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A drug cannot be said to ''cause'' a disease unless the plaintiff would have remained healthy had he or she not ingested the drug, right? Oddly, that seemingly simple principle has been muddled by many courts—which the authors of the Third Restatement of Torts have taken steps to correct.

Putting the 'but for' Back into Concurrent Causation

BY GAVIN J. ROONEY AND FRANK CATALINA

What does it mean for a drug or chemical to ''cause'' a disease, where the plaintiff has other risk factors for developing that disease and where forensic science cannot isolate a definitive cause among these several risks? Say you represent a pharmaceutical company facing lawsuits claiming that a drug that allegedly caused heart disease and the plaintiffs were also obese, had high cholesterol, and had a family history of heart disease. Or perhaps you represent a manufacturing company facing toxic tort litigation for allegedly discharging chemicals into the air that can cause lung cancer, when the plaintiffs also smoked. Your scientists tell you that it is impossible to determine exactly why the plaintiff developed the disease, apart from screening and weighing the likely contributions of the various risk factors. How must a jury sort through these multiple concurrent risk factors to determine if the defendant caused the disease? In other words, does proof that a drug or chemical created a risk of developing disease equate with proof that the drug or chemical actually caused that disease?

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Causation in these concurrent risk scenarios ought to be answered by a simple, ''but for'' question—*i.e.*, had the risk of contracting disease allegedly created by the defendant's drug or chemical not existed, would the plaintiff probably not have developed the disease? In other words, was the drug or chemical a ''but-for'' cause of the disease?

In many jurisdictions, juries are left to decide whether the defendant's conduct was a ''substantial factor'' in bringing about the plaintiff's injury. The ''substantial factor'' test derives from the Restatement (Second) of Torts (the ''Second Restatement''), which holds that a cause is a ''substantial factor'' among several potential causes if it alone would have been sufficient to cause the harm. Under confusing and confused case law and jury instructions, however, this issue has often been reduced to whether the defendant created a ''sub-

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stantial'' risk factor for the plaintiff's development of the disease. Indeed, some jurisdictions have gone so far as to hold that the ''but for'' and ''substantial factor'' tests are mutually exclusive concepts, and that a plaintiff in a concurrent causation case need not show that the harm would have been avoided ''but for'' the risk created by the defendant's drug or chemical.

The Restatement (Third) of Torts: Liability for Physical and Emotional Harm (the ''Third Restatement'') does away with the confusing ''substantial factor'' test and clarifies that conduct cannot be a legal cause of harm unless that cause alone, or acting in concert with other causes, was enough to result in the injury. As the authors of the Third Restatement realized, this change is necessary to ensure that the ''substantial factor'' test is not misused to hold defendants liable for injuries they did not cause. Accordingly, the Third Restatement provides defendants with the authority to argue for a clarification of the law to reintroduce the ''but-for'' principle back into the causation analysis.

I. The Substantial Factor Test of the Second Restatement

It is a fundamental precept of tort law that a defendant cannot be held liable for conduct that did not cause the plaintiff's injury. First-year law students recognize this as the ''but-for'' test, meaning that ''but for'' the conduct the injury never would have occurred. ''But for'' causation becomes more difficult when there are concurrent possible causes of harm. In such situations, the ''but for'' test ''has been tempered by decisions holding that, even if damage would have occurred in the absence of a defendant's negligence, liability may be imposed upon a showing that the negligent conduct was a substantial factor in causing the harm alleged.''[1]

That said, the ''but for'' concept remains embedded in the Second Restatement's ''substantial factor'' test. As the Second Restatement defines that test:

> Except as stated in subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent. (2) If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, *and each of itself is sufficient to bring about harm to another*, the actor's negligence *may be* found to be a substantial factor in bringing it about.[2]

Accordingly, the ''substantial factor'' test of the Second Restatement requires proof that the actor's conduct was sufficient to cause the harm in its own right, even if there was another cause at work. The classic ''substantial factor'' example is where two fires are set in a forest and, after combining, burn down a house.[3] In such a case, neither fire is a ''but-for'' cause of the house's destruction because the other fire would have burned down the house on its own. However, under the ''substantial factor'' test of the Second Restatement, both fires may be a cause because each alone was itself sufficient to bring about the harm. In other words, the ''but for'' concept is satisfied because the fire created by the defendant was alone sufficient to burn down the house.

II. Application of the Substantial Factor Test

The ''substantial factor'' test has been adopted and applied in numerous jurisdictions throughout the United States.[4] However, as one commentator has noted, ''[o]ver the years, courts [] used the ''substantial factor'' test to do an increasing variety of things it was never intended to do and for which it is not appropriate. As a result, the test now creates unnecessary confusion in the law and has outlived its usefulness.''[5] In particular, some courts have interpreted the ''substantial factor'' test as relaxing the requirement that the plaintiff prove her injuries were caused by the defendant. As the authors of the Third Restatement explained, ''some courts have accepted the proposition that, although the plaintiff cannot show the defendant's tortious conduct was a but-for cause of harm by a preponderance of the evidence, the plaintiff may still prevail by showing that the tortious conduct was a substantial factor in causing the harm. That proposition is inconsistent with the substantial-factor standard adopted in the Restatement Second of Torts . . . .''[6]

New Jersey is one such state, and its ''substantial factor'' test derives from the principles set forth in the Second Restatement.[7] Application of the ''substantial factor'' test in New Jersey has been varied and confusing. New Jersey's Model Civil Jury Charges contain a ''substantial factor'' charge for use in concurrent causation cases.[8] Under that charge, a jury must first determine whether the defendant's negligence was ''a cause'' of the defendant's harm, and, if so, it must then determine whether the negligence ''was a substantial factor that singly, or in combination with other causes, brought about the'' plaintiff's harm.[9] It further instructs that, ''[b]y substantial, it is meant that it was not a remote, trivial, or inconsequential cause.''[10]

In fact, the New Jersey Supreme Court recently held that ''[t]hese two forms of causation''—''but for'' and ''substantial factor''—are ''mutually exclusive,'' and that a ''but-for'' charge should only be given where ''there is only one potential cause of the injury or harm.'' In concurrent causation situations, the Court held that it would be error to instruct a jury that the defendant's conduct must be a ''but for'' causation of the harm.[11] In itself, this case represents a misunderstanding of the ''substantial factor'' test that is far removed from its articulation in the Second Restatement.

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[1] *Vuocolo v. Diamond Shamrock Chems. Co.*, 240 N.J. Super. 289, 293 (App. Div. 1990).

[2] Restatement (Second) of Torts § 432 (1965) (emphasis added).

[3] *See, e.g.*, *Cantor v. Saputelli*, 121 F. Supp. 2d 786, 793 (D.N.J. 2000) (quoting Restatement (Second) of Torts § 432 cmt. d, ill. 3 (1965)).

[4] In the context of toxic torts for example, *see* 2 Margie Searcy-Alford, Esq., *A Guide to Toxic Torts*, § 10.01[2][b] (2014) (stating ''Most States Now Use the ''Substantial Factor Test'' and listing as examples Alabama, California, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Texas, Utah, and Washington).

[5] David A. Fischer, *Insufficient Causes*, 94 Kent. L. J. 277, 277 (2005-06) (internal citations omitted).

[6] Restatement (Third) of Torts: Physical and Emotional Harm § 26 cmt. j (2010).

[7] *See Vuocolo*, 240 N.J. Super. at 294-95.

[8] N.J. Model Civ. Jury Charge 6.12.

[9] *Id.*

[10] *Id.*

[11] *Komlodi v. Picciano*, 217 N.J. 387, 422 (2014).

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While the Model Jury Charge explains that a cause must not be trivial or inconsequential to be considered a ''substantial factor,'' case law provides little guidance on what that means, and, indeed as to whether the cause must be either sufficient on its own to cause the injury or a necessary component of a combination of factors that cause an injury. For instance, in an asbestos case, New Jersey's Appellate Division noted that, ''[w]e do not tell a jury that a significant factor must be one that is 5%, 15%, 30% or 40%, we merely tell a jury that it must be 'significant.' ''[12] Thus, in concurrent causation cases, New Jersey law appears to leave the question of causation to the jury's senses of whether the defendant played some ''non-trivial'' role in bringing about the plaintiff's harm without actually addressing whether the defendant's conduct alone was sufficient to cause the harm.

To add to the confusion, New Jersey courts have employed the ''substantial factor'' test to conflate the concept of risk with that of causation. For instance, in the medical malpractice context, where negligence may result in a ''lost chance'' to diagnose and successfully treat an illness, the Supreme Court has stated that ''[t]he substantial factor test allows the plaintiff to submit to the jury not whether 'but for' defendant's negligence the injury would not have occurred but 'whether the defendant's deviation from standard medical practice increased a patient's risk of harm . . . and whether such increased risk was a substantial factor in producing the ultimate harm.' Once the plaintiff demonstrates that the defendant's negligence actually ''increased the risk'' of an injury that later occurs, that conduct is deemed to be a cause ''in fact'' of the injury and the jury must then determine the proximate cause question: whether the increased risk was a substantial factor in bringing about the harm that occurred.''[13] Under this formulation, the ''substantial factor'' test is divorced completely from the concept of actual causation and becomes merely a test of whether the conduct is related closely enough to the result that ''a reasonable person [would] regard it as a cause, using that word in the popular sense.''[14]

III. The Third Restatement's Reformation of the Causation Test

The authors of the Third Restatement recognized that ''[t]he substantial factor test has not . . . withstood the test of time, as it has proved confusing and been misused.''[15] Accordingly, the Third Restatement abandons the ''substantial factor'' test for multiple causation cases. It does not depart materially from the standard for causation set forth in the Second Restatement, but it restates essentially the same standard without employing the confusing ''substantial factor'' language.

Under the standard in the Third Restatement, liability cannot be imposed for conduct *unless* ''the harm would not have occurred absent the conduct.''[16] The sole exception to this ''but-for'' rule is the ''simultaneous fires'' situation described above—''[i]f multiple acts occur, each of which . . . 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.''[17] The comments to this section of the Third Restatement explain that conduct that is insufficient on its own to cause harm can still be a cause of the harm where it is a necessary (*i.e.*, ''but-for'') component of a set of forces that combine to be more than sufficient to cause the harm.[18] For example, if three individuals lean against a car and cause it to roll off a cliff and the force required to push the car off the cliff was only that exerted by two people, the force exerted by any one of them would be a factual cause. Each would be a necessary component of a causal set (*i.e.*, two of the three) that was sufficient to have caused the harm, and several causal sets, each sufficient in its own right, acted concurrently to cause the harm.[19] Or, more bluntly stated, the absence of the defendant's conduct would have avoided the harm.

In *June v. Union Carbide Corp.*, the Tenth Circuit compared the Second and Third Restatements at length and determined that, while they use different terminology, the underlying standard of the Third Restatement is essentially no different than that of the Second.[20] The Colorado plaintiffs in *June* alleged that they or their decedents had been injured by exposure to radioactive materials from a nearby uranium mine.[21] Although Colorado law applied the ''substantial factor'' test of the Second Restatement, the district court entered summary judgment dismissing the plaintiffs' claims because they had submitted no evidence that absent their exposure to radiation they would not have developed their diseases.[22] The Tenth Circuit affirmed, holding that ''a defendant cannot be liable to the plaintiff unless its conduct is either (a) a but-for cause of the plaintiff's injury or (b) a necessary component of a causal set that (probably) would have caused the injury in the absence of other causes.''[23]

The *June* court clarified that, under either the Second Restatement or the Third Restatement, a plaintiff must prove that the conduct more likely than not would have caused the harm in the absence of the other concurrent cause.[24] As the court held:

> As we all know, in the modern world of many hazardous substances, there may by 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 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.[25]

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[12] *Grassis v. Johns-Manville Corp.*, 248 N.J. Super. 446, 457 (App. Div. 1991).
[13] *Verdicchio v. Ricca*, 179 N.J. 1, 24 (2004) (internal citation omitted).
[14] *Id.* (internal citation omitted).
[15] Restatement (Third) of Torts: Physical and Emotional Harm § 26 cmt. j (2010).
[16] Restatement (Third) of Torts: Physical and Emotional Harm § 26 (2010).
[17] *Id.*
[18] *Id.* cmt. f.
[19] *Id.* illus. 3.
[20] 577 F.3d 1234 (10th Cir. 2009).
[21] *Id.* at 1237.
[22] *Id.* at 1238.
[23] *Id.* at 1244.
[24] *Id.* at 1243.
[25] *Id.*

Thus, the Tenth Circuit confirmed the plain meaning of section 432 of the Restatement (Second)—the only exception to the ''but-for'' test provided by the substantial factor standard is where two (or more) sufficient causes operate simultaneously and each would have caused the harm absent the other.

The Third Restatement and the *June* decision point the way forward for a more coherent understanding of causation in states that follow the confusing ''substantial factor'' test. These jurisdictions often avowedly follow the Restatement,[26] and as *June* makes clear, the standards of the Third Restatement are essentially the same as those in the Second. The Third Restatement merely clarifies and reinforces the standards of the Second Restatement by doing away with the confusing ''substantial factor'' language and explaining more precisely what has always been true—conduct that is not a factual cause of harm cannot give rise to tort liability.[27] Thus, applying the causation analysis of the Third Restatement would not require a wholesale change in the causation standard. It would merely modernize and clarify the standard plaintiffs must meet in proving causation.

Returning to the example of the lung-cancer or the heart-disease plaintiff, application of the Third Restatement requires the plaintiffs to prove that the drug or chemical actually caused the disease—and that simply identifying the drug or chemical as a ''substantial factor,'' among other risk factors, is insufficient. In other words, the plaintiff must show that he or she would have remained healthy absent the defendant's conduct, thus returning the concept of causation to its logical ''but for'' roots.

[26] *See Vuocolo*, 240 N.J. Super. at 294-95; *Maloy v. Schneider*, 2012 WL 2890800, *4-5 (N.J. Super. App. Div. July 17, 2012) (Sabatino, J.A.D., concurring) (explaining that Restatement (Third) has superseded Restatement (Second) and that re-examination of New Jersey liability tests may be warranted under new standards as old tests were predicated on Restatement (Second)).

[27] *See June*, 577 F.3d at 1239-44.

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