Workable Rules For Determining Proximate Cause

(CONTINUED)

PART II

CAUSE IN FACT

The "But For Rule" or the "Sine Qua Non Rule" will usually, but not always, bring a sound result as to whether certain acts or omissions of duty are a cause in fact of the plaintiff's damage. The rule affirms that the defendant's wrong is the cause of the plaintiff's damage, if but for its commission the damage would not have happened.\(^{92}\) It has been contended\(^{93}\) that causation in fact should be identified with causation *sine qua non*; i.e., "The term actual cause" should be "used to denote any occurrence . . . whether an act of omission . . . or an operation of a force of nature, which is a necessary antecedent, or as it is often called a cause *sine qua non* of an event." But as cause in fact often exists where it is not a *sine qua non*, this seems unwarranted, as for example, where the damage would have happened although the defendant never acted and yet he did act and his act was a cause in fact of the damage. To illustrate, if \(A\) and \(B\) each sell a rope to \(C\) who is bent on hanging himself and \(C\) uses the rope purchased of \(A\), \(A\)'s selling the rope to \(C\) is a cause in fact of \(C\)'s hanging himself although it were clearly proven that \(C\) would have used the rope purchased of \(B\) if \(A\) had not sold him a rope. It has been said, too, that the rule "may be applied negatively to exclude liability, but not affirmatively to impose liability."\(^{94}\) But is not the truth just the reverse of this statement, at least, when the test is used as a test of cause in fact? The defendant's act may often be a cause in fact of the plaintiff's damage when it is clear that the damage would have occurred had he never acted. We can safely use the test this far. If the effect would not have been produced had the defendant not acted, the defendant's act is a cause in fact of the effect.

I. Omission

Where the defendant's cause is a failure to act, causation in fact exists only where doing the act would have prevented the consequence. For example, if the defendant who is under duty to fence a hole in the ice fails to do so and the plaintiff's horses run away and fall into the hole and are drowned, the failure of the defendant to fence the hole is


not a cause, if the fence, when erected, would not have stopped the horses in their flight.\textsuperscript{95} So where the defendant was under a duty to provide a lock to the gate of an elevator shaft, it was held his failure to do so was not a cause in fact of the deceased's walking into the shaft if he would have done so had the defendant provided a proper lock.\textsuperscript{96} The failure to put up a street railing is not a cause of the plaintiff's injury if the plaintiff would have been injured if the railing had been constructed.\textsuperscript{97} On the other hand, if the erection of the fence, or the providing of the lock or the street railing would have prevented in the first instance the horses from running into the hole, in the second, the deceased stepping into the elevator well, and in the third, the plaintiff's injury, the failure to provide these safeguards were causes in fact in each case of the injury suffered.

\textit{II. Positive Act}

Where the defendant's cause is a positive act as distinguished from an omission or failure to act, causation in fact exists if the defendant's act was a perceptible factor in producing the result, and there is no better test of cause in fact than just that. The "But For" test is usually a sufficient test of causation in fact in the case of a positive act. It is universally true that if the damage would not have occurred but for the defendant's act, the defendant's act is a cause in fact of the plaintiff's damage. Thus in \textit{Gilman v. Noyes},\textsuperscript{98} if the sheep would not have been eaten by bears had the defendant not left the bars down permitting their escape, the defendant's act in leaving the bars down is a cause in fact of the loss of the sheep. But the reverse is not always true; it is not universally true that the defendant's act was not a cause of the plaintiff's damage if the damage would have occurred had the defendant not acted, for it makes no difference if the result would have been produced by other causes if in fact it was produced by the defendant's act. As Beale says: "The question is not what would have happened, but what did happen."\textsuperscript{99} For example, \textit{A, B, C, and D} make misrepresentations of facts concerning a certain mine to induce the plaintiff to buy and the plaintiff buys in reliance thereon. Assume that it appears that the representation of each reached the plaintiff simultaneously and that the plaintiff would have bought on the representations of any three, but not on the representations of any less than three. It is thus apparent

\textsuperscript{95}Sowles v. Moore (1893) 65 Vt. 322, 26 Atl. 629; Stacy v. Knickerbocker Ice Co. (1893) 84 Wis. 614, 54 N. W. 1091.
\textsuperscript{96}Browne v. Siegel Cooper & Co. (1899) 90 Ill. App. 49. See also Weinberger v. Kratzenstein (1901) 35 Misc. 74, 71 N. Y. Supp. 244.
\textsuperscript{97}Wilson v. Atlanta (1878) 60 Ga. 474.
\textsuperscript{98}(1876) 57 N. H. 627.
\textsuperscript{99}Beale, \textit{Proximate Consequences of an Act} (1920) 33 Harv. L. Rev. 636.
that the plaintiff would have bought without the representations of A, or of B, or of C, or of D. Is it not clear that neither A, B, C, nor D should escape liability on the ground that his representation was not a cause in fact of the plaintiff's purchase? The defendant's representation, whether he was A, B, C, or D was a perceptible factor in inducing the plaintiff to purchase yet his representation was not essential for the plaintiff would have purchased without it.

Again, for example, suppose A sets a fire which combines with a fire set by B and the combined forces proceed and burn the plaintiff's property. A's fire is a cause although the loss would have occurred just the same had A never set a fire.

III. Proof of Cause in Fact

The use of the word "probable" in determining whether the defendant was negligent must not be confused with its use in determining whether the quantum of proof of a particular fact, in this instance, actual cause, has been sufficient. Where the word is used in the sense of predicting the future course of events, as in negligence, it has a more or less elastic meaning. It is commonly said that the subsequent event is sufficiently probable of occurrence to constitute negligence if a reasonably prudent man in the defendant's situation could have foreseen its occurrence at the time he acted. That means, of course, that the chances of its happening might be considerably less than fifty-fifty. If the defendant shoots into a crowd where a reasonably prudent man would foresee that he might hit someone, the chances of hitting the plaintiff are slight, but they are sufficiently great to render the defendant's act at least negligent toward the plaintiff. It is somewhat confusing to use the word, "probable," in defining negligence. For while probability of injury must exist, an act does not become negligent merely because its occurrence is "probable." The greater the utility of the actor's conduct the greater the chance he is warranted in taking, and the greater the interest which his act imperils the less the risk he is justified in taking. He must not take an unreasonable risk of harming another, but many factors other than probability of occurrence enter into a determination of what is unreasonable. In saving the life of a child in danger, a person is warranted in taking greater chances of being injured than in saving a box from destruction. So too, it may be unreasonable to take the same risk of injuring a child as a person might take of injuring a box.

When a jury is instructed that the evidence must satisfy them that the existence of cause in fact is probable, what is meant is that the jury must find "that the chances are in favor of the existence of actual cause. 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 the 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.\(^{100}\)

If the degrees of probability of the existence of cause in fact were arranged in order from the least to the greatest, it might form an hierarchy something like this: (1) Clearly not a cause. (2) Possible but very improbable that it was a cause. (3) Reasonably could have been a cause but probably was not. (4) More likely that it was not a cause than that it was. (5) More likely that it was a cause than it was not. (6) Reasonable possibility that it was not a cause but probably was. (7) Possible but very improbable that it was not a cause. (8) Clearly a cause. For the plaintiff to establish the existence of cause in fact, he does not have to prove to an absolute certainty that the defendant's act rather than some other cause was responsible for the damage. In the civil action he needs to prove only by a preponderance of the evidence and in the criminal prosecution the state must prove beyond a reasonable doubt. If it was (1) clearly not a cause, or (2) possible but very improbable that it was a cause, the court should non-suit the plaintiff or direct a verdict for the defendant. If it was (7) possible but very improbable that it was not a cause in a civil action, or (8) clearly was a cause in either a civil or criminal action, the court should direct a verdict for the plaintiff if all the other elements of legal liability are found to exist. If it appeared to the court to fall with (3), (4), (5), or (6) in the hierarchy given, the question should be left to the jury under instructions in civil actions that if they find that the defendant's act or omission was more likely the cause of the plaintiff's damage than not, or was probably the cause even though there was a reasonable possibility in their minds that it was not, and in criminal actions if they find that the defendant's act or omission was beyond a reasonable doubt the cause of the injury, they should find that the defendant's act or omission was a cause in fact of the defendant's damage.

Whether cause in fact exists is often difficult to determine;\(^{101}\) but where reasonable men can differ as to its existence or non-existence, it is a question for the jury to determine under appropriate instruction. For example, in *Tullgren v. Amoskeag Mfg. Co.*,\(^{102}\) the decedent became sick at defendant's factory and the overseer of the factory sent

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\(^{100}\) Smith, *op. cit.* supra note 92 at 116.

\(^{101}\) See *Ex parte Heigho* (1910) 18 Idaho 566, 110 Pac. 1029.

\(^{102}\) (1926) 82 N. H. 268, 133 Atl. 4.
her home in an automobile kept by the defendant. When about 700 feet from her home, the driver left her on the road to walk the rest of the way. Soon after reaching her home, she died. In an action to recover for her death, the question raised was whether or not this alleged negligence of the driver of the automobile in letting her out to walk the rest of the way home was a cause in fact of her death. There was testimony by experts that over-exertion by the decedent in her condition, as disclosed, was likely to cause death. The court held the defendant was not entitled to a directed verdict and on the evidence the jury gave a verdict for the plaintiff.

In Bishop v. St. Paul City Ry. Co.\textsuperscript{103} the plaintiff while a passenger on defendant’s street car was, by reason of the negligent handling of the car, thrown loose from the strap to which he was holding and against the floor. He was rendered unconscious for a few minutes, and received some scratches over his ear. He went about his business and these disappeared, but eight months later paralysis intervened. The difficulty was to trace the effects of the defendant’s acts into the paralysis which later developed. There was evidence of nervousness, sleeplessness and irritability from the time of the injury. The court was of opinion that there was evidence here from which a jury could properly infer a causal connection between the original injury and the later paralysis.

In Reynolds v. Texas & Pacific Ry. Co.\textsuperscript{104} the defendant negligently left its stairs leading from its station improperly lighted and a passenger made a misstep and fell down the stairs and was injured. The defendant did not escape liability merely by reason of the possibility that the injury might have happened had the stairs been lighted where the failure to light the stairs greatly multiplied the chances of the occurrence. If the passenger stepped on a banana peeling, the presence of which proper lighting would more likely than not have revealed, the jury would properly infer the absence of proper lighting was a cause in fact of her fall. If there was a defect in the heel of her shoe or she had weak ankles and frequently fell, the jury might very properly infer that the failure to properly light the platform was not a contributing factor in producing her fall.

Where the defendant is under a duty to properly fence a hole in the ice and the plaintiff’s team runs away without the plaintiff’s negligence and falls into the hole and is drowned, the fact that the fence was not erected or was improperly erected is a cause if the horses would not have drowned had the fence been erected; but the plaintiff, to

\textsuperscript{103} (1892) 48 Minn. 26, 50 N. W. 927.
\textsuperscript{104} (1885) 37 La. Ann. 694.
establish that the failure of the defendant to fence the hole in the ice was a cause, does not have to establish to an absolute certainty that the fence would have proved unavailing. It is sufficient proof if it appears that the fence would more likely than not have stopped the horses.

In Huckabee v. State,\textsuperscript{105} defendant was indicted for killing deceased by cutting him with a knife. The evidence was in conflict whether deceased was cut with a knife or with barbed wire with which he came in contact during the altercation. He had a pistol wound on his leg and various other wounds. Deceased was a bleeder, \textit{i.e.}, a person who bleeds freely from a slight wound. Even slight wounds were dangerous. Deceased died of loss of blood and probably from erysipelas inflammation. One physician testified that the wound on deceased’s neck, which may have been caused by the knife, would have accelerated his death. It was held error for the court to refuse to charge that unless the jury were convinced, that is, beyond a reasonable doubt, this being a crime, that the deceased died from the effects of the knife wound, they must acquit. The indictment only charged killing with a knife and the defendant cannot be convicted for the results of the pistol shot or of throwing him against the fence. It was said it is not necessary to show that the knife wound was the sole cause of death but it is sufficient if it contributed to the death.

In Ilfrey v. Sabine & East Texas R. Co.\textsuperscript{106} the plaintiff sued for damages for the destruction of his house, alleging that it was caused by the negligent construction of the embankment upon which the defendant’s railroad track was laid. The house was situated fronting on and very near to a body of water. The company track was built upon an embankment about four feet in height, about a mile west of the plaintiff’s house. A violent storm and a sixty-mile wind blew the water from the body of water and destroyed the plaintiff’s house. The plaintiff contends that the water which was driven by the storm over the town was retained by the railroad embankment and prevented from flowing over the level country west of it as it would otherwise have done and that in consequence, the height of the flood was increased and the house thereby destroyed. The case was tried without a jury. The trial court found that the storm was one of unusual violence amounting to an act of God against which no reasonable amount of diligence and skill could have provided. Judgment for the defendant was affirmed. If the house would have been washed away in the absence of the railroad embankment, then the embankment would not be the cause of the loss and the plaintiffs were not entitled to recover. If the evidence did show that the company’s embankment did dam the water and cause it to rise

\textsuperscript{105} (1909) 159 Ala. 45, 48 So. 796.
higher than it would have arisen but for the construction, it would still
be a question whether the increased depth of water contributed in any
manner to the destruction of the house. The court was warranted by
the evidence in concluding that it was not proved by a preponderance
of evidence that the embankment caused the loss of the property. If
the loss would have occurred although the embankment had never been
constructed, the plaintiff was not entitled to recover.

IV. Proof of Cause in Fact Where Causes Are Concurrent

Is there any distinction as to the matter of proof taken between
the case where the defendant's force sets in operation another force or
produces a condition or situation upon which another force operates
in succession to it and produces the injury and the case where the de-
fendant's force acts in cooperation with, or independently of, and
more or less simultaneously with other forces to directly produce the
result? In the former case the law requires the plaintiff to establish in
the civil action\textsuperscript{107} by the preponderance of the evidence and in the
criminal action\textsuperscript{108} beyond a reasonable doubt that the defendant's act
did in fact cause the injury; that is, the jury must be able to infer
from the evidence produced that the defendant's act was more likely
than not or beyond a reasonable doubt the cause of the injury. Do
the courts relax the requirements of proof of cause in fact in the cases
of concurrent causes by reason of the fact that either one of several
concurrent causes may have been sufficient alone to produce the injury
and because it will often be difficult to establish which of the alleged
concurring causes was in fact a cause?

In Corey\textsuperscript{109} v. Havener\textsuperscript{109} two defendants, operating separately two
motorcycles, drove up on either side of the plaintiff's horse and wagon
and frightened the horse by their negligent driving through emission of
steam and loud noises. The plaintiff lost control of his horses and suf-
f ered injury to himself and wagon. Witnesses could not say which of
the defendants caused the horses to take fright. The judge was re-
quested to instruct the jury that the burden was on the plaintiff to
show which one of the defendants was to blame, and that if it was not
clearly shown which one of the defendants caused the accident, the
plaintiff could not recover. The judge refused this instruction. The
court said it makes no difference if there was no concert between them
or that it is impossible to determine what portion of the injury was
curred by each. If each contributed to the injury, that is enough to

\textsuperscript{108} United States v. Knowles (D. C. 9th, 1864) 4 Sawy. 517.
\textsuperscript{109} (1902) 182 Mass. 250, 65 N. E. 69.
find both liable. Whether each contributed was a question for the jury.\footnote{110}

In \textit{Wilson v. State},\footnote{111} deceased and one \textit{W} had a quarrel and struck a few blows. The defendant and his brother came up, the defendant striking deceased on the head with a large rock and his brother stabbing him with a knife. There was no evidence that the defendant and his brother acted in concert, or that the defendant even saw what the brother was doing until after the blows were struck. It was held that the court erred in excluding evidence of the extent of the wound caused by the rock. If the defendant and his brother acted in concert, the court said, it would be immaterial which blow caused the death, but if not, it must be shown that the wound inflicted by the defendant materially contributed to the death of the deceased. The evidence, tending to show that it did not, should have been admitted. If the wound inflicted by the defendant did not materially contribute to the death of the deceased, and he did not act in concert with the other assailant, or have any knowledge of his intentions, he was not guilty. In this case it was possible to distinguish at least some of the effects of the two different causes.

In \textit{Regina v. Salmon},\footnote{112} three persons were charged with manslaughter. They went out for rifle practice and set up a target about 100 yards distant in a tree in a field near a house. The gun was sighted for 950 yards, and probably would be deadly at a mile. One shot killed a boy in a tree in his father's garden, 393 yards distant. It was not clear which one fired the shot that killed the boy. The court sustained a conviction of the three defendants, but emphasized the point that they were all engaged in a common pursuit and each was answerable for the acts of the other.

In \textit{Oliver v. Miles},\footnote{113} \textit{S} and \textit{O} were hunting together near a highway and both shot across the highway. A shot from one of the guns struck a boy who was on the highway in the eye, necessitating its removal. The boy's father recovered damages of \textit{O} though the proof did not show which one, \textit{O} or \textit{S}, did the damage. The court emphasized the point that they were hunting jointly.

In \textit{State v. Newberg},\footnote{114} the defendants, Newberg and Black were hunting deer about nine o'clock at night. While sitting by their camp fire they heard a noise made by the hoofs of a horse. Black reached for

\footnotesize{\textit{\begin{itemize}
  \item (Tex. Crim. 1893) 24 S. W. 409.
  \item (1880) 6 Q. B. D. 79.
  \item (1927) 144 Miss. 852, 110 So. 666.
  \item (1929) 129 Ore. 564, 278 Pac. 568.
\end{itemize}}}

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a spotlight and remarked, "Maybe it's a buck," directed its rays to the vicinity of the noise and exclaimed, "It's a buck! Harry, get your gun." Newberg fired three shots and then Black directed his spotlight at the object and said, "You never hit him, give me the gun." He took the gun and fired one shot. They had shot Leonard Olsen and his horse. Newberg appealed from a conviction of manslaughter on the ground of the refusal of the court to instruct, "Each of the defendants in this case cannot be guilty of the crime of manslaughter... If there is a reasonable doubt in your minds as to whether or not the deceased met his death as a result of a bullet from the gun when Newberg fired it, it is your duty to find him not guilty." The court held the refusal to give this instruction was not erroneous, but again the court emphasized the point that they were acting jointly.

Suppose in each, Regina v. Salmon, Oliver v. Miles, and State v. Newberg, these men had been acting independently. Must we excuse each of the defendants because it is clear that the bullet which took effect came from only one of their guns and it is impossible to say which? Should there be some relaxation of proof in this type of case? Let us look at some of the cases where a tendency to relax is shown.

In Northrup v. Eakes, the defendants negligently allowed crude oil to escape into a stream and this combined with the oil of several others to flow down the stream. The whole stream became ignited and the fire was carried down to the plaintiff's barn which was burned. The court held the defendants liable for the entire damage although their neglect alone might not have caused it. In this case, it would have been easy for the jury to infer that the defendant's oil was a contributing cause of the burning of the plaintiff's barn.

Apparently there has been some relaxation as to the burden of proof imposed upon the plaintiff in cases of fires from several sources uniting to produce injury. In Miller v. Northern Pacific Ry., where a fire set by one of the defendant's locomotives combined with a second fire from another source, an instruction to the jury that "A person who negligently sets a fire is responsible for the damage done by it, although such fire is joined by a fire set by another person and the two concurrently do the damage, if it appears that the first fire would have done the damage without the assistance of the second fire" was sustained. As worded, the instruction is certainly no relaxation in the requirement of proof of cause over that required in cases of successive causes. In Cook v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., the court limited liability of the defendant to cases where the fire

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115 (1919) 72 Okla. 66, 178 Pac. 266.
116 (1913) 24 Idaho 567, 135 Pac. 845.
117 (1898) 98 Wis. 624, 74 N. W. 561.
which combined with the defendant's was of responsible origin. This limitation of the defendant's liability to cases where the plaintiff had proved the other combining causes were from a responsible source was refused application in *Kingston v. Chicago & Northwestern Ry. Co.*, where the source of the combining fire was of unknown origin. The court refused to exempt from liability saying, "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 imputes 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." The *Cook* case was repudiated in toto by the Minnesota supreme court in *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, the court referring to the *Cook* case as follows: "But if it decides that if such fire combines with another of no responsible origin, and after the union of two such fires they destroy the property and either fire independently of the other would have destroyed it, then irrespective of whether the first fire was or was not a material factor in the destruction of the property, there is no liability, we are not prepared to adopt the doctrine as the law of this state."

It has been argued in support of this distinction that if the plaintiff is allowed to recover when one of the causes is innocent, plaintiff recovers without even proving that he has been wronged, but where both causes are wrongful the plaintiff at least proves that his injury was due to someone's actionable conduct. But this hardly seems a warranted distinction, for the plaintiff falls short of proving that the defendant has wronged him in either case. The rejection of this distinction is

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118 (1927) 191 Wis. 610, 211 N. W. 913. See discussion of these cases in Note (1927) 4 Wisc. L. Rev. 248.

119 (1920) 146 Minn. 430, 179 N. W. 45.
further buttressed by the fact that to adopt the distinction as a rule of law allows a wrong-doing defendant, whose wrong must have actually caused the injury in many cases, to escape because the plaintiff could not carry an impossible burden of proof. We conclude there is insufficient basis for the distinction taken in the *Cook* case and submit that it was properly rejected in *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*

But how far should the relaxation of proof go? Let us suppose cases differing somewhat from cases of several fires coalescing and where it is possible and even likely that each fire did actually contribute to the result. Suppose a case of shooting where if one bullet took effect it is not at all likely or possible that the others could have. Let us suppose that A and B simultaneously and independently shoot C and the bullets of each hit C in a vital spot and C is instantly killed. Even though each shot is alone sufficient to kill C, should either A or B or both escape liability on the ground that his act did not cause C's death? It would be futile to require the plaintiff in a civil action or the state in a criminal prosecution to prove that it was more likely than not or beyond a reasonable doubt that defendant A or defendant B, as the case might be, was the cause of C's death. Should this case be distinguished from the case where A and B independently shoot at C and but one bullet touches C's body? In such case, such proof as is ordinarily required that either A or B shot C, of course fails. It is suggested that there should be a relaxation of the proof required of the plaintiff or of the state, where the injury occurs as the result of one where more than one independent force is operating, and it is impossible to determine that the force set in operation by defendant did not in fact constitute a cause of the damage, and where it may have caused the damage, but the plaintiff is unable to establish that it was a cause.

Where two or more independent causes so combine or unite or bear such relation to each other and the injury that it is impossible to determine how far, if at all, any one of them was a factor in producing the result which must have happened through their several or collective operation, the plaintiff should be held to have offered sufficient proof if he shows (1) that the plaintiff's injury did happen from one of the several or the collective operation of such independent causes, of which the defendant's was one, (2) that it is impossible to determine that

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120 *Ibid.* See *People v. Gold Run Ditch & Mining Co.* (1884) 66 Cal. 138, 4 Pac. 1152 (pollution of stream by several persons); *Geuder, Paeschke & Frey Co. v. City of Milwaukee* (1911) 147 Wis. 491, 133 N. W. 835 (where plaintiff's property was flooded from the combined waters of the city's negligently broken sewer and a natural freshet and city was held not liable). See discussion of these cases in Note (1924) 71 U. of Pa. L. Rev. 346.
the defendant's act did not constitute a cause and (3) that the defendant's act was as likely a cause as any of the other independent causes involved. It is submitted that no distinction should be taken between the cases where each bullet of A and B are found in a vital place in C's body and where only one bullet is found. The plaintiff should not be required to establish that the defendant's bullet would certainly have killed the victim if the other did not.

Where only one of two or more simultaneous and independent forces causes a damage but it is impossible to determine which one, it is sometimes said that legal or proximate cause exists although cause in fact does not. In the Restatement,\textsuperscript{121} for example, it is stated, "In such a case, an act which sets either of these forces in motion, or an omission which permits the operations of either is regarded as the legal cause ... although the act or omission is not a necessary antecedent ... and so is not an 'actual cause.'" Professor Smith recognizes an exception to his rule that only a substantial factor can be a legal cause. He says "Where two tort-feasors 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,"\textsuperscript{122} each is liable, although the damage would have occurred just the same if his tort had not been committed.\textsuperscript{123}

While it is true that liability may be imposed in some of these cases of simultaneous, independent forces where cause in fact does not exist, because it seems better policy to lay down a rule of proof which makes such result possible than to regularly excuse wrongdoers who did actually cause the injury in question, it seems better to treat such cases as instances of relaxation in proof of cause in fact. To do so will avoid the confusion involved in saying legal cause exists where cause in fact does not and it more accurately states the problem. There are no cases where it can be truthfully said that legal cause exists where cause in fact does not though it may happen by reason of relaxation of proof that liability will be imposed in cases where cause in fact is not by the ordinary rules of proof shown to exist.

\textbf{V. Relation of Fault to Consequence}

Apart from the rare cases where policy demands relaxation of proof of cause on the plaintiff's part it is universally recognized that there must be found to exist between the defendant's act or omission and the harm for which it is sought to hold him liable a cause in fact relation. "It would be obviously opposed to any possible conception of justice that any one should be required to answer for a harm unless he

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\item\textsuperscript{121} 	extit{Restatement of the Law of Torts} (Am. L. Inst. 1925) 13, §6.
\item\textsuperscript{122} Smith, \textit{op. cit. supra} note 92 at 312.
\item\textsuperscript{123} See also McLaughlin, \textit{Proximate Cause} (1925) 39 Harv. L. Rev. 149, 153.
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\end{footnotesize}
had actually caused it."¹²⁴ The same reasoning applies where the defendant seeks to avoid liability by reason of the contributory negligence of the plaintiff. Plaintiff's negligent act must, in order to bar him, have been a contributing cause of the injury he received. If the injury would have occurred precisely as it did or its chances of occurrence would have been fully as great had he not acted, or had he acted carefully, he is not barred by reason of the fact that he was at the time of receiving the injury acting wrongfully.

With the growing recognition that in order to impose liability the defendant's act or omission must not only have caused the harm, but must also have been wrongful, there arises the question as to whether the wrongful character or quality of the defendant's conduct must have been essential to produce the harm, or is it enough that the defendant's conduct caused the harm and that it was also wrongful? For example, if the defendant negligently runs its train over a crossing and kills the plaintiff's cow, should the defendant be held liable if the cow would have been killed by a careful running of the train?¹²⁵ It would seem to be a wholly proper conception of the requirement of fault as an element of liability to require that the fault was necessary to produce the harm. It is not universally emphasized, but there is sufficient recognition of it to warrant the assertion that such requirement exists in the law. The fault of the defendant which is required for liability, or of the plaintiff to prevent recovery, is one which, at least in fact, causes the injury. The most frequent application of the principle here stated occurs in cases of violation of statutes or ordinances. It should be observed that this requirement of causal connection between the fault element and the harm is distinct from the requirement that the statute must have been designed to protect the plaintiff against the hazard which it has encountered.¹²⁶ There are three groups of cases denying liability for consequences resulting from violations of statutes or ordinances which have a bearing on this distinction.

First, there are the cases where a perfectly clear cause in fact relation exists between the wrongful character of the defendant's conduct and the consequence, but the defendant is exempted from liability by reason of the fact that the statute was not designed to protect the interest invaded or to protect it from the particular hazard which produced the injury. In Gorris v. Scott,¹²⁷ where a statute required ves-

¹²⁶ Dean Leon Green seems to assume the contrary. Green, Rationale of Proximate Cause (1927) 13, 40, 143; Green, Are There Dependable Rules of Causation (1929) 77 U. of Pa. L. Rev. 601, 608, 621, 623.
¹²⁷ (1874) L. R. 9 Exch. 125.
sels bringing animals by sea to ports in Great Britain to provide pens of certain dimensions for said animals in order to prevent the spread of infectious diseases in Great Britain it was held that the defendant was not liable for the loss of sheep by being swept overboard by the sea though compliance with the statute would have prevented the loss. Here it was the defendant's improper conduct in taking the sheep on board without providing pens which caused the loss. A cause in fact relation exists not only between the defendant's act and the result, but between the wrongful character of his act and the consequences, but liability is refused for another reason. The statute was designed to protect a different interest than that which was injured and against a different type of hazard than that from which the injury arose.

Where an act of Congress requires railroads engaged in interstate commerce to equip cars with automatic couplers to protect brakemen from the dangers of hand coupling, a brakeman injured in a collision which would not have occurred had the statute been observed cannot recover damages. The cause in fact relation between fault and the injury exists, but the consequence did not result from the hazard (i.e. that of coupling) against which the statute was designed to protect the brakeman.

Second, there are the cases where exemption from liability may rest upon either the absence of the cause in fact relation between the wrongful character of the conduct and the consequence thereof, or because it is more or less obvious that the statute was not designed to protect against the injury which occurred. Cases involving the violation of statutes prohibiting secular activities on Sunday, wagering or profanity are good examples of this type. A railway company which kills a cow at a public crossing while running its train on Sunday in violation of the statute is not liable in the absence of negligence. The statute against running trains on Sunday was not designed to protect against such hazard and the wrongfulness of violating the statute by running a train on Sunday had no causal connection with the result since the chances of the result would have been equally as great in running the train on a week day. The question is often raised whether a plaintiff is barred by the fact that he receives his injury while violating a statute as by travelling unlawfully on Sunday. To illustrate: The defendant leaves an excavation in the public street without levelling the earth. This is negligence. The plaintiff, travelling on Sunday, is upset by this pile of earth and injured. The plaintiff's wrongfulness in travel-

128 Tingle v. Chicago, Burlington & Quincy R. (1882) 60 Iowa 333, 14 N. W. 320. But see White v. Levarn (1918) 93 Vt. 218, 108 Atl. 564, where defendant, who accidentally shot plaintiff while both were hunting on Sunday in violation of statute, was held liable.
Ring on Sunday is not a cause of the injury he suffered. While it is true that his driving was a cause of his injury, for if he had obeyed the law and remained at home the accident would not have happened, still he might have been driving on the highway for some purpose legal on Sunday or have been driving on Monday, and the injury would have happened just the same, whether his driving was legal or illegal. In other words, the illegality of his driving was not a cause.129

In Sutton v. Town of Wauwatosa,130 the plaintiff was driving his cattle to market on Sunday in violation of a statute and suffered a loss by reason of a breakdown of a defective bridge which threw a number of his cattle into a stream in which they were drowned. The court held that the plaintiff was not barred from recovery by reason of his travelling on Sunday, saying, "the act or conduct of the plaintiff which can be imputed to him as a fault... must have some connection with the injury as cause to effect. This also seems almost too clear to require thought or elaboration. To make good the defense on this ground, it must appear that a relation existed between the act or violation of law on the part of the plaintiff and the injury or accident of which he complains."131

Where the statute forbade racing for wagers and the plaintiff was injured while racing with the defendant on the highway for a wager, through the wilful running down of the plaintiff by the defendant, the plaintiff was not barred from recovery. While his racing was a cause of the injury, the wrongfulness of his racing, that is, racing for a wager, was not a cause.132

Driving an automobile without a license for the car violates a statute, yet defendant is not liable for injury which he inflicts merely accidentally while so doing.133

129 Platz v. City of Cohoes (1882) 89 N. Y. 219. In this case the court said, "In such an action, the fault which prevents a recovery is one which directly contributes to the accident."

130 (1871) 29 Wis. 21.

131 But see Bosworth v. Inhabitants of Swansey (1845) 10 Met. (Mass.) 363; Hyde Park v. Gay (1876) 120 Mass. 589. These cases are no longer law in Massachusetts. See Read v. Boston & Albany R. (1885) 140 Mass. 199, 4 N. E. 227. The change was effected by statute.

132 Welch v. Wesson (1856) 6 Gray (Mass.) 505. In Thompson v. State (1901) 131 Ala. 18, 31 So. 725, where the defendant ran into deceased while racing on the public road, the trial court refused to charge that defendant was not liable unless he was running his horse at such a furious and reckless rate of speed as to be grossly negligent of the consequences to the lives of others. The court on appeal held that the instruction was properly refused, saying, "Horse racing along a public road is unlawful, and, if the homicide was caused by such unlawful act, it may have amounted to manslaughter in the second degree, regardless of whether the running was furious, reckless, and grossly negligent."

133 Hemming v. City of New Haven (1910) 82 Conn. 661, 74 Atl. 892; Atlantic Coast Line R. Co. v. Weir (1912) 63 Fla. 69, 58 So. 641; Armstead v.
The requirement of a license for the car is a revenue measure not meant to protect persons from personal injury and the wrong has no causal relation to the consequence.

Parking a truck on the wrong side of the street in violation of an ordinance does not make the defendant liable to the plaintiff's intestate, who stood upon the curbing, where the injury was not the result of the wrongfulness of the parking. "The rule as to the manner in which vehicles must proceed and stop created no safeguard against such a danger and disobedience of that rule was not the cause of the plaintiff's intestate's death." Parking on the wrong side of the street may in fact cause injury to persons using the highway and when such causal relation exists it is appropriate to attach responsibility to such act. Thus where the defendant parked his car on the wrong side of the road with headlights burning just behind the plaintiff's car parked properly on the right side of the road and a third car, its driver deceived by the position of the headlights crashed into it head-on, backing it into plaintiff's car the court held it could not be ruled as a matter of law that defendant's wrongful parking was not the proximate cause of the plaintiff's damage.

Running a street car eight miles per hour in excess of the ordinance limit does not preclude recovery by the plaintiff motorman for injury sustained by the falling upon him of a tree, which the defendant city had negligently let stand by the side of the track. The wrongfulness of his act did not increase the chances of the result, and the ordinance was not meant to protect against such a hazard.

In Lineberry v. North Carolina Ry. Co., the plaintiff, a boy nine years of age, in company with two other boys, was playing beside the defendant's railroad on a steep embankment. While so playing, one of the plaintiff's companions pushed the plaintiff into the defendant's train. As a result the plaintiff suffered the loss of a foot. It appears at the time of the accident that the defendant's train was operating at a speed of twenty-five miles per hour in violation of the town speed ordinance. While the court said that the defendant's negligence was not

the proximate cause of the injury to the plaintiff because the intervening act of the plaintiff's companion was the sole proximate cause of the injury, the proper explanation of the case seems to be that no cause in fact relation existed between the defendant's fault and the consequence which happened and that the ordinance was not designed to protect against such hazard.

Third, there is a group of cases where the statute was designed to protect the persons of the class to which the plaintiff belonged and against the type of hazard from which the injury resulted, yet the defendant escapes liability by reason of the fact that the wrongfulness of his act had no causal relation to the consequence which befell the plaintiff. Example of this type of case are injuries caused while violating statutes against speed limits, driving without lights or without proper brakes, carrying concealed weapons, trains going over crossings without signalling, failing to provide fire escapes, and practicing a profession without a license.

If the defendant drives on the public highway in excess of the speed limit and this excessive speed results in injury to the plaintiff, a person properly travelling on the highway, the defendant should not escape liability; the statute was made to protect the interest of the plaintiff from the hazard which he encountered and the causal relation of fault and consequence is clear. But suppose the defendant while going twelve miles per hour in violation of a city ordinance against travelling in excess of ten miles per hour but otherwise driving carefully runs over the plaintiff, a small child; if it is clear that he would have run over the child had he been driving eight or ten miles per hour he should not be held liable.\textsuperscript{129}

When the defendant while driving an automobile without an operator's license causes injury he is generally held not liable, although the purpose of such requirement is to promote public safety. This is based on the ground that the violation of the statute has no causal connection with the injury.\textsuperscript{140} Where the unlicensed driver like the one in \textit{Bourne}

129 Dean Green has difficulty explaining the case because by his test liability would be imposed when his instinct tells him it should not be. He explains it as one of those cases where rules won't work. Green, \textit{Are There Dependable Rules of Causation} (1929) 77 U. of Pa. L. Rev. 619.


See Hartnett v. Boston Store of Chicago (1914) 265 Ill. 331, 106 N. E. 837 for a case of violating an ordinance against selling firearms to minors. The holding in the case seems questionable.
v. Whitman had had a license but it had expired and he had applied for a new one, it is difficult to see any causal connection between the wrongfulness of his act and the consequence. As the court says: "If the illegal quality of the act had no tendency to cause this accident, the fact that it is punishable, because of the illegality, ought not to preclude one from recovery for harmful results to which, without negligence, the innocent features of the act alone contributed." But where the defendant is one who would not be entitled to a license because not measuring up to the competency required under the administration of the statute the connection of fault and consequence would be clear.

In Johnson v. Boston & Maine R. R., the court held that a plaintiff, who, while operating an automobile without a license, collided with the defendant's train, could not recover. The court succeeded in establishing a cause in fact connection between the plaintiff's fault and the consequence by saying the plaintiff in failing to secure a license was deemed conclusively incompetent. If plaintiff's failure to secure a license had no connection with the plaintiff's running into the defendant's train then his recovery should not be barred.

If the defendant violates a statute by driving his automobile without lights or without proper brakes, or if the defendant's railway engineer passes a crossing without signalling or the defendant fails to provide the statutory fire escapes or other device required by statute, and harm results to the plaintiff by reason of failure to comply with the statute, the defendant cannot escape liability. But it is not enough that the harm results from an act which constitutes a violation of the statute enacted to protect the plaintiff from such injury if there is no causal relation between the wrongfulness of the act and the consequence. If the injury would have occurred had the the defendant had proper lights burning or sufficient brakes or if adequate signalling or equipment with fire escapes or other devices would not have prevented the injury the defendant is not held liable.

In Martin v. Hersog, where the plaintiff and her husband were driving on the highway without lights in violation of statute and were negligently run into by the defendant and the husband killed, it was held that the plaintiff was not barred by the negligence in failing to have lights unless the omission of the "statutory signal" was a cause of the injury. The court said: "We must be on our guard, however, against confusing the question of negligence with that of the casual connection between the negligence and the injury. A defendant who

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141 (1911) 209 Mass. 155, 95 N. E. 404.
143 (1920) 228 N. Y. 164, 126 N. E. 814.
travels without lights is not to pay damages for his fault unless the absence of lights is the cause of the disaster. A plaintiff who travels without them is not to forfeit the right to damages unless the absence of lights is at least a contributing cause of the disaster. To say that conduct is negligence is not to say that it is always contributory negligence. ('Proof of negligence in the air, so to speak, will not do.' Pollock, Torts (10th ed.) p. 472).

This requirement of causal connection between fault and consequence is observed in Tieman v. Red Top Cab Co.,\(^{144}\) where the jury was permitted to find whether the absence of headlights on defendant's taxicab, which struck the plaintiff's husband, a pedestrian, contributed to the accident.

In Holman v. Chicago, Rock Island & Pacific R. Co.,\(^{145}\) where the statute required railroad companies to ring a bell or sound a whistle before reaching and while crossing any travelled public road or street and provided that the railroad companies should be liable for all damages sustained by reason of such neglect, the defendant company was held not liable. It was shown that the defendant company's train while crossing a street without ringing the bell or blowing the whistle struck and killed the plaintiff's cow, but there was no "evidence tending to show that the cow was killed by reason of such neglect."

Where the defendant fails to erect a fire escape as required by statute and it appears that the plaintiff's intestate could not or would not have used it if he had, the defendant is not liable for the injury done. Nor is a railroad company liable for failing to provide a headlight if the one killed was warned of the train's approach in time to avoid it.\(^{146}\)

Where the defendant practices his profession without a license, as for instance a chiropractor or a pharmacist, and injury results to a patient or a customer while so doing, the courts generally hold the defendant not liable if in his treatment of the plaintiff he measured up to the standard of care and skill required of the qualified practitioner.\(^{147}\)

Many states have statutes providing that whoever kills a human being without malice and involuntarily while engaged in the commission of an unlawful act is guilty of manslaughter. Taken literally, these statutes would make a defendant guilty of manslaughter if he, while driving with due care, accidentally ran over a person and killed him, if

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\(^{144}\) (1931) 67 Cal. App. Dec. 1, 3 P. (2d) 381.
\(^{145}\) (1876) 62 Mo. 562.
\(^{146}\) Note (1921) 15 A. L. R. 1534 collecting cases.
at the time he happened to be using profanity or was spitting in the street in violation of a statute. Courts have imposed the requirements in cases involving the violation of these statutes not only that the statute must have been designed to prevent injury to the person but also the death must have ensued as a consequence of the violation.\textsuperscript{148} In \textit{Potter v. State}\textsuperscript{149} where the defendant while carrying a concealed weapon in violation of statute caused the death of \textit{Y}, by reason of the discharge of the weapon while the defendant and \textit{Y} were engaged in a friendly scuffle, the court held the defendant was not guilty of manslaughter. The court imposed the requirement of a cause in fact relation between the wrongfulness of the defendant's act and the death. The court says: "With equal reason and force it may be asserted that the mere fact that the accused was unlawfully carrying the weapon in question at the time it was accidentally discharged is not, under the circumstances, a material element in the case, for it is manifest that such unlawful act did not, during the scuffle between the parties, render the pistol any more liable to be discharged than though the carrying thereof had been lawful."\textsuperscript{150}

Where the defendant, while operating his automobile, unlawfully causes death by his driving, he will not be held for manslaughter, if his act was not inherently dangerous or likely to cause death.\textsuperscript{161} Of course, where a statute forbids speed in excess of a definite rate and it clearly appears that the unlawfulness of the speed was the cause of death, the defendant will be held guilty.\textsuperscript{162}

But this causal connection of fault and consequence is required not only in cases involving the violation of statute, but equally in cases of common law fault.

Where the consequence follows an omission of duty or a failure to act, the connection of fault and consequence always exists. It is clear that if the result would have happened had the duty been performed the failure to perform the duty is not a cause in fact of the conse-


\textsuperscript{149} (1904) 162 Ind. 213, 70 N. E. 129.

\textsuperscript{150} \textit{Ibid.} at page 217, 70 N. E. at 131.

\textsuperscript{151} State v. Wersengoff (1919) 85 W. Va. 271, 101 S. E. 450.

But the courts have not stopped with exempting the defendant from liability where his fault consists in the violation of a statute or the failure to perform an affirmative duty; they have excused him from liability where his negligent affirmative act caused the damage, if the damage would have occurred had he acted carefully.

In Regina v. Dalloway,\textsuperscript{154} the defendant while driving negligently ran over a child, which he could not have avoided running over had he driven carefully, and the court held the defendant was not liable. In Barrett v. United States Railroad Administration,\textsuperscript{155} the defendant, who negligently ran its train over a crossing, was held not liable to the plaintiff who, while driving his automobile carefully, skidded on the ice into the defendant's train. It was shown that if careful signalling had been made by the defendant, the collision would nevertheless not have been avoided.

Where the defendant builds a dam, negligently constructing the spillway, and the dam gives way, and the water overflows the plaintiff's premises below, the defendant will not be liable if the consequences would have occurred had the dam been carefully built.\textsuperscript{156}

In Bellefontaine & Indiana Ry. Co. v. Bailey,\textsuperscript{157} where it was alleged that defendant negligently ran its train so as to kill the plaintiff's horses, it was held error to refuse to instruct the jury that though the defendant was negligent, the plaintiff must fail in his action if the jury found that due care would not have prevented the injury.

In Titcomb v. Fitchburg Ry. Co.,\textsuperscript{158} where the defendant had provided insufficient railing to its approach to a highway bridge which it was bound to maintain over its roadbed, the jury were instructed that if they were satisfied that the injury to the plaintiff would not have occurred if the railings had been sufficient, they must find a verdict for her. With respect to this instruction, the Supreme Court of Massachusetts observed: "So far as such fence would be effectual to guard against injury from the frightening of a horse about to enter upon the bridge, by the approach of a train of cars passing under the bridge, the plaintiff was entitled to that protection. Not that the defendant was bound to maintain a barrier that would in all cases stop the progress of a frightened horse about to enter upon the bridge, but it was bound to maintain and keep in repair a suitable and proper fence at..."
the place; and if the discharge of this duty would have prevented the occurrence of the present injury, and the plaintiff is shown to have been without fault on her part, the railroad company may properly be charged in the present action. The fact whether such a fence would have prevented the occurrence of the injury may be a difficult one for the jury to find, but the burden is on the plaintiff to show this, and if she can establish it the defendant may be held liable for the injuries sustained."

In *Whitney v. Northwestern Pacific Ry. Co.*, the court was of the opinion that the plaintiff would not be barred by her intestate's negligent failure to stop, look, and listen, if stopping, looking and listening would not have prevented his death.

*Mahoney v. Beatman* presents this problem of relation of fault on the part of the plaintiff to consequence in a very clear way. In that case the plaintiff was driving a Rolls Royce automobile southerly on the Hartford-New London turnpike at sixty miles per hour and the defendant was driving a Nash northerly on the same turnpike. It was a clear day and the road was straight for three-fourths of a mile. The concrete portion of the road was eighteen feet wide and there was a gravel shoulder about four feet wide on each side. The defendant had his head turned talking to some persons in the rear seat and his car veered over on to the left of the middle of the concrete pavement. The plaintiff's chauffeur to avoid collision drove onto the gravel shoulder on his right hand side of the road, the left wheels of the car still remaining about two feet over from the edge of the concrete. The Nash's right wheels were about seven and a half feet over on the concrete from the edge. The left side of the Nash struck the hub cap of the left front wheel and a spare wheel and the left fender of the Rolls Royce. The injury to the Rolls Royce from the impact was slight but after the impact it turned across the road, struck a tree, knocked down a two and a half foot stone wall and rolled over on its side. The damages the car suffered after the impact were due to the driver's inability to control or stop after the collision because of the speed at which it was driven. The trial court awarded the plaintiff damages suffered from the impact but not the substantial damages suffered thereafter. On appeal the Supreme Court of Connecticut set aside this judgment and ordered the trial court to render a judgment for all the damages suffered.

The theory of the trial court was that the plaintiff could not recover for any of the injury suffered after the collision which could have been avoided by controlling or stopping the car since such loss of control was the result of the plaintiff's contributory negligence, but the Supreme

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159 (1919) 39 Cal. App. 139, 178 Pac. 326.
160 (1929) 110 Conn. 184, 147 Atl. 762; Note (1930) 66 A. L. R. 1134.
Court was of the opinion that unless the plaintiff's driver was negligent after the collision the defendant would be responsible, for the defendant's wrong would be a substantial factor in producing these injuries. But the problem, it is submitted, was not whether the defendant's wrong was a substantial factor in producing the consequential injuries to the Rolls Royce for that seems too clear for argument, but the problem was whether the plaintiff's negligence was a proximate cause also of these injuries. The plaintiff is properly treated as not responsible for the collision since while his act was a cause in fact of the collision there was no cause in fact relation between the plaintiff's fault and the collision; it would have happened had he driven carefully. However, there is a cause in fact relation between the plaintiff's negligent driving before the collision and the damages his car suffered after the collision. Not only is that true but there seems to be the clearest case of the existence of proximate cause between the plaintiff's negligence and the later damages to the Rolls Royce. There was an intervening act, it is true, without which the damage would not have occurred, but the reason the fast driving was negligent was because it was foreseeable that such intervening act might occur or that the plaintiff might lose control of his car by reason of some such intervening act.\footnote{Apparently \textit{contra} to Mahoney v. Beatman, \textit{supra} note 161, are Wright v. Illinois & Mississippi Telegraph Co. (1866) 20 Iowa 195; Gould v. McKenna (1878) 86 Pa. St. 297, 27 Am. Rep. 705.}

In general the defendant is excused where the same result would have occurred had the defendant acted carefully, but one group of cases which is an exception to this rule must be carefully distinguished. These are the cases where the defendant's negligent act combines with a \textit{Vis Major} or Act of God to produce the result. If the defendant could not have foreseen the intervening \textit{Vis Major} which was necessary to produce the result he is excused,\footnote{Livezey v. Philadelphia (1870) 64 Pa. St. 106, 3 Am. Rep. 578.} but if he could as a reasonable man have foreseen the intervention of a natural force that would have produced the injury, he will not be excused for the injury which results from a natural force of the same character which was of such extraordinary and unforeseeable strength that it might have caused the injury had the defendant acted carefully. The reason for this seems to be that the defendant cannot be excused for a consequence which his negligent act produced when he could foresee the likelihood of the intervening force occurring in every respect except its extraordinary extent and intensity, and that unusual phase, that unexpected character of the force, was not required to produce the result. The law seems clear that advantage of the \textit{Vis Major} doctrine may be taken only where the consequence resulted either entirely without the defendant's act being a cause in fact or where it resulted from the unusual or
extraordinary character of the intervening force which was not foreseeable. Thus where a defendant negligently leaves walls standing so that an ordinary wind will blow them down and they are blown down by an extraordinary wind, the defendant is not excused under the doctrine of *Vis Major.*

If a city provides pipes to carry water off a street and they are insufficient to carry off the water in case of reasonably expectable rains, the city is not excused for the consequences of its negligence, if an extraordinary rain overflows the streets and causes the damage. If the defendant makes an excavation leaving his neighbor's land without sufficient lateral support, the fact that the land sinks by reason of flooding of the excavation on the occasion of an unusual and excessive rain will not excuse him where an ordinary rain would have produced the same result. If the defendant places culm from his coal mine near a stream where every flood will act upon it and carry it down the stream and deposit it on the plaintiff's land doing the plaintiff damage, the defendant cannot take advantage of the fact or use the doctrine of *Vis Major* or Act of God to excuse himself where such culm was carried down by an extraordinary flood. If the harm would have resulted from the Act of God alone, the defendant will escape liability, although he may have acted negligently, for in such case it is clear that the defendant's wrong did not perceptibly contribute to the result. In *Baltimore & Ohio R. Co. v. Sulphur Springs School District* the defendant put up an embankment with insufficient culverts to carry off the excess water from an ordinary rain. It seems clear that the court was correct in its view that if this would have happened without the defendant having erected any embankment, he should not be held liable. The defendant's act cannot make him liable unless it is an actual perceptible cause of the injury.

*Charles E. Carpenter.*


165 Ulrich v. Dakota Loan & Trust Co. (1892) 3 S. D. 44; see also Smith v. Faxon (1892) 156 Mass. 859, 31 N. E. 687.

166 Elder v. Lykens Valley Coal Co. (1893) 157 Pa. St. 490, 27 Atl. 545; see infra note 323.
