

**NIED**

**&**

**Causation**

# Falzone v. Busch

# “Zone of Danger”

Requires a reasonable fear of immediate physical injury

Many jurisdictions also require that the emotional distress resulted in substantial bodily injury

# Portee v. Jaffee

“Few notions anywhere in the law are more vague than  
the fundamental concept of the law of negligence:  
the duty of reasonable care.”

*Portee v. Jaffee*, 417 A.2d 521 (N.J. 1980).

# Court's framing of question before it:

“one formulation of the issue before us is whether it was foreseeable that the mother would be observing the death of her young child”

“more directly stated, we must determine whether defendants owed a duty to the plaintiff that was violated when her child became trapped in the elevator”

# “Bystander liability”

- (1) the death or serious physical injury of another caused by defendant’s negligence;
- (2) a marital or intimate, familial relationship between plaintiff and the injured person;
- (3) observation of the death or injury at the scene of the accident;  
and
- (4) resulting severe emotional distress

# Gammon v. Osteopathic Hospital of Maine



# Traditional Requirements for *Allowing Recovery* for an NIED Claim (in Maine)

- physical impact
- objective manifestation
- underlying or accompanying tort
- special circumstances

# Different jurisdictions' approaches to NIED

“Impact” Rule

“Zone of Danger”

“Bystander Liability”

Special, specified circumstances

Underlying tort law principles

# Causation

Two parts:

1. Factual cause

2. Proximate cause

# Factual cause is usually simple

Adams v. Bullock: “The Swinging Wire and Electric Trolley”

Martin v. Herzog: “The Buggy Without Lights”

Byrne v. Boadle: “The Falling Flour Barrel”

Reynolds v. Hicks: “Underage Drinking and Driving”

# Stubbs v. City of Rochester

# Zuchowicz v. United States

**When factual cause is not simple,  
it's impossible.**

# Four typical scenarios in which factual cause may be contested

1. Many potential causes
2. No idea what happened
3. Know what happened, but don't know that it wouldn't have happened if defendant had behaved reasonably
4. Know what happened, but don't know who to blame



**What about multiple possible causes?**

# Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co.

“Multiple Fires Whodunnit”

# Necessary and Sufficient Conditions

## Necessary condition:

Result happens ONLY IF condition exists.

Put another way:

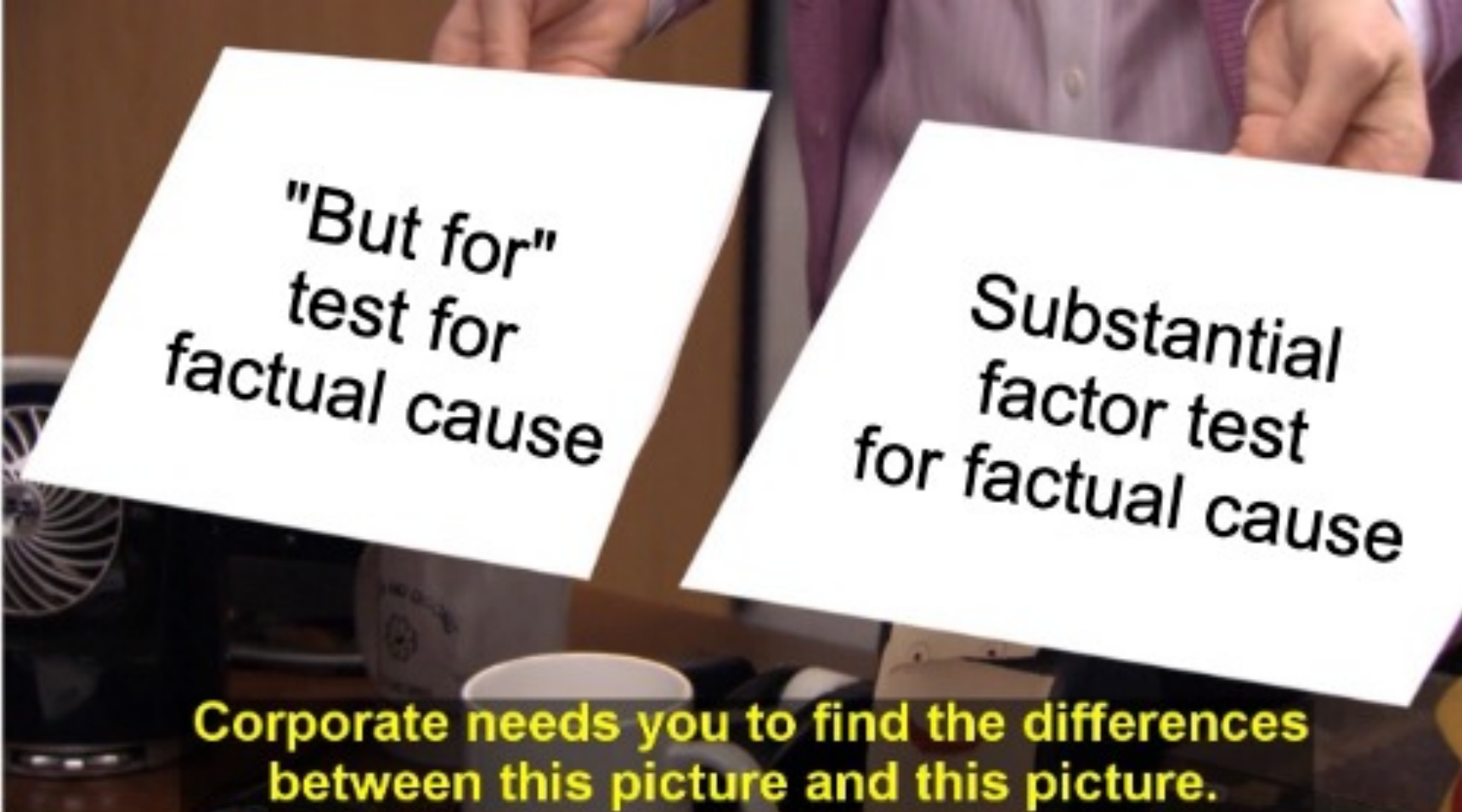
IF NOT condition, then NO result.

## Sufficient condition:

IF condition exists, then result happens.

# Two different tests for factual causation


1. “But for”
2. Substantial factor



"But for"  
test for  
factual cause

Substantial  
factor test  
for factual cause

Corporate needs you to find the differences  
between this picture and this picture.



They're the same picture.

# California Jury Instructions

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

[Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]

# Summers v. Tice

“Hunting Party Whodunnit”

# Summers v. Tice

Three reasons for alternative liability:

1. Almost 51% probability
2. Fairness
3. “Smoke out” the real evidence



# Summers v. Tice

~~Three~~ reasons for alternative liability:

1. ~~Almost 51% probability~~
2. Fairness
3. ~~“Smoke out” the real evidence~~

# Garcia v. Joseph Vince Co.

“Fencing Sabre Whodunnit”