

***Robins Dry Dock* and the Law of Negligence: A Rights-Based Rationale for the Economic Loss Rule**

Peter Benson*

[This is a draft for the purposes of the Legal Theory Workshop. Not all the footnotes have been filled in.]

No single decision in American tort law has more dominated the analysis of liability for pure economic loss than *Robins Dry Dock & Repair C. v. Flint*.¹ It is now almost eighty years since Holmes penned his highly compressed three-page ruling in which he denied the plaintiff, a time-charterer, recovery for financial loss which resulted from the defendant's interference with the plaintiff's use of the chartered vessel. As many have noted, this denial of liability went sharply against the current of the overwhelming tendency of modern negligence law "that pushed liability for physical injuries toward the full extent of what was foreseeable and shattered ancient barriers to recovery based on limitations associated with privity of contract and similar restrictive concepts".² Yet, in the face of modern negligence law and notwithstanding that *Robins* was a case in admiralty, the decision remains, overwhelmingly, the majority view and represents the longest standing and most influential statement in American tort law of what has come to be called "the economic loss rule".

It attained this position of preeminence, not primarily because courts were bound to follow it as a matter of legal precedent – many, in fact, were not – but rather because the majority of courts were, and continue to be, persuaded that *Robins* provides the most convincing

* Professor, Faculty of Law, University of Toronto.

¹ 275 U.S. 303 (1927) (Holmes, J.). [Hereinafter; *Robins*]. Judge Breyer has referred to *Robins* as "[t]he leading 'pure financial injury' case". *Barber Lines A/S, et al., v. M/V DONAU MARU, et al.* 764 F.2d. 50, 51 (1st Cir. 1985) [Hereinafter: *Barber Lines*]. See also, H. Bernstein, *Civil Liability for Pure Economic Loss under American Tort Law* 46 *The American Journal of Comparative Law* 111 (1998). Bernstein refers to *Robins* as "a leading 20th century case reaffirming the traditional rule which bars recovery for pure economic loss in negligence" (at 112) and "the leading precedent in this area" (at 128).

² Fleming James, Jr. *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal* 25 *Vanderbilt L.R.* 43 (1972) at 47 [Hereinafter: "*Liability for Economic Loss*"], now incorporated into Harper and James, Jr. *The Law of Torts* (2nd Ed) Vol. 4 (Little, Brown and Company: 1986) S.25.18A at 627.

determination of the issue.³ Even those minority courts that reject the economic loss rule recognize the force of *Robins*. Thus those who wish to stake out a different position generally first feel obliged to show either that *Robins* is inapplicable to the facts before them or that its reach is otherwise limited.⁴ Similarly, scholarly discussions have to take account of *Robins* — whether by way of defense or criticism -- or risk the charge of incompleteness and even irrelevance.

Against this background, it would be paradoxical and problematic if the prevailing judicial and scholarly understandings of *Robins* not only do not fit with its actual reasoning or conclusion but also *cannot* do so. I will argue, however, that this is precisely the case. And further, this failure is made worse by pervasive ambiguity and even disagreement in the ways courts and writers understand the basis and reach of the decision. The consequence is that although the issue of tort liability for pure economic loss might appear substantially settled given the strength and persistence of the majority view for over a century, the prevailing understandings of this part of tort law are in fact unable to provide fully satisfactory answers to the challenges and objections that continue to be raised against it. *Robins* rules, but it is by no means clear on what basis or how far.⁵

The fact that the prevailing understandings of this seminal case in American tort law cannot make sense of it would be justification enough for yet another effort to do so. And one

³ Two fairly recent influential expressions of this view are *State of Louisiana ex.rel. William J. Guste, Jr. v. M/V TESTBANK et al.*, 752 F.2d 1019 (5th Cir. 1985) [Hereinafter: *TESTBANK*] at 1028-9 and *Barber Lines*, *supra* note 1 at 53-56.

⁴ Typical illustrations are the minority opinion of Wisdom J. in *TESTBANK*, *supra* note 3 at 1035, 1038-1046; *Venore Transportation Company v. M/V STRUMA* 583 F.2d. 708 (4th Cir. 1978) [Hereinafter: *The STRUMA*] at 710-711; *People Express Airlines v. Consolidated RailCorp.* 495 A.2d. 107 (N.J. 1985) [Hereinafter: *People Express*] at 110-112; and *Union Oil Co. et al. v. James J. Oppen et al.* 501 F.2d 558 (9th Cir. 1974) [Hereinafter: *Oppen*] at 563-564.

⁵ This same point is made by David R. Owen in his useful discussion of *Robins*, “Recovery for Economic Loss Under U.S. Maritime Law: Sixty Years Under *Robins* Dry Dock”, (1987) 18 *Journal of Maritime Law and Commerce* 157 at 159-163.

principal aim of this article will be to explain the actual rationale of the decision. But my interest in doing this is not restricted to this. There are deeper and more far-reaching questions at issue here. These deeper questions are raised by *all* the approaches to *Robins* – by both the majority and minority views alike. As I will explain, the puzzle of *Robins* casts its shadow over much more of tort law than just the specific kind of pure economic loss for which it denied recovery. The search for its rationale goes to the very heart of the theory of negligence itself.

More particularly, despite the differences between the majority and minority views, they generally agree on two basic points. These two points have now become unquestioned assumptions of *both* majority and minority positions as well as of scholarly treatment of the economic loss rule. They also imply a certain general conception of negligence.

First, there is wide agreement that the question of whether there should be tort liability for pure economic loss⁶ should be decided by the particular kind or situation of economic loss that is at stake.⁷ Thus a majority of jurisdictions, in addition to denying liability for the sort of loss in *Robins*, exclude liability in defective products cases but allow recovery in those involving negligent misrepresentation and professional negligence.⁸ While these differences in outcome do not exclude the possibility of a unified account that is sensitive to the different ways in which pure economic loss arises, it is now a fixed and unquestioned view that there cannot be such an

⁶ “Pure” economic loss is financial loss sustained by a plaintiff that is *not* consequential upon injury to the plaintiff’s own person or property. Where, however, the financial loss *is* consequential upon such injury, it is always in principle recoverable, assuming it is reasonably foreseeable. For example, I am in principle entitled to damages for lost profit that I would have earned from the use of my factory had it not been damaged by another’s negligence. The fact that my loss is financial does not in any way make it less qualified as an item for recovery.

⁷ Robert Rabin is fully representative when he calls for a “more discerning approach” that distinguishes among the different types and circumstances of pure economic loss. See, R.L. Rabin, “Tort Recovery for Negligently Inflicted Economic loss: A Reassessment”, 37 *Stan. L. Rev.* 1513, 1514 (1985) [Hereinafter: “*Tort Recovery*”].

⁸ For recent overviews, see the informative articles by Gary T. Schwartz, “The Economic Loss Doctrine in American Tort Law: Assessing the Recent Experience” in *Civil Liability for Pure Economic Loss* (ed. E. Banakas, 1996) at 103-130 and Bernstein, *supra*. note 1.

explanation.⁹ Viewed as laying down “the general proposition that claims for pure economic loss are not recoverable in tort”,¹⁰ *Robins* stands in the way of a unified or even coherent account of tort liability for economic loss. The diversity of outcome is handled by asserting that the situations in which there can be recovery represent “exceptions” to the “general” economic loss rule against recovery.¹¹

Second, both majority and minority views share the general assumption that the denial of liability in *Robins* cannot be justified by general principles of negligence law alone. It is taken for granted that the economic loss rule must be explained on some other basis than and may thus be in tension with ordinary principles governing injury to person or property.¹² If, as is usually assumed, the analysis of tort liability for physical loss embodies the “fundamental principles of negligence”, *Robins* appears to challenge the unity of negligence law. It seems to bring into question the possibility of a general conception of negligence.

In contrast with these prevailing approaches and assumptions, my aim in this article is to show that there *is* a rationale for *Robins* that at once fits with its reasoning and conclusion and that is consistent with the unity of tort liability for pure economic loss in particular and of the law of negligence as a whole. Once this rationale is presented, I think it is apparent that it animates the explicit considerations that led Holmes to deny recovery. In addition, this rationale settles the

⁹ Gary Schwartz expresses the prevailing view among scholars when he recommends that “we abandon any attempt to formulate a general theory for the problem of tort law and economic loss: the problem is multiform rather than unitary in character.” Gary T. Schwartz, “Economic Loss in American Tort Law: The Examples of *J’Aire* and of Products Liability” (1986) 23 *San Diego L. Rev.* 37. More recently, Jane Stapleton has expressed the same view. J. Stapleton, “Comparative Economic Loss: Lessons from Case-Law Focused ‘Middle Theory’ ”, 50 *UCLA L. Rev.* 531 (2002) at 534-5.

¹⁰ Victor P. Goldberg, “Recovery for Pure Economic Loss in Tort: Another Look at *Robins Dry Dock v. Flint*” 20 *J. of Leg. Stud.* 249 (1991) at 249.

¹¹ This is the way the *Barber* court characterizes the field of tort liability for pure economic loss. See *Barber*, *supra* note 1 at 56.

¹² In addition to Fleming James’s influential assertion of this view (*supra* note 2 at 44), any of the torts textbooks may be used as illustrations. See, for example, W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* (5th ed. 1984) at 1001; Morris and Morris, Jr. *Morris on Torts* (2nd ed. 1980) at 181-3; or J. Fleming, *The Law of Torts* (8th ed. 1992) 179-181. As well there is the *Restatement of the Law (Second): Torts*, Section 766C, Comment (a) (The American Law Institute, 1977) [Hereinafter: *Restatement Torts 2d*].

meaning and parameters of the economic loss rule and it provides in its own terms a definitive answer to the various challenges to the rule. With certain important qualifications and clarifications, the majority view is justified. I will argue that the suggested rationale explains the denial of recovery in *Robins* on a basis that is consistent with recovery in the misrepresentation cases and in the other most settled “exceptions” to the economic loss rule. Indeed, I will show that, viewing the cases in this light, the difference in outcome is not only possible but also *required*. This is because the proposed rationale for *Robins* is articulated wholly in terms of the general principles of negligence. Far from being in tension with the analysis of liability for physical loss or requiring a justification that falls outside it, the approach taken by *Robins* to pure economic loss highlights an essential prerequisite of negligence in general that must therefore also be met in physical loss cases but which is not usually made explicit there because injury to person or property so obviously satisfies it. The suggested rationale roots the economic loss rule squarely in the general normative structure of negligence as applicable within the usual parameters of adjudication on a case-by-case basis. While it is not my aim in this article to set out and to defend in detail a general conception of negligence, I shall argue that the economic loss rule not only does not stand in the way of such a conception but, more positively, identifies what a general conception must include. *Robins* provides indispensable insight into the first principles of negligence.

I. The Prevailing Approach to the Economic Loss Rule

Before considering the prevailing understanding of the rationale for the economic loss rule that is shared by both defenders and opponents, I wish to set out more clearly the kind of

circumstances of pure economic loss to which it applies. What are the essential features of the sort of economic loss that is at issue in *Robins*?

In this type of pure economic loss, the defendant damages something which the plaintiff neither owns nor possesses but in which he or she nevertheless has an interest – an interest that may, but need not always, be rooted in a contract with a third party who does own or possess it. As a result of the damage to the item, the plaintiff's interest in it is interfered with or impaired, causing him or her financial loss. For example, suppose that a plaintiff has an interest founded upon a contract with a third party, or just a liberty, to use the third party's bridge for its commercial purposes¹³. We may even assume that the plaintiff is the sole user of the bridge. As a result of the defendant damaging the bridge, it must be closed temporarily for repairs, making it necessary for the plaintiff to secure alternative arrangements at additional cost or simply depriving the plaintiff of revenues it expected from the use of the bridge. Stated more generally, the plaintiff's financial interest in the bridge is to be able to use it with resulting benefit or at least without having to incur certain additional costs. In either case, the plaintiff's interest is affected when the bridge is damaged. The plaintiff's interest thus depends upon the bridge being in a certain condition; in a sense, the plaintiff relies on its being such. This is disrupted by the defendant.

Now it is certainly the case that the owner of the bridge can recover for damage sustained where the loss is foreseeably caused by the defendant's failure to use due care. In fact, if under the owner's contract with the plaintiff, the former is obliged to indemnify the latter in case the

¹³ The case law is replete with economic loss negligence claims arising from bridge closures. See, for example, *Rickards v. Sun Oil Co.* (1945, N.J.) 41 A2d 267; *General Food Corp. v. U.S.A et al* 448 F. Supp. 111 (Maryland. U.S.D.C, 1978); *Louisville & Nashville R. Co. v. M/V Bayou Lacombe*, 597 F.2d 469 (5th Cir. 1979); *Leadfree Enterprises, Inc. v. United States Steel Corp.* (1983) 711 F2d 805 (CA Wis); *Stop & Shop Cos. V. Fisher* (1983, Mass) 444 NE2d 368; and *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.* (1984, Iowa) 345 NW2d 124.; *Aikens et al. v. Debow et al.* 541S.E.2d 576 (Vir. S.C.App.) 2000. In the absence of a contractual or special relationship between plaintiff and defendant, the result is invariably non-suit on the basis that the plaintiff has not stated a cause of action in negligence.

bridge is closed under such circumstances, this financial burden now placed on the owner is recoverable against the defendant.¹⁴ But, assuming that the plaintiff does not have either a proprietary or a possessory interest in the bridge, the plaintiff cannot recover *any* economic loss whatsoever flowing from the damage to the bridge. This includes precisely the sorts of loss that would be recoverable if suffered by the owner. So, if the owner is not contractually obliged to indemnify the plaintiff for the lost use of the bridge, this quantum of loss, which will now be borne by the plaintiff alone, is not recoverable against the defendant, irrespective of how foreseeable the plaintiff's loss may be. A claim of this kind is simply non-actionable in negligence. Because this sort of pure economic loss results from damage to something *else* that is neither owned nor possessed by the plaintiff but that typically belongs to another, it is sometimes referred to as "relational" economic loss.¹⁵ The general non-recoverability of relational economic loss¹⁶ was most influentially decided by nineteenth century English case of *Cattle*¹⁷ and it

¹⁴ This is recognized in the early case of *Byrd v. English et al.* 43 SE 419 (Geo. 1903) at 420.

¹⁵ The term "relational economic loss" is widely used in English and Commonwealth discussions of the issue. See for example, R. Bernstein, *Economic Loss* 131 (1993) and also B. Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss* (2nd Ed., 1989) at pp. 2, 198-280. For a useful, more recent overview of relational economic loss in Canadian tort law by Feldthusen, who is one of the most influential Anglo-commonwealth scholars of this issue, see his article "The Recovery of Pure Economic Loss in Canada: Proximity, Justice, Rationality, and Chaos" in *Civil Liability for Pure Economic Loss*, E.K. Banakas, ed. (1996) at pp.143-7. In the United States, the term used most often is 'negligent interference with contractual relations'. See, *Restatement Torts 2nd*, *supra* note 11, s. 766c; *Prosser and Keeton on the Law of Torts*, *supra* note 11, s. 129. This latter characterization is useful to the extent that it points to the important contrast with the tort of intentional interference with contract. However, as the case law makes clear, the economic loss rule as stated in *Robins* applies whether or not there exists an actual or even a prospective contractual relation between the plaintiff and the one whose property is damaged. The term "relational economic loss" is less misleading because it focuses on the fact that the plaintiff's loss results injury to something *else* in which the plaintiff does not have a proprietary or possessory interest. I should add that relational economic loss does not necessarily entail that the thing injured be owned by another individual. It is enough that it is neither owned nor possessed by the plaintiff.

¹⁶ Illustrations 1-4, *Restatement Torts 2nd*, s. 766c, *supra* note 11, are all examples of relational economic loss. In addition to these and the bridge closure scenario just presented, cases involving the paradigmatic kinds of relational economic loss include: *Byrd v. English*, *supra* note 13 (plaintiff factory owner sustains extra costs and lost profit when unable to operate his plant as a result of defendant negligently interfering with electricity conduit owned by third person who is contractually obliged to supply power to plaintiff); *Stevenson v. East Ohio Gas Co.*, 73 N.E. 2d 200 (Ohio Ct. App. 1946) (employee sues for lost wages when prevented from working at factory because of threatened danger to factory created by defendant's negligence); *The Federal no 2*, 21 F.2d 313 (1927) (plaintiff employer sues for contractually required cost of treating employee injured by defendant's negligence); *Connecticut Mut. Life Ins. Co. v. New York & N.H.R.R.* 24 Conn. 265 (1856) (plaintiff insurer of A's life sues defendant who negligently causes A's premature death); *TESTBANK*, *supra* note 3 (various plaintiffs, including shipping interests,

remains the majority view in American tort law¹⁸ where it is generally referred to as the “economic loss rule”.¹⁹ The simple question is: on what reasonable basis, if any, are claims for relational economic loss categorically excluded in negligence law?

Two grounds may be ruled out from the start. The problem with relational economic loss is neither that it is financial nor that it is unforeseeable. Pure financial loss is fully recoverable in other instances, most pertinently, where the loss resulted from the plaintiff’s reasonable reliance upon the defendant’s representations. More generally, pure financial loss is typically sought and recovered in breach of contract cases. There is nothing per se in the financial character of a loss that makes it unsuitable for purposes of compensation.²⁰ As for foreseeability, in many, if not most, cases of relational economic loss, the loss is perfectly foreseeable by the standard supposed in instances of physical loss to person or property. Indeed, as we will see shortly, it is characteristic of relational economic loss that it is almost invariably foreseeable. In the decisions that have upheld and explained the economic loss rule, courts typically go out of their way to

marina and boat operators, seafood enterprises, tackle and bait shops, and recreational fishermen suffer financial losses when Mississippi River Gulf outlet closed and maritime activities suspended due to threatened contamination to outlet caused by defendant’s negligence); *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.* 29 S.W.3d 282 (Texas C.A., 2000) (plaintiff excavator incurs increased expense in performing contract for third party as a result of defendant’s alleged failure to bury electrical lines properly and mark line locations); *La Societe Anonyme de Remorquage a Helice v. Bennetts*, [1911] 1 K.B. 243 (plaintiff tug owner loses remuneration under towage contract when unable to complete towage of ship that was sunk en route due to defendant’s negligence); *Barber Lines*, *supra* note 1 (plaintiff incurs extra costs when its vessel is prevented by defendant’s negligent oil spill from docking at nearby berth owned by third party); and *Leigh & Sillavan Ltd. V. Aliakmon Shipping Co., (The Aliakmon)* [1986] A.C. 785 (H.L. Eng) (plaintiff buyer suffers financial loss as a result of defendant damaging goods en route at a time when the risk, but not the property in the goods, has passed to plaintiff).

¹⁷ *Cattle v. Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453.

¹⁸ List circuits and states with leading cases representing majority and minority views.

¹⁹ The term “economic loss rule” is also used to refer to the non-recoverability in tort for pure economic loss that results from a product being less valuable or useful than reasonably expected. The leading American case is still *East River S.S. Corp. v. Transamerica Delaval Inc.* 476 U.S. 858 (1986). The most important English case is *Murphy v. Brentwood Dist. Council*, [1990] 2 ALL ER 908 (H.L.). It is beyond the scope of this essay to examine the possible rationale for non-recovery for this kind of economic loss and its connection, if any, with the rule in *Robins*. I discuss this question in my earlier article, “The Basis for Excluding Liability for Economic Loss in Tort Law,” in Owen, ed., *Philosophical Foundations of Tort Law* (1995) 428-456 at pp.436-7.

²⁰ For typical statements to this effect, see James, “Liability for Economic Loss”, *supra* note 2 at 44. See also Rabin, “Tort Recovery”, *supra* note 7 at 1525; and E. W. Middleton, Jr. “Damages: Loss of Prospective Profits Recoverable in an Action for the Negligent Destruction of a Chattel.” (1950) 35 *Cornell Law Quarterly Review* 863. For a judicial statement of this point, see *Caltex Oil (Aust) Pty Ltd v. The Dredge “Willemstead”* (1976) 11 ALR 227 (HC of A) at 257 (per Stephen J.)

note that the fact that the loss was foreseeable does not affect the determination that it is not recoverable. Indeed, the economic loss rule is characterized as a limitation on the doctrine of foreseeability.²¹ The justification for the economic loss rule must lie elsewhere.

When reflection has been brought to bear on this question by both courts and legal scholars over the past several decades, the overwhelming conclusion reached by *both* those who endorse *Robins* and those who challenge it has been that the justification for the economic loss rule must be lie in considerations of policy that constrain what would otherwise be a finding of liability under the normal operation of basic principles of negligence. There is wide agreement that the rule must be rooted in what Fleming James called the “pragmatic objection” to liability for pure economic loss.²² According to the pragmatic objection, if we apply ordinary negligence analysis to cases of relational economic loss, the result will be the imposition of extensive and indeterminate liability on defendants, which is unfair to them while being unnecessary – and perhaps even counter-productive—to the creation of appropriate incentives for the purpose of preventing accidents causing such loss. To avoid these consequences, the ordinary analysis must not apply and recovery must be denied. This, the pragmatic objection holds, is the rationale for the economic loss rule. Let me elaborate.

The pragmatic objection is thus in two steps. First, it holds that *prima facie* there should be liability for foreseeable relational economic loss on ordinary principles of negligence that apply in general to cases of damage to person or property. Starting from the uncontroversial point that there is nothing about the financial character of loss that *per se* disqualifies it for recovery, the pragmatic objection supposes that economic loss is something that, all things being

²¹ This is noted by the vast majority of decisions. See, for example, *TESTBANK*, *supra* note 3 at 1021-1028; and *Barber Lines*, *supra* note 1 at 50: “We assume that the injury was foreseeable.”

²² Fleming James, Jr. presented this rationale in his article, *Liability for Economic Loss*, *supra* note 2, which remains to this day the single most influential discussion of this topic. My own presentation of the pragmatic justification follows his account while trying to bring out explicitly the main steps in his argument.

equal, should be avoided and for which there should be recovery. This is true of *any* kind of interference with economic interests, whether it arises in circumstances of relational economic loss, defective products, negligent misrepresentation, or whatever. Following the general view that, *prima facie*, it is fair and reasonable as between parties that defendants be held liable for *foreseeable* losses,²³ the pragmatic objection holds that, *prima facie*, there should be liability for foreseeable economic losses in all circumstances.

However, whereas this conclusion seems unproblematic in most cases²⁴ of injury to person or property – cases of so-called “physical loss”, this is not so in most circumstances of pure economic loss. The reason is straightforward.

Given the evident general social and economic fact of the interdependence of commercial interests whereby a practically unlimited range of interests are intertwined in a practically unlimited variety of ways, it must be reasonably foreseeable at a high level of generality that damage to any one interest may affect other interests, however removed or indirect the impact may be. Viewed in light of the general fact interdependence, no reverberation from the initial damage that arises through this interlocking of interests can be intelligibly distinguished as extraordinary or unforeseeable.²⁵ The logic of negligence would seem to require, therefore, that there be at least *prima facie* a general duty to refrain from causing relational economic loss of whatever kind, however indirect it might be. But – and this is the pragmatic objection—a duty of this kind can lead to *extensive or widespread* liability – that is, to quantitatively vast losses suffered by a vast number of plaintiffs—as well as to *indeterminate or open-ended* liability – that

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²⁴ Rabin discusses circumstances of physical loss where this is not in fact the case. See Rabin, “Tort Recovery”, *supra* note 7 at 1529-33.

²⁵ The case law is replete with statements of this fact of interdependence as well as of its legal relevance for the purposes of the analysis of liability in negligence. See, for example, *Connecticut M.L. Ins. Co. v. New York & New Haven R.R. Co.* 25 Conn. 265 (1856) at 573-5; *Byrd v. English*, *supra* note 11 at 420; and *Stevenson v. East Ohio Gas Co* 73 N.E.2d 200 (Ohio CA, 1946) at 203. One of the best statements of this fact is found in the English case of *Weller & Co. v. Foot & Mouth Disease Research Inst.* [1965] 3 All E.R. 560 at 563 (Q.B.)

is, to losses that are qualitatively and quantitatively unascertainable and variable given the indeterminate variety of interests and the indeterminate number of plaintiffs that may be affected on any given occasion.²⁶

Thus extensive and indeterminate economic losses are in fact the *foreseeable* consequence of negligent interference with such interests. This consequence, it is often noted, is not to be expected in the typical case of physical loss, where the possibility of a single injury generating indeterminate and extensive ripple effects is normally circumscribed. To impose a general duty to avoid causing foreseeable relational economic loss – as seems required by ordinary principles of negligence-- would therefore expose defendants to extensive and indeterminate liability-- and this, the pragmatic objection holds, would be unfair to them and socially inexpedient. The foreseeability requirement alone will not ensure reasonable outcomes. Defendants may find themselves liable for vast sums of uninsurable, because indeterminate, losses as a result of momentary and even trivial carelessness that did not injure or even endanger the persons or properties of the plaintiffs who sustained the relational economic loss. Holding defendants liable for such losses would be a legal consequence grossly disproportionate to the wrongfulness of their failing. In addition, from a social point of view, the imposition of liability could be inappropriate, because inefficient or ineffectual, as a means of discouraging net loss-creating activity or as a method of facilitating loss-spreading, particularly when insurance considerations are taken into account. A general duty to avoid causing foreseeable relational economic loss would thus have the serious potential of imposing ruinous consequences on socially useful activity.²⁷

²⁶ Both of these aspects are recognized in decisions and the literature. See for example, *Barber Lines*, *supra* note 1 at 54 and Rabin, “Tort Recovery”, *supra* note 7 at 153. I should add that Rabin sees the policy concerns underlying the economic loss rule as general ones that negligence law takes, or ought to take, seriously in other contexts.

²⁷ The phrase is taken from Fleming James, “Liability for Economic Loss”, *supra* note 2 at 48.

For the foregoing reasons, the pragmatic objection holds that, at a second step, a rule of policy is needed to constraint the prima facie operation of the ordinary principles of negligence and, in particular, the doctrine of foreseeability. This policy rule negatives or limits the prima facie duty to avoid foreseeable loss. According to the pragmatic objection, the economic loss rule is to be understood in this light. The requirement that the plaintiff has a possessory or proprietary interest in the thing damaged is viewed as a policy requirement that is independent of and constrains the operation of ordinary principles of negligence. The pragmatic rationale thus provides a purely instrumental justification for the economic loss rule: the latter is justified to the extent, but *only* to the extent, that it *in fact* accomplishes the end of avoiding the imposition of extensive and indeterminate liability.²⁸

It is easy to see how the pragmatic rationale might suggest itself. After all, it is certainly the case that the economic loss rule does have the effect of limiting the extent of liability. The fact that this is its consequence might lead one to suppose that this is *also* its purpose and rationale. More fundamentally, the pragmatic justification seems to be rooted in the plausible moral intuition that it seems unfair to hold a defendant responsible for the inherently expansive and indeterminate economic losses that can flow from momentary carelessness, when such losses are sustained by persons who neither own nor possess but who are only indirectly connected with the thing that was immediately and directly affected by the defendant's negligence.

But why should this be so? If the losses are foreseeable, given the evident general fact of interlocking commercial interests, why does this not determine our judgment as to the gravity and extent of the defendant's culpability? The only measure of culpability that is pertinent in negligence is one that reflects the seriousness (both in kind and in amount) of the foreseeable

²⁸ This point is emphasized by Fleming James, Jr. as part of his pragmatic rationale for the rule. See "Liability for Economic Loss", *ibid.*, Section IV "Limits of the Pragmatic Objection" at pp. 55 and following.

consequences of one's acts and omissions. And if losses (whether physical or financial) are multiplied, so too must remedies.²⁹

In reply, it might be said that what makes such liability unfair to the defendant is the consideration that the defendant is not responsible for this factor of social and economic interdependence which is the ground upon which the losses are said to be foreseeable. This interdependence is the result of innumerable individual decisions of others to rely upon each other, independently of and prior to the defendant's act or omission. It is a given that conditions and qualifies interaction but for which no individual can be held responsible. Presumably it is for everyone's advantage. It is reasonable to view a loss that is part of this general interdependence as an inevitable incident of daily living the risk of which all assume because all benefit from the very interdependence which makes the risk unavoidable and yet foreseeable.

Taking the pragmatic justification on its own terms, it seems nonetheless seriously problematic in at least two ways.

First, it represents an inherently instable amalgam of competing, and indeed contradictory, purposes.³⁰ On the one hand, it supposes, positively, that plaintiffs ought in principle to be compensated for their foreseeable economic losses. This is a requirement of fairness and the multiplication of losses does not detract from each plaintiff's claim to redress. Yet, on the other hand, this very requirement is either unnecessary for or actually distorts appropriate incentives for the avoidance of cost-imposing activities. As well, it places an unfair burden on defendants. These are separate, competing, and indeed conflicting considerations,

²⁹ Here it is useful to recall Chief Justice Holt's celebrated reminder that "...it is no objection to say that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense." *Ashby v. White* 92 Eng. Rep. 126 (K.B. 1703) at 137.

³⁰ This is reflected in *Restatement Torts 2nd*, *supra* note 12, s. 766C, Comment (a). After listing a variety of divergent policy considerations that may underlie the economic loss rule, the *Restatement* concludes that there is as yet no general recognition of liability "[w]hatever the reason may be". *Ibid.*

each of which can occupy the whole field. It is by no means clear what weight should be assigned to each of them or how they should be combined.³¹ The pragmatic justification does not provide any guidance here and, offhand, it seems difficult to see how it could possibly do so.

Not only is the content of the pragmatic justification inherently unstable in the way just indicated, it also requires judgments about the application and satisfaction of the different criteria and purposes that are exceedingly difficult, if not impossible, to make – and certainly they are beyond the competence of a court seized with litigation. This is now widely recognized not only by scholars but also by the courts themselves.³² But if such judgments cannot be readily made, and if made, they remain intractably complex and subject to objection and disagreement, they cannot form part of the *publicly reasoned* disposition of a case.³³ If we hold, as I think we must, that publicity is an essential requirement not only for the conclusions of judicial decisions but also for the reasons that lead to those conclusions, this defect means that the very considerations made salient by the pragmatic justification cannot possibly be part of adjudication. They cannot belong to the public reason of courts.

³¹ In *Barber Lines*, *supra* note 1, Judge Breyer acknowledges this difficulty in his instructive discussion of the economic loss rule's policy basis. At pp. 55-56. Of course, this issue has spawned a significant scholarly literature, mainly taking an economic approach, which provides competing accounts of which policy factors are pertinent as well as how they should be evaluated, weighed and combined. See, for example, the differing, and indeed mutually incompatible, approaches taken by William Bishop and Mario Rizzo. W. Bishop, "Economic Loss in Tort" 2 *Oxford J. Leg. Stud.* 1 (1982) and M. Rizzo, "The Economic Loss Problem: A Comment on Bishop", *ibid.*, pp. 197-206 and M. Rizzo, "A Theory of Economic Loss in the Law of Torts", 11 *J. Leg. Stud.* 281 (1982). In a more recent article, Bishop discusses the problem of the relation between what he calls "allocative efficiency" and "corrective justice" norms and argues that the unqualified operation of the economic loss rule results in incompatibility between these two aims. He also suggests that in four out of eight paradigmatic fact situations considered, the unqualified operation of the rule does not achieve either aim. See W. Bishop, "Efficiency and Justice in Tort Damages: The Shortcomings of the Pecuniary Loss Rule" 15 *J. Leg. Stud.* 347

³² A particularly clear recognition of this difficulty is found in Judge Breyer's judgment in *Barber Lines*, *ibid.* See also the remarks to the same effect by Judge Wisdom in his dissent in the *TESTBANK* case, *supra* note 3 at 1052 ("The Economic Arguments") and by Judge Merhige in *Pruitt et al. v. Allied Chemical Corporation*, 523 F. supp. 975 (E.D. Virg. 1981) at 978-80. A judicial opinion that perhaps reflects insufficient awareness of this point is Judge Sneed's decision in *Oppen*, *supra* note 4 at 569-570, which, as a result, received harsh criticism from Richard Posner. See, R. Posner, "Uses and Abuses of Economics in Law" (1979) 46 *The University of Chicago Law Review* 281, 298-301.

³³ The requirements of public reason are most fully and systematically set out by John Rawls. See, in particular, Rawls, *The Idea of Public Reason Revisited*, 64 *U Chi. L. R.* 765 (1997)

There is a further difficulty with the pragmatic rationale. Because the pragmatic justification views the economic loss rule simply as a way of avoiding open-ended and crushing liability, it actually brings the rule into question and makes inevitable attempts to articulate an alternative treatment of relational economic loss that can claim to better serve the very end set out by that justification. We see this in the very article that sets out most forcefully the pragmatic rationale for the economic loss rule. Fleming James emphasizes that precisely because the rule is justified only in circumstances where permitting recovery will actually create the possibility of extensive and indeterminate liability, it has no application where those consequences do not arise.³⁴ This conclusion contrasts sharply with the way courts actually apply the rule, which bars recovery for *any and every* relational economic loss that is not consequential upon damage to something in which the plaintiff has a possessory or proprietary interest. It is not surprising therefore that James identifies a number of situations where the application of the economic loss rule by courts cannot be justified. And among these is *Robins* itself.³⁵ James concludes that the distinction between indirect economic loss and physical loss is one that is crude and unreliable, requiring reexamination if a limitation on recovery for pragmatic reasons is to be retained.³⁶

The pragmatic rationale, which is still in some form or another the nearly universal basis upon which the economic loss rule is justified by both courts and scholars, turns out *in its own* terms to be unable to account for that rule. If we endorse the pragmatic rationale, the economic loss rule, as it was and continues to be actually applied, is problematic. Moreover, given the

³⁴ See Part IV of “Tort Liability for Economic Loss”, *supra* note 2, pp. 55 ff.

³⁵ In connection with *Robins*, Fleming James writes: “If there were no charter, the owner who lost the vessel’s use could recover for that loss measured by its reasonable value. If the defendant were liable to the charterer instead, it would not be a wide and open-ended liability, but a finite one that the tortfeasor or his liability insurer would expect to pay under frequently occurring circumstances. There seems to be no valid reason why defendant should escape this ordinary item of damage just because the loss in this case happened to be suffered by one who had no proprietary interest in the ship. What has been called the pragmatic objection simply has no application.” *Ibid.*, 56.

³⁶ *Ibid.*, 50-51. For a similar conclusion, see J. Fleming, “Negligent Economic Loss in American Law” in _____ at 30; Bishop and Sutton, *supra* note 26 at 352,356, and 360; B.S. Markesinis and S.F. Deakin, *Tort Law* 86 (1994); Bernstein, *supra* note 14 at 165.

pragmatic rationale, the attempt to fashion a more reliable and precise set of criteria instead of the economic loss rule's single prerequisite of a proprietary or possessory interest is not only rational but necessary. Not only does the economic loss rule deny recovery to plaintiffs who, as a matter of fairness, ought to be compensated for their foreseeable losses, where this denial does not forward the goal of avoiding indeterminate liability; it rules out recovery in circumstances where the denial of liability gives the wrong answer to the question of how to achieve socially efficient loss-spreading or optimal accident prevention. The minority position comprises courts that decline to view the absence of a proprietary or possessory interest as decisive in and of itself. Instead, they treat the plaintiff's lack of such interest as just one among a number of factors which relate to the concern of indeterminate liability, depending on the particular circumstances of a given case.³⁷

It is important to keep in mind here that those courts which adopt the minority view and reject the strict application of the economic loss rule do so on the very same ground supposed by the majority approach. All agree that the issue of liability is to be settled on the basis of the pragmatic rationale. Moreover, both approaches accept the logic of negligence as set out above: they agree that, as a matter of fairness, plaintiffs ought, *prima facie*, to recover for negligently caused foreseeable relational economic loss. As far as fairness to plaintiffs goes, it is the foreseeable character of loss – and this alone - that distinguishes recoverable from non-recoverable losses. In this respect, physical and economic losses are considered from the same standpoint. To summarize the basic premise upon which all agree: *prima facie*, plaintiffs should recover for foreseeable economic loss unless the countervailing considerations identified by the pragmatic rationale apply.

³⁷ For illustrations, see dissenting opinion of Judge Wisdom in *TESTBANK*, *supra* note 3 at 1035ff and the important 1985 decision of the New Jersey Supreme Court in *People Express*, *supra*, note 4 ; perhaps the most detailed and careful statement of this objection is Justice Stephen's opinion in *Caltex Oil*, *supra* note 17 at pp.255-260.

Minority courts have formulated different alternatives to the economic loss rule. To simplify, these formulations are reducible to two: first, there can be recovery so long as the plaintiff's *relation to the negligently caused physical loss (or the risk thereof)* distinguishes the plaintiff's economic loss from the myriad indirect losses that result from the general interdependence of commercial interests; and second, there can be recovery so long as the plaintiff's *interest* is equivalent or sufficiently similar to the sort of interest that is regularly protected under existing tort law.

The well-known decision in the *People Express Airlines* case³⁸ illustrates the first approach.³⁹ Starting from the premise that the economic loss rule is in tension with the “over-arching purpose of tort law that wronged persons should be compensated for their injuries”,⁴⁰ the Court highlights the normative centrality of foreseeability : “the extent of liability and the degree of foreseeability stand in direct proportion to one another”.⁴¹ To meet the objections of the pragmatic rationale, the Court proposes the idea of an “identifiable class” of plaintiffs which, it emphasizes, is not simply a foreseeable class of plaintiffs. An identifiable class is “particularly foreseeable in terms of the type of persons or entities comprising the class, the certainty or predictability of their presence, the approximate numbers of those in the class, as well as the type of economic expectations disrupted.”⁴² We might say of the plaintiff who belongs to an identifiable class : if anyone would suffer economic loss as a result of this negligence, we can say in advance that it would *predictably and particularly* be persons like the plaintiff with his or

³⁸ *Supra* note 4.

³⁹ Additional illustrations of the first approach are the dissenting opinion of Judge Wisdom in *TESTBANK*, *supra* note 3; the decision in *Oppen*, *supra* note 4; the opinions (majority) of Gibbs, Stephen, and Mason JJ. in *Caltex Oil*, *supra* note 4; the decision of Supreme Court of Alaska in *Mattingly v. Sheldon Jackson College* (1987) 743 O.2d. 356; the majority opinion of Justice McLachlin (as she then was) in *Canadian National Railway v. Norsk Pacific Steamship* (1992) 91 DLR (4th) 289 (SCC); and *5th Avenue Chocolatiers, Ltd. V. 540 Acquisition Co. L.L.C.* (2000) 272 A.D.2d 23 (NYSC).

⁴⁰ *People Express*, *supra* note 4 at 111.

⁴¹ *Ibid.* at 115-6.

⁴² *Ibid.* at 116.

her economic interests, given the regularity of his or her presence and physical proximity in relation to the accident, the necessarily limited numbers of those similarly situated, the type of commercial interests which the accident would clearly and immediately disrupt, and so forth. The Court acknowledges that there will be circumstances that are not readily susceptible to this categorization.⁴³ But where it *is* possible to carve out an identifiable class in a particular situation, there seems to be nothing in the pragmatic objection to liability that would preclude doing so.

The notion of particular foreseeability is not in itself unintelligible.⁴⁴ As both commentators and courts have noted,⁴⁵ a similar or at least a parallel concept is arguably found in the law of public nuisance. The fact that it is particular *foreseeability* that distinguishes those who can recover their economic losses from those who cannot is consistent with the fundamental premises of even the majority view, which takes foreseeability as the central normative idea in determining recoverable loss. It is not a criterion wholly foreign to the analysis of liability. While it is true that ordinarily the law of negligence does not recognize degrees of foreseeability or specify an idea of particular foreseeability, the role of this idea is not so much to establish the plaintiff's claim in fairness against the defendant --- that is already secured by virtue of the plaintiff having suffered a foreseeable loss—but rather to show that the concern about open-ended liability does not apply if a particularly foreseeable plaintiff were granted recovery. Its role is, as it were, to negate the negation of what fairness to the plaintiff would otherwise require.

⁴³ *Ibid.* at 118.

⁴⁴ Of course, this is not to say that it is uncontentious or ultimately defensible. See the criticisms of this view, from the majority standpoint, by Judge Breyer in *Barber Lines*, *supra* note 1 at 56-7. I evaluate the minority approaches in the following section. See text accompanying footnote 87 *infra* and following.

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The second approach has several variants that have been suggested by courts⁴⁶ and proposed by leading writers.⁴⁷ Fleming James himself recommended this alternative in his criticism of *Robins*.⁴⁸ The essential idea here is that there should be recovery for relational economic loss where the sort of loss sustained by the plaintiff is precisely the kind that would have been sustained by one who has a possessory or property interest in the damaged thing. The reason it is not suffered by the latter is that, as a consequence of the relation (sometimes contractual) between the owner and the plaintiff, the risk of such loss has been “transferred”⁴⁹ from owner to the plaintiff so that if the plaintiff does not recover, the defendant will escape this “conventional item of recovery”⁵⁰. For example, a vendor and purchaser may agree that the vendor retains title but transfers the risk of loss or damage to the goods to the purchaser while the goods are being transported to the purchaser.⁵¹ The purchaser will suffer a loss if the goods are damaged by a third person, the defendant, but, in the absence of a proprietary or possessory right to the goods, is barred by the economic loss rule from recovering against the defendant. According to this second approach, this conclusion is unjustified. There is one and the same loss, irrespective of how it has been allocated as between the plaintiff and the owner. The allocation of

⁴⁶ The most important American decisions are the Court of Appeal decision of Justice Mack in *Flint v. Robins Dry Dock & Repair Co.* 13 F.2d 3, 5 (2d Cir.1926) and *The STRUMA*, *supra* note 4, which is followed in *Amoco Transport Co. v. S/S MASON LYKES*, (1985) 768 F.2d 659 (5th Cir. C.A.) Among English judges, Lord Goff has also taken this approach in *Leigh and Sullivan Ltd. V. Aliakmon Shipping Co. Ltd* [1985] Q.B. 350, 399.

⁴⁷ John Fleming endorsed this approach. See “Negligent Economic Loss in American Law” p.30; Bernstein, *supra* note 14 at 165.

⁴⁸ See “*Liability for Economic Loss*”, *supra* note 2 at 56-7.

⁴⁹ This term is used in *THE STRUMA*, *supra* note 4, pp. 710-711: “But payment for loss of use of the damaged vessel is a conventional item of recovery, and the fact that the charter party has transferred the risk of loss of use from the owner to the time charterer should not extinguish the right to a recovery of a traditional item of damages.”

⁵⁰ *The STRUMA*, *supra* note 4 at 710. In the *Aliakmon* case, Goff L.J. (as he then was) articulated what he termed “the principle of transferred loss”: “...Where A owes a duty of care in tort not to cause physical damage to B’s property, and commits a breach of that duty in circumstances in which the loss or physical damage to the property will ordinarily fall on B but (as is reasonably foreseeable by A) such loss or damage, by reason of a contractual relationship between B and C, falls on C, then C will be entitled, subject to the terms of any contract restricting A’s liability to B, to bring an action in tort against A in respect of such loss or damage to the extent that it falls on him,C.” *Supra* note 43 at 77.

⁵¹ As in the *Aliakmon*, *supra* note 44 and *Margarine Union GmbH v. Cambay Prince Steamship Co. Ltd. (The Wear Breeze)* [1967] 3 All ER 775.

risk should neither increase nor diminish the defendant's responsibility. Denying recovery to the plaintiff for a loss that is of a character which will ordinarily fall on, and would be recoverable by, the owner but which, in the given circumstances, has been transferred to the plaintiff will only result in making the defendant's duty empty and unenforceable. Moreover, where the loss is of this kind, there will generally be no risk of open-ended or extensive liability if recovery is granted.⁵² Here also, then, the pragmatic objection has no application. It follows that, given its own premise -- that negligently caused foreseeable loss triggers a prima facie claim to compensation -- the majority view has no principled basis upon which to reject this alternative to the economic loss rule. Acceptance of the pragmatic rationale for the economic loss rule entails recognition of the transferred loss exception.

So long as the majority view sees the ground of the economic loss rule in the pragmatic objection, it cannot coherently exclude these alternatives. In fact, they are its inevitable and required outcome. Against these alternatives and more generally against the minority call for the adjudication of economic loss claims on a case-by-case basis in accordance with ordinary principles of negligence, subject of course to the policy of avoiding the imposition of indeterminate liability, the majority position's final defense is to retreat to a so-called "bright-line" view⁵³ of the economic loss rule and to deny that economic loss claims can effectively and coherently be determined on a case-by-case basis.

According to the majority view, the economic loss rule, while not free from arbitrariness, "has the virtue of predictability with the vice of creating results in cases at its edge that are said

⁵² This point is expressly underlined by the court in *STRUMA*, *supra* note 4 at 710 and by Lord Goff in *The Aliakmon*, *ibid.*, at 399.

⁵³ This is now the prevailing way in which the courts explicitly characterize the economic loss rule. Illustrative decisions include, in addition to the leading *TESTBANK* and *Barber Lines* cases, *Getty Refining and Marketing Co. v. MT FADI B* [hereinafter "*Getty Refining*"] 766 F.2d 829 (3d Cir. 1985) and *Corpus Christi Oil & Gas Company v. Zapata Gulf Marine Corp.* [hereinafter "*Corpus Christi Oil*"] 71 F.3d 198 (5th cir. 1995), to name just two others.

to be ‘unjust’ or ‘unfair’”.⁵⁴ There must be *some* rule to impose a limit at *some* point.⁵⁵

Moreover, proponents of the majority view stress that the very considerations taken into consideration under the pragmatic objection cannot be applied or even discerned in the usual case-by-case context, as urged by the minority. Such considerations must be “highly general and abstract”⁵⁶ and thus inapplicable on a case-by-case basis because, it is claimed, judges lack the requisite empirical information that would allow measurement of their force or magnitude.

Indeed, as I have already noted⁵⁷, to apply the pragmatic objection in a given case, courts would, among other things, have to identify which policy objectives are relevant (and to what extent) both in general and in that particular situation; determine what weight should be given to each consideration and how competing and even conflicting objectives should be combined; and finally, identify, gather, and evaluate all relevant empirical data. Not surprisingly, then, courts openly acknowledge that “we do not know the answers to these questions nor can judges readily answer them in particular cases.”⁵⁸ At best, broad categories can be identified in which, by and large, recovery may or may not raise the specter of open-ended liability. The consequence is, of course, that economic loss claims which satisfy the pragmatic objection and the ordinary requirements of negligence will nonetheless be denied because courts lack the information and

⁵⁴ *TESTBANK*, *supra* note 3 at 1029. It is worth noting that in England, the response to Lord Goff’s proposed principle of transferred loss, set out in note 47, *infra*, has also been the assertion of a bright line approach to the economic loss rule. See Lord Brandon’s speech in *The Aliakmon* where he explicitly grounds the economic loss rule on the pragmatic objection but at the same time rejects the idea of transferred loss, not because it runs afoul the pragmatic objection, but because “the law should [not] allow special pleading in a particular case within the general rule to detract from its application.” [1986] 1 A.C. 785 at 816-817.

⁵⁵ Lord Oliver’s remarks in the leading English case of *Murphy*, *supra* note 14 at 934: “The solution to [cases of relational economic loss] has so far been achieved pragmatically ... not by the application of logic but by the perceived necessity to place some limits, perhaps arbitrary limits, to what would otherwise be an endless, cumulative causative chain bounded only by theoretical foreseeability.”

⁵⁶ *Barber Lines*, *supra* note 1 at 53.

⁵⁷ See footnotes 30 & 31, *supra*.

⁵⁸ *Barber Lines*, *supra* note 1 at 59.

resources to apply the pragmatic rationale to a given particular case. The preservation of a bright-line rule requires this sacrifice of fairness in individual cases.⁵⁹

This back-and-forth between the majority and minority view brings out the unavoidable instability of the economic loss rule when justified by the pragmatic rationale shared by both positions. The rule turns out to be over-reaching and crude when measured against the objectives it is deemed to serve. The attempt to divide up the field into a general rule and “recognized” exceptions does nothing to resolve this inherent instability but simply masks it. Moreover, if, as the majority contends, there are serious and in fact intractable difficulties in applying the pragmatic rationale on a case-by-case basis, it is no longer clear that this rationale can be part of a *public* basis of justification for that rule. The pragmatic rationale seems inherently unsuited to perform this essential role. We lack at present a justification that shows why the economic loss rule, as stated in *Robins* and followed by the great majority of courts, is *necessary* and, moreover, shows this in a way that fits with the sorts of reasons and considerations that can be readily discerned and applied by courts in their usual adjudicative role on a case-by-case basis.

We seem to have reached an impasse. The economic loss rule is without a normatively sufficient and institutionally appropriate rationale. Yet the economic loss rule, as applied to relational economic loss, was settled by a virtually uninterrupted series of consistent decisions for over a century that developed even in detail along similar lines in the British Commonwealth

⁵⁹ This is major part of the criticism of the bright-line approach currently endorsed by the majority view. See, for example, the well-articulated criticisms in *People Express*, *supra* note 4 at 110-111 and in the dissenting opinion of Judge Wisdom in the *TESBANK* case, *supra* note 3 at 1051. The present essay also rejects the bright line approach to the economic loss rule and endorses the idea of resting liability for pure economic loss on first principles of negligence in the context of case-by-case adjudication. Where it differs from the minority criticism is in its understanding of what those first principles are and how they apply in circumstances of relational economic loss. It also disagrees with both the majority and minority views inasmuch as it does not explain *Robins* or justify the economic loss rule on the basis of the pragmatic objection but, to the contrary, elucidates them in light of first principles of negligence that apply to all kinds of loss.

and in the United States. Far from qualifying or limiting the rule, courts took it to its natural limit, generalizing its principle and filling it out in scope and application. And, as has been frequently noted,⁶⁰ the courts that did this were the very same ones that also elaborated during this period the modern law of negligence. We should therefore have compelling grounds before dismissing this history as simply mistaken.⁶¹ To the contrary, given this history, it is more reasonable to conjecture that the source of the lack of fit between the rationale and the rule lies with the former, not the latter. It may be the pragmatic rationale, not the economic loss rule, that has to be revised or even abandoned altogether.

The history of the development of the economic loss rule is consistent with this last suggestion. It is striking that most of the earlier cases that formulate and elaborate the economic loss rule do so *without* making the pragmatic considerations its *explicit* basis. The pragmatic justification forms no part of the reasoning that leads to the denial of recovery for relational economic loss. This is widely so in American, English, and Commonwealth decisions.⁶² Instead, the courts typically say, without further explanation, that relational economic loss is indirect loss and such loss is not recoverable, being *damnum absque injuria*. More often than not, courts note the complete absence of legal precedent for recovery despite the fact that such losses must frequently occur and take this as evidence of the doubtfulness of the claims. In the early landmark English case of *Cattle*, for example, Lord Blackburn justifies the denial of recovery on the ground that “[n]o authority in favour of the plaintiff’s right to sue was cited, as so far as our knowledge goes, there was none that could have been cited.”⁶³

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Even more interestingly, when certain of these founding decisions *do* refer to the consequences that might follow from a finding of liability -- the very consequences which are the concern of the pragmatic objection—they make clear that this is *not* the basis upon which they denied recovery: “[t]he magnitude of these consequences must not be allowed to deprive the plaintiffs of their rights, but it emphasizes the importance of the case.”⁶⁴ With some notable exceptions, explicit judicial endorsement of the pragmatic rationale is a relatively recent phenomenon.

The fact that the courts, which established the economic loss rule, do not rely on the pragmatic objection or other policy rationales but instead excluded recovery in the unelaborated and categorical manner indicated in the previous paragraph does not necessarily mean that they understood the rule to be an exception to, or to be in tension with, the general principles of negligence that they were simultaneously in the process of developing. There is another possible explanation. These courts may have viewed recovery for relational economic loss as directly incompatible with certain ultimate premises that must be presupposed for there to be *any* liability in negligence. Now, as a general matter, the more basic and more pervasive a presupposition is, the less one should expect courts *ordinarily* to draw *explicit* attention to it or to seek support for it in precedent. The point is that it is *presupposed*. Nevertheless, it is the mark of a great and seminal judgment that, in order to resolve the particular issue at hand, it must – and does -- bring out more explicitly the deep connection between conclusion and presupposition and thereby presents in a clearer light the *conception of liability* that is at work in its own decision as well as in those of previous cases. Justice Holmes’ ruling in *Robins* is just such a judgment.

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II. The *Ratio* and Reach of *Robins*

In *Robins*, the plaintiffs were time-charterers of a vessel owned by, and in the possession of, a third party. While the vessel was being dry docked for its semi-annual inspection, the defendant, who had contracted with the owner to inspect and service the vessel, carelessly damaged the propeller, making necessary certain additional repairs and thereby causing additional delay before the vessel could be put back in service. The charterparty agreement between the plaintiffs and third party suspended the plaintiffs' obligation to pay hire during the period the vessel was out of service. Nevertheless, the plaintiffs sustained lost profits during this period as a result of their inability to use the vessel as planned. The lost profits constituted relational economic loss. The plaintiffs brought an action in negligence against the defendant for this financial loss. Reversing the decision in favour of the plaintiffs at the Circuit Court of Appeal, Justice Holmes denied recovery.

As I have already indicated, there is considerable disagreement among courts and scholars as to the basis and scope of the decision. Some courts, particularly those which adopt the minority position, see it as confined to negligent interference with *contractual* relations⁶⁵ or to only certain kinds of financial loss, such as lost profit as opposed to wasted expenses⁶⁶. Other courts, especially those which endorse the majority position and apply the economic loss rule strictly, view the decision as making the existence of actual *physical* damage to one's property a necessary condition of liability for resulting economic loss.⁶⁷ Most commentators criticize it as failing to provide any reasons for the denial of recovery or they simply read in the sort of pragmatic concerns discussed above, with the accompanying criticism that such concerns do not

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seem to apply in the particular circumstances of the case.⁶⁸ *Robins* remains a puzzle and a problem despite its monumental authority and influence.

To understand the decision and to see its reasoning, it is crucial to identify the precise point of Holmes's disagreement with the Court of Appeals. Both courts reject the plaintiffs' arguments that they have a possessory or proprietary interest in the vessel⁶⁹ and that they should qualify as third party beneficiaries in relation to the contract of employment between the defendants and the owners of the vessel.⁷⁰ Moreover, the Court of Appeals, no differently than the Supreme Court, clearly sees that the fact that the plaintiffs' financial loss may be foreseeable in accordance with ordinary negligence standards is not sufficient to justify the imposition of liability upon the defendants.⁷¹ The line of reasoning that leads the Court of Appeals to grant recovery and that is rejected by Justice Holmes is as follows.

The starting point of the Court of Appeal's analysis is that the defendant should be responsible for the lost use of the vessel during the additional time it has to be dry-docked as a result of the accident. The defendant is responsible for interference with the use of the vessel *as such*, and the market value of the use that is interfered with supplies the measure of recovery.⁷² The key idea here is that the use and the value of that use are viewed as protected interests and recoverable *quite apart from which party's use is interfered with and what legal relation obtains between that party and the defendant*. So, the court points out, had there been no charterparty, the owner of the vessel would have sustained the lost use of the vessel and would have been entitled to recover the entire amount (to the extent that it was foreseeable) from the defendant. In the actual circumstances of the accident, the lost use is borne by both the owner and the plaintiffs

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in the form of lost hire sustained by the former and lost profits suffered by the latter. The fact that the charterparty divides up the loss in this way should not, the court contends, be allowed to diminish the defendant's responsibility for this foreseeable and proximate item of recovery. This apportionment of loss is legally relevant only as between the plaintiffs and the owner. It does not, and cannot, affect in any way the object and scope of the defendant's liability.

Because the measure of the total recovery is the market value of the lost use of the vessel, the defendant's liability for its tortious act is for the actual damage done to "the *combined interests* in the ship".⁷³ And this, the court emphasizes, involves "*no injustice* to [defendant]".⁷⁴ To the contrary, because the defendant's negligence "directly affect[s] several parties, each is *entitled to his just share* of the total amount"⁷⁵ quite irrespective of whether it has a proprietary or possessory interest in the vessel. Unless the defendant is required to compensate the plaintiffs, there remains a portion of the total amount of lost use that would be recovered by no one, despite the fact that it resulted from the defendant's negligence. The Court suggests (without, however choosing between) two ways of giving legal effect to the plaintiffs' right to recover: first, directly against the defendant, enforceable independently of any suit by the owner; second, indirectly and by analogy to bailment cases, through the owner having an equitable obligation as trustee to pay over to plaintiffs so much of what it recovers from the defendant as exceeds its own particular loss. Finally, the Court distinguishes previous cases in which liability was denied on the basis that there the loss was too remote to permit recovery. Here, by contrast, the plaintiffs' loss is both foreseeable and proximate, being of the same kind as the loss directly sustained by the owner.

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The precise basis of the Court of Appeals' decision to grant recovery is nothing other than the previously discussed principle of transferred loss.⁷⁶ Against this entire line of reasoning, Justice Holmes answers simply and with the utmost clarity that "justice does not permit the [defendant] to be charged with the full value of the loss of use unless there is some one who has a claim to it as against the [defendant]."⁷⁷ For the defendant's interference with the use of the vessel to be a wrong against the plaintiffs, the plaintiffs, Holmes insists, must have, *in their own right and as against the defendant*, a legally protected interest in that use. The fact that someone *else*, such as the owner, might have such an interest or the fact that the plaintiffs might have a contractual right against the owners to have their loss indemnified cannot in the least satisfy this requirement. To state a cause of action, the plaintiffs' complaint must be founded upon their own protected interest, not another's, and that interest has to be against the defendant, not someone else.

Given the particular facts of the case, the requisite interest is clearly absent. Justice Holmes presupposes that legally protected interests must in general be either *in rem* or *in personam* and, more particularly, that the plaintiffs must have such an interest with respect to the lost use and profit for which they are seeking recovery. But the plaintiffs have neither interest against the defendant. Because they lack a possessory or proprietary right in the vessel, they do not have a right *in rem*. And their only interest *in personam* is their contractual right against the owner of the vessel, not the defendant. The plaintiffs' claim to redress must be based on their rights and thus, if at all, has to be worked out through their contractual relation with the owner.

This conclusion does not suppose or reflect the primacy of contract or any such idea but simply results from a rights-based analysis. Lacking, as against the defendant, any legally

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cognizable interest in the use of the vessel, the plaintiffs have no standing in negligence to claim against the defendant for their portion of lost use. Correlatively, the defendant is not responsible for impaired use as such – whether in whole or in part-- but only for interference with use that can rightfully be claimed by another against the defendant. In the absence of such a right, interference with use cannot be a wrong against anyone. Wrongs are *relative* to others who have rights against the wrongdoer with respect to the thing damaged or impaired. This is the central idea in *Robins* and this Holmes takes to be a requirement of justice.

Given this analysis, Holmes readily disposes of the possible analogy between the present case and bailment.⁷⁸ In the latter, *both* bailee and bailor have either a possessory or a proprietary interest in the damaged chattel and *both*, therefore, have rights as against the defendant for interference with those rights in the chattel. The bailment analogy cannot apply where a plaintiff has no claim in its own right as against the defendant.

What is conspicuously absent in the decision is any discussion whatsoever of the sorts of considerations that make up the pragmatic objection to liability. There is no mention of remoteness, even though this was discussed by the Court of Appeal⁷⁹ and was referred to by counsel in its submissions before the Supreme Court.⁸⁰ This does not mean, as so many have hastily concluded, that no justification is provided. When Holmes famously concludes that the law does not spread its protection so far, the reason he provides is the absence of a right in the plaintiffs as against the defendant. Rather than relying on pragmatic considerations, Holmes rests his decision upon a conception of liability in which wrong is an injury to something that comes under another's rights and these rights, in turn, must be relative to the defendant's particular

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conduct with respect to the thing. Duty exists, and is intelligible, only in relation to or as the correlative of such right. This conception of liability I shall characterize as “juridical”.

In general terms, the metes and bounds of the decision may be stated with reasonable clarity and certainty. They are entailed by the central idea that the denial of liability must apply in principle to any case of negligently caused relational economic loss where a plaintiff does not have a right, exclusive as against the defendant, with respect to the item interfered with by the defendant’s conduct. From this core idea, certain definite consequences follow.

First, the exclusion of liability in *Robins* is not limited to cases of negligent interference with *contractual* interests.⁸¹ The economic loss rule applies wherever a plaintiff’s interest in the damaged thing is less than an exclusive right against the defendant. Thus the denial of liability applies not just where the only interest a plaintiff has with respect to the claimed item is a contractual right against a third party but also where the interest is something less, such as a mere liberty or permission to use it. All these interests fall short of a (claim) right as against the defendant. The fact that the plaintiff has a liberty to use something implies, by definition, merely that he or she does no wrong in making use of it, not that he or she has a right to such use or that others are under a correlative duty to refrain from interfering with this use.

Second, the economic loss rule applies to *any* kind of financial loss that arises as a result of the plaintiff not being able to use something in which he or she lacks the requisite right as against the defendant.⁸² So, in *Robins*, had the plaintiffs’ loss taken the form of wasted hire rather than lost profit, the action against the defendant would have been dismissed on exactly the same reasoning. The hire would have been paid under a contract with the owner—which, in itself, could not give the plaintiffs any right against the defendant – and the hire would have been

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wasted because the plaintiffs were unable to use the vessel during the period of additional delay – but they had no right to such use as against the defendant.

Third, the rationale for the economic loss rule has nothing to do with the question of remoteness of loss as this is ordinarily understood in the law of negligence.⁸³ The fact that defendant foreseeably impairs some interest which the plaintiff may have does not establish that the latter's interest is founded upon a right exclusive as against the former. The two points are conceptually, and legally, distinct and independent of each other. It is not surprising, then, that *Robins* makes no mention whatever of remoteness, despite the fact, as mentioned above, that the Court of Appeals rationalized previous cases which denied recovery on this basis and the defendant itself, before the Supreme Court, argued that the plaintiffs' claim should fail for this reason.⁸⁴ It would also seem to follow that where a plaintiff *does* have the requisite right as against the defendant and he or she can satisfy the ordinary standard of foreseeability, there should be recovery, however many other plaintiffs with divergent financial claims are similarly in a position to succeed. As it stands, *Robins* provides no point of entry to the pragmatic objection.

Fourth, while in *Robins* the plaintiffs' loss did not result from physical damage to anything in which the plaintiffs had a possessory or proprietary interest, the economic loss rule does not require that the financial loss be consequential upon actual physical damage for it to be actionable. One finds in both majority and minority decisions statements that appear to assume the contrary.⁸⁵ What *Robins* requires is *just* that the plaintiff's financial loss results from an

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⁸⁴ When Holmes writes 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*" (*Robins*, *supra* note 1 at 309, emphasis added), he is referring to the absence of knowledge not for the purpose of determining foreseeability but rather because this shows that the wrong in question cannot possibly be the intentional tort of interference with contractual relations, for which there can be liability.

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impairment of the plaintiff's right with respect to something, such right entailing the entitlement to possess, use, or dispose of the thing without interference by the defendant. Actual physical damage is not a requirement per se but only a particular way in which this right can be injured. Where a right is interfered with even in the absence of actual physical damage, *Robins* definitely does not bar recovery for financial loss that results therefrom. By way of illustration, consider the following sets of facts drawn from two well-know cases.

In the first, ⁸⁶during the period the defendant's vessel is discharging cargo at the plaintiff's marine terminal, a crack in the vessel's deck and hull is discovered, resulting in the U.S. Coast Guard ordering the vessel to remain at berth until such time as the problem is resolved. The crack, we suppose, is attributable to defendant's negligence and the response by the Coast Guard is reasonably foreseeable. During the period of enforced delay, the plaintiff is not able to use *its* pier as planned. So, for example, the plaintiff is not able to give access to other ships that are scheduled to dock, resulting in financial loss to the plaintiff in the form of demurrage payments contractually owed to these other ships in such circumstances. Yet there has been no actual physical damage to the plaintiff's property (its pier). Supposing these financial losses to be reasonably foreseeable, are they barred by *Robins*?

In the second set of facts, ⁸⁷ the plaintiff airline suffers financial loss when it is forced to evacuate its offices in the wake of a tank car accident that occurs at the defendant's nearby railroad yard as a result of defendant's negligence. The evacuation is ordered by the municipal authorities because the vicinity surrounding the accident is threatened by the risk of fire, should the damaged tank car explode. No explosion or any physical damage to plaintiff's premises is caused. Not only are the plaintiff's employees required to leave the premises but, in addition,

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they cannot return to the offices for a period of time. As a result, plaintiff suffers business interruption losses that include loss bookings, wasted wages, and other fixed operating expenses that have to be paid during the period of closure. Once again we ask whether *Robins* precludes recovery for these losses, assuming they are reasonably foreseeable.

In the first set of facts, the plaintiff's inability to give third parties access to its pier constitutes an interference with its capacity to use its own property. This impairment of its capacity to use its own property results from what amounts to a "taking" by the defendant of the plaintiff's pier. The gravamen of the plaintiff's complaint should be made clear: the plaintiff is asking that the defendant *leave the plaintiff's property (its pier) alone*, not that the defendant refrain from impairing something *else*, which the plaintiff may wish or need to use in conjunction with its property but which the plaintiff neither owns nor possesses. In other words, all that the plaintiff is asserting is a proprietary right exclusive as against the defendant. But this is exactly what *Robins* requires. The fact that this interference with use has arisen through the defendant's continued occupation of the pier at the order of the public authorities rather than as a result of direct physical damage to the pier is not determinative: these represent merely two different ways in which the defendant's negligent conduct can interfere with the plaintiff's property right. Moreover, the fact that the plaintiff's financial loss arises through its contractual relations with third parties is just the manner in which the lost use of its own property materializes. This is equivalent to the owner of the damaged vessel in *Robins* having to forego hire from the plaintiff time-charterer as a result of the contract between them. There is no doubt, as a matter of precedent, that the economic loss rule would not preclude recovery of such losses.

As a matter of principle, we can now see why it should not be barred in the above scenario as well, despite the absence of actual physical damage to the pier.⁸⁸

The second set of facts requires a more nuanced analysis. We must distinguish between financial losses incurred *just because* the plaintiff's employees are forced to leave and those losses that arise through the fact that they cannot return because the means of access to the offices are no longer available for use. The economic loss rule would allow recovery of the first but not the second. This is because the first sort of loss would simply be the materialization of an interference with the plaintiff's right to exclude the defendant from affecting its use of its property. The plaintiff is asking merely to be left alone. For example, imagine that the day the offices are evacuated, the plaintiff is in the process of making bookings for flights or that it is under an obligation to pay its employees their wages. As a result of having to evacuate, the bookings are lost and the wages wasted. By contrast, where the plaintiff's financial losses arise through its no longer being able to *return* to its premises because it is deprived of access to them, the plaintiff's complaint must suppose that the plaintiff should have the use of something (viz. the road to its offices) which it neither owns nor possesses and so, with respect to which, it does not have an exclusive right of use as against the defendant. By the very character of its claim, the plaintiff is asserting a right to depend upon something that does not belong to it and in which the plaintiff lacks an exclusive right relative to the defendant. This is precisely the factor that brings the exclusionary rule into play.

We are now in a position to show how, in its own terms, *Robins* addresses, and indeed provides a complete answer to, the approaches which the minority view proposes in substitution for the economic loss rule. I have already divided these alternatives into two categories.⁸⁹ In the

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first, the traditional standard of proximity is sharpened and intensified by requiring either the plaintiff to be a member of an identifiable or particularly foreseeable class or, alternatively, the damage sustained to be particular and special in the sense of being different in kind and degree from economic loss suffered by the general public as a result of the accident. The aim is to ensure that the nexus between the defendant's conduct and the plaintiff's loss is sufficiently distinct and close so that if liability is imposed in such circumstances, it will not entail the consequences that concern the pragmatic objection. In the second category, the focus is on the character of the plaintiff's interest. Recovery should be possible when the plaintiff's interest in the damaged thing is the very sort of interest that would be protected if sued upon by the owner in circumstances where it is the plaintiff and not the owner who bears the risk of loss with respect to this interest. The idea here is that the plaintiff's loss is with respect to a conventional item of recovery that will be unprotected if the plaintiff cannot recover. Denying recovery will result in the defendant not shouldering the full consequences of his or her negligence. It should be emphasized that these alternative approaches are proposed as superior to the economic loss rule in fulfilling the traditional purposes of negligence law. The claim is that, in contrast to the economic loss rule, these alternatives uphold the requirements of justice and fairness between the parties where the pragmatic objection does not apply.

None of the additional criteria proposed under any of these alternatives meets the fundamental requirement in *Robins* that the plaintiff must have a right, exclusive as against the defendant, with respect to (the use of) the damaged thing. Accordingly, all necessarily fail to establish an actionable claim to the financial loss, however foreseeable the loss may be. Let me try to show this in some detail.

One criterion proposed for singling out particular relational economic losses from such losses generally sustained by the public as a result of an accident is the requirement that the plaintiff's financial loss arise from the very same negligence that *also* causes, or at least threatens, injury to the plaintiff's person or property.⁹⁰ According to this criterion, however, the financial loss need not be consequential upon the injury to the plaintiff's person or property. For example, the defendant negligently cuts electrical cables owned by the municipality that supply power to the plaintiff's hotel, thereby damaging the cooling mechanisms of the plaintiff's refrigerators and blacking out the premises. The plaintiff sustains physical loss to the refrigerators and financial loss as a result of having to close the dining hall until power is restored. Although the financial loss does not flow from and is independent of the actual physical loss to the plaintiff's property, it is contended that the requirement of an independent physical loss (actual or threatened) serves to circumscribe the number of plaintiffs and the extent of recovery as well as to avoid multiplicity of suits, thus satisfying the pragmatic objection.

But, against this approach, the problem is that on these facts the financial loss does not flow from an actual or threatened interference with the plaintiff's rights in anything. The financial loss results from the loss of electricity that is supplied by cables with respect to which, we have supposed, the plaintiff has no exclusive right of use as against the defendant. The fact that one loss (*viz.* the physical loss) *does* result from a violation of a right in the thing (refrigerators) does *not* in the least establish that some other loss, distinct from and independent of it, also arises from a breach of such a right. To meet this criterion and so to satisfy *Robins*, one would have to show that the independent financial loss flows from an interference with a right in something *else* – here, the use of the cables. Stated abstractly, the fact that a loss is caused by negligent conduct does not, and cannot, in itself show that this loss is with respect to something

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in which the plaintiff has the required right. Conduct may be “negligent” and may cause “loss” without affecting something that comes under the plaintiff’s rights as against the defendant. A prerequisite of an actual or threatened physical loss that is independent of the financial loss may serve as a limiting device that cuts off the spectre of open-ended liability or the multiplication of suits, and so satisfies the pragmatic objection. But it does nothing whatever to link the financial loss to something in which the plaintiff has the necessary protected interest. It cannot possibly satisfy *Robins*.⁹¹

A more serious challenge appears to be posed by those cases that propose a more narrowly defined conception of proximity and directness in the effort to confine liability within the limits of the pragmatic objection. Here again the point of these formulations is to demonstrate that the plaintiff’s financial loss is different in kind from the sorts of financial losses that may be ordinarily and foreseeably sustained by the public in general following damage to some item or resource which they neither own nor possess. Since the pragmatic objection no longer applies, there is no reason in fairness or justice that precludes recovery. To establish the distinctiveness of the plaintiff’s financial loss, courts⁹² consider among other things: the temporal and physical closeness of the plaintiff’s loss to the accident; whether the plaintiff’s presence in the zone of danger is fortuitous or predictable; whether the defendant has a reasonable opportunity to ascertain the more specific identity and nature of the plaintiff’s interest in relation to the damaged thing and to foresee that its negligence can directly affect those interests in a way that causes financial loss; whether the plaintiff’s interest in the (use of) the damaged item (owned and possessed by a third party) is primary and direct or merely incidental and casual; the inherent likelihood that the asset, if damaged, would be productive of economic loss to those who rely

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directly on its use; or whether the plaintiff's loss can be shown to be special and particular in a way that must be done for a member of a community to succeed in bringing an action for public nuisance. These various considerations allow courts to establish normatively justified boundaries⁹³ that distinguish those who can recover relational economic loss without running afoul of the legitimate concerns of the pragmatic objection. Or so it is contended.

However, if we provisionally accept *Robins*' requirement that the plaintiff's financial interest in the damaged thing be founded upon some rightful claim as against the defendant, can any of these considerations actually draw a line on a "normatively justified basis"? These factors may certainly show that a plaintiff's loss or identity is "more" or "particularly" foreseeable and "specifically" ascertainable. Moreover, the foreseeability and ascertainableness of loss and class of plaintiff are necessary and essential prerequisites for liability in negligence. And so such factors are normatively relevant at least insofar as they at least specify these requirements. Nevertheless, foreseeability is only one of the necessary conditions for liability. It is also essential that the plaintiff has a right exclusive as against the defendant. Unless the plaintiff has this right, there is no normatively justified basis for singling him or her out for recovery from others, however "distinct" or "special" that plaintiff's financial loss may be in comparison to that suffered by members of the community in general. It is worth repeating that the existence of such a right and the foreseeability (or directness and closeness) of loss are wholly distinct matters. The various efforts to specify foreseeability and directness do nothing – and cannot do anything-- to establish this further element of right. Thus, these formulations also cannot possibly satisfy the requirement in *Robins*, not because they are either incoherent or intrinsically unreasonable, but simply because they are normatively irrelevant for this purpose.

The same is true for the different formulations under the second category. According to *Robins*, it is not, and cannot be, an argument for allowing recovery that the plaintiff's loss is the sort of loss which might have been sustained by a different party who has the requisite right as against the defendant. *Robins* rejects the idea of a "conventional or ordinary item of recovery" or of a "transfer of loss" as irrelevant to the analysis of negligence. Moreover, the fact that non-recovery by the plaintiff may result in there being no liability or recovery at all for the interference with the use of the damaged item must also be, in itself, juridically irrelevant. The central teaching of *Robins* is that the *only* kind of loss that *can* be legally relevant is one that is sustained by the party having the requisite right as against the defendant and that flows from the defendant's interference with that right, not from something else. It is the fact that the use, which is interfered with, comes under the plaintiff's rights as against the defendant that makes the loss resulting from that impairment a recoverable item. Apart from this relation, loss is juridically irrelevant. Certainly, a particular kind of loss may be said to be a typical consequence of interference with rights. But this is a purely statistical factual point that adds nothing to the legal analysis. The statistical point becomes a source of serious confusion, however, when it is invoked to give a plaintiff standing to sue in circumstances where he or she lacks the requisite right. Moreover, the fact that non-recovery by the plaintiff (who, we suppose, does not have the required right) may result in the defendant not having to indemnify anyone for the results of his or her not necessarily problematic. Here it simply means that, in the assumed circumstances, no one's rights have been infringed and no wrong has been done by the defendant's conduct. Consequently, no one is entitled to be compensated by the defendant. According to the analysis of negligence proposed in *Robins*, this result is not capricious nor does it represent a lacuna in the law. To the contrary, it is required.⁹⁴

Here then is an understanding of the economic loss rule that views it, not as a bright line rule nor as resting upon a pragmatic concern about indeterminate or extensive liability, but simply as stemming wholly from a purely *juridical* consideration: to succeed, the plaintiff must have an exclusive right as against the defendant to the item for which recovery is claimed. This is a categorical requirement. *Whenever* the plaintiff lacks this right, his or her claim must be non-suited for failing to establish a cause of action. This requirement is completely distinct from and independent of the pragmatic objection. With respect to relational economic loss,⁹⁵ the fact that there is or is not a prospect of indeterminate liability neither establishes nor denies the existence of the requisite right on the part of the plaintiff. Moreover, we have seen that this understanding of the economic loss rule appears to provide a complete answer to the idea of transferred loss in all its various formulations: the fact that one person (the plaintiff) suffers a loss which in different circumstances might have been borne by another who has a property or possessory interest in the damaged item does not in any way establish that the plaintiff has the necessary right himself or herself. A plaintiff must sue for his or her own right, not as the vicarious beneficiary of another's right. Since the principle of transferred loss supposes that the plaintiff's claim can be detached from the very element that Holmes requires as an essential prerequisite to establishing the commission of a wrong against him, the difference in approach could not be more stark.

Should this approach to relational economic loss be viewed as an isolated and special analysis suited for a particular kind of loss or, to the contrary, does it reflect a more general conception of negligence and ultimately of liability in private law? It is clear how Holmes must understand it. We have seen that in *Robins* Holmes presents the conclusion of no recovery *as required by justice*. And what justice requires – a claim on the part of the plaintiff vis-à-vis the

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defendant to the impaired use – is expressed in wholly general juridical terms that can apply to any claim in negligence. While Holmes does not elaborate or generalize this point further in *Robins*, he does so in his discussion of the “general principles of liability” in his great work, *The Common Law*.⁹⁶

In that discussion, Holmes treats the existence of an exclusive right against the defendant as a *general* requirement of liability in private law for *any* sort of loss, whether physical or financial, and not as a point peculiar to economic loss cases. He notes:

...[T]here are certain forms of harm which...can *never* be complained of by any one except a person who stands in a particular relation to the actor or to some other person or thing. Thus it is neither a harm nor a wrong to take fish from a pond *unless the pond is possessed or owned by some one*, and then *only* to the possessor or owner. It is neither a harm nor a wrong to abstain from delivering a bale of wool at a certain time and place, unless a binding promise has been made to deliver it and then it is a wrong *only* to the promisee.⁹⁷

Holmes supposes here that conduct, whether act or omission, is not a wrong at law unless it is a wrong against someone; that, to be a wrong against someone, the conduct must impair or otherwise affect something that comes under that person’s right, whether by virtue of possession, property, or contract; and finally, that to be recoverable, a loss must be sustained by the one who has such a right and must result from the interference with that right. This analysis holds for *any* kind of recoverable loss and makes *no* distinction between physical and economic damage.

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Holmes' conception of wrong requires us to ascertain the nature of the plaintiff's interest in the object or objects that are affected by the defendant's conduct. This interest must be founded upon a right to the object that is exclusive as against the defendant.

Now whether there is the requisite exclusive right is decided upon the basis of doctrines and principles that have general application at common law. Holmes identifies three such elementary and general grounds of exclusive right at common law which give persons standing to complain about harms done: possession, property, and contract.⁹⁸ Possession and property entitle a person to exclude anyone else from using something without that person's consent, so long as the possessor or owner has, relative to another, the better claim as a matter of possession or property. Possession and property are thus elementary and general sources of exclusive right as against others. Contract also establishes such exclusive rights. The principal difference here is that contract rights are personal in the sense that they are always as against a definite person or persons and only hold as between the contracting parties. Holmes does *not*, however, present tort law, including negligence, as a fourth elementary source of right. To the contrary, tort law appears to presuppose that one *already* has something (one's body, an external object) that comes under one's exclusive rights (whether by possession, property, or contract), and, with this prerequisite satisfied, it elaborates the normative conditions (such as fault) under which another's conduct may constitute wrongful interference with that interest.

In *all* claims of relational economic loss that fail under the economic loss rule, the *only* kind of exclusive *right* that the plaintiff may⁹⁹ have with respect to the damaged item is a contractual right, but this contractual right is as against someone *other* than the defendant. Therefore, *as against the* defendant, the plaintiff has no exclusive right whatsoever to it. The

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⁹⁹ Of course, the plaintiff may have less than an exclusive right. He or she may only have a liberty. But this necessarily fails to satisfy the prerequisite of actionable wrong with respect to anyone at all.

reason why the economic loss rule bars recovery to the plaintiff is that, in relation to this plaintiff, the defendant has committed no wrong. The plaintiff's complaint cannot be brought under the general conception of liability that underpins private law. The fact that the loss may be foreseeable cannot make good this deficiency, for, to repeat, the fact that the loss may be foreseeable – even specifically or particularly foreseeable— does not, and cannot, give the plaintiff the requisite right in the thing. While foreseeability may be a necessary condition of liability, it is not sufficient. Moreover, this analysis of the economic loss rule, which is purely juridical in character, can stand on its own without the need to invoke any other considerations. The complete absence in *Robins* of any reference to pragmatic concerns is thus neither arbitrary nor a lacuna in its reasoning. On Holmes's understanding, the denial of recovery for relational economic loss must be viewed as an important and instructive application of, and not at all an exception to, the "logic" or "fundamental principles" of negligence that apply to all kinds of loss, physical as well as purely financial. It must be entailed by any general conception of negligence in private law.

Is this conclusion justified? More specifically, does the requirement of an exclusive right, as set out in *Robins*, reflect a general principle or a basic premise of the modern law of negligence? And can it reasonably be viewed as a requirement of justice? The next section addresses these questions.

III. Is the Economic Loss Rule Required by the Law of Negligence?

The main task of this section is to determine whether the requirement of an exclusive right and the conception of wrong that underpin the denial of liability for relational economic loss in *Robins* are essential to the modern law of negligence. To this end, we

must try to specify the legal principle or doctrine which incorporates this requirement and show how it fits within first principle of negligence. This is in keeping with the idea of public justification. If the conception of wrong that animates *Robins* can be shown to cohere at a fundamental level with widely recognized and general principles of negligence, this is a first step toward working out this justification. As well, it is important to clarify the ideal of justice or fairness that animates this analysis. My main contention will be that the requirement of an exclusive right and the conception of wrong that this entails express a general and fundamental premise of the law of negligence traditionally put as the principle of no liability for nonfeasance. Often, nonfeasance is equated with omissions, so that the principle is understood as saying that there can be no liability for omissions, as opposed to acts. While this understanding of the principle is not wholly without grounds, it is, I will argue, misleading and I will suggest a different interpretation of the principle that is at once more consistent with the law and intelligible as a fundamental requirement of a rights-based approach to negligence. Having set out and explained this principle, I will then try to show not only how it fits with the distinct but equally fundamental requirement of foreseeability but that the two are mutually necessary. Together these requirements specify reasonable and fair first principles of negligence that are appropriate for adjudication of individual cases in accordance with a public conception of right.

To arrive at the idea that the economic loss rule's denial of liability for relational economic loss may be understood as an instance of the principle of no liability for nonfeasance, I shall begin with, and seek to generalize, a conclusion that is accepted by both majority and minority courts, namely, that one is not liable for causing one's competitors foreseeable economic loss by drawing away potential or even actual customers through one's legitimate

competitive activity.¹⁰⁰ All agree that any duty to avoid causing economic loss must be framed so as not to result in the imposition of liability for causing purely competitive loss, with the consequence that there cannot be a *general* duty to avoid causing pure economic loss but at most a duty that arises only in certain circumstances and not others. Accordingly, if the law is to be consistent throughout, a duty to avoid causing pure economic loss cannot arise in circumstances that bring into play the very same considerations that underlie the refusal to impose liability for competition losses. Why is there no liability for competition losses?

The usual explanation is that economic competition contributes to the general welfare and that such loss is the unavoidable concomitant of competitive activity. Without denying this rationale, a quite different basis for the conclusion is available – one that is juridical in character. Simply stated, it is that the fact that I may impact, even foreseeably, on your commercial interest in the custom or business of third parties in the pursuit of my own business purposes does not injure any right in you that is exclusive against me. Clearly, you cannot have a possessory or property right in the continued custom or business of others. At most, there may be a potential or actual contractual relation between you and third parties. If there is as yet no contract, there is no right to be injured. But even where there is a contract, the contractual rights and obligations are between you and the third party. I am a stranger to the contract. It gives me no rights and imposes no duties on me relative to you. Contractual rights and obligations are as between the contracting parties. If the third party chooses to violate his or her agreement with you by dealing with me, that is a matter of his or her responsibility and possible liability, not mine. In short, the reason I am not liable is that, relative to me, there is a complete absence of right on your part to the continued custom or business of third parties. If I cause you loss by drawing away business or customers, this is *damnum sine inuria*.

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Of course, I *can* be held liable if I draw customers away from you *for the purpose of injuring you* and not as part of the independent pursuit of my own business interests. Here, as more generally in cases of so-called intentional interference with economic or other interests, the law treats the plaintiff's interest as a protected right relative to the intentional wrongdoer. The crucial distinguishing factor is the defendant's willful conduct. In virtue of it, the defendant is taken as treating the interest as a valuable right which he or she is misappropriating without the plaintiff's consent. It is the wrongdoer's conduct and purpose that invest what would otherwise be an unprotected interest with the character of an exclusive right.¹⁰¹

Now the case of no liability for competition losses may itself be generalized as but one example of a variety of instances where the common law does not impose liability for acts or omissions which nevertheless cause reasonably foreseeable loss (both physical and financial) to others. A particularly clear and comprehensive statement of this generalization is provided by Lord Diplock in the landmark decision of the English House of Lords in *Home Office v. Dorset Yacht* :¹⁰²

The branch of English law which deals with civil wrongs abounds with instances of acts, and, more particularly, of omissions which give rise to no legal liability in the doer or ommitter for loss or damage sustained by others as a consequence of the act or omission, however reasonably or probably that loss or damage might have been anticipated....Examples could be multiplied. You may cause loss to a tradesman by withdrawing your custom though the goods which he supplies are entirely satisfactory; you may damage your neighbour's land by intercepting the flow of percolating water to it even though the interception is of no advantage to

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yourself; you need not warn him of a risk of physical danger to which he is about to expose himself unless there is some special relationship between the two of you such as that of occupier of land and visitor; you may watch your neighbour's goods being ruined by a thunderstorm though the slightest effort on your part could protect them from the rain and you may do so with impunity unless there is some special relationship between you such as that of bailor and bailee.¹⁰³

What is the common thread running through all these examples? I want to suggest that they are all instances of the familiar and pervasive distinction between misfeasance and nonfeasance, of which Bohlen wrote that “[t]here is no distinction more deeply rooted in the common law and more fundamental.”¹⁰⁴ The common law, it is said, does not impose liability for nonfeasance. This is sometimes expressed as: no one is under a duty to benefit, rescue, or otherwise to assist another, absent a contractual relationship or some other special relationship between the two. Moreover, commentators often construe non-liability for nonfeasance as *non-liability for omissions*, in contrast to acts for which liability may be imposed.

To determine the appropriate meaning and scope of the distinction between misfeasance and nonfeasance¹⁰⁵ and, thus, whether the understanding of the economic rule in *Robins* illustrates it, let's consider what is generally treated as the paradigmatic instance of nonfeasance – which is also one of the examples given by Lord Diplock -- namely, the failure to rescue another (or another's property) in danger, where the danger is neither created nor in any way contributed to by the defendant and where there is neither a contract nor a special relation between the parties.

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¹⁰⁵ refer to Moch

It is trite law that the failure to rescue in these circumstances will not, and cannot, give rise to liability.¹⁰⁶ This is so despite the fact that the resulting loss may have been the perfectly foreseeable outcome of the omission. Further, the non-imposition of liability is generally understood as following from the absence of duty rather than from some other factor, such as causation. As far as the issue of causation goes, it is clear that, in given circumstances, but for the defendant's omission, the risk of danger to the plaintiff might not have materialized in loss. An absence of causation is not the problem. Rather, the concern here is the existence and the ambit of the defendant's responsibility. Why, then, might there be no duty to act in these circumstances?

In the failure to rescue cases, the plaintiff's complaint is not that the defendant does something that detrimentally affects his or her condition but, to the contrary, that the defendant fails to act in a way that preserves or improves the plaintiff's condition to his or her benefit. The gist, then, of the plaintiff's complaint against the defendant is that the latter has left the plaintiff alone whereas the defendant should have done something for the plaintiff.

If we suppose factually that the defendant has done nothing at all that might possibly affect, positively or negatively, the plaintiff's circumstances, the defendant's failure to act may be viewed as a complete absence of conduct of any kind. But unless there has been conduct or externalized choice of some kind, one cannot be liable to another. One becomes liable to another not through being but by doing. So the conclusion of no liability appears to follow readily from this fundamental requirement that there be conduct of some kind.

The foregoing analysis is subject, however, to an obvious challenge. In the circumstances supposed, it is not the case that the defendant has simply done nothing. To the contrary, he or she has decided to do something other than assist the plaintiff. This is, after all, a decision and

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choice. The reason for no duty or liability cannot simply be the absence of conduct. Rather, it must be the absence of a *certain kind* of conduct: conduct that can possibly be a wrong. And this requires that we determine whether the defendant's decision to do something else has affected the plaintiff's rights against the defendant.

Now in the circumstances at hand, the only protected interest that the plaintiff can assert vis-à-vis the defendant is his or her right to bodily integrity. This is the only generally recognized protected interest which might possibly be in play. However, the plaintiff's right here, as always, is a right to *exclude* the defendant. The right, in short, is no less, but also no more, than a right to be left alone. But that is exactly what the defendant has done. Relative to the defendant, as someone who has not contributed in any way to the creation of the risk of danger to the plaintiff, the danger belongs to the plaintiff's own given circumstances and qualifies the extent and value of his or her assets. What the plaintiff has as his or her own exclusively with respect to the defendant is bodily existence *just in this condition of danger*. It is from this "asset" that the defendant is excluded. But the defendant's decision to do something other than rescue the plaintiff does not impair this asset but leaves it as is. It cannot possibly violate, but to the contrary respects, the plaintiff's right of bodily integrity. The plaintiff's "loss" flows, therefore, from an omission that is fully compatible with the plaintiff's rights. While the defendant's conduct may have consequences for the *material* condition of the plaintiff's body and life in the sense that it does not improve his or her circumstances, it does not engage or otherwise affect any *right* with respect to that condition which the plaintiff might have as against the defendant. It is also a case of *damnum sine injuria*. In conclusion, the reason why there is no duty to rescue despite the presence of conduct of some kind on the defendant's part is that the plaintiff has no right that is opposable to this conduct in these circumstances. By such conduct the defendant

cannot possibly wrong the plaintiff. The analysis is precisely the same as in the competition case discussed above.

Consider one more of Lord Diplock's examples -- the case of a defendant intercepting the flow of percolating water under his or her own land, to the plaintiff's detriment. Here, in contrast to the rescue cases, there is something more than an omission. The defendant clearly acts. But the analysis is the same. Drawn from the seminal nuisance case of *Mayor of Bradford v. Pickles*,¹⁰⁷ Lord Diplock supposes a scenario involving two adjacent landowners under whose properties flows so-called "percolating water" -- water that does not follow a defined path or channel. The defendant decides to abstract the water under his land, preventing it from flowing under the plaintiff's. Hitherto, the plaintiff has relied on the use of this water, say, to supply the local inhabitants. Now that the defendant has captured the supply of water, he proposes to sell it to the plaintiff. The plaintiff brings an action in nuisance to stop the defendant from taking the water. In *Pickles*, the plaintiff is non-suited.

One might think that this conclusion follows from the fact that the defendant's use of his land should be found to be reasonable vis-à-vis the plaintiff as measured by a community standard -- the standard and essential inquiry under nuisance. On the given facts, however, we do not ever get to the nuisance analysis. According to English law, no one has a property or possessory right in free-flowing percolating water. Unless and until someone has abstracted and contained it, it belongs to no one. Thus the plaintiff has no right, exclusive against the defendant, to the percolating water which the defendant takes from under his own land. Seen in this light, the plaintiff's complaint does not actually bring into play the legal analysis proper to nuisance because the defendant has not in any way affected any legally protected interest which the plaintiff has in the use and the enjoyment of her land. There is no need to adjudicate between

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conflicting uses of neighbouring properties. The fact that the plaintiff's intended use of her land is frustrated by the defendant's action cannot possibly be a wrong because it is consequential upon the loss of something to which the plaintiff has no right against the defendant. Here again, the defendant's conduct does not affect anything that comes under the plaintiff's rights.

The well-known American case of *Fountainebleau Hotel Corporation v. Forty-Five Twenty-Five, Inc.*¹⁰⁸ illustrates this same analysis. What makes the decision notable is that the Florida District Court of Appeal reverses the lower court's decision *explicitly* on this very point of the requirement of a right. Here the defendant's planned addition to its hotel interferes with the light and air on the beach in front of the plaintiff's hotel, casting a shadow upon the beach of such a size as to render it unfit for the use and enjoyment of the plaintiff's guests with consequential financial loss to the plaintiff. The Court emphasizes that the maxim *sic utere tuo ut alienum non laedas* means "...only that one must use one's property so as not to injure *the lawful rights* of another."¹⁰⁹ The defendant's use of its land can be a nuisance, therefore, only if the plaintiff has a legal right to the free flow of light and air across the defendant's adjoining land. But, in the absence of a contract or statute, no such right, the Court concludes, is recognized at common law. While the deprivation of light certainly impairs the plaintiff's interests, it is not a wrong. Holding this interference to be a nuisance would in effect compel the defendant gratuitously to confer upon the plaintiff incorporeal rights incidental to the latter's ownership of land which the law does not recognize.

There seems, then, to be a single thread running through all these examples where the common law will not impose liability: the plaintiff cannot show that a right, exclusive as against the defendant, has possibly been affected by the defendant's conduct. Where no right is in play, a

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duty of care does not, and cannot, arise. The absence of a duty is here just the correlative juridical expression of the non-existence of a right. This analysis applies to acts as well as to omissions. It holds where the loss is physical as well as purely financial. The conclusion of no liability in the failure to rescue and competition cases rests on the same ground. If the reason for no liability in the rescue cases is styled the principle of no liability for nonfeasance, then it is this principle that runs through all these examples. On the view that I am suggesting, the defining feature of nonfeasance is conduct of *some* kind -- rather than, say, the complete absence of conduct as with mere bodily movement caused by an external force -- that *cannot possibly injure any right belonging to the plaintiff relative to the defendant*. One way of expressing the difference between misfeasance and nonfeasance is that, as a matter of fairness and reasonableness in our interactions with others, the law does not require us to benefit others, only not to injure them.¹¹⁰ In contrast to morals, the idiom of the law is restricted to the imposition of prohibitions against injury.¹¹¹ And for there to be injury in the legal sense there must be conduct that interferes with the exclusive rights of others. Thus the misfeasance-nonfeasance distinction is a principle of a highly general kind. It governs all conduct, both acts and omissions, and it holds for any loss, whether physical or economic.¹¹²

It is important to understand the full significance of the tort requirement of misfeasance.

It states a *necessary* condition of the existence of duty. Unless one has the requisite right

¹¹⁰ “What we need to know is the conduct that engenders the relation. It is here that the formula [the ‘time-honored ... distinction between misfeasance and nonfeasance’], however incomplete, has its value and significance. If conduct has gone forward to such a stage that in action would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward.” *H.R. Moch Co. v. Rensselaer Water Co.* 159 N.E. 896, 898 (C.A.N.Y., 1928) (per Cardozo J.)

¹¹¹ Certainly the most influential expression of this normative point is that of Lord Atkin in the great case of *M’Alister (or Donoghue) v. Stevenson* [1932] AC 562 (HL): “The liability for negligence... is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay... The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? Receives a restricted reply.”

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exclusive as against another, one cannot be wronged by the other's conduct, despite the fact that this conduct frustrates one's projects or affects one's well-being. Moreover, the basis of this exclusive right must be something that is generally recognized in the different parts of private law. Accordingly, apart from the right of bodily integrity which belongs to every person even prior to any act, the two other recognized bases of exclusive right are property and contract, which require definite acts and give rise to rights *in rem* and *in personam* respectively.¹¹³ Negligence law is not a further source of exclusive right but to the contrary presupposes these mentioned grounds.

The economic loss rule, as applied to relational economic loss, directly reflects the misfeasance requirement. As I have tried to explain in some detail, the plaintiff's action for relational economic loss necessarily depends upon a claim with respect to something that does not come under the plaintiff's rights as against the defendant. This is true, I have emphasized, of every case of relational economic loss. Every such case is therefore an instance of nonfeasance.¹¹⁴ The plaintiff's claim *must* be non-suited, no differently than in the rescue or competition cases.

Not only does the economic loss rule stand on a par with these other instances of no liability. The further point, which I now wish to discuss briefly, is that there is in fact no tension between the refusal to impose liability for relational economic loss and the development of modern negligence which "pushed liability for physical injuries toward the full extent of what was foreseeable and shattered ancient barriers to recovery based on limitations associated with privity of contract and similar restrictive concepts".¹¹⁵ That this might be the case should not be completely surprising. After all, the courts that elaborated the full implications of the economic

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¹¹⁴ Seale v. Perry

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loss rule were, as I previously noted, the very same that created modern negligence law. And these courts did not present the two movements as in tension with each other. To the contrary, they treated both as mutually compatible.

While I have suggested that the existence of the requisite right in the plaintiff as against the defendant is a necessary condition of duty, it is not sufficient, standing alone. There is a second element that is equally prerequisite to the existence of a duty of care. The defendant's conduct must *foreseeably* threaten the thing that comes under the plaintiff's right. What is the relation between these two elements? As I will now explain, the two requirements work in tandem in spelling out, albeit in different respects, the implications of what may be termed a *relational* analysis of the prerequisites of duty in negligence.

Let me begin with the development of modern negligence law for physical loss. Simplifying matters, this development turned on two points, one negative and the other positive. First, the courts denied that, as between plaintiff and defendant, a duty of care in negligence was precluded simply because the defendant was in contractual privity with a third party with respect to the source of the plaintiff's damage. Even in such circumstances, there *could* be an independent and distinct relation between plaintiff and defendant sounding in negligence.¹¹⁶ Second, for there to be such a relation, the defendant's conduct must have foreseeably threatened the plaintiff's protected interest. *Foreseeability* became the touchstone of a relation of duty.¹¹⁷

What is more, the modern law of negligence specified a certain, limited notion of foreseeability. To establish a relation of duty *toward the plaintiff*, it was not enough to show that the defendant's conduct foreseeably threatened just *anybody's* protected interests. Indeed it is no exaggeration to say that the modern law of negligence was born precisely with the rejection of

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this view. To give rise to a duty of care, it is essential that the conduct is foreseeably dangerous *relative to the plaintiff*. The plaintiff must show that, as against himself or herself and not simply someone else, the defendant's conduct threatened harm. Risk, the courts held, that is not relational in this way is, strictly speaking, irrelevant to the law of negligence.¹¹⁸

Now the fit between the economic loss rule and the foreseeability requirement becomes evident if we keep in mind the fact that each is relational in a way that complements the other. In keeping with the distinction between misfeasance and nonfeasance, the economic loss rule requires that the defendant impairs something that comes under his or her right as against the defendant. It specifies *a form of interest* that is intrinsically and necessarily relational as between the parties. On the one hand, the interest must be one that can be attributed to the plaintiff in his or her own right. It is not enough that the defendant interferes with something that falls under someone else's right. The plaintiff has standing only if she can show that something of her own has been impaired and that she has been wronged in her own right. On the other hand, the plaintiff's own interest must be as against the defendant: as attributable to the plaintiff, the interest must simultaneously, and indeed necessarily, refer to the defendant. Absent this inherently relational character, the plaintiff's interest is not protected. A right that is exclusive as against the defendant has this character. Indeed this is its very essence. The reason the economic loss rule requires the plaintiff has a possessory or proprietary interest is that, in this way, he or she has the requisite exclusive right. For, as I have already noted, at common law, the main grounds of exclusive right (other than bodily integrity) are possession or property and contract. In sum, the economic loss rule stipulates a form of interest that belongs to the plaintiff and that is, as it were, privy as between the parties. This is the core meaning of the economic loss rule. And since, in general, it may fairly and reasonably be expected of persons that they respect each

other's legitimate interests, the economic loss rule is essential to specifying what may fairly and reasonably be expected *as between two particular parties*.

For its part, the foreseeability requirement of modern negligence law stipulates *a form of conduct* that is conceived wholly with reference to its impact upon the plaintiff's own interest. Unless the defendant's conduct foreseeably threatens another's interests, the defendant cannot choose to avoid this outcome. Relative to the outcome, the defendant's causal contribution cannot count as conduct and the defendant should not, fairly and reasonably, be held accountable for it. But the requirement of foreseeability is specified further. Thus it is clearly not sufficient that the defendant's conduct foreseeably threatens someone else's interests or the interests of "society in general". There is no such thing as risk in the air, just as there cannot be negligence in the air.¹¹⁹ The risk must be *to the plaintiff* and it must import a relation as between the two of them. Unless the defendant can reasonably foresee the consequences of his or her conduct for the plaintiff's own interests, his "act" or "omission" cannot count as conduct with respect to any impact on those interests. So far as the plaintiff is concerned, it is not an act of choice that is relevant for the purposes of negligence. The foreseeability requirement specifies a form of foreseeability that is privy as between the parties. It ensures that there is the kind of interaction between two parties that allows a court to hold one party reasonably and fairly accountable for its impact upon the other.

We may sum up the fit between the foreseeability requirement and the economic loss rule, viewed as an illustration of the misfeasance-nonfeasance distinction, by saying: while there is general agreement that negligence must entail *conduct* that directly impacts upon *the interests of others*, these two doctrines work together to specify a definite form of conduct affecting another's interests that is strictly and necessarily other-related *as between the two parties*. Far

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from being in tension with each other, the two doctrines are mutually supportive and complementary. The fundamental basis of modern conception of negligence is not foreseeability alone¹²⁰, which then is qualified or somehow limited by the requirement of misfeasance. Both are equally basic and positively essential to establishing a relation of duty in negligence. They are first principles in the modern law of negligence.

In cases of physical loss, the existence of a protected interest is generally unproblematic. These are situations, after all, where the defendant has damaged the plaintiff's person or property. In these circumstances, there is no need to advert expressly to the requirement of an exclusive right as a necessary condition of duty. The condition is clearly met. The issue becomes one of foreseeability.

The relational economic loss scenarios present the exact contrary. Here, whereas the loss is generally and unproblematically foreseeable, the existence of the protected interest is the deciding factor. The great importance of the economic loss rule is that it brings out the necessity of a requirement that is rarely made explicit in most parts of negligence because there it is obviously satisfied. There are, of course, cases of physical loss – such as the rescue cases -- where the issue of protected interest is also pivotal to the question of liability. But it is the relational economic loss decisions where this is always and integrally the case. The challenge in relational economic loss scenarios is to follow through consistently and correctly the prerequisite of protected interest in fact patterns that often test judgment and take this requirement to its limit. My fundamental contention, however, is that far from being in tension with the understanding of duty in the general conception of negligence, the economic loss rule illustrates it. The economic loss rule is required by modern negligence law.

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There is a further step that should be taken to show, even provisionally, that this understanding of the economic loss rule makes sense within the wider context of tort law. We should consider the well-established instances in the law of negligence where recovery for financial loss *is* possible, even though they do not involve in any straightforward way suits for financial loss consequential upon damage to something that the plaintiff owns or possesses. It will not suffice to attempt to neutralize or hive off these instances by labeling them as “exceptions” to the economic loss rule. We must try, rather, to elucidate how they are mutually compatible and supportive. At stake here is the unity of the treatment of pure economic loss in the law of negligence. If these instances of liability and the economic loss doctrine are to stand together, we must show how this is possible on a principled and rational basis. In light of the approach that I have proposed in this essay, it will be necessary as a first step to explain how the instances where liability may be imposed satisfy the requirement of misfeasance and so are fundamentally distinguishable from financial loss that is barred by *Robins*. The next section takes up this matter.

IV. The Fit Between The Economic Loss Rule And Its “Exceptions”

There are three major instances of pure economic loss where there is wide agreement that recovery should be possible on a principled basis: so-called “unavoidable” economic loss, general average contribution, and, finally, negligent misrepresentation. What is the relation between the economic loss rule and these instances of recovery? That is our main question in this section. I will consider each of these instances in turn. My aim will be to see whether they fit with the economic loss rule under the same general conception of liability for negligence discussed in the previous section. However, before doing so, I should briefly mention an

“exception” to the economic loss rule that cannot, in my view, be explained on any principled basis. I am referring to the commercial fishermen cases.¹²¹

The question in these cases is whether commercial fishermen – as opposed to say, restaurant owners who serve the fish harvested – should be entitled to recover relational economic loss sustained as a result of the devastation of fishing waters by negligently caused oil spills or other accidents. Despite the fact that both commercial fishermen and restaurant owners depend upon the availability of fish for their livelihoods and may suffer serious financial losses that are equally foreseeable and specific in the wake of such disasters, some courts have singled out commercial fishermen, but not others, for recovery. While these courts explain their decision on the ground that commercial fishermen have been and continue to be the “favorites of admiralty”,¹²² other courts have declined to do this precisely because this creates a “corresponding class of villains on whom ... a new type of liability”¹²³ is imposed.

Allowing commercial fishermen to recover in these circumstances is inconsistent with *Robins*. Moreover, this conclusion does not fit with the general conception of duty discussed in the previous section. It is true that the fishermen may be the “first” to take the fish and thus “directly” or “immediately” rely on the continued availability of this resource. Others -- restaurant owners, tackle and bait suppliers, and so forth -- may depend upon the fishermen in the pursuit of their own commercial interests, making their use of the resource one-step removed from the immediacy of the fishermen’s. While this may be a factually correct description, the question is whether this characterization is juridically relevant. The only criterion is whether the fishermen have the requisite protected interest in the resource, so that interference with their use of it can possibly constitute a wrong. Now no courts, not even those which grant recovery,

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recognize in the fishermen possessory or proprietary rights to the fish prior to harvesting them. They have no right as against anyone to the continued availability and use of the fish. And the same is true of the other claimants. The fact that the fishermen's use is factually more direct or immediate, as compared to the uses by other commercial interests, makes no difference so far as the establishment of the necessary protected interest is concerned. All these uses are juridically indistinguishable in that they all fall short of representing exercises of exclusive right against the defendant. Accordingly, interference with these uses as a result of maritime accidents and closures is nonfeasance. The commercial fishermen claims are for the very sort of economic loss that comes squarely within the ruling of *Robins*. There is no legally relevant difference between the loss in *Robins* and the loss in the commercial fishermen cases. *Robins* dictates no recovery in negligence for the one loss as for the other.

I now turn to the three most important instances where it is well-established that there can be recovery for pure economic loss. It is widely assumed that these exceptions to the economic loss rule are not *ad hoc* but rather can be distinguished from it and justified as a matter of principle. My primary aim here is to see whether the prior discussion of the economic loss rule supports this assumption.

(a) “Unavoidable” Economic Loss

In the first of these, which I shall call “unavoidable” economic loss,¹²⁴ the plaintiff is using something that belongs to a third party in such a way that if the thing is damaged, the plaintiff's own person or property is endangered. The defendant damages the third party's property and the plaintiff unavoidably suffers financial loss before she can extricate herself or her property from the danger or as a result of her attempting to do so. There is consistent and widely accepted case law which holds that this economic loss, if reasonably foreseeable, is

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recoverable.¹²⁵ To understand the principle underlying these cases, it will be helpful, as a first step, to begin with a situation involving, not economic, but rather physical loss.

Suppose, then, that while the plaintiff is actually making use of a third party's bridge, for example, the defendant carelessly but foreseeably damages the bridge, thereby also endangering anything that happens to be on the bridge, including the plaintiff and her vehicle. If the bridge collapses, injuring the plaintiff or her vehicle, there is no question that she can recover for this physical loss and for any foreseeable financial loss flowing from it. The fact that the injury is sustained because the plaintiff is using the property of another has no significance other than specifying the particular circumstances in which her person and property have been made vulnerable to a risk of injury imposed by the defendant's conduct. This is just where the plaintiff and her car happen to be. The case should be analysed simply as one of injury to person or property with respect to which the plaintiff has an exclusive right as against the defendant. When the plaintiff sues for injury to person and property, she need not claim a right to the continued availability of the use of the bridge. In juridical terms, her claim supposes merely that she wants to get off the bridge unharmed but has been deprived of the opportunity of doing so by the defendant's negligence. In essence, she asks that her person or property be left alone.

Newlin v. New England Tel. & Tel. Co.,¹²⁶ an early and well-known "economic loss"¹²⁷ case that is still generally followed,¹²⁸ comes within the foregoing analysis. In *Newlin*, the plaintiff was in the business of growing and selling mushrooms which were cultivated in cellars and required a uniform temperature. The apparatus used by the plaintiff to maintain this uniform temperature was powered by electricity and the electricity was, in turn, supplied by a third party

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power company under contract with the plaintiff. The defendant carelessly damaged the third party's power line, thereby cutting off the supply of electricity to the plaintiff. As a result of the power cut-off, the plaintiff's apparatus was disabled, causing the temperature to rise and destroying the mushroom crop. The court concluded that the plaintiff's claim against the defendant in negligence for the loss of the crop was actionable, despite the fact that the plaintiff "derived his right to the use of the electric current from others."¹²⁹

This conclusion may be justified within certain parameters. The plaintiff is using the power supply and, in the process of using it, the power cut-off results in an uncontrolled increase in temperature which destroys the crop before the plaintiff can take corrective measures. As in the bridge example, the defendant may be viewed as having carelessly affected the property of a third party in a way that endangers the plaintiff's own property. If it is reasonable to so characterize the incident, the gist of the plaintiff's claim is, not that he has, as against the defendant, the right to the *continued availability of the electricity*, but rather that, as a result of the defendant's failure to take care, his use of the electricity has become an unavoidable source of danger to his crop. On this analysis, the fact that the crop is destroyed as a result of the mere stoppage of the temperature control mechanism rather than, say, by its exploding, is just the particular manner in which danger to his crop materializes. And while the loss actually sustained by the plaintiff is "physical", the conclusion that the loss is recoverable does not depend upon this but rather upon the fact that the plaintiff's complaint with respect to this loss rests *only* upon his negative interest in excluding the defendant from his property (the mushroom crop) rather than a positive interest in enjoying the continued availability of the electricity, to which he has no right except as against the third party. According to this analysis, the plaintiff's claim sounds

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in misfeasance despite the fact that he derives his right to the use of the power from someone other than the defendant.

The argument for recovering “unavoidable” pure economic loss draws upon the foregoing analysis and takes it one step further. By way of illustration, we return to the bridge example but now suppose that the plaintiff attempts to avert the threatened danger to her vehicle by taking certain measures. The plaintiff is simply trying to rescue her property from the peril to which it has been exposed as a result of the defendant’s carelessness. She is attempting to extricate the vehicle from the ambit of risk rather than to continue to use the bridge. If in doing this she sustains physical or financial loss, it is “unavoidable”. And this loss should be recoverable so long as her response and the resulting loss are reasonably foreseeable. Whether the plaintiff’s loss results from her property being actually injured or just directly threatened with injury, her action for recovery relates solely to her interest in excluding the defendant from interfering with her property and therefore with something that comes under her right as against the defendant. And as I have already suggested, the fact that the plaintiff sustains the loss only because she is using something that belongs to another does not determine the character of her claim. It merely specifies the circumstances in which her property is injured or threatened with injury. Her action sounds in misfeasance and so is qualitatively distinguishable from the sort of claim barred by *Robins*.

If, by contrast, the plaintiff were to put forward such losses as the cost of finding alternative routes, the financial repercussions of being delayed, and so forth, her claim *would* implicitly rest upon her asserting an interest in having the bridge available for her use. But, lacking a possessory or property right in the bridge, her interest in its continued use would be without a rightful basis – and so legally irrelevant – relative to the defendant. She would have no

protected interest in the use of the bridge as against the defendant and an action for these sorts of losses must fail.

The recent important decision of the 5th Circuit Court of Appeals in *Corpus Christi Oil & Gas Co. v. Zapata Gulf Marine*¹³⁰ distinguishes between recoverable and non-recoverable economic loss precisely along these lines and illustrates the foregoing analysis. In *Corpus Christi Oil*, the plaintiff owned offshore gas wells and a platform. Attached to a leg of the platform was a riser, a vertical pipe through which flowed gas and gas condensate. The riser was owned by a third party. The riser connected to a pipeline, also owned by the third party, which ran eight miles from the platform to the beach. The defendant's barge allided with the plaintiff's platform, damaging the third party's gas riser but not the plaintiff's platform or wells. The third party ordered the plaintiff to shut in its wells so that it could inspect the riser and replace the damaged section. During the two-week period of repairs, the plaintiff could not use the riser to convey its gas, which remained unaffected in the ground. As a consequence, the plaintiff sustained financial losses from its inability to produce and sell its gas during this period. In addition, the plaintiff had to flare its gas in order to avert structural damage to its wells.

The plaintiff sued the defendant for the cost incurred in flaring its gas as well as for revenues lost during the period of repairs to the gas riser. The Court allows recovery for the costs of flaring the gas. The costs of flaring are "directly attributable to [plaintiff's] efforts to avoid physical damages that would have rendered defendant liable for much larger sums."¹³¹ Costs incurred "to save its wells" constitute "the physical damage to a proprietary interest, i.e. its gas"¹³² sufficient to satisfy the requirements of the economic loss rule. By contrast, the court denies recovery for the lost profits. It does so, not because the loss consists in lost profit rather

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than costs, but only because it is not consequential upon injury to the requisite protected interest. According to the court, the lost revenues result solely from the fact that the plaintiff “could not use the [defendant’s] pipeline”.¹³³ The loss is “occasioned only by the physical injury to [third party’s] riser, property in which Corpus Christi had no proprietary interest.”¹³⁴ Since the lost revenues results from the unavailability of the riser and not from the flaring of the gas, the Court treats the claims for lost profit as qualitatively distinct and legally independent from the claim for the costs of flaring. The losses flow from two different interests, only one of which belongs to the plaintiff. The court expressly refuses to interpret *Robins* as permitting recovery for economic loss sustained by a plaintiff so long as the plaintiff suffers *some* injury to person or property, irrespective of the connection between the two losses.¹³⁵

While the court views *Robins* as stating a bright line rule founded upon pragmatic concerns about indeterminate liability, its entire judgment rests upon a careful analysis of the “character of the interest harmed”.¹³⁶ Whereas the claim for lost revenues presupposes implicitly that the plaintiff has positively, as against the defendant, a protected interest in the continued use of the gas riser, the action for the costs of flaring rests solely on its right to have its property (gas wells) left alone. Since the only right which the plaintiff has in the continued use of the gas riser is against the third party, the claim for lost revenues must fail, not because it is economic loss or lost profit, but on account of its being with respect to a legally unprotected interest. The court’s approach is fully consistent with the analysis proposed in this paper.

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The analysis of unavoidable loss, as I will now try to show, is also pertinent to the second main instance where it is well-established that there may be recovery in negligence for pure economic loss, namely, financial loss arising from general average contribution.

(b) General Average Contribution

The circumstances giving rise to general average contribution are as follows.¹³⁷ To simplify, suppose that an owner of goods and a ship owner contract to have the goods carried on the vessel to an agreed-upon destination. Insofar as both cargo and ship share the same goal, namely, safe and timely arrival of the vessel and goods at the destination, and, as well, may be subject to the same risks at sea, they may be viewed as participants in a “common “or “joint” venture that terminates with the successful arrival of the ship and goods. Suppose that, while at sea, the ship is imperiled in a way that also endangers the cargo. Something must be done to avert the common danger so that ship and cargo may be preserved and the venture successfully completed. In the face of such danger and in the absence of an agreement to the contrary, the parties are deemed to have authorized the captain of the vessel to avert the threat: each of the parties is held to have requested the captain, as its own “agent of necessity”, to deal with its own interests and the interests of the others in a way that preserves, as best he can, the interests of each and all. This may require the sacrifice of an interest (for example, jettisoning some of the cargo, casting away the mast, or stranding the vessel) or an extraordinary expenditure (for example, the repair of the ship, payment for salvage, etc.). As long as the sacrifice or expenditure is made in relation to a common peril in order to preserve each and all of the interests, physically or at least their value, and to ensure the successful completion of the venture, it counts as an *act* of “general average”.

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Each party, therefore, impliedly authorizes the captain to cause a physical or financial loss to its own interest and to the interests of the other parties if this is necessary to preserve them or ensure the successful completion of the venture. In the case of threatened destruction of the interests, all may be lost unless the captain acts. It is against this backdrop of the threatened destruction of all the interests, that the act of general average can hold out a prospect of benefit for *each* of the interests and it is this possibility of benefit that is the foundation of the authority of the master.¹³⁸ Each party authorizes the captain to do what he reasonably can to rescue its interests on condition that he does the same for each and all of the other interests. Moreover, justice requires “that what is given for the general benefit of all shall be made good by the contribution of all”.¹³⁹ This is the “germ and substance of all the law”¹⁴⁰ of general average *contribution*. More precisely, as a matter of “equity”, “natural justice”, and “the policy of the law” -- quite apart from contract -- the law requires each party to share in the burden of a general average act “in proportion to the share of each in the adventure”,¹⁴¹ insofar as the sacrifice or expenditure constitutes an act of general average and on the condition that it actually averts the peril and allows the venture to be terminated successfully. General average contribution is thus a financial outlay made by one party that is relation to an act of general average that saves the joint venture by imposing a loss upon another party.

Where the danger has been caused by the negligence, say, of a second vessel, a party who has sustained a pure financial loss as a result of making general average contribution may seek to recover this loss from the offending vessel. Yet the plaintiff’s financial loss appears to arise *indirectly* from the defendant’s conduct *as a consequence of the loss sustained by another*

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(namely, the party who has suffered the sacrifice entailed by the general average act). Because of the relation between the parties to the common venture, one of them is obliged to take on a part of the loss suffered by other. But it is only the latter's loss that is with respect to a proprietary or possessory interest which is actually affected by the defendant's negligence. The plaintiff's claim for the loss represented by the contribution seems, at first glance, to fall squarely within *Robins'* exclusionary rule. Is this in fact so?

In *The Sucarseco*,¹⁴² decided only eight years after *Robins*, the Supreme Court of the United States answers this question in the negative. The Court expressly distinguishes general average contribution from the sort of claim barred by *Robins*, holding that, whereas in the second there cannot be recovery, in the first there can.¹⁴³ According to the Supreme Court, the latter is "...not a case of an attempt, by reason of 'a tort to the person or property of one man,' to make the tort-feasor liable to another 'merely because the injured person was under a contract with that other, unknown to the doer of the wrong.'"¹⁴⁴ The claim of the plaintiffs for their general average contribution is not "in any sense a derivative claim" but rather "accrues to [them] in their own right."¹⁴⁵ American tort law consistently continues to uphold this conclusion, at least within certain parameters.¹⁴⁶ Moreover, some ten years after *The Sucarseco*, the Privy Council, in the widely cited case of *Morrison Steamship Co. v. Greystoke Castle*,¹⁴⁷ reaches an identical result on similar facts, despite the well-established rule against liability for relational economic loss, and this decision has been upheld, again within certain parameters,¹⁴⁸ throughout the Commonwealth ever since. It appears, then, that there is wide agreement that these sharply

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contrary conclusions about liability for pure economic loss can stand together. But upon what basis? I will bring out a line of analysis that is found, sometimes only implicitly, in the decisions that grant recovery.

The first step is the premise that a defendant is responsible in negligence for the whole amount of loss resulting from a general average act necessitated by the defendant's failure to use due care. The whole loss is the direct consequence of its negligence. Assuming the loss is reasonably foreseeable in the ordinary way, there is liability irrespective of the form (physical or financial) which the loss takes or by whom it is borne. Correlatively, whoever sustains this loss is entitled, to the extent of its share in the loss, to recover against the defendant.

The crucial next step is that, while the general average *contribution* is made in relation to and after the general average *act*, the contribution and act are viewed as simultaneous and mutually related for the normative purpose of analyzing the defendant's liability in negligence: the contribution is a part of the loss caused by the negligence. Both act and contribution are understood as but different aspects of one response to the peril common to ship and cargo created by defendant's negligence and both count as parts of an effort by each party to rescue its interests from the danger posed to them. The captain is authorized by each and every party to act as its agent of necessity in the face of the common peril to take reasonable measures of rescue *on the condition that the cost (in terms of value) of such rescue will be borne equitably by all the Iparties*. It is on this – and *only* on this-- condition that any rescue attempt will take place and that therefore anything can be saved from the danger. Thus, any loss suffered by an interest, whether it takes shape as a sacrifice or contribution, constitutes loss *unavoidably resulting from the defendant's negligence*, despite the parties' effort to avert the consequences of the risk. Let me elaborate.

That act and contribution form one united response is reflected in the requirement that when the captain, for example, jettisons cargo, he does this not only as agent for, and with the express or implied authority of, the cargo owner but also as agent for and with the express or implied authority of the ship owner. For, as I have emphasized, the captain has the power to sacrifice cargo *only* on condition that the ship owner shall contribute a portion of the value thereby lost. And this condition must be with the express or implied authority of the one upon whom -- here, the ship owner -- it will be imposed. Moreover, unless the captain has been so authorized by the ship owner, it cannot be implied that the cargo owner has mandated the general average act because, without the condition of contribution, the act would be a pure sacrifice without any benefit for the cargo owner. But, as I noted above, in all cases it is the prospect of benefit to each of the parties that is the foundation of the authority of the master as their agent of necessity and of the character of the act as being one of general average. Act and contribution are thus mutually and necessarily conditioning, such that one may not rightfully take place without the other. Seen in this light, the general average act and contribution count in legal contemplation as integral constituents of a reaction – an act of rescue -- undertaken on behalf of, and more precisely, *by each of the owners* to preserve their respective actual physical interests, or at least their value, in the face of a danger that threatens each and all of those interests.

With this analysis in hand, we can now answer the objection that *Robins* bars recovery for general average contribution because, the contention is, the contribution is a pure financial loss that is incurred only because of the contributor's relation with another who alone sustains damage to a proprietary or possessory interest as a result of the defendant's negligence. According to this objection, general average contribution is essentially a form of indemnification paid by one party to another for damage caused to the other's property; the law of general

average represents a method of shifting in whole or in part a loss sustained by another, where this shifting is seen as a conceptually and legally distinct operation that relates to another's already fully constituted loss. This shifting of loss implies legal relations only as between the parties to the venture, not with the defendant. While consistency with *Robins* may allow a party to recover for the damage to its property sustained as a result of a general average *act*, it forbids the plaintiff from recovering its economic loss that results from making general average *contribution*.

This objection fails to take into account the very foundation of general average as explained above. The basis of general average is that not only must all the interests be threatened by the danger posed by the defendant's conduct but, in addition, the captain is not authorized to take action as agent of necessity and sacrifice any interest or make any expenditure unless the action is undertaken for the benefit of all. Hence arises the requirement of contribution, which crystallizes simultaneously with the act that counts as general average, so that general average act and contribution notionally combine as a means of rescue undertaken jointly by each and all of the parties in response to their common danger. Whatever loss a party sustains despite, or as a consequence of, this effort to avert injury to its own interests counts as unavoidable loss directly caused by the defendant's negligence. Each party to the venture may thus be viewed as taking action to protect its own interests from injury; each can make a non-derivative claim for loss in its own right because, to do so, it need refer only to its exclusive right in its own property as against the defendant. The fact that the obligation to contribute may be expressly agreed upon between the parties to the venture or implied as a matter of law between them does not affect this analysis. It merely specifies the particular terms and conditions of rescue which the parties have individually empowered the captain to take on their behalf as their agent of necessity in the circumstances of common peril. A payment of general average contribution is simply a cost of

rescue assumed by the captain on behalf and for the benefit of a party as his or her agent of necessity.

This answer only goes so far, however. It supposes that contribution may reasonably be viewed as unavoidable loss. This may not always be so. This is because the law of general average characterizes an act as general average not only if it is needed to avert a common risk to each and all of the interests but also if it is necessary to allow the venture to be completed successfully. However, it is only if the act is needed in the first way that it can give rise to unavoidable loss and so be recoverable under general principles of negligence. If it arises in the second way, it is still general average but constitutes relational economic loss and so must be denied under *Robins*.

By way of an example, suppose that a ship at sea is damaged by defendant's negligence and to avert the common danger to all the interests, the captain jettisons cargo. Clearly, the jettison is an act of general average, giving rise to a requirement of contribution. After the jettison, the ship is able to reach port safely but cannot resume the voyage without first being repaired. Expenditures made to repair the damage will also count in law as general average because they are "extraordinary expenses" due to the original negligence that created the peril and are necessary for the joint adventure to be concluded successfully. It is true that all such expenditures, to qualify as general average, must ultimately relate to an originating circumstance of common peril. However, because, at the time the repairs are made, the original common peril has already been averted and the cargo is in no danger at all, the question arises as to whether general average contribution to these costs, which are necessary to fit the vessel to complete the voyage, still amounts to unavoidable economic loss or rather constitutes non-recoverable loss consequential upon damage to another's property.

The problem, it seems to me, is that, on these facts, it is the jettison that rescues the interests from danger and the repairs are unconnected with the actual course of rescue. Rather, the repairs are made solely to enable the venture to be completed. Any danger to cargo has already been neutralized by the jettison. Therefore, the benefit to cargo of the repairs is that they allow cargo to enjoy the ship's services as contracted for. But the ship belongs to another. Cargo's contribution to the repairs would also have this derivative quality; it represents a cost that is with respect to the continued use of property that belongs to another. Cargo's requisite exclusive right in the damaged interest is lacking. It is purely and simply relational economic loss and so barred by *Robins*. The fact that this contribution is required under the law of general average (or by the parties' contract) merely specifies the circumstances in which such non-recoverable loss arises. If, however, we change the facts and suppose instead that the damage to the ship has been voluntarily inflicted upon it by the captain in order to save all the interests from common danger posed by defendant's negligence, cargo's contribution for repairs to *this* damage is recoverable consistently with *Robins* as cargo's own non-derivative cost of rescuing *its* property (along with the ship) from the danger.

I conclude that not every instance of general average contribution should be recoverable under general principles of negligence. One of the difficulties with the *Sucarseco* is that it does not make the necessary distinctions.¹⁴⁹ In a nutshell, my argument is that there can be liability consistently with *Robins* when the general average contribution represents unavoidable pure economic loss, in the sense explained. This, and this alone, ensures that the imposition of liability for general average contribution entails the imposition of liability for misfeasance only. The sorts of claims that are barred by *Robins* go beyond these parameters. This is also true of

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certain, albeit infrequent, attempts¹⁵⁰ to extend the reach of the *Sucarseco* – and more particularly, the idea of a joint or common venture-- with respect to claims for economic loss in negligence. They cannot be sustained on first principles of negligence.

(c) Detrimental Reliance

The third and certainly the most important instance in which pure economic loss may be recovered is where the plaintiff has sustained such loss as a result of relying upon the defendant's representations or undertakings. While courts and scholars agree that financial loss resulting from reasonable reliance is actionable, there are different, and indeed conflicting, interpretations of the underlying principle.¹⁵¹ My chief aim is to see whether there is *some* interpretation of the principle that can stand consistently with the denial of recovery under the economic loss rule. In light of the rationale that I have proposed for the economic loss rule, we must show that there is an analysis of reliance-based recovery which makes it truly distinct from non-recoverable economic loss by fully satisfying the requirement of misfeasance. Moreover, it should be possible to present this analysis strictly in terms of the rights and duties between the parties without bringing into play pragmatic concerns of avoiding indeterminate liability or other such considerations. As I will now explain, there is in fact an analysis of reliance-based liability that meets these requirements. It is the view which Justice Cardozo first presents in *Glanzer v. Sheppard* and then elaborates in subsequent decisions.

To begin, let me fix the issue of reliance and its relation to the economic loss rule by presenting a simple fact pattern. Returning to the bridge example, a plaintiff, who has relied on the availability of a bridge(owned by a third party), is no longer able to use it to transport his goods as a result of it being damaged by the defendant's carelessness and must therefore secure

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alternative means to transport them. As well, the plaintiff loses profits as a result of not being able to use the bridge. We shall assume that the cost of the alternative means is now greater than it would have been had the plaintiff initially chosen it rather than use the bridge. The plaintiff claims this increased cost as well as the lost profits. If the facts are restricted to these, the plaintiff's claim must fail, coming squarely under the economic loss rule. But what if the plaintiff contends that, as a matter of fact, he justifiably relied on the defendant's representations or assurances as to the availability of the bridge and that, on this basis, he decided to use it? Would this make any difference and if so, how? For an answer, we turn to *Glanzer*.

In *Glanzer*, the plaintiffs were buyers of beans from a third party (the seller) who had arranged by contract with the defendants, public weighers, to have the defendants weigh the beans and send a copy of the certificate of weight, not only to the seller, but also directly to the plaintiffs. To the knowledge of the defendants, the price the plaintiffs were to pay for the beans would be based upon the figure stated in the certificate. Indeed, this, the defendants knew, was the very purpose of sending the plaintiffs their own copy of the certificate. The defendants were careless in weighing the beans and overstated the weight in their certificate. When the plaintiffs later attempted a resale, they discovered that the actual weight of the beans was less than the weight as certified and that they had overpaid the sellers. They brought suit against the defendants for the amount overpaid. Writing for the New York Court of Appeal, Cardozo J affirmed the decision of the Appellate Division ordering judgment for the plaintiffs.

In holding that the defendants were under a duty of care in negligence toward the plaintiffs, Justice Cardozo underlined the following crucial features of their situation. First, it was reasonably apparent and indeed actually known to the defendants that the main purpose of

the service of weighing – “the very aim and end of the transaction”¹⁵²-- was that the plaintiffs would use the certificates to determine what they paid the sellers. As a result of the seller’s communications to them, the defendants knew that the beans had been sold and that in reliance on the certificates issued by them payment would be made. The defendants also reasonably knew that the plaintiffs would be aware that the defendants had been so informed by the seller and that the plaintiffs, knowing the defendants to be public weighers employed by the seller, would view the defendants as acting, not casually, but in the pursuit of their independent calling. Viewing the defendants’ action in its setting, the plaintiffs reasonably would regard the defendants as ‘intend[ing] to sway [plaintiffs’] conduct.’¹⁵³ The very end and aim of the transaction was *to induce action on the part of one who relies*.¹⁵⁴

According to this analysis, there appear to be at least two basic prerequisites to the existence of a duty in negligence in these circumstances. First, there must be words or conduct on the defendant’s part that reasonably conveys to the plaintiff the defendant’s intention that the plaintiff may rely upon the defendant. Second, the plaintiff must so rely. I want now to consider each of these two components more closely in turn and to explain how they are mutually connected.

First, the defendant must reasonably *intend* that the plaintiff should rely upon the defendant.¹⁵⁵ More precisely, the plaintiff must be able reasonably to infer this intention from the defendant’s words or conduct. Whether such intention exists is decided by how matters reasonably appear to the plaintiff, in keeping with an objective standard for liability in

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¹⁵³ *Glanzer*, above n 24, 276.

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negligence. Unless this intention, express or implied, exists, the plaintiff's reliance upon the defendant cannot be imputed to the defendant but must be seen simply as the plaintiff's own independent decision and at his or her own risk. It cannot be viewed as reliance for which the defendant has assumed responsibility in law. This reflects the more general idea that no one can be liable for the consequences of another's independent and unilateral course of conduct. Thus the fact that it may be rational for, in the sense of being in the interests of, the plaintiff to rely does not, in itself, make the defendant responsible for the reliance. Similarly, the fact that the plaintiff's reliance may be perfectly foreseeable is not enough to impute responsibility. Finally, the fact that the defendant just shares information with the plaintiff need not, by itself, engage the defendant's responsibility: it is still the plaintiff's own judgment and decision to use the information given as he or she sees fit. The parties remain mutually independent and responsible for themselves alone. Only the defendant's implied or express invitation to rely can change this situation of mutual independence into one of dependence of one upon the other. This invitation to rely is the defendant's *act* which engages his or her responsibility toward the other, displacing, as it were, their initial mutual independence. *As between plaintiff and defendant*, the plaintiff's decision to rely no longer counts as simply his or her independent and unilateral choice and at his or her own risk. By inviting the plaintiff to rely, the defendant has, *eo ipso*, assumed *some* responsibility toward the plaintiff and has done what is necessary to bring himself or herself under a duty of care in negligence.

The defendant's invitation to rely is not only essential to the establishment of a duty of care in negligence; it also determines the content and scope of the duty. Whether the defendant owes any duty and what that duty is are wholly rooted in the defendant's own act, in this way paralleling the idea in contract that the content of a contract is determined by the terms of the

offer. It is important to repeat, however, that the content and scope of the defendant's undertaking are ascertained in accordance with an objective standard and therefore in terms of how the invitation reasonably appears to the plaintiff, taking into account both express and implied aspects of the parties' interaction as well as "the implications and promptings of usage and fair dealing", ¹⁵⁶ as Cardozo aptly puts it. To illustrate and elaborate upon this point, it will be helpful to compare *Glanzer* with another Cardozo decision, which is probably the most cited case in this area. I am referring to *Ultramares Corporation v. Touche*. ¹⁵⁷

In *Ultramares*, the defendants, a firm of public accountants, were employed by Fred Stern & Co. ["Stern"] to prepare and certify a balance sheet exhibiting the condition of its business, as they had done in the preceding three years. As the defendants well knew, Stern imported and sold rubber and for this purpose required extensive credit and borrowed heavily from banks and other lenders. The defendants also knew that in the ordinary course of business, Stern would show the balance sheet when certified to banks, creditors, stockholders, purchasers or sellers as required for financial dealings. The defendants provided Stern with some thirty copies certified with serial numbers as counterpart originals. However, Stern said nothing as to the persons to whom the certificates would be shown or the extent and number of the transactions in which they might be used. In particular, nothing was said about the plaintiff, a corporation, which had previously never made advances to Stern but which, now, at Stern's request, was willing to make loans on condition that it received a balance sheet certified by public accountants. Stern provided the plaintiff with a signed certificate and in reliance upon it, the plaintiff made Stern a series of loans. Within a year, Stern was unable to repay the loans and was declared a bankrupt. As it turned out, the audit was seriously flawed. The plaintiffs brought

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an action in negligence against the defendants to recover their financial loss. Writing for a unanimous Court of Appeals, Justice Cardozo presented the fundamental issue as “whether negligence, even if it existed, was a wrong to the plaintiff”¹⁵⁸ and held that the answer to this question depended upon settling the prior “question of duty, its origin and measure”.¹⁵⁹ His answer, well-known and still controversial, was that the defendants were under no duty in negligence and that accordingly the plaintiffs’ action for damages must fail. The question is why.

It is a widely held view that the reason Cardozo declined to find liability in the circumstances of *Ultramares* is nothing other than the pragmatic objection. What phrase is more often cited in the economic loss cases and literature than his statement that a finding of duty would expose accountants to liability “in an indeterminate amount for an indeterminate time to an indeterminate class”?¹⁶⁰ More than half a century ago, Seavey suggested that Cardozo’s “opinion bears internal evidence of [his] fear that by making accountants responsible to an indefinite number for an indefinite time, liability would have such a crushing effect on their business that either they could no longer continue, or their rates would be so high that people could not afford to use their services.”¹⁶¹ In Seavey’s view, the reasons underlying the decision are “primarily economic”.¹⁶² Since Seavey wrote, it has become commonplace for courts as well as commentators to cite Cardozo’s statement, without reference to the particular facts of the case or, more importantly, to the actual reasoning in which it is embedded, as a self-explanatory slogan of policy which Cardozo apparently invokes to explain the different treatment of claims

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for pure economic loss in contrast to those for physical loss.¹⁶³ This view of his statement and of the judgment as a whole is, however, incorrect.

The fact is that at no point in *Ultramares* or for that matter in *any* of his other opinions dealing with the issue of liability in negligence for pure economic loss, does Cardozo expressly make economic or other policy considerations the basis of his conclusions about liability. He treats the possibility of indeterminate liability, *not* as a pragmatic limit on what would otherwise be required by basic principles of negligence, but rather, as a consideration that is immanently relevant *to the determination of duty according to general negligence principles in circumstances of reliance*. Thus, in *Ultramares*, he goes only so far as to suggest that “the hazards of a business conducted on these terms [viz., with the possibility of indeterminate liability for mere carelessness] are so extreme *as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences*.”¹⁶⁴ It is worth noting that there is no decision outside of the reliance context where he invokes, even in this limited way, the relevance of indeterminate liability. This raises the question of whether it is relevant only in reliance cases. What, then, might be the role and significance of the reference to indeterminate liability in reliance cases if it is not the simple enunciation of the pragmatic objection? As I will now explain, it is pertinent in ascertaining the existence and scope of a defendant’s invitation to rely.

To see this, I want to contrast reliance cases such as *Glanzer* and *Ultramares* with yet another landmark decision, *MacPherson v. Buick Motor Company*.¹⁶⁵ In that case, it will be recalled, the defendant, a manufacturer of automobiles, was held to be under a duty of care in negligence toward the plaintiff who was injured when his car collapsed, despite the absence of a

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¹⁶⁴ also compare to statements in *Weller and Simpson*

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direct contractual relation between them. In explaining the basis of this duty, Cardozo invokes the principle that “one who invites another to make use of an appliance is bound to the exercise of reasonable care.”¹⁶⁶ Justice Cardozo rightly invokes the idea of reliance because without it the plaintiff cannot impute responsibility to the manufacturer for the consequences of the plaintiff’s own decision to use the product. The consumer must be able reasonably to view the manufacturer as having invited him or her to rely on a representation (generally implicit) as to the non-dangerous condition of the product. The basis for implying this invitation¹⁶⁷ will typically be that the manufacturer has chosen to make its product available to potential users in such a way that that the manufacturer reasonably knows that consumers will reasonably view the manufacturer as intending it to be used (in standard ways) as is, without the need for intermediate inspection and without danger to themselves or their property. In the case of physical injury resulting from the ordinary use of a defective appliance or product, *any* such person may reasonably view himself or herself as having been invited by the defendant to use it without danger to person or property. Cardozo does not limit the assumption of responsibility by the manufacturer to the immediate purchaser or first consumer of the product. Moreover, so long as uses come within the parameters of ordinary usage, the particular use to which a given consumer puts the product is irrelevant. To frame or limit the scope of the manufacturer’s invitation to rely in these ways would not be a reasonable interpretation of its intention as manifested by the manner in which it makes its product available for use.

A different assessment of the invitation to rely may be appropriate, however, in cases of the provision of information for the use of others. Implicit in the approach taken by Justice Cardozo in such circumstances is the idea that it is reasonable to presume that one who provides

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information to others for their use intends it to be used by a *definite person or determinate set of persons for the purpose of a specific transaction or determinate set of transactions*. A reasonable person should view another as inviting him or her to rely only if he or she comes within these more definite and limited parameters. This presumption is one of fact and is the default position. The reason would seem to be this.¹⁶⁸ In the context of economic and social interdependence, a particular item of information can be communicated, shared, and relied upon by indefinite numbers of persons in indeterminate ways for an indeterminate time without using it up. If a person who provides information to another may reasonably be viewed, simply in virtue of this specific and defined service to one, as having invited reliance by anyone *else* to whom the information is foreseeably communicated, the provider must be imputed with “an intention to assume an obligation of indefinite extension”¹⁶⁹ with the consequence that “the assumption of one relation will mean the involuntary assumption of a series of new relations, inescapably hooked together.”¹⁷⁰ The idea of an “ordinary use” of information is indefinite and indeterminate, to the point of being almost meaningless.¹⁷¹ But it is *not* reasonable to *presume* that a person would voluntarily take on an indeterminate responsibility of this kind which cannot be measured or weighed in advance, absent positive evidence to that effect. Where a person does make reasonably evident to another that he or she is inviting a more open-ended reliance, the duty is extended beyond these parameters.

With this in mind, we can understand the different conclusions reached in *Glanzer* and *Ultramares*. In *Glanzer*, the certificate of weight is not conveyed to the buyer by the seller as part of the latter’s operations of business as occasion might require. Rather, it is transmitted by

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the defendants directly to the buyer with the knowledge that the buyer will pay the seller in reliance on the correctness of the information contained in the certificate. Although the certificate is paid for by the sellers, it is prepared primarily and explicitly for the buyer's use. Here then the buyer can reasonably view itself as invited by the defendants to rely. By contrast, the information in *Ultramares* is prepared for and given directly to Stern as a "convenient instrumentality for use in the development of the business".¹⁷² Stern's use of the certificates in furtherance of *its* business entails showing it to a range of persons with varied interests and relations with Stern. As for members of this unknown or at least indeterminate and indefinite class, it cannot be said that they reasonably might view themselves as directly invited by the defendant auditors to rely on the correctness of the information contained therein. They cannot reasonably understand the defendants as doing the audit and transmitting the certificates to Stern for the purpose of swaying the decisions of those who might happen to have business relations with Stern. The fact that Stern's reliance upon the defendants may take the form of showing the certificates to the plaintiffs and, as such, may be justified reliance as between him and the defendants does not, and cannot, be the basis of the further conclusion that the plaintiffs' reliance is also justified as against the defendants. Such sharing of information by Stern with the plaintiffs counts, so far as the defendants' responsibility goes, as *Stern's own use* of the information and *his* reliance upon it for his purposes. It may come within the scope of the defendant's responsibility toward Stern, not toward others. The plaintiffs' claim to relying reasonably on the defendants must not be derivative from another's claim but must stand on its own feet and be established as a direct relation between the parties. The plaintiffs must reasonably be able to view *themselves* as being directly invited by the defendant to rely.

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The significance of the concern about indeterminate liability is, then, that it goes to the question of whether it is reasonable, in given circumstance, to impute to the defendant an intention to invite reliance, which is a basic prerequisite to the establishment of a duty relation with the plaintiff. This is a *juridical* requirement and is completely distinct from the pragmatic objection. It is not surprising that Justice Cardozo refers to this consideration *only* in the context of negligent *undertakings involving reliance* and does not treat it as a free-standing policy concern that can be deployed generally in economic loss cases. On the foregoing analysis, a juridical concern about indeterminate liability should figure only in circumstances where a plaintiff must show justified reliance upon the defendant in order to succeed. Claims for relational economic loss that are denied under the rule in *Robins* are not reliance-based. There is therefore no reason to invoke this concern. It is worth noting, finally, that in contract law cases such as *Kerr SS Co Inc v RCA*,¹⁷³ Justice Cardozo treats the prospect of indeterminate liability in an identical way when determining what is clearly the same basic issue only in a contract setting; namely, whether a defendant has assumed responsibility for the consequences of breach under the doctrine of *Hadley v Baxendale*.¹⁷⁴

Where a plaintiff claims to have suffered loss as a result of the defendant's negligence in circumstances of reliance upon the defendant's representation or undertaking, the plaintiff can establish that a duty of care is owed only insofar as his or her reliance is reasonable. Based on the foregoing discussion, "reasonable" does not mean individually or collectively rational. Whether or not the plaintiff's decision to rely is rational in terms of its net value to the plaintiff in light of his or her preferences or in terms of some notion of collective well-being is irrelevant. For

¹⁷³ 157 NE 140 (NY CA 1927).

¹⁷⁴ (1854) 9 Ex 341, 156 ER 145 [*Hadley*].

purposes of analyzing liability, “reasonable” has to do only with relation to another – more specifically, whether one person’s conduct acceptably affects another when the other, in turn, takes into consideration the relation to the first. Here, the idea of reasonable reliance is the correlative of the kind of conduct on the defendant’s part that is necessary to give rise to a duty of care. This conduct, to repeat, is an express or implied invitation to rely that cancels the parties’ initial mutual independence and that provides a basis for attributing to the defendant certain consequences of the plaintiff’s own decision to do or not to do something. Accordingly, reliance is reasonable just insofar as it comes within the terms and scope of the defendant’s invitation, and the latter, in keeping with the relational standpoint presupposed throughout, is construed in light of how it reasonably appears to the one invited. Paralleling the relation between offer and acceptance – where it is the offer alone that sets the terms of a possible acceptance—the plaintiff’s reliance, to be reasonable, must respond to and reflect nothing more than what is contained in the invitation to rely.

Now it is one thing to specify what makes reliance *reasonable*. We still have to determine what the plaintiff must show by way of *reliance* to establish a duty relation with the defendant. This is the second element which Justice Cardozo presupposes to be necessary to found the plaintiff’s claim in *Glanzer*. But what does this entail? Simply stated, the plaintiff must show that he or she has “changed position to his or her detriment”.¹⁷⁵ Let me elaborate.

The key to understanding this idea of reliance is to be clear as to what it implies by way of protected interest. The protected interest which reliance asserts must sound in tort, not contract. Accordingly, the plaintiff’s protected interest cannot be, in and of itself, the defendant’s fulfilment of its undertaking or a representation. A claim to the fulfilment of a promise or representation has to be founded on a contract and, in the absence of this, the mere deprivation of

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what is promised or represented is not a loss and cannot be a detriment in legal contemplation. In and of itself, non-fulfillment is not an actionable loss or detriment in tort. The fact that a plaintiff may rely upon the representation or undertaking being fulfilled in the sense of expecting this to happen is thus categorically insufficient to found tort liability. Moreover, even if the plaintiff relies on the representation by making plans and pursuing purposes which depend upon the fulfillment of the undertaking or representation and claims that non-fulfillment frustrates these purposes with resulting loss, this still would not be enough. The plaintiff's loss flows from the defendant's failure to perform in a certain way, but to this performance the plaintiff can have no right apart from contract. For there to be a loss or detriment in tort law, there must be something other than merely the deprivation of the performance or the foreseeable consequences flowing therefrom. Reliance, to be a basis of tort liability, must be specified in other terms.

If the plaintiff's reliance claim must be with respect to a protected interest in something other than the fulfillment of the undertaking or representation in and of itself, what might this be? Apart from the undertaking or representation itself, the plaintiff may rely upon the defendant by giving up some actual or potential advantage which he or she would otherwise have obtained or by making some expenditure which he or she otherwise would not have incurred. For the missed opportunity or expenditure to give rise to a loss that is distinct and separate from the performance itself and thus actionable in tort, two conditions must be satisfied: first, as a matter of fact, the plaintiff could and would have availed herself of the opportunity or not have made the expenditure had she not relied upon the defendant in the first place; and second, had the plaintiff not so relied but instead taken the alternative course of conduct, she would have had, compared to her post-reliance situation, more of something in which she can have a legally recognized interest. By not pursuing an advantageous opportunity otherwise available to her or

by making an expenditure that she otherwise would not have done, the plaintiff *changes position* in reliance upon the defendant. Such change of position, I want to suggest, is the only kind of reliance that is actionable in tort.¹⁷⁶

By way of illustration,¹⁷⁷ suppose defendant, upon learning that the plaintiff plans to ship its goods by sea, offers to insure the plaintiff's goods for nothing in return. The plaintiff goes ahead and ships his goods. They are lost at sea. Had the defendant insured them as promised, the plaintiff would have been indemnified for the value of the goods. Unfortunately, the defendant did not do so and the plaintiff loses this value. It may be that the plaintiff contracted with a third party to sell the goods and now is unable to fulfill this obligation, with resulting loss. Are these losses actionable in negligence? The point of the foregoing analysis is that, to be actionable, there must be reliance in the requisite way. The plaintiff must have changed position to its detriment. The plaintiff's loss, I have emphasized, cannot be the deprivation of the promised performance or the consequences flowing therefrom. If, however, we suppose that the plaintiff can show, for example, that, but for the defendant's promise, it would have availed itself of insurance from *another* source or would *not* have shipped its goods until it obtained insurance from someone, there is now a change of position and foreseeable loss that results from it may be recoverable. In making out its claim on this basis, the plaintiff is not attempting directly to enforce the defendant's representation or promise. Rather, the plaintiff is seeking to be placed in the position it could and would have been apart from its reliance upon, and therefore interaction with, the defendant. Note that if in fact there was no one else willing to insure the goods or if the

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plaintiff intended to send the goods even if uninsured, there would be no change of position and so no possibility of tort liability.¹⁷⁸

In *Glanzer*, there is the requisite change of position. The basis of the plaintiffs' claim is not just that the defendants have failed to weigh the beans correctly. Proper performance of the weighing and certification is owed to the sellers, not the plaintiffs, and this is in virtue of the contract between defendants and sellers. Rather, the plaintiffs' claim is that had they not relied upon the defendants, they would presumably have paid the correct amount as determined on some other basis or, at the extreme, would have refrained from buying the beans at all. At least, their claim may reasonably be framed this way on the facts presented. In either case, the plaintiffs would not suffer the loss of their money by paying more than what is required by the terms with the seller. It is the loss represented by the over-payment that Justice Cardozo treats as the measure of recovery.

Because the defendants' wrong consists in inducing the plaintiffs to change position to their detriment rather than in depriving the plaintiffs of the performance (weighing) as such or of the state of affairs represented (by the certificate),¹⁷⁹ there will be no liability so long as the defendants enable the plaintiffs to regain their pre-reliance position, despite the fact that the service is unperformed and notwithstanding the failure to fulfill the representation.¹⁸⁰ Thus, had the defendants given the plaintiffs timely warning of their mistake before the plaintiffs made the over-payment, they would have exercised reasonable care and complied with their duty. This brings out clearly the fact that the duty lies in tort, not contract.

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¹⁷⁹ As Seavey, *ibid*, noted. '[T]he wrong is not primarily in depriving the plaintiff of the promised reward but in causing the plaintiff to change position to his detriment.'

¹⁸⁰ In another important decision, *Imperator Realty co v Tull* 127 NE 263 (NY CA 1920), Justice Cardozo makes this point explicitly.

On this analysis, the plaintiffs must be viewed as having a legally protected interest in their pre-reliance position. The plaintiffs must not be prejudiced relative to this position as a result of the defendant's failure to use reasonable care. It is in comparison to this baseline that the plaintiffs' loss is determined. Compensation seeks to restore the plaintiffs to this pre-reliance position.

Change of position requires, then, that we compare two things, namely, the plaintiff's position with respect to an asset as it would have been *prior* to or *independently* of relying and his or her position with respect to the *same* asset *after* relying. We must presuppose that this asset either would have belonged or did belong to the plaintiff apart from interaction with the defendant, let alone the fulfillment of the promise or representation. The plaintiff does not acquire the asset from the defendant, as he or she would in contract. As in tort cases generally, the asset is treated simply as something in which, prior to interaction with the defendant, the plaintiff already has a legally protected interest and which the defendant must not injure. This appears to satisfy the requirement of misfeasance.

Yet the way injury and asset are construed here does seem different than in the ordinary case of damage to person or property where the defendant damages an actual asset which the plaintiff owns and uses. In the case of physical loss, the plaintiff appears purely passive in the face of the defendant's decision to act without due care. By contrast, in the reliance cases, an essential factor leading to the plaintiff's loss is the plaintiff's *own decision* to give up an existing asset or not to obtain a potential asset, all in reliance upon the defendant. *Both* plaintiff and defendant are active. Moreover, again in contrast with the physical loss situation, the plaintiff does not own or possess this asset at the moment of the defendant's negligence because, precisely, he or she has given it up or not pursued it in reliance upon the defendant. How can

reliance-based liability be for injury to something the plaintiff owns or possesses at the time of the negligence, in keeping with the requirement of misfeasance?

The fact of invited reliance answers this question. Because the defendant *induces* the plaintiff to rely, it does not lie in the defendant's mouth to deny responsibility for the reasonably foreseeable and unavoidable consequences of this reliance. As a matter of fairness and reasonableness between the parties, the defendant must be taken to have assumed responsibility for the consequences of the plaintiff's reliance because of the defendant's own decision to invite the plaintiff to rely. Insofar as the consequences of the plaintiff's reliance are imputed to the defendant rather than to the plaintiff, the plaintiff figures as passive and dependent in the legal relation with the defendant. The same reasoning holds for the question of misfeasance. The reason the plaintiff does not obtain or, alternatively, gives up the pre-reliance asset such that she does not have it at the moment of the defendant's negligence is that the plaintiff has responded reasonably to the defendants' invitation to rely. The plaintiff, we suppose as a matter of fact, can show that she *could and would* have obtained or retained the benefit had she not been induced to forego it at the invitation of the defendant. In other words, the plaintiff could and would have made it her own independent of interaction with the defendant. Had she done so, it could and would have constituted a protected interest in the ordinary way as against the defendant. Once again, as a matter of reasonableness and fairness between the parties in light of the invitation to rely, the defendant is estopped from asserting that this foregone or lost opportunity is not a present asset belonging to the plaintiff and which the defendant must take reasonable care not to impair or damage. As between the parties, the plaintiff's pre-reliance position counts as a protected asset which the defendant has injured by its failure to use due care.

Gathering together the main points so far, let me summarize the role that reliance plays in this analysis. For the defendant's conduct to constitute negligence, it must impair, injure or otherwise adversely affect some interest which the plaintiff can assert by rights as against the defendant. There is no such thing as negligence in the air. In keeping with the difference between contract and tort, this protected interest must not be in something which the plaintiff acquires from the defendant. Rather it must be deemed to belong to the plaintiff independently of the defendant, with the latter being duty-bound not to injure it negligently. Apart from a plaintiff's reliance in the form of giving up a potential or actual benefit that otherwise could and would have been enjoyed, there is nothing but the defendant's performance or representation itself that can be the object of the protected interest which the plaintiff must have to bring an action in negligence. But a plaintiff can acquire a right to the performance or representation itself only on the basis of a contract between him and the defendant. It follows, therefore, that, in these circumstances, the plaintiff's reliance, in the sense of changing position to his detriment, is a *necessary* condition of the plaintiff having a legally protected interest for the purposes of negligence. The requisite protected interest is, and can only be, in the plaintiff's pre-reliance condition. This is essential to the plaintiff being able to claim for misfeasance. Moreover, it is only insofar as this reliance *has been invited* by the defendant that the consequences of the plaintiff's own decision can reasonably be imputed to the defendant and that the plaintiff's reliance can be specified on the basis of the *kind* of pre-existing protected interest that tort requires as against the defendant. The assertion of a protected interest (of the kind required by the law of negligence) and the claim that the defendant has injured that interest are worked out in light of an interaction between the parties that is constituted by an invitation to rely on the one

side and reliance in response to this invitation on the other side.¹⁸¹ The requirement of injury to a protected interest is specified through this bilateral interaction and, in virtue of this, the requirement is satisfied as between the parties only. Relative to the defendant, therefore, the plaintiff suffers a loss or injury that is cognizable in tort law.

To conclude this discussion of reliance, I return to the main question of this section, which is whether the possibility of recovery under *Glanzer* can stand coherently with the denial of liability under *Robins*. My basic contention is that the difference in outcome is explained by the presence or absence of a legally protected interest which makes it possible to view the defendant's act or omission as misfeasance rather than nonfeasance, in the sense discussed above. In the case of injury to person or property, this prerequisite for liability is clearly met. The plaintiff has a right exclusive as against the defendant. I have argued that the same can be true where the loss is sustained as a result of the plaintiff taking action in reliance upon the defendant's representation or undertaking if, but *only* if, this reliance is invited by the defendant and involves a change of position by the plaintiff. However, in circumstances of relational economic loss where, ex hypothesi, there has been no such reliance, the needed right is missing and therefore the plaintiff's loss, however foreseeable, results from nonfeasance. It is mistaken to view liability under *Glanzer* as an "exception" to the economic loss rule.¹⁸² Rather, both express the very same general conception of liability for negligence and stand on the very same footing. Understood on this basis, each is equally fundamental as well as necessary.

Against this conclusion, it might be objected that circumstances of relational economic loss *do* involve reliance, at least in the following way. In virtue of the general interconnectedness

¹⁸¹ This is nowhere expressed more clearly than in Lush J's remarkable opinion in *Seale v Perry*, where he writes: In the negligent misrepresentation cases it may perhaps be said that a right arises in the plaintiff out of the facts of reliance by the plaintiff on the misrepresentation and an acceptance of responsibility by the defendant for the advice contained in the misrepresentation, a right which arises out of a relation of 'proximity', a para-contractual right."

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of commercial and economic interests, a defendant should reasonably know that people will depend directly and indirectly upon the availability of assets and services belonging to others. If the defendant damages or otherwise interferes with these assets or services, the interests of those who rely may foreseeably be affected. If reliance is a basis of recovery in the situation of *Glanzer*, why not here also? The answer¹⁸³ is that a plaintiff whose reliance, however foreseeable, is a function of this general economic interdependence cannot reasonably view the defendant as having invited his or her reliance. To attribute to the defendant an intention to invite such reliance would be to impute an intention to invite that is wholly indeterminate in all respects. But this, I have suggested, would be unreasonable. No person may reasonably be viewed as responsible for the general reliance of persons upon each other. In other words, insofar as persons rely in this way, they do so at their own risk. Reliance-based liability cannot be established on these factors alone. The denial of liability in *Robins* is fully coherent with the possibility of recovery under *Glanzer*.¹⁸⁴

Conclusion

In this essay, I have tried to make explicit and explain the normative premises animating Oliver Wendell Holmes's seminal formulation of the economic loss rule in *Robins Dry Dock*. In doing so, my aim has been to accomplish two main objectives. First, I have tried to understand, precisely and in its own terms, the admittedly compressed line of reasoning that leads Holmes to deny the plaintiff's claim for its foreseeable economic loss. Second, I have attempted to show

¹⁸³ This is the answer Justice Cardozo gives in *Moch*, *supra* note 110 at 897.

¹⁸⁴ The upshot of my argument is that decisions which do not make invited reliance, in the sense discussed of change of position, the basis of the duty relation will be in tension with *Robins*. The same holds true for decisions that ground the duty relation in a "special relationship" between the parties that falls short of the bilateral interaction characteristic of reliance so understood. Thus the reasoning supporting recovery in such decisions as *Biakanja*, *J'Aire* (name some more recent decisions as well) conflicts with *Robins*.

how this line of reasoning not only is not in tension with first principles of negligence but, to the contrary, that it exemplifies these principles in a particularly lucid and fundamental way. So understood, the economic loss rule belongs to, and is indeed required by, the general conception of negligence in modern tort law.

Against the overwhelmingly dominant views that Holmes' conclusion of no liability either is merely asserted without explanation or, more frequently, can only be justified on an extrinsic policy basis – the pragmatic objection— to which the judgment does not even allude, I have argued that Holmes presents a clear and intelligible line of reasoning that has nothing to do with the pragmatic objection but rather makes salient the kind of legal relation between the parties.¹⁸⁵ The analysis is strictly juridical or rights-based and is fully appropriate to adjudication on a case-by-case procedure. It is not at all necessary to present the economic loss doctrine as a bright-line rule, as do its defenders. Understood in the way I have proposed, the judgment provides definite guidance as to the application of the economic loss rule and definitively resolves the current disagreements and questions, even among those courts and writers who on balance endorse the rule, regarding its content and reach. In this connection, I show that the majority view, which follows *Robins* and does so, for the most part, accurately, needs nonetheless to make certain crucial distinctions if it is to apply the economic loss rule consistently with Holmes' reasoning and rationale. At the same time, I have also explained in detail how, understood in the way suggested, *Robins* decisively answers all the main objections and alternative views that have been advanced by those, representing the minority, who seek to limit or replace it. This is something, I have argued, the current majority view is not able to do precisely because it misunderstands the basis of the judgment.

¹⁸⁵ I do this in Sections I & II, *infra*.

Beyond the task of identifying and elucidating *Robin's* rationale, I have explored how it fits within the modern conception of negligence.¹⁸⁶ Against the view that the economic loss rule is in tension with or is based on considerations that are separate from general first principles of negligence, I have argued that it fully reflects, and is indeed required by, these principles. It does not bring into question the unity or coherence of negligence law. More specifically, in keeping with the idea of a public justification as understood by Rawls¹⁸⁷, I have tried to show how the denial of recovery for the sort of economic loss that arises in cases like *Robins* -- what I call "relational economic loss"¹⁸⁸ -- rests on a general first principle that is presupposed by all tort judgments. It is integral to the public reason of courts in their adjudicative role in determining tort liability. This is the principle that there can only be liability for misfeasance. To prevent misunderstanding that may result from partial or indefensible interpretations of this principle, it has been necessary to provide a careful discussion of the meaning of the misfeasance-nonfeasance distinction.¹⁸⁹ Properly understood, the distinction shapes the most fundamental ideas of negligence, such as its conceptions of wrong, injury, and loss. It is a general principle that governs tort liability for both physical and economic loss. Furthermore, it expresses a definite though limited idea of responsibility and fairness as between two parties and fits with the other basic requirement of reasonable foreseeability to constitute the foundation of modern negligence. Viewed in this light, the teaching of *Robins* illuminates a first principle of negligence that is always presupposed but rarely an issue. In cases of relational economic loss, it is *the* issue. Finally, as part of the effort to fit *Robins* within the larger context of negligence and thereby to ascertain the unity of negligence, I have examined in detail the fit between the economic loss

¹⁸⁶ I do this in Sections III & IV, *infra*.

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¹⁸⁹ I do this in Section III.

rule as set out in that case and the other main areas of negligence where pure economic loss is recoverable.¹⁹⁰ My conclusion is that, understood in the way I have suggested, the denial of recovery in *Robins* is perfectly compatible with these other areas where liability is widely recognized. The latter are not “exceptions” to the economic loss rule but rather both reflect the very same conception of liability that animates modern negligence law.

¹⁹⁰ I do this in Section IV.

