65.25

6/13/69

Memorandum 69-79

Subject: Study 65.25 - Inverse Condemnation (Water Damage)

Attached to this memorandum is a draft statute (Exhibit I, pink sheets) which incorporates the changes adopted at the first June meeting. The staff believes that the statute now is in suitable shape to form the basis for a tentative recommendation. If the Commission concurs, we will prepare the introductory portion of the recommendation during the summer with a view towards distribution of the tentative recommendation for comment immediately after the September meeting.

Also attached to this memorandum are extracts from the two leading summaries of tort law (Exhibit II, yellow sheets: Harper & James)(Exhibit III, green sheets: Prosser) discussing the issues of multiple causation and apportionment of damages. These discussions and the California cases cited therein, the staff believes, indicate that these issues are ones that the courts are now and will be able to handle satisfactorily without legislative guidance.

Respectfully submitted,

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EXHIBIT I

DRAFT STATUTE
(Provisions Added to Part 2 of Division 3.6 of Title 1 of the Government Code)

CHAPTER 20. INVERSE CONDEMNATION

Article 1. General Provisions

(to be drafted later)

Article 2. Water Damage

Section 870. Definitions

870. As used in this article:

(a) "Alteration" includes, but is not limited to, diversion, obstruction, acceleration, concentration, or augmentation.

(b) "Property" has the same meaning as the meaning given that word in Section 14 of Article I of the California Constitution.

(c) "Improvement" means any work, facility, or system owned by a public entity.

(d) "Water damage" means damage to property caused by the alteration of the natural flow of surface or stream waters or by waters escaped from a natural or artificial watercourse.

Comment. Section 870 defines "water damage" in subdivision (d) and "alteration" in subdivision (a) to eliminate any difference in liability based on the causative nature of the change in flow of waters. See the Comment to Section 870.4.

Subdivision (b) insures that "property" will be given the same meaning in this article as it has in Section 14 of Article I. See the Comment to Section 870.2.

Subdivision (c) broadly defines improvement to embrace not only flood control, water storage, reclamation, irrigation, and drainage facilities of every size and variety but also such non-water-oriented improvements as buildings and parking lots which alter the flow of water.

Section 870.2. Article establishes rules governing inverse condemnation liability

870.2. This article establishes the rules governing the liability of a public entity under Section 14 of Article I of the California Constitution for water damage caused by an improvement as designed and constructed by the public entity.

Comment. This article is intended to provide a scheme sufficiently comprehensive to serve as the exclusive basis of inverse condemnation liability for water damage. Section 870.2 makes clear this intention while recognizing the ultimate constitutional source for such liability. Although inverse condemnation liability has its source in Section 14 of Article I of the California Constitution, this does not preclude the enactment of reasonable, consistent legislative rules governing such liability. Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of Legislative Power, 19 Stan. L. Rev. 727 (1967).

Section 870.4. Liability for water damage

870.4. Except as provided by this article, a public entity is liable for all water damage proximately caused by its improvement as designed and constructed.

Comment. Section 870.4 states the basic rule of liability of public entities for water damage resulting from public improvements as deliberately designed and constructed. The section complements the existing statutory scheme dealing with liability for dangerous conditions of property (Chapter 2) and liability generally for the negligent or wrongful acts of public employees (Chapter 1). As a consequence of the requirement of deliberate design and construction, liability for damage resulting from negligent maintenance remains within the ambit of the latter sections.

Section 870.4 imposes liability only for damage to property; no liability is imposed for personal injury. See Section 870(b), (d). Also implicit in the definition of water damage is the intent to deal with problems generally of "too much" rather than "too little" water. See Section 871.2.

Without regard to fault, and subject only to the owner's duty to take reasonable steps to minimize any damage (see Section 870.8), Section 870.4 imposes liability on the public entity for all damage to property proximately caused by the disturbance of the natural water conditions by a public improvement. Eliminated is any distinction between surface, stream, and flood waters, as well as any necessity to classify a disturbance or change as an obstruction, diversion, or merely a natural channel improvement. With respect to surface water, this article basically codifies former law. See Burrows v. State, 260 Cal. App.2d 29, 66 Cal. Rptr. 868

(1968). See also Keys v. Romley, 64 Cal.2d 396, 50 Cal. Rptr. 273, 412 P.2d 529 (1966); Pagliotti v. Acquistapace, 64 Cal.2d 873, 50 Cal. Rptr. 282, 412 P.2d 538 (1966). Similarly, with respect to stream waters diverted by an improvement thereby causing damage to private property, the former law is continued. See, e.g., Youngblood v. Los Angeles County Flood Control Dist., 56 Cal.2d 603, 15 Cal. Rptr. 904, 364 P.2d 840 (1961). Former law may, however, have required pleading and proof of fault with respect to the obstruction of stream waters. See, e.g., Youngblood v. Los Angeles County Flood Control Dist., supra; Beckley v. Reclamation Board, 205 Cal. App.2d 734, 23 Cal. Rptr. 428 (1962). The distinction between diversion and obstruction was not, however, a sharply defined one and may have merely reflected the difference between a deliberate program (inverse) and negligent maintenance (tort). Compare Bauer v. County of Ventura, 45 Cal.2d 276, 289 P.2d 1 (1955), with Hayashi v. Alameda County Flood Control and Water Conservation Dist., 167 Cal. App.2d 584, 334 P.2d 1048 (1959). This latter distinction is preserved in the present statutory scheme. On the other hand, under former law, there was no inverse liability for improvement of the natural channel--narrowing, deepening, preventing absorption by lining--even though it greatly increased the total volume or velocity resulting in downstream damage. See, e.g., Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1 (1941); San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392, 188 Pac. 554 (1920). There appears to be no persuasive reason supporting this inconsistent rule of nonliability, and Section 870.4 changes the law in this area to provide a uniform rule of liability in any case of alteration of the natural conditions.

With respect to flood waters, the so-called general rule formerly was that flood waters are a "common enemy" against which an owner of land may defend himself with impunity for damage to other lands caused by the exclusion of flood waters from his land. See Clement v. State Reclamation Board, 35 Cal.2d 628, 220 P.2d 897 (1950); Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 Pac. 625 (1887). However, this rule was qualified by a requirement of reasonableness. House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 153 P.2d 950 (1944). Further, the rule was subject to the condition that a permanent system of flood control that deliberately incorporated a known substantial risk of overflow of flood waters upon private property that in the absence of the improvements would not be harmed constituted a compensable taking. Beckley v. Reclamation Board, 205 Cal. App.2d 734, 23 Cal. Rptr. 428 (1962). In essence then, while Section 870.4 rejects the "common enemy" rule with respect to flood waters, it may do little more than focus proper attention on the proximate results of a deliberate, planned public improvement.

It should be noted that, consistent with the intention to provide statutory rules governing inverse condemnation liability, this article attempts to deal only with liability for damage caused by public improvements. No attempt is made to provide rules governing the private sector, i.e., liability for damage caused by private improvements, or to predict the effect, if any, of this article on such rules. The rules governing private liability may therefore differ from the rules set forth herein, requiring separate application of these different rules of law to the respective parties where public and private improvements are concurring causes of damage.

Section 870.6. Only damage caused solely by improvement compensable

870.6. A public entity is not liable under Section 870.4 for damage which would have resulted had the improvement not been constructed.

Comment. Section 870.6 may merely make explicit what is implicit in the requirement of proximate causation under Section 870.4. Nevertheless, this section makes clear that nothing in Section 870.4 alters the former rule that liability is not incurred merely because flood control improvements do not provide protection to all property owners. See Weck v. Los Angeles County Flood Control Dist., 80 Cal. App.2d 182, 181 P.2d 935 (1947). In short, the law recognizes that some degree of flood protection is better than none. Secondly, this section insures that a claimant may not recover for any more damage than that caused solely by the improvement. Thus, property subject to inundation in its natural state may be damaged by a public improvement but it is only the incremental change that is compensable. However, an improvement that has been in existence for a long period of time may form the basis of reasonable reliance interests and be considered a natural condition. Damage resulting from a subsequent improvement, though no worse than would have resulted if neither improvement had ever been constructed, may therefore properly form the basis of a claim for damages. Clement v. State Reclamation Board, 35 Cal.2d 628, 220 P.2d 897 (1950).

Section 870.8. Duty to mitigate damages; recovery of expenses of mitigation

870.8. (a) A public entity is not liable under Section 870.4 for damage which the public entity establishes could have been avoided if the owner of the property had taken reasonable steps available to him to minimize or prevent damage caused or imminently threatened by the improvement.

(b) A public entity is liable for all expenses which the owner establishes he reasonably and in good faith incurred in an effort to minimize or prevent damage to his property caused or imminently threatened by the improvement.

Comment. Section 870.8 codifies the rule that an owner whose property is being taken or damaged by a public entity is under a duty to take available reasonable steps to minimize his loss, and the corollary to this rule that expenses reasonably and in good faith incurred in an effort to minimize the loss are recoverable from the entity. Albers v. County of Los Angeles, 62 Cal.2d 250, 269, 42 Cal. Rptr. 89, , 398 P.2d 129, (1965) (citing with approval 18 Am. Jur., Eminent Domain, § 262 at 903; 29 C.J.S., Eminent Domain, § 155 at 1015 n.69; 4 Nichols, Eminent Domain § 14.22 at 525 (3d ed. 1962)); Burrows v. State of California, 260 Cal. App.2d 29, 32 n.2, 66 Cal. Rptr. 868, n.2 (1968). But cf. Western Salt Co. v. City of Newport Beach, 271 Adv. Cal. App. 454 (1969). The form of the respective statements ensures that the proper party will bear the burden of pleading and proving any breach of the requisite duty or obligation.

This section does not attempt to particularize with regard to what constitutes reasonable steps available for mitigation. The myriad of

situations that can arise precludes such an attempt. Nevertheless, it should be noted that in appropriate circumstances the reasonableness of an owner's conduct could be affected by his giving notice to the entity of threatened danger and by his willingness to accept preventive measures provided by the entity.

The doctrine of avoidable consequences stated in Section 870.8 is qualified by the requirement that damage be imminently threatened. This makes clear that the threat must be impending or threatening to occur immediately.

Section 871. Offset of benefits against damages

871. In determining any damages recoverable under Section 870.4, the trier of fact shall deduct the value of any benefit conferred by the improvement upon the owner of the property damaged.

Note: Section 871 states a rule of offsetting benefits. The rule provided here will, however, be consistent with that to be provided for direct condemnation after this aspect of direct condemnation has been studied by the Commission. The rule stated in Section 871 is analogous to the general tort rule that, in determining damages suffered as a result of a tortious act, consideration may be given where equitable to the value of any special benefit conferred by that act. See Maben v. Rankin, 55 Cal.2d 139, 10 Cal. Rptr. 353, 358 P.2d 681 (1961) (action for assault and battery and false imprisonment stemming from psychiatric care); Estate of de Laveaga, 50 Cal.2d 480, 326 P.2d 129 (19)(interest beneficiary received benefit of interest paid on interest erroneously held as principal); Hicks v. Drew, 117 Cal. 305, 314-315, 49 Pac. 189 (1897)(flooding case); Restatement, Torts § 920. It is also reflected in the set-off of special benefits against severance damage in a direct condemnation case. See Code of Civil Procedure Section 1248(3); Sacramento & San Joaquin Drainage Dist. v. W.P. Roduner Cattle & Farming Co., 268 Adv. Cal. App. 215 (1968).

Section 871.2. Law governing use of water not affected

871.2. Nothing in this article affects the law governing the right to the use of water either in quantity or quality.

Comment. Section 871.2 makes clear that this article is not intended to affect in any way the rights governing the use of water. Water rights in the latter context remain governed by Article XIV of the California Constitution and the various provisions of the Water Code relating thereto. Moreover, it is clear that this article is concerned with problems of quantity, not quality. Nothing in this article is intended to affect the law relating to liability for pollution of water.

Memorandum 69-79

EXHIBIT II

2 Harper & James, Torts at 1121-1131 (1956)

§ 20.3. Multiple causes in fact. [N]o injury proceeds from a single cause. But by law if no injury would have occurred to plaintiff *but for* defendant's conduct, then defendant is liable — if at all — for the whole injury. This is true regardless of its position in the string of acts leading to the injury even though one or more of the other causes contributing to the result also involved wrongdoing on the part of other persons. In that case the others may also be liable but the law attempts no apportionment of damages among such tort-feasors, though a plaintiff is entitled only to a single satisfaction of his claim.[1] So if two negligently driven cars collide and the collision injures a third person, both drivers are liable for his injury; or if A negligently leaves an obstruction in the highway and B negligently drives into it so that injury to C ensues, A and B are both liable to C.

A more serious question arises where defendant's negligence and another cause for which defendant is not responsible would each have caused the *whole* injury even in the absence of the other cause. Where both causes involve the wrongful acts of legally responsible human beings there is virtual unanimity among courts in holding both (or either) liable for the whole injury just as in the situations described in the last paragraphs.[2] A leading case is *Corey v. Havener*,[3] in which the two defendants on motorcycles passed plaintiff's horse, one on either side, and so frightened it by their speed, noise, and smoke that the horse ran away and injured plaintiff. Plaintiff had recovery against both defendants in spite of the obvious probability that either motorcycle alone would have produced the result,[4] and the fact that each was sued separately (the actions were tried together).

The authorities are divided, however, in the case where the other cause (which would alone have produced the injury) is a natural force or the innocent act of another.[5] The case for denying liability here has been well put by Edgerton. He concedes that defendant's act stands in the same logical relation to the result "whether the other is a wrongdoer, an innocent person, or a thunderstorm." "But," he continues, "our sense of justice demands the imposition of liability when the harm should not have happened but for the wrongful act of human beings, while it does not make the same demand when the harm would have been produced by an innocent person or a natural force, if there had been no wrongful human action."[6] The opposing view, which appears to be of greater merit, rejects this reasoning and holds the wrongdoer in the case put.[7] In terms of the fault principle the argument for the majority position is that after all defendant has committed a wrong and this has been in fact *a* cause of the injury; further, such

negligent conduct will be more effectively deterred[8] by imposing liability than by giving the wrongdoer a windfall in cases where an all-sufficient innocent cause happens to concur with his wrong in producing harm. If the objective of compensating accident victims be stressed, the scale is tipped heavily in favor of liability, however evenly balanced the opposing arguments in terms of fault.

So far we have been dealing with cases where the harm is not even theoretically apportionable, either because none of it would have happened but for defendant's negligence or because there would be no feasible way, even in the light of omniscience, to attribute any identifiable part of it to defendant's act rather than another cause, as in the case of the two fires which unite to burn property which either alone would have consumed. But there are many situations in which each of several causes (without the concurrence of any of the others) produces *some* (but not *all* the) harm. In such a case it may be hard or even impossible on the facts practically available to tell just how much of the harm each of these causes brought about, but at least in *theory* (i.e., to the eye of omniscience) they are capable of separation. Where this is the case, each of the defendants responsible for these causes may still be liable for the whole injury. This will be so where they acted in concert or in the course of a joint enterprise so that each is responsible vicariously for the acts of the others.[9] The notion of action in concert involves the intentional aiding or abetting of a wrong, the "coming [together] to do an unlawful act,"[10] as where several ruffians set upon a man and beat him, each inflicting separate wounds. This concept has limited application to the field of accidental injuries. Joint enterprise is more appropriate to this field but this concept is rarely invoked except in connection with contributory negligence.[11]

Even where defendants are not all liable for the whole injury, there are some situations where one is liable for the whole but the other is not. Where, for instance, A's act injures plaintiff and also foreseeably exposes him to further injury by B, A is liable for the whole harm, but B only for that part of it which he inflicted. This would be the case if one driver negligently ran down a pedestrian and, as he was lying there, another driver ran over him, breaking his leg.[12] Another situation where this notion is commonly applied is that where, after defendant negligently injures plaintiff, a doctor's treatment of the injury negligently makes it worse. The defendant is liable for the whole injury including the aggravation although the doctor would of course be liable only for the aggravation his malpractice caused.[13] Another case in which one defendant will be liable for all the injury is that in which he is vicariously responsible for the conduct of the others acting with him, and each inflicts some injury.[14]

Except in the situations described in the last two paragraphs, the prevailing rule is that where each of several defendants causes only *part* of defendant's injury, so that the parts would be capable of separation if all the facts were known, then each is liable only to the extent of that part. Thus where two dogs run together and

kill sheep, each of the separate owners of the dogs is liable only for the sheep his dog killed.[15] If each of several riparian owners pollutes a stream somewhat, he is liable only for the damage resulting from his own contribution to the pollution[16] (unless of course it can be said that none of the damage would have resulted but for his contribution,[17] in which case he would probably be liable for it all).[18]

Where each of several independent actors has inflicted successive injuries each actor's liability is limited again to his own contribution to the injury (except, as we have seen, the original actor will be liable for the later injuries if they arise from a risk the likelihood of which made his conduct negligent).[19] A like result is

[16] Chipman v. Palmer, 77 N.Y. 51, 33 Am. Rep. 566 (1879); Martinowski v. City of Hannibal, 35 Mo. App. 70 (1889); City of Mansfield v. Brister, 76 Ohio St. 270, 81 N.E. 631 (1907); Standard Phosphate Co. v. Lunn, 66 Fla. 220, 63 So. 429 (1913); Mitchell Realty Co. v. West Allis, 184 Wis. 352, 199 N.W. 390 (1924); Masonite Corp. v. Burnham, 164 Miss. 840, 146 So. 292 (1933); annotations, 9 A.L.R. 939 (1920), 35 id. 409 (1925), 91 id. 760 (1934).

[17] Where each of several defendants has inflicted some actual injury, in itself negligible and harmless, but the cumulative effect of the many similar small injuries is some appreciable, serious damage, it would seem to be just to impose liability upon each. The surrounding circumstances (e.g., the high degree of pollution already found in a stream) make the action of each (e.g., the addition of but a slight legally innocent discharge) unreasonable, and subject him to liability even though his conduct if it occurred by itself would be innocent. Statements to this effect are found in Woodyear v. Schaefer, 57 Md. 1, 10, 40 Am. Rep. 419 (1881) (pollution of river); Hillman v. Newington, 57 Cal. 56 (1880) (use of water in which plaintiff had prior rights); United States v. Luce, 141 Fed. 385, 411 (D. Del. 1905) (smoke from two factories); Hill v. Smith, 32 Cal. 166 (1867) (pollution); Delaware & Hudson Canal Co. v. Torrey, 33 Pa. 143 (1859) (filling river with refuse); Lawton v. Herrick, 85 Conn. 417, 428, 76 Atl. 986 (1910) (pollution).

A slightly different situation is presented in the illustration suggested by Kay, J., in Blair & Sumner v. Deakin, 57 L.T.R. 522, 525 (1887) (each of two manufacturers discharges a chemical, harmless in itself, which combines chemically with the other's discharge to cause a pollution).

[18] Cf. Wright v. Cooper, 1 Tyler 425 (Vt. 1802) (two dams across creek cause flooding of plaintiff's land; neither dam alone would have caused any damage); Town of Sharon v. Anahma Realty Corp., 97 Vt. 336, 123 Atl. 192 (1924) (ice jam caused by pier of one defendant and dam of other, neither of which alone could have caused any damage); Weideman Silk Dyeing Co. v. East Jersey Water Co., 91 Atl. 338 (N.J. Sup. Ct. 1914), *rev'd on other grounds*, 88 N.J.L. 485, 96 Atl. 1108 (1915). But cf. Woodland v. Portneuf Marsh Irr. Co., 26 Idaho 739, 146 Pac. 1106 (1915) (damages to be apportioned among defendants).

Perhaps in these cases, before liability is imposed, the plaintiff will be required to establish that the defendant knew or had reason to know of the circumstances which made it likely that his conduct would cause injury. For suggestive analogies, see Folsom v. Apple River Log-Driving Co., 41 Wis. 602 (1877); McKay v. Southern Bell Tel. & Tel. Co., 111 Ala. 337, 19 So. 695 (1896).

[19] Notes 12 and 13, *supra*, deal with situations where an original wrongdoer will be liable for harm done by later wrongdoers. Cases where each of successive wrongdoers was held liable only for the amount of harm directly contributed by himself, are: Freshwater v. Bulmer Rayon Co., [1933] 1 Ch. 162 (pollution of stream by two defendants, operating same plant in successive periods); Coleman Vitrified Brick Co. v. Smith, 175 S.W. 860 (Tex. Civ. App. 1915) (damages to plaintiff through operation of brick kiln by successive owners on adjacent property); Albrecht v. St. Hedwig's Soc., 205 Mich. 395, 171 N.W. 461 (1919) (successive assaults upon the plaintiff); McCannon v. Chicago & N.W. Ry. Co., 160 Minn. 148, 199 N.W. 894 (1924) (workman contracted silicosis through negligence of successive employers).

reached when the same defendant by two successive acts causes separate injuries, and the defendant is not liable for the first but for the second act. Thus where a trolley runs down a careless pedestrian and the motorman injures him again through negligence in trying to extricate him from his position of danger, the company will be liable for the second but not for the first injury.[20] And an employer who exposed his workman to the danger of silicosis over a period of time extending back beyond the statute of limitations will be liable for the aggravation of the disease caused by the exposure within the statutory period.[21]

At the time of their injuries accident victims are in all sorts of diverse conditions, physically, mentally, financially, and in many other ways. And these pre-existing conditions may have the greatest bearing on the extent of the injury actually suffered by any particular plaintiff in a given case. Thus the same slight blow in the abdomen might cause only fleeting discomfort to a man but a miscarriage to a pregnant woman.[22] Or a slight touch, scarcely noticed by the recipient, might be so aggravated by the presence of latent disease at the point of impact as to cause the loss of the use of a limb.[23] These situations too involve concurring causes just as do the situations we have been discussing before in this section. And the cases will be seen to fall into the same patterns. Thus defendant's act may be a cause in fact of the whole injury (as in the case of the miscarriage or the diabetic's leg), and where it is not even theoretically divisible defendant will be liable for the whole of it.[24] But defendant's act may only aggravate an illness or injury which would have caused some harm anyway, or accelerate a loss — death, for instance — which would have taken place anyway. And in such a case defendant's liability extends only to the amount of harm which he in fact caused.[25]

As a matter of substantive law these limitations on a defendant's liability seem fair enough. The rub comes from the frequent difficulty of proof. Under a strict technical view plaintiff may be put to the burden of proving by the greater probability not only the fact but the amount of damage which can be traced to defendant's act as a prerequisite to recovering *anything*. This would sometimes lead to turning away a plaintiff without redress against a wrongdoer who has admittedly caused him some harm. And sometimes it would lead to the even more unlovely spectacle of turning a plaintiff away without redress although he has shown that he has suffered some damage at the hands of *each* of several defendant wrongdoers and what the aggregate amount of the damages comes to.[26] To avoid this harsh result, courts have evolved several techniques.

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[20] See

Slater v. Pacific American Oil Co., 212 Cal. 648, 300 Pac. 31 (1931) (land damaged by deposits of substances negligently permitted to run down ravine by defendant and others; injunction granted but award of damages reversed for lack of specific evidence of defendant's contribution to the total deposit);

(1) They have tended to find a single indivisible injury in many questionable cases. There is often room for viewing the matter either way, as in a pollution case or smoke or stench nuisance cases, where the *total* condition that actually did cause the harm would not have existed without the addition of each increment.[27]

(2) The court may distort and expand the concert of action notion, finding such concert, and entire liability, when under accepted usage none is present.[28]

Either device (1) or (2) will make each defendant liable for the whole injury leaving all the defendants to work out among themselves any matter of apportionment.

(3) The court may relax the requirements of proof as by adopting a lower standard where the amount of damage is in question rather than the fact of some damage. Some courts have expressly adopted a rule making this distinction.[29] Others have let the jury make the best guess they can at apportionment on whatever evidence has been made available in the case.[30] This last seems to be the usual way of handling the problem where plaintiff shows the total extent of his injury and it also appears that defendant's act merely aggravated a pre-existing condition. After all this is no more a matter of guesswork than assigning a money value to pain and suffering, or to "the death alone," [31] or to reputation, or an alienated affection.

[27] Tidal Oil v. Pease, 158 Okla. 137, 5 P.2d 399 (1931) (pollution of separate streams running through plaintiff's pasture lands); Johnson v. Thomas Irvine Lumber Co., 75 Wash. 539, 135 Pac. 217 (1913) (several independent companies permitted logs to jam in river, deflecting flow and eroding plaintiff's land). Cf. the recent case of Micelli v. Hirsch, 83 N.E.2d 240 (Ohio App. 1948), in which plaintiff's decedent, knocked down by a car driven by H and immediately run over by one driven by B, was then pronounced dead from his several injuries, any one of which could have caused his death. The court found no concert of action, but did find an indivisible injury, and held that joinder of B and H was proper.

[28] See Moses v. Town of Morganton, 192 N.C. 102, 133 S.E. 421, 423 (1926) (defendants who independently polluted same stream held jointly liable on ground that each, with knowledge of others' actions, continued his own actions, which "ipso facto creates a concert of action and makes a common design or purpose"); Arneil v. Peterson, [1931] A.C. 560 (two dogs, one owned by defendant, killed plaintiff's sheep; defendant, who did not act in concert with other owner in any way, was held liable for the entire damage on the ground that the *dogs* acted in concert). That the law should require, and then be satisfied with, such methods for reaching desired conclusions is a sad commentary upon its basic premises and its formalism.

[29] Cases are collected in annotation, 78 A.L.R. 858 (1932); see also McCormick, Damages 102 (1935).

[30] A typical statement is the following: "In such cases since the injured party cannot supply the materials necessary to enable the jury to make an exact computation of the damages in suit, the approved practice is to leave it to the good sense of the jury, as reasonable men, to form from the evidence the best estimate that can be made under the circumstances." Jenkins v. Pennsylvania R. Co., 67 N.J.L. 331, 334, 51 Atl. 704, 705 (1902). This attitude is quite commonly adopted. Eckman v. Lehigh & W.B. Coal Co., 50 Pa. Super. 427 (1912) (pollution in stream); Inland Power & Light Co. v. Greiger, 91 F. 2d 811 (9th Cir. 1937) (erosion of land as result of river overflow).

The Texas court has recently adopted the indivisible injury approach and repudiated any requirement of concert of action. Landers v. East Texas Salt Water Disposal Co., 151 Tex. 251, 248 S.W.2d 731 (1952), overruling Sun Oil Co. v. Robicheaux, 25 S.W.2d 715 (Tex. Com. App. 1930). An injury is indivisible which "cannot be apportioned with certainty to the individual wrongdoer." The case is noted in 31 N.C. L. Rev. 237 (1953), 31 Texas L. Rev. 226 (1952).

(4) Where a plaintiff has shown the total amount of his damage, and that defendant's wrong has made some contribution to it, the burden of proving the extent to which this contribution fell short of the whole might be put on defendant. There are many instances which would furnish analogies close enough to support such a rule. Although the substantive law of damages shields a defendant from liability for "avoidable consequences," the burden of establishing their avoidability is on the defendant.[32] Once delivery to a bailee and his failure to redeliver are shown, the bailee has the burden of disproving the very gist of his liability — negligence.[33] Once the delivery of goods sold or the performance of services contracted for appears, defendant has the burden of disproving the very breach of the contract — nonpayment.[34] The real question is not whether shifting this burden of proof would violate any formal canon of procedure, but whether it is the fair and expedient thing to do in view of defendants' generally greater access to the evidence in these situations and of the relative hardships in those cases where no evidence is forthcoming. The last means balancing the injustice of denying all redress to a man who has shown himself entitled to some, against the injustice of making a wrongdoer pay for more damage than he has caused. Eminent authorities have advocated shifting the burden of proof in this way in suits against concurrent or successive wrongdoers where the total damage caused by all is theoretically divisible.[35] There has as yet been scanty judicial acceptance of such a rule though the California court has recently adopted a similar one in a case where there was doubt which of two defendants caused the whole harm.[36] The rule may well gain wider acceptance, however, since it fits well within the framework of familiar precedents and principles and reflects the modern trend to emphasize compensation of accident victims and a broad distribution of their losses rather than a more perfect tracing out of the implications of the fault principle.[37]

(5) Where it appears that each of several defendants has contributed to plaintiff's injury but a sufficient basis in the evidence for making an allocation among them does not appear, the courts could of course arbitrarily divide the damages among them equally or could allow the jury to do so on the basis of whatever evidence it had before it.[38] This result is eminently sensible but perhaps it does more violence to some elusive overtones of our Anglo-American common law tradition than a shifting of the burden of proof.

(6) Faced with this problem the court, in exercise of its equity powers, could call all the independent wrongdoers before it and apportion the damages among them as best it could. This desirable procedure is only rarely used.[39]

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[36] Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948). In its opinion the California court suggested that the burden of proof on apportioning damages among concurrent or successive tort-feasors might well be put on defendants. The two problems are very similar to each other. See further Note, 47 Mich. L. Rev. 1232 (1949); Micelli v. Hirsch, 83 N.E.2d 240 (Ohio App. 1948) (discussed note 27 *supra*).

Memorandum 69-79

EXHIBIT III

Prosser, Torts at 247-257 (1964)

42. APPORTIONMENT OF DAMAGES

Once it is determined that the defendant's conduct has been a cause of some damage suffered by the plaintiff, a further question may arise as to the portion of the total damage sustained which may properly be assigned to the defendant, as distinguished from other causes. The question is primarily not one of the fact of causation, but of the feasibility and practical convenience of splitting up the total harm into separate parts which may be attributed to each of two or more causes.[57] Where a logical basis can be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm which he has in fact caused, it may be expected that the division will be made. Where no such basis can be found, and any division must be purely arbitrary, there is no practical course except to hold the defendant for the entire loss, notwithstanding the fact that other causes have contributed to it.

The distinction is one between injuries which are reasonably capable of being divided, and injuries which are not. If two defendants, struggling for a single gun, succeed in shooting the plaintiff, there is no logical or reasonable basis for dividing the injury between them, and each will be liable for all of it. If they shoot him independently, with separate guns, and he dies from the effect of both wounds, there can still be no division, for death cannot be divided or apportioned except by an arbitrary rule devised for that purpose.[58] If they merely inflict separate wounds, and he survives, a basis for division exists, because it is possible to regard the two wounds as separate injuries;[59] and the same is of course true as to wounds negligently inflicted.[60] There will be obvious difficulties of proof as to the apportionment of certain elements of damages, such as physical and mental suffering and medical expenses, but such difficulties are not insuperable, and it is better to attempt some rough division than to hold one defendant for the wound inflicted by the other. Upon the same basis, if two defendants each pollute a stream with oil, it is possible to say that each has interfered to a separate extent with the plaintiff's rights in the water, and to make some division of the damages.[61] It is not possible if the oil is ignited, and burns the plaintiff's barn.[62]

In general, it may be said that entire liability will be imposed only where there is no reasonable alternative. Each case must turn upon its own particular facts; but it is possible to make a classification of the more common types of situations.[63]

Concerted Action

Where two or more persons act in concert, it is well settled both in criminal [64] and in civil cases that each will be liable for the entire result.[65] Such concerted wrongdoers were considered "joint tort feasors" by the early common law.[66] In legal contemplation, there is a joint enterprise, and a mutual agency, so that the act of one is the act of all,[67] and liability for all that is done must be visited upon each. It follows that there is no logical basis upon which the jury may be permitted to apportion the damages.[68]

62. On this basis Griffith v. Kerrigan, 1952, 109 Cal.App.2d 637, 241 P.2d 296, where water damaged fruit trees, appears wrongly decided.

fail to perform their obligation, and harm results, each will be liable for the event; and here likewise there is no reasonable basis for any division of damages.

Single Indivisible Result

Certain results, by their very nature, are obviously incapable of any logical, reasonable, or practical division. Death is such a result,[76] and so is a broken leg or any single wound, the destruction of a house by fire, or the sinking of a barge.[77] No ingenuity can suggest anything more than a purely arbitrary apportionment of such harm. Where two or more causes combine to produce such a single result, incapable of any logical division, each may be a substantial factor in bringing about the loss, and if so, each must be charged with all of it. Here again the typical case is that of two vehicles which collide and injure a third person.[78] The duties which are owed to the plaintiff by the defendants are separate, and may not be identical in character or scope,[79] but entire liability rests upon the obvious fact that each has contributed to the single result, and that no rational division can be made.[80]

Such entire liability is imposed both where some of the causes are innocent, as where a fire set by the defendant is carried by a wind,[81] and where two or more of the causes are culpable. It is imposed where either cause would have been sufficient in itself to bring about the result, as in the case of merging fires which burn a building,[82] and also where both were essential to the injury, as in the vehicle collision suggested above.[83] It is not necessary that the misconduct of two defendants be simultaneous. One defendant may create a situation upon which the other may act later to cause the damage. One may leave combustible material, and the other set it afire;[84] one may leave a hole in the street, and the other drive into it.[85] Liability in such a case is not a matter of causation, but of the effect of the intervening agency upon culpability.[86] If a defendant is liable at all, he will be liable for all the damage caused.[87]

Damage of Same Kind Capable of Apportionment

Certain other results, by their nature, are more capable of apportionment. If two defendants independently shoot the plaintiff at the same time, and one wounds him in the arm and the other in the leg, the ultimate result may be a badly damaged plaintiff in the hospital, but it is still possible, as a practical matter, to regard the two wounds as separate wrongs.[88] Mere coincidence in time does not make the two one tort, nor does similarity of design or conduct, without concert.[89] Evidence may be entirely lacking upon which to apportion some elements of the damages, such as medical expenses, or permanent disability, or the plaintiff's pain and suffering; but this never has been regarded as sufficient reason to hold one defendant liable for the damage inflicted by the other.[90]

There have appeared in the decisions a number of similar situations, in some of which the extent of the harm inflicted by the separate torts has been almost incapable of any definite and satisfactory proof, and has been left merely to the jury's estimate. Thus the owners of trespassing cattle,[91] or of dogs

83. Washington & Georgetown R. Co. v. Hickey, 1907, 166 U.S. 521, 17 S.Ct. 661, 41 L.Ed. 1101 (horse car driven onto railway tracks with negligent operation of crossing gates); Folsom v. Apple River Log-Driving Co., 1877, 41 Wis. 602 (dam and bridge causing flood); Brown v. New England Telephone & Telegraph Co., 1907, 80 Vt. 1, 66 A. 801 (light wires and telephone wires crossed); Ramsey v. Carolina-Tennessee Power Co., 1928, 195 N.C. 788, 143 S.E. 861 (railway shunting cars which struck negligently maintained power line pole); Barnes v. Masterson, 1899, 38 App.Div. 612, 56 N.Y.S. 939 (defendants successively deposited sand against plaintiff's wall, which collapsed).

89. Dickson v. Yates, 1922, 194 Iowa 910, 188 N.W. 948, 27 A.L.R. 533 (battery and trespass at same time by different persons); Millard v. Miller, 1907, 39 Colo. 103, 88 P. 845 (independent appropriations of different parts of pasture).

91. Dooley v. Seventeen Thousand Five Hundred Head of Sheep, 1894, 4 Cal.Unrep. 479, 101 Cal. xvii, 35 P. 1011; Pacific Live Stock Co. v. Murray, 1904, 45 Or. 103, 76 P. 1079; Wood v. Snider, 1907, 187 N.Y. 28, 79 N.E. 858; Hill v. Chappel Bros. of Montana, 1933, 93 Mont. 92, 18 P.2d 1106.

which together kill sheep,[92] are held liable only for the separate damage done by their own animals, unless there has been some concerted action, such as keeping the animals in a common herd.[93] Nuisance cases, in particular, have tended to result in apportionment of the damages, largely because the interference with the plaintiff's use of his land has tended to be severable in terms of quantity, percentage, or degree. Thus defendants who independently pollute the same stream,[94] or who flood the plaintiff's land from separate sources,[95] are liable only severally for the damages individually caused, and the same is true as to nuisances due to noise,[96] or pollution of the air.[97] Perhaps the most extreme example is the case of separate repetitions of the same defamatory statement,[98] or separate acts which result in alienation of affections.[99] One may speculate that the effort to apportion the damages whenever some rational and possible basis could be found has been due in no small measure in the past to the lack of any rule of contribution if one tortfeasor should be compelled to pay the entire damages.

The same kind of apportionment is, however, entirely possible where some part of the damage may logically and conveniently be assigned to an innocent cause. Thus a defendant's dam or embankment might reasonably be expected to flood the plaintiff's property in the event of any ordinary rainfall, but a quite unprecedented and unforeseeable cloudburst may cause a flood similar in kind but far greater in extent. In such cases the weight of authority,[1] notwithstanding the view of the Restatement of Torts to the contrary,[2] holds that the defendant is liable only for such portion of the total damage as may properly be attributed to his negligence—or in other words, the flood which would have resulted from his obstruction with an ordinary rain. A similar distinction has been made between damages which would have followed in any case from the defendant's reasonable conduct, and those in excess which may be attributed to his negligence,[3] and likewise between those damages caused by the defendant and those by the plaintiff himself.[4]

The difficulty of any complete and exact proof in assessing such separate damages has received frequent mention in all these cases, but it has not been regarded as sufficient justification for entire liability. The emphasis is placed upon the logical possibility of apportionment, and the distinct and separate invasion of the plaintiff's interests which may be attributed to each cause. The difficulty of proof may have been overstated. The courts necessarily have been very liberal in permitting the jury to award damages where the uncertainty as to their extent arises from the nature of the wrong itself, for which the defendant, and not the plaintiff, is responsi-

93. Ushirohira v. Stuckey, 1921, 52 Cal.App. 526, 199 P. 339; Wilson v. White, 1906, 77 Neb. 351, 109 N.W. 367; cf. Stephens v. Schadler, 1919, 182 Ky. 833, 207 S.W. 704.

94. Miller v. Highland Ditch Co., 1894, 87 Cal. 430, 25 P. 550; William Tackaberry Co. v. Sioux City Service Co., 1911, 154 Iowa 358, 132 N.W. 945, 134 N.W. 1064; Verheyen v. Dewey, 1915, 27 Idaho 1, 146 P. 1115; Boulger v. Northern Pac. R. Co., 1918, 41 N.D. 316, 171 N.W. 632; Ryan Gulch Reservoir Co. v. Swartz, 1925, 77 Colo. 60, 234 P. 1059. Cf. Katenkamp v. Union Realty Co., 1940, 36 Cal.App.2d 602, 98 P.2d 230 (washing away sand from beach).

1. Rudburn v. Fir Tree Lumber Co., 1915, 83 Wash. 643, 145 P. 632; McAdams v. Chicago, R. I. & P. R. Co., 1925, 200 Iowa 782, 205 N.W. 310; Rix v. Town of Alamogordo, 1938, 42 N.M. 325, 77 P.2d 765; Wilson v. Hagins, 1927, 116 Tex. 538, 295 S.W. 922; Brown v. Chicago, B. & Q. R. Co., D.Neb.1912, 195 F. 1007; Johnson v. Dundas, [1945] Ont.Rep. 670, [1945] 4 Dom.L.Rep. 624. See Notes, 1938, 23 Minn. L.Rev. 91; 1950, 35 Mo.L.Rev. 98.

2. § 450. The illustration there given is based on Elder v. Lykens Valley Coal Co., 1893, 157 Pa. 490, 27 A. 545. Accord: Inland Power & Light Co. v. Grieger, 9 Cir.1937, 91 F.2d 811, 112 A.L.R. 1075; Willie v. Minnesota Power & Light Co., 1933, 190 Minn. 95, 250 N.W. 800.

3. Jenkins v. Pennsylvania R. Co., 1902, 67 N.J.L. 331, 51 A. 704 (smoke nuisance).

ble.[5] The requirements of proof usually have been somewhat relaxed in such cases, and it has been said that no very exact evidence will be required, and that general evidence as to the proportion in which the causes contributed to the result will be sufficient to support a verdict.[6] Cases are few in which recovery has actually been denied for lack of such proof.[7] As a last resort, in the absence of anything to the contrary, it has been presumed that certain causes are equally responsible, and the damages have been divided equally between them.[8] The difficulty is certainly no greater than in cases where part of the damage is to be attributed to the unreasonable conduct of the plaintiff himself, and the rule of avoidable consequences is applied to limit his recovery.[9]

There has remained, however, enough in the way of real difficulty experienced, and possible injustice feared, to lead several writers[10] to urge that in any case where two or more defendants are shown to have been negligent, and to have caused each some damage, and only the extent as to each is in question, the burden of proof should be shifted to the defendants, and each should be held liable to the extent that he cannot produce evidence to limit his liability. The justification for this rests upon the fact that a choice must be made, as to where the loss due to failure of proof shall fall, between an entirely innocent plaintiff and defendants who are clearly proved to have been at fault, and to have done him harm. A few courts have accepted this position, and have placed the burden of proof as to apportionment upon the defendants in such cases,[11] as for example where there are chain automobile collisions, and there is doubt as to the injuries inflicted by each driver.[12] Texas decisions[13] refusing to permit apportionment because the injury is regarded as "indivisible" appear in reality to mean no more than that the defendants have the burden of proving any basis for division. There are, however, some comparatively recent cases[14] which have left the burden of proof upon the plaintiff.

Successive Injuries

The damages may be conveniently severable in point of time. If two defendants, independently operating the same plant, pollute a stream over successive periods, it is clear that each has caused separate damage, limited in time, and that neither has any responsibility for the loss caused by the other.[15] The same may be true where a workman's health is impaired by the negligence of successive employers,[16] and of course where successive batteries or other personal injuries are inflicted upon the plaintiff.[17]

It is important to note that there are situations in which the earlier wrongdoer will be liable for the entire damage, while the later one will not. If an automobile negligently driven by defendant A strikes the plaintiff, fractures his skull, and leaves him helpless

7. The only cases found are Deutsch v. Connecticut Co., 1923, 98 Conn. 482, 119 A. 891; Maas v. Perkins, 1953, 42 Wash.2d 38, 253 P.2d 427; Slater v. Pacific American Oil Co., 1931, 212 Cal. 648, 300 P. 31; Tucker Oil Co. v. Matthews, Tex.Civ.App.1958, 319 S.W.2d 606. All of these cases are believed no longer to be law.

11. Phillips Petroleum Co. v. Hardee, 5 Cir.1951, 189 F.2d 205 (pollution of irrigation waters); Finnegan v. Royal Realty Co., 1950, 35 Cal.2d 409, 218 P.2d 17 (aggravation of injuries from fire because of failure to provide exit doors); City of Oakland v. Pacific Gas & Elec. Co., 1941, 47 Cal.App.2d 444, 118 P.2d 328 (increased damage to books from delay in shutting off steam); De Corsey v. Purex Corp., 1949, 92 Cal.App.2d 669, 207 P.2d 616 (aggravation of injuries from exploding bottle due to deterioration of compound); cf. Colonial Ins. Co. v. Industrial Acc. Comm., 1946, 29 Cal.2d 79, 172 P.2d 884 (workmen's compensation, with multiple insurance carriers).

12. Maddux v. Donaldson, 1961, 362 Mich. 425, 108 N.W.2d 33; Murphy v. Taxicabs of Louisville, Ky. 1959, 330 S.W.2d 395; Copley v. Putter, 1949, 93 Cal.App.2d 453, 207 P.2d 876; Rund v. Grimm, 1961, 252 Iowa 1266, 110 N.W.2d 321; cf. Wise v. Carter, Fla.App.1960, 119 So.2d 40.

on the highway, where shortly afterward a second automobile, negligently driven by defendant B, runs over him and breaks his leg, A will be liable for both injuries, for when the plaintiff was left in the highway, it was reasonably to be anticipated that a second car would run him down.[18] But defendant B should be liable only for the broken leg, since he had no part in causing the fractured skull, and could not foresee or avoid it.[19] On the same basis, an original wrongdoer may be liable for the additional damages inflicted by the negligent treatment of his victim by a physician,[20] while the physician will not be liable for the original injury.[21]

Potential Damage

Chief Justice Peaslee of New Hampshire, in an extremely interesting article,[22] pointed out that there are situations in which an apparently indivisible injury may be apportioned upon the basis of potential damage from one cause, which reduces the value of the loss inflicted by another. In the case which prompted the article,[23] a boy standing on the high beam of a bridge trestle lost his balance and started to fall to substantially certain death or serious injury far below. He came in contact with defendant's wires, and was electrocuted. The incipient fall was an accomplished fact before the defendant's negligence caused any harm at all. The court allowed damages only for such a sum as his prospects for life and health were worth when the defendant killed him.

In the same manner, it has been held that an existing disease[24] or a prior accident[25] which reduces the plaintiff's life expectancy will limit accordingly the value of his life in an action for wrongful death. Then what is the value of a burning house which the defendant prevents a fire engine from extinguishing,[26] or one in the path of a conflagration which he destroys?[27] What damage has the plaintiff suffered when the defendant blocks the passage of his barge into a canal in which passage was already blocked by a landslide?[28]

Value is an estimate of worth at the time and place of the wrong. It is obvious that if such factors as these are to be considered as reducing value, they must be in operation when the defendant causes harm, and so imminent that reasonable men would take them into account.[29] There is a clear distinction between a man who is standing in the path of an avalanche when the defendant shoots him, and one who is about to embark on a steamship doomed later to strike an iceberg and sink.[30] The life of the latter has value at the time, as any insurance company would agree, while that of the former has none. So a forest fire a mile away may affect the market value of a building, while one a hundred miles away will not, although it may afterwards destroy it.

So far as the feasibility of such apportionment is concerned, it is equally possible where both causes are culpable.[31] If A shoots B and kills him instantly, two minutes after C has administered to him a slow poison for which there is no known antidote, it can still be said that his life had little value when A killed him. But in such a case A has deprived the plaintiff, not only of the life, but of a possible redress against C. Because A has killed B, C has not caused his death, and so has not become liable, as he was otherwise certain to do. There was not only potential damage, but a potential cause of action in compensation for it, which A has destroyed. It is therefore proper to hold A liable for the full value of B's life, in contrast to the case where B has poisoned himself by mistake. Such questions, however, apparently have not been considered by any court.

Acts Harmless in Themselves Which Together Cause Damage

A very troublesome question arises where the acts of each of two or more parties, standing alone, would not be wrongful, but together they cause harm to the plaintiff. If several defendants independently pollute a stream, the impurities traceable to each may be negligible and harmless, but all together may render the water entirely unfit for use. The difficulty lies in the fact that each defendant alone would have committed no tort. There would have been no negligence, and no nuisance, since the individual use of the stream would have been a reasonable use, and no harm would have resulted.

Obviously the plaintiff's interests have been invaded, and if each defendant is to escape on the ground that his contribution was harmless in itself, there will be no redress.[32] A number of courts have held that acts which individually would be innocent may be tortious if they thus combine to cause damage, in cases of pollution,[33] flooding of land,[34] diversion of water,[35] obstruction of a highway,[36] or even a noise nuisance.[37] The explanation of the paradox is that the standard of reasonable conduct applicable to each defendant is governed by the surrounding circumstances, including the activities of the other defendants. Pollution of a stream to even a slight extent becomes unreasonable when similar pollution by others makes the condition of the stream approach the danger point. The single act itself becomes wrongful because of what others are doing.[38]

Where, as in the usual case, such liability must be based on negligence or intent rather than any ultra-hazardous activity, it would seem that there can be no tortious conduct unless the individual knows, or is at least negligent in failing to discover, that his conduct may concur with that of others to cause damage.[39] And liability need not necessarily be entire, for there is no reason why damages may not be apportioned here, to the same extent as in any other case.[40]

32. Hill v. Smith, 1867, 32 Cal. 166; James, L. J., in Thorpe v. Brumfitt, 1873, L.R. 8 Ch.App. 650.

33. Duke of Buccleuch v. Cowan, 1866, 5 Sess.Cas. (Macph.) 214; Woodyear v. Schaefer, 1881, 57 Md. 1, 40 Am.Rep. 419; Warren v. Parkhurst, 1904, 45 Misc. 466, 92 N.Y.S. 725; Northup v. Eakes, 1918, 72 Okl. 66, 178 P. 266. Compare the rule suggested in Blair v. Deakin, 1887, 57 L.T., N.S., 522, of two defendants each discharging a chemical harmless in itself, which combined with the other to render the water unusable.

34. Sloggy v. Dilworth, 1888, 38 Minn. 179, 36 N.W. 451; Wright v. Cooper, 1822, 1 Tyler, Vt., 425; Town of Sharon v. Anahama Realty Corp., 1924, 97 Vt. 336, 123 A. 192; Woodland v. Portneuf Marsh Valley Irr. Co., 1915, 26 Idaho 789, 146 P. 1106.

35. Hillman v. Newington, 1880, 57 Cal. 56.

36. Thorpe v. Brumfitt, 1873, L.R. 8 Ch.App. 650; Sadler v. Great Western R. Co., [1895] L.R. 2 Q.B. 688.

37. Lambton v. Mellish, [1894] 3 Ch. 163.

38. "The acts of the other company must be taken into account because it may be that the one company ought not to be doing what it was when the other company was doing what it did." Sadler v. Great Western R. Co., [1895] 2 Q.B. 688. Accord; Woodyear v. Schaefer, 1881, 57 Md. 1; Hillman v. Newington, 1880, 57 Cal. 56; United States v. Luce, C.C.Del.1905, 141 F. 385, 411; Lawton v. Herrick, 1910, 83 Conn. 417, 428, 76 A. 986, 990; cf. Weidman Silk Dyeing Co. v. East Jersey Water Co., N.J. Sup.1914, 91 A. 338.

It has been said, however, that to be liable the defendant must have "contributed substantially" rather than infinitesimally—a clear application of the substantial factor test of causation. See Duke of Buccleuch v. Cowan, 1866, 5 Sess.Cas., Macph., 214.