1997

Dealing with Evidentiary Deficiency

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Lack of information distorts litigation. Claims or defenses that a party might prove easily, or that might even be undisputed, in a world of perfect information can be difficult or impossible to prove in the real world of imperfect information. Some information deficiencies are inevitable, at least in the sense that we could not eliminate them without incurring undue social costs. In some cases, however, a person’s conduct may have caused the deficiency. More generally, the person may have had available a reasonable alternative course of conduct that would have eliminated, or at least mitigated, the deficiency.

Ariel Porat and Alex Stein focus on this problem of “evidential damage” in a fascinating and wide-ranging article. I believe they have made a substantial contribution by creating that focus and by thinking comprehensively about the problem; they have persuaded me that this is a pervasive problem and that we should recognize the common elements among its various manifestations. Perhaps it also follows that we should have an overall strategy for dealing with evidential damage.

I do not, however, agree with Porat and Stein that it is therefore unsatisfactory to address this problem with different doctrinal tools in different situations. Rather, I think it is probably best to use a variety of doctrinal tools to address the problem; the choice of which tool or combination of tools will depend on the facts of the given situation.

In particular, though I believe that the specific “magic bullet” proposed by Porat and Stein—treating the negligent infliction of evidential damage as actionable in tort—has an appropriate role, I do not believe that it is generally optimal. That solution is unnecessarily formal and would tend to multiply litigation. It fails to reflect, and would tend to retard, the usual ability of the litigation system to respond by more limited means to the problem of evidential damage and the more general problem of uncertainty. In some circumstances, it would distract focus from the primary
wrong committed, making liability turn instead on secondary fac-
tors. Finally, because it must be kept in bounds by a requirement
of scienter, it would not even address the most common types of
remediable evidentiary deficiencies, or would do so only clumsily.
Indeed, while Porat and Stein contend that the “comprehensive ev-
dentiary damage doctrine” they propose should “replace all other
legal doctrines that handle the problem of evidential damage both
indirectly and incompletely,” they hedge their bets considerably:
their essential claim is that “evidential damage should be actiona-
ble,” but they hasten to declare that the term “actionable,” as they
use it, “refers to any legal redress, including shifting the burden of
proof.”

In this essay, I will use the term “evidentiary deficiency” to
refer to a deficiency of the evidence—that is, a situation in which,
for whatever reason, the evidence is of less than optimal quality,
and so contributes to uncertainty. And I will use the term “evi-
dential damage” in the sense that I believe Porat and Stein do, to
refer to wrongful conduct by a person that contributes to an evi-
dentiary deficiency. I will not attempt here to offer a comprehen-
sive theory of how the legal system ought to respond to the
problem of evidentiary deficiency, or to the narrower problem of
evidential damage. I will, however, discuss some of the remedies
that are available to the legal system. In doing so I hope to show
that only a rather limited role is appropriate for a specially con-
structed tort remedy. Like Porat and Stein, I will focus on the situa-
tion in which the underlying litigation affected by the evidentiary
deficiency is a civil tort action. Part I considers what I will call
“intrinsic remedies”—those that are available, and often applied,
in the underlying litigation, without the need for joinder of an addi-
tional party or an additional claim. Part II then discusses extrinsic
remedies, including, but not limited to, a tort action for evidential
damage.

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3 Id. at 1899.
4 See id. at 1899-1900.
5 Id. at 1894.
6 See id. at 1894 & n.5.
7 Evidentiary deficiency may perhaps be thought of as a gap between the actual evi-
dence and the “best evidence.” Various aspects of the “best evidence principle” are ex-
plored in great depth in Dale A. Nance, The Best Evidence Principle, 73 IOWA L. REV. 227
(1988).
8 I am thus using the words “evidentiary” and “evidential”—which are dictionary
synonyms—in slightly different senses. An evidentiary deficiency is a deficiency of the
evidence, while evidential damage is an injury to the evidence.
I. INTRINSIC REMEDIES

Intrinsic remedies obviously have the advantage that they do not multiply litigation. Indeed, they are often invisible in the sense that the court will not be conscious that it is invoking a remedy for evidentiary deficiency. Most of these remedies are subject to a significant limitation, in that, at least ordinarily, they can only be invoked when the entity that is allegedly responsible for the evidentiary deficiency is also a party to the litigation concerning the underlying dispute, or closely affiliated with a party. Most often, though, I believe this condition holds. These remedies are therefore extremely useful.

A. Missing Evidence Inference

Porat and Stein give only passing reference to what I believe is probably the most common and useful response of the legal system to evidentiary deficiency—the ability of the factfinder to draw an inference against the party who presumably was in the better position to produce the evidence. One longstanding and well-known version of this inference is the “spoliation inference”—allowing a factfinder to “draw an unfavorable inference against a litigant who has destroyed documents relevant to a legal dispute.”9 But the doctrine is much broader than spoliation. It can be invoked, for example, whenever one party fails to call as a witness a person whose testimony might have been expected to be favorable to that party and whose presence was more easily secured by that party than by the other.10

Like most of the other remedies discussed in this Part, the missing evidence inference can only be invoked when the entity that is allegedly responsible for the evidentiary deficiency, or another close affiliate of that entity, is also a party to the underlying litigation. The essence of this inference is a conclusion by the factfinder, “HOLDER had better access to this item of evidence but didn’t present it, so I think the evidence probably was adverse to HOLDER”—a line of reasoning that simply does not apply if

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9 JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE 32 (1989). This inference is sometimes expressed in the maxim omnia praesumuntur contra spoliatorem—all things are presumed against a wrongdoer. Porat & Stein, supra note 1, at n.16 and accompanying text. In modern terms, however, it is important to distinguish between an adverse inference and an adverse presumption.

10 See, e.g., United States v. Pitts, 918 F.2d 197, 199-200 (D.C. Cir. 1990) (explaining the doctrine and holding instruction erroneous under the circumstances); People v. Walker, 500 N.Y.S.2d 704 (App. Div. 1986) (holding that the trial court committed reversible error by denying defendant ability to argue on basis of the prosecution’s failure to present a witness).
HOLDER is not a party to, or at least interested in, the litigation. In addition, a court will not generally allow a party to rely very heavily on the inference in carrying her burden of producing evidence with respect to a given proposition. Suppose, for example, that the plaintiff is trying to prove that the defendant defrauded her by making misrepresentations about the quality of land he sold her. If the sole basis offered by the plaintiff for concluding that the defendant knew about the condition in question is that the defendant had destroyed some documents that might have revealed such knowledge, a court would likely grant the defendant judgment as a matter of law.

Within these limitations, however, the missing evidence inference is extremely useful and powerful. Its strength lies in large part in its informality: a jury is allowed to give the absence of the evidence as much weight as it believes that absence merits. Thus, there is no need for the court to draw legal standards as to whether the party should have produced the evidence in question, or as to how much or what quality of evidence the party should have produced. The court does not need to determine a standard of scienter; even if the court declines to find that the party's failure to produce an item of evidence was negligent, the jury may give that failure whatever weight it seems to warrant. Obviously, the more purposeful the failure was, the more weight it will tend to have. The key, however, is that the jury is free to analyze the facts of the missing evidence and the surrounding circumstances—whatever is known about the evidence, and how it came to be destroyed, never created, or otherwise not presented in court—and give them whatever probative value they appear to warrant. However powerful the absence of the evidence may be, so much power may the jury accord it.

This effect may, of course, be hard for a party to predict, but any party should take into account that the attempt to limit evidence will often appear more sinister than the evidence itself. And, of course, if it turns out that the evidence is produced after all—as often happens when, for example, attempts to destroy doc-

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11 I mean “factfinder” generally, but for simplicity I will often refer to a jury as the factfinder.

12 Indeed, because the inference itself is a conclusion drawn by the factfinder, there is little need for doctrine concerning it. The factfinder can simply draw whatever inference seems warranted. Courts do, however, occasionally discuss the circumstances in which counsel can argue to the jury that it may draw a missing evidence inference, or the more limited circumstances in which the court may instruct the jury that it might draw such an inference. See, e.g., Pitts, 918 F.2d 197; Walker, 500 N.Y.S.2d 704.
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documents fail to account for all copies—the party may suffer the worst of both worlds—the evidence will be produced and the jurors will tend to assess it, and the party’s motives, in the worst possible light.\(^{13}\)

One other advantage of the missing evidence inference is worthy of note. It is symmetrical and can be invoked against either party, or even both parties, in a given litigation. Indeed, it may even be applied against both parties with respect to the same litigated issue if both seem to be withholding evidence.

B. Allocating the Burden of Production

1. The Initial Allocation

Porat and Stein give substantial attention to the possibility of assigning the burden of persuasion against the party responsible for evidential damage.\(^{14}\) For reasons I will discuss below, I believe this remedy is substantially less important than they do. They seem, however, to overlook a related part of the evidentiary system that is crucial in addressing evidentiary deficiency—assignment of the burden of production.

The burden of production refers to the following situation. Suppose that a given proposition favored by the plaintiff, PROP, is material to the litigation in that, given certain factual predicates, the truth or falsity of PROP may determine which party is entitled to judgment, or whether judgment for a given party is appropriate without making further inquiry into other issues. If the court casts the burden of production on the plaintiff, then, assuming there is insubstantial evidence bearing on the question of whether or not PROP is true, the court will act as if PROP is false; casting the burden of production on the defendant means that, in the same situation, the court will act as if PROP is true. Thus, the party bearing the burden of production knows that it must present substantial evidence regarding PROP—generally, enough evidence to warrant a jury verdict in its favor on that point—or suffer adverse action by the court.

How the burden of production should be allocated is a complex matter. Various factors seem to play a role, but two stand out as especially crucial. First, how probable PROP seems to be in the setting of the case, without additional evidence bearing on it, is

\(^{13}\) See Charles R. Nesson, Foreword to Gorelick et al., supra note 9, at v. For a rather notorious example of a document that was initially withheld, but eventually produced, likely with a significant impact on the jury, see Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 305-08 (2d Cir. 1979).

\(^{14}\) Porat & Stein, supra note 1, at 1913.
obviously significant; if PROP seems overwhelmingly likely in the circumstances, then this factor weighs heavily in favor of imposing the burden of production on the defendant, and if PROP seems very unlikely, then this factor will weigh strongly in favor of imposing the burden of production on the plaintiff. Second, and of principal importance here, if one party has better access to evidence that bears on whether or not PROP is true, then that should weigh in favor of imposing the burden of production on that party.15

The reasoning underlying this second factor is straightforward enough, and is illustrated by the polar case in which one party, say the defendant, has exclusive access to the evidence bearing on PROP. In that case, imposing the burden of production on the plaintiff with respect to PROP is tantamount, whatever the facts may be, to holding as a matter of law that PROP is false: the plaintiff has no way of satisfying the burden, and the defendant will never be required to present the evidence. On the other hand, imposing the burden on the defendant provides some assurance of a just result: if the evidence tends to disprove PROP, the burden of production gives him an appropriate incentive to present it, while if the evidence tends to prove PROP the defendant will likely lose, either failing to satisfy the burden of producing evidence of NOT-PROP or failing to satisfy the jury that NOT-PROP is true.16

Thus, allocation of the burden of production is a significant tool by which the courts can make it likely that the party with better access to the evidence will present it to the extent appropriate, or suffer if he does not. The production burden thus helps limit evidential damage, though its impact is not limited to those who damage evidence. Indeed, allocating the burden of production is stronger medicine than the missing evidence inference: if the burden of production with respect to PROP is assigned to the defendant, and if there is no substantial evidence with respect to PROP, then the plaintiff will receive a favorable ruling as a matter of law.

15 See Bruce L. Hay, Allocating the Burden of Proof, 72 Ind. L.J. 651 (1997) (analyzing these and several other factors). Cf. 2 Kenneth S. Broun et al., McCormick on Evidence 428 (John W. Strong ed., 4th ed. 1992) [hereinafter McCormick] (discussing various factors that enter into allocation of burdens of proof without distinguishing sharply between the burden of proof and the burden of production, and contending that differential access to evidence "should not be overemphasized").
16 Of course, it is possible that the defendant will be able to sift out helpful from unhelpful evidence, presenting enough evidence to satisfy the burden of production that NOT-PROP is true and withholding evidence of PROP. But even then, she may fail to satisfy the jury that NOT-PROP is true, especially if her withholding of evidence is apparent.
on PROP without even having to argue why the evidence is deficient.

2. **Shifting the Burden of Production: Presumptions**

The allocation of the burden of production made at the outset of the litigation, or made in general with respect to a given type of claim, may shift depending on what further facts come into play. A rule of law causing such a shift is a presumption, properly understood. A presumption operates by providing that, if PREDICATE is true, then the jury should conclude that PROP is true, unless the party opposing PROP introduces sufficient evidence to support a finding that PROP is not true.\(^{17}\) Presumptions can operate to account for particulars of the case at hand and shift the burden of production to the party who has, or had, better access to information.\(^{18}\)

Suppose that in a certain case the burden of production with respect to a particular proposition is generally on the plaintiff. Suppose further that some fact or combination of facts in the particular case suggests strongly that the defendant has better access to evidence bearing on that proposition, or makes that differential in access more significant as a basis on which to assign the burden of production. A presumption might usefully shift the burden of production in such a case. For example, usually the plaintiff in a tort case has the burden of producing evidence that the defendant's tortious conduct injured her, but the Restatement of Torts\(^{19}\) provides:

> Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.\(^{20}\)

This rule provides one justification for the result in the celebrated case of *Summers v. Tice*,\(^{21}\) which Porat and Stein adopt as

\(^{17}\) I am following the treatment set forth in 2 McCORMICK, *supra* note 15, at 450.

\(^{18}\) Note that, in some cases, the truth of the predicate is in substantial doubt. The effect of the presumption, assuming that the defendant has challenged PREDICATE but not otherwise offered significant evidence challenging PROP, would then be an instruction of the form: "If you find PREDICATE, then you must find PROP." I am concentrating here on cases in which PREDICATE is clearly true, so that the effect of the presumption is an unconditional shift of the burden of production.

\(^{19}\) Porat & Stein, *supra* note 1, at 1896 n.9 (quoting RESTATEMENT (SECOND) OF TORTS § 433 B (1965) [hereinafter RESTATEMENT OF TORTS]).

\(^{20}\) *Id.*

\(^{21}\) 199 P.2d 1 (Cal. 1948).
Indeed, one of the illustrations to this rule in the official commentary is a capsule summary of *Summers.* Note that on this rationale, the result in *Summers* does not depend on any judgment that the defendants have created evidential damage. The hunters are each liable not because they have created evidential damage, but because (1) they have each acted tortiously, (2) in a way that might have harmed the plaintiff, (3) the plaintiff has indeed been harmed, but (4) it is unclear which hunter's tortious conduct caused the injury. Given this predicate, it seems appropriate to place on each hunter, in the victim's suit against him, the burden of producing evidence that something other than his conduct caused the injury. This is true even if each defendant did nothing wrong apart from the underlying tort—indeed, even if each defendant acted extraordinarily responsibly in a way that would maximize the chance of finding useful evidence. Suppose, for example, that each hunter used bullets with individualized markings, but for some reason—perhaps that the injuring bullet passed through the victim's body and disappeared—the source of the injury still could not be identified. I believe the result would not change. The presumption, in effect, creates a "no fault" rule with respect to the evidentiary deficiency.

In other circumstances, though, the basis for applying a presumption to address an evidentiary deficiency may be that conduct by a party appears to have created or aggravated that deficiency. Thus, a particularly grievous case of destruction or other spoliation might lead to a presumption that the damaged evidence would have disfavored the spoliator. The traditional expression that all things are presumed against the spoliator captures this idea. In fact, however, it is probably rather rare that a case of spoliation is sufficiently serious to justify a true presumption, actually shifting the burden of production, rather than simply supporting the case of the spoliator's opponent.

C. The Burden and Standard of Persuasion

1. In General

Porat and Stein discuss at some length the importance of the burden of persuasion in addressing problems of evidential damage. I agree that the burden of persuasion and its associated concept, the standard of persuasion, have a role in addressing such

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22 Porat & Stein, *supra* note 1, at 1901.
23 **RESTATEMENT OF TORTS** § 433B(3) cmt. h, illus. 9.
problems, but I believe it is somewhat different from, and perhaps lesser than, the one that Porat and Stein envision.

The standard of persuasion reflects the degree to which the factfinder must be persuaded to find for a given party on a particular issue. The standard of persuasion may cast a shadow early in the litigation; if it is clear that in the end the factfinder will not reasonably be able to find for a given party with respect to a given proposition, then the court may as well summarily adjudicate that proposition as a matter of law against that party. It is, however, at the end of the trial, when the case is submitted to the factfinder, that the standard of persuasion comes actively into play. When a case is tried before a jury, the burden of production acts as an instruction to the court, telling it whether the proposition should be submitted to the jury. But the standard of persuasion acts as an instruction to the jurors, assuming the proposition has been submitted to them. It tells them, for any given level of uncertainty, for which party they should find with respect to that proposition.

The key in determining the standard of persuasion is the social loss or gain of the various possible outcomes. Is the difference in value between an accurate determination and an inaccurate one when the defendant is actually entitled to judgment greater than the corresponding difference when the plaintiff is actually entitled to judgment? To the extent that the answer to these questions is affirmative, the standard of persuasion will be unfavorable to the plaintiff. The standard may be expressed in terms of a posterior probability—a probability assessed in light of all the evidence in the case—that is the dividing point between the realm in which the jury should find for the plaintiff and the realm in which it should find for the defendant. Thus, if an inaccurate determination for the plaintiff with respect to PROP is deemed to be about as bad as an inaccurate determination for the defendant, and an accurate determination for the plaintiff is deemed to be about as good as an accurate determination for the defendant, then the dividing point is reached when the probability of PROP is .5—that is, when PROP seems about as likely to be true as not. This is the usual rule in a civil case. If the jurors think that PROP is more likely to be true,

24 I elaborate on this model in somewhat different terms in Richard D. Friedman, Answering the Bayesioskeptical Challenge, 1 INT'L J. ECON. & PROOF 276 (1997). The difference in value between an accurate result and an inaccurate one might be thought of as the opportunity cost of inaccuracy. Thus, this model is essentially equivalent to the earlier one presented in Richard O. Lempert, Modeling Relevance, 75 MICH. L. REV. 1021, 1032-41 (1977).
then they should find for the plaintiff, and if they believe it is less likely to be true, then they should find for the defendant.

A tie-breaking rule is necessary to determine which way the jurors should find if they happen to assign a probability exactly on the dividing point. Most often, such a rule awards the tie to the defendant, perhaps on appropriate grounds of inertia. Thus, we say that the plaintiff must demonstrate the elements of her claim by "a preponderance of the evidence" or—more accurately—prove that the element is "more likely than not" to be true. It is this tie-breaking rule that is most often referred to as the burden of persuasion, and that is how I understand Porat and Stein to use the term. Most often we assume in civil litigation that a "more likely than not" standard will apply, and the only question is in which direction—that is, who loses with respect to an element if the jury finds the element to be exactly as likely to be true as not.

Thus, the metric used by the jurors in applying the standard and burden of persuasion is the posterior probability—how probable a disputed proposition appears in light of all the evidence in the case. Assuming a given posterior probability, application of the standard and burden of persuasion does not depend on the prior probability—that is, on how probable the proposition appeared before the evidence was introduced. That is old news, superseded by the newer information. Moreover, given the posterior probability, application of the standard or burden of persuasion generally does not depend on the parties' relative access to the evidence. Such access may affect the posterior probability assigned by the jury, thus the missing evidence inference, but it is the posterior probability of PROP that is the bottom line. If that probability is sufficiently high, then the jurors should find in favor of the plaintiff, whether one party, the other, or neither had better access to evidence.

This analysis suggests two basic points. First, if we think of the burden of persuasion in a civil suit as the tie-breaking rule that determines for which party the jurors should find if their probability assessment is exactly on the dividing point, then determining which party has the burden is a relatively insignificant issue. Most often, if there is enough evidence on a matter to send it to the jury, it is unlikely that the jury will assign a posterior probability right on the fifty percent dividing point, which is, after all, infinitesimally small. Allocation of that burden will not have any substantial effect in treating problems of evidentiary deficiency, and I think Porat and Stein expend relatively too much effort in addressing it. The more significant matter is what I have called the stan-
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standard of persuasion. The standard of persuasion identifies not who wins when the jury’s probability assessment is right on the dividing point, but where, in the probability continuum from zero to one, that dividing point should be.\(^{25}\)

Second, we must exercise caution in adjusting the standard of persuasion as a response to an evidentiary deficiency. The standard of persuasion depends on assessments of social gains and losses from accurate and inaccurate determinations, and it is measured in terms of posterior probability. Perhaps we can say in some cases that the standard of persuasion is affected by damage to the evidence caused by one party, so that, for example, if the defendant has caused such damage the plaintiff should be able to prevail at a lower posterior probability than would otherwise be required. That conclusion does not necessarily follow, however. The damage to the evidence has already presumably been taken into account by the jury, via a missing evidence inference, in determining the posterior probability; adjusting the burden of persuasion amounts to a form of double counting, in which the same factor both lowers the bar and brings the plaintiff closer to it. Further, it is not always clear that the evidentiary deficiency affects the factors of social gain and loss that should determine the standard of persuasion. Compare Case One, in which strong evidence makes the posterior probability of PROP rather high, and Case Two, in which the defendant has caused some evidential damage but, even taking that into account, the posterior probability of PROP is lower. If the standard of persuasion is to be lowered because of evidential damage caused by the defendant, then it may mean that judgment would be appropriate for the plaintiff in Case Two but not in Case One, notwithstanding that in Case One the posterior probability is higher. That conclusion should be reached only hesitantly.

I believe, though, in some settings this conclusion is justified. I will discuss three types of cases in which this may be so.

2. Spoliation

If the defendant has damaged the evidence in an egregious

\(^{25}\) An analogy: Whether it takes a simple majority of the Senate (as in the case of confirmation of nominations) or two-thirds (as in the case of treaty ratifications) to approve a given course of conduct is far more significant than what happens in the case of a tie. Assuming the dividing point is 50% (and 100 senators vote), the choice of tie-breaking rule will determine the outcome only when the vote is 50-50. But the choice of majority or two-thirds rules will determine the outcome whenever the number of positive votes is between 51 (or even 50, depending on the tie-breaking rule) and 66, inclusive.
way and so hindered the truth-determination process, there may be a valid argument that the social loss of an inaccurate determination against the defendant is not as great as it would be absent that damage. Thus, in a case of document destruction the judicial system might in effect say to the defendant:

You have destroyed documents that might have revealed with greater clarity whether in fact you committed fraud. Because of that destruction, we are more inclined, by virtue of a spoliation inference, to conclude that you did indeed commit fraud. But not only that: Because you have hindered the truth-determination process itself, we are less concerned than we would otherwise be about the prospect of concluding that you committed fraud when in fact you did not.

In other words, in this circumstance double-counting might well be appropriate. Even in such a situation, though, the courts should probably be cautious, considering whether the best approach is to leave the standard of persuasion alone, confining the impact of the spoliation in the underlying litigation to the spoliation inference and addressing and punishing separately the wrong of obstructing the judicial process.

3. Causation

The other two settings that I will discuss in which adjustment of the standard of persuasion may be appropriate presuppose not spoliation or any other form of evidential damage, but rather the conclusion that the defendant did in fact commit the tort alleged. The issue now is what remedy, if any, the plaintiff should have against the defendant. Given that the defendant acted tortiously, the court might be inclined, depending on the particular circumstances, to apply a relatively lenient standard on other aspects of the case.

Consider first the matter of causation. If it is established that the plaintiff suffered injury and that the defendant acted tortiously in a way that might have caused such injury, the court might decide that the social loss of holding the defendant liable for the injury, even if the defendant did not cause it, is not particularly great. The court might, therefore, apply a standard of persuasion favorable to the plaintiff.26 Thus, in the \textit{Summers}27 situation, the court might

\footnote{26 This discussion raises an interesting issue, which I will refer to as the probability of causation. What do we mean when we say, “it is X\% probable that the tortious conduct caused the injury”? Porat and Stein analyze the problem in terms of a case in which the negligence consists of a doctor’s delay in surgery, leading to a reduction in the patient’s chance of recovery from 75\% to 25\%. Porat & Stein, \textit{supra} note 1, at 1902. If the patient does in fact fail to recover, how probable should we deem it to be that the injury was}
caused by the malpractice? Although Stein is a vigorous opponent of Bayesian methods in analyzing evidentiary problems, and he repeats his antipathy here, he and Porat attempt a Bayesian solution. See id. at 1904 n.37. In light of Stein’s history, I am glad to see the attempt. Unfortunately, it is erroneous in several respects.

First, they define $p(D)$ as the probability of injury (or damage) either by natural causes or through malpractice, and they say that in this case the probability is .75. But .75 is the probability of being afflicted given malpractice; what the probability of injury is before we know whether or not the doctor committed malpractice depends on the probability of malpractice.

Second, they define $p(M)$ as the probability of malpractice and say that it is 1, because the malpractice of the doctor is given, but then they seek to determine $p(M \mid D)$, which would ordinarily be read as the probability of $M$ given $D$. There is nothing inherently wrong with treating $M$ as given, but then it does not make sense to try to determine the probability of $M$ given $D)—if $M$ is given, that probability is 1 as well.

Third, they speak of $p(M \mid D)$, which they attempt to derive from Bayes’s Theorem, as the probability that the injury “originated from”—which I take to be synonymous with “was caused by”—the malpractice. But, Bayes’s Theorem derives the probability of $M$ given $D$, not the probability that $M$ was caused by $D$. And, as I have suggested above, it is the former probability rather than the latter that is the standard meaning of $p(M \mid D)$. In short, the probability they have purported to derive is not a probability of causation.

Fourth, they speak of $p(D \mid M)$ as the ex ante probability of injury given natural causes only and $p(D \mid M)$ as the ex ante probability of injury “given malpractice only.” Id. But the expression “given malpractice only” is essentially meaningless because presumably the natural causes will always be at work. Furthermore, the figure they offer for $p(D \mid M)$ in this case, .50, is derived simply by subtracting $p(D \mid N)$, which is .25 in this case, from $p(D)$, which they have said is .75. But if $M$ is certain, as they have posited, $p(D \mid M)$ must equal $p(D)$.

Notwithstanding all of these problems, they reach the proper result in this case—the probability of causation is 2/3. How can this be? First, I will offer what I believe is a proper analysis of the problem, and then show how it is a mathematical equivalent of the expression they offer, but more straightforward and without the errors and confusions created by their analysis.

Define $p(C \mid D,M)$, the probability of causation given the facts of damage and of malpractice, as equal to

$$p(D \mid M) - p(D \mid N) \over p(D \mid M)$$

Note the common sense intuition here: the probability that the malpractice committed the injury, given that the malpractice was committed and the injury was suffered, is the difference between how probable the injury was given the malpractice and how probable the injury would have been absent the malpractice, scaled by the denominator of the fraction to take into account that there has in fact been both injury and malpractice. Thinking about the matter in a frequentist fashion, this formula determines the probability of causation by asking: of those cases in which both injury and malpractice occurred, how many of them would not have occurred but for the malpractice? (To be precise, though, I have really defined here a probability of association rather than of causation. In this case, however, if malpractice and injury are associated, we can assume that the malpractice caused the injury; certainly, the causation did not run the other way, and it does not seem plausible that both malpractice and injury might have been caused by a third phenomenon that did not involve a causal link from malpractice to injury.)

Now, note how my expression turns out to be a mathematical equivalent of Porat’s and Stein’s. I have defined an expression for $p(C \mid D,M)$, the probability of causation given $D$ and $M$; that is what Porat and Stein are also trying to express in speaking of $p(M \mid D)$, even though this is not what this latter probability means. Using Bayes’s Theorem, they say that this probability equals
decide that, given that each defendant fired a potentially fatal shot, each defendant bears not only the burden of producing evidence, but also the burden of sufficiently satisfying the jury that the shot he fired was not in fact fatal. Consider also the famous case of *Sindell v. Abbott Laboratories*—the DES Case described by Porat and Stein. In this case, it was clear not only that the plaintiff was injured and that each defendant committed tortious conduct capable of causing the type of injury suffered by the plaintiff, but also that each defendant’s conduct did cause such injury to some persons. In such a case, the court might conclude that the precise question of whether a particular defendant caused the injury suffered by a particular plaintiff is nearly insignificant, so long as, in the aggregate, each defendant pays approximately the appropriate amount for the total injury that its conduct caused. Apportionment of responsibility based on market share, in the absence of evidence suggesting another outcome, might therefore be a reasonable solution.

4. Damages

Suppose now that in an ordinary tort case causation of the plaintiff’s injury by the defendant’s conduct is also established, so that the only open question is the extent of the damages. The ordinary concept of the standard of persuasion does not usually work well with respect to damages, which are a quantitative concept: the precise amount of damages could fall at any point over a very broad domain, and so, ordinarily, a jury could not reasonably say that it is more likely than not that the damages suffered by the plaintiff precisely equal any given amount. With a slight adaptation, however, the concept of the standard of persuasion might work tolerably well. Under this adaptation, the jurors would be instructed in an ordinary tort case to determine the median expected amount of damages—that is, the amount X for which, in

\[
p(D) = \frac{p(M) \times p(D|M)}{p(D)}
\]

But as I have shown above, \( p(M) \), by their account, equals 1, and so drops out; \( p(D|M) \) equals what they call \( p(D) \) minus \( p(D|N) \), and what they call \( p(D) \) is really \( p(D|M) \). Thus, the numerator of their fraction should be \( p(D|M) - p(D|N) \), and the denominator should be \( p(D|M) \). In other words, the fraction reduces exactly to the one I have offered above.

In my cynical moments, I am left wondering which is worse, for those whom I have called Bayesioskeptics to snipe at what we Bayesians do or for them to attempt to do what we do.

27 199 P.2d at 1 (Cal. 1948).
28 607 P.2d 924 (Cal. 1980).
their view, it is as probable that the actual amount of damages is
greater than $X$ as that the actual amount is less than $X$.\(^{30}\)

Now, the plaintiff is entitled in the ordinary tort case to an
amount in damages that, in theory, leaves her in a position as good
as the one she would have been in had the tort never been commit-
ted.\(^{31}\) That position, however, is counterfactual, never to be real-
ized for the very reason that the defendant, by committing the tort,
has altered the plaintiff’s position. A court might reason that if the
defendant’s tortious conduct has made the problem of assessing
this counterfactual position very intractable, then the social loss of
assessing damages too high is not as great as it otherwise would be.
There might therefore be some justification for applying a more
lenient standard of persuasion. The court might instruct the jury,
in effect, that it should give the benefit of doubt to the plaintiff, so
that it is somewhat more probable than not that the amount of
damages selected is greater than the actual amount of damages suf-
fered by the plaintiff. This is essentially what the courts often do.\(^{32}\)

### D. Conclusive Remedies

Carried to its logical extreme, an adjustment of the standard of
persuasion eliminates an issue from the litigation. If the issue is a
determinative one, eliminating it can yield a summary adjudication
of the litigation. Thus, if the standard of persuasion for PROP is
taken down to zero, then the court may take PROP as established
in the plaintiff’s favor and act accordingly. Similarly, if the stan-
dard of persuasion for PROP is elevated to one—that is, 100%—
then the court should take the matter as established in the defend-

\(^{30}\) It may in fact be preferable to use the mean (average) expected amount of damages
instead. But the median amount seems to lend itself better to an adaptation of the stan-
dard of persuasion, and so I will concentrate on it here.

\(^{31}\) See, e.g., MARC FRANKLIN & ROBERT RABIN, TORT LAW AND ALTERNATIVES:

\(^{32}\) Thus, in Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931),
the Supreme Court, relying on ample authority, said:

> Where the tort itself is of such a nature as to preclude the ascertainment of the
> amount of damages with certainty, it would be a perversion of fundamental
> principles of justice to deny all relief to the injured person, and thereby relieve
> the wrongdoer from making any amend for his acts. In such case, while the
damages may not be determined by mere speculation or guess, it will be
> enough if the evidence show the extent of the damages as a matter of just and
> reasonable inference, although the result be only approximate. The wrongdoer
> is not entitled to complain that they cannot be measured with the exactness and
> precision that would be possible if the case, which he alone is responsible for
> making, were otherwise.

Id. at 563. See also Porat & Stein, supra note 1, at 1915 n.69 (quoting Dickerson, Inc. v.
Holloway, 685 F. Supp. 1555, 1569 (M.D. Fla. 1987)).
ant's favor; if PROP is an essential element of the plaintiff's claim, then the defendant should have judgment as a matter of law.

Only in rather rare circumstances should a court adopt such a conclusive remedy in response to evidentiary deficiency. In an egregious case of suppression of evidence, however, such a remedy might well be appropriate. Indeed, Federal Rule of Civil Procedure 37(b)(2) explicitly authorizes such remedies for failure to obey discovery orders.33

E. Exclusionary Rules: The Best Evidence Principle

Rules that exclude evidence are usually, or at least often, based on the idea that the evidence would do more harm than good to the truth-determining process or would hurt some social policy external to the litigation at hand. But an exclusionary rule can also be based on the idea that exclusion of the proffered evidence will likely induce the proponent to introduce evidence that is somehow better for the truth-determining process than the proffered evidence. Such a rule is based on the "best evidence principle," the idea that the parties should be encouraged to present the best evidence available of any material proposition.

The original documents rule— or the modern best evidence rule—is a clear manifestation of this principle. The best evidence rule excludes certain types of secondary evidence of the contents of documents, not because they are more prejudicial than probative, but because they raise doubts that the originals would not. If the proponent has reasonable access to the original (a precondition for application of the exclusionary rule), exclusion of the secondary evidence should induce the proponent to present the original, so long as presentation of the original is a better result, from the proponent's point of view, than exclusion of any evidence of the contents of the document. On the other hand, presentation of the original might be counterproductive to the proponent, perhaps be-

33 FED. R. CIV. P. 37(b)(2). That rule authorizes the court to impose various sanctions, including:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . . .

34 See FED. R. EVID. 1001-1008.
cause it contains information absent from the secondary evidence that the proponent would rather keep away from the jury. In such a case, invocation of the best evidence principle will have foiled the proponent in an attempt to skew the evidence unfairly.

In part, the rule against hearsay may also be seen as a best evidence rule. Suppose a proponent offers hearsay evidence of a statement made by a declarant who does not testify but who is reasonably available to that party. The court may decide that, even assuming the hearsay is more probative than prejudicial, it would be better to hear the declarant's own testimony, under oath, in front of the jury, and subject to cross-examination. The court might, therefore, exclude the hearsay evidence in hopes of inducing the proponent to present the live testimony instead. And indeed, if the declarant's evidence is important to the proponent, and the declarant really is easily available as a witness, one would expect the proponent to respond to the exclusion by calling the declarant as a witness—again, unless the proponent anticipates that the declarant's testimony would be counterproductive, in which case the exclusion should be deemed to have a salutary effect.

If the declarant is unavailable, but the unavailability was caused by evidential damage, best evidence principles still apply. Two aspects of hearsay doctrine, both expressed in the Federal Rules of Evidence, reflect this point. Rule 804(a) denies to a proponent certain exceptions to the rule against hearsay if the declarant's unavailability is "due to the procurement or wrongdoing of the proponent . . . for the purpose of preventing the witness from attending or testifying." And on the other side of the coin, the recently promulgated Rule 804(b)(6), which is based on longstanding doctrine, overcomes a hearsay objection if the opponent "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

The extent to which the best evidence principle explains modern evidentiary law, and to which it ought to be invoked to exclude evidence that is net beneficial to truth determination but not as beneficial as other potential evidence, is a matter of debate. For

35 Of course, if the opponent could just as easily make the declarant a witness if he wished, this might be a factor weighing in favor of admitting the hearsay, the evidence offered by the proponent, and leaving it to the opponent to call the declarant as a witness if he deems that worthwhile. I have explored the matter rather fully in Richard D. Friedman, Toward a Partial Economic, Game-Theoretic Analysis of Hearsay, 76 MINN. L. REV. 723, 753-59 (1992).
36 FED. R. EVID. 804(a).
37 FED. R. EVID. 804(b)(6).
38 The leading modern exposition of the principle, attempting (with probably somewhat
present purposes, it is enough to notice that the principle exists, that in some contexts courts actively implement it, and that it provides some relief for the broad problem of evidentiary deficiency and the narrower problem of suppression of useful evidence.

F. Discovery and Presentation of Evidence by the Opponent

One final remedy is easy to overlook because it is so basic and pervasive. Conduct by one party that would otherwise degrade the evidence available to the factfinder is unlikely to have that effect if the opposing party has a reasonable opportunity to discover the evidence, or a close substitute, and present it to the jury. Liberal discovery opportunities, characteristic of modern systems, facilitate the ability of parties to find evidence both from adverse parties and from third persons. Thus, for example, a party’s attempt to suppress an unfavorable document is often bound to fail. Somewhere a photocopy is likely to turn up, and if so the opponent is likely to find it. Moreover, each party has the power to compel unwilling persons to provide testimony for trial, in person or by deposition.

The ability of parties to generate evidence is important not merely as a corrective for conduct by their adversaries that would otherwise create evidential damage. It is a fundamental part of the adversary system, a reflection of the belief that the best way to ensure that the premises are not shrouded in darkness is to give the power of creating light to those who would benefit from it.

G. Summary

I have discussed a range of remedies for evidentiary deficiency available to the court within the underlying litigation, but I would not swear that I have covered them all. I have had several points in mind in this survey.

First, these remedies are varied and extensive. They are a pervasive part of our litigation system, and could not be removed without substantially gutting the system. Indeed, though I have referred to them here as remedies, they are to a large extent a set of considerations that should be taken into account in various contexts in sensible application of the basic building blocks of our procedural system.

Second, these remedies address not merely the problem of evidential damage, harm to the quality of the evidence caused by the wrongful conduct of a person, but also the broader problem of evi-

overextended reach) to account through it for most of the law of evidence, is Nance, supra note 7.
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dentiary deficiency. Where wrongful conduct is the source of the evidentiary deficiency, that factor can be taken into account in determining an appropriate remedy, but no separate framework for addressing evidential damage is necessarily required.

Third, in the aggregate these remedies are very powerful. In large part, they are designed to generate an optimal amount of evidence, and on the whole they seem to succeed rather well; those who regard trials as too long and discovery as too intrusive are likely to think that these remedies are excessively strong.

This discussion does not, of course, suggest that these intrinsic remedies provide a suitable remedy for all important sorts of evidential damage. It does, however, suggest that they are the inevitable, first, and principal line of defense available against evidentiary deficiency and evidential damage, and that only a limited back-up role is appropriate for extrinsic remedies.

II. EXTRINSIC REMEDIES

Extrinsic remedies, as I am using the term, are those that do not form a part of the factfinding process of the underlying proceeding. They must, therefore, result from the initiation of another proceeding or at least from the joinder of an additional claim or party to that proceeding. That in itself is a consideration weighing strongly against heavy reliance on such remedies to correct evidential damage. Another is that measures of the types discussed in Part I, which are intrinsic parts of the underlying proceeding, already provide such a sturdy ring of remedies that most often a separate proceeding will not be necessary. Nevertheless, there are some circumstances in which an extrinsic remedy is appropriate for evidential damage. This Part first discusses what I will call "public remedies," and then the remedy favored by Porat and Stein—an action in tort for evidential damage.

39 Contempt proceedings for violating discovery or similar orders may be thought to occupy an intermediate position between intrinsic and extrinsic remedies. The contempt proceeding is collateral to the underlying litigation. Like an ordinary criminal procedure but unlike a sanction consisting of consequences in the underlying action, it does not immediately benefit the opposing party. On the other hand, the contempt proceeding may be so brief and simple that it can be deemed part of the underlying litigation, and the court imposing contempt may hope not to punish the condemnor but to encourage compliance.

40 In some circumstances, extrinsic remedies are appropriate for the broader problem of evidentiary deficiency. A duty to generate or maintain evidence can be imposed on a person in anticipation that the evidence may turn out to be useful in litigation. Assuming such a duty is created, its violation is a form of evidential damage, and I shall discuss it as such in this Part. Hence, in this Part, I will generally refer to evidential damage, and not to the broader matter of evidentiary deficiency.
A. Public Remedies

By public remedies, I mean those remedies that are meant to punish or deter the wrongful conduct and do not in themselves yield any monetary or litigation benefit to the party potentially hurt by evidential damage, except so far as they do in fact deter the conduct.

The most obvious form of a public remedy for evidential damage is criminal prosecution for obstruction of justice or some similar crime. But there are other forms as well. For example, the government may pursue a civil action against a person or entity, seeking a fine or other relief, for failing to maintain proper records of a prescribed type. An attorney or other professional who suppresses evidence may be subject to sanctions under the governing code of professional responsibility. A police officer or other governmental official who is negligent in gathering or maintaining evidence may be subject to discipline or even dismissal, perhaps but not necessarily after a formal proceeding.

Generalizations are hazardous, especially across such a broad range of remedies, but it is possible to identify several factors that will tend to make a public remedy appropriate.

First, as emphasized earlier, if the person creating the evidential damage is not a party to the underlying litigation, or at least closely interested in it, then remedies intrinsic to the first litigation are unlikely to have much effect. A public remedy might therefore be the best option.

Second, for a public remedy to be appropriate, it is not necessary to show injury to any particular person. Indeed, a public remedy may be designed to guarantee that evidence will be generated and preserved in case litigation later arises, or even to determine whether there should be litigation. Recordkeeping requirements are of this nature. Consider, for example, requirements that a stock exchange maintain records of transactions conducted on the exchange. If the exchange destroys the records in violation of this requirement, it may not be apparent that any individual has lost a litigation-related interest. But the requirement serves a valid purpose, preserving evidence so that potential litigants can explore whether they have a claim worth pursuing and, if necessary, prove the claim.

Third, in some circumstances it may be relatively difficult to assess what weight the evidential damage should be given in underlying litigation—even if in fact underlying litigation may be maintained notwithstanding that damage—but relatively easy to assess
the wrongfulness of the damage. Suppose, for example, that a stockbroker negligently allows all his customer records to be destroyed. Even assuming that without the records a given customer has a viable underlying claim against the broker, perhaps for breach of fiduciary duty, it may be difficult to know what significance to attribute in that action to the destruction. It is relatively easy, though, to say that the stockbroker should not have negligently allowed his records to be destroyed.

Fourth, if the situation is an identifiable and recurrent one, and the same person will be in the same situation repeatedly or continuously, then it is relatively easy, and effective as a deterrent, to articulate evidence-maintaining responsibilities for that person and hold him to a rather strict standard of liability. For example, stockbrokers know that they must maintain customer records, and they should not expect much sympathy if they lose them or allow them to be destroyed.

Finally, a person might commit an evidential wrong that is so egregious that any adverse impact it may have on the wrongdoer in the underlying litigation is not sufficient either as a deterrent or as punishment. Consider particularly dramatic types of evidential damage, such as willful destruction of evidence or—the most dramatic of all—murder of a potential witness. It would obviously be unacceptable if the most serious loss the wrongdoer could suffer as a result was loss of the underlying litigation.

B. A Tort Remedy

We come at last to the remedy emphasized by Porat and Stein, a tort action for evidential damage. I believe there probably is a role for such an action, but quite a narrowly confined one.

1. Impairment by a Third Person

Assume that a third person wrongfully, with a negligent—or worse—state of mind, impairs evidence that likely would otherwise be significant in an actual or potential underlying litigation, and that it appears probable that one of the parties to that litigation is prejudiced by that impairment. In these circumstances, it seems plausible to me that the injured party should have a tort action against the third person for the evidential damage.\textsuperscript{41}

\textsuperscript{41} By referring to potential underlying litigation, I mean to refer to the possibility that a potential plaintiff will decline to bring an underlying tort action against the potential defendant because the evidential damage makes that suit futile and perhaps even irresponsible. I do not believe that the potential plaintiff should be required to bring such a suit as a precondition to an action for evidential damage—but if she does not bring that action she
These circumstances rather closely describe Smith v. Superior Court, the pioneering case recognizing a tort of intentional spoliation of evidence. There, repairmen servicing the plaintiffs' car after an accident destroyed evidence that might have been significant in the plaintiffs' underlying action against another driver based on the accident, thereby "significantly prejudicing the [plaintiffs'] opportunity to obtain damages for their injuries." The court held that "a prospective civil action in a product liability case is a valuable 'probable expectancy' entitled to court protection.

One might ask in such a case why, if the evidential impairment was enough to justify recovery against the third person, the total evidence was not enough to justify recovery against the defendant in the underlying litigation. After all, if the basis for the evidential damage action is the argument, "If it weren't for this impairment my suit against the underlying defendant would be strong enough to merit recovery," then perhaps the jury in the underlying action should be allowed to say, "Taking the impairment into account, the evidence is strong enough to merit recovery." Correspondingly, if the evidence in the underlying action, even taking the impairment into account, is too weak to justify recovery for the plaintiff, then we may ask why the jury should be able to conclude, in an action based on the impairment, that in fact the impairment prejudiced the plaintiff.

Put another way, the question is whether there is a zone in which the facts are sufficiently uncertain that the judicial system is unwilling to hold accountable the underlying defendant, who denies wrongdoing, and yet the evidential impairment is sufficiently clear that the third person should be held accountable. I think there is such a zone. Recall the analysis of causation and damage in Part I: if it is established that the defendant acted wrongfully, and in doing so made determination of causation and damage difficult, then it may be appropriate to apply a relatively lenient standard of persuasion with respect to these issues. The principle seems to apply perfectly well when the wrong is impairment of evidence that would have been useful in another suit.

should be required to demonstrate that it would indeed, in all probability, have been futile or irresponsible.

42 See Porat & Stein, supra note 1, at 1910 n.53 (quoting Smith v. Superior Court, 198 Cal. Rptr. 829 (Ct. App. 1984)).

43 Antecedents to Smith are described in Gorelick et al., supra note 9, at 140-41.

44 Smith, 198 Cal. Rptr. at 829.

45 Id. at 837.
Clemente v. State\textsuperscript{46} illustrates the point nicely. There, a police officer acted negligently in investigating a pedestrian-motorcycle accident, failing to secure information that would have led to the identification of the motorcyclist. The state was held liable because this negligence destroyed the pedestrian's opportunity to obtain compensation for his injuries in litigation against the motorcyclist. That a person should have a right of action against the state for negligent breach of a duty to exercise due care in the conduct of the investigation is a dubious proposition. But let us assume the point, which the California Supreme Court treated as the law of the case.\textsuperscript{47} The state contended that, even given such a right of action, the plaintiff ought not be able to recover unless he showed that any judgment secured from the motorcyclist would have been collectible. The court rejected this argument and, relying on ample traditional authority, declared: "If plaintiff's inability to prove his damages with certainty is due to defendant's actions, the law does not generally require such proof."\textsuperscript{48} That seems reasonable enough, so long as there really is a plausible chance that the evidential damage did actually harm the plaintiff—in this case, that Clemente would have been able to collect on his judgment. If not, the evidential damage claim is a pure windfall for the plaintiff. In such a case, public remedies seem more appropriate, unless they are so inadequate that it seems worthwhile to make the plaintiff, in effect, a bounty hunter.

2. Impairment by a Party to the Underlying Litigation

The argument in favor of a tort action for evidential damage is far weaker when the evidentiary impairment is made by a party to the underlying litigation. In this discussion, I will assume that the impairing party is the defendant in the underlying action; I believe the argument against the action for evidential damage is weaker still when the impairing party is the plaintiff in the underlying action.

Bear in mind that the action for evidential damage only works—unless we are willing to give the plaintiff a windfall—if the plaintiff has, at least plausibly, been damaged in the underlying action. A judgment against the defendant in an evidential damage action would therefore say to the defendant, in essence:

Because you impaired some evidence, we are too uncertain

\textsuperscript{46} 707 P.2d 818 (Cal. 1985); see also Porat & Stein, supra note 1, at 1909 n.50.
\textsuperscript{47} By the time the California Supreme Court decided \textit{Clemente}, it had already decided that there was no such right, but \textit{Clemente} was decided as if there were.
\textsuperscript{48} \textit{Clemente}, 707 P.2d at 828.
given the evidence that remains to determine whether you committed
the underlying tort. Therefore, we cannot hold you liable
to the plaintiff for that tort. But because we think that if you
had not impaired the evidence it is sufficiently likely that we
would have found you liable to the plaintiff for the underlying
tort, we will hold you liable to the same plaintiff for impairing
the evidence, the damages being what you would have had to
pay the plaintiff if you had been held liable for the underlying
tort.

On the other hand, if the court relies on internal remedies to ad-
dress the evidential damage, it may say to the defendant, in es-
sense: "In light of all the evidence, including the fact that you
impaired some evidence, it is sufficiently likely that you committed
the tort alleged that we hold you liable to the plaintiff for it."

I think it is rather obvious that the second approach is simpler,
clearer, and more straightforward. I do not think there are any
instances in which the first approach would justify judgment for the
plaintiff but the second approach would not.\footnote{In order to help make the first approach appear more determinative in the absence
of good information, Porat and Stein offer a rule for the secondary action based on eviden-
tial damage: "If the potential impact of the missing evidence cannot be predicted, the
judge should assume that this evidence, in conjunction with the evidence actually available,
could equally favor either the plaintiff or the defendant . . ." Porat & Stein, supra note 1,
at 1930 & n.112. They offer no basis for this assumption, which strikes me as rather bi-
zarre. It would be odd enough if they assumed merely that the missing evidence itself
could, with equal probability, favor either side, but they are suggesting the more powerful
assumption that the aggregate of the evidence should be treated as even-handed. Under
this approach, any time there is missing evidence, the factfinder should treat the plaintiff's
account and the defendant's account as equally likely. I confess to being mystified.}
The first approach is based on the perception that the probability that the defendant
would have been held liable for the underlying tort if he had not
impaired the evidence is sufficiently great that he should pay dam-
ages as if he had indeed been held liable for that tort. I believe
that in any case where this logic would apply, the court can say
more directly that the probability that the defendant is liable for
the tort is sufficiently great that he should be held liable for it.

The second approach, which is dependent on internal reme-
dies, avoids more than just extra litigation and circumlocution. The
first approach requires some definition of the category of eviden-
tial damage by the defendant that should be actionable. I think
that, despite their best efforts, Porat and Stein leave this category
very amorphous.\footnote{Thus, in many of the cases that Porat and Stein discuss, the evidential damage that
they perceive is attributable to the underlying tortious conduct, and to the very quality that
made the conduct tortious, by altering the situation of the plaintiff. For example, in the
case of a doctor who aggravates risk to P by negligently delaying surgery, they say that the
}
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not have to make that effort. Similarly, the second approach, unlike the first, does not need to be concerned very much with matters of scienter.\textsuperscript{51} To a large extent, as I have suggested in Part I, the internal remedies depend on giving evidence of impairment, however caused, the weight it seems to warrant. And when they move beyond that, they operate, for the most part, in terms of degree rather than of hard-edged doctrinal categories.

The action for evidential damage raises other related problems as well. The premise of the action is that the underlying tort action provides an inadequate remedy given the evidential impairment, so that a back-up action is needed, much in the way that equitable remedies are available when there is no adequate remedy at law. But, as I have argued in Part I, there is in fact a range of remedies internal to and pervasive in the underlying action that address quite powerfully the problem of evidential damage and the broader matter of evidentiary deficiency. If an assessment of evidential damage is to be realistic and to avoid giving the plaintiff a windfall, it must evaluate just how effective these remedies are. This evaluation is at best difficult, at least unless the evidential damage is so severe that it destroys the plaintiff’s chance of recovery in the underlying action, notwithstanding the internal remedies. To simplify the secondary action by assuming that the evidential impairment vitiates the underlying action accords far too little significance to the internal remedies. Moreover, reliance on the secondary action, which seeks the same relief as the underlying one, would tend to retard the proper development of the law governing the underlying action. A court cannot give effect to the secondary action unless it concludes that the underlying action was impaired, and it may be overly hasty in reaching that conclusion.

Perhaps the most troublesome aspect of reliance on the secondary action is that it deflects emphasis in the wrong direction, and so saps the torts system of some of its moral force. The hunters in

\textsuperscript{51} Porat and Stein pay considerable attention to the question of what degree of intentionality should be required for the cause of action they envision. See Porat & Stein, \textit{supra} note 1, at 1922-26.
Summers\(^{52}\) and the manufacturers in Sindell\(^{53}\) were not liable because their conduct hindered the factfinding process. The hunters were liable because they each shot negligently in a way capable of causing grievous harm, and as a result of one of their shots the plaintiff did suffer such harm. The drug manufacturers were liable because they sold drugs that were capable of causing, and did cause, serious injury. In cases like these, the adjudicative system must deal with an evidentiary deficiency, perhaps caused in part by wrongful conduct of the defendant, and it may not be a simple matter to determine, with sufficient confidence to make the defendant liable, that the defendant committed the tort alleged. But to conclude, while fully considering the evidentiary deficiency, that the defendant should indeed be held liable to the plaintiff for that underlying tort is a far different matter from saying that the defendant is liable for creating the evidentiary deficiency.

It is important that the torts system maintain its focus on the principal problem. In cases like these the principal problem is the effect of the defendants' conduct on the lives of people in the outside world, not the effect of that conduct on the litigation of tort cases.

**Conclusion**

I suspect that Porat and Stein would agree with much of what I have said here, as I agree with much of what they have said. To a substantial extent, I suppose, I am operating from the same insights as they and reformulating them in a way that I regard as better accommodated within our litigation system. I believe, however, that we disagree significantly in one important respect: I believe they give too little prominence to the role of internal remedies and correspondingly too much to a tort action for evidential damage. For this reason also, I have chosen to put much of my discussion of evidential damage in the broader framework of evidentiary deficiency, because I believe the internal remedies that address the broader problem provide substantial relief for the narrower problem as well. In any event, Porat and Stein have made a significant contribution by showing that the problem of evidential damage is an important one that appears in many different contexts. Even if no single approach to the problem is appropriate, comprehensive thought about it is very desirable.

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\(^{52}\) 199 P.2d 1 (Cal. 1948).

\(^{53}\) 607 P.2d 924 (Cal. 1980).