1500 CAUSE

In answering question(s)_____, you must decide whether someone's negligence caused the (accident) (injury). (This) (These) question(s) (does) (do) not ask about "**the** cause" but rather "**a** cause" because an (accident) (injury) may have more than one cause. Someone's negligence caused the (accident) (injury) if it was a substantial factor in producing the (accident) (injury). An (accident) (injury) may be caused by one person's negligence or by the combined negligence of two or more people.

COMMENT

This instruction was originally approved in 1989. It was revised in 1999, 2005, and 2021.

This instruction is based on Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 236-38, 55 N.W.2d 29 (1952), and Osborne v. Montgomery, 203 Wis. 223, 242, 234 N.W. 372 (1931). It was approved in Ayala v. Farmers Mut. Auto Ins. Co., 272 Wis. 629, 639-40, 76 N.W.2d 563 (1956).

In Wisconsin, the test for whether negligence was causal is whether that negligence was a "substantial factor" in causing the injuries. Merco Distributing Corp. v. Commercial Police Alarm Co., Inc., 84 Wis.2d 455, 267 N.W.2d 652 (1978); see also Steinberg v. Jensen, 204 Wis.2d 115, 553 N.W.2d 820 (Ct. App. 1996). It is erroneous to instruct a jury that they must find that the negligence was "the" substantial factor in causing injury. Reserve Supply Co. v. Viner, 9 Wis.2d 530, 101 N.W.2d 663 (1960). In Steinberg v. Jensen, supra, the jury sent a note to the trial court asking: "With the cause question, do we all or only 10 to 2 majority, have to agree on the specific cause. It is sufficient for each of us to have some cause attributed to Dr. Jensen?" The trial judge gave the following supplemental instruction: "Specifically to your question the answer to that is no, not all have to agree but rather a 10 to 2 majority must agree and you must agree on a specific cause in that regard but the numbers are 10 to 2." On appeal, the court of appeals said that although the supplemental causation instruction did not use the term "the substantial factor in causing injury," the instruction implied that the jurors must agree that the negligence was "the cause," rather than "a cause." The use of the term "specific cause" informed the jury that they must agree on a particular, single, exclusive cause in order to answer "yes" to the causation question. The court said that instructing the jury in this manner resulted in a misstatement of the law regarding causation.

Intervening Cause. Where an intervening (superseding) cause allegedly produced by another is interposed as a defense by a defendant charged with the first act of negligence, the jury is first required to find whether the found negligence of such first actor was a substantial factor in causing the accident on which liability is sought to be predicated. See Pfeifer, supra. If the jury finds the negligence of the first actor is a substantial factor, then the defense of intervening cause is unavailing unless the court determines that there are policy factors which should relieve the first actor for liability. Ryan v. Cameron, 270 Wis.

325, 331, 71 N.W.2d 408 (1955); Restatement, Second, Torts § 447 (1934); Campbell, "Law of Negligence in Wisconsin," 1955 Wis. L. Rev. 1, 40.

Public Policy Factors. In 2004, the Wisconsin Supreme Court reviewed the history behind the application of the six public policy factors used to preclude tort liability and the relationship between "public policy" and "proximate cause." Mackenzie Fandrey v. American Family Mut. Ins. Co., 2004 WI 62, 272 Wis.2d 46, 680 N.W.2d 345. The court said that when "public policy" is used in the context of precluding liability, that term is being used as a *synonym* for "proximate cause." The supreme court noted that the term "proximate cause" referred to two distinct concepts. The first use of the term was to describe "limitations on liability and on the extent of liability based on lack of causal connection in fact." The second use of "proximate cause" was to describe limitations on liability and on the extent of liability based on public policy factors making it unfair to hold a party liable for tort damages.

The court said that the first use on meaning of "proximate cause" has long been abandoned in Wisconsin in favor of the "substantial factor" test used to establish cause-in-fact, which is a jury issue. The court then noted that the second use and meaning of "proximate cause" still remains a part of Wisconsin's legal cause analysis. After reviewing a series of decisions addressing terms such as "cause-in-fact," "legal cause," "proximate cause," and "public policy factors," the court wrote in a footnote:

> "Fn 7. This discussion is not intended as an invitation to reintroduce the term 'proximate cause' into Wisconsin's legal lexicon or to alter the current state of Wisconsin's tort jurisprudence. Rather, this discussion represents an accurate historical analysis of Wisconsin's use of the term 'proximate cause' in relation to public policy factors. We are simply recognizing that what has previously been labeled as 'proximate cause,' i.e. the second step in the legal cause analysis, is now referred to as 'public policy factors.' This concept has not changed; only the label has done so. We emphasize that this opinion does nothing to change Wisconsin's common law relating to duty, breach, and cause in negligence claims. Once it is established that a plaintiff's negligence was a substantial factor in producing an injury, the only limitation on liability is public policy factors--what was previously referred to as 'proximate cause.' We use the terms 'proximate cause' and 'public policy factors' interchangeably only because, historically, Wisconsin courts have used these terms interchangeably."
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> In a concurring opinion, Justice Bradley addressed the above quoted footnote as follows:
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> ¶45. The majority, at times, uses the terms "proximate cause" and "public policy" interchangeably. This may leave the reader wondering about the continued vitality of using proximate cause to limit liability. Footnote 7, however, provides the answer. Simply put, in Wisconsin we use public policy factors, not proximate cause, to limit liability.

Cause of Collision v. Cause of Injury. In submitting the cause question relating to a nondriver plaintiff (following a contributory negligence question), the inquiry is usually whether the negligence is a cause of plaintiff's injuries (or damage) rather than whether it is a cause of the collision. In matters where causation is disputed as to both the accident and the injury, it is error not to instruct the jury on a cause of the accident and a cause of the injury. Failure to do so may lead a jury to be "misled into believing that the 'a cause'/'substantial factor' standard does not apply" to the assessment of the causation of the injuries. Pennell v. Am. Family Mut. Ins. Co., 392 Wis. 2d 2019, 228, 943 N.W.2d 892 (2020).

On distinction of active and passive negligence of a passenger as related to the cause question, see Theisen v. Milwaukee Auto Ins. Co., 18 Wis.2d 91, 105, 118 N.W.2d 140 (1962), and McConville v. State Farm Mut. Auto Ins. Co., 15 Wis.2d 374, 385, 113 N.W.2d 14 (1962).

Lookout and failure to warn on the part of a guest may in exceptional cases be a substantial factor or a cause of the collision or accident, but ordinarily such negligence is not, although it may be, a cause of his or her injuries. Theisen v. Milwaukee Auto Ins. Co., supra.

If there is more than one cause, it is prejudicial error to say "the cause" instead of "a cause." Reserve Supply Co. v. Viner, 9 Wis.2d 530, 533, 101 N.W.2d 663 (1960). See also Clark v. Leisure Vehicles, Inc., 96 Wis. 2d 607, 292 N.W.2d 630 (1980).

If there is no issue of comparative negligence, it is preferable to use the term "the cause" instead of "a cause." Spleas v. Milwaukee & Suburban Transp. Corp., 21 Wis.2d 635, 639, 124 N.W.2d 593 (1963). In this instance, eliminate sentences 2 and 3 of the instruction.

The supreme court will follow the substantial factor concept of causation under which there may be several substantial factors contributing to the same result. Sampson v. Laskin, 66 Wis.2d 318, 326, 224 N.W.2d 594 (1975). See also Morgan v. Pennsylvania Gen. Ins. Co., 87 Wis.2d 723, 275 N.W.2d 660 (1979).

It need not be the sole factor, the primary factor, only a substantial factor. Schnabl v. Ford Motor Co., 54 Wis.2d 345, 353-54, 195 N.W.2d 602, 198 N.W.2d 161 (1972).

It is not important that the defects alleged did not cause the initial accident as long as they were a substantial factor in causing injury. Arbet v. Gussarson, 66 Wis.2d 551, 557, 225 N.W.2d 431 (1975). See also Sumnicht v. Toyota Motor Sales, 121 Wis.2d 338, 360 N.W.2d 2 (1984).

The word "substantial" is used to denote the fact that conduct has such an effect in producing the harm as to lead a reasonable person to regard the conduct as a cause of the harm, using the word "cause" in the popular sense in which there always is implicit the idea of responsibility. Retzlaff v. Soman Home Furnishings, 260 Wis. 615, 620, 51 N.W.2d 514 (1952).

The cause may be differently expressed in specific situations. See, for example, Wis JI-Civil 1023.3 Cause in Medical Malpractice—Informed Consent Cases.

Policy Factors. Policy factors may be applied by the court to limit liability for remote, extraordinary, highly unusual, or conscience-shocking results of harm. Farmers Mut. Auto Ins. Co. v. Gast, 17 Wis.2d 344, 117 N.W.2d 347 (1962); Dombrowski v. Albrent Freight & Storage Corp., 264 Wis. 440, 446, 59 N.W.2d 465 (1953); Pfeifer v. Standard Gateway Theater, Inc., supra at 238-39; O'Connell v. Old Line Life Ins. Co., 227 Wis. 671, 673-74, 278 N.W. 458 (1938); Osborne v. Montgomery, supra at 237; Kerwin v. Chippewa Shoe Mfg. Co., 163 Wis. 428, 431-33, 157 N.W. 1101 (1916); Habrouck v. Armour & Co., 139 Wis. 357, 366, 121 N.W. 157 (1909); Parnell, "Causation," Feb. 1957 Wis. Bar Bull. 17.