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THE INTERSECTION OF FACTUAL CAUSATION AND DAMAGES

*Michael D. Green**

Some of the most intriguing brain teasers in tort law involve the valuation of damages for harm arising from wrongfully inflicted injury to person or property.¹

INTRODUCTION

I first became interested in the subject of this paper while working on factual causation for the *Restatement (Third) of Torts*. In that process, my co-reporter, Bill Powers, and I kept coming across difficult questions relating to how much of an injury should be attributed to a tortfeasor. These are the issues to which David Fischer adverts in the above passage. Thus, imagine a person injured by a tortfeasor and that person suffers a fifty percent diminution in work capacity. Later, the person independently develops a disease that will, in a few years, prevent her from working at all.² To what measure of damages is the plaintiff entitled from the tortfeasor? Does it matter if the second disease results from tortious, rather than innocent, conduct? While this particular example involves earnings capacity as the harm, the same sorts of issues arise for the harm of interest at this Symposium—noneconomic harm.³ Consider a pregnant woman who is injured in a

* Williams Professor of Law, Wake Forest University School of Law. Numerous conversations over the past decade with Bill Powers, my co-reporter of two portions of the *Restatement (Third) of Torts*, have informed the views I express in this paper. Bill, despite heroic efforts, has not been able to eliminate all of my errors. David Fischer has been helpful both in his work in this area and in comments he provided on a prior draft. I learned a lot during an opportunity to discuss this paper with the New York torts group and with my colleagues at Wake Forest at a development seminar. John Vermitsky has provided much appreciated research assistance.

1. David A. Fischer, *Successive Causes and the Enigma of Duplicated Harm*, 66 TENN. L. REV. 1127, 1127 (1999).

2. I borrow here from the British case of *Jobling v. Associated Dairies Ltd.*, [1982] A.C. 794 (H.L.). See also *Victorson v. Milwaukee & Suburban Transp. Co.*, 234 N.W.2d 332, 344 (Wis. 1975) (finding that unrelated stroke suffered before trial that caused loss of earnings capacity barred recovery for future earnings).

3. See, e.g., *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 973 (7th Cir. 1983) (holding that pre-existing back condition could be considered by jury in awarding pain and suffering damages for subsequent injury to back because subsequent injury may just have accelerated pain that plaintiff would otherwise suffer from pre-existing condition); *Henderson v. United States*, 328 F.2d 502 (5th Cir. 1964); *Kegel v. United States*, 289 F. Supp. 790, 796 (D. Mont. 1968) (reducing

train crash that results in the premature cesarean section delivery of her baby, born with several deficits due to prematurity. May the railroad reduce the pain and suffering damages for which it would otherwise be liable by pointing to the pain and suffering of labor at full term that the plaintiff would have incurred?⁴ Consider also a defendant who negligently runs into a pedestrian, seriously injuring the pedestrian's foot and leg and causing severe and permanent pain. Some time later, the victim is in another accident that requires the amputation of his leg. Can the first defendant obtain a reduction in the pain and suffering damages for which she would have been liable if the second accident had not occurred?⁵ Thus the inquiry in which I engage in this paper is applicable to noneconomic damages, but not exclusively so.

These are hard questions—harder than a number of difficult questions we puzzled over involving multiple sufficient causes, especially

plaintiff's damages for pain and suffering due to herniated disk based on pre-existing condition and time when pre-existing condition would have produced same harm); Fischer, *supra* note 1, at 1131 ("Duplicated harm also occurs with non-economic losses such as pain, suffering, and mental distress.").

4. The issue is suggested by, but not raised in, *Powers v. Campbell*, 442 P.2d 792, 794-95 (N.M. 1968). Contrary to my conclusions later in this paper, most courts do not provide defendants a credit for the pain and suffering a mother would incur at term when the defendant causes a miscarriage. See Fischer, *supra* note 1, at 1144 n.92. I agree with Professor Fischer that whatever is happening in these cases is different from the standard treatment for duplicated harm. Perhaps the pain of labor, while real pain (as I am assured by my wife and other mothers), is experienced under circumstances that make it far less traumatic and harmful than if it occurred in a different context. Perhaps anticipated pain that occurs in the midst of a glorious event such as an ordinary birth is neither cognizable as harm nor a basis for discount as harm avoided. That the outcome depends, as Prosser suggests, on the amount of time before the due date that the miscarriage occurs is implausible and unpersuasive. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 353 n.78 (5th ed. 1984). In every case, we can be reasonably sure (certainly beyond the fifty percent preponderance threshold) that, in the absence of the miscarriage, the woman would have experienced such pain. About two-thirds of all recognized pregnancies result in a live birth; only fifteen to twenty percent are terminated by miscarriage or stillbirth. See S. VENTURA ET AL., CTRS. DISEASE CONTROL, TRENDS IN PREGNANCIES AND PREGNANCY RATES BY OUTCOME: ESTIMATES FOR THE UNITED STATES, 1976-96, at 25 (2000).

Note that the harm avoided and for which the defendant seeks a credit was a consequence of the defendant's tort. This, then, overlaps with the narrower field of conferral of a benefit and whether a defendant can obtain a credit for such. Courts have been more reluctant to adjust damages in this specific instance. See RESTATEMENT (SECOND) OF TORTS § 920 (1979) (noting that benefit conferred by defendant is relevant to damages only "to the extent that this is equitable"). See also *infra* note 12.

5. I borrow from another British case, *Baker v. Willoughby*, [1970] A.C. 467 (H.L. 1969). See also *Jurney v. Lubeznik*, 218 N.E.2d 799 (Ill. App. Ct. 1966). The issue arose in *Baker*, but the extent of damage for post amputation pain and suffering was so small as not to require any adjustment. See Harvey McGregor, *Variations on an Engima*, 33 MOD. L. REV. 378, 383-84 (1970).

when negligent omissions constituted those sufficient causes.⁶ Deadlines and perhaps our limited ability to grapple over conundrums as difficult as these led me to argue that the problem was not one of causation but damages.⁷ We could postpone damages issues to a future torts Restatement project and thus avoid having to confront and resolve these issues. Despite Bill Powers's discomfort with that route and his arguments to me that we were neglecting a causal matter, that is exactly what we did.⁸ This was the American Law Institute's (ALI) analog of the dismissal in a law review article that "this issue is beyond the scope of this article."

Lest I sound cavalier about this matter, I want to acknowledge that the matter is of some importance. In his influential article on causation and loss of a chance, Professor King urged that for the sake of analytical clarity, the idea of causation be kept distinct from the idea of damages and its component inquiry, identification of the harm.⁹ For a variety of reasons he demonstrates in the lost chance context, such clarity is important to working through a variety of difficult problems at the intersection of these subjects.¹⁰ I have even more appreciation for Professor King's advice, having observed the difficulties created by coupling factual cause and limitations on liability as legal cause or proximate cause.¹¹

6. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 27 cmt. i (Proposed Final Draft No. 1, 2005).

7. By "damages" I mean identification of the harm that will require valuation by the factfinder. In determining damages, there are at least three steps required to determine an appropriate monetary award: (1) identifying the detriment suffered by the plaintiff, (2) determining whether the detriment suffered by the plaintiff is a compensable harm, and (3) determining the value of the harm. It is the first aspect that I address in this paper.

8. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 26 cmt. k, § 27 illus. 6, § 31 cmt. c (Proposed Final Draft No. 1, 2005).

9. See Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1353-54 (1981).

10. For an explanation of the reasons for having different elements for a cause of action, see W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. REV. 921 (2005).

11. The confusion, inefficiency, and opacity created by the failure to separate and distinguish two quite different problems has long been appreciated and documented. See VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 89 (3d ed. 1994) ("One of the great breakthroughs in analysis of proximate cause was accomplished when courts and legal scholars attempted to isolate problems of causation in fact from proximate cause."); Laurence H. Eldredge, *Culpable Intervention as Superseding Cause*, 86 U. PA. L. REV. 121, 123 (1937) ("All too frequently the language of opinions serves only to obscure the real problem by discussing the two separate questions as one . . ."); Leon Green, *The Torts Restatement*, 29 ILL. L. REV. 582, 603, 606-07 (1935) (criticizing *Restatement of Torts*'s failure to keep factual cause and proximate cause distinct); Wex S. Malone, *Ruminations on Dixie Drive It Yourself Versus American Beverage Company*, 30 LA. L. REV. 363, 370, 377 (1970); Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 97 (1956); Charles B. Mikell, *Jury Instructions and Proximate Cause: An Uncertain Trumpet in Georgia*, 27 GA. ST. B.J. 60, 64 (1990) ("The factual issue of cause in fact

I am pleased that this Symposium has afforded me the opportunity to revisit these questions, which we deferred at the time. Having left these questions to a future Restatement, I have the luxury of rethinking whether we made the right choice about where they belong without much concern for the proper substantive resolution of them.¹² Someone else will assume responsibility for assisting the ALI to work through these questions at the intersection of causation and damages. Moreover, this Symposium affords me the possibility of explaining to my friend and long-time collaborator that deferring these matters was proper. Having engaged in such efforts in the past, I do not hold great optimism that I will succeed. My efforts were given a boost, however, while doing some preliminary research for this paper. I came across a promising opinion in a recent torts casebook that was published after we chose deferral. As the authors of that casebook put it: “[T]he issue . . . is often thought to present a conundrum as to actual causation. . . . Might [it] better be understood as raising an issue of damages—that is, the amount of compensation that, in fairness, ought to be paid to the victim (or his estate) by the tortfeasor?”¹³

should rigorously be separated from the policy decision about proximate cause.”); Walter Probert, *Causation in the Negligence Jargon: A Plea for Balanced “Realism,”* 18 U. FLA. L. REV. 369, 372 (1965). Before he became the Reporter for the *Restatement Second of Torts*, Dean Prosser expressed similar views:

A decision upon one issue, and the language used in it, has no bearing on any other.

The confusion which surrounds the whole subject results very largely from carrying over such language to another entirely unrelated problem. The first essential step in any clarification of “proximate cause” is a separation of the issues.

William L. Prosser, *Proximate Cause in California*, 38 CAL. L. REV. 369, 425 (1950). See also Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 945, 971, 978 (2001); Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1080 (2001).

12. Thus, I do not address a matter that is often discussed with the issues I propose to examine in this paper: how to account for the defendant conferring a benefit on the plaintiff at the same time that the plaintiff is injured by the defendant. See RESTATEMENT (SECOND) OF TORTS § 920 (1979). That question is dealt with under the rubric of damages and raises concerns that overlap with those identified above. See *id.* at illus. 8. Tension between the duplicated harm rule, which I do address, and the benefit rule is minimized when the latter permits a credit where the interests affected are the same, but denies a credit where the interests are different (and, thus, there is not duplicated harm). Thus, I do not think the fact that proper accounting for benefits is dealt with as a matter of damages contributes significantly one way or the other to the larger Powers-Green debate I address herein. I also suspect that the matter of conferring a benefit does not arise very often when the defendant’s tort involves physical harm, the subject of the *Third Restatement* project that generated our interest in the proper home for the issues we deferred.

13. JOHN C. P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 257 (2004). I also find support in the work of David Robertson, who treats the issue as one of damages. See David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1794 (1997). Ironically, I am inclined to think that Professor Robertson is overbroad in what he characterizes as damages issues. For him, so long as the defendant caused some of the harm complained of by

I must confess that the subject of this paper is at the periphery of the subject matter of this Symposium. Most of the participants here are going to delve deeply into the murky waters of pain and suffering, whether and why we should recognize that as a compensable loss, and how to value it when it occurs. My topic bears on that question because of the need to identify the existence and length of noneconomic damages that are eligible for compensation. My trepidation at balancing on the margin is enhanced by the realization that if I should conclude that Bill Powers is correct that this is a matter of causation, I have analyzed myself right out of the subject matter of this conference. That acknowledgment should satisfy my ethical obligation of full disclosure of the biases and external influences with which I come to this inquiry.

After working through this problem, I am now inclined to believe several things: (1) in an unimportant way, the problem is one of both causation and damages (or harm, as I characterize the identification of the detriment that must be valued to determine damages); (2) that the problem of determining the appropriate damages in cases such as I set forth initially is one best not dealt with as a matter of factual cause; (3) that the most likely doctrinal arena in which to place those problems is damages; and (4) the law that emerges in determining these damages awards provides insight into the errors of addressing these matters as one of causation. At the end of the day, I find myself pleased to have prevailed in my disagreement with Bill Powers on the matter of whether we appropriately deferred. I must confess, however, that my record with him is no better for it because of a victory he can now claim on a matter that emerges later in this paper, but that I will defer identifying and discussing for as long as I can.

II. THE NECESSITY OF CAUSATION AND HARM IDENTIFICATION

In a foundational sense, both causation and harm identification are required in the determination of damages that might be described as overdetermined or duplicated. The “duplicated” term is applicable to cases like one described earlier in which the victim’s fifty percent diminution in work capacity caused by a tortfeasor is duplicated some time later when an independent event (disease) produced the same harm (and more). Thus, from the time that the disease disabled the plaintiff, both the tortious harm and the disease caused the duplicated

plaintiff, the remaining issues are damages. I would think that so long as there is evidence that emerges that some of the harm suffered by plaintiff was not caused by defendant, there is a causal issue. In addition, whether and when to shift the burden of proof on causation is not a matter of damages law.

harm of a fifty percent diminution in work capacity. By contrast, “overdetermined harm” occurs when two independently sufficient causes concur at the same time and each is capable of causing harm.¹⁴ Duplicated harms can be understood as a special conceptual case of overdetermined harms—while they do not occur at the same time, they share the characteristic of multiple causes producing overlapping or duplicated harm, although not at the same time.¹⁵

No damages scheme can proceed without an identification of the harm for which damages are awarded.¹⁶ At the same time, causation is critical because it limits the harm that qualifies for compensation. Aside from the necessity of both, there is an interactive quality to the two concepts, as explained below.

In order to make any causal inquiry, the inquiry must be framed.¹⁷ That framing requires identifying the act or event that is of interest as a potential cause and the legally cognizable outcome or harm to which the inquiry is addressed. Only *after* those two items are specified can we engage in a causal inquiry: counterfactually by employing the familiar but-for standard or by supplementing it with an appropriate test for overdetermined harms. Specifying the harm is a distinctly normative act. In personal injury cases it may often not seem so, but when we think about whether increased risk, pleural plaque (a consequence of asbestos exposure that is revealed in abnormal x-rays without any clinical symptomology), or stand-alone emotional disturbance constitute harms, we readily appreciate the normativity involved in charac-

14. I refer to those causes that produce overdetermined harm as multiple sufficient causes or concurring causes, the latter of which I also use to refer to causes that are responsible for duplicated harm. Multiple sufficient causes is a more convenient shorthand for the NESS (necessary element of a sufficient set) test. When a cause is not sufficient along with other background causes to cause the harm, as in the case of a partial dose of poison, resort to the NESS test is required. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 27 cmt. f (Proposed Final Draft No. 1, 2005).

15. As explained later, labeling the forces responsible for duplicated harm as causes is problematic, indeed, often incorrect. For now, it is useful in understanding the concept of duplicated harm.

16. As Stephen Perry put it: “[A]n award of damages is often intended to compensate for harm; if we do not know something about the nature of harm, we cannot fully understand the nature of at least this type of compensation.” Stephen Perry, *Harm, History, and Counterfactuals*, 40 SAN DIEGO L. REV. 1283, 1283 (2003).

17. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 26 cmt. f (Proposed Final Draft No. 1, 2005). See also Robertson, *supra* note 13, at 1769. Tony Honoré makes this point along with the observation that, for its purposes, law imposes a particular form of framing that addresses the act and harm that are specified by the law as the ones of interest. See TONY HONORÉ, *RESPONSIBILITY AND FAULT* 100, 106 (1999) (arguing that “[t]he inquiry is into whether certain faulty conduct (or risk-creating conduct entailing strict liability) caused certain harm”).

terizing what counts as harm.¹⁸ Thus, Professor King's seminal article urges recognition of loss of a chance of a benefit, such as cure of a terminal disease, as compensable harm. King contends that the reform would reconceptualize the harm from the classical detrimental outcome to the foregone probability of avoiding that outcome, thereby modifying the damages recoverable while holding constant the requirement of factual causation and its definition.¹⁹

III. THE ROLE OF HARM IDENTIFICATION

I also contend, uncontroversially I expect, that harm of the sort addressed at this Symposium has a time dimension: a plaintiff who suffers some magnitude of pain and suffering for a longer period than another plaintiff is entitled to a greater award of damages. The same is true in death cases. For those with a consortium claim, the loss is, in part, a function of the amount of time that the survivor has lost with the deceased relation. Whether or not the defendant's lawyer decides to abjure out of sensitivity, the lawyer should be able to argue that the widower of a seventy-five-year-old decedent has suffered a considerably diminished harm than would have been the case if the decedent were twenty-five. Similarly, in the handful of jurisdictions that permit recovery for hedonic damages in death cases, the lost enjoyment is a function of the amount of time that the decedent was deprived of the pleasures of life.²⁰

There are a number of contemporary controversies in tort law that illustrate the role of harm identification in determining damages. Once again, one such controversy concerns time and the possibility of disease acceleration that arises in the toxic substances context.²¹ Since the remand of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* to the

18. See John C. P. Goldberg, *Rethinking Injury and Proximate Cause*, 40 SAN DIEGO L. REV. 1315, 1317–21 (2003) (characterizing Stephen Perry's claims).

19. See King, *supra* note 9.

20. Only a few jurisdictions have affirmatively decided that hedonic damages are recoverable in death cases. See *Choctaw Maid Farms, Inc. v. Hailey*, 822 So. 2d 911, 928–31 (Miss. 2002) (Cobb, J., dissenting in part); Victor E. Schwartz & Cary Silverman, *Hedonic Damages: The Rapidly Bubbling Cauldron*, 69 BROOK. L. REV. 1037, 1059–60 n.107 (2004). The New Hampshire Supreme Court was the most direct in addressing the role of time, as the statute authorizing suit contained language permitting damages based on "the probable duration of [the deceased's] life but for the injury." See *Marcotte v. Timberlane/Hampstead Sch. Dist.*, 733 A.2d 394, 399 (N.H. 1999) (quoting the state wrongful death statute). During Britain's experiment with hedonic damages, the House of Lords acknowledged the role of time lost. See *Benham v. Gambling*, [1941] 1 Eng. Rep. 7, 12–13 (H.L.).

21. For a philosopher's claim that defining harm by reference to the time by which that harm was accelerated assists in unraveling causal inquiries, see L.A. Paul, *Keeping Track of the Time: Emending the Counterfactual Analysis of Causation*, 58 ANALYSIS 191, 193 (1998).

Ninth Circuit,²² there has been conflict over whether a plaintiff can prevail if the epidemiologic studies employed to demonstrate the existence of general causation do not reveal a doubling of disease (a relative risk of two reflects a doubling of disease) in the population exposed to an alleged toxin.²³ The idea behind this doubling requirement is that unless the toxic agent increases the incidence of disease in a group exposed to the agent by something greater than one hundred percent, no member of that group who contracts the disease can “more likely than not” pin his or her disease on exposure to the agent.

This oversimplifies the claim, but in recent years a number of scientists have criticized a threshold requirement of a doubling of risk on the ground that it fails to account for the possibility that the agent may, rather than causing a disease in a person who otherwise never would have contracted it, merely accelerate the time at which the disease occurs.²⁴ If that were the case, then relative risks less than two may reflect a majority of exposed persons having their disease accelerated in time and support recovery for those claimants out for damages that reflect the acceleration. The difficulty with this claim is that there may be no evidence available to determine whether the biology and development of the disease is of the accelerative variety—perhaps because victims already have a genetic predisposition that merely requires a source to actuate the disease—or of the generative variety.

If there were cases in which such evidence existed,²⁵ we might well want to recognize the acceleration of the onset of a disease and provide the plaintiff with damages reflecting that harm. A plaintiff could

22. 43 F.3d 1311, 1320 (9th Cir. 1995) (requiring that a plaintiff demonstrate a minimum relative risk of 2.0).

23. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 28 cmt. c(4) reporters' note (Proposed Final Draft No. 1, 2005); Russellyn S. Carruth & Bernard D. Goldstein, *Relative Risk Greater Than Two in Proof of Causation in Toxic Tort Litigation*, 41 JURIMETRICS J. 195 (2001).

24. See Sander Greenland & James M. Robins, *Conceptual Problems in the Definition and Interpretation of Attributable Fractions*, 128 AM. J. EPIDEMIOLOGY 1185 (1988); Sander Greenland & James M. Robins, *Epidemiology, Justice, and the Probability of Causation*, 40 JURIMETRICS J. 321 (2000); James Robins, *Should Compensation Schemes Be Based on the Probability of Causation or Expected Years of Life Lost?*, 12 J.L. & POL'Y 537 (2004); Ofer Shpilberg et al., *The Next Stage: Molecular Epidemiology*, 50 J. CLINICAL EPIDEMIOLOGY 633, 637 (1997) (“[A] 1.5-fold relative risk may be composed of a 5-fold risk in 10% of the population, and a 1.1-fold risk in the remaining 90%, or a 2-fold risk in 25% and a 1.1-fold for 75%, or a 1.5-fold risk for the entire population.”).

25. For examples of studies whose results suggest acceleration, see James L. Gale et al., *Risk of Serious Acute Neurological Illness After Immunization With Diphtheria-Tetanus-Pertussis Vaccine*, 271 JAMA 37, 41 (1994) (discussing finding in another study that risk of seizures following DPT vaccine administration were significantly higher within six days of administration; after twenty-eight days, the incidence had dropped to normal); Brad A. Racette et al., *Welding-Related Parkinsonism: Clinical Features, Treatment, and Pathophysiology*, 56 NEUROLOGY 8, 12

recover for pain and suffering and lost earnings capacity, but only for the period of time that reflects the acceleration of the disease caused by the toxic agent. Thus the modified harm that reflects acceleration becomes the basis for an award of damages.

A better recognized area of acceleration occurs in what are colloquially known as “thin-skull plaintiff cases.” The plaintiff with a predisposition to suffer more severe or different types of harm than might reasonably be foreseeable may nevertheless recover for that harm.²⁶ Yet that plaintiff’s predisposition will reduce the damages to which he or she would otherwise be entitled if the factfinder determines that the harm would have occurred due to the predisposition at some later time—defendants only pay for the accelerated harm that they cause thin-skull plaintiffs.²⁷

Another arena in which recharacterization of the harm plays a role is in lost chance cases. For example, a physician’s failure to diagnose or refer a patient deprives that patient of an opportunity for successful treatment. A number of courts have reconceptualized the harm suffered as being the lost chance, which is the probability of successful treatment lost due to the missed or delayed diagnosis. Thus the harm to be compensated becomes the damages that would be awarded for the disease or illness, discounted by the probability that the harm could have been avoided if there had been no negligence.²⁸

(2001) (stating that the authors “believe that welding exposure acts as an accelerant to cause [Parkinson’s Disease]”).

26. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 31 (Proposed Final Draft No. 1, 2005).

27. See *Maurer v. United States*, 668 F.2d 98, 100 (2d Cir. 1981). The court noted that: [w]hen a plaintiff has a preexisting condition that would inevitably worsen, a defendant causing subsequent injury is entitled to have the plaintiff’s damages discounted to reflect the proportion of damages that would have been suffered even in the absence of the subsequent injury, but the burden of proof in such cases is upon the defendant to prove the extent of the damages that the preexisting condition would inevitably have caused.

Id.

See also *Steinhauser v. Hertz Corp.*, 421 F.2d 1169 (2d Cir. 1970); *Kegel v. United States*, 289 F. Supp. 790, 796 (D. Mont. 1968) (deciding a Federal Tort Claims Act case); *Dorsey v. Muilenburg*, 345 S.W.2d 134, 142 (Mo. 1961); *McCahill v. New York Transp. Co.*, 94 N.E. 616, 617 (N.Y. 1911); *Haws v. Bullock*, 592 S.W.2d 588, 591 (Tenn. Ct. App. 1979); *Smith v. Leech Brain & Co. Ltd.*, [1962] 2 Q.B. 405, 416. The Queen’s Bench reporter then noted that the court “must make a substantial reduction from the figure [for dependent damages] because of the fact that the plaintiff’s husband might have developed cancer even if he had not suffered the burn [due to the defendant’s tortious act that caused his cancer].”

28. This reconceptualized harm—a lost probability of cure—is not as pure a reconceptualization as might appear. Before a plaintiff is going to be able to recover for this harm, he or she is going to have to suffer the ultimate harm—whatever outcome successful treatment would have avoided. The plaintiff who, despite being deprived of a better chance of successful treatment, nevertheless beats the odds and is cured will not be able to recover for the greater lost chance

These are cases that require no modification of normal causal concepts, create no stress for the typical but-for causation standard, and, while requiring modification of customary tort principles, exclusively employ harm identification with which to accomplish that purpose. Thus, the lost chance cases properly belong to damages law, not causation.²⁹ Similarly, if acceleration of disease exists, it requires adjustment at the harm identification point, not with causal concepts, as does acceleration in the thin-skull context. Moreover, I take these observations as reflecting a preliminary success for my position on whether causation or damages law is at the core of the problems identified at the outset. Let us see if causation can make a comeback.

IV. THE ROLE OF CAUSATION

I begin with what I believe is an uncontroversial assertion: One cannot cause an outcome that has already occurred.³⁰ If I stop talking at this moment, self-conscious that nothing I have to say is worthwhile, and subsequently Steve Landsman yells, "Shut-up, Green, we've heard enough," Landsman's uncivil and unkind, if accurate, statement is not a cause of my silence. Landsman is not liable for silencing me even if there is an action in tort for justifiable silencing; he simply has not caused any of my silence, although he may cause me considerable emotional disturbance. Similarly, a negligent automobile driver who runs over a person who is lying on the pavement, already dead, has not caused that person's death or, indeed, any harm to that person.³¹

that he or she suffered. Perhaps the answer is that while he or she suffered a lost chance, that lost chance caused no monetary damages. This answer assumes that the treatment was not any more costly or lengthy because of the delay in diagnosis.

29. There are courts that have permitted the jury to find causation for the entirety of the plaintiff's harm. See David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 WAKE FOREST L. REV. 605, 641 n.193 (2001) (providing case citations). Some flatly misinterpret § 323(a) of the *Second Restatement* to support that outcome. See DAN B. DOBBS, THE LAW OF TORTS § 178, at 435 n.3 (2000) (citing such cases). Others employ the "substantial factor" standard contained in the *Second Restatement* to permit the jury to find causation on something less than the *sine qua non* standard based on a preponderance of the evidence; in my view, this once again misuses the substantial factor concept. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 26 cmt. j & reporters' note (Proposed Final Draft No. 1, 2005).

30. No serious controversy exists over the proposition that a tortious act that occurs after harm has already happened cannot be a factual cause of the harm. For a review of the cases and scholarship, see DOBBS, *supra* note 29, at 416; KEETON ET AL., *supra* note 4, § 52, at 353; Fischer, *supra* note 1, at 1149; see also H. L. A. HART & TONY HONORÉ, CAUSATION IN THE LAW 239 (2d ed. 1985); King, *supra* note 9, at 1357-58; Michael S. Moore, *The Metaphysics of Causal Intervention*, 88 CAL. L. REV. 827, 860-61 (2000); Stapleton, *supra* note 11, at 960 n.43; Glanville Williams, *Causation in the Law*, 1961 CAMBRIDGE L.J. 62, 69, 72; Wright, *supra* note 11, at 1098-99; Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1795 (1985).

31. See *Saden v. Kirby*, 660 So. 2d 423 (La. 1995); HART & HONORÉ, *supra* note 30, at 239; King, *supra* note 9, at 1357-58; Stapleton, *supra* note 11, at 960 n.43; Williams, *supra* note 30, at

This conclusion is reflected in the concept of causal “preemption.” As Tony Honoré put it: “[I]t seems clear that it is impossible to cause an event that has already occurred. One can flog a dead horse but not kill it.”³²

Let me switch weapons of singular destruction and move to guns. If two hunters fire negligently at their quarry and their bullets arrive in the plaintiff’s eye at the same moment, is either one a cause of the plaintiff’s harm? This is just a variation on the familiar “two fires” hypothetical³³ that requires some consideration of the role of the *sine qua non* test for factual cause. Each hunter is a cause of the harm and liable for the full extent of damages suffered by the victim. *Sine qua non* will not do here, but there is no doubt that instinctively,³⁴ rationally, and normatively, we are entirely comfortable describing each hunter’s action as a cause of the victim’s harm and holding each liable for damages affiliated with the loss of an eye.³⁵

69, 72; Wright, *supra* note 11, at 1098–99; Wright, *supra* note 30, at 1795. Professor Moore, perhaps uniquely, conceptualizes preemptive causes as intervening causes, an aspect of proximate cause rather than factual cause. See Moore, *supra* note 30, at 846. I fail to see the attraction of employing a normative-judgmental standard for a proposition that falls well within the definition of causation. For a cause to produce an effect the cause must precede the effect. With the outcome having already occurred, the preempted force cannot be a factual cause of harm—there is no reason to move to the murky world of proximate cause and intervening acts to resolve this matter.

32. HONORÉ, *supra* note 17, at 113.

33. The familiar “two-fires hypothetical” is not a hypothetical. All three of the early classic cases that addressed the question of overdetermined harm involved multiple sufficient fires. See *Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 179 N.W. 45 (Minn. 1920); *Kingston v. Chicago & N.W. Ry. Co.*, 211 N.W. 913 (Wis. 1927); *Cook v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 74 N.W. 561 (Wis. 1898). Railroads in close proximity to their neighbors had a troubling propensity to cause fires.

34. See Barbara A. Spellman & Alexandra Kincannon, *The Relation Between Counterfactual (“But For”) and Causal Reasoning: Experimental Findings and Implications for Jurors’ Decisions*, 64 LAW & CONTEMP. PROBS. 241 (2001) (finding that subjects reasoned that multiple sufficient causes were causes even without instructions on what constituted causation).

35. Professors Hart and Honoré, two of the leading legal academics to examine causation, do not even attempt a justification for finding multiple sufficient forces as causes, merely observing: “It is perfectly intelligible that in these circumstances a legal system should treat each as the cause rather than neither, as the *sine qua non* test would require.” HART & HONORÉ, *supra* note 30, at 124. Modern caselaw is consistent. See, e.g., *Zuchowicz v. United States*, 140 F.3d 381, 388 n.6 (2d Cir. 1998); *Basko v. Sterling Drug, Inc.*, 416 F.2d 417, 429 (2d Cir. 1969) (applying Connecticut law); *Vincent v. Fairbanks Mem’l Hosp.*, 862 P.2d 847 (Alaska 1993); *Nazareno v. Urie*, 638 P.2d 671, 677 (Alaska 1981); *Thomsen v. Rexall Drug & Chem. Co.*, 45 Cal. Rptr. 642 (Cal. Ct. App. 1965); *Stahl v. Metro. Dade County*, 438 So. 2d 14, 18 (Fla. Dist. Ct. App. 1983) (dicta); *Gerst v. Marshall*, 549 N.W.2d 810 (Iowa 1996) (dicta); *LeJeune v. Allstate Ins. Co.*, 365 So. 2d 471, 475–77 (La. 1978); *Augustine v. Cross*, No. 92-01417, 1995 WL 808900 (Mass. Super. Ct. Jan. 4, 1995) (dicta); *Heer v. State*, 432 N.W.2d 559, 567 (S.D. 1988); *Waste Mgmt., Inc. v. S. Cent. Bell Tel. Co.*, 15 S.W.3d 425 (Tenn. Ct. App. 1997).

Legal commentators have offered a number of explanations why each of the hunters' tortious acts is a cause of the harm.³⁶ Some attempt to retain the but-for standard, yet they manipulate it in a way that reaches the desired outcome. Thus, but for the tortious acts of the two hunters, the victim would still have his eye.³⁷ Yes, but there is a certain, arbitrary quality to this rationale that is troubling. But for the torts of one of the hunters and another hunter on the other side of the county who fired carelessly and hit nothing, the victim would not have suffered harm.³⁸ Richard Wright has popularized a different approach that has its genesis, at least in the legal arena, in the work of H. L. A. Hart and Tony Honoré—the necessary element of a sufficient set (NESS) test.³⁹ Thus, an act or omission is a cause if it is a necessary element of a set of factors sufficient for the harm to occur. The attractiveness of Wright's formulation in dealing with multiple sufficient causes is its recognition that while but-for is a definition of causation, it is not the exclusive definition and can be supplemented when there are multiple sufficient causes.⁴⁰

So far, causation is up to the task of appropriately identifying the harm for which a victim is entitled to damages. Causation becomes stressed, however, with a modest modification of the two hunters hy-

36. See ARNO C. BECHT & FRANK W. MILLER, *THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES* 16–17 (1961) (advocating describing the harm with enough specificity that it includes the existence of both sufficient causes, thereby preserving the but-for test); KEETON ET AL., *supra* note 4, at 268–69 (arguing for treating the two parties responsible for the multiple sufficient causes together as one, when but-for causation would be inadequate); J. L. MACKIE, *THE CEMENT OF THE UNIVERSE: A STUDY OF CAUSATION* 265–66 (L. Jonathan Cohen ed., 1974) (stating that both causes considered together are a but-for cause of the harm); Stapleton, *supra* note 11, at 968 (upholding the “dignity of the law” requires modifying the but-for standard).

37. See KEETON ET AL., *supra* note 4, at 268–69; MACKIE, *supra* note 36, at 265–66.

38. See Wright, *supra* note 30, at 1780–81.

39. See HART & HONORÉ, *supra* note 30.

40. I use the term “multiple sufficient causes” for simplicity, although Professor Wright's formulation is more precise. See *RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM* § 27 cmt. f (Proposed Final Draft No. 1, 2005). The difference matters when the tortious act is not, by itself, sufficient with other “background” causes to constitute all that is necessary to produce the harm. Thus, if six asbestos defendants each contribute one-fifth of the dose of asbestos required to cause lung cancer, none, along with background causes, is a sufficient cause of the lung cancer. This is where the NESS concept provides greater precision in identifying each of the defendants' contributions as a necessary element of a sufficient set of five doses for lung cancer to occur.

I am grateful to Jane Stapleton who pointed out to me that we can employ but-for as a nonexclusive definition of causation supplemented with the multiple sufficient cause standard. See also Michael Moore, *For What Must We Pay? Causation and Counterfactual Baselines*, 40 *SAN DIEGO L. REV.* 1181, 1257 (2003) (concluding that but-for is not necessary for causation because of overdetermined-harm cases). The NESS standard has the elegance of encompassing both but-for and a supplementary standard for multiple sufficient causes, but is cumbersome for ordinary usage when the straightforward but-for standard is up to the task.

pothetical. Suppose that one of them acts nontortiously or that the other sufficient cause is one of natural origin.

The instance of concurring innocent and tortious causes has a long and controversial history. The late nineteenth and early twentieth century cases split on this question.⁴¹ Commentators at the time had conflicting views on the matter but their arguments resembled smoke and mirrors rather than anything persuasive in resolving the question.⁴² For reasons that I have not been able to determine and will have to leave to the future, Francis Bohlen,⁴³ the Reporter for the *Restatement of Torts*, drafted that document so as to impose liability on the defendant whose tortious act concurred with a sufficient innocent cause.⁴⁴ Dean Prosser reported that this standard, enunciated in

41. See *supra* note 33.

42. Compare ARCHIBALD ROBINSON WATSON, DAMAGES FOR PERSONAL INJURIES § 61, at 62–64 (1901) (criticizing the *Cook* case and stating, without reason or citation, that there should be liability for multiple sufficient causes, even when one is innocent), and Charles E. Carpenter, *Concurrent Causation*, 83 U. PA. L. REV. 941, 948 (1935) (advocating that defendant's act is a factual cause and that the but-for test is not the exclusive means for determining factual causes), with Henry W. Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211 (1924), Robert J. Peaslee, *Multiple Causation and Damage*, 47 HARV. L. REV. 1127 (1934) (arguing such a defendant's act should not be held a cause of plaintiff's harm because plaintiff would have suffered the harm in any case), and Williams, *supra* note 30, at 76. In his treatise on damages, Professor McCormick split the difference, proclaiming in the text that both causes had to be of tortious origin and citing *Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 179 N.W. 45 (Minn. 1920), the case that held liability should be imposed in the event of concurring innocent and tortious causes, in the supporting footnote. See CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 74, at 263 n.5 (1935). Peaslee's article stands as an exception to the criticism of the commentators contained in the text. Rereading his article while writing this paper made me appreciate that he had a persuasive ground for treating concurring tortious and innocent causes differently from two concurring tortious causes. Peaslee's article, unfortunately, was published two years after Bohlen first drafted the provisions that became § 432(2) and comment *d* in the *Restatement of Torts* and too late (I infer) for Bohlen to take account of it.

43. Bohlen was not a student of factual causation. None of his published writing in the field of torts contained anything more than a passing reference to causation, although at the time proximate cause was the umbrella term employed to address both factual cause and limits on liability. See FRANCIS H. BOHLEN, STUDIES IN THE LAW OF TORTS (1926) (containing an anthology of Bohlen's earlier publications). His two-volume, 1,500 page casebook contained two cases and six pages on factual causation. See FRANCIS H. BOHLEN, CASES ON THE LAW OF TORTS 223–29 (1915). The two cases came to conflicting outcomes on whether the plaintiff had to prove that the defendant's tortious act was the sole cause of harm. Also included was a case equivalent to *City of Piqua v. Morris*, 120 N.E. 300 (Ohio 1918), placed in the subsection of proximate cause on intervening causes. Bohlen's only publication before the first *Restatement* that addressed either multiple sufficient causes or duplicated harm was the third edition of his casebook, which included *Anderson*, 179 N.W. 45, without commentary. FRANCIS H. BOHLEN, CASES ON THE LAW OF TORTS 225–27 (3d ed. 1930). *Anderson* was the basis for an illustration contained in the first *Restatement* that made a tortfeasor liable when his or her act, along with an innocent cause, produced overdetermined harm. RESTATEMENT OF TORTS: APPENDIX § 432 reporter's notes (1966).

44. The comments to the first *Restatement* provide:

The statement in Subsection (2) applies not only when the second force which is operating simultaneously with the force set in motion by the defendant's negligence is generated by the negligent conduct of a third person, but also when it is generated by an innocent act of a third person or when its origin is unknown.

RESTATEMENT OF TORTS § 432(2) cmt. d (1934).

Although the *Restatement's* language only addressed the matter of whether such a defendant's act was a substantial factor—the causal language of the *Restatement*—in producing the harm, the context, and the absence of any limitation on this provision in the remainder of the *Restatement* reveal that § 432(2) and comment *d* were intended to resolve the question of the liability of the defendant whose tortious act concurred with an innocent cause. Courts and commentators have so understood it. See *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 561 (3d Cir. 1990); *Basko v. Sterling Drug, Inc.*, 416 F.2d 417, 429 (2d Cir. 1969); *State v. Abbott*, 498 P.2d 712, 727 (Alaska 1972) (stating that when multiple sufficient causes are found, "liability should be imposed") (internal quotation marks omitted). See also *Vincent v. Fairbanks Mem'l Hosp.*, 862 P.2d 847, 851–52 (Alaska 1993) (quoting *Abbott*, 498 P.2d at 727, that when multiple sufficient causes exist, "liability should be imposed" and applying it in a case in which one such cause was of innocent origin); *Kitchen Krafters, Inc. v. Eastside Bank*, 789 P.2d 567, 574–75 (Mont. 1990); *Kyriss v. State*, 707 P.2d 5, 7–8 (Mont. 1985); FOWLER V. HARPER ET AL., 4 THE LAW OF TORTS § 20.3, at 116 n.7 (2d ed. 1986); Karen L. Chadwick, "Causing" Enhanced Injuries in Crashworthiness Cases, 48 SYRACUSE L. REV. 1223, 1231 (1998); King, *supra* note 9, at 1370; Christopher H. Schroeder, *Two Methods for Evaluating Duty to Rescue Proposals*, 49 LAW & CONTEMP. PROBS. 181, 183 n.8 (1986).

Professor Richard Wright agrees that § 432(2) resolves the matter of liability, not just causation, but reaches the conclusion in a different fashion. He believes that the *Restatement's* "substantial factor" element encompasses both factual and proximate cause, and therefore § 432(2) addresses all matters bearing on liability, save duty and breach, in providing that causes of overdetermined harm can be found to be a substantial factor. Richard Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425, 1447 (2003). By contrast, I take the *Restatement* at its word that there is a two step process in determining legal cause (the umbrella term employed by the *Restatement*): (1) whether tortious conduct is a substantial factor in causing harm (factual cause), and (2) whether there is some rule that obviates the liability of the defendant (proximate cause). The revision to the first *Restatement of Torts* makes this explicit in explaining the two steps above and that "the 'substantial factor' element deals with causation in fact while the other element deals with a legal policy relieving the actor of liability for harm he has, as a matter of fact, caused." RESTATEMENT OF TORTS § 433 reason for changes (Supp. 1949). While the *Second Restatement* did not reiterate this language, Reporter Prosser's treatise, published concurrently, observed that while satisfying the "substantial factor" causal requirement was necessary to liability, it was not sufficient because other "considerations" could "prevent liability." See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41, at 241 (4th ed. 1971). In support of his interpretation, Professor Wright does point to one subsection in the *Second Restatement* contained in the "Substantial Factor" title that addresses matters outside the realm of factual causation. The placement of that subsection, however, appears to be an unfortunate by-product of a less-than-ideal revision process in both the 1948 and 1964 replacements for the first *Restatement*. The title of the chapter that follows the "Substantial Factor" title, "Rules Which Determine the Responsibility of a Negligent Actor for Harm Which his Conduct is a Substantial Factor in Producing," reveals the separation of substantial factor and factual causation from proximate cause limitations on liability. See 2 RESTATEMENT (SECOND) OF TORTS 449 (1965).

comment *d* of § 432(2), “found general acceptance,”⁴⁵ and he retained it verbatim in the *Second Restatement*.⁴⁶

In drafting the *Third Restatement*, we found the same split among contemporary commentators that existed earlier.⁴⁷ We even found a split of opinion on the state of the case law, with Professor Fischer writing that the “weight of modern authority rejects the innocent/culpable origin distinction, and holds a wrongdoer liable without regard to the culpability of the other party.”⁴⁸ Professor Wright, on the other hand, stated that “[c]ourts generally absolve the defendant from liability if he proves that the injury would have occurred anyway as a result of independent non-tortious conditions.”⁴⁹ Exploring the case law

45. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 41, at 243–44 n.26 (3d ed. 1964).

46. Both of the *Restatements* cast the standard for causation in the case of multiple sufficient causes as that both “may” be found a cause of the harm. The use of “may” might be understood to provide the factfinder some discretionary power to conclude that such a multiple sufficient cause is not a substantial factor and, therefore, not a legal cause. I do not believe that interpretation to be correct. The reason for the discretionary “may” is not because of the multiple sufficient cause circumstance but because the *Restatements* required that all causes reach the threshold of being a substantial factor, meaning that it be more than just a trivial factor. See *RESTATEMENT OF TORTS* § 431 cmt. a; see also *RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM* § 27 cmt. b. reporters’ note (Proposed Final Draft No. 1, 2005).

47. Compare, e.g., HARPER ET AL., *supra* note 44, at 114–16 (endorsing treating one tortious competing cause as a factual cause as “of greater merit” and furthering both deterrence and compensation goals), with, e.g., Wright, *supra* note 30, at 1798 (explaining the corrective justice objection to imposing liability on the defendant whose tortious act concurs with a sufficient innocent cause to produce harm). Hart and Honoré were conflicted on this matter. At one point they declared that the tortious and innocent concurring causes were more doubtful than when both causes were tortious. See HART & HONORÉ, *supra* note 30, at 236. Later they suggested that the early *Cook* case that absolved the defendant of liability was “discredited,” but that when duplicated harm occurs, the plaintiff cannot recover for the innocently caused portion of the harm. See HART & HONORÉ, *supra* note 30, at 236, 239, 248.

Law and economics analysts concur with the corrective justice commentators that a tortfeasor who concurs with an independent and sufficient innocent cause should not be held liable for the harm. The explanation is that no additional deterrence is provided by holding the tortfeasor liable in that suit, because there are already adequate incentives in place for the tortfeasor to exercise the appropriate level of care. Exercising that care would not reduce the incidence of loss when other innocent causes would produce the same harm. Thus, there is no reason to incur the costs of an additional lawsuit if no beneficial deterrence incentives would be provided. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 234–36 (1987); see also Mario J. Rizzo & Frank S. Arnold, *Causal Apportionment in the Law of Torts: An Economic Theory*, 80 COLUM. L. REV. 1399, 1414 (1980) (arguing from economic perspective that the innocent cause has reduced the value of plaintiff’s property to zero).

48. David A. Fischer, *Causation in Fact in Omission Cases*, 1992 UTAH L. REV. 1335, 1346, 1381; see also Moore, *supra* note 40, at 1189–90.

49. Wright, *supra* note 30, at 1798. Professor Wright cited two Wisconsin cases in support of this principle, both preceding the first *Restatement of Torts*. The first case arose when two fires merged, one of tortious origin and the other of unknown origin, neither party having proved whether the second fire was of tortious or innocent origin. The court held that the fire of unknown origin was the proximate cause of the harm and a superseding cause for the negligently

since the *Second Restatement*, we found that virtually every one of the handful of cases to confront the situation adhered to the comment *d* position.⁵⁰ With two *Restatements* dating back seventy years, there

started fire. *Cook v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 74 N.W. 561 (Wis. 1898). Thirty years later, the court went out of its way to modify *Cook*, stating that defendants would have a defense to prove that a fire of unknown origin was due to natural causes and therefore a superseding cause. Wright also cited a British case, *Jobling v. Associated Dairies Ltd.*, [1982] A.C. 794 (H.L.).

Recently, Professor Wright reaffirmed the position he expressed twenty years ago. To accommodate modern case law, however, including some that did not exist at the time of his California article, he has modified his claim. Now, he finds a rule that the defendant may exonerate himself or herself if he or she proves that the plaintiff would “almost certainly” have suffered the harm due to a nontortious cause. Wright, *supra* note 44, at 1435. He dismisses the cases of the second half of the twentieth century that hold a tortfeasor responsible for a multiple sufficient tortious cause that concurs with an innocent cause with the claim that they are not inconsistent with his “almost-certainty” defense. These cases are not inconsistent with it because, in Professor Wright’s account of them, none involves a situation in which it was “almost certain” that an innocent cause was a multiple sufficient cause or because they involve cases in which the courts were only addressing factual causation and therefore not addressing his limitation, which he grounds in aspects other than factual cause. *Id.* at 1459. The former claim is a little like asserting that there is a rule of law that defendants who are bald, have a last name of Green, and live in North Carolina have immunity from liability and that all the case law is consistent with that principle because, although they do not address it, no such person is a defendant in those cases. The latter explanation rings hollow since the *Restatement* provisions imposing liability are an aspect of its treatment of factual cause. That the courts in such a case did not discuss Professor Wright’s “almost certain” defense does not mean that it exists. Rather, I think it means that the courts thought that there was no such limitation and that their treatment of the causation issue resolved the matters required for liability of the defendant aside from duty and breach. Some of the cases do focus narrowly on the question of the propriety of the causation instruction in light of multiple sufficient causes. *See, e.g.*, *Fussell v. St. Clair*, 818 P.2d 295, 298–99 (Idaho 1991). Nevertheless, if the courts in those cases thought that there was an available defense to liability under those circumstances, whether it had been asserted or not, one would expect that the court would have mentioned it in the course of its explanation of the law applicable to these complex and unusual circumstances. I address Professor Wright’s claim that the defendant’s burden of proof is one of almost certainty in the context of harm that is duplicated by innocent and tortious causes. *See infra* notes 121–42 and accompanying text.

Wright criticizes a reporters’ note in the *Third Restatement* that cites Professor Fischer’s statement about the weight of modern authority on concurring innocent and tortious multiple sufficient causes. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 27 cmt. d reporters’ note (Tentative Draft No. 2, 2002). Wright asserts that “Fischer subsequently abandoned this claim.” Wright, *supra* note 44, at 1452. Wright cites Fischer’s subsequent statement that “courts are split” on this question without either acknowledging or appreciating that a cross reference for that statement refers to an earlier passage in which Professor Fischer stated, “many courts impose liability on the sole tortfeasor when the other force is innocent.” Fischer, *supra* note 1, at 1130. Split they are, but the weight of modern authority is to impose liability, as Fischer’s footnotes, which cite to a number of cases, reveal. *Id.* at 1129–30 nn.7–9.

50. *See* *Basko v. Sterling Drug, Inc.*, 416 F.2d 417, 427 (2d Cir. 1969); *Vincent v. Fairbanks Mem’l Hosp.*, 862 P.2d 847, 851–52 (Alaska 1993); *Thomsen v. Rexall Drug & Chem. Co.*, 45 Cal. Rptr. 642, 647 (Cal. Ct. App. 1965); *Fussell*, 818 P.2d at 298–99; *Kitchen Krafters, Inc. v. Eastside Bank*, 789 P.2d 567, 574–75 (Mont. 1990) (treating breach of fiduciary duty and poor economy as multiple sufficient causes of plaintiff’s financial losses); *Kyriss v. State*, 707 P.2d 5, 7–8 (Mont. 1985); *cf.* *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 561 (3d Cir. 1990) (finding two potentially sufficient causes: (1) tortious conduct of defendant prior to 1966, and (2) post-

seemed no compelling reason to reject that position.⁵¹ Indeed, the case for imposing liability on the tortfeasor responsible for the multiple sufficient cause is not unappealing. The tortfeasor is culpable, the plaintiff (at least at the time of the first two *Restatements*) is innocent, and there is a close relationship between the defendant's tortious act and the plaintiff's harm, regardless of the existence of an innocent sufficient cause.⁵² Why should the plaintiff go away with no compensation under these circumstances?⁵³

The *Third Restatement*, while omitting the unfortunate and obfuscating "substantial factor" language, so provides: "This Section applies regardless of whether the other cause involves tortious conduct or consists only of innocent conduct. As long as the competing cause was sufficient to produce the same harm as the defendant's tortious conduct, this Section is applicable."⁵⁴ Thus, if I should decide to stop talking now, realizing that I have nothing further to say, and simultaneously Steve Landsman declares in no uncertain terms that it is time for me to stop, he is a cause of the quiet in the room and is liable to the audience for damages resulting from missing out on the remainder of my erudition. In conclusion, causation has taken the day and determined that the tortfeasor who concurs with an innocent cause is liable for damages reflecting the overdetermined harm. Note that the audience is no worse off because of Landsman's tortious (and heinous) act, as they would have suffered equally in a tort-free world.

1966 behavior preempted from tort liability by federal law). *But cf.* *Young v. Flathead County*, 757 P.2d 772, 777 (Mont. 1988) (stating the rule, in dicta, as encompassing situations when the competing cause involves "the conduct of one or more [defendants that] would have been sufficient to produce the same result"). To this list should be added *Uttinger v. United States*, 432 F.2d 485, 486-88 (6th Cir. 1970), in which a drunken boat driver ran into an obstruction near shore for which the defendant was responsible. A possible scenario is that if the obstruction had not been there, the boat would have rammed into the shore resulting in similar injury. In an opinion that does not squarely confront the issue the court held the government was not liable. *Id.* at 491-92 (McCree, J., dissenting in part). The court's decision could be understood as holding that the concurrence of the decedent's negligence (contributory negligence being a nontortious cause) and the defendant's negligence as sufficient causes for the harm is insufficient for liability. *Id.* But the complexity of the facts and the court's ambiguity about whether its decision was based on a lack of factual causation, proximate cause, or no negligence by the government leaves the case an unsatisfying precedent on the multiple sufficient cause matter.

51. Bill Powers would, for reasons explained later, want me to add that these provisions were drafted before he joined as a co-reporter. Bill became a co-reporter after the untimely and tragic death of Gary Schwartz. Gary never had the opportunity to look at these provisions, so I bear full responsibility for them.

52. *See Moore, supra* note 40, at 1265 (claiming that corrective justice supports imposing liability in this instance).

53. I recognize the rejoinder is that the plaintiff would have to go away with no compensation if only the innocent cause were in operation at the time.

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

Before conceding, I want to reconsider the wrongful death hedonic damages cases. Recall that a few courts permit recovery for the pleasures of life foregone because the tortfeasor has ended the decedent's life. From a causal perspective, the tortious act has preempted any other cause of the decedent's death, including the driver who later comes on the scene and negligently runs over the decedent's corpse. It seems equally true that innocent causes of death—a lightning strike or other natural disaster—are also preempted from constituting causes of the decedent's death. But if that is true, it is equally true of natural causes of death. That is to say, old age or disease has been preempted as a cause of death for someone who is already dead. Logically, then, the defendant in a wrongful death case has *caused* the decedent the loss of hedonic pleasure for an unlimited, infinite duration; the tortious death preempts any harm that those subsequent natural causes would have produced.⁵⁵

Not only can that not be, it is not. Wrongful death damages that flow from the premature death of the decedent are limited by the actuarially predicted date of death (or, in the case of earnings capacity, retirement⁵⁶) of the decedent.⁵⁷

In addition to this limitation on the duration of damages running afoul of the causal concept of preemption, there is a tension between this rule and the rule previously discussed that multiple sufficient causes, when one is innocent and the other tortious, are each a cause of the harm. In these death cases, the two causes do not concur simultaneously to produce the harm. Yet, when we consider the time when death would have occurred (in the absence of the preempting cause), there is more than a passing similarity. We can conceptualize the period after actuarially predicted death would have occurred as an overdetermined outcome, although to distinguish it from forces that harm

55. See Fischer, *supra* note 1, at 1137. A different conception about what constitutes a cause—so far I have taken seriously the idea that factual causation is largely a nonnormative inquiry into the counterfactual state in which necessary conditions are required—could produce different results. See *infra* note 101.

56. The assumption that earnings capacity ends at retirement is no longer accurate, as a majority of preretirees intend to continue working after they retire. See S. KATHI BROWN, *STAYING AHEAD OF THE CURVE 2003: THE AARP WORKING IN RETIREMENT STUDY 15* (2003).

57. See, e.g., *Burke v. United States*, 605 F. Supp. 981, 989 (D. Md. 1985); *Monias v. Endal*, 623 A.2d 656, 659 (Md. 1993) (“We hold, in accord with the majority of other jurisdictions, that the proper measure of lost earnings damages in a personal injury action for a plaintiff whose life expectancy is reduced by the defendant’s negligence is the plaintiff’s loss of earnings based on the plaintiff’s life expectancy had the tortious conduct not occurred.”); *RESTATEMENT (SECOND) OF TORTS* § 924 cmt. e (1979); Fischer, *supra* note 1, at 1137–39.

Since mortality tables reflect averages for the population, it remains for the parties to attempt to show that the decedent was, in some relevant respect, not average and therefore would have survived for something other than that shown in mortality tables.

simultaneously I refer to it as “duplicated harm” or a “duplicated outcome.”⁵⁸ Why should actuarially predicted death, most frequently due to innocent causes, end the period for which damages are recovered when both the tortious cause of death and the hypothetical natural cause of death are each sufficient causes of the hedonic loss beginning at the time when the decedent would otherwise have died? Death due to natural causes is, to be sure, a hypothetical event rather than an event that actually occurred because it is physically preempted by the wrongful death. Yet that difference should result in natural death playing, if anything, a less significant role with regard to the harm caused by the tortfeasor than a concurring innocent cause.

We might attribute this anomaly and tension to pragmatism. After all, how can we expect a tortfeasor to pay damages for a loss in perpetuity? The sum is not infinite—some specific award would be sufficient to throw off a stream of income in perpetuity—but the idea is sufficiently mind boggling that we need not pursue it.

But pragmatism fails to explain the rule. When we dig just a little deeper, we discover that a defendant is not liable for any harm that is duplicated by the defendant’s tort and some future potential innocent cause.⁵⁹ Indeed, the defendant is also not liable for duplicated harm when the duplication is the result of an actual event, rather than the hypothetical actuarially predicted date of death that never occurred. Thus, consider a woman incapacitated by a tortfeasor such that she loses one hundred percent of her earnings capacity and is then killed by an act of God before trial.⁶⁰ The recovery for lost earning capacity will be limited to the period from the time of the tort until the time of

58. I also employ the term “duplicative cause” and “innocent cause” to describe those actual and hypothetical events that affect the damages for which a defendant is liable. I do so for convenience of expression even though those “causes” are preempted from truly causing the harm by the earlier tortious cause and, in some cases, by the fact that the cause never actually occurred because the tortious act prevented the innocent cause, as when a person with a terminal disease is killed prematurely by a tortious act.

59. David Fischer has painstakingly documented the state of the law on these questions. Fischer, *supra* note 1, at 1136–45, 1153–55; *see also* *The Pocahontas*, 109 F.2d 929 (2d Cir. 1940). The statement in the text requires qualification because at least a few conflicting decisions exist. *See, e.g., Moore v. The Sally J.*, 27 F. Supp. 2d 1255, 1263 (W.D. Wash. 1998); *Buchalski v. Universal Marine Corp.*, 393 F. Supp. 246 (W.D. Wash. 1975); *see also Harris v. Illinois Cent. R.R. Co.*, 58 F.3d 1140 (6th Cir. 1995) (declaring *Buchalski* unpersuasive).

60. The “before trial” qualification reflects the impact of concerns about finality that limit the law’s willingness to reconsider the correctness or accuracy of judgments in light of events subsequent to trial.

death.⁶¹ Similarly, the period for which pain and suffering damages can be recovered terminates with the death of the victim.⁶²

This then reveals that pragmatism cannot account for the treatment of post natural-death damages and confronts us with a considerable anomaly for simultaneously occurring, overdetermined harm resulting from sufficient tortious and innocent causes. As explained above, when tortious and innocent sufficient causes concur, the party responsible for the tortious cause is held liable for the entire harm. Yet, given the treatment of duplicated harm when one cause is innocent, if the innocent cause occurs just after the tortious cause has already caused the harm, the responsible tortfeasor will be liable for damages based only on the brief period of time that separated the two causes. A similar anomaly, although one easier to accept, also exists if the innocent cause just precedes the tortious cause. In that case, the tortfeasor will not be held liable for any damages, but the idea of pre-emption seems to justify that result: the tortfeasor did not cause any harm because it had already occurred.

That these results are not a matter of factual causation is confirmed by the treatment of duplicated harm when both of the causes are of tortious origin. Although there is very little consideration of this situation in American case law, cases from Britain and Canada are in agreement.⁶³ Reconsider the victim who is incapacitated by a tortfeasor and suffers a total loss of earnings capacity. Rather than resulting from a subsequent act of God, she is shot by a criminal, causing permanent paralysis, and this occurs before trial. Notwithstanding that the second tortious act duplicated her lost earnings capacity from that point on, the plaintiff would be permitted to recover from the first tortfeasor for her lost earnings capacity, undiminished by the second tortfeasor's duplication. One might explain this outcome by pointing out that the initial injury preempted any role for the second tortfeasor's conduct. That is true, but only underscores that the difference between treatment of damages in this circumstance and that em-

61. See *Nemmers v. United States*, 795 F.2d 628, 636 n.4 (7th Cir. 1986); *City of Tampa v. Johnson*, 114 So. 2d 807 (Fla. Dist. Ct. App. 1959); *Denman v. Johnston*, 48 N.W. 565 (Mich. 1891). See generally Mark A. Rothstein, *Preventing the Discovery of Plaintiff Genetic Profiles by Defendants Seeking to Limit Damages in Personal Injury Litigation*, 71 IND. L.J. 877, 884-85 (1996).

62. See *Badia v. City of Casa Grande*, 988 P.2d 134, 140 (Ariz. Ct. App. 1999).

63. See *Spouse v. Ragu Foods, Inc.*, 537 N.Y.S.2d 739 (N.Y. Sup. Ct. 1989); *Stene v. Evans*, [1958] 14 D.L.R.2d 73 (Alb. Sup. Ct. App. Div.); *Long v. Thiessen & Laliberte*, 65 W.W.R. 577 (B.C. Ct. App. 1968); *Dingle v. Associated Newspapers Ltd.*, [1961] 2 Q.B. 162 (dicta), *aff'd*, [1964] A.C. 371 (1962); *Baker v. Willoughby*, [1970] A.C. 467 (H.L. 1969); HART & HONORÉ, *supra* note 30, at 247 ("If both are wrongful the victim recovers the whole of his loss from the first wrongdoer.").

ployed when the second cause is innocent must be grounded in something other than causation.

Robert Peaslee developed a theory to justify the limited liability of a tortfeasor who causes harm that is later duplicated by an innocent cause that several commentators have found attractive.⁶⁴ Peaslee suggested that the damages should be determined based on the value of the property or interest at the time the tortfeasor caused the harm. A looming calamity that threatened imminent destruction of the property reduces its market value to a fraction of what it would have been, so that the tortfeasor has caused only a small loss. This theory emerged from the case that spawned Peaslee's inquiry, *Dillon v. Twin State Gas & Electric Co.*⁶⁵

In *Dillon*, a fourteen-year-old boy was playing on a girder at the top of defendant's bridge, some nineteen feet above the road. He lost his balance and grabbed an electrical wire to stabilize himself. The wire was charged with high voltage. The defendant could be found negligent in failing to protect those who might come in contact with it. The electricity killed the child, but had he not been killed by electrocution, he might have fallen from the girder and been killed or seriously injured. Alternatively, he might have regained his balance and suffered no injury, independent of the electrocution.⁶⁶ The court ruled that the factfinder's determination of what would have occurred would affect the damage recovery: the defendant would only be liable for the "value" of the earnings capacity of the decedent in light of what would have happened to him if he had not been electrocuted. If serious injury would have resulted, the child would have had diminished earning capacity, and the defendant would only be liable for the loss of that diminished earning capacity.

If this "value at the time" theory works, it would provide a considerable comeback for me in my debate with Bill Powers. "Value" in this sense is merely an altered description of the harm; instead of loss of a healthy child's lifetime earning capacity, the decedent suffered a loss

64. See Peaslee, *supra* note 42. Among the commentators endorsing Peaslee's theory to explain nonsimultaneous sufficient causes is William Prosser. See PROSSER, *supra* note 44, at 321; see also JOHN FLEMING, *THE LAW OF TORTS* 187 n.23 (3d ed. 1965).

65. 163 A. 111 (N.H. 1932). Peaslee's interest in this subject, it seems fair to infer, was generated by his being the Chief Justice of the New Hampshire Supreme Court at the time it decided *Dillon*.

66. *Id.* at 115. The court's opinion suggests, without explicitly stating, that the decedent did not fall after being electrocuted and his body remained on the girder. In the last paragraph of its opinion, the court stated that what would have happened to the decedent absent the electrocution would have to be determined at trial and observed that this included, "[w]hether the shock from the current threw him back on the girder . . ." *Id.*

of earning capacity as if he were born with a handicap that reduced his life prospects and earning capacity.⁶⁷ Much as I would like to claim victory (in no small part because of how infrequently it occurs when Bill and I disagree), I cannot. At least not at this point. The value theory simply will not carry the day.

Consider a factory destroyed in a fire ignited by a camper's negligently discarded cigarette. Twelve hours later, a newly developed weather system causes a tornado that rips through town and destroys everything in its path, including the ashes of the factory. At the time that the factory was destroyed, the tornado did not exist, and the factory's value would be undiminished by the prospects for such an act of God.⁶⁸ Similarly, consider the plaintiff rendered a paraplegic in an automobile accident who later contracts a neurological disease that would have deprived her of the use of her lower body if she had not already lost it. The value theory cannot account for the defendant being liable for the plaintiff's lost earnings only from the time of the accident to when her disease would otherwise have caused her paraplegia.⁶⁹ Thus, the value theory is inadequate to explain the law.⁷⁰

67. At this point, I might expect a quick-witted skeptic to point out that even in this situation, the loss of earning capacity after death is overdetermined; each of the handicap and the tortious cause of death being responsible for the first increment of lost earning capacity (the difference between a normal child and a handicapped child's earning capacity) and the death being solely responsible for the remainder of the loss (a handicapped child's earning capacity). The skeptic would be right, which underscores David Fischer's observation that "in virtually every tort case both the wrongful act of the defendant and some other force, not attributable to the defendant, are each individually sufficient to cause some portion of the harm arising from the injury." Fischer, *supra* note 1, at 1127-28.

Indeed, with Professor Fischer's observation on the table, I will reveal something that I blithely skipped over at the beginning of this paper. In discussing the role of harm identification in determining damages, I mentioned acceleration of the onset of disease and thin-skull preexisting conditions as examples of the need for careful definition of the harm. *Supra* notes 22-27 and accompanying text. Each of those examples entailed duplicated harm in which innocent pre-empted causes existed and strongly influenced our intuitions about the correct formulation of the harm.

68. There is always some small background risk of an act of God that theoretically affects the value of property. That proposition need not detain us, as it is greater than average risks that are unknown at the time the harm is caused by a tortious act that reveals the inadequacy of the value explanation.

69. See *Melito v. Genesee Hosp.*, 561 N.Y.S.2d 951, 952 (N.Y. App. Div. 1990) (discussing stroke occurring three years after heart attack for which defendant was responsible); *Russell v. Cox*, 451 N.W.2d 804 (Wis. Ct. App. 1989) (addressing innocently caused injury occurring almost two years after initial tortious injury).

70. Prudence suggests a caveat. Perhaps the value theory is only a partial explanation of what is going on in duplicated harm cases. Some other theory might explain the cases discussed above for which the value theory is inadequate. If so, I have to leave to someone else identifying the other theory, as I cannot.

Nevertheless, there is one criticism of the value theory that I do not want to endorse, for reasons explained below.⁷¹

I do not think it a criticism of the value theory that it would, if accepted, overturn the rule regarding concurring innocent and tortious causes of overdetermined harm. If the prospect of the child in *Dillon* falling to his death diminishes the value of his life for tort purposes, then surely the innocent fire that would destroy a house in the absence of a competing tortious fire has reduced the value of the house to nothing, and the tortfeasor responsible for the latter fire would not be liable for any damages.

Dean Prosser confronted the conflict between the value theory that he endorsed, and the rule of liability (when a tortious cause concurs with an innocent cause) contained in the *Restatement*, for which he served as reporter, and supported in his treatise.⁷² His explanation was that application of the value theory to multiple sufficient causes with one of innocent origin “is unsound, since any decrease in value of the property before destruction must be attributed equally to the threat of each fire.”⁷³ One might read Prosser’s claim as bearing on apportionment of liability. On that reading, damages would be apportioned between the tortfeasor and, in some figurative sense, the source of the innocent fire.⁷⁴ The tortfeasor would then pay half of the damages associated with the loss. That seems an unlikely interpretation, as no case had suggested that outcome, and the *Restatement* and Prosser’s treatise supported full liability for the defendant responsible for such a tortious fire. If, however, Prosser did not mean to address apportionment, then his argument fails. After all, *each* of the two fires reduce the value of the house to zero, not one-half its pre-existing market value. And, indeed, in the duplicated harm cases, the tortious cause and the innocent cause, if known in advance, also *each* reduce the value of the duplicated harm to zero.⁷⁵ Yet that does not result in ignoring the role of the innocent cause when duplicated harm occurs. In the end, Prosser’s distinction does not work, leaving me to

71. See *infra* text accompanying notes 101–102.

72. See RESTATEMENT (SECOND) OF TORTS § 432 cmt. d (1965); PROSSER, *supra* note 44, § 41, at 239–40. I cite to the fourth edition of Prosser’s treatise because the subsequent version was prepared by several other authors after Prosser’s death. Professor King, another adherent to the value theory, ran into the same problem with multiple sufficient tortious causes. See King, *supra* note 9, at 1362–63.

73. PROSSER, *supra* note 44, at 321 n.85.

74. The discussion occurs in a section of Prosser’s treatise denominated “Apportionment of Damages.” *Id.* § 52, at 313–23.

75. This reveals another problem with the value theory that I would endorse: it would also reverse the law when two tortious causes produce an overdetermined harm. See Fischer, *supra* note 1, at 1150.

conclude that there is no good basis to justify a different resolution of duplicated harm and overdetermined harm when one cause is tortious and the other is innocent.

The tension between the damages rule employed in duplicated harm cases and in the overdetermined harm cases leads me to return to the appropriate treatment of overdetermined harms. As explained above, the *Restatements* and the vast majority of (admittedly sparse) case law since the *Second Restatement* impose liability on the defendant responsible for a tortious cause that concurs with an innocent cause to produce overdetermined harm.⁷⁶ Yet there are a number of cases that fail to appreciate the existence of concurring innocent and tortious causes and, in that omission, raise questions about the robustness of the *Restatement's* position on this question.

*Basko v. Sterling Drug, Inc.*⁷⁷ is a leading modern case that supports the *Restatement* position. In *Basko*, the plaintiff took two different drugs serially, each of which the jury could have found caused his adverse reaction. The jury could have found, however, that one was not defective for its failure to warn because that adverse reaction was unforeseeable at the time. By contrast, the jury could have found the other drug contained inadequate warnings by the time that plaintiff took it. The Second Circuit found the trial court erred in instructing on causation by failing to address the situation of the two drugs being multiple sufficient causes of the plaintiff's disease. The court explained that "plaintiff would be entitled to recover if the jury found that either Aralen or Triquin alone would have been sufficient to produce"⁷⁸ plaintiff's disease.

A variation on *Basko* that diminishes its probity on the issue at hand arose more recently in another Second Circuit drug case, *Zuchowicz v. United States*, in an opinion by Judge Calabresi.⁷⁹ The

76. See *supra* notes 47–50 and accompanying text. As explained in note 49, some courts address the narrow question of the appropriate instruction on causation and do not explicitly make any statement about liability. Yet as that note also points out, if those courts believed there was some non-cause-based defense to liability in those circumstances, I would expect them to say so.

77. 416 F.2d 417 (2d Cir. 1969).

78. *Id.* at 429. In his dismissal of *Basko* as not inconsistent with the limitation that he advocates for concurring innocent and tortious causes, see *supra* note 44, Professor Wright characterizes the quoted language as "dicta." Wright, *supra* note 44, at 1462. He explains that this is so because the factual predicate for his defense based on proof there was almost certainly an innocent concurring cause with the defendant's tortious conduct was not present in the case. To put this as mildly as I can, Professor Wright's conception of what constitutes dicta is different from mine: If every statement of law necessary to the disposition of the case based on the facts presented is rendered dicta by the conjuring of some exception not presented by the facts of the case, there is nothing but dicta in the reporters.

79. 140 F.3d 381 (2d Cir. 1998).

decedent received twice the maximum dose of a drug due to the negligence of government physicians or pharmacists or both and subsequently died from a rare disease. Judge Calabresi addressed the matter of adequate proof that the overdose, as opposed to the proper dose of the drug, caused the decedent's disease. One might analogize this situation to *Basko* by treating the ordinary dose as equivalent to the first drug the plaintiff received in *Basko*, and the overdose in *Zuchowicz*—the extra dose that was negligently provided—as the equivalent of the second drug ingested by the plaintiff in *Basko* after the defendant had notice and should have provided a warning.⁸⁰ Yet, in the course of a wide ranging discourse on causation that has already made it into one of the leading torts casebooks,⁸¹ Judge Calabresi concluded that the overdose alone would have had to have caused the decedent's disease for the plaintiff to recover.⁸² In short, a modern tort law icon failed to appreciate the possibility that the decedent's disease was overdetermined by both the correct dose (which by hypothesis would have been sufficient alone) and the overdose (which also would have been sufficient given the hypothesis and the fact that the overdose was equal to the correct dose). I do not think I am going out on a limb to say that if *Zuchowicz* were modified so that both doses were tortiously provided—either by the same defendant or separate ones—the case would readily have been identified as one involving overdetermined harm and that liability would be imposed regardless of whether one dose or the doubled dose was required to cause the disease. I do not know how frequent these instances of failing to appreciate the existence of overdetermined harm are, but I suspect it is not uncommon.⁸³

Another arguable incursion on the *Second Restatement's* position is reflected in *City of Piqua v. Morris*,⁸⁴ and its progeny. The defendant's negligence resulted in nonfunctioning drains that were designed to prevent excess water from overflowing its reservoirs, thereby causing harm to adjacent landowners. An extraordinary rain occurred,

80. This analogy is intuitively more attractive if the drug were provided in multiple tablets so that there is a physical instance of the correct dose and the overdose. Yet I cannot articulate a reason why it should matter if the decedent received one pill or two. See *infra* note 88 and accompanying text.

81. See MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES* 349–55 (7th ed. 2001).

82. *Zuchowicz*, 140 F.3d at 390.

83. Another such case is *State Department of Environmental Protection v. Jersey Central Power & Light Co.*, 351 A.2d 337 (N.J. 1976), in which the court failed to appreciate that an innocent cause concurred with a tortious cause in killing fish by lowering the temperature of the water below what the fish could withstand.

84. 120 N.E. 300 (Ohio 1918).

one that could not have been contained even if the drains were functioning properly, and the plaintiff's land was flooded. Because of the common usage of proximate cause to encompass both factual cause and limitations on liability,⁸⁵ and the concept of an act of God as a defense to liability, the court's opinion is ambiguous about the basis on which it found that the defendant was not liable.⁸⁶

Regardless of the basis on which the court in *City of Piqua* relied, at least some sophisticated legal observers think that the issue is one of factual cause. In the casebook authored by Professors Franklin and Rabin, they utilize a hypothetical equivalent to *City of Piqua* and observe that there is a "clear" absence of factual cause.⁸⁷ Perhaps even more telling, in the same section in which the *Restatement of Torts* declares that concurring innocent and tortious sufficient causes are each a cause of harm, there are two illustrations, both equivalent to *City of Piqua*, that declare that in each case the tortious conduct "is not a cause [of the harm]."⁸⁸

These cases of innocent overwhelming forces and negligence in failing to take precautions against less severe forces can be understood as involving multiple sufficient causes.⁸⁹ I do not think they have to be so described because the unitary nature of the overwhelming force presents a conceptual difficulty for the NESS test: Can we conceive of the flood as involving two portions of excess water (either of which in combination with the defendant's negligence is a sufficient set to cause the defendant's harm)?⁹⁰ If we can take that conceptual step, then we have multiple sufficient causes, and the *City of Piqua* situa-

85. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 29 cmt. g (Proposed Final Draft No. 1, 2005).

86. The court used or quoted language that suggested that the basis for the decision was factual causation ("[i]f the superior force would have produced the same damage, whether the defendant had been negligent or not, his negligence is not deemed the cause of the injury," *City of Piqua*, 120 N.E. at 302 (quoting 1 SHEARMAN & REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 39 (6th ed.))), proximate cause ("[I]liability extends no further, and he is not held responsible for inevitable accidents, nor for injuries occasioned by extraordinary floods, which could not be anticipated or guarded against by the exercise of ordinary and reasonable foresight, care, and skill," *id.* at 303 (quoting *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 57 F. 441, 448 (1893))), and that the act of God argument was an affirmative defense. *Id.*

87. See FRANKLIN & RABIN, *supra* note 81, at 342.

88. See RESTATEMENT (SECOND) OF TORTS § 432 illus. 1-2 (1965); RESTATEMENT OF TORTS § 432 illus. 1-2 (1934). The reporter's notes to § 432 cite *City of Piqua* in support of the illustration that is similar to it. See RESTATEMENT (SECOND) OF TORTS APPENDIX § 432, at 118 (1966).

89. Indeed, Professor Wright insists that they are. See Wright, *supra* note 44, at 1440, 1445. Professor Fischer questions that judgment in David A. Fischer, *Insufficient Causes*, 94 Ky. L.J. (forthcoming 2006) ("My intuitive reaction is that the negligence has caused no injury at all.").

90. See Moore, *supra* note 40, at 1247-48 (describing such cases and explaining their inconsistency with a but-for standard for causation).

tion stands in opposition to the *Second Restatement*.⁹¹ Indeed, even if *City of Piqua* is not about factual causation, and grounds its rule of nonliability on some other basis, it is inconsistent with the *Second Restatement*. Judgments such as those of Professors Franklin, Rabin, and Fischer—again the conceptual qualification—are flatly contrary.

Another inroad into the *Restatement's* position on tortious and innocent concurring causes exists when both causes involve a failure to prevent or avoid a risk of harm that exists independently of those failures, and preventing the harm would require both omissions to be corrected.⁹² Thus, most courts find that when an omitted warning would not have been read even if it had been provided, the omission is not a cause of the harm.⁹³ Similarly, the driver who negligently fails to apply brakes that had, just prior, failed without warning, is not a cause of the harm that occurs in a resulting accident.⁹⁴

The difficulty in recognizing these cases as involving overdetermined harm is again conceptual. When the tortious conduct consists of actively creating risk, such as starting a fire or shooting a gun, it is easy to ask the counterfactual inquiry required: in the absence of the other sufficient cause, would the cause of interest have been sufficient to produce the harm? The counterfactual inquiry with multiple sufficient causes only requires eliminating the other sufficient cause and making the standard but-for inquiry. When the acts involved consist of failures to prevent, however, the counterfactual inquiry requires *adding* something that did not exist to the existing baseline facts. Thus, with an omitted warning that was not read, one must add a fact—that the omitted warning would have been read—to the counterfactual in-

91. The *Second Restatement* is inconsistent in its specific treatment of the *City of Piqua* situation. See *supra* note 88 and accompanying text. It is also inconsistent in its general resolution of the question of concurring innocent and tortious multiple sufficient causes. See RESTATEMENT (SECOND) OF TORTS § 432 cmt. d (1965).

92. Professor Fischer labels these cases “dependently sufficient causes” and discusses them in Fischer, *supra* note 89.

93. See *Daniel v. Ben E. Keith Co.*, 97 F.3d 1329, 1333 (10th Cir. 1996) (applying Oklahoma law); *Johnson v. Niagara Mach. & Tool Works*, 666 F.2d 1223, 1225 (8th Cir. 1981) (applying Minnesota law); *Sowles v. Urschel Labs., Inc.*, 595 F.2d 1361, 1365 (8th Cir. 1979) (applying Minnesota law); *Anderson v. Bungee Int'l Mfg. Corp.*, 44 F. Supp. 2d 534, 539–40 (S.D.N.Y. 1999); *E.R. Squibb & Sons, Inc. v. Cox*, 477 So. 2d 963 (Ala. 1985); *Bushong v. Garman Co.*, 843 S.W.2d 807, 811 (Ark. 1992); *Cobb Heating & Air Conditioning Co. v. Hertron Chem. Co.*, 229 S.E.2d 681 (Ga. Ct. App. 1976); *Parzini v. Ctr. Chem. Co.*, 201 S.E.2d 808, 809 (Ga. Ct. App. 1973), *vacated on other grounds*, 218 S.E.2d 580 (Ga. 1975); *Safeco Ins. Co. v. Baker*, 515 So. 2d 655 (La. Ct. App. 1987); *Hiner v. Bridgestone/Firestone, Inc.*, 978 P.2d 505 (Wash. 1999); see also DOBBS, *supra* note 29, § 367, at 1017 (“[I]f the plaintiff failed to read the content-inadequate warning, it is frequently difficult to see how a more adequate warning would have made any difference . . .”).

94. Cf. *Saunders Sys. Birmingham Co. v. Adams*, 117 So. 72 (Ala. 1928).

quiry about whether the omitted warning was a cause of harm. Adding facts runs counter to the conventional counterfactual causation inquiry of taking the world as it is and asking what would have occurred without the tortious conduct of interest. Intuitively, but perhaps not rationally, omitting the existence of competing sufficient causes in the counterfactual inquiry is more comfortable than adding additional facts, such as the omitted failure to prevent.⁹⁵

The difficulty with these failures to prevent is not limited to the concurring, innocent/tortious concurring cause circumstance. One can imagine a case in which a product manufacturer omitted a necessary warning and a person other than the plaintiff negligently failed to read what instructions were provided.⁹⁶ Such cases are rare, however, and it remains to be seen if courts will turn away plaintiffs who were injured in circumstances in which two tortfeasors committed negligent acts, each involving a failure to intervene to prevent harm, that concurred to permit the harm to occur.

The first two *Restatements* limited their provisions on causes of overdetermined harm to “two forces [that] are actively operating.”⁹⁷ That language might be understood to exclude dependent omissions, such as those discussed above, thereby excluding concurring failures to prevent from the treatment of concurring innocent and tortious causes. Prosser appreciated this problem and also assumed that the “actively operating” language of § 432(2) did not encompass failures to prevent. He opined, however, that if the case arose, liability would be imposed, at least when both omissions were the result of tortious conduct.⁹⁸ There is considerable academic support for Prosser’s posi-

95. That intuition—making the counterfactual inquiry required to determine causation does not permit altering the existing state of affairs by adding factual circumstances—may explain the limitation in the first two *Restatements*. See *infra* notes 97–99 and accompanying text.

96. See *Safeco*, 515 So. 2d at 655. In many cases, the person failing to read the instructions—and therefore the other sufficient cause—is the plaintiff. In a day when contributory negligence barred a plaintiff’s recovery, failing to appreciate these cases as involving causal overdetermination would not have changed the outcome. With comparative responsibility now the overwhelming rule, however, misdiagnosing these multiple sufficient failures to prevent does run counter to the law on overdetermined outcomes.

97. RESTATEMENT (SECOND) OF TORTS § 432(2) (1965). I have been unable to locate the source of the “actively operating” language, although intuitions about the appropriate process for conducting a causal inquiry may be at work. See *supra* note 95. The logical culprit is Jeremiah Smith who first employed the “substantial factor” language to address causation, albeit for defining the scope of liability rather than factual cause and multiple sufficient causes as it is employed in the *Restatement*. See Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 103, 303 (1911). His work, however, contains no such qualification.

98. See PROSSER, *supra* note 44, § 41, at 243–44 n.24. The revisers of the treatise responsible for the fifth edition did not share his view—the opinion about the outcome of such a concurrence of causes is omitted in that edition.

tion but scant caselaw addressing the matter.⁹⁹ If he is right that two tortious failures to prevent would justify liability, then we have an even more serious incursion on the previous *Restatements'* imposition of liability on an active tortious cause that concurs with an innocent cause. Thus, concurring innocent and tortious failures to prevent would not result in liability, while concurring tortious causes that failed to prevent would.

Several conclusions seem inescapable from the foregoing discussion. First, the *Restatements* appropriately resolve the matter of overdetermined harm when both causes are the result of tortious conduct. And if an act or force is a factual cause when it is the result of tortious conduct, it must equally be a cause when there is no tortious conduct behind it.¹⁰⁰ For factual cause, as we understand it, entails no assessment of the culpability of the human agent responsible for it—indeed, forces of nature have no human agency, yet constitute causes of harm, sometimes incalculable harm, as revealed by the 2004 tsunami in the Indian Ocean.¹⁰¹

99. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 27, cmt. i (Proposed Final Draft No. 1, 2005) (“In such instances, a strong case can be made that causal rules should not be employed so as to leave the injured person remediless.”); BECHT & MILLER, *supra* note 36, at 8–9 (concluding that to exonerate both tortfeasors would be “morally indefensible and constitute an “inexcusable” outcome); Fischer, *supra* note 89 (“Surely, it is unfair to allow each negligent tortfeasor to escape liability by hiding behind the negligent omission of the other.”); Robertson, *supra* note 13, at 1787. *But cf.* Safeco Ins. Co. v. Baker, 515 So. 2d 655, 658 (La. Ct. App. 1987) (holding that product manufacturer that failed to provide adequate warning was not cause in fact of harm when installer failed to read warnings provided; installer also found liable at trial but did not appeal).

100. See HART & HONORÉ, *supra* note 30, at 235 (“In our view . . . when each factor is sufficient, with other normal conditions, to bring about the harm as and when it occurs, each is properly described as a cause of the harm.”); Moore, *supra* note 40, at 1265 (asserting that distinguishing between two tortious concurring causes and an innocent and tortious concurring cause must be accomplished on other than causal grounds). Moore goes on to assert that the distinction has to be in the relevant state of the world that is taken as the baseline for the causal inquiry: we take into account the natural cause as part of the baseline. I find that suggestion unpersuasive as there is no basis for employing that baseline when the concurring cause is innocent yet not employing it when it is tortious, a point that leads Moore himself to a similar conclusion about the persuasiveness of the baseline explanation.

101. One might have a different view of this matter with a different idea about factual causation. The *Second Restatement* employed the concept of substantial factor as the definition of a cause and the indeterminacy of that standard might permit distinguishing among causes based on the culpability of the actor responsible for the cause. Indeed, the *Restatement* explains that to constitute a “substantial factor,” the act must have “such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility.” RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965). With that understanding of causation, distinctions could be drawn between tortious and innocent forces, although that would be done as a matter of fact rather than of law. Preliminary empirical work by Professor David Fischer reveals considerable variation in the way students respond to several of the situations discussed above, including concurring failures to prevent. See Fischer,

Second, there is a strong tension—I am tempted to say an irreconcilable conflict—between the first two *Restatements'* treatment of concurring innocent and tortious causes of overdetermined harm and the case law when duplicated harm results from an innocent and tortious cause. We could have a legal regime in which those two rules both exist, but it is difficult to find an explanation for why we treat those two situations differently. It could be that the duplicated harm rule is wrong, but the implications of that when it comes to natural death as an innocent duplicating cause are simply inconceivable.¹⁰² Moreover, the treatment of duplicated harm is longstanding, abundant, and remarkably consistent.¹⁰³

These observations lead to two further, related conclusions: the treatment of concurring innocent and tortious duplicated harm has a source in some area other than factual causation,¹⁰⁴ and the first two *Restatements* (and the current *Restatement* draft) have gone awry in resolving the matter of the *liability* of a tortfeasor whose conduct concurs with an innocent cause to produce overdetermined harm. Cause the tortfeasor's act is, but liability should not follow. That liability should not follow is a result of the prior observation about the tension between duplicated and overdetermined harm when innocent and tortious forces concur.

If the latter conclusion is correct, then some other aspect of tort law must step up and provide the basis for the outcome.¹⁰⁵ For duplicated harm, it seems quite sensible to assign that task to the process of determining for what harm the defendant is liable—an item I previously

supra note 89. That work does not tell us how, after group deliberations, juries might resolve this question.

102. See *supra* notes 55–57 and accompanying text.

103. See Fischer, *supra* note 89 (characterizing as “nearly all pervasive” the limitation on duplicated damages when one cause is innocent).

104. David Fischer has persuaded me to limit this claim to actively operating forces and leave out the instance of concurring omission cases. See *supra* notes 89, 98–99 and accompanying text. Fischer correctly points out that most would think of the nonliability of an actor who failed to prevent harm that could have been prevented only if both the actor interceded and some other innocent omission also were otherwise as based on a lack of causation. To explain the foregoing with a concrete example, if a night watchman negligently fails to turn on a security alarm that would not have worked in any case because of an unprecedented electrical storm that was adequate to disable it, we would explain the nonliability of the night watchman on the grounds of a lack of causation. In many such cases, perhaps in all, only lack of imagination would prevent there being a concurring nontortious cause to concur with the tortious omission.

105. Twenty years ago, in his illuminating article on causation, Professor Wright suggested that the determination was one of proximate cause and damages: “It is a proximate-cause issue of policy or principle that is most appropriately placed under the heading of damages, and it also arises in the duplicative-causation cases.” Wright, *supra* note 30, at 1798.

suggested is an aspect of damages law.¹⁰⁶ That may not be as appropriate a home for addressing the liability of a tortfeasor whose act concurs with an innocent cause to produce an overdetermined harm, as the outcome there, for reasons expressed above, would be to negate any liability, an all-or-nothing proposition.

Richard Wright, who recently addressed this question, finds a principle that a defendant is not liable if the plaintiff's harm would have occurred, regardless of the defendant's acts, as the result of innocent causes.¹⁰⁷ He asserts that this is an affirmative defense¹⁰⁸ for which the defendant's burden is to establish that the harm due to the innocent concurring or duplicating cause "*almost certainly*" would have occurred absent the tortious cause.¹⁰⁹ This defense, according to Wright, is applicable both to overdetermined harm and to duplicated harm in which an innocent cause concurs with a tortious cause, or would have caused duplicated harm previously caused by tortious conduct.¹¹⁰ He suggests, in his most recent work, that this is a matter of proximate cause or limitation on liability,¹¹¹ although earlier he had adverted to both proximate cause and damages as the source of this rule.¹¹² Wright believes that this defense is both normatively and descriptively correct.¹¹³

I have considerable sympathy for several aspects of Wright's claim. First, any such limitation rule must be placed elsewhere than factual causation. Many of what I have referred to as duplicating causes are not causes at all; they are preempted by the harm having already occurred or are hypothetical events that in fact never occur, such as death at a standardized age for the decedent in a wrongful death case. For reasons I explain below, imposing the burden of proof on the defendant makes good sense. While we generally think of both proximate cause and damages as *prima facie* elements of a claim for which the plaintiff bears the burden of proof, there are instances in which

106. John Fleming sloughed together overdetermined harm and duplicated harm in suggesting that for the former the innocent cause "be taken into account, if not for the purpose of eliminating the causal relevance of the other (guilty) factor, at all events of reducing the recoverable loss." See FLEMING, *supra* note 64, at 180.

107. Wright, *supra* note 44, at 1434.

108. *Id.* at 1436.

109. *Id.* at 1435.

110. *Id.*

111. *Id.* at 1450.

112. See *supra* note 105 and accompanying text.

113. Wright, *supra* note 44, at 1436 ("This, indeed, is how this limitation seems to be applied by the courts.").

the burden of proof on a prima facie element is shifted to the defendant.¹¹⁴

This rule could be imposed as a matter of proximate cause or, in the new vernacular adopted by the *Third Restatement*, scope of liability.¹¹⁵ Indeed, there are suggestions in some cases that proximate cause is the source of this limitation, but we should not make too much of that language, which occurred when the term “proximate cause” was used to mean factual cause, proximate cause, or both. For duplicated harm, it is more comfortable to address this as a matter of damages (identification of the harm), because scope of liability is an all-or-nothing proposition and because there is nothing in the law on scope of liability that appears to address this question and limit the extent of damages for which a defendant is liable.¹¹⁶ Placing such a rule in proximate cause also risks confusion because of the misleading second word of the phrase and the multiple usages of it. At first glance it might appear that there is an uncomfortable ring to using damages to eliminate entirely the liability of a tortfeasor whose conduct concurs with an innocent cause to produce overdetermined harm. Yet, identification of harm is, I have suggested, an aspect of determining damages. That task includes assessing whether an injury is a cognizable harm, as with the determination of whether a lost chance is a compensable harm. Thus, I think we can comfortably place this inquiry within the damages determination.

On the other hand, imposing a burden of proof of virtual certainty, as Professor Wright suggests, is hard to square with contemporary civil burdens of proof.¹¹⁷ As explained below, justification for such an extreme requirement is hard to find, and there is considerable reason to doubt its existence.

While proof of legally cognizable harm and appropriate evidence to document its amount is an element of a plaintiff's prima facie claim, importing some aspects of an affirmative defense—including the burden of pleading, production, and persuasion—to the matter of causes of overdetermined or duplicated harm would not be unprecedented. Thus, the burden of raising, which is similar if not equivalent to the burden of pleading, whether proximate cause exists, is often imposed on the defendant. That is because proximate cause is rarely an issue

114. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 27 (Proposed Final Draft No. 1, 2005); see also *infra* text accompanying notes 118–20.

115. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 29, at 574 special note on proximate cause (Proposed Final Draft No. 1, 2005).

116. See generally JOSEPH A. PAGE, TORTS: PROXIMATE CAUSE (2003).

117. But see COLO. REV. STAT. ANN. § 13-25-127 (West 1995) (requiring party seeking punitive damages to prove entitlement beyond a reasonable doubt).

in a tort case, and if there is to be an issue about it, the burden is on the defendant to contend that its existence is in dispute and to provide some basis for that claim.¹¹⁸ Similarly, we might expect the defendant who claims that there is duplicated harm that limits its liability to provide notice to the other parties of that claim.

Moreover, there is reason to impose the burden of production on the defendant with regard to duplicated or overdetermined harm. One reason is that proving a negative is quite difficult. To require the plaintiff to prove that there were no other innocent sufficient causes of his or her harm and that there are no other innocent causes that duplicate or might duplicate some of the harm caused by the defendant would be an onerous burden. Requiring the defendant to come forward with evidence that plausibly reveals the existence of such a cause is thus attractive.¹¹⁹ A second reason to shift the burden of proof might be that the defendant is culpable and has harmed the plaintiff, and if there is to be a decision based on an absence of evidence, the defendant should bear that risk rather than the plaintiff. That reasoning explains a substantial amount of burden shifting from plaintiff to defendant in tort law,¹²⁰ but much of its force is diminished

118. Indeed, treatment of proximate cause in the *Second Restatement* is couched in terms that look like an affirmative defense, providing the default that if the tortious conduct is a substantial factor, then legal cause exists unless "there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm." RESTATEMENT (SECOND) OF TORTS § 431(b) (1965); see also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 29 cmt. a (Proposed Final Draft No. 1, 2005).

119. For affirmation of the proposition that the burden is the defendant's, see *Stevens v. Bangor & Aroostook Railroad Co.*, 97 F.3d 594, 599, 601–02 (1st Cir. 1996); *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963 (7th Cir. 1983); *Hudgins v. Serrano*, 453 A.2d 218, 222 (N.J. Super. Ct. App. Div. 1982) (placing on defendant the burden of proving plaintiff's preexisting condition would occur and duplicate damages in the future); *Meyer v. Union R.R. Co.*, 865 A.2d 857, 866 (Pa. Super. Ct. 2004). The concern about proving a negative would not materialize when the event was one about which there was no dispute. In that event, we might even impose on the plaintiff the burden of proof with regard to when it would occur. That suggests, for example, that it is the plaintiff's burden of proof in a wrongful death case to provide appropriate mortality tables (if they are not admissible through judicial notice) by which to estimate the extent to which the decedent's death was accelerated. *But cf. Rober v. N. Pac. Ry. Co.*, 142 N.W. 22, 25 (N.D. 1913) (holding that plaintiff need not introduce mortality tables and determining that the damage award was not excessive by reference to mortality tables of which the court took judicial notice). See also *Follett v. Jones*, 481 S.W.2d 713 (Ark. 1972) (requiring plaintiff to prove life expectancy of decedent who had lung cancer at the time that defendant caused death in automobile accident).

120. Indeed, that was precisely the explanation employed in one of the cases on which Professor Wright relies, *Kingston v. Chicago & N.W. Ry. Co.*, 211 N.W. 913, 915 (Wis. 1927). *Kingston* modified an earlier case that is the leading case denying liability to a defendant whose tortious conduct concurred with a fire of unknown origin to produce the plaintiff's overdetermined harm. See *Cook v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 74 N.W. 561 (Wis. 1898). *Kingston* imposed the burden of proof on the defendant to prove that the source of a concurring cause was innocent rather than tortious.

with the advent of comparative responsibility. No longer can we universally employ the culpable defendant and innocent plaintiff justification for shifting the burden of proof.

Let me return to the question of the magnitude of the burden of persuasion. An "almost-certainly" standard would diminish the role of innocent causes enormously and the rationale for it is difficult to find, although Professor Wright musters some support.¹²¹ Professor Wright is not entirely clear whether his "almost-certainly" standard applies to the fact of the innocent force or its timing.

With regard to the likelihood of the event, we know beyond "almost certainly" that everyone will die. For events that are not physically preempted and occur before trial, the almost-certainly standard would also be satisfied. But most events that postdate the trial will be at best a probabilistic assessment and their timing likely highly variable. Yet uncertainty about timing may be more salient than the probability of the event. There is very little discounting for an individual predisposed to schizophrenia if the disease would not have occurred until moments before death. Yet surely we cannot expect the defendant to prove with any precision *when* some potential event would have occurred. David Fischer explains the evidence employed to locate the time of natural death for purposes of determining damages based on future events that will not occur because they are preempted by the plaintiff's harm or decedent's death: "In both the cases predicting a future time of death and the cases predicting future forces that reduce earning capacity, courts often use speculative evidence."¹²²

Professor Dobbs, who Wright cites, does suggest (with some tentativeness) that there must be limits to the use of potential future events that are preempted by the defendant's tortious conduct to reduce the harm for which the defendant is liable. He provides the hypothetical example of a car accident that causes the death of a person who was on her way to a plane that later was blown up by a terrorist.¹²³ His

121. See Wright, *supra* note 44, at 1435 n.30 (citing DOBBS, *supra* note 29, § 177, at 434 (quoting Robertson, *supra* note 13, at 1798 and Fischer, *supra* note 1, at 1142-43)). Robertson contemplates a rule that distinguishes future events based on their immediacy and the certainty that they would occur. Prosser endorses the proposition that the future event must be imminent. See KEETON ET AL., *supra* note 4, § 52, at 321-22. Fleming endorses a "reasonably imminent" requirement, citing Prosser, and also requires that the duplicating cause be in operation at the time of the defendant's tortious act. See FLEMING, *supra* note 64, at 181.

122. Fischer, *supra* note 1, at 1139; see also Morton v. Sw. Tel. & Tel. Co., 217 S.W. 831, 835 (Mo. 1920) ("Of course, as has been said, there can be no absolute certainty as to the duration of any one's life. The tables are simply evidence for the jury to consider in estimating the damage to accrue—damage which at best is more or less conjectural.").

123. DOBBS, *supra* note 29, at 433.

suggestion seems right, but because the second event was tortious,¹²⁴ we would not reduce damages based on a tortious duplicating cause for reasons previously discussed.¹²⁵

Professor Dobbs concludes by tentatively suggesting that a limit articulated by Professor David Robertson might be appropriate. Robertson, addressing contingent future events, argues that there is a difference between a *Dillon* look-alike (a parachuter whose parachute failed to open shot while in the air by a hunter) and a decedent killed by a defendant in a wrongful death case who defends on the basis that the decedent was about to board an airplane that crashed on take-off.¹²⁶ Robertson thinks that the latter claim will not be accepted, while distinguishing *Dillon* on grounds of immediacy such that courts could not honestly ignore the threat to the parachutist of crashing into the ground, but could live with themselves by ignoring the airplane that crashed. Robertson implicitly contemplates that the crash is innocent and quotes the Prosser treatise:

There is a clear distinction between a person who is standing in the path of an avalanche when the defendant shoots to kill, and one who is about to embark on a steamship doomed later to strike an iceberg and sink. The life of the latter has value at the time, as any insurance company would agree, but that of the former has none.¹²⁷

Prosser's distinction may merely address the different life expectancies of the decedent at death, but that has nothing to do with immediacy. The more significant distinction returns us to the value theory to explain damages, and Prosser is correct based on the view that the future steamship passenger's life would not be discounted because the future event was not known at the time of the death. Prosser was an adherent to the value theory, and this passage reveals that view.¹²⁸ At another level, however, the fact that the future passenger's life had value at the time of his death does not necessarily contradict reducing the damages his estate would recover for his death. Yes, there was some loss because of the premature death, but it was much less than it would have been if the deceased had chosen a land-based vacation instead of a cruise. The inability of the value theory to take account of any risk unknown at the time of the plaintiff's injury but that emerges

124. See *supra* note 63 and accompanying text.

125. The second reason that Professor Dobbs provides is that such limitations run into problems when the two concurring or duplicative causes are both the result of tortious conduct. That, of course, does not apply when one of the causes is innocent.

126. See Robertson, *supra* note 13. I assume that the plane crash was not a result of tortious conduct; if it were we would be back with Professor Dobbs's case of two tortious causes producing duplicated harm.

127. *Id.* (quoting KEETON ET AL., *supra* note 4, § 52, at 353).

128. *Id.*

before trial reveals that theory's inability to confront the task at hand.¹²⁹

One additional objection to considering nonimminent contingent events is raised by Professor King: "The retrospective conjuring up of events contingent at the time of injury would open the door to absurd results. Allowing such contingencies to affect valuation would create a rule that could not be administered."¹³⁰

Professor King appears concerned that such a rule would permit defendants to employ the "kitchen sink" of contingent possibilities that *might* occur in the future, even if they were of a very low probability. Such a rule would be administratively costly, perhaps prohibitively so. This concern leads King to propose that before a future contingency can be considered in determining harm, it must have, borrowing from Prosser, "attached" at the time harm was imminent.¹³¹ Attachment occurs when the sequence of events leading to the duplicated harm exists, requiring problematical interpretation.¹³² King also imports into the imminence standard that the plaintiff could not take action to avoid the duplicated harm even if fully aware of it.¹³³

King's concern that leads to his invocation of an imminence requirement, however, appears to be an artifact of the value theory. With the value theory, all potential future risks, at least those whose information costs are less than the risks' discounted value, would be taken into account. Alternatively, he may be concerned that defendants would conjure a plethora of possibilities that *might* occur.

Neither of these concerns should prevent consideration of contingent events in determining the damages to which a plaintiff is entitled.

129. See *supra* text accompanying notes 64, 68–69.

130. King, *supra* note 9, at 1358; see also FLEMING, *supra* note 64, at 181.

131. See King, *supra* note 9 (citing KEETON ET AL., *supra* note 4, § 52, at 353).

132. Professor King, like Prosser and other commentators, confronts the "doomed steamship" hypothetical. He concludes that because the conditions for the steamship sinking are not all in place at the time, along with the fact that the victim, if prescient, could have avoided the problem (an additional condition he would impose), the hypothetical death of the victim on the steamship should not affect the damages for which the defendant is liable. I think the steamship hypothetical, along with the miscarriage cases, is confounded by the fact that, on one view, it involves a defendant arguing for credit for having conferred a benefit, while on another it merely involves an innocent, if hypothetical, duplicating cause. See *supra* note 4 and accompanying text. I do not have an answer for this Janus-like circumstance, but depending on which perspective is adopted may lead to different outcomes. I do not have an answer for this matter, but recognizing it as such may assist in attacking it and appreciating why we respond differently when the source of the innocent cause is not a force or event that the defendant's tort has prevented from occurring.

133. Professor Fischer has also gently criticized Professor King's claim that the innocent cause must have "attached" before it can be considered. See Fischer, *supra* note 1, at 1143–46.

While the value theory would address any risk that was worth consideration, the requirement that the future events be proved by a preponderance of the evidence provides sufficient protection from the administrative costs that concerned Professor King. For a long time tort law has insisted that plaintiffs recover for all consequences—present or future—in a single lawsuit.¹³⁴ That requirement has not been abandoned or modified because of its administrative inefficiencies,¹³⁵ and one state's recent move to relax the preponderance standard and permit damages for future contingent harm based on its probability suggests a tolerance for greater administrative expense with regard to future contingent events.¹³⁶

With regard to defendants presenting myriad possible future events, the discipline of their having the burden of proof should obviate that concern.¹³⁷ The risk of parties asserting remote or speculative claims always exists, but requiring that they provide sufficient evidence to permit the factfinder to make such a determination provides considerable control. So long as proof of future contingencies is required of defendants by a preponderance of the evidence, we can go a long way toward easing Professor King's concerns.¹³⁸

There are a number of instances in which the law already adjudicates contingent events and employs the preponderance standard as the burden of proof. Proof of future harm that the plaintiff may suffer was mentioned above.¹³⁹ For plaintiffs who are predisposed to a harm that is accelerated by the defendant's tortious conduct, courts routinely permit the jury to consider the predisposition and to reduce

134. See, e.g., *Fetter v. Beal*, [1697] 91 Eng. Rep. 1122 (K.B.).

135. Asbestos litigation, which involves multiple independent diseases with different latency periods is a unique exception. See, e.g., *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 120–21 (D.C. Cir. 1982); *Pustejovsky v. Rapid-Am. Corp.*, 35 S.W.3d 643, 649 n.3 (Tex. 2000) (citing cases).

136. *Dillon v. Evanston Hosp.*, 771 N.E.2d 357 (Ill. 2002); see also *Pelcha v. United Amusement Co.*, 606 P.2d 1168 (Or. Ct. App. 1980) (recovery for less than fifty percent probability of future harm). Canadian law has long permitted a plaintiff to recover damages for the probability of future injury, even when the probability is less than fifty percent. See *Athey v. Leonati*, [1997] 140 D.L.R. 235.

137. As Alex Stein made me appreciate, the burden of proof does not work very well when the issue is one that is continuous, such as time or damages, as opposed to one that is dichotomous. Frequently, the question of the timing of some future event will require resolution for purposes of determining damages. No specific date can be proved by a preponderance of the evidence. Consistent with the reasons for placing the burden of proof on defendant, my inclination is to employ an instruction that tells the jury to resolve doubts about timing in favor of the plaintiff.

138. Indeed, in the same article that Professor King expressed concern about excessive use of contingent possibilities being asserted, he recognized that the prevailing rule on proof of those contingencies is the preponderance standard. See King, *supra* note 9, at 1370 n.54.

139. See text accompanying notes 134–35.

damages if it finds that the plaintiff would have suffered the same harm at a later time.¹⁴⁰ Those cases contain no hint of an enhanced burden of proof, and there is, after all, a “functional identity between imminent threats and pre-existing conditions.”¹⁴¹ Plaintiffs with a latent disease that might cause duplicated harm at some time in the future demonstrate a similar and additional instance in which future contingent events are adjudicated to determine the damages to which a plaintiff is entitled.¹⁴² Indeed, cases in which plaintiffs who suffer tortious injury and have a disease that may produce duplicated harm some time in the future are even less sympathetic cases for discounting damages than the accident victim who avoids the doomed airline flight because in the latter case, we know the disposition of the duplicating causal possibility, while in the former we can only try to predict at the time of trial what the future will bring.¹⁴³

V. CONCLUSION

The matter of duplicated harm must be a matter of harm identification and not factual causation. Much of what counts as duplicated harm in determining the damages that a plaintiff can recover occurs without the duplicating “cause” ever taking place and actually causing any harm, either because the harm is preempted or the cause is a

140. See *Stevens v. Bangor & Aroostook R.R. Co.*, 97 F.3d 594, 599 (1st Cir. 1996); *Stoleson v. United States*, 708 F.2d 1217 (7th Cir. 1983) (imposing burden of proof on the plaintiff to prove extent to which her harm would have occurred due to preexisting condition if tortious conduct had not occurred); *Steinhauser v. Hertz Corp.*, 421 F.2d 1169, 1174 (2d Cir. 1970) (permitting defendant to provide evidence that plaintiff's preexisting condition would duplicate her harm some time in the future even though “exact prediction of [the plaintiff's] future apart from the accident is difficult or even impossible”); *Meyer v. Union R.R. Co.*, 865 A.2d 857 (Pa. Super. Ct. 2004). One commentator characterizes the process as a “blank guess about the future.” Ulrich Wagner, *Successive Causes and the Quantum of Damages in Personal Injury Cases*, 10 OSGOOD HALL L.J. 369, 375 (1972).

In *Lancaster v. Norfolk & Western Railway Co.*, 773 F.2d 807 (7th Cir. 1985), Judge Posner asserted that damages should be reduced by the probability that the plaintiff would have suffered the disease in the absence of the defendant's precipitation of it. This is consistent with Judge Posner's advocacy for employing probabilities, even those less than fifty percent, in determining aspects of liability and damages. The discounting provided in *Lancaster* fails to account for the fact that the defendant also caused an acceleration of the disease and that for, at least some portion of time, the plaintiff should recover full damages for the consequences of his disease.

141. Robertson, *supra* note 13, at 1798 n.162; see also *Meyer*, 865 A.2d at 863 (comparing principle of apportionment for preexisting conditions with apportionment adopted in *Dillon v. Twin State Gas & Electric Co.*, 163 A. 111 (N.H. 1932)).

142. See *Victorson v. Milwaukee & Suburban Transp. Co.*, 234 N.W.2d 332 (Wis. 1975); *Jobling v. Associated Dairies Ltd.* [1982] A.C. 794 (H.L.).

143. The fact that the duplicating cause in one is a disease or other physical attribute of the plaintiff while in the other it is an exogenous event, whether manmade or an act of God, might cut the other way, but I do not see a reason why that should be so.

purely hypothetical one that never actually occurs. Taking those non-occurrences into account in awarding damages, thus, must be grounded in something other than the matter of factual causation. I take considerable satisfaction from this conclusion and that I was correct in my debate with Bill about the proper source for these rules, although it remains to be seen if he will be persuaded. When the ALI undertakes a project on damages for the *Third Restatement of Torts*, this issue is one squarely within the scope of that subject.

Yet my satisfaction is considerably tempered by the recognition that on another matter on which we debated—the proper treatment of overdetermined harms when one cause is of innocent origin—Bill was right, and I failed to see the forest for the trees.¹⁴⁴ Multiple sufficient causes are, after all, causes, regardless of whether they are of tortious or innocent origin. That they are causes, however, does not mean that liability exists. The first two *Restatements* unfortunately failed to recognize this and led a number of courts (and me) astray.

Comparing treatment of duplicated harm reveals the difficulty with the first two *Restatements'* treatment of concurring tortious and innocent causes. Imposing liability on the tortfeasor whose act concurs with an innocent sufficient force just cannot be reconciled with the way in which we treat the far more common phenomenon of duplicated harm. Perhaps they were led to that error by the fact that different reporters for each of the first two *Restatements* were responsible for the causation and damages provisions. The rule on concurring innocent and tortious causes in the first two *Restatements* was produced by reporters who did not draft and, I presume, did not have the opportunity to consider the disquieting tension that damages law presents for their resolution of concurring innocent and tortious causes.¹⁴⁵

I am grateful for the opportunity provided by this Symposium on damages to consider damages law and its intersection with causation. May I also express my relief at not concluding myself outside the subject matter of this Symposium?

144. Actually, a split decision with Bill on these two matters is far better than my overall average with him.

145. As this article is going to press, we hope to persuade the ALI to permit us to amend the current treatment of innocent and tortious concurring causes in the *Third Restatement* to provide the necessary room for a future project on damages to speak to the question of whether any damages are recoverable in such a situation.

