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Issue 1

TORT LAW—THE WRONGFUL DEMISE OF BUT FOR CAUSATION

Tory A. Weigand*

The observation by Professor Dobbs that “[t]he substantial factor test is not so much a test as an incantation”¹ remains compelling. The continued and widespread use of “substantial factor” in lieu of “but for” as the predominate means of defining causation in any multiple defendant or multiple cause case is troubling. “Substantial factor” was never intended to supplant “but for” in such cases. This overuse and misunderstanding, which is otherwise accentuated by the Third Restatement’s causal set notion, poses the significant risk that causation can be found when the defendant’s conduct is neither a “but for” nor sufficient cause of the harm or injury. The result is an unacceptable dilution of the requisite nexus for legal responsibility. This Article inspects the origin and sources of substantial factor causation in Massachusetts jurisprudence as well as the approach advocated for by the Third Restatement, both informing and demonstrating the need for greater understanding and restraint as to the otherwise wholesale substitution of “substantial factor” for “but for” in multiple cause or multiple defendant cases.

INTRODUCTION

Since “the mists of time,” the *sine qua non* of factual causation has been “but for.”² Despite its primacy and root in individual responsibility, but for causation has been under strain due to the perceived difficulties posed by cases involving multiple potential causes. The substantial factor

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1. DAN B. DOBBS, THE LAW OF TORTS 416 (2000).

2. John D. Rue, *Returning to the Roots of the Bramble Bush: The “But For” Test Regains Primacy in Causal Analysis in the American Law Institute’s Proposed Restatement (Third) of Torts*, 71 *FORDHAM L. REV.* 2679, 2684 (2003).

language emerged as a salve with courts and litigants, increasingly resorting to, or arguing, that the substantial factor test is an improvement or necessary substitute for the but for test in any multiple causation case. The use of substantial factor causation has now become commonplace. It can be found in both the factual and proximate cause constituents and appears poised to become the predominate means of defining causation.³

The ascendancy of substantial factor causation and the corresponding perceived or actual demise of but for causation in any multiple cause case is troubling.⁴ Such use is inconsistent with the humble origins of “substantial factor” threatens to impermissibly dilute the requisite degree of causal nexus imperative for imposition of responsibility.⁵ Compounding the picture is the advent of the Third Restatement of Torts (Third Restatement) which, while reasserting the primacy of “but for,” purges substantial factor terminology from causation parlance altogether

3. See, e.g., *Matsuyama v. Birnbaum*, 890 N.E.2d 819, 842–44 (Mass. 2008); *O’Connor v. Raymark Indus., Inc.*, 518 N.E.2d 510, 511–12 (Mass. 1988); see *Wright v. Reithoffer Shows, Inc.*, No. 15-P-1644, 2016 WL 6188540, at *1 (Mass. App. Ct. Oct. 24, 2016) (noting verdict based on conduct “not a substantial contributing cause” with no reference to “but for”); *Supeno v. Equity Office Props. Mgmt., LLC*, 874 N.E.2d 660, 664 (Mass. App. Ct. 2007) (“In tort law, the test for causation is whether the ‘defendant’s negligence was a *substantial factor* in bringing about injury” (quoting *Bernier v. Bos. Edison Co.*, 403 N.E.2d 391, 400 (Mass. 1980))); *Boucher v. Lowell Automatic Transmission*, No. 9722, 2001 WL 920693, at *3 (Mass. App. Div. Aug. 8, 2001) (“In a negligence case, it is sufficient to use the phrase ‘substantial factor’ when giving an instruction on proximate cause.”); see also *Bonoldi v. DJP Hosp., Inc.*, No. 15-P-780, 2016 WL 4577493, at *1 (Mass. Sept. 2, 2016) (affirming substantial contributing cause instruction); *Klairmont v. Gainsboro Rest., Inc.*, 987 N.E.2d 1247, 1263–65 n.26 (Mass. 2013) (same); *Wess v. Butterworth*, No. 14-P-1790, 2016 WL 3474846, at *2 (Mass. App. Ct. June 27, 2016) (same); *Peters v. Shaws Supermarkets, Inc.*, No. 15-P-1304, 2016 WL 3460633, at *2–3 (Mass. App. Ct. June 24, 2016) (same); *Hannon v. Calleva*, No. 14-P-1061, 2015 WL 4079832, at *1–2 (Mass. App. Ct. July 7, 2015) (same); *Hixon v. Glynn*, No. 14-P-498, 2015 WL 1311680, at *1 (Mass. App. Ct. Mar. 25, 2015) (same); *C.A.I., Inc. v. Bos. Gas Co.*, No. 12-P-1893, 2014 WL 73377, at *1 (Mass. App. Ct. Jan. 10, 2014) (same); *Ho Ho v. Hodin*, No. 11-P-1628, 2013 WL 1314522, at *2–3 (Mass. App. Ct. Apr. 3, 2013) (same); *Miyazaki v. Works*, No. 11-P-2176, 2012 WL 6049083, at *2 (Mass. App. Ct. Dec. 6, 2012) (same); *Murphy v. Consalvi*, No. 11-P-1665, 2012 WL 3481699, at *1 (Mass. App. Ct. Aug. 16, 2012) (same); *Pitts v. Wingate at Brighton, Inc.*, 972 N.E.2d 74, 80 (Mass. App. Ct. 2012) (same); *Edson v. Richter*, No. 09-P-905, 2010 WL 1329032, at *1 (Mass. App. Ct. Apr. 7, 2010) (same); *Mastaby v. Cent. Hosp., Inc.*, 613 N.E.2d 123, 124 n.3 (Mass. App. Ct. 1993).

4. See Anthony J. Sebok, *Actual Causation in the Second and Third Restatement: Or, the Expulsion of the Substantial Factor Test*, in *CAUSATION IN EUROPEAN TORT LAW* 60, 63 (Marta Infantino & Eleni Zervogianni eds., Cambridge Univ. Press 2017) (“It is important to recognize what ‘substantial factor’ was not intended to do. It was not intended to form an *alternative* to the well-known ‘but-for’ test for causation.”).

5. Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT. L. REV. 407, 430 (1987) (“For tort law wrongfulness without causation is empty; causation without wrongfulness is blind.”).

and adopts the expansive “causal set” mode imposing liability for otherwise insufficient causes.⁶

This Article examines factual causation in Massachusetts, including the origin and use of the but for test and the substantial factor exception, as well as their treatment under the various Restatements. It reviews three primary sources relied upon for the suggestion that “but for” is no longer necessary in any multiple defendant or multiple cause action. The article questions whether these sources provide a viable basis to supplant “but for” with “substantial factor” and explores the arguments for and against the continued use of substantial factor causation in jury instructions, including its treatment under the Restatement.

I. CAUSE IN FACT AND “BUT FOR”

Massachusetts refers to factual cause as “cause in fact” or “actual causation.”⁷ It requires that a cause-and-effect relationship or actual connection be established between the wrongful act and the asserted harm.⁸ Factual cause is “empirically ascertainable” and grounded in the facts of the case.⁹

Factual cause is distinct from proximate or legal cause because “[t]he law does not impose liability for all harm factually caused by tortious conduct.”¹⁰ Proximate cause thus presupposes the existence of factual cause and addresses the issue of whether in fairness, pragmatic judgment, and as a matter of social policy, the defendant should be held responsible, or legally accountable, for the harm or injury claimed. Proximate cause is a limiting principle serving to confine a wrongdoer’s responsibility for

6. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. f (AM. LAW INST. 2010) (recognizing trivially insufficient but necessary to a sufficient set as factual causes).

7. See, e.g., *Kent v. Commonwealth*, 771 N.E.2d 770, 777 (Mass. 2002) (utilizing “cause in fact”); *Ulwick v. DeChristopher*, 582 N.E.2d 954, 958 (Mass. 1991) (“[T]he plaintiff has the burden of proving each and every element of that claim: duty, breach of duty (or, the element of negligence), causation (actual and proximate) and damages.”); *Wiska v. St. Stanislaus Social Club, Inc.*, 390 N.E.2d 1133, 1136–37 (Mass. App. Ct. 1979) (utilizing “actual causation” for cause in fact); see also, H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 90 (2d ed. 1985) (explaining that causation is comprised of actual causation, or cause in fact, and proximate cause).

8. David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1680 (2007) (“Before negligence law assigns responsibility to a defendant for a plaintiff’s harm, it demands that the plaintiff establish a cause-and-effect relationship between the negligence and the harm.”).

9. See *Rue*, *supra* note 2, at 2679–80.

10. *Leavitt v. Brockton Hosp., Inc.*, 907 N.E.2d 213, 219 (Mass. 2009); see HART & HONORÉ, *supra* note 7.

factually caused harm to foreseeable risks, or those risks fairly emanating from the asserted wrong as opposed to those that may arise remotely.¹¹ The definition or scope of proximate cause (or foreseeable result) is, in turn, “based on considerations of policy and pragmatic judgment.”¹²

The but for test is the classic and necessary inquiry for factual causation: the defendant’s conduct was a cause of the plaintiff’s harm if the harm would not have occurred absent the defendant’s negligence—i.e., without which the harm would not have occurred.¹³ An action is not a but for cause of an injury if the injury would have come about regardless of the action.¹⁴ Factual or but for causation requires a “counterfactual inquiry.”¹⁵ It requires identification of the asserted injury and wrongful conduct and poses the question that if the wrongful conduct had not taken place whether the injury would have occurred.¹⁶ “[T]he answers [to the but for inquiry] are characterized as opinion rather than certain knowledge because the but-for question is always asking about what would have happened had things been different than they in fact were.”¹⁷

11. See *Kent*, 771 N.E.2d at 777.

12. *Poskus v. Lombardo’s of Randolph, Inc.*, 670 N.E.2d 383, 386 (Mass. 1996); see also *Glick v. Prince Italian Foods of Saugus, Inc.*, 514 N.E.2d 100, 102 (Mass. 1987) (“Proximate cause does not require the particular act which caused the injury to have been foreseen, only that the general character and probability of the injury be foreseeable.” (citing *Carey v. New Yorker of Worcester, Inc.*, 245 N.E.2d 420, 423 (Mass. 1969))); *Young v. Atl. Richfield Co.*, 512 N.E.2d 272, 275 (Mass. 1987), *cert. denied*, 484 U.S. 1066 (1988) (holding the defendant’s breach of duty must “create a risk of the species which was causally related to the result which occurred”).

13. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 366, at 265 (5th ed. 1984) (“An act or omission is not regarded as a cause of an event if the particular event would have occurred without it.”); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 (AM. LAW INST. 2010) (“Conduct is a factual cause of harm when the harm would not have occurred absent the conduct.”).

14. KEETON ET AL., *supra* note 13, § 366, at 265–66.

15. See David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1770 n.21 (1997) [hereinafter *Common Sense*].

16. See *id.* at 1768–73.

17. *Id.* at 1769. Robertson explains that under the but for analysis, “the defendant’s wrongful conduct is now ‘corrected’ to the minimal extent necessary to make it conform to the law’s requirements.” *Id.* at 1770. Consistent with the “more probable than not” burden of proof, a claimant bears the burden of showing “that there was greater likelihood or probability that the harm complained of was due to causes for which the defendant was responsible than from any other cause.” *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 338–39 (Mass. 1983) (quoting *Carey v. Gen. Motors Corp.*, 387 N.E.2d 583, 587 (Mass. 1979)). Similarly, “plaintiffs are not required to eliminate entirely all possibility that the defendant’s conduct was not a cause. It is enough that they introduce evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than that it was not.” *Carey*, 387 N.E.2d at 585–86 (citing RESTATEMENT (SECOND) OF TORTS § 433B cmt. b (AM. LAW. INST. 1965)); see

The but for test is not without its critics.¹⁸ To some, asking the counterfactual question “take[s] the eye off the ball” in that “it focuses the jury’s attention on speculation about what might have happened rather than on the cause in fact problem of ‘what happened.’”¹⁹ Similarly, it is argued that “counterfactual causation is an incomplete theory.”²⁰ The test is deemed over-inclusive insofar as it finds necessary background conditions as causes and can likewise “underrepresent our intuitive notions of causal relationships.”²¹ The relied upon atypical scenarios have been referenced as “corner” cases which, to some, cannot be reconciled with the but for test and “raise fundamental analytical objections.”²²

Despite any shortcoming, the best test for factual causation yet devised is “but for.”²³ Court adjudications of disputes are typically after the fact and thereby necessitate both a retrospective view and the inherent “what if” question. The counterfactual inquiry is not conceptually

also *Miles v. Edward O. Tabor, M.D., Inc.*, 443 N.E.2d 1302, 1304 (Mass. 1982); *Zezuski v. Jenny Mfg. Co.*, 293 N.E.2d 875, 878–79 (Mass. 1973).

18. See, e.g., Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 556–57 (1962) (contending that the but for test “take[s] the eye off the ball”); Note, *Rethinking Actual Causation in Tort Law*, 130 HARV. L. REV. 2163, 2164–66 (2017) [hereinafter *Rethinking Actual Causation*] (advocating for departure from acceptance of the but for test as to actual causation); E. Wayne Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause in Fact*, 46 TEX. L. REV. 423, 430–31 (1968) (arguing the use of a but for hypothetical is a faulty means of determining whether the conduct caused harm).

19. Green, *supra* note 18, at 156; Thode, *supra* note 18, at 431; see Leon Green, *Are There Dependable Rules of Causation?*, 77 U. PA. L. REV. 601, 605 (1929) (finding that “but for” is problematic because it requires speculating about what would have happened). The use of the but for counterfactual hypothetical, as it is argued, fails to “prob[e] the relationship between the conduct and the injury[.]” but rather “considers the injury in isolation from the conduct.” Ernest J. Weinrib, *A Step Forward in Factual Causation*, 38 MOD. L. REV. 518, 521–22 (1975) [hereinafter *A Step Forward*] (explaining that the but for test can only “operate as a [test] . . . of inclusion not of exclusion”); see also Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1774 (1985) (advocating Necessary Element of a Sufficient Set test (or NESS test) for causation). Professor Wright’s NESS test is a substitute test for actual causation. It provides that “a particular condition was a cause of (condition contributing to) a specific consequence if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence.” Wright, *supra*, at 1790 (emphasis omitted).

20. John Morris, *Dirty Harriet: The Restatement (Third) of Torts and the Causal Relevance of Intent*, 92 TEX. L. REV. 1685, 1687 (2014) [hereinafter *Dirty Harriet*]; *Rethinking Actual Causation*, *supra* note 18, at 2166 (“[I]n cases of overdetermination and preemption, the but-for conception denies causal status to actions that appear intuitively causal.”).

21. *Dirty Harriet*, *supra* note 20.

22. *Rethinking Actual Causation*, *supra* note 18, at 2168. Examples of such “corner” cases include asbestos, pollution, terrorist financiers, and child pornography. *Dirty Harriet*, *supra* note 20, at 1692–1708.

23. Rue, *supra* note 2, at 2722 (“The ‘but for’ test is the worst mechanism to determine factual cause imaginable, except for all the others that have been tried so far.”).

difficult to apply, as “[e]veryone who moves about in the world successfully applies the but-for test countless times each day, usually without conscious thought.”²⁴ The process of identifying the specific harm, determining the acts or omissions of each defendant, and applying the counterfactual inquiry as to each works well in most cases, including those involving multiple defendants or causes, keeping in mind that a given harm may have more than one factual cause. Furthermore, the more difficult “corner” cases can be approached through notions of concerted or concurrent activity. To the extent there is ever deemed a need, given unusual circumstances, to implement a less demanding standard, it must be confined to identifiable, rigorous, and principled criteria.

At its core, the importance of but for causation lies in individual responsibility. There is no moral or social policy justifying imposition of liability where the wrongful conduct did not cause the harm or injury.

[T]he security and well-being of those engaged in socially desirable activities are just as important as the security and well-being of those who are injured; and a loss ought not to be shifted from a victim unless he can establish that it was attributable to tortious conduct of the defendant.²⁵

“Insistence by the courts on the cause in fact requirement prevents the litigation from being transformed into a general comparative survey of the moral qualities and defects of the litigants.”²⁶ It “is an all-or-nothing proposition. . . . [S]pecific conduct is either a cause in fact, or it is not,”²⁷ representing the very minimum, albeit necessary, nexus for legal responsibility.²⁸ It is only when an act or omission results in harm that

24. David W. Robertson, *The Vocabulary of Negligence Law: Continuing Causation Confusion*, 58 LA. L. REV. 1, 7–8 (1997) [hereinafter *The Vocabulary of Negligence Law*].

25. *Common Sense*, *supra* note 15, at 1766 (alteration in original) (quoting Page Keeton, *Torts, Annual Survey of Texas Law*, 36 SW. L.J. 1, 2 (1982)).

26. *A Step Forward*, *supra* note 19, at 518.

27. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 reporters’ note cmt. j (AM. LAW INST. 2010) (quoting *Waste Mgmt., Inc. v. S. Cent. Bell Tel. Co.*, 15 S.W.3d 425, 433 (Tenn. Ct. App. 1997)).

28. See David W. Robertson, *Causation in the Restatement (Third) of Torts: Three Arguable Mistakes*, 44 WAKE FOREST L. REV. 1007, 1008 (2009) [hereinafter *Three Arguable Mistakes*].

[T]he cause-in-fact requirement is the “linchpin” of the corrective-justice theory. Indeed, it has long been regarded as a truism that “a defendant should never be held liable to a plaintiff for a loss where it appears that his wrong did not contribute to it, and no policy or moral consideration can be strong enough to warrant the imposition of liability in such [a] case.”

Id. (second alteration in original) (footnote omitted) (quoting Charles E. Carpenter, *Concurrent Causation*, 83 U. PA. L. REV. 941, 947 (1935)).

would not have otherwise occurred—and only then—that legal liability can be imposed.²⁹ “To abandon the but for test is to abandon the element of causation.”³⁰

II. SUBSTANTIAL FACTOR: ROOTS AND RESTATEMENT

A. *Professor Smith and Substantial Factor as Proximate Cause*

The substantial factor element of causation has early Massachusetts roots. It is credited to have first emerged in a 1912 *Harvard Law Review* article by Jeremiah Smith,³¹ who took issue with the prevailing view that a tortfeasor was not liable for “improbable consequences,” contending that such non-liability was arbitrary.³² Smith rejected the notion that tortfeasors should be relieved of liability where the harmful consequence was not foreseeable.³³ He, in turn, argued that the appropriate linchpin for causative liability was that “[the d]efendant’s tort must have been a substantial factor in producing the damage complained of.”³⁴ Professor Smith’s reference to “substantial factor” was related to proximate cause, not cause in fact.³⁵ He had no issue with the but for test for factual

29. See Michael Moore, *For What Must We Pay? Causation and Counterfactual Baselines*, 40 SAN DIEGO L. REV. 1181, 1216–17 (2003).

30. Hillel David et al., *Proving Causation Where the But For Test is Unworkable*, 30 ADVOCATES’ Q. 216, 220 (2005).

31. Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 303, 310 (1911); see Michael D. Green, *The Intersection of Factual Causation and Damages*, 55 DEPAUL L. REV. 671, 698 n.97 (2006).

32. See Smith, *supra* note 31, at 304–05; see also Peter Zablotsky, *Mixing Oil and Water: Reconciling the Substantial Factor and Result-Within-the-Risk Approaches to Proximate Cause*, 56 CLEV. ST. L. REV. 1003, 1013–14 (2008) (discussing Professor Smith’s substantial factor approach to proximate cause).

33. See Smith, *supra* note 31, at 316 n.41.

34. *Id.* at 309. As noted by Professor Zablotsky, Professor Smith did not advocate for the elimination of foreseeability but that:

[F]oreseeability determined the extent of the duty owed, and that initial duty and resulting harm were substantially related if they were “of a like general character” or “related to the same persons or class of persons, and to the same subject matter,” or if the harm was brought about it [sic] the same general “mode” or “manner.”

Zablotsky, *supra* note 32, at 1014 (footnotes omitted).

35. See Smith, *supra* note 31, at 308–10; see also RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. j. (AM. LAW INST. 2010) (explaining that Smith intended the substantial factor test “to address the problem of proximate cause, not factual cause”). Professor Smith defined “substantial factor” as follows:

“Substantial” is not here meant to be understood as expressing merely the idea of “actual,” as opposed to “nominal.” It is meant to be understood as expressing the idea of “considerable” or “of some magnitude,” in antithesis to “trifling,” “slight,” “trivial” or “minute.” This notion of “considerable” is the idea sometimes (though

causation, rather his concern centered on identifying a practical alternative to the foreseeability or probability tests used for proximate cause.³⁶

The initial emergence of “substantial factor” in the proximate cause prong is notable as there remains uncertainty over whether the substantial factor test is an aspect of factual or proximate cause, or both.³⁷ This entanglement, although perhaps more academic than practical, impedes both the decoupling of the two distinct prongs and the search for clarity regarding causative nomenclature and instructions.³⁸ As much as factual cause and proximate cause are believed or intended to separate the ascertainment of policy-free facts from application of value-laden policy, there is no such clean line with the use of “substantial factor.” The purported screening out function of “substantial factor” as to some “but for” causes—on essentially evaluative grounds—creates ambiguity between factual and proximate cause. Moreover, “whether a factor is substantial . . . is a mixed question of fact and law requiring a decision as to the applicability of a legal norm to a given state of facts.”³⁹ In the end, a formidable argument can be made that “substantial factor” is more suited for the policy work of proximate cause than the factual work of actual causation.⁴⁰

B. “Twin Fires” and “Sufficient” Harm

There is very little mention, or use, of the substantial factor test for causation in case law prior to the Restatement of the Law of Torts (First Restatement) in 1934.⁴¹ The 1920 “twin fires” decision of the Minnesota Supreme Court is the oft-cited case or precursor to substantial factor

it may not be always) conveyed by the word “substantial” in the statement, that, in order to maintain an action for certain kinds of “nuisance,” the damage must be “substantial.”

Smith, *supra* note 31, at 310 n.22.

36. See Smith, *supra* note 31, at 325.

37. See, e.g., Rodriguez-Cirilo v. Garcia, 115 F.3d 50, 54 n.6 (1st Cir. 1997) (Campbell, J., concurring) (noting disagreement over whether “substantial factor” is part of factual cause or proximate cause).

38. See generally Rue, *supra* note 2, at 2714 (“[I]t is far from settled case law that the ‘substantial factor’ doctrine is applicable only to factual, and not proximate cause.”).

39. *A Step Forward*, *supra* note 19, at 532 (“Uncertainty as to the facts increases the scope that must be accorded to considerations of policy.”).

40. See Rue, *supra* note 2, at 2715–16.

41. See 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS, § 20.6, at 180 (2d ed. 1986) (“This ‘test’ for limiting liability attracted no following in the courts, and only scant attention from commentators, until the Restatement of Torts adopted it.”). Prior to the publishing of the First Restatement, Connecticut adopted Professor Smith’s substantial factor terminology. See, e.g., Mahoney v. Beatman, 147 A. 762, 767 (Conn. 1929).

causation.⁴² In this case, the owner of property destroyed by a fire brought a negligence action against a railroad company, contending that a spark from a train caused a fire to smolder on his property, which later “flared up” and destroyed the property.⁴³ The railroad proposed alternative explanations for the damage to the plaintiff’s property: other fires in the area that had been swept up by weather conditions caused the damage or the fire attributable to the railroad had been swallowed by either another fire or multiple fires before reaching the property.⁴⁴ The court held that the applicable showing required a determination as to whether the defendant’s tortious fire was a material factor in the fire that ultimately destroyed the property.⁴⁵ It remained the plaintiff’s burden to establish that the defendant’s fire *would have otherwise been sufficient* to have damaged the property even if it had not merged with the innocent fire or fires.⁴⁶ That is, the defendant’s wrongful fire would have otherwise been a but for or necessary cause of the property damage absent the other fire.⁴⁷

This has since been described as the “combined forces,” “overdetermined,” or “multiple sufficient causes” scenario, wherein it is claimed that the but for test for causation fails. That is, when two or more causes could have independently brought about the asserted harm, the but for test has been described as “inappropriate” insofar as it allows for a negligent defendant to escape liability.⁴⁸ Under the test, but for the

42. See generally *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 179 N.W. 45 (Minn. 1920), *overruled in part on other grounds by Borsheim v. Great N. Ry. Co.*, 183 N.W. 519 (1921) (holding that the plaintiff must establish that the defendant’s tortious fire was a material factor in destroying the plaintiff’s property).

43. *Id.* at 46.

44. See *id.* at 46–49.

45. *Id.* at 46, 49. The court refused to follow an earlier Wisconsin Supreme Court decision which held that the defendant could be found not liable where the defendant’s negligently started fire merged with a fire that was not the result of any wrongdoing. See *id.* at 49.

46. The court instructed the jury as follows:

If you find that bog fire was set by defendant’s engine, and that some greater fire swept over it before it reached plaintiff’s land, then it will be for you to determine whether the bog fire was a material or substantial factor in causing plaintiff’s damage. If it was, defendant was liable. If it was not, defendant was not liable. If the bog fire was set by one of defendant’s engines, and if one of defendant’s engines also set a fire or fires west of Kettle River, and those fires combined and burned over plaintiff’s property, then the defendant is liable.

Id. at 46.

47. *Id.*

48. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 reporters’ note cmt. a (AM. LAW INST. 2010) (“There is near-universal recognition of the inappropriateness of the but-for standard for factual causation when multiple sufficient causes exist.”).

defendant's negligence, the plaintiff would have still suffered the same damages because of the other causes.⁴⁹ "Clearly, two culpable defendants should not both escape liability, merely on the basis of a rote incantation of the 'but for' [test] in combination with an assertion of another defendant's tortious behavior."⁵⁰ The "material factor" or "substantial factor" notion thus arose to allow the finding of causation where any one of the possible causes would have been sufficient to cause the injury.⁵¹ While the non-defendant combining cause cannot be a basis to excuse liability for lack of causation, each defendant's negligence must still be independently sufficient and itself substantial. As to the "twin fire" scenario, for example, the property damage would have occurred due to defendant's fire leaving aside its merger with the other fire. Consequently, a fundamental attribute of the but for test is its requirement that causation be established by the sufficiency of each wrongdoer's action or omission in relation to the resulting harm.

C. *Substantial Factor in the Second Restatement: Double Duty*

The First Restatement was published in 1934 with the Second Restatement following in 1965.⁵² Influenced by Professor Smith's article as well as the *Anderson* decision, substantial factor causation was set out as a fundamental concept.⁵³ It was intended to serve two purposes: (1) address and recognize the "twin fire" or multiple sufficient causes scenario; and (2) distinguish between trivial and substantial but for causes.⁵⁴

The Second Restatement provides that an actor's negligence is a "legal cause" of harm when it "is a substantial factor in bringing about the

49. *Id.* § 27 cmt. a ("When an actor's tortious conduct is such a cause, it nevertheless would not be a factual cause if factual causes were limited to the definition in § 26: even without that tortious conduct, the harm would still have occurred because of the competing cause.").

50. Rue, *supra* note 2, at 2706.

51. See Carpenter, *supra* note 28, at 952 ("The question is not whether the other causes would have been sufficient without the defendant's wrong, but whether the defendant's wrong was actually a material factor in producing the injury.").

52. RESTATEMENT (SECOND) OF TORTS (AM. LAW INST. 1965); RESTATEMENT OF THE LAW OF TORTS (AM. LAW INST. 1934).

53. The Second Restatement provides the following regarding legal cause:

The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

RESTATEMENT (SECOND) OF TORTS § 431 (AM. LAW INST. 1965).

54. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 reporters' note cmt. j (AM. LAW INST. 2010).

harm,” and there is otherwise no applicable “rule of law relieving the actor of liability.”⁵⁵ It identifies the primacy of but for causation by providing that an actor’s negligence is not a substantial factor if the harm would have otherwise occurred.⁵⁶ “In order to be a legal cause of another’s harm, it is not enough that the harm would not have occurred had the actor not been negligent. . . . but . . . [t]he negligence must also be a substantial factor in bringing about the plaintiff’s harm.”⁵⁷ Under the Second Restatement, a “substantial factor” is an *additional* requirement for purposes of causation and intended to provide insulation against unlimited liability.⁵⁸

The Second Restatement incorporates “substantial factor” into the “factual cause” definition for purposes of addressing the twin fire/multiple sufficient cause scenario. Pursuant to section 432(2), “[i]f 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.”⁵⁹ There is no true substitution of but for causation with substantial factor causation in that each of the multiple causes (or “fires”) must still be found to be independently sufficient to have caused the harm. “Sufficiency,” in turn, is not met where a force *could* have caused the harm but only if it *would* have in fact caused the harm.⁶⁰

55. RESTATEMENT (SECOND) OF TORTS § 431 (AM. LAW INST. 1965).

56. *Id.* § 432.

57. *Id.* § 431 cmt. a.

58. *See, e.g., Jorgensen v. Mass. Port Auth.*, 905 F.2d 515, 524 (1st Cir. 1990) (articulating that causation-in-fact in Massachusetts requires a showing that defendant’s conduct was both a but for cause and “‘substantial legal factor’ in bringing about the alleged harm”); *see also Or v. Edwards*, 818 N.E.2d 163, 171 (Mass. App. Ct. 2004) (holding that factual cause requires a plaintiff to demonstrate that a defendant’s negligence “was as a matter of fact a substantial causative factor in bringing about the [harm]. . . . [and that t]he question can be recast in ‘but for’ terms without change in meaning or likely result”). *But see Komlodi v. Picciano*, 89 A.3d 1234, 1254 (N.J. 2014) (holding that “but for” and “substantial factor” are mutually exclusive); *Garcia v. Windley*, 164 P.3d 819, 823 (Idaho 2007) (same).

59. RESTATEMENT (SECOND) OF TORTS § 432(2) (AM. LAW INST. 1965).

60. *June v. Union Carbide Corp.*, 577 F.3d 1234, 1243 (10th Cir. 2009). According to the Tenth Circuit in *June*:

The use of the word *sufficient* in both Restatements does not mean that either of them would impose liability for conduct that is not a but-for cause if only the conduct *could* have caused the injury. Rather, it is necessary for the plaintiff to show that the conduct (or the causal set of which it is a necessary part) *would* in fact have caused the injury. As we all know, in the modern world of many hazardous substances, there may be many possible causes of a particular cancer. Each could be said to be *sufficient* to cause a specific person’s cancer. But one who suffers that cancer does not have a cause of action based on each such

The Second Restatement also uses “substantial factor” in an effort to distinguish between all but for causes, particularly between the trivial or *de minimis* and the significant or substantial causes.⁶¹ Considerations include: the number and effect of other producing causes; whether the defendant created a “continuous and active” force operating at the time of the harm; and lapse of time.⁶² It is this definition of “substantial factor” that results in an inquiry arguably more appropriate for proximate cause than factual causation.⁶³ The purpose of the inquiry is to excuse defendants whose conduct is a but for cause of harm when the effect of that conduct is so “insignificant that no ordinary mind would think of [it] as [a] cause[.]”⁶⁴ It arguably reflects a “policy [type] judgment that the causal role played by the defendant’s carelessness was [sufficiently insubstantial] as to make it unfair to assign any responsibility to him.”⁶⁵ The Second Restatement, however, did not intend that the substantial factor test serve as a substitute for but for cause.⁶⁶ The purpose of “‘substantial factor’ was meant to narrow the class of but-for [or

substance to which he was exposed, regardless of how unlikely it is that the cancer resulted from that exposure. Only a substance that would have actually (that is, probably) caused the cancer can be a factual cause without being a but-for cause. . . . It is not enough that the drug *could have* caused the defect, as might be inferred from use of the term *sufficient cause*.

Id. at 1243–44.

61. See RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (AM. LAW INST. 1965).

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, rather than in the so-called “philosophic sense,” which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called “philosophic sense,” yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Id.; see also Sebok, *supra* note 4, at 66 (“[T]he phrase ‘substantial factor’ was meant to narrow the class of but-for causes that ought to be recognized as a basis for liability by excluding insubstantial or trivial causes.”).

62. RESTATEMENT (SECOND) OF TORTS § 433 (AM. LAW INST. 1965). These considerations “are actually limitations on what conduct can qualify as a substantial factor.” *June*, 577 F.3d at 1241.

63. See generally Smith, *supra* note 31, at 309–10 (discussing the notion of substantial as a limitation in proximate cause prong of causation).

64. RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (AM. LAW INST. 1965).

65. Sebok, *supra* note 4, at 67.

66. *Id.* at 64 (“A careful reading of the Restatement provisions . . . suggests that they were not intended to have the effect of supplanting or replacing but-for causation. Rather, they were intended to serve two very different goals.”).

sufficient] causes that ought to be recognized as a basis for liability by excluding insubstantial or trivial causes.”⁶⁷

D. *The Third Restatement: The Banishment of Substantial Factor and the Advent of Causal Sets*

First published in 2010, the Third Restatement deemed the Second Restatement’s treatment of causation through the use and reliance on legal cause, proximate cause, and substantial factor to be inadequate.⁶⁸ It proceeded to eliminate the use of the terms “substantial factor,” “proximate cause,” and “legal cause” from its causation formulation altogether.⁶⁹ According to the drafters, “[t]he substantial-factor test has not . . . withstood the test of time, as it has proved confusing and been misused.”⁷⁰ The problem is the perception that the term “substantial” permits either a more rigorous or more lenient standard for factual cause resulting from the term’s evaluative character.⁷¹ It is deemed to serve as a judgmental limitation on liability, where factual cause is an all-or-nothing proposition. Specific conduct is either cause in fact or it is not; “there are no degrees of factual cause.”⁷² By eliminating the evaluative substantial causation, the fact finder cannot find an otherwise factual (but for) cause “insubstantial,” and thus not actionable, or otherwise pick and

67. *Id.* at 66.

68. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. a (AM. LAW INST. 2010) (“Despite the venerability of the ‘legal cause’ term in Restatement history, it has not been widely adopted in judicial and legal discourse, nor is it helpful in explicating the ground that it covers.”).

69. See *id.* §§ 26–27.

70. *Id.* § 26 cmt. j.

71. See *id.* § 26 reporters’ note cmt. j; *Rue, supra* note 2, at 2723. The substantial factor test is “little more than a jurisprudential Rorschach blot—in one circumstance justifying a relaxed standard of causation, in another supporting a heightened standard.” *Id.*

The essential requirement, recognized in both Torts Restatements, is that the party’s tortious conduct be a necessary condition for the occurrence of the plaintiff’s harm: the harm would not have occurred but for the conduct. To the extent that substantial factor is employed instead of the but-for test, it is undesirably vague. As such, it may lure the factfinder into thinking that a substantial factor means something less than a but-for cause or, conversely, may suggest that the factfinder distinguish among factual causes, determining that some are and some are not “substantial factors.” Thus, use of substantial factor may unfairly permit proof of causation on less than a showing that the tortious conduct was a but-for cause of harm or may unfairly require some proof greater than the existence of but-for causation.

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

72. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 reporters’ note cmt. j (AM. LAW INST. 2010).

choose, on evaluative grounds, tortious acts that are independently sufficient to cause harm.

Under the Third Restatement, causation is essentially twofold: factual causation provided in sections 26 through 28,⁷³ and harm within the scope of liability, provided in section 29.⁷⁴ As to factual cause, the but for, or *sine qua non* test, is reaffirmed and set out as the general rule. Section 26, entitled “Factual Cause,” provides: “Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. Tortious conduct may also be a factual cause of harm under [Section] 27.”⁷⁵

Section 27, in turn, entitled “Multiple Sufficient Causes,” addresses the circumstance of multiple sufficient (or overdetermined) causes, such as the twin fires scenario. It provides: “If multiple acts occur, each of which under [section] 26 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.”⁷⁶ Section 27 represents an extension of section 26, not an exception. Not only does the Third Restatement regard the multiple sufficient scenario addressed by Section 27 to be “the unusual case,”⁷⁷ but, as with the Second Restatement, “sufficiency” is not defined as a cause that *could* have caused the harm, but a cause that *would* have in fact (i.e. probably) caused the harm.⁷⁸ It is otherwise justified by “comport[ing] with deep-seated intuitions about causation and fairness in attributing responsibility.”⁷⁹

Of particular importance is the fact that the Third Restatement subtly adopts the notion of causal sets,⁸⁰ or the “NESS” test.⁸¹ That is, defendant A will be a factual cause of harm if he is part of a set of other actors or causes and that causal set is sufficient to cause harm and A is necessary to the set. Its proponents assert that NESS is an appropriate substitute for

73. See generally *id.* §§ 26, 28.

74. See generally *id.* § 29.

75. *Id.* § 26.

76. *Id.* § 27.

77. *Id.* § 26 cmt. c.

78. *June v. Union Carbide Corp.*, 577 F.3d 1234, 1241 (10th Cir. 2009).

79. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. c (AM. LAW INST. 2010).

80. *June*, 577 F.3d at 1241–42.

81. NESS is an acronym for the “Necessary Element of a Sufficient Set.” See Wright, *supra* note 19, at 1788–1803 (articulating the NESS test and inquiry).

the but for test in the “corner” cases,⁸² where “but for” does not impose liability, but our intuition dictates that causation should be found.⁸³

With reference to the twin fire scenario, causal-set causation would exist regardless of whether the defendant’s fire was sufficient to have caused the damage alone. Another example of a causal set involves pollution where the accumulation of five units of pollution is sufficient to cause injury to seven defendants, acting independently and each discharging one unit of pollution each.⁸⁴ A further example of such a corner case is known as preemptive causation. This exists, for instance, where a mechanic fails to make the required repairs to a set of car brakes and the driver later fails to use the brake pedal upon approaching an intersection, striking the car ahead of him.⁸⁵

This causal set notion is somewhat problematic in that it is found in the comment section of section 27 of the Third Restatement and expands, if not contradicts, the plain terms of both sections 26 and 27 by providing that insufficiency is not fatal to establishing factual causation.⁸⁶ Comment *f* provides that “[t]he fact that an actor’s conduct requires other conduct to be sufficient to cause another’s harm does not obviate the applicability of [section 27].”⁸⁷ Other than the general references to asbestos cases and academic law reviews, there is little cited support.⁸⁸ Nonetheless, factual cause is deemed established where the harm is caused by a tortious act that either alone or as a necessary part of a combination of other factors would have caused the harm.⁸⁹ Stated differently, unnecessary and non-independently sufficient contributions are a factual cause where they are necessary to a causal set, which set is itself sufficient to cause the harm.

82. *Rethinking Actual Causation*, *supra* note 18, at 2164 (“[T]here are corner cases in which the [but for] conception appears to break down.”).

83. “The NESS test not only resolves but also clarifies and illuminates the causal issues in the problematic causation cases that have plagued tort scholars for generations.” Wright, *supra* note 19, at 1802. NESS is “the essence of the concept of causation.” *Id.* at 1790.

84. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. f, illus. 4 (AM. LAW INST. 2010); see also *Wilcox v. Homestead Mining Co.*, 619 F.3d 1165, 1169–70 (10th Cir. 2010) (finding insufficient causal connection between pollution and cancer).

85. See *Saunders Sys. Birmingham Co. v. Adams*, 117 So. 72, 72–73 (Ala. 1928).

86. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. f (AM. LAW INST. 2010).

87. *Id.*

88. *Dirty Harriet*, *supra* note 20, at 1690 (“Sparse precedent supports the inclusion of comment *f* into the *Restatement Third*.”).

89. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. f (AM. LAW INST. 2010).

The inclusion of the causal set approach to factual cause is a distinct change from the Second Restatement. The Second Restatement does not recognize any causal set concept and otherwise permits the fact finder to consider whether or not an independently sufficient cause was substantial and thus a factual cause or not.⁹⁰ As noted by one observer, “NESS fundamentally challenges the traditional insistence on counterfactual causation in the first place.”⁹¹

Section 29 of the Third Restatement restates what was formerly deemed “proximate” or “legal” cause as a “scope of liability” framework. It provides that “[a]n actor’s liability is limited to those harms that result from the risks that made the actor’s conduct tortious.”⁹² The “scope of liability” approach includes intervening and superseding cause issues, as well as a “trivial contribution” provision.⁹³ The trivial contribution provision provides that “[w]hen an actor’s negligent conduct constitutes only a trivial contribution to a causal set that is a factual cause of harm under [section] 27, the harm is not within the scope of the actor’s liability.”⁹⁴

The placement of the trivial contribution principle in scope of liability, as opposed to factual cause, is notable in that, according to the comments, it seeks to preserve the historical limitation of the liability aspect of the substantial factor test.⁹⁵ Comment *b* of section 36 also makes clear that this trivial contribution exemption sets forth “a narrow rule that

90. See RESTATEMENT (SECOND) OF TORTS § 432 (AM. LAW INST. 1965).

91. *Dirty Harriet*, *supra* note 20, at 1691.

92. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (AM. LAW INST. 2010). Not only does this eliminate the use of, or reference to, either proximate or legal cause, it also purges foreseeability from the scope of liability determinations. The “risk standard” set forth in § 29 requires consideration of “the risks that made the actor’s conduct tortious,” and “whether the harm for which recovery is sought was a result of any of those risks.” *Id.* § 29 cmt. d. It is believed to provide “greater clarity” than the foreseeability test because “it focuses attention on the particular circumstances that existed at the time of the actor’s conduct and the risks that were posed by that conduct.” *Id.* § 29 cmt. j.

93. *Id.* § 36. The Third Restatement provides that the risk standard can be applied by fact finders “with more sensitivity to the underlying rationale than they might must with the unadorned foreseeable-harm standard,” while “[a] foreseeability standard risks being misunderstood because of uncertainty about what must be foreseen, by whom, and at what time.” *Id.* § 29 cmt. j. The Third Restatement approach regards scope of liability as a non-issue in most cases. Scope of liability will be an issue only in those cases involving a somewhat unique fact pattern; that is, where the claimant was within the scope of some harm, but the injury is the result of a risk that was not, or was arguably not, one of the risks that made the actor’s conduct tortious in the first place.

94. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 36 (AM. LAW INST. 2010).

95. *Id.* § 36 cmt. a.

[courts] ha[ve] developed as a matter of fairness, equitable-loss distribution, and administrative cost.”⁹⁶ Most notably, section 36 addresses the potential over-inclusiveness of section 27, particularly comment *f* of section 27, in that a cause does not have to be substantial in order to constitute a factual cause in the competing forces scenario.⁹⁷ In order to reel in liability in such circumstances, section 36 exempts trivial contributions from an otherwise sufficient cause from liability.⁹⁸

Section 36 of the Third Restatement, unlike its counterpart in the Second Restatement (section 433), “applies only to one of multiple sufficient causes, not to a but-for factual cause.”⁹⁹ Illustration 2 in section 36 makes the point that a defendant’s negligence resulted in a small amount of water to join with a substantial amount of naturally occurring run-off due to spring rains resulting in damage.¹⁰⁰ Assuming that the small amount of water was “the straw that br[oke] the camel’s back,” the defendant could not invoke the trivial exemption of section 36 to limit its liability,¹⁰¹ even though the water it negligently released was “a small fraction” of the total water which caused the injury.¹⁰² This reflects the notion that “trivial” can only be understood in comparison to other causes with all but for causes constituting actual cause, irrespective of any triviality. The end result is that under the Third Restatement, conduct will be a factual cause of harm if it is a but for cause, or a necessary element of a sufficient causal set, and the causal contribution is not trivial.

96. *Id.* § 36 cmt. b.

97. *Id.* § 36 cmt. a (noting section intended to prevent causal liability upon conduct while a member of a sufficient causal set “pales by comparison to the other contributions to that causal set”).

98. *Id.* § 36 cmt. b (“[E]xception applies only when there are multiple sufficient causes and the tortious conduct at issue constitutes a trivial contribution . . .”).

99. *June v. Union Carbide Corp.*, 577 F.3d 1234, 1241 (10th Cir. 2009).

100. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 36 cmt. b, illus. 2 (AM. LAW INST. 2010).

101. *Id.* § 36 cmt. b. According to the comments following illustration 1 in section 36:

The limitation on the scope of liability provided in this Section is not applicable if the trivial contributing cause is necessary for the outcome; this Section is only applicable when the outcome is overdetermined (§ 27). By contrast, the actor who negligently provides the straw that breaks the camel’s back is subject to liability for the broken back.

Id.

102. *Id.* § 36 cmt. b, illus. 2.

III. THE MASSACHUSETTS EXPERIENCE

Massachusetts cases have referenced the substantial factor,¹⁰³ substantial contributing cause,¹⁰⁴ and substantial legal factor¹⁰⁵ tests interchangeably, with the concept first entering Massachusetts appellate parlance following—and with direct reference to—the publication of the First Restatement.¹⁰⁶ Massachusetts continued to reference the substantial factor rubric with the advent of the Second Restatement in 1965.¹⁰⁷ The substantial factor rubric has steadily grown in use to include toxic tort or asbestos cases, as well as cases involving multiple causes or defendants. Indeed, it is often used as the operative test for causation in any negligence or related action.¹⁰⁸

103. See, e.g., *Evans v. Lorillard Tobacco Co.*, 990 N.E.2d 997, 1021 (Mass. 2013); *Morin v. AutoZone Ne., Inc.*, 943 N.E.2d 495, 499 (Mass. App. Ct. 2011).

104. See, e.g., *Klaimont v. Gainsboro Rest., Inc.*, 987 N.E.2d 1247, 1251 (Mass. 2013) (noting jury's finding that defendant's violation of the building code was not a "substantial contributing cause" of death); *LeBlanc v. Pierce Motor Co.*, 30 N.E.2d 684, 686 (Mass. 1940) (finding evidence sufficient as to vehicle owner's negligence being "a substantial contributing cause of the accident"); *Hoa Ho v. Hodin*, No. 11-P-1628, 2013 WL 1314522, at *1 (Mass. App. Ct. Apr. 3, 2013) (referencing trial court's use of "substantial contributing cause"); *Miyazaki v. Works*, No. 11-P-2176, 2012 WL 6049083, at *2 (Mass. App. Ct. Dec. 6, 2012) (defining substantial contributing cause as being "one of several causes of [harm]," while stating that it must still be a cause "without which [the accident] would not otherwise have occurred").

105. See, e.g., *Tritsch v. Bos. Edison Co.*, 293 N.E.2d 264, 266-67 (Mass. 1973); *Nemet v. Bos. Water & Sewer Comm'n*, 775 N.E.2d 750, 754 (Mass. App. Ct. 2002).

106. *Quinby v. Bos. & Me. R.R.*, 61 N.E.2d 853, 858 (Mass. 1945) (showing that sufficient evidence of causation as to the negligence of the gate tender by failing to raise the gate earlier constituted a substantial factor in bringing about damage; citing the First Restatement); *McKenna v. Andreassi*, 197 N.E. 879, 882-83 (Mass. 1935) ("[V]iolation of the ordinance was not a substantial factor in causing the accident."); see *Gosselin v. Silver*, 17 N.E.2d 706, 707 (Mass. 1938) (showing that use of excessive force was a substantial factor in causing bodily injury); *Vigneault v. Dr. Hewson Dental Co.*, 15 N.E.2d 185, 188 (Mass. 1938) (showing that either extraction or negligent anesthetization was sufficient to produce infection and could be considered a substantial factor in bringing about the harm). The earliest Massachusetts case referencing "substantial contributing cause" is *Wheeler v. City of Worcester*, 92 Mass. 591 (1865). There, a property owner whose building was damaged by flooding water sued multiple defendants and contended that, "[i]f either of the three causes of obstruction . . . , or all of them combined, were substantial contributing causes of the flooding . . . , then the defendants [were] responsible." *Id.* at 594. The court did not specifically address the contention, finding, *inter alia*, that deposits from underground sewer were not "so considerable as to form any substantial part of the causes of the flooding." *Id.* at 599.

107. *Delicata v. Bourlesses*, 404 N.E.2d 667, 671 (Mass. App. Ct. 1980) ("[A]n injured party is permitted to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing, even if the concurrent negligence of others contributed to the incident.").

108. See, e.g., *O'Connor v. Raymark Indus., Inc.*, 518 N.E.2d 510, 511 (Mass. 1988); *Bernier v. Bos. Edison Co.*, 403 N.E.2d 391, 399-400 (Mass. 1980); *Bonoldi v. DJP Hosp., Inc.*, No. 15-P-780, 2016 WL 4577493, at *1 (Mass. App. Ct. Sept. 2, 2016); *Wess v.*

The present-day use of substantial factor causation in Massachusetts is derived from reliance upon the following: the rule of joint and several liability, decisions addressing causation in asbestos or toxic tort cases, as well as *dicta* in a loss of chance case.¹⁰⁹ Upon inspection, these sources do not justify a wholesale substitution of substantial factor causation with but for factual causation in any multiple defendant or multiple cause case. This is true even without the Third Restatement's fodder for the position that the use of substantial factor causation is problematic and should be discarded altogether.¹¹⁰ To date, no Massachusetts appellate court has adopted the factual causation framework of the Third Restatement. The use of "substantial factor" in Massachusetts is discussed in the following sections.

A. *Speeding Motorcycles and "Contributing" Harm*

A precursor to the potential demise of the but for test in Massachusetts was *Corey v. Havener*,¹¹¹ which was later cited by the Second Restatement and subsequent decisions as supporting the use of the substantial factor test in multiple defendant or multiple cause cases.¹¹² There, the two defendants, riding noisy motorcycles passed the plaintiff's wagon on each side, frightening the plaintiff's horses, causing them to run away and injure the plaintiff.¹¹³

The court noted that the jury had found both defendants liable and upheld the finding of liability on appeal stating:

It makes no difference that there was no concert between them, or that it is impossible to determine what portion of the injury was caused by each. If each contributed to the injury, that is enough to bind both. Whether each contributed was a question for the jury.

Butterworth, No. 14-P-1790, 2016 WL 3474846, at *2 (Mass. App. Ct. June 27, 2016); *Peters v. Shaw's Supermarkets, Inc.*, No. 15-P-1304, 2016 WL 3460633, at *3 (Mass. App. Ct. June 24, 2016); *Hannon v. Calleva*, No. 14-P-1061, 2015 WL 4079832, at *1-2 (Mass. App. Ct. July 7, 2015); *Pitts v. Wingate at Brighton, Inc.*, 972 N.E.2d 74, 80 (Mass. App. Ct. 2012); *Supeno v. Equity Office Props. Mgmt., LLC*, 874 N.E.2d 660, 664 (Mass. App. Ct. 2007).

109. See *Matsuyama v. Birnbaum*, 890 N.E.2d 819, 842-44 (Mass. 2008) (addressing "substantial factor" in loss of chance claim); *O'Connor*, 518 N.E.2d at 512-13 (addressing "but for" and "substantial factor" in asbestos litigation).

110. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 reporters' note cmt. j (articulating elimination of substantial factor language as it calls for improper evaluative discretion); see also *id.* § 27 reporters' note cmt. b.

111. See *Corey v. Havener*, 65 N.E. 69, 69 (Mass. 1902).

112. FOWLER V. HARPER ET AL., THE LAW OF TORTS § 20.3 (2d ed. 1986) (citing *Corey*, 65 N.E. at 69).

113. *Corey*, 65 N.E. at 69.

....

If both defendants contributed to the accident, the jury could not single out one as the person to blame.¹¹⁴

The decision in *Corey*, at first blush, appears to be a twin fire, or “over-determined cause,” analogue. Yet, it is not.¹¹⁵ It essentially resorts to an expanded joint and several liability rule without expressly stating so.¹¹⁶ The notion of joint and several liability for an indivisible injury became well established at common law, although later modified by statute.¹¹⁷ At common law, an indivisible injury results when two or more causes combine to produce a single injury incapable of division on any reasonable basis.¹¹⁸ Joint and several liability initially emerged where the tortious actors either acted in concert or through a conspiracy.¹¹⁹ In such

114. *Id.* (citations omitted).

115. Richard W. Wright & Ingeborg Puppe, *Causation: Linguistic, Philosophical, Legal and Economic*, 91 CHI.-KENT L. REV. 461, 486 (2016) (noting that *Corey* is erroneously and commonly cited as an example of a multiple sufficient cause case).

116. See Donald G. Gifford, *The Challenge to the Individual Causation Requirement in Mass Products Torts*, 62 WASH. & LEE L. REV. 873, 908 (2005) (citing *Corey* as an example of common law joint and several liability).

117. *Chase v. Roy*, 294 N.E.2d 336, 340 (Mass. 1973) (alteration in original) (“[T]he law here must be considered as settled, that if two or more wrongdoers negligently contribute to the personal injury of another by their several acts, which operate concurrently . . . they are jointly and severally liable.” (quoting *Feneff v. Bos. & Me. R.R.*, 82 N.E. 705, 707 (Mass. 1907))); *Herman v. Horne Realty Inc.*, No. 08-ADMS-10038, 2009 WL 1846312, at *2 (Mass. App. Div. June 24, 2009); see *Bryant v. Bigelow Carpet Co.*, 131 Mass. 491, 503 (1881); *Bos. & Albany R.R. v. Shanly*, 107 Mass. 568, 579 (1871).

118. Gifford, *supra* note 116, at 908 (“Traditional common law holds that where the tortious acts of two or more defendants are each a cause-in-fact of an indivisible injury to the plaintiff, the defendants are jointly and severally liable.”); see also *Payton v. Abbott Labs*, 512 F. Supp. 1031, 1035 (D. Mass. 1981) (citing *Gurney v. Tenney*, 84 N.E. 428, 430 (Mass. 1908)).

119. Massachusetts law recognizes the concert of action theory of tort liability. Under this theory, a defendant who has an agreement with another to perform a tortious act or to achieve a tortious result may be liable to a plaintiff, even if that defendant was not the cause-in-fact of the injury. See *Payton*, 512 F. Supp. at 1035 (“The plaintiff need not prove the existence of an agreement by direct evidence.” (citing *Nelson v. Nason*, 177 N.E.2d 887, 888 (Mass. 1961))). Rather, an agreement may be inferred if the conduct of the defendants suggests a tortious implied meeting of the minds. *Id.*; *Nelson*, 177 N.E.2d at 888 (holding that although the parties claimed that they did not agree to drag race, such an agreement was inferred). Massachusetts has adopted the Second Restatement’s approach to this issue. *Payton*, 512 F. Supp. at 1034–35. Section 876 of the Second Restatement, titled “Persons Acting in Concert,” provides:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself . . .

RESTATEMENT (SECOND) OF TORTS § 876 (AM. LAW INST. 1965).

circumstances, there was no need to address the cause and effect of each actor's conduct separately; only collectively. The *Corey* court notes the "in concert" requirement, but holds that joint liability remains appropriate even absent strict concerted action under the circumstances.¹²⁰ While not expressly stated, it was clear in *Corey* that the defendants' negligent conduct was concurrent and that the injury was indivisible, justifying joint liability.¹²¹

The rule as to joint and several liability is not a substitute for causation;¹²² it is fundamentally a rule of procedure.¹²³ It provides that a plaintiff harmed by multiple tortfeasors can sue one or more of them, recover judgment against one or more of them, and collect on the judgment against one or more of them.¹²⁴ The fact that it has been expanded upon and allowed to be based on separate acts and does not require either conspiracy or concerted action does not justify the imposition of liability without proper causal connection. Concurrence and

120. *Corey v. Havener*, 65 N.E. 69, 69 (Mass. 1902).

121. JOSEPH R. NOLAN & LAURIE J. SARTORIO, TORT LAW, 37A MASSACHUSETTS PRACTICE SERIES § 25.1 (3d ed. 2005); see *Chase*, 294 N.E.2d at 340 (citing *Feneff*, 82 N.E. at 707 (stating the rule and need for concurrence and that damages are "inseparable")). "Common law joint and several liability evolved on the theory that, as between an injured, innocent plaintiff and defendants whose breach of some duty is proximately related to the injury, it is preferable to allocate the risk of a default in the payment of due compensation to the defendants." *Harsh v. Petroll*, 887 A.2d 209, 217 (Pa. 2005). Central to this doctrine is that the harm is indivisible and the negligent acts are "concurrent." *Edmunds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260–61 (1979); see also NOLAN & SARTORIO, *supra* ("The litmus test [for joint and several liability] consists of concurrent negligence and inseparable damages."). Concurrence would at least require that the putative act be operative at the time of the harm and act together with the other asserted acts. "The question is primarily not the fact of causation, but of the feasibility and practical convenience of splitting up the total harm into separate parts which may be attributed to each of two or more causes." KEETON ET AL., *supra* note 13, § 52, at 345. Joint tortfeasors and concurrent negligence are legally distinguishable concepts. The term "joint tortfeasors" refers to a situation where one person is vicariously liable for the torts of another (e.g., employer for employee, if within scope), or where two or more people act together in further of some common design or purpose. Cf. *Chase*, 294 N.E.2d at 340. Concurrent negligence is where two or more actors cause the same injury as a result of their separate tortious acts.

122. *Three Arguable Mistakes*, *supra* note 28, at 1014 ("The standard (procedural) joint-and-several-liability doctrine does no cause-in-fact work.").

123. See *Donnelly v. Larkin*, 98 N.E.2d 280, 285–86 (Mass. 1951).

124. See *O'Connor v. Raymark Indus., Inc.*, 518 N.E.2d 510, 513 (Mass. 1988) ("[I]f two or more wrongdoers negligently contribute to the personal injury of another by their several acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable, they are jointly and severally liable." (quoting *Chase*, 294 N.E. 2d. at 340)); *Mitchell v. Hastings & Koch Enters., Inc.*, 647 N.E.2d 78, 84 (Mass. App. Ct. 1995) (holding that when the negligence of the operators of two vehicles constitutes concurrent causes of injuries, they are jointly and severally liable to plaintiff).

indivisible injury remain necessary prerequisites. Even if there is concurrence and an indivisible injury, there still remains the need to establish causation. This burden of proof remains even if there is no obligation to show what specific portion of the injury was attributable to which joint tortfeasor.¹²⁵ The “but for,” or sufficient, concept is a plain and necessary component in showing that the tortfeasor “contributed” to the harm or injury.

Corey is also noteworthy in that there was no mention or discussion of factual causation, including either but for or substantial factor causation.¹²⁶ Rather, the causal nexus as to joint liability was simply noted to require “contribut[ion].”¹²⁷ There is no reference to the contribution needing to be something other than “but for.” Nonetheless, both earlier and later case law, as well as legal commentators and the Restatement, cited to *Corey* for the proposition that the causal nexus must be either sufficient to cause the harm or a substantial factor in causing the harm.¹²⁸ Indeed, by 1950, the Massachusetts Supreme Judicial Court (SJC) cited to *Corey* (post-First Restatement) as standing for the proposition that

125. See *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 725–26 (Cal. 1989) (Mosk, J., dissenting) (representing that the nexus must be “sufficient” (citing *Corey*, 65 N.E. at 69)); see also *Oulighan v. Butler*, 75 N.E. 726, 728 (Mass. 1905).

In the practical furtherance of justice, it is a principle of the law of torts that where two or more wrongdoers injure another in person or in property by their several acts, all of which are concurrent and contribute to one wrong, but which might have been caused by each, then, if upon the evidence no distinction can be drawn between their acts, they all are jointly or severally liable.

Id. (citing *Corey*, 65 N.E. at 69); *Payton v. Abbott Labs Inc.*, 780 F.2d 147, 157 (1st Cir. 1985) (explaining that under the law of Massachusetts, joint and several liability may attach to each cause where there is evidence that two causes for which liability may attach are probably involved in an injury, but their respective causal roles cannot be separated). See *Bos. & Albany R.R. Co. v. Shanley*, 107 Mass. 568, 579 (1871), for cases prior to *Corey*:

The many ways in which wrongdoers may injure another give rise to some nice distinctions; but when their several acts directly contribute to produce a single injury, each being sufficient to have caused the whole, and it is impossible to distinguish the portions of injury caused by each, that concurrence ought to render each of them liable for the whole in a joint action. On this ground, the manufacturers who sent the articles are jointly liable in this action.

Id. The Second Restatement also cited *Corey* for the substantial factor test. RESTATEMENT (SECOND) OF TORTS, § 432 cmt. d, illus. 3 & reporter’s notes (AM. LAW INST. 1965).

126. *Corey*, 89 N.E.at 69.

127. *Id.*

128. See RESTATEMENT (SECOND) OF TORTS § 432 reporters’ note cmt. d, illus. 3 (AM. LAW INST. 1965).

causation for joint liability was established on the showing of “substantial factor.”¹²⁹

B. *Asbestos and O’Connor v. Raymark Industries, Inc.*

The SJC’s 1988 decision in *O’Connor v. Raymark Industries, Inc.*, involving toxic tort and asbestos, is another frequently cited source supporting or implying the abandonment of but for causation and the use of “substantial factor” in any multiple cause or multiple defendant action.¹³⁰ However, the decision does not fairly support the wholesale displacement of but for causation with “substantial factor.”

In *O’Connor*, the plaintiff brought mesothelioma claims against seventeen defendants, sixteen of whom had settled prior to trial.¹³¹ On appeal, as to the defense verdict for the sole remaining defendant, the plaintiff challenged the special verdict slip and jury instructions on causation. The plaintiff argued that substantial contributing cause was defined to require that “the plaintiff must show that the defendant’s product must make a difference in the result”—essentially but for causation.¹³² The plaintiff further complained that the instructions “required the plaintiff to apportion the injury, at least to the extent of separating out the effect of the defendant’s product from the combined effect of all the asbestos dust which her late husband inhaled.”¹³³ The court rejected the plaintiff’s argument, although it noted it to be a “close” question.¹³⁴ It held that,

Read in context, the judge’s statement served to distinguish between a “substantial factor,” tending along with other factors to produce the plaintiff’s disease and death, and a negligible factor, so slight or so tangential to the harm caused that, even when combined with other factors, it could not reasonably be said to have contributed to the result.¹³⁵

The court otherwise reiterated that the plaintiff did not have the burden to prove but for causation or to distinguish the particular effect of

129. *Whalen v. Shivek*, 93 N.E.2d 393, 397 (Mass. 1950); *see also Mahoney v. Beatman*, 147 A. 762, 767 (Conn. 1929) (citing *Corey* for the proposition that concurrent causation requires that the act be a substantial factor).

130. *O’Connor v. Raymark Indus., Inc.*, 518 N.E.2d 510, 510 (Mass. 1988).

131. *Id.* at 510–13.

132. *Id.* at 512 (claiming the lower court’s jury instructions to be in error).

133. *Id.* at 513 (quoting the appellant’s brief).

134. *Id.*

135. *Id.*

the defendant's product from the effect of the other asbestos products.¹³⁶ Further, the court reiterated the general rule of joint and several liability: "[I]f two or more wrongdoers negligently contribute to the personal injury of another by their several acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable, they are jointly and severally liable."¹³⁷

Wholesale reliance upon *O'Connor* as justification for, or creation of, a general exception and substitute for but for factual causation in any multiple defendant or multiple cause case is unjustified. The case centered around the unique circumstances posed in asbestos cases and the fact that medical science is unable to determine the threshold asbestos fiber dose or exposure necessary to cause the disease. As the court of appeals noted in *Morin v. AutoZone Northeast, Inc.*, "[b]ecause the resulting injury may not emerge for years or decades after exposure, the law does not require the plaintiff . . . to establish the precise brand names of the asbestos-bearing products, the particular occasions of exposure, or the specific allocation of causation among multiple defendants' products."¹³⁸ As a result, the causation obligation in asbestos cases is unique, requiring a claimant to establish only: "(1) that the defendant's product contained asbestos (product identification), (2) that the victim was exposed to the asbestos in the defendant's product (exposure), and (3) that such exposure was a substantial contributing factor in causing harm to the victim (substantial factor)."¹³⁹

Consequently, while but for causation is not expressly required, causation remains established where there is evidence that the defendant contributed to the resulting injury, and where there is evidence of a degree of exposure being "greater than 'insignificant or de minimis.'"¹⁴⁰ This is,

136. *Id.*

137. *Id.* (quoting *Chase v. Roy*, 294 N.E.2d 336, 340 (Mass. 1973)). The court noted "[t]he 'substantial factor' formulation is one concerning legal significance rather than factual quantum." *Id.* (quoting *KEETON ET AL.*, supra note 13, § 41, at 267).

138. *Morin v. AutoZone Ne., Inc.*, 943 N.E.2d 495, 498 (Mass. App. Ct. 2011).

139. *Id.* at 499 (citing *Welch v. Keene Corp.*, 575 N.E.2d 766, 769–70 (Mass. App. Ct. 1991)); see *O'Connor*, 518 N.E.2d at 511–12; see also *Kreppein v. Celotex Corp.*, 969 F.2d 1424, 1425 (2d Cir. 1992) ("[The court rejects] a strict requirement for proof of causation in asbestos cases."); *In re Haw. Fed. Asbestos Cases*, 960 F.2d 806, 817–18 (9th Cir. 1992) (adopting a "less restrictive approach" to causation in asbestos cases); *Barraford v. T & N Ltd.*, 988 F. Supp. 2d 81, 88 (D. Mass. 2013) ("As to causation, 'the plaintiff need not produce evidence of "but for" causation on the part of the targeted product, but only of its contribution to causation of the resulting injury.'" (quoting *Morin*, 943 N.E.2d at 499)).

140. *Morin*, 943 N.E.2d at 499–500 ("[T]he adjusted standard of proof of causation does not relax to a level of speculation. The plaintiff must produce evidence of a degree of exposure greater than 'insignificant or de minimis.'" (quoting *Welch*, 575 N.E.2d at 770)); see *Payton v.*

in fact, one of the functions of “substantial factor,” in that it was “to excuse defendants whose conduct is a but-for cause of harm when the effect of that conduct ‘is so insignificant that no ordinary mind would think of [it] as [a] cause[.]’”¹⁴¹ Courts have so far found expert testimony to be central in establishing that the exposure was a significant contributing factor to the disease.¹⁴² The battleground remains over what is more than a nominal or trivial exposure; whether an expert’s mere incantation that any exposure was a significant contributing factor is sufficient; and whether there must be evidence quantifying the exposure to assist and justify any finding of substantial contributing cause.¹⁴³

O’Connor is a questionable basis for substituting “substantial factor” for “but for” in any multiple defendant or multiple cause case not only because of its unique circumstances (i.e. asbestos), but because it likewise conflates “contribution” with “causation.”¹⁴⁴ “Exposure to multiple products means in most such cases that no defendant is more likely than not a ‘but for’ cause, and it also means that most defendants contributed *nothing* to the actual injury. The conceptual shift to contribution does not work to avoid this plaintiff’s conundrum.”¹⁴⁵ It remains that the asbestos/mesothelioma claims are unique to causation. This stems from the long latency period and resulting difficulty in identifying defendants whose products plaintiffs were exposed to, as well as difficulty in determining the amount of exposure created by any particular defendant and that exposure’s “contribution” to the injury. As noted, “[n]ot only is substantial factor an inadequate finger in the hole of the dike, there is the

Abbott Labs, 780 F.2d 147, 156 (1st Cir. 1985); *O’Connor*, 518 N.E.2d at 511 (requiring that the plaintiff prove “more than just a casual or minimal contact”); RESTATEMENT (SECOND) OF TORTS § 433B cmt. a (AM. LAW INST. 1965).

141. Joseph Sanders et al., *The Insubstantiality of the “Substantial Factor” Test for Causation*, 73 MO. L. REV. 399, 419 (2008) (alterations in original) (quoting RESTATEMENT (SECOND) OF TORTS § 431 cmt. a).

142. *Welch*, 575 N.E.2d at 770. The court found the jury could infer that plaintiff’s exposure was a “substantial factor” because plaintiff offered expert testimony explaining that plaintiff’s disease “was caused by the cumulative effect of all the [asbestos] dust that he had inhaled over the span of his career.” *Id.*

143. Massachusetts courts have required, in order to state a triable claim, that the person “worked with, or in close proximity to, defendants’ asbestos products.” *Id.* at 769; *see also* *Roehling v. Nat’l Gypsum Co. Gold Bond Bldg. Prods.*, 786 F.2d 1225, 1228 (4th Cir. 1986) (“The evidence, circumstantial as it may be, need only establish that [plaintiff] was in the same vicinity as witnesses who can identify the products causing the asbestos dust that all people in that area, not just the product handlers, inhaled.”); *O’Connor*, 518 N.E.2d at 511 (holding that the exposure must be “more than just casual or minimum exposure”).

144. *O’Connor*, 518 N.E.2d at 513.

145. Bert Black & David H. Hollander, Jr., *Unravelling Causation: Back to the Basics*, 3 U. BALT. J. ENVTL. L. 1, 14 (1993).

possibility that the substantial factor rubric will be shuttled off to other contexts to eliminate liability where the concerns involved in asbestos litigation do not exist.”¹⁴⁶

The reference to the joint and several rule in *O'Connor* is also problematic as it was *dicta*. Leaving aside that neither “concurrence” nor “indivisible injury” particularly applied as there was only one defendant at issue, the joint and several liability rule as it relies on “contribution” simply leaves the causation question unanswered. The recitation of the joint and several liability rule added nothing to the dispositive analysis as to cause and effect, as the rule is not a substitute for the proper showing of causation.¹⁴⁷

C. *Loss of Chance and Matsuyama v. Birnbaum*

The 2008 decision, *Matsuyama v. Birnbaum*,¹⁴⁸ is another leading decision frequently cited for the proposition that substantial factor causation, rather than but for causation, is the appropriate instruction in any multiple cause or multiple defendant case.¹⁴⁹ In *Matsuyama*, the SJC recognized loss of chance as a cognizable harm under the wrongful death statute.¹⁵⁰ In effect, the court reconceptualized recoverable harm under the statute and determined that such harm was not limited to death, but also the loss of a statistical chance of cure or better outcome. Rather than receiving full damages for the adverse outcome, the claimant is only entitled to the value of the lost opportunity (i.e., the difference in the chances before the negligence from the chances after).¹⁵¹ By recognizing the loss of the chance as the harm, the court did not opt to employ or adopt any modified test as to causation such as “a diluted substantial-factor or other factual-causation test.”¹⁵² Thus, there is no modification of factual causation. Instead, there is a reconceptualization of harm with the *Matsuyama* rule—in effect, a species of proportional liability.

In commenting on causation in a loss of chance case, the court stated,

146. Sanders, et al., *supra* note 141, at 429.

147. See *Hobbs v. TLT Constr. Corp.*, 935 N.E.2d 1290, 1292 (Mass. App. Ct. 2010) (rejecting plaintiff’s claim that trial court erred in failing to instruct on joint and several liability under *O'Connor*, as harms were not indivisible).

148. *Matsuyama v. Birnbaum*, 890 N.E.2d 819 (Mass. 2008).

149. *Donovan v. Philip Morris USA, Inc.*, 65 F. Supp. 3d 251, 266 n.7 (D. Mass. 2014); *Bonoldi v. DJP Hosp., Inc.*, No. 15-P-780, 2016 WL 4577493, at *1–2 (Mass. App. Ct. Sept. 2, 2016); *Hannon v. Calleva*, No. 14-P-1061, 2015 WL 4079832, at *2 (Mass. App. Ct. July 7, 2015).

150. *Matsuyama*, 890 N.E.2d at 835–38.

151. *Id.* at 842–43.

152. *Id.* at 832 n.29 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. n (AM. LAW INST. Proposed Final Draft No. 1, 2005)).

The defendants claim that the evidence was insufficient to show that, as the judge instructed the jury, “an act or omission of [the defendant] was a substantially contributing factor to the death of Mr. Matsuyama.” The “substantial contributing factor” test is useful in cases in which damage has multiple causes, including but not limited to cases with multiple tortfeasors in which it may be impossible to say for certain that any *individual* defendant’s conduct was a but-for cause of the harm, even though it can be shown that the defendants, in the aggregate, caused the harm. The substantial contributing factor test is less appropriate, however, as an instruction as to cause in a loss of chance case in which one defendant’s malpractice alone is alleged to have caused the victim’s diminished likelihood of a more favorable outcome. The proper test in a loss of chance case concerning the conduct of a single defendant is whether that conduct was the but-for cause of the loss of chance.¹⁵³

This passage, which is *dictum*, is of potential concern to the extent that it is intended or interpreted as suggesting that causation can be established by a showing of something less than “but for” in any multiple defendant case, or that but for causation is limited to single defendant causes or cases.¹⁵⁴

First, the *Matsuyama* court noted that “substantial factor” was a “less appropriate” test for causation where there is a single defendant and an identifiable harm.¹⁵⁵ It found that the instruction, including reference to “substantial,” sufficiently “focused the jury’s attention on the idea that [the defendant physician’s] negligence, if any, had to be a but for cause of [the plaintiff’s] losing a ‘fair chance of survival.’”¹⁵⁶ It is compelling that the court referenced the use of “substantial factor” as “less appropriate” in the single defendant action. It is “less appropriate” because using “substantial factor” in lieu of “but for” is to invite the potential alteration (i.e., dilute or heighten) of the necessary showing between the negligent act and the harm, justifying imposing responsibility on the defendant. Yet,

153. *Id.* at 842 (footnotes omitted).

154. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. n.

155. *Matsuyama*, 890 N.E.2d at 842.

156. *Id.* at 843; *see also Three Arguable Mistakes*, *supra* note 28, at 1019.

Courts sometimes grasp that the substantial-factor test is appropriate for only a narrow range of multiple-cause situations, but quite often they go badly wrong by assuming that the but-for test can be jettisoned in favor of a much vaguer and less demanding substantial-factor inquiry in any case in which the tortfeasor’s conduct has combined with other causal conditions in any way creating difficulties for the plaintiff.

Id. (footnote omitted).

this fundamental social justification applies to all defendants, including where there is more than one defendant in a single case.

Further, even in single defendant cases, there are other potential causes. The causation dispute in *Matsuyama*, for instance, was between whether the alleged failure to timely diagnose or whether the underlying disease itself (i.e., cancer and its biology) caused the death or the loss of an opportunity of cure. Despite this dueling causal dispute, the court considered the substantial factor test to be “less appropriate” in order to maintain the necessary burden.¹⁵⁷

Second, there was only one defendant in *Matsuyama* along with a specific and asserted loss of a statistical chance of cure. However, even if there were other defendants, their respective acts would need to be independently shown to have been sufficient to have caused the respective harm unless they were acting in concurrence or in concert. Any appreciable difference in time, for instance, as to the negligent acts (i.e., failure to diagnose) would likely result in a “different” loss of chance. To the extent the harm sought would be death and thus considered an indivisible harm, it remains that the separate acts of negligence would have to be shown to have been sufficient and independent of other causes—whether another defendant or the underlying disease—to have caused the death. While the court stated the general rule as to joint and several liability—that is, “multiple tortfeasors in which it may be impossible to say for certain that any *individual* defendant’s conduct was a but-for cause of the harm”¹⁵⁸—the court’s wording, while accurate, remains misleading to the extent that it is interpreted or relied upon as standing for or supporting the proposition that in a multiple defendant or multiple cause action, it need not be shown that each individual defendant’s conduct be independently sufficient to cause the harm. The defendant’s conduct must be a but for or sufficient cause of the harm, leaving aside any causative role other defendants or other causes may or may not have had.

Finally, the *Matsuyama* court cited to and relied upon the asbestos decision in *O’Connor*, which remains the unique circumstance in which medical science was unable to say what the threshold dose of asbestos fibers or exposure is necessary to cause the disease.¹⁵⁹ Due to the nature of the disease process, which can occur over decades and involve multiple sources of exposure, choosing which fibers came from which defendants was not possible, resulting in the judicial modification to causation. This

157. *Matsuyama*, 890 N.E. 2d at 842–43.

158. *Id.* at 842.

159. *Id.* at 842 & n.47.

unique circumstance was not applicable to *Matsuyama*. The recitation of the joint and several liability rule does not address, nor is it a substitute for, requiring the proper factual causation test in multiple defendant or multiple cause cases.

IV. THE CASE FOR AND AGAINST SUBSTANTIAL FACTOR AND THE PRIMACY OF “BUT FOR”

“Substantial contributing cause,” or “substantial contributing factor,” is a common and fundamental, if not primary, term used in instructions for causation involving any multiple defendant or multiple cause case.¹⁶⁰ *O'Connor* and *Matsuyama*, in turn, remain frequently relied upon in support of using the substantial factor test.¹⁶¹ Although there are instructions and cases indicating that substantial contributing cause or factor is defined in terms of “but for” consistent with the Second Restatement,¹⁶² there are cases and instances where it is not,¹⁶³ with the ever present concern that but for causation no longer has a seat at the head of the causation table.

The Third Restatement has made a case against the use of “substantial factor” as an operative standard for causation, with its drafters asserting that the test has not “withstood the test of time, as it has proved confusing and been misused.”¹⁶⁴ While the Third Restatement agrees that use of “substantial factor” “can be useful” in the multiple sufficient cause scenario, it finds “substantial factor” to be “overuse[d]” and “abuse[d].”¹⁶⁵ A clear and present danger of the substantial factor test is that its use outside of the rather limited “twin fire” or multiple sufficient cause case

160. See cases cited *supra* note 3.

161. See, e.g., *Bonoldi v. DJP Hosp., Inc.*, No. 15-P-780, 2016 WL 4577493, at *1 (Mass. App. Ct. Sept. 2, 2016); *Hannon v. Calleva*, No. 14-P-1061, 2015 WL 4079832, at *2 (Mass. App. Ct. July 7, 2015); *Pitts v. Wingate at Brighton, Inc.*, 972 N.E.2d 74, 80 (Mass. App. Ct. 2012).

162. *Bonoldi*, 2016 WL 4577493, at *1. There, the appeals court rejected any error in the trial court’s instruction on causation using “substantial factor” where the claimant brought a negligence action against both a lessor and an entity responsible for maintenance as to an alleged slip and fall. *Id.* The court found no error in using “substantial factor” and cited *Matsuyama*, noting that there were not only two defendants, but also evidence that the claimant suffered from preexisting migraine headaches. *Id.*

163. See, e.g., Final Jury Instructions at 21–22, *Powell v. Fuller*, No. 2012-0740 (Mass. Super. Ct. Aug. 29, 2017).

164. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. j (AM. LAW. INST. 2010).

165. *Id.* at reporters’ notes cmt. j. The drafters noted that to the extent certain courts use “substantial factor” instead of “but for,” it is “undesirably vague.” *Id.*

will encourage juries to find causation even when the defendant's conduct is not a but for or sufficient cause of the plaintiff's injury.¹⁶⁶

The Third Restatement's criticism includes uncertainty over whether substantial factor causation is to be a cause in fact or proximate cause consideration.¹⁶⁷ Further, the concern includes whether substantial factor causation is potentially worse than but for causation, insofar as "avoiding the misconception that a single cause must be found for an outcome."¹⁶⁸ The Third Restatement also finds that the use of "substantial factor" to distinguish insignificant or trivial causes in order to prevent imposition of liability for such causes contravenes the premise that factual cause is not one of degree.¹⁶⁹ As such, the Third Restatement refuses to employ "substantial factor" and instead: (a) re-emphasizes the primacy of the but for test; (b) uses the "sufficiency" or "necessary condition" approach for actions involving multiple and sufficient causal sets; and (c) requires that the issue of insignificance or triviality of a cause be assessed as part of the scope of liability inquiry (proximate cause).¹⁷⁰

Neither the SJC nor the court of appeals has addressed whether the Third Restatement's approach will be adopted. Such an adoption would represent a significant change in both the terminology and scope of current precedent due to the complete banishment of the substantial factor test as well as the inclusion of the causal set notion. In 2015, a claimant asked the court of appeals to adopt the Third Restatement's causation formulation, including the concept that use of substantial contributing factor is inappropriate where multiple causes or tortfeasors are not present.¹⁷¹ The court of appeals held it was unnecessary to address whether the use of "substantial factor" in the instruction was proper, as there was evidence that the neck injury was caused by an event, or events, prior to the motorcycle accident.¹⁷² Citing *O'Connor*, the court of appeals held that the instruction "properly differentiated between a substantial factor that could give rise to liability and a negligible factor that could

166. See generally *id.* at cmt. j. The Third Restatement finds "substantial factor" problematic as it "is employed alternatively to impose a more rigorous standard for factual cause or to provide a more lenient standard." *Id.*

167. *Id.* at reporters' notes cmt. j ("[Substantial factor's] evaluative component . . . make[s] it appear to be doing scope-of-liability (proximate-cause) duty.").

168. *Id.*

169. *Id.* at cmt. j ("There is no question of degree [with factual causation].").

170. *Id.* §§ 26–27, 36.

171. *Hannon v. Calleva*, No. 14-P-1061, 2015 WL 4079832, at *1–2 (Mass. App. Ct. July 7, 2015) (citing *O'Connor v. Raymark Indus., Inc.*, 518 N.E.2d 510, 513 (Mass. 1988)).

172. *Id.* at *2.

not.”¹⁷³ Notably, the instruction otherwise included the need to establish but for causation and that, while there may be multiple potential causes, the defendant’s negligence must be “a substantial contributing factor to bringing about the injury.”¹⁷⁴

A further issue with substantial factor causation is the difficulty in defining its substantial versus insignificant or trivial divide. The various approaches fall into three general categories: (1) defining substantial by utilizing some or all of the definition and factors provided by the Second Restatement;¹⁷⁵ (2) defining it as the same or part of the proximate, that is “natural and probable,” consequence formulation;¹⁷⁶ and (3) providing no definition and leaving it to the common sense and judgment of the fact finder.¹⁷⁷

The Massachusetts Continuing Legal Education (MCLE) model instruction opts to leave “substantial factor” to the construction and application of the fact finder.¹⁷⁸ This is not unlike courts in other jurisdictions, which have found either that “[t]he meaning of the term

173. *Id.* (citing *O’Connor*, 518 N.E.2d at 513).

174. *Id.* at *1 n.2. The portion of the instruction quoted by the court included:

To prove proximate cause, the plaintiff, Mr. Hannon, must show that there is a greater likelihood or probability that the harm complained of was due to the causes for which the defendant was responsible, than it was not.

The plaintiff is not required to eliminate entirely, all possibility that the defendant’s conduct was not the cause. It is enough if he establishes that it is more probable that the event caused by the defendant, than it was caused by another event.

It is for you to determine upon consideration of all the evidence, whether it is more likely than not that Mr. Hannon’s injuries would not have occurred but for the defendant’s action or inaction.

The plaintiff is not required to prove that the defendant’s conduct was the sole cause. Most events in life are the product of more than one cause or force. It is enough if Mr. Hannon proves that the defendant’s negligence was a substantial contributing factor to bringing about the injury.

Id.

175. RESTATEMENT (SECOND) OF TORTS § 433 (AM. LAW INST. 1964).

176. *See Soule v. Gen. Motors Corp.*, 882 P.2d 298, 317 (Cal. 1994).

177. *Gabriel v. Lovewell*, 164 S.W.3d 835, 848 (Tex. Ct. App. 2005) (“The jurors were entitled to consider all this evidence in light of their own general experience and common sense and conclude that the Gabriels’ acts or omissions were a substantial factor in bringing about the injury.”); David A. Fischer, *Causation in Fact in Omission Cases*, 1992 UTAH L. REV. 1335, 1347 (1992) (“[C]ourts simply leave to the jury, without further definition, the question of whether the conduct was a substantial factor.”).

178. HON. PATRICK F. BRADY ET AL., MASSACHUSETTS SUPERIOR COURT CIVIL PRACTICE JURY INSTRUCTIONS § 2.1.8 (Mass. Continuing Legal Ed. 2d ed. 2003) (using the term “substantial” in its ordinary sense, which requires no further elaboration).

‘substantial factor’ is so clear as to need no expository definition”¹⁷⁹ or that substantial factor causation “expresses a concept of relativity which is difficult to reduce to further definiteness.”¹⁸⁰ Leaving the fact finder to determine whether the but for or sufficient cause in question is either significant or insignificant is consistent with the value our system places on the abilities of juries, and that any further definitional efforts may confound or impair understanding and application.

Other courts have continued to use the definition and criteria used in the Second Restatement, which references that substantial means that the “defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause.”¹⁸¹ Section 432 further explains the need to excuse defendants from liability for a but for or sufficient cause that is otherwise trivial when compared to the other applicable causes. That is, conduct is not a substantial factor when it “is so insignificant that no ordinary mind would think of [it] as [a] cause[.]”¹⁸²

The case for the continued use of “substantial factor” resides largely in its familiarity, including its apparent acceptance and entrenchment in the “twin fire” scenario as well as toxic tort or asbestos cases.¹⁸³ It is a term that has been used in causation parlance for over a century, including by a significant number of jurisdictions.¹⁸⁴ Further, “substantial factor” works well in the “twin fire” or multiple sufficient cause scenario. Where adequate instruction is given to the fact finder that there can be more than one cause, the concern that “substantial factor” can substitute and eliminate “but for,” or otherwise support the misconception that a single cause must be found, is significantly diminished. “When it is carefully

179. *Pilon v. Alderman*, 152 A. 157, 157 (Conn. 1930).

180. *Furrer v. Talent Irrigation Dist.*, 466 P.2d 605, 614 (Or. 1970).

181. RESTATEMENT (SECOND) OF TORTS § 431 cmt. a. (AM. LAW. INST. 1965).

182. *Id.* Further, courts have continued to use the criteria in section 433 of R2, which identifies:

(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 the actor’s conduct has created a force or series of forces which are in continuous and 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; (c) lapse of time.

Id. § 433. Indeed, the Massachusetts Appeals Court has affirmed a trial court’s use of these factors in a causation instruction. *Mastaby v. Cent. Hosp., Inc.*, 613 N.E.2d 123, 124–25 & n.3 (Mass. App. Ct. 1993).

183. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 reporters’ note cmt. j (AM. LAW. INST. 2010); *see also O’Connor v. Raymark Indus., Inc.*, 518 N.E.2d 510, 512–13 (Mass. 1988) (utilizing “substantial factor” in an asbestos injury claim).

184. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 reporters’ note cmt. j (AM. LAW. INST. 2010); *see also O’Connor*, 518 N.E.2d at 512–13.

applied, the version of the substantial-factor test laid out in [the Second Restatement, section 432(2)] does useful work in numerous cases,” with the issue remaining that the use “be confined by rigorous criteria.”¹⁸⁵

The complete banishment of “substantial factor” under the Third Restatement’s approach is problematic. Replacing “substantial factor” with “contribute,” “sufficient,” or “necessary” does not obviate the evaluative problem perceived with “substantial factor.” Assessment of whether a cause contributed or was sufficient or necessary requires an assessment of degree as well. Also, the Third Restatement—unlike the Second Restatement—wrongly omits that a defendant’s conduct in a multiple cause case needs to “be alone sufficient and itself substantial.”¹⁸⁶ Moreover, consideration of the trivial or insubstantiality aspect in the proximate cause portion of the inquiry (i.e. scope of liability), instead of factual causation, does not fit well despite the Third Restatement’s contention that the trivial/insubstantiality rule is one “of fairness, equitable-loss distribution, and administrative cost.”¹⁸⁷ A determination that conduct was only an insignificant contribution or cause can be argued not to be one of policy, but rather that no reasonable person would consider it a cause. Further, it can be argued that the Second Restatement’s approach as to the work of “substantial factor”—that is, distinguishing between but for causes and thus providing a further and important limitation—is a valuable approach and one which Massachusetts appeals courts have essentially followed. Finally, the concerns with the use of “substantial factor” can be addressed without complete banishment, starting with the recognition that it is not meant to replace but for causation in multiple defendant or multiple cause cases or otherwise eliminate the independently sufficient causal showing absent concurrence or concert.

CONCLUSION

Any actual or suggested demise of but for causation in multiple defendant or multiple cause actions is wrongful. “Substantial factor” was never intended to substitute and supplant “but for” in all actions involving multiple defendants or multiple causes. There remains a formidable argument that there can be no causation, in any tort case, where the but for

185. *Three Arguable Mistakes*, *supra* note 28, at 1019.

186. *Id.* at 1021 (emphasis omitted); *see* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 (AM. LAW. INST. 2010).

187. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 36 cmt. b (AM. LAW. INST. 2010).

test has not been satisfied.¹⁸⁸ At the very least, “[r]equiring the plaintiff to prove cause in fact by the but-for test is almost always the right approach.”¹⁸⁹ Indeed, the long-standing causative showing in Massachusetts is not only “but for,” but also “substantial factor”: a factor must first be a cause before it can be a substantial cause.¹⁹⁰

Upon close inspection, neither *Corey*, *Matsuyama*, nor *O’Connor* provide any basis for wholesale use of “substantial factor” in lieu of the but for test in any multiple defendant action. To be sure, *Corey* represents one of the infrequent “corner,” multiple sufficient, or over-determined cases. Yet, *Corey*, and other cases like it, when properly examined and understood, can be addressed through principled application of concerted action. This allows for a unification of the multiple defendants for purposes of factual causation without the wholesale abandonment of but for causation. This, in turn, remains the exception and requires rigorous discipline with both sufficiency and “concerted action,” a fundamental prerequisites for imposition of such “aggregate” liability.

To the extent *Corey* embodies the notion of joint and several liability or concurrent negligence, neither are surrogates for proper causal showing. The notion that a tortfeasor should not be absolved of culpability where the harm would have also occurred due to the negligence of another does not obviate the need to require the necessary causative showing as to each defendant. The fundamental need to show “but for” or sufficiency as to each individual and with reference to the specific defendant’s conduct and the specific harm remains.

As to both *O’Connor* and *Matsuyama* and their rote recitation that

The “substantial contributing factor” test is useful in cases in which damage has multiple causes, including but not limited to cases with multiple tortfeasors in which it may be impossible to say for certain that any *individual* defendant’s conduct was a but-for cause of the harm, even though it can be shown that the defendants, in the aggregate, caused the harm,¹⁹¹

188. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 282 (1989) (Kennedy, J., dissenting) (“Any standard less than but-for, however, simply represents a decision to impose liability without causation.”); *see also Paroline v. United States*, 572 U.S. 434, 452 (2014) (“[A]lternative causal tests [to but-for] are a kind of legal fiction or construct. If the conduct of a wrongdoer is neither necessary nor sufficient to produce an outcome, that conduct cannot in a strict sense be said to have caused the outcome.”).

189. *Common Sense*, *supra* note 15, at 1776.

190. *See Jorgensen v. Mass. Port Auth.*, 905 F.2d 515, 524 (1st Cir. 1990).

191. *Matsuyama v. Birnbaum*, 890 N.E.2d 819, 842 (Mass. 2008).

remains misleading. *Matsuyama*, in fact, did not even involve multiple defendants, with the SJC otherwise acknowledging that the but for test applied to the facts before it and the asserted harm of a loss of chance of cure or better outcome. Even if multiple defendants were present, absent concerted action and truly indivisible or identical statistical diminishment, each defendant's liability and causative inquiry would need to be assessed independently.

Finally, to the extent but for causation is problematic in cases such as *O'Connor*, it is because causation cannot be proved at the scientific level.¹⁹² It is not that the but for test has no application, but that "[t]he issue in such situations rather involves the manner and standard of proof that will satisfy, for legal as opposed to scientific purposes, the necessary element of causation, including its core component as expressed by the but for test."¹⁹³ As to the causal set, or NESS approach, identified in the comments of the Third Restatement, it is not remotely the law of Massachusetts or of most other jurisdictions.¹⁹⁴ It imposes legal responsibility for individually insufficient, insubstantial, and unnecessary conduct. Cause in fact requires the defendant's conduct alone to be sufficient and itself substantial.¹⁹⁵

Absent compelling circumstances, every defendant, including in actions involving multiple defendants or multiple causes, is entitled to have their respective conduct individually assessed for purposes of causation. They should not be subject to a diluted standard merely because there are multiple defendants or multiple causes. While there may be more than one cause in fact, the dispositive and minimum showing remains "but for," or whether the harm would have occurred absent the specific tortious conduct at issue. To utilize "substantial factor" in all such cases or without reference to but for causation or sufficiency is inappropriate and results in the distinct potential of requiring either a heightened or lessened showing as to the necessary connection between the specific conduct and the specific harm fundamental to legal responsibility.

192. *O'Connor v. Raymark Indus., Inc.*, 518 N.E.2d 510, 511–13 (Mass. 1988).

193. *David et al.*, *supra* note 30, at 220.

194. *But see* *Major v. R.J. Reynolds Tobacco Co.*, 222 Cal. Rptr. 3d 563, 581–82 (Cal. Dist. Ct. App. 2017).

195. *See Three Arguable Mistakes*, *supra* note 28, at 1021–23 (arguing that the omission from § 27 of the Third Restatement that a defendant's "conduct be alone *sufficient* and itself *substantial*" is a mistake).