No. 66994-0-I, Department of Labor and Industries v. Shirley

Grosse, J. (dissenting) — Not every act that causes harm results in legal liability.[1] Although an act or omission may be a cause in fact of an injury, it nevertheless may not be a legal cause of the injury. Legal causation is as much a part of proximate cause as is cause in fact. Here, the majority concludes that Brian Shirley's simultaneous ingestion of alcohol and multiple prescription pain medications—nearly three years after his industrial injury and after his claim was closed—did not break the chain of causation between the industrial injury and Shirley's death. This conclusion, whether correct or incorrect, addresses the cause in fact element of proximate cause. Left unaddressed in the majority opinion is the element of legal causation, namely whether, given considerations of logic, common sense, and public policy, liability should attach as a matter of law. Here, legal causation is not present.

Moreover, I believe that cause in fact is absent as well. I cannot accept as rational the conclusion that it was foreseeable that a back injury of this nature would inexorably result in the injured workman abusing the pain killers prescribed for his treatment while simultaneously abusing alcohol. That this may occur altogether too frequently does not alter the fact that it is the abuse that gives rise to the risk of death, not the injury and treatment. For both of these reasons, I dissent.

Proximate cause consists of two elements: cause in fact and legal causation.[2] Unlike cause in fact, legal causation "rests on policy considerations as to how far the

[1] Colbert v. Moomba Sports, Inc., 163 Wn.2d 43, 51, 176 P.3d 497 (2008).
[2] Harbeson v. Parke-Davis, Inc., 98 Wn.2d 460, 475-76, 656 P.2d 483 (1983).

consequences of [a] defendant's acts should extend. It involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact."[3] As Professor William Prosser observes, the concept of legal causation is intertwined with the concept of duty, the relevant question being: "'[W]as the defendant under a duty to protect the plaintiff against the event which did in fact occur?'"[4] The answer to this question involves considerations of "'logic, common sense, justice, policy, and precedent.'"[5] Where, in light of these considerations, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability, the essential element of legal causation is absent.[6]

Here, although it speaks of "proximate cause," the majority addresses only the cause in fact element of proximate cause.[7] The majority addresses none of the policy considerations that must be addressed in connection with a determination as to the existence of legal causation. These policy considerations dictate that the Department of Labor and Industries' liability should not be extended to require the payment of survivor benefits under the circumstances presented here.

Shirley sustained the industrial injury in 2004. His claim was closed the following year. At the time the claim was closed, no medical professional had

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[3] Hartley v. State, 103 Wn.2d 768, 779, 698 P.2d 77 (1985).
[4] Hartley, 103 Wn.2d at 779 (quoting W. Prosser, Law of Torts § 42, at 244 (4th ed. 1971)).
[5] Hartley, 103 Wn.2d at 779 (quoting King v. Seattle, 84 Wn.2d 239, 250, 525 P.2d 228 (1974)).
[6] Michaels v. CH2M Hill, Inc., 171 Wn.2d 587, 612, 257 P.3d 532 (2011).
[7] For example, the majority states that the sole issue "is whether Mr. Shirley's ingestion of a legal amount of alcohol simultaneously with multiple prescription medications constituted an intervening act that broke the causal chain between his original industrial injury and his death." See majority at 7-8. This is a question of cause in fact, not legal causation.

prescribed the pain medications that were in his system at the time of his death. Shirley never sought to reopen his claim and died in May 2007. Dr. Chester Jangala treated Shirley after his claim was closed in 2005 and prescribed the pain medications Shirley ingested. Most of the medications Dr. Jangala prescribed were to treat Shirley's industrial injury.[8]

It is beyond reasonable possibility that Dr. Jangala directed Shirley to take all the prescribed medications at the same time. And, given Dr. Jangala's testimony that he was fairly certain that he advised Shirley not to drink alcohol while taking the medications because he routinely so advised his patients, it cannot be said that Dr. Jangala directed Shirley to drink alcohol at the same time he took the combination of pain medications. Rather, Shirley's ingestion of a cocktail of various pain medications, at least two in greater than therapeutic amounts,[9] and his simultaneous ingestion of alcohol were Shirley's own deliberate, volitional acts.

Further, I disagree with the majority's conclusion that Shirley's deliberate ingestion of a combination of prescription medication along with alcohol did not break the chain of causation between Shirley's industrial injury and his death. "Cause in fact [is] 'but for' causation, events the act produced in a direct unbroken sequence which would not have resulted had the act not occurred."[10] A superseding cause is an intervening act that breaks the sequence and relieves a defendant from liability. To be

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[8] Dr. Jangala prescribed alprazolam, "in the distant past" as an anti-anxiety medication. Jangala Deposition at 13.

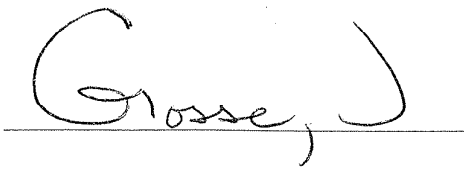
[9] The level of oxycodone in Shirley's system at the time of the autopsy was above the therapeutic range (.13 milligrams per liter) and the level of citalopram was three times the level considered therapeutic (.43 milligrams per liter).

[10] Jenkins v. Weyerhaeuser Co., 143 Wn. App. 246, 254, 177 P.3d 180 (2008) (quoting Hertog, ex rel. S.A.H. v. City of Seattle, 138 Wn.2d 265, 282-83, 979 P.2d 400 (1999)).

a superseding cause, an intervening act must be one that is not reasonably foreseeable.[11]

Here, it was not reasonably foreseeable that Shirley would ingest several varieties of prescription pain medications at the same time when clearly he was not directed or advised to do so by a medical care professional. Nor was it reasonably foreseeable that he would act contrary to his physician's admonition not to drink alcohol while taking the medications. Shirley's deliberate acts, in contravention of his physician's directions and common sense, were a superseding cause that broke the chain of causation between his industrial injury and his death.

I would reverse the trial court's order denying the Department's motion for summary judgment and affirming the grant of survivor benefits to Shirley's widow.



[11] State v. Roggenkamp, 115 Wn. App. 927, 945, 64 P.3d 92 (2003), aff'd, 153 Wn.2d 614, 106 P.3d 196 (2005).