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INTRODUCTION: THE THIRD RESTATEMENT OF TORTS IN A CRYSTAL BALL

Michael D. Green[†]

Restatements and Legal Change

We should feel obligated in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs. (1967)

In judging what was right, a preponderating balance of authority would normally be given weight, as it no doubt would generally weight with courts, but it would not be thought to be conclusive. (1968)

-Herbert Wechsler
Director
The American Law Institute
1963–1984

My hat goes off to the editors of the William Mitchell Law Review for gathering a magnificent collection of articles about the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) (Third Restatement)¹ by an international group of

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The text above appears on the wall of the conference room at the American Law Institute (ALI) in Philadelphia where meetings of the ALI council, advisers, and the members consultative groups are regularly held with reporters for the various ALI projects.

1. Unless otherwise made clear, the Restatement (Third) of Torts: Liability for Physical and Emotional Harm will be referred to as the “Third Restatement.” The Third Restatement is being published in two volumes, the first in 2010 and the second, which is forthcoming, in 2012. As those familiar with the process of replacing the Restatement (Second) of Torts (1965) are aware, the Third Restatement consists of various subject-specific projects, which include two already completed, Products Liability in 1998 and Apportionment of Liability in 2000.

accomplished torts scholars and practitioners. This Issue and the corresponding Symposium reflect the breadth of the Third Restatement. Initially subtitled “General Principles,” it was to cover the basic building blocks of tort law: the three bases for liability, intent, negligence, and strict liability, duty, factual causation, proximate cause, and affirmative duties. But the Third Restatement covers considerably more, drilling down deep into the details of a negligence action and associated proof issues, including, for example, *res ipsa loquitur*. It goes on to address three major areas in which modified duties have been adopted—one for non-physical harms that consist solely of emotional disturbance, and the special cases of the effect of property ownership on duties owed to entrants on the land and those who hire independent contractors. Hence, the subtitle evolved to its current “Liability for Physical and Emotional Harm,” as the scope of the project grew.

Despite that breadth, I am not surprised that the contributions to this Issue cluster around three topics: factual causation, the general duty of reasonable care, and the special duty rules applicable to land possessors. Those were three of the most contentious issues that the Third Restatement addressed and, after robust debate, these provisions were adopted by a majority vote, but, on at least one occasion, the outcome was in question until the Chair finished counting the show of hands.

Ken Oliphant, a British legal scholar and Director of the Institute for European Tort Law in Vienna, Austria, dives right into an issue all legal systems confront—thin evidence of an element of a claim. Oliphant is interested in this problem in the context of factual causation. Factual causation is a particularly interesting area in which to address the matter because, although factual causation is an objective, non-normative inquiry, the defendant(s)’s conduct may reflect quite a range of culpability, which may affect a court’s assessment of the evidence brought to bear on this issue.²

Oliphant pursues the idea of proportional liability—imposing liability on an otherwise liable defendant based on the probability that the defendant’s tortious conduct was a cause of plaintiff’s harm.³ This is a subject that has received a great deal of scholarly

Another piece is ongoing addressing economic loss.

2. See Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 66 (1956).

3. Proportional liability, as discussed by Oliphant and this paper, is limited

attention in the United States. It is also a hot topic in Europe where the European Centre on Tort and Insurance Law (“ECTIL”) is preparing a monograph on the subject.

Oliphant’s survey of European systems’ approach to proportional liability reveals the wisdom of the American Law Institute (ALI) in reaching out to foreign legal scholars and lawyers to join the membership rolls and to become involved in the Institute’s work. As a result of this program, the ALI now boasts torts scholars from England (Oliphant), Spain, Italy, and Israel. Even if the approach of civil law systems to these issues is not useful for adoption, their participation provides additional insight into the depth and breadth of these problems.

Oliphant, fairly, inquires why the Third Restatement did not attend more aggressively to the scholarly advocacy on behalf of proportional liability.⁴ I don’t think it’s much of a secret that I am among a very small group of torts scholars who have been critical of the pro-proportional liability literature, especially in the toxic torts arena which has been the focus of most academic proponents in this country.⁵ The nub of my concern is that proportional liability is only attractive when, despite the lack of good evidence, the probability distribution based on the specific facts is limited. Thus, if we know, in a given case, that the probability of factual causation is twenty percent, the case for awarding proportional damages is strong—much stronger than when all we know is that the probability is somewhere between zero and forty percent.⁶ I don’t believe that sort of evidence exists in toxic substances cases where

to the matter of factual causation and does not address the more common apportionment of liability by relative fault as has become almost universal in the United States with the use of comparative fault or responsibility.

4. As I wrote in the United States Report for the publication on proportional liability now being prepared by ECTIL, “[s]cholarly use of ‘proportional liability’ [reflects] a strong consensus in favor of a variety of reforms that would produce more proportional liability in a variety of . . . categories” See, e.g., Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 849 (1984); Allen Rostron, *Beyond Market Share Liability: A Theory of Proportional Share Liability for Nonfungible Products*, 52 UCLA L. REV. 151 (2004); Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439 (1990).

5. See Michael D. Green, *The Future of Proportional Liability: The Lessons of Toxic Substances Causation*, in *EXPLORING TORT LAW* 352 (Stuart Madden ed. 2005).

6. This is true whether we use ex ante contribution to the risk of harm or ex post probability of causing the harm.

courts have failed to heed scholars' calls for employing proportional liability.

Oliphant concludes with a wise assessment of the potential for comparative law: "Lawyers everywhere can learn useful lessons from the practical experiences of other jurisdictions in developing such approaches."⁷ Oliphant's survey of European treatment of proportional liability provides a compelling illustration of his dictum. As I read Oliphant's recounting of the Dutch and English acceptance of proportional liability, I realized that with asbestos litigation we have a ready, if modestly imperfect, source of evidence to ascertain the risk contribution of various sources of asbestos that might be used for a proportional liability scheme. The length of time one was employed at a job site where asbestos fibers were released or contained in the air can be used as a reasonable approximation of the risk contribution to the victim's asbestotic disease. So, perhaps extension of proportional liability to asbestos litigation might make sense when non-tortious sources of asbestos exposure exist, as well as when competing causes, such as smoking in the case of lung cancer, exist. Asbestos defendants should not bear liability for the risk contribution of these other sources of risk, and perhaps American law could learn from the English and Dutch approach, notwithstanding my general objection to the use of proportional liability.

My tentative assessment of Oliphant's comparative analysis was tempered, however, by consideration of an important caveat to the Oliphant evaluation of the benefit of comparative law: One must be careful about transporting the law from one jurisdiction to another because differences in legal systems may affect the suitability of importation. In this case, asbestos litigation in both England and the Netherlands is against the victim's employer. In the United States, because we have workers' compensation—the exclusive remedy for occupational injury and disease—tort claims arising from asbestos are instead against the supplier of asbestos or asbestos products. Assessing the risk contribution of each supplier of asbestos products to a work site is far more complicated than counting days of exposure at a given place of employment. One might have to consider a large array of factors—many of which would be difficult of ascertainment—to even begin to assess risk

7. Ken Oliphant, *Uncertain Factual Causation in the Third Restatement: Some Comparative Notes*, 37 WM. MITCHELL L. REV. 1599 (2011).

contribution of a given defendant over many decades of occupational exposure.

Thus, frequently asbestos plaintiffs are exposed to multiple entities' asbestos products—often dozens⁸ and sometimes for very different lengths of time.⁹ But length of time exposed is not the same as dose, as some asbestos products are more friable, producing more respirable fibers than others in which the asbestos is encapsulated.¹⁰ The plaintiff may be in closer proximity to some defendants' products than others at a given job site, especially at large and complex ones, thereby affecting the effective dose and risk contribution. A debate continues to rage about the relative potency of different asbestos fibers in causing mesothelioma, which would be invoked if risk contribution were employed.¹¹ Maybe proportional liability could be employed despite these obstacles, but operationalizing it in United States would be a great deal more difficult than in those jurisdictions in which employers are the responsible parties.

There is another reason why the seeds for the development of proportional liability in England and the Netherlands have less potency in the United States. With employers as the defendants, there may well be times of self-employment when exposures cannot be attributed to the tortious conduct of others, as was the case in *Barker v. Corus (UK) plc*,¹² in England. That is not the case in the United States where product suppliers are the defendants. Moreover, the problem of causal uncertainty—and it is substantial in asbestos despite the fact that agent-disease causation is straightforward for the three primary asbestotic diseases¹³—has

8. The Civil Justice Institute at Rand found that, in the early years of asbestos litigation, the number of defendants per case averaged twenty. DEBORAH R. HENSLER ET AL., *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS* 15 (1985).

9. See, e.g., *Eckenrod v. GAF Corp.*, 544 A.2d 50, 52 (Pa. Super. Ct. 1988) (plaintiff exposed to three different defendant's products for 20, 15, and 8 years).

10. See, e.g., *John Crane, Inc. v. Linkus*, 988 A.2d 511 (Md. Ct. Spec. App. 2010); *In re Ethyl Corp.*, 975 S.W.2d 606, 617 (Tex. 1998).

11. Compare Richard A. Lemen, *Chrysotile Asbestos as a Cause of Mesothelioma: Application of the Hill Causation Model*, 10 J. OCCUP. ENVTL. HEALTH 233, 233 (2004) with J.C. McDonald & A.D. McDonald, *Chrysotile, Tremolite and Carcinogenicity*, 41 ANN. OCCUP. HYG. 699, 699 (1997); see *Nolan v. Weil-McLain*, 851 N.E.2d 281, 284–85 (Ill. App. Ct. 2006).

12. [2006] UKHL 20, [2006] 2 AC 572.

13. These problems are explained in Michael D. Green, *A Future for Asbestos Apportionment?*, 12 CONN. INS. L.J. 315 (2006). To be sure, there is a serious causation problem with one of those diseases, lung cancer, when an asbestos

been resolved reasonably satisfactorily, initially with the decision in *Borel v. Fibreboard Paper Products Corp.*,¹⁴ and later in *Rutherford v. Owens-Illinois, Inc.*¹⁵ *Borel*, the seminal case imposing liability on asbestos defendants held that the jury could find all defendants responsible for exposing the plaintiff to asbestos jointly and severally liable and thereby affirmed the plaintiff's judgment.¹⁶ *Rutherford*, which occurred later in the life cycle of asbestos litigation, employed risk contribution by asbestos defendants and whether the risk was a substantial factor in causing harm, thereby eliminating the concern that the proportional liability adopted in England and the Netherlands addresses.

Larry Stewart who had a front-row seat in the process that of preparing the Third Restatement as a member of the advisory committee and a member of the ALI council explores another controversial aspect of the Third Restatement. The Third Restatement attempts to bring a measure of coherence and clarity to the issue of duty,¹⁷ which has been used as an instrument for a variety of purposes, many of them opaque to the reader of court opinions addressing the matter of duty. Stewart carefully explains that effort for those who are unfamiliar with its contours. Stewart then proceeds to explain what he would have had the Third Restatement do in the duty realm that it did not.

The Third Restatement insists that duty must be categorical, must ignore foreseeability, and must not be decided solely based on facts specific to the case. At the same time, it recognizes and approves of withdrawals or modifications of the presumptive duty of reasonable care on grounds of policy or principle, remaining agnostic about the grounds adopted by courts for those withdrawals or modifications. Stewart argues for rejecting social norms as a valid ground for modifying the presumptive duty. Some will

victim was also a smoker, but it has not been a significant obstacle for most such claimants. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 28 illus. 2–3 (2010).

14. 493 F.2d 1076 (5th Cir. 1973).

15. 941 P.2d 1203 (Cal. 1997).

16. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. g reporters' note (2010) ("Since the first asbestos case in which a plaintiff was successful [referring to *Borel*], courts have allowed plaintiffs to recover from all defendants to whose asbestos products the plaintiff was exposed.").

17. See John C. P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 712–17 (2001) (explaining the multiple uses and misuses of duty by courts).

sympathize with this claim. But if normative judgments about the grounds for limited and no-duty rules are placed on the Third Restatement process agenda, I fear many conflagrations in the process that may make the controversy over the reasonable alternative design requirement in the Products Liability Restatement look like a love feast.¹⁸

Professor Geoffrey Rapp's contribution to this Issue underscores that the treatment of causation in the first two torts restatements was sorely in need of repair. It was no secret in torts circles that causation was a weak link in those volumes and led courts into a great deal of mischief, confused thinking, and virtually nonsensical gibberish about causation.¹⁹ This presented both a challenge and opportunity for the ALI in repairing what the earlier restatements wrought. As Professor Rapp observes in his conclusion, only with the passage of time will assessment of the success of the Third Restatement be possible.

Jeff Ehrich and Mike Steenson engage in the hard labor of trying to reconcile the Third Restatement with a specific state's torts jurisprudence. As the Colloquium that preceded this Issue and corresponding Symposium dramatically revealed, approaches to tort law can vary substantially even between neighbors such as Iowa and Minnesota. Does the Third Restatement have something to offer all states, regardless of their history and approach to tort law?

Ehrich examines Minnesota law on negligent infliction of emotional distress. He rightly recognizes that in that arena, Minnesota law is stagnant and has failed to keep up with developments since the Restatement (Second) of Torts (1965) ("Second Restatement"), which contained no provision for liability for negligently inflicted emotional harm. Ehrich's survey of other states' treatments of this area reveals the significant, if halting and multi-variegated, developments in this area of law.

Ehrich's assessment of the unsatisfactory state of Minnesota law with regard to stand-alone emotional harm is convincing.

18. Compare, e.g., James A. Henderson, Jr. & Aaron D. Twerski, *Product Design Liability in Oregon and the New Restatement*, 78 OR. L. REV. 1 (1999), with, e.g., Andrew F. Popper, *Restatement Third Goes to Court*, 35 TRIAL 54 (Apr. 1999).

19. Courts frequently speak about superseding causes severing the causal chain between defendant's tortious act and plaintiff's harm, a usage that Judge Posner has characterized as "legal mumbo jumbo." *Shadday v. Omni Hotels Mgmt. Corp.*, 477 F.3d 511, 513 (7th Cir. 2007).

Nevertheless, he proceeds beyond criticism to attempt to provide a useful framework for the future. Working with parameters suggested by the Minnesota Supreme Court's cases, Ehrich provides a framework for a future in which liability for negligently inflicted emotional harm is appropriately limited to a defined and objective class of activities and relationships that avoid the concerns that have led courts to be more cautious about this type of harm than they are with physical harm.

One final note about Ehrich's roundup of emotional harm jurisprudence. He notes that the Maine Supreme Court, in a leading emotional harm case, rejected the eggshell plaintiff rule: "We do not provide compensation for the hurt feelings of the supersensitive plaintiff—the eggshell psyche. A defendant is bound to foresee psychic harm only when such [severe] harm reasonably could be expected to befall the ordinarily sensitive person."²⁰

It may be that Maine has abolished the thin-skull rule for emotional harm cases. But, we will only know that when a sensitive plaintiff is exposed to negligent conduct that would cause a reasonable person to suffer severe harm. If the sensitive person suffers greater harm than would an ordinary person and the Maine Supreme Court holds that plaintiff can only recover damages for harm that the ordinary individual would, then we can accurately say that the thin-skull rule was abolished. But *Gammon* only tells us that there is a threshold of severity of harm that all plaintiffs must meet not whether we take such plaintiffs as we find them for purposes of awarding damages.²¹

Professor Steenson addresses the Third Restatement and its compatibility with Minnesota tort law, an area in which he is an acknowledged expert. Steenson provides a careful and concise summary of the basic principles of the Third Restatement, as well its reception in a handful of courts that have already confronted its provisions and decided whether and how much of it they want to adopt for their own state's torts jurisprudence.

Steenson then parses Minnesota negligence law dating back over a century, documenting the subtle twists and turns in that caselaw. When the Supreme Court says that foreseeability is most often for the jury but "can be decided by the court as a matter of

20. *Gammon v. Osteopathic Hosp. of Me., Inc.*, 534 A.2d 1282, 1285 (Me. 1987).

21. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 cmt. i (Tent. Draft No. 5, 2008).

law,”²² does the court mean nothing more than the standard rule for removing a factual question from the jury: reasonable minds could reach only one conclusion?²³ Or does it mean something else, as surely its decision in *Szyplinski v. Midwest Mobile Home Supply Co.*,²⁴ suggests, with its stated position that “generally the better rule is to submit the issue of foreseeability to the jury”? It comes as no surprise, therefore, that the lower courts in Minnesota reflect inconsistency and confusion, as Steenson documents. My strong suspicion is that this inconsistency reflects other aspects of the cases that are obscured by the use of foreseeability and pingponging it between judge and jury. That opacity is one of the evils that the Third Restatement sought to ameliorate by removing foreseeability from the duty determination.²⁵

Steenson’s survey of Minnesota doctrine on factual cause and scope of liability (proximate cause) is a clarion call for creating an impenetrable barrier between the two. Minnesota cause law not only repeatedly confuses the two, but criticizes the test for cause in fact for failing to handle scope of liability issues—a little like blaming President Obama for the muddle that exists in tort law in Minnesota. The court that first developed the substantial factor test for a specific and narrow problem of factual causation,²⁶ now has elevated it to duty for which it is not and never was suited—substantial factor ignores the fact that an act is or is not a cause of a dichotomous outcome. Causation of an injury or disease is not a matter of degree,²⁷ and the substantial factor standard provides no analytical framework for deciding causation.²⁸ I do not envy the judges on the court of appeals who have to deal, on a regular basis,

22. *Foss v. Kincade*, 766 N.W.2d 317, 323 (Minn. 2009).

23. *Canada v. McCarthy*, 567 N.W.2d 496, 506 (Minn. 1997).

24. 241 N.W.2d 306, 309 (Minn. 1976).

25. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. j reporters’ note (2010).

26. Specifically the over-determined outcome. See *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 146 Minn. 430, 179 N.W. 45 (1920); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 (2010).

27. ARNO C. BECHT & FRANK W. MILLER, THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES 132 (1961) (“we cannot see that there is any justification for distinguishing among causes on the strength of quantity”); J.L. MACKIE, THE CEMENT OF THE UNIVERSE: A STUDY OF CAUSATION 128 (1980) (“if two factors are each necessary in the circumstances, they are equally necessary”).

28. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. j reporters’ note (2010).

with the conflicting and confusing case law that Steenson lays out.

David Logan does, among other things, the important work of highlighting an often misunderstood issue: What is a restatement? Logan explains the tension that has always existed in the ALI's work between a pure "restatement" and "reforming" law that may be outdated, inappropriate, or conflicting. The dictum with which I began this Introduction is an artful and wise, if general articulation of the philosophy of the ALI in its work that hangs just to the right of reporters attending ALI meetings. "Restatement" is a bit misleading, and there are many who it has misled.

But there are other aspects to the restating process that deserve mention. First, when the law is so muddled that it is the equivalent of legal mumbo jumbo, providing no cognitively coherent standard, but one that is, however, well ensconced, should a restatement take it upon itself to reform that law?²⁹ And, if it does, what role should restating take? Second, recognizing the tension between restating and reforming, how ambitious should a restatement be? Every reporter for every restatement confronts this question nearly every day in the process of preparing a draft restatement, and the extensive ALI process guarantees that the reporter's decision will be repeatedly reviewed. Logan explains how this second issue was resolved in the chapter on land possessor duties. Only modestly, in the major aspect of the chapter, which adopts what has become the majority (but only barely) rule³⁰ imposing a duty of reasonable care to those categorized as invitees

29. An example of what I am referring to is the language frequently used in instructions on causation, explaining that a cause is that which "in natural and continuous sequence, unbroken by efficient intervening cause, produces the result." *Peters v. Forster*, 804 N.E.2d 736, 743 (Ind. 2004); *see also Dellwo v. Pearson*, 107 N.W.2d 859, 861-62 (Minn. 1961). What is a "natural sequence" and how is it distinguished from an "unnatural" one? Are there discontinuous sequences between a cause and its effect? What inefficient causes exist? And how will we know the difference from their efficient namesakes? Somehow nonsensical language like this has withstood the test of time in too many jurisdictions.

30. Not only is the "majority rule" of significance, if not conclusive, in restating, the trend of decisions is important as well. Restatements are prepared at a given point in time, and the common law is constantly evolving. In the case of land possessor duties, the virtually unanimous trend since *Rowland v. Christian*, in 1968, was to adopt a unitary standard, even if it took forty years before a majority was reached, by my count, with the decision of the Iowa Supreme Court in *Koenig v. Koenig*, 766 N.W.2d 635 (Iowa 2009). *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 cmt. a reporters' note (Tentative Draft No. 6, Mar. 2, 2009) (stating that of forty-eight states that can be classified, twenty-four had adopted a unitary duty for invitees and licensees).

and licensee.

But much more significantly with regard to trespassers, as Logan carefully documents. While the Second Restatement made numerous distinctions among trespassers, separating out child trespassers, constant trespassers, and known trespassers for special treatment, the Third Restatement makes only one distinction among trespassers. They are either flagrant trespassers or ordinary trespasser with different duties owed to each. One could search fifty-one jurisdictions, as Logan explains, and not find a single flagrant-trespasser rule.

Logan assesses the flagrant trespasser concept in the crucible in which it was formed—the ALI process for drafting, reviewing and approving its work. Comparing that process with both common-law and democratic decision making, Logan concludes:

Ultimately the level of influence accorded a restatement rule will be determined in the rough and tumble of litigation in coming years. In this sense, the ALI's work, though antidemocratic in origin, will be tested and stand or fall, in the marketplace of ideas.³¹

The ALI has both succeeded and failed when it has attempted reform.³² I agree with Dean Logan that we shall have to wait and see which side of the scorecard the flagrant trespasser idea should be assigned, but, as I suggest below, there is a surrogate issue that will probably have to suffice for judging the flagrant trespasser idea.³³

Professor Christie addresses the same topic as Dean Logan, albeit with greater discomfort. He expresses concern that trespassers are truly different from other entrants on land in that their presence is less likely to be anticipated. That fact might give others concerns about imposing the same duty on land possessors for trespassers (save flagrant trespassers) as for other entrants.

Perhaps I can ameliorate those concerns. First, some risks on land require durable precautions, rather than transient ones.³⁴ Thus, if one stores toxic chemicals on one's property, durable

31. David Logan, *When the Restatement is Not a Restatement: The Curious Case of the "Flagrant Trespasser,"* 37 WM. MITCHELL L. REV. 1448 (2011).

32. One such unsuccessful attempt of which I was acutely aware was the effort to inject the concept of "legal cause" into tort law. The Third Restatement abandons that effort for reasons explained in § 26 cmt. a and § 29 cmt. g.

33. See text accompanying *infra* notes 39–40.

34. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 cmt. h (forthcoming 2012).

precautions are likely required to adequately contain those chemicals—transient precautions such as oral warnings are unlikely to be sufficient. Thus, transient precautions are the ones of concern to Christie in that they are dependent on the foreseeability of an entrant's presence and exposure to the risk. The seminal case of *Rowland v. Christian*,³⁵ illustrates. *Rowland* involved a latent defect on a faucet knob—repairs were a matter for the landlord rather than the tenant-defendant. The only precaution available to her was a warning, alerting her guest to the danger so that he could avoid it.

But suppose that Rowland had been a trespasser. To facilitate the point, let us also assume that Rowland was not a flagrant trespasser. So, let's make him a repair person who mistakenly entered Christian's apartment when he was supposed to go to an adjacent apartment. While in Christian's unit, he used the bathroom and sliced his hand on the faucet, just as Rowland did in the actual case.

In my assessment, our hypothetical plaintiff would lose in his tort suit against Christian. And he would lose as a matter of law, without reaching a jury. The reason addresses the concern raised by Christie, but resolves it in a different fashion from that which he suggests: with no foreseeable risk to an entrant, Christian has not acted negligently. More precisely, no reasonable jury could find that she acted negligently. More generally, foreseeability is always on the table when it comes to negligence or breach of the duty of reasonable care.³⁶ More importantly, this decision is based on the specific facts of this hypothetical case. To repeat one of the most important points in the Third Restatement, foreseeability can only be assessed based on the specific facts of a case, not categorically. Foreseeability, thus, is a matter for breach not for duty, which is and should be categorical.³⁷

Professor Christie also expresses concern that the land possessor chapter of the Third Restatement may fail in the Institute's founding purpose to bring consistency and clarity to the common law. By failing to provide a bright-line rule to distinguish flagrant trespassers from ordinary ones, this provision may produce

35. 443 P.2d 561 (Cal. 1968).

36. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 3 cmt. g, 7 cmt. j (2010).

37. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. j (2010).

disparate and inconsistent decisions. Perhaps, but if that happened because, say, Texas holds real property ownership more dear and uninvited entrants more culpable because of the vast array of landholdings in that state than, say, Massachusetts, where the safety of individuals who live in more tightly confined environments is an important principle, that would be precisely what the Third Restatement envisions.³⁸ Differences in state law because of differences in the states should not be troublesome to the ALI in its work.³⁹

I don't, however, think that we will face different determinations about which trespassers are flagrant. Indeed, contrary to Professor Christie's prophesy that future decisions on flagrant trespassers will be disappointing, I don't expect that there will be much, if any, case law development about which trespassers are flagrant. In fact, I would not be surprised if, in the next several decades, there is not a single case addressing the flagrant trespasser concept.

The reason for this bold prediction is straightforward. What plaintiffs' lawyer would accept and bring a case on behalf of a person who entered land to commit a crime or otherwise proverbially to rub the owner's nose in the entrant's uninvited and unwanted presence? Any witted plaintiff's lawyer would realize that, regardless of the law, no jury would find in such a plaintiff's favor. The paucity of cases in which a trespasser who might be characterized as flagrant in the years since *Rowland v. Christian* has made an appearance,⁴⁰ while short of conclusive proof, supports my

38. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 cmt. a (forthcoming 2012).

39. Thus, § 21 of the Third Restatement recognizes different approaches to strict liability for livestock that cause damage to another's property. Some jurisdictions temper the strict liability by providing a defense when others failed to build a fence to keep livestock out ("fencing out") while other states do not provide such a defense, thereby requiring that ranchers keep their livestock confined ("fencing in). Generally, fencing out is employed when farmers are in the minority and ranchers are in the majority, thereby permitting free ranging for livestock. By contrast, in states where farmers are in the majority and ranchers in the minority, fencing in, which minimizes the burden of fencing, is employed.

40. The flagrant trespasser concept is based on a California statute enacted in the aftermath of *Rowland* that exempts land possessors from liability to entrants who are committing any one of twenty-five specified criminal acts unless the possessor acts willfully, wantonly, or criminally. The restatement reports on the invocation of this statute in the years since it was enacted:

In the twenty-two years between the time the California statute was enacted and this reporters' note was prepared, it has been invoked

thesis that the flagrant trespasser concept is not going to produce chaos in the law applicable to land possessors tort obligations.

A more appropriate test for the flagrant trespasser concept is whether it gives comfort to those states that decide to reform their land possessor law by moving from categorical duties to a unitary duty regime. Among those two dozen jurisdictions that still retain rules developed during feudal times, will some include trespassers among those owed a duty of reasonable care if and when they reform their laws? A number of states that adopted a unitary duty of reasonable care for invitees and licensees declined to extend that duty to trespassers, expressing concern about the hypothetical “flagrant” trespasser.⁴¹ Thus, I suggest that the success of the flagrant trespasser provision in the Third Restatement be measured not by the consistency it brings to what I expect will be a non-existent body of case law, but by its role in educating courts to appreciate that trespassers are not all created equal and some—those that are not flagrant—should be treated as other entrants are with reasonable care taken for their safety.

Steve Gold, with his characteristic perspicacity, takes on the issue of causation in toxic substances litigation, a subject that he has been addressing since his student note twenty-five years ago.⁴² Gold is not very happy with the current state of affairs in this world, and he looks to the potential for the Third Restatement to ameliorate his concerns. Gold thus focuses attention on one of the most controversial provisions in the Third Restatement, its treatment of proof of causation in the toxic arena contained in

exceedingly rarely. In neither of the two reported cases citing section 847 was an arguably flagrant trespasser seeking to impose a duty of reasonable care on a land possessor. . . . Nor has the reporters’ research revealed any land possessor cases in which the other statutes cited above limiting a criminal plaintiff’s ability to recover in tort have been invoked. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 cmt. a (forthcoming 2012).

41. See, e.g., *Maffucci v. Royal Park Ltd. P’ship*, 707 A.2d 15 (Conn. 1998) (McDonald, J., concurring) (“A burglar inherently endangers himself or herself and others when committing an offense. . . . Landowners simply should not be required to keep their property safe for burglars else they be held liable for negligence.”); *Sandoe v. Lefta Assocs.*, 551 A.2d 76 (D.C. 1988); *Schofield v. Merrill*, 435 N.E.2d 339 (Mass. 1982); *Peterson v. Balach*, 199 N.W.2d 639 (Minn. 1972) (“Burglars are trespassers; vandals are trespassers. We have criminal statutes governing trespassers.”); *Basso v. Miller*, 352 N.E.2d 868 (N.Y. 1976) (Breitel, C.J., concurring); *Fandrey v. Am. Family Mut. Ins. Co.*, 680 N.W.2d 345 (Wis. 2004).

42. Steve Gold, Note, *Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence*, 96 YALE L.J. 376 (1986).

comment c to section 28.

Gold takes as his starting point the preponderance of the evidence standard on causation. He notes that this standard implies a balancing of errors between plaintiffs and defendants reflecting a judgment that errors on behalf of plaintiffs (false positives) are equally costly as errors on behalf of defendants (false negatives). Gold finds in the current landscape of toxic torts a bias in favor of false negatives and against false positives, a false negative asymmetry, as he puts it, that troubles him. Causation standards in toxic tort cases should not be more stringent than in other, run-of-the-mill tort cases: “[T]he definition of causation is the same, the burden of persuasion is the same, and the scrutiny of evidence proffered to satisfy the burden should be the same.”⁴³ I think he is absolutely right. I also agree that there is a bias in operation, although I am less convinced that it is as pronounced as he believes. In short, courts have always screened out cases in which the evidence of causation was thin, albeit under a different rubric than the current *Daubert* regime.

Gold’s assessment suggests that he would prefer a world in which all or nearly all cases would be submitted to the factfinder for a determination based on a preponderance of the available evidence of causation.⁴⁴ I have sympathy for this view as well. Long ago, in response to some of the evidentiary thresholds imposed by courts that Gold identifies and criticizes, I wrote:

Toxic causation must be assessed with due regard for the available evidence. Where the epidemiologic record is substantial, reliable, and consistent, the saliency of animal studies or other evidence of toxicity is quite low. However, when epidemiologic evidence is lacking, thin, of questionable validity and ultimately inconclusive, dismissing other toxicological evidence is unjustifiable. The point is that plaintiffs should be required to prove causation by a preponderance of the available evidence, not by some

43. Steve Gold, *The “Reshaping” of the False Negative Asymmetry in Toxic Tort Causation*, 37 WM. MITCHELL L. REV. 1561, n.269 (2011).

44. This may not be a fair reading. Gold acknowledges the role for the burden of production in separating out cases in which a reasonable inference of causation may be drawn from the evidence as contrasted from those in which speculation alone would be the basis for such a finding. He also appears to endorse portions of comment c that approve of insufficiency of the evidence dismissals. Gold, *supra* note 42, n.282.

predetermined standard that may require nonexistent studies.⁴⁵

I am not nearly as sanguine about what I wrote almost twenty years ago today, and I take this opportunity to revise my position. Partly as the result of some sage and critical questioning by Joe Sanders, who shares my fascination with causation in this context, and partly as the result of expanded horizons and reflection, I now appreciate much more acutely the role of the burden of production and its impact in these cases. I also appreciate that the use of the burden of production to screen plaintiffs' claims is not peculiar to toxic substance litigation.⁴⁶

The burden of production has always burdened the plaintiff when evidence of a prima facie element of a case is scarce. And it does so without regard to the merits of the case. As Gold puts it, it produces only false negatives, the asymmetry that concerns him. Yes, this is undesirable, but the alternative of shifting the burden full scale to defendants is worse. It is worse because of the difficulty of proving a negative. Indeed, if we were to shift the burden of proof to defendants in toxic tort cases, plaintiffs would win every birth defects case on causation because the majority of birth defects are of unknown origin.⁴⁷ That means that a defendant would be unable to show, by a preponderance of the evidence, that its agent didn't cause plaintiff's birth defect. Defendants could never prove that their agents aren't capable of causing harm—i.e., are entirely safe—at least through epidemiology because all that negative

45. Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: the Legacy of Agent Orange and Bendectin Litigation*, 86 NW. U. L. REV. 643, 680 (1992).

46. As I read Gold, he suggests otherwise. He writes, "Scientific uncertainty of a type not usually seen in other tort cases poses recognized unique obstacles to proof of toxic tort causation." Gold, *supra* note 43, at 1510, n.13. Gold is probably correct that toxic tort cases as a whole suffer from a greater incidence of uncertainty due to thin evidence of causation than other cases—I put aside any impact of a differential selection effect between these two classes of cases by plaintiffs' attorneys. But the problem of limited evidence is by no means unique to this genre, as I explain in the text. And while he is correct that general causation is exceedingly rarely invoked in routine traumatic-injury torts that is because general causation is almost always satisfied in those cases because the biologic mechanism of crushed skulls or broken bones from blunt impact is well understood. But sufficient evidence of specific causation, even if not denominated as such, is, with some frequency, a stumbling block for all torts plaintiffs.

47. See Robert L. Brent, *Environmental Causes of Human Congenital Malformations: The Pediatrician's Role in Dealing with These Complex Clinical Problems Caused by a Multiplicity of Environmental and Genetic Factors*, 113 PEDIATRICS 957, 958 (2004).

epidemiology is able to do is limit the extent of risk that might exist. Not only unable to disprove general causation, defendant could not disprove specific causation because the majority of birth defects cannot be attributed to a cause that a defendant might refute. In short, the false positives with a shifted burden of proof would dwarf the false negatives that the current system imposes.

Thus, imposing the burden of production means that courts will screen out a number of cases in which there is merit but the evidence is just too thin to permit an acceptable degree of confidence in the outcome. This is the familiar distinction between a reasonable inference, which means that there is a sufficient base of evidence in favor of the proposition, and mere speculation, which is the universal appellation when the evidence simply doesn't measure up. To put the point slightly differently, as more evidence that favors a proposition emerges, the range of inferences by each member of a population evaluating that evidence will narrow. If asked the likelihood it rained at some prior time in a remote location, the range of responses by those asked is likely to be wide. As evidence is provided—the number of days per year that it rains in that location, the humidity at the relevant time, the degree of cloud cover, etc.—those assessments will narrow. Before courts let cases go to a jury, exercising their role in ruling on the burden of production, the evidence must narrow the range of inference to an indescribable and sometimes shifting degree, but narrow it must. No judge would submit a case to the jury if the issue were whether it rained at a given time with the only evidence being that there were some (unidentified type) clouds in the sky at the time.⁴⁸ Similarly, no judge would submit to a jury a case of a victim suffering a rare form of cancer in which the plaintiff's only evidence was a couple of case reports of patients who suffered the same common disease as plaintiff after exposure to the same agent.

The conventional tort example of insufficient evidence to permit an inference of causation is *Wolf v. Kaufman*.⁴⁹ Plaintiff's

48. Yes, I need to exclude from this statement rain forests and deserts. But these examples support my point—with evidence that the location is a rain forest or desert, the range of assessments by a population will narrow.

49. 237 N.Y.S. 550 (App. Div. 1929). *But see* *Reynolds v. Tex. & Pac. Ry. Co.*, 37 La. Ann. 694 (La. 1885) (similar factual situation to *Wolf*; court concludes jury verdict on behalf of plaintiff is proper because the defendant's negligence "greatly multiplied" the risk of an accident, and the possibility that accident would have happened in the absence of defendant's negligence is too speculative).

decendent fell on stairs that were unlighted due to the defendant's negligence and died as a result. The *Wolf* court held that the evidence—limited to the fact of the fall on the unlit stairs—failed to satisfy the burden of production because “it would be solely a conjecture for a jury to draw the conclusion that the deceased fell down the stairs because of the absence of light.”⁵⁰ The modern version of *Wolf* is *Butts v. Weisz*.⁵¹ Just as in *Wolf*, plaintiff's decendent fell down a dimly lit staircase. And just as in *Wolf*, there was no other evidence about why the decendent fell. But revealing the connection between conventional tort litigation and the modern *Daubert*, expert-screening era, the court affirmed the lower court's ruling excluding plaintiff's expert opinion that the dim lighting and a dangerous step were the cause of the fall.

Of course, the line that courts draw between reasonable inference and impermissible speculation is a varying one. The same court that decided *Wolf* with the same judge authoring the opinion decided a similar case nineteen years later in contrary fashion.⁵² Gold is, in my view right, in his claim that many courts in the current toxic substances era have drawn the line too far toward ruling that plaintiffs' evidence is insufficient, as the Comment in the Third Restatement that he discusses explains. Just as with flagrant trespassers, only time will tell whether, as Gold hopes, comment c makes a difference in how courts deal with the difficulties of proof in toxic causation cases.⁵³

Given the interesting issues revealed by the array of articles in this Issue and corresponding Symposium, I suggest we all revisit this Issue in a decade or two when the evidence improves such that reasonable inferences may be possible. It should make for a revelatory read.

50. *Id.* at 550.

51. Nos. 10-1643, 10-1644 (3d Cir. Dec. 28, 2010).

52. See *Ingersoll v. Liberty Bank of Buffalo*, 14 N.E.2d 828 (N.Y. 1938) (Finch, J.) (holding that it was for jury to decide whether, on the one hand, decendent fell down stairs due to a heart attack or dizziness while carrying thirty-two-pound box or whether, on the other, decendent fell on second-to-last step, which was found broken and had been negligently maintained by defendant, and injuries from fall caused his death).

53. One early return supporting Gold's aspirations for comment c is *Milward v. Acuity Specialty Products Group, Inc.*, 2011 WL 982385 (1st Cir. 2011). One of the most significant toxic tort causation cases in recent memory, *Milward* takes a significant first step toward fulfilling the promise that Gold finds in comment c.