The Common Law is Not Dead

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David Keltner
david.keltner@kellyhart.com

It's about causation – stupid!

- Since January 1, 2017 the Supreme Court has issued several causation cases. These cases are not only important in their own right, but give us a window into past cases to which the Court continually refers.

Proximate cause = "cause in fact" + "foreseeability"

In an unbroken line of cases, the Supreme Court recognizes that an act, omission or breach is a *proximate cause* of an injury if the breach was (1) a *cause in fact* of the harm, and (2) the injury was *foreseeable*.

Stanfield v. Neubaum, 494 S.W.3d 90, 97 (Tex. 2016).

HMC Hotel Props. II Ltd. P'ship v. Keystone-Texas Prop. Holding Corp., 439 S.W.3d 910, 913 (Tex. 2014).

Cause in fact

- Cause in fact requires the act, omission, or breach to be a ***substantial factor*** in bringing about the harm; and
- ***But for*** the act, omission or breach, the harm would not occur.
- In other words, ***substantial factor*** and ***but for causation*** are both necessary to prove *cause in fact.*

HMC Hotel Props. II Ltd. P'ship v. Keystone-Texas Prop. Holding Corp., 439 S.W.3d 910, 913 (Tex. 2014).

New and independent/ *superseding cause v. concurring cause*

- A new and independent cause "destroys" the causal connection between the act, omission or duty and the eventual harm.
- On the other hand, concurring cause continues the harm caused by the first act, omission or breach.

Stanfield v. Neubaum, 494 S.W.3d 90, 98 (Tex. 2016).

Judicial error = new, independent and intervening cause

***Stanfield v. Neubaum*, 494 S.W.3d 90 (Tex. 2016)**

- A legal malpractice case dealing with litigation conduct in an underlying usury case.
- The defense lawyers raised the defenses of (1) *bona fide* error and (2) a usury cure-letter.
- Neither defense was raised at trial.
- Instead, the defense lawyers argued that the person who made the loan was not the agent of their defendant-client.
- After an unfortunate verdict, the defendant-client sued the lawyers for failing to raise the *bona fide* error and usury cure-letter defenses.
- In the meantime, a new lawyer appealed the adverse judgment.
- The court of appeals reversed the agency finding and held that no agency existed as a matter of law—rendering judgment for the defendant-client.
- Nonetheless, the client continued the malpractice claim by claiming that the appeal would not have been necessary if the *bona fide* error and the usury cure-letter defenses had been raised.

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