The facts, as the judge found them, were as follows. On June 20, 1943, the Conners Company chartered the barge, *Anna C* to the Pennsylvania Railroad Company at a stated hire per diem, by a charter of the kind usual in the Harbor, which included the services of a bargee, apparently limited to the hours 8 A.M. to 4 P.M. On January 2, 1944, the barge, which had lifted the cargo of flour, was made fast off the end of Pier 58 on the Manhattan side of the North River, whence she was later shifted to Pier 52. At some time not disclosed, five other barges were moored outside her, extending into the river; her lines to the pier were not then strengthened. At the end of the next pier north (called the Public Pier), lay four barges; and a line had been made fast from the outermost of these to the fourth barge of the tier hanging to Pier 52. The purpose of this line is not entirely apparent, and in any event it obstructed entrance into the slip between the two piers of barges. The Grace Line, which had chartered the tug, *Carroll,* sent her down to the locus in quo to 'drill' out one of the barges which lay at the end of the Public Pier; and in order to do so it was necessary to throw off the line between the two tiers. On board the *Carroll* at the time were not only her master, but a 'harbormaster' employed by the Grace Line. Before throwing off the line between the two tiers, the *Carroll* nosed up against the outer barge of the tier lying off Pier 52, ran a line from her own stem to the middle bit of that barge, and kept working her engines 'slow ahead' against the ebb tide which was making at that time. The captain of the *Carroll* put a deckhand and the 'harbormaster' on the barges, told them to throw off the line which barred the entrance to the slip; but, before doing so, to make sure that the tier on Pier 52 was safely moored, as there was a strong northerly wind blowing down the river. The 'harbormaster' and the deckhand went aboard the barges and readjusted all the fasts to their satisfaction, including those from the *Anna C* to the pier.

After doing so, they threw off the line between the two tiers and again boarded the *Carroll,* which backed away from the outside barge, preparatory to 'drilling' out the barge she was after in the tier off the Public Pier. She had only got about seventy-five feet away when the tier off Pier 52 broke adrift because the fasts

from the *Anna C,* either rendered, or carried away. The tide and wind carried down the six barges, still holding together, until the *Anna C* fetched up against a tanker, lying on the north side of the pier below- Pier 51- whose propeller broke a hole in her at or near her bottom. Shortly thereafter: i.e., at about 2:15 P.M., she careened, dumped her cargo of flour and sank. The tug, *Grace,* owned by the Grace Line, and the *Carroll,* came to the help of the flotilla after it broke loose; and, as both had syphon pumps on board, they could have kept the *Anna C* afloat, had they learned of her condition; but the bargee had left her on the evening before, and nobody was on board to observe that she was leaking. The Grace Line wishes to exonerate itself from all liability because the 'harbormaster' was not authorized to pass on the sufficiency of the fasts of the *Anna C* which held the tier to Pier 52; the Carroll Company wishes to charge the Grace Line with the entire liability because the 'harbormaster' was given an over-all authority. Both wish to charge the *Anna C* with a share of all her damages, or at least with so much as resulted from her sinking. The Pennsylvania Railroad Company also wishes to hold the barge liable. The Conners Company wishes the decrees to be affirmed.

The first question is whether the Grace Line should be held liable at all for any part of the damages. The answer depends first upon how far the 'harbormaster's' authority went, for concededly he was an employee of some sort. Although the judge made no other finding of fact than that he was an 'employee,' in his second conclusion of law he held that the Grace Line was 'responsible for his negligence.' Since the facts on which he based this liability do not appear, we cannot give that weight to the conclusion which we should to a finding of fact; but it so happens that on cross-examination the 'harbormaster' showed that he was authorized to pass on the sufficiency of the facts of the *Anna C.* He said that it was part of his job to tie up barges; that when he came 'to tie up a barge' he had 'to go in and look at the barges that are inside the barge' he was 'handling'; that in such cases 'most of the time' he went in 'to see that the lines to the inside barges are strong enough to hold these barges'; and that 'if they are not' he 'put out sufficient

other lines as are necessary.' That does not, however, determine the other question: i.e., whether, when the master of the *Carroll* told him and the deckhand to go aboard the tier and look at the fasts, preparatory to casting off the line between the tiers, the tug master meant the 'harbormaster' to exercise a joint authority with the deckhand. As to this the judge in his tenth finding said: 'The captain of the Carroll then put the deckhand of the tug and the harbor master aboard the boats at the end of Pier 52 to throw off the line between the two tiers of boats after first ascertaining if it would be safe to do so.' Whatever doubts the testimony of the 'harbormaster' might raise, this finding settles it for us that the master of the *Carroll* deputed the deckhand and the 'harbormaster,' jointly to pass upon the sufficiency of the *Anna C*'s fasts to the pier. The case is stronger against the Grace Line than *Rice v. The Marion A.C. Meseck*, was against the tug there held liable, because the tug had only acted under the express orders of the 'harbormaster.' Here, although the relations were reversed, that makes no difference in principle; and the 'harbormaster' was not instructed what he should do about the fast, but was allowed to use his own judgment. The fact that the deckhand shared in this decision, did not exonerate him, and there is no reason why both should not be held equally liable, as the judge held them.

We cannot, however, excuse the Conners Company for the bargee's failure to care for the barge, and we think that this prevents full recovery. First as to the facts. As we have said, the deckhand and the 'harbormaster' jointly undertook to pass upon the *Anna C*'s fasts to the pier; and even though we assume that the bargee was responsible for his fasts after the other barges were added outside, there is not the slightest ground for saying that the deckhand and the 'harbormaster' would have paid any attention to any protest which he might have made, had he been there. We do not therefore attribute it as in any degree a fault of the *Anna C* that the flotilla broke adrift. Hence she may recover in full against the Carroll Company and the Grace Line for any injury she suffered from the contact with the tanker's propeller, which we shall speak of as the 'collision damages.' On the other hand, if the bargee had been on board, and had done his duty to

his employer, he would have gone below at once, examined the injury, and called for help from the *Carroll* and the Grace Line tug. Moreover, it is clear that these tugs could have kept the barge afloat, until they had safely beached her, and saved her cargo. This would have avoided what we shall call the 'sinking damages.' Thus, if it was a failure in the Conner Company's proper care of its own barge, for the bargee to be absent, the company can recover only one third of the 'sinking' damages from the Carroll Company and one third from the Grace Line. For this reason the question arises whether a barge owner is slack in the care of his barge if the bargee is absent.

As to the consequences of a bargee's absence from his barge there have been a number of decisions; and we cannot agree that it never ground for liability even to other vessels who may be injured.~ It appears~ there is no general rule to determine when the absence of a bargee or other attendant will make the owner of the barge liable for injuries to other vessels if she breaks away from her moorings. However, in any cases where he would be so liable for injuries to others obviously he must reduce his damages proportionately, if the injury is to his own barge. It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability. Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL. Applied to the situation at bar, the likelihood that a barge will break from her fasts and the damage she will do, vary with the place and time; for example, if a storm threatens, the danger is greater; so it is, if she is in a crowded harbor where moored barges are constantly being shifted about. On the other hand, the barge must not be the bargee's prison, even though he lives aboard; he

must go ashore at times. We need not say whether, even in such crowded waters as New York Harbor a bargee must be aboard at night at all; it may be that the custom is otherwise, as Ward, J., supposed in *The Kathryn B. Guinan*; and that, if so, the situation is one where custom should control. We leave that question open; but we hold that it is not in all cases a sufficient answer to a bargee's absence without excuse, during working hours, that he has properly made fast his barge to a pier, when he leaves her. In the case at bar the bargee left at five o'clock in the afternoon of January 3rd, and the flotilla broke away at about two o'clock in the afternoon of the following day, twenty-one hours afterwards. The bargee had been away all the time, and we hold that his fabricated story was affirmative evidence that he had no excuse for his absence. At the locus in quo – especially during the short January days and in the full tide of war activity – barges were being constantly 'drilled' in and out. Certainly it was not beyond reasonable expectation that, with the inevitable haste and bustle, the work might not be done with adequate care. In such circumstances we hold – and it is all that we do hold – that it was a fair requirement that the Conners Company should have a bargee aboard (unless he had some excuse for his absence), during the working hours of daylight.~

Decrees reversed and cause remanded for further proceedings in accordance with the foregoing.

The BPL Formula's Place in Torts

Based on the *Carroll Towing* opinion, it does not appear that Judge Hand intended to wholly redefine negligence using algebra. Instead, it looks like he meant to use algebra as a way of illustrating the negligence concept of what is reasonable. Yet however modestly Judge Hand might have intended it, his algebraic way of thinking about breach of the duty of care has been embraced by law-and-economics scholars as holding the key to describing liability in a way that promotes economic efficiency.

The key figure in the promotion of the Hand Formula was Professor Richard A. Posner of the University of Chicago. In a 1972 article, Professor Posner – now a judge on the Seventh Circuit – saluted

Carroll Towing as providing the path to understanding negligence in terms of a cost-benefit analysis. Posner rejected the view that negligence is about compensation or morals. Instead, he argued that it is about economics.

> "It is time to take a fresh look at the social function of liability for negligent acts. The essential clue, I believe, is provided by Judge Learned Hand's famous formulation of the negligence standard – one of the few attempts to give content to the deceptively simple concept of ordinary care. [I]t never purported to be original but was an attempt to make explicit the standard that the courts had long applied. … Hand was adumbrating, perhaps unwittingly, an economic meaning of negligence. Discounting (multiplying) the cost of an accident if it occurs by the probability of occurrence yields a measure of the economic benefit to be anticipated rom incurring the costs necessary to prevent the accident."

Richard A. Posner, *A Theory of Negligence,* 1 J. LEGAL STUD. 29, 32 (1972). The idea of reconceptualizing negligence in economic terms, so that it will serve economic goals, has been highly influential in scholarly circles. The impact in the courts has been considerably smaller. While there are sporadic examples of courts expressly engaging in the negligence calculus – including opinions authored by Judge Posner – the formula has not been widely embraced by the bench. Insofar as the idea has had influence, it has been followed by controversy.

How the BPL Formula Works

In *U.S. v. Carroll Towing*, the BPL formula assigns variables as follows: **B is the burden, P is the probability that something will go wrong, and L is the total loss that would result**.

When multiplied together, **P and L represent the total amount of risk**. It follows from this that just because the L is big, it is not necessarily the case that the total level of risk is big. A relatively large harm, when coupled with a miniscule probability, might represent a

relatively small risk overall. The variable P can be thought of as "discounting" L.

What you might call the "negligence condition" exists when the following inequality is true:

B < PL

If we incorporate that formula into an algorithm, we would have this:

Regarding a certain precaution:
If B < PL,
and if the certain precaution is not taken,
then the duty of care is breached.

If the PL is greater than B, there is a breach of the duty of care. If the B is greater than the PL, then there is there is no breach. What happens if B = PL? This essentially reflects a tie between the plaintiff and defendant on the breach-of-duty question. Since the fundaments of civil procedure mandate that the plaintiff has the burden of proof, such a tie would, in essence, go to the defendant, since it is a failure to prove breach. Thus, B = PL means there is no breach of the duty of care.

Some important things to keep in mind:

The L in the formula reflects the total amount of loss suffered – not the loss suffered by the defendant. This is where BPL analysis can be distinguished from what most people think of as "cost-benefit analysis." When a business manager weighs the costs and the benefits of undertaking some initiative, the manager is looking at the costs and the benefits to the firm. That is not how the BPL formula is meant to work. The BPL formula is meant to take into account the entire loss suffered anywhere.

The P in the formula is a number ranging from 0 to 1. If there is no chance that the harm could come to pass, then P is 0. If it is certain that the harm would come to fruition absent the precaution, then P is 1. If there is a 50% probability – alternately stated as odds of 1 to 1, or a chance of 1 in 2 – then the P is 0.5.

Example: Dangling Danger – Suppose a company will be using a crane to move a large generator assembly to the top of a tall building. If the crane or cabling fails, then the equipment package will fall, crushing a single-story restaurant below. The move will be done when the restaurant is closed and vacated, so there will be no danger to people. If the restaurant were to be destroyed, it would represent a loss to its proprietors of $600,000. The kind of crane involved, making this kind of maneuver, has a failure rate of 1 in 10,000. Using a second crane to lift the load at the same time would eliminate this risk, but it would cost an additional $12,000 to hire. If no second crane is used, and the load falls, destroying the restaurant, then according to BPL analysis, was there a breach of the duty of care? In this case, L = $600,000 and B = $12,000. To get P, we divide 1 by 10,000, so P = 0.0001. P multiplied by L is $60. Since the B of $12,000 is not less than the PL of $60, it is not a breach of the duty of care to forgo the precaution.

In order to make the analysis work, you need to do it on a precaution-by-precaution basis. In the example just given, there are probably many things that the construction company could do to avoid danger to the restaurant. It could disassemble the package and move it in smaller bundles. It could redesign the new building so that it didn't require a generator assembly on top. It could build a temporary protective shell around the restaurant to protect it in the case of a crane failure. There is no need to put all these into the BPL formula at once, because they all represent different decisions. BPL analysis works on one decision at a time – providing an answer as to whether it is a breach of the duty of care to do or omit to do *a certain something*.

Also, to make the analysis work, the B and the L must be expressed in the same units. For instance, if B and L are both expressed in present-value dollars, the proper comparison can be made. If the B were in dollars and the L in euros, you would have to convert one into the other. The time value of money can be a complicating factor as well. If the B is expressed in present dollars – which would make

sense, since money would have to be spent on the precaution now – the L must be expressed in present dollars as well. This may require some translation, because if the harm would be suffered 10 years from now, then whatever the loss would represent in dollars at that time must be translated into a figure stated in present dollars. This can be accomplished by "discounting" the future funds to present value. If the harm would not necessarily take place at a certain time in the future, but may take place at any time over the next 25 years, say, perhaps with the magnitude of the loss varying over time, then the calculation becomes very complex – something probably better suited for an accountant rather than a lawyer. The point is that BPL analysis is about comparing numerical values, and that necessarily means they must be expressed in equivalent units.

If compensation for different currencies and the time value of money is a difficult problem, an even bigger challenge lurks where the loss is not originally stated in terms of money at all, but is stated in terms of lives potentially cut short. If the burden is expressed in terms of dollars, but the danger is one of loss of life, then to do the analysis you must put a dollar-value on human life. Distasteful as it may seem, if you are going to use BPL analysis in a situation where human life is on the line, there is no way around this need to monetize death.

As it turns out, the torts system is quite accustomed to putting a dollar value on human life in the case of wrongful death claims. This thorny damages question – how much money will fairly compensate a plaintiff for the loss of a loved one – is a subject for a later chapter.

Putting a dollar value on human life is also a regular part of the job for government regulators trying to decide questions such as how much money should be spent on motor vehicle safety measures or environmental remediation. The U.S. Department of Transportation has used a value of $6 million per human life to justify new vehicle standards, such as more crush-resistant roofs on cars. In 2008, the U.S. Environmental Protection Agency valued a single human at $7.22 million in making decisions about limits on air pollution. In 2010, the EPA used a value of $9.1 million per life in proposing new, tighter standards. Another way of valuing human life is by the year. A common figure used by insurers to decide whether life-saving

medical treatment should be provided is $50,000 per year of "quality" life. Another estimate came up with $129,000 per quality year per person. (*See* Binyamin Appelbaum, "As U.S. Agencies Put More Value on a Life, Businesses Fret," N.Y. TIMES, Feb. 16, 2011; Kathleen Kingsbury, "The Value of a Human Life: $129,000," TIME, Tuesday, May 20, 2008.)

Check-Your-Understanding Questions About the Hand Formula

A. Aaron does a Hand Formula calculation, specifying values as follows: B = $77,000, P = 25, L = $1 million. On this basis he calculates that the defendant is negligent for not undertaking the precaution. What has Aaron done wrong?

B. Brinda does a Hand Formula calculation, specifying values as follows: B = 44 work hours, P = 0.003, L = $10,000. On this basis she calculates that the defendant is not negligent for neglecting the precaution. What has Brinda done wrong?

Some Simple Problems Using the Hand Formula

C. A company built a temporary scaffolding structure near a parade route for a television network. The purpose was to support several remotely controlled television cameras to provide national coverage of a New Year's Day parade. On the day of the parade, a large float goes out of control and strikes the structure. The cameras plummet and are completely destroyed. At trial, the plaintiff television network produces evidence that the cameras together were worth $65,000. The evidence shows that the defendant company could have built the scaffolding structure with reinforcements such that it would not have collapsed following such a collision, but this would have cost an additional $2,000 to accomplish. Expert testimony at trial explains that based on past accidents, there was a 1-in-10,000 chance that a float would have veered off course at this particular place during the parade. Using BPL analysis, did the defendant company breach its duty of care?

D. A natural-gas pipeline operated by the defendant leaks and causes an explosion. The explosion destroys the plaintiff's aviation fuel

depot. The plaintiff's fuel depot is the only structure along this section of pipeline. The lost depot and the inventory of fuel it contains totals $12 million. The defendant company that operates the pipeline could have avoided the accident by installing an automatic cut-off mechanism on the section of pipeline near the plaintiff's warehouse. The installation of the mechanism would have cost $8 per year, amortized over the life of the pipeline. Experts estimated the chance of a pipeline explosion along this section of pipe in any given year to be 1 in 140,000. Using BPL analysis, did the defendant pipeline company breach its duty of care?

Some Not-So-Simple Problems Using the Hand Formula

E. A different natural gas pipeline leaks and causes an explosion, destroying the plaintiff's car, a new minivan valued at $35,000. The theory of negligence urged at trial is that the defendant pipeline operator should have installed a centrally controlled multi-modal pressure-monitoring/chemical-sniffer system, which, if installed, would have prevented this type of accident not only from happening at the location where plaintiff's car was parked, but anywhere along the pipeline. Installation of the system would have cost an amortized $15 million per year of the pipelines' operational life. The pipeline is 500 miles long runs through many densely populated urban areas, including business/financial centers, hospitals, and government facilities. In that sense, it appears lucky that this mishap happened in an isolated area where it only destroyed an unoccupied minivan. At trial, an expert estimated that an average explosion along the length of the pipeline, taking into account the destructive radius and the concentration of people and property along the route, would represent a loss of 20 lives plus $300 million in property damage. The probability of such an explosion, the expert estimated, was 1-in-200 in any given year over the operating lifetime of the pipeline. The probability that the defendant's minivan, in particular, would be destroyed, the expert estimated at 1 in 10,000,000. Can BPL analysis be used to determine whether the defendant company breached its duty of care? Is so, what result?

F. A new particle accelerator has been built to collide atomic nuclei together at enormous energies to probe the leading edge of fundamental physics. Physicists are very excited about the data the experiment will produce, and it is possible that it could reveal new truths about our universe. The project is not, however, expected to produce anything of practical value. Because the machine is built to explore new realms of physics, there are some unknowns about what the machine could produce. One hypothesized danger is that the collider could produce strangelets – microscopic particles of "strange matter" – that could start a chain reaction converting all normal matter on Earth into strange matter, which would reduce the Earth to a hyperdense ball, about 100 meters wide, destroying all life in the process. No one has calculated a probability of such a disaster, but one team of physicists calculated the ceiling on the probability of a strangelet disaster as no more than 1-in-50,000. The collider represents a total cost of about $1.1 billion. Astronomers believe that the Sun will eventually expand as it dies, scorching Earth and killing everything on it. Assume the planet has another 7 billion years before it is engulfed by the Sun. The current world population is about 7 billion. Can BPL analysis be used to determine whether operating the collider represents a breach of the duty of due care? If so, what result?

Res Ipsa Loquitor

The doctrine of res ipsa loquitor provides a special way for a plaintiff to prevail on the element of breach of the duty of due care. To understand how res ipsa loquitor works and why it is advantageous to some plaintiffs, it's first necessary to understand some context.

The Usual Necessity of Specific Evidence of Breach

Ordinarily, a negligence plaintiff must have "a specific theory of negligence" to take to the jury. That is to say, the plaintiff must prove a breach of the duty of care with specific evidence as to what happened, allowing the jury to conclude that the particular conduct was in breach of the duty of care.

For instance, if the evidence shows that plaintiff fell in the defendant's store and was injured as a result, no prima facie case for

negligence has been made out. Why not? There is nothing in evidence that can provide a fair inference that any breach of the duty of care occurred. Perhaps the plaintiff fell because he slipped on something just dropped by a fellow customer. Perhaps the plaintiff fell because he was tripped by another customer. Perhaps the plaintiff tripped over his own feet. If, however, the plaintiff presents testimony from a store clerk that where the plaintiff fell there was a pool of water on the floor owing to an unrepaired roof leak, then there is specific evidence of conduct constituting a breach of the duty of due care.

The Place for Res Ipsa Loquitor

While specific evidence of a breach of the duty of care is the norm in negligence law and is generally required, sometimes there is a lack of evidence as to how an accident happened. Yet, because of the circumstances, it may be obvious that there was negligence. In such a case, the doctrine of ***res ipsa loquitor*** allows a plaintiff to prevail in spite of a lack of specific evidence showing a breach of the duty of care.

Suppose a pedestrian walks along the sidewalk next to a multistory building where a flour warehouse occupies an upper floor. A barrel of flour suddenly drops on top of the plaintiff. There is no specific evidence of how the barrel fell. Was there negligence? You might say that a falling barrel of flour pretty much speaks for itself. And that is exactly what the court said in the leading case of *Byrne v. Boadle:* "The thing speaks for itself." Only Chief Baron Pollock said it in Latin: "Res ipsa loquitor."

With the doctrine of res ipsa loquitor, the law is essentially saying that even when we don't know exactly what happened, it is nonetheless obvious that, whatever it was, it was likely negligent.

Case: Byrne v. Boadle

This case, from mid-19th-Century Liverpool, is the progenitor of res ipsa loquitor doctrine.

Byrne v. Boadle

Court of Exchequer
November 25, 1863

159 E.R. 299. England. 2 Hurlstone and Coltman 722. Opinion by POLLOCK, C.B. BRAMWELL, B.; CHANNELL, B.; and PIGOTT, B. concurred, with CHANNELL writing separately.

The FACTS as set forth by the REPORTER:

The plaintiff was walking in a public street past the defendant's shop when a barrel of flour fell upon him from a window above the shop, and seriously injured him. Held sufficient primâ facie evidence of negligence for the jury, to cast on the defendant the onus of proving that the accident was not caused by his negligence.~

Declaration:

> For that the defendant, by his servants, so negligently and unskilfully managed and lowered certain barrels of flour by means of a certain jigger-hoist and machinery attached to the shop of the defendant, situated in a certain highway, along which the plaintiff was then passing, that by and through the negligence of the defendant, by his said servants, one of the said barrels of flour fell upon and struck against the plaintiff, whereby the plaintiff was thrown down, wounded, lamed, and permanently injured, and was prevented from attending to his business for a long time, to wit, thence hitherto, and incurred great expense for medical attendance, and suffered great pain and anguish, and was otherwise damnified.~

At the trial before the learned Assessor of the Court of Passage at Liverpool, the evidence adduced on the part of the plaintiff was as follows: A witness named Critchley said: "On the 18th July, I was in Scotland Road, on the right side going north, defendant's shop is on that side. When I was opposite to his shop, a barrel of flour fell from a window above in defendant's house and shop, and knocked the plaintiff down. He was carried

into an adjoining shop. A horse and cart came opposite the defendant's door. Barrels of flour were in the cart. I do not think the barrel was being lowered by a rope. I cannot say: I did not see the barrel until it struck the plaintiff. It was not swinging when it struck the plaintiff. It struck him on the shoulder and knocked him towards the shop. No one called out until after the accident." The plaintiff said: "On approaching Scotland Place and defendant's shop, I lost all recollection. I felt no blow. I saw nothing to warn me of danger. I was taken home in a cab. I was helpless for a fortnight." (He then described his sufferings.) "I saw the path clear. I did not see any cart opposite defendant's shop." Another witness said: "I saw a barrel falling. I don't know how, but from defendant's." The only other witness was a surgeon, who described the injury which the plaintiff had received. It was admitted that the defendant was a dealer in flour.

It was submitted, on the part of the defendant, that there was no evidence of negligence for the jury. The learned Assessor was of that opinion, and nonsuited the plaintiff, reserving leave to him to move the Court of Exchequer to enter the verdict for him with damages, the amount assessed by the jury.~

CHIEF BARON CHARLES EDWARD POLLOCK:

There are certain cases of which it may be said res ipsa loquitur, and this seems one of them. ~I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford primâ facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident

> alone would be primâ facie evidence of negligence. Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are primâ facie responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them. The present case upon the evidence comes to this, a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible for the acts of his servants who had the controul of it; and in my opinion the fact of its falling is primâ facie evidence of negligence, and the plaintiff who was injured by it is not bound to shew that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.

The Requirements for Res Ipsa Loquitor

The two requirements for res ipsa loquitor are that the antecedent to the accident was (1) **likely negligence** (that is, likely a breach of the duty of care), and (2) **likely the conduct of the defendant**.

These requirements are dictated by logic: If it is not likely negligence or if it is not likely the defendant who caused the accident, then it cannot be said that the defendant likely breached the duty of care.

Note that some courts are stricter. Instead of requiring the plaintiff merely to show that it was likely the defendant's conduct at issue, some courts require proof that that the instrumentality of harm was in the defendant's "exclusive control." Such a view is not the prevailing modern one.

The Effect of Res Ipsa Loquitor

If the plaintiff successfully convinces the court that res ipsa loquitor should be allowed in the case, then this usually means one of two things, depending on the jurisdiction. In some jurisdictions, the effect of res ipsa loquitor is that the jury is permitted – but not required – to draw an inference that the defendant breached the duty of care. Other jurisdictions hold that the effect of res ipsa loquitor is to establish the breach element of the negligence case in the plaintiff's

favor, switching the burden to the defendant, who can then rebut the presumption of breach with specific evidence.

This burden-shifting function of res ipsa loquitor is potentially important where specific facts are difficult for the plaintiff to discover. Such was likely the case with *Byrne v. Boadle*. In modern American litigation, however, civil procedure rules allow very wide-ranging discovery. So with the kind of depositions and document requests that are allowed today, it might be quite easy to discover exactly what happened. When such discovery does not work to shed light on the matter, however – perhaps because of uncooperative or unavailable witnesses – then the burden-shifting function of res ipsa loquitor remains important as a way of making it the defendant's problem to find out what was going on at the defendant's place of business or arena of operation that caused the emergence of the means that did the plaintiff harm.

Recurrent Situations for Res Ipsa Loquitor

Certain situations come up again and again as candidates for res ipsa loquitor.

One such recurrent situation involves gravity-driven injuries – like the falling barrel of Byrne. There probably are no more upper-floor barrel warehouses in crowded pedestrian areas these days, but there are still many accidents where gravity is the moving force. A falling light fixture in a sports arena, for instance, is a good candidate for res ipsa loquitor: Lights don't usually fall absent negligence (so the first prong of "likely negligence" is met), and it is probable that the operator of the sports arena was the negligent party ("likely the conduct of the defendant").

Airplane crashes have been a frequent source for the invocation of res ipsa loquitor. For example, in *Widmyer v. Southeast Skyways, Inc.,* 584 P.2d 1 (Alaska 1978), the Supreme Court of Alaska held that "air crashes do not normally occur absent negligence, even in inclement weather." The court based its reasoning on the strong general track record of safety in aviation in the late 1970s. And of course, since then, aviation has only gotten safer.

Packaged food is another wellspring of res ipsa loquitor cases. In particular, an almost unbelievable number of mid-20th-century cases involve glass bottles of Coca-Cola soft drinks. In *Payne v. Rome Coca-Cola Bottling Co.,* 10 Ga.App. 762, (Ga.App. 1912), the court allowed res ipsa loquitor to be used by a customer whose sight was destroyed when an exploding bottle propelled glass fragments through his eye. The *Payne* court summed up res ipsa loquitor about as well as anyone before or since when it said:

> "Bottles filled with a harmless and refreshing beverage do not ordinarily explode. When they do, an inference of negligence somewhere and in somebody may arise."

A sampling of other cases: *Zentz v. Coca Cola Bottling Co. of Fresno,* 39 Cal.2d 436 (Cal. 1952) (restaurant worker severely cut by exploding bottle allowed to use res ipsa loquitor); *Groves v. Florida Coca-Cola Bottling Co,* 40 So.2d 128 (Fla. 1949) (waitress injured by exploding bottle allowed to use res ipsa loquitor); *Honea v. Coca Cola Bottling Co.,* 143 Tex. 272 (Tex. 1944) (15-year-old boy who suffered a severe wrist injury from exploding bottle when moving a case of Coca-Cola allowed to argue res ipsa loquitor); *Escola v. Coca Cola Bottling Co. of Fresno,* 24 Cal.2d 453 (Cal. 1944) (waitress injured by exploding bottle allowed to use res ipsa loquitor); *Starke Coca-Cola Bottling Co. v. Carrington,* 159 Fla. 718 (Fla. 1947) (vending machine customer injured by exploding bottle allowed to use res ipsa loquitor).

Another recurrent arena for res ipsa loquitor involves nursery schools and nursing homes – facilities where the very young or very old are cared for. What very young children and the infirmed elderly can have in common is an inability to speak for themselves, leaving them unable to explain how they were injured. When such persons are hurt without any witnesses other than the defendants, the situation is ripe for a cover up: If the defendants lie and destroy evidence, it may well be impossible to make a specific showing of negligent conduct.

Case: Fowler v. Seaton

While most cases in this book take the form of judicial opinions, the reading for this case is the opening statement delivered to the jury by

the plaintiff's attorney. The case illustrates the potential for res ipsa loquitor in a child-care setting.

Fowler v. Seaton

Superior Court of Los Angeles
c. 1963

JENNY GENE FOWLER, a Minor, etc., Plaintiff, v. ANNABELLE SEATON, Defendant. L.A. No. 27865. Reproduced in 61 Cal.2d 684-686.

OPENING STATEMENT for the PLAINTIFF by attorney WILLIAM P. CAMUSI:

Plaintiff in this case of Fowler versus Seaton expects to prove the following facts: Minor plaintiff, Jenny Gene Fowler began attending the Happy Day Nursery School in September 1958. The Happy Day Nursery was a pre school nursery where children would be left for the day by their parents. Their nursery consisted of a house and a little children's playground with such playthings as a swing and slide and similar paraphernalia. The Happy Day Nursery is located in the City of Van Nuys~. The Happy Day Nursery was owned and operated at all times herein relevant by the defendant, Annabelle Seaton.

The nursery school made a weekly monetary charge to the parents of such pre school age children who attended there. The school is, of course, a private school and the defendant was at all times licensed to operate such a school.

On January 21, 1959 the minor plaintiff, Jenny Gene Fowler was taken to the said Happy Day Nursery School by her mother and left in charge of and custody of the defendant at about 9:00 a.m. of that day. At that time Jenny Gene Fowler was three years and ten months of age. When her mother left her in the custody of the defendant on that morning of January 21, 1959, Jenny Gene Fowler was in good health and sound of limb and body and she was well and had no marks on her body.

Jenny Gene Fowler's mother picked her up at the nursery school at approximately 6:00 p.m. of said day. At that time the

defendant told plaintiff's mother that Jenny Fowler had had an accident in that the child had wet her pants.

However, we will offer proof that the child had stopped wetting her pants approximately a year prior to this day of January 21, 1959.

On the way home that evening and for the remainder of the evening the child appeared downcast or depressed and stayed close to her mother at all times. At the dinner table at approximately 7:00 p.m. Jenny Gene Fowler's father noticed that the child's eyes were crossed. The child's hair was arranged in bangs over her forehead and her forehead was not usually visible. At that time the mother approached the child to look into the child's eyes. The mother pushed the child's hair away from the forehead, for the first time noticed a sizable round protruding bump on the child's forehead.

Jenny Gene Fowler had been in the mother's immediate presence ever since the mother had picked her up at the school, the nursery school, and the child had not received any injury or had not been in any accident whatsoever from the time she was picked up at the nursery school until her parents observed the cross eyes and bump on the child's forehead at the dinner table.

The mother immediately called the defendant at the nursery school and asked what had happened to plaintiff at the school that day. Defendant replied that another child had struck the plaintiff.

Attorney for the minor plaintiff took the deposition of the defendant Annabelle Seaton and Miss Seaton testified in effect as follows:

Near the end of the day defendant had four or five children in a room seated in a semi circle on the floor looking at television while the children were waiting to be picked up by their parents. Minor plaintiff was one of the children in this group. None of the children in this group were more than five years of age. The defendant testified that she was in the room somewhat behind the children at the time observing them, when suddenly a little boy named Bobbie Schimp seated on the floor next to minor

plaintiff hit minor plaintiff without warning in the forehead area of her head. The defendant testified that Bobbie Schimp had nothing in his hands.

Some time early the following morning, January 22, 1959, minor plaintiff had a nose bleed and was vomiting. She also had a slight temperature. From the evening of January 21, 1959 minor plaintiff's eyes would intermittently cross and uncross until within several months the child's eyes were constantly crossed.

The minor plaintiff had never had cross eyes before the accident. Plaintiff will prove by a competent medical doctor that plaintiff, Jenny Gene Fowler, suffered a concussion of the brain on January 21, 1959, and that a blow to the forehead – and that said blow to the forehead caused said concussion, that said blow and assault resulted, and shock resulted in Jenny Gene Fowler's eyes becoming crossed.

We will prove through said medical authority that some children have a latent tendency to crossing of the eyes. That the fusion mechanism which causes a person's eyes to function in parallel unison and see singularly is very delicately balanced in a small child the age of minor plaintiff, and that a blow or deep shock which might result from a blow may cause the fusion mechanism to cease to function properly and that the delicate muscles of the eyes become imbalanced.

As a result of the accident minor plaintiff had had surgery to the right eye. Her eyes are still crossed. We will prove through a medical specialist that one additional operation will be necessary and possibly a third, that cosmetically the appearance of plaintiff's eyes can be improved to normal or almost normal position, she may have some impairment of good sight.

We will offer proof of certain unpaid medical bills to which plaintiff is responsible and the estimated cost of future medical care and surgery to her eyes necessitated by the accident.

[E]ither because of the shock or fright resulting from the accident or because of the age of plaintiff, she has been unable to state or give any information concerning the accident. No

information is available from the other children because of their tender years.

Plaintiff will prove through a medical doctor that the blow on the forehead and resulting concussion to minor plaintiff on January 21, 1959 was of such a force that it would have been impossible for a boy five years of age or less sitting on the floor with nothing in his hands to have delivered a blow of such force as to have caused the said injuries to minor plaintiff, and that the only inference that can be drawn is that the defendant, Annabelle Seaton, is not telling us what really happened that day at the nursery school and that the only reasonable inference which can be drawn is that the defendant, Annabelle Seaton, did not exercise reasonable care for the safety of the children in her care and custody, and, more specifically with reference to minor plaintiff.

I should also state with regard to the damages sustained by the minor plaintiff and as a result of her eyes crossing she has become more withdrawn and has certain psychological problems and has not done as well in school as she might otherwise had it not been for this accident.

Postscript on *Fowler v. Seaton*

Following the opening statement, the defendant moved to dismiss the case on the basis that the doctrine of res ipsa loquitor was inapplicable to the case. The court granted the motion, but the Supreme Court of California reversed, saying:

> "Not only was the plaintiff healthy when delivered and badly injured when returned to her parents, but it appears that defendant had a guilty conscience and tried to cover up the injury. Here we have a severe and unusual injury,~ one that does not normally occur in nursery schools if the children are properly supervised. We have a volunteer explanation that was inferably false, and, when faced with a demand to explain, the proffering of another inferably false explanation. We have a case where it appears that the plaintiff did not

> contribute to her own injuries. Thus the proffered evidence showed the existence of a duty of careful supervision owed by defendant to plaintiff. Under the circumstances it is inferable that defendant had a consciousness of guilt, knew the cause of the injury, was under a duty to explain, and was trying to conceal it. Thus it may be reasonably inferred that the duty was violated. Certainly it is more probable than not that the injury was the result of defendant's faulty supervision."

The Similarity of Res Ipsa Loquitor to Strict Liability

The application of res ipsa loquitor in negligence bears considerable practical similarity to the cause of action for strict liability. As discussed in the tort-law overview of Chapter 2, strict liability is a cause of action that, like negligence, is available for personal injuries and property damage suffered as a result of accidents. In terms of doctrine, strict liability is the same as negligence with one very large difference: The elements of duty of care and breach of the duty of care in the negligence cause of action are replaced in strict liability by a single element of "absolute duty of safety," which requires the plaintiff to show that the situation in which the harm arose falls into one of five categories: ultrahazardous activities, defective products, wild animals, trespassing livestock, and domestic animals with known vicious propensities. If so, there is no need to show that the defendant was careless; so long as an injury and causation can be shown, the defendant is on the hook for the damages.

How res ipsa loquitor and strict liability are similar is that in either instance, the plaintiff is relieved of having to show that it was defendant's carelessness that led to the injury. With res ipsa loquitor, the plaintiff is given a presumption in lieu of having to present evidence on breach of the duty of care. With strict liability, the element of breach of duty of care is not part of the prima facie case. Either way, the defendant becomes absolutely responsible should something go wrong. You will also notice overlap in the situations in which res ipsa loquitor and strict liability are imposed. The exploding Coca-Cola bottle cases, for instance, were brought as negligence

claims making use of res ispa loquitor. Today, thanks to the evolution of tort law, those same cases could be brought as claims for strict liability, since exploding pop bottles would constitute defective products. (Happily, of course, pop bottles rarely explode these days thanks to advances in plastics and glass.)

Special Rules for Land Owners and Occupiers

An idiosyncratic aspect of the common law regards the standard of care expected of owners or occupiers of real property. When it comes to the liability for conditions of land and buildings, there are special rules that dictate the standard of care.

These special rules only apply when the injury arises from a *condition* of *real property*.

The phrase "real property" means land and anything built on the land along with all fixtures. In property law, a "fixture" is something attached to the real property. So an installed ceiling lamp is a fixture, and thus part of the real property, while a floor lamp that can be unplugged and repositioned is "chattel" – meaning property that is not real property.

The special rules apply to land owners *and occupiers* because one does not have to "own" the property outright to be liable for conditions on the property. Someone who is in possession of the property – a lessee, for example, can be liable in the same way as an owner.

The special rules apply only to *conditions* on the property. Note that *activities* on the property, as opposed to conditions, are not covered by the special rules. If an injury results because of something the land owner/occupier is doing on the land, then the standard of care is that of the reasonable person. But if the injury results from a condition of the property – such as a rotted stair case or a knife-like edge on handhold – then the special rules are engaged.

The key to how the special rules work is that they require a different standard of care depending on the classification of the plaintiff – i.e., the person who enters the land.

The rules differ from jurisdiction to jurisdiction, so any restatement of them will be highly imperfect. But what follows is a fairly standard

conception of the traditional rules, ordered from the lowest duty to the highest.

Undiscovered/Unanticipated Trespassers

A person is a trespasser if she or he intentionally enters upon someone else's land without permission (express or implied) or some other privilege to do so. And if the land owner/occupier has no reason to know of or anticipate the trespassers' presence on the land, then the trespasser is an "undiscovered/unanticipated" trespasser. Such a person is owed **no duty**. That is to say, there is no way the undiscovered/unanticipated trespasser can recover against a land owner/occupier in a negligence action for an injury sustained because of a condition of the real property.

Discovered/Anticipated Trespassers

A discovered/anticipated trespasser is a trespasser – someone intentionally entering upon the land without privilege – who the land owner/occupier either knows or expects to be on the land. If a land owner knows that people habitually cut across the property as a shortcut between two public places, then such people would be anticipated trespassers. Even if the owner/occupier has not witnessed trespassers in the past, if there is evidence on the property that a reasonable person would understand as indicating trespassers – such as a beaten path – then the owner/occupier will be considered to have constructive notice of the trespassers.

Discovered/anticipated trespassers are owed a duty. In courts following the traditional approach, there is **a duty to warn of or make safe any concealed artificial conditions which are capable of causing death or serious bodily injury**. This is lower than the reasonable-care standard in three key ways: (1) only concealed or hidden dangers – "traps" the courts sometimes say – trigger the duty; (2) the duty only applies to artificial conditions, not natural conditions; (3) the dangers must be very serious ones, such as those risking life or limb. A good example is an abandoned mine shaft: it's hidden, it's not a natural feature, and it's potentially lethal. To obviate such liability the owner/occupier can either remedy the condition or create an effective warning – such as with posted signs.

Note that some courts have scrapped the traditional approach in favor of applying the ordinary reasonable-care standard for discovered/anticipated trespassers.

Discovered/Anticipated Child Trespassers

An extra duty is placed on an owner/occupier in certain circumstances when the known (or knowable) trespassers are children. This rule is often called **attractive nuisance doctrine**, although as we will see that name is misleading.

Where a land owner/occupier knows or should be aware of child trespassers, that owner/occupier has **a duty to remediate a dangerous artificial condition on the land capable of causing death or serious bodily injury, so long as the condition can be remedied without imposing an unreasonable burden on the owner/occupier**.

The most important difference with regard to anticipated child trespassers as opposed to their adult counterparts is that the danger need not be concealed to trigger the duty. Another important difference is that prominent warning signs do not offer an easy way out of liability. These differences reflect that fact that children lack good judgment and are often drawn to obviously dangerous things rather than being revulsed by them.

The special treatment of children got its start in cases where children trespassed onto railroad land, attracted to the idea of playing on a rail turntable. A seminal case was *Keffe v. Milwaukee & St. Paul Railway Co.,* 21 Minn. 207 (Minn. 1875). A 7-year-old boy riding the turntable in this way got his leg caught, crushing it and necessitating an amputation. The court reasoned as follows:

> "[T]he defendant knew that the turn-table, when left unfastened, was easily revolved; that, when left unfastened, it was very attractive, and when put in motion by them, dangerous, to young children: and knew also that many children were in the habit of going upon it to play. The defendant therefore knew that by leaving this turn-table unfastened and

> unguarded, it was not merely inviting young children to come upon the turn-table, but was holding out an allurement, which, acting upon the natural instincts by which such children are controlled, drew them by those instincts into a hidden danger; and having thus knowingly allured them into a place of danger, without their fault, (for it cannot blame them for not resisting the temptation it has set before them,) it was bound to use care to protect them from the danger into which they were thus led, and from which they could not be expected to protect themselves."

For this reason the doctrine was often referred to as the "turntable doctrine." A broader label, apparently traceable to the *Keffe* case, is the "attractive nuisance doctrine." The doctrine reflects a special protectiveness courts often exhibit toward children. But not all courts. The doctrine was rejected in Michigan in *Ryan v. Towar,* 128 Mich. 463 (Mich. 1901), a case in which an 8-year-old girl was caught in a water wheel on an abandoned industrial site. When she began screaming, her older sister came to her aid and was injured as well. Justice Frank Hooker wrote for the Supreme Court of Michigan:

> "There is no more lawless class than children, and none more annoyingly resent an attempt to prevent their trespasses. The average citizen has learned that the surest way to be overrun by children is to give them to understand that their presence is distasteful.~ The remedy which the law affords for the trifling trespasses of children is inadequate. No one ever thinks of suing them, and to attempt to remove a crowd of boys from private premises by gently laying on of hands, and using no more force than necessary to put them off, would be a roaring farce, with all honors to the juveniles. For a corporation with an empty treasury, and overwhelmed with debt, to be required to be to the expense of preventing children from going across its lots to school, lest it be said that it invited and licensed

> them to do so, is to our minds an unreasonable proposition."

Originally, attractive nuisance doctrine required – as its name suggests – that the child be induced to trespass through attraction to the dangerous condition itself, in order for the land owner/occupier's duty to be triggered. This is no longer generally the case. Although courts often still call the doctrine "attractive nuisance," the danger need not attract the child in order for the land owner/occupier to have a duty. For instance Michigan – which these days recognizes attractive nuisance doctrine – has no requirement that the condition lure the children onto the land. The court in *Pippin v Atallah,* 245 Mich App 136 (Mich. App. 2001) explains, "The term 'attractive nuisance' is a misnomer (or historical leftover) because it is not necessary, in order to maintain such an action, that the hazardous condition be the reason that the children came onto the property."

Licensees

The category of licensee is the default category of nontrespassers. Someone who is not trespassing is a licensee unless for some reason they qualify as an invitee (discussed below). In general, people on private property with the consent of the owner/occupier are licensees. Licensees include visitors to private homes, such as friends and family. Ironically (and confusingly), people who come into your home by way of a formal party invitation are not invitees; they are licensees.

With regard to conditions on real property, an owner/occupier owes to licensees **a duty to warn of or try reasonably to make safe concealed hazards that are known to the owner/occupier**. This is different from the duty to discovered/anticipated trespassers in that to trigger a duty, the danger need not be artificial, nor does it need to constitute a threat of serious bodily injury or death.

Invitees

Invitees are people who are allowed to come on land to conduct business related to the owner/occupier's business, or who are members of the public on land that is held open to the general public. Customers at the mall, visitors in a hospital, fans at a concert,

and sunbathers in a park are all invitees. Some jurisdictions also consider public employees such as police officers, firefighters, and mail carriers to be invitees, even when in private homes, so long as they are privileged to be there.

Invitees are owed the highest duty by land owners/occupiers.

When it comes to conditions of real property, invitees are owed **a duty to adequately warn of or render safe concealed hazards *plus* to make a diligent effort to inspect for unknown dangers.**

The key difference between licensees and invitees is that with invitees, there is a requirement to affirmatively go out and look for conditions that may be a hazard for the unwary. This makes sense if you consider that invitees are generally persons from whom the owner/occupier stands to make money. In cases where there is no money to be made, such as with public spaces like parks, there is at least a subtle cue that the space is one where visitors can feel entitled to be there, as opposed to a private locale where they should feel as if they are guests who are obliged to be a little more circumspect.

Case: Campbell v. Weathers

The following case makes use of the special rules for negligence of land owners/occupiers and explores the boundaries of the definition of "invitee."

Campbell v. Weathers

Supreme Court of Kansas
March 8, 1941

153 Kan. 316. JOE CAMPBELL, Appellant, v. CLAUDE WEATHERS, doing business as WEATHERS CIGAR STORE AND LUNCH, THE FIRST NATIONAL BANK of WICHITA, as Trustee of the Colar Sims Estate, and R. E. BLACK, as Manager, etc., Appellees. No. 34,850.

Justice HUGO T. WEDELL:

This was an action against three defendants to recover damages for personal injury. The demurrers of the defendants to

plaintiff's evidence were sustained and those rulings constitute the sole basis of appeal.

The defendants were the lessee of a building, who operated a cigar and lunch business, the owner of the building and the owner's manager of the building.

The building was located in the business section of the city of Wichita, and at the southeast corner of an intersection. The building faced the north. It had an entrance at the west front corner and from the north near the northeast corner. A counter was located near the front and across the building east and west. Between the east end of the counter and the east wall of the building was an opening which led to a hallway along the east side of the building. The hallway led to a toilet which was located toward the west end of the hall. The toilet was west of the hallway. Immediately to the south of the portion of the building occupied by the defendant lessee another tenant operated a shoeshine parlor. There was an entrance to the shoeshine parlor from the west. There was access from the shoeshine parlor to the toilet and hallway by means of a door into the toilet. There was a trap door in the floor of the hallway approximately half way between the lunch counter of the defendant lessee and the toilet room. The hallway was 29 or 31 inches in width. Plaintiff had been a customer of the defendant lessee for a number of years. On Sunday morning, June 4, 1939, between 8:30 and 9 o'clock, plaintiff entered the place of business operated by the defendant lessee as a cigar and lunch business. He spent probably fifteen or twenty minutes in the front part of the building and then started for the toilet. He stepped into the open trap door in the floor of the hallway, broke his right arm and sustained some other injuries.

Other pertinent facts will be considered in connection with the contentions of the respective parties.

We shall first consider the sufficiency of the evidence to take the case to the jury on the question of lessee's liability. Lessee demurred to the evidence upon the ground it showed that if plaintiff sustained an injury it was due to his own contributory negligence and not the negligence of Weathers, the lessee.

Appellant contends that demurrer raised only the question of his contributory negligence. The contention is not good. The demurrer was intended to raise, and did raise, also, the question of the sufficiency of the evidence to show negligence on the part of the lessee. It was so considered and ruled upon.

The first issue to be determined is the relationship between plaintiff and the lessee. Was plaintiff a trespasser, a licensee or an invitee? The answer must be found in the evidence. A part of the answer is contained in the nature of the business the lessee conducted. It is conceded lessee operated a business which was open to the public. Lessee's business was that of selling cigars and lunches to the public. It was conceded in oral argument, although the abstract does not reflect it, that the lessee also operated a bar for the sale of beer, but that beer was not being sold on Sunday, the day of the accident. Plaintiff had been a customer of the lessee for a number of years. He resided in the city of Wichita. He was a switchman for one of the railroads. He stopped at the lessee's place of business whenever he was in town. He had used the hallway and toilet on numerous occasions, whenever he was in town, and had never been advised the toilet was not intended for public use. When he entered lessee's place of business the lessee and three of his employees were present. He thought he had stated he was going back to use the toilet, but he was not certain he had so stated. None of the persons present heard the remark. He saw no signs which warned him not to use the hallway or toilet. The hallway was the direct route to the toilet. One of lessee's employees testified he had never been told by the lessee or anyone else that the toilet was a private toilet. On that point the examination of one of lessee's employees discloses the following:

> Q. Mr. Hodges, do you know or were you ever told by Mr. Weathers or by Mr. Black or anybody who purported to be the manager of that building that that toilet was a private toilet?
>
> A. No, sir.

> Q. Do you know whether or not it was used by people other than the employees and the lessees and lessors of that building?
>
> A. Yes, sir.
>
> Q. Well, was it used?
>
> A. Yes, it was used by everybody, used by the public.

Appellant insists the evidence discloses he was an invitee. Appellee counters with the contention appellant was not an invitee for the purpose of using the toilet. Appellee also urges the evidence does not disclose appellant purchased anything on this particular day and hence was not a customer on this occasion.

The evidence disclosed appellant had been a regular customer of the lessee for a number of years and that he had used the hallway and toilet about every day he had been in town. He had never seen any signs not to use the toilet and had never been forbidden to use it. That the public had a general invitation to be or to become lessee's customers cannot be doubted. It appears the trial court sustained the demurrer on the ground appellant had received no specific invitation or express permission to use the toilet on this particular occasion. Was a specific invitation or permission necessary in this case? That lessee was operating a lunch counter is conceded. No valid reason is advanced by appellee for his contention that lessee was not conducting a restaurant business within the ordinary acceptation of that term. We think it would constitute undue and unwarranted nicety of discrimination to say that a person who operates a public lunch counter is not engaged in the restaurant business. This appellant, a restaurant operator in the city of Wichita, was required by statute to provide a water closet for the accommodation of his guests. G. S. 1935, 36-111 and 36-113, required that he furnish a public washroom, convenient and of easy access to his guests. The word "toilet" might refer to either a water closet or washroom. Appellant was an invitee not only while in the front part of the place of business where the lunch counter was located but while he was on his way to the

toilet. He was an invitee at all times. Appellant had been a regular customer of the lessee for a number of years. We think it is clear appellant, in view of the evidence in the instant case, was an invitee to use the toilet. The mere fact appellant had received no special invitation or specific permission on this particular occasion to use the toilet provided for guests or invitees did not convert him into a mere licensee. The evidence is clear appellant had used the hallway and toilet for a number of years and that it was used by everybody.

Can we say, as a matter of law, in view of the record in this particular case, appellant had no implied invitation to use the toilet simply because he had not made an actual purchase before he was injured? Assuming for the moment that it might be necessary under some circumstances for a regular customer of long standing to be an actual purchaser on the particular occasion of his injury to constitute him an implied invitee to use the toilet, does the evidence in the instant case compel such a ruling on the demurrer? We think it does not.~

The writer cannot subscribe to the theory that a regular customer of long standing is not an invitee to use toilet facilities required by law to be provided by the operator of a restaurant, simply because the customer had not actually made a purchase on the particular occasion of his injury, prior to his injury. It would seem doubtful whether such a doctrine could be applied justly to regular customers of a business which the law does not specifically require to be supplied with toilet facilities, but which does so for the convenience or accommodation of its guests.~ It is common knowledge that business concerns invest huge sums of money in newspaper, radio and other mediums of advertising in order to induce regular and prospective customers to frequent their place of business and to examine their stocks of merchandise. They do not contemplate a sale to every invitee. They do hope to interest regular customers and cultivate prospective customers. It is common knowledge that an open door of a business place, without special invitation by advertisement or otherwise, constitutes an invitation to the public generally to enter.~ In the case of *Kinsman v. Barton &*

Company, 141 Wash. 311, that court had occasion to determine what constituted an invitee, and said:

> "An invitee is one who is either expressly or impliedly invited onto the premises of another in connection with the business carried on by that other. … If one goes into a store with the view of then, or at some other time, doing some business with the store, he is an invitee."

[In] *MacDonough v. Woolworth Co.,* 91 N.J.L. 677~ it was held:

> "The implied invitation of the storekeeper is broad enough to include one who enters a general store with a vague purpose of buying if she sees anything that strikes her fancy."

Of course, if it appears a person had no intention of presently or in the future becoming a customer he could not be held to be an invitee, as there would be no basis for any thought of mutual benefit.~

Did the lessee violate any duty to appellant, an invitee? The specific negligence alleged was:

> 1. That they caused an opening to be made in the middle of the dimly lighted hallway leading to the toilet, knowing that the said hallway was used by customers, employees and the general public.
>
> 2. That they negligently failed to warn this plaintiff of the hole in the said floor and of the dangerous condition caused by the hole being left open in the floor.
>
> 3. That they negligently failed to warn this plaintiff of the insufficiently lighted and darkened condition caused by the defendants in the said hall. At the time the plaintiff entered into the said hall, the defendants and their agents knew well that the hole was not properly lighted and that there was no lid on the hole that this plaintiff stepped into, and that they, the defendants, and their agents, negligently failed

to warn this plaintiff of the condition of the said floor.

It was also alleged the foregoing acts of negligence were directly responsible for the injury sustained.

The trap door in the hallway was opened on the day before the accident. It was opened in order to obtain ventilation underneath the floor and in order to get relief from dampness and the muddy ground, preparatory to reenforcing the floor. It was left open on Sunday, the day of the accident, at the suggestion of the lessee. The hallway was very narrow, only 29 or 31 inches in width. The trap door covered enough of the floor so as to make it impossible or highly inconvenient for persons to pass between the east side of the hole and the east wall without walking sideways. That distance was between six and eight inches, or perhaps one foot. On the morning of the accident the hallway was dark or dimly lighted. There was an electric light suspended from the ceiling, but it was not lighted at the time of the injury. It appears, if appellant stated he was going to the toilet, no one heard the statement. Appellant did not know the trap door was open. He saw no signs to warn him it was open and no one in person advised him concerning it. The lessee previously had been expressly warned by one of his own employees that he had almost fallen into the hole and that it should be closed or someone would be injured and sue him. The employee thought the lessee advised him to leave the hole open. At any rate it was left open. It was the custom to clean up on Sunday mornings and to throw trash into the hallway. After appellant started for the toilet he passed the porter, who had a broom in his hand. Owing to the lack of light, appellant could see only the image of a pasteboard box on the floor of the hallway. The hole could not be seen by reason of the box. It has been held upon good authority that a storekeeper who places racks of merchandise about a railing around a stairway to a basement so as to obstruct the view of customers is negligent. There was not sufficient room between the box and the east wall to pass around the box. Appellant stepped over the box, "very easily" and in doing so stepped into the hole, broke his right arm and possibly sustained some other injuries. The

pasteboard box was variously described as 20 inches in height, 16 to 18 inches in height, and approximately 14 to 16 inches wide. In the case of *Bass v. Hunt,* 151 Kan. 740, the trial court sustained a demurrer to plaintiff's evidence in a case very similar in principle. This court reversed the ruling, and held:

> "It is the duty of a *restaurant keeper* to keep in a reasonably safe condition the portions of his establishment where his guests *may be expected to come and go,* including a necessary water closet *and the passage thereto,* and it cannot be said as a matter of law there was no actionable negligence in his failure to sufficiently light the passageway or to warn a guest of an unguarded stairway covered by a trap door which was not closed." (Emphasis supplied.)

We are unable to distinguish the *Bass* case from the instant case, in principle.~

The lessee also contends the pasteboard box constituted a warning~. Certainly we cannot say, as a matter of law, appellant should have interpreted the existence of a pasteboard box of the size mentioned, in view of other circumstances, as constituting a barricade to an open hole in the floor immediately on the other side of the box. Nor is there any evidence in the record the box was intended to constitute a barricade.~

The order sustaining~ the demurrer of the lessee is reversed.

Questions to Ponder About *Campbell v. Weathers*

A. Do you think the ruling in this case will function to help business patrons in the long run? On the plus side, it may encourage business owners to make their premises safer. Business owners would likely argue that the decision will hurt patrons in the long run, because it will cause fewer restrooms to be made available. Which perspective do you think is right? Or is it possible that businesses will not apprise themselves of developments in the law of torts regarding dangerous conditions, and thus the *Campbell* case will have no effect other than to make it easier for injured patrons to recover?

B. One defense to negligence – which is discussed in a later chapter – is assumption of the risk. Suppose the business proprietor posted the following sign:

> Going to the restroom may be dangerous. Patrons who choose to use the restroom assume all risk of doing so.

What effect do you think this should have, if any? Assuming such a sign could relieve all liability, would it be a good business decision to post it?

C. Recall the discussion of gender and the reasonable person standard above. In discussing women's shopping and men's drinking and cigar smoking, does the *Campbell* opinion reveal sexist stereotyping among 20th Century judges? Do you think a judge would write the same things today? If not, do you think a judge might think the same things today? Either way, do you think it matters to the outcome of the case or the doctrine announced?

Some Problems About Duties of Land Owners/Occupiers

A. Addison's mother-in-law, Yelena, is beginning to descend the stairs into Addison's cellar. "Watch out, Yelena," Addison calls. "There is a pipe that sticks out of the wall on the right around the middle of the stairs, down near your feet." Yelena, in a hurry, does not try to crowd to the left. She hits the pipe, trips, and falls down the remainder of the stairs, sustaining injuries. It turns out that Addison, who is a licensed plumber, could have easily fixed the pipe with about a 20 minute's work and $20 worth of supplies. But she never bothered. Can Yelena recover from Addison in negligence?

B. Jayla owns and operates an independent hardware store downtown. Sawyer, a customer, browses the decorative drawer pulls. When he notices Jayla disappear into the back, Sawyer sneaks through a door marked "No Admittance." Sawyer, an amateur sleuth who has been turned down several times for a private investigator's license because of a record of criminal convictions, is looking for evidence of a price-fixing conspiracy he is convinced exists with other hardware stores in town. He finds a shelf containing banker's

boxes of documents. He starts to pull one out, and the entire shelf collapses on top of him, injuring him badly. It turns out the kid Jayla hired on a subminimum youth-training wage did not follow directions putting the shelf together, leaving out several bolts and bracket-supports. Can Sawyer recover from Jayla in negligence?

C. Gareth owns a 20,000-acre ranch out west where herds of buffalo roam through a maze of badlands. Badlands are areas unsuitable for agriculture and difficult to travel through that are characterized by ravines, gullies, hoodoos, cliffs, and canyons. Gareth knows that hunters often trek through his land to hunt deer and pheasants. One geological formation, which Gareth and his ranch hands have come to call Dead Man's Drop, is a steep, narrow ravine in an otherwise flat plain overgrown with tall prairie grass. At certain times of day, the opening is all but invisible. It's already injured 15 trespassers, two fatally. Nonetheless, Gareth has posted no warning signs or done anything else to remedy the danger. Twyla, a bow hunter looking for bucks, is stalking through the grass silently while aiming and looking to her side when – WHOOSH – she falls into the gap, sustaining multiple bone fractures, torn ligaments, and other injuries. Can Twyla recover from Gareth in negligence?

Case: Rowland v. Christian

Not all jurisdictions follow the special rules for owner/occupier negligence for conditions of real property. In this case, California's high court expresses considerable contempt for the traditional rules and decides to discard them in favor of the flexible and portable reasonable-person standard.

Rowland v. Christian

Supreme Court of California
August 8, 1968

69 Cal. 2d 108. JAMES DAVIS ROWLAND, JR., Plaintiff and Appellant, v. NANCY CHRISTIAN, Defendant and Respondent. S. F. No. 22583. In Bank. Peters, J. Traynor, C. J., Tobriner, J., Mosk, J., and Sullivan, J., concurred. Burke, J., dissents. McComb, J., concurred.

Justice RAYMOND E. PETERS:

Plaintiff appeals from a summary judgment for defendant Nancy Christian in this personal injury action.

In his complaint plaintiff alleged that about November 1, 1963, Miss Christian told the lessors of her apartment that the knob of the cold water faucet on the bathroom basin was cracked and should be replaced; that on November 30, 1963, plaintiff entered the apartment at the invitation of Miss Christian; that he was injured while using the bathroom fixtures, suffering severed tendons and nerves of his right hand; and that he has incurred medical and hospital expenses. He further alleged that the bathroom fixtures were dangerous, that Miss Christian was aware of the dangerous condition, and that his injuries were proximately caused by the negligence of Miss Christian. Plaintiff sought recovery of his medical and hospital expenses, loss of wages, damage to his clothing, and $100,000 general damages. It does not appear from the complaint whether the crack in the faucet handle was obvious to an ordinary inspection or was concealed.

Miss Christian filed an answer containing a general denial except that she alleged that plaintiff was a social guest and admitted the allegations that she had told the lessors that the faucet was defective and that it should be replaced. Miss Christian also alleged contributory negligence and assumption of the risk. In connection with the defenses, she alleged that plaintiff had failed to use his "eyesight" and knew of the condition of the premises. Apart from these allegations, Miss Christian did not allege whether the crack in the faucet handle was obvious or concealed.

Miss Christian's affidavit in support of the motion for summary judgment alleged facts showing that plaintiff was a social guest in her apartment when, as he was using the bathroom, the porcelain handle of one of the water faucets broke in his hand causing injuries to his hand and that plaintiff had used the bathroom on a prior occasion. In opposition to the motion for summary judgment, plaintiff filed an affidavit stating that immediately prior to the accident he told Miss Christian that he

was going to use the bathroom facilities, that she had known for two weeks prior to the accident that the faucet handle that caused injury was cracked, that she warned the manager of the building of the condition, that nothing was done to repair the condition of the handle, that she did not say anything to plaintiff as to the condition of the handle, and that when plaintiff turned off the faucet the handle broke in his hands severing the tendons and medial nerve in his right hand.

The summary judgment procedure is drastic and should be used with caution so that it does not become a substitute for an open trial.~ A summary judgment for defendant has been held improper where his affidavits were conclusionary and did not show that he was entitled to judgment and where the plaintiff did not file any counteraffidavits.

In the instant case, Miss Christian's affidavit and admissions made by plaintiff show that plaintiff was a social guest and that he suffered injury when the faucet handle broke; they do not show that the faucet handle crack was obvious or even nonconcealed. Without in any way contradicting her affidavit or his own admissions, plaintiff at trial could establish that she was aware of the condition and realized or should have realized that it involved an unreasonable risk of harm to him, that defendant should have expected that he would not discover the danger, that she did not exercise reasonable care to eliminate the danger or warn him of it, and that he did not know or have reason to know of the danger. Plaintiff also could establish, without contradicting Miss Christian's affidavit or his admissions, that the crack was not obvious and was concealed. Under the circumstances, a summary judgment is proper in this case only if, after proof of such facts, a judgment would be required as a matter of law for Miss Christian. The record supports no such conclusion.

Section 1714 of the Civil Code provides:

> "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property

> or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. … "

This code section, which has been unchanged in our law since 1872, states a civil law and not a common law principle.

Nevertheless, some common law judges and commentators have urged that the principle embodied in this code section serves as the foundation of our negligence law. Thus in a concurring opinion, Brett, M. R. in *Heaven v. Pender* (1883) 11 Q.B.D. 503, 509, states: "whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

California cases have occasionally stated a similar view: "All persons are required to use ordinary care to prevent others being injured as the result of their conduct." Although it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by § 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy.

A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

One of the areas where this court and other courts have departed from the fundamental concept that a man is liable for injuries caused by his carelessness is with regard to the liability of a possessor of land for injuries to persons who have entered upon that land. It has been suggested that the special rules regarding liability of the possessor of land are due to historical considerations stemming from the high place which land has traditionally held in English and American thought, the dominance and prestige of the landowning class in England during the formative period of the rules governing the possessor's liability, and the heritage of feudalism.

The departure from the fundamental rule of liability for negligence has been accomplished by classifying the plaintiff either as a trespasser, licensee, or invitee and then adopting special rules as to the duty owed by the possessor to each of the classifications. Generally speaking a trespasser is a person who enters or remains upon land of another without a privilege to do so; a licensee is a person like a social guest who is not an invitee and who is privileged to enter or remain upon land by virtue of the possessor's consent, and an invitee is a business visitor who is invited or permitted to enter or remain on the land for a purpose directly or indirectly connected with business dealings between them.

Although the invitor owes the invitee a duty to exercise ordinary care to avoid injuring him, the general rule is that a trespasser and licensee or social guest are obliged to take the premises as they find them insofar as any alleged defective condition thereon may exist, and that the possessor of the land owes them only the duty of refraining from wanton or willful injury. The ordinary justification for the general rule severely restricting the occupier's liability to social guests is based on the theory that the guest should not expect special precautions to be made on his account and that if the host does not inspect and maintain his property the guest should not expect this to be done on his account.

An increasing regard for human safety has led to a retreat from this position, and an exception to the general rule limiting

liability has been made as to active operations where an obligation to exercise reasonable care for the protection of the licensee has been imposed on the occupier of land. In an apparent attempt to avoid the general rule limiting liability, courts have broadly defined active operations, sometimes giving the term a strained construction in cases involving dangers known to the occupier.

Thus in *Hansen v. Richey*, 237 Cal.App.2d 475, 481, an action for wrongful death of a drowned youth, the court held that liability could be predicated not upon the maintenance of a dangerous swimming pool but upon negligence "in the active conduct of a party for a large number of youthful guests in the light of knowledge of the dangerous pool." ⌙Rather than characterizing the finding of active negligence in *Hansen v. Richey, supra*, 237 Cal.App.2d 475, 481, as a strained construction of that term perhaps the opinion should be characterized as "an ingenious process of finding active negligence in addition to the known dangerous condition, … " (See, Witkin, Summary of Cal. Law (1967 Supp.) Torts, § 255, pp. 535-536.)⌟ In *Howard v. Howard*, 186 Cal.App.2d 622, 625, where plaintiff was injured by slipping on spilled grease, active negligence was found on the ground that the defendant requested the plaintiff to enter the kitchen by a route which he knew would be dangerous and defective and that the defendant failed to warn her of the dangerous condition. In *Newman v. Fox West Coast Theatres*, 86 Cal.App.2d 428, 431-433, the plaintiff suffered injuries when she slipped and fell on a dirty washroom floor, and active negligence was found on the ground that there was no water or foreign substances on the washroom floor when plaintiff entered the theater, that the manager of the theater was aware that a dangerous condition was created after plaintiff's entry, that the manager had time to clean up the condition after learning of it, and that he did not do so or warn plaintiff of the condition.

Another exception to the general rule limiting liability has been recognized for cases where the occupier is aware of the dangerous condition, the condition amounts to a concealed trap, and the guest is unaware of the trap. In none of these cases,

however, did the court impose liability on the basis of a concealed trap; in some liability was found on another theory, and in others the court concluded that there was no trap. A trap has been defined as a "concealed" danger, a danger with a deceptive appearance of safety. It has also been defined as something akin to a spring gun or steel trap. In the latter case it is pointed out that the lack of definiteness in the application of the term "trap" to any other situation makes its use argumentative and unsatisfactory.

The cases dealing with the active negligence and the trap exceptions are indicative of the subtleties and confusion which have resulted from application of the common law principles governing the liability of the possessor of land. Similar confusion and complexity exist as to the definitions of trespasser, licensee, and invitee.

In refusing to adopt the rules relating to the liability of a possessor of land for the law of admiralty, the United States Supreme Court stated:

> "The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards 'imposing on

> owners and occupiers a single duty of reasonable care in all the circumstances.'"

The courts of this state have also recognized the failings of the common law rules relating to the liability of the owner and occupier of land. In refusing to apply the law of invitees, licensees, and trespassers to determine the liability of an independent contractor hired by the occupier, we pointed out that application of those rules was difficult and often arbitrary. In refusing to apply the common law rules to a known trespasser on an automobile, the common law rules were characterized as "unrealistic, arbitrary, and inelastic," and it was pointed out that exceedingly fine distinctions had been developed resulting in confusion and that many recent cases have in fact applied the general doctrine of negligence embodied in § 1714 of the Civil Code rather than the rigid common law categories test.~

There is another fundamental objection to the approach to the question of the possessor's liability on the basis of the common law distinctions based upon the status of the injured party as a trespasser, licensee, or invitee. Complexity can be borne and confusion remedied where the underlying principles governing liability are based upon proper considerations. Whatever may have been the historical justifications for the common law distinctions, it is clear that those distinctions are not justified in the light of our modern society and that the complexity and confusion which has arisen is not due to difficulty in applying the original common law rules – they are all too easy to apply in their original formulation – but is due to the attempts to apply just rules in our modern society within the ancient terminology.~

A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of

care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.

It bears repetition that the basic policy of this state set forth by the Legislature in § 1714 of the Civil Code is that everyone is responsible for an injury caused to another by his want of ordinary care or skill in the management of his property. The factors which may in particular cases warrant departure from this fundamental principle do not warrant the wholesale immunities resulting from the common law classifications, and we are satisfied that continued adherence to the common law distinctions can only lead to injustice or, if we are to avoid injustice, further fictions with the resulting complexity and confusion. We decline to follow and perpetuate such rigid classifications. The proper test to be applied to the liability of the possessor of land in accordance with § 1714 of the Civil Code is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative.

Once the ancient concepts as to the liability of the occupier of land are stripped away, the status of the plaintiff relegated to its proper place in determining such liability, and ordinary principles of negligence applied, the result in the instant case presents no substantial difficulties. As we have seen, when we view the matters presented on the motion for summary judgment as we must, we must assume defendant Miss Christian was aware that the faucet handle was defective and dangerous, that the defect was not obvious, and that plaintiff was about to come in contact with the defective condition, and under the undisputed facts she neither remedied the condition nor warned plaintiff of it. Where the occupier of land is aware of a concealed condition involving in the absence of precautions an unreasonable risk of harm to those coming in contact with it and is aware that a person on the premises is about to come in

contact with it, the trier of fact can reasonably conclude that a failure to warn or to repair the condition constitutes negligence. Whether or not a guest has a right to expect that his host will remedy dangerous conditions on his account, he should reasonably be entitled to rely upon a warning of the dangerous condition so that he, like the host, will be in a position to take special precautions when he comes in contact with it.

It may be noted that by carving further exceptions out of the traditional rules relating to the liability to licensees or social guests, other jurisdictions reach the same result, that by continuing to adhere to the strained construction of active negligence or possibly, by applying the trap doctrine the result would be reached on the basis of some California precedents~. However, to approach the problem in these manners would only add to the confusion, complexity, and fictions which have resulted from the common law distinctions.

The judgment is reversed.

Justice LOUIS H. BURKE, dissenting:

I dissent. In determining the liability of the occupier or owner of land for injuries, the distinctions between trespassers, licensees and invitees have been developed and applied by the courts over a period of many years. They supply a reasonable and workable approach to the problems involved, and one which provides the degree of stability and predictability so highly prized in the law. The unfortunate alternative, it appears to me, is the route taken by the majority in their opinion in this case; that such issues are to be decided on a case by case basis under the application of the basic law of negligence, bereft of the guiding principles and precedent which the law has heretofore attached by virtue of the relationship of the parties to one another.~

In my view, it is not a proper function of this court to overturn the learning, wisdom and experience of the past in this field. Sweeping modifications of tort liability law fall more suitably within the domain of the Legislature, before which all affected interests can be heard and which can enact statutes providing uniform standards and guidelines for the future.

I would affirm the judgment for defendant.

Some Questions to Ponder About *Rowland v. Christian*

A. Is the flexibility of the reasonable person standard a strength? Or is it a necessary evil for the great universe of situations for which we cannot hope to create specific rules, such as those traditionally used for conditions on real property?

B. Justice Burke's dissent suggests that such changes in the law are better made by the legislature so that "all affected interests can be heard" and so that the law can "uniform standards and guidelines for the future." But note that the "learning, wisdom, and experience of the past" that Justice Burke salutes – what he says is reflected in the traditional rules – are the product of judicial, not legislative, effort. Perhaps the dissent can be characterized as saying, in essence, that the judiciary has done such a great job developing these special rules, only the legislature should be trusted to change them. Is that a fair characterization? Is there any way to resolve the apparent tension in Justice Burke's reasoning?

Statute: California Civil Code § 847

California Civil Code § 847

Added by Stats. 1985, c. 1541 § 1.

The CALIFORNIA CODE:

(a) An owner, including, but not limited to, a public entity, as defined in Section 811.2 of the Government Code, of any estate or any other interest in real property, whether possessory or nonpossessory, shall not be liable to any person for any injury or death that occurs upon that property during the course of or after the commission of any of the felonies set forth in subdivision (b) by the injured or deceased person.

(b) The felonies to which the provisions of this section apply are the following: (1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, or threat of great bodily harm; (5) oral copulation by force, violence, duress, menace, or threat of great bodily harm; (6) lewd acts on a child under the age of 14 years; (7) any felony

punishable by death or imprisonment in the state prison for life; (8) any other felony in which the defendant inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant uses a firearm; (9) attempted murder; (10) assault with intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a noninmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing great bodily injury; (17) exploding a destructive device or any explosive with intent to murder; (18) burglary; (19) robbery; (20) kidnapping; (21) taking of a hostage by an inmate of a state prison; (22) any felony in which the defendant personally used a dangerous or deadly weapon; (23) selling, furnishing, administering, or providing heroin, cocaine, or phencyclidine (PCP) to a minor; (24) grand theft as defined in Sections 487 and 487a of the Penal Code; and (25) any attempt to commit a crime listed in this subdivision other than an assault.

(c) The limitation on liability conferred by this section arises at the moment the injured or deceased person commences the felony or attempted felony and extends to the moment the injured or deceased person is no longer upon the property.

(d) The limitation on liability conferred by this section applies only when the injured or deceased person's conduct in furtherance of the commission of a felony specified in subdivision (b) proximately or legally causes the injury or death.

(e) The limitation on liability conferred by this section arises only upon the charge of a felony listed in subdivision (b) and the subsequent conviction of that felony or a lesser included felony or misdemeanor arising from a charge of a felony listed in subdivision (b). During the pendency of any such criminal action, a civil action alleging this liability shall be abated and the statute of limitations on the civil cause of action shall be tolled.

(f) This section does not limit the liability of an owner or an owner's agent which otherwise exists for willful, wanton, or

criminal conduct, or for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

(g) The limitation on liability provided by this section shall be in addition to any other available defense.

A COMMENTARY on the statute by the Supreme Court of California:

[From *Calvillo-Silva v. Home Grocery,* 19 Cal. 4th 714 (Cal. 1998):]

Section 847 of the Civil Code provides that in certain circumstances an owner of any estate or other interest in real property shall not be liable for injuries that occur upon the property during or after the injured person's commission of any one of 25 felonies listed in the statute.~

The general policy of California with respect to tort liability is set forth in § 1714. For well over 100 years, § 1714 has provided in relevant part: "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself."

Three decades ago, *Rowland v. Christian* (1968) 69 Cal. 2d 108 relied upon the basic policy articulated in § 1714 to hold that a possessor of land generally owes a duty of care to all persons who enter the possessor's premises, whether the person is an invitee (business visitor), a licensee (social guest), or a trespasser.~

When the Legislature considered enactment of § 847 in 1985, it heard arguments from proponents of the measure that immunity was needed "to address the increasing number of attempts by criminals injured in the course of their crimes to demand compensation from their intended victims" and to provide a means to "facilitate the early dismissal of lawsuits of this type." In evaluating the matter, the Legislature specifically considered two controversial cases in which plaintiffs had sought substantial sums for injuries they incurred while trespassing on the property of others. In one case involving public property, a plaintiff sued a school district for $3 million

after he fell through a skylight during an attempt to illegally remove floodlights from the roof of a school gymnasium. The plaintiff, who was rendered a quadriplegic from the fall, obtained a settlement of $260,000 plus monthly payments of $1,200 for life. In another case, a motorcycle thief who trespassed and went joyriding across a farmer's field received nearly $500,000 in damages from the farmer for injuries he sustained after hitting a pothole in the field.~ The bill to enact § 847 was viewed as proposing a partial reversal of *Rowland v. Christian*, which in effect had permitted such lawsuits to be maintained. As noted by various legislative committees, the sentiment providing the impetus for the legislation was reflected in the following statements of the bill's author: "[W]hatever may be said in defense of the alleged right of a trespasser to sue a landowner for the trespasser's injuries sustained while trespassing, there is almost nothing to be said on behalf of the thief, a cattle rustler or other felon who is injured in the course of his felony. Such a wrongdoer should not be allowed by the law to add still more injury to insult."~

Some Questions to Ponder About California Civil Code § 847

A. What effect would § 847 have on a plaintiff who was injured while on property committing attempted voluntary manslaughter, which is a crime in California. Look at subsection (b) and consider provisions (1), (9) and (25) together. Is a person convicted of attempted voluntary manslaughter disallowed recovery in negligence? What do you think the legislature intended? Why do think they included (1), (9), and (25) as they did? Given (1) and (25), what would be the point of (9)?

B. Why do you think the legislature stopped short of completely overturning *Rowland* by reinstating the traditional common law rules that disallow any recovery in negligence for an unknown trespasser?

C. How do you think it came to pass that the would-be thief who fell through a skylight received a settlement for more than a quarter million dollars? Notice that this was not a court-entered judgment, but was instead a settlement. What circumstances can you think of that might have led to this result?

7. Actual Causation

"If we could fly out of that window hand in hand,
hover over this great city, gently remove the roofs,
and peep in at the queer things which are going on,
the strange coincidences, the plannings, the cross-
purposes, the wonderful chains of events, working
through generations, and leading to the most *outré*
results, it would make all fiction with its
conventionalities and foreseen conclusions most stale
and unprofitable."
– Sherlock Holmes, "A Case of Identity," by Arthur
Conan Doyle, 1892

Introduction

The chapter does double duty. Actual causation is not just an element of negligence, it is an issue in torts generally, including with strict liability, battery, trespass to land, etc. So you will learn the concepts here, in the context of negligence, but keep in mind that they are generally applicable throughout the landscape of tort law. (Your introductory course in criminal law may cover actual causation as well. The essential concept there is the same, although the ramifications can be quite distinct.)

You may find that actual causation is the simplest element to understand. And, in many cases, it is also the easiest to prove at trial. In other cases, however, showing actual causation can be the most perplexing challenge the plaintiff will face.

The requirement of actual causation is simply that there must be a cause-and-effect relationship between the defendant's conduct and the plaintiff's injury. The concept of breaching a duty of care is an almost endless jurisprudential puzzle. It requires real wrangling. Actual causation, by contrast, is almost self-explanatory. As we will see in this chapter, however, there are a few complications – some of them quite surprising – that bear some scrutiny. Nonetheless, the

relative simplicity of the concept means that there is considerably less to say about it.

When actual causation presents a live issue in a case, it is usually a factual matter rather than a legal one. That is, the issue is usually something to be resolved with evidence, witnesses, and logical thinking. The first case in this chapter, *Beswick v. CareStat,* presents a fascinating vehicle for thinking about issues of proving actual causation by a preponderance of the evidence.

Next are some complications, considered under the label of "multiplicity issues," that come about when there are multiple parties that could be said to be responsible, yet who could slip out of liability because of some seemingly paradoxical results that come from strict application of the actual-causation requirement.

The But-For Test

Here is 95% of the law of actual causation: If the injury would not have occurred but for the defendant's breach of the duty of care, then actual causation is satisfied; if not, then not. That is called the "but for" test. You simply ask, "But for the defendant's breach of the duty of care, would the injury have occurred?"

Now, you can ask same the question without using the words "but for." (E.g., "Absent the defendant's accused conduct, would the injury have occurred anyway?") But the words used by all the courts and all the learned treatises are "but for." Law, in general, is filled with long phrases, big words, counterintuitive terms, and numerical code provisions – not to mention a heavy helping of Latin. So it may come as something of a surprise that the lynchpin of actual causation comes down to a test named with two words of three letters each that mean exactly what they sound like they mean: "but for." Moreover, the term is universal. Everyone calls it the "but for" test, even a law-school-dean-turned-justice writing for a unanimous U.S. Supreme Court. *See Fox v. Vice,* __ U.S. __, 131 S.Ct. 2205, 2215 (2011) (Justice Kagan, discussing the "but-for test" in the context of civil rights claims under 42 U.S.C. § 1988).

Actual Causation vs. Proximate Causation

There are two distinct concepts within the umbrella of "causation" in torts. One is actual causation, the subject of this chapter. The other is proximate causation, the subject of the next. Since actual causation and proximate causation are conceptually distinct, this book treats them as separate elements. But many writers will lump them together as "causation." Thus, distinguishing the concepts from one another is the first step in understanding either one.

Actual causation is a matter of strict, logical, cause-and-effect relationships. Proximate causation – where proximate means "close" – is a judgment call about how direct or attenuated the cause-and-effect relationship is, and whether it is close enough for liability.

This example will help you see the difference. Suppose you drive a car carelessly and run over your neighbor's mailbox. Your neighbor, sitting on her front porch, has seen the whole thing. Bursting out of the car, you put your hands on your hips and say, with indignity, "My mother and father caused this to happen." Your neighbor screws up her eyebrows. "What on earth are you talking about?" she says. You answer, "My mother and father got together and they, you know, caused me to exist. So they caused this to happen to your mailbox. I'm so sorry."

In such a case it would be absolutely undeniably true that, as a strict matter of the logic of cause-and-effect, you mother and father caused the accident. But, of course, offering this as some kind of explanation for what happened to the mailbox is silly. The tension here is the difference between actual causation and proximate causation. It is true that your mother and father caused the accident in the sense of *actual causation.* But your mother and father did not cause the accident in the sense of *proximate causation.*

In everyday, non-legal English, when we use the word "caused," we are talking about some combination of actual causation and proximate causation. Most of the time, there is no need to separate out the concepts. But when it comes to legal analysis in torts, we need to specify exactly what we are talking about because, as you will see, the two concepts implicate entirely different sets of concerns.

Some Notes on the Terminology of Causation

A key stumbling block in learning actual causation is the vocabulary used to talk about it. Ironically, while the test for actual causation is easy, and while it is represented by a pithy, descriptive label with consistent usage – "but for" – the same cannot be said for the terminology used to talk about actual causation itself, or that of its neighboring prima facie element, proximate causation. Be on guard. The labels are myriad, confusing, and used inconsistently by lawyers and judges alike.

Actual Causation's Other Labels: Causation-in-Fact, Factual Causation, and More

What we are calling "actual causation" in this book goes by different names.

It is not enough to tell you that we will use the term "actual causation" in this book, and leave it at that. You have to learn the other terms, and how they are potentially confusing, so that you will be able to read and understand cases, briefs, and other legal documents no matter whom they are written by.

"Actual causation" is also called "causation-in-fact," "factual causation," and "direct causation." The term "causation-in-fact" actually appears to be the most commonly used term, with "actual causation," being the second most common.

We are using "actual causation" in this book, even though it comes in second place in frequency, because it is the most apt and least confusing term of those in common use. The potential problem with calling the requirement "causation-in-fact" or "factual causation" is that it makes it sound like it is not a legal concept, but is instead just something for the jury to decide based only on factual evidence. That perception would be mistaken, however. Actual causation is a judge-rendered legal doctrine, and the law of actual causation is applied, clarified, and evolved by judges and appellate courts. So "factual causation" is actually quite "legal."

No doubt the commonality of the term "causation-in-fact" owes to the fact that, in practice, that the actual causation element of the

plaintiff's case often presents only fact issues for the jury and leaves no questions that need to be decided by the judge. But that is not because actual causation is not legal, is it is only because the legal doctrine on actual causation is crystal clear in nearly all cases. That is to say, in the garden variety negligence case, all open questions with regard to actual causation will turn on how facts are interpreted and how the factfinder perceives the credibility of witnesses. The parties will not typically present the judge with conflicting interpretations of the law of actual causation, but will instead agree to use standard jury instructions on actual causation.

While we are on the subject of the tendency to call actual causation "factual causation," we should note that proximate causation is sometimes called "legal causation." The reasons for this are corollary to the prevalence of "factual causation" and "causation-in-fact" for actual causation. If you put the terms together, calling actual causation "factual causation" and proximate causation "legal causation," it sounds as if they are the factual and legal sides to a unified question of "causation." But that's not accurate. Actual causation and proximate causation are two conceptually separate requirements of the prima facie case for negligence, both of which involve the application of law to facts. Both implicate legal questions and both implicate factual issues. So, to avoid headscratchers like talking about the "law of causation-in-fact" or the "facts needed to show legal causation," we will stick to the terms "actual causation" and "proximate causation."

Now, there is another label for actual causation that is more confusing than any of the others by an order of magnitude. Sometimes, reported opinions will use the label "proximate causation" to refer to actual causation. Courts frequently say that the plaintiff cannot prove that something is the "proximate cause" of something else, when what they are talking about is failure to show actual causation. You will find an example in the *Beswick* case immediately below. Courts probably do this because they are lumping the concepts of actual causation and proximate causation together, but then instead of calling the amalgam "causation," they refer to it as "proximate causation." In such cases, you can mentally translate the

phrase as "causation, which includes a requirement that the causation be proximate."

These complications over terminology seem like needless headaches. You might think that a better casebook would have gone through all the cases and used bracketed insertions to make all the terms consistent. Yet that would be doing students a serious disservice. In the real world, the terminology is all over the place. So you might as well learn your way around it now.

For good or for bad, these sorts of lexicological tangles are part and parcel of our common law system. Using any of these terms – including "proximate causation" – to discuss actual causation cannot be called "wrong." These usages lead to confusion, yes, but they are not actually incorrect. Because court opinions are built by using various other court opinions as precedent, the body of common law exists as a web of interconnected nodes unorganized by any centralized authority. Some courts see one element of causation where other courts see two. Among the courts, different names spring up, and differences persist both out of a kind of linguistic drift and because of stubborn disagreement about which terms are best.

Check-Your-Understanding Questions About Causation Terminology

A. A court says, "The plaintiff cannot prove causation, in fact, because the plaintiff's injury is only tenuously and indirectly connected with the defendant's action." What concept of causation is the court talking about?

B. A court says, "The plaintiff's case fails for want of proximate causation since the plaintiff's injuries would have happened regardless of the alleged negligent conduct of the defendant." What concept of causation is the court talking about?

Think "A" Not "The"

The most important conceptual aspect of the law of causation for you to understand is that an injury can have more than one actual cause. Do not think in terms of whether some action is "the cause"

of an injury, instead ask whether the action is "a cause." This applies both to actual causation and proximate causation.

There is a tendency – perhaps endemic to human cognition – to want to find *the* factor or *the* person who is to blame. This is reflected in the question, "Who *really* is to blame?" (That phrase, in quotes, gets 299,000 hits on Google.) Clearly many people think this way when considering issues of responsibility. Tort law, however, does not. In reality, there are a nearly limitless number of causes for every event. And every event may have a nearly limitless number of effects. Tort law recognizes this, and thus actual causation doctrine only requires that there be a logical, actual cause-and-effect relationship between the alleged breach of the duty of care and the plaintiff's injury. If more than one breach of the duty of care was an actual cause of the plaintiff's injury, then the plaintiff can separately establish the element of actual causation as to each and every such breach, including against an unlimited number of defendants.

> ***Example: Leadfoot to Liver Lobe*** – A leadfoot driver shoots through a suburban intersection at 90 miles per hour. She hits a driver making a left turn who is texting instead of looking ahead. The vectors of the colliding masses of automobile wreckage converge to eject a spray of debris at a gasoline tanker parked nearby. The tank is structurally weak because of improper welds – welds that would have been fixed except that they were missed by a safety inspector. The welds burst and the spilling mass of gasoline erupts into flames near the plaintiff. While not seriously hurt, the plaintiff is nonetheless whisked to the hospital for observation where he is x-rayed. The radiologist misreads the film and counsels an unnecessary surgery. During that surgery, an unwashed scalpel, supplied by the hospital, is handed to an unobservant surgeon by an unobservant nurse. Either the surgeon or the nurse could have seen with a mere glance that the scalpel was covered with blood before it got anywhere near the patient's skin. Upon incision, the dirty scalpel transmits a flotilla of microbial pathogens to the plaintiff. Those pathogens precipitate a case of sepsis, eventually resulting in the plaintiff

losing the left lobe of his liver. Who actually caused the accident? We apply the but-for test, and we must conclude that the harm befalling the plaintiff would not have occurred but for the negligent conduct of the leadfoot, the texter, the welder, the inspector, the radiologist, the hospital, the nurse, and the surgeon. Each one represents a but-for cause. Every single one can be held liable. The plaintiff can sue one, some, or all. It's entirely the plaintiff's choice.

Proof and Preponderance

Like all elements of the prima facie case, the element of actual causation must be proved by a preponderance of the evidence. That is, it must be shown that it was more likely than not that the injury would not have occurred but for the defendant's breach of the duty of care. Where actual causation is an issue in a case, it is meeting this burden through the presentation of evidence to the jury that often poses the biggest challenge to the plaintiff.

Case: Beswick v. CareStat

The following case provides a rich set of facts to consider issues of actual causation. Note that the court in this case uses the phrase "proximate causation" to denote its discussion of actual causation questions. (See "Some Notes on the Terminology of Actual Causation," above.)

Beswick v. CareStat

United States District Court for the Eastern District of Pennsylvania
December 6, 2001

185 F.Supp.2d 418. No. 00-1304. Reported as "Beswick v. City of Philadelphia." Ralph Raymond BESWICK, et al. v. CITY OF PHILADELPHIA, et al. Civil Action No. 00-1304.

Chief Judge JAMES T. GILES:

I. INTRODUCTION

Ralph Raymond Beswick, Jr. and Rose Wiegand, Co-Administrators of the Estate of Ralph Richard Beswick, Sr., bring a constitutional claim pursuant to 42 U.S.C. § 1983 against

the City of Philadelphia ("City") and its former 911 call-taker, Julie Rodriguez, and, asserting pendent jurisdiction, bring state law negligence claims against Julie Rodriguez, and Father and Son Transport Leasing Inc., d/b/a CareStat Ambulance and Invalid Coach Transportation, Inc. ("CareStat"), a private ambulance service, its record owner, Slawomir Cieloszcyk, a purported owner and manager, Gregory Sverdlev, and two CareStat employees, Ruslan Ilehuk and Ivan Tkach (collectively "CareStat defendants").

Before the court are four Motions for Summary Judgment filed by:~ the CareStat defendants, for alleged failure to establish proximate cause;~ and~ Tkach~ and Ilehuk, on the grounds that~ there is no competent evidence supporting the claim of Tkach and Ilehuk's employee negligence~ .

For the reasons that follow, the City's motion is granted, the CareStat defendants' motions are denied, and the motions of Sverdlev, Tkach, and Ilehuk are denied.

II. FACTUAL BACKGROUND

Plaintiffs' claims all arise from the death of Ralph Richard Beswick, Sr. on February 11, 2000.~

Consistent with the review standards applicable to motions for summary judgment, Fed.R.Civ.P. 56(c), the alleged facts, viewed in the light most favorable to the plaintiffs, follow.

A. The Events of February 11, 2000

On the evening of February 11, 2000, Ralph Richard Beswick, Sr. collapsed on the dining room floor of the South Kensington home that he and Wiegand had shared for 23 years. From the living room where she had been watching television, Wiegand heard the "thump" of Beswick falling and went to him.~ There is some discrepancy in the record as to whether Wiegand went to Beswick immediately after he had fallen, or if some minutes had passed before she realized he had fallen. For the purposes of summary judgment, this court must assume that Wiegand went to him straightaway, as she indicated in her police statement taken eleven days after Beswick's death.~ Upon

entering the kitchen and finding Beswick lying prone on the floor, Wiegand immediately dialed the City's medical emergency response number, 911, and told the answering call-taker, Julie Rodriguez, that Beswick had fallen and needed urgent assistance, and requested an ambulance. Rodriguez asked if Beswick was breathing. Wiegand responded that he was. Without obtaining any further information, Rodriguez told Wiegand that "somebody" was "on the way."

Fire Department regulations require 911 operators to refer all emergency medical calls to the Fire Department, which then dispatches Fire Rescue Units appropriately equipped and staffed to respond to medical emergencies. The mechanical protocol of the job of 911 call-taker requires that the call be transferred immediately to the dispatcher upon termination of the emergency call. The last step of the mechanical protocol of the call-taker job is to punch a sequential button on a console to connect the dispatcher and transmit the acquired information from the caller. The dispatcher forwards the call to the Rescue Unit closest to the response site.

Instead of following established procedure, which would have continued the process to trigger the Rescue Unit's response, Rodriguez abandoned protocol and used a telephone located next to her console to call a private ambulance company, CareStat, to see if it could respond to the Wiegand call. Rodriguez, without the knowledge of the City, had recently begun working for CareStat as a dispatcher in her off hours, and had a secret deal with CareStat to refer to it all calls received in her City 911 capacity that she believed CareStat could handle. Under the City's protocol, Rodriguez was required to treat all 911 calls as emergencies requiring the City's Rescue Unit response. She had no discretion to act otherwise.

Immediately after speaking with Wiegand, Rodriguez telephoned Slawomir Cieloszcyk (also known as "Slavik"), the owner and dispatcher of CareStat. Upon telling Cieloszcyk that Ralph Beswick, Sr. was age 65 and unconscious from a fall, Rodriguez asked how long it would take CareStat to get to the Beswick home. Neither Rodriguez nor Cieloszcyk knew that the 911 call

was, in fact, a situation other than an emergency, such as a heart attack or other serious medical event. Cieloszcyk estimated a response time of fifteen minutes. He ended the conversation by saying, "We're on the way."

Arguably, corruptly, in violation of Pennsylvania's statutory requirements applicable to private ambulances, Cieloszcyk undertook a response to a medical situation to which CareStat was not authorized to respond. All 911 calls are assumed to be medical emergencies unless and until actual response and evaluation by the City Fire Department might determine otherwise. CareStat had no permission from the City to use 911 call-taker Rodriguez to refer calls to it and knew that the 911 call was being diverted from the City's established response system. Under these circumstances, Cieloszcyk nevertheless gave the Beswick response assignment to employees Ilehuk and Tkach, neither of whom had completed the requisite training to become a licensed EMT or paramedic. Ilehuk and Tkach, having the same knowledge as Cieloszcyk, including the deal with Rodriguez to compromise her City 911 job responsibilities, accepted the call and set out for the Beswick residence.

Ten minutes after the first 911 call had been made, because there was yet no emergency vehicle at the Beswick home, Wiegand's sister placed another 911 call at 8:02 p.m. to make sure that the City's rescue services had already been dispatched. This call also happened to have been received and handled by Rodriguez. Despite this second urgent call, Rodriguez did not punch it over to the City's emergency dispatch system. She called CareStat again, seeking assurance that its ambulance dispatched would arrive soon. Cieloszcyk assured Rodriguez that the CareStat ambulance was on the way as he had promised her.

Because an emergency equipped unit still had not arrived, Wiegand called 911 a third time. The third call came to a call-taker other than Rodriguez. He followed all Fire Department procedures and within a very short time period a City Fire Department Rescue Unit arrived at the Beswick home. Rodriguez became aware of the third Wiegand call. She

promptly called Cieloszcyk at CareStat and told him that a City paramedic unit was responding to the Beswick home, and requested that he hide her involvement in the misdirecting of the 911 calls. By the time that the CareStat ambulance arrived, the Fire Rescue Unit had already removed Beswick from the home. It was then that the Beswick family realized that the 911 call-taker had caused a private ambulance to attempt to respond to their emergency call, and that it was ill-equipped to have dealt with the Beswick medical emergency had it arrived earlier.

B. The Delay in Response to Beswick because of Defendants' Actions

The first emergency telephone call concerning Beswick was received by Rodriguez at the Fire Command Center ("FCC") at 19:53:41. The second call, placed by Wiegand's sister, was received by Rodriguez at 20:02:54. The third Wiegand call was received at the FCC by dispatcher Jose Zayes at 20:04:57, and the City Fire Department response was immediately dispatched.

Fire Battalion Chief William C. Schweizer confirmed that at the time Rodriguez received the first call at 19:53:41, Medic Unit No. 2 would have been available to respond from its base at Kensington and Castor, which was within several minutes of the Beswick home. Medic Unit No. 2, like other City Medic Units, was staffed with paramedics, who have more training than EMTs. However, at 20:04:57, when Zayes received the third call, Medic Unit No. 2 was no longer available. Nor was the next closest Medic Unit, No. 8, based at Boudinot and Hart Streets. In response to the 20:04:47 call, Medic Unit 31, the third closest of the City's Medic Units, was dispatched from Second Street, and Fire Department Engine No. 7 was dispatched from Kensington and Castor. However, Engine No. 7 is staffed only with EMTs, and EMTs are not permitted to administer epinephrine or atropine to patients. Medic unit 31 took 8 minutes and 34 seconds to arrive at 959 East Schiller Street. Engine No. 7 took 3 minutes and 34 seconds to arrive. Engine No. 7 and Medic Unit No. 2 – which was available for the first call but was never contacted by Rodriguez – were both based at Kensington and Castor, and would have had to travel the same

distance to get to the Beswick residence. Based upon this information, the total delay in getting a Medic Unit to respond to Beswick has been estimated by Battalion Chief Schweizer to be 16 minutes and 16 seconds. ⁴It is undisputed that Beswick died of a heart attack upon his arrival at the hospital. He was cremated two days later without an autopsy, so the exact magnitude of his heart attack can never be known.⁵

Plaintiffs have introduced evidence that this 16 minute, 16 second delay caused or contributed to the cause of Beswick's death, through the deposition testimony of Kale Etchberger and Joanne Przeworski, the two Fire Department paramedics who arrived on the scene as part of Medic Unit 31. Both testified that when they arrived, Engine No. 7's EMTs were already tending to Beswick. However, those EMTs, unlike paramedics, cannot administer medications. As indicated in these paramedics' depositions, Engine No. 7's Lifepack 500 defibrillator machine received a "shock advised" message at 20:07:48, which suggests that at the time, Beswick was either in a state of v-fib or v-tack; in other words, his heartbeat was not totally flat. Additionally, upon the administration of medications by Etchberger and Przeworski, Beswick's heart rate was temporarily restored. Both paramedics testified that they believed he had a chance to be saved when they first came to the scene. Plaintiffs' expert, Dr. Norman Makous, a cardiologist, would opine to a reasonable degree of medical certainty that based on established medical literature regarding observed cardiac arrests due to ventricular fibrillation, and assuming that Beswick was still breathing at the time of the first 911 call, that had Medic Unit No. 2 arrived after the first call, Beswick's chance of survival would have equaled, if not exceeded, thirty-four (34) percent.~

III. Discussion

Summary judgment under Federal Rule of Civil Procedure 56(c) is appropriate only if, drawing all inferences in favor of the non-moving party, "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material

fact and the movant is entitled to judgment as a matter of law." ~

Loss of a Chance Theory of Proximate Cause

CareStat defendants argue that on its face, a statistical survival rate of 34 percent, which plaintiffs' medical expert concludes is the chance for survival Beswick would have had if a City ambulance had been appropriately dispatched, is insufficient as a matter of law to establish proximate cause. In the alternative, CareStat defendants argue that additional factors unique to Beswick, such as preexisting heart and stroke conditions, as well as chronic obstructive pulmonary disease, necessarily served to reduce his chances of survival well below 34 percent; further, they contend that Wiegand's deposition testimony indicates that she waited "five or ten minutes" before responding to Beswick's collapse, therefore Dr. Makous' conclusions, which are based on observed cardiac arrests, are inadmissible. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) (holding that when expert testimony's factual basis, data, principles, methods or their application are called sufficiently into question, the trial court must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline).

1. For Purposes of Summary Judgment, Beswick's Chance of Survival, Absent Defendants' Negligence, was 34 Percent.

Addressing defendants' alternative argument first, for summary judgment purposes, this court must accept plaintiffs' allegation that Wiegand heard Beswick collapse and responded immediately, as she stated in the police report taken eleven days after Beswick's death. Further, Dr. Makous' conclusions are predicated upon an article from the New England Journal of Medicine, which states that "the rate of survival to hospital discharge for patients with a witnessed collapse who are found to be in ventricular fibrillation is 34 percent." Mickey S. Eisenberg, M.D., Ph.D., & Terry J. Mengert, M.D., "Cardiac Resuscitation," N. Eng. J. Med., vol. 344, no. 17, at 1304 (April 26, 2001). The article further states that "[w]hen cardiopulmonary resuscitation is started within four minutes after collapse, the likelihood of survival to hospital discharge

doubles." Id. at 1305. Viewing all facts of record in the light most favorable to plaintiffs, this court must assume that Wiegand called 911 immediately after Beswick's collapse, and that at that time, Medic Unit No. 2, with licensed paramedics, was available for dispatch and 3 minutes and 34 seconds from the Beswick residence. "The article does not specify whether the start of CPR within four minutes after cardiac arrest doubles the 34 percent chance of survival, or if it refers to some other statistic." Thus, a jury could conclude that Beswick's chances for survival were at least 34 percent, if not more, had the 911 call not been diverted to CareStat. Moreover, the 34 percent survival rate noted in the article and in Dr. Makous' conclusions does not assume only patients who are experiencing their first cardiac arrest, or patients without other pre-existing conditions. Thus, for the purposes of summary judgment, the court must assume that the factors surrounding the cardiac arrest of an individual with Beswick's medical history were taken into account by both the article and Dr. Makous.

The court finds Dr. Makous, a licensed physician who has spent more than fifty years practicing cardiology, is basing his opinions upon established modern medicine, stated, inter loci, in the New England Journal of Medicine, and thus is scientifically reliable. The 34 percent probability that Dr. Makous cites should not be confused with the degree of his medical certainty as to the accuracy of that opinion.

2. Loss of a Chance

Pennsylvania tort law follows the Restatement Second of Torts, § 323, which provides:

> § 323. Negligent Performance of Undertaking to Render Services. One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) *his failure to exercise such care*

> *increases the risk of such harm,* or (b) the harm is suffered because of the other's reliance upon the undertaking.

(emphasis added). See *Hamil v. Bashline*, 481 Pa. 256 (1978). In *Hamil*, plaintiff's husband, who was suffering from severe chest pains, was brought to the defendant hospital. Due to a faulty electrical outlet, the EKG machine failed to function. A second EKG machine could not be found and, upon receiving no further aid or treatment, *Hamil* transported her husband to a private doctor's office, where he died of cardiac arrest while an EKG was being taken. Plaintiff's expert witness estimated that the decedent would have had a 75 percent chance of surviving the attack had he been appropriately treated upon his arrival at the hospital. Following the introduction of all evidence, the trial court determined that plaintiff's medical expert had failed to establish, with the required degree of medical certainty, that the alleged negligence of the defendant was the proximate cause of plaintiff's harm, and directed a verdict for the defendant. The Supreme Court reversed, finding that cases such as this "by their very nature elude the degree of certainty one would prefer and upon which the law normally insists before a person may be held liable." The court interpreted the effect of § 323(a) of the Restatement as to address these situations, and relaxed the degree of evidentiary proof normally required for plaintiff to make a case for the jury as to whether a defendant may be held liable for the plaintiff's injuries. Accordingly, the court adopted the following standard:

> Once a plaintiff has introduced evidence that a defendant's negligent act or omission increased the risk of harm to a person in plaintiff's position, and that the harm was in fact sustained, it becomes a question for the jury as to whether or not that increased risk was a substantial factor in producing the harm. Such a conclusion follows from an analysis of the function of § 323(a).

In determining the burden of proof required ultimately to warrant a jury verdict for the plaintiff, the *Hamil* court again

relied on the Restatement Second of Torts, which reflected the state of the law at the time of its adoption in 1965; namely that the quantum of proof, or "substantial factor," necessary is a preponderance of the evidence.

⌙Comment (a) of § 433B states:

> a. Subsection (1) states the general rule as to the burden of proof on the issue of causation. As on other issues in civil cases, the plaintiff is required to produce evidence that the conduct of the defendant has been a substantial factor in bringing about the harm he has suffered, and to sustain his burden of proof by a preponderance of the evidence. This means that he must make it appear that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the harm. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.⌟

Accordingly, this court will permit Dr. Makous' testimony regarding the increased risk of harm to Beswick of 34 percent, and will allow the jury to determine, by a preponderance of the evidence, whether this increased risk brought about Beswick's death.~

D. Negligence of Ilehuk and Tkach

The CareStat defendants seek dismissal of Tkach and Ilehuk on the grounds that any negligence on their part could not have been a proximate cause of the death of Beswick because they arrived after the Fire Department, and thus never participated in the care of Beswick. Plaintiffs argue that it is not the lack of qualifications of these defendants that caused the delay in Beswick's treatment. Rather, they claim that these defendants should have turned down the assignment because of their lack of qualifications, which contributed to the delay in medical attention. Plaintiffs assert, and defendants do not dispute, that

> Ilehuk and Tkach had not yet completed their training as paramedics. Thus, plaintiffs contend, those defendants' acceptance of the 911 call was improper as a matter of Pennsylvania statutory law. Because of the breach of their duty to refuse a call for a residential transport, defendants caused a delay which allegedly was the proximate cause of Beswick losing all chance of survival.
>
> IV. CONCLUSION
>
> For the foregoing reasons,~ the CareStat defendants' Motions are denied, and~ Tkach, and Ilehuk's Motion is denied.
>
> An appropriate order follows.~

Some Historical Notes on *Beswick*

A. Perception of corruption and incompetence with the 911 system goes back well before *Beswick*. Rap group Public Enemy included "911 Is a Joke" on their seminal *Fear of a Black Planet* album in 1990. Flava Flav rapped:

> "Now I dialed 911 a long time ago
> Don't you see how late they're reactin'
> They only come and they come when they wanna
> So get the morgue, embalm the goner~
> You better wake up and smell the real flavor
> Cause 911 is a fake life saver"

B. Even though Julia Rodriguez knew that Ralph R. Beswick, Sr. died on February 11, 2000, according to newspaper accounts she again diverted calls to CareStat two days later on February 13. The Beswick call was one of eight allegedly diverted to CareStat on February 11 and 13, 2000. The others included a 34-week pregnant woman who was "leaking water," a man asking for an ambulance to transport his 78-year-old grandfather to the hospital, a person who was having blood-pressure problems following a dental procedure, a woman asking for transport to the hospital for her 77-year-old father after his feeding tube popped out, and two different women requesting assistance for their mothers who had fallen.

On March 21, 2000, between four and six in the morning, police arrested Julia Rodriguez, Slawomir Cieloszczyk, Ruslan Ilehuk, and Ivan Tkach. Rodriguez pled guilty to a series of charges. Cieloszczyk, Ilchuk and Tkach were convicted of various counts of conspiracy, theft of services, and recklessly endangering another person. In April 2001, the four were sentenced. Rodriguez received a one to two year prison sentence plus four years of probation and 100 hours of community service. Cieloszczyk received six to 23 months in prison plus three years of probation. Ilchuk and Tkach, each received six to 23 months of house arrest plus two years of probation and 200 hours of community service.

The CareStat ambulance company went out of business and the Philadelphia Fire Department severed its relationship with the private paramedic school where Rodriguez first met Ilchuk and Tkach.

Note on Loss of a Chance and Some Questions to Ponder

There are difficult philosophical questions brewing in *Beswick*.

The plaintiff's expert says that had Ralph Beswick gotten to the hospital without the CareStat-instigated delay, then he would have had a 34 percent chance of surviving. In other words, the odds are that Beswick would have died even if he had received the emergency services blocked by the defendants. So, bearing that in mind, did the defendants' actions kill Beswick? Or is it even possible to say?

Here we have what is called a "loss of a chance" situation, a recurrent problem in a great variety of torts lawsuits, especially those involving expert testimony that offers statistical probabilities.

There are two ways of conceiving of the loss-of-a-chance problem – as a question of causation, or as a question of whether or not there is an injury sufficient for a prima facie case. The distinction between these two modes of thought begins with understanding what, exactly, is the injury being sued upon.

If the injury is *the loss of a chance to survive*, then we encounter the difficult question of whether losing a "a chance" counts as a personal injury.

If, however, the injury being sued upon is *death*, then we have the difficult causation question of whether one can say that causing a decreased probability of survival is the same as causing death.

The loss-of-a-chance question is dealt with in a deeper way in the case of *Herskovits v. Group Health,* which appears later on in Chapter 9 as part of a discussion of the injury requirement of the prima facie case for negligence. *Herskovits* presents both ways of conceiving of the problem – as a question of causation, and as a question of the existence of an injury.

For now, however, in the case of *Beswick*, the injury being sued on is Beswick's death. That means we are confronted with the causation question. So, some questions to ponder:

A. The preponderance standard requires that the plaintiff prove that it is more likely than not (>50%) that the injury – death in this case – was actually caused by the defendant's negligent action. Can we say that we are more than 50% sure that Beswick's death was caused by the defendants' negligence when Beswick had a greater than 50% chance of dying anyway?

B. Consider the following from the court's opinion:

> "[T]his court will permit Dr. Makous' testimony regarding the increased risk of harm to Beswick of 34 percent, and will allow the jury to determine, by a preponderance of the evidence, whether this increased risk brought about Beswick's death."

Does this question make sense? How can an "increased risk" of death bring about someone's death? That is, how can someone be killed by an increased risk of being killed by something, as opposed to being killed by the something itself? And if this question is so conceptually vexed, then what is the point of putting it to a jury?

Note on "Substantial Factor"

In seeking a way to resolve the thorny loss-of-a-chance causation questions presented in this case, the *Beswick* court follows the lead of Pennsylvania state courts in looking to the "substantial factor"

requirement of the Restatement Second of Torts. The court quotes from Comment (a) of § 433B, "[T]he plaintiff is required to produce evidence that the conduct of the defendant has been a substantial factor in bringing about the harm he has suffered."

It is not clear, however, that engaging in a "substantial factor" inquiry does much to help. In fact, it is hard even to know what the "substantial factor test" is supposed to be. A team of torts scholars has noted that the substantial factor test is surrounded by ambiguity and uncertainty. They write, "[T]he test gives no clear guidance to the factfinder about how one should approach the causal problem. It also permits courts to engage in fuzzy-headed thinking about what sort of causal requirement should be imposed on plaintiffs, especially in cases that present complications in the availability of causal evidence." Joseph Sanders, William C. Powers, Jr., Michael D. Green, *The Insubstantiality of the "Substantial Factor" Test for Causation,* 73 MO. L. REV. 399, 430 (2008).

Multiplicity Issues

In any given case, trying to untangle the facts to determine but-for causation can be difficult. Conceptually, however, the but-for test itself is simple. And, as we discussed earlier, the but-for test is most of actual causation doctrine. When we do have to venture beyond the but-for test, actual causation doctrine gets considerably more complex.

The situations in which actual causation doctrine moves beyond the but-for test all have to do with concurrent negligent conduct by multiple actors – what we are calling in this book "multiplicity" issues. As you will see, once multiple negligent actors enter the mix, it is possible to create scenarios where the strict application of the but-for test will allow some or all of them to escape liability, even in situations where that seems at odds with our intuitions of fairness.

The multiplicity exceptions to the but-for test all apply when the but-for test *is not* satisfied – that is, when a defendant's negligent action cannot be shown by a preponderance of the evidence to be a but-for cause of the plaintiff's injury. In other words, the exceptions to the but-for test are for holding defendants liable even when the conduct

of those defendants was not a but-for cause of the plaintiff's injury. Stated still another way, the multiplicity exceptions to the but-for test help plaintiffs, not defendants. (To be entirely candid, this is not universally true. Some highly complex cases involving things like environmental damage have employed but-for exceptions against plaintiffs, but those cases are rare, involve exotic facts, tend to be idiosyncratic, and are arguably erroneously decided. We won't be covering them here.)

Also, keep in mind that just because there are multiple actors in a case, it does not follow that we need to look at exceptions to the but-for doctrine. In the vast majority of situations in the real world that involve multiple negligent defendants, the but-for test will indicate that each one of them is an actual cause of the plaintiff's injury.

Multiple Necessary Causes

In situations where there are multiple necessary causes – more than one action that had to occur in order for the plaintiff to be injured – then there is no need to look for an exception to but-for causation, because all such action satisfy the but-for test.

Let's go back to the basic rule: If a plaintiff would not have suffered the complained-of injury but for the negligent conduct of the defendant, then actual causation is satisfied. Stated in this positive form, the but-for rule has no exceptions. That is, it is true with no caveats that if a defendant is a but-for cause of the plaintiff's injury, then actual causation is satisfied.

Everything else in actual causation law is directed at expanding the range of defendants who will be deemed an actual cause of the plaintiff's injuries. That is, in rare circumstances, the law sometimes will allow the actual causation requirement to be satisfied against a defendant who cannot, because of strict logic or a lack of proof, be found to be a but-for cause of the plaintiff's injury. Those situations are exemplified in the cases found further below in this chapter: *Kingston v. Chicago & Northwestern Railway, Summers v. Tice,* and *Sindell v. Abbott Labs.*

But first, let's cement our understanding of how the but-for test works with multiple parties. Any and all defendants whose conduct is a but-for cause of the sued-upon injury has the actual-causation element satisfied against them. No such defendant can point to any other defendant and say, "That defendant is *really* to blame, so I should not be held liable." (You might want to re-review the *Leadfoot to Liver Lobe* example above.)

When we study damages later on, we will find out that it may be possible for one of multiple defendants to escape responsibility for a portion of the damages. Whether this is possible depends on the jurisdiction and the circumstances. Sometimes, one of many responsible defendants can, at plaintiff's election, be made to pay all the damages (joint and several liability), other times less culpable defendants can shrug off a part of the financial hit (such as through apportionment, indemnity, or contribution). But none of this changes the analysis with regard to the actual-causation element: But-for causation satisfies the element actual causation.

The situation where there is more than one but-for cause is sometimes called **multiple necessary causes**. We can state a rule for this situation as follows: **Where multiple causes are necessary to produce the harm, then each such cause is an actual cause.** Now, you can regard this as a rule. It's reliably accurate. But, in reality, calling it a "rule" is unnecessary. The only good that comes of stating this as a rule is to dispel an instinctual misapprehension that, in the ordinary case, there is only one true cause of a plaintiff's harm. All you need to do is apply the but-for test: If the defendant is a but-for cause, then the actual-causation element is met. Other defendants are simply irrelevant to the actual causation question.

Case: Jarvis v. J.I. Case Co.

The following case illustrates how any defendant who is a but-for cause is helpless to escape the actual causation element. Note that the court – continuing our cavalcade of motley terminology – uses the terms "legal cause" and "cause in fact" to refer to actual causation.

Jarvis v. J.I. Case Co.

Court of Appeal of Louisiana, First Circuit
October 11, 1989

551 So.2d 61. Harry Jarvis & Dorothy Jarvis v. J.I. Case Co., Teledyne Wisconsin Motor, Louisiana Municipal Risk Management Agency, Certainteed Corp., Koppers, Inc., and William D. Cook d/b/a Billy's Equipment Repair, a/k/a B&L Group, Inc. Nos. 88 CA 0700, 88 CA 1579 and 88 CA 1288. Before WATKINS, CRAIN and ALFORD, JJ.

Judge J. LOUIS WATKINS, JR.:

From a series of summary judgments dismissing all defendants, plaintiffs Harry and Dorothy Jarvis have appealed.

In their petition plaintiffs claimed damages for severe personal injury, alleging negligence and strict products liability on the part of the following defendants: Certainteed Corporation~, Koppers Company, Inc.~, J.I. Case Corporation (Case), Teledyne Wisconsin Motor~, and B&L Group, Inc.~

Mr. Jarvis was an experienced foreman of a repair crew for the City of Baker. On December 10, 1984, his crew was sent out to repair a natural gas leak. Mr. Jarvis was operating a backhoe powered by a gasoline powered internal combustion engine. Before the gas to the leaking line was cut off by the supervisor and a co-worker, Mr. Jarvis positioned the backhoe over the area of the gas leak. Plaintiffs allege that the backhoe backfired, causing the gas to ignite and explode. Mr. Jarvis was rescued from the fire, but he received severe burns to much of his body.

Several weeks prior to the accident city employees performed some maintenance work on the particular gas vein, which was constructed of PVC pipe designed, manufactured, and sold by defendant Certainteed. The workers used a solvent, Bitumastic No. 50, which was designed, manufactured, and distributed by defendant Koppers. The solvent was used at a coupling to facilitate that procedure, but in the process some of the solvent came into contact with the PVC pipe. The solvent allegedly caused the pipe to soften and eventually rupture.

Plaintiffs' cause of action against the remaining defendants focuses on the backhoe. At some undisclosed time prior to the accident, the backhoe, designed and manufactured by defendant Case, was taken to defendant B&L for an engine replacement. Defendant Teledyne designed and manufactured the engine which the repairman installed.

Thus, plaintiffs claim the use of four instrumentalities – the pipe, the solvent, the backhoe, and the engine – combined to cause the explosion and the resulting personal injury. The defenses available to the four manufacturers are identical. ~[A]ll defendants claim that they cannot be liable because Mr. Jarvis was the sole cause of his own injury when he knowingly placed the backhoe in contact with the leaking gas. The fallacy of defendants' argument is their failure to acknowledge the concept that there can be several causes in fact which combine, result in injury, and become legal cause.

Plaintiffs contend that the trial court erred in granting the motions because the defendants are not entitled to judgment as a matter of law. We agree. In oral reasons for judgment the trial judge appeared to focus on the nature of an internal combustion engine: that the substitution of a natural gas mixture in lieu of an oxygen mixture into the carburator will result in a "very spectacular combustion." However, the laws of physics do not resolve the question of legal cause. Although the trial judge stated he was basing his decision to grant the summary judgments on a duty-risk analysis of the facts, our own analysis leads to a different result.

[I]n this case there is an obvious ease of association between injury by explosion and the duty of manufacturers and repairmen to provide pipe, solvent, a backhoe and an engine that are not unreasonably dangerous, whether the danger arises from poor design, failure to warn, or from traditional negligence.

Furthermore, causation is clearly a question for the trier of fact. Any causal connection between the harm and a defendant mover's act, however slight when compared with other causes in fact, presents a jury question.~

Accordingly, we reverse the judgments of the trial court and remand the case for further proceedings. Costs of appeal are to be borne by the five appellees-defendants.

REVERSED AND REMANDED.

Multiple Sufficient Causes

Here we come to the first kind of case in which actual causation can be established against a defendant despite the fact that the plaintiff would have suffered the injury even if the defendant had not acted negligently – that is, even where the defendant is not a but-for cause. The occasion is where there are **multiple sufficient causes**, that is where there was more than one negligent act – i.e., breach of the duty of care – that would have caused the harm.

The doctrine is best explained with an example that drove the doctrine's development: twin fires. In fact, multiple-sufficient-cause doctrine might well be called the "twin-fires doctrine," since it is so closely associated with this particular circumstance: Defendant A negligently sets a fire that spreads through the countryside. Not far away, Defendant B negligently sets a fire that spreads through the countryside. Soon, the A fire and the B fire merge. The merged fire proceeds along a path that leads to the plaintiff's property, burning it down. Neither defendant represents a but-for cause of plaintiff's injuries. Why not? Ask the but-for question. Would the plaintiff have been uninjured but for the actions of A? No – the plaintiff would have been injured anyway, since the fire set by B was sufficient to cause a conflagration to move across the countryside to plaintiff's property. That is, if A had been careful and not set any fire, the plaintiff's house still would have burned down. So A is not a but-for cause of the plaintiff's injuries. The exact same can be said of B. If B had been non-negligent and never set the fire, the plaintiff's property still would have burned, since A's ignition of the countryside was sufficient to burn the path to the plaintiff.

If but-for causation were the only way to establish the element of actual causation against a defendant, then in a twin-fires case, the plaintiff would lose. Courts found this result unpalatable: The only reason the plaintiff winds up empty handed is that there was *more*

carelessness. So the courts fashioned doctrine that allows actual causation to be satisfied even where the but-for test is not. We can state a rule for these situations like this: **Where each of multiple discrete events, not committed by the same actor, would have been sufficient each in itself to cause the harm, then each act is deemed an actual cause, despite not being a but-for cause.**

Our twin-fire example had two negligent actors, each contributing a sufficient cause. But in its purest form, the doctrine does not require multiple negligent actors. One cause could have been set in motion nonnegligently – for instance, by someone who caused the fire despite exercising all due care, or even by natural causes. Not all courts would go so far – as the *Kingston* case indicates, below. Nonetheless, the application of the doctrine focuses on whomever the plaintiff has sued. If that defendant's actions were sufficient to cause the plaintiff's injury, then actual causation can be deemed satisfied despite the fact that the defendant's actions are not a but-for cause.

Case: Kingston v. Chicago & Northwestern Railway

The following is a classic twin-fires case that illustrates the doctrine.

Kingston v. Chicago & Northwestern Railway

Supreme Court of Wisconsin
January 11, 1927

191 Wis. 610, KINGSTON, Respondent, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

The FACTS in the OFFICIAL REPORTER:

Action to recover damages caused by a fire. One main line of defendant's railroad extends in a general north-and-south direction from Gillett, Wisconsin, to Saunders, Michigan, through Bonita. A branch line extends westerly from Bonita to Oconto Company's logging road. The branch runs generally in an east-and-west direction and is about ten miles in length. LaFortune's spur is on the branch about two miles west of Bonita. The spur consists of a sidetrack on the south side of and parallel with the branch track. Plaintiff's property was located on

a landing, known as Kingston's landing, and as the cedar yard, adjacent to and south of the spur track.

On April 29, 1925, a forest fire was burning about one half to one mile northwesterly, nearly west, of this landing. On the same date another fire was burning about four miles northeast of the landing. On April 30th these two fires united in a region about 940 feet north of the railroad track. The line of fire thus formed after the union was about forty or fifty rods east and west. It then traveled south and burned plaintiff's property, consisting of logs, timber, and poles on this landing or in the cedar yard. The plaintiff claims that both fires which united were set by the railroad company, one by a locomotive on its main line running north of Bonita, the other by a locomotive on the branch about three miles west of Bonita and about a mile in a westerly direction from the spur.

The jury found that both fires were set by locomotives belonging to the defendant company and that both fires constituted a proximate cause of the damage.~

Judgment was rendered for the plaintiff for the amount of the damages as found by the jury, and the defendant brings this appeal.

Justice WALTER C. OWEN:

The jury found that both fires were set by sparks emitted from locomotives on and over defendant's right of way. Appellant contends that there is no evidence to support the finding that either fire was so set. We have carefully examined the record and have come to the conclusion that the evidence does support the finding that the northeast fire was set by sparks emitted from a locomotive then being run on and over the right of way of defendant's main line. We conclude, however, that the evidence does not support the finding that the northwest fire was set by sparks emitted from defendant's locomotives or that the defendant had any connection with its origin. A review of the evidence to justify these conclusions would seem to serve no good purpose, and we content ourselves by a simple statement of the conclusions thus reached.

We therefore have this situation: The northeast fire was set by sparks emitted from defendant's locomotive. This fire, according to the finding of the jury, constituted a proximate cause of the destruction of plaintiff's property. This finding we find to be well supported by the evidence. We have the northwest fire, of unknown origin. This fire, according to the finding of the jury, also constituted a proximate cause of the destruction of the plaintiff's property. This finding we also find to be well supported by the evidence. We have a union of these two fires 940 feet north of plaintiff's property, from which point the united fire bore down upon and destroyed the property. We therefore have two separate, independent, and distinct agencies, each of which constituted the proximate cause of plaintiff's damage, and either of which, in the absence of the other, would have accomplished such result.

It is settled in the law of negligence that any one of two or more joint tortfeasors, or one of two or more wrongdoers whose concurring acts of negligence result in injury, are each individually responsible for the entire damage resulting from their joint or concurrent acts of negligence. This rule also obtains "where two causes, each attributable to the negligence of a responsible person, concur in producing an injury to another, either of which causes would produce it regardless of the other, … because, whether the concurrence be intentional, actual, or constructive, each wrongdoer, in effect, adopts the conduct of his co-actor, and for the further reason that it is impossible to apportion the damage or to say that either perpetrated any distinct injury that can be separated from the whole. The whole loss must necessarily be considered and treated as an entirety."

From our present consideration of the subject we are not disposed to criticise the doctrine which exempts from liability a wrongdoer who sets a fire which unites with a fire originating from natural causes, such as lightning, not attributable to any human agency, resulting in damage. It is also conceivable that a fire so set might unite with a fire of so much greater proportions, such as a raging forest fire, as to be enveloped or swallowed up by the greater holocaust, and its identity

destroyed, so that the greater fire could be said to be an intervening or superseding cause. But we have no such situation here. These fires were of comparatively equal rank. If there was any difference in their magnitude or threatening aspect, the record indicates that the northeast fire was the larger fire and was really regarded as the menacing agency. At any rate there is no intimation or suggestion that the northeast fire was enveloped and swallowed up by the northwest fire. We will err on the side of the defendant if we regard the two fires as of equal rank.~

Now the question is whether the railroad company, which is found to have been responsible for the origin of the northeast fire, escapes liability because the origin of the northwest fire is not identified, although there is no reason to believe that it had any other than human origin. An affirmative answer to that question would certainly make a wrongdoer a favorite of the law at the expense of an innocent sufferer. The injustice of such a doctrine sufficiently impeaches the logic upon which it is founded. Where one who has suffered damage by fire proves the origin of a fire and the course of that fire up to the point of the destruction of his property, one has certainly established liability on the part of the originator of the fire. Granting that the union of that fire with another of natural origin, or with another of much greater proportions, is available as a defense, the burden is on the defendant to show that by reason of such union with a fire of such character the fire set by him was not the proximate cause of the damage. No principle of justice requires that the plaintiff be placed under the burden of specifically identifying the origin of both fires in order to recover the damages for which either or both fires are responsible.~

By the Court. – Judgment affirmed.

Twin-Fires Cases and the "Substantial Factor Test" in the Multiplicity Context

The "substantial factor" inquiry – which we discussed in relation to the *Beswick* case – often comes up when courts confront situations – like that in *Kingston v. Chicago & Northwestern Railway* – where there are

multiple sufficient causes for a single injury. The idea is that if there are multiple sufficient causes, then to count as an actual cause, the conduct need not be a but-for cause, but must at least be a "substantial factor" in causing the plaintiff's injury.

Although courts frequently refer to this as a "test," it does not tend to function like one. Professor David A. Fischer has written, "The test offers no real guidance for determining when a factor is substantial or even a 'factor.' Courts and juries must rely on intuition to decide the issue." See Fischer, *Insufficient Causes,* 94 KY. L.J. 277, 280-81 (2005).

At any rate, courts have now gone on to use the "substantial factor" inquiry far beyond situations involving multiple sufficient causes. Fisher notes, "Over the years, courts used the substantial factor test to do an increasing variety of things it was never intended to do and for which it is not appropriate. As a result, the test now creates unnecessary confusion in the law and has outlived its usefulness." *Id.* at 277 (footnote omitted).

About the best that can be said about the "substantial factor" requirement is that it seems to function as a placeholder for a given court's intuitive sense of fairness – one that, while defying crisp logical specification, provides a path to a more comfortable result.

The Summers v. Tice Doctrine

Another situation in which the courts will permit actual causation to be satisfied despite the failure of the but-for test is the situation in *Summers v. Tice*: Multiple actors do something negligent, and while only one of them logically could be responsible for the plaintiff's injury, because of the circumstances, it is impossible to tell which one is. In such a case, the *Summers v. Tice* doctrine allows the plaintiff a presumption that each of the multiple actors is an actual cause; thus the burden of proof is shifted, leaving it to the defendants to disprove causation – if they can – on an individual basis.

This doctrine has been called "double fault and alternative liability" by treatise writers Prosser & Keeton, and "alternative causes and the shifted burden of proof" by the Dan B. Dobbs treatise. But in this

casebook, we will simply call it "*Summers v. Tice* doctrine," which is probably the most common shorthand, referring as it does to the bizarre case that gave the doctrine its birth.

Case: Summers v. Tice

The seminal case on *Summers v. Tice* doctrine is also its most vivid exemplar.

Summers v. Tice

Supreme Court of California
November 17, 1948

33 Cal. 2d 80. CHARLES A. SUMMERS, Respondent, v. HAROLD W. TICE et al., Appellants. L. A. Nos. 20650, 20651. In Bank. Carter, J. Gibson, C. J., Shenk, J., Edmonds, J., Traynor, J., Schauer, J., and Spence, J., concurred.

Justice JESSE W. CARTER:

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 1/2 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 10-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.

First, on the subject of negligence, defendant Simonson contends that the evidence is insufficient to sustain the finding on that score, but he does not point out wherein it is lacking. There is evidence that both defendants, at about the same time or one immediately after the other, shot at a quail and in so doing shot toward plaintiff who was uphill from them, and that they knew his location. That is sufficient from which the trial court could conclude that they acted with respect to plaintiff other than as persons of ordinary prudence. The issue was one of fact for the trial court.~

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 tort feasors, 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.~

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.~

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 tort feasors 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.~

The judgment is affirmed.

Check-Your-Understanding Questions About *Summers*

A. Could Summers have proved by a preponderance of the evidence that he would not have suffered his injury but for the negligent action of Tice?

B. Could Summers have proved by a preponderance of the evidence that he would not have suffered his injury but for the negligent action of Simonson?

C. Suppose, instead of things happening the way they did, Summers's eye was injured in the following manner: Tice shouts at Simonson that there is a quail in the direction Tice is pointing. This is despite the fact that Summers is fully visible in this direction. Simonson takes the shot, even though, had Simonson simply looked, he would have noticed Summers standing in the open in the line of fire. Under these tweaked facts, is the doctrine announced in *Summers v. Tice* now necessary for Summers to show actual causation against Tice and Simonson for the eye injury? Or do the actions of both Simonson and Tice individually satisfy the but-for test?

Market-Share Liability

The final situation we will cover in which a court will allow actual causation to be established notwithstanding a lack of but-for causation is that of market-share liability. This doctrine is applicable in situations that are similar to *Summers v. Tice,* where it is unknown who among multiple negligent actors caused the harm. But market-share liability can be used in situations where courts have been reluctant to extend *Summers*, in particular, where there is a large number of defendants and where those defendants are not quantitatively equal participants in the conduct that is alleged to have harmed the plaintiff.

Just as the multiple-sufficient-cause doctrine is closely associated with the twin-fires situation and the *Summers* doctrine is associated with simultaneously discharged shotguns, the market-share liability doctrine is closely associated with a particular set of facts: cancer caused by diethylstilbesterol – called "DES" – a drug given to pregnant women primarily in the 1940s, 50s, and 60s. It turns out

that an expectant mother's ingestion of DES can cause changes in a female fetus that eventually manifest as adenosis and cancer when the female child reaches at least the age of 10 or 12 years. Sometimes these problems do not manifest until adulthood. Many different drug companies manufactured DES, and because of the passage of time and the erosion of memory and destruction of records, it became impossible to determine who among them manufactured the particular tablets taken by any given plaintiff's mother.

As with *Summers,* in the DES cases multiple parties engaged in negligent or otherwise culpable conduct, and as with *Summers,* it was impossible for the injured plaintiff to show but-for causation against any single defendant. But the DES situation was unlike *Summers* in that some drug companies manufactured a large portion of the DES sold, while others manufactured only a very small sliver. There was also a very large number of manufacturers – upwards of 200. By contrast, in *Summers,* there were only two defendants, each of whom discharged similar shotgun shells at the same time with equal likelihood of injuring the plaintiff. Holding any one DES defendant responsible for all of plaintiff's damages – as *Summers v. Tice* would have allowed – seemed unfair to courts. But so did not providing plaintiffs any path to recovery. The solution was market-share liability, in which each defendant could be made liable for a portion of the plaintiff's damages corresponding to the defendant's share of the DES market.

Case: Sindell v. Abbott Labs

The following is the seminal case on market-share liability. It also demonstrates the potential influence of a student law-review note.

Sindell v. Abbott Labs

Supreme Court of California
March 20, 1980

26 Cal. 3d 588. JUDITH SINDELL, Plaintiff and Appellant, v. ABBOTT LABORATORIES et al., Defendants and Respondents. MAUREEN ROGERS, Plaintiff and Appellant, v. REXALL DRUG COMPANY et al., Defendants and Respondents. Defendant-appellees: Abbott Laboratories, Eli

Lilly and Company, E.R. Squibb and Sons, the Upjohn Company, and Rexall Drug Company. Opinion by Mosk, J., with Bird, C.J., Newman, J., and White, J., concurring. Separate dissenting opinion by Richardson, J., with Clark and Manuel, JJ., concurring. White, J., assigned by the Chairperson of the Judicial Council.

Justice STANLEY MOSK:

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, for the purpose of preventing miscarriage. 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.

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. 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.

In 1971, the Food and Drug Administration ordered defendants to cease marketing and promoting DES for the purpose of preventing miscarriages, and to warn physicians and the public that the drug should not be used by pregnant women because of the danger to their unborn children.

During the period defendants marketed DES, they knew or should have known that it was a carcinogenic substance, that there was a grave danger after varying periods of latency it would cause cancerous and precancerous growths in the daughters of the mothers who took it, and that it was ineffective to prevent miscarriage. Nevertheless, defendants continued to advertise and market the drug as a miscarriage preventative. They failed to test DES for efficacy and safety; the tests performed by others, upon which they relied, indicated that it was not safe or effective. In violation of the authorization of the Food and Drug Administration, defendants marketed DES on an unlimited basis rather than as an experimental drug, and they failed to warn of its potential danger. It is alleged also that defendants failed to determine if there was any means to avoid or treat the effects of DES upon the daughters of women exposed to it during pregnancy, and failed to monitor the carcinogenic effects of the drug.

Because of defendants' advertised assurances that DES was safe and effective to prevent miscarriage, plaintiff was exposed to the drug prior to her birth. She became aware of the danger from such exposure within one year of the time she filed her complaint. As a result of the DES ingested by her mother,

plaintiff developed a malignant bladder tumor which was removed by surgery. She suffers from adenosis and must constantly be monitored by biopsy or colposcopy to insure early warning of further malignancy.

The first cause of action alleges that defendants were jointly and individually negligent in that they manufactured, marketed and promoted DES as a safe and efficacious drug to prevent miscarriage, without adequate testing or warning, and without monitoring or reporting its effects.

A separate cause of action alleges that defendants are jointly liable regardless of which particular brand of DES was ingested by plaintiff's mother because defendants collaborated in marketing, promoting and testing the drug, relied upon each other's tests, and adhered to an industry-wide safety standard. DES was produced from a common and mutually agreed upon formula as a fungible drug interchangeable with other brands of the same product; defendants knew or should have known that it was customary for doctors to prescribe the drug by its generic rather than its brand name and that pharmacists filled prescriptions from whatever brand of the drug happened to be in stock.

Other causes of action are based upon theories of strict liability, violation of express and implied warranties, false and fraudulent representations, misbranding of drugs in violation of federal law, conspiracy and "lack of consent."

Each cause of action alleges that defendants are jointly liable because they acted in concert, on the basis of express and implied agreements, and in reliance upon and ratification and exploitation of each other's testing and marketing methods.

Plaintiff 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.

Defendants demurred to the complaint. While the complaint did not expressly allege that plaintiff could not identify the manufacturer of the precise drug ingested by her mother, she stated in her points and authorities in opposition to the demurrers filed by some of the defendants that she was unable to make the identification, and the trial court sustained the demurrers of these defendants without leave to amend on the ground that plaintiff did not and stated she could not identify which defendant had manufactured the drug responsible for her injuries. Thereupon, the court dismissed the action.~

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. According to a note in the Fordham Law Review, estimates of the number of women who took the drug during pregnancy range from 1 1/2 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. ([Naomi Sheiner] 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, those that have been decided resulted in judgments in favor of the drug company defendants because of the failure of the plaintiffs to identify the manufacturer of the DES prescribed to their mothers. The same result was reached in a recent California case. 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 or from the use of a defective product.

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, 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, 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, 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 that 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." 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. 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, an inference of negligence arose that defendants were required to meet by explaining their conduct.

The rule developed in *Summers* has been embodied in the Restatement of Torts. (Rest.2d Torts, § 433B, subd. (3).) Indeed, the *Summers* facts are used as an illustration.

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 "[ordinarily] … in a far better position to offer evidence to determine which one caused the injury" than a plaintiff, 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. 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.

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.~

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 the fact defendants do not have greater access to information that 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. 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.

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 that 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.

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.

II

The second principle upon which plaintiff relies is the so-called "concert of action" theory.~ 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.

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.~ 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.

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.

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. 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. 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. 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.

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 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 Co.* (1944) 24 Cal.2d 453, 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.

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*, "[the] 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." 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. 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