



The Restatement (3d) of Torts: Duty: Out Precautionary Principle: In

DRI 2011 Annual Meeting
David A. Oliver
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Heralds of the “Reshaping” of Torts

The New Restatement’s Top 10 Tort Tools

The “Reshaping” of the False Negative Asymmetry In Toxic Tort Causation

The Insubstantiality of the “Substantial Factor” Test for Causation

“Introduction: The Third Restatement of Torts in a Crystal Ball”

Milward v. Acuity Specialty Products

Duty

An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm

- a) Save in “exceptional cases” judges “need not concern themselves with the existence or content of this ordinary duty”
- b) Foreseeability is fact and case specific and only on rare occasions may a court find that reasonable people cannot conclude that an outcome was foreseeable

Duty

The first draft eliminated duty all together

Legal reasoning regarding duty was considered to be “incoherent”

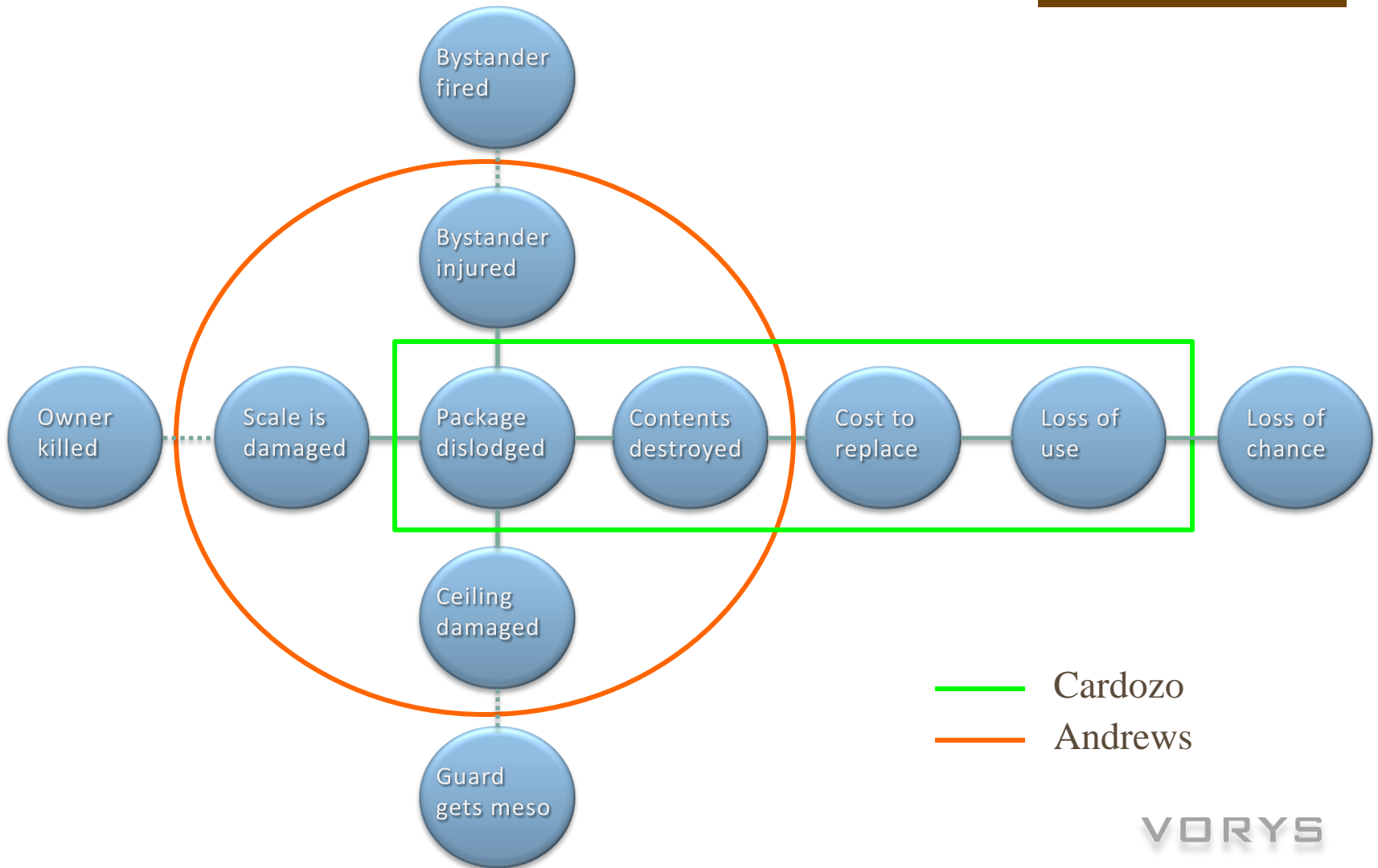
Duty was eviscerated and only risk creation is left

Hardly Incoherent

Cardozo: “The risk reasonably to be perceived defines the duty to be obeyed, and risk imparts relation; it is risk to another or to others within the range of apprehension”.

Andrews: “What we do mean by the word “proximate” is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.”

It's All About Risk



Foreseeability's Fatal Flaw: Hindsight Bias

The impulse to make sense out of unwanted or unexpected circumstances

The more negative the outcome the more likely it will be perceived as having been foreseeable

It's heightened by extreme outcomes

Disputing foreseeability may exacerbate misperceptions of *ex ante* risks and thus assessment of conduct

All that was needed was to understand the relationship between foreseeability, proximate cause and risk; to embrace *Palsgraf's* true meaning: that the *ex ante* risk imparted is the best measure of the reasonableness of the conduct.

The Restatement's Take on Risk

Ex ante or *ex post*?

In the case of cancer, is it simply relative contribution?

Quantitative or qualitative?

When, if ever, can a reasonable person take risks?

We're Irrational About Risk

People tend to hate uncertainty

They overestimate small risks

They underestimate large risks

They fear change

Take Mammography

Assume the following:

- a) Only 1% of women over 50 have breast cancer
- b) The accuracy rate of mammography is 90%
- c) The false positive rate for mammograms is only 5%
- d) A woman over 50 has a positive mammogram

Question:

What are the odds that she really does have breast cancer?

Answer: _____

Percentages Deceive Us

Assume the following:

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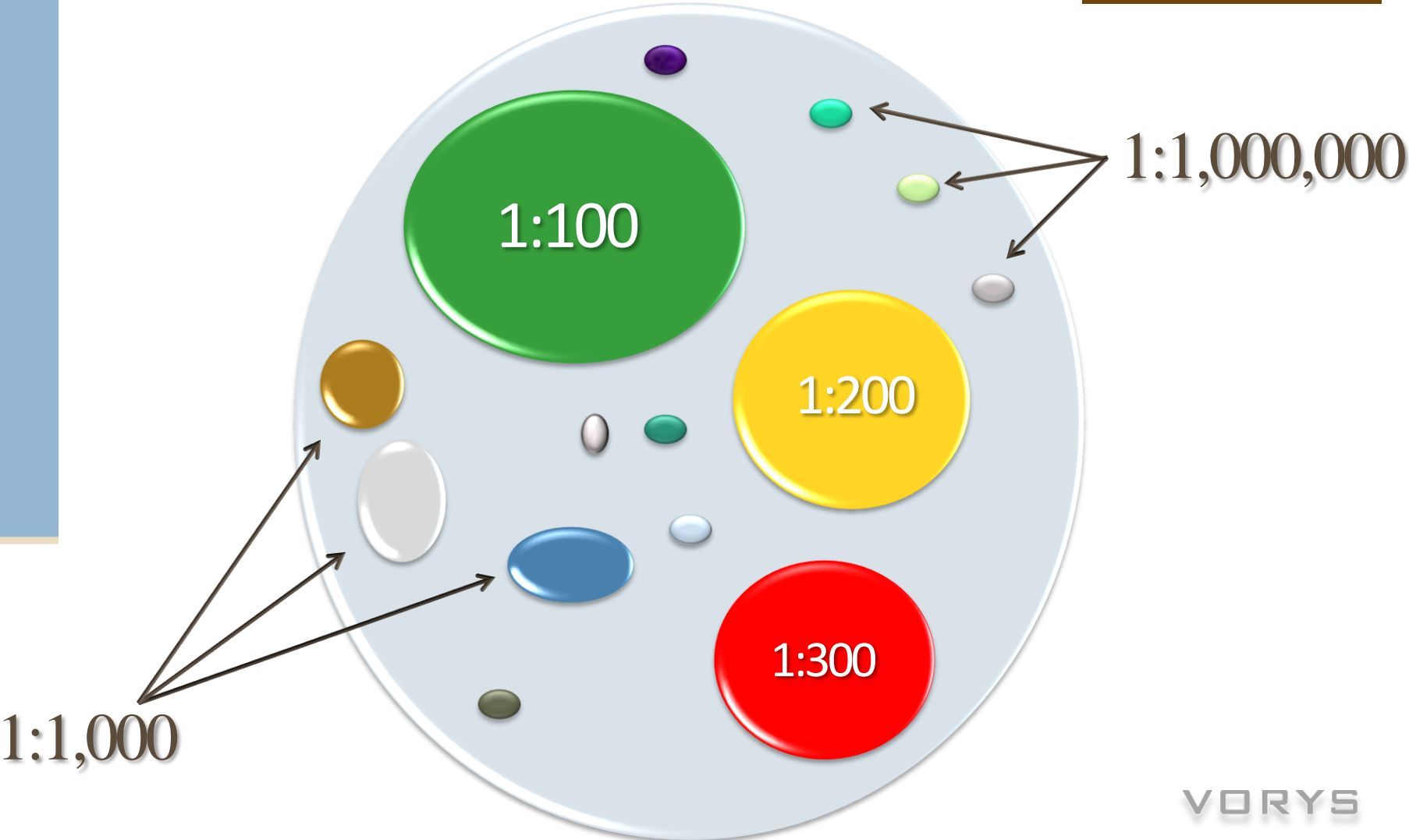
Answer: **15%**

Risk and the Restatement

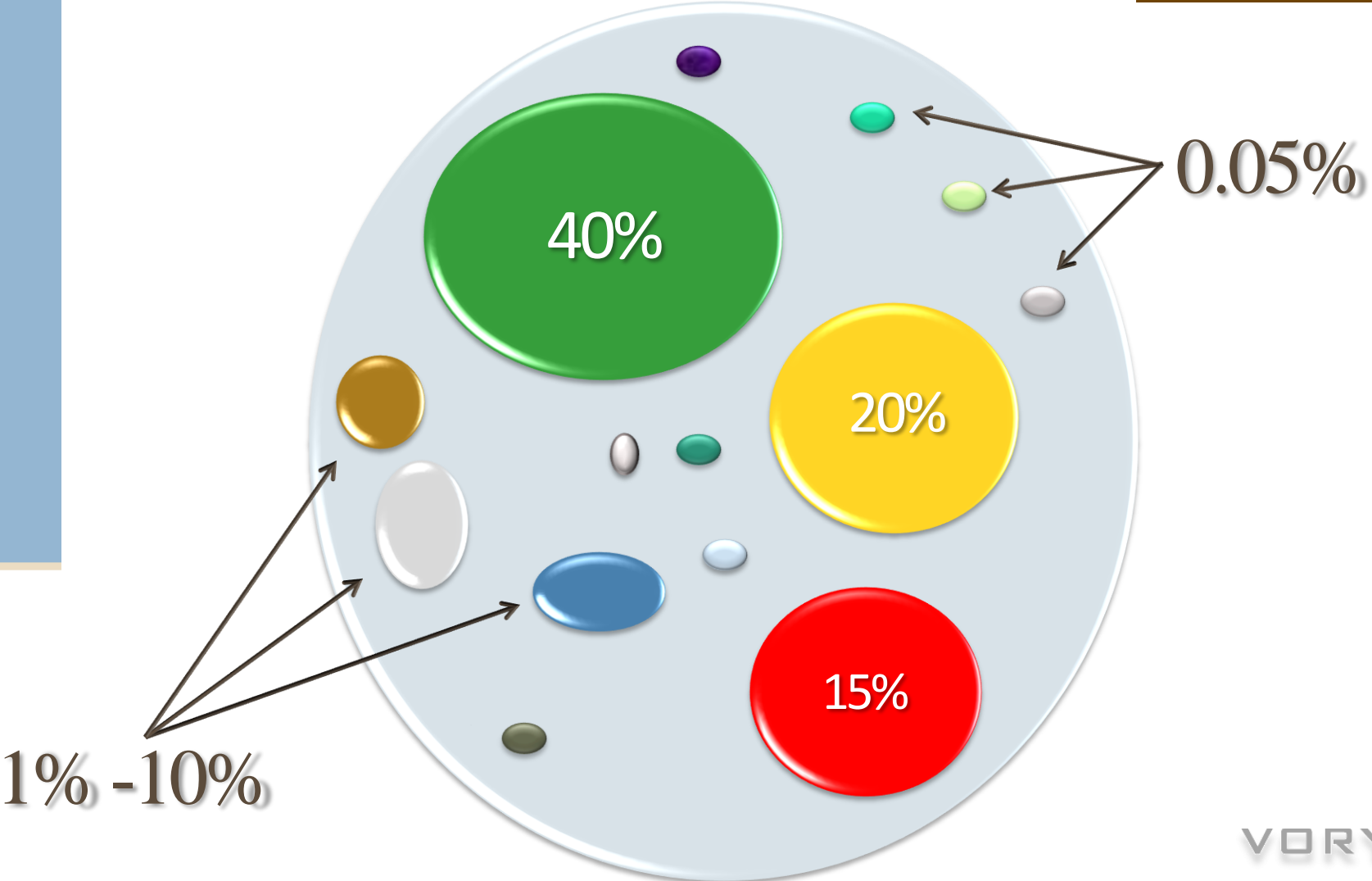
“Given the reality of causal uncertainty, we believe the *Rutherford* solution to the problem is the best yet devised. The *Rutherford* approach of **imposing liability for risk contribution** is self correcting in the case of small doses, at least in jurisdictions with several liability.”

The Insubstantiality of the “Substantial Factor” Test for Causation

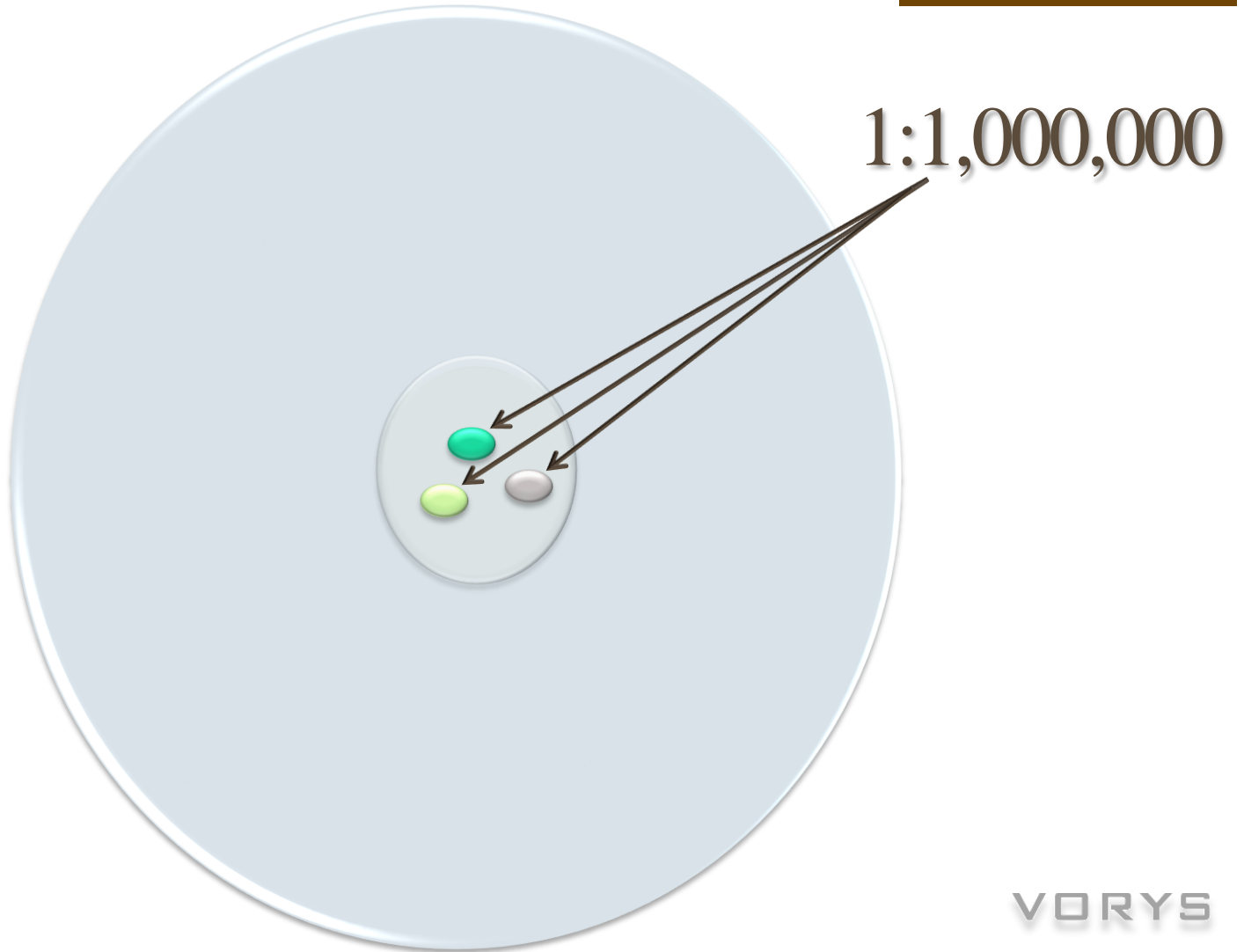
Risks *Ex Ante*



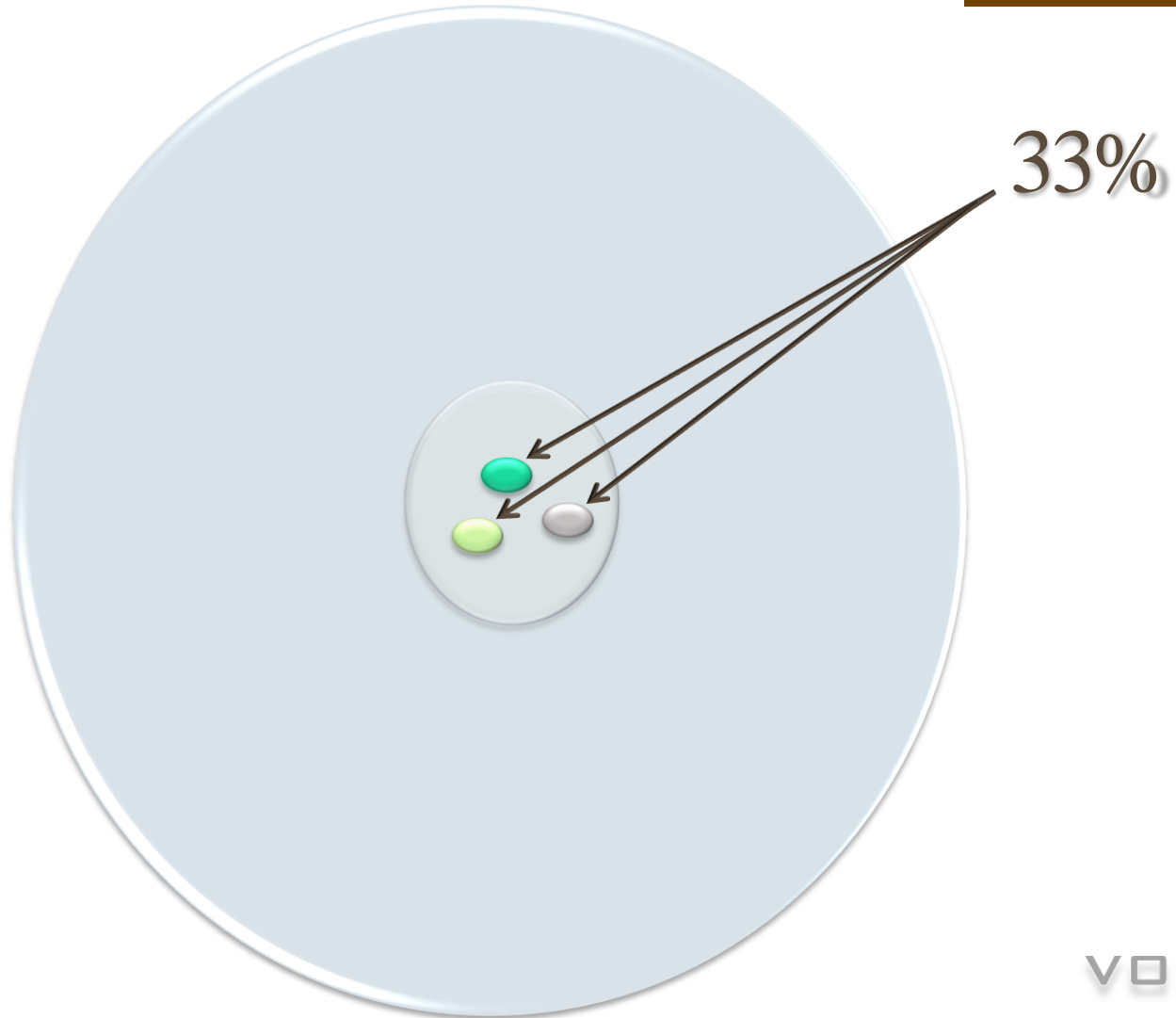
Risk Contribution *Ex Post*



Little Risks *Ex Ante*



Little Risks *Ex Post*: Are Torts Still Wrongs?

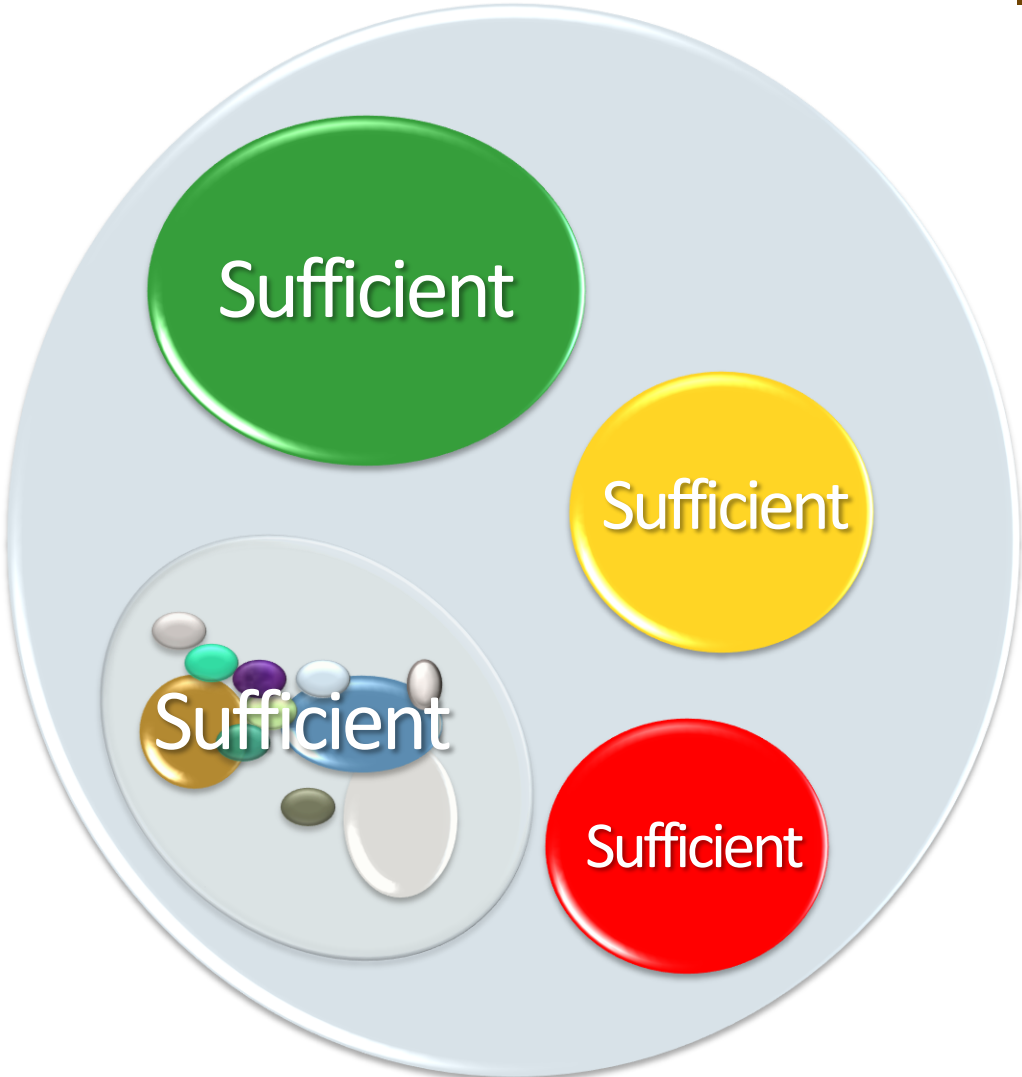


Multiple Sufficient Causes

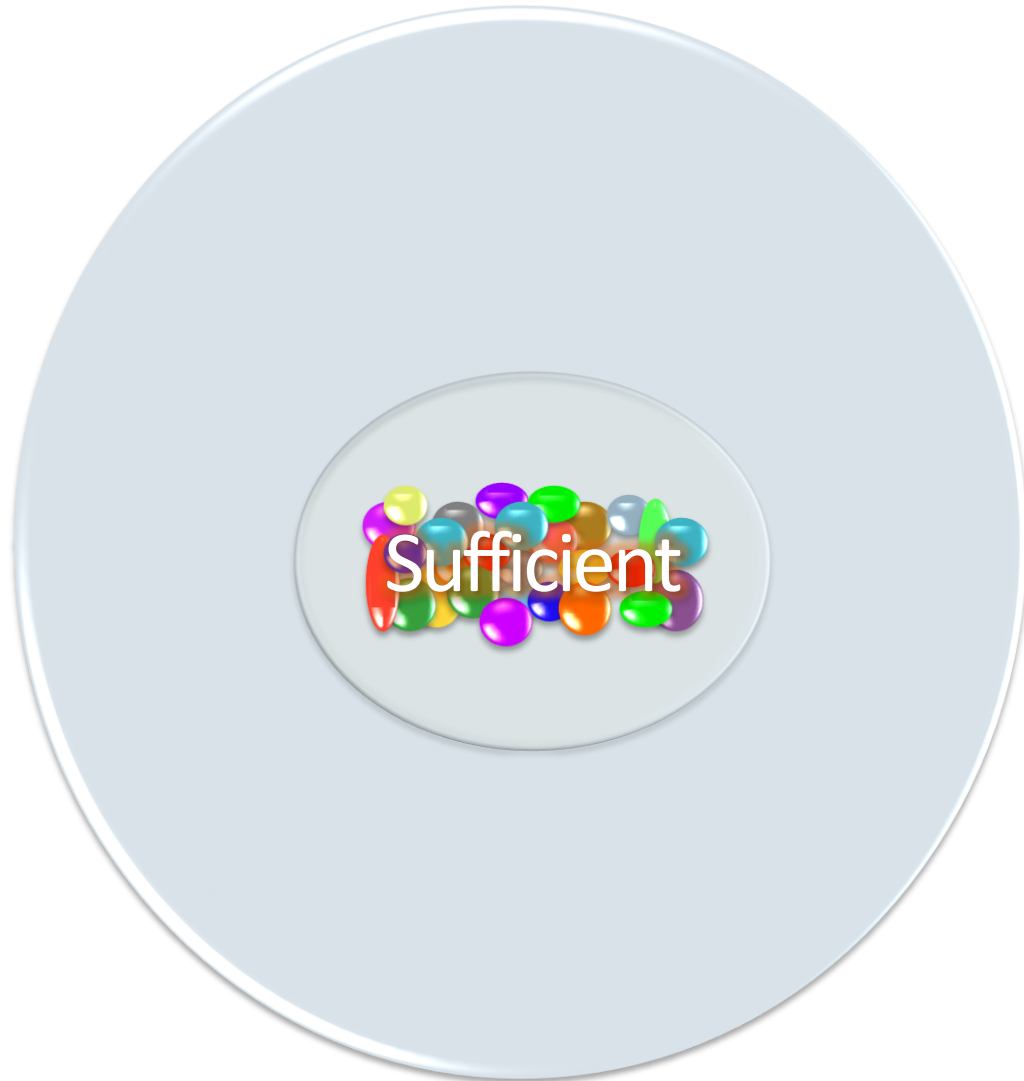
Comment f. The fact that an actor's conduct requires other conduct to be sufficient to cause another's harm does not obviate the applicability of this Section. Moreover, **the fact that the other person's conduct is sufficient to cause the harm does not prevent the actor's conduct from being a factual cause of harm pursuant to this Section, if the actor's conduct is necessary to at least one causal set.**

- Section 27

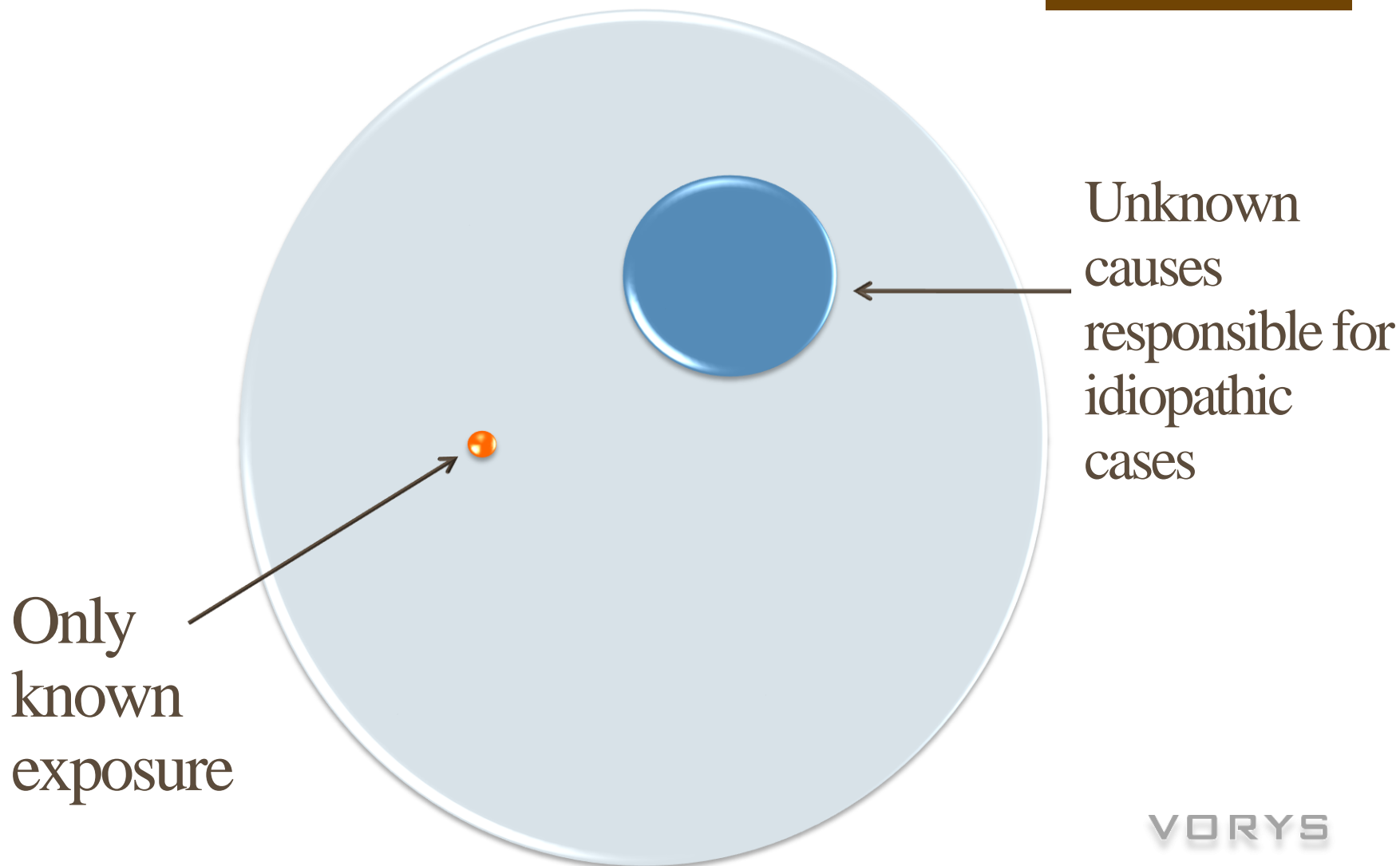
So . . .



But what happens when . . . ?



What does liability for “risk contribution” mean when . . . ?



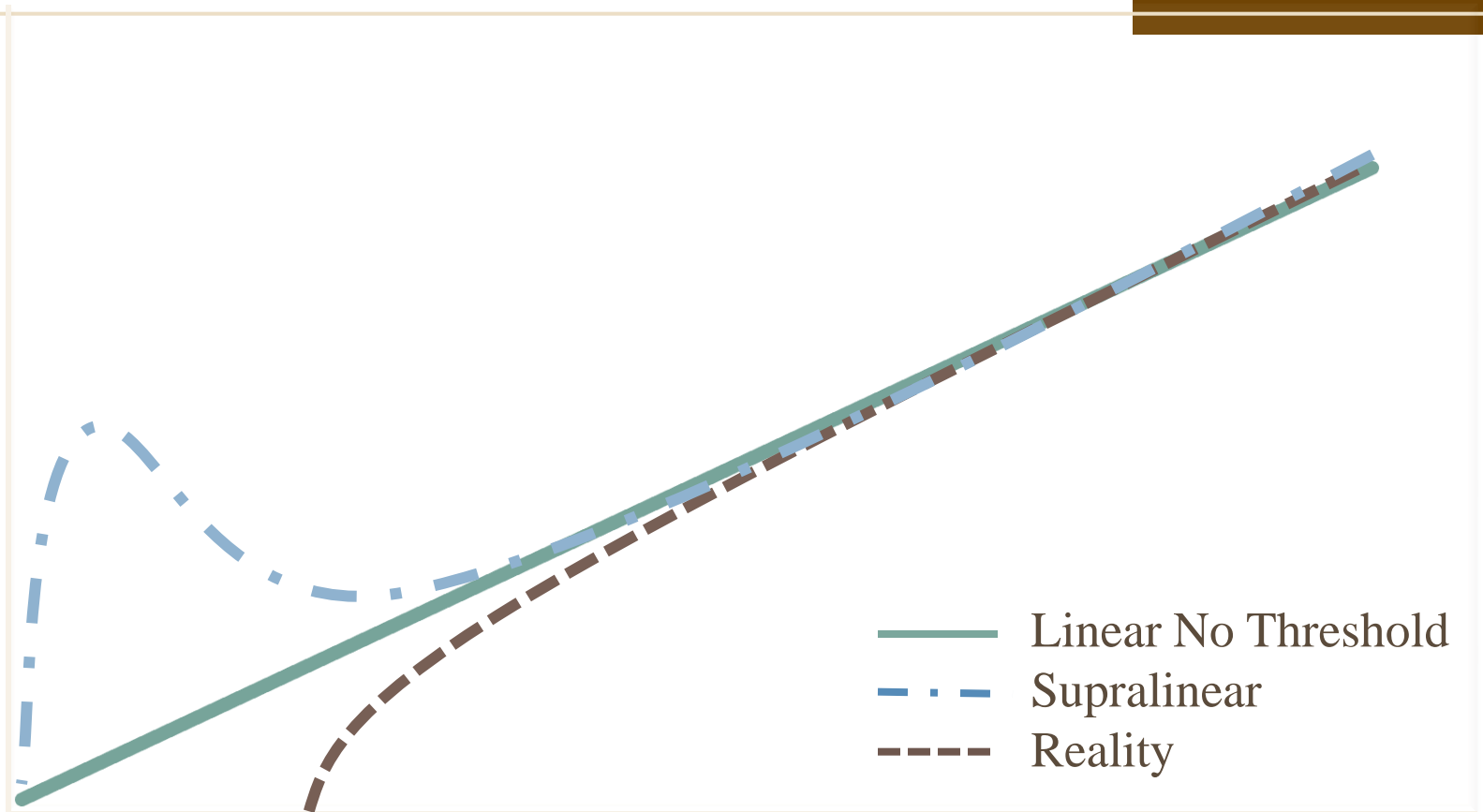
Causation

“We may define a cause to be an object followed by another and where all the objects, similar to the first, are followed by objects similar to the second. Or, in other words, if the first object had not been the second never had existed.”

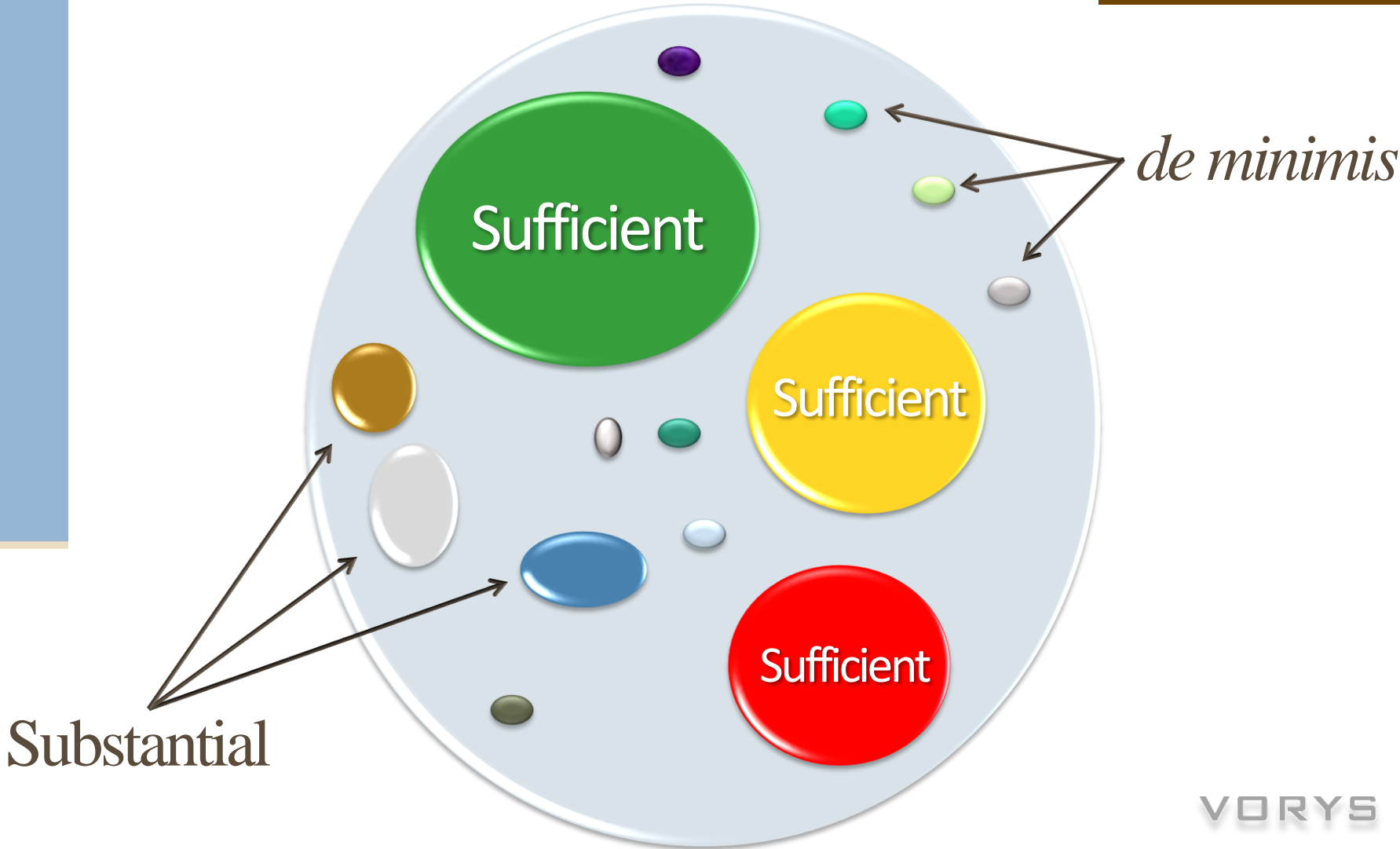
"An Enquiry Concerning Human Understanding"

David Hume (1748)

Conflating Risk and Causation

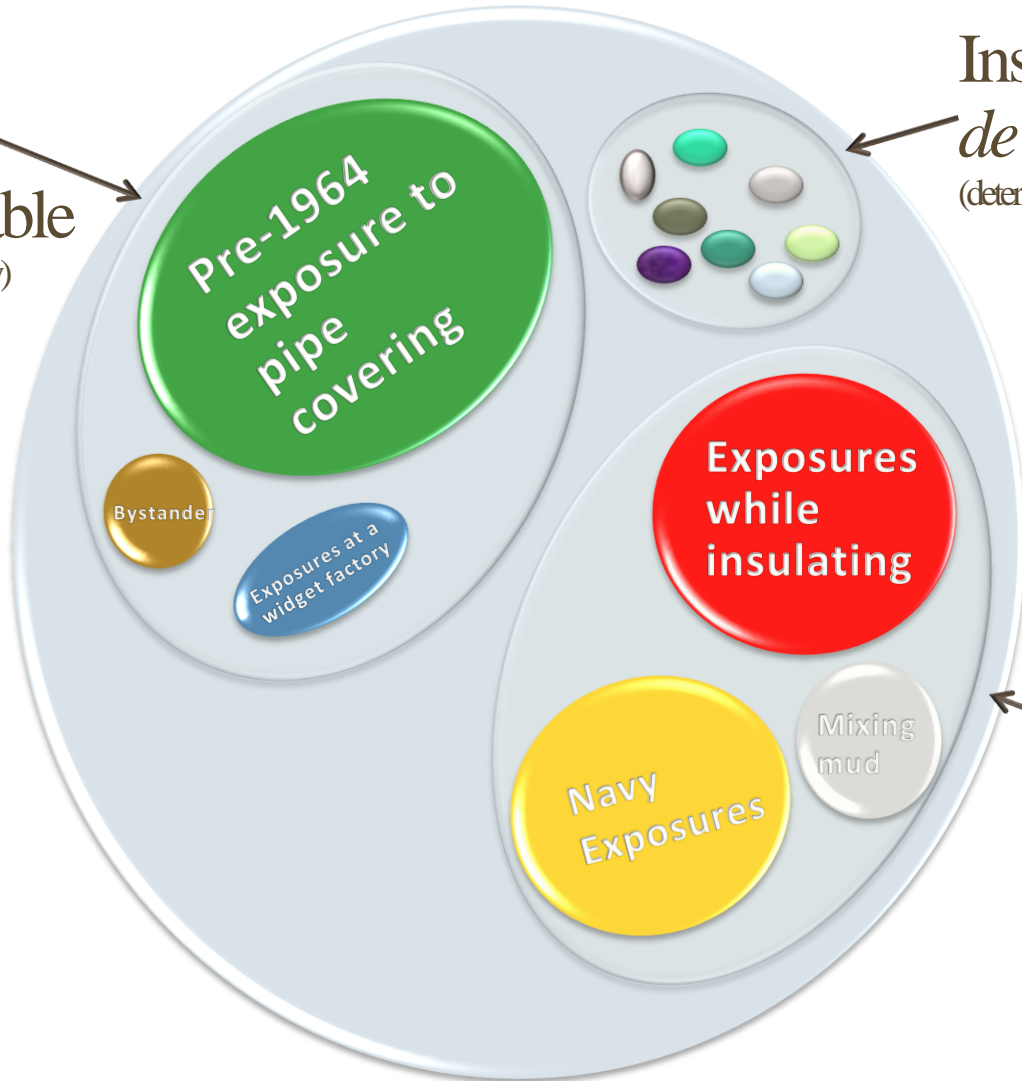


Understanding Substantial Factor Causation



How It Might Play Out

Substantial
but
Unforeseeable
(determined by the jury)



Insubstantial /
de minimis
(determined by the court)

Substantial
and
Foreseeable
(determined by the jury)



This was supposed to be “The Age of
Degenerative and Man-Made Disease”

See *The Epidemiologic Transition* (1971)
Abdel Omran

The Age of Pestilence and Famine

Life is “nasty, brutish and short”

The Age of Receding Pandemics

“The time has come to close the book on infectious diseases.” - U.S. Surgeon General, 1964

The Age of Degenerative and Man-Made Disease

A Theory That Fit the Time

“*Silent Spring*”; smoking and lung cancer;

“*Expendable Americans*”

A.B. Hill's "Causal Criteria": A Handy Tool for Defending Dogma

Milward v. Acuity

Untested hypotheses are sufficient

The fact that none of the premises actually support the hypothesis don't matter

Enthymemes are a substitute for the Scientific Method



But of course Hill was famously wrong about
the cause of peptic ulcer disease

The Problem Is “Epidemiology is Not Science”

“Risk factor epidemiology is an ancillary methodology, which, if governed by rigorous scientific principles, may provide testable hypotheses of causality. It cannot ‘contradict’ pertinent scientific data, and it ignores them only at its peril.”

The Emptiness of the Black Box
Petr Skrabanek, *Epidemiology*
(September 1994)

We Never Left the Second Age of Infectious Diseases

Stomach cancer

MALT Lymphoma

Rheumatoid arthritis

Liver cancer


Throat Cancer

Nasopharyngeal carcinoma

Peptic Ulcers

The Restatement: Extracting and Reviving the DNA of A Bygone Era





Life is either a daring adventure or nothing.
Security does not exist in nature, nor do the
children of men as a whole experience it.
Avoiding danger is no safer in the long run
than exposure.

Helen Keller



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