**03.07 SUBSTANTIAL FACTOR**

Negligence is a substantial factor in causing harm if:

(1) the harm would not have occurred without the negligence; and

(2) the negligence was important enough in causing the harm that a reasonable person would hold the negligent person responsible. The negligence cannot be a remote or trivial factor.

[Number (1) does not apply if two events operated to cause the harm, one because of the defendant’s negligence and the other not, and each event by itself was sufficient to cause the harm.]

Directions for Use

This is the general causation instruction for negligence cases. It includes both fact and legal cause. The bracketed language should be given if two or more forces are claimed to have operated to bring about the injury, and each of them operating alone is sufficient to cause the injury.

If there is evidence of multiple causes, Instruction 3.08 (Multiple Causes) should also be given. If there is evidence of superseding cause, Instruction 3.09 (Superseding Cause) should be given.

Comment

This instruction uses more understandable language for the traditional legal phrases “but for” and “legal causation.” The Alaska causation test is substantial factor. *E.g.,* *Osborne v. Russell*, 669 P.2d 550, 555 (Alaska 1983). The test has been described as follows:

[T]he elements of proximate cause: [n]egligent conduct may be found to be the ‘legal cause’ of harm if the negligent act ‘was more likely than not a substantial factor in bringing about [the] injury’. . . .

Normally, in order to satisfy the substantial factor test it must be shown *both* that the accident would not have happened ‘but for’ the defendant's negligence and that the negligent act was so important in bringing about the injury that reasonable men would regard it as a cause and attach responsibility to it.

*Gonzales v. Krueger*, 799 P.2d 1318, 1320 (Alaska1990)(citations omitted). *E.g.,* *Robles v. Shoreside Petroleum, Inc.*, 29 P.3d 838, 841 (Alaska 2001).

Enumerated paragraph 1 of Instruction 3.06 sets out the test for cause in fact. *See, e.g.,* *Vincent by Staton v. Fairbanks Memorial Hospital*, 862 P.2d 847, 851 (Alaska 1993). Enumerated paragraph 2 sets out the test for legal cause. *See, e.g.,* *id.* at 851. The bracketed paragraph sets out the exception to the cause in fact test. *See, e.g.,* *id.* at 851-52.

The prior version of 3.06 used the “but for” language for cause in fact: “the harm would not have occurred but for the act or failure to act.” This is a typical formulation of the cause in fact test. *See, e.g.,* *Hogg v. Raven Contractors, Inc*., 134 P.3d 349, 351 (Alaska 2006); *Vincent, 862 P.2d* at 850. The committee decided, however, that the test would be easier to understand if the instruction stated that “the harm would not have occurred without the negligence.” This language is consistent with the concept underlying the “but for” test. *See, e.g.,* *Gonzales*, 799 P.2d at 1321.

The prior version of 3.06 described the test for legal cause as “the act or failure to act was so important in bringing about the harm that a reasonable person would regard it as a cause and attach responsibility to it.” This language appears in Alaska opinions discussing the substantial factor test. *See, e.g.,* *Hogg,* 134 P.3d at 351; *Vincent*, 862 P.2d at 850. The committee nevertheless decided the instruction could be improved by more directly stating the issue as determining responsibility for the harm:

[T]he negligence was important enough in causing the harm that a reasonable person would hold the negligent person responsible. The negligence cannot be a remote or trivial factor.

This is consistent with the concept underlying legal cause: whether the conduct was so significant and important a cause of the claimant’s harm that the actor should be held legally responsible. *See, e.g.,* *Gonzales*, 799 P.2d at 1321. *Cf,* *City of Fairbanks v. Nesbett*, 432 P.2d 607, 610‑11 (Alaska 1967) (It is not necessary for the actor's conduct to be "the" legal cause of an injury; it is only necessary that such conduct be "a" legal cause.).

The prior version of 3.06 set out the exception to the “but for” cause in fact test as follows:

There is, however, one exception to the requirement that the harm would not have occurred but for the act, or failure to act, of the defendant. If two forces operated to cause the harm, one because of the defendant and the other not, and each force by itself was sufficient to cause the harm, then the defendant's act or failure to act is a cause of the harm if it was so important in bringing about the harm that a reasonable person would regard it as a cause and attach responsibility to it.

This language is taken directly from Alaska Supreme Court opinions discussing the exception to the cause in fact test. *See, e.g.,* *Vincent*, 862 P.2d at 852; *State v. Abbott*, 498 P.2d 712, 727 (Alaska 1972). The committee decided the instruction would more clearly inform the jury of what action to take if the instruction simply stated that the cause in fact test does not apply where the case involves independent concurrent causes. *See, e.g., Vincent*, 862 P.2d at 851-52 (the “but for” test is inappropriate when the case involves “independent concurrent causation” where two or more forces are involved, either one of which is sufficient by itself to cause the injury).

The terms “legal cause,” “proximate cause,” and “substantial factor” have been used interchangeably. *See, e.g.,* *Hogg,* 134 P.3d at 351 (“A legal cause of harm is an act or a failure to act which is a substantial factor in bringing about the harm”); *Robles*, 29 P.3d at 851 (“Alaska applies a two-part test of legal causation in negligence cases”); *Vincent*, 862 P.2d at 851 (“As a general rule, Alaska follows the ‘substantial factor test’ of causation”); *Yukon Equipment, Inc. v. Gordon*, 660 P.2d 428, 432 (Alaska 1983)(“When I use the terms ‘legal cause’ or ‘proximate cause’ in these instructions, I am using them synonymously”), *overruled in part*, *Williford v. L.J. Carr Investments, Inc.*, 783 P.2d 235, 237 n.5 (Alaska 1989); *Alvey v. Pioneer Oilfield Services, Inc*.,648 P.2d 599, 600 (Alaska 1982) (“Proximate cause exists where the negligent act was, more likely than not, a substantial factor in bringing about the injury”). Instruction 3.06 sets out the test for all these causation concepts.