

# DEFENDING PROXIMATE CAUSE & DAMAGES IN AN ADMITTED LIABILITY CASE

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## I. INTRODUCTION

### A. Elements of a Negligence Claim

1. *Duty*: Legal duty to use due care.
2. *Breach*: Breach of legal duty.
3. *Proximate Cause*: Whether the breach of duty caused injury or harm.
4. *Damages*: Actual damages, compensatory or punitive.

## II. PROXIMATE CAUSE

### A. Admitted Liability

Situations arise where it makes strategic sense to admit breach of duty and defend a case on the elements of proximate cause and/or damages.

### B. Difficulty in Defining Proximate Cause

“Proximate cause is a troublesome phrase. It has a particular meaning in the law but is difficult to define. It has been defined as: ‘That which immediately precedes and produces the effect, as distinguished from a remote, mediate, or predisposing cause; that from which the fact might be expected to follow without the concurrence of any unusual circumstance; that without which the accident would not have happened, and from which the injury or a like injury might have been anticipated.’” *Jeffers v. Olexo*, 43 Ohio St. 3d 140, 143 (1989), quoting, *Corrigan v. E. W. Bohren Transport Co.*, 408 F. 2d 301, 303 (6th Cir. 1968).

### C. Proximate Cause Standard

If an injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in the light of all the attending circumstances, the injury is then the proximate result of the negligence. It is not necessary that

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the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone. *Mussivand v. David*, 45 Ohio St.3d 314 (1989).

### III. DAMAGES

#### A. Damages Standards

1. Injury or damage is a necessary element of a cause of action for negligence. *Hanson v. Kynast*, 24 Ohio St.3d 171 (1986).
2. A fundamental rule of damages is that the injured party shall be fully compensated. *Brady v. Stafford*, 115 Ohio St. 67, 79 (1926).
3. The plaintiff bears the burden of proving damages. Damages cannot be awarded if the plaintiff fails to meet this burden by presenting adequate proof. *Broadvue Motors, Inc. v. Chief of Police, City of Maple Heights*, 135 Ohio App.3d 405 (1999).
4. The general rule for the recovery of compensatory damages is that the injury and the resulting damage must be shown with a reasonable degree of certainty and not be left to conjecture and speculation. *Swartz v. Steele*, 42 Ohio App.2d 1, 5 (1974); *Gahanna v. Eastgate Properties, Inc.*, 36 Ohio St.3d 65, 68 (1988).

### IV. DEFENDING CLAIMS BASED ON LACK OF PROXIMATE CAUSE AND/OR DAMAGES

#### A. Knowledge is Power

1. *Facts are Key*: This seems obvious, but knowing the facts of your case better than opposing counsel provides advantages at all stages of litigation.

#### B. Conduct Internet Research as Part of Fact Gathering Process

1. *Internet Search Engines* ([www.yahoo.com](http://www.yahoo.com), [www.google.com](http://www.google.com), etc.): As a rule of thumb, a search should be performed on all claimants at the outset of the litigation.

EXAMPLE: Claimant alleges permanent injuries including “frozen shoulder” resulting from slip and fall at hotel. Claimant alleges inability to raise arm above shoulder-level. Internet search for claimant reveals church bulletin indicating that claimant helped at the church’s food stand

at county fair. Photo from county fair website depicts claimant reaching above head to grab food off of shelf.

2. *Court Dockets*

- a. *Civil Dockets:* Determine whether claimant is a vexatious litigator and whether claimant has brought lawsuit in the past for similar injuries that are claimed in current lawsuit in effort to prove pre-existing condition.

EXAMPLE: Claimant alleges permanent knee injuries from slip and fall at conference center. Civil docket search reveals numerous prior tort claims. A review of pleadings from prior claims demonstrates two prior trip and fall claims with the same injuries alleged. Plaintiff confirms at deposition.

- b. *Criminal Dockets:* Research prior criminal history, traffic infractions, license suspensions, etc.
- c. *Bankruptcy Dockets:* If claimant has a pending bankruptcy, confirm that the claim at issue is reported in the bankruptcy proceeding.

3. *Social Media*

- a. *Facebook* ([www.facebook.com](http://www.facebook.com)): Facebook is a public social networking website that allows people to communicate with their friends, family, and coworkers. Users develop a Facebook “profile” which incorporates personal information about the user. Profile information can include, names, birth date, gender, relationship status, employment status, educational history, hobbies, and interests. Users can incorporate photographs, video, and other digital media into their profiles. Users can also update their profile through “wall posts” and “status updates” which provide virtual, realtime updates on information of the user’s choice. Users can also keep track of profile updates of other people they know.
- b. *Twitter* ([www.twitter.com](http://www.twitter.com)): Twitter is another public social networking website that allows users to post limited messages, as well as photographs, that are then distributed to other users. Twitter users can develop networks of followers, who receive tweets sent from, and updates about, Twitter users.
- c. *Instagram* ([www.instagram.com](http://www.instagram.com)): Instagram is an online photo-sharing and social networking service that enables its users to take

pictures and share them on a variety of social networking services, such as Facebook or Twitter.

- d. *MySpace* ([www.myspace.com](http://www.myspace.com)): MySpace is similar to Facebook. MySpace users create a profile and upload personal information.
- e. *YouTube* ([www.youtube.com](http://www.youtube.com)): YouTube allows users to post video online. Also allows users to search and view videos posted by others.

EXAMPLE: Claimant alleges permanent injuries and loss of enjoyment of life. Social media search for claimant's name yields nothing. Defense counsel learns claimant's maiden name at deposition. Social media search for maiden name reveals Facebook account displaying photographs of claimant's recent vacation to Mexico. Photographs show claimant water-skiing, cliff diving and 4-wheeling.

4. *County Auditor*

*Website* ([www.auditor.cuyahogacounty.us](http://www.auditor.cuyahogacounty.us)): Contains property information for all parcels in Cuyahoga County, including owner, sale and transfer history, and sale price.

**C. Develop and Confirm Facts Through Written Discovery and Deposition Testimony**

- 1. In admitted liability case, discovery focuses on causation and damages, as opposed to seeking evidence to disprove client's breach.
  - a. Focus on developing facts for use by medical experts and damages experts. Consult these experts in preparing for claimant's deposition.
- 2. Claimant's discovery deposition is the most important tool at counsel's disposal to develop and confirm relevant facts.

EXAMPLE 1: Claimant alleged permanent leg and feet injuries resulting from MVA. Claimant was avid recreational athlete, who alleged loss of enjoyment of life as a result of no longer being able to participate in athletic pursuits to the extent pre-injury. At deposition, defense counsel inquired into claimant's attempts to take up running again. Though hesitant, at first, claimant admitted to not only participating in various races since the injury, but also winning a number of them. This information is used to oppose claimant's allegation of permanency, and to demonstrate to a jury or mediator the *de minimis* nature of the loss of enjoyment of life claim.

EXAMPLE 2: In litigation regarding property damage allegedly resulting from collapsed retaining wall, claimants' argued that they were entitled to compensation for costs of unrelated aesthetic improvements made in the area where damage occurred. Defense counsel established at claimants' depositions, as well as at landscaper depositions, that the ornamental landscaping installed after the collapse of the wall was not the same as the material that had been damaged, and that the decision to install the ornamental landscaping was the choice of the claimants, and not necessitated by the collapse of the wall. This information was used to demonstrate the inappropriateness of claimant's damages valuation.

3. Depositions of eyewitnesses to alleged tortious event are not as important in admitted liability case. It is more beneficial to put your efforts into developing your case through your causation and damages experts.

#### **D. Medical Experts**

1. Medical expert review is an invaluable tool in defendant the proximate cause and damages aspects of admitted liability personal injury claims.
  - a. Confirm the extent of claimant's alleged injuries.
  - b. Confirm the degree of permanency of alleged injuries.
  - c. Confirm the necessity of treatment received by claimant.
  - d. Determine the extent to which claimant's alleged injuries are attributable to preexisting conditions.
2. *Types of Medical Expert Review (IME vs. Medical Records Review)*
  - a. *Independent Medical Exam/Evaluation (IME):* An IME is an examination of the claimant performed by a doctor who has not previously been involved in the claimant's care. It is usually performed at the behest of the party defending the claim. No doctor-patient relationship is established by the examination. As well as the physical examination of the claimant, an IME will usually include a review of the claimant's pertinent medical records and the preparation of a written report setting forth the doctor's conclusions derived from the IME. The objective of IME is to determine one or more of the following:
    - i. Relationship of diagnosis to a specific injury, accident or illness;

- ii. Necessity of treatment provided;
- iii. Further treatment recommendations;
- iv. Extent of permanent impairment or disability;
- v. Other information that may be needed to evaluate a claim.

The benefit of an IME as opposed to a medical records review is that the doctor performing the IME and serving as your expert witness has the benefit of examining the claimant's physical and mental state first-hand. However, the cost of an IME is usually greater than a medical records review, and they are more difficult to schedule.

EXAMPLE: Use of IME in MVA claim to determine extent of alleged soft tissue shoulder injuries. IME physician noted pre-existing, 7-year history of shoulder pain. Negative finding on x-rays. No mention in medical records of claimant attributing pain to MVA until 10 months post-MVA. Over-dramatizing extent of injury at physical examination. Claimant appeared to be in "manic phase of bipolar disease" at physical examination.

- b. *Medical Records Review:* A medical records review is also performed by a doctor who has not previously been involved in the claimant's care. It is usually performed at the behest of the party defending the claim. The reviewing doctor will review all of the claimant's pertinent medical records and prepare a written report setting forth the doctor's conclusions based upon this review. The benefit of the medical records review, as opposed to an IME is that it is usually cheaper and can be conducted quicker given that a physical examination of the claimant is not scheduled. However, the doctor performing the review will not have the benefit of examining the claimant first-hand.

A medical records review may be more appropriate where permanency of injuries is not an issue, or in an effort to establish the necessity of various treatment received by the claimant.

EXAMPLE: Use of medical records review to determine that surgical procedure utilized was unnecessary and that claimant's alleged injuries were pre-existing and not the result of minor MVA at issue.

3. Ideally, the expert performing the IME or medical records review should have past experience rendering opinions for both claimants and defendants. Such an expert will be less likely to appear as biased at trial.

**E. Financial/Damages Experts**

1. A number of professionals can be utilized in an effort to reduce the amount of damages alleged by claimant.
  - a. Forensic accountants, appraisers, professional estimators, engineers

EXAMPLE 1: In litigation regarding property damage allegedly resulting from collapsed retaining wall, use of professional estimator/engineer to quantify scope of actual damage to defend claimants' allegation that they were entitled to compensation for cost of unrelated aesthetic improvements made in the area where damage occurred.

EXAMPLE 2: In negligence action where claimant alleged lost profits of various fast-food stores, use of forensic accountant to separate out losses due to negligence versus unrelated lost profits resulting from market factors and general mismanagement of business by claimant.

**F. Alternative Dispute Resolution (ADR)/Mediation Considerations**

1. Admitted liability cases are often better candidates for mediation.
  - a. Benefits include: avoiding litigation expenses associated with trial; avoiding potential runaway jury scenario; having a qualified third-party explain strengths and weaknesses of the case can facilitate productive settlement discussions.
2. Given the potential benefits, cases should be worked up to position them for ADR/mediation.
  - a. Obtain detailed expert report on causation, in attempt to clearly explain position not only to opposing counsel, but also to claimant and mediator.
  - b. Obtain expert reports that outline weakness of claimant's damage valuation and clearly illustrate and itemize claimant's actual damages.

## **G. Products Liability Context Example**

1. *Plaintiff's Allegations:* Plaintiff was exposed to asbestos insulation on turbines on 6 Great Lakes tanker ships during his employment with a Great Lakes shipping company (1979-1997).
2. Various turbines manufactured in the 1940s and 1950s may have been shipped with asbestos insulation. Case needed to defended on proximate cause or damages, if possible.
3. *Plaintiff's Proffered Evidence:* Plaintiff testified that he participated in removal and reinstallation of turbine insulation during 5-year Coast Guard and American Bureau of Shipping turbine inspections. Asbestos abatement procedures began in 1987, and anyone coming in contact with asbestos after this time must wear respiratory mask.
  - a. Co-worker witness testifies that the turbines on the vessels were made by client.
4. A review of American Bureau of Shipping records at Bowling Green State University Great Lakes Maritime Library, including yearly registry of commercial ships and onboard equipment indicates that only 2 of the 6 ships had client's turbines.

Plaintiffs counsel stipulates to the accuracy of the American Bureau of Shipping records and that the other 4 ships are no longer at issue.
5. *Internet Research*
  - a. Biographical information regarding Great Lakes ships from [www.boatnerd.com](http://www.boatnerd.com) reveals that "Ship 1" was in indefinite layup in Duluth, MN since 1981, and that "Ship 2" was in the Ford Motor fleet until 1989 at which time it was purchased by Plaintiff's employer. This reduced Plaintiff's exposure period to 1979-1981 on "Ship 1" and 1989-1997 of "Ship 2."
6. *Records from Plaintiff's Employer*
  - a. Obtained Affidavit from employer confirming above dates.
  - b. Obtained document showing Plaintiff's job duties placed him at a separate shipbuilding company as on-site representative for employer from 1979 to 1982.

7. *Outcome*

- a. No exposure on “Ship 1” could have been proximate cause of Plaintiff’s injuries.
- b. Any exposure on “Ship 2” was after abatement began, after Plaintiff began wearing breathing protection, and would have only occurred 1-2 times depending on when 5-year inspection occurred. This could be considered the proximate cause of Plaintiff’s injuries.
- c. Summary judgment granted.

**H. Legal Malpractice Context Examples**

Common Fact Pattern in Legal Malpractice Cases: Lawyer breached the standard of care and the legal malpractice case is defended on proximate cause and damages.

1. *Example: Underlying Divorce*

Lawyer voluntarily dismisses divorce action prior to trial which allowed adverse party to re-file in another jurisdiction. Successor attorney fees for re-filing in new jurisdiction are recoverable as damages in the legal malpractice case. No other damages unless substantive divorce law is different in new jurisdiction.

2. *Example: Missed Statute of Limitations*

Lawyer missed statute of limitations on a personal injury action. Admit breach and then defend the underlying personal injury action as you would otherwise on damages.

3. *Example: Underlying Settlement*

Lawyer forces client into a settlement on the eve of trial. Client then sues lawyer contending there would have been a better result had the underlying case gone to trial. Legal malpractice plaintiff must prove what the result in the underlying case would have been but for the coerced settlement in order to demonstrate measure of damages in legal malpractice case.