


Expanding Potential Exposure for Businesses

Causation Standards and the Planned
Parenthood Shooting Opinion

BY ERIC HOBBS AND ELISABETH HUTCHINSON



This article discusses Rocky Mountain Planned Parenthood, Inc. v. Wagner and its impact on the analysis of causation in tort claims.

In a case that “truly tests the boundaries of the proximate cause inquiry,”¹ the Colorado Supreme Court recently expounded on—and arguably altered—the standards governing the analysis of causation not only under the Colorado Premises Liability Act (CPLA),² but also for all common law tort claims. In doing so, the Court has made foreseeability a prime focus of the proximate cause inquiry in Colorado. This analysis expands property owners’ exposure to liability for intentional harmful acts carried out by third parties on the property. It also potentially expands liability for tort defendants in other contexts where the actions of multiple parties contribute to the same harm.

Rocky Mountain Planned Parenthood, Inc. v. Wagner signals a limit on the “predominant cause” doctrine, which previously allowed property owners and tort defendants to evade liability for intentional conduct of others. At the same time, the case highlights that the duty-of-care principle remains a viable means to restrict liability for higher-level corporate entities not in a special relationship with the plaintiff.

This article discusses *Wagner*, which arose from a 2015 mass shooting at a Planned Parenthood facility in Colorado Springs.

Overview of *Wagner*

In *Wagner*, an anti-abortion group released internet videos purporting to depict Planned Parenthood staff discussing selling fetal tissue and organs for medical research. Following the videos’ release, Planned Parenthood facilities throughout the country saw a spike in threats against the organization’s facilities and staff members. Among the anti-abortionists who observed the videos was Robert Dear. Enraged by the videos, Dear went to Planned Parenthood of the Rocky Mountains (PPRM) in Colorado Springs armed with numerous guns, propane tanks, and a ballistic vest. He began firing on individuals in the parking lot and then continued the massacre inside the building. Following a five-hour standoff with police, Dear surrendered. Three people were killed and nine others were injured.

Plaintiffs—a group of injured victims and survivors of deceased victims—filed suit against PPRM claiming they were invitees under the CPLA. They also filed suit against PPRM’s national parent organization, Planned Parenthood Federation of America (PPFA), claiming negligent supervision and failure to require or instruct PPRM to maintain adequate safety measures.

The trial court granted PPRM summary judgment, finding that, to the extent PPRM’s conduct may have contributed to plaintiffs’

injuries, PPRM's conduct was not a proximate cause of those injuries because Dear's conduct was the "predominant" cause of the harm and his conduct was not reasonably foreseeable.

The trial court also granted PPFA summary judgment, holding that PPFA owed no legal duty to plaintiffs because PPFA was not in a recognized "special relationship" with plaintiffs that could give rise to liability based on conduct that occurred at an individual Planned Parenthood chapter's facility.

On appeal, the Colorado Court of Appeals unanimously affirmed summary judgment for PPFA. However, with respect to PPRM, the division split, with the majority reversing summary judgment on the issue of causation. The majority held that plaintiffs produced sufficient evidence to overcome summary judgment and go to the jury on whether PPRM knew or should have known of the potential for violent acts at its facility yet failed to provide adequate security. In so ruling, the Court diverged from prior federal district of Colorado cases recognizing that the acts of criminal mass murderers constituted the "predominant" cause of injuries inflicted so as to relieve property owners of liability as a matter of law.³ The Court remanded the case for trial against PPRM on the CPLA claim.

The Colorado Supreme Court granted certiorari to review the following issues:

1. whether an individual who acts to cause mass casualties without regard to his or her own survival or capture is necessarily the predominant cause of harm to the victims of the individual's attack, such that a landowner cannot be liable under the CPLA for a failure to implement security measures that the plaintiffs allege may have prevented the harm; and
2. whether the Court of Appeals erred in concluding that PPFA did not owe a duty of care to the patrons of the PPRM Colorado Springs facility.

The Court Splits on Proximate Cause

Affirming the judgment of the Court of Appeals, the Supreme Court split 4-3, with Justice Gabriel authoring the majority opinion and Justice Hart authoring the partial dissent.

“

Rocky Mountain Planned Parenthood, Inc. v. Wagner signals a limit on the 'predominant cause' doctrine, which previously allowed property owners and tort defendants to evade liability for intentional conduct of others. At the same time, the case highlights that the duty-of-care principle remains a viable means to restrict liability for higher-level corporate entities not in a special relationship with the plaintiff.

”

All justices agreed on some issues. First, and important with respect to the precedential impact of the decision, the Court recognized that the CPLA incorporates common law tort principles with regard to causation under CRS § 13-21-115(3)(c)(I). Second, the Court recognized that the causation inquiry consists of two separate prongs: (1) actual—or “but for”—cause, and (2) proximate cause. The Court split on precisely how the proximate cause prong of the analysis should operate. Both the majority and the dissent agreed that “foreseeability” and the “substantial factor” analysis played a role in assessing proximate causation. The dispute centered on which issue was dispositive. For the majority, Justice Gabriel emphasized foreseeability. For the three justices dissenting in part, Justice Hart emphasized the limiting principles of proximate cause, specifically focusing on whether the cause was a “substantial factor” in bringing about the harm. The majority and dissent also diverged on whether the court or jury ultimately should determine proximate cause questions.

The Majority Opinion

For the majority, Justice Gabriel reasoned that the proximate (or “legal”) cause inquiry “depends largely on the question of the foreseeability of harm.”⁴ In so holding, the Court opined that plaintiffs had presented sufficient evidence that PPRM knew or should have known of the danger of acts of violence being carried out at its Colorado Springs facility to overcome summary judgment. The majority also stressed that proximate cause is a question of fact for the jury to decide.⁵

On the issue of whether Dear's criminal conduct in carrying out the mass shooting constituted a “predominant” cause so as to relieve PPRM from liability as a matter of proximate causation, the majority held that (1) this was PPRM's burden to prove at the summary judgment stage, (2) the standard is “difficult” to satisfy,⁶ and (3) on the record before the Court, PPRM had not satisfied its burden. The Court underscored the record evidence showing that PPRM knew of risks of violence at its facilities (and even provided staff members with protective devices such as bulletproof vests) and

also knew that the threat of violence increased significantly in the wake of the inflammatory videos. Signaling perhaps the most significant dispute with the dissent, the majority held that the jury—not the court—should determine whether an actor is a “predominant” cause in the scenario of multiple concurrent causes involving a criminal shooter.⁷

Staying true to the majority’s focus on foreseeability, the Court distinguished past cases finding mass acts of violence to constitute a “predominant” cause sufficient to relieve other actors of liability,⁸ including cases arising from the Columbine High School massacre⁹ and the Aurora theater shooting.¹⁰ The majority reasoned that the attack on PPRM—a highly controversial operation that received increased threats of violence in the days leading up to the incident—was reasonably foreseeable, but in the prior cases, the attacks were not.¹¹

In so holding, the Court perhaps laid a precedent expanding exposure for entities that may be considered “controversial” and receive more threats of violence than organizations whose functions are less politically charged. Anticipating this criticism, the majority emphasized that it was determining a procedural matter (summary judgment) rather than the merits, and its decision that summary judgment was not warranted did not mean a jury could or should ultimately find for the plaintiffs on the proximate and predominant cause inquiries.

The Partial Dissent

In contrast, Justice Hart, joined by Justices Márquez and Boatright, stressed that the “substantial factor” analysis should be dispositive in cases involving mass shootings, regardless of the foreseeability of potential incidents. In addressing this issue as a matter of general tort law, Justice Hart emphasized the role of the proximate causation inquiry in counterbalancing the “virtually unlimited liability” imposed by the factual (but-for) cause prong of the causation analysis.¹² In her view, proximate cause calls for a “policy judgment[] and common sense: Given the circumstances, is it fair to hold the defendant responsible for his [or her] conduct?”¹³ In situations where multiple concurrent actions combine to cause

“
The Court split on precisely how the proximate cause prong of the analysis should operate. Both the majority and the dissent agreed that ‘foreseeability’ and the ‘substantial factor’ analysis played a role in assessing proximate causation. The dispute centered on which issue was dispositive.
”

a given harm, Justice Hart reasoned that this inquiry should cut off liability as a matter of principle where at least part of the defendant’s conduct is, relative to other actors, much more substantial in bringing about the harm. In the case of a mass shooting, Justice Hart opined that the shooter’s conduct should be considered so predominant as to categorically cut off liability for other concurrent actors such as PPRM. And significantly, Justice Hart emphasized—in contrast to the majority—that although it can often be a jury question, the determination of whether such cause is “predominant” may also be resolved as a matter of law by the court.

Seizing on the majority’s foreseeability analysis, the dissent forewarned an environment in which controversial organizations may be exposed to increased liability, even for senseless acts of violence by criminal mass murderers. After noting the majority’s insistence that its conclusion “does not turn on whether a mass shooter’s attack is on a politically controversial business,” Justice Hart expressed “fear that the consequence of the court’s approach is that certain businesses and activities will face entirely different risks of liability than others will.”¹⁴ The dissenting justices warned that if an organization is “more threat-prone” (citing not only abortion clinics, but also synagogues and Black churches), these organizations “may be found liable for their failure to mitigate or prevent mass shootings.”¹⁵ All of this “ignores the reality that the overwhelming—the predominant—cause of harm to victims of mass shootings is the maniacal determination of the shooter himself.”¹⁶

Agreement on PPFA’s Lack of Duty

All justices agreed that corporate parent PPFA did not owe a duty of care to plaintiffs as PPRM’s invitees. Plaintiffs’ allegations against PPFA were for nonfeasance stemming from PPFA’s alleged failure to ensure PPRM followed the national organization’s purported security mandates. Therefore, plaintiffs were required to show that PPFA was in a recognized “special relationship” with the plaintiffs. The Court held that plaintiffs failed to satisfy that showing. Further, plaintiffs also failed to present sufficient evidence to suggest PPFA controlled the daily actions of PPRM under an alter ego theory. Based on the

lack of evidence of PPFA's control over PPRM's day-to-day activities, the Court distinguished this case from *Grenier v. Commissioner of Transportation*¹⁷ and *Brown v. Delta Tau Delta*,¹⁸ which plaintiffs relied upon. Instead, the Court found the facts to be more analogous to *University of Denver v. Whitlock*,¹⁹ where the Court concluded the connection to and control over the affiliate organization were too attenuated such that the university was not liable for a fraternity's actions. Likewise, the Court held that plaintiffs failed to present evidence that PPFA assumed any duty to provide security and did not show either that PPFA failed to exercise reasonable care in that alleged undertaking or that plaintiffs relied on PPFA to provide the promised security at PPRM.

Takeaways

The Colorado Supreme Court's holding may reach well beyond premises liability because the Court analyzed and applied common law causation principles. The opinion will likely have three main implications for tort plaintiffs and defendants in Colorado.

First, fewer tort cases will be decided by dispositive motions prior to trial. The majority concluded that a jury should, in most circumstances, be allowed to decide proximate cause issues, including whether one party's actions constitute a predominant cause so as to cut off liability for other actors. This holding differs from prior federal district court decisions holding, as a matter of law, that the defendants' conduct was not a proximate cause of the plaintiffs' injuries²⁰ and thereby limiting the jury's role on causation issues. In sharp contrast, the dissent would allow a more defense-friendly approach—endorsed in both federal cases addressing prior Colorado-based mass shootings—of allowing the court to decide the proximate cause issue as a matter of law, short of submission to a jury.

Second, businesses and organizations operating in Colorado can expect increased exposure to tort liability based on known dangers and threats of violence, especially if a business's operations involve controversial subject matters. The majority's emphasis on foreseeability rather than a substantial factor in its proximate cause analysis is a subtle shift in Colorado tort law, and businesses and organizations should be

cognizant of what actions they should take to protect themselves from liability based on threats or hazards that become known to their organizations. Given *Wagner*, courts will likely be less inclined to resolve on summary judgment causation questions involving businesses that become aware of threats of violence, especially those involved in controversial causes.

Third, practically speaking, the predominant cause doctrine has been significantly limited. If an armed gunman intent on inflicting mass casualties against institutions with which he or she has profound philosophical differences is not *always* considered a predominant cause as a matter of law, it is highly unlikely that courts will limit liability for defendants in other contexts of multiple concurrent causes in the future.

While limiting defendants' ability to resolve their liability short of trial, the precise impact of this decision ultimately will come down to the jury. Colorado juries may well agree, based on the circumstances of each case, that the actions of the criminal actor are predominant, thus relieving businesses of liability for lack of proximate causation. Or, even if the jury finds causation satisfied, it may still apportion the vast majority of liability to the criminal actor under comparative fault principles.²¹ What is certain is that this decision will increase costs of businesses forced to defend sympathetic claims in lengthy trials. Inevitably, at trial, plaintiffs will shift their focus to the conduct of the deep-pocket defendants and away from the criminal actor, and it will be left to businesses and property owners to show that they should not incur financial responsibility for the tragic consequences of the deliberate actions of another. ^{CL}



Eric Hobbs is a partner in Shook, Hardy & Bacon L.L.P. in Denver. He focuses his practice on complex tort and business litigation—

ehobbs@shb.com. **Elisabeth Hutchinson** is an associate at Shook, Hardy & Bacon L.L.P. in Denver. She focuses on complex litigation and appeals. Hutchinson is a former law clerk for the Colorado Supreme Court, Colorado Court of Appeals, and US Court of Appeals for the Tenth Circuit—ehutchinson@shb.com.

Coordinating Editor: Jennifer Seidman, jseidman@burgsimpson.com

NOTES

1. *Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 467 P.3d 287, 300 (Colo. 2020) (Hart, J., dissenting in part).
2. CRS § 13-21-115.
3. *Castaldo v. Stone*, 192 F.Supp.2d 1124, 1170-71 (D.Colo. 2001); *Nowlan v. Cinemark Holdings, Inc.*, No. 12-CV-02517-RBJ-MEH, 2016 WL 4092468 at *3 (D.Colo. June 24, 2016).
4. *Wagner*, 467 P.3d at 292.
5. *Id.* at 292-93.
6. *Id.* at 293.
7. *Id.* at 292-94.
8. *Id.* at 293-94.
9. *Castaldo*, 192 F.Supp.2d at 1133-34.
10. *Nowlan*, 2016 WL 4092468 at *1.
11. *Wagner*, 467 P.3d at 294.
12. *Id.* at 298 (Hart, J., dissenting in part).
13. *Id.* at 299.
14. *Id.* at 301.
15. *Id.*
16. *Id.*
17. *Grenier v. Comm'r of Transp.*, 51 A.3d 367 (Conn. 2012).
18. *Brown v. Delta Tau Delta*, 118 A.3d 789 (Me. 2015).
19. *Univ. of Denver v. Whitlock*, 744 P.2d 54 (Colo. 1987).
20. *Castaldo*, 192 F.Supp.2d at 1171 (shooting at Columbine High School); *Nowlan*, 2016 WL 4092468 at *3 (shooting at Aurora theater).
21. See, e.g., *Slack v. Farmers Ins. Exch.*, 5 P.3d 280, 286-87 (Colo. 2000).