

I. INTRODUCTION

A central issue in many medical malpractice cases is whether any alleged breach of the applicable standard of care caused the plaintiff's injury. California courts have made clear that the appropriate test for causation is the "but-for" test, not the "substantial factor" test currently set forth in California Civil Jury Instruction (CACI) No. 430. In other words, the present CACI No. 430 instruction is inconsistent with California law for establishing causation in a medical malpractice case.

II. CASE LAW

A. *Viner v. Sweet* (2003) 30 Cal.4th 1232

Viner concerned a transactional legal malpractice case, in which the plaintiffs established the defendant law firm was negligent. However, there remained an issue of whether the firm's negligence caused plaintiffs' harm. Although the law firm requested a "but-for" causation instruction, the trial court gave the "substantial factor" instruction.

The jury instruction was challenged on appeal, and plaintiffs argued "that in *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, [the Supreme Court] repudiated the "but-for" test of causation in tort cases alleging negligence." The Supreme Court responded shortly: "Not so." (*Viner v. Sweet, supra*, 30 Cal.4th at p. 1239.) "*Mitchell* did not abandon or repudiate the requirement that the plaintiff must prove that, *but for* the alleged negligence, the harm would not have happened." (*Ibid.*) However, the Court did note that the "but for" test is *subsumed* by the "substantial factor" test. (*Ibid.*)

Indicating that California has adopted the "substantial factor" test contained in the Restatement Second of Torts, Section 432, the *Viner* Court addressed the relationship between the "but for" test and the "substantial factor" test:

Subsection (1) of Section 432 provides: "Except as stated in subsection (2), the actor's negligent conduct is *not a substantial factor* in bringing about harm to another *if the harm would have been sustained even if the actor had not been negligent.*" (Italics added.) Subsection (2) states that if "two forces are actively operating . . . and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about."

(*Viner, supra*, 30 Cal.4th at p. 1240.)

The Court further explained that section 432 adopts the "but-for" test of causation, while subsection (2) provides for an exception to that test. (*Viner, supra*, 30 Cal.4th at p. 1240.) In other words, the "substantial factor" test is really an exception to the "but-for" test, and is appropriate only in cases of

concurrent, independent causes.¹

Since *Viner*, courts and counsel have struggled with the application of these concepts in various contexts, lending vague guidance as to the appropriate standards.

B. *Jennings v. Palomar Pomorado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108

The application of *Viner* is not limited to legal malpractice cases. For instance, in *Jennings*, the Court of Appeal addressed the propriety of excluding expert medical testimony in a medical malpractice case. As the Court of Appeals noted: “Proof that a negligent act was a substantial factor in causing the injury *does not relieve* the plaintiff of the burden of proving the negligent act was a cause-in-fact of the injury,” relying upon the Supreme Court decision in *Viner*. (114 Cal.App.4th at p.1113, fn. 3 [emphasis added].)

C. *Mayes v. Bryan* (2006) 139 Cal.App.4th 1075

Most recently, the Second District Court of Appeal addressed the causation instruction in the context of an action for medical malpractice, which was couched in a physician’s allegedly negligent post-operative interpretation of a lung scan. In *Mayes*, *both parties* requested – and the court gave – the following version of the “substantial factor” test from BAJI 3.76 with modifications:

The law defines cause in its own particular way. The cause of an injury or death is something more likely than not a factor in bringing about the injury or death.

(*Id.* at p. 1087.)

The defendants further requested that the trial court instruct the jury as follows, based upon *Viner*: “Plaintiff must show that one or more of the defendants was a cause of plaintiff’s injuries. To be a cause of injury, plaintiff must show that but for the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result.” (*Id.* at p. 1091.) The Court rejected the proposed instruction. (*Ibid.*)

The Court found that “the proper test for proving causation is the ‘substantial factor’ test,” noting that the Supreme Court “has repeatedly restated its view that “*the ‘substantial factor’ test subsumes the traditional ‘but for’ test of causation.* (*Mayes, supra*, 139 Cal.App.4th at p. 1091, 1094.) Causation is proven when sufficient evidence is produced to allow the jury to infer that, in the

¹ “Concurrent, independent causes” should not be confused with “concurrent causes.” The phrase “concurrent, independent causes” refers to multiples forces operating at the time and independently, each of which would have been sufficient by itself to bring about the harm. In contrast, concurrent causes simply refers to multiple forces operating at the same time. (*Viner, supra*, 30 Cal.4th at p. 1240, fn. 3.)

absence of the defendant's negligence, there is a reasonable medical probability that the plaintiff would have obtained a better result. (*Id.* at p. 1092.)

The court then engaged in a lengthy discussion of *Mitchell, supra*, and *Viner, supra*. The defendants cited *Viner* for the proposition that, even if plaintiffs demonstrated that the defendants' conduct was a substantial factor in bringing about plaintiff's injury, that plaintiffs must also prove "but for" causation. (*Mayes, supra*, 139 Cal.App.4th at p. 1094.) The court responded as follows:

Viner acknowledged that *Mitchell* did not repudiate the "substantial factor" test." [Citations.] "Rather, the Supreme Court has repeatedly restated its view that "the 'substantial factor' test subsumes the traditional 'but for' test of causation." [Citation.] They are both tests of causation in fact. [Citation.]

(*Ibid.*)

The court also discussed CACI No. 430, the present causation instruction, which is stated as follows:

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

[Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]

The court noted that "[t]here is no requirement in . . . CACI No. 430 that the bracketed language be used *in addition to* the first sentence of the instruction. . . . Thus, the trial court is not *required* to instruct from both tests . . . unless the state of the evidence suggests otherwise." (*Id.* at pp. 1094-1095.) Unfortunately, the Court did not explicitly set forth the circumstances where the "state of the evidence suggests otherwise."

In light of the above, the *Mayes* court found that there was no error in refusing to instruct the jury on "but for" causation, because the jury was instructed on "substantial factor," and "but for" is subsumed under the substantial factor test. In other words, the court found that "a 'but for' instruction would have been redundant." (*Mayes, supra*, 139 Cal.App.4th at p. 1095.) Furthermore, the court indicated that there was no evidentiary support for the defendant's contention that the decedent would have died even had the defendant physician not acted negligently. (*Ibid.*)

Interestingly, the *Mayes* court stated that: "[E]ven if, per *Viner*, courts in medical malpractice cases must now instruct juries on both 'substantial factor' and 'but for' we conclude on the whole record that no prejudice resulted from the lack of a 'but for' instruction." (*Mayes, supra*, 139 Cal.App.4th at p. 1097.) The Court concluded that, for a jury to find that the defendant was a substantial factor in plaintiff's mistreatment, "it necessarily concluded that [plaintiff's] injury would not have happened without [defendant's] negligence." (*Ibid.*)

III.

ANALYSIS

CACI No. 430 is vague and inconsistent with established jurisprudence. Specifically, it provides that: “A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.”

As an initial matter, CACI No. 430 redefines the phrase, “substantial factor” in such a way that it does not sufficiently reflect the “but-for” test required in California. The only guidance provided to the jury is the definition of the “substantial factor” test for establishing causation, i.e., “a factor that a reasonable person would consider to have contributed to the harm.” In other words, a jury will be instructed that a “substantial factor” does not actually need to be substantial. It only needs to be “a factor.” In a medical malpractice action, it could be argued that everyone and everything involved in the care and treatment of a patient amounts to “a factor.” Thus, CACI No. 430 provides the jury with no guidance as to the complex issue of causation.

Secondly, CACI No. 430 will allow a jury to make its causation determination based upon a “reasonable person” standard. In a medical malpractice case, causation can only be established through expert testimony. Thus, CACI No. 430’s emphasis on what “a reasonable person would have considered contributed to the harm,” is a misinterpretation of the applicable law. The jury is required to make its causation determination based upon expert testimony, not a reasonable person standard. While this instruction may be permissible in an ordinary negligence case, it is impermissible for a medical malpractice action.

Finally, CACI No. 430 is in conflict with well-settled case law holding that, in medical malpractice cases, causation must be proven to a “reasonable medical probability,” i.e., that it is more likely than not that the alleged negligence caused plaintiff’s alleged harm. (See, e.g., *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1498 [“A possible cause only becomes ‘probable’ when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of the action.])

III. CONCLUSION

In sum, CACI No. 430 has significantly muddled the concept of causation. While *Viner* and *Jennings* appear to support the issuance of the “but for” test along with the “substantial factor” test in a medical malpractice case, *Mayer* may weaken that proposition, in that it referred to the “but for” test as redundant when given with the “substantial factor” test. However, if the defense establishes a strong causation theory with competent expert testimony, this may create the “state of the evidence” discussed in *Mayer*, and the “but for” instruction may be issued.