

2006

# Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss

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## Recommended Citation

48 Ariz. L. Rev. 773 (2006)

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# KEEP IT SIMPLE: AN EXPLANATION OF THE RULE OF NO RECOVERY FOR PURE ECONOMIC LOSS

Anita Bernstein \*

## INTRODUCTION

Here is the problem, as a prominent casebook presents it. In one group of cases alleging accidental harm, “[t]he defendant is by hypothesis negligent; the plaintiff’s harm is typically foreseeable, even if the precise identity of the plaintiff is not; there are rarely any intervening acts or events sufficient to sever the causal connection; and typically there are no affirmative defenses based on the plaintiff’s misconduct.”<sup>1</sup> So much compliance with the demands of negligence doctrine in this group notwithstanding, courts almost uniformly deny plaintiffs compensation for their consequential or “pure” economic loss. When economic-loss plaintiffs cannot connect physical injury or property damage to the acts or omissions of defendants, judges will kick these plaintiffs out of court. Why?

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\* Sam Nunn Professor of Law, Emory University, and Wallace Stevens Professor of Law, New York Law School. This Article is a revised version of a paper originally written for presentation at the Dan B. Dobbs Conference on Economic Tort Law hosted by the University of Arizona James E. Rogers College of Law in Tucson, Arizona, on March 3–4, 2006. Articles from the Conference are collected in this issue, Volume 48 Number 4, of the *Arizona Law Review*. I acknowledge with gratitude the scholarship of Dan Dobbs and the leadership of Ellen Bublick that came together to create this Conference. Participants at workshops at Brooklyn, Emory, and Lewis and Clark law schools honed my thesis. Marc Miller, Tony Sebok, Bobby Ahdieh, Bob Rabin, and Ted Janger gave eye-opening comments. All the mistakes that remain, I own.

1. RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 1166 (8th ed. 2004). I have never found a better statement of the problem. See Anita Bernstein, *The Representational Dialectic (With Illustrations from Obscenity, Forfeiture, and Accident Law)*, 87 CAL. L. REV. 305, 341–42 (1999) [hereinafter Bernstein, *Representational Dialectic*] (quoting the formulation from an earlier edition of this casebook). Epstein talks about economic loss that results from negligent rather than intentional conduct, and I do the same in this Article, as does the current draft of the Restatement. See RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS (Preliminary Draft No. 2, 2006) (including blackletter under Part I, Introduction; and Part II, Unintentional Injury, while reserving for future rounds Parts III through V, on intentional wrongs that cause economic loss).

A question as fundamental as this one ought to come with either a quick, convincing, widely shared answer or an extensive literature plumbing its mysteries. The tort rule on pure economic loss offers neither satisfaction. Whereas outside the United States, especially in Europe and Canada, this topic is as well-covered as any in torts, pure economic loss “remains a backwater within the discourse of American tort law.”<sup>2</sup> The rule never got its own blackletter section in Restatement (Second) of Torts,<sup>3</sup> and commentators have never agreed on how to classify the cases that fall within its ambit. They even disagree on what to call the rule.<sup>4</sup>

The literature does contain a few attempts to justify the rule of no recovery, helpfully gathered by Mark Gergen, reporter for the American Law Institute’s Restatement (Third) of Torts: Liability for Economic Loss. Professor Gergen encountered five rationales.<sup>5</sup> The first rationale is to protect against liability for “incalculable losses.”<sup>6</sup> The second, associated with law and economics, is that economic losses “are not social losses.”<sup>7</sup> For a third rationale, Gergen invokes the Canadian torts scholar Bruce Feldthusen: “People are more important than money.”<sup>8</sup> The fourth rationale: Courts that reject claims for pure economic loss are trying to “[e]ncourage private ordering.”<sup>9</sup> Fifth, courts that follow the rule are “preserving the priority of contract law” and related doctrines, including “restitution and equity,” which deserve deference for being “more determinate and more supportive of private ordering than accident law.”<sup>10</sup>

If one were harsh, one might quote the sneer attributed to the physicist Wolfgang Pauli: These five standard rationales for the economic loss rule appear “not even wrong.”<sup>11</sup> The first of them, sometimes called in metaphoric shorthand

2. Gary T. Schwartz, *American Tort Law and the (Supposed) Economic Loss Rule*, in PURE ECONOMIC LOSS IN EUROPE 94, 96 (Mauro Bussani & Vernon Valentine Palmer eds., 2003).

3. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. LOSS 16–17 (Preliminary Draft No. 1, 2005) (summarizing scattered, “cryptic” treatment of the topic in the Restatement (Second)).

4. Commentators outside the United States sometimes use “the exclusionary rule,” which in the United States is often reserved for criminal procedure and has no home in private litigation. In this Article, I try to stick to “the economic loss rule” or “economic loss,” usually unmodified by “pure.” See also *infra* notes 42–43, 157 and accompanying text (questioning whether a true “rule” really exists).

5. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. LOSS 15 (Preliminary Draft No. 1, 2005) (noting that the fifth rationale “ties into” the fourth, which in turn “ties into” the first three). The Gergen list was revised and redacted in RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS § 8 cmt. b (Preliminary Draft No. 2, 2006).

6. RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS 14 (Preliminary Draft No. 2, 2006).

7. *Id.*

8. *Id.* at 15 (citing BRUCE FELDTHUSEN, ECONOMIC NEGLIGENCE 12 (4th ed. 2000)).

9. *Id.*

10. *Id.*

11. The mathematician Peter Woit has made extended use of this phrase (which Pauli may in fact never have said), maintaining a blog called “Not Even Wrong.” Woit is

“the floodgates,” applies to only some claims for economic loss. American case law is full of economic-loss plaintiffs who were able to state with precision what they lost, to no avail.<sup>12</sup> Perhaps they lacked a theory of why another hypothetical group of plaintiffs should not recover, but such a labor of exclusion was not their job. Many observers and participants in the American tort system would reject the premise of the second rationale—that only those losses that economists would recognize as “social losses” should be remedied. Even if this point were universally acknowledged, economic losses at least sometimes *are* social losses, as several writers from the law and economics camp have explained.<sup>13</sup> That “people are more important than money” does not tell us why courts find damage to tangible property compensable.<sup>14</sup> In sum, the first three rationales are overbroad, if not fatuous. The fourth and fifth rationales say basically the same thing: Other areas of law—contract, restitution, equity—are superior to accident law, and economic-loss plaintiffs are losers for having failed to embrace the private ordering that these other areas present.

Getting warm, I think. The first draft Restatement led off with “the most commonly stated reason for the rule,”<sup>15</sup> but this first rationale, popular though it may be, is vapid. The list grows more compelling with each entry. It never becomes completely convincing, even at the end: Some economic-loss plaintiffs never could have achieved private ordering with the defendant yet lose anyway. Furthermore, when these last two rationales are overapplied—perhaps even when

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also the author of NOT EVEN WRONG: THE FAILURE OF STRING THEORY AND THE CONTINUING CHALLENGE TO UNIFY THE LAWS OF PHYSICS (2006).

12. See Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1525 (1985) (“Lost profits, wages, and other monetary expectancies involve assessments of tangible value that have been entertained on countless occasions in contract and property disputes.”); Eileen Silverstein, *On Recovery in Tort for Pure Economic Loss*, 32 U. MICH. J.L. REFORM 403, 412 (1999) (wondering why one court that had expressed concern about the floodgates “did not pause to address the consequences of denying recovery to the single plaintiff who alone claimed that the [claimed breach of duty] caused provable damages with reasonable certainty”). Silverstein goes on to argue that economic losses are much more determinate and less speculative than damages for pain and suffering related to physical injury. *Id.* at 423.

13. See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 136 (1987) (stating that some economic loss claims do involve losses of “social welfare”); Russell Brown, *Still Crazy After All These Years: Anns, Cooper v. Hobart and Pure Economic Loss*, 36 U. BRIT. COLUMBIA L. REV. 159, 161 n.8 (2003) (claiming that the “no social losses” hypothesis rests on “a dubious assumption of excess capacity”); Mario J. Rizzo, *The Economic Loss Problem: A Comment on Bishop*, 2 OXFORD J. LEGAL STUD. 197, 201–04 (1982) (offering extended critique).

14. See Richard L. Abel, *Should Tort Law Protect Property Against Accidental Loss?*, 23 SAN DIEGO L. REV. 79 (1986) (answering “no” to this question). It is possible to cobble together a response: for example, one scholar has suggested that “human values” support ranking “tangible property” above “intangible wealth” in the hierarchy of compensable interests. TONY WEIR, *A CASEBOOK ON TORT* 6 (9th ed. 2000). But this third rationale does not say why money cannot be deemed worth something, even if it is at the bottom of a hierarchy.

15. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. LOSS 15 (Preliminary Draft No. 1, 2005).

they are taken at face value—they deny most of modern products liability, starting with the famous Fall of the Citadel that set plaintiffs free from privity.<sup>16</sup> Flaws and all, the Restatement crescendo—no recovery for pure economic loss because tort law should defer to better law (doctrines “more determinate and more supportive of private ordering”)—presents the beginning of an answer to our question, which I state here as Keep It Simple.

Whereas most areas of legal doctrine have over time moved toward more complexity—codification, statutes, regulations, loopholes, exceptions, procedural tangles—tort still aligns its rules with the intuitions and stances of ordinary people. American tort law puts “ordinary” into a rule,<sup>17</sup> refers whenever possible to “reasonable” actors,<sup>18</sup> insists that persons enjoy a right of access *qua* litigants to the courts,<sup>19</sup> and (in particular contrast to other areas of private law, including contract law) regards litigants with a warmth to which an average person can relate: Few other fields make law about the emotional ties between parents and children, intimate relations that husbands share with wives, or the range of awful feelings that human beings experience: fear, shock, apprehension of imminent harmful contact, severe emotional distress, chagrin at having their privacy invaded.

Empowering the civil jury, tort law celebrates a bastion of homespun inexpertise<sup>20</sup>—and does so uniquely: Unlike litigants in the criminal justice system, who face strong pressure to waive their jury-trial rights in the form of both pretrial incentives to plead guilty and augmented sentences following conviction should they refuse to plead, tort plaintiffs can still contemplate settlement offers

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16. William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 793 (1966).

17. From the start, modern negligence law refused to delineate the obligations of this type of care *ex ante*, thereby emphasizing the power of nonexpert individuals to determine how cases would come out. See *Brown v. Kendall*, 60 Mass. (6 Cush.) 292, 296 (1850) (“[W]hat constitutes ordinary care will vary with the circumstances of cases.”).

18. See generally DAN B. DOBBS, *THE LAW OF TORTS* 277 (2000) (outlining “the objective reasonable person standard”). In addition to evaluating individuals’ behavior under a reasonable person standard, tort law also gives “reasonable” a procedural meaning in its standards for dismissal, summary judgment, and directed verdict: A judge ought to take a plaintiff’s case from a jury if “reasonable people could not accept it as sufficient to prove the plaintiff’s case.” *Id.* at 355.

19. See U.S. CONST. amend. VII; John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 526 (2005). State constitutions frequently contain “equal access” or “open courts” provisions as well.

20. In conversations with me Robert Rabin has expressed disagreement: Tort law is full of complexity, he argues, giving as examples toxic torts, claims of design defect, and questions of causation that call for knowledge of arcana like engineering or pharmacology. Personal injury claims, especially ones that reach juries, often do contain complexity. Tort adjudication keeps them simple not by denying the mechanics of harm, which can be infinitely complex, but by asking and answering questions at a basic level: What injury did the plaintiff experience? Did *X* act as a reasonable person? Who should win, the plaintiff or the defendant? Tort law makes complicated past events simpler to fit them into questions like these. Expert witnesses and summary judgment memoranda, which to Rabin exemplify complexity, also function as simplifiers.

free from rules that punish them for rejecting deals and going before a jury.<sup>21</sup> American fee rules permit contingent financing in tort cases, a measure they prohibit in criminal litigation,<sup>22</sup> which helps litigants of modest income to acquire their own panel of lay decisionmakers. Compensation schemes, expert tribunals, and statutory immunities to replace or thwart jury-focused personal injury litigation (such as the federal law enacted in 2005 that protects gun manufacturers from some lawsuits<sup>23</sup>) remain rare.

If one takes this orientation as given, it follows that in the United States tort rules will be relatively accessible to average citizens, more so than rules in other areas. The fogs that generate income for specialist counselors in fields like antitrust, trusts and estates, corporate governance and business planning, environmental law, and tax law become obstructions in a subject built to anticipate a jury trial. Straightforward tort rules take shape in straightforward (if windy) jury instructions.<sup>24</sup> Straightforward jury instructions yield straightforward verdicts. Straightforward verdicts form the basis of judgments. These judgments in turn join the ongoing keep-it-simple formation of common law tort doctrine, completing the circle.

Consistent with almost all of tort law, the economic loss rule hews more to simplicity than any of the “goals” or meta-theory that torts scholars (who do not share their field’s need to keep it simple) like to emphasize: efficiency, corrective justice, compensation, insurance, and so on. Tort law refuses to recognize actions for pure consequential financial loss because these claims are not easy enough to follow. The ability to sort good claims of economic entitlement from bad requires

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21. Persons convicted of crimes receive augmented prison sentences as punishment, in effect, for not having pleaded guilty, regardless of whether formal sentencing guidelines impose this augmentation. Compare Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2135 (2003) (describing a “timely guilty plea” as a basis recognized in the federal guidelines for reducing a defendant’s sentence; this reduction is tantamount to increasing the sentences of those defendants who insist on jury trials), with Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens’ Perceptions of the Criminal Jury*, 12 LAW & HUM. BEHAV. 333, 334 (1988) (noting a practice of “imposing harsher sentences on defendants who request a trial by jury,” which predates the rise of sentencing guidelines).

22. See generally Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 COLUM. L. REV. 595, 597 (1993) (describing the ban and proposing a modification).

23. Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901-7903, 18 U.S.C. §§ 922, 924 (2005)).

24. For example, Florida juries in negligence actions hear a straightforward-if-windy paragraph:

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances.

FLA. STANDARD JURY INSTRUCTIONS IN CIVIL CASES § 4.1 (2004).

a degree of maturity, financial sophistication, and capacity for abstract thought that exceeds what tort rules—written for the layperson—can take for granted.<sup>25</sup>

The amateurism that connects liability rules to simplicity is integral to all of tort law, not just American tort law, where inexpertise and lack of training hold official power via the jury. Economic loss rules outside the United States, where juries play virtually no part in negligence litigation,<sup>26</sup> still tend to reject claims of lost financial expectancy due to negligence.<sup>27</sup> This rejection suggests that even in legal systems where adjudication is entirely in the hands of professionals, tort doctrine must rest on precepts that ordinary people can understand, because tort law applies with unique force to non-volunteers.<sup>28</sup> It is fairer to burden contracting parties with the strict-liability severity of contract law, and real-property sellers and buyers with baroque hurdles, fictions, and Statute of Frauds requirements, than it would be to impose burdensome standards in a field of universal application like tort. To remain intelligible to prospective plaintiffs, tortfeasor-defendants, and (in the United States) jurors, tort law must articulate its demands simply, with a relatively low common denominator in mind.

How simple is simple enough? As a first step toward measurement, we can look for average abilities to comprehend factual material, conventionally

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25. Disagreement again from Professor Rabin, who believes there is nothing complicated about “a business that goes under” after its customers can’t get there: “As a parent I could make those scenarios clear to a ten-year-old.” Telephone Conversation with Robert L. Rabin, A. Calder Mackay Professor of Law, Stanford Law School, in Stanford, Cal. (Mar. 29, 2006). Stephen Perry provides a response to this point, referring to complexities that the ten-year-old might find hard to follow. Stephen R. Perry, *Protected Interests and Undertakings in the Law of Negligence*, 42 U. TORONTO L.J. 247, 265 (1992) (noting that a tavern could be put out of business by “negligent interference” but also by other means that the law condones, and so it becomes hard to say why its owner should have an action for negligent interference). In mentioning a business destroyed completely by the loss of custom, Rabin has picked a relatively simple example of economic loss. For an example that would be harder to explain to his ten-year-old, see *infra* Part II.B.2 (describing divided decisional law on loss resulting from an evacuation or closure that does not destroy a business).

26. See generally Fleming James Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43, 45–46 (1972) (noting “the remarkable parallel” between outcomes in the British Commonwealth and the United States, including “details in drawing the line on recovery,” as revealed in case law from both systems that rarely includes citations to foreign decisional law).

27. Trying to describe the economic loss rule as it functions outside the United States is a challenge far beyond the scope of this Article. See generally PURE ECONOMIC LOSS IN EUROPE (Mauro Bussani & Vernon Valentine Palmer eds., 2003) (noting much variety in European doctrine alone, to say nothing of other national legal systems). See also JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 263 (2006) [hereinafter GORDLEY, FOUNDATIONS] (“The rule has been adopted in some jurisdictions such as Germany, England and the United States and not in others such as France, Italy, and the Netherlands.”). Jurisdictions do not need an economic loss rule *per se* to deny recovery; concepts like remoteness can defeat plaintiffs’ claims. See *id.* at 274.

28. I elaborate in Anita Bernstein, *Complaints*, 32 MCGEORGE L. REV. 37, 45 (2000).

expressed in the United States as reading levels that correspond to school grades.<sup>29</sup> The average American reads at just below the eighth-grade level.<sup>30</sup> Tort law has room to raise this low standard a bit. Defendants participate in tort litigation only if they have enough money to be worth suing, plaintiffs only if they are worldly enough to maneuver themselves into court (or to be within reach of a recruiter like a class-action litigator), and jurors only if they bear markers of relative privilege: driver's licenses, home ownership, registration on the voter rolls. Thus each player in the tort system is likely to possess more sophistication and formal education than the average American. As a reading level or approximate mental age for tort-liability purposes, late adolescence—which happens to be the onset of adult-level liability for negligence<sup>31</sup>—seems about right. If this estimate of whether to draw the line is close enough, then tort rules will emerge comprehensible to the average American late-teenager, and will not demand more understanding than she can provide.

This person, though notoriously ignorant about money management and the causes of financial consequences,<sup>32</sup> would have no trouble with two tort precepts that can pertain to economic loss. One is that harming another person on purpose without justification is blameworthy. The other is what only an exceedingly rare teenager would call *assumpsit*, the doctrine that holds actors liable for certain consequences that follow their undertakings or quasi-contracts. Developmental psychology sites basic awareness of these two concepts in early childhood, and identifies a more generalized consciousness of them that takes form in adolescence.<sup>33</sup> A young child might leap into rage after suffering an unprovoked blow, for instance, or when a caregiver fails to deliver a promised reward. Starting

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29. In talking about cognition and comprehension levels in the American population I hope not to reopen debates about whether intelligence exists, how to measure it, or whether it is unitary or varied. Nor do I claim that the ability to comprehend is distributed in a bell-curve pattern.

30. Norman M. Goldfarb, *How Well Does the Average U.S. Adult Read?*, J. CLINICAL RES. BEST PRACTICES, Sept. 2005, available at <http://www.firstclinical.com> (citing 1992 findings and breaking down medians and averages).

31. Seventeen seems to be about as old as a person can be before forfeiting the permissive standard of care that children enjoy. *Charbonneau v. MacRury*, 153 A. 457, 464 (N.H. 1931) (extending to 17-year-old defendant this lower standard of care). Professor Dobbs adds that a mentally disabled 18-year old whose "mental age" is lower than his chronological age is held to the standard of his mental age, whereas a mentally disabled adult would not enjoy this favorable deviation. DOBBS, *supra* note 18, at 294.

32. The JumpStart Coalition for Personal Financial Literacy tests thousands of high school students each year on personal finance, and consistently reports that 40% to 60% of the students fail the test. See 2006 Survey of Financial Literacy Among High School Students, <http://www.jumpstartcoalition.com/media/2006SurveyWithAnswers.doc>. Adults, whom JumpStart and most other "financial literacy" advocates do not test, may not understand money much better than these teenagers. Presumably they learn a bit, however, from maintaining a bank account, paying interest on credit-card debt, financing the purchase of an automobile, budgeting for rent or a mortgage, and similar undertakings generally reserved for adults.

33. Lawrence Kohlberg, *Moral Stages and Moralization: The Cognitive-Development Approach*, in MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH, AND SOCIAL ISSUES 31, 31–53 (Thomas Lickona ed., 1976).



at about age nine, the child begins to absorb the notion of external disapproval, and goes on to accept "law and order" as a valuable end.<sup>34</sup> In a few years this child will be nearly ready to sit on a jury passing on claims of battery, say, or the failure to aid a sick person in a defendant's custody.

Economic loss cases frequently extend beyond these two simple precepts to incorporate unintentional harms that may or may not include undertakings. When the harm is accidental and unmediated by agreement, those who make findings of fact and law need another level of comprehension and cognition to do their work of adjudicating. Consistent with its rules that children must reach a certain age before they can be held liable in negligence yet are vulnerable to suits for intentional torts at any age, tort doctrine demands more maturity and extra mental effort to decide cases where plaintiffs admit that defendants intended them no harm, and are not bound to them by explicit promises. Negligence—here, a failure to act with reasonable care—is not beyond the ken of our late-adolescent torts player, but the tenet of Keep It Simple limits redress for those injuries that ask the factfinder to perceive and quantify an abstract loss. Abstract injury is too hard to perceive even though its dollar value might be easy to calculate.

Here I use "perceive" advisedly: It is almost impossible to speak in English about understanding without reference to the most cherished of the five senses. "Observation," "definition," "insight," "illuminate," "enlighten," "vision," "reflection," "clarity," "survey," "perspective," "overview," "point of view," "intelligent," "idea," "theory," "contemplate," "speculate," and "brilliant," among other English words that describe cognition, have visual roots.<sup>35</sup> Eyesight and the visual imagination convey reality to human beings.<sup>36</sup> When the wrong in question is neither intentional nor contractual, for many people it must make visual sense: The plaintiff must be able to draw a picture, figuratively speaking, that connects its injury with the defendant's conduct.

Among the interests protected by negligence law, this capacity to be visualized separates the winners—that is, first, the integrity of a human body and, second, tangible property—from the big loser, pure economic loss. Occupying the space between winners and losers on the invaded-interests continuum is emotional distress—a protected interest that is less weak than economic loss on visuals: Every human being old enough to be a litigant or a juror has had personal experience with emotional distress, and has almost certainly seen the

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34. ROLF E. MUUSS, THEORIES OF ADOLESCENCE 211 (6th ed. 1996).

35. See Daniel Chandler, Visual Perception 1, <http://www.aber.ac.uk/media/Modules/MC10220/visper01.html>. Chandler omits the accident-law favorite "foreseeability."

36. The blind not excluded. Consistent with negligence doctrine, whose rules of reasonable conduct for blind persons may be understood to eschew pity and condescension, see DOBBS, *supra* note 18, at 283–84, here I claim only that American law deems inability to see a deviation from the norm. Visual perception is a fact of life for many blind individuals. See Nancy H. Kerr & G. William Domhoff, *Do the Blind Literally "See" in Their Dreams? A Critique of a Recent Claim that They Do*, 14 DREAMING 230 (2004) (summarizing current consensus that blind people who were able to see in their early childhood experience visual dreams); Kate Shatzkin, *Research Center to Aid Blind*, BALTIMORE SUN, Jan. 30, 2004, at 1B (noting that some legally blind children are visual learners).

manifestations of distress in others as well. Emotional distress is powerfully comprehensible to our late-adolescent even without a connection to the visual,<sup>37</sup> but reaches our factfinder most clearly when it can enter his mind's eye.<sup>38</sup>

In this (pardon the expression) light, most of the rationales for the rule provided in the Restatement's Preliminary Draft 1 become not wrong, not even "not even wrong,"<sup>39</sup> but rather partial expressions of the simplicity thesis. Economic loss is only sometimes "incalculable," but it *is* always invisible, and thus harder than other types of tort damage for a lay person to grasp. People might not be "more important" than property, but when the property in question consists of unrealized economic gains, or obligations to transfer money outside of contract, these people are at least easier to see. Courts do not uniformly "encourage private ordering," and contract law is not inherently superior to tort law: Instead, courts prefer to impose contract and contract-like rules when contracting is feasible, because this basis for responsibility has deeper roots than negligence in the minds of our late-adolescent participants, and resonates better with their sense of injustice.

It is only the second rationale—"economic losses are not social losses"—that cannot be seen (again, pardon me) as partial expression of the simplicity thesis. To be sure, the economists' explanation of the rule and mine enjoy a fair degree of overlap. For instance, whereas I would defend the no-liability consensus in cases where the parties could have allocated the loss in advance by contract on the ground that contract is a sturdier notion in the late-adolescent mind than negligence, their stated rationale will be efficiency or welfare or some such,<sup>40</sup> but we reach the same end. I grant that many economic losses are not social losses and thus do not offend against welfare. But others *are* social losses, and economic analysts of the economic loss rule need to say why they refuse to argue here for the level of welfare through deterrence that they typically seek. They also need to explain decisional law. Because the cases sport some inconsistency, nobody can account for them all, but as I try to show below, the simplicity thesis does better at describing pure economic loss than its two chief rivals: The law and economics claim about social losses, which cannot explain as much of the case law as I can, and the "incalculable" or "floodgates" or "proportionality" rationale, which explains nothing.

I start this explanation below in Part I, which presents a taxonomy of economic loss cases. In the hope of doing as much explanatory work as possible, I

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37. See *infra* Parts I.C, II.B (discussing the role of emotion in strengthening economic loss claims).

38. I use the phrase "our factfinder," along with similar terms like "our protagonist," to refer to a hypothetical individual who instantiates the Keep It Simple thesis by choosing to side with either the plaintiff or the defendant in particular types of economic loss claims. What this person finds is more commonly understood as a duty of care *vel non* rather than facts, but to convey the lay quality of a juror I need a more familiar locution than "our [no-]duty-finder." See also *infra* notes 41–44 and accompanying text (expounding on the duty question).

39. See *supra* note 11 and accompanying text.

40. Anita Bernstein, *Whatever Happened to Law and Economics?*, 64 MD. L. REV. 303, 311–15 (2005) [hereinafter Bernstein, *Whatever Happened?*].

look at a wider swath of cases than what other writers have chosen in their studies of the economic loss rule. Part II presents my thesis: Keep It Simple. Part III undertakes the comparison just mentioned: I investigate how the law and economics and "floodgates" theses fare, in contrast to Keep It Simple, as explanations of how cases do (or should) come out. Part IV looks for additional explanations of the economic loss rule that supplement, rather than compete with, the Keep It Simple thesis.

Juxtaposing "rivals" against Keep It Simple may require a word of clarification on how the thesis functions. Although it explains what is frequently called a limited-duty rule, or a rule about plaintiffs who lose because defendants owe them no duty, it focuses on lay persons and thus is at odds with traditional duty, the element of the *prima facie* case most restricted to professionals. Judges, advocates, legislators, and perhaps scholars build duty rules as filters. The perspective on unintentionally inflicted economic loss that I offer here has no abstract precept to filter claims before plaintiffs can move on to unreasonable conduct or the causation of harm.<sup>41</sup> Instead it is a descriptive, inductive, context-dependent approach to claims as they arise, looking nothing like "duty" in the sense of *ex ante* prescriptive tenets. Though consistent with the suggestion of one scholar that this particular no-duty rule might not be a rule at all but a concern with remoteness<sup>42</sup> mixed with "common sense grounds" that cannot be wedged into "any rule or principle abstractly,"<sup>43</sup> Keep It Simple nevertheless finds some predictability and coherence in decisional law. The late-adolescent adjudicator reaches conclusions about liability that fall at least into patterns, if not rules.<sup>44</sup> She also reminds us that even duty, the domain of experts, has to reckon with ordinary people.

## I. A TAXONOMY OF CLAIMS FOR UNINTENTIONALLY INFLICTED ECONOMIC LOSS

Scholars diverge on how to sort cases on pure economic loss where plaintiffs have not accused defendants of inflicting intentional harm. One taxonomy by Mario Bussani, Vernon Valentine Palmer, and Francesco Parisi (collectively, "Bussani"), written to reflect the case law of Europe, contains four groups: "ricochet loss," "transferred loss," "closures of public service and infrastructures," and "reliance upon flawed information or professional services."<sup>45</sup>

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41. See generally David G. Owen, *Duty Rules*, 54 VAND. L. REV. 767, 773-74 (1999) (summarizing the categories of cases where plaintiffs cannot recover even though they can show that the defendant acted unreasonably and that they suffered foreseeable harm as a result).

42. GORDLEY, FOUNDATIONS, *supra* note 27, at 274.

43. *Id.* at 279.

44. And thus may be amenable to testing. An experimental study could ask 17-year-olds—or persons of the reading level that takes into account the American average of about 12 or 13 with a boost added for the elite nature of American tort litigation, see *supra* notes 30-31 and accompanying text—what they thought of economic loss scenarios of the kind described in Part I.

45. See Mario Bussani, Vernon Valentine Palmer & Francesco Parisi, *Liability for Pure Financial Loss in Europe: An Economic Restatement*, 51 AM. J. COMP. L. 113,

Another writer finds only three: intellectual services, defective products, and interference with use of resources.<sup>46</sup> Another presents a five-parter: negligent misrepresentation, negligent performance of a service, defective products or structures, public's failure to confer an economic benefit, and relational economic loss.<sup>47</sup> One writer also likes the number five, but divides his list into three categories denying recovery and two allowing it.<sup>48</sup> Another taxonomy finds eight categories.<sup>49</sup> The current draft Restatement responds to this fray by staying out of it, restricting its taxonomical effort to conclusions about whether the plaintiff can reach a jury: Its three-parter divides into (1) duty cases; (2) no-duty cases; and (3) cases where courts may, but need not, find a duty of care.<sup>50</sup> This approach suits a work like the Restatement that seeks to guide the outcome of future cases. Because my own aims are descriptive, however, I cannot stay out of the fray; so here I start with a taxonomy that widens Bussani's (the one rooted in European case law) to describe the economic-loss landscape.

### *A. Cases Involving a Contract-Like Relation Between Plaintiff and Defendant*

#### *1. "Transferred Loss"*

This category of economic loss starts with a tangible injury for which the victim is not suing. "Here, *C* causes physical damage to *B*'s property or person, but a contract between *A* and *B* (or the law itself) transfers a loss that would ordinarily be *B*'s onto *A*,"<sup>51</sup> explains Bussani. These transfers "frequently result[] from leases, sales, insurance agreements and other contracts, separating property rights from rights of use or risk bearing."<sup>52</sup> Cases like these, which feature express and usually written contracts, present straightforward illustrations of how a plaintiff can suffer financial loss from physical damage or personal injury without having possessed the land, chattel, or human body that suffered impact following the defendant's negligence.<sup>53</sup> Most of subrogation fits in this category.

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117–21 (2003) [hereinafter Bussani, *Economic Restatement*]. The authors have published several papers with similar titles, sometimes with their names in a different order. One of them has told me to rely on this one when commenting on their co-authored writing on economic loss. E-mail from Francesco Parisi to Anita Bernstein, Oct. 7, 2005 (on file with author).

46. Herbert Bernstein, *Civil Liability for Pure Economic Loss Under American Tort Law*, 46 AM. J. COMP. L. 111, 114–25 (1998).

47. BRUCE FELDTHUSEN, *ECONOMIC NEGLIGENCE* 12 (4th ed. 2000).

48. Peter Benson, *The Basis for Excluding Liability for Economic Loss in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 427, 428–29 (David G. Owen ed., 1995).

49. William Bishop & John Sutton, *Efficiency and Justice in Tort Damages: The Shortcomings of the Pecuniary Loss Rule*, 15 J. LEGAL STUD. 347, 360–61 (1986).

50. RESTATEMENT (THIRD) ECON. TORTS & RELATED WRONGS i–ii (Preliminary Draft No. 2, 2006).

51. Bussani, *Economic Restatement*, *supra* note 45, at 118.

52. *Id.* at 119.

53. The leading case is *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), which denied a claim for two weeks' worth of lost profits. The plaintiff was the time charterer of a steamship; the defendant had repaired the steamship negligently, causing the

Following the general pattern within “pure economic loss,” courts typically decline to find liability here. Tort law is said to reject “negligent interference with contract,”<sup>54</sup> in contrast to the intentional-interference alternative, which permits recovery when various elements are present. It admits that, for instance, professional sports teams lose revenue when star athletes are injured by tortfeasors’ negligence, but lets this loss lie where it falls.<sup>55</sup> A long history of case law rejects separate actions by insurance companies against tortfeasors for harm to the insured persons.<sup>56</sup>

The transferred-loss category grows murkier, however, if one is willing to go along with Bussani to consider transfers occasioned by means other than contract. To illustrate their non-contractual category—what they call “(or the law itself)” —the authors mention a hypothetical statute that forces private employer *A* to continue paying wages to employee *B* after *B* is injured through negligence, even though *A* receives no work from *B* during a recovery period.<sup>57</sup> The authors cite neither a pay continuation statute nor a case to illustrate this category, and continue this omission in their later paper on economic loss that repeats the same hypothetical.<sup>58</sup>

Litigation from the 1990s may fill the “transferred loss” illustrations gap. Local governments that spent money treating gunshot wounds and cigarette-linked illness brought actions against the handgun and tobacco industries to recoup these expenses, a type of economic loss connected to the personal injuries to others. It is perhaps an overstatement to say that “the law itself” “transferred” these losses from injured persons to governments—not least because case law did not so hold: most of the gun litigation failed while the government recoupment portion of the cigarette litigation settled—but at least some fraction of handgun- and cigarette-related injury does force governments to spend public money.<sup>59</sup>

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vessel to remain in dry dock for those two weeks. Justice Holmes told the plaintiff charterer that “[t]he law does not spread its protection so far.” *Id.* at 309.

54. DOBBS, *supra* note 18, at 1259, 1283.

55. The leading case is still *Phoenix Professional Hockey Club v. Hirmer*, 502 P.2d 164 (Ariz. 1972).

56. This rule, stated first in *Connecticut Mutual Life Insurance Co. v. New York and New Haven Railroad*, 25 Conn. 265 (1856), remains good law. With “separate actions” I mean to distinguish subrogation, where the insurer stands in the shoes of the insured.

57. Bussani, *Economic Restatement*, *supra* note 45, at 119.

58. Francesco Parisi, Vernon V. Palmer & Mario Bussani, *The Comparative Law and Economics of Pure Economic Loss* (George Mason Law & Economics Working Paper Series, Paper No. 05-12), available at <http://www.ssrn.com/abstract=742104>. One commentator on economic loss notes the existence of a pay continuation statute in Germany. Jürgen G. Backhaus, *Pure Economic Loss: An Analysis*, in PURE ECONOMIC LOSS IN EUROPE 57, 71 (Mauro Bussani & Vernon Valentine Palmer eds., 2003) (calling the *Engeltfortzahlungsgesetz* “a technique to reduce the secondary costs of accidents”).

59. Litigation by hospitals to cover smoking-related expenditures on behalf of patients has been unsuccessful. Courts have held that these plaintiffs lack standing, perhaps because their expenditures were more optional, or less necessary, than those of governments. See *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 436 (3d Cir. 2000) (noting that governments possess “political power” along with a “parens patriae right to protect the health and welfare” of citizens). Similar claims by union health insurance

## 2. Defective Products

Economic loss as well as personal injury can result from defective products. Unlike most of the categories, this one includes a Supreme Court case, *East River Steam Ship Corp. v. Transamerica Delaval*.<sup>60</sup> This unanimous decision upheld equally unanimous lower court rulings, including the Third Circuit en banc; all the many judges who heard *East River Steam Ship* agreed that the \$8 million in losses (for repairs and income lost when the ships had to go out of service) that the plaintiffs, ship charterers, attributed to defects in the ships' engines were not compensable in tort. This decision strengthened the national prestige of *Seely v. White Motor Co.*,<sup>61</sup> the California Supreme Court decision that had, in 1965, excluded economic loss from strict products liability claims. So aided by *East River Steam Ship*, *Seely* crushed its rival, *Santor v. A & M Karagheusian, Inc.*,<sup>62</sup> a New Jersey decision that had come out the opposite way to allow economic loss in a products liability action a few months earlier.

In the four decades since *Seely* and the two since *East River Steam Ship*, case law has favored the holding they share: Plaintiffs generally cannot recover in tort (i.e. negligence or strict products liability) for an economic injury that results from a defect in a product. The paradigm here is financial loss that results in costly repair of the product, inability to make profitable use of it, or post-accident cleanup,<sup>63</sup> but damage to the product itself also can fit within this generalization.<sup>64</sup> The remedy for all such losses generally lies in contract.<sup>65</sup> In 1997, the New Jersey

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trusts have failed on the ground that insurers have no claim against tortfeasors for harms to their insureds, absent subrogation. *United Food & Commercial Workers Unions v. Philip Morris, Inc.*, 223 F.3d 1271, 1273 (11th Cir. 2000); *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 241 F.3d 696, 702 (9th Cir. 2001) ("All other Courts of Appeals that have addressed the issue have agreed that union trust funds lack standing to bring antitrust and RICO claims against the tobacco industry to recover their increased expenditures for treating tobacco-related illnesses.").

60. 476 U.S. 858 (1986). I expound on this case in Anita Bernstein, *Products Liability in the United States Supreme Court: A Venture in Memory of Gary Schwartz*, 53 S.C.L. REV. 1193, 1200–02 (2002).

61. 403 P.2d 145 (Cal. 1965).

62. 207 A.2d 305 (N.J. 1965).

63. See, e.g., *Kestrel Holdings I, L.L.C. v. Learjet Inc.*, 316 F. Supp. 2d 1071, 1076 (D. Kan. 2004) (applying Kansas law to deny plaintiff's economic loss claims, which included services costs and use of alternative aircraft); *Detroit Edison Co. v. NABCO*, 35 F.3d 236 (6th Cir. 1994) (applying Michigan law).

64. See, e.g., *Am. Home Assurance Co. v. Major Tool & Mach., Inc.*, 767 F.2d 446 (8th Cir. 1985) (applying Minnesota law to deny recovery for value of defective turbine); *Delmarva Power & Light v. Meter-Treater, Inc.*, 218 F. Supp. 2d 564 (D. Del. 2002) (applying Delaware law); *Hawkins Constr. Co. v. Matthews Co.*, 209 N.W.2d 643 (Neb. 1973) (denying claim for value of failed scaffolding).

65. *Neibarger v. Univ. Coops., Inc.*, 486 N.W.2d 612, 614–16 (Mich. 1992) (contrasting the functions of tort with the functions of contract in the economic loss context); *Brown v. Eurocopter S.A.*, 143 F. Supp. 2d 781, 782 (S.D. Tex. 2001) (endorsing the distinction as stated in *East River Steam Ship*).

Supreme Court issued a decision that all but overruled *Santor*,<sup>66</sup> bringing almost to a close the controversy over pure economic loss in products liability. Courts apparently regard this interest as amenable to safeguarding through contract.

### 3. *Unsatisfactory Buildings*

Home buyers and developers have brought many tales of woe to the courts, featuring builders or a contractor as the villain. Like some other groups of plaintiffs we have considered, they have encountered judicial disfavor. Individuals once were precluded even from making claims for personal injury under “the accepted work doctrine,” a vestige of privity, which cut off a builder’s liability for negligence when the buyer accepted the building.<sup>67</sup> Within our subject, economic loss, plaintiffs sometimes allege that bad construction of a building by a defendant with which they are not in privity caused them economic loss in the form of necessary remedial measures or diminished property value. Asbestos abatement, a special subcategory, involves contaminated structures. In these cases, the plaintiffs are building owners under a legal duty to remove (“abate”) the asbestos, and defendants are suppliers or manufacturers of this product. This category resembles “transferred loss” but is a little different: The defendants supplied a satisfactory product, usually as insulation, that became problematic only later.

### 4. *Flawed Services*

Judicial authors and commentators have come up with an array of labels for this category. Many include the word “information.” Reference to information has the virtue of perhaps capturing more material—stretching from the famous Cardozo decision finding a weigher of beans liable to a plaintiff who had relied on the accuracy of the weight reported<sup>68</sup> to judgments against Western Union for negligent transmittal of business telegraphs<sup>69</sup>—than falls under “flawed services,” a term I prefer, because it is somewhat more precise and also describes most of the contemporary cases. Some like to say “professional services,” a phrase that invites confusion about what professional means.<sup>70</sup>

Lawyers often cause this type of economic loss. Courts construe attorney malpractice mostly in financial terms—disfavoring causes of action for severe emotional distress and similar sufferings (like wrongful incarceration following

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66. See *Boyes v. Greenwich Boat Works*, 27 F. Supp. 2d 543, 551 (D.N.J. 1998) (describing *Santor* as having been overruled by *Alloway v. General Marine Industries*, 695 A.2d 264 (N.J. 1997)). Westlaw’s KeyCite lists *Santor* as “abrogated by” *Alloway*.

67. DOBBS, *supra* note 18, at 1043–44.

68. *Glanzer v. Shepard*, 135 N.E. 275 (N.Y. 1922).

69. *Aikens v. Debow*, 541 S.E.2d 576, 590–91 n.15 (W. Va. 2000) (citing *W. Union Tel. Co. v. Tatum*, 49 So. 2d 673 (Ala. App. 1950) (accepting liability for the delayed delivery of telegram that had contained a contract offer, thereby causing plaintiff to not obtain a contract)); *Bluefield Milling Co. v. W. Union Tel. Co.*, 139 S.E. 638 (W. Va. 1927).

70. The first draft Restatement speaks of a person “who undertakes to render a service to another as a professional, fiduciary, bailee, or in a similar capacity.” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. LOSS § 9, at 27 (Preliminary Draft No. 1, 2005). In an illustration, the Restatement treats exterminators as covered, “though pest extermination is not a profession.” *Id.* § 9 illus. 5, at 33.

negligent defense in a criminal proceeding)<sup>71</sup>—and so the harms of attorney malpractice amount to economic loss. Recognized claims in this area include breaches of duty in the lawyer-client relation and, somewhat more controversially, deviations from a professional standard of care that cause losses to certain types of nonclients. For example, an attorney might prepare a testamentary instrument negligently for a client and through this negligence cause another individual not to inherit money.<sup>72</sup> Parties to real estate transactions have prevailed in some negligence actions against lawyers who worked not for them but for the other party to the sale, or a bank with an interest in their transaction.<sup>73</sup>

Accountants, auditors, and other professional reviewers of financial conditions who do not fulfill relevant standards of care in examination have been held liable to investors who relied on the accuracy of their reports as a condition of investment. Like attorney malpractice, this subject has been roiled by controversy on the question of liability to nonclients. Courts universally say yes, but vary in how generously they bend privity of contract in favor of plaintiffs.

A miscellany of other providers inflict economic loss when they render their services negligently. Maladroit architects can topple a building.<sup>74</sup> Drug-testing laboratories can mistakenly determine that an employee or job applicant uses unlawful drugs and thus cause this current or prospective worker to forfeit remunerative work.<sup>75</sup> Negligence by a notary public can result in economic loss.<sup>76</sup> Insurers working on real estate purchases sometimes miss defects in title.<sup>77</sup> Carelessness by adoption agencies can impose on adoptive parents a financial burden that they might not have experienced if the agencies had taken care to disclose the physical or mental health conditions that the children had.<sup>78</sup>

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71. Joseph J. Kelleher, Note, *An Attorney's Liability for the Negligent Infliction of Emotional Distress*, 58 FORDHAM L. REV. 1309 (1990) (noting that courts seldom recognize this claim); GEOFFREY C. HAZARD, JR., SUSAN P. KONIAK, ROGER C. CRAMTON & GEORGE M. COHEN, *THE LAW AND ETHICS OF LAWYERING* 898 (4th ed. 2005) ("As a practical matter, criminal defense lawyers are not accountable to their clients in malpractice actions.").

72. The leading disappointed-heirs case is *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958). For a more recent return to the subject, allowing the claim, see *Harrigfeld v. Hancock*, 90 P.3d 884 (Idaho 2004), answering a certified question from the Ninth Circuit.

73. See *Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987); *McCamish v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999); *Collins v. Binkley*, 750 S.W.2d 737 (Tenn. 1988).

74. See generally Note, *Architectural Malpractice: A Contract-Based Approach*, 92 Harv. L. Rev. 1075 (1979) (describing this cause of action).

75. See Schwartz, *supra* note 2, at 112 (contrasting *Duncan v. Afton, Inc.*, 991 P.2d 739 (Wyo. 1999) (finding the claim valid), with *Ney v. Axelrod*, 723 A.2d 719 (Pa. 1999) (rejecting the claim)).

76. *Biakanja v. Irving*, mentioned above in note 72, involved a notary public rather than an attorney as defendant.

77. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. LOSS § 9 illus. 6, at 33–34 (Preliminary Draft No. 1, 2005).

78. Schwartz, *supra* note 2, at 113–14.



### 5. Spoliation

“Spoliation,” or “the destruction, alternation, or mutilation of evidence,”<sup>79</sup> is more than just a tort. Evidence law, for instance, uses the term to refer to an inference against one party in a civil case.<sup>80</sup> In torts, spoliation refers to an action for damages by an individual who suffers harm to her claim in litigation following the defendant’s destruction of evidence.<sup>81</sup> A products liability claim, for example, might succeed only if what remains of an injurious product is available for inspection at trial.

The choice to discuss spoliation here—that is, considering it among “contract-like paradigms” rather than focusing on its accidental destruction of property<sup>82</sup>—reflects the state of the cases. Most jurisdictions do not recognize the tort of spoliation, and among the decisions that do recognize it, most involve an undertaking or bailment by the defendant. Discussing spoliation in a book chapter about economic loss in the United States, Gary Schwartz singles out only one case for praise: *Coprigh v. Superior Court*,<sup>83</sup> for its “valuable point about contractual possibilities”: Anyone who wants someone else to preserve valuable evidence “should secure from the third party an agreement that it will do so; such a contractual agreement is then appropriate for judicial enforcement.”<sup>84</sup> It seems reasonable, then, for this taxonomy to proceed on the premise that an undertaking is integral, if not absolutely necessary, to a claim of negligent spoliation.

### B. Impediments to the Plaintiff’s Regular Business Operations

The categories of the previous section involved undertakings or agreements between the defendant and someone else, not always the plaintiff. Here we move to accidental harms where contracts play a diminished role. The wrongful behavior in the cases discussed in this section consists of the infliction of tangible, visible damage in a way that affects another’s economic expectancy.

#### 1. Physical Harms to Property that the Plaintiff Does Not Own

##### a. Damage to Utility Lines

In this class of cases, the defendant negligently causes damage to a source of some resource like water, heating, electric power, air conditioning and the like that is necessary for the plaintiff’s business operations. Its negligence takes

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79. MERRIAM-WEBSTER’S DICTIONARY OF LAW (2001), available at <http://research.lawyers.com/glossary/spoliation.html>.

80. For a recent discussion of spoliation in the law of evidence, see *Durst v. FedEx Express*, No. 03-5186, 2006 WL 1541027 (D.N.J. Jun. 2, 2006).

81. Spoliation can be intentional or negligent. Most of the cases involve unintentional destruction and so, consistent with this Article’s focus on accidents as well as the majority of problems that reach the courts, we will assume negligence rather than intentional destruction. Cf. Schwartz, *supra* note 2, at 112 (calling the tort “negligent spoliation”).

82. See *infra* Part B.1.

83. 95 Cal. Rptr. 2d 884 (Cal. Ct. App. 2000).

84. Schwartz, *supra* note 2, at 113.

physical expression in property not owned by the plaintiff, who suffers (only) economic loss in consequence of this physical harm. A leading case in the no-recovery canon, *Byrd v. English*, falls in this category.<sup>85</sup> As a general rule, courts view this kind of claim with hostility,<sup>86</sup> although exceptions appear.<sup>87</sup>

#### b. Damage to Public Environments or Infrastructures

This category relates closely to the next one, evacuations and closures,<sup>88</sup> but with more focus on the property-like interests of plaintiffs. Here defendants harm or destroy public spaces, of which the Restatement (Second) gives several examples: highways, bridges, streets, streams.<sup>89</sup> Economic activity revolving around water—coves, harbors, rivers, even seawater around a dock—dominates this case law. Whereas most accidentally inflicted economic loss gets captioned as negligence, some litigants bring actions in public nuisance: Public nuisance law will recognize a claim where the plaintiff suffered an injury different in kind from what the general public suffered.<sup>90</sup> Under this analysis, used in negligence as well as nuisance, notably successful plaintiffs have been people who catch fish and seafood for a living.<sup>91</sup> Courts appear to have identified a property interest in what they pull out of the water and sell.

#### 2. Evacuations and Closures

In this group of cases, the plaintiff loses money when carelessness by the defendant forces authorities to close or evacuate a discrete area that the plaintiff does not own. This closure, by impeding the plaintiff's business, causes economic loss. Although the consequences to the plaintiff resemble those of the previous category, "accidents that produce tangible physical effects," the category is different: Here it is less clear that *anyone* can prevail against the negligent actor—lack of a tangible injury occludes all potential claims. One would expect

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85. 43 S.E. 419 (Ga. 1903). *Byrd*, cited by Justice Holmes in *Robins*, is a classic expression of floodgates reasoning: If this plaintiff can sue, who can't?

86. See *Cargill, Inc., v. Offshore Logistics, Inc.*, 615 F.2d 212 (5th Cir. 1980); *FMR Corp. v. Boston Edison Co.*, 613 N.E.2d 902 (Mass. 1993); *Chambers v. Spruce Lighting Co.*, 95 S.E. 192 (W. Va. 1918).

87. In *Green Mountain Power Corp. v. General Electric Corp.*, 496 F. Supp. 169 (D. Vt. 1980), the court allowed the claim, flatly rejecting the rule of no recovery for negligent interference with contract.

88. See *infra* Part II.B.2.

89. RESTATEMENT (SECOND) OF TORTS § 821C (1979).

90. Pegen Mulhern, Comment, *Marine Pollution, Fishers, and the Pillars of the Land: A Tort Recovery Standard for Pure Economic Losses*, 18 B.C. ENVTL. AFF. L. REV. 85, 101 (1990).

91. *Louisiana v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985) (holding that the only plaintiffs stating a claim against the negligently piloted merchant vessel were those who lost their opportunity to obtain fish and seafood from the area); *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974); *Pruitt v. Allied Chem. Corp.*, 523 F. Supp. 975 (E.D. Va. 1981); *Burgess v. M/V Tamano*, 370 F. Supp. 247 (D. Me. 1973); see also RESTATEMENT (SECOND) OF TORTS § 821C cmt. h, illus. 11 (1979).

economic-loss plaintiffs to fare even worse in the evacuation cases than they do in tangible-damage-to-someone-else cases.<sup>92</sup> They do fare poorly.<sup>93</sup>

Two famous cases defy the pattern. The most notorious piece of decisional law in this category is *People Express Airlines, Inc. v. Consolidated Rail Corp.*,<sup>94</sup> where the New Jersey Supreme Court forthrightly characterized the plaintiff's claim as "unaccompanied by property damage or personal injury."<sup>95</sup> Negligence by the defendant, Conrail, caused a chemical fire in a railroad yard. Worried that the fire might lead to an explosion, authorities evacuated the plaintiff's nearby airport terminal, causing the plaintiff to forfeit bookings and thereby lose revenue. The court allowed the claim. In *J'Aire Corp. v. Gregory*,<sup>96</sup> decided a few years earlier, the California Supreme Court upheld the claim of a restaurant business against a contractor for negligent delays in its remodeling of a local airport. Following these delays the plaintiff, whose only connection to the defendant contractor was its lease for space in the airport terminal that the contractor was remodeling, sued for profits that it lost during the unreasonably elongated construction period and the time during which it could not open because of the lack of air conditioning. The court agreed with the restaurant plaintiff that

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92. The New York Court of Appeals expounded on this subject in 532 *Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc.*, 750 N.E.2d 1097 (N.Y. 2001). When part of a building fell down in midtown Manhattan, plaintiff business lost money due to closure and access difficulties for their customers. Holding that they could not recover, the court reviewed two intermediate-appellate precedent cases, both arising out of the same accident, an explosion that caused both property damage to a nearby business and a loss of electric power that affected several nearby plants. In an action by the nearby business that had suffered property damage, the Appellate Division recognized a claim for economic loss as well as for the property damage. In the related case, brought by workers at a nearby factory who lost wages when the plant closed temporarily, the Appellate Division held that the plaintiffs had failed to state a cause of action. *Id.* at 1102-03.

93. See *In re Marine Navigation Sulphur Carriers v. Lone Star Indus., Inc.*, 638 F.2d 700, 702 (4th Cir. 1981) (rejecting claim of shippers foreclosed from navigable waters in Virginia); *In re Cleveland Tankers, Inc.*, 791 F. Supp. 699 (E.D. Mich. 1992) (dismissing claims of business entities that lost business when a channel was ordered closed); *In re Williamson Leasing Co.*, 577 F. Supp. 890 (E.D. Mo. 1984) (finding no liability for economic loss following the closing of a railroad bridge for 91 days); *Gen. Pub. Utils. v. Glass Kitchens of Lancaster, Inc.*, 542 A.2d 567 (Pa. Super. Ct. 1988) (rejecting claim based on Amish loss of tourist revenue after Three Mile Island). Multi-plaintiff litigation in *Philip Morris, Inc. v. Emerson*, 368 S.E.2d 268 (Va. 1988), arising out of a chemical-leakage accident, illustrates the tendency of courts to regard this harm as intangible and, accordingly, less than real. Pertinent among these claims was that of a nearby campground that had to evacuate. Finding "no evidence that any of the pentaborane gas actually invaded the campground," the Virginia Supreme Court denied this claim. *Id.* at 282. For an example of the same outcome in an English court, see *Weller & Co. v. Foot & Mouth Disease Research Institute*, (1966) 1 Q.B. 569, rejecting a claim by auctioneers for lost commissions following the closure of a market due to the fear of cattle disease that defendants' negligence had engendered.

94. 495 A.2d 107 (N.J. 1985).

95. *Id.* at 108.

96. 598 P.2d 60 (Cal. 1979).

the dilatory contractor had breached a duty to it, and held that these lost profits were foreseeable.<sup>97</sup>

The bulk of economic-loss case law repudiates *People Express* and *J'Aire*. Some of this repudiation takes place under the label of proximate cause. *Petitions of Kinsman Transit Co. (Kinsman II)*,<sup>98</sup> for instance, appears in torts casebooks as a proximate-cause two-part note case rather than an economic loss case, even though *Kinsman II* includes plaintiffs who could not use the Buffalo River for navigation because of an obstruction attributable to negligence and thereby lost income. This economic loss, said the Second Circuit, was "too remote."<sup>99</sup> As a subset of economic-loss case law, much of which can be said to illustrate remoteness,<sup>100</sup> the closure category seems particularly vulnerable to this condemnation.<sup>101</sup>

### C. Emotions Mixed with Financial Loss

In this category, plaintiffs add references to their dignity or emotional state to their claims for lost money. Such causes of action hardly warrant the label of "pure" economic loss; one might call these efforts a search for redress of the monetizable and the non-monetizable combined.

#### 1. Defamation

Because a defamation plaintiff need not prove physical impact, damage to tangible property, emotional effects, or intentional conduct by the defendant, this cause of action warrants a place in a taxonomy of unintentional economic loss. Defamation actions seek to repair harm to "reputation," an interest that includes the plaintiff's economic well-being along with the value of her good name.

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97. *Id.* at 61–64. Along with the major exceptional holdings of *People Express* and *J'Aire*, case law on evacuations and closures includes a couple of successful claims by excavator plaintiffs that suffered economic loss when a utility defendant negligently failed to mark the location of its power lines, causing the plaintiffs to suffer lost profits from unwanted "down time." *A&L Underground, Inc. v. City of Port Richey*, 732 So. 2d 480, 481 (Fla. Dist. Ct. App. 1995); *Followell v. Cent. Ill. Pub. Serv. Co.*, 663 N.E.2d 1122, 1124 (Ill. App. 1996). These claims relied, however, on state-specific rights of action declared explicitly in statutes. *See Coastal Conduit & Ditching, Inc., v. Noram Energy Corp.*, 29 S.W.3d 282, 288–90 (Tex. App. 2000) (distinguishing *A&L Underground* and *Followell* in a decision that "decline[d] to follow *J'Aire Corp.* and *People Express Airlines*," preferring to join "the majority of jurisdictions which have considered this issue"). A statute also controlled in *Kodiak Island Borough v. Exxon Corp.*, 991 P.2d 757 (Alaska 1999), where the Alaska Supreme Court held that under a state statute Exxon had to pay municipalities for the indirect costs of the notorious Exxon *Valdez* accident.

98. 388 F.2d 821 (2d Cir. 1968) (*Kinsman II*); *see also In re Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964) (*Kinsman I*).

99. *Kinsman II*, 388 F.2d at 824.

100. *See infra* Part III.B.

101. *See* David Gruning, *Pure Economic Loss in American Tort Law: An Unstable Consensus*, 54 AM. J. COMP. L. 187, 194–95 (2006) (discussing "remoteness" as central to *Kinsman* and also to the economic-loss problem of negligent failure to confine a diseased animal whose escape closes an auction).

Although these claims can include emotional and dignitary injury,<sup>102</sup> economic loss often dominates. One section of the Restatement (Second) gives four examples of "special harm" accompanying defamatory statements that the law will redress—telling the plaintiff's employer that the plaintiff is a labor agitator and thereby causing the plaintiff to lose his job; telling the plaintiff's employer that the plaintiff is "unchaste," with the same result; saying that a person engaged to be married has a venereal disease, causing his fiancée to break the engagement; and announcing that a merchant uses false weights and measures, causing a loss of business. Three of these examples focus on economic loss more than any other type of harm.<sup>103</sup>

## 2. Wrongful death<sup>104</sup>

In a wrongful death action, a relative of a person who died as the result of tortious (usually negligent) conduct depicts this dead person as a source of value to him or her as the decedent's close relative. This statutory cause of action, unknown to the common law that clung to its *actio personalis* maxim,<sup>105</sup> accompanies a related statutory cause of action, the "survival statute," but protects different interests.<sup>106</sup> A survival statute allows the representative of a dead plaintiff to proceed with litigation on behalf of this deceased person, as if she had not died. Wrongful death, by contrast, sites the loss in heirs rather than the decedent herself. Courts measure the value of this lost life in two ways. First, they can count the amount of support that the decedent's dependents would have expected to receive but for the wrongful death.<sup>107</sup> Second, they can estimate the amount of savings the decedent would have accumulated but for the wrongful death, and presume that she would have left her estate to these family members.<sup>108</sup>

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102. Time, Inc. v. Firestone, 424 U.S. 448, 460–61 (1976).

103. RESTATEMENT (SECOND) OF TORTS § 622 (1977).

104. By classifying wrongful death as an economic loss claim, this heading opens the related question of whether to add consortium to this category. See Bussani, *Economic Restatement*, *supra* note 45, at 124 (putting together "pure economic loss, emotional distress and consortium" as examples of "limitations imposed on the extent of compensable harm"). Certainly consortium contains a pecuniary element, at least in its history; the cause of action began with a master's claim for loss of services resulting from the enticement or injury of his servant. DOBBS, *supra* note 18, at 842. Today, however, Professor Dobbs's phrase "[l]oss of consortium as a species of emotional harm," *id.* at 841, appears more accurate than an economic-loss characterization.

105. *Actio personalis moritur cum persona*, or, "[a] personal action (arising out of a tort) dies with the person." Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment (Part 1 of 3)*, 94 YALE L.J. 1855, 1912 (1985).

106. DOBBS, *supra* note 18, at 803.

107. *Id.* at 808.

108. *Id.* at 810–11. Professor Dobbs notes that this measure is perhaps more speculative than the loss-of-support alternative because the decedent "might have left her estate to different beneficiaries, or might [have] consumed it all in the costs of nursing homes or otherwise." *Id.* at 811.

### *D. Harm to Intellectual Property*

Including wrongful death in this taxonomy moves from the common law to statutes. Dan Dobbs heads further down this path: As part of his discussion of economic loss in his treatise on torts, Professor Dobbs mentions copyright and trademark as examples of how the law recognizes “stand-alone economic interests” by statute.<sup>109</sup> Some would exclude copyright and trademark infringement from a canon of tort subjects,<sup>110</sup> and I do not understand Dobbs to be insisting on their inclusion. Instead he brings up copyright and trademark to point out that recognition of “pure” economic interests without personal injury or property damage is not alien to the law. Like the other causes of action included in this taxonomy, copyright and trademark infringement can be committed unintentionally,<sup>111</sup> do not of themselves cause personal injury or damage to tangible property, and inflict economic loss.

## II. THE SIMPLICITY THESIS

To review: Keep It Simple begins with the observation that tort law governs relations among persons who have not volunteered for attention from the law. Accordingly it must, on the one hand, be intelligible to nonexperts and unworldly persons. On the other hand, because tort law as practiced requires a modicum of money or sophistication to play the game, these players are better educated and more comfortable with abstraction than the average person, who in the United States reads slightly below the eighth grade level. From here it becomes approximately correct to say that tort rules are aimed at a reading, or more generally a cognitive, level of about 17.<sup>112</sup>

The experiences and limitations of a person at this developmental stage are constitutive of tort doctrine. Some financial losses are easy for this person to understand. Any teenager has for many years been familiar with intentional wrongdoing, as both agent and object, and so would with no difficulty recognize torts like deceit and conversion. Economic loss discussed in this Article derives from unintentional conduct, however, and unintentional harm is not actionable

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109. DOBBS, *supra* note 18, § 482A (Supp. 2005).

110. Decisional law has applied the tort rubric to intellectual property violations. *See, e.g.,* Polar Bear Prods., Inc. v. Timex Corp., 384 F.3d 700, 720 (9th Cir. 2004) (citations omitted) (holding that because trademark infringement “sounds in tort,” its statute of limitations under Montana law is that of a tort claim); *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 931 (7th Cir. 2003); *Ted Browne Music Co. v. Fowler*, 290 F. 751, 754 (2d Cir. 1923) (“[I]nfringement of a copyright is tort . . .”).

111. As George Harrison learned to his dismay when the Second Circuit found that his song “My Sweet Lord” infringed a copyright, even though the trial judge also found that he did not do so consciously. *ABKCO Music, Inc. v. Harrisongs Music, Inc.*, 722 F.2d 988, 997 (2d Cir. 1983). For an older statement of the point, see *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 102 F.2d 282, 283 (8th Cir. 1939), which notes that intent to infringe is not an element of copyright violation. On trademark, see *Sunward Electronics, Inc. v. McDonald*, 362 F.3d 17, 25 (2d Cir. 2004), which notes that intent to deceive is not an element of trademark infringement; nor is good faith a defense.

112. *See* Goldfarb, *supra* note 30 (expressing hope that this approximation will be refined following future study).

without the breach of some duty. Our 17-year-old understands *assumpsit*, the idea that undertakings create responsibilities. When there is no undertaking and the loss is (only) economic the existence, and in turn the breach, of duty grows more abstract for this factfinder, more difficult to comprehend. Two additions help convey the reality of injury when present in economic loss claims: a reference to the emotional context of a natal family, and a visual image of the injury.

### *A. Assumpsit or Not*

Individuals regard contracts as constituents of justice. Developmental psychology can help us consider which claims are simple enough yet also compelling enough to resonate with participants in the American systems of tort adjudication. To describe its contributions, I rely on the work of the theorist deemed central to this subject: Lawrence Kohlberg.<sup>113</sup>

With respect to the sense of morality and justice, Kohlberg situates the late adolescent at Stage 3 or 4 of a six-stage hierarchy (or perhaps only a five-stage hierarchy, the sixth being hard to attain in lived human experience). The first stage in moral development is an "obedience and punishment orientation." The young child identifies wrong behavior as that which receives punishment. At Stage 2, a child sees persons as individuals possessing self-interest. These two early stages are "preconventional morality," wherein children see morality as external to what they do. In the next two stages, "conventional morality," adolescents identify themselves as members of society. Stage 3 introduces the pursuit of "good interpersonal relationships." Kohlberg's Stage 4, summed up as "law and order" and "maintaining the social order," focuses on what is good for society as a whole.<sup>114</sup>

For present purposes, we need not dwell on the criticism of Kohlberg that Stage 4 may not really represent an advance from Stage 3.<sup>115</sup> Instead, we can focus on the rung Stages 3 and 4 occupy together, Kohlberg's conventional morality. Tort liability rules must resonate for persons at this stage. After they move further along, reaching "postconventional morality," individuals reflect on the nature of a good society (in Stage 5) and later, at the elusive Stage 6, might pursue universal principles. Stages 5 and 6 are not simple enough for Keep It Simple.

Undertakings make sense to our factfinder: Conventional morality at stages 3 and 4 recognizes many claims that can be classified under contract or *assumpsit*. Protests following breached contracts will win support. While inclined to honor contract-like understandings, the factfinder is not a lawyer, and has no affinity for legalisms. A person at stage 3 or 4 might cut plaintiffs slack on formal requirements of contract law like consideration and the statute of frauds. But this

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113. In law reviews, Kohlberg is a controversial thinker. *See infra* note 115 and accompanying text. Here I put aside controversy-Kohlberg and stay within consensus-Kohlberg.

114. RONALD F. DUSKA & MARIELLEN WHELAN, *MORAL DEVELOPMENT: A GUIDE TO PIAGET AND KOHLBERG* 45-47 (1975).

115. *See* CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 18 (1982).

liberality has important limits: Our late-teenager will not honor every claim of loss following every type of undertaking.

Conventional morality denies that individuals can help themselves to the property of others simply by assertion. Stage 3 demands that people defer to roles and responsibilities within groups, and Stage 4 expects people to fulfill their duties with respect to society and group welfare. To satisfy the demands of conventional morality, plaintiffs expecting defendants to compensate them for money they lost, or did not get, from an undertaking must present their claims in terms of duties. If they failed to make the bargain that would have obviated their loss, our factfinder would generally hold them responsible for their own lapse. A deal is a deal, says conventional morality, and the absence of a deal is in turn the absence of a deal.<sup>116</sup>

Transferred loss provides an example of contract-assumpsit reasoning for our factfinder. "Here," Bussani begins, "C causes physical damage to B's property or person, but a contract between A and B (or the law itself) transfers a loss that would ordinarily be B's onto A."<sup>117</sup> Putting aside the parenthetical "(or the law itself)" for a minute, our factfinder will see this category in terms of an unexcused failure to make the right contract. If a contract between A and B transferred the loss that C caused to B's property onto A, then Keep It Simple will let the loss fall onto A, on the ground that A is responsible for the contracts it makes or could have made but failed to make. Though unversed in terms of art, this factfinder would reach a conclusion consistent with the law of subrogation and negligent interference with contractual relations.

Losses transferred by "the law itself" are another matter for this participant in the tort system. Such losses will not look simple, and our factfinder will not feel competent to resolve them. She is new, after all, to the idea of positive law as a distinct imperative. Whereas this person would without much struggle reject claims by private parties for losses that were transferred onto them, and would rule in favor of different plaintiffs in economic loss cases with equal swiftness, she would have no insight into what to do with the subrogation-like claims for recoupment that local governments have brought against manufacturers of cigarettes and handguns. Not surprisingly, American law has kept juries at a distance from these claims.<sup>118</sup> Pay continuation statutes, the other example of losses transferred by "the law itself," are virtually nonexistent in the United States,

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116. In this sense Keep It Simple recalls a contribution to the economic loss literature from law and economics: the concept of "channeling contracts," whose formation the law might choose to encourage by denying liability. Mario J. Rizzo, *A Theory of Economic Loss in the Law of Torts*, 11 J. LEGAL STUD. 281, 282 (1982). The denial of recovery in tort teaches prospective plaintiffs who lack privity of contract with the prospective tortfeasor to seek indemnification in advance from another person or entity. For a detailed critique of channeling as both a positive and a normative theory, see Ronan Perry, *Relational Economic Loss: An Integrated Economic Justification for the Economic Loss Rule*, 56 RUTGERS L. REV. 711, 776-81 (2004).

117. See *supra* note 51 and accompanying text.

118. See Andrew S. Cabana, *Missing the Target: Municipal Litigation Against Handgun Manufacturers: Abuse of the Civil Tort System*, 9 GEO. MASON L. REV. 1127, 1135-45, 1160-65 (2001) (summarizing the application of standing and other doctrines to reject municipalities' claims for handgun-related economic loss).



and so this subcategory disappears within American law. Asbestos abatement becomes another exception unamenable to adjudication by this factfinder: Losses derived from a duty to abate asbestos resemble pay continuation and subrogation, transferred mainly by "the law itself," rather than the harms plaintiffs experience and recount, and so it too retreats from the jury-focus of American law.

Our factfinder looks askance at the remainder of paradigmatic cases classified above as contract-like. Claimants reporting economic loss resulting from defective products, disappointed possessors of (most) buildings,<sup>119</sup> and victims of spoliation generally could have looked out for themselves with a contract and thus do not appear entitled to a post hoc rescue in court by our protagonist. Non-privy recipients of bad services like flawed accountings would also lose, unless they can identify themselves as, in effect, third-party beneficiaries.

This person does understand duties of beneficence based on power and subordination: Stages 3 and 4 give a person ample experience with hierarchies that create duties. Parents and children, teachers and pupils, employers and employees all convey paternalism as a source of obligation, and so a person at the conventional-morality stage would reject reform proposals like the suggestion to replace medical malpractice liability with contract.<sup>120</sup> When the contexts supporting a paternalistic relation between defendant and plaintiff are not present, however, our factfinder has no problem letting adverse outcomes lie where they fall.

Thus far Keep It Simple has aligned itself generally in the camp of defendants, finding that the absence of a contract precludes liability. The next two sections show a pro-plaintiff side of our factfinder. This person brings an emotional and familial history to accept several economic loss claims that add injured feelings or violations of the hearth to the loss of money. Visual images can also persuade this factfinder that an economic loss is tangible and thus warrants redress.

### ***B. Empathy***

Certain claims that mix emotion with financial loss resonate at stages 3 and 4. Defamation doctrine accords with Keep It Simple by relating the reputation of human beings to an interest they hold along with their personality. It ranks economic-expectancy-related-to-reputation above economic expectation of the contract-like category just described—defamation plaintiffs fare better than, say, spoliation plaintiffs—in a way that a teenager, who knows what it means to be denigrated or humiliated before other people, would readily understand. Defamation doctrine accordingly takes personal defamation more seriously than insults that harm the reputation of a business, which are covered under the less

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119. See *infra* notes 170–173 and accompanying text (distinguishing homes from commercial buildings).

120. This idea was first announced in Richard A. Epstein, *Medical Malpractice: The Case for Contract*, 1 AM. B. FOUND. RES. J. 87 (1976), and explored extensively in later decades. See Gary T. Schwartz, *Medical Malpractice, Tort, Contract, and Managed Care*, 1998 U. ILL. L. REV. 885, 897 (providing a twenty-year history of this proposal in the academy).

plaintiff-friendly rubrics of injurious falsehood, trade libel, commercial disparagement, slander of title, or “veggie libel.”<sup>121</sup> It does not care about the reputations of dead people,<sup>122</sup> a stance that most adolescent adjudicators would endorse. Wrongful death claims—stories told by survivors about the relatives they miss—come across as accounts of genuine loss, however.

Harms to buildings have two aspects that pertain to the Keep It Simple thesis. On one hand they fall under the contract-like classification, making our factfinder unsympathetic to plaintiffs. On the other hand, certain types of buildings engage emotions, opening an opportunity for sympathy for the plaintiff.<sup>123</sup> The next section extends this theme to the visual dimension.

### C. Visuals

Although the dominance of sight over the other four senses that we have noted is a generalization applicable to persons of all ages, visual perception is, like Kohlberg’s “moral stages,” a developmental phenomenon. The developmental psychologist Anne Schlottmann has identified “[i]nnate perceptual causality” as the technique by which young children begin to understand cause and effect.<sup>124</sup> Whereas Piaget, titan of the field, had claimed that children learn causality by “feeling the efficacy of [their] own actions,” Schlottmann interpreted later experimental work to find that observation is more fundamental to causal understanding than experience.<sup>125</sup> Adults go on to understand causality in terms of mechanisms: Invisible electricity, they learn, can make a toy car move. We adults have taught ourselves not to overrely on what we see,<sup>126</sup> although the lesson is shaky: “At one time or another,” according to a neuroscience text, “almost all of us have been charmed by the skill of an effective ventriloquist. You don’t quite suspend your belief that wooden heads can’t talk, . . . but because the dummy’s lips, eyes, and head are moving and the ventriloquist’s aren’t, you experience the voice as coming from the dummy.”<sup>127</sup> The “ventriloquist effect” refers to

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121. DOBBS, *supra* note 18, at 1138–39. Dobbs refers to “sirloin slander” as well as “veggie libel” statutes. *Id.* at 1139 (“These statutes, using varied language, permit claims based upon false statements about food products.”).

122. *Id.* (“No action lies for defamation of the dead.”).

123. Rhode Island case law illustrates the point. See *Boston Inv. Prop. #1 State v. E.W. Burman, Inc.*, 658 A.2d 515 (R.I. 1995) (answering certified question: no liability for economic loss when a parking lot didn’t hold up). Rhode Island later limited this holding to commercial transactions, first expressly in *Rousseau v. K.N. Construction, Inc.*, 727 A.2d 190 (R.I. 1999), and then implicitly in *Nichols v. R.R. Beaufort & Associates, Inc.*, 727 A.2d 194 (R.I. 1999).

124. Anne Schlottmann, *Perception Versus Knowledge of Cause and Effect in Children: When Seeing is Believing*, CURRENT DIRECTIONS PSYCHOL. SCI., Aug. 2001, at 111, 112, available at <http://www.psychol.ucl.ac.uk/babylab/Schlottmann%202001.pdf>.

125. *Id.*

126. *Id.* at 113.

127. BARRY E. STEIN & M. ALEX MEREDITH, *THE MERGING OF THE SENSES* I (1993).

intersensory bias—where “the visual modality predominates,”<sup>128</sup> in adults as well as children.

This simple hierarchy—visual observation for beginners, mechanistic neo-Humean hypotheses for the advanced—may be of interest beyond developmental psychology. It is, of course, not so simple. Schottmann warns that “mechanism-based causality” may not be “automatically subsuming its precursor.”<sup>129</sup> Human beings learn mechanistic causality “usually [as] a matter of hypothesis, not fact, and perceptually designated causes are not necessarily wrong.”<sup>130</sup> This warning heeded, consider a few starting points: First, vision- or perception-based accounts of reality, including causality, come across to human beings as convincing before mechanistic accounts do. Second, the ventriloquist effect has no counterpart assigning privilege to another of the five senses: When sensory inputs conflict, human beings rate visually obtained information as more reliable than information conveyed by other senses. Third, as I have developed at length elsewhere, American legal doctrine manifests its own occasional ventriloquist effect, or privileging of the visual.<sup>131</sup> If these premises are credited, it becomes possible to explore the role of visually obtained information in the landscape of no-duty rules for economic loss.

The point regarding visuals applies to economic loss cases to which the contracts-assumpsit paradigm does not speak. It accords with the rule of no liability for accidents that impede normal business operations. Plaintiffs cannot recover for damage to utility lines because this damage cannot be understood as a picture: Our factfinder can visualize a downed telephone pole but not its connection to the economic loss of a business. Similarly, the economic loss attributable to closures and evacuations—again, with no significant visual images—will have to lie where it falls.

On the plaintiff's side of the ledger, the visual bias of Keep It Simple affirms the prevailing view that those who earn profits by capturing fish and seafood from public waters have a claim for economic loss when a defendant negligently prevents them from carrying out their work. Images of fishermen or oystermen kept ashore at the edge of polluted or barricaded waters with empty lines or nets in hand—or reeling in poisoned corpses rather than fresh food—resonate in the mind's eye. This image is much more acute than one of disappointed recreationists turned away from public waters when they want to catch fish for sport, or swim, or snorkel.

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128. *Id.*

129. Schottmann, *supra* note 124, at 113.

130. *Id.* I have noted the tendency of American doctrine on the one hand to regard the visual as primitive, superstitious, or otherwise erroneous and bound to be superseded in the future through enlightenment, and on the other to privilege visible and tangible interests over interests that can be manifest only in words or abstractions. Bernstein, *Representational Dialectic*, *supra* note 1.

131. Among my examples in *Representational Dialectic* were obscenity and civil asset forfeiture. These doctrines impose criminal and quasi-criminal sanctions on individuals by focusing not on harm, the traditional concern of the criminal law, but on the presence of a visible object. See *id.* at 322–40.

The visual priority in Keep It Simple is consistent with other rules noted in the Part I taxonomy. Copyrights and trademarks are amenable to visual perception: Our young factfinder can see anything that can be copyrighted—even computer code—or that serves as a distinctive business mark, and has no trouble understanding the appropriation or misuse of it. The rule that the dead and the merely incorporated cannot be defamed<sup>132</sup> makes sense at Stages 3 and 4, where abstractions and invisible entities elude attention.

### III. “KEEP IT SIMPLE” MEETS ITS CHIEF RIVALS

In this Part, I compare the Keep It Simple thesis with its chief rival sources of explanation for the no-recovery rule: First, law and economics; second, “the floodgates,” an overriding concern with unbounded liability to an undifferentiated class of claimants. The comparison looks to decisional law, asking whether cases come out consistent with any of these three explanations. Inconsistency within this case law means that no descriptive theory can explain every case; but of the three, Keep It Simple aligns best with what courts have decided.

#### A. *Keep It Simple vs. Law and Economics*

##### 1. *The Explanation*

Economic analysts focus on social losses or “socially relevant externalities,”<sup>133</sup> as distinguished from the “private” losses that individuals suffer. The social losses of a particular action consist of the sum of all private losses minus the sum of all benefits that this conduct generates.<sup>134</sup> In this metric, financial losses certainly count: “[T]he purely economic nature of the harm suffered by the victim should not be dispositive and liability should be imposed on the tortfeasor,” Mauro Bussani with his co-authors writes, “whenever the accident is the source of a socially relevant loss.”<sup>135</sup> To the extent that the conduct in question causes only private loss that is not socially relevant—paradigmatically, because it is offset by social gains—tort law should not hold a defendant liable.

Bussani discusses some of the categories considered here and identifies what he deems the optimal legal response. For transferred loss, he claims “normative agnosticism,”<sup>136</sup> either liability or no liability is fine, so long as the rules (a) preclude double recovery by plaintiffs and (b) permit some party—either the person who suffers economic loss or the stakeholder in the person or property harmed—to recover. For utility cases, Bussani favors liability: “[T]he asset’s market price does not capture the full surplus that third parties derive” from its use, and so limiting recovery to whatever loss the utility company suffers “would fall short of the true social loss occasioned by the accident.”<sup>137</sup> For closed public

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132. See *supra* note 122 and accompanying text.

133. Bussani, *Economic Restatement*, *supra* note 45, at 132.

134. *Id.* at 131.

135. *Id.* at 137.

136. *Id.* at 145.

137. *Id.* at 145. Another economic analyst disagrees, however, finding social losses too scant:

environments and infrastructures, Bussani argues that allowing recovery gives too much to plaintiffs and denying it gives too much to defendants; the proper rule would fall somewhere in the middle. Because neither rule is perfect, Bussani feels untroubled by the dominant rule of no liability.<sup>138</sup> For flawed services, referring generally to sloppy work by expert counselors, Bussani worries about third parties enjoying a right to sue without paying for the generation of information. To avoid this externality, he would recognize claims only from those whom the transaction was intended to benefit.<sup>139</sup>

The Bussani taxonomy stops here, and so views from law and economics on the other causes of action we have considered will have to come from more diffuse sources. An extensive literature on the law and economics of intellectual property finds value in copyrights and trademarks but takes no unitary position (*à la* Bussani) on whether liability should be augmented, reduced, or maintained at current levels.<sup>140</sup> Writings on the law and economics of making spoliation actionable in tort appear limited to one article,<sup>141</sup> which concludes that the answer is uncertain; the author does insist that actionable spoliation must be either intentional or in breach of “a legal or contractual duty to preserve evidence which is relevant to the potential civil action.”<sup>142</sup>

## 2. *The Scorecard*

From the case law, the claim that “efficiency” explains various judicial choices, both pro and con, on recovery for economic loss appears exaggerated. Bussani professes to be indifferent to the rule on transferred loss: Any rule will suit, so long as the tortfeasor becomes liable to *someone*. But it is far from clear that the alternative plaintiff can sue when by the happenstance of a contract or “the

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Economic losses consequent upon a negligent interruption in the supply of a public utility should similarly be irrecoverable. Loss of profits is usually a mere transfer of wealth. Expenditures that are intended to prevent the loss of profits are either inefficient expenses or are too small to justify the administrative costs of tort liability. Any payment by the halted manufacturer to its employees during the interruption is a wealth transfer: the latter are getting paid without having to work.

Perry, *supra* note 116, at 783.

138. Bussani, *Economic Restatement*, *supra* note 45, at 149–50.

139. *Id.* at 151.

140. In 2002 Wendy Gordon published a short essay surveying two decades of her own work on the law and economics of copyright questions, particularly fair use, which makes a good introductory text. Wendy J. Gordon, *The “Market Failure” and Intellectual Property: A Response to Professor Lunney*, 82 B.U. L. REV. 1031 (2002). For a defense of trademarks, see William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 303 (1987), which argues that robust trademark protection improves both the quality of trademarks and the quality of goods.

141. Terry R. Spencer, *Do Not Fold Spindle or Mutilate: The Trend Towards Recognition of Spoliation as a Separate Tort*, 30 IDAHO L. REV. 37 (1993). Chris William Sanchirico, *Evidence Tampering*, 53 DUKE L.J. 1214, 1280–83 (2004), touches lightly on nearby ground when refusing to lament the choice of most courts to reject this tort. *See id.* at 1317 (stating that the law has opted “for high sanctions rather than likely detection”).

142. Spencer, *supra* note 141, at 53.

law itself" she experiences no loss. The Bussani rationale does a good job explaining what it calls the "loss of a star" cases, an easy category wherein most courts agree that a professional sports organization cannot recover for lost ticket sales against a tortfeasor who injures the crowd-drawing athlete on its payroll. It also works to explain European-style pay continuation liability. But the fish Bussani shoots in this barrel are small. Injured superstars and pay continuation statutes seldom turn up in American case law, and even in the European tradition in which the Bussani analysis is based, transferred loss arises more often in the context of leased and chartered assets, and there, Bussani cannot write a cogent rule.

For utility claims, Bussani thinks that denying recovery would undercount social losses. Most courts nevertheless deny recovery. Are judges thumbing their noses at efficiency? Bussani presses on: "If liability is avoided in those cases"—yes, liability is indeed avoided—"it is most likely because of concerns for open-ended liability and not for efficient incentive considerations."<sup>143</sup> This nimble version of economic analysis takes ownership of stances that come out its way and then backflips to disclaim responsibility for stances that don't: When a rule is not congruent with efficiency, "it is most likely" that something other than efficiency is going on. Indeed.<sup>144</sup>

On closures and evacuations, Bussani acknowledges a bind. Closures seldom generate much social loss, but they always generate some. "A private economic loss of one party would not generate a social loss of equal magnitude, unless we consider the purely abstract case of a perfectly inelastic market."<sup>145</sup> Therefore neither a no-liability rule nor a rule allowing recovery would align with efficiency, although the no-liability rule comes closer. Bussani puts this one in his Win column: The rule of no recovery is "driven by implicit efficiency considerations."<sup>146</sup> It helps to throw on the scale some ever-helpful anxiety about "the administrative costs of implementing a full liability system"<sup>147</sup>—tort recovery is never free, after all. It would be more accurate to say that for cases involving closures, no rule can achieve an efficient result.

For flawed services, Bussani would recognize claims by intended beneficiaries and not the general public. This outcome lands solidly in his Win column. Few states take a contrary position, and Restatement (Second) of Torts is in accord.

As for the claims that Bussani does not discuss, including wrongful death, spoliation, defamation, and intellectual property, economic analysts have not ventured to say much about how cases should come out. Copyright and trademark are especially indeterminate, as was mentioned.<sup>148</sup> As a recent paper notes, the tricky balance for copyright is to "stop deterring innovators, and permit cost-

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143. Bussani, *Economic Restatement*, *supra* note 45, at 145.

144. See generally Bernstein, *Whatever Happened*, *supra* note 40, at 306–07 (accusing law and economics of a tendency to overcount its victories).

145. Bussani, *Economic Restatement*, *supra* note 45, at 148–49.

146. *Id.* at 149.

147. *Id.*

148. See *supra* note 140 and accompanying text.

effective enforcement of copyright.”<sup>149</sup> This recommendation is reminiscent of the counsel that Satchel Paige gave to baseball pitchers: Throw strikes.<sup>150</sup> Chris Sanchirico takes a position consistent with most of the case law on spoliation.<sup>151</sup> As both competitor and judge in this exercise, I ought to be generous to a rival, and so will assign all this miscellany to the law and economics Win column.

To compare the explanatory power of law and economics accounts with the account of Keep It Simple, however, we must return to the topics contained in Bussani, as this work is the only writing in law and economics that builds a wide taxonomy and then purports to identify whether liability or no liability is efficient. The two explanations account equally well for one major category, flawed services. But Keep It Simple fares better overall. It rejects liability for transferred loss, as do the courts, whereas Bussani can recommend only “agnosticism.” For utility cases, Bussani’s preferred rule of liability is contrary to what courts reach,<sup>152</sup> whereas Keep It Simple aligns with the case law. Keep It Simple is congruent with decisional law also on closures and evacuations, and its ambivalence about unsatisfactory buildings that happen to be homes also comports with how courts rule.

### ***B. Keep It Simple vs. The Floodgates Explanation***

The exercise just undertaken with respect to law and economics—explanation first, scorecard second—is harder to do here, because the claim is harder to articulate. Adherents do not come together in an academic movement; most of them do not use the metaphor “floodgates,” which I have chosen only for shorthand’s sake.<sup>153</sup> Nevertheless, some variation on floodgates is probably the most widely shared understanding of why American tort law rejects claims for economic loss, and so it needs an airing in any presentation of a differing account.

#### *1. The Explanation*

The floodgates rationale offers no topic-by-topic analysis like Bussani’s, just a stance: Because economic loss does not have the same inherent connection

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149. Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation* (Univ. of Cal., Berkeley Sch. of Law, Law & Economics Working Paper No. 025; Univ. of Tex. Sch. of Law, Public Law & Legal Theory Research Paper No. 63; 2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=525662](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=525662).

150. “Throw strikes. Home plate don’t move.” The Official Satchel Paige Quote Page, <http://www.satchelpaige.com/quote2.html> (last visited Oct. 30, 2006). In fairness to Lemley and Reese, I acknowledge that I have pulled their phrase out of context: Their paper does make specific recommendations, focusing on the incentives that potential litigants face.

151. See *supra* notes 79–84.

152. But see *supra* note 136 (noting that Bussani is not speaking for all of law and economics on this point).

153. Writings on the floodgates rationale include Rabin, *supra* note 12, and Jane Stapleton, *Duty of Care and Economic Loss: A Wider Agenda*, 107 L.Q. REV. 249 (1991). See also Bernstein, *Representational Dialectic*, *supra* note 1, at 342 n.233 (citing other sources).

to physical consequences that accompany personal injury and property damage, commentators have deemed it more dependent on the judiciary for the drawing of lines. Unless tort law can distinguish categorically between good and bad economic loss claims, courts will impose "liability in an indeterminate amount for an indeterminate time to an indeterminate class."<sup>154</sup> Indeterminacy means excessive liability.<sup>155</sup>

## 2. Commentary and Scorecard

Is that so? How much is much? "The floodgates" may be a popular rationale in part because it is malleable; consumers of the theory can opt for either flexibility or rigor. In its soft form the floodgates resembles proximate cause, where the defendant's lapse is unquestioned but the consequences of the lapse deemed too remote for judicial redress. Some of James Gordley's account of the economic loss rule can be read in this light.<sup>156</sup> From that point Gordley takes the necessary next step: He denies that the economic loss rule is a rule, and prefers not to generalize about what courts do with economic loss claims.<sup>157</sup>

In this soft form the floodgates metaphor cannot be interrogated or tested. Injuries gain redress if they are not too remote. Observers determine what is too remote by looking at what courts refuse to redress; judges determine what is too remote to redress by applying the economic loss rule. Q.E.D. Rather than rejoin the ancient debate over whether "duty" is, or should be, less question-begging than the foreseeability of proximate cause,<sup>158</sup> I will conclude this summary of the soft form with the remark that it does not predict or explain much.<sup>159</sup>

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154. Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931).

155. As Rudolf von Ihering thundered in 1861,

Where would it lead if everyone could be sued, not only for intentional wrongdoing (*dolus*) but for gross negligence (*culpa lata*) absent a contractual relationship? An ill-advised statement, a rumor passed on, a false report, bad advice . . . and so forth—in short, anything and everything would make one liable to compensate for the damage that ensued . . . .

GORDLEY, FOUNDATIONS, *supra* note 27, at 271.

156. GORDLEY, FOUNDATIONS, *supra* note 27; James Gordley, *The Rule Against Recovery in Negligence for Pure Economic Loss: A Historical Accident?*, in PURE ECONOMIC LOSS IN EUROPE 25 (Mauro Bussani & Vernon Valentine Palmer eds., 2003) [hereinafter Gordley, *Historical Accident*]. Gordley adds normative arguments that I put aside because this Article is concerned only with descriptions of the economic loss rule. See GORDLEY, FOUNDATIONS, *supra* note 27, at 281 (arguing that a pro-plaintiff approach would "redistribute resources to those holding forms of property and engaged in activities that are more likely to result in accidents").

157. Gordley, *Historical Accident*, *supra* note 156; GORDLEY, FOUNDATIONS, *supra* note 27, at 280–84 (presenting instead a general "rationale for limiting liability in tort" for economic loss that coexists with equally cogent rationales for not limiting it). Gordley does join law and economics and Keep It Simple in approving claims by third-party beneficiaries for negligently prepared financial information. *Id.* at 282–83.

158. See Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1021 (1928) ("When we say in a particular case that . . . defendant was under a duty . . . this but means that we have already passed judgment."); William L. Prosser, *Palsgraf*



A hard form is possible, although it appears to be absent in the literature. Rejecting open-ended responsibility for negligently inflicted economic loss, the "floodgates" perspective implicitly seeks to constrain liability through whatever bright-line rules may be fashioned on principled bases. Committed to keeping the set of good claims bounded and determinate, this approach has a natural fondness for privity-like boundaries. It would hew to the preference for contract reasoning that Keep It Simple favors, but in a more restrictive manner: The sympathetic indulgence of human (as compared to business-entity) plaintiffs would not appear here, and the floodgates approach would be troubled even by relatively narrow exceptions to privity like the "intent to benefit third parties" rationale of the second Restatement.<sup>160</sup> Consistent with Keep It Simple, but contrary to law and economics according to Bussani and his co-authors, it would reject liability for utility interruptions. It might or might not allow plaintiffs deprived of a fish or seafood catch to recover for despoliation of a marine environment. It would presumably find *actio personalis mortis cum persona* more attractive than its statutory replacement.<sup>161</sup> It would have no problem recognizing recovery for copyright and trademark infringement.

Unlike the soft form of the floodgates explanation, the hard form is amenable to a scorecard, and we see that Keep It Simple outperforms its challenger once again. In his article about the floodgates—or what he called a "pragmatic" account of the economic loss rule—Fleming James acknowledged that courts disallow claims "to which the pragmatic objection has no valid application."<sup>162</sup> He gave as examples two transferred-loss problems: the first involving a plaintiff ship-charterer who cannot recover for the lost time value consumed by repairs occasioned by the defendant's negligence, and the second a pay-continuation obligation. In both these cases, James pointed out, the obligation is just as finite and well-delineated as it would be in a lawsuit by the more primary plaintiff, the ship owner or the employee himself.<sup>163</sup> Bussani makes the same point when saying that fears of "open-ended litigation" cannot explain a key European result: About half the European nations they study allow plaintiffs to recover in the utility cases, but almost none permit recovery for "loss of a star," even though the former

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*Revisited*, 52 MICH. L. REV. 1, 15 (1953) ("Does the railroad, then, owe a duty to Mrs. Palsgraf not to injure her in this way? Why, yes, if the court finds that it does. There is no other answer."). For a critical review of this "duty-skepticism," see John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1758 (1998).

159. I have little patience for explanations that persist even though they explain very little. See Bernstein, *Whatever Happened*, *supra* note 40, at 315, 329, 331 (criticizing law and economics for its tautologies); Anita Bernstein, *The Communities That Make Standards of Care Possible*, 77 CHI.-KENT L. REV. 735, 750 (2002) (faulting the resort to "administrative convenience" as an account of what courts do).

160. RESTATEMENT (SECOND) OF TORTS § 552 (1965).

161. No "floodgates" writer has ever said that, as far as I know; but letting heirs seek recovery for a wrongful death seems decidedly more unbounded, and less predictable, than killing off the action along with the decedent. See DOBBS, *supra* note 18, at 807–15 (summarizing the doctrinal complications that follow acceptance of this cause of action).

162. James, *supra* note 26, at 55–56.

163. *Id.* at 56–57.

category is much more open-ended than the latter.<sup>164</sup> Thus on transferred loss, pay continuation, and “loss of a star,” then, this rationale does not align well with case outcomes. If “the floodgates” does indeed disapprove of wrongful death claims,<sup>165</sup> then it compares poorly with Keep It Simple, which would support every state’s current rejection of a harsh common law rule.<sup>166</sup>

More generally, pervasive breadth in other types of tort claims challenges the floodgates rationale. The rationale overlooks the staggering number of human beings who can be physically injured by one product,<sup>167</sup> and the comparable breadth of property at risk from tortious conduct. (“Even before the awful potential of atomic energy was understood, man had witnessed such terrible urban conflagrations as the London and Chicago fires.”<sup>168</sup>) Though compatible with tort reform, whose adherents wax endlessly about unpredictability (especially when discussing medical malpractice claims and damages for nonpecuniary loss), the rationale conflicts with the expansive pro-plaintiff developments of the mid-twentieth century through the 1970s—the retreat of immunities, expanded liability for failure to warn, the *Rowland v. Christian* merger of status categories for visitors to land—that to a great extent remain good law.<sup>169</sup>

### C. Categories Where Keep It Simple Has No Ready Answer

As was noted, our Keep It Simple factfinder has mixed feelings about lawsuits resulting from unsatisfactory buildings in which plaintiffs live. Her preference for contracts impels her to side with defendants here: Plaintiffs might have mitigated their losses in advance, yet they chose not to protect themselves. Her other analytic devices, however—references to emotions found in the natal family and a visual orientation—push in the other direction. This ambivalence shows up poorly, one must admit, on a scorecard. Having faulted Bussani for his “agnosticism” on transferred losses,<sup>170</sup> I must also fault Keep It Simple in the category of unsatisfactory buildings.

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164. Bussani, *Economic Restatement*, *supra* note 45, at 144. Echoing James, Bussani adds that a foreseeability rationale cannot explain the economic loss rule, because economic loss cases do not differ much from “a typical tort situation” on this criterion. *Id.* at 124.

165. See *supra* note 160 and accompanying text.

166. DOBBS, *supra* note 18, at 804. Keep It Simple would also agree with the law of almost every state that wives and husbands are entitled to damages for loss of consortium when their spouses are severely injured. It is also receptive to extending consortium to the parent-child relationship in death cases, but that point is beyond the scope of this Article: parents in the contemporary United States do not generally have an economic expectancy in the lives of their children, and the economic expectancy that children have in the lives of their parents is covered under wrongful death.

167. Silverstein, *supra* note 12, at 417 (“[T]here is simply no limit on potential damage awards for mass torts like improperly produced, tested, marketed, or implanted asbestos, cigarettes, silicon breast enhancers, or birth control devices.”).

168. James, *supra* note 26, at 50.

169. LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 349–76 (2002).

170. See *supra* note 135 and accompanying text.

Consistent with Keep It Simple, however, courts sometimes treat properties that people live in differently from commercial buildings or properties that developers hold for short-term investment. A leading case, *Casa Clara Condominium Association, Inc. v. Charley Troppino & Sons, Inc.*,<sup>171</sup> rejected a homeowner's claim against a subcontractor for the harms caused by bad concrete. The harsh decision—plaintiffs had no other remedy to supplement their economic loss claim<sup>172</sup>—has won acceptance in most courts; among those who reject it, however, the status of plaintiffs as homeowners has been controlling.<sup>173</sup> Partial credit here for Keep It Simple.

As was mentioned, Keep It Simple would honor claims for lost profits by commercial fishers following the closure of marine environments.<sup>174</sup> The factfinder would not be able to deal confidently with claims related to recreational fishing;<sup>175</sup> the visual image for the recreation version is not very different from the livelihood kind. Keep It Simple would likely regard both classes of fishing plaintiffs as having been harmed, but might disfavor the recreational claims based on an inability to estimate the plaintiffs' losses. The two rival explanations, both of them confident that recreational-fisher plaintiffs should be turned away, line up with case outcomes here somewhat better than Keep It Simple.

#### IV. BEYOND SIMPLE: NONRIVALROUS ACCOUNTS OF THE ECONOMIC LOSS RULE

Among rationales for the economic loss rule, Keep It Simple is clearly contrary to the two discussed in the last Part, while occupying a somewhat different relation to others. This Part looks at some accounts of the rule that have received relatively scant attention in decisional law and do not appear in Professor Gergen's summary of explanations for the no-recovery rule. As I characterize these accounts, they complete the thesis by helping to explain the appeal of simplicity when it is experts, elites, and professionals who create no-duty rules. They are not rival theses to Keep It Simple, because they do not attempt to predict how cases will come out.

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171. 620 So. 2d 1244 (Fla. 1993).

172. *Id.* at 1248 (Barkett, J., concurring in part and dissenting in part).

173. *See, e.g.*, *Aas v. Superior Court*, 75 Cal. Rptr. 2d 581 (Ct. App. 1998) (concluding, after a multi-factor balancing test, that contractor and subcontractors had a duty to homeowners), *aff'd*, 12 P.3d 1125 (Cal. 2000); *Yacht Club II Homeowners Ass'n, Inc. v. A.C. Excavating*, 94 P.3d 1177, 1181 (Colo. Ct. App. 2003) (criticizing *Casa Clara Condominium Association* to hold that "subcontractors owe homeowners a duty of care").

174. *See supra* Part III.C.

175. Case law is divided. *Compare Louisiana ex rel Guste v. M/V Testbank*, 524 F. Supp. 1170, 1174 (E.D. La. 1981) (holding that only commercial fishermen, not recreational fishermen, could recover), *aff'd*, 752 F.2d 1019 (5th Cir. 1985), *with* *Pruitt v. Allied Chem. Corp.*, 523 F. Supp. 975, 978 (E.D. Va. 1981) (allowing the claim of recreational-fisher plaintiffs). Courts appear to prefer the rule that allows only commercial plaintiffs to recover.

*A. No Recovery Meets the Market: Perry and Silverstein*

In separate writings, Stephen Perry and Eileen Silverstein propose different versions of a thesis that tort law denies recovery because economic losses attributable to negligence too closely resemble the economic losses that capitalism condones and takes for granted. "Consider the following fact situation," writes Perry. "A driver carelessly damages a public bridge in an accident, as a result of which the bridge is closed for a period and the custom at a nearby tavern is reduced."<sup>176</sup> One could invoke foreseeability to hold the driver liable for this economic loss, he continues. He then says why Anglo-American negligence law does not do so:

[A person] could intentionally reduce the tavern's custom, thereby causing exactly the same type and amount of economic loss, without penalty or liability. He could, for example, set up a competing establishment, even if his motive was to drive the tavern owner out of business. He could, if he was a striking employee, set up a picket line outside. Or he could mount a boycott of the tavern because, say, it was only accessible by car and he wanted to discourage drinking and driving. Given the pervasive vulnerability of the tavern owner's economic interest, it is difficult to see how protecting it against general negligent interference could be justified.<sup>177</sup>

In other words, economic loss differs from physical injury and property damage with respect to background conditions that the system condones. It is seldom all right to hurt another person's body or property, but it is often just fine to obstruct the economic interests of another person, even intentionally, along the lines that the tavern example suggests. Perry calls economic interests "inherently vulnerable."<sup>178</sup>

Several years later, Eileen Silverstein (without citing Perry), emphasized that this vulnerability is not inherent or apolitical. The economic loss rule, she says, softens "the rough edges of capitalism by truncating inquiry."<sup>179</sup> Whereas the illustrations of lawful economic interference that Perry gathers avoid ideology—Perry's threesome consists of a predator hellbent on vicious competition, a worker on a picket line, and a MADDish activist—Silverstein by contrast used an ideological illustration: Lynn LoPucki's much-discussed analysis of the corporate form as a shield against liability.<sup>180</sup> A business can bifurcate its asset-holding and liability-generating functions through "strategic preparation" that shuffles corporate assets out of a liability-generating shell company that will be judgment

176. Perry, *supra* note 25, at 265. The illustration is based on a Canadian case called *Star Village Tavern v. Nield*, [1976] 6 W.W.R. 80. *Id.* at 265 n.62.

177. Perry, *supra* note 25, at 265–66. Perry also notes that "the relatively free dissemination of information that takes place in liberal societies means that a person's economic interests can suffer, sometimes as the result of a specific intention to harm, because someone publishes negative consumer reports about his products . . ." *Id.* at 264.

178. *Id.* at 267.

179. Silverstein, *supra* note 12, at 432.

180. *Id.* (citing Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1 (1998)).

proof before claimants can seek compensation for their harms.<sup>181</sup> The preparation, though choreographed, stays hidden from view: It looks like “the result of financial reversals” that nobody intended, LoPucki wrote,<sup>182</sup> and so corporate bankruptcy made a transition from “a stigmatizing event in 1980 to ‘an acceptable, trendy reorganizing tool’ in the early 1990s.”<sup>183</sup>

This view of the economic loss rule sees the denial of recovery as useful to a falsely rosy dogma. “Market ideology tells us that if we work hard we will have economic security,”<sup>184</sup> writes Silverstein, and that what appear to be setbacks or defeats are actually instances of strength, for other economic actors if not the downtrodden themselves. Negligently inflicted economic loss refutes this merry promise; making it actionable would teach people “that economic vulnerability is only one accident away. Even further, recovery for pure economic injury would call attention to the dangers of material insecurity in an economy that denies the ability of the market operating in the normal course of business to cause serious financial injury.”<sup>185</sup>

The simplicity thesis is compatible with the references Perry and Silverstein make to the market, as well as their suggestion that North American liability rules reflect the capitalist economy in which they were written. My late-teen construct is not the same person from culture to culture. Under hypothetical political-economic conditions that are more protective, paternalistic, or overtly beneficent than those prevailing now in the United States (while retaining the American tradition of pursuing compensation for injury through tort litigation), the backdrop of “contract” would vary. Perhaps our factfinder would take a social-welfare contract for granted and find an entitlement to compensation in tort whenever anyone suffered injury. The visual backdrop could change too, because culture influences what a human being can see.<sup>186</sup>

### ***B. Formalism and History: Benson and Gordley***

Other explanations of the economic loss rule also present no conflict with Keep It Simple and help to account for its durability. Peter Benson offers a formalistic rationale, in the vernacular of property: He argues that because the economic-loss plaintiff has brought a claim based on an “interest falling short of a proprietary or a possessory right,” her injury is necessarily more attenuated than that of a plaintiff who claims harm to her person or property.<sup>187</sup> This plaintiff

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181. Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 53–54 (1998).

182. *Id.*

183. Silverstein, *supra* note 12, at 432.

184. *Id.* at 437.

185. *Id.*

186. See generally ANNA GRIMSHAW & AMANDA RAVETZ, INTRODUCTION TO VISUALIZING ANTHROPOLOGY 3 (Anna Grimshaw & Amanda Ravetz eds., 2005) (describing shared agendas of anthropologists and “visual practitioners”). A San Francisco museum, the acclaimed Exploratorium, investigates relations between perception and culture, beginning with an epigraph: “We don’t see things as they are; we see things as we are.” The Exploratorium, Introduction, <http://www.exploratorium.edu/seeing/about/introduction.html> (visited Oct. 30, 2006).

187. Benson, *supra* note 48, at 434.

"seeks protection of an interest in the use of something from which he has no right to exclude the defendant."<sup>188</sup> The defendant's behavior constitutes at most "nonfeasance," which to Benson resembles "withholding a benefit," a condition that cannot give rise to liability.<sup>189</sup>

James Gordley makes the provocative suggestion that, at least in Germany and England, the economic loss rule may have arisen by what he calls "a historical accident."<sup>190</sup> Drafters of the German Civil Code reviewed doctrine and cases to write a definition of "unlawful" conduct that excluded economic consequences, probably unintentionally. In England a rule of no recovery for economic expectancy emerged in the treatises at the turn of the twentieth century based on a misreading of the leading decisions, and from there became ingrained. Rather than maintain an unsound so-called economic loss rule, Gordley suggests, judges should write more carefully about duty (that is, to focus on the responsibility to exercise due care or not, rather than on the consequences of lapses) and proximate cause.

At first blush the Gordley prescription may appear contrary to Keep It Simple: I have tried to account for a pattern that Gordley has deemed undeserving of its own label. But the two theses coexist in harmony. Referring to a late-adolescent "factfinder," Keep It Simple downplays, as does Gordley, the "ruleness" of the economic loss rule.

### CONCLUSION

The difficulty that plaintiffs face when they seek redress in court for economic losses attributable to negligence is much too provocative and important to warrant its continuing residence in "a backwater."<sup>191</sup> Economic loss is a category of encyclopedic breadth within Torts. Because business entities as well as human beings can experience economic loss, the number of potential litigants and the dollar value of damages that could be alleged are both larger than their counterparts in personal-injury litigation. In their refusal to hear most claims of negligence whose consequences are only monetary, American courts have kept out of view an enormous quantity of real harm.

Economic loss deserves more attention from scholars in particular as respite from the hundred years' war that has riven Torts in the United States.<sup>192</sup> For decades, many commentators and participants have cast their lot with either defendants or plaintiffs in the politicized battleground of tort reform, where tort theory and principled doctrine cannot thrive.<sup>193</sup> Before despairing of the possibility

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188. *Id.* at 435.

189. *Id.* at 448.

190. Gordley, *Historical Accident*, *supra* note 156.

191. See Schwartz, *supra* note 2, at 96.

192. Andrew Blum, *The Hundred Years' (Tort) War*, NAT'L L.J., Oct. 15, 1990, at 1.

193. See Anita Bernstein, *Muss es Sein? Not Necessarily, Says Tort Law*, 67 LAW & CONTEMP. PROBS. 7, 7 (2004):

One cohort thinks of tort litigation as David aiming his slingshot at Goliath's infinite greed and rapacity; another coins such phrases about

of separating law from politics, we might wish for a torts world where business-corporation plaintiffs sue human defendants for negligence,<sup>194</sup> left-wing or progressive ideology can be invoked to both favor and oppose liability,<sup>195</sup> and a pro-defendant “no duty” rule can support the liberal value of free speech. Theory and principle do well in a world where the harms of negligence are experienced bloodlessly, without physical pain or human plaintiffs who are in court only because they cannot otherwise afford the medical care they need.<sup>196</sup> Economic loss offers such a realm for study.

My own study has led to *Keep It Simple*, a descriptive thesis about the approach American courts take to claims for economic loss. *Keep It Simple* explains many patterns in case law. It does not account for every holding of every case, or even every pattern—but it does a better job of explanation than its rivals,<sup>197</sup> and comports well with other descriptive writing on the subject.<sup>198</sup>

Like other commentary on the economic loss rule that purports to be descriptive, *Keep It Simple* contains a little bit of argument. Robust normative work has filled this Conference, and just a few pages away from this Article, Judge Posner seeks to identify “the best rule of law for the ‘economic torts’.”<sup>199</sup> I have eschewed such a search here, presenting *Keep It Simple* almost entirely to talk about how cases do come out rather than how they should come out. But I close this Article appreciative of the “conventional morality,”<sup>200</sup> respect for emotions and the hearth, and even the visual orientation that our protagonist brings to a subset of negligence cases. She often reaches the right answers for the right reasons. Her ordinary humanity gives at least a valuable supplement, if not a better

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injustice as “the tort tax,” and “the lawsuit lottery,” argues that bloated transaction costs enrich lawyers and bureaucracies, and laments the loss of playgrounds and obstetricians—literally “motherhood issues,” as one political scientist calls them, with “equity, efficiency, security, and liberty” at stake.

194. *E.g.*, *Phoenix Prof'l Hockey Club v. Hirmer*, 502 P.2d 164 (Ariz. 1972); *Byrd v. English*, 43 S.E. 419 (Ga. 1903).

195. *Compare* Abel, *supra* note 14 (arguing that actions for negligence should be limited to human beings alleging personal injury), *with* Silverstein, *supra* note 12 (suggesting that the economic loss rule, by denying the reality of wrongful financial harm, promotes neoliberal ideology).

196. Most of my taxonomy, *see supra* Part I, fits this bill, the exceptions being wrongful death and perhaps damage to homes. Other economic-loss taxonomies, *see supra* notes 39–43 and accompanying text, are even freer of human pain and suffering.

197. *See supra* Part III.

198. *See supra* Part IV.

199. Richard A. Posner, *Common-Law Economic Torts: A Legal and Economic Analysis*, 48 ARIZ. L. REV. 735 (2006).

200. I checked Lexis and Westlaw for law review articles with this phrase in their title, and found two. Both used the phrase pejoratively. Lindsay Brooke King, Note, *Enforcing Conventional Morality Through Taxation?: Determining the Excludability of Employer-Provided Domestic Partner Health Benefits Under Sections 105(b) and 106 of the Internal Revenue Code*, 53 WASH. & LEE L. REV. 301 (1996) (condemning American tax law for favoring conventional coupling); Wojciech Sadurski, *Conventional Morality and Judicial Standards*, 73 VA. L. REV. 339, 342 (1987) (claiming that “judicial recourse to conventional morality” is futile).

alternative, to the sweeping prescriptions that “efficiency” or rigid no-duty rules would impose.<sup>201</sup>

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201. In his discussion of economic loss cases Judge Posner gives an example that revisits the comparison between law and economics and Keep It Simple. *See supra* Part III.A. He mentions the problem of a pre-employment drug test whose false-positive conclusion, attributed to negligence in the administration of the test, results in the loss of a job. *See* Posner, *supra* note 199, at 742. Posner would allow the employee a claim on efficiency grounds: The employer does not have an adequate incentive to monitor the performance of its laboratory, and so “the principal victim and therefore logical enforcer of the lab’s duty of due care is the employee.” *Id.* at 743. Keep It Simple’s teenager, familiar with the unfairness of false accusations that carry penalties, would also favor the claim, perceiving the injury as an indignity. It seems to me that Keep It Simple outperforms its law and economics rival here not on alignment with case law (which Posner notes is divided; no alignment can occur) but on the question of remedy. Posner does not say what damages this victim should receive (the value of the lost job, even though the plaintiff might not have won it even without the false-positive test result? lost wages, adjusted for wages received? a deterrence-focused penalty not tailored to the injury?). Keep It Simple maintains focus on an affront. Affronts may be hard to price, but at least the loss being compensated remains in view.



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