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Damages: Symposium Presentation of Anthony Sebok

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PROFESSOR ANTHONY SEBOK:

Thank you very much. First, I want to thank Southwestern for inviting me again. I love coming out here, and these conferences have just been getting better and better. I cannot wait to see what the next one is going to be like.

My presentation could be brief. It is a riddle that I have on looking at the Council Draft for the Restatement of Torts (Third): Remedies. Having taught causation in first-year torts for many years, I was, of course, very interested to see how the Restatement handled the issue of multiple factual causes. I thought it had been handled earlier in the Restatement section on Physical and Emotional Harm, but I was surprised to see that it comes up again in the Remedies section. There is nothing wrong with that, but it gave me an opportunity to return to a problem which, like a lot of us here, I think we have never been sort of completely satisfied with—how the common law or the academic world handles a problem that does not arise very often perhaps in actual litigation, although we can talk a bit more about the extent to which this will become more important as we go forward.

Now, the background here is, as I said, section 27 of the Restatement on Liability for Physical and Emotional Harm, which was adopted many years ago after important work done by people in this room.[1] The section handles

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1. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 27 (AM. L. INST. 2010).

cause in fact in two sections: sections 26 and 27. Section 27 handles the multiple sufficient cause question.[2] In some sense, it clarifies the discussion of section 432 of the Restatement (Second) of Torts, and it clarifies in the following sense: it comes down firmly on what I would call the *Anderson* side, saying that in fact, where two tortious sufficient causes simultaneously cause injury, there is a completed tort, and where there are two causes – one tortious, one innocent – that simultaneously cause harm to the victim, there is a completed tort.[3] But what section 27 clearly says, is just because there is a completed tort—just because there is a legally compensable injury—it does not say anything about what the damages should be.[4] It explicitly carves that out and says that should be handled by somebody else.

It has now been handled. It has been handled in the Remedies section of the Restatement (Third), and I want to go through the structure of the solution. When you read through the entire section 12, you see four architectonic positions or principles, and they handle the whole landscape. I have them on slides 1 and 2 here.

SLIDE 1: Presentation of Anthony J. Sebok, *Concluding the Restatement (Third) of Torts*, Southwestern Law Review (March 24, 2023).

§12 Multiple Sufficient Causes

Simultaneous *Tortious* Causes
If a defendant's tortious conduct is one of two or more independent, sufficient, and simultaneous factual causes of an indivisible harm to a plaintiff, and if *all* of the sufficient causes *are tortious*, the defendant *is liable* for all or part of the plaintiff's damages within the scope of the defendant's liability.

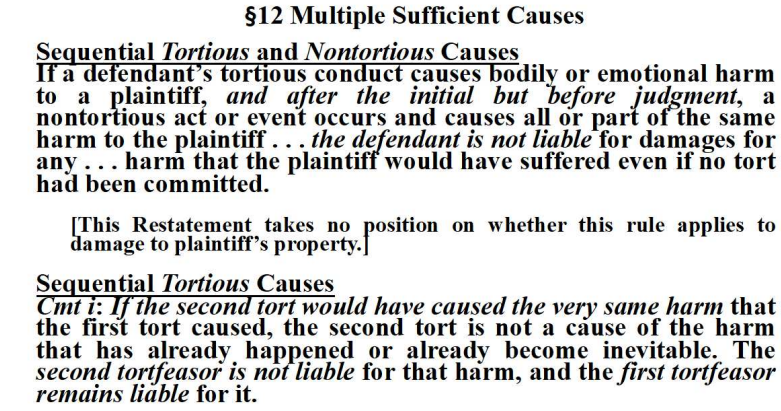
Simultaneous *Tortious* and *Nontortious* Causes
If a defendant's tortious conduct is one of two or more independent, sufficient, and simultaneous factual causes of an indivisible harm to a plaintiff, and if *one* or more of the sufficient causes *is not tortious*, this Restatement *takes no position on whether the defendant is liable* for all, part, or none of the plaintiff's damages.

2. *Id.*

3. *See generally* Anderson v. Minneapolis, S. P. & S. S. M. R. Co., 179 N.W. 45 (Minn. 1920).

4. *Id.*

SLIDE 2: Presentation of Anthony J. Sebok, *Concluding the Restatement (Third) of Torts*, Southwestern Law Review (March 24, 2023).



§12 Multiple Sufficient Causes

Sequential *Tortious* and *Nontortious* Causes
If a defendant's tortious conduct causes bodily or emotional harm to a plaintiff, *and after the initial but before judgment*, a nontortious act or event occurs and causes all or part of the same harm to the plaintiff . . . *the defendant is not liable* for damages for any . . . harm that the plaintiff would have suffered even if no tort had been committed.

[This Restatement takes no position on whether this rule applies to damage to plaintiff's property.]

Sequential *Tortious* Causes
***Cmt i*: *If the second tort would have caused the very same harm* that the first tort caused, the second tort is not a cause of the harm that has already happened or already become inevitable. The *second tortfeasor is not liable* for that harm, and the *first tortfeasor remains liable* for it.**

Slide 1 deals with two simultaneous tortious causes. Slide 2 deals with a simultaneous tortious and non-tortious cause. In the case of simultaneous tortious causes, we have the standard two fires case that we are all familiar with, where both defendants are open to being held liable for damages, and as the language here says, there are going to be all sorts of questions of apportionment, and burden of proof perhaps might also come in, as well as evidentiary questions. When a simultaneous tortious and non-tortious cause comes together, the ALI chooses to basically say we do not know what to do still—we take no position.

Let us move on. Then, and I think this is very interesting and important, because it really does bring up something which I think has not been sufficiently present in my teaching, at least, and I think in the scholarship. There is another logically important question here: sequential causation, where we have preempted causes. So, there are two rules in section 12. One is that we have sequential tortious and non-tortious causes. So, you have a victim suffering from an injury that causes a loss, and then before trial, it is proven that an identical event would occur that would cause its injury that would produce the same loss. Where that second event happens before trial occurs, at trial, the defendant can say, I am not responsible for any of the losses that flow after the non-tortious event. So, obviously, I am responsible for the losses that flow from my wrongdoing up to the point where the non-tortious event struck the victim, but after that point, I am not responsible. The ALI adopts that position, saying that overwhelming case law supports this. Then, hidden in Comment *i*, there is a completion of the landscape,

which asks what happens if you have two tortious causes?[5] Now let me be clear: there is a lot of talk here about not needing to have a special rule because these are divisible harms. That is not always true. Sometimes, you can have—and they admit this—a tortious act that occurs at time one, and before trial, you can have a second tortious act, which occurs at time two that would have caused exactly the same loss. Now, that does not mean there would not be additional losses before the second tortious cause.

Obviously, between the first tortious cause and the second tortious cause, there can be pain and suffering that can be compensable, but then, at that moment, the second tortious cause produces harm that simply reproduces the loss that the first tortious cause would have created. And the question is, after that point in time—just like with the tortious and non-tortious cause—what should we do? Here, the ALI says the second tortious cause is not responsible. The first tortious cause is responsible for all the harm that will continue even after the first and even after the second. So that is four principles; you can imagine we have a two-by-two matrix here [shown on slide 3].

SLIDE 3: Presentation of Anthony J. Sebok, *Concluding the Restatement (Third) of Torts*, Southwestern Law Review (March 24, 2023).

§12 Multiple Sufficient Causes

	Concurrent	Sequential
$\Delta_1 + \Delta_2$	Box 1 : $\Delta_1 + \Delta_2$ liable	Box 2: Δ_1 liable / Δ_2 not liable
Δ_1 + nature	Box 3: Maybe Δ_1 liable / Maybe not	Box 4: : Δ_1 not liable

I am going to come back to it. But this should be, I hope now, a summary. We have what Professor Michael D. Green [who is here in this room] talked about: instead of concurrent possibilities, you talked about overdetermined.[6] That was in the 2006 article, and instead of sequentially, you talked about duplicated.[7] I do not think the vocabulary really matters.

5. *Id.* § 27 cmt. i.

6. Michael Green was in the audience when these comments were delivered.

7. Michael D. Green, *Note and Comment: The Intersection of Factual Causation and Damages*, 55 DEPAUL L. REV. 671, 675 (2006).

You said one thing which I thought was interesting—because I am not quite sure I agree with what you said. You said that duplicated causation cases, which would be the sequential deal, are special cases of the overdetermined position, concurrent causation cases. I am not quite sure I completely agree with that because there is a difference in the sort of question posed by the counterfactual. So, with concurrent, the counterfactual is just how much of the loss would be caused by either of the two defendants. With the sequential or the duplicative, all the loss we are talking about is caused by the second defendant. So, the counterfactual is what would have happened if the first defendant had not been there, whereas in the concurrent, it is not the same question. There is the question of how much each of them would have caused it if the other one had been there, and the answer is all of it. But it is not really the thing I want to focus on.

What I want to focus on is three things. First, is what the ALI chose to do with the two-by-two matrix. What they chose to do was anticipated by comment *e*.[8] The solution in box three is in tension with the solution of box one and box four. We cannot come to a solution about box three because box one pulls us in one direction, and box four pulls us in another direction, and they are in equipoise. It is not that the case law is in equipoise. It is just by their own logic that they are in equipoise. So, the ALI says, listen, with box one, the principle is if you have simultaneous wrongdoing, it generates an obligation on each wrongdoer to repair all the natural consequences that flow from the wrongdoing.[9] That is a right to redress. Then, box four says—it is also another principle of remedies law—that no wrongdoer is obliged to repair an inevitable natural consequence. That is the right position. We are not going to put the victim back into a position better than they would have been in had the wrongdoer not acted. In this case, it would be giving them money for something nature did to them in box four. So, the ALI literally says you just cannot choose between these two. We are not going to choose between these two.

I will make two small observations and maybe a third observation. Here is my small first observation: I do not understand box two. I just do not get it. I do not agree with it. I am just going to put it this way: if, as the ALI asserts, boxes one and four are right, then I do not think box two is right. This is not to say that I know the answer for box three. And this is why I say that. Why should, in box two, the first wrongdoer not benefit from the appearance of the second wrongdoer? In box two, the appearance of the second wrongdoer does not take the first wrongdoer off the hook; he or she

8. *Id.* § 27 cmt. e.

9. *See id.*

still must pay for all the damages. The second tortfeasor is not liable, and the first tortfeasor is liable. That is box two. And I guess I do not understand that at all.

If in box four a "natural event" lets the first wrongdoer off the hook; why in box two does the second wrongdoer not let the first wrongdoer off the hook? Let me give you an example. Imagine if a basketball player with a five-year contract would make $1 million. On January 1, 2023, defendant one causes a complete loss of the player's ability to play basketball. Trial is set for January 1, 2024, one year later. The day before the trial, on December 31, 2023, the second wrongdoer comes around and causes the exact same loss. Maybe it was a careless bicyclist breaking the leg in the first instance, and maybe it was a doctor who had committed malpractice in the second instance. In the second instance experts say the malpractice typically results in paralysis of both legs. According to box two, defendant one pays $5 million. Why not $1 million? If nature had destroyed that leg, they would have paid $1 million but in box two they must pay $5 million. I just do not understand it.

So that is the first of my quibbles, but here is my second, much larger, quibble. My second quibble is with box four. My second quibble goes something like this: most of the box four cases the ALI refers to are cases involving the death of the victim. I think that skews the analysis. If we think about the analysis from that perspective, then why the death cases are so easy is obvious. An unrelated death that comes after the original injury means that the defendant's wrongful act makes no difference to the loss that they created. In some sense, if you kill someone, then the fact that they cannot work—the fact they lost the capacity to work—is meaningless if they are dead. Their loss of capacity to work does not matter if they have no body with which to work.

However, take a harder case. Take a case, for example, where the defendant destroys a worker's ability to work by blinding her on January 1, 2023. (Imagine, for example, that she was an airline pilot.) She alleges she cannot operate an airplane because she has been tortiously blinded. Her trial is set for a year later. Now assume that the day before the trial, on December 31, 2022, a doctor carelessly prescribed her a medicine that is known to cause blindness. Under box two, the defendant is responsible for the victim's loss of income as a pilot for her foreseeable working life even after the careless doctor comes into the picture. But now imagine this variation. After the defendant tortiously blinded the pilot, a natural mishap occurs that would have blinded the pilot anyway (perhaps she is infected with a disease that destroys the optic nerve, along with other symptoms). In this case, according

to box four, the pilot gets her lost earnings only up to the point at which nature would have taken away her sight.

Now, the interesting question is, why should that be so? The answer is because they were going to lose their job anyway due to their bad luck at being struck blind. Had the pilot not been blinded by the defendant, she would still have been discharged by the airline a year later because if she is blind, she cannot perform the job for which she was hired. But look at the section 12 of the Restatement draft: "Courts should not cut off damages that actually occurred because of hypothetical events that did not occur."[10] [Shown on slide 4].

SLIDE 4: Presentation of Anthony J. Sebok, *Concluding the Restatement (Third) of Torts*, Southwestern Law Review (March 24, 2023).

§12 Multiple Sufficient Causes

"Courts should not cut off damages that actually occurred because of hypothetical events that did not occur, however likely those events seem to have been."

From: (d.) Damages when tortious and nontortious causes occur sequentially.

It is hard to see how the outcome entailed under box 4 in my hypothetical is not based on a hypothetical event: the pilot receives only a year of lost income because at the time of the trial, we know *what would have happened* had the defendant not tortiously blinded her. It is unclear exactly how comment *d* can be rendered consistent with box four.

Let me just offer this amendment. [See slide 4.] So, I think that this would be a more plausible account of what box four is intended to achieve. I think that courts should not cut off damages that will occur because of hypothetical events that did not occur. In other words, it is the hypothetical event in box four that will occur, which is being fired from your job. It is not that you are dead. It is that you are being fired from your job, and someone is going to take a practical action. Now, there are cases that say this, and they are not in the majority, but I actually think that they have the better reasoning.

I am going to leave with just one example. The reason why this is extremely hard, in my opinion, is because it focuses so much on lost-earnings

10. RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS § 12 (AM. L. INST., Preliminary Draft No. 3, 2022).

capacity, but I think if you reframe the question into different contexts, this alternative becomes more attractive. So, for example, I think my last variation—box four—imagine a woman who is caused a negligent injury so that she loses her reproductive capacities. She has a trial coming up in one year after that happens, on January 1st. The day before, through some natural event, she sadly suffers a disease that causes her to lose her capacities. When she goes to trial, she would say to the defendant, you owe me for the loss of amenity. You owe me for the entire loss of my capacities, including, for example, the disappointment I have for the rest of my life that I cannot reproduce, or, for example, for the cost of adoption because I cannot reproduce. Now, according to the American Law Institute, the Restatement comes back, the defendant comes back, and says, no, I only owe you for the loss between the day I injured you and the day in which nature took away your capacity to reproduce. After that, everything else you suffer is just bad luck. I find that very hard to accept. I think that, in fact, I would say that the victim should receive compensation for an entire lifetime of disappointment in not being able to reproduce, not just until the point when she lost her ability to reproduce due to natural reasons. There might not be a strong, logical, and airtight argument for this, other than saying that these two concerns I raised about section 27 leaves me worrying and keeps me up at night.

SLIDE 5: Presentation of Anthony J. Sebok, *Concluding the Restatement (Third) of Torts*, Southwestern Law Review (March 24, 2023).

§12 Multiple Sufficient Causes

Proposed amendment to Box 4:

"Courts should not cut off damages that will occur because of hypothetical events that did not occur, however likely those events seem to have been."

***See Buchalski v. Universal Marine Corp.*, 393 F.Supp. 246 (1975)**