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Actual Causation in North Carolina Tort Law

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THE CONCEPT OF ACTUAL CAUSATION

Basic Issues Involved in Actual Causation.

Liability in tort is imposed only when the wrongdoer's conduct is an actual cause of the harm for which recovery is sought. Actual causation consists simply of the causal link between conduct and injury and in many cases is so apparent from what has happened that it goes unnoticed by courts and litigants alike. Nevertheless, actual causation is an essential part of the plaintiff's cause of action and a failure to allege[1] and prove[2] it is fatal to his claim.

Although defendant has been negligent, he is not liable if his negligence had nothing to do with plaintiff's injury.[3] Proof that a car involved in a collision was equipped with improper brakes[4] or lights[5] is insufficient to hold defendant liable when it appears that such defect played no part in causing the accident. No liability attaches for defendant's failure to light a stairway if the cause of plaintiff's fall down the stairs was that she misjudged her step and not that she was unable to see in the dark.[6] The omission of warning of a train's approach to a crossing may be negligent, but no causal connection exists between the lack of such a warning and the collision of an automobile with the forty-second

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[1]Battley v. Seaboard Airline Ry., 1 N.C. App. 384, 161 S.E.2d 750 (1968) (allegations of slippery condition of floor due to defendant's negligence and of plaintiff's fall insufficient to state cause of action because no allegation of causal connection). *Compare* Reynolds v. Murph, 241 N.C. 60, 64, 84 S.E.2d 273, 276-77 (1954) (conclusory allegation of causation sufficient unless "it appears affirmatively from the complaint that there was no causal connection between the alleged negligence and the injury").

[2]Phelps v. City of Winston-Salem, 272 N.C. 24, 157 S.E.2d 719 (1967); Hubbard v. Quality Oil Co., 268 N.C. 489, 151 S.E.2d 71 (1966); Reason v. Singer Sewing Mach. Co., 259 N.C. 264, 130 S.E.2d 397 (1963).

[3]Miller v. Coppage, 261 N.C. 430, 135 S.E.2d 1 (1964); Wall v. Trogdon, 249 N.C. 747, 107 S.E.2d 757 (1959); Cranford v. Western Union Tel. Co., 138 N.C. 162, 50 S.E. 585 (1905).

[4]Beaman v. Duncan, 228 N.C. 600, 46 S.E.2d 707 (1948).

[5]Oxedine v. Lowry, 260 N.C. 709, 133 S.E.2d 687 (1963) (bicycle); Morris v. Jenrette Transp. Co., 235 N.C. 568, 70 S.E.2d 845 (1952) (truck).

[6]Carter v. Carolina Realty Co., 223 N.C. 188, 25 S.E.2d 553 (1943).

car of the train; consequently, the railroad cannot be held liable.[7] Similarly, the failure of an automobile driver to give a traffic signal is without significance if the signal would not have been seen had it been given.[8]

While actual causation is a requisite to tort liability, its existence, even when negligence has been established, does not always entitle plaintiff to recover.[9] For obvious reasons of fundamental fairness, when defendant's negligence is not a cause of plaintiff's injury, defendant is not liable and no further inquiry is needed.[10] The existence of a cause-in-fact relationship, however, does not establish liability since other factors affecting legal responsibility remain to be considered.[11] Such other factors have been taken into account to limit defendant's liability short of all consequences his conduct may have caused. The requirement that some harm of the general type that has occurred be foreseeable is the overriding principle adopted by most courts to limit liability for negligence.[12] Through this broad principle courts have attempted to limit liability to those risks on account of which defendant's conduct is found to be negligent and thus to deny recovery for harm caused by other risks whether they are associated with defendant's conduct or arise independently of it.[13] In its broadest sweep the foreseeability rule has been ap-

[7]Chinnis v. Atlantic Coast Line R.R., 219 N.C. 528, 14 S.E.2d 500 (1941).

[8]Clarke v. Holman, 274 N.C. 425, 163 S.E.2d 783 (1968); Cozart v. Hudson, 239 N.C. 279, 78 S.E.2d 881 (1954).

[9]Barefoot v. Joyner, 270 N.C. 388, 154 S.E.2d 543 (1967) (charge that permitted recovery upon finding negligence and actual causation held erroneous); Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966) (same).

[10]McNair v. Richardson, 244 N.C. 65, 92 S.E.2d 459 (1956) (charge that foreseeability was unnecessary if defendant's act was unlawful held erroneous).

[11]*E.g.*, Williams v. Mickens, 247 N.C. 262, 100 S.E.2d 511 (1957) (intervening intentional conduct; defendant who negligently left keys in car not liable for its negligent operation by thief); Rulane Gas Co. v. Montgomery Ward & Co., 231 N.C. 270, 56 S.E.2d 689 (1949) (intervening negligent conduct; seller of defective hot water heater not liable for explosion when service man, aware of presence of gas vapors, struck match which ignited them); Pugh v. Tidewater Power Co., 237 N.C. 693, 75 S.E.2d 766 (1953) (unforeseeable risk; metal wire on which kite had flown came into contact with defendant's uninsulated electric wires); Johnson v. Atlantic Coast Line R.R., 184 N.C. 101, 113 S.E. 606 (1922) (no recovery for economic loss); Kimberly v. Howland, 143 N.C. 398, 55 S.E. 778 (1906) (no recovery for negligently inflicted mental harm unless contemporaneous or resulting physical injury) (dictum).

[12]Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966); Green v. Bowers, 230 N.C. 651, 55 S.E.2d 192 (1949).

[13]Belk v. Boyce, 263 N.C. 24, 138 S.E.2d 789 (1964) (cruelty-to-animal statute not intended for protection of humans); Ward v. Southern Ry., 206 N.C. 530, 174 S.E. 443 (1934) (although thieves could be anticipated, injury to bystander unforeseeable when stolen coal was thrown off car); Brewster v. Elizabeth City, 137 N.C. 392, 49 S.E. 885 (1905) (plaintiff's failure to watch where he was walking may not include risk that plank on which he stepped would "fly up" and hit him);

plied by courts to deny liability in any case in which they felt justice required such a result, and some of these opinions are questionable both in the determination to take the case from the jury and in the decision on the merits.[14]

The usual question to arise under actual causation is that of the connection between two events—the defendant's conduct and the plaintiff's injury. Whether that connection exists is simply a matter of observation of the usual relationship between events that knowledge and experience indicate to exist. However, another problem has also generally been handled by courts as one of actual causation. Even though such a causal link exists between defendant's negligence and plaintiff's injury, his negligence is not considered an actual cause of the injury if the harm would have resulted without such negligence. Thus, when the front wheels of a truck driven backwards in violation of a statute by defendant hit a child who was under the truck, the backing of the truck is not regarded as an actual cause of the child's death if he would have been struck by the rear wheels had the truck been driven forward.[15] On the same basis, the excessive speed at which defendant drove his car is not an actual cause of a collision that could not have been avoided if he had been driving at a reasonable speed.[16] Similarly, the absence of a protective barrier at a race track is not an actual cause of injury to a spectator when such a barrier, had it been present, would have provided no protection when a car left the track at a speed of 120 miles an hour.[17]

This causal limitation on liability, like that which requires a connection between conduct and harm, is one of basic fairness. Defendant

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Roseman v. Carolina Cent. R.R., 112 N.C. 709, 16 S.E. 766 (1893) (ejection of railroad passenger who was in apparent control of his faculties no basis for liability when ejected passenger found frozen in puddle of water).

[14]*E.g.*, Wood v. Carolina Tel. & Tel. Co., 228 N.C. 605, 46 S.E.2d 717 (1948) (telephone pole maintained within six inches of traveled portion of street; no reason to foresee arm of automobile driver extending out of car window will strike it); Lee v. Carolina Upholstery Co., 227 N.C. 88, 40 S.E.2d 688 (1946) (plaintiff fell down open elevator shaft when rope on which he was pulling slipped out of his hand; no reason to foresee danger to plaintiff after he had moved several yards away from elevator before it was moved); Ferguson v. City of Asheville, 213 N.C. 569, 197 S.E. 146 (1938) (driver's negligence in failing to discover ramp negligently placed in street by city relieved city of liability to third party); Newell v. Darnell, 209 N.C. 254, 183 S.E. 374 (1936) (negligence of driver whose car struck plaintiff when he stepped into street unforeseeable to defendant who had obstructed sidewalk).

[15]Ham v. Greensboro Ice & Fuel Co., 204 N.C. 614, 169 S.E. 180 (1933).

[16]Holland v. Malpass, 255 N.C. 395, 121 S.E.2d 576 (1961).

[17]Lane v. Eastern Carolina Drivers Ass'n, 253 N.C. 764, 117 S.E.2d 737 (1961).

should not be liable for harm plaintiff would have suffered even if defendant had not been negligent. However, the problem is not so simple as that of determining the existence of a causal link between conduct and harm. It involves inquiry not only about what has actually happened but also about what would have happened under circumstances that never in fact occurred. The alternative set of hypothetical circumstances to be constructed is not always easy to identify.[18] When defendant parks his car on the wrong side of the road, there is no more reason to hypothesize that had he not been negligent, he would have parked on the same side of the road than to suppose that he would have parked on the other side of the road. Further, the determination of what would have happened under a different set of circumstances is not without difficulty. While an adequate protective barrier may not have prevented a car traveling at 120 miles an hour from leaving the race track, its speed probably would have been reduced by collision with the barrier or its direction may have been altered. In one instance less severe injuries may have been inflicted upon plaintiff; in the other he may have escaped injury altogether. Similarly, when defendant's speeding car runs over and injures someone, it may be clear that defendant would have been unable to avoid the collision had he been driving at a safe speed, but it is less apparent that the same injuries would have been inflicted whether defendant was driving at twenty or forty miles an hour.[19] Of course, to the extent that the court requires proof of the amount of aggravation caused by defendant's conduct in this type of case, the fact that defendant's negligence may have increased the injuries which arose out of the accident may be of little practical importance because plaintiff would seldom be able to offer such proof.[20]

Although these two limitations on liability are in some ways quite

[18]*E.g.*, Goldstein v. Southern Ry., 188 N.C. 636, 125 S.E. 177 (1924). Plaintiff skidded off a road into an unguarded excavation on defendant's property. The court, in finding causation, observed: "If the hole or excavation had not been there, or if a fence or rail had been erected between the road and the hole, the plaintiff would not have been injured." *Id.* at 639, 125 S.E. at 178. The court did not consider whether warning, without more, would have constituted reasonable care. If a warning would have been sufficient—and it probably would not have been under the circumstances—the accident that occurred could have happened although adequate warning had been given. *See also* McIntyre v. Monarch Elevator & Mach. Co., 230 N.C. 539, 54 S.E.2d 45 (1949). A dissenting opinion argues persuasively that adequate warning would not have prevented the fall of a woman who had "blacked out" down open elevator shaft. *Id.* at 547, 54 S.E.2d at 50.

[19]Middleton v. Melbourne Tramway & Omnibus Co., 16 Commw. L.R. 572 (Austl. 1913).

[20]*Cf.* Fox v. Hollar, 257 N.C. 65, 125 S.E.2d 334 (1962).

distinct, both have been encompassed in a single rule that has become the primary tool for determining the existence of actual causation—the "but for" or "sine qua non" rule.[21] If injury to plaintiff would not have occurred "but for" defendant's negligence, causation exists; if plaintiff's injury would have resulted without the defendant's negligence, his negligence is not its cause. Application of the rule precludes liability both when no causal link exists between conduct and harm and also when, although a connection exists, the accident would have occurred without defendant's negligence.

The basic purpose of the "but for" rule is to exclude liability when fairness requires it, but despite its general suitability for this purpose, in one situation it does not work well. General agreement exists, at least in the few cases that have considered the problem,[22] that when two causes either of which is capable of causing the injury combine to bring the injury about, a defendant who is responsible for one of them is liable. When two motorcycles passing at the same time, one of which is driven by defendant, frighten plaintiff's horse,[23] or when a fire set by defendant joins with another fire and the merged fire burns plaintiff's property, defendant is held liable.[24]

That either motorcycle rider should escape liability because the other's conduct by itself would have caused the event is totally unacceptable. Such a result would permit two wrongdoers to escape liability for harm clearly risked by their negligence and leave an innocent plaintiff to bear the loss that their conduct caused. However, to hold defendant liable in the merged-fire cases when one of the fires is of innocent origin is more difficult to justify. Since defendant's negligence has combined with another cause to produce the same injury that would have occurred had the other cause not been present, it may be argued that his attempt

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[21]Ratliff v. Duke Power Co., 268 N.C. 605, 614, 151 S.E.2d 641, 648 (1966):

> An event which is a "but for" cause of another event—that is, a cause without which the second event would not have taken place—is not, necessarily, the proximate cause of the second event. . . . [O]ne event cannot be a proximate cause of another if, had the first event not occurred, the second would have occurred anyway . . . .

Lane v. Eastern Carolina Drivers Ass'n, 253 N.C. 764, 769, 117 S.E.2d 737, 741 (1961): "The alleged negligence, to be actionable, must be so related to the injury that, but for such negligence, injury would not have occurred."

[22]W. PROSSER, HANDBOOK OF THE LAW OF TORTS 239 (4th ed. 1971) [hereinafter cited as PROSSER].

[23]Corey v. Havener, 182 Mass. 250, 65 N.E. 69 (1902).

[24]*E.g.*, Anderson v. Minneapolis, St. P. & S. Ste. M. Ry., 146 Minn. 430, 179 N.W. 45 (1920).

to escape liability deserves little sympathy. The difficulty with this argument is that its focus is wrong. The overriding purpose of tort law is to compensate the injured, not to punish the wrongdoer. The issue is whether denial of compensation will result in an injustice. Any injustice in denying the injured party recovery for a loss that would have been brought about by an innocent force anyway is not apparent. Application of the rule to this situation must be defended, if at all, on grounds of deterrence rather than compensation. Probably, however, the burden should be placed on the defendant to show that the other fire was of innocent origin.[25]

Out of such cases evolved a broader test under which defendant's conduct is considered a cause of an accident if it is a substantial factor in bringing it about.[26] The substantial-factor test involves the determination not only of the extent to which defendant's conduct has in fact played a part in bringing about the injury but also whether the contribution his conduct has made warrants holding him liable for the harm.[27] Its effect upon the determination of legal responsibility should be only to exclude liability when defendant's conduct has made an insignificant contribution to the harm or when the same harm would have resulted without defendant's negligence. Identical results are achieved under the "but for" and substantial-factor test of actual causation except when causes coalesce to produce injury, a situation in which the "but for" formula has proved to be inadequate.

Neither the trial nor appellate courts in North Carolina seem to employ the substantial-factor rule; however, no cases in which the "but for" rule was not adequate to deal with the causal issue could be found. The usual formula used by North Carolina courts merges actual and proximate cause into a single issue: Proximate cause is a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed.[28] In cases in which other causes intervene between defendant's conduct and plaintiff's injury, the court sometimes employs a

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[25]Kingston v. Chicago & N.W. Ry., 191 Wis. 610, 211 N.W. 913 (1927).

[26]RESTATEMENT (SECOND) OF TORTS §§ 431-33 (1965).

[27]*Id.* § 431, Comment *a.*

[28]*E.g.*, Barefoot v. Joyner, 270 N.C. 388, 393, 154 S.E.2d 543, 547 (1967); Nance v. Parks, 266 N.C. 206, 209, 146 S.E.2d 24, 27 (1966).

concept similar to the substantial-factor test by reasoning that original negligence cannot be insulated "so long as it plays a substantial part in the injury."[29] However, considerations that influence the determination of legal responsibility other than the effect of defendant's conduct in bringing about the accident seem to be relied upon by the court in these cases.

When Satisfactory Proof of Causation Is Impossible.

Natural antipathy of holding a defendant liable for harm he has not caused may sometimes induce an unwarranted skepticism of the adequacy of proof to show causation. Unusually stringent proof requirements found in occasional cases[30] and unsympathetic regard for the probative value of evidence of causation in others[31] may in part reflect this concern to avoid imposition of liability upon an innocent party. This same concern may go far to explain cases like *Whitehead v. Carolina Telephone and Telegraph Co.*[32] In that case the complaint alleged that immediately after a small fire had been discovered on plaintiff's property, an attempt was made to notify the fire department; that because of defendant's negligence communication with the fire department was delayed about twenty minutes; and that if the notice had been promptly communicated, the fire department could have put out the fire before it destroyed plaintiff's property. The court held that a demurrer to the complaint was properly sustained. The decision seems to be based largely upon the fact that whatever proof might have been offered, uncer-

[29]*E.g.*, Porter v. Pitt, 261 N.C. 482, 135 S.E.2d 42 (1964); Watters v. Parrish, 252 N.C. 787, 115 S.E.2d 1 (1960).

[30]*E.g.*, Phelps v. City of Winston-Salem, 272 N.C. 24, 28, 157 S.E.2d 719, 722 (1967) (emphasis by the court):

> In criminal cases, [circumstantial evidence] must point unerringly to the guilt of the defendant and, in effect, must show not only that the defendant is guilty but that upon no reasonable interpretation of the evidence could he be innocent. And also, that if the evidence is consistent with a finding of either guilt or innocence that the innocent interpretation must be adopted.
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> The law in civil cases is so similar that little difference can be found. . . . And it is not sufficient to show that the circumstantial evidence introduced *could* have produced the result—it must show that it *did*.

J.S. Moore & Co. v. Atlantic Coast Line R.R., 173 N.C. 311, 318, 92 S.E. 1, 4 (1917) (concurring opinion). "[T]here must be more than bare evidence of a possibility, or even a probability . . . ." *Id.* at 318, 92 S.E. at 4.

[31]*See* text accompanying notes 104-17 *infra*.

[32]190 N.C. 197, 129 S.E. 602 (1925).

tainties would have remained about the effect of the delay and thus that the causal relationship was basically incapable of satisfactory proof.

Undoubtedly there are cases in which the causal connection between negligence and injury is not capable of very satisfactory proof. When a drowned child is found in a swimming pool, uncertainty inevitably exists over whether the presence of a life guard would have saved the child's life.[33] And because the circumstances under which the drowning occurred are unknown, that uncertainty is incapable of resolution in terms of probabilities. "The heart of plaintiff's case is the stark fact that the lifeless body of a boy was found in defendant's . . . unguarded pool."[34] Similarly, whether a warning label on a jug of gasoline would have prevented an unknown third person from exposing it to a blow torch is essentially an unanswerable inquiry.[35]

A comparable problem is presented by cases in which available evidence permits only the determination that defendant's conduct has deprived plaintiff of a chance to avoid the injury. The only reasonable evaluation of evidence of delay in setting a fracture[36] or in delivering medication[37] may be that it reduced the patient's chances of recovery. If in these cases the chance itself can be valued and is recognized as a legally protectible interest, no significant causation problem exists.[38] However, if the chance cannot be valued, recovery must be sought for the injury itself, and proof of the chance seldom will be enough to show the required causal connection.

The question raised by these cases may be dealt with in terms of the sufficiency of the evidence for submission of the issue of causation to the jury.[39] It has been suggested that because the injury is the very one risked by defendant's conduct, the court should view with some liberality the sufficiency of the evidence and leave it to the jury to deter-

[33]Bell v. Page, 271 N.C. 396, 156 S.E.2d 711 (1967) (evidence that nine-year-old boy discovered drowned in pool and that statute requiring fence or watchmen violated held sufficient).

[34]*Id.* at 400, 156 S.E.2d at 715.

[35]Reynolds v. Murph, 241 N.C. 60, 84 S.E.2d 273 (1954) (allegation held sufficient but recognized that if identity of third person remains unknown proof of causation will be difficult).

[36]Gower v. Davidian, 212 N.C. 172, 193 S.E. 28 (1937) (proof held insufficient).

[37]Byrd v. Southern Express Co., 139 N.C. 273, 51 S.E. 851 (1905) (proof held insufficient).

[38]*E.g.*, Kansas City, M. & O. Ry. v. Bell, 197 S.W. 322 (Tex. Civ. App. 1917) (recognized right to recover for loss of chance to win first prize in hog show).

[39]*E.g.*, Rovegno v. San Jose Knights of Columbus Hall Ass'n, 108 Cal. App. 591, 291 P. 848 (1st Dist. 1930) (drowning case; evidence held sufficient for submission to jury).

mine if causation has been proved.[40] A difficulty with this suggestion is that what is involved is neither fact nor inference. The issues are whether the basic requirements for legal responsibility are to be changed and whether recovery is to be allowed when defendant's negligence has not been shown to be the likely cause of the injury. Those issues seem peculiarly for the judge rather than the jury to decide. That, for example, the risk of drownings is increased by the absence of lifeguards and the danger of gasoline by the failure to label it is an important consideration in the determination of this issue. Also important is the fact that proof beyond what the plaintiff has offered is not possible. Finally, to some extent at least, defendant's conduct has helped to create the plight in which the plaintiff is caught.[41] All of these considerations strongly suggest the need for modification of the rule of actual causation to permit recovery in appropriate cases[42] when normal proof requirements cannot be met.[43] However, to effect such change by submission of the case to the jury under instructions that, to hold the defendant liable, it must find causation is not only to disguise the issue but also to leave its outcome to the impulses of the jury. Even the court's consideration of the problem in the context of the sufficiency of the proof to show actual causation produces inconsistent results.[44]

MULTIPLE CAUSES

A negligent defendant may be liable even though his conduct was

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[40]PROSSER 243.

[41]These considerations have caused courts to modify the causation rule in other cases involving more than one cause. See p. 274 *infra*.

[42]Other proof or its availability to plaintiff may make unnecessary or inappropriate any special rule for determining liability. *E.g.*, Justice v. Prescott, 258 N.C. 781, 129 S.E.2d 479 (1963) (per curiam) (boy found dead in pool but no proof he drowned; life guards on duty but neither they nor other swimmers observed plaintiff in trouble; evidence held insufficient); Godfrey v. Western Carolina Power Co., 190 N.C. 24, 128 S.E. 485 (1925) (substantial evidence presented to establish causation).

[43]*See* Hicks v. United States, 368 F.2d 626 (4th Cir. 1966), *noted in* 45 N.C.L. REV. 799 (1967); Gardner v. National Bulk Carriers, Inc., 310 F.2d 284 (4th Cir. 1962). The suggestion has been made that policy considerations should and do in several ways assume an important role in decisions relating to actual causation. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60 *passim* (1956).

[44]*Compare* Bell v. Page, 271 N.C. 396, 156 S.E.2d 711 (1967), *with* Whitehead v. Carolina Tel. & Tel. Co., 190 N.C. 197, 129 S.E. 602 (1925).

not the sole cause of the harm that has occurred.[45] If such conduct has played a significant part in causing an injury, liability may attach even though other causes have contributed to bring about such injury. Defendant is responsible for the entire harm when his negligence concurs with that of a third party or a nonculpable cause to precipitate an accident.[46] Further, a direct physical connection between defendant's conduct and plaintiff's harm is not required, and when the injury arises out of risks defendant's conduct has created, defendant may be liable although he was not involved in the accident itself.[47] For example, when defendant's negligence threatens a collision between his car and another, and the driver of the other car through evasive action avoids that collision but in doing so is injured in a different way, defendant is liable.[48]

Concert of Action.

In two situations a wrongdoer may be liable even though no causal link exists between his conduct and the accident. Although neither situation necessarily involves more than one cause, they are discussed here because they, like the cases involving multiple causes, raise the issue whether a defendant is to be held responsible for harm brought about by causes other than his own conduct. When two or more persons act in concert in the commission of a tort, each participant is held liable for

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[45]Safeguard Ins. Co. v. Wilmington Cold Storage Co., 267 N.C. 679, 149 S.E.2d 27 (1966) (defendant's negligence concurred with Act of God); Watters v. Parrish, 252 N.C. 787, 115 S.E.2d 1 (1960) (concurring negligence); Pugh v. Smith, 247 N.C. 264, 100 S.E.2d 503 (1957) (error to place burden on plaintiff to show defendant's negligence was *the* cause of his injuries); Godwin v. Johnson Cotton Co., 238 N.C. 627, 78 S.E.2d 772 (1953) (same). *Cf.* Belk v. Boyce, 263 N.C. 24, 138 S.E.2d 789 (1964) (charge that defendant's negligence must be *the* cause of injuries upheld when no evidence of other causes); Harris v. Montgomery Ward & Co., 230 N.C. 485, 53 S.E.2d 536 (1949) (error to charge defendant's negligence need not be the sole cause when no evidence of other causes).

[46]*See* text accompanying notes 69-82 *infra.*

[47]Slaughter v. Slaughter, 264 N.C. 732, 142 S.E.2d 683 (1965) (plaintiff, frightened by defendant's conduct, fell while running away); Langford v. Shu, 258 N.C. 135, 128 S.E.2d 210 (1962) (plaintiff stepped into brick wall when frightened by practical joke); Morgan v. Bell Bakeries, Inc., 246 N.C. 429, 98 S.E.2d 464 (1957) (truck, in effort to avoid collision with defendant's truck, jacknifed across road and was struck by oncoming truck).

[48]Underwood v. Gay, 268 N.C. 715, 151 S.E.2d 590 (1966) (per curiam) (plaintiff, in taking evasive action to avoid striking defendant's car, ran off road); Robertson v. Ghee, 262 N.C. 584, 138 S.E.2d 220 (1964) (defendant's negligence caused wreck in which passenger was thrown onto road; plaintiff, in taking evasive action to avoid striking passenger, ran off road); Bondurant v. Mastin, 252 N.C. 113, 130 S.E.2d 292 (1960) (plaintiff, in taking evasive action, collided with oncoming truck).

the acts of the others.[49] "[W]here there is a common intent to assault and beat, or where the parties are all present at the beating . . . or are guilty as abettors by reason of counsel or encouragement given beforehand, each is guilty of the whole . . . ."[50] The traditional rule relating to concert of action requires common design and community of action in carrying it out.[51] The theory for imposition of liability is that under such circumstances a joint enterprise or agency is established, and each participant becomes vicariously liable for the actions of the group.

The North Carolina court seems to have extended the concert-of-action rule[52] to deal with the broader issue of defendant's liability for harm that other causes have helped to produce when the facts do not fit within the narrow confines of vicarious liability. Joint and several liability has been imposed for harm occurring by the independent and separate acts of several tortfeasors in discharging sewerage into a stream that runs through plaintiff's property[53] or in washing sediment onto his land.[54] In the early cases[55] the court attached some importance to the fact that each wrongdoer had acted with knowledge of what the others were doing and of the effect their combined actions were likely to have. That defendant's knowledge may not have been crucial to these decisions, however, is suggested by the court's view that constructive knowledge, based upon the fact that such activity by others was taking place, was sufficient.[56] The true basis for this line of decisions may be more accurately reflected in a recent opinion. In *Phillips v. Hassett Mining Co.*,[57]

[49]Nye v. Pure Oil Co., 257 N.C. 477, 126 S.E.2d 48 (1962) (conspiracy to defraud); Garrett v. Garrett, 228 N.C. 530, 46 S.E.2d 302 (1948) (assault and battery); Williams v. Cape Fear Lumber Co., 176 N.C. 174, 96 S.E. 950 (1918) (concert or agreement may be established by circumstantial evidence).

[50]Smithwick v. Ward, 52 N.C. 64, 67 (1859).

[51]PROSSER 291.

[52]Even in applying the concert-of-action rule, a liberal view seems to be taken by the court. Branch Banking & Trust Co. v. Peirce, 195 N.C. 717, 718, 143 S.E. 524, 525 (1928) ("the allegation of a general course of dealing and systematic policy of wrongdoing, concealment and mismanagement, virtually amounting to a conspiracy, in which the defendants are all charged with having participated at different times and in varying degrees" which tend to a single end is enough).

[53]Phillips v. Hassett Mining Co., 244 N.C. 17, 92 S.E.2d 429 (1956); Stowe v. City of Gastonia, 231 N.C. 157, 56 S.E.2d 413 (1949); Lineberger v. City of Gastonia, 196 N.C. 445, 146 S.E. 79 (1929); Moses v. Town of Morganton, 192 N.C. 102, 133 S.E. 421 (1926).

[54]McKinney v. Deneen, 231 N.C. 540, 58 S.E.2d 107 (1950).

[55]Lineberger v. City of Gastonia, 196 N.C. 445, 146 S.E. 79 (1929); Moses v. Town of Morganton, 192 N.C. 102, 133 S.E. 421 (1926).

[56]*Id.*

[57]244 N.C. 17, 92 S.E.2d 429 (1956).

the court said: "Concert of action is not a requisite of joint tortfeasorship. . . . If the independent wrongful acts of two or more persons unite in producing a single indivisible injury, the parties are joint tortfeasors within the meaning of the law, and the injured party may sue only one or all the tortfeasors, as he may elect."[58]

Most of the North Carolina cases have involved nuisances and are opposed to the majority view that rejects joint and several liability for consequential harm resulting from the independent acts of several tortfeasors.[59] Courts that follow the majority view frequently allow damages to be apportioned among such tortfeasors on the basis of any evidence, however minimal, that will permit a rough apportionment to be made.[60] One North Carolina case has held that damages should be apportioned among tortfeasors when the evidence provides a basis for doing so.[61] Thus the two views may coalesce in cases in which some basis for apportionment of damages exists. However, when no basis on which to apportion damages can be found, the majority rule permits the wrongdoers to escape liability altogether and imposes on the innocent injured person the loss they have caused. The North Carolina position permits recovery in such situations, and, although it may result in imposing liability on a wrongdoer for injury he has not caused, such an outcome seems preferable to that reached under the majority view.

Double Fault-Alternative Liability Cases.

A similar problem arises in cases, none of which seem to have arisen in North Carolina, that are said to involve double fault and alternative liability.[62] Although the fault of two or more wrongdoers may be established, it may be clear that the conduct of only one has resulted in the

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[58]*Id.* at 22, 92 S.E.2d at 433.

[59]*E.g.*, Farley v. Crystal Coal & Coke Co., 85 W. Va. 595, 102 S.E. 265 (1920); Chipman v. Palmer, 77 N.Y. 51 (1879).

[60]PROSSER 317-18.

[61]Long v. Swindell, 77 N.C. 176 (1877).

> While the separate action of each defendant causes the single injury, the share of each in causing it, is separable, and may be accurately measured. It is, *caeteris paribus*, as they seem to have been here, proportionate to the area which he drains upon the plaintiff. Under these circumstances it would be unjust and unreasonable to assess joint damages, by which the possessor of ten acres drained would pay as much as the possessor of fifty acres . . . .

Id. at 184-85.

[62]PROSSER 243.

injury. If the one whose conduct caused the injury can be identified, he, but not the others, is liable. On the other hand, if the proof establishes that the conduct of one of the wrongdoers caused the harm but fails to identify who is responsible, a causal connection between the injury and the fault of any of the tortfeasors has not been established. The classic illustration of this type of situation is that in which two hunters negligently shot at the same time in plaintiff's direction and a pellet, which could have come from either gun, hit him.[63]

Although in this situation the conduct of one of the negligent parties has caused no injury, the issue that confronts the court is much the same as that involved in the nuisance cases: Strict insistence upon proof of causation precludes any recovery by the plaintiff, while imposition of joint and several liability holds one party responsible for harm he has not caused. The choice between these alternatives is one of policy, not of fact. Faced with this choice, courts have imposed joint and several liability on grounds either that concert of action existed[64] or that the burden to show causation should be shifted to the defendants and that upon failure of such proof each is to be held liable.[65] Here, as in the nuisance cases, not only the plaintiff's injury but also the uncertainty about the causation issue has been created by the defendants' conduct. In the nuisance cases, however, the defendants are more likely to be in better position than the plaintiff to produce evidence that will permit some apportionment of damages to be made. Still, on balance, a fairer result is achieved in these as well as the nuisance cases by holding defendants liable than by denying plaintiff any right of recovery.

One group of cases has extended the double fault-alternative liability rule by finding several defendants liable when uncertainty existed about who among them was negligent as well as about causation. The leading case is *Ybarra v. Spangard*,[66] in which res ipsa loquitur was applied to permit plaintiff, who had been injured by an external blow while undergoing an operation, to recover against several doctors and nurses who had participated in the operation, although no agency or other relationship existed so as to render any of them vicariously liable

[63]Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948); Moore v. Foster, 182 Miss. 15, 180 So. 73 (1938); Oliver v. Miles, 144 Miss. 852, 110 So. 666 (1927).

[64]Moore v. Foster, 182 Miss. 15, 180 So. 73 (1938); Oliver v. Miles, 144 Miss. 852, 110 So. 666 (1927).

[65]Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948).

[66]25 Cal. 2d 486, 154 P.2d 687 (1944).

for the acts of the others. While it is possible that the injury could have resulted from the negligence of any of them, it is also clear that the negligence of one or more could have caused the injury and that the others were free of fault. The court, finding the evidence sufficient against all defendants, emphasized that the group worked as a team in performing the operation and that the defendants were in a better position to account for what had happened than the plaintiff who was unconscious during the operation. The most consistent application of res ipsa against multiple defendants has been against defendants who form a chain of distribution for the marketing of products.[67] In an occasional case in which no unity among the defendants is present, the doctrine has also been applied.[68] No North Carolina cases could be found in which an attempt was made to rely upon res ipsa under these circumstances.

Concurring Negligence.

At common law when the negligence of two or more persons concurred to produce a single impact and indivisible injuries, each wrongdoer was held liable for the entire loss. This rule continues to be the law.[69] Thus when a train and a car collide at a crossing[70] or two cars collide on the highway[71] and the operator of each vehicle is negligent, each is liable for all harm which results from the collision. In such cases, although neither concert of action nor any other relationship between the parties exists and each acts independently of the other, their actions concur to produce a single result and no apportionment of damages among them is possible. Since each has contributed to the injury, each must be held liable for all the damages unless plaintiff is to be denied recovery or some arbitrary apportionment is to be made. That the tort-

[67]Dement v. Olin-Mathieson Chem. Corp., 282 F.2d 76 (5th Cir. 1960); Loch v. Confair, 372 Pa. 212, 93 A.2d 451 (1953) (manufacturer and retailer); Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953) (manufacturer, distributor, and retailer); Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P.2d 1041 (1953) (manufacturer and others).

[68]Gauthreaux v. Hogan, 185 So. 2d 44 (La. Ct. App. 1966) (two-car collision); Raber v. Tumin, 36 Cal. 2d 654, 226 P.2d 574 (1951) (fall of ladder).

[69]*E.g.*, Wise v. Vincent, 265 N.C. 647, 144 S.E.2d 877 (1965); Tillman v. Bellamy, 242 N.C. 201, 87 S.E.2d 253 (1955); White v. Carolina Realty Co., 182 N.C. 536, 109 S.E. 564 (1921).

[70]*E.g.*, Earwood v. Southern Ry., 192 N.C. 27, 133 S.E. 180 (1926).

[71]*E.g.*, Turner v. Turner, 261 N.C. 472, 135 S.E.2d 12 (1964); Stockwell v. Brown, 254 N.C. 662, 119 S.E.2d 795 (1961).

feasors acted at different times makes no difference;[72] what is important is that their negligence has combined to bring about a single result. One tortfeasor may act upon a condition created by the other, as when one defendant runs into a car negligently parked by the other[73] or a railway car strikes a negligently maintained power line pole.[74] However, in situations in which another's negligence intervenes between a tortfeasor's act and the plaintiff's injury, policies other than those involved in actual causation may relieve the tortfeasor of all liability.[75]

For the same reasons entire liability has also been recognized when defendant's conduct concurs with innocent causes to bring about an accident.[76] Liability has been imposed when the wind upended a board defendant had left insecurely fastened[77] or spread a fire he had left unattended;[78] when a flood broke through a negligently constructed dam;[79] and when lightning set fire to a hazardous condition he had permitted to exist.[80] Similarly, recovery against the defendant has been allowed when plaintiff's or another's nonnegligent conduct concurred in causing the accident[81] or when an unknown cause has contributed in bringing it about.[82]

Successive Impacts.

Because of "chain-collision" automobile accidents, the question of

[72]Hayes v. City of Wilmington, 243 N.C. 525, 91 S.E.2d 673 (1956) (negligently laid gas pipe struck by grading machine); Price v. City of Monroe, 234 N.C. 666, 68 S.E.2d 283 (1951) (negligently driven car ran into ditch defendant had excavated across street).

[73]*E.g.*, Grimes v. Gibert, 6 N.C. App. 304, 170 S.E.2d 65 (1969).

[74]Ramsey v. Carolina-Tennessee Power Co., 195 N.C. 788, 143 S.E. 861 (1928).

[75]*E.g.*, Williams v. Mickens, 247 N.C. 262, 100 S.E.2d 511 (1957) (intervening intentional conduct; defendant who negligently left keys in car not liable for its negligent operation by thief); Rulane Gas Co. v. Montgomery Ward & Co., 231 N.C. 270, 56 S.E.2d 689 (1949) (intervening negligent conduct; seller of defective hot water heater not liable for explosion when service man, aware of presence of gas vapors, struck match which ignited them).

[76]Safeguard Ins. Co. v. Wilmington Cold Storage Co., 267 N.C. 679, 149 S.E.2d 27 (1966) (Act of God); Dillon v. Raleigh, 124 N.C. 184, 32 S.E. 548 (1899) (frightened horse bolted and ran into obstruction negligently maintained in street).

[77]Ridge v. Norfolk Southern R.R., 167 N.C. 510, 83 S.E. 762 (1914).

[78]Gibbon v. Lamm, 183 N.C. 421, 111 S.E. 618 (1922).

[79]Supervisor & Comm'rs v. Jennings, 181 N.C. 393, 107 S.E. 312 (1921).

[80]Lawrence v. Yadkin River Power Co., 190 N.C. 664, 130 S.E. 735 (1925).

[81]Pinyan v. Settle, 263 N.C. 578, 139 S.E.2d 863 (1965); Adams v. State Bd. of Educ., 248 N.C. 506, 103 S.E.2d 854 (1958); Graham v. Atlantic Coast Line R.R., 240 N.C. 338, 82 S.E.2d 346 (1954).

[82]Stone v. Texas Co., 180 N.C. 546, 105 S.E. 425 (1920) (gasoline spillage ignited in unknown way).

the liability of several defendants whose conduct has caused injuries through separate impacts has been frequently litigated in recent years. The negligence of the defendant who caused the first collision created a situation on which the others acted and may be regarded as a cause of all the harm.[83] However, the negligence of defendants involved in subsequent collisions cannot be regarded as the cause of injuries received in earlier impacts. The combined effect of the several impacts may be an indivisible injury or separate injuries which cannot be related to any specific impact. When uncertainty exists concerning the injuries inflicted by each defendant, courts have permitted the plaintiff to recover either by recognizing that the injuries were incapable of apportionment or by shifting the burden on apportionment to the defendant.[84]

When substantial time elapses between impacts, imposition of entire liability upon several defendants is more questionable.[85] If the impacts are sufficiently separated in time so as to afford opportunity to the injured person to ascertain the harm inflicted by each, the inability to produce evidence of apportionment is caused by the plaintiff's inaction and not by the acts of defendants. Under such circumstances no injustice arises by placing the burden on the plaintiff to show what harm has been caused by such defendant. Of course, if the nature of the injuries precludes any determination of the extent of harm caused by each defendant, the passage of time may be immaterial, except that at some point in time defendant's liability for subsequent events is likely to be terminated.

When no appreciable time lapse occurs between impacts, the North Carolina court has imposed joint and several liability upon the defendants in cases involving successive impacts.[86] The court has reached this result by holding the defendants to be concurring tortfeasors. Use of this theory in one case may have blurred the nature of the issue involved and thereby resulted in a questionable decision. In *Fox v. Hollar*,[87] the initial

[83]*E.g.*, Hall v. Coble Dairies, Inc., 234 N.C. 206, 67 S.E.2d 63 (1951) (plaintiff, dazed by collision, walked into path of another car; negligent defendant who caused collision liable for injuries caused by second car).

[84]Maddux v. Donaldson, 362 Mich. 425, 108 N.W.2d 33 (1961); Note, 44 N.C.L. REV. 249 (1965).

[85]*See* Loui v. Oakley, 50 Hawaii 260, 438 P.2d 393 (1968).

[86]Gatlin v. Parsons, 257 N.C. 469, 126 S.E.2d 51 (1962); Riddle v. Artis, 243 N.C. 668, 91 S.E.2d 894 (1956); Barber v. Wooten, 234 N.C. 107, 66 S.E.2d 690 (1951); Lewis v. Hunter, 212 N.C. 504, 193 S.E. 814 (1937); West v. Collins Baking Co., 208 N.C. 526, 181 S.E. 551 (1935).

[87]257 N.C. 65, 125 S.E.2d 334 (1962).

collision was an unavoidable accident, but the second impact was caused by defendant's negligence. The court, observing that under these circumstances the concurring-negligence theory was inapplicable, held that plaintiff could recover only for such injuries as he could show were caused by the second collision.

In other cases[88] entire liability of all defendants has not been imposed because the evidence failed to show any damage that was inflicted by one of the impacts. A strict interpretation of these cases might suggest that they are inconsistent with the imposition of joint and several liability in cases involving successive impacts. However, a better interpretation of them may be to limit their holding to situations in which it affirmatively appears, at least to some extent, that no injury was inflicted by one of the impacts. Such a view seems sound and does not conflict with the basic rule imposing liability when separation of damages is not possible.

Summary.

General acceptance of entire liability for harm produced by concurring causes exists when the causes other than defendant's negligence are simply instrumentalities through which the harm risked by his conduct is realized. In the usual situation in which the rule is applied, the other causes would have produced no harm without the defendant's negligence. When some injury to the plaintiff would have been effected by another cause operating without defendant's negligence, greater reluctance to impose liability for all the harm caused by the concurrence of the two surfaces. This reluctance is evident in the nuisance cases,[89] in those in which successive impacts occur,[90] and in some cases in which an Act of God concurs with defendant's negligence[91] to cause injury. In such cases the natural instinct is to apportion damages according to the contribution each cause has made, and such a division is appropriate

[88]Gatlin v. Parsons, 257 N.C. 469, 126 S.E.2d 51 (1962); Riddle v. Artis, 246 N.C. 629, 99 S.E.2d 857 (1957). Two other cases involved similar facts but were decided on proximate-cause questions. Copple v. Warner, 260 N.C. 737, 133 S.E.2d 641 (1963); Batts v. Faggart, 260 N.C. 641, 133 S.E.2d 504 (1963).

[89]*See* text accompanying notes 52-61 *supra*.

[90]*See* text accompanying notes 83-88 *supra*.

[91]*E.g.*, Cole v. Shell Petroleum Corp., 149 Kan. 25, 86 P.2d 740 (1939) (flood and obstruction in river; alternative ground for holding no liability was failure to show extent defendant's negligence contributed to harm).

when the evidence provides a basis for it. A liberal view of the sufficiency of the evidence to permit apportionment should be taken,[92] since a rough division of damages may provide an acceptable adjustment of the need to compensate plaintiff and the desire to limit defendant's liability to harm he has caused. However, the appeal of this solution may lead to an insistence upon proof by plaintiff that will permit apportionment and, when such proof is not possible, to a denial of recovery. In this way the apportionment rule, which seems so eminently fair, may subordinate the interests of the plaintiff to those of the wrongdoer whose conduct has contributed to bring about the injury and the uncertainty about the extent of harm he has caused.

In view of all the developments relating to multiple causes, a rule definitely seems to be emerging that permits recovery when apportionment of damages is not possible. This result is achieved by shifting to the wrongdoers the burden to show the harm for which other causes are responsible and, upon failure of such proof, by holding them liable for the entire harm. The *Restatement* has adopted this view.

PROOF OF CAUSATION

When Defendant's Negligence Is Capable of Causing Harm.

Actual causation, like any other fact, may be established by circumstantial evidence.[93] The inference of causation from other facts may be an easy one. Thus, when a car being driven at an excessive speed or by an intoxicated driver leaves the road, the obvious inference to be drawn is that speed in the one instance[94] and intoxication in the other[95] caused loss of control of the car and the ensuing accident. Similarly, evidence that a train engine was emitting sparks when it passed property on which a fire was discovered immediately thereafter readily permits the infer-

[92] *E.g.*, McAllister v. Pennsylvania R.R., 324 Pa. 65, 187 A. 415 (1936).

[93] Drum v. Bisaner, 252 N.C. 305, 113 S.E.2d 560 (1960) (inference that faulty electrical wiring caused fire); Nance v. Merchants' Fertilizer & Phosphate Co., 200 N.C. 702, 158 S.E. 486 (1931) (inference that negligently released chemical waste killed hogs); Masten v. Texas Co., 194 N.C. 540, 140 S.E. 89 (1927) (inference that gasoline escaping from defendant's tank contaminated well); Lawrence v. Yadkin River Power Co., 190 N.C. 664, 130 S.E. 735 (1925) (inference that fire started in foul right of way under electric transmission lines).

[94] Wilkerson v. Clark, 264 N.C. 439, 141 S.E.2d 884 (1965); Yates v. Chappell, 263 N.C. 461, 139 S.E.2d 728 (1965).

[95] Southern Nat'l Bank v. Lindsey, 264 N.C. 585, 142 S.E.2d 357 (1965).

ence that the fire was set by sparks from the engine.[96] Circumstantial proof of causation, however, is not always so simple. The inference of causation may be incident to a special mode of proof, such as the similar-instances rule[97] or *res ipsa loquitur*,[98] by which the circumstantial evidence is held to establish a prima facie case and the issues of fault and causal connection are inseparably woven together.[99] In these cases the circumstances of the accident either alone or in conjunction with evidence of other similar occurrences not only identify the defendant's negligence as a possible cause of the accident but also suggest that the accident was caused more likely by defendant's negligence than by other possible causes.[100] Further complexity arises because frequently the inference that arises under these special modes of proof merely indicates that some negligence of the defendant was the probable cause of the injury but seldom identifies a particular act or omission as its likely cause.

The use of direct evidence to prove actual causation usually raises only the question of its credibility. If it is accepted, causation is established; if it is rejected, the proof of causation fails. In contrast, circumstantial evidence, even if accepted, leaves open the possibility of other causes of the accident, and these must be weighed against the possibility that defendant's negligence was *the* cause. The existence of several possible causes of the accident does not prevent an inference that defendant's negligence was its likely cause. Nor need the evidence exclude every other possible cause before the inference can be drawn that defendant's negligence was its probable cause.[101]

When defendant's negligence is established and the accident is one that such negligence is likely to cause, the inference that defendant's negligence was its probable cause is clearly permissible without direct evidence establishing the causal connection. Thus when a car driven by defendant at eighty miles an hour leaves the road and plunges into

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[96]Betts v. Southern Ry., 230 N.C. 609, 55 S.E.2d 76 (1949).

[97]For a discussion of the similar-instances rule see Byrd, *Proof of Negligence in North Carolina—Part II. Similar Occurrences and Violation of Statute*, 48 N.C.L. REV. 731-44 (1970).

[98]For a discussion of *res ipsa loquitur* see Byrd, *Proof of Negligence in North Carolina—Part I. Res Ipsa Loquitur*, 48 N.C.L. REV. 452 (1970).

[99]*See* text accompanying notes 130-49 *infra*.

[100]Young v. Anchor Co., 239 N.C. 288, 79 S.E.2d 785 (1954); Jones v. Bland, 182 N.C. 70, 108 S.E. 344 (1921).

[101]Greene v. Nichols, 274 N.C. 18, 161 S.E.2d 521 (1968) (unexplained single car accident); Cherry v. Smallwood, 7 N.C. App. 392, 171 S.E.2d 83 (1969) (same).

danger, the inference that excessive speed caused the accident seems almost inescapable.[102] Under these circumstances the chance that other possible causes that have not been shown to have been actively operating at the time of the accident brought about the accident seems too remote to assume any real significance. The absence of evidence that affirmatively shows that other possible causes were not in operation at the time of the accident does not weaken the inference materially. Further, the inference is equally compelling whether defendant's negligence is established by direct or circumstantial evidence.

Situations arise in which significant doubt about the cause of the accident exists, despite the coincidence of defendant's negligence and the accident and the correlation between them that normal experience indicates. When defendant negligently permits part of his open land to be covered with dry brush, debris, and other combustibles, the risk of a fire is apparent. Yet when a general conflagration burns over a large area, including defendant's property, and nothing indicates where the fire began, the inference that the fire started on defendant's premises, though permissible, is not clearly more compelling than other permissible inferences.[103] Even if the difficulty of finding the evidence of causation sufficient in this type of case is conceded, two North Carolina cases involving the origin of fires may fail to accord to circumstantial evidence the full probative force it deserves.

In *Maharias v. Weathers Brothers Moving & Storage*,[104] a fire started in a room of defendant's warehouse that had been used for polishing furniture. About one-half bushel of charred rags that had furniture polish on them were found in the corner of the room where the fire started. An expert expressed the opinion that the pile of rags "could have caused spontaneous combustion." The court, stating that the evidence raised only a conjecture, found it insufficient for submission to the jury. In *Phelps v. City of Winston-Salem*[105] defendant operated a pro-

[102]Wilkerson v. Clark, 264 N.C. 439, 141 S.E.2d 884 (1965). *But see* Crisp v. Medlin, 264 N.C. 314, 319, 141 S.E.2d 609, 612 (1965): "In our opinion, and we so hold, the mere fact that it can be reasonably inferred from the evidence that the Chevrolet automobile was traveling at a very rapid speed when it wrecked is not sufficient to permit a jury to find that such speed caused its wreck . . . ."

[103]The apparent holding in Maguire v. Seaboard Airline Ry., 154 N.C. 384, 70 S.E. 737 (1911), is that proof of such circumstances is insufficient for submission to the jury.

[104]257 N.C. 767, 127 S.E.2d 548 (1962).

[105]272 N.C. 24, 157 S.E.2d 719 (1967).

duce market in which he rented stalls to sellers of produce. Defendant retained general control of the premises. An oil tank, coal, and cylinders of ethylene gas were stored in the market. The building was heated by oil and coal stoves, one of which had a crack in it. Other flammable material was in several sections of the building. Large quantities of combustibles were piled on the roof of the building. A fire started in one of the stalls, spread over the entire building, and destroyed property of plaintiffs, who were three tenants in the market. The court again found the evidence insufficient.

Both decisions seem wrong. In both defendant's negligence was established, the negligent conduct created the risk of fire, and the place where the fire started was located in a small area within which defendant's negligence was in operation. Although under these circumstances causes of the fire other than the defendant's negligence are possible, the more compelling inference is that the fire, the origin of which was localized to a small area in which a known fire hazard existed, resulted from that hazard and not from some unknown source. To say that such evidence permits only conjecture and surmise, as the North Carolina court did, practically denies the efficacy of circumstantial evidence as a mode of proof.

Despite its verbalization, the test[105] under which the North Carolina court seems to determine the sufficiency of the evidence for submission to the jury—evidence that permits a finding of more probable than not—is not a mathematical formula from which to derive an inescapable conclusion but is only a general guideline to assure that a fair foundation exists for defendant's liability. The test is not designed to limit the jury's role to that of resolving conflicting evidence and to place in the trial judge or appellate court the evaluative determinations presented by the evidence. Under our system those determinations are for the jury to make, and the court's function is simply to ascertain that a determination in favor of the plaintiff is fairly permitted by the evidence. Serious doubt exists that either *Maharis* or *Phelps* is consistent with these basic ideas.

The court's analysis of the causation issue in the *Phelps* case may

[105]*See* Drum v. Bisaner, 252 N.C. 305, 310, 113 S.E.2d 560, 564 (1960) ("the more reasonable probability") & cases cited therein. When the court finds the proof insufficient, it typically observes that "[t]he evidence raised a mere conjecture, surmise and speculation." *E.g.*, Matharais v. Weathers Bros. Moving & Storage, 257 N.C. 767, 768, 127 S.E.2d 548, 549 (1962).

be objectionable for another reason. The court seems to have rejected the possibility that defendant's negligence in permitting large quantities of combustibles to be on his premises so as to create a fire hazard provided a basis for holding him liable unless defendant also negligently set the fire. Two statements of the court point this out: "Although there is evidence that the fire started in the vicinity of the Blalock tomato shed and its roof was cluttered with combustible and flammable materials the only evidence relating to the cause of the fire is that it was 'unknown.' "[107] The court elaborated:

> Here, combustible material was on the roof, there were oil burning stoves with cracks in them, and flammable material was in several sections of the building. For some of these conditions the [defendant] might have been responsible, but the tenants and customers may have been responsible for the remainder. People were sleeping in the building and were coming in and going out all through the night. It is possible that anyone of them may have let a lighted cigarette or a still-burning match come in contact with some of the combustible material.[108]

Defendant's negligence may have been causally related to the destruction of plaintiff's property in three ways. First, defendant negligently maintained and permitted to be maintained by others conditions that could have set the fire. Secondly, even if the source that set the fire was something for which defendant was not responsible, it negligently permitted combustibles and flammables to "clutter" the building and thus created a substantial risk that they would be ignited in some way. The fact that the fire was actually set by an Act of God,[109] a third person,[110] or an unknown source[111] does not eliminate defendant's negligence as a cause. Thirdly, even if some unknown agency set the fire and the fire originated outside the hazardous conditions created by defen-

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[107]272 N.C. at 30, 157 S.E.2d at 723.

[108]272 N.C. at 31, 157 S.E.2d at 724.

[109]Lawrence v. Yadkin River Power Co., 190 N.C. 664, 130 S.E. 735 (1925) (lightning caused molten insulator to fall into dried grass and brush).

[110]*Cf.* Shepard v. Rheem Mfg. Co., 251 N.C. 751, 112 S.E.2d 380 (1960) (ignition and explosion of gas which had escaped from defective hot water heater sold by defendant and installed by contractor in room without ventilation); Smith v. Shell Union Oil Co., 214 N.C. 824, 198 S.E. 622 (1938) (per curiam) (ignition by match and explosion of gasoline-kerosene mixture); Williams v. Railroad, 140 N.C. 623, 53 S.E. 448 (1906) (defendant without fault set fire to his own unsafe premises).

[111]Newton v. Texas Co., 180 N.C. 561, 105 S.E. 433 (1920) (gasoline allowed to escape when it could have been ignited by any of a number of sources).

dant's negligence, those conditions may have been a substantial factor in the spread of the fire beyond the area where it started. Admittedly, the strength of the inference that the foul condition of defendant's property is a substantial factor in the spread of fire depends upon the particular circumstances present. When a large area, including defendant's property, has been consumed by a general conflagration, the possibility looms large that the extent of the fire would have been the same regardless of the condition of defendant's property.[112] However, if, as in *Phelps*, it is shown that the quantity of combustible material was large and that the fire started near it, the inference that the fire was fed and enlarged by its presence is a reasonable one.[113]

The court's apparent holding that defendant would not be liable if the fire were set by a third party or an unknown source is ostensibly based upon a proximate-cause rationale that a defendant's liability must be stopped short of all consequences it may have caused. If it is assumed that the court consciously considered the limitation-of-liability question and further assumed that its decision of that question is correct, then the only actual-cause question that bears upon liability would be whether defendant's negligence set the fire. In this posture the court's decision relating to actual causation is, although still debatable, a more defensible one.

Neither of the above assumptions can be readily accepted. The part of the opinion that creates the difficulty of interpretation is set out below:

> The law does not charge a person with all the possible consequences of his negligence, nor that which is merely possible. A man's responsibility for his negligence must end somewhere. If the connection between negligence and the injury appears unnatural, unreasonable, and improbable in the light of common experience, the negligence, if deemed a cause of the injury at all, is to be considered a remote rather than a proximate cause. It imposes too heavy a responsibility for negligence to hold the tort-feasor responsible for what is unusual and unlikely to happen or for what was only remotely and slightly probable.[114]

While rejection of the decision as a ruling on the limitation-of-liability

[112]*See* Maguire v. Seaboard Airline Ry., 154 N.C. 384, 70 S.E. 737 (1911).

[113]Reid & Sibell, Inc. v. Gilmore & Edwards Co., 134 Cal. App. 2d 60, 285 P.2d 364 (1st Dist. 1955).

[114]Phelps v. City of Winston-Salem, 272 N.C. 24, 30, 157 S.E.2d 719, 723 (1967).

question flies squarely in the face of this language of the court, its acceptance creates an equally difficult problem. Common sense repels the notion that a fire is an "unnatural," "unreasonable," "improbable," "unusual," and "unlikely" consequence of a serious fire hazard. If it is negligent to clutter premises with combustibles and flammables, the danger of fire is the very risk that makes such conduct unreasonable. Further, as a proximate-cause ruling, the decision conflicts with established precedent in North Carolina[115] and elsewhere.[116] Finally, the practice of the North Carolina court of blending the actual-cause and the limitation-of-liability questions into a single inquiry under the proximate-cause label has been a frequent source of confusion, even for the court itself.[117]

In the type of case under consideration, the court readily recognizes the force of circumstantial evidence when the proof not only establishes negligence and harm such negligence could have caused but also shows other circumstances that tend to tie the two together. The court's willingness to accept circumstantial evidence in these instances is apparent in cases involving the origin of fires—a situation in which without the additional proof the court's regard for circumstantial evidence is, as just seen, less than enthusiastic. If the circumstances tend to pinpoint the origin of the fire to the precise place of impact of defendant's negligence, the sufficiency of the evidence to prove actual causation is not questioned. Thus submission to the jury has been held proper when the circumstances indicate that the fire started at the place at which defendant had installed faulty electrical wiring[118] or had been working with an open-flame torch.[119] The circumstances relating the negligence and the injury may be so strong that the inference is almost compelling.[120]

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[115]*See* cases cited notes 109-11 *supra*.

[116]PROSSER 272.

[117]For example, in *Phelps* the court relied upon Maguire v. Seaboard Airline Ry., 154 N.C. 384, 70 S.E. 737 (1911), for the proposition that a defendant who negligently leaves combustibles on property so as to create a fire hazard is not liable when the combustibles are ignited by a third person or an unknown cause. The case, properly interpreted, seems to hold only that the evidence was inadequate to show that the condition of the premises contributed either to the ignition or the spread of the fire. *See also* Barefoot v. Joyner, 270 N.C. 388, 154 S.E.2d 543 (1967) (trial court erroneously defined proximate cause as a cause without which the accident never would have occurred); Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966) (same).

[118]Jenkins v. Leftwich Elec. Co., 254 N.C. 553, 119 S.E.2d 767 (1961); Drum v. Bisaner, 252 N.C. 305, 113 S.E.2d 560 (1960).

[119]Patton v. Dail, 252 N.C. 425, 114 S.E.2d 87 (1960).

[120]Nance v. Merchants Fertilizer & Phosphate Co., 200 N.C. 702, 158 S.E. 486 (1931) (same

Just as additional circumstances may strengthen the inference of causal connection between defendant's negligence and plaintiff's injury, they may also diminish the force of that inference. The probative value of the coincidence of the negligence and the injury and the possible relationship between them that ordinary experience suggests is substantially impaired when additional circumstances tend to negate that connection[121] or to show that other causes may have brought about the accident.[122] Although the court, in determining the sufficiency of the evidence for submission to the jury, must view the evidence in the light most favorable to the plaintiff, all the circumstances presented by plaintiff's proof may appropriately be considered.

When Capacity of Defendant's Negligence to Cause Harm is Uncertain. In the cases discussed in the preceding section ordinary experience indicated that the negligent conduct involved was capable of causing plaintiff's injury. No evidence was needed to enable that determination to be made. That speed may cause a driver to lose control of a car and that faulty electrical wiring may cause a fire are commonly known. A number of North Carolina cases involve situations in which a conclusion that defendant's negligence could have caused plaintiff's injury cannot be based upon common knowledge, and the only foundation for an inference of causal connection is the coincidence in time of the negligence and the injury.

Wall v. Trogdon[123] effectively illustrates this line of cases. The evidence showed that defendants were spraying crops on land adjacent to plaintiff's property, that the plane from which the spray was dispensed passed at low altitudes over lakes on plaintiff's property, that the spray-

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acid present in defendant's chemical waste pile, in stream flowing downward from it to plaintiff's property, in mud holes in hog pen from which hogs drank water, and in entrails of dead hogs); Masten v. Texas Co., 194 N.C. 540, 140 S.E. 89 (1927) (defendant's gasoline tank, shown to be leaking, only one within one-half mile of plaintiff's contaminated well; ground sloped downward from tank to well; underground stream flowed in same direction).

[121]Hubbard v. Quality Oil Co., 268 N.C. 489, 151 S.E.2d 71 (1966) (location of fire indicated that vapors from overflow of gasoline at unattended pump could not have caused it; evidence that overflow, if any, occurred after fire started); Foreman-Blades Lumber Co. v. City of Elizabeth City, 227 N.C. 270, 41 S.E.2d 761 (1947) (two hundred feet separated defendant's brush fire and fire causing damage).

[122]Sanders v. Polk, 264 N.C. 309, 141 S.E.2d 479 (1965) (prostrate body lying in street when struck by defendant; uncertain whether and how many times body had been run over by others); J.S. Moore & Co. v. Atlantic Coast Line R.R., 173 N.C. 311, 92 S.E. 1 (1917) (hazardous conditions at sawmill where fire occurred thirty minutes after train passed).

[123]249 N.C. 747, 107 S.E.2d 757 (1959).

ing devices used were defective and continued to emit a liquid spray as the plane passed over the lakes, and that the following day the water in the lakes was covered with an oily substance and the fish in the lakes were dead or dying. The court held that the evidence established no causal connection between the death of the fish and the defendant's negligence. The deficiency in the evidence seen by the court was its failure to show that the spray contained any substance harmful to fish or to show what caused the fish to die. A similar holding has been reached in other cases in which plaintiff has shown that his injury occurred immediately after contact with a substance to which he was negligently exposed by defendant but has offered no proof that the substance was capable of causing the injury.[124]

In all of these cases additional evidence was clearly available to the plaintiff. Reasonable effort could have produced proof that the substance contained harmful ingredients, that those ingredients were capable of causing the injury, and, perhaps, that they or similar ingredients in fact caused the injury. The apparent availability of other evidence may be one reason why the court holds the proof in these cases insufficient for submission to the jury. The major thrust of each opinion seems to be a roll call of the missing evidence. For example, in *Wall* the Court observed: "In the first place there is no evidence as to elements constituting the spray used in spraying the crops. If there were poison in the spray there is no evidence that it was poisonous to fish. If it were poisonous to fish there is no evidence that the fish died from the poison."[125] In *Hanrahan v. Walgreen Co.*[126] the Court further observed that

[124]Reason v. Singer Sewing Mach. Co., 259 N.C. 264, 130 S.E.2d 397 (1963) (warm oil sprayed in plaintiff's face; her eyes soon thereafter began to burn and to water, and the following day a specialist found severe burns of her eyelids and conjunctiva where the oil had been sprayed; insufficient for submission to jury; no showing that oil contained chemicals that could cause burns); Martin v. Jewel Box, Inc., 6 N.C. App. 429, 431, 170 S.E.2d 123, 125 (1969) (plaintiff became immediately ill when she inhaled powder released from broken fluorescent light tube; insufficient for submission to jury: "[the] evidence is completely devoid of any proof of what elements the tube, or powder, contained or whether whatever it contained was or could be harmful if inhaled." *Cf.* Hanrahan v. Walgreen Co., 243 N.C. 268, 90 S.E.2d 392 (1955) (breach of warranty action; plaintiff, after using defendant's hair rinse, had weeping dermatitis of scalp, face, and neck, and scalp of plaintiff's girl friend became red and inflammed after using same rinse; insufficient for submission to jury; no evidence hair rinse contained any poisonous or deleterious ingredient); Mauney v. Luzier's Inc., 215 N.C. 673, 2 S.E.2d 888 (1939) (breach of warranty action; "breaking out" on face after use of defendant's cosmetics; insufficient for submission to jury; no showing of the nature of the skin condition or of its cause).

[125]Wall v. Trogdon, 249 N.C. 747, 754, 107 S.E.2d 757, 762 (1959).

[126]243 N.C. 268, 90 S.E.2d 392 (1955).

"[a]lthough three of the capsules [of hair rinse] were in [plaintiff's] possession, she produced no analysis of them showing they contained any deleterious substance."[127]

The willingness of a jury to draw inferences from the facts proved may be adversely affected by the absence of other evidence that apparently could have been produced by plaintiff. However, the effect of its absence upon the determination of the sufficiency of the evidence offered for submission to the jury seems significantly less unless the court undertakes more weighing of the evidence than seems appropriate for this decision. Admittedly, the plaintiff's plight does not engender great sympathy or call for a policy exception[128] to normal causation rules to avoid a situation in which it would otherwise be impossible for plaintiff to establish the causal connection. On the other hand, no significant possibility of unfairness to defendant is created by submitting the case to the jury. The missing evidence is equally as available to defendant as to plaintiff, and, if it negates or weakens an inference of causal connection, such evidence can be introduced by him.

Of course, the burden of proof is upon the plaintiff, and these observations are not intended to suggest any modification of that requirement. The basic inquiry involved in these cases is simply whether plaintiff's evidence permits an inference that defendant's negligence likely caused his injury. If such an inference can be drawn, the case should be submitted to the jury, and the fact that other evidence may have been available but was not introduced should not lead to a different decision. If proof that warm oil was sprayed into plaintiff's face and eyes, that his eyes immediately began to burn and to water, and that the irritation continued until the following day when it was determined that his eye lids and conjunctiva were burned where the oil had sprayed permits a reasonable inference that the oil caused the burns—as it certainly seems to do—the case should be submitted to the jury. While proof that the burns were caused by a chemical and that the oil contained chemicals capable of causing the burns would have established the causal connection with great certainty and while such a strong foundation for factual findings is always to be desired, neither consideration bears importantly upon the sufficiency of the evidence actually before the court.

The holding in one case, if its facts can be viewed to parallel those

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[127] *Id.* at 269, 90 S.E.2d at 393.

[128] *See* text accompanying notes 45-92 *supra.*

of the cases under consideration, is contrary to the position of the court set out in the preceding discussion. In *Harper v. Bulluck*[129] plaintiff became seriously ill and died after eating weiners made of decomposed meat. A friend who ate some of the weiners also became ill. The proof was held sufficient to be submitted to the jury. The facts of the case, however, can be readily distinguished. Here the proof showed that the substance was dangerous, while in none of the other cases was this fact shown. Arguably, this additional fact is not critical unless the evidence indicates that the dangers shown to be present were capable of producing the injury. That decomposed meat can cause serious physical injury seems clearly to be a matter of common knowledge. Thus specific proof that it could have caused plaintiff's injury was not needed. These two additional facts unquestionably make the proof in *Harper* substantially stronger than it was in the other cases.

When Proof Shows Only the Occurrence—Res Ipsa Loquitur. If defendant's negligence is not shown to have been in operation at the time of the accident but nevertheless can be identified as a possible cause of the accident, the choice among possible causes is a more difficult one.[130] Evidence that establishes defendant's connection with the accident may be enough to permit the inference that his negligence could have caused it. A possible cause of almost any untoward event is the negligence of persons involved in it. However, if nothing more is shown, it cannot be said that the negligence of those involved is either the sole possible cause or necessarily the more probable one.[131] The majority of cases that fit this description are decided under the doctrine of *res ipsa loquitur.* In such cases the determination made by the courts concerns the sufficiency of the proof to establish defendant's negligence. Usually, however, that determination is made—once defendant's negligence is identified as a possible cause of the accident—by ascertaining whether defendant's negligence, among the various possible causes of the accident, is more probably the cause than the others.

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[129]198 N.C. 448, 152 S.E. 405 (1941).

[130]*E.g.*, Dickerson v. Norfolk S. R.R., 190 N.C. 292, 129 S.E. 810 (1925) (fact that defendant's train engine, emitting heavy black smoke, passed and repassed plaintiff's property on which fire was discovered one hour later does not permit inference that defendant's negligence set fire); Zurich Ins. Co. v. Multi-Ply Corp., 6 N.C. App. 467, 170 S.E.2d 526 (1969) (fact that inflammable lacquer used in defendant's plywood finishing plant, without proof of improper handling or storage, does not permit inference that fire which started in plant was caused by defendant's negligence).

[131]*E.g.*, Haynes v. Horton, 261 N.C. 615, 135 S.E.2d 582 (1964) (customer slipped and fell on floor of defendant's business establishment).

Res ipsa loquitur[132] is a form of circumstantial evidence in which proof of the occurrence alone is held sufficient to permit an inference that it was caused by defendant's negligence.[133] It does not relax the normal requirements of proof that must be met by plaintiff to establish the cause of action[134] but simply recognizes that common experience sometimes permits a reasonable inference of negligence and causation from the occurrence itself.[135] Thus for the doctrine to apply the accident must be one that does not occur in the ordinary course of things without negligence. When the proof establishes such a happening, an inference of negligence arises, although the possibility that the occurrence was an unavoidable accident still exists.[136]

The proof must permit the inference that *defendant's* negligence was the cause of the accident. Although the proof permits an inference that negligence caused the accident, if the likelihood that someone else was culpable is equally as great as the possibility that defendant was at fault, the proof is inadequate.[137] Thus, in the absence of other circumstances, res ipsa does not apply when two cars collide[138] or when a car strikes a pedestrian[139] since, as between the parties, the likelihood of fault is equal. The traditional statement of the rule requires that the instrumentality causing the injury be in the exclusive management and control

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[132]The following paragraphs are a brief summary of the author's fuller discussion in Byrd, *Proof of Negligence in North Carolina—Part I. Res Ipsa Loquitur*, 48 N.C.L. REV. 452 (1970). The present discussion attempts only to show the involvement of the causal concept in the application of the doctrine.

[133]O'Brien v. Parks Cramer Co., 196 N.C. 359, 145 S.E. 684 (1928).

[134]Young v. Anchor Co., 239 N.C. 288, 79 S.E.2d 785 (1954) (charge that permitted verdict for plaintiff without finding negligence held erroneous); Kiger v. Liipfert Scales Co., 162 N.C. 133, 78 S.E. 76 (1913) (same). *See also* Trull v. Carolina-Virginia Well Co., 264 N.C. 687, 693, 142 S.E.2d 622, 626 (1965) ("The rule of absolute and strict liability differs from the doctrine of *res ipsa loquitur* in that the former . . . operates regardless of . . . negligence, while the latter is a rule of evidence which operates as *prima facie* proof of negligence.").

[135]Greene v. Nichols, 274 N.C. 18, 161 S.E.2d 521 (1968); Overcash v. Charlotte Elec. Ry. Light & Power Co., 144 N.C. 572, 57 S.E. 377 (1907).

[136]Boone v. Matheny, 224 N.C. 250, 29 S.E.2d 687 (1944); Etheridge v. Etheridge, 222 N.C. 616, 24 S.E.2d 477 (1943).

[137]Kekelis v. Whitin Mach. Works, 273 N.C. 439, 160 S.E.2d 320 (1968); Wilson v. Perkins, 211 N.C. 110, 189 S.E. 179 (1937).

[138]Swainey v. Great Atl. & Pac. Tea Co., 202 N.C. 272, 162 S.E. 557 (1932) (truck and bicycle); Burke v. Carolina Coach Co., 198 N.C. 8, 150 S.E. 636 (1929).

[139]Meegan v. Grubbs, 253 N.C. 63, 116 S.E.2d 151 (1960); Rogers v. Green, 252 N.C. 214, 113 S.E.2d 364 (1960).

of the defendant and in this way identifies the defendant as the responsible party.[140]

Plaintiff's possession, operation, or other use of the instrumentality that injured him may foreclose the inference that the accident was caused by the defendant's negligence. If the accident is one that could have been caused by negligent use or operation, then, in the absence of evidence of proper handling,[141] it is no more probable that defendant's negligence caused the accident than that plaintiff's own conduct was the cause.[142] For the same reason possession or control of the instrumentality by a third person at the time of the accident or in the interim after it leaves defendant's control and the happening of the accident, unless reasonably accounted for, precludes the inference that defendant's negligence likely caused the accident.[143] When the nature of the accident or the way in which it occurred indicates that possession and control of the plaintiff or others played no material part in the accident, an inference of defendant's negligence is permissible.[144]

In these situations evidence that tends to negate other possible causes of the accident strengthens the inference that defendant's negligence was the cause.[145] Thus, evidence eliminating weather, road, and

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[140]O'Quinn v. Southard, 269 N.C. 385, 152 S.E.2d 538 (1967) (defendant's exclusive control absent); Trull v. Carolina-Virginia Well Co., 264 N.C. 687, 142 S.E.2d 622 (1965) (same).

[141]Kekelis v. Whitin Mach. Works, 273 N.C. 439, 160 S.E.2d 320 (1968); Bryant v. Burns-Hammond Constr. Co., 197 N.C. 639, 150 S.E. 122 (1929).

[142]Wyatt v. North Carolina Equip. Co., 253 N.C. 355, 117 S.E.2d 21 (1960) (front-end loader tilted forward; no showing whether operated on incline or level area).

[143]Kekelis v. Whitin Mach. Co., 273 N.C. 439, 160 S.E.2d 320 (1968) (*res ipsa* inapplicable because of failure to account for intermediary's careful handling of machine); Wilcox v. Glover Motors, Inc., 269 N.C. 473, 482, 153 S.E.2d 76, 83 (1967) ("The doctrine of *res ipsa loquitur* does not apply to a brake failure several hours and many miles after delivery of the car" by the dealer to the prospective purchaser.).

[144]Schueler v. Good Friend N.C. Corp., 231 N.C. 416, 57 S.E.2d 324 (1950) (row of chairs tilted over when plaintiff sat down in one of them); Eaker v. International Shoe Co., 199 N.C. 379, 154 S.E. 667 (1930) (machine started operating by itself); Lindsey v. Atlantic Coast Line R.R., 173 N.C. 390, 92 S.E. 166 (1917) (when bolt on floor of train of type used to fasten rails and frequently carried by railroad employees, unlikely that third person placed it there); Marcom v. Raleigh & A. Air Line R.R.., 126 N.C. 200, 35 S.E. 423 (1900) (malicious conduct of others unlikely cause of defect in railroad tract). *But see* Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967) (car brakes failed a few hours after plaintiff took possession from dealer; no exclusive control); Harward v. General Motors Corp., 235 N.C. 88, 68 S.E.2d 855 (1952) (steering mechanism of new car locked; no exclusive control; decision rendered seemingly without regard to duration of plaintiff's possession).

[145]There is a remarkable series of cases in which circumstantial evidence eliminated all possible causes of the accident other than defendant's negligence. Peoples Bank & Trust Co. v. Snowden, 267 N.C. 749, 148 S.E.2d 833 (1966); Randall v. Rogers, 262 N.C. 544, 138 S.E.2d 248 (1964); Lane v. Dorney, 252 N.C. 90, 113 S.E.2d 33 (1960).

traffic conditions as possible causes of defendant's car leaving the road makes it more probable that the cause was the driver's negligence.[146] If defendant's health and the mechanical condition of the car are accounted for, the probability that defendant's negligence was the cause becomes even greater.[147] Sometimes, other factors, even though they are not expressly eliminated by the evidence as possible causes of the accident, can be easily dismissed.[148] Possible causes which, had they been present, would likely have been disclosed by proof of the happening itself and those occurrences which rarely happen in the normal course of events fit into this category and deserve serious consideration only if positive evidence of their presence is introduced.

Similarly, evidence which demonstrates that other causes may have played a prominent part in what has happened may so weaken the inference of defendant's negligence that the proof establishes merely a possibility that defendant's negligence caused the accident. Any inference of negligence from proof that a dress upon which brown spots were discovered was in good condition when it was delivered to the dry cleaners is substantially weakened if the proof also shows the spots were first discovered one week after its return from the cleaners and after it had been worn to a party.

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[146]Greene v. Nichols, 274 N.C. 18, 161 S.E.2d 521 (1968).

[147]*Id.* (by implication).

[148]Greene v. Nichols, 274 N.C. 18, 26, 161 S.E.2d 521, 526 (1968) ("Highway defects or the negligence of another could cause a car to leave the road. The presence of either of these causes, however, would ordinarily be apparent. Mechanical defects in the vehicle or driver-illness could cause an automobile to leave the road, but these possible causes occur comparatively infrequently and their probability can ordinarily be negated."); Marcom v. Raleigh & A. Air Line R.R., 126 N.C. 200, 35 S.E. 423 (1900) (malicious conduct of other unlikely cause of defect in railroad tract); Cherry v. Smallwood, 7 N.C. App. 56, 58, 171 S.E.2d 83, 84 (1969) (*Res ipsa* applied although "[t]here was no evidence as to what road was involved or whether the road was wet or dry, paved or unpaved. Neither was there evidence of defects in the road, mechanical defects in the vehicle, speed of the vehicle, or illness of the driver.").