NYLJ

LETTERS

To the Editor

Problem Reported With Charge on Cause

I am writing to publicize a problem that I, and other attorneys, am experiencing with regard to the suggested proximate cause charge, PJI 2:70 etc, and its related special verdict question.

It wrongly raises plaintiff's burden of proof.

The old phraseology asked a jury, "Was defendant's negligence a proximate cause of the accident? The new phraseology asks, "Was defendant's negligence a substantial factor in causing the accident?

This seeming quibble with regard to the wording of the proximate cause special verdict coupled with an inadequate jury charge leads a jury to wrongly believe that substantial negligence or gross negligence is required. Jurors take the words "substantial factor" as referring to the negligence and not to the causation. The wording diverts a jury's attention from an evaluation of causation to an evaluation of the degree of negligence. Negligence, however, like pregnancy, is not a matter of degrees. You either are or are not.

Why this might happen, I think, has its origins in grammar. We all have inherent grammatical circuits that give us an ideology that governs how we see the world. We only see what our grammatical ideology lets us see.

In the old phraseology, there were three significant thoughts: negligence, proximate cause, accident. By their positioning in the sentence, the three terms shared equal status and were separate and apart from one another. Negligence was seen as a different entity than proximate cause which was again seen as a different entity than accident. Moreover, the old phraseology had an onomatopoeic flow to it from negligence through causation to accident imitating the flow of causation from cause to an effect.

However, in the new phraseology, an additional thought has been thrust into the mix. Now there are negligence, substantial factor, causation and accident and they no longer share equal, independent status. In fact, the ranking of causation is — grammatically speaking — down at the bottom. Now, negligence, substantial factor and accident are the stars and causation is a bit player. By placing the concept of causation in a prepositional phrase subordinate to and modifying substantial factor, causation is relegated to the bottom of the heap of thoughts.

Here is what is happening. Jurors, like us, read from left to right. In the old phraseology, they first encountered "negligence" and then "proximate cause" and based the instruction given by the word, "was," jurors tried to figure out whether the negligence was a proximate cause. Now, on account of the new phraseology, jurors are going from "negligence" to "substantial factor" and, in reality, are not even going as far as the word "factor" and are wrongly trying to figure out whether the negligence is substantial.

Substantial negligence is not what the law requires for liability. It requires substantial causation.

To give causation the status it deserves and to satisfy those who think the word "substantial" is better than the word "proximate," the special verdict should be rewritten as follows:

> Was defendant's negligence a cause in a substantial way of the accident?

This phraseology would make clear to a jury that substantial modifies causation, not negligence. It would even be better to ask simply "Was defendant's negligence a cause of the accident." leaving an explanation of the substantiality element of causation to the judge's charge.

The problem is especially acute in a case where a jury must apportion negligence. A jury that thinks a defendant's culpability is 50 percent or less and is under the false impression that the negligence must be substantial has a tendency to return a defendant's verdict.

I know I sound like a Jesuit splitting hairs but the problem is real and is causing juries to throw out meritorious cases. Again I don't think the writers intentionally attempted to raise plaintiff's burden of proof, but that is the effect.

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