JAMES, J., concurring.

I join in the reasoning of the majority opinion when it rejects defendant's argument that "the substantial-factor instruction applies only in cases in which the actions of multiple *tortfeasors* combine or concur to cause the plaintiff's injury." ___ Or App at ___ (slip op at 10). I do not join the reasoning of the majority when, drawing from our workers compensation caselaw, it crafts a distinction in tort between "susceptibility" and "cause." ___ Or App at ___ (slip op at 12-13). I need not explore my reasons for parting ways with the majority on that point, however, because I ultimately concur in the judgment. In this case, plaintiff requested both the "but for" causation instruction, UCJI 23.01, as well as the "substantial factor" causation instruction, UCJI 23.02. Had plaintiff requested only the substantial factor instruction and objected and excepted to the giving of the "but for" instruction, I would write in a dissenting posture. But, that did not happen. I cannot conclude that a court errs when it fails to give both instructions, as that does not cure the defect I perceive. The problem lies in Oregon's preference for the "but for" instruction. As I will explain, in virtually all situations, the giving of the substantial factor instruction is simply the more elegant, accurate, and understandable way to instruct jurors. And yet, for some reason, "but for," not "substantial factor," is the default causation instruction in trial courts. That should change.

Before I turn to the legal intricacies of causation, it is important to begin with a notion that, unfortunately, all too often gets lost in our discussion of complex legal

doctrines: jury instructions should *help* the jury. We ask a great deal of our fellow citizens when they answer the call to jury service. We place upon their shoulders the incredible burden of deciding the most serious matters--livelihoods, wrongful death, profound injury, and the liberty of their fellow citizen. And while performing this act of service they juggle life disruptions and family inconvenience; they miss meetings, school recitals, and vacations. They often give up work and wages, and frequently incur childcare costs, all while we pay them a token sum as recompense. Yet, despite this all, they do an exceptional job.

Research has shown, and any Oregon trial judge would agree, that jurors are dedicated decision-makers who strive to get things right "[and] work to develop the most plausible reconstruction of events that led to trial." *Jurors Are Practical Problem Solvers, But Have Difficulty Understanding Jury Instructions, Experts Say*, A.B.A. News, Aug 14, 2017, *available at* www.americanbar.org/news/abanews/aba-news-archives/2017/08/jurors_are_practical/ (accessed Nov 23, 2021). And as has been noted, "when given proper instructions and respect for their intelligence, [jurors] are relatively good decision makers." Pat Vaughan Tremmel, *Research Shows How Juries Really Behave*, Northwestern News, Dec 20, 2005, *available at* www.northwestern.edu/newscenter/stories/2005/12/diamond.html (accessed Nov 23, 2021).

With all that jurors give to Oregon, our focus should rightly be, but seldom is, on providing instructions crafted towards most succinctly helping the jury perform

their difficult task. Our instructions on causation are the perfect example of where we stumble in this regard.

From the perspective of legal theory, Oregon recognizes two separate ways of thinking about causation in a negligence case, which are generally referred to as "but for" or "substantial factor" causation. *Joshi v. Providence Health System*, 342 Or 152, 163-64, 149 P3d 1164 (2006). The "but for" rule provides that a jury can only find that a defendant's negligence caused an injury if the injury "would not have occurred but for that [negligent] conduct[.]" *Joshi*, 342 Or at 161 (so describing the "but for" rule and quoting W. Page Keeton, *Prosser and Keeton on The Law of Torts* 265-68, § 41 (5th ed 1984)).

The "substantial factor" rule was articulated by the Oregon Supreme Court in *Dewey v. A. F. Klaveness & Co*., 233 Or 515, 379 P2d 560 (1963), which described that causation was satisfied if the defendant's conduct was a "substantial factor" in causing the injury. *See also Joshi*, 342 Or at 159 (recognizing *Dewey* as a source of the rule). In *Joshi*, the Oregon Supreme Court recognized, as it has multiple times, that the "substantial factor," rather than "but for," conceptualization of causation applies when the jury is tasked with determining liability based on multiple causes. It emphasized that in those cases "it is enough that [each defendant] substantially contributed to the injuries eventually suffered by [the plaintiff]." *Joshi*, 342 Or at 160 (quoting *McEwen v. Ortho Pharmaceutical*, 270 Or 375, 418, 528 P2d 522 (1974)).

When we consider causation from a theoretical perspective, both "but for"

and "substantial factor" are merely expressions of a unitary concept--factual causation. *Jennewein v. MCIMetro Access Transmission Services*, 308 Or App 396, 401, 481 P3d 939 (2021). As the Oregon Supreme Court has noted, "[t]he two tests, in all but rare circumstances, usually lead to the same conclusion." *State v. Turnidge (S059155)*, 359 Or 364, 471 n 61, 374 P3d 853 (2016) (citing *Joshi*, 342 Or at 162).

However, as the arguments in a case become more complex--the more a jury is invited to consider, or even speculate about, multiple causal factors--"but for" conceptualization may pose a trap. The "but for" concept in such cases may not be correct because it "may produce a different result" that inappropriately insulates a culpable party from liability based on the possibility that the other wrongful act alone could have still resulted in the injury. *Joshi*, 342 Or at 162.

Conceptually then, "but for" causation is a subset of "substantial factor" causation. Put another way, there may be cases where "but for" causation is intellectually inadequate. But I am aware of no Oregon case concluding the inverse: that substantial factor causation was inadequate, and that flaw could only be corrected by employing a "but for" approach. In fact, as we have explained, the term "substantial factor" is "'a concept of relativity'" used to determine causation within a "totality of potentially causative circumstances." *Lyons v. Walsh & Sons Trucking Co., Ltd.*, 183 Or App 76, 83, 51 P3d 625 (2002), *aff'd*, 337 Or 319, 96 P3d 1215 (2004) (citing and quoting *Furrer v. Talent Irrigation District*, 258 Or 494, 511, 466 P2d 605 (1971)). The "substantial factor" rule "simply acknowledges the reality that many, perhaps most, [injuries] are the

product of multiple causes and interrelated dynamics. Whether any particular cause, or any individual actor's conduct, is sufficiently 'substantial' to warrant the imposition of liability depends, properly, on a consideration of the whole." *Lyons*, 183 Or App at 84.

Despite "but for" causation being conceptually subsumed under substantial factor causation, our practice in Oregon is to instruct the opposite. In trial courts across Oregon, the "but for" instruction is the one first reached for by the trial judge. *See, e.g.*, *Towe v. Sacagawea, Inc.*, 246 Or App 26, 52-53, 264 P3d 184 (2011), *aff'd in part, rev'd in part*, 357 Or 74, 374 P3d 766 (2015) (Sercombe, J., dissenting) ("The 'but for' rule of causation is used in the majority of cases * * *. * * * By comparison, the substantial factor test for causation is best suited to * * * situations in which the 'but for' rule has proved troublesome[.]") Yet, the Oregon Supreme Court has opined, for at least half a century, that the "but for" instruction is a poor manner of instructing a jury. *See, e.g.*, *Smelser v. Pirtle*, 242 Or 294, 298, 409 P2d 340 (1965) ("It will have to be admitted that it would be possible for laymen to be confused by the giving of the 'but for' instruction in this case. They might not be able to make the fine distinction between a similar and identical damage and thus believe that if some damage, other than that sued for, would have resulted to plaintiff anyway, the defendant was absolved. However, we cannot say that it was technically incorrect. Because of the considerable chance that, under the circumstances here, it might be misunderstood it was not a very practical instruction. However, it is not technically incorrect and therefore we do not consider it reversible error."). Neither this court, nor the Oregon Supreme Court, have ever explained why the

default instruction we provide to a jury is the one with the predilection to being "troublesome" at times.

In lieu of favoring the "but for" instruction, Oregon could leave it as an option in exceptional cases, but simply disfavor it, as have other jurisdictions. As the California Supreme Court reasoned:

> "The deficiencies may mislead jurors, causing them, if they can glean the instruction's meaning despite the grammatical flaws, to focus improperly on the cause that is spatially or temporally closest to the harm.
>
> "In contrast, the 'substantial factor' test, incorporated in [Book of Approved Jury Instructions (BAJI)] No. 3.76 and developed by the Restatement Second of Torts, section 431 (com. to BAJI No. 3.76) has been comparatively free of criticism and has even received praise. 'As an instruction submitting the question of causation in fact to the jury in intelligible form, it appears impossible to improve on the Restatement's "substantial factor [test.]"' (Prosser, *Proximate Cause in California*, * * * 38 Cal.L.Rev. 369, 421 [(1950)].) It is 'sufficiently intelligible to any layman to furnish an adequate guide to the jury, and it is neither possible nor desirable to reduce it to lower terms.'
>
> "* * * * *
>
> "Not only does the substantial factor instruction assist in the resolution of the problem of independent causes, as noted above, but '[i]t aids in the disposition * * * of two other types of situations which have proved troublesome.'* * * Thus, '[t]he substantial factor language in BAJI No. 3.76 makes it the preferable instruction over BAJI No. 3.75 (*Maupin v. Widling*, * * * 192 Cal App 3d 568, 575, 237 Cal Rptr 521 [(1987)].)'"

Mitchell v. Gonzales, 54 Cal 3d 1041, 1052-53, 819 P2d 872, 878-79 (1991).

Reversing our order of preference--giving the substantial factor instruction in all but the exceptional case, is not foreclosed by *Joshi*. *Joshi*'s pronouncement that "[t]he 'but-for' test for causation, * * * applies to the majority of cases" was in response to the plaintiff's argument in that case that, as a legal concept, "the 'reasonable probability'

causation standard has been superseded by the 'substantial factor' standard." *Joshi*, 342 Or at 162, 159. The *Joshi* court was not asked, and never considered, whether, on the practical matter of plainly instructing a jury, the substantial factor instruction should be preferred. Accordingly, while there is resolution about whether substantial factor causation, as a legal concept, supplanted "but for" causation in Oregon, the issue of how we should best instruct a jury on factual causation remains unresolved.

Despite the concerns raised in this concurrence, I agree with the majority that the judgment in this case should be affirmed. Faced with a request for both the "but for" and "substantial factor" instructions, I cannot find reversible error in the trial court's decision to deny the request.

I respectfully concur.