

NEGLIGENCE—PROXIMATE CAUSE

UNLIKELYHOOD OF PHYSICAL RECOVERY AS PRECLUDING DEFENDANT'S NEGLIGENCE FROM BEING PROXIMATE CAUSE OF INJURY

The subject of causation, with its accompanying intriguing "catch" words and phrases, has long been perhaps the most interesting, and simultaneously the most perplexing, phase of the law of torts. Ample attest to this statement are the myriad law review articles and exhaustive judicial opinions which have dealt with the topic. That the issue is by no means moot; that the controversy still waxes keen, is indicated by current decisions, which consistently present new and fascinating points for discussion.

In the recent case of *Kuhn v. Banker*¹ the Supreme Court of Ohio held that even though there is evidence of malpractice sufficient for submission to the jury of that issue, a verdict must be directed in favor of the defendant where it appears from the evidence that the *probability* of normal recovery by the patient was less than half, even in the exercise of due care by the physician. The court said: "To maintain her action the plaintiff was required to prove not only negligence or unskillfulness amounting to malpractice on the part of the defendant but also that the act of malpractice was the proximate cause of injury and damage to plaintiff."²

The facts were briefly: plaintiff had suffered a broken hip which was properly and efficiently set by the defendant, this setting being followed by a disunion occasioned by absorption through natural processes at the bony union—an occurrence disclosable only by means of X-ray photography, this method being the accepted medical practice in the particular locality. Plaintiff complained of a grating sensation in her hip, and exclaimed that her hip wasn't "together," but met with a scoffing attitude on the part of the defendant who failed to X-ray the fracture to ascertain whether the plaintiff's claims were founded on facts. Some three months thereafter an examination by an independent physician revealed the disunion, which, by this time, had progressed to such an extent as to be incurable by natural processes, and consequently extreme surgical methods, specif., wiring the fractured bone together, were, of necessity, resorted to, in order to remedy the situation to the fullest possible extent. By the disunion the plaintiff was from fifty to seventy-five per cent disabled from active occupation. Expert testimony estab-

¹ 133 Ohio St. 304, Ohio Bar, Feb. 21, 1938.

² *Ibid.*, p. 310.

lished as fact that, had the defendant followed standard practices and been guilty of no negligence whatever, there was nevertheless a lesser likelihood, rather than a greater one, that a bony reunion would have taken place. On these facts the directed verdict in favor of defendant, granted by the trial court, was affirmed by the Supreme Court.

The case raises the following question, viz.: Does the fact that an injury has less than an even chance to heal properly, prevent the negligence of plaintiff's attending physician from being the proximate cause of the injury accompanying the failure to heal?

The question of "probabilities" is encountered in many phases of the law, and the resolution of the problem is not always the same. Thus, in order to clarify subsequent discourse, and focus the discussion on the precise issue, it is advisable to draw the "fine line of distinction" between the use and significance of the word in its treatment in problems involving the judge and jury, and those involving causation. Probably as concise and accurate a statement of the true differentiation between the two is that made by Jeremiah Smith in his discussion of "Legal Cause in Actions of Tort,"³ where he says:

We submit that the word "probable," when used in laying down a test of duty to use care or when used in the alleged rules affirming or restricting liability for the consequences of a tort, does not carry the full meaning belonging to it when used in charging a jury as to the *quantum* of proof. When the judge tells the jury that the plaintiff must satisfy them that the existence of an alleged fact is *probable*⁴ (that a certain proposition is probably true), he means that the jury must find that the chances (the balance of probabilities) are in favor of the existence of the disputed fact. If the jury find that the chances in favor of its existence are only three out of six (and *a fortiori* if only three out of seven), they must find against the party upon whom the burden of proof rests. But if the chances of harm resulting to plaintiff, in case certain precautions are not taken by defendant, are three out of seven, the jury would often be justified in finding the defendant negligent if he could have taken those precautions and failed to do so. So when the question is one of causal relation it is a mistake to use language implying that a consequence in order to be "probable" must be "one that is more likely to follow its supposed cause than it is to fail to follow it." "Probable," both in testing the duty to use care and in the alleged rule as to causation, does not mean "more likely than not," but rather "not unlikely"; or, more definitely, "such a chance of harm as would induce a prudent man not to run the risk; such a chance of harmful result that a prudent man would foresee an appreciable risk that some harm would happen."⁵

³ Sel. Essays on the Law of Torts, p. 649, 25 Harv. L. Rev. 103, 223, 303 (Dec., 1911-Jan., Feb., 1912).

⁴ Italics writer's.

⁵ Sel. Essays on the Law of Torts, p. 649, 662. See pp. 662 *et seq.* for examples of terminology *re* "probable consequences" rule.

Somewhat more briefly stated, but to the same effect, as respects the charge of the judge to the jury, is the following remark from *Davis v. Guarnieri*:⁶ "It is not necessary to the determination of the issues in a civil case * * * that the triers should *believe* the existence of any material fact, but that the probabilities, when weighed by them, preponderate in favor of the fact which they find to be established by the proof. It is legally and logically impossible for it to be probable that a fact exists, and at the same time probable that it does not exist."⁷

As indicative of the importance of this distinction, and illustrative of the aura of confusion surrounding it in some decisions, the following quotation from Judge Smith's previously cited article⁸ is valuable:

There are some opinions which "betray a confusion of the principles of 'legal cause' with those underlying the requirements concerning certainty of proof" Suppose that plaintiff has failed to make out by preponderance of evidence that defendant's tort was, in fact, the cause of plaintiff's damage. Then the case should be decided on the short ground that plaintiff has failed to establish the existence of causal relation; and there is no occasion for the court to say whether, if that relation had been made out, they would nevertheless have denied recovery on the ground that the damage, even though it actually resulted, was improbable. Yet cases of this sort may be found where the court appears to base the decision upon the alleged rule that the improbability of a consequence bars recovery for any damage, even though it was actually caused by defendant's tort. Certainly such opinions ought not be counted as authorities in favor of the alleged rule.⁹

The "rules" for ascertaining the appropriate occasions on which to impose tort liability for injurious consequences accruing to others from acts or omissions on the part of the defendant are numerous, and due to the varied precepts which they recite are deserving of some notice. Among them "Lord Bacon's Maxim,"¹⁰ the "But For" rule,¹¹ Mill's

⁶ 45 Ohio St. 470, 490, 15 N.E. 350 (1887).

⁷ Approved in *Cincinnati, Hamilton & Dayton Ry. Co. v. Frye*, 80 Ohio St. 289, 88 N.E. 642, 131 Am. St. Rep. 709 (1909).

Accord: *Lippold v. Kidd*, 126 Ore. 160, 269 Pac. 210, 59 A.L.R. 875 (1928); *Ramberg v. Morgan*, 209 Iowa 474, 218 N.W. 492 (1928).

Re directed verdict, see: *Hubach v. Cole*, 133 Ohio St. 137, 140 (1938); *Hamden Lodge v. Ohio Fucl Gas Co.*, 127 Ohio St. 469, 189 N.E. 246 (1934); *Matuschka v. Murphy*, 173 Wis. 484, 180 N.W. 821 (1921); *Loomis v. Toledo Rys. & Light Co.*, 107 Ohio St. 161, 140 N.E. 639 (1923); *Cleveland Ry. Co. v. Sutherland*, 115 Ohio St. 262, 152 N.E. 726 (1926); *Doumitt v. Dicmer*, 144 Ore. 36, 23 Pac. (2d) 918 (1933).

⁸ Sel. Essays on the Law of Torts, p. 649.

⁹ *Ibid.*, p. 671.

The author makes the following additional statement: "Whenever a requisite to maintenance of a plaintiff's claim or any part of it cannot be established with sufficient certainty, the plaintiff fails *pro tanto*; but because of the principles concerning certainty of proof, not because of any principle of proximate cause." (P. 672).

¹⁰ "*In jure non remota causa, sed proxima, spectatur.*" Bacon's Maxims of the Law, *Regula I.*

Bacon comments: "It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause;

"Logician's Theory,"¹² and the "Last Wrongdoer Rule"¹³ are variously espoused as the correct and adequate test, but none presently receives too great acclamation. More important to consider is the "Probable Consequences Rule,"¹⁴ which asserts, according to Judge Smith,¹⁵ actually two rules, viz.: a wrongdoer is liable for probable consequences only, but (a) "if a consequence which actually resulted from defendant's tort was a probable consequence, then defendant cannot escape liability on the ground that his tort was not the legal cause"; however (b) "if a consequence which actually resulted from defendant's tort was an improbable consequence, then defendant is exonerated on the ground that his tort was not the legal cause."¹⁶ Clearly, the phrase "probable consequences"

and judgeth of acts by that, without looking to any further degree."

Jeremiah Smith comments: "Taken literally, the maxim would be understood as implying that the antecedent which is nearest in space or time is invariably to be regarded as the legal cause; * * * But it is a mistake to suppose that contiguity in space or nearness in time are legal tests of the existence of causal relation. No doubt these elements are often important to be considered in determining the question of fact as to the existence of such relation; but lack of contiguity or nearness would not, as matter of law, conclusively establish that the defendant's tort was not the cause of the damage." (25 Harv. L. Rev. 103, 114).

See *Bishop v. St. Paul City Ry.*, 48 Minn. 26, 50 N.W. 927 (1892), where plaintiff's paralysis did not develop until more than seven months after the accident, but nonetheless the defendant's tort was found to have been the proximate cause.

¹¹ This rule, which is sometimes called the "*Causa sine qua non*" test, is fairly widely accepted, but has the demerit of being inapplicable affirmatively, and consequently is not a sufficient sole test for determination of liability. The rule states that if, *but for* the commission of the defendant's tort the damage would not have occurred, then his tort is the legal cause of such damage; or, conversely, the defendant's tort is not the legal cause of plaintiff's damage if the damage would probably have occurred in the absence of such tort. However, in instances where there are two simultaneously operating negligent or wilful tortfeasors, each of whose act is sufficient in itself to bring about the harmful result to plaintiff, either, or both, in a proper instance, may be held liable. The rule makes no allowance for this obvious exception.

¹² Mill, *Logic*, 9 Eng. ed., 378-383.

This rule, in gist, affirms that "all antecedents are equally causes, or rather parts of the cause (the cause being the sum of all the antecedents), and we have no right to single out any one of them and call it the cause." (Sel. Essays on the Law of Torts, p. 649, 656, f.n. 26). It is open to the obvious criticism of being too theoretical to be helpful. "The distinction between cause and condition would be valuable, if there were any definite standard for determining what is a cause and what is a condition." (1 Jaggard, *Torts*, 64.) Says Pollock, ". . . the contrast of 'cause' and 'condition' is dangerous to refine upon; . . ." (Pollock, *Torts*, 8 ed., 464, note 1).

¹³ This rule is advocated by Dr. Wharton, and urges that "the legal cause is the last (or nearest) culpable human actor to be found in the chain of antecedents; *i.e.*, the one acting last before, or nearest to, the happening of the damage to plaintiff." (Sel. Essays on the Law of Torts, p. 649, 657). See Wharton, *Negligence*, 1 ed., section 85-90, and 134-145. Although the rule is generally effective and adequate it makes no allowance for two certain facts, viz., (1) the last tortfeasor may not be the efficient cause of plaintiff's damage, due to remoteness and exhaustion of the force which he set in motion; and (2) other antecedent parties, other than the last wrongdoer, may also be liable, and chargeable at the election of the plaintiff. See A.L.I. Restatement of the Law of Torts, Section 439, and Sections 442-453.

¹⁴ See 25 Harv. L. Rev. 103, pp. 114 *et seq.*

¹⁵ "Legal Cause in Actions of Tort," *supra*.

¹⁶ *Ibid.*, p. 114.

does not refer exclusively to consequences more probable than not,¹⁷ and today the rule is frequently stated in terms of "foreseeability."¹⁸ Lastly, the general rule proposed by Jeremiah Smith, at the conclusion of his essay on the subject of legal cause, requires that the defendant's tort must have been a "substantial factor" in producing the damage to the plaintiff. Smith phrases it thus: "To constitute such causal relation between defendant's tort and plaintiff's damage as will suffice to maintain an action of tort, the defendant's tort must have been a substantial factor in producing the damage complained of."¹⁹ This test is commended by reiteration in the Restatement of the Law of Torts²⁰ in Section 431, wherein "legal cause" is defined as follows:

The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) if there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

This appears to be a workable rule, if somewhat susceptible to individual interpretation of the phrase "substantial factor."²¹ Perhaps therein lies its value.

The essential problem which confronts us at this point is that of liability of individual tortfeasors in instances of multiple causation. As a general proposition it may be baldly averred that, in cases of concurrent negligence, defendants are liable as long as the negligent act of each is a substantial factor, sufficient to produce the damage complained of; and thus, no defendant is excused merely because the negligence of another defendant would have been sufficient of itself to cause the loss. This assertion is supported by the Restatement of Torts, *supra*, in Section 432 (1) and (2), where it is said:

(1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if it would have been sustained even if the actor had not been negligent.

¹⁷ *Supra*, p. 378

¹⁸ See article by Prof. Bohlen in 56 *Univ. Pa. L. Rev.* 331, note 79.

¹⁹ *Sel. Essays on the Law of Torts*, 649, 712.

²⁰ *Amer. L. Inst.* (1934).

²¹ See 21 *Mich. L. Rev.* 34, at p. 173, where Albert Levitt proposes the following set of rules by which to gauge proximate cause:

1. If a forbidden act produces a force which causes an injury, that act is the proximate cause of the injury.

2. If a forbidden act creates that which causes a force to produce an injury, that act is the proximate cause of the injury.

3. If a forbidden omission fails to stop a force from causing an injury, that omission is the proximate cause of the injury.

4. If a forbidden omission fails to stop that which produces the cause of an injury, that omission is the proximate cause of the injury.

5. If a forbidden passive situation concurs with lawful activities, or with activities that are outside the purview of the law, to produce an injury, that forbidden passive situation is the proximate cause of the injury.

(2) If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be held to be a substantial factor in bringing it about.

Obviously these statements refer to "harmful consequences" either potentially or actually resulting from tortious acts or omissions of the defendant. No suggestion is made as to the rule governing prospects of "recovery" from existing maladies or injuries, nor is any intimation offered that these rules were intended to apply to such situations.²²

Professor Joseph H. Beale propounds the following proposition: "Where the act is the failure merely of a legal duty, causation is established only when the doing of the act would have prevented the result; if the result would have happened just as it did whether the alleged actor had done his duty or not the failure to perform the duty was not a factor in the result, or, in other words, did not cause it."²³ This assertion is substantially in accord with the position taken by Jeremiah Smith in his substantial factor rule, *supra*, and with the later declarations of Section 432 (1) of the Restatement of Torts, *supra*. There is ample case material to lend additional support. For instance, in *Regina v. Dalloway*²⁴ it appeared that the defendant was driving negligently when a child ran in front of his horses and was killed. Erle, J., charged that if, in the exer-

²² The following is an excerpt from the Restatement of Torts, *supra*, commenting upon Section 432 (1) and (2):

Section 432(1):

(a) If, without the actor's negligent conduct, the other would have sustained harm, the same in character and extent as that which he receives, the actor's conduct, except in the situation dealt with in Subsection (2), not being even its necessary antecedent, is not a substantial factor in bringing it about.

(b) The statement in this Subsection is most frequently, although not exclusively, applicable where the actor's tortious conduct consists in a failure to take some precautions which are required for the protection of another's person or land or chattels. In such case, if the same harm, both in character and extent, would have been sustained even had the actor taken the required precautions, his failure to do so is not even a perceptible factor in bringing it about and cannot be a substantial factor in producing it.

[Illustration: *Ford v. Trident Fisheries Co.*, 122 N.E. (Mass.) 389 (1919).]

(c) * * * In order to prevent the actor's negligent conduct from being a substantial factor, it must clearly appear that the required precautions would have proved unavailing or that the harm would have been sustained even had the negligent act not been done.

[Illustration: *Reynolds v. Texas & P. R. Co.*, 37 La. Ann. 694 (1885).]

Section 432(2):

(d) The statement in Subsection (2) applies not only when the second force which is operating simultaneously with the force set in motion by the defendant's negligence is generated by the negligent conduct of a third person, but also when it is generated by an innocent act of a third person or when its origin is unknown.

[Illustration: *Anderson v. Minn., St. P. & S. Ste. M. R. Co.*, 146 Minn. 430, 179 N.W. 45 (1920). *Contra: Cook v. Minn., St. P. & S. Ste. M. R. Co.*, 98 Wis. 624, 74 N.W. 561 (1898); *Kingston v. Chicago & N.W. Ry.*, 191 Wis. 610, 211 N.W. 913 (1927).]

²³ Beale, "The Proximate Consequences of an Act," 33 Harv. L. Rev. 633, 637 (1920), Sel. Essays on the Law of Torts, p. 730, 734.

²⁴ 2 Cox, C.C. 273 (1847).

cise of the greatest possible care, he could not have avoided the accident, he must be acquitted. So too, in *Piqua v. Morris*²⁵ where the embankment of defendant's reservoir broke away and water injured plaintiff's land the negligence of the defendant in failing to maintain a sufficient spillway was held not to be the cause of the loss where it was shown that the flood on this occasion was so extraordinarily great that a sufficient spillway would not have saved the embankment. Thus, in *Stacy v. Knickerbocker Ice Co.*²⁶ defendant failed to maintain a fence around an opening in the lake ice from which ice had been removed. Plaintiff's horses escaped and crashed through the opening in the ice, being drowned. Evidence revealed that the horses were plunging in such a headlong dash that had defendant maintained an ordinarily sufficient fence it could not have checked them, and consequently verdict was rendered for the defendant.²⁷ And, in *Baltimore & Ohio R. Co. v. Sulphur Springs Independent School District*²⁸ albeit defendant negligently constructed an embankment across the mouth of a hollow through which ran a rivulet, the fact that the flood which swept through the hollow was of such unprecedented magnitude that it would have caused the damage notwithstanding defendant had not been negligent was held to be enough to preclude defendant's negligence from being a proximate cause of the damage accruing to the plaintiff. In each of these cases it must be noted that the damage would have occurred at all events; *i.e.*, the occurrence of the damage was in no sense problematical, but was, on the other hand, certain. There seems to be no question but that, in such a situation, where the concurring cause is innocent,²⁹ and the damage is inevitable despite all that defendant could do, the defendant should be absolved.

Some cases are, however, closer to the line. For example, in *Ford v. Trident Fisheries Co.*³⁰ the mate of defendant's vessel fell therefrom into the sea and never rose to the surface. The ship's boat was negligently lashed to the deck so that it could not be seasonably launched and used. Held: In the absence of evidence of the *possibility* of saving Ford (the mate), causation by the defendant had not been proved. Similarly, in *Gutman v. Bronx Borough Bank*³¹ the verdict was returned for the

²⁵ 98 Ohio St. 42, 120 N.E. 300 (1918).

²⁶ 84 Wis. 614, 54 N.W. 1091 (1893).

²⁷ Accord: *Sowles v. Moore*, 65 Vt. 322, 26 Atl. 629 (1893).

²⁸ 96 Pa. 65, 42 Am. Rep. 529 (1880).

²⁹ Except for casual references the instant discussion is not concerned with those problems wherein there are two tortfeasors concurring, either both actively, or one actively and one passively. For the purpose of this dissertation the concurring cause is assumed, if not otherwise stated, to be innocent, or of unknown origin, presumably innocent.

³⁰ 122 N.E. (Mass.) 389 (1919).

³¹ 188 App. Div. 664, 177 N.Y. Supp. 173 (1919).

defendant on the ground that its tort was not the substantial cause of the injury to plaintiff. Here plaintiff had sent a check to her broker to keep good her margin on a falling stock, and defendant wrongfully refused to cash it, whereupon she was sold out. The court was of the opinion that plaintiff could not recover unless she could show, by the course of the market, that otherwise she would not have lost both stock and check. Again, in *Reynolds v. Texas & P. R. Co.*³² where plaintiff, a large woman weighing more than 250 pounds, was hurrying to a train and fell down the steps in defendant's poorly lighted passageway, there was evidence that plaintiff "might" have fallen had the passageway been adequately lighted. The court instructed the jury to find for the plaintiff on the basis that the mere *possibility* that the accident might have happened without defendant's negligence in insufficient to break the causal chain between such negligence and the resultant injury. It will be noticed that in the *Ford* and *Gutman* cases the courts emphasized the fact that evidence of a "possibility" that the accident might have been averted was lacking, and the natural inference to be drawn from such stresses is that had such a possibility been disclosed by the proof, the negligent defendant would have been charged with liability. In the *Reynolds* case, however, the "possibility" was on the other side of the scales, thus making it a much stronger case, for it would seem fairly clear that the fact that there is a bare possibility that injury *might* occur despite the absence of any negligence on the part of the defendant is insufficient to exonerate the said defendant.

Chief Justice Peaslee,³³ in his article on "Multiple Causation and Damage,"³⁴ arrives at the conclusion that, where one cause is innocent, and the causes are strictly concurrent, the tortfeasor should not be liable.³⁵ This determination is not uncontested. In *Cook v. Minneapolis, St. P. & S. Ste. M. R. Co.*³⁶ the plaintiff sought to recover for the destruction of his dwelling by fire. It appeared that defendant had negligently permitted a fire to escape from its right of way, which fire was sufficient, in itself, to destroy plaintiff's home, but that simultaneously

³² 37 La. Ann. 694 (1885).

³³ James Robert Peaslee, LL.B., Boston Univ., 1886; Chief Justice, Supreme Court of New Hampshire.

³⁴ 47 Harv. L. Rev. 1127 (1934).

³⁵ Peaslee comments: "In the solution of this problem three elements have been stressed: (1) the immediateness of causation; (2) the quantity or percentage of causation where there are multiple causes; and (3) the strictly moral element, including the state or operation of the actor's mind." (*Ibid.*, p. 1128). This reference to the state of mind of the actor seems to be somewhat out of harmony with certain statements made by Smith, with whom Peaslee generally coincides, viz.: "There is no reason why probability should be any more essential to actual existence of causal relation in negligent torts than in intentional torts." (Sel. Essays on the Law of Torts, p. 649, 696).

³⁶ 98 Wis. 624, 74 N.W. 561 (1898).

operating with defendant's fire was one of unknown origin, presumptively innocently set, as by spontaneous combustion, this latter conflagration being also solely sufficient to destroy plaintiff's house. The court held for defendant, applying the "But For" rule.³⁷ Thus, in *Kingston v. Chicago & N. W. Ry.*³⁸ the court, under similar facts, absolved the defendant, but required it to satisfactorily prove to the jury that the second fire was innocently set. *Contra* is *Anderson v. Minneapolis, St. P. & S. Ste. M. R. Co.*,³⁹ which, under similar facts, held for the plaintiff. This latter view is supported by the Restatement of Torts in Section 432 (2), comment (d).⁴⁰ Peaslee, who cites these cases in his article,⁴¹ criticizes the *Anderson* case and the sustaining position taken by the Restatement, *supra*; he sides with Judge Smith in asserting that the "But For" rule is more appropriately applicable to these instances of concurring causation.⁴²

Up to this point the question of damages has not been squarely met. Clearly "damage done is an essential element in the cause of action for negligence,"⁴³ and thus, in these instances of dual causation wherein there is an innocent cause operating simultaneously with the defendant's tort, the argument is made that if the plaintiff is permitted to recover *in toto* he will be better off than he would have been had defendant done no wrong. Patently the counter to this contention is that had not the innocent cause been present the defendant's act would have accomplished the injurious result anyway. Some courts leave the question at this point, saying that since the object of tort law is compensation for wrong done, not punishment of the wrongdoer, these claims cannot be heard, or, if heard, cannot avail the complainant, for the burden resting upon the plaintiff to make out his case, these arguments, by leaving the situation in equipoise, defeat him.⁴⁴ Says Peaslee: "The points to be stressed are: (1) that the separable character of damage following upon the successive operation of innocent and guilty causes has been largely lost sight of by those who maintain that the guilty actor must answer for all,

³⁷ Footnote 22, *supra*.

³⁸ 191 Wis. 610, 211 N.W. 913 (1927).

³⁹ 146 Minn. 430, 179 N.W. 45 (1920).

⁴⁰ Note 22, *supra*.

⁴¹ 47 Harv. L. Rev. 1127 (1934).

⁴² In a series of "explanations" which Smith addends to his article is included the following: "Explanation 3. A defendant's tort cannot be considered a legal cause of plaintiff's damage, if that damage would have occurred just the same even though the defendant's tort had not been committed. *Exception*: Where two tortfeasors are simultaneously operating independently of each other, and the separate tortious act of each is sufficient in and of itself to produce the damaging result." (25 Harv. L. Rev. 312).

⁴³ 47 Harv. L. Rev. 1127, 1130.

⁴⁴ *Ibid.*

See *supra*, *Piqua v. Morris*, 98 Ohio St. 42, 120 N.E. 300 (1918).

and (2) that impending innocent causation may produce an actual loss where the threat of guilty but compensable cause would not."⁴⁵ Thus he urges that "If it appears that at last some part of the loss would have been avoided had the defendant acted prudently, liability should follow."⁴⁶ According to the author, "Separation of damage is no novelty in the law. Even when there are multiple wrongdoers, if the act of one has already caused harm, the act of another which then operates upon the damaged object creates no liability if it occasions no additional injury. The question is merely whether the damages are separable in fact."⁴⁷ *Quaere*: When was the damage done?⁴⁸

In *Dillon v. Twin State Gas & Electric Co.*⁴⁹ a boy standing on a high trestle bridge lost his balance and was falling to certain death on the rocks below when he was electrocuted by coming in contact with defendant's wrongfully charged electric wire. The verdict was for plaintiff, and judgment was for only such sum as the boy's prospects for life and health were worth at the time defendant's fault became causal. The court said:

Although he died from electrocution, yet if by reason of his preceding loss of balance he was bound to fall except for the intervention of the current, he either did not have long to live or was to be maimed. In such an outcome of his loss of balance the defendant deprived him, not of a life of normal expectancy, but of one too short to be given pecuniary allowance, in one alternative, and not of normal, but of limited, earning capacity, in the other.

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

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

His probable future but for the current thus bears on liability, as well as damage.⁵⁰

Suppose a trespasser, D, drills for oil on P's land, the reputation being that there is a valuable pool of oil underlying the land, and finds that in fact the land is barren of oil. Can P now sue D not only for the

⁴⁵ *Ibid.*, p. 1133.

⁴⁶ *Ibid.*, p. 1133.

⁴⁷ *Ibid.*, p. 1134.

⁴⁸ It must be kept in mind that where there is strict concurrence no separation of damage can be made.

⁴⁹ 85 N.H. 449, 163 Atl. 111 (1932).

⁵⁰ *Ibid.*, p. 456.

ordinary damages occasioned by his trespassing, but also for those sums represented by the diminution in value of the land?⁵¹

Was the damage a probably consequence of D's act? *I.e.*, was D's tort a proximate cause of the damage? Obviously it was. But what should be the measure of damage—the reputed value less the actual present value—or the mere loss occasioned by the trespass?⁵²

⁵¹ *Humble Oil & Refining Co. v. Kishi*, 276 S.W. 190 (Tex. Comm. App., 1925); *Martel et al. v. Hall Oil Co., et al.*, 36 Wyo. 166 (1927). See 4 Tex. L. Rev. 215—Green.

⁵² Judge Peaslee propounds the following example:

A's house on the sands is salable at \$5000 on Jan. 15th. Had B negligently destroyed it by fire that day, recovery would be \$5000. On Jan. 20th, the house had been so undermined that it was certain the next tide would carry it out to sea. Its value then was nil. If B negligently burned it between tides should he be mulcted \$5000? (a) Suppose the fire occurred on the 18th, when the effect of the sea was still problematical, and the house salable at one-half price? (b) Suppose the danger passed without damage to the house and the house could have been sold for \$5000?

Suppose the undermining were caused by the wash from B's negligently operated tug. One more day and actionable damage would have been done. X burns the building negligently. A could have sold the house for only one-half price. Why should X be liable for more? Answer: The answer is that the purchaser under these circumstances gets a bargain. He acquires the house, the sound value of which he could recover from X if the latter negligently burned it or from B if his continued operations washed it away, or a sound house if neither event occurred. (47 Harv. L. Rev. 1127, 1137.)

The problem of causation appears in the criminal field quite pointedly. Although it is necessary, generally, to make a fundamental distinction between wrongs inflicting injuries resulting in death, and those inflicting lesser injuries, where tort law is being considered, the same problem is not presented in the criminal law. The following situations are illustrative:

a) A advises B, a prisoner who is under sentence to be executed, to commit suicide. B, acting on this advice, commits suicide the night before the day fixed for the execution. A is guilty of murder. *Com. v. Bowen*, 13 Mass. 356, 7 Am. Dec. 154 (1816). Compare *Com. v. Mink*, 123 Mass. 422, 25 Am. Rep. 109 (1877).

b) A and B mutually agree to commit suicide. As a result of the attempt, A dies and B survives. B is guilty of the murder of A. *McMahan v. State*, 168 Ala. 70, 53 So. 89 (1910); *Turner v. State*, 119 Tenn. 663, 108 S.W. 1139, 15 L.R.A. (N.S.) 988, 123 Am. St. Rep. 758, 14 Ann. Cas. 990 (1907).

c) D's wife is mortally ill and suffering greatly. At her request D places a potion of "paris green" within her reach. She drinks it and dies. D is guilty of murder. *People v. Roberts*, 211 Mich. 187, 178 N.W. 690, 13 A.L.R. 1253 (1920).

d) A shoots B mortally wounding him. B, having about one hour to live, cuts his own throat and dies in five minutes. A is guilty of manslaughter. *People v. Lewis*, 124 Cal. 551, 57 Pac. 470, 45 L.R.A. 783 (1899).

d-1) Compare with (d): "If one man inflicts a mortal wound, of which the victim is languishing, and then a second kills the deceased by an independent act, we cannot imagine how the first can be said to have killed him, without involving the absurdity of saying that the deceased was killed twice." *State v. Scates*, 50 N.C. 420, 423-424 (1858). *Contra*: 53 Vt. 560.

e) "The thirteenth instruction asked by the counsel for the defendant was properly refused. The jury would have been informed substantially that a defendant is not guilty of murder in the killing of a person who has already been mortally wounded by another—a doctrine which cannot be seriously contended for." *People v. Ah Fat*, 48 Cal. 61 (1874).

f) A stabs B in self-defense. B turns to run when A stabs him in the back. B dies. A is not criminally responsible unless it appears the second wound was mortal. *Miller v. State*, 37 Ind. 432 (1871).

g) A shoots B. B, at the time, is in the last stages of consumption and has but a few months to live. The wound, had B been a well man, would probably not have been fatal. B dies within two months. A is guilty of murder. *Hopkins v. Com.*, 117 Ky. 941,

Thus far the discussion has been confined to a consideration of causation with respect to "harmful" consequences, whereas the ultimate focus of this discussion is concerned with probability of recovery as an item either exonerating or charging the negligent actor. The fact that defendant's negligence, standing alone, would be sufficient to charge him with liability, is not disputed, for purposes of this discourse.

In the preceding material it has been shown that the fact that there is a not unlikely chance for harm to result from a particular tort, whether negligent or otherwise, is sufficient to enable the injured party to hold the actor responsible for the resultant damage on the theory that his wrong is the proximate cause of the injury. Moreover, in certain instances liability has been imposed for negligent *acts* even where the loss was certain to occur notwithstanding—but where the factor complained of is a negligent *omission*, liability does not follow where the damage was sure to happen. But, there is no requirement that the consequences be more probable than not. But may a problematical (not unlikely) chance of recovery be the basis of an action on the theory that the tort has directly caused the loss of chance and resulted in damage? The principal case would say "no." However, in *Craig v. Chambers*,⁵³ wherein defendant was employed in his professional capacity as physician to treat plaintiff's injured arm, and failed to effect a cure, the court in *dictum* stated: " * * * any want of the proper degree of skill or care which diminishes the chances of the patient's recovery, prolongs his illness, increases his suffering, or, in short, makes his condition worse than it would have been if due skill and care had been used, would, in a legal sense, constitute injury."⁵⁴ In accord with this conclusion is *Rogers v. Kee*⁵⁵ which quotes the above excerpt from the Chambers case *verbatim*, with approval, and adds: "If the result to the plaintiff today is exactly what it would have been if the defendant had discovered seasonably and properly treated the fracture, * * * he has sustained no damage on account of the condition of the hip. But, if you find the condition of the hip is not all that could reasonably be expected to follow by reasonable discovery and treatment of the fracture, * * * then you may allow him such sum as you deem just and reasonable in compensation for such pain and suffering, bodily and mental, resulting from the defendant's

80 S.W. 156, 4 Ann. Cas. 957 (1904). The court said: "If one unlawfully wounds another, and thereby hastens or accelerates his death by reason of some disease with which he is afflicted, the wrongdoer is guilty of the crime thereby resulting." See 2 Bishop, Crim. Law, sec. 368, subsec. 3.

⁵³ 17 Ohio St. 254 (1867).

⁵⁴ *Ibid.*, p. 261.

⁵⁵ 171 Mich. 551, 137 N.W. 260 (1912).

negligence."⁵⁶ So too, in *Burke v. Foster*⁵⁷ the Kentucky court remarked: "We think, when a physician undertakes to give his attention, care, and skill to a given case of injury or disease, the patient is entitled to the chance for the better results that are supposed to come from such treatment, and as are recorded by the science of his profession to a proper treatment. That the patient might have died in spite of the treatment, or that "ordinarily" they did die in such cases * * * is no excuse to the physician who neglects to give his patient the benefit of the chance involved in a proper treatment of his case."⁵⁸

But probably the majority of the cases decided on this precise issue preponderate in favor of the position taken by the principal case.⁵⁹ Two of the leading cases so holding are *Green v. Stone*⁶⁰ and *Connellan v. Coffey*,⁶¹ in each of which the defendant, being sued for malpractice, had a verdict. In the former case the court said: "The duty rested upon the plaintiff to produce testimony before the jury to the effect that the earlier treatment of the case with reasonable probability would have aided the patient. As the testimony goes no further than to state that earlier treatment might have been beneficial, the jury were left purely to speculation as to whether the conduct of the defendant was a cause of the plaintiff's subsequent condition; and, under the circumstances, the court did not err in setting aside the verdict."⁶² In the *Coffey* case plaintiff broke his arm and defendant was called to attend, but gas gangrene developed to such an extent as to necessitate amputation. Complainant contended that the nature of proof of causation in malpractice cases is "peculiar and exceptional," and that plaintiff should recover if defendant's negligence "deprived the plaintiff of the chances of a better recovery presumed to flow from proper treatment." Citing the Restatement of Torts, Section 431 (a), (b),⁶³ the court held against this contention, and discussed "those negligent acts or omissions which play so minor a part in producing the injuries that the law does not recognize them as

⁵⁶ *Ibid.*, p. 563.

⁵⁷ 114 Ky. 20, 69 S.W. 1096, 59 L.R.A. 2707 (1902). Here plaintiff was suffering from a multiple-compound fracture of the humerus. Defendant physician examined him and failed to discover the dislocation of the shoulder. As a result plaintiff was permanently incapacitated. Evidence was that had defendant done all he should have done, plaintiff probably would have been more or less incapacitated.

⁵⁸ *Ibid.*, p. 26.

⁵⁹ In general, on the question of "Proximate Cause in an Action Against a Physician or Surgeon for Malpractice," see 59 A.L.R. 885.

⁶⁰ 119 Conn. 300, 176 Atl. 123 (1934).

⁶¹ 122 Conn. 136, 187 Atl. 901 (1936).

⁶² 119 Conn. 300, 306.

⁶³ See *supra*, p. 381

legal cases."⁶⁴ And, in *Smith v. Dumond*⁶⁵ the New York court held that "in order to entitle plaintiff to recover for the permanent injury which it was proven that he had sustained, it was necessary to prove that this permanent injury would not have been present had not the defendant been guilty of negligence or want of skill."⁶⁶ So too, in *Wallace v. Yudelson*,⁶⁷ where defendant failed to remove a bony growth until the third operation, on the issue of defendant's negligence, the court excluded evidence of an expert witness that had the bony growth been removed at first plaintiff would have been all right, as highly speculative and incompetent. But see *Chase v. Nelson*,⁶⁸ wherein the court stated that "He had a right in his defense to show that even if his act was a negligent one, that still the nature of Nelson's afflictions were of such a character that he would have died soon at all events; and although such a showing might not constitute a complete bar to the action, it was still important in mitigation of damages."⁶⁹ In *Lippold v. Kidd*⁷⁰ the Oregon tribunal concluded that a physician is not liable for the loss of a patient's eye because of his negligence in failing to remove a foreign particle from it, if the injury was such that the eye would have been lost had the particle been removed. There can be no quarrel with this particular statement, but a reading of the case will disclose that the court apparently disregarded utterly rather extensive testimony by the defendant himself that only the probabilities were against recovery by plaintiff, and that the eye might not have been lost.⁷¹

But what is the justification for absolution of the tortfeasor in these instances where the chances for recovery are initially less than half? It is said that the law of torts does not aim to punish the wrongdoer, but merely to compensate the injured party; but this cannot support decisions which, in effect, penalize the complainant because of the coincidental concurrence of an innocent substantial cause with the defendant's

⁶⁴ 122 Conn. 136, 142.

"If the chain of causation of the damage, when traced from the beginning to the end, includes an act or omission which, even though wrongful or negligent, is or becomes of no consequence in the results, or so trivial as to be a mere incident of the operating cause, it is not such a factor as will impose liability for those results." (P. 142.)

⁶⁵ 3 Silv. Supp. Ct. 358, 25 N.Y.S.R. 382, 6 N. Y. Supp. 242 (1889).

⁶⁶ *Ibid.*, p. 244 in N. Y. Supp.

⁶⁷ 244 Ill. App. 320 (1927).

⁶⁸ 39 Ill. App. 53 (1890).

⁶⁹ *Ibid.*, p. 59.

⁷⁰ 126 Ore. 160, 269 Pac. 210, 59 A.L.R. 875 (1928).

⁷¹ Here defendant, in negligent disregard of accepted medical practice in his locality, failed to use an ophthalmoscope, or take an X-ray picture, to ascertain the presence of a small steel sliver in plaintiff's eye. Plaintiff subsequently lost his eye. Testimony was conflicting, with experts for the defendant testifying that plaintiff would have certainly lost his eye at all events. However, defendant himself testified that there was a possibility that the eye might have been saved.

negligent tort, and simultaneously permit the actor to go scot free. The other argument against permitting a plaintiff to profit by a full recovery from the wrongdoer is valid, but ought not be conclusive. Nor should the formal contention that, the burden of proof being on the complainant, he fails to make out his case in these situations, prevail over the obvious equities of the case. Drawing, at last, our analogy to the previously considered cases of harmful consequences occasioned by multiple causation, it would seem not altogether infeasible to apply the suggested procedure of separating damage, and on this basis to assess the negligent defendant, who by his tort has deprived plaintiff of an opportunity, albeit it may be a meager one, to recover from an injury not originally inflicted by the defendant, such sums as represent his proportionate contribution to plaintiff's injury. That is, assuming the measure of defendant's liability to be represented by the unknown X, then, as the prospects of recovery are to one-hundred, so will X be to the total of the damages suffered by plaintiff. On this basis of computation defendant would not be punished, for he would be paying no more than his tort cost plaintiff; and plaintiff would not be unduly enriched, since his compensation would be solely gauged with respect to the reasonable worth of his expectancy of recovery under normal circumstances.

ROBERT H. JONES

PARTNERSHIP

DISSOLUTION AND ASSUMPTION OF DEBTS — EFFECT UPON RIGHTS OF CREDITORS

A dissolution agreement was drawn up by Benjamin and David Leiken, partners, operating as the Mansfield Beautician's Supply Co., wherein David Leikin agreed, for a consideration, to take over the assets and assume the obligations of said partnership. The continuing partner operated under the firm name for a five-month period, at the end of which time he was adjudged a bankrupt in a proceeding brought by his creditors. The State of Ohio filed a claim with the referee for sales tax claimed to be due the state, under the authority of Ohio G.C. 5546-9a. Part of said tax accrued prior to the dissolution of the partnership and the remainder subsequent thereto. The trustee contended that if any assessment at all could be made only that part which accrued subsequent to the dissolution was a provable claim against the bankrupt, and that in any case the state was not entitled to priority over general creditors, because the sum due the state was not a tax but a debt. The District Court for