

# Chapter 2

## Proximate Cause

---

### Introduction

Causation is one of the most difficult concepts for many law students to master. This is perhaps because most of the causation concept is intuitively obvious. What is difficult is not the largely intuitive and obvious part, but the relatively rare case in which our intuitive faculties fail us. For example, when two cars collide in an intersection, and one of the cars was driven at excessive speed through a red light, it is not difficult for us to assign the cause of the accident to speeding and failure to yield. Although the issue of causation is technically part of the plaintiff's burden of proof, in practice that issue will occupy almost none of the jury's time in deliberation.

The difficulty arises where we are uncertain about what caused a particular accident, or where we are certain of one cause, but uncertain with respect to another. For example, if an asbestos worker/smoker dies of lung cancer, what must we know about the relationship between lung cancer and smoking or between lung cancer and asbestos before we can say that one or the other (or both) *caused* his lung cancer? Is it enough to note that smokers have a significantly higher rate of lung cancer than nonsmokers? What about the fact that asbestos workers have higher lung cancer rates than the population as a whole?

A typical jury instruction requires the jury to find that the defendant's conduct was "a proximate cause" of the plaintiff's injury. Tort law has generally divided the question of proximate cause into two separate inquiries, both of which must be affirmatively answered by the finder of fact:

- (a) *But-for causation* (also called *cause-in-fact*): Can it be said that the injury would not have

occurred *but for* the defendant's conduct?

—and —

- (b) *Legal cause*: was the defendant's conduct *closely enough* related to the plaintiff's injury to make it fair to hold him liable?

Each of these is taken up in turn, after we have looked at a California case that abandoned the traditional approach.

#### MITCHELL v. GONZALEZ

54 Cal. 3d 1041, 1 Cal. Rptr. 2d 913, 819 P.2d 872 (1991)

LUCAS, Chief Justice

In this case we decide whether BAJI No. 3.75,<sup>1</sup> the so-called proximate cause instruction, which contains a "but for" test of cause in fact, should continue to be given in this state, or whether it should be disapproved in favor of BAJI No. 3.76, the so-called legal cause instruction, which employs the "substantial factor" test of cause in fact.<sup>2</sup>

---

<sup>1</sup> All BAJI instructions referred to are from the bound volume of the seventh edition (1986) unless otherwise noted.

<sup>2</sup> BAJI No. 3.75, requested by defendants and given by the trial court, provides: "A proximate cause of (continued...)"

Plaintiffs James and Joyce Mitchell, the parents of 12-year-old Damechie Mitchell, who drowned in Lake Gregory on July 4, 1985, sued defendants Jose L. Gonzales, Matilde Gonzales, and Mrs. Gonzales's son Luis (hereafter defendants) for damages, claiming defendants' negligence caused Damechie's death. By special verdict, the jury found that defendants were negligent, *i.e.*, they had breached a duty, but that the negligence was not a proximate cause of the death.

The Court of Appeal concluded that, under the facts, the trial court erred when it denied plaintiffs' request to instruct the jury pursuant to BAJI No. 3.76 and instead instructed under BAJI No. 3.75. After reviewing both instructions, the Court of Appeal concluded that BAJI No. 3.75 is potentially misleading and should not have been given, and that the trial court committed prejudicial error when it refused to give BAJI No. 3.76.

We granted review in this case to determine whether courts should continue to instruct juries on cause in fact using BAJI No. 3.75 in light of the frequent criticism of that instruction. We conclude that the Court of Appeal was correct and that BAJI No. 3.75 should be disapproved.

### I. Facts

Damechie, 12 years old, standing 4 feet 11 inches tall, and weighing 90 pounds, had a tag-along little-brother relationship with his friend Luis, who was 14 years old, 5 feet 4 inches tall, and weighed 190 pounds. The Gonzales invited Damechie to accompany them to Lake Gregory for

the Fourth of July. According to Mrs. Mitchell's testimony, when Mrs. Gonzales called her to ask whether Damechie could accompany them, she informed Mrs. Gonzales that Damechie could not swim. After Mrs. Gonzales suggested that the boys would play in the shallow edge of the lake, the Mitchells agreed that Damechie could go, as long as he was restricted to the edge of the lake.

Mrs. Gonzales denied that she had told Mrs. Mitchell the children would be swimming or that Mrs. Mitchell had told her Damechie could not swim.

According to Mrs. Mitchell, while Damechie was packing, he, Luis, and Luis's sister, Yoshi, talked about swimming. Mrs. Mitchell told the children Damechie could not swim and should not go swimming. Luis and Yoshi said they would watch Damechie.

Luis testified that Mrs. Mitchell did not tell him that Damechie could not swim. He did remember telling her they were going swimming, but he did not remember what she said about it. He also remembered that Mrs. Mitchell told him to watch out for Damechie because Luis was bigger and older than Damechie.

At the lake, the Gonzales family was joined by Mr. and Mrs. Reyes and their young children. Luis asked his parents for money to rent a paddleboard. Mrs. Gonzales told him, as she always did, not to go into water over his head. Both Luis and Yoshi knew how to swim.

The three children rented two paddleboards, replying affirmatively when asked by the employee in charge of rentals whether they knew how to swim. During the morning, the children stayed within 30 feet of shore, in water that was not over their heads. Mr. and Mrs. Gonzales admittedly did not watch the children during some of the time the children were in the water.

Mrs. Gonzales testified that had she known the children were going into deep water, she probably would not have allowed it because she believed it would be dangerous. Apparently, because of her vantage point, it was difficult for her to watch the children in the water, and there was a long period when she did not have them in sight. She assumed Luis would obey her, although she acknowledged that he had disobeyed her on other occasions.

Mr. Gonzales testified that he relied on the lifeguards to watch the children and that he neither

---

(...continued)

[injury] [damage] [loss] [or] [harm] is a cause which, in natural and continuous sequence, produces the [injury] [damage] [loss] [or] [harm] and without which the [injury] [damage] [loss] [or] [harm] would not have occurred." Because of the "without which" language, courts often refer to this instruction as the "but for" instruction of causation. BAJI No. 3.76, requested by plaintiffs and refused by the trial court, provides: "A legal cause of [injury] [damage] [loss] [or] [harm] is a cause which is a substantial factor in bringing about the [injury] [damage] [loss] [or] [harm]."

We emphasize that despite the use of the terms proximate cause and legal cause, BAJI Nos. 3.75 and 3.76 are instructions on cause in fact. Issues that are properly referred to as questions of proximate or legal cause are contained in other instructions. (*See, e.g.*, BAJI No. 3.79 [superseding causes].)

knew nor asked whether Damechie could swim.

After lunch, Mrs. Gonzales told the children not to leave the picnic area and went to the restroom. Nevertheless, the children left and rented another paddleboard. When she returned to the picnic site 15 minutes later, the children were gone and Mr. Gonzales was asleep. She did not know where they had gone, nor did she ask Mr. Reyes, who was awake and at the site, of their whereabouts.

The children had entered the water and, on their paddleboard, crossed the lake. When Luis started to push Damechi and Yoshi, who were on the paddleboard, back across the lake, Damechie told Luis he could not swim.

Luis, nevertheless, pushed them 100 feet out onto the lake, into water over their heads. He then told Damechie to let him get on the paddleboard because he was tired. Damechie again told Luis he was unable to swim and asked him to be careful. Luis promised to be careful. After Luis got on board, Damechie asked Luis whether Luis would save him if he fell off. Luis said he would do so.

Shortly before the accident, the children were five to ten feet from three women, apparently on a nearby paddleboard, who testified that the children made a lot of noise and engaged in horseplay. They each testified that Luis was the rowdiest.

One of the women testified that the paddleboard tipped over and that the noise and roughhousing stopped for five to ten minutes. Immediately before the board tipped over, Luis was on the center of the board and Damechie and Yoshi were draped over it. During the quiet period, neither Luis nor Yoshi called or gestured for help, but they appeared to be whispering.

The second woman testified that the quiet period lasted from one to five minutes, during which time she glanced over and saw only Luis and Yoshi. She did not hear any cries for help.

The third woman thought three minutes of quiet elapsed before she notice only two children where there had previously been three. She never heard any call for help.

After the women noticed one of the children was missing, Luis said, "Lady, my friend's down there," indicating the lake. One of the women yelled for a lifeguard and asked Luis why he had not signalled for help sooner. He replied that neither he nor his sister could swim. He also said

that Damechie had grabbed Luis in an effort to save himself and that he, Luis, had kicked Damechie to get him off and to avoid being pulled under.

Luis testified that the board tipped over when Damechie put his hands on Luis's shoulder. He admitted he rocked the board before it tipped over and that Damechie's movement had not caused the board to tip. The employee in charge of the paddleboard rentals testified that "You have to work at it" to get a board to tip. Yoshi testified that the board tipped when Luis attempted to climb on.

Luis testified that Damechie was very scared while the board was rocking and that he asked Luis not to rock the board because he did not want to fall off. Additionally, Luis admitted that at the time, he was being very rowdy and that when he tipped the board, he and Damechie fell off. Damechie panicked and grabbed Luis's shorts, pulling them down. Luis pulled them up, and Damechie grabbed Luis's ankles. Luis shook free of Damechie, got to the surface, and climbed onto the board. He looked into the water and could see Damechie's fingers, which he tried to grab. Yoshi remained on the board. Luis testified inconsistently, one time stating that he waited two or three minutes before calling a lifeguard and another time stating that he immediately called for a lifeguard.

Later that day, Luis told the lifeguards that Damechie had rocked the board, causing it to flip. He asked them whether he and his family would be sued. Mrs. Gonzales asked him, "Why didn't you stay where I told you to stay?"

Damechie's body was not recovered for several days because of the opacity of the water and bottom vegetation. The body was about 120 feet from shore in 8 feet of water.

The Mitchells sued the Gonzaleses, including Luis, and others not party to this appeal. The complaint alleged causes of action for negligence and wrongful death. Defendants asserted comparative negligence on the part of Damechie and his parents.

As noted above, the court refused plaintiffs' proffered instruction on causation in fact (*i.e.*, BAJI No. 3.76) and instead gave the causation in fact instruction requested by defendants, BAJI No. 3.75.

The jury, by special verdict, concluded that

defendants were negligent but that the negligence was not a cause of the death. The jury therefore did not reach a special verdict on comparative negligence.

The trial court denied plaintiffs' motions for a new trial or a judgment notwithstanding the verdict. The Court of Appeal reversed.

## II. Discussion

As explained below, we conclude the Court of Appeal correctly determined that the trial court prejudicially erred when it refused BAJI No. 3.76 and instead gave BAJI No. 3.75. Our discussion proceeds in two steps. We begin by determining whether instructional error occurred. Our analysis focuses on whether conceptual and grammatical flaws in BAJI No. 3.75 may confuse jurors and lead them to improperly limit their findings on causation, and whether BAJI No. 3.76 is a superior alternative instruction. Because we find error, we next analyze prejudice and conclude that there is a reasonable probability that BAJI No. 3.75 misled the jurors into finding that defendants' negligence was not a "proximate cause" of Damechie's death and that a result more favorable to plaintiffs would have occurred if the jury had been instructed under BAJI No. 3.76. Accordingly, we affirm the Court of Appeal's decision reversing the judgment of the trial court.

### A. Alleged Instructional Error

As Dean Prosser observed over 40 years ago, "Proximate cause remains a tangle and a jungle, a palace of mirrors and a maze...." Cases "indicate that 'proximate cause' covers a multitude of sins, that it is a complex term of highly uncertain meaning under which other rules, doctrines and reasons lie buried...." (Prosser, *Proximate Cause in California* (1950) 38 CAL. L. REV. 369, 375.)

One of the concepts included in the term proximate cause is cause in fact, also referred to as actual cause.<sup>3</sup> Indeed, for purposes of BAJI No.

3.75, "so far as a jury is concerned 'proximate cause' only relates to causation in fact." (Com. to BAJI No. 3.75, italics added.)<sup>4</sup> "There are two widely recognized tests for establishing cause in fact. The 'but for' or 'sine qua non' rule, unfortunately labeled 'proximate cause' in BAJI No. 3.75, asks whether the injury would not have occurred but for the defendant's conduct. The other test, labeled 'legal cause' in BAJI No. 3.76, asks whether the defendant's conduct was a substantial factor in bringing about the injury." (*Maupin v. Widling* (1987) 192 Cal. App. 3d 568, 574, 237 Cal. Rptr. 521.)

BAJI Nos. 3.75 and 3.76 are alternative instructions that should not jointly be given in a single lawsuit. (*See Maupin v. Widling, supra*, 192 Cal. App. 3d 568, 575-579, 237 Cal. Rptr. 521 [error to give both BAJI No. 3.75, which instructs on supervening causes in substantial factor terms, and BAJI No. 3.76].) Several Court of Appeal opinions have discussed the propriety of giving one or the other instruction in particular circumstances. It has generally been recognized that the "but for" test contained in BAJI No. 3.75 should not be used when two "causes concur to bring about an event and either one of them operating alone could have been sufficient to cause the result" (*Thomsen v. Rexall Drug & Chemical Co.* [(1965)] 235 Cal. App. 2d 775 [45 Cal. Rptr. 642]). In those few situations, where there are concurrent [independent] causes, our law provides one cannot escape responsibility for his negligence on the ground that identical harm would have occurred without it. The proper rule for such situations is that the defendant's conduct is a cause of the event because it is a material element and a substantial factor in bringing it about." (*Vecchione v. Carlin* (1980) 111 Cal. App. 3d 351, 359, 168 Cal. Rptr. 571; *see also Hart v. Browne* (1980) 103 Cal.

---

(...continued)  
369, 374.)

<sup>3</sup> In addition to the issue of causation in fact, Prosser lists the following issues that have at various times been included in the proximate cause rubric: apportionment of damages among causes, liability for unforeseeable consequences, superseding causes, shifted responsibility, duty to the plaintiff, and plaintiff's fault. (Prosser, *Proximate Cause in California, supra*, 38 CAL. L. REV. (continued...))

<sup>4</sup> Although the dissent embarks upon a general discussion of proximate cause, the discussion is misplaced. We do not dispute the dissent's claim that there is more than one concept included in the term "proximate cause." (Dis. opn., *post*, at p. 923 of 1 Cal. Rptr. 2d, at p. 881 of 819 P.2d.) For purposes of this case, however, we focus on the jury's consideration of BAJI No. 3.75 as it relates to cause in fact.

App. 3d 947, 960-962, 163 Cal. Rptr. 356; *Fraijo v. Hartland Hospital* (1979) 99 Cal. App. 3d 331, 346-347, 160 Cal. Rptr. 246; PROSSER & KEETON ON TORTS (5th ed. 1984) § 41, pp. 266-267; BAJI Nos. 3.75, 3.76 and respective comments.) The foregoing authorities conclude that in such a situation BAJI No. 3.76 should be given.

This case presents the issue of whether BAJI No. 3.75 should be given in any negligence action.

Criticism of the term "proximate cause" has been extensive. Justice Traynor once observed, "In all probability the general expectation is the reasonable one that in time courts will dispel the mists that have settled on the doctrine of proximate cause in the field of negligence." (*Mosley v. Arden Farms Co.* (1945) 26 Cal. 2d 213, 222, 157 P.2d 372 (conc. opn. of TRAYNOR, J.)) Similarly, while serving on the Court of Appeal, Justice Tobriner commented, "The concept of proximate causation has given courts and commentators consummate difficulty and has in truth defied precise definition." (*State Comp. Ins. Fund v. Ind. Acc. Com.* (1959) 176 Cal. App. 2d 10, 20, 1 Cal. Rptr. 73.)

Nor did Prosser and Keeton hide their dislike for the term: "The word 'proximate' is a legacy of Lord Chancellor Bacon, who in his time committed other sins. The word means nothing more than near or immediate; and when it was first taken up by the courts it had connotations of proximity in time and space which have long since disappeared. It is an unfortunate word, which places an entirely wrong emphasis upon the factor of physical or mechanical closeness." (PROSSER & KEETON ON TORTS, *supra*, § 42, at p. 273, fn. omitted.)

It is reasonably likely that when jurors hear the term "proximate cause" they may misunderstand its meaning or improperly limit their discussion of what constitutes a cause in fact. Prosser and Keeton's concern that the word "proximate" improperly imputes a spatial or temporal connotation is well founded. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981) page 1828, defines proximate as "very near," "next," "immediately preceding or following." Yet, "[p]roximity in point of time or space is no part of the definition [of proximate cause] ... except as it may afford evidence for or against proximity of causation. [Citation.]" (*Osborn v. City of Whittier* (1951) 103 Cal. App. 2d 609, 616, 230 P.2d 132.)

Given the foregoing criticism, it is not surprising that a jury instruction incorporating the term "proximate cause" would come under attack from courts, litigants, and commentators. In considering a predecessor to BAJI No. 3.75 that included language almost identical to the current instruction,<sup>5</sup> Prosser observed, "There are probably few judges who would undertake to say just what this means, and fewer still who would expect it to mean anything whatever to a jury. The first sentence was lifted by a California opinion long since from SHEARMAN AND REDFIELD ON NEGLIGENCE, a text written for lawyers and not expected to be comprehensible to laymen, and none too good a text at that." (Prosser, *Proximate Cause in California, supra*, 38 CAL. L. REV. 369, 424, fn. omitted.)

The misunderstanding engendered by the term "proximate cause" has been documented.<sup>6</sup> In a scholarly study of 14 jury instructions, BAJI No. 3.75 produced proportionally the most misunderstanding among laypersons. (Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions* (1979) 79 COLUM. L. REV. 1306, 1353 (hereafter *Psycholinguistic Study*)). The study noted two significant problems with BAJI No. 3.75. First, because the phrase "natural and continuous

---

<sup>5</sup> "The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or through intermediate agencies or through conditions created by such agencies." (BAJI No. 104 (4th ed. 1943 bound vol.), italics added.)

<sup>6</sup> Contrary to the dissenting opinion, we think it unwise to underestimate the problems associated with the term "proximate cause." (Dis. opn., *post*, at p. 924 of 1 Cal. Rptr. 2d, at p. 882 of 819 P.2d.) The preceding examples clearly establish the likelihood that jurors will be misled by the term. It is in the face of a flurry of criticism that the dissent recognizes the instruction is not a "model of clarity." (Dis. opn., *post*, at p. 923 of 1 Cal. Rptr. 2d, at p. 881 of 819 P.2d.) Yet, the dissent advocates retention of the flawed instruction without explaining what mysterious meritorious aspect of the instruction overcomes its readily apparent shortcomings. The dissent fails to articulate any compelling reason for this court to embrace an admittedly confusing instruction.

sequence" precedes "the verb it is intended to modify, the construction leaves the listener with the impression that the cause itself is in a natural and continuous sequence. Inasmuch as a single 'cause' cannot be in a continuous sequence, the listener is befuddled." (*Psycholinguistic Study, supra*, 79 COLUM. L. REV. at p. 1323.) Second, in one experiment, "the term 'proximate cause' was misunderstood by 23% of the subjects.... They interpreted it as 'approximate cause,' 'estimated cause,' or some fabrication." (*Id.*, at p. 1353.)

Our Courts of Appeal have recognized the serious problems with the language of BAJI No. 3.75. In *Fraijo v. Hartland Hospital, supra*, 99 Cal. App. 3d 331, 160 Cal. Rptr. 246, the court criticized the instruction because it appeared to place an undue emphasis on "nearness." Nonetheless, "despite the criticism of the 'but for' language in BAJI No. 3.75, the most recent edition of California Jury Instructions (Civil) [citation] ... allow[s] the trial judge to exercise a discretion in selecting his preference between ... the 'proximate cause' instruction found in BAJI No. 3.75, or the 'legal cause' instruction found in BAJI No. 3.76." (*Id.*, at p. 346, 160 Cal. Rptr. 246.)

The *Fraijo* court said, "We agree that BAJI No. 3.75—the proximate cause instruction—is far from constituting a model of clarity in informing a jury as to what is meant by proximate causation.... Nevertheless, in view of its long history of being considered a correct statement of the law by the courts of this state, we are not inclined to hold that BAJI No. 3.75 is an erroneous instruction. Although we believe such a determination should be made, we consider that the determination ought to be made by our Supreme Court and not by an intermediate reviewing court." (*Fraijo v. Hartland Hospital, supra*, 99 Cal. App. 3d 331, 347, 160 Cal. Rptr. 246; *see also Maupin v. Widling, supra*, 192 Cal. App. 3d 568, 574, 237 Cal. Rptr. 521 ["BAJI No. 3.75 is famous for causing juror confusion. It has been criticized for its inexact terminology and incorrect sentence structure."]; *John B. Gunn Law Corp. v. Maynard* (1987) 189 Cal. App. 3d 1565, 1571, 235 Cal. Rptr. 180 [instruction misleading, but "it has never been held error in California to instruct in terms of BAJI No. 3.75 due to lack of intelligibility."].)

We believe the foregoing authorities properly criticize BAJI No. 3.75 for being conceptually and

grammatically deficient. 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 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, supra*, 38 CAL. L. REV. 369, 421.) 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." (*Id.*, at p. 379.)<sup>7</sup>

Moreover, the "substantial factor" test subsumes the "but for" test. "If the conduct which is claimed to have caused the injury had nothing at all to do with the injuries, it could not be said that the conduct was a factor, let alone a substantial factor, in the production of the injuries." (*Douppnik v. General Motors Corp.* (1990) 225 Cal. App. 3d 849, 861, 275 Cal. Rptr. 715.)

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. One is that where a similar, but not identical result would have followed without the defendant's act; the other where one defendant has made a clearly

---

<sup>7</sup> Although the dissent recognizes that BAJI No. 3.76 (embodying the "substantial factor" test) is "essentially a cause-in-fact instruction," it criticizes the test on grounds unrelated to its use with regard to cause-in-fact considerations. The dissent prefaces its discussion with the qualification, "When the 'substantial factor' test is used as a means of setting limits on liability...." (Dis. opn., *post*, at p. 925 of 1 Cal. Rptr. 2d, at p. 884 of 819 P.2d.) Without articulating any reason to believe the test would be so applied, the dissent claims the test does not work well for the liability limiting considerations that are distinct from a finding of cause-in-fact. Although the dissent further details the shortcomings of the "substantial factor" test when the test is used for other purposes, it does not demonstrate any deficiencies of the "substantial factor" test when used for cause-in-fact determinations.

proved but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire. But in the great majority of cases, it produces the same legal conclusion as the but-for test. Except in the classes of cases indicated, no case has been found where the defendant's act could be called a substantial factor when the event would have occurred without it; nor will cases very often arise where it would not be such a factor when it was so indispensable a cause that without it the result would not have followed." (PROSSER & KEETON ON TORTS, *supra*, § 41, at pp. 267-268, fns. omitted, italics added.) Thus, "[t]he substantial factor language in BAJI No. 3.76 makes it the preferable instruction over BAJI No. 375. [Citation.]" (*Maupin v. Widling, supra*, 192 Cal. App. 3d 568, 575, 237 Cal. Rptr. 521.)

We recognize that BAJI No. 3.76 is not perfectly phrased. The term "legal cause" may be confusing. As part of the psycholinguistic study referred to above, the experimenters rewrote BAJI No. 3.75 to include the term "legal cause."<sup>8</sup> The study found that "25% of the subjects who heard 'legal cause' misinterpreted it as the opposite of an 'illegal cause.' We would therefore recommend that the term 'legal cause' not be used in jury instructions; instead, the simple term 'cause' should be used, with the explanation that the law defines 'cause' in its own particular way."<sup>9</sup> (*Psycholinguistic Study, supra*, 79 COLUM. L. REV. at p. 1353.)

Moreover, "advocates, judges, and scholars [have] capitalized upon the ambiguities and nuances of 'substantial'" and have created new uses for the instruction. (PROSSER & KEETON ON TORTS (5th ed., 1988 supp.) § 41, p. 45.) One

such use is "in cases in which a defendant's conduct is clearly a 'but for' cause of plaintiff's harm, and defense counsel contends that defendant's conduct made such an insubstantial contribution to the outcome that liability should not be imposed. [¶] ... Used in this way, the 'substantial factor' test becomes an additional barrier to liability...." *Id.*, at pp. 43-44.) Such a use of the "substantial factor" test undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby. We are confident, however, that proper argument by counsel and instruction by the court will prevent any confusion from occurring.<sup>10</sup>

The continued use of BAJI No. 3.75 as an instruction on cause in fact is unwise. The foregoing amply demonstrates that BAJI No. 3.75 is grammatically confusing and conceptually misleading. Continued use of this instruction will likely cause needless appellate litigation regarding the propriety of the instructions in particular cases. Use of BAJI No. 3.76 will avoid much of the confusion inherent in BAJI No. 3.75. It is intelligible and easily applied. We therefore conclude that BAJI No. 3.75, the so-called proximate cause instruction, should be disapproved and that the court erred when it refused to give BAJI No. 3.76 and instead gave BAJI No. 3.75. (*See ante*, p. 920 of 1 Cal. Rptr. 2d, at p. 879 of 819 P.2d, fn. 7.)

#### **B. Prejudicial Effect of Erroneous Instruction**

Having determined it was error to refuse to give BAJI No. 3.76 and instead give BAJI No. 3.75, we must decide whether the error was so prejudicial as to require reversal.

Under article VI, section 13 of the California Constitution, if there is error in instructing the jury, the judgment shall be reversed only when the reviewing court, "after an examination of the entire cause, including the evidence," concludes that the error "has resulted in a miscarriage of justice." Under the Constitution, we must determine

<sup>8</sup> The modified instruction read, "A legal cause of an injury is something that triggers a natural chain of events that ultimately produces the injury. [¶] Without the legal cause, the injury would not occur." (*Psycholinguistic Study, supra*, 79 COLUM. L. REV. at p. 1352.)

<sup>9</sup> Although we need not decide whether BAJI No. 3.76 should be rewritten to eliminate the term "legal cause," we do suggest that the Committee on Standard Jury Instructions consider whether the instruction could be improved by adopting the suggestion of the Psycholinguistic Study or by otherwise modifying the instruction.

<sup>10</sup> Although we disapprove BAJI No. 3.75, nothing in this opinion should be read to discourage the Committee on Standard Jury Instructions from drafting a new and proper "but for" instruction.

whether it is reasonably probable that result more favorable to the appealing party would have been reached in the absence of error. (*People v. Watson* (1956) 46 Cal. 2d 818, 836, 299 P.2d 243.) Although there is no precise formula for determining the prejudicial effect of instructional error, we are guided by the five factors enumerated in *LeMons v. Regents of University of California* (1978) 21 Cal. 3d 869, 876, 148 Cal. Rptr. 355, 582 P.2d 946.

The first factor we consider is the degree of conflict in the evidence on the critical issue, here cause in fact. The evidence shows that Damechie drowned, not only because he could not swim, but also because he was placed in a position in which his inability to swim resulted in death. The jury's verdict, amply supported by the evidence, indicates that Mr. and Mrs. Gonzales and their son Luis were at least partially responsible for Damechie's predicament. Mr. and Mrs. Gonzales failed to supervise him adequately. Luis, after assuring Damechie he would be careful and knowing that Damechie could not swim, climbed onto the paddleboard, rocked it, causing it to flip over, and failed to call for help despite the presence of adults who might have been able to save Damechie. The conflict in the evidence is not great. If properly instructed, it is reasonably probable that the jury would have found defendants' behavior to have been a substantial factor, and thus a cause in fact, in Damechie's death.

Second, we consider whether the jury asked for a rereading of the erroneous instruction or of related evidence. The jury did not make such a request, but we note that jury received a copy of the instructions, making such a request unnecessary.

Third, we analyze the closeness of the jury's verdict. The jury found on a vote of nine to three that Jose Gonzales and Luis were negligent (*i.e.*, they breached a duty of care to Damechie). Likewise, the jury concluded on a vote of 11 to 1 that Matilde Gonzales was negligent. Yet the jury unanimously concluded that neither the actions of Luis nor Jose Gonzales caused Damechie's death and, on a vote of 10 to 2, the jury found that the actions of Matilde Gonzales were not a cause of the death.

The verdict as to causation was not particularly close. It seems that the jury did follow BAJI No.

3.75 but was misled by the instruction's flaws: Having found the defendants negligent, it is illogical and inconsistent on this record to conclude that they were not a cause in fact of Damechie's death. Accordingly, we conclude it is reasonably probable that the jury was confused by BAJI No. 3.75 and overemphasized the "but for" nature of the instruction, improperly focusing on the factor operative at the closest temporal proximity to the time of death, Damechie's inability to swim.

Fourth, we consider whether defense counsel's closing argument contributed to the instruction's misleading effect. The closing argument was replete with references to Damechie's inability to swim, his own knowledge that he could not swim, and his decision nevertheless to venture out on the lake. Counsel also argued that Damechie's parents knew he could not swim, yet they permitted him to go with the Gonzalezes without determining whether the Gonzalezes intended to take the children swimming, and argued that but for these facts, Damechie would not have drowned.

The argument thus highlighted the condition temporally closest to the death, Damechie's inability to swim, and factors related to it. As discussed above, BAJI No. 3.75 improperly emphasizes temporal and spatial proximity. The argument thus contributed to the instruction's misleading effect. It is reasonably probable that if the jury had received the substantial factor instruction, counsel's argument would not have misled the jury.

Finally we consider the effect of other instructions in remedying the error BAJI No. 3.77 was requested by both parties and given by the court.<sup>11</sup> This instruction did not remedy the confusion caused by instructing the jury under

---

<sup>11</sup> BAJI No. 3.77 provides: "There may be more than one [proximate] [legal] cause of an injury. When negligent conduct of two or more persons contributes concurrently as [proximate] [legal] causes of an injury, the conduct of each of said persons is a [proximate] [legal] cause of the injury regardless of the extent to which each contributes to the injury. A cause is concurrent if it was operative at the moment of injury and acted with another cause to produce the injury. [It is no defense that the negligent conduct of a person not joined as a party was also a [proximate] [legal] cause of the injury.]" As read, the instruction included the term "proximate" and the last sentence.



BAJI No. 3.75. By frequently repeating the term "proximate cause" and by emphasizing that a cause must be operating at the moment of injury, the instruction buttressed rather counteracted the restrictions on time and place inherent in the word "proximate." Thus, giving BAJI No. 3.77 did not cure the deficiencies of BAJI No. 3.75. (*Hart v. Browne, supra*, 103 Cal. App. 3d 947, 961, 163 Cal. Rptr. 356.)

Based on the foregoing analysis, we conclude that it is reasonably probable a result more favorable to the plaintiffs would have resulted if BAJI No. 3.75 had not been given.

### Conclusion

We conclude that BAJI No. 3.75 should be disapproved, that the trial court erred when it gave the instruction, and that such error was prejudicial. Accordingly, the decision of the Court of Appeal reversing the judgment in favor of defendants is affirmed.

MOSK, PANELLI, ARABIAN, BAXTER and GEORGE, JJ., concur.

KENNARD, Associate Justice, dissenting

I dissent.

The majority invalidates a jury instruction on proximate cause — an essential element of every tort case — that has been used in this state for some 50 years and embodies well-established law. And, by delegating responsibility for defining proximate cause to the Committee on Standard Jury Instructions, the majority neglects its duty to provide guidance to trial courts and litigants. This court should give guidance to the committee, not seek guidance from it.

The majority proscribes use of BAJI No. 3.75, a standard jury instruction that defines proximate cause as "a cause which, in natural and continuous sequence, produces the injury and without which the injury would not have occurred." As I shall explain, proximate cause includes two elements: an element of physical or logical causation, known as cause in fact, and a more normative or evaluative element, which the term "proximate" imperfectly conveys. The majority concedes that the concept of proximate cause includes these two distinct elements, yet it limits its discussion of BAJI No. 3.75 to that instruction "as it relates to cause in

fact." (Maj. opn., *ante*, p. 917 of 1 Cal. Rptr. 2d, at p. 875 of 819 P.2d, fn. 4.) Having found BAJI No. 3.75 fatally deficient, the majority suggests that another instruction, BAJI No. 3.76, provides a satisfactory alternative instruction on cause in fact. Yet the majority does not embrace this other instruction as an adequate expression of the second, more elusive element of proximate cause. Because BAJI No. 3.75 addresses both elements of proximate cause, the majority's decision leaves a significant unanswered question: Is there now a standard jury instruction that trial courts can use to convey the second element?

Legal scholars have long struggled with the complexities and subtleties of proximate cause. (*See e.g., Smith, Legal Cause in Actions of Tort* (1911) 25 HARV. L. REV. 103; Prosser, *Proximate Cause in California* (1950) 38 CAL. L. REV. 369.) But the problem of proximate cause — when and how to limit liability when cause and effect relationships logically continue to infinity — has remained intractable and the riddle of proximate cause has remained unsolved. (PROSSER & KEETON ON TORTS (5th ed. 1984) § 43, p. 300.) Although BAJI No. 3.75 is not a model of clarity, and a better instruction would certainly be most welcome, this court should not proscribe the use of BAJI No. 3.75 unless and until it proposes a better instruction that includes both elements of proximate cause, or at least provides meaningful guidance on the subject. Because the majority has done neither, I would not hold in this case that the trial court erred in instructing the jury with BAJI No. 3.75.

### I

To understand the issue presented in this case, it is necessary to examine the concept of proximate cause and the manner in which BAJI No. 3.75 explains it to the jury.

An essential element of any cause of action for negligence is that the defendant's act or omission was a cause of the plaintiff's injury. (*E.g., PROSSER & KEETON ON TORTS, supra*, § 41, p. 263; 6 WITKIN, SUMMARY OF CAL. LAW (9th ed. 1988) *Torts*, § 965, p. 354.) To simply say, however, that the defendant's act or omission must be a necessary antecedent of the plaintiff's injury does not resolve the question of whether the defendant should be held liable. As Prosser and Keeton observed: "The consequences of an act go forward to eternity, and the causes of an event go

back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would `set society on edge and fill the courts with endless litigation.'" (PROSSER & KEETON ON TORTS, *supra*, § 41, p. 264, quoting *North v. Johnson* (1894) 58 Minn. 242, 59 N.W. 1012.)

Accordingly, the law must impose limitations on liability other than simple causality. These additional limitations are related not only to the degree of connection between the act or omission and the injury, but also to "our more or less inadequately expressed ideas of what justice demands, or of what is administratively possible and convenient." (PROSSER & KEETON ON TORTS, *supra*, § 41, p. 264.) Thus, there are two basic elements of proximate cause: cause in fact and the limitations imposed by "our more or less inadequately expressed ideas of what justice demands." For the sake of clarity and convenience, I shall refer to the latter element as the social evaluative process.

BAJI No. 3.75, the instruction invalidated by the majority, addresses both elements of proximate cause. By stating that a proximate cause is one "without which the injury would not have occurred" (or, in other words, that the injury would not have occurred "but for" the defendant's conduct), the instruction addresses the element of cause in fact. The term "natural and continuous sequence" and the word "proximate," on the other hand, address the social evaluative process because they require the jury, after determining cause in fact, to reflect further on causation before finally deciding the issue of liability.

## II

The majority disapproves BAJI No. 3.75 because it contains the word "proximate," which connotes proximity in space or time. (Maj. opn., *ante*, at pp. 918-919 of 1 Cal. Rptr. 2d, at pp. 876-77 of 819 P.2d.) The majority exaggerates the difficulties presented by the use of the word "proximate" and adopts a wholly inadequate solution. Although proximity in time or space is not relevant to cause in fact, it is frequently an appropriate consideration in determining the second element of proximate cause, the social evaluative process. In the absence of an instruction that captures that element at least as well, use of

BAJI No. 3.75 should not be forbidden.

The majority relies on a statement from Prosser and Keeton objecting to the term "proximate" as "an unfortunate word, which places an entirely wrong *emphasis* upon the factor of physical or mechanical closeness." (PROSSER & KEETON ON TORTS, *supra*, § 42, p. 273; italics added.) Yet by these words Prosser and Keeton do not assert that proximity in space and time is irrelevant to the ultimate determination of proximate cause, but only that it should not be unduly emphasized. This necessarily implies that temporal and spatial proximity does play some role in the determination of proximate cause.

Other authority supports the conclusion that temporal and spatial proximity is frequently an appropriate consideration in determining the social evaluative process element of proximate cause. As a Court of Appeal recently remarked, "The time span between any alleged misconduct and the harm is among the factors to be considered in determining the existence of proximate cause." (*Weissich v. County of Marin* (1990) 224 Cal. App. 3d 1069, 1083, 274 Cal. Rptr. 342; *see also Duffy v. City of Oceanside* (1986) 179 Cal. App. 3d 666, 674, 224 Cal. Rptr. 879; REST. 2D TORTS, § 433, com. f.) The same is true of proximity in space. Foreseeability of injury, which is a concept that includes spatial nearness or remoteness, may be relevant to the trier of fact's decision whether defendant's act "was a proximate or legal cause of the plaintiff's injury." (*Ballard v. Uribe* (1986) 41 Cal. 3d 564, 572-573, fn. 6, 224 Cal. Rptr. 664, 715 P.2d 624.) Indeed, a case the majority cites recognizes the potential relevance of temporal and spatial proximity. In *Osborn v. City of Whittier*, *supra*, 103 Cal. App. 2d 609, 616, 230 P.2d 132, the court said that "[p]roximity in point of time or space ... is of no importance *except as it may afford evidence for or against proximity of causation.*" (Italics added.)

The majority directs its remaining criticism of BAJI No. 3.75 to the statement in the instruction that "a proximate cause is a cause which, *in natural and continuous sequence*, produces the injury...." (Italics added.) Quoting from a psycholinguistic study, the majority characterizes the instruction as befuddling because the term "natural and continuous sequence" precedes the verb it modifies, thus creating the impression that

the cause itself is in a "natural and continuous sequence." (Maj. opn., *ante*, at p. 919 of 1 Cal. Rptr. 2d, at p. 878 of 819 P.2d.) But this perceived problem with the placement of the language could be readily corrected by simply rearranging the sentence to read: "a proximate cause of the injury is a cause without which the injury would not have occurred and which produces the injury in natural and continuous sequence."

There is no immediate need to proscribe use of BAJI No. 3.75. Trial courts have been instructing juries in its language since 1969 (BAJI No. 3.75 (6th ed. 1977); BAJI No. 3.75 (5th ed. 1969)), and, as the majority notes (maj. opn., *ante*, at p. 917 of 1 Cal. Rptr. 2d, at p. 876 of 819 P.2d, fn.4), it is almost identical to the standard instruction used since 1943. (BAJI No. 104 (4th ed. 1943).) The courts of this state have long considered it a correct statement of the law. (*Fraijo v. Hartland Hospital* (1979) 99 Cal. App. 3d 331, 347, 160 Cal. Rptr. 246.) Despite its flaws, BAJI No. 3.75 ought to be retained as an acceptable instruction in the absence of a proposed superior instruction.

The majority asserts that disapproval of BAJI No. 3.75 is justified because "issues that are properly referred to as questions of proximate or legal cause are contained in other instructions. (*See e.g.*, BAJI No. 3.79 [superseding causes].)" (Maj. opn., *ante*, at p. 914 of 1 Cal. Rptr. 2d, at pp. 873 of 819 P.2d, fn.2.) But a review of the relevant instructions (BAJI Nos. 3.77, 3.78, 3.79, and 3.80) shows that each addresses a specialized situation.<sup>1</sup> None attempts a general definition of the social evaluative process element of proximate cause, and thus none will fill the void resulting

from the proscribing of BAJI No. 3.75.

### III

The majority favors the "substantial factor" instruction, BAJI No. 3.76, over the "but for" instruction, BAJI No. 3.75, as a definition of cause in fact. But the majority makes no claim that BAJI No. 3.76 adequately addresses the social evaluative process element, the most critical and elusive aspect of proximate cause.

BAJI No. 3.76 states that "[a] legal cause of injury is a cause which is a substantial factor in bringing about the injury." The word "substantial" refers only to whether the defendant's act was more than a minimal element in the plaintiff's injury. (PROSSER & KEETON ON TORTS, *supra*, § 41, p. 267; *see also* Prosser, *Proximate Cause in California*, *supra*, 38 CAL. L. REV. 369, 378-382.) Thus, BAJI No. 3.76 is essentially a cause-in-fact instruction. Because it requires only a single determination by the jury (whether the defendant's conduct was a "substantial factor" in producing the plaintiff's injury), BAJI No. 3.76 does not reflect as clearly as does BAJI No. 3.75 the two separate and distinct elements of proximate cause.

When the "substantial factor" test of BAJI No. 3.76 is used as a means of setting limits on liability, it is no better than the "but for" test of BAJI No. 3.75, the instruction invalidated by the majority, and it is just as problematic as the word "proximate" in BAJI No. 3.75. As Prosser and Keeton observed: "A number of courts have [used substantial factor as a test of proximate cause, not just cause in fact], apparently accepting the phrase as the answer to all prayers and some sort of universal solvent. As applied to the fact of causation alone, the test though not ideal, may be thought useful. But when the 'substantial factor' is made to include all the ill-defined considerations of policy which go to limit liability once causation in fact is found, it has no more definite meaning than 'proximate cause,' and it becomes a hindrance rather than a help." (PROSSER & KEETON ON TORTS, *supra*, § 42, p. 278.)

Because its language is neither as clear nor as helpful as it superficially appears, the "substantial factor" (BAJI No. 3.76) instruction is no better than the "but for" instruction (BAJI No. 3.75). As Prosser and Keeton explained: "Even if 'substantial factor' seemed sufficiently intelligible as a guide in time past, however, the development

---

<sup>1</sup> BAJI No. 3.77 states that there may be concurrent causes. BAJI No. 3.78 says that a defendant is not relieved of liability when there are two independent causes. BAJI No. 3.79 explains that a defendant is not relieved of liability by the negligence of a third party if the defendant should have realized that the third party might act as it did, or a reasonable person would not have regarded the third party's acts as highly extraordinary, or the conduct of the third party was not extraordinarily negligent and was a normal consequence of the situation created by the defendant. BAJI No. 3.80 addresses the situation when all of the defendants were negligent but the plaintiff cannot prove causation.

of several quite distinct and conflicting meanings for the term 'substantial factor' has created risk of confusion and misunderstanding, especially when a court, or an advocate or scholar, uses the phrase without explicit indication of which of its conflicting meanings is intended." (PROSSER & KEETON ON TORTS, *supra*, 1988 supp. p. 43.) For instance, the term "substantial factor" may impose an additional barrier to liability when used to focus on the respective degrees of the contribution of different causes of any injury. It may also be used to focus the inquiry on an actors motive or purpose in the sense of attempting to provide a means of distinguishing permissible and impermissible motives. And it may be confused with the separate requirement that the plaintiff prove the elements of the case by a preponderance of the evidence. (*Id.* at pp. 43-45.)

Thus, the majority fails to recognize that BAJI No. 3.76 is no better than BAJI No. 3.75 as a comprehensive proximate cause instruction.

#### IV

By delegating to the Committee on Standard Jury Instructions<sup>2</sup> the responsibility for defining

proximate cause, the court neglects its duty, as the highest court in this state, to provide guidance to the state's trial courts.

It is easy, as the majority has done, to find fault with existing formulations of proximate cause. It is quite another matter, however, to actually address and resolve the subtle and complex issues presented by the concept of proximate cause. The Committee on Standard Jury Instructions will necessarily be in the same situation as are trial judges: "The trial judge is in the dilemma that a failure to instruct at all on proximate cause is very likely to be error, while any instruction he [or she] gives runs the risk of being so complicated and vulnerable to attack in its ideas or language that it invites appeal." (Prosser, *Proximate Cause in California*, *supra*, 38 CAL. L. REV. at pp. 423-424.)

Unless and until this court is prepared to offer a better alternative or provide meaningful guidance on both elements of proximate cause, I would not invalidate BAJI No. 3.75. Accordingly, I would hold that the trial court did not err when it instructed the jury in the terms of BAJI No. 3.75.

### Questions and Notes

1. Although he writes in the minority in this case, Justice Kennard articulates the view of most jurisdictions on the law of proximate cause.

---

<sup>2</sup> The committee's full name is The Committee on Standard Jury Instructions, Civil, of the Superior Court of Los Angeles County, California. Formed in 1938, the committee includes among its members attorneys as well as superior court judges. The committee has performed invaluable service by drafting standard or pattern jury instructions, based primarily on published appellate decisions, for use in civil jury trials. Although no statute mandates the use of the instructions, the Judicial Council has recommended their use, when applicable, "unless [the trial judge] finds that a different instruction would more adequately, accurately or clearly state the law." (Cal. Standards Jud. Admin., § 5.) The Judicial Council has cautioned that trial judges should give jury instructions proposed by the parties' attorneys "no less consideration" than the committee's standard instructions. (*Ibid.*)

## § A. But-For Causation (Cause-in-Fact)

### 1. The Traditional Burden of Proof

#### HULL v. MERCK & CO.

758 F.2d 1474 (11th Cir. 1985)

#### PER CURIAM

In this diversity case applying Georgia law, Jim Dale Hull appeals from a jury verdict for the appellee, Merck & Company, Inc. (Merck), in the United States District Court for the Northern District of Georgia. Finding no error in the trial of the case, we affirm.

Merck operates three adjacent chemical plants in Albany, Georgia. Waste chemicals are expelled via three fiberglass sewer pipes which meet at a large junction before emptying into a one-million-gallon neutralizing pool. In 1980, Merck determined that the waste lines needed replacement. It solicited bids from four companies specializing in such work, including Augusta Fiberglass Coatings (AFC), the appellant's employer. Merck cautioned the bidders that Merck planned to operate the factories throughout the replacement activity, and that bypass pipes and various types of safety equipment would be necessary to the work. Before bidding, AFC also inspected the job site. AFC's bid was accepted and Hull commenced supervision of the job on September 4, 1980.

AFC relayed Merck's cautionary instructions to its employees and provided AFC workers, as required by Merck, with rubber boots, pants, coats and gloves, as well as goggles and masks. Hull, who had long experience working with chemicals, initially wore some of the equipment but after a few days ceased this practice. Many of Hull's coworkers used the safety equipment extensively. At an October 17, 1984 employee meeting, AFC noted a lack of full compliance and reminded the employees of the necessity of wearing the protective gear.

Although the evidence was conflicting, it appears that Hull spent about four hours each day in the trench which was dug to expose the pipelines. He regularly breathed gases and allowed liquid to spill on his clothing and body. Hull noted at the time that the chemical fumes in and around

the pipes were a health hazard. His most severe exposure occurred on September 22, 1980. On that morning, Hull stuck his head inside the 20-inch pipe connecting lines 1 and 2 to line 3. The pipes were supposed to carry only a two percent solution of waste, but because of an accidental spill in the factories, the pipe contained at that moment an 80 to 85 percent solution of toluene. Hull became dizzy and nauseous. As a result, he received oxygen at the plant infirmary.

Within a year after the completion of the Merck contract, Hull suffered bone marrow depression, followed by leukemia. He sued Merck for \$2,500,000.00 plus punitive damages, alleging (1) that Merck had negligently failed to disclose the nature and health dangers of the waste chemicals carried by the pipelines; (2) that Merck had negligently failed to inform him adequately of the necessity for wearing the various types of protective gear during construction; (3) that the intermittent discharge without warning of high-concentration spills into the pipelines resulted from the negligent operation of the factories; and (4) that Merck's decision to continue plant operations and consequently the flow of waste chemicals during the pipelines replacement project amounted to negligence. The jury trial commenced on January 23, 1984 and resulted in a verdict for Merck.

\* \* \*

#### **Evidence of Exposure to Benzene**

The waste pipelines contained trace amounts of benzene, a compound widely considered to pose risks of cancer. Before the trial, Hull deposed a medical expert, Dr. Cohen, who stated that Hull's disease was caused by benzene, toluene or both. On questioning by Merck's counsel, however, Dr. Cohen admitted that in reaching this conclusion he had made two assumptions: "one, that [Hull's] toxic exposure was significant... And, two, that it caused his acute leukemia." Deposition of Dr. Cohen pp. 24-25.

The appellant now challenges the district court's exclusion of this deposition evidence at the trial. The district court was well within its discretion in excluding the evidence. *E.g.*, *United States v. Lopez*, 543 F.2d 1156 (5th Cir. 1976), *cert. denied*, 429 U.S. 1111, 97 S. Ct. 1150, 51 L.

Ed. 2d 566 (1977). Here, the assumptions made by Dr. Cohen rendered his seemingly firm opinion quite speculative, and the danger of irrelevance is clear. Such potentially confusing testimony is at odds with the purposes of expert testimony as envisioned in FED. R. EVID. 702. The district court's decision was not "manifestly erroneous," 543 F.2d at 1158, especially considering that only parts of the deposition were excluded, and that Dr. Cohen was not barred from testifying before the jury and thereby subjecting himself to cross-examination.

Hull also contends the court erred in failing to instruct the jury as to whether benzene exposure caused Hull's leukemia. But Hull's own expert admitted at the trial that the concentrations of benzene to which Hull claimed to be exposed could not have precipitated the disease. There was no evidence to support submission of such an instruction to the jury, and the district court did not err in refusing to give the instruction.

## Questions and Notes

1. For a survey of the problem of establishing causation in toxic tort cases, see Matteo, *How Many Mice Must Die?*, [7 TEMP. ENVTL. L. & TECH. J. 103](#) (1988); Shirley K. Duffy, "Risk Assessment": a Methodology for Deciding Claims for Increased Risk of Cancer, [11 PENN. ST. ENVTL. L. REV. 213](#); Alani. Golanski, *General Causation at a Crossroads in Toxic Tort Cases*, [108 PENN. ST. L. REV. 479](#) (2003).

2. Critics of the tort system often point to what they call "junk science" as the justification for imposing liability; a prime example is the \$4 billion settlement for the class action brought by women claiming injury from breast implants. See David E. Bernstein, *The Breast Implant Fiasco*, [87 CALIF. L. REV. 457](#) (1999).

3. For a general discussion of the causation issue as it applies to the burgeoning field of toxic tort litigation, see Shelly Brinker, *Opening the Door to the Indeterminate Plaintiff: An Analysis of the Causation Barriers Facing Environmental Toxic Tort Plaintiffs*, [46 UCLA L. REV. 1289](#) (1999); Jon R. Pierce and Terrence Sexton, *Toxicogenomics: Toward the Future of Toxic Tort*

*Causation*, [5 N.C. J.L. & TECH. 33](#) (2003). An example of a toxic tort case close to home (and the problems the plaintiffs faced in establishing liability, see Eric DeJure Wilson, *Hope for Hanford Downwinders?: the Ninth Circuit's Ruling in ... (In re Hanford Nuclear Reservation Litig.)*, [82 OR. L. REV. 581](#) (2003).

4. One of the complaints about modern tort litigation is that it degenerates into a "battle of the experts." One proposal to alleviate the spectacle of partisan experts-for-hire is to encourage the judges to appoint neutral experts or panels of experts. See Karen Butler Reisinger, *Note. Court-Appointed Expert Panels: A Comparison of Two Models*, [32 IND. L. REV. 225](#) (1998).

## REYNOLDS v. TEXAS & PACIFIC RAILWAY CO.

37 La. Ann. 694 (1885)

FENNER, J.

The plaintiff and his wife claim damages for the defendant company for injuries suffered by the wife and caused by the alleged negligence of the company.

Mr. Reynolds, with his wife, sister-in-law, three small children and two colored attendants, had purchased tickets as passengers on the defendant road, and were at the depot at Morrogh Station for the purpose of boarding the east-bound train, which was due at that station at about midnight, but, being behind time, did not reach there till about two o'clock in the morning.

\* \* \*

Several witnesses testif[ied] that passengers were warned to "hurry up." Mrs. Reynolds, a corpulent woman, weighing two hundred and fifty pounds, emerging from the bright light of the sitting room, which naturally exaggerated the outside darkness, and hastening down these unlighted steps, made a misstep in some way and was precipitated beyond the narrow platform in front and down the slope beyond, incurring the serious injuries complained of.

Upon what grounds to the company claim exemption from liability?

1st. It denies the fact of negligence on its part, and contends that the way was safe and the lights

sufficient.

We have already disposed of this contention, and have found that the light was insufficient and that this rendered the way insecure....

2d. It contends that, even conceding the negligence of the company in the above respect, it does not follow that the accident to plaintiff was necessarily caused thereby, but that she might well have made the misstep and fallen even had it been broad daylight. We concede that this is possible, and recognize the distinction between *post hoc* and *propter hoc*. But where the negligence of the defendant greatly multiplies the chances of accident to the plaintiff, and is of a character naturally leading to its occurrence, the mere possibility that it might have happened without the negligence is not sufficient to break the chain of cause and effect between the negligence and the injury. Courts, in such matters, consider the natural and ordinary course of events, and do not indulge in fanciful suppositions. The whole tendency of the evidence connects the accident with the negligence.

\* \* \*

Judgment affirmed.

## 2. Modifying the But-For Causation Requirement

### a. Excusable Inability to Identify the Defendant

#### SUMMERS v. TICE

33 Cal. 2d 80, 199 P.2d 1 (1948)

CARTER, Justice

Each of the two defendants appeals from a judgment against them in an action for personal injuries. Pursuant to stipulation the appeals have been consolidated.

Plaintiff's action was against both defendants for an injury to his right eye and face as the result of being struck by bird shot discharged from a shotgun. The case was tried by the court without a jury and the court found that on November 20, 1945, plaintiff and the two defendants were

hunting quail on the open range. Each of the defendants was armed with a 12 gauge shotgun loaded with shells containing 7<sup>1</sup>/<sub>2</sub> size shot. Prior to going hunting plaintiff discussed the hunting procedure with defendants, indicating that they were to exercise care when shooting and to "keep in line." In the course of hunting plaintiff proceeded up a hill, thus placing the hunters at the points of a triangle. The view of defendants with reference to plaintiff was unobstructed and they knew his location. Defendant Tice flushed a quail which rose in flight to a ten foot elevation and flew between plaintiff and defendants. Both defendants shot at the quail, shooting in plaintiff's direction. At that time defendants were 75 yards from plaintiff. One shot struck plaintiff in his eye and another in his upper lip. Finally it was found by the court that as the direct result of the shooting by defendants the shots struck plaintiff as above mentioned and that defendants were negligent in so shooting and plaintiff was not contributorily negligent.

\* \* \*

The problem presented in this case is whether the judgment against both defendants may stand. It is argued by defendants that they are not joint tortfeasors, and thus jointly and severally liable, as they were not acting in concert, and that there is not sufficient evidence to show which defendant was guilty of the negligence which caused the injuries the shooting by Tice or that by Simonson. Tice argues that there is evidence to show that the shot which struck plaintiff came from Simonson's gun because of admissions allegedly made by him to third persons and no evidence that they came from his gun. Further in connection with the latter contention, the court failed to find on plaintiff's allegation in his complaint that he did not know which one was at fault did not find which defendant was guilty of the negligence which caused the injuries to plaintiff.

Considering the last argument first, we believe it is clear that the court sufficiently found on the issue that defendants were jointly liable and that thus the negligence of both was the cause of the injury or to that legal effect. It found that both defendants were negligent and "That as a direct and proximate result of the shots fired by defendants, and each of them, a birdshot pellet was caused to and did lodge in plaintiff's right eye and

that another birdshot pellet was caused to and did lodge in plaintiff's upper lip." In so doing the court evidently did not give credence to the admissions of Simonson to third persons that he fired the shots, which it was justified in doing. It thus determined that the negligence of both defendants was the legal cause of the injury or that both were responsible. Implicit in such finding is the assumption that the court was unable to ascertain whether the shots were from the gun of one defendant or the other or one shot from each of them. The one shot that entered plaintiff's eye was the major factor in assessing damages and that shot could not have come from the gun of both defendants. It was from one or the other only.

It has been held that where a group of persons are on a hunting party, or otherwise engaged in the use of firearms, and two of them are negligent in firing in the direction of a third person who is injured thereby, both of those so firing are liable for the injury suffered by the third person, although the negligence of only one of them could have caused the injury. *Moore v. Foster*, Miss., 180 So. 73; *Oliver v. Miles*, Miss., 110 So. 666, 50 A.L.R. 357; *Reyher v. Mayne*, 90 Colo. 856, 10 P.2d 1109; *Benson v. Ross*, 143 Mich. 452, 106 N.W. 1120, 114 Am. St. Rep. 675. The same rule has been applied in criminal cases (*State v. Newberg*, 129 Or. 564, 278 P. 568, 63 A.L.R. 1225), and both drivers have been held liable for the negligence of one where they engaged in a racing contest causing an injury to a third person. *Saisa v. Lilja*, 1 Cir., 76 F.2d 380. These cases speak of the action of defendants as being in concert as the ground of decision, yet it would seem they are straining that concept and the more reasonable basis appears in *Oliver v. Miles*, *supra*. There two persons were hunting together. Both shot at some partridges and in so doing shot across the highway injuring plaintiff who was travelling on it. The court stated they were acting in concert and thus both were liable. The court then stated (110 So. 668): "We think that ... each is liable for the resulting injury to the boy, although no one can say definitely who actually shot him. To hold otherwise would be to exonerate both from liability, although each was negligent, and the injury resulted from such negligence." (Emphasis added.) 110 So. p. 668. It is said in the RESTATEMENT: "For harm resulting to a third

person from the tortious conduct of another, a person is liable if he ... (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." (REST., TORTS, sec. 876(b)(c).) Under subsection (b) the example is given: "*A* and *B* are members of a hunting party. Each of them in the presence of the other shoots across a public road at an animal this being negligent as to persons on the road. *A* hits the animal. *B*'s bullet strikes *C*, a traveler on the road. *A* is liable to *C*." (REST., TORTS, Sec. 876(b), Com., Illus. 3.) An illustration given under subsection (c) is the same as above except the factor of both defendants shooting is missing and joint liability is not imposed. It is further said that: "If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself sufficient to bring about harm to another, the actor's negligence may be held by the jury to be a substantial factor in bringing it about." (REST., TORTS, sec. 432.) Dean Wigmore has this to say: "When two or more persons by their acts are possibly the sole cause of a harm, or when two or more acts of the same person are possibly the sole cause, and the plaintiff has introduced evidence that the one of the two persons, or the one of the same person's two acts, is culpable, then the defendant has the burden of proving that the other person, or his other act, was the sole cause of the harm. (b) ... The real reason for the rule that each joint tortfeasor is responsible for the whole damage is the practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them they did all; let them be the ones to apportion it among themselves. Since, then, the difficulty of proof is the reason, the rule should apply whenever the harm has plural causes, and not merely when they acted in conscious concert..." (WIGMORE, SELECT CASES ON THE LAW OF TORTS, sec. 153.) Similarly Professor Carpenter has said: "[Suppose] the case where *A* and *B* independently shoot at *C* and but one bullet touches *C*'s body. In such case, such proof as is ordinarily required that either *A* or *B* shot *C*, of course fails. It is suggested that there should be a



relaxation of the proof required of the plaintiff ... where the injury occurs as the result of one where more than one independent force is operating, and it is impossible to determine that the force set in operation by defendant did not in fact constitute a cause of the damage, and where it may have caused the damage, but the plaintiff is unable to establish that it was a cause." (20 CAL. L. REV. 406.)

When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless. Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury. This reasoning has recently found favor in this Court. In a quite analogous situation this Court held that a patient injured while unconscious on an operating table in a hospital could hold all or any of the persons who had any connection with the operation even though he could not select the particular acts by the particular person which led to his disability. *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687, 162 A.L.R. 1258. There the Court was considering whether the patient could avail himself of *res ipsa loquitur*, rather than where the burden of proof lay, yet the effect of the decision is that plaintiff has made out a case when he has produced evidence which gives rise to an inference of negligence which was the proximate cause of the injury. It is up to defendants to explain the cause of the injury. It was there said: "If the doctrine is to continue to serve a useful purpose, we should not forget that "the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person." 25 Cal. 2d at page 490, 154 P.2d at page

689, 162 A.L.R. 1258. Similarly in the instant case plaintiff is not able to establish which of defendants caused his injury.

\* \* \*

In addition to that, however, it should be pointed out that the same reasons of policy and justice shift the burden to each of defendants to absolve himself if he can relieving the wronged person of the duty of apportioning the injury to a particular defendant, apply here where we are concerned with whether plaintiff is required to supply evidence for the apportionment of damages. If defendants are independent tortfeasors and thus each liable for the damage caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress. The wrongdoers should be left to work out between themselves any apportionment. *See, Colonial Ins. Co., v. Industrial Acc. Com.*, 29 Cal. 2d 79, 172 P.2d 884. Some of the cited cases refer to the difficulty of apportioning the burden of damages between the independent tortfeasors, and say that where factually a correct division cannot be made, the trier of fact may make it the best it can, which would be more or less a guess, stressing the factor that the wrongdoers are not a position to complain of uncertainty. *California Orange Co. v. Riverside P.C. Co.*, *supra*.

\* \* \*

The judgment is affirmed.

GIBSON, C.J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

**SINDELL v. ABBOTT LABORATORIES**

26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924 (1980)

MOSK, Justice

This case involves a complex problem both timely and significant: may a plaintiff, injured as the result of a drug administered to her mother during pregnancy, who knows the type of drug involved but cannot identify the manufacturer of the precise product, hold liable for her injuries a maker of a drug produced from an identical formula?

Plaintiff Judith Sindell brought an action against eleven drug companies and Does 1 through 100, on behalf of herself and other women similarly situated. The complaint alleges as follows:

Between 1941 and 1971, defendants were engaged in the business of manufacturing, promoting, and marketing diethylstilbesterol (DES), a drug which is a synthetic compound of the female hormone estrogen. The drug was administered to plaintiff's mother and the mothers of the class she represents,<sup>1</sup> for the purpose of preventing miscarriage. In 1947, the Food and Drug Administration authorized the marketing of DES as a miscarriage preventative, but only on an experimental basis, with a requirement that the drug contain a warning label to that effect.

DES may cause cancerous vaginal and cervical growths in the daughters exposed to it before birth, because their mothers took the drug during pregnancy. The form of cancer from which these daughters suffer is known as adenocarcinoma, and it manifests itself after a minimum latent period of 10 or 12 years.<sup>2</sup> It is a fast-spreading and deadly disease, and radical surgery is required to prevent it from spreading.

DES also causes adenosis, precancerous vaginal and cervical growths which may spread to other areas of the body. The treatment for adenosis is cauterization, surgery, or cryosurgery. Women who suffer from this condition must be monitored by biopsy or colposcopic examination twice a year, a painful and expensive procedure. Thousands of women whose mothers received DES during pregnancy are unaware of the effects of the drug.

\* \* \*

Plaintiff [Sindell] seeks compensatory damages of \$1 million and punitive damages of \$10 million for herself. For the members of her class, she prays for equitable relief in the form of an order that defendants warn physicians and others of the danger of DES and the necessity of performing certain tests to determine the presence of disease caused by the drug, and that they establish free clinics in California to perform such tests.

\* \* \*

This case is but one of a number filed throughout the country seeking to hold drug manufacturers liable for injuries allegedly resulting from DES prescribed to the plaintiffs' mothers since 1947.<sup>3</sup> According to a note in the *Fordham Law Review*, estimates of the number of women who took the drug during pregnancy range from 1½ million to 3 million. Hundreds, perhaps thousands, of the daughters of these women suffer from adenocarcinoma, and the incidence of vaginal adenosis among them is 30 to 90 percent. (Comment, *DES and a Proposed Theory of Enterprise Liability* (1978) 46 *FORDHAM L. REV.* 963, 964-967 (hereafter *Fordham Comment*.) Most of the cases are still pending. With two exceptions,<sup>4</sup> those that have been decided resulted in judgments in favor of the drug company

<sup>1</sup> The plaintiff class alleged consists of "girls and women who are residents of California and who have been exposed to DES before birth and who may or may not know that fact or the dangers" to which they were exposed. Defendants are also sued as representatives of a class of drug manufacturers which sold DES after 1941.

<sup>2</sup> [Ed. note: The evidence showed that the rate of cancer among "DES daughters" was .1-.4%.]

<sup>3</sup> DES was marketed under many different trade names.

<sup>4</sup> In a recent New York case a jury found in the plaintiff's favor in spite of her inability to identify a specific manufacturer of DES. An appeal is pending. (*Bichler v. Eli Lilly and Co.* (Sup. Ct. N.Y. 1979).) A Michigan appellate court recently held that plaintiffs had stated a cause of action against several manufacturers of DES even though identification could not be made. (*Abel v. Eli Lilly and Co.* (decided Dec. 5, 1979) Docket No. 60497.) That decision is on appeal to the Supreme Court of Michigan.

defendants because of the failure of the plaintiffs to identify the manufacturer of the DES prescribed to their mothers.<sup>5</sup> The same result was reached in a recent California case. (*McCreery v. Eli Lilly & Co.* (1978) 87 Cal. App. 3d 77, 82-84, 150 Cal. Rptr. 730.) The present action is another attempt to overcome this obstacle to recovery.

We begin with the proposition that, as a general rule, the imposition of liability depends upon a showing by the plaintiff that his or her injuries were caused by the act of the defendant or by an instrumentality under the defendant's control. The rule applies whether the injury resulted from an accidental event (*e.g.*, *Shunk v. Bosworth* (6th Cir. 1964) 334 F.2d 309) or from the use of a defective product. (*E.g.*, *Wetzel v. Eaton Corporation* (D. Minn. 1973) 62 F.R.D. 22, 29-30; *Garcia v. Joseph Vince Co.* (1978) 84 Cal. App. 3d 868, 873-875, 148 Cal. Rptr. 843; and *see* annot. collection of cases in 51 A.L.R.3d 1344, 1351; 1 HURSH AND BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY 2D (1974) p. 125.)

There are, however, exceptions to this rule. Plaintiff's complaint suggests several bases upon which defendants may be held liable for her injuries even though she cannot demonstrate the name of the manufacturer which produced the DES actually taken by her mother. The first of these theories, classically illustrated by *Summers v. Tice* (1948) 33 Cal. 2d 80, 199 P.2d 1, places the burden of proof of causation upon tortious defendants in certain circumstances. The second basis of liability emerging from the complaint is that defendants acted in concert to cause injury to plaintiff. There is a third and novel approach to the problem, sometimes called the theory of "enterprise liability," but which we prefer to designate by the more accurate term of "industry-wide" liability,<sup>6</sup> which might obviate the necessity for identifying the manufacturer of the

injury-causing drug. We shall conclude that these doctrines, as previously interpreted, may not be applied to hold defendants liable under the allegations of this complaint. However, we shall propose and adopt a fourth basis for permitting the action to be tried, grounded upon an extension of the *Summers* doctrine.

## I

Plaintiff places primary reliance upon cases which hold that if a party cannot identify which of two or more defendants caused an injury, the burden of proof may shift to the defendants to show that they were not responsible for the harm. This principle is sometimes referred to as the "alternative liability" theory.

The celebrated case of *Summers v. Tice, supra*, 33 Cal. 2d 80, 199 P.2d 1, a unanimous opinion of this court, best exemplifies the rule. In *Summers*, the plaintiff was injured when two hunters negligently shot in his direction. It could not be determined which of them had fired the shot which actually caused the injury to the plaintiff's eye, but both defendants were nevertheless held jointly and severally liable for the whole of the damages. We reasoned that both were wrongdoers, both were negligent toward the plaintiff, and that it would be unfair to require plaintiff to isolate the defendant responsible, because if the one pointed out were to escape liability, the other might also, and the plaintiff-victim would be shorn of any remedy. In these circumstances, we held, the burden of proof shifted to the defendants, "each to absolve himself if he can." (*Id.*, p. 86, 199 P.2d p. 4.) We stated that under these or similar circumstances a defendant is ordinarily in a "far better position" to offer evidence to determine whether he or another defendant caused the injury.

In *Summers*, we relied upon *Ybarra v. Spangard* (1944) 25 Cal. 2d 486, 154 P.2d 687. There, the plaintiff was injured while he was unconscious during the course of surgery. He sought damages against several doctors and a nurse who attended him while he was unconscious. We held that it would be unreasonable to require him to identify the particular defendant who had performed the alleged negligent act because he was unconscious at the time of the injury and the defendants exercised control over the instrumentalities which caused the harm. Therefore, under the doctrine of *res ipsa loquitur*,

<sup>5</sup> *E.g.*, *Gray v. United States* (S.D. Tex. 1978) 445 F. Supp. 337. In their briefs, defendants refer to a number of other cases in which trial courts have dismissed actions in DES cases on the ground stated above.

<sup>6</sup> The term "enterprise liability" is sometimes used broadly to mean that losses caused by an enterprise should be borne by it. Klemme, *Enterprise Liability* (1976) 47 COLO. L. REV. 153, 158.

an inference of negligence arose that defendants were required to meet by explaining their conduct.<sup>7</sup>

The rule developed in *Summers* has been embodied in the RESTATEMENT OF TORTS. (REST. 2D TORTS, § 433B, subsec. (3))<sup>8</sup> Indeed, the *Summers* facts are used as an illustration (p. 447).

Defendants assert that these principles are inapplicable here. First, they insist that a predicate to shifting the burden of proof under *Summers-Ybarra* is that the defendants must have greater access to information regarding the cause of the injuries than the plaintiff, whereas in the present case the reverse appears.

Plaintiff does not claim that defendants are in a better position than she to identify the manufacturer of the drug taken by her mother or, indeed, that they have the ability to do so at all, but argues, rather, that *Summers* does not impose such a requirement as a condition to the shifting of the burden of proof. In this respect we believe

plaintiff is correct.

In *Summers*, the circumstances of the accident themselves precluded an explanation of its cause. To be sure, *Summers* states that defendants are "[o]rdinarily ... in a far better position to offer evidence to determine which one caused the injury" than a plaintiff (33 Cal. 2d 80, at p. 86, 199 P.2d 1 at p. 4), but the decision does not determine that this "ordinary" situation was present. Neither the facts nor the language of the opinion indicate that the two defendants, simultaneously shooting in the same direction, were in a better position than the plaintiff to ascertain whose shot caused the injury. As the opinion acknowledges, it was impossible for the trial court to determine whether the shot which entered the plaintiff's eye came from the gun of one defendant or the other. Nevertheless, burden of proof was shifted to the defendants.

Here, as in *Summers*, the circumstances of the injury appear to render identification of the manufacturer of the drug ingested by plaintiff's mother impossible by either plaintiff or defendants, and it cannot reasonably be said that one is in a better position than the other to make the identification. Because many years elapsed between the time the drug was taken and the manifestation of plaintiff's injuries she, and many other daughters of mothers who took DES, are unable to make such identification.<sup>9</sup> Certainly there can be no implication that plaintiff is at fault in failing to do so the event occurred while plaintiff was in utero, a generation ago.<sup>10</sup>

---

<sup>7</sup> Other cases cited by plaintiff for the proposition stated in *Summers* are only peripherally relevant. For example, in *Ray v. Alad Corporation* (1977) 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3, the plaintiff brought an action in strict liability for personal injuries sustained when he fell from a defective ladder manufactured by the defendant's predecessor corporation. We held that, although under the general rule governing corporate succession the defendant could not be held responsible, nevertheless a "special departure" from that rule was justified in the particular circumstances. The defendant had succeeded to the good will of the manufacturer of the ladder, and it could obtain insurance against the risk of liability, whereas the plaintiff would be left without redress if he could not hold the defendant liable. The question whether one corporation should, for policy reasons, be answerable for the products manufactured by its predecessor is a different issue than that we describe above.

<sup>8</sup> Section 433B, subsection (3) of the RESTATEMENT provides: "Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm." The reason underlying the rule is "the injustice of permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm." (REST. 2D TORTS, § 433B, com. f, p. 446.)

---

<sup>9</sup> The trial court was not required to determine whether plaintiff had made sufficient efforts to establish identification since it concluded that her failure to do so was fatal to her claim. The court accepted at face value plaintiff's assertion that she could not make the identification, and for purposes of this appeal we make the same assumption.

<sup>10</sup> Defendants maintain that plaintiff is in a better position than they are to identify the manufacturer because her mother might recall the name of the prescribing physician or the hospital or pharmacy where the drug originated, and might know the brand and strength of dosage, the appearance of the medication, or other details from which the manufacturer might be identified, whereas they possess none of this information. As we point out in footnote 12, we assume for purposes of this appeal that

(continued...)

On the other hand, it cannot be said with assurance that defendants have the means to make the identification. In this connection, they point out that drug manufacturers ordinarily have no direct contact with the patients who take a drug prescribed by their doctors. Defendants sell to wholesalers, who in turn supply the product to physicians and pharmacies. Manufacturers do not maintain records of the persons who take the drugs they produce, and the selection of the medication is made by the physician rather than the manufacturer. Nor do we conclude that the absence of evidence on this subject is due to the fault of defendants. While it is alleged that they produced a defective product with delayed effects and without adequate warnings, the difficulty or impossibility of identification results primarily from the passage of time rather than from their allegedly negligent acts of failing to provide adequate warnings. Thus *Haft v. Lone Palm Hotel* (1970) 3 Cal. 3d 756, 91 Cal. Rptr. 745, 478 P.2d 465, upon which plaintiff relies, is distinguishable.<sup>11</sup> It is important to observe, however, that while defendants do not have means superior to plaintiff to identify the maker of the

precise drug taken by her mother, they may in some instances be able to prove that they did not manufacture the injury-causing substance. In the present case, for example, one of the original defendants was dismissed from the action upon proof that it did not manufacture DES until after plaintiff was born.

Thus we conclude that the fact defendants do not have greater access to information which might establish the identity of the manufacturer of the DES which injured plaintiff does not per se prevent application of the *Summers* rule.

Nevertheless, plaintiff may not prevail in her claim that the *Summers* rationale should be employed to fix the whole liability for her injuries upon defendants, at least as those principles have previously been applied.<sup>12</sup> There is an important difference between the situation involved in *Summers* and the present case. There, all the parties who were or could have been responsible for the harm to the plaintiff were joined as defendants. Here, by contrast, there are approximately 200 drug companies which made DES, any of which might have manufactured the injury-producing drug.<sup>13</sup>

---

(...continued)

plaintiff cannot point to any particular manufacturer as the producer of the DES taken by her mother.

<sup>11</sup> In *Haft*, a father and his young son drowned in defendants' swimming pool. There were no witnesses to the accident. Defendants were negligent in failing to provide a lifeguard, as required by law. We held that the absence of evidence of causation was a direct and foreseeable result of the defendants' negligence, and that, therefore, the burden of proof on the issue of causation was upon defendants. Plaintiff attempts to bring herself within this holding. She asserts that defendants' failure to discover or warn of the dangers of DES and to label the drug as experimental caused her mother to fail to keep records or remember the brand name of the drug prescribed to her "since she was unaware of any reason to do so for a period of 10 to 20 years." There is no proper analogy to *Haft* here. While in *Haft* the presence of a lifeguard on the scene would have provided a witness to the accident and probably prevented it, plaintiff asks us to speculate that if the DES taken by her mother had been labelled as an experimental drug, she would have recalled or recorded the name of the manufacturer and passed this information on to her daughter. It cannot be said here that the absence of evidence of causation was a "direct and foreseeable result" of defendants' failure to provide a warning label.

---

<sup>12</sup> Plaintiff relies upon three older cases for the proposition that the burden of proof may be shifted to defendants to explain the cause of an accident even if less than all of them are before the court. (*Benson v. Ross* (1906) 143 Mich. 452, 106 N.W. 1120; *Moore v. Foster* (1938) 182 Miss. 15, 180 So. 73; *Oliver v. Miles* (1927) 144 Miss. 852, 110 So. 666.) These cases do not relate to the shifting of the burden of proof; rather, they imposed liability upon one of two or more joint tortfeasors on the ground that they acted in concert in committing a negligent act. This theory of concerted action as a basis for defendants' liability will be discussed infra. In *Summers*, we stated that these cases were "straining" the concept of concerted action and that the "more reasonable" basis for holding defendants jointly liable when more than one of them had committed a tort and plaintiff could not establish the identity of the party who had caused the damage was the danger that otherwise two negligent parties might be exonerated. (*Summers*, 33 Cal. 2d 80, at pp. 84-85, 199 P.2d 1.)

<sup>13</sup> According to the RESTATEMENT, the burden of proof shifts to the defendants only if the plaintiff can demonstrate that all defendants acted tortiously and that the harm resulted from the conduct of one of them. (REST. 2D TORTS, § 433B, com. g, p. 446.) It goes on to state (continued...)

Defendants maintain that, while in *Summers* there was a 50 percent chance that one of the two defendants was responsible for the plaintiff's injuries, here since any one of 200 companies which manufactured DES might have made the product which harmed plaintiff, there is no rational basis upon which to infer that any defendant in this action caused plaintiff's injuries, nor even a reasonable possibility that they were responsible.<sup>14</sup>

These arguments are persuasive if we measure the chance that any one of the defendants supplied the injury-causing drug by the number of possible tortfeasors. In such a context, the possibility that any of the five defendants supplied the DES to plaintiff's mother is so remote that it would be unfair to require each defendant to exonerate itself. There may be a substantial likelihood that none of the five defendants joined in the action made the DES which caused the injury, and that the offending producer not named would escape liability altogether. While we propose, *infra*, an adaptation of the rule in *Summers* which will substantially overcome these difficulties, defendants appear to be correct that the rule, as previously applied, cannot relieve plaintiff of the burden of proving the identity of the manufacturer which made the drug causing her injuries.<sup>15</sup>

---

(...continued)

that the rule thus far has been applied only where all the actors involved are joined as defendants and where the conduct of all is simultaneous in time, but cases might arise in which some modification of the rule would be necessary if one of the actors is or cannot be joined, or because of the effects of lapse of time, or other circumstances. (*Id.*, com. h, p. 446.)

<sup>14</sup> Defendants claim further that the effect of shifting the burden of proof to them to demonstrate that they did not manufacture the DES which caused the injury would create a rebuttable presumption that one of them made the drug taken by plaintiff's mother, and that this presumption would deny them due process because there is no rational basis for the inference.

<sup>15</sup> *Garcia v. Joseph Vince Co.*, *supra*, 84 Cal. App. 3d 868, 148 Cal. Rptr. 843, relied upon by defendants, presents a distinguishable factual situation. The plaintiff in *Garcia* was injured by a defective saber. He was unable to identify which of two manufacturers had produced the  
(continued...)

## II

The second principle upon which plaintiff relies is the so-called "concert of action" theory. Preliminarily, we briefly describe the procedure a drug manufacturer must follow before placing a drug on the market. Under federal law as it read prior to 1962, a new drug was defined as one "not generally recognized as ... safe." (§ 102, 76 Stat. 781 (Oct. 10, 1962).) Such a substance could be marketed only if a new drug application had been filed with the Food and Drug Administration and had become "effective." <sup>16</sup>If the agency determined that a product was no longer a "new drug," *i.e.*, that it was "generally recognized as ... safe," (21 U.S.C.A. § 321, subd. (p) (1)) it could be manufactured by any drug company without submitting an application to the agency. According to defendants, 123 new drug applications for DES had been approved by 1952, and in that year DES was declared not to be a "new drug," thus allowing any manufacturer to produce it without prior testing and without submitting a new drug application to the Food and Drug Administration.

With this background we consider whether the complaint states a claim based upon "concert of action" among defendants. The elements of this doctrine are prescribed in section 876 of the

---

(...continued)

weapon because it was commingled with other sabers after the accident. In a suit against both manufacturers, the court refused to apply the *Summers* rationale on the ground that the plaintiff had not shown that either defendant had violated a duty to him. Thus in *Garcia*, only one of the two defendants was alleged to have manufactured a defective product, and the plaintiff's inability to identify which of the two was negligent resulted in a judgment for both defendants. (*See also Wetzel v. Eaton, supra*, 62 F.R.D. 22.) Here, by contrast, the DES manufactured by all defendants is alleged to be defective, but plaintiff is unable to demonstrate which of the defendants supplied the precise DES which caused her injuries.

<sup>16</sup> A new drug application became "effective" automatically if the Secretary of Health, Education and Welfare failed within a certain period of time to disapprove the application. If the agency had insufficient information to decide whether the drug was safe or had information that it was unsafe, the application was denied. (§ 505, 52 Stat. 1052 (June 25, 1938).) Since 1962, affirmative approval of an application has been required before a new drug may be marketed. (21 U.S.C.A. § 355, subd. (c).)

RESTATEMENT OF TORTS. The section provides, "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." With respect to this doctrine, Prosser states that "those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him. (¶) Express agreement is not necessary, and all that is required is that there be a tacit understanding..." (PROSSER, LAW OF TORTS (4th ed. 1971), sec. 46, p. 292.)

Plaintiff contends that her complaint states a cause of action under these principles. She alleges that defendants' wrongful conduct "is the result of planned and concerted action, express and implied agreements, collaboration in, reliance upon, acquiescence in and ratification, exploitation and adoption of each other's testing, marketing methods, lack of warnings ... and other acts or omissions..." and that "acting individually and in concert, [defendants] promoted, approved, authorized, acquiesced in, and reaped profits from sales" of DES. These allegations, plaintiff claims, state a "tacit understanding" among defendants to commit a tortious act against her.

In our view, this litany of charges is insufficient to allege a cause of action under the rules stated above. The gravamen of the charge of concert is that defendants failed to adequately test the drug or to give sufficient warning of its dangers and that they relied upon the tests performed by one another and took advantage of each others' promotional and marketing techniques. These allegations do not amount to a charge that there was a tacit understanding or a common plan among defendants to fail to conduct adequate tests or give sufficient warnings, and that they substantially aided and encouraged one

another in these omissions. The complaint charges also that defendants produced DES from a "common and mutually agreed upon formula," allowing pharmacists to treat the drug as a "fungible commodity" and to fill prescriptions from whatever brand of DES they had on hand at the time. It is difficult to understand how these allegations can form the basis of a cause of action for wrongful conduct by defendants, acting in concert. The formula for DES is a scientific constant. It is set forth in the United States Pharmacopoeia, and any manufacturer producing that drug must, with exceptions not relevant here, utilize the formula set forth in that compendium. (21 U.S.C.A. § 351, subd. (b).)

What the complaint appears to charge is defendants' parallel or imitative conduct in that they relied upon each others' testing and promotion methods. But such conduct describes a common practice in industry: a producer avails himself of the experience and methods of others making the same or similar products. Application of the concept of concert of action to this situation would expand the doctrine far beyond its intended scope and would render virtually any manufacturer liable for the defective products of an entire industry, even if it could be demonstrated that the product which caused the injury was not made by the defendant.

None of the cases cited by plaintiff supports a conclusion that defendants may be held liable for concerted tortious acts. They involve conduct by a small number of individuals whose actions resulted in a tort against a single plaintiff, usually over a short span of time, and the defendant held liable was either a direct participant in the acts which caused damage,<sup>17</sup> or encouraged and assisted the person who directly caused the injuries by

---

<sup>17</sup> *Weinberg Co. v. Bixby* (1921) 185 Cal. 87, 103, 196 P. 25, involved a husband who was held liable with his wife for wrongful diversion of flood waters although he had given his wife title to the land upon which the outlet causing the diversion was constructed. He not only owned land affected by the flood waters, but he was his wife's agent for the purpose of reopening the outlet which caused the damage. In *Meyer v. Thomas* (1936) 18 Cal. App. 2d 299, 305-306, 63 P.2d 1176, both defendants participated in the conversion of a note and deed of trust.

participating in a joint activity.<sup>18</sup>

### III

A third theory upon which plaintiff relies is the concept of industry-wide liability, or according to the terminology of the parties, "enterprise liability." This theory was suggested in *Hall v. E.I. Du Pont de Nemours & Co., Inc.* (E.D. N.Y. 1972) 345 F. Supp. 353. In that case, plaintiffs were 13 children injured by the explosion of blasting caps in 12 separate incidents which occurred in 10 different states between 1955 and 1959. The defendants were six blasting cap manufacturers, comprising virtually the entire blasting cap industry in the United States, and their trade association. There were, however, a number of Canadian blasting cap manufacturers which could have supplied the caps. The gravamen of the complaint was that the practice of the industry of omitting a warning on individual blasting caps and of failing to take other safety measures created an unreasonable risk of harm, resulting in the plaintiffs' injuries. The complaint did not identify a particular manufacturer of a cap which caused a particular injury.

The court reasoned as follows: there was evidence that defendants, acting independently, had adhered to an industry-wide standard with regard to the safety features of blasting caps, that they had in effect delegated some functions of safety investigation and design, such as labelling, to their trade association, and that there was industry-wide cooperation in the manufacture and design of blasting caps. In these circumstances, the evidence supported a conclusion that all the defendants jointly controlled the risk. Thus, if plaintiffs could establish by a preponderance of the evidence that the caps were manufactured by one of the defendants, the burden of proof as to causation would shift to all the defendants. The court noted that this theory of liability applied to

industries composed of a small number of units, and that what would be fair and reasonable with regard to an industry of five or ten producers might be manifestly unreasonable if applied to a decentralized industry composed of countless small producers.<sup>19</sup>

Plaintiff attempts to state a cause of action under the rationale of *Hall*. She alleges joint enterprise and collaboration among defendants in the production, marketing, promotion and testing of DES, and "concerted promulgation and adherence to industry-wide testing, safety, warning and efficacy standards" for the drug. We have concluded above that allegations that defendants relied upon one another's testing and promotion methods do not state a cause of action for concerted conduct to commit a tortious act. Under the theory of industry-wide liability, however, each manufacturer could be liable for all injuries caused by DES by virtue of adherence to an industry-wide standard of safety.

In the Fordham Comment, the industry-wide theory of liability is discussed and refined in the context of its applicability to actions alleging injuries resulting from DES. The author explains causation under that theory as follows, "[T]he industrywide standard becomes itself the cause of plaintiff's injury, just as defendants' joint plan is the cause of injury in the traditional concert of action plea. Each defendant's adherence perpetuates this standard, which results in the manufacture of the particular, unidentifiable injury-producing product. Therefore, each industry member has contributed to plaintiff's injury." (Fordham Comment, *supra*, at p. 997.)

The Comment proposes seven requirements for a cause of action based upon industry-wide liability,<sup>20</sup> and suggests that if a plaintiff proves

<sup>18</sup> In *Agovino v. Kunze* (1960) 181 Cal. App. 2d 591, 599, 5 Cal. Rptr. 534, a participant in a drag race was held liable for injuries to a plaintiff who collided with the car of another racer. In *Loeb v. Kimmerle* (1932) 215 Cal. 143, 151, 9 P.2d 199, a defendant who encouraged another defendant to commit an assault was held jointly liable for the plaintiff's injuries. Also see *Weirum v. RKO General, Inc.* (1975) 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36.

<sup>19</sup> In discussing strict liability, the *Hall* court mentioned the drug industry, stating, "In cases where manufacturers have more experience, more information, and more control over the risky properties of their products than do drug manufacturers, courts have applied a broader concept of foreseeability which approaches the enterprise liability rationale." (345 F. Supp. 353 at p. 370.)

<sup>20</sup> The suggested requirements are as follows: 1. There existed an insufficient, industry-wide standard of safety as  
(continued...)



these elements, the burden of proof of causation should be shifted to the defendants, who may exonerate themselves only by showing that their product could not have caused the injury.<sup>21</sup>

We decline to apply this theory in the present case. At least 200 manufacturers produced DES; *Hall*, which involved 6 manufacturers representing the entire blasting cap industry in the United States, cautioned against application of the doctrine espoused therein to a large number of producers. (345 F. Supp. at p. 378.) Moreover, in *Hall*, the conclusion that the defendants jointly controlled the risk was based upon allegations that they had delegated some functions relating to safety to a trade association. There are no such allegations here, and we have concluded above that plaintiff has failed to allege liability on a concert of action theory.

Equally important, the drug industry is closely regulated by the Food and Drug Administration, which actively controls the testing and manufacture of drugs and the method by which they are marketed, including the contents of

warning labels.<sup>22</sup> To a considerable degree, therefore, the standards followed by drug manufacturers are suggested or compelled by the government. Adherence to those standards cannot, of course, absolve a manufacturer of liability to which it would otherwise be subject. (*Stevens v. Parke, Davis & Co.* (1973) 9 Cal. 3d 51, 65, 107 Cal. Rptr. 45, 507 P.2d 653.) But since the government plays such a pervasive role in formulating the criteria for the testing and marketing of drugs, it would be unfair to impose upon a manufacturer liability for injuries resulting from the use of a drug which it did not supply simply because it followed the standards of the industry.<sup>23</sup>

#### IV

If we were confined to the theories of *Summers* and *Hall*, we would be constrained to hold that the judgment must be sustained. Should we require that plaintiff identify the manufacturer which supplied the DES used by her mother or that all DES manufacturers be joined in the action, she would effectively be precluded from any recovery. As defendants candidly admit, there is little likelihood that all the manufacturers who made DES at the time in question are still in business or that they are subject to the jurisdiction of the California courts. There are, however, forceful arguments in favor of holding that plaintiff has a cause of action.

In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those

---

(...continued)

to the manufacture of the product. 2. Plaintiff is not at fault for the absence of evidence identifying the causative agent but, rather, this absence of proof is due to defendant's conduct. 3. A generically similar defective product was manufactured by all the defendants. 4. Plaintiff's injury was caused by this defect. 5. Defendants owed a duty to the class of which plaintiff was a member. 6. There is clear and convincing evidence that plaintiff's injury was caused by a product made by one of the defendants. For example, the joined defendants accounted for a high percentage of such defective products on the market at the time of plaintiff's injury. 7. All defendants were tortfeasors.

<sup>21</sup> The Fordham Comment takes exception to one aspect of the theory of industry-wide liability as set forth in *Hall*, *i.e.*, the conclusion that a plaintiff is only required to show by a preponderance of the evidence that one of the defendants manufactured the product which caused her injury. The Comment suggests that a plaintiff be required to prove by clear and convincing evidence that one of the defendants before the court was responsible and that this standard of proof would require that the plaintiff join in the action the producers of 75 or 80 percent of the DES prescribed for prevention of miscarriage. It is also suggested that the damages be apportioned among the defendants according to their share of the market for DES. (Fordham Comment, *supra*, 999-1000.)

<sup>22</sup> Federal regulations may specify the type of tests a manufacturer must perform for certain drugs (21 C.F.R. § 436.206 *et seq.*), the type of packaging used (§ 429.10), the warnings which appear on labels (§ 369.20), and the standards to be followed in the manufacture of a drug (§ 211.22 *et seq.*).

<sup>23</sup> *Abel v. Eli Lilly and Company*, the Michigan case referred to above which held that the plaintiffs had stated a cause of action against several manufacturers of DES even though they could not identify a particular manufacturer as the source of a particular injury, relied upon the theories of concerted action and alternative liability.

injured by such products, or to fashion remedies to meet these changing needs. Just as Justice Traynor in his landmark concurring opinion in *Escola v. Coca Cola Bottling Company* (1944) 24 Cal. 2d 453, 467-468, 150 P.2d 436, recognized that in an era of mass production and complex marketing methods the traditional standard of negligence was insufficient to govern the obligations of manufacturer to consumer, so should we acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances. THE RESTATEMENT comments that modification of the *Summers* rule may be necessary in a situation like that before us. (See fn. 16, *ante*.)

The most persuasive reason for finding plaintiff states a cause of action is that advanced in *Summers*: as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury. Here, as in *Summers*, plaintiff is not at fault in failing to provide evidence of causation, and although the absence of such evidence is not attributable to the defendants either, their conduct in marketing a drug the effects of which are delayed for many years played a significant role in creating the unavailability of proof.

From a broader policy standpoint, defendants are better able to bear the cost of injury resulting from the manufacture of a defective product. As was said by Justice Traynor in *Escola*, "[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." (24 Cal. 2d p. 462, 150 P.2d p. 441; see also REST. 2D TORTS, § 402A, com. c, pp. 349-350.) The manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effects; thus, holding it liable for defects and failure to warn of harmful effects will provide an incentive to product safety. (*Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal. 3d 121, 129, 104 Cal. Rptr. 433, 501 P.2d 1153; *Beech Aircraft Corp. v. Superior Court* (1976) 61 Cal. App. 3d 501, 522-523, 132 Cal. Rptr. 541.) These considerations are particularly significant where medication is involved, for the consumer is virtually helpless to protect himself from serious,

sometimes permanent, sometimes fatal, injuries caused by deleterious drugs.

Where, as here, all defendants produced a drug from an identical formula and the manufacturer of the DES which caused plaintiff's injuries cannot be identified through no fault of plaintiff, a modification of the rule of *Summers* is warranted. As we have seen, an undiluted *Summers* rationale is inappropriate to shift the burden of proof of causation to defendants because if we measure the chance that any particular manufacturer supplied the injury-causing product by the number of producers of DES, there is a possibility that none of the five defendants in this case produced the offending substance and that the responsible manufacturer, not named in the action, will escape liability. But we approach the issue of causation from a different perspective: we hold it to be reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose. Plaintiff asserts in her briefs that Eli Lilly and Company and 5 or 6 other companies produced 90 percent of the DES marketed. If at trial this is established to be the fact, then there is a corresponding likelihood that this comparative handful of producers manufactured the DES which caused plaintiff's injuries, and only a 10 percent likelihood that the offending producer would escape liability.<sup>24</sup>

If plaintiff joins in the action the manufacturers of a substantial share of the DES which her mother might have taken, the injustice of shifting the

---

<sup>24</sup> The Fordham Comment explains the connection between percentage of market share and liability as follows: "[I]f X Manufacturer sold one-fifth of all the DES prescribed for pregnancy and identification could be made in all cases, X would be the sole defendant in approximately one-fifth of all cases and liable for all the damages in those cases. Under alternative liability, X would be joined in all cases in which identification could not be made, but liable for only one-fifth of the total damages in these cases. X would pay the same amount either way. Although the correlation is not, in practice, perfect [footnote omitted], it is close enough so that defendants' objections on the ground of fairness lose their value." (Fordham Comment, *supra*, at p. 94.)

burden of proof to defendants to demonstrate that they could not have made the substance which injured plaintiff is significantly diminished. While 75 to 80 percent of the market is suggested as the requirement by the Fordham Comment (at p. 996), we hold only that a substantial percentage is required.

The presence in the action of a substantial share of the appropriate market also provides a ready means to apportion damages among the defendants. Each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries. In the present case, as we have seen, one DES manufacturer was dismissed from the action upon filing a declaration that it had not manufactured DES until after plaintiff was born. Once plaintiff has met her burden of joining the required defendants, they in turn may cross-complain against other DES manufacturers, not joined in the action, which they can allege might have supplied the injury-causing product.

Under this approach, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products. Some minor discrepancy in the correlation between market share and liability is inevitable; therefore, a defendant may be held liable for a somewhat different percentage of the damage than its share of the appropriate market would justify. It is probably impossible, with the passage of time, to determine market share with mathematical exactitude. But just as a jury cannot be expected to determine the precise relationship between fault and liability in applying the doctrine of comparative fault (*Li v. Yellow Cab Co.* (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226) or partial indemnity (*American Motorcycle Ass'n v. Superior Court* (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899), the difficulty of apportioning damages among the defendant producers in exact relation to their market share does not seriously militate against the rule we adopt. As we said in *Summers* with regard to the liability of independent tortfeasors, where a correct division of liability cannot be made "the trier of fact may make it the best it can." (33 Cal. 2d at p. 88, 199 P.2d at p. 5.)

We are not unmindful of the practical

problems involved in defining the market and determining market share,<sup>25</sup> but these are largely matters of proof which properly cannot be determined at the pleading stage of these proceedings. Defendants urge that it would be both unfair and contrary to public policy to hold them liable for plaintiff's injuries in the absence of proof that one of them supplied the drug responsible for the damage. Most of their arguments, however, are based upon the assumption that one manufacturer would be held responsible for the products of another or for those of all other manufacturers if plaintiff ultimately prevails. But under the rule we adopt, each manufacturer's liability for an injury would be approximately equivalent to the damages caused by the DES it manufactured.<sup>26</sup>

The judgments are reversed.

BIRD, C.J., and NEWMAN and WHITE, JJ., concur.

RICHARDSON, Justice, dissenting

I respectfully dissent. In these consolidated cases the majority adopts a wholly new theory which contains these ingredients: The plaintiffs were not alive at the time of the commission of the tortious acts. They sue a generation later. They are permitted to receive substantial damages from multiple defendants without any proof that any defendant caused or even probably caused plaintiffs' injuries.

Although the majority purports to change only

---

<sup>25</sup> Defendants assert that there are no figures available to determine market share, that DES was provided for a number of uses other than to prevent miscarriage and it would be difficult to ascertain what proportion of the drug was used as a miscarriage preventative, and that the establishment of a time frame and area for market share would pose problems.

<sup>26</sup> The dissent concludes by implying the problem will disappear if the Legislature appropriates funds "for the education, identification, and screening of persons exposed to DES." While such a measure may arguably be helpful in the abstract, it does not address the issue involved here: damages for injuries which have been or will be suffered. Nor, as a principle, do we see any justification for shifting the financial burden for such damages from drug manufacturers to the taxpayers of California.

the required burden of proof by shifting it from plaintiffs to defendants, the effect of its holding is to guarantee that plaintiffs will prevail on the causation issue because defendants are no more capable of disproving factual causation than plaintiffs are of proving it. "Market share" liability thus represents a new high water mark in tort law. The ramifications seem almost limitless, a fact which prompted one recent commentator, in criticizing a substantially identical theory, to conclude that "Elimination of the burden of proof as to identification (of the manufacturer whose drug injured plaintiff) would impose a liability which would exceed absolute liability." (Coggins, *Industry-Wide Liability* (1979) 13 SUFFOLK L. REV. 980, 998, fn. omitted; *see also* pp. 1000-1001.) In my view, the majority's departure from traditional tort doctrine is unwise.

The applicable principles of causation are very well established. A leading torts scholar, Dean Prosser, has authoritatively put it this way: "An *essential* element of the plaintiff's cause of action for negligence, *or for that matter for any other tort*, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." (PROSSER, TORTS (4th ed. 1971) § 41, p. 236, italics added.) With particular reference to the matter before us, and in the context of products liability, the requirement of a causation element has been recognized as equally fundamental. "It is clear that any holding that a producer, manufacturer, seller, or a person in a similar position, is liable for injury caused by a particular product, must necessarily be predicated upon proof that the product in question was one for whose condition the defendant was in some way responsible. Thus, for example, if recovery is sought from a manufacturer, *it must be shown that he actually was the manufacturer of the product which caused the injury;...*" (1 HURSH & BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY (2d ed. 1974) § 1:41, p. 125, italics added; *accord*, PROSSER, *supra*, § 103, at pp. 671-672; 2 DOOLEY, MODERN TORT LAW (1977) § 32.03, p. 243.) Indeed, an inability to prove this causal link between defendant's conduct and plaintiff's injury has proven fatal in prior cases brought against manufacturers of DES by persons who were situated in positions identical to those of plaintiffs

herein. (*See McCreery v. Eli Lilly & Co.* (1978) 87 Cal. App. 3d 77, 82, 150 Cal. Rptr. 730; *Gray v. United States* (D. Tex. 1978) 445 F. Supp. 337, 338.)

The majority now expressly abandons the foregoing traditional requirement of some causal connection between defendants' act and plaintiffs' injury in the creation of its new modified industry-wide tort. Conceptually, the doctrine of absolute liability which heretofore in negligence law has substituted only for the requirement of a breach of defendant's duty of care, under the majority's hand now subsumes the additional necessity of a causal relationship.

According to the majority, in the present case plaintiffs have openly conceded that they are unable to identify the particular entity which manufactured the drug consumed by their mothers. In fact, plaintiffs have joined only five of the approximately two hundred drug companies which manufactured DES. Thus, the case constitutes far more than a mere factual variant upon the theme composed in *Summers v. Tice* (1948) 33 Cal. 2d 80, 199 P.2d 1, wherein plaintiff joined as codefendants the only two persons who could have injured him. As the majority must acknowledge, our *Summers* rule applies only to cases in which "it is proved that harm has been caused to the plaintiff by ... one of [the named defendants], but there is uncertainty as to which one has caused it..." (REST. 2D TORTS, § 433B, subd. (3).) In the present case, in stark contrast, it remains wholly speculative and conjectural whether any of the five named defendants actually caused plaintiffs' injuries.

The fact that plaintiffs cannot tie defendants to the injury-producing drug does not trouble the majority for it declares that the *Summers* requirement of proof of actual causation by a named defendant is satisfied by a joinder of those defendants who have together manufactured "a substantial percentage" of the DES which has been marketed. Notably lacking from the majority's expression of its new rule, unfortunately, is any definition or guidance as to what should constitute a "substantial" share of the relevant market. The issue is entirely open-ended and the answer, presumably, is anyone's guess.

Much more significant, however, is the consequence of this unprecedented extension of

liability. Recovery is permitted from a handful of defendants each of whom individually may account for a comparatively small share of the relevant market, so long as the aggregate business of those who have been sued is deemed "substantial." In other words, a particular defendant may be held proportionately liable even though mathematically it is much more likely than not that it played no role whatever in causing plaintiffs' injuries. Plaintiffs have strikingly capsulated their reasoning by insisting "that while one manufacturer's product may not have injured a particular plaintiff, we can assume that it injured a different plaintiff and all we are talking about is a mere matching of plaintiffs and defendants." (Counsel's letter (Oct. 16, 1979) p. 3.) In adopting the foregoing rationale the majority rejects over 100 years of tort law which required that before tort liability was imposed a "matching" of defendant's conduct and plaintiff's injury was absolutely essential. Furthermore, in bestowing on plaintiffs this new largess the majority sprinkles the rain of liability upon all the joined defendants alike those who may be tortfeasors and those who may have had nothing at all to do with plaintiffs' injury and an added bonus is conferred. Plaintiffs are free to pick and choose their targets.

The "market share" thesis may be paraphrased. Plaintiffs have been hurt by someone who made DES. Because of the lapse of time no one can prove who made it. Perhaps it was not the named defendants who made it, but they did make some. Although DES was apparently safe at the time it was used, it was subsequently proven unsafe as to some daughters of some users. Plaintiffs have suffered injury and defendants are wealthy. There should be a remedy. Strict products liability is unavailable because the element of causation is lacking. Strike that requirement and label what remains "alternative" liability, "industry-wide" liability, or "market share" liability, proving thereby that if you hit the square peg hard and often enough the round holes will really become square, although you may splinter the board in the process.

\* \* \*

Finally, I am disturbed by the broad and ominous ramifications of the majority's holding. The law review comment, which is the wellspring of the majority's new theory, conceding the

widespread consequences of industry-wide liability, openly acknowledges that "The DES cases are only the tip of an iceberg." (Comment, *DES and a Proposed Theory of Enterprise Liability* (1978) 46 *FORDHAM L. REV.* 963, 1007.) Although the pharmaceutical drug industry may be the first target of this new sanction, the majority's reasoning has equally threatening application to many other areas of business and commercial activities.

Given the grave and sweeping economic, social, and medical effects of "market share" liability, the policy decision to introduce and define it should rest not with us, but with the Legislature which is currently considering not only major statutory reform of California product liability law in general, but the DES problem in particular. (*See* Sen. Bill No. 1392 (1979-1980 Reg. Sess.), which would establish and appropriate funds for the education, identification, and screening of persons exposed to DES, and would prohibit health care and hospital service plans from excluding or limiting coverage to persons exposed to DES.) An alternative proposal for administrative compensation, described as "a limited version of no-fault products liability" has been suggested by one commentator. (Coggins, *supra*, 13 *SUFFOLK L. REV.* at pp. 1019-1021.) Compensation under such a plan would be awarded by an administrative tribunal from funds collected "via a tax paid by all manufacturers." (P. 1020, fn. omitted.) In any event, the problem invites a legislative rather than an attempted judicial solution.

I would affirm the judgments of dismissal.

CLARK and MANUEL, JJ., concur.

## Questions and Notes

1. As you will learn in the course of your law school career, law reviews are for the most part edited by law students. "Notes" and "Comments" are articles written by students; notes are usually an analysis of some recent important case, whereas "comments" usually suggest a change in the law. The court in this case relies heavily upon a student-written comment appearing in the *Fordham Law Review*. Do you think it appropriate that the supreme court of the most populous state in the

nation should make substantial changes in the law based upon an approach suggested by someone who hasn't even completed law school?

2. The challenges of managing a large class action based on claims of personal injury have led many courts to reject the class action vehicle, even where the alternative is thousands of individual cases. Moreover, there are important due process limitations on what courts may do. For example, in *Amchem Prods., Inc. v. Windsor*, [117 S. Ct. 2231 \(1997\)](#), the Supreme Court rejected a settlement-only class action brought by victims of asbestos exposure. The case is analyzed (and criticized) in S. Charles Neill, *The Tower of Babel Revisited: The U.S. Supreme Court Decertifies One of the Largest Mass Tort Classes in History*, [37 WASHBURN L.J. 793](#) (1998).

### **BROWN v. SUPERIOR COURT**

44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470 (1988)

*[This case is significant both for its impact on the "market share" theory, and also because of its holdings with respect to product liability. The parts of the case dealing with product liability are excerpted in Chapter Six, § B. - ed.]*

MOSK, Justice

\* \* \*

## **II. Sindell Issues**

### **A. Breach of Express and Implied Warranty and Fraud**

\* \* \*

### **B. Joint and Several or Several Liability**

The last issue we determine is whether the defendants found liable in a market share action are to be held jointly and severally liable for the judgment or whether, as defendants here assert, each defendant should be liable only for the portion of a plaintiff's damages that corresponds to the percentage of its share of the relevant market for DES.

The consequences of these methods of determining liability are markedly different. If such defendants are jointly and severally liable, a

plaintiff may recover the entire amount of the judgment from any of the defendants joined in the action. Since the plaintiff is required under Sindell to join the manufacturers of only a substantial share of the appropriate market for DES, it follows that if joint liability were the rule, a defendant could be held responsible for a portion of the judgment that may greatly exceed the percentage of its market share. Under several liability, in contrast, because each defendant's liability for the judgment would be confined to the percentage of its share of the market, a plaintiff would not recover the entire amount of the judgment (except in the unlikely event that all manufacturers were joined in the action) but only the percentage of the sum awarded that is equal to the market shares of the defendants joined in the action. In the one case, it would be the plaintiff who would bear the loss resulting from the fact that some producers of DES that might have been found liable under the market share theory were not joined in the action (or if a defendant became insolvent), whereas in the other such losses would fall on the defendants. Since, as we pointed out in Sindell, there is little likelihood that all manufacturers of DES in the appropriate market would be amenable to suit, the adoption of one or the other basis for liability could significantly affect the amount of a plaintiff's recovery and, concomitantly, a defendant's liability.

\* \* \*

In creating the market share doctrine, this court attempted to fashion a remedy for persons injured by a drug taken by their mothers a generation ago, making identification of the manufacturer impossible in many cases. We realized that in order to provide relief to an injured DES daughter faced with this dilemma, we would have to allow recovery of damages against some defendants which may not have manufactured the drug that caused the damage. To protect such defendants against excessive liability, we considered and rejected three separate theories of liability suggested by the plaintiff, and formulated, instead, the market share concept.

We explained the basis of the doctrine as follows: In order to decrease the likelihood that a manufacturer of DES would be held liable for injuries caused by products not of its making, and to achieve a reasonable approximation of its

responsibility for injuries caused by the DES it produced, the plaintiff should be required to join in the action the manufacturers of a substantial share of the relevant DES market. If this were done, the injustice of shifting the burden of proof to defendants to exonerate themselves of responsibility for the plaintiff's injuries would be diminished. Each defendant would be held liable for the proportion of the judgment represented by its market share, and its overall liability for injuries caused by DES would approximate the injuries caused by the DES it manufactured. A DES manufacturer found liable under this approach would not be held responsible for injuries caused by another producer of the drug. The opinion acknowledged that only an approximation of a manufacturer's liability could be achieved by this procedure, but underlying our holding was a recognition that such a result was preferable to denying recovery altogether to plaintiffs injured by DES.

It is apparent that the imposition of joint liability on defendants in a market share action would be inconsistent with this rationale. Any defendant could be held responsible for the entire judgment even though its market share may have been comparatively insignificant. Liability would in the first instance be measured not by the likelihood of responsibility for the plaintiff's injuries but by the financial ability of a defendant to undertake payment of the entire judgment or a large portion of it. A defendant that paid a larger percentage of the judgment than warranted by its market share would have the burden of seeking indemnity from other defendants (Code Civ. Proc., § 875; *American Motorcycle Association v. Superior Court* (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899), and it would bear the loss if producers of DES that might have been held liable in the action were not amenable to suit, or if a codefendant was bankrupt. In short, the imposition of joint liability among defendant manufacturers in a market share action would frustrate Sindell's goal of achieving a balance between the interests of DES plaintiffs and manufacturers of the drug.

This holding is consistent with the views of commentators who, with a few exceptions, have concluded that Sindell in effect held or should have held that defendants are not jointly liable for

damages in a market share action. (Schwartz & Mahshigian, *Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution* (1985) 73 CAL. L. REV. 941, 957; Note, *Sindell v. Abbott Laboratories: A Market Share Approach to DES Causation* (1981) 69 CAL. L. REV. 1179, 1194; Comment, *The Market Share Theory: Sindell, Contribution to Industry-Wide Liability* (1981) 19 HOUSTON L. REV. 107, 131-132; Note, *Products liability* (1981) 34 OKLA. L. REV. 843, 853; Note, *Market Share Liability: An Answer to the DES Causation Problem* (1981) 94 HARV. L. REV. 668, 673; Note, *DES: Judicial Interest Balancing and Innovation* (1981) 22 B.C. L. REV. 747, 770, 774.)

Finally, plaintiff proposes an alternate means to apportion liability among defendants. She suggests that if we conclude that joint liability is not appropriate, each defendant's liability should be "inflated" in proportion to its market share in an amount sufficient to assure that plaintiff would recover the entire amount of the judgment. While this ingenious approach would not be as unjust to defendants as joint liability, we decline to adopt the proposal because it would nonetheless represent a retreat from Sindell's attempt to achieve as close an approximation as possible between a DES manufacturer's liability for damages and its individual responsibility for the injuries caused by the products it manufactured.

The judgment of the Court of Appeal is affirmed.

[All concur.]

**EDWARDS v. A.L. LEASE & CO.**

46 Cal. App. 4th 1029, 54 Cal. Rptr.2d 259 (1996)

HANING, Associate Justice.

In this appeal we are asked to apply the market share theory of liability of *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 163 Cal. Rptr. 132, 607 P.2d 924 (*Sindell*), or the alternative theory of liability of *Summers v. Tice* (1948) 33 Cal.2d 80, 199 P.2d 1 (*Summers*) to wholesalers of defective residential drain pipe where the manufacturers are known, but where the plaintiffs in this product liability action for property damage allegedly cannot determine which wholesaler distributed the pipe that was installed in their

homes. We affirm.

### Background

This appeal is taken from a judgment of dismissal after demurrers to appellants' third amended complaints were sustained without leave to amend. The established standard of appellate review requires us to accept all material facts properly pleaded as true and accept those subject to judicial notice, and we report them accordingly. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318, 216 Cal. Rptr. 718, 703 P.2d 58)

Appellants are individual homeowners whose homes have been damaged by defective acrylonitrile-butadiene-styrene (ABS) drain, waste and vent pipes manufactured by Centaur Mfg., Inc., (Centaur) and Phoenix Extrusion Company (Phoenix).<sup>3</sup> Properly made ABS pipe must be manufactured from new, as opposed to recycled plastic, or it will fail. During an approximately two-year period, Centaur and Phoenix manufactured ABS pipe with recycled plastic. Defective components and recycled plastic from which the pipe was manufactured during this period were supplied to Centaur and Phoenix by two known component manufacturers. Centaur and Phoenix sold the defective pipe to wholesalers, who resold it to the plumbing contractors that installed it in plaintiffs' homes. The pipe was installed during the original construction of plaintiffs' homes between 1985 and 1988, and clearly designates the manufacturer as either Centaur or Phoenix. Respondents are a group comprising "approximately 100 [percent]" of the wholesalers of the defective pipe.

Appellants filed an action for property damage against the manufacturers, the component suppliers, an industry overseer, and respondent wholesalers. Appellants' amended complaints allege generally that although they can identify the

manufacturer of the defective pipe installed in their individual homes, the suppliers of the defective components from which the pipe was manufactured, and the industry overseer, they cannot determine which wholesaler(s) distributed the pipe to the plumbing contractors that installed it in their homes, and have exhausted all reasonable efforts to do so. The nature of the defect is such that it may not manifest itself and cause harm for several years after installation; and the lapse of time, the fact that many plumbing contractors are no longer in business, and the attendant lack of records make it virtually impossible to trace the wholesaler(s) of the defective pipe. Appellants' action against respondents is based solely on strict liability under either a *Sindell* or *Summers* theory.

The trial court sustained the respondents' demurrers and dismissed the action against them, ruling that neither *Sindell's* market share theory nor *Summers'* alternative theory of liability was applicable. It is from this judgment of dismissal that the appeal is taken.

### Discussion

#### A. Market Share Liability

*Sindell* departs from the general rule requiring plaintiffs to identify the specific defendants whose conduct caused injury, and provides an exception to that rule under certain circumstances. The *Sindell* facts are well known. The *Sindell* plaintiffs were women who had developed cancer due to prenatal exposure to diethylstilbestrol (DES), a prescription drug designed to prevent miscarriage and which was utilized by their mothers for that purpose. DES was manufactured by several pharmaceutical companies from an identical formula. When plaintiffs were unable to determine which manufacturer supplied the DES ingested by their mothers, the court fashioned a market share theory of liability, permitting plaintiffs to join a substantial share of the manufacturers, and shifting the burden to the individual manufacturers to demonstrate they did not manufacture the drug causing plaintiffs' injuries.

The factual matrix of appellants' cases differs significantly from that of the *Sindell* plaintiffs. First, the *Sindell* plaintiffs were unable to identify the manufacturer of the defectively designed drug causing their injuries, and would have been without a remedy for extremely serious injuries absent

<sup>3</sup> The relationship between Centaur and Phoenix is not clear. Phoenix is sometimes alleged as "Phoenix Extrusion Company doing business as [or also known as] Centaur Marketing, Inc.," and is also alleged as the successor of Centaur. The complaint of plaintiffs Edwards and Albright alleges that Centaur filed for bankruptcy. Plaintiffs Marshall, Carter and Abad allege that "Centaur is no longer in operation." For all practical purposes, however, we appear to be dealing with a single manufacturing operation in these actions.



market share liability. Appellants here know who manufactured the defective pipe, know who supplied the defective components from which it was manufactured, and also know the general contractor or builder who constructed their homes--indeed, their complaints allege that they have contacted either their individual developers or builders. Consequently, appellants have identifiable defendants, and are not otherwise without a remedy.

Second, *Sindell* dealt with a fungible product manufactured from the same formula, which was inherently defective for its intended purpose by reason of design. In contrast, appellants were not damaged by a fungible product uniformly manufactured from a common formula, and which is inherently unsafe due to its defective design. When properly manufactured, ABS pipe is fit for its intended purpose. Appellants were damaged by manufacturing defects occurring during a discrete time period by a single manufacturer. (See fn. 1, ante.) California courts have not imposed market share liability for nonfungible products (*Mullen v. Armstrong World Industries, Inc.* (1988) 200 Cal. App. 3d 250, 246 Cal. Rptr. 32) or defectively manufactured products which are not otherwise harmful for their intended purpose (*Sheffield v. Eli Lilly & Co.* (1983) 144 Cal. App. 3d 583, 192 Cal. Rptr. 870). For these reasons alone we conclude market share liability is inapplicable here, and therefore we need not discuss the other reasons advanced by respondents for its nonapplicability.

### **B. Alternative Liability**

Alternative liability is the label for the burden-shifting rule of *Summers*. In *Summers*, the plaintiff was injured by shotgun pellets fired by one of two persons who negligently fired in plaintiff's direction during a hunting trip. Although plaintiff was unable to determine which of the named defendants fired the specific shot which struck him, the court held that since both defendants were negligent they were liable as joint tortfeasors, and the burden was imposed upon them to prove they did not cause plaintiff's injuries. The *Summers* court reasoned that without such a rule the plaintiff was without a remedy, and that the defendants were better able to provide evidence of causation. "If one can escape the other may also and plaintiff is remediless.

Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury." (*Summers, supra*, 33 Cal.2d at p. 86, 199 P.2d 1.) *Summers* was based on a provision of the Restatement of Torts, which states: "Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm." (REST.2D TORTS, § 433B, subd. (3), italics added.)

Much of the rationale for application of the *Summers* rule is missing in cases where individual plaintiffs have identifiable defendants. Appellants have alleged generally that they are unable to determine which wholesaler supplied their particular plumbing contractors with the defective pipe, and are unable to identify the plumbing contractors who installed the pipe, their general contractors or their developers. However, appellants' general allegations advanced on behalf of a class which has not been certified, must give way to the specific allegations regarding the individual litigants involved in this appeal. (See, e.g., *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713, 63 Cal. Rptr. 724, 433 P.2d 732; *Dale v. City of Mountain View* (1976) 55 Cal. App. 3d 101, 105, 127 Cal. Rptr. 520.) The individual appellants in this appeal specifically allege they not only have identified, but have contacted the developers and/or builders of their particular homes about the defective pipe, and do not allege any reason why the plumbing contractors that installed the pipe in their homes and the wholesaler from whom their plumbing contractors obtained the pipe cannot be identified. Consequently, in contrast to the *Summers* plaintiff, appellants are not without a remedy due to their inability to identify and join the responsible defendants.

The judgment is affirmed.

## Questions and Notes

1. One commentator has expressed skepticism concerning the court's ability to make meaningful (and fair) determinations of "market share." See Fischer, *Products Liability — An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623 (1981).

2. There is considerable debate about the best way to handle mass tort cases, of which the DES cases are but an example. Should the plaintiffs (and defendants) be given individual treatment, or is some sort of "assembly-line" approach best for all concerned? For a recent review, see Symposium, *Conflict of Laws and Complex Litigation Issues in Mass Tort Litigation*, 1989 U. ILL. L. REV. 35.

3. There are even efforts to apply market share liability theories against illegal drug dealers. See Kevin G. Meeks, *From Sindell to Street Pushers: Imposing Market Share Tort Liability on Illegal Drug Dealers*, 33 GA. L. REV. 315 (1998).

### b. Loss of a Chance

#### DILLON v. TWIN STATE GAS & ELECTRIC CO.

163 A. 111 (N.H. 1932)

Action for negligently causing the death of the plaintiff's intestate, a boy of 14. A jury trial resulted in a disagreement.

The defendant maintained wires to carry electric current over a public bridge in Berlin. In the construction of the bridge there were two spans of girders on each side between the roadway and footway. In each span the girders at each end sloped upwards towards each other from the floor of the bridge until connected by horizontal girders about nineteen feet above the floor.

The wires were carried above the framework of the bridge between the two rows of girders. To light the footway of the bridge at its center a lamp was hung from a bracket just outside of one of the horizontal girders and crossing over the end of the

girder near its connection with a sloping girder. Wires ran from a post obliquely downward to the lamp and crossed the horizontal girder a foot or more above it. The construction of the wire lines over and upon the bridge is termed aerial. The wires were insulated for weather protection but not against contact.

The decedent and other boys had been accustomed for a number of years to play on the bridge in the daytime, habitually climbing the sloping girders to the horizontal ones, one which they walked and sat and from which they sometimes dived into the river. No current passed through the wires in the daytime except by chance.

The decedent, while sitting on a horizontal girder at a point where the wires from the post to the lamp were in front of him or at his side, and while facing outwards from the side of the bridge, leaned over, lost his balance, instinctively threw out his arm, and took hold of one of the wires with his right hand to save himself from falling. The wires happened to be charged with a high voltage current at the time and he was electrocuted. Further facts appear in the opinion.

\* \* \*

ALLEN, J.

The bridge was in the compact part of the city. It was in evidence that at one time the defendant's construction foreman had complained to the city marshal about its use by boys as a playground, and in his complaint had referred to the defendant's wires. The only wires were those over the bridge superstructure. From this evidence and that relating to the extent of the practice for boys to climb up to and upon the horizontal girders an inference that the defendant had notice of the practice was reasonable. The occasion for the complaint might be found due to apprehension of danger from proximity to the wires. This only came about from climbing upon the upper framework of the bridge. There was no suggestion of danger in any use of the bridge confined to the floor level.

The use of the girders brought the wires leading to the lamp close to those making the use, and as to them it was in effect the same as though the wires were near the floor of the bridge. While the current in the wires over the bridge was mechanically shut off during the daytime, other wires carried a commercial current, and there was

a risk from many causes of the energizing of the bridge wires at any time. It is claimed that these causes could not be overcome or prevented. If they could not, their consequences might be. Having notice of the use made of the girders, and knowing the chance of the wires becoming charged at any time, the defendant may not say that it was not called upon to take action until the chance happened. Due care demanded reasonable measures to forestall the consequences of a chance current if the chance was too likely to occur to be ignored.

\* \* \*

When it is said that care is owing only towards those with whom there is a relationship, the problem of determining if a relationship exists remains. It is not solved by rigid and arbitrary classifications between those entitled, and those not entitled, to receive care. "The rule of reasonable conduct is applied in this jurisdiction ... to show the extent of an existing relation.... It is a reasonable rule because it only calls for reasonable conduct." *McCaffrey v. Company*, *supra*, page 51 of 80 N.H., 114 A. 395, 398. And the rule goes even farther and serves to show the existence of a relation as well as its extent. Reasonableness is as well a test of the requirement of conduct as a matter of law as of its character, as a matter of fact.

\* \* \*

In passing upon the issue of reasonableness, relative and comparative considerations are made. In general, when the danger is great and the wrongful conduct of the injured person is not serious, it is reasonable for the law to find a relationship and to impose a duty of protection. A defendant in his own interest causing dangerous forces to operate or dangerous conditions to exist should reasonably protect those likely to be exposed to them and not reasonably in fault for the exposure.

Standing of reasonableness may change in changing conditions and changing attitudes towards the conditions. But the principle of reasonable conduct remains unchanged as the test of civil liability, in the absence of special rules. It is because of such changes and because of the elements of reasonableness which resolve into opinion that differences and conflict of rules come

about. But it is a difference of application and not a principle.

\* \* \*

"The object of the law being to safeguard and protect the various rights in land, it is obviously going quite far enough to limit the immunity to the one whose rights have been invaded. Nor does logic or justice require more. A trespass is an injury to the possession; and, as it is only he whose possession is disturbed who can sue therefor, so it should be that he, alone, could assert the unlawful invasion when suit is brought by an injured trespasser. One should not be allowed 'to defend an indefensible act' by showing that the party injured was engaged in doing something which, as to a third person, was unlawful." *Humphrey v. Company*, 100 Vt. 414, 139 A. 440, 442, 56 A.L.R. 1011.

Authority is understood to be nearly unanimous in support of this view.

\* \* \*

The circumstances of the decedent's death give rise to an unusual issue of its cause. In leaning over from the girder and losing his balance he was entitled to no protection from the defendant to keep from falling. Its only liability was in exposing him to the danger of charged wires. If but for the current in the wires he would have fallen down on the floor of the bridge or into the river, he would without doubt have been either killed or seriously injured. Although he died from electrocution, yet, if by reason of his preceding loss of balance he was bound to fall except for the intervention of the current, he either did not have long to live or was to be maimed. In such an outcome of his loss of balance, the defendant deprived him, not of a life of normal expectancy, but of one too short to be given pecuniary allowance, in one alternative, and not of normal, but of limited, earning capacity, in the other.

If it were found that he would have thus fallen with death probably resulting, the defendant would not be liable, unless for conscious suffering found to have been sustained from the shock. In that situation his life or earning capacity had no value. To constitute actionable negligence there must be damage, and damage is limited to those elements the statute prescribes

If it should be found that but for the current he

would have fallen with serious injury, then the loss of life or earning capacity resulting from the electrocution would be measured by its value in such injured condition. Evidence that he would be crippled would be taken into account in the same manner as though he had already been crippled.

His probable future but for the current thus bears on liability as well as damages. Whether the shock from the current threw him back on the girder or whether he would have recovered his balance, with or without the aid of the wire he took hold of, if it had not been charged, are issues of fact, as to which the evidence as it stands may lead to difference conclusions.

Exception overruled. All concurred.

## Questions and Notes

1. Suppose the jury were convinced that there was a 30% chance that, but for the electrified wire, the plaintiff would have landed in the river and floated to safety; but a 70% chance that he would have landed on the rocks and been killed. What result?

### HARDY v. SOUTHWESTERN BELL TELEPHONE CO.

910 P.2d 1024 (Okla. 1996)

SIMMS, Justice.

The United States District Court for the Northern District of Oklahoma has certified the following question of law to this Court pursuant to the Uniform Certification of Law Act, 20 O.S.1991, § 1602:

Does the lost chance of survival doctrine set out in *McKellips v. Saint Francis Hosp., Inc.*, 741 P.2d 467 (Okla.1987), and restricted therein to certain limited types of medical malpractice actions, apply in an ordinary negligence case that is not brought against a medical practitioner or hospital?

Our answer is that an action for loss of chance of survival may not be expanded to apply in an

ordinary negligence action brought against one other than a medical practitioner or a hospital.

In light of the outcome of our decision answering this certified question, we find it unnecessary to consider issues regarding the limitation of Southwestern Bell's liability by reason of tariffs on file with the Oklahoma Corporation Commission.

Plaintiff, Dr. Homer Hardy, brought this action for wrongful death against Southwestern Bell Telephone Company alleging that its negligence caused a failure of the 911 emergency system which resulted in his wife's death from a heart attack she suffered in their Tulsa home the morning of July 18, 1992, because plaintiff was unable to promptly summon emergency assistance and an ambulance for her.

Ruling on the parties' motions for summary judgment, the trial court held that plaintiff could not establish defendant's action as the cause in fact of his injury; that plaintiff failed to make the necessary causal connection between the delay caused by the system failure and the decedent's death which is required by controlling authority.

Finding that plaintiff could not meet his burden of proof of causation in a traditional negligence action, the trial judge determined the question of the applicability of *McKellips*, with its reduced standard of causation, would be appropriate to certify to this Court, even though *McKellips* explicitly limits application of the doctrine to the area of medical malpractice and rejects the idea of expanding past that boundary to ordinary negligence actions.

In its order of certification the trial court set forth the following facts as relevant to the question certified and showing the nature of the controversy in which the question arose.

Mrs. Hardy ("Deceased") suffered a heart attack in her home on July 18, 1992 and died at Hillcrest Medical Center later that same day. From the time the Deceased suffered her heart attack to the time EMSA arrived at Mrs. Hardy's home, the Decedent's husband ("Plaintiff") administered Cardiovascular Pulmonary Resuscitation ("CPR") on his wife and attempted to summon EMSA using the Emergency 911 System ("911 System") of

Defendant Southwestern Bell Company ("SWB"). Plaintiff was unable to reach EMSA. After repeated attempts to summon EMSA using the 911 system, Plaintiff dialed the operator, who called the Fire Department and ambulance. Plaintiff alleges his unsuccessful attempts to summon EMSA was due to a "system lock-up" resulting from SWB's decision, despite its knowledge of previous incidents in other areas of the country where the telephone system overloaded during similar types of concert ticket sales, to allow the sale of Garth Brooks concert tickets by phone. Plaintiff contends the overload of the telephone system was the proximate cause of his wife's death. In response, Defendant claims decedent's death was proximately caused by her heart attack.

In deciding *McKellips* the Court joined with a growing number of jurisdictions which have recently adopted the "loss of chance" doctrine in medical malpractice actions. While the decisions have some differences in their approaches, the essence of the action is that medical providers are liable for negligent treatment which decreased a patient's chance of survival for a better outcome even though the adverse result probably would have occurred anyway. In the typical loss of chance case the plaintiff is already suffering from a threatening condition or is subject to some existing risk, unlike a healthy plaintiff in most injury actions. The plaintiff claims that the tortfeasor has negligently breached the very duty imposed to prevent the harm suffered. The negligence increases the risk of harm by aggravating the effect of the pre-existing condition or risk and/or taking away whatever chance for recovery existed before the negligence.

In *McKellips*, for instance, plaintiff brought a wrongful death action against the hospital and physician for negligent care of the decedent who was brought to the hospital suffering chest pain. Decedent was diagnosed as having gastritis and released but died of cardiac arrest approximately five hours later. Evidence established that decedent had a less than even chance for recovery or survival even with non-negligent care. In the case at bar, plaintiff states that he does not know

if his wife would have survived if the ambulance could have been summoned and had arrived in its normal response time, but that the delay caused a loss of his wife's chance to survive the heart attack.

As the Court explained in *McKellips*, under traditional principles of causation in negligence actions, plaintiff must present evidence that it is "more likely than not" that the harm suffered was caused by defendant's negligence. While absolute certainty is not required, mere possibility of causation is insufficient. When the matter is one of pure speculation or conjecture or the probabilities evenly balanced, it is the duty of the court to direct a verdict for defendant because a party will not be permitted to recover from another whose acts, however wrongful, are not the proximate cause of the injury suffered. Recovery is barred therefore where defendant's treatment or diagnosis, even if clearly negligent, deprives a patient of only 50% or less chance of avoiding harm. In the typical loss of chance case, pre-existing illness or injuries have already lowered the patient's chance of avoiding the ultimate harm. The patient already has a disease or condition from which death or impairment would more than likely result so that even if defendant's negligence will deprive the patient of all existing chance to avoid the harm, traditional causation principles will totally bar recovery. *Id.*, at 470- 471.

In *McKellips* the Court discussed the various theories upon which loss of chance malpractice cases have been adopted to ameliorate this perceived harsh result of the all-or-nothing traditional causation standard. Some courts have relaxed the degree of certainty necessary for the submission of the issue of proximate cause from the reasonable probability standard to a substantial factor test. In those cases, the ultimate harm, rather than the lost chance itself is the focus so that full damages are awarded in the same manner as if plaintiff had established "but for" causation for the original harm.

Relying on the Second Restatement of Torts, § 323(a) some States impose liability on a showing that defendant's negligence was a substantial factor in increasing plaintiff's risk of harm or reducing plaintiff's chances of obtaining a better result. Some jurisdictions view the lost chance itself as the injury, treating it as a separate, distinct cause of

action. The plaintiff does not recover for the value of the serious medical condition or death, only for the lost chance of recovery. Issues of the standard of causation are not involved because the focus of the proximate cause inquiry is limited to whether it is more likely than not that defendant's malpractice decreased a chance of survival. *Id.*, at 471-473.

After considering the several variations of analysis of the doctrine, the *McKellips* court adopted what has been referred to as a "hybrid" approach, applying a relaxed standard of causation but limiting damages to the value of the lost chance. The court adopted the increased risk analysis of § 323, allowing a plaintiff to go the jury not only with evidence of increased risk, but also with evidence of substantial decrease in chances for survival. *Id.*, at 475-477. See *Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397 (Tex.1993).

As recognized by the trial court in the instant case, the *McKellips* court announced it was specifically limiting the application of the loss of chance doctrine adopted that day to:

a limited type of medical malpractice case where the duty breached was one imposed to prevent the type of harm which a patient ultimately sustains and because of the inherent nature of such a case a plaintiff is unable to produce evidence of causation sufficient to meet the traditional rule of causation. We note that our decision today does not change the traditional principles of causation in the ordinary negligence case and this new rule applies only in those limited situations as presented here. At 474-475.

In its conclusion, the court stated:

In summary, we hold in medical malpractice cases involving the loss of a less than even chance of recovery or survival where the plaintiff shows that the defendant's conduct caused a substantial reduction of the patient's chance of recovery or survival, irrespective of statistical evidence, the question of proximate cause is for the jury. We further hold if a jury determines the defendant's negligence is the proximate

cause of the patient's injury, the defendant is liable for only those damages proximately caused by his negligence which aggravated a pre-existing condition. Consequently, a total recovery for all damages attributable to death are not allowed and damages should be limited in accordance with the prescribed method of valuation. At 477.

The public policy considerations which are reflected in the judicial decisions creating this remarkable exception to the traditional rule of the standard of proof of causation focus on the special relationship of the physician and patient and the expression of apprehension that failure to adopt the loss of chance doctrine in medical malpractice suits would place patients with pre-existing conditions in peril.

In *Aasheim v. Humberger*, 215 Mont. 127, 695 P.2d 824, 828 (1985), the Supreme Court of Montana determined that a patient was entitled to a loss of chance instruction where her physician's failure to order diagnostic x-rays resulted in failure to properly diagnose cancer and patient's loss of chance to preserve her knee. The court explained:

We feel that including 'loss of chance' within causality recognizes the realities inherent in medical negligence litigation. People who seek medical treatment are diseased or injured. Failure to diagnose or properly treat denies the opportunity to recover. Including this lost opportunity within the causality embrace gives recognition to a real loss consequence of medical failure.

Addressing these policy concerns in *McKellips*, the Court pointed out that a health care professional who has deprived a patient of a significant chance for recovery through negligence should not be able to rely on the inevitability of the patient's condition inasmuch as defendant put the chance for improvement "beyond the possibility of realization". We recognized that "health care providers should not be given the benefit of the uncertainty created by their own negligent conduct. To hold otherwise would in effect allow care providers to evade liability for their negligent actions or inactions to situations in which patients

would not necessarily have survived or recovered, but still would have a significant chance of survival or recovery." At 474.

We also discussed there the subversion of the deterrence function of tort law which would occur if recovery is denied for statistically irrefutable loss suffered by reason of conduct which breaches the duty imposed to prevent the very type of harm the plaintiff ultimately sustains. We set forth the observation of the Supreme Court of Kansas in *Roberson v. Counselman*, 235 Kan. 1006, 686 P.2d 149 (1984), criticizing the "all or nothing" requirement of traditional causation in medical malpractice cases, stating:

There are sound reasons of public policy involved in reaching this result. The reasoning of the district court herein (which is similar to the extreme position taken in *Cooper v. Sisters*, 27 Ohio St.2d 242, 272 N.E.2d 97), in essence, declares open season on critically ill or injured persons as care providers would be free of liability for even the grossest malpractice if the patient had only a fifty-fifty chance of surviving the disease or injury even with proper treatment. Under such rationale a segment of society often least able to exercise independent judgment would be at the mercy of those professionals on whom it must rely for life-saving health care.

In *Falcon v. Memorial Hospital*, 436 Mich. 443, 462 N.W.2d 44 (1990), the Supreme Court of Michigan recognized that a patient's loss of a 37.5% opportunity of living because of a physician's negligent failure to act could form the basis of a medical malpractice action. The court spoke of the expectations of patients about their physicians and noted that "a patient goes to a physician precisely to improve his opportunities of avoiding, ameliorating or reducing physical harm and pain and suffering ... that is why [patients] go to physicians. That is what physicians undertake to do. That is what they are paid for. They are, and should be, subject to liability if they fail to measure up to the standard of care." 462 N.W.2d at 52. The court concluded that injury which results from medical malpractice includes not only physical harm, but the loss of opportunity of

avoiding physical harm so that a physician who deprives a patient of a 37.5% chance of surviving which she would have had if the physician had not failed to act, is subject to a loss of chance of survival action.

The public policy concerns of medical practice which have been held to justify a reduced burden of causation in lost chance cases do not transfer over to ordinary negligence cases. Public policy is not served by extending the causation exception to the "but for" rule to other tortfeasors. Under the decisions discussed and other "loss of chance" medical provider opinions, the physician had the opportunity to perform properly under the terms of the physician-patient special relationship but was alleged to have failed to do so.

The essence of the doctrine is the special relationship of the physician and the patient. In these cases the duty is clear, the negligence is unquestioned and the resulting harm, the destruction of a chance for a better outcome, has obvious value and is not so speculative as to be beyond being reasonably considered a result of defendant's negligence.

In *Daugert v. Pappas*, 104 Wash. 2d 254, 704 P.2d 600 (1985), the Supreme Court of Washington rejected an attempt to apply principles of loss of chance to an action for legal malpractice based on failure to file an appeal. The court found that while the loss of chance to recover from misdiagnosis of cancer such as was present in *Herskovits v. Group Health Coop of Puget Sound*, 99 Wash. 2d 609, 664 P.2d 474 (1983), resulted in a very real injury with definite value which would require compensation, there is no commensurate harm, no lost chance, in a legal malpractice case as the matter may eventually be reviewed. Neither, held the court, is there in a legal malpractice action a separate and distinguishable harm, a diminished chance.

Plaintiff presents no convincing arguments regarding application of the loss of chance doctrine to this situation. In *Coker v. Southwestern Bell Telephone Co.*, 580 P.2d 151 (Okl. 1978), we held that plaintiff did not state a cause of action against the telephone company for damages sustained when fire destroyed his place of business with the theory that the defective telephone prevented him from summoning emergency assistance to extinguish the fire. We held that the petition did not assert the

requisite causal connection between alleged negligence of the defendant and the resulting damages. We observed that it would be "necessary to heap conclusion upon conclusion as to the course events would have taken had the telephone operated properly" in order to establish the causal connection between the defective telephone and the ultimate destruction of appellant's business. Addressing the issue of causation we found the failure of phone service was too remote from plaintiff's loss to establish grounds for recovery and stated "that the number and character of the random elements which must come together in precisely the correct sequence at exactly the right time in order for it to be established that failure of telephone service was an efficient cause of appellant's loss so far removes appellee's act of negligence from the ultimate consequences as to break any asserted causal connection." *Id.*, at 154.

We relied in large part on a Washington decision, *Foss v. Pacific Telephone and Telegraph Co.*, 26 Wash. 2d 92, 173 P.2d 144, 149 (1946), which we noted had ruled on facts virtually identical to Coker. In *Foss* the Supreme Court of Washington had collected and analyzed many decisions addressing the very points we considered regarding causation and we set forth the following instructive discussion of causation from that decision:

Appellant's claim of causation rests on pure speculation. Surely we could not hold that anyone could ever say that if respondent's operator had promptly answered appellant's call and made connection of his telephone with the fire department in Kent that the fire department would have immediately answered the telephone; would have promptly left the house where the fire department equipment is kept; would have proceeded rapidly to the scene of the fire without mishap; would have quickly arranged its equipment to fight the fire with only minor damage to the building.

The trier of fact in the instant case would likewise be forced to heap conclusion upon conclusion as to the course events would have taken if the 911 system had worked properly and

have no more than mere conjecture as to what damages plaintiff suffered by reason of defendant's action. Plaintiff's claim of causation is far too speculative and too remote to be sustained here. Plaintiff presents us with no convincing argument as to why a loss of chance relaxed standard of causation limited by the Court to medical malpractice actions should be applied here to reduce his burden.

We would be remiss in our duty if we failed to observe here that the application of the lost chance of survival doctrine to these facts as urged by plaintiff would cause a fundamental redefinition of the meaning of causation in tort law. While the majority of the Court were persuaded in McKellips that the particular facts and circumstances of that case required creating an exception to the "more likely than not" requirement of traditional causation, we refuse to effect a total restructuring of tort law by applying the lost chance doctrine beyond the established boundary of medical malpractice to ordinary negligence actions.

ALMA WILSON, C.J., KAUGER, V.C.J., and LAVENDER, HARGRAVE, OPALA, SUMMERS and WATT, JJ., concur.

HODGES, J., disqualified.

## Questions and Notes

1. What threshold would you adopt as the plaintiff's burden of proof on the issue of causation?

2. Go back to *Dillon*. Assume the jury would find the probability of landing in water and swimming to safety was 70% and the chance of landing on the rocks (and death) was 30%. What result? Is that result consistent with your answer to the preceding question?

3. For a view contrary to *Hardy*, see Jonathan P. Kieffer, *The Case for Across-the-Board Application of the Loss-of-Chance Doctrine*, [64 DEF. COUNS. J. 568](#) (1997). For a general consideration of the topic, see Michelle L. Truckor, *The Loss of Chance Doctrine: Legal*



*Recovery for Patients on the Edge of Survival*, [24 U. DAYTON L. REV. 349](#) (1999).

4. Loss of a chance continues to generate interest. See Joseph H., King, Jr., "*Reduction of Likelihood*" *Reformulation and other Retrofitting of the Loss-of-a-Chance Doctrine*. [28 U. MEM. L. REV. 491](#) (1998).

### c. Multiple Redundant Causes: The "Substantial Factor" Test

#### PURCELL v. ASBESTOS CORPORATION, LTD.

153 Or. App. 415, 959 P.2d 89 (1998)

DEITS, Chief Judge.

Defendants Owens-Corning Fiberglas Corporation (Owens) and E.J. Bartells Company (Bartells) appeal and plaintiff cross-appeals from the judgment for plaintiff in this negligence and products liability action arising from an asbestos-related disease that plaintiff suffered as a result of exposure to products manufactured by defendants.<sup>4</sup> We affirm on the appeal and on the cross-appeal.

Plaintiff developed mesothelioma, a cancer of the lining of the lungs, as a result of inhaling airborne asbestos fibers. He was exposed to the asbestos during his 35-year employment with several employers at numerous job sites. During many of plaintiff's working years, asbestos was used commonly in fire-resistant products such as insulation products and wall board. According to expert testimony, inhaled asbestos fibers may lie dormant in the lungs and pleura for 10 to 60 years before developing into cancer. One asbestos-related disease expert testified that even one exposure to airborne asbestos fibers can cause mesothelioma.

Plaintiff's occupational exposure to airborne asbestos fibers began in 1955 at Jantzen Knitting Mills, where he worked as an apprentice machinist. As an apprentice, plaintiff was exposed to airborne asbestos fibers as he observed other workers apply formed half-rounds of insulation and powder, mixed with water to create asbestos "mud" or cement, which sealed the insulation around steam lines. Plaintiff also worked as an electrician for Allied Electric for about two years beginning in 1959, and for Bohm Electric from 1961 to 1973. Plaintiff was employed as an electrician by the Portland School District (school district) in 1973-74 and 1984-93. While working as an electrician, plaintiff was exposed to airborne asbestos fibers from multiple sources, including asbestos-containing sheet cement boards and dust from deteriorating heat and hot water pipe insulation at more than 100 sites. Those sites included schools, paper mills, shopping centers, jails, hotels, and manufacturing plants. Plaintiff stopped working in 1993, when he was diagnosed with mesothelioma.

During his many years of employment, plaintiff was exposed to several types of asbestos products. Bartells distributed two asbestos-containing product lines, Eagle-Picher cement and Johns-Manville cements and insulation. The Johns-Manville products were distributed from 1955 to 1972 and included Thermobestos and 85 percent Magnesium, which was a cement of 85 percent magnesium and 15 percent asbestos. From 1958 to 1972, Owens and Owens-Illinois, a subsidiary, manufactured and sold Kaylo, which was a calcium-silicate based product that was combined with asbestos. Kaylo was sold in formed blocks as an insulating material to be placed around steam pipes and hot water heaters. Kaylo cement, a loose material containing up to 100 percent asbestos, was mixed with water and applied in the joints and between blocks to secure and seal the insulation.

Plaintiff brought this action in November 1993, against Owens, Bartells and 16 other defendants, alleging strict products liability and negligence and seeking compensatory and punitive damages for personal injuries resulting from exposure to asbestos-containing materials. Plaintiff alleged, in relevant part: "E. J. Bartells Company ... was engaged in the manufacture, distribution

---

<sup>4</sup> In the balance of this opinion, we will refer to the defendants "Owens" and "Bartells" individually and refer to them as "defendants" collectively. Plaintiff, John Purcell, died during the course of this litigation, and his surviving spouse has been substituted as a party. We nevertheless will refer to John Purcell as "plaintiff."

and sale of asbestos-containing refractory, building and insulation materials. " ... "Owens-Corning Fiberglas was ... engaged in the manufacture, sale and distribution of asbestos-containing insulation and building materials. " ... "Defendants' asbestos products were unreasonably dangerous and defective in that: "1. Defendants did not provide sufficient or adequate warnings and/or instructions of the harm that could be caused by exposure to defendants' asbestos-containing products; "2. The asbestos-containing products of the defendants caused pulmonary disease and/or cancer if inhaled by individuals in their work place. "3. Individual workmen were not advised to utilize proper respiratory protection and were exposed to airborne asbestos fibers within their working environment."

The case proceeded to trial against 12 defendants, nine of which settled and one of which received a directed verdict in its favor. Bartells and Owens remained as defendants. The jury awarded plaintiff \$307,000 in economic damages and \$1.5 million in noneconomic damages against both defendants. It also awarded plaintiff \$3 million in punitive damages against Owens. Pursuant to ORS 18.455 (1993), the court reduced the amount of the verdict against those defendants by the amount of the settlements between plaintiff and the other defendants.

Defendants first assign error to the denial of their motions for a directed verdict.<sup>5</sup> Owens asserts that plaintiff's proof was insufficient to establish "medical causation" under the proper legal standard. Additionally, both defendants contend that, even assuming that plaintiff's evidence was sufficient in that regard, he nevertheless failed to offer adequate proof of his exposure to their asbestos-containing products, as distinct from products of other manufacturers, to permit the inference that their products caused his disease.

We review the denial of a motion for a directed verdict by considering the evidence, including the inferences, in the light most favorable to plaintiff, the nonmoving party. *Brown v. J.C. Penney Co.*, 297 Or. 695, 705, 688 P.2d 811 (1984). The verdict cannot be set aside "unless we can affirmatively say that there is no evidence from which the jury could have found the facts necessary to establish the elements of plaintiff's cause of action." *Id.*; OR. CONST., Art. VII (Amended), s 3.

We turn first to the medical causation issue. Plaintiff's expert, Dr. Andrew Churg, is a pathologist who specializes in the diagnosis of mesothelioma. He testified that plaintiff's exposure to airborne asbestos fibers caused the disease. According to Churg, inhaled asbestos fibers have a latency period of from 10 to 60 years, and at least 15 years generally will elapse between the victim's initial exposure and the onset of mesothelioma. Additionally, Churg testified that a single exposure to asbestos fibers can cause mesothelioma, with each subsequent exposure exponentially increasing the risk of the disease. Thus, Churg concluded that all of plaintiff's exposure to asbestos fibers over the years "contributed to some degree" to his mesothelioma.

As noted above, Owens contends that plaintiff's evidence was insufficient to establish causation. According to Owens, plaintiff was required and failed to show that exposure to its products, in itself, caused plaintiff's mesothelioma or that plaintiff would not have suffered the disease in the absence of exposure to Owens' products. Owens reasons that, because plaintiff did not prove that his mesothelioma was not caused by exposure to the products of other asbestos manufacturers, the fact that plaintiff may have been exposed to an Owens' product is legally insufficient to support a finding of causation or liability against it. For the same reason, Owens also argues that Churg's testimony did not establish that exposure to Owens' products could have been the medical cause of the disease: It asserts that plaintiff's evidence did not show that those exposures were a "substantial factor" in causing the disease.

The Oregon Supreme Court articulated the "substantial factor" test as the standard for proving causation and for assessing the "respective liability of multiple defendants" in *McEwen v. Ortho*

---

<sup>5</sup> Plaintiff contends, on various grounds, that defendants did not adequately preserve those assignments of error or their arguments under them. We have considered plaintiff's arguments and conclude without discussion that defendants have adequately preserved their assignments and arguments.

*Pharmaceutical*, 270 Or. 375, 528 P.2d 522 (1974). The plaintiff there ingested birth control pills manufactured by two defendants, neither of which contained warnings about possible side effects that left her blind in one eye. The plaintiff brought a products liability action against both manufacturers for failing to provide adequate warnings. The court stated that the "respective liability of multiple defendants depends upon whether the negligence of each was a substantial factor in producing the complained of harm. If both [defendants] were negligent and their negligence combined to produce plaintiff's injuries, then the negligence of [one] was concurrent with that of [the other] and does not insulate [the other] from liability. This is true although the negligent omissions of each defendant occurred at different times and without concerted action. Nor is it essential to ... liability that its negligence be sufficient to bring about plaintiff's harm by itself; it is enough that the [defendant] substantially contributed to the injuries eventually suffered by [the plaintiff]." *Id.* at 418, 528 P.2d 522. (Citations omitted; emphasis supplied.)

The trial court properly applied that causation standard here. Owens, Bartells and possibly others manufactured or distributed the asbestos in this case. Plaintiff's expert testified that any minute exposure to airborne asbestos fibers could cause mesothelioma and that, once plaintiff had been exposed, any subsequent exposures exponentially increased the likelihood of contracting the disease. Examining the evidence in the light most favorable to plaintiff, he was exposed at different times over the course of many years to the asbestos products of various manufacturers. Those exposures combined to create an increased risk of mesothelioma. Thus, if plaintiff was exposed to defendants' products, the jury could find that defendants substantially contributed to plaintiff's disease, thereby meeting the causation requirement.

Defendants assert that we should apply a more stringent variation of the substantial factor test to establish causation in asbestos cases, such as the "frequency, regularity, and proximity" test used in some other jurisdictions. Under that test, a plaintiff must show that he or she worked in proximity, on a regular basis, to asbestos products manufactured by a particular defendant. *See, e.g.,*

*Tragarz v. Keene Corp.*, 980 F.2d 411, 420 (7th Cir.1992); *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162-63 (4th Cir.1986). However, even the jurisdictions that follow the "frequency, regularity, and proximity" test apply it less rigidly when dealing with mesothelioma, because it can be caused by very minor exposures. *Tragarz*, 980 F.2d at 421; *Thacker v. UNR Industries, Inc.*, 151 Ill.2d 343, 177 Ill. Dec. 379, 603 N.E.2d 449, 460 (1992). As the court said in *Wehmeier v. UNR Industries, Inc.*, 213 Ill.App.3d 6, 157 Ill. Dec. 251, 572 N.E.2d 320, 337 (1991): "Where there is competent evidence that one or a de minimus number of asbestos fibers can cause injury, a jury may conclude the fibers were a substantial factor in causing a plaintiff's injury."

In *Ingram v. AC&S, Inc.*, 977 F.2d 1332, 1343-44 (9th Cir.1992), the Ninth Circuit rejected the "frequency, regularity, or proximity" test as the standard of causation under Oregon law. In that case, a former insulator and machinist who contracted asbestosis sued several asbestos manufacturers and received favorable verdicts. The defendants appealed, contending that there was insufficient evidence of causation to support the verdict because the insulator worked for only a short time with the defendants' products and evidence showing the machinist's exposure was described as "somewhat scant." The court concluded in *Ingram*: "The more stringent test suggested by [the defendant] has no place in a jurisdiction such as Oregon which looks only to cause-in-fact ... . Under Oregon law, once asbestos was present in the workplace, it is the jury's task to determine if the presence of that asbestos played a role in the occurrence of the plaintiff's injuries." *Id.* We agree with that understanding of Oregon law.

Defendants also argue that the Oregon Supreme Court's causation analysis in *Senn v. Merrell-Dow Pharmaceuticals*, 305 Or. 256, 751 P.2d 215 (1988), is applicable here. In that case, the plaintiff could not establish which of two defendant drug manufacturers supplied the vaccine that caused her injuries. Answering certified questions, the court concluded that it would not apply a theory of alternative liability where "neither defendant is able to produce exculpatory evidence," because such a theory would impose liability when the "probability of causation is 50

percent or less" under the plaintiff's evidence. *Id.* at 269, 751 P.2d 215. Defendants argue here that holding them liable in this case would do exactly that--impose liability when it is "less probable than not" that either party was responsible for plaintiff's mesothelioma.

Defendants' reliance on *Senn* is misplaced. There, only one defendant could have caused the plaintiff's harm because she used only one product. In this case, as in *McEwen*, multiple exposures to the products of more than one defendant could have combined to cause plaintiff's injury. We conclude that, in these circumstances, the proper inquiry under *McEwen* is whether defendants substantially contributed to plaintiff's injuries. 270 Or. at 418, 528 P.2d 522. In view of the medical evidence that a single exposure could have caused plaintiff's disease and that all exposures contributed to the likelihood of his contracting mesothelioma, a reasonable jury could find that the exposure to either or both of defendants' products was a substantial factor in causing plaintiff's disease.

Defendants further contend, however, that plaintiff failed to provide sufficient evidence to link their products to the work sites at which he sought to show that he was exposed to airborne asbestos fibers. Plaintiff worked at many sites, and his evidence was directed at showing that one or both of the defendants' products were located at various sites at the times that plaintiff worked there. The trial court held that plaintiff's proof was sufficient to go to the jury with respect to the Portland International Airport, various locations operated by the Portland School District, the Clackamas County Jail, the Cosmopolitan Motor Hotel, Mt. Hood Community College and Lloyd Center. We agree with the trial court in each instance.<sup>6</sup> Although the parties make detailed site-by-site arguments about the proof of plaintiff's exposures to defendants' products, it is unnecessary for us to engage in similar detail in our discussion, given the legal standard that we have held applies to the question. Plaintiff's evidence sufficed to allow the jury to infer that he

was exposed to asbestos-containing products of both defendants, singly or in combination, at each of the work locations that the trial court allowed the jury to consider and that the exposures began in 1959 and continued until at least the 1980s. The exposures at some of the sites were recurrent. The number of discrete sites at which plaintiff's evidence showed that he was exposed to defendants' products in his work for the school district alone exceeded 100.

Defendants make extensive and detailed arguments challenging the adequacy of plaintiff's evidence that he was exposed to the products of either or both of them at various places where he worked. However, defendants' arguments fail to demonstrate that the proof was insufficient but amount instead to attacks on the weight of the evidence. Those arguments should have been and probably were addressed to the jury. However, our review is limited to whether the evidence was adequate to allow the jury to find what it did. We conclude that it was.

Owens also makes a specific contention that certain evidence regarding exposures at a particular work location--Benson High School--was improperly admitted and should have been stricken. This contention requires separate discussion because, if it is correct, the jury's finding could have been based on inadmissible evidence, even though there was ample other evidence to support the finding. William Barnes, a retired Owens asbestos worker, testified on direct examination that he did not apply insulation at Benson but had surveyed the school and identified Kaylo as the brand of asbestos previously installed. On cross-examination by Owens' attorney, Barnes stated that a friend who installed pipe covering at Benson told him that Kaylo was used. Owens objected and moved to strike Barnes' product identification as hearsay.

Plaintiff's counsel then inquired further about the basis for Barnes' product identification, to which Barnes responded that Kaylo "had a harder finish and is more brittle" than the magnesium product and thus, after examining the product himself, he believed that it was Kaylo. The court gave a curative instruction to the jury, directing it to disregard Barnes' testimony about what his colleague told him, but allowing the jury to consider Barnes' firsthand knowledge.

---

<sup>6</sup> The trial court also concluded that the evidence was insufficient to go to the jury with respect to a number of other work sites.

Owens frames its assignment of error as challenging the court's denial of his motion to strike the testimony. Plaintiff responds that, if there was error, it was invited, because Owens himself elicited the testimony. See *James v. General Motors of Canada, Ltd.*, 101 Or.App. 138, 146 n. 4, 790 P.2d 8, rev. den. 310 Or. 243, 796 P.2d 360 (1990). Be that as it may, and assuming that the motion in the trial court and the assignment here are sufficient to preserve and raise the issue, we conclude that the curative instruction that the

court gave adequately diffused any likelihood that the jury improperly considered the hearsay testimony. Indeed, the instruction effectively gave Owens exactly what it now contends it should have received--the striking of the hearsay evidence. We hold that the trial court correctly denied defendants' motions for a directed verdict.

\* \* \*

Affirmed on appeal and on cross-appeal.

## § B. Legal Cause: Policy Considerations Precluding Liability

**Introductory Note.** As noted earlier, the concept of "proximate cause" is rooted in notions of fairness: even though the defendant's conduct may have been a "but-for" cause of the plaintiff's injuries, is it fair to hold the defendant liable for them? For example, in *Berry v. Sugar Notch, infra*, the court decided that even if it were true that the motorman's negligence (exceeding the speed limit) was a cause-in-fact of the injury, it would not be fair to hold him liable, since it was simply a chance occurrence. This section identifies three different areas where courts will refuse to impose liability even where but-for causation is present: (1) where the defendant's conduct did not tend to *increase the risk* of the plaintiff's injury; (2) where the negligence of *another tortfeasor* (often called a "superseding" tortfeasor) was so reprehensible as to make the initial defendant's negligence merely a "remote" cause; or (3) where the plaintiff was so far removed in time and/or space from the defendant's initial act of negligence that an injury to that plaintiff was *unforeseeable*, thus making it unfair to impose liability.

### 1. Increased Risk v. Mere Chance

#### BERRY v. SUGAR NOTCH

191 Pa. 345, 43 A. 240 (1899)

FELL, J.

The plaintiff was a motorman in the employ of the Wilkesbarre & Wyoming Valley Traction Company, on its line running from Wilkesbarre to the borough of Sugar Notch. The ordinance by virtue of which the company was permitted to lay its track and operate its cars in the borough of Sugar Notch contained a provision that the speed of the cars while on the streets of the borough should not exceed eight miles an hour. On the line of the road, and within the borough limits, there was a large chestnut tree, as to the condition of which there was some dispute at the trial. The question of the negligence of the borough in permitting it to remain must, however, be considered as set at rest by the verdict. On the day of the accident the plaintiff was running his car on the borough street in a violent windstorm, and as he passed under the tree it was blown down, crushing the roof of the car, and causing the plaintiff's injury. There is some conflict of testimony as to the speed at which the car was running, but it seems to be fairly well established that it was considerably in excess of the rate permitted by the borough ordinance. We do not think that the fact that the plaintiff was running his car at a higher rate of speed than eight miles an hour affects his right to recover. It may be that in

doing so he violated the ordinance by virtue of which the company was permitted to operate its cars in the streets of the borough, but he certainly was not, for that reason, without rights upon the streets. Nor can it be said that the speed was the cause of the accident, or contributed to it. It might have been otherwise if the tree had fallen before the car reached it, for in that case a high rate of speed might have rendered it impossible for the plaintiff to avoid a collision which he either foresaw or should have foreseen. Even in that case the ground for denying him the right to recover would be that he had been guilty of contributory negligence, and not that he had violated a borough ordinance. The testimony, however, shows that the tree fell upon the car as it passed beneath. With this phase of the case in view, it was urged on behalf of the appellant that the speed was the immediate cause of the plaintiff's injury, inasmuch as it was the particular speed at which he was running which brought the car to the place of the accident at the moment when the tree blew down. This argument, while we cannot deny its ingenuity, strikes us, to say the least, as being somewhat sophistical. That his speed brought him to the place of the accident at the moment of the accident was the merest chance, and a thing which no foresight could have predicted. The same thing might as readily have happened to a car running slowly, or it might have been that a high speed alone would have carried him beyond the tree to a place of safety. It was also argued by the appellant's counsel that, even if the speed was not the sole efficient cause of the accident, it at least contributed to its severity, and materially increased the damage. It may be that it did. But what basis could a jury have for finding such to be the case? and, should they so find, what guide could be given them for differentiating between the injury done this man and the injury which would have been done a man in a similar accident on a car running at a speed of eight miles an hour or less? The judgment is affirmed.

### CHANNEL v. MILLS

77 Wash. App. 268, 890 P.2d 535 (1995)

MORGAN, Judge.

This is a personal injury case in which the plaintiffs appeal a jury verdict in favor of the defendant.<sup>1</sup> We affirm.

On August 30, 1986, a two-car collision occurred at the intersection of N.E. 54th Street and St. James Road in Vancouver. Patricia Channel was the driver of one car, and Jonathan Mills was the driver of the other. Keith Anderson, the driver of a third car, narrowly missed being involved.

The intersection at N.E. 54th and St. James is controlled by a red-yellow-green traffic light. N.E. 54th is a two-way street, with one lane for westbound traffic and one lane for eastbound traffic. St. James is a one-way street, with two lanes for southbound traffic. The speed limit on St. James is 35 mph.

Prior to the accident, Channel was driving west on N.E. 54th. Her daughters, Linda and Christy, were with her. At the same time, Mills was driving south on St. James in the left (easterly) lane. Anderson was driving south on St. James in the right (westerly) lane. Mills was slightly behind Anderson, so Anderson entered the intersection first.

As Anderson approached the intersection, something caused him to apply his brakes. He skidded 100-160 feet, then accelerated. He passed just in front of the Channel vehicle.

As Mills entered the intersection, he broadsided the Channel vehicle. Although he heard Anderson skidding, he never saw the Channel vehicle, and he never applied his brakes. Nor did Channel see him or apply her brakes. Christy Channel was killed, and Patricia and Linda Channel were seriously injured.

Channel sued Mills and Anderson. However, she voluntarily dismissed Anderson before trial.

The issue at trial was who had the green light. Patricia and Linda Channel said they did, and

---

<sup>1</sup> This is the second appeal in this case. The opinion in the earlier appeal is published at 61 Wash. App. 295, 810 P.2d 67 (1991). The issues in the earlier appeal differ from the ones here.

Mills and Anderson said they did. The jury returned a defense verdict, as well as a special interrogatory stating that Mills and Anderson had the green light.

Channel now assigns error to three rulings made by the trial court during trial. One involves the exclusion of evidence concerning Mills' speed. A second involves the admission of evidence from an unlicensed engineer. A third involves the exclusion of a photograph taken about a year after the accident.

### I.

At trial, Channel wanted to argue that even if she ran the red light, Mills was speeding, and that but for his speed, he could have avoided the collision. Thus, she called, out of the presence of the jury, an accident reconstructionist named Keith M. Cronrath. Cronrath assumed that a reasonable person driving south on St. James would have been travelling the speed limit, 35 mph. He calculated Mills' speed "at most probably 51 miles per hour at impact".<sup>2</sup> He said that Mills' "cone of vision" would have extended 20 degrees to the east,<sup>3</sup> and that Mills could have seen Channel's car when Mills was 94 feet north of the point of impact. At that point, he said, Channel's speed was "at most probably 24 miles per hour",<sup>4</sup> and Channel would have been 43-45 feet east of the point of impact. Opining that it was proper to allow Mills 1.75 seconds of "reaction time",<sup>5</sup> he

testified that if Mills had been travelling 35 mph instead of 51 mph, the vehicles would have cleared. In actuality, at that point you wouldn't even need to brake. They'd clear without braking.

Report of Proceedings, 1/14/92 at 51. The trial court excluded the offer on the ground that it was not relevant to the issue before the jury.

The question is whether, and when, a favored driver's speed should be deemed a "proximate cause" of a collision.<sup>6</sup> The question supposes a favored driver who has the right of way but is speeding; a disfavored driver, pedestrian or cyclist who invades the favored driver's right of way; and an ensuing collision. Thus, the question can arise in a variety of contexts. In one, the favored driver is speeding at a controlled intersection, and a disfavored driver runs the red light or stop sign. *E.g.*, *Church v. Shaffer*, 162 Wash. 126, 297 P. 1097 (1931); *Baker v. Herman Mut. Ins. Co.* 17 Wis.2d 597, 117 N.W.2d 725, 728-29 (1962). In another, the favored driver is speeding at an uncontrolled intersection, and a disfavored driver fails to yield. *E.g.*, *Grobe v. Valley Garbage Service, Inc.*, 87 Wash. 2d 217, 220, 551 P.2d 748 (1976); *Whitchurch v. McBride*, 63 Wash. App. 272, 818 P.2d 622 (1991), *review denied*, 118 Wash. 2d 1029, 828 P.2d 564 (1992); *Marchese v. Metheny*, 23 Ariz. 333, 203 P. 567, 569 (1922). In a third, the favored driver is speeding when an oncoming driver turns left across, or swerves into, his lane. *E.g.*, *Bohnsack v. Kirkham*, 72 Wash. 2d 183, 194, 432 P.2d 554 (1967); *White v. Greyhound Corp.*, 46 Wash. 2d 260, 264, 280 P.2d 670 (1955); *Smith v. Sherman Smith Trucking Co.*, 569 So.2d 347 (Ala.1990). In a fourth, the favored driver is speeding when a disfavored

<sup>2</sup> Report of Proceedings, 1/14/92, at 37. An expert hired by the defense calculated Mills' speed at 30-35 m.p.h.

<sup>3</sup> Cronrath testified: "In other words, as you're driving you're aware--reasonably aware of what's going on within a twenty degree cone of vision, and that's plus or minus twenty degrees. Twenty degrees this side, twenty degrees that side." Report of Proceedings, 1/14/92, at 46.

<sup>4</sup> Report of Proceedings, 1/14/92, at 37.

<sup>5</sup> Cronrath testified "that almost all people will have reacted to an unexpected hazard similar to this in one and three quarters second." He then went on, "And then there's braking from at the end of the one and three quarters seconds to this point [point of impact]." Report of Proceedings, 1/14/92, 46. Thus, he was considering (continued...)

(...continued)

"reaction time" to be the time that elapses from perceiving a hazard to first hitting the brakes.

<sup>6</sup> More simply formulated, the question is when can a favored driver's excessive speed serve as the predicate for liability. As Prosser and Keeton observe, "the language of causation", when used to decide whether speed can serve as a basis for liability, "leads often to confusion". PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 264 (5th ed.1984). We use the proximate cause formulation in the text, because it is the formulation found in the Washington cases.

driver, pedestrian or cyclist darts into the right of way from a curb or driveway. *E.g.*, *Chhuth v. George*, 43 Wash. App. 640, 644, 719 P.2d 562, review denied, 106 Wash. 2d 1007 (1986); *Theonnes v. Hazen*, 37 Wash. App. 644, 646-48, 681 P.2d 1284 (1984). In a fifth, the favored driver is operating a train, which is speeding, and the train's right of way is violated by a car or truck that fails to stop at a grade crossing. *Dombeck v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 24 Wis.2d 420, 129 N.W.2d 185 (1964); *Barlett v. Kansas City Southern Ry. Co.*, 854 S.W.2d 396, 400 (Mo.1993). In our discussion, we utilize authorities from all of these contexts.

Generally, "proximate" cause subdivides into cause in fact and legal cause. *Christen v. Lee*, 113 Wash. 2d 479, 507, 780 P.2d 1307 (1989); *Baughn v. Honda Motor Co.*, 107 Wash. 2d 127, 142, 727 P.2d 655 (1986); *Hartley v. State*, 103 Wash. 2d 768, 777, 698 P.2d 77 (1985); *Braegelmann v. County of Snohomish*, 53 Wash. App. 381, 384, 766 P.2d 1137, review denied, 112 Wash. 2d 1020 (1989). A cause in fact is a cause but for which the accident would not have happened. *Christen*, 113 Wash. 2d at 507, 780 P.2d 1307; *Baughn*, 107 Wash. 2d at 142, 727 P.2d 655. A legal cause is a cause in fact that warrants legal liability as a matter of social policy.<sup>7</sup> *Christen*, 113 Wash. 2d at 508, 780 P.2d 1307; *Baughn*, 107 Wash. 2d at 146, 727 P.2d 655; *Hartley*, 103 Wash. 2d at 779, 698 P.2d 77. A cause is "proximate" only if it is *both* a cause in

fact and a legal cause.<sup>8</sup> *Hartley*, 103 Wash. 2d at 777-81, 698 P.2d 77; *King v. Seattle*, 84 Wash. 2d 239, 249-50, 525 P.2d 228 (1974); see *Christen*, 113 Wash. 2d at 507-08, 780 P.2d 1307.

Various cases illustrate how these principles of causation apply to a favored driver's excessive speed. In *Berry v. Sugar Notch Borough*, *supra*, a tree fell on the favored driver's car while he was driving at excessive speed. He sued the city for negligently failing to inspect and remove the tree. The city argued "that the speed was the immediate cause of the plaintiff's injury, inasmuch as it was the particular speed at which he was running which brought the car to the place of the accident at the moment when the tree blew down". The court rejected this argument, stating:

This argument, while we cannot deny its ingenuity, strikes us, to say the least, as being somewhat sophistical. That his speed brought him to the place of the accident at the moment of the accident

---

<sup>8</sup> The reason is that not all causes in fact warrant the imposition of legal liability.

"[B]ut for" is rarely an adequate notion of cause.... We do not say that since, in all probability, [plaintiff] would not have had an accident on I-70 if Columbus had not discovered America, Columbus caused the accident. *Cf. Berry v. Sugar Notch Borough*, 191 Pa. 345, 43 Atl. 240 (1899); *Central of Georgia Ry. v. Price*, 106 Ga. 176, 32 S.E. 77 (1898). What we pick out from the welter of necessary or sufficient conditions as "the cause" of some event depends on the nature of our interest in the event. If we were historians of technology we might attribute [plaintiff's] accident to the inventor of the internal combustion engine. *Milam v. State Farm Mut. Auto. Ins. Co.*, 972 F.2d 166, 169 (7th Cir.1992).

---

<sup>7</sup> The *Hartley* court said:

Legal causation ... rests on policy considerations as to how far the consequences of defendant's acts *should* extend. It involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. If the factual elements of the tort are proved, determination of legal liability will be dependent on "mixed considerations of logic, common sense, justice, policy and precedent." *King v. Seattle* [84 Wash. 2d], at 250 [525 P.2d 228] (quoting 1 T. Street, *Foundations of Legal Liability* 100, 110 (1906)). See also Prosser, at 244.

(Italics in original.) *Hartley*, 103 Wash. 2d at 779, 698 P.2d 77.

<sup>9</sup> The *Hartley* court notes, "Some confusion probably has been generated by the imprecise use of the term 'proximate cause' to encompass cause in fact and legal causation alone or in combination." This confusion, it says, is embodied in Washington Pattern Instruction 15.01, which defines "proximate cause" as "a cause which in a direct sequence, unbroken by any new independent cause, produces the [injury] [event] complained of and without which such event would not have happened". *Hartley*, 103 Wash. 2d at 778, 698 P.2d 77; see also, *Alger v. Mukilteo*, 107 Wash. 2d 541, 545, 730 P.2d 1333 (1987); *King v. Seattle*, 84 Wash. 2d 239, 249, 525 P.2d 228 (1974). We agree.



was the merest chance, and a thing which no foresight could have predicted. The same thing might as readily have happened to a car running slowly, or it might have been that a high speed alone would have carried him beyond the tree to a place of safety. *Berry*, 43 A. at 240.

In *Baker v. Herman Mut. Ins. Co.*, *supra*, a southbound truck collided with an eastbound car at an intersection controlled by a stop sign for eastbound traffic. The plaintiff, a passenger in the car, argued that the truck driver should be found liable because he had been driving faster than the speed limit, which was 40 mph. The court said:

Even if the truck was traveling in excess of forty miles per hour, we are satisfied that its speed could not have been causal. This court has never held that excessive or unlawful speed is causal merely because it places the vehicle at a particular place at a particular time. Excessive speed is causal, however, when it prevents or retards the operator, after seeing danger, from slowing down, stopping, or otherwise controlling the vehicle so as to avoid a collision. *Baker*, 117 N.W.2d at 728.

According to the court, a reasonable person driving southbound would not have realized the car was not going to yield until a few feet before the collision, and the truck driver, as a matter of law, lacked opportunity to avoid the collision.

In *Dombeck v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, *supra*, a car drove out in front of a train, and three people were killed or injured. The claimants argued the train had been travelling 65 mph when its legal speed limit was 40 mph. Concluding "that the trial court did not err in failing to submit a jury question as to the train's speed", *Dombeck*, 129 N.W.2d at 193, the court held:

Speed is not causal merely because the train arrived at the crossing the instant it did while if it had been going slower the car might have safely crossed ahead of it. *Dombeck*, at 192.

Quoting *Baker*, the court went on to say that

even if the train had been going the legal speed limit, it could not have stopped or otherwise avoided the collision.

In *Marchese v. Metheny*, *supra*, the plaintiff's southbound car collided with the defendant's westbound truck, apparently at an uncontrolled intersection. According to the defendant's testimony, the plaintiff had been driving 26 mph in a 15 mph zone. Based on this testimony, the defendant contended that

if [plaintiff's] car had been driven at a lawful speed it could not have been at the place where the accident occurred, and therefore the [plaintiff's] negligence was the direct, proximate, and sole cause of the collision. *Marchese*, 203 P. at 568.

Citing *Sugar Notch*, *supra*, the court rejected this contention.

In *Smith v. Sherman Smith Trucking Co.*, *supra*, the plaintiff's northbound car swerved into the southbound lane, where it collided with the defendant's oncoming truck. The plaintiff sued, and the defendant moved for summary judgment. The plaintiff produced testimony from an expert, who opined that the truck had been travelling 48 mph in a 40 mph zone. The court held the defendant not liable, because his speed had not contributed to the accident "other than the fact that his [vehicle] happened to be at the place [plaintiff] was." *Smith*, 569 So.2d at 349 (quoting *Fox v. Bartholf*, 374 So.2d 294 (Ala.1979)).

In *Barlett v. Kansas City Southern Ry. Co.*, *supra*, the plaintiff's theory of causation was what the court called the "mere location" rule. That rule, the court said, "would permit finding causation from evidence that the train's speed at a 'remote' point in time 'caused' the train to be at the scene of the accident". *Barlett*, 854 S.W.2d at 400. Stating that the mere location rule "violates common sense", the court said:

While speed at a remote point in time may be a "philosophical" cause of a collision, it cannot be a "legal" cause. The mere location rule cannot be the basis for submitting a claim of violating the speed limit in this, or any future, case. *Barlett*, at 400.

The commentators are in accord. Blashfield states:

[E]xcessive speed is judicially significant only where it is a proximate cause of the collision or injury. Excessive or unlawful speed is not causal merely because it places a vehicle at a particular place at a particular time, but it is causal where it prevents or retards the operator from slowing down, stopping, or otherwise controlling the vehicle so as to avoid the collision.

(Footnotes omitted.) 2 BLASHFIELD, *AUTOMOBILE LAW & PRACTICE* § 105.6, at 313-317 (Rev. 3d ed.).

Prosser and Keeton ask rhetorically:

Defendant operates an automobile over five miles of highway at a speed in excess of what is proper, and so arrives at a point in the street just at the moment that a child unexpectedly darts out from the curb. Is speed a cause of the death of the child?

PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 264 n.6 (5th ed. 1984). In the accompanying text, Prosser and Keeton explain:

[I]f the defendant drives through the state of New Jersey at an excessive speed, and arrives in Philadelphia in time for the car to be struck by lightning, speed is a cause of the accident, since without it the car would not have been there in time; and if the defendant driver is not liable to a passenger, it is because in the eyes of the law the negligence did not extend to such a risk. The attempt to deal with such cases in the language of causation leads often to confusion. (Footnotes omitted.) Prosser and Keeton, § 41 at 264.<sup>10</sup>

Washington law is also in accord. A number of cases have said that speed in excess of that permitted by statute or ordinance is not a proximate cause of a collision if the favored driver's automobile is where it is entitled to be, and the favored driver would have been unable to avoid the collision even if driving at a lawful speed. *E.g.*, *Grobe v. Valley Garbage Service, supra*; *Bohnsack v. Kirkham, supra*; *White v. Greyhound Corp., supra*; *Theonnes v. Hazen, supra*. A necessary corollary is that speed is not a proximate cause if it does no more than bring the favored and disfavored drivers to the same location at the same time, and the favored driver has the right to be at that location (*i.e.*, the favored driver has the right of way). *See Whitchurch v. McBride, supra*, (favored driver's speed of 43 mph in a 25 mph zone brought vehicles to same location at same time; evidence insufficient to go to jury).

According to the foregoing authorities, a claimant can demonstrate cause in fact by showing that "but for" the favored driver's speed, the favored and disfavored drivers each would have reached (and safely crossed) the point of impact at a different time (*i.e.*, the vehicles "would have cleared", or the vehicles "would have missed"). However, a claimant cannot demonstrate legal cause by showing only this much. Virtually without exception, the authorities hold that if excessive speed does no more than bring the favored and disfavored drivers to the same location at the same time, the excessive speed is "remote" rather than "proximate", and causation is not established.

At least three reasons underlie this result. One involves speed. Suppose, for example, the facts alleged in this case. Cronrath testified that Mills would have missed Channel if he had been driving

---

(...continued)

negligence. *Doss*, 134 S.E. at 564. The Town provided a detour, and the plaintiff was using that detour when his car was rearended by an airplane trying to land at the park. The plaintiff's estate sued the Town, apparently on the theory that but for the Town's negligence in maintaining the street, he would not have been using the detour, and but for using the detour, he and the airplane would not have been at the point of impact at the same time. The court held that the Town's negligence in maintaining the street was not a proximate cause of the accident.

---

<sup>10</sup> One of the cases cited by Prosser and Keeton, *Doss v. Town of Big Stone Gap*, 145 Va. 520, 134 S.E. 563 (1926), is interesting because of its facts. The defendant Town maintained an aviation park, which it held open to both airplanes and the motoring public. The street leading to the park became "practically impassable for automobiles", allegedly as a result of the Town's (continued...)

the legal speed limit of 35 instead of 51 mph. Mills would also have missed Channel, however, if he had been driving 10, 15, 85 or 110 mph. Thus, it cannot rationally be said that Mills hit Channel because Mills was driving over the speed limit; rather, it can only be said that Mills hit Channel because Mills was not driving at a speed *different from* (*i.e.*, either above or below) 51 mph. The *Sugar Notch* court expressed this idea by stating, "The same thing might as readily have happened to a car running slowly, or it might have been that a high speed alone would have carried him beyond the [point of impact] to a place of safety." *Sugar Notch*, 43 A. at 240.

Another reason involves location. Suppose, for example, that a favored driver maintains an unreasonable and excessive speed from milepost 1 to milepost 60. After milepost 60, the favored driver maintains a safe and reasonable speed, but he nevertheless collides with the disfavored driver at milepost 100. If excessive speed could be a legal or "proximate" cause merely because it brings the favored and disfavored drivers to the same place at the same time, the speed between mileposts 1 and 60 would be a basis for liability. Unanimously, however, the authorities deem speed at a "remote" location to be insufficient to establish causation. An example is the *Barlett* case, in which the court said (1) that the "mere location" rule "would permit finding causation from evidence that the train's speed at a 'remote' point in time 'caused' the train to be at the scene of the accident", and (2) that "the mere location rule cannot be the basis for submitting a claim of violating the speed limit in this, or any future, case." *Barlett*, 854 S.W.2d at 400. *Accord*, Prosser and Keeton § 41, at 264.

A third reason involves distance. When a court is interested in whether a reasonable person would have been able to brake or swerve between the place at which he or she would have perceived danger (the "point of notice") and the place of the collision (the "point of impact"), it must focus on the distance between those two points. However, when a court is interested only in whether the vehicles would have cleared each other, it has no more reason to focus on the distance between point of notice and point of impact (here, not more than 94 feet) than to focus on any other distance (*e.g.*, 300 yards, three miles, or ten miles). *See*

*Whitchurch v. McBride*, 63 Wash. App. at 277, 818 P.2d 622.

Nothing said so far means that a claimant cannot prove causation (*i.e.*, both cause in fact and legal cause) by showing that but for excessive speed, the favored driver, between the point of notice and the point of impact, would have been able to brake, swerve or otherwise avoid the point of impact.<sup>11</sup> To make this showing, however, a claimant must produce evidence from which the trier of fact can infer the approximate point of notice, *Whitchurch v. McBride*, at 275-77, 818 P.2d 622,<sup>12</sup> and perhaps other facts as well.<sup>13</sup>

---

<sup>11</sup> We do not mean to imply that there are not other ways in which a claimant can demonstrate that a favored driver's speed satisfies the principles of causation. Assuming there are, none are suggested here.

<sup>12</sup> *Whitchurch* illustrates the principles herein discussed, even though we failed to distinguish clearly between cause in fact and legal cause. The plaintiff in *Whitchurch* was the disfavored driver. The defendant was the favored driver, and the collision took place at an uncontrolled intersection. At the end of the plaintiff's case, the defendant moved to dismiss, as a matter of law, for the failure to prove causation. The trial court granted the motion, and we affirmed, essentially for two reasons.

First, "The plaintiff offered no evidence tending to show the approximate point at which a reasonable person driving westbound on Pacific would have (a) seen [the disfavored driver's] car approaching from the south and (b) realized that it was not going to yield." *Whitchurch*, at 277, 818 P.2d 622. In other words, the plaintiff failed to produce evidence from which to infer the point of notice, and without such evidence, a rational trier of fact could not infer that the favored driver, but for excessive speed, could have braked, swerved or otherwise avoided the point of impact. Thus, plaintiff failed to prove cause in fact, in the sense of proving that the favored driver could have braked between point of impact and point of notice, but for his speed. *See Whitchurch*, at 275-77, 818 P.2d 622.

Second, the plaintiff did offer evidence supporting inferences that the defendant had been going 43 mph in a 25 mph zone, and that the defendant's car would have missed the plaintiff's car if the defendant had been going the speed limit of 25 mph. Even if this evidence showed cause in fact, however, it could not show legal or "proximate" cause. Thus, it was insufficient to prove causation, and insufficient to warrant submission of the case to the jury. *See Whitchurch*, at 277, 818 P.2d 622.

<sup>13</sup> We do not address such facts today, but they arguably (continued...)

\* \* \*

Affirmed.

SEINFELD, C.J., and GERRY L. ALEXANDER,  
J. Pro Tem., concur.

## Questions and Notes

1. Suppose a 15-year-old without a license to drive gets into an accident. What must the victim prove — in terms of negligence — in order to recover?

2. Same facts as in Question #1, except that the driver is a 23-year-old with an expired license. What result?

## 2. Superseding Tortfeasors: Breaking the Chain of Causation

### CROWE V. GASTON

134 Wash. 2d 509, 951 P.2d 1118 (1998)

MADSEN, Justice.

Joel Crowe seeks review of a trial court order granting defendants Oscar's and Kevin Rettenmeier's motions for summary judgment. At issue is whether Oscar's can be liable for alcohol-related injuries to Crowe when Oscar's sold alcohol to a minor who shared it with another minor who then injured Crowe. We find that Oscar's can be held liable and reverse the trial court's order granting Oscar's motion for summary judgment.

Also at issue is whether Kevin Rettenmeier, the minor who bought the alcohol, can be found liable for Crowe's injuries for supplying alcohol to the minor who then injured Crowe. We conclude that he cannot and affirm the trial court's order granting Rettenmeier's motion for summary

---

(...continued)

include the approximate point of impact and a reasonable driver's approximate reaction and/or braking distance.

**CROWE V. GASTON**

judgment.

### Statement of the Case

On February 11, 1994, Kevin Rettenmeier, age 17, met Joe Schweigert and two of Schweigert's friends, Brad Rosenquist and Adam Fitzpatrick, all of whom were under 21, and agreed to buy them beer. They all proceeded to Oscar's, Rettenmeier traveling in a separate car. When they arrived, Schweigert and his friends gave money to Rettenmeier, who then entered the store and purchased beer while the others stayed in their car out of sight. It is not clear from the record how much beer was purchased. Rettenmeier purchased either twenty-four twelve-ounce cans plus two 40 ounce bottles, twelve twelve-ounce cans, or four to possibly seven 40 ounce bottles of beer. Rettenmeier gave all the beer he purchased to Schweigert and his friends.

Afterward, the group decided to go over to the house of another acquaintance, Steve Dean. At Dean's house they were joined by Joel Crowe and others. The group drank beer and played pool; however, Crowe claims he did not drink any beer. Later that evening, Crowe accepted a ride home by an intoxicated Fitzpatrick. During the ride, Fitzpatrick drove off the road and hit a tree, causing injuries to Crowe.

Crowe sued Oscar's and Rettenmeier, among others, for damages. Crowe claimed that Oscar's and Rettenmeier were liable for his injuries because they had furnished the alcohol that caused Fitzpatrick's intoxication. The trial court granted Oscar's and Rettenmeier's motions for summary judgment. Crowe appealed the trial court's order to the Court of Appeals. This court granted the Appellant's motion to transfer the case from the Court of Appeals.

### Standard of Review

An appellate court engages in the same review as the trial court when reviewing a summary judgment order. *Reynolds v. Hicks*, 134 Wash. 2d 491, 495, 951 P.2d 761, 763 (1998). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* If, after considering the evidence in the light most favorable to the nonmoving party, reasonable minds could come to but one conclusion, then the

motion for summary judgment will be granted. *Id.*

### Vendor Liability

The issue presented in this case is whether Oscar's, a commercial vendor, can be liable for injuries to Crowe which resulted from Oscar's illegal sale of alcohol to Kevin Rettenmeier. Crowe bases his claim of negligence on Oscar's violation of RCW 66.44.320<sup>1</sup> and RCW 66.44.270,<sup>2</sup> which prohibit the sale of alcohol to anyone under the age of 21.

In order to prove an actionable claim for negligence, Crowe must show (1) the existence of a duty to the plaintiff, (2) a breach of that duty, (3) a resulting injury, and (4) the breach as the proximate cause of the injury. *See Reynolds*, 951 P.2d at 763. Oscar's argument in this case is two-fold. First Oscar's contends that it did not owe a duty of care to Crowe. Second, Oscar's asserts that, even if it owed a duty of care to Crowe, it was not the legal cause of Crowe's injuries.

#### A. Duty of Care

We turn first to whether Oscar's owed a duty of care to Crowe. The existence of a legal duty is a question of law. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wash. 2d 468, 951 P.2d 749, 752 (1998). Washington courts have recognized that a legislative enactment may prescribe a standard of conduct required of a reasonable person that when breached may be introduced to the trier of fact as evidence of negligence. *Id.*, 951 P.2d at 751-52; *Purchase v. Meyer*, 108 Wash. 2d 220, 737 P.2d 661 (1987). To determine whether a defendant owes a duty of care to a complaining party based upon a statutory violation, this court has adopted the Restatement

(Second) of Torts § 286<sup>3</sup> which, among other things, requires the injured person to be within the class of persons the statute was enacted to protect. *Schooley*, 951 P.2d at 752-53. Oscar's argues that this prong of the Restatement test is not satisfied.

Citing our decisions in *Young and Purchase*, Oscar's contends that Crowe is not a member of the protected class because only minor purchasers and third persons injured by the minor purchaser are protected by the statutes in question. *See Young v. Caravan Corp.*, 99 Wash. 2d 655, 663 P.2d 834, 672 P.2d 1267 (1983) (a minor purchaser's estate had an action in negligence for the minor's alcohol-related death against the tavern owner who sold alcohol to the minor); *Purchase*, 108 Wash. 2d 220, 737 P.2d 661 (a third person injured by an intoxicated minor purchaser had a cause of action against the tavern owner who sold alcohol to the minor). However, in our recent decision in *Schooley*, we found the protected class was not so limited.

In that case, Lori Schooley became intoxicated from alcohol obtained from another minor purchaser and injured herself. *Schooley*, 951 P.2d at 751. The alcohol vendor in *Schooley* made a similar argument which we rejected, finding the protected class extends to injuries which result when a minor purchaser shares the alcohol with other minors. *Id.* at 753. We noted that this court in *Purchase* emphasized that vendors owed a duty not only to the minor purchaser but "to members of the general public as well." *Id.* at 753 (quoting *Purchase*, 108 Wash. 2d at 228, 737 P.2d 661). In light of the purpose of the legislation, which is to prevent against the hazard

<sup>1</sup> RCW 66.44.320 provides: "[e]very person who shall sell any intoxicating liquor to any minor shall be guilty of a violation of Title 66 RCW."

<sup>2</sup> RCW 66.44.270(1) provides: "[i]t is unlawful for any person to sell ... liquor to any person under the age of twenty-one...."

<sup>3</sup> RESTATEMENT (SECOND) OF TORTS § 286 (1965) provides:

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment ... whose purpose is found to be exclusively or in part

- (a) to protect a class of persons which includes the one whose interest is invaded, and
- (b) to protect the particular interest which is invaded, and
- (c) to protect that interest against the kind of harm which has resulted, and
- (d) to protect that interest against the particular hazard from which the harm results.

of "alcohol in the hands of minors," we found it was arbitrary to draw a distinction between third persons injured by the intoxicated minor purchaser and those injured as a result of the minor purchaser sharing the alcohol with other minors. *Id.* at 753 (quoting *Hansen v. Friend*, 118 Wash. 2d 476, 481-82, 824 P.2d 483 (1992)). We found this distinction especially illogical when faced with the fact that minors who drink commonly do so with other minors. *Id.* at 753. "[P]rotecting all those injured as a result of the illegal sale of alcohol to minors is the best way to serve the purpose for which the legislation was created, to prevent minors from drinking." *Id.*

In this case, similar to the situation in *Schooley*, Kevin Rettenmeier purchased alcohol which he gave to a number of other minors. One of those minors then drove while intoxicated causing injuries to Crowe. Thus, we find that Crowe is part of the protected class.

The alcohol vendor, of course, is only responsible for the foreseeable consequences of his actions. *Id.* at 754; see also *Burkhart v. Harrod*, 110 Wash. 2d 381, 395, 755 P.2d 759 (1988). In this way, foreseeability serves to limit the scope of the duty owed by the alcohol vendor to Crowe. See *Schooley*, 951 P.2d at 754. Whether or not it was foreseeable that the minor purchaser would share the alcohol with others resulting in the injury to Crowe is a question of fact for the jury. See *id.* at 754. The trier of fact may consider the amount and character of the alcohol purchased, the time of day, the presence of other minors on the premises or in a vehicle, and statements made by the purchaser to determine whether it was foreseeable the alcohol would be shared with others. *Id.*

Oscar's asks this court to find, as a matter of law, that the circumstances of the sale of beer to Rettenmeier could not put the seller on notice that the beer would be shared with others and that they would then drive while intoxicated. We will decide issues of foreseeability as a matter of law only where reasonable minds cannot differ. *Schooley*, 951 P.2d at 754. Based on the facts of this case, however, we decline to find that Crowe's injuries were not foreseeable.

First, in *Schooley* we determined that reasonable minds could conclude that a minor purchasing substantial quantities of alcohol would share it with other minors. *Id.* at 754. Second,

and more important, there is a genuine issue of material fact in this case concerning how much beer was actually purchased. Thus, it is for the trier of fact to determine how much beer was actually purchased and if the amount purchased would indicate that it would be shared with others.

Additionally, we find that reasonable minds could conclude that minors who obtain alcohol from another minor purchaser would then drive while intoxicated. The question is whether "[t]he harm sustained [is] reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant." (Quoting *Hansen*, 118 Wash. 2d at 484, 824 P.2d 483). *Id.* at 754. We have previously recognized that the general harm encompassed by this duty is that of alcohol-induced driver error. *Christen v. Lee*, 113 Wash. 2d 479, 495, 780 P.2d 1307 (1989). In fact, a minor is guilty of driving under the influence in Washington if the minor has a breath test reading of .02 grams of alcohol per 210 liters of breath. RCW 46.61.503, .506. This standard is one-fifth that of adults. See RCW 46.61.502. It follows that the Legislature was particularly concerned about the danger of minors driving while intoxicated. Thus, we leave the question of whether Crowe's injuries were foreseeable to the jury.

### B. Legal Causation

Next, Oscar's argues that it was not the legal cause of Crowe's injuries. Legal causation is one of the elements of proximate causation and is grounded in policy determinations as to how far the consequences of a defendant's acts should extend. *Schooley*, 951 P.2d at 754. A determination of legal liability will depend upon "mixed considerations of logic, common sense, justice, policy, and precedent." *Id.* at 754 (quoting *King v. City of Seattle*, 84 Wash. 2d 239, 250, 525 P.2d 228 (1974)). Where the facts are not in dispute, legal causation is for the court to decide as a matter of law.

As the petitioner did in *Schooley*, Oscar's argues that Crowe's injuries are too remote from the initial sale and that legal consequences of the sale cannot extend that far. See *Schooley*, 951 P.2d at 755. Oscar's bases this argument solely on the policy concern of unlimited liability. In *Schooley*, however, we found this argument unpersuasive noting that other legal principles such

as foreseeability, superseding causation, and contributory negligence serve to dispel these fears. *Id.* at 755-56. We found that the policies behind legislation prohibiting the sale of alcohol to minors outweighed Petitioner's concerns. *Id.* at 755-57.

This is especially so where the duty involved is not onerous. The alcohol vendor is simply required to check the buyer's identification. Additionally, if, after the purchaser presents identification, the vendor still has doubts about the purchaser's age the vendor can fill out and have the purchaser sign a certification card complying with RCW 66.20.190. If the vendor completes this step the vendor is immune from any criminal or civil liability regarding the sale of alcohol to the minor. RCW 66.20.210; *see also Schooley*, 951 P.2d at 755-56.

In this case we find the injuries to Crowe are not so remote as to preclude liability. The policy consideration behind the legislation prohibiting vendors from selling alcohol to minors are best served by holding vendors liable for the foreseeable consequences of the illegal sale of alcohol to minors. Thus, we conclude that legal cause is satisfied in this case.

### C. Superseding Causation

Finally, Oscar's argues that the intervening intentional misconduct of Rettenmeier, the minor purchaser, and Fitzpatrick, the driver, serve to break the chain of causation in this case. A finding of proximate causation is premised upon the proof of cause in fact, as well as the legal determination that liability should attach. *Maltman v. Sauer*, 84 Wash. 2d 975, 981, 530 P.2d 254 (1975). Cause in fact requires proof that "there was a sufficiently close, actual, causal connection between defendant's conduct and the actual damage suffered by plaintiff." *Id.* (quoting *Rikstad v. Holmberg*, 76 Wash. 2d 265, 268, 456 P.2d 355 (1969)). A defendant's negligence is the cause of the plaintiff's injury only if such negligence, unbroken by any new independent cause, produces the injury complained of. *Id.* at 982, 530 P.2d 254. Where an intervening act does break the chain of causation, it is referred to as a "superseding cause." *Id.*

"Whether an act may be considered a superseding cause sufficient to relieve a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendant; only

intervening acts which are not reasonably foreseeable are deemed superseding causes." *Cramer v. Department of Highways*, 73 Wash. App. 516, 520, 870 P.2d 999 (1994) (quoting *Anderson v. Dreis & Krump Mfg. Corp.*, 48 Wash. App. 432, 442, 739 P.2d 1177 (1987)). An intervening act is not foreseeable if it is "so highly extraordinary or improbable as to be wholly beyond the range of expectability." *Christen*, 113 Wash. 2d at 492, 780 P.2d 1307 (quoting *McLeod v. Grant County Sch. Dist.* 128, 42 Wash. 2d 316, 323, 255 P.2d 360 (1953)). The foreseeability of an intervening act, unlike the determination of legal cause in general, is ordinarily a question of fact for the jury. *Cramer*, 73 Wash. App. at 521, 870 P.2d 999. Thus, in this case it is for the jury to decide whether the acts of Rettenmeier and Fitzpatrick break the chain of causation, thus, relieving Oscar's from liability.

### Social Host Liability

Crowe also asserts that Rettenmeier is liable for his injuries because Rettenmeier breached a duty owed to Crowe when he supplied beer to Fitzpatrick. Crowe's claims concern the duties of a social host rather than a commercial vendor of alcohol. The issue presented in this case is whether a social host, Rettenmeier, who furnishes alcohol to a minor, Fitzpatrick, owes a duty of care to a third person, Crowe, injured by the intoxicated minor.

Plaintiff contends that RCW 66.44.270(1) creates a duty of care owed by Rettenmeier to Crowe. RCW 66.44.270(1) makes it unlawful for any person to "give, or otherwise supply liquor to any person under the age of twenty-one years...." This court has recognized that a minor who is injured as a result of alcohol intoxication has a cause of action against the social host who supplied the alcohol based on a violation of RCW 66.44.270(1). *See Hansen*, 118 Wash. 2d 476, 824 P.2d 483. However, in *Reynolds*, we recently held that social host liability based on RCW 66.44.270(1) does not extend to injuries to third persons. *See Reynolds*, 951 P.2d at 766.

In *Reynolds*, we emphasized our reluctance to hold social hosts liable to the same extent of commercial vendors. "Social hosts are not as capable of handling the responsibilities of monitoring their guests' alcohol consumption as are their commercial and quasi-commercial

counterparts.... [T]he commercial proprietor has a proprietary interest and profit motive, and should be expected to exercise greater supervision than in the (non-commercial) social setting.'" *Id.* at 764 (alteration in original) (quoting *Burkhart v. Harrod*, 110 Wash. 2d 381, 386-87, 755 P.2d 759 (1988)).

Additionally, we found that RCW 66.44.270 was enacted to protect minors from injuries resulting from their own abuse of alcohol, not to protect third parties injured by intoxicated minors. *Reynolds*, 951 P.2d at 765. We explained that RCW 66.44.270(1) does not make it unlawful for the minor's parent or guardian to give alcohol to the minor if consumed in the presence of the parent or guardian, indicating that the statute was not designed for the protection of third persons. *Reynolds*, 951 P.2d at 765; *see also Mills v. Estate of Schwartz*, 44 Wash. App. 578, 584, 722 P.2d 1363 (1986) (finding that the Legislature, by allowing minors to drink alcohol if furnished by the minor's parent, did not intend to protect third persons); *Hosteller v. Ward*, 41 Wash. App. 343, 354, 704 P.2d 1193 (1985) (based on the exception to the statute, the court found that RCW 66.44.270 was designed to protect minors, not third persons, from injury). We noted in *Reynolds* that expanding the protected class to include injured third persons would "lead to an illogical result whereby a person who did not violate RCW 66.44.270 would then be liable in negligence pursuant to the same statute." *Reynolds*, 951 P.2d at 765. We concluded that RCW 66.44.270(1) was not enacted to protect third persons injured by an intoxicated minor. *Id.* at 765.

We also noted that the Legislature provided alcohol vendors with a means by which they can immunize themselves from civil liability for alcohol-related injuries resulting from the sale of alcohol to a minor, but did not provide the same protection for social hosts. *Id.* at 765; RCW 66.20.210.<sup>4</sup> This distinction, we stated, evinced as

---

<sup>4</sup> If, after a purchaser presents identification, the vendor still has doubts about the purchaser's age the vendor can fill out and have the purchaser sign a certification card complying with RCW 66.20.190. If the vendor completes this step the vendor is immune from any criminal or civil liability regarding the sale of alcohol to  
(continued...)

intent by the Legislature that commercial vendors would be held liable to a greater extent than social hosts.

Thus, in the present case, Rettenmeier owed no duty of care to Crowe.

### Conclusion

We reverse the trial court's order granting Oscar's motion for summary judgment and affirm the trial court's order granting Rettenmeier's motion for summary judgment.

GUY and ALEXANDER, JJ., concur.

DURHAM, Chief Justice (concurring).

I agree with the majority that a commercial vendor's duty to refrain from selling alcohol to minors extends to all minors and third parties who are foreseeably injured as a result. I also agree that, as a gratuitous furnisher of alcohol, Rettenmeier should not be liable for injuries to third parties caused by the minor to whom he furnished alcohol. However, I would do so for the reasons expressed in my concurrence in *Reynolds v. Hicks*, 134 Wash. 2d 491, 951 P.2d 761 (1998).

DOLLIVER, J., concurs.

JOHNSON, Justice (concurring in part, dissenting in part).

For the reasons articulated in my dissent in *Reynolds v. Hicks*, 134 Wash. 2d 491, 951 P.2d 761 (1998) (Johnson, J., dissenting), I must reaffirm my position and concur in part and dissent in part. The facts of the present case involve a commercial alcohol vendor who sells alcohol to a minor, who transfers alcohol to another minor, who becomes intoxicated, and injures another person. In this single case we are confronted with commercial alcohol vendor liability, the issue in *Schooley v. Pinch's Deli Market*, 134 Wash. 2d 468, 951 P.2d 749 (1998), and social host liability, the issue in *Reynolds*.

The majority's position that commercial alcohol vendors are liable when they illegally sell alcohol to minors is consistent with our decision in

---

(...continued)  
the minor. RCW 66.20.210.



*Schooley*, however, the majority continues to justify the illegal conduct of providing alcohol to minors when the person providing the alcohol is a social host. I have clearly stated my position on this issue in my dissent in *Reynolds* and in *Hansen v. Friend*, 118 Wash. 2d 476, 824 P.2d 483 (1992). Under RCW 66.44.270(1), social hosts have a duty of care and may be found liable in negligence when an injury is caused by breach of this duty.

SMITH and TALMADGE, JJ., concur.

SANDERS, Justice (concurring in part, dissenting in part).

I would affirm the trial court's dismissal of claims against Oscar's for the reasons set forth in my dissenting opinion in *Schooley v. Pinch's Deli Market, Inc.*, 134 Wash. 2d 468, 951 P.2d 749 (1998). I concur with the majority that the claim against Rettenmeier must be dismissed based on *Reynolds v. Hicks*, 134 Wash. 2d 491, 951 P.2d 761 (1998).

## Questions and Notes

1. If you had been a member of the Washington Supreme Court at the time this case was decided, which opinion would you have signed?

2. Some jurisdictions have responded to the expansion of tavern-owners' liability with legislative restrictions. In California, for example, "the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person." CAL. CIV. CODE ANN. § 1714 (West 1985). Would you have voted for this provision?

## LINEY v. CHESTNUT MOTORS

421 Pa. 26, 218 A.2d 336 (1966)

EAGEN, Justice

In this action in trespass, the lower court sustained preliminary objections to the complaint in the nature of a demurrer and dismissed the action. This appeal challenges the correctness of that order.

The pertinent pleaded facts are as follows:

The defendant operates an automobile sales agency and garage. About ten o'clock a.m. on the day involved, a customer's automobile was delivered to the garage for repairs. The defendant's employees allowed the automobile to remain outside the building, double-parked in the street and with the key in the ignition. About three hours later, it was stolen by an adult stranger who then drove it around the block in such a careless manner that it mounted a sidewalk, struck the plaintiff, a pedestrian thereon, causing her serious injury. Defendant's garage was located in a Philadelphia area experiencing a high and increasing number of automobile thefts in the immediate preceding months.

The lower court's order was correct and we affirm. The complaint failed to state a cause of action against the defendant.

Assuming that defendant's employees were negligent in permitting the automobile to remain outside in the street under the circumstances described, it is clear that the defendant could not have anticipated and foreseen that this carelessness of its employees would result in the harm the plaintiff suffered. *See, Raczynski v. W. T. Cowan, Inc.*, 138 Pa. Super, 392, 10 A.2d 810 (1940), and *Roscovich v. Parkway Baking Co.*, 107 Pa. Super. 493, 163 A. 915 (1933). In other words, the defendant violated no duty owed to the plaintiff. This being so, the plaintiff was not harmed by the defendant's negligence. *See, Dahlstrom v. Shrum*, 368 Pa. 423, 84 A.2d 307 (1951), and *Zilka v. Sanctis Construction, Inc.*, 409 Pa. 396, 186 A.2d 897 (1962). Assuming also that the defendant should have foreseen the likelihood of the theft of the automobile, nothing existed in the present case to put it on notice that the thief would be an incompetent or careless driver. Under the circumstances, the thief's careless operation of the automobile was a superseding cause of the injury

suffered, and defendant's negligence, if such existed, only a remote cause thereof upon which no action would lie. *See*, RESTATEMENT, TORTS, (SECOND) §§ 448, 449, and § 302 B, Illustration 2 (1965); PROSSER, LAW OF TORTS (2d ed. 1941), at 140-41-42; *DeLuca v. Manchester Ldry. & Dry Cl. Co.*, 380 Pa. 484, 112 A.2d 372 (1955); *Kite v. Jones*, 389 Pa. 339, 132 A.2d 683 (1957); and, *Green v. Independent Oil Co.*, 414 Pa. 477, 201 A.2d 207 (1964).

It is true that the question of proximate cause is generally for the jury. However, if the relevant facts are not in dispute and the remoteness of the causal connection between the defendant's negligence and the plaintiff's injury clearly appears, the question becomes one of law: *Klimczak v. 7-Up Bottling Co. of Phila.*, 385 Pa. 287, 122 A.2d 707 (1956), and *Green v. Independent Oil Co.*, *supra*.

Finally, it is strenuously argued that *Anderson v. Bushong Pontiac Co.*, 404 Pa. 382, 171 A.2d 771 (1961), is controlling. We do not agree. In *Anderson*, several salient facts were present which are absent here. Those facts clearly put the defendant in that case on notice, not only that the automobile was likely to be stolen, but also that it was likely to be stolen and operated by an incompetent driver. In *Anderson*, we cited *Murray v. Wright*, 166 Cal. App. 2d 589, 333 P.2d 111 (1958), as persuasive authority for sustaining liability under the facts therein presented. We note that the same court has denied liability in a situation similar to the one now before us. *See, Richards v. Stanley*, 43 Cal. 2d 60, 271 P.2d 23 (1954). Other jurisdictions have reached the same result. *See, Midkiff v. Watkins*, 52 So. 2d 573 (La. App. 1951); *Wilson v. Harrington*, 295 N.Y. 667, 65 N.E.2d 101 (1946); and, *Teague v. Pritchard*, 38 Tenn. App. 686, 279 S.W.2d 706 (1954).

Order affirmed.

MUSMANNO and ROBERTS, JJ., dissent.

## Questions and Notes

1. One law review article found evidence that the accident rate for stolen vehicles is about 200 times that of the normal accident rate. *See An Exercise Based Upon Empirical Data: Liability for*

*Harm Caused by Stolen Automobiles*, 1969 WIS. L. REV. 909. Should the court have been expected to know (or intuit) such a fact? Is it relevant to the disposition of the case?

### ROSS v. HARTMAN

139 F.2d 14 (D.C. Cir. 1943)

EDGERTON, Associate Justice

This is an appeal by the plaintiff from a judgment for the defendant in a personal injury action.

The facts were stipulated. Appellee's agent violated a traffic ordinance of the District of Columbia by leaving appellee's truck unattended in a public alley, with the ignition unlocked and the key in the switch. He left the truck outside a garage "so that it might be taken inside the garage by the garage attendant for night storage," but he does not appear to have notified anyone that he had left it. Within two hours and unknown person drove the truck away and negligently ran over the appellant.

The trial court duly directed a verdict for the appellee on the authority of *Squires v. Brooks*. That case was decided in 1916. On facts essentially similar to these, and despite the presence of a similar ordinance, this court held that the defendant's act in leaving the car unlocked was not a "proximate" or legal cause of the plaintiff's injury because the wrongful act of a third person intervened. We cannot reconcile that decision with facts which have become clearer and principles which have become better established than they were in 1916, and we think it should be overruled.

Everyone knows now that children and thieves frequently cause harm by tampering with unlocked cars. The danger that they will do so on a particular occasion may be slight or great. In the absence of an ordinance, therefore, leaving a car unlocked might not be negligent in some circumstances, although in other circumstances it might be both negligent and a legal or "proximate" cause of a resulting accident.

But the existence of an ordinance changes the situation. If a driver causes an accident by exceeding the speed limit, for example, we do not inquire whether his prohibited conduct was

unreasonably dangerous. It is enough that it was prohibited. Violation of an ordinance intended to promote safety is negligence. If by creating the hazard which the ordinance was intended to avoid it brings about the harm which the ordinance was intended to prevent, it is a legal cause of the harm. This comes only to saying that in such circumstances the law has no reason to ignore and does not ignore the casual relation which obviously exists in fact. The law has excellent reason to recognize it, since it is the very relation which the makers of the ordinance anticipated. This court has applied these principles to speed limits and other regulations of the manner of driving.

The same principles govern this case. The particular ordinance involved here is one of a series which require, among other things, that motor vehicles be equipped with horns and lamps. Ordinary bicycles are required to have bells and lamps, but they are not required to be locked. The evident purpose of requiring motor vehicles to be locked is not to prevent theft for the sake of owners or the policy, but to promote the safety of the public in the streets. An unlocked motor vehicle creates little more risk of theft than an unlocked bicycle, or for that matter an unlocked house, but it creates much more risk that meddling by children, thieves, or others will result in injuries to the public. The ordinance is intended to prevent such consequences. Since it is a safety measure, its violation was negligence. This negligence created the hazard and thereby brought about the harm which the ordinance was intended to prevent. It was therefore a legal or "proximate" cause of the harm.<sup>1</sup> Both negligence and causation

are too clear in this case, we think, for submission to a jury

The fact that the intermeddler's conduct was itself a proximate cause of the harm, and was probably criminal, is immaterial. *Janof v. Newsom* involved a statute which forbade employment agencies to recommend servants without investigating their references. An agency recommended a servant to the plaintiff without investigation, the plaintiff employed the servant, and the servant robbed the plaintiff. This court held the agency responsible for the plaintiff's loss. In that case as in this, the conduct of the defendant or his agent was negligent precisely because it created a risk that a third person would act improperly. In such circumstances the fact that a third person does act improperly is not an intelligible reason for excusing the defendant.

There are practical as well as theoretical reasons for not excusing him. The rule we are adopting tends to make the streets safer by discouraging the hazardous conduct which the ordinance forbids. It puts the burden of the risk, as far as may be, upon those who create it. Appellee's agent created a risk which was both obvious and prohibited. Since appellee was responsible for the risk, it is fairer to hold him responsible for the harm than to deny a remedy to the innocent victim.

Reversed.

## Questions and Notes

1. Are *Liney* and *Ross* distinguishable? Or are they fundamentally the same case?

2. The RESTATEMENT (2D), TORTS, § 440

(...continued)

Neither do we suggest that the ordinance should be interpreted as intended to apply in all possible circumstances. In some emergencies, no doubt, the act of leaving a car unlocked and unattended in a public place would not be a violation of the ordinance, fairly interpreted, and would therefore entail no responsibility for consequences. A classic illustration of the same general principle is the Bologna ordinance against blood-letting in the streets, which did not make criminals of surgeons.

<sup>1</sup> This does not mean that one who violates a safety ordinance is responsible for all harm that accompanies or follows his negligence. He is responsible for the consequences of his negligence but not for coincidences. If in the present case, for example, the intermeddler had simply released the brake of appellee's truck, without making use of the ignition key or the unlocked switch, and the truck had thereupon rolled downhill and injured appellant, appellee would not have been responsible for the injuries because of the negligence of his agent in leaving the switch unlocked, since it would have had no part in causing them. In other words the fact that the ignition was unlocked, which alone gave the agent's conduct its negligent character, would have had nothing to do with bringing about the harm.

(continued...)

defines a "superseding cause" as "an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." By contrast, in § 441 an "intervening force" is defined as "one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." It does not prevent the actor's conduct from being found a proximate cause. Do these definitions help distinguish one kind of cause from another?

3. If a tavern negligently serves an intoxicated patron in violation of state law, is the tavern responsible for intentional torts committed by the patron? *Compare*, 753 S.W.2d 507 (Tex. App. 1988, writ denied), with *Christen v. Lee*, 113 Wash. 2d 479, 780 P.2d 1307 (1989). The Texas case is reviewed in a casenote, 20 TEX. TECH. L. REV. 1323 (1989).

4. In *Kitchen v. K-Mart Corporation*, 697 So.2d 1200 (Fla. 1997), the plaintiff was shot by her intoxicated ex-boyfriend, who had purchased a gun from K-Mart. When the clerk at K-Mart discovered his writing was too illegible to be read on the required firearms form, the clerk filled it out for him and had him initial it and sign it. The jury determined that the plaintiff's damages were \$12 million. Should K-Mart be required to pay the damages caused by the shooting? Or was the ex-boyfriend a superseding cause of the injury?

### 3. Remote and Indirect Results of Negligent Conduct

#### PALSGRAF v. LONG ISLAND R. CO.

248 N.Y. 339, 162 N.E. 99 (1928)

CARDOZO, C.J.

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.

The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. "Proof of negligence in the air, so to speak, will not do." POLLOCK, TORTS (11th Ed.) p. 455; *Martin v. Herzog*, 228 N.Y. 164, 170, 126 N.E. 814. Cf. SALMOND, TORTS (6th Ed.) p. 24. "Negligence is the absence of care, according to the circumstances." Willes, J., in *Vaughan v. Taff Vale Ry. Co.*, 5 H.& N. 679, 688; 1 BEVEN, NEGLIGENCE (4th Ed.) 7; *Paul v. Consol. Fireworks Co.*, 212 N.Y. 117, 105 N.E. 795; *Adams v. Bullock*, 227 N.Y. 208, 211, 125 N.E. 93; *Parrott v. Wells-Fargo Co.*, 15 Wall. (U.S.)

524, 21 L. Ed. 206. The plaintiff, as she stood upon the platform of the station, might claim to be protected against intentional invasion of her bodily security. Such invasion is not charged. She might claim to be protected against unintentional invasion by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would ensue. These, from the point of view of the law, were the bounds of her immunity, with perhaps some rare exceptions, survivals for the most part of ancient forms of liability, where conduct is held to be at the peril of the actor. *Sullivan v. Dunham*, 161 N.Y. 290, 55 N.E. 923, 47 L.R.A. 715, 76 Am. St. Rep. 274. If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to some one else. "In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury."

\* \* \*

A different conclusion will involve us, and swiftly too, in a maze of contradictions. A guard stumbles over a package which has been left upon a platform. It seems to be a bundle of newspapers. It turns out to be a can of dynamite. To the eye of ordinary vigilance, the bundle is abandoned waste, which may be kicked or trod on with impunity. Is a passenger at the other end of the platform protected by the law against the unsuspected hazard concealed beneath the waste? If not, is the result to be any different, so far as the distant passenger is concerned, when the guard stumbles over a valise which a truckman or a porter has left upon the walk? The passenger far away, if the victim of a wrong at all, has a cause of action, not derivative, but original and primary. His claim to be protected against invasion of his bodily security is neither greater nor less because the act resulting in the invasion is a wrong to another far removed. In this case, the rights that are said to have been invaded, are not even of the same order. The man was not injured in his person nor even put in danger. The purpose of the act, as well as its effect, was to make his person safe. It there was a

wrong to him at all, which may very well be doubted it was a wrong to a property interest only, the safety of his package. Out of this wrong to property, which threatened injury to nothing else, there has passed, we are told, to the plaintiff by derivation or succession a right of action for the invasion of an interest of another order, the right to bodily security. The diversity of interests emphasizes the futility of the effort to build the plaintiff's right upon the basis of a wrong to some one else. The gain is one of emphasis, for a like result would follow if the interests were the same. Even then, the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty. One who jostles one's neighbor in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb, not the one who explodes it without suspicion of the danger. Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform.

The argument for the plaintiff is built upon the shifting meanings of such words as "wrong" and "wrongful," and shares their instability. What the plaintiff must show is "a wrong" to herself; *i.e.*, a violation of her own right, and not merely a wrong to some one else, nor conduct "wrongful" because unsocial, but not "a wrong" to any one. We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act and therefore of a wrongful one, irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the eye of vigilance perceives the risk of damage. If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension. Seavey, *Negligence, Subjective or Objective*, 41 H. L. Rv. 6; *Boronkay v. Robinson & Carpenter*, 247 N.Y. 365, 160 N.E. 400. This does not mean, of course, that one who launches a destructive force is always relieved of liability, if the force, though known to be destructive, pursues an unexpected

path. "It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye." *Munsey v. Webb*, 231 U.S. 150, 156, 34 S. Ct. 44, 45 (58 L. Ed. 162); *Condran v. Park & Tilford*, 213 N.Y. 341, 345, 107 N.E. 565; *Robert v. United States Shipping Board Emergency Fleet Corp.*, 240 N.Y. 474, 477, 148 N.E. 650. Some acts, such as shooting are so imminently dangerous to any one who may come within reach of the missile however unexpectedly, as to impose a duty of prevision not far from that of an insurer. Even today, and much oftener in earlier stages of the law, one acts sometimes at one's peril. *Jeremiah Smith, Tort and Absolute Liability*, 30 H. L. RV. 328; STREET, FOUNDATIONS OF LEGAL LIABILITY, vol. 1, pp. 77, 78. Under this head, it may be, fall certain cases of what is known as transferred intent, an act willfully dangerous to *A* resulting by misadventure in injury to *B*. *Talmage v. Smith*, 101 Mich. 370, 374, 59 N.W. 656, 45 Am. St. Rep. 414. These cases aside, wrong is defined in terms of the natural or probable, at least when unintentional. *Parrot v. Wells-Fargo Co. (The Nitro-Glycerine Case)* 15 Wall. 524, 21 L. Ed. 206. The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury. Here, by concession, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and willfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him. His conduct would not have involved, even then, an unreasonable probability of invasion of her bodily security. Liability can be no greater where the act is inadvertent.

Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all. Bowen, L.J., in *Thomas v. Quartermaine*, 18 Q.B.D. 685, 694. Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is

protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. Affront to personality is still the keynote of the wrong. Confirmation of this view will be found in the history and development of the action on the case. Negligence as a basis of civil liability was unknown to medieval law. 8 HOLDSWORTH, HISTORY OF ENGLISH LAW, p. 449; STREET, FOUNDATIONS OF LEGAL LIABILITY, vol. 1, pp. 189, 190. For damage to the person, the sole remedy was trespass, and trespass did not lie in the absence of aggression, and that direct and personal. HOLDSWORTH, *op. cit.* p. 453; STREET, *op. cit.* vol. 3, pp. 258, 260, vol. 1, pp. 71, 74. Liability for other damage, as where a servant without orders from the master does or omits something to the damage of another, is a plant of later growth. HOLDSWORTH, *op. cit.* 450, 457; Wigmore, *Responsibility for Tortious Acts*, vol. 3, ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 520, 523, 526, 533. When it emerged out of the legal soil, it was thought of as a variant of trespass, an offshoot of the parent stock. This appears in the form of action, which was known as trespass on the case. HOLDSWORTH, *op. cit.* p. 449; *cf. Scott v. Shepard*, 2 WM. BLACK. 892; GREEN, RATIONALE OF PROXIMATE CAUSE, p. 19. The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another. Thus to view his cause of action is to ignore the fundamental difference between tort and crime. HOLLAND, JURISPRUDENCE (12th Ed.) p. 328. He sues for breach of a duty owing to himself.

The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability. If there is no tort to be redressed, there is no occasion to consider what damage might be recovered if there were a finding of a tort. We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the

plaintiff, would entail liability for any and all consequences, however novel or extraordinary. *Bird v. St. Paul Fire & Marine Ins. Co.*, 224 N.Y. 47, 54, 120 N.E. 86, 13 A.L.R. 875; *Ehrgott v. Mayor, etc., of City of New York*, 96 N.Y. 264, 48 Am. Rep. 622; *Smith v. London & S. W. R. Co.*, (1870-1871) L.R. 6 C.P. 14; 1 BEVEN, NEGLIGENCE, 106; STREET, *op. cit.* vol. 1, p. 90; GREEN, RATIONALE OF PROXIMATE CAUSE, pp. 88, 118; *cf. Matter of Polemis*, L.R. 1921, 3 K.B. 560; 44 LAW QUARTERLY REVIEW, 142. There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as, *e.g.*, one of bodily security. Perhaps other distinctions may be necessary. We do not go into the question now. The consequences to be followed must first be rooted in a wrong.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and the complaint dismissed, with costs in all courts.

ANDREWS, J. (dissenting)

Assisting a passenger to board a train, the defendant's servant negligently knocked a package from his arms. It fell between the platform and the cars. Of its contents the servant knew and could know nothing. A violent explosion followed. The concussion broke some scales standing a considerable distance away. In falling, they injured the plaintiff, an intending passenger.

Upon these facts, may she recover the damages she has suffered in an action brought against the master? The result we shall reach depends upon our theory as to the nature of negligence. Is it a relative concept—the breach of some duty owing to a particular person or to particular persons? Or, where there is an act which unreasonably threatens the safety of others, is the doer liable for all its proximate consequences, even where they result in injury to one who would generally be thought to be outside the radius of danger? This is not a mere dispute as to words. We might not believe that to the average mind the dropping of the bundle would seem to involve the probability of harm to the plaintiff standing many feet away whatever might be the case as to the

owner or to one so near as to be likely to be struck by its fall. If, however, we adopt the second hypothesis, we have to inquire only as to the relation between cause and effect. We deal in terms of proximate cause, not of negligence.

Negligence may be defined roughly as an act or omission which unreasonably does or may affect the rights of others, or which unreasonably fails to protect one's self from the dangers resulting from such acts. Here I confine myself to the first branch of the definition. Nor do I comment on the word "unreasonable." For present purposes it sufficiently describes that average of conduct that society requires of its members.

There must be both the act or the omission, and the right. It is the act itself, not the intent of the actor, that is important. *Hover v. Barkhoof*, 44 N.Y. 113; *Mertz v. Connecticut Co.*, 217 N.Y. 475, 112 N.E. 166. In criminal law both the intent and the result are to be considered. Intent again is material in tort actions, where punitive damages are sought, dependent on actual malice—not one merely reckless conduct. But here neither insanity nor infancy lessens responsibility. *Williams v. Hays*, 143 N.Y. 442, 38 N.E. 449, 26 L.R.A. 153, 42 Am. St. Rep. 743.

As has been said, except in cases of contributory negligence, there must be rights which are or may be affected. Often though injury has occurred, no rights of him who suffers have been touched. A licensee or trespasser upon my land has no claim to affirmative care on my part that the land be made safe. *Meiers v. Fred Koch Brewery*, 229 N.Y. 10, 127 N.E. 491, 13 A.L.R. 633. Where a railroad is required to fence its tracks against cattle, no man's rights are injured should he wander upon the road because such fence is absent. *Di Caprio v. New York Cent. R. Co.*, 231 N.Y. 94, 131 N.E. 746, 16 A.L.R. 940. An unborn child may not demand immunity from personal harm. *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567, 20 A.L.R. 1503.

But we are told that "there is no negligence unless there is in the particular case a legal duty to take care, and this duty must be not which is owed to the plaintiff himself and not merely to others." SALMOND TORTS (6th Ed.) 24. This I think too narrow a conception. Where there is the unreasonable act, and some right that may be affected there is negligence whether damage does

or does not result. That is immaterial. Should we drive down Broadway at a reckless speed, we are negligent whether we strike an approaching car or miss it by an inch. The act itself is wrongful. If is a wrong not only to those who happen to be within the radius of danger, but to all who might have been there—a wrong to the public at large. Such is the language of the street. Such the language of the courts when speaking of contributory negligence. Such again and again their language in speaking of the duty of some defendant and discussing proximate cause in cases where such a discussion is wholly irrelevant on any other theory. *Perry v. Rochester Line Co.*, 219 N.Y. 60, 113 N.E. 529, L.R.A. 1917B, 1058. As was said by Mr. Justice Holmes many years ago:

The measure of the defendant's duty in determining whether a wrong has been committed is one thing, the measure of liability when a wrong has been committed is another. *Spade v. Lynn & B.R. Co.*, 172 Mass. 488, 491, 52 N.E. 747, 748 (43 L.R.A. 832, 70 Am. St. Rep. 298).

Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect *A*, *B*, or *C* alone.

It may well be that there is no such thing as negligence in the abstract. "Proof of negligence in the air, so to speak, will not do." In an empty world negligence would not exist. It does involve a relationship between man and his fellows, but not merely a relationship between man and those whom he might reasonably expect his act would injure; rather, a relationship between him and those whom he does in fact injure. If his act has a tendency to harm some one, it harms him a mile away as surely as it does those on the scene. We now permit children to recover for the negligent killing of the father. It was never prevented on the theory that no duty was owing to them. A husband may be compensated for the loss of his wife's services. To say that the wrongdoer was negligent as to the husband as well as to the wife is merely an attempt to fit facts to theory. An insurance company paying a fire loss recovers its payment of the negligent incendiary. We speak of subrogation—of suing in the right of the insured. Behind the cloud of words is the fact they hide, that the act,

wrongful as to the insured, has also injured the company. Even if it be true that the fault of father, wife, or insured will prevent recovery, it is because we consider the original negligence, not the proximate cause of the injury. POLLOCK, TORTS (12th Ed.) 463.

In the well-known *Polemis Case*, (1921) 3 K.B. 560, SCRUTTON, L.J., said that the dropping of a plank was negligent, for it might injure "workman or cargo or ship." Because of either possibility, the owner of the vessel was to be made good for his loss. The act being wrongful, the doer was liable for its proximate results. Criticized and explained as this statement may have been, I think it states the law as it should be and as it is. *Smith v. London & S.W.R. Co. R.R.* (1870-71) L.R. 6 C.P. 14; *Anthony v. Staid*, 52 Mass. (11 Metc.) 290; *Wood v. Pennsylvania R. Co.*, 177 Pa. 306, 35 A. 699, 35 L.R.A. 199, 55 Am. St. Rep. 728; *Trashansky v. Hershkovitz*, 239 N.Y. 452, 147 N.E. 63.

The proposition is this: Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm, might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining, but this is not a duty to a particular individual because as to him harm might be expected. Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain. We have never, I think, held otherwise. Indeed in the *Di Caprio Case* we said that a breach of a general ordinance defining the degree of care to be exercised in one's calling is evidence of negligence as to every one. We did not limit this statement to those who might be expected to be exposed to danger. Unreasonable risk being taken, its consequences are not confined to those who might probably be hurt.

If this be so, we do not have a plaintiff suing by "derivation or succession." Her action is original and primary. Her claim is for a breach of duty to herself—not that she is subrogated to any right of action of the owner of the parcel or of a passenger standing at the scene of the explosion.

The right to recover damages rests on



additional considerations. The plaintiff's rights must be injured, and this injury must be caused by the negligence. We build a dam, but are negligent as to its foundations. Breaking, it injures property down stream. We are not liable if all this happened because of some reason other than the insecure foundation. But, when injuries do result from out unlawful act, we are liable for the consequences. It does not matter that they are unusual, unexpected, unforeseen, and unforeseeable. But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former.

These two words have never been given an inclusive definition. What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations, as does the existence of negligence itself. Any philosophical doctrine of causation does not help us. A boy throws a stone into a pond. The ripples spread. The water level rises. The history of that pond is altered to all eternity. It will be altered by other causes also. Yet it will be forever the resultant of all causes combined. Each one will have an influence. How great only omniscience can say. You may speak of a chain, or, if you please, a net. An analogy is of little aid. Each cause brings about future events. Without each the future would not be the same. Each is proximate in the sense it is essential. But that is not what we mean by the word. Nor on the other hand do we mean sole cause. There is no such thing.

Should analogy be though helpful, however, I prefer that of a stream. The spring, starting on its journey, is joined by tributary after tributary. The river, reaching the ocean, comes from a hundred sources. No man may say whence any drop of water is derived. Yet for a time distinction may be possible. Into the clear creek, brown swamp water flows from the left. Later, from the right comes water stained by its clay bed. The three may remain for a space, sharply divided. But at last inevitably no trace of separation remains. They are so commingled that all distinction is lost.

As we have said, we cannot trace the effect of an act to the end, if end there is. Again, however, we may trace it part of the way. A murder at Serajevo may be the necessary antecedent to an assassination in London twenty years hence. An overturned lantern may burn all Chicago. We may

follow the fire from the shed to the last building. We rightly say the fire started by the lantern caused its destruction.

A cause, but not the proximate cause. What we do mean by the word "proximate" is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. Take our rule as to fires. Sparks from my burning haystack set on fire my house and my neighbor's. I may recover from a negligent railroad. He may not. Yet the wrongful act as directly harmed the one as the other. We may regret that the line was drawn just where it was, but drawn somewhere it had to be. We said the act of the railroad was not the proximate cause of our neighbor's fire. Cause it surely was. The words we used were simply indicative of our notions of public policy. Other courts think differently. But somewhere they reach the point where they cannot say the stream comes from any one source.

Take the illustration given in an unpublished manuscript by a distinguished and helpful writer on the law of torts. A chauffeur negligently collides with another car which is filled with dynamite, although he could not know it. An explosion follows. *A*, walking on the sidewalk nearby, is killed. *B*, sitting in a window of a building opposite, is cut by flying glass. *C*, likewise sitting in a window a block away, is similarly injured. And a further illustration: A nursemaid, ten blocks away, startled by the noise, involuntarily drops a baby from her arms to the walk. We are told that *C* may not recover while *A* may. As to *B* it is a question for court or jury. We will all agree that the baby might not. Because, we are again told, the chauffeur had no reason to believe his conduct involved any risk of injuring either *C* or the baby. As to them he was not negligent.

But the chauffeur, being negligent in risking the collision, his belief that the scope of the harm he might do would be limited is immaterial. His act unreasonably jeopardized the safety of any one who might be affected by it. *C*'s injury and that of the baby were directly traceable to the collision. Without that, the injury would not have happened. *C* had the right to sit in his office, secure from such dangers. The baby was entitled to use the

sidewalk with reasonable safety.

The true theory is, it seems to me, that the injury to *C*, if in truth he is to be denied recovery, and the injury to the baby, is that their several injuries were not the proximate result of the negligence. And here not what the chauffeur had reason to believe would be the result of his conduct, but what the prudent would foresee, may have a bearing — may have some bearing, for the problem of proximate cause is not to be solved by any one consideration. It is all a question of expediency. There are no fixed rules to govern our judgment. There are simply matters of which we may take account. We have in a somewhat different connection spoken of "the stream of events." We have asked whether that stream was deflected — whether it was forced into new and unexpected channels. *Donnelly v. H.C. & A.I. Piercy Contracting Co.*, 222 N.Y. 210, 118 N.E. 605. This is rather rhetoric than law. There is in truth little to guide us other than common sense.

There are some hints that may help us. The proximate cause, involved as it may be with many other causes, must be, at the least, something without which the event would not happen. The court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated? Is the cause likely, in the usual judgment of mankind, to produce the result? Or, by the exercise of prudent foresight, could the result be foreseen? Is the result too remote from the cause, and here we consider remoteness in time and space. *Bird v. St. Paul & M. Ins. Co.*, 224 N.Y. 47, 120 N.E. 86, 13 A.L.R. 875, where we passed upon the construction of a contract — but something was also said on this subject. Clearly we must so consider, for the greater the distance either in time or space, the more surely do other causes intervene to affect the result. When a lantern is overturned, the firing of a shed is a fairly direct consequence. Many things contribute to the spread of the conflagration — the force of the wind, the direction and width of streets, the character of intervening structures, other factors. We draw an uncertain and wavering line, but draw it we must as best we can.

Once again, it is all a question of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.

Here another question must be answered. In the case supposed, it is said, and said correctly, that the chauffeur is liable for the direct effect of the explosion, although he had no reason to suppose it would follow a collision. "The fact that the injury occurred in a different manner than that which might have been expected does not prevent the chauffeur's negligence from being in law the cause of the injury." But the natural results of a negligent act — the results which a prudent man would or should foresee — do have a bearing upon the decision as to proximate cause. We have said so repeatedly. What should be foreseen? No human foresight would suggest that a collision itself might injure one a block away. On the contrary, given an explosion, such a possibility might be reasonably expected. I think the direct connection, the foresight of which the courts speak, assumes prevision of the explosion, for the immediate results of which, at least, the chauffeur is responsible.

If may be said this is unjust. Why? In fairness he should make good every injury flowing from his negligence. Not because of tenderness toward him we say he need not answer for all that follows his wrong. We look back to the catastrophe, the fire kindled by the spark, or the explosion. We trace the consequences, not indefinitely, but to a certain point. And to aid us in fixing that point we ask what might ordinarily be expected to follow the fire or the explosion.

This last suggestion is the factor which must determine the case before us. The act upon which defendant's liability rests is knocking an apparently harmless package onto the platform. The act was negligent. For its proximate consequences the defendant is liable. If its contents were broken, to the owner; if it fell upon and crushed a passenger's foot, then to him; if it exploded and injured one in the immediate vicinity, to him also as to *A* in the illustration. *Mrs. Palsgraf* was standing some distance away. How far cannot be told from the record — apparently 25 or 30 feet, perhaps less. Except for the explosion, she would not have been injured. We are told by the appellant in his brief,

"It cannot be denied that the explosion was the direct cause of the plaintiff's injuries." So it was a substantial factor in producing the result —there was here a natural and continuous sequence — direct connection. The only intervening cause was that, instead of blowing her to the ground, the concussion smashed the weighing machine which in turn fell upon her. There was no remoteness in time, little in space. And surely, given such an explosion as here, it needed no great foresight to predict that the natural result would be to injure one on the platform at no greater distance from its scene than was the plaintiff. Just how no one might be able to predict. Whether by flying fragments, by broken glass, by wreckage of machines or structures no one could say. But injury in some form was most probable.

Under these circumstances I cannot say as a matter of law that the plaintiff's injuries were not the proximate result of the negligence. That is all we have before us. The court refused to so charge. No request was made to submit the matter to the jury as a question of fact, even would that have been proper upon the record before us.

The judgment appealed from should be affirmed, with costs.

POUND, LEHMAN, and KELLOGG, JJ., concur with CARDOZO, C.J.

ANDREWS, J., dissents in opinion in which CRANE and O'BRIEN, JJ., concur.

Judgment reversed, etc.

## Questions and Notes

1. What is the difference between Cardozo's and Andrews' opinions? Which do you find more persuasive?

2. There is some question about whether the issue of foreseeability is for the judge or for the jury. Although Cardozo views the issue of foreseeability as a component of the question of whether or not the defendant owes a duty to the plaintiff (which is usually considered a question of law rather than fact, and thus reserved for the judge), the specific facts of a case must often be determined by the jury. Thus in many cases it will be the jury who determines whether or not the plaintiff was foreseeable.

3. A trilogy of British cases have struggled with the application of the foreseeability doctrine. The *Polemis* case (3 K.B. 560 [1921], All E.R. 40) was referenced in Judge Andrews dissenting opinion, *supra*. A plank was dropped by the defendant's employees into the hold of a ship carrying cans of gasoline. The falling plank somehow created a spark that ignited the vapor in the hold, destroying the ship and its cargo. Arbitrators found that the explosion was not a foreseeable result of the negligence. However, the judge concluded that "once the act is negligent, the fact that its exact operation was not foreseen is immaterial." Is this consistent with the foreseeability doctrine? Some judges thought not. In *Overseas Tankship v. Morts Dock & Engineering*, P.C. [1961], 1 All E.R. 404 ("*Wagon Mound 1*"), the Privy Council considered another harbor fire. The tanker *Wagon Mound* spilled a large amount of furnace oil into Sydney Harbour. Experts consulted at the time assured the dock and ship owners that the oil slick could not catch fire. However, it was ignited by a freakish accident in which molten metal, dropped from a welder, landed on floating rags; the rags acted as a wick, and started a fire that engulfed a dock and associated boats. The court rejected the broad notion of causation represented by *Polemis* and instead limited liability to that which is foreseeable, denying any recovery beyond the nuisance damage caused by the spilled oil.

However, in *The Wagon Mound* ("*Wagon Mound 2*"), P.C. [1966] 2 All E.R. 709, the Privy Council backed away from the stricter rule in *Wagon Mound 1* and held that although the risk of ignition was very slight, the owners of the tanker should have taken some action to prevent the calamity in light of the serious risk the oil presented. A reasonable person, Lord Reid stated, "would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage and required no expense." Analyzed in terms of Learned Hand's formula, there is no additional burden to prevent the oil spill (since ordinary care would require it anyway), and thus the slightest chance of additional damage would make the actor negligent for failing to prevent such an injury.

The leading American case on the foreseeability question is *Kinsman Transit*, which follows:

**KINSMAN TRANSIT CO.**

338 F.2d 708 (2D Cir. 1964)

FRIENDLY, Circuit Judge

We have here six appeals, 28 U.S.C. 1292(A)(3), from an interlocutory decree in admiralty adjudicating liability. The litigation, in the District Court for the Western District of New York, arose out of a series of misadventures on a navigable portion of the Buffalo River during the night of January 21, 1959. The owners of two vessels petitioned for exoneration from or limitation of liability; numerous claimants appeared in these proceedings and also filed libels against the Continental Grain Company and the City of Buffalo, which filed cross-claims. The proceedings were consolidated for trial before Judge Burke. We shall summarize the facts as found by him:

The Buffalo River flows through Buffalo from east to west, with many turns and bends, until it empties into Lake Erie. Its navigable western portion is lined with docks, grain elevators, and industrial installations; during the winter, lake vessels tie up there pending resumption of navigation on the Great Lakes, without power and with only a shipkeeper aboard. About a mile from the mouth, the City of Buffalo maintains a lift bridge at Michigan Avenue. Thaws and rain frequently cause freshets to develop in the upper part of the river and its tributary, Cazenovia Creek; currents then range up to fifteen miles an hour and propel broken ice down the river, which sometimes overflows its banks.

On January 21, 1959, rain and thaw followed a period of freezing weather. The United States Weather Bureau issued appropriate warnings which were published and broadcast. Around 6 P.M. an ice jam that had formed in Cazenovia Creek disintegrated. Another ice jam formed just west of the junction of the creek and the river; it broke loose around 9 P.M.

The MacGilvray Shiras, owned by The Kinsman Transit Company, was moored at the dock of the Concrete Elevator, operated by Continental Grain Company, on the south side of the river about three miles upstream of the Michigan Avenue Bridge. She was loaded with grain owned by Continental. The berth, east of the main portion of the dock, was exposed in the sense that about 150' of the Shiras' forward end,

pointing upstream, and 70' of her stern—a total of over half her length—projected beyond the dock. This left between her stem and the bank a space of water seventy-five feet wide where the ice and other debris could float in and accumulate. The position was the more hazardous in that the berth was just below a bend in the river, and the Shiras was on the inner bank. None of her anchors had been put out. From about 10 P.M. large chunks of ice and debris began to pile up between the Shiras' starboard bow and the bank; the pressure exerted by this mass on her starboard bow was augmented by the force of the current and of floating ice against her port quarter. The mooring lines began to part, and a "deadman," to which the No. 1 mooring cable had been attached, pulled out of the ground—the judge finding that it had not been properly constructed or inspected. About 10:40 P.M. the stern lines parted, and the Shiras drifted into the current. During the previous forty minutes, the shipkeeper took no action to ready the anchors by releasing the devil's claws; when he sought to drop them after the Shiras broke loose, he released the compressors with the claws still hooked in the chain so that the anchors jammed and could no longer be dropped. The trial judge reasonably found that if the anchors had dropped at that time, the Shiras would probably have fetched up at the hairpin bend just below the Concrete Elevator, and that in any case they would considerably have slowed her progress, the significance of which will shortly appear.

Careening stern first down the S-shaped river, the Shiras, at about 11 P.M., struck the bow of the Michael K. Tewksbury, owned by Midland Steamship Line, Inc. The Tewksbury was moored in a relatively protected area flush against the face of a dock on the outer bank just below a hairpin bend so that no opportunity was afforded for ice to build up between her port bow and the dock. Her shipkeeper had left around 5 P.M. and spent the evening watching television with a girl friend and her family. The collision caused the Tewksbury's mooring lines to part; she too drifted stern first down the river, followed by the Shiras. The collision caused damage to the Steamer Druckenmiller which was moored opposite the Tewksbury. Thus far there was no substantial conflict in the testimony; as to what followed there was. Judge Burke found, and we accept his findings as soundly based, that at about 10:43 P.M., Goetz, the superintendent of the Concrete Elevator, telephoned Krupavich, another

employee of Continental, that the Shiras was adrift; Kruptavich called the Coast Guard, which called the city fire station on the river, which in turn warned the crew on the Michigan Avenue Bridge, this last call being made about 10:48 P.M. Not quite twenty minutes later the watchman at the elevator where the Tewksbury had been moored phoned the bridge crew to raise the bridge. Although not more than two minutes and ten seconds were needed to elevate the bridge to full height after traffic was stopped, assuming that the motor started promptly, the bridge was just being raised when, at 11:17 P.M., the Tewksbury crashed into its center. The bridge crew consisted of an operator and two tenders; a change of shift was scheduled for 11 P.M. The inference is rather strong, despite contrary testimony, that the operator on the earlier shift had not yet returned from a tavern when the telephone call from the fire station was received; that the operator on the second shift did not arrive until shortly before the call from the elevator where the Tewksbury had been moored; and that in consequence the bridge was not raised until too late.

The first crash was followed by a second, when the south tower of the bridge fell. The Tewksbury grounded and stopped in the wreckage with her forward end resting against the stern of the Steamer Farr, which was moored on the south side of the river just above the bridge. The Shiras ended her journey with her stern against the Tewksbury and her bow against the north side of the river. So wedged, the two vessels substantially dammed the flow, causing water and ice to back up and flood installations on the banks with consequent damage as far as the Concrete Elevator, nearly three miles upstream. Two of the bridge crew suffered injuries. Later the north tower of the bridge collapsed, damaging adjacent property.

*[The trial court concluded that the damages caused by the Shiras were without the knowledge of the owner, thus allowing Kinsman to limit its liability to the value of the Shiras and its cargo; that the Tewksbury and its owner deserved exoneration; that the City of Buffalo was at fault for failing to raise the Michigan Avenue Bridge; that the city was not at fault for the state of the flood improvements or for failing to dynamite the ice jams; and that the Tewksbury and the*

*Druckenmiller could recover from Continental and Kinsman for damages suffered at the Standard Elevator dock. - ed.]*

\* \* \*

We see no reason why an actor engaging in conduct which entails a large risk of small damage and a small risk of other and greater damage, of the same general sort, from the same forces, and to the same class of persons, should be relieved of responsibility for the latter simply because the chance of its occurrence, if viewed alone, may not have been large enough to require the exercise of care. By hypothesis, the risk of the lesser harm was sufficient to render his disregard of it actionable; the existence of a less likely additional risk that the very forces against whose action he was required to guard would produce other and greater damage than could have been reasonably anticipated should inculcate him further rather than limit his liability. This does not mean that the careless actor will always be held for all damages for which the forces that he risked were a cause in fact. Somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity. Thus, if the destruction of the Michigan Avenue Bridge had delayed the arrival of a doctor, with consequent loss of a patient's life, few judges would impose liability on any of the parties here, although the agreement in result might not be paralleled by similar unanimity in reasoning; perhaps in the long run one returns to Judge Andrews' statement in *Palsgraf*, 248 N.Y. at 354-355, 162 N.E. at 104 (dissenting opinion). "It is all a question of expediency, ... of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind." It would be pleasant if greater certainty were possible, *see* PROSSER, TORTS, 262, but the many efforts that have been made at defining the locus of the "uncertain and wavering line," 248 N.Y. at 354, 162 N.E. 99, are not very promising; what courts do in such cases makes better sense than what they, or others, say. Where the line will be drawn will vary from age to age; as society has come to rely increasingly on insurance and other methods of loss-sharing, the point may lie further off than a century ago. Here it is surely more equitable that the losses from the

operators' negligent failure to raise the Michigan Avenue Bridge should be ratably borne by Buffalo's taxpayers than left with the innocent victims of the flooding; yet the mind is also repelled by a solution that would impose liability solely on the City and exonerate the persons whose negligent acts of commission and omission were the precipitating force of the collision with the bridge and its sequelae. We go only so far as to hold that where, as here, the damages resulted from the same physical forces whose existence required the exercise of greater care than was displayed and were of the same general sort that was expectable, unforeseeability of the exact developments and of the extent of the loss will not limit liability. Other fact situations can be dealt with when they arise.

\* \* \*

MOORE, Circuit Judge (concurring and dissenting)

I do not hesitate to concur with Judge FRIENDLY'S well-reasoned and well-expressed opinion as to limitation of Kinsman's liability, the extent of the liability of the City of Buffalo, Continental and Kinsman for the damages suffered by the City, the Shiras, the Tewksbury, the Druckenmiller and the Farr and the division of damages.

I cannot agree, however, merely because "society has come to rely increasingly on insurance and other methods of loss-sharing" that the courts should, or have the power to, create a vast judicial insurance company which will adequately compensate all who have suffered damages. Equally disturbing is the suggestion that "Here it is surely more equitable that the losses from the operators' negligent failure to raise the Michigan Avenue Bridge should be ratably borne by Buffalo's taxpayers than left with the innocent victims of the flooding." Under any such principle, negligence suits would become further simplified by requiring a claimant to establish only his own innocence and then offer, in addition to his financial statement, proof of the financial condition of the respective defendants. Judgment would be entered against the defendant which court or jury decided was best able to pay. Nor am I convinced that it should be the responsibility of the Buffalo

taxpayers to reimburse the "innocent victims" in their community for damages sustained. In my opinion, before financial liability is imposed, there should be some showing of legal liability.

Unfortunate though it was for Buffalo to have had its fine vehicular bridge demolished in a most unexpected manner, I accept the finding of liability for normal consequences because the City had plenty of time to raise the bridge after notice was given. Bridges, however, serve two purposes. They permit vehicles to cross the river when they are down; they permit vessels to travel on the river when they are up. But no bridge builder or bridge operator would envision a bridge as a dam or as a dam potential.

By an extraordinary concatenation of even more extraordinary events, not unlike the humorous and almost-beyond-all-imagination sequences depicted by the famous cartoonist, Rube Goldberg, the Shiras with its companions which it picked up en route did combine with the bridge demolition to create a very effective dam across the Buffalo River. Without specification of the nature of the damages, claims in favor of some twenty persons and companies were allowed (Finding of Fact #33, Interlocutory Decree, par. 11) resulting from the various collisions and from "the damming of the river at the bridge, the backing up of the water and ice upstream, and the overflowing of the banks of the river and flooding of industrial installations along the river banks." (Sup. Finding of Fact #26a.) My dissent is limited to that portion of the opinion which approves the awarding of damages suffered as a result of the flooding of various properties upstream. I am not satisfied with reliance on hindsight or on the assumption that since flooding occurred, therefore, it must have been foreseeable. In fact, the majority hold that the danger "of flooding would not have been unforeseeable under the circumstances to anyone who gave them thought." But believing that "anyone" might be too broad, they resort to that most famous of all legal mythological characters, the reasonably "prudent man." Even he, however, "carefully pondering the problem," is not to be relied upon because they permit him to become prudent "with the aid of hindsight."

The majority, in effect, would remove from the law of negligence the concept of foreseeability because, as they say, "The weight of authority in

this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are "direct." Yet lingering thoughts of recognized legal principles create for them lingering doubts because they say: "This does not mean that the careless actor will always be held for all damages for which the forces that he risked were a cause in fact. Somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity." The very example given, namely, the patient who dies because the doctor is delayed by the destruction of the bridge, certainly presents a direct consequence as a factual matter yet the majority opinion states that "few judges would impose liability on any of the parties here," under these circumstances.

In final analysis the answers to the questions when the link is "too tenuous" and when "consequence is only fortuity" are dependent solely on the particular point of view of the particular judge under the particular circumstances. In differing with my colleagues, I must be giving "unconscious recognition of the harshness of holding a man for what he could not conceivably have guarded against, because human foresight could not go so far." (L. HAND, C.J., in *Sinram v. Pennsylvania R. Co.*, 61 F.2d 767, 770, 2 Cir., 1932.) If "foreseeability" be the test, I can foresee the likelihood that a vessel negligently allowed to break its moorings and to drift uncontrolled in a rapidly flowing river may well strike other ships, piers and bridges. Liability would also result on the "direct consequence" theory. However, to me the fortuitous circumstance of the vessels so arranging themselves as to create a dam is much "too tenuous."

The decisions bearing on the foreseeability question have been so completely collected in three English cases that no repetition of the reasoning pro and con of this principle need be made here. To these cases may be added the many American cases cited in the majority opinion which to me push the doctrine of foreseeability to ridiculous lengths—ridiculous, I suppose, only to the judge whose "human foresight" is restricted to finite limits but not to the judge who can say: It happened; ergo, it must have been foreseeable. The line of demarcation will always be "uncertain and wavering," *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 354, 162 N.E. 99, 59 A.L.R. 1253

(1928), but if, concededly, a line exists, there must be areas on each side. The flood claimants are much too far on the non-liability side of the line. As to them, I would not award any recovery even if the taxpayers of Buffalo are better able to bear the loss.

## Questions and Notes

1. Although an *unforeseeable plaintiff* is unable to recover, a foreseeable plaintiff is not limited to those types of damage that were foreseeable; the plaintiff is entitled to a full recovery. The case often cited for this proposition is *Vosburg v. Putney*, 80 Wis. 523, 50 N.W. 403 (1891). There a 12-year-old schoolboy kicked a classmate in the shin; because of a prior injury the kick precipitated serious injury to the boy's leg. The defendant was required to pay for the entire cost of the injury, despite the fact that a reasonable person could not have foreseen the seriousness of the injury inflicted. This rule is sometimes referred to as the "thin-skulled plaintiff" or "eggshell plaintiff" doctrine: If I am liable for a slight injury to the plaintiff's skull, I am fully liable for whatever injury follows from the wrongful contact. This is essentially the same rule as the court observed in *Polemis*; but the rule changes dramatically when no injury at all is foreseeable with respect to the plaintiff. Is this a sensible distinction?

2. Note that in *Kinsman* the court contrasted the foreseeable consequences of a negligent act with those consequences that are "only fortuity." Does this suggest a connection between the concept of "increased risk" as discussed in *Berry* and the requirement that the injured victim be foreseeable?

3. As a related point, it is important to note that the plaintiff need not establish that the exact mechanism by which the injury occurred was foreseeable; even a rather bizarre chain of events will support liability if the general result is foreseeable from the defendant's conduct. For example, in *United Novelty Co. v. Daniels*, the plaintiff was injured when he was using gasoline to clean the defendant's machine. In the course of the cleaning process, a rat hidden in the machine decided he would move to new quarters, and

scurried away. Unfortunately for the rat (as well as the plaintiff), the rat's escape route took him through a furnace with an open flame, causing the rat's fur to catch fire. Out of the fire (into the frying pan, so to speak), the rat ran back to the machine, which then exploded from the gasoline fumes. Since the defendant had reason to anticipate the risk of explosion from supplying gasoline to clean his machine, the injury was foreseeable, even though the immediate precipitating event was not.

### **HARRIS v. R.A. MARTIN, INC.**

513 S.E.2d 170 (W. Va., 1998)

PER CURIAM:

This case is before this Court upon an appeal of a final order of the Circuit Court of Jackson County entered on July 31, 1997. The appellant, Kevin Harris, a summer employee for the City of Ripley, sustained injuries when a garbage dumpster fell on his leg. He instituted an action against the appellee, R.A. Martin, a construction company, alleging that it was negligent in placing heavy construction materials in the dumpster. Pursuant to the July 31, 1997 order, the circuit court entered summary judgment in favor of the appellee. In this appeal, the appellant contends that the circuit court erred by finding that the appellee owed him no legal duty of care.

This Court has before it the petition for appeal, all matters of record, and the briefs and argument of counsel. For the reasons discussed below, the final order of the circuit court is reversed, and this case is remanded.

#### **I. Facts**

In August 1994, the appellant was employed as a summer worker for the City of Ripley. While helping with the city garbage collection, the appellant was injured as he attempted to position a garbage dumpster for emptying. The dumpster which contained several large blocks of concrete on top of trash tilted forward and fell on the appellant's leg, pinning him between the dumpster and the pavement. As a result, the appellant suffered a broken ankle.

An investigation into the accident revealed that the blocks of concrete had been placed in the

dumpster by employees of the appellee, a contractor hired by the Jackson County Board of Education to repair tennis courts located in the Ripley City Park.<sup>1</sup> The dumpster at issue was located about ten yards from the swimming pool in the park and was intended for swimming pool use only. The evidence indicated that the appellee had not been given permission to place concrete or any kind of heavy construction materials in the City's dumpsters. In addition, an ordinance of the City of Ripley specifies that it is "unlawful for any unauthorized person to dispose of refuse, trash, garbage or any other materials in, at or near a commercial dumpster owned or serviced by the City."<sup>2</sup>

After the accident, the appellant sued the appellee alleging that it was negligent in placing the construction material in the dumpster. Subsequently, the appellee moved for summary judgment on the basis that it owed no duty to the appellant. On July 31, 1997, the circuit court granted summary judgment in favor of the appellee finding that "in the absence of extraordinary circumstances, a person who disposes of nonhazardous materials in a dumpster has no duty to dispose of those materials in such a way as to assure that a worker emptying the dumpster avoids injury and that no extraordinary circumstances were present in this case."

#### **II. Standard of Review**

On numerous occasions, we have indicated that "[a] circuit court's entry of summary judgment is reviewed de novo." Syllabus Point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). See also Syllabus Point 4, *Dieter Eng'g Servs., Inc. v. Parkland Dev., Inc.*, 199 W. Va. 48, 483 S.E.2d 48 (1996); Syllabus Point 1, *Smith v. Stacy*, 198 W. Va. 498, 482 S.E.2d 115 (1996).

---

<sup>1</sup> Ripley City Park is located on property leased to the City by the Jackson County Board of Education.

<sup>2</sup> The ordinance further states that an "unauthorized person" includes any person who is not the owner, agent or employee of the business, organization or institution for which the dumpster has been supplied and which is being billed for the servicing of the same and who is not acting with the express permission of any such owner, agent or employee."



Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is required when the record shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In Syllabus Point 3 of *Aetna Casualty & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963), this Court held: "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." See also Syllabus Point 3, *Evans v. Mutual Mining*, 199 W. Va. 526, 485 S.E.2d 695 (1997); Syllabus Point 1, *McClung Invs., Inc. v. Green Valley Community Pub. Serv. Dist.*, 199 W. Va. 490, 485 S.E.2d 434 (1997). We have also observed that:

Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syllabus Point 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995). See also Syllabus Point 2, *Cottrill v. Ranson*, 200 W. Va. 691, 490 S.E.2d 778 (1997); Syllabus Point 2, *McGraw v. St. Joseph's Hosp.*, 200 W. Va. 114, 488 S.E.2d 389 (1997).

In *Williams*, we clarified the function of the circuit court at the summary judgment stage. We explained that the circuit court is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." 194 W. Va. at 59, 459 S.E.2d at 336 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed.2d 202, 212 (1986)). Consequently, any permissible inference from the underlying facts must be drawn in the light most favorable to the party opposing the motion. *Painter*, 192 W. Va. at 192, 451 S.E.2d at 758. "Summary judgment should be denied `even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.' " *Williams*, 194 W. Va. at 59, 459 S.E.2d at 336 (quoting *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir.), cert. denied, 342 U.S. 887, 72 S.

Ct. 178, 96 L. Ed. 666 (1951)).

### III. Existence of Duty

The establishment of a prima facie case of negligence requires a showing that a defendant is guilty of some act or omission in violation of a duty owed to the plaintiff. See Syllabus Point 1, *Parsley v. General Motors Acceptance Corp.*, 167 W. Va. 866, 280 S.E.2d 703 (1981). In this case, the appellant contends that the circuit court erred by finding that the appellee owed him no duty of care. We agree.

In *Robertson v. LeMaster*, 171 W. Va. 607, 301 S.E.2d 563 (1983), we discussed the modern trend of expanding the concept of duty in tort cases. In Syllabus Point 1 of *Robertson*, we stated that "[t]he liability to make reparation for an injury, by negligence, is founded upon an original moral duty, enjoined upon every person, so to conduct himself, or exercise his own rights, as not to injur [sic] another." In this regard, we explained that "[i]t is well-established that one who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm." Syllabus Point 2, *Robertson*. We further explained that "[Duty]" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in light of the apparent risk." 171 W. Va. at 611, 301 S.E.2d at 567, quoting W. PROSSER, *THE LAW OF TORTS*, § 53 (4th ed. 1971). While the existence of a duty is defined in terms of foreseeability, it also involves policy considerations including "the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant." *Id.*

As we stated in Syllabus Point 3 of *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988):

The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the

general nature of that suffered was likely to result?

Pursuant to the Sewell standard, the inquiry must focus upon the extent to which the appellant could have reasonably foreseen that bodily injury could occur due to his actions. As Justice Cardozo succinctly noted, "[t]he risk reasonably to be perceived defines the duty to be obeyed." *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99, 100 (1928). In addressing such issues of foreseeability in *Johnson v. Mays*, 191 W. Va. 628, 447 S.E.2d 563 (1994), we explained that questions of the foreseeability that harm may result from placing gasoline in an unlabeled container at the request of ten-year old boys were questions of fact for the jury. *Id.* at 634, 447 S.E.2d at 569.

The appellee argues that it owed no duty to the appellant in connection with the toppling dumpster based on *Robinson v. Suitery, Ltd.*, 172 Ill. App.3d 359, 122 Ill. Dec. 307, 526 N.E.2d 566 (1988). In *Robinson*, the plaintiff cut her hand on a piece of glass as she attempted to dispose of trash in a commercial dumpster shared by tenants of a mini-mall. The plaintiff filed suit against another business located at the mall for negligent disposal of fluorescent light tubes. The court held that the user of a commercial dumpster did not owe a duty to the plaintiff because the glass tubes were disposed where they should have been, in the garbage dumpster.

The case sub judice differs from *Robertson* in two factual respects. First, there are genuine issues of fact with regard to whether the appellee had permission to use the dumpster in question. There are in fact allegations that the appellee may have violated an ordinance by using the dumpster. Secondly, the *Robinson* court sought to avoid imposing a duty on those permissibly using a dumpster to take extraordinary measures.

Furthermore, we decline to follow the Illinois court's reasoning in *Robinson* because it differs from *Robertson* in a significant legal respect. It appears that Illinois courts, in determining whether a duty was owed by a defendant, place little weight on whether the plaintiff's injury was foreseeable. While the *Robinson* court recognized that "foreseeability is only one element in the determination of duty," the court also indicated that "[f]oreseeability of harm does not enter into

the process' of critical inquiry into the true basis of duty." The court concluded that "[t]he courts generally focus on public policy considerations when it comes to ascertaining whether a duty exists in a given situation." 122 Ill. Dec. 307, 526 N.E.2d at 568 (citation omitted).

#### IV. Jury Question

In West Virginia, we have repeatedly held that the existence of a defendant's duty is generally a question of fact for jury determination. We stated as follows in Syllabus Point 5 of *Hatten v. Mason Realty Co.*, 148 W. Va. 380, 135 S.E.2d 236 (1964):

Questions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them.

In accord, Syllabus Point 6, *McAllister v. Weirton Hosp. Co.*, 173 W. Va. 75, 312 S.E.2d 738 (1983); Syllabus Point 1, *Ratlief v. Yokum*, 167 W. Va. 779, 280 S.E.2d 584 (1981); Syllabus Point 17, *Anderson v. Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (1990). We believe this rule is applicable in this case.

We have also explained that "[d]ue care is a relative term and depends on time, place, and other circumstances. It should be in proportion to the danger apparent and within reasonable anticipation." Syllabus Point 2, *Johnson v. United Fuel Gas Co.*, 112 W. Va. 578, 166 S.E. 118 (1932). In Syllabus Point 1 of *Dicken v. Liverpool Salt & Coal Co.*, 41 W. Va. 511, 23 S.E. 582 (1895), we explained that "[n]egligence is the violation of the duty of taking care under the given circumstances. It is not absolute, but is always relative to some circumstance of time, place, manner, or person." Thus, those aspects of relativity and irresolution compel jury determination.

We conclude that the circuit court improvidently granted summary judgment in favor of the appellee. The record indicates that the appellee placed heavy construction materials on the top of a full dumpster, near the front, making it top-heavy. The evidence suggests although the appellee was performing work for the City, it did

not have permission to use the dumpster which was obviously intended for use by persons at the swimming pool. The appellant was a City employee paid to assist in the emptying of dumpsters. Viewing the facts in the light most favorable to the appellant, we believe the appellee could have reasonably foreseen that an overloaded, top-heavy dumpster would pose a risk of harm to a city employee whose job involves emptying dumpsters. At a minimum, the record reveals genuine issues of material fact regarding the existence of a duty, precluding summary judgment.

Thus, we conclude that the trial court erred in ruling that the appellee owed no duty to the appellant. Accordingly, the final order of the Circuit Court of Jackson County is reversed, and this case is remanded for further proceedings.

Reversed and Remanded.

Justice McGRAW did not participate in the decision of this case.

MAYNARD, Justice, dissenting:

I dissent because I agree with the trial court's determination that the appellee owed the appellant no legal duty of care.

I am told that down in the Mother State of Virginia, at Charlottesville, beginning law students at the University of Virginia College of Law are introduced to the law of torts by being taught the "Four Ds" of a tort: Duty, Dereliction, Damage and Direct Cause.<sup>3</sup> The majority opinion errs by deviating from this revered formula.

The determination of whether a tort exists begins by answering the threshold question whether the alleged tortfeasor owes any duty of care. If the answer to this question is in the negative, the analysis is at an end, and it is determined that no tort has been committed. The majority correctly states that the existence of a

duty, although defined in terms of foreseeability, also involves policy considerations including "the likelihood of injury, the magnitude of the burden of guarding against it, and the consequence of placing that burden on the defendant." Quoting *Robertson v. LeMaster*, 171 W. Va. 607, 611, 301 S.E.2d 563, 567 (1983). However, the majority thereafter discards these other important considerations and decides this case entirely on the basis of foreseeability. While the majority criticizes the Illinois case of *Robinson*, stating that it places too little weight on foreseeability, the majority proceeds to make foreseeability the totality of its analysis of the existence of a duty. Courts have traditionally recognized that,

A line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit. It is always tempting to impose new duties and, concomitantly, liabilities, regardless of the economic and social burden. Thus, the courts have generally recognized that public policy and social considerations, as well as foreseeability, are important factors in determining whether a duty will be held to exist in a particular situation.

57A AM.JUR.2d *Negligence* § 87, p. 143 (1989) (footnotes omitted). The majority, however, ignores public policy and social considerations. In so doing, it unquestioningly embraces "the modern trend of expanding the concept of duty in tort cases." In fact, the majority so expands the element of duty, that its existence now becomes almost a given in any tort case. If a party is injured by the conduct of another, there must have been a duty to avoid such conduct.

The majority's incomplete analysis of the existence of a duty does damage to our law of torts and raises some serious questions. Obviously, we live in a society that produces vast amounts of trash, and the daily necessity of discarding trash is common to all from private homeowners and small businesses to the largest companies. People and businesses routinely toss things like broken glass, splintered wood, nails, sharp metal, pressurized hairspray cans, etc., into dumpsters. This is the purpose of dumpsters. In the aftermath of this decision, is everyone who places trash in a

---

<sup>3</sup> This information is courtesy of Howard M. Persinger, Jr., attorney at law and graduate of the University of Virginia College of Law. I acquired this knowledge from Howard at the expense of suffering Howard's slight air exhibited by those who curiously feel they have the benefit of a superior legal education, a trait not uncommon among graduates of that venerable institution.

dumpster liable if someone is injured by their trash? If the element of foreseeability is the sole consideration in determining the existence of a duty, the troubling answer to this question is yes. This unreasonably burdens the average homeowner who must now carefully categorize, separate, sort, and dispose of his or her trash in a way that forecloses any possibility that someone could be injured by it.

Also, the majority opinion, by making contradictory statements, confuses the law concerning who decides whether a duty exists. The majority states, "[i]n West Virginia, we have repeatedly held that the existence of a defendant's duty is generally a question of fact for jury determination." Conversely, this Court has also repeatedly stated, however, that "[t]he determination of whether the plaintiff is owed a duty of care by the defendant must be rendered as a matter of law by the court." *Jack v. Fritts*, 193 W. Va. 494, 498, 457 S.E.2d 431, 435 (1995), citing *Parsley v. General Motors Acceptance Corp.*, 167 W. Va. 866, 870, 280 S.E.2d 703, 706 (1981). See also *Miller v. Whitworth*, 193 W. Va. 262, 265, 455 S.E.2d 821, 824 (1995) ("We are mindful that the determination of whether there is a duty is a question of law and not a question of fact for the jury." (Citation omitted)); and *Yourtee v. Hubbard*, 196 W. Va. 683, 474 S.E.2d 613 (1996). Also, legal commentators agree that "the determination of any question of duty ... has been held to be an issue of law for the court rather than for the jury, to be determined by reference to the body of statutes, rules, principles and precedents which make up the law." 57A

Am.Jur.2d Negligence § 86, p. 142 (1989) (footnotes omitted). Well now, which is it? Is the existence of a duty a question of law for the court or a question of fact for the jury? The majority's holding leaves circuit courts and lawyers asking whose responsibility it is to determine the existence of a duty in a tort case. I am now puzzled and ask the same question.

Finally, if there is a culprit in this case who should be liable for the appellant's injury, it is the manufacturer of the dumpster. Dumpsters are made to hold all manner of heavy materials. The dumpster at issue should not have tipped over simply because construction materials were placed in it. The fact that it did so may indicate a design defect.

In conclusion, I agree with the circuit court's finding that "in the absence of extraordinary circumstances, a person who disposes of nonhazardous materials in a dumpster has no duty to dispose of those materials in such a way as to assure that a worker emptying the dumpster avoids injury and that no extraordinary circumstances were present in this case." Therefore, I would affirm the circuit court's order granting summary judgment to the appellee. In reversing that order, the majority unreasonably expands the concept of duty in tort law and adds ambiguity to the law of who determines the existence of duty in the first instance. Accordingly, I respectfully dissent.

I am authorized to state that Justice McCUSKEY joins in this dissent.