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Has *Addy v. Jenkins, Inc.* Heightened the Standard for Establishing a Reasonable Inference of Proximate Cause in Maine?

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HAS *ADDY V. JENKINS, INC.* HEIGHTENED THE STANDARD FOR ESTABLISHING A REASONABLE INFERENCE OF PROXIMATE CAUSE IN MAINE?

Denitsa N. Pocheva-Smith

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*Denitsa N. Pocheva-Smith**

I. INTRODUCTION

Suppose the following: A subcontractor is hired by a construction company to dry-wall the outside of a building. The general contractor provides and erects a three-story staging to assist the subcontractor during that process. The staging is installed before the subcontractor is scheduled to start work, but does not contain safety equipment, such as rails, platforms, or ladders, and is not tied to the building.

The subcontractor begins work on the building on Monday. On that same day, he falls while ascending the staging. He reports the fall to the general contractor and asks that safety equipment be installed on that portion of the building.

Later that week, on Friday, the subcontractor spends about five hours on the high level of the staging. He then climbs up to the roof and performs work on the chimney for another hour. Shortly thereafter, the subcontractor finds himself on the ground. He remembers that he was on the roof of the main building and fell while climbing down the staging. However, he does not remember how he stepped off the roof or exactly how he fell. There were no witnesses to the accident.

These are the facts of *Addy v. Jenkins, Inc.*,¹ as stated by the Supreme Judicial Court of Maine, sitting as the Law Court, in a review of the trial court's decision to grant defendant Jenkins, Inc.'s motion for summary judgment.² It must be noted that, in his deposition, the plaintiff testified that he could not remember whether he fell from the roof of an adjacent mechanical building, from a ladder leading to that building, or from the staging.³ However, the plaintiff later submitted an errata sheet, in which he noted that he recalled he had been on the roof of the main building and that he had fallen to the ground while climbing down the staging.⁴ Despite that inconsistency, the Law Court pointed out that on an appeal from summary judgment the evidence must be taken in the light most favorable to the non-moving party, the plaintiff in this case.⁵

The Law Court held in *Addy* that summary judgment for the defendant on the issue of proximate causation was appropriate because “[a]ny finding that [the plaintiff’s] fall was caused by a defect in the staging would be based on speculation

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1. 2009 ME 46, 969 A.2d 935.

2. *Id.* ¶¶ 2-5, 969 A.2d at 937-38.

3. *Id.* ¶ 5, 969 A.2d at 937.

4. *Id.* An errata sheet is “[a]n attachment to a deposition transcript containing the deponent’s corrections upon reading the transcript and the reasons for those corrections.” BLACK’S LAW DICTIONARY 582 (8th ed. 2004).

5. *Addy*, 2009 ME 46, ¶ 2, 969 A.2d at 937.

or conjecture.”⁶ Justice Silver, joined by Justice Levy, disagreed and expressed his concern that the majority’s decision created “a new and heightened burden with respect to the causation element of tort law, and . . . put plaintiffs at a disadvantage for a lack of memory that may itself be an inextricable part of the accident and the injury.”⁷

The Law Court also discussed the defendant’s duty of care to the plaintiff and the breach of that duty; however, these topics are beyond the scope of this Note and will not be examined further.⁸ The Law Court determined that the plaintiff had “established on a prima facie basis that [the defendant] owed a duty to him to provide a safe workplace environment,” and that the plaintiff had presented sufficient evidence in order to overcome summary judgment on the issue of the defendant’s breach.⁹ Justice Silver, joined by Justice Levy, concurred with that portion of the majority’s opinion.¹⁰

Part II of this Note examines the concept of proximate cause generally under Maine law and the standard of review on motions for summary judgment and for judgment as a matter of law in Maine cases. Additionally, Part II reviews Maine’s precedent on the issue of reasonable inference of proximate cause. This review focuses particularly on cases in which the plaintiff had no recollection of or could not explain how he was injured and there were no eye witnesses to relate what had transpired. Part III of this Note analyzes the procedural history of *Addy* and the reasoning applied by the majority and the dissent. Finally, in Part IV, this Note provides an in-depth analysis of the *Addy* decision and its effect on the doctrine of reasonable inference of proximate cause in Maine.

II. BACKGROUND

A. *The Elements of Negligence and the Nature of Causation in American Jurisprudence*

In order to prevail on a negligence claim, a plaintiff must plead and prove by a preponderance of the evidence the following four elements: (1) that the defendant owed the plaintiff a duty of care; (2) that the defendant breached that duty; (3) that the defendant’s breach was the cause-in-fact and proximate cause of some type of harm suffered by the plaintiff; and (4) that the plaintiff suffered an injury.¹¹ Accordingly, with respect to the third element, a finding of causation requires the application of a two-prong test.¹² This Note’s focus is on the second part of that

6. *Id.* ¶¶ 1, 15, 969 A.2d at 940.

7. *Id.* ¶ 18, 969 A.2d at 940 (Silver, J., concurring in part and dissenting in part).

8. Additionally, the plaintiff’s wife had filed a claim for loss of consortium but that claim was not an issue on appeal. *Id.* ¶ 1 n.1, 969 A.2d at 937 (citation to footnote only).

9. *Id.* ¶ 9, 969 A.2d at 938.

10. *Id.* ¶ 17, 969 A.2d at 940 (Silver, J., concurring in part and dissenting in part).

11. Peter Nash Swisher, *Causation Requirements in Tort and Insurance Law Practice: Demystifying Some Legal Causation “Riddles,”* 43 TORT TRIAL & INS. PRAC. L.J. 1, 3 (2007). See also W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 263 (5th ed. 1984).

12. Peter C. Haley, *Paradigms of Proximate Cause*, 36 TORT & INS. L.J. 147, 148 (2000). First, the fact-finder must determine whether the plaintiff’s damages would not have been incurred but for the defendant’s breach of the duty owed. David W. Robertson, *The Common Sense of Cause in Fact*, 75

test—establishing proximate cause.¹³

For the past four hundred years, courts and commentators have struggled to properly understand and apply the concept of proximate cause in negligence actions.¹⁴ One of the reasons for these difficulties is the fact that proximate cause has very little to do with causation per se.¹⁵ For example, one commentator has stated:

“Proximate cause”—in itself an unfortunate term—is merely the limitation which the courts have placed upon the actor’s responsibility for the consequences of the actor’s conduct As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea

TEX. L. REV. 1765, 1768 (1997). The “but for” test is the traditional rule for factual causation; other standards, such as independently sufficient causes, the “loss of chance” rule, and the rules of multiple fault and alternative liability, market-share liability, enterprise liability, liability based on concerted action, and incitement provide further assistance to the fact-finder in analyzing factual causation. *See* VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 355-409 (4th ed. 2009). However, detailed review of these theories is beyond the scope of this Note.

If the plaintiff has proven factual cause, the fact-finder then goes on to determine whether “the plaintiff’s loss or injury was foreseeable by the defendant, and . . . as a fundamental policy of the law, the defendant’s responsibility should extend to paying for the loss/injury at issue, even if the loss/injury was indeed foreseeable.” Haley, *supra*, at 148.

13. Commentators often equate proximate causation with foreseeability, which has been considered an important factor in the proximate cause analysis. JOHNSON & GUNN, *supra* note 12, at 417. The law does not require that the exact occurrence of an accident be foreseen; rather, it is sufficient that the broad outlines of the injury be foreseeable, *Merhi v. Becker*, 325 A.2d 270, 273 (Conn. 1973), and that the plaintiff generally falls within the class of persons to which the defendant owes a duty. *See generally* *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

Other theories have also shaped the concept of proximate cause and have played a role in determining its exact contours. Under the theory of direct causation, liability attaches whenever there is an unbroken chain of events between the negligence of the defendant and the plaintiff’s injury, no matter how unexpected or bizarre. JOHNSON & GUNN, *supra* note 12, at 413; *see generally* *In re Arbitration Between Polemis and Furness, Withy & Co., Ltd.*, (1921) 3 K.B. 560 (Eng.) (where a ship hand negligently knocked a plank into the hold of a ship carrying cases of benzine and petrol, and the plank unexpectedly struck a spark that ignited the petroleum vapor that had collected in the hold, started a fire and burned the ship down; liability was imposed for the loss of the ship, even though the damage could not reasonably have been expected, because the loss was a direct result of the negligence). The direct causation theory has influenced American jurisprudence. JOHNSON & GUNN, *supra* note 12, at 414.

The theory of result within the risk provides that the defendant should be held liable only if the actual injury resulted from one of the risks that made the defendant’s conduct negligent. *Id.* at 430; *see generally* *Di Ponzio v. Riordan*, 679 N.E.2d 616 (N.Y. 1997) (a gas station patron, who was injured when a vehicle that had been left unattended and with the engine running at a gas pump by another driver rolled forward and pinned the patron between two vehicles, could not recover against the gas station because the risk that the unattended vehicle would cause injury was not among the hazards associated with leaving a vehicle running).

The related theories of intervening and superseding causes provide further insight. Intervening causes are those events which come into play after the negligent act of the defendant and which participate along with the defendant’s conduct in causing the harm. JOHNSON & GUNN, *supra* note 12, at 439. Superseding causes are those intervening causes that break the chain of proximate cause between the defendant’s negligence and the harm and absolve the defendant of legal responsibility. *Id.*

14. Swisher, *supra* note 11, at 8.

15. *Id.*

of justice or policy.¹⁶

In other words, proximate cause is a policy determination of the legislature or the courts to limit tort liability in certain circumstances.¹⁷

In the context of causation, it is the court's function to determine whether the evidence causes reasonable minds to differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff, and whether the harm could be apportioned among two or more causes.¹⁸ In addition, the court decides the questions of causation and apportionment in any case in which reasonable minds could not differ about the facts.¹⁹ However, when the evidence could cause reasonable minds to differ, it is within the jury's realm to determine whether the defendant's negligence has been a substantial factor in causing harm to the plaintiff, and the apportionment of the harm to more than one cause.²⁰

B. Negligence and the Issue of Proximate Cause in Maine

In Maine, the negligence cause of action has been defined almost exclusively by the Law Court—legislative involvement has been limited to certain areas, such as medical malpractice and products liability, and the Restatement of Torts has seldom been cited as authority.²¹ If a plaintiff is to prevail in a negligence claim in Maine, he “must establish that the [defendant was] under a duty to conform to a certain standard of conduct and that a breach of that duty proximately caused an injury to the plaintiff.”²² Accordingly, in addressing the issue of causation, the Law Court has dispensed with factual cause, and its focus has been exclusively on proximate cause.²³

The Law Court has noted that “[v]ery few words commonly employed in the law of torts have occasioned as much case law and confusion as the term ‘proximate cause.’”²⁴ The Law Court has defined it as “that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the result would not have occurred.”²⁵ Under Maine law, a negligent act would be the legal or proximate cause of an injury “if (a) the actor's conduct is a *substantial factor* in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the

16. KEETON ET AL., *supra* note 11, at 264.

17. Swisher, *supra* note 11, at 8.

18. See RESTATEMENT (SECOND) OF TORTS § 434(1) (1965).

19. *See id.*

20. *See id.* § 434(2).

21. JACK SIMMONS ET AL., MAINE TORT LAW § 7.02 (2004 ed.).

22. *Rowe v. Bennett*, 514 A.2d 802, 804 (Me. 1986).

23. *See Allen v. Hunter*, 505 A.2d 486, 488 (Me. 1986) (the trial court's application of the “but for” test “improperly blurred the distinction between the discrete principles of proximate cause and negligence”).

24. *Wing v. Morse*, 300 A.2d 491, 495 (Me. 1973).

25. *Michalka v. Great N. Paper Co.*, 151 Me. 98, 105, 116 A.2d 139, 143 (1955).

manner in which his negligence has resulted in the harm.”²⁶

In Maine, as in other jurisdictions, whether an injury was proximately caused by an actor’s negligent conduct is a question of fact that is to be resolved by the fact-finder, unless reasonable minds cannot differ as to how an injury occurred and the defendant is entitled to a judgment as a matter of law.²⁷ Accordingly, proximate cause issues are often reviewed by Maine courts in connection with motions for summary judgment and claims of insufficiency of the evidence to support a verdict.

C. Maine’s Standard of Review on Motions for Summary Judgment and for Judgment as a Matter of Law

To review a motion for summary judgment in Maine, the court is summoned to “examine the evidence in the light most favorable to the [party opposing the motion] to determine whether the record supports the conclusion that there is no genuine issue of material fact and that the prevailing party is entitled to a judgment as a matter of law.”²⁸ A fact in question is material if it has the potential of affecting the outcome of the case.²⁹ An issue is genuine when the facts set forth in the record would require a jury to choose between the parties’ differing versions of the truth.³⁰ On appeal, the Law Court reviews de novo the grant of a motion for summary judgment.³¹

Under Maine law, in order to prevail on a motion for summary judgment, the non-moving party must present evidence that would be sufficient to overcome a motion for judgment as a matter of law.³² The party opposing the motion “must establish a *prima facie* case for each element of his cause of action.”³³ Consequently, the moving party is entitled to judgment as matter of law “when any jury verdict for the [non-moving party] would be based on conjecture or speculation.”³⁴

Additionally, in reviewing a motion for judgment as a matter of law based on a claim of insufficiency of the evidence to support a verdict, the court’s task is to determine whether “any reasonable view of the evidence and those inferences that are justifiably drawn from that evidence supports the jury verdict.”³⁵ If “any reasonable view of the evidence could sustain a verdict for the opposing party

26. *Wing*, 300 A.2d at 495-96. According to the Law Court, the foundational basis for proximate cause is the “reasonable foreseeability of injury.” *Brewer v. Roosevelt Motor Lodge*, 295 A.2d 647, 652 (Me. 1972).

27. See *Klingerman v. SOL Corp. of Me.*, 505 A.2d 474, 478 (Me. 1986); RESTATEMENT (SECOND) OF TORTS § 434(1) (1965).

28. *Champagne v. Mid-Me. Med. Ctr.*, 1998 ME 87, ¶ 5, 711 A.2d 842, 844.

29. Donald G. Alexander, *Tips for Success in Summary Judgment Practice*, 16 ME. B.J. 172, 174 (2001); *Burdzel v. Sobus*, 2000 ME 84, ¶ 6, 750 A.2d 573, 575.

30. *Prescott v. State Tax Assessor*, 1998 ME 250, ¶ 5, 721 A.2d 169, 171-72.

31. *Efstathiou v. Aspinquid, Inc.*, 2008 ME 145, ¶ 13, 956 A.2d 110, 116.

32. *Rodrigue v. Rodrigue*, 1997 ME 99, ¶ 8, 694 A.2d 924, 926.

33. *Fleming v. Gardner*, 658 A.2d 1074, 1076 (Me. 1995). A *prima facie* showing requires merely that a party satisfy its burden of production on each element of the cause of action. See *Oak Ridge Builders, Inc. v. Howland*, No. CV-03-17, 2006 WL 2959690, at *10 (Me. Super. Oct. 6, 2006).

34. *Fleming*, 658 A.2d at 1076.

35. *Bates v. Anderson*, 614 A.2d 551, 552 (Me. 1992).

pursuant to the substantive law that is an essential element of the claim,” granting the motion would be improper.³⁶ A particular application of these rules is found within the context of the doctrine of reasonable inference of proximate cause.

D. Reasonable Inference of Proximate Cause under Maine Law

In certain circumstances, a plaintiff may not be able to remember, recount, or explain how an accident happened and how he was injured.³⁷ In these situations, the plaintiff may still prevail on a motion for summary judgment or for judgment as a matter of law if he can overcome that deficiency by producing other reliable evidence.³⁸ Such evidence may be in the form of eye witness testimony, known physical facts, or reasonable inferences of proximate cause, and may be direct or circumstantial.³⁹ When making conclusions based on known facts, fact-finders may and should use their common sense and need not ignore their own outside-of-court life experiences.⁴⁰ Reasonable inferences may be considered if they are rational and flow logically from the evidence.⁴¹ The fact-finder may even consider multiple reasonable inferences, so long as they are not equally probable.⁴² In these cases, however, the mere possibility of causation is not sufficient, and the defendant would be entitled to judgment as a matter of law if a finding of proximate cause would be based on pure speculation or conjecture, or “even if the probabilities [were] evenly balanced.”⁴³

It is apparent from the brief review of these rules that a finding of the existence or lack of a reasonable inference of proximate cause requires a case-by-case determination. Therefore, it would be both helpful and instructive to a proper examination of *Addy* to explore the Law Court’s past decisions on this issue.

E. Maine’s Precedent: Reasonable Inference of Proximate Cause Found

The Law Court applied the analysis of reasonable inference of proximate cause as early as 1908. In *Lebrecque v. Hill Manufacturing Co.*,⁴⁴ the Law Court was called upon to review a motion to set aside the verdict in favor of the plaintiff as being against the evidence.⁴⁵ The plaintiff was an employee at the defendant’s cotton mill, and his responsibilities included operating an “opener” machine.⁴⁶ The plaintiff suffered multiple fractures of his right arm when an allegedly defective leather belt connecting two of the pulleys of the “opener” broke and drew his arm into the pulley while he was operating the machine according to the instructions

36. *Currier v. Toys ‘R’ Us, Inc.*, 680 A.2d 453, 455 (Me. 1996).

37. *Thompson v. Frankus (Thompson II)*, 151 Me. 54, 58, 115 A.2d 718, 720 (1955).

38. *See id.*

39. *Id.*

40. *See Melanson v. Reed Bros.*, 146 Me. 16, 22, 76 A.2d 853, 856 (1950).

41. *Addy*, 2009 ME 46, ¶ 20, 969 A.2d at 940 (Silver, J., concurring in part and dissenting in part); *Hersum v. Kennebec Water Dist.*, 151 Me. 256, 263, 117 A.2d 334, 338 (Me. 1955).

42. *Addy*, 2009 ME 46, ¶ 20, 969 A.2d at 940.

43. *Houde v. Millett*, 2001 ME 183, ¶ 11, 787 A.2d 757, 759 (quoting *Merriam v. Wagner*, 2000 ME 159, ¶ 10, 757 A.2d 778, 781).

44. 104 Me. 380, 71 A. 1023 (1908).

45. *Id.* at 381, 71 A. at 1023.

46. *Id.*

given to him by his supervisor.⁴⁷ The accident happened extremely quickly and the plaintiff could not describe exactly how his arm was drawn into the pulley.⁴⁸ In addition, no one witnessed the events.⁴⁹

Nonetheless, the Law Court stated that to overturn the jury verdict would mean to hold that the inference drawn by the jury would be indisputably wrong and the contrary inference would be the only reasonable one, and determined that “in some way the breaking of the belt was the proximate cause of [the plaintiff’s] injuries.”⁵⁰ Additionally, the court highlighted that the plaintiff’s version of the events was not contradicted by any direct evidence or discredited by any circumstances or improbabilities.⁵¹

In 1955, in *Thompson v. Frankus (Thompson II)*,⁵² the Law Court was asked to review the grant of a motion for judgment as a matter of law for the defendant at the close of the evidence.⁵³ In that case, on the night of the accident, the plaintiff was visiting a friend who was a tenant in a second-floor apartment in a building owned by the defendant.⁵⁴ The only means of ingress and regress from that apartment was a common stairway that was not lit and did not have a railing.⁵⁵ Additionally, evidence was presented at trial that the linoleum covering the tread of each stair “was badly worn and contained holes of such a nature as to create a hazard.”⁵⁶ At approximately 8:30 p.m., the plaintiff decided to leave and used a match to light the stairway.⁵⁷ She took a single step, tripped, and fell to the bottom of the stairs, suffering severe injuries.⁵⁸ The defendant argued that if the plaintiff, who could see what she was doing, could not explain exactly what caused her to fall, the jury could not possibly determine that fact without engaging in speculation or guessing.⁵⁹ However, the Law Court declined to invalidate the fact-finder’s right to make that determination,⁶⁰ and held that the jury could have reasonably inferred, based on the evidence presented, that the plaintiff “stumbled or tripped over the defective covering and because of the defects” of the stairs.⁶¹

47. *See id.* at 381-83, 71 A. at 1023-24.

48. *Id.* at 389, 71 A. at 1026.

49. *Id.* at 384, 71 A. at 1025.

50. *Lebrecque*, 104 Me. at 390, 71 A. at 1027.

51. *Id.* at 389, 71 A. at 1026.

52. *Thompson II*, 151 Me. 54, 115 A.2d 718 (1955).

53. *Id.* at 55, 115 A.2d at 718. This appeal included two cases, reviewed together, in which Anna Thompson and her husband sought damages for her injuries. *Id.* The plaintiffs had obtained a verdict in a previous trial, but the Law Court granted a new trial on the defendant’s motion because the jury had not been instructed on the issue of the defendant’s duty to the plaintiff. *Id.*, 115 A.2d at 718; *see Thompson v. Franckus (Thompson I)*, 150 Me. 196, 204, 107 A.2d 485, 489 (1954). In *Thompson II*, the facts did not materially differ, and the Law Court reviewed them as fully stated in its first opinion. *Thompson II*, 151 Me. at 55, 115 A.2d at 718.

54. *Thompson I*, 150 Me. at 197, 107 A.2d at 486.

55. *Id.*

56. *Id.* at 198, 107 A.2d at 486.

57. *Id.* at 197-98, 107 A.2d at 486.

58. *Id.* at 198, 107 A.2d at 486.

59. *Thompson II*, 151 Me. at 58, 115 A.2d at 720.

60. *See id.* at 60, 115 A.2d at 721 (stating that “it was for the jury to determine whether or not the defendant’s negligence was the proximate cause of the plaintiff’s fall”).

61. *Id.* at 59, 115 A.2d at 720.

More recently, in *Rodrigue v. Rodrigue*,⁶² the Law Court vacated a summary judgment granted in favor of the defendant in part because it determined that genuine issues of material fact existed as to whether the defendant's negligence was the proximate cause of the plaintiff's injuries.⁶³ In that case, the plaintiff and her adult son were renting a first-floor apartment in a building owned by the defendant.⁶⁴ Heat was provided by a furnace located in the dirt floor basement, which could be accessed through the plaintiff's apartment.⁶⁵ According to the plaintiff, she had been down the stairs to the basement only once, years before the accident in question, and the basement was only used to store a Christmas tree and some ornaments, and "the stairs were covered with plaster, dust, and debris, such as boards, nails, paint cans, and brushes."⁶⁶

On the morning of the accident, the plaintiff awoke to a cold apartment and decided to go downstairs to check the furnace.⁶⁷ She slipped on the second or third step, even though she did not know exactly what she slipped on, and fell to the bottom of the stairs, suffering back, neck, head, and shoulder injuries.⁶⁸ The Law Court cited *Thompson II* for support that a reasonable inference of proximate cause may be sufficient, and held that the summary judgment should be vacated because the plaintiff's testimony, if believed, could support a finding that her injuries were proximately caused by the defendant's negligence in maintaining the stairs.⁶⁹

The Law Court applied the analysis of reasonable inference of proximate cause again in *Marcoux v. Parker Hannifin/Nichols Portland Division*.⁷⁰ The plaintiff in that case was a full-time employee of a staffing agency that provided the defendant's plant with temporary workers.⁷¹ The plaintiff's responsibilities included making rounds with the plant supervisors and verifying the workers' hours.⁷² While walking around the plant, the plaintiff came across a green liquid stain on the floor to her right, and a bucket with no mops in it to her left.⁷³ The plaintiff walked between the stain and the bucket in order to avoid them, but lost her footing and fell.⁷⁴ Viewing the facts in the light most favorable to the plaintiff, the Law Court held that genuine issues of material fact existed as to proximate cause because there was evidence in the record that could support a finding that there was a stain on the floor right before and after the plaintiff fell.⁷⁵

F. Maine's Precedent: Reasonable Inference of Proximate Cause Not Found

In another line of cases, the Law Court has declined to find a reasonable

62. 1997 ME 99, 694 A.2d 924.

63. *See id.* ¶ 16, 694 A.2d at 927.

64. *Id.* ¶ 2, 694 A.2d at 925.

65. *Id.*

66. *Id.* ¶¶ 3-6, 694 A.2d at 925.

67. *Id.* ¶ 2, 694 A.2d at 925.

68. *Rodrigue*, 1997 ME 99, ¶¶ 2, 6, 694 A.2d at 925.

69. *Id.* ¶¶ 14-16, 694 A.2d at 927.

70. 2005 ME 107, 881 A.2d 1138.

71. *Id.* ¶ 2, 881 A.2d at 1140.

72. *Id.*

73. *Id.* ¶ 3, 881 A.2d at 1140.

74. *Id.*

75. *Id.* ¶¶ 26-27, 881 A.2d at 1146.

inference of proximate cause. For example, in *Cyr v. Adamar Associates Ltd. Partnership*,⁷⁶ the personal representative of the estate of a motel patron appealed the grant of a motion for summary judgment in favor of the defendant.⁷⁷ The patron was a registered guest in a motel owned by the defendant and was socializing with her co-workers at the motel lounge when she noticed that a man was staring at her.⁷⁸ She got up to go to the ladies' room and stated that she would return shortly.⁷⁹ She never returned, and her dead body was found the next day in a nearby field that was not owned by the defendant.⁸⁰ Her injuries showed signs of a struggle.⁸¹ The Law Court determined that the defendant was entitled to judgment as a matter of law based on the lack of evidence as to whether the patron was abducted or whether she voluntarily left with the person who later killed her, and, coupled with the fact that her body was found on a property not owned by the defendant, the connection between the motel's security measures and the patron's death was too tenuous and uncertain to hold the defendant liable.⁸²

Lack of evidence of causal connection between the defendant's negligence and the plaintiff's injuries similarly led to the affirmance of summary judgment in favor of the defendant in *Houde v. Millett*.⁸³ There, the plaintiff was a friend of the tenant of a first-floor apartment in a building owned by the defendant, and stayed there in order to take care of her friend's son while the tenant was away.⁸⁴ The tenant had access to and used the building's basement.⁸⁵ A few months before the accident in question, the defendant had hired a company to line the chimney.⁸⁶ The workers left a large amount of soot on the basement floor and, despite numerous requests from the plaintiff, the defendant never cleaned the basement.⁸⁷ The night before the accident, the tenant's son had tracked an unusually large amount of soot onto the kitchen floor, and the plaintiff cleaned it up.⁸⁸ The next morning, the plaintiff was sitting down in the kitchen; she then got up, took two steps, and slipped, at which point her leg got caught in the chair and was broken in several places.⁸⁹

Although the plaintiff did not see, nor did anyone else observe, any soot on the floor that morning, she noticed a smudge that looked like a soot stain on her pajamas after the accident, and she could not think of any other way soot could have appeared on her pajamas.⁹⁰ The Law Court noted that the evidence made it "possible" that soot on the floor was the cause of the accident, but that, based on

76. 2000 ME 110, 752 A.2d 603.

77. *Id.* ¶ 1, 752 A.2d at 603.

78. *Id.* ¶ 2, 752 A.2d at 604.

79. *Id.*

80. *Id.* ¶ 3, 752 A.2d at 604.

81. *Id.*

82. *Cyr*, 2000 ME 110, ¶ 7, 752 A.2d at 604.

83. 2001 ME 183, 787 A.2d 757.

84. *Id.* ¶¶ 2-3, 787 A.2d at 758.

85. *Id.* ¶ 2, 787 A.2d at 758.

86. *Id.* ¶ 4, 787 A.2d at 758.

87. *Id.*

88. *Id.* ¶ 5, 787 A.2d at 758.

89. *Houde*, 2001 ME 183, ¶ 6, 787 A.2d at 758.

90. *Id.* ¶ 7, 787 A.2d at 758.

the evidence, the jury would have to engage in speculation as to the condition of the floor that morning; therefore, the Law Court held that the defendant was entitled to judgment as a matter of law.⁹¹

A few years later, the Law Court was again asked to review a summary judgment ruling in favor of a defendant. In *Durham v. HTH Corp.*,⁹² the plaintiff was a patron in a restaurant operated by the defendant.⁹³ The bathrooms of the establishment were located downstairs from the dining area, and the plaintiff had gone down those stairs on previous occasions, including the night of the accident that initiated the case.⁹⁴ Later that night, the plaintiff again headed down the stairs, but her heel got caught on something on the first step, and she fell and hit her head on the wall.⁹⁵ There were no witnesses to the fall.⁹⁶ There was evidence in the record that the area was not well lit and that the metal strip placed on the step had been replaced three years before the accident, but was dirty and had never been cleaned before.⁹⁷ The record also contained references to two prior accidents on the stairs involving other patrons; however, it did not include any additional information as to the circumstances of those accidents.⁹⁸ Additionally, evidence was presented that a few hours after the accident the metal strip was pulled up; however, there was no evidence as to the metal strip's condition prior to the accident.⁹⁹ Based on the lack of evidence of a dangerous condition associated with the metal strip before the accident occurred, the Law Court concluded that causation could not be proved.¹⁰⁰

It was this line of cases that the Kennebec County Superior Court relied upon in *Addy* in granting the defendant's motion for summary judgment on the issue of proximate cause.

III. THE *ADDY* DECISION

A. *The Trial Court's Order*

The plaintiff in *Addy* filed a complaint in the Kennebec County Superior Court, alleging, inter alia, that the defendant's negligence proximately caused injuries to him.¹⁰¹ After the discovery process, the defendant filed a motion for summary judgment, maintaining that the plaintiff could not establish whether he fell off the staging, that this was merely an assumption on his part based on where he landed, and that the plaintiff had admitted in his deposition that he could have fallen off the roof of the adjacent building or off a ladder used to access that roof.¹⁰²

91. *Id.* ¶ 12, 787 A.2d at 759-60.

92. 2005 ME 53, 870 A.2d 577.

93. *Id.* ¶ 2, 870 A.2d at 578.

94. *Id.*

95. *Id.* ¶ 3, 870 A.2d at 578.

96. *Id.* ¶ 5, 870 A.2d at 579.

97. *Id.* ¶¶ 3-4, 870 A.2d at 578-79.

98. *Durham*, 2005 ME 53, ¶ 4, 870 A.2d at 579.

99. *Id.* ¶ 5, 870 A.2d at 579.

100. *Id.* ¶ 9 n.2, 870 A.2d at 579 (citation to footnote only).

101. See App. 1, *Addy v. Jenkins, Inc.*, 2009 ME 46, 969 A.2d 935 (KEN-07-428).

102. *Id.* at 12.

Therefore, the defendant argued, the evidence was too speculative to support a finding of proximate cause.¹⁰³ The plaintiff responded that even though he did not remember exactly how he fell, he did recall climbing down the staging, and that it was more probable than not that the defective condition of the staging was a substantial cause of his injuries.¹⁰⁴

The trial court found that upon completing his project on the day of the accident, the plaintiff had stepped from the edge of the roof onto the staging, but remembered nothing that transpired until he found himself on the ground injured.¹⁰⁵ The trial court relied on the Law Court's precedent regarding reasonable inference of proximate cause because no direct evidence was presented as to the plaintiff's fall, and, considering all the facts in the light most favorable to the plaintiff, concluded that there was no evidence that the defendant's negligence was the proximate cause of the plaintiff's injuries.¹⁰⁶

B. The Majority's Opinion

On appeal to the Law Court, the parties renewed their causation arguments and engaged in vigorous evidentiary and factual disputes.¹⁰⁷ Nonetheless, the majority acknowledged that "[a]lthough [the plaintiff's] evidence is somewhat contradictory, when viewed in the light most favorable to him, there [was] evidence that his fall was from the staging erected by [the defendant]."¹⁰⁸ The majority further stated, however, that the plaintiff did not remember exactly how he fell, and whether his fall had anything to do with the deficiencies of the staging, which were the very facts the plaintiff relied upon to establish causation.¹⁰⁹

The majority reviewed the rules applicable to proximate causation at the summary judgment stage, and examined *Durham* in detail as an analogous case.¹¹⁰ The majority concluded that, just like the plaintiff in *Durham*, the plaintiff in this case had failed to establish a connection between the defendant's negligence and the injuries suffered because the plaintiff had "presented evidence of only *from where* he fell, rather than *how* he fell."¹¹¹ The Law Court further distinguished *Thompson II* because in that case the plaintiff had offered more evidence on causation than the plaintiff had presented in this case—the plaintiff in *Thompson II* "attempted to descend the stairs of an apartment building, . . . the stairs were in a dilapidated condition, . . . she 'reached for a hand rail and found that there was none,' and . . . she tripped and fell as she was descending the stairs."¹¹²

103. *Id.*

104. *Id.*

105. *Id.* at 15. The trial court further explained that while the plaintiff had given unsworn statements that he was climbing down the staging, this was merely an assumption on his part because he had no memory of it. *Id.* at 15 n.4 (citation to footnote only).

106. App. 17-18.

107. See Blue Br. 10-18, *Addy v. Jenkins, Inc.*, 2009 ME 46, 969 A.2d 935; Red Br. 10-18, *Addy v. Jenkins, Inc.*, 2009 ME 46, 969 A.2d 935 (KEN-07-428); Pet.'s Reply 2-6, *Addy v. Jenkins, Inc.*, 2009 ME 46, 969 A.2d 935 (KEN-07-428).

108. *Addy*, 2009 ME 46, ¶ 11, 969 A.2d at 939.

109. *Id.*

110. *Id.* ¶¶ 12-13, 969 A.2d at 939.

111. *Id.* ¶ 14, 969 A.2d at 939.

112. *Id.* ¶ 14 n.2, 969 A.2d at 939 (citation to footnote only).

Accordingly, in *Addy*, the Law Court held that the superior court was correct in granting the defendant's motion for summary judgment on the ground that any finding that the plaintiff's fall was caused by defects in the staging would have been based on conjecture or speculation.¹¹³

C. The Dissent

Justice Silver, joined by Justice Levy, labeled the majority's opinion "a significant departure from our prior case law" and stated that the majority now required that "a plaintiff must present direct evidence of proximate cause in order to withstand summary judgment, and that reasonable inferences [were] no longer permissible."¹¹⁴ Justice Silver further stated that the majority disregarded the well-established and methodical analysis previously applied by the Law Court in distinguishing reasonable inferences from speculation,¹¹⁵ and simply chose not to discuss in any way the role of inference in this case.¹¹⁶ The dissent then went on to contend that it was perfectly reasonable to infer causation here "given that (1) the lack of safety equipment on the staging [was] undisputed; (2) Addy fell while descending the staging; and (3) no competing inference [had] been advanced by [the defendant]."¹¹⁷

Justice Silver distinguished *Durham* and *Houde*, which were relied upon by the majority, by reasoning that there was no significant evidence of the existence of a dangerous condition before the accidents in either of those cases.¹¹⁸ The dissent offered comparison to a more applicable case, *Marcoux*, where there was evidence of a dangerous condition, but the plaintiff did not remember exactly how she fell.¹¹⁹ Justice Silver pointed out that the facts in *Marcoux*, where the plaintiff had been allowed to use a reasonable inference of causation in order to avoid summary judgment, were "legally indistinguishable" from the case at bar.¹²⁰ Additionally, Justice Silver provided a side-by-side comparison of the facts in *Thompson II* with the ones in the case on appeal in order to demonstrate the lack of rational basis for distinguishing the two cases:

In *Thompson [II]*, the plaintiff attempted to descend the stairs of an apartment building. Addy attempted to descend the staging. In *Thompson [II]*, the stairs were in a dilapidated condition, thus presenting a safety hazard. Likewise, Addy was faced with a safety hazard upon his descent of the staging because it was not equipped with safety equipment. In *Thompson [II]*, the plaintiff tripped and fell as she was descending the stairs. Addy fell as he was descending the staging.¹²¹

Finally, the dissent expressed its concern that the majority's opinion would

113. *Id.* ¶ 15, 969 A.2d at 940.

114. *Addy*, 2009 ME 46, ¶ 18, 969 A.2d at 940 (Silver, J., concurring in part and dissenting in part).

115. *Id.* ¶ 20, 969 A.2d at 940.

116. *Id.* ¶ 21, 969 A.2d at 941.

117. *Id.*

118. *Id.* ¶¶ 22-23, 969 A.2d at 941.

119. *Id.* ¶ 24, 969 A.2d at 941.

120. *Addy*, 2009 ME 46, ¶ 25, 969 A.2d at 941-42 (Silver, J., concurring in part and dissenting in part).

121. *Id.* ¶ 29, 969 A.2d at 942-43 (citations omitted).

have unfortunate consequences for plaintiffs who had been injured as a result of known negligence on the part of the defendants, and that those plaintiffs would ironically be put at a greater disadvantage because of their lack of memory of the accident.¹²² While the plaintiff's lack of memory may have presented a credibility issue in this case, Justice Silver argued that *Addy* was not an appropriate case for summary judgment.¹²³

IV. *ADDY* HAS HEIGHTENED THE STANDARD FOR ESTABLISHING A REASONABLE INFERENCE OF PROXIMATE CAUSE IN MAINE

The doctrine of reasonable inference of proximate cause was firmly established in Maine more than a century ago. It has been applied by the Law Court consistently until 2009, when the majority in *Addy* chose to alter it. It must be noted that Justice Silver rather unconvincingly critiqued certain aspects of the majority's opinion—for example, that the majority suggested “a plaintiff must present direct evidence of proximate cause in order to withstand summary judgment, and . . . reasonable inferences are *no longer permissible*,” and that “a plaintiff who cannot remember an otherwise unwitnessed accident *cannot rely on any inference*, however reasonable”¹²⁴ To the contrary, the majority searched for a reasonable inference of proximate cause between the defendant's breach of duty and the plaintiff's injury, but did not find it based on the facts of this particular case.

Nonetheless, the Law Court's decision represents a significant modification of the established contours of the doctrine considering the essential differences between the facts of this case and some of the earlier cases cited by the majority as support for the conclusion that the plaintiff was unsuccessful in showing proximate cause and that judgment as a matter of law for the defendant was proper. *Houde* and *Durham*, both used by the majority as analogous cases, have one element in common—no evidence was presented by the plaintiffs that a dangerous condition existed before the accidents happened.¹²⁵ In those cases, the Law Court held, as a matter of law, that proximate cause could not be proven precisely because of the lack of that crucial evidence.¹²⁶ In stark contrast, in *Addy*, the facts viewed in the light most favorable to the plaintiff showed that he was in direct contact with the staging, which was found by the majority to be defective and dangerous, just prior to the accident.¹²⁷

Under the majority's analysis, the opinion may have reached a different conclusion had the court determined that the plaintiff had not been on the staging when he fell. In that situation, the plaintiff would have been in the same position as the plaintiffs in *Houde* and *Durham*—the fact that the defendant was negligent in some way could not have been proximately linked to the plaintiff's injuries.

122. *Id.* ¶ 31, 969 A.2d at 943.

123. *Id.* ¶ 32, 969 A.2d at 944.

124. *Id.* ¶ 18, 969 A.2d at 942 (emphasis added).

125. See *Houde*, 2001 ME 183, ¶ 7, 787 A.2d at 758; *Durham*, 2005 ME 53, ¶ 5, 870 A.2d at 579.

126. See *Houde*, 2001 ME 183, ¶ 12, 787 A.2d at 759-60; *Durham*, 2005 ME 53, ¶ 9 n.2, 870 A.2d at 579 (citation to footnote only).

127. *Addy*, 2009 ME 46, ¶¶ 2, 5, 969 A.2d at 937.

However, the majority expressly stated that it accepted, for the purpose of summary judgment review, the plaintiff's testimony that he fell while descending the staging.¹²⁸

In refusing to disturb the trial court's decision to grant the defendant's motion for summary judgment, the majority relied on the distinction between the plaintiff's evidence as to *from where* he fell and *how* he fell.¹²⁹ However, this is where the doctrine of reasonable inferences of proximate cause is implicated—it has been firmly and consistently established by the Law Court that the lack of direct evidence can be substituted with permissible inferences if they flow logically from the rest of the evidence, and that even if there are multiple explanations for a given event, the higher probability of one over the other is sufficient to overcome a dispositive motion.¹³⁰ Moreover, as Justice Silver pointed out, the defendant in *Addy* did not offer any competing inference.¹³¹ Accordingly, a highly probable and reasonable inference based on the facts of the case was that the defective and dangerous condition of the staging, created by the defendant, was the proximate cause of the plaintiff's injuries. Therefore, the doctrine of reasonable inference of proximate cause was applicable, and genuine issues of material fact existed as to causation.

A comparison of the facts in *Addy* with the previous decisions of the Law Court, in which a reasonable inference of proximate cause was found, makes the outcome of *Addy* even more puzzling. In all of those cases, the plaintiff had no recollection or could not explain exactly how the accident happened, and no one witnessed it.¹³² In each case, however, there was evidence that the dangerous condition, created by the defendants, was present immediately prior to the accident.¹³³ As a result, the Law Court held in each instance that genuine issues of material fact existed that needed to be determined by a jury.¹³⁴ Despite the indistinguishable facts in *Addy*—the plaintiff could not remember exactly how he fell, there were no witnesses to his fall, and just prior to the accident he was in contact with the defectively constructed staging—the majority in this case decided that causation was lacking as a matter of law.

A recent application of *Addy* illustrates the consequences of its holding. In a 2009 Cumberland County Superior Court order on a motion for summary judgment, the facts presented were as follows: A real estate broker was showing a mobile home to the plaintiff, a potential buyer.¹³⁵ While inspecting part of the property by herself, the plaintiff came to a door, opened it without knowing what was on the other side, stepped in, and fell to the bottom of a set of stairs, sustaining serious injuries.¹³⁶ As it turned out, the door opened into a stairway leading to the

128. *See id.* ¶ 11, 969 A.2d at 939.

129. *Id.* ¶ 14, 969 A.2d at 939.

130. *See supra* notes 37-43 and accompanying text.

131. *See Addy*, ¶ 21, 969 A.2d at 941.

132. *See supra* notes 44-75 and accompanying text.

133. *See supra* notes 44-75 and accompanying text.

134. *See supra* notes 44-75 and accompanying text.

135. *See* Mem. of Law in Support of Def. Po-Go Realty, Inc.'s Mot. for Summ. J., *Barrett v. Po-Go Realty Inc.*, No. CUMSC-CV-2008-489, 2009 WL 5667070 (Me. Super. July 20, 2009), 2009 WL 5799802.

136. *Id.*

mobile home's basement.¹³⁷ At her deposition, the plaintiff testified that at the time of the accident, she "got one foot in and . . . went airborne."¹³⁸ The plaintiff alleged in her summary judgment pleadings that the mobile home was not well lit, that the real estate broker did not warn the plaintiff that the home had a basement, which was a rarity for mobile homes, and that the basement stairs were rickety and had no banister.¹³⁹

The superior court determined that genuine issues of material fact existed as to the defendants' duties and breach.¹⁴⁰ In reviewing causation, however, the trial court relied on *Addy* for the determination that, based on the plaintiff's deposition testimony, the defendants would be entitled to summary judgment to the extent that the plaintiff was "premissing liability on the allegedly rickety condition of the stairs or on alleged code violations that could be linked to [the plaintiff's] fall only by speculation."¹⁴¹ However, the court went on to determine that genuine issues of material fact existed as to whether the specific appearance of the basement door and stairs were not sufficiently obvious so that a warning would be required.¹⁴² Therefore, even though the plaintiff prevailed on other grounds, the court would have declined to apply the doctrine of reasonable inference of causation, even though genuine issues of material fact existed as to the defective condition of the stairs, and the plaintiff was allegedly in contact with them.

The Law Court's modification of the doctrine of reasonable inference of proximate cause could have been prompted by the recent trend of liberal use of summary judgment practice.¹⁴³ During the 1980s and 1990s, courts began granting summary judgment in cases that had a very limited chance of success, even though some disputes as to material facts existed.¹⁴⁴ The United States Court of Appeals for the First Circuit views summary judgment as a device that "has proven its usefulness as a means of avoiding full-dress trials in unwinnable cases, thereby freeing courts to utilize scarce judicial resources in more beneficial ways."¹⁴⁵ Consequently, crammed dockets and scheduling difficulties have led to more grants of summary judgment motions in marginal cases, and the affirmation of these rulings on appeal.¹⁴⁶

Whatever the reason, however, by amending the doctrine of reasonable

137. *Id.*

138. *Barrett*, 2009 WL 5667070 (alteration in original).

139. Pl.'s Resp. to Def. Po-Go Realty, Inc.'s Mot. for Summ. J., *Barrett v. Po-Go Realty Inc.*, No. CUMSC-CV-2008-489, 2009 WL 5667070 (Me. Super. July 20, 2009), 2009 WL 5799801.

140. *Barrett*, 2009 WL 5667070.

141. *Id.*

142. *Id.*

143. See *Stanley v. Han. County Comm'rs*, 2004 ME 157, ¶ 38, 864 A.2d 169, 181 (Alexander, J., dissenting). This practice has been criticized as violating the basic purpose of the summary judgment rule, as well as the right to a trial by jury guaranteed by the state and federal constitutions and Maine's civil rules. *Id.* As one civil practice scholar has noted, that practice could lead to "trialworthy cases [being] terminated pretrial on motion papers, possibly compromising the litigants' constitutional rights to a day in court and jury trial." Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U.L. REV. 982, 1071 (2003).

144. *Stanley*, 2004 ME 157, ¶ 40, 864 A.2d at 181.

145. *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991).

146. See *Stanley*, 2004 ME 157, ¶ 40-41, 864 A.2d at 181-82.

inference of proximate cause, the majority in *Addy* created a dangerous precedent that will likely disfavor plaintiffs with a lack of memory of the circumstances of an accident. The doctrine has been part of the law in Maine for significant reasons—among others, eliminating the doctrine would “invite perjury on the part of plaintiffs who in all honesty do not know or cannot recall exactly what did happen.”¹⁴⁷ After all, the existence or lack of proximate cause is to be determined by the jury unless the evidence is insufficient “as a matter of law.”¹⁴⁸ Therefore, unless there are no genuine issues of material fact as to the probability that the defendant’s negligence proximately caused the plaintiff’s injuries, courts should defer to the jurors’ wisdom and ability to uncover the truth. Unfortunately, after *Addy*, this could possibly be the case less and less for plaintiffs with little or no recollection of the events and unable to present direct evidence of how an accident occurred.

V. CONCLUSION

This Note contends that the facts in *Addy* warranted a finding of a reasonable inference of proximate cause based on the Law Court’s precedent on that issue, at least for the purposes of overcoming summary judgment. They presented genuine issues of material fact that should have been decided by a jury. Additionally, from a broader standpoint, this case has heightened the standard for showing a reasonable inference of proximate cause at the dispositive motion stages of the litigation of negligence claims in Maine.

A review of Maine’s proximate causation precedent reveals that over the last decade this legal concept has been frequently used to decide cases “as a matter of law” on summary judgment or post-verdict motions. Accelerating this trend, the majority in *Addy* distinguished prior decisions of the Law Court, in which a reasonable inference of proximate cause had been found on very similar facts for the purpose of overcoming dispositive motions. The Law Court’s decision in *Addy* has left the dissenters, as well as other critics,¹⁴⁹ concerned that plaintiffs with no recollection of the circumstances of an accident and who cannot produce direct evidence will not be able to get past summary judgment. Moreover, even if those plaintiffs survive summary judgment and are successful in obtaining jury verdicts, the judgments based on those verdicts may later be vacated by the courts by granting motions for judgment as a matter of law based on claims of insufficiency of the evidence to support those verdicts.

147. *Thompson II*, 151 Me. at 58-59, 115 A.2d at 720.

148. See *Klingerman*, 505 A.2d at 478; RESTATEMENT (SECOND) OF TORTS § 434(1) (1965).

149. See DWIGHT G. CONGER ET AL., CONSTRUCTION ACCIDENT LITIGATION § 4:8.60 (2010).