

The Newspaper Wire Problem

See *Eitel v. Times, Inc.*, 352 P.2d 485 (Or. 1960). This problem should be analyzed first in the traditional way: whether causation can be proven adequately to raise a jury question regarding the liability of each individual defendant. Then attention should turn to suing the defendants as a group and invoking *Summers v. Tice* alternative liability. At the outset you might consider the bus terminal's liability, probably not because they complained/cleaned up.

There can also be a question of the newspapers' responsibility for the actions of the delivery carriers. Are they independent contractors or employees?

There are three possible newspaper defendants: City Times, Daily Journal, and the Community News. The relevant causal concerns include: (1) Did a newspaper wire loop cause Plaintiff's fall; (2) Did the wire loop come from one of the three newspaper companies; (3) Which newspaper's wire was involved; and (4) How did the wire which resulted in the fall come to be on the sidewalk?

There might be other causes of the fall, especially since she's an old lady with a weak ankle and it happened at night. Can she show MLTN it was the wire? Probably the eyewitness testimony is enough to get it to a jury.

How did the wire loop come to cause the Plaintiffs fall? Can the P show causation against any of the Ds, separately or as a group? Or are there too many other potential causes of a fall?

1. It could have been thrown there by a carrier.
2. It could have been kicked along by another pedestrian.
3. It could have been picked up at another location and eventually thrown near the terminal.
4. It could have been thrown up by a car from the street.
5. Someone could have taken it from the garbage and discarded it.

Are the Defendants responsible for any or all of the above? What is the scope of liability? Are these independent or dependent intervening causes?

Individual Liability

The best individual claim can be made against the City Times because of the testimony of the witnesses about the wire loop. The defendant may challenge the identification ability of the wire by these witnesses, but that is a matter for the jury to weigh. Although the sidewalk was swept and was clean before Plaintiff arrived, the wire could have been up the street and kicked down to the terminal sidewalk before Plaintiff's fall. Plaintiff and several witnesses establish that there was a wire on the sidewalk. There probably is sufficient evidence to raise a jury question on causation against City Times. There probably is insufficient evidence regarding the other two newspapers. Should the Plaintiff drop the other two defendants or sue all three as a group? This is an interesting dilemma for the Plaintiffs attorney. If she drops the other two newspapers, the City Times will invoke the ghosts of the other two papers. There is also the risk

that the trial court would exclude the wire identification testimony as too tenuous. The plaintiff probably should be able to go forward against the City Times individually, and alternatively sue all three as a group.

Group Liability: alternative and market share

Can use alternative here at least initially because you have a small number of Ds and all can be sued. Under *Summers v. Tice* P needs to show that:

1. Each defendant must have been negligent. Here you've got evidence re continuing complaints about all 3. Is that enough?
2. The harm must have been caused by only one defendant's carelessness. Only one loop, only one fall.
3. There must be the potential of similar harm by each.
4. Plaintiff must be unable to show which Defendant caused the harm – here the testimony re specific loops might actually work against the P.
5. The responsible party must be in court. The Plaintiff must have the right group of defendants in court. Is the group under inclusive, over-inclusive, or "just right"? See *Summers and Ybarra*.

Market share: She could try to argue that the 3 companies should be held liable according to their share of the newspaper market (60/20/20), on grounds that they all put the same “product”, i.e. wire loops, in a place where P could be injured by them, and that the number of loops would be directly proportional to the number of papers bundled, such that it would be fair to hold them as a group. You would have problems with fungibility – they're not exactly alike --, with the time period (hard to limit), and with the signature harm issue. You also have a problem in that there's only one plaintiff, so there's really no way of spreading out the probabilities over the “run of the cases”. Under these circumstances, use alternative liability.