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"CAUSE IN FACT" IN TORT LAW—
A PHILOSOPHICAL AND HISTORICAL EXAMINATION

Paul J. Zwier*

Under traditional tort analysis, "cause in fact" has long been an essential element in finding a defendant liable for a plaintiff's injury. The cause in fact requirement has been essential not only to negligence theory, but also to the growth of strict liability theory in products liability law. Tort theory

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3. Cause in fact also has been analyzed in terms of Prosser's more traditional approach. See W. Prosser, HANDBOOK OF THE LAW OF TORTS § 41 (4th ed. 1971) [hereinafter cited as Prosser]. "An essential element," Prosser states, "of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." Id. § 41, at 236. Prosser further concludes that the burden of proof of cause in fact is on the plaintiff:

On the issue of the fact of causation, as on other issues essential to his cause of action for negligence, the plaintiff, in general, has the burden of proof. He must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. Where the conclusion is not one within the common knowledge of laymen, expert testimony may provide a sufficient basis for it, but in the absence of such testimony it may not be drawn.

Id. § 41, at 241. Cf. RESTATEMENT OF TORTS § 431 (1934) (cause in fact is not listed as a separate element but can be found codified in § 281).

generally has required that a plaintiff identify that the defendant's act, omission, product, or dangerous animal was sufficiently connected to the plaintiff's injury. By requiring that the plaintiff prove identification and causation before a defendant is required to pay for a plaintiff's injuries, tort law satisfies society's notion of justice.

Since the 1940's, however, a series of California cases has both directly and indirectly challenged this cause in fact requirement. This line of cases includes *Ybarra v. Spangard*, *Summers v. Tice*, *Haft v. Lone Palm Hotel*, and most recently, *Sindell v. Abbott Laboratories*. In *Sindell*, the defendant drug manufacturers sold diethylstilbestrol (DES), a substance which allegedly causes cancer in the daughters of some women who took the drug. The *Sindell* court held that plaintiffs need not carry the burden of proving which of the defendants manufactured the product ultimately causing the plaintiffs' injuries. Instead, the court required only that the plaintiffs show that each defendant enjoyed a substantial share of the DES market and that the plaintiffs' injuries were in fact caused by the drug. In so holding, the California Supreme Court required that all the defendants answer for plaintiffs' injuries regardless of whether the plaintiffs could identify the specific manufacturer causally connected to each particular injury. A defendant could escape market share liability only if that defendant proved that it

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6. 33 Cal. 2d 80, 199 P.2d 1 (1948).
9. *Id.* at 611, 607 P.2d at 937, 163 Cal. Rptr. at 145.
10. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.
11. *Id.*
12. Under the theory of market share liability, each defendant will be found liable for a proportion of the judgment that is equivalent to its share of the market unless the defendant can prove that its product could not have caused the alleged injury. *See id.* at 611-12, 607 P.2d at 937, 163 Cal. Rptr. at 145. Although the extent to which this theory may be employed is yet to be determined, market share liability is properly applied where a product manufactured by the defendants is produced from the same or similar formula and the plaintiff, through no fault of his own, cannot identify which defendant was responsible for his injury. Market share liability was justified by the *Sindell* court as follows:

Under this approach, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products. Some minor discrepancy in the correlation between market share and liability is inevitable; therefore, a defendant may be held liable for a somewhat different percentage of the damage than its share of the appropriate market would justify. It is probably impossible, with the passage of time, to determine market share with mathematical exactitude. But just as a jury cannot be expected to determine the precise relationship between fault and liability in applying the doctrine of comparative fault, . . . the difficulty of apportioning damages among the defendant producers in exact relation to their market share does not seriously militate against the rule we adopt. As we said in *Summers* with regard to the liability of independent tortfeasors, where a correct division of liability cannot be made "the trier of fact may make it the best it can."
was not the cause of the plaintiffs' injury.\(^\text{13}\)

Although the *Sindell* decision drew a sharp dissent,\(^\text{14}\) it does not appear

*Id.* at 612-13, 607 P.2d at 937, 163 Cal. Rptr. at 145 (citations omitted). The *Sindell* court's rationale arose from a formula set forth in a law review article which made a correlation between percentage of market share and liability:

If X manufacturer sold one-fifth of all the DES prescribed for pregnancy and identification could be made in all cases, X would be the sole defendant in approximately one-fifth of all cases and liable for all the damages in those cases. Under alternative liability, X would be joined in all cases in which identification could not be made, but liable for only one-fifth of the total damages in these cases. X would pay the same amount either way. Although the correlation is not, in practice, perfect [footnote omitted], it is close enough so that defendants' objections on the ground of fairness lose their value.

*Id.* at 612 n.28, 607 P.2d at 937 n.28, 163 Cal. Rptr. at 145 n.28 (quoting Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 944 (1978) [hereinafter cited as Comment].

13. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

14. The dissent in *Sindell* declared that the majority had gone "too far." It recognized that an essential element in an action for negligence required some reasonable connection between the defendant's act or omission and the plaintiff's injury. *Id.* at 614, 607 P.2d at 938, 163 Cal. Rptr. at 146 (Bird, C.J., dissenting). Moreover, the dissent argued that precedent would not allow liability to attach until one of the defendants was proven to have caused plaintiffs' injury. The *Sindell* dissent found it wholly speculative and conjectural whether any of the five named defendants in the instant case actually had caused plaintiffs' injury, *id.* at 615, 607 P.2d at 939, 163 Cal. Rptr. at 147, and labelled the majority opinion as "complete unfairness" and "unwise." *Id.* at 614, 618, 607 P.2d at 938, 940, 163 Cal. Rptr. at 146, 148.

Furthermore, the dissent viewed the ramifications of the majority's rejection of well-established principles of causation as being limitless, imposing liabilities which might exceed even absolute liability. *Id.* at 614, 607 P.2d at 938, 163 Cal. Rptr. at 146. See Note, *Industry Wide Liability*, 13 SUFFOLK U.L. REV. 980, 998 (1979) [hereinafter cited as *Industry Wide Liability*].

The dissent based its criticism on precedent but articulated little of the philosophical or historical rationale which caused the majority's decision to be morally offensive. Perhaps the dissent's inability to clearly articulate its rationale was because, for many, causation has seemed inherently elementary and essential to past ideas of responsibility. Prosser writes:

> It is never enough for the plaintiff to prove merely that he has been injured by the negligence of someone unidentified. Even though there is beyond all possible doubt negligence in the air, it is still necessary to bring it home to the defendant. On this too the plaintiff has the burden of proof by a preponderance of the evidence; and in any case where it is clear that it is at least equally probable that the negligence was that of another, the court must direct the jury that the plaintiff has not proved his case. The injury must either be traced to a specific instrumentality or cause for which the defendant was responsible, or it must be shown that he was responsible for all reasonably probable causes to which the accident could be attributed. Prosser, *supra* note 2 § 39, at 218. See generally Hart & Honoré, *supra* note 1, at 24-57.

A position contrary to Prosser's is taken by Calabresi. According to Calabresi, a causal requirement may not always be essential:

> Causal requirements, like all other legal requirements, must ultimately justify themselves in functional terms. Law is a human construct designed to accomplish certain goals. Often—perhaps most of the time—the goals are terribly complex and hard to analyze clearly, and one is properly suspicious of analysis and prescription that would discard time-honored legal terms because one cannot find immediate, clear policy justifications for them. Still, the object of law is to serve human needs, and thus legal terms (which in other contexts may have other, deeper meanings)
that the decision offended societal notions of justice as there has been little negative reaction from commentators.\textsuperscript{14} It is curious that the notion of cause in fact, which for the last few centuries has been so essential in assessing responsibility, and which has been viewed as expressing society’s “bare minimum requirement for imposing liability,”\textsuperscript{16} can be so easily and effortlessly disregarded.\textsuperscript{17} This disregard may stem from a failure to fully analyze or understand the historical goals for which the cause in fact requirement was intended to serve.

The philosophical and historical underpinnings of the cause in fact requirement seem to support present day notions of justice which, in turn, provide the legal bases of tort law. The question arising from Sindell and similar cases is whether those historical and philosophical forces which undergird cause in fact have continuing vitality. Clear identification of the original underpinnings are necessary to determine if these same forces exist today. Without the continued existence of these forces, the rule to which they gave birth should cease to exist.

Some may argue that because fault is no longer necessary to establish liability in many tort actions,\textsuperscript{18} the cause in fact requirement should also

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must sooner or later be linked to the service of human needs.


17. Sindell raises the question of whether cause in fact is a necessary element for placing responsibility for an injury on a defendant. This case challenges the long accepted requirement that the plaintiff bear the burden of identifying the cause of plaintiff’s harm. The result is an abandonment of the connection or relationship necessary for traditional defendant liability. See Novel Tort Theory Upheld, Nat’l L.J., Apr. 7, 1980, at 3, col. 1; Allocating Blame, Products Liability Law Is In Flux As Attorney Tests A Radical Doctrine, Wall St. J., Dec. 30, 1980, at 1, col. 6. One pre-Sindell commentary pointed out that:

At least it is true that the plain man’s causal notions function as a species of basic model in the light of which the courts see the issues before them, and to which they seek analogies, although the issues are often very different in kind and complexity from those that confront the plain man. These notions have very deep roots in all our thinking and in common ideas of when it is just or fair to punish or exact compensation. Hence even lawyers who most wish the law to cut loose from traditional ways of talking about causation concede that at certain points popular conceptions of justice demand attention to them.

HART & HONORÉ, supra note 1, at 1.

18. See generally PROSSER, supra note 2, §§ 75-78, at 492-516 (persons will be held liable,
be eliminated. There is, however, a fundamental difference between cause in fact and fault. Traditionally, analysis of fault connotes blameworthiness, while analysis of causation focuses on the identification of the actual forces that produced the injury. Furthermore, the requirement of cause in fact becomes more important as fault principles are deemphasized. Because the cause in fact requirement may be the only major hurdle facing plaintiff's attempt to secure recovery, its strategical importance as a defense to the defendant has increased dramatically.

An historical review of the cause in fact requirement gives perspective to the forces which produced the recent abandonment of the cause in fact requirement in Sindell. Many historical and social reasons for adopting the

regardless of fault, for harm caused by animals, fire, or abnormally dangerous things and activities).

19. In the nineteenth century, it was commonly felt that liability should not be imposed without the defendant being at fault, and fault was deemed to coincide with moral blame. Id. § 4, at 17-18. See Smith, Tort and Absolute Liability—Suggested Changes in Classification, 30 HARV. L. REV. 241, 255 (1917) (liability founded on fault or blameworthiness). Today, tort liability may not necessarily be founded on moral blameworthiness, but rather on a form of "social fault" which may be defined as a failure to conform to a level of conduct prescribed by society. See PROSSER, supra note 2, §§ 4, 75, at 18, 493.

20. One commentator described the functional differences between fault and causation:

[The term "proximate cause" is defined as requiring "foreseeability or anticipation of some harm" as the result of defendant's conduct. This gives a context of fault or some other form of wrongdoing, and destroys or at least overshadows the simple idea of cause and effect. There is frequently causal relation between a defendant's conduct and a plaintiff's hurt without any negligence or other wrong on the defendant's part, and hence no liability. Causal relation never of itself determines or imposes liability. The elements of wrongdoing and damages must also be present. The term "cause" is frequently used in the sense of "fault" but that usage is not involved in causal relation. The dual meaning of "cause" (fault plus causal relation) however is the source of much of the trouble in separating causal relations from negligence.

Green, Proximate Cause in Texas Negligence Law, 28 TEX. L. REV. 471, 475 (1950) [hereinafter cited as Texas Law].

21. Pound articulated the need for historical review when he wrote:

Legal history, then, may be made to show us the analogies, the legal premises, which have developed as the potential bases of legal growth. It may be made to show us the ideals which have developed, to which jurists and judges have sought to make law conform by logical use of these analogies and logical drawing out of these premises. It may be made to show the way in which the working out of these analogies and the logical development of these premises have determined both the content and the spirit of the transition which is the most important part of our law both in bulk and in intrinsic significance. . . . [I]n the long run, the condition of law depends upon the condition of the traditional element in the legal system, by which legislative rules are interpreted and developed and into which, if they succeed in establishing themselves as law, enacted rules are absorbed and incorporated.

R. POUND, THE SPIRIT OF THE COMMON LAW 12-13 (1921) [hereinafter cited as POUND]. Oliver Wendell Holmes believed that historical inquiry was a means to derive the reasons behind a given rule or law. See O.W. HOLMES, THE COMMON LAW 5 (1881) [hereinafter cited as HOLMES]. According to Holmes, customs and beliefs at a certain time in history provide the impetus and reason for the development of a rule. Over time, the rule becomes ingrained in society,
cause in fact requirement no longer exist and other forces have precipitated changes in the tort law. There are historical forces working against the cause in fact requirement and these forces are as ingrained in tort law as those supporting the cause in fact requirement. For organizational purposes, an appropriate place to begin an analysis of the recent disregard of cause in fact is at the source of the common law notions of justice which originally fostered the cause in fact requirement. Second, this paper will discuss those historical forces mitigating against a cause in fact requirement. Finally, a new force of corporate accountability will be shown to exist, which when combined with the historical mitigating forces have brought about the demise of the cause in fact requirement in *Sindell*. To fully understand this historical discussion, however, another issue must first be addressed: How did the definition of cause in fact evolve?

**Definition of Cause in Fact**

Although the analytical element of cause in fact has not always been specifically identified in common law torts, courts continually insisted on some measure of causation. To satisfy the concept of causation at early common law, one was required to make only a general determination of what had occurred and which person or object was to blame. Around the turn of the twentieth century, however, courts divided the causation issue into two distinct inquiries: a determination of proximate or legal cause, and cause in fact. This dual analysis was viewed as demonstrating the courts' and the original customs and beliefs fall into disuse but the rule remains intact. Jurists then attempt to explain the rule's existence by reference to modern-day policies, and the "reasons" behind the rule take on new form. *Id.* One great contribution made by Holmes was his relentless inquiry into the reasons behind the original customs and beliefs. It was Holmes' belief that only by determining the actual reasons for a given rule could progress be made in predicting the development of the common law. *Id.* at 1.

22. See Malone, supra note 16, at 60. Malone notes that it was not until this century that courts treated the inquiry into the cause in fact of an injury as being distinct from the inquiry into the proximate cause of an injury.

23. In the words of Professor Leon Green: "Causal relation is the universal factor common to all legal liability." L. GREEN, RATIONALE OF PROXIMATE CAUSE 132 (1927) [hereinafter cited as RATIONALE]. Professor Green describes the inquiry into the cause of an injury as one governed by matters of degree. According to Green, there is "no such thing as sole cause," rather, courts are to determine whether the defendant's conduct sufficiently contributed to the injury in such a way as to make him responsible. *Id.* at 134. Ultimately, the question was whether the conduct involved was of the type for which society should make the defendant responsible. *Id.* Thus, the inquiry into "cause," according to Green, was an inquiry into the legal or proximate cause of the injury.

24. The use of the word "cause" at this time had no precise meaning since cause in fact was not yet analytically separate from proximate cause. "Cause," then, was used as a shorthand form of stating a conclusion as to what occurred. Malone, supra note 16, at 60.

25. The idea of identifying a cause of an injury often is confused with the identification of the legal or proximate cause of an injury. While identification of cause is limited to what force actually caused the injury, legal or proximate cause is a separate determination that the defendant's conduct is such that the law will impose liability. These two concepts are distinct
increased proficiency in analyzing the separate causes that produced injuries to the plaintiff. The cause in fact analysis focused on possible causes of the injury before an inquiry into legal or proximate cause proceeded. This analytical separation did little, however, to clearly define the distinctive characteristics of the cause in fact element. Although a number of causes for an injury could exist, the courts reserved inquiry into these causes until after a determination of whether a defendant was sufficiently connected to the injury.

Unfortunately, the two causation inquiries often commingled, and failure to clearly define proximate cause yielded further confusion. The most

because a given defendant may be the sole cause of an injury, however, a court may not chose to hold the defendant liable. Sindell, however, posed the opposite problem. There, the defendants were never proven to be the actual cause of the plaintiffs' injury, but the court was willing to impose liability.

26. For a discussion of turn-of-the-century decisions which grappled with the cause in fact/proximate cause distinction and the tests set forth to solve the problem, see RATIONALE, supra note 23, at 144-70. For a full discussion of this division of inquiry, see HART & HONORÉ, supra note 1, at 79-102.

27. The cause in fact inquiry, according to Professor Green, focuses on the contribution of the defendant's conduct to the injury, and then a separate determination of liability is made: The causal relation issue . . . does not initiate an exploratory search for all the causes that contributed to the victim's injury, or a search for the cause, or the proximate or the legal cause. . . . A philosophic or scientific exploration of defendant's conduct may be relevant to other issues but not to the causal relation issue. The inquiry is limited to the fact of defendant's contribution to the injury. The search for proximate, legal or other causes is designed to determine whether the defendant's conduct should be condemned and he be made to compensate for his victim's injury. . . . The only relevance the consideration of other cause factors may have in the determination of the causal relation issue is the light they may shed on whether defendant's conduct contributed to the injury. Green, supra note 2, at 548-49 (emphasis in original).

28. The problem of separating the inquiries of proximate cause and cause in fact stems in part, from the inability of the layperson to distinguish the two concepts. "For the layman," Malone noted, "cause and purpose are a single blend." Malone, supra note 16, at 67. Separation of the concepts, according to Malone, is an attempt to further define causation issues, but in doing so, "we lose much of the meaning of the very phenomenon we are investigating." Id. 29. See supra note 27.

29. Although the judiciary attempted to distinguish the two concepts, the problem of confusion arose because the language used to explain the differences was similar. See Malone, supra note 16, at 60. Malone stated, however, that the two inquiries take on different meanings, but his analysis is primarily ex post facto: When policy can be recognized openly as the dominating factor, so that it can be dealt with directly, the problem can be meaningfully labeled as one of proximate cause, duty, risk, negligence, etc. On the other hand, when the attention of the trier is focused primarily on what happened and the usual techniques of factual inquiry can be effectively used, the issue is properly termed one of simple cause although policy impulses may assist materially in giving the proper turn to the judgment. Language has not yet furnished us with sharper tools than these. Id. at 97.

For in depth discussion of the problems the Texas courts encountered in reconciling the two theories, see Texas Law, supra note 20, at 474-90.

31. For a discussion of various formulations of proximate cause, see generally Beale, The
common method for distinguishing the two inquiries treated cause in fact as a question for the trier of fact, and proximate cause as a question of law. The determination of each causal element was divided to keep the two inquiries separate. Initially, it is the judge's duty to determine whether the defendant's act can, as a matter of law, be the proximate cause of the plaintiff's injury. Thereafter, the jury, as the trier of fact, makes the final determination of whether the defendant can sufficiently be identified as the cause of the injury.

Cause in fact analysis, however, necessitated more than a simple factual inquiry established through production of testimony. From his understanding of, and experience with, the world, the trier of fact was required to make a judgment that certain effects follow certain antecedents. To ascertain whether a cause in fact existed, the trier of fact's "judging capacity" needed to be furnished with enough evidentiary facts to enable him, based on his experience, to rationally connect the defendant's act with the plaintiff's injury, in order that the trier of fact could label the defendant's act as the cause.

The definitional problems of cause in fact become apparent upon close examination of this process. Each trier of fact must deduce a cause from evidentiary facts, and this deduction is dependent upon the trier's past experience. Because each trier of fact's deductions are dependent upon varying past experiences, inconsistent conclusions regarding similar fact patterns can result. This incongruity results because evidence that may be viewed as causation to one trier of fact may be too tenuous to support such a finding to another.

Proximate Consequences of an Act, 33 Harv. L. Rev. 633 (1920) (finding of proximate cause requires that defendant act or fail to act in violation of a duty, and such act or omission caused or created a force which caused the result) [hereinafter cited as Beale]; Edgerton, Legal Cause, 72 U. Pa. L. Rev. 211 (1924) (determination of proximate cause should include a consideration of whether it is reasonable and just to treat the defendant's act as the cause of the harm); McLaughlin, Proximate Cause, 39 Harv. L. Rev. 149 (1925) (an act which produces an intended result is the proximate cause of the harm); Smith, supra note 1, at 107-08 (proximate cause is either the act which directly causes the harm, or the act which sets other things in motion to cause the harm); Texas Law, supra note 20, at 475-76 (finding of proximate cause requires that defendant could foresee his act resulting in harm).

32. See RATIONALE, supra note 23, at 135.
33. See id. at 136-41. See also-PROSSER, supra note 2, § 42, at 244 (proximate cause is a question of law which decides whether the defendant should be legally responsible).
34. By virtue of his or her control over the proceeding and the jury instructions, a judge has great latitude in directing the outcome of the proceeding based upon the linguistical confusion inherent in the definition of proximate cause.
36. Evidentiary data alone is insufficient to make a finding of cause in fact. Meaning attaches to the data only after it is assimilated through the mental process of deduction. Id. at 61.
37. Id. at 61-62.
38. Id. at 61.
39. Malone argues that because determining cause in fact necessarily involves a deductive process based on our experiences, we move further away from an inquiry into the actual cause:
The problem with cause in fact is related intimately to the philosophical search for ultimate cause. One philosopher, David Hume, concluded that cause and effect could never be proved.\(^40\) He argued that causation was dependent upon deductions from past experience and concluded that it was not possible to project whether a past experience would be consistent with a future event.\(^41\) This interrelationship between philosophical speculations and legal realities was commented on by Malone who stated that “proof of what we call the relation of cause and effect . . . can be nothing more than ‘the projection of our habit of expecting certain consequents to follow certain antecedents merely because we had observed these sequences on previous occasions.’”\(^42\) Using Hume’s analysis, Malone further observed that the determination of cause in fact was, in reality, a promulgation of legal policy because judgment was involved in every causal determination.\(^43\)

The search for the distinctive qualities of the cause in fact inquiry led to confusion as to whether causation was related, in any way, to the cause in fact element. If, under Hume’s analysis, cause in fact cannot be proved, and if a cause in fact determination requires proof that a minimum connection or relationship between plaintiff and defendant exists before liability is imposed, then the question of whether the cause in fact element is essential would appear to beg itself. Despite the Humean problem of causation, the courts have acted as if causation can be proven. Experience confirms that the law will act as if causation and effect can be discovered and proved.\(^44\)

In response to the difficulties surrounding the illusive definitions of proximate cause and cause in fact, courts dealt with the problem by developing the “but for” or “sine qua non” test to describe cause in fact.\(^45\) According to this test, liability may attach if it can be said that but for the occurrence of the defendant’s act, omission, or product, the plaintiff would not have been injured.\(^46\) The identification of both a specific defendant and that defendant’s act, omission, or product was said to be indispensable to the existence of the plaintiff’s injury.\(^47\)

\(^{40}\) Malone, supra note 16, at 64-65 (quoting W. Prosser, Handbook of the Law of Torts § 44, at 223 (2d ed. 1955)). See also supra note 39.


\(^{42}\) Id. at 65.

\(^{43}\) Id. See Prosser, supra note 2, § 41, at 238 nn.12-18.

\(^{44}\) Id. See Prosser, supra note 2, § 41, at 239.

\(^{45}\) Liability should only be imposed, Malone wrote, when a plaintiff could demonstrate the presence or existence of the defendant’s misconduct. Malone, supra note 16, at 66. Malone then explained the significance of using the “but for” test to establish the connection between the defendant’s act or omission and the plaintiff’s injury: “[T]he but-for test seems to be the
The "but for" test was initially the best means by which to provide the jury with a guideline to determine whether a cause in fact existed. This test assisted the jury in allocating responsibilities by permitting an inquiry into the relationship between the plaintiff's injury and the defendant's action without assessing blame. The test also required an initial identification of a defendant by the plaintiff. The identification requirement protected the defendant from defending lawsuits in which the plaintiff was unable to declare affirmatively that the defendant caused the injury.

In most cases, the "but for" test was easily applied. At times, however, the jury encountered problems in applying the test and, thus, was forced to speculate about the specific cause. If the court was not satisfied with the jury's conclusion regarding the casual relationship between the plaintiff's injury and the defendant's action, a directed verdict resulted for the defendant.

The courts varied in describing the necessary level of identification and causation needed for the jury to find liability. For example, one court held that, the connection between the defendant's actions and the plaintiff's injuries could "not be opposed to human experience." Another court required that the jury be able to "reasonably infer" that the defendant's ac-

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48. The "but for" test is characterized by Prosser as a rule of exclusion. Given that for any single event there is an infinite number of antecedent events or causes, and that there will also be an infinite number of future events or causes as a result of the single event, the "but for" test operates to exclude those remote consequences from consideration of the cause in fact of the injury. Prosser, supra note 2, § 41, at 239. See also Malone, supra note 16, at 66 (the "but for" test may be the best test developed for causation thus far, however, "it ignores the irresistible urge of the trier to pass judgment at the same time that he observes"). But see Beale, supra note 31, at 640-41 (the rule requiring exclusion is a matter of judicial limitation and therefore is a determination of proximate or legal cause rather than cause in fact).

49. This initial inquiry was limited solely to whether the defendant's conduct was a cause of the injury. Motivation and intent were irrelevant to this stage of the inquiry, as legal liability could only attach after the defendant was determined to have contributed in some way to the injury. Green, supra note 2, at 548.

50. According to Green, tort liability required that a plaintiff identify the particular defendant which caused the harm: "The beginning point of all tort liability is affirmative conduct, and the first step in establishing a defendant's liability is to identify him and connect his conduct with the victim's injury." Id. at 546 (emphasis in original).

51. This was especially true in instances where there were two or more causes which could have brought about the injury." See infra notes 62-63 and accompanying text. See also Prosser, supra note 2, § 41, at 239 (the "but for" test fails in a situation where two or more causes could have caused the plaintiff's injury).

52. See Prosser, supra note 2, § 41, at 241 (plaintiff cannot prevail unless he satisfies the burden of proof on the issue of causation). See, e.g., Houston v. Republican Athletic Ass'n, 343 Pa. 218, 220, 22 A.2d 715, 716 (1941) (in the absence of either direct proof or strong circumstantial evidence to support an inference of causation, a directed verdict is appropriate).

53. Rovegno v. San Jose Knights of Columbus Hall Ass'n, 108 Cal. App. 591, 595, 291 P. 848, 850 (1930) (normal human experience would support a finding that the failure of a pool owner to provide adequate safety measures was the proximate cause of the decedent's death).
tion was the cause of the plaintiff’s injuries to find liability. On the other hand, other courts required that the jury find that the defendant’s actions were “equally consistent with,” probably, or “the only reasonable inference of” the cause of the injuries. In every case, regardless of how the standard was described, the court required an identification by the plaintiff of the defendant.

The “but for” definition was most troublesome analytically where the facts identified more than one cause of a plaintiff’s injury. In these situations, the cause in fact inquiry often resembled a determination of proximate cause in that the trier of fact had to determine which of the number of causes could have been feasibly responsible for the plaintiff’s injury. Therefore, the “but for” test was of little help when the trier of fact attempted to determine the sole cause between competing causes.

The Minnesota Supreme Court, in Anderson v. Minneapolis, Saint Paul

54. Tennant v. Peoria & P.U. Ry., 321 U.S. 29, 35 (1944) (the jury could reasonably infer that failure to ring a bell before starting the locomotive was the proximate cause of the decedent switchman’s death).


56. See Harper v. Young, 139 Neb. 624, 627, 298 N.W. 342, 344 (1941) (evidence supporting an inference of negligence must exclude the probability of other causes of the injury).

57. Houston v. Republican Athletic Ass’n, 343 Pa. 218, 220, 22 A.2d 715, 716 (1941) (when two or more equally probable causes of an injury exist, defendant cannot be held liable on the basis of a mere guess).

58. See supra notes 53-57.

59. For example, in Anderson v. Minneapolis, St. P. & S. Ste. M. Ry., 146 Minn. 430, 179 N.W. 45 (1920), a defendant’s railroad engine started a fire which merged with another fire to ultimately destroy the plaintiff’s property. The “but for” test was not applied because either fire may have caused the destruction of the property. Instead, the defendant was held liable because the fire was a “material element” of the destruction of property. Id. at 440-41, 179 N.W. at 49.

In another case, passengers in an automobile were thrown onto the roadway after colliding with a truck, and were then run over by three automobiles which were not able to stop. Either the collision with the truck and the subsequent impact on the roadway, or the automobiles colliding with the bodies could have caused the resultant death. The court did not use the “but for” test; instead, it held that the truck driver and automobile operators could both be fully liable even if it was “impossible to determine in what proportion each contributed to the injury.” Glick v. Ballentine Produce, Inc., 396 S.W.2d 609, 613 (Mo. 1965), appeal dismissed, 385 U.S. 5 (1966).

In a final example, two defendant motorcyclists passed plaintiff’s horse-drawn wagon, one on each side, and frightened the horse due to the smoke and loud noise. The horse went out of control and plaintiff’s wagon collided with another wagon. The court held both defendants liable because each one alone could have been the cause of the harm. Corey v. Havener, 182 Mass. 250, 65 N.E. 69 (1902) (contribution to the injury was enough to make both defendants liable). See also Daniels v. Dillinger, 445 S.W.2d 410 (Mo. Ct. App. 1969) (joint and several liability imposed on defendants involved in a multiple automobile collision at an intersection).

60. The “but for” test becomes wholly inadequate to determine the issue of causation when combined causes are present because it cannot be said that either cause alone would be sufficient to bring about the injury.
& Sault Sainte Marie Railway,\textsuperscript{61} adopted a test which was designed to better handle the determination of cause in fact in cases involving multiple causes. This test considers whether the defendant's action was a "material element" or a substantial factor in producing the plaintiff's injury.\textsuperscript{62} Similar to the "but for" test, this substantial factor or material element test included the notion that the defendant's act or object needed to be possessed by the defendant and produced the plaintiff's injury.\textsuperscript{63} According to the Minnesota Supreme Court and a majority of courts that adopted Minnesota's approach, the substantial factor test was the minimum requirement for assessing liability.\textsuperscript{64}

\begin{itemize}
  \item \textsuperscript{61} 146 Minn. 430, 179 N.W. 45 (1920).
  \item \textsuperscript{62} In Anderson, the defendant's railroad engine started a fire, which then merged with another fire of unknown origin to cause damage to the plaintiff's property. The defendant argued that it should be absolved of liability because the fire of unknown origin alone could have been sufficient to have caused the damage. \textit{Id.} at 440, 179 N.W. at 49. The Anderson court disagreed because that would allow the railroad to escape liability without an evaluation of whether one defendant's action was a "material factor" in causing the damage. The court was unwilling to let the railroad escape liability without making this assessment: "[O]ne who negligently sets a fire is not liable if another's property is damaged, unless it is made to appear that the fire was a material element in the destruction of the property. . . ." \textit{Id.}
  \item \textsuperscript{63} Specifically, it was the plaintiff's burden to establish that a minimal relationship between a defendant's action and the plaintiff's injury existed, and also that this minimal relationship required the identification of the defendant. \textit{See Prosser, supra} note 2, \textsection{} 41, at 241.
  \item \textsuperscript{64} The substantial factor test was adopted by the American Law Institute in the first Restatement of Torts, \textsection{} 431 (1934), and has been retained largely unchanged in the current Restatement. \textit{See Restatement (Second) of Torts} \textsection{} 431 (1965). The Restatement version of the test has been applied in at least 31 states. \textit{See Restatement (Second) of Torts} \textsection{}s 430-434 (App. & Cum. Supp. 1982-83); \textit{Annot.}, 100 A.L.R. \textsection{} 984 (1965). The major reason for the wide acceptance of the test is its flexibility. Prosser maintains that the substantial factor test is an improvement over the "but for" test because it leads to the same results as the "but for" test where that test is applicable, and additionally applies to situations where the "but for" test is not useful, such as multiple cause cases. \textit{Prosser, supra} note 2, \textsection{} 41, at 240. Accord J. Dooley, \textit{Modern Tort Law} \textsection{} 8.02 (1982).
  \item Perhaps another reason for the cause in fact requirement stems from a linguistic confusion. Obviously, part of our definition of liability is the concept of responsibility. Liability is imposed because one is responsible, in some way, for the harm caused. But the term responsibility is elusive. Historically, it comes from the Latin word \textit{respondeere} which means "answerable or accountable for." VIII \textit{The Oxford English Dictionary} 542 (1933). The word responsibility, then, suggests the burden of coming forward and answering questions about a happening. One commentator, Professor H.L.A. Hart, suggests that the word responsibility also has been used synonymously in many instances with the word causation. \textit{Id.} at 363. Although the Duke's death may be considered the cause for World War I, it certainly was not responsible for the war. The notion, therefore, that cause in fact is essential to ideas of responsibility may stem from the fact that they often are used synonymously with causation. \textit{Id.} at 363. Although the Duke's death may be considered the cause for World War I, it certainly was not responsible for the war. The notion, therefore, that cause in fact is essential to ideas of responsibility may stem from the fact that they often are used synonymously with causation. \textit{Id.} at 348. Yet, Hart notes that causation is analytically a much more neutral term than responsibility, and that responsibility, in a legal sense, has long been a moral judgment of blame which demands an answer from the actor. \textit{Id.} at 349. The belief that injustice results when liability is imposed without the proof of cause in fact, then, may partially stem from the linguistic confusion of the notions of responsibility and causation.
\end{itemize}
SOURCE OF THE CAUSAL ELEMENT: THE NEED TO IDENTIFY THE OWNER, CONTROLLER, OR MANUFACTURER OF THE THING CAUSING THE HARM

To trace the history of the cause in fact requirement, an analysis of early concepts of liability and their relation to causation is helpful. The concept of liability in early tort law was closely related to the desire for vengeance. Early Greek law provided that when a slave killed a man, the slave was turned over to the deceased's family to do with as the family wished. Similarly, according to early Hebrew law, when an ox killed a man the ox was put to death and the deceased's family was deemed to have avenged the death. Finally, Roman law embodied the notion of vengeance by requiring the surrender of animals or retribution by the wrongdoer when damage was done.

A strong argument exists that this need for vengeance was related to the idea of moral blame. Blame was applied, however, in a broader sense than the modern day use of the word. The ancient mind was not willing to

65. An historical inquiry into the roots of cause in fact provides insight into the evolution of the meaning of the term. Through this analysis, patterns of change can be detected by which we can to predict and analyze cases which fringe on the outer boundary of socially and legally acceptable definitions of liability and cause in fact. See supra note 21 and accompanying text.

66. Holmes noted that the need for vengeance generally was regarded as the driving force behind the institution of Roman, German, and Anglo-Saxon laws which replaced blood feuds with more civilized legal procedures. Holmes, supra note 21, at 2-3. As stated by one commentator, the need for revenge was so strong that absent proof that a certain act was caused by the defendant, liability was imposed because of man's "'primitive urge to find a wish and will behind all causation. . . . [T]he actor was presumed guilty unless he could 'be judged utterly without his fault. . . .'" Ehrenzweig, A Psychoanalysis of Negligence, 47 NW. U.L. REV. 855, 861-62 (1953) (quoting Weaver v. Ward, 80 Eng. Rep. 284 (1618)) [hereinafter cited as Ehrenzweig]. See Wigmore, Responsibility for Tortious Act: Its History, 7 HARV. L. REV. 315, 316 (1894) (primitive law was driven by an "instinctive impulse, guided by superstition, to visit with vengeance the visible source, whatever it be, human or animal, witting or unwitting, of the evil result") [hereinafter cited as Wigmore].

67. HOLMES, supra note 21, at 7. If the owner refused to surrender the slave, he was obligated to "make good the loss." Id. at 7-8.

68. See infra note 73.

69. HOLMES, supra note 21, at 8. Holmes notes that this law was applied to slaves and even children.

70. Primitive law, Ehrenzweig argues, attached liability when moral blame could be found. Due to man's "'primitive animistic mind,'" however, moral blame was found even when an act of nature, such as a lightning bolt, caused the injury. Ehrenzweig, supra note 66, at 859-60. See HOLMES, supra note 21, at 3 ("[v]engeance imports a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done").

71. Wigmore provides the following example of how the primitive mind went to great lengths to assess blame in an instance where someone was injured by an accident of nature:

Baldur the beautiful was beloved by all the gods, and Frigga had exacted an oath from all things—fire, water, stones, trees, and all—not to harm Baldur; for Baldur had dreamed of his own death. Then the gods, his safety assured, began in fun to pelt him with stones, clubs, and battle-axes, and found him indeed invulnerable. But Loki the jealous was vexed because Baldur was not hurt; and going in disguise to Frigga, he learned that the mistletoe alone had not been sworn, for it seemed too feeble a plant to do harm. Then Loki went to Hodur, the blind
accept the "accident" or harmful result without assessing blame.\textsuperscript{72} Blame was placed on whatever caused the harm, whether it be the person, animal,\textsuperscript{73} or the inanimate object causing the harm.\textsuperscript{74} Just as one might kick the door in which he catches his fingers, early notions of liability required that the object causing the injury be subject to surrender. In short, a search through the causal chain of events for an object or an agent to blame was essential to fulfill the desire for revenge—the driving force behind liability.

Later, compensation was introduced into the law. It not only helped prevent blood feuds arising from avenging acts, but primarily was applied to harms arising from the acts of slaves and animals.\textsuperscript{75} The most significant force in promoting compensation was the owner's desire to retain control

god, who had been standing apart, for he had nothing to throw. He could not see to aim, so Loki gave him the mistletoe twig and guided his hand, and the twig flew, and struck Baldur lifeless. Then the other gods were for laying strong hands on the murderer; but they were in a sacred place. And Hodur fled. And Odin said, 'now, who will wreak vengeance on Hodur, and send Baldur's slayer to Hades?' The avenger was Wali, Baldur's younger brother, who washed not his hands and combed not his hair until he had fulfilled his vengeance and smitten to death the slayer of Baldur.


72. Ehrenzweig provides one example of lightning striking A's land and causing a fire which spreads to B's land and causes damage. If the lightning could be "traced to a conscious will to do harm," then A would be held responsible for B's damage. Ehrenzweig, \textit{supra} note 66, at 859-60 (citing Tubervil v. Stamp, 91 Eng. Rep. 13 (1698)).

73. Holmes cites the famous examples from Exodus 21:28 of vengeance, and hence blame-worthiness, on an animal: "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten, but the owner of the ox shall be quit." HOLMES, \textit{supra} note 21, at 7. See also Wigmore, \textit{supra} note 66, at 327.

74. This primitive notion of attributing responsibility to an inanimate object was linked to early ideas of causation. Holmes artfully explains the concept of revenge on inanimate objects as one of personification:

\begin{quote}
Learned men have been ready to find a reason in the personification of inanimate nature common to savages and children. . . . Without such a personification, anger towards lifeless things would have been transitory, at most. It is noticeable that the commonest example in the most primitive customs and laws is that of a tree which falls upon a man, or from which he falls and is killed. . . . [The tree] was delivered to the relatives, or chopped to pieces for the gratification of a real or simulated passion.
\end{quote}

. . . . [L]iability seems to have been regarded as attached to the body doing the damage, in an almost physical sense. . . . The hatred for anything giving us pain, which wreaks itself on the manifest cause, and which leads even civilized men to kick a door when it pinches his finger, is embodied in . . . early Roman law.

HOLMES, \textit{supra} note 21, at 11-12 (footnote citations omitted). Examples of inanimate objects being surrendered or abandoned include a tree which fell and killed someone, a well where someone drowned, a penknife or sword which an attacker used, and a steam-engine. Id. at 24-25. See also id. at 26-30 (treatment of a ship as the "most living" and, therefore, most personified inanimate object); Wigmore, \textit{supra} note 66, at 328-29 (personified objects include beams to a house, weapons which have injured or killed, and sickles and axes).

75. See HOLMES, \textit{supra} note 21, at 15-17.
over his possessions by “buying the vengeance off.”" Because a slave or animal was often more valuable to the owner than payment for the injury, compensation permitted the owner to protect his property interests. Oliver Wendell Holmes noted that there is some scant history that makes this rule applicable to inanimate objects; however, the expansion of liability theory to include general personal liability likely stunted the growth and focus of this particular area of the law because the development of general personal liability obviated the need to go after the object. As society became more civilized, compensation was more accepted, and the owner of the child, slave, animal, or inanimate object causing the injury eventually lost the choice of surrender and was forced to compensate the injured. Consequently, the idea of surrendering the person or object was forgotten.

Nonetheless, early notions of liability for the injury continued to be based upon vengeance and moral blame which, according to Holmes, pre-dated notions of responsibility based upon the fault of the owner. Liability based upon vengeance and blame was associated with the object doing the harm. Therefore, the owner of the object was sued only when he had possession of the object. Liability followed the object, and the "action followed the guilty thing into whosesoever hands it came." Because at early common law ownership and control were strictly construed, vengeance was appropriate only if there was both current ownership and control. Yet, the notion of vengeance soon expanded to include persons other than owners, such as shipowners and innkeepers. Eventually, this

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76. Id. at 15.
77. Id. at 8.
78. Id. at 10.
79. Holmes cites Roman law for the proposition that vengeance on inanimate objects could be satisfied by payment. Id. at 8.
80. Id. at 15.
81. The development of a compensation scheme to buy off vengeance, Holmes remarks, became a general custom. Over time the custom developed into a rule which was accepted and, for the most part, remained unquestioned. This process of acceptance of the compensation rule, Holmes argues, laid the foundation for the new legal form of general personal liability in which masters became liable for the torts committed by their servants. Thus, the narrow and limited privilege of buying off vengeance developed into a generally accepted rule which eventually evolved into a well recognized legal principle. See supra note 21 (Holmes' theory on the evolution of legal principles).
82. HOLMES, supra note 21, at 9.
83. Id. at 10. Holmes sums this concept up eloquently:
All this shows very clearly that the liability of the owner was merely a way of getting at the slave or animal which was the immediate cause of the offence. In other words, vengeance on the immediate offender was the object of the Greek and early Roman process, not indemnity from the master or owner. The liability of the owner was simply a liability of the offending thing.
Id.
84. See id.
85. The transition from surrendering the culpable object or person to imposing liability on the owner was gradual. First, masters became personally liable for those acts of their slaves
expansion developed into the doctrine of respondeat superior which renders employers generally liable for the actions of their employees. The development of these later doctrines moved tort law further away from the notion that a "man act[ed] at his peril." The reality of an employer-employee relationship could no longer be viewed as involving a property right such as that in a master-slave or owner-object relationship. As the notion of liability expanded, however, the prerequisite for liability remained. That is, to place the agent in the chain of causation, he had to have some direct contact with, or control over, the object causing the injury.

In sum, the cause in fact requirement can be traced to the desire for vengeance. This desire for vengeance resulted in the need to identify the person committing the harmful act or possessing the harmful object. Responsibility for the injury was associated with causation, both because the object itself was blamed for the harm and because the owner had control over the object doing the harm. Without these relationships, vengeance would not come about and liability would not attach.

THE BURDEN OF PROVING CAUSE IN FACT

The burden of proving cause in fact arises from what may be the last vestiges of a system of laws that placed primary emphasis on the rights of the individual. An individual will not be held responsible for injuries to
another unless a relationship between the individual and the injuries is demonstrated.\textsuperscript{89} In the absence of such proof, respect for a person’s individualism protects him from both harm and responsibility. This protection of individual rights is founded upon some of the strongest social and religious movements responsible for developing the common law. In fact, some suggest that this individualism may even be essential to the working of the common law.\textsuperscript{90}

Individualism has been forged into the common law as a result of a number of dominant forces rooted in the history of the common law.\textsuperscript{91} The first, and perhaps the strongest of these, was the influence of the Puritan tradition on American and English law. The Puritans relied on the law to protect the individual from control by the collective authorities.\textsuperscript{92} Historically, Puritans reacted strongly to the Anglican Church’s self-asserted declaration of supremacy in biblical interpretation\textsuperscript{93} and rejected the Church’s insistence that it dictate almost every aspect of life.\textsuperscript{94} Puritan dogma instead emphasized

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\textsuperscript{89} The historical tendency of courts to emphasize the doctrines of assumption of risk and contributory negligence illustrates the strength of the general common law principle that liability must be based on a substantial causal relationship between the defendant’s action and the plaintiff’s injuries. The Puritan emphasis on individual freedom played a significant role in the development of these doctrines. The defendant has an interest, based on his individual right to be free, not to be held liable for wrongs unless his actions were determined to be a cause of the injury. \textit{Id.} at 47-48.

\textsuperscript{90} The ideas and principles that laid the foundation of the Anglo-American legal system were those of Germanic law. Adherence to the notion of strict individualism was a pervasive characteristic of Germanic legal traditions, and the German law considered man to act with “his eyes open” and capable of caring for himself. It insisted upon full and exact performance of legal duties, including abiding by the consequences of one’s own acts. Remnants of the spirit of this strict law may be found in the doctrines of assumption of risk and contributory negligence. \textit{Id.} at 13-20.

\textsuperscript{91} \textit{See id.} at 42-45 (discussion of the effects of individualism on the common law and on early American legal structures).

\textsuperscript{92} Coercion by authorities was inconsistent with the Puritan’s belief in the supremacy of individual will. According to the Puritan’s view, communities, including political ones, were established by compact or convenant, rather than by subordination to a superior power. Individuals assenting to the contract agreed to be bound by its fixed and universal rules and to abide by the consequences of their actions. The law, because it was based on the consent of the individual and applied inflexibly in accordance with that consent, provided protection from arbitrary exercise of control by authorities. \textit{Id.} at 42-45. This Puritan belief strikingly parallels the contract theory expounded upon by John Locke. \textit{See infra} notes 135-41 and accompanying text.

\textsuperscript{93} For a discussion of the definition and significance of Puritanism, see D. LITTLE, RELIGION, ORDER AND LAW (1969) [hereinafter cited as LITTLE]. This work is a fascinating examination of the religious philosophies of John Calvin and the Elizabethan Puritans, and how they gave birth to a “new order.” The new order was built on the new found conscience of man. It was believed that not only the clergy, but each man carried God’s laws in his “heart,” and that society was to be ordered around the voluntary obedience to those laws. This new order challenged the joint venture of Anglicanism and the Crown, and eventually led to civil war in England. \textit{See id.} at 33-132. \textit{See also} PLUCKNETT, supra note 85, at 53 (Plucknett briefly describes the beginning of the civil war, including the influence of religious dissent).

\textsuperscript{94} Although the Puritans believed that secular authority should be subservient to religious law and that such authority should support the church, they also maintained that the functions
the freedom of individual conscience, individual biblical interpretation, and free speech.95 The Puritans demanded that the law free them from the political-legal coercion of collective authority.96

Puritan ideas of individual supremacy also were manifested in laws that permitted a person to freely contract for rights and duties.97 This idea of freedom to contract would later dominate jurisprudential thought in the courts.98 Any authority, especially the law, that affected the safety, morals, or well-being of the individual was met with hostility. Regulation of the individual was considered meddlesome and an imposition upon the rights of man.99

The impact of this Puritan quest for individualism has had a significant effect on the common law doctrines that exist today.100 For example, doctrines of church and state should be kept distinct. Furthermore, the Puritans steadfastly believed that the church should not use coercion or become involved in civil affairs. Rather, Puritan philosophy generally held that voluntary consent of individuals, not force, should bind the community together. See Little, supra note 93, at 84-131.

95. The conscience, Little notes, was seen by Puritans as the spiritual intermediary between God and man. Only when man’s conscience was free from constraint, such as coercive state authority, could man fully effectuate God’s will in achieving the “right order.” Id. at 114-15. See Pound, supra note 21, at 45.

96. Indeed, it was not unusual for a Puritan to “disobey the law of the land if in his judgment the end of the law (the purpose of God) is advanced by his action.” Little, supra note 93, at 125 (emphasis in original). Thus, an unrestricted, unconstrained conscience was a necessary prerequisite in the Puritan religion, and the legal structure surrounding the Puritans was secondary to the will of God.

97. Freedom to contract went hand-in-hand with the Puritan’s notion of individualism. Only when the conscience was free from coercive restraints was it able to freely and fully enter into a meeting of the minds. Thus, the Puritans valued the ability to freely conduct their own business and marital contractual relations. Id. at 204-05, 257-58. Pound noted the importance of freedom to contract in Puritan law:

[T]he conception of a maximum of abstract individual self-assertion exempt from social control, to which his vigorous and learned opinions gave currency, is essential to the Puritan conception of consociation. We are to be with one another but not over one another. The whole is to have no right of control over the individual beyond the minimum necessary to keep the peace. Everything else is to be left to the free contract of a free man.

Pound, supra note 21, at 49. See generally P. Reinsch, English Common Law in the Early American Colonies 54 (1899) [hereinafter cited as Reinsch].

98. Although Puritan law had long before embodied the principle of freedom to contract, American constitutional law did not embrace this notion of “liberty to contract” until the turn of the century. Pound, supra note 21, at 48-49. Pound further states that Puritans rejected the rise of equity, for it was through equity in which a person’s bad decisions were rectified. The Puritans preferred to see poorly informed or otherwise incapable business persons face the “consequences of their folly.” Id. at 53.

99. The Puritan man was to be free from constraints to enable him to “freely yield[ ] subjection to the will of God. . . .” Little, supra note 93, at 115 (quoting Perkin, II, 276). But see M. Walzer, The Revolution of the Saints: A Study in the Origins of Radical Politics (1965) (Puritan leaders believed they could acquire political power through a highly disciplined society).

100. Although no single doctrine can account for the entire shaping of the common law, Pound suggests that Puritanism, has been a “controlling factor” because of its unique em-
such as assumption of risk and contributory negligence have been attributed to Puritan influence on the law. Under these doctrines, an employer is held responsible only if its actions prove to be the cause of the injury and the employee has not in any way culpably participated in the actions. Thus, before liability will be imposed the employee must prove that a strong causal relationship exists between the employer's actions and the injury.

Because of the Puritan's distrust of authority, law influenced by Puritanism denied judicial discretion to impinge upon both the individual's freedom from liability and the freedom to secure one's own safety. Rather, Puritan law phasis on the assertion of "ultra-individualism"—the strong feeling of a man's independence and freedom from oppressive societal constraints. Pound, supra note 21, at 36-37. See supra note 88.

101. See supra note 89.
102. According to Puritanism, an employee had no recourse against an employer for injuries stemming from dangerous aspects of the work performed or from a co-employee's negligence. Under either circumstance, the employee knew of and assumed these risks of employment. Pound, supra note 21, at 47-48. The unwillingness of the courts during the turn of the century to depart from these Puritan influenced doctrines is evidenced by their reluctance to faithfully apply the non-contributory negligence law embodied in the workers' compensation statutes. See infra note 103.

103. Pound notes that the Massachusetts legislature, strongly influenced by Puritan thought, drafted statutes incorporating the doctrines of assumption of risk and contributory negligence:

It is not an accident that the classical exposition of this doctrine was penned in Massachusetts. Again, a workman, engaged constantly upon a machine, so that he comes to be a part of it and to operate mechanically himself, omits a precaution and is injured. The common law says to him, "You are a free man, you have a mind and are capable of using it; you chose freely to do a dangerous thing and were injured; you must abide by the consequences." As a matter of fact, it may well be he did not and could not choose freely. Before the days of workmen's compensation it was said that statistics showed the great majority of industrial accidents happened in the last working hour of the day, when the faculties were numbed and the operator had ceased to be the free agent which our theory contemplated. But there was no escape from the legal theory. That very condition was a risk of the employment, and was assumed by the laborer. Legislation had been changing these rules, yet courts long had a tendency to read the doctrine of contributory negligence into the statutes even where the legislature had tried to get rid of it. Pound, supra note 21, at 48. In short, the Puritan view required that the harmful act stem from an individual's conduct to be actionable. The individual was responsible only if he caused the harm; otherwise, the person harmed was viewed as the cause of his injury.

104. Id. at 55. Puritan distrust of the magistrate also stemmed from an unwillingness to permit a political state to interfere with the process of becoming a self-reliant man. The very recognition by the Puritans of a state which had control over them, however, appears to be contradictory to the principles of Puritanism which emphasized the freedom of the individual's conscience to determine the best way to live. Indeed, Pound regarded the Puritan man as one whose conscience would not allow him to be judged by the "discretion of men," but rather by the will of God. Id. at 50-51. Little, however, in an elaborate discussion of these apparent contradictions, finds an underlying consistency. The Puritan viewed life as being divided into two spheres: first, the "inward" life—that affected by the will of God—in which no man-made laws could "transcend," and second, the "outward" life—that affected and governed by the state. Little, supra note 93, at 123.

105. The Puritan influence contributed to the development of American judicial procedure, which is dominated by an abundance of rules. The Puritans conceived of the ideal judge as
required that some type of causation be established before an individual's freedom could be infringed. Eighteenth and nineteenth century tort and criminal law is illustrative of this Puritan influence. Puritanism, as Pound stated:

expresse[d] the feeling of the self-reliant man that he is to make his own bargains and determine upon his own acts and control his own property, accepting the responsibility that goes with such power, subjecting himself to liability for the consequences of his free choice, but exempt from interference in making his choice.

From this Puritan perspective, a present day products liability situation might have been resolved in the following manner. The plaintiff freely contracted with the seller of the product. Accordingly, the plaintiff must accept responsibility for the consequences of his actions, and the law and the courts should not infringe on the rights of the plaintiff to buy or the right of the defendant to sell a product. The courts would have no discretion to rule otherwise because a court's primary purpose would be "to bring about a maximum of individual self-assertion." The Puritanical notion of individualism was certainly a prime force behind the development of cause in fact, as evidenced by the present day plaintiff's burden to prove cause in fact. The plaintiff not only had the burden of proving cause in fact but also had to be free from any contributory negligence before the law would interfere with a defendant's life and property.

A second force of individualism influencing the development of cause in fact stemmed from the English court battles with the Crown in the seventeenth century. The king claimed that his authority arose from God, and thus, the Crown was the supreme governing authority.

a "human machine," bound by rigid rules of evidence and subject to detailed review by a series of tribunals. Legal formulas were considered essential in Puritan law to insure fairness for the individual and to minimize judicial discretion. See C. Fifoot, History and Sources of the Common Law—Tort and Contract 154-83 (1949) [hereinafter cited as Fifoot].

106. For a discussion of the influence of Puritanism on the criminal law, see Pound, supra note 21, at 49-51. Pound specifically notes the Puritan objection to individualized punishments because of the belief that man should be judged by the "inflexible rule of the strict law," rather than by the discretion of the state or its representatives. Id. at 51. In the area of tort liability, Fifoot provides a sampling of cases in this period that clearly show the rise of the doctrine of negligence. See Fifoot, supra note 105, at 164-66. One such example involves the evolution of the doctrine of common law bailment. Bailment cases provide an interesting scenario concerning the cause in fact requirement because liability arises due to the bailor's possession of the object, and the presumption arises that a bailee, by virtue of his possession, has sufficient control over the object to hold him legally liable to the bailor for any loss. See generally Holmes, supra note 21, at 164-205 (discussion of the development of common law bailment); Plucknett, supra note 85, at 476-80 (same).

107. Pound, supra note 21, at 50.
108. Id. at 59.
109. See id. at 60-84.
110. In the early part of the seventeenth century, the Crown secured a strong foothold in
claim of ultimate authority, however, was challenged by jurists and the common law courts.\textsuperscript{111}

One of the king's skirmishes with the court parallels the issues arising in modern product liability cases. King Henry VI authorized the Company of Dyers in London to search for and confiscate cloth stained with poisonous dyes.\textsuperscript{112} The court ruled that the king violated the law of the land because a person's property could not be forfeited without adjudication and an opportunity to be heard.\textsuperscript{113} In other words, the court denied the Crown the power to interfere with the individual and his property rights without first demonstrating that an individual dyer was responsible for the illegal act. The court protected the dyer's rights at the expense of societal needs. In balancing the two interests, the need for the individual to be free from intrusion superseded the societal need to investigate the illegal activity and confiscate hazardous products.

As a result of a number of such battles between the courts and the king, the doctrine of "supremacy of the law"\textsuperscript{114} developed, and the king gradually succumbed to the law. For the first time, the individual was protected from the arbitrary and capricious exercises of the king's power even when it was exercised for the protection of society.\textsuperscript{115} From Lord Coke's perspective, the king's power was subjected to the law because it needed to be tempered by rules of reason,\textsuperscript{116} and these rules were derived from elements of ecclesiastical supremacy as a result of the appointment of John Whitgift as Archbishop of Canterbury in 1583. LITTLE, supra note 93, at 136. According to Whitgift's interpretation of religion and law, "the divine command issues in the existing order and the existing order gives form and content to the command [and] . . . identification obtains only when the existing order is under the rulership of a 'Christian prince.'" \textit{Id.} at 138. The existing order, of course, was the Crown, and the church itself became subordinate to the "ultimate . . . power and authority of the crown in ecclesiastical matters. . . ." \textit{Id.} at 140.

111. Little writes of Archbishop Grindal, who, in 1576, sent a letter to the Queen stating that he would not abide by the Queen's command to stop the Puritans from preaching. Grindal also stated that the Queen was subject to God's command in the same fashion as her subjects. The Queen responded by confining Grindal to his home for over seven years until his death. \textit{Id.} at 135. Pound also remarks on a confrontation between King James I and Lord Coke in which Coke informed the King that he was subject to God and the law of the land. The King replied by removing Coke from his position as a judge. POUND, supra note 21, at 60-61. In another example, when the King pardoned defendants on a conviction of forcible disseisen without regard to court form and procedure, the court denied the validity of the King's act. \textit{Id.} at 66-67 (uncited case) (King's letter of pardon sent to sheriff did not permit the sheriff to disobey the law's mandate to execute the writ).

112. \textit{Id.} at 68-69 (uncited case).

113. \textit{Id.} at 69.

114. The doctrine of supremacy of law was coined by Pound as follows: "[T]he sovereign . . . [is] bound to act upon principles, not according to arbitrary will; [and is] obliged to conform to reason, instead of being free to follow caprice." \textit{Id.} at 64. This doctrine was in no way destined for its existence; on the contrary, centuries of constant struggle took place in which the strength of the King's power was challenged. See \textit{id.} at 69.

115. The courts, during this phase, developed into an institution which guarded "individual interests against the encroachments of state and of society." \textit{Id.} at 74.

116. \textit{See} LITTLE, supra note 93, at 182.
Most of the law that arose during the battles between the Crown and the court remained as common law and was carried over to America. Instead of the Crown, however, the American courts battled with the state. Ideas such as due process, equal protection, and fundamental rights of the individual were protected from the arbitrary and capricious power of the state. America declared the supremacy of law with new vigor by subjecting all of its officials to the dictates of the law. Because of the prevailing religious and philosophical thinking, American law compelled the protection of the individual's natural rights. These rights evolved to place the burden of proving the identity of the causal agent in civil actions on the plaintiff.

117. Little quotes from Coke to demonstrate the perfect unity between the common law and "fundamental" or natural law:

To the end that all Judges and Justices in all the several parts of the realm, might, as it were, with one mouth in all men's cases pronounce one and the same sentence; whose learned works are extant, and digested into nine volumes, wherein if you observe the unity and consent of so many several judges and courts in so many successions of ages, and the coherence and concordance of such infinite, several and diverse cases, (one, as it were with sweet consent and amity, proving and approving another) it may be questioned whether the matter be worthy of greater admiration or commendation: for as in nature we see the infinite distinction of things proceed from some unity, as many flowers from one root, many rivers from one fountain, many arteries in the body of man from one heart . . . so without question Lex orta cum [ex] mente divina, and this admirable unity and consent in such diversity of things, proceeds only from God the fountain and founder of all good laws and constitutions.

Id. at 175 (quoting E. Coke, The Reports of Sir Edward Coke in English in Thirteen Parts Compleat Preface to 2, ii-iii (London 1738) (7 Vols.)). "According to Coke, 'this admirable unity and consent' is founded in what he variously calls 'fundamental law,' 'rule of common law,' or 'common right' that is, in the sum and substance of the ancient law of the realm." Little, supra note 93, at 175.

118. See infra notes 124-34 and accompanying text.

119. See Pound, supra note 21, at 75. But see Reinsch, supra note 97 (English common law had little influence in America). See generally Plucknett, supra note 85, at 75-76 (discussion of the historical development of the origins of the common law).

120. See Pound, supra note 21, at 75.

121. Id. at 100-01.

122. In discussing the victory of the supremacy of the law, Pound states:

[The Supremacy] doctrine, therefore, became established among the fundamentals of our legal tradition as a result of the victory. But the victory gave it a new scope and a new spirit. Its scope for a time broadened, so as to make of it a doctrine of limitations upon all sovereign power, independent of positive law and at most simply declared thereby. Its spirit became individualist. It became a doctrine that it was the function of the common law and of common-law courts to stand between the individual and oppressive action by the state; that the courts were set up and the law existed to guard individual interests against the encroachments of state and society. . . . Too often it led the law in the last century to stand full- armored before individuals, natural and artificial, that needed no defence, but sallied from beneath its aegis to injure society.

Id. at 74. See generally Plucknett, supra note 85, at 243 (discussion of Coke's influence on the development of the supremacy of law doctrine).

123. See C. McCormick, Handbook of the Law of Evidence 786 (1972) [hereinafter cited at McCormick].
The legal philosophy that undergirded early common law also emphasized individualism and the need for a cause in fact element. Although stemming from many different schools of natural law, this philosophy maintained that individualism was supreme, and that free and unfettered individual rights constituted the proper model upon which to base the law.

Natural law insisted upon an inquiry into good faith and reason in an endeavor to make the law more humane and moral. The struggle of natural law philosophers revolved around their desire to institute individualism as the rational basis of philosophy so that law and morals could "coincide." In attempting to combine morality with law, natural law philosophers insisted that the concept of security be examined and emphasized. Under natural law, an aggressor who invaded a person's security was held liable only if the aggressor either willed the invasion or breached some rule designed to protect the security of others. Because this new analysis of security required more than blame, the individual had greater control over the situations in which he would be liable for someone else's injury. Natural law, then, can be viewed as also producing the cause in fact requirement. Implicit in this concept of security is this requirement that a defendant be identified as the person invading or threatening another's security before liability could attach.

This natural law analysis of security, and its corresponding emphasis on

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124. Blackstone notes that the principal purpose of all human laws is the protection of individual rights. See 1 W. BLACKSTONE, COMMENTARIES* 38-43.

125. Pound cites several historical sources in the development of natural law principles which include the philosophy of Aristotle, the tenets of Roman law, the juristic theory of Grotius, and the writings of Coke and Blackstone. Two principal theories of natural rights emerged from these foundations. Both theories held that the primary purpose of law is to protect individual rights. One theory viewed natural rights as the moral qualities inherent in human beings which could be identified by making reasoned deductions from human nature. The second theory based natural rights upon the terms of the social contract entered into by the individual. See generally POUND, supra note 21, at 85-102; infra notes 135-41.

126. POUND, supra note 21, at 100. See also supra note 124. See generally L. FULLER, THE MORALITY OF LAW 96-106 (1964).

127. The natural law period of the seventeenth and eighteenth centuries represented a period of liberalization in the law. During this period, proponents of natural law rejected the arbitrary exercise of power, inflexible rules, and uniformity that characterized the period of "strict law," in favor of emphasizing reason, morality, ethical justice, and duty. See POUND, supra note 21, at 140-41.

128. As natural law theory became embodied in legal systems, certain qualities of the "strict law" were carried over to restrict judicial discretion in the administration of the laws. The development of the concepts of equality and security illustrate this "maturing" of the legal process. Both the strict rule that the same remedy be applied in similar situations, and the liberal view that all individuals have the same status under the law, contributed to the emphasis on equality. The concept of security buttressed this emphasis on equality by demanding that legal results should be determined by individual will and intention. Id. at 142-43.

129. Natural law separated the concept of security into two elements. The first element of the concept of security was that all individual interests should be protected from external oppression. Second, an individual was only accountable to others by making a willful choice to do so or by violating the security interests of another. Id.

130. Id.
individualism, established certain fundamental rights of property and contract.131 This, in turn, led to the formation of the Bill of Rights, the basis of American liberties.132 Pound found security and liberty to be closely interconnected:

Liberty . . . mean["t] in the nineteenth century . . . that the individual shall not be held legally unless for a fault, unless for an act on his part that infringes another's right, and that another shall not be permitted to exact of him except as to the extent he was willed a relation to which the law in advance attached such power to exact.133

This notion of the protection of individual liberties added to the development of imposing the burden of proof of fault and causation on the plaintiff.134

In addition to Puritanism, the battles between the court and the Crown, and natural law, two other forces in the common law led to the development of the cause in fact requirement in tort law: the political theory of social contract and the influence of the frontier and pioneer family. The socio-political philosophy of John Locke, embodied in his theory of social contract, pervades American common law.135 The theory of social contract

131. The protection of the individual's interest in acquisitions was recognized as an important guarantee within the natural law concept of security. The power to freely contract was considered an asset or property interest deserving of legal protection. Therefore, acquisitions obtained by the individual through exercise of the contract right was secured by law. Id. at 144. See generally Corwin, The "Higher Law" Background of American Constitutional Law (pt. 1), 42 HARV. L. REV. 149 (1928) [hereinafter cited as Corwin].

132. The guarantees contained in the Bill of Rights to insure both equality and security were consistent with natural law's emphasis on the importance of maximizing individual rights. See POUND, supra note 21, at 143.

133. Id. (emphasis added). For further discussion of natural law theory influence on the United States Constitution and civil law, see Corwin, supra note 131, at 383, 405-06. Two commentators suggest that moral fault may not have been a necessary prerequisite for liability under natural law, but both suggest the necessity of proving causation. See Brown, The Natural Law Basis of Juridical Institutions in the Anglo-American Legal System, 4 CATH. U.L. REV. 81, 84-86 (1953-54); Lucey, Liability Without Fault and the Natural Law, 24 TENN. L. REV. 952, 960-62 (1957).

134. See MCCORMICK, supra note 123, at 786-89. McCormick, in commenting on the distribution of burdens, recognized the "natural tendency to place the burdens on the party desiring change." Id. at 788-89. Because the plaintiff generally seeks to change the present state of affairs, McCormick reasons that he should bear the risk of failure of proof. Id. at 786.

135. See J. LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT (1924), reprinted in part in THE TRADITION OF FREEDOM pt. 2, at 1-80 (M. Mayer ed. 1957) [hereinafter cited as TRADITION]. Locke wrote that each individual submits himself to the will of the majority because of the original compact through which society was formed. Id. at 28. See also Rose, The Law of Nature: An Introduction to American Legal Philosophy, 13 OHIO ST. L.J. 121, 136-40 (1952) [hereinafter cited as Rose]. Rose stated that Locke's theories "[o]riginally intended as a justification for a limited sovereignty and the guarantee of individual rights of man which it is the function of civil government to protect, . . . have supported not only the aims of the Founding Fathers, but the rise of capitalistic democracy in industrial America." Id. at 138. Another commentator suggested that the social contract theory, which maximized individualism, is eroding:

The individualistic philosophy of the 18th and 19th centuries proceeded from the idea that the human individual was sovereign, i.e., of the highest value. From this it was concluded that a social order can be binding on the individual only when
states that individuals joined with each other to form a "contract" to establish a government, and this government, through the collective will of the people, protects an individual's inherent rights. The terms of the social contract were discoverable by examining those rights inherent and vital to each individual, and Locke declared that the government could not deprive the people of these rights. Central to the theory of social contract was the notion that the government was not the source of the people's power; rather, the people were the source of the government's power. The social contract theory, therefore, substantially restricted the government's power over the individual.

Arguably, this political philosophy would require the plaintiff to show a strong causal element to protect the individual defendant. In social contract terminology, an individual would not enter into a contract whereby his individual rights and protections later could be altered without the accuser first demonstrating that he was the cause in fact of the injury.

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it is recognized by the individual as binding. From this came the doctrine of the social contract, which still has its exponents; but today the inclination is rather to a universalistic philosophy of values according to which the community is superior to the individual.


137. See TRADITION, supra note 135, pt. 2, ch. XI, at 39-44. Locke wrote that in the original contract, man was willing to leave the freedom he enjoyed in the state of nature to join with others "for the mutual preservation of their lives, liberties, and estates. . . ." Id. at 36. Among the needs Locke found lacking in the state of nature were "established, settled, known law, . . . indifferent judge[s] with authority to determine all differences according to the established law . . . [and the] power to back and support the sentence when right, and to give it due execution. . . ." Id. at 36-37.

138. See TRADITION, supra note 135, pt. 2, ch. IX, at 37-38. Locke suggested that man would not have entered into this original contract if it were to his detriment, therefore, "the power of the . . . legislature . . . can never . . . extend farther than the common good." Id. at 37. See also Rose, supra note 135, at 137 (Rose interpreted Locke's theory to embody the notion that rulers were empowered to follow established law, and the "people may resist an unlawful abuse of power").

139. Augmenting this view was Locke's insistence on man's right to property. See TRADITION, supra note 135, pt. 2, ch. V, at 11-14. Locke wrote that man gained the right to property because he labored on, and improved the condition of, the property and that God gave the land to the "industrious and rational—and labour was to be his title to it—not to the fancy or covetousness of the quarrelsome and contentious." Id. at 12. See also Rose, supra note 135, at 137 (Rose interprets Locke's position as requiring that legislative and executive powers be accountable to the people, and that the executive function be "inferior to the legislature," or representative body of the people).

140. Under Locke's theory, the people have the right to judge whether the ruler has acted against their trust, for it is the people who originally bestowed the trust in the ruler. The people may remove the ruler or legislature from power, elect a new ruler or legislature, or change the form of government. TRADITION, supra note 135, pt. 2, ch. XIX, at 79-80. See also Rose, supra note 135, at 137 (governments have no absolute power, according to Locke, and thus arbitrary deprivation of property or taxation without consent of the public cannot be permitted).

141. The defendant's reaction that "we didn't bargain for" liability without proof of causa-
Finally, the cause in fact element, grounded in individualism, was further encouraged by the spirit of the American pioneer.\textsuperscript{142} Americans in the late seventeenth and early eighteenth centuries were "self-made" persons.\textsuperscript{143} Frontier people were independent explorers who generally found, cleared, and farmed their own land.\textsuperscript{144} Because of the abundance of land, they often were isolated from others and were forced to depend upon themselves for survival.\textsuperscript{145} In the vastness of the frontier, the pioneer had little use for the courts or the law\textsuperscript{146} except when occasional outbursts of violence struck the community.\textsuperscript{147} Because of this independence from the legal system, the individual was, for the most part, forced to fend for himself whenever injury occurred. As a result, the pioneer often lived with the results of his own

\textsuperscript{142} See generally Corwin, \textit{supra} note 131, at 388-94. Corwin contrasts Hobbes, the author of \textit{Leviathan} (1651), with Locke, and finds that Hobbes views natural and civil law as coextensive: that rights are "implements of public policy. Locke, on the other hand, regards government as creative of no rights, but as strictly fiduciary in character, and as designed to make more secure and more readily available rights which antedate it and which would survive it." \textit{Id.} at 389.

\textsuperscript{143} See \textit{generally} Pound, \textit{supra} note 21, at 112-38. Pound remarked on the pioneer spirit: There was a "frontier repugnance to scientific law [highly educated bar] and the insistence of the pioneer that his judges decide offhand without study of what other judges may have done in European monarchies. . . ." \textit{Id.} at 118. However, aversion to this arbitrary form of law, coupled with distrust of governmental action, motivated those who formulated the legal system to attempt to establish a detailed system of rules so that the judge would have little discretion. The philosophy of the pioneer, according to Pound, was that "[i]f men had to be governed, it must be by known rules of the law." \textit{Id.} at 119.

\textsuperscript{144} See \textit{R. Morris, Studies and History of American Law} 17-21 (2d ed. 1959) [hereinafter cited as Morris]. The frontier environment, Morris remarks, contributed to the development of the self-made person: "in the seventeenth century American law was born. It grew amid the surroundings of the first American frontier which nurtured self assertion and independence." \textit{Id.} at 17.

\textsuperscript{145} As a result, individualism thrived. The pioneer saw prosperity as a by-product of determined, strong individual effort. Pound, \textit{supra} note 21, at 126-27. Those in the "outposts of civilization," according to Pound, did not "tolerate anything which [stood] for discipline, good order and obedience; and the man who lets another command him they despise[d]." \textit{Id.} at 117 (quoting Orvin Wister). Partly because of the economic success of this formative period, many of the frontier doctrines survived well past the simple days of the agrarian society. \textit{Id.} at 130.

\textsuperscript{146} As the population moved westward, English influence over these colonies decreased accordingly, which caused the frontier person to feel even less bound by the constraints of established legal systems. \textit{Id.} at 119.

\textsuperscript{147} The pioneer was most concerned with limiting governmental interference with his independence. Protection of his general security was tolerated, but the nineteenth century American living on a self-sufficient farm wanted minimal interference from the government. See \textit{id}.

\textsuperscript{148} The pioneer permitted "governmental machinery, . . . civil and criminal tribunals and rules and standards of decision to be applied therein," but only to the extent that they protected his general security. \textit{Id}. Pound states that even in the criminal law, the colonists gave "excessive power to juries" and limited the trial judge's power "to control the trial." \textit{Id.} at 123. This was a result of the colonists' memories of the "harsh and brutal" law of England and the politicalization of the criminal law in English courts. \textit{Id.} at 122.
misfortune, even though his only mistake may have been the inability to anticipate another individual's harmful conduct.\textsuperscript{148}

The law of the frontier further exemplified this individualism. The elements required for a cause of action limited the judge's discretion, thereby protecting the individual from the state's intrusion.\textsuperscript{149} The plaintiff was required to prove the identity of the cause of the harm.\textsuperscript{150} This cause in fact requirement safeguarded the individual from both speculation and the judge's predisposition against a particular person.\textsuperscript{151}

The five forces of individualism underlying American common law—Puritanism, the battles between the court and the Crown, natural law, social contract, and the frontier spirit—are collectively responsible for the requirement that the plaintiff prove cause in fact. In cases that do not require proof of cause in fact before imposing liability, these forces suggest the negative response that the courts have gone "too far." Without proof of cause in fact, responsibility for the wrong seems to be lacking because either cause in fact is implicit in the notion of responsibility or it is intrinsically a minimum definition of liability. Without this requirement, there is arguably a violation of the individual's rights and liberties that lie at the foundation of America's independence. Furthermore, an argument can be made that without the cause in fact requirement, there would be a violation of the social contract between individuals and their government when liability would be imposed without causation.

The history of common law, however, is not exclusively contained in these five forces. There are other forces which support the imposition of liability absent the cause in fact element. One such force is identified by commentators as the force of status liability, which was a remnant of the feudal days of early England.\textsuperscript{152} As will be discussed, the identification of the decline

\textsuperscript{148} Id. at 135.

\textsuperscript{149} Id. at 119-20. According to Pound, the problem of developing rules which would meet the needs of the American people and also limit the discretion of the magistrate "determined the whole course of our legal development until the last quarter of the nineteenth century."  
\textsuperscript{150} Id. at 120.

\textsuperscript{151} In a group of cases reviewed in the early colonial period, all required that the plaintiff allege the identity of the person or animal that inflicted the harm, or identify the master who owned the slave. For a survey of early tort cases, see Morris, supra note 143, at 201-58.

\textsuperscript{152} See Pound, supra note 21, at 116-20.

\textsuperscript{152} See Tobriner & Grodin, The Individual and the Public Service Enterprise in the New Industrial State, 55 Calif. L. Rev. 1247, 1249 (1967) [hereinafter cited as Tobriner & Grodin]. The authors contended that the common law has reacted to the increasing organization of society by reactivating status relationships, and in particular, status relationships implicating organizations affecting the public interest. Id. In the past, such enterprises as blacksmiths, purveyors of food, veterinarians, tailors, common carriers, and innkeepers were seen to have placed themselves in the public limelight as providers of services. The common law imposed obligations on these enterprises including "the duty to serve all customers on reasonable terms without discrimination and the duty to provide the kind of product or service reasonably to be expected from their economic role." Id. at 1250.

Fifoot likewise suggests that certain higher duties were demanded of businesses because of their common or "public calling." Fifoot lists a number of examples of common callings which
of cause in fact based on this historical vestige of status is not clear because status liability traditionally has insisted upon strong, simple causation elements. Status liability, however, may provide some understanding of how the common law can encompass a concept of liability which does not require proof of cause in fact.

**FORCES AGAINST THE CAUSE IN FACT REQUIREMENT**

**Status in Tort Liability**

Common law liability based on duties owed to another because of one's relational status originated in feudal landlord-tenant law. The idea that each man should stand on his own and "play the game as a man, without squealing," did not override certain feudal duties. The feudal relationship determined the nature of the duties and responsibilities. Specifically, the tenant owed duties of service and fealty to the lord, and the lord owed protection and warranty to the tenant.

Other early common law relationships also created duties which initially overrode developing individualistic tendencies in the common law. The relationship of master-servant, parent-child, mortgagor-mortgagee, and common carrier-consumer were among a few of the common law relation-give rise to higher duties: carriers, innkeepers, surgeons and veterinary surgeons, the smith or ferrier, and to a lesser degree, the ferryman, carpenter, shepherd, and barber. FIFOOT, supra note 105, at 157 (citing Winfield, The History of Negligence in the Law of Torts, 42 LAW Q. REV. 184, 185-90 (1926)).

153. See Rintala, The Supreme Court of California, 1966-1969—Foreword: "Status" Concepts in the Law of Torts, 58 CALIF. L. REV. 80 (1970) [hereinafter cited as Rintala]. Traditional negligence law, according to Rintala, focuses on the plaintiff, whereas the 'status' approach focuses upon the defendants, not the particular plaintiff." Id. at 86. Rintala states that the focus of the status approach is now "upon the role voluntarily assumed by the defendant and the defendant's relationship, arising out of the role assumed, to the general class of persons who may be affected by one who plays such a role." Id.

154. See Tobriner & Grodin, supra note 152, at 1249. For a discussion of status concepts and the development of contract law, see H. MAINE, ANCIENT LAW 170 (1930) (societal relationships historically have affected legal relationships particularly in the area of contract law); Graveson, The Movement From Status to Contract, 4 MOD. L. REV. 261 (1941) (there is an increasing emphasis on status in modern contractual relations).

155. POUND, supra note 21, at 20. Individualism had no place in the feudal legal system. The assignment of rights, duties, and liabilities were not made according to one's undertakings or actions, but rather according to his status as landlord or tenant. Id.

156. Id. at 29.

157. Id. at 27.

158. In mortgagor-mortgagee relationships, the common law courts tended to apply rules based on the perceived relationship of the parties, rather than on their interests as manifested in the terms of their contract. Id. at 24.

159. See Jackson v. Rogers, 89 Eng. Rep. 968 (K.B. 1683) (refusal of defendant carrier to haul goods brought by plaintiff is actionable as would be the refusal of an innkeeper to provide lodging for a guest or the refusal of a blacksmith to shoe a horse); HOLMES, supra note 21, at 183-205 (Holmes declared that the legal duties of common carriers result from obligations attached by custom or law to particular "public callings" and from the principles of bailment). For examples of "public callings" that were given special duties, see generally J.
ships which created responsibilities based on status. Inherent in the concept of status liability was a perceived public need giving rise to a heightened duty. The resulting responsibility or liability was not based on fault, will, or intent, but rather was based on the status of the person.\footnote{160}

These common law ideas of status liability were gradually suppressed in the 1800's by forces maximizing individualism.\footnote{161} Sir Henry Maine identified this suppression as an evolving societal process moving from status to contract.\footnote{162} Based on his study of law and evolution, he concluded that American law gradually was perfecting an ideology of man's individual rights.\footnote{163} Other commentators viewed status liability as the antithesis of freedom, and contract as freedom's synthesis.\footnote{164} Indeed, status liability often was blamed for the degradation of individual freedom.

Yet, as cities grew and the industrialization of America unfolded, the equality inherent in the simple agrarian society of the early pioneer life suddenly was transformed into a society dominated by strong collective forces over the individual.\footnote{165} Society's industrialization and corresponding growth of the cities altered life styles and forced people to become more dependent upon each other for their subsistence.\footnote{166} The maximization of individualism,

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  \item \footnote{Beale & B. Wyman, Cases on Public Service Companies: Public Carriers, Public Works, and Other Public Utilities (1902).}{160. Social positions carried with them certain legal rights and obligations. Because an individual did not assume his status voluntarily, he had no control over the resulting legal consequences. Thus, individual choice played no part in the assignment of responsibility in feudal law. Because this system prevented the individual from controlling his liability, it served as a deterrent to individual initiative. See Rintala, \textit{supra} note 153, at 83-84.}
  \item \footnote{161. The development of a mercantile economy and its accompanying laissez-faire philosophy were two important factors leading to an increased recognition of individualism. The emergence of the right to contract liberated individuals from the constraints of status relationships and enabled them to create rights and duties through the exercise of free will. This new power to establish individual relationships did not extend to common carriers, however, whose obligations were still determined in accordance with their status. See Tobriner & Grodin, \textit{supra} note 152, at 1251.}{161.}
  \item \footnote{162. See H. Maine, Ancient Law 165 (F. Pollock ed. 1906).}{162.}
  \item \footnote{163. \textit{Id.} at 302.}{163.}
  \item \footnote{164. As summarized by Rintala, contract law and liability based on fault furthered the values of maximizing individual freedom and encouraging economic progress by limiting liability to those situations in which the individual caused the harm to another or failed to perform a voluntarily assumed obligation which resulted in harm. Status, on the other hand, impeded both of those values. Imposing liability without fault restricted individual freedom and deterred individual initiative. Rintala, \textit{supra} note 153, at 83-84.}{164.}
  \item \footnote{165. The mass production, marketing, and distribution of goods and services is not consistent with the view of a laissez-faire economy consisting of a series of individual contracts reflecting the will of the consumer. Individual freedom has also been restricted by the controlling influence of unions and professional societies. Because these organizations were considered, in some cases, as quasi-public in nature, courts have revived status concepts to impose obligations upon them based upon duties owed to the public and individuals with whom they deal. See Tobriner & Grodin, \textit{supra} note 152, at 1251-53.}{165.}
  \item \footnote{166. Modern society brings individuals into routine contact with various institutions as a matter of social and economic necessity. Dependency upon these institutions creates relationships in which expectations and customs develop, and the protection of public expectations}{166.}
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which had become an ingrained philosophy on the frontier, now became a basic tenet only of groups possessing great wealth and superior bargaining power. The result of this urban transformation was an economic and moral injustice toward certain groups in society such as tenants, employees, and consumers. The law gradually responded, however, returning to the idea of status liability for the justification of imposing higher duties for the protection of the individual. Responsibility for safety and protection was placed upon an individual defendant without regard to his will to act.

by enforcing customary standards of conduct would amount to reintroducing status as a basis of liability—rights and obligations would be imposed according to the relation between the parties, not by any voluntary act or agreement. The standardization of contracts, for example insurance policies, has eroded the principle of freedom of contract and has also provided an impetus toward the revival of status liability. See Rintala, supra note 153, at 91-93.

167. Large economic enterprises, unions, and professional organizations, according to Tobriner and Grodin, are able to exercise much power over individuals. These organizations may represent the only source of essential commodities and may provide the only means by which an individual can pursue his chosen trade or profession and attain personal security. The individual has little ability to influence these organizations, and it is the view of these commentators that the belief that such organizations are voluntary associations of persons whose freedom should be maximized may be erroneous because they actually operate to restrict the individual freedom of their members. Tobriner & Grodin, supra note 152, at 1254-56.

168. The ability of the modern organization to act arbitrarily and impose its will upon individuals constitutes a sharp curtailment of the progress toward individual rights represented by the advent of contract law. The individual is, in many situations, no longer “free” to bargain and create rights and duties for himself. Id. at 1251-55.

169. See Rintala, supra note 153, at 95-132 (discussion of California cases explicitly or implicitly adopting the “new” status approach to tort liability). It is important to note that the “newer” concept of liability based on status is different from the status liability of feudal days. The emphasis on status in feudal times seemed to focus on the plaintiff, and looked to his right to a cause of action based on his status. The notion of privity in negligence law has been identified as a remnant of this status relationship requirement. The status concept in feudal law protected the defendants—often those who were more powerful—because of the lack of status of the plaintiff. The newer status concept looks more to the role, position, and relation of the defendant. The difference lies in the analysis. The courts first determine the defendant's role, which is an attribute one acquires rather than is born with, and then ascertain the defendant's relationship to the general class of persons who may be affected. The status concept of liability is a possible source of the relaxation of the fault and proximate cause concepts and suggests the ability of the law to impose obligations on persons because of their acquired relationship. Id. at 83-94.

170. Legal obligations have been imposed upon enterprises participating in mass production and distribution for several basic reasons: such organizations are better able to bear the cost and spread the risk of losses related to the products from which these enterprises profit; the consumer possesses little bargaining power in his routine relations with these enterprises; the consumer is unable to detect defects likely to cause injury; and the consumer cannot protect himself from harm by avoiding contact with these organizations upon which he is dependent for economic and social necessities. The use of these justifications indicates a reliance on the relation between the parties, rather than on the intention or act of the defendant, in determining liability. The evolution of strict liability in the products liability area illustrates the return to status liability concepts. See Rintala, supra note 153, at 116-19. Theories of modern-day products liability represent this development in the law. See Tobriner & Grodin, supra note 152, at 1279. See generally Cowan, Some Policy Bases of Products Liability, 17 Stan. L. Rev. 1077, 1086-87 (1965); Rapson, Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort, 19 Rutgers L. Rev. 692 (1965).
Proof of cause in fact, however, always has been required under status concepts of liability.\textsuperscript{171} The identity of the owner, employer, landlord, or carrier, whose duties included guarding against certain risks, also was necessary for a cause of action.\textsuperscript{172} In cases premised on status liability, it must be demonstrated that the defendant's failure to warn or breach of the duty of care was the cause in fact of the injury.\textsuperscript{173} That is, the defendant's act or omission must have been responsible in some material way, and as a substantial element, in bringing about the plaintiff's injury.\textsuperscript{174} The common law concept of status liability, therefore, cannot supply the analytical justification for the court's imposition of liability absent an identification of the cause in fact.\textsuperscript{175} A relatively recent force in American common law, however, encourages assessing liability without proof of the cause in fact. This force, known as the philosophy of legal realism, has shaped American common law since the early 1900's.

\textit{Legal Realism}

Notwithstanding the existence of natural law and its emphasis on individualism, the competing philosophy of legal realism arose in American jurisprudence around the turn of the twentieth century. Contrary to natural law's emphasis on individualism, legal realism focused on the attainment of social goals and the fulfillment of social needs.\textsuperscript{176} Legal realists were most concerned with the question of how courts should decide difficult or con-

\begin{itemize}
  \item \textsuperscript{171} Some specific relationship between the injured plaintiff and the defendant was necessary before a cause of action could be maintained. \textit{See} Rintala, \textit{supra} note 153, at 83-94.
  \item \textsuperscript{172} In addition, defendants operating businesses traditionally recognized as "common callings," that is, those affecting a public interest, were burdened with extra duties of care. Because the defendant voluntarily provided a public service, public expectations as to the proper performance of that service were deemed sufficiently important to justify the imposition of additional obligations. In the absence of such status, the defendant would be liable only to those plaintiffs with whom he was in privity. \textit{Id}. at 89-91.
  \item \textsuperscript{174} \textit{See} \textit{supra} notes 62-63 and accompanying text.
  \item \textsuperscript{175} The status approach to liability focuses on the position voluntarily assumed by the defendant and the resulting relationship created with the plaintiff. The causal analysis involves determining whether the defendant, by assuming his status or performing his role in a particular manner, gave rise to the events that produced the plaintiff's injury. \textit{See} Rintala, \textit{supra} note 153, at 84-89. The defendant's failure to meet public expectations that are considered deserving of legal protection may form the substantial causal connection necessary for liability to attach. The plaintiff, however, must be able to identify the defendant who caused the harm.
  \item \textsuperscript{176} The idea that law should be a means to social ends in large part stemmed from a belief that by placing paramount importance on societal interests, courts would be providing for "the greatest total of interests or to the interests that weigh most in our civilization, with the least sacrifice of the scheme of interests as a whole." Pound, \textit{A Survey of Social Interests}, 57 HARV. L. REV. 1, 39 (1943). Support of legal realism arose at the end of the 19th century. As a result, legal limitations were placed upon the formerly unbridled freedom to contract. For example, statutes were passed which required wages to be paid in money instead of fungible goods. \textit{See} \textit{id}. at 38.
\end{itemize}
The focus of legal thought shifted from the determination of individual rights to judicial decision making. Whereas natural law was oriented towards establishing permanent rights and rules, legal realism was concerned with methodology. This shift in focus can be attributed, in part, to the changing role of American courts in addressing the problems of industrialization. The courts were confronted with increasingly complex cases as a result of new legal issues arising from industrialization. In this transitory period, American courts were re-analyzing many of the time-honored societal maxims. The courts reexamined not only earlier rules and precedents but also fundamental documents such as the Constitution. The interpretation of precedents, as well as the interpretation of the Constitution, varied greatly from case to case. American lawyers found it difficult to discover and describe the rules of historical jurisprudence upon which the courts based their decisions. Thus, decisions had the effect of eroding case law precedents. As the courts promulgated new law in politically controversial areas, difficulties increased.

Legal realists were skeptical of natural law because of its inability to describe the courts' process. These jurists argued that natural law had gone

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177. The focus of legal realism is on analysis of process and procedure rather than on substantive legal rights. See Llewellyn, Some Realism About Realism, 44 HARV. L. REV. 1222 (1931) (discussion of the points of departure of legal realism from traditional inquiries into substantive law). One recent commentator remarked that the most significant impact of legal realism on modern legal education is "a widely shared skepticism about the value of learning substantive 'rule' or 'principles'. . . ." G. E. White, Tort Law in America 63 (1980) [hereinafter cited as WHITE]. See also K. LLEWELLYN, THE COMMON LAW TRADITION 508-18 (1960) (discussion reemphasizing that realism is nothing more than a method or process of analysis). See generally R. Pound, 2 JURISPRUDENCE 349 (1959); W. Rumble, American Legal Realism (1969) [hereinafter cited as Rumble]; Hart, American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream, 11 GA. L. REV. 969 (1977) [hereinafter cited as Hart].

178. The process of judicial decision making advocated by legal realists includes a systematic reexamination of the basis for legal rules, rather than a blind application of the rules without concern for whether the circumstances justifying the creation of the rule continue to justify its existence. See supra note 21 (Holmes advocates historical inquiry to determine the original rationale behind the rules). See generally K. Llewellyn, Jurisprudence, Realism in Theory and Practice (1962) [hereinafter cited as Llewellyn].

179. Pound commented on the two schools of thought. One viewed law as a system designed to advance individual freedom; the other thought "of law not negatively as a system of hands off while individuals assert[ed] themselves freely, but positively as a social institution existing for social ends." Pound, supra note 21, at 197. The latter school of thought was deemed the better approach as the courts found themselves facing new legal questions resulting from industrialization. These new legal issues were answered inadequately because of earlier ingrained views of the role of the courts.

180. See Hart, supra note 177, at 976-97.

181. See generally Llewellyn, supra note 178.

182. As new issues were raised, courts began to realize that they could not blindly apply "rules and doctrines apart from the economic and social history of their time." Id. at 213.

183. See generally Rumble, supra note 177.

184. Legal realists criticized the "traditional" approach to law for failing to explain the nature and operation of the legal system. Gilmore, Legal Realism: Its Cause and Cure, 70 YALE L.J. 1037, 1039 (1961) [hereinafter cited as Gilmore]. Indeed, the primary fault found with other
astray because it had taken a doctrinal approach to jurisprudence in concentrating on rules articulated in court decisions. According to legal realists, the natural law theorist’s search for uniform rules was erroneous because judges actually decided cases according to their own political and moral beliefs. One commentator remarked that the “bias of realism was anti-conceptual, anti-doctrinal,” and that natural law encouraged the use of generally stated rules of law that concealed, rather than explained, the bases of judicial decisions. By focusing on the intellectual and psychological process of judicial decision making, legal realists believed they were more accurately defining the law.

Legal realism was augmented by another legal philosophy known as legal positivism. Legal positivism stood for the tenet that law was created by political superiors and could not be discovered through moral principles. Proponents of legal positivism denied the existence of any self-evident or inherent principles.

Legal theories was their focus upon the decisions rather than the method by which they were reached. Legal realists believed that cases should be decided exclusively on the facts of the case at bar and not on the basis of rules formulated under circumstances that no longer existed. Accordingly, legal realists viewed precedent as “simply a gimmick by which clever judges fool other people and stupid judges occasionally fool themselves. The study of doctrine—of rules of law—[was thought largely to be] sterile and absurd.”

In concentrating on precedent, the legal system became increasingly out of touch with the prevailing popular notions of justice. Consequently, the decisions reflected a divergence between legal concepts and popular concepts regarding the role of the courts. See Pound, The Need of a Sociological Jurisprudence, 19 Green Bag 607 (1907). To correct this deficiency in the judicial system, legal realists advocated a study of these rules. They considered not only how the rules developed and evolved, but also the social effects of such rules and the societal objectives advanced by their application. See Pound, The Scope and Purpose of Sociological Jurisprudence (pts. 1 & 2-3), 24 Harv. L. Rev. 591 (1911), 25 Harv. L. Rev. 140, 489 (1912).

See J. Frank, Law and the Modern Mind (1930) (the “law” is divided into two spheres: “actual law,” or already decided cases, and “probable law,” or a prediction as to the consequences of any given action). For a discussion of basic legal definitions according to one realist, see generally Llewellyn, A Realistic Jurisprudence—The Next Step, 30 Colum. L. Rev. 431 (1930).


Holmes contended that principles develop and change as society changes. Rather than adhere to principles developed in an earlier time, he suggested that “our only interest in the past is for the light it throws upon the present.” O. W. Holmes, The Path of The Law in Collected Legal Papers 167, 194-95 (1920). By placing precedent in proper perspective, the legal realists sought to create a legal system that was better able to cope with the complexities of a modern society unfettered by the constraints of existing rules. See Gilmore, supra note 184, at 1039. In contrast, natural law theorists argue that the one principle that is self-evident in law is that of morality; all law must be grounded in some moral principle.

Professor H.L.A. Hart, a strong proponent of positivism, maintains that a legal system does not lose its “legal character” because its laws do not reflect a component of morality. See Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958). Hart was criticized, however, by Professor Lon Fuller, who, in response to Hart’s assertion that the Nazi regime constituted a legal system, replied: “To me there is nothing shocking in saying that a dictatorship which clothes itself with tinsel of legal form can so far depart from the
as natural law had insisted, but rather were purely an application of man-
made law.\textsuperscript{190} This manmade law first was promulgated by the state
legislatures, and then by the courts, to contend with societal wants and needs
in particular situations.\textsuperscript{191} Legal positivism became the philosophical corner-
stone for the social utilitarian—what was good for society as a whole was
right and just.

The combination of legal realism, legal positivism, and the common law
notions of status largely have been responsible for modern day product
liability law.\textsuperscript{192} The realists' and positivists' insistence on the satisfaction of
the needs of such societal groups as consumers, employees, and tenants over-
rode the natural law theorists' insistence on the protection of individual rights
and the doctrine of fault.\textsuperscript{193} The combination of status law principles and
the legal philosophies of realism and positivism eventually led to the elimina-
tion of cause in fact in certain situations. This combination influenced judicial
decisions in that courts began to determine and prioritize society's needs.

\textbf{The California Cases}

In certain situations, the three forces of status liability, legal realism, and
legal positivism have been stronger than doctrines that protect the individual.
The California cases of \textit{Ybarra v. Spangard},\textsuperscript{194} \textit{Summers v. Tice},\textsuperscript{195} and \textit{Haft v. Lone Palm Hotel},\textsuperscript{196} represent instances where the forces of individualism
were overcome and the burden was shifted to the defendant to demonstrate
the absence of cause in fact. Before analyzing these cases, the type of cause
in fact problem considered by the California courts must be understood.
Courts had defined cause in fact to mean that the defendant's action was
a material element and a substantial factor in bringing about the plaintiff's
injury.\textsuperscript{197} Yet, this definition was not suitable when courts were confronted
with situations where there were potentially multiple causes of the injury.

\begin{itemize}
  \item morality of order, from the inner morality of law itself, that it ceases to be a legal system."  
  \item In the area of torts, White notes that the legal realists did not believe that there were
certain immutable principles reflected in the cases. "For the Realists [tort law] was seen as
a collection of individual claims linked, if at all, by the interests they affected, or the social
policies they tested, or perhaps, the analytical inquiries they regularly posed."  \textit{White, supra}
note 177, at 111.
  \item The realist rejected, however, any notion that his law embodied universal principles.  
  \textit{Id.} at 112.
  \item Although products liability law did not fully emerge until after World War II, White
finds its origin in the realism movement of 1910-1940.  \textit{Id.} at 168-73.
  \item \textit{Id.} Although the various forces may be labelled differently, the broader implications
of realism, positivism, and sociological jurisprudence movements have been demonstrated by
the reliance and focus on manmade law.
  \item 25 Cal. 2d 486, 154 P.2d 687 (1944).
  \item 33 Cal. 2d 80, 199 P.2d 1 (1948).
  \item 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970).
  \item See \textit{supra} notes 62-63 and accompanying text.
\end{itemize}
but only one cause in fact produced the injury.\textsuperscript{198} One commentator argued that in these types of factual situations, a cause in fact determination became a matter of strict conjecture.\textsuperscript{199}

An example of this type of factual scenario was presented in \textit{Summers v. Tice}.\textsuperscript{200} In \textit{Summers}, three men were hunting quail. The men spread out in a line to flush out the quail, but the plaintiff on the right inadvertently moved ahead of the other two hunters. The defendant on the far left roused a quail which flew towards the plaintiff who unknowingly had moved ahead. Both defendants fired and the plaintiff sustained injury to his right eye from the shot of one of the defendants' guns.\textsuperscript{201} Contrasted with a typical multiple cause case where both of the defendants' actions contribute to the injury, in \textit{Summers} only one of the defendants' shots caused the plaintiff's injury. The plaintiff was unable to prove which defendant's shot struck him because both defendants had fired simultaneously and were using the same type of gun and cartridge.\textsuperscript{202}

The \textit{Summers} case presented a new analytical problem: How does a plaintiff proceed to establish liability when there are multiple possible defendants, only one of whom was the cause in fact of the injury? The defendants in \textit{Summers} moved for a directed verdict because the plaintiff could not prove which of the defendants' actions was the "but for", or the \textit{sine qua non}, of the plaintiff's injury.\textsuperscript{203} Nor could the plaintiff prove that one of the defendants' acts standing alone was a "substantial factor" in bringing about the plaintiff's injury.\textsuperscript{204} Because the plaintiff shouldered the burden of proving cause in fact, and could not meet it, defendants argued that they were absolved from liability.

The California Supreme Court did not agree with the defendants'
arguments and, instead, shifted the burden of proof to the defendants.\textsuperscript{205} In shifting the burden, the court did not rely on a probability theory to ascertain whether the defendants were the cause in fact of plaintiff's injuries.\textsuperscript{206} Rather, the court carved out an exception to the cause in fact requirement on the following grounds: where both defendants were wrongdoers and the plaintiff is unable to prove which defendant caused the injury, the burden of proof shifts to the defendants.\textsuperscript{207} Once the burden is shifted, the court gives each defendant the opportunity to prove he was not the cause in fact of the injury.\textsuperscript{208} The California court essentially shifted its emphasis from that of protecting the "innocent until proven otherwise" defendant to protecting the innocent, injured plaintiff.

One commentator of Summers queried whether a court could stand idly by to watch "two wrongdoers . . . pass the ball of legal responsibility back and forth between themselves while the outraged victim stands helplessly on the sideline."\textsuperscript{209} Other commentators of the Summers decision predicted that this shifting of the burden would extend to situations in which the defendant had a greater ability than the plaintiff to prove the cause in fact of the injury.\textsuperscript{210} These sentiments indicate a perceived willingness in the legal community to alter the requirement of cause in fact when presented with compelling circumstances.

If the factual situation of Summers were confronted by a jurisdiction whose courts favored the maxims of individualism, the courts would reason that the plaintiff was responsible for choosing his hunting partners and therefore, he took the chance that his fellow hunters would not be careful and prudent. Plaintiff, in a sense, bore the risk of injury by electing to hunt with them. Defendants would only be responsible if they contracted to bear the responsibility, intended the harm, or were identified by the plaintiff as the wrongdoer who brought about his harm.

Other societal forces support shifting the burden of proving cause in fact to the defendant. The realist would view the need to protect society from negligent hunters as overriding the need to protect the individual's right to hunt from intrusion by the state. Because hunters use deadly weapons, society may demand that hunters be more responsible for their actions.\textsuperscript{211} Gun safety

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\item \textsuperscript{205} \textit{Id.} at 86, 199 P.2d at 4.
\item \textsuperscript{206} \textit{Id.} at 84, 199 P.2d at 3.
\item \textsuperscript{207} \textit{Id.} at 86, 199 P.2d at 4.
\item \textsuperscript{208} \textit{Id.} at 88, 199 P.2d at 5.
\item \textsuperscript{209} Malone, supra note 16, at 83.
\item \textsuperscript{211} See Davison v. Flowers, 123 Ohio 91, 174 N.E. 137 (1930) (defendant had duty to plaintiff hunting companion to exercise ordinary care in handling a loaded gun); Winas v. Randolph, 169 Pa. 606, 32 A. 622 (1895) (members of hunting party each had a duty to guard against accidental discharge of weapons); Inbau, \textit{Firearms and Legal Doctrine}, 7 Tul. L. Rev. 529, 551-55 (1933) (courts have adopted a flexible approach in assessing liability in negligent hunter cases).\end{itemize}
is a high priority in society, and therefore, the need for accountability of hunters as a class is great. These considerations most probably had an impact in overriding the cause in fact requirement, although they were not articulated by the *Summers* court.

A California case that was decided prior to *Summers*, had also taken exception to the cause in fact element. In *Ybarra v. Spangard*,\(^{212}\) the plaintiff underwent surgery to have his appendix removed. Prior to the operation, he was anesthetized. After the operation, plaintiff developed paralysis in his right arm and atrophy of the muscles of the right shoulder and arm.\(^{213}\) The plaintiff sued all the doctors, nurses, and technicians involved in the operation. Because the plaintiff had been unconscious during the operation, he was unable to prove which defendant's negligence was the cause in fact of his injury.

The court determined the question of negligence by applying the doctrine of res ipsa loquitur.\(^{214}\) In analyzing the case under the res ipsa loquitur doctrine, the court agreed with the plaintiff that the instrumentality of the operation had been in the collective control of the defendants, the injury was of a type that ordinarily occurred as a result of negligence, and the defendants were in a better position to know what had occurred than the plaintiff.\(^{215}\) Finding that these basic elements of res ipsa loquitur were satisfied, the court permitted the plaintiff to recover from all defendants.

*Ybarra*, although often cited for its application of the res ipsa loquitur doctrine, also presented a cause in fact problem\(^{216}\) in that both the specific act of negligence and the actor or causal agent who in fact caused the negligence were unknown. The cause in fact issue, however, was not directly

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213. *Id.* at 488, 154 P.2d at 688.
214. Res ipsa loquitur is a judicially created doctrine that enables a plaintiff to establish an inference of negligence without proving that the defendant was the cause in fact of the injury. To invoke the doctrine of res ipsa loquitur:
   (1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence;
   (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
   (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.
216. *See* Adamson, *supra* note 214, at 1045-47 (many unanswered questions as to the facts of the case, and the jury deliberation process was subject to speculation).
addressed by the *Ybarra* court. Perhaps the rationale which later governed *Summers* was implicit in the reasoning in *Ybarra*. In both cases, all known defendants were joined in the action, and the injury was of a sort that ordinarily occurred only as a result of negligence. Yet, in contrast to the *Summers* situation where all defendants were deemed wrongdoers, some, if not a majority, of the *Ybarra* defendants may have acted without negligence. It is also possible that the person at fault in *Ybarra* was not named as a defendant. An employee of an independent contractor, working outside the scope of his employment, may have been the cause in fact. This possibility was not accounted for by the *Ybarra* court. Rather, the *Ybarra* court imposed upon all named defendants the burden of proving absence of cause in fact and negligence.

These burdens of proof were shifted to the named defendants because of the likelihood that they were responsible despite plaintiff's inability to identify and connect them to his harm.

The forces of status liability are easily recognizable in *Ybarra*. The medical profession has assumed a position, a certain status in society, that imposes a duty (and concomitantly more of a burden) of accountability to the individuals it serves. The medical profession's special role in society requires that it be held to a higher standard of care.

The automatic imposition of a higher standard of care is not free from criticism, however, in light of the different defendants involved in *Ybarra*. Although the nurses and technicians are an essential component of the medical profession, they undoubtedly have a different relationship with the patient than the doctor does. The nurses and technicians are generally less responsible and less knowledgeable than the attending physician. Furthermore, they are directed by and subordinate to the physician. *Ybarra*, however, did not distinguish between the duties owed by each of the defendants or the status each defendant had with respect to the patient. Instead, the *Ybarra* court shifted the burden to all defendants to prove the absence of cause in fact.

The burden was shifted to the defendants in *Ybarra* because the status concept coincided with the demand of realism—that a strong societal need supersedes individual rights. The strong societal need involved was the protection of the helpless, unconscious patient-consumer. The *Ybarra* court summarized this need: "This . . . places upon them [the defendants] the burden of initial explanation. Plaintiff was rendered unconscious for the purpose of undergoing surgical treatment by the defendants; it is manifestly unreasonable for them to insist that he identify any one of them as the person who did the alleged negligent act."

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217. 25 Cal. 2d at 490-91, 154 P.2d at 690.
218. Id. at 492, 154 P.2d at 690.
219. This status relationship of physician-patient acquired special importance in *Ybarra* because the plaintiff patient was unconscious and was completely at the mercy of the physicians. Although the court did not explicitly refer to its decision as one based on status, it did note that the plaintiff's unconsciousness was perhaps the most compelling reason to extend the doctrine of res ipsa loquitur to these situations. Id. at 490-91, 154 P.2d at 690.
220. Id. at 492-92, 154 P.2d at 690.
221. Id. at 492, 154 P.2d at 690 (emphasis added).
CAUSE IN FACT

"number of those in whose care the patient is placed is not a good reason for denying him all reasonable opportunity to recover for negligent harm. It is rather a good reason for re-examination of the statement of legal theories which supposedly compel such a shocking result." 222

It should be noted that there is language in the Ybarra opinion that gives rise to the identification of a third force operating against individualism. That is, the court seemed to distrust the size and complexity of the defendant hospital. 223 It could be argued that the court held the hospital to a higher standard of care because its size and complexity might enable it to escape responsibility in certain circumstances. 224

Finally, the California Supreme Court in Haft v. Lone Palm Hotel, 225 raised an interesting issue concerning cause in fact. In Lone Palm Hotel, a father and his five year old son drowned in a pool where there was no lifeguard on duty. 226 The pool did not have adequate warnings concerning the depth and other dangers of the pool. 227 Because there were no witnesses to the drowning, no one could provide any substantial information concerning the cause of the accident. 228 Thus, it was unknown whether the Lone Palm Hotel's negligence or intervening acts of negligence caused the deaths. 229

Although it was clear that the Lone Palm Hotel was negligent in its failure to provide a lifeguard and its failure to sufficiently warn about the dangers of swimming in the pool, a causal connection between the hotel's negligence and the injury could not be established. The court considered the absence

222. Id. at 491-92, 154 P.2d at 690. The court noted that modern hospital care involves coordinated efforts by numerous persons who may have varying legal relationships with the defendant hospital. For example, hospital personnel may be viewed as either independent contractors or employees. But the court went on to state that it did not believe "that either the number or relationship of the defendants alone determines whether . . . res ipsa loquitur applies." Id. at 491, 154 P.2d at 690. All defendants, the court held, who had control over the plaintiff during any time of the operation would be liable notwithstanding their differing legal relationships with the defendant hospital. Id. at 491-92, 154 P.2d at 690.

223. Id. at 493-94, 154 P.2d at 691.

224. Id. The court hinted at this when it stated:

A hospital today conducts a highly integrated system of activities, with many persons contributing their efforts. There may be, e.g., preparation for surgery by nurses and interns who are employees of the hospital; administering of an anesthetic by a doctor who may be an employee of the hospital, an employee of the operating surgeon, or an independent contractor; performance of an operation by a surgeon and assistants who may be his employees, employees of the hospital, or independent contractors; and post surgical care by the surgeon, a hospital physician, and nurses.

Id.

225. 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970).

226. Id. at 761-63, 478 P.2d at 467-68, 91 Cal. Rptr. at 747-48.

227. Id.

228. Id. at 762, 478 P.2d at 467, 91 Cal. Rptr. at 747.

229. There might have been intervening negligence of the father for the son's death, or negligence of the son for the father's death. Each decedent could have been contributorily negligent for his own death. There may have been foul play or negligence on the part of some unknown swimmer. It could not be determined which of these possible persons or causes were the causes in fact of the deaths.
of a lifeguard to be the cause of the lack of an observer. The failure to provide a lifeguard was part of the negligence of the defendant because, presumably, if a lifeguard had been on duty, the cause of the accident would have been known. Furthermore, a lifeguard might have prevented the drownings. The court shifted the burden of proof to the defendant both because of the foreseeability of the harm resulting from the failure to have a lifeguard on duty and, also, because of the likelihood that a lifeguard could have proven the cause in fact.

The position of the Lone Palm Hotel court was essentially the same as that of Ybarra—the plaintiff only had to produce evidence that gave rise to an inference of the negligence which was the proximate cause of the injury. Such a rule clearly favors the plaintiff because the burden of proving causation is shifted once there is a determination of wrongdoing.

Other forces also were involved in the Lone Palm Hotel decision. The court stressed that the status of the defendant as a public pool owner imposed a higher duty. The realists' "needs analysis" also underlines the Lone Palm Hotel decision. The court, in a footnote, referred to Calabresi's cost benefit analysis that assigns liability to the party in the best position to distribute losses. This analysis comports with the realists' theory because the right of a person to be free from unwarranted intrusion is sacrificed to benefit the public good.

In summary, the emphasis on proximate cause in Summers, Ybarra, and Lone Palm Hotel, clouded the issue of cause in fact. In these cases, an examination of the causation issues was by-passed to reach the proximate cause issue. Essentially the blameworthiness, or the societal interest in prohibiting the defendants' particular negligence, was so strong that a cause in fact connection was viewed as unnecessary. The determination of proximate cause ostensibly de-emphasized the requirement of cause in fact. These decisions, therefore, are merely conclusions or determinations that impose legal liability upon the defendants. The rule, as evidenced by these cases, is that a prima facie case is made when a plaintiff produces evidence which simply infers wrongdoing or negligence, and this wrongdoing, even though not proved in fact to be causally connected to the injury, nevertheless may give rise to liability. The courts found no injustice in shifting the burden because

230. Id. at 771, 478 P.2d at 474-75, 91 Cal. Rptr. at 754-55.
231. Id. at 769, 478 P.2d at 472-73, 91 Cal. Rptr. at 752-53.
232. Id. at 772 n.18, 478 P.2d at 475 n.18, 91 Cal. Rptr. at 755 n.18.
233. Id. at 772, 478 P.2d at 475, 91 Cal. Rptr. at 755.
234. Id. at 773, 478 P.2d at 475-76, 91 Cal. Rptr. at 755-56.
235. Id. at 767, 478 P.2d at 471, 91 Cal. Rptr. at 751. The duty of the defendant pool owner was defined and imposed by statute. See Cal. Health & Safety Code § 24101.4 (West 1967) (Code required lifeguard service, and in the absence of such service, mandated that signs be posted that clearly indicated that no lifeguard was on duty).
236. 3 Cal. 3d at 775 n.20, 478 P.2d at 477 n.20, 91 Cal. Rptr. at 757 n.20. See generally Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499 (1961) (economic justifications for enterprise liability, loss allocation, and deep-pocket theories).
the defendants, in fact, were wrongdoers and were negligent in some way.

The Need for Corporate Accountability

The importance of the cause in fact requirement stems from the burden it places on the plaintiff to establish the minimal relationship between the injury and the defendant before the defendant is forced to raise a defense. Absent this minimal showing, the defendant has a right to be free from intrusion, and the plaintiff must bear his own loss. As previously discussed, plaintiff's burden arises from the philosophy of individualism which protects the individual defendant from the collective power of the state. In short, the individual's security, property rights, and right to be free from interference are protected by the cause in fact requirement.

Arguably, the need for the cause in fact element is diminished when the persons or entities allegedly committing a wrongdoing have strong economic power and, therefore, are better able to protect themselves. Although never articulated by the courts, there seems to be an increasing need for more accountability\(^{237}\) and a greater assumption of responsibility when the harm inflicted upon an individual can be traced, however tenuously, to a large, diversified, and powerful business defendant.\(^{238}\) When the state resolves a dispute with this type of defendant in mind, it becomes, through the exercise of judicial power, the protector of the individual plaintiff's right to be free from harm and intrusion. Indeed, when dealing with this type of defendant, individuals may be better protected when the cause in fact requirement is overlooked.\(^{239}\)

The large publicly held corporation is a prime example of an entity from which the individual plaintiff must be specially protected.\(^{240}\) Generally, the corporate entity is mistrusted in American society because, as a practical matter, corporations are managed primarily for the purpose of producing profits. This pursuit of profit may cause a corporation to have a less active

\(^{237}\) The need for corporate accountability is closely associated with the new status concept, discussed supra notes 154-75 and accompanying text. The common law policy of protecting the public from certain enterprises is a discernable undertone in modern concepts of status and corporate liability. The corporation is especially susceptible to this accountability because of its size, power, and complexity. See Tobriner & Grodin, supra note 152, at 1253 (due to critical services that these corporations provide and the superiority of their bargaining power, obligations flowing from status, rather than from contractual relations, are imposed). See also B. Wyman, Public Service Corporation § 1 (1911) ("free competition fails in some cases to secure the public good" and state control may be necessary); Arterburn, The Origin and First Test of Public Callings, 75 U. PA. L. REV. 411, 423 (1927) (economic conditions and monopolistic practices may give rise to imposition of a public duty upon a private enterprise). See generally F. Hall, The Concept of A Business Affected with a Public Interest (1940); Burdick, The Origin of the Peculiar Duties of Public Service Companies (pt. 1), 11 COLUM. L. REV. 514 (1911).

\(^{238}\) See infra note 242 and accompanying text.

\(^{239}\) See Stone, The Place of Enterprise Liability in the Control of Corporate Conduct, 90 YALE L.J. 1 (1980) [hereinafter cited as Stone].
"social conscience." In addition, the sheer size of the modern corporate entity affords it considerable economic leverage with which to pursue its objectives. The citizenry is left to rely on the legislature and the judiciary to impose a public duty upon the large, modern corporation to insure accountability. Because a corporation is more powerful than an individual

241. Stone remarks that "more and more it is [corporations] ... who produce, pollute, [and] swindle . . ." Id. at 27. Stone also criticizes the size of governmental bodies and their corresponding tendency to become wasteful and antagonistic toward social progress:

Such mischief as these non-business institutions threatened is neither more confined nor more controllable because it is not motivated by profit. A mismanaged pension fund can sadden as many lives as a mismanaged assembly line. Government bureaus motivated by various "policy reasons" have committed any number of acts that were not nice, and some that were illegal. And in the name of science, things have been done that greed would shrink from.

Id. at 2.

242. See Tobriner & Grodin, supra note 152, at 1243 (public duties should be imposed upon corporate enterprises). Stone suggests that different tort principles be applied to the corporation:

The law grew up around notions of what was possible, effective, and just in the control of ordinary human beings in ordinary, extra-institutional contexts. As corporations came to assume an increasingly prominent role in social activity, the law, by the simple device of deeming them "persons," fitted corporations into the pre-existing system for the control of misconduct. But the value of these borrowed approaches is becoming more and more suspect as applied to modern complex bureaucratic organizations and to those who labor within them. Hence, some re-evaluation is in order of the premises and techniques that underlie our efforts to control corporate conduct.

Such a reevaluation demands that we accord the control of corporate organizations the concentrated attention of an independent field of law. This requires us to be prepared, on the one hand, to recognize the fundamental differences between formal organizations and ordinary persons, and, on the other, to appreciate the significant features that the several organizational types possess in common, and on which a comprehensive approach to corporate control must build. An article such as this, which singles out business corporations for sustained consideration, can provide at best a prolegomenon to the creation of the necessary model. Nevertheless, at least two insights of common and considerable significance can be gleaned from the discussion.

First, it seems evident that, of all the types of corporate bureaucracy that the law may seek to discipline, the business corporation is most appropriately suited to the technique of enterprise liability. Ideals of acceptable social conduct are conveniently transmitted in monetary signals that the business organization can translate, in turn, into its native tongue, the language of profits and losses. The approach has the further advantage of entrusting to the superior expertise of the enterprise participants the task of putting their own house in order. Yet even as applied to the business corporation, where we can expect them to work best, enterprise liability measures, with their "black box" respect for interior relationships, have their limits. In some circumstances, it becomes necessary to replace or reinforce enterprise liability with various interventionist techniques that restrict the autonomy of the participants . . .

Second, the selection of techniques cannot be implemented with tunnel vision. The aims that are sought through one technique—say, criminal penalties against agents—can be undone by independent techniques such as indemnification of the agent under state codes. The most rationally calculated threats against the enterprise can be mocked by bars to judgment, such as limited liability in the case of the business corporation. What is required is an imaginative coordination of the
plaintiff and because a corporation's purely economic motives are sometimes suspect, the courts may not feel troubled in calling upon a corporation to bear the burden of disproving cause in fact.

Upon closer analysis, however, this argument is insufficient to cause the burden to shift. Although the corporation is viewed as an economic entity with considerable power, those affected by this requirement of a higher standard of accountability are the individual shareholders who will suffer diminished returns on their investments and the individual consumers who will pay higher prices. The shareholders and consumers, however, are removed from the concerns of the injured individual and will provide little incentive for greater corporate accountability. Moreover, the fact that there are many shareholders and consumers to bear the burden makes the burden less oppressive to the defendant corporation. Basically, the corporation can distribute the burden of increased corporate accountability to society as a whole.

Nonetheless, in products liability cases, the force for greater corporate accountability adds to the impetus against the cause in fact requirement. This force must be of sufficient strength to justify a finding of liability even though an element of fault or wrongdoing is tenuous. Rather than searching for the agent of the wrongdoing, as in Summers, Ybarra, and Lone Palm Hotel, products liability cases focus instead on the defective product.\(^3\) Proof of cause in fact becomes secondary to enforcement of the duty of a manufacturer to produce a safe product for the consumer. In a products liability case liability may be imposed even though the defendant manufacturer had neither actual nor constructive knowledge of the defect. The manufacturers, for instance, may lack the ability to know or discover the defect and still be liable. Yet this "innocence" does not protect the defendant. On the contrary, the burden may shift because of the particular characteristics of the defendant. Sindell v. Abbott Laboratories\(^4\) illustrates the extent to which this imposition of a higher corporate accountability on a publicly held corporation has facilitated the erosion of the plaintiff's burden to prove cause in fact.

Sindell v. Abbott Laboratories

In Sindell, the plaintiffs were the daughters of women who had taken the drug DES around 1947 to help avoid miscarriage during pregnancy.\(^5\) DES was first marketed in 1941 and continued on the market until 1971.

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\(^{244}\) 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980).

\(^{245}\) Id. at 593 n.1, 607 P.2d at 925 n.1, 163 Cal. Rptr. at 133 n.1.
During this time, the drug allegedly was never tested for its effectiveness in helping to prevent miscarriages. In 1971, however, the Food and Drug Administration determined that DES contained a carcinogenic substance which was linked to cancerous growths in the daughters of the women who had taken the drug.

The major hurdle confronting the plaintiffs in *Sindell* was the determination of the cause in fact of their injury—which drug company sold the DES to each individual’s mother. This determination proved insurmountable for the plaintiffs. Over two hundred manufacturers of DES existed in 1947, and any evidence of the specific sales of DES to the plaintiffs’ mothers had long since been discarded. Additionally, many of the manufacturers that were in the market in 1947 were either bankrupt or beyond the court’s jurisdiction. A final problem was that the DES manufactured by one company was indistinguishable from another company’s DES in that DES was simply a chemical mixture with little or no variation in the manufacturers’ final product. Indeed, the plaintiffs in *Sindell* admitted their inability to determine which company’s product was the cause of their injury.

The Supreme Court of California held that the plaintiffs did not have to plead and prove the cause in fact element. In approaching “the issue of causation from a different perspective,” the court held that the defendants would be liable to the extent of their share of the market if the named defendants collectively comprised a substantial “share” or “percentage” of the DES market. The court did not specifically define what constituted a “substantial share” of a market, but noted that it had no difficulty

246. The plaintiffs alleged in their complaint that DES was never tested, although the Supreme Court of California failed to comment on this assertion of fact. *Id.* at 595, 607 P.2d at 926, 163 Cal. Rptr. at 134.

247. *Id.* at 594, 607 P.2d at 925-26, 163 Cal. Rptr. at 133-34.

248. *Id.* at 593-94, 607 P.2d at 925, 163 Cal. Rptr. at 133.

249. The plaintiff Sindell was a cancer victim who had a malignant bladder tumor. *Id.* at 595-96, 607 P.2d at 926, 163 Cal. Rptr. at 134. The plaintiff class represented a group of women residents of California who had been exposed to DES before birth, regardless of whether they knew of that fact. *Id.* at 593 n.1, 607 P.2d at 925 n.1, 163 Cal. Rptr. at 133 n.1.

250. *Id.* at 611-12, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45.

251. *Id.* at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

252. *Id.* at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.

253. *Id.* at 611, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45.

254. *Id.* at 596-97, 607 P.2d at 926, 163 Cal. Rptr. at 134.

255. *Id.* at 611, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45.

256. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

257. *Id.*

258. The court rejected the proposal set forth in one article that a “substantial market” be comprised of at least 75-80% of the market. Comment, *supra* note 12, at 996-97. By doing so, the court seemed to adopt a more flexible approach in determining what constitutes a substantial share. Considering that each industry has peculiar business aspects which might preclude any hard and fast rule of defining “substantial share,” the court’s refusal to adopt any fixed percentage was probably realistic and warranted. The *Sindell* court’s approach permits a case-by-case analysis of each industry in determining what constitutes a substantial share or percentage of the market.
in holding the named DES manufacturers liable because collectively they constituted ninety percent of the market.259

In Sindell, unlike Summers, there was no claim that all possible individual defendants who could have caused the injury were joined. There was, therefore, a possible causal gap in that the defendant who was the cause in fact of the injury may not have been among those joined in the lawsuit.260 It was also possible that the company that had been the cause in fact of the plaintiffs' injuries in Sindell was bankrupt and that the plaintiffs would not have recovered even if the precise cause in fact of their injury could have been determined.

The California court considered a number of theories to obviate the cause in fact element. It first considered the Summers reasoning that where all possible defendants are joined and are in some way negligent toward the plaintiff, the burden shifts to the defendants.261 Under the Summers rationale, the plaintiff would not be required to isolate the responsible defendant. Not all possible defendants, however, were joined in Sindell. In addition, in Summers there was a fifty percent chance that one of the two hunters was responsible, whereas in Sindell, there was, at best, only a one in two hundred chance that a particular defendant was liable. Because of these distinctions, the Sindell court rejected the Summers case as controlling.262

The Sindell court next considered the argument made by the plaintiffs that the defendants should be held liable under a concert of action theory.263

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259. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.
260. In Ybarra, there may have been possible intervening agents who were not hospital employees and, therefore, not named in the complaint. Similarly, in Lone Palm Hotel there may have been unknown but potential defendants involved in the pool accident who had not been joined. See supra notes 213-14 & 226-34 and accompanying text.
262. 26 Cal. 3d at 599-602, 607 P.2d at 928-31, 163 Cal. Rptr. at 136-39. See infra text accompanying notes 203-08.
263. Id. at 603, 607 P.2d at 931, 163 Cal. Rptr. at 139. The concert of action theory permits the imposition of liability where the defendants, pursuant to a tacit understanding or other cooperative behavior, act in unison to injure the plaintiff. See Comment, supra note 12, at 978-85; Note, Beyond Enterprise Liability in DES Cases—Sindell, 14 IND. L. REV. 695, 700 (1981). Mere knowledge of the actions of other defendants may be sufficient to infer liability under this theory, which evolved from the criminal law regarding conspiracy. See PROSSER, supra note 2, § 46, at 292. Cf. State v. Newberg, 129 Or. 564, 278 P. 568 (1929) (defendant who held spotlight while co-defendant fired fatal bullet was guilty of involuntary manslaughter). An illustrative tort situation in which the theory has been applied is that in which two automobile drivers, without express agreement, commence to drag race their cars. Both drivers are liable for any injury to third persons where it is impossible to determine which driver actually caused the injury. See Bierczynski v. Rogers, 239 A.2d 218 (Del. 1968). This theory also has been applied in situations in which apportionment of injury was difficult and defendants had knowledge of each other's conduct. See, e.g., Velsicol Chem. Corp. v. Rowe, 543 S.W.2d 337 (Tenn. 1976) (since several companies caused chemical pollution rendering it impossible to apportion the wrongfulness of each defendant, all the defendants may be held equally liable); Mitchell v. Gilson, 233 Ga. 453, 211 S.E.2d 744 (1974) (holding both doctors liable where one attempted to cure injury caused by the other's malpractice without disclosing source of the injury to plaintiff). The Sindell court rejected an application of this theory due to the insufficiency of
Plaintiffs alleged that defendants (1) had failed to adequately test DES or give sufficient warnings of the dangers of the drug, (2) erroneously relied upon the tests performed by other drug manufacturers, and (3) took advantage of one another's marketing and promotional techniques. The court, however, viewed such allegations as insufficient to support a concert of action charge since plaintiffs did not allege that there was a tacit understanding or a common plan among the defendant manufacturers. The proof of a collective wrongdoing by the DES manufacturers was simply not present in the case.

Third, the court examined the enterprise liability theory relied on in Hall v. E.I. DuPont de Nemours & Co. In DuPont, thirteen children were injured by blasting caps in twelve separate incidents between 1955 and 1959. The defendants were six American blasting cap manufacturers who virtually comprised the entire blasting cap industry. It was possible, however, that a Canadian blasting cap company may have been the cause of some of the injuries. The DuPont court discerned that if the defendants operated through an association in their safety and warning procedures, then the defendants jointly controlled the risks and could be liable as an enterprise. Proof that one of the blasting caps that caused an injury was manufactured by one of the defendants in the association would impose liability on all defendants. The Sindell court rejected the DuPont rationale because of the disparity in the number of possible defendants and because the plaintiffs could not prove that the drug companies acted collectively as an enterprise by jointly controlling the risks.

Each of these theories examined by the Sindell court emphasizes the lack of any traditional means to establish responsibility in a case where cause in fact cannot be proved. The plaintiffs could not establish a specific causal

the evidence to support the existence of a tacit agreement among the defendants. 26 Cal. 3d at 604-06, 607 P.2d at 932-33, 163 Cal. Rptr. at 140-41.
264. Id. at 604, 607 P.2d at 932, 163 Cal. Rptr. at 140.
265. Id. at 605, 607 P.2d at 932-33, 163 Cal. Rptr. at 140-41.
266. 345 F. Supp. 353 (E.D.N.Y. 1972). According to the theory of enterprise liability, the plaintiff only need demonstrate that all the defendants, owing a duty of care to the plaintiff, manufactured a generically similar defective product based upon an industry-wide standard of safety, and that the source of the product which caused the injury cannot be identified. See Comment, supra note 12, at 995-1006; Note, Industry-Wide Liability: Solving the Mystery of the Missing Manufacturer in Products Liability Law, 38 WASH. & LEE L. REV. 139, 140 n.5. (1981). Unlike the concert of action theory, the plaintiff need not show the existence of a tacit understanding or knowledge on the part of the defendants. See supra note 263.

The theory of enterprise liability was first applied in Hall v. E.I. Du Pont de Nemours Co., 345 F. Supp. 353 (E.D.N.Y. 1972). In invoking this theory, the DuPont court referred to the fact that the case involved only six companies. Id. at 357. Because Sindell involved over 200 defendants, the Sindell court refused to rely on this theory. See infra text accompanying note 271.
267. 345 F. Supp. at 359.
268. Id.
269. Id.
270. Id. at 376-78, 386.
271. 26 Cal. 3d 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.
connection between a particular defendant and the injuries. There was no allegation that any specific defendant contributed to the injury, but only that each defendant contributed to the market by producing DES. Because it was virtually impossible for the plaintiffs to bear the burden of proving cause in fact, the court refused to impose such a burden. Instead, the Sindell court adopted a market share liability theory,\(^2\) holding that each defendant would be liable to the extent of its share of the market once manufacturers controlling a substantial portion of the market had been joined as defendants.\(^3\) The Sindell court held for the plaintiffs largely on grounds of public policy: as between an innocent plaintiff and a defendant manufacturer, the defendant should, and is better able, to bear the cost of injury to the plaintiff.\(^2\)

Realism was a driving force underlying Sindell. An estimated three million women\(^2\) whose mothers took DES were potentially in need of protection. Yet, at least theoretically, the drug manufacturer is not “at fault” in a product liability action unless proved otherwise. Both parties initially should be “innocent” in the eyes of the court. Despite the need for protection of possible innocent individual defendants, the nature of the defendants’ business in Sindell accounted for the court’s decision to switch the burden and, ultimately, to hold each defendant liable.\(^2\)

Perhaps if the defendants in Sindell had been sole proprietors or closely held corporations, the court would not have shifted the burden. Defendants in Sindell such as Abbott Laboratories, Eli Lilly & Co., and the Upjohn Company obviously did not fit into these categories. It could be argued that the court chose to protect the individual from the power of the collective forces of the defendants\(^2\) because the individual consumers were more helpless, innocent, and unprotected than the public corporations which profited from the sale of DES. Furthermore, the burden shifted because the defendants could more easily spread their losses.\(^2\)

Another consideration underlying the court’s decision was that the drug industry has a special responsibility to the modern consumer.\(^2\) As drug manufacturers, the defendants were quasi-medical entities which entered the marketplace purporting to relieve the sufferings of others. This status gave

\(^{272}\) Id. at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

\(^{273}\) Id.

\(^{274}\) Id. at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144.


\(^{276}\) 26 Cal. 3d at 611-13, 607 P.2d at 637-38, 163 Cal. Rptr. at 145-46.

\(^{277}\) See Tobriner & Grodin, supra note 152, at 1251-55. In one DES suit, the plaintiff named individual pharmacists as co-defendants but these defendants were dismissed. Bichler v. Willing, 58 A.D.2d 331, 397 N.Y.S.2d 57 (1977). The claims against the pharmacists in Bichler were dismissed because the pharmacists did not alter the product in any material way and had no reason to know that the product was harmful. Id. at 333, 397 N.Y.S.2d at 59.

\(^{278}\) 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.

\(^{279}\) Id.
rise to the imposition of a higher level of accountability, and manufacturers appropriately should bear the cost of the injury. Furthermore, the complexities of modern production and marketing techniques make increasingly common a situation where an innocent consumer of a drug is unable to identify the specific producer. In the Sindell court's view, courts may either adhere rigidly to prior doctrine requiring cause in fact and thus deny recovery to a Sindell-type plaintiff or modify traditional notions of causation to meet new and challenging tort situations. Clearly, the Sindell court favored change, and as a result, the rationale supporting the cause in fact requirement—protection of the individual from intrusion by the state—clearly was violated.

The reaction to the Sindell decision has been varied. On the one hand, there has been approval of Sindell's fulfillment of the societal need that seemed to require someone other than the injured to bear the loss. It could be argued, however, that the fundamental natural law of individual rights has been violated because the shifting of the burden has occurred without any requirement on the plaintiff to prove that the defendant was the cause in fact of the injury. In effect, the defendant can be held liable because of its mere association with a particular product. This criticism is related to a perceived decline of Puritanism and the philosophy of social contract. Perhaps this criticism of the court's decision is also based on the fear of the decline of the deep-rooted tradition which underlies cause in fact and much of common law torts. Sindell also could be feared as signalling the simultaneous rise of judicial and political activism in the affairs of the individual.

Finally, Sindell left unanswered the question of whether its holding could be applied to an individual defendant. The position that the requirement of cause in fact is not necessary even when the defendant is an individual might be subject to criticism from the legal realists and proponents of positivism. They might argue that the law of Sindell, thus interpreted, becomes a tool for the political and social ends of the particular judge to be used against an individual defendant. In their viewpoint, however, the law should be used for the political and social ends of society.

Further, a broad reading of Sindell would underscore the criticism of individualists in two ways. First, proponents would argue that the courts have become nothing more than "little legislatures," creating law to achieve their own perceived social objectives. Second, notwithstanding the validity of the above criticisms, the decisions of courts, absent the cause in fact require-

280. Id. at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.
282. See supra notes 176-91 and accompanying text.
ment to protect the individual defendant, become, at best, only a determination of the needs of society at a given point in time.

CONCLUSION

The controversy over the requirement of cause in fact raises the question of whether its foundation is weakening. The elimination of the element of cause in fact, or the removal of the burden requiring plaintiff's identification of the causal agent of the harm, clearly indicates changes in these forces. There is some question as to whether the Sindell court went too far. Still undecided is whether the common law, developed from principles of individualism, can withstand the strain. The answer depends, to a great extent, on future interpretation of the Sindell decision. If interpreted broadly, the adaptability of the common law to the new philosophy of market share liability will be tested.

If Sindell is interpreted narrowly as being only applicable to large publicly held corporations, then individualism will continue to be protected. However, a clearer definition of the specific characteristics of the defendant will be necessary. If a clearer definition is not forthcoming, or if the Sindell case applies to individual defendants, then much of the common law is truly shaken.

283. One commentator remarked on the evolution of common law principles and the decision making process:

[L]aw is a process of decision. Legal institutions are not autonomous entities. They are decisional agencies: part of a vast social process of value sharing and distribution. In this conception of law, power and authority are crucial terms since the pervasive issue is whether decisions are authoritative. Community expectations as to who is to make decisions, the scope of their authority, and the relevant procedures are integral to legal definition. Otherwise decisions, however controlling in fact, would not be law but rather exercises of naked power.

C. MURPHY, MODERN LEGAL PHILOSOPHY 70 (1978).

284. The failure to protect the corporate defendant, however, directly conflicts with the legal fiction of corporate personhood. A narrow interpretation of Sindell places extra risks on the large, publicly held corporation. A different tort standard—tending towards strict liability—is created by Sindell for the defendants that are public corporations. Yet, it is probably more appropriate to limit the Sindell rationale to public corporations because of the harshness in imposing this liability on individual defendants. See Stone, supra note 240, at 76-77.