

THE ECONOMIC BIAS IN TORT LAW

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Economic loss is moving to the forefront of tort discourse on both sides of the Atlantic. A Council draft of the Restatement (Third) of Torts: Economic Torts and Related Wrongs is being appraised and discussed by prominent American tort scholars, and European academics are seeking common ground regarding liability for economic loss in the European Union. The time may well be ripe to focus on an unexplored, perhaps unnoticed, mystery in the common-law of torts: the consequential–relational economic loss dichotomy. Consequential economic loss is economic loss that stems from physical injury to the plaintiff's own person or property. Relational economic loss is purely economic loss that stems from physical injury to the person or property of a third party, or to an ownerless resource. The difference between the two may often seem normatively immaterial, but it has far-reaching implications in tort law. This Article endeavors to unveil the political—redistributive—underpinning of this perplexing legal distinction.

Part I shows that while all common-law jurisdictions have allowed recovery for consequential losses without much hesitation for centuries, most of them have been reluctant to impose liability for relational losses. Part II identifies the various reasons given by courts and scholars for the consistent unwillingness to impose liability for relational losses. It shows that these reasons are equally applicable to consequential losses, inapplicable to most cases of relational loss, or fundamentally flawed. The inevitable conclusion is that the law should treat consequential and relational losses similarly, at least as a general rule. The positive and normative analyses thus seem incongruent.

Part III theorizes that the best account for the consequential–relational economic loss distinction is an embedded political inclination of common-law judges. The traditional distinction has been used, perhaps unconsciously, to empower the powerful. Following a general overview of his hypothesis, notwithstanding its intrinsic ap-

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peal, Professor Ronen Perry substantiates it further on three levels. First, he places it in a wider theoretical context, assuming that an interpretive account of a particular doctrine must, at least to some extent, fit with an interpretive theory of the relevant branch of law. Put differently, Perry “zooms out” to show that Robins Dry Rock & Repair Co. v. Flint is an unremarkable tile in a larger mosaic. Second, he “zooms in” to show that the intricacies of the law concerning relational economic loss, not only the general rule of no-recovery, roughly conform to his hypothesis. Third, he tests his hypothesis from a comparative perspective. If Perry’s contention holds, and the consequential–relational loss dichotomy is politically contingent, different legal regimes may be expected in other political environments. He demonstrates that this is in fact the case.

INTRODUCTION

Economic loss is moving to the forefront of tort discourse on both sides of the Atlantic. A Council draft of the *Restatement (Third) of Torts: Economic Torts and Related Wrongs* is being appraised and discussed by prominent American tort scholars,¹ and European academics are seeking common ground regarding liability for economic loss in the European Union.² The time may well be ripe to focus on an unexplored, perhaps unnoticed, mystery in the common law of torts: the consequential–relational economic loss dichotomy. Economic loss is a loss of profit or a positive outlay that does not reflect the cost of repairing or replacing a nonfinancial object, such as bodily integrity or property. It is *consequential* when it stems from physical injury to the plaintiff’s own person or property. It is purely economic in any other case. *Relational economic loss* is purely economic loss that stems from physical injury to the person or property of a third party, or to an ownerless resource.³ The

1. RESTATEMENT (THIRD) OF TORTS: ECONOMIC TORTS AND RELATED WRONGS (Council Draft No. 2, 2007); see also Ellen M. Bublick, *Economic Torts: Gains in Understanding Losses*, 48 ARIZ. L. REV. 693, 693–95 (2006) (introducing the Restatement project).

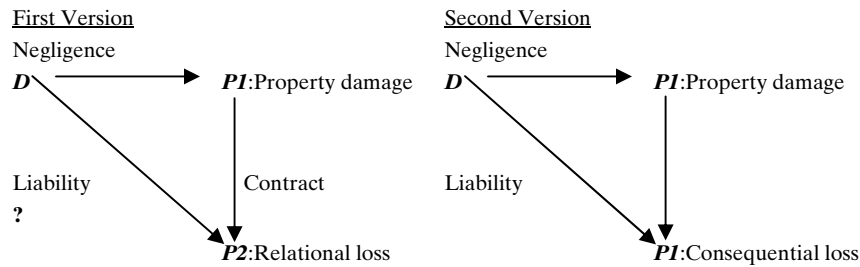
2. See, e.g., PURE ECONOMIC LOSS (Willem H. van Boom et al. eds., 2004); PURE ECONOMIC LOSS IN EUROPE (Mauro Bussani & Vernon Valentine Palmer eds., 2003); see also EUROPEAN GROUP ON TORT LAW: PRINCIPLES OF EUROPEAN TORT LAW § 2:102(4) (2005), available at <http://www.egtl.org/principles/pdf/PETL.pdf> (“Protection of pure economic interests or contractual relationships may be more limited in scope.”).

3. The term “relational interests” is well known in the American literature. See, e.g., Leon Green, *Relational Interests*, 29 ILL. L. REV. 460, 462 (1934) (defining relational interests as “interests in relations with other persons”). The term “relational economic loss” was first used in Canada, following the seminal work of Bruce Feldthusen. See BRUCE FELDTHUSEN, *ECONOMIC NEGLIGENCE* 199–280 (2d ed. 1989) (synthesizing the cases dealing with relational economic loss); see also *Can. Nat’l Ry. Co. v. Norsk Pac. S.S. Co.*, [1992] 91 D.L.R.4th 289, 291 (Can.); ALLEN M. LINDEN, *CANADIAN TORT LAW* 440–43 (7th ed. 2001). It is now frequently used in other common-law jurisdictions. See, e.g., *SEAS Sapfor Forests Proprietary, Ltd. v. Elec. Trust of S. Austl.*, (1996) S. Austl. Sup. Ct. 5718; *Landcatch, Ltd. v. Int’l Oil Pollution Comp. Fund*, [1999] S.C. 101 (H.L.) (appeal taken from Scot.) (U.K.); ROBBY BERNSTEIN, *ECONOMIC LOSS* 131 (1993); PETER CANE, *THE ANATOMY OF TORT LAW* 164 (1997); CLERK & LINDSELL ON TORTS 271–77 (Margaret R. Brazier ed., 17th ed. 1995); *THE LAW OF TORTS IN NEW ZEALAND* 262 (Stephen Todd ed., 2d ed. 1997); Karen Hogg, *Relational Loss, the Ex-*

difference between consequential loss and relational loss may often seem normatively immaterial, but it has far-reaching implications in tort law. This Article endeavors to unveil the political—redistributive—underpinning of this perplexing legal distinction.

Assume, for example, that *D* injures a railway bridge owned by *P1*, and that *P2*, a railroad company using the bridge under contract with *P1*, is forced to use an alternative route at an additional cost.⁴ *P2* incurs relational economic loss. Now assume *P1* is also a railroad company, using its own bridge for exactly the same purpose. Following the accident *P1* needs to use an alternative route at an additional cost. Its economic loss is consequential, not relational.

The Railroad Bridge Case



At first sight the difference between *P1*'s and *P2*'s economic losses may seem technical and fortuitous, but it is legally crucial. Part I shows that while all common-law jurisdictions have allowed recovery for consequential losses without much hesitation for centuries, most of them have been reluctant to impose liability for relational losses. For example, in its eminent yet exceptionally terse decision in *Robins Dry Dock & Repair Co. v. Flint*,⁵ the Supreme Court held that relational economic losses are generally irrecoverable.⁶ With very few exceptions, federal and state courts have faithfully adhered to this bright-line rule.⁷ The traditional exclusion of liability for relational losses has been discussed from various theoretical angles,⁸ but no one has convincingly addressed the conse-

clusory Rule and the High Court of Australia, 3 TORT L. REV. 26 (1995); Ronen Perry, *Relational Economic Loss: An Integrated Economic Justification for the Exclusionary Rule*, 56 RUTGERS L. REV. 711 (2004).

4. See, e.g., *Louisville & Nashville R.R. v. M/V Bayou LaCombe*, 597 F.2d 469, 474 (5th Cir. 1979) (denying liability for extra cost incurred by railway company when defendant negligently damaged a railway bridge owned by a third party); *Louisville & Nashville R.R. v. Arrow Transp. Co.*, 170 F. Supp. 597, 600 (N.D. Ala. 1959) (same); *Gypsum Carrier, Inc. v. The Queen*, [1977] 78 D.L.R.3d 175, 198–99 (Can.) (same). But cf. *Can. Nat'l Ry.*, 91 D.L.R.4th at 289 (allowing recovery for extra cost incurred by railway company in similar circumstances).

5. 275 U.S. 303 (1927).

6. *Id.* at 309.

7. See *infra* notes 20–29 and accompanying text.

8. See *infra* Part II.

quential–relational loss dichotomy. Why does the common law allow recovery for the one but not for the other despite their obvious similarity?

Part II systematically identifies the various reasons given by courts and scholars for the consistent unwillingness to impose liability for relational losses. It shows that these reasons are equally applicable to consequential losses, inapplicable to most cases of relational loss, or fundamentally flawed. The inevitable conclusion is that the law should treat consequential and relational losses similarly, at least as a general rule. The positive and normative analyses thus seem incongruent.

Part III theorizes that the best account for the consequential–relational economic loss distinction is an embedded political inclination of common-law judges. The traditional distinction has been used, perhaps unconsciously, to empower the powerful. Following a general overview of my hypothesis, notwithstanding its intrinsic appeal, I substantiate it further on three levels. First, I place it in a wider theoretical context, assuming that an interpretive account of a particular doctrine must, at least to some extent, fit with an interpretive theory of the relevant branch of law. Put differently, I “zoom out” to show that *Robins* is an unremarkable tile in a larger mosaic. Second, I “zoom in” to show that the intricacies of the law concerning relational economic loss, not only the general rule of no-recovery, roughly conform to my hypothesis. Third, I test my hypothesis from a comparative perspective. If my contention holds, and the consequential–relational loss dichotomy is politically contingent, different legal regimes may be expected in other political environments. I demonstrate that this is in fact the case.

At the outset, a few methodological comments are in order. First, although this Article critically evaluates an important distinction in tort law, it does not espouse the radical view that tort law is normatively indefensible. Tort law generally serves legitimate goals. It needs to be restructured, not abolished, and I point out a specific incoherence that calls for revision. Second, the Article does not determine whether and to what extent consequential and relational losses should be recoverable, although I tend to favor principled liability for both. Again, my goal is to elucidate the incoherence, not to resolve it. Still, some general guidelines for the appropriate solution may become evident through the process. Third, I am aware of the analogous distinction between non-pecuniary harm that stems from physical injury to the plaintiff’s own person or property and non-pecuniary harm that stems from physical injury to another.⁹ I focus only on the consequential–relational *economic* loss dichotomy because it is more clear cut in Anglo-American law,¹⁰ it has

9. See Mark Geistfeld, *The Analytics of Duty: Medical Monitoring and Related Forms of Economic Loss*, 88 VA. L. REV. 1921, 1927–30 (2002) (discussing that distinction).

10. Nowadays, relational emotional harm, as opposed to relational economic loss, is recoverable in most common-law jurisdictions. See Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 TENN. L. REV. 177, 198–201 (2006) (summarizing relevant law).

been neglected in the academic literature,¹¹ and it seems to have a somewhat different critical explanation.

I. THE CONSEQUENTIAL-RELATIONAL ECONOMIC LOSS DICHOTOMY

Consequential economic loss is a loss of profit or a positive outlay that stems from an injury to the plaintiff's own person or property. As any type of harm is ultimately translated into monetary terms, the distinction between physical injury and consequential economic loss may be somewhat confusing at first glance. The conceptual borderline becomes clearer when one considers the nature of the claim rather than that of the remedy. Inasmuch as the claim aims to "restore," albeit metaphorically, the plaintiff's life, bodily integrity, health, or property, the harm complained of is physical. In reality, it may be hard, even impossible, to fully restore bodily integrity (or even property) following an accidental injury. But to the extent that the law aspires to place the plaintiff's person or property as near as possible to the pre-injury position, it deals with the physical injury itself. To the extent that the plaintiff aims to recover costs or lost profits that arose from an injury to his or her person or property but were not incurred in an effort to restore physical integrity, the harm complained of is consequential economic loss.

For example, in cases of property damage, the costs of repair or replacement, or any diminishment of value, are mere reflections of the physical injury itself. Hence they are indisputably recoverable.¹² Loss of profits that the owner expected to make from using, renting, or selling the object, as well as any cost incurred by using an alternative object during the repairs, are consequential losses. In cases of bodily injury, medical and other expenses associated with the recovery process reflect the physical injury and are clearly recoverable.¹³ Arguably, earning capacity is an element of physical integrity, making permanent loss of earning capacity an integral part of the physical injury itself.¹⁴ Loss of profit from expected actions or transactions, including loss of income during recovery, and any expenditure incurred following the injury but unrelated to the recovery process itself are consequential losses.

The law concerning consequential economic loss is well settled in all common-law jurisdictions. If the defendant negligently injured the person or property of the plaintiff and the plaintiff is entitled to compensation for the physical injury, then "he can claim, in addition, for economic

11. Liability for emotional harm has been discussed from critical perspectives. See, e.g., Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 851-53; Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 491-503 (1998).

12. See RESTATEMENT (SECOND) OF TORTS §§ 927(1), 928(a), 929(1)(a) (1979) (setting the principles for compensation for physical harm to property).

13. See *id.* § 924(c).

14. This loss is also recoverable. See *id.* § 924(b).

loss consequent on it.”¹⁵ This principle has been endorsed and applied throughout the Anglo-American world for centuries and has not been challenged.¹⁶

Relational economic loss is a loss of profit or a positive outlay that stems from an injury to the person or property of a third party or to an ownerless resource. The law governing this type of loss is also unambiguous. Starting with *Anthony v. Slaid*,¹⁷ and subject to a few deviations, American courts have consistently denied recovery for relational economic losses. The leading authority is *Robins Dry Dock & Repair Co. v. Flint*,¹⁸ in which the Supreme Court held that “a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong.”¹⁹ Despite its explicit reference to a contractual relationship between the plaintiff and the immediate victim of the wrong and to the defendant’s unawareness of such relationship, this case was broadly interpreted to exclude liability for any relational economic loss, whether the relationship between the two victims was contractual or noncontractual,²⁰ known or unknown to the doer of the wrong.²¹ Further attempts to restrict the Court’s ruling to lost profits as opposed to positive outlays,²² to negligence as opposed to other forms of

15. *SCM, Ltd. v. W.J. Whittall & Son, Ltd.*, [1970] 3 All E.R. 245, 248 (C.A.) (Eng.).

16. *See, e.g.*, *Nat’l Steel Corp. v. Great Lakes Towing Co.*, 574 F.2d 339, 343 (6th Cir. 1978) (“[In case of] an interference with the use of plaintiff’s property, the plaintiff is entitled to recover the value of the use during the interference, or the value of the amount paid for a substitute.”); *People Express Airlines Inc. v. Consol. Rail Corp.*, 495 A.2d 107, 109 (N.J. 1985) (“[A] defendant who negligently injures a plaintiff or his property may be liable for all proximately caused harm, including economic losses.”); *Caltex Oil (Austl.) Pty. Ltd. v. Dredge “Willemstad,”* (1976) 136 C.L.R. 529, 544–45 (Austl.); *Elliott Steam Tug Co. v. Shipping Controller*, [1922] 1 K.B. 127, 140 (Eng.); *see also* RESTATEMENT (SECOND) OF TORTS §§ 924(d), 927(2), 928(b), 929(1)(b) (1979) (setting the principles for compensation for consequential economic losses).

17. 52 Mass. (11 Met.) 290, 291 (1846).

18. 275 U.S. 303 (1927).

19. *Id.* at 309. For further discussion of this case, see Henry D. Gabriel, *Testbank: The Fifth Circuit Reaffirms the Bright Line Rule of Robins Dry Dock and Fails to Devise a Test to Allow Recovery for Pure Economic Damages*, 31 LOY. L. REV. 265, 267–71 (1985); Victor P. Goldberg, *Recovery for Pure Economic Loss in Tort: Another Look at Robins Dry Dock v. Flint*, 20 J. LEGAL STUD. 249 (1991); David R. Owen, *Recovery for Economic Loss Under U.S. Maritime Law: Sixty Years Under Robins Dry Dock*, 18 J. MAR. L. & COM. 157 (1987).

20. *See, e.g.*, *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 625 (1st Cir. 1994); *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 51 (1st Cir. 1985); *La. ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1021, 1023–24 (5th Cir. 1985); *In re Oriental Republic Uru.*, 821 F. Supp. 950, 954 (D. Del. 1993); *In re Cleveland Tankers, Inc.*, 791 F. Supp. 669, 677 (E.D. Mich. 1992); *Gen. Foods Corp. v. United States*, 448 F. Supp. 111, 114 (D. Md. 1978).

21. *See, e.g.*, *Steele v. J & S Metals, Inc.*, 335 A.2d 629, 630 (Conn. Super. Ct. 1974); *PPG Indus., Inc. v. Bean Dredging*, 447 So. 2d 1058, 1060–61 (La. 1984); *Messina v. Sheraton Corp. of Am.*, 291 So. 2d 829, 830–31 (La. Ct. App. 1974); *Ferguson v. Green Island Contracting Corp.*, 355 N.Y.S.2d 196, 197–99 (N.Y. App. Div. 1974).

22. *See, e.g.*, *Barber Lines*, 764 F.2d at 51–52; *In re Cleveland Tankers*, 791 F. Supp. at 677.

action (e.g., nuisance),²³ or to the law of admiralty as opposed to the common law,²⁴ have also failed.

Federal courts have generally accepted the broad interpretation of *Robins*, and applied it to the great majority of relational loss cases.²⁵ Only a few narrow exceptions have been recognized.²⁶ Most state courts have also embraced the bright-line rule.²⁷ Only a few courts replaced it with a more generous approach. The New Jersey Supreme Court, for example, held that one owes a duty of care to take reasonable measures to avoid the risk of causing purely economic loss to particular individuals or individuals comprising an identifiable class with respect to whom one knows or has reason to know are likely to suffer such loss from one's conduct.²⁸ Still, the *Restatement (Second) of Torts* explicitly endorsed the majority view.²⁹

The steadfast reluctance to impose liability for relational economic losses is also characteristic of other common-law jurisdictions. Following the seminal cases of *Cattle v. Stockton Waterworks*³⁰ and *Simpson v. Thomson*,³¹ English courts have consistently denied recovery for such losses, subject to very few, limited exceptions. The traditional rule has prevailed despite revolutionary changes in the English law of torts during

23. *Barber Lines*, 764 F.2d at 56–57; *Testbank*, 752 F.2d at 1030–31; *Dick Meyers Towing Serv. v. United States*, 577 F.2d 1023, 1025 n.4 (5th Cir. 1978); *Rickards v. Sun Oil Co.*, 41 A.2d 267, 269 (N.J. 1945).

24. See, e.g., *Ballard Shipping*, 32 F.3d at 627–28; *In re Nautilus Motor Tanker Co.*, 900 F. Supp. 697, 703 (D.N.J. 1995).

25. See, e.g., *Taira Lynn Marine Ltd. No. 5 v. Jays Seafood, Inc.*, 444 F.3d 371, 377–81 (5th Cir. 2006); *Getty Ref. & Mktg. Co. v. M/T Fadi B*, 766 F.2d 829, 832–33 (3d Cir. 1985); *Barber Lines*, 764 F.2d at 51–52; *Testbank*, 752 F.2d at 1021–28; *Hercules Carriers, Inc. v. Florida*, 720 F.2d 1201, 1202 (11th Cir. 1983); *Akron Corp. v. M/T Cantigny*, 706 F.2d 151, 152–53 (5th Cir. 1983); *Kingston Shipping Co. v. Roberts*, 667 F.2d 34, 35 (11th Cir. 1982); *Marine Navigation Sulphur Carriers v. Lone Star Indus., Inc.*, 638 F.2d 700, 702 (4th Cir. 1981); *Cargill, Inc. v. Offshore Logistics, Inc.*, 615 F.2d 212, 213–14 (5th Cir. 1980); *Louisville & Nashville R.R. v. M/V Bayou LaCombe*, 597 F.2d 469, 472–74 (5th Cir. 1979); *Dick Meyers Towing Serv.*, 577 F.2d at 1024–25; *Kaiser Aluminum & Chem. Corp. v. Marshland Dredging Co.*, 455 F.2d 957, 958 (5th Cir. 1972).

26. See *infra* Part III.C.

27. See, e.g., *Conn. Mut. Life Ins. Co. v. N.Y. & New Haven R.R.*, 25 Conn. 265, 275 (1856); *Koskela v. Martin*, 414 N.E.2d 1148, 1151 (Ill. App. Ct. 1980); *Gosch v. Juelfs*, 701 N.W.2d 90, 91 (Iowa 2005); 532 Madison Ave. *Gourmet Foods Inc. v. Finlandia Ctr. Inc.*, 750 N.E.2d 1097, 1103 (N.Y. 2001); *Aikens v. Balt. & Ohio R.R.*, 501 A.2d 277, 278–79 (Pa. Super. Ct. 1985).

28. *People Express Airlines v. Consol. Rail Corp.*, 495 A.2d 107, 116 (N.J. 1985). This authority was subsequently followed in *Alaska*. See *Mattingly v. Sheldon Jackson Coll.*, 743 P.2d 356, 359–61 (Alaska 1987).

29. RESTATEMENT (SECOND) OF TORTS § 766C (1979) (“One is not liable to another for pecuniary harm not deriving from physical harm to the other . . .”).

30. [1875] All E.R. 220, 223 (Q.B.) (Eng.) (“[T]he question arises, can the plaintiff sue in his own name for the loss which he has sustained in consequence of the damage which the defendants have done to the property of [a third party], causing the plaintiff to lose money under his contract? We think he cannot.”).

31. [1877–78] 3 App. Cas. 279, 289 (H.L.) (appeal taken from Scot.) (U.K.) (rejecting the contention that “where damage is done by a wrongdoer to a chattel [or person] not only the owner of that chattel [or the injured person], but all those who by contract with the owner [or person] have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel [or the person], have a right of action against the wrongdoer”).

the twentieth century. For example, the well-known dictum of Lord Atkin in *Donoghue v. Stevenson*,³² introducing foreseeability as the general test for the existence of a duty of care, was interpreted to apply only to cases of injury to the plaintiff's own person or property. Purely economic loss was excluded from its ambit.³³ Similarly, in *Hedley Byrne & Co. v. Heller & Partners, Ltd.*,³⁴ a negligent misrepresentation case, the House of Lords expressed its objection to the traditional distinction between physical injury and purely economic loss and its readiness, at least in principle, to allow compensation for the latter.³⁵ However, this authority was later distinguished in relational loss cases as applying only to negligent misstatements.³⁶

*Anns v. London Borough of Merton*³⁷ posed another threat to the validity of the exclusionary rule. In that case, Lord Wilberforce forged a general two-pronged test for the existence of a notional duty of care³⁸ that seemed to permit expansion of the boundaries of tort liability. Yet this expectation was disappointed. Some courts held that the House of Lords focused on economic loss ensuing from a negligent omission by a local authority. None of the authorities cited concerned relational economic loss, so *Anns* was inapplicable to such losses.³⁹ Some opined that the two-pronged test was applicable only to *new* fact-situations, not to settled legal issues.⁴⁰ Others observed that the exclusionary rule could survive even within the two-prong framework as it was based on legiti-

32. [1932] All E.R. 1, 10–11 (H.L.) (appeal taken from Scot.) (U.K.).

33. See, e.g., *Konstantinidis v. World Tankers Corp. (The World Harmony)*, [1965] 2 All E.R. 139, 155–56 (P.) (Eng.) (stating that the *Donoghue* line of cases restricts the duty to one's neighbor "to avoid injuring him either in his person or in his property"); *Weller & Co. v. Foot & Mouth Disease Research Inst.*, [1965] 3 All E.R. 560, 563 (Q.B.) (Eng.) (holding that plaintiff must show direct injury to their person or property to warrant relief).

34. *Hedley Byrne & Co. v. Heller & Partners*, [1963] 2 All E.R. 575 (H.L.) (appeal taken from Eng.) (U.K.).

35. *Id.* at 595.

36. See *The World Harmony*, [1965] 2 All E.R. at 155 (holding that *Hedley Byrne* is inapplicable to cases of relational economic loss); *Weller*, [1965] 3 All E.R. at 570 (observing that *Hedley Byrne* did not affect the common-law principle that a duty of care which arises from a risk of direct injury to person or property is owed only to those whose person or property may foreseeably be injured by a failure to take care); *Margarine Union GmbH v. Cambay Prince S.S. Co. (The Wear Breeze)*, [1969] 1 Q.B. 219, 250–51 (Eng.) (same).

37. [1977] 2 All E.R. 492 (H.L.) (appeal taken from Eng.) (U.K.).

38. *Id.* at 498 ("First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise . . .").

39. *Candlewood Navigation Corp. v. Mitsui OSK Lines, Ltd. (The Mineral Transporter)*, [1985] 2 All E.R. 935, 942 (P.C.) (appeal taken from N.S.W.).

40. *Leigh & Silavan, Ltd. v. Aliakmon Shipping Co. (The Aliakmon)*, [1986] 2 All E.R. 145, 153–54 (H.L.) (appeal taken from Eng.) (U.K.).

mate policy considerations.⁴¹ In any case, the attempt to formulate a general test for the existence of a duty of care was eventually abandoned in *Murphy v. Brentwood District Council*.⁴²

In the 1980s, the House of Lords conclusively held that economic loss resulting from an injury to the property of a third party was not actionable (the *Mineral Transporter* and the *Aliakmon* being the leading cases).⁴³ In the same spirit, Parliament nullified anachronistic and exceptional rules of the common law, allowing compensation for economic loss consequent on a bodily injury to another: the *actio per quod servitium amisit* and the *actio per quod consortium amisit*.⁴⁴ The state of the law has not changed since. The English approach to relational losses was also adopted and implemented in Scotland⁴⁵ and in Ireland.⁴⁶

In Canada, the Supreme Court showed some willingness to part ways with the English authorities in the early 1990s, but since retreated to the traditional position. In *Canadian National Railway Co. v. Norsk Pacific Steamship Co.* (“CNR”),⁴⁷ this court, by a four-to-three majority, allowed recovery for economic loss consequent on an injury to the property of a third person.⁴⁸ The minority, headed by Justice La Forest, distinguished relational losses from other categories of purely economic loss⁴⁹ and found the recent expansion of liability in other categories irrelevant.⁵⁰ In his view, the exclusionary rule in its initial narrow form was supported by legitimate policy considerations⁵¹ and should be relaxed only in exceptional cases.⁵² Justice McLachlin, speaking for three members of the court, preferred not to classify purely economic loss cases into different categories.⁵³ In her view, a two-stage test should be applied to all: purely economic loss was *prima facie* recoverable where, in addition to negligent conduct and foreseeable loss, there was sufficient proximity between the negligent act and the loss;⁵⁴ still, courts could reject liability for

41. *The Mineral Transporter*, [1985] 2 All E.R. at 945; *The Aliakmon*, [1986] 2 All E.R. at 154–55.

42. [1990] 2 All E.R. 908 (H.L.) (appeal taken from Eng.) (U.K.).

43. *The Mineral Transporter*, [1985] 2 All E.R. at 945; *The Aliakmon*, [1986] 2 All E.R. at 154–55.

44. Administration of Justice Act, 1982, c. 53, § 2 (Eng.); see *infra* notes 267–81 and accompanying text.

45. *Robertson v. Turnbull*, 1982 S.L.T. 96, 109 (H.L.) (Scot.); *Landcatch, Ltd. v. Int’l Oil Pollution Comp. Fund*, [1999] 2 Lloyd’s Rep. 316, 328, 333–34 (Sess.) (Scot.); *Dynamco, Ltd. v. Holland & Hannen & Cubitts, Ltd.*, 1972 S.L.T. 38, 39 (Sess.) (Scot.); *Reavis v. Clan Line Steamers, Ltd.*, [1925] S.C. 725, 732 (Sess.) (Scot.).

46. *Irish Paper Sacks, Ltd. v. John Sisk & Son (Dublin), Ltd.*, [1972] Ir. H. Ct. (unreported).

47. [1992] 91 D.L.R.4th 289 (Can.).

48. *Id.* at 289.

49. *Id.* at 299–303, 316.

50. *Id.* at 308.

51. *Id.* at 345–53, 354–55 (discussing policy concerns that legitimize the exclusionary rule).

52. *Id.* at 356–57 (explaining that the court should adhere to the general rule in the absence of certain policy reasons).

53. *Id.* at 358–91.

54. *Id.* at 367–71; see also *id.* at 378–79 (“[A] test for recovery of economic loss . . . whether ‘contractual relational’ economic loss or otherwise—should be flexible enough to meet the complexities of

purely economic loss where required by policy reasons not taken into account in the proximity analysis.⁵⁵ Justice McLachlin concluded that recovery should be permitted in the case at bar because foreseeability and proximity were established, and there were no policy considerations justifying exclusion of liability.⁵⁶ Finally, Justice Stevenson allowed the claim, relying on the “known plaintiff” test,⁵⁷ which was rejected by all of his colleagues.

Following *CNR*, the law was in a state of flux. All that could be said was that the potential for liability for relational losses was somewhat higher than before. In *D’Amato v. Badger*,⁵⁸ the Supreme Court denied a claim for economic loss consequent on an injury to the person of a third party. The court explained that “[w]hile the tests of *La Forest* and *McLachlin JJ.* in *CNR* are different, they will usually achieve the same result” and that the case at bar was not a case in which the plaintiff would succeed on one test but not on the other.⁵⁹ It thereby postponed an inevitable decision.⁶⁰

In *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*,⁶¹ Justice McLachlin admitted that given the commercial importance of this issue, the court must settle the controversy.⁶² On the methodological level, McLachlin synthesized the two approaches by injecting a policy-based presumption against recovery into the second branch of her two-pronged test. She revised her initial view, holding that in relational economic loss cases, one must first inquire whether the relationship of proximity necessary to find a *prima facie* duty of care was present, and if so, whether policy concerns that *usually precluded* recovery of relational economic loss may be overridden.⁶³ On the concrete level, McLachlin found that while a *prima facie* duty existed, policy considerations negated it.⁶⁴ Now if policy negates the duty in cases like *Bow Valley*, it is very difficult to imagine circumstances in which liability will be imposed. Justice Iacobucci observed that McLachlin had effectively “adopted the general exclusionary rule and categorical exceptions approach set forth by *La Forest J.* in *Norsk*.”⁶⁵ Many judges and scholars have espoused this in-

commercial reality and to permit the recognition of new situations in which liability ought, in justice, to lie as such situations arise.”).

55. *Id.* at 371.

56. *Id.* at 375–77.

57. *See id.* at 387, 391 (preferring to determine liability by asking whether the defendant can “reasonably foresee that a specific individual, as distinct from a general class of persons, will suffer financial loss” as a result of his conduct).

58. [1996] 137 D.L.R.4th 129 (Can.).

59. *Id.* at 137.

60. *Id.* at 137–39 (deciding that a company is not entitled to recovery of purely economic loss arising from the loss of a principal shareholder and employee).

61. [1997] 153 D.L.R.4th 385 (Can.).

62. *Id.* at 405.

63. *Id.* at 409.

64. *Id.* at 411–13.

65. *Id.* at 428.

terpretation since.⁶⁶ Thus, after a short period of relatively high potential for expansion in Canadian courts, the pendulum has almost returned to its baseline.⁶⁷

The New Zealand Court of Appeal wholeheartedly embraced the Wilberforce (*Anns v. Merton*) formula as a principle of general application in the law of negligence⁶⁸ and has consistently adhered to it since. Within this framework, at least two courts of first instance permitted recovery for relational economic loss.⁶⁹ However, in *Williams v. Attorney-General*,⁷⁰ the Court of Appeal assumed the continued validity of the exclusionary rule. In that case, the plaintiff's vessel was seized by the customs department and incurred injuries while the plaintiff had neither ownership nor possession of it according to the relevant statute.⁷¹ The court by a three-to-two majority allowed recovery. The minority held that the exclusionary rule barred the claim.⁷² The majority distinguished, but did not contest, the exclusionary rule, holding that the relevant statute gave the plaintiff a property interest in the vessel during its forfeiture.⁷³ In *Riddell v. Porteous*,⁷⁴ the Court of Appeal implied that policy considerations might annul the duty of care in most cases of relational economic loss.⁷⁵

The High Court of Australia adopted a more liberal approach. In *Caltex Oil (Australia) Pty. Ltd. v. Dredge "Willemstad"*⁷⁶ the court unanimously allowed a claim for economic loss stemming from an injury to the property of a third party. This case was apparently the most far-reaching challenge to the exclusionary rule in the British Commonwealth until *CNR*.⁷⁷ However, it had no *ratio decidendi*. Each of the five judges used a different method to justify his conclusion. Still, one factor seemed to outweigh all others and was decisive in the judgments of Gibbs and

66. See, e.g., *Martel Bldg. Ltd. v. Canada*, [2000] 2 S.C.R. 860, 877–79, 2000 SCC 60 (Can.) (interpreting *Bow Valley* as introducing a “presumptive exclusionary rule”); Bruce Feldthusen, *Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel?*, 8 TORT L. REV. 33, 41 n.42 (2000) (“These decisions reduce the authority of, if not overrule, the judgment of McLachlin J in [*CNR*].”); Daniel Kalderimis, *Contractual Economic Loss in New Zealand—“Who, Then, Is My Neighbour” Really?*, 29 VICTORIA U. WELLINGTON L. REV. 193, 209 (1999) (“Although [McLachlin’s judgment was] phrased in the language of compromise, a closer analysis reveals a total capitulation.”).

67. In later cases courts assumed the existence of a presumptive exclusionary rule. See, e.g., *Livingstone v. Canada*, 2004 ABCA 236, ¶ 2 (Alta. C.A.), available at <http://www.canlii.org/en/ab/abca/doc/2004/2004abca236/2004abca236.pdf>.

68. See, e.g., *Brown v. Heathcote County Council*, [1986] 1 N.Z.L.R. 76, 79 (C.A.).

69. *Mainguard Packaging Ltd. v. Hilton Haulage Ltd.*, [1990] 1 N.Z.L.R. 360 (H.C. Christchurch); *N.Z. Forest Prods. Ltd. v. Attorney-Gen.*, [1986] 1 N.Z.L.R. 14 (H.C. Auckland).

70. [1990] 1 N.Z.L.R. 646 (C.A.).

71. *Id.* at 646.

72. *Id.* at 679 (Richardson, J., dissenting); *id.* at 687 (Casey, J., dissenting).

73. *Id.* at 672 (Cooke, President); *id.* at 685 (Somers, J., concurring); *id.* at 691–92 (Bisson, J., concurring).

74. [1999] 1 N.Z.L.R. 1, 29–35 (C.A.).

75. See also Feldthusen, *supra* note 66, at 41 (“The New Zealand Court of Appeal has yet to rule conclusively, but seems at least implicitly to recognise relational claims as distinct.”).

76. (1976) 136 C.L.R. 529 (Austl.).

77. J.A. Smillie, *Negligence and Economic Loss*, 32 U. TORONTO L.J. 231, 232–33 (1982).

Mason: the defendant's knowledge or means of knowledge that the plaintiff individually, not merely as a member of an unascertained class, would be likely to suffer economic loss in consequence of his or her negligence.⁷⁸

In the following years the High Court decided, somewhat surprisingly, to resolve all cases of purely economic loss with a twofold test of foreseeability and proximity.⁷⁹ This approach was also applied in cases of relational loss,⁸⁰ but was later abandoned under the influence of academic critique. In *Perre v. Apand Property Ltd.*,⁸¹ the court once again allowed a claim for purely economic loss resulting from an injury to the property of another.⁸² Unfortunately, just like *Caltex*, the case lacks a *ratio decidendi*. Only three of the seven members of the panel adhered to the twofold test.⁸³ Each of the other four used a different conceptual framework. Even so, two factors were emphasized in most of the judgments. All judges said, in one way or another, that the defendant knew or had reason to know that its negligence might cause damage to the plaintiffs as members of an ascertainable class.⁸⁴ Most judges added that the plaintiffs could not protect themselves against the defendant's negligence.⁸⁵ Consequently, the law in Australia is now uncertain. But the prospects of liability for relational loss are relatively higher than in other common-law jurisdictions.⁸⁶

In sum, while consequential economic losses are recoverable in all common-law jurisdictions, relational economic losses are generally not recoverable, although Australia stands as a salient exception. I will contend that although this rigid distinction is impossible to justify, it may have a troubling clandestine explanation.

78. (1976) 136 C.L.R. at 555 (Gibbs, J., concurring); *id.* at 593 (Mason, J., concurring). Judge Stephen preferred the test of proximity. *Id.* at 574–76. Judge Jacobs opined that relational economic loss should be recoverable if it resulted from a “physical effect” of the wrong on the person or property of the plaintiff. *Id.* at 597, 599. Judge Murphy believed that the general principles of tort law were equally applicable to relational loss cases. *Id.* at 606.

79. See, e.g., *San Sebastian Prop. Ltd. v. Minister*, (1986) 162 C.L.R. 341, 355 (Austl.); *Council of the Shire of Sutherland v. Heyman*, (1985) 157 C.L.R. 424, 497–98 (Austl.).

80. See, e.g., *SEAS Sapfor Forests Proprietary, Ltd. v. Elec. Trust of S. Austl.*, (1996) S.A.S.C. 5718.

81. (1999) 198 C.L.R. 180 (Austl.).

82. *Id.* at 203.

83. Justice Callinan specifically spoke of foreseeability and proximity. *Id.* at 321–26. Justice Gummow with whom Chief Justice Gleeson concurred, spoke of a “close relationship” but meant the same thing. *Id.* at 254.

84. *Id.* at 194–95 (Gleeson, C.J.); *id.* at 202 (Gaudron, J.); *id.* at 203–04, 221–22, 230–31, 233–35 (McHugh, J.); *id.* at 255–56 (Gummow, J.); *id.* at 288–90 (Kirby, J.); *id.* at 303–05 (Hayne, J.); *id.* at 326–27, 331 (Callinan, J.).

85. *Id.* at 202 (Gaudron, J.); *id.* at 204, 225–30, 236 (McHugh, J.); *id.* at 259–60 (Gummow, J.); *id.* at 328 (Callinan, J.); see also Feldthusen, *supra* note 66, at 34, 46–48.

86. See, e.g., *Fortuna Seafoods Prop. Ltd. v. Ship “Eternal Wind,”* (2005) Queensl. C.A. 405, available at <http://cclsr.law.unimelb.edu.au/judgements/states/qld/2005/november/2005qca405.htm> (allowing recovery for relational economic loss under unique circumstances).

II. TRADITIONAL JUSTIFICATIONS

A. *Indiscriminative*

Some of the most frequently cited “justifications” for excluding liability for relational economic loss are indiscriminate in the sense that they are equally applicable to consequential losses. Whether or not these arguments justify exclusion of liability for relational losses, they cannot justify a distinction between consequential and relational losses. If they are valid, they require exclusion of liability for the two types of economic loss; and if they are invalid, consequential and relational losses should be equally recoverable. In this Section, I discuss two categories of indiscriminative justifications: fairness-based arguments with a distributive structure and welfare maximization arguments.

1. *Fairness*

The first fairness-based argument attaches normative significance to *ex ante* allocation of risk between the plaintiff and a third party. Many judges and scholars contend that the typical relational victim could protect his or her interest through a contract with the primary victim and that failing to do so justifies exclusion of liability.⁸⁷ This proposition seems to have at least two fairness-based justifications.⁸⁸ First, one may argue that a victim, who was aware of the financial risk and could easily protect against it but refrained from taking the necessary measures, assumed the risk and cannot recover upon its realization.⁸⁹ Second, where a potential victim enters a contract and agrees to bear a certain risk, the risk is usually priced into the contract. The potential victim is thereby compensated *ex ante* for the risk and should not be compensated again *ex post*.⁹⁰ Nonpricing of the risk may indicate that it was deemed insignificant by the parties, and tort law need not be used to protect personal interests from insignificant risks. Although the self-protection justification is usually framed in terms of fairness, it is occasionally supported by utilitarian arguments. For example, tort litigation is time-consuming, wearisome, and costly. Arguably, if one can protect one’s interest in a simpler and less costly manner, one should be encouraged to do so. Additionally, directing potential victims to the contractual venue is supported by the general preference for consensual transactions over collective inter-

87. See, e.g., *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 54 (1st Cir. 1985); John G. Fleming, *Tort in a Contractual Matrix*, 3 TORT L. REV. 12, 18–19 (1995); Jane Stapleton, *Duty of Care and Economic Loss: A Wider Agenda*, 107 LAW Q. REV. 249, 266, 285 (1991).

88. The particulars of the interaction between the plaintiff and a third party are irrelevant from a corrective justice perspective, so these “fairness” arguments should be classified as distributive.

89. See David Howarth, *Economic Loss in England: The Search for Coherence*, in CIVIL LIABILITY FOR PURE ECONOMIC LOSS 27, 48 (Efstathios K. Banakas ed., 1996).

90. *Can. Nat’l Ry. Co. v. Norsk Pac. S.S. Co.*, [1992] 91 D.L.R.4th 289, 374 (Can.) (McLachlin, J.) (criticizing this argument).

vention (*laissez-faire* policy). As these arguments focus on utility rather than fairness, they are cited here merely for the sake of completeness.

A possible response to this line of argument is that protection through contract is frequently impractical due to asymmetric bargaining power,⁹¹ lack of information about potential risks,⁹² the prohibitive cost of negotiating contractual provisions for each and every contingency,⁹³ or the absence of any contractual link between the plaintiff and the primary victim. But even where contractual protection is feasible, one may rightly wonder why the same argument is not used to exclude recovery for analogous consequential loss.

Consider the following example: *D* injures a ship that operates under time charter.⁹⁴ *P1* is the owner, *P2* the time charterer. If *P2* is not obliged to pay hire during the repairs, *P1* is entitled to recover for the lost hire.⁹⁵ However, if *P2* must keep paying hire during the repairs, *P2* will not be able to recover.⁹⁶ Arguably, in both cases the plaintiff could protect itself from the financial risk through the contract. In the second case, the relational victim *P2* could insist on inclusion of an off-hire clause; but in the first case *P1* could insist on the exclusion of such a clause. It is difficult to understand why the contractual protection argument should apply only to one of the two.⁹⁷

Other fairness-based arguments derive from the understanding that legal protection is a public commodity that should be distributed in accordance with the relative value of the various interests that may be put at risk. Some argue that because economic interests are inevitably vulnerable in free-market economies, being subject to various nonactionable intentional interferences, such as competition, strikes, or boycotts, they should not be protected from mere negligent interferences.⁹⁸ This

91. *Id.* at 351 (La Forest, J.); *id.* at 374 (McLachlin, J.).

92. *Id.* at 351.

93. William Bishop & John Sutton, *Efficiency and Justice in Tort Damages: The Shortcomings of the Pecuniary Loss Rule*, 15 J. LEGAL STUD. 347, 366 (1986).

94. A time-charterer is not in possession of the chartered ship. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 9-5 (3d ed. 2001).

95. *The Mergus*, (1947) 81 Lloyd's List L.R. 91 (Eng.).

96. See, e.g., *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 309 (1927) (holding that a time-charterer is not entitled to compensation for economic loss consequent upon a negligent infliction of harm to the ship); *Candlewood Navigation Corp. v. Mitsui OSK Lines, Ltd. (The Mineral Transporter)*, [1985] 2 All E.R. 935, 938–40 (P.C.) (appeal taken from N.S.W.) (same); *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Co.*, [1997] 153 D.L.R.4th 385, 411–13 (Can.) (holding that contractual users of an oil rig who agreed to keep paying hire in case of injury are not entitled to recover). But cf. *Venore Transp. Co. v. M/V Struma*, 583 F.2d 708, 711 (4th Cir. 1978) (allowing a time-charterer of a negligently damaged ship to recover for the hire it had to pay during the repairs).

97. I elaborate on a slightly different version of the contractual protection argument in Section II.C below.

98. Christopher Harvey, *Economic Losses and Negligence—the Search for a Just Solution*, 50 CAN. BAR REV. 580, 582 (1972); Robert Hayes, *The Duty of Care and Liability for Purely Economic Loss*, 12 MELB. U. L. REV. 79, 95 (1979); Philip S. James, *The Fallacies of Simpson v. Thomson*, 34 MODERN L. REV. 149, 160 (1971); Stephen R. Perry, *Protected Interests and Undertakings in the Law of Negligence*, 42 U. TORONTO L.J. 247, 263–66 (1992); C.S.C. Sheller, *Pride and Precedent: Economic Loss—the Search for a New Bright Line*, 1995 LLOYD'S MAR. & COM. L.Q. 203, 216; L.L. Stevens, *Neg-*

argument is clearly false, in its assumption and its implication alike. It is untrue that intentional interference with economic interests is generally permitted. Even activities considered legitimate, such as competition, have their limits, and are regulated by tort law.⁹⁹ More important, an interest cannot be deemed unworthy of legal protection simply because some activities that put it at risk are considered lawful. The lawfulness of certain activities that harm or jeopardize economic interests may have reasons that are inapplicable to other types of interference with economic interests.¹⁰⁰

A related and more appealing argument is that economic interests are inferior to life, bodily integrity, health, and property and therefore less worthy of legal protection.¹⁰¹ However, even if the superiority of life and bodily integrity is undisputed,¹⁰² it is hard to justify any distinction between property damage and purely economic loss in terms of interest-hierarchy. After all, property is a manifestation of wealth.¹⁰³ The loss of x dollars is generally similar to the destruction of a tangible object with a market value of x dollars. Some may argue that tangible objects have an additional, incalculable, sentimental value.¹⁰⁴ But I tend to believe that in most cases a sentimental value is either nonexistent or insignificant,¹⁰⁵ and even where it exists and merits legal protection, it can be protected without an arbitrary distinction being made between the economic ingredient of property damage and other economic losses.¹⁰⁶ Furthermore, even if one personal interest is generally inferior to another, a significant

ligent Acts Causing Pure Financial Loss: Policy Factors at Work, 23 U. TORONTO L.J. 431, 455 (1973); A.B. Wilkinson & A.D.M. Forte, *Pure Economic Loss—a Scottish Perspective*, 30 JURID. REV. 1, 15 (1985).

99. See, e.g., Hazel Carty, *The Economic Torts and English Law: An Uncertain Future*, 95 KY. L.J. 845 (2007) (discussing the economic torts in English law).

100. See Peter Cane, *Economic Loss and the Tort of Negligence*, 12 MELB. U. L. REV. 408, 415–16 (1980).

101. See, e.g., *Bow Valley Husky*, [1997] 153 D.L.R.4th at 404 (“[E]conomic interests have customarily been seen by the common-law courts as less worthy of protection than either bodily security or property.”); P.S. Atiyah, *Negligence and Economic Loss*, 83 LAW Q. REV. 248, 269 (1967); Cane, *supra* note 100, at 414; Hayes, *supra* note 98, at 80, 83; Fleming James, Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43, 54 n.45 (1972); James, *supra* note 98, at 160; Stevens, *supra* note 98, at 449, 454, 457.

102. See, e.g., Mark Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle that Safety Matters More than Money*, 76 N.Y.U. L. REV. 114, 125 (2001) (observing, *inter alia*, that physical injury is more disruptive to the pursuit of one’s life plan than is the loss of money, and that if no amount of money is equivalent to a human life, then safety interests apparently dominate ordinary economic interests).

103. See Harvey, *supra* note 98, at 584 n.22; James, *supra* note 98, at 160.

104. Cf. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897) (“A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.”).

105. At this stage, I do not have empirical evidence to support this intuition, but nor do I know of any contradicting data. I hope to substantiate my intuition empirically in a future article.

106. Courts may allow recovery for an impairment of the sentimental value in cases of property damage, regardless of the market value. See, e.g., *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1068 (Haw. 1981); *Rodrigues v. State*, 472 P.2d 509, 520–21 (Haw. 1970).

impairment to the first may be more burdensome than a slight injury to the second.¹⁰⁷ For example, many people might prefer a slight and transient physical injury to losing their life savings.

Yet even if the inevitable-vulnerability or interest-hierarchy arguments were valid, neither could justify a distinction between consequential and relational economic losses. If financial interests that stem from contract, anticipation of contract, or “mere” expectation do not deserve protection from negligent interference due to their inevitable vulnerability or relative inferiority, consequential losses should also be irrecoverable. But if contractual relations and financial expectations deserve such protection, consequential and relational losses should be equally recoverable.

2. *Welfare Maximization*

One of the conventional economic justifications for *Robins* and its progeny is that many financial losses, relational in particular, are not true social costs.¹⁰⁸ According to economic theory, efficient deterrence requires internalization of the social cost of every inefficient act by the actor.¹⁰⁹ In the assessment of social costs, it is important not to add private losses that reflect “wealth transfers,” namely diminution of personal wealth that generates corresponding gains to others. Such gains do not mitigate the private loss, but they cancel it out in the calculation of the externalized social cost. Internalization of private losses irrespective of the parallel gains may lead to overdeterrence. Arguably, many relational economic losses correspond to resulting economic gains. Thus, exclusion of liability prevents overdeterrence.¹¹⁰

Assume, for example, that an excavation contractor is considering the use of certain precautions that might reduce the probability of accidental harm to electricity cables owned by the public utility company from 0.2 to 0.1. Replacing an injured cable costs \$1,000, whereas the cost

107. Roger B. Godwin, *Negligent Interference with Economic Expectancy: The Case for Recovery*, 16 STAN. L. REV. 664, 692 (1964).

108. W. Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEGAL STUD. 1, 1 (1982).

109. See, e.g., Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 16 (2000).

110. Bishop, *supra* note 108, at 4. This view is now firmly established in the academic literature. See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 251 (1987); RICHARD A. POSNER, *TORT LAW: CASES AND ECONOMIC ANALYSIS* 467–68 (1982); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 138–39 (1987); Feldthusen, *supra* note 66, at 50–51; Bruce Feldthusen & John Palmer, *Economic Loss and the Supreme Court of Canada: An Economic Critique of Norsk Steamship and Bird Construction*, 74 CAN. B. REV. 427, 436, 439 (1995); Israel Gilead, *Tort Law and Internalization: The Gap Between Private Loss and Social Cost*, 17 INT’L REV. L. & ECON. 589, 593–94 (1997); Victor P. Goldberg, *Recovery for Economic Loss Following the Exxon Valdez Oil Spill*, 23 J. LEGAL STUD. 1, 19–22, 31–32, 36–37 (1994); Andrew W. McThenia & Joseph E. Ulrich, *A Return to Principles of Corrective Justice in Deciding Economic Loss Cases*, 69 VA. L. REV. 1517, 1531 (1983); Richard A. Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. L. REV. 735, 736–37 (2006) [hereinafter Posner, *Common-Law Economic Torts*]; Sheller, *supra* note 98, at 216.

of precaution is \$500. Under these assumptions, it would be inefficient to take precautions because the cost outweighs the benefit ($\$500 > (0.2 - 0.1) \times \$1,000 = \$100$). Now assume that several factories produce a certain product, that demand for this product is cyclic, and that the size of each factory is optimal. Assume further that if the contractor accidentally injures an electricity cable, production halts in one of the factories resulting in loss of profits.

We must now distinguish two possible cases. If the competitors can increase their production during the interference at no extra cost beyond what the normal production costs would have been, their gain will fully offset the unfortunate factory's loss. If the relational loss is higher than \$4,000, allowing recovery will encourage the contractor to choose an inefficient level of care, because the cost of precaution is lower than the consequent reduction in expected liability ($\$500 < (0.2 - 0.1) \times (\$1,000 + \$4,000 + \epsilon) = \$500 + \epsilon$), although it still exceeds the true social cost (\$100). If, on the other hand, the competitors cannot increase production during the interference at a cost similar to what the normal cost would have been, prices will increase and sales will drop. In such a case, there is an actual social cost, in addition to the cost of repairing the cable.

The critical question turns out to be this: when can a producer expand its level of production without destabilizing the market equilibrium? If the accident occurs at an off-peak time, the competitors can easily increase their production, utilizing their excess manufacturing potential.¹¹¹ The extra production costs incurred by the competitors (which include manpower, raw material, electricity, machinery wear and tear, etc.) cannot be regarded as true social costs caused by the accident. But for the accident, they would have been borne by the halted plant. If, however, the accident occurs at peak, the costs of production may rise and the supply curve will shift upward.¹¹² The farther demand is from its peak, the smaller the halted plant's market share, and the shorter the interruption, the easier it is for the competitors to stand in for the unfortunate factory without destabilizing the market equilibrium. Because demand is only seldom at its peak we may conclude that in most cases a temporary disturbance to production in a single plant does not give rise to a social cost or that the private losses of the halted plant greatly exceed such cost. Exclusion of liability for the relational loss thus prevents internalization of wealth transfers. True, considerable social costs may occur once in a while. But identifying these rare cases and trying to evaluate the respective social costs (which are by no means equivalent to the private losses) is not worthwhile. The cost of gathering and process-

111. Cf. Posner, *Common-Law Economic Torts*, *supra* note 110, at 737 ("Most retail establishments operate most of the time with a bit of excess capacity in order to handle peak demands.").

112. Bishop, *supra* note 108, at 14–15.

ing the necessary information is significantly higher than the social cost that would consequently be internalized.¹¹³

Furthermore, even if the interruption occurs at peak and even if the market share of the halted plant is relatively high and the interruption is rather long, social cost will not necessarily ensue. Consumers may sometimes have an inventory that can be utilized during the interruption and then renewed. In other cases, especially where the interruption affects production of durables, they may prefer to postpone new acquisitions regardless of the unavailability of an inventory. In both cases, the halted plant's profits are not lost but rescheduled. Also, the halted plant or its competitors may use their own inventories to meet demand.¹¹⁴ In all of these cases, the market equilibrium will not destabilize.

This line of reasoning has faced some criticism. In an earlier Article, I discussed the critiques in detail and concluded that this argument has merit in many cases.¹¹⁵ But valid or not, one cannot escape the simple truth: it is equally applicable to consequential losses and therefore cannot justify the consequential-relational economic loss dichotomy.¹¹⁶ Suppose that production in a certain factory is interrupted by a direct injury to its machinery. Just as in the hypothetical above, the competitors may be able to expand their production temporarily without destabilizing the market equilibrium. Similarly, consumers or competitors may be able to utilize inventories. Nevertheless, the factory owner will receive compensation for lost profits.¹¹⁷ Likewise a person who is physically injured receives compensation for loss of earnings even though his or her employer can hire a substitute worker from the ranks of the unemployed, and the latter's income offsets the victim's loss.¹¹⁸

William Bishop was aware of this problem and offered a somewhat dubious justification for the traditional dichotomy. Any industrial or business interruption results in a limited social cost. Sometimes the substitutes are produced at a slightly higher cost, sometimes they are not identical to those of the halted plant, and so on. These "costs" are generally equivalent to some fraction of the private loss.¹¹⁹ So from an economic perspective, liability must be imposed for some fraction of the pri-

113. *Id.* at 17.

114. Producers and consumers may well hold larger than optimal inventories out of fear of negligent interruptions of production. This means that negligent interruptions cause true social costs (the cost of holding the additional inventory). However, I think that since nonnegligent interruptions are usually more frequent than negligent ones, and since there are other commercial reasons for holding inventories, the impact of negligent interruptions on inventory strategies is not considerable. I will naturally revise some of my conclusions if this assumption is found to be inconsistent with empirical data.

115. Perry, *supra* note 3, at 733–45. I am having second thoughts about my original conclusion and intend to discuss it further, but this is irrelevant here.

116. Gilead, *supra* note 110, at 604–05.

117. See, e.g., *SCM, Ltd. v. W.J. Whittall & Son, Ltd.*, [1970] 3 All E.R. 245, 249–50 (C.A.); *British Celanese, Ltd. v. A.H. Hunt (Capacitors), Ltd.*, [1969] 2 All E.R. 1252, 1258–61 (Q.B.) (Eng.).

118. See Geistfeld, *supra* note 9, at 1928 n.27.

119. Bishop, *supra* note 108, at 12.

vate loss. In Bishop's opinion, this can be achieved if courts select only some victims for compensation,¹²⁰ and physical injury can be used as a rough—even arbitrary—selection device.¹²¹ The administrative cost of this mechanism is considerably lower than the administrative cost of a specific analysis of each and every relational loss: it does not increase the number of claims or require complex calculations. Alas, this argument is highly problematic, as there is no compelling reason to believe that consequential losses correspond, even roughly, to the social cost. The economic distinction between social costs and wealth transfers may therefore justify a legal distinction between property injury and economic loss, but it cannot justify the consequential-relational loss dichotomy.¹²²

Another justification for exclusion of liability for relational losses turns on the fact that the injurer is already liable for the physical injury. The marginal deterrent effect obtained from holding the injurer liable for a relational loss may be nil whenever the cost of taking optimal care is lower than the ensuing reduction in expected liability toward the primary victim.¹²³ Put differently, liability for the primary victim's loss may provide an adequate incentive. Alternatively, the marginal deterrent effect of a relational claim may be lower than the administrative cost involved in shifting the additional loss.¹²⁴ So even if all relational losses were true social costs, allowing recovery might not be cost-justified.¹²⁵ However, the same line of reasoning is applicable to consequential economic losses. Given the deterrent effect of liability for physical injury, the benefit of allowing recovery for consequential losses in terms of deterrence may be lower than the administrative costs, although not as often as in the case of relational losses.¹²⁶

A third argument is that exclusion of liability for relational losses may reduce the likelihood of inefficient expenditures.¹²⁷ Assume, for example, that a negligently operated dredge fractures an oil pipeline. The company that used the pipeline under contract with its owner to obtain petroleum products decides to utilize alternative means of transportation

120. *Id.*

121. *Id.*; see also Feldthusen & Palmer, *supra* note 110, at 439, 445.

122. Cf. Feldthusen & Palmer, *supra* note 110, at 439 (observing that the economic distinction calls for reconsidering the law concerning consequential losses).

123. See Donald Harris & Cento Veljanovski, *Liability for Economic Loss in Tort*, in *THE LAW OF TORT: POLICIES AND TRENDS IN LIABILITY FOR DAMAGE TO PROPERTY AND ECONOMIC LOSS* 45, 52–53 (Michael Furmston ed., 1986).

124. See BERNSTEIN, *supra* note 3, at 163; Bruce Feldthusen, *Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow*, 17 CAN. BUS. L.J. 356, 378–79 (1991); Posner, *Common-Law Economic Torts*, *supra* note 110, at 740; Smillie, *supra* note 77, at 239, 241; see also *Can. Nat'l Ry. Co. v. Norsk Pac. S.S. Co.*, [1992] 91 D.L.R.4th 289, 301 (Can.) (La Forest, J.) (“[I]n such cases, the right of action of the property owner already puts pressure on the defendants to act with care. The deterrent effect of tort law, to the extent that it survives the advent of widespread insurance, is already present.”).

125. To the extent that relational losses are not true social costs, no resources should be invested in preventing them.

126. The difference in frequency is of course unknown, but it is presumably small.

127. See Perry, *supra* note 3, at 753–56.

at a considerably higher cost during the repairs.¹²⁸ Doing so is inefficient if the increased production cost exceeds the product's utility to consumers or if competitors can produce the same product at a lower cost during the interruption. Denial of liability may help prevent the inefficient expenditure under those circumstances, albeit imperfectly.¹²⁹ Still, the fact that the company did not own the pipeline is irrelevant. To the extent that using an alternative shipping method is inefficient, it would be equally so if the user of the pipeline were also the owner; and the additional cost incurred by the user should be equally irrecoverable.

A fourth argument is that exclusion of liability for relational losses gives potential victims an incentive to take precautions to prevent harm¹³⁰ and gives actual victims an incentive to mitigate damages.¹³¹ For example, to avoid loss of profits in cases of accidental power failure, businesses can install stand-by systems *ex ante*, or they can try to make up for the loss by doing more work when the interruption ceases.¹³² Similarly, where a towed barge sinks, the owners of the tugboat will not suffer economic loss if they use it to haul another ship,¹³³ and when a factory is damaged and closed for repairs, workers will not incur economic loss if they obtain alternative employment.¹³⁴

According to this argument, allowing recovery for relational losses may have three adverse consequences. First, it may induce potential victims not to invest in mobility and malleability of resources *ex ante*, even where such an investment is socially desirable.¹³⁵ Second, it may weaken victims' incentives to turn their capital to alternative and perhaps equally valuable uses after the accident.¹³⁶ Third, a loss of profit that could be mitigated by the victim is not a social cost externalized by the injurer, so imposing liability will result in overdeterrence of potential injurers.¹³⁷ Although the defenses of comparative negligence and mitigation of damages may provide the necessary incentives,¹³⁸ exclusion of liability can do so at a much lower administrative cost.¹³⁹ Indeed, the administrative advantage cannot in itself justify a rule of no recovery, because such a rule may reduce or even eliminate potential injurers' incentives to take due

128. *Caltex Oil (Austl.) Pty. Ltd. v. Dredge "Willemstad,"* (1976) 136 C.L.R. 529, 544 (Austl.).

129. The company will incur this expenditure regardless of the legal rule if the cost of production using the alternative means of transportation is lower than the market price. However, exclusion of liability is still justified, because imposing liability is tantamount to subsidizing inefficient activity.

130. *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 55 (1st Cir. 1985).

131. Hayes, *supra* note 98, at 114.

132. *Spartan Steel & Alloys, Ltd. v. Martin & Co.*, [1972] 3 All E.R. 557, 563-64 (C.A.) (Eng.).

133. Bishop, *supra* note 108, at 23-24.

134. *Id.* at 17-18. However, one may say that if workers of the damaged factory find alternative employment they displace other workers (or potential workers). See Mario J. Rizzo, *The Economic Loss Problem: A Comment on Bishop*, 2 OXFORD J. LEGAL STUD. 197, 205 (1982).

135. Bishop, *supra* note 108, at 18-19.

136. Goldberg, *supra* note 110, at 17.

137. Gilead, *supra* note 110, at 591-92.

138. SHAVELL, *supra* note 110, at 144-46.

139. Goldberg, *supra* note 110, at 17.

care. However, as explained above, in cases of relational economic loss the injurer is already liable for the physical injury. Therefore, a general rule of no recovery provides appropriate incentives to victims at a lower administrative cost than the classical defenses, without eliminating injurers' incentives.

Still, this argument cannot justify a sharp distinction between consequential and relational economic losses. Where those who expected to benefit from an injured object can take measures to protect their financial interests *ex ante* or find alternative uses for their unharmed means of production *ex post*,¹⁴⁰ they should be encouraged to do so, even if they own that particular object. Any business that can take measures to avoid the economic upshot of a power cutoff can take similar measures where the interruption stems from damage to its own electric cables. The owners of a tugboat whose tow has been injured can ward off their potential loss by hauling another ship, even if they also own the injured tow.¹⁴¹ And the workers at an injured factory can obtain alternative employment during the repairs even if they own that factory.

So far, I have focused on deterrence-oriented arguments. Another common justification for the exclusionary rule derives from the notion of loss spreading. The underlying assumption is that first-party insurance is a more efficient means of spreading relational losses than liability insurance associated with tort liability.¹⁴² First, the cost of information required for the evaluation of the risk is usually higher in the case of liability insurance. A potential relational victim knows better than the potential injurer what the nature of the personal risk is, in what circumstances it will materialize, and what the magnitude of the loss will be.¹⁴³ Second, the costs of establishing the right for compensation are higher in the case of liability insurance because first-party insurance does not

140. I refer here to measures that may only prevent the financial loss, not to those which can prevent the accident itself.

141. However, the law may allow recovery if they do not take the necessary measures to tow another ship. See, e.g., *Domar Ocean Transp., Ltd. v. M/V Andrew Martin*, 754 F.2d 616, 619 (5th Cir. 1985) (holding that where a barge is injured, and the owner of the barge is also the owner of the tugboat, the owner can recover for loss of profits from using the barge and the tugboat alike).

142. *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 54 (1st Cir. 1985); *La. ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1029 (5th Cir. 1985); *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Co.*, [1997] 153 D.L.R.4th 385, 404 (Can.); *Can. Nat'l Ry. Co. v. Norsk Pac. S.S. Co.*, [1992] 91 D.L.R.4th 289, 350 (Can.); *Feldthusen & Palmer*, *supra* note 110, at 437, 443–44 (detailing the advantages of first-party insurance); *James*, *supra* note 101, at 52–53 (same); *Ann O'Brien, Limited Recovery Rule as a Dam: Preventing a Flood of Litigation for Negligent Infliction of Pure Economic Loss*, 31 ARIZ. L. REV. 959, 968 (1989) (same); *Smillie*, *supra* note 77, at 235, 241–42 (same); *Stevens*, *supra* note 98, at 461–62 (same); Note, *Negligent Interference with Contract: Knowledge as a Standard for Recovery*, 63 VA. L. REV. 813, 817 n.34 (1977) (same).

143. See also Recent Cases, *Interference with Business or Occupation—Commercial Fishermen Can Recover Profits Lost as a Result of Negligently Caused Oil Spill—Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974), 88 HARV. L. REV. 444, 449 (1974) (“[I]t is arguably more efficient for potential plaintiffs to obtain first-party insurance on their own limited interests than for potential defendants to obtain insurance in vast amounts for all possible types of economic loss.”).

hinge on tort litigation or tort negotiation.¹⁴⁴ Exclusion of liability induces potential victims to insure themselves against prospective personal losses and potential injurers not to insure themselves against liability for these losses. It thereby guarantees efficient loss spreading while preventing double insurance.¹⁴⁵

But as far as the costs of specific risk evaluation and subsequent litigation are concerned,¹⁴⁶ the apparent advantages of first-party insurance are not limited to relational economic losses. First-party insurance also seems to be a better means of spreading consequential losses.¹⁴⁷ Consider, for example, the railroad bridge case outlined in the introduction. The railway operator and its insurer are better equipped to assess the financial risk than the potential injurer and its insurer, even if the user owns the bridge. In fact, owning the bridge may put the railway operator at a better position than a mere contractual user because long-term possession facilitates accumulation of relevant data. The cost of administering tort liability for consequential loss where the user owns the bridge may be somewhat lower than that of administering liability for relational loss where the user is distinct from the owner. In the former case, the claim attaches to an action for property damage, whereas in the latter it is technically independent. However, in both cases, disallowing recovery saves the administrative cost of tort liability for economic loss. A rule of no recovery surely generates another cost, namely the administrative cost of enforcing the victim's right against the insurer, but the alternative rule involves a similar cost—that of enforcing the injurer's right against its insurer.

Other “justifications” concern administrative costs. A relatively infrequent argument is that purely economic losses may be too difficult to evaluate, especially in cases of interference with mere expectation.¹⁴⁸ A somewhat related argument is that given the speculative nature of economic losses, loss of profits in particular, exclusion of liability is required

144. See also Michael MacGrath, *The Recovery of Pure Economic Loss in Negligence—An Emerging Dichotomy*, 5 OXFORD J. LEGAL STUD. 350, 375 (1985) (“[F]irst party insurance . . . tends to be more readily available at more reasonable rates because of the absence of the high cost of litigation or arbitration . . .”).

145. *Can. Nat'l Ry.*, [1992] 91 D.L.R.4th at 352, 354; Feldthusen, *supra* note 66, at 48–49; James, *supra* note 101, at 54–55. Ambiguous liability formulas (such as “proximity”) frequently result in double insurance.

146. As opposed to the effect of indeterminate number of victims, discussed below.

147. PETER CANE, *TORT LAW AND ECONOMIC INTERESTS* 458 (2d ed. 1996). Some say that most arguments in favor of first-party insurance are also valid with regard to property damage. See, e.g., Margaret Jacobs, *No Liability for Economic Loss?*, 36 MOD. L. REV. 314, 316 (1973). It is unnecessary to discuss this argument here.

148. *Gen. Foods Co. v. United States*, 448 F. Supp. 111, 113 (D. Md. 1978) (“Such suits . . . would produce serious problems in litigation, particularly in the areas of proof and apportionment of damages.”); John G. Rich, *Negligent Interference with Prospective Economic Advantage—J’Aire Corp. v. Gregory*, 1980 UTAH L. REV. 431, 434; Note, *supra* note 142, at 817 (observing that uncertainty in measurement of economic loss is used to justify exclusion of liability).

to hinder inflated or even false claims.¹⁴⁹ These arguments seem quite odd. Considering the objective external manifestation of economic losses, they are not harder to evaluate¹⁵⁰ or easier to fabricate¹⁵¹ than pain and suffering and other non-pecuniary losses that are generally recoverable. Moreover, the plaintiff always bears the burden of proving the loss by a preponderance of evidence. This may deter potential claimants from bringing suit in cases of serious evaluation difficulty and reduce the likelihood of inflated and collusive claims. Lastly, courts have the required expertise to deal with evaluation problems and collusive claims; this is their everyday task.¹⁵² They habitually evaluate economic losses in other contexts, such as breach of contract, economic torts, and misrepresentation.¹⁵³ Yet even if the twin arguments were valid, they would be equally applicable to consequential losses. Difficulty in evaluating a bridge user's loss and any motivation to inflate the claim are equally present where the user owns the bridge and the economic loss is consequential.

Finally, the exclusionary rule is frequently said to provide a certain and easily applicable limitation on tort liability.¹⁵⁴ As a "bright-line rule,"¹⁵⁵ it enables potential injurers and victims to better prepare for contingencies,¹⁵⁶ impels actual victims to avoid fruitless litigation, thereby saving its cost, and makes the administration of tort actions by the courts easier and less costly.¹⁵⁷ A possible response is that justice is more important than certainty;¹⁵⁸ otherwise there would be no liability at all.¹⁵⁹ Liability should be limited in a just and principled manner, not through

149. *Stromer v. Yuba City*, 37 Cal. Rptr. 240, 243 (1964); *Conn. Mut. Life Ins. v. N.Y. & New Haven R.R.*, 25 Conn. 265, 274 (1856); *People Express Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107, 110 (N.J. 1985); *Ferguson v. Green Island Contracting Corp.*, 355 N.Y.S.2d 196, 198 (N.Y. App. Div. 1974); *Spartan Steel & Alloys, Ltd. v. Martin & Co.*, [1972] 3 All E.R. 557, 564 (C.A.) (Eng.); O'Brien, *supra* note 142, at 967; Rich, *supra* note 148, at 434; Kelly M. Hnatt, Note, *Purely Economic Loss: A Standard for Recovery*, 73 IOWA L. REV. 1181, 1183, 1191 (1988); Note, *supra* note 142, at 817.

150. See Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1525 (1985).

151. *Leadfree Enters., Inc. v. U.S. Steel Corp.*, 711 F.2d 805, 808 (7th Cir. 1983); Godwin, *supra* note 107, at 693; Rabin, *supra* note 150, at 1525.

152. *Kinsman Transit Co. v. City of Buffalo*, 388 F.2d 821, 823 (2d Cir. 1968) ("Here, as elsewhere, the answer must be that courts have some expertise in performing their almost daily task of distinguishing the honest from the collusive or fraudulent claim.").

153. See Rabin, *supra* note 150, at 1525.

154. *Candlewood Navigation Corp. v. Mitsui OSK Lines, Ltd. (The Mineral Transporter)*, [1985] 2 All E.R. 935, 945 (P.C.) (appeal taken from N.S.W.) ("[The exclusionary rule] has the merit of drawing a definite and readily ascertainable line."); *Leigh & Silavan, Ltd. v. Aliakmon Shipping Co. (The Aliakmon)*, [1986] 2 All E.R. 145, 153-54 (H.L.) (appeal taken from Eng.) (U.K.) ("simple to understand and easy to apply").

155. See Gabriel, *supra* note 19, at 265; Stapleton, *supra* note 87, at 256.

156. *Can. Nat'l Ry. Co. v. Norsk Pac. S.S. Co.*, [1992] 91 D.L.R.4th 289, 335 (Can.); O'Brien, *supra* note 142, at 967; Smillie, *supra* note 77, at 254.

157. *La. ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1028-29 (5th Cir. 1985) ("[The exclusionary rule] operates as a rule of law and allows a court to adjudicate rather than manage.").

158. Gabriel, *supra* note 19, at 278, 284 ("[The exclusionary rule] does not provide certainty that the potential claimants excluded are the least meritorious."); Sheller, *supra* note 98, at 209.

159. No liability at all is probably the most certain rule and the easiest to apply.

arbitrary bright lines. A milder version of this argument is that certainty may be relevant but not decisive: it must be weighed against other relevant factors. A less certain set of rules may be warranted if it yields fairer or more efficient outcomes. It is thus highly doubtful that certainty can justify blanket exclusion of recovery for all relational losses. More importantly in the current context, certainty cannot justify the consequential-relational loss dichotomy. A rule that precludes recovery for both types of loss is clearly more certain and less arbitrary than a rule that distinguishes them. Similarly, a system that allows recovery for particular consequences of physical injury, whether or not incurred by the primary victim, may be simpler to understand, easier to apply, and less arbitrary than a system that allows recovery for all consequential losses and bars recovery for all relational losses.¹⁶⁰ The traditional dichotomy is not superior to any of these alternatives in terms of certainty.

B. *Incomprehensive*

Some of the common justifications for exclusion of liability for relational losses turn on the fear of open-endedness. In the seminal case of *Ultramares Corp. v. Touche*,¹⁶¹ Justice Cardozo observed that allowing claims for purely economic loss may expose the wrongdoer to “liability in an indeterminate amount for an indeterminate time to an indeterminate class.”¹⁶² Although *Ultramares* was not a relational loss case, the same rationale has been invoked in numerous relational loss cases as the principal reason for exclusion of liability.¹⁶³ The validity of this argument rests on two assumptions: a real likelihood of open-endedness and its undesirability.

The soundness of the first assumption seems self-evident. A negligent infliction of injury to one person may result in economic loss to that person’s relatives, customers, creditors, suppliers, employers, and partners;¹⁶⁴ the loss of each of those may economically affect others and so on. Similarly, injuring a factory may cause economic loss to its suppliers of raw materials, distributors, consumers, business partners,¹⁶⁵ and em-

160. For example, allowing recovery for the cost of using a substitute for the injured object, either by the primary victim or the relational victims, is easier to apply than the traditional dichotomy, because liability for consequential loss of profits may raise serious problems with respect to causation and quantification.

161. 174 N.E. 441 (N.Y. 1931).

162. *Id.* at 444. This case was a negligent misrepresentation case. *Id.* at 442.

163. See *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 54 (1st Cir. 1985); *In re Waterstand Marine, Ltd.*, No. 87-1516, 1988 U.S. Dist. LEXIS 3242, at *12-13 (E.D. Pa. 1988); *Pruitt v. Allied Chem. Corp.*, 523 F. Supp. 975, 979-80 (E.D. Va. 1981); *Byrd v. English*, 43 S.E. 419, 420 (Ga. 1903).

164. See *Champion Well Serv., Inc. v. NL Indus.*, 769 P.2d 382, 385 (Wyo. 1989) (holding that an employer cannot recover economic losses consequent upon a negligent infliction of harm to its key employee).

165. See, e.g., *PPG Indus., Inc. v. Bean Dredging*, 447 So. 2d 1058, 1061-62 (La. 1984); Smillie, *supra* note 77, at 241 (illustrating that interruption of production in one factory may cause economic

ployees;¹⁶⁶ owners of shops and restaurants where employees or their families customarily shop and dine may lose profits; and so forth.¹⁶⁷ Theoretically, such proliferation of economic losses is boundless, so the potential number of relational victims is vast and indeterminate. This phenomenon has been termed “the ripple effect,”¹⁶⁸ “the domino effect,”¹⁶⁹ and the “chain reaction.”¹⁷⁰ The larger the number of valid claims, the more extensive the liability; and if the potential number of victims is large and uncertain, potential liability is also large and uncertain.

Regarding undesirability, three aspects of the ripple effect should be distinguished: the number of victims, the extent of liability, and uncertainty about both. The potential number of victims may in itself have some normative significance. For example, denial of liability in cases of multiple claimants may be the natural and most efficient way to secure loss spreading *ex post*.¹⁷¹ Furthermore, allowing recovery by numerous relational victims will “open the door to a mass of litigation which might very well overwhelm the courts . . .”¹⁷² Slightly rephrased, the possibility of a large number of plaintiffs with somewhat different claims “threatens to raise significantly the cost of even relatively simple tort actions.”¹⁷³ Arguably, this problem may be solved through procedural mechanisms such as consolidation of actions or class actions in appropriate cases,¹⁷⁴ but this is not a perfect solution because courts will still need to determine each plaintiff’s loss and decide whether the defendant’s negligence

loss to those who supply it with raw materials, those who distribute the products, and those who purchase its products).

166. See, e.g., *Stevenson v. E. Ohio Gas Co.*, 73 N.E.2d 200, 203–04 (Ohio Ct. App. 1946).

167. See Smillie, *supra* note 77, at 241.

168. E.g., *Can. Nat’l Ry. Co. v. Norsk Pac. S.S. Co.*, [1992] 91 D.L.R.4th 289, 302 (Can.); Stapleton, *supra* note 87, at 255.

169. E.g., Owen, *supra* note 19, at 163.

170. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 1001 (5th ed. 1984).

171. Hayes, *supra* note 98, at 114 (“[I]t is appropriate that the risk should be shared around.”); O’Brien, *supra* note 142, at 968; Perry, *supra* note 3, at 761–63; Posner, *Common-Law Economic Torts*, *supra* note 110, at 738; Note, *supra* note 142, at 817 n.34 (“A single act easily can interfere with numerous contracts. Denial of recovery may effectively spread the loss over the contractors rather than concentrating it on the individual tort-feasor.”); cf. *Spartan Steel & Alloys, Ltd. v. Martin & Co.*, [1972] 3 All E.R. 557, 564 (C.A.) (Eng.) (“[I]n such a hazard as this, the risk of economic loss should be suffered by the whole community who suffer the losses—usually many but comparatively small losses—rather than on the one pair of shoulders, that is, on the contractor on whom the total of them, all added together, might be very heavy.”).

172. *Dundee Cement Co. v. Chem. Labs., Inc.*, 712 F.2d 1166, 1172 (7th Cir. 1983); *Stevenson v. E. Ohio Gas Co.*, 73 N.E.2d 200, 203 (Ohio Ct. App. 1946); *Caltex Oil (Austl.) Pty. Ltd. v. Dredge “Willemstad,”* (1976) 136 C.L.R. 529, 562–63 (Austl.) (Stephen, J., concurring); *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Co.*, [1997] 153 D.L.R. 4th 385, 404 (Can.); O’Brien, *supra* note 142, at 966; Rich, *supra* note 148, at 434; Smillie, *supra* note 77, at 231; Stevens, *supra* note 98, at 452; Recent Cases, *supra* note 143, at 449; Hnatt, *supra* note 149, at 1183, 1191; Note, *supra* note 142, at 817.

173. *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 54 (1st Cir. 1985).

174. *Caltex*, (1976) 136 C.L.R. at 606 (Murphy, J., concurring); Christopher V. Panoff, In re the Exxon Valdez, Alaska Native Class v. Exxon Corp.: *Cultural Resources, Subsistence Living, and the Special Injury Rule*, 28 ENVTL. L. 701, 711–12 (1998); Wilkinson & Forte, *supra* note 98, at 21.

caused that loss. Where different classes of plaintiffs exist, courts will also need to decide the question of duty for each class. Moreover, each plaintiff may be individually accused of assumption of risk, contributory negligence, or not mitigating the loss.

Still, the relevance of the potential number of claimants largely depends on the rough correlation between the number of valid claims and the extent of tort liability. The likelihood of extensive liability is deemed normatively relevant for several reasons. First, from an interest-hierarchy distributive perspective, assuming that any defendant has a limited pool of assets that all successful claimants ultimately need to share, denial of liability for relational losses may be required to guarantee full recovery for injuries to physical interests which may be considered more worthy of legal protection.¹⁷⁵ This argument loses much of its force in cases of property damage, considering my reservations about the superiority of tangible property to purely economic interests.¹⁷⁶

Second, from a compensatory perspective, assuming once again that defendants have limited funds, each victim may end up with compensation for a very small fraction of his or her loss, making the costly process futile (“mere rhetorical justice”).¹⁷⁷ Third, from a retributive justice perspective, allowing recovery for relational losses may give rise to an abominable disproportion between the severity of the sanction and the gravity of the wrong.¹⁷⁸ An insignificant, and perhaps absentminded, deviation from the objective standard of care cannot justify the imposition of such an onerous penalty.¹⁷⁹

Fourth, the marginal deterrent effect of tort liability is diminishing to zero, either because at a certain point no further precautions are

175. *Can. Nat'l Ry. Co. v. Norsk Pac. S.S. Co.*, [1992] 91 D.L.R.4th 289, 352–53, 355 (Can.) (La Forest, J., dissenting); Geistfeld, *supra* note 9, at 1933–35, 1937–38, 1943, 1950 (applying this argument to emotional and economic losses); Sheller, *supra* note 98, at 205.

176. See *supra* notes 101–07 and accompanying text.

177. *Dominion Tape of Can., Ltd. v. L.R. McDonald & Sons, Ltd.*, [1971] 21 D.L.R.3d 299, 300 (Can.) (“[A] judgment pompously engrossed which cannot be executed for want of sufficient assets on the part of the judgment debtor [turns the trial] into a futile exercise . . .”).

178. *Phoenix Prof'l Hockey Club, Inc. v. Hirmer*, 502 P.2d 164, 165 (Ariz. 1972) (holding that imposition of liability for relational losses “could impose a severe penalty on one guilty of mere negligence”); *Aikens v. Balt. & Ohio R.R.*, 501 A.2d 277, 279 (Pa. Super. Ct. 1985) (observing that imposition of such liability “would create a disproportion between the large amount of damages that might be recovered and the extent of the defendant’s fault”); *Caltex*, (1976) 136 C.L.R. at 551, 562–63, 591; *Can. Nat'l Ry.*, [1992] 91 D.L.R.4th at 365–66; *Leigh & Silavan, Ltd. v. Aliakmon Shipping Co. (The Aliakmon)*, [1986] 2 All E.R. 145, 154 (H.L.) (appeal taken from Eng.) (U.K.); RESTATEMENT (SECOND) OF TORTS § 766C cmt. a (1979) (“[C]ourts apparently have been influenced by . . . the probable disproportion between the large damages that might be recovered and the extent of the defendant’s fault.”); Gabriel, *supra* note 19, at 266; Hayes, *supra* note 98, at 82; O’Brien, *supra* note 142, at 967; Rich, *supra* note 148, at 434; Smillie, *supra* note 77, at 231; Recent Cases, *supra* note 143, at 448; Hnatt, *supra* note 149, at 1183, 1193; Comment, *Foreseeability of Third Party Economic Injuries—A Problem in Analysis*, 20 U. CHI. L. REV. 283, 296, 298 (1953); Note, *supra* note 142, at 817; see also Rabin, *supra* note 150, at 1534, 1538 (asserting that abhorrence of disproportionate penalties for wrongful behavior is the most plausible explanation for judicial reluctance to allow recovery for pure economic loss).

179. But cf. Geistfeld, *supra* note 9, at 1931–32 (criticizing this type of argument).

available or because the expected payment is limited by defendants' financial capacity or statutory caps.¹⁸⁰ Any expansion of the class of victims entitled to compensation carries a price in administrative costs. Allowing recovery where the marginal benefit in terms of deterrence is smaller than the respective cost is economically mistaken. At the same time, unconstrained liability may unduly restrict the freedom of action of potential tortfeasors.¹⁸¹ The fear of open-ended liability may hinder socially beneficial initiatives and activities.

Fifth, from an *ex post* perspective, unconstrained liability may be "crushing." Businesses whose activities are generally beneficial might be overburdened, their operation might be impaired, and some may even collapse.¹⁸² Workers will lose their jobs, and means of production will not be utilized efficiently or remain idle. Sixth, as the extent of potential liability grows, insurance companies may refuse to cover liability, demand an unreasonable premium, or set an upper limit for the cover. Even a large insurance company will not agree to insure potential injurers against potentially catastrophic liability or to set a reasonable premium for an immeasurable risk. This may thwart loss spreading. Seventh, if potential liability is truly very large, potential injurers' motivation to purchase liability insurance, where available, dwindles dramatically, and losses are not spread.¹⁸³

The third aspect of the ripple effect is that the extent of potential liability—the number of potential victims and the particulars of individual harms—is uncertain, leaving potential injurers incapable of preparing for

180. *La. ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1029 (5th Cir. 1985); Harris & Veljanovski, *supra* note 123, at 53. The natural limit of the injurer's liability equals its individual ability to pay. Sometimes a limit on the extent of liability is set by law. *See, e.g.*, 46 U.S.C. app. § 183(a) (2000); Limitation of Liability for Maritime Claims Act, 1989, art. 6g, No. 151 (Austl.); Marine Liability Act, 2001 S.C., ch. 6, §§ 24–34 (Can.); Merchant Shipping Act, 1995, c. 21, § 191 (Eng.); SCHOENBAUM, *supra* note 94, at 808–33.

181. *See Phoenix Profl Hockey Club*, 502 P.2d at 165 ("undue burden on freedom of action"); *Aikens*, 501 A.2d at 279 (using similar language); Godwin, *supra* note 107, at 676 (using similar language); McThenia & Ulrich, *supra* note 110, at 1520 n.17 ("unduly limiting freedom of action for fear of incurring such liability"); O'Brien, *supra* note 142, at 967–68 ("limit a potential tortfeasor's commercial freedom"); Rich, *supra* note 148, at 435 ("unduly restrict the freedom to conduct one's affairs without worrying excessively about the effect it will have on the economic relations of others"); Note, *supra* note 142, at 817 ("unduly restrict the freedom of action of potential tortfeasors").

182. *Dundee Cement Co. v. Chem. Labs., Inc.*, 712 F.2d 1166, 1171 (7th Cir. 1983) ("crushing, virtually open-ended liability"); *Leadfree Enters., Inc. v. U.S. Steel Corp.*, 711 F.2d 805, 808 (7th Cir. 1983) ("crushing liability on a tortfeasor"); *Can. Nat'l Ry.*, [1992] 91 D.L.R.4th at 365–66 ("To permit all economic loss related to a negligent act to be recovered would be to subject potential defendants to liability which . . . may cripple their ability to do business."); Feldthusen, *supra* note 66, at 49 ("ruinous liability"); Hnatt, *supra* note 149, at 1194 ("[T]he burden of excessive liability could cause economic or social dislocation."); Smillie, *supra* note 77, at 231 ("curtailment of productive activity"); Recent Cases, *supra* note 143, at 449 ("[T]he resulting liability might be so great as to cause economic or social dislocation.").

183. *See SHAVELL*, *supra* note 110, at 240 (showing how an injurer whose "assets are lower than the harm they may cause" can be in a better position without insurance); *cf.* Harris & Veljanovski, *supra* note 123, at 53 (noting that potential defendants may underinsure if they believe they are judgment proof or to discourage litigation).

contingencies.¹⁸⁴ Furthermore, uncertainty adds to the above-mentioned advantages of first-party insurance. While first-party insurance covers well-defined injuries to the insured's interests, liability insurance covers third parties' losses, whose number and extent are unknown in advance.¹⁸⁵

These are all legitimate concerns. But none can justify an absolute bar to recovery for relational losses because the assumption of open-endedness is, in fact, unsound in most cases. First, there are fact-situations in which the number of potential victims is limited and reasonably foreseeable. In those situations, any concern related to the "ripple effect" is irrelevant.¹⁸⁶ The argument that in such cases liability should be imposed has nonetheless been rejected in numerous cases.¹⁸⁷ For example, where *P2* bears the risk of injury to *P1*'s property (a classic "transferred loss" case), negligent injury to that property only affects *P2*. The English House of Lords acknowledged that, but adhered to the exclusionary rule and denied recovery by *P2*.¹⁸⁸

Second, there are cases where the number of victims is very limited in reality, although the number of potential victims and expected liability may have been open-ended in foresight. For instance, in several reported cases a negligent injury to an electric cable, with potentially wide-ranging consequences, interrupted production at a single factory.¹⁸⁹ In those cases, the unwarranted effects of numerous claims and extensive liability are no longer relevant. Disallowing recovery is not required to guarantee "natural" *ex post* loss spreading or full recovery for injuries to "more important" interests and is not necessary to prevent mass litigation, financially crushing liability, or abominably disproportionate sanction.¹⁹⁰ Considerations pertaining to the *potential* number of victims are still relevant, but standing alone their justificatory power is much weaker.

Third, a multiplicity of victims does not necessarily yield multiple actions and extensive liability. The fear of open-ended liability implicitly presupposes that all or most victims ultimately sue and recover. This

184. See BERNSTEIN, *supra* note 3, at 200–01; FRANCIS TRINDADE & PETER CANE, *THE LAW OF TORTS IN AUSTRALIA* 371–72 (3d ed. 1999); Stapleton, *supra* note 87, at 254–55.

185. See Posner, *Common-Law Economic Torts*, *supra* note 110, at 737–38.

186. James, *supra* note 101, at 55–57.

187. David W. Robertson, *Recovery in Louisiana Tort Law for Intangible Economic Loss: Negligence Actions and the Tort of Intentional Interference with Contractual Relations*, 46 LA. L. REV. 737, 753–54, 759 (1986); Stapleton, *supra* note 87, at 264.

188. Leigh & Silavan, Ltd. v. Aliakmon Shipping Co. (*The Aliakmon*), [1986] 2 All E.R. 145, 154 (H.L.) (appeal taken from Eng.) (U.K.).

189. See, e.g., Seaway Hotels, Ltd. v. Cragg (Can.), Ltd., [1959] 21 D.L.R.2d 264 (Can.); Main-guard Packaging Ltd. v. Hilton Haulage Ltd., [1990] 1 N.Z.L.R. 360 (H.C. Christchurch); N.Z. Forest Prods. Ltd. v. Attorney-Gen., [1986] 1 N.Z.L.R. 14 (H.C. Auckland).

190. See, e.g., Bishop, *supra* note 108, at 2 (explaining that the loss-spreading rationale cannot justify denial of recovery where there is only one victim); Basil S. Markesinis, *Compensation for Negligently Inflicted Pure Economic Loss: Some Canadian Views*, 109 LAW Q. REV. 5, 10 (1993) (observing that in Judge La Forest's discussion of loss spreading in *CNR* "no specific reply was given for those accidents which involved only one victim").

supposition is clearly false. The ordinary principles of tort liability, such as proximate cause, serve as rough screening devices, reducing the likelihood of recovery by all victims.¹⁹¹ Even those entitled to compensation may choose not to bring an action because tort litigation is wearisome and costly, its outcome is uncertain, and collecting an award may prove difficult, especially if the defendant's resources are limited.¹⁹²

As I will show below, in some civil law jurisdictions there is no bar to recovery for relational losses, and tort liability is nonetheless limited and manageable.¹⁹³ This observation is highly important. The fact that applying ordinary principles of tort law to relational losses has not given rise to the undesirable outcomes enumerated above is compelling evidence that the fears are exaggerated. In conclusion, "ripple effect" arguments are valid, at most, with regard to several categories of cases, such as an injury to a public road or an electric cable; most of the arguments apply only to some of the cases in these categories; and even in these relatively few cases the validity of open-endedness concerns is questionable, because a large number of victims does not necessarily translate into a large number of successful claimants.

C. Fundamentally Flawed

The only attempt to seriously tackle the consequential-relational economic loss dichotomy was made by Mario Rizzo. In his view, where an injury to a certain person or to a person's property may result in economic losses to others and where transaction costs are low, the law seeks to "channel" economic losses through the primary victim to save the cost of multiple tort actions.¹⁹⁴ A channeling contract is a contractual arrangement whereby the primary victim agrees to indemnify relational victims for their losses. Rizzo opined that channeling saves the costs of litigating independent relational loss claims and may thus be economically desirable.¹⁹⁵ The law encourages channeling by denying recovery for relational losses and allowing recovery for economic losses that have been shifted to the primary victim. The former rule induces potential re-

191. Gabriel, *supra* note 19, at 266, 282.

192. Cf. John Summers, Comment, *The Case of the Disappearing Defendant: An Economic Analysis*, 132 U. PA. L. REV. 145, 145, 150 (1983) (observing that if the injurer is insolvent, or it is too costly for the victim to bring an action against the injurer, then from the perspective of the victim, the injurer has "disappeared"; the victim will receive no compensation).

193. *Can. Nat'l Ry. Co. v. Norsk Pac. S.S. Co.*, [1992] 91 D.L.R.4th 289, 384 (Can.) (Stevenson, J., concurring) ("[French law has] no categorical rule preventing the recovery of pure economic loss Yet, the French civil law system works well; insurance is not impossible to get; business is conducted as anywhere else in the world."); Bernard Rudden, *Tortious*, 6 TUL. CIV. L.F. 105, 107 (1991) (observing that "the French seem to ignore almost all of Cardozo's warnings without suffering ill effects").

194. Mario J. Rizzo, *A Theory of Economic Loss in the Law of Torts*, 11 J. LEGAL STUD. 281, 283 (1982).

195. *Id.*

lational victims to demand channeling provisions, and the latter facilitates the primary victim's consent.¹⁹⁶

However, this line of argument seems generally unpersuasive. It is valid only if four conditions are met: (1) allowing recovery for the shifted loss is in itself warranted, (2) the costs of negotiating channeling provisions are truly lower than the subsequent reduction in administrative costs, (3) the traditional legal dichotomy encourages potential victims to negotiate channeling arrangements that they would not otherwise consider, and (4) there is no better way to minimize administrative costs. In most cases, one or more of these conditions will not be met.

Starting with the first condition, contractual channeling merely shifts losses from one person to another but does not change the nature of these losses or the special circumstances in which they occur. The substantive difficulties associated with liability for relational losses, like the fact that many of them are not true social costs, are still relevant after channeling.¹⁹⁷ In those cases, channeling is simply wasteful.

Regarding the second condition, the aggregate costs of channeling will rarely be lower than the subsequent reduction in administrative costs. First, in all cases where the primary victim and the relational victim are not contractually linked, the cost of *ex ante* channeling is very high, so the "channeling theory" cannot justify exclusion of liability for the relational loss.¹⁹⁸ In reality, however, courts consistently apply the exclusionary rule to these cases.¹⁹⁹ Parenthetically, if courts used the channeling theory as a normative guideline, allowing recovery where channeling was unfeasible, they would give noncontractual economic expectations better protection than that given to contractual rights. Absurdly, the fact that relational victims are contractually linked with the primary victim would *diminish* their prospects of recovery.²⁰⁰

Second, even where relational victims are contractually linked with the primary victim, the cost of channeling may be considerable for various reasons.²⁰¹ For example, the potential primary victim often has a greater bargaining power than potential relational victims, as in the case of electricity interruption.²⁰² Moreover, the risk of negligent interference

196. *Id.*

197. Feldthusen & Palmer, *supra* note 110, at 444–45.

198. Rizzo, *supra* note 194, at 301.

199. *See, e.g.*, Rickards v. Sun Oil Co., 4 A.2d 267, 269 (N.J. 1945) (no recovery for relational economic loss despite the unfeasibility of channeling); *see also* Rabin, *supra* note 150, at 1535 n.72 (asserting that the theory cannot explain cases in which recovery was denied even though the victims' losses could not be channeled through a third party).

200. *See* Rizzo, *supra* note 194, at 297 (demonstrating this point in his analysis of *Weller & Co. v. Foot & Mouth Disease Research Inst.*, [1965] 3 All E.R. 560 (Q.B.) (Eng.)).

201. *Can. Nat'l Ry. Co. v. Norsk Pac. S.S. Co.*, [1992] 91 D.L.R.4th 289, 351, 374 (Can.); CANE, *supra* note 147, at 455; William Bishop, *Economic Loss: Economic Theory and Emerging Doctrine*, in *THE LAW OF TORT: POLICIES & TRENDS IN LIABILITY FOR DAMAGE TO PROPERTY AND ECONOMIC LOSS* 73, 75 (Michael Furmston ed., 1986).

202. *See, e.g.*, Byrd v. English, 43 S.E. 419, 420 (Ga. 1903).

with the contract may be so uncommon that the parties cannot foresee it during their negotiations.

Third, even if the cost of channeling in a particular transaction is lower than the resultant reduction in litigation costs in case of an accident, the aggregate cost of channeling may be much higher than the aggregate reduction in litigation costs. This is because most relational economic interests are not accidentally harmed. The aggregate cost of channeling equals the product of the individual cost of channeling and the number of relational interests, whereas the aggregate reduction in litigation cost equals the product of the individual reduction in litigation cost and the number of actual victims who choose to sue.²⁰³

Fourth, many victims settle their claims. The average cost of settling a claim is usually much lower than the average cost of litigation. Hence, the aggregate reduction in administrative costs due to channeling may be lower than the aggregate cost of channeling, even if the latter is lower than the product of individual reduction in litigation cost (in case of litigation) and the number of actual victims who seek compensation.²⁰⁴

Fifth, channeling may generate additional administrative costs. If the primary victim refuses to indemnify the relational victim or if a dispute arises with regard to the extent of the contractual indemnity or the construction of the channeling clause, the disagreement will lead to litigation or further negotiation. Consequently, instead of two tort actions we shall have one but with an additional claim in contracts. I admit that the likelihood of a contractual dispute and its administrative cost are lower than those of a tort dispute, but the expected cost cannot be ignored.

Regarding the third condition, the traditional dichotomy does not always change potential victims' preferences. Most economic interests are not wrongfully harmed, so the expected loss of a potential relational victim may be lower than its personal cost of channeling. Under these circumstances, exclusion of liability for relational losses will not induce potential victims to protect themselves through contract, and injurers will not have to bear their losses. If these losses are true social costs, the exclusionary rule will result in underdeterrence of potential injurers.²⁰⁵ At the same time, when the cost of channeling is low, potential relational victims may insist on channeling, even if liability is imposed for relational losses, in order to reduce their own expected litigation cost.²⁰⁶

Regarding the last condition, even if the cost of channeling is lower than the expected cost of litigation, there are alternative ways, better

203. Bishop, *supra* note 201, at 74.

204. Cf. *id.* at 76 (arguing that the class action suit is "the ultimate consolidating device"); Harris & Veljanovski, *supra* note 123, at 55 (explaining that the threat of litigation is necessary to deter potential wrongdoers).

205. Bishop, *supra* note 201, at 74.

206. Harris & Veljanovski, *supra* note 123, at 70 n.37.

than explicit contractual channeling, to minimize administrative costs. For example, consolidation of tort actions²⁰⁷ may have the same effect as channeling and at a lower cost. Consolidation enables the court to handle all losses arising from a single occurrence together, reducing administrative costs almost like channeling, and at the same time saves the costs of negotiating channeling provisions. Similarly, courts can determine that the contract includes an implied (and reasonable) channeling arrangement. That way, the administrative costs of tort claims will be reduced and the cost of channeling will be saved.²⁰⁸ Alternatively, courts can allow the primary victim to claim damages for the relational losses as a trustee of the relational victims.²⁰⁹

III. A CRITICAL REASSESSMENT

A. *The Main Hypothesis*

As I endeavored to show in Part II, the reasons given for exclusion of liability for relational losses are equally applicable to consequential losses, inapplicable to most cases of relational loss, or fundamentally flawed. The inevitable conclusion is that the law should treat consequential economic losses and relational economic losses similarly, at least as a general rule. Several judges have actually endorsed such a view. Most notably, in the celebrated case of *Junior Books v. Veitchi*,²¹⁰ Lord Roskill explicitly stated: “I see no reason why what was called . . . ‘damage to the pocket’ simpliciter should be disallowed when ‘damage to the pocket’ coupled with physical damage has hitherto always been allowed.”²¹¹ However, this is the minority view. The normative analysis is generally incompatible with existing law.

What then is the explanation for the consequential–relational loss dichotomy? What purpose can it serve? The traditional distinction grants an unparalleled benefit to owners of means of production. It protects their contractual rights and other economic expectations from negligent interference. Other parties, whose contractual rights and economic expectations hinge on the availability and integrity of the same means of production, do not enjoy comparable protection. In addition, the traditional distinction indirectly favors nonowners, who can transfer

207. FED. R. CIV. P. 20(a)(1) (“Persons may join in one action as plaintiffs if [A] they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and [B] any question of law or fact common to all plaintiffs will arise in the action.”). In certain cases a class action under FED. R. CIV. P. 23 will be the appropriate solution.

208. Harris & Veljanovski, *supra* note 123, at 70 n.38.

209. Atiyah, *supra* note 101, at 274–75.

210. *Junior Books, Ltd. v. Veitchi Co.*, [1982] S.L.T. 492, 502 (H.L.) (appeal taken from Scot.) (U.K.).

211. *Id.*; see also *Caltex Oil (Austl.) Pty. Ltd. v. Dredge “Willemstad,”* (1976) 136 C.L.R. 529, 570 (Stephen, J., concurring).

their financial risks to owners through contractual indemnification clauses. Put differently, one may evade the harshness of the “exclusionary rule” and obtain legal protection for one’s financial interests by acquiring ownership of the means of production on which these interests depend or by contractually transferring the risk to the rightful owners.

Consider, for example, the railway bridge case. *P*, who uses a bridge under contract with the owner, is forced to reroute its trains at an additional cost when *D* negligently injures that bridge²¹² or to halt its operation with a subsequent loss of profits.²¹³ *P* cannot recover for the loss. Now assume that *P* purchased the bridge before the accident. This does not change the nature of any of the normatively relevant features of the case: the injurious conduct, the loss, the causal chain, and foreseeability of the loss. However, by purchasing the bridge *P* acquired legal protection for any contractual right and economic expectation that might rely on the physical integrity of the bridge,²¹⁴ in addition to legal protection of the bridge itself.²¹⁵ *P*’s financial interests would also be protected if the contract between *P* and the bridge owner provided that the latter must reimburse the former for any loss incurred while the bridge was unusable. In theory, *P* could evade the exclusionary rule in these two ways.

Now consider the time charterer case. *P*, operating a ship as a time charterer, loses profits when *D* injures the ship. *P* is not entitled to compensation.²¹⁶ If *P* bought the ship, *P* would be allowed to recover not only the cost of repair, but also any loss of profits.²¹⁷ Similarly, *P*’s interests would be protected if the owner were obliged under the charter to compensate *P* for any loss incurred while the ship was unseaworthy. Once again, *P* had two ways to evade the harshness of the traditional dichotomy.

Lastly, consider the injured workplace case. Workers at a damaged shop owned by another cannot recover for lost wages during the repairs.²¹⁸ However, if these workers bought the shop, they would be enti-

212. See *supra* note 4 and accompanying text.

213. Cf. *Corpus Christi Oil & Gas Co. v. Zapata Gulf Marine Corp.*, 71 F.3d 198, 202–03 (5th Cir. 1995) (holding that a company that used a pipeline under contract with its owner cannot recover loss of profits incurred following a negligent infliction of harm to that pipeline).

214. See, e.g., *In re Canal Barge Co.*, 323 F. Supp. 805, 823 (N.D. Miss. 1971) (allowing bridge lessee to recover for increased operating costs and loss of revenue following damage to the bridge).

215. *Id.* (holding that the bridge owner is entitled to compensation for the cost of repair).

216. See, e.g., *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 308–09 (1927) (holding that a person with a contractual right of use in property negligently damaged by the defendant cannot recover for lost profits); *Fed. Commerce & Navigation Co. v. M/V Marathonian*, 392 F. Supp. 908 (S.D.N.Y. 1975), *aff’d*, 528 F.2d 907 (2d Cir. 1975) (same); *Rederi A/B Soya v. Evergreen Marine Corp.*, 1972 A.M.C. 1555, 1562–66 (E.D. Va. 1971), *aff’d*, 1973 A.M.C. 538 (4th Cir. 1972) (same); *Candlewood Navigation Corp. v. Mitsui OSK Lines, Ltd. (The Mineral Transporter)*, [1985] 2 All E.R. 935, 938–40 (P.C.) (appeal taken from N.S.W.).

217. Cf. *Bosnor, S.A. de C.V. v. Tug L.A. Barrios*, 796 F.2d 776, 783 (5th Cir. 1986) (finding that a demise charterer of a vessel, being in possession of the vessel, is entitled to compensation for loss of profits when the vessel is injured).

218. E.g., *Henderson v. Arundel Corp.*, 262 F. Supp. 152, 159–60 (D. Md. 1966) (holding that a defendant whose negligence caused damage to plaintiffs’ workplace is not liable for their lost wages);

tled to compensation not only for the cost of repair but also for lost income. Alternatively, the workers' interests would be protected if the employer were obliged to pay their wages during the repairs.²¹⁹

These escape routes from the exclusionary rule are theoretically available in many relational loss cases. Where a person's financial interests depend on the availability and integrity of a certain object, that person can obtain legal protection for those interests by acquiring the relevant object or negotiating a contractual transfer of the risk to the owner. This leads us to proposition 1: *Tort law favors those who own means of production or who can easily transfer their financial risks to owners.*

Now we must ask ourselves who ultimately benefits from this legal reality. A relatively affluent person, who wishes to use a certain object, and is not satisfied with a contractual—partly protected—right, can purchase that object and use it as an owner. A prosperous railway company may buy the bridge; a well-off user of marine transportation can buy the ship. If the object is injured, the owner is entitled to compensation for economic loss consequent on that injury. A less wealthy person will not be able to purchase the object and will have to use it under contract or some other relation with the owner. The wealthier potential victims are, the easier it is for them to accumulate the means of production they need to pursue their goals. This leads us to proposition 2: *The ability to acquire means of production is correlative with wealth.*

A person who wishes to use a certain object without bearing the risk of unavailability and without having to purchase it might wish to negotiate an indemnification clause with the owner. But the price that this person will have to pay for the owner's consent, hence the likelihood of acquiring contractual protection, depends on that person's relative bargaining power. The more powerful that person is, the higher the likelihood of obtaining contractual protection. This leads us to the somewhat trivial proposition 3: *The ability to evade the exclusionary rule through contract with the owner is correlative with bargaining power.*

From propositions 1, 2, and 3 we can deduce that the consequential-relational economic loss dichotomy operates much like regressive taxation. It affords differential protection to economic interests: the more affluent and powerful potential victims are, the easier it is for them to evade the exclusionary rule and gain legal protection for their economic expectations. The traditional—seemingly formal—distinction between consequential and relational losses further empowers the powerful.

Adams v. S. Pac. Transp. Co., 123 Cal. Rptr. 216, 216–18 (Ct. App. 1975) (same); Willis v. Ga. N. Ry. Co., 314 S.E.2d 919, 919–20 (Ga. Ct. App. 1984) (same); Local Joint Executive Bd. of Las Vegas v. Stern, 651 P.2d 637, 638 (Nev. 1982) (same); Aikens v. Balt. & Ohio R.R., 501 A.2d 277, 278–79 (Pa. Super. Ct. 1985) (same); cf. Stevenson v. E. Ohio Gas Co., 73 N.E.2d 200, 203–04 (Ohio Ct. App. 1946) (holding that workers whose workplace was shut down following a nearby conflagration cannot recover for lost wages).

219. Cf. George A. Hormel & Co. v. Maez, 155 Cal. Rptr. 337, 338, 341 (1979) (allowing the owner of an injured factory to recover for wages paid to idled employees).

I do not contend that wealthier or more powerful parties will always or usually use one of the paths outlined above to acquire protection for their economic interests. In certain cases, they will not foresee the risks associated with their dependence on the availability or integrity of others' means of production, and in other cases they may choose not to protect themselves at all or to use alternative methods, such as self-insurance. The essence of my hypothesis is that the law makes it easier for them to acquire legal protection. A systematic bias exists in favor of the wealthy and the powerful.

One may argue that the differential protection is fair because a person who purchases means of production or transfers financial risks to others pays for the additional protection. This argument is problematic. In the case of a purchase, the buyer pays the market value of a certain object. Tort law provides full protection for this value through compensation for the cost of repair or replacement following a wrongful injury. Protecting the owner's contractual rights and mere expectations is a bonus. But even one who does not accept this counter-argument should be troubled by the fact that the wealthier can acquire legal protection that the poorer cannot, at a presumably lower cost than its true worth. In the case of a contractual transfer of risk, the price of the transfer—hence its likelihood—stands in inverse ratio to the potential victim's bargaining power: the stronger the party, the lower the price of risk transfer, and the higher its likelihood.

A possible criticism of my analysis hinges on the assumption that potential victims can purchase insurance for their economic interests.²²⁰ They are likely to buy insurance even if their prospective losses, or some of them, may be recoverable in tort, because insurance covers nontortious interruptions as well. Ultimately, both consequential and relational losses may be covered by the same type of insurance. Now, if economic loss insurance rates are determined by projected income and a *general* assessment of the risk,²²¹ the likelihood of recovery in tort in cases of negligent interruption might not have an effect on the premium. Hence, consequential and relational losses will not only be covered by similar insurance policies but also at a similar price. In that case, the economically powerful are favored only *de jure*, not *de facto*.

This argument is flawed for three reasons. First, it assumes the availability and prevalence of first party insurance for all or most economic risks. Unfortunately, no general insurance against economic losses exists, due to the extreme moral-hazard problems that it would raise.²²² Business interruption insurance and key-person insurance cover

220. Cf. Smillie, *supra* note 77, at 241 (assuming the availability of business interruption insurance for a different purpose); Stevens, *supra* note 98, at 462–63 (same).

221. See Mark E. Battersby, *Insurance Essentials: Figuring Out What Kinds and How Much Insurance You Need*, PA. LAW., Jan.–Feb. 2007, at 42, 45 (stating that the premium is usually based on annual income).

222. Bishop, *supra* note 108, at 2.

only specified events and particular losses²²³ and are not available to all persons, businesses, and organizations. More important, coverage under business interruption insurance typically requires physical injury to the business,²²⁴ making relational losses not only irrecoverable in tort, but also uninsurable. Finally, to the extent that insurance against economic risks is available, its price might be too high to purchase. Numerous relational loss cases demonstrate that potential economic victims are frequently uninsured, even when their expected losses are irrecoverable in tort.

Second, the criticism assumes that the existence of a right of action in tort does not affect insurance rates. Theoretically, persons whose financial interests are protected from negligent interference under tort law may not need insurance against such risks, so they can apply for a more limited coverage at a lower price. Assuming, *arguendo*, that insurance companies do not allow such limitations, those whose economic losses are more likely to be covered by tort law will still pay less for their insurance. Upon payment to the insured, an insurer is entitled to be subrogated to the extent of its payment to any right of action that the insured may have against a third person whose negligence caused the loss.²²⁵ The insured's right of action reduces the insurer's expected payout, so the higher the likelihood of tort recovery the lower the premium.

Third, the criticism assumes that the economic environment in which the traditional dichotomy crystallized and has persisted for years has always been similar to the one we know today. But business interruption insurance emerged in Anglo-American markets only in the late-nineteenth century²²⁶ and was unreservedly dependent on physical injury to the insured for many decades.²²⁷ So even if it has marginally alleviated the economic bias in tort law, it has done so only in recent times.

Common-law judges have consistently upheld the consequential-relational loss dichotomy. In other words, they advanced an inegalitarian redistributive scheme, at least unconsciously. I do not espouse a stronger version of this argument, whereby judges have deliberately and consciously attempted to shore up the stronger segments of society. But we cannot ignore the inevitable outcome of consistent adherence to the traditional dichotomy. I assume, therefore, that common-law judges' subconscious inclination to support stronger parties has played a role in

223. See Shirley R. Brener, Comment, *Outgrowing Impossibility: Examining the Impossibility Doctrine in the Wake of Hurricane Katrina*, 56 EMORY L.J. 461, 497 (2006).

224. See 2 JEFFREY W. STEMPEL, STEMPEL ON INSURANCE CONTRACTS § 22.02 (3d ed. 2006); William H. Danne, Annotation, *Business Interruption Insurance*, 37 A.L.R.5th 41 § 16 (1996); Jeffrey W. Stempel, *A Mixed Bag for Chicken Little: Analyzing Year 2000 Claims and Insurance Coverage*, 48 EMORY L.J. 169, 214-15 (1999).

225. 44A AM. JUR. 2D *Insurance* § 1768 (2007).

226. See Mauro Bussani et al., *Liability for Pure Financial Loss in Europe: An Economic Restatement*, 51 AM. J. COMP. L. 113, 117 n.13 (2003).

227. See GORDON J.R. HICKMOTT, PRINCIPLES AND PRACTICE OF INTERRUPTION INSURANCE 3-4 (1982).

shaping the law. In speaking about subconscious tendency, my hypothesis is more akin to Posner's original economic theory of the law²²⁸ than to conspiracy theories of the Horwitzian type.²²⁹ Although I dispute Posner's perception of the judicial motivation, I hesitate to attribute to common-law judges any intention to widen socioeconomic gaps.

B. A Wider Context

If my hypothesis is correct, and the traditional dichotomy may be associated with a certain political inclination of Anglo-American judges, then we should expect other manifestations of that background in tort law and probably in other fields as well. Associating an esoteric legal distinction with a judicial *Weltanschauung* may seem quite dubious if it turns out that it had no further impact on judge-made law. The purpose of this Section is to demonstrate that the political understanding of the economic loss distinction fits with a more general theory of tort law. Put differently, *Robins* is an unremarkable tile in a larger mosaic. I do not contend that tort law perfectly conforms to a monistic interpretive theory. Such an argument is inevitably false, given the diversity and complexity of ideas and forces that have affected the development of the common law throughout modern history. But if the traditional dichotomy truly reflects a certain political inclination, it cannot be the sole reflection.

The inegalitarian underpinnings of current tort law are primarily evident in the law of damages. First, tort damages for pecuniary losses reproduce existing distribution of wealth and income.²³⁰ Compensation for property damage upholds the unequal distribution of property²³¹ and the belief that victims' worth is proportional to the value of their property.²³² Compensation for loss of income in cases of bodily injury or wrongful death endorses the legitimacy of existing income distribution and the intergenerational reproduction of inequality.²³³ The compensation system is systematically biased against homemakers, the unem-

228. See, e.g., Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 763–64 (1975) (explaining that important elements of tort law “can best be understood as attempts, though rarely acknowledged as such, to promote an efficient allocation of resources”).

229. Cf. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860*, at 253–54 (1977) (“As political and economic power shifted to merchant and entrepreneurial groups in the postrevolutionary period, they began to forge an alliance with the legal profession to advance their own interests through a transformation of the legal system.”); see also Charles J. McClain, *Legal Change and Class Interests: A Review Essay on Morton Horwitz's The Transformation of American Law*, 68 CAL. L. REV. 382, 391–92 (1980) (“The Horwitz thesis is therefore one that posits orchestrated and purposive legal change.”).

230. Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 799 (1990).

231. *Id.* at 823.

232. *Id.* at 803. Abel consequently argued that property loss should not be compensated. *Id.* at 823.

233. *Id.* at 803; Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV. 719, 731–32 (2003) (noting that “higher-earning victims receive greater awards than lower earners”).

ployed, working women and minorities, and other economically deprived sectors.²³⁴ Tort law treats humans unequally.²³⁵ The costs of preserving this inequality are borne by the public at large. All those who buy liability insurance, purchase products or services, or pay taxes subsidize the more extensive protection of victims from higher socioeconomic sectors.²³⁶ One may argue that any attempt to challenge the principle of full compensation for harm caused by wrongful conduct defies the basic structure of tort law. But as Goldberg recently pointed out, this principle emerged only in the mid- to late-nineteenth century²³⁷ and is not an inexorable feature of tort law.²³⁸

Second, according to one view, tort damages for non-pecuniary damages extend the capitalist concept of commodification to human suffering: damages for pain and suffering commodify unpleasant experience;²³⁹ awards for injuries to relationships, such as loss of parental society and companionship, loss of spousal consortium,²⁴⁰ or emotional harm following an injury to a loved one²⁴¹ commodify love.²⁴² Non-pecuniary damages also dehumanize the response to misfortune, substituting money for compassion.²⁴³ This argument may be deemed somewhat problematic, because monetary compensation can be used to alleviate pain and different types of human suffering. A better view is that “[a]lthough some legitimately worry about the commodification of intangible losses . . . the only thing worse than having one’s pain reduced to money is having one’s pain reduced to very little money.”²⁴⁴ The real problem then is that, in assessing non-pecuniary damages, jurors may show more sympathy for those who enjoyed more pleasant lives prior to

234. See, e.g., Chamallas, *supra* note 11, at 464–65 (observing that women of all races and minority men continue to receive significantly lower damage awards than white men in personal injury and wrongful death suits); see also *id.* at 481–82 (contending that estimates of work-life expectancy and the amount the plaintiff would have earned each year are gender- and race-biased); Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435, 1438–39 (2005) (same); Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1280 (2004) (noting that “women, minorities, and the poor receive lesser amounts of economic loss compensation than more economically well off white men”).

235. Abel, *supra* note 230, at 823.

236. *Id.* at 799.

237. John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 437, 438–46 (2006).

238. In fact, even current law does not truly abide by the principle of full compensation. Most notably, the prevailing litigant is ordinarily not entitled to collect attorneys’ fees from the loser. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975).

239. Abel, *supra* note 230, at 803–04 (“The jury, therefore, must simulate a market in sadomasochism by asking what they would charge to undergo the victim’s misfortune. Tort law thus transforms an involuntary past sacrifice (injury) into future gain (damages), reflecting bourgeois notions of delayed gratification and an instrumental view of the self.”).

240. See, e.g., *Rodriguez v. Bethlehem Steel Corp.*, 525 P.2d 669 (Cal. 1974).

241. See, e.g., *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968).

242. Abel, *supra* note 230, at 805–06.

243. *Id.* at 823.

244. Chamallas, *supra* note 234, at 1437–38.

their injury.²⁴⁵ Moreover, tort reforms usually cap non-pecuniary damages, suggesting that these damages are somehow less essential to a fair system of compensation than damages for pecuniary losses.²⁴⁶ These reforms seem to have a more significant impact on weaker victims who are less likely to recover large sums for wage replacement and other economic losses, such as homemakers or the unemployed.²⁴⁷ Similarly, workers' compensation schemes deprive injured employees, a patently weak sector, of the right to compensation for non-pecuniary losses, exacerbating the inequalitarian structure of the law.²⁴⁸

Differential compensation inevitably turns into differential exposure to risk. An entrepreneur will spend less to protect those who are less likely to sue and will recover lower damage awards: "poor, unemployed, young, old, or inadequately educated individuals, racial minorities, noncitizens, and women."²⁴⁹ Endangering lower classes is always cheaper. Thus, cheap consumer products are more dangerous, low-paid workers are more likely to incur serious injuries and illnesses at work, and the lower-class population is exposed to greater pollution.²⁵⁰

The political background of modern tort law is also manifest in substantive tort doctrine. Morton Horwitz opined that the emergence of negligence as a general precondition for liability, and the decline of the basic presumption of compensation for injury in the nineteenth century were aimed at supporting those who undertook schemes of economic development, at the expense of economically weaker, less active, and less organized segments of society.²⁵¹ Victims were practically forced to subsidize entrepreneurs. In his view, this change in tort doctrine reflects a more profound transformation of American law during the antebellum period, whereby courts attempted to promote economic growth regardless of the resulting redistribution of wealth and power.²⁵² Without expressing an opinion about the validity of his conspiracy theory, the shift from strict liability to negligence clearly buttressed the stronger sectors, to the detriment of the weaker.

But this is only part of the story. Negligent conduct is regularly defined by the celebrated Hand formula,²⁵³ which relates three variables in

245. Abel, *supra* note 230, at 800.

246. Chamallas, *supra* note 11, at 503–04, 519–20; *see, e.g.*, *Fein v. Permanente Med. Group*, 695 P.2d 665, 681 n.17 (Cal. 1985) ("The first priority of the tort system is to compensate the injured party for the economic loss he has suffered.").

247. Chamallas, *supra* note 234, at 1437; Finley, *supra* note 234, at 1281–82, 1313 (observing that noneconomic loss damages are more important for women, racial minorities, and the elderly, who may suffer little economic loss, and that several types of injuries that are disproportionately suffered by women do not affect women in primarily economic terms).

248. Abel, *supra* note 230, at 803.

249. *Id.* at 809.

250. *Id.*

251. HORWITZ, *supra* note 229, at 85–101.

252. *Id.* at xv–xvi.

253. *See* William E. Nelson, *From Fairness to Efficiency: The Transformation of Tort Law in New York, 1920–1980*, 47 BUFF. L. REV. 117, 217–20 (1999) (demonstrating the dominance of the Hand

an algebraic inequality: if the probability of harm is called P , the severity of harm L , and the burden of precautions needed to eliminate the risk B , “liability depends upon whether B is less than L multiplied by P : i.e., whether $B < PL$.”²⁵⁴ Put differently, failure to take cost-justified precautions is negligent.²⁵⁵ This formula is patently biased in favor of the privileged. First, it favors those who have the resources to engage in hazardous activities. It permits actions that expose others to significant risks as long as aggregate welfare increases.²⁵⁶ Choosing to act in a way that creates a serious risk may be deemed “reasonable” even if it does not benefit anyone but the person who has made that choice, provided that the benefit is larger than the expected cost.²⁵⁷ The ability to initiate and engage in highly profitable activities that imperil others is usually correlative with wealth and power. Second, the Hand formula links the required expenditure on safety with expected loss, thereby affording weaker protection to lower-class victims, whose expected loss is lower.²⁵⁸

The inegalitarian undertone is also present in the realm of defenses. Courts have denied liability under theories of victims’ consent even though that consent was frequently given “within an environment of limited and grossly unequal economic resources, influenced by divergent cultural norms about their entitlement to safety and suffering from a profound sense of political powerlessness.”²⁵⁹ The assumption of risk defense often reflects an unrealistic conception of free choice. For example, courts held that people who have dangerous jobs, such as firefighters, police officers, or even assistant veterinarians, assumed job-

formula). *But cf.* Ronen Perry, *Re-Torts*, 59 ALA. L. REV. (forthcoming 2008) (challenging the dominance of the Hand formula).

254. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

255. Section 3 of the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (Proposed Final Draft No. 1, 2005) embraced this formula. *See, e.g.*, Stephen R. Perry, *Cost-Benefit Analysis and the Negligence Standard*, 54 VAND. L. REV. 893, 894 (2001); Kenneth W. Simons, *The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness as Well as Efficiency Values*, 54 VAND. L. REV. 901, 902 (2001).

256. *Cf.* Heidi M. Hurd, *Is It Wrong to Do Right When Others Do Wrong?*, 7 LEGAL THEORY 307, 307 (2001) (“[T]he Hand Formula appears to allow rights violations in the name of utility or wealth maximization . . .”); Perry, *supra* note 255, at 897 (“[A]n understanding of negligence that permitted one person unilaterally to impose substantial risks on others simply because the costs of prevention were too high is very unlikely to be acceptable from a non-consequentialist perspective.”).

257. Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 AM. J. JURIS. 143, 162 (2002) (observing that the Third Restatement allows, indeed requires, a person to engage in conduct that imposes even very serious risks on others as long as the benefits the person expects to obtain from the conduct outweigh the risks to those others).

258. Economically powerful sectors have more holdings and higher income, so their expected loss from exposure to a particular risk is higher. *Cf.* Tsachi Keren-Paz, *An Inquiry into the Merits of Redistribution Through Tort Law: Rejecting the Claim of Randomness*, 16 CAN. J.L. & JURISPRUDENCE 91, 95–96 (2003) (illustrating the regressive nature of the Hand formula). Keren-Paz misses a crucial point, though. The inverse ratio between potential victims’ economic power and their exposure to risk exists even under a rule of strict liability. As explained above, expected liability is determined by expected loss, so potential injurers who expose others to risk in pursuance of their goals will choose to endanger economically weaker parties even under strict liability.

259. Abel, *supra* note 230, at 820–21.

related risks by voluntarily engaging in those occupations.²⁶⁰ The related fellow-servant rule, whereby an employer is not liable for injuries negligently inflicted by one employee upon another,²⁶¹ was also explained in terms of assumption of risk.²⁶² Still, it is regarded by many as a conscious attempt to assist entrepreneurial classes by reducing their expected liability.²⁶³ Similarly, several courts found that victims “chose” to use dangerous products where no reasonable alternative existed.²⁶⁴ Another manifestation of the tilted conception of free choice is the occasional validation of disclaimers and “agreements not to sue” in cases of unequal bargaining power,²⁶⁵ although courts are now more reluctant to enforce such waivers in cases of gross imbalance.²⁶⁶

C. *The Exceptions*

If the consequential-relational loss dichotomy reflects an inegalitarian judicial inclination, it is likely that the exclusionary rule has been relaxed where an exception clearly served wealthier or more powerful

260. Including those attributable to third parties' negligence. See, e.g., *Nelson v. Hall*, 165 Cal. App. 3d 709, 714, 715 (1985) (holding that a veterinary assistant bitten by a dog in the course of treatment cannot sue its owners, because in choosing to engage in this occupation he assumed the risk of being bitten); *Cooper v. City of N.Y.*, 619 N.E.2d 369, 372 (N.Y. 1993) (“[I]ndividuals who elect to join the uniformed services do so with knowledge of the dangers attendant upon those occupations and the distinct possibility that they might be hurt in the course of their employment.”) (quoting *Pascarella v. City of N.Y.*, 538 N.Y.S.2d 815, 820 (N.Y. App. Div. 1989)); *Kenavan v. City of N.Y.*, 517 N.E.2d 872, 874 (N.Y. 1987) (holding that firefighters assume the risk of injuries caused by third parties' negligence in the course of duty). Sometimes it is said that firefighters, police officers, and the like are compensated for taking the risk through their salaries and workmen's compensation schemes. See, e.g., *Walters v. Sloan*, 571 P.2d 609, 612–13 (Cal. 1977) (holding that a police officer injured while performing official duties cannot recover for a negligent act which created the occasion for the officer's employment: “Firemen and policemen are paid for the work they perform including preparation for facing the hazards of their professions”); *Krauth v. Geller*, 157 A.2d 129, 131 (N.J. 1960) (“[T]he fireman should receive appropriate compensation from the public he serves, both in pay which reflects the hazard and in workmen's compensation benefits for the consequences of the inherent risks of the calling.”).

261. Comment, *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837–1860*, 132 U. PA. L. REV. 579, 579, 588, 590 (1984).

262. *Farwell v. Boston & Worcester R.R.*, 45 Mass. 49, 57 (1842) (“[H]e who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services. . . . [including] perils arising from the carelessness and negligence of those who are in the same employment.”).

263. *Buckley v. City of N.Y.*, 437 N.E.2d 1088, 1089 (N.Y. 1982) (“[T]he rule simply reflected a 19th century bias by the courts in favor of business”); Comment, *supra* note 261, at 593–94.

264. MARK A. GEISTFELD, *PRINCIPLES OF PRODUCTS LIABILITY* 231–33 (2006) (criticizing this practice).

265. See, e.g., *Ciofalo v. Vic Tanney Gyms, Inc.*, 177 N.E.2d 925, 926–27 (N.Y. 1961) (giving effect to a gymnasium membership contract whereby members assume full responsibility for any injuries they incur at the gymnasium, including those caused by the owner's negligence); *Baschuk v. Diver's Way Scuba, Inc.*, 618 N.Y.S.2d 428, 429 (N.Y. App. Div. 1994) (holding that a liability release signed by a student in a scuba diving course was enforceable to absolve the course sponsor from consequences of all negligence).

266. See, e.g., *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441 (Cal. 1963) (invalidating exemption clause due to unequal bargaining power); *Johnston v. Fargo*, 77 N.E. 388 (N.Y. 1906) (same).

parties. Once again, given the diversity and complexity of factors that had an impact on the development of tort doctrine, we cannot expect the intricacies of tort law to fully comply with the general hypothesis.

The most noteworthy exceptions to the traditional dichotomy concern loss of another person's services. For centuries, the common law allowed employers whose employees were negligently injured by third parties to sue the injurers for loss of services (*actio per quod servitium amisit*).²⁶⁷ In 1956, the English Court of Appeal confined this action to the realm of domestic relations, where a member of the master's household was injured,²⁶⁸ and in 1982, it was completely abolished by Parliament.²⁶⁹ The action gradually fell into disuse in the United States during the second half of the twentieth century²⁷⁰ but has survived and even expanded beyond its historical bounds in Australia²⁷¹ and Canada.²⁷²

Similarly, a husband had a cause of action against any person who negligently injured his wife for loss of consortium (*actio per quod servitium amisit*).²⁷³ From the early 1980s the action was abolished by statute in England,²⁷⁴ and in some jurisdictions in Australia²⁷⁵ and Canada,²⁷⁶ whereas courts in the United States expanded it during the second half of the twentieth century by allowing recovery to women whose husbands were wrongfully injured.²⁷⁷ Finally, a father had a cause of action against those who injured his children, depriving him of their services.²⁷⁸ This action was also abolished in England²⁷⁹ but extended to the mother in the United States.²⁸⁰ Generally, children do not have a cause of action for loss of parental consortium or services in case of injury to a parent.²⁸¹

267. Warren A. Seavey, *Liability to Master for Negligent Harm to Servant*, 1956 WASH. U. L.Q. 309, 311; Comment, *supra* note 178, at 291.

268. *Inland Revenue Comm'rs v. Hambrook*, [1956] 2 Q.B. 641, 666 (C.A.) (Eng.).

269. Administration of Justice Act, 1982, c. 53, § 2(c)(i) (Eng.).

270. See, e.g., *Phoenix Prof'l Hockey Club, Inc. v. Hirmer*, 502 P.2d 164, 164-65 (Ariz. 1972); *Cravens/Pocock Ins. Agency, Inc. v. John F. Beasley Constr. Co.*, 766 S.W.2d 309, 311-12 (Tex. App. 1989).

271. *Comm'r for Rys. (N.S.W.) v. Scott* (1959) 102 C.L.R. 392, 410-18 (Austl.).

272. *Kneeshaw & Spawton's Crumpet Co. v. Latendorff*, [1965] 54 D.L.R.2d 84, 87-89 (Alta.); *Genereux v. Peterson Howell & Heather (Can.) Ltd.*, [1972] 34 D.L.R. 3d 614, 620-27 (Ont. C.A.); *Nugent v. Bd. of Rosetown Sch. Unit No. 43*, [1979] 79 D.L.R. 3d 394, 397-99 (Sask. C.A.).

273. Green, *supra* note 3, at 465-66; Evans Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 2 (1923); Susan G. Ridgeway, *Loss of Consortium and Loss of Services Actions: A Legacy of Separate Spheres*, 50 MONT. L. REV. 349, 354 (1989); Kevin Lindsey, Note, *A More Equitable Approach to Loss of Spousal Consortium*, 75 IOWA L. REV. 713, 713 (1990); Comment, *supra* note 178, at 292.

274. Administration of Justice Act, 1982, c. 53, § 2(a) (Eng.).

275. See TRINDADE & CANE, *supra* note 184, at 536-37.

276. See, e.g., Family Relations Act, R.S.B.C., ch. 128, § 123 (1996) (B.C.); Equality of Status Act, R.S.M., ch. E-130, § 1(1)(c) (1987) (Man.).

277. The seminal case was *Hitafer v. Argonne Co.*, 183 F.2d 811 (D.C. Cir.). See also Lindsey, *supra* note 273, at 714, 718.

278. Green, *supra* note 3, at 479; Ridgeway, *supra* note 273, at 354-55.

279. Administration of Justice Act, 1982, c. 53, § 2(b) (Eng.).

280. Ridgeway, *supra* note 273, at 351, 362.

281. *Id.* at 351. There are very few exceptions. See, e.g., *Ferriter v. O'Connell's Sons, Inc.*, 413 N.E.2d 690, 693 (Mass. 1980) (allowing recovery for loss of parental consortium).

How can these exceptions be explained? In Roman law, the *paterfamilias* governed all members of his household, including his wife, children, servants, and slaves. When one of these persons was injured, the *paterfamilias* was the only one entitled to sue the injurer.²⁸² The master's cause of action for the loss of his servant's services was introduced into the common law in the thirteenth century, although in a slightly altered form, and the actions for the loss of a wife's consortium and of a child's services followed.²⁸³ In common law, the master's right of action was "comparable to a modern action for negligent injuries to a chattel. The chattel owner is allowed recovery both for the cost of the chattel's repair and the loss of use value entailed during the period in which the repairs are being made."²⁸⁴ The rights of the husband and the father were similarly understood.²⁸⁵ In their historical form then, these actions were not regarded as exceptions to the traditional dichotomy. However, regardless of judicial rhetoric, the legal protection of relational interests was clearly biased in favor of the stronger parties in basic interpersonal relationships: the employer, the husband, and the father.²⁸⁶ Courts empowered the powerful by recognizing asymmetrical proprietary or quasi-proprietary rights. Moreover, the ancient actions survived for a relatively long time after the demise of the ancient perception of interpersonal relationship. Their survival through the nineteenth century and most of the twentieth century can be explained by a mixture of judicial conservatism²⁸⁷ and indifference to the clear bias in favor of the powerful.

Other exceptions are esoteric doctrines with very limited application in maritime law. One such doctrine concerns fishing joint ventures pursued under profit-sharing agreements between ship owners, net owners, and crew members. Several courts have opined that fishermen are

282. Ridgeway, *supra* note 273, at 352–53; Francis Bowes Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 663–64 (1923); Thomas W. Tucker, *Sources of Louisiana's Law of Persons: Blackstone, Domat, and the French Codes*, 44 TUL. L. REV. 264, 267 (1970).

283. Godwin, *supra* note 107, at 666–67; Ridgeway, *supra* note 273, at 353; John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690, 746 (2001).

284. Comment, *supra* note 178, at 292; *see also* Stevens, *supra* note 98, at 447 ("[A] master retained a proprietary right in his servant . . .").

285. Chamallas, *supra* note 11, at 527 ("[T]he husband owned the services of the wife, in much the same way that the master owned the services of his servant."); Jacob Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 653 (1930) ("[B]oth wife and servant are considered chattels . . . [The relationship] gave to the husband a proprietary interest in [his wife] . . ."); Ridgeway, *supra* note 273, at 355 ("[T]he law recognized the father as master and the child as his capital asset."); Seavey, *supra* note 267, at 310 ("[T]he husband or father was in possession of the spouse or daughter."); Stevens, *supra* note 98, at 444 ("[A man has] certain proprietary rights in his wife."); Lindsey, *supra* note 273, at 713 ("[The wife was] the property of her husband . . . a party injuring a wife . . . infringed on the husband's proprietary interest.").

286. Cf. Chamallas, *supra* note 11, at 501 (explaining that the old claims were "given only to the dominant party"); Green, *supra* note 3, at 484 (noting that a child did not have a cause of action when a parent was injured).

287. See Seavey, *supra* note 267, at 310 ("It is seldom that an interest which has been protected by the law loses its protection.").

entitled to compensation for their lost share when the ship is damaged.²⁸⁸ This exception derives from the special status of seamen in maritime law and is theoretically irrelevant in the common law of torts.²⁸⁹ Moreover, it has been narrowly construed. When a ship is injured, crew members are not entitled to compensation for their losses unless a “joint venture” exists.²⁹⁰ Finally, the exception has not been endorsed throughout the common-law world, and many courts rejected it.²⁹¹ Although this exception in itself is inconsistent with my hypothesis, it highlights the fact that beyond its very narrow bounds, workers are not entitled to compensation where their workplace is damaged.

A related exception concerns “general average contribution.” Under this principle of maritime law, cargo owners share with the ship owner any cost required to avert a common imminent peril during the journey. If a ship is injured and needs to be repaired immediately, cargo owners must pay a certain part of the costs of repair, including towage and unloading and reloading the cargo.²⁹² Both the Supreme Court of the United States and the House of Lords held that where a third party negligently injures the ship, that party must reimburse cargo owners for their contribution.²⁹³ The rationale for this rule is that “a general average act is one undertaken to preserve the various interests engaged in the joint adventure and to enable it to be carried to a successful conclusion.”²⁹⁴ The cost is incurred in the name of all parties involved in the venture in an attempt to prevent injury to their property. The exception may be regarded as an extension of the legal protection of tangible property. In any event, it is confined to a unique and extremely rare maritime context.

Lastly, in cases of oceanic pollution, common-law judges have allowed commercial fishermen, oystermen, crabbers, and the like to recover for lost fishing profits following the diminution of aquatic life.²⁹⁵ Recovery for pollution-related harms is thus limited to commercial “harvesters.”²⁹⁶ Other relational losses caused by oceanic pollution are ut-

288. *Yarmouth Sea Prods. Ltd. v. Scully*, 131 F.3d 389, 397–99 (4th Cir. 1997); *Miller Indus. Inc. v. Caterpillar Tractor Co.*, 733 F.2d 813, 820 (11th Cir. 1984); *Carbone v. Ursich*, 209 F.2d 178, 181–82 (9th Cir. 1953); *Van Camp Sea Food Co. v. Di Leva*, 171 F.2d 454, 454 (9th Cir. 1948).

289. *Carbone*, 209 F.2d at 182 (“This long recognized rule is no doubt a manifestation of the familiar principle that seamen are the favorites of admiralty and their economic interests entitled to the fullest possible legal protection.”); see also Note, *supra* note 142, at 822 (referring to *Carbone* as a “seaman’s exception”).

290. *Henderson v. Arundel Corp.*, 262 F. Supp. 152, 159–60 (D. Md. 1966).

291. See, e.g., *Boat Dianne Lynn Inc. v. C & N Fishing Corp.*, 729 F. Supp. 1400, 1401 (D. Me. 1989); *Casado v. Schooner Pilgrim, Inc.*, 171 F. Supp. 78, 79–80 (D. Mass. 1959).

292. *Aktieselskabet Cuzco v. Sucarseco*, 294 U.S. 394, 401–02 (1935).

293. *Id.* at 403–05; *Morrison S.S. Co. v. Owners of Cargo Lately Laden on S.S. Greystoke Castle*, [1946] 2 All E.R. 696 (H.L.) (appeal taken from Eng.) (U.K.).

294. *Morrison*, [1946] 2 All E.R. at 710.

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

296. Other victims are not entitled to recover. *La. ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1028–29 (5th Cir. 1985); see, e.g., *In re The Exxon Valdez*, 767 F. Supp. 1509, 1516 (D. Alaska 1991).

terly irrecoverable. According to the dominant view, the fishermen's exception is based on unique environmental concerns.²⁹⁷ Several courts implied that this is not a genuine exception because fishermen have a constructive proprietary interest in fish in waters they normally harvest.²⁹⁸

D. A Comparative Perspective

If my hypothesis is correct, and the consequential-relational loss dichotomy is politically contingent, one may expect different legal regimes in other political environments. This Section provides some evidence in support of this inference. Proving that the law of economic loss fully correlates with certain variables is clearly impracticable given the multiplicity and complexity of factors affecting judicial decision making in various jurisdictions. Therefore, I aim merely to demonstrate that with a different political background the law may, indeed, take a different route. I focus on the French legal system mainly because it operates within a political environment that is, in many respects, antithetical to the Anglo-American milieu. I assume that a complementary comparative study of law and politics may yield more support for my hypothesis;²⁹⁹ but I realize that nonsalient differences in political background may not generate any notable difference in law.³⁰⁰

Arguably, there is a profound political difference between France and English-speaking countries, most notably the United States. France is an egalitarian social Republic under the express terms of its Constitution.³⁰¹ Its constitutive adage is "Liberté, Égalité, Fraternité" (liberty,

297. *Channel Star Excursions, Inc. v. S. Pac. Transp. Co.*, 77 F.3d 1135, 1138 (9th Cir. 1996) ("Un-ion Oil is limited to the environmental sphere; if it is under admiralty law, it can only be said to have carved out a unique exception to the *Robins Dry Dock* rule by placing a duty on oil drillers to fish and the marine ecosystem.").

298. See *Testbank*, 752 F.2d at 1027 n.10; *Pruitt v. Allied Chem. Corp.*, 523 F. Supp. 975, 978 (E.D. Va. 1981). This, of course, is a clear fiction. See McThenia & Ulrich, *supra* note 110, at 1525–28.

299. For example, Italy has a strong socialist tradition. See, e.g., Robert Leonardi, *Representation in Italy: Institutionalized Tradition and Electoral Choice*, 9 J. INTERDISC. HIST. 559, 559 (1979) (book review); Giacomo Sani, *Political Traditions as Contextual Variables: Partisanship in Italy*, 20 AM. J. POL. SCI. 375, 385–86, 388–89 (1976). Relational economic losses are apparently recoverable under the same principles applied to consequential losses. See Mauro Bussani & Vernon Valentine Palmer, *The Liability Regimes of Europe—Their Façades and Interiors*, in *PURE ECONOMIC LOSS IN EUROPE* 120, 133–35 (Mauro Bussani & Vernon Valentine Palmer eds., 2003).

300. For example, it appears that German law does not allow recovery for relational economic losses in tort law. B.S. MARKESINIS, *THE LAW OF TORTS: A COMPARATIVE INTRODUCTION* 59 ff (3d ed. 1997). But one should bear in mind that Section 823(1) of the German BGB, a product of the late nineteenth century, enumerates the interests protected by tort law and leaves very little discretion for the courts, and that German judges have been able to address many cases of purely economic loss through a more flexible law of contracts. See B. S. Markesinis, *An Expanding Tort Law—The Price of A Rigid Contract Law*, 103 LAW. Q. REV. 354 (1987).

301. 1958 CONST. 1 (Fr.), available at <http://www.conseil-constitutionnel.fr/textes/constit.htm> ("La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens . . .").

equality, fraternity).³⁰² So while the United States “comes the closest of any country to laissez-faire capitalism,”³⁰³ France has a long tradition of a strong central government that plays a leading role in its economy and ensures “basic social welfare through subsidies and regulation, as well as public ownership.”³⁰⁴ Unsurprisingly, in the French debate on the European constitution, both camps promised to prevent the country from adopting the despised Anglo-Saxon “ultra liberalism.” The American form of capitalism was regarded as a universal adversary, and the disagreement was on the best way to confront it and remain different.³⁰⁵

If, then, the consequential-relational loss dichotomy is an inegalitarian redistributive scheme, one may expect it not to exist in France or at least not to be as strict. The starting point is the French Civil Code. Section 1382 states: “Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation.”³⁰⁶ Section 1383 clarifies that “fault” includes not only intentional acts but also negligence.³⁰⁷ Section 1151 stipulates that liability is imposed only for the immediate and direct consequences of the wrong.³⁰⁸ These sections are applied on a case-by-case basis.

Courts have consistently found that sections 1382–1383 do not contain any *a priori* limitations on the scope or nature of protected interests.³⁰⁹ Zweigert & Kötz observed that “it is immaterial whether the harm complained of by the plaintiff is physical harm to person or property or not. . . . [T]he very idea of ‘purely economic loss’ is not to be met with in judgments or books.”³¹⁰ Put differently, liability may be imposed under sections 1382–1383 even if the defendant’s fault only affected the plaintiff’s future income or business prospects.³¹¹ Theoretically, French courts could determine that relational losses, as opposed to consequen-

302. *Id.* art. 2.

303. John C. Reitz, *Political Economy as a Major Architectural Principle of Public Law*, 75 TUL. L. REV. 1121, 1127 (2001).

304. *Id.* at 1128.

305. ALBERTO ALESINA & FRANCESCO GIAVAZZI, *THE FUTURE OF EUROPE: REFORM OR DECLINE* 2 (2006). The authors explain that “‘Europe’ means continental Western Europe, because [in] many dimensions Europeans have, vis-à-vis the United Kingdom, reactions that are similar to those elicited by the United States.” *Id.* at 9.

306. CODE CIVIL [C. CIV.] art. 1382 (Fr.), translated in THE FRENCH CIVIL CODE 253 (John H. Crabb trans., 1977).

307. *Id.* at art. 1383.

308. *Id.* at art. 1151.

309. See Bussani & Palmer, *supra* note 299, at 127.

310. KONRAD ZWIEGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 617 (Tony Weir trans., 3d ed. 1998); see also Christian Lapoyade Deschamps, *La Réparation du Préjudice Économique Pur en Droit Français*, in CIVIL LIABILITY FOR PURE ECONOMIC LOSS 89, 89 (Efsthios K. Banakas ed., 1996) (observing that French law does not treat purely economic loss as a distinct problem); Lara Khoury, *The Liability of Auditors Beyond Their Clients: A Comparative Study*, 46 MCGILL L.J. 413, 453 (2001) (“[Purely economic loss] has never been categorically excluded or treated separately.”); D. Marshall, *Liability for Pure Economic Loss Negligently Caused—French and English Law Compared*, 24 INT’L & COMP. L.Q. 748, 749 (1975) (“[E]conomic loss is not treated in French law as a specific problem.”).

311. Bussani & Palmer, *supra* note 299, at 127.

tial losses, were not “immediate and direct” for the purposes of section 1151. This approach, although advocated by at least one scholar,³¹² has not been embraced by the judiciary.

This does not mean that relational economic losses are generally recoverable. Recovery may be denied where causation is absent³¹³ or where the particular loss is uncertain³¹⁴ or indirect.³¹⁵ But the same restrictions apply to any kind of loss and may lead to denial of recovery for consequential losses in the appropriate cases. More importantly, where all general preconditions for liability are met liability will be imposed, regardless of the classification of the loss. Accordingly, French courts have allowed recovery in fact-situations governed by the exclusionary rule in common-law jurisdictions.³¹⁶

A few illustrations should suffice. In one case, the *Cour de cassation* found a defendant, who negligently injured a gas pipe that served the plaintiff’s factory but was owned by a third party, liable for the plaintiff’s loss of profit.³¹⁷ The same court allowed a bus company to recover for loss of profits due to a negligent obstruction of public roads in Marseille.³¹⁸ Courts also allowed recovery for economic loss incurred by ship owners following negligent obstruction of access to seaports³¹⁹ or docks.³²⁰ A soccer club was compensated for economic loss following a player’s death.³²¹ The *Tribunal de Grande Instance* of Nanterre held that workers were entitled to sue a motorist who crashed into and damaged their workplace for lost wages.³²² The *Tribunal de Grande Instance* of Bastia allowed recovery by fishermen, local authorities, and businesses

312. Paul Esmein, *Le nez de Cléopâtre ou les Affres de la Causalité*, D. 1964 Chron. 205, ¶ 20 (“Un dommage doit être dit indirect quand la personne qui en demande réparation le subit par répercussion d’un autre dommage, subi par une autre personne.”).

313. Cour de cassation, Chambre sociale [Cass. soc.] [high court of general jurisdiction, social chamber], Nov. 27, 1964, Gaz. Pal. 1965, 1, 133; Cour de cassation, Deuxième chambre civile [Cass. 2e civ.] [high court of general jurisdiction, second civil chamber], Nov. 14, 1958, Gaz. Pal. 1959, 1, 31.

314. Cour de cassation, Chambre sociale [Cass. soc.] [high court of general jurisdiction, social chamber], Nov. 27, 1964, Gaz. Pal. 1965, 1, 133; Cour d’appel [CA] [regional court of appeal] Colmar, Apr. 20, 1955, JCP 1955 II 8741.

315. Cour d’appel [CA] [regional court of appeal] Colmar, 2e ch., Apr. 20, 1956, JCP 1956 IV 128 (“la baisse sensible du chiffre d’affaires de la société qui peut, apparemment, en résulter, ne peut être considérée comme un dommage direct susceptible de donner lieu à réparation”).

316. Bussani & Palmer, *supra* note 299, at 127, 130–31; Jacques Herbots, *Economic Loss in the Legal Systems of the Continent*, in *THE LAW OF TORT—POLICIES & TRENDS IN LIABILITY FOR DAMAGE TO PROPERTY AND ECONOMIC LOSS* 137, 143, 152 (Michael Furmston ed., 1986); Khoury, *supra* note 310, at 452.

317. Cour de cassation, Deuxième chambre civile [Cass. 2e civ.] [high court of general jurisdiction, second civil chamber], May 8, 1970, D. 1970 Somm., 203. Cf. J.E. Constr. v. General Motors, [1985] C.A. 275, 279 (Que.); Joly v. Ferme Ré-Mi Inc., [1974] C.A. 523 (Que.).

318. Cour de cassation, Deuxième chambre civile [Cass. 2e civ.] [high court of general jurisdiction, second civil chamber], Apr. 28, 1965, D.S. 1965, 777, Esmein.

319. Cour de cassation, Deuxième chambre civile [Cass. 2e civ.] [high court of general jurisdiction, second civil chamber], Mar. 19, 1980, JCP 1980 IV 216.

320. Cour d’appel [CA] [regional court of appeal] Rouen, Dec. 17, 1987, D.M.F. 1988, 488.

321. Cour d’appel [CA] [regional court of appeal] Colmar, Apr. 20, 1955, JCP 1955 II 8741.

322. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Nanterre, Oct. 22, 1975, Gaz. Pal. 1976, 1, 392, Valon.

who suffered economic losses following an oil spill near Corsica.³²³ Finally, French courts recognized dependants' rights in cases of wrongful death without the need for specific statutory intervention³²⁴ and without any *a priori* restriction of the class of relatives entitled to recover.³²⁵

The Supreme Court of Canada thus correctly observed that in the civil law jurisdictions of France and Quebec, "[T]he law does not distinguish between loss arising from damage of one's own property and loss arising from damage to the property of another."³²⁶ If civil law judges restrict recovery, it is not as a matter of law but on the basis of the facts of the case at hand. I contend that the unwillingness to distinguish consequential and relational losses may be explained, at least in part, by the different political atmosphere.³²⁷ At any rate, the French experience serves as good evidence for the unsoundness of many arguments used by Anglo-American courts to justify the traditional dichotomy.

IV. CONCLUSION

The consequential-relational economic loss dichotomy is an unexplored, conceivably unnoticed, mystery in tort law. Part I showed that while all common-law jurisdictions have allowed recovery for consequential losses for centuries, most of them have been reluctant to impose liability for relational losses.

Part II analyzed the various reasons courts and scholars have given for the unwillingness to impose liability for relational losses. Some of these reasons are indiscriminate in the sense that they are equally applicable to consequential losses. For example, it is often said that economic interests are inferior to life, bodily integrity, health, and property and therefore less worthy of legal protection. But if financial interests that stem from contract, anticipation of contract, or mere expectation do not merit protection from negligent interference due to their inferiority, consequential losses should also be irrecoverable. Likewise, one of the economic justifications for the exclusionary rule is that many financial losses, relational in particular, are not true social costs, because they generate corresponding economic gains. But to the extent that this line of argument is valid, it is equally applicable to consequential losses and therefore cannot justify the traditional dichotomy.

323. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Bastia, Dec. 8, 1976, D.S. 1977, Jur. 427; *see also* Goldberg, *supra* note 110, at 2 n.7 (stating that similar claims were allowed following the Amoco Cadiz oil spill in 1978).

324. *See* Marshall, *supra* note 310, at 752.

325. Deschamps, *supra* note 310, at 96-97; Herbots, *supra* note 316, at 143; Marshall, *supra* note 310, at 760.

326. Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Co., [1997] 153 D.L.R.4th 385, 404 (Can.).

327. This difference is evident with regard to other doctrines as well. For example, the French Cour de cassation, as opposed to Anglo-American courts, found that the general principle of *responsion-deat superior* applied to cases of "fellow servant." *See* Comment, *supra* note 261, at 579, 585.

Other justifications for exclusion of liability for relational losses turn on the fear of open-endedness. The relevance of this fear rests on two assumptions: a real likelihood of open-endedness and its undesirability. I agree that a multiplicity of potential victims, extensive liability, and uncertainty about the extent of liability may be undesirable for various reasons. However, the “real likelihood” assumption is unsound in most cases. It is valid, at most, with regard to several categories of cases, such as an injury to a public road or an electric cable; even within these categories the actual number of victims and the extent of liability may often be limited *ex post*, making most of the fears associated with open-endedness irrelevant; and even in the relatively few cases with numerous victims, there are doubts about the validity of open-endedness concerns, because a large number of victims does not necessarily translate into a large number of successful claimants.

Finally, it has been argued that the traditional dichotomy was meant to channel economic losses through the primary victim to save the cost of multiple tort actions. However, I showed that one or more of the conditions for the validity of this argument are generally not met. The inevitable conclusion of Part II was that the law should treat consequential and relational losses similarly, at least as a general rule. The positive and normative analyses thus seem incongruent.

Part III theorized that the best account for the consequential-relational loss distinction is an embedded political inclination of common-law judges. This distinction has been used, perhaps unconsciously, to empower the powerful. I explained that through this dichotomy tort law has favored those who own means of production or who can easily transfer their financial risks to owners through contract. The ability to acquire means of production is correlative with wealth, and the ability to transfer financial risks to owners is correlative with bargaining power. The consequential-relational loss dichotomy thus affords differential protection to economic interests: the more affluent and powerful potential victims are, the easier it is for them to evade the exclusionary rule and gain legal protection for their economic expectations. Common-law judges have consistently upheld this dichotomy. So we can say that they have advanced an inegalitarian redistributive scheme, at least unconsciously.

Following a general overview of my hypothesis, I substantiated it further on three levels. First, if the traditional dichotomy should be associated with a certain political inclination of Anglo-American judges, one might expect other manifestations of that background in tort law. Accordingly, I showed that the political interpretation of the economic loss distinction fits with a more general understanding of tort law. It is an unnoticed tile in a larger mosaic. Second, if the traditional dichotomy truly reflects an inegalitarian judicial inclination, it is likely that the exclusionary rule has been relaxed where an exception clearly served

wealthier or more powerful parties. The most noteworthy exceptions to the traditional dichotomy concern loss of another person's services or consortium. These are clearly biased in favor of the stronger parties in basic interpersonal relationships. Third, if my hypothesis is correct, and the traditional dichotomy is politically contingent, one may expect different legal regimes in other political environments. I focused on the French legal system mainly because it operates within a political environment that is, in many respects, antithetical to the Anglo-American milieu. France, as an egalitarian social Republic, differs from most English-speaking countries, the United States in particular. In accordance with my hypothesis, French courts have not treated purely economic loss as a legally distinct category, and have allowed recovery in fact-situations governed by the exclusionary rule in common-law jurisdictions.

As indicated above, the main purpose of this Article was to elucidate a problem, not to advocate a specific solution. Nevertheless, I hope that the drafters of the Third Restatement and members of European unification workgroups will be attentive to my theoretical insight. Otherwise, these valuable projects might end up perpetuating the economic bias in tort law.