

PROVING YOUR CASE TO JUDGMENT

Robert E. Kleinpeter

I. Introduction

The Sad Career of Pierre Lunchbox - A Louisiana Tale

Pierre, favoring immediate funds over the poverty of college education, opts for the big bucks of a chemical operator's job right out of high school. In 1972, he begins his career as a trainee operator with Toxic, Inc., a New Jersey chemical company anxious to enter Louisiana where the workers are hungry and the regulators "reasonable." By 2000, Pierre is earning \$50,000/year, has his choice of shifts, and is the most experienced operator in the plant, now called Peachblossom Louisiana, L.L.C., a division of a Japanese multinational. About this time, he begins to forget details of job tasks he has performed for years, is absent-minded at home, and ultimately gets lost on the route to work he has taken for almost thirty years. He begins seeing various local physicians whose preliminary diagnoses range from middle age crises to early onset senility to outright malingering. None link his condition to the toxic soup he has worked in for three decades. Accordingly, when his supervisor tells him he is unsafe to other workers and must retire, he is cut loose with a pension plan that has been invested in the Japanese stock market, and the hope of Social Security disability and Medicare two years hence.

In 2001, Pierre comes to you, his former Cub Scout den leader, who made some short-term financial sacrifices for the dubious riches of a law practice. You quickly analyze this as a compensation case and file a claim for occupational disease only to have it summarily denied as non work-related. You then start casting around for a medical witness to investigate a possible link. You make some inquiries and soon realize the cost of the experts will exceed the total return offered by a Foster-era schedule of benefits even if you prevail. Do you quit here or does a more effective remedy exist?

In the classic tort scenario involving trauma such as a car wreck or slip and fall, the plaintiff's cause of action arises at a fixed point in time that is sufficiently obvious to any reasonable person. Not so for toxic torts. The Louisiana Supreme Court has recognized that cases arising from long-term toxic exposures present difficulties in determining when an injured plaintiff's cause of action arises.ⁱ For example, consider a case involving tortious exposures over decades which are a substantial factor in causing a disabling medical condition many years later, ultimately resulting in death. The direct tort action and survival action may be decided by the applicable law existing at the time of the tortious exposures; the resulting wrongful death action may be governed by the law in effect at the time of death.ⁱⁱ

And if a plaintiff like the unfortunate Pierre has experienced toxic insults over decades which ultimately disable him, his causes of action may be decided by different substantive rules which dramatically change over the years of his employment. Consider the issue of a defendant's liability as solidary or joint and divisible. If Pierre can prove a tortfeasor's conduct from 1972 to 1987 was a substantial factor in causing his disease process, he can recover 100% of his damages against that defendant even if multiple tortfeasors contributed to

his harm under the then-existing rule of solidary liability (“1% = 100%”). But for the same conduct from 1987 to 1996, the tortfeasor whose fault is quantified at less than 50% is only liable for 50% (“1% = 50%”), and for the same conduct from 1996 on, the tortfeasor is only liable for his allocated share (“1% = 1%”). When one begins to consider the application of strict liability, ultrahazardous activity, product liability, punitive damages and other theories to Pierre’s fact situation, it can quickly become a conceptual thicket. Let’s evaluate some options Pierre may have.

II. Avoiding Worker’s Compensation Immunity (Or, Who Can Pierre Sue?)

1. Tort Immunity in The Workplace

Our discussion should probably begin with an understanding of tort immunity in the workplace, or who Pierre **cannot** sue for negligence. If Pierre was an employee of Peachblossom Louisiana, L.L.C. (Peachblossom), or its predecessor corporate entities, he is prohibited from instituting a suit for negligence for exposure after 1976.

After the 1976 amendments to Section 1032 of the Louisiana Worker’s Compensation Act, La. R.S. 23:1021 et seq., the following are immune from a proceeding in tort:

- a. Pierre’s actual employer;
- b. Pierre’s co-employees under that same employer, including supervisory employees or executive officers;
- c. any principal (statutory employer) as to Pierre;
- d. any employees of a principal;
- e. a partner, if Pierre is employed by a partnership;
- f. an officer, director or stockholder of Pierre’s employer or any principal.ⁱⁱⁱ

Pierre’s employment by Peachblossom as a W-2 employee prohibits a suit against Peachblossom, except for harm caused by an intentional act.

2. Intentional Tort by Employer

Section 1032(B) of the Worker’s Compensation Act, as amended in 1976, reads:

Nothing in this Chapter shall affect the liability of the employer, or any officer, director, stockholder, partner, or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an **intentional act** (emphasis supplied).

Before 1976, a negligence action could be brought against a co-employee. The amendment disallowed this kind of action with the exception of those committed by an “intentional act.” Thus, a co-worker or employer who committed a battery upon a plaintiff cannot use the compensation statute as a shield. To prove an intentional act a plaintiff must show a person “either (1) consciously desired the physical results of his act or (2) knew that that result was substantially certain to follow from his conduct.”^{iv} This burden is stated in the

alternative as a way of relieving a claimant of the difficulty of establishing an actor's subjective state of mind (desiring the consequences) if he can show that the consequences were substantially certain to follow the act. Courts have explained that defining an intentional act by way of the disjunctive does not create an additional exception; proving substantial certainty is just a way of proving intentionality.

The fact that the actor may not intend the full consequences of his "intentional" act does not necessarily make the resulting injury subject to the workers' compensation scheme. In *Caudle v. Betts*,^v the defendant shocked the back of plaintiff's neck with an electric automobile condenser after chasing him around the car dealership where both worked. The plaintiff suffered an unexpected impairment of his occipital nerve as well as other injuries. The fact that the defendant intended the offensive contact made him liable for all the consequences of his act.

Courts have, for the most part, narrowly construed the intentional act exception. For example, in *Reeves v. Structural Preservation Systems*,^{vi} an employer directed an employee to move a heavy sandblasting pot manually, a procedure prohibited by OSHA which the employee's supervisor feared would eventually lead to injury. The Supreme Court held this was insufficient to establish an intentional act. The event - moving the heavy sandblasting pot manually - had occurred before without injury and the court thus held it was not substantially certain to occur.

But two recent appellate cases involving toxic torts have allowed an employee action pursuant to the intentional act exception. In *Belgard v. American Freightways, Inc.*,^{vii} a fork lift operator punctured a drum containing liquid ammonium hydroxate while attempting to off-load it at a terminal facility. The terminal manager and a worker tried to patch the drum and stop the leak but became overwhelmed by the toxic fumes. Belgard came into the area and moved the trailer carrying the punctured drum after being ordered to do so by his supervisor. The plaintiff had no protective equipment so he inhaled the fumes which caused him permanent debilitating injuries. In reversing the grant of summary judgment for the employer and finding material facts were in dispute, the court wrote:

To order an unprotected worker into area of toxic fumes that has just been evacuated to protect other workers is hardly harmless conduct. In other cases where an employer has had knowledge of a dangerous situation and, nevertheless, ordered an employee into a situation where injury is likely to occur, as here, we have reversed a trial court's grant of summary judgment in favor of the employer and remanded for trial.^{viii}

Another appellate court in *Abney v. Exxon Corp.*^{ix} found an intentional act harmed welders for J. E. Merit Contractors, Inc. (Merit) at the Exxon Chemical plant in Baton Rouge. Their job assignment was to weld stainless steel sheets to the inside of an Exxon fractionation tower using IncoWeld welding rods during the course of which they were exposed to known human carcinogens. The plaintiffs theorized they had to be exposed to and inhaled hazardous substances in order to perform their welding tasks inside the enclosed tower. Although the parties disputed whether a sufficient supply of dust masks existed and whether they were

available to the welders, the welders were not provided with the MSDS for the welding rod. The court found the district court's decision awarding damages to the welders was not manifestly erroneous, and affirmed a judgment in their favor, since every time the welders worked in the fractionation tower they inevitably suffered nose bleeds and other symptoms, and because they had informed Merit supervisory personnel of the problems they encountered. The court stated "we believe the plaintiffs showed that every time they went into the tower they inevitably suffered health problems, they complained but were not provided with safety equipment to alleviate the inevitable health problems, and they were ordered to return to work. Thus, they have proved an intentional act."^x

Belgard and *Abney* are consistent with the Louisiana Supreme Court's jurisprudence in this area. For the employer to be liable for intentional act it is not necessary that its supervisor intend to inflict actual damage or that its intention be malicious. It is sufficient if the actor intends to inflict either a harmful or offensive contact without the employee's consent.^{xi} And even the employee's consent will not preclude employer liability for an intentional act if the employee's consent to the contact was induced by a substantial mistake as to the nature of the vapor or the extent of harm to be expected from it and the mistake had been known to the employer or induced by its misrepresentation.

3. *Injuries Outside the Compensation Act*

Some injuries are considered "outside" of workers' compensation even if suffered by an employee in the course and scope of that worker's employment. This principle can be the basis for the assertion of a tort claim when the workers' compensation laws provide no coverage for an incident, or even when they provide no specified recovery for a covered incident.^{xii} As an example, what if Pierre worked for Peachblossom for less than a year instead of decades?

A recent Louisiana Supreme Court case involved a cleaners which employed a worker for five months to remove spots from clothing by plying a chemical (methoxyethanol) into the affected area with her bare hands. After three years the worker began experiencing medical problems and was diagnosed with a form of aplastic anemia, which caused her bone marrow to produce abnormal cells, consistent with her exposure to the toxic chemicals at the cleaners. Can she sue her former employer in tort under a negligence theory?

Yes, said the supreme court, on rehearing, in *O'Regan v. Preferred Enterprises, Inc.*^{xiii} Reversing its previous decision,^{xiv} the high court agreed with the district court and court of appeal, both of which denied the employer's motion for summary judgment based on a claim of employer immunity. The worker had originally filed a workers' compensation claim for benefits as a result of contracting an occupational disease. A workers' compensation judge denied benefits and the court of appeal affirmed.^{xv} The worker then filed a suit in district court against her employer and various other defendants who allegedly designed, manufactured and/or distributed the hazardous chemicals used in her job, giving rise to the issue before the supreme court.

Occupational diseases have never easily fit into the workers' compensation scheme.

Louisiana introduced the workers' compensation system in 1914^{xvi} but it was not until 1952 that the legislature established coverage for some occupational diseases under the rubric of workers compensation, and then only if the disease had been caused by contact with certain substances.^{xvii} The 1952 legislation also specifically provided for occupational diseases contracted by employees who had worked less than twelve months for the employer in a provision that applied to this case as La. R.S. 23:1031.1 (D):

Any occupational disease as herein listed contracted by an employee while performing work for a particular employer **in which he has been engaged for less than twelve months shall be presumed to be non-occupational** and not to have been contracted in the course of and arising out of such employment, provided, however, that any such occupational disease so contracted within the twelve months' limitation as set out herein shall become compensable when the occupational disease shall have been proved to have been contracted during the course of the prior twelve months' employment by an **overwhelming preponderance of evidence** (emphasis supplied).

The non-occupational presumption survived a 1975 legislative act removing the list of specific occupational diseases covered by workers' compensation and substituting the requirement that the disease be peculiar to the employee's particular trade.^{xviii} Thus, according to the supreme court:

[B]y virtue of the presumption that is operative because of the Legislature's creation of the temporal requirement, such disease has been identified as a risk that falls outside the protection of the compensation act. In this regard, we find that the Legislature has not only imposed a higher burden of proof, it has created a category which presumptively eliminates certain employees from workers' compensation benefits.^{xix} Second, if an employee attempts to be brought under the Act and fails to meet the heightened burden of proof, the disease remains "to be non-occupational and not to have been contracted in the course of and arising out of such employment."^{xx}

Since the employee has been eliminated from the benefits of the Workers' Compensation Act because of the presumption, the compromise that is the essence of workers' compensation theory is missing. By ratcheting up the standard of proof to an overwhelming preponderance of the evidence and expressly presuming that a claimant's injuries are non-occupational, and not contracted in the course of and arising out of employment, the Legislature has effectively withdrawn the compromise between worker and employer.

The court's decision was in accord with situations occurring under the former occupational disease statute which provided a specific list of compensable diseases. Employees harmed by substances not included in that list could sue their employer in tort because their disease was not covered by the Act.^{xxi} The exclusivity provision does not apply if the claim is not covered by the Act since "there has been no quid pro quo and thus the claimant has not lost her right to sue in tort."^{xxii}

The court cautioned its holding does not allow an employee to always seek a subsequent remedy after unsuccessfully pursuing the first. Courts must distinguish between cases which failed because the Act does not apply and those cases in which the employee failed to prove an element of an otherwise compensable claim. The court noted that “[t]he underlying circumstance in cases allowing the employee to pursue an action in tort against his employer is that, for whatever reason, the injuries in question are not ‘compensable’ under the Act.” This is so because “[t]he Act was not intended to give the employer a windfall and relieve him of all responsibility toward injured employees.”^{xxiii}

A thoughtful concurrence^{xxiv} stated that the critical issue is whether the legislature’s raising of the burden of proof for certain employees with occupational disease claims either unconstitutionally discriminates against them or substantially departs from the compromise philosophy essential to the employer-worker tradeoff. The concurrence concluded that since the legislature never gave the plaintiff a chance to prove causation by a simple preponderance of the evidence (requiring instead an overwhelming preponderance of the evidence), she had been denied a remedy under the Workers’ Compensation Act. Thus, a tort remedy is available to her if she can prove causation and negligence by a preponderance of the evidence.

In response to *O’Regan*, the Legislature enacted Act No. 1189 in the 2001 Regular Legislative Session which amended La. R.S. 23:1031.1(D) to read as follows:

Any occupational disease contracted by an employee while performing work for a particular employer in which he has been engaged for less than twelve months shall be presumed not to have been contracted in the course of and arising out of such employment, provided, however, that any such occupational disease so contracted within the twelve months’ limitation as set out herein shall become compensable when the occupational disease shall have been proved to have been contracted during the course of the prior twelve months’ employment by a preponderance of evidence.

Claims for disability arising from an occupational disease now have a prescriptive period of one (1) year, instead of the previous six (6) month time period.

4. *Statutory Employers*

What if Pierre worked for a contractor at the plant site. Would Peachblossom be considered his statutory employer and thereby immune from tort? It depends.

For a long time, Louisiana law has imposed compensation liability on statutory employers who might possibly interpose an independent contractor or sub-contractor between itself and an injured worker to avoid compensation liability. Imposition of this compensation liability created tort immunity.

La. R.S. 23:1061 provides the statutory basis for defining a principal employer. Before its amendment in 1989, it had remained unchanged since the Worker’s Compensation Act in 1914, providing in pertinent part:

Where any person (in this section referred to as principal) undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person (in this section referred to as contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; . . .

This and the 1976 amendment to §1032^{xxv} were the statutes construed by the Louisiana Supreme Court in *Berry v. Holston Well Service, Inc.*^{xxvi} The *Berry* court abandoned a previous construction of the statutory employment relationship called the “integral relationship” test. This test, according to the court, was an “almost limitless standard [which] yielded inconsistent and often illogical results since almost everything could be said to be integrally related to the principal’s trade, business or occupation.”^{xxvii} The court declared it would instead adopt a test more in line with the purpose of Sections 1032 and 1061. It then outlined a three-part test for determining whether contract work was part of an alleged principal’s trade, business or occupation:

1. Is the contract work specialized? Specialized work is, as a matter of law, not a part of the principal’s trade, business, or occupation, and the principal is not the statutory employer of the specialized contractor’s employees.

2. Where the contract work is non-specialized, the court must compare the contract work with the principal’s trade, business or occupation. At this second step, the court should make the following inquiries:

- (i) Is the contract work routine and customary? That is, is it regular and predictable?
- (ii) Does the principal have the equipment and personnel capable of performing the work?
- (iii) What is the practice in the industry? Do industry participants normally contract out this type of work or do they have their own employees perform the work?

3. Was the principal engaged in the work at the time of the alleged accident?

Thus, if the work was specialized per se, or when the principal was not actually engaged in the contract work at the time of the accident, there was no tort immunity.

After *Berry*, the legislature, in 1989, amended Section 1061 to add a sentence tracking several of the *Berry* factors:

The fact that work is specialized or nonspecialized, is extraordinary construction or simple maintenance, is work that is usually done by contract or by the principal’s direct employee, or is routine or unpredictable, shall not

prevent the work undertaken by the principal from being considered part of the principal's trade, business, or occupation, regardless of whether the principal has the equipment or manpower capable of performing the work

In *Kirkland v. Riverwood International, USA, Inc.*,^{xxviii} the supreme court considered the effect of this legislative change to Section 1061. The court held that in determining whether the contract work is part of the alleged principal's trade, business or occupation, the court must consider all pertinent factors under "the totality of the circumstances." The court rejected a mechanistic approach and stated the following multiple factors should be considered, the presence or absence of any one factor not being dispositive:

- (1) The nature of the business of the alleged principal;
- (2) Whether the work was specialized or non-specialized;
- (3) Whether the contract work was routine, customary, ordinary or usual;
- (4) Whether the alleged principal customarily used his own employees to perform the work, or whether he contracted out all or most of such work;
- (5) Whether the alleged principal had the equipment and personnel capable of performing the contract work;
- (6) Whether those in similar businesses normally contract out this type of work or whether they have their own employees perform the work;
- (7) Whether the direct employer of the claimant was an independent business enterprise who insured his own workers and included that cost in the contract; and
- (8) Whether the principal was engaged in the contract work at the time of the incident.

In 1997 and in response to *Kirkland* and *Berry*, Section 1061 was again amended, prospectively only, to read that tort immunity on the basis of trade, business or occupation will exist when the work is part of the principal's trade, business or occupation, which is in turn defined as work which is an integral part of or essential to the ability of the principal to generate that individual principal's goods, products or services and there is a written contract between the principal and the contractor which recognizes the principal as statutory employer. That contract creates a rebuttable presumption of the relationship which may be overcome only by a showing that the work is not an integral part of or essential to the ability of the principal to generate its goods, products or services.^{xxix} Recent court decisions hold that the question of statutory employer status is a question of law for the court to decide.^{xxx}

5. *Consultants*

What if Peachblossom hired various consultants throughout the years of Pierre's employment to comply with environmental regulations or ensure his and other workers' safety? These health and safety consultants might monitor breathing air to establish the presence of chemicals, make recommendations about what levels of chemicals are safe for workers to be exposed to, provide engineering services to decrease emissions of chemicals, survey the worker population for health problems specific to the industry or monitor and measure biological and psychological indicators of worker distress. These types of consultants are "third persons" for tort purposes against whom Pierre may institute suit.

A worker directly employed by Peachblossom, even if rendering specialized services such as a plant physician, would be immune from suit as a co-employee, since the legislature has amended the worker's compensation statutes to eliminate the "dual capacity" doctrine.^{xxxix} That doctrinal theory formerly allowed a laborer to sue the plant's full-time on site "company doctor" for malpractice since the doctor was not (at that time) an ordinary co-employee.^{xxxix}

6. *Executive Officers*

In 1976, the worker's compensation law was amended to read:

The rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation * * *, shall be exclusive of all other rights and remedies of such employee * * * against his employer, or any principal or any officer, director, stockholder, partner or employee of such employer or principal, for said injury, or compensable sickness or disease. * * *^{xxxix}

This amendment disallowed the so-called "executive officer" suits wherein a worker could seek tort recovery for work-related injury against officers either of the employer or a principal and their liability insurers, under certain circumstances. Thus, if a supervising corporate employee of the injured worker had been personally delegated a duty by the corporation to the worker, and breached the duty through personal (as contrasted with technical or vicarious) fault, a tort suit was permitted. This included not acting upon actual knowledge of the risk to others, as well as from a lack of ordinary care in discovering and avoiding such risk of harm which has resulted from the breach of the duty.^{xxxix} In toxic tort cases where exposures from twenty-five years ago can cause delayed injury, executive officer suits are still used to recover damages for injured workers, particularly, but not exclusively, when asbestos and silica are involved.

7. *Principal v. Sub or Sub v. Sub*

If Pierre, as a W-2 paycheck employee of Peachblossom, were hurt by the actions of a contractor at the plant site he would have a cause of action pursuant to *Benoit v. Hunt Tool Co.*^{xxxix} and progeny. In other words, the employees of a contractor are considered third persons as far as the principal's employees are concerned. This scenario is sometimes described as being able to "sue down" but not "sue up." One can also "sue sideways" such that an employee of a subcontractor can sue an employee of a different subcontractor on the same jobsite since there is no obligation of worker's compensation owed to one by the other.

8. *Products Manufacturers*

Pierre can sue the manufacturer of a product which caused him harm during his term of employment, as long as the product manufacturer is not his employer.^{xxxix} The Louisiana Product Liability Act^{xxxix} (LPLA) covers causes of action which arise after September 1, 1988,^{xxxix} including wrongful death. It doesn't cover direct and survival damages which

arose before September 1, 1988. These are governed by *Halphen v. Johns-Manville Sales Corp.*^{xxxix} Under the LPLA, the plaintiff must prove the product causing the harm was either unreasonably dangerous in construction or composition, unreasonably dangerous in design, unreasonably dangerous because of inadequate warning, or unreasonably dangerous because of nonconformity to express warranty. The LPLA sets forth these four theories as the exclusive theories of liability against manufacturers for damage caused by their products.

9. *Franchise Liability*

What if Pierre, instead of working for Peachblossom, worked for a locally owned and operated franchisee of a national chain? Let's say Pierre worked for an automotive service business and over his employment years handled solvents, came in contact with heavy metal filings and had been exposed to asbestos fibers. After decades of work he develops a cancer associated with these risks. Counsel for Pierre may want to investigate a claim against the franchiser depending upon the facts surrounding Pierre's exposure, the franchise agreement between Pierre's employer and the franchiser, the service manual's health and safety information or lack of it, advertising and marketing materials and other pertinent information. For example, the franchiser in touting the benefits of its system may advertise that franchisees don't need to know anything about the business in which they're investing. Instead, the franchiser will train them in matters involving finance, equipment and materials necessary for the enterprise, safety training for employees and anything else they might need. This kind of promise may create direct liability for the franchiser who fails to exercise reasonable care to train workers after promising in writing to do so. Also, direct liability may lie if the franchise system as designed was inherently flawed since a hole - that of training workers for safety and monitoring their health - existed and there was no instruction about what the franchisee should have done.

Theories of vicarious liability should be considered against the franchiser such as agency and the franchiser's right to control the franchisee even though it is an independent contractor. The franchise documents will usually make it abundantly clear that the franchisee is an independent contractor; however, the same documents will then impose specific requirements to conform to the franchiser's "system", mandate inspections of the facility by the franchiser's employees, set quality standards and allow total access to the franchisee's financial records. This right to control, not actual control, of the independent contractor by the principal can create vicarious liability under some circumstances.^{xl} Logically, this right of control should be less extensive than control required for agency vicarious liability; however, there must be step-by-step control, not just a requirement that the franchisee should conform to the principal's safety standards, or allow for daily inspections or permit a contractual right to reject any aspect of work at the franchisee's expense.

III. Overcoming Toxic Tort Causation Defenses or "Confounders"

The most hotly contested medical issue in a toxic tort case usually involves causation. Did defendant's product, process or chemical "cause" or "contribute" to the plaintiff's injury? Defense tactics used to dispute a plaintiff's medical causation case are predictable and consistent. Typically they involve blaming a plaintiff's toxic injury on a lifestyle choice, such as smoking, drinking or eating spicy foods; claiming plaintiff's predisposition to injury comes

from psychological or genetic factors; or pointing a finger at another entity. These defense confounders can be overcome by using basic principles of tort law to prove your case.

1. *Substantial Factor*

There must be some connection between the act or omission of the defendant and the damage suffered by plaintiff for a tort to be actionable. The vast majority of typical torts allow this cause-in-fact query to be satisfied by the “but-for” rule which has been stated as follows: The defendant’s conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant’s conduct is not a cause of the event if the event would have occurred without it.^{xli}

There is a class of tort cases which frequently, but not exclusively, includes toxic insults where the but-for rule fails. If two causes contribute to bring about an event, and either one of them, operating alone, would have been sufficient to cause the same result, some test other than but-for is required. Over time common law courts developed an alternative causation rule which has become known as the “substantial factor” test or formula. Thus, the defendant’s conduct is a cause of the event if it was a material element and a substantial factor in bringing it about. There has been considerable discussion among commentators as to whether “substantial factor” is a phrase sufficiently helpful to furnish an adequate guide for the jury, and whether it is possible or desirable to reduce it to any lower terms.^{xlii}

Louisiana law has long held that negligence is a cause in fact of the harm to another if it was more likely than not a substantial factor in bringing about the harm. And a long-recognized principle of Louisiana law is there can be more than one cause in fact making both wrongdoers liable.^{xliii} Causation is not defeated by the possibility that the injury would have happened without the defendant’s involvement.^{xliv} What instructions should a jury be given where multiple factors may contribute to cause a plaintiff’s disease?

One of the best examples of jury instructions to be given on causation when multiple potential causes of the injury exist occurred in *Rutherford v. Owens-Illinois, Inc.*^{xlv} Although involving California tort and products liability law, the court’s reasoning is, for the most part, applicable to Louisiana causation issues since it analyzes the “substantial factor” test familiar to Louisiana.^{xlvi}

In *Rutherford*, a products liability action brought by the estate of a worker who had been exposed to asbestos-containing products and subsequently died of lung cancer, the California Supreme Court cited four factors in asbestos-related cancer cases that necessitated a departure from standard jury instructions on causation. The *Rutherford* court commented that:

plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff’s exposure to defendant’s asbestos-containing product in reasonable medical probability^{xlvii} was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer,

without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that actually produced the malignant growth.^{xlvi}

Without proper guidance, a juror might conclude that the asbestos plaintiff needed to prove that fibers from the defendant's product were a substantial factor actually contributing to the development of the plaintiff's cancer. This would be, in many cases, a medically impossible burden, even with the greatest possible effort by plaintiff, because of the inherent uncertainty regarding the cellular formation of an asbestos-related cancer. Thus, the *Rutherford* court held that in addition to the standard causation instructions, the jury must also be instructed that:

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

Louisiana courts handling toxic tort claims have struggled with the same cause-in-fact issues decided by the *Rutherford* court.¹ California's experience in this area provides helpful guidance.

2. *Take the Victim as You Find Him*

A plaintiff's psychological tendencies, previous trauma and genetic predisposition have long been discovery areas where defendants sought information about confounders to mitigate or redirect their liability for hurting the plaintiff. This behavior will likely increase in the future, especially as science expands its study of genes and their function. An example of this new area of scientific scrutiny is the National Institute of Environmental Health Sciences' announcement in late 2000 of a new research initiative to establish five National Centers for Toxicogenomics.^{li} These centers will study how the human "genome" responds to stressors of industrial and agricultural chemicals, heat, sunlight, radiation, nutrition, prescription drugs, smoking, drinking alcohol and other factors. One can imagine what zealous defendants will attempt to do with emerging data before reliable science has evaluated its usefulness in environmental health or occupational decisions.

The Louisiana Supreme Court has affirmed many times^{lii} the common law rule, found in Restatement (Second) of Torts, §457, that a tortfeasor takes his victim as he finds him. Thus, the tortfeasor is responsible in damages for the consequences of his tort although the damages so caused are greater because of a prior condition of the victim which is aggravated by the tort. For example, in *Reck v. Stevens*^{liii} the supreme court reversed the court of appeal's reduction of the trial court's award for damages, finding the plaintiff's dormant (but until then controlled) psychiatric condition was activated by the tortfeasor's conduct. Likewise, in *Walton v. William Wolf Baking Co., Inc.*^{liiv} medical testimony indicated the victim was predisposed toward neurosis. Although he functioned well before the accident, his reaction to

the injury was more severe than that of most people. The court still found this did not lessen the tortfeasor's responsibility to compensate the plaintiff for all the consequences of the accident.

The Louisiana Supreme Court in *Lasha v. Olin Corp.*^{lv} held both lower courts committed reversible error in overlooking or misapplying the rules of law that require the defendant to take the victim as he finds him and to be responsible for aggravation during treatment of plaintiff's injuries, so long as plaintiff exercised reasonable care in placing himself for treatment. The plaintiff in *Lasha* was a truck driver exposed to chlorine gas while unloading a truck at defendant's chemical plant. He was a heavy smoker and had experienced ordinary problems of bronchitis and sinusitis. He had never been diagnosed with chronic respiratory problems nor diagnosed with depression. After he suffered chemical exposure, he had permanently disabling respiratory and psychological problems.

The defendant plant acknowledged Lasha was exposed to chlorine gas but argued successfully in the trial and appellate courts that his health problems were attributable to heavy smoking, a tendency toward hypochondria and depression caused by negligent over medication by his physicians. The lower courts found plaintiff failed to prove the cause-in-fact element of his case since over-medication by his own doctors had exacerbated a tendency to depression and hypochondria which disabled him. And since the chlorine gas did not cause compensable injury to a co-worker located near Lasha at the time of the exposure who neither missed work nor suffered health problems, the lower courts apparently found Lasha especially predisposed or vulnerable to respiratory illness since a "normal" person would not suffer harm.

But the supreme court found liability against the defendant plant. Even though the plaintiff's problems may have also been attributable to heavy smoking and a tendency toward hypochondria, and although a co-worker suffered no injury, the defendant's liability was not mitigated by the fact plaintiff's pre-existing infirmities or conditions were responsible in part for the consequences of his injury. The defendant plant had to take Lasha as it found him and was responsible for all natural and probable consequences of its tortious conduct. Thus, this long-standing rule applies to any predisposition of the plaintiff and can be used offensively by counsel to aid in successfully prosecuting the case. The Louisiana Supreme Court has recently affirmed that the finding of the trier of fact as to whether the defendant's negligent action aggravated a pre-existing injury or condition is subject to the manifest error or clearly wrong standard of review.^{lvi}

IV. More Plaintiff Causation Tools

1. Burden of Proof

The defense will almost always employ experts who testify the applicable science does not support the plaintiff's medical causation. The initial method for dealing with such testimony is getting the defense expert to agree that the burden of proof in the case is "more likely than not", not "scientific certainty". Any trial court analysis of your expert's theory (which is what you're now asking the defense expert to evaluate) must give due consideration

to the simple fact that the standard of proof in a civil trial is still, and always has been, more likely than not. The defense expert may not only resist, but be unwilling to consider the civil justice system's standard of proof. As Professor Sheila Jasanoff, Chair of Cornell University's Department of Science and Technology Studies (who was cited by the court in *Daubert*), has written, "It is often said that standards of proof are fundamentally different in science and the law. Thus, proof for scientists generally amounts to something like a 95 percent certainty that a presumed cause-effect correlation is not due to mere chance. Proof in civil litigation, by contrast, requires only a showing that the harm alleged was more probably than not caused by the defendant's conduct. Overly stringent restrictions on admissibility could imperceptibly ratchet up the standard of proof in civil litigation. It should be noted that the *Daubert* majority viewed the older 'general acceptance' test from *Frey* as too restrictive."^{lvii}

In *Lasha v. Olin Corp.*,^{lviii} the Louisiana Supreme Court reversed the lower courts who had erred in requiring the plaintiff to prove "to a reasonable medical certainty" his exposure to chlorine gas caused his injuries. A plaintiff's burden of proof is by a preponderance of the evidence or more likely than not, not by some artificially created greater standard. The court explained the lower courts' error as follows:

When the term "reasonable medical certainty" is used to describe the measure of persuasion in a tort case, it produces harmful error in two respects. First, it places upon the plaintiff a higher degree of proof than is required in the ordinary civil case. To require plaintiff to prove defendant's negligence, for example, to "a reasonable certainty" is to require him to prove it to such degree as to leave no reasonable doubt, which is equivalent to saying that he must prove it beyond a reasonable doubt. Second, because the word "medical" is susceptible of being construed as referring only to expert medical testimony, the use of the phrase "reasonable medical certainty" tends to preclude the trier of the facts from considering evidence other than that of expert medical witnesses. While expert medical evidence is sometimes essential, it is self-evident that, as a general rule, whether the defendant's fault was a cause in fact of a plaintiff's personal injury or damage may be proved by other direct or circumstantial evidence. (citations omitted).^{lix}

2. *Reversing Daubert on Defense Experts*

Getting the defense expert to validate your expert's methodology or exposing flaws in the defense expert's analysis is attainable and worth the effort. If the defense expert refuses to analyze the medical causation issue through the proper "more likely than not" burden of proof, then reverse his scientific requirements against him. For example, the expert may state the cause of your client's condition is most consistent with some predisposing, environmental or unknowable factor - its anything but the actions of the defendant. Have the scientific expert explain his analysis. Then make the defense expert critique your causation theory in great detail, which may include his imposition of additional methodologies he considers necessary to comprise "good science". Then have him apply that same analysis to his alternative causation theory. Almost always, the defense expert will be unable to meet his unnecessarily stringent requirements of proof for alternative causation.

Another way to illustrate the same point is to have the scientific expert explain his opinion of medical causation and how he arrived at it. Then ask him to assume his opinion is wrong. Ask what process would the expert go through to analyze and assess the opinion to find the error? Usually the expert will not respond the same way to this question as to the initial explanation of how he arrived at his medical causation opinion.

The court can readily infer the defense expert is not applying the same intellectual rigor to his alternative causation theory as he claims is required by “good science”; or, he is not as critical of his own opinion as he should be. Either way, a foundation is laid for validation of the plaintiff’s methodology on medical causation since it is similar to or more analytical than defendant’s methodology. If the defense expert is unable to meet his requirements for alleged “good science” he may be subject to a *Daubert* motion to exclude his alternative medical causation theory.

3. *Reasonable Possibility*

A potent trial weapon for the acute, if not chronic, exposure case is a conclusion of law for the trial judge or instruction for the jury on “reasonable possibility” as it relates to medical causation. Louisiana has long recognized medical causation is sufficiently proved if two conditions are met: (1) good health prior to the accident, and (2) medical testimony showing a reasonable possibility that the accident caused the injury. The plaintiff has been found in good health even when he or she had a pre-existing injury or illness that was dormant before the accident.^{lx} Although some courts have held the showing of reasonable possibility is alone sufficient to prove causation^{lxi} other courts have considered plaintiff’s showing of reasonable possibility as to medical causation created a rebuttable presumption in his favor.^{lxii}

V. Medical Causation and Reliability

Recent cases concerning Parlodel, a lactation suppressant, demonstrate the *Daubert* issues associated with admission of scientifically reliable medical evidence necessary to prove causation. Some courts have allowed expert opinions into evidence to establish a causal link between Parlodel and acute myocardial infarction (AMI),^{lxiii} others have refused admission of expert medical evidence claiming a link between Parlodel and seizures or strokes.^{lxiv} Analysis of one of the Parlodel cases, *Globetti v. Sandoz Pharmaceutical Corporation*,^{lxv} is helpful in evaluating a court’s determination of how it approached compliance with its *Daubert* “gatekeeping” requirements.

Mrs. Globetti suffered an AMI about six days after delivering her sixth child, having taken Parlodel twice daily after the child’s birth to suppress lactation. Her overall health was good, she was not a smoker or overweight, and had “protective” (very low) cholesterol levels. She had no history of high blood pressure and had never experienced hypertension during pregnancy nor delivery. Angiography of her heart wall failed to reveal any thrombus, dissection, or occlusion of the coronary artery that could account for the AMI. Her initial treating cardiologist concluded her heart event had been caused by a spasm of the coronary artery. This cardiologist knew of the possible association between Parlodel and AMI but

opined Mrs. Globetti's heart spasm was spontaneous. Other treating cardiologists and retained experts expressed medical opinions the Parlodel contributed to the arterial spasm that caused the AMI. The defendant pharmaceutical company (Sandoz) challenged these causation opinions by summary judgment motion.

Sandoz contended the medical expert opinion of the plaintiff's treating and retained doctors was nothing more than unscientific speculation, excludable under *Daubert*. According to Sandoz, plaintiffs needed an epidemiological study showing an increased risk of AMI associated with Parlodel use for a sufficiently reliable scientific opinion to be admissible. Plaintiffs opposed the motion, arguing that epidemiological evidence was not needed since there was plenty of scientifically reliable data from which a medical expert could conclude Parlodel can cause vasoconstriction sufficiently severe to cause AMI: animal studies, case reports, Food and Drug Administration Adverse Drug Reaction Reports (ADRs) and the generally accepted opinion of the medical community that Parlodel is a risk factor for AMI since it causes vasoconstriction.

The *Globetti* opinion began its analysis by noting the four *Daubert* factors^{lxvi} were neither exclusive nor exhaustive, that it remains for the trial court to determine what procedures are necessary for it to analyze the admissibility of an expert's opinion^{lxvii} and *Daubert* supplemented the old *Frye*^{lxviii} standard with a more "flexible" approach. Thus, the "gatekeeping" role of the trial court requires a practical recognition of what can be known and how it is known. The gatekeeping role is to separate opinions supported by appropriate validation based on "good grounds" from simple subjective speculation masquerading as scientific knowledge. The court wrote:

It is not part of the trial judge's gatekeeping role to determine whether the proffered opinion is scientifically *correct* or *certain* in the way one might think of the law of gravity. The gatekeeping role is addressed to mere evidentiary admissibility; it is the fact-finder's role (usually a jury) to determine whether the opinion is correct or worthy of credence. For the trial court to overreach in the gatekeeping function and determine whether the opinion evidence is correct or worthy of credence is to usurp the jury's right to decide the facts of the case. All the trial judge is asked to decide is whether the proffered evidence is based on "good grounds" tied to the scientific method.^{lxix}

Three of plaintiffs' experts used the differential diagnostic technique, wherein the physician lists the known possible causes of a condition or disease, usually from most likely to least likely, then utilizes diagnostic tests eliminating causes from the list until left with the most likely cause. Diagnostic tests typically include physical examination, medical history, testing of blood and other body fluids, MRIs, CAT scans, X-rays and other techniques for "falsifying" a hypothesis the disease came from a particular listed cause. The court recognized tests such as these performed on Mrs. Globetti are scientifically accepted techniques for confirming or eliminating specific causes for her AMI. Thus, the court considered the doctors' conclusion the AMI was caused by an arterial spasm to be well-supported.

The court then considered the quality of the next part in the causation opinion that the spasm was caused by plaintiff's ingestion of Parlodel. Experts for plaintiffs reasoned Parlodel has vasoconstrictive characteristics and is capable of causing a coronary artery spasm and was the most likely cause of AMI in the absence of any other reasonable explanation. Sandoz attacked this reasoning by claiming there was no reliable evidence Parlodel can cause vasoconstriction and plaintiffs' experts were incorrect in concluding there were no other causes for Mrs. Globetti's AMI.

The court concluded plaintiffs' experts based their opinion Parlodel can cause vasoconstriction sufficiently severe to cause an AMI on sound scientific evidence and methodologies. As foundation for their opinions plaintiffs' experts cited animal studies of ergot alkaloids similar to Parlodel to have a vasoconstrictive effect; Sandoz acknowledged and relied upon these studies in internal documents. Case reports and ADRs reported to the FDA were consistent with literature reviews that identified Parlodel as a risk factor for AMI in the postpartum period. Also, several medical textbooks state that bromocriptine (the chemical compound from which comes Parlodel) is a risk factor for AMI in the postpartum period. These sources and others were more than adequate evidence from which a reliable conclusion could be drawn about the association between Parlodel use, arterial spasm and AMI. Sandoz pointed out there is no epidemiological study showing an increased risk of AMI associated with bromocriptine. This lack of study, according to defendant, was fatal to plaintiffs. The court disagreed. Plaintiffs argued and the court agreed that an epidemiological study of the association between Parlodel and AMI is not practical because of the relative rarity of AMIs among postpartum women. The court wrote:

To gather a population of postpartum women with a sufficient sub-population of those who have suffered an AMI to be statistically significant would require hundreds of thousands, if not millions, of women. The evidence suggests that AMI occurs in postpartum women at the rare rate of 1 to 1.5 per 100,000 live births. Thus, even in a study of one million women, the sub-population of those suffering an AMI would be only ten to fifteen women, far from enough to allow drawing any statistically significant conclusions. In short, the best scientific evidence available *as a practical matter* is that presented by plaintiffs' experts.^{lxx}

The court also commented on the ethical problems associated with experimenting on human beings just to satisfy an evidentiary standard. A control-group study would require administering Parlodel to women and exposing them to the possibility of strokes and heart attacks. Thus, for the association between Parlodel and AMI or stroke to be scientifically established, a scientist must expect a number of deaths to occur among the test subjects.

The court further noted although one can question the adequacy of the scientific evidence relied upon by plaintiffs' experts, the validity of the methodologies is adequate. Thus, the court denied the defendant's motion for summary judgment on medical causation since there is reliable scientific information from which a reasonable scientific inference can be drawn that Parlodel can cause vasoconstriction under circumstances of low vascular resistance and that such vasoconstriction can cause arterial spasm to occlude a coronary artery

leading to a myocardial infarction.

Other courts have recently upheld the admissibility of expert medical testimony that strokes were caused by Parlodel,^{lxxi} finding it sufficiently reliable. These cases represent excellent analyses of the admissibility issues stemming from *Daubert*.

VI. Future Trends and Hot Topics

1. When Is an Injury Manifest?

Tradition holds that a cause of action occurs when the victim suffers harm caused by the defendant's wrong. Typically, the threat of future harm not yet realized is not enough.^{lxxii} Non-traditional claims for fear of cancer have been allowed by Louisiana courts,^{lxxiii} but there is no uniformity in applying standards to recovery. Courts have generally applied a sort of "naked eye" standard to personal injury cases, requiring injuries to be clearly manifest. But what about an injury invisible to the eye from a carcinogen that enters the body? Some experts contend that although the damage from the carcinogenic agent cannot be seen by the naked eye, the risk created by the toxin is real.^{lxxiv} An out-of-state case, *Bryson v. Pillsbury Company*,^{lxxv} points out the problems facing courts grappling with the latent harm caused by chromosomal damage.

In *Bryson*, the plaintiff discovered that her horse had fallen into a pit filled with water from a storm. Plaintiff retrieved her horse from the pit, which had been used by the defendant company to dispose of pesticidal waste. The plaintiff later developed rashes that covered her body. In opposing the company's motion for summary judgment on grounds of assumption of risk and speculative damages, the plaintiff, Bryson, through her expert from the University of Minnesota, presented evidence she suffered from extensive chromosome breakage as a result of the exposure and that, because of the chromosome breakage, she has an increased risk of developing cancer. The trial court rejected the company's claim of assumption of risk, but granted summary judgment on the grounds that the plaintiff suffered no present injury and that her claimed damages for future harm were too speculative as a matter of law.

The appellate court considered two issues:

1. Did Bryson present sufficient evidence to support her claim of a present injury?
2. Did Bryson present sufficient evidence to support her claim for damages based on her alleged increased risk of developing cancer?

Citing a previous case, *Werlein v. United States*,^{lxxvi} the court stated:

[T]he court in *Werlein* stated that it could not rule as a matter of law that the plaintiffs' alleged injuries are not "real" simply because they are subcellular. The effect of volatile organic compounds on the human body is a subtle, complex matter. It is for the trier of fact, aided by expert testimony, to

determine whether plaintiffs have suffered present harm.

The asymptomatic, subcellular damages claimed in *Werlein* are similar to the injury claimed by Bryson. Here, Bryson's expert witness presented evidence that Bryson's exposure to Captan resulted in chromosome breakage, and that such breakage is a "real and present physical and biologic injury." This testimony was disputed by the company, whose expert testified that an elevated number of chromosome aberrations are not considered an "injury" per se because they do not in and of themselves result in any physical impairment. Following the reasoning of *Werlein*, we conclude the trier of fact should resolve this fact dispute.

Further, like the plaintiffs in *Werlein*, Bryson claims emotional distress damages and medical monitoring expenses because of her alleged chromosome damage. The court in *Werlein* determined that the existence and extent of these alleged damages also presented fact questions for the jury. Again, following *Werlein*, we conclude that because there are genuine fact issues concerning the existence of Bryson's present injuries and damages, summary judgment on this claim is inappropriate.^{lxxvii}

The court affirmed the trial court's dismissal of plaintiff's claim for increased risk of future harm since she could not prove that her increased risk of developing cancer was more likely than not to occur.

No Louisiana case has awarded damages for sub-cellular damage. And the Louisiana Supreme Court has been silent on the issue of increased risk as it relates to toxic torts. Circuit courts have allowed evidence of increased risk as relevant to the issue of fear of cancer.^{lxxviii} Louisiana courts have also allowed medical monitoring damages in toxic suits, without holding medical monitoring was an independent legal right, when competent expert testimony has shown the plaintiff to be at increased risk of contracting leukemia or cancer.^{lxxix} The U. S. Fifth Circuit has commented that evidence is inadmissible to prove a claim for increased risk of cancer unless the plaintiff "can show that the toxic exposure more probably than not will lead to cancer."^{lxxx}

As opposed to a cause of action based on increased risk of disease, the Louisiana Supreme Court has developed a line of cases that allows recovery for the "lost chance" of survival, usually in the context of medical negligence.^{lxxxi} The court has stated its reluctance to extend the lost chance of survival doctrine to an ordinary negligence case that is not brought against a medical practitioner or hospital.^{lxxxii}

As medical science continues to uncover latent harm through increased accuracy of diagnostic methods for subclinical adverse effects, the law must adapt in new ways to provide adequate compensation. And Louisiana courts must determine perhaps, when such injuries are manifest.^{lxxxiii}

Courts have generally held that coverage for personal injury claims under a

Commercial General Liability (“CGL”) policy is triggered at the time of exposure to the injury-causing agent. Thus, “injury” within the meaning of the policy is the subclinical tissue damage that results on inhalation of a toxic substance such as asbestos, even if symptoms or a diagnosable condition have not yet developed.^{lxxxiv}

2. *Summary Judgment and Expert Testimony*

In *Independent Fire Insurance Company v. Sunbeam Corporation*,^{lxxxv} an important decision of special interest to toxic tort litigators, the Louisiana Supreme Court clarified the role of expert testimony in supporting and opposing a motion for summary judgment. The Court also reiterated several traditional principles of summary judgment law which endure even after the 1996 and 1997 amendments to La. Code Civ. P. art. 966.

Before *Sunbeam*, supporting or opposing a motion for summary judgment using expert testimony was an uncertain practice. Courts of appeal inconsistently applied La. Code Civ. P. art. 967, describing the type of documentation a party may submit. The First Circuit held that expert opinions do not meet article 967's requirement of “personal knowledge”, though it tempered that stance to allow expert opinions submitted by way of deposition. The Third and Fifth Circuits disallowed expert opinions not based on first-hand observation or knowledge, whether by affidavit or deposition. The Fourth Circuit allowed expert opinion to support a motion for summary judgment. The Second Circuit has held both ways. In *Sunbeam*, the Supreme Court resolved the conflict among the circuits by deciding that expert opinion testimony, whether by affidavit or deposition, may be considered in support of or in opposition to a motion for summary judgment. Assuming the testimony would be admissible at trial, it must be considered at the summary judgment stage.

The case began after homeowners and their insurer filed suit against the manufacturer of a propane gas barbecue grill, contending a fire in the home was caused by a defective grill or by a defective safety valve on the propane tank attached to the grill. The grill manufacturer third-partied a service station, who the plaintiff then added as a direct defendant, claiming the service station negligently overfilled a spare propane tank, causing vented vapors to ignite during grill use while cooking hamburgers. The third-party defendant service station filed a motion for summary judgment, asserting there was no evidence it had overfilled the spare propane tank nor any evidence it had contributed causally to the fire. Along with the deposition of the homeowner and a service station employee (who testified he didn't remember filling the spare tank, described the customary procedure for filling a propane tank like the one at issue, and testified that the service station had state inspected equipment and proper training to fill propane tanks), the service station also produced three expert witnesses by deposition. The first expert, a mechanical engineer, testified the spare tank was not overfilled, based on the eyewitness testimony of the homeowner and his own examination of the service station facility, which met applicable safety standards for filling propane gas tanks. Another engineer opined the fire started from a gas discharge from the safety valve of the operating grill tank where it was subjected to excessive heat. The third expert said the most likely cause was the malfunction of the hose line connected to the operating grill tank.

In opposition to the service station's motion for summary judgment, the plaintiffs and

third-party plaintiffs produced the report and deposition of the grill manufacturer's own expert employee. That expert performed tests using equipment similar to the homeowner's grill but with a properly filled spare propane tank and a non-defective operating tank and grill. After testing the grill by replicating the facts as described by the homeowner, he concluded it was not possible that the flames came from the operating tank. This expert opined that, counter to the homeowner's eyewitness testimony and recollection of the fire, the only possible scenario was that the fire occurred from the accidental venting of the safety relief valve of an overfilled spare tank. The expert's conclusion was that the fire was the service station's fault. This was not based on any first-hand knowledge.

The Supreme Court found a genuine issue of material fact existed, reversing the court of appeal which had affirmed the trial court's granting of summary judgment for the service station. The Court commented that "it would be inequitable and illogical to allow a party who has eyewitness testimony to be granted summary judgment over a party who has no eyewitness testimony, but who does have expert opinion evidence, which if believed, would contradict the eyewitness testimony."^{lxxxvi} The Court thus adopted the *Daubert* standards^{lxxxvii} for admissibility of expert opinion evidence at the summary judgment stage, as have the federal courts. The Court pointed out that although no affidavits were submitted in connection with the motion at issue, they may properly be used in support of or in opposition to a motion for summary judgment and are subject to challenge by way of a *Daubert* hearing, a motion to strike, or counter affidavits.

The Court emphasized four principles in its decision. The first is that the trial judge cannot make credibility determinations on a motion for summary judgment. Second, the court must not attempt to evaluate the persuasiveness of competing scientific studies. In performing its gatekeeping analysis at the summary judgment stage, the court must "focus solely on the principles and methodology, not on the conclusions they generate."^{lxxxviii} Third, the court "must draw those inferences from the undisputed facts which are most favorable to the party opposing the motion."^{lxxxix} Fourth, and most importantly, summary judgments deprive the litigants of the opportunity to present their evidence to a jury and should be granted only when the evidence presented at the motion for summary judgment establishes that there is no genuine issue of material fact in dispute. If a party submits expert opinion evidence in opposition to a motion for summary judgment that would be admissible under *Daubert* and the other applicable evidentiary rules, and is sufficient to allow a reasonable juror to conclude that the expert's opinion on a material fact more likely than not is true, the trial judge should deny the motion and let the issue be decided at trial.

The Court's decision in reversing a grant of summary judgment allowed the opinion of one expert to successfully counter eyewitness testimony and three other experts. *Sunbeam* lays down a uniform approach to the role of expert testimony in supporting and opposing summary judgment. Equally important, it restates the overall law of summary judgment in a manner which restores some of the imbalances created by overly expansive interpretations of the 1996 and 1997 amendments.

3. *Latent Injuries and Tortious Exposures*

Fairminded observers of the law applicable to latent toxic tort injuries have considered it settled law for almost a decade that the exposure theory applies in Louisiana. The exposure theory holds that the law in effect at the time of the tortious exposures applies if the medical evidence proves the toxic exposures were a substantial factor in developing the disease which results in the later manifestation of damages.

This collective mindset stems from the Louisiana Supreme Court cases of *Cole v. Celotex*^{xc} and *Walls v. American Optical Corporation*,^{xci} various state appellate decisions and federal court interpretations of state law. This is a reasonable and perhaps inescapable inference since the *Cole* court stated “when the tortious exposures occurring before Act 341's [the specific legislative act at issue before the court] effective date are significant and such exposures later result in the manifestation of damages, preact law applies.”^{xcii} The *Walls* court further embraced the exposure theory in its 1999 decision, stating: “*Cole* established the ‘exposure theory’ for determining the applicable law within the context of the direct tort action and survival action.”^{xciii}

A state 5th circuit decision interpreted *Cole* and *Wall* as endorsing the exposure theory:

Cole v. Celotex and *Walls v. American Optical* have validated the use of ‘significant exposures’ test for determining the applicable law in a long-latency tort cause of action. The law in effect at the time of tortious exposures will apply if the evidence proves that the exposures were *significant* AND *resulted in the later manifestation of damages*. There is no bright line test to establish significant exposure in cases involving latent diseases. However, expert medical testimony establishing that the exposure was sufficient enough to begin the disease process is acceptable to fix the time period for accrual of the cause of action.^{xciv}

The Second Circuit, however, has expressly declined to apply the exposure theory, stating as follows:

Until the Louisiana Supreme Court directs otherwise, we are, therefore, bound to apply that general analysis, i.e., fault, causation and damage, and decline to embark upon an across-the-board policy determination that in every case the substantial exposure theory dictates when a plaintiff's cause of action accrues.^{xcv}

For now, the supreme court and almost all inferior courts can fairly be said to have adopted the exposure theory for direct and survival claims. Of course, the Louisiana Supreme Court specifically held in *Walls* that *Cole's* reasoning shouldn't apply to the wholly distinct cause of action for wrongful death since a plaintiff's wrongful death cause of action doesn't accrue until the death occurs.

- i *Cole v. Celotex Corp.*, 599 So. 2d 1058 (La. 1992).
- ii *Walls v. American Optical Corporation*, 98-0455 (La. 9/8/99), 740 So. 2d 1262.
- iii 14 H. Alston Johnson, III, Louisiana Civil Law Treatise: Workers' Compensation Law and Practice, [Malone & Johnson], §368, pp. 251-252 (1994).
- iv *Mayer v. Valentine Sugars, Inc.*, 444 So. 2d 618, 621 (La. 1984).
- v 512 So. 2d 389 (La. 1987).
- vi 98-1795 (La. 3/12/99), 731 So. 2d 208.
- vii 99-1067 (La.App. 3 Cir. 12/29/99), 755 So. 2d 982, *writ denied*, 2000-0293 (La. 3/31/00), 756 So. 2d 1147.
- viii *Id.* at 986.
- ix 98-0911 (La.App. 1 Cir. 9/24/99), 755 So. 2d 283, *writ denied* 1999-3035 (La. 1/14/00), 753 So. 2d 216.
- x *Id.* at 290.
- xi *Fricke v. Owens-Corning Fiberglas Corp.*, 571 So. 2d 130 (La. 1990).
- xii For a thorough review of this topic, see Malone & Johnson § 362, pp. 153 - 162 (1994).
- xiii 98-1602 (La. 3/17/00), 758 So. 2d 124.
- xiv *O'Regan v. Preferred Enterprises, Inc.*, 98-1602 (La. 6/29/99), 737 So.2d 31.
- xv *O'Regan v. Number One Cleaners*, 96-769 (La.App. 5 Cir. 2/12/97), 690 So.2d 103.
- xvi 1914 La. Acts 20.
- xvii This exclusive list included diseases caused by contact with specific substances, namely the diseases of contact poisoning from enumerated sources, asbestosis, silicosis, dermatosis, and pneumoconiosis. La. R.S. 23:1031(A) (1952). Coverage was also provided for diseased conditions caused by exposure to X rays or radioactive substances. Subsequently, in 1958 La. Acts 39, the Legislature added tuberculosis as one of the specified occupational diseases, if it was "contracted during the course of employment by an employee of a hospital or unit thereof specializing in the care and treatment of tuberculosis patients." La. R.S. 23:1031.1(A) (1958).
- xviii 1975 La. Acts 583 revised La. R.S. 23:1031.1 (A) to amend the definition of occupational disease by removing the list of specific diseases for which there was coverage under workers' compensation and substituted the following:

An occupational disease shall mean only that disease or illness which is due to causes and conditions characteristic of and peculiar to the particular trade, occupation, process, or employment in which the employee is exposed to such disease.

- xix Cf. La. R.S. 23:1021(7)(b) (mental injury caused by mental stress), La. R.S. 23:1021(7)(c) (mental injury caused by physical injury), and La. R.S. 23:1021(7)(e) (heart-related or perivascular injuries) for examples of a legislatively crafted higher burden of proof (clear and convincing standard) without a non-occupational presumption.
- xx *O'Regan*, 758 So. 2d at 132-133.
- xxi *Samson v. Southern Bell Tel. & Tel. Co.*, 205 So.2d 497, 500 (La.App. 1st Cir.1967) (holding that the employee could sue the employer in tort where the act provided no remedy for work-connected mental breakdowns).
- xxii *O'Regan*, 758 So. 2d at 138.
- xxiii *Id.* at 131.
- xxiv Lemmon J., concurring., *Id.* at 141.
- xxv The 1976 amendment to Section 1032 conferred tort immunity to a principal when the work performed was a part of the principal's trade, business or occupation and tracked verbatim the language in Section 1061 defining a principal.
- xxvi 488 So. 2d 934 (La. 1986).
- xxvii *Id.*

- xxviii95-1830 (La. 9/13/96), 681 So. 2d 329.
- xxixSee Malone-Johnson, §364, pocket part, pp. 19-21.
- xxx *Lemaire v. CIGA-GEIGY Corp.*, 99-1809 (La.App. 1st Cir. 6/22/2001) 793 So.2d 336, 346; and *Emery, et al., v. Owens Corporation, et al.*, 200-2144 (La.App. 1 Cir. 11/9/01), 2001 WL 1391041 (La.App. 1 Cir.).
- xxxixA sentence, effective January 1, 1990, added to Section 1032(A) reads: “This exclusive remedy . . . under any dual capacity theory or doctrine.”
- xxxii*Ducote v. Albert*, 521 So. 2d 399 (La. 1988).
- xxxiii
- LSA - R.S. 23:1032, as amended by Acts 1976, No. 147.
- xxxivSee *Canter v. Koehring Co.*, 283 So. 2d 716 (1973).
- xxxv219 La. 380, 53 So. 2d 137 (1951).
- xxxvi*Atchison v. Archer-Daniels-Midland Co.*, 360 So. 2d 599 (La.App. 4th Cir. 1978), *writ denied* 362 So. 2d 1389 (La. 1978). Pierre can’t sue his statutory employer either. *Smith v. AMF Tuboscope, Inc.* 442 So. 2d 679 (La.App. 1st Cir. 1983).
- xxxviiLa. R.S. 9:2800, 51 et seq.
- xxxviiiSection 2 of the act provides, “This act shall become effective September 1, 1988.”
- xxxix484 So. 2d 110 (La. 1988).
- xl *Crane v. Exxon Corp., USA*, 613 So. 2d 214 (La.App. 1st Cir 1992).
- xli *Smith, Legal Cause in Actions of Tort*, 1911, 25 Harv.L.Rev. 103, 106, 109, McLaughlin, *Proximate Cause*, 1925, 39 Harv.L.Rev. 149, 155.
- xlii *Green, Rationale of Proximate Cause*, 1927, 132-141; *Green, The Causal Relation Issue*, 1962, 60, Mich.L.Rev. 543, 554. *Hart and Honore, Causation In The Law*, 1959, 216-218, 263-266.
- xliii *Dixie Drive It Yourself Systems v. American Beverage Co.*, 242 La. 471, 137 So. 2d 298 (1962).
- xliv See *In Re Ralph C. Manguno*, and cases therein citing Louisiana law, 961 F. 2d 533 (5th Cir. 1992).
- xlvi 16 Cal.4th 953, 67 Cal.Rptr.2d 16, 941 P.2d 1203 (1997).
- xlvi In *Perkins v. Texas and New Orleans Railroad Company*, 243 La. 829, 147 So.2d 646 (1962) the Louisiana Supreme Court wrote:

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

The burden of proving this casual link is upon the plaintiff. Recognizing that the fact of causation is not susceptible of proof to a mathematical certainty, the law requires only that the evidence show that it is more probable than not that the harm was caused by the tortious conduct of the defendant. Stated differently, it must appear that it is more likely than not that the harm would have been averted but for the negligence of the defendant. 243 La. at 835-836, 147 So. 2d at 648. (emphasis supplied).

- xlviLouisiana requires medical causation be proved only by a preponderance of the evidence, i.e., more probable than not. *Lasha v. Olin Corp.*, 625 So.2d, 1002 (La. 1993).
- xlvi*Id.* at 1219.
- xlvi*Id.* at 1223.

- 1 *Lilley v. Board of Supervisors of Louisiana State University*, 98-1277 (La.App. 3 Cir. 3/24/99), 735 So.2d 696, *writ denied*, 99-1162 (La. 6/4/99), 744 So.2d 629; *Quick v. Murphy Oil Company*, 93-2267 (La.App. 4 Cir. 9/20/94), 643 So.2d 1291, *writ denied*, 94-2583 (La. 1/6/95), 648 So.2d 923; *Egan v. Kaiser Aluminum & Chemical Corporation*, 94-1939 (La.App. 4 Cir. 5/22/96), 677 So.2d 1027, *writ denied*, 96-2401 (La. 12/6/96), 684 So.2d 930. Also, see *In re Manguno*, 961 F.2d 533 (5th Cir. 1992), which interpreted Louisiana law as “many factors or things or the conduct of two or

more persons or companies may operate at the same time either independently or together to cause injury and in such case may be a proximate cause.”

- li For an extended discussion of the future of gene-environment interactions see TXLR 16, No. 1, 25-29.
- lii *Thames v. Zerangue*, 411 So. 2d 17 (La. 1982); *Aisole v. Dean*, 574 So. 2d 1248 (La. 1991); *Walton v. William Wolf Baking Co., Inc.* 406 So. 2d 168 (La 1981); *Reck v. Stevens*, 373 So. 2d 498 (La. 1979).
- liii *Supra*.
- liv *Supra*.
- lv 625 So. 2d 1002, (La. 1993).
- lvi *Touchard v. Slemco Electric Foundation, et al.*, 99-3577 (La. 10/17/00), 769 So. 2d 1200).
- lvii Sheila Jasanoff, *Judging Science: Issues, Assumptions, Models*, 1997 Forum For State Court Judges 9 (The Roscoe Pound Foundation) July 19, 1997.
- lviii 625 So. 2d 1002 (La. 1993).
- lix *Id.* at 1005 (citations omitted).
- lx *Marcantel v. Allen Parish School Board*, 490 So. 2d 1162 (La.App. 3d Cir.) *writ denied*, 496 So. 2d 328 (La. 1986); *Davis v. Galilee Baptist Church*, 486 So. 2d 1021 (La.App. 2d Cir. 1986).
- lxi *Housley v. Cerise*, 579 So. 2d 973 (La. 1991); *Wisner v. Illinois Central Gulf Railroad*, 537 So. 2d 740 (La.App. 1 Cir. 12/20/88), *writ denied*, 540 So. 2d 342 (1989).
- lxii *Davis v. Galilee Baptist Church*, 486 So. 2d 1021 (La.App. 2 Cir. 1986); *Miller v. Allstate Insurance Company*, 221 So. 2d 908 (La.App. 1st Cir. 1969).
- lxiii *Globetti v. Sandoz Pharmaceutical Corporation*, 111 F.Supp. 2d 1174 (N.D. Ala. 2000); *Anderson v. Sandoz Pharmaceutical Corporation*, 77 F.Supp. 2d 804 (S.D. Tx. 1999).
- lxiv *Hollander v. Sandoz Pharmaceutical Corporation*, 95 F.Supp. 2d 1230 (W.D.Okla. 2000); *Glastetter v. Novartis Pharmaceutical Corporation*, 107 F.Supp. 2d 1015 (E.D.Mo. 2000); *Brumbaugh v. Sandoz Pharmaceutical Corporation*, 77 F.Supp. 2d 1153 (D.Mont. 1999).
- lxv 101 F.Supp. 2d 1174 (N.D. Ala. 2000).
- lxvi These factors were testability, peer review and publication, assessing the known or potential rate of error of the proposition, and whether it has found general acceptance in the scientific community.
- lxvii See *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).
- lxviii *Frye v. United States*, 293 F. 1013 (1923).
- lxix *Globetti*, 101 F.Supp. 2d at 1177.
- lxx *Id.* at 1179.
- lxxi *Brasher, et al., v. Sandoz Pharmaceutical Corp., et al.*, 160 F.Supp. 2d 1291 (N.D. Ala. 2001).
- lxxii W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* §1, at 4 (5th ed. 1984).
- lxxiii See, e.g., *Anderson v. Welding Testing Laboratory, Inc.*, 304 So. 2d 351 (La. 12/2/74); *Wisner v. Illinois Central Gulf R.R.*, 537 So. 2d 740 (La.App. 1st Cir. 1989), *writ denied*, 540 So. 2d 342 (1989); *Hagerty v. L & L Marine Services, Inc.*, 788 F. 2d 315 (5th Cir. 1986).
- lxxiv Peter G. Shields & Curtis C. Harris, *Molecular Epidemiology and the Genetics of Environmental Cancer*, 266 JAMA 681 (1991).
- lxxv 573 N.W. 2d 718 (Minn. Ct.App. 1998).
- lxxvi 746 F.Supp. 887, (D.Minn. 1990) vacated in part on other grounds, 793 F.Supp. 898 (1992).
- lxxvii *Bryson*, 573 N.W. 2d at 721.
- lxxviii *Wisner, supra, writ denied*, 540 So.2d 342 (1989); *Bonnette, et al., v. Conoco, Inc., et al.*, 2001 WL 1047546 (La.App. 3 Cir.)
- lxxix *Manuel v. Shell Oil Co.*, 94-590 (La.App. 5 Cir. 10/18/95), 664 So. 2d 47; *Jeffery v. Thibaut Oil*

Co., 94-851 (La.App. 5 Cir. 3/1/95), 652 So. 2d 1021.

lxxx *Hagerty v. L & L Marine Services, Inc.* 788 F. 2d 315, 319 (5th Cir. 1986).

lxxxii The policies and problems which keep the court from extending “lost chance” to negligence cases involving increased risk are discussed in Keith W. Lapeze, *Recovery for Increased Risk of Disease in Louisiana*, 58 La.L.Rev. 249, 276-280 (1997).

lxxxiii *Smith v. State of Louisiana, Department of Health and Hospitals*, 95-0038 (La. 6/25/96), 676 S. 2d 543.

lxxxiiii La. C.C. art. 2315 now reads:

Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person. *Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease.*

lxxxiv *Guaranty National Insurance Co. v. Azrock Industries, d/b/a Azrock Commercial Flooring*, 211 F.3d 239 (5th Cir 2000).

lxxxv 99-2257 (La. 2/29/00), 755 So. 2d 226.

lxxxvi *Id.* at 235.

lxxxvii *Daubert v. Merrell Dow Chemicals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.ED.2d 469 (1993).

lxxxviii Citing *Daubert*, at 595.

lxxxix Citing Frank L. Maraist and Harry T. Lemmon, 1 Louisiana Civil Law Treatise, Civil Procedure, § 6,8, p. 145 (1999).

xc 599 So. 2d 1058 (La. 1992).

xci

98-0455 (La. 9/8/99), 740 So. 2d 1262.

xcii *Cole*, 599 So. 2d at 1066.

xciii *Walls*, 740 So. 2d 1273.

xciv *Abadie v. Metropolitan Life Insurance Company*, 00-344 (La.App. 5 Cir. 5/31/01), 796 So.2d 941, “Louisiana Decisions Without Published Opinions.”

xcv *Austin v. Abney Mills, Inc.*, 2001 WL 322754 (La.App. 2 Cir. 4/4/01).