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Rules of Legal Cause in Negligence Cases

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IN ACTIONS for negligence several distinct issues may arise which must be carefully differentiated. In the first place, it must be shown that the defendant has been guilty of a breach of duty of care towards the plaintiff or at least towards a class of persons of which the plaintiff is a member. Second, after this primary requirement is met, the plaintiff in order to secure a recovery must further prove that there exists a causal relation between the injury to his person or property and the defendant's negligent conduct. The fundamental difference between these two issues is well recognized by the authoritative writers and the better considered cases.

It is, however, beyond the scope of this article to discuss the requirements of negligence and our attention will be confined solely to the doc-


3 However, attention should be called to a recent helpful suggestion. Edgerton, Legal Cause, 72 University of Pennsylvania Law Review, 211, 238, n. 104; McLaughlin, Proximate Cause, 39 Harvard Law Review, 149, 166 et seq.

Causation may also be an important issue in certain other types of cases where what may be called the defendant's primary liability is not predicated on negligence, e. g., cases under certain special statutes (Workmen's Compensation Acts, Civil Damage Acts etc.) and cases where the defendant is said to act at peril (e. g., knowingly keeping a vicious animal).

The defendant's intention may have a double effect. It may in the first place, make an act wrongful which would not be negligent. Causation will also generally be carried further than where the defendant's act is merely negligent. See Wyant v. Crouse (1901) 127 Mich. 158, 86 N. W. 527, 53 L. R. A. 626.

Up to the present time, the authoritative writers appear to have proceeded upon the theory that the same principles of causation obtain in torts and
trine of proximate cause as limiting liability for the consequences of a negligent act.

Various tests of legal cause have been laid down by the courts. It is now proposed to enumerate and to compare these tests and to observe the results which have been worked out by the courts in this very difficult and complicated phase of the law. First, under the "probable consequence rule," one is held responsible if he ought as a reasonable man to have foreseen that the particular results were likely to happen. Second, under the "similar probable consequence rule," one may be held liable if he might have foreseen that some such injury was likely to result, although he could not reasonably have foreseen the particular results. Third, under the "natural and proximate consequence rule," the defendant is held responsible for improbable results if no extraordinary force or volition intervenes to break the ordinary course of events. Fourth, under the "direct consequence rule," one is liable for all results flowing from his act in direct natural sequence. Fifth, there is the "but for rule," the function and scope of which is discussed below.

It should be noted in the first place that the function of the doctrine of proximate cause is, assuming a wrongful act, to limit rather than to attach liability for its consequences. For the courts have ordinarily taken the view that a person is not liable as an insurer that his blameworthy conduct will never result in harm to others, but is only answerable, it may be stated in a very general way, where the law considers him to have been the responsible cause of the injury. The rules of proximate cause would seem, therefore, to involve an exclusion process, that is, a cutting off of those consequences of negligent conduct for which the defendant is not considered to have been the volitional cause and hence need not respond in damages.

In contract cases, the question is whether the defendant is liable for the damage under a fair interpretation or construction of the contract which fixes the extent of the liability. See Viaux v. Scully Foundation Co. (1924) 247 Mass. 296, 300, 142 N. E. 81. A comparison of tort and contract cases, however, often affords suggestive analogies. See McLaughlin, Proximate Cause, 39 Harvard Law Review, 151, n. 13.

"Probable", in rules one and two, does not necessarily mean that the chances that a given result would happen must be greater than the chances that it would not happen. It should be interpreted merely to call for a dangerous possibility of injury or an undue risk created by the defendant.

What the law is seeking is a responsible, human, volitional cause of the injury. See Merrill v. Los Angeles Gas Co. (1910) 158 Cal. 499, 503, 111 Pac. 534, 139 Am. St. Rep. 134, 31 L. R. A. (N. S.) 559. Were we remoulding or originating our legal vocabulary, it would probably be desirable to speak of "responsible" cause rather than "proximate" cause.
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The first task before the court is undoubtedly to establish causation in fact and this is usually done by applying what is known as the "but for" rule which may operate conclusively to exclude the defendant's liability. As a general rule, the defendant should not be held responsible unless the accident would not have happened "but for" the defendant's negligence. Thus, in Laidlaw v. Sage, where the defendant drew the plaintiff in front of him to serve as a shield from an impending explosion, the court held that as the plaintiff's position had only been changed a few inches, recovery would be denied unless the plaintiff could show that his injuries were increased by the defendant's wrongful act.

An exception arises, however, from the difficulty of apportioning responsibility among several wrongdoers each of whom may be regarded as a concurrent cause of the injury. It would, of course, be absurd in such cases to relieve both parties of liability on the ground that both are responsible. Thus, in Fraser v. Flanders, where a pedestrian was injured by the collision of two negligently operated automobiles at a street intersection, the court properly held both drivers jointly and severally liable. Further difficulties arise

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7 (1899) 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216.

8 Whether operating contemporaneously or successively in producing the injury. In cases of successive negligence, however, the original wrongdoer may sometimes be relieved. See infra, body of the article.

No hard and fast rule can be laid down as to whether the acts of several defendants operate contemporaneously or successively in producing the injury and various courts frequently reach directly opposite results on indistinguishable sets of facts. If a court considers it necessary to solve the problem at all, the most important element to be considered is the separation in time and space of the several acts of the defendants. See McLaughlin, Proximate Cause, 39 Harvard Law Review, 181, n. 92.


Similarly, if it is the duty of two persons to do a thing and neither does
where the defendant's responsible act concurs with a contemporaneous irresponsible cause in producing the injury. For example, in *Cook v. Minneapolis, St. Paul and Sault Ste. Marie Railway Company*, the defendant's negligently started fire united with one of unknown origin and burned the plaintiff's premises. The court held that the defendant would not be responsible if either fire would have reached the plaintiff's property and caused its destruction at approximately the same time. This would seem to be a logical following of the "but for" rule to the effect that a wrongdoer will not be held


In some cases, however, as the pollution of streams, fouling of air etc., where there is often a considerable separation in time and space between the several acts of the parties which concur in producing the injury and in which cases it is relatively easy to apportion fault, the courts generally hold that each tortfeasor is liable only for the consequences of his own wrong and must be sued alone for damages. *Miller v. Highland Ditch Co.* (1891) 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254; *Farley v. Crystal Coal*, etc. Co. (1920) 85 W. Va. 595, 102 S. E. 265, 9 A. L. R. 933, overruling *Day v. Louisville Coal*, etc. Co. (1906) 60 W. Va. 27, 53 S. E. 776, 10 L. R. A. (N. S.) 167; *Mitchell Realty Co. v. City of West Allis* (1924) 184 Wis. 352, 199 N. W. 390. Cf. *Johnson v. Irvine Lbr. Co.* (1913) 75 Wash. 539, 135 Pac. 217, reversed on rehearing (1914) 79 Wash. 520, 140 Pac. 577. See comment on the first hearing in 2 California Law Review, 253.

There are dicta to the effect that if one party knows what the others are doing, this will take the place of concert of action so that each may be held jointly and several liable. *Bowman v. Humphrey* (1904) 124 Iowa, 744, 747; 83 Central Law Journal, 404, 410. See also *Weinberg Co. v. Bixby* (1921) 185 Cal. 87, 196 Pac. 25, 34, there being in this case, however, a common enterprise as to those held liable.

Note the statement in *Hill v. Smith* (1867) 32 Cal. 166, to the effect that one is not exonerated from civil liability for the proportionate injury caused by his act which when joined with the acts of others causes serious harm, even though one's act standing alone would not constitute a nuisance and hence would not be actionable. But see contra, as to criminal liability. *Gray v. State* (1891) 90 Tenn. 645, 18 S. W. 260, 25 Am. St. Rep. 707.


As to whether the defendant is liable when his responsible act concurs with a successive irresponsible cause see, infra, body of the article and infra, n. 51.

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responsible if the accident would have occurred at approximately
the same time regardless of the defendant's wrong, from other irre-
sponsible causes. Other courts, however, have taken the opposite
view.

It is to be noted that while the "but for" rule may be applied
negatively to exclude liability, it is frequently too broad to apply
affirmatively to impose liability. Thus, in Orton v. Pennsylvania
Railroad Company, where the plaintiff sustained injuries when a
negligently driven automobile in which he was a passenger collided
with the defendant's train negligently left blocking a highway at
night and without lights, the court held that the proximate cause of
the injury was the carelessness of the driver of the automobile whose
lights would disclose substantial objects on the highway ahead for a
distance of two hundred feet, and that the defendant could not be
held responsible as his act was merely a condition and the driver's
act superseded it as the responsible cause of the injury. It is clear
that "but for" the defendant's negligence the collision would not have
occurred, but this is not sufficient to impose responsibility upon the
defendant. The driver had independent, volitional control of the
situation and became the responsible cause of the accident. It re-
 mains to be seen when, if ever, the defendant will be held liable
where a new, independent and volitional cause intervenes between
the defendant's act and the injury.

After causation in fact is found to exist, the court usually pro-
ceeds next to examine the defendant's actions and to trace causation
through the intervening sequences to the final injury. The defend-
ant is then held responsible or not under any one of the first four

\[ \text{But if } A \text{ kills } B \text{ who is so ill he would soon die from other causes, } A \text{ is liable for the earlier death. See Cahill v. New York, etc. Co. (1911) 201 N. Y. 221, Ann. Cas. 1912A 961, 48 L. R. A. (N. S.) 131. See also, People v. Lewis, supra, n. 10; Duque v. State (1909) 56 Tex. Cr. Rep. 214, 119 S. W. 687.} \]

\[ \text{Anderson v. Minneapolis, etc. Ry Co. (1920) 146 Minn. 430, 179 N. W. 45. Cf. Miller v. Northern Pacific Ry. Co. (1913) 24 Idaho, 567, 135 Pac. 845, Ann. Cas. 1915C 1214, holding that if the irresponsible cause operating alone would not produce the injury, the defendant will not be relieved. This would seem to be correct as the defendant's negligence may properly be considered as concurring with the irresponsible cause in producing the injury in this situation.} \]

\[ \text{This consideration also holds good for Jeremiah Smith's suggested "substantial factor" test which appears to be similar to the "but for" rule. See 25 Harvard Law Review, 103 et seq.} \]

\[ \text{It is not enough "that in the mere train of physical causation the result should follow from the wrongful act. There must be some mental element." The Mars (S. D. N. Y. 1914) 9 F. (2d) 183, 184. This statement is unquestionably true in cases where the act of a responsible agency has intervened between the defendant's act and the plaintiff's injury.} \]

\[ \text{(C. C. A. 6th Cir. July 3, 1925) 7 F. (2d) 36.} \]
tests discussed above which are used by the various courts or by the same courts in the several types of cases to determine how far one is legally responsible for the consequences of his wrongful conduct which has in fact caused them.

It is necessary, in the first place, to devise a rough scheme of classification of the cases which will serve as a general guide in determining the limits of responsibility. The first distinction to be drawn is between those cases where the defendant's act has caused the injury in direct natural sequence\(^\text{17}\) and without the intervention of any responsible agency and those cases where the defendant's act has caused the damage only in concurrence with the responsible act of another. In this connection, it is to be noted that it is only where we can find some responsible act between the defendant's negligent conduct and the injury that we have a true case of intervening agency, as other forces which may join with the defendant's act in producing the injury such as natural phenomena, acts of animals, irresponsible acts of children and instinctive and irresponsible acts of adults can not properly be considered as breaking the chain of direct causation, though such facts may have a bearing in determining the just limits of responsibility. Another distinction to be drawn which is very important in many cases is between those situations where the defendant's negligent conduct consists solely in the creation of a dangerous situation which must be acted upon by other agencies, responsible or otherwise, before producing the injury\(^\text{18}\) and those cases where the defendant's force was active, that is, continually in motion throughout the entire period under consideration by the court.

Let us now examine a few of the cases in order that we may observe the results of the several rules which the courts have in general applied to the various situations. In the first place, the direct result of the defendant's act, whether active force or dangerous situation, is, except as noted below, generally held proximate.\(^\text{19}\)

\(^\text{17}\) Directness must be understood in the sense of direct natural sequence not broken by any intervening responsible cause. It does not refer to directness in time or space in which latter sense directness would be simply a matter of degree. See Berkovitz v. American River Gravel Co. (1923) 191 Cal. 195, 215 Pac. 675, repudiating this latter view of directness as a test of causation in California.

The term "direct causation", as used in this article, refers to all cases in which no act of a legally responsible agent has intervened between the defendant's act and the plaintiff's injury. This is what is meant when it is stated that "the defendant's act . . . caused the injury in direct natural sequence."

\(^\text{18}\) This is what Professor Beale calls a passive force. See Beale, Proximate Consequences of an Act, 33 Harvard Law Review, 633, 645.

\(^\text{19}\) In general, see the following cases in which the direct result of the
Thus, in *Austin W. Jones Company v. State*\(^\text{20}\) where the defendant negligently paroled an insane person who ignited a certain building, the court applied the "natural and proximate consequence" rule and held the defendant company liable. The act of the insane person being legally irresponsible did not break the chain of direct causation. Similarly, in *Cahill v. E. B. & A. L. Stone Company*,\(^\text{21}\) the defendant was properly held liable where a push cart was negligently left standing in a public street and the plaintiff, a small boy, was injured when the cart was put in motion by other children playing around it. The irresponsible act of the children in starting the car was not such an intervening act as would break the chain of causation. And, in *Royal Indemnity Company v. Midland Public Service Corporation*,\(^\text{22}\) defendant's active force was held proximate. *Smith v. London & Southwestern Ry. Co.* (1870) 6 C. P. 14, 40 L. J., C. P. 21, 23 L. T. 678; *Mathews v. Kansas City Dy. Co.* (1919) 104 Kan. 92, 178 Pac. 252; *Lynn Gas & Electric Co. v. Meridan Fire Ins. Co.* (1893) 158 Mass. 570, 33 N. E. 690, 35 Am. St. Rep. 540, 20 L. R. A. 297; *Solomon v. Branfname* (1919) 175 N. Y. Supp. 835.

In general, see the following cases where the direct result of a dangerous situation created by the defendant was held proximate. *Page v. Buckeport (1874)* 64 Me. 51, 18 Am. Rep. 239; *Adams v. Chicopee (1880)* 147 Mass. 440, 18 N. E. 231; *Terry v. New Orleans, etc. R. Co.* (1912) 103 Miss. 679, 60 So. 729; *Gilman v. Noyes* (1876) 57 N. H. 627; *Hocking Valley Ry. Co. v. Helber, Adm'r.* (1915) 91 Ohio St. 231, 110 N. E. 481.

Where the plaintiff's condition is in part caused by a latent disease or condition, the defendant is generally held liable for the entire damage. *Mann Boudoir Car Co. v. Dupre* (1893) 54 Fed. 646, 4 C. C. A. 540, 4 C. C. A. 54; *Watson v. Rinderknecht* (1901) 82 Minn. 235, 84 N. W. 798. Cases collected: Bohlen, *Cases on Torts* (2d. ed.) p. 228, n. 16. See also *State v. O'Brien* (1890) 81 Iowa, 88, 46 N. W. 752. *Contra:* Pullman Palace Car Co. v. *Barker* (1878) 4 Colo. 344, 34 Am. Rep. 89, relieving the defendant under the "probable consequence" rule.


It might be argued that the children in some cases possessed sufficient faculties, that their conduct might properly be considered responsible. If so, causation should be tested as in other cases of intervening responsible agencies. See also infra, n. 31. Cf. also cases cited infra, n. 28.


See also in accord where a natural force intervenes between the defendant's act and the injury. *Bailiffs of Romney Marsh v. Trinity House* (1870) 5 Ex. 204, 22 L. T. 446, affirmed in (1872) 7 Ex. 247, 41 L. J., Ex. 106; *Smith v. San Joaquin, etc. Corp.* (1922) 59 Cal. App. 647, 211 Pac. 843; *Benedict...
the defendant was held liable when a horse became entangled in a
guy wire negligently left insecure which caused it to break and injure
the plaintiff. The act of the horse not being volitional or responsible
did not break the chain of direct causation.

In the famous Squib Case,\(^2\) where the defendant threw a lighted
squib into a crowd and several persons to avoid injury to themselves
or their property hastily tossed it aside until it was thrown against
the plaintiff who was injured, the defendant was held responsible;
the acts of the intervening persons being instinctive rather than
volitional. This case, perhaps, might be regarded also as an illustra-
tion of the second test, the "probable similar consequence" rule,
for while the defendant could not have foreseen the particular injury,
he could have foreseen that some such injury was likely to result.
There is no clear cut dividing line between the two rules. The
"natural and proximate consequence" rule is broader, however, and
one is held even for improbable consequences, except as noted below,
regardless of what might have been anticipated.

In Hill v. Winsor,\(^2\) where the defendant's tug negligently ran
against a pile in the river which force was transmitted through the
intervening piles until it threw out a brace used to keep two piles
apart and the plaintiff's leg was caught between these two piles, the
court had no difficulty in holding the defendant liable. This is the
leading case on the "similar probable consequence" rule, although
it might be considered as a good illustration of the "direct conse-
quence" rule which the English court recently formulated in the
case of In re Polemis and Furniss, Withy and Company.\(^2\) In this
case a board was negligently dropped into the hold of a ship. The hold,
being filled with petrol vapor, burst into flames upon the fall of the
board destroying the ship. The court held the destruction of the
ship a direct consequence of the dropping of the board and that the
defendant was liable for the entire damage. This rule (if directness
be understood in the sense of natural direct sequence not broken by
intervening responsible agencies) is practically a restatement of the
"natural and proximate consequence" rule.

\(^{23}\) Pineapple Co. v. Atlantic Airline R. R. Co. (1908) 55 Fla. 514, 46 So. 732,
84 Wis. 289, 54 N. W. 618, 36 Am. St. Rep. 928, 19 L. R. A. 513. See also
infra, n. 31.

Cf. Champagne v. Hamburger Co. (1915) 169 Cal. 683, 147 Pac. 954; Ricker

\(^{25}\) (1875) 118 Mass. 251.

\(^{26}\) [1921] 3 K. B. 560, 90 L. J., K. B. 1353, 37 T. L. R. 940, 126 L. T. 154,
It is to be noted, however, that one frequently is not held liable even for the direct consequences of an act where the injury took place under what the law considers an extraordinary course of events, that is, an act of God. If the injury would have happened through the operation of the act of God alone, regardless of the defendant's negligence, the courts usually apply the "but for" rule to relieve the defendant. Thus, in Asher v. Pacific Electric Railway Company,\textsuperscript{26} the court points out that if the extraordinary flood was of sufficient force to cause the injury notwithstanding any negligence of the defendant in maintaining a certain structure in the stream, then the existence of the structure could not have caused the damage. Where, however, the "but for" rule can not be applied to relieve the defendant and the latter's negligent act may properly be considered as concurring with the act of God in producing the injury, most courts will hold the defendant responsible.\textsuperscript{27}

For the sake of completeness it should be mentioned that the courts in several cases of direct causation have applied the first rule or the foreseeability of the particular injury test. Thus, in Mendelson v. Davis,\textsuperscript{28} where the defendant's train negligently gave a sudden


The cases are fairly evenly divided as to whether a common carrier should be held liable where there has been a negligent delay in the transit of goods which are subsequently destroyed by an act of God. Some hold the carrier liable. Ward v. Pittsburg, etc. R. R. Co. (1896) 162 Ill. 545; Green-Wheeler Shoe Co. v. Chicago, etc. Ry. Co. (1906) 130 Iowa, 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882; Bibb Broom Corn Co. v. Atchison, etc. Ry. Co. (1905) 94 Mnn. 269, 102 N. W. 799. See also Shaw v. Symmons & Sons [1917] 1 K. B. 799, 86 L. J., K. B. 549, 117 L. T. 91, 33 T. L. R. 239, holding a mere bailee liable in this situation. Contra: Railroad Co. v. Reeves (1899) 10 Wall. (77 U. S.) 176, 19 L. Ed. 909; Seaboard, etc. Ry. v. Mullin (1915) 70 Fla. 450, L. R. A. 1916D 982. See also 72 University of Pennsylvania Law Review, 312.


\textsuperscript{28} (1922) 281 Fed. 18. Accord: Toledo, etc. Ry. Co. v. Muthersborough (1874) 71 Ill. 572; Engle v. Director General of Railroads (1921) 78 Ind. App. 547, 133 N. E. 138; Pittsburgh, etc. Co. v. Dravo, etc. Co. (1922) 272 Pa. 118, 116 Atl. 147. See also Hoag v. Lake Shore, etc. R. R. Co. (1877) 85 Penn. St. 293. See also Edgerton, Legal Cause, 72 University of Pennsylvania Law Review, 211, 220 et seq; McLaughlin, Proximate Cause, 39 Harvard Law Review, 149, 163.

In New York, the defendant's liability for the spread of fire has been
lurch which threw the plaintiff through an open vestibule door, the railway company was held not liable as it was not responsible for the open vestibule door and the particular manner in which the plaintiff was injured could not have been foreseen. In California, it would seem as if the “natural and proximate consequence” rule has been adopted in cases of direct causation.

Turning now to the situation where the act of a responsible agency has intervened between the defendant’s act and the plaintiff’s injury, we find that the early tendency undoubtedly was to restrict liability. The courts held that where there were two successive wrongdoers the one nearest the resulting injury should suffer. This view still finds considerable support in the cases today, although arbitrarily limited to adjacent premises. Hoffman v. King (1899) 160 N. Y. 618, 73 Am. St. Rep. 715, 46 L. R. A. 672; Ryan v. New York, etc. R. R. Co. (1866) 35 N. Y. 210, 91 Am. Dec. 49.


See infra, ns. 36, 37, 42, 48. In certain of these cases, however, a similar result might be reached if the court relied on a foreseeability test. “It is only the occasional negligence [which] is one of the ordinary incidents of human life which under the circumstances should be anticipated.” Murphy v. Gt. Nor. Ry. Co. [1897] 2 Ir. Rep. 301. Hence, in cases of an extraordinary intervening negligent act of a responsible agent (which one might well say superseded the wrongful act of the first tortfeasor), the original defendant might well be relieved on the ground that such consequences of his act could not reasonably have been anticipated. A good example is to be found in the case of The Mars, supra, n. 15. In this case the operators of the defendant’s tug negligently collided with the plaintiff’s barge and made a large hole in one side of it about five feet above the then water-line. The plaintiff’s servants, however, negligently continued to load the vessel until the hole became submerged beneath the water-line which resulted in the sinking of the barge. The court relieved the defendant remarking that the sinking of the barge was not one of those damages which the operators of the tug were bound to anticipate as likely to result from their negligent act.

Some of the cases referred to in the notes above, however, rest solely upon the older doctrine that where there are two successive wrongdoers, the one nearest the resulting injury only is to be held legally responsible for the entire damage. See Claypool v. Wigmore (1904) 34 Ind. App. 35, 71 N. E. 509, where the intervening negligent act seems clearly to have been of the character defined in Murphy v. Gt. Nor. Ry. Co. supra.

Occasionally, any volitional act even though lawful or irresponsible has been held automatically to break the chain of responsibility. See Hartford v. All Night & Day Bank (1915) 170 Cal. 538, 150 Pac. 355; Bearden v. Bank of Italy (1922) 57 Cal. App. 377, 207 Pac. 270. See infra, n. 52. See also contra cases cited supra, n. 21 and Cole v. German Savings & Loan Society (1903) 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416 (acts of children). See also Loftus v. Dehail (1901) 133 Cal. 214, 65 Pac. 379 (willful act of four-year-old child). See also Bollinger v. Rader, supra, n. 20 (act of insane man). Some of these cases may rest on the rule applied in the cases cited supra, n. 28, where even though there is no intervening act of a responsible
many modern courts proceed on the theory that the intervention of a subsequent piece of carelessness does not automatically remove responsibility from the original wrongdoer. Great difference of opinion, however, is to be found in the decisions as to which forecast test is to be applied to determine liability in each of the various situations noted below.

In the first place courts often will not relieve a defendant where the intervening act, even though negligent, was motivated by a desire to prevent the defendant's act, whether active force or dangerous situation, from causing some apparent damage. Thus, in *Clark v. Chambers*, the defendant was held liable when a barrier negligently placed by him across a highway was removed by a stranger who negligently placed it on an adjoining footpath where the plaintiff ran into it and sustained severe injuries. Similarly, one may act to prevent injuries from occurring through defendant's active force as where one is injured or killed trying to put out a negligently started fire. In this latter situation, the defendant is

agent and the defendant's act may be considered as causing the injury in indirect natural sequence, the defendant will nevertheless be relieved under the "probable consequence" rule.


The extreme limit of this view is to be found in cases where natural forces have been held automatically to break the chain of responsibility. Pennsylvania Co. v. Whitlock (1884) 99 Ind. 16 (wind—defendant's force active); Chamberlain v. City of Oshkosh, supra, n. 22 (ice—defendant responsible for a dangerous situation); Marvin v. Chicago, etc. Ry. Co. (1891) 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506 (wind—defendant's force active).

The originator of a slander or libel is generally held not liable for its unauthorized repetition. Maytag v. Cummins (1919) 260 Fed. 74, 171 C. C. A. 110; Carpenter v. Ashley (1906) 148 Cal. 422, 426, 83 Pac. 444; Burt v. Adv. Newspaper Co. (1891) 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; Schaefflin v. Coffey (1900) 162 N. Y. 12, 69 N. Y. Supp. 1143; Odgers, Libel and Slander (4th ed.) p. 388 et seq. In several cases, however, it has been held that the author of a slander per se is liable for the secondary publications or repetitions which might reasonably have been anticipated as a "natural and probable consequence" of his act. Sawyer v. Gilmers (1925) 89 N. C. 7, 126 S. E. 183, comment 23 Michigan Law Review, 808; Southwestern Tel., etc. Co. v. Long. (1916) 183 S. W. 421 (Tex. Civ. App.).


33 Illinois, etc. R. R. Co. v. Siler (1907) 229 Ill. 390, 15 L. R. A. (N. S.) 819; Liming v. Illinois, etc. R. R. Co. (1890) 81 Iowa, 246, 47 N. W. 60; Wagner v. International Ry. Co. (1921) 232 N. Y. 176, 180 N. Y. Supp. 957,
sometimes relieved generally on the ground that the plaintiff's act could not reasonably have been foreseen. In cases where the defendant's negligent act has been directed towards or upon the plaintiff by the negligent act of another, the first wrongdoer ordinarily will be held if this intervening act might have been foreseen as a dangerous possibility. In Merrill v. Los Angeles Gas Company, for example, the defendant negligently allowed large quantities of gas to escape from a broken service main under a certain restaurant. The proprietor of the restaurant, although warned by the company to extinguish all lights, negligently left the gas burning under a coffee urn. An explosion ensued which severely injured the plaintiff, a customer in the restaurant. The court held the gas company liable for the entire damage applying it would seem the "natural and probable consequence" rule. Occasionally, however, the original wrongdoer will be relieved. An extreme example where recovery was denied although the intervening act seems to have been quite foreseeable, is to be found in the case of Beckham v. Seaboard Airline Railway. In this case, the defendant negligently stored oil and waste in a certain building. Two "hobo" negroes occupying the building with the defendant's knowledge, carelessly overturned a lamp and in the ensuing conflagration the plaintiff's property was destroyed. It was held that the intervening responsible act broke the chain of responsibility.

Where the defendant's act consists in the creation of a dangerous situation rather than the setting of an active force in motion, the original wrongdoer is frequently relieved. In Orton v. Pennsylvania Railroad Company, the facts of which are given above, recovery

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was denied as the intervening responsible act of the driver of the automobile superseded the negligence of the defendant and made the latter's act the remote cause of the injury. If the court purports to rely on a foreseeability test, the defendant is often relieved unless a rather high degree of probability is present. An extreme example is to be found in the case of Stone v. Boston and Albany Railroad Company. In this case the defendant negligently left barrels of oil standing on a station platform. A stranger bringing goods for shipment to the station lit his pipe and carelessly threw the lighted match on the platform. In the ensuing conflagration the plaintiff's property was burned. The court held the defendant not liable remarking that one need not anticipate that which is "merely possible according to occasional experience." Some courts, however, hold the original wrongdoer if he should have foreseen a dangerous risk or possibility of the harmful result. Thus, in Carroll v. Central Counties Gas Company, an automobile negligently ran off a bridge and fell on a gas pipe which the defendant maintained in an insecure condition. The pipe burst and the escaping gas ignited burning the plaintiff, a passenger in the car. The defendant was held liable under the "similar probable consequence" rule as one might have foreseen that some such injury was likely to happen. In Pastene v. Adams, the defendant negligently piled certain lumber. A long time subsequently, a stranger negligently caused it to fall injuring the plaintiff. The court held that the negligence of the defendant concurring with that of the stranger was the proximate cause of the injury and that the defendant was liable for the entire damage.

Where, however, the intervening force is a criminal or willful act as distinguished from a merely negligent act, the majority rule holds that the first wrongdoer is not liable whether his act consists in the setting of an active force in motion or merely in the creation of a dangerous situation. The decisions often rest on the fiction that one may presume that others will conduct themselves in a law-

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41 (1874) 49 Cal. 87. Accord: Chancy v. City of Fargo (1895) 5 N. D. 173, 64 N. W. 932. In these cases the court probably felt that the intervening act was of such a nature that it might have been foreseen as a dangerous possibility, although no mention is made of this in the opinions.
ful manner and therefore such acts could never be anticipated. Hence, in *The Lusitania*, although the operators of the vessel were negligent in disobeying the advice of the British Admiralty in regard to the route to be taken, recovery was denied as the intervening illegal act of the German submarine in torpedoing the ship broke the chain of responsibility. But, even in this type of cases, the above fiction is meeting with disfavor by the more advanced courts at the present time and several decisions hold the first tortfeasor responsible if the intervening illegal act of the stranger is such as should have been anticipated. In the case of *Hines v. Garrett*, the defendant railroad negligently carried the plaintiff past her destination. Those in charge of the train then improperly coerced the plaintiff, an eighteen year old girl, to leave it and return by foot at a point which bore the reputation of being a dangerous resort for tramps. While thus proceeding to her home the plaintiff was attacked and raped by several unknown persons. The court held the defendant liable as the intervening illegal act was such as a reasonable man might well have anticipated as likely to occur.

In most of the foregoing cases, it is to be noted that the plaintiff was suing for damages sustained at the time he first came into contact, whether directly or through responsible agencies, with the defendant's wrongful conduct. It often happens, however, that the plaintiff's injuries are greatly aggravated through the intervention of agencies, responsible or otherwise, after the first impingement of the defendant's wrong, that is, after the plaintiff's cause of action first became complete. It is submitted that a distinction might be drawn on this basis and that it would be proper to hold the defendant for all loss sustained subsequent to the original injury where causation in fact appears. Even if it be conceded that there is a

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44 Might not this suggestion harmonize *Hines v. Garrett*, supra, n. 43 and Brower v. New York, etc. R. R. Co., supra, n. 43 with the cases cited supra, n. 42? But see semble contra: Sira v. Wabash R. R. Co., supra, n. 42.
rational basis for this division, it may safely be stated that the law has not crystallized to any great extent along this line although it may be in the process of development. There is, however, a tendency to hold the defendant for the entire damage where the plaintiff's condition has been aggravated by the subsequent development of disease or where a physician has been negligent in the treatment of personal injuries. In some cases, under certain special statutes, recovery has also been allowed where the wronged party, as a result of his injuries, subsequently became insane and committed suicide. But, in strictly negligence cases, suicide is generally held to break the chain of responsibility, some courts relieving the defendant because of the volitional nature of the decedent's act if he had any mentality left and other because such results were beyond the range of anticipation. In all other types of cases the distinction is, in general, not recognized and we find the courts determining the defendant's liability for subsequently accruing damages under any one of the various legal tests already discussed.


47 Recovery is generally allowed under the Workmen's Compensation Acts. Marriott v. Malby (1920) 37 T. L. R. 123; Malone v. Cayzer, Irvine & Co. (1908) Sessions Cas. (Scotch) 479; Sponatski's Case, supra, n. 2. See also Garrigan v. Kennedy (1904) 19 S. D. 11 (Civil Damage Act case).

48 Stevens v. Steadman (1913) 140 Ga. 690, 79 S. E. 564; Daniels v. New York, etc. R. R. Co. (1903) 183 Mass. 393, 67 N. E. 424. With the latter case compare Sponatski's Case, supra, n. 2.

For the sake of completeness it is well to mention two remaining situations generally recognized by the courts. Whenever the operation of the defendant's active force reaches a position of apparent safety, the courts ordinarily will follow it no longer. In Lummers v. Pacific Electric Railway Company, for example, the plaintiff was wrongfully ejected from the defendant's interurban car. He seemingly reached a position of apparent safety away from the tracks but six hours later he was found near the tracks with both legs cut off apparently by a passing train. The defendant was held not liable.

In the other situation, viz., where the injury was caused by an intervening act of unknown origin which may or may not have been responsible, there is a square conflict of authority. In California, the original wrongdoer has generally been held liable, except in the case of an intervening criminal or willful act, the courts adopting either the "probable" or the "similar probable consequence" rule.

As to whether the defendant will be held liable when his active force has been brought to a position of rest through the intervention of others, compare Haverly v. State Line, etc. Co. (1909) 135 Penn. St. 50, 19 Atl. 1013, 20 Am. St. Rep. 848 (holding the defendant—intervention of the plaintiff's servants) with Doggett v. Richmond, etc. Co. (1878) 78 N. C. 305 (contra-intervention of third parties). It would seem as if the defendant might well be relieved in this situation.

As to whether the defendant will be held liable when he has created a dangerous situation which at the time of the injury is under the control of another who omits to take charge and inspect it, although it is the latter's duty to do so, compare Travis v. Rochester Bridge Co. (1919) 188 Ind. 79, 122 N. E. 1 (relieving the defendant) with Teal v. American Min. Co. (1901) 84 Minn. 320, 87 N. W. 837 (contra). See also Missouri, etc. Ry. Co. v. Merrill (1902) 65 Kan. 436. With these cases compare the cases cited supra, n. 10, second paragraph.


See California cases cited supra, ns. 35, 40, 41. Cf. Trice v. Southern Pacific Co. (1916) 174 Cal. 89, 96, 161 Pac. 1144; Polloni v. Rylan (1915) 28 Cal. App. 51, 151 Pac. 296 (dicta to the effect that any intervening responsible cause will break the chain of responsibility). In these cases it would seem as if the defendant's primary negligence had not been established or was at least doubtful.

But in two California cases, Hartford v. All Night and Day Bank, supra, n. 31 and Bearden v. Bank of Italy, supra, n. 31, the California courts relieved the original wrongdoer under rather extraordinary circumstances. The defendant in each of the above cases had failed to honor the plaintiff's
The above discussion indicates the intricacies of the subject as well as the conflicting opinions entertained by the courts. The various tests suggested for determining liability are often so incapable of exact definition and so flexible in their application in any given case that the court or jury must often be guided rather by their own innate sense of justice and reasonableness than by the supposed standards of the law. Furthermore, the classification of the cases outlined above often seems rather arbitrary and motivated simply by a desire to make a distinction somehow in order that a rational result may be reached without the necessity of overruling precedents. Then too the various classes are often so vague and overlapping that a given case frequently may be placed in one category or another as the adjudicators may think most desirable.

In view of these features of the problem, a recent writer has suggested\textsuperscript{53} that we do away with all our present rules and tests and simply permit the jury to work out a just solution of each case upon its own peculiar facts. The adoption of Professor Edgerton's recommendations would amount in effect to the introduction of a new, general test of legal cause, which one might well designate the "just consequence" rule. Under this rule, the jury is to be instructed carefully to weigh the degree of defendant's fault\textsuperscript{54} and to consider all the circumstances under which the plaintiff sustained his injury which they may think pertinent with a particular view, however, to certain tendencies\textsuperscript{55} as to which they are to be especially instructed. The jury would then be requested to set a just and reasonable limit of liability depending in each case, in general, on a balancing of the various competing social as well as individual interests that may appear to be involved.

The disadvantages of Professor Edgerton's view have recently been carefully considered.\textsuperscript{56} They are in general two in number. First, it is desirable that we have certain standards of law upon

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\item \textsuperscript{53} Edgerton, Legal Cause, 72 University of Pennsylvania Law Review, 210 et seq.
\item \textsuperscript{54} "It is questionable whether the now discredited doctrine of degrees of negligence should be revived under this modified form". McLaughlin, Proximate Cause, 39 Harvard Law Review, 195, n. 115.
\item \textsuperscript{55} These tendencies Professor Edgerton believes to prevail in the law at the present time as he points out in his thesis. Edgerton, Legal Cause, 72 University of Pennsylvania Law Review, 211 et seq. Most of them, though not all, are similar to those indicated above in the body of the note.
\item \textsuperscript{56} McLaughlin, Proximate Cause, 39 Harvard Law Review, 144 et seq.
\end{itemize}
which the court's instructions to the jury are to be based. This will serve to curb in some measure at least the extrajudicial considerations which often enter into a jury verdict and which would tend to become unduly prominent under the suggested system. It also gives the judges a definite control over the decisions and thus enables them rather than the untrained juries to pass on the intricate questions of policy which are often involved in the cases. Second, under the suggested system the predictions of the practicing attorney as to the probable outcome of a given case would be even more uncertain than they are at the present time and thus the orderly settlement of controversies out of court would be discouraged.

If it be thought desirable to frame a general rule covering all of the above noted tendencies, one might suggest the "responsible cause rule" under which a defendant will be held liable for the consequences of his wrongful conduct only where he is the —or a\textsuperscript{57}—responsible cause of the injury.

In summarizing the above noted tendencies in terms of the suggested rule, one may say in the first place, that a wrongdoer is, in general, a responsible cause of an injury only where his act has \textit{in fact} caused the damage. Where causation in fact has been established, the cases may conveniently be divided into two large, general groups, viz., cases of direct causation and of successive negligence or intervening responsible cause. In the former class of cases, there being only one responsible party or at most several jointly responsible defendants, a tortfeasor will be held liable, under what is believed to be the better rule,\textsuperscript{58} for all the consequences of his wrongful conduct regardless of their foreseeability. In the second class of cases, where there are two responsible parties, the original wrongdoer will usually be held liable if the intervening act might have been foreseen as a dangerous possibility and, as regards the liability of the intervening responsible agent, the law will, in general, also hold him answerable for the plaintiff's loss where causation in fact is found to exist.

Berkeley, California.

\textit{Norris J. Burke.}

\textsuperscript{57}It is to be noted that the law is searching also for the responsible cause of the injury in cases involving what is known as the doctrine of the last clear chance which might conveniently be included under the above suggested rule. However, in cases involving the last clear chance rule, it is necessary that the defendant's act be the proximate cause of injury whereas in cases of causation proper the law will frequently hold one liable whose act is only a proximate cause of the injury.

\textsuperscript{58}It is hard to say just how great a part the rule of foreseeability plays in cases of direct causation. Many of the cases exclude the idea of foreseeability altogether; other cases unquestionably apply the rule and still other cases are so badly confused that it is hard to say upon what basis the decision is placed. Hence, in this instance, it was thought best not to attempt to suggest which line of cases are in the majority.