the procedural weight given to statutes on the one hand and ordinances and regulations on the other.

6. *Judicial Ambiguity.* Clarifying the effect of proof of statutory violation has been difficult for courts. For example, a Utah court has written:

> The parties disagree about whether the violation of a statute or ordinance . . . constitutes "per se" or "prima facie" negligence in Utah. Their confusion is not surprising because Utah appellate courts have also occasionally confused these terms. However, though the terminology has been confused, the concept has remained the same and was succinctly stated in Intermountain Farmers Ass'n v. Fitzgerald, 574 P.2d 1162 (Utah 1978).
>
> > [T]he violation of a statute does not necessarily constitute negligence per se and may be considered *only as evidence of negligence.* . . . [The violation] may be regarded as "prima facie evidence of negligence, but is subject to justification or excuse. . . ."
>
> Id. at 1164-65 (quoting Thompson v. Ford Motor Co., 16 Utah 2d 30, 395 P.2d 62, 64 (1964)) (emphasis added). "Prima facie" negligence is the correct standard and a trial court commits prejudicial error when it gives a jury instruction which provides that the violation of a statute *is* negligence without the possibility for justification or excuse. Id. at 1164.

Gaw v. State of Utah, 798 P.2d 1130 (Utah Ct. App. 1990). In this excerpt, the court referred to all three of the possible treatments of proof of statutory violation: "evidence of negligence," "prima facie evidence of negligence," and "negligence per se." What is the best interpretation of the court's position?

7. *Problem: Violation of Statute Without Fault.* A defendant drove his car into the plaintiff's car and injured her. The defendant had driven into an intersection against a red light, in violation of a statute. The defendant explained that the brakes on his car had failed suddenly and without warning. He had just purchased the car. The manager of the car dealership testified that the brakes were working properly at the time of sale. The defendant testified that the brakes were working up to the time of this incident. A highway patrol officer checked the brakes immediately after the accident and found they were not working. The manager inspected the brakes the morning after the accident and found that they were working. Evidence showed that this can happen due to dirt clogging a valve in a brake cylinder. Should a court grant the plaintiff a jury instruction requiring a finding that the defendant was negligent if the defendant violated the statute? See Eddy v. McAninch, 347 P.2d 499 (Colo. 1959).

Statute: BREACH OF DUTY — EVIDENCE OF NEGLIGENCE — NEGLIGENCE PER SE

Wash. Rev. Code §5.40.050

A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence; however, any breach of duty as provided by statute, ordinance, or administrative rule relating to electrical fire safety, the use of smoke alarms, or driving while under the influence of intoxicating liquor or any drug, shall be considered negligence per se.

Statute: PRESUMPTIONS AFFECTING THE BURDEN OF PROOF

Cal. Evid. Code §669 (2002)

Failure to exercise due care

(a) The failure of a person to exercise due care is presumed if:

(1) He violated a statute, ordinance, or regulation of a public entity;

(2) The violation proximately caused death or injury to person or property;

(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and

(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

(b) This presumption may be rebutted by proof that:

(1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law; or

(2) The person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications.

NOTES TO STATUTES

1. ***Categorizing Violations.*** The Washington state statute treats some violations of statutes, ordinances, and regulations as some evidence of negligence and others as negligence per se. It does not explicitly say that no excuses will be allowed for violations of rules relating to electrical fire safety, the use of smoke alarms, or driving while intoxicated, but what rationale would support that treatment? Are those likely to be enactments that prescribe standards of conduct in rigid terms?

2. ***Presumption of Negligence.*** The California evidence statute offers a typical definition of the elements necessary to make a statutory violation relevant in a torts case. With regard to the power given to proof of violation, it requires a finding of negligence unless the violator establishes ordinary prudence, under the usual rules defining reasonable care for adults and children.

III. Industry Custom

If a litigant can show that an industry as a whole has a customary way of doing something, that proof could support a number of conclusions. The customary way is probably affordable, well-known, safe, and consistent with the overall success of the activity. Courts acknowledge this, but typically give less power to proof of violation of an industry custom than they give to proof of violation of a statute. Compliance with a trade or industry custom is usually treated as relevant, but not conclusive. The T.J. Hooper case is a classic case about compliance with industry custom.

Elledge v. Richland/Lexington School District Five considers proof of deviation from custom, and Wal-Mart Stores, Inc. v. Wright examines the related question of an actor's violation of the actor's own established policies.

THE T.J. HOOPER

60 F.2d 737 (2d. Cir. 1932)

L. HAND, J.

[The tugboat T.J. Hooper and another tugboat were tugging barges when they encountered a gale; the barges sank and their owners sought damages from the owners of the tugboats. The tugboats' captains would have sought shelter if they had received radio broadcasts from a weather bureau in Arlington forecasting that weather condition. The trial court imposed liability, holding that lack of a radio made a vessel unseaworthy.]

[The tugboats did not receive the broadcast storm warnings] because their private radio receiving sets, which were on board, were not in working order. These belonged to them personally, and were partly a toy, partly a part of the equipment, but neither furnished by the owner, nor supervised by it. It is not fair to say that there was a general custom among coastwise carriers so as to equip their tugs. One line alone did it; as for the rest, they relied upon their crews, so far as they can be said to have relied at all. An adequate receiving set suitable for a coastwise tug can now be got at small cost and is reasonably reliable if kept up; obviously it is a source of great protection to their tows. Twice every day they can receive these predictions, based upon the widest possible information, available to every vessel within two or three hundred miles and more. Such a set is the ears of the tug to catch the spoken word, just as the master's binoculars are her eyes to see a storm signal ashore. Whatever may be said as to other vessels, tugs towing heavy coal laden barges, strung out for half a mile, have little power to maneuvre, and do not, as this case proves, expose themselves to weather which would not turn back stauncher craft. They can have at hand protection against dangers of which they can learn in no other way.

Is it then a final answer that the business had not yet generally adopted receiving sets? There are yet, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves. Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission. But here there was no custom at all as to receiving sets; some had them, some did not; the most that can be urged is that they had not yet become general. Certainly in such a case we need not pause; when some have thought a device necessary, at least we may say that they were right, and the others too slack. The statute [46 U.S.C.A. §484] does not bear on this situation at all. It prescribes not a receiving, but a transmitting set, and for a very different purpose; to call for help, not to get news. We hold the tugs therefore because had they been properly equipped, they would have got the Arlington reports. The injury was a direct consequence of this unseaworthiness.

Decree affirmed.

NOTES TO THE T.J. HOOPER

1. ***Relevance of Custom Evidence.*** The T.J. Hooper is considered the classic case about the relevance of custom. Yet the practice among tugboat captains with respect to radios was mixed. Was it customary to have radios? Was it customary not to have radios? On what facts did the court ultimately base its decision that the tugboats were unseaworthy? How did the practice among tugboat captains affect the court's decision?

2. ***Custom and the Learned Hand Test.*** Learned Hand, the author of this opinion, also wrote the opinion in *Carroll Towing* (discussed in McCarty v. Pheasant Run, in Chapter 3) proposing that a cost-benefit calculation could define reasonable care. If the custom of an industry might be characterized as representing the industry's consensus on an efficient balance between costs and benefits, is Hand's position rejecting custom in T.J. Hooper consistent with his position on a cost-benefit analysis of reasonable care?

ELLEDGE v. RICHLAND/LEXINGTON SCHOOL DISTRICT FIVE

534 S.E.2d 289 (S.C. App. 2001)

HEARN, C.J.

In this negligence action, Christine Elledge sued Richland/Lexington School District Five for injuries sustained by her daughter, Ginger Sierra, in a fall from playground equipment. The jury returned a verdict for the school district and Elledge appeals, arguing the trial judge erred in excluding evidence of playground industry standards and in charging the jury. We reverse and remand.

On December 9, 1994, Ginger Sierra, a nine-year-old fourth grader at Irmo Elementary School, slipped and fell while playing on the school playground's modified monkey bars. The bars were originally designed to stand approximately four and one-half feet off the ground with a bench running underneath. Children were encouraged to sit or lie on the bench and pull themselves along the length of the bars.

In 1991, after the school principal noticed some children climbing on top of the bars rather than lying on the bench, he contracted with a playground equipment sales representative to make safety recommendations. The representative, who was not trained or licensed as an engineer, eventually modified the monkey bars by removing the bench and lowering the bars. The resulting apparatus formed an inclined "ladder," with parallel bars from twenty to thirty inches off the ground. Tires were also installed at each end of the bars for mounting and dismounting, and the children were encouraged to walk across from one end to the other. Despite the fact that the thin side bars were not intended as a walking surface, neither handrails nor a non-slip surface was added to the "new" monkey bars.

On the day of her accident, Ginger was walking across the bars after a light rain. Her foot slipped on a narrow bar, causing her to fall, and her right leg became trapped between the bars. As a result, Ginger suffered a severe "spiral-type" fracture in her right femur, resulting in damage to the thighbone's growth plate. . . .

. . . Elledge sued Richland/Lexington School District 5 (District) for negligence and gross negligence. . . . Prior to trial, the District filed a motion in limine, which the trial court granted, to exclude "any testimony and/or documentary evidence" relating

to the Consumer Products Safety Commission's (CPSC) guidelines for playground safety or the American Society for Testing and Materials' (ASTM) standards for playground equipment. The court adhered to its ruling during trial, and Elledge proffered excerpts from written and video depositions to support her claim that such evidence was relevant to the applicable standard of care.

[T]he jury returned a verdict for the District. The trial court denied all post-trial motions and this appeal followed. . . .

Elledge first asserts the trial court erred in excluding evidence of the CPSC guidelines and ASTM standards, arguing such evidence was relevant to establish the appropriate standard of care. We agree.

Evidence of industry standards, customs, and practices is "often highly probative when defining a standard of care." 57A Am. Jur. 2d *Negligence* §185 (1999). . . . *[S]ee also,* 57A Am. Jur. 2d at §186 (1999) ("A safety code ordinarily represents a consensus of opinion carrying the approval of a significant segment of an industry, and is not introduced as substantive law but most often as illustrative evidence of safety practices or rules generally prevailing in the industry that provides support for expert testimony concerning the proper standard of care.")

In the present case, the trial court precluded Elledge's evidence of the CPSC guidelines and ASTM standards for playground safety based on the mistaken belief that the District must have adopted these national protocols before such evidence was admissible. This was error. The District cites no cases, and we are aware of none, mandating promulgation or implementation of national industry standards prior to their admission in a negligence case. To the contrary, while such proof might be necessary in attempting to establish negligence per se, it is not required when the evidence is offered to demonstrate an applicable standard of care. *See, Sawyer v. Dreis & Krump Mfg. Co.,* 67 N.Y.2d 328 (1986) (national standards were properly admitted and could be considered by the jury as some evidence of negligence but they were not conclusive on the subject of negligence and the jury should have been so instructed).

. . . [W]e adhere to the view . . . articulated by the New Jersey Supreme Court:

> [A safety] code is not introduced as substantive law, as proof of regulations or absolute standards having the force of law or scientific truth. It is offered in connection with expert testimony which identifies it as illustrative evidence of safety practices or rules generally prevailing in the industry, and as such it provides support for the opinion of the expert concerning the proper standard of care.

McComish v. DeSoi, 42 N.J. 274 (1964). . . .

Because we find the trial court committed reversible error in refusing to admit relevant evidence of industry standards, the judgment of the court below is reversed and remanded.

NOTES TO ELLEDGE v. RICHLAND/LEXINGTON SCHOOL DISTRICT FIVE

1. ***Uses of Custom Evidence.*** Evidence of an industry custom might be introduced to show that an actor's failure to follow it amounts to negligence or might be introduced to show that conduct in conformity with custom meets a standard of

reasonable care. The evidentiary weight given to custom evidence is the same in both contexts. How does the weight given to custom evidence in *Elledge* compare to the weight given to evidence of a statutory violation?

2. ***Problem: Weight Given to Custom Evidence.*** In Franklin v. Toal, 19 P.3d 834 (Okla. 2000), the plaintiff was harmed when a "phrenic nerve pad" placed under her heart during surgery was left in her body at the conclusion of the operation. One defendant submitted evidence that other hospitals did not include phrenic nerve pads on their count lists. What weight should be given to this evidence?

Perspective: Compliance with Custom as "Only Some Evidence"

A classic article on tort law's treatment of evidence of compliance with custom is Clarence Morris, *Custom and Negligence*, 42 Colum. L. Rev. 1147 (1942). Professor Steven Hetcher, in *Creating Safe Social Norms in a Dangerous World*, 73 S. Cal. L. Rev. 1, 19-22 (1999), summarized Professor Morris's arguments as follows:

> Morris argued that evidence of conformity to custom is relevant and should go to the jury because it tends to reduce natural jury prejudice against businesses that injure individuals. He contended, however, that there should be no per se rule protecting all injurers simply because they were conforming to an existent practice. Morris gave two main reasons in support of his view that evidence of conformity should go to the jury, beginning with the following: "Evidence of conformity induces objective thought; it counteracts sympathy for an injured plaintiff; it highlights the need for care in weighing the defendant's conduct; and inhibits the tendency to hold the defendant on the suspicion that he is able to absorb the loss better than the plaintiff." . . .
>
> Morris's second point with respect to the evidentiary role of custom also concerns the connection between custom and jury prejudice rather than its connection to due care. Morris states this justification for preferring the evidentiary rule as follows:
>
> Evidence of conformity sharpens attention on the practicality of caution greater than the defendant used. It puts teeth in the requirement that the plaintiff establish negligence. Judges and jurymen seldom know much about the defendant's business. When the defendant's craft is palpably esoteric, the courts require the plaintiff to prove by experts that a feasible way of avoiding the plaintiff's injury was open to the defendant. But unfortunately men do not always appreciate their ignorance. Those not in the know are prone to set impractical standards when they judge conduct that has caused injury. Evidence that the defendant has followed the ways of his calling checks hasty acceptance of suggestions for unfeasible change.

Professor Hetcher objected to the first point, that permitting custom evidence overcomes jurors' bias against businesses:

> These points have the ring of truth so far as they go, but their plausibility depends on the assumption that the defendant was following a reasonable or

> nearly reasonable custom. If the custom was flagrantly unreasonable, juries would be unlikely to worry that their verdict will make the defendant less competitive. It is more plausible to suppose that a jury would instead think that, as all industry participants in the practice were acting wrongfully, each should make changes in its behavior (and pay for failing to do so). In other words, the fact that the whole industry engages in an odious practice might well make a jury more sympathetic toward the victim of such a practice.
>
> He also objected to the second point, that custom evidence focuses the juries' attention on the requirement that the plaintiff must prove that the defendant did not use reasonable care:
>
> > Note that Morris' second point in defense of the evidentiary rule again speaks to the effect of the information on the jury's ability to arrive at a less prejudicial perspective on a situation, rather than to the intrinsic, epistemic value of the evidence. . . . We see then that just as with Morris' first rationale for the evidentiary rule, here too the argument, while of interest to the overall study of norms, does not increase our understanding as to why conformity to custom has independent, evidentiary value.

WAL-MART STORES, INC. v. WRIGHT

774 N.E.2d 891 (Ind. 2002)

BOEHM, J.

Ruth Ann Wright sued for injuries she sustained when she slipped on a puddle of water at the "Outdoor Lawn and Garden Corral" of the Carmel Wal-Mart. Wright alleged Wal-Mart was negligent in the maintenance, care and inspection of the premises, and Wal-Mart asserted contributory negligence. By stipulation of the parties, a number of Wal-Mart's employee documents assembled as a "Store Manual" were admitted into evidence at the jury trial that followed. Several of these detailed procedures for dealing with spills and other floor hazards. . . .

At the end of the trial, Wright tendered the following instruction:

> There was in effect at the time of the Plaintiff's injury a store manual and safety handbook prepared by the Defendant, Wal-Mart Stores, Inc., and issued to Wal-Mart Store, Inc. employees. You may consider the violation of any rules, policies, practices and procedures contained in these manuals and safety handbook along with all of the other evidence and the Court's instructions in deciding whether Wal-Mart was negligent.
>
> The violation of its rules, policies, practices and procedures are a proper item of evidence tending to show the degree of care recognized by Wal-Mart as ordinary care under the conditions specified in its rules, policies, practices and procedures.

Wal-Mart objected on the ground that "you can set standards for yourself that exceed ordinary care and the fact that you've done that shouldn't be used, as this second paragraph says, as evidence tending to show the degree that you believe is ordinary. The jury decides what ordinary care is." The court overruled the objection and the tendered instruction became Final Instruction 17. The court also instructed the jury that . . . negligence is the failure to do what a reasonably careful and prudent person

would do under the same or similar circumstances or the doing of something that a reasonably careful and prudent person would not do under the same or similar circumstances. . . .

The jury found Wal-Mart liable. . . . Wal-Mart appealed, contending that the second paragraph of Final Instruction 17 was an improper statement of law that incorrectly altered the standard of care from an objective one to a subjective one. The Court of Appeals affirmed, holding the challenged paragraph of the instruction was proper because it "did not require the jury to find that ordinary care, as recognized by Wal-Mart, was the standard to which Wal-Mart should be held," and because the trial court had not "instructed the jury that reasonable or ordinary care was anything other than that of a reasonably careful and ordinarily prudent person." This Court granted transfer.

. . . Wal-Mart argues that the second paragraph of Final Instruction 17 incorrectly stated the law because it invited jurors to apply Wal-Mart's subjective view of the standard of care as evidenced by the Manual, rather than an objective standard of ordinary care. Wright responds that the paragraph simply allows jurors to consider Wal-Mart's subjective view of ordinary care as some evidence of what was in fact ordinary care, and does not convert the objective standard to a subjective one. The Court of Appeals agreed with Wright, holding that the paragraph was proper because it "did not require the jury to find that ordinary care, as recognized by Wal-Mart, was the standard to which Wal-Mart should be held," and because the trial court had not "instructed the jury that reasonable or ordinary care was anything other than that of a reasonably careful and ordinarily prudent person."

Initially, we note that implicit in each of these positions, and explicit in the second paragraph of the instruction, is the assumption that the Manual in fact "tend[s] to show the degree of care recognized by Wal-Mart as ordinary care under the conditions specified in [the Manual]." Wal-Mart also objected to this assumption, contending "you can set standards for yourself that exceed ordinary care and the fact that you've done that shouldn't be used, as this second paragraph says, as evidence tending to show the degree that you believe is ordinary." We agree. The second paragraph of the instruction told the jurors that because Wal-Mart has established certain rules and policies, those rules and policies are evidence of the degree of care recognized by Wal-Mart as ordinary care. But Wal-Mart is correct that its rules and policies may exceed its view of what is required by ordinary care in a given situation. Rules and policies in the Manual may have been established for any number of reasons having nothing to do with safety and ordinary care, including a desire to appear more clean and neat to attract customers, or a concern that spills may contaminate merchandise.

The law has long recognized that failure to follow a party's precautionary steps or procedures is not necessarily failure to exercise ordinary care. . . . We think this rule is salutary because it encourages following the best practices without necessarily establishing them as a legal norm.

There is a second problem with the instruction. Even if the Manual reflected Wal-Mart's subjective view of ordinary care, the second paragraph of the instruction incorrectly states the law because it invites jurors to apply Wal-Mart's subjective view—as evidenced by the Manual—rather than an objective standard of ordinary care. It is axiomatic that in a negligence action "[t]he standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor." W. Page Keeton et al., *Prosser & Keeton*

on the Law of Torts §32, at 173-74 & n. 3 (5th ed. 1984) . . . A defendant's belief that it is acting reasonably is no defense if its conduct falls below reasonable care. Similarly, a defendant's belief that it should perform at a higher standard than objective reasonable care is equally irrelevant. . . .

Wright cites four cases in support of the instruction. . . . These authorities support the admissibility of the Manual, which Wal-Mart does not contest. They do not support an instruction to consider any "violation" of the Manual as "evidence tending to show the degree of care recognized by Wal-Mart as ordinary care under the conditions." We conclude that the second paragraph of Final Instruction 17 was an improper invitation to deviate from the accepted objective standard of ordinary care and therefore incorrectly stated the law.

The judgment of the trial court is reversed. This action is remanded for a new trial.

NOTES TO WAL-MART STORES, INC. v. WRIGHT

1. ***Incentives for Internal Rules.*** A trial court in a case similar to *Wright* stated:

> Let me tell you what I think public policy–wise. We want K-Mart and Publix and Burger King and all those places to have internal policies that assure the highest standard of public safety. And God forbid that there be jury instructions that, hey, if you fail to wash your hands or something like that the jury can consider it *in evidence* against you. In other words, these retail establishments being held to a higher standard than the reasonable man standard.

Mayo v. Publix Super Markets, Inc., 686 So. 2d 801, 802 (Fla. App. 1997). Do enterprises have incentives to adopt internal rules even if those rules might be brought to the attention of juries in negligence cases?

2. ***Specific Relevance of Internal Rules.*** The *Wright* court acknowledges the admissibility of Wal-Mart's rules, and there was no challenge to the first paragraph of the instruction. Apparently, a jury may learn about such rules but must not treat their violation as equivalent to unreasonable conduct. A jury could perhaps use information about a defendant's own rules to support a conclusion that the actions required by the rules were practical or were known to the defendant at the time of the plaintiff's injury.

IV. *Res Ipsa Loquitur*

Sometimes a litigant can introduce eyewitness testimony that totally explains what someone did or how something happened, but often litigants rely on circumstantial evidence. "Circumstantial" evidence is information a factfinder may use to make inferences about past events (for example, how a person acted or how an injury occurred). Tort law recognizes some uses of circumstantial evidence as proof of breach with the phrase "res ipsa loquitur," which is Latin for "the thing speaks for itself." When a plaintiff relies on the *res ipsa loquitur* doctrine, the jury will be allowed to conclude that the defendant was negligent even though the plaintiff may not have introduced detailed or direct evidence about the precise shortcomings of the defendant's actions.

The classic case introducing this concept to tort law is Byrne v. Boadle. Its facts are compelling: If someone walks on a sidewalk and gets hit by a barrel that comes out of a second-story window, should those facts alone be enough to entitle the pedestrian to damages in a lawsuit? As the *res ipsa* doctrine developed, courts tended to apply it only when four elements were present: (1) the type of injury was usually associated with negligence; (2) the defendant had exclusive control of whatever caused the injury; (3) the plaintiff had made no causal contribution to the harm; and (4) the defendant's access to information about the event was superior to the plaintiff's. Modern courts rarely refer to all four of these elements. Shull v. B.F. Goodrich focuses on the two most significant elements of the doctrine, the requirement that accidents like the one that occurred are usually the result of someone's negligence and the requirement that the instrumentality that caused the harm was in that actor's control at the time of the negligent act. In Dover Elevator Co. v. Swann, the court limits use of the doctrine in a circumstance where the plaintiff is able to provide fairly detailed proof about the events that caused injury.

BYRNE v. BOADLE

159 Eng. Rep. 299 (Ex. 1863)

[In a negligence action, the plaintiff introduced evidence showing that as he was walking on a street past the defendant's shop, a barrel fell from the shop's second-story window and hit him. The plaintiff was nonsuited at trial on the ground that there was no evidence of negligence. The plaintiff appealed.]

POLLOCK, C. B.

. . . We are all of opinion that the rule must be absolute to enter the verdict for the plaintiff. The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford prima facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be prima facie evidence of negligence. Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are prima facie responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them. The present case upon the evidence comes to this, a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible for the acts of his servants who had the control of it; and in my opinion the fact of its falling is prima facie evidence of negligence, and the plaintiff who was injured by it is not bound to shew that it could

not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.

NOTES TO BYRNE v. BOADLE

1. ***Inference of Tortious Conduct.*** Deciding whether a person used reasonable care usually requires comparing that person's conduct to the way a reasonable person would behave. In Byrne v. Boadle, the plaintiff could offer no explanation of what the defendant did that caused his injuries, so no comparison was possible. The court inferred from the circumstances, however, that the defendant (or its employees) more likely than not was negligent. Under these circumstances, it would be unfair to require the plaintiff to identify the defendant's specific tortious conduct. What was it about the circumstances that persuaded the court to permit this inference? What kind of evidence would have been direct evidence in a case of a barrel falling from an upstairs window?

2. ***Circumstantial Evidence Generally.*** The *res ipsa loquitur* doctrine is a label for the law's customary approach to circumstantial evidence. Circumstantial evidence is generally admissible in court on all kinds of issues. And factfinders are generally allowed to make inferences from evidence. So, despite its Latin label, the doctrine of *res ipsa loquitur* should not be interpreted as meaning that circumstantial evidence of negligence is admissible while other circumstantial evidence is not.

Circumstantial evidence of negligence is special because, when the elements of *res ipsa loquitur* are met, the party relying on the circumstantial evidence (usually the plaintiff) can avoid a directed verdict. In a case where the plaintiff had no direct evidence of what the defendant did wrong, the defendant might move for a directed verdict on the ground that the plaintiff has not introduced adequate proof of a negligent act. Where the *res ipsa loquitur* doctrine applies, the trial court will reject that motion. Furthermore, at the end of the trial, the doctrine will entitle the plaintiff to a special jury instruction. A *res ipsa* instruction informs the jury that, despite the plaintiff's failure to offer direct evidence of what the defendant did wrong, the jury may infer that the defendant was negligent.

SHULL v. B.F. GOODRICH CO.

477 N.E.2d 924 (Ind. Ct. App. 1985)

SULLIVAN, J.

A jury returned a defendant's verdict in a personal injury and loss of consortium case. Plaintiffs Everett D. Shull, Sr. and Lapaloma Shull, appeal the judgment entered thereon. They present one issue: Whether the trial court erred in refusing an instruction upon the doctrine of *res ipsa loquitur*.

In 1979 Mr. Shull, age 56, was a truck driver with a motor freight company. He was directed by his employer to the B.F. Goodrich plant in Woodburn, Indiana, to pick up a load of tires. While on Goodrich's loading dock Shull was injured when a dockplate, a mechanical device which forms a bridge between the dock and the truck trailer and upon which Shull was standing, malfunctioned, throwing Shull to the floor of his trailer. The Shulls sued Goodrich for negligence. . . .

At the close of the evidence Shulls tendered and the court refused the following instruction:

> There is a doctrine in law called *res ipsa loquitor,* [sic] which doctrine may come into effect under certain conditions in a negligence case. In order for the doctrine to apply, you must find that the following facts existed on May 29, 1979, the time of the occurrence in question:
>
> First: That the plaintiff was injured as a proximate result of the occurrence;
>
> Second: That the instrumentality causing the injury was under the exclusive control of B.F. Goodrich;
>
> Third: That the occurrence was of a sort which usually does not occur in the absence of negligence on the part of the person in control.
>
> If you find that the plaintiffs have established each of the three elements as stated by a preponderance of the evidence then you may infer that the defendant, B.F. Goodrich was negligent and you may consider this inference together with all the other evidence in the case in arriving at your verdict. Record at 46. . . .

The words "*res ipsa loquitur*" literally mean "the thing speaks for itself." Black's Law Dictionary. The doctrine is a rule of evidence allowing an inference of negligence to be drawn under certain factual circumstances. . . .

The true question is whether the event was more probably occasioned by negligence of the defendant rather than some other cause. A plaintiff relying upon *res ipsa loquitur* may show that the event or occurrence was more probably the result of negligence by simply relying upon the basis of common sense and experience or he may present expert testimony to establish this proposition. [As] Dean Prosser [has observed]:

> In the usual case the basis of past experience from which the conclusion may be drawn that such events usually do not occur without negligence, is one common to the whole community, upon which the jury are simply permitted to rely. Even where such a basis of common knowledge is lacking, however, expert testimony may provide a sufficient foundation; and by the same token it may destroy an inference which would otherwise arise. In many cases the inference to be drawn is a double one, that the accident was caused in a particular manner, and that the defendant's conduct with reference to that cause was negligent. . . .
>
> The plaintiff is not required to eliminate with certainty all other possible causes or inferences, which would mean that he must prove a civil case beyond a reasonable doubt. All that is needed is evidence from which reasonable men can say that on the whole it is more likely that there was negligence associated with the cause of the event than that there was not. It is enough that the court cannot say that the jury could not reasonably come to that conclusion.

W. Prosser, Handbook of The Law of Torts, §39, p.217-218 (4th ed. 1971).

In Indiana the doctrine is invoked where (1) the injuring instrumentality is shown to have been under the exclusive control of the defendant, and (2) the accident is one which in the ordinary course of things does not happen if those who control the instrumentality use proper care.

The tendered instruction was derived from the Indiana Pattern Jury Instructions and was a correct statement of the law of *res ipsa loquitur* in Indiana. . . .

The precise issue thus becomes whether the Shulls presented evidence from which a reasonable jury could conclude that the dock-plate would not have malfunctioned in the absence of negligence on the part of the party in control and that Goodrich was the

party in exclusive control. If so, then the Shulls were entitled to have the jurors instructed that if they did find those elements established by a preponderance of the evidence, they could infer that Goodrich was negligent.

When Shull arrived at Goodrich's plant he was directed to dock #7, one of Goodrich's eighteen loading docks. Each dock is equipped with a dock-plate. The dock-plate is a mechanical device consisting of a metal plate with a sixteen to eighteen inch metal lip, both operated by a torsion spring. The dock-plate is activated by pulling a ring which releases a spring raising the dock-plate to an angle of approximately 30°. Then the shipper walks the dock-plate down so that the lip is inside and rests upon the trailer bed. The plate is held in place by a ratchet device called a hold-down assembly consisting of a metal bar with serrated or grooved edges in it and into which a "pawl" or wedge fits. When in place the dock-plate serves as a bridge on which fork lift trucks and people walk back and forth between the loading area and the trailer bed.

The parties agree that the dock-plate on dock #7 was not operating properly on the day in question. Shull testified that upon arriving he went to the loading area and attempted to activate the dock-plate by pulling the metal ring but it would not respond. James Vogel, a Goodrich employee, then arrived at the scene and was successful in activating the dock-plate. Vogel and Shull testified they had problems getting the dock-plate to stay in a locked position. The first two times Vogel activated the dock-plate, it would spring up and the two men walked it down. On each of these first two attempts the dock-plate would not stay down but instead would "pop up" a couple of inches. The two men attempted the same process a third time and both testified that after they walked the dock-plate down it appeared locked. Vogel walked to his fork truck and Shull walked into the trailer. While Shull was on the lip of the dock-plate, the plate suddenly released to its fully elevated position throwing Shull to the floor of his trailer.

Neither party disputed that dock-plate failure is a rare event. There was evidence that after the accident Goodrich's maintenance department looked at the dock-plate but no specific cause of the malfunction was introduced into evidence. Shull argues that dock-plates don't normally fail without negligence on the part of the person responsible for maintaining them. In arguing for a directed verdict, Goodrich contended that the reason for this malfunction was not produced by Shull and that negligence could not be inferred from the mere fact of the malfunction. The Shulls argued *res ipsa loquitur*, and the judge, in denying the motion, held the evidence sufficient to avoid a directed verdict.

Generally, *res ipsa loquitur* would allow the jury to attribute Shull's injury under unexplained circumstances to Goodrich's negligence based upon evidence from which a reasonable person may conclude it is more likely than not that the accident was caused by Goodrich's negligence. This requirement necessitates a reasonable showing that the accident was indeed one which would not ordinarily occur in the absence [sic: presence?] of proper care on the part of those who manage or maintain the instrumentality causing injury.

This inference of negligence as a component of *res ipsa* may be based upon common knowledge and/or the testimony of experts or other witnesses. Jack Ringler, Goodrich's engineer and head of maintenance, testified that under normal circumstances the dock-plates remained secured until the trailer pulled away or the ring was pulled down to release the hold-down assembly. On the occasion in question, however, the trailer was stationary and the ring had not been pulled. Nonetheless, according to

the testimony of the Goodrich employee assisting Shull, the dock-plate raised as though the ring had been pulled.

The unexplained malfunction of machinery is ordinarily attributable to a defect and/or improper maintenance. Where responsibility for the defect may be attributed to the defendant, negligence may be inferred. In the instant case, Goodrich admitted that the dock-plates were serviced only after trouble arose. Ringler also specifically testified that Goodrich had experienced previous malfunctions with the dock-plates caused by a problem or defect in the ratchet device. He further testified, given Shull's report of the manner in which the malfunction occurred, that, in his opinion, the mechanism was faulty and should be replaced. This is evidence from which it might be reasonably concluded that it was more likely than not that the accident would not have ordinarily occurred in the absence of Goodrich's negligence. . . .

The evidence which tends to support the conclusion that Goodrich was in exclusive control of the dock-plate must be viewed in light of the definition of "exclusive control" in the law of *res ipsa loquitur*. As stated, the doctrine of *res ipsa loquitur* is an evidentiary rule.

It is not necessary that defendant be in control of the causative instrumentality at the moment of injury so long as defendant was the last person in control of the instrumentality under circumstances permitting an inference of negligence. Dean Prosser explained that:

> [exclusive control] of course does serve effectively to focus any negligence upon the defendant; but the strict and literal application of the formula has led some courts to ridiculous conclusions, requiring that the defendant be in possession at the time of the plaintiff's injury. . . . Of course this is wrong: it loses sight of the real purpose of the reasoning process in an attempt to reduce it to a fixed, mechanical and rigid rule. "Control," if it is not to be pernicious and misleading, must be a flexible term.

W. Prosser, Handbook of the Law of Torts, §39, p.220 (4th ed.1971). In keeping with this concept courts must look to the defendant's right to control, and opportunity to exercise it. In some situations "control" is simply the wrong word and the courts should determine whether the evidence reasonably eliminates explanations other than the defendant's negligence. As noted by Prosser:

> The plaintiff is not required to eliminate *with certainty all* other possible causes and inferences, which would mean that he must prove a civil case beyond a reasonable doubt. . . . The injury must either be traced to a specific instrumentality or cause for which the defendant was responsible, *or it must be shown that he was responsible for all reasonably probable causes to which the accident could be attributed.*

Prosser, supra at 218. (Emphasis supplied.) . . .

The evidence which tends to support exclusive control in *Goodrich* is that Goodrich was the sole occupant of the factory since it was built in 1961. In 1968 the dock-plates were installed and, at all times thereafter, Goodrich performed all maintenance upon them. Goodrich employees were used for the purpose and no independent contractors were employed. Clearly if the jury were to believe that the dock-plate would not have malfunctioned but for an act or omission constituting negligence, there was sufficient evidence for them to conclude that Goodrich was in exclusive control of the dock-plates at the time the negligent acts would have occurred. . . .

Because Shull's tendered instruction on the doctrine of *res ipsa loquitur* correctly stated the law, was supported by sufficient evidence and was not covered by other

instructions, it was error for the trial court to refuse it. We do not know what the jury's verdict would have been had they been properly instructed, therefore, we reverse the judgment and remand this case for a new trial.

NOTES TO SHULL v. B.F. GOODRICH

1. *Elements of* Res Ipsa Loquitur. The court in Shull v. B.F. Goodrich describes the two basic elements a plaintiff must prove to be entitled to a *res ipsa loquitur* instruction. Would these elements have been met if required by the court in Bryne v. Boadle? What evidence demonstrated each element in *Shull?*

2. *The Restatement (Third) and the Exclusive Control Requirement.* The Restatement (Third) of Torts §17 (Proposed Final Draft No. 1, April 26, 2005) proposes a one-sentence test for when the plaintiff is entitled to a *res ipsa loquitur* instruction: "The factfinder may infer that the defendant has been negligent when the accident causing the plaintiff's physical harm is a type of accident that ordinarily happens because of the negligence of the class of actors of which the defendant is the relevant member." The drafters objected to the exclusive control element that is so common in states' articulations of the standards for *res ipsa loquitur:*

> A number of courts adopt a two-step inquiry: step one asks whether the accident is of a type that usually happens because of negligence, while step two asks whether the "instrumentality" inflicting the harm was under the "exclusive control" of the defendant. This formulation, with its emphasis on exclusive control, is unsatisfactory for at least two reasons. One is that the test is sometimes indeterminate, since there may be several instruments that could be deemed the cause of the plaintiff's injury. Another objection is more basic. In one well-known early *res ipsa loquitur* case, a barrel fell out of the window of the defendant's business premises, injuring a pedestrian below. In such a case, exclusive control is an effective proxy for the underlying question of which party was probably negligent: the party with the exclusive control of the barrel at the time of the incident is in all likelihood the one whose negligence caused the barrel to fall. In fact, the exclusive-control criterion is often effective in identifying the negligent party, and in these cases exclusive control plays a vital role in *res ipsa loquitur* evaluations. Yet frequently exclusive control functions poorly as such a proxy. Consider, for example, the consumer who buys a new car; a day after the purchase, the car's brakes fail, and the car strikes a pedestrian who is in a crosswalk. Undeniably, the motorist has exclusive control of the car at the time of the accident. Yet there is no reason to believe that the consumer is the negligent party, and adequate reason to believe that the negligence belongs to the car manufacturer (or, more precisely, that the latter has manufactured a defective product). Accordingly, the injured pedestrian should not have a *res ipsa loquitur* claim against the consumer, despite the latter's exclusive control; furthermore, the pedestrian might have a *res-ipsa*-like claim against the manufacturer, despite the latter's lack of exclusive control.

Id., cmt. b. Does the flexible definition of "exclusive control" given by the court in Shull v. B.F. Goodrich overcome the drafters' objections?

3. *Plaintiff's Contributory Negligence.* In addition to the two basic elements, some jurisdictions have required the plaintiff to show that the occurrence was not due to any voluntary action or contribution by the plaintiff. The purpose of this element, like the element of exclusive control, is to eliminate the plaintiff as the responsible party. The court in Shull v. B.F. Goodrich, in a footnote omitted in this

text, explained that in Indiana law does not require this element because the exclusive control element is sufficient to eliminate the plaintiff as a responsible party.

Requiring the plaintiff to show that he or she was not responsible was related to another concept, the defense of contributory negligence. That defense precluded any recovery for a plaintiff whose own negligence had contributed to an injury. The vast majority of states have replaced the contributory negligence doctrine with rules that allow some negligent plaintiffs to recover damages. This change in the general treatment of a plaintiff's negligence has led many states to eliminate specific consideration of a plaintiff's negligence in the context of the *res ipsa loquitur* doctrine.

4. ***Information Accessible Only to the Defendant.*** Some states apply another variation in the elements of *res ipsa loquitur*. They require the plaintiff to show that evidence of the explanation for the harm's occurrence is more accessible to the defendant than to the plaintiff. This requirement was probably met in Bryne v. Boadle. It would be harder to establish in Shull v. B.F. Goodrich, particularly under modern discovery rules, which allow the plaintiff to find out, before trial, all information, such as maintenance logs and records of prior breakdowns that the defendant has about possible causes of the accident. The following case, Dover Elevator Co. v. Swann, applies this element.

5. ***Procedural Role of* Res Ipsa Loquitur.** Reviewing its *res ipsa loquitur* precedents, the New York Court of Appeals wrote:

> [There has been] confusion over the doctrine's procedural effects. Courts, including ours, used "prima facie case," "presumption of negligence" and "inference of negligence" interchangeably even though the phrases can carry different procedural consequences. One case went so far as to use all three interchangeably.

Morejon v. Rais Construction Co., 7 N.Y.3d 203 (2006). The court concluded:

> Res ipsa loquitur is a phrase that, perhaps because it is in Latin, has taken on its own mystique, although it is nothing more than a brand of circumstantial evidence. Viewed in that light, the summary judgment (or directed verdict) issue may also be properly approached by simply evaluating the circumstantial evidence. If that evidence presents a question of fact as to the defendant's liability under the . . . test for res ipsa loquitur, the case should go to trial. If the circumstantial evidence does not reach that level and present a question of fact, the defendant will prevail on the law. Alternatively, as we have said, the plaintiff should win summary judgment or a directed verdict in the exceptional case in which no facts are left for determination.

Id., 211-12.

6. ***Problems: Application of* Res Ipsa Loquitur.** Should the doctrine of *res ipsa loquitur* be applied in the following circumstances? Is the common experience of humans sufficient to answer these questions or is expert testimony required to explain why such accidents occur?

A. An elevator stopped suddenly between floors, throwing an occupant to the floor and breaking her arm. See Colmenares Vivas v. Sun Alliance Insurance Co., 807 F.2d 1102 (1st Cir. 1986).

B. A store customer sat down in a chair provided by the store, and the chair collapsed, throwing the customer to the floor and causing injuries. See Trujeque v. Service Merchandise Corp., 117 N.M. 388, 872 P.2d 361 (1994).

C. A child was dropped off at a day care center in good health, but had a brain concussion at pickup time. See Fowler v. Seaton, 394 P.2d 697 (Cal. 1964).

D. A box of groceries fell from a large display and hit a customer. See Cardina v. Kash N'Karry Food Stores, Inc., 663 So. 2d 642 (Fla. App. 1995).

E. A bottle of a carbonated drink exploded in a waitress's hand, cutting it severely. See Escola v. Coca Cola Bottling Co., 150 P.2d 436 (Cal. 1944).

F. A girl cut her foot while playing soccer on a school playground. See Rosenberg v. Rockville Center Soccer Club, Inc., 500 N.Y.S.2d 856, N.Y. App. Div. (1990).

DOVER ELEVATOR CO. v. SWANN

334 Md. 231, 638 A.2d 762 (1994)

CHASANOW, J. . . .

The plaintiff, David Swann, was injured on February 2, 1987, while attempting to board an elevator that allegedly failed to level properly with the floor. . . .

. . . Swann filed a complaint against Prudential Insurance Company of America [owner of the building where the elevator was located] and Dover Elevator Company [which had manufactured, installed, and maintained the elevator]. The complaint alleged that Swann suffered $3,000,000.00 in damages as a result of the defendants' negligence and defects in the design, manufacture, installation and maintenance of elevator number two. . . .

At trial, Swann offered the expert testimony of Donald Moynihan, an elevator consultant and engineer. . . .

The specific negligence alleged by Moynihan's testimony was as follows: 1) Dover was negligent in filing and cleaning, as opposed to replacing, contacts 14 and 15 on elevator number two, resulting in a faulty current and the misleveling; 2) Dover was negligent by failing to spend adequate time servicing the elevator; 3) Dover's maintenance records were deficient; and 4) Dover failed to properly stock replacement parts in the elevator's machine room. Swann contends the elevator's misleveling was probably caused by an irregular current running between the number 14 and 15 contacts. The importance of this contention was explained by the Court of Special Appeals: "Although [Dover's Maintenance] Agreement specifically excludes several elevator components and associated systems, the component that Swann contends caused the misleveling, the '14 and 15 contacts,' was not excluded." . . .

Following a trial on the merits, the jury returned a verdict in favor of all the defendants. Swann appealed to the Court of Special Appeals, which affirmed the verdict as to Prudential . . . but reversed the verdict as to Dover [holding that the trial court had erred in refusing to instruct the jury on *res ipsa loquitur*]. . . . Dover petitioned this Court for a writ of certiorari, which was granted . . . to address the [following issue: May the plaintiff, who has proffered direct evidence of the specific cause of his injuries, also rely on the doctrine of *res ipsa loquitur* in order to establish the defendant's negligence?] . . .

The dilemma between the doctrine of *res ipsa loquitur* and offering direct evidence of negligence is best summarized by the oft-quoted discussion in Hickory Transfer Co. v. Nezbed, 202 Md. 253, 96 A.2d 241 (1953): "In this case the plaintiffs themselves

proved the details of the happening, foregoing reliance on *res ipsa loquitur;* and, having undertaken to prove the details, they failed to show negligence on the part of the defendants. Indeed, they explained away the possible inference of negligence. Paradoxically, the plaintiffs proved too much and too little." . . . The question presented by the instant case is, therefore, whether the plaintiff attempted to prove the "details of the happening," thereby precluding his reliance on *res ipsa loquitur.* . . .

[T]he Court of Special Appeals in the instant case held that "Swann's attempt to prove specific acts of negligence did not prevent him from requesting that the jury be instructed on both negligence and *res ipsa loquitur.*" . . . In examining this evidence, the court declared the following:

> Swann did not, however, purport to furnish a complete explanation of the accident. Indeed, Swann offered evidence establishing that Dover responded to reports of mislevelings on two separate occasions following the January 7th repair [when contacts 14 and 15 were filed]. There was no evidence of what, if any, corrective measures Dover took on those dates. It may well be that Dover negligently repaired the elevator on one, or both, of those occasions and such negligent act or acts caused the February 2nd misleveling incident. Further, at the close of the evidence, there was a dispute as to what caused the accident. Bothell testified that it was proper to clean, rather than replace, the 14 and 15 contacts, and that the door clutch mechanism prevents the elevator doors from opening when the elevator cab is greater than an inch or two from floor level. Therefore, "reasonable men might [have] differ[ed] as to the effect of the evidence before the jury." . . .

We find that the plaintiff's expert witness, Donald Moynihan, did purport to furnish a sufficiently complete explanation of the specific causes of elevator number two's misleveling, which would preclude plaintiff's reliance on *res ipsa loquitur.* . . .

In arriving at its conclusion that this direct evidence of negligence did not preclude the plaintiff's reliance on *res ipsa loquitur,* the Court of Special Appeals extensively discussed two principal cases: Blankenship v. Wagner, 261 Md. 37, 273 A.2d 412 (1971) and Nalee, Inc. v. Jacobs, 228 Md. 525, 180 A.2d 677 (1962). We find these cases distinguishable from the instant case, however, because little or no direct evidence of negligence was offered in either of them. The only evidence offered by the plaintiff in *Blankenship* was that, as he and a coworker were carrying a refrigerator up a set of stairs behind the defendant's house, one of the steps collapsed underneath the coworker's feet. . . . The plaintiff was forced to support the entire weight of the refrigerator from above to prevent it from falling on his coworker, who was caught in the broken step. In doing so, the plaintiff injured his back. . . . *Blankenship* is distinguishable from the instant case because the plaintiff in *Blankenship* never sought to offer even a partial explanation of why the step collapsed beneath his coworker's feet. He only sought to prove *res ipsa loquitur*'s three basic elements. This Court therefore decided that the directed verdict in favor of the defendant was inappropriate and reversible error. . . .

In the course of its reasoning, the *Blankenship* Court also acknowledged the following principle which guides our reasoning in the instant case:

> The justice of the rule permitting proof of negligence by circumstantial evidence is found in the circumstance that the principal evidence of the true cause of the accident is accessible to the defendant, but inaccessible to the victim of the accident. The rule is not applied by the courts except where the facts and the demands of justice

> make its application essential, depending upon the facts and circumstances in each particular case.

261 Md. at 41, 273 A.2d at 414 (quoting Potts v. Armour & Co., 183 Md. 483, 488, 39 A.2d 552, 555 (1944)).

The Court recognized, however, in reference to the direct evidence standard established in *Nezbed,* that an offer of some "circumstantial evidence which tends to show the defendant's negligence" should not as a matter of policy preclude reliance on *res ipsa loquitur.* . . .

The instant case also does not present a situation where "the principal evidence of the true cause of the accident" was accessible only to the defendant and "inaccessible to the victim." . . . As stated herein, the plaintiff's expert witness testified to the specific cause of the accident within a reasonable degree of engineering probability. Mr. Moynihan did not merely provide some circumstantial evidence tending to show the defendant's negligence with regard to contacts 14 and 15 and the misleveling of elevator number two. He purported to offer a complete explanation of the precise cause and how the negligence of Dover's technician contributed to that cause. . . .

The other case relied upon by the Court of Special Appeals, Nalee, Inc. v. Jacobs, is equally distinguishable from the factual circumstances of the instant case. In *Nalee,* the plaintiff was injured in the defendant's hotel when a nearby bench fell over and struck him on the foot. The only arguably direct evidence offered by the plaintiff was testimony that the bench was not fastened to the floor or the wall. . . .

As in *Blankenship,* the *Nalee* Court also recognized that direct . . . evidence of negligence may preclude application of *res ipsa loquitur.* . . . The *Nalee* Court correctly concluded that, in cases where the plaintiff's evidence "did not stop at the point of showing the happening of the accident under circumstances in which negligence of the defendant was a permissible inference," the plaintiff was properly precluded from utilizing the *res ipsa loquitur* doctrine. . . . The Court concluded that "negligence on the part of the defendant could have properly been drawn by the jury from the evidence in this case without resort to the 'doctrine' of *res ipsa loquitur.* . . ." *Nalee,* 228 Md. at 533, 180 A.2d at 681.

This Court's reasoning in *Nalee* is equally applicable to the instant case. The plaintiff in this case did not stop at the inference of the defendant's negligence, drawn from the single misleveling of the elevator, but purported to establish more. In doing so, "all of the facts with regard to the actual happening of the accident had been developed, and when developed, they were held insufficient to establish negligence" on the part of Dover. . . .

In the instant action, Swann's primary complaint was not that a single misleveling created an inference of negligence, but that Dover's failure to properly correct the problem after prior mislevelings constituted negligence. More particularly, Swann contended Dover was negligent by cleaning, rather than replacing, contacts 14 and 15, failing to spend adequate time servicing the elevator, keeping deficient records, and failing to stock sufficient replacement parts. . . . The trial judge apparently concluded, and we agree, that a *res ipsa loquitur* instruction was not proper because the plaintiff's expert witness established that the most likely cause of the elevator's misleveling was an insufficient current running between contacts 14 and 15 and the defendant's negligence, if any, was the failure to correct the misleveling problem. In effect, the plaintiff's expert, Donald Moynihan, and the defendant's

witness, Ronald Bothell, agreed that the probable cause of any possible misleveling was the contacts but they disagreed over whether cleaning rather than replacing these contacts constituted negligence.

Thus, the reasoning of *Nalee,* like that of *Blankenship,* leads us to the conclusion that *res ipsa loquitur* should not be applied to the facts and circumstances of the case before us. . . .

Judgment of the Court of Special Appeals reversed. . . .

NOTES TO DOVER ELEVATOR CO. v. SWANN

1. *Expert Testimony in* Res Ipsa Loquitur *Cases.* In many negligence cases, a defendant is entitled to have the judge instruct the jury that "the mere occurrence of an accident does not raise an inference of negligence." *Res ipsa loquitur* cases are those in which the mere occurrence of an accident under particular circumstances does raise such an inference. In *Dover Elevator Co.,* the plaintiff apparently did not need the usual benefit of the *res ipsa loquitur* doctrine — protection from a directed verdict for the defendant — because the plaintiff's expert testified as to what the defendant did that caused the accident. Is the plaintiff's use of an expert always fatal to the plaintiff's attempt to rely on *res ipsa loquitur* to prove breach? The plaintiff in Shull v. B.F. Goodrich was assisted by an expert. How was that testimony different from the expert's testimony in Dover Elevator Co. v. Swann?

2. *Expert Testimony in Medical* Res Ipsa Loquitur *Cases.* In some medical cases, experts testify that the plaintiff's injury was of a type usually associated with negligence. This kind of testimony necessarily involves some detailed proof about the injurious event, but it does not identify specific acts of negligence in the plaintiff's case. Rather, it explains the general nature of the medical procedure and the risks associated with it. This testimony can give the jury the necessary background for deciding whether the accident was one that usually results from negligence and whether the defendant was more likely than not the negligent actor. Many courts allow both this type of expert testimony and the *res ipsa loquitur* inference. *See, e.g.,* Connors v. University Associates in Obstetrics and Gynecology, 4 F.3d 123 (2d Cir. 1993).

Perspective: Counter-Intuitive Statistical Likelihood of Negligence

In a study with many respondents, federal magistrate judges reacted to a hypothetical problem in which it was stated that barrels fall from windows sometimes because of negligent conduct and sometimes in the absence of negligent conduct. The judges' analyses of the problem varied widely. Since one aspect of the *res ipsa loquitur* doctrine requires a belief that negligence was a highly likely cause of an injury, the wide range of the judges' responses suggests that application of the doctrine may sometimes be uneven or unfair. See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind,* 86 Cornell L. Rev. 777, 808-809 (2001):

> [W]e gave the judges in our study a *res ipsa loquitur* problem. In an item labeled "Evaluation of Probative Value of Evidence in a Torts Case," we presented all of

the judges with a paragraph-long description of a case based loosely on the classic English case, Byrne v. Boadle:

> The plaintiff was passing by a warehouse owned by the defendant when he was struck by a barrel, resulting in severe injuries. At the time, the barrel was in the final stages of being hoisted from the ground and loaded into the warehouse. The defendant's employees are not sure how the barrel broke loose and fell, but they agree that either the barrel was negligently secured or the rope was faulty. Government safety inspectors conducted an investigation of the warehouse and determined that in this warehouse: (1) when barrels are negligently secured, there is a 90% chance that they will break loose; (2) when barrels are safely secured, they break loose only 1% of the time; (3) workers negligently secure barrels only 1 in 1,000 times.

The materials then asked: "Given these facts, how likely is it that the barrel that hit the plaintiff fell due to the negligence of one of the workers"? The materials provided the judges with one of four probability ranges to select: 0-25%, 26-50%, 51-75%, or 76-100%.

[T]he actual probability that the defendant was negligent is only 8.3%. . . .

Of the 159 judges who responded to the question, 40.9% selected the right answer by choosing 0-25%; 8.8% indicated 26-50%; 10.1% indicated 51-75%; and 40.3% indicated 76-100%.

CHAPTER 5

Legal Cause: Cause-in-Fact

I. Introduction

Causation Doctrines Connect a Defendant's Conduct to a Plaintiff's Harm. Tort law limits the potential liability of individuals whose conduct is improper. Even when a plaintiff shows that a defendant's conduct was worse than the conduct required by an applicable standard of care, to win damages the plaintiff must also show that there was a causal connection between the defendant's conduct and the plaintiff's harm. This concept is known as *cause-in-fact.* The cause-in-fact part of a plaintiff's case requires proof that as a matter of historical and physical fact, it is more likely than not that the defendant's conduct was a cause of what happened to the plaintiff.

In addition to the cause-in-fact requirement, tort law provides some other limits to liability. These limits are based more on policy considerations than on an effort to determine historical or physical facts about the plaintiff's injury and the defendant's conduct. For example, proximate cause doctrines sometimes treat a defendant's conduct as too remote from a plaintiff's injury to justify holding the defendant liable. In certain cases, conduct by an actor other than the defendant will be treated as a *superseding cause,* which also insulates the defendant from responsibility. Also, the *duty* concept protects defendants from liability in cases where the law concludes that a person owes no obligation or only a limited obligation to another to protect another person from harm. These policy-based limits on liability are different from *cause-in-fact.* Limits on liability are treated in following chapters.

Terminology. Some courts and legal writers use legal cause to describe only cause-in-fact or only proximate cause. Others use *proximate cause* to describe cause-in-fact, proximate cause, and superseding cause. Still others include *superseding cause* under the category of *proximate cause.* This casebook uses *legal cause* as a term encompassing all aspects of causation. This usage is common but is certainly not universal. This casebook also attempts to treat each causation component separately and with a clear label (such as "cause-in-fact," "proximate cause," and "superseding cause").

II. Basic Cause-in-Fact: The But-For Test

In most situations, a defendant's action is defined as a "cause-in-fact" of a plaintiff's harm if the plaintiff's harm would not have occurred if the defendant had acted properly. Put another way, the question is whether the plaintiff would have been free from harm "but for" (in the absence of) the defendant's negligent conduct. This analysis of cause-in-fact is called the *but-for test.* It treats one occurrence as a cause of a second occurrence if the first occurrence was necessary or essential for the happening of the second occurrence.

In a negligence case, applying the but-for test requires the finder of fact to decide how the plaintiff's injury occurred and to compare that scenario with what the trier of fact thinks would have happened if the defendant's conduct had been free from negligence. If the finder of fact believes that without the defendant's negligent conduct the plaintiff's injury would not have happened, then the cause-in-fact element of the plaintiff's case is satisfied. The defendant's conduct will be treated as a cause-in-fact of the plaintiff's harm.

While *cause-in-fact* sounds like a straightforward historical inquiry, it actually can involve considerable speculation. It requires a comparison of some real past events with an alternative imagined set of past events (life as it would have been without the defendant's negligent conduct). Cay v. State of Louisiana illustrates this process, in a case where the "what if" question ("what if the defendant had acted reasonably?") involved the height of a bridge guardrail. Lyons v. Midnight Sun Transportation Services, Inc. applies a cause-in-fact analysis to a vehicular accident, showing the degree of deference an appellate court will ordinarily give to trial court findings about causation and highlighting the separate nature of causation and breach-of-duty inquiries.

CAY v. STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

631 So. 2d 393 (La. 1994)

LEMMON, J.

This is a wrongful death action filed by the parents of Keith Cay, who was killed in a fall from a bridge constructed and maintained by the Department of Transportation and Development (DOTD). The principal issue [is] whether plaintiffs proved that DOTD's construction of the bridge railing at a height lower than the minimum standard for pedestrian traffic was a cause-in-fact of Cay's fall from the bridge. . . .

Cay, a twenty-seven year-old single offshore worker, returned to his home in Sandy Lake from a seven-day work shift on November 3, 1987. Later that afternoon his sister drove him to Jonesville, thirteen miles from his home, to obtain a hunting license and shotgun shells for a hunting trip the next day. Cay cashed a check for $60.00 and paid for the hunting items, but remained in Jonesville when his sister returned to Sandy Lake about 7:00 p.m. Around 10:00 p.m. Cay entered a barroom and stayed until about 11:00 p.m., when he left the barroom on foot after declining an offer for a ride to his home. He carried an opened beer with him.

Five days later, Cay's body was discovered on a rock bank of the Little River, thirty-five feet below the bridge across the river. Cay would have had to cross the bridge in order to travel from Jonesville to his home.

Cay's body was found in a thicket of brambles and brush. The broken brush above the body and the lack of a path through the brush at ground level indicated that Cay had fallen from the bridge. There was no evidence suggesting suicide or foul play.[1] There was evidence, however, that Cay, who was wearing dark clothes, was walking on the wrong side of the road for pedestrian traffic and was intoxicated.

The bridge, built in 1978, was forty feet wide, with two twelve-foot lanes of travel and an eight-foot shoulder on each side. The side railings were thirty-two inches high, the minimum height under existing standards for bridges designed for vehicular traffic. There were no curbs, sidewalks or separate railings for pedestrian traffic, although it was well known that many pedestrians had used the old bridge to cross the river to communities and recreation areas on the other side.

Cay's parents filed this action against DOTD, seeking recovery on the basis that the guard railings on the sides of the bridge were too low and therefore unsafe for pedestrians whom DOTD knew were using the bridge and that DOTD failed to provide pedestrian walkways or signs warning pedestrians about the hazardous conditions.

The trial court rendered judgment for plaintiffs, concluding that Cay accidently fell from the bridge. The court held that the fall was caused in part by the inadequate railing and in part by Cay's intoxicated condition. Pointing out that DOTD had closed the old bridge to both vehicular and pedestrian traffic and should have been aware that numerous pedestrians would use the new bridge to reach a recreational park, the Trinity community and other points across the river from Jonesville, the court found that DOTD breached its duty to pedestrians by failing to build the side railings to a height of thirty-six inches, as required by the American Association of State Highway and Transportation Officials (AASHTO) standards for pedestrian railings. The court concluded that this construction deficiency was a cause of the accident in that "a higher rail would have prevented the fall." Noting that there was no evidence establishing what actually caused the incident, the court surmised that Cay was "startled by oncoming traffic, moved quickly to avoid perceived danger, tripped over the low rail, lost his balance, and with nothing to prevent the fall, fell from the Little River Bridge." ...

The court of appeal affirmed. The court concluded that the inadequate railing was a cause-in-fact of the accident, stating, "It is true that the accident might have occurred had the railing been higher. However, it is also true that the accident might not have happened had the railing been higher." The court further stated, "Had the railing been higher, the decedent might have been able to avoid the accident."

Because these statements are an incorrect articulation of the preponderance of the evidence standard for the plaintiffs' burden of proof in circumstantial evidence cases, we granted certiorari.

Burden of Proof

In a negligence action, the plaintiff has the burden of proving negligence and causation by a preponderance of the evidence. Proof is sufficient to constitute a preponderance when the entirety of the evidence, both direct and circumstantial, establishes that the fact or causation sought to be proved is more probable than not.

[1] The fact that Cay bought a hunting license and supplies militates against a conclusion that he planned to commit suicide.

One critical issue in the present case is causation, and the entirety of the evidence bearing on that issue is circumstantial. For the plaintiff to prevail in this type of case, the inferences drawn from the circumstantial evidence must establish all the necessary elements of a negligence action, including causation, and the plaintiff must sustain the burden of proving that the injuries were more likely than not the result of the particular defendant's negligence. The plaintiff must present evidence of circumstances surrounding the incident from which the factfinder may reasonably conclude that the particular defendant's negligence caused the plaintiff's injuries.

CAUSE-IN-FACT

... Cause-in-fact is usually a "but for" inquiry which tests whether the injury would not have occurred but for the defendant's substandard conduct. The cause-in-fact issue is usually a jury question unless reasonable minds could not differ.

The principal negligence attributed to DOTD in the present case is the failure to build the bridge railings to the height required in the AASHTO standards. The causation inquiry is whether that failure caused Cay's fall or, conversely, whether the fall would have been prevented if DOTD had constructed the railing at least thirty-six inches high.

The determination of whether a higher railing would have prevented Cay's fall depends on how the accident occurred. Plaintiffs had the burden to prove that a higher railing would have prevented Cay's fall in the manner in which the accident occurred. ...

The circumstantial evidence did not establish the exact cause of Cay's fall from the bridge, but it is more likely than not that Cay's going over the side was not intentional, either on his part or on the part of a third party. More probably than not, Cay did not commit suicide, as evidence of plans and preparation for a hunting trip minimize this possibility. More probably than not, he was not pushed, as he had little money or valuables on his person, and the evidence from barroom patrons does not suggest any hostility toward or by him during the evening. More likely than not, he was not struck by a vehicle and knocked over the railing. It is therefore most likely that he accidently fell over the railing.

The evidence suggests that Cay moved at a sharp angle toward the railing, for some unknown reason, and stumbled over. For purposes of the cause-in-fact analysis, it matters little whether his movement toward the railing was prompted by perceived danger of an approaching automobile or by staggering in an intoxicated condition or for some other reason. Whatever the cause of Cay's movement toward the railing at a sharp angle, the cause-in-fact inquiry is whether a higher railing would have prevented the accidental fall.

The trial judge's finding that a higher railing would have prevented the fall is supported by expert testimony that the very reason for the minimum height requirement for railing on bridges intended for pedestrian use is to have a railing above the center of gravity of most persons using the bridge so that the users will not fall over. ...

A cause-in-fact determination is one of fact on which appellate courts must accord great deference to the trial court. We cannot say that the trial court erred manifestly in determining that a railing built to AASHTO minimum specifications would have prevented Cay's fall when he approached the railing at a sharp angle, although the exact cause of Cay's approaching the railing at a sharp angle is not known. While a

higher rail would not have prevented Cay from jumping or a third party from throwing Cay over the rail, one could reasonably conclude that a rail above Cay's center of gravity would have prevented an accidental fall. . . .

NOTES TO CAY v. LOUISIANA

1. *Deciding Among Possible Causes.* The plaintiff's claims require the finder of fact to reach conclusions on two topics: (1) what happened to the decedent; and (2) whether the alleged negligent conduct by the defendant was a necessary element for what happened to the plaintiff. The lack of witnesses to Mr. Cay's death made the first of these two questions difficult; in some cases there will be no dispute about what actually happened, even if the parties do dispute whether a change in the defendant's conduct would have prevented the injurious event. What was the plaintiff's characterization of what occurred?

2. *Burden of Proof of Causation.* The plaintiff must prove by a *preponderance of the evidence* that higher railings would have prevented the harm to Cay, that *more likely than not,* the railing height was a cause-in-fact. What supports the finding that the DOTD's negligence was more likely than not a but-for cause?

The appellate court held that the accident *might* have occurred and that the decedent *might* have been able to avoid the accident had the railing been higher. Bearing in mind that the preponderance of the evidence standard usually requires the proponent of a fact to show that the likelihood of that fact being true is greater than 50 percent, what probability was associated with concluding that the fall *might* have been prevented by higher railings?

3. *Multiple But-For Causes.* There are an infinite number of but-for causes for any accident, even including the plaintiff's having been born. In Cay v. State of Louisiana, the trial court identified two occurrences that were each a cause-in-fact of the death: the height of the railing and Cay's intoxication. In a cause-in-fact analysis, the court asks whether, given all of the other factors present at the time, the defendant's act made a difference. How does that analysis support the conclusion that the intoxication *and* the railing height are each a cause-in-fact?

Perspective: But-For Cause and Toxic Substances

Proof that an actor's conduct is more likely than not a necessary event in the chain of causation is particularly difficult in cases involving exposure to allegedly toxic substances. Often, the best scientific evidence can establish only that exposure to a toxic substance generally increases the likelihood that a harm, such as cancer, will occur. Scientific evidence often cannot establish that the exposure caused the cancer in the specific case of a particular plaintiff because the plaintiff was exposed to many environmental carcinogens.

In such cases, scientists testify about the enhanced risk created by exposure to the substance. For example, they compare the background rate of cancers in populations where there is no exposure to the alleged toxin to the frequency of cancers in similar populations exposed to the toxin. Where there is credible

proof that the frequency of cancers more than doubles, courts often hold that the but-for cause proof is met.

Why require a more than double increase in risk? Courts reason that if the number of cancers in populations exposed to the toxin is more than twice the number in the unexposed population, it is more likely than not that any particular plaintiff's cancer was due to the exposure. For example, if there are 30 cases of cancer in an unexposed population and 40 cases of cancer in an exposed population, then exposure to the toxin is a but-for cause of only 10 of the cancers. This would mean that more likely than not exposure to the toxin is not a necessary event in the development of any particular plaintiff's cancer.

LYONS v. MIDNIGHT SUN TRANSPORTATION SERVICES, INC.

928 P.2d 1202 (Alaska 1996)

PER CURIAM.

Esther Hunter-Lyons was killed when her Volkswagen van was struck broadside by a truck driven by David Jette and owned by Midnight Sun Transportation Services, Inc. When the accident occurred, Jette was driving south in the right-hand lane of Arctic Boulevard in Anchorage. Hunter-Lyons pulled out of a parking lot in front of him. Jette braked and steered to the left, but Hunter-Lyons continued to pull out further into the traffic lane. Jette's truck collided with Hunter-Lyons's vehicle. David Lyons, the deceased's husband, filed suit, asserting that Jette had been speeding and driving negligently.

At trial, conflicting testimony was introduced regarding Jette's speed before the collision. Lyons's expert witness testified that Jette may have been driving as fast as 53 miles per hour. Midnight Sun's expert testified that Jette probably had been driving significantly slower and that the collision could have occurred even if Jette had been driving at the speed limit, 35 miles per hour. Lyons's expert later testified that if Jette had stayed in his own lane, and had not steered to the left, there would have been no collision. Midnight Sun's expert contended that steering to the left when a vehicle pulls out onto the roadway from the right is a normal response and is generally the safest course of action to follow.

Over Lyons's objection, the jury was given an instruction on the sudden emergency doctrine. The jury found that Jette, in fact, had been negligent, but his negligence was not a legal cause of the accident. Lyons appeals, arguing that the court should not have given the jury the sudden emergency instruction. . . .

We find that Lyons has little cause to complain of the sudden emergency instruction because the jury decided the issue in his favor.

To the question "Was Midnight Sun's employee, David Jette, negligent?" the jury answered "YES." The jury finding of negligence indicates that the jury concluded David Jette was driving negligently or responded inappropriately when Ms. Hunter-Lyons entered the traffic lane and, thus, did not exercise the care and prudence a reasonable person would have exercised under the circumstances.

However, Lyons's claims were defeated on the basis of lack of causation. Although the jury found Jette to have been negligent, it also found that this negligence was not

the legal cause of the accident. Duty, breach of duty, causation, and harm are the separate and distinct elements of a negligence claim, all of which must be proven before a defendant can be held liable for the plaintiff's injuries. . . .

. . . [W]e cannot say that the jury's finding of lack of causation was unreasonable. There was evidence presented at trial from which the jury could reasonably have drawn the conclusion that even though Jette was driving negligently, his negligence was not the proximate cause of the accident. Midnight Sun introduced expert testimony to the effect that the primary cause of the accident was Ms. Hunter-Lyons's action in pulling out of the parking lot in front of an oncoming truck. Terry Day, an accident reconstruction specialist testified that, depending on how fast Ms. Hunter-Lyons was moving, the accident could have happened even if Jette had been driving within the speed limit. Midnight Sun also introduced expert testimony to the effect that Jette responded properly to the unexpected introduction of an automobile in his traffic lane. Although all of this testimony was disputed by Lyons, a reasonable jury could have concluded that Ms. Hunter-Lyons caused the accident by abruptly pulling out in front of an oncoming truck, and that David Jette's negligence was not a contributing factor. With the element of causation lacking, even the most egregious negligence cannot result in liability. . . .

NOTES TO LYONS v. MIDNIGHT SUN TRANSPORTATION SERVICES, INC.

1. *Terminology.* The *Lyons* court stated that there was evidence to support the jury's conclusion that the defendant's negligence was not a proximate cause, referring to testimony that the accident could have occurred even if Jette had been driving the speed limit. "Proximate cause" in this usage means the same thing as "cause-in-fact."

2. *Independence of Tort Elements.* How does the court justify victory for the defendant, when there is significant evidence showing that the defendant's truck driver acted negligently?

3. *Problems: But-For Cause*

A. A jockey was injured when the horse he was riding bolted from the race course and ran through a removable railing. The jockey sought damages from the operator of the race course. On the day of the accident, the railing was not painted. (The defendant's use of an unpainted railing was a violation of certain state regulations and was therefore negligent conduct.) The jockey introduced evidence that, because the railing was not painted white (and horses only distinguish between black and white), the fence may have visually blended with the gray infield. Is it more likely than not that the race course's negligence in failing to paint the fence white was a but-for cause of the jockey's injuries? See Martino v. Park Jefferson Racing Assn., 315 N.W.2d 309 (S.D. 1982).

B. Linda Musch was an experienced, careful horse rider. Her horse was trained to work with cattle, and she had worked with the horse many times without mishap. She was injured when she and her horse collided with an unmarked gray steel guy wire on a utility pole owned and maintained by a utility company. She claimed that the lack of markings was a cause-in-fact of her injury and sought damages from the utility. An opinion in the case stated:

> The evidence reflected that the horse was trained to pursue a calf and if "given its head" it would do that instinctively. Linda testified that she gave the horse some slack in the

rein and said to the horse "Let's go get him." The evidence reflected that Linda took off with her horse and the calf began darting in different directions. The horse followed the calf and when it darted under the guy wire the horse followed.

Was the utility's failure to provide a white cover on the guy wire a cause-in-fact of the plaintiff's injuries? See Musch v. H-D Cooperative, Inc., 487 N.W.2d 623 (S.D. 1992).

Perspective: Moral Role of Causation

A moral argument for imposing liability on an actor is that the actor caused harm to the other. Causation is not usually enough for liability, however, because there must also be a duty and fault on the part of the injurer. The combination of negligence and causation "particularizes" or singles out the injurer from other people who might be forced to pay:

> If *A* unreasonably puts *B* at risk, then this is a fact about *A* that is not true of everyone. Moreover, it is a fact about *A* that is morally relevant to *B*'s claims against *A*'s resources. For it is consistent with the value we place upon freedom of action that individuals are encouraged not *unjustifiably* to impose risks on others.

Causation also particularizes the victim. It is not enough that the actor's negligence created a risk:

> Causation particularizes the victim in the *analytic* sense that a victim, by definition, is someone who suffers harm. Thus, the fact that *A* causes *B* harm is normatively significant because it demonstrates that *B*, not someone else, was harmed by *A*. So if *A* must pay someone, it must be *B*, not *C*, *D*, or *E*, none of whom were harmed by *A*.

See Jules A. Coleman, *Property, Wrongfulness, and the Duty to Compensate*, 63 Chi.-Kent L. Rev. 451, 452 (1987).

III. Alternatives to the But-For Test

A. Reasons for Alternatives

A rigorous application of the but-for test would prevent a plaintiff from recovering in some cases where most people would believe that a defendant's actions actually did harm the plaintiff. These cases may involve multiple actors where the conduct of each actor might have been sufficient to cause the harm. In that circumstance, a plaintiff would probably not be able to prove that conduct by any one of the actors was a but-for cause of the plaintiff's entire harm. Courts may relieve the plaintiff of the obligation to prove who caused the harm.

Modern cases have also involved situations where conduct by only one or some, but not all, of a group of defendants could have caused a plaintiff's injury but the

plaintiff cannot show who caused it. Variations on the but-for test known as *alternative liability* and *market share liability* may resolve these cases. Finally, courts have developed special causation rules for some medical malpractice cases where the likely effects of the normal risks inherent in a patient's condition make it difficult to evaluate whether a physician's substandard conduct actually made a difference in the outcome.

B. Multiple Sufficient Causes

The but-for test could prevent a plaintiff's recovery in a case where conduct by each of two or more actors was sufficient independently to have caused the plaintiff's harm. Asking whether the plaintiff would have been all right if a particular actor's conduct had been different would lead to the answer that the plaintiff would still have been injured. That result would prevent a finding of cause-in-fact under the but-for test. For these cases, most courts change the rules about who must prove cause. Once the plaintiff demonstrates that each of the defendant's acts would have been sufficient to cause the harm, each defendant must prove its act was not a substantial factor in producing the harm.

Two distinct questions arise in these cases. Courts must determine whether any particular defendant may be subject to liability for the plaintiff's injury. Also, courts must determine the amount of liability that can fairly be assigned to any particular defendant. The main focus of this section is the first question: Under circumstances that involve two or more actors, will the legal system impose any liability at all on any one or more of those defendants? The answer to this question is often yes. The follow-up inquiry, how much responsibility can each defendant be required to assume, is treated in detail in Chapter 8. Cases often need to consider both the initial question (can any of these multiple defendants be required to pay anything?) and the question of the proper extent of any individual defendant's liability. Kingston v. Chicago & N.W. Ry. Co. is the classic case most often cited for situations where each actor's conduct was sufficient to produce the harm. In a multiple-sufficient-cause case, there may be obvious differences in the role of each defendant's conduct in contributing to the plaintiff's harm. Brisboy v. Fibreboard Paper Products Corporation treats this complication by applying a proximate cause test called the substantial factor test. Chapter 6 provides a fuller analysis of this and other proximate cause doctrines.

KINGSTON v. CHICAGO & NORTHWESTERN RAILWAY CO.

211 N.W. 913 (Wis. 1927)

OWEN, J. . . .

We, therefore, have this situation: The northeast fire was set by sparks emitted from defendant's locomotive. This fire, according to the finding of the jury, constituted a proximate cause of the destruction of plaintiff's property. This finding we find to be well supported by the evidence. We have the northwest fire, of unknown origin. This fire, according to the finding of the jury, also constituted a proximate cause of the destruction of the plaintiff's property. This finding we also find to be well supported by the evidence. We have a union of these two fires 940 feet north of plaintiff's property,

from which point the united fire bore down upon and destroyed the property. We, therefore, have two separate, independent, and distinct agencies, each of which constituted the proximate cause of plaintiff's damage, and either of which, in the absence of the other, would have accomplished such result.

It is settled in the law of negligence that any one of two or more joint tort-feasors, or one of two or more wrongdoers whose concurring acts of negligence result in injury, are each individually responsible for the entire damage resulting from their joint or concurrent acts of negligence. This rule also obtains—

> where two causes, each attributable to the negligence of a responsible person, concur in producing an injury to another, either of which causes would produce it regardless of the other, . . . because, whether the concurrence be intentional, actual or constructive, each wrongdoer, in effect, adopts the conduct of his co-actor, and for the further reason that it is impossible to apportion the damage or to say that either perpetrated any distinct injury that can be separated from the whole. The whole loss must necessarily be considered and treated as an entirety.

Cook v. Minneapolis, St. Paul & Sault Ste. Marie R. Co., 98 Wis. 634, at page 642, 74 N.W. 561 (1898). That case presented a situation very similar to this. One fire, originating by sparks emitted from a locomotive, united with another fire of unknown origin and consumed plaintiff's property. There was nothing to indicate that the fire of unknown origin was not set by some human agency. The evidence in the case merely failed to identify the agency. In that case it was held that the railroad company which set one fire was not responsible for the damage committed by the united fires because the origin of the other fire was not identified. . . .

Emphasis is placed upon the fact, especially in the opinion, that one fire had "no responsible origin." At other times in the opinion the fact is emphasized that it had no "known responsible origin." The plain inference from the entire opinion is that, if both fires had been of responsible origin, or of known responsible origin, each wrongdoer would have been liable for the entire damage. The conclusion of the court exempting the railroad company from liability seems to be based upon the single fact that one fire had no responsible origin, or no known responsible origin. It is difficult to determine just what weight was accorded to the fact that the origin of the fire was unknown. If the conclusion of the court was founded upon the assumption that the fire of unknown origin had no responsible origin, the conclusion announced may be sound and in harmony with well-settled principles of negligence.

From our present consideration of the subject, we are not disposed to criticise the doctrine which exempts from liability a wrongdoer who sets a fire which unites with a fire originating from natural causes, such as lightning, not attributable to any human agency, resulting in damage. It is also conceivable that a fire so set might unite with a fire of so much greater proportions, such as a raging forest fire, so as to be enveloped or swallowed up by the greater holocaust and its identity destroyed, so that the greater fire could be said to be an intervening or superseding cause. But we have no such situation here. These fires were of comparatively equal rank. If there was any difference in their magnitude or threatening aspect the record indicates that the northeast fire was the larger fire and was really regarded as the menacing agency. At any rate, there is no intimation or suggestion that the northeast fire was enveloped and swallowed up by the northwest fire. We will err on the side of the defendant if we regard the two fires as of equal rank.

According to well-settled principles of negligence, it is undoubted that, if the proof disclosed the origin of the northwest fire, even though its origin be attributed to a third person, the railroad company, as the originator of the northwest fire, would be liable for the entire damage. There is no reason to believe that the northwest [sic: northeast] fire originated from any other than human agency. It was a small fire. It had traveled over a limited area. It had been in existence but for a day. For a time it was thought to have been extinguished. It was not in the nature of a raging forest fire. The record discloses nothing of natural phenomena which could have given rise to the fire. It is morally certain that it was set by some human agency.

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

. . . We are not disposed to apply the doctrine of the *Cook* Case to the instant situation. There being no attempt on the part of the defendant to prove that the northwest fire was due to an irresponsible origin — that is, an origin not attributable to a human being — and the evidence in the case affording no reason to believe that it had an origin not attributable to a human being, and it appearing that the northeast fire, for the origin of which the defendant is responsible, was a proximate cause of plaintiff's loss the defendant is responsible for the entire amount of that loss. While under some circumstances a wrongdoer is not responsible for damage which would have occurred in the absence of his wrongful act, even though such wrongful act was a proximate cause of the accident, that doctrine does not obtain "where two causes, each attributable to the negligence of a responsible person, concur in producing an injury to another, either of which causes would produce it regardless of the other." This is because "it is impossible to apportion the damages or to say that either perpetrated any distinct injury that can be separated from the whole," and to permit each of two wrongdoers to plead the wrong of the other as a defense to his own wrongdoing, would permit both wrongdoers to escape and penalize the innocent party who has been damaged by their wrongful acts.

The fact that the northeast fire was set by the railroad company, which fire was a proximate cause of plaintiff's damage, is sufficient to affirm the judgment. This conclusion renders it unnecessary to consider other grounds of liability stressed in respondent's brief.

Judgment affirmed.

NOTES TO KINGSTON v. CHICAGO & NORTHWESTERN RAILWAY CO.

1. *Multiple Sufficient Causes.* The cause-in-fact rule usually places the burden on the plaintiff to show that the damage would not have occurred if the defendant had not acted as he or she did. Kingston v. Chicago & Northwestern Railway Co. illustrates the difficulty in proving cause-in-fact in cases involving more than one wrongdoer. If two fires would each have burned down the plaintiff's building without the other, neither one is a necessary event in the chain of causation. Without the first fire, the second would have destroyed the property, and vice versa. The doctrine of *multiple sufficient causes* prevents each of the two tortfeasors from escaping liability by blaming the other. This doctrine removes the obligation to prove that each defendant's act was a but-for cause.

2. *Shifting the Burden of Proof: Character of Actors' Conduct.* If each of several acts would be sufficient to produce the plaintiff's harm, the burden shifts to each defendant to avoid liability. A defendant will not be liable unless all defendants acted tortiously. There is no discussion in *Kingston* of why the railroad was at fault in setting fires by its locomotive, but state statutes commonly made railroads liable for damages caused by such fires without regard to whether they were at fault. It was not proved who the other tortious actor was, but the court concluded that it was some person engaging in tortious conduct. That is what the court means by the fire being "of responsible origin" as opposed to being set by natural forces.

In some jurisdictions, if a defendant's tortious act combines with a natural act, such as a lightning strike, because the other cause is not a human agency the multiple sufficient cause rule does not apply, and the plaintiff would be unable to meet his or her burden of proving that the defendant's act was a but-for cause. Other jurisdictions do not excuse a defendant from liability in this circumstance. See Moore v. Standard Paint & Glass Store, 358 P.2d 33, 36 (Colo. 1960):

> This court has on at least three occasions ruled that one whose wrongful acts cooperated with an act of God is liable for injuries which are the natural result thereof, the defense of an act of God being available only to defendants who can prove that the injury resulted *solely* from the act of God without any contributory negligence on the part of the defendant.

Under the *Kingston* rule, each of the acts that were independently sufficient to produce the harm must have been tortious for the plaintiff to avoid the harsh result of the but-for cause test. In contrast, some courts and the Restatements of Torts take the position that any defendant whose tortious act was independently sufficient to cause the plaintiff's harm may be liable even if other independently sufficient acts were innocent. See Restatement (Third) of Torts, Comment d (Proposed Final Draft No. 1 April 6, 2005).

BRISBOY v. FIBREBOARD PAPER PRODUCTS CORPORATION

384 N.W.2d 39 (Mich. Ct. App. 1986)

PER CURIAM. Defendant appeals as of right from a jury verdict finding the defendant's negligence in failing to warn the plaintiff's decedent of the danger of working with asbestos products to be the proximate cause of his death. . . .

Charlotte Rand filed a complaint on October 31, 1979, seeking damages for the wrongful death of her husband, Charles Rand. Plaintiff alleged that her decedent died as a result of lung cancer caused by asbestosis contracted during his 26-year career as an asbestos insulation worker. Plaintiff named as defendants the nine employers her decedent had worked for from 1951 until 1977, but [settled with all but Fibreboard Paper Products Corporation before the end of the trial.]

The testimony of a coworker of the decedent, Laurence Jean, revealed that the decedent worked for the defendant for at least six months and at most nine months as an asbestos insulator, i.e., applying insulation material containing asbestos to various pipes. Mr. Jean testified that the air was "very, very dusty" while performing the work, and that there was no way to avoid breathing this dust.

The evidence presented at trial also revealed that plaintiff's decedent was a heavy cigarette user, having smoked two packs per day for 30 years. The effect of the cigarette use on the plaintiff's condition was disputed by the medical experts presented by the parties. Dr. Joseph Wagoner, appearing on behalf of the plaintiff, discounted the effect of Mr. Rand's cigarette smoking on the grounds that Mr. Rand died of adenocarcinoma, and that cigarette smoking is more related to the squamous-type cell, not the adeno type. Dr. Wagoner concluded that cigarette smoking does not increase an asbestos worker's risk of developing lung cancer.

Dr. Leighton Kong, who performed the autopsy on the decedent, admitted that cigarette smoking can be related to adenocarcinoma of the lung, and in fact could have been the sole cause of Mr. Rand's lung cancer. However, Dr. Kong believed that there is a stronger link between asbestosis and cancer than cigarette smoking and cancer. . . .

The defendant's medical evidence included the testimony of Dr. Harry Demopoulos. Dr. Demopoulos opined that Mr. Rand did not suffer from asbestosis, and that Mr. Rand's adenocarcinoma was due solely to cigarette smoking. Dr. William Weiss testified that Mr. Rand had no evidence of pulmonary asbestosis and, in light of this fact, Mr. Rand's development of lung cancer was attributable to his history of cigarette smoking. Dr. Weiss also testified that, while asbestosis and cigarette smoking can combine to create a synergistic effect and thus a greater risk of developing lung cancer than the additive risk of the two factors alone, this increased risk does not exist without the presence of asbestosis. . . .

On appeal, defendant first argues that there was insufficient evidence to establish that Mr. Rand's six- to nine-month exposure to defendant's asbestos products was a proximate cause of his death. Defendant argues that the trial court therefore improperly denied defendant's motion for a directed verdict. . . .

Under Michigan law, an actor will not be held liable for his negligent conduct unless that conduct was a legal or proximate cause of the harm to the plaintiff. There may be more than one proximate cause of an injury, and thus the mere fact that some other cause concurs, contributes, or cooperates to produce an injury does not relieve any of the parties whose negligent conduct was one of the causes of the plaintiff's harm. An actor's negligent conduct will not be a legal or proximate cause of the harm to another unless that conduct was a substantial factor in bringing about the harm. One of the considerations in determining whether an actor's conduct was a substantial factor in bringing about the harm to another is "the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it" [Restatement Torts, 2d, §433(a)]. Where a number

of events each contribute to the ultimate harm, one may have such a predominant effect as to make the effect of a particular actor's negligence insignificant. On the other hand, where none of the contributing factors has a predominant effect, their combined effect may act to dilute the effect of the actor's negligence and prevent it from becoming a substantial factor in bringing about the harm [Restatement Torts, 2d, §433, Comment d].

The plaintiff's proofs, viewed in the light most favorable to him, revealed the following. Mr. Rand's autopsy indicated that he died from cancer resulting from asbestosis and that there was a massive amount of asbestos in his lungs. The nature of the disease from which Mr. Rand suffered is that it progresses cumulatively, with each group of asbestos fibers which lodges in the lung, doing damage to the area in which it is present. The exposure to asbestos need not be extensive, and, in fact, even one month of exposure may cause asbestosis and ultimately result in the victim's death. Consequently, there is no safe level of exposure to any carcinogen.

This evidence was sufficient to permit reasonable minds to conclude that Mr. Rand died, at least in part, due to the development of asbestosis in his lungs as a result of his inhalation of asbestos fibers during his working career. While plaintiff naturally could not directly prove that defendant's asbestos fibers caused the disease which led to his death (it is impossible to determine which particular fibers from the group of fibers to which Mr. Rand was exposed in his career caused the disease), plaintiff did establish that, during the time Mr. Rand worked with defendant's product, the air was extremely dusty and that, when asbestos dust is visible, it necessarily implies an extreme exposure. Plaintiff also established that each fiber which lodges in the lung causes asbestosis in the area around that fiber. Thus, reasonable minds could conclude that Mr. Rand inhaled asbestos fibers from defendant's product and developed asbestosis. The only remaining issue, therefore, is whether the harm caused by defendant's negligent conduct was a substantial factor in bringing about the disease which led to Mr. Rand's death. While clearly a close question, we find that there was sufficient evidence in plaintiff's favor to withstand a motion for a directed verdict. Evidence was presented which showed that Mr. Rand was heavily exposed to defendant's product for six to nine months, that asbestos products were phased out in the early 1970s, and that Mr. Rand was exposed to asbestos products only 50 percent of the time at work during the years from 1954-1962. . . . We therefore find that the trial court properly denied defendant's motion for a directed verdict. . . .

Affirmed.

NOTES TO BRISBOY v. FIBREBOARD PAPER PRODUCTS CORPORATION

1. ***Characterizing Causes.*** The court discussed the plaintiff's exposure to asbestos at nine different employers' workplaces over a 26-year period, the plaintiff's exposure to asbestos at Fibreboard's workplace for the most recent six to nine months, and medical testimony about the effects of asbestos exposure. For Fibreboard to be liable for the plaintiff's cancer, the plaintiff must demonstrate that the exposure at Fibreboard's workplace was more likely than not independently sufficient to cause the cancer. What medical testimony supports the conclusion that this is a multiple sufficient cause case?

2. *Limitations on Liability for Multiple Sufficient Causes.* The Restatement (Second) of Torts §433(2) states:

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

The "substantial factor" test can limit an actor's liability, since the word *may* in the rule allows a court to find that some actors whose conduct was independently sufficient to cause the harm *may not be liable* for the harm caused.

Under Restatement (Second) §433, the first concept for the substantial factor test is "the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it." If there are many causes and/or if causes other than a particular actor's conduct have a much greater effect in producing the harm, that actor will not be liable.

Evidence of the effect of Fibreboard's conduct compared with conduct by other employers and with the decedent's own smoking included these facts:

A. He worked with asbestos from 1951 to 1977.

B. He was exposed to asbestos products only 50 percent of the time from 1954 to 1962.

C. Asbestos products were phased out in the early 1970s.

D. He was heavily exposed to defendant's product for six to nine months.

E. He smoked cigarettes at the rate of two packs a day for 30 years.

The court found that proximate cause was a close question, but it denied the defendant's motion for a directed verdict. Could a reasonable jury have found that Fibreboard's conduct had a great enough effect compared with other factors to make it a substantial factor?

3. *Numerous Proximate Causes.* The *Brisboy* court recognized that there may be more than one proximate cause of an injury. Does it make sense that there can be more than one substantial factor? Does the Restatement (Second) §433 allow for more than one proximate cause?

4. *Problem: Multiple Sufficient Causes.* The bottom level of a parking garage shared a common wall with the basement of a store. A cloudburst caused rain to flood the bottom level of the garage to a level of seven to eight feet along the common wall, and enough water seeped through the wall to cover the floor of the store's basement. There was so much rain that the city's sewer system was inadequate to carry it away. Thus, water in the store's basement might have come from backed-up sewers as well as from the parking structure.

The store owner sued the operator of the garage, seeking damages for the flooding. The defendant answered, claiming that even if it had been negligent, its negligence was not a legal cause of the harm, because the damage would have occurred anyway due to the city's negligently designed sewer system. If the city's sewer system was negligently designed, is the garage operator's argument correct? See Moore v. Standard Paint & Glass of Pueblo, 358 P.2d 33 (Colo. 1960).

5. *Multi-Party Cases Where But-For Analysis Works Well.* In a case like *Kingston* or *Brisboy*, the but-for test would protect the defendant from liability because the

defendant's conduct was not necessary to cause the harm. There are, however, many multi-actor situations where the but-for test *can* establish factual causation. These are cases where neither actor's conduct was independently sufficient to cause the harm. For example, in Glomb v. Glomb, 530 A.2d 1362 (Pa. Super. Ct. 1986), a babysitter intentionally hit and injured a child. The parents knew that the babysitter had hit the child in the past but continued to hire her. In this situation, injury to the child would not have occurred if the parents had not negligently continued to hire the babysitter. Also, injury to the child would not have occurred if the babysitter had not hit the child. The but-for test would treat the babysitter's conduct and the parents' conduct as each being a cause-in-fact of the child's injury. These are not multiple sufficient causes but rather "indivisible causes," causes that are both necessary and combine to produce a single indistinguishable harm. Actors whose tortious acts combine to produce such harms are both liable to the plaintiff as long as each one's conduct was a proximate cause. Indivisible causes are discussed in greater detail in Chapter 8.

Perspective: Preemptive Causes

The Restatement approach to the multiple sufficient cause cases is described in §432(2), discussed in Note 2 following *Brisboy*. Professor Richard W. Wright, *Extent of Legal Responsibility*, 54 Vand. L. Rev. 1071, 1098-1099 (2001), objects that this test "does not clearly distinguish cases of duplicative causation, . . . in which the different competing forces reinforced each other, from cases of preemptive causation, in which one competing force preempted the potential causal effect of the other." If the fire from the northeast reached and destroyed the plaintiff's property before the fire from the northwest could reach it, the northwest fire was potentially sufficient to destroy the property but "was not actually sufficient since it arrived too late." The plaintiff is entitled to recover from either defendant only if both fires were actually sufficient.

A classic multiple cause hypothetical involves two enemies of a third person who is about to set out on a long trek across the desert. The first person mixes a deadly poison into the water in the intended victim's canteen. The second, ignorant of the first person's poisoning, dumps the water from the canteen so that the trekker will die of thirst. When the victim dies of thirst, is his estate entitled to recover from either of the two enemies under the multiple sufficient causes rule?

C. Concert of Action

Concert of action and *concerted action* are names for a theory that sometimes permits a plaintiff who is injured by a defendant's tortious conduct to impose liability on someone else in addition to that defendant. This additional defendant's relationship to the plaintiff's harm might not satisfy the but-for test of causation, but the concerted action theory makes the additional defendant liable to the plaintiff. As will be seen in detail in Chapter 8, a theory that increases the number of defendants against whom a plaintiff

can state a cause of action is helpful to plaintiffs, because it increases the chance that the plaintiff will be able to collect damages if the plaintiff wins the case. Shinn v. Allen articulates a set of criteria for determining when "concert of action" applies to the conduct of two or more actors and applies them to an unfortunately common circumstance.

SHINN v. ALLEN

984 S.W.2d 308 (Tex. Ct. App. 1998)

WILSON, J. . . .

In December 1994, a vehicle driven by Jeremy Michael Faggard, in which Allen was a passenger, collided with a vehicle driven by Robert Wayne Shinn, Gail Shinn's husband. Robert Shinn was killed in the accident, and Gail Shinn was seriously injured.

Gail Shinn sued Allen for negligence, alleging Allen substantially assisted or encouraged an intoxicated person to drive an automobile on public roads that resulted in the collision which killed Robert Shinn and injured her. Allen . . . moved for summary judgment contending he owed no duty to Gail Shinn. The summary judgment was granted. In her sole point of error, Gail Shinn alleges the trial court erred in granting Allen's motion for summary judgment because the evidence established the existence of both a duty and a question of material fact under the concert-of-action theory of liability.

. . . The summary judgment evidence consists of Allen's affidavit, his deposition, his answers to interrogatories, and a copy of the judgment in Faggard's driving-while-intoxicated case.

On the day of the accident, Faggard picked Allen up from his parents' home at approximately 3:00 p.m. to go and "hang out." Allen and Faggard were acquaintances who had met playing volleyball. Allen stated that Faggard was not a "close buddy of mine." Both Allen and Faggard were under 21 years of age; however, about an hour before the accident Faggard decided to buy some beer. Faggard and Allen went to the convenience store where Faggard bought a twelve-pack of beer. Allen did not pay for the beer or arrange for the purchase of the beer. Allen stated he did not plan on drinking that day and did not know that Faggard drank. After buying the beer, Faggard and Allen went to Faggard's house and talked and drank the beer. Allen consumed four or five beers, and Faggard consumed six or seven. Allen and Faggard did not eat anything while drinking the beer, and the last time Allen ate was at "lunchtime."

Sometime before 7:00 p.m., Allen asked Faggard to take him home because his parents wanted him home by 7:00 p.m. to eat dinner. During the ride home, Allen did not think Faggard was speeding.

The summary judgment evidence indicates Allen did not exercise any control over the operation of Faggard's vehicle. Allen affirmatively stated that he did not know what Faggard's tolerance level to alcohol was. Allen did not observe anything indicating Faggard was intoxicated before the accident. Faggard did not slur his words and was not stumbling or walking in a way that would indicate he was intoxicated. Allen, however, did state that he (Allen) was drunk. Faggard was later convicted of driving while intoxicated. Gail Shinn asserts that the summary judgment should be reversed because there is a fact issue regarding whether Allen is liable under the concert-of-action theory. The Texas Supreme Court has stated that, "whether such a theory of

liability is recognized in Texas is an open question." Juhl v. Airington, 936 S.W.2d 640, 643 (Tex. 1996). A version of the theory has been articulated by Professor Keeton as follows:

> All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit, are equally liable.

W. Page Keeton et al., Prosser and Keeton on the Law of Torts §46, at 323 (5th ed. 1984).

The Restatement (Second) of Torts also incorporates this principle, imposing liability on a person for the conduct of another which causes harm. Section 876 states:

> §876 Persons Acting in Concert
>
> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Restatement (Second) of Torts §876 (1977).

Gail Shinn argues that the facts of this case fall under section 876(b). Subsection (b) imposes liability not for an agreement, but for substantially assisting and encouraging a wrongdoer in a tortious act. This subsection requires that the defendant have "an unlawful intent, i.e., knowledge that the other party is breaching a duty and the intent to assist that party's actions." *Juhl*, 936 S.W.2d at 644. Comment d to section 876 lists five factors that can be relevant to whether the defendant substantially assisted the wrongdoer. These include: (1) the nature of the wrongful act; (2) the kind and amount of the assistance; (3) the relation of the defendant and the actor; (4) the presence or absence of the defendant at the occurrence of the wrongful act; and (5) the defendant's state of mind. Restatement (Second) of torts §876 cmt. d (1977).

1. Nature of the Wrongful Act

The purpose of the concert-of-action theory is to deter antisocial or dangerous behavior that is likely to cause serious injury or death to a person or certain harm to a large number of people. It is commonly recognized that driving while intoxicated is an antisocial and dangerous behavior, likely to cause serious injury or death to a person.

2. The Kind and Amount of the Assistance

Gail Shinn relies on Cooper v. Bondoni, 841 P.2d 608 (Okla. Ct. App. 1992), to support her position. The court in *Cooper* recognized that the non-acting person must give substantial assistance or encouragement to the tortfeasor in order to affix Section 876 liability. There is no evidence Allen purchased the beer, ordered the beer, paid for the beer, encouraged Faggard to consume the beer, or encouraged

Faggard to drive recklessly. Allen asked for a ride home. Allen's request was gratuitous. There is no evidence that Faggard's decision to drive in an intoxicated condition was more than his alone.

3. Relation of the Parties

There is no special relationship between Allen and Faggard, such as an employee/employer relationship, that would place one party in a position of control over the other. Allen and Faggard were just acquaintances who decided to "hang out" one afternoon.

4. Presence or Absence of the Defendant

Although we are not bound by out-of-state decisions, we find Olson v. Ische, 343 N.W.2d 284 (Minn. 1984), informative on this issue. In *Olson*, the court held that "the mere presence of the particular defendant at the commission of the wrong, or his failure to object to it, is not enough to charge him with responsibility." Id. at 289 (citing Stock v. Fife, 430 N.E.2d 845, 849 n.10 (Mass. App. Ct. 1982) (quoting William Lloyd Prosser, Handbook of the Law of Torts §46, at 292 (4th ed. 1971)). It is uncontroverted that Allen was riding in Faggard's car as a passenger when the accident occurred.

5. Defendant's State of Mind

The summary judgment evidence shows Allen stated he did not think Faggard was intoxicated. While a fact issue exists as to whether Allen had knowledge that Faggard was intoxicated, that issue alone does not create a fact issue as to whether Allen substantially assisted or encouraged Faggard. Rather, Allen's state of mind is merely one of five factors that can be relevant to whether Allen substantially assisted Faggard.

In reviewing the summary judgment evidence in the context of the above five factors, we conclude Gail Shinn did not raise a material fact issue that Allen substantially assisted or encouraged Faggard in operating the vehicle.

Gail Shinn additionally relies on three out-of-state cases to support her position. All three of these cases, however, are factually distinguishable. In Price v. Halstead, 355 S.E.2d 380, 383 (W. Va. 1987), the complaint alleged that all of the passengers were actively engaged in providing alcohol and marijuana to the driver both before and during the trip and knew that the driver was intoxicated. In Cooper v. Bondoni, the driver and the passengers had all been drinking prior to getting into the car. 841 P.2d at 608-09. According to the driver, everybody in the car encouraged and urged him to violate the law and pass a pickup in a no passing zone. In Aebischer v. Reidt, 704 P.2d 531, 532 (Or. Ct. App. 1985), the passenger contributed equally to the purchase of additional marijuana and kept refilling the "bong" which the driver continued to grab from the passenger. All of these cases are distinguishable in that the assistance or encouragement to commit the wrongful act in these cases was more direct, ongoing, and apparent than the present case.

In reviewing the above factors in the context of the summary judgment standard of review, we conclude that the evidence conclusively disproves that Allen breached the concert-of-action theory of duty to Gail Shinn. . . .

The judgment is affirmed.

NOTES TO SHINN v. ALLEN

1. ***Common Plan or Objective.*** The Restatement (Second) of Torts §876 describes three situations in which one person may be held liable for harm caused by another person. They all require proof that the second person's conduct was tortious.

The most obvious case of concerted action is described in subsection 876(a). In this situation, a defendant is liable for the harm caused by the tortious conduct of another if the defendant expressly or impliedly agrees to cooperate in a particular line of conduct or to accomplish a particular result. When *A* and *B* agree to beat up and rob *C*, *A* and *B* are committing a tortious act in concert, and each is liable for the acts of the other as well as his own acts. For this theory, the acts of all of the parties acting in concert, must be tortious. The Restatement offers the following example:

> *A* is drunk and disorderly on the public street. *B*, *C*, and *D*, who are all police officers, attempt to arrest *A* for the misdemeanor committed in their presence. *A* resists arrest. *B* and *C* take hold of *A*, using no more force than is reasonable under the circumstances. *A* breaks away and attempts to escape. *D* draws a pistol and shoots *A* in the back [which is unreasonable force under the circumstances].

Will *B* and *C* be found to have acted in concert with *D*? Is this common design theory applicable to the facts of Shinn v. Allen?

2. ***Substantial Assistance and Knowing Tortious Conduct.*** The plaintiff in Shinn v. Allen based her claim on the second type of concerted action. According to subsection 876(b), she must prove that (1) Allen knew Faggard's conduct was tortious ("constituted a breach of duty"), and (2) Allen substantially assisted or encouraged Faggard. What evidence supports or refutes each element?

3. ***Substantial Assistance and Separate Tortious Conduct.*** According to subsection 876(c), concerted action will be found when (1) a person provides substantial assistance to the other person whose tortious conduct harms the plaintiff and (2) the person's conduct, separately considered, is tortious. While the second and third types of concerted action both involve a person who gives substantial assistance to the other, the third type requires that the person and the other both act tortiously.

4. ***Problem: Concerted Action.*** Would two drivers engaged in drag racing be acting in concert for the purposes of Restatement (Second) of Torts §876? Carroll and Chapman were racing their cars on a public road, in violation of a state statute, when Carroll's car hit the car that Clausen, the plaintiff, was driving. Clausen and Carroll were killed. Clausen's estate sued Chapman (and Carroll's estate), even though Chapman's car was not physically involved in the collision.

Would a precedent involving a somewhat similar problem be helpful? In Sanke v. Bechina, 576 N.E.2d 1212 (Ill. App. Ct. 1991), the defendant and the plaintiff were both passengers in the driver's car. The defendant passenger "verbally encouraged the driver to exceed the posted speed limit and to disregard a stop sign," and "used physical gestures to encourage the driver's reckless operation of the vehicle." The driver subsequently lost control of the car, killing the plaintiff passenger. Citing Restatement (Second) of Torts §876, the court found that the defendant passenger and the driver were engaged in joint tortious concerted action.

Were Carroll and Chapman acting in concert according to any of the Restatement definitions? Were their activities the same type of concerted action as the activities of the parties in *Sanke?* See Clausen v. Carroll, 684 N.E.2d 167 (Ill. App. 1997).

D. Alternative Liability

In multiple sufficient cause cases, it is possible that conduct by *each* of the defendants could have caused the plaintiff's harm. In concerted action cases, the conduct of *all* of the defendants combined to produce the plaintiff's harm. In contrast, there are some other multiple actor situations where all the actors have acted unreasonably but *only one or some* of them (not all of them) caused the harm. The *alternative liability theory* exposes an actor to liability even where there is a possibility that the plaintiff's harm was entirely caused by someone else. Summers v. Tice is a classic two-wrongdoer case of alternative liability and is cited in many other cases discussing this treatment of cause-in-fact. Burke v. Schaffner is a modern case that identifies the critical elements of an alternative liability case and determines whether the theory might apply where there is only one wrongdoer but the identity of that wrongdoer is difficult to establish.

SUMMERS v. TICE

199 P.2d 1 (Cal. 1948)

CARTER, J.

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

Plaintiff's action was against both defendants for an injury to his right eye and face as the result of being struck by bird shot discharged from a shotgun. The case was tried by the court without a jury and the court found that on November 20, 1945, plaintiff and the two defendants were hunting quail on the open range. Each of the defendants was armed with a 12 gauge shotgun loaded with shells containing 7 ½ size shot. Prior to going hunting plaintiff discussed the hunting procedure with defendants, indicating that they were to exercise care when shooting and to "keep in line." In the course of hunting plaintiff proceeded up a hill, thus placing the hunters at the points of a triangle. The view of defendants with reference to plaintiff was unobstructed and they knew his location. Defendant Tice flushed a quail which rose in flight to a ten foot elevation and flew between plaintiff and defendants. Both defendants shot at the quail, shooting in plaintiff's direction. At that time defendants were 75 yards from plaintiff. One shot struck plaintiff in his eye and another in his upper lip. Finally it was found by the court that as the direct result of the shooting by defendants the shots struck plaintiff as above mentioned and that defendants were negligent in so shooting and plaintiff was not contributorily negligent.

First, on the subject of negligence, defendant Simonson contends that the evidence is insufficient to sustain the finding on that score, but he does not point out wherein it is lacking. There is evidence that both defendants, at about the same time or one immediately after the other, shot at a quail and in so doing shot toward plaintiff who was uphill from them, and that they knew his location. That is sufficient from

which the trial court could conclude that they acted with respect to plaintiff other than as persons of ordinary prudence. The issue was one of fact for the trial court. . . .

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

Considering the last argument first, we believe it is clear that the court sufficiently found on the issue that defendants were jointly liable and that thus the negligence of both was the cause of the injury or to that legal effect. It found that both defendants were negligent and "That as a direct and proximate result of the shots fired by defendants, and each of them, a birdshot pellet was caused to and did lodge in plaintiff's right eye and that another birdshot pellet was caused to and did lodge in plaintiff's upper lip." In so doing the court evidently did not give credence to the admissions of Simonson to third persons that he fired the shots, which it was justified in doing. It thus determined that the negligence of both defendants was the legal cause of the injury or that both were responsible. Implicit in such finding is the assumption that the court was unable to ascertain whether the shots were from the gun of one defendant or the other or one shot from each of them. The one shot that entered plaintiff's eye was the major factor in assessing damages and that shot could not have come from the gun of both defendants. It was from one or the other only.

It has been held that where a group of persons are on a hunting party, or otherwise engaged in the use of firearms, and two of them are negligent in firing in the direction of a third person who is injured thereby, both of those so firing are liable for the injury suffered by the third person, although the negligence of only one of them could have caused the injury. The same rule has been applied in criminal cases, and both drivers have been held liable for the negligence of one where they engaged in a racing contest causing an injury to a third person. These cases speak of the action of defendants as being in concert as the ground of decision, yet it would seem they are straining that concept and the more reasonable basis appears in Oliver v. Miles [110 So. 166 (Miss. 1926)]. There two persons were hunting together. Both shot at some partridges and in so doing shot across the highway injuring plaintiff who was travelling on it. The court stated they were acting in concert and thus both were liable. The court then stated (110 So. 668): "We think that . . . each is liable for the resulting injury to the boy, although no one can say definitely who actually shot him. *To hold otherwise would be to exonerate both from liability, although each was negligent, and the injury resulted from such negligence.*" (Emphasis added.) 110 So. p.668. It is said in the Restatement: "For harm resulting to a third person from the tortious conduct of another, a person is liable if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own

conduct, separately considered, constitutes a breach of duty to the third person." (Rest., Torts, sec. 876(b)(c).) Under subsection (b) the example is given: "*A* and *B* are members of a hunting party. Each of them in the presence of the other shoots across a public road at an animal this being negligent as to persons on the road. *A* hits the animal. *B*'s bullet strikes *C*, a traveler on the road. *A* is liable to *C*." (Rest., Torts, Sec. 876(b), Com., Illus. 3.) An illustration given under subsection (c) is the same as above except the factor of both defendants shooting is missing and joint liability is not imposed. It is further said that: "If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself sufficient to bring about harm to another, the actor's negligence may be held by the jury to be a substantial factor in bringing it about." (Rest., Torts, sec. 432.) Dean Wigmore has this to say: "When two or more persons by their acts are possibly the sole cause of a harm, or when two or more acts of the same person are possibly the sole cause, and the plaintiff has introduced evidence that the one of the two persons, or the one of the same person's two acts, is culpable, then the defendant has the burden of proving that the other person, or his other act, was the sole cause of the harm. (b) . . . The real reason for the rule that each joint tortfeasor is responsible for the whole damage is the practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them they did all; let them be the ones to apportion it among themselves. Since, then, the difficulty of proof is the reason, the rule should apply whenever the harm has plural causes, and not merely when they acted in conscious concert. . . ." (Wigmore, Select Cases on the Law of Torts, §153.) Similarly Professor Carpenter has said: "[Suppose] the case where A and B independently shoot at C and but one bullet touches C's body. In such case, such proof as is ordinarily required that either A or B shot C, of course, fails. It is suggested that there should be a relaxation of the proof required of the plaintiff . . . where the injury occurs as the result of one where more than one independent force is operating, and it is impossible to determine that the force set in operation by defendant did not in fact constitute a cause of the damage, and where it may have caused the damage, but the plaintiff is unable to establish that it was a cause." (20 Cal. L. Rev. 406.)

When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless. Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury. . . .

In addition to that, however, it should be pointed out that the same reasons of policy and justice shift the burden to each of defendants to absolve himself if he can — relieving the wronged person of the duty of apportioning the injury to a particular defendant, apply here where we are concerned with whether plaintiff is required to supply evidence for the apportionment of damages. If defendants are independent tort feasors and thus each liable for the damage caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not

be deprived of his right to redress. The wrongdoers should be left to work out between themselves any apportionment. . . .

The judgment is affirmed.

NOTES TO SUMMERS v. TICE

1. ***Fair Treatment of Gaps in Information.*** Usually, a plaintiff must bring information to a trial about all of the elements of the plaintiff's cause of action. If there is a gap with regard to some aspect of required information, the plaintiff will lose the case. Summers v. Tice reverses this standard procedure. Instead of having a plaintiff suffer because of a lack of information, one or both of the defendants will bear the financial cost of losing the case. This alternative liability doctrine is based on the notion that it is fairer under some circumstances to require the negligent defendants rather than the innocent plaintiff to prove who caused the harm. As the court said, "The one shot that entered plaintiff's eye was the major factor in assessing damages and that shot could not have come from the gun of both defendants. It was from one or the other only." The court concluded that "The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape, the other may also and the plaintiff is remediless." One of the reasons the usual burden of proof would be unfair in these cases is that the defendants are likely to know better than the plaintiff which one caused the harm, but may strategically withhold that information. If crucial information were unavailable to the plaintiff and also unavailable to all the defendants, would that alter the fairness of the result in Summer v. Tice?

2. ***Alternative Liability Compared with Concerted Action.*** The Summers v. Tice court referred to decisions that had applied the concerted action doctrine to cases like the one before the Summers v. Tice court. The court adopted alternative liability, a different doctrine. Would the concerted action theory fit the facts of Summers v. Tice? Was there sufficient evidence for the plaintiff to establish that there was an agreement to a course of conduct or to a common objective, or that a defendant gave substantial assistance or encouragement to another who caused the harm? If two different doctrines fit the facts of a case, a party may rely on either one.

3. ***Problem: Alternative Liability.*** Would the rule from Summers v. Tice help to resolve this case? An incident occurred upon property belonging to Ernest Hagler, who allegedly owned a dog involved in an attack. The other dog belonged to the defendant, Charles Musick, who leased a portion of the Hagler premises. Approximately a year prior to the incident, the plaintiff, Ms. Hood, had gone to the Musick residence to purchase some homegrown tomatoes from the Haglers. On the day in question, the plaintiff, being in the neighborhood, decided to stop by and see if the Haglers had any produce to sell. Upon arriving at the Haglers, the plaintiff parked in the common driveway between the Haglers' residence and that of their lessee, Mr. Musick. She got out of the car and proceeded up the driveway to the back door, where she was surprised to see two large dogs roaming free and unrestricted.

Ms. Hood testified that on her previous visit she saw no dogs or any evidence of dogs, and was not aware that dogs were on the premises. At this point, according to Ms. Hood, the dogs began weaving back and forth and snapping at her. She was gradually forced back because of the animals' advance. As she turned to enter her car, she was bitten in the leg by one of the dogs. Unfortunately, because Ms. Hood

had her back to the dogs when bitten, she was unable to identify which of the two dogs bit her. As a result of this bite and complications arising therefrom, Ms. Hood was hospitalized and underwent surgery. Subsequently, she brought an action against both Mr. Hagler and Mr. Musick.

The jury returned a verdict for the defendants in this case. The plaintiff appealed, claiming that the burden of proof with respect to which animal caused the harm should rest on the defendants. Should the dog owners bear the burden of proof with respect to causation? See Hood v. Hagler, 606 P.2d 548 (Okla. 1979).

BURKE v. SCHAFFNER

683 N.E.2d 861 (Ohio Ct. App. 1996)

TYACK, J.

On October 4, 1994, Gary Burke and his wife, Tammy Burke, filed a complaint in the Franklin County Court of Common Pleas, naming Kerri Schaffner as the lone defendant. The lawsuit arose as a result of serious injuries sustained by Gary Burke on October 26, 1993, when he was struck by a pickup truck driven by Martin Malone, with whom the Burkes settled prior to commencing litigation. The incident occurred during a party held for officers of the City of Columbus Division of Police, Eighth Precinct.

There is no dispute between the parties that the pickup truck accelerated suddenly, causing Mr. Burke to be pinned between it and a parked car. The Burkes' complaint alleged that Schaffner, who was seated directly beside the driver, negligently stepped on the accelerator as she moved over on the front seat to make room for two other passengers getting into the truck.

Prior to trial, counsel for Schaffner filed a motion for summary judgment. Appended to the motion was an affidavit in which she stated, "At no time while I was in the vehicle did my foot hit the accelerator. . . ." In their memorandum contra, the Burkes relied upon deposition testimony of Malone, which included his denial of fault and resulting conclusion that Schaffner must have stepped on the accelerator. In a decision rendered August 24, 1995, the trial court denied the motion, holding that there existed a genuine issue of material fact as to who hit the accelerator.

The case proceeded to a trial by jury on March 11, 1996. Essentially, plaintiffs' theory, based in large part upon Malone's testimony, was that Schaffner stepped on the accelerator. To the evident surprise of plaintiffs' counsel, the defense rested without calling any witnesses, including Schaffner herself. Plaintiffs' counsel unsuccessfully attempted to reopen their case or, alternatively, to call the defendant as a "rebuttal" witness.

On March 14, 1996, the jury returned a verdict in favor of Schaffner. The jury's response to an interrogatory submitted with the verdict forms indicated the jury's express finding that Schaffner was not negligent.

Gary Burke and Tammy Burke ("appellants") have timely appealed. . . .

In their first assignment of error, appellants argue that the trial court erred in failing to grant their motion for a directed verdict. Specifically, appellants reason as follows. They "proved" that Schaffner was one of only two persons who could have negligently harmed Burke. The only other potentially responsible person, Martin Malone, called by appellants as a witness, testified that he did not step on the

accelerator. Thus, since Schaffner failed to present any evidence to overcome her burden to demonstrate that she did not cause the harm, appellants should have been granted a directed verdict.

In addressing this specific contention, appellants necessarily incorporate issues pertaining to the doctrine of alternative liability, the subject of their second assignment of error. Thus, we address these arguments jointly. . . .

As discussed below, the evidence, construed most strongly in favor of the defendant, Schaffner, did not support a directed verdict, as reasonable minds could reach different conclusions as to whether or not defendant was negligent.

Appellants' argument relies heavily upon the testimony of Martin Malone, who, as indicated above, unequivocally denied stepping on the accelerator. Appellants contend that the doctrine of alternative liability mandates a finding that since Schaffner did not testify or otherwise present evidence, she failed to satisfy her burden to prove that she was not negligent. Appellees counter, and the trial court so held, that the doctrine of alternative liability is not applicable to this case.

The doctrine of alternative liability was adopted by a narrow majority of the Supreme Court of Ohio in Minnich v. Ashland Oil Co. 473 N.E.2d 1199 (Ohio 1984). . . .

In this case, the trial court found alternative liability (and thus, burden shifting) to be inappropriate based upon a narrow interpretation of *Minnich*, limiting its application to cases involving multiple defendants, each of whom acted tortiously. The trial court rejected the doctrine based upon appellants' theory that only one of two persons stepped on the accelerator — either the named defendant, Kerri Schaffner, or Martin Malone, the latter of whom denied fault.

Appellants acknowledge the current status of the doctrine in Ohio, citing pertinent case law; however, they construe the case law in a manner which broadens the scope of the doctrine to include situations involving a single negligent act committed by one potentially unidentifiable person, regardless of that person's status as a party or non-party. The trial court rejected this expansion of the doctrine.

We too reject such a broad interpretation. We agree with the holding of the trial court and find its reasoning to be sound. Plain language in *Minnich* lends support to this narrow interpretation:

> It should be emphasized that under this alternative liability theory, plaintiff must still prove: (1) that two or more defendants committed tortious acts, and (2) that plaintiff was injured as a proximate result of the wrongdoing of one of the defendants. Only then will the burden shift to the defendants to prove that they were not the cause of plaintiff's injuries. *This doctrine does not apply in cases where there is no proof that the conduct of more than one defendant has been tortious.* (Emphasis added.)

473 N.E.2d at 1200.

The rationale for the doctrine of alternative liability, and the burden-shifting exception, is not applicable in circumstances where only one person has acted tortiously. The Supreme Court of Ohio has consistently reiterated the rationale justifying the seldom-employed burden shifting:

> [T]he reason for the exception is the unfairness of permitting tortfeasors to escape liability simply because the nature of their conduct and of the resulting injury has made it difficult or impossible to prove which of them caused the harm. . . .

Huston v. Konieczny (1990), 556 N.E.2d 505, 510 (Ohio 1990).

Schaffner argues, and the trial court agreed, that the doctrine further requires that the multiple negligent persons be named as defendants in the litigation; if all negligent actors are brought before the court, then the burden shifts to each of them to disprove causation. We agree. In *Huston*, the court was careful to note:

> In order for the burden of proof to shift from the plaintiffs under 2 Restatement of the Law 2d, Torts, Section 433B(3), all tortfeasors should be before the court, if possible. . . .

The Supreme Court of Ohio has continued to limit the application of alternative liability to "unique situations," all of which have required a plaintiff to satisfy a threshold burden of proving that "*all the defendants* acted tortiously." (Emphasis added.) Horton v. Harwick Chem. Corp., 653 N.E.2d 1196, 1203 (Ohio 1995).

Only upon a plaintiff's showing that each of the multiple defendants acted tortiously should the causation burden shift to and among the defendants, who have each created a "substantially similar risk of harm." 653 N.E.2d at 1203. That rationale simply does not apply to these facts, since appellants attempted to prove that a single tortfeasor, Schaffner, committed a single tortious act, to the exclusion of the only other potentially responsible person, Martin Malone, whom appellants did not sue and, in fact, attempted to exculpate during trial. . . .

As Ms. Schaffner was the only defendant before the court, there was no other named defendant to whom the burden could or should have shifted. The trial court properly ruled that alternative liability was inappropriate under these circumstances and, thus, properly rejected the requested jury instruction. Further, since alternative liability was not applicable, the defendant had no burden to present evidence that she did not cause the harm. As a result, the trial court did not err in overruling appellants' motion for a directed verdict, since reasonable minds could differ in concluding who, if anyone, was negligent.

The first and second assignments of error were overruled. [Other assignments of error were also overruled and the judgment was affirmed.]

NOTES TO BURKE v. SHAFFNER

1. *Multiple Tortious Defendants.* The unusual facts of Burke v. Shaffner describe a failed attempt by the plaintiffs to shift the burden of proof on causation to a single defendant. The plaintiffs could not establish which of two possible people caused the sudden acceleration of the truck, but they were denied the advantage of the alternative liability theory. What element of that doctrine did the plaintiffs fail to establish? How was that element shown in Summers v. Tice?

2. *All Defendants Present.* The doctrine requires the plaintiff to show that each person whose negligence might have caused the harm is a defendant in the lawsuit. Both of the hunters who shot at the plaintiff in Summers v. Tice were defendants. Was that element satisfied in Burke v. Shaffner?

3. *Defendants Created Similar Risks.* Another element identified by the court was that all of the defendants' negligent conduct must have created similar risks. Why was this element missing from the plaintiffs' case in *Burke?*

4. *Problems: The Elements of Alternative Liability.* Because of the use of forceps during his delivery, baby Adam received permanent brain injuries. The attending

physician, Dr. Cohn, diagnosed the baby's position as face down, while in fact the baby was face up. When babies are face up, the use of forceps is inappropriate. The forceps slipped off the baby's head twice while Dr. Cohn attempted to deliver the baby. Dr. Brady was called, did not ascertain the baby's position, and, using the forceps, eventually delivered the baby. The parents claimed that both doctors negligently failed to determine the baby's position and negligently used forceps by applying too much compression pressure to the baby's head, causing brain injuries. The parents settled with Dr. Cohn, and only Dr. Brady was a defendant in the trial. Should the court grant the plaintiff parents their motion to shift the burden of proof with respect to causation to Dr. Brady based on the alternative liability theory? See Battocchi v. Washington Hospital Center, 581 A.2d 759 (D.C. 1990).

Two brothers hosted a party at which minors consumed alcohol. The brothers and some others at the party all bought alcoholic beverages and put them in a bathtub to which all the guests had access. It is negligent per se to serve alcohol to a minor because it is contrary to state law. One minor left the party while intoxicated and drove his car carelessly, injuring the plaintiff. The plaintiff sued the brothers and the others who had brought alcohol to the party. Is alternative liability a theory on which the plaintiff may rely to shift the burden of the proof on this issue to the defendants? See Huston v. Konieczny, 556 N.E.2d 505 (Ohio 1990).

Perspective: Alternative Liability

In alternative liability cases, both tortfeasors breached a duty to the plaintiff by creating a similar risk of harm to the plaintiff, and either could have caused the harm. Only one actually harmed the plaintiff, but the plaintiff cannot determine which one. The court's solution is to allow the plaintiff to collect the full amount of the damages from either defendant, to hold them "jointly" liable. Would it be fairer to hold each liable for 50 percent of the damages? That would match the share of liability to the probability each caused the harm.

Damage rules accomplish this 50/50 split in two ways. In states where joint liability is the rule, a defendant in a case like Summers v. Tice who pays more than his share (50 percent) may sue the other defendant in a legal action called a *contribution* action and recover any overpayment. The bottom line is that each will pay 50 percent (assuming that each has sufficient funds to pay). Other states arrive at this result more directly by holding each defendant "severally" liable for his share rather than "jointly" liable for the entire amount. This avoids the need for a contribution action.

E. Market Share Liability

In some cases where a victim has been harmed by a product that was produced by a number of manufacturers to identical specifications, courts have given plaintiffs the benefit of a modified alternative liability theory. In these cases, the plaintiff has no way of identifying the sources of the product that caused the injury and thus cannot be sure