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NEGLIGENCE-PROXIMATE CAUSE-PLAINTIFF'S BURDEN OF PROOF WHERE EITHER OF TWO WRONGFUL ACTS COULD HAVE CAUSED INJURY

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NEGLIGENCE—PROXIMATE CAUSE—PLAINTIFF'S BURDEN OF PROOF WHERE EITHER OF TWO WRONGFUL ACTS COULD HAVE CAUSED INJURY—While walking on a highway, *A* was knocked down by a car driven by *B*, and was almost immediately run over by *C*'s car. *A* was pronounced dead from several injuries, any one of which would have sufficed to cause his death. Plaintiff, *A*'s administratrix, recovered judgment against both *B* and *C* for *A*'s death. *Held*, reversing on other grounds, joinder of *B* and *C* was proper. *Micelli v. Hirsch*, (Ohio App. 1948) 83 N.E. (2d) 240.

When independent wrongful acts of two persons apparently combine to produce a single injury, which either of the acts alone could have caused, the plaintiff may encounter difficulty in proving causation in fact by either defendant, even where it is certain that together they caused the entire damage.[1] As in the principal case, this problem of proof is often raised on an issue of misjoinder.[2] Absent action in concert, procedural rules usually require concurrent causation; therefore, the plaintiff ordinarily must first establish beyond conjecture that each act substantially contributed to his injury.[3] When this is impossible, redress will be denied unless the requirement of proof of causation is relaxed. Thus, where the plaintiff could not show beyond mere speculation that the second of two vehicles which struck decedent caused death, recovery from the second actor has been denied, even though the death did not occur until after the second mishap.[4] Under similar facts, the first tortfeasor has been held not liable for the same reason.[5] It has been recommended that when the plaintiff has proved that at least one of the two persons is culpable, the burden be shifted to the defendants to show whose act was responsible for the injury.[6] The California court has expressly adopted this rule in a case in which only one of the two defendants could have caused the injury; although the court recognized the possibility that one might thus be held liable for an injury to which his wrong did not contribute, it was reluctant to exonerate the two negligent wrongdoers and leave the plaintiff remediless, when ordinarily the actors are in a better position than the plaintiff to show which of them caused the injury.[7] On the facts of the principal case, a presumption that both *B* and *C* materially contributed to *A*'s death was justified by these considerations plus the strong probability that both the original impact of *B*'s car and the

[1] Summers v. Tice, (Cal. 1948) 199 P. (2d) 1; Carpenter, "Concurrent Causation," 83 UNIV. PA. L. REV. 941 (1935); 2 WIGMORE, CASES ON TORTS 865-866 (1912).

[2] See PROSSER, TORTS 1092-1105 (1941) for the various meanings of "joint tortfeasors" which have been confused by courts, with the result in some cases that uncertain rules of procedure affect the substantive liability of the defendants. Cf. Corey v. Havener, 182 Mass. 250, 65 N.E. 69 (1902).

[3] PROSSER, TORTS 321-326 (1941).

[4] Frye v. Detroit, 256 Mich. 466, 239 N.W. 886 (1932). The court also concluded that the wrongs were not concurrent; hence plaintiff had to prove that the death would not have occurred but for defendant's negligence. But acts need not be simultaneous to be regarded as concurrent. Hill v. Peres, (Cal. App. 1934) 28 P. (2d) 946; Pastene v. Adams, 49 Cal. 87 (1874). The "but for" test fails in this type situation, where either of the acts would have caused the identical result alone. The "substantial factor" test should have been used. PROSSER, TORTS 323-324 (1941); 2 TORTS RESTATEMENT, §431 (1934).

[5] Christensen v. Los Angeles Electric Supply Co., (Cal. App. 1931) 297 P. 614; disapproved in Summers v. Tice, (Cal. 1948) 199 P. (2d) 1.

[6] 2 WIGMORE, CASES ON TORTS 865-866 (1912), citing Corey v. Havener, 182 Mass. 250, 65 N.E. 69 (1902); Carpenter, "Concurrent Causation," 83 UNIV. PA. L. REV. 941 (1935).

[7] Summers v. Tice, (Cal. 1948) 199 P. (2d) 1. There, *X* and *Y* negligently fired shotguns at a bird. A single shot put out the eye of a fellow hunter. Judgment for plaintiff against *X* and *Y* as joint tortfeasors was affirmed, reversing (Cal. App. 1948) 190 P. (2d) 963. See also Oliver v. Miles, 144 Miss. 852, 110 S. 666 (1926). In Tucker v. San Francisco, (Cal. App. 1931) 296 P. 101, judgment against all defendants was affirmed in the absence of any direct evidence of causation in fact, the court deciding that the jury could have reasonably inferred either that decedent's death occurred before or after the second impact.

second striking by C's car together caused the death. The court found the acts of *B* and *C* were so associated that the jury was warranted in finding the alleged negligent acts of both produced *A*'s death, apparently relaxing the requirement of proof of causation.[8] A categorical rule shifting the burden of proof to the defendants in all cases involving plural defendants when the plaintiff cannot prove cause in fact against any one alone might be as objectionable in some cases as the prevailing rule. Nonetheless, in fairness to the plaintiff, the trial court should be permitted to relax the requirement of proof, at least when it is probable that both actors materially contributed to the single, indivisible injury.

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[8] Principal case at 242. The explanation was offered that *A* was presumed to continue alive until found dead. No reason for the presumption was given.