SMU | Dedman School of Law

SMU Law Review

Volume 22 | Issue 5 Article 10

1968

The Doctrine of Most Significant Contracts in Texas: Marmon v. Mustang Aviation, Inc.

and Code of Criminal Procedure Revision Committees have undertaken the formidable task of developing precise distinctions between insanity and incompetency for presentation to the 1971 Texas Legislature.[57] One may expect to see (1) terminological changes that reflect the different problems presented by mental unsoundness, (2) a mandatory preliminary hearing on incompetency, (3) specific guidelines on jury involvement in determining incompetency, and (4) the articulation of the various criteria to be used in making each decision.

J. Christopher Bird

The Doctrine of Most Significant Contacts in Texas: Marmon v. Mustang Aviation, Inc.

In November 1964, an airplane owned by Mustang Aviation crashed in Colorado, killing the four persons aboard. Three of the passengers were Texas residents. All were employed by and on a business trip for a Texas corporation. The aircraft was rented in Texas and had been hangared, maintained, and licensed in Texas. The only contact the decedents had with Colorado other than the accident was a one-hour stopover for refueling and weather information.[1]

Nevertheless, in the ensuing wrongful death action brought in Texas, the defendant airline contended that the law of Colorado was applicable since the accident occurred there and Texas traditionally followed the rule of lex loci delicti.[2] The Colorado statute, however, allows a maximum recovery of only $25,000 for wrongful death. To avoid this limitation the plaintiffs argued that the lex loci delicti rule should be abandoned in favor of the emerging doctrine of "most significant contacts."[3] Under the "most significant contacts" rationale, the law of the jurisdiction with the most significant relationship with the parties is applied. Thus the doctrine, if adopted, would make Texas law applicable to the case.[4]

Refusing to follow plaintiff's suggestion, the trial court applied the Colorado limitation on recovery. The court of civil appeals, affirming the trial court, refused to adopt the "most significant contacts doctrine," and held that the substantive law of the place of the tort governed,[5] that the amount of damages was substantive, and that Colorado limitation on recovery must therefore be applied. In reaching this decision, the court reasoned that article 4678,[6] giving Texas citizens the right to maintain an action in Texas courts for wrongful death occurring in another state or foreign country, made Colorado law applicable to determine the extent of

[57] *See* note 43 *supra.*

[1] Marmon v. Mustang Aviation, Inc., 416 S.W.2d 58 (Tex. Civ. App. 1967).

[2] RESTATEMENT OF CONFLICT OF LAWS § 379 (1934). The lex loci delicti doctrine provides for the application of the laws of the state where the injury occurred; J. BEALE, A TREATISE ON THE CONFLICT OF LAW 1933-34 (1935).

[3] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1965), which advocates the application of the "local law of the state which has the most significant relationship with the occurrence and with the parties."

[4] TEX. REV. CIV. STAT. ANN. arts. 4671-78 (1952). This would allow the plaintiffs to avoid the Colorado limitation and have an unlimited recovery as provided by Texas Law.

[5] Marmon v. Mustang Aviation, Inc., 416 S.W.2d 58 (Tex. Civ. App. 1967).

[6] TEX. REV. CIV. STAT. ANN. art. 4678 (1952).

recovery.[7] Plaintiffs appealed to the Supreme Court of Texas. *Held, affirmed*: The doctrine of "most significant contacts" cannot be applied because to do so would give the Texas wrongful death statute an extraterritorial effect. *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d. 182 (Tex. 1968).

I. The Law Applicable to Tort Actions Brought in Texas

Texas has long followed the doctrine of lex loci delicti in choosing the law applicable to tort cases.[8] This has been carried to extremes occasionally. Where the law[9] of the place of the tort, the loci delicti, was extremely dissimilar to that of Texas, the Texas court would decline to adjudicate the case.[10]

---

[7] 416 S.W.2d at 63.

[8] "The law of the place where the cause of action arose, the lex loci delictis, must determine the nature of the cause of action, and the defenses, if any, available. The case asserted must stand or fall upon the law." Jones v. Louisiana W. Ry., 243 S.W. 976, 978 (Tex. Comm'n App. 1922); Withers v. Stimmel, 363 S.W.2d 144 (Tex. Civ. App. 1962), *error ref. n.r.e.*

[9] The term "law" has been interpreted to mean both the right, or cause of action itself, and the remedy. In Mexican Nat'l Ry. v. Jackson, 89 Tex. 107, 33 S.W. 857 (1896) the Texas Supreme Court noted the dissimilarities of Texas and Mexican law in detail. Under Mexican law, the plaintiff's *right* to recover in a civil action for negligence depended upon a determination of the defendant's criminal liability for the same wrong. If the criminal liability was determined the plaintiff's *remedy* was an initial judgment for the amount that his present injury was ascertainable and both judgments if the injury worsened or recurred. The plaintiff also had a *right* to recover for injuries to members of his family occasioned by the tort. The defendant made her payments to the plaintiff in installments and had a *right* to have those payments diminished by the extent the plaintiff was later able to earn a living. The court noted that these rights and the remedies they entailed were both different from anything known to the laws of Texas. This dissimilarity in both the rights and the remedies furnished an ample basis for the court to decline to adjudicate the case where the plaintiff had the alternative of bringing his action in Mexico initially, where these rights and remedies could be properly determined. The court bolstered this rationale by considering the disruptive effects which an adjudication of a tort occurring in Mexico might have on trade between Texas and Mexico as this might in effect subject carriers who conducted such trade to an uncertain standard of liability.

The court here did state that the refusal to adjudicate the plaintiff's case worked no injustice upon him because he could still seek redress in the courts of Mexico. But if this were not so, said the court, the "interests of justice" would require the Texas courts to decide the case to prevent the plaintiff from being left without a forum, and the concern for the dissimilarity of the laws of Texas and Mexico and the preservation of good trade relations would have little weight. This result would still be in conformity with the lex loci delicti doctrine.

The Texas Supreme Court also held in St. Louis I.M. & S. Ry. v. McCormick, 71 Tex. 660, 9 S.W. 540 (1888), that the enforceability of rights in Texas courts extends only so far as they are similar to those granted in Texas law. The same statement was made in Texas & Pac. Ry. v. Richards, 68 Tex. 375, 4 S.W. 627 (1887), wherein the court said that the same considerations of similarity also affected the remedy as well as the right.

Thus the concern of the court regarding the application of dissimilar law pertains to both the right and the remedy and persists to date. *See* Garza v. Greyhound Lines, Inc., 418 S.W.2d 595 (Tex. Civ. App. 1967). But the potential harsh results of such a refusal where it would leave the plaintiff without a forum, which would occur in a case like Mexican Nat'l Ry. Co. v. Jackson, *supra*, if the defendant corporation was not amenable to litigation in Mexico or any other forum, was recognized in the *Jackson* case. Apparently the court could in the interests of justice proceed to apply even dissimilar law, as the court in *Jackson* stated, where the plaintiff brought his suit in Texas as a matter of necessity since he had no other forum and not a choice. This would still be in conformity with the lex loci delicti doctrine.

[10] Mexican Nat'l Ry. v. Jackson, 89 Tex. 107, 33 S.W. 857 (1896). There were exceptions to this rule, however, as evidenced by the case of Mexican Cent. Ry. v. Mitten, 13 Tex. Civ. App. 653, 36 S.W. 282 (1896), *error ref.* The court in *Mitten* allowed recovery by the plaintiff in a lump sum for a tort committed in Mexico, despite the fact that Mexican law was greatly dissimilar to that of Texas. The court criticized an earlier case, Mexican Nat'l Ry. v. Jackson, 89 Tex. 107, 33 S.W. 857 (1896), which held that Mexican law was so dissimilar to that of Texas that Texas courts could not adjudicate a claim for a tort occurring in Mexico. The court in *Mitten* determined that the state of Texas had such a significant relationship with the occurrence so as to allow the Texas

The harsh result[11] of the refusal by Texas courts to adjudicate cases involving dissimilar foreign law has been mitigated to a great extent by article 4678.[12] Basically, this statute permits citizens of Texas to maintain actions in Texas courts for torts occurring in other jurisdictions, and to enforce the remedies provided by the jurisdiction in which the tort occurs.

It is not clear whether the statute is mandatory, but the point was touched on in *Flaiz v. Moore*.[13] There the Texas Supreme Court stated in dicta that the requisite authority for enforcing a *cause of action* given by foreign law, even where Texas law provided none, was supplied by article 4678 and that Texas courts could no longer refuse to adjudicate such suits.[14] Thus, the doctrine of refusing to adjudicate a claim involving foreign law dissimilar to that of Texas may be obsolete.[15]

II. General Development of the "Most Significant Contacts" Doctrine

The first major step[16] toward adoption of the doctrine of "most significant contacts" occurred in *Kilberg v. Northeast Airlines*.[17] In *Kilberg* the

court to try the case where a Texas resident was involved. This result was not, however, incompatible with the lex loci delicti doctrine in that Mexican law, the law of the place where the tort occurred, was applied.

[11] *See* note 9 *supra*.

[12] Tex. Rev. Civ. Stat. Ann. art. 4678 (1952):

> Whenever the death or personal injury of a citizen of this State or of the United States, or of any foreign country having equal treaty right with the United States on behalf of its citizens, has been . . . caused by the wrongful act, neglect or default of another in any foreign State or country for which a right to maintain an action and recover damages thereof is given by the statute or law of such foreign State or country, such right of action may be enforced in the courts of this State . . . .

It has been thought until recently, however, that foreign laws must be similar to those of Texas before they are enforceable in the state. *See* El Paso & Juarez Faction Co. v. Carruth, 255 S.W. 159 (Tex. Comm'n App. 1923); Carter v. Tillery, 257 S.W.2d 465 (Tex. Civ. App. 1953), *error ref. n.r.e.* The potential harsh results of the doctrine of refusal to apply dissimilar law have been accounted for in the case of Mexican Nat'l Ry. v. Jackson, 89 Tex. 107, 33 S.W. 857 (1896), and probably pose no real problem, since the court there said that they would not refuse adjudication if the harsh results of doing so were actually shown. *See* note 9 *supra*.

[13] 359 S.W.2d 872 (Tex. 1962).

[14] *Id.*

[15] The doctrine has probably never been a hard and fast rule. *See* note 9 *supra*.

[16] The development of the "most significant contacts" doctrine can arguably be traced to a dissent in an early Supreme Court case, Slater v. Mexican Nat'l Ry., 194 U.S. 120 (1904), although the Court did not specifically discuss the doctrine. The majority in *Slater* determined that the amount of damages recoverable for a tort occurring in Mexico was substantive and thus controlled by the law of the locus delicti. This case was referred to in Marmon v. Mustang Aviation, Inc., 416 S.W.2d 58 (Tex. Civ. App. 1967), as being "at the head of" the line of cases applying the lex loci delicti doctrine. *Id.* at 62. This view has been consistently followed by the Texas courts. Withers v. Stimmel, 363 S.W.2d 144 (Tex. Civ. App. 1962), *error ref. n.r.e.*; Davis v. Gant, 247 S.W. 576 (Tex. Civ. App. 1922), *error ref.* (allowing recovery for mental anguish permitted under laws of the locus delicti, though such is not allowed in Texas); Texas & N.O.R.R. v. Miller, 128 S.W. 1165 (Tex. Civ. App. 1910), *error ref.*; Thomas v. Western Union Tel. Co., 61 S.W. 501 (Tex. Civ. App. 1901), *error ref.* "A question of damages pertains to the right, not the remedy and is not governed by the law of the forum. This is the rule whether the action is based on tort or contract." 12 Tex. Jur. 2d *Conflict of Laws* § 14, at 314 (1960).

Before the *Slater* decision, the federal courts exhibited a concern over the harshness of strictly applying the lex loci delicti doctrine. In Reeves v. Shulmeier, 303 F.2d 802 (5th Cir. 1902), the court held that for a tort occurring in Oklahoma, the Oklahoma law allowing the wife to sue without joining her husband, must be applied, and not the Texas law refusing to allow such procedure because of the community property stature of the recovery. One can speculate as to the possible influence this approach might have had, if it had persisted, on our state courts, given the remarkable adherence to the opposite *Slater* view which actually did occur.

[17] 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). The court expressly commended the reasoning in the *Slater* dissent.

New York Court of Appeals allowed recovery under a Massachusetts wrongful death statute for a tort occurring in Massachusetts, but refused to apply the limitation on the amount of recovery which the Massachusetts statute prescribed.[18] However, the *Kilberg* court did not adopt the "most significant contacts" doctrine. Instead, it based the decision on New York's public policy in favor of helping its own citizens. Any intimation in *Kilberg* that the measure of damages was procedural rather than substantive was later disapproved by the New York Court of Appeals,[19] and the public policy justification remained the principle basis for such decisions.[20] Finally, two years after *Kilberg*, the court expressly adopted the doctrine of "most significant contacts."[21]

Other states soon embraced the "most significant contacts" rationale. For example, the Supreme Court of Pennsylvania adopted the doctrine in *Griffith v. United Airlines, Inc.*,[22] a case involving the wrongful death act of Colorado. Thereafter five other states unequivocally recognized the doctrine of "most significant contacts."[23] In addition, the doctrine has been adopted in the Second,[24] Fourth,[25] Fifth,[26] and Seventh Circuits.[27]

III. "Most Significant Contacts:" Some Theoretical Considerations

Generally, cases fall into three categories.[28] The first is the spurious conflict, which arises when only one state has a policy affected by the occurrence. *Wilcox v. Wilcox* is an excellent example of such a conflict.[29] There a husband and wife domiciled in Wisconsin were injured in an auto accident in Nebraska, and the wife sued the husband in Wisconsin. The husband contended that the Nebraska guest statute, which prevented recovery in any case except one involving gross negligence, should be applied.

---

[18] This occurred despite the fact that the adoption of any rule other than lex loci delicti was flatly rejected in the earlier case of Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918), wherein the court overruled Wooden v. Western N.Y. & P.R. Co., 126 N.Y. 10, 26 N.E. 1050 (1891). *Wooden* was a case demonstrating an early recognition by the New York court of the value of a logical approach to the choice of laws problem in tort litigation, much like that finally advocated by the "most significant contacts" doctrine.

[19] Davenport v. Webb, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962).

[20] The constitutionality of such an approach was upheld in a later federal case, Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir.), *cert. denied*, 372 U.S. 912 (1962). This case involved the same plane crash as litigated in *Kilberg*. In *Pearson* the defendant unsuccessfully contended that the full faith and credit clause of the Constitution of the United States, U.S. Const. art. IV, § 1, required New York to give effect to the Massachusetts statute.

[21] Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963).

[22] 416 Pa. 1, 203 A.2d 796 (1964).

[23] Iowa, in the case of Fabricius v. Norgen, 257 Iowa 268, 132 N.W.2d 410 (1965); Wisconsin, in the case of Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965); Minnesota, in the case of Kopp v. Rechtzigel, 273 Minn. 441, 141 N.W.2d 526 (1966); New Hampshire, in the case of Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Florida, in the case of Hopkins v. Lockheed Aircraft Corp., 201 So. 2d 743 (Fla. 1967).

[24] Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir.), *cert. denied*, 372 U.S. 912 (1962).

[25] McClure v. United States Liner Co., 368 F.2d 197 (4th Cir. 1966).

[26] Sequros Tepeyac v. Bostrom, 347 F.2d 168 (5th Cir. 1965).

[27] Watts v. Pioneer Corn Co., 342 F.2d 617 (7th Cir. 1965).

[28] For a discussion of the categories of conflicts in tort, see Note, *Wilcox v. Wilcox: The Beginning of a New Approach to Conflict of Laws in Tort Cases*, 1966 Wis. L. Rev. 913.

[29] 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

The trial court and the court of appeals agreed. However, the Supreme Court of Wisconsin reversed and, on the basis of the "most significant contacts" doctrine, applied Wisconsin law. The court reasoned that the Nebraska law in question was clearly designed to protect Nebraska defendants. The Wisconsin law, which allowed recovery by an injured automobile guest, was designed to protect Wisconsin plaintiffs. Since both the plaintiff and defendant were from Wisconsin, the purpose for which the Nebraska law was created could not be served by its application in this case. But the purpose for which the Wisconsin law was enacted could be furthered. In short, Nebraska had no real interest in the situation while Wisconsin did. The conflict was spurious and Wisconsin law should apply.

The second category is the direct conflict,[30] which occurs when more than one state has an interest in applying its law. This would have been the situation in the *Wilcox* case if the defendant had been a Nebraska domiciliary. The third and final category is the erroneous conflict,[31] in which the policy of neither state is affected. This would have been the case in *Wilcox* if neither the plaintiff nor the defendant resided in Wisconsin or Nebraska and the suit was brought in Wisconsin.

The lex loci delicti doctrine seems more logically applicable to the case of an erroneous conflict. The application of the doctrine in such a case conflicts with no interest of either state involved. Thus, the element of certainty in choosing the applicable law which lex loci delicti affords is a persuasive factor in commending the doctrine. However, in the direct conflict situation, where both states have an interest in applying their law, the logical commendations of lex loci delicti decrease. The application of a certain law by the use of a rigid formula, without taking into account the interests involved, appears capricious. Here the "most significant contacts" doctrine assumes a new attractiveness and seems to produce a more just result simply because the applicable law is determined by the gravity of each state's interest in the parties involved. Whatever its merits in the other two situations, lex loci delicti seems most unsuited to a spurious conflict, where only one state has an interest, because under it the interested state may or may not be the state whose law is applied. The choice depends upon sheer chance.

IV. Marmon v. Mustang Aviation, Inc.

When the foregoing analysis is made in *Marmon*, the case seems to be a spurious conflict. Three of the four decedents were Texas residents and all were employed by a Texas corporation. The fourth decedent, the pilot, was hired in Texas and worked for a corporation which had its headquarters in Texas. The aircraft was hangared, maintained, and licensed in Texas. The court of appeals aptly summed up the situation, stating: "[t]he only connection between the aircraft, its pilot and passengers, with the state of Colorado was the crash near Kim and a landing in Denver

[30] *Id.*
[31] *Id.*

earlier that day."[32] Thus, Texas had every interest in assuring a just disposition of the case and no interest of Colorado was affected by the controversy. The purpose of the Colorado limitation on recovery for wrongful death—to protect a Colorado defendant from an excessive recovery—was not served by applying Colorado law, for there was no Colorado defendant. The purpose of the unlimited recovery allowed by Texas law—securing a just compensation for the injuries of Texas citizens—was not served, for Texas law was not applied.

The court of civil appeals stated that it was beyond their power to adopt the doctrine of "most significant contacts" advanced by the appellant. Thus, the decision rested solely with the Supreme Court of Texas. The court did not follow the reasoning of the court of civil appeals. Instead, the supreme court interpreted the central question in *Marmon* to be whether the Texas wrongful death statute[33] should be given extraterritorial effect.[34] The court relied primarily upon *Willis v. Missouri Pacific Ry.*,[35] which held that, where a remedy was granted by statute rather than by common law, the court was without power to give the statute an extraterritorial effect. In addition, because the Texas wrongful death statute[36] is silent as to extraterritorial effect, the *Marmon* court presumed that the legislature did not intend for the statute to be applied extraterritorially.[37] Thus the court held that no choice of laws problem existed, and that under the principle of stare decisis the interpretation of the wrongful death statute supplied by *Willis* controlled the case.

A strong dissent by Associate Justice Steakley, joined by Associate Justices Smith and Greenhill, emphasized the importance of the state's interest in enforcing its public policy to benefit its citizens and felt that the United States Supreme Court had removed any taint of unconstitutionality from the "most significant contacts" doctrine.[38] The decision in *Willis*, said the dissent, should not control in *Marmon* because of the Supreme Court's recognition of a state's constitutional interest in protecting its citizens. This interest should be held superior to considerations limiting a state's power under the mandate of outmoded cases such as *Willis*.

V. Conclusion

While the doctrine of lex loci delicti has the advantage of supplying certainty in the choice and application of law, and thus deters forum shop-

[32] Marmon v. Mustang Aviation, Inc., 416 S.W.2d 58, 64 (Tex. Civ. App. 1967), citing Campbell v. Campbell, 362 S.W.2d 904 (Tex. Civ. App. 1962), *error dismissed*; Clayton v. Clayton, 308 S.W.2d 557 (Tex. Civ. App. 1957); Grand Prize Distrib. Co. v. Gulf Brewing Co., 267 S.W.2d 906 (Tex. Civ. App. 1954); Ball v. Gulf States Util. Co., 123 S.W.2d 937 (Tex. Civ. App. 1939).

[33] Tex. Rev. Civ. Stat. Ann. art. 4671 (1952).

[34] Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex. 1968).

[35] 61 Tex. 432 (1884).

[36] Tex. Rev. Civ. Stat. Ann. art. 4671 (1952).

[37] Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 187 (Tex. 1968), citing 50 Am. Jur. *Statutes* § 487 (1944).

[38] Richards v. United States, 369 U.S. 1, 15 (1962): "Where more than one state has sufficiently substantial contact with the activity in question, the forum state by analysis of the interest possessed by the state involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multi-state activity."

ping, modern developments make the doctrine questionable. The old argument that it is fair to subject a voluntary visitor to local laws becomes somewhat hollow when the voluntary entry into a jurisdiction amounts to no more than an accidental fall in an aircraft. In this situation there is such an insignificant relationship between the injured party and the place of the injury that even the desirable advantage of certainty should yield to considerations reflecting the real interests of the parties concerned. Texas has moved in this direction by abandoning its prior refusal to apply the law of lex locus delicti because of its dissimilarity with that of the forum. Perhaps this signals a recognition that the place of the tort should not always be the controlling consideration in the adjudication of tort claims arising outside the forum state.

R. Randall Bridwell

Negligence — Financial Institution's Liability to Borrower's Customers

Defendant, Great Western Savings and Loan Association, provided most of the money for a one-hundred-acre housing development in California. When house buyers suffered economic loss from construction defects, they sought recovery for the negligence of both the savings and loan association and its borrower, a corporation capitalized at $5,000 by two men with no experience in large-scale tract development.[1] The savings and loan association's financial involvement was three-pronged: it purchased the land and later resold it to its borrower;[2] it made construction loans after the houses were presold from a model set up on the tract; and it exercised a right of first refusal on first trust deed financing for most of the approximately 250 house buyers. It could be inferred that the savings and loan association committed financing before receiving financial statements or customary feasibility studies from its borrower's inexperienced organizers. The savings and loan association's involvement further included approval of its borrower's house plans, which lacked features to compensate for the expansive nature of the tract's soil. Houses on the tract were heavily damaged,[3] probably[4] when soil expansion cracked their foundations. The sav-

[1] The issues at the trial's first phase were: "[1. whether] a principal-agent, joint venture, or joint enterprise relationship existed between the [two defendants]; [2. if not] whether Great Western had any independent duty to [the house buyers]; and [3] whether Great Western . . . committed fraud upon which it could be liable." Connor v. Conejo Valley Dev. Co., 61 Cal. Rptr. 333, 341 (Ct. App. 1967). The court held against the plaintiffs on the first issue, for them on the second, and did not reach the third.

[2] Details of the land purchase are at 61 Cal. Rptr. at 337-38. The total original acquisition cost was $340,000, of which the development company put up $190,000, and the savings and loan association $150,000. Four months later and for $180,000, the borrower took title under an option from the savings and loan association.

[3] The houses sold for about $15,000 each, and they were damaged to the extent of about forty per cent of their value. 61 Cal. Rptr. at 346.

[4] Since the appeal was from a nonsuit, the court "[disregarded] conflicting evidence, [gave] to the plaintiff's evidence all the value to which it is legally entitled, and [indulged] in every legitimate inference which may be drawn from that evidence." 61 Cal. Rptr. at 341. The court's lengthy discussion of the soil indicates its inference of causation.