

# COMPARATIVE ECONOMIC LOSS: LESSONS FROM CASE-LAW-FOCUSED “MIDDLE THEORY”

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*In common law jurisdictions outside the United States, Gary Schwartz was the most highly regarded American torts scholar of his time, not least because of the similarity of his approach to the approach adopted by the vast majority of common law scholars outside the United States. This case-law-focused middle theory seeks to promote legal reasoning that is precise, internally coherent, and normatively convincing, and aims to provide a high level of predictability in relation to the way future cases will be decided in legal environments of relatively tight adherence to precedent. This Article reports the exciting progress this method has achieved in non-U.S. common law jurisdictions in the area of claims for pure economic loss in the tort of negligence. It suggests that courts adhere to the following propositions. The fact that the economic loss to the plaintiff was foreseeable is not sufficient to generate a duty of care. There is no normatively coherent justification for grouping cases together in pockets on the basis of superficial factual similarities. Whatever the factual matrix of the case, courts will be concerned by five substantive factors that can be stated as prerequisites for the recognition of a duty of care. These relate to: the defendant's legitimate economic self-interest; whether the plaintiff class and the quantum of recoverable loss can be described by criteria that are normatively justifiable; whether these criteria allow the relevant class and quantum to be reasonably ascertainable by the defendant; whether the plaintiff could have secured appropriate self-protection; and whether the plaintiff was especially vulnerable.*

INTRODUCTION .....	532
I. OVERVIEW OF U.S. CASE LAW .....	535
A. The Disparate Pockets Appearance of Areas of Economic Loss in U.S. Negligence Law.....	535
II. FIVE LESSONS FROM MIDDLE THEORY ANALYSIS OF NON-U.S. COMMON LAW CASE LAW .....	537
A. Rejection of the Bright-Line Exclusionary Rule: “Legitimate” Economic Self-Interest Examined on a Case-by-Case Basis.....	539
B. The Rejection of “Pockets”; Embrace of Open-Textured Legal Reasoning.....	540

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C.	Indeterminacy—Controlled by Doctrine . . . . .	543
1.	Early Advice Cases . . . . .	545
2.	Current Open-Textured (Not Necessarily Advice) Cases . . . . .	546
D.	The “Primacy Of Contract”—Now Replaced by the Concern with Self-Protection . . . . .	551
E.	The Tort of Negligence Manifests a Core Concern with Vulnerability..	554
1.	Commercial Plaintiffs . . . . .	559
2.	Public Authority Defendants . . . . .	559
III.	RECOVERY FOR ECONOMIC LOSS IN U.S. PUBLIC NUISANCE CASES . . . . .	561
A.	Deconstructing U.S. Case Law with the Lessons of Middle Theory . . . . .	561
B.	Recovery of Economic Loss from Waterway Pollution Under U.S. Public Nuisance Law . . . . .	564
C.	The Critical Lesson from the U.S. Public Nuisance Cases . . . . .	567
IV.	THEORY . . . . .	571
A.	The Response of Noneconomic Theorists . . . . .	571
B.	Lawyer-Economists and Economic Loss . . . . .	574
C.	The Challenge to High Theorists from Case-Law-Focused “Middle Theory” . . . . .	580
	CONCLUSION: SUMMARY OF COMMONWEALTH JURISPRUDENCE IN ECONOMIC LOSS CASES . . . . .	582

## INTRODUCTION

When informed of the death of Gary Schwartz, Tony Weir, today the most eminent of Commonwealth tort scholars, observed sadly that “I [had] long considered him the best writer on tort law then alive.”<sup>1</sup> Indeed, tort lawyers in other common law systems also found Gary Schwartz’s scholarship to be the ideal route into the U.S. legal landscape. Gary was the outstanding communicator with other jurisdictions because the techniques he used were so close to those of non-U.S. common law scholarship. Eschewing extreme pure theories of law, he tried to understand the law as it operated in courts. His work was rooted in and disciplined by the messiness of real-world judicial reasoning from case law.

The most prestigious type of legal scholarship in the non-U.S. common law systems has traditionally been that which influenced appellate judges by expounding compelling accounts of the broad landscape of precedent and illuminating critiques of legal reasoning in case law. This methodology is what I will call case-law-focused “middle theory.” The ideal has recently been summed up as: “Accurate in its presentation and perceptive in its criticism, it is in the best tradition of sober writing about the common law: no line is being shot, no oxen gored, no trumpets overblown.”<sup>2</sup>

1. E-mail from Tony Weir, Reader in Law, Fellow and Director of Studies at Trinity College, University of Cambridge, to Jane Stapleton, Professor, Australian National University (July 27, 2001) (on file with author).

2. Tony Weir, *An Analysis of the Economic Torts*, 118 LAW Q. REV. 164, 167 (2002) (reviewing HAZEL CARTY, *AN ANALYSIS OF THE ECONOMIC TORTS* (2001)).

Reasons for the dominance of this style of scholarship in non-U.S. jurisdictions are not hard to find.<sup>3</sup> In striking contrast to the United States, the common law legal systems in the United Kingdom and other major English-speaking common law countries are characterized by a uniformly high-quality judiciary, rare use of juries, a single court of final appeal, a tight system of precedent, and an active legislature. Though litigation levels may be lower than in the United States, the result of a legal system structured in this way is that there grows, over time, a much more dense and integrated body of detailed legal reasoning. In the United Kingdom tort law is determined by the House of Lords, in Canada by the Supreme Court of Canada, in Australia by the High Court, and so on. Each new major case comes to the same national tribunal, who then attempts to accommodate its decision within the matrix of its own earlier decisions.

The dominant concerns of these judges are to accommodate the current decision within precedent and to do so using legal reasoning that is precise, internally coherent, and normatively convincing as well as offering a high level of predictability in relation to the way future cases will be decided. This arrangement presents the academy with the opportunity to scrutinize tightly a dense set of judgments in a field and to participate in a dialogue with the appellate court that is focused on a relatively small and agreed set of appropriate materials.

Given this conception of the judicial task, appellate courts in non-U.S. common law jurisdictions dismiss high theory as having little relevance to the future path of the common law. While the level of analytical precision of high theory tends to be very impressive (one reason for its allure to post-graduate students), it carries flaws that are fatal to its exercising significant influence over non-U.S. common law courts. First, high theorists tend to ignore, or dismiss as "wrong," precedents that do not fit the pure theory.<sup>4</sup> Second, high theory typically provides a very low level of predictability as to how future complex legal disputes will be resolved. As a result, the work of high theorists of corrective justice strictly derived from Kantian right or the claims of lawyer-economists meet with relatively little judicial, and therefore academic, interest.

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3. See also P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* 7–21 (1987).

4. See, e.g., Peter Cane, *Corrective Justice and Correlativity in Private Law*, 16 OXFORD J. LEGAL STUD. 471, 477–78 (1996) (criticizing the theory of Ernest Weinrib). See also the later discussion of Peter Benson's work at *infra* notes 229–235 and accompanying text.

## A. Economic Loss

This technique of case-law-focused middle theory that Gary Schwartz shared with non-U.S. common lawyers works well to clarify the law, both helping courts and practitioners and providing insights to challenge high theorists of tort law. In this Article, I demonstrate these outcomes in the context of the topic of the last publication to appear under Gary's name.<sup>5</sup> This dealt with the recoverability in tort law of pure economic loss, that is economic loss not consequential on physical injury to the person or property of the plaintiff. In his essay, Gary notes that "the problem remains a back-water within the discourse of American tort law," rarely discussed by scholars and often ignored by courts.<sup>6</sup> Indeed, he emphasizes that "the only reason" for both of his earlier major publications on the economic loss topic<sup>7</sup> was that he had been invited to conferences in England on that subject.<sup>8</sup>

In contrast, in other common law jurisdictions, specifically the United Kingdom, Canada, Australia, and New Zealand, which I will refer to collectively as the "Commonwealth jurisdictions," negligence claims for economic loss are the most heavily litigated tort cases in appellate courts and the most analyzed by middle theory scholars. As a result of the middle theory dialogue between academics and judges over this dense case law, non-U.S. common law jurisdictions, particularly in the New World, have developed a matrix of substantive legal concerns governing the issue of recognition of liability that has replaced, or is in the process of replacing, the artificial pockets approach that still bedevils the area in the United States. This matrix, so far consisting of four main ideas, confirms Gary's general intuition that tort law cannot be explained by grand unitary theory but only by a rich "mixed" set of values<sup>9</sup> that generate the complex boundaries of liability that interest practitioners and courts. It confirms the wisdom of Gary's overall conclusion on economic loss: that we must abandon any effort to formulate

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5. Gary T. Schwartz, *American Tort Law and the (Supposed) Economic Loss Rule*, in *THE FRONTIERS OF TORT LIABILITY: PURE ECONOMIC LOSS IN EUROPE* 125 (Mauro Bussani & Vernon Valentine Palmer eds.) (forthcoming 2003).

6. *Id.* at 126. For another excellent overview of the U.S. position, see Herbert Bernstein, *Civil Liability for Pure Economic Loss Under American Tort Law*, 46 *AM. J. COMP. LAW* 111 (1998). See also John Fleming, *Negligent Economic Loss in American Law*, in *NEGLIGENCE AFTER MURPHY V. BRENTWOOD* DC 26 (1991), and Eileen Silverstein, *On Recovery in Tort for Pure Economic Loss*, 32 *U. MICH. J.L. REFORM* 403 (1999).

7. Gary T. Schwartz, *Economic Loss in American Tort Law: The Examples of J'Aire and of Products Liability*, 23 *SAN DIEGO L. REV.* 37 (1986) [hereinafter *Examples*]; Gary T. Schwartz, *The Economic Loss Doctrine in American Tort Law: Assessing the Recent Experience*, in *CIVIL LIABILITY FOR PURE ECONOMIC LOSS* 103 (K. Banakas ed., 1995).

8. Schwartz, *supra* note 5 (draft at 125).

9. Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 *TEX. L. REV.* 1801, 1815-33 (1997).

any single general theory for the economic loss problem, because it is multi-form rather than unitary in character.<sup>10</sup>

Part I gives a short overview of U.S. negligence case law concerning economic loss, highlighting how U.S. courts and commentators treat cases in pockets according to superficial factual characteristics. Part II shows how the case-law-focused middle theory of Commonwealth lawyers allowed them first to reject any bright-line exclusionary rule and then to abandon the pockets approach in favor of an open-textured form of legal reasoning that focuses on identifying, expounding, and applying the underlying concerns guiding courts. The discussion shows how Commonwealth courts have pinpointed and responded to three major concerns. One is the concern with indeterminacy of liability, which has been recognized as controllable by doctrinal limitations to the class of plaintiff and the class of loss. Next, a concern with self-protection has been found to require a sensitive investigation of the factual context in which the plaintiff operated. Finally, Commonwealth courts, especially in the New World, are beginning to embrace the concern with protecting the vulnerable as a core value of tort law. Part III analyzes the recovery of economic loss in the U.S. law of public nuisance and argues that, far from being an embarrassing anomaly, it provides a compelling link to the developments in the Commonwealth. Part IV discusses the very few ideas put forward by "high theorists" about this area of law and why they fail to convince. I argue that the trends demonstrated in Commonwealth jurisprudence present an exciting challenge to future theorists. I conclude with a short summary.

## I. OVERVIEW OF U.S. CASE LAW

### A. The Disparate Pockets Appearance of Areas of Economic Loss in U.S. Negligence Law

Gary's paper observes that, despite some brief early flirtation by a few U.S. jurisdictions with the idea of allowing recovery for pure economic loss in the products liability area,<sup>11</sup> there is in practice, albeit not always evident in judicial reasoning, a powerful no-liability approach operating in the U.S. tort of negligence.<sup>12</sup> Until the 1990s, exceptions to this approach, such as

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10. *Examples, supra* note 7, at 38.

11. *See, e.g., Santor v. A & M Karagheusian, Inc.*, 207 A.2d 305, 314 (N.J. 1965).

12. Schwartz, *supra* note 5 (draft at 124). In the products field, for example, see *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986); *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965); and *Spring Motors Distributors v. Ford Motor Co.*, 489 A.2d 660, 672 (N.J. 1985). On the comparative position in the United Kingdom, see JANE STAPLETON, *PRODUCT LIABILITY* 277-78 (1994).

*J'Aire Corp. v. Gregory*<sup>13</sup> and *People Express Airlines v. Consolidated Rail Corp.*,<sup>14</sup> were extremely rare and failed to win significant academic or judicial support. The 1990s have seen more pockets of liability being recognized in the pure economic loss field. One example is where a bettor sued a race-track when a betting machine failed accurately to register his bet.<sup>15</sup> Gary notes that some jurisdictions have allowed new forms of claims in negligence to succeed: by existing or prospective employees who lose employment prospects after negligent drug-testing by laboratories engaged for this purpose by the employer;<sup>16</sup> by those deprived of the opportunity to litigate by the negligent spoliation of evidence;<sup>17</sup> by those who are negligently underinformed of the physical or mental health needs of a child they are about to adopt;<sup>18</sup> and even, in some jurisdictions, by the purchaser, and even subsequent purchaser, of a dwelling against a negligent builder.<sup>19</sup> But even in these classes of cases, courts are divided in their approach and plaintiff success is not uniform. In any case, the factual contexts being litigated in the United States are so diverse and academic interest is so sporadic<sup>20</sup> that it is fair to say there is as yet no doctrinal coherence to this difficult area of U.S. law.

U.S. high theorists continue to treat the issue of liability in negligence for economic loss with striking neglect. Rationalizations for the core exclusionary response of U.S. law typically extend little further than three crude ideas. First, there is a concern with indeterminate liability: the *Ultramares Corp. v. Touche*<sup>21</sup> concern. Second, there is what Gary described as the "primacy of contract" notion: the idea that contract is somehow self-evidently the only appropriate venue for claims for economic loss. Finally, there is the attempt to rationalize the economic loss rule by lawyer-economists on the basis that many contexts of economic loss do not reflect net social losses and

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13. 598 P.2d 60 (Cal. 1979). For discussions of *J'Aire*, see Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1517-25 (1985); Schwartz, *supra* note 7.

14. 495 A.2d 107 (N.J. 1985).

15. *Register v. Oaklawn Jockey Club, Inc.*, 822 S.W.2d 391, 391 (Ark. 1992) (Dudley, J., concurring).

16. Schwartz, *supra* note 5 (draft at 140-41); see also, e.g., *Duncan v. Afton, Inc.*, 991 P.2d 739, 716 (Wyo. 1999); cf. *Ney v. Axelrod*, 723 A.2d 719, 722 (Pa. Super. Ct. 1999).

17. Schwartz, *supra* note 5 (draft at 141); see also, e.g., *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846 (D.C. 1998).

18. Schwartz, *supra* note 5 (draft at 142); see also, e.g., *Jackson v. State*, 956 P.2d 35 (Mont. 1998).

19. Schwartz, *supra* note 5 (draft at 142-43); see also, e.g., *Aas v. Superior Court*, 12 P.3d 1125 (Cal. 2000).

20. Herbert Bernstein, in his excellent article, notes not only that "the American law of liability for purely economic losses is much less well settled and less uniform than one might wish it to be," Bernstein, *supra* note 6, at 125, but that "courts and the bar are not really helped very much by the commentators." *Id.* at 130.

21. 174 N.E. 441, 444-48 (N.Y. 1931).

are therefore not appropriate cases for legal intervention in pursuit of wealth maximization.

Of especial interest to non-U.S. common lawyers is the long-standing sanguine acceptance in the United States that liability for pure economic loss is acceptable in the case of professional malpractice. That lawyers and architects can be liable in negligence to their *clients* in relation to economic loss seems virtually self-evident. What is interesting is that U.S. law recognizes suits by nonclient parties against “professionals.” There is a simple reason why this settled but isolated pocket of liability for economic loss in negligence interests the lawyer in Commonwealth jurisdictions. Commonwealth courts ultimately found the notion of the negligent “professional” to be an unsatisfactory boundary, both at the theoretical level and pragmatically, so these courts began to allow recovery for pure economic loss in a much wider variety of situations.

## II. FIVE LESSONS FROM MIDDLE THEORY ANALYSIS OF NON-U.S. COMMON LAW CASE LAW

For the past forty years, non-U.S. common law courts and scholars have applied middle theory to the economic loss problem and thereby have achieved much greater clarity in their analysis. Specifically, as we will see below, the application of case-law-focused middle theory to the field offers compelling lessons about the common law in this area. For example, scholars found that no one-factor analysis adequately captures the variety of concerns that the legal reasoning of courts explicitly identifies in this area. In the jurisdictions with the most open-textured legal reasoning, it is now well-settled that it is folly to compartmentalize cases into what I have called pockets according to crude factual features. For example, courts in such jurisdictions no longer deal with economic loss caused by negligent misstatements as if it were somehow fundamentally different from economic loss caused by negligent acts.<sup>22</sup>

The early reliance on this crude pockets approach was placed under great pressure by academic criticism and has been abandoned in Australia or is being abandoned in Canada and the United Kingdom, allowing the substantive themes in the explicit, detailed reasoning given by appellate courts to be exposed. It is now possible to assemble a matrix of substantive legal concerns that governs recognition of liability in the area and illuminates

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22. E.g., *Henderson v. Merrett Syndicates Ltd.*, [1995] 2 A.C. 145, 194–96 (1995) (appeal taken from Eng.). On Australian case law see Peter Cane, *The Blight of Economic Loss: Is There Life After Perre v. Apand?*, 8 *TORTS L.J.* 246, 254–55 (2000).

some of the deepest impulses in the law of torts. The most important of these are:

- a concern with tort intruding on the competitiveness of markets (i.e., “legitimate” self-interest causing pure economic loss to competitors);
- the concern that the boundaries of liability be normatively justifiable;
- the concern that the boundaries of liability be ascertainable;
- the concern with whether the plaintiff had the opportunity to take “appropriate” forms of self-protection (namely, ones that would have internalized losses to an appropriate party); and
- the mirror pro-liability concern with the vulnerability of the plaintiff.

In Commonwealth jurisdictions, the analytical label under which most systemic concerns relating to negligence liability are evaluated is that of duty. The large majority of appellate decisions in negligence relate to disputes about “duty.” Concern to preserve jury power, even in the very few jurisdictions that retain juries for this sort of claim, is nonexistent, so the appropriateness of this allocation of issues to the court is widely accepted.<sup>23</sup>

In the area of complaints about physical injury, three duty matters are settled. First, a duty will *always* be owed where the plaintiff (or the plaintiff’s property) has been physically injured by a private defendant’s affirmative careless act, even where the parties are strangers.<sup>24</sup> This is what I call the “traditional” negligence case.<sup>25</sup> Second, a duty will *never* be owed where the defendant has unreasonably failed to assist a stranger-plaintiff, resulting in injury to that plaintiff’s interests.<sup>26</sup> Third, in “nontraditional” claims, such as where the defendant’s careless failure to control the conduct of a third person results in injury to the plaintiff, courts use an approach that balances concerns both for the recognition of a duty and those countervailing to such a recognition. In these claims, there is no threshold presumption that the balance of those factors will favor liability.<sup>27</sup>

Economic loss claims are clearly not traditional negligence claims. Moreover, in relation to a plaintiff’s economic interests, it would clearly be intolerable to adopt the first automatic-duty approach in a market economy:

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23. Though some would prefer it located under other court-controlled areas. See D. Howarth, *My Brother’s Keeper? Liability for Acts of Third Parties*, 14 J. LEGAL STUD. 88 (1994).

24. Jane Stapleton, *Duty of Care Factors: A Selection from the Judicial Menu*, in *THE LAW OF OBLIGATIONS: ESSAYS IN HONOUR OF JOHN FLEMING* 59, 72 (Peter Cane & Jane Stapleton eds., 1998).

25. Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 946 (2001).

26. Stapleton, *supra* note 24, at 73–74.

27. *Id.*

“Legitimate” self-interest often causes foreseeable pure economic loss to competitors, and the indiscriminate imposition of tort duties might disrupt the freely accepted contractual allocation of risk between parties. The initial debate on economic loss in non-U.S. jurisdictions, therefore, was whether the traditional bright-line no-duty approach should apply, or the more subtle “balancing” approach being developed in nontraditional cases involving physical injury resulting from nonfeasance.<sup>28</sup>

A. Rejection of the Bright-Line Exclusionary Rule:  
“Legitimate” Economic Self-Interest Examined  
on a Case-by-Case Basis

Until 1964, Commonwealth jurisdictions adhered in virtually all cases to the bright-line no-duty approach. Then, in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*,<sup>29</sup> the House of Lords, whose decisions at that time were followed by all courts in Canada, Australia, and New Zealand, decided that a bank owed a duty of care to a business that had requested a credit reference concerning a third party.<sup>30</sup> The reference was careless and one consequence of the commercial plaintiff relying on the reference was that it lost money in its dealings with the third party.<sup>31</sup> Henceforward, all Commonwealth jurisdictions applied the more subtle “balancing” approach to claims of pure economic loss, labeling it the requirement that there be a so-called “special relationship” between the parties before a defendant could owe a duty of care in relation to pure economic loss.<sup>32</sup>

Particularly from the perspective of the modern sophisticated level of judicial analysis in the area, the reasoning in *Hedley Byrne* is surprisingly thin for such a radical development of the law.<sup>33</sup> The most perceptive of commentators immediately attacked the decision on the basis that the commercial plaintiff had adequate opportunities to protect itself in an appropriate way: for example, by paying for the commercially useful advice and acquiring contractual protection.<sup>34</sup> It would be a quarter-century before this sound criticism crystallized into a firm explicit concern of courts.

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28. See Jane Stapleton, *Duty of Care and Economic Loss: A Wider Agenda*, 107 LAW Q. REV. 249 (1991) and the cases cited therein.

29. 1964 A.C. 465 (appeal taken from Eng.).

30. *Id.* at 492–93, 504, 513–14.

31. *Id.* at 480–81.

32. Stapleton, *supra* note 25, at 941.

33. See Stapleton, *supra* note 28, at 259.

34. J.A. Weir, *Liability for Syntax*, 1963 CAMBRIDGE L.J. 216, 218. “[The plaintiffs] made bad business deals, having taken only a free opinion before hazarding their wealth in the hope of profit, no part of which, had it eventuated, would they have transferred to the honest person whom they now seek to saddle with their loss.” *Id.* On what is “appropriate” protection, see Jane Stapleton,

But what *Hedley Byrne* did institute was the modern era of economic loss claims, where the concern not to impinge on a defendant's legitimate self-interest in a market economy is no longer regarded as justifying a blanket exclusionary rule, but rather is a concern that is examined on a case-by-case basis. While courts accept that in a market economy legitimate self-interest can cause pure economic loss to competitors and that, therefore, there is a valid concern that tort does not intrude on the competitiveness of markets, they look behind this slogan. Courts look to see whether the defendant's conduct is a mere concomitant of competitive behavior, advancing its legitimate interests, or whether it damaged the economic interests of others without such a positive motive. The fact that carelessness is often cheaper for defendants does not rate as a legitimate reason to engage in that behavior. This is obvious where the carelessness caused physical injury to the property of a third party and the economic loss of the plaintiff is a ripple emanating from that source. But it is also true where no physical injury has occurred to anyone, for example, where a solicitor has carelessly omitted a legacy from a will or a valuer has carelessly overvalued a property.

#### B. The Rejection of "Pockets"; Embrace of Open-Textured Legal Reasoning

For many years, *Hedley Byrne* was widely treated in Commonwealth courts as only creating an isolated pocket of liability for economic loss limited to verbal negligence, which is termed "negligent misstatement" (to distinguish the tort phenomenon from the narrower concept of a "misrepresentation," a term restricted to those misstatements that induce the representee to contract with the representor).<sup>35</sup> The liability was also taken to be restricted to misstatements made by "professional" advisers (later extended to misstatements made in a "business context").<sup>36</sup>

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*Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence*, 111 LAW Q. REV. 301 (1995).

35. See *Caparo Indus. Plc. v. Dickman*, [1990] 2 A.C. 605, 619, 635 (appeal taken from Eng.). In the United Kingdom and most Commonwealth jurisdictions, the term "misrepresentation" is usually reserved for cases where the statement induced a contract between the representor and representee. See, e.g., *Resolute Maritime Inc. v. Nippon Kaiji Kyokai*, 1 W.L.R. 857 (Eng. Q.B. 1983); GUENTER TREITEL, *THE LAW OF CONTRACT* 325 (9th ed. 1995). "Misstatement" is the broader tort term that includes cases such as *Hedley Byrne*, 1964 A.C. 465. Lawyers in these jurisdictions find it odd that, in the United States, negligent "misrepresentation" cases are dealt with separately from other forms of negligence. See DAN B. DOBBS, *THE LAW OF TORTS* 1343-84 (2000).

36. Compare *Esso Petroleum Co. v. Mardon*, 1976 Q.B. 801, 819-20 (C.A.) (discussing the "course of business" principle), with *Mutual Life and Citizens' Assurance Co. Ltd. v. Evatt*, 1971 A.C. 793, 801-09 (P.C.) (appeal taken from Austl.) (discussing the "skill" principle).

It is true that many advice cases do have certain characteristics that nonadvice cases do not. In particular, an important feature is that, to precipitate loss in an advice situation, someone must react<sup>37</sup> to that advice, though not necessarily the plaintiff. In Commonwealth jurisdictions, this idea was at first imperfectly expressed in terms of a requirement of "reliance." But academic commentators trenchantly pointed out that in a sense we all "rely" on others acting carefully in how they go about their business. A pedestrian relies on drivers to act carefully. This is wholly different from the relevant feature in advice cases, such as where a financial adviser negligently urges a person to buy a stock investment. Advice per se does not injure. In striking contrast to the case of a pedestrian being hurt by the careless act of a driver, before this advice can play a role in the history of any later loss suffered by the investor in relation to that stock, the investor must have reacted to, in the sense of been influenced by, that advice.<sup>38</sup>

Prompted by vigorous academic criticism, Commonwealth courts eventually realized that reliance merely goes to establishing causation of loss, and that if causation between the defendant's carelessness and the plaintiff's loss can be established even in the absence of reliance by the plaintiff, as would be the case in the intended beneficiary cases, that absence is no reason to deny liability.<sup>39</sup> This opened the door for the courts to concede that they had no reason to limit exposure to negligence liability for pure economic loss to advice cases. Similarly, academic analysis of judicial reasoning convinced courts that no sufficiently compelling reason could be found for the limitation to professional advisers.<sup>40</sup> By doing so the law would randomly dismiss compelling claims where the plaintiff's economic loss resulted from other forms of conduct. These include: where the plaintiff acquired a building whose quality was poor due to the negligent construction by the builder;<sup>41</sup> where the plaintiff had been economically dependent on the physical integrity of property owned by a third person which was damaged by the negli-

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37. Notice that the reaction may be to refrain from doing something the person would otherwise have done. "Change of position" is a neat synonym for the idea behind "influence."

38. This additional historical requirement opens the way for the defense to argue for no liability based on the responsibility of the investor and others to check the soundness of the advice before following it. In other words, even where the advice did play a role in the history of the investor's subsequent conduct in relation to the stock, the context might be such that the law decides that the investor should have checked it. The failure to do so may not merely be another historical factor leading to the loss, so that a defense of contributory negligence may be available (of course, this will not be so if the person who should have checked was not the plaintiff), but may be judged so significant in responsibility terms that the historical factor of the defendant's advice is deemed relatively insignificant in those terms.

39. See, e.g., *White v. Jones*, [1995] 2 A.C. 207 (appeal taken from Eng.).

40. This evolution was described in JOHN G. FLEMING, *THE LAW OF TORTS* 605-06 (6th ed. 1983).

41. See, e.g., *Bryan v. Maloney*, (1994-1995) 182 C.L.R. 609, 616.

gence of the defendant;<sup>42</sup> where an intended beneficiary failed to inherit because of the careless conduct of a lawyer;<sup>43</sup> or where Lloyd's insurance agents were careless in the handling of the affairs of private investing underwriters, known as Names.<sup>44</sup>

In short, in response to the dialogue with the academy, judgments of courts in the Commonwealth, especially in the New World, reflect an increasing and welcome trend away from any a priori characterization of the case according to single factual features, such as whether the allegedly negligent conduct consisted of words or acts.<sup>45</sup> As with nontraditional physical loss cases, courts now tend to use an open-textured analysis of all the substantive legal concerns weighing for and against recognition of a duty, be they moral, economic, or other types of concerns relevant to the incidence

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42. See, e.g., *Caltex Oil (Australia) v. The Dredge "Willemstad"*, (1976) 136 C.L.R. 529, 555–56; *Canadian Nat'l Ry. Co. v. Norsk Pac. S.S. Co.*, [1992] 1 S.C.R. 1021, 1024.

43. See, e.g., *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958); *White*, [1995] 2 A.C. at 224.

44. *Henderson v. Merrett Syndicates Ltd.*, [1995] 2 A.C. 145, 194–96 (appeal from Eng.).

45. Canadian Professor Bruce Feldthusen has long advocated an approach based on what he claims are distinct categories of economic loss, only some of which he believes should be recognized as "pockets" of liability. See Bruce Feldthusen, *Liability for Pure Economic Loss: Yes, But Why?* 28 U.W. AUSTL. L. REV. 84 (1999) [hereinafter *Liability*]; Bruce Feldthusen, *Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel?*, 8 TORT L. REV. 33 (2000). Feldthusen asserts that "[i]n each of the five categories of economic loss claim to have emerged, there is required a unique justification for liability, a different justification in each category, and a very different justification from that which exists for physical harm." *Liability*, *supra*, at 120. These categories have found some limited favor in Canada. See, for example, *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, 1241–43; *D'Amato v. Badger*, [1996] 2 S.C.R. 1071, 1082–83; *Winnipeg Condominium Corp. v. Bird Const. Co.*, [1995] 1 S.C.R. 85; and the judgment of La Forest in *Norsk*, [1992] 1 S.C.R. at 1049 (La Forest, J., dissenting).

A recent Canadian Supreme Court decision, however, found Feldthusen's categories inadequate to cover the precise facts of the case. See *Martel Bldg. Ltd. v. Canada*, [2000] 1 S.C.R. 86, discussed in I.N. Duncan Wallace, Note, *Tender Call Obligations in Canada*, 117 LAW Q. REV. 351 (2001). A more general problem with this sort of pockets approach is that a fact situation can easily straddle more than one pocket: A misstatement can precipitate physical damage to the property of a third person and thereby cause economic loss to the plaintiff who relied on the integrity of that property, or the misstatement of an architect could result in the plaintiff acquiring defective property. See Stapleton, *supra* note 28, at 280.

The Feldthusen approach has rightly been rejected in Australian courts, which refuse to see any rational basis for his separation of "shoddy statements, shoddy services and shoddy goods." Cane, *supra* note 22, at 254. After decisions such as *Henderson*, [1995] 2 A.C. at 145, where the House of Lords refused to place importance on whether the negligent conduct of the Lloyd's managers was categorized as misstatements or negligent services, it seems U.K. courts will similarly dismiss the Feldthusen categories on the basis that they attempt to organize precedents in a manner that has no normatively justifiable basis. On the other hand, classification merely as a way of illustrating the variety of fact situations that can arise may be useful. See, e.g., 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) (setting out eight categories that the authors emphasize "are not mutually exclusive").

of tort liability.<sup>46</sup> Across the diverse fact situations giving rise to novel claims for tort protection, the concerns that are judged as relevant range from the very specific<sup>47</sup> to the more systemic.

### C. Indeterminacy—Controlled by Doctrine

The concern with indeterminacy of liability was traditionally a central slogan raised against the recognition of a duty of care in relation to pure economic loss. This is often known as the *Ultramares* concern, named for a famous early exposition by then-Judge Benjamin Cardozo. The law, it is said, should refuse to recognize liability where the plaintiff class or the quantum that is alleged to be within the scope of the liability are so indeterminate that the uncertain scope of threatened liability would be intolerably unfair to defendants.<sup>48</sup>

One common source of indeterminacy in economic loss cases relates to the extent of a plaintiff's loss. For example, the careless investment adviser may not reasonably be able to foresee the extent to which the advised investor may respond: She may buy \$100 worth of the recommended stock or \$1 million. In such cases, the indeterminacy in relation to the amount of a victim's loss provides a strong reason not to hold that the adviser owed a duty of care.<sup>49</sup> Another indeterminacy-generating characteristic of the scenario behind economic loss claims that is rarely shared with physical loss claims, is that pure economic loss tends to have "ripple effects."<sup>50</sup> One class, which I will call the "primary class" of victims, suffers economic loss "directly" from the carelessness of the defendant, in the sense that their loss was not triggered by the reaction of another victim, say X, to X's own economic loss. Such "primary" victims can be distinguished from "secondary" victims whose economic loss was due to the response that the primary victims took to their economic loss, such as ceasing to contract with such secondary vic-

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46. See, for example, the concern with the dignity of the law. Stapleton, *supra* note 24, at 77.

47. Consider, for example, the law's concern that its rules not positively encourage abortion, a concern that can, depending on the facts, weigh in favor or against the recognition of a duty of care. *Id.* at 73, 86.

48. *Ultramares Corp. v. Touche*, 174 N.E. 441, 444–48 (N.Y. 1931).

49. But this point must not be exaggerated. In personal injury cases, for instance, the doctrine that a defendant must take the plaintiff as found may justify liability for unforeseeable losses related, for example, to the victim's standard of living. In the United Kingdom, this is graphically known as the "shabby millionaire" principle. *The Arpad*, 1934 P. 189, 202 (Eng. C.A.) (Scrutton, J.); JOHN FLEMING, *THE LAW OF TORTS* 235 (9th ed. 1998); HARVEY MCGREGOR, *MCGREGOR ON DAMAGES* 130 (16th ed. 1997).

50. Stapleton, *supra* note 28, at 255; see also *Perre v. Apand Propriety Ltd.*, (1999) 198 C.L.R. 180, 221 (McHugh, J.); *Canadian Nat'l Ry. Co. v. Norsk Pac. S.S. Co.*, [1992] 1 S.C.R. 1021, 1105–06 (La Forest, J., dissenting); *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, 1964 A.C. 465, 534 (Lord Pearce) (appeal taken from Eng.).

tims. For example, when a negligently advised investor suffers economic loss as a result of following that advice, she may no longer have the funds to continue trading with a third party, who thereby suffers economic loss. Another type of ripple effect is commonly associated with advice cases: The carelessly advised investor may pass the advice on to a third party, such as her husband and his circle of friends, who then react to it in the same injurious way.<sup>51</sup> Ripple effects such as these generate indeterminacy both of the entire class of victims and of the total economic loss flowing from the negligence.

After an intense debate among academics, it is now recognized by Commonwealth courts that, while the total extent of economic loss and the total number of victims in an economic loss case may be indeterminate, this factual feature need not be fatal to a claim. There is no *legal* problem of indeterminacy if: first, the law can, on a normatively justifiable basis, restrict those who can sue, and second, this normatively justified class is reasonably determinate in terms of its numbers (that is, the size of the class is ascertainable by parties in the defendant's position). A parallel double requirement (that is, normative justification plus reasonable ascertainability) applies to the issue of the amount for which members of the class can claim. Indeterminacy, in other words, is now seen as merely one manifestation of the institutional concern that the boundaries of liability should be ascertainable and based on normatively justifiable arguments.

The famous "tunnel" example illustrates these points. Suppose that due to the carelessness of the defendant, who provides the lighting in the Brooklyn Battery Tunnel, the lights fuse and there is a black-out, which results in the tunnel being closed to traffic for six hours. An indeterminate number of victims will suffer economic loss, and the extent of their loss will be indeterminate, too. But there will be no *legal* problem of indeterminacy if first, the law can, on a normatively justifiable basis, restrict those who can sue. We might well accept, for example, that primary victims such as those caught in the traffic jam at the tunnel are not an arbitrary grouping but rather that they ought to get priority, because we give some form of normative significance to the fact that their loss resulted directly from the closure of the tunnel. This contrasts with the position of secondary victims, whose economic loss resulted from the inability of the primary victims to contract with them. But this would not be sufficient to control the legal problem of indeterminacy. To do so, the class of such primary victims must also be ascertainable in terms of numbers. This will not be the case because the number

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51. On the other hand there are advice cases where the advice could at most only injure one party. See, e.g., *N. Territory of Austl. v. Mengel*, (1995) 185 C.L.R. 307, 316.

that will be held up in the traffic jam will depend on the time of day that the black-out and closure happens to occur, 3 A.M. or rush hour.

### 1. Early Advice Cases

At first, the way the indeterminacy problem was controlled in advice cases was by limiting recovery to the target audience of the advice. This notion of the target audiences allowed, for example, those who value property to be liable to those who commissioned the report for themselves to use, such as potential lenders. It also allowed such advisers to be liable to those who, although they did not commission the report, were the intended target audience for the report, such as the potential purchaser.<sup>52</sup> Also, where a statute requires firms of lawyers to deliver annual accountants' reports to the Law Society, the accountant engaged by such a firm could be held to owe a duty of care to the Law Society, in its capacity as trustee for a statutory compensation fund for solicitor negligence.<sup>53</sup>

Sometimes considerable effort was required of courts to enunciate the reasons for drawing distinctions between classes of victims influenced by the advice. An important commercial example here has been that, while the auditors of companies may be held liable for their careless work to the company that engaged them, courts in Commonwealth jurisdictions will typically not hold them liable to lenders or existing or prospective shareholders.<sup>54</sup>

It is now recognized that sometimes liability may be restricted, on a normatively justifiable basis, to an ascertainable class of nontarget parties, whom the defendant should clearly have foreseen would be affected, without risking indeterminacy of liability. Thus, a careless reference-giver may be liable to the subject of the reference even though it was requested by and relayed to another party and it was that other party who was influenced by it to the detriment of the subject.<sup>55</sup> Clearly, the subject of the reference can claim a special interest in the care with which it is made. A litigant has a similar special interest in the care with which its lawyer deals with the case

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52. *Smith v. Bush*, [1990] 1 A.C. 831 (appeal taken from Eng.).

53. *Law Soc'y v. KPMG Peat Marwick*, [2000] 4 All E.R. 540 (C.A.).

54. *Esanda Fin. Corp. v. Peat Marwick Hungerfords*, (1997) 188 C.L.R. 241; *Hercules Mgmts. Ltd. v. Ernst & Young* [1997] D.L.R. 577; *Caparo Indus. Plc. v. Dickman*, [1990] 2 A.C. 605 (appeal taken from Eng.). Compare the take-over case of *Morgan Crucible Co. v. Hill Samuel*, [1990] 2 W.L.R. 655 (Eng. C.A.). For the U.S. position, see DOBBS, *supra* note 35, at 1343–84.

55. *Spring v. Guardian Assurance Plc.*, [1994] 3 W.L.R. 354 (H.L.) (appeal taken from Eng.).

in court.<sup>56</sup> Yet another example of a nontarget party being able to sue on the basis of a clear and normatively recognizable special interest, was where Canadian engineers responsible for the negligent specifications in a tender package put out by a province were held liable to the successful tenderer.<sup>57</sup>

In short, the general lesson that can be drawn from the advice cases is that if a normatively justifiable argument can be made to draw the line of liability at a certain radius and this allows the plaintiff class to be ascertainable, indeterminacy concerns are eliminated, even though ripples of economic loss may continue very much more widely into society. This insight freed Commonwealth courts to consider a whole range of economic loss claims, not merely advice claims, in which the imposition of liability could be contemplated because the duty lines relating to the class of victims who could sue and the quantum for which they could sue could be drawn on a normatively justifiable basis that produced a plaintiff class that was ascertainable.

## 2. Current Open-Textured (Not Necessarily Advice) Cases

Once pockets based on superficial factual similarities had been abandoned, the resultant open-textured analysis of substantive legal concerns led to the recognition that indeterminacy might be controllable by doctrine not merely in advice cases such as *Hedley Byrne* but also elsewhere. Perhaps the most important area where this realization has so far had an impact is in the treatment of cases where the defendant's negligent conduct (words or otherwise) has resulted in direct *physical* loss to one party, and this physical damage then causes economic loss to primary class victims, which in turn triggers secondary and further ripples of economic losses to others down the line. The factual variety of such cases is very wide. Examples include situations where the negligence of the defendant physically damages a railway bridge,<sup>58</sup> a gas line, electricity cable,<sup>59</sup> or oil pipeline of a third party,<sup>60</sup> disrupting the business of the plaintiff which relied on use of the damaged facility.

In the United Kingdom, where the pockets approach still haunts the courts, this sort of economic loss is still characterized separately and treated as irrecoverable. One reason proffered is the problem of indeterminacy: the

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56. See, e.g., *Arthur J.S. Hall & Co. v. Simons*, [2000] 3 W.L.R. 543 (Eng. H.L.) (appeal taken from Eng.). There is no contractual relationship between the solicitor's client and a barrister.

57. *Edgeworth Constr. v. Lea & Assoc.*, [1993] 3 S.C.R. 206.

58. *Canadian Nat'l Ry. Co. v. Norsk Pac. S.S. Co.*, [1992] 1 S.C.R. 1021, 1037.

59. Compare *Seaway Hotels Ltd. v. Cragg (Canada) Ltd.*, [1960] D.L.R. 264, 265 (Ont. C.A.), with *Spartan Steel & Alloys Ltd. v. Martin & Co. Ltd.*, 1973 Q.B. 27, 34 (C.A.).

60. *Caltex Oil (Australia) v. The Dredge "Willemstad"*, (1976-1977) 136 C.L.R. 529, 530-31.

unforeseeable number of parties who may have been economically dependent on the property that was damaged, and the unforeseeable extent of the dependence of each.<sup>61</sup> Here, it is also useful to mention *Leigh & Silavan Ltd. v. Aliakmon Shipping Co. (The Aliakmon)*,<sup>62</sup> where the House of Lords faced a case like this in which there was no such indeterminacy of parties or quantum. Even so, the House rejected the claim on the basis of the traditional exclusionary rule,<sup>63</sup> and in dicta noted the additional reason (discussed below) that the plaintiff should have protected itself in contract, specifically by a contract with the owner of the property relied upon.

Canadian and particularly Australasian courts have not been as timid as their British counterparts. They grasped the point from the advice cases that the indeterminacy concern in law is merely one manifestation of the concern that the boundaries of liability should be ascertainable and based on normatively justifiable arguments. In law, indeterminacy may therefore be adequately controlled by appropriate doctrinal requirements. In *Caltex Oil v. The Dredge "Willemstad"*,<sup>64</sup> for example, the Australian High Court allowed a claim for pure economic loss by the only user (albeit not owner) of an oil pipeline, which had been damaged by the negligence of the defendant-dredge.<sup>65</sup> Similarly, in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*,<sup>66</sup> the Canadian Supreme Court allowed a claim by a plaintiff who had been the principal, but not exclusive, user (again, not the owner) of the bridge, which had been damaged by the negligence of the defendant tug-owner.<sup>67</sup> In both cases, the courts proffered substantive normative arguments that they claimed justified a distinction being drawn between one ripple of economic loss, which could be within the scope of liability of the defendant, and further ripples, which were judged to present less compelling arguments for recovery.<sup>68</sup>

Where normative justifications are not available to delineate a determinate class of victims who should be allowed to sue and an ascertainable

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61. *Spartan Steel*, 1973 Q.B. at 27; see also *Candlewood Navigation Corp. v. Mitsui O.S.K. Lines Ltd.*, 1986 A.C. 1 (P.C.) (appeal taken from Eng.). In the United States, see *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). In that case, the plaintiff class was determinate, but query whether the quantum of lost profits was determinate.

62. 1986 A.C. 785 (appeal taken from Eng.). For a discussion of *The Aliakmon*, see Jane Stapleton, *supra* note 34, at 333–35.

63. *The Aliakmon*, 1986 A.C. at 818–19.

64. (1976–1977) 136 C.L.R. 529.

65. But query whether the claim should have been denied on the ground that the plaintiff was a powerful commercial party that had had adequate opportunities for appropriate self-protection (by contract with the owner of the pipeline).

66. *Norsk*, [1992] 1 S.C.R. at 1021. But see *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210. A commentary on the latter is Duncan Wallace, *Contractual Relational Loss in Canada*, 114 LAW Q. REV. 370 (1998).

67. *Norsk*, [1992] 1 S.C.R. at 1037.

68. *Willemstad*, (1976–1977) 136 C.L.R. at 544–56; *Norsk*, [1992] 1 S.C.R. at 1049–87.

quantum of loss for which they can sue, liability is refused.<sup>69</sup> One Canadian example is the decision in *B.D.C. Ltd. v. Hofstrand Farms Ltd.*,<sup>70</sup> where the careless delay by the defendant-courier caused economic loss to the nonprivity sender. The Canadian Supreme Court noted that there was no way to craft a normatively justifiable limit to the extent of the victim's recoverable loss, such that the quantum of loss for which couriers would be liable would be ascertainable.<sup>71</sup> If the plaintiff were to succeed, there would be no logical cut-off point to put a reasonably ascertainable limitation on the courier's range of liability.<sup>72</sup>

Recent cases involving economic loss in an agricultural setting neatly illustrate the richness and power of this technique of using doctrinal limitations to control the indeterminacy problem. In the earlier English case of *Weller & Co. v. Foot and Mouth Disease Research Institute*,<sup>73</sup> it had been noted that agricultural contamination, like foot and mouth disease, can be "a tragedy which can foreseeably affect almost all businesses in [an agricultural] area."<sup>74</sup> Such contamination seems to raise an insurmountable problem of the sort of indeterminacy noted by Cardozo in *Ultramares*. But as recent Australian decisions have shown, the fact that the total number of people suffering economic loss as a result of the defendant's negligence is indeterminate or that the total quantum of economic loss resulting from the negligence is indeterminate, does not necessarily mean that ascertainable classes of victims and ascertainable sums for which they can sue may not be differentiated on some normatively justifiable basis.<sup>75</sup> If that basis is normatively justifiable *and* produces an ascertainable class and quantum, the concern with the unfairness of uncertainty is avoided, and the advantages of the imposition of a duty of care to some victims are secured. An obvious candidate for such differentiation are primary victims, namely those whose economic loss was suffered directly from the carelessness and not from another victim's

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69. Courts in all common law jurisdictions have tried to control liability for nervous shock or emotional distress by deploying certain spatial, temporal, and relational rules. See, e.g., *Janesch v. Coffey*, (1984) 155 C.L.R. 549; *Frost v. Chief Constable of South Yorkshire Police*, [1999] 2 A.C. 455; *Van Soest v. Residual Health Management Unit* [2000] 1 N.Z.L.R. 179. These have not been based on any rational argument and have little support, leading to a halt in the expansion of liability in this area in the United Kingdom. See, e.g., *McFarlane v. Tayside Health Board* (Scotland), [2000] 2 A.C. 59, 74–75, 81–83 (appeal taken from Scot.).

70. [1986] D.L.R. 1.

71. *Id.* at 11.

72. *Id.*

73. [1996] 1 Q.B. 569 (C.A.). In *Weller*, the escape of foot and mouth virus resulted in auctioneer-plaintiffs losing profits when the market was closed. See also *Cattle v. Stockton Waterworks Co.*, 1985 Q.B. 453, 457–58.

74. *Weller*, [1996] 1 Q.B. at 577.

75. See *Wilkins v. Dovuro Propriety Ltd.*, (1999–2000) 169 A.L.R. 276; *Perre v. Apand Propriety Ltd.*, (1999) 198 C.L.R. 180; *McMullin v. ICI Austl. Operations Propriety Ltd.*, (1997) 72 F.C.R. 1, *reconsidered by* (1999) 169 A.L.R. 227.

reaction to their own economic loss. But other features may also qualify as being normatively justifiable limits.<sup>76</sup>

Another recent case is *McMullin v. ICI Australia Operations Propriety Ltd.*<sup>77</sup> ICI had developed "Helix" as an insecticide for use in the growing of cotton.<sup>78</sup> Its active ingredient was chlorfluazuron (CFZ). It was common practice for cattle to graze on cotton stubble, and some cattle became contaminated with CFZ, causing economic loss to a number of parties. The Australian Federal Court held that ICI owed a duty of care to four classes of plaintiffs.<sup>79</sup> The first class were claimants (mainly graziers) whose cattle became contaminated by CFZ during their period of ownership. These were physical loss claims. The second class of plaintiffs were graziers and others, such as abattoir operators, who unwittingly purchased already-contaminated cattle.<sup>80</sup> In Commonwealth jurisprudence, these are classed as claims for pure economic loss. The third successful class were claimants such as meat processors and exporters, who owned meat that was found to be contaminated and was, therefore, condemned. Because it was not clear whether contamination occurred after acquisition, it was not clear whether these claims were for physical loss or pure economic loss. The fourth class were claimants, such as feed lot operators, who found that cattle in their possession (but not ownership) were contaminated and thereafter incurred expense in holding them in detention. These were pure economic loss claims. By limiting the scope of ICI's duty of care to only those ripples of economic loss associated with the plaintiff's ownership or possession of contaminated cattle/meat, the court not only controlled the problem of indeterminacy of liability (as opposed to indeterminacy of total loss) but explicitly attempted to base this control upon a normative argument of who were the vulnerable "primary" victims of the carelessness.<sup>81</sup>

Importantly, the Court refused to recognize a duty of care to protect three other classes of injured parties<sup>82</sup> from pure economic loss, on the basis

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76. And individual judges may disagree, as in *Perre*, (1999) 198 C.L.R. 180, where the High Court of Australia emphasized that courts must draw a line on some rational basis to control the problem of indeterminate liability. The line should be "clear and as easy of application as is possible." *Id.* at 194. All agreed it could be drawn in this case to protect potato growers but there was no unanimity about other groups. *Cane*, *supra* note 22, at 253.

77. (1997) 72 F.C.R. 1.

78. For the facts recited here, see *McMullin*, (1997) 72 F.C.R. 1, 2-4.

79. *Id.* at 82.

80. *Id.* at 69-70.

81. *Id.* at 82.

82. These were (1) claimants whose cattle were not in fact contaminated by CFZ but were placed in detention because of a belief they were or might be affected; (2) claimants, such as gin trash transporters and trash pellet suppliers, who lost business (or their whole enterprise) because of the discovery of CFZ contamination and the resultant advice given to graziers against feeding cotton gin trash to cattle; and (3) claimants, such as abattoir operators, feed lot operators, stock agents, cattle transporters, meat processors, and exporters and the like, who lost business, or suf-

that "once one moves away from the cattle (or meat) trail, there is no connecting link."<sup>83</sup> The situation becomes similar to that described by Justice Widgery in *Weller*:<sup>84</sup>

[O]utside the ownership or possession limit there is no stopping point short of where foreseeability ends. ICI would be liable to an abattoir owner in north Queensland (remote from the cotton fields where Helix was used) who lost export sales as a result of a ban by a particular country on the importation of Australian beef caused by CFZ concern.<sup>85</sup>

Another Australian case is worth noting, not least because the plaintiffs' pure economic loss flowed from state regulatory rules. In *Perre v. Apand Propriety Ltd.*,<sup>86</sup> the defendant negligently supplied infected seed potatoes to a farmer who then grew a diseased crop. The disease did not spread but legal regulation prevented growers within a twenty-mile radius from exporting their potatoes, directly or indirectly, into the lucrative Western Australian (WA) market.<sup>87</sup> A majority of the High Court of Australia allowed claims for economic loss by these growers, by processors who provided services to these growers, and by landowners who claimed that the value of their land had been reduced because it could not be used for the growing of potatoes for the WA market.<sup>88</sup> On the other hand, it seems likely that all the justices would have refused claims by trucking companies working for growers and processors, parties who were not exclusively dependent on the response of primary victims.<sup>89</sup> Again, by limiting the scope of liability to only those ripples of economic loss associated with plaintiffs who were vulnerable to the defendant's conduct in the sense of being exclusively dependent on the defendant taking care, the High Court not only controlled the problem of indeterminacy of *liability* (as opposed to indeterminacy of total loss) but also explicitly attempted to base this control upon a normative argument of who were the most vulnerable victims of the carelessness, including those secondary victims who were exclusively dependent on the response of primary victims.

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ferred reduced profit margins, because of the effect of the controls introduced by state regulators or the attitude of foreign governments to CFZ contamination.

83. *McMullin*, (1997) 72 F.C.R. at 79.

84. *Id.*

85. *McMullin v. ICI Austl. Operations Propriety Ltd.*, (1999) 169 A.L.R. 227, 233-34.

86. (1999) 198 C.L.R. 180. Commentaries on this case include Cane, *supra* note 22, at 253-62, and Christian Witting, *The Three-Stage Test Abandoned in Australia—or Not?* 118 *LAW Q. REV.* 214, 217 (2002).

87. *Perre*, (1999) 198 C.L.R. at 183.

88. *Id.*

89. Cane, *supra* note 22, at 258.

D. The “Primacy Of Contract”—Now Replaced by the Concern with Self-Protection

In *The Aliakmon*, the House of Lords asserted that contract is usually the appropriate realm for the recovery of negligently caused economic loss, and this notion has bedeviled economic loss case law.<sup>90</sup> For example, Gary Schwartz notes that this “primacy of contract” notion is widely cited in the United States to prevent recovery in the one field where American scholars have shown interest in the area of economic loss.<sup>91</sup> This is the area of claims by those who have acquired products of poor quality. In this context, the form the argument takes is that to allow tort into this field would “undermine or circumvent” statutory (sales) warranty law and the strict requirements of those entitlements.<sup>92</sup> Of course, a moment’s reflection on the position in physical loss claims shows that this argument is inadequate: Buyers, users, and mere bystanders alike are able to use the tort of negligence (and the special rule in tort concerning product liability) to recover for physical injury due to the condition of products even though these claims could be said to “circumvent” statutory (sales) warranty requirements. Moreover, the idea that a tort duty of care here is tantamount to a transmissible warranty of quality ignores the fundamental distinction between duties of care and strict obligations to achieve a certain result.

Despite rigorous academic criticism, courts in the United Kingdom continue to bend to precedents that embrace the idea that contract, not tort, is the appropriate sphere for economic loss claims, except for the inexplicable pocket of liability under the rule in *Hedley Byrne*. A breakthrough seemed to occur in the House of Lords decision in *Junior Books, Ltd. v. Veitchi Ltd.*,<sup>93</sup> where no issue of indeterminacy arose on the facts. Here, the purchaser of a building successfully sued a subcontractor in negligence for the economic loss associated with the poor quality of the resultant building.<sup>94</sup> But the decision was swiftly isolated when the House of Lords, in *D.&F. Estates Ltd. v. Church Commissioners for England*,<sup>95</sup> denied builder’s liability.<sup>96</sup> Among the reasons given for this sterile result was the reassertion

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90. *Leigh & Silavan Ltd. v. Aliakmon Ltd. (The Aliakmon)*, 1986 A.C. 785, 818–19 (appeal taken from Eng.); see also Stapleton, *supra* note 34, at 333–34.

91. Schwartz, *supra* note 5 (draft at 128, 130, 132–33).

92. *Id.* at 130.

93. [1983] 1 A.C. 520 (appeal taken from Scot.).

94. *Id.* at 522.

95. 1989 A.C. 177 (appeal taken from Eng.).

96. There were two reasons for this. First, the courts reasserted, again without explanation, that contract is the appropriate realm for the recovery for negligently caused economic loss. *Id.* at 201–02.

The second reason is more complicated. In the *Hedley Byrne* pocket, those acquiring defective property had been successfully suing local authorities for carelessly approving buildings that had

by the House of Lords, again without explanation, that contract is the “appropriate” realm for the recovery of negligently caused economic loss.

New World Commonwealth courts have been more sensitive to academic criticism and have adopted a more subtle approach, which probes whether contract was a *realistic* alternative avenue for protection of the plaintiff in the circumstances of the case and whether other concerns such as the mitigation of loss support liability. Decisions in Commonwealth cases where the plaintiff has suffered economic loss through the acquisition of defective property illustrate the gulf that has opened up with the U.K. courts. In *Rivtow Marine Ltd. v. Washington Iron Works*,<sup>97</sup> the Canadian Supreme Court allowed an economic loss negligence claim against the manufacturer of a defective crane by a plaintiff who was economically dependent on using the crane. Unfortunately, the reasoning did not address the full range of possible objections to liability. Later Canadian cases, such as *Winnipeg Condominium Corp. v. Bird Construction Co.*, permitted plaintiffs to sue builders for economic loss suffered when they acquired dangerously defective property.<sup>98</sup> The Canadians also allow such “dangerous defect” claims by those acquiring defective premises against public authority inspectors, as in *City of Kamloops v. Nielson*.<sup>99</sup> Courts in Australasia go even further. In *Bryan v. Maloney*,<sup>100</sup> the Australian High Court allowed a subsequent purchaser to sue the builder of a house for pure economic loss even where the defect in the property was not dangerous. In *Invercargill City Council v. Hamlin*,<sup>101</sup> New Zealand house purchasers were held allowed to sue local authority inspectors in relation to property defects even if they are not dangerous.

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defects of quality that careful inspection would have detected. Indeed, an earlier House of Lords case allowing such recovery against public authorities, *Anns v. Merton London Borough Council*, 1978 A.C. 728 (appeal taken from Eng.), had been couched in such broad terms that concern began to mount about its explosive potential to enlarge liability for economic loss generally. A new generation of Law Lords was determined to staunch the growth of such liability. In particular, they were concerned with protecting the finances of local government, which had allegedly been severely damaged by the recognition of building inspector liability. It seemed that local ratepayers had become the guarantors of bad builders. *Id.* at 759. But, ignoring the quite separate concerns relevant to the liability of local authorities on the one hand and builders on the other, the House of Lords treated the two areas of liability as inextricably linked. *Id.* If local authority liability was to be denied, the builder’s liability in *Junior Books* had to go, too, or so the Law Lords assumed. The chance to eliminate the *Junior Books* pocket of builder’s liability came up first when *D. & F. Estates Ltd.* was taken to the Lords in 1988. This was quickly followed by *Murphy v. Brentwood District Council*, (1991) 1 A.C. 398 (appeal taken from Eng.), where the Lords removed the *Anns* pocket of building inspector’s liability.

97. [1974] 1 S.C.R. 1189, 1215–16.

98. [1995] 1 S.C.R. 85, 121.

99. [1984] 2 S.C.R. 2, 35. Query if dangerousness of the defect is necessary. See *Ingles v. Tutkaluk Constr. Ltd.*, [2000] 1 S.C.R. 298.

100. (1994–1995) 182 C.L.R. 609, 628–30.

101. 1996 A.C. 624 (P.C.) (appeal taken from N.Z.).

Another Australian case in the agricultural context provides a good illustration of how Commonwealth courts have transformed this rough "primacy of contract" idea into a sophisticated tool of differentiation between cases. In *Wilkins v. Dovuro Propriety Ltd.*,<sup>102</sup> the defendant seed merchant-importer knowingly allowed its certified canola seed, contaminated by the seed of weeds not established in the Western Australian wheat belt, to be resold by local retail seed merchants without warning farmers in that area. When the contamination was discovered the government required farmers to take expensive weed-eradication measures.<sup>103</sup> These primary victims successfully sued the defendant in negligence for this economic loss.<sup>104</sup>

The detailed reasoning of the Federal Court of Australia emphasized that the economic loss suffered by the plaintiff group was reasonably foreseeable, that the defendant had not been legitimately protecting or pursuing its business interests and that because the class of persons who were vulnerable to a failure to warn by the defendant was limited and ascertainable in the relevant sense, no question of indeterminacy of *liability* (as opposed to indeterminacy of total loss) arose.<sup>105</sup> The court also agreed with Canadian authorities that there are sound policy reasons for encouraging people to make reasonable attempts to avoid or mitigate their losses.<sup>106</sup> But the Court particularly noted that recognition of a duty would neither interfere with the body of law which governs the sale of goods generally, nor disrupt any freely accepted contractual matrix, because this was "not a situation . . . where it is realistically to be expected that farmers would protect themselves by obtaining contractual warranties."<sup>107</sup>

What the New World Commonwealth jurisdictions have come to understand is that there are two aspects to the argument that the plaintiff should have protected itself by contract, and together they reveal and limit a fundamental impulse of tort law. On the one hand, there are situations in which the plaintiff is a powerful commercial party quite able to extract the relevant contractual protection from the defendant or a middle party in a way that would appropriately internalize the loss to the careless party.<sup>108</sup> This is the sound countervailing argument to the finding of a duty of care in *Hedley Byrne*: The powerful commercial plaintiff could have paid the bank for the financial reference. This would have internalized the loss to the appropriate party without the assistance of tort law. It is also the core objec-

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102. (1999–2000) 169 A.L.R. 276, 277–78.

103. *Id.* at 277.

104. *Id.* at 322–23.

105. *Id.* at 302–11.

106. *Id.* at 314–16.

107. *Id.* at 486–87.

108. This is why first-party insurance is not an "appropriate" form of self-protection. See Jane Stapleton, *Tort, Insurance and Ideology*, 58 MOD. L. REV. 820 (1995).

tion to allowing a powerful commercial party, such as the plaintiff in *Junior Books*, to sue its nominated subcontractor for careless provision of a poor-quality structure.<sup>109</sup> In that case, the market conditions had been such that, if this risk was important to the plaintiff and contractual protection from the risk could not be extracted from the middle party (that is, the main contractor), the plaintiff could and should have bargained for a collateral warranty directly with the subcontractor. Using this sound reasoning, Commonwealth courts have been able convincingly to stem attempts to exploit tort law by a range of commercial free riders.<sup>110</sup>

On the other hand (and this is where tort theorists really should take especial note), where the plaintiff could *not* have realistically protected itself in this way, the New World Commonwealth courts have accepted that circumstances may well support tort protecting that party, even if superficially the factual matrix seems to mirror the one in *Junior Books*.<sup>111</sup> Thus, in the New World Commonwealth jurisdictions, it is possible that not only advisers (architects, valuers, surveyors, etc.) but also builders may be liable for economic loss to those who acquire defective premises if market conditions prevented the plaintiffs from gaining appropriate contractual protection.<sup>112</sup>

#### E. The Tort of Negligence Manifests a Core Concern with Vulnerability

Once the concern with self-protection and its flip-side concern to protect the vulnerable crystallized, sensitivity to the latter began to have a dramatic effect on New World jurisprudence. Now that New World Commonwealth courts have abandoned any artificial pockets approach to pure economic loss, they have been free to distill, from their open-textured analysis, core values and concerns that are common across the tort of negligence. Specifically, the idea has crystallized that, at its core, the tort of negligence is most clearly concerned with protection of the vulnerable. Vulnerability is a concept that accommodates both rights and deterrence theories of tort law and does so in a dramatically more fine-tuned manner than either of these competing schools of thought can achieve alone. Suppose the plaintiff faced a uniform market condition that prevented it from secur-

109. Thus, in the Court of Appeal of New Zealand, President Cooke has observed that "in such a case of industrial construction the network of contractual relationships normally provides sufficient avenues of redress to make the imposition of supervening tort duties not demanded." *Invercargill City Council v. Hamlin* [1994] 3 N.Z.L.R. 513, 520.

110. See, e.g., *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; *Kavanagh v. Cont'l Shelf Co. (No. 46) Ltd.* [1993] 2 N.Z.L.R. 648; *S. Pac. Mfg. Co. v. N.Z. Sec. Consultants & Investigations Ltd.* [1992] 2 N.Z.L.R. 282.

111. In *Junior Books*, the parties to the litigation were linked by both having a contract with a middle party. Stapleton, *supra* note 34, at 327-35.

112. See, e.g., *Bryan v. Maloney*, (1995) 182 C.L.R. 609, 619-20. Compare the current embarrassing incoherence of the U.K. position. See *supra* text accompanying note 96.

ing relevant contractual protection from the defendant or a middle party in a way that would have appropriately internalized the loss to the careless party. Then, *even if formally there was a contractual matrix*<sup>113</sup> that linked plaintiff and defendant, directly or indirectly, that provides no reason for tort law to refuse protection. Indeed, it may confirm the vulnerability of the plaintiff. Given this focus on substantive vulnerability, the mere fact that the plaintiff and defendant have had dealings, directly or indirectly, is now recognized, at least by New World Commonwealth courts, as no trump factor justifying denial of liability.

For example, in New World Commonwealth jurisdictions, the market in used dwellings is still characterized by the uniform condition of caveat emptor.<sup>114</sup> The buyer cannot achieve contractual protection from builders whose careless work resulted in quality defects to the structure. Decisions such as that by the Australian High Court in *Bryan v. Maloney*<sup>115</sup> reflect tort's concern with the prone position of a subsequent purchaser of what is usually the most important investment in a citizen's life. Economic loss decisions in Canadian and New Zealand also vindicate this sort of concern with the plaintiff's economic vulnerability.<sup>116</sup>

Even courts in the United Kingdom seem to be groping their way towards an exposition of policy along the lines of those now being clearly and convincingly enunciated in New World Commonwealth courts. For example, though the United Kingdom still doggedly refuses to allow the plaintiff who has acquired defective property to sue the careless builder, in *Smith v. Bush*<sup>117</sup> the House of Lords allowed a purchaser to sue the professional on whose careless valuation of the property she had relied in buying the house.

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113. On the issue of existing contractual matrices, see John G. Fleming, *Employee's Tort in a Contractual Matrix*, 13 OXFORD J. LEGAL STUDS. 430 (1993), and John G. Fleming, *Tort in a Contractual Matrix*, 33 OSGOODE HALL L.J. 661 (1995). For some case law, see *Edgeworth Construction v. Lea and Assoc.*, [1993] 3 S.C.R. 206; *Henderson v. Merrett Syndicates Ltd.*, [1995] 2 A.C. 145 (appeal taken from Eng.); *Smith v. Bush*, [1990] 1 A.C. 831 (appeal taken from Eng.); *Junior Books Ltd. v. Veitchi Ltd.*, [1983] 1 A.C. 520 (appeal taken from Scot.); *Pacific Assoc. Inc. v. Baxter*, [1990] 1 Q.B. 993 (C.A.); *Norwich City Council v. Harvey*, [1989] 1 W.L.R. 828 (C.A.); *Simaan General Contracting Co. v. Pilkington Glass Ltd.*, 1988 Q.B. 758 (C.A.); *Muirhead v. Industrial Tank Specialities Ltd.*, 1986 Q.B. 507 (C.A.); *R.M. Turton & Co. v. Kerslake* [2000] 3 N.Z.L.R. 406; *Price Waterhouse v. Kwan* [2000] 3 N.Z.L.R. 39; *Kavanagh* [1993] 2 N.Z.L.R. at 650–51, 653–56; *South Pacific Manufacturing Co. v. New Zealand Security Consultants & Investigations Ltd.* [1992] 2 N.Z.L.R. 282; and *Bailey v. HSS Alarms Ltd.*, TIMES, (London) June 20, 2000, at 25.

114. FLEMING, *supra* note 49, at 523–24.

115. (1995) 182 C.L.R. 609.

116. See, e.g., *Invercargill City Council v. Hamlin*, 1996 A.C. 624, 635–48 (P.C.) (appeal from N.Z.); *Edgeworth Constr.*, [1993] 3 S.C.R. at 220–21.

117. [1990] 1 A.C. 831 (appeal taken from Eng.). Bizarrely, the Lords saw no irrationality in this striking contrast: Under *D.&F. Estates*, builders could not be sued for digging trenches too shallow for the building, but the architect or surveyor who advises a builder to do so may be liable! See *D.&F. Estates Ltd. v. Church Comm'rs for Eng.*, 1989 A.C. 177, 216–17 (appeal taken from Eng.).

The plaintiff had been powerless in the face of uniform market conditions, and the House of Lords, intent on protecting her, merely retreated behind the assertion that the case fell within the "settled" *Hedley Byrne* principle.<sup>118</sup> What was significant about *Smith v. Bush* was that, though there was a contractual matrix indirectly linking the plaintiff and defendant through the middle party of a mortgage lender, the standard form nature of the contracts across the relevant market were such that purchasers were prevented from acquiring, either from the middle party or directly with the valuer, contractual protection for the risk of careless valuations.<sup>119</sup> This House of Lords decision, at least, reveals an appreciation of the importance of the vulnerability of purchasers in such a market.

A House of Lords decision with perhaps even more potential to bring substantive coherence to the U.K. approach to economic loss in the tort of negligence is *Henderson v. Merrett Syndicates Ltd.*,<sup>120</sup> a case arising from the carelessness with which the funds of Lloyd's insurance market investors, known as Names, were managed by certain agents and underwriters at Lloyd's of London. Some Names had contracts directly with the managing agents, while others were linked to them indirectly by contracts with a middle party.<sup>121</sup> But as the decision of the House of Lords makes clear, the market conditions inflexibly prevented the Names from bargaining for protection against the risk of the managing agents and others being careless.<sup>122</sup> A major feature of the decision in *Henderson* was that, in their keenness to protect the "vulnerable"<sup>123</sup> Names, the Lords were forced to clarify that the pocket of liability for economic loss in the United Kingdom, the *Hedley Byrne* pocket, was not restricted to cases of negligent words. Subsequent attempts to confine this pocket with devices such as a requirement that the defendant had "assumed responsibility" to the plaintiff failed,<sup>124</sup> and U.K. courts have belatedly begun to acknowledge the greater wisdom of New World Commonwealth jurisdictions in developing an open-textured substantive approach.<sup>125</sup>

In time, U.K. courts may acknowledge that the denial of liability in those acquisition-of-defective-building cases where the defendant is the builder, such as *D. & F. Estates*, cannot be defended on the grounds that were

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118. *Smith*, [1990] 1 A.C. at 845-46.

119. *Id.* at 841-42.

120. [1995] 2 A.C. 145 (appeal taken from Eng.).

121. *Id.* at 149-50.

122. *Id.* at 174-77.

123. Though it has to be asked whether the Names were a truly vulnerable group facing uniformly unprotective conditions across the relevant market.

124. Stapleton, *supra* note 24, at 64-65; see also *infra* note 136.

125. See, for example, the form of the judgments in *McFarlane v. Tayside Health Board (Scotland)*, [2000] 2 A.C. 59 (appeal taken from Scot.).

given in those cases. They may come to see that, importantly, different substantive legal concerns can arise in different building cases and that there is no normative justification for lumping them all together in some artificial pocket. There is a convincing normative argument that would have denied a duty of care in *Junior Books*, but it is not one related to the fact that it was a suit against a builder. It is the normative concern that the powerful commercial plaintiff had adequate opportunities to secure appropriate protection from that defendant. In *D.&F. Estates*, the issue the Lords should have considered had nothing to do with the fact that the service was that of a builder.<sup>126</sup> The issue should have been, as in *Smith v. Bush* and *Henderson*, whether the *D.&F. Estates* plaintiffs could have secured protection from the defendant-builder. It is likely in time that the logic and sound concerns deployed in *Smith v. Bush* and *Henderson* will prompt U.K. courts to afford equivalent treatment to those who suffer economic loss by their acquisition of defective realty and choose to sue the careless builder, just as such plaintiffs are now treated in New World cases such as *Bryan v. Maloney*.

Even more broadly, U.K. courts may reassess their current rigid rejection of claims for pure economic loss involving the interruption of the use of resources. After all, U.K. courts now routinely allow liability in *Ultramares* situations, where the entire loss caused by the defendant is indeterminate, so long as the plaintiff class is ascertainable and defined on a normatively justifiable basis.<sup>127</sup> Where this can be done and where the plaintiff could not have secured appropriate protection from the defendant, the balance of concerns may well be judged to be in favor of the imposition of a duty of care. This would be so *whatever* the factual context happens to be, including the disruption-to-the-use-of-resources cases.<sup>128</sup> New World cases such as *Norsk*, *Perre*, *Caltex Oil*, *Dovuro*, and *McMullin* show the viability of this development. Moreover, as we are about to see, even U.S. courts have imposed liability here on occasion: See, for example, *Union Oil Co. v. Oppen*,<sup>129</sup> *In re*

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126. Where a duty was denied because the House of Lords made a flawed linkage between builder liability and the issue of the liability of local authority inspectors. *D.&F. Estates Ltd. v. Church Comm'rs for Eng.*, 1989 A.C. 177, 182–83 (appeal taken from Eng.).

127. See, e.g., *Morgan Crucible Co. v. Hill Samuel Bank Ltd.*, [1990] 2 W.L.R. 655 (Eng. C.A.). In general, see the principles laid down in *Caparo Industries v. Dickman*, [1990] 2 A.C. 605 (appeal taken from Eng.), and the discussion in MICHAEL JONES, *TEXTBOOK ON TORTS* 94–131 (7th ed. 2000).

128. I use this term merely to describe cases in a loose manner. A main argument in this Article is that, as Commonwealth courts have found, any approach that clings to a first stage of classification into pockets according to some factual feature will, quite apart from having no substantive justification, create anomalies. This is not least because such pockets can overlap. See Stapleton, *supra* note 28, at 282–85. For example, it may be that as a result of the negligent misstatement of a professional engineer, the supply to a factory of a utility (such as water, gas, or electricity) is unnecessarily switched off, causing economic loss to those engaged in the enterprise.

129. 501 F.2d 558 (9th Cir. 1974).

*Exxon Valdez*,<sup>130</sup> *Louisiana ex rel Guste v. M/V Testbank*,<sup>131</sup> and *Pruitt v. Allied Chemical Corp.*<sup>132</sup>

To sum up, New World Commonwealth courts now look, not to the crude question of whether contractual protection was formally available to the plaintiff, but to whether this or other relevant<sup>133</sup> forms of self-protection were realistically available in the specific context. It is true that in economic loss cases in the Commonwealth there seems to be a greater concern with self-protection than in physical loss cases. Nevertheless, the resultant close examination of whether the plaintiff had a reasonable opportunity to, say, check the advice of the defendant or bargain for contractual protection directly with the defendant or indirectly with a middle party, often reveals that the plaintiff had been particularly vulnerable to the defendant's carelessness.

This normative concern with the protection of the vulnerable links what might otherwise seem to be diverse fact situations. For example, vulnerability explains why, across most Commonwealth courts, negligent lawyers have been held liable to intended beneficiaries who lost an inheritance as a result of the lawyer's negligence.<sup>134</sup> In such cases, there is no risk of indeterminacy and no opportunity for self-protection. Even in the United Kingdom, recovery was achieved in such a case in 1995,<sup>135</sup> though the House of Lords predictably had some difficulty accommodating the decision within its creaking pockets approach.<sup>136</sup> Vulnerability also explains why those whose economic interests are damaged by a careless reference have been allowed to succeed in suing the reference-giver.<sup>137</sup> Vulnerability also links

130. 104 F.2d 1196 (9th Cir. 1997).

131. 524 F. Supp. 1170 (E.D. La. 1981), *aff'd* 752 F.2d 1019 (5th Cir. 1985).

132. 523 F. Supp. 975 (D.C. Va. 1981).

133. For a discussion of this, see Stapleton, *supra* note 34, at 305–19. If tort law is to have any normative justification, it must reject first-party insurance as an “appropriate” method of self-protection. Stapleton, *supra* note 108, at 829–32.

134. See, e.g., *Hill v. Van Erp*, (1997) 188 C.L.R. 159, 165. This is also a generally recognized approach in the United States. See Rabin, *supra* note 13, at 1520.

135. *White v. Jones*, [1995] 2 A.C. 207 (appeal taken from Eng.).

136. By this stage, the *Hedley Byrne* “pocket” had been broadened in *Henderson* to include acts and the operative factor had been renamed “assumption of responsibility.” But since there was no *factual* basis for any such advertent “assumption” in the intended beneficiary case of *White*, the Lords' finding of a duty in that case required them to “massage” the limits of this pocket to be defined in terms of a concept, “assumption of responsibility,” that could be an assumption “in law” even when not “in fact.” *White*, [1995] 2 A.C. at 224. *White* has been applied in *Gorham v. British Telecommunications Plc.*, [2000] 4 All E.R. 867 (C.A.), where the English Court of Appeal held that, where an insurance company advised a customer on an insurance provision for pension and life coverage, it owed the customer's dependents a duty of care not to give the customer negligent advice that adversely affected their interests as the customer had intended them to be. See *supra* note 124.

137. See, e.g., *Spring v. Guardian Assurance Plc.*, [1994] 3 W.L.R. 354 (H.L.) (appeal taken from Eng.).

these factually diverse cases with those where the plaintiff acquires defective property but is unable in the circumstances to extract contractual protection from the careless party.

### 1. Commercial Plaintiffs

This new enunciation of a concern with vulnerability is having a major impact on two classes of litigants. First, commercial plaintiffs in general are finding it more difficult to recover for economic loss because they are less likely to be able to establish their vulnerability. This is a welcome reorientation of Commonwealth appellate tort litigation, which had become dominated by claims of commercial parties for pure economic loss. After the commercial plaintiff in *Hedley Byrne* was held to have been owed a duty of care, well-financed commercial plaintiffs had begun to claim tort protection in a wide range of business contexts.<sup>138</sup> The newly articulated judicial concern with vulnerability has acted as a brake on many such claims.

### 2. Public Authority Defendants

The second class of litigants that the concern with vulnerability has affected very significantly is that of public authority defendants. Traditionally, there has been a sharp concern not to impinge on the work of public authorities. These bodies do not pursue a "selfish" goal of financial profit but are instead charged to promote the public good even at the expense of an individual citizen. For example, the regulator of banks might allow a bank to attempt to trade out of its difficulties so that public confidence in the banking system generally is maintained.<sup>139</sup> That this public interest might be pursued at the expense of the unwarned private depositor is accepted and reflected in a denial of tort protection to the depositor hurt by

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138. A cynic might point out that it was irrelevant that this wave of claims dominated appellate court dockets in Commonwealth jurisdictions: After all, they could hardly be said to have ousted the claims of private citizens. It is well known that substantial barriers to justice have faced most private citizens in Commonwealth jurisdictions. On the other hand, it has been an expensive period for the law, both in court costs and in the threat of distortion it presented to the development of the law.

139. "[T]he very nature of the task, with its emphasis on the broader public interest," militates strongly against a duty owed to an individual whose interests the public authority might legitimately chose to sacrifice in pursuit of that public interest. *Davis v. Radcliffe*, [1990] 1 W.L.R. 821, 826 (P.C.) (appeal taken from Isle of Man). See generally Stapleton, *supra* note 34, at 313–14. For a recent Canadian example, see the decision of the Canadian Supreme Court in *Cooper v. Hobart*, [2001] D.L.R. 193, in which the court held that the Registrar of Mortgage Brokers, a statutory regulator, owed no duty of care to individuals who lent to the relevant broker because, *inter alia*, the regulator's duty was to act in the public interest and instill public confidence in the system. For a commentary on this decision, see Jason Neyers, *Distilling Duty: The Supreme Court of Canada Amends Anns*, 118 LAW Q. REV. 221 (2001).

the carelessness of the regulator. Borderline cases arose where the courts tried uneasily to distinguish between policy decisions, which tort would not be allowed to review, such as whether to set up open prisons, and reviewable operational activities, such as where guards slept on the job and allowed inmates to escape and injure property.<sup>140</sup>

But the newly crystallizing core concern with vulnerability highlights an important feature of public authorities. Typically the citizen is not merely vulnerable to the effects of government action. Their relationship with these bodies is typically characterized by what I have called "exclusive dependence."<sup>141</sup> For example, in the English case of *Welton v. North Cornwall District Council*,<sup>142</sup> the local environmental health officer negligently required the plaintiff-owner of food premises to undertake unnecessary works. The citizen was obliged to comply and for this reason the authority was held liable for the economic loss.<sup>143</sup> Similarly, if state officials carelessly forbid plaintiff-graziers to market their cattle, the citizens have no option but to obey and suffer the economic loss involved.<sup>144</sup> Another example would be if state air traffic controllers negligently forbid commercial aircraft from flying, the latter having no option but to obey and suffer economic loss.

Commonwealth courts, increasingly being presented with claims against public authorities for economic loss by prone citizens, are cautiously responding in a protective manner. Examples include the New Zealand case of *Craig v. East Coast Bays City Council*,<sup>145</sup> where the court held that a council owed a duty of care in relation to its negligent handling of an application for planning permission by a third party, which deprived the plaintiff of an opportunity to object. Even silence can trigger public authority liability. For example, in *L. Shaddock & Associates Proprietary Limited v. Parramatta City Council*,<sup>146</sup> the High Court of Australia held a council liable for failure to warn a prospective purchaser of land of a road-widening scheme.<sup>147</sup>

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140. *Home Office v. Dorset Yacht Co.*, 1970 A.C. 1004, 1025 (appeal taken from Eng.).

141. Stapleton, *supra* note 24, at 86.

142. [1997] 1 W.L.R. 570 (Eng. C.A.).

143. *Id.* at 573.

144. Compare the facts of *Northern Territory of Australia v. Mengel*, (1994–1995) 185 C.L.R. 307, 308–09, where no carelessness was established.

145. [1986] 1 N.Z.L.R. 99.

146. (1981–1982) 150 C.L.R. 225.

147. *Id.* at 235–37. Other landmark cases include *City of Kamloops v. Nielson*, [1984] 2 S.C.R. 2, and *Invercargill City Council v. Hamlin*, 1996 A.C. 624. To American eyes, perhaps one of the most remarkable decisions is *Phelps v. London Borough of Hillingdon*, [2000] 4 All E.R. 504 (H.L.) (appeal taken from Eng.), where the House of Lords held a local education authority vicariously liable for the negligent failure of its employee to diagnose that the plaintiff suffered from dyslexia. Lord Nicholls stressed that "throughout, the child [plaintiff] was *very dependent* upon the [defendant] expert's assessment. The child was in a *singularly vulnerable* position." *Id.* at 529 (emphasis added). It was accepted for limitation purposes that the claim, for "psychological damage" leading

In short, the area of public authority liability is not an easy one for courts. Features that make it especially complex include the delicate issue of the separation of powers, often in terms of the issue of "available" resources, now made especially acute in the United Kingdom with the advent of the Human Rights Act of 1998.<sup>148</sup> But, Commonwealth courts have become acutely aware that it is also an area where the vulnerability of the plaintiff is often most easily established.

### III. RECOVERY FOR ECONOMIC LOSS IN U.S. PUBLIC NUISANCE CASES

#### A. Deconstructing U.S. Case Law with the Lessons of Middle Theory

At the outset we saw how U.S. case law on economic loss is still treated as falling into disparate fact-dictated pockets of liability, with little if any attempt being made to examine U.S. precedents for general themes of connection across these pockets. The disappointed legatee cases<sup>149</sup> are seen separately from disruption-to-use-of-resources cases<sup>150</sup> or defective product quality cases<sup>151</sup> or intellectual services cases.<sup>152</sup> This pockets approach of U.S. courts produced the same paralyzing anomaly in the building context that befuddles U.K. law even today: U.S. courts typically refuse to allow a house owner to sue the builder for shoddy work but allow claims for shoddy work against the architect.<sup>153</sup> In contrast, we have seen from New World Commonwealth jurisprudence that while this may make sense when the plaintiff is the first buyer who had the opportunity to extract appropriate contractual protection from the builder, it is very odd where the plaintiff is the subsequent purchaser unable to do so because of the uniform caveat

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to a reduced level of achievement, was one for personal injuries. *Id.* at 532–33; see also M.C. Harris, *Education and Local Authorities*, 117 *LAW Q. REV.* 25 (2001).

148. Human Rights Act, 1998, c. 42 (Eng.); see Jonathan Morgan, *Nuisance, Property and Human Rights*, 118 *LAW Q. REV.* 27, 28 (2002).

149. See, e.g., *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958) (holding that the defendant negligently failed to have the will properly attested). Compare *White v. Jones*, [1995] 2 A.C. 207 (appeal taken from Eng.), with *Hill v. Van Erp*, (1997) 188 C.L.R. 159.

150. See, e.g., *In re Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964), *aff'd* 388 F.2d 821 (2d Cir. 1968).

151. See, e.g., *E. River S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986); *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965); *Alloway v. Gen. Marine Indus. LP*, 695 A.2d 264 (N.J. 1997); *Spring Motor Distribution v. Ford Motor Co.*, 489 A.2d 660, 672 (N.J. 1985); *Santor v. A & M Karagheusian, Inc.*, 207 A.2d 305 (N.J. 1965); see also Schwartz, *supra* note 5 (draft at 127–29).

152. See, e.g., *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931). Compare *Caparo Indus. Plc. v. Dickman*, [1990] 2 A.C. 605 (appeal taken from Eng.), with *Glanzer v. Shepard*, 135 N.E. 275 (N.Y. 1922).

153. Schwartz, *supra* note 5 (draft at 143–46).

emptor convention in the used house market. Nor is it necessarily any answer to say that the subsequent buyer should protect itself by buying the services of a professional inspector of buildings, because some defects created by a builder may not be reasonably discoverable once construction is completed.

Other significant U.S. case law can be helpfully deconstructed in the light of the substantive approach taken by New World Commonwealth jurisdictions that have abandoned the shackles of the pockets methodology. Take *Robins Dry Dock & Repair Co. v. Flint*,<sup>154</sup> for example. There the plaintiff was a charterer who sued for the two weeks the ship was out of service as a result of the negligence of a dry dock in performing scheduled repairs.<sup>155</sup> Here, there was only one ascertainable plaintiff, but the U.S. Supreme Court rejected the claim on the crude basis of the exclusionary rule.<sup>156</sup> New World Commonwealth courts would now ask in such a case: Was the loss for which the plaintiff was seeking damages ascertainable and describable on a normatively justifiable basis? Even if so, could the commercial plaintiff have secured appropriate protection directly or indirectly from the negligent defendant?<sup>157</sup>

Or take *J'Aire Corp. v. Gregory*, where the plaintiff-tenant, a restaurateur, successfully sued the contractor of the landlord for negligent delay in work on its premises that caused the tenant to lose profits.<sup>158</sup> The California Supreme Court rejected "overly rigid common law formulations of duty"<sup>159</sup> but provided little in the way of a convincing analysis of the normative factors governing the delicate duty boundary. For example, the court laid no emphasis on whether the plaintiff had secured (in its contract with the landlord) or could have secured (by direct or indirect dealings with the defendant) appropriate self-protection via contract.<sup>160</sup>

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154. 275 U.S. 303 (1927). For commentary, see Victor P. Goldberg, *Recovery for Pure Economic Loss in Tort: Another Look at Robins Dry Dock v. Flint*, 20 J. LEGAL STUD. 249 (1991). Victor Goldberg stated, "The *Robins* rule is overbroad, lumping together a number of very different problems. Many of the claims barred by the economic loss doctrine are easily distinguishable from *Robins*." *Id.* at 249.

155. *Robins*, 275 U.S. at 307.

156. *Id.* at 309–10.

157. The case is akin to *Leigh and Silavan Ltd. v. Aliakmon Shipping Co. (The Aliakmon)*, 1986 A.C. 785.

158. 598 P.2d 60, 66 (1979). Compare *Junior Books Ltd. v. Veitchi Ltd.*, [1983] 1 A.C. 520 (appeal taken from Eng.), and *Henderson v. Merrett Syndicates Ltd.*, [1995] 2 A.C. 145 (appeal taken from Eng.), with *Bryan v. Maloney*, (1995) 182 C.L.R. 609.

159. *J'Aire Corp. v. Gregory*, 157 Cal. Rptr. 407, 411 (1979).

160. See Schwartz, *supra* note 5 (draft at 133); Schwartz, *supra* note 7, at 41; see also Stapleton, *supra* note 34, at 321–24. For case law, see *Simaan General Contracting Co. v. Pilkington Glass Ltd.*, 1988 Q.B. 758; *Muirhead v. Industrial Tank Specialities Ltd.*, 1986 Q.B. 507; *South Pacific Manufacturing Co. v. New Zealand Security Consultants & Investigations Ltd.* [1992] 2 N.Z.L.R. 282; compare *Junior Books*, [1983] 1 A.C. at 533–34.

Finally, consider *People Express Airlines, Inc. v. Consolidated Rail Corp.*<sup>161</sup> Because of the negligent management of dangerous chemicals a locality was evacuated.<sup>162</sup> The airline office of the plaintiff was located in this area and as a result it lost profits.<sup>163</sup> The plaintiff was vulnerable to the defendant's carelessness and did not have adequate means of protecting itself in an appropriate way.<sup>164</sup> But although these are sound reasons for imposing a duty of care,<sup>165</sup> these reasons are not sufficient. The court should have attempted to give a definition of, and normative justification for, the plaintiff class, so that we could then evaluate these to see whether they provided a sound demarcation line for the class and generated a class that was ascertainable.<sup>166</sup>

There are glimmers of a more substantive approach in certain areas of U.S. case law. Take the more recent case of *Alloway v. General Marine Industries, L.P.*,<sup>167</sup> where the New Jersey Supreme Court was confronted with a products liability case involving a luxury boat that sank due to its defective condition. The court followed the majority approach to such claims for economic loss under either negligence or the special products rule and held for the defendant on the basis that the buyer already had access to appropriate contractual protection under the sale-of-goods legislation.<sup>168</sup> Importantly, however, the court noted the relevance to tort protection of the issue of "bargaining power," agreeing with earlier courts that, by contrast with personal injuries, the consuming public as a whole should not bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies.<sup>169</sup> Moreover, it also noted that:

Comparative bargaining power cannot be determined merely by labeling a consumer either "commercial" or "non-commercial." As the facts of this case reveal, some non-commercial purchasers will enjoy equal bargaining power. Similarly, some commercial purchasers in no sense enjoy equal bargaining power or the opportunity to secure adequate protections in the bargaining process.<sup>170</sup>

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161. 495 A.2d 107 (N.J. 1985).

162. *Id.* at 108.

163. *Id.*

164. *Id.* at 108-09.

165. Indeed, Gary noted that there could be a moral argument in favor of liability in cases whose facts resembled *People Express Airlines*. Schwartz, *supra* note 5 (draft at 136).

166. See *infra* text accompanying note 210.

167. 695 A.2d 264 (N.J. 1997).

168. *Id.* at 270-74, 275. On the comparative position in the United Kingdom, see JANE STAPLETON, *PRODUCT LIABILITY* 277-78 (1994).

169. *Alloway*, 695 A.2d at 272 (citing *Casa Clara v. Charley Toppino & Sons*, 620 So. 2d 1244, 1247 (Fla. 1993)).

170. *Id.* at 276 (Handler & Stein, JJ., concurring). Consider also the fact that the plaintiffs in the key U.K. decision of *D. & F. Estates Ltd. v. Church Commissioners for England*, 1989 A.C. 177 (appeal taken from Eng.), were wealthy.

B. Recovery of Economic Loss from Waterway Pollution Under U.S. Public Nuisance Law

We should now turn to an area where U.S. courts have been more accommodating to economic loss claims than Commonwealth courts, thus providing critical lessons for all common law systems. The area is that of economic loss caused by the defendant's negligent pollution of public waterways. In a 1970 Canadian case, commercial fishermen were unsuccessful in their claims of lost livelihood against polluters of public waterways.<sup>171</sup> In contrast, the perceived "unfairness"<sup>172</sup> of that result led California and some federal courts, such as that in *Union Oil v. Oppen*, to carve out the "commercial fishermen's" exception, allowing recovery for pure economic loss by those who made their livelihood from fishing the waterway negligently polluted by the defendant.<sup>173</sup> Accordingly, in the *Exxon Valdez* litigation, for example, some 10,000 commercial fishermen were allowed to sue in federal court.<sup>174</sup> They won verdicts of U.S. \$286.8 million in compensatory damages (based on the market value of the fish they would have caught had the season not been disrupted by the oil spill) and U.S. \$5 billion in punitive damages.<sup>175</sup> The apparent anomaly represented by the commercial fishermen's exception led the court in the *Exxon Valdez* case to certify the issue for appeal, but this was never pursued.<sup>176</sup>

Technically, the doctrinal vehicle for this rule of recovery for economic losses, such as lost profits, is the tort of public nuisance. From the outset, it

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171. Hickey v. Elec. Reduction, [1970] D.L.R. 368.

172. See the text of footnote 65 in the magisterial treatment of the area by Denise Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 773 n.65 (2001).

173. See, e.g., *In re Union Oil Co. v. Oppen*, 501 F.2d 558, 570 (9th Cir. 1974); *In re Exxon Valdez*, 1994 WL 182856 (D. Alaska Mar. 23 1994); *Louisiana ex rel. Guste v. M/V Testbank*, 524 F. Supp. 1170, 1173 (E.D. La. 1981). This is therefore an exception to the general bar on pure economic loss recovery in federal maritime cases, which was established in the seminal decision of the U.S. Supreme Court in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). For a discussion of *Robins*, see *Pruitt v. Allied Chemical Corp.*, 523 F. Supp. 975 (E.D. Va. 1981), and Goldberg, *supra* note 154.

174. *In re Exxon Valdez*, 767 F. Supp. 1509 (D. Alaska 1991).

175. *In re Exxon Valdez*, 270 F.3d 1215, 1225 (9th Cir. 2001). Good introductions to the nature of this complex litigation are *In re Exxon Valdez*, 104 F.3d 1196, 1197-98 (9th Cir. 1997), which accepted claims for economic losses but disallowed claims by Alaska natives to recover noneconomic claims for cultural damage, and Deborah S. Bardwick, *The American Tort System's Response to Environmental Disaster: The Exxon Valdez Oil Spill as a Case Study*, 19 *STAN. ENVTL. L.J.* 259, 278 (2000). See also DAVID LEBEDOFF, *CLEANING UP: THE STORY BEHIND THE BIGGEST LEGAL BONANZA OF OUR TIME* (1997); Theodore Eisenberg, *Damage Awards in Perspective: Behind the Headline-Grabbing Awards in Exxon Valdez and Engle*, 36 *WAKE FOREST L. REV.* 1129, 1139-48 (2001).

176. *Exxon*, 767 F. Supp. at 1509; see also Victor Goldberg, *Recovery for Economic Loss Following the Exxon Valdez Oil Spill*, 23 *J. LEGAL STUD.* 1 (1994).

has been recognized that pure economic loss is recoverable in this tort.<sup>177</sup> So long as the defendant has infringed a public right recognized by the common law and a section of the public has been affected, the plaintiff class can recover pure economic loss. This rule is still, however, formally subjected to the “different-in-kind” requirement. In other words, the plaintiff’s economic loss must be a “special” injury, or as it is usually put, it must be different in kind (not just different in degree) from that suffered by the public in general. The result is that courts “disallow recovery of otherwise cognizable economic losses where the economic injury is widespread.”<sup>178</sup>

In her recent magisterial treatment of this area of the law, Denise Antolini attacks the “special injury” (different-in-kind) rule in the United States as producing the paradox that “the broader the injury to the community and the more the plaintiff’s injury resembles an injury also suffered by other members of the public, the less likely that the plaintiff can bring a public nuisance lawsuit.”<sup>179</sup> There have been “serious criticism of the traditional [different-in-kind] doctrine and calls for liberalization by distinguished torts and environmental scholars,” such as Jeremiah Smith, William L. Prosser, John W. Wade, William H. Rodgers, Jr., and John Fleming, but these “have utterly failed to penetrate the case law.”<sup>180</sup>

Prosser, for example, noted that the traditional different-in-kind requirement meant that a business would not succeed in recovering pure economic loss from a defendant who blocked access to an isolated town because the injury was likely to be judged “common to the whole community,”<sup>181</sup> merely different by being greater in degree, not different in kind. Indeed, in *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*,<sup>182</sup> restaurants, bars, motels, and other retail establishments in South Sioux City, Iowa suffered millions of dollars in economic loss when a bridge over the Missouri River

177. Antolini, *supra* note 172, at 773 n.65. In the United Kingdom, it is a well-settled rule that damages for pure economic loss are recoverable in public nuisance. See, e.g., *Benjamin v. Storr*, 9 L.R.-C.P. 400 (1874); *Smith v. Warringah Shire Council*, (1962) N.S.W.L.R. 944; *Gravesham Borough Council v. British Ry. Bd.*, [1978] Ch. 379, 398; *Wilkes v. Hungerford Market Co.*, (1835) 2 Bing NC 281; *Campbell v. Mayor of the Metropolitan Borough of Paddington*, [1911] 1 K.B. 869 (C.A.); *J. Lyons & Sons v. Wilkins*, (1896) 1 Ch. 811, 827; *Hubbard v. Pitt*, [1976] 1 Q.B. 142 (C.A.). See also other cases as cited in R.A. BUCKLEY, *THE LAW OF NUISANCE* 75 n.18 (2d ed., 1996).

178. Antolini, *supra* note 172, at 773 n.65. In the United Kingdom, the prerequisite in public nuisance that the plaintiff has suffered some special damage is imposed in a very demanding way in claims for loss of commercial profits. See BUCKLEY, *supra* note 177, at 74–76. For discussion of control of loss-of-profit claims in *private* nuisance, see *id.* at 126–27.

179. Antolini, *supra* note 172, at 761.

180. *Id.* at 762. See especially FLEMING, *supra* note 49, at 460–63. See the trenchant criticism of the rule by authors listed by Antolini, *supra* note 172, at 760 n.8.

181. W. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1010 (1966).

182. 345 N.W.2d 124 (Iowa 1984). This case is discussed in detail by Antolini, *supra* note 172, at 787–89.

was closed because of construction defects. Yet the Iowa Supreme Court held that the businesses could not sue the negligent contractor in public nuisance because they had not suffered special damage: The economic losses were widespread throughout the entire community affected by the bridge closure.<sup>183</sup> Similarly, in *Rickards v. Sun Oil Co.*,<sup>184</sup> the defendant's barge wrecked a drawbridge to an island, causing economic loss to island businesses. Their claims in public nuisance failed.<sup>185</sup>

Of the reasons put forward for the different-in-kind requirement, Prosser thought the best was avoidance of the feared "multiplicity of actions."<sup>186</sup> Nevertheless, he attacked the requirement and promoted a change to the "substantially greater in degree" rule advocated by Jeremiah Smith and John Fleming. Moreover, Prosser perceptively noted that when a plaintiff's economic loss was merely greater in degree, this indicated some special interest of the plaintiff not common to the community.<sup>187</sup> Thus, when a person traverses a particular road a dozen times a day,

he nearly always has some special reason to do so, and that reason will almost invariably be based upon some special interest of his own, not common to the community. [Therefore] substantial interference with that interest will be particular damage, sufficient to support the tort action.<sup>188</sup>

Prosser realistically appreciated that where to draw the line between special interest and common community interest would have to be a matter of degree:

Where to draw the line between cases where the injury is more general or more equally distributed, and cases where it is not, where, by reason of local situation the damage is comparatively much greater to the special few, is often a difficult task. In spite of all the refinements and distinctions which have been made, it is often a mere matter of degree, and the courts have to draw the line between the more immediate obstruction or peculiar interference, which is ground for special damage, and the more remote obstruction or interference, which is not.<sup>189</sup>

183. *Neb. Innkeepers*, 345 N.W.2d at 129-30.

184. 41 A.2d 267 (N.J. 1945). These establishments ranged from a fishing pier and bar, hotels, cafes, gas station, and repair shop, to produce and poultry. *Id.* at 268; see also *Neb. Innkeepers*, 345 N.W.2d at 124.

185. *Rickards*, 41 A.2d at 268-69.

186. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 570 (1941).

187. Antolini, *supra* note 172, at 824; Prosser, *supra* note 181, at 1011.

188. RESTATEMENT (SECOND) OF TORTS § 821C, at 18 (Council Draft No. 24, 1967), discussed by Antolini, *supra* note 172, at 787 n.351. John Wade refused to address the isolation cases (e.g., bridge closure) once he took over as Reporter of the *Restatement (Second)*. See *id.* at 787 n.490.

189. Prosser, *supra* note 181, at 1011 n.116.

## C. The Critical Lesson from the U.S. Public Nuisance Cases

If we now return to the cases where the courts allow the recovery of economic loss by fishermen and consider the reasoning therein, we find that it is often not compelling. For example, in *Union Oil*, the court bizarrely noted the “familiar principle that seamen are the favorites of admiralty and their economic interests entitled to the fullest possible legal protection.”<sup>190</sup> The court went on to declare: “The injury here asserted by the plaintiff is a pecuniary loss of a particular and special nature, limited to the class of commercial fishermen which they represent.”<sup>191</sup>

Though this assertion is consistent with Prosser’s approach, it fails to expound how the commercial fishermen’s loss is “special.” The case also does not convincingly address what Prosser called the best reason for the requirement of special damage, namely the fear of a multiplicity of actions. Indeed, the recognition of a duty of care to fishermen clearly lets loose multiple actions, such as the 10,000 successful claims in *Exxon Valdez*.<sup>192</sup>

This suggests that it is not a concern with multiplicity of actions that generates the limiting requirement in public nuisance. Indeed, that would be an odd concern.<sup>193</sup> As Chief Justice John Holt noted in 1703:

[I]t is no objection to say, that it will occasion multiplicity of actions: for if men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense. Suppose the defendant had beat forty or fifty men, the damage done to each one is peculiar to himself, and he shall have an action. So if many persons

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190. 501 F.2d 558, 567 (9th Cir. 1974).

191. *Id.* at 570.

192. *In re Exxon Valdez*, 1994 WL 182856 (D. Alaska. Mar. 23, 1994).

193. “It is the business of the law to remedy wrongs that deserve it, even at the expense of a ‘flood of claims’; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the courts too much work to do.” William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877 (1939); see also *Perre v. Apand Propriety Ltd.* (1999) 198 C.L.R. 180, 233 (McHugh, J.); *id.* at 303 (Callinan, J.); Stapleton, *supra* note 24, at 65–66. An excellent recent example is the judgment of Justice Turner in *Griffiths v. British Coal Corp.*, (Q.B. Jan. 23 1998) (unreported), which upheld the largest personal injury claim in British history and led to a record settlement of £2 billion for the benefit of 100,000 ex-miners suffering from a range of chest illnesses, a sum considerably more than the government received from the privatization of the coal industry. See Jane Stapleton, Book Review, 116 LAW Q. REV. 506, 510–11 (2000) (reviewing RICHARD GOLDBERG, *CAUSATION AND RISK IN THE LAW OF TORTS: SCIENTIFIC EVIDENCE AND MEDICINAL PRODUCT LIABILITY* (1999)). Indeed, statutory provisions facilitating class actions and other procedural reforms reflect society’s concern to address the barriers to justice that can result in today’s complex society, where a single piece of wrongdoing can injure a large number of people. They are a way of addressing, by lowering, the “costs of mass litigation” concern.

received a private injury by a public nuisance, every man shall have his action . . . .<sup>194</sup>

In my view, it is a different concern that justifies some special requirement in public nuisance. This is the concern with indeterminacy of liability,<sup>195</sup> a concern that continues to be overlooked because of the historic focus on the issue of multiplicity. Thus, while Antolini discusses the multiplicity issue at length in her recent seminal article on the field, she does not mention the *Ultramares* concern with indeterminacy of liability, or the way it is controlled throughout the law of torts by the creation of special requirements. In my view, the special damage requirement in public nuisance is a direct analogue of the class and quantum restrictions developed by Commonwealth courts in the duty area for the recovery of economic loss in negligence.<sup>196</sup> As we have seen, these restrictions control indeterminacy of liability even in situations where the total economic loss resulting from the negligence is indeterminate.

Public nuisance was a predecessor tort from which the tort of negligence itself emerged in the late seventeenth century.<sup>197</sup> In discussing private actions for damages, John Fleming noted the similarities between negligence and public nuisance and raised the question of “what justification there could be for divergent policies between nuisance and negligence” in the area of recovery for pure economic loss.<sup>198</sup> What we see in cases such as *Union Oil* is the control of indeterminacy of liability in public nuisance by the construction of a plaintiff class that had a reasonably foreseeable, special connection to the resource polluted by the defendant. In *Union Oil*, the class consisted of primary victims (that is, their loss did not result from the response of others to the pollution)<sup>199</sup> who had been exclusively dependent on the use of the polluted resource.<sup>200</sup> That class was also ascertainable.

194. *Ashby v. White*, 92 Eng. Rep. 126 (K.B. 1703), reprinted in 1 JOHN SMITH, A SELECTION OF LEADING CASES ON VARIOUS BRANCHES OF THE LAW: WITH NOTES 320 (Richard H. Collins & Robert Arbuthnot eds., 9th ed. 1903); Antolini, *supra* note 172, at 797 n.180.

195. Stapleton, *supra* note 24, at 65–66.

196. In toto, these are labeled as the requirement of a “special relationship.” The same workable control can be achieved by other techniques, such as the damages cap in the federal Oil Pollution and Prevention Act of 1990, 33 U.S.C. §§ 2701–2761 (2000), which recognizes that all those who suffer actual economic harm from oil spills in U.S. waters or on the shoreline have a private right of action for damages against the parties responsible for the spill. Shay S. Scott, Comment, *Combining Environmental Citizens Suits and Other Private Theories of Recovery*, 8 J. ENVTL. L. & LITIG. 369, 397 (1993) (citing § 2702(a)). This statute would seem to recognize that the polluter is liable to, say, “a nearby motel owner whose business declines when a river is polluted.” DOBBS, *supra* note 35, at 1337.

197. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 466 (3d ed., 1990).

198. FLEMING, *supra* note 49, at 460.

199. In that sense they were a “first set of victims.” *But cf.* Goldberg, *supra* note 176, at 37.

200. *Union Oil Co. v. Oppen*, 501 F.2d 558, 570 (9th Cir. 1974).

U.S. nuisance claims for lost profits such as this demonstrate, then, that where a normatively justifiable plaintiff class, say of primary victims such as the commercial fisherman in *M/V Testbank*, is ascertainable, liability to them may be allowed in the tort of public nuisance and yet denied to those whose economic loss is a ripple effect of that suffered by the plaintiff class, such as the fish wholesalers and retailers (for example, fish restaurants).<sup>201</sup> This is exactly the same point illustrated by New World Commonwealth claims in the tort of negligence such as *Perre*, *Dovuro*, and the successful negligent advice cases. In all these cases, the plaintiffs can define, on rational and convincing grounds, a class (and the quantum for which they can sue) that is ascertainable. The indeterminacy of liability concern is thereby sufficiently controlled, even where the negligence claim is one for lost profits.

By failing to identify the implications for the tort of negligence that are presented by the U.S. public nuisance rule of polluters' liability to fishermen, U.S. courts have unnecessarily paralyzed the development of negligence law. Very odd judgments result, such as that in *Stop & Shop Cos. v. Fisher*.<sup>202</sup> Here, because of the negligence of the defendant's barge a bridge was closed for two months, causing a substantial loss of profits to the plaintiff's stores on one side.<sup>203</sup> Though the economic loss claim in negligence was rejected, the parallel claim in public nuisance was upheld.<sup>204</sup>

So to sum up: In the interests of fairness, courts rightly refuse to impose liability, the contours of which are not normatively justifiable or ascertainable. In economic loss claims in negligence, such as those involving disruption to the use of resources, the "indeterminacy" issue is not whether the social impact is indeterminate but whether a plaintiff class (and the quantum for which they can sue) can be described so that it is ascertainable and based on normatively justifiable arguments. One such possible criterion is that plaintiffs are primary victims—that is, enterprises or parties whose economic loss was direct in the sense that it did not flow from the response of

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201. Epstein's neat phrase is "the next circle of grievance." RICHARD A. EPSTEIN, TORTS 380 (1999); see also *Louisiana ex rel. Guste v. M/V Testbank*, 524 F. Supp. 1170 (E.D. La. 1981) (defendants liable to commercial fishermen but not liable to others such as seafood restaurants). In what may have been a shrewd concession to public outrage over this pollution disaster, the defendants did not appeal the finding for the former class. The appeal of the latter classes was denied at *M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985); *In re Exxon Valdez*, 1994 WL 182856 (D. Alaska Mar. 23, 1994); and *Pruitt v. Allied Chemical Corp.*, 523 F. Supp. 975 (E.D. Va. 1981).

202. 444 N.E.2d 368 (1983); cf. *In re Kinsman Transit Co.*, 388 F.2d 821, 825 (2d Cir. 1968) (stating that such losses, although foreseeable, are as a matter of policy too remote to support recovery).

203. *Stop & Shop*, 444 N.E.2d at 369–70.

204. *Id.* at 374.

other parties to the calamity.<sup>205</sup> Seen in this light, it is irrelevant to the concerns of the law if the disruption caused damage to property or, if it did, whether that property was a natural resource or owned by a third party.

Three propositions follow: First, in waterway pollution cases, fishermen may be a normatively justifiable plaintiff class<sup>206</sup> but restaurants will usually not be.<sup>207</sup> Second, in situations of disruption to energy utilities, while consumers of the disrupted utility are likely to be a normatively justifiable plaintiff class,<sup>208</sup> their customers will not usually be. Third, in cases where the defendant's negligence has damaged the property of a third party, a normatively justifiable plaintiff class may consist of those who were exclusively dependent on the integrity of that property (so long as the class size and the quantum of recoverable loss are ascertainable),<sup>209</sup> but their customers will usually not be.

We can now see the objection that can be made to the reasoning, if not the result, in *People Express Airlines*.<sup>210</sup> Here, it will be remembered, the defendant's negligent management of dangerous chemicals caused a locality to be evacuated, and the plaintiff's airline office lost profits as a result. The New Jersey Supreme Court rejected any general rule against recovery in negligence for pure economic loss and, significantly, noted cases allowing recovery of pure economic loss in public nuisance, such as *Union Oil* and *M/V Testbank*.<sup>211</sup> Recovery would be possible if the plaintiffs were an "identifi-

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205. Cf. *Strauss v. Belle Realty Co.*, 482 N.E.2d 34 (N.Y. 1985). In *Strauss*, the electric utility was held not liable to the tenant of an apartment injured in a common area as a result of the utility's negligent failure to provide electric service: The class of victims was indeterminate, and the class of plaintiffs suffering personal injuries could not be limited "in logic and fairness" to those who happened to be resident-consumers of electricity. *Id.* at 38. The court perceived an "impossibility of fixing a rational boundary once beyond the contractual relationship." *Id.*

206. *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974); *Exxon Valdez*, 1994 WL 182856; *M/V Testbank*, 524 F. Supp. 1170 (E.D. La. 1981); *Pruitt*, 523 F. Supp. 975.

207. *M/V Testbank*, 752 F.2d 1019, 1050 (9th Cir. 1985). *But see Pruitt*, 523 F. Supp. 980 (No valid distinction between recognition of commercial damages suffered by those who fish for profit and personal harm suffered by those who fish for sport exists, which would justify awarding compensation to commercial fisherman for any loss of profits they may prove to have been caused by the negligence of a company in polluting a stream and denying sports fishermen entitlement to legal redress for provable damage to the stream's ecology.). *See also Wilkins v. Dovuro Propriety Ltd.*, 2000 F.C.A. 1902 (referring to canola farmers who were supplied with seed later reasonably suspected of being contaminated and who were required by the government to take expensive precautionary measures).

208. Of course, they would also have to satisfy other duty requirements, such as not having had reasonable opportunities for appropriate self-protection.

209. *See, e.g., Perre v. Apand*, (1999) 198 C.L.R. 180; *McMullin v. ICI Australia Operations Propriety Ltd.*, (1997) 72 F.C.R. 1, *reconsidered by* (1999) 169 A.C.R. 227; *Caltex Oil (Australia) v. The Dredge "Willemstad"*, (1976) 136 C.L.R. 529; *Norsk Pac. S.S. Co. v. Canadian Nat'l Ry. Co.*, [1992] 1 S.C.R. 1021.

210. *See supra* text accompanying note 166.

211. 524 F. Supp. at 1170 (holding the defendants responsible for a ship collision liable to commercial fishermen, shrimpers, crabbers, and oystermen for pollution of the Mississippi but not

able" class, that is, if they were "particularly foreseeable in terms of the type of persons or entities comprising the class, the certainty or predictability of their presence, the approximate numbers of those in the class, as well as the type of economic expectations disrupted."<sup>212</sup>

This approach is convincing to the extent that it notes that the fact that the global extent of loss was indeterminate would not bar claims by such ascertainable groups. However, the court did not attempt to give a normatively justifiable definition of the plaintiff class<sup>213</sup> or show that the class was ascertainable.<sup>214</sup> Vulnerability is not sufficient. The same complaint can be made of the liability imposed in public nuisance in *Stop & Shop Cos.*

#### IV. THEORY

##### A. The Response of Noneconomic Theorists

What interest have common law theorists shown in this area?<sup>215</sup> In 1998, Professor Herbert Bernstein rightly noted that U.S. "courts and the

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liable to others, such as seafood restaurants). The appeal of the latter classes was denied at *M/V Testbank*, 752 F.2d 1019.

212. *People Express Airlines v. Consolidated Rail Corp.*, 495 A.2d 107, 116 (N.J. 1985).

213. The criteria that mark the demarcation line of the plaintiff class must not merely allow the class to be determinate but must also be based on substantive legal concerns. A criterion that a plaintiff class must be blond might make the plaintiff class determinate, but it does not reflect any (so far expounded) substantive concern of the law. For example, in the intended beneficiary cases such as *White v. Jones*, [1995] 2 A.C. 207 (appeal taken from Eng.), the ripples of economic loss may well go further than the intended beneficiary, because that person may have agreed, say, to invest in the business of a third party, who as a result of the negligence of the lawyer has lost that investment. But the plaintiff class can be limited to the intended beneficiary in response to a convincing legal concern, namely that the legal arrangement between the lawyer and testator was to benefit this person and unless a duty to her is recognized that "binding" arrangement would be unenforceable and the lawyer would get off "scot-free."

214. Where no harm can come to the plaintiff unless the plaintiff (or a third party) responds to the conduct of the defendant, which is often the case in negligent advice cases, the issues of self-protection on the plaintiff's part, as well as the foreseeability by the defendant of the plaintiff (or third party) and the degree of likely response by the plaintiff (or third party), become clearly relevant to the issue of indeterminacy.

215. I do not deal here with an interesting high-theory article by Stephen R. Perry, *Protected Interests and Undertakings in the Law of Negligence*, 42 UNIV. TORONTO L.J. 247 (1992). Relying on the case law as it seemed to stand when he wrote, Perry argued against the proposition that "economic interests broadly conceived should be regarded as protected interests in negligence law," despite many modern judicial assertions to the contrary. *Id.* at 316. On the other hand, in Perry's view, there are sound reasons for imposing liability where there has been "detrimental reliance" on an undertaking, but this reflects a vindication of an autonomy interest. *Id.* at 250. Perry's analysis has been somewhat overtaken by events, as it pre-dates many of the cases, discussed herein, that imposed liability in this area even though the plaintiff did not rely on any undertaking by the defendant in any "causally" relevant sense of changing position in response. See, e.g., *Perre v. Apand* (1999) 198 C.L.R. 180; *Norsk Pac. S.S. Co. v. Canadian Nat'l Ry. Co.*, [1992] 1 S.C.R.

bar are not really helped very much by the commentators” and that U.S. “academics have not even begun to conceptualize the phenomenon of negligent interference with the use of resources.”<sup>216</sup> Next, I assess some of this sporadic academic interest.

An early contribution came from Professor Robert L. Rabin, who saw the law as reflecting “a deep abhorrence to the notion of disproportionate penalties for wrongful behavior.”<sup>217</sup> In other words, his argument was that what may be going on in the economic loss case law is a crude rejection, on fairness grounds, of “disproportionate” liability for “widespread loss.”<sup>218</sup> But he failed in his attempt to explain the economic loss case law on the basis of this concern that liability should be proportionate to fault. As noted by Gary Schwartz<sup>219</sup> and Herbert Bernstein,<sup>220</sup> Rabin could not explain why in the area of defective product quality, where there is *no* problem of disproportionate liability, there was no liability for economic loss in the United States, nor could he explain why in claims relating to physical loss the law is content to impose extensive, arguably “disproportionate” liability.

Indeed, the same point seems overlooked by Rabin in the economic loss field itself. For example, Rabin usefully contrasted two cases involving negligent advice.<sup>221</sup> In *Glanzer v. Shepard*,<sup>222</sup> Judge Cardozo recognized the liability of a weigher of beans to the only injured recipient of the advice, the customer of the party who had hired the negligent weigher.<sup>223</sup> Rabin contrasted *Glanzer* with *Ultramares*, where Cardozo refused, on indeterminacy grounds, to recognize that careless auditors were liable to a lender. Of course, it is well known that subsequent U.S. case law on auditors has reached outcomes similar to those in Commonwealth jurisdictions, controlling indeterminacy by limiting liability to the target class and requiring some reasonable foreseeability of the quantum of loss carelessness would threaten. Yet Rabin classifies the auditors’ liability cases as members of a “triangular configuration” set that he says contrasts with cases of “widespread harm.”<sup>224</sup> But it is only because the courts have constructed doctrinal limits on the class who can sue auditors that recovery is allowed. Liability is then determinate even though the economic harm is still “widespread.”

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1021; *White*, [1995] 2 A.C. 207. Similarly, his analysis does not easily accommodate the nontraditional physical loss claims that have boomed in the past decade.

216. Bernstein, *supra* note 6, at 130.

217. Rabin, *supra* note 13, at 1534.

218. *Id.* at 1534–38.

219. Schwartz, *supra* note 7, at 126–27.

220. Bernstein, *supra* note 6, at 127–28.

221. Rabin, *supra* note 13, at 1527.

222. 135 N.E. 275 (N.Y. 1922).

223. *Id.* at 275–76.

224. Rabin, *supra* note 13, at 1527, 1534.

Professor Richard Epstein rejected the traditional negligence rule that barred recovery for pure economic loss as “both unjust and inefficient,”<sup>225</sup> but he was initially, that is in 1979, critical of the rule allowing recovery by the commercial fishermen in *Union Oil*.<sup>226</sup> By 1999, Epstein was concluding that “[t]he correct answer to this [*Union Oil*] problem is, to say the least, hard to imagine . . . [I]t is uncertain as to whether [commercial fishermen] are the recipients of an ad hoc privilege, or simply only [an] illustration of a general principle.”<sup>227</sup> Eventually, in 2000, he noted that “on balance, it looks as though convenience favors allowing actions by immediate parties with large stakes, such as fishermen . . . but denies them to parties one step removed, such as processors and retail fish stores.”<sup>228</sup>

In a 1995 article, Professor Peter Benson aimed “to sketch a justification for the traditional exclusion of tort liability for certain categories of negligently caused pure economic loss.”<sup>229</sup> The difficulty with his analysis is that it purports to provide an analysis of the law as it appears in the law reports—the underlying “general conception of liability for negligence which [courts are] elaborating.”<sup>230</sup> Yet the real project seems, in fact, to be a working through of a very demanding *normative* conception of negligence. That normative conception is encapsulated in the assertion that the “internal”<sup>231</sup> structure of the law embodies “the principle that there is liability only for misfeasance.”<sup>232</sup> To force the actual case law to fit this conception, Benson has to conclude that the decision of the Supreme Court of Canada in *Winnipeg Condominium Corp. v. Bird Construction Co.* is wrong because it does not preclude liability for nonfeasance.<sup>233</sup> Similarly, he admits that he will not discuss the cogency of cases such as *Biakanja v. Irving*,<sup>234</sup> where a careless lawyer failed to have a will properly attested, and *White v. Jones*, where a careless lawyer failed to draw up a will, “except to say that they seem to impose liability for mere nonfeasance.”<sup>235</sup>

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225. Richard A. Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477, 502 n.71 (1979).

226. See *id.* at 501–02; Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979).

227. EPSTEIN, *supra* note 201, at 610.

228. Richard A. Epstein, *Too Pragmatic by Half*, 109 YALE L.J. 1639, 1654 (2000) (reviewing DANIEL A. FARBER, *ECO: PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* (1999)).

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

230. *Id.* at 444–45.

231. *Id.* at 444.

232. *Id.* at 448.

233. *Id.* at 441 n.29.

234. 320 P.2d 16 (Cal. 1958).

235. Benson, *supra* note 229, at 450 n.48.

My point here is not that normative high-theory projects such as Benson's are necessarily sterile. My point is the more limited one that they do not speak to the project that non-U.S. common law judges and most legal scholars have assigned to themselves. A core concern of this latter project is to streamline legal reasoning so that artificial categories are eliminated and the rich mix of normative judicial concerns are exposed for the scrutiny of the academy and future courts. Of course, within that project there are normative issues about what the appropriate standards should be against which legal reasoning is to be assessed. On the other hand, there are vast areas of the law that are settled and accepted as satisfying whatever those standards might be. For example, Commonwealth judges are simply not in the market for rewriting the law of negligence to eliminate liability for nonfeasance. Whatever mainstream academic or judicial criticism there has been of decisions such as *Winnipeg Condominium* and *White*, it has not been on this crude basis. This means that in relation to the critical assessment of the rich "vegetable soup" of legal reasoning produced by non-U.S. common law courts, the pure Kantian "carrot puree" of high theory and the radical restructuring of tort law outcomes that it mandates have little to offer.

In general, then, high theorists of a noneconomic bent have not yet adequately grappled with the patterns of case law and substance of legal reasoning that are actually being produced by common law courts.

## B. Lawyer-Economists and Economic Loss

Lawyer-economists have expended a little more effort on the problem. Scholars such as William Bishop<sup>236</sup> and Victor Goldberg<sup>237</sup> have tried to explain the common rejection of claims for economic loss on the basis of an absence of "net social costs."<sup>238</sup> The loss to the plaintiff had been "made" up by a gain to some other party in society. This approach has been soundly attacked for being based on "dubious empirical assumptions about consumer

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236. W. Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEGAL STUD. 1 (1982); William Bishop & John Sutton, *Efficiency and Justice in Tort Damages: The Shortcomings of the Pecuniary Loss Rule*, 15 J. LEGAL STUD. 347 (1986); see also, e.g., Goldberg, *supra* note 176.

237. See generally Goldberg, *supra* note 154; Goldberg, *supra* note 176.

238. See also *Liability*, *supra* note 45, at 102. Feldthusen writes:

They represent not social loss, as occurs when property is damaged or destroyed, but private loss when wealth is transferred from one party to another with nothing being lost overall. The plaintiff's loss will often be a competitor's gain. To hold the defendant liable for transfer losses as if they were true losses will over-deter useful conduct. It is not practicable to develop legal rules to distinguish true losses from transfers. Accurate deterrence signals may be better accomplished by precluding recovery for most relational claims than by allowing it.

*Id.*

preferences, marginal cost functions, and excess capacity.”<sup>239</sup> It also does not provide an explanation for the settled areas where recovery is allowed, and yet there is clearly no net social cost but only wealth transfers, as where the negligence of a lawyer causes an intended legacy to fail.

A second failed attempt by a lawyer-economist to devise an integrated explanation for the diverse case law is that of Mario Rizzo.<sup>240</sup> Rizzo cleverly spotted that where the plaintiff could have made what he called “channeling contracts” with the tortfeasor or a middle party, it was appropriate to deny liability in order to reduce litigation costs with little loss of deterrent effect.<sup>241</sup> Yet he was unable to explain the denial of recovery in other cases where such self-protection was not available, as in cases brought by secondary victims of a utility disruption.

A third lawyer-economist looked down the lens used by Rizzo but in the other direction. James Palmer<sup>242</sup> asserted that “the economic approach provides a powerful set of tools capable of explaining the major decisions in this area in terms of economic efficiency and wealth maximization, and that this explanation is more convincing than the traditional legal analysis used in the cases themselves.”<sup>243</sup>

In the context of financial services, Palmer argued that the law should be concerned with free-loaders and that a key determinant of liability for economic loss should be whether the defendant would have been able to appropriate the value that his work represented to the relevant plaintiff class. Palmer noted:

A prima facie rule of liability that is consistent with both the economic analysis and most of the leading cases is this. The provider of a financial service should owe a prima facie duty of care to the claimant if: the claimant was, or could have been, charged directly or indirectly for the financial benefit that would have been provided . . . had the service been properly performed; and the provider could have reasonably foreseen the way in which the performance of the service was going to affect the claimant.<sup>244</sup>

It is true that this idea is consistent with the denial of liability in cases brought against auditors by third parties,<sup>245</sup> such as *Ultramares* in the United

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239. Rabin, *supra* note 13, at 1536 n.72; see also Schwartz, *supra* note 7, at 128–29.

240. Mario J. Rizzo, *A Theory of Economic Loss in the Law of Torts*, 11 J. LEGAL STUD. 281 (1982).

241. *Id.* at 291–96.

242. James D. Palmer, *Liability for Negligently Performed Financial Services: An Economic Theory*, 26 VIC. U. WELLINGTON L. REV. 71 (1996).

243. *Id.* at 72.

244. *Id.* at 82.

245. That is, parties who were not “the immediate requester” of the service from the auditor and whom the auditor cannot charge directly or indirectly.

States and *Caparo* in the United Kingdom. If liability were imposed in such cases, the auditor would face the social costs of her services to these classes, including lenders to or shareholders in the enterprise that was audited, but the auditor would be unable to appropriate the full social benefit that accrues to those classes because the auditor could not extract payment from them for the audit.<sup>246</sup> Indeed, Palmer might also have developed his idea to embrace the issue of whether the defendant could successfully have excluded his liability to the plaintiff.

Palmer also rightly acknowledges the economic argument for liability being more extensive than his prima facie rule in cases where the service “provider can capture most of the benefits from the service and would not otherwise face liability for the full costs of the service.”<sup>247</sup> The problem here is that the service provider can inflict these costs on society with impunity, unless tort law<sup>248</sup> intervenes. The example Palmer gives is where the law outside the tort of negligence does not “give any party the ability to sanction the careless performance of the service,” as in the intended beneficiary cases.<sup>249</sup> Here, the lawyer gets paid for his work but, unless there is a duty of care, “there would be a real social cost as the testator would have to seek a more expensive method of ensuring that her intentions are carried out.”<sup>250</sup> A Commonwealth lawyer would add that this is also true where the market conditions would have prevented the plaintiff from securing appropriate protection directly or indirectly from the defendant, as in *Smith v. Bush*, *Bryan v. Maloney*, and *Henderson v. Merrett*.

But Palmer seems to ignore a critical argument for liability, sometimes being *narrower* than his prima facie rule and sometimes being *wider*: whether the plaintiff had the capacity to obtain appropriate protection directly or indirectly from the defendant. Though he suggests reasons why liability may have been denied in certain cases that fall within his prima facie “defendant can charge plaintiff” prerequisite for liability, such as *South Pacific Manufacturing v. New Zealand Security Consultants & Investigations Ltd.*,<sup>251</sup> he ignores a core reason the court expressed for that refusal: Namely, the commercial plaintiff could have secured appropriate protection directly or indirectly from the defendant, so that the court “cannot see any justification for allowing them a greater recovery through tort than they were prepared to pay for in contract.”<sup>252</sup> This is, of course, the concern countervailing to the im-

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246. Palmer, *supra* note 242, at 76.

247. *Id.* at 88.

248. Public law might intervene, but query whether devices such as the criminal law would internalize an adequate quantum to the careless party.

249. Palmer, *supra* note 242, at 88.

250. *Id.*

251. [1992] 2 N.Z.L.R. 282.

252. *Id.* at 308.

position of a duty of care in *Hedley Byrne* itself,<sup>253</sup> and it is now a well-accepted concern in Commonwealth jurisprudence. But it raises the inverse question. Take the case where the defendant could not have charged for its service (or excluded liability)—a factor Palmer would say militates against a duty being imposed. How would this case be resolved if it had so happened that the plaintiff could not have extracted appropriate protection—a factor that, as we have seen, weighs in favor of the recognition of a duty of care?

What about Richard Posner? What does he say when recovery of pure economic loss is denied, as in the bridge-to-the-island case of *Rickards v. Sun Oil Co.*?<sup>254</sup> Posner merely asserts the social facts on which economic analysis would support that no-recovery result:

[T]he economic explanation is that . . . the accident to the draw-bridge created external benefits as well as external costs. The business lost by merchants on the island presumably was recouped by merchants on the mainland. Because there is no way that the tortfeasor can obtain restitution of these benefits, if he were liable for this kind of accident he would be overdeterred . . . if the defendant had been liable for the island merchants' losses, it would have borne a cost greater than the net cost created by the accident.<sup>255</sup>

In contrast, Posner describes the rule allowing recovery in *Union Oil* as the "simple and sensible solution"<sup>256</sup> to a case "where economic analysis indicates that there should be tort liability."<sup>257</sup> Over time, his rationale became one based on assertions about social costs:

If the supply of fish were so elastic that the reduction in catch caused by the oil spill was fully offset by an increase in catch elsewhere, then

253. See also Victor P. Goldberg, *Accountable Accountants: Is Third-Party Liability Necessary?*, 17 J. LEGAL STUD. 295, 312 (1988). "If investors want assurances against losses arising from accountant negligence or other causes, they can purchase it. . . . [T]he accountant's liability to third parties should be determined *entirely* by voluntary agreement." *Id.* (emphasis added).

254. See also *Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124 (Iowa 1984).

255. WILLIAM LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 251 (1987).

256. Richard A. Posner, *Epstein's Tort Theory: A Critique*, 8 J. LEGAL STUD. 457, 468 (1979); see also LANDES & POSNER, *supra* note 255, at 105.

257. Posner, *supra* note 256, at 474 ("[T]he result [was] correct: giving the plaintiffs a tort right was a way of making the defendant internalize some of the external costs of the oil spill."). At first, the Posner rationale was the crude internalization one:

One way of preventing oil companies from ignoring the effects of oil spills on fish is to make the companies liable to the fishermen for the value of the lost catch. Tort liability would do this.

. . . Recognizing a tort right in an *Oppen*-type case serves to reduce the divergence between private and social costs that is created when oil companies do not take into account the effects of oil spills on fish.

*Id.* at 468.

damages should be denied. . . . [T]he court, however, allowed damages in *Oppen* and this seems the economically correct result. The spill probably caused a net reduction in the number of fish caught. The benefits to other fishermen were therefore more than offset by the losses to consumers from paying higher prices for fish and from substituting other foods.<sup>258</sup>

There are many problems with this, quite apart from the appearance that Posner builds an economic justification for the results in case law by merely assuming the necessary social facts for each particular case.<sup>259</sup> First, Posner makes no attempt to explain how it is that the quantum of lost profits legally recoverable in *Union Oil* coincides, even roughly, with the net social cost.<sup>260</sup>

Second, even if we assumed the no-social-costs fact situation in a particular case, there are a number of economic arguments that can be made to support recognition of liability.<sup>261</sup> Moreover, as we saw Palmer point out, even if the dispute *looks* like one merely about whether to shift wealth, there may be a real social cost if the plaintiff class was forced into an alternative method of self-protection (rather than being entitled to rely on the defen-

258. LANDES & POSNER, *supra* note 255, at 252.

259. In another important example of this odd approach, Posner supports the result in *George A. Hormel & Co. v. Maex*, 155 Cal. Rptr. 337 (1979). Here the defendant's negligence disrupted the electricity supply to the plaintiff's factory. *Id.* at 338. The resultant power surge burnt out the plaintiff's transformer, with the result that employees were made idle for two hours. *Id.* The plaintiff continued to be responsible to pay their wages, and the plaintiff successfully recovered these costs from the defendant even though they were not economic losses consequential on damage to the plaintiff's person (for example, medical expenses of an injured plaintiff) or plaintiff's property (for example, the loss of value and loss of profits associated with that piece of plaintiff's property). *Id.* at 338–39. They were pure economic losses. See *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors)*, 1973 Q.B. 27 (noting the distinction). Yet when confronted by *Stevenson v. East Ohio Gas Co.*, 73 N.E.2d 200 (Ohio 1946), in which the defendant's negligence prevented the employee-plaintiff from getting to his place of work, Posner supported the denial of the claim for lost wages with the assertion of the appropriate facts: “[T]he plaintiff’s employer *may* have made up the plaintiff’s lost product by expanding production from another plant or deferring someone’s vacation; therefore the net social cost may have been less than the loss in the plaintiff’s wages.” LANDES & POSNER, *supra* note 255, at 254 (emphasis added). But a more cogent reason for the result in *Stevenson* is that the whole city district had been put off limits and there was no special way in which to describe the plaintiff class to make it sufficiently ascertainable. In contrast, where the negligence had a special effect on the plaintiff’s workplace, such a description is possible and the way is opened to allow recovery for such “primary” victims. Hence, the more equivalent case to *Maex* is *Reilly v. Pyle*, 49 Pa. D. & C.2d 570 (1970), where the damage was to the enterprise employing the employee itself and where, in a parallel outcome to *Maex*, the court refused the defendant’s demurrer that the plaintiff had failed to state a cause of action. *But see Beck v. FMC Corp.*, 398 N.E.2d 10 (N.Y. 1977).

260. Posner also does not explain how it is that “the owner of the bridge [in *Rickards*] could have sued to recover the deadweight losses caused by the accident.” LANDES & POSNER, *supra* note 255, at 252.

261. For example, where the defendant’s advice influences resource allocation decisions, it is efficient to give incentives that care is taken. Palmer, *supra* note 242, at 78–79.

dant's care), which was more expensive. Here, the law-and-economics approach itself supports the imposition of liability.<sup>262</sup> Again, to adapt Gary Schwartz's skepticism about the "no social loss" assertion,<sup>263</sup> the very fact that in *Rickards* consumers had preferred to shop on the island suggests that being forced to patronize mainland merchants deprives the class of consumers of some "welfare" and that "consumers do indeed suffer a private loss that is a 'social loss' in the sense of not being offset by any compensating private gains."<sup>264</sup>

Gary was right to conclude that "from an economic perspective the economic-loss rule [of no liability], is unsatisfying in cases whose facts resemble [*Rickards*]."<sup>265</sup> Gary also made the same compelling point about *People Express Airlines*, where the plaintiff was a no-frills airline many of whose consumers probably had no close substitute.<sup>266</sup>

Third, Posner's focus on the empirically unquantifiable notion of social and administrative costs leads him to neglect factors that courts explicitly acknowledge were concerns that influenced their decisions. Thus, he suggests that what lies behind the judicial suggestion<sup>267</sup> of a driver's nonliability for negligently causing a traffic-delaying accident in the Brooklyn Battery Tunnel was "the administrative costs of allowing numerous small claims . . . . Although significant in aggregate, the cost would still not be great enough (in all likelihood) to warrant the expense of a class action, and individual law suits would cost far more than any possible allocative gain."<sup>268</sup>

Yet courts are clear that the concern they have here is fairness to the defendant in being able to ascertain the groups, if any, to whom he will be liable. Because there is no normatively justifiable way in *this Tunnel case* to define a plaintiff class that would have been ascertainable by the defendant, liability is denied. Were a class to be ascertainable on such a basis,<sup>269</sup> then, even if that class was large and each victim's loss was small, there is no reason to think courts would not allow recovery just as they did, to Posner's approval, in *Union Oil*. It is hard to see why the result in *Union Oil* should be different had the number of (ascertainable) fishermen been ten times that in the case, with each suffering only a tenth of the loss in profits.

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262. *Id.* at 113; see also text accompanying *supra* note 250.

263. See, e.g., Schwartz, *supra* note 7, at 128–30.

264. Schwartz, *supra* note 5 (draft at 136); Schwartz, *supra* note 7, at 128. This point is separate from the criticism of the underlying "excess capacity" assumption of lawyer-economists. See *supra* text accompanying note 239.

265. Schwartz, *supra* note 5 (draft at 136).

266. Schwartz, *supra* note 7, at 127–28.

267. *In re Kinsman Transit Co.*, 388 F.2d 821, 825 n.8 (2d Cir. 1968).

268. LANDES & POSNER, *supra* note 255, at 254.

269. On which point, see the pragmatic comments of Prosser, see text accompanying *supra* notes 188–189, about frequent users of a resource and how the specialness and ascertainability issues are matters of degree.

Overall, then, the approach of lawyer-economists is indeterminate in any specific case because of the impossibility of sufficiently accurate “individualized determinations of social loss.”<sup>270</sup> The approach is also merely intuitive when it seeks to explain groups of cases classified according to such crude factual features as whether the cases involved misstatement or not.<sup>271</sup>

### C. The Challenge to High Theorists from Case-Law-Focused “Middle Theory”

High theorists have failed significantly to clarify the law on economic loss. In particular, high theorists fail to address the diverse range of situations where recovery is allowed and the legal reasoning deployed therein.

U.S. scholars that have made a contribution to the reclassification and synthesis of economic loss doctrine are those, like Gary Schwartz and Herbert Bernstein,<sup>272</sup> who focus on case law and probe outside the artificial pockets in which U.S. case law is marooned to identify the substantive concerns that guide courts without assuming these will all be of the same character.<sup>273</sup> This is just the sort of case-based, declassified, mixed approach that I describe as middle theory, and it is the one traditionally used by mainstream tort scholars in the Commonwealth. As I have noted, Commonwealth tort scholars are relatively indifferent to high theory and do not seek “to make it all tidy and four-square like the Marx brother who took shears to the bits of clothes which stuck out of his suitcase.”<sup>274</sup>

For the institutional reasons outlined at the beginning of this Article, Commonwealth scholarship focuses tightly on case law reasoning. In the Commonwealth, appellate judges express the concerns of the common law

270. Of particular relevance here is the pioneering work of Richard Markovits to bring home to lawyers the perturbations to economic theory of its own subtheory of the second-best. See Richard S. Markovits, *Second-Best Theory and Law & Economics: An Introduction*, 73 CHIC.-KENT LAW REV. 3 (1998).

271. Schwartz, *supra* note 7, at 128–29.

272. See, e.g., Bernstein, *supra* note 6, 130–31. Bernstein writes:

Why, the question will be, should only an individual right based in private law, as for instance that of a lessee [like the plaintiff in *J'Aire*], deserve protection from such interference? If, on the other hand, certain users of public resources, such as the fishermen in *Union Oil v. Oppen*, are entitled to recover for their pure economic loss, why should other users of public resources, like the claimants in *In re Kinsman* (No.2), not be granted recovery? The answer may be that it makes a difference whether the interference with a use of resources effectively shuts down a business, at least temporarily, or just increases the costs of running a business. More probing inquiry is needed, many questions remain.

*Id.*

273. Another important contribution, albeit limited to cases concerning the liability of a contracting party to a third party for negligent performance of a contract, is that of Jay M. Feinman, *Doctrinal Classification and Economic Negligence*, 33 SAN DIEGO L. REV. 137 (1996).

274. Weir, *supra* note 2, at 165.

in rich terms across a range of economic, process, institutional, and fairness categories,<sup>275</sup> including distributive justice.<sup>276</sup> Of course, Commonwealth lawyers see that fairness concerns are and should be relevant to tort entitlements. Similarly, it is obvious that courts have and should have a sensitivity to the wealth and incentive implications of legal rules. But in practice, it is the complex tensions between these and other diverse legal concerns that Commonwealth lawyers accept as legitimately generating the boundaries of tort entitlements. And it is with those boundaries that most Commonwealth tort scholars are concerned, because it is the dispute at the boundary that produces the appellate case law. Appellate courts are vigilant in crafting those boundaries because they appreciate that the negligence principle has not only remarkable “vitality,”<sup>277</sup> but also a voraciousness<sup>278</sup> that demands tight control.

Just as it is true in the nontraditional physical loss cases that those complex boundaries simply cannot be accommodated within a mono-theory, be it economic or fairness-based, so also in the economic loss cases.<sup>279</sup> By engaging with the rich tapestry of legal concerns expounded in appellate judgments, the middle theory approach of New World Commonwealth scholarship has been able to abandon the artificial, normatively unjustifiable pockets approach to economic loss. Courts have come to appreciate the general lesson about indeterminacy that can be drawn from the early advice cases. Even if the class of victims suffering economic loss as a result of the defendant’s negligence is indeterminate, or even if the total economic loss suffered as a result of the negligence is indeterminate, there may be a normatively justifiable way to define a class of plaintiffs and a class of recoverable loss such that the size of the class and the quantum of recoverable loss are ascertainable, meaning that the defendant’s *liability* is not indeterminate. Scholars using case-law-focused middle theory have looked at such norma-

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275. Stapleton, *supra* note 193, at 59.

276. See *White v. Chief Constable*, [1999] 2 A.C. 455, 510 (appeal take from Eng.); *McFarlane v. Tayside Health Bd.* (Scotland), [2000] 2 A.C. 59, 82–83, 96 (appeal taken from Scot.); *McLoughlin v. Grovers*, [2002] 2 W.L.R. 1279 (2001) (Eng. & Wales C.A.); *Parkinson v. St James & Seacroft Univ. Hosp. NHS Trust*, 2002 Q.B. 266 (2001) (Eng. & Wales C.A.); Peter Cane, *Distributive Justice and Tort Law*, 2001 N.Z. L. REV. 401; Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 98 MICH. L. REV. 138 (1999); Justice Keith Mason, *Fault, Causation and Responsibility*, 19 AUSTL. L. REV. 201 (2000); Stapleton, *supra* note 25, at 946–47.

277. See Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981).

278. Stapleton, *supra* note 25, at 946, 956, 984 n.106; Jane Stapleton, *Pure Economic Loss: A Judicial Exemplar*, in GÉRARD V. LA FOREST at the SUPREME COURT OF CANADA, 1985–1997, at 449, 451–52 (Rebecca Johnson et al. eds., 2000).

279. It also seems unlikely that nontraditional physical loss cases or economic loss cases can be accounted for in terms of the dualist “mixed theory” that Gary Schwartz wrote about, whereby one pure theory supplies the understanding for the affirmative imposition of liability and another pure theory works as a limiting principle. Schwartz, *supra* note 9, at 1824–26.

tive justifications used by courts and have identified substantive concepts that lie at the heart of tort law, such as the tension between the value of self-protection and the mirror concern with vulnerability.

From these developments a new age for tort theory should dawn. This should, for example, illuminate the welcome reorientation of tort protection away from powerful commercial plaintiffs towards the vulnerable (be they commercial parties or private citizens). It should also, for example, open up a new dimension within the public/private debate as the tensions in public authority liability for economic loss are addressed. Finally, it might nudge high theorists to address the reality of entitlements in negligence, specifically the intriguing phenomenon that, outside the traditional area where the careless positive act of a private defendant resulted in physical injury to the plaintiff, recognition of a legal entitlement in the tort of negligence is only episodic.<sup>280</sup>

#### CONCLUSION: SUMMARY OF COMMONWEALTH JURISPRUDENCE IN ECONOMIC LOSS CASES

As with the scholarship of Gary Schwartz, mainstream Commonwealth legal scholarship prides itself on engaging with the messiness of real-world judicial reasoning. The aim is to expound compelling accounts of the broad landscape of precedent and illuminating critiques of specific aspects of legal reasoning in particular cases. This may not be as elegant and glamorous as the reasoning promoted by high theorists of law, but it has the distinct attraction that it offers the real possibility of assisting and influencing the coherent development of the law by the courts. This case-law-focused middle theory subjects to critical assessment the rich range of substantive concerns courts themselves cite as having influenced decisions. Mere judicial assertions are ignored. Inconsistency is exposed. Compelling reasons are demanded by commentators from courts that have resorted to bright-line rules or that have grouped cases together on the basis of superficial factual similarities. Once this method strips away those aspects of judicial reasoning shown to be inadequate, it permits the formulation of what seem to be the underlying rational principles that guide courts.

This Article reports, for an American audience, the exciting progress this method has achieved in the area of claims for pure economic loss in the tort of negligence. Here, the case-law-focused middle theory technique of Commonwealth jurisprudence suggests three basic propositions. First, just as it is the case in nontraditional physical loss claims, it is not sufficient to establish a duty of care in relation to pure economic loss to show that such

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280. Stapleton, *supra* note 25, at 946 n.106, 996 n.141.

loss to the plaintiff was foreseeable. This is expressed as there being a requirement of a special relationship. Second, there is no normative justification for the pockets approach to the duty issue. It should be abandoned. Finally, at least five substantive concerns of the law have emerged from the middle-theory critical analysis of the legal reasoning in case law. These can conveniently be expressed as prerequisites for the recognition of a duty of care, whatever the factual matrix of the case: that the defendant was not merely pursuing a legitimate self-interest causing pure economic loss to competitors; that the plaintiff class and the quantum that is to be recoverable can be described using normatively justifiable criteria, such as the class of primary victims; that the plaintiff class and the quantum of recoverable loss, defined in this way, are reasonably ascertainable by the defendant; that the plaintiff could not have secured appropriate self-protection; and that the plaintiff was especially vulnerable, for example by being exclusively dependent on the defendant using care.

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