

# Texas Law Review

## *See Also*

### Response

### Conceptual Clarity and Necessary Muddles

Michael D. Green & William C. Powers, Jr.\*

We applaud Michael Raupp's work in *The Multiplication of Indivisible Injury*.<sup>1</sup> He takes on a conceptually difficult topic and plumbs problematic issues created by the adoption of comparative fault, the modification of joint and several liability, and evidentiary inadequacies. He does so clearly and with aplomb, and we admire his intellectual courage in following his dogged analysis where it leads him, even if that entails some constructive criticism of the *Restatement (Third) of Torts: Apportionment of Liability*.<sup>2</sup>

We agree with Mr. Raupp on one important point. When multiple tortfeasors<sup>3</sup> cause harm to a victim, apportionment of liability should be a two-step process. First, the court should determine which tortfeasors caused which parts of the plaintiff's harm. If all of them caused the entire harm, this step can be omitted. *After* causal apportionment is completed, if there are multiple tortfeasors who caused any discrete portion of the plaintiff's harm,

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\* Green is the Williams Professor of Law at Wake Forest University School of Law. Powers is President of the University of Texas at Austin and Hines H. Baker and Thelma Kelley Baker Chair and University Distinguished Teaching Professor at the University of Texas School of Law. Powers and Green were the Reporters for *Restatement (Third) of Torts: Apportionment of Liability*. President Powers thanks Professor Green for taking the laboring oar doing the research and drafting of this Response. Powers stands behind all of the ideas herein.

1. Michael T. Raupp, Note, *The Multiplication of Indivisible Injury*, 90 TEXAS L. REV. 259 (2011).

2. We refer to this *Restatement* variously as either the "*Apportionment Restatement*" or the "*Third Restatement*," even though there are currently two other subject-specific pieces of the *Third Restatement of Torts* that have already been published, with more to come in future years.

3. For simplicity and brevity, our use of *tortfeasors* includes the plaintiff when contributorily negligent despite the awkwardness of that usage.

liability then should be apportioned on the basis of comparative responsibility.<sup>4</sup> Causation and responsibility (or fault) are two distinct bases for apportionment. In a perfect world, apportionment would always proceed in this manner.

The explanation for this apportionment hierarchy is quite simple and compelling. Tortfeasors should not pay for harm that they did not cause. Thus, we must first determine who caused what harm and then apportion liability among those who caused the same harm. Among those tortfeasors who cause the same harm, there is no basis for further apportionment on a causal basis. A cause is a necessary condition, not a matter of degree, and it does not afford a basis for comparison among causes of the same harm.<sup>5</sup> Of course, in many cases, we will not need to perform the first apportionment step. If two negligent automobile drivers collide, resulting in a wheel from one the cars striking a pedestrian, no causal apportionment is necessary. The plaintiff has suffered a truly “indivisible injury” for which each tortfeasor is a cause of the entire injury. The only apportionment required is to determine the comparative *responsibility* of the two drivers.<sup>6</sup>

However, as the *Apportionment Restatement* explains, with considerable understatement, “available evidence sometimes leaves uncertainty that the legal regime must accommodate.”<sup>7</sup> When that happens, courts must confront tensions with the conceptual purity of the two-step apportionment above. Would that it were not so, but confront and resolve it the law must.

The lacunae in evidence with which *The Multiplication of Indivisible Injury* is concerned is worth restating. Plaintiff can prove that two or more defendants acted tortiously and that their tortious conduct was a factual cause

4. We use the broader term *comparative responsibility*, rather than *comparative negligence* or even *comparative fault*, because those strictly liable are often subject to comparative apportionment.

5. See *Sandford v. Chevrolet Div. of Gen. Motors*, 642 P.2d 624, 630 (Or. 1982) (rejecting an analysis of “comparative causation” in favor of a determination of comparative fault); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 cmt. a (2000) (“Assigning shares of ‘causation’ wrongly suggests that indivisible injuries jointly caused by two or more actors can be divided on the basis of causation.”). Notwithstanding the unassailability of this principle, there is much contrary in the legal literature. See, e.g., *Murray v. Fairbanks Morse*, 610 F.2d 149, 159 (3d Cir. 1979) (requiring an analysis of “causative contribution” by each party where products liability and negligence were alleged); *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843, 850 (N.H. 1978) (deriving a comparative-cause analysis for a products liability matter from the state legislature’s adoption of such an approach for negligence cases); Warren A. Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 89 (1942) (“A negligent person is not liable to another unless his negligence is, in some degree, a factual cause of harm.”); cf. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 424 (Tex. 1984) (juxtaposing comparative fault with comparative causation as new mechanisms for distributing accident costs).

6. There are two reasons for the responsibility apportionment. If joint and several liability is the applicable rule, apportionment is necessary for contribution purposes. If joint and several liability is not the governing rule, apportionment is necessary to determine the share of liability of each defendant to be provided in judgment.

7. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. a (2000).

of some harm to plaintiff.<sup>8</sup> However, unlike the true indivisible injury described above, those defendants caused less than all of the injury suffered by plaintiff. While plaintiff can show that each caused *some* harm, plaintiff cannot show *how much* harm each one caused.<sup>9</sup>

Modern treatment of this situation can be traced to a Texas case, *Landers v. East Texas Salt Water Disposal Co.*<sup>10</sup> Plaintiff's lake was polluted by two upstream defendants; plaintiff had stocked the pond with fish that were killed.<sup>11</sup> Defendants, relying on settled law and *Sun Oil Co. v. Robicheaux*,<sup>12</sup> argued that they could only be held severally liable and that plaintiff was required to prove how much harm each defendant caused, a task that was impossible based on the available evidence.<sup>13</sup> Explaining the injustice of the *Robicheaux* rule, the Texas Supreme Court brushed it aside, holding that when an injury caused by multiple tortfeasors cannot reasonably be apportioned causally, they are jointly and severally liable for the entirety of the harm.<sup>14</sup> In the era of contributory negligence, which assured that plaintiffs would be innocent, the case for the *Landers* rule was compelling, as explained by the Michigan Supreme Court in *Maddux v. Donaldson*:<sup>15</sup>

When we impose upon an injured plaintiff the necessity of proving which impact did which harm in a chain collision situation, what we are actually expressing is a judicial policy that it is better that a plaintiff, injured through no fault of his own, take nothing, than that a

8. Raupp, *supra* note 1, at 261.

9. *Id.*

10. 248 S.W.2d 731 (Tex. 1952).

11. *Id.* at 731–32.

12. 23 S.W.2d 713 (Tex. Comm'n App. 1930).

13. *Landers*, 248 S.W.2d at 732–34. These pollution cases reveal that, contrary to the assertions in *The Multiplication of Indivisible Injury*, the problem is one that occurred and developed in non-automobile accident circumstances. See Raupp, *supra* note 1, at 262 (“The indivisible injury doctrine began in response to a particular set of circumstances in which successive car wrecks occurred so closely in time that it was impossible to sort out which injuries came from which wreck.”). As the *Second Restatement*, which adopted the *Landers* rule, stated, “A typical case is the pollution of a stream by a number of factories which discharge impurities into it.” RESTATEMENT (SECOND) OF TORTS § 433B(2) cmt. c (1965).

Moreover, cases of the *Landers* era reveal a variety of tort contexts in which causal indivisibility arose. See *Phillips Petroleum Co. v. Hardee*, 189 F.2d 205, 206 (5th Cir. 1951) (pollution of irrigation water that harmed plaintiffs' rice crop); *Finnegan v. Royal Realty Co.*, 218 P.2d 17, 17–18 (Cal. 1950) (enhanced injury after a fire due to the obstruction of exit doors); *City of Oakland v. Pac. Gas & Elec. Co.*, 118 P.2d 328, 329 (Cal. Dist. Ct. App. 1941) (escaping steam damaged library books); *Riley v. Indus. Fin. Serv. Co.*, 302 S.W.2d 652, 654 (Tex. 1957) (emotional distress due to oppressive loan-collection practices by defendants).

Causal indivisibility continues to be an issue in modern toxic-substances litigation. See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1094–96 (5th Cir. 1973) (noting that each defendant–manufacturer of asbestos products was a cause of some harm to the plaintiff who had a progressive disease, but since evidence did not permit causal apportionment, defendants could be held jointly and severally liable for all harm based on *Landers*).

14. *Landers*, 248 S.W.2d at 734.

15. 108 N.W.2d 33 (Mich. 1961).

tortfeasor pay more than his theoretical share of the damages accruing out of a confused situation which his wrong has helped to create. The mere statement of the policy exposes its aberrations.<sup>16</sup>

To distinguish the “evidentially indivisible injury” of *Landers* from the “truly indivisible injury” of the pedestrian hit by a car wheel, we refer to the “*Landers* rule,” rather than the “indivisible injury rule,” even though some courts<sup>17</sup> and Mr. Raupp’s *The Multiplication of Indivisible Injury*<sup>18</sup> employ the latter terminology.

*Landers*, *Maddux*, and other cases of that generation that softened the *Robicheaux* approach found their way into the *Second Restatement of Torts* in 1965.<sup>19</sup> But the *Second Restatement* added a felicitous improvement that *Landers* largely glided by<sup>20</sup>: proof by a plaintiff that each of multiple defendants had caused some indeterminate amount of harm would shift the burden of proof on causal apportionment to defendants.<sup>21</sup> Defendants could then introduce evidence that might be the basis for causal apportionment. Of course, the allocation of the burden of proof when evidence is unavailable is outcome dispositive—the *Restatement* shifted the risk of evidential insufficiency to defendants. But when a defendant could meet the burden, the defendant would not pay for the entire harm.<sup>22</sup>

*Multiplication of Indivisible Injury* expresses the concern that the *Landers* rule has been expanded too far, encouraged by the *Third*

16. *Id.* at 35 (footnote omitted); accord RESTATEMENT (SECOND) OF TORTS § 433B(2) cmt. d (1965) (“As between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm caused should fall upon the former.”).

17. See, e.g., *Piner v. Superior Court*, 962 P.2d 909, 916 (Ariz. 1998).

18. See, e.g., Raupp, *supra* note 1, at 259 (“[T]he ‘single indivisible injury rule’ . . . operates solely as an exception to the rule requiring the plaintiff to tie his specific injuries to the event created by the negligent defendant.” (emphasis omitted)).

19. RESTATEMENT (SECOND) OF TORTS § 433B(2) (1965) (shifting the burden of proof on causal apportionment to defendants who claim they caused less than all of plaintiff’s harm).

20. *Landers* only obliquely addressed the matter of shifting the burden of proof to defendants, thereby giving them the opportunity to provide evidence that could permit causal apportionment:

Where the tortious acts of two or more wrongdoers join to produce an indivisible injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for the entire damages and the injured party may proceed to judgment against any one separately or against all in one suit.

248 S.W.2d at 734. Yet an injury might be apportioned with reasonable certainty either by plaintiff or by defendants—*Landers* means that plaintiff need not do it as an aspect of her prima facie case. The *Second Restatement* made clear that if a plaintiff does not provide evidence for causal apportionment, defendants then have the burden of proof to do so. RESTATEMENT (SECOND) OF TORTS § 433B(2) (1965).

21. RESTATEMENT (SECOND) OF TORTS § 433B(2) (1965). For an excellent history of Section 433B(2), see Gerald W. Boston, *Apportionment of Harm in Tort Law: A Proposed Restatement*, 21 U. DAYTON L. REV. 267 (1996).

22. RESTATEMENT (SECOND) OF TORTS § 433B(2) (1965).

*Restatement of Torts*.<sup>23</sup> The author recommends that courts take a more active role in screening cases to determine that causal apportionment is truly indivisible.<sup>24</sup> He argues that the time between the separate events causing harm should inform courts in this screening process, although he does not advocate a specific time period for dispositive effect.<sup>25</sup> In addition, Mr. Raupp goes on to point out substantial difficulties with the administration of the *Landers* rule in an era where several liability, rather than joint and several liability, plays a major role in apportionment.<sup>26</sup> Thus, in many jurisdictions, nonparties may be assessed a percentage of comparative responsibility in order to assure that the principle of several liability—each party only pays its comparative responsibility share of the harm—is respected. Those nonparties may be physicians or others for whom a finding of wrongdoing would cause reputational harm. Making a finding of fault with concomitant harm to a nonparty is unfair, Mr. Raupp points out.<sup>27</sup>

Perhaps most importantly, we think that the case for *Landers* is weaker today than when it was adopted but for a reason that Mr. Raupp neglects. We are not sympathetic to his entreaties that courts police the availability of *Landers* more carefully nor do we find the use of time between events particularly useful for any policing that might occur. We agree that there are difficult administrative issues in the application of *Landers* to the modern era of comparative responsibility, modifications of joint and several liability, and assessment of responsibility to nonparties. Nevertheless, we argue that muddling through is better than the alternatives, and we prefer a different muddle from the one Mr. Raupp presents. Finally, we appreciate that the assignment of fault or responsibility to certain nonparties may cause them some reputational or emotional harm, but this is the consequence of modification of joint and several liability, not the *Landers* rule. It exists whether or not courts accept or reject *Landers*. We explain our position on these matters below.

First, the *Landers* rule is based on the fact that two or more *wrongdoers* caused harm to an innocent victim, as expressed in the quote from *Maddux, supra*. In a day when contributory negligence was a complete bar to recovery, all plaintiffs seeking to invoke *Landers* were innocent. With the adoption of comparative responsibility, that will not always be the case, and the fairness of shifting the burden of proof to wrongdoers is considerably

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23. See Raupp, *supra* note 1, at 264 (claiming that the *Apportionment Restatement* does not provide a line to determine when the *Landers* rule applies).

24. *Id.* at 279–81.

25. See *id.* at 279 (declining to adopt a “hard rule as to when injuries take place too far apart,” but advocating “limiting language” to restrict application of the doctrine).

26. See generally *id.* at 269–78 (identifying issues with the application of the indivisible injury rule as it acts to bar certain plaintiffs’ recovery and as it applies to nonparties).

27. *Id.* at 275–78.

weakened.<sup>28</sup> That weakened justification led us to search for some alternative to the *Landers* rule in the *Third Restatement*. But Mr. Raupp is wrong to ascribe the development of or the expansion of the *Landers* rule to the *Third Restatement*;<sup>29</sup> it was there in the *Second Restatement*.<sup>30</sup> And the *Second Restatement*, like the *Third*, had no restriction on how close in time the two events causing the injury must be.<sup>31</sup> True, the advent of comparative responsibility since the *Second Restatement* spawned new concerns, and Mr. Raupp is free to suggest different responses from those that we did, but our adoption of the *Landers* rule is not responsible for the ills that Mr. Raupp identifies.

Before explaining the accommodation of this tension we endorse, let us consider why careful judicial screening is not essential in a *Landers* situation. The critical matter is that *Landers* does not simply make the defendants jointly and severally liable for the entire harm. Rather, the rule shifts the burden of proof on causal apportionment from the plaintiff to the defendants after the plaintiff shows that each defendant caused *some* harm, but cannot prove how much.<sup>32</sup> Thus, defendants always have the opportunity to prove how little of the injury they caused. At least one of the defendants, and perhaps both, have the incentive to introduce evidence that would permit the fact finder to apportion on the basis of causation. Thus, the matter of screening cases to determine if they are genuine *Landers* cases does not pose a problem requiring substantial efforts. If the evidence introduced during the plaintiff's case reveals the existence of an evidential basis for causal apportionment that plaintiff has ignored, the court should deny plaintiff the burden-shifting benefit of *Landers*. But in other cases, defendants should, acting in their own interest, solve the problem of obtaining and presenting available evidence to permit causal apportionment.<sup>33</sup>

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28. To generalize the point made in the text, many tort doctrines were premised on an innocent plaintiff. Adoption of comparative responsibility requires rethinking and potential modification of all of those rules. See Michael D. Green, *The Unanticipated Ripples of Comparative Negligence: Superseding Cause in Products Liability and Beyond*, 53 S.C. L. REV. 1103 (2002) (explaining the many product-liability doctrines potentially affected by the adoption of comparative responsibility).

29. See *supra* note 23 and accompanying text.

30. RESTATEMENT (SECOND) OF TORTS § 433A(2) cmt. i (1965).

31. Compare RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26(b)(1)–(2), cmt. g (2000) (defining an injury as indivisible when one or more parties has caused less than all of plaintiff's harm but the evidence does not provide a "reasonable basis for the factfinder to determine" the amount of harm caused by that party), with RESTATEMENT (SECOND) OF TORTS § 433A(2) cmt. i (1965) (defining an indivisible injury as one "incapable of any logical, reasonable, or practical division").

32. And we acknowledge that the availability of *Landers* does not provide incentives for a plaintiff to seek out such evidence, especially when joint and several liability does not exist and one of the defendants is insolvent.

33. With some frequency, defendants make a strategic decision to eschew the causal apportionment opportunity and instead attempt to prove that they caused no harm. See, e.g., *Dafner v. Raymark Indus. Inc.*, 611 A.2d 136, 141 (N.J. Super. Ct. App. Div. 1992) (summarizing the

To be sure, there may be cases where it is not evident that plaintiff has access to evidence that would permit causal apportionment, but such evidence does exist. Plaintiff may choose not to present such evidence because *Landers* results in her being better off. Yet defendants have the opportunity to seek that evidence through discovery. If the evidence resides in medical records of the plaintiff, defendants routinely obtain access to that evidence.<sup>34</sup> Only in what we suspect are quite limited circumstances where plaintiff uniquely has control of evidence that cannot be obtained through discovery would there be a problem of the sort that concerns Mr. Raupp.

Thus, we are not impressed with *Potts v. Litt*,<sup>35</sup> a case that *The Multiplication of Indivisible Injury* embraces.<sup>36</sup> The court reversed a jury verdict for plaintiff against two defendants who, in separate accidents, injured plaintiff.<sup>37</sup> The trial court instructed the jury that both defendants would be liable for all of the plaintiff's injury if the evidence did not permit causal apportionment.<sup>38</sup> The jury so found, and judgment was entered for plaintiff.<sup>39</sup> Reversing, the court of appeals distinguished precedent in Arizona because in this case, the accidents were thirteen days apart, and plaintiff had been treated by a chiropractor five times in between.<sup>40</sup> That was too long a period, according to the court, to shift the burden of proof to defendants.<sup>41</sup> But if there was evidence resulting from those five chiropractic visits that would permit causal apportionment, the defendants could have as readily obtained it and presented it at trial as could have the plaintiff. Unfortunately, the *Potts* court does not address whether defendants made such an attempt, and it may be that, going for broke, defendants decided to rely on the argument that the burden of proof on causal apportionment was on the plaintiff and declined to provide the jury with evidence that would have provided the basis for causal apportionment.<sup>42</sup>

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testimony of an asbestos-exposure expert, who “completely discounted” any role of defendant’s asbestos in causing the plaintiff’s cancer).

34. See FED. R. CIV. P. 34, 35, 45 (stating the procedural rules for obtaining documents and physical and mental examinations).

35. 828 P.2d 1239 (Ariz. Ct. App. 1991).

36. See Raupp, *supra* note 1, at 264 & n.37 (acknowledging the limiting effects of *Potts*, in which the injury-causing accidents occurred thirteen days apart).

37. *Potts*, 828 P.2d at 1240, 1242.

38. *Id.* at 1241.

39. *Id.* at 1240.

40. *Id.* at 1241 (distinguishing *Holtz v. Holder*, 418 P.2d 584 (Ariz. 1966)).

41. *Id.*

42. Similarly, we are not impressed with *State ex rel. Jinkerson v. Koehr*, 826 S.W.2d 346 (Mo. 1992)—also relied on by Mr. Raupp, *supra* note 1, at 265—as a decision cutting back on the *Landers* rule. The Missouri Supreme Court held that there was not common liability of two defendants who were in separate accidents with plaintiffs some eleven months apart. *Jinkerson*, 826 S.W.2d at 346, 348. As a consequence, venue could not be based on a provision addressing suit against multiple defendants. *Id.* at 348. But the court did so without consulting its own precedent on the matter, *Barlow v. Thornhill*, 537 S.W.2d 412 (Mo. 1976), which accepted *Landers* in a two-

Employing time as the basis for determining when *Landers* is available, as Mr. Raupp advocates, ignores the rationale of the rule. The point of *Landers* is that causal apportionment is difficult, and it may be difficult regardless of the passage of time. Though time may play a role in the difficulty of proof, consider an asbestosis victim who was exposed to different manufacturers' asbestos over a period of decades. Each exposure to asbestos is thought to cause an incremental, but indeterminable, amount of damage.<sup>43</sup> An asbestosis victim may have been exposed over a period of several decades to different manufacturers' asbestos, but the science on this disease simply does not permit anything but pure speculation about the contribution of each exposure.

How should tort law respond to the adoption of comparative responsibility and its concomitant weakening of the rationale for *Landers*? After all, if plaintiff's fault also contributed to causing his injuries, the case for visiting the risk of inadequate evidence on the defendants is considerably reduced. Initially, while working on the *Third Restatement*, we were enamored of a rule adopted in Hawaii and New Jersey that provides that if there is inadequate evidence to apportion to multiple tortiously caused events, each of which was only a partial cause of plaintiff's harm, the entire harm should be apportioned pro rata to each of those events. Thus, in *Loui v. Oakley*,<sup>44</sup> plaintiff was involved in four different automobile accidents that caused injury to the same part of her body.<sup>45</sup> The court held that, if causal apportionment among the four accidents was not possible, the damages should be divided by the four events with the single defendant in *Loui* (involved in one of the four accidents) liable for one-fourth of the damages.<sup>46</sup> While we felt this was an attractive method to handle this evidentiary

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accident context. *Id.* at 419. Instead, based on plaintiff's analogy to the rule that imposes liability on the original tortfeasor for enhanced harm due to medical malpractice (the secondary harm rule), the *Jinkerson* court distinguished that precedent, as well it should. 826 S.W.2d at 348 (citing *State ex rel. Bitting v. Adolf*, 704 S.W.2d 671 (Mo. 1986)). The secondary harm rule is not about causal apportionment or even causation but is about scope of liability (proximate cause), providing that the enhanced harm is within the first tortfeasor's scope of liability. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 35 (2010) (reiterating the accepted rule as to the scope of liability of negligent parties for enhanced harm). But the *Jinkerson* court never got to *Landers* as a possible basis for common liability of defendants.

43. *See* Michael Green, *A Future for Asbestos Apportionment?*, 12 CONN. INS. L.J. 315, 328–35 (2006) (explaining the progressive nature of asbestosis and the possible roles that each incremental exposure may play in the development and progression of the disease).

44. 438 P.2d 393 (Haw. 1968).

45. *Id.* at 394–95.

46. *Id.* at 397. Although *Loui* was pre-comparative responsibility, the New Jersey Supreme Court adopted such a rule post-comparative responsibility. *See* *Campione v. Soden*, 695 A.2d 1364, 1375 (N.J. 1997) (holding that where the jury cannot apportion damages among successive accidents, the court apportions damages equally among the causative events).

uncertainty, it was too radical a step in departing from existing law for the American Law Institute to adopt it in a Restatement.<sup>47</sup>

Instead, the *Third Restatement*, after explaining the history, competing tensions, and lack of a conceptually pure resolution, urges courts to employ a low threshold for the burden of production on the sufficiency of evidence with regard to causal apportionment.<sup>48</sup> Thus, if there is any basis in the record for the jury to apportion harm to different tortiously caused events, the court should permit the jury to do so instead of ruling that the party seeking causal apportionment has failed in her burden of production.<sup>49</sup> The *Third Restatement* places the burden of causal apportionment on the party claiming that his or her tortious conduct caused less than all of the plaintiff's harm.<sup>50</sup> In a comparative negligence world, there will be cases in which the *Landers* rule disadvantages the plaintiff.<sup>51</sup>

One intriguing procedural tangle raised by Mr. Raupp is how to apportion responsibility when there are two or more separate accidents that result in evidentially indivisible harm.<sup>52</sup> Indeed, this problem is not limited to *Landers* but also applies to truly indivisible harm resulting from separate accidents. Consider a first accident in which the plaintiff loses the use of her arm. Despite that loss, she is still able to pursue full-time employment. In the second accident, she loses the use of a leg. The combination of the loss of the arm and the leg prevent her from pursuing her occupation, but neither

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47. Although not adopted in the *Third Restatement*, pro rata causal apportionment is presented in a positive light in the Reporters' Notes. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 Reporters' Note cmt. h (2000).

48. *Id.*

49. *Id.*; see also *Cal. Orange Co. v. Riverside Portland Cement Co.*, 195 P. 694, 695 (Cal. Dist. Ct. App. 1920) (arguing that the jury is best able to proportion and assess damages where "entire accuracy is impossible" (quoting *Ogden v. Lucas*, 48 Ill. 492, 492 (1868))); *Loui*, 438 P.2d at 396–97 (sanctioning a "rough apportionment" if evidence to permit a more precise determination is unavailable). This relaxed burden of production is consistent with the more general principle applicable to proof of damages that a plaintiff need not provide precise proof as to the amount of damages if evidence is unavailable to do so. See, e.g., *Bagwell Coatings, Inc. v. Middle S. Energy, Inc.*, 797 F.2d 1298, 1309 (5th Cir. 1986) ("[I]t may be said, as a general rule, that a party who has broken his contract will not be permitted to escape liability because of the lack of a perfect measure of damages caused by his breach. Therefore, a reasonable basis for computation and the best evidence which is obtainable under the circumstances of the case, and which will enable the trier to arrive at a fair approximate estimate of loss is sufficient proof." (quoting *Koehring Co. v. Hyde Constr. Co.*, 178 So.2d 838, 853 (Miss. 1965))); *Blackburn v. Aetna Freight Lines, Inc.*, 368 F.2d 345, 347–48 (3d Cir. 1966) (observing that the plaintiff need only supply information sufficient to estimate damages, and exactness is not required).

50. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. h (2000).

51. Thus, if after suffering injury, the plaintiff is negligent in explaining a prior medical condition that results in enhanced harm, the plaintiff theoretically should only have her comparative responsibility reduce the enhanced harm. But if the harm is "evidentially indivisible," plaintiff's comparative responsibility will reduce her recovery for the entirety of her injury. See *id.* § 3 Reporters' Note cmt. b (2000) (discussing the damage-apportionment issues raised by a plaintiff's additional preaccident and postaccident injuries resulting from her own negligence).

52. Raupp, *supra* note 1, at 259.

loss separately would. Each of the defendants is a cause of the truly indivisible harm of loss of employment.

The comparative responsibility of the parties in one such accident is different from the comparative responsibility of a different set of parties in a different accident. Thus, logically there should be separate apportionments of comparative responsibility for each such event in this type of case. But two separate apportionments—among separate sets of parties in each—then raise the problem of how to combine them to determine what the liability will be for each defendant who is liable for a true or *Landers* indivisible injury. Mr. Raupp endorses the procedure set forth by the Arizona Supreme Court in *Piner v. Superior Court*,<sup>53</sup> which entails adding the fault found in each separate accident for all parties and dividing by the number of accidents involved.<sup>54</sup>

The *Piner* rule is intuitively attractive—the logic being that each party’s fault in each separate accident is distinct from the fault in another action. Nevertheless, we find it less desirable than a unitary effort at apportioning liability among all relevant persons from all injury-contributing accidents. And the common practice in a truly indivisible injury case is to have a single apportionment. Separate apportionment simply does not work when there is only one defendant at fault in each accident. Comparative responsibility of 100% would have to be assigned to each. That would result in each defendant bearing a pro rata share of the liability, even if there is a wide disparity between their respective culpabilities in the two accidents.

Thus, we think a preferable apportionment scheme would be to have the jury do a single apportionment among all parties involved in all of the relevant accidents.<sup>55</sup> Granted the plaintiff’s fault in the multiple accidents might be quite different. But juries have been performing equitable apportionments of responsibility for decades, and a blending of plaintiff’s fault in multiple events is no more taxing than other conceptually impure circumstances that arise in apportioning comparative responsibility.<sup>56</sup> A single apportionment also provides the jury with the opportunity to include in its apportionment consideration of causal factors. Thus, even though the

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53. 962 P.2d 909, 917 (Ariz. 1998).

54. For explanation and illustration, see Raupp, *supra* note 1, at 269–78.

55. We assume that there will be a single action in which this unitary apportionment procedure could be conducted. Obviously, there are good reasons for courts to encourage joinder of claims in *Landers* situations whenever possible. See *Loui v. Oakley*, 438 P.2d 393, 397 (Haw. 1968) (urging joinder of all claims against defendants in each of the four accidents contributing to plaintiff’s harm).

56. For example, there was much angst over extending comparative fault to cases in which defendants were strictly liable because comparing plaintiff’s negligence with defendant’s strict liability was comparable to comparing apples and oranges. See, e.g., *Daly v. Gen. Motors Corp.*, 575 P.2d 1162, 1178 (Cal. 1978) (Jefferson, J., concurring and dissenting) (quipping that such an “impractical” apportionment is no more logical than asking the jury to apportion fault between a negligent quart of milk and a strictly liable metal bar).

defendants may not have adequate evidence to meet their burden of production for causal apportionment, the jury could be permitted to do a blended causation and responsibility apportionment that takes into account both the limited evidence on causation and the comparative responsibility of the parties. Imperfect? Yes. But a viable procedure to do the best we can with an unfortunate lacunae in causal evidence? We suggest so, as does the *Third Restatement*.<sup>57</sup>

A critic might question the *Third Restatement's* unitary apportionment scheme because it dilutes the effect of plaintiff's comparative responsibility in jurisdictions that employ a modified comparative scheme. In these jurisdictions, a plaintiff's comparative responsibility that reaches the threshold of 50% (or greater than 50%) resurrects the old contributory-negligence-as-a-complete-bar rule.<sup>58</sup> If the fault of multiple defendants is included in a comparative responsibility apportionment, plaintiff is less likely to reach the threshold required for the complete bar rule than if separate apportionment occurs for each accident.

But this is true in all multiple-defendant cases, not just *Landers* cases. In these cases, the more defendants, the less likely that plaintiff will reach the threshold for barring her claim. If a jurisdiction decides that it really wants to put teeth in its modified scheme, it can provide that plaintiff's negligence bars a claim whenever the plaintiff's comparative responsibility is greater than any single defendant's comparative responsibility.<sup>59</sup> And a jurisdiction that wants to take a short step in that direction could make such a provision for all *Landers* cases, which, after all, a critic might claim, are different from true indivisible injury cases in that each defendant only caused a portion of the harm. Thus, if we did know how much each defendant caused, separate apportionments of the plaintiff with each defendant involved would occur, providing greater bite to modified comparative responsibility. Yet we would also understand a jurisdiction declining to do so because of the basic unfairness of modified comparative responsibility,<sup>60</sup> which only partially

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57. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. j (2000); see also *Loui*, 438 P.2d at 396–97 (permitting a “rough apportionment” by the jury of how much of the plaintiff's damages can be attributed to the defendant's negligence).

58. *The Multiplication of Indivisible Injury* raises this issue, pointing out the “difficult situation created when indivisible injury intersects with the bar-to-recovery provisions of comparative fault regimes.” Raupp, *supra* note 1, at 274.

59. We are only aware of one jurisdiction, among the more than thirty that employ modified comparative responsibility, that compares a plaintiff's responsibility with each defendant for purposes of determining if the plaintiff is barred. WIS. STAT. ANN. § 895.045(1) (West 2006).

60. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7 Reporters' Note cmt. a (2000) (arguing that pure comparative responsibility “better reflects the underlying goal of comparative responsibility: apportioning losses among various parties according to their respective shares of responsibility”).

displaces contributory negligence, a much criticized and now discredited rule.<sup>61</sup>

Mr. Raupp confronts the fact that sometimes a jury will apportion comparative responsibility to nonparties,<sup>62</sup> which is permitted by approximately twenty jurisdictions that have eliminated joint and several liability. Suppose that a nonparty is the sole actor involved in one of multiple accidents, each of which caused an indeterminate amount of harm.

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61. *See, e.g.*, *Haeg v. Sprague, Warner & Co.*, 281 N.W. 261, 263 (Minn. 1938) (recognizing the harshness of contributory negligence); 1 DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 218, at 763 (2d ed. 2011) (“No satisfactory reasoning has ever explained the rule.”); Leon Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36, 36 (1944) (characterizing the contributory negligence rule as “harsh”).

62. Mr. Raupp is not quite correct in attributing assignment of responsibility to nonparties as a consequence of comparative responsibility. Raupp, *supra* note 1, at 275–78. Comparative responsibility does not require apportioning to nonparties. Indeed, at the time of the *Third Restatement* in 2000, there were eight jurisdictions that had adopted comparative fault yet retained joint and several liability and did not apportion liability to nonparties. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 Reporters’ Note cmt. a., tbl.1 (2000) (listing Arkansas, Delaware, Maine, Massachusetts, Pennsylvania, Rhode Island, South Carolina, and South Dakota in this category). Several other jurisdictions, with hybrids between joint and several and several liability, also barred apportionment to nonparties. *See generally id.*

Modification of joint and several liability, instead, is the reason for apportioning to nonparties. Joint and several liability makes each tortfeasor liable for the entirety of plaintiff’s harm, obviating any need for assigning responsibility to those who are not parties. *Id.* § 10. Indeed, the only reason to assign comparative responsibility as among defendants in a joint and several liability regime is for contribution purposes, as each is liable for the full amount of plaintiff’s harm. However, the principle of several liability—each tortfeasor only pays for his or her share of plaintiff’s harm—justifies assigning comparative responsibility to nonparty tortfeasors, which some several liability jurisdictions have adopted. *See id.* § B19 Reporters’ Note cmt. f (stating that “[t]he concept of several liability requires that nonparties be submitted to the factfinder for assignment of responsibility,” and identifying examples of courts that have approved assignment of comparative responsibility to nonparties). The source that Mr. Raupp cites, *supra* note 1, at 275 n.94, does support the proposition that comparative responsibility requires assignment to nonparties, Leonard E. Eilbacher, *Comparative Fault and the Nonparty Tortfeasor*, 17 IND. L. REV. 903, 903 (1984), but it is also incorrect. It is the case that reforming comparative responsibility was one of the reasons for the widespread modification of joint and several liability so that, in an indirect way, comparative responsibility contributed to nonparty apportionment.

Similarly, we disagree with Mr. Raupp’s analysis that nonparty apportionment is not problematic in relation to the plaintiff because the plaintiff had the choice to join the nonparty and chose not to do so. Raupp, *supra* note 1, at 275–76. The reason nonparties are not joined is because personal jurisdiction cannot be obtained over them, subject matter jurisdiction in federal court would be destroyed, or the nonparty is insolvent. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § B19 Reporters’ Note cmt. f (2000) (identifying jurisdictional and solvency issues associated with joinder). And aside from when personal jurisdiction is lacking, defendants are free to join a nonparty through third-party-joinder provisions. *See* FED. R. CIV. P. 14(a) (describing when a defendant may join a third party).

Finally, we disagree with Mr. Raupp that nonparties benefit plaintiffs under joint and several liability by providing another source from which to recover damages. Raupp, *supra* note 1, at 275 n.95. Nonparties are not bound by a judgment, and plaintiff could only recover from a nonparty assigned comparative responsibility by bringing another action against the former nonparty and proving again all of the elements of a tort claim against that person. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § B19 Reporters’ Note cmt. f (2000).

Plaintiff has every incentive to join such a party. Any comparative responsibility assigned to a nonparty will decrease plaintiff's recovery from the remaining defendants and, of course, plaintiff cannot recover anything from a nonparty assigned comparative responsibility. So we think the incidence of such cases will not be common.

How would the unitary apportionment that we advocate above operate when a nonparty and a party are the two tortfeasors who each caused some portion of the harm? Plaintiff, to qualify for *Landers's* burden shifting, would have to show that the nonparty was negligent and caused some of plaintiff's harm. Defendant, then, would have the opportunity to provide evidence to permit causal apportionment, but failing to satisfy that burden of production would result in an apportionment of comparative responsibility to plaintiff (if contributorily negligent in either accident), defendant, and nonparty. At this point, because plaintiff will recover only defendant's comparative share of the damages, plaintiff's incentive is to minimize the negligence of the nonparty, as the more responsibility assigned to the nonparty, the less (presumably) available for the defendant, and, at the end of the day, the less plaintiff will recover from defendant. Of course, defendant has the complementary interest of proving greater culpability by the nonparty to minimize defendant's liability. Does this put the plaintiff in a delicate and uncomfortable strategic position? Yes. Is this apportioning of liability less than conceptually pure? Yes, as we acknowledge above in advocating a unitary apportionment to all parties (and, if necessary nonparties) involved in causing plaintiff's injury. Is this nevertheless a reasonable and workable mechanism for doing the best that we can under the circumstances? We think so. And we think it is better than denying plaintiffs the *Landers* burden shifting and sending such plaintiffs who have been harmed by both tortfeasors, albeit in an indeterminate amount, away with no recovery.

Finally, Mr. Raupp is concerned with the impact of *Landers* and nonparty apportionment on doctors and others who may suffer dignitary and other emotional harm from a finding of faulty conduct.<sup>63</sup> He assesses this consequence as a serious one, while the *Third Restatement* recognizes it but cites a number of reasons that diminish concerns about this adverse impact. Regardless of who is right, we should appreciate that assignment of fault to nonparties with concomitant reputational and emotional harm is a function of several liability rather than the *Landers* rule. Several liability, after all, is the reason for assignment of comparative responsibility to nonparties because it limits liability to each party's comparative share of responsibility. Thus, a doctor whose malpractice causes distinct enhanced harm to an accident victim may well have her negligence and comparative culpability litigated even though a nonparty. Even though we know precisely how much

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63. Raupp, *supra* note 1, at 276–78.

enhanced harm was caused by the doctor, both the original tortfeasor and the doctor are liable for the enhanced harm, and in a several liability jurisdiction their respective degrees of responsibility have to be determined. The harm that Mr. Raupp is concerned about in this context must be laid at the feet of nonparty apportionment, not *Landers*, which only provides one limited context in which the problem arises.

### Conclusion

Evidential uncertainty is unfortunate but a reality for the legal system. In response, we can rest on the burden of proof and leave behind the party who bears it behind. But in many contexts, that response sets off unfairness alarms, as well as concern about diminished incentives for socially responsive behavior. Alternative liability,<sup>64</sup> market-share liability,<sup>65</sup> and rules about how precisely the magnitude of damages must be proved<sup>66</sup> are among the numerous responses that the law has adopted to ameliorate those fairness and incentive concerns. *Landers* is of a piece with these responses to evidential uncertainties.

Apportionment in the face of evidential uncertainty is conceptually messy and does not nourish our appetite for logical ordering. Yet our judgment is that the alternative is worse, so the law should make this accommodation, appreciating the trade-offs involved.

Having made that case, we concur with Mr. Raupp that the law, once having bowed to *Landers*-like pragmatism, should still seek to structure that response in the most coherent and reasonable fashion. We thank him for this opportunity to look more carefully at those issues in light of comparative responsibility, modification of joint and several liability, and apportioning responsibility to nonparties.

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64. See Green, *supra* note 28, at 1106 n.17 (observing that alternative liability is based on a rationale that culpable defendants should bear the burden of proof on causation when an innocent plaintiff is reasonably unable to do so).

65. See Michelle Adams, *Causation and Responsibility in Tort and Affirmative Action*, 79 TEXAS L. REV. 643, 679 (2001) (describing market-share liability as holding defendants in an industry proportionally liable if they cannot exculpate themselves from liability after the plaintiff has established her inability to identify the defendant that caused her injuries). For the work pioneering this approach, see Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978).

66. See Joseph Sanders, Michael D. Green & William C. Powers, Jr., *The Insubstantiality of the "Substantial Factor" Test for Causation*, 73 MO. L. REV. 399, 426–27 (2008) (discussing the difficulty of apportioning damages among defendants whose individual responsibility for asbestos-related injuries is unclear in magnitude).