CAUSATION (CONTRIBUTION) AND THE 'NO WORSE OFF' LIMITATION ON LIABILITY

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I INTRODUCTION

This article, like two of my first three articles,[1] combines discussions of issues that could and perhaps should have been split into several articles. However, I once again have thought that all of the included parts are useful for readers, especially those who have not read my prior work, to be able to fully understand my arguments. Those who are familiar with my prior work might want to skip Part III except for Part III.E.4, in which I discuss overdetermined failure of a preventive causal process.

In Part II, I rebut claims that there is no core sense of causation that underlies all of our uses of causal expressions, identify that core sense as causation in accordance with and as determined by the laws of nature, and distinguish causation in that core sense from the issues of legal responsibility and ultimate liability with which it is often confused as a result of our broad, inconsistent and careless use of causal expressions.

In Part III, I discuss and evaluate the various proposed analyses of causation in its core sense, focusing on the traditional strong necessity (but-for/*sine qua non*) analysis, which fails in overdetermined causation situations, and the weak-necessity/strong-sufficiency (NESS) analysis, which encompasses overdetermined causation situations and reduces to the strong necessity analysis when there is no overdetermination.

In Part IV, I discuss the 'no worse off' (NWO) limitation on liability for wrongfully caused harm, which is often confused with the strong necessity analysis of causation, and criticise its rejection (at the time of my submission of this paper for publication) in the draft *Restatement Third of Torts: Remedies*.

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[1] Richard W Wright, 'Causation in Tort Law' (1985) 73(6) *California Law Review* 1735 [hereafter Wright, 'Causation']; Richard W Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts' (1988) 73(5) *Iowa Law Review* 1001 [hereafter Wright, 'Bramble Bush'].

In Part V, I mention some issues regarding alleged distinctions between causation and contribution that I had meant to discuss in this paper, but unfortunately was unable to include due to lack of time and space.

II DISTINGUISHING CAUSATION IN ITS CORE SENSE FROM LEGAL RESPONSIBILITY AND ULTIMATE LIABILITY

Proof of actual or possible[2] causation of an injury to a plaintiff's legally protected interests by the legally relevant aspect[3] of a defendant's conduct or activity is necessary but not sufficient for the defendant's being legally responsible for the injury and related losses. To establish legal responsibility and ultimate liability, other considerations, including other actual or potential causes of the injury and/or related losses and the normatively relevant risks created by the defendant's conduct, also must be taken into account.[4] Unfortunately, discussions of causation, responsibility and liability in the law, as in ordinary life, often fail to distinguish the core issue of the defendant's causation of the injury/losses from the legal responsibility and ultimate liability issues. Causal language is employed indiscriminately to refer to all three issues, often without notice or even recognition of the distinct issue(s) involved in the particular discussion.[5]

Some have claimed that there is no core concept of causation that underlies all of the various usages of causal language, in the law or elsewhere.[6] Jane Stapleton asserts that 'it is futile for philosophers to search for a coherent freestanding metaphysical account of "causation"',[7] that 'causal language can

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[2] See text at fns 28–31 below.

[3] See Wright, 'Causation' (n 1) 1766–71.

[4] Richard W Wright, 'The Grounds and Extent of Legal Responsibility' (2003) 40(4) *San Diego Law Review* 1425 [hereafter Wright, 'Legal Responsibility']. Legal responsibility for the consequences of one's conduct is a matter of interactive justice (often misleadingly called 'corrective justice'). Legal responsibility can also be based, as a matter of distributive justice, on a person's excessive share of society's resources: ibid 1429–34; Richard W Wright, 'The Principles of Justice' (2000) 75(5) *Notre Dame Law Review* 1859, 1883–92.

[5] Wright, 'Bramble Bush' (n 1) 1011–4.

[6] This is a common claim by efficiency theorists, who argue that the law should therefore ignore causation or define it so as to maximise aggregate social wealth or welfare. For criticism of their arguments, see Richard W Wright, 'Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis' (1985) 14(2) *Journal of Legal Studies* 435; Richard W Wright, 'The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics' (1987) 63(3) *Chicago-Kent Law Review* 553; Richard W Wright, 'The New Old Efficiency Theories of Causation and Liability' (2014/2015) 7(1–2) *Journal of Tort Law* 65.

[7] Jane Stapleton, 'Choosing what we mean by "Causation" in the Law' (2008) 73(2) *Missouri Law Review* 433, 439 [hereafter Stapleton, 'Choosing']; see ibid 439 fn 15.

denote whatever we choose it to',[8] and that, 'when the lawyer uses the concept of causation, he is not bound to use it in the same way as a philosopher, or a scientist, or an ordinary man'.[9] Similarly, Lord Hoffmann has declared that 'causal requirements are creatures of the law and nothing more'[10] and rejects the 'concept of something having to be *really* a cause according to criteria lying outside the law'.[11]

Yet, prior to her recent articles, Stapleton has insisted on distinguishing between true (factual/actual/natural/empirical) causation and so-called 'legal' or 'proximate' causation, which encompasses legal responsibility issues in addition to the factual causation issue, and on renaming the 'legal/proximate' cause issue as a 'scope of liability' issue (as has been done recently in the American Law Institute's *Restatement Third of Torts*[12] and supposedly but not actually in civil liability statutes in Australia[13]) to reduce confusion of the causation issue with the normative legal responsibility issue.[14] Although she has employed various confused and confusing terms in her elaborations of causation,[15] until recently

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[8] Ibid 456; see Jane Stapleton, 'An "Extended But-For" Test for the Causal Relation in the Law of Obligations' (2015) 35(4) *Oxford Journal of Legal Studies* 697, 702 [hereafter Stapleton, 'Extended But-For'].

[9] Jane Stapleton, 'Unnecessary Causes' (2013) 129 (January) *Law Quarterly Review* 39, 41, quoting Glanville Williams, 'Causation in the Law' (1961) 19(1) *Cambridge Law Journal* 62, 75–6.

[10] Lord Hoffmann, 'Causation' in Richard Goldberg (ed), *Perspectives on Causation* (Hart Publishing, 2011) 3, 9.

[11] Ibid 5.

[12] American Law Institute, *Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm* (2010) § 26 and comment a, § 29 comments a, b and g [hereafter *Restatement Third: Physical and Emotional Harm*]. For the prior 76 years, the first and second *Restatements* led the way in promoting the confusion of causation and legal responsibility. See, eg, Richard W Wright, 'Once More into the Bramble Bush: Duty, Causal Contribution and the Extent of Legal Responsibility' (2001) 54(3) *Vanderbilt Law Review* 1071, 1073–80, 1097–1101 [hereafter Wright, 'Once More']; Jane Stapleton, 'Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences' (2001) 54(3) *Vanderbilt Law Review* 941, 969–81 [hereafter Stapleton, 'Legal Cause']; text at fns 140–150 below.

[13] See, eg, Civil Law (Wrongs) Act 2002 (ACT) § 45(1); Civil Liability Act 2002 (NSW) § 5D(1); Civil Liability Act 2003 (Qld) § 11(1); Civil Liability Act 1936 (SA) § 34(1); Civil Liability Act 2002 (Tas) § s 13(1); Wrongs Act 1958 (Vic) § 51(1); Civil Liability Act 2002 (WA) § 5C(1). These statutes initially restrict 'factual causation' to 'necessary' conditions, without specifying the required sense of necessity—presumably the strong (but-for/*sine-qua-non*) sense, but the language is ambiguous. See, eg, Civil Liability Act 2002 (WA) § 5C(1)(a); text at fns 35–49 below. However, they then state that 'factual causation' can be established for unnecessary conditions using the same normative criterion that is specified for determining scope of liability. See, e.g, § 5C(2)(a) [factual causation] and § 5C(4) [scope of liability] ('the court is to consider (amongst other relevant things) whether and why responsibility for the harm should, or should not, be imposed on the tortfeasor').

[14] See, eg, Stapleton, 'Legal Cause' (n 12) 945; Stapleton, 'Choosing' (n 7) 448–9, 455, 458–9, 463.

[15] See, eg, Stapleton, 'Choosing' (n 7) 433, 436 (requiring 'involvement', which is further elaborated as 'necessity, duplicate necessity and contribution, though contribution subsumes the others'); Stapleton 'Legal Cause' (n 12) 959-60 & fn 43 (employing a 'targeted but-for' test of 'historical involvement', which assumes elimination of competing conditions prior to applying the but-for test unless the

she has insisted on analysing causation as a relationship based on science and the laws of nature, excluding normative issues,[16] and she has identified the NESS analysis, which is discussed in Parts III.D and III.E below, as the best 'algorithm' for analysing factual causation, despite some alleged deficiencies.[17] In her most recent article, she backs off of these positions. She now treats humanly created rules as well as the laws of nature as causal relations,[18] incorporates normative considerations as part of the 'causal' analysis,[19] and no longer endorses but rather broadly criticises the NESS analysis.[20]

Lord Hoffman rejects the distinction between factual causation and legal causation, claiming that no judges have recognised or employed the distinction,[21] even though it has been employed frequently (albeit often unclearly) in Australia, the United States and elsewhere.[22] Yet he acknowledges that the NESS analysis supports findings of factual causation, while leaving the issues of legal responsibility and ultimate liability for proper normative assessment, in situations in which the existence of 'cause-in-fact' would be denied under Herbert Hart and Tony Honoré's failed attempt to lump these issues together as supposedly factual, ordinary-language-based, 'common sense' attributions of

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competing condition was a preemptive condition); Stapleton, 'Unnecessary Causes' (n 9) 39 (requiring that 'either, but for the factor, the phenomenon would have been prevented, or the factor resulted in some positive contribution to the relevant mechanism by which the phenomenon came about'); Stapleton, 'Extended But-For' (n 8) 713 (requiring that 'but for that factor alone, (i) the phenomenon would not exist or (ii) an actual contribution to an element of the positive requirements for the existence of the phenomenon would not exist'). For discussion of some of the defects in these analyses, including their obvious circularity, see Wright, 'Once More' (n 12) 1109–20 and fns 53, 60, 61, 63, 104, 109, 114 and accompanying text below.

[16] See, eg, Stapleton, 'Choosing' (n 7) 433–5, 437, 446; Stapleton 'Legal Cause' (n 12) 959–60; Stapleton, 'Unnecessary Causes' (n 9) 39–42 (focusing on 'phenomena' and 'mechanisms').

[17] See, eg, Stapleton, 'Choosing' (n 7) 443–4, 471–80; Stapleton, 'Legal Cause' (n 12) 959 & n 42; Stapleton, 'Unnecessary Causes' (n 9) 49 n 40.

[18] Stapleton, 'Extended But-For' (n 8) 699-700 & n 7, 702 n 19, 703, 707; accord, Sandy Steel, *Proof of Causation in Tort Law* (Cambridge University Press, 2015) 32–33. Humanly created rules are not causal relations. The relevant causal relations instead involve human awareness of and reactions to those rules and their perceived satisfaction or lack of satisfaction. See Richard W Wright and Ingeborg Puppe, 'Causation: Linguistic, Philosophical, Legal and Economic' (2016) 91(2) *Chicago-Kent Law Review* 461, 468–9; Richard W Wright, 'The NESS Account of Natural Causation: A Response to Criticisms' in Goldberg (n 10) 285, 307–9 [hereafter Wright, 'Response to Criticisms']; fn 102 and accompanying text below.

[19] Stapleton, 'Extended But-For' (n 8) 718–22.

[20] Ibid 697, 700 & fn 7 and 9, 701–2 & fn 19, 703 & fn 26, 714 & fn 81.

[21] Hoffmann (n 10) 3–5.

[22] See Dan B Dobbs, Paul T Hayden and Ellen M Bublick, *Hornbook on Torts* (West Academic Publishing, 2nd ed, 2016) § 14.3 at 316; Jaap Spier and Olav A Haazen, 'Comparative Conclusions on Causation' in Jaap Spier (ed), *Unification of Tort Law: Causation* (Kluwer Law International, 2000) 127, 127–34; Martina Infantino and Eleni Zervogianni (n 12) 597–600 ('Causation across Stages'); fns 12 and 13 and accompanying text above.

causation.[23] He claims that sometimes a condition is treated as a cause for legal purposes when causation did not exist,[24] but the cases that he discusses do not support this claim. The defendant's conduct in *Kuwait Airways Corporation v Iraqi Airways Co*[25] was a cause, although not a but-for cause, of its conversion of the plaintiff's airplanes (and there was no basis for application of the 'no worse off' limitation on liability,[26] especially as applied in the context of conversion). *Chester v Afshar*[27] is more debatable, but can be analyzed in the same way, given the trial court's finding that the plaintiff would not have initially consented to the surgery with consequent adverse effects if she had been warned of the risks. Liability for damages (apart from damages for the intrusion on her autonomy, if such were separately available) would depend on whether the likelihood of her undergoing the same surgery with the same risk later would make the 'no worse off' limitation on liability applicable. *Fairchild v Glenhaven Funeral Services Ltd*[28] is a case in which there was tortious conduct by the defendant which may well have contributed to the plaintiff's injury, but it was inherently impossible for the plaintiff to prove causation. In such situations, as Lord Hoffmann himself explains,[29] it may be just to shift the burden of proof on the causation issue to the defendant, or to impose proportional liability based on the probability of causation, as courts in common law and civil law jurisdictions have done in limited situations.[30] This shift in the burden of proof does not constitute an abandonment of the causation requirement for liability. The defendant can avoid liability if he can prove lack of causation.[31]

It is true that, as a matter of raw power, legislatures and courts can employ causal language in any way they want. But this is not true when considering their proper and accepted roles as instruments of interactive justice. Individuals' conformance with the interactive justice principle depends on the law's use of a

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[23] Hoffmann (n 10) 7; see also 5–6; text at fn 83 below.
[24] Hoffmann (n 10) 6.
[25] [2002] 2 A.C. 883.
[26] See part IV below.
[27] [2005] 1 AC 134.
[28] [2003] 1 AC 32.
[29] Hoffmann (n 10) 8–9.
[30] See Richard W Wright, 'Proving Causation: Probability versus Belief' in Goldberg (n 10) 195, 212–20.
[31] Ibid. A notable exception is *Hymowitz v Eli Lilly & Co* (New York 1989) 539 NE 2nd 1069, in which, in order to preserve consistent application of its second-best market-share proportional liability scheme, the court would not allow a defendant to exculpate itself by proving lack of causation. See Richard W Wright, 'Liability for Possible Wrongs: Causation, Statistical Probability, and the Burden of Proof' (2008) 41(4) *Loyola of Los Angeles Law Review* 1295, 1327-8.

core underlying concept of causation that is consistent with the laws of nature, which every person must explicitly or implicitly recognise in going about their everyday lives.

The core concept of causation that underlies all uses of causal language is the NESS analysis. It is true, as Lord Hoffmann stated,[32] that as of the time that he presented his remarks, in 2010, very few judges had heard of the NESS analysis, but that analysis had only recently been clarified and popularised in the academic literature and was not adopted in the American Law Institute's *Restatement of Torts* (and then only in the comments) until 2010.[33] As courts have been made aware of it in appropriate cases, the NESS analysis has usually been accepted or at least relied upon, as demonstrated by recent decisions of courts, including the highest courts, in Australia, the United Kingdom and the United States.[34]

III CAUSATION

A *Causal Analysis: Necessity and Sufficiency*

Since the publication of David Hume's revolutionary account of causation, according to which our attributions of causation are based on perceived regularities in nature rather than supposedly perceived causal forces,[35] analyses of causation have usually been phrased in terms of necessary and/or sufficient

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[32] Hoffman (n 10) 3.

[33] See *Restatement Third: Physical and Emotional Harm* (n 12) § 26 comment d reporters' note (stating that the causal-set model employed in §§ 26 and 27 is 'consistent with the necessary element of a sufficient set (NESS) test'); Michael D Green, 'The Intersection of Factual Causation and Damages' (2006) 55(2) *DePaul Law Review* 671, 676 fn 14 ('Multiple sufficient causes is a more convenient shorthand for the NESS (necessary element of a sufficient set) test'); ibid 682 & fn 40; Anthony Sebok, 'Actual Causation in the Second and Third Restatements: Or, the Expulsion of the Substantial Factor Test' in Martina Infantino and Eleni Zervogianni (eds), *Causation in European Tort Law* (Cambridge University Press, 2017) 60, 70–3; fn 58 and accompanying text below.

[34] Australia: *Swan v The Queen* [2020] HCA 11, [25]; *Strong v Woolworths Ltd* [2012] HCA 5, [20]–[28]; *Amaca Party Ltd v Booth* [2011] HCA 53, [48], [53], [70]; *Allianz Australia Ltd v Sim* [2012] NSWCA 68, [37]–[49], [133]–[145]; *Zanner v Zanner* [2010] NSWCA 343, [11]. United Kingdom: *The Financial Conduct Authority v Arch Insurance* [2021] UKSC 1, [182]–[185], [189]–[191]. United States: *Paroline v United States* (2014) 572 US 434, 451–2 (relying on the NESS analysis while describing it as a legal fiction); *United States v Kearney* (1st Circuit 2012) 672 F 3rd 81, 98; *Kemper v Deutsche Bank AG* (7th Circuit 2018) 911 F 3rd 383, 390–1; *June v Union Carbide Corp* (10th Circuit 2009) 577 F 3rd 1234, 1253; *Natural Resources Defense Council v Zinke* (ED Calif 2018) 347 F Supp 3rd 465, 488–91; *Major v RJ Reynolds Tobacco Co* (California 2017) 14 Cal App 5th 1179, 1198–200. The Australian cases contradict Justice James Edelman's claim that the Australian courts are moving back to exclusive reliance on the but-for test. See James Edelman, 'Unnecessary causation' (2015) 89(1) *Australian Law Journal* 20, 20–30, 24–5. They are instead moving forward with the NESS analysis.

[35] David Hume, *An Enquiry Concerning Human Understanding* (1748) § VII pts I–II.

conditions for the occurrence of the specified result.[36] However, much unnecessary confusion persists because of a common failure to clearly identify and distinguish the different senses of 'necessity' and 'sufficiency'. As applied in our real world, a strict necessity analysis for X's being a cause of Y in a particular situation requires that X be necessary for the occurrence of Y whenever Y occurs; a strong necessity analysis requires that X be necessary for the occurrence of Y given the other existing conditions in the particular situation; and a weak necessity analysis requires that X be necessary for the sufficiency of some set of existing conditions for the occurrence of Y in the particular situation. A strict sufficiency analysis requires that X be sufficient all by itself for the occurrence of Y; a strong sufficiency analysis requires that X be necessary for the sufficiency of some set of existing conditions for the occurrence of Y in the particular situation [which is the same as the weak necessity analysis]; and a weak sufficiency analysis 'requires' only that X be a part of some set of existing conditions that was sufficient for the occurrence of Y in the particular situation.[37]

Sandy Steel disagrees with using labels such as 'weak', 'strong' and 'strict' to distinguish the different senses of necessity and sufficiency, because some authors have used labels with meanings different from those defined above.[38] He cites Judith Jarvis Thomson[39] and likely also has in mind Jane Stapleton[40]. I believe that it is important to clearly distinguish and label the different senses of necessity and sufficiency and to employ those labels uniformly to provide clarity, avoid repetition, facilitate comparison and minimise confusion. The labels and

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[36] Some academics endorse 'singularist' theories, which purport not to rely upon causal laws or generalisations but instead return to the pre-Humean idea of direct perception of causation or causal forces. For criticism of such theories, see Ingeborg Puppe and Thomas Grosse-Wilde, 'A NESS Causation Based Concept for Imputation of Harm in Criminal Law' (2022) 49(1) *University of Western Australia Law Review* 306, pt I; Richard W Wright, 'Causation: Metaphysics or Intuition' in Kimberly Kessler Ferzan and Stephen J Morse (eds), *Legal, Moral, and Metaphysical Truths: The Philosophy of Michael S. Moore* (Oxford University Press, 2016) 171, 182–6.

[37] Wright, 'Bramble Bush' (n 1) 1019–21.

[38] Steel (n 18) 26 fn 55.

[39] Ibid, citing Judith Jarvis Thomson, 'Some Reflections on Hart and Honoré, Causation in the Law' in Matthew H Kramer, Claire Grant, Ben Colburn and Antony Hatzistavrou (eds), *The Legacy of H.L.A. Hart: Legal, Political and Moral Philosophy* (Oxford University Press, 2008) 143, 145-6. Thomson uses 'weak' and 'strong' necessity as labels for what I describe as 'strong' and 'strict' necessity, respectively, and adds a super strict 'strong*' necessity analysis that requires that, in the absence of the condition at issue, the result would not occur anywhere in David Lewis's imaginary universe of infinite possible worlds with different causal laws: 144-6. Thomson uses 'fact/entailment necessary/sufficient condition analysis' as the label for what I describe as 'weak' necessity: 148.

[40] Stapleton has uniquely employed 'medium necessity' to refer to what I label 'strict necessity' and (apparently) 'medium sufficiency' to refer to what I label 'strong sufficiency'. Stapleton, 'Choosing' (n 7) 434 & fn 3.

definitions described in the prior paragraph, which I have used since 1988, are, unlike those uniquely used by Thomson and Stapleton, realistic, easily understandable, consistent with the three different senses of necessity described by Hart and Honoré,[41] and in agreement with prior usages by other well-known causal theorists, including John Mackie[42] and Michael Scriven.[43]

Hume apparently adopted the strict senses of necessity and sufficiency (as defined above) and considered them to be equivalent.[44] However, the strict senses are too strict, as John Stuart Mill explained in his subsequent landmark discussion of causation based on the laws of nature,[45] which departed from Hume's regularity account on many fundamental points.[46] Contrary to the strict necessity test, a specific result, e.g., death, can usually (always?) be caused in more than one way, including ways that do not require the specific condition at issue. Contrary to the strict sufficiency test, no condition ever is sufficient by itself for the occurrence of any distinct result; there must always also be, at the very least, the prior existence of some other condition being acted upon. At the other end of the spectrum of tests, the weak sufficiency test is clearly too weak. It can be satisfied by adding any condition, no matter how causally irrelevant, to a set of existing conditions that is already sufficient without the added condition.[47]

This leaves for consideration the strong necessity, weak necessity and strong sufficiency analyses. The strong necessity analysis is usually described and

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[41] H.L.A. Hart and Tony Honoré, *Causation in the Law* (Oxford University Press, 2nd ed, 1985) 112–3 (describing, in order, what I have labeled 'weak', 'strict' and 'strong' necessity).

[42] J.L. Mackie, *The Cement of the Universe: A Study of Causation*, (Oxford University Press, 1974, corrected ed 1980) 38–40, 60–6, 126–7. Thomson continues to express amazement, first expressed by her in 1987, that lawyers supposedly have not considered what she labels 'weak sufficiency' ('x caused y just in case if y hadn't occurred, then x wouldn't have occurred'): Thomson (n 39) 146-7. See Judith Jarvis Thomson, 'Preliminaries About Causation and Rights' (1987) 63(3) *Chicago-Kent Law Review* 471, 482–3 & fn 13. As I explained in 1988, this reverse but-for test is analytically equivalent to but much more cumbersome than the weak-necessity/strong-sufficiency (NESS) analysis. Wright, 'Bramble Bush' (n 1) 1021 fn 108; see Mackie 39-40, 60-6, 126-7, 167-9.

[43] Michael Scriven, 'The Logic of Cause' (1971) 2(1) *Theory and Decision* 49, 50–3.

[44] Hume famously stated: '[W]e may define a cause to be an object, followed by another, and where all of the objects similar to the first are followed by objects similar to the second [strict sufficiency]. Or in other words where, if the first object had not been, the second never had existed [strict necessity].' Hume (n 35) § VII pt II; see Wright & Puppe (n 18) 465.

[45] John Stuart Mill, A System of Logic: Ratiocinative and Inductive (Longman's, Green & Co, 1843, 8th ed, 1872) bk III ch V § 3, ch X § 1.

[46] See Wright and Puppe (n 18) 466–9. In his doctoral thesis, originally published in 1813 and substantially revised in 1847, Arthur Schopenhauer sketched in much less detail than Mill a similar analysis of causation based on the laws of nature structured as minimally sufficient sets of conditions. Arthur Schopenhauer, On the Fourfold Root of the Principle of Sufficient Reason (2nd ed, 1847) (Open Court, E.F.J. Payne trans, 1999) §§ 5, 16, 20; see Wright and Puppe 466.

[47] Mill (n 45) bk III ch V § 3, ch X § 1; Mackie (n 42) 38–40, 60–6, 126–7; Wright, 'Bramble Bush' (n 1) 1020–1.

implemented in the law as the 'but for' or '*sine qua non*' test, which asks whether, but for (in the absence of) the condition at issue, the relevant result would have occurred in the specific existing circumstances?[48] The weak necessity and strong sufficiency analyses are identical and have come to be known as the NESS (**n**ecessary **e**lement of a **s**ufficient **s**et) analysis, which, as I have stated since my first article, is more accurately described as the 'necessary for the sufficiency of a sufficient set' analysis.[49]

B *Strong Necessity (But For /* Sine Qua Non*)*

The strong necessity analysis is universally recognized as an inclusive test of causation. It is treated by some in common law jurisdictions, many in civil law jurisdictions, and many philosophers as the exclusive test.[50] However, it fails when causation was overdetermined by duplicative or preempted conditions.[51] In duplicative causation situations, there are two or more distinct (although usually overlapping) fully instantiated minimally sufficient sets of existing conditions – e.g., two fires, each sufficient without the other for the destruction of a house when combined with other existing conditions in the particular situation (including oxygen, wind direction, sufficient dry fuel between the origin of the fire and the house, and the existence of the house when the fire arrives), which merge and destroy the house. In preemptive causation situations, the preemptive cause is part of a fully instantiated minimally sufficient set of existing conditions while the preempted condition is a member of an incompletely instantiated minimally sufficient set. For example, if the first fire destroys the house before the second fire arrives, a necessary condition for a minimally sufficient set containing the second fire but not the first (the existence of the house when the second fire arrives) was not instantiated. In either

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[48] See, eg, *Restatement Third: Physical and Emotional Harm* (n 12) § 26 ('Conduct is a factual cause of harm when the harm would not have occurred absent the conduct.'); European Group on Tort Law, *Principles of European Tort Law: Text and Commentary* (Springer, 2005) § 3:101 ('Conditio sine qua non. An activity or conduct (hereafter: activity) is a cause of the victim's damage if, in the absence of the activity, the damage would not have occurred.').

[49] See fn 90 and accompanying text below.

[50] See, eg, David Lewis, 'Causation' (1973) 70(17) *Journal of Philosophy* 556, 557–8; Mackie (n 42) 38–48, 76–7, 126–7; Friedrich Toepel, 'Causal Overdetermination' in Benedickt Kahmen and Markus Stepanians (eds), *Critical Essays on 'Causation and Responsibility'* (Walter de Gruyter, 2013) 111–32; Spier and Haazen (n 22) 127–54, 127–30; Reinhard Zimmerman, 'Comparative Report' in Bénédict Winiger, Helmut Koziol, Bernhard A Koch & Reinhard Zimmerman (eds), *Digest of European Tort Law: Essential Cases on Natural Causation* (Springer, 2007) 99–100.

[51] I and others include as overdetermined causation situations both duplicative and preemptive causation situations, while others include (less accurately) only duplicative causation situations.

situation, neither fire would be treated as a cause under the strong necessity test, leaving the destruction of the house as an unexplained miracle.[52]

Various attempts, all unsuccessful, have been made to try to rescue the strong necessity test as the exclusive test of causation. The primary method adds legally irrelevant details to the description of the result, including (most commonly) the time and perhaps the location at which it occurred or, tautologically, the manner of its occurrence (e.g., death by two shots, or poisoning, or thirst).[53] This method allows totally irrelevant conditions to be treated as causes, merely by including them in the description of the result.[54] Even if time and place are included, the victim may well have died at the same place and time, or even at a later time, as a result of a preempted condition.[55]

A second deficient method applies the test to the aggregated competing conditions. Some treat the aggregate condition as a cause while denying causation by any of the individual included conditions.[56] Others treat causation by the aggregate condition as establishing causation by each included condition.[57] This method not only ignores the law's proper focus on individual causation as a necessary condition for individual responsibility, but also allows preempted conditions and totally irrelevant conditions to be treated as causes.

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[52] Hart and Honoré (n 41) 122–8, 206–7, 235–253; Wright, 'Causation' (n 1) 1791–8; Wright, 'Response to Criticisms' (n 18) 297–303.

[53] See, eg, American Law Institute, *Model Penal Code and Commentaries* (1985) (originally published 1962) § 2.03 comment 2 at 258–9; Mackie (n 42) 45–6; L.A. Paul, 'Counterfactual Theories' in Helen Beebee, Christopher Hitchcock and Peter Menzies (eds), *The Oxford Handbook of Causation* (Oxford University Press, 2009) 158, 178–9; Steel (n 18) 18 (including only the time of occurrence); Toepel (n 50), 120–2 (including the time and perhaps the location). Stapleton has been the most egregious employer of this method. See Wright and Puppe (n 18) 475 fn 54. I thought, upon reading Stapleton, 'Unnecessary Causes' (n 9) 42–3, that she had finally abandoned it, except with regard to the time and place of occurrence. However, she returned to broader use in her most recent article, while claiming that 'Wright . . . often overlooks this critical distinction'. Stapleton, 'Extended But-For' (n 8) 700 n 9; ibid 702 n 19; see ibid 700 ('Amy's death by poison at noon on Friday 13 June 2014 under Dan's palm tree'), 703–4 & n 30 (destruction of car which '*actually* occurred', involving persuasion by Gayle, although otherwise Roy would have persuaded Harry to do exactly the same thing), 724 ('death by thirst on Friday at noon'). Steel and Toepel claim that the NESS analysis requires specification of the time of occurrence in preemptive causation situations. Steel (n 18) 18 fn 16; Friedrich Toepel email to Richard Wright 15 August 2020. It does not. See Wright, 'Response to Criticisms' (n 18) 292, 297–303; text at fns 52 above and 69 below.

[54] Wright, 'Causation' (n 1) 1777–80; Hart and Honoré (n 41) 449–53 (discussing the German literature); Ingeborg Puppe, 'Der Erfolg und seine kausale Erklärung im Strafrecht' (1980) 92(4) *Zeitschrift für die gesamte Strafrechtswissenschaft* 863, 870–4 (same) [hereafter Puppe, 'Der Erfolg'].

[55] Wright and Puppe (n 18) 477.

[56] See, eg, Mackie (n 42) 47, apparently approved by Toepel (n 50) 121. Steel is willing to adopt the aggregate but-for test for overdetermination by multiple negative conditions, but not positive ones. Steel (n 18) 32, 34.

[57] See, eg, Model Penal Code (n 51), § 2.03 comment 2 at 259; W Page Keeton (ed), *Prosser and Keeton on the Law of Torts* (West Publishing Co, 5th ed, 1984) § 41 at 268–9.

When lumped together the preemptive and preempted conditions are strongly necessary, while neither is when considered separately. Causally irrelevant conditions are not strongly necessary when considered individually, while the aggregate condition formed by adding them to the actual causal conditions is strongly necessary.

A third deficient method, which unfortunately has been adopted in the blackletter (but not the comments) of the *Restatement Third of Torts*[58] and perhaps in the *Principles of European Tort Law*,[59] assumes the non-existence of the competing conditions that prevented the condition at issue from being strongly necessary.[60] A related method asserts that one should not consider, when applying the strong necessity test, conditions that did not actually occur, regardless of how likely it was that they would occur in the absence of the condition at issue.[61] These proposed methods enable recognition of some (but not all) duplicative causes, but only at the cost of erroneously allowing preempted conditions to be treated as causes. Moreover, they make the outcome of the counterfactual reasoning highly indeterminate. If the condition at issue had not occurred, the causal process involving the preempted condition would have been completed, but that now has also been removed from consideration, leaving a totally unreal and indeterminate scenario.[62]

Many academics and courts assume that the strong necessity test requires a counterfactual analysis of alternative hypothetical situations that might have occurred if the condition at issue had not occurred, which, however, gives rise to irrelevant and often irresolvable speculation about what might otherwise have

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[58] *Restatement Third: Physical and Emotional Harm* (n 12) § 27 ('Multiple Sufficient Causes. If multiple acts occur, each of which under § 26 [requiring but-for causation] alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm.'). The phrase 'multiple sufficient causes' and § 27 itself are described as encompassing (only) situations in which there are multiple independently strongly sufficient conditions. See § 27 comments a, e and h. However, § 27 does not distinguish between duplicative and preemptive conditions. The use of NESS analysis to identify weakly but not strongly necessary conditions as causes is described and approved in § 27 comment f ('multiple sufficient causal sets'). See § 27 comment f reporters' notes and § 27 comment i. Preemptive causation situations are addressed conclusorily, without any analysis, in § 26 comment k and § 27 comments e and h.

[59] *Principles of European Tort Law* (n 48) § 3:102 ('Concurrent causes. In case of multiple activities, where each of them alone would have caused the damage at the same time, each activity is regarded as a cause of the victim's damage.'). It is not clear whether this language is meant to be a modified but-for analysis, as in the *Restatement Third of Torts* (see fn 58 above), upon which it seems to have been based, or an independent strong sufficiency analysis (see text at fns 66–69 below).

[60] See, eg, Stapleton, 'Choosing' (n 7) 441–2 ('duplicate necessity'); Stapleton 'Legal Cause' (n 12) 959–60 & fn 43 ('targeted but-for' test).

[61] See, eg, Williams (n 9) 72; Stapleton, 'Extended But-For' (n 8) 703–4.

[62] See Wright and Puppe (n 18) 478-9.

occurred.[63] Many philosophers have been enticed into a no-exit wilderness, in which some of them still wander, by David Lewis's implausible and illogical 'possible worlds' analyses.[64] Instead, the strong necessity test should be understood (and is usually applied in practice) as a real world, instantiated laws-of-nature analysis that is a corollary of the NESS analysis and has two parts: (1) was the condition at issue part of the complete instantiation in the specific situation of the antecedent of one or more abstract causal laws/generalisations described in terms of minimally sufficient conditions, which when fully instantiated have as their ultimate consequence the effect at issue (the NESS analysis), and (2) were the other existing conditions insufficient without the condition at issue for such complete instantiation (the strong necessity analysis)? The first part is often not explicitly recognised but is essential and always at least implicitly assumed. The second part is causally irrelevant but is satisfied when there is only one set of existing conditions that is minimally sufficient for the occurrence of the specified result.[65]

C *Independent Strong Sufficiency*

Many courts in the United States and other countries recognise a condition as a cause if it was either strongly necessary or independently strongly sufficient, while failing to specify what is required for independent strong sufficiency.[66] A condition is independently strongly sufficient if it by itself completely instantiates a necessary element of a completely instantiated minimally sufficient set of conditions for the occurrence of the result – for example, a fire that completes a minimally sufficient set of existing conditions that does not include any competing fire. Unfortunately, almost all references to the independent strong sufficiency analysis, including the often cited § 432(2) in the *Restatement*

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[63] See, eg, Dobbs, Hayden and Bublick (n 22) § 14.5 at 319–20; Hart and Honoré (n 41) lviii–lxi, 411–4, 458; Stapleton, 'Extended But-For' (n 8) 702–3, 705–8; Steel (n 18) 9, 17, 26 fn 55. But see Michael S Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford University Press, 2009) 374–82, 390 fn 61 (discussing covering law analysis of counterfactual statements).

[64] See Wright and Puppe (n 18) 470–3, 478–9.

[65] Ibid 472-3; Karl Engisch, *Die Kausalität als Merkmal der strafrechtlichen Tatbestände* (Mohr, 1931) 17, 18–9, 25–6. Causal analysis of omissions usually (but not always) differs from causal analysis of positive acts by focusing on their role in preventing the complete instantiation of a causal process that would have prevented the occurrence of a specific result. See text at fns 112–126 below.

[66] Wright and Puppe (n 18) 474 & fn 50, 479–80 & fn 78.

Second of Torts[67] and perhaps § 3:102 of the *Principles of European Tort Law*,[68] fail to specify the required complete instantiation in the particular situation of the antecedent portion of the relevant causal generalisation (and its underlying causal laws), which is required for actual causal sufficiency rather than abstract lawful sufficiency, and therefore fail to distinguish preempted conditions from duplicative causes. For example, if fire *A* reaches and destroys a house before fire *B*, which would have destroyed the house if it still existed when fire *B* arrived, the antecedent portion of the destruction by fire causal generalisation was fully instantiated when considering fire *A*, but was not when considering fire *B* since there was not an existing house when fire *B* arrived. Although fire *B* guaranteed the destruction of the house, it did not contribute to its destruction.[69]

D *Weak Necessity / Strong Sufficiency (NESS)*

As far as I am aware, Karl Engisch, in an insightful monograph published in 1931, was the first person to reject the strong necessity test as the exclusive test of causation in singular instances, or even as a proper test when employed, as usually assumed, through counterfactual analysis of what might otherwise have occurred rather than real world analysis of what actually occurred.[70] He explained that the strong necessity analysis is a corollary or 'side effect' of proper causal analysis, according to which conditions are tested for their causal status in singular instances through subsumption under the laws of nature,[71] and he demonstrated its failure in duplicative and preemptive overdetermined causation situations, without, however, clearly distinguishing the two types of situation.[72] He did not provide an explicit elaboration of the structure of the laws of nature or their instantiation in specific instances in terms of necessary and/or sufficient

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[67] American Law Institute, *Restatement of the Law Second, Torts* (1965) § 432(2) [hereafter *Restatement Second*]: 'If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.' For discussion of the many defects in this formulation, see Wright, 'Once More' (n 12) 1097–101; text at fns 140–50 below.

[68] See fn 59 above.

[69] See fn 52 above.

[70] Engisch (note 65) 17–19, 26. Four years later, Charles Carpenter also rejected the strong necessity analysis as the exclusive analysis and the related use of counterfactual reasoning, but he did not provide any alternative analysis. Charles E Carpenter, 'Concurrent Causation' (1935) 83(8) *University of Pennsylvania Law Review* 941–52, 946–9. For a brief discussion of some of Engisch's important insights, see Richard W Wright, 'Identifying and Assigning Liability Among Multiple Legally Responsible Causes' (forthcoming 2022) *Rechtstheorie* pt II.E.

[71] Engisch (note 65) 17–9, 25–6.

[72] Ibid 12–3, 13 fn 1, 14–6, 15, 22, 27–8, 27 fn 5, 30–1.

conditions. However, he seems to have understood that the laws of nature must be structured as abstractly defined minimally sufficient sets,[73] while insisting that for a condition to be a cause in a singular instance it need merely be part of the instantiation of a relevant sequence of fully instantiated laws of nature.[74]

An explicit statement and endorsement of the weak necessity analysis of causation in singular instances first appeared in 1959 in Herbert Hart's and Tony Honoré's monumental work, *Causation in the Law*,[75] which expanded on an article by Honoré that was published two years earlier in the German legal literature.[76] Honoré, at least, was aware of Engisch's prior work, which he cited in the comparative law portion of their book, which he wrote.[77] Building on Mill's prior analysis,[78] Hart and Honoré agreed with Engisch, contrary to Mill, that more than one distinct (but usually overlapping) set of existing minimally sufficient conditions for a specific consequence could be (and frequently is) instantiated in a specific situation.[79] They employed the weak necessity criterion to identify 'causally relevant factors': 'A condition may be necessary just in the sense that it is one of a set of conditions jointly sufficient for the production of the consequence: it is necessary because it is required to complete this set'.[80] They explained that this criterion encompasses independently strongly sufficient conditions as well as strongly necessary conditions.[81]

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[73] See, eg, his discussion of the use of Mill's Difference Method to determine through empirical investigation the elements of a law of nature: ibid 24–6, especially 24 fn 1.

[74] Ibid 21–3, 25–6.

[75] H.L.A. Hart and A.M. Honoré, *Causation in the Law* (Oxford University Press, 1959). The second edition, published in 1985, Hart and Honoré (n 41), has minor revisions in the initial text but a long introduction noting significant changes in their thought. See Richard W Wright, 'The Nightmare and the Noble Dream: Hart and Honoré on Causation and Responsibility' in Kramer et al (n 39) 165, 176–7. Without citing Hart and Honoré's prior work, although they must have been aware of it, several non-legal philosophers subsequently developed similar analyses of causation. See Wright, 'Bramble Bush' (n 1) 1019 fn 98. The best known analysis is by John Mackie, who, in a paper published in 1965 introduced his INUS ('**i**nsufficient but **n**on-redundant part of an **u**nnecessary but **s**ufficient condition') analysis. Mackie (n 42) 62 & fn 5. Yet Mackie and others followed Mill in employing this analysis only for causal laws, while insisting on strong necessity in singular instances of causation. Ibid 38–48, 76–7, 126–7; see Wright, 'Bramble Bush' 1023 fn 113. Furthermore, Mackie implausibly claimed that the strong necessity test can be and often is properly applied in specific instances using singularist reasoning, without any implicit reference to causal laws. Mackie 56, 77–8, 121–4, 224, 257 fn 14, 267–8. The defects in Mackie's arguments are discused in Wright, 'Bramble Bush' (n 1) 1023–34.

[76] Tony Honoré, 'Die Kausalitätslehre im anglo-amerikanischen Recht im Vergleich zum deutschen Recht' (1957) 69 *Zeitschrift für die gesamte Strafrechtswissenschaft* 463.

[77] Hart and Honoré (n 41) 435 fn 18, 439 fn 45, 446 fn 98, 447 fn 1, 449 fn 12, 450 fn 19, 483.

[78] Ibid 15–22, 111–3.

[79] Ibid xxxix–xl, 20.

[80] Ibid 112–3.

[81] Ibid xxxix–xl, 20, 112–3, 122–5, 235–253.

Hart and Honoré's weak necessity definition of a 'causally relevant factor' was a major advance in the analysis of causation in the Anglo-American academic literature, in philosophy as well as law.[82] However, the potential clarifying impact of their analysis was undermined by several aspects of their discussion. Most significantly, their analysis of causally relevant factors was only a preliminary step, not even mentioned in the introduction to their book, in pursuit of their primary project, which was an unsuccessful attempt to use ordinary language analysis to identify supposedly factual, non-normative 'common sense' criteria, applicable in non-legal as well as legal contexts, for treating only one or a few of the many causally relevant factors in a specific situation as causes.[83] Their primary focus on ordinary language analysis, with resultant inclusion of legal responsibility as well as causation issues, overwhelmed and sometimes distorted their analysis of causally relevant factors, which was further distorted by their intuitive understanding of a cause as something that 'made a difference', their related use of counterfactual reasoning based on hypothetical facts rather than actual facts, and their confusing employment of overlapping categories of 'additional', 'combinatory/reinforcing', 'neutralizing', 'overtaking', 'alternative' etc. causally relevant factors.[84] Their discussion of causally relevant factors subsequently received minimal notice in the legal literature,[85] and their primary argument promoted further confusion by courts, lawyers and philosophers of the distinct issues of causation and responsibility, which continues to this day.[86]

In the 1980s, I and Ingeborg Puppe independently published papers criticizing the strong necessity analysis and instead insisting on the weak-necessity/strong-sufficiency analysis for proper resolution of the causation issue in singular instances. Puppe, being unaware of Hart and Honoré's prior work but building on Engisch's prior work,[87] defined a cause as a necessary component of a fully instantiated minimally sufficient set of conditions according to natural laws.[88] I sought to revive, clarify, correct and extend Hart and Honoré's analysis.

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[82] See, eg, Phillipa Foot, 'Hart and Honoré: Causation in the Law' (1963) 72(4) *Philosophical Review* 505; M.P. Golding, 'Causation in the Law' (1962) 59(4) *Journal of Philosophy* 85; D.D. Raphael, 'Causation in the Law' (1962) 37(139) *Philosophy* 83.

[83] Hart and Honoré (n 41) 1–6, 11–3, 23–108, criticized in Haskell Fain, 'Hart and Honoré on Causation in the Law'(1966) 9(1–4) *Inquiry* 322–38; Wright, 'The Nightmare and the Noble Dream' (n 75).

[84] Hart and Honoré (n 41) 29, 122–5, 206–7, 235–253; see Wright, 'Causation' (n 1) 1745–50, 1796–8; Wright, 'The Nightmare and the Noble Dream' (n 75); Wright, 'Response to Criticisms' (n 18) 286–8.

[85] See Wright, 'Causation' (n 1) 1788 & fn 227.

[86] Ibid 1745–50; Wright, 'The Nightmare and the Noble Dream' (n 75).

[87] See text at fns 70–74 above.

[88] Puppe, 'Der Erfolg' (n 54) 874–8, 889–92, 909.

Rejecting their treating only some causally relevant factors as causes,[89] I re-described such factors as 'NESS' (**n**ecessary **e**lement of a **s**ufficient **s**et) conditions, while insisting that the condition at issue must be not merely a member of a sufficient set of existing conditions, but rather necessary for the sufficiency of a minimally sufficient set of existing conditions that instantiate the antecedent portion of a law of nature.[90]

Going beyond prior discussions of the weak necessity analysis, Puppe and I each applied the NESS analysis to recognise as causes conditions that were neither strongly necessary nor independently strongly sufficient. Consider, for example, the casting of three individual affirmative votes when only two were necessary for approval of some action, or three sources of force, fire, water, noise, toxin, etc, each of size N, which combine to produce an indivisible injury for the occurrence of which only 2N amount was necessary. Employing the NESS analysis, each of the affirmative votes or sources can properly be identified as a cause of the relevant legal injury by including it and either one of the other two affirmative votes or sources in a completely instantiated minimally sufficient set that does not include the third affirmative vote or source.[91] This analysis has been accepted and incorporated in the *Restatement Third of Torts*[92] and accepted or employed by courts, including the highest courts, in Australia, the United Kingdom and the United States.[93]

I have argued that the NESS analysis can and should be employed to recognize even more conditions as causes. For example, assume there were only two voters, X with the right to cast 2N votes and Y with the right to cast only N votes, who each cast their votes in the affirmative when 2N affirmative votes were necessary and sufficient for approval of an action, or two simultaneously operative sources

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[89] Wright, 'Causation' (n 1) 1745–50, 1788–803; Wright, 'Bramble Bush' (n 1) 1012–4.

[90] Wright, 'Causation' (n 1) 1788–9, 1793, 1803–4, 1823; Wright, 'Bramble Bush' (n 1) 1019, 1041; Wright, 'Once More' (n 12) 1102–3 & fns 112 and 113.

[91] Ingeborg Puppe, 'Entscheidungsanmerkung zu BGHSt 37,107' [1992] *Juristische Rundschau* 30–2; Wright, 'Causation' (n 1) 1791–3. For examples of such cases, which are not rare, see, eg, (1990) 37 BGHSt 106 (corporate board vote to market a leather spray); *Warren v Parkhurst* (Sup Ct 1904) 92 NYS 725, affirmed (App Div 1905) 93 NYS 1009, affirmed (New York 1906) 78 NE 579 (pollution); Winiger et al (n 50) 531–43; Carpenter (n 67) 943-5, 948; Steel (n 18) 21–3.

[92] *Restatement Third: Physical and Emotional Harm* (n 12) § 27 comment f and reporters' note; see Green (n 33) 676 n 14 ('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 a 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 comment f (Proposed Final Draft No. 1, 2005).'); ibid 682 n 40. Section 27 and its comment f are erroneously described as employing an aggregate strong necessity test in Dobbs, Hayden and Bublick (n 22) § 14.6 at 324.

[93] See fn 34 above.

of force, fire, water, noise, toxin, etc., X of size 2N and Y of size N, when amount 2N was necessary and sufficient for the plaintiff's suffering of an indivisible injury. In each case, X's contribution was both strongly necessary and independently strongly sufficient and thus clearly was a cause. Y's contribution was not strongly necessary, independently strongly sufficient, or, apparently, even weakly-necessary/strongly-sufficient, since it was not necessary for the sufficiency of any set that contains X's contribution, while a set that does not contain X's contribution would not be sufficient. Yet, from the perspective of scientific/natural causation, it cannot possibly matter which person or source supplied the various votes or amounts of force, fire, water, noise, toxin, etc.

I initially argued that Y's contribution can be shown to be a NESS condition by including it in a minimally sufficient set that also includes X's contribution described as 'at least amount N', which is an actual condition. Contrary to criticisms by some, the fact that X was larger than N is not ignored, but rather must be considered to make sure that this fact did not prevent the complete instantiation of the allegedly minimally sufficient set containing X's contribution described as 'at least amount N' by preventing the instantiation of one or more of its required elements.[94]

However, as I acknowledged long ago, this analytic technique, although valid, may be too subtle or complex to be practically useful. Moreover, it will be of no use in the frequent situations in which the size of the individual contributing conditions or the minimum required aggregate contribution is unknown, as in the two cases most often cited (erroneously) in the United States and elsewhere as supposed examples of causation by multiple independently strongly sufficient conditions, *Anderson v Minneapolis, St Paul & Sault Ste Marie Railway Co*[95] and *Corey v Havener*[96]. In each of these cases, the courts did not require proof—and it is doubtful that it could have been proved—that the defendant's tortious conduct was strongly necessary, independently strongly sufficient, or weakly-necessary/strongly-sufficient, even using the 'at least' descriptive technique, but rather merely that it was a 'substantial/material factor' (*Anderson*) or

[94] Wright, 'Causation' (n 1) 1793–4; Wright, 'Bramble Bush' (n 1) 1035–9. Puppe has resisted this extension of the NESS analysis, initially as supposedly not being valid. Puppe, 'Der Erfolg' (n 54) 883–95; Wright and Puppe (n 18) 485. She now recognises its validity but opposes its use, as least in criminal law, for unspecified normative reasons: Puppe and Grosse-Wilde (n 36) pt III.C n 78.

[95] 179 NW 45, 46 (Minnesota 1920) (destruction of property by two merged independently initiated fires).

[96] 65 NE 69 (Massachusetts 1902) (injuries caused by a horse's being startled by two independently operated motorcycles).

'contributed' (*Corey*).[97] Similarly, it usually will be difficult, if not impossible, to use this analysis to prove that one reason among others for some decision or action was a cause.[98]

Such cases occur often.[99] When causation seems clear but a condition cannot be proven to be strongly necessary (or independently strongly sufficient), courts and academics in common law jurisdictions have used various undefined and unelaborated phrases, including 'robust application of but-for', 'common sense causation', 'substantial factor', 'material contribution', or merely 'contribution', 'factor' or 'cause', to identify them as causes.[100] The words 'factor', 'contribution', 'causation' and 'cause' merely restate the causal issue without analysing or resolving it. The 'substantial', 'material' and 'common sense' qualifiers make things worse by adding tests of significance that confuse the causation issue with the legal responsibility issue.

Consideration of these issues led me to realise, long ago, that the conceptual complexities can be avoided and the informational difficulties greatly reduced by applying the NESS analysis only to the construction of causal laws as minimally sufficient sets of abstract conditions, while treating any actual condition that was a coherent part of the complete instantiation of the antecedent portion of a relevant causal law in a specific situation as a cause of the instantiated consequent portion, even if the abstract condition that it helped to instantiate was over-instantiated.[101] To be a coherent part of the complete instantiation it must be

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[97] *Anderson*, 179 NW at 46; *Corey*, 65 NE at 69; see Wright, 'Legal Responsibility' (n 4) 1442–3; text at fns 196–199 below.

[98] See Wright and Puppe (n 18) 486 and fn 103; Steel (n 18) 29. For elaboration of this point, see Elise Bant and Jeannie Marie Paterson, 'Statutory causation in cases of misleading conduct: Lessons from and for the common law' (2017) 24(1) *Torts Law Journal* 1, 18–22 & fns 90 and 108.

[99] See, eg, *Bonnington Castings Limited v Wardlaw* [1956] AC 613; *Hotson v East Berkshire Health Authority* [1987] AC 750; *Williams v Bermuda Hospital Bd* [2016] UKPC 4; *Bailey v Ministry of Defence* [2008] EWCA (Civ) 883; *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 530–32; *Athey v. Leonati* [1996] 3 SCR 458; *Clements v Clements* [2012] 2 SCR 181; *Sew Hoy & Sons Ltd v Coopers & Lybrand* [1996] 1 NZLR 392; *Burrage v United States* (2014) 571 US 204; *Paroline v United States* (2014) 572 US 434; *Tidal Oil Co v Pease* (Oklahoma 1931) 5 P 2nd 389; Bénédict Winiger, 'Comparative Report' in Winiger et al (n 50) 347–8; David A Fischer, 'Insufficient Causes' (2005-2006) 94(2) *Kentucky Law Journal* 277, 284–7; *Spier and Haazen* (n 22) 146–7.

[100] See, eg, in fn 99 above, using 'material contribution': *Bonnington*, *Williams*, *Bailey*, *March*, *Athey* and *Sew Hoy*; using 'common sense': *March* and *Clements*; using 'robust but-for': *Clements*. For discussion of widespread use of 'substantial factor' in the USA due to its employment in the first and second *Restatements*, see Sebok (n 33) 62–3 and the articles cited in fn 12 above. For discussion of the actual or suggested use of 'a factor' in Australia, see Bant and Paterson (n 98) 15–18; Henry Cooney, 'Factual causation in cases of market-based causation' (2021) 27(1) *Torts Law Journal* 51.

[101] Wright, 'Response to Criticisms' (n 18) 291, 303–5, 307–9; Richard W Wright, 'Acts and Omissions as Positive and Negative Causes' [hereafter Wright, 'Acts and Omissions'] in Jason W Neyers, Erika

consistent with the other required conditions. For example, a second fire that arrived after the house had already burned down would not be consistent with the requirement that there be an existing house to burn down when the fire arrives at the location of the house. Similarly, to establish that some information contributed to a specific decision, it need only be established that the information was considered and counted positively in favour of the decision; if so, it was part of the complete instantiation in the specific situation of an abstractly defined (in accord with the laws of nature) minimally sufficient set of reasons for that decision.[102]

E *Criticisms of the NESS Analysis*

The NESS analysis is generally acknowledged, even by its critics, to be a major improvement over the strong necessity analysis.[103] The critics either assume that it is the same as Hume's crude regularity theory or fail to understand it as initially elaborated and subsequently clarified.[104] For detailed refutation of these

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Chamberlain and Stephen G.A. Pitel (eds), *Emerging Issues in Tort Law* (Hart Publishing, 2007) 287, 296-8; Wright, 'Once More' (n 14) 1107–9; see Moore (n 63) 489–90.

[102] See Wright and Puppe (n 18) 487 & fn 109; Wright, 'Bramble Bush' (n 1) 1037, 1038; Bant and Paterson (n 98) 19–20, 22. In the mental causation cases, Bant and Paterson's 'a factor' analysis and my simplified NESS analysis are practically indistinguishable. However, the NESS analysis requires an at least implicit understanding that the condition at issue is part of the complete instantiation on the particular occasion of relevant causal laws or generalisations specified as minimally sufficient sets of conditions, while they seem to reject any such requirement. See Bant and Paterson 15 fn 70, in which they apparently intended to cite Wright, 'Response to Criticisms' (n 18) 291 fn 40, and to disagree with my criticism therein of Allan Beever's weak sufficiency analysis of causation, which enables any condition, no matter how irrelevant, to be treated as a cause. See text at fns 37 and 47 above. I believe that mental processes are physical processes and thus subject to causal laws, although the relevant causal laws and related causal generalisations are much less *observably* regular and predictable than for more obvious types of physical processes. Even if mental and (other) physical processes at the elementary particle/wave level are probabilistic, as modern science generally assumes, they are only partially rather than completely undetermined. The NESS analysis of causation continues to apply in a partially indeterministic world. See Mackie (n 42) 49–50, 76, 237–47; Wright, 'Bramble Bush' 1028–9, 1029 fn 145, 1042–9; Wright, 'Response to Criticisms' (n 18) 309–11.

[103] See, eg, Fischer, 'Insufficient Causes' (n 99) 277 ('The NESS (Necessary Element of a Sufficient Set) test of causation, popularized by Professor Richard Wright, is emerging as the new supplement to the but-for test for the twenty-first century'); Carl-Friedrich Stuckenberg, 'Causation', in Markus D. Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law*, Oxford 2014, 474–81; Miquel Martín-Casals, 'Causation and Scope of Liability in the Internet of Things (IoT)', in Sebastian Lohsse, Reiner Schulze and Dirk Staudenmayer (eds), *Liability for Robotics and in the Internet of Things* (Nomos/Hart 2019) 201–8, 212; and the authors cited in Wright, 'Response to Criticisms' (n 18) 285 fn 1 and Wright and Puppe (n 18) 488 fns 110 and 111.

[104] The initial critique, cited by almost all since, is Richard Fumerton and Ken Kress, 'Causation and the Law: Preemption, Lawful Sufficiency, and Causal Sufficiency' (2001) 64(4) *Law and Contemporary Problems* 83, 97–104; see Moore (n 63) 475–95; Michael S Moore, 'Some Further Thoughts on Causation (and Related Topics) Prompted by Fifteen Critics' in Kahmen and Stepanians (n 50) 333,

criticisms, the great majority of which cite without discussion prior criticisms and ignore subsequent clarifications and refutations, see the sources cited in the appended footnote.[105] I discuss the most common criticisms here.

1 *Epiphenomena*

One of the most common objections is the supposed inability of the NESS analysis to avoid treating epiphenomena (distinct effects of a common cause) as mutual causes of each other if they occur simultaneously, or the first in time as a cause of the second. Frequent examples include daylight supposedly causing night-time darkness (and vice versa), the fall of the mercury in a barometer as supposedly causing a storm, or the sounding of an end-of-work horn in one city as supposedly causing workers in a distant city to leave work.

While this objection applies to Hume's crude regularity theory, it does not apply to Mill's laws of nature theory, as Mill himself explained with regard to the supposed counterexample of daylight causing night-time darkness, and vice versa, in every approximately 24-hour period. Mill pointed out that, although these (in his time) were observed regularities, they were not unconditional, as required for a law of nature. If the sun never rose above the horizon or, conversely, never sank below the horizon, we would have permanent night or permanent day, respectively.[106] Indeed, we now know that daylight fails to follow night-time darkness, and vice versa, for a number of days each year in the polar regions of the earth. More fundamentally, there is no causal law or generalisation (incompletely specified causal law) for which the occurrence of night-time darkness is one of the conditions in the antecedent for the occurrence of daylight, and vice versa. A causal generalisation containing in its antecedent the occurrence of night-time darkness but excluding the unobstructed flow of

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334–48, 382–3; Stapleton, 'Extended But-For' (n 8) 700 fn 9, 701–2 & fn 19, 703 & fn 26, 714 & fn 81, 720 fn 108, 726 fn 128; Steel (n 18) 18 fn 16, 27–33 & fns 59 & 68; Thomson (n 39) 143–164, 150–6. See also Lewis (n 50) 556–7, 565–7; Mackie (n 42) 40–8, 81–7; L.A. Paul and Ned Hall, *Causation: A User's Guide* (Oxford University Press, 2013) 14–6, 71–3, 89–91, 149 (criticizing regularity and covering law accounts but recognizing that a properly formulated minimally sufficient set [covering law!] account does not suffer from the same defects as the regularity account). Steel retreats from most of his criticisms in footnotes. See Steel (n 18) 26 fn 57, 27 fns 58 & 61, 29 fn 64. Yet, despite describing Stapleton's causal analyses as inferior to and reliant on the NESS analysis and noting (apparently at the last minute) my longstanding simplification of the NESS analysis, ibid 27 fn 58, 33–7, he 'draws upon' her account when the NESS analysis supposedly 'would be needlessly complex': ibid 33 fn 79, 36–7.

[105] Ingeborg Puppe, 'The Concept of Causation in the Law' in Kahmen and Stepanians (n 50) 67, 86–92 [hereafter Puppe, 'Concept']; Wright, 'Bramble Bush' (n 1) 1023–39; Wright, 'Response to Criticisms' (n 18) 295–322; Wright, 'Causation: Metaphysics or Intuition' (n 36) 171–86.

[106] Mill (n 45) bk III ch V § 6.

sunlight would not be sufficient, when instantiated, for the occurrence of daylight, but if the unobstructed flow of sunlight is included the prior occurrence of night-time darkness is not necessary for the sufficiency of the set of antecedent conditions. The same response applies to the other epiphenomenal situations routinely put forth as supposed counterexamples to covering-law theories, including the barometer–storm example (with the common cause being a drop in air pressure) and the end-of-work horn example (with the common cause being recognition of attainment of a certain time of day).[107]

2 *Causal Directionality*

A second commonly argued set of counterexamples ignores the structure of causal laws, whereby the minimally sufficient conditions in the antecedent, when fully instantiated, cause the instantiation of the condition in the consequent, and not vice versa. A frequently mentioned supposed counterexample involves treating the shadow of a flagpole as a cause of the flagpole's height. If we measure the length of the shadow (with unobstructed sun light) and the position of the sun with respect to the upright flagpole, we can use the laws of geometry to calculate the flagpole's height. However, this mere lawful sufficiency is based on an inversion of the structure of the relevant causal law or generalisation and is not the same as causal sufficiency, which requires the complete instantiation of the antecedent of the causal law and treats a condition as causal only if it is a part of the complete instantiation of the antecedent. The shadow is an instantiation of the consequent of the relevant causal law or generalisation, while the position of the sun and the location and height of the flagpole are instantiations of conditions in the antecedent, as we realize when we observe that the flagpole's location and height and the position of the sun remain the same regardless of the presence, absence or changing length of the flag pole's shadow, but not vice versa.[108]

3 *Circular Definition*

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[107] Puppe, 'Concept' (n 105) 87–91; Wright, 'Response to Criticisms' (n 18) 297. For discussion of the relationship between causal laws and causal generalisations, and how proof of complete instantiation of a causal generalisation in a specific situation relates to proof of the complete instantiation of the underlying causal laws, see Wright, 'Response to Criticisms' 290–1.

[108] Puppe, 'Concept' (n 105) 88–91; Wright, 'Response to Criticisms' (n 18) 296. Mackie also emphasises the necessity of including the direction of causation, which he calls 'causal priority', in the analysis of causation. However, to accommodate ordinary language usages of 'sufficient', he treats this as a supplement to rather than incorporating it in his INUS formula: Mackie (n 42) 51–3, 190–2.

Many critics of the NESS analysis, while agreeing that resort to properly specified causal laws and generalisations can avoid many or all of the objections to Hume's crude regularity theory, claim that such resort, by using terms such as '*causal* laws', '*causal* generalisations' and '*causal* sufficiency', is viciously circular.[109] A short answer is that these terms simply refer to the laws of nature and related generalisations and their complete instantiation in specific instances. I have provided the following more precise definitions of a 'causal law' and 'a cause', which do not engage in circular use of causal language. 'Causal sufficiency' is simply the complete instantiation of a causal law or its relevant generalisation in a particular situation.

> A causal [natural] law is an empirically derived statement that describes a successional relation between a set of abstract conditions (properties or features of possible events and states of affairs in our real world) that constitute the antecedent and one or more specified conditions of a distinct abstract event or state of affairs that constitute the consequent such that, regardless of any other then existing conditions, the instantiation of all the conditions in the antecedent entails the immediate (instantaneous) instantiation of the consequent, which would not be entailed if less than all of the conditions in the antecedent were instantiated.[110]

> When analysing singular instances of causation, an actual condition *c* was a cause of an actual condition *e* if and only if *c* was a part of (rather than being necessary for) the instantiation of one of the abstract conditions in the completely instantiated antecedent of a causal law, the consequent of which was instantiated by *e* immediately

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[109] This criticism was initially stated in Fumerton and Kress (n 104) 84, 101–4 and has been further discussed in Moore, 'Some Further Thoughts' (n 104) 336–9. It has been cited by many others without any discussion or consideration of subsequent clarifications and rebuttals. See, eg, Stapleton, 'Extended But-For' (n 8) 702; Steel (n 18) 27 fn 59; David A Lagnado and Tobias Gerstenberg, 'Causation in Moral and Legal Reasoning' in Michael R Waldmann (ed), *The Oxford Handbook of Causal Reasoning* (Oxford University Press, 2017) 565, 572. Stapleton's citation of the criticism is ironic, since each of her various proposed causal analyses has employed viciously circular criteria, eg, 'involvement' and 'contribution', which are made more definite only by her past reference to the NESS analysis for elaboration of some of them. See fn 15 above. In her most recent account she states: 'A specified factor is a cause of the existence of a particular phenomenon . . . only if, but for that factor alone, (i) the phenomenon would not exist or (ii) an actual contribution to an element of the positive requirements for the existence of the phenomenon would not exist': Stapleton, 'Extended But-For' (n 8) 713. Condition (ii), which seems to be deficiently based on my longstanding simplification of the NESS analysis (see text at fns 101–102 above), is viciously circular, ambiguous and incomplete. It fails to define or elaborate 'contribution', 'positive requirements' or 'element', or to require instantiation of all of the positive requirements or elements.

[110] Wright, 'Response to Criticisms' (n 18) 289; Wright, 'Causation: Metaphysics or Intuition' (n 36) 172–7. The 'regardless' phrase may be superfluous. Contrary to a criticism in Moore, 'Some Further Thoughts' (n 104) 382–3, none of the language in this definition invokes any counterfactual analysis, rather than a simple matching of existing conditions in the singular instance with the abstract conditions in the causal law.

> (instantaneously) upon the complete instantiation of its antecedent, or (as is more often the case) if *c* is connected to *e* through a sequence of such instantiations of causal laws.[111]

4 *Omissions and Negative Causation*

Another frequently mentioned criticism of the NESS analysis is the past failure by me and Puppe, its two primary proponents, to agree on its proper application in cases involving overdetermined failure of a preventive causal process due to lack of instantiation of more than one of its required NESS elements. Such lacks of instantiation (omissions/absences/negative conditions) are not, as Michael Moore argues, ghostly non-entities, but rather are real aspects of states of affairs that play a crucial role in a great many causal relations, including, as Jonathan Schaffer has explained, all voluntary human actions.[112]

Omissions generally operate as negative causes of some consequence, by precluding the occurrence of a possible preventing cause. However, omissions can and often do operate as positive ('producing') causes. For example, a mother's noticing a child's failure to brush her teeth may cause the mother to instruct the child to do so. In the analysis of causation, it is the distinction between positive causation and negative causation that is significant, rather than the distinction between acts and omissions. The philosophical and analytical difficulties posed by omissions as negative causes are posed also by acts when those acts similarly give rise to negative causation. For example, the act of removing a safety device or damaging it so that it no longer works results in a situation identical to that which exists if there had been no safety device in the first place.[113]

The most debated causation situations in the legal literature are those in which the failure of some preventive causal process is overdetermined by multiple negative conditions. Typically, *A* or (less frequently) a third party, *C*, is injured when *A* negligently failed to attempt to use a safeguard (eg, brakes or a warning) that was tortiously not provided or provided in a non-working condition by *B*,

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[111] Wright, 'Response to Criticisms' (n 18) 291. These definitions are set forth to satisfy rigorous theorists. As a practical matter, we need only insist that the condition at issue was part of the complete instantiation of the antecedent portion of the relevant causal law. See text at fns 101–102 above.

[112] Jonathan Schaffer, 'Causes need not be Physically Connected to their Effects: The Case for Negative Causation' in Christopher Hitchcock (ed), *Contemporary Debates in Philosophy of Science* (Blackwell, 2004) 197; Jonathan Schaffer, 'Disconnection and Responsibility' (2012) 18(4) *Legal Theory* 399; see Wright, 'Causation: Metaphysics or Intuition' (n 36) 177–9.

[113] Wright, 'Acts and Omissions' (n 101) 290–2.

when provision and use of the working safeguard would have prevented the injury. In these situations, some argue that neither *A* nor *B* was a cause of the injury, since neither was a but-for cause, although their combined conduct was a but-for cause;[114] some argue that *A* and *B* were both causes;[115] and others, including Puppe and I, have argued that one of *A* and *B* was a preemptive cause unless their failures occurred simultaneously, in which case each was a duplicative cause.[116]

Previously Puppe and I have disagreed regarding the proper method of analysis in these overdetermined negative causation situations. We each initially tried to analyse them in the same manner as overdetermined positive causation situations, by asking if each negative condition was necessary for the complete instantiation of a set of conditions that was minimally sufficient for the occurrence of the result at issue.[117] However, as critics pointed out, our attempts to distinguish the negative conditions using this analysis were inconsistent.[118] My consideration of the critics' arguments led me to recognise that proper analysis of situations involving the failure of a preventive causal process (negative causation) differs from the analysis of situations involving the success of a causal process (positive causation). To explain the success of a causal process we need to show that the causal laws underlying the steps in the causal process were all completely instantiated, and we treat any condition that was a part of such

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[114] See, eg, Becht and Miller, *The Test of Factual Causation in Negligence and Strict Liability Cases* (Washington University Press, 1961) 82 fn 116, 88–9, 95–8, 210–1; William L Prosser, *Handbook of the Law of Torts* (West Publishing Co, 4th ed, 1971) § 41 at 238–9; John G Fleming, *The Law of Torts* (Law Book Co, 6th ed, 1983) 174; David W Robertson, 'The Common Sense of Cause in Fact' (1977) 75(7) *Texas Law Review* 1765, 1787–8; Stapleton, 'Unnecessary Causes' (n 9) 40 & fn 6; Stapleton, 'Extended But-For' (n 8) 708-9, 716–20. Stapleton bases her current position on the claim that 'a defendant is entitled to take the world as he finds it', which is only partially true, since a person must take into account reasonably foreseeable future events, and she compounds her error by interpreting 'the world as he finds it' as how things actually turned out in full hindsight. Her attempt to treat multiple negative conditions in a failed preventive process as not having any impact on the state of the world while treating unnecessary positive conditions as having an impact is illogical and bewildering.

[115] See, eg, Steel (n 18) 32 (aggregating *A* and *B*); Hart and Honoré (n 41) 127 (neither a cause if not concurrent), 128 and 236 (both causes if concurrent); cf Fischer, 'Insufficient Causes' (n 99) 301–2 (noting the conceptual conundrum of treating neither as a cause when their combined conduct was a but-for cause, the unfairness of holding neither liable if both behaved wrongly, and the supposed lack of any way to distinguish them).

[116] See Puppe and Wright (n 118) 52–4.

[117] Puppe, 'Der Erfolg' (n 54) 903–5; Puppe, 'Concept' (n 105) 99–101; Wright, 'Causation' (n 1) 1801–3.

[118] For cogent criticism of my initial argument, see David A Fischer, 'Causation in Fact in Omission Cases' [1992] *Utah Law Review* 1335, 1357–9 [hereafter Fischer, 'Omission Cases']. For criticism of Puppe's initial argument, see Ingeborg Puppe and Richard W Wright, 'Causation in the Law: Philosophy, Doctrine and Practice' in *Causation in European Tort Law* (n 12) 17, 52–3.

complete instantiation as a cause. However, when a causal process has failed, this complete instantiation analysis obviously does not apply. Instead there has been a failure of such complete instantiation, and we need to determine at what point it failed.[119]

I for some time argued that a failure at a physically prior step in the preventive causal process (eg, attempting to use brakes) causes the failure of the entire process at that point and preempts the potential failure at a physically subsequent step (eg, the operation of the brakes) that would have been reached if not for the failure at the physically prior step, even if the defect in the brakes occurred prior to the failure to attempt to brake.[120] Puppe has always argued for the opposite, temporally based failure analysis, according to which a preventive causal process fails as soon as there is an irretrievable lack of instantiation of one of its required conditions (eg, functioning brakes), which preempts the potential causal effect of the subsequent lack of instantiation of another required condition (eg, attempting to use the brakes).[121]

We recently resolved our prior disagreements. We agree that the proper analysis of overdetermined negative causation situations is a combination of our prior analyses, which should (i) (as I have argued) focus on the role of the various negative conditions in causing the failure of the preventive causal process (and thus as a negative cause of the unprevented ultimate result) rather than trying to fit them in as part of the complete instantiation of the unprevented positive causal process, but (ii) (as Puppe has argued) identify the temporally first irretrievable lack of instantiation of a required condition in the preventive causal process as a preemptive cause of its failure (and thus as a negative cause of the unprevented ultimate result). Just as you cannot kill an already dead horse, you cannot cause the failure of an already failed causal process.[122]

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[119] Wright, 'Once More' (n 12) 1129–31; Wright, 'Acts and Omissions' (n 101) 303.

[120] Wright, 'Once More' (n 12) 1128–31; Wright, 'Acts and Omissions' (n 101) 303–5; Wright, 'Response to Criticisms' (n 18) 317–21. My initial statement of this argument, in 'Once More', was brief and unclear and misled Fischer and others into thinking that I was still trying to fit negative conditions into the complete instantiation of a positive causal process, rather than analyzing their contribution to the failure of a preventive causal process. See Fischer, 'Insufficient Causes' (n 99) 304–8 & fn 136; Steel (n 18) 30. Fischer's criticism of my causal chain analysis of the failure of a causal process, ibid 309–12, was on point and, along with Puppe's criticisms, eventually led me to agree with Puppe's temporally based analysis, which fits better, for what it's worth, with the results of Fischer's student survey (see Fischer, 'Insufficient Causes' (n 99) 313–6).

[121] Puppe, 'Der Erfolg' (n 54) 900–1; Puppe, 'Concept' (n 105) 99–100.

[122] Puppe and Wright (n 118) 53–4. So I now return to my initial assessment of the situation in which D empties P's water keg and fills it with salt and C subsequently steals the keg, leaving P with no water in the desert. D, not C, is the preemptive cause of P's death due to lack of water. See Wright, 'Causation' (n 1) 1802; cf Wright 'Response to Criticisms' (n 51) 298 fn 88.

This conclusion is contrary to the causal reasoning, but not the ultimate liability result, in many cases involving *A*'s failure to attempt to access and use in a timely and proper manner a safeguard (a safety device, instruction or warning) that *B* failed to provide at all or in working order, which if properly provided and used would have prevented injury to *X*. In such cases, the courts generally hold that *B*'s failure to properly provide the safeguard was not a cause of the unprevented injury to *X*, and thus there is no liability.[123] However, the courts fail to recognise that these are overdetermined causation cases and thus invalidly employ the strong necessity (but for) analysis,[124] rather than recognising that causation exists and considering whether the 'no worse off' limitation on liability discussed in Part IV immediately below, which applies if *A* clearly would have suffered the same injury or related losses anyway as a result of non-liable conditions, should apply. Usually the injured person was *A*, who did not use or would not have used the safeguard even if it had been properly provided. In that case, even if we treat *B*'s failure to properly provide the safeguard as a cause of *A*'s injury, *A* should not be able to hold *B* liable since *A* would have suffered the same injury or related losses anyway as a result of *A*'s failure to attempt to use the safeguard, which is a non-liable condition: you cannot sue (or recover from) yourself.[125] On the other hand, if the injured person was *C*, an innocent third party, even those academics who deny that either *A* or *B* was a cause of the injury argue that one or both of *A* and *B* should be held liable for the injury.[126]

IV THE 'NO WORSE OFF' (NWO) LIMITATION ON LIABILITY[127]

[123] See, eg, *Saunders System Birmingham Co v Adams* (1928) 117 So 72 (Alabama) (failure to attempt to use non-working brakes); *Weeks v McNulty* (1898) 48 SW 809 (Tennessee) (failure to provide fire escape for which hotel guest did not check); *Safeco Insurance Co v Baker* (1987) 515 So 2d 655 (Louisiana App 3d Cir) (incomplete instructions which however were not read); *McWilliams v Sir William Arrol & Co Ltd* [1962] UKHL 3; (failure to supply safety belt which would not have been used if it had been supplied).

[124] See Fischer, 'Omission Cases' (n 118) 1350–6; Fischer, 'Insufficient Causes' (n 99) 301–2; *Restatement Third: Physical and Emotional Harm* (n 12) § 27 comment i and reporters' note at 396–9.

[125] See, eg, the *Saunders*, *Weeks* and *McWilliams* cases in fn 123 above.

[126] See, eg, the *Safeco* case in fn 123 above; Becht and Miller (n 114) 96–7; Prosser (n 114) 239–40 fn 25; Fleming (n 114) 174 fn 19; Fischer, 'Insufficient Causes' (n 99) 301; Robertson (n 114) 1787; Stapleton, 'Extended But-For' (n 8) 721–2; *Restatement Third: Physical and Emotional Harm* (n 12) § 27 comment i.

[127] I have previously described this as a limitation on legal responsibility. See Wright, 'Legal Responsibility' (n 4) 1434–67. I believe it is better described as a limitation on liability for compensatory damages, as I stated in my first article in 1985 and Green has persuasively argued. See Wright, 'Causation' (n 1) 1798; Green (n 33) 675, 690–1, 700–1 & fn 105. The tortfeasor has satisfied all of the requirements for being held legally responsible, but escapes liability for all or part of the compensatory damages because he has not made the plaintiff worse off with respect to such damages.

A *The Rightful Position*

If a plaintiff's injury and/or related compensable losses, although wrongfully caused by the defendant, would have occurred anyway as a result of non-liable conditions, the plaintiff's private law interactive justice claim, which is based on the plaintiff's external freedom having been impaired by the wrongful conduct of others, should (and usually does) fail, at least with respect to compensatory damages, not because of a lack of wrongful causation of the plaintiff's injuries but because the plaintiff has not been made worse off by any wrongful conduct.[128] This principle is stated incompletely (since it refers only to the defendant's wrongful conduct rather than all potentially liable conditions[129]) in section 2 of the draft *Restatement Third of Torts: Remedies*,[130] which states, as a basic principle of 'corrective' (interactive) justice:[131]

> § 2. The Rightful Position (Make-Whole Relief)
>
> A plaintiff who establishes a defendant's liability in tort generally is entitled to a remedy that will place that plaintiff, as nearly as possible, in the position the plaintiff would have occupied if the tort had not been committed. …[132]

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[128] Wright, 'Legal Responsibility' (n 4) 1429–34; Robert J Peaslee, 'Multiple Causation and Damage' (1934) 47(7) *Harvard Law Review* 1127, 1130; Fleming (n 114) 174; Williams (n 9) 76; Green (n 33) 700, 709; David A Fischer, 'Successive Causes and the Enigma of Duplicated Harm' (1999) 66(4) *Tennessee Law Review* 1127, 1164–5 [hereafter Fischer, 'Duplicated Harm']; Fischer, 'Insufficient Causes' (n 99) 293; Green (n 33) 700, 709; Stapleton, 'Extended But-For' (n 8) 713, 720–2. This issue does not arise in criminal law with respect to proper criminal punishment (rather than related compensation schemes) since the criminal action is not based on a discrete injury to any individual but rather a nondiscrete injury to the security, order and peace of each and every member of society. See Wright, 'Legal Responsibility' 1432; cf Puppe and Grosse-Wilde (n 36) pt III.C at fns 73–75 (arguing, as criminal law professors, against the NWO, but failing to distinguish compensatory damages from criminal punishment and to note that the NWO limitation applies only when the injury or related losses clearly would have occurred anyway due to non-liable conditions). The NWO limitation also should not apply in actions for declaratory or (non-compensatory) injunctive relief, nor in actions for dignitary damages, including proper punitive damages, based on a defendant's deliberate disregard of the plaintiff's legally protected interests. See, eg, Civil Rights Act of 1991, 42 USC § 2000e-5(g)(2)(B) (2006); Wright, 'Legal Responsibility' 1431–2; Fischer, 'Insufficient Causes' (n 99) 297; Bant and Paterson (n 98) 27–9.

[129] See Wright, 'Legal Responsibility' (n 4) 1434; Stapleton, 'Unnecessary Causes' (n 9) 58–63.

[130] American Law Institute, *Restatement of the Law Third, Torts: Remedies* (Council Draft No. 1, August 31, 2021) [hereafter *Restatement Third: Remedies*].

[131] Ibid § 2 comment b ('Restoration to the plaintiff's rightful position does corrective justice between the parties').

[132] Ibid § 2.

The plaintiff is entitled to be made whole, but not more than whole, as compared with the situation in which she would have been had there been no liability generating conditions created by the defendant or anyone else.[133] This limitation on liability, which I have called the 'no worse off' (NWO) limitation[134] often is not explicitly recognised. Instead, courts and academics, including the drafters of the first and second *Restatements*, often erroneously attribute the lack of liability to a supposed lack of causation, established by invalidly applying the strong necessity analysis in situations involving overdetermined causation, rather than correctly acknowledging causation and then considering the NWO limitation.[135]

When the issue is correctly identified as an issue of just liability for proven wrongfully caused harm rather than as an issue of whether there was wrongful causation of harm, the defendant should have the burden of proving the fortuity that the relevant injury or loss would have occurred anyway as a result of non-liable conditions, as several leading cases have stated[136] and Michael Green, the

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[133] Liability generating conditions include insured against conditions. For example, assume that the defendant negligently caused a flood that destroyed the plaintiff's house, which would have been destroyed by an approaching lightning fire, which the flood extinguished. If the plaintiff had insurance against such fire damage, he was made worse off by the flood, since the insurance company would have been liable for the fire damage. Cf Tithe Case, Y.B. Trin., 21 Hen. 7, f. 27, pl. 5 (1506), reprinted in CHS Fifoot, *History and Sources of the Common Law: Tort and Contract* (Stevens & Sons, 1949) 197–8 (defendant liable for the value of corn that perished from unspecified causes in the plaintiff's barn, into which the defendant had moved the corn to prevent it from being eaten by trespassing cattle, since the owner of the cattle would have been liable for any corn eaten by the cattle).

[134] The earliest use of the 'no worse off' phrase of which I am aware is in *O'Donnell v. City of Syracuse* (New York 1906) 76 NE 738, 743 ('The plaintiff and the other citizens affected by the flood were no worse off than they would have been if the creek had not been used at all for sewerage purposes, except for the incidental deposit of sewage matter.'). I thank my colleague Edward Lee for this citation. For recent usage, see, eg, *Columbia Gas Transmission Co v Ogle* (Southern District Ohio 1997) 51 F Supp 2nd 866, 877 ('There is no damage from alleged fraud, where complaining party is no worse off than it would have been had alleged fraud not been committed.').

[135] See, eg, *Restatement Second* (n 67) § 432(1) comment b; Stephen Todd (ed), *Todd on Torts* (Thomson Reuters, 8th ed, 2019) [20.2.01]; text at fns 123–126 above and 140–150 below.

[136] See, eg, *Kingston v Chicago & Northwestern Railway Co* (Wisconsin 1927) 211 NW 913; *City of Piqua v Morris* (Ohio 1918) 120 NE 300; cf *Anderson v Minneapolis, St Paul & Sault Ste Marie Railway Co* (Minnesota 1920) 179 NW 45, 46 ('[defendant] did not show how such fires originated, neither did it clearly and certainly trace the destruction of plaintiff's property to them'). Some courts also treat the 'superseding cause' / 'act of God' limitation as a defense. See Wright, 'Legal Responsibility' (n 4) 1427, 1436–7, in which it is suggested that it would be reasonable to treat all of the limitations on the scope of liability as defenses. See also 1427–8. See further Stephen D Sugarman, 'A New Approach to Tort Doctrine: Taking the Best from the Civil Law and Common Law of Canada' (2002) 17 *Supreme Court Law Review, Second Series* 375, 384. After further thought, I think these limitations should not be treated as defenses, since defenses are properly based on justifications (or, in criminal law, excuses). However, there should be a shift of the burden of proof to the defendant. Cf *Restatement Third: Physical and Emotional Harm* (n 12) § 29 comment a ('scope of liability functions as a limitation on liability in a select group of cases, operating more like an affirmative defense, although formally it is not one').

reporter primarily responsible for this issue in the *Restatement Third: Liability for Physical and Emotional Harm*, has persuasively argued. Green notes the great difficulty of the plaintiff's being able to prove the negative proposition that the injury would not have been caused anyway by then existing non-liable conditions. He also notes the relative positions, normatively, of the plaintiff (whether innocent, as usually is true, or contributorily negligent) and the defendant, who is a proven wrongful cause of the plaintiff's injury and related losses.[137] Shifting the burden of proof, either explicitly or through presumptions, to the defendant on the causation issue is common in civil law as well as common law jurisdictions when the plaintiff is unable to identify which of several persons who acted wrongfully and may have caused her injury actually caused the injury.[138] There is much more reason to shift the burden of proof on liability when the defendant is a proven wrongful factual cause of the plaintiff's injury and seeks to escape liability due to the fortuitous presence of a non-liable condition that may have caused the injury in the absence of the defendant's wrongful conduct.[139]

B *History*

Unfortunately, the American Law Institute (ALI) has yet to get this right. For 76 years, from 1934 until 2010, the *Restatements* failed to distinguish the causation issue from the legal responsibility issue and instead promoted confusion of these two issues.[140] This was especially problematic when there was overdetermination and (i) the defendant's causal contribution involved a passive condition and/or (ii) the duplicative or preempted condition was a non-liable condition. The *Restatements* only treated 'actively operating' conditions, 'each of [which] itself is sufficient', as exceptions to the strong necessity (but-for) test.[141] They thus described a failure to take precautions required for the protection of others' interests (as in the multiple-negative-condition cases discussed above[142]) as 'not

[137] Green (n 33) 703; see text at fns 176–179 below.
[138] See, eg, *Summers v Tice* (California 1948) 199 P 2nd 1; *Maddux v Donaldson* (Michigan 1961) 108 NW 2nd 33; *Cook v Lewis* [1951] SCR 830; *Restatement Third: Physical and Emotional Harm* (n 12) § 28(b); Winiger et al (n 50) § 6a at 353–89.
[139] Stapleton disagrees, despite demonstrating that it will be very difficult for a plaintiff to prove the negative proposition that the injury would *not* have been caused anyway by non-liable conditions. See Stapleton, 'Unnecessary Causes' (n 9) 56–7.
[140] See the articles cited in fn 12 above.
[141] *Restatement Second* (n 67) § 432(2); see fn 67 above. Unless there is a significant difference in the cited sections and comments, I will cite only the *Restatement Second*.
[142] See text at fns 114–126 above.

even a perceptible factor' in causing some harm 'if the same harm . . . would have been sustained even had the actor taken the required precautions'.[143]

Similarly, the *Restatements* included, as an illustration of a (supposed) lack of causation due to a lack of strong necessity, a situation based on the well-known *Piqua* dam failure case.[144] In the illustration a negligently constructed dam burst during a storm of unprecedented severity that 'would have burst the dam even had it been properly constructed'.[145] The lack of liability in *Piqua* and many similar flooding cases cannot properly be attributed to a lack of causation, but rather must be based on the NWO limitation. The negligent construction or maintenance of the dam was a duplicative cause of the flooding and related damage; it caused the dam to burst or overflow earlier than otherwise would have occurred and may have even enhanced the flooding damage.[146]

A more significant part of the prior *Restatements*, when considering the NWO limitation, is § 432(2) comment d, which states that a defendant's negligence may be found to be a substantial factor under § 432(2) 'not only when the second force which is operating simultaneously with the force set in motion by 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.'[147] Read literally, this comment merely states, correctly, that both the defendant's negligent conduct and the other contributing condition, whether tortious or innocent (but, incorrectly, only if each is 'actively operating' and 'itself is sufficient'), may be found to be 'substantial factors' (and thus also 'factors'). Section 433 states additional considerations that are important in determining whether a condition is a substantial factor, which go beyond the factual causation issue and address the normative issue of legal responsibility,[148]

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[143] *Restatement Second* (n 67) § 432(1) comment b.

[144] *City of Piqua v Morris* (Ohio 1918) 120 NE 300; see text at fns 187–189 below.

[145] *Restatement Second* (n 67) § 432(1) comment b, illustration 2.

[146] See Wright, 'Legal Responsibility' (n 4) 1437–40. The *Restatement Third* seems to agree, but does not explicitly adopt a position. See *Restatement Third: Physical and Emotional Harm* (n 12) § 27 comment g; Sebok (n 33) 80.

[147] *Restatement Second* (n 67) § 432(2) comment d; see Sebok (n 33) illustration 4.

[148] American Law Institute, *Restatement of the Law of Torts* (1934) § 433 states:

> The following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing about harm to another:
>
> (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
>
> (b) whether after the event and looking back from the harm to the actor's negligent conduct it appears highly extraordinary that it should have brought about the harm;
>
> (c) whether the actor's conduct has created a force or series of forces which are continuous and in active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;

and § 431 comment a states: 'The word "substantial" is used to denote the fact that the defendant's conduct has 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.'[149] Thus, not surprisingly, some courts and academics, including I myself previously (I now admit error) and the reporters for the *Restatement Third*, have viewed the references to 'substantial factor' in *Restatement Second* § 432(2) and (indirectly) its comment d, which literally only address the factual causation issue of whether a condition was strongly necessary or independently strongly sufficient, as being meant to address not merely factual causation but also the ultimate liability issue and thus as a rejection of the NWO limitation.[150]

During its annual meeting in May 2005, the ALI approved the final draft of *Restatement of the Law Third, Torts: Liability for Physical Harm* (which has not been commercially published), which eliminated all of the prior *Restatements*' confusing discussions of 'substantial factors' and 'legal causes' and clearly distinguished 'factual causation' from the additional issues involved in assessing 'scope of liability' (legal responsibility).[151] However, it continued (what the reporters believed to have been intended) the *Restatement Second*'s rejection of the NWO limitation in situations involving 'multiple sufficient causes' (multiple independently strongly sufficient conditions), based on what it described as a 'significant majority' of the 'modern' cases decided since publication of the *Restatement Second*,[152] although it also described those cases as 'rare' and 'only a handful'.[153] It noted contrary results (findings of no or reduced liability) in cases involving overwhelming forces of nature or preempted conditions that (respectively) were or would have been independently strongly sufficient to

(d) lapse of time.

A 1948 revision of the first *Restatement* deleted clause (b) in § 433 and moved it, with a minor language change, into § 435 as an aspect of legal causation. These changes were maintained in the *Restatement Second*. The reporter for the 1948 revision, Laurence Eldredge, and the reporter for the *Restatement Second*, William Prosser, both claimed that this change restricted the meaning of 'substantial factor' to causation in fact. See Wright, 'Once More' (n 12) 1076–8. This claim is repeated by Green: Green (n 33) 684 fn 44; *Restatement Third: Physical and Emotional Harm* (n 12) § 29 comment a. This is not correct. The *Restatement Second* continues to include § 433 and its list of factors that address appropriate legal responsibility rather than factual causation.

[149] *Restatement Second* (n 67) § 431 comment a.

[150] See, eg, American Law Institute, *Restatement of the Law Third, Torts: Liability for Physical Harm* (Proposed Final Draft No. 1, April 6, 2005) § 27 comment d [hereafter *Restatement Third: Physical Harm*]; Green (n 33) 683-4 & n 44.

[151] *Restatement Third: Physical Harm* (n 150) §§ 26, 27, 29; see Sebok (n 33) 60–1, 68–9.

[152] *Restatement Third: Physical Harm* (n 150) § 27 comment d.

[153] Ibid § 27 comment b; see Green (n 33) 685–7.

produce the relevant injury or losses, and it suggested that the lack of liability in these cases could be affected by the fact that the competing duplicative or preempted condition did not involve tortious conduct.[154]

The NWO limitation issue continued to be debated within the ALI. By the time the enlarged *Restatement Third: Liability for Physical and Emotional Harm* was completed and published in 2010, Green, who (as I previously noted) was the reporter primarily responsible for this issue[155] and who previously had been opposed to the NWO limitation,[156] joined his co-reporter William Powers, Jr[157] and Jane Stapleton[158] (among others) on the ALI Council in arguing in favour of the NWO limitation, based on consideration of the underlying principles and recently published studies (including his own) that contained more expansive and detailed study of the relevant case law.[159] They convinced the Council to modify § 27 comment d to refer only to factual causation and to leave the NWO limitation issue for treatment in a subsequent *Restatement* project.[160]

The reporters for the *Restatement Third of Torts: Remedies*, to whom this issue was punted, have rejected the NWO limitation in an awkwardly worded section[161] that is improperly limited to cases involving 'multiple sufficient causes' (multiple independently strongly sufficient conditions),[162] despite strong support of the NWO limitation by the reporters for the *Physical and Emotional Harm*

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[154] *Restatement Third: Physical Harm* (n 150) § 26 comment k and reporters' notes, § 27 comments d and i; see Green (n 33) 673.

[155] See Green (n 33) 687 n 51.

[156] See ibid 686–7, 709.

[157] Ibid 709.

[158] See Stapleton, 'Unnecessary Causes' (n 9) 54–63; Stapleton, 'Extended But-For' (n 8) 713, 720–2; Stapleton, 'Comments on Restatement Third: Remedies PD1', submitted to the ALI and copied to Richard W Wright by email November 13, 2020. As usual, Stapleton employs her own unique terminology, using 'no better off' rather than 'no worse off'.

[159] Green (n 33) 709; see Wright, 'Legal Responsibility' (n 4) 1434–67; text at fns 224, 227, 237–249 below.

[160] *Restatement Third: Physical and Emotional Harm* (n 12) § 27 comment d; see Green (n 33) 671–3, 709 & fn 145.

[161] *Restatement Third: Remedies* (n 130) § 12 states in relevant part:

> (a) If a defendant's tortious conduct is one of two or more sufficient factual causes of an indivisible harm to a plaintiff, and if one or more of the causes is not tortious, no share of responsibility is allocated to the nontortious cause or causes.
>
> (1) If none of the other sufficient factual causes is tortious, the defendant is liable for the full amount of plaintiff's damages, less any reduction to account for the plaintiff's comparative share of responsibility under the rules in Restatement Third, Torts: Apportionment of Liability.
>
> (2) If one or more of the causes is tortious, each defendant is liable for that defendant's comparative share of responsibility under the rules stated in Restatement Third, Torts: Apportionment of Liability.

As with all of the prior *Restatements*, 'sufficiency' is not defined or elaborated.

[162] The reporters also unduly limit their case analysis to cases involving physical harm. See text at fn 182 below.

project and David Fischer, upon whose research the reporters for both projects have relied.[163]

C *Principles*

I defer discussion of the *Remedies* reporters' minimal and incomplete discussion of the cases to focus first on their discussion of normative liability principles. They quote, without further elaboration, the following statement (also unelaborated) from the reporters' notes for the *Restatement Third: Physical and Emotional Harm*:

> The argument in favor of liability is that the fortuity of some other innocent cause should not absolve a tortfeasor whose conduct was fully sufficient to cause the plaintiff's harm. Imposing liability in such a circumstance serves the policy of deterrence. A no less forceful response is that the plaintiff is no worse off for the tortfeasor's act – the innocent cause alone would have put the plaintiff in precisely the predicament he or she is in.[164]

The fortuity argument begs the question of whether the fortuity makes a significant difference as a matter of principle (justice) or policy (efficient deterrence). As *Restatement Third: Physical and Emotional Harm* § 27 comment c states, 'That justification [the fortuity argument] is not entirely satisfactory. Tortious acts occur, with some frequency, that fortuitously do not cause harm. Nevertheless, the actors committing these acts are not held liable in tort.'[165] The unelaborated deterrence argument is invalid, for several reasons, as Green has subsequently acknowledged.[166] Efficient deterrence would best be served by completely eliminating the causation requirement and instead imposing fines on inefficient behavior whenever it occurs.[167] If, nevertheless, proof of causation is required for liability, imposing liability in situations involving overdetermination is not likely to affect individuals' behaviour since such situations, even if not rare (as the reporters often argue), are usually

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[163] See text at fns 155–159 above and fns 224, 237–249 below.
[164] *Restatement Third: Remedies* (n 130) 193-4, quoting *Restatement Third: Physical and Emotional Harm* (n 12) § 27 comment d reporters' note at 388.
[165] *Restatement Third: Physical and Emotional Harm* (n 12) § 27 comment c.
[166] Green (n 33) 685 fn 47.
[167] See the articles cited in fn 6 above.

unforeseeable, especially if there is overdetermination by a non-liable condition, so imposing liability would have a minimal if any effect on efficient deterrence.[168]

The reporters omit the 'no worse off' interactive justice principle from their own list of possible reasons for distinguishing situations involving innocent versus tortious causes,[169] even though it is the foundational 'rightful position' principle in their *Remedies* project. Instead, they cavalierly dismiss it without any reasoned argument[170] and put forth several surprisingly bad arguments for rejecting the NWO limitation. For example, they claim: 'To determine that defendant's tort is a factual cause of plaintiff's harm would be a pointless academic exercise unless it follows that defendant is liable for that harm.'[171] This claim illogically treats a necessary condition for liability as a sufficient condition. If it were accepted, we should do away with all 'scope of liability' limitations (including, eg, the foreseeable risk, superseding cause, and trivial contribution limitations) and all defenses. They similarly claim:

> [T]he reason courts crafted the multiple-sufficient-causes addition to but-for causation in the first place was to make sure that a plaintiff's loss was compensated when an actor had committed tortious acts that were fully sufficient to have caused the loss, and that such a tortfeasor did not benefit from fortuity. It is hard to imagine that those courts recognized a broader class of factual causes than but-for causation for any reason *other* than to make such defendants liable for their tortious conduct toward plaintiffs. Otherwise, the courts would have been altering the rules on factual causation for no reason at all.[172]

The courts and the first and second *Restatements* recognise independently strongly sufficient conditions in addition to strongly necessary conditions as

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[168] Ibid; see Fischer, 'Duplicated Harm' (n 128) 1136 & fn 30; Fischer, 'Insufficient Causes' (n 99) 293–4.

[169] *Restatement Third: Remedies* (n 130) § 12 comment d at 195:

> It would be inconsistent to say that defendant is exonerated by the fortuity of a concurrent innocent cause but not by the fortuity of a concurrent and entirely independent second tortfeasor, or vice versa. Neither defendant's culpability, nor the benefits of deterrence, nor the widespread judgment that defendant's tort is a factually sufficient cause of plaintiff's injury, is in any way dependent on whether the other sufficient cause is innocent or tortious.

[170] Ibid 195–6:

> Perhaps the most plausible argument for distinguishing one tortious and one innocent cause from two tortious causes is the claim that plaintiff's rightful position is the position that plaintiff would have occupied but for all tortious contributions to the injury. On this reading, plaintiff bears any loss that also had a sufficient innocent cause. As against that premise, there is the essential unanimity of the modern cases, and the fact of a culpable tortfeasor who was a sufficient factual cause of harm to an injured and uncompensated plaintiff.

[171] Ibid 193.

[172] Ibid 194.

factual causes because it is clear that the strong necessity analysis fails to reach the correct answer on the factual causation issue in overdetermined causation cases. It does not follow that all factual causes should be held legally responsible, and, again, such clearly is not the case, even if we set aside the NWO limitation.

The reporters' final argument for rejection of the NWO limitation is also bad. They state:

> Endorsing a no-liability rule [if the NWO limitation applies] would affect few cases, because cases of multiple sufficient causes are already rare, and because those who advocate a no-liability rule have proposed adjustments that would make it very difficult for defendants to prevail even in those few cases. Some of the scholars who advocate the no-liability rule would shift the burden to the defendant to prove that the other cause was both sufficient and innocent, and at least one scholar would raise the defendant's standard of proof to a near certainty that the same injury would have happened if only the innocent cause had been present. These stringent qualifications to the proposed rule suggest doubt about the proposal's wisdom. And such changes would limit even further the number of cases to which this rule would apply, making a no-liability rule a further complication of the law and an additional issue for litigation with little payoff.[173]

There are several problems with this argument. First, the *Remedies* project is supposed to be addressing all torts in all situations. So, even if cases involving 'multiple sufficient causes' (multiple independently strongly sufficient conditions) were rare, which is not true, there are a great many overdetermined causation cases in which the defendant's conduct was not independently strongly sufficient and/or there was preemptive rather than duplicative causation, especially when all torts, rather than only those involving physical harm, are included.[174] As is documented in several studies and the completed and published *Restatement Third: Physical and Emotional Harm* and *Economic Harm* projects, what are rare are cases that fail to apply the NWO limitation when it is clear that the relevant injury or losses would have occurred anyway as a result of non-liable conditions.[175]

Second, those who support shifting the burden of proof regarding the NWO limitation to the defendant do not have doubts regarding the limitation. They instead believe that, rather than rejecting the NWO limitation, which reflects the 'rightful position' principle upon which the reporters for the *Remedies* project

[173] Ibid 196.
[174] See text at notes 123–6 above and 224–59 below.
[175] See Part IV.D below.

claim to base their project, the burden of proof on that issue should shift to the defendant to prove the fortuity (which the reporters keep emphasising) that the injury or losses would have occurred anyway as a result of non-liable conditions. The defendant has little or no claim as a matter of fairness, justice or efficiency to avoid liability for the injury that he wrongfully caused; he is instead merely a lucky beneficiary of the 'rightful position' principle that limits the plaintiff's compensation.[176] I have previously argued that the defendant should satisfy an 'almost certain' standard of proof, which courts often apply when reducing damages because of pre-existing or possible future conditions, but that has been criticised (ridiculed) as being too strict.[177] The intermediate 'clear and convincing' evidence standard should provide sufficient protection of the plaintiff's rightful position regarding wrongfully caused harm,[178] which, however, would be greatly weakened if the 'preponderance of the evidence' or 'balance of probability' standards were used, considering especially their often being erroneously interpreted as referring to a mere statistical or mathematical probability rather than belief in an actual fact.[179] Those who are opposed to the NWO limitation should readily accept and argue for a high burden of proof being placed on the defendant if the NWO limitation is applicable.

The NWO limitation on liability is required by the 'rightful position' interactive justice principle that is the foundational principle in the *Remedies* project and also supported, contrary to the *Remedy* reporters' brief and unsupported claim, by efficient deterrence arguments.[180] The reporters' other arguments for rejecting the NWO limitation are illogical and demonstrate the

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[176] See, eg, Green (n 33) 701–3; text at fns 136–139 above.

[177] Green (n 33) 686 fn 49.

[178] Wright, 'Legal Responsibility' (n 4) 1435, 1434–7, 1454, 1461, 1463; see Dan B Dobbs, *The Law of Torts* (West Group, 2000) at 434, quoting Robertson (n 114) 1798 ('[W]e must take into account risks of future harm from other sources only if those risks "are so far advanced and so nearly certain at the time of the accident that any attempt to ignore their functional identity with pre-existing conditions would seem dishonest.); Fischer, 'Duplicated Harm' (n 128) 1136 ('it must be sufficiently clear that the subsequent [non-liable] event would not have occurred'); cf ibid 1142B4 (discussing proposals to require actual or unavoidable 'attachment' of the non-liable condition); *Anderson v Minneapolis, St Paul & Sault Ste Marie Railway Co* (Minnesota 1920) 179 NW 45, 46 ('[Defendant] did not show how such fires originated, neither did it clearly and certainly trace the destruction of plaintiff's property to them.').

[179] See, eg, Wright, 'Proving Causation' (n 30); Richard W Wright, 'Legal Proof: Foundherentism and Statistical Evidence' in Diego Dei Vecchi and Carmen Vázquez (eds), *Essays in Honor of Susan Haack* (Marcel Pons, forthcoming 2022) (in Spanish), available in English at SSRN: https://ssrn.com/abstract=3930330.

[180] See text at fns 166–168 above.

continuing failure of the *Restatements* to distinguish clearly between factual causation, legal responsibility and ultimate liability.

D *The Cases*

The *Remedies* draft states that '[*Restatement Third: Physical and Emotional Harm*] § 27, and the cases on which both that section and this Section [12] are based, are all cases of physical damage to person or property. Harm without physical damage may be subject to different rules.'[181] While the limitation to cases involving physical damage was understandable (albeit misleading) for the *Physical and Emotional Harm* project, which was simply the *Physical Harm* project when the NWO issue was being addressed, the *Remedies* project is supposed to cover all torts. Moreover, both sections are improperly limited to cases with 'multiple sufficient causes' (multiple independently strongly sufficient conditions). The NWO limitation is applicable in any case in which the injury and related losses would have occurred anyway as a result of non-liable conditions, regardless of whether the defendant's tortious conduct was independently strongly sufficient. While it is not logically possible for there to be independently strongly sufficient non-liable conditions if the defendant's tortious conduct was strongly necessary for the plaintiff's injury, it is possible (and frequently occurs) that the effects of the defendant's independently strongly sufficient or weakly necessary conduct were or would have been duplicated by duplicative or preempted independently strongly sufficient non-liable conditions. Note that Fischer, who as far as I know has done more research on these cases than anyone else except perhaps Green, has stated: 'There is virtually no authority for holding a tortfeasor who makes an insufficient contribution liable where the other contributions were nontortious.'[182]

The *Remedies* draft dismisses without mention 'very old'[183] well-known landmark cases that applied the NWO limitation, which continue to be discussed as valid precedents in Torts treatises and casebooks and by the courts. Three cases that continue to be widely cited in Tort texts and often in cases are *City of Piqua v Morris* ('*Piqua*'),[184] *Kingston v Chicago & Northwestern Railway Co*

[181] *Restatement Third: Remedies* (n 130) § 12 comment a.
[182] Fischer, 'Insufficient Causes' (n 99) 294.
[183] *Restatement Third: Remedies* (n 130) § 12 comment b.
[184] (Ohio 1918) 120 NE 300; see also *Pluchak v Crawford* (Michigan 1904) 100 NW 765, 766–7 (finding no liability if the flooding of the mill caused by the defendant's dams would have occurred anyway due to natural springs); *Geuder, Paeschke & Frey Co v City of Milwaukee* (Wisconsin 1911) 133 NW 835,

('*Kingston*'),[185] and *Dillon v Twin States Gas & Electric Co*.[186] *Piqua* is a dam failure flooding case and was the basis for an illustration in the first and second *Restatements* in which causation is incorrectly denied based on the strong necessity (but-for) test, but was actually correctly denied in *Piqua* based on the NWO limitation (in an opinion that muddied the issue with 'sole cause' language).[187] *Piqua*'s statements of the NWO limitation continue to be cited as good law,[188] and the NWO limitation continues to be applied generally in flooding cases.[189]

Kingston is the only 'very old' case mentioned by the reporters. It is one of several railroad fire cases, including *Anderson v Minneapolis, St Paul & Sault Ste Marie Railway Co*,[190] *Miller v Northern Pacific Railway Co*[191] and *Cook v Minneapolis, St Paul & Sault Ste Marie Railway Co*,[192] all of which are consistent with the NWO limitation. The *Remedies* reporters incorrectly state that *Cook* was overruled by *Kingston*.[193] *Kingston* instead modified *Cook*: it stated that a defendant should be relieved of liability only if he proves that the damage would have occurred anyway as a result of a non-tortious fire.[194] The reporters state that illustration 3 in § 12 comment d is based on *Kingston*, but, contrary to *Kingston* and the other multiple-fire cases, illustration 3 states that the defendant should be fully liable even though it is given that, in the absence of the fire negligently set by the defendant, the plaintiff's house still would have been destroyed by the lightning fire.[195]

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840 (finding no liability for a basement flooded by the bursting of the defendant's sewer if the flooding would have occurred anyway due to flood waters from an extraordinary storm).

[185] (Wisconsin 1927) 211 NW 913. *Kingston* is mentioned but misdescribed in the reporters' notes as the basis for a couple of illustrations. See text at fns 190–195 below.

[186] (New Hampshire 1932) 163 A 111; see Wright, 'Legal Responsibility' (n 4) 1465–6; Fischer, 'Duplicated Harm' (n 128) 1142; Green (n 33) 691–3; text at fn 208 below.

[187] *Restatement Second* (n 67) § 432(1) comment b, illustration 2; see Wright, 'Legal Responsibility' (n 4) 1438–40, 1445; text at fns 144–146 above.

[188] See, eg, *State ex rel Huttman v Parma* (Ohio App 2016) 70 N.E.3d 1074, 1080; *Wright v Ohio Department of Natural Resources* (Ohio Court of Claims 2004) 2004 WL 1515008; Denis Binder, 'Legal Liability for Dam Failures' (privately published 2002) https://papers.ssrn.com/abstract_id=1330511 at 19–20, 32–33, 43.

[189] See, eg, *Department of Environmental Protection v Jersey Central Power & Light Co* (New Jersey 1976) 351 A 2nd 337, 340–2 (finding no liability for fish killed due to a drop in the temperature of water discharged from a nuclear power plant since the fish would have been killed anyway by river water of the same temperature); Binder (n 186); Green (n 33) 695–7; text at fns 246–247 below.

[190] (Minnesota 1920) 179 NW 45.

[191] (Idaho 1913) 135 P 845.

[192] (Wisconsin 1898) 74 NW 561.

[193] *Restatement Third: Remedies* (n 130) § 12 comment d reporters' note at 207.

[194] See Wright, 'Legal Responsibility' (n 4) 1434–5; Green (n 33) 703 fn 120.

[195] *Restatement Third: Remedies* (n 130) § 12 comment d illustration 3 and reporters' note at 207.

Anderson is often incorrectly described as a case in which the defendant was held liable even though the damage would have occurred anyway as a result of non-tortiously started fires.[196] As is discussed above, it was not proven in *Anderson* that the fires other than the one tortiously set by the defendant were independently sufficient to destroy the plaintiff's home.[197] Moreover, the other fires were at best of *unknown* origin and, indeed, might have been found by the jury to have been started by the defendant:

> Defendant introduced evidence to show that [other] fires were burning west and northwest of, and were swept by the wind towards, plaintiff's premises. It did not show how such fires originated, neither did it clearly and certainly trace the destruction of plaintiff's property to them. By cross-examination of defendant's witnesses and by his rebuttal evidence plaintiff made a showing which would have justified the jury in finding that the fires proved by defendant were started by its locomotive.[198]

The *Anderson* court stated that it was 'not prepared to adopt the doctrine that there would be no liability if the other fires were 'of no responsible origin', but it did not distinguish situations in which the other fires were proven to be of no responsible origin from those in which they were of 'unknown origin', and it ended its discussion of this issue by stating, consistently with *Kingston*, that it rejected (what it took to be) 'the doctrine of the Cook Case [that if] one of the fires is of unknown origin, there is no liability'.[199]

The reporters for the *Restatement Third: Physical and Emotional Harm* found and listed, with little or no description or discussion, seven 'modern' (post *Restatement Second*) cases allegedly involving 'multiple sufficient causes' (multiple independently strongly sufficient conditions) that 'accepted the proposition that the tortious actor is subject to liability when the competing cause did not involve tortious conduct.'[200] They noted, correctly, that 'a number of the decisions appear to confuse multiple *sufficient* causes with either (a) multiple *necessary* causes . . . or (b) alternative causes'.[201] Almost all of the cases

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[196] See, eg, Fischer, 'Omission Cases' (n 118) 1345 fns 34 and 36; Fischer, 'Duplicated Harm' (n 128) 1130 & fn 9; Green (n 33) 681 fn 33, 683. Fischer subsequently acknowledged that it was not proven that any of the fires in *Anderson* were strongly necessary or independently strongly sufficient: Fischer, 'Insufficient Causes' (n 99) 286 fn 36.

[197] See text at fns 95–97 above.

[198] *Anderson*, 179 NW at 46.

[199] Ibid 49.

[200] *Restatement Third: Physical and Emotional Harm* (n 12) § 27 comment d reporters' notes at 388.

[201] Ibid 389.

focused on the factual causation issue and mentioned the NWO issue, if at all, in *dicta*. In none of the cases was the evidence, I believe, sufficient to support a finding that the plaintiff clearly or even probably would have suffered the injury anyway as a result of non-liable conditions.[202]

The reporters noted that '[o]ne reason for the paucity of multiple-sufficient-cause cases may be that this phenomenon's presence frequently is not recognised'.[203] This is true, as we have seen with respect to the treatment of the burst or overflowed dam cases by the prior *Restatements* and (thus) the courts and many law professors.[204] It is a significant reason for their initial lack of success in finding 'modern' multiple-sufficient-cause cases, especially those employing the NWO limitation. But a much more significant reason for this lack of success is their restricting the case analysis under § 27 to cases allegedly involving 'multiple sufficient causes' (independently strongly sufficient conditions). This was proper given section 27's being so restricted, but is not made clear, is understood by very few people, and greatly misleads readers of their discussion of the NWO limitation in § 27, its comments and the reporters' notes. Rather, given the way they are organised and written, these are easily read (including, apparently, by the *Remedies* reporters) as rejecting the NWO limitation in all cases.

The reporters discuss a possible multiple-sufficient-cause case possibly employing the NWO limitation, *Utinger v United States*.[205] The plaintiff and her husband, the drunk and speeding driver in the dark of a boat in which she was a passenger, suffered serious injuries (his being death) when the boat hit a railway rail for which the defendant was responsible which was a few feet under the surface of the water a few feet from the shore of the river. If the rail had not been there the boat might instead have rammed into a tree a few feet away at the water's edge. Focusing on her claim on behalf of her husband's estate, which the court summarily rejected, the reporters suggest that the court might or could have treated this as a multiple-sufficient-causes case in which the defendant's contributorily negligent conduct would have been a non-liable condition. However, they conclude that the case is 'an unsatisfactory precedent on the

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[202] For detailed discussion of the cases, see Wright, 'Legal Responsibility' (n 4) 1452–63. In that article, I argued that the defendant should have to prove that the injury 'almost certainly' would have occurred anyway, which, as I have admitted in this article, is too strict. See text at fns 177–179 above.

[203] *Restatement Third: Physical and Emotional Harm* (n 12) § 27 comment b reporters' notes at 386.

[204] See *Restatement Third: Physical Harm* (n 150) § 27 comment d reporters' notes at 468–9; text at fns 144–146, 184–189 above.

[205] (Sixth Circuit 1970) 432 F 2nd 485.

multiple-sufficient-cause matter' due to 'the complexity of the facts and the court's ambiguity about whether the decision was based on a lack of factual causation, a lack of proximate cause, or a lack of negligence by the defendant'.[206] I agree.

The more interesting claim, which the reporters did not discuss but upon which the judges focused, is the wife's claim for her own injuries. The court, after discussing the relevant evidence and concluding that the boat was headed straight for the shore, stated that, even if the defendant was negligent for having the rail hidden in the water, that negligence was a remote rather than proximate cause of the wife's injuries, since if the boat had not hit the rail it 'inevitably' would have rammed into the tree a few feet away, causing the same or essentially similar injuries.[207] Judge McCree did not think there had been a proper basis for that finding, but agreed (citing *Dillon v Twin States Gas & Electric Co*) that if it were true, there would be no liability even if the defendant was negligent.[208] This is a particularly interesting case since it is not true that, absent any tortious conduct by anyone (as the NWO limitation is usually stated), the wife would have suffered the same injuries or losses as a result of a non-liable condition. It is a real-life example of a point that I made with students over the years: in cases like this you need to be careful to apply the NWO analysis to the step in the causal process for which the defendant is (allegedly) a wrongful cause—in this case, given the dangerous situation created by the husband's negligent behavior, that link is the pending collision with resulting injuries, which is the issue upon which the judges focused. If the boat had not hit the rail, would it have hit the tree (a non-liable condition), producing essentially the same injuries?

The other pro-NWO-limitation case that the reporters discuss is *Young v Flathead County*.[209] They label as *dicta*[210] the court's statement that 'the "substantial factor" test has been designed to deal with problems where application of the "but for" test would allow each of a number of *defendants* to escape responsibility because the conduct of one or more others would have been sufficient to produce the same result'.[211] It was not *dicta*. In a not entirely

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[206] *Restatement Third: Physical and Emotional Harm* (n 12) comment d reporters' notes at 389.
[207] *Utinger*, 432 F 2nd at 488, 489 ('It was inevitable that had he not struck the rail he would have collided with the river bank and tree.').
[208] Ibid 492 (Judge McCree, dissenting in part), citing, inter alia, *Dillon v Twin States Gas & Electric Co* (New Hampshire 1932) 163 A 111; *Restatement Second* § 432(1).
[209] (Montana 1988) 757 P 2nd 772.
[210] *Restatement Third: Physical and Emotional Harm* (n 12) comment d reporters' notes at 388.
[211] Ibid 777 (emphasis added).

consistent opinion (as is true with many of these cases), the court reversed the trial court's judgment in favour of the plaintiff developer on the ground that, even though the developer 'present[ed] a reasonable argument that but for the representations of the County they would not have proceeded with the project,'[212] those representations, even if reasonably relied upon, were not a 'proximate cause' of the failure of the development:

> [S]ince other factors—the economy, failure to secure additional financing, and especially the inability to secure approval of the sewer system—had an impact on the resulting damage, Developers cannot claim the County's representations alone 'proximately caused' the damage. Where more than one possible cause of damage appears, the plaintiff must eliminate causes other than those for which the defendant is responsible.
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> …
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> Regardless of whether the County made any representations that condominiums were or were not subject to subdivision review, the fact is that it is likely the project would not have been completed because sanitary approval could not be secured. The County also points out that in addition to the above mentioned factors, the testimony of Developers' accountant was that a number of occurrences combined to cause the demise of the development.[213]

Two of the cases that the reporters cite as alleged multiple-sufficient-cause cases that acknowledged, if only in *dicta*, the possible imposition of liability despite the existence of independently strongly sufficient non-liable conditions are also Montana cases. *Young* was decided after *Kyriss v State*,[214] in which the court focused solely on the factual causation issue. *Kitchen Krafters, Inc. v Eastside Bank*,[215] which was decided after *Young*, stated that it was applying the principles of causation previously stated in *Young* and reversed the verdict in favour of the plaintiff due to the lack of any instruction on proximate causation.[216] Note that both *Kitchen Krafters* and *Young* involved economic loss rather than physical injury. Given the common application of the NWO

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[212] Ibid.
[213] Ibid 777–8 (citations omitted).
[214] (Montana 1985) 707 P 2nd 5.
[215] (Montana 1990) 789 P 2nd 567.
[216] See *Restatement Third: Physical and Emotional Harm* (n 12) § 27 comment i at 39 ('it is difficult to make much out of the *Kitchen Krafters* case').

limitation in the economic harm cases, which is discussed below,[217] *Kitchen Krafters* is a very weak precedent for rejecting the NWO limitation.

Another of the listed cases that is a very weak precedent for rejection of the NWO limitation is *Cipollone v Liggett Group, Inc*,[218] in which the plaintiff's wife, who died from cancer in 1984, had smoked cigarettes from 1942 until shortly before her death. The defendant was immunized from liability for its failure to warn about the risks of smoking after 1965 (but not before) by federal legislation enacted in 1965 that the court previously had ruled had the effect of preempting state tort cases against cigarette manufactures based on failure to warn. The defendant argued that the plaintiff should not be able to recover damages because her smoking after 1965 might have been enough by itself to cause the cancer. The court disagreed:

> [J]ust as it is unfair to let one tortfeasor completely escape liability for his fire merely because another tortfeasor caused another fire, so it is unfair to let Liggett completely escape liability for its pre-1966 behavior merely because its post-1965 behavior (or that of its codefendants), which was immunized from scrutiny at the trial, might also have caused enough damage, by itself, to kill her.[219]

In either situation, it is not true, as required by the NWO limitation and the underlying 'rightful position' principle, that the plaintiff would have suffered the same injury anyway in the absence of any tortious conduct by the defendant or others. The federal statute did not make Liggett's post-1965 failure to warn non-tortious under the applicable state tort law, but rather provided a federal immunity defense for any post-1965 failure to warn. The *Remedies* draft treats the federal statute as having created a no-duty rule rather than an immunity and as thus supposedly rendering the post-1965 failures to warn non-tortious,[220] but that is contrary to the quoted language from the court's decision and is highly debatable. In any event, a tortfeasor should not be able to escape liability for non-immunised tortiously caused harm by pointing to other conduct by itself or others that normally would give rise to legal liability but is shielded from liability by an immunity or no-duty rule.

The reporters for the *Restatement Third: Physical and Emotional Harm* described the admittedly small set of cases discussed above as 'largely consistent,

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[217] See text at fns 250–259 below.
[218] (Third Circuit 1986) 789 F 2nd 181.
[219] Ibid 561 (emphasis added).
[220] *Restatement Third: Remedies* (n 130) § 12 comment c illustration 2, comment e illustration 7.

although limited in quantity and coherence'.[221] The *Restatement Third: Remedies* draft describes them as 'not numerous, but . . . essentially unanimous'.[222] The *Remedies* draft further claims:

> No court has rejected liability [because of the NWO limitation] in the decade since [the publication of the *Restatement Third: Physical and Emotional Harm*]. In contrast, the Virginia Supreme Court recently embraced the rule that a tortiously acting defendant cannot escape or diminish liability by pointing to an innocent additional sufficient cause of plaintiff's injuries. The few other courts weighing in during the last decade have also restated the majority rule, and no recent case appears to reject it. The point about innocent causes appears to have been dictum in these recent cases, but dictum that was closely integrated into the court's reasoning.[223]

These claims fail to take into account large bodies of case law, including, as the reporters for the *Restatement Third: Physical and Emotional Harm* noted, the so-called 'overlapping' or 'duplicated' harm cases:

> [S]ignificant tension for such a rule of liability [despite the presence of independently strongly sufficient non-liable conditions] exists in a considerably larger body of law [than the multiple-sufficient-cause cases] that generally passes under the rubric of damages. Rather than involving multiple sufficient causes of the same harm, this area entails multiple causes of overlapping harm, where each of the causes is sufficient to cause a portion of the harm or damages suffered by the plaintiff and one is of innocent origin. Thus, if a plaintiff is permanently disabled by a tortfeasor and, due to an act of God, dies before trial, damages will be limited to the period before plaintiff's death. Damages for the period the plaintiff would have lived in the absence of the act of God are overlapping—both the tortious act and the act of God each are independent causes of that loss. Indeed, natural death . . . always ends the period for which damages accrue. . . . Even hypothetical events that do not occur but would have caused the harm in the absence of the tort serve as a limitation on damages. Thus, in a wrongful-death case, damages are measured in reference to the actuarially predicted date of death. The damages law referred to above is robust and has been painstakingly documented by Professor Fischer in David A. Fischer, *Successive Causes and the Enigma of Duplicated Harm*, 66 TENN. L. REV. 1127, 1136–1145, 1153–55 (1999). See also Michael D. Green, *The Intersection of Factual Causation and Damages*, 55 DEPAUL L. REV. 671, 709 (2006) (exploring the damages rule, its implications for concurring innocent and tortious multiple causes, and concluding that '[i]mposing liability on the tortfeasor

[221] *Restatement Third: Physical and Emotional Harm* (n 12) § 27 comment d reporters' notes at 389.
[222] *Restatement Third: Remedies* (n 130) § 12 comment d at 193.
[223] Ibid.

> 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').[224]

The *Remedies* reporters quote only a portion of this statement. They omit the initial and ending portions that cite the articles by Fischer and Green and the descriptions of the case law regarding 'overlapping' or 'duplicated' harm as being 'robust', 'far more common', 'considerably larger' than and irreconcilable with the very small number of multiple-sufficient-cause cases upon which they rely.[225] They do not discuss the cited articles or any of the case law discussed in those articles. To the contrary, they assert:

> [T]he inconsistency between the majority rule [supposedly rejecting the NWO limitation] and judicial treatment of other cases of overlapping harm is of marginal relevance. . . . An innocent, concurrent, and factually sufficient cause of the same harm is not inevitable; judging by the number of reported cases, it is in fact rather rare, and a certain degree of inconsistency is probably unavoidable in dealing with rare and anomalous cases.[226]

They provide no citation or support for this claim, which is refuted by the articles by Fischer and Green, which document the common application of the NWO limitation in situations involving 'overlapping' or 'duplicated' harm.[227] Two well-known cases are *Baker v Willoughby*[228] and *Jobling v Associated Dairies Ltd*,[229] which produced different liability results based on the applicability of the NWO limitation in *Jobling* but not in *Baker*.[230]

In *Baker*, the defendant tortiously injured the plaintiff's left leg and ankle, causing loss of mobility and consequent loss of enjoyment of life and income. Subsequently, prior to trial (when damage awards become final and fixed) his left leg was so severely injured by an independent criminal attack that it had to be amputated and replaced by an artificial limb. Lord Reid, joined by Lords Donovan and Guest and Viscount Dilhorne, employed concurrent causation reasoning similar to that stated by the reporters for the *Physical and Emotional*

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[224] *Restatement Third: Physical and Emotional Harm* (n 12) § 27 comment d reporters' note at 389–90 (emphasis added).
[225] *Restatement Third: Remedies* (n 130) § 12 comment d at 194.
[226] Ibid 194–5.
[227] Green (n 33) 689 & n 59; Fischer, 'Duplicated Harm' (n 128) 1165; Fischer, 'Insufficient Causes' (n 99) 292-4; see text at fns 236–241 below.
[228] [1970] AC 467.
[229] [1982] AC 794.
[230] See Wright, 'Causation' (n 1) 1798 & fns 262 and 263; Fischer, 'Duplicated Harm' (n 128) 1155–7.

Harm project, quoted above,[231] to justify continuing to hold the defendant liable for the plaintiff's original lack of capacity and related damages after the criminal attack.[232] Lord Pearson had difficulties with Lord Reid's concurrent causation analysis, given the independent causation of the two distinct injuries, but nevertheless concurred in the ultimate liability result to avoid an otherwise unjust result.[233]

In *Jobling*, the plaintiff suffered workplace injuries which rendered him fit only for sedentary work. Subsequently, prior to trial, he was independently afflicted with spondylotic myelopathy in his neck, which rendered him totally unfit for work. The Law Lords affirmed the trial court's rejection of the plaintiff's claim for loss of earnings after the date of the supervening myelopathy. They rejected the 'theory of concurrent causes' employed by Lord Reid in *Baker*, but nevertheless agreed with the result in *Baker* for reasons similar to Lord Pearson's and kept it in place as a precedent along with *Jobling*, with the differing results being explicitly based on the tortious versus innocent nature of the supervening event.[234]

As I have previously stated, I believe that these 'duplicated harm' cases are properly analysed as preemptive causation cases rather than as duplicative overdetermined causation cases. Any so-called 'overlapping' or 'duplicated' harm—eg, lack of capacity and related damages—was preemptively caused by the first injury. Just as you cannot kill someone who is already dead, you cannot incapacitate someone who has already suffered the same incapacity (and related damages), although you can reduce or increase the extent of the prior incapacity (and related damages). The initial tortfeasor is a preemptive cause of the 'duplicated' harm, but the NWO limitation will apply to the extent that the harm would clearly have been caused anyway by a subsequent actual or hypothetical non-liable condition.[235]

Fischer's study of the 'duplicated harm' cases resulted in his concluding, contrary to a statement in his initial article which was relied upon in the *Physical*

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[231] See text at fn 224 above; Green (n 33) 675–6, but see 701 ('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 never in fact occur'), 689 fn 58 (same), 708–9 (same).
[232] [1970] AC 467, 490–4 (Lord Reid).
[233] Ibid 495–7 (Lord Pearson).
[234] [1982] AC 794 (1981).
[235] Wright, 'Causation' (n 1) 1797–1801; Wright, 'Legal Responsibility' (n 4) 1464 fn 146; see Fischer, 'Duplicated Harm' (n 128) 1149, 1153, 1155; fn 231 above.

Harm project,[236] that the overall case law as well as basic principles strongly support the NWO limitation:

> In multiple sufficient cause cases [involving duplicative causation of the same injury by two or more independently strongly sufficient conditions], in which one of the forces was innocent, courts are split on the question of whether the tortfeasor should be liable. Absent strategic behavior, there is no efficiency reason to impose liability on the tortfeasor when one of the forces was non-tortious. The corrective justice argument for imposing liability is also quite weak because liability places the plaintiff in a better position than she would have occupied if the tort had not occurred.
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> . . .
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> In duplicated harm cases, courts hold at least one tortfeasor liable for duplicated harm when all the duplicating forces are tortious. The unfairness of denying recovery to an innocent plaintiff by allowing each wrongdoer to assert the wrong of the other is manifest. Imposing liability places the plaintiff in the position she would have occupied if no tort had occurred. When one force is innocent, however, the usual damage rule applies and the plaintiff bears the burden of the duplicated losses. This is fair because the tort leaves the plaintiff no worse off than if the tort had not occurred.
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> . . .
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> The near universality of the principle that applies in duplicated harm cases involving an innocent force, and the pervasiveness of such cases, suggests that fairness considerations do not warrant liability in multiple sufficient cause cases involving an innocent force. The early multiple sufficient cause cases had it right. Tortfeasors should be liable only if all duplicating forces are tortious. When one of the forces is innocent in the multiple sufficient cause cases, the plaintiff has no better fairness argument for suspending the normal rules of causation [liability] than do plaintiffs in the duplicated harm cases. From a policy perspective, the duplicated harm scenario and the multiple sufficient cause scenario are indistinguishable.[237]

Green agreed in his article. Focusing primarily on the 'duplicated harm' cases, while also discussing preemptive causation cases generally,[238] the cases involving

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[236] See Fischer, 'Omission Cases' (n 118) 1346 ('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'), quoted in *Restatement Third: Physical Harm* (n 150) § 27 comment d reporters' notes at 468, *Restatement Third: Physical and Emotional Harm* (n 12) § 27 comment d reporters' notes at 389, and Green (n 33) 685.

[237] Fischer, 'Duplicated Harm' (n 128) 1164–5; see Fischer, 'Insufficient Causes' (n 99) 293 (same).

[238] Green (n 33) 688–91.

overdetermined failure of a preventive cause,[239] and duplicative causation cases involving an overwhelming condition,[240] he stated:

> Several conclusions seem inescapable. ... First, the *Restatements* appropriately resolve the matter of [causation of and liability for] overdetermined harm when both causes are the result of tortious conduct.
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> . . .
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> 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. Moreover, the treatment of duplicated harm is longstanding, abundant, and remarkably consistent.
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> 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, and the first two *Restatements* (and the current *Restatement* [*Third*] 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.[241]

The reporters for the *Physical and Emotional Harm* project also noted that it is 'difficult to square' (supposed) rejection of the NWO limitation when the innocent cause was a duplicative cause with general acceptance of the NWO limitation when the innocent cause was a preempted condition:

> Another causation principle provides that an act cannot cause harm if the harm occurs before the act. Once the harm has occurred, subsequent events are preempted as causes of the harm [and thus cannot be held liable], even if they would have caused the same harm if it had not already occurred. See § 26, Comment *k*. . . . A river overflows, destroying property near the river. If a tortious act caused the flood and destroyed the

[239] Ibid 697–9.
[240] Ibid 695–7.
[241] Ibid 699–700 (footnotes omitted); see ibid 709 ('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.').

> property just before an innocent cause [rather, preempted condition] (e.g., a hurricane) would have done so, the owners of the destroyed property can recover damages from the tortfeasor only for their loss for the brief period between when the land was destroyed by the tortious act and when it would have been destroyed by the hurricane. . . . These results are difficult to square with a rule that if the hurricane and the tortious act occurred simultaneously, the tortfeasor should be held responsible for all the damage to the property.[242]

As I discussed in Part III.E.4 above, the preemptive causation cases include the large number of cases in which the defendant failed to provide a properly working safeguard or warning, which, however, would not have been used or heeded even if it had been provided. The courts usually erroneously employ the strong necessity (but for) analysis to find that the tortious failure to provide the safeguard was not a cause of the plaintiff's injury. It rather was a preemptive cause of the failure of the preventive causal process (and thus a cause of the unprevented injury), which preempted the potential causal effect of the subsequent failure to use or heed the safeguard. You cannot cause the failure of an already failed causal process.[243] As is suggested in *Restatement Third: Physical and Emotional Harm*,[244] the finding of a lack of causation (and thus liability) in these cases likely is influenced by the fact that, in almost all of them, the NWO limitation applies, since the injured plaintiff is the person who did not attempt to use or would not have used the safeguard if it had been provided. Such failure constitutes a non-liable condition that would have caused the injury (by causing the failure of the preventive causal process) even if the safeguard had been properly provided. If instead a third party tortiously failed to attempt to use the safeguard, the NWO limitation would not apply, and liability of at least one of the tortious actors is viewed more favourably, despite continuing disagreement by academics and courts on whether only one, both of them, or (illogically) none of them was a cause.[245]

The reporters for the *Restatement Third: Physical and Emotional Harm* also acknowledged that the NWO limitation is generally applied in cases involving overwhelming forces of nature, eg, fires and floods,[246] regardless of whether the innocent condition was a duplicative or preempted condition, although the issue

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[242] *Restatement Third: Physical and Emotional Harm* (n 12) § 27 comment d Reporters' Note at 390; see ibid § 26 comment k, § 27 comment h; Green (n 33) 688–91.
[243] See text at fns 122–124 above; Green (n 33) 697–9.
[244] *Restatement Third: Physical and Emotional Harm* (n 12) § 27 comment i.
[245] See text at fns 125–126 above; Green (n 33) 697–9.
[246] See text at fns 184–199 above.

has often been clouded, especially in the first and second *Restatements*, by a failure to distinguish the causation issue from the legal responsibility and ultimate liability issues.[247] The reporters note the theoretical plausibility but practical difficulty of trying to describe the defendant's tortious conduct as a NESS condition in the specific situation,[248] but this is not necessary under the less technical version of the NESS analysis, which confines the NESS analysis to the description of the relevant causal laws or generalisations and merely requires proof in a specific situation that the condition at issue was part of the complete instantiation of the causal laws or generalisations as so described.[249]

None of these large bodies of case law are mentioned by the reporters for the *Restatement Third: Remedies*, who, however, do acknowledge (while attempting to distinguish) the application of the NWO limitation in tortious interference with contract cases:

> An actor who uses tortious means to induce a party to a contract to breach is generally liable for tortious interference with the contract. But if the party who breaches the contract would have breached that contract anyway, for independent reasons, courts generally hold that the tortious interferer did not cause the breach, and so is not liable. Restatement Third, Torts: Liability for Economic Harm § 17, Comment *m*. The tortious-interference cases and the physical harm cases do not cite each other.
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> One might say that the tortious-interference cases are simply subject to a different rule. Or one might say that the tortious-interference cases are distinguishable, because the relationship among the multiple causes and the ultimate harm is different than in the classical physical-damage cases. The two causes are not independent of each other, because the causal contribution of the defendant who interferes necessarily runs through the causal contribution of the defendant who breaches. Little turns on the choice of explanation.[250]

The suggested distinction does not work. While the defendant's tortious inducement 'runs through' (contributes) to the breaching party's reasons for breaching, it does not 'run through' to the breaching party's independent reason for breaching. The *Restatement Third of Torts: Liability for Economic Harm*[251]

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[247] *Restatement Third: Physical and Emotional Harm* (n 12) § 27 comment i and reporters' notes at 395-6; see *Restatement Second* (n 67) § 432 comment b illustration 2; Wright, 'Legal Responsibility' (n 4) 1434-40, 1437 fn 34, 1465 & fn 148; Green (n 33) 695–7; text at fns 144–146 above.

[248] *Restatement Third: Physical and Emotional Harm* (n 12) § 27 comment i; see Green (n 33) 696–7.

[249] See text at fns 101–102 above.

[250] *Restatement Third: Remedies* (n 130) §12 comment f.

[251] American Law Institute, *Restatement of the Law Third, Torts: Liability for Economic Harm* (2010) [hereafter *Restatement Third: Economic Harm*].

notes that the courts usually base the lack of liability in these situations on a supposed lack of causation, but that it instead could (should!) be based on the NWO limitation:

> In some cases, a defendant's wrongful conduct, while sufficient to produce the plaintiff's harm, was not a "but for" cause of the harm: the contract would have been breached for good reason even if the bad reason supplied by the defendant had not existed. Courts do not permit recovery in those circumstances for tortious interference with contract. The denial of recovery may be explained in more than one way. Restatement Third, Torts: Liability for Physical and Emotional Harm § 27 reasoned that the defendant's act in such a case is properly considered a cause of the plaintiff's harm, but said the damages suffered by the plaintiff on account of the act might be nil. Courts considering such questions when deciding claims for interference with contract have used a different rationale. They have concluded that the defendant's conduct did not cause the plaintiff's harm. Either line of reasoning is defensible.[252]

The lack of causation rationale is not defensible with respect to factual causation, as the *Restatement Third of Torts* has finally acknowledged.[253] The lack of liability can only be explained and justified by the NWO limitation on liability. This is true with respect to the economic torts generally. The reporters for the *Remedies* project state that the *Restatement Third: Economic Harm* 'does not indicate that the issue has arisen with respect to any of the other torts treated in that Restatement.'[254] This is incorrect. The *Restatement Third: Economic Harm* states and documents the denial of liability when the economic loss would have occurred anyway as a result of non-liable conditions not only in tortious interference with contract cases,[255] but also in tort cases based on negligent misrepresentation,[256] fraud,[257] tortious interference with contractual expectation,[258] and tortious interference with inheritance or gift.[259]

Contrary to the statements in the draft *Restatement Third: Remedies*, principles (interactive justice), policy (efficient deterrence), and the overwhelming body of case law support the NWO limitation.

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[252] Ibid § 17 comment m.
[253] See Restatement Third: Physical and Emotional Harm (n 12) § 27 comment d.
[254] *Restatement Third: Remedies* (n 130) §12 comment f reporters' notes.
[255] See also Fischer, 'Insufficient Causes' (n 99) 286-7 fn 44.
[256] Restatement Third: Economic Harm (n 221) § 5 comment i.
[257] Ibid § 11 comment a; see 37 American Jurisprudence 2nd: Fraud and Deceit § 388; Fischer, 'Insufficient Causes' (n 99) 286-8 fn 43.
[258] Restatement Third: Economic Harm (n 221) § 18 comment d.
[259] Ibid § 19 comment d.

V ADDENDUM

When I started to write this article, it was entitled 'Causation = Contribution = NESS'. I planned to argue, as the title indicates, against those who think (i) that anything significant in law or life should turn on the use of one versus the other of those terms and their variants, (ii) that in 'cumulative' rather than 'threshold' causation cases each contribution produces distinct/separable/divisible harm, (iii) that 'material contribution' cases like *Bonnington Castings Limited v Wardlaw*,[260] *Williams v Bermuda Hospital Board*[261] and *Bailey v Ministry of Defence*[262] are not really departures from the but-for test, and so forth.

As usual, my focus shifted as I wrote, in part because of the pending consideration (rejection) of the 'no worse off' limitation at the American Law Institute's meeting in May of this year. I kept thinking, until quite recently, that I would still be able to complete and include my partially written section on causation and contribution in this last part, and thereby contribute to the discussion of that topic, as originally intended and advertised, at the symposium for which this article was written. I expect readers of this article will be relieved to see that I ran out of space and time, due to spending much more time and space (and editorial patience) on the 'no worse off' limitation topic than I initially expected.

[260] [1956] 1 All ER 615.
[261] [2016] UKPC 4.
[262] [2008] EWCA (Civ) 883.