June, 1935

University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

VOLUME 83 JUNE, 1935 No. 8

CONCURRENT CAUSATION

CHARLES E. CARPENTER †

To avoid confusion in reasoning on concurrent causation, it is well to keep clearly in mind a few elementary, if not almost self-evident, principles which obtain in other types of causation.

First: Causation in fact as the term is used in law is very inclusive. It means any and all antecedents, active or passive, creative or receptive, which were factors actually involved in producing a consequence. For instance, the inventor of a machine is the cause in fact of injuries received in the use of that machine which would not have happened had the machine not been invented.

Second: An actor is not liable in every instance for damage which his wrongful act caused in fact, but only in those instances where all the other elements of liability exist, and one of these is that the damage was a legal or proximate consequence as well as a consequence in fact.

Third: An actor is never liable for a damage if it appears that his wrongful act was not a cause in fact.

Fourth: The "but for" test has only a limited use as a test of causation in fact, and can never be used as a test of legal cause.

Fifth: Every consequence is the result of more than one cause; usually, if not always, of very many causes. Some of these causes are always of innocent origin, and sometimes there are one or more wrongful ones.

Sixth: The defendant does not escape liability for a damage to which his wrongful cause substantially contributed either because of the fact that other causes contributed or because some other causes were innocent.

Seventh: The plaintiff must establish in the civil action the existence of each element of liability by a preponderance of evidence; *i. e.*, that its

† A. B., 1903, A. M., 1904, Kansas University; LL. B., 1908, Harvard University; Professor of Law, University of Southern California; author of articles in various legal periodicals.

existence is more likely than not. The requirement of proof of causation is no exception to this rule.

A single case will serve to illustrate these principles. *P* is sitting in the rear seat of an automobile driven by *B*, who drives up to *D*'s gasoline station and asks *A*, the attendant, to fill his tank with gasoline. In filling the tank, *A* negligently spills gasoline over *P*'s clothes. *B*, knowing that the lid of the coil box had been removed that morning by a very small child and that if the car were cranked in the presence of gasoline fumes a spark might ignite them, nevertheless, directs *X*, who is unaware of the danger, to crank the car. When *X* cranks the car, a spark from the coil box ignites the fumes and burns *P* severely.[1]

The causes in fact involved in this case are numerous: (1) *P*'s presence in the car, (2) *B*'s driving up to the station, (3) *D*'s maintaining the station, (4) *D*'s hiring *A*, (5) *A*'s negligently spilling the gasoline on *P*, (6) *B*'s negligently directing *X* to crank the car, (7) *X*'s cranking the car, (8) *C*'s removal of the coil box lid. The invention of (9) gasoline, (10) automobiles, (11) gasoline pumps, (12) coil boxes, and (13) possibly Benjamin Franklin's discovery of the identity of lightning and electricity which made possible these later inventions, as well as an almost infinite variety of others that might be imagined, may be causes in fact of *P*'s damage. Applying the "but for" test, we say that any one of these antecedents but for which the damage would not have occurred is a cause in fact of *P*'s loss. Only a few of these, however, would be considered legal causes. Perhaps only *P*'s, *A*'s, *B*'s and *C*'s acts fall into the category of legal cause. It is clear that the acts of the inventors do not. *A* and *B* acted wrongfully, *X* innocently, and *C* was irresponsible. *A* and *B* will each be held liable for the full damage *P* suffered (though of course *P* can have no more than one complete satisfaction). Neither *A* nor *B* escape liability because of the fact that other acts contributed to *P*'s injury or because there were other innocent or irresponsible causes involved. The law is unable to apportion the burden among the contributing factors. Its choice is then either to let each wrongdoer escape entirely, the innocent plaintiff thereby going unrequited, or to hold each wrongful actor liable for the full amount. It has chosen the latter alternative. Philosophical doubt by reason of the fact that such result involves holding a defendant liable for consequences produced by the wrong of another has not troubled the courts so long as the defendant's wrong was a substantial contributing factor. In the action against the defendant, he is treated as if he were the sole cause of the whole damage. The concurrent cause cases present no peculiar problem in this respect, nor are they peculiar, as we shall see, in respect to permitting a defendant's act to be treated as a cause of a loss that would have occurred without the defendant's act.

1. The facts are suggested by Teasdale v. Beacon Oil Co., 266 Mass. 25, 164 N. E. 612 (1929).

This type of concurrent cause case does present, however, certain difficulties as to proof of causation.

Where all the concurrent factors involved are necessary to produce the damage, proof that each factor was necessary will establish causation with respect to the defendant's wrong. Where the defendant's cause is not a necessary factor, peculiar difficulties are encountered. If each of the forces concurring is operating separate and distinct from the others, it may be easy to trace the defendant's force as a substantial factor, but where they combine, coalesce or intermingle, so as to make it impossible to determine that any one of the forces is still operating to contribute to the result, the problem of proof of causation becomes more troublesome. The policy of not permitting a wrongdoer to escape liability for a consequence which his wrongful conduct contributed to produce might very well induce the courts in such cases to relax the requirement of proof of causation by a preponderance of the evidence. There seem, however, to be no cases where the courts have done so clearly. They adhere for the most part to the strict requirement of proof by a preponderance of the evidence.

For instance, in *Corey v. Havener,*[2] the two defendants, riding noisy motorcycles, passed the plaintiff's wagon on either side, frightening the plaintiff's horses and causing them to run away and to injure the plaintiff. The court held both defendants liable. It said:

> "It makes no difference that there was no concert between them, or that it is impossible to determine what portion of the injury was caused by each. If each contributed to the injury, that is enough to bind both. Whether each contributed was a question for the jury. . . . If both defendants contributed to the accident, the jury could not single out one as the person to blame."

In *Anderson v. Minneapolis, St. Paul & S. S. M. Ry.,*[3] where the defendant's fire combined with that from another source and the combined fires burned the plaintiff's property, an instruction was sustained that,

> "If you find that other fire or fires not set by one of the defendant's engines mingled with one that was set by one of the defendant's engines, there may be difficulty in determining whether you should find that the fire set by the engine was a material or substantial element in causing plaintiff's damage. If it was, the defendant is liable, otherwise it is not."

In *Orton v. Virginia Carolina Chemical Co.,*[4] where several companies discharged acid into a stream of water, and plaintiff's cattle were killed by drinking it, the court held defendant liable, saying:

2. 182 Mass. 250, 65 N. E. 69 (1902). The quotation is at pp. 251, 252, 65 N. E. at 69.
3. 146 Minn. 430, 179 N. W. 45 (1920). The quotation is at p. 434, 179 N. W. at 46.
4. 142 La. 790, 77 So. 632 (1918). The quotation is at p. 796, 77 So. at 634.

> "The mere fact that other nuisances existed in the same locality which produce similar results is no defense, if the nuisance complained of adds to the nuisance already existing to such an extent that the injury complained of was measurably traceable thereto. It is not necessary that all the injury should be the result of the nuisance charged, if it be of such a character and produces such results as, standing alone, it would be a nuisance to plaintiff. The fact that it is the principal, though not the sole, agent producing the injury is sufficient."

In *Bollinger v. American Asphalt Roof Corp.*,[5] where the plaintiff's park was injured by fumes from adjacent factories, the following instruction was sustained:

> "If there was enough of smoke and fumes definitely found to have come from defendant's plant to cause perceptible injury to plaintiff's, then the fact that another person or persons also joined in causing the injury would be no defense; and it was not necessary for the jury to find how much smoke and fumes came from each place."

Possibly *Tidal Oil Co. v. Pease* [6] is a case where the court did relax in this matter of proof. In that case there were two streams of water which flowed through the plaintiff's premises, and his cattle drank from either one or both of these streams and were killed. The defendants had allowed salt water and oil to flow into the streams. No one defendant was guilty of discharging refuse into both streams, but each stream was sufficiently poisoned to cause the death of the cattle. The court stated, "While the defendants were acting independently of each other, if their acts combined to produce the alleged injury to plaintiffs' live stock, . . . each so acting is responsible for the entire result even though the act of any one defendant might not have caused it." The case seems to permit recovery without a preponderance of proof that defendant's act was a substantial factor in causing the plaintiff's loss.

Would it not be in accord with policy for the courts to adopt a rule as to proof in the concurrent cause cases that would be a relaxation of that generally required in the cases? We suggest that,

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

5. 224 Mo. App. 98, 19 S. W. (2d) 544 (1929). The quotation is at p. 113, 19 S. W. (2d) at 552.

6. 153 Okla. 137, 5 P. (2d) 389 (1931). The quotation is at p. 140, 5 P. (2d) at 391.

> defendant's act did not constitute a cause and (3) that the defendant's act was as likely a cause as any of the other independent causes involved." [7]

The relaxation of proof suggested does not mean that legal cause may exist where cause in fact does not. It merely means that proof of cause both in fact and law is relaxed.

Apparently, the only peculiarity of the concurrent cause cases is in respect to the difficulty of proof of causation. At least that was the only difficulty experienced by courts and legal writers until the Wisconsin court in the *Cook* case [8] invoked a new and unheard of principle. In that case, the court limited liability of the defendant to cases where the fire which combined with the defendant's was of responsible origin. Seemingly, the additional burden was placed on the plaintiff of proving that other combining causes which concurred with the defendant's were from a responsible source. In *Kingston v. Chicago & Northwestern Ry.*,[9] the Wisconsin court rejected this, at least in part, saying that this "would certainly make a wrongdoer a favorite of the law at the expense of an innocent sufferer"; and further, "Where one who has suffered damage by fire proves the origin of the 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." The court would thus throw the burden on the defendant to show that "the fire set by him was not the proximate cause of the damage." [10] The *Cook* case was repudiated *in toto* by the Minnesota Supreme Court in *Anderson v. Minneapolis, St. Paul & S. S. M. Ry.*,[11] the court referring to the *Cook* case as follows:

> "But if it decides that if such fire combines with another of no responsible origin, and after the union of the two fires they destroy the property, and either fire independently of the other would have destroyed it, then, irrespective of whether the first fire was or was not a material factor in the destruction of the property, there is no liability, we are not prepared to adopt the doctrine as the law of this state."

In spite of this repudiation of the *Cook* case and its rejection by the American Law Institute,[12] we find Mr. Justice Peaslee, in an article recently

7. Carpenter, *Workable Rules for Determining Proximate Cause, II* (1932) 20 CALIF. L. REV. 396, 406.

8. Cook v. Minneapolis, St. Paul & S. S. M. Ry., 98 Wis. 624, 74 N. W. 561 (1898).

9. 191 Wis. 610, 211 N. W. 913 (1927). The quotations are at p. 616, 211 N. W. at 915.

10. The case assumes there would be no liability upon the defendant if the other fire was of natural origin. This certainly should be true if the fire of natural origin was of an overwhelming character as compared with the defendant's fire, but it is doubtful if it should be otherwise.

11. 146 Minn. 430, 179 N. W. 45 (1920), cited note 3 *supra*. The quotation is at p. 440, 179 N. W. at 49.

12. RESTATEMENT, TORTS (1934) § 432, illustration 7.

published in the *Harvard Law Review,*[13] favoring the doctrine of the *Cook* case, contending that where "an innocent cause concurs with a cause negligently created to inflict loss upon an innocent third party", the author of the negligent cause should not be held liable. The article should not escape criticism, not alone because it champions an unsound result, contrary to the *Restatement of Torts,* but also because of the misuse of the "but for" test, the untenable and confused character of the argument made in support of the conclusion and the misconception of the difficulty peculiar to concurrent cause.

Unsound Result

It would seem clear that if a plaintiff satisfies the requirements of proof of negligence and causation required in other types of tort, he should not fail in the concurrent cause cases merely because he does not or cannot show that another cause which did contribute to his damage was not an innocent cause. Innocent causes are always in all types of tort cases associated with the defendant's wrongful cause in producing the damage for which the defendant is held liable. In determining the liability of the defendant, there is no reason apparent for inquiring into the nature of other causes that contributed to produce the damage in the concurrent cause cases which does not exist in other types of cases. There is no discoverable reason for differentiating the cases. To excuse the defendant from liability where all the elements of liability required in other cases exist would be to make the defendant a favorite of the law in the concurrent cause cases, and this, too, without warrant.

The "But For" Test

To hold a defendant liable for a loss which would have occurred without the defendant's wrong, Justice Peaslee contends, involves a rejection of the "but for" test.[14] It is submitted that this involves a misuse of the "but for" test. The "but for" test does not affirm, as Justice Peaslee assumes it does, that the defendant's wrong is not a cause of the plaintiff's damage if the damage would have happened without the defendant's wrong. It merely affirms that the defendant's wrong is a cause in fact (not necessarily a substantial factor) of the plaintiff's damage if but for its commission the damage would not have happened. The *Restatement of Torts* makes it a general rule that the defendant's negligent conduct must be a necessary antecedent.[15] To make this a general rule is not open to criticism, for it is

13. *Multiple Causation and Damage* (1934) 47 HARV. L. REV. 1127.

14. He says that the Supreme Court of Minnesota rejected the "but for" test where it held a defendant liable for damage that would have resulted without defendant's wrong. *Ibid.* This idea pervades his whole article. *Id.* at 1141, 1142.

15. Section 432: "(1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if it would have been sustained even if the actor had not been negligent. (2) If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be held by the jury to be a substantial factor in bringing it about."

usually true that defendant's wrong is not a cause of a consequence if it was not needed to produce it, but to allow only one exception to this general rule, as the *Restatement* does, namely, where there are two concurring forces each sufficient alone to cause the damage, is open to criticism, for there are plenty of other exceptions, as will appear later in this discussion.[16] However, the *Restatement* recognizes that true causation in fact exists or may exist in this exceptional case, and provides that the jury may find the actor's negligence to be a substantial factor.[17] Justice Peaslee's argument, on the other hand, seems to imply that the actor's wrongful act is not a cause of the plaintiff's damage if it fails to satisfy the "but for" test as he conceives that test.[18] Yet he suggests that an exception should be allowed in favor of liability where the general rule works injustice to the injured plaintiff. Does this not introduce an entirely new principle, foreign to causation, as the basis of liability?[19] Does it not imply that liability should exist even though cause in fact does not? It seems too clear for argument that a defendant should never be held liable to a plaintiff for a loss where it appears that his wrong did not contribute to it, and no policy or moral consideration can be strong enough to warrant the imposition of liability in such case.

Let us now examine the assumption that it is a universal principle that an actor's wrong is not a cause of the damage if it was not necessary to

16. *Infra* p. 948 *et seq.*

17. It is submitted that the statement in RESTATEMENT, TORTS (Tent. Draft, 1925) § 6, Comment, is incorrect. The statement is: "An act or omission may be the actual cause of an invasion of which it is not the legal cause. On the other hand, an act or omission cannot be the legal cause of an invasion unless the invasion is the result of the act or omission, that is, if the invasion would have occurred even though there had been no such antecedent act or omission. To this the one exception is where an invasion is brought about by the simultaneous operation of two forces, each independent of the other and each of itself sufficient to bring about the invasion had the other not been operating. In such a case an act which sets either of these forces in motion, or an omission which permits the operation of either, is regarded as the legal cause of the invasion, although the act or omission is not a necessary antecedent of the invasion and so is not an 'actual cause' thereof, as the term 'actual cause' is above defined."

The error in this statement consists in assuming that a cause must have been a necessary antecedent. It results from a misapprehension of the "but for" test. Causation in fact may exist though the particular cause was not necessary and the consequence would have occurred without the cause in question. *Infra* p. 948. The truth is that the writer of the words sees that actual cause exists in such case, but the test of cause in fact which he uses is not satisfied. The test of causation in fact is what is inadequate; it is not that legal causes exists and cause in fact does not.

18. Peaslee, *supra* note 13, at 1128, 1129.

19. "Considering the inherent difficulties in determining legal causation, the 'substantial factor' test probably meets the normal situation as adequately as may be expected. Its application, however, to all cases of multiple causation, as advocated by the Restatement, encounters real trouble. Even though the defendant's act was not a necessary factor and the same result would have ensued without it, the jury are to decide whether or not it was a substantial factor, and fix liability or non-liability accordingly. What is it that the jury are to consider in such a situation? The defendant's dereliction is conceded, and there seems to be but one test for the jury to apply. If they think that on the whole he ought to pay they will find against him, and *vice versa*. While this result may not be a novelty in our law, it is one to be avoided whenever possible. A rational application of the more precise 'but for' test considerably lessens the capricious choice of the jury. Only so far, therefore, as the Restatement's exception can sustain the burden of proving that the 'but for' test works injustice to the damaged party, should it be accepted." *Ibid.*

produce it. The "but for" test may be used properly as a test of causation, but not as a test of non-causation, as is done by Justice Peaslee. It can be used affirmatively with safety as a universal test of causation in fact. It is always true that defendant's wrong is a cause in fact of the plaintiff's damage if the damage would not have occurred without the defendant's wrong. The test cannot, however, be turned about and used negatively as a universal test. It cannot be said, as Mr. Justice Peaslee implies, that the defendant's wrongful act is not the cause of the plaintiff's damage if the damage would have occurred without the defendant's act. The question is not what would have occurred, but what did occur. The negative application of the test would often excuse a defendant from liability on the ground that his act was not a cause when in fact it was. For example, *A*, *B* and *C* each push, independently of each other and with approximately equal force, on the plaintiff's automobile, and by their combined pushing they push the car over a precipice. Let us assume that the pushing of any two would have moved the car and would have been sufficient to push the car over the precipice. By applying the "but for" test negatively, as Justice Peaslee does, we get the result that no one of *A*, *B* or *C* was a cause of the car's being pushed over the precipice, since any one of them could truthfully say that the car would have been pushed over the precipice without his pushing. The pushing of *A*, *B* or *C* was not a necessary factor in causing the car to go over the precipice. But is it not perfectly clear that each, *A*, *B* and *C*, were causes of the car going over the precipice? The question of causation is not whether it would be unfair to the plaintiff to refuse to hold the defendant liable, but did the defendant push substantially on the car, and that is a question properly left to the jury, as provided in the *Restatement.*[20]

The cases are too frequent where it is perfectly clear that the defendant was an actual cause in fact in producing the damage, which would have occurred substantially as and when it did without his act, to make it proper to rely upon the "but for" test applied negatively to exclude liability. Such cases are not confined to the one exception stated in Section 432 of the *Restatement of Torts,* nor to concurrent cause cases, but are found in other types of cause cases as well. For example, *A* is bent upon hanging himself, and defendant sells him a rope which he uses for that purpose. No matter how clearly it may be established that *A* would have obtained a rope from *B* and hanged himself, it is clear that defendant is a cause of the deceased's hanging himself. Or again, *A* is falling from a precipice and is sure to meet his death on the rocks below, but defendant shoots and kills him as he falls. Is it not clear that the defendant actually killed *A*, no matter if *A* would certainly have been killed without any act of the defendant? Of course, there are other problems involved in determining the liability of the

20. RESTATEMENT, TORTS (1934) § 432.

defendant in these as in all other cases. The reason for rejecting or finding exceptions to the "but for" rule as a test to determine that the defendant is not liable where his wrongful act was not a necessary antecedent is that such application of the test excuses the defendant from liability on the ground that his act was not a cause when it may be clear, frequently, that his act was a cause.

The Argument for Nonliability of Defendant Where One of the Causes Is Innocent

To sustain his contention that the author of the wrongful cause should escape liability where the other concurring cause is innocent but not where it is wrongful, Mr. Justice Peaslee argues that in the former inevitable loss is not increased by the defendant's wrong, but is in the latter. To make this clear, he resorts to the successive cause cases. *Dillon v. Twin State Gas & Electric Co.*[21] he considers illustrative. The facts of this case he states as follows:

> "A boy standing upon the high beam of a bridge trestle lost his balance and was falling to rocks far below. Serious injury, if not death, was certain to ensue, when he was caught upon the defendant's wires and electrocuted. The charged condition of the wires was wrongful as to him. The decision allowed damages for only such sum as his prospects for life and health were worth at the time the defendant's fault became causal." [22]

He observes further:

> "This case does not deal with an instance of strictly concurrent causation. The loss of balance and incipient fall were accomplished facts, the serious consequences of which were certain, before the defendant's wrong became an operative cause. Within the decision are the broad propositions that in the absence of a concurrent wrong a negligent party is not liable beyond the damages shown to have been caused by his negligence, and that in actions for injury to the person, the injured person's danger from other factors, at the time of harm, must be considered." [23]

He reasons that where the innocent cause is in actual inescapable operation before the wrongful act became efficient, it is not apparent how the latter can be considered the cause of the loss. For, he says, the loss has already been inflicted by the innocent cause before the later wrongful act becomes operative as a factor in destroying the physical object of property. This he contends is not true in the case of successive wrongful causes. The innocent cause, he says, has taken value from the plaintiff by reducing the value of

21. 85 N. H. 449, 163 Atl. 111 (1932).
22. Peaslee, *supra* note 13, at 1134.
23. *Id.* at 1135.

the property before it is destroyed. There is no redress for the loss it produced, whereas the first wrongful cause has not taken value from the plaintiff since the plaintiff has a cause of action against this wrongdoer which is equivalent in legal contemplation to the value of the property loss sustained.[24] But is not the answer to this obvious? If it is correct to reason that the plaintiff has not suffered loss since he has a cause of action against the original wrongdoer, equivalent in value to the property loss inflicted, it follows that the second wrongdoer does not cause him any loss because the equivalent value, the cause of action against the first wrongdoer, still exists after the second wrongdoer has consummated his tort. If the defendant is to escape liability in the case of the prior innocent cause because he has not taken value from the plaintiff, should he not escape also in the case of a prior wrongful cause for the same reason? In the former case (the innocent cause case), the plaintiff's loss has been inflicted before the defendant's act becomes effective. In the latter (the wrongful cause case), since the plaintiff has the substituted equivalent value of the property loss, both before and after the defendant's act becomes effective, it follows that the defendant has caused the plaintiff no loss.

In the innocent concurrent cause case, he says, "Recovery would make the plaintiff better off than he would have been if the defendant had done no wrong." [25] But is not the same true in case both causes are wrongful? The plaintiff then has two causes of action instead of one. It is sometimes said that a cause of action against a tortfeasor is in legal contemplation the equivalent in value of the loss caused by him, but this is rarely true in fact, and a plaintiff with two causes of action to compensate for a loss is in much better position than if he had but one; and frequently it will occur that the plaintiff is in fact made fully as much better off by having a cause of action against the defendant in the case of a prior wrongful cause as where the prior cause was innocent and he had no other cause of action. That we have a principle of law that a plaintiff cannot have more than full satisfaction for

24. "The wrongfully caused circumstance stands quite differently. No one may set up the wrong of another as an excuse for his own. The defendant will not be heard to say that someone was about to establish an actionable nuisance next door to the house the defendant burned, and therefore it had little value. He will be denied such a defense, because the threat of nuisance was something the plaintiff had the right to resist. It was a threatened invasion of his legal right, the consummation of which he was not called upon to endure; whereas an innocent threat would have made his rights less vauable because operating in a legal way. The situation of threatened wrong still leaves the plaintiff possessed of all the values he had before. If this wrongful threat becomes executed, the plaintiff has his remedy. The familiar phrase of the street, 'If you hit me you'll pay for it', is an everyday illustration. But the innocent threat takes value from him, for, if the anticipated loss be inflicted, there is no redress. Paradoxical as it may seem, it is nevertheless true that the innocent threat foreshadows irreparable loss, while the guilty threat does not. The unlawful threat may make the plaintiff's property less saleable, but the total value still belongs to him. The prospective harm has not impaired that value, because the prospect of an accrued right to recover the damage from the offender keeps strict pace with that of impending injury. In the case of innocent causation there is no such compensating feature." *Id.* at 1137.

25. *Id.* at 1130.

the damage done him, which does limit a plaintiff's recovery from defendant to the extent he has already taken satisfaction from others who were also responsible causes of the damage, should not be permitted to confuse our thinking in comparing cases of responsible and non-responsible causes.

No one can question the soundness of the successive cause cases which refuse to hold a defendant liable for losses which had accrued when his cause became operative. Wherever such appraisal of accrued loss is possible, the defendant should to that extent be relieved of liability, and no difference is made whether one of the causes is innocent or whether they are all wrongful. But such successive cause cases have no bearing on either the successive or concurrent cause cases in which such segregation of loss is impossible. To argue in either the successive or concurrent cause cases that where it is impossible to segregate or apportion the damages caused by each actor a defendant should not be held liable for the damage caused by another would practically preclude all liability in tort.

Mr. Justice Peaslee's argument as to the strictly concurrent cause cases, while more subtle, is no less untenable than his argument from the successive cause cases. Theoretically and logically, he contends, there should be no liability where several wrongdoers act independently and loss results from their combined causation. To hold each liable for the damage thus caused, he thinks, is to hold a wrongdoer liable for the consequences of another's act. To hold such persons liable cannot, he urges, be based upon logic but must be based upon policy or morals.[26] It is apparent that he feels that the law in these cases holds the defendant liable for consequences he did not cause for reasons of policy or morals. But to refuse to impose any liability, as he suggests, on the ground that the defendant is not a cause would be even more illogical, for the defendant did contribute substantially to the damage. To permit him to escape would require resort to policy or morals or some other ground, and there seems to be no cogent reason for permitting the defendant to escape. The policy Mr. Justice Peaslee suggests is that the plaintiff should not be put to nice discrimination: ". . . he should not be called upon to act as a divider between them. Nor should he be put to the chance of falling between two stools." [27] But the policy suggested is easily and equally well satisfied by denying all recovery to the plaintiff, which certainly should be done if the assumption is that the defendant's wrong was not a contributing cause in fact of the injury. The real policy behind imposing liability in such cases, as distinguished from that suggested, is that wrongdoers should not be permitted to escape the consequences of their wrongful acts. Even a showing that the result would have occurred just the same through other causes is not enough to overcome

26. *Id.* at 1131.
27. *Id.* at 1132.

this. This policy of the law refuses to recognize the distinction between the cases where the other cause was innocent and those where it was wrongful.

Respects in Which Concurrent Cause Cases Are Peculiar

The law does not excuse a defendant from liability for a consequence because other causes were necessary to produce it, and this is true even though one or more of the other causes was innocent.[28] Philosophically, it may be difficult to say that a defendant's act was a cause of damage where other causes operated along with the defendant's to produce it, but is it not true that throughout the whole of the law of torts a defendant when held for causing a loss is held for a loss which would not have resulted by his own act alone? Every effect is a consequence of more than one cause. In fact there are always many cooperating causes. If the law should adopt a rule that a defendant should never be held liable for consequences which other causes than his own aided to produce, a defendant could never be held liable in any case. Also if the law should adopt the rule that whenever an innocent cause contributes to a loss the wrongdoer should be excused, a defendant could never be held liable. There seems to be no reason for treating the concurrent cause cases as an exception in this respect, and the rule which prevails in the majority of courts that have passed on this question makes no distinction.[29] Too, there seems to be no reason for treating the concurrent cause cases differently where other causes would have been sufficient to produce the injury. The question is not whether the other causes would have been sufficient without the defendant's wrong, but whether the defendant's wrong was actually a material factor in producing the injury. If the jury can find the latter, it would seem wholly improper to make an exception in the concurrent cause cases and excuse the defendant from liability. This seems particularly erroneous in view of the fact that the ground urged for excusing the defendant is that his wrong was not a cause.

The aspect in which the concurrent cause cases are peculiar is with respect to the difficulty of proof of causation. When several causes are operating concurrently and the evidence does not disclose that each one of the defendants in particular was necessary to produce the consequence, but each alone would have been sufficient, it may frequently be difficult to ascertain that defendant's cause was actually a material factor in producing the consequence. To lay down a rule which would always excuse a defendant in such case because the jury were not convinced by a preponderance of proof that defendant's act was a material factor would often result in excusing a defendant where his wrong was a very material cause. Policy must enter to determine whether a relaxation of proof should be permitted. As yet the courts have not so relaxed.

28. See the illustration given *supra* p. 942.
29. *Supra* pp. 942-945.