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MONTANA'S LAW OF CAUSATION: HISTORY, ANALYSIS AND A PROPOSAL FOR CHANGE

Sarah A. Dixon*

I. INTRODUCTION

The element of causation is typically the most significant source of contention in negligence cases. Despite its integral role in negligence law for nearly two centuries, the element of causation enjoys no clear agreement as to the "best" formula for application.\(^1\) In Montana, cases reported in the past ten years reflect numerous changes in causation law. In an attempt to correlate pattern jury instructions with this ongoing change, the Montana Supreme Court Commission on Civil Jury Instructions (MPI Commission) remolded the causation instructions twice in the past six years. Nevertheless, the measures taken by the Montana Supreme Court and the MPI Commission remain controversial in the legal community. Disagreement has created an arena for jury instruction battles among attorneys, and unstable guidelines for judges to determine which instructions to give. Occasionally, the fluctuating law and inconsistent practices have resulted in confused or misled juries. For example, a recent Montana jury was so confused by the causation jury instruction that the foreperson asked the bailiff for a legal dictionary to check the meaning of the word "proximate."\(^2\) The Montana Supreme Court,

* The author is grateful to Larry E. Riley for his suggestion of this topic and support through its completion, Co-Editor in Chief Jason P. Loble for his criticism, time and enthusiasm, and Peter Dixon for his encouragement and helpful perspectives from a California courtroom.


disagreeing with the district court, held that the defendants were entitled to a new trial due to jury misconduct.\(^3\)

In the summer of 1995, I solicited information from several Montana attorneys and judges, many of whom are or were members of the MPI Commission. Regarding the issue of how to instruct juries on causation, the following concerns were widespread:

- the lack of a universal understanding of Montana's law on causation;
- the tactical advantages taken by plaintiffs' and defendants' lawyers because of the widespread ambiguity; and
- the need for clear jury instructions that correspond appropriately with the law.\(^4\)

In response to these concerns, this Comment attempts to clarify Montana's causation law and propose corresponding jury instructions. Part II traces the developments in Montana's law of causation. Part III examines the history and general characteristics of the negligence elements applicable to Montana's problems with causation. This Part initially sets forth the fundamental concepts present in all negligence cases, and then specifically examines cause-in-fact, proximate cause, and duty. Part IV provides an analysis of Montana's law of causation during the *Kitchen Krafters*\(^5\) era. This Part begins with an evaluation of how Montana's two-tiered approach to the causation element comported with the fundamental concepts of all negligence cases. Next, each tier is analyzed separately, with particular attention to the interplay and overlap among cause-in-fact, proximate cause and duty. Also within Part IV, an analysis of Montana's common law during the *Kitchen Krafters* era will expose the weaknesses and problematic patterns in Montana's approach to causation. Part V proposes solutions to the problems identified in Part IV, and includes proposed jury instructions for the element of causation. Part VI analyzes the most recent Montana causa-

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3. *Id.* at 9, 901 P.2d at 605. While bailiff misconduct was also alleged, the court specified that jury misconduct alone provided sufficient grounds for a new trial. *Id.* at 5, 901 P.2d at 603.

4. The following members of the MPI Commission contributed to the compilation of this list: L. Randall Bishop, Leonard H. Langen, Gary Graham, Jim Regnier, Douglas J. Wold, Stuart Kellner, and Richard Cebull. Practitioners Ward Taleff and Larry Riley also contributed their ideas and concerns.

tion case, *Busta v. Columbus Hospital Corporation*,\(^6\) and concludes that the solutions offered in Part V would be preferable to those provided by the *Busta* decision.

**II. DEVELOPMENT OF CAUSATION IN MONTANA**

The following discussion traces Montana's landmark changes in the substantive definition of causation and how the pattern jury instructions reflect these changes. It is necessary to present this overview for a complete understanding of how the law of causation developed into its present state. This overview will reveal that Montana's current causation test developed from a single test to a two-tiered test, in which distinct aspects of causation were analyzed separately.

In the past, the courts of Montana instructed juries on causation using an instruction from the Montana Jury Instruction Guide. This instruction, commonly known as MJIG 15.00, read: "[t]he proximate cause of an injury is that cause which, in a natural and continuous sequence, unbroken by any new and independent cause, produces the injury, and *without which it would not have occurred*."\(^7\) This test directed plaintiffs to prove an unbroken chain of events as a method for determining proximity of the cause. This method has traditionally been called the "direct cause" test, because the chain of events is expected to lead directly to the cause.\(^8\) The last phrase of the test indicates that a proximate cause is one "without which the injury would not have occurred," language that generally defines the "but for" test, the predominant factual test for cause-in-fact.\(^9\) The language of the MJIG 15.00 instruction demonstrates that Montana law, at that time, did not distinguish between cause-in-fact and proximate cause as two separate subelements.\(^10\) Rather, the test melded these subelements under the name of "proximate cause."

While currently most jury instruction issues relate to the scope and definition of proximate cause, most problems with the MJIG 15.00 causation instruction originally arose from the "but for" portion of the test. Generally, for a defendant to meet the

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7. MONTANA JURY INSTRUCTION GUIDE (CIVIL) 15.00 (emphasis added); see also Young v. Flathead County, 232 Mont. 274, 757 P.2d 772 (1988), for an application of this jury instruction.
9. KEETON ET AL., supra note 1, § 41, at 265.
10. See Young, 232 Mont. at 282, 757 P.2d at 777.
requirements of the “but for” test, the plaintiff has to show that his injury would not have occurred but for the defendant’s conduct. Conversely, if the plaintiff’s injury would have occurred regardless of the defendant’s conduct, this conduct was not the cause-in-fact of the plaintiff’s injury.11

Situations inevitably arose in which an injury would have happened regardless of the defendant’s conduct, yet the defendant’s negligent conduct was sufficient to cause or greatly contribute to the result. For example, in Kyriss v. State,12 a prisoner named Frank Templin developed gangrene from an infected ingrown toenail.13 As a result, Templin’s leg was amputated at the knee.14 Although the prison doctors were negligent in not discovering the gangrene, Templin had a pre-existing circulatory problem, which increased the spreading of the infection.15 The court held that under MJIG 15.00, the doctors would not have been responsible because their negligence was not the “but for” cause of his damage; Templin’s arteriosclerosis would have caused his leg to be amputated regardless of the doctor’s conduct.16

When the Montana Supreme Court adopted the “substantial factor” test, it qualified it as a rare replacement for the “but for” test.17 The “substantial factor” test was to be applied in situations when the “but for” test would release defendants from liability, even though they could have been responsible to a significant degree.18 Currently, if this situation arises, the “substantial factor” test essentially requires that the defendant’s conduct was more probably than not a contributing factor.19

In 1989, the MPI Commission met in an attempt to clarify and simplify the MJIG 15.00 instruction. The Commission did not intend to change MJIG 15.00’s statement of the law by deleting clauses and words like “proximate” from the former instruction.20 Rather, the Commission was apparently concerned with

11. Id.
14. Id.
15. Id.
16. Id. at 167, 707 P.2d at 8.
18. Rudeck, 218 Mont. at 53, 709 P.2d at 628.
20. From the “Commission Notes” to MONTANA PATTERN JURY INSTRUCTIONS (CIVIL) 2.07, 2.08 (repealed and replaced by 2.06 in 1991). The Montana Supreme Court recently suggested substantial reinstatement of these instructions. See infra text accompanying note 189.
recent developments in the "substantial factor" test for concurring causes, and accordingly split the causation instructions into single and multiple causes as follows:

a. for a single cause:
   "The defendant's conduct is a cause of the (injury/death/damage) if it helped produce it and if the (injury/death/damage) would not have occurred without it." 21

b. for multiple causes:
   "A legal cause of the (injury/death/damage) is a cause which is a substantial factor in bringing it about." 22

c. for "those cases where the chain of causation is in issue (e.g., where there is an allegation of an independent intervening cause) . . .
   [t]he defendant's conduct is a cause of the (injury/death/damage) if, in a natural and continuous sequence, it helped produce it and if the (injury/death/damage) would not have occurred without it." 23

Although the "chain of causation" language of MJIG 15.00 was not criticized in case law at that time, the Commission decided to replace this language with the words "helped produce it" for the single cause instruction. 24 The result of the 1989 revision suggests limiting a chain of causation analysis to situations in which independent intervening causes are alleged. 25

In the 1990 decision of Kitchen Krafters v. Eastside Bank of Montana, 26 the Justices of the Montana Supreme Court expressly disapproved of these instructions and decided that a better approach would be dividing the causation element into separate cause-in-fact and proximate cause tests. 27 Accordingly, the court in Kitchen Krafters specifically adopted the two-tiered approach to causation; the jury was instructed to find cause-in-fact first, then proximate cause. 28

21. MONTANA PATTERN JURY INSTRUCTIONS (CIVIL) 2.08 (1989).
22. MONTANA PATTERN JURY INSTRUCTIONS (CIVIL) 2.07 (1989).
23. MONTANA PATTERN JURY INSTRUCTIONS (CIVIL) 2.08 (1989).
24. See supra note 21 and accompanying text.
25. For a discussion about the problems with this kind of categorization, see infra notes 219-27.
27. Kitchen Krafters, 242 Mont. at 167, 789 P.2d at 574.
28. Id. Two years before the Kitchen Krafters decision, the Montana Supreme
The second change the court made in *Kitchen Krafters* related to the second tier, proximate cause. By discarding the language of MPI 2.07 and 2.08 (and of MJIG 15.00), the court not only reintroduced the jury to the word "proximate," but provided a new test for proximate cause. The *Kitchen Krafters* test for causation read:

In order for the defendant's negligence . . . to be the proximate cause of the plaintiff's injury, it must appear from the facts and circumstances surrounding the accident . . . that the defendant as an ordinarily prudent person, could have foreseen that the plaintiff's injury would be the natural and probable consequence of the wrongful act.\(^{29}\)

After the *Kitchen Krafters* decision, the "foreseeability" test was integrated as the dominant test for finding proximate cause in Montana.\(^{30}\) Problematically, "foreseeability" is also a method of determining the scope of a defendant's duty in Montana.\(^{31}\) Therefore, the use of the "foreseeability" test within the proximate cause test creates confusion and calls into question the role of the duty element.

In 1991, the MPI Commission revisited causation jury instructions. Their goal was to synchronize the pattern instruction with the holding of *Kitchen Krafters*.\(^{32}\) The resulting instruction read as follows:

The Defendant is liable if his negligence is the cause in fact and proximate cause of Plaintiff's [injury/death/damage].
(The Defendant's conduct is a cause in fact of the injury if it helped produce it and the injury would not have occurred without it)

OR

(The Defendant's conduct is a cause in fact of the Plaintiff's injuries if it is a substantial factor in bringing them about.)

The Defendant's conduct is [the] [a] proximate cause of the Plaintiff's [injuries/damages] if it appears from the facts and the circumstances surrounding the incident that an ordinarily prudent person could have foreseen that injury or damage would be the natural and probable consequence of the conduct. However, the specific injury [or aggravation of a pre-existing condition] that actually occurred need not have been foreseen.

In the comment to this instruction, the Commission directs the reader to case law to discern the appropriate instruction for cause-in-fact.

Currently, attorneys and judges struggle with the issues raised by this Comment before choosing jury instructions. Ambiguities in the law of causation provide for a variety of possible jury instructions, and the process of choosing the instructions is often contentious. This process is further complicated by attorneys who naturally take advantage of these ambiguities by selecting instructions that will best serve the interests of their clients. Worst of all, the chosen instructions frequently confuse the jury. As previously noted, in Allers v. Riley the Mon-

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33. **MONTANA PATTERN JURY INSTRUCTIONS (CIVIL) 2.06 (1991).**
35. Some Montana attorneys, in fulfilling their duties of zealous representation, may view the process of submitting jury instructions strategically. For example, defense attorneys may advocate the foreseeable result test for proximate cause, because liability is definable, the outcome predictable, and an escape route calculable. Interview with Gary Graham, Member of the MPI Commission, Missoula, MT (July 18, 1995). On the other hand, plaintiff’s attorneys may argue that the foreseeability test in a jury instruction opens the door for a confused, misled jury. Telephone Interview with L. Randall Bishop, Member of the MPI Commission, Billings, MT (June 28, 1995).
Montana Supreme Court awarded the defendant a new trial because the bailiff met the jury's request for a legal dictionary in the jury room.\textsuperscript{37} The decision hinged on the fact that there was no mention of "foreseeability" in the dictionary definition of "proximate," and as a result, this jury misconduct substantially affected the defendant's rights.\textsuperscript{38} Not only did the results of this case reiterate the inherent confusion of using foreseeability as a factor for determining proximate cause, but they underscored the need for understandable jury instructions.

Justice Trieweiler articulated these concerns in the dissenting opinion:

\begin{quote}
It occurs to me that the only prejudice that occurred in this case, occurred when the District Court gave its instruction No. 14 which pertained to proximate cause and was mandated in our decision in Kitchen Krafters. . . . That instruction is a convoluted, incomprehensible and irrelevant description of an abstract legal notion which did not belong in the jury instructions in the first place. To suggest that one of the parties was prejudiced when the jury tried to overcome this considerable judicially-created obstacle by trying to understand the relatively simple concept of causation through other means, carries the detached, misguided and esoteric notions of Kitchen Krafters to a new extreme.\textsuperscript{39}
\end{quote}

The frustration among attorneys, judges, and juries is primarily due to the interplay among the elements of proximate cause, cause-in-fact, and duty. Part IV of this Comment addresses this problem by examining how a broad application of the "substantial factor" test would infringe upon a necessary proximate cause analysis. Part IV also examines how the proximate cause analysis during the \textit{Kitchen Krafters} era infringed upon a proper duty analysis. Part VI examines how the \textit{Busta} decision did not properly resolve these problems. While the present debate in Montana primarily focuses on proximate cause, clarification of this element is only possible after an examination of the general background of all three related elements: proximate cause, duty and cause-in-fact.

\textsuperscript{37} Allers, 273 Mont. at 9, 901 P.2d at 605.
\textsuperscript{38} Id. at 7, 901 P.2d at 604-05.
\textsuperscript{39} Id. at 12, 901 P.2d at 607 (Trieweiler, J., dissenting).

https://scholarship.law.umt.edu/mlr/vol57/iss2/12
III. General Background of the Applicable Negligence Elements

A defendant is liable for negligence after the plaintiff proves four elements: duty, breach, cause, and damage. Duty and breach constitute negligence, but to recover, the plaintiff is required to prove a causal link between the defendant's negligence and the damage. Although causation is often referred to as an element of negligence, it is helpful to think of it instead as a requirement for negligence liability, rather than an element necessary to prove the negligence of the defendant. In this light, the importance of a proper duty analysis becomes clear, for duty and breach alone conclusively establish the defendant's negligence.

The purpose of the causation element is to find a "reasonable connection" between the defendant's negligence and the plaintiff's injury that justifies compensation for the plaintiff. Naturally, this nebulous standard subjects the causation element to much debate about how to determine when a "reasonable connection" exists. Several considerations are important.

First, facts must somehow link the negligence to the damage. Frequently, this factual connection is referred to as "cause-in-fact." Second, there must be a method for excluding results too attenuated to reasonably justify compensation by the defendant. Causes-in-fact which are within these arbitrary, policy-driven parameters of jurisprudence have often been called the "proximate causes" of the plaintiff's damage. This method is supported by the reasoning that, while every proximate cause is a cause-in-fact, not every cause-in-fact is a proximate cause. In this manner, the finding of "proximate cause" conclusively establishes causation as a requirement for negligence liability. Proper causation analysis limits liability to results reasonably connected to the defendant's negligent conduct.

40. KEETON ET AL., supra note 1, § 41, at 164-65.
41. Id.
42. Id. at 263.
43. Id. at 263-64.
44. See generally KEETON ET AL., supra note 1, § 41, at 263.
45. Id. at 264.
46. Id.
47. Id. at 165, 264.
48. This approach finds broad acceptance, although the order and form in which these concepts appear varies among jurisdictions. See, e.g., Reiman Assoc. Inc. v. R/A Advertising, Inc., 306 N.W.2d 292, 301 (Wis. Ct. App. 1981) (holding that "legal cause" is comprised of two elements, "proximate cause" and "cause-in-fact"); KEETON ET AL., supra note 1, at 165 (explaining that "legal" or "proximate" cause is the ele-
purpose of cause-in-fact is to make a scientific determination based on facts, while the purpose of proximate cause is to make an arbitrary determination based on policy. While the operation of these fundamental purposes is helpful in defining the causation element of negligence, the difficulty lies in converting these two tiers into workable rules of law. The specific problem is that legal rules must be concrete and predictable; but unpredictability is the very nature of a case with a complex chain of causation. William Prosser articulated the riddle about the relationship between the law and causation in noting that "[a] rule for the unpredictable is itself a contradiction in terms." 49

In summary, cause-in-fact, duty, and proximate cause play important roles in the negligence equation. If properly applied, these elements answer the question of whether a defendant had a duty to a plaintiff, and if so, whether the defendant's conduct was a factual and proximate cause of the plaintiff's injury, thereby justifying compensation. Although these elements are related, it is necessary first to discuss them individually.

A. Cause-in-Fact

Cause-in-fact determines a factual connection between the defendant's negligence and the plaintiff's injury. 50 Usually this is accomplished by inquiring whether and what damage would have occurred without the defendant's negligence, in order to eliminate the defendant's liability as to this damage. 51 As stated earlier, this method is commonly known as the "but for" test for cause-in-fact; it decides that "but for" the defendant's conduct, the injury would not have occurred. 52 However, there are times when it is difficult to discern what would have happened to the plaintiff in the defendant's absence.

This phenomenon may be explained by the classic hypothetical involving two property owners separated by dense forest. 53 Suppose each property owner negligently drops a match, and a
raging forest fire results. Either could successfully argue that her conduct was not the cause-in-fact of the damage. Specifically, both parties would fail the “but for” test because a fire of the same caliber would probably have occurred regardless of their respective negligence, whatever the respective degree may have been. Because it is unjust to allow one party to escape liability at the expense of her neighbor, the “substantial factor” test was initiated as a favorable replacement for the “but for” test under such circumstances.

The problem with the introduction of the “substantial factor” test is that it calls the importance of the “but for” test into question. One might observe that the “but for” test seems superfluous because if something is a “substantial factor” in causing an injury, then naturally the injury would not have occurred “but for” this substantial factor. The general rule in Montana, however, is that the “substantial factor” test is limited only to circumstances when the “but for” test would not operate properly, due to a situation similar to the forest fire hypothetical. The “but for” test has not been retired because it is a mathematically precise test, and is therefore more effective than the imprecise word “substantial.” Additionally, the word “substantial” can raise improper inferences of “proximity.”

B. Proximate Cause

A finding of proximate cause ensures that a factual connection is reasonable enough to justify compensation for the plaintiff. Proximate cause is a necessary test because there must be a method for excluding damage too attenuated from the defendant’s act to reasonably justify compensation for this damage.

Not unlike today, medieval scholars attempted to define proximate cause. As an element of the negligence equation,

55. See Rudeck v. Wright, 218 Mont. 41, 53, 709 P.2d 621, 628 (1985) (concluding that the “but for” test works well in many cases).
56. The California Supreme Court has recognized that “substantial factor” infers proximate cause, and has gone so far as to adopt the “substantial factor” test as a complete replacement for a proximate cause analysis. See infra note 124 and accompanying text.
57. See supra notes 44-48 and accompanying text.
58. KEETON ET AL., supra note 2, § 41, at 264.
however, the notion of proximate cause arrived much later. At first, courts were concerned with pinpointing a defendant's wrongful conduct, rather than addressing the resulting effects of the conduct. For example, one of the earliest theories of negligence incorporated a general duty of care. Originally, this meant that everyone had a general duty of care to all parts of the custom under which he was operating. Duty was not limited to a specific event or a specific person.

It became apparent, however, that the results of the defendant's breach of a general duty could, like a row of falling dominoes, extend indefinitely. For example, in *Flower v. Adam*, the defendant was responsible for dumping a pile of lime rubbish in the street. The wind blew some of the debris, startling the plaintiff's horse and causing it to turn toward an oncoming carriage. The plaintiff violently tugged the reigns, and the horse ran into another pile of rubbish, ultimately throwing the plaintiff and injuring him. The court held that "dumping debris in the road is a public nuisance because it obstructs travel, not because it gives rise to dust that may spook a horse. A wind-whipped dust whirlwind could have spooked plaintiff's horse if the lime rubbish heap had been by the side of the road, and hence not a public nuisance." Essentially, the court used a "but for" analysis to find that, while the defendant breached his general duty to abstain from creating a nuisance, the result could have occurred regardless of this breach. The court added that the result was "too remote to affect the defendant in this action." This analysis represents the early methods of protecting a defendant from remote liability.

While helping to set some limits, cause-in-fact was often an inadequate limit for causal sequence cases. Plaintiffs with freakish and isolated injuries could eventually find someone to

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60. See Kelley, *supra* note 59, at 61-64 (discussing the early emphasis on the "reasonable man" standard of care, and pleading a general duty of care).
61. *Id.* at 63-64.
62. *Id.*
63. See *Palsgraf Revisited*, *supra* note 49, at 24.
64. See Kelley, *supra* note 59 (citing *Flower v. Adam*, 127 Eng. Rep. 1098 (C.P. 1810)).
65. *Id.* at 65.
66. *Id.*
67. *Id.*
68. *Id.*
blame by tracing the sequential chain back as far as needed.\textsuperscript{70} Because the "but for" test could be applied to ridiculously remote actions or defendants, the quest began for a better limiting rule.

In response, two limiting theories formed under the rubric of "proximate cause."\textsuperscript{71} The earliest method for limiting liability through causation was the "direct cause" test.\textsuperscript{72} This method examined the events between the defendant's wrongful act and the plaintiff's injury and asked whether the events flowed in an ordinary, natural and continuous sequence.\textsuperscript{73} If they did, the defendant's conduct was a proximate cause of these results, and liability attached.

While there was general agreement that a proximate cause rule was needed, the direct cause theorists were soon confronted with a new theory.\textsuperscript{74} Frederick Pollock was famed for introducing the second limiting theory, "that the proximate cause limitation in negligence cases, precluded liability for harm a reasonable person in defendant's position would not have foreseen."\textsuperscript{75} While many scholars continued to rely upon the original "direct cause" test, Pollock's view marked the beginning of the rivalry between the direct cause theory of proximate cause and the foreseeable result theory.\textsuperscript{76} The next section will examine how the duty element also came to implement the notion of "foreseeability" as a limiting mechanism.

\textbf{C. Duty}

Like the theories of proximate cause, duty has to a varying extent been employed as a means of limiting a defendant's liabil-

\textsuperscript{70} See id.
\textsuperscript{71} See Kelley, supra note 59, at 73-74.
\textsuperscript{72} Id. at 74.
\textsuperscript{73} Id. at 74-75 (citing FRANCIS WHARTON, A TREATISE ON THE LAW OF NEGLIGENCE 73-74 (2d ed. 1878)).
\textsuperscript{74} Id. at 75.
\textsuperscript{75} Id. at 73, 80.
\textsuperscript{76} Compare Milwaukee & Saint Paul Ry. Co. v. Kellogg, 94 U.S. 469, 474 (1876) (applying the "direct cause" test) with Fairbanks v. Kerr, 70 Pa. 86 (1871) (applying the "foreseeable consequences" test). For a brief, speculative discussion of why judges began implementing the foreseeable consequences test, see Kelley, supra note 59, at 76-77.

Similarly, Montana law has reflected fluctuation between these two tests. Montana previously employed the "direct cause" test according to MJIG 15.00, then employed the "foreseeable result" test prescribed in Kitchen Krafters v. Eastside Bank of Montana, 242 Mont. 155, 159, 789 P.2d 567, 575 (1990). For a discussion of the current law, see infra part VI.
ity. Under the notion of "specific duty," courts attempted to define a defendant's ultimate liability by specifically defining the scope of his or her duty. The competition for "the limiting element," then, has fluctuated among (1) the proximate cause theory of direct cause, (2) the proximate cause theory of foreseeable results and (3) the specific duty theory.

The use of duty as a limiting element grew out of a dissatisfaction with both theories of proximate cause. Joeseph Bingham, a legal scholar from the early 20th century, provided a widely accepted view of the relationship between proximate cause and duty. He viewed any liability inquiry beyond a "but-for" analysis of cause-in-fact as a question of duty, not cause. In contrast with the earlier "general duty" of care theory, Bingham believed that duty was a specific obligation, either owed or not owed to the specific plaintiff, as defined by the court after the facts of the case are before it. Bingham's analysis helped solve the domino-effect that could accompany a general duty of care, but it also had the effect of reducing—if not eliminating—the importance of a proximate cause analysis. This phenomenon occurred because the same principles and words used to define duty were also being used to define proximate cause: foreseeability, directness, sequence, results, circumstances. Naturally, then, when one element focused on the "sequence," or the "foreseeable consequences," proof of the other element with the same focus became redundant.

This teeter-tottering between duty and proximate cause is best exemplified in Palsgraf v. Long Island Railroad Compa-

77. See generally Kelley, supra note 59, at 82-88.
78. Id. at 83-85.
79. Id. at 82.
80. Id.
81. Id. (tracing Bingham's theories of duty and proximate cause according to Joseph Bingham, Some Suggestions Concerning "Legal Cause" at Common Law, 9 COLUM. L. REV. 16, 36 (1909)).
82. Kelley, supra note 59, at 86.
83. Bingham's theory required that the duty parameters be defined so precisely that if damage were outside of these parameters, the defendant would potentially not be responsible for even direct causes or foreseeable results. See id.
84. See William Prosser, Proximate Cause in California, 38 CAL. L. REV. 369, 395-96 (1950) (declaring that, although "[t]here is an appealing neatness and simplicity in the limitation which makes the same foreseeable risk that defines negligence define the boundaries of liability for it," this simplicity is deceptive). It is deceptive because, while it is relatively easy to limit the scope of a defendant's duty based on his ability to foresee all possibilities of harm, it is very difficult to foresee the precise harm. Id. at 396.
ny. Palsgraf involved some questionable conduct leading to rather unpredictable results. Helen Palsgraf stood on a platform of the Long Island Railroad. When a train began to pull away, two men ran to catch it. One of the men carried a package, and lost his balance a bit when he jumped on the train. In an effort to help him, one guard aboard the train reached forward to pull him, and another guard on the platform pushed him. This "assistance" knocked the package out of the defendant’s hands. Although innocent-looking, the package contained fireworks, which caused an explosion upon impact with the ground. The shock from this explosion knocked loose some scales at the end of the platform, which hit Helen Palsgraf and injured her.

In writing for the majority, Chief Justice Cardozo noted that "[p]roof of negligence in the air, so to speak, will not do." The court held that because there was no negligence specifically to the plaintiff, the defendant was not liable. In this manner, Cardozo followed the philosophy of Joseph Bingham by setting specific limits on the duty of the guards. In doing so, the court also implemented another kind of foreseeability test; it reasoned that because the defendant’s actions created no foreseeable risk to the specific plaintiff, there was no duty owed.

Writing in dissent, Justice Andrews took a more general view of duty, deciding there “is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone.” Further, Andrews examined the cause, or results...
of the defendant's conduct. He concluded that a defendant's liability should be limited to "proximate results," defined as follows:

What we do mean by the word "proximate" is that, because of convenience, of public policy, or a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. . . . The words we used . . . [are] simply indicative of our notions of public policy. Other courts think differently. But somewhere they reach the point where they cannot say the stream comes from any one source.

Although Andrews does not use the usual "natural and continuous sequence" language in his opinion, the last sentence connotes the "direct causation" approach for limiting defendant's liability. Precisely how courts would implement this "rough sense of justice" equation is one of the many questions remaining after Palsgraf, among the criticism of both the majority and the minority opinions.

William Prosser compared the foreseeable risk test for duty and the direct cause test for proximate cause by noting that they both attempt to find a "reasonably close connection" between the acts of the defendant and the injury to the plaintiff. In a related discussion, Prosser explained that the rationale for applying a proximate cause test is to eliminate those results which are "too cockeyed and far-fetched." Prosser's observations suggest that even the most reputable theorists are guided through the causation maze by simple principles of common sense.

IV. ANALYSIS OF MONTANA'S LAW OF CAUSATION DURING THE KITCHEN KRAFTERS ERA

The frustration among Montana attorneys, judges, and juries is primarily due to the interplay among cause-in-fact, proximate

99. Id.
100. Id. at 103-04.
101. See, e.g., Palsgraf Revisited, supra note 49, at 7 (finding it a mistake for the court to omit further discussion of the duty owed to Helen Palsgraf because of her status as a passenger).
102. One could also add the foreseeable result test for proximate cause to Prosser's list.
103. See Palsgraf Revisited, supra note 49, at 27.
104. Id. (quoting one of Prosser's freshman students, attempting to define the limits of a defendant's liability).
cause, and duty analyses. The first section of this part evaluates the two-tiered approach to the causation element established in the *Kitchen Krafters* decision. The second section discusses the first tier, cause-in-fact, and considers the problems that attend a broad application of the "substantial factor" test. The third section discusses the second tier, proximate cause, and examines how the proximate cause analysis during the *Kitchen Krafters* era infringed upon a proper duty analysis. This final section discusses proximate cause and duty together because, during the *Kitchen Krafters* era, the distinction between these two elements was blurred.

A. The Two-Tiered Approach

Just as a contractor should insure that the frame of a building is secure before attending to the details within, it is necessary to inspect Montana’s causation framework during the *Kitchen Krafters* era before specifically examining the elements that influenced Montana’s causation law. The *Kitchen Krafters* decision established a two-tiered approach to the causation element.\(^{105}\) This approach corresponded well with the fundamental purposes of the causation element. The first tier supplied a cause-in-fact test to draw a connection between the defendant's conduct and the plaintiff's injury. The second tier supplied a proximate cause test to insure that the connection was reasonable enough to justify compensation. Because the factual connection is often broad in scope, possibly limitless, the proximate cause tier properly required that a limiting line be drawn.

By realigning the law to comport with its fundamental purposes, the two-tiered analysis introduced in *Kitchen Krafters* provided a secure framework for causation law in Montana. To function effectively, however, the tests within the framework needed to advance the purposes behind this approach, not impede them.

B. The First Tier: Cause-in-Fact

As indicated in the background discussion of cause-in-fact, the first tier may be satisfied by one of two different tests: the

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105. *Kitchen Krafters v. Eastside Bank of Montana*, 242 Mont. 155, 168, 789 P.2d 567, 574 (1990) (holding that whether the plaintiff proved cause-in-fact by either the "substantial factor" test or the "but for" test, it then "becomes incumbent on him to move to the second tier": proximate cause).
"but for" test or the "substantial factor" test. Montana's largest problem with the cause-in-fact tier has been how and under what circumstances the "substantial factor" test replaces the "but for" test. The Montana Supreme Court has repeatedly qualified the "substantial factor" test as being a rare alternative for the "but for" test. Use of the test has been limited to situations in which multiple defendants (or the contributing negligence or condition of the plaintiff), by their similar relations to the event, were each capable of causing the result individually or concurring with the others in bringing it about. Under this notion, occurrences involving the exclusive responsibility of only one defendant would continue to be subjected to the "but for" test because the "substantial factor" test is not needed to prevent injustice.

It is helpful to locate the boundaries around Montana's use of the "substantial factor" test as they are set by case law. The Montana Supreme Court instated the "substantial factor" test in two landmark cases, Rudeck v. Wright and Kyriss v. State. In Rudeck, a doctor failed to detect a surgical sponge that he left inside a patient, despite numerous visits. Additionally, two assisting surgical nurses neglected to inform the doctor of an unaccounted sponge, and a radiologist failed to inform the doctors that X-rays revealed the presence of the sponge. The defendant doctor tried to argue that he was not liable because the negligence of the nurse and the radiologist was sufficient to cause the resulting injuries. The court was unpersuaded, and held that the actions of the nurses, the radiologist and the doctor were "concurrent causes," and that the doctor was liable because his conduct was a "substantial factor" in causing the damage. Similarly, in Kyriss, a case discussed earlier, the court held that the plaintiff's preexisting condition of arteriosclerosis and the doctor's negligence in not detecting gangrene concurred in causing the patient's leg to be amputated at

107. See, e.g., id.
108. Nonetheless, some argue that the "substantial factor" test should enjoy a broader application because it subsumes the "but for" test. See infra notes 120-26 and accompanying text.
111. Rudeck, 218 Mont. at 44, 709 P.2d at 623.
112. Id. at 44-45, 709 P.2d at 623.
113. Id. at 49, 709 P.2d at 627.
114. Id. at 53-54, 709 P.2d at 629.
the knee.\textsuperscript{115}

\textit{Rudeck} and \textit{Kyriss} illustrate the most common situation in which the “substantial factor” test has been applied in Montana: when concurring causes are present, or are likely to be present. It is generally assumed that concurrent causes aid in bringing about the damage; that is, even though the damage would have occurred regardless of the other cause, it probably would have been lesser in degree. For example, in \textit{Rudeck}, the sponge would either never have appeared, or it would have been detected sooner. Similarly, in \textit{Kyriss}, although Mr. Templin was undoubtedly facing an amputation, perhaps a greater portion would have been saved but for one of the concurrent causes.

An important limitation to Montana’s use of the “substantial factor” test was established in \textit{Juedeman v. Montana Deaconess Medical Center}.\textsuperscript{116} The court decided in \textit{Juedeman} that, because a patient must have died from \textit{either} the negligent removal of a catheter or the patient’s preexisting condition, not a concurrence of both, the “substantial factor” test would not apply.\textsuperscript{117} The court expressed that \textit{Kyriss} mandated that the “substantial factor” instruction only be applied to causes that conurred in bringing about the damage.\textsuperscript{118} Because the situation in \textit{Juedeman} sharply contrasted with that of \textit{Kyriss}, the court held that the “but for” test should apply by default.\textsuperscript{119} Specifically, in \textit{Juedeman}, \textit{either} the preexisting condition or the nurse caused the patient’s death, but the concurrence of both was impossible. In \textit{Kyriss}, on the other hand, \textit{both} the preexisting condition and the doctor concurrently caused the extent of the amputation.

While the decision to apply the “but for” test in \textit{Juedeman} marks a clear limitation on the “substantial factor” test in Montana, other jurisdictions may have applied the “substantial factor” test to the facts in that case. These jurisdictions have adopted the notion of “substantial possibility” as a synonym for “substantial factor.”\textsuperscript{120} For example, evidence that expedient rescue efforts would have saved the life of a suicide victim would warrant the use of the “substantial factor” test.\textsuperscript{121} If this rationale

\begin{footnotes}
\item[115.] See supra notes 12-16 and accompanying text.
\item[116.] 223 Mont. 311, 726 P.2d 301 (1986).
\item[117.] \textit{Juedeman}, 223 Mont. at 319, 726 P.2d at 306.
\item[118.] \textit{Id.} at 319, 726 P.2d at 305.
\item[119.] \textit{Id.} at 319, 726 P.2d at 307.
\item[120.] KEETON ET AL., supra note 1, § 41, at 41 (Supp. 1988).
\item[121.] \textit{Id.} at 44-45 (citing Hake v. Manchester Township, 486 A.2d 836 (N.J. 1985); see also Waffen v. United States Dep’t of Health & Human Servs., 799 F.2d 911 (4th Cir. 1986) (holding that a cause of action exists if there was a “substantial
\end{footnotes}
were applied to the facts of *Juedeman*, the nurse's conduct and
the patient's preexisting condition could have been considered
"substantial factors," because they were mere "substantial possi-
bilities" in causing the patient's death.\(^{122}\) The Montana Su-
preme Court's holding in *Juedeman*, however, complies with the
proper standard of proof needed to evoke the "substantial factor"
test. To give credence to the probative nature of the name "sub-
stantial factor," the test is limited to conduct that is "more prob-
ably than not a contributing factor."\(^{123}\)

California's law of causation represents the broadest use of
the "substantial factor" test. In California, the "substantial fac-
tor" test, by itself, comprises the entire test for causation.\(^{124}\) Al-
though the Montana Supreme Court has recognized the propen-
sity of the "substantial factor" test to subsume both the cause-in-
fact and the proximate cause tiers, the court has denied this
effect.\(^{125}\) While the Montana Supreme Court has a tendency to
follow California's legal developments, its decision not to do so is
wise in this context. California's simple approach contradicts the
complexity of the causation element. The "substantial factor"
test, by itself, does not separate the factual determination that
"A" led to "D" from an evaluation of proximate cause; stated
differently, the substantial factor test does not, by itself, test the
reasonableness of the causal connection. Moreover, by imple-
menting the "substantial factor" test as the sole determinant of
cause-in-fact, the precision of the "but for" test for pinpointing
the cause of most damages is forgotten.

In conclusion, the Montana Supreme Court should maintain
the current limitations on the "substantial factor" test prescribed
by case law.\(^{126}\) This less precise test should be reserved for sit-

\(^{122}\) See id.

\(^{123}\) KEETON ET AL., supra note 1, § 41, at 43 (Supp. 1988).

\(^{124}\) See Mitchell v. Gonzales, 819 P.2d 872, 878-791 (Cal. 1991) (holding that
the proximate cause jury instruction should be abolished in favor of the "substantial
factor" test for "legal" cause).

\(^{125}\) See *Juedeman*, 223 Mont. at 321, 726 P.2d at 307 (reasoning that, had the
attorneys for the plaintiff been successful in retaining the "substantial factor" instruc-
tion in this case, it would have replaced the instructions for both cause-in-fact and
proximate cause); see also Kitchen Krafters v. Eastside Bank of Montana, 242 Mont.
155, 166, 789 P.2d 567, 574 (1990) (finding that the district court erred in allowing a
"substantial factor" jury instruction as a replacement for a proximate cause instruc-
tion).

\(^{126}\) Specific limits are needed because the tactical uses of the "substantial fac-
tor" test by plaintiff's and defense attorneys may ultimately override the proper use
of the "substantial factor" test. Specifically, plaintiff's attorneys prefer a broad appli-
uations in which one source of the damage cannot be pinpointed, but there are concurring sources to varying degrees. Moreover, whether the "but for" test or the "substantial factor" test is used to satisfy the first tier, the *Kitchen Krafters* decision properly mandated an analysis of proximate cause in the second tier of the causation element.

C. The Second Tier: Proximate Cause and its Relationship with the Duty Element

1. Montana's Foreseeability Tests

Given the background discussion in Part III about duty and proximate cause as competing limiting elements, Montana's two main problems with using the foreseeability test for proximate cause during the *Kitchen Krafters* era are clear. First, current case law analyzes "foreseeability" within the "duty" element of negligence. The parameters of a defendant's duty are defined in terms of what risks were reasonably foreseeable. While this is slightly different from *Kitchen Krafters's* proximate cause notion of finding foreseeable results of the defendant's negligence, the issue was whether it was redundant and confusing for a jury to wrestle with foreseeability twice in a negligence analysis. Second, the *Kitchen Krafters* decision created concern about whether the foreseeability test was the most effective test for proximate cause. The *Kitchen Krafters* foreseeability test excluded unforeseeable results within the direct causal chain, which may otherwise be reasonably compensable.

Furthermore, since the *Kitchen Krafters* decision marked the switch from a direct cause test to a foreseeable results test for

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127. See infra notes 128-145 and accompanying text.


129. These issues were addressed by the court in Busta v. Columbus Hosp. Corp., ___ Mont. ___, 916 P.2d 122 (1996); see infra notes 183-96 and accompanying text.
proximate cause, the relationship between the foreseeable results test for proximate cause and the foreseeable risk test for duty became increasingly muddled. The issues raised above must be appropriately resolved for Montana courts and juries to apply negligence law with clarity and predictability.

2. The Duty Test in Montana

Initially, it is important to note that prior to the *Kitchen Krafters* decision, the Montana Supreme Court addressed the role of duty as limiting element in *Mang v. Eliasson*. No portion of *Mang* was overruled by *Kitchen Krafters*, and the case remains in effect as the authoritative method for ascertaining duty.

In *Mang*, the defendant's weeds spread by wind to the plaintiff's land, and the plaintiff sued for crop damage. The court found that "the evidence fail[ed] to substantiate ... that defendants' conduct created such a risk or hazard which was unreasonably dangerous and hence negligent in the first instance." In holding that the defendant was not liable, the court analyzed the element of duty as follows:

Foreseeability is of prime importance in establishing the element of duty and the question of defendant's negligence, if any, must of necessity hinge on a finding of a breach of that duty. If a reasonably prudent defendant can foresee neither any danger of direct injury nor any risk for an intervening cause, he is simply not negligent.

The Montana Supreme Court judged the defendant's "conduct in light of the situation as it would have appeared to the reasonable man in his shoes at the time of the act or omission complained of." The court noted that the "plaintiff should not, by hindsight, be allowed to hold defendants to a higher degree of foreseeability than he himself had." Finally, the court stated that the issue "is not what might have prevented a particular accident, but what reasonably prudent men would have done in the

130. See supra notes 7, 33 and accompanying text.
134. *Id.* at 438, 458 P.2d at 781.
135. *Id.* at 437, 458 P.2d at 781 (emphasis added).
136. *Id.* at 437, 458 P.2d at 781.
137. *Id.* at 438, 458 P.2d at 781.
discharge of their duties under the circumstances as they existed at the time of the accident." This language from the *Mang* indicates the emphasis the court placed on a "before the fact" analysis of the duty element. That is, events that occurred after the defendant's litigated act were excluded when determining the defendant's duty. 

While the foregoing language from *Mang* indicates that the court followed a "general duty" theory, the court also engaged in a "specific duty" discussion. This added inquiry contravenes the court's preference for a "before the fact" analysis of duty, because a "specific duty" analysis necessarily asks what events and which people were foreseeable, based on the benefit of a "hindsight" look at the event.

In essence, the holding and reasoning of the court in *Mang* comports with a general duty analysis, thus making its discussion of specific duty unnecessary and improper. Two years after *Mang*, the Montana Supreme Court attempted to clarify this point in *Ekwortzel v. Parker*. In *Ekwortzel*, the plaintiff alleged that the defendant's mule caused the horse upon which the plaintiff was riding to fall, causing his injuries. The defendant argued that, pursuant to *Mang*, he needed to be able to foresee the specific accident to have a duty; in other words, duty

139. *Id.* at 436-38, 458 P.2d at 780-81 (quoting 2 Fowler V. Harper & Fleming James, Jr., Harper & James, *The Law of Torts* § 18.2, at 1018 (1st ed. 1956), which stated that, under the specific duty theory, the "obligation to refrain from particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks and hazards whose likelihood made the conduct unreasonably dangerous").

The *Mang* court also discussed the amount of care a defendant is required to use in terms of the scope of the risk the defendant created by his conduct. *Id.* at 436-37, 458 P.2d at 780-81. This "scope of duty" notion can become problematic if the scope of duty is defined using the chain of events after the fact to discern whether the events were within the scope of the risk before the fact. Pointedly, this methodology usurps a proximate cause analysis, which should be the only element analyzing the events after the defendant's litigated act. Thus, a scope of duty notion works best if used in conjunction with the "reasonable person standard," and asks what risks the reasonable person would have foreseen had that person engaged in the same conduct as the defendant, before the defendant acted in such a manner that litigation ensued.

140. For language in accord with this interpretation of *Mang*, see Rikstad v. Holmberg, 456 P.2d 355 (Wash. 1969) (citing McLeod v. Grant Cty. School Dist. 255 P.2d 360 (Wash. 1953) (holding that "the pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated.").

141. 156 Mont. 477, 482 P.2d 559 (1971).
142. *Ekwortzel*, 156 Mont. at 479, 482 P.2d at 560.
would be extended to the plaintiff only if the defendant could foresee that someone's horse would slip and fall on a paved highway because of his mule. The court disagreed with the defendant's interpretation of Mang, and instead cited Mang for the proposition that duty is to be analyzed "at the time of the act or omission complained of," rather than in light of what actually happened.

Regardless of this clarification in Ekwortzel, the supreme court has continued to cite Mang for the contradictory notions of general and specific duty. This Comment suggests that Mang be interpreted to embody the "before the fact" notion of general duty, as the court did in Ekwortzel. This means that a defendant's duty is defined by his ability to reasonably foresee some kind danger at the time he acted; but not necessarily the precise danger. The amount of care required, or the scope of the defendant's duty, would similarly be analyzed before the defendant acted. This interpretation is consistent with the Mang court's reasoning.

This interpretation of the Mang is also preferable because it does not prematurely invoke a proximate cause analysis. In other words, the interpretation does not require the defendant to foresee all the consequences of his actions. This interpretation of Mang contrasts sharply with Palsgraf, where the majority followed Bingham's method by examining the events after the fact, and in light of them, making an informed decision about whether the defendant had a duty to the specific plaintiff. Bingham's method requires an "after the fact" analysis by considering the consequences and results of the defendant's conduct. In this manner, Cardozo and others combined a cause and effect analysis within a duty analysis, thereby usurping any influence the causation element had upon the equation. The Mang reasoning, on the other hand, emphasizes that the question is whether the defendant could have foreseen any risk or any danger of injury or

143. Id. at 483, 482 P.2d at 562.
144. Id.
145. Id.
146. See, e.g., Belue, 199 Mont. at 454-55, 649 P.2d at 753-54; see also Scott v. Robson, 182 Mont. 528, 538-39, 597 P.2d 1150, 1155-56 (1979); Schafer v. State Dep't of Inst., 181 Mont. 102, 105-06, 592 P.2d 493, 495-96 (1979).
147. See supra notes 141-45 and accompanying text.
148. See Pretty on Top v. City of Hardin, 182 Mont. 311, 597 P.2d 58 (1979) (holding a defendant who could not foresee any danger at all, is not negligent).
149. See supra notes 135-38 and accompanying text.
150. See supra notes 81-83 and accompanying text.
intervening cause, at or before the time he performed the litigated act. Appropriately, it is a "before the fact" analysis, concerned with the potential risks of injury that a reasonable person had the duty to foresee.\footnote{151}

The reasoning in \textit{Mang} is akin to Andrews' reasoning in the dissent of \textit{Palsgraf}.\footnote{152} Again, it does not rely on the defendant's ability to foresee the precise risk of harm, but rather on his ability to foresee any risk of harm.\footnote{153} This characteristic appropriately shifts any questions of remote or unusual results into the domain of causation.\footnote{154}

To summarize, the \textit{Mang} foreseeable risk test for duty is appropriate for three reasons: First, it extends the scope of duty beyond specific plaintiffs and injuries. Second, it requires a factual determination that the defendant should have foreseen a risk of injury. And third, it does not inappropriately usurp a causation analysis of results. Moreover, the \textit{Mang} test complies with one of the earliest theories of negligence, that of a "reasonable person" standing in the defendant's shoes, whereas the theories of Bingham and Cardozo did not. Bingham's and Cardozo's "after the fact" analysis suggests a standard more akin to a that of a "clairvoyant person," rather than a reasonable person, a standard too limiting on the parameters of a person's duty to foresee a risk of harm.

\footnote{151}{In practice it may be difficult to divorce the results of a defendant's act from a determination of whether she had a duty to foresee a risk. This problem can generally be avoided by applying the notion of duty broadly, and shifting an analysis of the specific results into proximate cause. This practice also avoids confounding the jury with a redundant foreseeability analysis.}

\footnote{152}{See \textit{supra} note 98 and accompanying text. The \textit{Mang} reasoning and Andrews' reasoning would protect the law-abiding motorist who ran over an unexpected body in the roadway. See \textit{Palsgraf Revisited}, \textit{supra} note 49, at 27.}

\footnote{153}{For example, this test would not have protected the defendant who, in hitting a pedestrian with his speeding car, hurled the pedestrian's body against the plaintiff, who was standing safely behind a bus. Although the result created by the flying body was entirely absurd and unforeseeable, there was a risk of some injury created by the defendant's driving. The defendant should seek protection under the limiting notion of proximate cause. See \textit{Palsgraf Revisited}, \textit{supra} note 49, at 10-11.}

\footnote{154}{This methodology would appropriately place an analysis of intervening causes into the domain of causation, as they are events that occurred after the fact. \textit{But see Shafer,} 181 Mont. at 106, 592 P.2d at 496 (analyzing intervening causes within duty). See also \textit{Prosser,} \textit{supra} note 84, at 395-96. Prosser opposed the notion that a defendant should be absolved from liability merely because results are remote, and argued instead that liability depends upon whether the burden of the loss should fall upon the negligent defendant or the unexpecting plaintiff. Moreover, Prosser suggested that this issue turns on policy; the specific question is how to distribute the damage to a group most able to pay.}
3. The Kitchen Krafters Test for Proximate Cause

Before addressing the impact that the Kitchen Krafters decision had on Montana law, it is important to note the circumstances under which the case was presented to the supreme court in 1990. MJIG 15.00, the jury instruction that contained the "direct cause" language, was superseded by the MPI Commission in 1989. Although MPI 2.07 and 2.08 were a product of hard work by the Commission, the court was nonetheless dealing with an unfamiliar invention. The proposed instructions were vastly different from those previously existing in MJIG 15.00, and were less than one year old.

The facts of Kitchen Krafters are also worth mentioning because, unlike the facts of Palsgraf and Flower, they are not typically "cockeyed or far-fetched." Kitchen Krafters, Inc. sought to purchase commercial property in Great Falls, and Eastside Bank of Montana (the Bank) acted as an escrow agent on the property. Real Estate broker Robert Schnell assisted Kitchen Krafters with the purchase, but also negotiated a separate transaction with the Bank. The Bank loaned Schnell $30,000, secured by a trust indenture on the property. The escrow agreement (of which Kitchen Krafters was aware) specified that payments made to the Bank would be applied to Schnell's underlying trust indenture and Schnell would be responsible for the balance. On July 9, 1973, Kitchen Krafters made a $5,000 payment; but rather than applying this sum to the trust indenture, the Bank paid Schnell directly, and Schnell never applied it to his debt. Kitchen Krafters discovered the Bank's neglect of the agreement in 1980 or 1981, when the Bank told Kitchen Krafters that the property held in trust would not be released until the balance was paid. Kitchen Krafters claimed that, as a direct result of the Bank not releasing the trust indenture, the Kitchen Krafters corporation dissolved. The trial court instructed the jury on "legal cause" using MPI 2.07 and 2.08.

155. See supra notes 20-25 and accompanying text.
157. Id.
158. Id.
159. Id.
160. Id. at 159, 789 P.2d at 569.
162. Id. at 160, 789 P.2d at 570.
163. Note that "legal cause" is a synonym for "proximate cause." Id. at 168, 789 P.2d 570.
The supreme court reversed and remanded, for failure to properly instruct on proximate cause. The Montana Supreme Court directed the trial court to apply a foreseeable results test. Specifically, in order for the Bank's negligence to be the proximate cause of the purchaser's injury, the facts and circumstances surrounding nondisclosure must indicate that the Bank could have foreseen that the break up of the corporation would be the natural and probable consequence of their acts.

Unlike the foreseeable results test for causation introduced in *Kitchen Krafters*, the *Mang* foreseeable risk test for duty, as interpreted by Ekwortzel, is much broader. As opposed to foreseeing specific consequences, the defendant must have been able to foresee "neither any danger of direct injury nor any risk for an intervening cause." It follows that the *Mang* analysis satisfies the element of duty, and causation is still required to justify compensation. By not attending to this existing analysis within the duty element, the court in *Kitchen Krafters* produced a redundant and confusing analysis of foreseeability. By confusing the role of foreseeability played in the negligence equation, the court also confused attorneys, judges, and jurors.

V. A PROPOSED SOLUTION

A. Redelineation of Montana Law

The fundamental purpose of the causation element is to limit liability to those cases where the connection between the defendant's negligence and the plaintiff's injury is reasonable. In clarifying the law of causation in Montana, this Comment proposes that Montana consistently apply a two-tiered approach to comport with this fundamental purpose. The first tier would supply a cause-in-fact test to find a connection, and the second

P.2d at 574.
164. *Id.* at 170, 789 P.2d at 576.
165. *Id.* at 169, 789 P.2d at 575.
166. *See supra* text accompanying note 135.
167. Two years after *Kitchen Krafters*, the Montana Supreme Court recognized the redundancy in requiring two foreseeability analyses in *Sizemore v. Montana Power Co.*, 246 Mont. 37, 803 P.2d 629 (1990). In *Sizemore*, the court held that foreseeability belongs in the context of either duty or cause, but not both. *Id.* at 46, 803 P.2d at 635.

The court in *Kitchen Krafters* also overlooked the possibility of reinstating the direct cause test for proximate cause. This analysis would require examining the results of the defendant's act to determine whether they flowed in a natural, continuous sequence to produce the specific outcome.
tier would supply a proximate cause test to insure that the connection is reasonable enough to justify compensation.

The first tier, cause-in-fact, would be satisfied by either the “but for” test or the “substantial factor” test, whichever is appropriate. The “substantial factor” test would be appropriate only when the following factors are present: (1) the “but for” test fails due to the concurrence, or probable concurrence, of causes; and (2) the defendant’s conduct was more probably than not a substantial factor in bringing about the result. Additionally, the “substantial factor test” only satisfies the first tier of the approach; a proximate cause test should always follow the use of either the “substantial factor” test or the “but for” test.

In order to maintain the appropriate test for the second tier, this Comment suggests that Mang’s foreseeable risk test for duty should be maintained as it was interpreted in Ekwortzel.\(^{168}\) This would define a defendant’s duty by his ability to reasonably foresee some kind danger at the time he acted, but not necessarily the precise danger.

Given that foreseeability would be examined under duty, this Comment proposes that Kitchen Krafter’s foreseeable results test for proximate cause be completely overruled. This change in the law would eliminate a redundant application of the foreseeability concept and simplify causation jury instructions. As a replacement, this Comment proposes that Montana assume a direct cause test for proximate cause. This test would consider whether the events between the defendant’s negligence and the plaintiff’s damage were natural and continuous.

This revision of Montana law advances the fundamental purposes of the causation element, and this organization clarifies each part of the element. In particular, this revision solves Montana’s largest problem with causation by more effectively separating duty from proximate cause. First, the tests can be kept separate because they confront two very distinct situations. Pointedly, duty is confined to a “before the fact” analysis of the reasonably foreseeable risks—any risks—of a defendant’s acts. Proximate cause, on the other hand, examines the directness of the results “after the fact.” As a result, a duty analysis need not be forced upon a case addressing uncanny results, and a proximate cause test will not incompetently dominate what is essentially a duty question. Second, these revisions embrace, rather than fight, the “teeter-totter” dynamic inherent in the process of

\(^{168}\) See supra notes 141-45 and accompanying text.
balancing the limiting elements of duty and proximate cause. Under these revisions, one limiting element is not regularly preferred over the other, but may require more emphasis in particular cases. Specifically, the facts of some cases will be tailored to a duty analysis while others will involve causation issues. Moreover, if a particular case presents issues of fact as to both elements, the jury is less likely to be confused because the definitions and applications for each are distinct.

B. Proposed Jury Instructions

In response to the redelineation of the law of causation proposed in this Comment, the following jury instructions are proposed:

Cause
a. Cause-in-fact
   i. The “but for” test:
      If you find that the damage to the plaintiff would not have happened but for the breach of duty by the defendant, then the defendant’s conduct is a cause-in-fact of the plaintiff’s damage.

   ii. The substantial factor test:
      QUALIFICATION:
      If (1) there is a concurrence, or probable concurrence of causes, and (2) the defendant’s conduct is more probably than not a substantial factor in bringing about the result;

      then:
      only those actors or factors meeting the above requirements may qualify for the substantial factor test for cause-in-fact as follows:

      SUBSTANTIAL FACTOR JURY INSTRUCTION. The (defendant’s conduct/plaintiff’s conduct/preexisting condition) is a cause-in-fact of the plaintiff’s damage if the conduct or condition was a substantial factor in bringing it about.

      APPORTIONMENT. Apportionment of damages to the plaintiff shall reflect the degree by which each actor or factor was a substantial factor:
      (1) after a proximate cause analysis, and
      (2) within the determination of damages.
b. Proximate Cause

If you find that the sequence of events between the defendant's conduct and the damage to the plaintiff was natural and continuous then the defendant's conduct was a proximate cause of the plaintiff's damage.

VI. ANALYSIS OF BUSTA V. COLUMBUS HOSPITAL CORPORATION

In the most recent Montana case involving proximate cause, Busta v. Columbus Hospital Corp., the Montana Supreme Court addressed "the role of foreseeability and the appropriate manner for instructing juries on the issue of causation." With the Busta decision, the court had an opportunity to rectify the problems in causation law identified in foregoing sections of this Comment. However, the Busta decision not only failed to fully rectify those problems, but created additional sources of confusion. A careful reading of Busta reveals that the foreseeability concept will continue to be applied as a method of finding proximate cause in many cases. In the remaining cases, not only is the foreseeability test removed from the causation element, but the proximate cause element is removed altogether. These peculiar results may be attributed to the fact that the court made two improper assumptions. First, the court treated the foreseeability concept as a necessary component of proximate cause. Second, the court deemed that only cases involving third-party, intervening cause issues require a proximate cause analysis. Moreover, interpreting the meaning of Busta creates confusion in and of itself, for neither the court's reasoning nor the court's cited authorities support the court's limited overruling of Kitchen Krafters. Further, the court left conflicting and confusing guidelines regarding the scope of the duty element, the use of the substantial factor test, and the issue of when a proximate cause instruction is warranted. This part concludes that the solution proposed in Part IV of this Comment would be preferable to the changes created by the Busta decision.

The facts of Busta reveal that Delbert Busta was admitted to Columbus Hospital for surgical treatment of prostate cancer and inguinal hernia repair. Although he had been diagnosed with simple schizophrenia when he was discharged from the Army, 169. ___ Mont. ___, 916 P.2d 122 (1996).
170. Busta, ___ Mont. at ___, 916 P.2d at 133.
171. Id. at ___, 916 P.2d at 125.
Bust a displayed no outward signs of mental or emotional problems when he was admitted.\textsuperscript{172} During the early morning hours following a successful surgery, Busta freed himself from his catheter and I.V.s, constructed a makeshift rope out of two sheets and a hospital gown, and attempted to escape through the three foot by four foot opening in his third floor window.\textsuperscript{173} Later that day, Delbert Busta died from injuries caused by his fall.\textsuperscript{174} The attending nurse testified that, on the evening before his death, Busta exhibited uncooperative behavior, refusing to take his medication and be repositioned.\textsuperscript{175} Also, his pulse was abnormally rapid and his blood pressure was elevated.\textsuperscript{176} The nurse did not report Busta's symptoms or unusual attitude to the treating physician.\textsuperscript{177} Other testimony revealed that less than six months before Busta's death, an inspection team specifically instructed the president of Columbus hospital "to restrict the opening of your patient room windows, so that patients cannot inadvertently fall or jump from the windows."\textsuperscript{178} Two architects testified that the window was unsafe, and the risk of a patient's escape through such a window was foreseeable.\textsuperscript{179}

The district court rejected the defendant's proposed instructions on proximate cause, and the plaintiff withdrew its instructions once the defendant objected to them.\textsuperscript{180} The court did not offer an instruction of its own, and as a result, the jury returned a verdict in favor of the plaintiff after not receiving a proximate cause instruction.\textsuperscript{181} The district court attributed its failure to instruct on proximate cause to the difficulty district courts face when selecting proximate cause jury instructions due to the Kitchen Krafters decision.\textsuperscript{182} Accordingly, the district court requested that the requirements for causation jury instructions be clarified by the Montana Supreme Court.

The Montana Supreme Court held that the district court did not err in failing to provide a proximate cause instruction.\textsuperscript{183}

\textsuperscript{172} Id. Trial testimony indicated the diagnosis of "simple schizophrenia" was ascribed to withdrawn, anti-social behavior, not bizarre or delusional behavior. Also, Busta's wife and children did not know of this diagnosis. Id.

\textsuperscript{173} Id.

\textsuperscript{174} Busta, \textit{__} Mont. at \textit{__}, 916 P.2d at 125.

\textsuperscript{175} Id.

\textsuperscript{176} Id. at \textit{__}, 916 P.2d at 125-26.

\textsuperscript{177} Id. at \textit{__}, 916 P.2d at 126.

\textsuperscript{178} Id. at \textit{__}, 916 P.2d at 127.

\textsuperscript{179} Busta, \textit{__} Mont. at \textit{__}, 916 P.2d at 127-28.

\textsuperscript{180} Id. at \textit{__}, 916 P.2d at 131.

\textsuperscript{181} Id. at \textit{__}, 916 P.2d at 131-32.

\textsuperscript{182} Id. at \textit{__}, 916 P.2d at 132.

\textsuperscript{183} Id. at \textit{__}, 916 P.2d at 141. The court also found it was harmless error not
Most importantly, the court responded to the district court's request for clarification of the causation element by examining Montana law before and after the *Kitchen Krafters* decision, and by searching for methods of improving instructions.\textsuperscript{184} The court found that "[t]he first time that the word 'foreseeable' ever appeared in the context of 'proximate cause' in one of our opinions, other than as related to intervening causes,"\textsuperscript{185} was in the *Kitchen Krafters* decision. The court then criticized its opinion in *Kitchen Krafters* because the decision mandated a "redundant" consideration of the foreseeability notion: *Mang* required that foreseeability be established in duty and *Kitchen Krafters* required that foreseeability be established in causation.\textsuperscript{186}

In response to its examination of Montana's law of causation, the court partially overruled *Kitchen Krafters* in the following manner: "We therefore reverse that part of our decision in *Kitchen Krafters*, which requires a two-tiered analysis of causation which includes consideration of foreseeability in cases other than those where there has been an allegation that the chain of causation has been severed by an independent intervening cause."\textsuperscript{187}

The court then gave four reasons which "compel" this holding. First, the requirement that the defendant need to have foreseen the plaintiff's injury requires proof of an intentional act, rather than a negligent act. Second, the foreseeability analysis in the proximate cause element is redundant because it is already required in the duty element. Third, Montana statutes require that foreseeability be considered in determining negligence, not proximate cause. Fourth, the terms "foreseeability" and "proximate cause" are confusing and distracting to jurors.\textsuperscript{188}

Finally, the court set forth two proposed jury instructions:

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\textsuperscript{185} *Busta*, ___ Mont. at __, 916 P.2d at 135.

\textsuperscript{186} *Id.* at __, 916 P.2d at 136; see also supra notes 127-29 and accompanying text.

\textsuperscript{187} *Busta*, ___ Mont. at __, 916 P.2d at 139.

\textsuperscript{188} *Id.*
We hold that with the exception of those cases involving allegations of independent intervening cause or multiple causes, it is sufficient to instruct the jury, as recommended in 1989 by the Montana Supreme Court Commission on Civil Jury Instructions, that “The defendant's conduct is a cause of (injury/death/damage) if it helped produce it and if the (injury/death/damage) would not have occurred without it.”

In those cases where the chain of causation is an issue (e.g., where there is an allegation of an independent intervening cause), we recommend, as did the Commission in 1989, the following instruction: “The defendant's conduct is a cause of the (injury/death/damage) if, in a natural and continuous sequence, it helped produce it and if the (injury/death/damage) would not have occurred without it.”

A. Interpreting the Busta Decision

1. A Limited Overruling of Kitchen Krafters

At first glance, the Busta decision may appear to impose substantial changes in the law of causation. This is so because the majority argued strenuously against the court's former, “redundant” application of the foreseeability test, which resulted from Kitchen Krafters. However, the decision actually imposed only a very limited overruling of Kitchen Krafters. The court pointedly reversed only “that part of our decision in Kitchen Krafters which requires a two-tiered analysis of causation which includes consideration of foreseeability in cases other than those where there has been an allegation that the chain of causation has been severed by an independent intervening cause.” It follows from this holding that the Kitchen Krafters foreseeability analysis will still apply to those cases which contain appropriate allegations of intervening causes. The court's “reversal” of Kitchen Krafters simply means that it will remove a redundant analysis of foreseeability from only one category of cases. As a result, the Busta decision, though replete with criticism of the foreseeability concept within proximate cause, will still permit a redundant analysis of foreseeability in many negligence cases.

189. Id. (citations omitted).
190. Id. (emphasis added) (citation omitted).
191. See infra note 218 and accompanying text (explaining that in those cases in which the foreseeability test is removed from the causation element, the proximate cause element is removed altogether).
Although this limited overruling may seem surprising and impossible, given the court’s extensive criticism of redundant foreseeability tests, other parts of the decision support this interpretation. For example, the minority opinion in Busta interprets the decision in precisely the same way, stating that “the majority concludes it is unnecessary to address foreseeability as part of the causation element, except in cases of intervening superseding events.” Additionally, analysis of the majority’s treatment of precedent case law supports the fact that the court intended such a limited overruling. In its analysis of prior decisions, the court distinguished cases that involved intervening causes from those that did not, and then qualified its overruling of Kitchen Krafters according to this distinction. Specifically, the court stated that, before Kitchen Krafters, the court originally applied the proximate cause test only in cases involving intervening causes. Then the court noted that the first time foreseeability entered discussions of proximate cause for non-intervening cause cases was in Kitchen Krafters. Finally, the court noted that all cases applying the concept of foreseeability after Kitchen Krafters, except Logan v. Yellowstone County, involved intervening cause issues. While this method of categorization is criticized in Section B, it is clear from the court’s categorization of prior case law that it fully intended to limit the overruling of Kitchen Krafters as the language of the holding indicates.

2. Interpretation Problems

Despite evidence of the Montana Supreme Court’s intent to create a change in the law, the reasons for the particular holding in Busta are unclear. One problem arises because the court’s reasoning contradicts its holding. Curiously, the court’s limited overruling of Kitchen Krafters indicates that the court was operating under the notion that it is only redundant and inappropriate to use foreseeability in a proximate cause analysis in cases that do not involve intervening causes. Problematically, this notion is not supported by the court’s four stated reasons for its

192. Busta, ___ Mont. at ___, 916 P.2d at 144 (Erdmann, J., concurring and dissenting) (emphasis added).
193. Id. at ___, 916 P.2d at 133-35.
194. Id. at ___, 916 P.2d at 135 (explaining that in Kitchen Krafters, the court affirmed the two-tiered approach and mandated that foreseeability was to be applied in all considerations of proximate cause).
196. Busta, ___ Mont. at ___, 916 P.2d at 136.
limited overruling of *Kitchen Krafters*. For example, the court's second reason states that a foreseeability analysis in the causation element is redundant because it is already required in the duty element. As well, the court's third reason explains that Montana statutes require that foreseeability be considered in determining negligence, but not proximate cause. These stated reasons are unqualified and sweeping. Nowhere in the *Busta* opinion does the court qualify these reasons or rationalize why the concept of foreseeability is redundant in some cases but not in others. Moreover, many of the authorities cited by the court do not support the court's limited overruling of *Kitchen Krafters*; rather, the authorities indicate that foreseeability is *never* an appropriate concept in proximate cause. For example, the court cites with approval the view that "[f]oreseeability does not touch on the causal element. Foreseeability relates only to the element of fault." Unfortunately, the court failed to reconcile the differences between its holding and the assertions of its citations.

Another source of confusion concerns the jury instructions proposed in *Busta*. Primarily, by proposing single instructions for both categories of cases, *Busta* impliedly overruled the *Kitchen Krafters* two-tiered approach to causation instructions. Accordingly, despite the language of the *Busta* holding, practitioners should be aware that after *Busta*, it appears that juries will no longer be given a two-tiered causation test.

197. See id. at __, 916 P.2d at 139.

198. Id. at __, 916 P.2d at 136 (quoting 1 J.D. LEE & BARRY A. LINDAHL, MODERN TORT LAW § 5.02 (rev. ed. 1990)). The court in *Busta* observed that "[a]lthough we acknowledge that there are other jurisdictions which engage in such a dual analysis... knowledgeable writers and the better-reasoned decisions of other jurisdictions criticize such a redundant consideration of foreseeability." Id. (citations omitted). The court also observed that "[t]he element of cause becomes operative only if a duty is breached and damages result, whereupon the defendant becomes liable for the damages directly caused by his breach of duty." Id. (citing Leon Green, The Causal Relation Issue in Negligence Law, 60 MICH. L. REV. 543, 549 (1962)).

The *Busta* court furnished additional authoritative quotations standing for the same proposition. The court first quoted the Wisconsin Supreme Court as follows: "This court is definitely committed to the principle that, while foreseeability is an element to be considered by the jury in determining negligence, it has no part in the jury's decision of whether particular negligence found by it is causal." *Busta*, __ Mont. at __, 916 P.2d at 136 (quoting Strahlendorf v. Walgreen Co., 114 N.W.2d 823 (Wis. 1962)). The court then quoted an article in the *Michigan Law Review*: "Clearly the issue of causal relation between the defendant's conduct and the plaintiff's injury is not determined by foreseeability. . . . Causal relation is a neutral issue, blind to right and wrong." Id. (quoting Leon Green, The Causal Relation Issue in Negligence Law, 60 MICH. L. REV. 543, 549 (1962)).

199. See supra text accompanying note 189 (explaining that one category of cases involves intervening cause issues and the other category does not).
Additionally, the substance of the jury instructions proposed in *Busta* appears to contradict the court's limited overruling of *Kitchen Krafters*. This confusion arises because in cases involving intervening causes, the court eliminated the word “foreseeability” from the causation instruction.200 The new instruction for causation in cases involving intervening cause issues asks whether the results of the defendant's actions were “natural and continuous”; juries will no longer be asked whether particular results were foreseeable.201 Thus, on its face, this instruction appears to drastically alter the analysis of proximate causation by reverting to a direct cause analysis similar to MJIG 15.00.202 As discussed earlier, however, the *Busta* opinion supports the continued use of the foreseeability concept in cases with intervening causes at issue. The court removed the word “foreseeability” from the instruction only because the word itself was confusing.203 Thus, the instruction proposed in *Busta*, which does not incorporate the word “foreseeable,” appears to contradict the limited overruling of *Kitchen Krafters*, which allows a foreseeability analysis in many cases. The effect of this contradiction is that practitioners will still be able to argue the foreseeability concept to juries, but they will not be able to offer the term in causation jury instructions.

In summary, the court in *Busta* overruled *Kitchen Krafters* in a limited way. The foreseeability concept will still apply to cases with issues of intervening causes, regardless of the fact that the word “foreseeability” has been removed from the jury instruction. The other changes created by the *Busta* decision involved the removal of the two-tiered causation instruction and the removal of the proximate cause test altogether for cases which do not involve intervening cause issues. The following section provides analysis of these effects.

**B. Analysis of the Busta Opinion**

The following sections will analyze the *Busta* opinion in terms of the two primary assertions used by the Montana Supreme Court in its decision of that case. First, the court’s equat-

200. *Busta*, __ Mont. at __, 916 P.2d at 139.
201. *Id.*
202. *Id.; see also supra* note 7 and accompanying text.
203. *Busta*, __ Mont. at __, 916 P.2d at 140 ( recomendming that terms such as “reasonable foreseeability” should “not be allowed to confuse jurors by the inclusion of those terms in jury instructions”).
ing of foreseeability with proximate cause will be addressed. Second, criticism will be made of the court's assumption that only cases involving intervening causes require the proximate cause test.

1. Foreseeability and Proximate Cause

As stated, the court in Busta decided that while the "natural and continuous" language will appear in all causation jury instructions, the foreseeability concept will also apply to cases involving intervening cause issues. Based upon these mandates, it is apparent that the court finds that the concept of "foreseeability" and the concept of "natural and continuous" impart the same meaning. In turn, it is apparent that the court is unable to divorce the concept of foreseeability from the element of proximate cause.

By equating the terms in this way, the court failed to observe that there are many factors that may contribute to a proximate cause analysis. Interestingly, the Montana Supreme Court cited to these many factors when it referenced Justice Andrews' opinion in the Palsgraf case. As Justice Andrews suggested, when analyzing proximate cause,

the court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated? Is the cause likely, in the usual judgment of mankind, to produce the result? Or, by the exercise of prudence foresight, could the result be foreseen?

As indicated by Andrews' list of factors, foreseeability is but one of the many ways to analyze proximate cause. Further, Andrews' list indicates, by its inclusion of the word "or" preceding the word foreseeability, that proximate cause can be interpreted with or without a discussion of the foreseeability concept.

By failing to recognize the multiplicity of factors that can attend proximate cause analyses, the court in Busta also failed to recognize that there are two generally accepted methods for determining proximate cause. First, under the "foreseeable results" theory of proximate cause, as discussed in earlier sections

204. Id. at __, 916 P.2d at 133 (quoting Palsgraf v. Long Island Ry. Co., 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting)).

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of this Comment, the jury is asked whether the defendant could have reasonably foreseen certain results as a method for determining proximate cause. The other method for determining proximate cause is the direct cause theory. This asks the jury to look at the events between the defendant's act and the plaintiff's injury and to determine whether they occurred in a natural and continuous sequence. As stated, the jury instructions proposed in Busta incorporate the wording of the direct cause method. However, the court has affirmed the continued application of the foreseeability concept. In this way, the Busta decision has created a mix of the two accepted methods for determining proximate cause.

This Comment proposes that the concept of foreseeability can be divorced from proximate cause analysis. In recognition of the fact that the court finds the word "foreseeability" confusing to jurors, this Comment further proposes that only one method of determining proximate cause—the direct cause theory—should be applied henceforth. The direct cause theory of proximate cause is preferable because (1) it does not emphasize the ability of the defendant to foresee all the consequences of his act, as determined by the jury after the fact; and (2) the defendant's ability to foresee risks is appropriately left to a duty analysis. Adoption of the direct cause method for determining proximate cause would allow for a complete overruling of the Kitchen Krafters decision, and would take both the word and the concept of foreseeability out of causation analysis.

2. The Court's Categorization of Negligence Cases

Section A argued that a complete overruling of Kitchen Krafters could have been accomplished had the court adopted only the direct cause test instead of a mixed test for proximate cause. This section will further conclude that the direct cause test also works well regardless of whether a case is categorized as one involving intervening causes.

As noted earlier, after looking back at Montana negligence cases extending over the past ten years, the court found that most cases that used a proximate cause analysis were cases involving intervening cause issues. The court explained that cases before Kitchen Krafters "discuss[ed] proximate cause only

205. See supra notes 74-75 and accompanying text.
206. See supra notes 71-73 and accompanying text.
207. See supra note 135 and accompanying text.
as it relates to continuing liability following an intervening act."\textsuperscript{208} The court then cited several cases using a proximate cause analysis since \textit{Kitchen Krafters}, and explained that "all of these cases, other than Logan, involved issues regarding the foreseeability of intervening causes."\textsuperscript{209} Based on this data, the court concluded that cases involving intervening cause issues are the only cases that require a proximate cause instruction.\textsuperscript{210} This conclusion, based upon categorization, is troubling for three reasons. First, it is misleading for the court to insert analysis into prior cases which was not used at the time those decisions were made. Second, the conclusion creates a confusing rule regarding when proximate cause instructions will be given. And third, intervening cause cases are not the only negligence cases that require a proximate cause analysis.

\textbf{a. The Court’s Categorization is Misleading}

The court’s analysis of prior case law in \textit{Busta} is misleading because the court inserted a new method of reasoning which was not used at the time those prior decisions were made. That is, the court used after-the-fact analysis of selected cases to form a rule for categorizing and applying causation law today. In doing so, the court misconstrued the reasoning in cases both before and after the \textit{Kitchen Krafters} decision.

In \textit{Busta}, the court asserted that "[i]n fact, our earlier decisions discuss . . . proximate cause only as it relates to continued liability following an intervening act."\textsuperscript{211} As an example, the court cited \textit{Young}, and stated that "Young was clearly an intervening cause case."\textsuperscript{212} This reasoning is misleading because early cases, like \textit{Young}, did not instruct on proximate cause merely because there were intervening causes at issue. Rather, instructions for the element were given because "[p]roximate cause is an element of the cause of action for negligence, and must be proven in order for a plaintiff to recover damages."\textsuperscript{213} In following this requirement, the court in \textit{Young} implemented the proximate cause test which was in effect at the time: "proxi-
mate cause is one which in a natural and continuous sequence, unbroken by any new, independent cause, produces injury, and without which the injury would not have occurred."

The court in *Busta* similarly misconstrued cases decided subsequent to *Kitchen Krafters*. For example, the court in *Busta* stated that: "[s]ince Sizemore involved allegations of a superseding, intervening event, we analyzed foreseeability as part of proximate cause in that case." This statement by the court is misleading because, again, it suggests that the court categorized the case as an intervening cause case as a prerequisite to applying the proximate cause instruction. To the contrary, every case cited by the court in *Busta*, including *Sizemore*, was decided using established precedent which mandated an analysis of proximate cause as a limiting element. For example, the court in *Sizemore* stated:

> The doctrine of proximate cause has been developed in an effort to prevent unlimited liability... [i]n recognition of this fact, the courts have sought to devise a means to cut off a defendant's liability when principles of equity and common sense demand such a result. By far the most common method for achieving this end is through resort to the foreseeability analysis.

Thus, like every other negligence case decided by the Montana Supreme Court, the court in *Sizemore* did not implement the proximate cause test *because* there were intervening causes, but because it followed established precedent explaining that proximate cause was a necessary element. Further, like every other negligence case decided by the court subsequent to *Kitchen Krafters*, the court in *Sizemore* implemented the "foreseeability" test because it was the required test at the time. As argued in the preceding section, however, the foreseeability test could be

214. Young, 232 Mont. at 282, 757 P.2d at 777 (citations omitted). Note that this test did not use the word "intervening," but instead emphasized the chain of causation.
217. *Sizemore*, 246 Mont. at 46, 803 P.2d at 635. The court supported this notion by accurately citing the methods used by several other Montana cases and explaining: "[i]n each of these cases we have set forth the rule that proximate cause has its basis in foreseeability." *Id.* at 43, 803 P.2d at 633.
removed from proximate cause analysis altogether and the proximate cause test would still have the same purpose and effect: the prevention of unlimited liability.

b. The Court's Categorization is Confusing

After holding that only cases involving intervening causes require a proximate cause instruction, the court offered an instruction which states that an allegation of intervening cause is necessary before a proximate cause instruction may be given. Accordingly, attorneys and judges will need to categorize future cases in order to determine which deserve a proximate cause instruction. However, the court's guidelines for making such a categorization are unclear in the wake of the Busta decision. The court held that, to make a valid assertion of intervening cause, there must be proof offered at trial that indicates a third person's contribution to the damage or injury of the plaintiff. Thus, the court in Busta appears to limit proximate cause instructions to situations in which a third party's act has intervened. This reasoning is troubling because intervening causes have never been qualified this way in Montana.

Causes that interrupt the causal chain may not necessarily be third party acts. For example, in Young v. Flathead County, the County told condominium developers (developers) that their development was not a subdivision, and would therefore not be subject to review. Allegedly relying on this representation, the developers proceeded with the large financial project. In finding it error for the district court to not allow evidence of other factors contributing to the developers' financial damage, the Montana Supreme Court held that the "developers

218. The court stated that "[i]n those cases which do not involve issues of intervening cause, proof of causation is satisfied by proof that a party's conduct was a cause-in-fact of the damage alleged." Busta, ___ Mont. at ___, 916 P.2d at 139. See supra text accompanying note 189 for the proximate cause instruction for the category of cases involving intervening causes.

219. Busta, ___ Mont. at ___, 916 P.2d at 140 (holding that there was "no proof offered at the time of trial that any person contributed as a cause of Delbert's injury and death other than Delbert and the defendant hospital"). Further, the error not to instruct on proximate cause was harmless in part because "there was no evidence of intervening acts by third parties which would interrupt the chain of causation." Id. at ___, 916 P.2d at 132. And finally, the court found that foreseeability discussions in early cases were limited to those "situations where it was alleged that acts of independent third parties intervened[,]" Id. at ___, 916 P.2d at 133.


221. Young, 232 Mont. at 281, 757 P.2d at 776.

222. Id. at 281, 757 P.2d at 777-78.
had to prove an uninterrupted chain of events . . . [which] could not be broken by any new, independent cause, such as economic factors or failure to secure sanitary approval.\textsuperscript{223} In deciding \textit{Young}, the Montana Supreme Court neither relied on the notion of "third party intervention" nor mentioned any form of the word "intervene."\textsuperscript{224} Rather, the court appropriately considered all possible interruptions to the causal chain—whether by actor, event, or factor—to determine whether the injury flowed in a natural and continuous sequence.\textsuperscript{225} The Montana Supreme Court has applied this same method of analyzing intervening causes in other cases.\textsuperscript{226} In some cases, the factors did not raise sufficient issue of material fact to preclude summary judgment,\textsuperscript{227} but the factors themselves were certainly not considered inherently deficient because they did not specifically involve third party intervention.

The burden the \textit{Busta} decision places on attorneys and judges to define what is or is not an intervening cause is confusing. Attorneys will be forced to decide how to categorize cases in the face of conflicting guidelines—the guidelines offered in \textit{Busta} versus the guidelines offered in prior case law. Moreover, the burden created by \textit{Busta} is unnecessary. The proximate cause element can be used in all cases, as argued in the following section, and the test should properly focus on the nature and degree of the causal connection, not on the issue of whether a cause can be defined as an intervening act by a third party.\textsuperscript{228}

c. \textit{Proximate Causation is a Necessary Analysis in all Negligence Cases}

After \textit{Busta}, only a cause-in-fact causation instruction will

\begin{footnotesize}
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\item \textsuperscript{223} Id. at 283, 757 P.2d at 777. The court also included the factor of failure to secure financial approval. Id.
\item \textsuperscript{224} Interestingly, the court in \textit{Busta} categorized \textit{Young} as "clearly" an intervening cause case. \textit{Busta}, __ Mont. at __, 916 P.2d at 135.
\item \textsuperscript{225} \textit{Young}, 232 Mont. at 283, 757 P.2d at 777-78.
\item \textsuperscript{226} See, e.g., Thayer v. Hicks, 243 Mont. 138, 154, 793 P.2d 784, 794 (1990) (considering the following factors in the chain of causation: loss of employees, competition from another business, lack of a market and leveraged condition); Thelen v. City of Billings, 238 Mont. 82, 88-89, 776 P.2d 520, 524 (1989) (holding that climate, storms, crop irrigation and water table fluctuation could address the issue of proximate cause, and help determine whether "the 'sequence' between the Defendant's actions and the Plaintiff's injury was 'unbroken by any new, independent cause.'").
\item \textsuperscript{227} See, e.g., \textit{Thelen}, 238 Mont. at 88-89, 776 P.2d at 524.
\item \textsuperscript{228} See supra notes 57-58, 104 and accompanying text (discussing the purposes of a proximate cause analysis).
\end{itemize}
\end{footnotesize}
be applied to cases which do not involve intervening causes. In its analysis of prior case law, the court isolated the 1994 case of Logan v. Yellowstone County, stating that Logan is one case out of six since Kitchen Krafters that did not involve the foreseeability of intervening causes. According to the court’s research and holding, then, the facts in cases like Logan do not require a proximate cause analysis.

The pertinent facts of Logan reveal that Mabel Logan was discharged from employment with Yellowstone Exhibition/Metra (Metra) as a switchboard operator. Upon getting a new job with the Yellowstone County Jail, Logan developed a repetitive motion injury to her hands. She sued Metra in tort, for breach of their duty to deal fairly and in good faith. The court held that “the causal connection between Logan’s discharge from employment and her repetitive motion injury is so remote that the injury cannot reasonably be described as a foreseeable result of the discharge from employment three years earlier.” This language indicates that the court in Logan used a proximate cause analysis to absolve Metra from liability. Applying the new causation instructions given in Busta, however, it appears that Metra could easily have been liable for Mabel Logan’s injuries. The specific instructions, according to Busta, would have been: Metra’s conduct is a cause of Mabel Logan’s motion injury if it helped produce it and if the injury would not have occurred without it. The discharge was a cause-in-fact of Mabel Logan’s injury, because she never would have taken the job at the County Jail and developed her injury if she had not been discharged. In substantially the same manner, Mabel’s discharge “helped produce” her injury. As a result, had Busta’s new test been applied to the facts of Logan, a clearly unjust result would have occurred. After Busta, the same type of unjust result will likely occur in cases which do not contain appropriate allegations of intervening causes.

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231. Id. at __, 916 P.2d at 139 (explaining that in cases without intervening causes at issue, it is sufficient to instruct only on cause-in-fact).
232. Logan, 263 Mont. at 219-20, 868 P.2d at 566.
233. Id. at 220, 868 P.2d at 566.
234. Id.
235. Id. at 222, 868 P.2d at 567.
236. See Busta, __ Mont. at __, 916 P.2d at 139 (stating the cause-in-fact instruction).
237. Logan, 263 Mont. at 221, 868 P.2d at 567.
By limiting analysis of proximate cause to cases involving intervening acts by third parties, the court has removed a necessary causation element from many other cases. As argued in foregoing sections of this Comment, the proximate cause test is necessary in all negligence cases because there must be a method for excluding damage too attenuated from the defendant's act to reasonably justify compensation for this damage.\textsuperscript{238} So long as the instruction accurately reflects the law, there is no need to make fine line distinctions about which cases deserve a proximate cause instruction. In earlier cases, the Montana Supreme Court supported this point with citation: "The event without millions of causes is simply inconceivable; and the mere fact of causation, as distinguished from the nature and degree of the causal connection, can provide no clue of any kind to singling out those which are held to be legally responsible."\textsuperscript{239} As well, the court has stated that "proximate cause is an element of the cause of action for negligence, and must be proven in order for a plaintiff to recover damages."\textsuperscript{240}

Even in the \textit{Busta} decision, the court recognized the necessity of a limiting element, by citing to the following assertion: "Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for the injury."\textsuperscript{241} Problematically, the Montana Supreme Court failed to reconcile these cited assertions with its removal of the proximate cause element from many negligence cases as a result of the \textit{Busta} decision. As proposed in Part V of this Comment, a better solution would be to remove the foreseeability concept from the proximate cause test altogether, and to apply the direct cause test for proximate causation to all negligence cases.

\textbf{C. Other Concerns About the Busta Decision}

In addition to mandating a confusing, unnecessary, and perhaps unfair determination of which cases deserve a proximate

\textsuperscript{238} See supra notes 44-48, 57-58 and accompanying text.
\textsuperscript{239} Thayer, 243 Mont. at 155, 793 P.2d at 795 (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 41, at 266 (5th ed. 1984 & Supp. 1988)).
\textsuperscript{240} Thelen v. City of Billings, 238 Mont. 82, 85, 776 P.2d 520, 522 (1989) (citing Young v. Flathead County., 232 Mont. 274, 282, 757 P.2d 772, 777 (1988)).
\textsuperscript{241} \textit{Busta}, __ Mont. at __, 916 P.2d at 137 (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 41, at 272-76 (5th ed. 1984 & Supp. 1988)).
cause analysis, the court in *Busta* also left unspecific guidelines for the future application of the duty element and the substantial factor test. In its discussion of the duty element, the court did not adequately define the role of the element as it relates to the entire negligence equation. The court seemed to approve of the "general duty" notion when it stated that "[i]n *Ekwortzel* . . . we declined to apply the foreseeability requirement set forth in *Mang* in a manner which would require that the specific accident which resulted be foreseen. . . . However, we did, from the time that *Mang* was decided until our decision in *Kitchen Krafters*, consistently relate the notion of foreseeability to the requirements of duty." In this statement, the court traced Montana's present application of the foreseeability concept to duty, but it failed to define the future role of duty as being "general" or "specific." This omission is significant because, regardless of the modification made by the court in the *Ekwortzel* decision, *Mang* has been cited for contradictory notions of general and specific duty.

Moreover, this treatment does not adequately define the scope of the limiting nature of the duty element because, according to *Busta*, there are now two instructions for causation. The issue that arises is whether the same duty element will be applied to both instructions. If the court is indeed applying the notion of a "general duty" uniformly, those cases that will require only a cause-in-fact test have lost a necessary limiting element. It remains to be seen whether the court will apply different tests for duty to the two different tests for causation. In conclusion, the court did not adequately consider the necessary balance between duty and causation as limiting elements when it changed Montana's law of causation.

The court in *Busta* also gave the controversial substantial factor test very cursory treatment. The extent of this treatment is as follows:

In those cases where there are allegations that the acts of more than one person combined to produce a result (e.g., when the plaintiff alleges negligence and the defendant alleges contributory negligence, or when there are multiple defendants), we acknowledge that the recommended cause-in-fact instruction

242. *Busta*, ___ Mont. at ___, 916 P.2d at 134.
243. See supra notes 147-49 and accompanying text.
244. See supra notes 78-84 and accompanying text for a discussion of duty as a limiting element.
would be confusing and misleading. Therefore, in those cases, we recommend continued use of the substantially factor instruction approved in Rudeck v. Wright and Kyriss v. State.245

The problem with this holding is twofold. First, the court did not define the substantial factor test to include "concurring causes" in the same manner as Rudeck and Kyriss.246 Specifically, the court did not include preexisting conditions, an accepted concurring cause, but rather limited the substantial factor test to negligent acts.247

Second, the court did not specifically overrule that part of Kitchen Krafters which stated that, regardless of whether the plaintiff proves cause-in-fact by either the substantial factor test or the but for test, it then "becomes incumbent on him to move to the second tier": proximate cause.248 The question becomes whether the substantial factor test will apply in addition to or instead of a proximate cause analysis in cases that do not involve intervening cause issues.249 Here too, the court did not offer adequate guidelines for how the new rules of causation will be applied to existing causation law.

VII. CONCLUSION

Montana has not been unique in its trouble analyzing the role of causation in negligence. While demonstrating that fundamental principles can be extracted from historical case law and scholarly opinions, this Comment recognizes the complexity of the law of causation. This Comment also acknowledges, however, that workable jury instructions are a necessary part of the law. In Busta, the Montana Supreme Court stated: "The point we wish to make is that the only purpose which is properly served by instructions to the jury is to assure a decision that is consistent with the evidence and the law. This can only be accomplished when the instructions are as plain, clear, concise, and as brief as possible."250 The causation instructions created in the

245. Busta, ___ Mont. at ___, 916 P.2d at 138 (citations omitted).
246. See supra notes 106-15 and accompanying text for a discussion of Montana's definition of the substantial factor test.
249. See supra notes 124-26 and accompanying text (suggesting that the substantial factor test should not comprise the entire test for causation).
250. Busta, ___ Mont. at ___, 916 P.2d at 140.
Busta decision, however, do not comport with the court’s assertion. The instructions are not consistent with either the rules created by the Busta decision, or the rules contained in precedent that the case did not overturn. Moreover, the differing tests resulting from the Busta decision will create confusion for Montana judges and practitioners, and such confusion will inevitably trickle down to juries.

On the other hand, the proposal in Part V of this Comment demonstrates that causation rules and instructions can be consistent. As well, the proposed instructions in Part V are uniform in application. In each case, a two-tiered analysis of causation would be required. With the exception of the particularized situation of concurring causes, the tests within each tier would be the same in all cases. Moreover, the proposals given in Part V acknowledge the interplay among all of the negligence elements, and recognize that a change in one element cannot be made without scrutinizing the effect on the remaining elements. The proposed changes would realign Montana’s law of causation in a manner that would be fair to litigants and simple for judges, juries and practitioners to apply.