. Lozano was the mother of a child who had been abducted by the mother's ex-husband, Junior. Lozano sued Junior's family members for aiding the abduction. Her case relied entirely on circumstantial evidence, and the jury returned a large verdict in her favor. The court of appeals reversed the judgment on the verdict, relying on the equal inference rule. A heavily-divided Supreme Court issued a per curium opinion reversing the court of appeals as to some family members. There were three dissents and concurrences, with various members of the court joining portions of different opinions.

In *Lozano*, a five-member majority signed on to the part of Chief Justice Phillips' concurring and dissenting opinion that described the equal inference rule as

> a species of the no evidence rule, emphasizing that when the circumstantial evidence is so slight that any plausible inference is purely a guess, it is in legal effect no evidence. But circumstantial evidence is not legally insufficient merely because more than one reasonable inference may be drawn from it. If circumstantial evidence will support more than one reasonable inference, it is for the jury to decide which is more reasonable, subject only to review by the trial court and the court of appeals to assure that such evidence is factual sufficient.
>
> Circumstantial evidence often requires a fact finder to choose among opposing reasonable inferences. . . . And this choice in turn may be influenced by the fact finder's views on credibility. Thus, a jury is entitled to consider the circumstantial evidence, weigh witnesses' credibility, and make reasonable inferences from the evidence it chooses to believe.

Id. at 148-49.

Chief Justice Phillips held that the equal inference rule should be limited to situations where the evidence is so meager "that any plausible inference is purely a guess." *Id.* at 149. Justice Hecht, who concurred in part and dissented in part, complained that the majority "turned to mush" the equal inference rule, because it deferred to the jury to choose between two equally-plausible inferences. *Id.* at 157. He criticized the majority's opinion for ignoring settled precedent and deferring to juror "speculation." *Id.* at 158-200.

Scholars thought (perhaps hoped) that *Lozano* sounded the death knell for the equal inference rule—or at least for that rule as the Court had previously applied it. Dorsaneo, who had filed an *amicus* in the case, viewed *Lozano* as "a pretty flat-out rejection of a rule that had limited utility and had gotten in the ascendancy by accident." Mary Alice Robbins, *Court Supports Juries' Power; Is The Equal-Inference Rule Dead?*, Tex. Lawyer 1 (Jan. 22, 2001), *available at http://www.drhrlaw.com/news/tl2.html*. Another legal scholar thought that *Lozano* headed "in the right direction," but reinterpreted, rather than rejected, the equal inference rule. *Id.*

Since *Lozano*, however, the Court has continued to apply the equal inference rule in causation cases. In *Marathon Corp. v. Pitzner*, 106 S.W.3d 724 (Tex. 2003), the Court reviewed a case in which an air conditioning repairman was injured while repairing an air conditioner on the defendant's property. The repairman, who had been working on the roof, was found on the ground with injuries to the front and back of his head. No one saw how the repairman sustained his injuries. The plaintiff posited that the repairman was injured when he received an electrical shock after coming in contact with high voltage wires due to the lack of access to the air conditioning units, which undisputedly did not comply with city code. The plaintiff's expert testified that he believed the repairman received an electrical shock or surprise of some kind. The defendant suggested that the repairman was injured through an assault and battery by an unknown assailant. The court found that the circumstantial evidence in that case gave rise to any number of inferences: "The absence of the ladder at the scene indicates that someone else was present on the premises at some point. The injuries to both the front and back of Pitzner's head are consistent with a fall but also with an assault and battery." *Id.* at 729. Concluding that the factfinder was left with nothing but speculation as to the cause of the repairman's injuries, the court reversed the judgment in favor of the plaintiff and rendered judgment that plaintiff take nothing. Dorsaneo called *Pitzner* "the Texas Supreme Court's most troubling recent decision" regarding the equal inference rule. William V. Dorsaneo, III, *Changing the Balance of Power: Juries, the Courts, and the Legislature*, State Bar of Texas—Practice Before the Texas Supreme Court 12 (April 16, 2004), *available at* www.tex-app.org/articles/55947_01.pdf.

Similarly, in *Ford Motor Company v. Ridgway*, 135 S.W.3d 598 (Tex. 2004), the Supreme Court applied the equal inference rule, albeit without mentioning the rule by name. *Ridgway* was a products liability case in which the owners of a truck that caught fire sued the truck's manufacturer, claiming that there was a defect in the truck's electrical system. The plaintiffs' expert testified that he "suspect[ed]" that the electrical system caused the fire, but he "declined to eliminate all portions of the fuel system as a possible cause of the accident." *Id.* at 600-601. The Court found this insufficient to create a fact issue on causation, and thus reversed the court of appeals (which had affirmed a judgment on a jury verdict in favor of the plaintiff). But it seems unlikely that a plaintiff must eliminate *every potential cause* to avoid the equal inference rule or to create a fact issue on causation. For instance, the Ridgways' expert probably did not affirmatively rule out the possibility that the engine spontaneously caught fire, or that some unknown, untraceable mysterious force from another dimension caused the fire. But our common sense—and a jury's common sense—would be able to dismiss such ridiculous theories without the benefit of expert help.

Suppose the expert in *Ridgway* had reliably testified that, in similar circumstances, a defective electrical system was the cause of the fire 51% of the time. Would that suffice? Would 60% be enough? 99%? One might consider related cases in which a plaintiff relies on epidemiological

studies to prove a case. In *Merrell Dow Pharmaceuticals v. Havner*, 953 S.W.2d 706 (Tex. 1997), the Supreme Court considered the use of epidemiological studies (statistical studies which attempt to quantify correlations between health effects and causes) in proving that a certain medication caused a young girl's birth defects. The Supreme Court first stated that "there is a rational basis for relating the requirements that there be more than a 'doubling of the risk' to our no evidence standard of review and to the more likely than not burden of proof." In other words, in general, a study must demonstrate that the defendant's product doubles the risk of an illness or condition before it could be considered as evidence of causation. The Court went on to hold, however, that such a study would not be sufficient evidence of causation: "To raise a fact issue on causation . . . a claimant must do more than simply introduce into evidence epidemiological studies that show a substantially elevated risk. . . . [I]f there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty." *Id.* at 720.

Although the expert's statement in *Ridgway* that he "suspected" the electrical system caused the fire was insufficient to create a fact issue, a recent Court opinion found similar testimony sufficient. In *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008), the plaintiff claimed that a doctor pushed a tube too far down her esophagus and caused the esophagus to tear. The Court reversed a court of appeals decision affirming a no-evidence summary judgment in favor of the defendant. The plaintiff's expert "testified that the intubation *probably* caused the tear in [the plaintiff's] esophagus, and [the defendants] admitted this was possible." *Id.* at 426 (emphasis added). The court briefly reviewed the basis for the plaintiff's expert's opinion and, although the defendant offered a plausible alternative explanation, *id.* at 427, the Court found the evidence sufficient to survive summary judgment. *Hamilton* should surprise the Court's critics—the court of appeals had affirmed summary judgment in favor of the defendant, and the Supreme Court reversed for trial. Given the Court's prior treatment of the equal inference rule, *Hamilton* might have seemed a perfect candidate for the application of that rule.

The Court also briefly addressed the equal inference rule in *City of Keller*:

> [T]his Court has continued to note rather than disregard the presence of equal but opposite inferences . . . . Thus, for example, one might infer from cart tracks in spilled macaroni salad that it had been on the floor a long time, but one might also infer the opposite—that a sloppy shopper recently did both.

168 S.W.3d at 814 (citing *Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d 934, 938 (Tex. 1998). This hypothetical might be within the realm of the jury's common experience. Suppose, for instance, that two sets of tracks ran through the macaroni salad. One might infer that the macaroni salad had been on the floor for a long time, but one also might infer that a sloppy shopper recently spilled the salad and made the first set and another shopper immediately made the second set (or even that the sloppy shopper reversed course and made both sets). But at some point, the jury's common experience should be allowed to determine which of two competing inferences is *more* plausible. Perhaps a fitting articulation of the dilemma posed by the application of the equal inference rule is this: How many sets of cart tracks must be present in the macaroni salad before a "reasonable juror" could infer that the salad had been on the floor for a long time (and before a court could reverse the jury's verdict on this basis)?

D. Inferential Rebuttal Instructions

In *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 449 (Tex. 2006), a sharply divided Court discussed inferential rebuttal instructions. "An inferential rebuttal defense operates to rebut an essential element of the plaintiff's case by proof of other facts." *Dillard v. Tex. Elec. Coop.*, 157 S.W.3d 429, 430 (Tex. 2005). There are five categories of inferential rebuttal instructions and, as the Supreme Court has noted, a given set of facts may implicate more than one category. *Dillard v. Tex. Elec. Coop.*, 157 S.W.3d 429, 434 (Tex. 2005) ("For example, an occurrence caused by severe weather could justify either an unavoidable-accident or an act-of-God instruction.").[70] The Court has held that a single inferential rebuttal instruction is generally sufficient, because "jurors need not agree on what person or thing caused an occurrence, so long as they agree it was not the defendant." *Id.* at 434.

In *Dew*, a plurality of the Court held that the facts of the case did not warrant an inferential rebuttal instruction, while the concurrence believed that, even if an instruction was warranted, any error was harmless. The dissenters, Justices Johnson, Hecht, and Green, argued that the refusal to submit an inferential rebuttal instruction amounted to harmful error. In a concurring opinion predating *Dew*, Justice Hecht detailed the benefits of inferential rebuttal instructions. After noting the argument that inferential rebuttal instructions are duplicative of other definitions and instructions in the charge, Justice Hecht continued:

> This view assumes that it is a good thing for trial courts to tell juries as little as possible about the parties' legal claims . . . . It may be that jurors can recognize that some accidents are unavoidable or the result of natural forces and not anyone's fault. It may be that jurors can sort through the causative agents in an occurrence without any more guidance than the standard proximate cause definition provides. Even so, there is very little harm, and some advantage, in a trial court's helping the jury with concepts like these. The law has long recognized this.

Thomas v. Oldham, 895 S.W.2d 352, 361 (Tex. 1995) (Hecht, J., concurring).

In recent years, the Court has not been inclined to reverse jury verdicts based on the inclusion or exclusion of inferential rebuttal instructions. In *Dew*, the court of appeals had reversed a judgment on a plaintiff's verdict based on the exclusion of the inferential rebuttal instruction, and the Court reversed and remanded to the court of appeals to consider issues that it had by-passed in its earlier opinion. *Dillard* presented the exact same situation. On the other hand, the Court has likewise found harmless error in the potentially-erroneous inclusion of an inferential rebuttal instruction. *See Bed, Bath & Beyond, Inc. v. Urista*, 211 S.W.3d 753, 757 (Tex. 2006). There, the jury found in favor of the defendant, and the court of appeals reversed due to the erroneous submission of the inferential rebuttal instruction. The Supreme Court reversed the court of appeals, holding (over a two-justice dissent) that any error in the submission was harmless.

IX. Pending Cases to Watch

[70] For a more detailed discussion of inferential rebuttal instructions, see Karen S. Precella, *Jury Charge Trends*, Advanced Civil Appellate Practice Course 2008 (Sept. 4-5, 2008).

A. Introduction

Several forthcoming Court decisions in the areas of causation and duty bear watching. The Court has heard argument in the following three cases, and rulings should be handed down shortly. In each of the cases, the court of appeals issued a plaintiff-friendly decision, and each is a likely candidate for reversal.

1. *Escoto v. Ambriz*, 200 S.W.3d 716 (Tex. App.—Corpus Christi 2006, pet. granted)

In *Escoto*, the defendant employed Robert Ambriz. Following a twelve-hour graveyard shift on the job, Ambriz was involved in a car accident in which he crossed the highway median. His survivors sued Ambriz's employer for wrongful death, alleging that the defendant caused him to fall asleep at the wheel and failed to provide necessary fatigue training. The trial court entered JNOV after the jury returned a verdict for the plaintiff.

The court of appeals reversed the JNOV, holding first that the defendant "had a duty because it was aware of the dangers of fatigue, knew of Ambriz's fatigue prior to the accident in question, but nonetheless permitted him to drive home to the foreseeable peril of himself and others." *Id.* at 726. Despite the court of appeals' language limiting the question to "these particular circumstances," the court of appeals' opinion arguably opened the door to a significant expansion of the concept of duty, particularly with its focus on the defendant's having "permitted" Ambriz to drive. How far would the duty extend? Must the employer take the employee's keys away? The dissent argued that the employer owed no duty under the circumstances.

The court also addressed causation. It found the evidence both legally and factually sufficient to support the jury's verdict. It held that the experts' testimony was reliable and admissible, and that the defendant's negligence did "much more" than merely provide a condition that made the injuries possible: "its conduct was instrumental in causing the fatigue, and the subsequent accident in question."

The key issues before the Supreme Court are whether the employer owed a duty to the plaintiffs (and, presumably, to the public in general) to refrain from negligently fatiguing its employee (or, in another issue, to conduct fatigue education) and whether the evidence was legally sufficient that the accident was a result of fatigue (rather than, for example, driver inattention) and whether fatigue education would have prevented the accident. The Court heard oral argument in this case on February 5, 2008.

2. *Del Lago Partners, Inc. v. Smith*, 206 S.W.3d 146 (Tex. App.—Waco 2006, pet. granted)

This is another duty and causation case, this time involving premises liability. A fight erupted between bar patrons at the defendant's resort, and one of the injured patrons sued the defendant for inadequate security. After a plaintiff's verdict, the majority in the court of appeals held that the resort owed a duty to the injured patron (because the injury was foreseeable) and that the plaintiff presented sufficient evidence that, had the resort had adequate security in the bar, the injury could have been prevented.

The dissent argued that no duty existed. It accused the majority of using "generic, undefined, unspecified past events" in its foreseeability analysis, and of improperly examining the event history in the resort as a whole—rather than just in the bar—to determine the existence for security in the bar. In distinguishing another case, the dissent also stated that, although foreseeability is a factor in the context of both duty and proximate cause, duty is typically a legal question whereas proximate cause is generally a fact question. So "[t]he methods and standards of review are different." The Supreme Court heard oral argument on December 6, 2007.

3. *Columbia Rio Grande Reg'l Healthcare, L.P. v. Hawley*, 188 S.W.3d 838, 842 (Tex. App.—Corpus Christi 2006, pet. granted)

Here, Ms. Hawley's primary care physician sent her to the defendant hospital for the removal of part of her colon (she had a "ruptured diverticuli"). An examination of the removed colon tissue revealed that Ms. Hawley had cancer, but the hospital did not inform Hawley of this fact, and she did not discover it for another year. She sued the hospital for negligence, and the key issue in the case was whether she would have had a greater-than 50% chance of survival had the hospital told her of the cancer (and had she begun treatment at that point). If, at the time of the hospital's negligence, Ms Hawley had a chance of survival 50% or less, she could not recover.

Sufficiency of the causation evidence (the chance-of-survival issue) was hotly contested in trial and on appeal, but the briefing in the Supreme Court addresses the trial court's jury instructions. One key issue before the Court is whether the trial court was required to submit a jury instruction informing the jury that, in order for the hospital's negligence to be the proximate cause of Hawley's injuries, she must have had a greater than 50% chance of survival when the cancer was first discovered. The trial court declined to give the instruction, and the court of appeals affirmed, holding that this concept was "inherent in the jury charge," because the loss-of-chance rule is not a separate hurdle for plaintiffs but is merely an application of the ultimate "preponderance of the evidence" standard of proof. The Court heard oral argument on January 17, 2008, and most of the oral argument dealt with this question.[71]

X. Conclusion

The Texas Supreme Court in recent years has not hesitated to reverse jury verdicts based on its view of the "causation" evidence; according to Professor Dorsaneo it has not appeared constrained or even much bothered by limitations in the Texas Constitution on the permissible scope of its evidentiary review, or by decades of tort formulations calculated to make "causation" findings largely the province of the jury. This trend occurred while the court was re-writing the evidentiary review rules, culminating in *City of Keller*. The court's recent willingness to take and decide causation cases is breathtaking, even when compared to the Court's most activist "plaintiffs-oriented" period (in the mid- and late 80's). What this means for *stare decisis* in this state is anybody's guess. How much future courts will perceive themselves constrained by the court's recent decisions is also anybody's guess. The danger, of course, is that what Judge Andrews called "practical politics" may mean future courts take away from the recent causation

[71] Justice O'Neill questioned the petitioner's assertion that the instruction must be explicitly spelled out to jurors. Justice Brister appeared unpersuaded by the respondent's contention that the instruction was sufficiently implied in the instruction regarding the plaintiff's burden of proof.

decisions the lesson that *every* aspect of a jury's decision in tort cases, and not just the "duty" issue, is really a question of public-policy for the court (and perhaps in a few years "practical politics" could mean those courts have less obeisance to the defense side of the docket and less deference to jury findings of no causation). They may infer that it is permissible to weigh the sufficiency of the evidence, as long as that function is disguised as something else, like "legal cause," or a "reasonable juror" test. One thing is certain: the recent Texas Supreme Court's approach to causation provides ample precedent for a later activist Court to second-guess juries and courts of appeals based on a different view of the weight of the causation evidence.

APPENDIX A

PJC 100.9 Proximate Cause

"Proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

COMMENT

Caveat. In *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007), the court held that the definition of "producing cause" should contain the "substantial factor" language. In light of that holding and previous supreme court cases discussing the similarities between producing and proximate cause (*see, e.g.*, *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995)), the definition of "proximate cause" may need to be modified to include the "substantial factor" language as follows:

> "Proximate cause" has two parts:
>
> 1. a proximate cause is a substantial factor that [*in a natural and continuous sequence*] brings about an event and without which the event would not have occurred; and
>
> 2. a proximate cause is foreseeable. "Foreseeable" means that a person using ordinary care would have reasonably anticipated that his acts or failure to act would have caused the event or some similar event.
>
> There may be more than one proximate cause of an event.

The phrase "in a natural and continuous sequence" is bracketed because it is unclear whether those words remain necessary in light of the "substantial factor" language and the apparent deletion of "in a natural sequence" from the analysis of "producing cause" in *Ledesma*. *Ledesma*, 242 S.W.3d at 46. The Committee has also attempted to make the language more understandable to the average juror.

When to use. PJC 100.9 should be used in every case in which a finding of proximate cause is required. It is based on the definition approved by the court in *Rudes v. Gottschalk*, 324 S.W.2d 201, 207 (Tex. 1959). For a discussion of the element of "foreseeability," see *Motsenbocker v. Wyatt*, 369 S.W.2d 319, 323 (Tex. 1963); and *Carey v. Pure Distributing Corp.*, 124 S.W.2d 847, 849 (Tex. 1939).

Caveat. As this edition went to press, the Supreme Court Advisory Committee was considering changes in the admonitory instructions for recommendation to the Supreme Court of Texas. For updates on the status of these recommendations, any changes to the approved instructions under rule 226a of the Texas Rules of Civil Procedure adopted by the Supreme Court, and any new pattern jury charges promulgated in response to such changes, visit **Update.TexasBarBooks.com** (book ID: 6454).

APPENDIX B

PJC 102.1 Question and Instruction on False, Misleading, or Deceptive Act or Practice (DTPA § 17.46(b))

QUESTION _____

Did *Don Davis* engage in any false, misleading, or deceptive act or practice that *Paul Payne* relied on to *his* detriment and that was a producing cause of damages to *Paul Payne*?

"Producing cause" means an efficient, exciting, or contributing cause that, in a natural sequence, produced the damages, if any. There may be more than one producing cause.

"False, misleading, or deceptive act or practice" means any of the following:

[Insert appropriate instructions.]

Answer: _____

COMMENT

When to use. PJC 102.1 is a basic question that should be appropriate in most cases brought under section 17.46(b) of the Texas Deceptive Trade Practices–Consumer Protection Act (Tex. Bus. & Com. Code §§ 17.41–.63) (DTPA). Questions for other causes of action based on the DTPA or the Insurance Code may be found at PJC 102.7 (unconscionable action), 102.8 (warranty), 102.14 (Insurance Code), and 102.21 (knowing or intentional conduct).

Accompanying instructions. Instructions to accompany PJC 102.1, informing the jury what type of conduct should be considered under the question, are at PJC 102.2–.6. If more than one instruction is used, each must be separated by the word or, because a finding of any one of the acts or practices defined in the instructions would support recovery under the DTPA.

"Producing cause." A consumer may maintain an action where any act or omission violating the DTPA constitutes a *producing cause* of actual damages. DTPA § 17.50(a). The definition of "producing cause" is from *Rourke v. Garza*, 530 S.W.2d 794, 801 (Tex. 1975).

Broad-form submission. PJC 102.1 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." *See also Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980)

(approving broad question in deceptive trade practice case). If there is legal uncertainty on one or more theories of recovery, broad-form submission may not be feasible, and separate questions may be required. *See Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 215 (Tex. 2005); *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378, 388–89 (Tex. 2000) (broad-form submission combining valid and invalid theories was harmful error).

Knowing or intentional conduct. If the defendant is found to have knowingly or intentionally engaged in any false, misleading, or deceptive conduct, the DTPA provides for additional damages. DTPA § 17.50(b)(1). See PJC 102.21 for a question on knowing or intentional conduct and PJC 115.11 for a question on additional damages.

Vicarious liability. If the issue is the vicarious liability of one for another's conduct, see *Celtic Life Insurance Co. v. Coats*, 885 S.W.2d 96, 98–99 (Tex. 1994); *Royal Globe Insurance Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 693–95 (Tex. 1979) (discussing principal's liability for acts of agent in DTPA and Insurance Code case); and *Southwestern Bell Telephone Co. v. Wilson*, 768 S.W.2d 755, 759 (Tex. App.—Corpus Christi 1988, writ denied) (company liable for unreasonable collection efforts of outside attorneys that "were committed for the purpose of accomplishing the mission entrusted to the attorneys").