

# Defining Causation In Transactional Malpractice

BY ARTHUR S. LINKER

The New York Court of Appeals repeatedly has held, and recently reaffirmed, that a legal malpractice claim requires proof that but for the attorney's negligence, the plaintiff-client would have prevailed in the underlying lawsuit (or, in an action alleging negligent advice, would not have incurred damages). *E.g.*, *Leder v. Spiegel*, 9 N.Y.3d 836 (2007); *AmBase Corp. v. Davis Polk & Wardwell*, 8 N.Y.3d 428 (2007). Despite those decisions, the Appellate Division, Second Department, over a vigorous dissent, recently upheld a jury verdict in a transactional malpractice action in which the trial court had rejected the defendant's request for a but for jury instruction on causation. Instead, the trial court had charged the jury that the plaintiff needed to prove only that the defendant's negligence was a substantial factor in causing actual damages to the plaintiffs. *Barnett v. Schwartz*, \_\_ A.D.3d \_\_, 2007; NY Slip Op 09712, 2007; WL 4328743 (2d Dept. Dec. 11, 2007). *Barnett* raises interesting questions concerning whether the substantial factor jury instruction is proper in a legal malpractice action and provides guidance sufficient for the jury to decide the causation issue correctly.

## The facts in *Barnett v. Schwartz*

In 1992, the plaintiffs retained the defendant attorney Jeffrey Schwartz and his law firm to provide advice and representation in connection with the plaintiffs entering into an as is lease agreement for commercial property, with an option to buy. Two years earlier the property had been classified as an inactive hazardous waste disposal site. At trial, plaintiffs claimed that they were never advised and were otherwise unaware of the environmental condition of the property when they signed the agreement; that they would not have signed the agreement had they known; and that they did not learn of the status of the property as a hazardous waste site until 1994. By then, the plaintiffs already had invested money to renovate the property.

The plaintiffs then sought further legal advice from Schwartz, who advised them that they had no recourse against the landlord/owner because they had signed an as is lease. Schwartz opined that a cleanup would take approximately six months, advised the plaintiffs to continue paying rent and to exercise the option to purchase the property and obtained a series of extensions of the purchase option over the next few years. The plaintiffs stopped paying rent in 1995. In 1996, the landlord/owner agreed to clean up the property but the cleanup took nearly three years and the property was not removed from the inactive hazardous waste site registry until 2000. In 2001, after having been notified that the condition had been remedied but that state environmental authorities would be conducting additional periodic testing of the air quality at the property the plaintiffs decided to vacate the property and not to exercise the purchase option.

Schwartz disputed the plaintiff's version of the facts, and contended that he had informed them about environmental risks related to the property. He claimed that the plaintiffs had chosen to sign the agreement without further investigation because both they and the landlord/owner were anxious to complete the transaction; and that he had discussed the as is clause with them and had told them that the

landlord! Owner had refused to insert an indemnification clause in the agreement. The defendants also claimed that, if the plaintiffs had exercised the option and purchased the property (which the landlord/owner later sold for a price that exceeded what would have been the plaintiffs cost), they would not have suffered any damages.

The trial court charged the jury that the plaintiffs were required to establish that the defendant's negligence was a substantial factor in causing actual damages to the plaintiff. The defense took vigorous exception to the substantial factor language, and unsuccessfully requested the trial court to charge the jury that the plaintiffs needed to prove that but for the defendant's negligence the plaintiffs would not have sustained damages. The jury found in favor of the plaintiffs and awarded damages.

### **The Appellate Division Affirms**

On appeal, the defendants contended that the trial court had given an erroneous jury charge on the causation issue. They argued that the substantial factor charge was error because it amounted to a less rigorous standard of causation than the but for charge that was declined by the trial court.

The Appellate Division majority disagreed. It held that the but for standard of causation did not require that the negligence be either the or a proximate cause of damages, or require a greater, more direct degree of causation than proximate cause; and that it was not synonymous with sole proximate cause or require a degree of causation in legal malpractice cases greater than proximate cause. The majority observed that the New York Pattern Jury Instruction on legal malpractice in the litigation context (NY PFI 2:152) does not expressly use the phrase but for, and that the comments to the instruction, while noting the but for formulation, provide that a defendant-attorney's negligence need only be a proximate cause of damages and refer the reader to the general Pattern Jury Instruction on proximate cause [NY PJI 2:70]. The instruction adopts the substantial factor test of RESTATEMENT (SECOND) OF TORTS 431. The majority therefore held that the but for formulation, which grew out of the lawsuit-within-a-lawsuit scenario, was not necessarily required in a case involving negligent transactional legal advice.

### **The Appellate Division Dissent**

The dissent argued that the jury charge was improper because the relevant cases do not indicate the requisite but for requirement is satisfied by proof that the malpractice was merely one (of several proven causes) resulting in the loss sustained and that while the plaintiffs need not show that the defendant's conduct was the only or sole factor resulting in the plaintiff's damages, nonetheless, the plaintiff must still conclusively demonstrate that such conduct was the primary, direct, or predominant cause of the loss sustained. According to the dissent, to prevail in a legal malpractice action the plaintiff is required to prove something more than that which was charged to the jury herein (to wit, that the jury need only find that the attorney's neglect was a proximate cause of the plaintiff's damages - i.e., one of several possible causes, including the plaintiff's own culpable conduct). The dissent cautioned, [w]hether intended or not, the trial court's employment of the phraseology in question and the majority's approval thereof will inevitably be construed by future plaintiffs as a diminishment of what heretofore had been a very rigorous standard of proof.

### **Is the Substantial Factor Test Appropriate?**

The cases have resulted in considerable confusion arising from the use of both the but for and the substantial factor formulations in determining causation. In *Milbank, Tweed, Hadley & McCloy v. Boon*, 13

F.3d 537, 543 (2d Cir. 1994), the Second Circuit, in applying the substantial factor analysis to a breach of fiduciary duty claim, stated that it did not require proof of strict but for causation or proximate cause. However, in *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 271; 780 N.Y.S 2d. 593, 596 (1st Dept. 2004), the Appellate Division held, in the context of a motion to dismiss, that the but for standard of causation applicable to a legal malpractice claim also applied to a claim for breach of fiduciary duty rather than the less rigorous substantial factor causative standard. See Roy Simon, *Legal Malpractice & Breach of Fiduciary Duty (Part I)*, NYPRR (April 2006).

In my judgment, it is questionable whether the substantial factor test, properly understood, is less rigorous. The source of the substantial factor test, RESTATEMENT (SECOND) OF TORTS 431, states (in comment a) that the word substantial imposes a requirement in addition to causation in fact (i.e., but for causation). The majority's holding in *Barnett v. Schwartz* is consistent with the RESTATEMENT because it recognizes that the substantial factor test provides an appropriate proximate cause jury instruction consistent with the substantive but for causation requirement. However, as *Milbank* and *Weil, Gotshal* show, in some cases courts nonetheless have construed the substantial factor language as implying a less rigorous causation requirement.

New York is not alone in confronting confusion on this issue. In *Mitchell v. Gonzales*, 54 Cal.3d 1041, 1052; 819 P.2d 872; 1 Cal. Rptr. 2d 913 (1991), the California Supreme Court endorsed the use of the substantial factor test in negligence cases, and specifically held that the substantial factor test subsumes the but for test. But in *Viner v. Sweet*, 30 Cal.4th 1232, 70 P.3d 1046, 135 Cal. Rptr. 2d 629 (2003), a transactional legal malpractice case, the trial court as in *Barnett* had refused defendants' requested instruction on but for causation and instead charged the jury to apply the substantial factor test. The California Supreme Court decided that but for causation was required as a matter of law, but explicitly stated that it was not framing its discussion in terms of instructional error. While reaffirming its prior holding in *Mitchell* adopting the substantial factor test as subsuming the but for test, the court invited the drafting of a new and proper but for instruction.

However, on remand, the Court of Appeal held that the trial court's refusal of the but for instruction was fundamental error, and cited with approval the then-new Judicial Council of California Civil Jury Instruction (CACI) No. 601, which is specifically applicable to legal malpractice and requires proof that the attorney would have obtained a better result if [the attorney] had acted as a reasonably careful attorney. *Viner v. Sweet*, 117 Cal. App. 4th 1218, 1222 n.2; 12 Cal. Rptr. 3d 533, 536 n.2 (2004). Nonetheless, the new California proximate cause jury instruction that is applied in negligence cases generally, CACI No. 430, continues to use the substantial factor language, and other California courts have rejected the argument that *Viner* requires use of an explicit but for instruction, at least in an ordinary negligence case. See *Mayes v. Bryan*, 139 Cal. App. 4th 1075; 44 Cal. Rptr. 3d 14(2006).

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (Proposed Final Draft No. 1 2005) would abandon use of the substantial factor test, replacing it with a requirement of factual cause and providing that [c]onduct is a factual cause of harm when the harm would not have occurred absent the conduct. Comment] explains that the substantial factor test has not ... withstood the test of time, as it has proved confusing and been misused, and that it is employed alternately to impose a more rigorous standard for factual cause or to provide a more lenient standard and tends to obscure, rather than to assist, explanation and clarification of the basis of ... decisions. The tortious history of the New York and California case law on causation in transactional legal malpractice cases echoes these concerns. Whether

the New York Court of Appeals ultimately will hold that the substantial factor test is a source of confusion rather than guidance and has outlived its usefulness remains to be seen.

---

*Arthur S. Linker is a litigation partner at Katten Muchin Rosenman LLP and a/so an Adjunct Professor at the Benjamin N. Cardozo School of Law.*

© Copyright 2008 – The New York Professional Responsibility Report (NYPRR)