

CAUSATION IN THE THIRD TORTS RESTATEMENT: THREE ARGUABLE MISTAKES

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I. INTRODUCTION

The portions of the Third Restatement¹ that I have studied closely--the chapters on *The Negligence Doctrine and Negligence Liability*, *Factual Cause*, *Scope of Liability (Proximate Cause)*, and *Affirmative Duties*--are remarkable improvements upon the Second Restatement, which was itself an impressive production. The Third Restatement's Reporters (Michael Green and Bill Powers) are due unreserved congratulations. This article focuses narrowly on three respects in which I disagree with the Third Restatement's treatment of causation. These three disagreements are explained in Sections III, IV, and V. Section II provides essential background.

II. 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."² 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

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¹ Unless otherwise indicated, references to the "Third Restatement" in this article are to RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (Proposed Final Draft No. 1, 2005). The title has since been amended to include emotional harm. See Tentative Draft No. 5, April 2007.

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

explaining rationally their decisions.”³ 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 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

Academics who seek an overarching theoretical justification of tort law fall into two main camps.⁴ Economic analysts assert that tort law should (and by and large does) aim at “promot[ing] efficient resource allocation.”⁵ “[T]he idea of causation can largely be dispensed with in an economic analysis of torts.”⁶

³ DAN B. DOBBS, *THE LAW OF TORTS* 12 (Hornbook ed. 2000).

⁴ See Richard Arneson, *Metaethics and Corrective Justice*, 37 *ARIZ. L. REV.* 33 (1995) (treating “economic analysis” and “corrective justice” as the two main theoretical justifications of tort law).

⁵ WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 1 (1987).

⁶ *Id.* at 229.

On the other hand, corrective justice⁷ 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."⁸ The cause-in-fact requirement is the "linchpin" of the corrective justice theory.⁹ Indeed, the corrective justice theory derives considerable support from the reality that cause in fact "has been the most pervasive and enduring requirement of tort liability over the centuries."¹⁰ It has long been regarded as a truism that "a defendant should never be held liable to a plaintiff for 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."¹¹

C. A SIMPLIFIED SUMMARY OF THE TRADITIONAL JUDICIAL VIEW OF FACTUAL CAUSATION

1. The but-for test is dominant.

Under the but-for test, "[c]onduct is a factual cause of harm when the harm would not have occurred absent the conduct."¹² The but-for test is dominant¹³ because it

⁷ For a clear and persuasive short account of the core idea of corrective justice, see the essay titled *The Obligation of Reparation* in NEIL MACCORMICK, LEGAL RIGHT AND SOCIAL DEMOCRACY 212-227 (1982).

⁸ DAVID W. ROBERTSON, WILLIAM POWERS, JR., DAVID A. ANDERSON, AND OLIN GUY WELLBORN III, CASES AND MATERIALS ON TORTS 116-117 (3d ed. 2004) (hereafter "Robertson").

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

¹⁰ Richard W. Wright, *Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUDIES 435, 435 (1985).

¹¹ Charles E. Carpenter, *Concurrent Causation*, 83 U.P.A. L. REV. 941, 947 (1935). Professor Carpenter thought the proposition "too clear for argument." *Id.*

¹² Third Restatement § 26. 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 counter-factual 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. See David W. Robertson, *The Common Sense of Cause In Fact*, 75 TEX. L. REV. 1765, 1768-73 (1997).

¹³ 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").

“corresponds with our intuitive concept of causation.”¹⁴ On this view, “[b]ut for’ is an absolute minimum for causation because *it is* merely causation in fact.”¹⁵ “Any standard less than but-for ... simply represents a decision to impose liability without causation.”¹⁶

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. This means that the evidence must persuade the trier of fact that it is more likely than not that defendant’s wrongful conduct was a cause in fact of the injuries in suit. The preponderance standard is often said to require a greater than “fifty percent likelihood.”¹⁷

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 asks whether the defendant’s wrongful conduct was necessary for the injury in suit.¹⁸ It refuses to attribute causation absent such necessity.

¹⁴ 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.)

¹⁵ Horn v. B.A.S.S., 92 F.3d 609, 611 (8th Cir. 1996) (emphasis supplied).

¹⁶ Price Waterhouse v. Hopkins, 490 U.S. 228, 282 (1989) (Kennedy, J., dissenting).

¹⁷ Stinson v. England, 633 N.E.2d 532, 536 (1994). See also Cooper v. Sisters of Charity, 272 N.E.2d 97, 104 (1971) (stating that “[p]robable is more than 50% of actual”); Dobbs, *supra* note 3, at 434-435 (indicating that undisputed testimony expressing a 60% probability would constitute a “heavy preponderance of the evidence”).

¹⁸ See *supra* note 12.

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?”)¹⁹ But when we make causation-attribution decisions, necessity vel non is the heart of the inquiry.^{19a} (“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.²⁰ In defining factual causation as but-for causation, tort law exhibits the conspicuous virtue of cleaving to the views of its constituency.²¹ And demonstrably judges and jurors use the but-for test on a daily basis to do good routine work.²² 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

¹⁹ 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.” See Dobbs, *supra* note 3, at 410.

^{19a} See J. L. MACKIE, *THE CEMENT OF THE UNIVERSE* 121, 141 (1974) (asserting that for most people most of the time, the but-for test captures the meaning of causation).

²⁰ “Sufficient causation, unlike necessary causation, takes us far afield from ordinary tort law and into a domain that is unfamiliar and uncharted.” Alexander, *supra* note 9, at 13. 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 an “ex ante risk reduction requirement”).

²¹ See Judith Jarvis Thompson, *The Decline of Cause*, 76 GEO. L.J. 137, 148 (1987) (arguing that a legal system fails if it does not reflect the views “of the man and woman in the street”); *McGhee v. National Coal Board*, 1973 S.L.T. 14, 22 (H.L. 1972) (Lord Reid, noting that “the legal conception 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.”).

²² See Third Restatement § 26, Reporters’ Note to ct. b (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”).

warning provided to him.²³ When a speeding motorist strikes a pedestrian and then argues that he would have been unable to stop even if 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.²⁴

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.²⁵

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 the 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.

²³ See, e.g., *Bloxom v. Bloxom*, 512 So.2d 839 (La. 1987); *Technical Chemical Co. v. Jacobs*, 480 S.W. 2d 602 (Tex. 1972); Michael D. Green, *The Intersection of Factual Causation and Damages*, 55 DEPAUL L. REV. 671, 697 n. 93 (2006).

²⁴ See, e.g., *Clark v. Cantrell*, 504 S.E.2d 605, 611 (S.C. 1998) (rejecting speeder's cause-in-fact argument); *Biggers v. Continental Bus System, Inc.*, 303 S.W.2d 359, 363, 365-367 (Tex. 1957) (same).

²⁵ The list below omits "market-share liability" because of "the declining significance of the issue." Third Restatement § 28 ct. o.

Multiple defendants who are not necessarily subject to full vicarious liability²⁶ for one another's conduct 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 common activity.]²⁷

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.²⁸

Some courts have been disposed to stretch the concerted-action concept pretty far.²⁹ Each of the 26 defendants in *Warren v. Parkhurst*³⁰ was a mill owner who discharged a "merely nominal"³¹ amount of pollution into the plaintiff's creek. The result of the defendants' cumulative discharges was a stinking, useless creek. No one defendant's input was necessary for the aggregate result, and the court evidently believed

²⁶ Vicarious causal responsibility is not the same thing as full vicarious liability. Typically courts using the concerted-action concept to establish cause in fact will emphasize the existence of independent tortious conduct on the part of each of the participants. See, e.g., *Moore v. Foster*, 180 So. 73 (Miss. 1938); *Oliver v. Miles*, 110 So. 666 (Miss. 1926); *Benson v. Ross*, 106 N.W. 1120 (Mich. 1906).

²⁷ W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, *PROSSER & KEETON ON TORTS* 323 (1984). See also *RESTATEMENT (SECOND) OF TORTS* § 876 (1979) (hereafter "Second Restatement").

²⁸ See *Snoparsky v. Baer*, 266 A.2d 707, 709 (Pa. 1970); *Keel v. Hainline*, 331 P.2d 397 (Okla. 1958).

²⁹ See, e.g., *Boim v. Holy Land Foundation*, 549 F.3d 685, 697-698 (7th Cir. 2008). For a thorough discussion of a variety of concerted-action concepts, see *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983).

³⁰ 92 N.Y.S. 725 (N.Y. Sup. Ct. 1904), *aff'd*, 93 N.Y.S. 1009 (A.D. 1905), *aff'd*, 78 N.E. 579 (N.Y. 1906).

³¹ 92 N.Y.S. at 725, 726.

that no one defendant's input made any discernible difference in the creek. 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, where 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.³²

b. Alternative liability

The alternative liability technique traces to *Summers v. Tice*.³³ Two negligent hunters fired their shotguns simultaneously, and the plaintiff's right eye was injured by a birdshot pellet. As to which hunter fired the injury-producing pellet, no information was available; the odds as to each were 50/50. In the California Supreme Court, the two hunters argued strenuously that the plaintiff must lose his case because he could not make out a case of but-for causation by a preponderance of the evidence against either hunter (50/50 is just shy of a preponderance). The court responded by announcing that each shooter should have the burden of showing that his bullet was not a cause-in-fact of the plaintiff's injuries. The effect of this burden-shifting technique was to hold each defendant liable to the plaintiff, because neither of them could move the case off the 50/50 equipoise that had initially stymied the plaintiff.

Two criteria circumscribe the *Summers* rule: each of the multiple actors engaged in tortious conduct, and it was clear that one of them caused the plaintiff's harm. Beyond

³² Id. at 727.

³³ 199 P.2d 1 (Cal. 1948).

that, the *Summers* court did not try to set the boundaries of the category of cases in which shifting the burden of proof on cause in fact to multiple tortfeasors may be appropriate. Some subsequent decisions have seemed to treat the burden-shifting technique as very broadly available.³⁴ And both the Second and Third Restatements formulate the technique in liberal terms, notably imposing no limit on the number of tortfeasors against whom it can be applied.³⁵ However, the better-reasoned cases reflect the view that the alternative liability technique “is defensible where the number of defendants is small, but that such a rule breaks down and becomes ‘unfair’ at some undefined point as the number of defendants increases and the likelihood that any particular defendant actually caused plaintiff’s harm decreases.”³⁶

c. 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.³⁷ Prosser saw in this recognition the germ of a technique³⁸ for helping the plaintiff survive the cause-in-fact battle in what are sometimes called “over-determined multiple omissions cases.”³⁹ The case that caught Prosser’s attention was *Saunders System Birmingham Co. v. Adams*,⁴⁰ in which tortfeasor *A* negligently leased a car with no brakes

³⁴ See, e.g., *Haft v. Lone Palm Hotel*, 478 P.2d 465 (Cal. 1970).

³⁵ See Second Restatement § 433B(3); Third Restatement § 28(b).

³⁶ *Senn v. Merrell-Dow Pharmaceuticals, Inc.*, 751 P.2d 215, 222 (Ore. 1988).

³⁷ See, e.g., *Smith v. State Dep’t of Health & Hospitals*, 676 So.2d 543, 548-549 (La. 1996) (discussing legal malpractice cases in which the injury is conceptualized as depriving the victim of a cause of action); *Clemente v. State*, 161 Cal.Rptr. 2d 799, 802 (Cal.App. 1980) (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).

³⁸ 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).

³⁹ *Wright*, *supra* note 20, at 1123.

⁴⁰ 117 So. 72 (Ala. 1928).

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.⁴¹

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.⁴² 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,⁴³ and the judicial support is even thinner.⁴⁴ Nevertheless, the technique is arguably in the traditional common-law tool kit, and thus it belongs on this list.

⁴¹ See *id.* at 74. The *Saunders* plaintiff sued only the car rental company, but the court's reasons for exonerating the company would necessarily have exonerated the driver as well.

⁴² See WILLIAM L. PROSSER, *THE LAW OF TORTS* 239-240 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 Prosser & Keeton, *supra* note 27, at 267 n. 27.

⁴³ See Third Restatement § 26 illus. 1 (indicating that the impairing a personal injury case is actionable "in a jurisdiction that recognizes negligent spoliation of evidence as a cause of action"); Benjamin J. Vernia, *Annotation, Negligent Spoliation of Evidence, Interfering with Prospective Civil Action as Actionable*, 10 A.L.R. 5TH 61 (2002); Common Sense, *supra* note 12, at 1787-89 (1997); Peaslee, *supra* note 38, at 1137-39.

⁴⁴ See *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

d. The lost opportunity theory

By definition, proving but-for causation by a preponderance of the evidence requires proof that there is a greater than 50% chance that the plaintiff's injury would not have happened without the defendant's tortious conduct.⁴⁵ *Herskovits v. Group Health Cooperative*⁴⁶ was a wrongful death action in which the medical tortfeasor's conduct (failing to timely detect and begin treating cancer) had probably made no difference, because at the time the defendant first saw the patient, the patient's chances of surviving were only 39%. However, the expert witnesses agreed (on the basis of cancer-study statistics) that the medical tortfeasor's conduct *had* probably lowered the patient's chances of surviving from 39% down to 25%. Two members of the Washington Supreme Court took the surprising view that the reduced-chances testimony was sufficient to justify treating the tortfeasor as a cause-in-fact of the death. Four others *Herskovits* justices wrote the opinion that has come to be viewed as the law of the case.

The four *Herskovits* justices began by acknowledging that on any traditional view cause-in-fact was lacking. Because *Herskovits* had only a 39% chance of surviving when the defendant first examined him, "it [was] clear from [the medical] testimony that Mr. *Herskovits* would have probably died from cancer even with the exercise of reasonable care by defendant."⁴⁷ This in turn necessarily meant that wrongful death damages could not be awarded. But the medical tortfeasor's culpable worsening of the patient's position

ability to sue someone else for the injury); *Dow Corning Corp. v. Hollis*, [1995] 4 S.C.R. 634, ___ (Canada 1995) (same); *Lewis v. Cook*, [1951] S.C.R. 830, 832-833 (Canada 1951) (same). Cf. *Brennen v. City of Eugene*, 591 P.2d 719, 726-727 (Ore. 1979) (treating an unenforceable judgment for personal injury damages as "a form of property" that was negligently damaged by the defendant's failure to maintain adequate liability insurance). See also *supra* note 37.

⁴⁵ See *supra* note 17.

⁴⁶ 664 P.2d 474 (Wash. 1983)

⁴⁷ *Id.* at 481.

need not go unredressed. “When a defendant’s negligent action or inaction has effectively terminated a person’s chance of survival, it does not lie in the defendant’s mouth to raise conjectures as to the measure of the chances that he has put beyond the possibility of realization.”⁴⁸ Accordingly, “the best resolution of the issue before us is to recognize the loss of a less than even chance as an actionable injury.”⁴⁹

In taking the lost chance rather than the death as the injury in suit, the *Herskovits* justices were making the same kind of adjustment that Prosser urged as appropriate for the remedy impairment cases.⁵⁰ Because the tortfeasor was revealed as a but-for cause of damaging a valuable asset⁵¹--i.e., of reducing the victim’s 39% chance of survival to a 25% chance--these justices believed that liability for *that* damage should be imposed. The justices accordingly concluded that Mrs. Herskovits should recover 14% of what a full wrongful death award would have been.⁵²

Courts have been sharply divided in their reactions to the lost opportunity theory.⁵³ Some have rejected the theory entirely.⁵⁴ Others have indicated they would

⁴⁸ *Id.* at 482 (quoting *Hicks v. United States*, 368 F.2d 626, 632 (4th Cir. 1966)).

⁴⁹ *Id.* at 487.

⁵⁰ See *supra* Section II-C-4-c.

⁵¹ See *Murrey v. United States*, 73 F.3d 1448, 1454 (7th Cir. 1996) (“No doubt Murrey would have paid a lot ... for a 5 percent chance of survival if the alternative was a certainty of immediate death.”).

⁵² The *Herskovits* justices stated that what the defendant’s tortious conduct took from the decedent was “at most a 14 percent reduction (from 39 percent to 25 percent)” in his chance of survival (664 P.2d at 480), and they quoted Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1382 (1981), for the proposition that the tortious destruction of a 40% chance of survival should lead to a recovery of “40% of the compensable value of the victim’s life had he survived”.

⁵³ See generally David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 WAKE FOREST L. REV. 605 (2001). See also Common Sense, *supra* note 12, at 1785-86 nn. 90-91.

⁵⁴ See, e.g., *Kramer v. Lewisville Mem’l Hosp.*, 858 S.W.2d 397 (Tex. 1993); *Hotson v. East Berkshire Area Health Authority*, [1987] A.C. 750 (H.L.).

limit it to medical malpractice cases,⁵⁵ or more narrowly to medical malpractice wrongful death cases,⁵⁶ or still more narrowly to only certain types of medical malpractice situations.⁵⁷ The Third Restatement “takes no position” on the validity of the lost opportunity approach.⁵⁸

e. 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 one 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.⁵⁹ A better term for this procedural doctrine would be “entire liability,”⁶⁰ but the “joint and several” usage is entrenched.

The standard (procedural) joint-and-several-liability doctrine does no cause-in-fact work.⁶¹ 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

⁵⁵ Hardy v. Southwestern Bell Tel. Co., 910 P.2d 1024 (Okla. 1996) (rejecting the lost opportunity theory in an action alleging negligent failure of 911 emergency system); Daugert v. Pappas, 704 P.2d 600 (Wash. 1985) (rejecting the theory in a legal malpractice case).

⁵⁶ Weymers v. Khera, 563 N.W.2d 647 (Mich. 1997).

⁵⁷ McKellips v. St. Francis Hosp., 741 P.2d 467, 474-75 (Okla. 1987) (confining the theory to “a limited type of medical malpractice case where the duty breached was one imposed to prevent the type of harm which a plaintiff ultimately sustains”).

⁵⁸ Third Restatement § 26 ct. n.

⁵⁹ See Dobbs, *supra* note 3, at 413.

⁶⁰ Prosser & Keeton, *supra* note 27, at 328.

⁶¹ 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, *supra* note 8, at 447-448. 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 (Ariz. 1998).

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.⁶² In these cases, the joint-and-several-liability term 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."⁶³

*Maddux v. Donaldson*⁶⁴ 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. 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. The two collisions were about 30 seconds apart. 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. Donaldson was dismissed early in the lawsuit,⁶⁵ which then proceeded solely against Bryie. The trial judge stuck close to

⁶² See, e.g., *Landers v. East Texas Salt Water Disposal Co.*, 248 S.W.2d 731, 731-732 (Tex. 1952) (holding two independent polluters of the plaintiff's farm pond liable for the entirety of the damage although their causal contributions were theoretically separable).

⁶³ Another name for it is the "single indivisible injury rule." *Piner v. Superior Court*, 962 P.2d 909, 913 (Ariz. 1998).

⁶⁴ 108 N.W. 2d 33 (Mich. 1961).

⁶⁵ 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.

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. 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 medical 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 this responsibility [of 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.⁶⁶

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.⁶⁷ 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

⁶⁶ 108 N.W.2d at 36-38 (internal quotation marks and citation omitted).

⁶⁷ See, e.g., *Lamoureaux v. Totem Ocean Trailer Express, Inc.*, 632 P.2d 539, 544 (Alaska 1981); *Epps v. City of Baton Rouge*, 604 So.2d 1336, 1345 (La.App. 1992).

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.⁶⁸

But in *Newbury v. Vogel* 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.⁶⁹

The *Newbury* court did not acknowledge that it was making a sizeable leap,^{69a} in effect doing away with the preexisting condition rule in any case in which it might leave the plaintiff remediless. A substantial number of courts have followed the *Newbury* lead.⁷⁰

The Third Restatement approves of *Maddux*.⁷¹ It is agnostic on *Newbury*.⁷² Elsewhere, Michael Green had said that *Newbury* “makes good sense.”⁷³ The Apportionment

⁶⁸ See *supra* note 67.

⁶⁹ 379 P.2d 811, 813 (Colo. 1963).

^{69a} *Maddux* is easy to justify. *Newbury* is harder. “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. Robertson, *supra* note 8, at 167.

⁷⁰ See, e.g., *Mauer 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, at 423 (suggesting that cases like *Newbury* represent merely “[a] variation on the [*Maddux*] rule”).

⁷¹ Third Restatement § 28 ct. d(1)

⁷² *Id.* § 28 ct. d(2).

⁷³ Green, *supra* note 23, at 701.

Restatement approves of both *Maddux* and *Newbury*, noting that *Newbury* is a close call.⁷⁴

f. 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.⁷⁵ 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 Second Restatement embraced the “substantial factor” label⁷⁶ 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.⁷⁷

The Third Restatement 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 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 act(s), each act is regarded as a factual cause of the harm.⁷⁸

⁷⁴ See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 ct. h & Reporter’s Note (2000).

⁷⁵ See Green, *supra* note 23, at 698 n. 97.

⁷⁶ See Second Restatement §§ 431(a), 432, 433.

⁷⁷ *Id.* § 432(2). Confusingly, the Second Restatement 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).

⁷⁸ This version of § 27 is from Council Draft No. 7 (Nov. 13, 2007). The version in Proposed Final Draft No 1 (2005), *supra* note 1, 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.

All of my disagreements with the Third Restatement involve § 27, so we will take up this story in the sections below.

III. THIRD RESTATEMENT § 27 IS OVERINCLUSIVE

A. THE SECOND RESTATEMENT VERSION OF THE SUBSTANTIAL FACTOR TEST HAS DONE USEFUL WORK

It is widely accepted that we need to relax the but-for requirement in what are variously called cases of “duplicative causation,”⁷⁹ “multiple sufficient causes,”⁸⁰ or “overdetermined result.”⁸¹ Professor Malone used yet another term, “combined force situations,”⁸² citing the example of “a fire started through the negligence of a railroad [that merged] with a fire of undetermined origin and the two together destroy[ed] plaintiff’s property.”⁸³ 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 syllogism.⁸⁴

⁷⁹ Wright, *supra* note 20, at 1098.

⁸⁰ Third Restatement § 27 ct. a.

⁸¹ Boeing Co. v. Cascade Corp., 207 F.3d 1177, 1185 (9th Cir. 2000).

⁸² Wex S. Malone, *Ruminations on Cause in Fact*, 9 STAN. L. REV. 60, 88 (1956).

⁸³ *Id.* at 89. The example is based on Anderson v. Minneapolis, St. P. & S.S.M. Ry., 179 N.W. 45 (Minn. 1920).

⁸⁴ Malone, *supra* note 82, at 89 (emphasis in original).

Malone thought the substantial factor approach a problem-free answer to the perceived inadequacies of the but-for test in “combined force situations.”⁸⁵ But the approach needs to be confined by rigorous criteria. There is highly seductive appeal in “drama over the syllogism,”⁸⁶ in “instinct”⁸⁷ over reasoning, in “incantation”⁸⁸ over analysis. Courts sometimes grasp that the substantial factor test is appropriate for only a narrow range of multiple-cause situations,⁸⁹ 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.⁹⁰ 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 Second Restatement § 432(2) does useful work in numerous cases.⁹¹ A good example is *Sanders v. American Body Armor and Equipment, Inc.*, in which “an 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.”⁹² Sanders, a policeman, was wearing a

⁸⁵ *Id.* at 88.

⁸⁶ *Id.* at 89.

⁸⁷ Common Sense, *supra* note 12, at 1778.

⁸⁸ Dobbs, *supra* note 3, at 416.

⁸⁹ See Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852, 860-863 (Mo. 1993) (outlining the classic limits on the legitimate use of the substantial factor test and (at 861) urging adherence to those limits to avoid “frittering away a meaningful causation test [the but for test]”).

⁹⁰ See, e.g., Daniels v. Hadley Memorial Hospital, 569 F.2d 749, 757 (D.C. Cir. 1977); Fowler v. Roberts, 556 So.2d 1, 5 n. 6 (La. 1989); Daugert v. Pappas, 704 P.2d 600, 605-606 (Wash. 1985); Fouche v. Chrysler Motors Corp., 692 P.2d 345, 348 (Idaho 1984); Sharp v. Kaiser Foundation Health Plan, 710 P.2d 1153, 1155 (Col. App. 1985), *aff’d*, 741 P.2d 714 (Col. 1987)

⁹¹ Third Restatement § 27 ct. b says there are “only a handful of cases” that explicitly rely on Second Restatement § 432(2), but the Reporters’ Note cites dozens of cases using the approach § 432(2) encapsulates.

⁹² 652 So.2d 883, 884 (Fla. App. 1995).

supposedly bullet-proof vest supplied by defendant. The abdominal wound was outside the vest-protection area, but the chest wound would have been prevented if the vest had functioned properly. The trial court granted defendant's motion for directed verdict on the view that the 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."⁹³ The appellate court held that the trial judge's reasoning was wrong,⁹⁴ quoting a version of the substantial factor test set out in the Prosser & Keeton treatise.⁹⁵ The functional identity of the Prosser & Keeton and Second Restatement versions of the substantial factor test--and the way in which Second Restatement § 432(2) readily deals with the *Sanders* situation-- is evident on the face of the 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 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.⁹⁶

§ 432(2): If two forces are actively operating, one because of the actor's negligence [the chest wound], the other [the abdominal wound] not because of any misconduct on his part, and each is itself 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.

⁹³ *Id.*

⁹⁴ The court went to conclude--quite implausibly, by the way--that defendant should win the case on legal causation grounds. See *id.* at 885.

⁹⁵ See *id.* at 884-885.

⁹⁶ Prosser & Keeton, *supra* note 27, at 266-267 (footnotes omitted).

B. THIRD RESTATEMENT § 27 OMITTS 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 Second Restatement § 432(2) (quoted just above) in this way. We will refer to the defendant as “D” and to the author of the competing cause as “X.” Section 432(2) says that D’s wrongful 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’s conduct--to bring about the harm; (b) X’s conduct was also sufficient--i.e., it did not need the help of D’s conduct⁹⁷--to bring about the harm; (c) D’s conduct was a “substantial” causal factor--i.e., it was approximately equal in magnitude and scope to X’s conduct.⁹⁸

When Second Restatement § 432(2) is formulated to yield the foregoing three criteria, it prevents the assertion of substantial-factor causation against any of the 26 polluters in *Warren v. Parkhurst*, *supra* Section II-C-4-a at note 30. 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

⁹⁷ This constraint is necessary because, were X’s conduct not sufficient, D’s conduct would be a but-for cause of at least some of the harm.

⁹⁸ Professor Green seems to agree that § 432(2) makes substantiality a requirement. See Green, *supra* note 23, 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.”).

action⁹⁹ or inextricable tangle approach¹⁰⁰ can be made to fit. (On a less traditional view, the remedy impairment approach¹⁰¹ might be considered.)

Third Restatement § 27 (quoted above at the end of Section II) omits two key requirements contained in Second Restatement § 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 § 27, which states (emphasis supplied, citation omitted):

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.*

Under this "causal set" approach, if we assume that it took 20 of the 26 polluters to ruin the *Warren* creek, § 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 19 of the others.

Some might argue that using § 27 to establish factual causation in *Warren* is a 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 § 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's rolling over the edge of the mountain and plummeting to its destruction. The force exerted by each of A through G

⁹⁹ See *supra* Section II-C-4-a.

¹⁰⁰ See *supra* Section II-C-4-d.

¹⁰¹ See *supra* Section II-C-4-c.

constituted 33% 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 1% of the force necessary to propel the car over the edge. Harriet's conduct was a § 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 any three of the others.¹⁰²

Under Second Restatement § 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. Third Restatement § 27 says that Harriet's conduct was a factual cause of the harm. Thus § 27 is overinclusive.¹⁰³ The Restaters concede this, which in turn requires the creation of

¹⁰² The hypothetical is a slightly modified version of Third Restatement § 29 illus. 12 (Tentative Draft No. 2, March 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.*

¹⁰³ It will be argued that the overinclusiveness manifest in Harriet's Case is required in order to make § 27 inclusive enough to find causation in a case in which three tortfeasors, each of whom provides 50% of the force necessary to push the car over the cliff, independently and simultaneously lean on the car. See Third Restatement § 27 illus. 3. I disagree. In most such real-world situations, these three tortfeasors would not be truly independent, so that the concerted action approach (*supra* Section II-C-4-a) might well work. If that approach were unavailable, the remedy impairment approach (*supra* Section II-C-4-c) could be used.

Either concerted action or remedy impairment would be a better way to handle the case than the “causal set” approach endorsed by § 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 Third Restatement § 29 illus. 12 (Tentative Draft No. 2, March 2005). 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 is a highly imaginative counterfactual scenario, lightyears 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 23, at 698 (emphasis supplied). See also Common Sense, *supra* note 12, at 1770 & n. 21 (emphasizing that in the conventional counterfactual inquiry, the only allowable change is correcting the defendant's wrongful conduct).

Third Restatement § 36 so as to exonerate Harriet on scope of liability (proximate cause) grounds. See *infra* Section IV.

IV. THE THIRD RESTATEMENT’S “SCOPE OF LIABILITY (PROXIMATE CAUSE)” SOLUTION TO § 27’S OVERINCLUSIVENESS IS UNSATISFACTORY

“[F]actual causation is largely a nonnormative inquiry.”¹⁰⁴ 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.”¹⁰⁵ Green was referring to the mistake of conceptualizing a cause-in-fact issue in scope of liability (proximate cause) terms. In crafting § 36 of the Third Restatement, Reporter Green seems to have done exactly what Professor Green counsels against.

In the Third Restatement, 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.¹⁰⁶ 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.

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

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

¹⁰⁴ Green, *supra* note 23, at 688 n. 55.

¹⁰⁵ *Id.* at 680 n. 31.

¹⁰⁶ See, e.g., Third Restatement § 29 ct. e (“intuitive notions of fairness and proportionality”); *id.* ct. f (“scope of liability [is] very much an evaluative matter”); *id.* ct. g (emphasizing the need for “clearly differentiating the predominately historical question of factual cause from the evaluative question of scope of liability”).

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.

The Third Restatement does not claim that § 36 fits comfortably within Chapter VI. The heart of Chapter VI is § 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 § 36 admits that "the limitation on liability provided in this Section is not a function of the risk standard expressed in § 29." The comment goes on to explain that § 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*" (my italics).

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.¹⁰⁷ The most persuasive, candid, and informative reason for exculpating Harriet is not that she should go free because legal policy treats the harm to

¹⁰⁷ 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"); *Baltimore and Ohio Railroad Co. v. Sulphur Spring Ind. School Dist.*, 96 Pa. 65, 1880 WL 13501 at *4 (1880) (stating that any alleged effect of defendant's conduct was "merely fanciful or speculative or microscopic").

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 absence of factual cause.”¹⁰⁸

V. THE THIRD RESTATEMENT’S REPORTERS’ RECENT DECISION TO JETTISON THE ANDERSON LINE OF CASES IS UNWISE

Second Restatement § 432(2) is based substantially¹⁰⁹ on *Anderson v. Minneapolis, St. P. & S.S.M. Ry.*,¹¹⁰ 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.¹¹¹ 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.”¹¹² Defendant was held liable for full damages.

Third Restatement *Proposed Final Draft No. 1* (2005) § 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.” The Reporters have since changed course and are now proposing propose a new comment *d* that would say:

¹⁰⁸ Green, *supra* note 23, at 696 (discussing *City of Piqua*).

¹⁰⁹ See *Basko v. Sterling Drug, Inc.*, 416 F.2d 417, 429 n. 15 (2d Cir. 1969) (noting that a Restatement illustration of the operation of the substantial factor is based on *Anderson*).

¹¹⁰ 179 N.W. 45 (Minn. 1920).

¹¹¹ See *supra* Section II-A at n. 83.

¹¹² 179 N.W. at 46.

When one of multiple sufficient causes is not tortious, 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 addressed in this Restatement.¹¹³

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....”¹¹⁴ 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 certainly have paved the way.

In a recent law review article, Professor Green carefully and candidly explains the Reporters' new reasoning.¹¹⁵ 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 Second Restatement have] adhered to” the *Anderson* view.¹¹⁶ 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

¹¹³ Third Restatement § 27 ct. d (Council Draft No. 7, Nov. 13, 2007) (citation omitted).

¹¹⁴ Third Restatement § 27, Council Draft No. 7, Reporters' Memorandum preceding § 27 (Nov. 13, 2007).

¹¹⁵ Green, *supra* note 23.

¹¹⁶ *Id.* at 685. Green's accompanying footnote 50 suggests this may be a fairly large “handful.”

duplicated harm.”¹¹⁷ Evaluating Professor Green’s assertion entails 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.¹¹⁸ (b) The day after the tort, P was at home in bed when killed by a tornado.¹¹⁹ (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 to need a name for situation (c); let us call it *Dillon*.¹²⁰)

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 chutist in the heart at the precise instant at which the chutist 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.”¹²¹

¹¹⁷ *Id.* at 709.

¹¹⁸ Cf. *Follett v. Jones*, 41 S.W. 2d 713 (Ark. 1972).

¹¹⁹ Cf. *Jobling v. Associated Dairies Ltd.*, [1982] AC 794 (H.L.).

¹²⁰ See Green, *supra* note 23, *id.* at 691 (discussing *Dillon v. Twin State Gas & Electric Co.*, 163 A. 111 (N.H. 1932)); *id.* at 705 (calling situation (c) a “Dillon look-alike”).

¹²¹ *Id.* at 700. This conflict was the focus of Judge Peaslee’s article, *supra* note 38.

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 Third Restatement § 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,¹²² and it can be lessened by insisting that in duplicated harm situations the defendant should have the burden of apportioning the damage (i.e., by embracing the *Newbury* expansion of the *Maddux* rule.¹²³) Surely the *Anderson* rule can survive without threatening a defendant's right to show that the implacable realities bearing on the plaintiff¹²⁴ 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

¹²² 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 the discussion. For treatment of the principal functional reason for distinguishing between cause-in-fact and damages issues, see Robertson, *supra* note 8, at 167.

¹²³ See *supra* Section II-C-4-e at note 69.

¹²⁴ See *supra* note 69a.

disturbing metaphysical aspect.¹²⁵ It may be that, by 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*.¹²⁶ When the matter is closely debatable, a Restatement should probably devastate as little as possible.

VI. CONCLUSION

The Third Restatement 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” cabinet¹²⁷--and stuck with the three criteria encapsulated in § 432(2) of the Second Restatement. (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.”)

¹²⁵ This sentence will be decried as question begging, but it is a bit more than that. See Peaslee, *supra* note 38, at 1130 (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”) (emphasis added); *id.* at 1135 (reiterating that competing innocent causes will not keep 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).

¹²⁶ According to WestLaw’s “keycite” feature, on March 13, 2009, *Anderson* (Minn. 1920) had been cited in 49 reported cases and *Dillon* (N.H. 1934) in 24.

¹²⁷ See Dobbs, *supra* note 3, at 407 & n. 10 (stating that causation problems have “led many serious thinkers to penetrating and puzzling analyses” and citing, *inter alia*, a seminal and much-admired piece by Richard Wright).