

---

---

## CAUSATION IN THE *RESTATEMENT (THIRD) OF TORTS*: THREE ARGUABLE MISTAKES

David W. Robertson\*

### INTRODUCTION

This Article focuses narrowly on three respects in which I disagree with the *Restatement (Third) of Torts*' treatment of causation.<sup>1</sup> These three disagreements are explained in Parts II, III, and IV. Part I provides essential background.

### I. BACKGROUND

#### A. *Posited Constraints on Legal Scholarship*

A scholar who sets out to describe, explain, justify, or criticize a body of existing law must ultimately ground the work in “actual legal practices.”<sup>2</sup> The scholar is free to propose as many alternative views as her creativity can conjure up, but proposals should not be masked as description. When the subject of study is a body of court decisions, the scholar must try to distinguish between “what judges do as fate- or culture-determined creatures [and] what judges do when they are at their best, acting consciously and explaining rationally their decisions.”<sup>3</sup> That distinction is real, it is necessary, and it is drawn by conscientious scholars (and not just by losing lawyers) on an everyday basis. But “conscientious” is the watchword: individual decisions cannot be set aside as bad law without articulated, principled justification; sizeable bodies of jurisprudence cannot be ignored merely because they are disagreeable; and novel ideas—ideas that have *no* demonstrable

---

\* W. Page Keeton Chair in Tort Law and University Distinguished Teaching Professor, University of Texas at Austin.

1. Unless otherwise indicated, references to the *Restatement (Third)* in this Article are to RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (Proposed Final Draft No. 1, 2005). The title has since been amended to include emotional harm. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (Tentative Draft No. 5, 2007). Nothing in this Article detracts from my view that the *Restatement (Third)* is a remarkably impressive piece of work, indeed a great improvement over its predecessors.

2. Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 629 (1992).

3. DAN B. DOBBS, THE LAW OF TORTS § 8, at 12 (2000).

judicial or legislative pedigree—cannot properly be proclaimed as existing law.

It seems to follow that a “Restatement” of a body of court decisions should capture, explain, and enhance the best available judicial views, but that it should not offer up as something visible or immanent in existing law any proposition or approach that is in reality brand-new, wholly lacking any trace of judicial acceptance. It probably also follows that a restatement should not lightly jettison or condemn a well-established doctrine.

### B. *Factual Causation Is Essential to Tort Liability*

Academicians who seek an overarching theoretical justification of tort law fall into two main camps.<sup>4</sup> Economic analysts assert that tort law should (and by and large does) aim at “promot[ing] efficient resource allocation.”<sup>5</sup> Corrective-justice<sup>6</sup> theorists hold that tort law’s main justification lies in its “ability to right wrongs, i.e., to restore the moral balance between injurer and injured.”<sup>7</sup> “[T]he idea of causation can largely be dispensed with in an economic analysis of torts.”<sup>8</sup> But the cause-in-fact requirement is the “linchpin” of the corrective-justice theory.<sup>9</sup> Indeed, it has long been regarded as a truism that “a defendant should never be held liable to a plaintiff for a loss where it appears that his wrong did not contribute to it, and no policy or moral consideration can be strong enough to warrant the imposition of liability in such [a] case.”<sup>10</sup>

### C. *A Truncated Summary of the Traditional Judicial View of Factual Causation*

#### 1. *The But-for Test Is Dominant*

Under the but-for test, “conduct is a factual cause of harm when

---

4. Compare WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 1 (1987) (“[T]he common law of torts is best explained as if . . . judges . . . were trying to promote efficient resource allocation.”), with NEIL MACCORMICK, *The Obligation of Reparation*, in *LEGAL RIGHT AND SOCIAL DEMOCRACY* 212, 226 (1982) (“The justice of the obligation of reparation is . . . corrective justice, and its ground is that one person’s right has been infringed by another.”).

5. LANDES & POSNER, *supra* note 4, at 1.

6. For a clear and persuasive short account of the core idea of corrective justice, see MACCORMICK, *supra* note 4, at 212–27.

7. DAVID W. ROBERTSON ET AL., *CASES AND MATERIALS ON TORTS* 116–17 (3d ed. 2004).

8. LANDES & POSNER, *supra* note 4, at 229.

9. Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 *LAW & PHIL.* 1, 12 (1987).

10. Charles E. Carpenter, *Concurrent Causation*, 83 *U. PA. L. REV.* 941, 947 (1935). Professor Carpenter thought the proposition “too clear for argument.” *Id.*

the harm would not have occurred absent the conduct.”<sup>11</sup> The but-for test is dominant<sup>12</sup> because it “corresponds with our intuitive concept of causation.”<sup>13</sup> On this view, “[b]ut for’ is an absolute minimum for causation because *it is* merely causation in fact.”<sup>14</sup> “Any standard less than but-for . . . simply represents a decision to impose liability without causation.”<sup>15</sup>

### 2. *The Plaintiff Has the Burden of Proof*

Unless the normal burden of proof is shifted, the plaintiff is required to establish cause in fact by a preponderance of the evidence.<sup>16</sup> This means that the evidence must persuade the trier of fact that it is more likely than not that a defendant’s wrongful conduct was a cause in fact of the injuries in suit.<sup>17</sup> The preponderance standard is often said to require a greater than “fifty percent likelihood.”<sup>18</sup>

### 3. *In Most Cases the Traditional Approach, Requiring the Plaintiff to Prove But-for Causation, Is Fully Satisfactory*

The but-for test asks whether an identified causal candidate was necessary for an identified outcome. In an action in tort, the plaintiff makes the required identifications by presenting the court with a specified outcome (the injury in suit) and a specified causal candidate (the defendant’s tortious conduct). The but-for test then

---

11. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 26 (Proposed Final Draft No. 1, 2005). In a negligence case, a careful framing of the but-for inquiry entails (a) identifying the injury in suit, (b) identifying the defendant’s putatively negligent conduct, (c) mentally constructing an imaginary counterfactual scenario in which the defendant’s conduct is corrected to the extent necessary to make it non-negligent (changing *nothing* else), and (d) asking whether in that scenario the injury in suit probably would have been avoided. David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1768–73 (1997).

12. See Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 85 (1975) (acknowledging the “virtual universality of the *but for* test”).

13. Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1020 (1988). Professor Wright refers to his “NESS” version of the but-for test rather than to the traditional judicial version. *Id.* at 1021.

14. *Horn v. B.A.S.S.*, 92 F.3d 609, 611 (8th Cir. 1996) (quoting *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 862 (Mo. 1993) (emphasis added)).

15. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 282 (1989) (Kennedy, J., dissenting).

16. DOBBS, *supra* note 3, § 19, at 37.

17. *Id.*

18. *Stinson v. England*, 633 N.E.2d 532, 536 (Ohio 1994); see also *Cooper v. Sisters of Charity of Cincinnati*, 272 N.E.2d 97, 104 (Ohio 1971) (stating that “[p]robable is more than 50% of actual”); DOBBS, *supra* note 3, § 178, at 434–35 (indicating that undisputed testimony expressing a sixty percent probability would constitute a “heavy preponderance of the evidence”).

asks whether the defendant's wrongful conduct was necessary for the injury in suit.<sup>19</sup> It refuses to attribute causation absent such necessity.<sup>20</sup>

When human beings make predictions about causation, we seem to think about sufficiency rather than necessity. ("Will the fuel in my car's tank suffice to reach the next gas station?")<sup>21</sup> But when we make causation-attribution decisions, necessity vel non is the heart of the inquiry.<sup>22</sup> ("Did I wake you?" means "Would you have continued sleeping if I hadn't dropped my shoe?") In torts cases, the cause-in-fact inquiry is always an attribution question, never a predictive one, so sufficiency issues are not in play.<sup>23</sup> In defining factual causation as but-for causation, tort law exhibits the conspicuous virtue of cleaving to the views of its constituency.<sup>24</sup> And demonstrably judges and jurors use the but-for test on a daily basis to do good routine work.<sup>25</sup> When a man who has hurt himself by using a product in a dangerous way sues the manufacturer for failing to supply an adequate warning against such use, the judge will probably direct a verdict against the man on the basis of cause in fact if the man admits that he would not have read any warning provided to him.<sup>26</sup> When a speeding motorist strikes a pedestrian and then argues that he would have been unable to stop even if

---

19. See *supra* note 11 and accompanying text.

20. DOBBS, *supra* note 3, § 168, at 409–11.

21. In everyday thought, "sufficient" simply means adequate for a particular purpose or outcome in a particular context. It never means alone adequate; "[n]othing is the result of a single cause in fact." *Id.* § 168, at 410.

22. See J.L. MACKIE, *THE CEMENT OF THE UNIVERSE: A STUDY OF CAUSATION* 121, 141 (1974) (asserting that for most people, most of the time, the but-for test captures the meaning of causation).

23. See Alexander, *supra* note 9, at 13 ("Sufficient causation, unlike necessary causation, takes us far afield from ordinary tort law and into a domain that is unfamiliar and uncharted."); cf. Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1083–84 n.44 (2001) (criticizing Professors Henderson and Twerski for mixing up the "ex post causal-contribution issue" with the "ex ante risk-reduction requirement").

24. See *McGhee v. Nat'l Coal Bd.*, (1972) 3 All E.R. 1008, 1011 (H.L.) (appeal taken from Scot.) (U.K.) ("[T]he legal concept of causation is not based on logic or philosophy. It is based on the practical way in which the ordinary man's mind works in the every-day affairs of life."); Judith Jarvis Thompson, *The Decline of Cause*, 76 GEO. L.J. 137, 148 (1987) (arguing that a legal system is irrational if it does not reflect the views "of the man and woman in the street").

25. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 26 reporters' note cmt. b (Proposed Final Draft No. 1, 2005) (setting forth multiple authorities for the proposition that "[c]ourts and scholars routinely acknowledge that the but-for test is central to determining factual cause").

26. See, e.g., *Bloxom v. Bloxom*, 512 So. 2d 839, 850–51 (La. 1987); *Technical Chem. Co. v. Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972); Michael D. Green, *The Intersection of Factual Causation and Damages*, 55 DEPAUL L. REV. 671, 697 n.93 (2006).

traveling at a safe speed, the judge will probably submit the cause-in-fact issue to the jury with an instruction to find for the plaintiff on the issue if the injury would probably not have occurred in the absence of defendant's excessive speed.<sup>27</sup>

#### 4. *Exceptions to the Normal Requirements*

Cases occasionally arise in which following the normal approach—which entails the two requirements that plaintiff (a) establish but-for causation (b) by a preponderance of the evidence—seems to work palpable injustice. In such cases courts will sometimes relax the normal requirements. The courts have not been very articulate in this arena, but over time academic attention to the general phenomenon has led to some agreement on a list of categories of cases in which such relaxations occur. Some of these categories are summarized in the subsections just below.<sup>28</sup>

a. *Concert of Action/Unitization.* On familiar principles, vicarious liability will lie against an employer for the tortious consequences of the conduct of its employees in the course and scope of their employment. When the plaintiff in such a case sues both the tortfeasor employee and the vicariously liable employer, no separate cause-in-fact inquiry is made respecting the employer. Instead, the two defendants are treated as a unit.<sup>29</sup>

Multiple defendants who are not necessarily subject to full vicarious liability for one another's conduct<sup>30</sup> can also be treated as a causal unit under a concept of "concerted action" that has been traditionally stated as follows:

All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit, are [causally responsible for the results of the

---

27. See, e.g., *Clark v. Cantrell*, 504 S.E.2d 605, 611 (S.C. Ct. App. 1998) (rejecting speeder's cause-in-fact argument); *Biggers v. Cont'l Bus. Sys., Inc.*, 303 S.W.2d 359, 363, 365–67 (Tex. 1957) (same).

28. The list below omits "market-share liability" because of "the declining significance of the issue." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 28 cmt. o (Proposed Final Draft No. 1, 2005). The "alternative liability" and "lost opportunity" theories are omitted because of space limitations. The *Restatement (Third)* is bullish on the alternative-liability theory. See *id.* § 28(b). It "takes no position" on the validity of the lost-opportunity theory. *Id.* § 26 cmt. n.

29. See DOBBS, *supra* note 3, § 170, at 413–14.

30. Vicarious causal responsibility is not the same thing as full vicarious liability. Typically courts using the concerted-action concept to establish factual causation will emphasize the existence of independent tortious conduct on the part of each of the participants. See, e.g., *Benson v. Ross*, 106 N.W. 1120, 1121 (Mich. 1906); *Moore v. Foster*, 180 So. 73, 74 (Miss. 1938); *Oliver v. Miles*, 110 So. 666, 668 (Miss. 1926).

common activity].<sup>31</sup>

For example, if eight boys engage in a dangerous game of rock throwing and an innocent plaintiff is struck by an unidentified rock thrown by one of the eight, the concerted-action concept will easily support attributing factual causation to each boy, on the view that he either threw the rock or played a significant role in bringing about its throwing by one of the others.<sup>32</sup>

Some courts have been disposed to stretch the concerted-action concept pretty far.<sup>33</sup> Each of the twenty-six defendants in *Warren v. Parkhurst*<sup>34</sup> was a mill owner who discharged a “merely nominal”<sup>35</sup> amount of pollution into the plaintiff’s creek. The result of the defendants’ cumulative discharges was a stinking, useless creek.<sup>36</sup> No single defendant’s input was necessary for the aggregate result, and the court evidently believed that no single defendant’s input made any discernible difference in the creek.<sup>37</sup> On that view, the plaintiff’s cause-in-fact case against each defendant failed the but-for test. The court nevertheless imposed liability by creating what might be termed a theory of *deemed* concerted action:

If the defendants had by agreement or concerted action united in fouling this stream, there could be no doubt [of their liability]. . . . And here, while each defendant acts separately, he is acting at the same time in the same manner as the other defendants, knowing that the contributions by himself and the others acting in the same way will result necessarily in the destruction of the plaintiff’s property. If necessary, in order to get at them, a court . . . may infer a unity of action, design, and understanding, and that each defendant is deliberately acting with the others in causing the destruction of the plaintiff’s property.<sup>38</sup>

b. *Remedy Impairment.* Courts recognize that a cause of action for damages is a valuable asset and that causing the loss of such a cause of action can in some circumstances be an actionable harm.<sup>39</sup>

---

31. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 46, at 323 (5th ed. 1984) (footnote call numbers omitted); see also RESTATEMENT (SECOND) OF TORTS § 876 (1979).

32. *Snoparsky v. Baer*, 266 A.2d 707, 709–10 (Pa. 1970); see also *Keel v. Hainline*, 331 P.2d 397, 400–01 (Okla. 1958).

33. See, e.g., *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 697–98 (7th Cir. 2008). For a thorough discussion of a variety of concerted-action concepts, see *Halberstam v. Welch*, 705 F.2d 472, 476–78 (D.C. Cir. 1983).

34. 92 N.Y.S. 725 (Sup. Ct. 1904), *aff’d*, 93 N.Y.S. 1009 (App. Div. 1905), *aff’d*, 78 N.E. 579 (N.Y. 1906).

35. *Id.* at 725.

36. *Id.* at 725–26.

37. *Id.*

38. *Id.* at 727.

39. See, e.g., *Clemente v. State*, 161 Cal. Rptr. 2d 799, 802 (Ct. App. 1980)

Prosser saw in this recognition the germ of a technique<sup>40</sup> for helping the plaintiff survive the cause-in-fact battle in what are sometimes called “over-determined multiple-omission cases.”<sup>41</sup> The case that caught Prosser’s attention was *Saunders System Birmingham Co. v. Adams*,<sup>42</sup> in which tortfeasor *A* negligently leased a car with no brakes to tortfeasor *B*, who negligently failed to apply the brake pedal and ran into the plaintiff. Each tortfeasor’s wrongful conduct kept the other’s from being a but-for cause of the accident, and the court’s opinion indicated that both tortfeasors were therefore entitled to exoneration on cause-in-fact grounds.<sup>43</sup>

Prosser thought the *Saunders System* court’s result was badly wrong, and he proposed that the correct analysis would have held each defendant liable for having destroyed the plaintiff’s cause of action against the other one.<sup>44</sup> Prosser’s proposed approach can be conceptualized as altering the identification of the injury in suit from the physical harm to the cause of action for the physical harm that—were it not for the targeted defendant’s negligent conduct—the plaintiff would have had against the other tortfeasor. (If *A* had provided a car with working brakes, *B*’s failure to apply the brake pedal would then have been a but-for cause of the injuries and the plaintiff’s lawsuit against *B* would have been viable.) The destroyed cause of action becomes a surrogate for the physical injury itself.

The academic support for Prosser’s suggested remedy-impairment technique is relatively thin,<sup>45</sup> and the judicial support is even thinner.<sup>46</sup> Nevertheless, the technique is arguably in the

---

(holding that a traffic victim could sue the state for the negligence of a highway-patrol officer who failed to get the name of the driver of the vehicle that struck the plaintiff); *Smith v. State Dep’t of Health & Hosps.*, 676 So. 2d 543, 548–49 n.9 (La. 1996) (discussing legal-malpractice cases in which the injury is conceptualized as depriving the victim of a cause of action).

40. Prosser deserves the credit, but the technique is strongly foreshadowed in Robert J. Peaslee, *Multiple Causation and Damage*, 47 HARV. L. REV. 1127, 1137–39 (1934).

41. See Wright, *supra* note 23, at 1123–31.

42. 117 So. 72 (Ala. 1928).

43. See *id.* at 74. The *Saunders System* plaintiff sued only the car-rental company, but the court’s reasons for exonerating the company would necessarily have exonerated the driver as well.

44. See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41, at 239–40 n.25 (4th ed. 1971). The fifth edition of the Prosser treatise abandoned the destruction-of-action suggestion and argued that the *Saunders System* court should have found causation against each of the defendants under the substantial-factor approach. See KEETON ET AL., *supra* note 31, § 41, at 267 & n.27.

45. See Peaslee, *supra* note 40, at 1137–39; Robertson, *supra* note 11, at 1787–89; Benjamin J. Vernia, Annotation, *Negligent Spoliation of Evidence, Interfering with Prospective Civil Action, as Actionable*, 10 A.L.R. 5TH 61, passim (2002).

46. The *Restatement (Third)* indicates that the impairment of a personal-injury case is actionable “[i]n a jurisdiction that recognizes negligent spoliation of evidence as a cause of action.” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR

traditional common-law tool kit, and thus it belongs on this list.

c. *Expanded Joint and Several Liability (The Inextricable-Tangle Cases)*. In its most traditional usage, “joint and several liability” does not refer to a cause-in-fact doctrine but rather to what might be loosely called a procedural doctrine whereby a plaintiff harmed by multiple tortfeasors can sue one or more of them, recover judgment against one or more of them, and enforce (collect on) the judgment against one or more of them, up to but not exceeding the full amount of the judgment.<sup>47</sup> A better term for this procedural doctrine would be “entire liability,”<sup>48</sup> but the “joint and several” usage is entrenched.

The standard (procedural) joint-and-several-liability doctrine does no cause-in-fact work.<sup>49</sup> In contrast, the vocabulary of joint and several liability has been put to cause-in-fact work in a group of cases whose common feature is a tangle of theoretically separable injuries produced by multiple tortfeasors under circumstances in which each tortfeasor’s wrongful conduct was a cause in fact of some but not all of the injuries. Ideally, a court confronted with such a case would separate out each tortfeasor’s causal contribution and hold each tortfeasor liable for only its portion of the tangle. But when the facts simply do not afford any basis for achieving such a separation, many courts have used the language of joint and several liability to treat each tortfeasor’s conduct as a cause in fact of the entire tangle.<sup>50</sup> In these cases, the joint-and-several-liability term

---

PHYSICAL HARM § 26 cmt. f, illus. 1 (Proposed Final Draft No. 1, 2005); *see, e.g.*, *The T.J. Hooper*, 60 F.2d 737, 739 (2d Cir. 1932) (suggesting that tortious conduct that does not cause physical injury may nevertheless be actionable if it causes the plaintiff to lose the ability to sue someone else for the injury); *Dow Corning Corp. v. Hollis*, [1995] 4 S.C.R. 634, 682–83 (Can.) (citing and quoting *Cook v. Lewis*, [1951] S.C.R. 830, 832–33 (Can.)); *see also supra* note 39; *cf. Brennen v. City of Eugene*, 591 P.2d 719, 725–27 (Or. 1979) (treating an unenforceable judgment for personal-injury damages as “a form of property” that was negligently damaged as a result of defendant’s issuance of a taxicab license to a company notwithstanding the fact that the company did not qualify for same due to its failure to carry the minimum amount of public-liability insurance).

47. *See DOBBS, supra* note 3, §170, at 413.

48. *KEETON ET AL., supra* note 31, § 47, at 328.

49. Many jurisdictions have recently modified or abolished the traditional (procedural) doctrine of joint and several liability by providing that the liability of some types of tortfeasors is limited by the percentage of fault assessed against the tortfeasor. *See ROBERTSON ET AL., supra* note 7, at 447–48. The impact of such changes on the cause-in-fact doctrine under discussion in this subsection must be assessed on a jurisdiction-by-jurisdiction basis. As a general matter it can be posited that the comparative-fault-inspired changes were not consciously meant to alter the cause-in-fact doctrine. This was the position of the court in *Piner v. Superior Court*, 962 P.2d 909, 912–13 (Ariz. 1998).

50. *See, e.g., Landers v. E. Tex. Salt Water Disposal Co.*, 248 S.W.2d 731, 731–34 (Tex. 1952) (holding two independent polluters of the plaintiff’s farm



has taken on a new meaning, distinct from its traditional (procedural) one; it has been used to describe an exceptional cause-in-fact technique that can be called “expanded joint and several liability.”<sup>51</sup>

*Maddux v. Donaldson*<sup>52</sup> exemplifies the reasoning in support of the expanded joint-and-several-liability technique. This was a three-vehicle traffic-accident case in which the plaintiff sustained fractures of her right leg, right arm, and left knee, as well as facial cuts and internal injuries.<sup>53</sup> The wrecks occurred when Donaldson’s pickup truck skidded into and struck the Maddux vehicle, knocking it into a second collision with Bryie’s car.<sup>54</sup> The two collisions were about 30 seconds apart.<sup>55</sup> Each of the two impacts was severe enough to have caused all of Mrs. Maddux’s injuries, but no one doubted that Bryie’s impact had played a significant role.<sup>56</sup> Donaldson was dismissed early in the lawsuit,<sup>57</sup> which then proceeded solely against Bryie. The trial judge stuck close to traditional law and dismissed the suit against Bryie because of the lack of evidence to show which of the injuries were caused by his impact.<sup>58</sup> Reversing, the Michigan Supreme Court held Bryie liable for the entire tangle of injuries:

[I]f there is competent testimony, adduced either by plaintiff or defendant, that the injuries are factually and medically separable, and that the liability for all such injuries and damages, or parts thereof, may be allocated with reasonable certainty to the impacts in turn, the jury will be instructed accordingly and mere difficulty in so doing will not relieve the triers of the facts of [the] responsibility [for such apportionment]. . . . But if, on the other hand, the triers of the facts conclude that they cannot reasonably make the division of liability between the tortfeasors . . . . we have, by their own finding, nothing more or less than an indivisible injury . . . . [for which the tortfeasors] are jointly and severally liable . . . .<sup>59</sup>

---

pond liable for the entirety of the damage although their causal contributions were theoretically separable).

51. Another name for it is the “single indivisible injury rule.” *Piner*, 962 P.2d at 913.

52. 108 N.W.2d 33 (Mich. 1961).

53. *Id.* at 34, 36.

54. *Id.* at 34.

55. *Id.* at 38.

56. *See id.* at 36.

57. *Id.* at 34. The cause-in-fact case against Donaldson was not problematic; if he had maintained control of his truck, neither of the two collisions would have happened.

58. *Id.*

59. *Id.* at 36–37 (internal quotation marks omitted) (footnote call numbers omitted).

While the *Maddux* reasoning can be described as merely shifting the burden of apportioning the tangle from plaintiff to defendant, this is a burden that typically cannot be met, so that the result is to hold a defendant like Bryie responsible for both the injuries he caused and the ones that were already in existence when his car struck the victim. By allowing the plaintiff to recover for injuries that preexisted the defendant's tort, the *Maddux* court created an exception to the normal rule for preexisting injuries, which precludes recovery for maladies already afflicting the victim at the time of her encounter with the tortfeasor and concomitantly requires the plaintiff to provide the court with a dividing line between the preexisting conditions and the "aggravation" brought about by the tortfeasor.<sup>60</sup> The expanded joint-and-several-liability doctrine provides an exception to the preexisting-condition rule.

The *Maddux* exception operates most straightforwardly when the plaintiff can tie the preexisting condition to a tortious cause. At one time it was clear that the technique could not be expanded to the more typical situation in which the plaintiff's preexisting condition had no identifiable tortious origin; here the normal preexisting-injury rule would require the plaintiff to separate the defendant's input from the rest of the tangle.<sup>61</sup> But in *Newbury v. Vogel*<sup>62</sup> the Colorado Supreme Court read cases like *Maddux* to stand for a much broader rule:

We find the law to be that where a pre-existing diseased condition exists, and where after trauma aggravating the condition disability and pain result, and no apportionment of the disability between that caused by the pre-existing condition and that caused by the trauma can be made, in such case, even though a portion of the present and future disability is directly attributable to the pre-existing condition, the defendant, whose act of negligence was the cause of the trauma, is responsible for the entire damage.<sup>63</sup>

The *Newbury* court did not acknowledge that it was making a sizeable leap,<sup>64</sup> in effect doing away with the preexisting-condition rule in any case in which it might leave the plaintiff remediless. A

---

60. See, e.g., *LaMoureaux v. Totem Ocean Trailer Express, Inc.*, 632 P.2d 539, 543-44 (Alaska 1981); *Epps v. City of Baton Rouge*, 604 So. 2d 1336, 1345 (La. Ct. App. 1992).

61. See *supra* note 60 and accompanying text.

62. 379 P.2d 811 (Colo. 1963).

63. *Id.* at 813.

64. *Maddux* is easy to justify. *Newbury* is harder. See ROBERTSON ET AL., *supra* note 7, at 167 ("Our tort law is a system of corrective justice, which means that tortfeasors can routinely take advantage of their victim's extraneous bad luck—e.g., in being old, sick, poor, and/or unable to prove up a case. But allowing tortfeasors to benefit from one another's bad conduct just seems too powerfully unfair to countenance.").

substantial number of courts have followed the *Newbury* lead.<sup>65</sup> The *Restatement (Third)* approves of *Maddux*.<sup>66</sup> It is agnostic on *Newbury*.<sup>67</sup> Professor Michael Green—one of the *Restatement (Third)*'s two eminent Reporters—believes that *Newbury* “makes good sense.”<sup>68</sup> The *Restatement (Third) of Torts: Apportionment of Liability*<sup>69</sup> approves of both *Maddux* and *Newbury*, noting that *Newbury* is a close call.<sup>70</sup>

d. *The Substantial-Factor Technique.* The term “substantial factor” entered the torts vocabulary as a proposed test for legal causation (i.e., proximate causation or scope of liability) in negligence cases.<sup>71</sup> But the term soon took on its primary current meaning as the name of the oldest and best-known of the exceptional approaches to the issue of cause in fact. The *Restatement (Second) of Torts* embraced the “substantial factor” label<sup>72</sup> and provided a traditional formulation of the substantial-factor test for cause in fact as follows:

If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.<sup>73</sup>

The *Restatement (Third)* jettisons the “substantial factor” label and provides a dramatically altered version of the test:

§ 27. Multiple Sufficient Causes

If multiple acts occur, each of which alone would have been a factual cause under § 26 [setting forth the but-for test] of the physical harm at the same time in the absence of the other

---

65. See, e.g., *Maurer v. United States*, 668 F.2d 98, 100 (2d Cir. 1981). Some commentators assert that the *Newbury* expansion of the *Maddux* technique is now the settled and nonproblematic majority approach. See, e.g., Lars Noah, *An Inventory of Mathematical Blunders in Applying the Loss-of-a-Chance Doctrine*, 24 REV. LITIG. 369, 390 (2005) (asserting that “defendants [generally] shoulder the often difficult burden of trying to apportion damages in situations where a pre-existing condition has been aggravated by their negligence”); cf. DOBBS, *supra* note 3, § 174, at 423 (suggesting that cases like *Newbury* represent merely “[a] variation on the [*Maddux*] rule”).

66. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 28 cmt. d(1) (Proposed Final Draft No. 1, 2005).

67. See *id.* § 28 cmt. d(2).

68. Green, *supra* note 26, at 701.

69. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. (2000).

70. See *id.* § 26 cmt. h & reporters' note cmt. h.

71. See Green, *supra* note 26, at 698 n.97.

72. See RESTATEMENT (SECOND) OF TORTS §§ 431(a), 432–433 (1979).

73. *Id.* § 432(2). Confusingly, the *Restatement (Second)* also used the term “substantial factor” in two other senses: in reference to the legal-cause issue and as a synonym for the but-for test for cause in fact. See *id.* § 432(1).

act(s), each act is regarded as a factual cause of the harm.<sup>74</sup>

All of my disagreements with the *Restatement (Third)* involve section 27, so we will take up this story in the Parts below.

## II. RESTATEMENT (THIRD) SECTION 27 IS OVERINCLUSIVE

### A. *The Restatement (Second) Version of the Substantial-Factor Test Has Done Useful Work*

It is widely accepted<sup>75</sup> that we need to relax the but-for requirement in what are variously called cases of “duplicative causation,”<sup>76</sup> “multiple sufficient causes,”<sup>77</sup> or “overdetermined result.”<sup>78</sup> Professor Malone used yet another term, “combined force situations,”<sup>79</sup> citing the example of “a fire started through the negligence of a railroad [that] merge[d] with a fire of undetermined origin and the two together destroy[ed] plaintiff’s property.”<sup>80</sup> The but-for test teaches that that the railroad’s fire was not a cause of the damage because of the sufficiency of the other fire. Malone thought this an unacceptable result, explaining:

[T]he wrongdoer will not be allowed to show that his fire was not a cause by establishing that the other fire would have destroyed the property even without his participation. Our senses have told us that he *did* participate. We are not obliged to make deductions in order to reach this conclusion. In the language of the layman, the defendant’s fire “had something to do with” the burning of plaintiff’s property. The affinity between his conduct and the destruction is recognized as being close enough to bring into play the well-established rules that prohibit the setting into motion of a destructive force. The but-for test has failed in such cases to justify itself policywise, so we search for other language that will allow us to do what we feel is right and proper. We demand that we be allowed to judge as we observe. Drama has triumphed over the

---

74. This version of section 27 is from RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 (Council Draft No. 7, 2007). The version in RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 27 (Proposed Final Draft No. 1, 2005) was this: “If multiple acts exist, each of which alone would have been a factual cause under § 26 of the physical harm at the same time, each act is regarded as a factual cause of the harm.” The major difference is the omission of the word “alone” in the 2007 version.

75. See, e.g., KEETON ET AL., *supra* note 31, § 41, at 266–67.

76. Wright, *supra* note 23, at 1098.

77. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 27 cmt. a (Proposed Final Draft No. 1, 2005).

78. Boeing Co. v. Cascade Corp., 207 F.3d 1177, 1185 (9th Cir. 2000).

79. Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 88 (1956).

80. *Id.* at 89. The example is based on *Anderson v. Minneapolis, St. Paul & S.S.M. Railway Co.*, 179 N.W. 45 (Minn. 1920).

syllogism.<sup>81</sup>

Malone thought the substantial-factor approach a problem-free answer to the perceived inadequacies of the but-for test in “combined force situations.”<sup>82</sup> But the approach needs to be confined by rigorous criteria. There is highly seductive appeal in “[d]rama . . . over the syllogism,”<sup>83</sup> in “instinct”<sup>84</sup> over reasoning, in “incantation”<sup>85</sup> over analysis. Courts sometimes grasp that the substantial-factor test is appropriate for only a narrow range of multiple-cause situations,<sup>86</sup> but quite often they go badly wrong by assuming that the but-for test can be jettisoned in favor of a much vaguer and less demanding substantial-factor inquiry in any case in which the tortfeasor’s conduct has combined with other causal conditions in any way creating difficulties for the plaintiff.<sup>87</sup> In this sense the substantial-factor technique seems perpetually poised to take over the whole show.

When it is carefully applied, the version of the substantial-factor test laid out in *Restatement (Second)* section 432(2)<sup>88</sup> does useful work in numerous cases.<sup>89</sup> A good example is *Sanders v. American Body Armor & Equipment, Inc.*,<sup>90</sup> in which “[a]n expert testified that [Sanders] died of two bullet wounds—one to the abdomen, and one to the chest—both fatal, and both inflicted ‘split seconds’ apart.”<sup>91</sup> Sanders, a policeman, was wearing a supposedly bulletproof vest supplied by defendant.<sup>92</sup> The abdominal wound was outside the vest-protection area, but the chest wound would have been prevented if the vest had functioned properly.<sup>93</sup> The trial court granted defendant’s motion for directed verdict on the view that the

---

81. Malone, *supra* note 79, at 89 (footnote call numbers omitted).

82. *Id.* at 88.

83. *Id.* at 89.

84. Robertson, *supra* note 11, at 1778.

85. DOBBS, *supra* note 3, § 171, at 416.

86. See Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 860–63 (Mo. 1993) (outlining the classic limits on the legitimate use of the substantial-factor test). In Callahan, the court also urged adherence to those limits to avoid “frittering away a meaningful causation test [the but-for test].” See *id.* at 861.

87. See, e.g., Daniels v. Hadley Mem’l Hosp., 566 F.2d 749, 757 (D.C. Cir. 1977); Sharp v. Kaiser Found. Health Plan of Colo., 710 P.2d 1153, 1155 (Colo. Ct. App. 1985), *aff’d*, 741 P.2d 714 (Colo. 1987); Fouche v. Chrysler Motors Corp., 692 P.2d 345, 348 (Idaho 1984); Fowler v. Roberts, 556 So. 2d 1, 5 n.6 (La. 1989); Daugert v. Pappas, 704 P.2d 600, 605–06 (Wash. 1985).

88. RESTATEMENT (SECOND) OF TORTS § 432(2) (1979).

89. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 27 cmt. b (Proposed Final Draft No. 1, 2005) says there are “[o]nly a handful of reported cases” that explicitly rely on section 432(2) from the *Restatement (Second)*, but the Reporters’ Note cites dozens of cases in which courts used the approach section 432(2) encapsulates. *Id.* § 27 reporters’ note.

90. 652 So. 2d 883 (Fla. Dist. Ct. App. 1995).

91. *Id.* at 884.

92. *Id.*

93. See *id.*

vest malfunction did not matter (i.e., was not a but-for cause of the death) because Sanders “would have died nevertheless from the bullet to his unprotected abdomen.”<sup>94</sup> The appellate court held that the trial judge’s reasoning was wrong,<sup>95</sup> quoting a version of the substantial-factor test set out in the Prosser and Keeton treatise.<sup>96</sup> The functional identity of the Prosser and Keeton and *Restatement (Second)* versions of the substantial-factor test—and the way in which *Restatement (Second)* section 432(2) readily deals with the *Sanders* situation—is evident on the face of the respective formulations:

*Prosser & Keeton*: [T]he “but for” rule serves to explain the greater number of cases; but there is one type of situation in which it fails. If two causes concur to bring about an event, and either one of them, operating alone, would have been sufficient to cause the identical result, some other test is needed. . . . The defendant sets a fire, which merges with a fire from some other source; the combined fires burn the plaintiff’s property, but either one would have done it alone. In such cases it is quite clear that each cause has in fact played so important a part in producing the result that responsibility should be imposed upon it; and it is equally clear that neither can be absolved from that responsibility upon the ground that the identical harm would have occurred without it, or there would be no liability at all.<sup>97</sup>

*Restatement (Second) Section 432(2)*: If two forces are actively operating, one because of the actor’s negligence [the chest wound], the other not because of any misconduct on his part [the abdominal wound], and each of itself is sufficient to bring about harm to another [the expert said each wound was fatal], the actor’s negligence may be found to be a substantial factor in bringing it about.<sup>98</sup>

#### B. *Restatement (Third) Section 27 Omits Important Limitations*

Despite their black-letter format, restatement sections are not statutes, and they should be read like any other treatise. Extraneous words can and should be ignored. Essential meaning can and should be gleaned from language, context, and common sense. Let us take *Restatement (Second)* section 432(2) (quoted just above) in this way. We will refer to the defendant as “*D*” and to the competing cause as “*X*.” Section 432(2) says that *D*’s wrongful

---

94. *Id.*

95. *Id.* The court went on to conclude—quite implausibly—that the defendant should win the case on legal-causation grounds. *See id.* at 885.

96. *Id.* at 884–85.

97. KEETON ET AL., *supra* note 31, § 41, at 266–67 (footnote call numbers omitted).

98. RESTATEMENT (SECOND) OF TORTS § 432(2) (1979).

conduct will not be a substantial-factor cause of harm unless: (a) *D*'s conduct was "sufficient"—i.e., it did not need the help of *X*—to bring about the harm; (b) *X* was also sufficient—i.e., it did not need the help of *D*'s conduct<sup>99</sup>—to bring about the harm; and (c) *D*'s conduct was a "substantial" causal factor—i.e., it was approximately equal in magnitude and scope to *X*.<sup>100</sup>

When *Restatement (Second)* section 432(2) is formulated to yield the foregoing three criteria, it prevents the assertion of substantial-factor causation against any of the twenty-six polluters in *Warren v. Parkhurst*.<sup>101</sup> No polluter's conduct was alone *sufficient* to bring about discernible harm, and no polluter's conduct alone made a *substantial* contribution to the harm. In the traditional view, factual causation cannot properly be attributed to the *Warren* defendants unless the concerted-action<sup>102</sup> or inextricable-tangle approach<sup>103</sup> can be made to fit. (On a less traditional view, the remedy-impairment approach<sup>104</sup> might also be considered.)

*Restatement (Third)* section 27 (quoted above at the end of Part I) omits two key requirements contained in *Restatement (Second)* section 432(2)—that *D*'s conduct be alone *sufficient* and itself *substantial*—and thus attributes factual causation to each of the *Warren* defendants. That this is true is shown by comment *f* to section 27, which states:

The fact that an actor's conduct requires other conduct to be sufficient to cause another's harm does not obviate the applicability of this Section. Moreover, the fact that the other person's conduct is sufficient to cause the harm does not prevent the actor's conduct from being a factual cause of harm pursuant to this Section, *if the actor's conduct is necessary to at least one causal set*.<sup>105</sup>

Under this "causal-set" approach, if we assume that it took twenty of the twenty-six polluters to ruin the *Warren* creek, section 27 deems each polluter's conduct a factual cause of the harm because it was necessary to the sufficiency of a causal set comprising the targeted polluter plus any nineteen of the others.

Some might argue that using section 27 to establish factual

---

99. This constraint is necessary because, were *X* not sufficient, *D*'s conduct would be a but-for cause of at least some of the harm.

100. Professor Green seems to agree that section 432(2) makes substantiality a requirement. See Green, *supra* note 26, at 685 n.46 (stating that the first and second Restatements "required that all causes reach the threshold of being a substantial factor, meaning that it be more than just a trivial factor").

101. See *supra* notes 34–38 and accompanying text.

102. See *supra* Part I.C.4.a.

103. See *supra* Part I.C.4.c.

104. See *supra* Part I.C.4.b.

105. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 27 cmt. f (Proposed Final Draft No. 1, 2005) (emphasis added) (citation omitted).

causation in *Warren* would be an improvement upon the court's rationale, on the view that "deemed" concerted action is dangerous. So let us look at a hypothetical situation—we will call it "Harriet's Case"—in which the "causal-set" approach of section 27 finds cause in fact when no one thinks responsibility should be attributed. Eight tortfeasors, acting independently but simultaneously, negligently lean on a car, which is parked at a scenic overlook in the mountains. Their combined forces result in the car rolling over the edge of the mountain and plummeting to its destruction. The force exerted by each of A through G constituted thirty-three percent of the force necessary to propel the bus over the edge. The force exerted by the eighth tortfeasor, Harriet, because of her slight build, was only one percent of the force necessary to propel the car over the edge. Harriet's conduct was a section 27 factual cause of the harm, because Harriet's force was a necessary element of an imaginary causal set made up of her conduct plus that of any three of the others.<sup>106</sup>

Under *Restatement (Second)* section 432(2), it is very plain that Harriet's force was neither sufficient to bring about the harm nor a substantial contribution to bringing it about; clearly Harriet should be exonerated on factual-causation grounds. *Restatement (Third)* section 27 says that Harriet's conduct was a factual cause of the harm. Thus section 27 is overinclusive.<sup>107</sup> The Reporters concede

---

106. The hypothetical is a slightly modified version of RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 cmt. q, illus. 12 (Tentative Draft No. 2, 2002). The illustration is used there to demonstrate that "when the contribution of an actor's tortious conduct to the causal set is trivial or insignificant, the actor is not subject to liability, based on scope-of-liability concerns." *Id.* § 29 cmt. q.

107. It will be argued that the overinclusiveness manifest in Harriet's Case is required in order to make section 27 inclusive enough to find causation in a case in which three tortfeasors, each of whom provides fifty percent of the force necessary to push the car over the cliff, independently and simultaneously lean on the car. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 27 cmt. f, illus. 3 (Proposed Final Draft No. 1, 2005). I disagree. In most such real-world situations, these three tortfeasors would not be truly independent, so that the concerted-action approach might well work. See *supra* Part I.C.4.a. If that approach were unavailable, the remedy-impairment approach could be used. See *supra* Part I.C.4.b. Either concerted action or remedy impairment would be a better way to handle the case than the causal-set approach endorsed by section 27. I have not found a judicial decision using the causal-set approach, and it seems potentially nearly boundless because it articulates no meaningful constraints on set construction. For example, consider RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 cmt. q, illus. 12 (Tentative Draft No. 2, 2002). In this illustration of the causal-set approach, tortfeasors A through G each supplied 25% of the force necessary to propel the car over the cliff, and Harriet added 2.5%. The Reporters indicate that the causal-set approach would deem Harriet a necessary element of a sufficient set of causal factors and thus a factual cause of the damage to the car. Deeming Harriet a necessary element of a sufficient set entails imagining a combination of her conduct with the conduct of any three of the others plus part, but not all, of the conduct of any fourth.



this, which in turn requires the creation of *Restatement (Third)* section 36, so as to exonerate Harriet on scope-of-liability (proximate-cause) grounds.<sup>108</sup>

III. THE *RESTATEMENT (THIRD)*'S "SCOPE OF LIABILITY (PROXIMATE CAUSE)" SOLUTION TO SECTION 27'S OVERINCLUSIVENESS IS UNSATISFACTORY

"[F]actual causation is largely a nonnormative inquiry."<sup>109</sup> Borrowing the wise words of Professor Michael Green, "I fail to see the attraction of employing a normative-judgmental standard for a proposition that falls well within the definition of [factual] causation."<sup>110</sup> Green was referring to the mistake of conceptualizing a cause-in-fact issue in scope-of-liability (proximate-cause) terms. In crafting section 36 of the *Restatement (Third)*, Reporter Green seems to have done exactly what Professor Green counsels against.

In the *Restatement (Third)*, the cause-in-fact issue is treated in Chapter V and the proximate-cause issue in Chapter VI, titled "Scope of Liability (Proximate Cause)." The scope-of-liability/proximate-cause issue is avowedly normative.<sup>111</sup> Yet the Chapter's concluding section provides:

§ 36. Trivial Contributions to Multiple Sufficient Causes

When an actor's negligent conduct constitutes only a trivial contribution to a causal set that is a factual cause of physical harm under § 27, the harm is not within the scope of the actor's liability.<sup>112</sup>

On its face, section 36 is plainly the *Restatement (Third)*'s answer to the problem section 27 creates in Harriet's Case. Comment *a* to section 36 emphasizes this:

---

This is a highly imaginative counterfactual scenario, light-years distant from "the conventional counterfactual causation inquiry of *taking the world as it is* and asking what would have occurred without the tortious conduct of interest." Green, *supra* note 26, at 698 (emphasis added); *see also* Robertson, *supra* note 11, at 1770 & n.21 (emphasizing that in the conventional counterfactual inquiry, the only allowable change is correcting the defendant's wrongful conduct).

108. *See infra* Part III.

109. Green, *supra* note 26, at 688 n.55.

110. *Id.* at 680 n.31.

111. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 cmt. e (Proposed Final Draft No. 1, 2005) (mentioning "intuitive notions of fairness and proportionality"); *id.* § 29 cmt. f ("[S]cope of liability [is] very much an evaluative matter."); *id.* § 29 cmt. g (emphasizing the need to "clearly differentiat[e] the predominately historical question of factual cause from the evaluative question of scope of liability").

112. *Id.* § 36.

Section 27 . . . makes clear that even an insufficient condition . . . can be a factual cause of harm when it combines with other acts to constitute a sufficient set to cause the harm, even if there also exist other sets of causes sufficient to cause the harm.

There are, however, a class of cases in which the actor's negligence, while a member of a causal set sufficient to cause the harm, pales by comparison to the other contributions to that causal set. While the conduct still constitutes a factual cause under § 27 and Comment *f*, this Section preserves the limitation on liability that the substantial-factor requirement played in the prior Restatements.<sup>113</sup>

The *Restatement (Third)* does not claim that section 36 fits comfortably within Chapter VI. The heart of Chapter VI is section 29, which is an excellent formulation of the core proximate-cause inquiry whether the injury to the plaintiff fell within the array of risks that made defendant's conduct negligent. This is called "the risk standard." Comment *b* to section 36 admits that "the limitation on liability provided in this Section is not a function of the risk standard expressed in § 29."<sup>114</sup> The comment goes on to explain that section 36 is nevertheless being included in the proximate-cause chapter because it sets forth "a narrow rule that *courts have developed as a matter of fairness, equitable-loss distribution, and administrative cost.*"<sup>115</sup>

The italicized expression just above does not seem to be accurate. In the best-known cases in which the substantial-factor test ruled out "trivial contributions," the courts did not say that they were making policy; instead they said that the defendant's conduct played no role that any sensible person could regard as a factual cause of the defendant's harm.<sup>116</sup> The most persuasive, candid, and informative reason for exculpating Harriet is not that she should go free because legal policy treats the harm to the car as outside her scope of responsibility; it is rather that no ordinary thinker could bring himself to say that she did any harm. Indeed, in another context Michael Green has acknowledged that at least some of the trivial-contribution cases were decided on the basis of "a 'clear'

---

113. *Id.* § 36 cmt. a.

114. *Id.* § 36 cmt. b.

115. *Id.* (emphasis added).

116. See *Golden v. Lerch Bros., Inc.*, 281 N.W. 249, 252 (Minn. 1938) ("The factual situation utterly fails to establish that [defendant's] acts or failure to act was a material element or substantial factor in the happening of the harm to plaintiff."); *City of Piqua v. Morris*, 120 N.E. 300, 302 (Ohio 1918) (stating that defendant's conduct "had nothing to do with the damage"); *Balt. & Ohio R.R. Co. v. Sulphur Spring Indep. Sch. Dist.*, 96 Pa. 65, 70 (1880) (stating that any alleged effect of defendant's conduct was "merely fanciful or speculative or microscopic").

absence of factual cause.”<sup>117</sup>

IV. THE *RESTATEMENT (THIRD)*'S REPORTERS' RECENT DECISION TO JETTISON THE *ANDERSON* LINE OF CASES IS UNWISE

*Restatement (Second)* section 432(2) is based substantially<sup>118</sup> on *Anderson v. Minneapolis, St. Paul & S.S.M. Railway Co.*,<sup>119</sup> which was also the source of Professor Malone's example in which a fire caused by defendant's negligence merged with a fire of unknown origin and the combined fires then destroyed the plaintiff's property.<sup>120</sup> The *Anderson* court held that defendant's fire was a cause in fact of plaintiff's loss because it “was a material or substantial element in causing plaintiff's damage.”<sup>121</sup> Defendant was held liable for the full damages.<sup>122</sup>

*Restatement (Third)* section 27 comment *d* takes note of arguments that the substantial-factor approach should be confined to multiple-tortfeasor situations, but it endorses *Anderson*, stating that “both of the first two Restatements and a significant majority of the courts since the Second Restatement have treated the tortious cause that concurs with an innocent cause as subject to liability, and so this Restatement continues that position.”<sup>123</sup>

The Reporters have since changed course and are now proposing a new comment *d* that would say:

When one of multiple sufficient causes is not tortious, the question whether the tortfeasor should be liable for damages is a different matter from the causal question. Requiring the tortfeasor to pay damages for harm that would have occurred in any event due to non-tortious forces is less persuasive than when both causes are tortious. Courts and commentators have . . . debated the merits of whether liability should be imposed in this situation for many decades, and there is a significant tension between this situation and damages rules when tortious and innocent forces cause overlapping harm. Nevertheless, a number of courts as well as the first two Restatements of Torts, impose liability on such tortfeasors, and this Restatement adheres to that position. The question of what (if any) damages should be awarded against these tortfeasors properly belongs to the law of damages and is not

---

117. Green, *supra* note 26, at 696 (discussing *City of Piqua*, 120 N.E. 300).

118. See *Basko v. Sterling Drug, Inc.*, 416 F.2d 417, 429 n.15 (2d Cir. 1969) (noting that a *Restatement (Second)* illustration of the operation of the substantial-factor technique is based on *Anderson*).

119. 179 N.W. 45 (Minn. 1920).

120. See *supra* notes 79–80 and accompanying text.

121. *Anderson*, 179 N.W. at 46.

122. *Id.* at 46, 49.

123. *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM* § 27 cmt. d (Proposed Final Draft No. 1, 2005).

addressed in this Restatement.<sup>124</sup>

In a Reporters' Memorandum, Professors Green and Powers explain why they believe the change to comment *d* is necessary:

[W]e envision that when the Institute eventually again addresses tort damages for physical harm, [it will conclude] that a defendant responsible for a tortious act that concurs with an innocent and sufficient cause [should] not be liable for any resulting damages. That outcome would reverse the . . . position of the first two Restatements . . . .<sup>125</sup>

In a nutshell: the Reporters want to jettison *Anderson*. If their new comment *d* is approved, they will not yet have fully achieved their goal, but they will have paved the way.

In a recent law review article,<sup>126</sup> Professor Green carefully and candidly explains the Reporters' new reasoning. He begins by acknowledging the "general acceptance" of *Anderson* and that "virtually every one of the handful of cases to confront the [*Anderson* issue since the *Restatement (Second)* have] adhered to" the *Anderson* view.<sup>127</sup> Nevertheless, he believes the *Anderson* rule needs to go because it "just cannot be reconciled with the way in which we treat the far more common phenomenon of duplicated harm."<sup>128</sup> Evaluating Professor Green's assertion requires a brief unpacking of the "duplicated-harm" concept.

In the present context, a "duplicated-harm" situation is one in which the results of tortious conduct are entangled with the effects of innocent conditions, events, or inevitabilities. Such situations are common, as can be seen from the following examples. Suppose that *D* tortiously shoots *P*, condemning *P* to a lifetime of pain and disability for which *D* is concededly responsible. *D*'s responsibility will nevertheless be dramatically diminished if: (a) at the time of the shooting, *P*'s life expectancy—determined actuarially, or determined by medical testimony that *P* was suffering from a fast-acting inevitably fatal disease—was short;<sup>129</sup> (b) the day after the tort, *P* was at home in bed when killed by a tornado;<sup>130</sup> or (c) at the time of the shooting, *P* was an unsuccessful parachutist, falling to earth from high in the sky after all of his chutes had failed. (We are going

124. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. d (Council Draft No. 7, 2007) (internal cross reference omitted).

125. *Id.* § 27 reporters' memorandum.

126. Green, *supra* note 26.

127. *Id.* at 683–86. Green's accompanying footnote suggests this may be a fairly large "handful." *Id.* at 686–87 n.50.

128. *Id.* at 709.

129. See *Follett v. Jones*, 481 S.W.2d 713 (Ark. 1972) (holding the tortfeasor not responsible for victim's preexisting cancer).

130. See *Jobling v. Associated Dairies Ltd.*, [1982] A.C. 794, 820–21 (H.L. 1981) (appeal taken from Eng.) (U.K.) (exonerating tortfeasor of responsibility for victim's subsequent unrelated illness).

to need a name for situation (c); let us call it *Dillon*.)<sup>131</sup>

In situations (a) and (b), *D* will owe something, but not much. In the *Dillon* situation, *D* may well owe nothing at all. Yet if *D* had shot the parachutist in the heart at the precise instant at which the parachutist struck the earth—instead of a few seconds earlier—*Anderson* would seem to mean that *D* would owe full damages. Professor Green is certainly right in noting that here we have “strong tension,” if not “irreconcilable conflict.”<sup>132</sup>

However, I do not believe that jettisoning *Anderson* is an acceptable response to the tension. A more suitable response would be simply to acknowledge the tension and live with it. Restatements are not primary legal authorities and thus should not purport to strike down an entire line of long-established case law. (Remember that the proposed new comment *d* to *Restatement (Third)* section 27 is not simply acknowledging the tension; it is seeking to ensure a future *Restatement* rejection of *Anderson*.) The tension between *Anderson* and situations (a) and (b) in the paragraph above is not a square conflict but rather a discontinuity,<sup>133</sup> and it can be lessened by insisting that in duplicated-harm situations the defendant should have the burden of apportioning the damage (that is, by embracing the *Newbury* expansion of the *Maddux* rule.)<sup>134</sup> Surely the *Anderson* rule can survive without threatening a defendant’s right to show that the implacable realities bearing on the plaintiff<sup>135</sup> have prevented the defendant’s tort from amounting to much.

The tension between *Anderson* and the *Dillon* situation is more acute, but it may be reconcilable. The defendant who shoots the unsuccessful parachutist a second or two before impact has the highly convincing argument that he took only a life expectancy of no value; gravity-propelled inevitability is at least as real and calculable as preexisting-disease-ordained inevitability. But when the fatal bullet and the impact with the earth arrive simultaneously, the defendant’s argument is less coherent; in this situation the claim that at the time of the tort the life the defendant took was already valueless has a disturbing metaphysical aspect.<sup>136</sup> It may be that, by

---

131. See Green, *supra* note 26, at 691 (discussing *Dillon v. Twin State Gas & Elec. Co.*, 163 A. 111 (N.H. 1932)); *id.* at 705 (calling situation (c) a “*Dillon* look-alike”).

132. Green, *supra* note 26, at 700. This conflict was also the focus of Judge Peaslee’s article. Peaslee, *supra* note 40, at 1127–28.

133. The functional discontinuity here is between full damages and discounted damages. Some would add that it is also a discontinuity between the law of cause in fact and the law of damages, but I do not see how those labels add anything functional to this discussion. For treatment of the principal functional reason for distinguishing between cause-in-fact and damages issues, see ROBERTSON ET AL., *supra* note 7, at 167 n.3 (emphasizing burden-of-proof differences).

134. See *supra* notes 62–63 and accompanying text.

135. See *supra* note 64.

136. This sentence will be decried as question begging, but it is a bit more

leaving the treatment of the *Anderson* situation to the substantial-factor test, we are wisely avoiding the waste and clutter entailed in inviting defendants to go down a frequently impassable forensic road.

If the foregoing attempt to reconcile *Anderson* and *Dillon* is deemed unconvincing, the question then arises whether to accept the conflict, resolve it by jettisoning *Dillon*, or resolve it by jettisoning *Anderson*. The third choice seems worst. There have been dozens or hundreds of cases relying on the *Anderson* rule, while far fewer courts have relied on *Dillon*.<sup>137</sup> When the matter is closely debatable, a restatement should probably devastate as little as possible.

#### CONCLUSION

The *Restatement (Third)* is a great piece of work. It will be even better if the Reporters drop their assault on *Anderson*. It would be better yet if it left out the “causal-set” idea—an academic creation that belongs in Dan Dobbs’s “penetrating and puzzling” cabinet<sup>138</sup>—and stuck with the three criteria encapsulated in section 432(2) of the *Restatement (Second)*. (Disapproving the “substantial factor” label is not a bad idea—“duplicative causation” might be better—although this is no more likely to succeed than the academy’s ceaseless effort to get rid of “proximate cause.”)

---

than that. See Peaslee, *supra* note 40, at 1130, 1135 (stating that in order to prevent a tortfeasor’s conduct from being regarded as causal, a competing innocent cause “must have been so far complete as to make the result certain . . . before the defendant’s act became operative” and reiterating that competing innocent causes will not keep a defendant’s conduct from being regarded as causal unless the innocent causes “were accomplished facts, the serious consequences of which were certain, before the defendant’s wrong became an operative cause” (emphasis added)).

137. According to Westlaw’s “Keycite” feature, as of July 10, 2009, *Anderson v. Minneapolis, St. Paul & S.S.M. Railway Co.*, 179 N.W. 45 (Minn. 1920), had been cited in forty-nine reported cases and *Dillon v. Twin State Gas & Electric Co.*, 163 A. 111 (N.H. 1934), in twenty-four.

138. See DOBBS, *supra* note 3, § 166, at 407 & n.10 (stating that causation problems have “led many serious thinkers to penetrating and puzzling analyses” and citing, *inter alia*, Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985), a seminal and much-admired piece).