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Proximate Cause in Civil Damages

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Proximate Cause in Civil Damages

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PROXIMATE CAUSE IN CIVIL DAMAGES ACT CASES

By: Professor Mike Stenson¹

I. Introduction

Osborne v. Twin Town Bowl, Inc.,² arose out of the death of 24-year-old Michael Riley.³ Mr. Riley (“Riley”) jumped from a bridge after being stopped for DWI by a Minnesota State Highway Patrol officer who arrested, but did not handcuff Riley.⁴ His family and girlfriend sued Twin Town Bowl under the Civil Damages Act,⁵ alleging that Riley was illegally served alcohol there, that the illegal sale led to his intoxication, and that his intoxication caused his death.⁶

Twin Town Bowl argued in its first motion for summary judgment that Riley’s intoxication was not a proximate cause of his death.⁷ The district denied the motion on the basis that dismissal was premature because of incomplete discovery.⁸ Twin City Bowl renewed its motion for summary judgment after the completion of further discovery.⁹ As part of their response to Twin Town Bowl’s motion, the plaintiffs submitted an expert psychological report in the form of an unnotarized affidavit.¹⁰ The expert examined Riley’s medical and drug history and interviewed Riley’s family and friends.¹¹ The report noted that Riley often experienced blackouts when drinking excessively and that Riley’s family and friends told him that Riley exhibited personality changes when he was intoxicated.¹² The personality changes included

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² 749 N.W.2d 367 (Minn. 2008).

³ *Id.* at 369.

⁴ *Id.*

⁵ Minn. Stat. § 340A.801 (2006).

⁶ *Osborne*, 749 N.W.2d at 369.

⁷ *Id.* at 370.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Osborne*, 749 N.W.2d at 370.

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“increased energy, flamboyance, grandiosity, aggressiveness, impulsivity, and thrill-seeking.”¹³ The expert’s opinion was that Riley may have been in a blackout state at the time he jumped into the river and that had Riley been sober, he would never have attempted such an escape.¹⁴

The district court granted Twin Town Bowl’s motion for summary judgment, concluding that there was “no evidence and no genuine issue of material fact on the causation issue.”¹⁵ The court of appeals, with one judge dissenting, affirmed.¹⁶ The Minnesota Supreme Court reversed.¹⁷

The sole issue on appeal was “whether there was a genuine issue of material fact as to “whether Riley’s intoxication was a proximate cause of him jumping to his death into the Minnesota River.”¹⁸ The Minnesota Supreme Court held that the evidence was sufficient to deny Twin Town’s motion for summary judgment.¹⁹

Osborne clarifies the standard for determining when intoxication is the proximate cause of an injury as well as the proof necessary to meet the standard. The court held that intoxication has to be a proximate cause but not the proximate cause of the injury giving rise to the dram shop claim,²⁰ and that given the well-known effects of intoxication, expert testimony is unnecessary to establish that intoxication was a proximate cause of an injury.²¹

This article focuses on the proximate cause standard the court adopted in *Osborne*. It offers a slightly different standard for resolving proximate cause issues that is consistent with *Osborne*, but more clearly separates proximate cause into causation and legal limits components.

II. THE CIVIL DAMAGES ACT

The first part Section 340A.801, subdivision 1 of the Minnesota Statutes establishes the requirements for recovery under the Civil Damages Act:

¹³ *Id.* The report also noted that in conversations with others, Riley had talked about a person who had jumped into a river and swum across to evade the authorities and that he believed he could do the same. *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Osborne v. Twin Town Bowl, Inc.*, 730 N.W.2d 307, 311 (Minn. Ct. App. 2007).

¹⁷ *Osborne*, 749 N.W.2d at 381.

¹⁸ *Id.* at 372.

¹⁹ *Id.* at 381.

²⁰ *Id.* at 376 (citing *Flom v. Flom*, 291 N.W.2d 914, 917 (Minn. 1980)).

²¹ *Id.* (citing *State v. Griese*, 565 N.W.2d 419, 425 (Minn. 1997)).

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A spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss by an intoxicated person or by the intoxication of another person, has a right of action in the person's own name for all damages sustained against a person who caused the intoxication of that person by illegally selling alcoholic beverages. All damages recovered by a minor under this section must be paid either to the minor or to the minor's parent, guardian, or next friend as the court directs.²²

To recover under the Civil Damages Act a claimant must prove that a commercial vendor of alcohol made an illegal sale of alcohol and, "by competent proof," that the illegal sale caused or contributed to the intoxication and the intoxication was the proximate cause of the injuries sustained by the claimant.²³

III. PURPOSES OF THE CIVIL DAMAGES ACT

The Civil Damages Act is "[p]rimarily compensatory in purpose."²⁴ It "provides a type of social insurance to compensate members of the public who are injured as a result of illegal liquor sales, and the burden of economic loss caused thereby is placed upon those who profit from furnishing liquor as a cost of engaging in that business,"²⁵ but it is also intended to punish vendors who make illegal sales of alcohol and to deter

²² 749 N.W.2d at 371 (quoting Minn. Stat. § 340A.801, subd. 1).

²³ *Kryzer v. Champlin Am. Legion No. 600*, 494 N.W.2d 35, 36 (Minn. 1992); *Hartwig v. Loyal Order of Moose, Brainerd Lodge*, 91 N.W.2d 794, 801 (1958). In *Rambaum v. Swisher*, 435 N.W.2d 19, 21 (Minn. 1989), the court framed the elements slightly differently:

(1) Was the sale in violation of a provision of Chapter 340A?(2) If so, was the violation substantially related to the purposes sought to be achieved by the Civil Damages Act, i.e., was the violation substantially related to the mischief sought to be suppressed and the remedy sought to be advanced by the Act? *Hollerich v. City of Good Thunder*, 340 N.W.2d 665, 669 (Minn.1983); *Kyanli v. Village of Watson*, 139 N.W.2d 275, 277 (1965). If yes, then the violation is an "illegal sale" under the Act. This second step presents a policy question and raises an issue of law for the court to decide. If there is an illegal sale, the third and fourth steps present two causation questions: (3) Was the illegal sale a cause of the intoxication? and (4) if so, was the intoxication a cause of plaintiff's injuries? We are concerned here only with the second step in this analysis.

Matthew H. Morgan, Note, *Minnesota Civil Damages Act: Unanswered Questions—Koehnen v. Dufuor*, 590 N.W.2d 107 (Minn. 1999), 26 WM. MITCHELL L. REV. 239, 259 (2000). Element two seems similar to a causation analysis, but as the court pointed out in *Rambaum*: "We are not at this second stage of our dramshop analysis concerned with 'causation' in a tort sense; rather, at this point we inquire whether, from a policy standpoint, there is a substantial relationship between the unlicensed sale and the purposes of dramshop liability." 435 N.W.2d at 21. It is not dissimilar, however, to the question a court has to answer in determining whether a bar that made an illegal sale that resulted in a person's intoxication is liable for the injuries caused by that intoxication.

²⁴ *Skaja v. Andrews Hotel Co.*, 161 N.W.2d 657, 661 (1968).

²⁵ *Skaja*, 161 N.W.2d at 661 (1968) (discussing the issue of whether contribution should be allowed as between vendors of intoxicating liquor who illegally sold alcohol to minor where the sales contributed equally to that intoxication). See, e.g., *Hollerich v. City of Good Thunder*, 340 N.W.2d 665, 668 (Minn. 1983) (stating "The

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others from engaging in the same conduct.²⁶If the provisions of the Civil Damages Act are clear as to its intent and purpose, the Minnesota Supreme Court has “liberally construed the act so as to suppress the mischief and advance the remedy.”²⁷ Because the Dram Shop Act is created by statute and has no common law counterpart, it must be “strictly construed ‘in the sense that it cannot be enlarged beyond its definite scope,’”²⁸ but if the language of the Civil Damage Act is clear as to its intent and purpose, the court has liberally construed it to suppress the mischief and advance the remedy in the Civil Damage Act.²⁹ For present purposes, a key question concerns the scope of responsibility of bars for the illegal sale of alcohol that results in intoxication. The general purposes of the Civil Damage Act provide only general guidelines.³⁰ One of the problems in applying these purposes is to determine the risks that will subject a commercial vendor of alcohol to liability under the Civil Damage Act. More specifically, the issue is whether general tort concepts of proximate cause apply to cases arising under the Civil Damage Act or some narrower conception of proximate cause.

IV. THE PROXIMATE CAUSE REQUIREMENT

Courts use varying means of imposing limits on tort liability.³¹ They sometimes conclude that a defendant owed no duty to the plaintiff,³² and sometimes that the defendant’s negligent conduct was not the proximate

concern of the Civil Damages Act is intoxication which results in injury to the intoxicated person’s dependants or others.”); *Conde v. City of Spring Lake Park*, 290 N.W.2d 164, 166 (Minn. 1980) (discussing the imposition of liability on alcohol vendors acts as an incentive to vendors to avoid illegal sales; it also reflects the judgment of the legislature that vendors are superior cost bearers); *Englund v. MN CA Partners*, 555 N.W.2d 328, 332 (Minn. Ct. App. 1996), *aff’d mem.*, 565 N.W.2d 433 (Minn. 1997) (stating “[T]he act’s purposes are (1) to protect the health, safety, and welfare of the public through careful regulation of liquor distribution, (2) to penalize vendors for the illegal sale of liquor, and (3) to provide a remedy for innocent third persons injured as a result of another’s intoxication.”). See Frank A. Sloan, Emily M. Stout, Kathryn Whetten-Goldstein & Lan Lian, *Drinkers, Drivers, and Bargenders* (2000), for an excellent discussion of the problems created by alcohol-impaired drivers.

²⁶ *Osborne*, 749 N.W.2d at 371 (Minn. 2008), citing *Hannah v. Chmielewski*, 323 N.W.2d 781, 784 (Minn. 1982) (quoting *Randall v. Village of Excelsior*, 103 N.W.2d 131, 134 (1960)).

²⁷ *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 857 (Minn. 1998).

²⁸ *Osborne*, 749 N.W.2d at 371, (quoting *Beck v. Groe*, 70 N.W.2d 886, 891 (1955)).

²⁹ See *Lefto*, 581 N.W.2d 855, 857 (Minn. 1998).

³⁰ See Minn. Stat. § 340A.801, subdiv. 1 (2006).

³¹ See, e.g., *Bjerke v. Johnson*, 742 N.W.2d 660, 667 (Minn. 2007).

³² Whether in strict liability or negligence cases, the Minnesota Supreme Court has linked duty to foreseeability. See, e.g., *Bjerke*, 742 N.W.2d at 667 (discussing the issue of whether defendant owed a duty to prevent criminal misconduct of third person in case involving a special relationship between defendant and plaintiff); *Whiteford v. Yamaha Motor Corp., U.S.A.*, 582 N.W.2d 916, 919 (Minn. 1998) (discussing whether the allegedly defective Snoscoot injured a child who slid under the snowmobile, receiving severe facial lacerations from a bracket on the machine).

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cause of the injury sustained by the plaintiff.³³ The use of proximate cause as a limitation on liability has been problematic for the courts.³⁴

Proximate cause consists of two separate determinations, one involving cause in fact and the other legal cause.³⁵ Sometimes the courts use the term proximate cause in concluding that a defendant's conduct was a cause-in-fact of the plaintiff's injury, and sometimes to describe a conclusion that the injury, while caused by such conduct, is beyond the scope of the risk created by the defendant's conduct.³⁶ Confusion may result if the two are conflated.

Section 26 of the Restatement (Third) of Torts adopts the "but-for" test as the appropriate test for resolving cause-in-fact issues, "Tortious conduct must be a factual cause of physical harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct."³⁷

The Third Restatement rejects the "substantial factor" test³⁸ in favor of the but-for test, for varying reasons,

³³ *Bjerke*, 742 N.W.2d at 667.

³⁴ The Minnesota Supreme Court in *Dellwo v. Pearson*, 259 Minn. 452, 453-54, 107 N.W.2d 859, 860-61 (1961), acknowledged the problem in defining proximate cause:

There is no subject in the field of law upon which more has been written with less elucidation than that of proximate cause. Cases discussing it are legion. It has challenged many of the most able commentators at one time or another. It is generally agreed that there is no simple formula for defining proximate cause, but this is assumed to be a difficulty peculiar to the law, which distinguishes between 'proximate cause' and 'cause in fact.' However, examination of the literature suggests that neither scientists nor philosophers have been more successful than judges in providing a verbal definition for this concept. We can contrast the concept of cause with that of destiny and of chance, we can use it operationally and pragmatically, but we cannot formulate a precise, rigorous, or very satisfactory verbal definition. Cause seems to be one of those elemental concepts that defies refined analysis but is known intuitively to commonsense.

³⁵ See generally Dan B. Dobbs, *The Law of Torts* § 182, at 447-48 (2000); Restatement (Third) of Torts § 26 cmt. a (Proposed Final Draft No. 1 2005) (discussing the proximate cause elements and the adoption of the "but-for" test).

³⁶ Restatement (Third) of Torts § 26 cmt. a. Reporters' Memorandum, Proposed Final Draft No. 1, notes that "w]ith the exception of Comment d to § 27 and Comment a to § 28, the substance of Proposed Final Draft No. 1 (issued on April 6, 2005), has been finally approved by both the Institute's Council and its membership. The draft has not yet been published in final form only because the project has been expanded to include chapters on emotional harm and landowner liability. After that work is completed and approved, the Reporters will do their final editorial work and an update of the Reporters' Notes, and then the final text of this Restatement project will be published."

³⁷ Restatement (Third) of Torts § 26 cmt. a

³⁸ Restatement (Third) of Torts § 26 cmt. j (Proposed Final Draft No. 1 2005).. Comment j explains the reasoning:

The "substantial-factor" test as the routine standard for factual cause originated in the Restatement of Torts §§ 431–432 and was replicated in the Restatement Second of Torts §§ 431–432. Its primary function was to permit the factfinder to decide that factual cause existed when there were overdetermined causes—each of two separate causal chains sufficient to bring about the plaintiff's

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including that the use of the substantial factor standard may permit a finding that a but-for cause is either not a sufficient causal connection or that even if it is, more is required to establish cause in fact.³⁹ Irrespective of what the standard is for determining the existence of a causal relationship, the issue arises as to how liability may be limited. Section 29 of the Restatement (Third) of Torts contains a primary limitation on liability, “An actor’s liability is limited to those physical harms that result from the risks that made the actor’s conduct tortious.”⁴⁰

The Restatement uses the term “Limitations on Liability for Tortious Conduct,” rather than “proximate cause,” although the concept may be equivalent to proximate cause limitations, depending on how those limitations are viewed by the courts.⁴¹ The Restatement notes that the substantial factor standard, while used as a limitation on the scope of liability, was not initially intended to be used that way.⁴² Most of the time, issues concerning the scope of liability will be clear, leaving only the issue of cause-in-fact, along with the breach of duty issue, for the jury.⁴³

harm, thereby rendering neither a but-for cause. See § 27. The substantial-factor test has not, however, withstood the test of time, as it has proved confusing and been misused. *Id.*

³⁹ See Restatement (Third) of Torts § 26 cmt. j (Proposed Final Draft No. 1 2005). See, e.g., *Guile v. Greenberg*, 192 Minn. 548, 551, 257 N.W. 649, 650 (1934) (discussing the use of the substantial factor test rather than but-for to avoid the impact of contributory negligence as a defense). The method of analysis would presumably be unnecessary given the fact that contributory negligence is no longer an all-or-nothing defense under Minn. Stat. § 604.01, subd. 1 (2008), Minnesota’s Comparative Fault Act.

⁴⁰ Restatement (Third) of Torts § 29 (Proposed Final Draft No. 1 2005).

⁴¹ See *id.*

⁴² See *id.* cmt. a.

⁴³ See *id.* Reporters’ Note. The Reporters’ Note offers four proposed jury instructions that cover section 29:

As counseled in this Comment, an instruction of scope of liability should not be given unless there is a genuine dispute about its existence based on the facts of the case. Alternative formulations for a scope-of-liability instruction are provided below; each jurisdiction can choose from these alternatives as a starting point for drafting a model instruction depending on its style for instructions and its preferences for trading off accuracy, simplicity, and parsimony. (The instructions assume that the factfinder has already been instructed on negligence or an alternative theory of liability and factual causation.)

1) You must decide whether the harm to the plaintiff is within the scope of defendant’s liability. To do that, you must first consider why you found the defendant negligent [or some other basis for tort liability]. You should consider all of the dangers that the defendant should have taken reasonable steps [or other tort obligation] to avoid. The defendant is liable for the plaintiff’s harm if you find that the plaintiff’s harm arose from the same general type of danger that was one of those that the defendants should have taken reasonable steps [or other tort obligation] to avoid. If the plaintiff’s harm, however, did not arise from the same general dangers that the defendant failed to take reasonable steps [or other tort obligation] to avoid, then you must find that the defendant is not liable for the plaintiff’s harm.

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A. PROXIMATE CAUSE IN MINNESOTA – NEGLIGENCE

In negligence cases Minnesota requires that the negligent act be a proximate cause of the harm.⁴⁴ In 1896, in *Christianson v. Chicago, St. P. M. & O. Ry.*, Justice Mitchell explained proximate cause:

What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow.⁴⁵

The Minnesota Supreme Court has reaffirmed the *Christianson* standard repeatedly;⁴⁶ emphasizing that proximate cause is tested by hindsight, but negligence by foresight.⁴⁷

2) You must decide whether the harm to the plaintiff is within the scope of defendant's liability. The plaintiff's harm is within the scope of defendant's liability if that harm arose from the same general type of danger that was among the dangers that defendant should have taken reasonable steps [or other tort obligation] to avoid. If you find that the plaintiff's harm arose from such a danger, you shall find the defendant liable for that harm. If you find the plaintiff's harm arose from some other danger, then you shall find for the defendant.

3) To decide if the defendant is liable for the plaintiff's harm, think about the dangers you considered when you found the defendant negligent [or otherwise subject to tort liability]. Then consider the plaintiff's harm. You must find the defendant liable for the plaintiff's harm if it arose from one of the dangers that made the defendant negligent [or otherwise subject to tort liability]. You must find the defendant not liable for harm that arose from different dangers.

4) You must decide whether the plaintiff's harm was of the same general type of harm that the defendant should have acted to avoid. If you find that it is, you shall find for the plaintiff. If you find that it is not the same general type, you must find for the defendant.

⁴⁴ See, e.g., *George v. Estate of Baker*, 724 N.W.2d 1, 11 (Minn. 2006). See generally 4 MINN. DIST. JUDGES ASS'N, MINNESOTA PRACTICE-JURY INSTRUCTION GUIDES, CIVIL, CIVJIG 27.10 (5th ed. 2006).

⁴⁵ 67 Minn. 94, 96, 69 N.W. 640, 641 (1896).

⁴⁶ See, e.g., *Kronzer v. First Nat. Bank of Minneapolis*, 305 Minn. 415, 426, 235 N.W.2d 187, 194 (1975); *Orwick v. Belshan*, 304 Minn. 338, 349-50, 231 N.W.2d 90, 97-98 (1975); *Hilligoss v. Cross Cos.*, 304 Minn. 546, 547, 228 N.W.2d 585, 586 (1975); *Dellwo v. Pearson*, 259 Minn. 452, 456, 107 N.W.2d 859, 862 (1961).

⁴⁷ See, e.g., *Schmidt v. Beninga*, 285 Minn. 477, 490-91, 173 N.W.2d 401, 408 (1970), (quoting *Dellwo v. Pearson*, 259 Minn. 452, 456, 107 N.W.2d 859, 862 (1961)).

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In *Lubbers v. Anderson*, a 1995 case, the Minnesota Supreme Court framed the proximate cause test as requiring foresight:

We have said that in order for a party's negligence to be the proximate cause of an injury “the act [must be] one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, . . . though he could not have anticipated the particular injury which did happen.”⁴⁸

Of course, it cannot be both, although both standards are aimed at developing appropriate limits on tort liability.

No matter how the proximate cause requirements are framed, the Minnesota Supreme Court has specifically noted the distinction between the cause-in-fact and proximate cause inquiries.⁴⁹

In *George v. Estate of Baker* the Minnesota Supreme Court recently stated that proximate cause means that the negligent act must have been “a substantial factor in the harm’s occurrence.”⁵⁰ That is the standard used in the pattern jury instructions on proximate cause, although the pattern instruction uses the term “direct cause.”⁵¹ The court in *George* rejected the “but for” standard as the proximate cause standard “because ‘[i]n a philosophical sense, the causes of an accident go back to the birth of the parties and the discovery of America.’”⁵² The court said, however, that while the defendant’s negligent conduct must have been a “substantial factor” in the injury, it also had to, at a minimum, have been a “but-for” cause of the plaintiff’s

⁴⁸ 539 N.W.2d 398, 401 (Minn. 1995).. (citing *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 113 (Minn. 1992), quoting *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 915 (Minn. 1983)); see also *Lietz v. Northern States Power Co.*, 718 N.W.2d 865 (Minn. 2006); *Canada v. McCarthy*, 567 N.W.2d 496, 506 (Minn. 1997).

⁴⁹ See, e.g., *Lietz v. Northern States Power Co.*, 718 N.W.2d 865, 872-73 (Minn. 2006); *Dellwo v. Pearson*, 259 Minn. 452, 454, 107 N.W.2d 859, 860 (1961); *Cook v. Person*, 246 Minn. 119, 122, 74 N.W.2d 389, 391 (1956). The court in *Lietz* separated the concepts:

There is proximate cause between a negligent act and an injury when the act is “one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others.” *Canada v. McCarthy*, 567 N.W.2d 496, 506 (Minn.1997) (quoting *Lubbers v. Anderson*, 539 N.W.2d 398, 402 (Minn.1995)). A plaintiff must also show that the negligent conduct was a substantial factor in bringing about the injury. *Id.* While the existence of proximate cause is usually a question of fact for the jury, “when reasonable minds could reach only one conclusion,” it is a question of law. *Id.* Viewing the evidence in a light most favorable to Jaenty, the installation of the anchor in a manner which severed a gas line was an act that a person exercising reasonable care would anticipate was likely to result in injury to others, and the puncture of the gas line was a substantial factor in bringing about the resulting explosion and Jaenty’s*873 alleged injuries. Given this causal connection, we hold that Jaenty’s alleged injuries arose out of the defective and unsafe condition of the anchor.

⁵⁰ *George v. Estate of Baker*, 724 N.W.2d 1, 11 (Minn. 2006).

⁵¹ See 4 MINN. DIST. JUDGES ASS'N, MINNESOTA PRACTICE-JURY INSTRUCTION GUIDES, CIVJIG 27.10 (5th ed.2006).

⁵² *George*, 724 N.W.2d at 11, citing William L. Prosser, *The Minnesota Court on Proximate Cause*, 21 MINN. L.REV. 19, 22 (1936).

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injury.⁵³ But-for causation becomes a necessary but not sufficient condition for causation.⁵⁴ The relationship of the “substantial factor” standard to determinations concerning the scope of a defendant’s responsibility for the consequences of negligent conduct is not clear.

The Minnesota Supreme Court adopted the substantial factor test in *Anderson v. Minneapolis St. P. & S. M. Ry. Co.*,⁵⁵ a case concerning the liability of a railroad for a fire that joined with another to burn out the plaintiff, where either fire would have been sufficient to cause the damage.⁵⁶ Application of a but-for standard would have negated liability on the part of the railroad.⁵⁷ Instead, the court held that the trial court was correct in instructing the jury that “If you find that other fires not set by one of defendant’s engines mingled with one that was set by one of defendant’s engines, there may be difficulty in determining whether you should find that the fire set by the engine was a material or substantial element in causing plaintiff’s damage. If it was, the defendant is liable; otherwise, it is not. . . .”⁵⁸ *Anderson* is generally credited with first adopting the substantial factor test,⁵⁹ but as a solution to a case involving over determined causes, where either of two or more causes would have been sufficient to cause the harm.⁶⁰

While the court rejected the “but-for” standard as a sole test of causation in *George*, on other occasions the court has embraced it.⁶¹ The court has used the but-for standard as the test for causation on both legal and

⁵³ See *George*, 724 N.W.2d at 11.

⁵⁴ See *Id.*

⁵⁵ 146 Minn. 430, 179 N.W. 45 (1920).

⁵⁶ *Id.* at 432-433, 179 N.W. at 46.

⁵⁷ *Id.* at 434, 179 N.W. at 45.

⁵⁸ *Id.*

⁵⁹ Restatement (Third) of Torts: Liability for Physical Harms § 26, cmt. j, Reporters’ Note (Proposed Final Draft No. 1 2005). The Reporters’ Note explains further:

employed it to deal with an overdetermined-outcome situation: two separate fires joined together and burned the plaintiff’s property; either fire alone would have been sufficient to cause the same harm. See § 27. Thus, it is not surprising that some courts and commentators have understood substantial factor to bear on factual cause while others have interpreted it to address proximate cause. The confusion has been exacerbated, no doubt, by the first two Restatements’ use of the umbrella term “legal cause,” to include both factual cause and proximate cause. Restatement Second, Torts § 431; Restatement of Torts § 431. See also David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1776 & n.43 (1997) (identifying the 3 distinct ways in which “substantial factor” is employed in the Restatement Second of Torts).

⁶⁰ Restatement (Third) of Torts: Liability for Physical Harms § 26, cmt. j, Reporters’ Note (Proposed Final Draft No. 1 2005). See *Fehling v. Levitan*, 382 N.W.2d 901, 904 (Minn. Ct. App. 1986), *rev. denied* (Minn. April 24, 1986).

⁶¹ See, e.g., *Jerry’s Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 819 (Minn. 2006); *Cornfeldt v. Tongen*, 295 N.W.2d 638, 640 (Minn.1980).

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medical malpractice cases.⁶² *George* acknowledges that the but-for is a minimum standard that has to be met in order to establish cause-in-fact, but that the substantial factor test has to be met as a proximate cause test.⁶³ The Minnesota Court of Appeals has noted that in most cases the substantial factor test will produce the same result as the but-for test.⁶⁴ The issue is what the substantial factor standard adds to causation analysis. The answer depends on whether the substantial factor test, dressed up, may be used as a limitation on the legal liability of a bar that illegally served alcohol.

The Minnesota Supreme Court has also stated that the proximate cause issue is a question of fact for the jury, whether the case involves a negligence or dram shop claim,⁶⁵ although in so stating the court seems to typically refer to the issue of whether the defendant's fault is a direct cause of the plaintiff's injury, the cause-in-fact issue, rather than the scope of responsibility issue.⁶⁶

B. OSBORNE AND PROXIMATE CUASE IN CIVIL DAMAGE ACT CASES

There is a dual causation requirement in dram shop cases.⁶⁷ The plaintiff must prove that the bar's illegal sale of alcohol caused the intoxication of the injured person and that the intoxication caused the injury giving rise to the claim.⁶⁸

The court in *Osborne* noted that in previous cases it has held that "the causal relationship between intoxication and injury required to prevail in a dram shop action is proximate causation."⁶⁹ The court made clear its intent to apply general tort principles in the dram shop context:

We have not in the past departed, nor do we presently see any reason to depart from the general tort principles of proximate cause in the dram shop context, which is based in tort liability. . . . Thus, as is consistent with our general tort law and our dram shop case precedent, for proximate cause to exist between the intoxication and the injury in a dram shop action, we conclude that the intoxication must have been a

⁶² *Jerry's Enters., Inc.*, 711 N.W.2d at 819; *Cornfeldt*, 295 N.W.2d at 640 (plaintiff required to show in informed consent case it was "more probable than not that but for the operation she would have recovered").

⁶³ *George*, 724 N.W.2d at 11.

⁶⁴ *Fehling v. Levitan*, 382 N.W.2d 901, 905 (Minn. Ct. App. 1986), *rev. denied* (Minn. April 24, 1986).

⁶⁵ *See, e.g.*, *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 373 (Minn. 2008) (dram shop); *Lietz v. Northern States Power Co.*, 718 N.W.2d 865, 872 (Minn. 2006) (negligence); *McCuller v. Workson*, 248 Minn. 44, 47, 78 N.W.2d 340, 342 (1956) (negligence).

⁶⁶ *Id.*

⁶⁷ *See Rambaum v. Swisher*, 435 N.W.2d 19, 21 (Minn. 1989).

⁶⁸ *See id.* at 21.

⁶⁹ 749 N.W.2d at 372 (citing *Kryzer v. Champlin Am. Legion No. 600*, 494 N.W.2d 35, 36 (Minn. 1992)) (emphasis omitted).

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substantial factor in bringing about the injury.⁷⁰

As formulated, the proximate cause requirement is satisfied if the intoxication was “a substantial factor in bringing about the injury.”⁷¹

The *Osborne* court stated that the proximate cause issue is a jury issue, although it qualified that statement in noting that sometimes the plaintiff’s injury might be caused by factors entirely unrelated to the intoxication.⁷² The court referred to three cases, *Kunza v. Pantze*,⁷³ *Kryzer v. Champlin American Legion No. 600*,⁷⁴ and *Crea v. Bly*,⁷⁵ in which it concluded that the intoxication was not a sufficient cause of the injury to justify recovery in a Civil Damages Act case.⁷⁶ Each case involves an arguably tenuous connection of the injury to the intoxication.⁷⁷ Each figured prominently in Twin Town’s argument that there was an insufficient causal connection between Riley’s intoxication and death.⁷⁸

1. CREA V. BLY⁷⁹

This is the entire opinion in *Crea*:

By special verdicts the jury below found that on January 2, 1977, Mark Montanari made an unprovoked attack on Anthony Crea in a parking lot adjacent to Mancini’s Bar, West St. Paul; that Montanari was aided, abetted, instructed or encouraged by Sally Bly to make the attack; that Crea did not provoke the attack; that Mancini’s Bar did not serve liquor to Montanari when he was obviously intoxicated; that Mancini’s Bar did serve liquor to Sally Bly when she was obviously intoxicated and therefore contributed to her intoxication; that the intoxication of Bly caused plaintiff Crea’s damages; that Crea was entitled to \$20,000 compensatory

⁷⁰ *Osborne*, 749 N.W.2d at 373 (citation omitted).

⁷¹ *Id.* As the court noted, that is the standard adopted in the Minnesota Civil Jury Instruction Guides. See 4 MINN. DIST. JUDGES ASS’N, MINNESOTA PRACTICE-JURY INSTRUCTION GUIDES, CIVJIG 27.10 (5th ed.2006); 4 MINN. DIST. JUDGES ASS’N, MINNESOTA PRACTICE-JURY INSTRUCTION GUIDES, CIVJIG 45.30 (5th ed.2006).

⁷² 749 N.W.2d at 373 (citing 5A ROGER S. HAYDOCK & PETER B. KNAPP, MINNESOTA PRACTICE, METHODS OF PRACTICE § 3.10 (4th ed.2007)).

⁷³ 531 N.W.2d 839 (Minn. 1995)

⁷⁴ 494 N.W.2d 35 (Minn. 1992).

⁷⁵ 298 N.W.2d 66 (Minn.1980).

⁷⁶ See *Osborne*, 749 N.W.2d at 374.

⁷⁷ See *id.*

⁷⁸ See *id.* at 373-74.

⁷⁹ 298 N.W.2d 66.

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damages and \$5,000 punitive damages; and that as between Montanari and Bly, each contributed 50% to the altercation.

The trial court held that Bly, Montanari and Mancini's Bar were each liable to Crea for 33 1/3% of the damages. We affirm as to Montanari and Bly and reverse as to Mancini's Bar, and hold as a matter of law that there was a break in the chain of causation between Mancini's contributing to Bly's intoxication and the injuries inflicted on Crea by Montanari. While the duties of dram shops to the public are and should be onerous, they do not extend to anticipating and protecting the public from the excesses of third parties beguiled into committing assaults on innocent victims by the importuning of intoxicated female patrons.⁸⁰

The court initially resolved the case on the basis that there was a break in the chain of causation, but then stated that dram shop responsibilities do not extend to the kind of incident in question.⁸¹ It is simply a common sense determination concerning the scope of a bar's responsibility under the Civil Damages Act.

2. KRYZER V. CHAMPLIN AMERICAN LEGION NO. 600

In *Kryzer*, the complaint alleged that the Legion Post illegally sold alcohol to Linda Kryzer and "that '[a]s a direct result of said illegal sale and barter of intoxicating liquor to Linda Kryzer, Linda Kryzer was caused to be removed from the bar by an employee of the defendant which resulted in injury to her wrist.'"⁸² There was no allegation that the illegal sale contributed to her intoxication and no allegation that her intoxication contributed or caused her injury.⁸³ The trial court concluded that even if Linda Kryzer had been removed from the bar because of her intoxication, the facts did not permit an inference that her intoxication directly contributed to cause her injuries or the injuries her husband sustained in seeking damages for loss of means of support.⁸⁴ The trial court held that the connection between Kryzer's intoxication and her injury was too remote to support the Civil Damages Act claim.⁸⁵

The Minnesota Court of Appeals reversed, concluding that while causation between the intoxication and injury has to be established, the standard is something less than proximate cause.⁸⁶ The court of appeals held that the plaintiff had to prove "only that his wife's intoxication contributed to her injury,"⁸⁷ and that

⁸⁰ *Id.*

⁸¹ *See id.*

⁸² *Kryzer v. Champlin Am. Legion No. 600*, 494 N.W.2d 36.(1992).

⁸³ *Id.*

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *Kryzer v. Champlin American Legion No. 600*, 481 N.W.2d 98, 102 (Minn. Ct. App. 1992), *rev'd*, 494 N.W.2d 35 (Minn. 1992).

⁸⁷ *Kryzer*, 481 N.W.2d.at 102.

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“but for wife's intoxication, she would not have been removed from the bar; and but for her removal from the bar, wife would not have been injured.”⁸⁸ The Minnesota Supreme Court reversed, noting it had held for forty years that in a Civil Damage Act action the intoxication must be the proximate cause of the injury,⁸⁹ and that while it had no “occasion to expressly require that the causal relationship be proximate” the court had “never retreated from that requirement.”⁹⁰ Based upon a backdrop in which the proximate cause requirement appeared embedded in Minnesota dram shop law, the Minnesota Supreme Court criticized the court of appeals’ creation of its own test, the but-for test, which, the Supreme Court said, “may or may not signify a causal connection.”⁹¹

The Minnesota Supreme Court continued its analysis of the case by distinguishing between the “occasion” and the “cause” of an injury, reaching back to its opinion in *Nelson v. Chicago, M. & St. P. Ry. Co.*,⁹² to explain the distinction.⁹³ That case involved fatal injury to a mule that stepped into a hole on an unfenced stretch of railroad track.⁹⁴ The railroad violated a Minnesota statute that made railroads “liable for domestic animals killed or injured by the negligence of such companies,” and stated that failure to have proper fencing “shall be deemed an act of negligence.”⁹⁵

Justice Mitchell limited the reach of the statute:

[I]t was neither the design nor the effect of the statute to make a railroad company liable absolutely for all injuries which would not have occurred had a fence been built, regardless of the fact whether such injury was the direct and natural, or only the remote and accidental, consequence of the absence of a fence, or whether the neglect to fence was merely the *occasion and not the natural cause of the injury*.⁹⁶

Applying that view, Justice Mitchell noted that “it is not enough that if a fence had been built the mule would not have gotten on the track, and hence would not have been injured. The omission to build the fence

⁸⁸ *Id.* at 103.

⁸⁹ *Kryzer*, 494 N.W.2d at 36-37 (citing *Hartwig v. Loyal Order of Moose, Brainerd Lodge*, 253 Minn. 347, 355, 91 N.W.2d 794, 801 (1958); *Strand v. Village of Watson*, 245 Minn. 414, 419, 72 N.W.2d 609, 614 (1955); *Hahn v. City of Ortonville*, 238 Minn. 428, 432, 57 N.W.2d 254, 258-59 (1953)). The court in *Kryzer* also noted that “[o]n other occasions the necessary causal connection has been described in terms we use to define proximate cause. Compare *Hollerich v. City of Good Thunder*, 340 N.W.2d 665, 668 (Minn.1983), with *Flom v. Flom*, 291 N.W.2d 914, 917 (Minn.1980), and *Peterson v. Fulton*, 192 Minn. 360, 365, 256 N.W. 901, 903 (1934).”

⁹⁰ *Kryzer*, 494 N.W.2d at 37.

⁹¹ *Id.*

⁹² 30 Minn. 74, 14 N.W. 360 (1882).

⁹³ *Kryzer*, 494 N.W.2d at 37.

⁹⁴ See *Nelson*, 30 Minn. at 74, 14 N.W. at 360.

⁹⁵ *Id.* at 75, 14 N.W. at 360.

⁹⁶ *Id.* at 361 (emphasis supplied).

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must have been the cause and not the mere occasion of the injury.”⁹⁷

The opinion goes further, however. After surveying a variety of authorities, Justice Mitchell concluded that the failure to have a fence was not the “proximate” cause of the injury.⁹⁸ Factual cause is different. He explained:

If this animal had been struck by a passing train it would be just such an accident as might reasonably have been anticipated, and hence the neglect to fence would be the natural and proximate cause of the injury. So, if it had been injured by falling into a trestle or cattle-guard while following the track, at least this would be a question of fact to submit to a jury to say whether it was the natural and proximate consequence of the neglect to fence. But if the chance of an injury from the cause which produced the damage in this case was so slight and remote that it could not be reasonably anticipated by any one, then the injury would be properly attributable to chance and accident, and not to the neglect of defendant.⁹⁹

On the other hand:

The fact is, the injury was not one reasonably to be apprehended, and did not follow as a natural or ordinary sequence from the absence of a fence. We can see no real difference in principle between the case at bar and one where an animal strays upon a railroad track and is there killed by lightning or a stray rifle ball, or (if objection is made to the cases supposed because some external independent power intervened) a case where the animal, after getting upon the railroad right of way, ran a thorn into its foot, or was injured by the falling of a tree not previously deemed dangerous.¹⁰⁰

On that basis, the court concluded that the defendant railroad was not liable as a matter of law.¹⁰¹ The issue was not whether there was cause-in-fact – there was. The issue is whether the statute was intended to include the type of injury that occurred in the case – it was not.¹⁰²

After *Nelson*, the court in *Kryzer* then cited Minnesota Supreme Court cases that purportedly rejected “but for” as a causation test, including a 1921 decision, *Childs v. Standard Oil Co.*,¹⁰³ a case involving the negligent overfilling of a kerosene tank in the basement of a store that eventually led to a fire when a neighboring tenant used a shovel that had been used to cover the spill with sawdust used the shovel to close the door of her furnace, resulting in a fire.¹⁰⁴ The court in *Childs*, however, rather than specifically rejecting

⁹⁷ *Id.*

⁹⁸ *Id.* at 362.

⁹⁹ *Nelson*, 30 Minn. at 74, 14 N.W. at 362 (citations omitted).

¹⁰⁰ *Id.*

¹⁰¹ *See id.*

¹⁰² *See id.*

¹⁰³ 182 N.W. 1000, 1001 (Minn. 1921).

¹⁰⁴ *See Kryzer*, 494 N.W.2d at 37.

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the “but for” standard, said that simply because the but-for test is satisfied “does not, as a matter of law, necessitate the conclusion that such act was the proximate cause of the damage.”¹⁰⁵ *Kryzer* characterized the supreme court as holding in *Childs* “that the defendant's act had become injurious only through the wrongful act of another and that liability attached only to the last act.”¹⁰⁶ What the court in *Childs* actually concluded, however, was that the last wrongdoer’s act was a superseding cause:

The fact that damage would not have happened but for defendant's tortious act does not, as a matter of law, necessitate the conclusion that such act was the proximate cause of the damage. If it only became injurious through some distinct wrongful act or neglect of another, the last wrong is the proximate cause, and the injury will be imputed to it, and not to that which is more remote. The test usually applied is this: Has an independent responsible agent intervened between the first wrongdoer and the plaintiff and the continuous sequence of events been interrupted or turned aside so as to produce a result which would not otherwise have followed? If so, the original wrongdoer ceases to be responsible.¹⁰⁷

Notwithstanding the court’s conclusion that the last person’s conduct was a superseding cause, the court in *Kryzer* applied *Childs* in concluding that, “[i]n the *Childs* case, as here, the act of a third party precipitated the injury for which the plaintiff sought recovery.”¹⁰⁸ Then, mixing and matching, the court applied the “occasion” language from *Nelson*, noting that while “Mrs. Kryzer's intoxication may have been the occasion for her ejection from the legion club . . . it did not cause either her injury or that sustained by the plaintiff.”¹⁰⁹ The court made a policy judgment in *Kryzer* in deciding that the plaintiff was not entitled to recover. Rather than distorting the cause-in-fact inquiry, however, the analysis would have been simplified had the court simply paraphrased *Crea* and concluded that the duties of dram shops to the public “. . . do not extend to anticipating” and guarding against injuries third parties inflict on intoxicated persons by alcohol-fueled conduct.¹¹⁰ Whether based on a duty determination or proximate cause, the result would have been the same.

¹⁰⁵ *Childs*, 182 N.W. at 1001.

¹⁰⁶ *Kryzer*, 494 N.W.2d at 37.

¹⁰⁷ *Childs*, 182 N.W. at 1001-1002. The court also cited *Medved v. Doolittle*, 19 N.W.2d 788 (Minn. 1945) for the same proposition.

¹⁰⁸ 494 N.W.2d at 37.

¹⁰⁹ *Id.* The court did note that the employee’s conduct, if negligently performed, could give rise to liability, if the employee acted negligently, but that by itself does not provide a causal connection between the intoxication and injury. *Id.* at 37-38, citing *Crea v. Bly*, 298 N.W.2d 66 (Minn.1980).

¹¹⁰ 298 N.W.2d 66, 66 (Minn. 1980).

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3. KUNZA V. PANTZE

Kunza v. Pantze,¹¹¹ the third and most recent of the trilogy of cases providing the background for *Osborne*, involved injuries sustained by the plaintiff when she jumped out of a vehicle driven by her then-husband, Pantze, in order to avoid further physical abuse.¹¹² The plaintiff also brought suit against the bar where they had been drinking, alleging that Pantze's intoxication caused her injuries.¹¹³ The district court held as a matter of law that Pantze's intoxication was not a proximate cause of the plaintiff's injuries because the causal chain was broken when the plaintiff voluntarily jumped from the vehicle.¹¹⁴ The court of appeals reversed. In its view, the Minnesota cases indicated "that wrongful conduct may be the proximate cause of injuries resulting from the plaintiff's efforts to avoid the direct consequences of the wrongful conduct, even if the plaintiff acted unreasonably in choosing a means of avoidance."¹¹⁵ The court therefore held "that Pantze's intoxication could have been a proximate cause of appellant's injuries, even though appellant's own actions may have been the immediate cause of those injuries."¹¹⁶ The Minnesota Supreme Court summarily reversed without further explanation, citing only *Kryzer*.¹¹⁷

Of the trilogy of cases, *Kunza* is perhaps the hardest to understand. Her decision to voluntarily jump from the vehicle was caused not by her intoxication or behavior, as in *Kryzer*, but by the intoxication of her husband.¹¹⁸ In general, as noted by the court of appeals in *Kunza*, an attempt to escape from a battery would subject the person committing the battery to liability for the direct consequences of his actions.¹¹⁹ If the car driver would be held liable for his alcohol-induced attacks, there appears to be no reason why injuries occurring during an escape attempt would not fall within the scope of the bar's duty not to illegally sell alcohol.

4. ARGUMENT AND RESOLUTION

Applying those cases, Twin Town Bowl argued that Riley's intoxication was only the "occasion" and not

¹¹¹ *Kunza v. Pantze*, 531 N.W.2d 839, 839 (Minn.1995).

¹¹² *Id.* at 839.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Kunza v. Pantze*, 527 N.W.2d 846, 850 (Minn. Ct. App. 1995), rev'd 531 N.W.2d 839 (Minn. 1995).

¹¹⁶ *Id.* at 850.

¹¹⁷ *Kunza*, 531 N.W.2d 839 (Minn. 1995).

¹¹⁸ *Kunza*, 527 N.W.2d at 847-48.

¹¹⁹ *Kunza v. Pantze*, 527 N.W.2d 846, 849-50.

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the “cause” of the injury.¹²⁰ They argued that it was the police officer’s reaction to Riley in stopping, arresting, but not handcuffing Riley that was the cause of Riley’s injury, rather than his intoxication.¹²¹ The plaintiffs, on the other hand, argued that the three cases were distinguishable because in each case the injury that occurred was the result of the actions of a third party.¹²² The Minnesota Supreme Court rejected Twin Town Bowl’s argument:

In this case, we conclude that it was not the choice of a third party, but instead Riley's own choice that caused his injury. It was Riley's decision to jump into the river, and him acting on that decision, that led to his death. While Twin Town Bowl argues that McDonald's (the trooper's) reaction to Riley caused Riley's injury, Riley's decision to jump into the river could not have been caused by McDonald. McDonald placing Riley under arrest and not handcuffing him may have given Riley the occasion to make a decision about whether he should jump into the river to avoid arrest, but it was Riley who chose to and did jump into the river.¹²³

In an interesting twist, the court concluded that the trooper’s action, rather than the intoxication, was the “occasion” of the injury, but the “occasion” language becomes problematic. The trooper’s liability was not in issue in the case, and acknowledging the existence of the causal connection between the trooper’s action and Riley’s death would in no way diminish the claim against Twin Town, assuming the requisite causal connection between Riley’s intoxication and injury could be established.¹²⁴

The court continued to emphasize the direct connection between Riley’s intoxication and the injury, distinguishing the cases involving actions of a third party:

Unlike the actions of a third party, it is possible that Riley's choices and actions substantially resulted from his intoxicated state of mind. Much like an intoxicated driver who speeds up at a red light because his alcohol-impaired judgment leads him to believe he can make it through an intersection before an oncoming vehicle arrives, Riley's decision to jump off a bridge when faced with arrest could have been substantially and directly caused by his alcohol-impaired judgment. . . Thus, we conclude that unlike the cases where we have affirmed the summary dismissal of a case because proximate cause did not exist, in this case it is not clear that Riley's injuries were “caused by factors that are entirely unrelated to [his] intoxication. . . On this point, we agree with the reasoning of the court of appeals dissent that “[t]he caselaw that defines proximate cause does not invite courts to decide as a matter of law that proximate cause is lacking when, as here, the facts suggest a direct link between the intoxication and the overserved patron's injurious act.”¹²⁵

¹²⁰ *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367 at 373-74 (Minn. 2008).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 374.

¹²⁴ *Id.*

¹²⁵ *Id.*, citing the court of appeals decision in *Osborne*, 730 N.W.2d at 313 (Ross, J., dissenting) (other citations omitted). Judge Ross’s dissent reads in part as follows:

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Then, relying on *Kryzer*, the court emphasized the necessity of establishing that Riley's intoxication was a "proximate cause" of his injury, not just a "but-for" cause, agreeing with the dissent's statement that the intoxication must be more than just the "occasion" for the injury, but not that the intoxication had to be the sole cause of the injury under the Dram Shop Act.¹²⁶

The court returned to the "substantial factor" standard as the appropriate test for causation in dram shop cases, while acknowledging that previously it had not been explicit in adopting that standard.¹²⁷ The court gave two reasons for its decision to make it clear that the substantial factor standard applied in dram shop cases.¹²⁸ The first was the general applicability of that standard in tort cases and the lack justification for departing from that standard in dram shop cases which the court said are really tort actions after all.¹²⁹

The second reason was that the court's review of past dram shop cases indicated that it really had, if only implicitly, adopted the substantial factor test. The court had used the term "*the proximate cause*" and "*a proximate cause*" in prior dram shop cases, but it emphasized that it had never taken the position that intoxication has to be "the sole cause of the injury."¹³⁰ The court concluded its analysis of the causation issue by reaffirming "the well-established tort principle in the dram shop context that intoxication need only be 'a substantial factor in bringing about the injury.'"¹³¹

The reasons the Minnesota appellate courts rejected these claims as a matter of law highlight that dram-shop liability must rest on intoxication-induced action that causes injury, not on a third-party's reaction to the intoxicated person, which in turn causes the injury. These cases stand for the unremarkable proposition that the merely responsive injurious action by a third person, as a matter of law, is too attenuated to constitute proximate cause because the action is not a direct product of the patron's intoxication. In *Kryzer*, the supreme court emphasized that "[t]he complaint alleges only that it was an act of a club employee in ejecting her which caused the injury." *Kryzer*, 494 N.W.2d at 37. In *Kunza*, the supreme court summarily reinstated summary judgment after this court reversed the district court, relying expressly on *Kryzer*. *Kunza*, 531 N.W.2d at 839. In *Crea*, the court explained that "[w]hile the duties of dram shops to the public are and should be onerous, they do not extend to anticipating and protecting the public from the excesses of third parties beguiled into committing assaults on innocent victims by the importuning of intoxicated ... patrons." *Crea*, 298 N.W.2d at 66. And in *Weber*, this court explained that "Weber has made no allegation that the [minor's] intoxication had any role in the injury Weber sustained when he apprehended the minor after chasing him on foot." *Weber*, 512 N.W.2d at 350.

¹²⁶ *Osborne*, 749 N.W.2d at 375.

¹²⁷ *See id.*

¹²⁸ *Id.*

¹²⁹ *Id.*, citing *Dahl v. Northwestern Nat'l Bank of Minneapolis*, 121 N.W.2d 321, 324 (1963).

¹³⁰ *Osborne*, 749 N.W.2d at 375 (emphasis the court's).

¹³¹ *Id.* at 376, citing *Flom v. Flom*, 291 N.W.2d 914, 917 (Minn.1980) (emphasis added) (defining proximate cause in the context of a negligence action).

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The remaining issue was whether there was sufficient evidence that Riley's intoxication caused his injury to avoid Twin Town Bowl's motion for summary judgment. The court noted the standard definition of "intoxication" as essentially diminished capacity,¹³² that "the effects of intoxication are within the common knowledge of lay people," and that "it is generally known that alcohol impairs both mental and physical capacity." The court concluded that "much like a drunk driver's clouded judgment and impaired physical faculties may substantially cause him to be involved in a motor vehicle accident . . . the known and proven effects of alcohol, in concert with the fact that Riley-while intoxicated-made a choice to escape arrest by jumping into a river, provide appellants with sufficient evidence to create a genuine issue of material fact as to whether Riley's intoxication proximately caused Riley to choose to jump into the river under the mistaken belief that he could swim safely to shore."¹³³

C. THE DISSENTING OPINIONS

Justices Page and Gildea dissented.¹³⁴ Justice Page's objection was procedural.¹³⁵ He concluded that while dram shop liability is strict liability in Minnesota, "something more than a bare-bones complaint and common knowledge should be required to establish a genuine issue of material fact sufficient to defeat summary judgment."¹³⁶ He completely discounted the expert's report.¹³⁷

Justice Gildea's dissent argued that the majority's opinion denying the motion for summary judgment rested on two flawed premises.¹³⁸ The first was that intoxication does not have to be the sole cause of injuries for dram shop liability to attach and the second that expert testimony was unnecessary to create a fact issue as

¹³² *Osborne*, 749 N.W.2d at 376, citing Black's Law Dictionary 841 (8th ed.2004), which defines intoxication as "[a] diminished ability to act with full mental and physical capabilities because of alcohol or drug consumption," and The Diagnostic and Statistical Manual of Mental Disorders, which classifies intoxication as a mental disorder that causing "maladaptive behavior or psychological changes," including "belligerence, mood liability, cognitive impairment, impaired judgment, [and] impaired social or occupational functioning." Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders 199-200, 196-97 (4th ed., text rev.2000). See also Emily L. R. Harrison, Cecile A. Marczynski & Mark T. Fillmore Driver Training Conditions Affect Sensitivity to the Impairing Effects of Alcohol on a Simulated Driving Test to the Impairing Effects of Alcohol on a Simulated Driving Test, 15 Experimental and Clinical Psychopharmacology 588 (2007) (even moderate doses of alcohol "impair a broad range of skilled activities related to driving performance in young adults"); Tom A. Scheizer & Muriel Vogel-Sprott, Alcohol-Impaired Speed and Accuracy of Cognitive Functions: A Review of Acute Tolerance and Recovery of Cognitive Performance, 16 Experimental and Clinical Psychopharmacology 588 (2007).

¹³³ *Osborne*, 749 N.W.2d at 376-77.

¹³⁴ *Id.* at 381-82.

¹³⁵ *Id.* at 381.

¹³⁶ *Id.* at 381-82.

¹³⁷ *Id.* at 382 n.1.

¹³⁸ *Id.* at 382.

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to the impact of intoxication in the case under consideration.¹³⁹ She argued that the broad formulation of causation applied by the majority in the case was inconsistent with both the language of the statute and the court's own precedent.¹⁴⁰

Justice Gildea placed primary reliance on the specific language of the Act, which provides in part that a claimant is entitled to recover for "pecuniary loss . . . by the intoxication of another person."¹⁴¹ She dismissed the majority's reference to the application of comparative fault to dram shop cases as an indication that there may be causes other than intoxication of an injury as being inapposite to Riley's case.¹⁴² She also dismissed the majority's reference to other cases intimating that there may be more than one cause of an injury in a dram shop case because the cases did not specifically hold that intoxication does not need to be *the* proximate cause of an injury.¹⁴³

The application of the comparative fault act to dram shop cases, along with other dram shop cases involving multiple causes,¹⁴⁴ establishes that multiple causes may be involved in a dram shop case. As the majority opinion noted, alcohol impairs cognitive judgment.¹⁴⁵ It may have influenced Riley's decision to jump, just as it would influence an intoxicated person to drive at an excessive rate of speed, or, perhaps, to commit a battery upon another person.¹⁴⁶ A rule that would require a showing that the intoxication and only the intoxication was the cause would be highly restrictive and hard to justify as a matter of policy.

If Riley's case were singled out for application of a rule requiring that his intoxication was the only cause of his injury, it would be difficult to distinguish numerous other cases where intoxication caused impaired judgment or motor skills that led to a particular accident. Impairment of an intoxicated driver's judgment or motor skills could lead to various negligent decisions resulting in injury to the intoxicated person.

D. TESTING OSBORNE

There are several Minnesota Court of Appeals cases that involve proximate cause issues. This section examines five of them for purposes of determining how the Minnesota Supreme Court's decision in

¹³⁹ *Osborne*, 749 N.W.2d at 376-77.

¹⁴⁰ *Id.* at 383-84.

¹⁴¹ *Id.* at 382 (quoting MINN. STAT. § 340A.801, subdiv. 1 (2008)).

¹⁴² *Id.* at 383 n.1.

¹⁴³ *Id.* at 383-84.

¹⁴⁴ *See, e.g., Kluger v. Gallett*, 281 Minn. 11, 178 N.W.2d 900 (1970) (pedestrian injured by negligence of intoxicated driver; suit against driver and bar).

¹⁴⁵ *Osborne*, 749 N.W.2d at 374.

¹⁴⁶ *See id.*

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Osborne might apply.¹⁴⁷ Four of the five are unpublished¹⁴⁸ One of the five, *Larson v. Mitch's, Inc.*,¹⁴⁹ was decided after *Osborne*.

In *Weber v. Au*, Weber was injured when he chased a minor who was involved in a fight outside a bar where he had been illegally served alcohol.¹⁵⁰ As the police officer approached the bar the minor got into his car and started to leave his parking space.¹⁵¹ The police officer pursued in his car and pulled the minor over.¹⁵² He got out and ran and the police officer pursued on foot.¹⁵³ The officer was injured when he grabbed the minor and they both fell to the pavement.¹⁵⁴ The issue was whether Weber's injuries were proximately caused by the intoxication of the minor resulting from the bar's illegal sale of alcohol to the minor.¹⁵⁵ Although the evidence was sketchy as to whether the minor was intoxicated, the court focused on the issue of whether the intoxication was a cause of the injury sustained by the police officer:

In opposing Au's motion for summary judgment and in his briefing on appeal, Weber simply alleged that Au's illegal sale contributed to the minor's intoxication, which caused the minor to engage in disorderly conduct in the fight outside the bar. Weber did not, however, allege that the minor's intoxication caused the minor to flee from Weber or that the minor's intoxication caused Weber and the minor to fall when Weber grabbed the minor's collar. Rather, Weber argued that, "but for" Au contributing to the minor's becoming drunk and disorderly by illegally selling him alcohol, Weber, as a police officer, would not have had the duty to apprehend the minor, and "but for" that duty, Weber and the minor would not have fallen down and injured Weber's knee.¹⁵⁶

The court noted in a footnote that "except for an inference arising from his starting the fight outside the bar, there is no evidence the minor was intoxicated."¹⁵⁷ He was "was not charged with driving while intoxicated

¹⁴⁷ *Larson v. Mitch's, Inc.*, 2008 WL 2572916 (Minn. Ct. App. July 1, 2008); *Brockman v. Beacon*, 2002 WL 31012602 (Minn. Ct. App. Sept. 10, 2002); *J.B. v. Mounds Vista, Inc.*, 2001 WL 16068804 (Minn. Ct. App. Dec. 18, 2001); *Barron v. Fransen, Inc.*, 2000 WL 16314 (Minn. Ct. App. Jan. 11, 2000); *Weber v. Au*, 512 N.W.2d 348 (Minn. Ct. App. 1994).

¹⁴⁸ *Id.*

¹⁴⁹ 2008 WL 2572916 (Minn. Ct. App. July 1, 2008).

¹⁵⁰ 512 N.W.2d 348 (Minn. Ct. App. 1994).

¹⁵¹ *Id.* at 349.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Weber*, 512 N.W.2d at 350.

¹⁵⁷ *Id.* n.1.

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despite his having driven his car a short distance prior to the foot race that culminated in Weber's knee injury," and Weber's report did not indicate that he "observed the minor to be intoxicated."¹⁵⁸

Obviously skeptical about the claim, the court held that the minor's intoxication was not the proximate cause of Weber's injuries.¹⁵⁹ In reaching its conclusion the court distinguished on its facts *Hannah v. Chmielewski, Inc.*, a Minnesota Supreme Court case in which a police officer was injured by a man who had been drinking at two bars owned by the defendants.¹⁶⁰ The court in *Weber* said that "[t]he distinction is that in the *Hannah* cases, it appears that the intoxicated person assaulted the police officer, while in the instant case, the minor ran away and the police officer 'tackled' him."¹⁶¹

The problem in *Weber* was identifying the relationship of the intoxication to the injury.¹⁶² For purposes of discussion it might be assumed that the minor's intoxication was a factor in prompting the fight outside the bar. Had another person injured in a fight with the minor made a claim under the Dram Shop Act there would have been no question concerning the causal connection. Had the police officer been directly injured by the intoxicated person, as in *Hannah*, there would likely have been a sufficient causal connection between the intoxication and the injury.¹⁶³ Neither of those things occurred. The police officer was injured, but only during the course of a pursuit that was separated in time from the altercation that prompted the police officer to give chase to the minor.¹⁶⁴ Connecting the intoxication to the police officer's injuries becomes more difficult with the intervening factors of the minor's decision to drive away and the police officer's decision to pursue on foot.¹⁶⁵ One might imagine facts, however, in which a police officer is injured while pursuing an intoxicated driver, and that the intoxication was a factor in the intoxicated driver's decision to escape, as it potentially was in *Osborne*.¹⁶⁶ The number of intervening factors,¹⁶⁷ however, makes it somewhat easier to conclude that there is no proximate cause, not because there is no cause-in-fact, but because the incident is not the kind of incident for which a bar should be liable.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 351.

¹⁶⁰ 323 N.W.2d 781 (Minn. 1982).

¹⁶¹ 512 N.W.2d at 350-51.

¹⁶² *Id.* at 350 n.1.

¹⁶³ *See* 323 N.W.2d 781.

¹⁶⁴ *Weber*, 512 N.W.2d at 349.

¹⁶⁵ *Id.*

¹⁶⁶ *See* 749 N.W.2d at 369.

¹⁶⁷ *See Kelly v. Sinclair Oil Corp.*, 476 N.W.2d 341, 350-51 (Iowa 1991).

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In *Barron v. Fransen, Inc.*,¹⁶⁸ the plaintiff was injured when he stopped to assist at an accident scene.¹⁶⁹ The accident occurred when Davis, who had been drinking at two bars before the accident, collided with another car during a lane change, lost control of his vehicle, and hit a freeway median barrier.¹⁷⁰ Barron parked on the right shoulder and crossed lanes of traffic to provide assistance.¹⁷¹ He was seriously injured while he was taking the pulse of a passenger in the Davis vehicle.¹⁷² The issue was whether Davis's intoxication was a proximate cause of Barron's injuries.¹⁷³ The court of appeals summarily held that it was "merely the 'occasion' and not the 'cause' of Barron's injuries."¹⁷⁴ The court noted that while Barron could argue that Davis's intoxication caused Barron to place himself in a position of danger, the "connection is too remote; the law requires a more direct connection, as illustrated by *Kryzer* and *Kunza*."¹⁷⁵

The Minnesota Supreme Court recognized the rescue doctrine in 1912.¹⁷⁶ In an ordinary negligence case the doctrine would have applied to make a negligent driver liable for causing the accident necessitating the rescue. It is not clear why the result should be different in a dram shop case. In light of *Osborne*, which applies standard proximate cause principles to dram shop cases, application of the rescue doctrine would seem to be justifiable in cases such as *Barron*.

That result seems to be reinforced by the court of appeals' decision in *Brockman v. Beacon Sports Bar & Grill*.¹⁷⁷ Brockman was seriously injured when he was pinned against a retaining wall by a car driven by Price, who had backed the car into a ditch.¹⁷⁸ Brockman was injured while assisting in pushing the car out of the ditch when the car moved backward, pinning himself against the wall.¹⁷⁹ Brockman subsequently underwent surgery as a result of the consequences of his injury but died because of a sudden cardiovascular

¹⁶⁸ *Barron v. Fransen, Inc.*, No. C7-99-1434, 2000 WL 16314 (Minn. Ct. App. Jan. 11, 2000).

¹⁶⁹ *Id.* at *1

¹⁷⁰ *Id.* at *1

¹⁷¹ *Id.*

¹⁷² *Barron*, 2000 WL 16314, at *1.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at *1.

¹⁷⁶ See *Perpich v. Leetonia Min. Co.*, 118 Minn. 508, 512, 137 N.W. 12, 14 (1912); see also *Shafer v. Gaylord*, 287 Minn. 1, 3, 176 N.W.2d 745, 747 (1970) (court noted but did not apply the rescue doctrine, which exists for the benefit of the injured rescuer); *Arnold v. Northern States Power Co.*, 209 Minn. 551, 558, 297 N.W. 182, 186 (1970).

¹⁷⁷ *Brockman v. Beacon Sports Bar & Grill*, No. C8-02-76, 2002 WL 31012602 (Minn. Ct. App. Sept. 10, 2002)..

¹⁷⁸ *Id.* at *1

¹⁷⁹ *Id.* at *1

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collapse most likely due to a blood clot in his lungs.¹⁸⁰ Brockman, Price, and Brockman’s cousin had been drinking at the bar prior to the accident.¹⁸¹ In a dram shop suit against the bar by Brockman’s father, who was appointed personal representative of his estate, the bar moved for summary judgment on the grounds that the evidence was insufficient to establish a prima facie case of Price’s intoxication or that the intoxication was a cause of Brockman’s death.¹⁸² The trial court granted the motion on the second, but not first ground.¹⁸³ The court of appeals reversed.¹⁸⁴ Applying standard proximate cause principles, the court noted first that “the concept of proximate cause has always encompassed unforeseen medical complications that develop from the original injury,”¹⁸⁵ and second, that proximate cause also encompasses the aggravation of an injury by administration of necessary medical care.¹⁸⁶

In *J.B. v. Mounds Vista, Inc.*,¹⁸⁷ the appellant-mother brought suit on behalf of her minor daughter against a bar alleging that her daughter was sexually assaulted and that the assault was proximately caused by the bar’s illegal sale of alcohol to the assailant.¹⁸⁸ There was no dispute that the bar illegally sold alcohol to the assailant when he was obviously intoxicated, and that the illegal sale caused the intoxication. The district court granted summary judgment for the bar, reasoning that the assailant’s conduct was an intentional criminal act that broke the chain of causation, which suggested a superseding cause analysis.¹⁸⁹

The court of appeals reversed. Citing *Kryzer*, the court of appeals stated that “[t]here must be a direct causal relationship between a person’s intoxication and the injury, demonstrated by a proximate-cause analysis rather than a ‘but for’ test.”¹⁹⁰ Applying that standard, the court held that the trial court was too quick in dismissing the claim on summary judgment where the appellants were not afforded the opportunity to engage in discovery.¹⁹¹

¹⁸⁰ *Id.* at *1

¹⁸¹ *Id.* at *1

¹⁸² *Brockman*, 2002 WL 31012602, at *1..

¹⁸³ *Id.* at *1

¹⁸⁴ *Id.* at *4

¹⁸⁵ *Id.* at *2, (citing *Keegan v. Mpls. & St. Louis R.R. Co.*, 76 Minn. 90, 91-95, 78 N.W. 965, 965-67 (1899)).

¹⁸⁶ *Brockman*, 2002 WL 31012602, at *2, (citing *Couillard v. Charles T. Miller Hosp.*, 253 Minn. 418, 422, 92 N.W.2d 96, 99 (1958)).

¹⁸⁷ *R.B. ex rel. J.B. v. Mounds Vista, Inc.*, No. C0-01-1017, 2001 WL 1606804 (Minn. Ct. App. Dec. 18, 2001).

¹⁸⁸ *Id.* at *1

¹⁸⁹ *Id.* at *2

¹⁹⁰ *Id.* at *2

¹⁹¹ *Id.* at *3

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The court of appeals also noted its statement in *Fete v. Peterson*,¹⁹² that “superseding cause” is more relevant in negligence actions, rather than strict liability cases such as dram shop cases, and because many dram shop cases follow criminal acts, the court seemed to indicate that it would be inappropriate to apply superseding cause principles in dram shop cases. The concern in *Fete* was that because criminal acts resulting in injury frequently follow the illegal sale of alcohol, bars would have an automatic defense to liability under the dram shop act, which is intended to impose responsibility on bars for the consequences of the conduct that the bar should have prevented in the first place.¹⁹³ The latter concern about the application of superseding cause is more relevant, perhaps, than the former, but it is actually consistent with superseding cause principles which would make the doctrine inapplicable in cases where the ultimate conduct could be anticipated as a consequence of the wrongful act. It is, of course, to be anticipated that illegal action will occur, as the Supreme Court of Minnesota noted in its opinion in *Osborne*.¹⁹⁴ The application of general negligence principles of causation, including superseding cause, would not achieve a result different from the one in the *J.B.* case, but it would result in a more forthright application of causation principles in the dram shop context.

In *Larson v. Mitch’s, Inc.*,¹⁹⁵ David Larson had been drinking at two different bars when he was involved in an altercation with another person who beat Larson up, rendering him unconscious and causing him serious injuries.¹⁹⁶ There is no indication that Mitch’s served alcohol to the other person. The district court dismissed the case, concluding that the assault and not the sale of alcohol by Mitch’s to Larson was the proximate cause of his injuries.¹⁹⁷ The court of appeals affirmed.¹⁹⁸ Relying primarily on *Crea v. Bly*,¹⁹⁹ and finding that its conclusion was supported by the Supreme Court’s decision in *Osborne*, the court concluded that the assault was a break in the causal chain.²⁰⁰ The rationale, not that there is no causal link between intoxication and injury, but that the type of injury that occurred is not one of the risks for which a bar is responsible, is sustainable based upon *Crea*.

¹⁹² *Fete v. Peterson*, 404 N.W.2d 862 (Minn. Ct. App.1987), *rev. denied* (Minn. June 26, 1987). (concluding superseding-cause instruction is a negligence instruction, which is inappropriate in strict-liability cases).

¹⁹³ *Id*

¹⁹⁴ *Osborne*, 749 N.W.2d at 375.

¹⁹⁵ *Larson v. Mitch’s, Inc.*, No. A07-0387, 2008 WL 2572916 (Minn. Ct. App. July 1, 2008).

¹⁹⁶ *Id.* at *1.

¹⁹⁷ *Id.* at *1.

¹⁹⁸ *Id.* at *3.

¹⁹⁹ *Crea v. Bly*, 298 N.W.2d 66 (Minn.1980).

²⁰⁰ Where another cause creates “a break in the chain of causation” between the intoxication and the injury, the dram shop is not liable for the injury. *Id*

V. RESOLUTION AND CONCLUSION

Deciding what proximate cause means in torts cases has been problematic. It may refer both to limits on the scope of liability and the existence of a cause-in-fact relationship between a defendant's conduct and the injury sustained by the plaintiff. The test for proximate cause is said to be whether the defendant's conduct is a substantial factor in bringing about the injury sustained by the plaintiff. The but-for test has been rejected by the Supreme Court on occasion, primarily because of the lack of limits on the standard, although on other occasions the court applies the but-for standard as the appropriate test of causation.

The Supreme Court has rejected the but-for test because it does not impose limits on liability. The substantial factor test, originally adopted in order to avoid the problems involved in cases where there are multiple sufficient causes of an accident, has been applied as the test of proximate cause, presumably because it provides a basis for limiting liability. In effect, what has happened is that the cause-in-fact test, the substantial factor test, has conflated both cause-in-fact and limits of liability tests into a single test. That overburdening of the causation test tends to obscure the central inquiry, which is a scope of liability issue.

The same result has occurred in dram shop cases where the issue concerns whether intoxication is a proximate cause of an injury. In cases where the causal chain is extended, sometimes to the breaking point, there are various ways to express the conclusion that there is no liability. The courts in Minnesota have sometimes said that there will be no liability where the intoxication is the "occasion" for an injury, rather than the cause, or that the intoxication is "entirely unrelated" to the injury. Those conclusions generally follow condemnation of the but-for standard for determining cause-in-fact and an acceptance of the substantial factor test as an appropriate test for making that determination. The overloading of the causation element to address questions that really concern the scope of liability sometimes makes the causation decisions difficult to understand.

The question is whether it would be more straightforward to simply state that a bar's obligation does not extend to cases involving intervention by third parties who act in response to the intoxication of another person. To the extent that proximate cause turns on limits of liability, separation of the scope of liability issue from questions of causal relationship makes the analysis clearer and avoids the unnecessary overloading and distortion of cause-in-fact principles.

The ultimate holding in *Osborne* is straightforward and understandable, particularly once the scope of liability issue is resolved. The supreme court concluded that for summary judgment purposes, "the evidence here is substantial enough so that 'reasonable persons might draw different conclusions' about whether Riley's intoxication caused him to make the fatal choice to jump into the river to avoid arrest"²⁰¹ At trial, the issue would be whether the intoxication was a direct cause of the injury. The pattern instruction states that "[a] direct cause is a cause that had a substantial part in bringing about the injury."²⁰² Proof that it was would have to focus on whether the intoxication was a cause-in-fact of Riley's decision to jump from the

²⁰¹ 749 N.W.2d at 381.

²⁰² 4 Minn. Dist. Judges Ass'n, Minnesota Practice-Jury Instruction Guides, CIVJIG 27.10 (5th ed.2006); see 4 Minn. Dist. Judges Ass'n, Minnesota Practice-Jury Instruction Guides, CIVJIG 45.30 (5th ed.2006)

bridge.

The real problem will not be with the application of the substantial factor test. Given the baggage the test carries, a move away from that standard to the simpler but-for standard is not likely to occur, but understanding that the other part of the substantial factor test – the scope of liability issue – is distinct from the cause-in-fact issue, will permit a clearer focus on the essential issue that has to be answered, which is whether a bar's responsibility should extend to the kind of injury that ultimately occurred.