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On Causation and Comparison: Medical Malpractice and other Professional Negligence After *Steiner Corp. v. Johnson & Higgins*

Ryan M. Springer

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I. INTRODUCTION

> Now God cannot be directly the cause of sin, either in Himself or in another, since every sin is a departure from the order which is to God as the end . . . . In like manner, neither can He cause sin indirectly. For it happens that God does not give some the assistance, whereby they may avoid sin, which assistance were He to give, they would not sin . . . . It is therefore evident that God is nowise a cause of sin.[1]

God has many names, but fortunately for organized religion, "The Initial Tortfeasor" is not one of them.[2] According to the Christian philosopher St. Thomas Aquinas, apportioning any liability to God for the sins of mortals would be entirely inappropriate since, as a matter of law, "God cannot be directly the cause of sin."[3] Certainly, such a conventional interpretation of the statement presents an intriguing theological idea. This note, however, offers a less reverent reading of Aquinas' proposition.

It posits that when read in the context of tort law, Aquinas' reasoning bears a striking resemblance to that employed by the Utah Supreme Court in *Steiner Corp. v. Johnson & Higgins* ("*Steiner Corp. III*").[4] The statement not only explains that God is not liable for the sins of

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1. 7 ST. THOMAS AQUINAS, SUMMA THEOLOGICA 386-87 (Fathers of the English Dominican Province trans., Burns Oates & Washbourne Ltd. 2d ed. 1927) (1265-1273).

2. It is possible, however, that one might argue that God's liability for certain actions is implicitly couched in such tort doctrines as the "act of God" defense. For an introduction to this defense, absent any religious implications, *see* DAN B. DOBBS, THE LAW OF TORTS § 191 (2000) [hereinafter DOBBS].

3. AQUINAS, *supra* note 1, at 386.

4. 2000 UT 21, 996 P.2d 531 [hereinafter *Steiner Corp. III*].

humankind, but also provides an analogy that may be used to understand the complicated doctrine of comparative negligence.

Steiner Corp. III dealt with Utah's comparative negligence laws, which establish a system of damages apportionment intended to distribute responsibility for the plaintiff's injuries among all the persons and entities that contributed to the harm.[5] The court, applying Utah's statutory scheme, held that liability for professional malpractice could not be apportioned to a plaintiff who caused the preexistent condition that created the need for the professional's assistance. The court explained that a preexistent condition "cannot be the cause, either proximate or direct, of the professional's failure to exercise an appropriate standard of care in fulfilling his duties."[6]

The holding of *Steiner Corp. III* marks a significant departure from the common law, but by doing so, it creates an appropriate balance of the policy considerations underlying Utah's comparative apportionment laws. As will be argued below, the *Steiner Corp. III* holding should also extend to situations where the preexistent conditions were caused by third-party tortfeasors as well as plaintiffs.

The first section of this note explains briefly the development of the comparative negligence doctrine, including its statutory adoption in Utah.[7] It also discusses two important interpretive cases as well as the subsequent effect of the Liability Reform Act.[8] The second section discusses the principal case, *Steiner Corp. III*, and several of the extra-jurisdictional cases upon which it relies. The final section addresses the policy considerations of Utah's apportionment system as applied in medical malpractice situations.

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5. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 67 (5th ed. 1984 & Supp. 1988) [hereinafter PROSSER AND KEETON].

6. *Id.* at 533.

7. This note does not extensively treat the development and dissemination of the comparative negligence doctrine. For a comprehensive discussion of this issue and its particular impact in Utah pre-*Steiner Corp. III* see Lee A. Wright, Comment, *Utah's Comparative Apportionment: What Happened to the Comparison?* 1998 UTAH L. REV. 543, 546-559.

8. 1986 Utah Laws 470, (amending UTAH CODE ANN. § 78-27-40 (Supp. 1986) (repealing former UTAH CODE ANN. § 78-27-40) (amended 1994)).

II. THE ADOPTION OF UTAH'S COMPARATIVE NEGLIGENCE AND LIABILITY REFORM ACTS

A. The Common Law: Contributory Negligence

Although the doctrine of comparative negligence has roots as ancient as its contributory negligence counterpart,[9] the latter doctrine was more widely accepted by the common law. One of the earliest cases involving contributory negligence is the 1809 case of *Butterfield v. Forrester*.[10] In *Butterfield*, the plaintiff sustained injuries from being thrown from his horse after it ran into debris negligently left in the road by the defendant.[11] Reasoning that "[a] party is not to cast himself upon an obstruction," Lord Ellenborough concluded that the plaintiff should be prohibited from recovering damages from the defendant.[12]

That reasoning gained favor throughout both England and America and the defense of contributory negligence became widely accepted as an absolute bar to recovery where a plaintiff's conduct contributed even slightly to the injuries.[13] It was not long, however, before the doctrine's application was limited. Courts started to recognize exceptions to the absolute defense of contributory negligence in cases where the defendant's conduct was intentional, wanton, or reckless, as well as in cases where the defendant had the last clear chance to avoid the injury.[14]

Before its decline, however, contributory negligence enjoyed a lengthy run in Utah, being accepted even prior to statehood[15] and lasting through the early 1970s.[16] Nevertheless, Utah courts apparently struggled with the outcomes of pure contributory negligence and soon joined the other jurisdictions that recognized the various common exceptions.[17]

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9. *See* A. Chalmers Mole and Lyman P. Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 33 (1932); William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 475-476. *See also* Wright, *supra* note 7, text accompanying notes 51-52.

10. 103 Eng. Rep. 926 (K.B. 1809).

11. *See id.* at 926-27.

12. *Id.*

13. *See* DOBBS, *supra* note 2, § 199 at 194.

14. *See* RESTATEMENT (SECOND) OF TORTS § 479 (1965); *see also* Fleming James, Jr., *Contributory Negligence*, 62 YALE L.J. 691, 706-729 (1953).

15. *See* Lawrence & Mann v. Howard, 1 Utah 142 (1874).

16. *See* Bridges v. Union Pac. R. Co., 488 P.2d 738, 740 (Utah 1971) ("The common law doctrine of contributory negligence has long been the rule of decision in the courts of this state, and . . . has attained a status similar to a statutory enactment. The legislative power of this state is vested in the legislature . . . and abrogation of the common-law doctrine of contributory negligence should be by legislative enactment.").

17. *See, e.g.*, Holmgren v. Union Pac. R. Co., 198 P.2d 459, 463 (Utah 1948) (recognizing the "last clear chance" exception); Jensen v. Denver & R.G.R. Co., 138 P. 1185, 1190 (Utah 1914) (recognizing exception where defendant's conduct manifested "reckless disregard").

Even so, Utah was reluctant to abandon the doctrine altogether.[18] But it was only a matter of time until the harsh results of contributory negligence were replaced in the majority of American jurisdictions, including Utah.

B. The Rise of Comparative Negligence

1. Adoption of comparative negligence in Utah

Generally, comparative negligence is the term for a system of damages apportionment based on the relative fault of all responsible parties.[19] The doctrine resolves some of the inequities implicit in contributory negligence by including the plaintiff's percentage of fault in an apportionment of liability and then reducing the amount of the judgment by that percentage, rather than operating as an absolute bar to recovery.[20] Its increasing popularity was likely the result of the same concerns that had motivated courts to develop the numerous exceptions to contributory negligence.

State legislatures began to replace contributory negligence with comparative negligence in the 1970s.[21] Utah joined the movement in 1973 by enacting its own Comparative Negligence Act.[22] In addition to setting forth provisions for the new doctrine, the Comparative Negligence Act expressly put an end to contributory negligence.[23]

Somewhat paradoxically, however, Utah maintained the doctrine of joint and several liability. Under this common law doctrine, responsibility could be apportioned to multiple tortfeasors, but each defendant was individually liable for the entire award.[24] Therefore, in situations where one or more responsible parties were immune or otherwise insolvent, the remaining defendants would have to pay amounts of the judgment disproportionate to their share of fault.[25]

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18. *See* Myers v. San Pedro, L.A. & S.L.R. Co., 116 P. 1119, 1121 (Utah 1911) (refusing to apply comparative negligence); *see also Bridges*, 488 P.2d. at 740.

19. *See* VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE, § 2-1 at 31 (3d ed. 1994 & Supp. 2000) [hereinafter SCHWARTZ].

20. *See* PROSSER AND KEETON, *supra* note 5, § 67.

21. *See* SCHWARTZ, *supra* note 19, §§ 1-4 to -5.

22. 1973 Utah Laws 710 (enacting UTAH CODE ANN. §§ 78-27-37 to -43 (Supp. 1973) (repealed, revised, and reenacted 1986, amended 1994, 1996, 1999)).

23. *See* UTAH CODE ANN. § 78-27-37 (Supp. 1985) (repealed, revised, and reenacted 1986, amended 1994, 1996, 1999) ("Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence . . . resulting in death or in injury to person or property . . . .").

24. *See* PROSSER AND KEETON § 47, *supra* note 5.

25. *See id.* at 327-328 ("When joinder is permitted, it is not compelled, and each tortfeasor

The only legal remedy available to a defendant who paid a disproportionate share was a separate suit against the joint tortfeasors for contribution. In some cases, such as those involving plaintiffs who deliberately chose not to sue certain joint tortfeasors because of impecuniosity, defendants would have little legal recourse at all and would pay the price for another person's conduct. Whereas contributory negligence placed undue burdens squarely on the plaintiff's shoulders, joint and several liability placed burdens on solvent defendants.[26] At best anomalous and at worst unjust, joint and several liability remained a part of Utah's comparative negligence scheme for a number of years.

2. Incorporation of the "unit rule"

An additional consideration involved in comparative negligence cases is the preliminary question of whether or not the negligence of separate tortfeasors should be aggregated or weighed separately. In 1984, the Utah Supreme Court addressed this issue in *Jensen v. Intermountain Health Care, Inc.*[27] Although the decision provides only a sparse account of the facts, it explains that the decedent of the plaintiff died as a result of negligence on the part of a physician and hospital.[28] A jury apportioned 46 percent of the fault for the decedent's death on his own negligence, and 18 and 36 percent on the physician and hospital, respectively.[29] The jury awarded the plaintiff proportionate damages, but the trial court set the judgment aside for no cause of action since the decedent's own negligence exceeded that of either of the defendants' individually.[30]

The trial court's decision was consistent with the minority "Wisconsin rule," which compares the fault of each defendant separately against the fault of the plaintiff.[31] On appeal, however, the Utah Supreme Court specifically incorporated the more widely accepted "unit rule," which aggregates the fault of multiple defendants and compares it with the plaintiff's own.[32] Applying this rule, the court combined the

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may be sued severally, and held responsible for the damage caused, although other wrongdoers have contributed to it.").

26. *See id.*

27. 679 P.2d 903 (Utah 1994).

28. *Id.*

29. *Id.*

30. *Id.* at 904. Under Utah's present comparative negligence statute, plaintiffs are barred from recovery where their own negligence amounts to fifty percent or more of the total fault; *see* UTAH CODE ANN. § 78-27-38 (1996 & Supp. 2001).

31. *Id.*

32. *See id.*

negligence of the defendants, thus making them collectively responsible for 54 percent of the total fault, and remanded the case for entry of the jury's verdict.[33]

Jensen is significant primarily for its adoption of the unit rule. However, it also illustrates that under the Comparative Negligence Act in 1984, the negligence of the decedent was apportioned in a medical malpractice action. Under Utah law, decedents possess the right to commence wrongful death actions, but for obvious reasons, the right vests in the decedent's personal representatives or heirs.[34] In *Jensen*, the actual right of the action was the decedent's, and *his* negligence was apportioned along with the professional negligence of the physician and hospital. Therefore, the practical result of the Utah Supreme Court's decision was the apportionment of the plaintiff's own negligence. As will be discussed below, however, such apportionment of a plaintiff's negligence was specifically rejected in *Steiner Corp. III*.

3. The Liability Reform Act

The legislative acts adopted in Utah and their underlying policies provide some insight into the disparate outcomes in *Jensen* and *Steiner Corp. III*. In 1986, the Utah Legislature revised the Comparative Negligence Act by adopting the Liability Reform Act.[35] Although the Reform Act retained some of the 1973 Comparative Negligence Act's provisions, it also made some important changes. One such change was the Reform Act's adoption of the term "comparative fault."[36] The concept of "fault," which originally appeared in the Utah Supreme Court's decision in *Mulherin v. Ingersoll-Rand Co.*,[37] was ultimately expanded to include both strict liability[38] and unknown or unidentified tortfeasors.[39] Most importantly, however, the adoption of "comparative fault" indicated the Utah Legislature's intent to significantly revise tort liability by shifting the focus from traditional tort doctrines to the singular inclusive concept of fault.[40]

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33. *Id.* at 909.

34. *See* UTAH CODE ANN. § 78-11-12 (1996 & Supp. 2001).

35. *See* 1986 Utah Laws 470 (amending UTAH CODE ANN. § 78-27-40 (Supp. 1986) (repealing former UTAH CODE ANN. § 78-27-40) (amended 1994)).

36. *Id.*

37. 628 P.2d 1301 (Utah 1981) (applying comparative fault in a products liability case).

38. *See* S.H. v. Bistryski, 923 P.2d 1376 (Utah 1996).

39. *See* Field v. Boyer, 952 P.2d 1078 (Utah 1998).

40. *See* Haff v. Hettich, 1999 ND 94, ¶ 14, 593 N.W. 2d 383, 387. *See also infra* text accompanying notes 93-105.

Additionally, the express abandonment of the doctrine of joint and several liability further demonstrates the legislature's intent. The new statute declared that "no defendant shall be liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant."[41] This language illustrated the Legislature's dissatisfaction with the inequitable distribution of liability among parties present under the common law systems. Moreover, these legislative changes helped establish the doctrinal landscape for the *Steiner Corp. III* decision.

C. Apportionment and Adjudication

When considering the judicial applications of the Utah Legislature's statutory reform, it is important to keep in mind three of the major purposes of tort law. First, tort law exists to deter wrongful conduct.[42] If persons are aware that there will be financial consequences for irresponsible behavior, they will be less likely to engage in tortious conduct.[43] Second, tort law encourages socially responsible behavior.[44] By holding liable parties financially accountable for the consequences of their actions, persons have an incentive to behave responsibly.[45] And finally, tort law serves to restore injured parties to their original condition by calculating damages and awarding financial remuneration.[46] Comparative negligence involves all of these policy considerations, but through its system of apportionment, focuses more immediately on the accountability concerns inherent in the second. As illustrated by the cases below, it is often difficult to satisfy all of the policy concerns equally.

In 1993, several cases tested new language of the Reform Act while balancing the fundamental interests of tort law.[47] The first of the post-Reform Act cases to reach the Utah Supreme Court, *Sullivan v. Scoular Grain Co.*,[48] is a significant benchmark in comparative fault jurisprudence in Utah.[49] The case involved a personal injury claim

41. UTAH CODE ANN. § 78-27-38 (1996 & Supp. 2001).

42. *See* DOBBS, *supra* note 2, § 1.

43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.*

47. *See* Dahl v. Kerbs Constr. Co., 853 P.2d 887 (Utah 1993); Brown v. Boyer-Washington Boulevard Assoc. v. CCC & T, 856 P.2d 352 (Utah 1993); Ericksen v. Salt Lake City Corp. v. Projects Unlimited, Corp., 858 P.2d 995 (Utah 1993).

48. 853 P.2d 877 (Utah 1993).

49. For discussion on the impact of Sullivan, *see* Dale T. Hansen, *Sullivan v. Scoular Grain Co.: Apportioning the Fault of Immune Employers*, 1994 BYU L. REV. 187; Geoffrey C. Haslam,

arising from a workplace accident.[50] Sullivan sued multiple defendants, including his employer, who was immune under the exclusive remedy provision of Utah's Workers' Compensation Law.[51]

Sullivan arrived at the Utah Supreme Court as two certified questions from the Federal District Court of Utah.[52] First, the District Court asked if Utah's comparative negligence scheme allowed "a jury [to] apportion the fault of the plaintiff's employers that caused or contributed to the accident although said employers are immune from suit"; and second, whether a jury could "apportion the fault of an individual or entity that has been dismissed from the litigation but against whom it is claimed that they have caused or contributed to the accident."[53]

Sullivan balanced the policy interests of restoring the plaintiff to his original condition with encouraging socially responsible behavior in situations where a partially accountable tortfeasor is immune from the judgment. If liability were apportioned to the immune employer, its immunity would relieve it of the financial responsibilities to the plaintiff. Consequently, the plaintiff could not fully recover and would therefore not be returned to his original condition.

Conversely, if the immune employer were not included in the apportionment, the percentage of its fault would not be determined, which would potentially yield three results. First, the employer would not be notified of the extent of its fault, and therefore would presumably not know what corrective measures it might need to enact to prevent future injuries. Second, assuming the employer was aware of the nature of its duty, not apportioning a percentage of fault would encourage future recklessness since there could be no financially adverse consequence. And finally, since the percentage of the employer's fault would not be factored into the total damages equation, the remaining tortfeasors would have to share the financial responsibility for the employer's fault, thus effectively resurrecting the inequities of joint and several liability.

Clearly, neither option could be entirely consistent with the legislative rejections of contributory negligence and joint and several liability and satisfy the attending policy concerns. Nevertheless, the court had to decide the issue based on the existing statutory language. Doing

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Apportioning the Comparative Fault of Non-party Joint Tortfeasors, 1994 UTAH L. REV. 444; Tim D. Dunn & W. Brent Wilcox, *Significant Changes in Comparative Fault and Workers' Compensation Reimbursement*, UTAH B.J. Aug.-Sept. 1994; Lee Edwards, *Sullivan v. Scoular Grain Co. and the 1994 Amendments: Is Joint and Several Liability Really Dead in Utah?*, 9 BYU J. PUB. L. 327.

50. *See Sullivan*, 853 P.2d. at 878.

51. *Id.*

52. *Id.*

53. *Id.*

so, the majority answered the District Court's first question affirmatively. The Utah Supreme Court explained that "apportionment of fault does not of itself subject the employer to civil liability. Rather, the apportionment process merely ensures that no defendant is held liable to any claimant for an amount of damages in excess of the percentage of fault attributable to that defendant."[54]

On the second question, however, the court held that "an individual or entity dismissed from a case pursuant to an adjudication on the merits of the liability issue *may not* be included in the apportionment," explaining that "[w]hen a defendant is dismissed due to a determination of lack of fault as a matter of law, the defendant's exclusion from apportionment does not subject the remaining defendants to liability for damages in excess of their proportionate fault."[55]

Although the decision was consistent with "the statutory scheme viewed in its entirety,"[56] Justice Stewart vigorously dissented because of the policy shortcomings implicit in the result.[57] Recognizing that the statutory language indicated the Legislature's intent to exclude the negligence of non-immune persons, he argued that through abolishing joint and several liability, the Reform Act "divide[d] the fault of an immune party among both *plaintiffs* and *defendants*."[58] Justice Stewart disagreed with the majority because its interpretation "load[ed] . . . fault entirely onto a plaintiff," thus returning to the inequity of abandoned common law doctrines.[59]

As indicated by the majority and dissenting opinions in *Sullivan*, the revised statutory scheme resulted in significant tension between the various policy considerations implicit in comparative negligence analysis and the statutory language. Seeking to alleviate that tension, the Legislature created a more accommodating balance between the interests of plaintiffs and defendants. In 1996, the Legislature responded to *Sullivan* by creating a new framework for liability apportionment in

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54. *Id.*

55. *Id.*

56. Brown v. Boyer-Washington Boulevard Assoc. v. CCC & T, 856 P.2d 352 at 355 (Utah 1993) (Durham, J., concurring). *See also* Wright, *supra* note 7, at 577 (noting that the "inconsistency between the use of the terms 'person' and 'party' in the statute may show a lack of intent to limit the parties to whom fault can be attributed").

57. *See* Sullivan v. Scoular Grain Co., 853 P.2d 877 at 886 (Utah 1993).

58. *Id.* (Stewart, J. dissenting) (emphasis in original). Justice Stewart's view, however, assumes that jurors would be "naturally inclined" to allocate the immune tortfeasor's fault among the plaintiffs and defendants. While this view is arguably more equitable, the fact remains that the statutory language provided no instructive mechanism to guide the jurors' inclinations, even if Justice Stewart's optimistic appraisal of human nature was correct.

59. *Id.*

cases involving immune tortfeasors.[60] The new system, still in place, provides that the liability of immune persons can be apportioned so long as the total percentage of their fault is less than 40 percent.[61] If the immune person's fault exceeds 40 percent, however, courts are to reduce the percentage of fault to zero and reallocate that percentage among the other parties in proportion to the percentage of fault "initially attributed to each party by the fact finder."[62]

Ultimately, *Sullivan* and the subsequent statutory amendments illustrate the emphasis Utah's comparative negligence scheme places on accountability. Utah's statute is less concerned with the standing of parties vis-à-vis non-parties than with appropriately determining percentages of fault. And despite its attending controversies, *Sullivan* shows the difficultly in addressing accountability in light of other procedural obstacles. The statutory amendment, however, demonstrates the Legislature's desire to be as equitable as possible to parties in interest, regardless of the formal standing of parties.

III. THE NEXT STEP: *STEINER CORP. V. JOHNSON & HIGGINS*

A. History of the Case

Steiner Corp., a privately owned leasing corporation, established a retirement plan to provide benefits for its employees. [63] Under the plan, employees were entitled to receive either a monthly annuity or a lump sum distribution as the retirement benefit.[64] Over time, the lump sum formula was modified into a layered formula that calculated payments based on fixed interest rates.[65] The monthly annuity, however, was paid out according to fluctuating market rates, and consequently, the lump sum option was more valuable than the monthly annuity.[66] In 1977, the firm of Johnson & Higgins was hired as the actuary for the retirement plan.[67] Although the majority of Steiner Corp.'s employees chose the more valuable lump sum, Johnson & Higgins evaluated the retirement plan based on the value of the annuities.[68] As a result, the retirement plan

60. *See* UTAH CODE ANN. § 78-27-39(2)(a) (1996 & Supp. 2001).

61. *Id.*

62. *Id.*

63. Steiner Corp. v. Johnson & Higgins of California, 31 F.3d 935, 936 (10th Cir. 1994) *cert. denied*, 513 U.S. 1081, (1995) [hereinafter *Steiner Corp. I*].

64. *Id.* at 937.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

valuations substantially understated the value of the benefits and costs that Steiner Corp. had incurred.[69]

In 1988, Steiner Corp. sued Johnson & Higgins for professional malpractice and breach of contract.[70] The trial court ultimately ruled partially in Steiner Corp.'s favor but rejected the primary claim for professional malpractice on the basis of Johnson & Higgins' contributory negligence defense.[71] Both sides appealed, and the Tenth Circuit affirmed in part, reversed in part, vacated in part, and remanded on the apportionment issue.[72]

On remand, the trial court again rejected Steiner Corp.'s professional malpractice claims because under Utah's comparative negligence statute, Steiner Corp.'s negligence was comparatively greater than that of Johnson & Higgins.[73] Steiner Corp. appealed, arguing the trial court erred in finding Steiner's negligence comparatively greater than that of Johnson & Higgins.[74] The Tenth Circuit again reversed and remanded for a determination of causation and damages.[75]

B. The Steiner Corp. III *Decision: A Clear Direction for Utah's Comparative Negligence Scheme*

Upon receiving the Tenth Circuit's directions on remand, the trial court certified two legal questions to the Utah Supreme Court.[76] The first question was whether, under Utah law, negligent acts "causing or contributing to the situation that the plaintiff hired a professional to resolve can be the basis for comparative or contributory negligence defense."[77] The second question was whether negligent acts "causing or contributing to the situation the plaintiff hired a professional to resolve can be considered in determining causation and damages."[78] The court answered "no" to both questions, holding that in spite of an actor's negligence in causing a preexistent condition, he or she "cannot be held to be contributorily negligent unless their negligence is causally

69. *Id.*

70. Steiner Corp. v. Johnson & Higgins of California, 135 F.3d 684, 685 (10th Cir. 1998) [hereinafter *Steiner Corp. II*].

71. *Id.*

72. *See Steiner Corp. I.*

73. *Steiner Corp. II* at 685.

74. *Id.*

75. *Id.* at 694.

76. *Steiner Corp. III*, 2001 UT 21, ¶ 1, 996 P.2d 531, 531-32.

77. *Id.*

78. *Id.*

connected" to the specific injury from which plaintiff's complaint seeks relief.[79]

Although the facts in *Steiner Corp. III* dealt with an actuarial firm, the Utah Supreme Court also addressed other forms of professional malpractice in its holding.[80] The court specifically stated that this principle mutually barred comparative and contributory negligence defenses "regarding medical . . . services."[81] Referring to the facts from a Texas medical malpractice case,[82] the court stated that because negligence relating to a patient's preexistent condition "was not 'simultaneous[ ] with or cooperating with' the fault for which the plaintiff sought recovery," the contributory negligence defense could not be raised.[83] Additionally, the court recognized that conduct relating to a preexistent medical condition "was not allowed as a defense because the malpractice caused a 'distinct subsequent injury,'"[84] and that such instances of professional negligence were "'intervening or superseding cause[s]' without which there would have been no injury at all."[85]

This decision and its interpretation of Utah's comparative apportionment scheme have yet to be applied in a medical malpractice case. However, based on the reasoning of the opinion and the evidence of policy concerns implicit in various statutory revisions, it is apparent that its application will mark a significant departure from the common law in medical malpractice cases. More importantly, perhaps, that departure will enact the equitable considerations at the heart of comparative apportionment.

IV. COMPARATIVE FAULT APPORTIONMENT IN MEDICAL MALPRACTICE CASES POST-*STEINER CORP. III*

A. Medical Malpractice Jurisprudence and the Common Law

Medical malpractice cases require a showing of burden beyond conventional negligence cases. In order to prove medical malpractice, the

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79. *Id.* at ¶ 4, 532.

80. *Id.* at ¶ 5, 532 ("When applying these principles to professional negligence, other courts have barred contributory negligence defenses based on the plaintiff's actions taken before obtaining the services of a professional. The defenses have been barred regarding medical, legal, and accounting services." (citations omitted)).

81. *Id.*, at ¶¶ 5-6, 532, *citing* Sendejar v. Alice Physicians & Surgeons Hosp., Inc., 555 S.W.2d 879 (Tex. Civ. App. 1977); Matthews v. Williford, 318 So.2d 480 (Fla. Dist. Ct. App. 1975); Bourne v. Seventh Ward Gen. Hosp. 54 So.2d 197 (La. Ct. App. 1989).

82. *Sendejar* at 885.

83. *Steiner Corp. III* at ¶ 6, 532-33.

84. *Id.* at ¶ 6, 533, *citing Matthews* at 483.

85. *Id.*, *citing Bourne* at 203.

plaintiff must prove (1) the standard of care required of physicians under similar circumstances practicing in the same field or specialty, (2) that the applicable standard of care was breached, (3) that the injury to the plaintiff was proximately caused by the defendant's negligence, and (4) that damages occurred as a result of the defendant's breach of duty.[86]

In traditional tort law, proximate cause is generally a question of fact and is to be decided by the jury.[87] Malpractice cases, however, present some qualifications to this general rule. As the Utah Court of Appeals has explained, "[b]ecause of the complex issues involved in a determination of proximate cause in a medical malpractice case, the plaintiff must provide expert testimony establishing that the health care provider's negligence proximately caused plaintiff's injury."[88] The Utah Supreme Court has recognized proximate cause in the context of professional malpractice as "that cause which, in natural and continuous sequence, unbroken by efficient intervening cause, produces injury and without which the result would not have occurred."[89] The court added that proximate cause is also "the efficient cause which necessarily sets in operation the factors that accomplish the injury."[90]

This concept of proximate cause is consistent with the common law doctrine articulated in the Restatement. Section 457 of the Restatement states, "If the negligent actor is liable for another's injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or negligent manner."[91] Under this doctrine, parties who are the proximate cause of a plaintiff's injuries are liable for damages resulting from foreseeable consequences of the original tort.[92]

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86. Dalley v. Utah Valley Reg'l Medical Ctr., 791 P.2d 193, 195 (Utah 1990). *See also* Nixdorf v. Hicken, 612 P.2d 348, 354 n. 17 (Utah 1980) (holding that the plaintiff has the burden to prove that the defendant's negligence was the proximate cause of the injury).

87. Mahmood v. Ross, 1999 UT 104, ¶ 22, 990 P.2d 933, 938.

88. Kent v. Pioneer Valley Hosp., 930 P.2d 904 (Utah App. 1997). *See also* Chadwick v. Nielsen, 763 P.2d 817, 821 (Utah App. 1988) ("Due to the technical and complex nature of a medical doctor's services, expert medical testimony must be presented at trial in order to establish the standard of care and proximate cause.").

89. Harline v. Barker, 912 P.2d 433, 439 (Utah 1996). *See also Mahmood*, at ¶ 22, 938; Butterfield v. Okubo, 831 P.2d 97, 106 (Utah 1992); State v. Lawson, 688 P.2d 479, 482 n.3 (Utah 1984).

90. *Harline*, 912 P.2d at 439 (Utah 1996).

91. RESTATEMENT (SECOND) OF TORTS § 457 (1965).

92. *See id.*, cmt. a

("[D]amages assessable against the actor include not only the injury originally caused by the actor's negligence but also the harm resulting from the manner in which the medical, surgical, or hospital services are rendered, irrespective of whether they are rendered in a mistaken or negligent manner, so long as the mistake or negligence is of the sort which is recognized as one of the risks which is inherent in the human fallibility of those who

This policy makes sense when considered under the traditional joint and several liability schemes that were in place when the Restatement was drafted. Under joint and several liability, plaintiffs could still recover fully for damages from negligent medical practitioners even if the original tortfeasor were insolvent or otherwise unavailable, so long as the negligent practitioners were parties to the case. But as the cases discussed below illustrate, the wisdom of the Restatement's position is suspect when considered in light of the policy concerns inherent in contemporary comparative apportionment schemes.

B. Extra-Jurisdictional Support

State courts have begun to recognize that it is inappropriate to apportion liability for malpractice to initial parties, whether plaintiffs or third parties. For example, North Dakota's Supreme Court recently held in *Haff v. Hettich* that "an original tortfeasor is not liable . . . for damages caused by medical malpractice in treating the original injury."[93] In that case, the plaintiff had been injured in an automobile accident with the defendant.[94] The plaintiff sought treatment for his injuries from the accident from a chiropractor, who subsequently administered negligent care.[95] The plaintiff argued in accordance with the common law that "subsequent improper medical treatment is a direct and proximate consequence of an original tortfeasor's acts."[96] The court, applying a comparative apportionment scheme materially comparable to Utah's, disagreed.[97] They explained:

> We decline to construe the [comparative fault statute] to impose liability on an original tortfeasor for an intervening cause like medical malpractice that the original tortfeasor was deemed to foresee under common law, because that interpretation would render meaningless the language for determining the percentage of fault and damages attributable to each person and for allocating several liability to each party for the amount

render such services."). *Id.*

93. 1999 ND 94, ¶ 14, 593 N.W. 2d 383, 385.

94. *Id.* at ¶ 2, 385.

95. *Id.*

96. *Id.* at ¶ 9, 386.

97. North Dakota has also adopted "comparative fault" language and follows the unit rule. *Compare* UTAH CODE ANN. § 78-27-38 (4) (1996 & Supp. 2001) *with* N.D. CENT. CODE § 32-03.2-01 to -02 (1996); *See also* Mark Richard Hanson, Comment, *Negligence—The Unit Rule and North Dakota's Comparative Negligence Statute*, 64 N.D. L. REV. 135 (1998).

> of damages attributable to the percentage of fault of that party.[98]

Haff clearly and capably illustrates the appropriateness of extending *Steiner Corp. III*'s holding to cover all original tortfeasors, not merely plaintiffs, that cause preexisting conditions for which medical attention is sought.

Additionally, this conclusion is implicitly supported by one of the cases cited to in the *Steiner Corp. III* opinion, *Lamoree v. Binghamton General Hospital*.[99] In that case, a woman shot a man in the leg while he was attempting to enter the woman's mother's home.[100] The defendant hospital subsequently admitted the man for treatment of the gunshot wound, where after nearly eighteen hours of waiting, he died.[101] Ironically, the woman who shot the decedent was his estranged companion, and as such, became the administrator of his estate.[102] This gave her the legal standing to sue for wrongful death in his behalf, so she brought malpractice suits against the hospital and the attending physician.[103] The defendants argued that since "the death of the plaintiff's intestate and the damages and injuries referred to in the plaintiff's complaint were caused or contributed to, in whole and part, by the plaintiff administratrix and by the plaintiff's intestate," that consideration of comparative negligence was appropriate.[104] The court, however, held:

> Any tortious acts of the defendants. . .were successive and independent of any act of the plaintiff and the decedent. . . .Since the complaints allege negligence on the part of the defendants *after admission to the hospital, any conduct on the part of the plaintiff administratrix or the plaintiff's intestate before admission to the hospital should not be considered as a defense by the defendants for any negligence or improper treatment after the plaintiff's intestate was admitted to the hospital.*[105]

Lamoree perfectly illustrates the immateriality of a party's standing when applying comparative negligence analysis. Based on the New York court's reasoning, the outcome would have been the same with regard to Ms. Lamoree's contribution to the injury regardless of whether she was

98. *Haff* at ¶ 9, 386.
99. 329 N.Y.S. 2d 85 (1972).
100. *Id.* at 87-88.
101. *Id.* at 87.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 90 (emphasis added).

the plaintiff or merely a third-party tortfeasor. It was little more than coincidence that she, as the initial tortfeasor, also became the plaintiff in behalf of the decedent. The logic of the case, as well as its role in the *Steiner Corp. III* holding, justifies Utah's departure from common law medical malpractice jurisprudence, and warrants the extension of the holding to third parties as well as plaintiffs.

C. Policy Shifts, Comparative Fault, and Medical Malpractice

Under the common law, concerns about proportionate distribution of fault and equitable apportionment of liability were not as important as punitive deterrence, as indicated by the harshness of contributory negligence and joint and several liability. The recent directions taken in Utah's comparative apportionment jurisprudence and legislation, however, illustrate that fairness and accountability have become primary policy considerations in Utah and other jurisdictions. Currently, courts seek to determine actual fault and allocate financial responsibility accordingly.

Steiner Corp. III clearly reflects this attention to equity in its holding. The court explained that for someone to be contributorily negligent, "his negligence must relate or contribute to the alleged injury caused by the professional stemming from the professional relationship."[106] It is impractical to think that the negligence or fault of one actor in creating a preexisting condition could actually contribute to the professional's negligence. It is also impractical to think that *Steiner Corp. III*'s reasoning should apply only to plaintiffs and not to third-party tortfeasors as well. In unequivocal language, without reference to the legal standing of any party, the Utah Supreme Court stated "that a preexisting condition that a professional is called upon to resolve *cannot be the cause*, either *proximate* or direct, of the professional's failure to exercise an appropriate standard of care in fulfilling his duties."[107]

Additionally, *Steiner Corp. III* reflects attention to policy concerns of actual accountability. The court noted that attributing fault for a professional's malpractice to another actor "would allow professionals to avoid responsibility for the very duties they undertake to perform."[108] Considering the common law systems of apportionment, however, it is apparent that attention to accountability was not a primary concern. It is

106. *Steiner Corp. III*, 2001 UT 21, ¶ 4, 996 P.2d 531, 532.

107. *Id.* at ¶ 7, 533 (emphasis added).

108. *Id.*

also apparent that not only should *Steiner Corp. III* be recognized as a departure from the common law, but also as a welcome one.[109]

D. Medical Malpractice Jurisprudence after Steiner Corp. III

If *Steiner Corp. III*'s language is taken on its face, the apportionment of an initial tortfeasor's fault in professional negligence cases under the third element of proving medical malpractice is automatically excluded. The holding, as a matter of law, eliminates the ability to determine proximate cause for malpractice because "a preexisting condition that a professional is called upon to resolve cannot be the cause, either proximate or direct, of the professional's failure to exercise an appropriate standard of care in fulfilling his duties."[110]

This conclusion effectively sustains the Liability Reform Act's abandonment of the joint tortfeasor doctrine. Additionally, *Steiner Corp. III* dealt with a preexistent condition caused by the plaintiffs, which would traditionally have been subject to a contributory negligence analysis. However, the court implicitly acknowledged the immateriality of the parties' legal standing, explaining that although answering certified questions dealing with what was traditionally subject to the doctrine of contributory negligence, "[s]ince comparative principles have previously been applied in cases dealing with contributory negligence, we will address the two doctrines together."[111] Ultimately, the conclusion advances Utah comparative fault jurisprudence beyond the common law's traditional restraints and justifications.

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109. It should also be noted that Utah's ability to move in such a direction is somewhat unique. Compared with other jurisdictions where comparative negligence statutes are to be interpreted in derogation to the common law, such progress could not occur. For instance, Florida, despite a comparative negligence scheme similar to Utah's, is required to interpret the doctrine with deference to the common law. *See* Wal-Mart Stores, Inc. v. McDonald, 676 So. 2d 12, 16 (Fla. Dist. Ct. App. 1996) ("Being in derogation of the common law, . . . Florida Statues must be strictly construed in favor of the common law." (citations omitted)). Utah's Legislature, however, has provided that:

> The rule of the common law that statutes in derogation thereof are to be strictly construed has not application to the statutes of this state. The statutes establish the laws of this state respecting subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter, the rules of equity shall prevail.

UTAH CODE ANN. § 68-3-2 (1996 & Supp. 2001).

110. *Steiner Corp. III* at ¶ 7, 533.

111. *Id.* at ¶ 4, 532.

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106. *Steiner Corp. III*, 2001 UT 21, ¶ 4, 996 P.2d 531, 532.

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