Goddard v. Farmers - A Study in Defense Causation Arguments and Plaintiff's Nullifying Instructions

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During the first week of torts class, you were taught the elements of duty, breach, injury, and causation. This presentation focuses on the element of causation generally, and its applications in the "bad faith" insurance trial of *Goddard v. Farmers* specifically. There is a good reason why the LSAT test spends so much time testing the applicant's analytical skills. Learning to "think like a lawyer," in large part, involves refining your capacity and ability to understand and communicate exactly why a particular event has occurred. Typical examples of causation arguments include "The plaintiff would never have been injured if . . ." and "Yes, it might be true, but . . ." Remember, what we lawyers call "causation," jurors understand as an explanation.

Psychologists tell us that in determining "the" cause of an outcome, jurors instinctively construct alternative scenarios that might lead to different results. This process is called "counterfactual" thinking. The easier it is for jurors to imagine a different sequence of events producing a different result, the more likely jurors will focus on the interchangeable element as "the cause" of the result

in question. Illustrating with a basic "slip and fall" case, if jurors can comfortably construct an alternative scenario to what actually happened, such as the plaintiff traversing a different route into the building, then they are likely to conclude, "Had the plaintiff just gone the other way, the accident wouldn't have happened." Thus**,** the plaintiff becomes the focus, thereby increasing his responsibility. If jurors construct an alternative scenario that includes the building custodian placing a "slippery when wet" sign at the base of the stairs, the jurors are likely to conclude, "Had the building custodian just put a sign up, the accident wouldn't have happened." Thus, the building management becomes the focus**,** thereby increasing the defendant's responsibility.

Effective lawyers encourage jurors to embrace an alternative (counterfactual) scenario that favors their client by questioning witnesses (e.g., "Did you see a sign that said 'slippery' anywhere near the stairs?") and articulating all the choices the opponent ignored.

Experienced lawyers sweep up and down the entire factual continuum of the case, both before and after the precise mechanism of the plaintiff's injuries, carefully searching for the best spot, or "causation event" from which to either attack or defend. When defending, they look for something unique that happened to explain the bad outcome. This works because if an unusual occurrence explains what happened, then the suggestion is it probably won't happen again; ergo, the world is a safe place and there is no need for the jury to educate a

defendant with a large plaintiff's verdict to prevent a similar injury from reoccurring. The plaintiff, on the other hand, wants to assign fault to an event, or non-event, which is characterized as a choice, as early as possible in the continuum of events. Both sides will then want to splinter each choice into as many discrete acts as possible. Again, the reason is that with increased choices comes increased responsibility, and therefore potential legal liability.

Whatever issue the attorneys decide to build their case theme and trial around, it must align with community values, namely fair play. This comports with common sense. The art is in selecting the right issue(s) on which to try your case. The more successfully this is done, the "better" the lawyer. This ability is often called instinct. Senior Eugene attorney John Jaqua said it best when, a long time ago, I heard him compliment an opposing lawyer saying, "He had a great sense of sidewalk justice."

Trial effectiveness requires that a lawyer be able to anticipate the core issues of the opponent's case. This knowledge allows you to preempt and neutralize the opponent. I must emphasize, this does not mean you ever allow an opponent to dictate how you try your case; it does however permit you to begin the process of preemption by framing the contested issues in a light most favorable to you and by refining your proof in these areas.

This is crucial for the plaintiff. Why? Because it is the plaintiff who wants compensation and only the plaintiff has the burden of proof. The defendant can do nothing and win. If the jury is evenly divided, the defendant wins.

I offer one additional point with all proper respect and deference to the worthy lawyers whom our office routinely faces. When serious claims are brought by plaintiffs, the insurance companies understandably and properly hire only the finest lawyers. The attorneys they employ are uniformly men and women of stature. By virtue of professional standing, they bring a certain air of authority to the legal positions they advocate. They are the essence of credibility and competence. This means that when a prominent defense lawyer explains to a judge and a jury that this is a very simple case that can be boiled down to one issue, you know you are in big trouble! You can assume the defense lawyer has competently framed the issue, and case, in a manner that is favorable to his or her position. Unless this is effectively anticipated and blunted, you are probably going to lose. Even if you are equal in talent and effort, and have correctly anticipated every issue with all its nuances, I guarantee you will still have your hands full.

Once you properly anticipate the issues or "high ground" the opponent is trying their case on, ask yourself, "What credible responses are available?" Jury consultants will tell you that when liability is clear in medical malpractice cases, the defense still wins most of the time by first admitting fault, thereby gaining credibility, and then proceeding to argue the separate issue of causation.

After the opposing lawyer's opening is delivered, have it transcribed by the court reporter. This provides you with their road map. If they vary from it, remind

the jury of this during the closing argument by reading, verbatim, what the opposing lawyer promised during his opening.

TAKE CONTROL - TRY YOUR CASE

Consider the verdict form and instructions a battleground. Carefully read every case with an eye to the particular issues of your case. Lavish time on your instructions. Is there favorable case law that responds to an anticipated defense argument? This can be a real opportunity. I call these "**nullifying**" instructions. I will discuss three examples of nullifying instructions used in the *Goddard* trial later. Submit supplemental instructions as the trial unfolds and new issues surface. If I spot an issue that I think I can later obtain a nullifying instruction on, I may not include that particular instruction with my pretrial instruction submissions. I do this hoping that my opponent will rely on the issue more than they might if they knew I was fully prepared with a nullifying instruction. I think of a "nullifying" instruction as much more than a technique for blocking or neutralizing. Think of it as an offensive weapon that allows you to punish an opponent for opportunistically pursuing defenses and arguments not countenanced by the law. This does not mean you should ever submit any proposed instruction that is not a fair and accurate statement of the law.

Know your judge. Does this judge stick to the Uniform Instructions, or does he or she welcome some personalization? Ask them, they will tell you.

Consider requesting the jury receive written instructions pursuant to ORCP 59B. Prepare a separate set for each juror. Would your closing argument be

more effective if the jury was instructed prior to your closing as the new rules provide? ORCP 58 B (8). If written instructions are not used, then always use an overhead projector to highlight the key instructions on which your case is anchored. Explain to the fact finders how the law supports your position when correctly applied to the facts in this particular case. Carefully walk the jurors through each question on the special verdict form. Weave the law and evidence into a whole cloth. Don't be shy about damages. If you don't believe your prayer is reasonable, why should the jury?

None of the above is difficult; it only requires some effort and practice. Your closing should integrate the (demonstrative) evidence, instructions and verdict form on an overhead projector, into a cohesive closing. After a few trials, it will all unfold so smoothly.

Most lawyers are far too casual with the instructions and verdict forms. These are real tools in the hands of an effective lawyer. If you have any doubt, watch my friend Mr. Tongue go to work long before the trial begins trying to convince the judge that his "single issue" trial and verdict form will save both the court and jury valuable time! If you lose this threshold battle, your next argument will not be to the trial judge, it will be before the Court of Appeals, requesting they reverse the Judge's order granting the defendant's motion for summary judgment. I know, this is what happened in the *Goddard* case. Don't let your opponent dominate the courtroom and simplify the case to his advantage.

Alternative pleadings, ORCP 16C, provides another underutilized tool for taking control of the issues in the case. Consider filing a Reply to the defendant's Answer that articulates your "alternative" case theory. Your chance of getting the court to instruct on a particular theory is best when the point is included in your pleadings. I don't think the form of the point, or the particular location the point is asserted in the pleadings is as important as the fact that it is mentioned, thereby placing the opposing lawyer clearly on notice.

CAUSATION AND A FEW OF ITS APPLICATIONS IN THE *GODDARD* "BAD FAITH" TRIAL

Goddard is a classic illustration of a skilled attorney defending on causation. Let's examine a few of the more explicit and implicit applications of causation, and the use of nullifying instructions in the trial.

I filed Goddard in May 1990. By the time we finally started the trial in April 2002, the case, in its various permutations, had generated five written Court of Appeals decisions. The idea behind a "bad faith" case is that an insurance company, after collecting a premium from a policyholder (called their insured), later fails to settle a claim against their insured within the applicable policy limits.

Some of the largest causation questions in the *Goddard* case involved whether Farmers' offers to settle were timely. Even assuming Farmers breached their duty to make a timely settlement offer, my friend Tom Tongue argued that it really didn't matter, because Plaintiff's counsel wouldn't and couldn't have recommend the client accept the policy limits offer, no matter when made.

Prior to trial, the judge agreed with Farmers, ruling that as a matter of law, there was no factual dispute on this question. Judge Douglas Beckman granted the defendant's motion for summary judgment on the sole issue of causation. The Court of Appeals disagreed, ruling there was some evidence to support the plaintiff's position. In no small part, the reversal was based upon the alternative pleadings we filed. See *Goddard v. Farmers Ins. Co.,* 173 Or App 633, 640 (2001) at footnote 5:

> "Farmers also quarrels with the sufficiency of plaintiff's pleadings to support a verdict in its favor. Specifically, Farmers notes that plaintiff has pleaded inconsistent alternative facts with respect to causation. Plaintiff's fourth amended complaint alleges:
>
> 'Plaintiff would have accepted a reasonable and timely settlement offer within the limits of Farmers' indemnity obligation. Alternatively, if prior to the filing of the declaratory judgment action Mrs. Goddard had received and rejected an offer of $100,000, it would have been because of the way Farmers had processed the estate's claim.'
>
> . . . ORCP 16 C specifically permits alternative pleadings: '[W]hen a party is in doubt as to which of two or more statements of fact is true, the party may allege them in the alternative.'"

The lawyers representing the Goddard estate in the original, underlying, wrongful death claim later testified, as witnesses in the subsequent "bad faith" case, that they had relied on unwritten representations made to them by one of Farmers' senior claims examiners that not one, but two $100,000 Farmers' policies applied to the claim. During the bad faith trial, Farmers' witnesses denied that such representations had ever been made, and that even had they

been made, the ultimate fact was that only one of the two $100,000 policies applied.

This placed the credibility of plaintiff's counsel squarely at issue. The defense capably suggested that, given the prayer for punitive damages and a 50 % contingency fee agreement, these lawyers were hoping to become millionaires. Further defense arguments suggested that because of large egos, the plaintiff's attorneys really didn't want to settle the case. Imagine the notoriety a large, easy verdict, against a drunk who was criminally convicted of negligent homicide against the deceased, would bring. The same lawyers would later attempt to use this large verdict of $863,274 to their advantage in an uninsured motorist arbitration.[1] More persuasively, Farmers also argued that plaintiff's counsel couldn't accept Farmers' offer of $100,000 because there was a $1,000,000 uninsured State Farm Policy looming in the background against which the plaintiff had made a claim. Defense counsel explained that if plaintiff's lawyers had accepted the $100,000 offer (which Farmers claimed they offered the second day of the wrongful death trial), it would have jeopardized the Goddard estate's later ability to fully collect under the State Farm policy by previously "settling short" with Farmers for only $100,000. Apart from fanatically preparing the two lawyers

[1] Prior to the death of her son, Mark, Mrs. Goddard had purchase a $1,000,000 uninsured motorist polity from State Farm. This disputed claim was settled for $350,000 after the wrongful death verdict. All of the evidence concerning the uninsured motorist policy was admitted over our ORS 18.530 objection that it was a collateral source.

We all know that such a verdict technically is not binding in the later arbitration, however, even my experts admitted it might have been accorded some weight.

for their testimony on this point, the following instruction from the court was helpful:

> "I further instruct you that the Marc E. Goddard estate may be excused from failing to accept an otherwise reasonable offer by Farmers, if the defendant through its agents, misrepresented facts or policy provisions to the estate's lawyers, and those lawyers then reasonably relied on Farmers' representations in declining such offers by Farmers."
> *Goddard v. Farmers Ins. Co.,* 173 Or App 633, 641, footnote 5 (2001)

A second defense causation argument presented was that "Even if Farmers was wrong, punitives were not appropriate because they had always relied upon the advice of their attorneys." These lawyers were, of course, different from the defense attorney they had selected to protect the interests of their insured in the underlying wrongful death case.

Once again, in addition to anticipating this issue with proof, we submitted a "nullifying" instruction that placed limits upon this "defense":

> "If you find the defendant reasonably relied on good faith evaluations of the attorneys it selects, then you may consider such relevance as evidence of defendant's exercise of due care.
> If, however, you find the defendant attempted to affect the opinions or services of such attorneys, or chose to ignore their recommendation, then you may also consider such evidence as a lack of due care towards its insured."

A third defense causation argument blunted by the offensive use of a nullifying instruction involved Farmers' allegation that, even if their staff or defense counsel had made any mistakes (breached the standard of care), both their insured, Munson, and his excess lawyer, had been fully apprised of each

issue, had participated in the decision making, and had concurred with each decision. Farmers went on to allege that Munson insisted Farmers file a declaratory judgment action in order to resolve the issue of whether Farmers' coverage was $100,000 as they alleged, or $200,000 as claimed by the attorneys for the Goddard estate. It should be noted that this coverage litigation took eight years, generated two written Court of Appeals decisions and involved three trials. Rest assured that in the bad faith trial, all the plaintiff's witnesses were exquisitely prepared on every contention. It didn't hurt however, during the closing, to be able to explain to the jury that, even if Munson did have his own excess lawyer to protect his personal interests, it was still Farmers' legal responsibility to affirmatively protect the interests of their insured. The Judge so charged the jury. This nullifying instruction both repeats the plaintiff's position and further lends the dignity of the robe to plaintiff's closing argument. Not only does the plaintiff get two closings, but now the instructions from the court repeat the key themes from two prior closings. "I'm sorry Tom, it just ain't fair!"

The Uniform Civil Jury Instruction Number 23.02, Multiple Causation, may provide additional ammunition in responding to "yes, but . . ." arguments.

CONCLUSION

I close this paper with compliments to my worthy opponent Tom Tongue. He is the proper recipient of every professionalism award the Bar has to give. Yes, it is nice to be invited to speak as the beneficiary of an eight-figure verdict; however, the plain truth is I wanted nine figures. That didn't happen. So, who

“won,” Barton and Strever with a $20 million dollar verdict, or Tom, who, in my judgment, saved his client $80 million?