

Hillsborough, }  
 Feb. 4, 1908. }

## BOUCHER v. LAROCHELLE.

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Where there is some evidence tending to establish negligence on the part of the defendant and the likelihood of its causing the injury complained of, the question of its weight is for the jury.

The rule that the jury cannot be permitted to determine by conjecture between two equally probable causes of injury, for one only of which the defendant is responsible, has no application unless the existence of a sufficient cause aside from the negligence charged is conceded or conclusively proved.

Where an injury complained of is the natural and probable result of the negligence charged, a wrongdoer cannot set up as a defence the bare possibility of loss if his wrongful act had never been done.

CASE, for causing the death of the plaintiff's intestate by the negligent administration of chloroform. Trial by jury and verdict for the plaintiff. The defendant moved for a nonsuit upon the ground that there was no evidence of the cause of death. The motion was denied, and he excepted. Transferred from the January term, 1907, of the superior court by *Peaslee, J.*

*Branch & Branch*, for the plaintiff.

*David W. Perkins* and *Cyprien J. Belanger*, for the defendant.

PARSONS, C. J. The defendant was employed to set a broken bone in the arm of the plaintiff's child, an infant of the age of seventeen months. For the purpose of the operation he administered chloroform, and before the operation was completed the child died. The plaintiff offered evidence tending to show that death may result from the negligent administration of chloroform and of the defendant's lack of care in administering it likely to produce this result. While the evidence was not without contradiction and was not entirely clear and convincing, it cannot be said there was not some evidence tending to establish each of these propositions. There being some evidence, the question of its weight was for the jury. It was for them to determine what amount or weight of competent evidence was sufficient or insufficient to convince their minds and warrant them in determining the matter of fact in dispute. *Deschenes v. Railroad*, 69 N. H.

285, 289; *Felch v. Railroad*, 66 N. H. 318, 323; *Fuller v. Rounceville*, 29 N. H. 554, 563, 564. From these facts, in the absence of other sufficient cause for the child's death, the jury could infer that the death resulted from the defendant's lack of care. There would be a direct and visible connection between the negligence charged and the injury complained of.

But the defendant contends that, conceding there was some evidence of the character stated, the conclusion that the death resulted from the negligence proved would be a mere surmise or conjecture, because it appeared from the evidence that the mere administration of chloroform to persons in a certain rare and obscure pathologic condition is sufficient to cause death, and that the fracture of a bone may cause a fatal embolism. The claim is that the death of the child may have been due to its condition, or may have been the direct result of the fracture; and that therefore the plaintiff failed to prove that the defendant's negligence was the cause of death. Using the word "proof" in the sense of demonstration to an absolute certainty, the defendant's contention could probably be sustained. No such burden rested on the plaintiff. He was not bound to exclude all possible causes of death. He was required only to make it more probable than otherwise that the fact was as he claimed it. The rule of *Deschenes v. Railroad*, 69 N. H. 285, that the jury cannot be permitted to determine by guess or conjecture between two equally probable causes of the injury, for one only of which the defendant is responsible, has no application unless the existence of a sufficient cause or causes for the injury, aside from the negligence charged, is conceded or conclusively proved.

Whether the child's condition was such that the mere administration of chloroform was a sufficient cause of the fatal result, or whether an embolism resulting from the fracture was the cause of the injury, are questions of fact upon which the case discloses little, if any, evidence. If there was evidence tending to establish either cause, it must be assumed in the present posture of the case that the jury were properly instructed as to its legal effect in the decision of the controversy submitted to them, if they found either contention sustained. It is common knowledge that death does not ordinarily follow the proper administration of an anesthetic, or immediately result from a fractured humerus. The defendant's motion for nonsuit could not be sustained upon the ground suggested, except upon the assumption that one or the other of these claims was conclusively proved by evidence which, in fact, went little farther than to suggest the possibility of their existence. The case is not one of a choice between two or more probable causes conceded to exist, but involves merely the power of

the jury to determine as matter of fact the non-existence of the causes which the defendant claimed, if existent, would render the cause of death doubtful.

Where the evidence discloses no connection between the injury and the negligence charged, except a bare possibility that the former resulted from the latter, there is nothing for the jury where it is also possible the injury may be due to other causes. *Deschenes v. Railroad*, 69 N. H. 285; *Dame v. Car Works*, 71 N. H. 407; *Reynolds v. Fibre Co.*, 73 N. H. 126. But where the injury is a natural and probable result of the negligence charged, a wrongdoer "cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done." *Davis v. Garrett*, 6 Bing. 716, 724; *Baltimore etc. R. R. v. Reaney*, 42 Md. 117; *Beauchamp v. Company*, 50 Mich. 163,—45 Am. Rep. 30. It was for the jury to determine what inference should be drawn from the fact that neither party secured or asked for an autopsy.

*Exception overruled.*

PEASLEE, J., did not sit: the others concurred.

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#### CUNNINGHAM v. C. R. PEASE HOUSE FURNISHING CO.

A tradesman who represents that stove polish sold by him may be safely used upon a hot stove is equally liable to the purchaser or to a member of his family, who is injured by an explosion of the compound.

One who purchases stove polish upon the representation that it may be safely used upon a hot stove, and is injured by an explosion of the compound, may maintain an action of deceit against the vendor if the representation was made with knowledge of its falsity, and an action of negligence if the statement, although honestly believed to be true, was made upon insufficient knowledge and without such an investigation as ordinary care demanded.

CASE, for personal injuries caused by an explosion of stove blacking. The declaration contained a count under sections 26 and 28, chapter 126, Public Statutes, and a count in negligence. A demurrer to the first count was sustained, and the question of the correctness of the ruling was reserved. There was a trial by jury upon the common-law count. At the close of the plaintiff's evidence a nonsuit was ordered upon the defendants' motion, and