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The Problem with Pure Economic Loss

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PETER BENSON*

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I. INTRODUCTION	

For well over a century, it has been a settled feature of American and English tort law that in a variety of situations there is no recovery in negligence for pure economic loss, that is, for economic loss unrelated to injury to the person or the property of the plaintiff.¹ This is true even if the loss is reasonably avoidable and perfectly foreseeable according to ordinary tort standards. I want to investigate whether this legal position is sound and how it might be accounted for.

For purposes of this Article, I shall focus on the kind of nonactionable pure economic loss that, from the start, has been a relatively fixed point in thinking

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1. This is the generally accepted definition of pure economic loss. See RESTATEMENT (THIRD) OF TORTS: ECON. TORTS AND RELATED WRONGS § 8, at 3 (Council Draft No. 1, 2006).

about this issue in all its shapes and forms. I am referring to what is now often called “relational economic loss.”² Here, a defendant carelessly damages or otherwise interferes with something or some facility—for example, a bridge—which the plaintiff is using but which the plaintiff neither owns nor possesses. The plaintiff may be entitled to use the bridge under a contract with the third-party owner or may simply be free to use it as a member of the public. The defendant’s carelessness interrupts the plaintiff’s use of the bridge, making it necessary for the plaintiff to find alternative facilities at a greater cost. The increased cost constitutes plaintiff’s “relational” financial loss because it results from damage done to something which the plaintiff neither owns nor possesses. For more than a century, courts have held such a loss nonactionable.

Given that the law is longstanding and there exists extensive scholarly literature dealing with this issue,³ the natural question is why undertake another inquiry into its rationale. The simple reason is that despite the law being relatively settled, we lack at present an explanation that makes sense of it, both in its own domain and in relation to other parts of negligence. The source of the difficulty is the way most commentators and courts currently understand the basis of the no recovery rule.

To elaborate, both defenders and critics of the traditional bar against recovery share the assumption that it cannot be justified on the basis of ordinary principles of negligence. They take as given that these principles would allow recovery in the very circumstances where courts have consistently denied it. The rationale *must* lie elsewhere.⁴ Thus pure economic loss claims are to be governed

2. See *infra* notes 16–18 and accompanying text. The term “relational economic loss” is widely used in English and British Commonwealth discussions of the issue. See R. BERNSTEIN, ECONOMIC LOSS 131 (1993); B. FELDTHUSEN, ECONOMIC NEGLIGENCE: THE RECOVERY OF PURE ECONOMIC LOSS 196–272 (2d ed. 1989); STEPHEN M. WADDAMS, DIMENSIONS OF PRIVATE LAW: CONCEPTS AND CATEGORIES IN ANGLO-AMERICAN LEGAL REASONING 47 (2003). In the United States, the term most often used for such claims is “negligent interference with contractual relations.” See RESTATEMENT (SECOND) OF TORTS § 766C (1977). This latter characterization is useful to the extent that it points to the important contrast with the tort of *intentional* interference with contract. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 161–68 (5th ed. 1984). However, this characterization is also misleading inasmuch as recovery is denied whether or not there exists an actual or even a prospective contractual relation between the plaintiff and the one whose property is damaged. Interestingly, the RESTATEMENT (THIRD) OF TORTS: ECONOMIC TORTS AND RELATED WRONG adopts the term “relational economic loss.” RESTATEMENT (THIRD) OF TORTS: ECON. TORTS AND RELATED WRONGS § 19, at 228 (Council Draft No. 1, 2006).

3. See sources cited *infra* note 19.

4. See Fleming James, Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43, 44 (1972) (“[T]he loss to plaintiff . . . would be readily recoverable if the test of duty—or remoteness—usually associated with the law of negligence were applied.”). In addition to James’s influential assertion of this view, the standard torts textbooks are illustrative. See JOHN G. FLEMING, THE LAW OF TORTS 179–81 (8th ed. 1992); KEETON ET AL., *supra* note 2, § 129; CLARENCE MORRIS & C. ROBERT MORRIS, JR., MORRIS ON TORTS 181–83 (2d ed. 1980); see also RESTATEMENT (SECOND) OF TORTS § 766C cmt. a (1977) (noting that courts have not generally recognized any liability for a negligent interference

by a special rule—the “economic loss rule.”⁵ On this view, economic loss represents a distinct topic within tort law that apparently raises its own special policy considerations and concerns.

This view of economic loss is not accidental but rather reflects, in turn, an underlying general conception of negligence in light of which nonrecovery is assessed. According to this general conception, the core positive norm in negligence is the standard of care, with the “duty” question serving the merely ancillary and negative function of restricting the ambit of legally relevant conduct to that which imposes foreseeable risks of harm to others.⁶ The touchstone of duty is foreseeability so that one whose conduct creates foreseeable risk of loss is *prima facie* subject to a duty to use reasonable care. It follows that the long-standing denial of claims for pure economic loss even where perfectly foreseeable must be an exception to and a limit on general principles, and the task is to explain the policy basis, if any, for treating such loss differently than the standard case of physical loss to person or property. Thus arises the problem of pure economic loss.

This conclusion is troubling. How can it be that *general* principles of negligence do not determine the appropriate outcome with respect to liability for financial loss which—no less than property loss—is a form of loss that is legally deserving of recognition in tort law and indeed is recoverable in other areas of negligence and of private law?⁷ This Article takes this question to heart and explores whether ordinary principles of negligence might in fact have the

with contracts and prospective contractual relations). Most recently, the RESTATEMENT (THIRD) OF TORTS: ECONOMIC TORTS AND RELATED WRONGS begins its discussion of the economic loss rule by noting “[t]here are several reasons why courts have not extended general principles of negligence . . . to redress solely pecuniary harm.” RESTATEMENT (THIRD) OF TORTS: ECON. TORTS AND RELATED WRONGS Pt. II, Introductory Note, at 1 (Council Draft No. 1, 2006) (emphasis added). The Reporter’s Note to section 8(a), “History of the Rule,” characterizes the economic loss rule “as a limitation on the negligence, strict liability, and products actions, which together compose modern accident law.” *Id.* § 8(a), Reporter’s Note, at 30.

5. For a brief historical overview of the rule, see RESTATEMENT (THIRD) OF TORTS: ECON. TORTS AND RELATED WRONGS § 8 cmt. a, at 4 (Council Draft No. 1, 2006). The denial of recovery for pure economic loss arising from defective products is also called the economic loss rule. In this Article, I limit discussion to relational economic loss. I discuss the defective product cases in Peter Benson, *The Basis for Excluding Liability for Economic Loss in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 427, 436–37 (David Owen ed., 1995).

6. See *infra* Part IV.B. For instructive discussions of this model, see John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1752–66 (1998) (arguing in detail that Oliver Wendell Holmes, Jr. and William L. Prosser are the intellectual sources of this model); and Stephen Perry, *The Role of Duty of Care in a Rights-Based Theory of Tort Law*, in THE GOALS OF PRIVATE LAW (A. Robertson & H.W. Tang eds.) (forthcoming 2009).

7. Numerous commentators and courts have noted this issue. For representative statements, see James, *supra* note 4, at 44; E.W. Middleton, Jr., *Damages: Loss of Prospective Profits Recoverable in an Action for the Negligent Destruction of a Chattel*, 35 CORNELL L.Q. 862 (1950); and Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1525 (1985). For a particularly good judicial statement of this point, see *Caltex Oil (Austl.) Pty. Ltd. v. The Dredge “Willemstad,”* (1976) 136 C.L.R. 529, 556–84 (Austl.).

resources to determine the appropriate treatment of relational economic loss. To do this, I revisit the foundational relational economic loss cases and, in particular, the decision that is generally recognized as the leading case in this area—Justice Holmes’s judgment in *Robins Dry Dock & Repair Co. v. Flint*.⁸ My aim will be to draw out and to clarify the reasoning that animates these decisions and to determine whether they embody general principles of negligence that can satisfactorily explain this area of tort law. My thesis is that they do.

Given *Robins*’s great influence, choosing it as a starting point for the elaboration of a case-based alternative approach is natural and indeed required. At first blush, however, the idea of looking to *Robins* for an *alternative* view to the dominant approach that treats the exclusion of recovery as a policy-driven limit on ordinary tort principles might seem odd and even doomed to failure, seeing that both defenders and critics of the economic loss rule standardly attribute this dominant rationale to *Robins* itself.⁹ At most, the alternative view might be prescriptive. But this is not so. We will see that the actual reasoning in *Robins* suggests an entirely different rationale for nonrecovery. It does not treat claims for pure economic loss as governed by special considerations, let alone by a special rule. Justice Holmes denied recovery on a basis that is generally applicable to all losses, physical or financial, and that expresses a fundamental and distinct requirement of negligence that, in addition to foreseeability, is a basic positive prerequisite for liability. Nothing could be more alien to the reasoning in *Robins* than the economic loss rule as it is currently understood.

This Article will proceed as follows. I begin in Part II by presenting and then critically evaluating the currently prevailing explanation that views the law’s treatment of relational economic loss as a special rule that departs from general principles of negligence. The discussion focuses on the influential account proposed by Professor Fleming James, Jr.,¹⁰ which is the most familiar and also the most intuitively straightforward illustration of this approach. James claims that the nonrecovery of relational economic loss is a “pragmatic” limitation on the ordinary principles of negligence,¹¹ and in particular, on foreseeability.¹² I argue that the approach, whether in James’s version or more generally, is

8. *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). Courts and commentators generally view *Robins* as the most influential economic loss case in American tort law. Thus, Justice Breyer referred to *Robins* as the “leading ‘pure financial injury’ case,” *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 51 (1st Cir. 1985), and Gary Schwartz wrote that “Justice Holmes’ opinion [in *Robins*] has long been regarded as a leading source of the economic loss no liability rule,” Gary T. Schwartz, *The Economic Loss Doctrine in American Tort Law: Assessing the Recent Experience*, in *CIVIL LIABILITY FOR PURE ECONOMIC LOSS* 123 (E. Banakas ed., 1996).

9. See *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 51–53 (1st Cir. 1985); *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1023 (5th Cir. 1985). This view of *Robins* is virtually unquestioned among tort scholars.

10. See James, *supra* note 4, at 44.

11. *Id.* at 45.

12. *Id.* at 48.

deficient both as an explanation of the settled law and as providing a rationale that courts can reasonably apply in their usual adjudicative role. Indeed, far from making sense of the long-standing denial of claims for relational economic loss, the pragmatic rationale directly challenges the law and brings it into question. If we are to account for the law, a different kind of justification is necessary.

Part III begins the central task of elaborating an alternative rationale. As already indicated, I look to the leading economic loss cases themselves, and to *Robins* in particular, for ideas and principles that can be worked up into a coherent and plausible analysis of tort liability for relational economic loss. My aim is to develop what—following John Rawls—may be called a “public basis of justification.”¹³ In this context, the term “public” does not reflect a difference between public and private law, but refers to the fact that the justification appeals to fundamental normative ideas and principles that are publicly available and accessible because they are present in the legal and political culture. Here, the economic loss decisions themselves provide this publicly available fund of ideas. A further requirement of a justification being public is that it must be capable of being transparently and readily implemented by the appropriate institutions. With respect to the nonrecovery rule, its justification must be suited to the competence of courts in their usual adjudicative decision making role on a case-by-case basis.

In light of this aim, it is crucially important to let *Robins* speak for itself instead of attributing to it views that are not part of its actual reasoning. My goal is to clarify the understanding of liability that animated *Robins*. More specifically, we need to identify and to assess the reason Justice Holmes required actionable financial loss to flow from damage to something in which the plaintiff has a proprietary or possessory interest. What is striking about the decision is that it made no mention, either directly or indirectly, of the need to limit the ordinary consequences of the foreseeability doctrine. In contrast to the judgment of the court of appeals, any reference to foreseeability was absent. If the requirement of a possessory or proprietary interest was not viewed as the upshot of policy considerations that specifically apply to relational economic loss, why was it relevant, let alone necessary? Justice Holmes explicitly presented it as a *requirement of justice* that is completely distinct from foreseeability and that does not reflect anything peculiar to loss being financial rather than physical. It was, we will see, a purely juridical requirement: to be actionable, the plaintiff's loss must result from defendant's interference with something that comes under

13. This Article is a first step in this direction. For Rawls's idea of such a “public justification,” see JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 26–29 (Erin Kelly ed., 2001) [hereinafter RAWLS, *RESTATEMENT*]; and John Rawls, *The Idea of Public Reason Revisited*, in *COLLECTED PAPERS* 573, 593–94 (Samuel Freeman ed., 1999). I have discussed the idea of a public justification for contract law in Peter Benson, *Contract as a Transfer of Ownership*, 48 WM. & MARY L. REV. 1673, 1693–1719 (2007), and in Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 OSGOODE HALL L.J. 273 (1995).

the former's exclusive rights as against the latter. The plaintiff's claim for relational economic loss in *Robins* failed to satisfy this prerequisite of duty.

Once Justice Holmes's reason for the requirement of a proprietary/possessory interest is properly understood, it becomes clear that, contrary to the seemingly ubiquitous assessments of minority courts and commentators,¹⁴ *Robins* provides definite guidance as to the precise content and reach of its principle. Liability can be assessed in terms that are readily applicable on a case-by-case basis. I also show that the suggested rationale, unlike the dominant policy-driven explanation, can answer all of the main objections and alternative views of courts taking a minority view in opposition to the traditional denial of relational economic loss. Such objections or alternatives simply miss the mark. At the same time, it turns out—perhaps surprisingly—that certain recent majority decisions, purporting to follow *Robins*, deny recovery in circumstances where in fact *Robins* does *not* require this; conversely, the imposition of liability by some leading minority decisions *is* explicable consistently with *Robins*. In these instances, the current majority view has overextended the reach of *Robins* because it misunderstands *Robins*'s basis.

This last remark reflects a more general point that should be emphasized: understood in the way I suggest, *Robins* does not bar economic loss claims as such but denies only those that fail to meet its requirement. There is nothing inherent about financial loss that makes it less actionable than physical loss. The fact that fidelity to *Robins* does not imply a general denial of economic loss claims opens up the possibility of there being situations where pure economic loss *can* be recovered consistently with it. Such situations of recoverable economic loss need not be viewed as “exceptions” to any “general” economic loss rule. The different outcomes can be justified on a common basis. Part III concludes with a brief discussion of the relation between *Robins* and some settled instances of recoverable economic loss.

Part IV completes the elaboration of the alternative view by highlighting the significance of the *Robins* principle within the larger law of negligence and by clarifying its bearing on the theory of negligence. It addresses two main questions: Does the ground for nonrecovery in *Robins* embody, as Justice Holmes himself thought, a *general* requirement of principle presupposed throughout the law of negligence? And if so, what is the relation between this requirement and the doctrine of foreseeability in a general conception of negligence? In answering these questions, I try to show not only that the *Robins* principle is indeed fundamental to and pervasive in the law of negligence, but also that it fits within a general rights-based conception of negligence which is unlike the one ordinarily ascribed to Justice Holmes and evidenced in much of

14. See *infra* text accompanying notes 56–61.

his extra-judicial writing.¹⁵ Nonetheless, it is this conception, I contend, that best illumines what courts do in physical and economic loss cases alike.

II. THE PREVAILING EXPLANATION AND ITS DEFICIENCIES

In this Part, I explore the underlying premises of the prevailing justification for the nonrecovery of relational economic loss and explain why it cannot provide a satisfactory account of the law. My purpose is to show the need for a fundamentally different approach. The problem, I suggest, lies not with what the courts (for the most part) do with relational economic loss but with the current interpretation and explanation of what they do.

First, let me briefly review the settled legal analysis of negligence claims for relational economic loss. Recalling the bridge example,¹⁶ the defendant damages something that the plaintiff neither owns nor possesses but in which the plaintiff nevertheless has an interest—a contractual right against a third party or just a liberty or privilege to use it. The plaintiff may even be the sole user of the bridge. The plaintiff's financial loss may consist of additional costs or lost profits that result when the bridge is no longer available for the plaintiff's use as a consequence of the defendant's carelessness. This loss is relational because it arises from damage to something other than the plaintiff's own person or property. While the third-party owner of the bridge may recover for foreseeable damage to the bridge and all foreseeable consequential financial loss (including the costs, if applicable, of indemnifying the plaintiff under their contract), the plaintiff may not recover any of the loss which the plaintiff sustains as a result of not having the use of the bridge. This conclusion does not depend on whether someone other than the plaintiff may successfully recover for the loss. It may be that no one can recover for the loss inflicted. This analysis, as settled by the influential nineteenth century English case of *Cattle v. Stockton Waterworks Co.*¹⁷ and largely followed thereafter, categorically holds for any and all relational economic loss.¹⁸

15. I say "much" because there are elements of this rights-based view in parts of his writings. See *infra* Part IV.A. For a good overview of Holmes's theoretical writings, see Goldberg & Zipursky, *supra* note 6, at 1753–56. Interestingly, and correctly in my view, these authors present *Robins* as a departure from and a challenge to the dominant policy-driven model of negligence which they see Justice Holmes himself as originating and defending in his extra-judicial writing. *Id.* at 1832–33.

16. See *supra* p. 824. The case law is replete with economic loss negligence claims arising from bridge closures. Such claims are invariably denied. See *Leadfree Enters., Inc. v. U.S. Steel Corp.*, 711 F.2d 805 (7th Cir. 1983); *Louisville & Nashville R.R. Co. v. M/V Bayou Lacombe*, 597 F.2d 469 (5th Cir. 1979); *Gen. Foods Corp. v. United States*, 448 F. Supp. 111 (D. Md. 1978); *Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124 (Iowa 1984); *Stop & Shop Cos. v. Fisher*, 444 N.E.2d 368 (Mass. 1983); *Rickards v. Sun Oil Co.*, 41 A.2d 267 (N.J. 1945).

17. (1875) 10 Q.B. 453 (Eng.).

18. The following selection of well-known cases illustrates the range of relational economic loss scenarios. See, e.g., *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50 (1st Cir. 1985) (describing plaintiff who incurred extra costs when its vessel was prevented by defendant's

While there have been a variety of scholarly efforts to explain the nonrecovery decisions, by far the most influential and intuitively compelling approach has been Professor Fleming James's pragmatic objection to recovery for pure economic loss.¹⁹ The pragmatic objection encapsulates and illustrates

negligent oil spill from docking at nearby berth owned by third party); *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985) (describing various plaintiffs, including shipping interests, marina and boat operators, seafood enterprises, tackle and bait shops, and recreational fishermen, who claimed financial losses sustained when Mississippi River Gulf outlet closed and maritime activities were suspended due to threatened contamination to outlet caused by defendant's negligence); *The Federal No. 2*, 21 F.2d 313 (2d Cir. 1927) (describing plaintiff employer who sued for contractually required costs of treating employee injured by defendant's negligence), *overruled by Black v. Red Star Towing & Transp. Co.*, 860 F.2d 30 (2d Cir. 1988); *Conn. Mut. Life Ins. Co. v. New York & N.H.R. Co.*, 25 Conn. 265 (1856) (involving plaintiff life insurer who sued defendant for negligently causing insured's premature death); *Byrd v. English*, 43 S.E. 419 (Ga. 1903) (involving plaintiff factory owner who sustained 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 was contractually obliged to supply power to plaintiff); *Stevenson v. E. Ohio Gas Co.*, 73 N.E.2d 200 (Ohio Ct. App. 1946) (involving employee who sued for lost wages when prevented from working at factory because of damage and danger to factory caused by defendant's negligence); *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*, 29 S.W.3d 282 (Texas Ct. App. 2000) (describing plaintiff excavator who incurred 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); *Leigh & Sillavan, Ltd. v. Aliakmon Shipping Co.*, [1985] Q.B. 350 (Eng.) (describing plaintiff buyer who suffered financial loss as a result of defendant damaging goods en route at a time when the risk, but not the property in the goods, had passed to plaintiff); *La Societe Anonyme de Remorquage a Helice v. Bennetts*, (1911) 1 K.B. 243 (Eng.) (involving plaintiff tugboat owner who lost remuneration under towing contract when unable to complete towage of ship that was sunk en route due to defendant's negligence); *see also* RESTATEMENT (SECOND) OF TORTS § 766C illus. 1–4 (incorporating examples of relational economic loss).

19. James, *supra* note 4. An earlier important discussion of economic loss that suggested a similar approach was P. Atiyah, *Negligence and Economic Loss* 83 L.Q.R. 248, 269–76 (1967). Since James's article, the great majority of discussions have developed, refined, and revised the policy analysis that he first set out in less elaborate but perhaps more accessible terms. The most fully developed theoretical discussions of the rule take an economic standpoint. *See* W. Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEGAL STUD. 1 (1982) [hereinafter Bishop, *Economic Loss*]; William Bishop & John Sutton, *Efficiency and Justice in Tort Damages: The Shortcomings of the Pecuniary Loss Rule*, 15 J. LEGAL STUD. 347 (1986) [hereinafter Bishop & Sutton, *Efficiency and Justice*]; Victor P. Goldberg, *Recovery for Pure Economic Loss in Tort: Another Look at Robins Dry Dock v. Flint*, 20 J. LEGAL STUD. 249 (1991); Ronen Perry, *Relational Economic Loss: An Integrated Economic Justification for the Exclusionary Rule*, 56 RUTGERS L. REV. 711 (2004) [hereinafter Perry, *Relational Economic Loss*]; Mario J. Rizzo, *A Theory of Economic Loss in the Law of Torts*, 11 J. LEGAL STUD. 281 (1982). Articles that provide a noneconomic, policy-based justification include Rabin, *supra* note 7, and Robert L. Rabin, *Respecting Boundaries and the Economic Loss Rule in Tort*, 48 ARIZ. L. REV. 857 (2006) [hereinafter Rabin, *Respecting Boundaries*], as well as the many articles by Jane Stapleton, including *Comparative Economic Loss: Lessons from Case-Law-Focused 'Middle Theory'*, 50 UCLA L. REV. 531 (2002) [hereinafter Stapleton, *Comparative Economic Loss*], and *Duty of Care and Economic Loss: A Wider Agenda*, 107 L.Q.R. 249 (1991). For a comparative, historical, and theoretical discussion, *see* JAMES GORDLEY, *FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT* 263–84 (2006). Exceptionally, a few articles take a "rights-based approach." *See* Allan Beever, *A Rights-Based Approach to the Recovery of Economic Loss in Negligence*, 4 OXFORD U. COMMONWEALTH L.J. 25 (2004); Benson, *supra* note 5; Russell Brown, *Justifying the Impossibility*

both the strengths and the weaknesses of the prevailing approach. Indeed, when courts during the past few decades have proposed justifications for the nonrecovery of relational economic loss, they usually have referred to James's explanation.²⁰ It is important to unpack its premises and see whether the justification is sound.

The pragmatic objection starts from the general premise that tort "liability should be imposed for the foreseeable consequences of negligence unless there is good reason for withholding it."²¹ For pure economic loss, there is such a reason. The operation of negligence principles, particularly foreseeability, can lead to the imposition of open-ended and crushing liability on defendants for even momentary and trivial carelessness which results in pure economic loss.²² Even after fully compensating those who have sustained damage to person or to property, defendants may find themselves liable for vast sums of indeterminate—and thus uninsurable—losses because of carelessness towards plaintiffs alleging relational economic loss but who have not been injured or even endangered as to person or property.²³ Holding defendants liable for such losses would be grossly disproportionate to the wrongfulness of their act or omission. From a societal point of view, the imposition of liability would be an ineffective means of discouraging loss-creating activity or facilitating loss spreading, particularly when insurance considerations are taken into account. A general duty to avoid causing foreseeable relational economic loss could thus potentially impose ruinous consequences on socially useful activity.

The source of this problem is the background social fact of the pervasive and intricate interdependence of commercial and economic interests in modern societies.²⁴ Given this interdependence, it is foreseeable that damage to a particular resource or facility can directly or indirectly cause economic losses that are extensive or widespread (vast losses suffered by a vast number of

of *Recoverable Relational Economic Loss*, 5 OXFORD U. COMMONWEALTH L.J. 155 (2005); Stephen R. Perry, *Protected Interests and Undertakings in the Law of Negligence*, 42 U. TORONTO L.J. 247 (1992) [hereinafter Perry, *Protected Interests*].

20. See, e.g., Mathiesen v. M/V Obelix, 817 F.2d 345, 347 (5th Cir. 1987) (discussing James's "pragmatic approach"); Amoco Transport Co. v. S/S Mason Lykes, 768 F.2d 659, 668 (5th Cir. 1985) (same); *Testbank*, 752 F.2d at 1022 (same); Getty Refining & Mktg. Co. v. MT FADI B, 766 F.2d 829, 832 (3d Cir. 1985) (same); Audio Odyssey Ltd. v. United States, 243 F. Supp. 2d 951, 961 (S.D. Iowa 2003) (same); Furash & Co. v. McClave, 130 F. Supp. 2d 48, 57 (D.D.C. 2001) (same); Getty Refining & Marketing Co. v. M/T Fadi B, 595 F. Supp. 452, 454 (E.D. Pa. 1984) (same).

21. James, *supra* note 4, at 48.

22. *Id.* at 50 (quoting Comment, *Foreseeability of Third Party Economic Injuries—A Problem in Analysis*, 20 U. CHI. L. REV. 283, 298 (1953)).

23. *Id.* at 53.

24. The case law provides numerous statements concerning this fact of interdependence and its consequences. See *Conn. Mut. Life Ins. Co. v. New York & N.H.R. Co.*, 25 Conn. 265 (1856); *Byrd v. English*, 43 S.E. 419, 420 (Ga. 1903); *Stevenson v. E. Ohio Gas Co.*, 73 N.E.2d 200, 203 (Ohio Ct. App. 1946); *Weller & Co. v. Foot & Mouth Disease Research Inst.*, (1966) 1 Q.B. 569 (Eng.).

plaintiffs), as well as indeterminate or open-ended (losses that are qualitatively and quantitatively unascertainable, given the indeterminate variety of interests and the indeterminate number of plaintiffs that may be affected).²⁵ Courts and commentators often note that, by contrast, in the typical case of physical loss it is unusual for a single physical injury to generate indeterminate and extensive physical ripple effects.²⁶

Indeed, it seems unfair to hold a defendant responsible for the inherently expansive and indeterminate economic losses that result just as much from the social and commercial interdependence of interests as they do from the defendant's momentary, and possibly very limited, carelessness. No individual is responsible for this interdependence, which is to some extent advantageous to all. Why not view such losses as the inevitable by-product of daily living in modern society—the risk we all assume because we all benefit from the very interdependence that makes this risk unavoidable and yet perfectly foreseeable? Some such intuition seems to be presupposed in the determination that liability for relational economic loss is disproportionate or unfair. Moreover, it seems intuitively compelling that compensating for relational loss in general results in economically perverse incentives, as the indeterminate and intrinsically unlimited character of such loss is unrelated to the economic importance of the defendant's activity and empties the notion of reasonable precautions of any practical content.

Because the foreseeability requirement alone cannot avoid, but will inevitably produce, such undesirable outcomes,²⁷ the second step of James's pragmatic objection calls for a rule of policy to constrain the operation of the ordinary negligence principles, particularly the doctrine of foreseeability.²⁸ According to the pragmatic objection, the requirement that recoverable economic loss must result from physical injury to the plaintiff's person or property is just such a limiting device. The 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 goal of avoiding the imposition of extensive and indeterminate liability.²⁹

25. Both aspects are recognized in decisions and the literature. See *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 54 (1st Cir. 1985); Rabin, *supra* note 7, at 1533.

26. See, e.g., Rabin, *supra* note 7, at 1532 (“[A] negligent act rarely creates the prospect of multiple physical harms. The careless driver or land occupant can only wreak so much havoc on others; typically, the damage is limited to an unfortunate few.”).

27. See, e.g., Rabin, *Respecting Boundaries*, *supra* note 19, at 864 (“[T]ort is threatened by the implications of its own doctrinal substratum; namely, the oft-invoked concept of foreseeability.”).

28. See *supra* note 4. Perhaps the single most influential judicial statement of this view can be found in *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1023 (5th Cir. 1985) (stating that the economic loss rule is “a pragmatic limitation imposed by the Court upon the tort doctrine of foreseeability”).

29. See James, *supra* note 4, at 55.

James's pragmatic objection to recovery thus represents an amalgam of considerations of fairness and efficiency which, he contends, cumulatively argue against recovery for relational economic loss. For the most part, subsequent scholarly efforts have either elaborated on or refined these considerations as well as their bearing on the desirability of recovery. Nevertheless, all these accounts share serious difficulties. Let me elaborate.

In tension with the assertion that the imposition of liability for relational economic loss is disproportionate to the wrong done and hence unfair, the prevailing approaches also hold the contrary principle that fairness requires that one who has caused reasonably foreseeable and avoidable loss should be held responsible for it. As a matter of fairness, the gravity and the extent of a defendant's culpability should reflect the seriousness—both in kind and amount—of the foreseeable and thus avoidable consequences of his or her acts and omissions. This establishes a sufficient basis for imposing liability. If losses (whether physical or financial) are multiplied, so too, as a matter of justice, should be remedies.³⁰ Moreover, even if no one is individually responsible for the mutually beneficial social and economic interdependence that carries with it the foreseeable risk of relational economic loss, the question remains as to why those who happen to have a proprietary or possessory interest can recover such loss, while those who do not have such an interest cannot. Why draw the line in this way? Can't there be sufficiently direct and particularly foreseeable financial loss that also comes within the ambit of recovery? As for the inefficiency of allowing recovery, while there are certainly scenarios where this is true, recovery is also denied in circumstances where it is not, or at least not clearly, so.

These internal tensions and questions point to the following basic difficulty. As James himself noted, courts deny recovery even when it does not appear to lead to any real danger of open-ended or excessive liability.³¹ The very rationale that is proposed for the rule thus leads to its rejection—or at most to only a partial acceptance of it.³² This reflects a fundamental underlying contrast between the explanation and the law it purports to justify: whereas the pragmatic rationale views the requirement of an interest in person or property merely as a means of avoiding indeterminate liability, and therefore as justified *only* to the

30. For a typical statement of this view in a pure economic loss decision, see *Holt Hauling & Warehousing v. M/V Ming Joy*, 614 F. Supp. 890, 895 (D. Pa. 1985) (stating that in circumstances of foreseeable loss “[e]ach of [the] injured parties suffers a real loss for which tort law ought, in a perfectly just world, to provide redress”).

31. James, *supra* note 4, at 50–51. Other commentators have reached a similar conclusion. See BERNSTEIN, *supra* note 2, at 165; DEAKIN ET AL., *TORT LAW* 83–86 (3d ed. 1994); GORDLEY, *supra* note 19, at 280–84; Bishop & Sutton, *Efficiency and Justice*, *supra* note 19, at 352, 356, 360; and John Fleming, *Negligent Economic Loss in American Law*, in *NEGLIGENCE AFTER MURPHY V. BRENTWOOD DC* 30 (Legal Research Foundation ed., 1991).

32. See James, *supra* note 4, at 50–51 (concluding 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). According to James, one of the instances where the pragmatic objection does *not* apply is to the facts of *Robins* itself. *Id.* at 56.

extent that it is needed to accomplish this purpose, the cases treat the requisite interest as a per se requirement. The pragmatic explanation cannot make sense of the categorical character of the requirement; nor, in my view, do any of the more recent versions of this approach.³³

There is a further basic problem with the pragmatic rationale. Courts—as they themselves³⁴ and scholars³⁵ explicitly recognize—are simply unable to apply the rationale on a case-by-case basis. They lack the institutional competence and factual basis to decide whether or not particular instances of economic loss raise the specter of indeterminate or extensive liability, given the highly complex and speculative factual determinations³⁶ and competing,

33. The divergence of the law and economic explanations is characteristic of the scholarly literature on the economic loss rule. Thus, on the one hand, William Bishop writes that despite its often decisive legal importance, the “fact that the plaintiff does not own property that has suffered physical damage is economically irrelevant.” Bishop, *Economic Loss*, *supra* note 19, at 25. On the other hand, he asserts the economic relevance of other factors—such as whether a plaintiff’s economic loss represents a true social cost—that simply play no role in the actual reasoning in *Robins* or in other leading decisions. *Id.* at 4. In a more recent article, Bishop and John Sutton posit “allocative efficiency” and “corrective justice” as two goals and norms of tort law and argue that in four out of eight paradigmatic fact situations considered, the unqualified operation of the economic loss rule does not achieve either aim. Bishop & Sutton, *Efficiency and Justice*, *supra* note 19, at 347–48, 356–60. M.J. Rizzo ascribes decisive economic importance to whether a “channeling contract” exists, or could have existed, between the plaintiff and the party whose person or property is injured under which the latter is, or could have been, obliged to indemnify the former for his economic loss. Rizzo, *supra* note 19, at 283–85, 291–96. However, the economic loss rule operates irrespective of this factor. No leading case makes the actual or possible existence of a channeling contract a prerequisite of the exclusionary rule. Ronen Perry suggests more than seven distinct and sometimes competing economic considerations, none of which figures in *Robins*. Perry, *Relational Economic Loss*, *supra* note 19, at 782. This divergence between the legal point of view and economic analysis does not necessarily mean that the law on economic loss is incompatible with economic norms. For a recent discussion of this issue in more general terms that argues for their compatibility, see Mark A. Geistfeld, *Efficiency and Fairness in Tort Law* (N.Y. Univ. Law & Econ. Research Paper Series, Working Paper No. 48, 2006). It does mean, however, that these explanations cannot illumine the law in its own framework and do not draw their ideas from the public legal culture as expressed in these decisions. As such, these explanations do not fulfill the first requirement of a public basis of justification. They are subject to the further difficulty of requiring courts to make highly speculative and complex factual and policy determinations that are beyond the courts’ institutional competence. For this reason also, these explanations do not provide a suitably public point of view.

34. See *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 55 (1st Cir. 1985) (“We do not know the answers to these questions nor can judges readily answer them in particular cases.”); *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1052 (5th Cir. 1985) (Wisdom, J., dissenting); *Pruitt v. Allied Chemical Corp.*, 523 F. Supp. 975, 978–80 (E.D. Va. 1981).

35. See, e.g., *MORRIS & MORRIS*, *supra* note 4, at 183 (“The danger of crushing damages can only be avoided by arbitrary solutions. No formula can draw the line properly. The courts, without data, are making arm-chair guesses concerning the ability of various classes of defendants to absorb or spread these losses. Because these limits are set arbitrarily, it is not too difficult for later courts to set them differently as their estimate of the strength of various classes of defendants or the worthiness of various kinds of plaintiffs changes.”).

36. A decision perhaps insufficiently aware of this point is *Union Oil Co. v. Oppen*, 501 F.2d 558, 569–70 (9th Cir. 1974), which, as a result, received harsh criticism in R. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 298–301 (1979).

frequently incompatible, policy considerations which this assessment often requires. If, as is the case, the pragmatic objection is the prevailing rationale for the economic loss rule, at a practical level it is a rule without a justification that can be implemented as part of the public reason of courts in their adjudicative role. In other words, the pragmatic objection does not provide a public basis of justification. Precisely because the pragmatic rationale does not give courts definite and practicable grounds to determine the parameters of the rule in particular instances, they must fall back on a bright line interpretation of it,³⁷ detached from the very sorts of evaluations which the pragmatic rationale requires. But given the stated tension between the economic loss rule and settled general principles of negligence that would otherwise govern—including the inevitable denial of meritorious claims that do not raise the specter of indeterminate liability—this is clearly an undesirable and unstable situation for any rational system of law.

In addition to bringing into question the very rule it purports to justify, the pragmatic objection makes inevitable attempts to articulate an alternative treatment of relational economic loss that serves the goals set out by that justification without sacrificing ordinary tort values. Hence there is the call for a more reliable and finely tuned set of criteria, instead of the majority position's single prerequisite of a proprietary or possessory interest. The minority position comprises precisely those courts that, although sharing the pragmatic concern about indeterminate or widespread liability, decline to view the absence of a proprietary or possessory interest as the sole decisive factor. Instead, these courts treat a proprietary interest as just one possible factor that may, depending on the particular circumstances of a given case, correlate with the risk of indeterminate liability.³⁸

It is not surprising, then, that commentators and courts have come to see this area of negligence as one beset by internal tensions and raising some of the most difficult issues in negligence practice and theory.³⁹ Indeed, a growing number of

37. For a typical statement of this position, see *Allders International (Ships) Ltd. v. U.S.*, 1995 WL 251571, at *1 (S.D.N.Y. Apr. 28, 1995) ("Most courts have read *Robins Dry Dock* to establish a bright line rule against recovery for economic loss caused by an unintentional maritime tort absent physical damage to property."). The RESTATEMENT (THIRD) OF TORTS: ECONOMIC TORTS AND RELATED WRONGS falls back on a bright-line justification for no liability in cases such as *Robins* where claimants incur pure economic loss as a result of having a contractual interest in the damaged item. See RESTATEMENT (THIRD) OF TORTS: ECON. TORTS AND RELATED WRONGS § 8 cmt. b, at 7 (Council Draft No. 1, 2006). The same approach now dominates English jurisprudence. See *Leigh & Silavan, Ltd. v. Aliakmon Shipping Co.*, [1985] Q.B. 350 (Eng.).

38. See *Testbank*, 752 F.2d at 1035–53 (Wisdom, J., dissenting); *People Express Airlines, Inc. v. Consolidated Rail Corp.*, 495 A.2d 107 (N.J. 1985). Perhaps the most thoughtful statement of this minority opinion is Justice Stephen's opinion in *Caltex Oil (Austl.) Pty. Ltd. v. The Dredge "Willemstad"*, (1976) 136 C.L.R. 529, 556–84 (Austl.).

39. See, e.g., RESTATEMENT (THIRD) OF TORTS: ECON. TORTS AND RELATED WRONGS, Reporter's Memorandum, at xi (Council Draft No. 1, 2006) ("Economic negligence is the most unsettled field in American tort law today."); B.S. Markesinis, *An Expanding Tort Law—The Price of a Rigid Contract Law*, 103 L.Q.R. 354, 354 (1987) ("[T]he theoretical difficulties associated

foreign common law jurisdictions have now jettisoned, or at least substantially revised, the economic loss rule.⁴⁰ Unless we can justify the treatment of pure economic loss in terms that do not stand against—but rather reflect—basic principles of tort law which courts can readily implement in their usual adjudicative role, it is not clear that the rule will—or more importantly, should—be retained. We seem to have reached an impasse regarding the economic loss rule.

There is a paradox here. Despite challenges by scholars and some courts, as well as the problems with the prevailing pragmatic rationale, the denial of recovery for even foreseeable pure economic loss in a variety of circumstances remains overwhelmingly the majority view in American tort law, both in federal and state courts.⁴¹ Historically, this denial of recovery for pure economic loss was settled by a virtually uninterrupted series of consistent decisions for over a century that developed, even in its details, along similar lines in both the British Commonwealth and in the United States.⁴² Courts took this denial of pure economic recovery to its logical conclusion, generalizing its principle and fleshing out its full scope and application.⁴³ Strikingly, the courts that did this were the very ones that, during this same period, created the modern law of negligence, giving full effect to the doctrine of foreseeability in cases of physical loss.⁴⁴ In settling the question of liability for pure economic loss, these courts did not view the determination of liability as either particularly difficult or controversial. In fact, most of the early cases that formulated and elaborated the economic loss rule did so without making pragmatic considerations the explicit basis.⁴⁵ This was widely so in American, English, and Commonwealth decisions. Instead, the courts typically said, without further explanation, that relational economic loss was indirect loss and that such loss was not recoverable, being *damnum absque injuria*—an injury without any injustice.⁴⁶ Often, courts noted the complete absence of legal precedent for recovery—despite the fact that such losses must frequently occur—and took this as evidence of the doubtfulness of the claims.⁴⁷ Even more interestingly, when, exceptionally, certain of these

with . . . economic loss cases place them indisputably in the first rank of problem areas of modern tort law.”).

40. For a good survey, see Karen Hogg, *Negligence and Economic Loss in England, Australia, Canada, and New Zealand*, 43 INT’L & COMP. L.Q. 116 (1994).

41. See sources cited *infra* note 56.

42. See, e.g., James, *supra* note 4, at 45 (noting the “remarkable parallel between the American decisions on [indirect economic loss] and those in the British Commonwealth”).

43. See, e.g., *id.* at 44–47 (discussing the difference in treatment between indirect economic loss and physical damage).

44. See *id.* at 46–47; see also *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 53 (1st Cir. 1985) (“The same judges who removed other recovery limitations left this one firmly in place.”).

45. See, e.g., Benson, *supra* note 5, at 427.

46. *Id.*

47. In the landmark English case of *Cattle v. Stockton*, for example, Lord Blackburn justified the denial of recovery on the ground that “[n]o authority in favour of the plaintiff’s right to sue was

founding decisions *did* refer to the consequences that might result from finding liability—the same consequences which are the concern of the pragmatic objection—they made clear that this was *not* the basis for denying recovery: “The magnitude of these consequences must not be allowed to deprive the plaintiffs of their rights, but it emphasizes the importance of the case.”⁴⁸ With some notable exceptions, explicit judicial endorsement of the pragmatic rationale is a relatively recent phenomenon.⁴⁹

The fact that these earlier decisions did not rely on the pragmatic objection or on other policy rationales, but instead excluded recovery categorically without much explanation, does not necessarily mean that they viewed the economic loss rule as an exception to, or in tension with, the general principles of negligence that these courts were simultaneously developing. Another explanation is possible: they may have regarded recovery for relational economic loss as directly incompatible with certain ultimate premises that must be presupposed for there to be *any* liability in negligence. The courts took these premises as given and uncontroversial—without the need to discuss or justify them expressly. Now, the more basic and more pervasive a premise is, the less one should expect courts ordinarily to draw explicit attention to it or to seek support for it in precedent. The premise is simply presupposed. Nevertheless, it is the mark of a great judgment that, in order to resolve the particular issue at hand, it brings out more explicitly the deeper connection between premise and

cited, and, as far as our knowledge goes, there was none that could have been cited.” *Cattle v. Stockton Waterworks Co.*, (1875) 10 Q.B. 453.

48. *Weller & Co. v. Foot & Mouth Disease Research Inst.*, (1966) 1 Q.B. 569 (Eng.). For still earlier explicit statements of this approach, see *Byrd v. English*, 43 S.E. 419, 420 (Ga. 1903), and particularly *Simpson & Co. v. Thomson*, 3 A.C. 279, 289–90 (Privy Council 1877) (Lord Penzance).

49. One of the first decisions in which the pragmatic objection is the *explicit* basis for the denial of recovery is *Stevenson v. E. Ohio Gas Co.*, 73 N.E.2d 200, 203–04 (Ohio Ct. App. 1946). Courts and commentators regularly cite Judge Cardozo’s influential words—“in an indeterminate amount for an indeterminate time to an indeterminate class”—from *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931) as the example of judicial recognition of the pragmatic objection. See, e.g., *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1039 (5th Cir. 1985) (quoting Judge Cardozo); James, *supra* note 4, at 45 (same). This, however, is incorrect. Cardozo’s reference to indeterminacy does *not* reflect the pragmatic objection. Instead, it concerns the reasonable basis for holding a defendant responsible for a third party’s reliance on a defendant’s statements or representations. It goes to the existence of a tort duty in circumstances of reliance. According to Cardozo, a prerequisite of such a duty is that the plaintiff must be able reasonably to view the defendant as intending the plaintiff’s reliance. *Ultramares Corp.*, 174 N.E. at 447. But, and this is the crucial point, plaintiffs cannot reasonably impute to a defendant an intention to assume an indeterminate responsibility absent clear positive evidence to that effect. Hence, in such circumstances, there is neither duty nor liability. Cardozo expresses the very same point in the contract decision of *Kerr S.S. Co. v. Radio Corp. of America*, 157 N.E. 140, 141 (N.Y. 1927), where, paralleling the misrepresentation cases in negligence, the issue is whether the defendant assumed responsibility for the consequences of breach under the doctrine of *Hadley v. Baxendale*. See Peter Benson, *Should White v. Jones Represent Canadian Law: A Return to First Principles*, in *EMERGING ISSUES IN TORT LAW* 164–65 (J. Neyers et al. eds., 2007). Goldberg and Zipursky also seem to share this rights-based interpretation of *Ultramares*. See Goldberg & Zipursky, *supra* note 6, at 1832–33.

conclusion, thereby presenting in a clearer light the conception of liability that is at work in its own decision as well as in previous cases. Indeed, a hallmark of the modern development of negligence is that, instead of embedding legal analysis in the opaque framework of the forms of action, courts began to articulate more general and abstract conceptions of the legal relations that give rise to rights and duties in tort. *Robins*, which also belongs to this period, is a judgment of this order. Or so I will now try to show.

III. THE REASON FOR NO RECOVERY: JURIDICAL, NOT POLICY

In this Part, I present a rationale for relational economic loss being per se nonactionable in negligence. Reflecting the idea of a public basis of justification, this rationale is drawn from the principles and values both explicitly articulated and latent in the economic loss cases. We ask whether there is a unifying and publicly available basis that provides a coherent account of this historically settled area of tort law. First, I argue that such a rationale is expressly put forward in *Robins*. This rationale is juridical or rights-based, not policy-driven as in the prevailing explanation. Given the common disagreement about *Robins* and its principle, it is crucial to determine the decision's precise metes and bounds, both in what it requires and in what it does not. Second, I show how this principle provides a complete and definitive answer to alternative tests of liability advocated by minority courts and by foreign common law jurisdictions critical of the traditional treatment of economic loss. This is something the prevailing explanation has failed to do. Third, I briefly discuss how situations of nonactionable relational economic loss differ from other situations of pure economic loss where there can be recovery. By way of illustration, I focus on two central instances of recovery. I suggest that there is no need to view these as "exceptions" to an economic loss rule. Rather, these different outcomes can be consistently explained within a single framework.

A. *The Principle and Reach of Robins*

In *Robins*, the plaintiffs were time-charterers of a vessel owned by—and in the possession of—a third party.⁵⁰ While the vessel was being dry-docked for its semi-annual inspection, the defendant, who had contracted with the owner to inspect and to service the vessel, carelessly damaged the propeller, making repairs necessary and thereby causing additional delay before the vessel returned to service.⁵¹ The charter party agreement between the plaintiffs and the third-party owner suspended the plaintiffs' obligation to pay hire while the vessel was out of service.⁵² Nevertheless, the plaintiffs sustained lost profits because of their

50. *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307 (1927).

51. *Id.*

52. *Id.*

inability to use the vessel as planned.⁵³ The plaintiffs brought an action in negligence for pure economic loss.⁵⁴ Reversing the plaintiffs' victory in the Second Circuit, Justice Holmes denied recovery.⁵⁵

Even though *Robins* was a decision in admiralty, the great majority of federal and state courts continue to follow *Robins* as a matter of common law negligence.⁵⁶ It is therefore paradoxical, and indeed troubling, that courts and scholars currently disagree over the parameters and scope of the decision. Some courts, particularly those which seek to limit or circumvent the decision, see *Robins* as confined to negligent interference with third-party *contractual* relations⁵⁷ or to only certain kinds of financial loss, such as lost profits as

53. *Id.*

54. *Id.*

55. *Id.* at 309–10.

56. *Robins* is endorsed (though sometimes with settled and limited exceptions) by the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits. See *Allders Int'l (Ships) Ltd. v. United States*, No. 95-6138, 100 F.3d 942, 1996 WL 19149, at *1 (2nd Cir. Jan. 16, 1996); *Channel Star Excursions v. S. Pac. Transp. Co.*, 77 F.3d 1135 (9th Cir. 1996); *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50 (1st Cir. 1985); *Getty Ref. & Mktg. Co. v. MT FADI B*, 766 F.2d 829 (3d Cir. 1985); *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985); *All-Iowa Contracting Co. v. Linear Dynamics, Inc.*, 296 F. Supp. 2d 969 (N.D. Iowa 2003); *Orgulf Transp. Co. v. Hill's Marine Enters.*, 188 F. Supp. 2d 1056 (S.D. Ill. 2002); *Furash & Co. v. McClave*, 130 F. Supp. 2d 48 (D.D.C. 2001); *In re Cleveland Tankers, Inc.*, 791 F. Supp. 669 (E.D. Mich. 1992); *Kingston Shipping Co. v. Roberts*, 667 F.2d 34 (11th Cir. 1982). The Fourth Circuit has stated that “without question, the *Robins Dry Dock* principle is alive and well in the Fourth Circuit,” *Yarmouth Sea Products Ltd. v. Scully*, 131 F.3d 389, 398 (4th Cir. 1997), but the leading case is *Venore Transp. Co. v. M/V Struma*, 583 F.2d 708 (4th Cir. 1978), which proposes a very different, and arguably incompatible, approach to the question of limitations upon liability for pure economic loss. With respect to state courts, once again the great majority embrace the *Robins* rule. There are some decisions, however, which reject *Robins* and lead the minority view. See, e.g., *Mattingly v. Sheldon Jackson Coll.*, 743 P.2d. 356 (Alaska 1987) (adopting a rule permitting recovery for purely economic losses); *J'Aire Corp. v. Gregory*, 598 P.2d 60, 63 (Cal. 1979) (“Where a special relationship exists between the parties, a plaintiff may recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in contractual privity.”); *Hawthorne v. Kober Constr. Co.*, 640 P.2d 467 (Mont. 1982) (finding plaintiff can maintain an action for negligence in the performance of duties growing out of contract, even where no privity of contract existed); *People Express Airlines, Inc. v. Consolidated Rail Corp.*, 495 A.2d 107, 118 (N.J. 1985) (“[A] defendant who has breached his duty of care to avoid the risk of economic injury to particularly foreseeable plaintiffs may be held liable for actual economic losses that are proximately caused by its breach of duty.”). More recently, the Supreme Court of Appeals of West Virginia qualified the economic loss rule by drawing upon these minority decisions and allowing recovery for pure economic loss where there exists a “special relationship” between plaintiff and defendant whereby the particular plaintiff is affected differently from society in general. *Aikens v. Debow*, 541 S.E.2d 576, 587–92 (2000). For helpful overviews of the law, see David Owen, *Recovery for Economic Loss Under U.S. Maritime Law: Sixty Years Under Robins Dry Dock*, 18 J. MAR. L. & COM. 157 (1987), and Perry, *Relational Economic Loss*, *supra* note 19, at 716–32. See also Ronen Perry, *The Economic Bias in Tort Law*, 2008 U. ILL. REV. 1573, 1578–79 (2008) (noting that both federal and state courts have generally embraced *Robins*).

57. See, e.g., *Testbank*, 752 F.2d at 1039–40 (Wisdom, J., dissenting) (“In limiting recovery in a chain of contractual relations, the Supreme Court drew the line after the first claim for damages. Justice Holmes had thus fashioned a rule in claims arising from a chain of contracts that would avoid a multiplicity of actions and prevent a vast extension of liability.”); *Hercules Carriers, Inc. v.*

opposed to wasted expenses.⁵⁸ Other courts, especially those that endorse the majority position and interpret the economic loss rule as a bright line rule, view *Robins* as requiring actual physical damage to one's property to find liability for resulting economic loss.⁵⁹ Commentators criticize *Robins* for failing to provide

Florida, 720 F.2d 1201, 1203 (11th Cir. 1983) (Clark, J., concurring) ("In *Robins* and *Byrd*, plaintiff A was in contract with party B, who failed to deliver contracted for benefits to A because of interference from tortfeasor C. Since A's injury resulted from B's failure to perform his contractual obligations, A's remedy, if any, is against B on the contract, and not against C, who cannot be touched for want of privity. The instant case, however, is solely a matter of tort. There is only plaintiff A who has suffered economic loss at the hands of tortfeasor C. There is no party B, no contract upon which A might base a claim for recovery, and no privity bar to an action against C."); *Fed. Commerce & Navigation Co. v. M/V Marathonian*, 528 F.2d 907, 908 (2d Cir. 1975) ("The *Robins* rule appears to be based on a contract theory, denying relief to one injured by negligent interference with contract."); *In re Kinsman Transit Co.*, 388 F.2d 821, 823 (2d Cir. 1968) ("We therefore prefer to leave the rock-strewn path of 'negligent interference with contract' for more familiar tort terrain."); *Pruitt v. Allied Chemical Corp.*, 523 F. Supp. 975, 981 (E.D. Va. 1981) (denying plaintiffs recovery for indirect economic harm because economic losses were not foreseeable and were too remote).

58. See, e.g., *Amoco Transport Co. v. S/S Mason Lykes*, 768 F.2d 659, 669 (5th Cir. 1985) (permitting cargo owners to recover actual, out of pocket expenses incurred directly from collision); *Struma*, 583 F.2d at 710–11 (permitting claim for damages for loss of use); *J. Ray McDermott & Co. v. SS Egero*, 453 F.2d 1202, 1204 (5th Cir. 1972) (permitting claim for reimbursement of expenses incurred under subcontract as a result of project being delayed, but indicating that claim for lost profits that might have been earned would be barred by *Robins*). James Gordley has suggested that economic losses involving extra cost, in contrast to lost profit, should be recoverable because unlike the latter the former are less variable and more unpredictable. See GORDLEY, *supra* note 19, at 284. For a similar position, see Perry, *Relational Economic Loss*, *supra* note 19, at 784.

59. See, e.g., *Getty Ref. & Mktg. Co. v. MT FADI B*, 766 F.2d 829, 833 (3d Cir. 1985) ("[W]here the negligence does not result in physical harm, thereby providing no basis for an independent tort, and the plaintiff suffers only pecuniary loss, he may not recover for the loss of the financial benefits of a contract or prospective trade."); *Testbank*, 752 F.2d at 1023 ("[T]here could be no recovery for economic loss absent physical injury to a proprietary interest . . ."). Other than *Testbank*, *Getty* contains the most frequently cited statement of this physical damage requirement. Several other cases have approved of and applied the language in *Getty*. See, e.g., *Reserve Mooring Inc. v. Am. Commercial Barge Line, LLC*, 251 F.3d 1069, 1072 (5th Cir. 2001) ("Like the plaintiff in [*Getty*], Reserve cannot escape the fact that Defendants' negligence did not result in physical damage to Reserve's mooring facility . . ."); *In re Oriental Republic of Uru.*, 821 F. Supp. 934, 937–40 (D. Del. 1993) (approving and applying *Getty*); *Consol. Rail Corp. v. M/T Hoegh Forum* 630 F. Supp. 83, 86 (E.D. Pa. 1985) ("[A]s in *Getty* . . . , no physical damages is alleged to the pier and defendant is therefore entitled to summary judgment as a matter of law."); see also *In re Taira Lynn Marine Ltd. No. 5, LLC*, 444 F.3d 371, 377 (5th Cir. 2006) (affirming the "economic loss rule" that there can be no recovery for pure economic loss without physical injury to a proprietary interest); *BP W. Coast Prods., LLC v. Alaska Tanker Co.*, No. C03-0727L, 2003 WL 23335932, at *1–*2 (W.D. Wash. Nov. 24, 2003) (same); *Maersk Line Ltd. v. CARE*, 271 F. Supp. 2d 818, 824 (E.D. Va. 2003) (same); *In Re One Meridian Plaza Fire Litig.*, 820 F. Supp. 1460, 1487 (E.D. Pa. 1993) ("As a practical matter, 'physical harm' suggests some physical contact or damage. Denial of access does not fit within this standard."). But see *Sekco Energy, Inc. v. M/V Margaret Chouest*, 820 F. Supp. 1009, 1011–12 (E.D. La. 1993) (citations omitted) (attributing incorrectly to *Robins* the idea that there must be physical damage but then correctly holding that where an ownership interest is interfered with, there is sufficient ground for liability even in the absence of "physical" damage).

any reasons for the denial of recovery,⁶⁰ or they simply read in the kinds of pragmatic concerns discussed earlier, with the accompanying criticism that such concerns did not seem to apply to the particular circumstances of the case.⁶¹ *Robins* remains a puzzle and a problem despite its authority and influence.

To understand *Robins* and its reasoning, it is important, first, to identify the precise point of disagreement between the Supreme Court and the Second Circuit.⁶² There was no disagreement over the facts. Moreover, both courts agreed that, as time-charterers, the plaintiffs did not have a possessory or proprietary interest in the vessel.⁶³ Additionally, the plaintiffs were not third-party beneficiaries of the employment contract between the defendants and the owners of the vessel.⁶⁴ Finally, both the court of appeals and the Supreme Court assumed that the mere foreseeability of the economic loss would not by itself justify the liability of the defendants.⁶⁵ What, then, was the basis of their disagreement?

The starting point of the court of appeals' analysis was that the defendant should be responsible for the *whole* of the lost use of the vessel during the additional dry-dock time.⁶⁶ Because "the measure of the total recovery is the market value of the loss of the 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."⁶⁷ This, the court emphasized, involved "no injustice to [defendant]."⁶⁸ To the contrary, because the defendant's negligence "directly affected several parties, each is *entitled to his just share* of the total amount,"⁶⁹ irrespective of whether he had a proprietary or possessory interest in the vessel. If there had been no agreement between the charterer and the owner, the owner would have sustained—and recovered—the whole loss himself.⁷⁰ The charter party which

60. See Bishop & Sutton, *Efficiency and Justice*, *supra* note 19, at 352–53 ("Holmes merely asserts that pure economic loss is not recoverable and on that ground overturns the decision of the Court of Appeals. Of course, [Justice] Mack [of the court of appeals] was perfectly aware of the general rule and was seeking to justify an exception on rational criteria. This argument Justice Holmes did not even attempt to answer."); Goldberg, *supra* note 19, at 256 ("Two things should be noted about Holmes's opinion. First, it is short on justification. Flint could recover if it had a property interest; it did not; ergo, no recovery. There is no attempt to question the doctrines that, in Holmes's perception, bar recovery."). The RESTATEMENT (THIRD) OF TORTS: ECONOMIC TORTS AND RELATED WRONGS states that Justice Holmes "appears to have thought it self-evident" that there is no liability for pure economic loss. RESTATEMENT (THIRD) OF TORTS: ECON. TORTS AND RELATED WRONGS § 8, Reporter's Note (a), at 30 (Council Draft No. 1, 2006).

61. See James, *supra* note 4, at 56.

62. See *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927); *Flint v. Robins Dry Dock & Repair Co.*, 13 F.2d 3 (2d Cir. 1926).

63. See *Robins*, 275 U.S. at 308; *Flint*, 13 F.2d at 5.

64. See *Robins*, 275 U.S. at 307; *Flint*, 13 F.2d at 4–5.

65. *Flint*, 13 F.2d at 6.

66. *Id.* at 5.

67. *Id.* (emphasis added)

68. *Id.*

69. *Id.* at 6 (emphasis added).

70. *Id.*

divided up the total loss between the owner and plaintiffs should not, the court reasoned, affect the defendant's liability for the loss: "The wrongdoer has no interest in and should not benefit because of the contractual obligations of the shipowner to the charterer, or the absence of any liability of the owner to the charterer for [defendant's] negligence."⁷¹ Moreover, unless the defendant compensated the plaintiffs, there would be a portion of the total amount of lost use which no one would recover, even though it resulted from the defendant's negligence. The court distinguished past decisions denying recovery for pure economic loss, as they involved indirect losses that were deemed too remote.⁷² Here, not only were the results "reasonably to be anticipated,"⁷³ but the wrongdoer "*directly affected*"⁷⁴ the plaintiffs, presumably because—like the owner—the plaintiffs had an interest in the use of the vessel and it was this use that the defendant directly affected.

The central premise of the court of appeals' judgment is clear: the defendant is responsible for negligent interference with the use of the vessel *as such* and whoever foreseeably is using it has standing to sue the defendant for its loss occasioned by this interference.⁷⁵ To have such standing, the plaintiff need not be in a relation of rights with the defendant regarding such use, as long as the item is owned at least by someone. Here, not having possession of or property in the vessel, the plaintiffs' *only* legal relation with respect to the vessel was their contract with the ship owner; but the contract gave the plaintiffs a right to use of the vessel as against the ship owner only, *not* the defendant. Despite the complete absence of a legal relation of rights between the plaintiffs and defendant with respect to their interest, the court of appeals concluded that the defendant still owed plaintiffs a duty in negligence to avoid injuring the plaintiffs' interest.

Against this entire line of reasoning, Justice Holmes answered simply and clearly 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]*."⁷⁶ For the defendant's interference with the use of the vessel to be a wrong against the plaintiffs, the plaintiffs' interest, Justice Holmes insisted, must be founded upon a right (or "claim"⁷⁷) *as against the defendant*. Only then

71. *Id.* at 5.

72. *Id.*

73. *Id.*

74. *Id.* (emphasis added).

75. *Id.* In taking this approach, the court of appeals endorsed what I call a "transferred loss" model of analysis which has subsequently been adopted by some minority position courts and scholars who challenge the traditional denial of relational economic loss. *See supra* notes 113–17, 123–25 and accompanying text.

76. *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 309 (1927) (emphasis added).

77. Holmes's use of the term "claim" is consistent with its meaning "a right." Interestingly, Hohfeld, writing prior to the *Robins* decision, suggested that the term "claim" should be used instead of right to avoid confusing the latter with other juridical conceptions. *See* W.N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 38 (1923).

would the plaintiff have a legally protected interest in that use to assert against the defendant in negligence.⁷⁸ By implication, the fact that someone else, such as the third-party owner, might have such an interest, or the fact that the plaintiffs might have this interest against some third party, could not satisfy this requirement. To state a cause of action, the plaintiffs' complaint must be founded on their own protected interest, not another's, and that interest must be against the defendant, not someone else. Apart from the requisite legal relation between the parties, the use of the vessel was not a protected interest in negligence. Since the plaintiffs lacked the necessary right in rem or in personam against the defendant, the plaintiffs' claim must be denied.⁷⁹ Holmes's disagreement with the court of appeals could not have been more fundamental.

What is conspicuously absent from *Robins* is any discussion of the sorts of considerations that make up the pragmatic objection to liability.⁸⁰ There is no mention of remoteness. Moreover, the Court did not premise the denial of recovery on the loss being financial, as if the financial character would make the loss less suitable or worthy as an item of compensation. Rather, the Court decided liability by asking a simple threshold question: Can the plaintiffs show that their loss resulted from the defendant impairing something that comes under the plaintiffs' rights—whether in rem or in personam—against the defendant?⁸¹ Having a property or possessory interest in the vessel would entail having a right to the use of the vessel that is exclusive as against the defendant, and having

78. *Robins*, 275 U.S. at 309.

79. *Id.* at 309–10.

80. It is noteworthy that any reference to such policy considerations is similarly absent in Holmes's extra-judicial comments about the case in his correspondence with Frederick Pollock. Justice Holmes wrote:

I have just finished a fairly interesting case in which a time charterer of a vessel tries to get damages from a dry dock company, for negligent delay in repairs *per quod* the charterer lost a fortnight of valuable time. I have no doubt that he can't recover but I have not yet heard from my brethren. Perhaps I should explain that there was no demise of the ship, that the owner remained in possession and put the vessel into dry dock without reference to the charter, having a right to do so by the terms of the instrument.

Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (Dec. 7, 1927), in II HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932, at 207–08 (Mark DeWolfe Howe ed., 2d ed. 1961).

81. See *Robins*, 275 U.S. at 309 (citing *The Federal No. 2*, 21 F.2d 313, 313 (2d Cir. 1927), *overruled by* *Black v. Red Star Towing & Transp. Co.*, 860 F.2d 30 (2d Cir. 1988); *Byrd v. English*, 43 S.E. 419, 420 (Ga. 1903); *Elliott Steam Tug Co. v. Shipping Controller*, (1922) 1 K.B. 127, 139–40 (Eng.)). This same rights-based analysis is found in *Byrd*:

The plaintiff is suing on account of an alleged tort by reason of which he was deprived of a supply of electric power with which to operate his printing establishment. What was his right to that power supply? Solely the right given him by virtue of his contract with the Georgia Electric Light Company, and with that contract the defendants are not even remotely connected.

Byrd, 43 S.E. at 420. Justice Holmes cited *Byrd* as a “good statement” of the applicable rule. *Robins*, 275 U.S. at 309 (citing *Byrd*, 43 S.E. at 420).

such a right seems to be a prerequisite of the loss being actionable.⁸² This, and not an instrumental concern about indeterminate liability, was the reason the Court gave for the requirement of a proprietary or possessory interest. Thus, Justice Holmes viewed wrongs in negligence as done in relation to others who have rights against the wrongdoer with respect to the very interest affected.⁸³ This relationship is the core idea in *Robins*, and Justice Holmes took it to be a requirement of justice.⁸⁴

We can now understand the significance of Holmes's conclusion that the plaintiffs' claim had to be worked out—if at all—through their contract with the ship owner.⁸⁵ The conclusion did not follow, as some have claimed, from an idea of the primacy of contract⁸⁶ or from an efficiency rationale that requires plaintiffs to “channel” their claims through their contracts with third-party owners.⁸⁷ It was simply the upshot of Holmes's rights-based analysis. If, as *Robins* requires, the plaintiffs' claim must be based on their rights and if the plaintiffs' only right to the use of the vessel is their contractual right against the owner, the contract, and only this, can be the basis of any action. As I will now

82. See *Robins*, 275 U.S. at 309 (citing *Federal No. 2*, 21 F.2d at 313; *Byrd*, 43 S.E. at 420; *Elliott Steam Tug*, 1 K.B. at 139–40).

83. See *Robins*, 275 U.S. at 308 (“The injury to the propeller was no wrong to the respondents but only to those to whom it belonged.”).

84. The Second Circuit clearly understood this view in *Agwilines Inc. v. Eagle Oil & Shipping Co.*, 153 F.2d 869, 871 (1946). Judge Learned Hand explained:

When [*Robins*] was before us, we held that, although the charterer had had no proprietary interest in the ship and no contract with the drydocking, the drydocking could not protect himself by the ordinary doctrine that a tortfeasor is not liable for remote damages, because the whole loss from detention of the ship was to be apprehended from his lack of care, whether the owner bore it all, or shared it with a charterer; and that, the whole loss being therefore a direct consequence of his negligence, he should not be allowed to cut down his liability. . . . To all of this the Supreme Court said “no.” . . . The Court thought it irrelevant that this resulted in exonerating the drydocking from nearly all liability through the fortuity that the profitable use of the ship had been divided between the owner and charterer: the difficulty went deeper; the drydocking had committed no legal wrong against the charterer at all, though he had caused it serious damage.

Agwilines, 153 F.2d at 871 (citations omitted) (citing *Flint v. Robins Dry Dock & Repair Co.*, 13 F.2d 3 (2d Cir. 1926), *rev'd*, 275 U.S. 303). See also *Venore Transp. Co. v. M/V Struma*, 583 F.2d 708, 711–12 (4th Cir. 1978) (Winter, J., dissenting), which clearly and consistently states the basis of *Robins* in these terms.

85. See *Robins*, 275 U.S. at 308.

86. It is worth mentioning here that the primacy of contract is often suggested as the reason for the non-recovery of economic loss in the defective products cases. See, e.g., *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) (discussing the need to keep contract law and products liability law in separate spheres to maintain limits on damage awards). I do not think that this is the most satisfactory way to explain these cases. While I cannot discuss this type of economic loss in this Article, I have suggested elsewhere that the defective product cases may also be explained on a basis similar to the proposed analysis of *Robins*: in the scenarios where recovery is denied, the plaintiff's economic interest in having a non-defective product does not rest on any exclusive right as against the defendant. There is no need to invoke the primacy of contract, however construed. See *Benson*, *supra* note 5, at 436–37.

87. See *Rizzo*, *supra* note 19, at 283; *supra* note 33.

explain, this rights-based analysis can also resolve current uncertainty and disagreement over the exact content and reach of *Robins*—something the prevailing pragmatic justification is unable to do.

First, the exclusion of liability in *Robins* is not, and indeed cannot be, limited to cases of negligent interference with third-party *contractual* relationships.⁸⁸ The defendant is not liable whenever a plaintiff's interest in the damaged thing is *less* than a right—whether proprietary, possessory, or contractual—against the defendant. Thus, the denial of liability applies not just where the plaintiff's only interest in the claimed item is a contractual right against a third party, but also where the plaintiff's interest is merely a liberty or a privilege to use it.⁸⁹ Because such interests fall short of a right (claim) against the defendant, financial loss resulting from the defendant's interference with them must be nonrecoverable under *Robins*—no differently than interference with contractual interests.

Second, Justice Holmes assumed that whether a plaintiff has the requisite proprietary or possessory interest depends upon settled legal principles (for example, the law of property) that define these interests and determine their existence independently of their possible role in tort law. What *Robins* definitely rejects is the idea of creating a protected interest out of nothing just to accomplish the aims of tort law. Thus, in *Robins*, it was the law of admiralty governing charter parties that determined the existence and the character of the plaintiffs' interest: being a time-charterer rather than a demise-charterer, the plaintiffs lacked a possessory or proprietary right in the damaged vessel.⁹⁰ Justice Holmes took this determination as conclusive in deciding whether the plaintiffs had the needed in rem right to found their claim in negligence.⁹¹ Following *Robins*, it would not suffice for the plaintiff's interest to display features “akin to” or “equivalent to” those of ownership or possession if these features would not qualify the interest as a valid in rem right according to relevant general principles of law apart from negligence.⁹²

88. This is correctly noted in the leading majority view decisions. See *Barber Lines A/S v. M/V Dona Maru*, 764 F.2d 50, 51 (1st Cir. 1985); *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1023–24 (5th Cir. 1985) (citing *Byrd v. English*, 43 S.E. 419 (Ga. 1903)).

89. See HOHFELD, *supra* note 77, at 38–39. According to Hohfeld, the fact that a plaintiff has a liberty or privilege to use something simply entails, by definition, that the plaintiff does no wrong in making use of it, in contrast to having a right to such use that imposes upon others a correlative duty of noninterference. See *id.*

90. See *Robins*, 275 U.S. at 308–09.

91. See *id.*

92. Most decisions are consistent with this approach. See, e.g., *IMTT-Gretna v. Robert E. Lee SS*, 993 F.2d 1193, 1194 (5th Cir. 1993) (holding that there was no property interest where the plaintiff had exclusive access to leased pipelines and where the plaintiff had preferential docking rights at the damaged berth but where the plaintiff did not own the damaged berth); *Tex. E. Transp. Corp. v. McMoran Offshore Exploration Co.*, 877 F.2d 1214, 1225 (5th Cir. 1989) (holding that there was no property interest where gas producer maintained appurtenances to a pipeline through which it transported its oil but where the producer did not own the pipeline); *Louisville & Nashville R.R. Co. v. M/V Bayou Lacombe*, 597 F.2d 469, 473 (5th Cir. 1979) (holding that a contract

Third, *Robins* applies to *any* kind of financial loss to the plaintiff which results from the plaintiff being deprived of the use or benefit of something which the plaintiff neither owns nor possesses. So in *Robins*, had the plaintiffs' loss been wasted hire rather than lost profit, the action against the defendant would have failed for the same reason.⁹³ The hire would have been paid under a contract with the vessel owner, which in itself cannot give the plaintiffs any right against the defendant, and the hire would have been wasted because the plaintiffs could not use the vessel during the additional delay—but the plaintiffs still would have had no right to such use as against the defendant. The only relevant criterion for distinguishing recoverable from nonrecoverable financial loss is the juridical consideration of whether a given loss results from interference with the plaintiff's rights as against the defendant.

Fourth, the rationale for nonrecovery has nothing to do with remoteness or foreseeability of loss as these concepts are ordinarily understood in the law of negligence.⁹⁴ The fact that the defendant foreseeably impairs some interest of the plaintiff does not establish that the plaintiff's interest is founded upon a right (proprietary, possessory, or contractual) as against the defendant. Conceptually and legally, the two points are mutually distinct. In this light, it is not surprising that *Robins* made no mention of remoteness, despite the fact that the court of appeals used remoteness to rationalize previous cases which denied recovery⁹⁵ and even though the defendant argued before the Supreme Court that the

allowing one railroad company to use a bridge did not create a property interest upon which the railroad company could base its claim for economic loss); *Plaza Marine, Inc. v. Exxon Corp.*, 814 F. Supp. 334, 336 (S.D.N.Y. 1993) (holding that there was no property interest where the plaintiff used a terminal facility to sell diesel fuel where the plaintiff did not own the damaged dock). *But see* *Holt Hauling & Warehousing Systems, Inc. v. M/V Ming Joy*, 614 F. Supp. 890, 899 (E.D. Pa. 1985) (holding that the proper test is a showing that a plaintiff's interest, whether founded upon contract or otherwise, displays sufficient "incidents of ownership" such that the plaintiff is well-positioned to protect the property by discovering damage, identifying those responsible, and bringing suit without the danger of "never-ending economic ripple effects and duplicative litigation"). While approving the analysis in cases such as *Louisville & Nashville R.R.* and emphasizing that the plaintiff must have sufficient sole "control and possession" of the damaged item, the court in *Holt Hauling* proposed a "functional" rather than a "formal" ownership interest requirement. *Id.* at 898–99. The functional approach is endorsed by the RESTATEMENT (THIRD) OF TORTS: ECON. TORTS AND RELATED WRONGS § 19 cmt. b, at 231 (Council Draft No. 1, 2006).

93. This is noted in the leading majority decisions. *See Barber Lines*, 764 F.2d at 51–52. *See* also the forceful dissent of Winter, J. in *Venore Transp. Co. v. M/V Struma*, 583 F.2d 708, 711–12 (4th Cir. 1978). For the same reason, given the requisite protected interest, all resulting foreseeable financial loss is recoverable without distinction, contrary to the suggestions of Gordley and R. Perry noted in *supra* note 58.

94. This proposition is recognized by the vast majority of decisions. *See, e.g., Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1023 (5th Cir. 1985) ("Thus *Robins* was a pragmatic limitation imposed by the Court upon the tort doctrine of foreseeability."); *Barber Lines*, 764 F.2d at 50 ("[C]ontrolling case law denies that a plaintiff can recover damages for negligently caused financial harm, even when foreseeable . . .").

95. *Flint v. Robins Dry Dock & Repair Co.*, 13 F.2d 3, 6 (2d Cir. 1926), *rev'd*, 275 U.S. 303.

plaintiffs' claim should fail for this very reason.⁹⁶ It would also seem to follow that where a plaintiff *does* have the requisite right as against the defendant, and the plaintiff can satisfy the ordinary standard of foreseeability, there should be recovery, regardless of how many other plaintiffs with divergent financial claims are similarly positioned to succeed.⁹⁷ As it stands, *Robins* provides no point of entry for the pragmatic objection. In itself, the number of claims is irrelevant.

Fifth, while the plaintiffs' loss in *Robins* did not result from physical damage to the plaintiffs' possessory or proprietary interest, the decision does not require that recoverable financial loss be consequential upon *actual physical damage* to the protected interest. This aspect of the rule against recovery must be clarified because there are some relatively recent majority decisions (as well as minority decisions) that assert the contrary.⁹⁸ What *Robins* requires is simply that the plaintiff's financial loss results from an impairment of the plaintiff's property or possessory right. Actual physical damage is merely one way in which a right can be injured—it has no further significance and is certainly not a per se requirement. Therefore, where a right is impaired, even absent actual physical damage, *Robins* does not bar recovery for resulting financial loss. Current majority interpretations and applications of the economic loss rule that make the absence of actual physical damage fatal to recovery overreach, while failing to recognize and protect the plaintiff's rights.

By way of illustration, consider the following two sets of facts drawn from well-known cases—the first from a leading majority decision, and the second from a leading minority judgment. In both scenarios, there has not been any actual physical injury to the item with respect to which financial loss is claimed. Nevertheless, *Robins*, correctly understood, not only rejects the majority analysis leading to nonrecovery but also supports the minority conclusion imposing liability.

In the first scenario,⁹⁹ while the defendant's (or a third party's) vessel is discharging cargo at the plaintiff's marine terminal, a crack in the vessel's deck and hull is discovered. The Coast Guard orders the vessel to remain at berth until the problem is resolved. The crack, we suppose, is attributable to the defendant's

96. See *Robins*, 275 U.S. at 305–06. When Justice Holmes wrote 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*, 275 U.S. at 309 (emphasis added), the reference to the absence of knowledge was included merely to show that the conduct could not possibly be an intentional interference with contractual relations, for which there can be liability. Exceptionally, certain decisions incorrectly see this reference as negating foreseeability, which they take as the reason for the denial of recovery in *Robins*. See, e.g., *Aikens v. Balt. & Ohio R.R. Co.*, 501 A.2d 277, 279 (Pa. Super. Ct. 1985) (“The reason a plaintiff cannot recover stems from the fact that the negligent actor has no knowledge of the contract or prospective relation and thus has no reason to foresee any harm to the plaintiff's interest.”).

97. See *infra* notes 124–26 and accompanying text.

98. See sources cited *supra* note 59.

99. These facts are modeled after *Getty Refining & Mktg. Co. v. MT FADI B*, 766 F.2d 829, 830 (3d Cir. 1985).

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, despite the fact that nothing prevents other vessels from approaching the pier by water. Because the plaintiff cannot give access to other ships that are scheduled and able to dock, the plaintiff suffers financial loss in the form of demurrage payments contractually owed to these ships in such circumstances. Yet, there has been no actual physical damage to the plaintiff's pier. Supposing these financial losses are the reasonably foreseeable consequence of defendant's negligence, are they barred by *Robins*?

The plaintiff's inability to give third parties access to its pier interferes with the plaintiff's capacity to use its *own* property. This impairment of its capacity to use its own property is, we have supposed, the foreseeable result of the defendant's negligence. The gravamen of the plaintiff's complaint should be made clear: the plaintiff asks that the defendant leave the *plaintiff's* property (the pier) alone, not that the defendant refrain from impairing something else that the plaintiff neither owns nor possesses but which the plaintiff wishes to use in conjunction with its own property.¹⁰⁰ The plaintiff's claim is that it has lost profits, not because vessels are prevented from reaching the plaintiff's otherwise functional facility (because, say, the defendant negligently has sunk a barge near the pier), but because the defendant has affected the facility itself, making it impossible for the plaintiff to use it at all.¹⁰¹ All that the plaintiff is asserting is its right in rem as against the defendant.¹⁰² But this is exactly what *Robins* requires.

That this interference with use arises through the vessel'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 negligence can interfere with the plaintiff's right. Indeed, the vessel's continued physical occupation of the pier is significant only because it constitutes negligent conduct that foreseeably triggers the order to shut down the pier. This same consequence, with resulting liability, might very well be produced by conduct not entailing *any* physical contact with the pier. Moreover, the fact that the plaintiff's financial loss arises because of its contractual relations with third parties is just the manner in which the lost use of

100. Cf. *Vicksburg Towing Co. v. Miss. Marine Transp. Co.*, 609 F.2d 176, 177 (5th Cir. 1980) (distinguishing between plaintiffs who own damaged property and plaintiffs who do not own the damaged property).

101. This contrast is from *Reserve Mooring, Inc. v. Am. Commercial Barge Lines*, No 99-1433, 1999 WL 1080317, at *2 (E.D. La. Nov. 30, 1999), *rev'd* 251 F.3d 1069 (5th Cir. 2001).

102. With reference to similar facts, a United States District Court emphasized that the plaintiff "owned the offshore oil platform, and its ownership interest includes the right to use that platform. The interference with that right underlies its claim for economic loss. . . . [T]he key consideration here is the character of [the plaintiff's] interest and not whether the platform sustained any physical damage." *Secko Energy, Inc. v. M/V Margaret Chouest*, 820 F. Supp. 1009, 1012 (E.D. La. 1993).

its own property materializes.¹⁰³ Such loss would be equivalent to the owner of the damaged vessel in *Robins* suffering a financial loss by having to indemnify the plaintiff time-charterer because of the contract between them. As a matter of precedent, there is no doubt that even the strictest view would not preclude recovery of this loss.¹⁰⁴ In the first scenario, recovery should not be barred as a matter of principle either, despite the absence of actual physical damage to the pier.¹⁰⁵

In the second scenario,¹⁰⁶ 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 because of the defendant's negligence. The evacuation is ordered by the municipal authorities because the vicinity surrounding the accident would be threatened by fire if the damaged tank car explodes. While no explosion or physical damage to plaintiff's premises occurs, not only are the plaintiff's employees required to leave the premises, but in addition they cannot return to the offices for a period of time. As a result, the plaintiff suffers business interruption losses including lost bookings, wasted wages, and other fixed operating expenses that have to be paid during the period of closure. Once again, does *Robins* preclude recovery for these losses if they are reasonably foreseeable?

The second set of facts requires a more nuanced analysis. Financial losses incurred by the plaintiff simply because the plaintiff's employees are forced to leave (for example, that day's lost bookings and wasted wages) must be distinguished from losses resulting from the employees not being able to return to work because access to the offices, for instance, a public road, is not available. *Robins* would allow recovery for the first category of losses but not for the

103. The majority opinion in *Getty* was therefore incorrect when it held that the plaintiff's claim, on facts similar to those presented in this hypothetical, "falls squarely within the prohibition of *Robins*" because the loss was incurred "solely because of its contractual relations with the various vessels" and not "by reason of its property right in the dock itself." *Getty*, 766 F.2d at 834. This same criticism applies to the majority view decisions cited *supra* note 59. By contrast, the dissenting opinion in *Getty* got it exactly right when it said that "[t]he tortious activity complained of is not the interference with contracts but the blockage of the dock." *Getty*, 766 F.2d at 841 (Mansmann, J., dissenting)..

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

105. See, e.g., *In re Nautilus Motor Tanker Co.*, 900 F. Supp. 697, 699, 705 (D.N.J. 1995) (adopting the minority view and holding that according to New Jersey common law the plaintiff, who was the owner and operator of a berth, could recover damages for interruption of its business and interference with its contractual relations with third parties resulting from the defendant's vessel's unexpected and lengthy stay at the berth for repairs made necessary by defendant's negligence). In *Nautilus*, the defendant's negligence caused no physical damage to the berth. *Id.* at 699. The Court relied on *People Express* to justify recovery in these circumstances because in its view, *Robins* and its progeny stood against recovery. *Id.* at 704–05 (citing *People Express Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107, 113 (N.J. 1985)). The analysis proposed in this Article supports this conclusion in principle but does so squarely within the parameters of *Robins* as explained herein.

106. This hypothetical is modeled after the leading minority decision found in *People Express Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107, 108–09 (N.J. 1985).

second.¹⁰⁷ Only the first category of loss arises from the defendant's interference with the plaintiff's rightful, exclusive use of its own property.¹⁰⁸ By contrast, in the second category, where the plaintiff's financial losses arise because its employees are not able to use a public road to return to plaintiff's premises, the plaintiff's claim for such losses entails that the defendant should indemnify the plaintiff for interfering with the latter's use of something—the public road to its offices—which the plaintiff neither owns nor possesses. For the purposes of negligence, the plaintiff has no claim to such use as against the defendant.¹⁰⁹ This is precisely the factor that brings the *Robins*'s exclusion into play.¹¹⁰

B. The Alternative Tests of Liability

The actual reasoning in *Robins* does more than settle current questions regarding the content and reach of the economic loss rule. It also provides a clear and definitive answer to the main alternative tests for the recovery of economic loss proposed by minority courts and certain foreign common law jurisdictions—something which the current majority interpretation is unable to do. Only if the *Robins* principle provides such an answer can the principle hold its own and be complete in its own terms. For purposes of this discussion, I have divided the alternative tests into two categories which, briefly summarized, are as follows.

In the first minority approach,¹¹¹ the traditional standard of proximity is sharpened and intensified by requiring either that the plaintiff be a member of an

107. *People Express*, 495 A.2d at 113.

108. The Supreme Court of Wyoming said of *People Express*: “Recovery permitted here is for loss of the injured party’s property or loss of use of its property needed in the conduct of business.” *Champion Well Serv., Inc. v. NL Indus.*, 769 P.2d 382, 384 (Wyo. 1989). Decisions to grant recovery for economic losses arising from property being made unusable because of contamination caused by defendant’s negligence may also be justified on this basis. See *Pennsylvania v. Gen. Pub. Utils. Corp.*, 710 F.2d 117, 122–23 (3d Cir. 1983); *Syracuse Cablesystems, Inc. v. Niagara Mohawk Power Corp.*, 578 N.Y.S.2d 770, 772 (N.Y. App. Div. 1991).

109. As a matter of negligence law, following *Robins*, there is no difference between this sort of claim and claims for financial loss arising from bridge closures which are standardly denied. See cases cited *supra* note 16. Denial of access to a right of way may, of course, be actionable in public nuisance which is, I argue, a different and distinct legal basis. See *infra* notes 120–22 and accompanying text.

110. This suggested contrast between the two kinds of claims in the second scenario was the basis of a 1970 German decision which factually is strictly analogous to *People Express*. See JAMES GORDLEY & ARTHUR TAYLOR VON MEHREN, AN INTRODUCTION TO THE COMPARATIVE STUDY OF PRIVATE LAW: READINGS, CASES, MATERIALS 317 (2006) (citing *People Express*, 495 A.2d 107; BGHZ, 55, 153). In a New York case, the New York Court of Appeals denied recovery in negligence to the plaintiffs, a group of various businesses, who brought actions for lost revenues when shoppers were unable to gain access to their stores as a result of street closures following construction collapses for which the defendants were allegedly responsible. 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097, 1099, 1103 (N.Y. 2001). While the court based its conclusion on the bright line approach to the economic loss rule, *id.* at 1103, nonrecovery is also consistent with the analysis proposed in this Article.

111. The leading minority decision taking this approach is *People Express*, 495 A.2d 107. Additional decisions also serve as examples of this first approach. See, e.g.,

identifiable or particularly foreseeable class or, alternatively, that the damage sustained be particular and special—different in kind and degree from the economic loss suffered by the general public as a result of the accident. The aim of this minority approach 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, it will be circumscribed and not the open-ended or expansive liability that concerns the pragmatic objection. There is no reason to deny recovery.

In the second alternative approach, approved by some minority courts¹¹² and endorsed by leading commentators,¹¹³ the focus is on the character of the plaintiff's interest. According to this approach, recovery should be possible when the plaintiff's interest in the damaged item is the very sort of interest that would be protected if sued upon by the owner. For example, a vendor and plaintiff purchaser may agree that, while the goods are being transported to the purchaser, the vendor will retain title in the goods but will transfer the risk of loss to the

Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1046–53 (5th Cir. 1985) (Wisdom, J., dissenting) (“The limitation imposed by ‘particular’ damages, together with refined notions of proximate cause and foreseeability, provides a workable scheme of liability that is in step with the rest of tort law, compensates innocent plaintiffs, and imposes the costs of harm on those who caused it.”); Union Oil Co. v. Oppen, 501 F.2d 558, 568–69 (9th Cir. 1974) (“[T]he chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk.”); Mattingly v. Sheldon Jackson Coll., 743 P.2d 356, 360–61 (Alaska 1987) (citing *People Express*, 495 A.2d at 115–16, 118) (“[T]he extent of liability and degree of foreseeability stand in direct proportion to one another. The more particular the foreseeability that economic loss will be suffered by the plaintiff as a result of defendant's negligence, the more just it is that liability be imposed and recovery allowed.”); Aikens v. Debow, 541 S.E.2d 576, 589–90 (W. Va. 2000) (concluding that a plaintiff who sustains purely economic loss may not recover unless there is a special relationship between the plaintiff and defendant that gives rise to a duty, and suggesting such special relationship can be proven “through evidence of foreseeability of the nature of the harm to be suffered by the particular plaintiff or an identifiable class”); Caltex Oil (Austl.) Pty. Ltd. v. The Dredge “Willemstad”, (1976) 136 C.L.R. 529 (Austl.) (suggesting a relationship of proximity between tortious act and resultant detriment that gives rise to a duty of care as a criterion for limiting recovery for purely economic loss); Canadian Nat'l Ry. Co. v. Norsk Pac. S.S. Co., [1992] 91 D.L.R. (4th) 289 (Can.) (finding that proximity and the relationship between plaintiff and defendant—i.e. contractual nexus—may give rise to a duty to the “known plaintiff”).

112. See *Amoco Transp. Co. v. S/S Mason Lykes*, 768 F.2d 659, 668–69 (5th Cir. 1985); *Venore Transp. Co. v. M/V Struma*, 583 F.2d 708, 709–10 (4th Cir. 1978); *Flint v. Robins Dry Dock & Repair Co.*, 13 F.2d 3, 5 (2d Cir. 1926), *rev'd*, 275 U.S. 303 (1927); *Pruitt v. Allied Chem. Corp.*, 523 F. Supp. 975, 979 (E.D. Va. 1981) (citing *Union Oil*, 501 F.2d at 570). These are the most important American decisions. Among English judges, Goff L.J. (as he then was) took this approach in *Leigh & Sullivan Ltd. v. Aliakmon Shipping Co.*, [1985] Q.B. 350, 399 (Eng. C.A.).

113. See BERNSTEIN, *supra* note 2, at 165; Dan B. Dobbs, *An Introduction to Non-Statutory Economic Loss Claims*, 48 ARIZ. L. REV. 713, 718–21 (2006) [hereinafter Dobbs, *Economic Loss Claims*]; Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 339, 372–73 (1980); Fleming, *supra* note 31, at 30; James, *supra* note 4, at 56–57. Ronen Perry argues that economic analysis justifies recovery for what he calls “transferred property damage.” Perry, *Relational Economic Loss*, *supra* note 19, at 784–85. This sort of loss corresponds to the kind of loss discussed here.

purchaser.¹¹⁴ If a third party damages the goods en route, then the purchaser will bear the loss. Similarly, a charter party may transfer the risk of loss of use of the vessel from the owner to the plaintiff time-charterer, so that the time-charterer, not the owner, bears the financial burden of impaired use.¹¹⁵ In such circumstances of “transferred loss,”¹¹⁶ because the plaintiff’s loss is with respect to a conventional or ordinary item of recovery,¹¹⁷ liability will normally not be open-ended or excessive. The pragmatic objection does not apply. Denying recovery to plaintiffs in these situations will result in ordinarily protected items being unprotected and defendants not having to shoulder the usual consequences of their negligence. This, it is argued, is both unnecessary and unfair.

The alternative approaches are proposed as superior to the economic loss rule in fulfilling the traditional purposes of negligence law. These alternatives claim to ensure that generally recognized principles of negligence are not compromised or sacrificed in circumstances where the pragmatic objection does not apply. Since, it is contended, allowing recovery in the circumstances specified under these alternative approaches will not result in open-ended liability, requiring the plaintiff to have a property or possessory interest in the damaged item is no longer necessary. And because these alternatives rely on a definite and refined balancing of the very sorts of considerations relevant to the pragmatic objection as well, the latter appears incapable of resisting this revision of the economic loss rule. How do these alternative approaches look in light of *Robins*? To provide an answer that does justice to these alternatives, I want to consider them in a little more detail.

Beginning with the first minority approach, one criterion proposed to ensure that pure economic loss is special and circumscribed even though it does not result from interference with the plaintiff’s property or possession is a requirement that the plaintiff’s financial loss arises from the very same negligence that *also* causes—or at least threatens to cause—injury to the plaintiff’s person or property.¹¹⁸ For example, the defendant negligently cuts

114. See *Leigh & Sullivan*, [1985] Q.B. at 382; *Margarine Union v. Cambay Prince Steamship Co.*, (1967) 3 All E.R. 775, 777–78 (Q.B.).

115. See *Venore Transp.*, 583 F.2d at 709.

116. This is the term most used by courts and scholars. See *Venore Transp.*, 583 F.2d at 710–711; *Canadian Nat’l Ry.*, [1992] 91 D.L.R. at 326–32 (LaForest, J.). See also the instructive elucidation of this principle in *Leigh & Sullivan* [1985] Q.B. at 399 (Goff, L.J.). For use by scholars, see citations in *supra* note 113. Throughout this Article, I use the term to cover situations in which the incidents or interests of ownership—for example, use or value—in a damaged item have been allocated or divided between two or more persons, where typically one party is and remains an owner and another is not an owner in a strict sense. For a somewhat different presentation of the transferred loss principle, see Dobbs, *Economic Loss Claims*, *supra* note 113, at 718–20.

117. This is how the loss is characterized in *Venore Transp.*, 583 F.2d at 710. See also James, *supra* note 4, at 56 (describing a transferred loss as an “ordinary item of damage”).

118. Several judicial opinions endorse this approach. See *Corpus Christi Oil & Gas Co. v. Zapata Gulf Marine Corp.*, 71 F.3d 198, 207 (5th Cir. 1995) (Benavides, J., concurring in part and dissenting in part); *Dunlop Tire & Rubber Corp. v. FMC Corp.*, 385 N.Y.S.2d 971, 974 (N.Y. App. Div. 1976); *Seaway Hotels Ltd. v. Gragg (Can.) Ltd.*, [1959] 21 D.L.R.2d 264 (Can.). Although it

electrical cables owned by the municipality which supplies power to the plaintiff's hotel, cutting off power. This damages the cooling mechanisms of the plaintiff's refrigerators, causing physical loss, and also blacks out the plaintiff's premises, forcing the plaintiff temporarily to close its dining hall, with resulting financial loss. According to the proposed criterion, it is enough that the financial loss flows from negligent conduct that also causes damage to the plaintiff's property, even though the financial loss does not result from that damage. In this way, the actionable financial consequences of negligence are limited, thus meeting the pragmatic objection.

However, the problem with this approach is that on the above 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 city cables, with respect to which the hotel owner plaintiff has no right of use as against the defendant. The only right that the plaintiff has to the supply of power is a contractual right as against the city. The fact that one loss (here, the physical loss) does result from injury to an interest (its refrigerators) in which the plaintiff has the requisite right does *not* establish that some other independent loss also arises from a breach of such a right. Each item of loss must be shown to result from interference with a right which the plaintiff has as against the defendant. The point is that conduct may be negligent, in the sense of being careless, and may cause "loss" (*damnum*) without affecting something that comes under the plaintiff's rights as against the defendant (*injuria*). A requirement that the financial loss results from negligent conduct that also causes physical loss to the plaintiff's person or property may serve as a limiting device that cuts off the spectre of open-ended liability or the multiplication of suits—satisfying the pragmatic objection—but it does nothing to link the financial loss to something in which the plaintiff has the necessary protected interest. It cannot possibly satisfy *Robins*.¹¹⁹

was subsequently reversed, the New York Supreme Court Appellate Division endorsed the approach taken by *Dunlop Tire*. See *5th Ave. Chocolatier, Ltd. v. 540 Acquisition Co.*, 712 N.Y.S.2d 8, 12 (N.Y. App. Div. 2000) (citing *Dunlop Tire*, 385 N.Y.S.2d 971), *rev'd sub nom.* 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097 (N.Y. 2001). A good discussion of the law is found in *Atiyah*, *supra* note 19, at 253–54. For scholarly support of this approach, see Bishop & Sutton, *Efficiency and Justice*, *supra* note 19, at 357; Rizzo, *supra* note 19, at 303.

119. This is recognized by the leading majority-view decisions. See *Am. River Transp. Co. v. Kavos Kaliakra SS*, 206 F.3d 462, 464 (5th Cir. 2000) (citing *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307–09 (1927)); *Corpus Christi*, 71 F.3d at 203 (quoting *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1022 (5th Cir. 1985)); *Gas Natural SDG S.A. v. United States*, No. 04 Civ. 8370(DAB), 2007 WL 959259, at *4 (S.D.N.Y. Mar. 22, 2007) (quoting *Testbank*, 752 F.2d at 1022). Some courts reject this minority approach on the basis that it will "largely eviscerate" the economic loss rule as a limitation of liability and as a bright line rule. See, e.g., *In re Oriental Republic of Uru.*, 821 F. Supp. 934, 940 n.3 (D. Del. 1993) ("[T]he 'bright line' rule contemplated by *Robins* and *FADI B* would be substantially blurred under this interpretation. The pragmatic limitation imposed by the *Robins* rule as well as the rule's utility, ease of application

A more serious challenge is posed by those decisions that propose a more narrowly defined conception of proximity and directness in an effort to confine liability and to meet 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 financial losses that may be ordinarily and foreseeably sustained by the public in general following damage to some item or resource that they neither own nor possess. The contention is that because the pragmatic objection no longer applies, there is no reason in fairness or justice to deny recovery. To establish the distinctiveness of the plaintiff's financial loss, courts consider, among other things, whether the plaintiff's loss is temporally and physically close 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 the damaged thing and to foresee that its negligence can directly affect those interests, causing 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; whether the item, if damaged, would be productive of economic loss to those who rely directly on its use; and whether the plaintiff's loss can be shown to be special and particular in a way that would satisfy the requirements of public nuisance.¹²⁰ These various considerations allow courts to establish what Jane Stapleton has called “normatively justifiable” boundaries¹²¹ that distinguish those who can recover relational economic loss without running afoul of the legitimate concerns of the pragmatic objection. Or so it is argued.

But are these boundaries normatively justifiable in the sense of satisfying *Robins*'s requirement that the plaintiff's financial interest in the use of the damaged item must be founded upon some rightful claim as against the defendant? The considerations used to establish the distinctiveness of the plaintiff's loss may certainly show that a plaintiff's loss or identity is “particularly” foreseeable or “specifically” ascertainable. And since the foreseeability and ascertainableness of the loss as well as of the class of plaintiffs are definite prerequisites of liability in negligence, factors which establish particular foreseeability are normatively relevant at least insofar as they relate to these requirements. Nevertheless, foreseeability is only one of the necessary conditions for liability. *Robins* held that it is also essential that the plaintiff has a right exclusive as against the defendant. This is a *distinct and independent* requirement. Such a right is necessary to establish a normatively justified basis for singling out a plaintiff for recovery; “distinct,” “special,” or “particularly foreseeable” loss is no substitute. Efforts to specify foreseeability and directness do not satisfy the requirement in *Robins*—not because they are incoherent or

and predictability all would be undermined if Sun's interpretation of the rule were adopted here.”). However, for reasons discussed in the text, this criticism cannot be definitive.

120. See cases cited *supra* note 111.

121. Stapleton, *Comparative Economic Loss*, *supra* note 19, at 538, 544.

intrinsically unreasonable but simply because foreseeability and directness do not, in themselves, assure the existence of the requisite right.¹²² They are normatively irrelevant for this purpose.

The same conclusion applies to the different formulations under the second category of alternative tests, namely, transferred loss. Here, because the Second Circuit in *Robins* allowed recovery on this very basis,¹²³ the incompatibility with the Supreme Court's reason for denying recovery is transparent. According to the Supreme Court, it is not, and cannot be, an argument for allowing recovery that the plaintiff's loss is the *sort* of loss that might be sustained by a different

122. This is true of attempts, usually unsuccessful, to base claims in negligence on an analysis drawn from private actions in public nuisance. In suits for pure economic loss, plaintiffs frequently frame their claims alternatively in negligence and public nuisance. See, e.g., *Testbank*, 752 F.2d at 1030–31 (addressing the plaintiff's public nuisance claim). This is of course perfectly legitimate, so long as the difference between these two types of claims is kept clearly in view. My concern here is solely with negligence and my contention is that the public nuisance distinction between particular and general damage is not sufficient by itself to justify a plaintiff's claim *in negligence* for its economic loss.

To be actionable in negligence, the damage must be to an interest that comes under the plaintiff's individual right as against the defendant. By contrast, the gravamen of the public nuisance action is for interference—usually, but not always, intentional—with some facility, conduit, or asset that people use and enjoy through the exercise of a right *common to the general public*. As Prosser explains, public nuisance is the invasion of an interest—a type of harm or damage—rather than a certain kind of conduct or condition; it requires that there be interference with the exercise of a public, not individual, right. William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1002–04 (1966). While activities that interfere with the private rights of individuals may also affect their public rights, or vice versa, this is not necessarily or always the case, and it certainly does not dissolve the juridical or conceptual difference between these two kinds of interests. *Id.*

Each type of action must therefore be established and accounted for on its own terms, and one cannot move directly from one to the other. Indeed, the public nuisance requirement of special loss expresses an additional limitation that is in principle not only irrelevant, but also wholly inappropriate in negligence where everyone who has sustained wrongful interference with his or her private right (e.g. property interest) has standing to sue for her foreseeable loss, whether the loss is identical or different in kind from that sustained by others. For useful recent judicial discussions, see *Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124, 129–30 (Iowa 1984), and *Stop & Shop Cos. v. Fisher*, 444 N.E.2d 368, 371–74 (Mass. 1983). Discussions of the relevance of public nuisance to negligence actions often ignore the different bases of these two kinds of liability. This is true, for example, of Stapleton. See Stapleton, *Comparative Economic Loss*, *supra* note 19, at 567–71. Similarly, the RESTATEMENT (THIRD) OF TORTS: ECONOMIC TORTS AND RELATED WRONGS moves directly from a nuisance analysis to a claim in negligence for solely pecuniary loss resulting from negligent damage to or obstruction of public property or a public resource, so long as recovery does not raise the concern of indeterminate liability. RESTATEMENT (THIRD) OF TORTS: ECON. TORTS AND RELATED WRONGS § 20, at 241 (Council Draft No. 1, 2006). This leads the Restatement to support claims such as those of businesses that rely on a publicly owned bridge for access and exit that lose profits when customers are no longer able to reach their premises as a result of bridge closure arising from a defendant's negligence. See *id.* cmt. c, illus. 4. Such a claim is one for economic loss that *Robins* squarely bars. The fact that the bridge is “public” has no further significance beyond the fact that it is not owned by the claimants, who therefore do not have the required protected interest for a negligence claim.

123. *Flint v. Robins Dry Dock & Repair Co.*, 13 F.2d 3, 5–6 (2d Cir. 1926), *rev'd*, 275 U.S. 303 (1927).

party who happens to have the requisite right as against the defendant. 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 establish that the plaintiff has the necessary right. Plaintiffs must sue for their own rights, not as the vicarious beneficiaries of others' rights. *Robins* therefore stands against the idea of a conventional or ordinary item of recovery, divorced from the appropriate legal relation between the parties. Apart from this relation, the meaning of “conventional” or “ordinary” is purely factual and statistical. It has no legal significance.

More generally, the potential number of persons who will be entitled to sue if the plaintiff succeeds or fails under *Robins* must be, in itself, wholly irrelevant according to the decision's reasoning. The only thing that matters is whether a plaintiff bases his or her claim on a relation of rights as between the parties. Thus, in circumstances of transferred loss, the fact that only one person (the plaintiff) and not others (the owner) will recover if the plaintiff's claim is accepted does not in the least strengthen the plaintiff's claim, even though this may avoid open-ended liability. On the other hand, *Robins* not only permits, but indeed requires, recovery by two or more plaintiffs of their financial losses with respect to the same item if each of them has the requisite right exclusive as against the defendant.¹²⁴ And just as it is possible for there to be more than one valid claim, it is possible that there might be no valid claim. The fact that nonrecovery by the plaintiff (who, we suppose, does not have the required right) may result in the negligent defendant not having to indemnify anyone for the consequences of his or her interference is not necessarily problematic. Here, it simply means that, in the assumed circumstances, the defendant's conduct has not injured anyone's rights and has caused no wrongful loss. Consequently, the defendant is not obliged to compensate anyone. According to the analysis of negligence in *Robins*, this result is not capricious, nor does it represent a lacuna in the law (as some have contended).¹²⁵ To the contrary, this result is required.

C. Some “Exceptions” to *Robins* Explained

There is wide agreement that, in a number of well-defined situations, there can be recovery in negligence for pure economic loss. This is fully accepted by the same courts that adhere to *Robins*.¹²⁶ Usually, they present these recovery situations as “exceptions” to an economic loss rule which, they assume, entails a general exclusion of liability for pure economic loss in light of the pragmatic

124. So for example, *both* the owner and the bareboat charterer of a vessel damaged by defendant may recover their respective foreseeable economic losses, including lost profits, resulting from impairment of their distinct uses of the vessel. See *Rogers Terminal & Shipping Corp. v. Int'l Grain Transfer, Inc.*, 672 F.2d 464, 466 (5th Cir. 1982).

125. See Fleming, *supra* note 31, at 30.

126. See, e.g., *Barber Lines*, 764 F.2d at 57 (noting a general principle against liability for negligently caused financial harm but recognizing that courts have created exceptions).

objection.¹²⁷ This standard view seems inevitable so long as *Robins* is taken to represent a general exclusion of liability for causing pure economic loss.¹²⁸ But the upshot of the previous discussion is that this view of the decision cannot be correct. If, as I have argued, the reason for nonrecovery is the plaintiff's failure to found its claim on the defendant's interference with its exclusive right, the very basis for denial sets definite qualitative limits to the exclusion of liability, beyond which it does not and cannot reach. *Robins* will thus be fully consistent with recovery in other situations of pure economic loss where the requirement of an exclusive right is satisfied. No situation need be viewed as an exception to the other. To illustrate, I will now briefly consider two of the more important and settled recovery situations: so-called "unavoidable" economic loss and reliance-based economic loss.¹²⁹

127. *Id.*

128. See, e.g., Goldberg, *supra* note 19, at 249 (*Robins* lays down "the general proposition that claims for pure economic loss are not recoverable in tort" (emphasis added)).

129. The list is, of course, not complete. Two other exceptions listed in *Barber Lines* are recovery in negligence for general average contribution losses and recovery for economic loss resulting from intentional interference with contractual relations. I discuss the first in P. Benson, *The Basis and Limits of Tort Recovery for General Average Contribution Economic Loss*, 16 *Torts L.J.* 1 (2008), and the second in *Benson, supra* note 5, at 455–57.

Whereas it is possible to show that these two exceptions are fully compatible with *Robins*, this is not the case with a third—the well-known "commercial fishermen exception." The latter exception has been actually applied or at least recognized in multiple cases. See *Yarmouth Sea Prods. Ltd. v. Scully*, 131 F.3d at 398–99 (4th Cir. 1996); *In re Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 625 n.1 (1st Cir. 1994); *Testbank*, 752 F.2d at 1027 n.10 (quoting *Union Oil Co. v. Oppen*, 501 F.2d 558, 570–71 (9th Cir. 1974)); *Barber Lines A/S v. M/V Dona Maru*, 764 F.2d 50, 56 (1st Cir. 1985); *Miller Indus. v. Caterpillar Tractor Co.*, 733 F.2d 813, 819–20 (11th Cir. 1984) (citing *Union Oil*, 501 F.2d at 567; *Carbone v. Ursich*, 209 F.2d 178, 182–83 (9th Cir. 1953); *Casado v. Schooner Pilgrim, Inc.* 171 F. Supp. 78, 80 (D. Mass. 1959)); *Union Oil*, 501 F.2d at 569–70; *Carbone*, 209 F.2d at 182–83; *Pruitt v. Allied Chem. Corp.*, 523 F. Supp. 975, 978 (E.D. Va. 1981).

The courts that recognize this claim do not premise it on the plaintiffs having a proprietary or possessory right in the damaged property (fish for example). To the contrary, their view (when expressed) is that there is no such right. See *Pruitt*, 523 F. Supp. at 976 n.3. But this makes recovery directly incompatible with *Robins*. See *Henderson v. Arundel Corp.*, 262 F. Supp. 152, 159–60 (D. Md. 1966) (quoting *Casado*, 171 F. Supp. at 80). The fact that the use made by commercial fishermen may be "more direct" or "immediate" than that of restaurant owners who depend on the fishermen's harvest is legally irrelevant because it does nothing at all to establish the requisite exclusive right—whether possessory, proprietary, or contractual—in the resource that is no longer available. Measured against this criterion, all these uses are legally indistinguishable. It is therefore not surprising that courts candidly confess that line drawing on a principled basis is difficult, if not impossible: "The Court thus finds itself with a perceived need to limit liability, without any articulable reason for excluding any particular set of plaintiffs." *Pruitt*, 523 F. Supp. at 980. Nonrecovery has been justified on economic grounds. See Perry, *Relational Economic Loss, supra* note 19, at 786. But see RESTATEMENT (THIRD) OF TORTS: ECON. TORTS AND RELATED WRONGS § 20 cmt. c (supporting recovery for economic loss by claimants (not only commercial fishermen) who are "primary users of a [public] natural resource" so long as their loss is reasonably certain and recovery does not impose indeterminate liability). The fact that a resource is "public," however, does not give the claimant the individual exclusive right required by *Robins*.

1. “Unavoidable” Pure Economic Loss

In typical circumstances of what I shall call “unavoidable”¹³⁰ economic loss, the plaintiff is using something that belongs to a third party in such a way that if it is damaged, then the plaintiff’s own person or property will be endangered. The defendant damages the third party’s property and the plaintiff unavoidably suffers financial loss as a result of the plaintiff attempting to avoid or mitigate the threatened danger to his or her interests. Because such loss need not be consequential upon actual damage to plaintiff’s person or property, it is pure economic loss. Since the financial loss apparently results from damage to a third party’s property, it seems to be relational economic loss. Despite the economic loss rule, however, there is accepted case law which holds that such pure economic loss, when reasonably foreseeable, is recoverable.¹³¹ To understand the basis of these decisions and their relation to *Robins*, it will be helpful, as a first step, to begin with a situation involving not financial but rather physical loss. By way of illustration, consider the important line of cases associated with the early and generally followed decision in *Newlin v. New England Tel. & Tel. Company*,¹³² which is usually seen as an exception to the economic loss rule.

In *Newlin*, the plaintiff was in the business of growing and selling mushrooms which were cultivated in cellars requiring 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 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 Supreme Judicial Court of Massachusetts 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.”¹³³

130. The phrase is taken from Lord Oliver’s speech in the leading House of Lords decision in *Murphy v. Brentwood Dist. Council*, [1991] 1 A.C. 398, 486–87 (Eng. H.L.) (Oliver, L.), where he contrasted an expenditure incurred by the plaintiff to prevent or mitigate “an otherwise inevitable injury” with financial losses barred by the economic loss rule. I examine unavoidable economic loss with reference to *Murphy* in Benson, *supra* note 5, at 437–44, and in relation to recovery for general average contribution losses in Benson, *supra* note 129. The following discussion draws on this latter article.

131. The leading case is *Corpus Christi Oil & Gas Co. v. Zapata Gulf Marine Corp.*, 71 F.3d 198, 207 (5th Cir. 1995). See discussion *infra* notes 136–45 and accompanying text. For English and Commonwealth cases, see cases cited *infra* note 144.

132. 54 N.E.2d 929 (1944). The *Newlin* fact pattern appears in RESTATEMENT (SECOND) OF TORTS § 766C cmt. b illus. 5, where it endorses the granting of recovery. Although a case of physical loss, *Newlin* is one of the exceptions to the economic loss doctrine that is listed in *Barber Lines*, 764 F.2d at 57.

133. *Newlin*, 54 N.E.2d at 931.

This conclusion may be justified within certain parameters.¹³⁴ 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. 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 in *Newlin*, the gist of the plaintiff's claim is not that the plaintiff has, as against the defendant, a right to the *continued availability of the electricity*, which is not the case, but rather that, as a result of the defendant's failure to take care, the plaintiff's use of the electricity has become a source of danger to plaintiff's crop, which *does* come under plaintiff's (property) rights. 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 the danger to plaintiff's crop materializes. And while the plaintiff's loss is "physical," its recoverability does not depend upon this but rather upon the fact that the plaintiff's complaint with respect to this loss rests *only* upon an interest in excluding the defendant from plaintiff's property (the mushroom crop) rather than a positive interest in enjoying the continued availability of the electricity, to which the plaintiff has no right except as against the third party. According to this analysis, the plaintiff's claim is simply for compensation for injury to property, even though the plaintiff sustained this loss while using someone else's power to which the plaintiff had no right (possessory, proprietary, or contractual) as against the defendant.

The argument for recovering unavoidable pure economic loss draws upon the foregoing analysis and takes it one step further.¹³⁵ By way of illustration, there is the important decision of the Fifth Circuit Court of Appeals in *Corpus*

134. A similar result was reached in the widely discussed English case, *Spartan Steel & Alloys Ltd. v. Martin & Co.*, [1972] 3 All E.R. 557 (C.A.) (Eng.). Other cases that involve injury to property or person in a manner similar to that in *Newlin* include *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 772 F.2d 1217 (5th Cir. 1985) (involving defendant's dredger that ruptured a natural gas pipeline which supplied gas to plaintiff's plant, resulting in an interruption in the supply of gas and causing extensive damage to physical equipment at the plant), and *Muirhead v. Industrial Tank Specialties Ltd.*, (1986) 1 Q.B. 507 (C.A.) (Eng.) (involving death of lobsters in tanks because of pump motor failure due to negligence of motor manufacturer; owner of lobsters sued for loss of lobsters and resulting economic losses including lost profits).

135. While the RESTATEMENT (THIRD) OF TORTS: ECONOMIC TORTS AND RELATED WRONGS endorses the imposition of liability in the foregoing circumstances, it does not take this further step. RESTATEMENT (THIRD) OF TORTS: ECON. TORTS AND RELATED WRONGS § 8 ill. 10 & Reporter's Note (Council Draft No. 1, 2006). It is true that in section 21, "Preventive Expenses," the Council Draft supports recovery in circumstances where a claimant incurs or will incur expense to prevent or mitigate a risk of serious *bodily* harm. But it does not abstract and generalize the underlying basis of such liability and *denies* recovery for expenses incurred to prevent damage to *property* rights. Under section 19, a claimant who incurs expense to alleviate or prevent physical harm to the person or property of *another* arising from the defendant's negligence may recover such expense under the law of restitution, not negligence. Moreover, such expenses are treated on a par with expenses incurred to *compensate* for such harm. The latter, however, is not unavoidable economic loss.

Christi Oil & Gas Co. v. Zapata Gulf Marine Corp.,¹³⁶ which should now be viewed as the leading unavoidable pure economic loss case.

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. A third party owned the riser as well as the connecting pipe, which was eight miles long and ran 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 own wells so that it could inspect the riser and replace the damaged section. During the two-week period of repairs, the riser remained unaffected in the ground but the plaintiff was no able to use the riser to convey its gas. 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 repairs to the gas riser.¹³⁷

The Court allowed recovery for the costs of flaring the gas. The costs of flaring were "directly attributable to [the plaintiff's] efforts to avoid the physical damages that would have rendered that defendant liable for much larger sums."¹³⁸ Costs incurred "to save its wells" constituted "the physical damage to a proprietary interest, i.e. its gas"¹³⁹ sufficient to satisfy the requirements of the economic loss rule. By contrast, the court denied recovery for the lost profits. It did so, not because the loss consisted in lost profit rather than costs, but only because it was not consequential upon injury to the requisite protected interest. According to the Court, the lost revenues resulted solely from the fact that the plaintiff "could not use the [defendant's] pipeline."¹⁴⁰ The loss was "occasioned only by the physical injury to [the third party's] riser, property in which Corpus Christi had no proprietary interest."¹⁴¹ Since the lost revenues resulted from the unavailability of the riser and not from the flaring of the gas, the Court treated the claims for lost profit as qualitatively distinct and legally independent from the claim for the costs of flaring. The losses flowed from interferences with two different interests, only one of which belonged to the plaintiff. The Court expressly refused 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.¹⁴²

136. 1 F.3d 198, 207 (5th Cir. 1995).

137. *Id.* at 200.

138. *Id.* at 202.

139. *Id.*

140. *Id.*

141. *Id.* at 203.

142. *Id.* at 204.

The entire judgment rested upon a careful analysis of the “character of the interest harmed.”¹⁴³ The claim for lost revenues presupposed that the plaintiff had, as against the defendant, a protected interest in the continued use of the gas riser. Since, however, the plaintiff’s right in the continued use of the gas riser was only against the third party, the claim for lost revenues must fail, not because it was economic loss or lost profit, but because it was for damage to an interest which was legally unprotected as between plaintiff and defendant. By contrast, the plaintiff’s action for the costs of flaring rested solely on its right to have its property (gas wells) left alone. The fact that the plaintiff incurred these costs to avoid or mitigate *threatened* damage to its property, rather than suffering *actual* damage with resulting financial loss, does not mean that the loss no longer related to the plaintiff’s exclusive right.¹⁴⁴ To hold otherwise would entail that the plaintiff must allow the defendant to damage its property—a conclusion that would have denied the plaintiff’s right altogether. Understood in this light, the *Corpus Christi* court’s decision is fully consistent with *Robins*.

2. *The Contrast with Reliance*

Pure economic loss resulting from a person’s reasonable reliance on another is actionable. The analysis of reliance-based liability is thus important for any complete account of pure economic loss. A full explanation of the basis of such liability, and in particular its relation to a more general conception of negligence, is beyond the scope of this Article.¹⁴⁵ Instead, I will briefly discuss a more limited—but nonetheless essential—point. Courts regularly refer to reliance as involving a “special relation” between the parties and hold, therefore, that the economic loss rule does not automatically apply.¹⁴⁶ This has led commentators to note the emergence of a broad dichotomy in the analysis of pure economic loss between situations coming under the no recovery rule and those involving

143. *Id.* at 201. This phrase, which has been quoted over the years by numerous courts, is taken from *Dick Meyers Towing Serv., Inc. v. United States*, 577 F.2d 1023, 1025 (5th Cir. 1978).

144. This reasoning brings American law into line with English and Commonwealth decisions and casts doubt upon categorical statements by other, generally lower, United States courts that economic loss arising from threatened rather than actual injury is never recoverable. *See, e.g., In re One Meridian Plaza Fire Litig.*, 820 F. Supp. 1460, 1484 (E.D. Pa. 1993). For English and Commonwealth decisions in accord, *see, for example, Weller & Co. v. Foot & Mouth Disease Research Inst.*, (1966) 1 Q.B. 569 (Eng.) (“[I]n an action of negligence founded on failure to take care to avoid damage to the property of another, only those whose property is injured, or at least directly threatened with injury, can recover.”), and *Murphy v. Brentwood Dist. Council*, (1991) 1 A.C. 398 (Eng. H.L.) (“[P]laintiff’s expenditure is . . . incurred in . . . preventing the injury from occurring.”). In Canada, there is the important decision of the Supreme Court of Canada in *Winnipeg Condominium Corp v. Bird Construction Co.*, [1995] 1 S.C.R. 85 (Can.).

145. I discuss reliance-based recovery of economic loss in Benson, *supra* note 5, at 450–55 and in Benson, *supra* note 49, at 155–65.

146. *See Barber Lines A/S v. M/V Dona Maru*, 764 F.2d 50, 56 (1st Cir. 1985) (citing *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.)).

reliance.¹⁴⁷ What makes situations of actionable reliance different from nonrecoverable relational economic loss? I want to identify the chief conditions of reliance-based liability and show how these differentiate the two situations.

The case law advances two interconnected requirements for actionable reliance.¹⁴⁸ First, the plaintiff must have actually relied on the defendant's representation or undertaking in the sense of changing position to his or her detriment. The claim will be for the loss sustained as a result of so relying. Second, the defendant must have assumed responsibility for the consequences of the plaintiff's reliance. I will briefly consider each of these requirements in turn.

There is little controversy that there must be reliance in the sense of change in position by the plaintiff.¹⁴⁹ Reliance involves some act or omission by the plaintiff that would not have occurred but for the decision to rely upon the defendant. For example, revising the facts in *Robins*, suppose that the plaintiff time-charterer, relying on the defendant dry-docking facility's promise to the ship owner to service the vessel in a timely and effective fashion, enters into contracts with third parties. The plaintiff's decision to contract with third parties is its change of position in reliance on the defendant's promise. Suppose further that the defendant is careless so that the vessel is unavailable to the plaintiff at the expected time and that as a consequence the plaintiff becomes liable to these third parties under their contracts, with resulting financial loss. The plaintiff is now worse off than it would have been had it not so relied. It is this worsening of the plaintiff's condition relative to its pre-reliance position that is the reliance loss.¹⁵⁰ And it is for this loss that the plaintiff sues in negligence.

For the defendant to come under a duty of care, however, it is not sufficient that the plaintiff relied in the manner just stated. The reliance was the plaintiff's own voluntary decision. Something more is needed to make another party responsible for the consequences of the plaintiff's decision to rely. That the

147. See Michael MacGrath, *The Recovery of Pure Economic Loss in Negligence—An Emerging Dichotomy*, 5 OXFORD J. LEGAL STUD. 350, 350–51 (1985). Exceptionally, there are decisions that find a “special relation” between the parties even though there has not been reliance. See *J’Aire Corp. v. Gregory*, 598 P.2d 60, 63 (Cal. 1979); *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958). For a detailed discussion of these cases, see Benson, *supra* note 49, at 155–65.

148. This is true of the main current approaches, as well as earlier leading decisions. For examples of the most important recent decisions, see *Bily v. Arthur Young & Co.*, 834 P.2d 745, 758–59 (Cal. 1992); *Stagen v. Stewart-West Coast Title Co.*, 196 Cal. Rptr. 732, 736–37 (Cal. Ct. App. 1983); *H. Rosenblum, Inc. v. Adler*, 461 A.2d 138, 142 (N.J. 1983), *superseded by statute*, 1995 N.J. Sess. Law Serv. 49 (West), *as stated in*, *E. Dickerson & Son, Inc. v. Ernst & Young, LLP*, 846 A.2d 1237, 1240 (N.J. 2004); and *Credit Alliance Corp. v. Arthur Anderson & Co.*, 483 N.E.2d 110, 118 (N.Y. 1985). For the leading earlier decisions on this issue, see *Ultramares Corp. v. Touche*, 174 N.E. 441, 444–47 (N.Y. 1931), and *Glanzer v. Shepard*, 135 N.E. 275, 275–76 (N.Y. 1922). For the leading Commonwealth decision on this issue, see *Hedley Byrne*, [1964] A.C. 465 (Eng.). See also RESTATEMENT (THIRD) OF TORTS: ECON. TORTS AND RELATED WRONGS § 9, at 52 (Council Draft No. 1, 2006) (adopting this approach).

149. For a classic discussion of this element, see Warren A. Seavey, *Reliance upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 926 (1951).

150. For a typical statement of this last point, see *Rosenblum*, 461 A.2d at 152 n. 13. For the clearest statement of this point, see Seavey, *supra* note 149, at 927.

decision to rely may have been foreseeable is not enough.¹⁵¹ For the defendant to be held liable, the defendant must have done something, on the basis of which the defendant may reasonably be held to have assumed this responsibility. More specifically, the defendant's conduct (whether by word or deed and including both acts and omissions) must be such that the plaintiff may reasonably view the defendant as intending that the plaintiff rely or as inviting the plaintiff to do so.¹⁵² So in the *Robins*-based scenario described above, the plaintiff time-charterer must show reliance on a representation—implied or express—by the defendant dry-docking facility to the plaintiff that the vessel would be ready at the expected time: more specifically, the plaintiff must reasonably be able to view the defendant as inviting the plaintiff to rely on its conduct, representation, or assurance.¹⁵³ This makes the plaintiff's reliance upon the defendant *justified* or *reasonable*; correlatively, the defendant may now be held to have assumed responsibility for the foreseeable consequences of plaintiff's reliance and as such to be under a duty to take reasonable care in words and conduct, both in making the representation and afterwards.¹⁵⁴

On the actual facts of *Robins*, the plaintiffs did not put forward any evidence of reasonable reliance. They did not claim a loss that resulted from having relied on the defendant and there were no facts showing that the plaintiffs could reasonably have viewed the defendant as inviting them to rely. The plaintiffs' loss arose through their contract with the vessel owner—a contract which the parties had entered into before the defendant came on the scene.¹⁵⁵ *Robins* was not a reliance case.

Granted this conclusion, the question remains as to whether claims that do meet the requirements of reliance are based on an exclusive right as against the defendant. If they do not, recovery would be in tension with *Robins* even if reliance scenarios differ from *Robins* in the manner just suggested. For instance, in the revised *Robins*-based scenario where the defendant has reasonably invited the plaintiffs to rely on an assurance of timely repair and in reliance thereon the plaintiff enters into contracts with third parties, what is plaintiff's exclusive right as against the defendant? The plaintiff's right cannot be in the performance itself of the timely servicing of the vessel because this service is owed—

151. All the decisions cited *supra* note 148, except for *Rosenblum*, agree on this point.

152. Except for *Rosenblum*, which represents a minority view, the decisions cited *supra* note 148 require that the defendant intends or invites reliance as a condition of his or her coming under a duty of care. For further scholarly discussion of the idea of invited reliance, see Benson, *supra* note 5, at 450–55; Mark P. Gergen, *The Ambit of Negligence Liability for Pure Economic Loss*, 48 ARIZ. L. REV. 749, 750, 752–60 (2006); and Perry, *Protected Interests*, *supra* note 19, at 281–85.

153. As throughout negligence, an objective test would apply. See *Bily v. Arthur Young & Co.*, 834 P.2d 745, 769–70 (Cal. 1992); *Glanzer v. Shepard*, 135 N.E. 275, 276 (N.Y. 1922); *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465, 486 (H.L.); RESTATEMENT (THIRD) OF TORTS: ECON. TORTS AND RELATED WRONGS § 9 cmt. d(2), at 60 (Council Draft No. 1, 2006).

154. For discussion of the standard of care in reliance cases, see Seavey, *supra* note 149, at 927 & n. 57.

155. *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 308–09 (1927).

contractually—to the ship owner, not to the plaintiff. To succeed, the plaintiff must be able to assert an interest of its own. As I will now explain, the requirement of reliance itself plays a crucial role.

Recall that the plaintiff's reliance claim is for damages that will undo the losses resulting from *plaintiff's change of position*; in other words, for damages that will put the plaintiff back in the situation it was in before it did, or omitted to do, anything in reliance upon the defendant. Thus plaintiff's *pre-reliance* position is the baseline against which its loss is measured. If this is so, the plaintiff's exclusive right against the defendant must be *with respect to that position*. To illustrate, in the hypothetical, the plaintiff's pre-reliance situation is that it would *not* have contracted with third parties or at least that it *would* have taken alternative measures to protect itself against the risk of financial loss that it now faces vis-à-vis the third parties. We suppose that the plaintiff can establish that it could and would have availed itself of one of these alternatives had it not relied on defendant's assurance, and that, in this way, it could and would have avoided the loss that actually resulted from defendant's lack of care. For the plaintiff, these alternatives therefore represent a no-loss situation in comparison with its post-reliance situation and, as such, constitute a valuable asset which the plaintiff could and would have had for itself but for its change of position at the invitation of the defendant.

Now a valuable asset can, in principle, be the content of an exclusive right—for instance the content of a personal right such as contract. In the circumstances of invited reliance, what the plaintiff has against the defendant is in fact a personal right with respect to the value of its pre-reliance situation. Given the defendant's invitation to rely, fairness and reasonableness require the defendant to treat the plaintiff's pre-reliance alternatives as a valuable asset belonging to the plaintiff with respect to which the defendant must exercise due care, both in making the assurance and in its subsequent conduct—within the parameters of its invitation to rely. In other words, the defendant may not say that the pre-reliance situation of no loss is not a valuable asset or that this asset never belonged to the plaintiff because the plaintiff did not avail itself of it. The defendant's own conduct of inviting reliance estops the defendant from so asserting. Exercising reasonable care requires at least of the defendant that it give the plaintiff adequate time and opportunity to return to the pre-reliance situation without loss. If this option is no longer available to the plaintiff, due care may necessitate the defendant following through on its representation or its equivalent.¹⁵⁶ In this way, the pre-reliance position counts as a protected interest as against the defendant—but *only* against the defendant—precisely because of the defendant's invitation to rely.¹⁵⁷ Thus understood, reliance-based liability

156. See Seavey, *supra* note 149, at pp. 925–27.

157. *Accord* Seale v. Perry, [1982] V.R. 193, 202 (Austl.) (Lush, L.J.) (“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

satisfies *Robins's* requirement of an exclusive right. It is indeed the factor of reasonable reliance that makes the difference.

IV. PURE ECONOMIC LOSS AND THE GENERAL CONCEPTION OF NEGLIGENCE

Thus far, I have explained the denial of relational economic loss claims, not as a bright line rule nor even as resting upon a pragmatic concern about indeterminate or extensive liability, but as stemming wholly from a purely *juridical* consideration: the significance of the requirement of a possessory or proprietary interest is that, in virtue of this, the plaintiff can assert a right, exclusive as against the defendant, to having or using an item free from interference by the defendant. In the absence of a contract or some other basis of personal right against the defendant, the plaintiff cannot have an exclusive right in any other way.¹⁵⁸ This is a *categorical* requirement: *whenever* a plaintiff lacks this right, the defendant is not under a duty of care toward the plaintiff and so its carelessness cannot constitute a wrong against the plaintiff with respect to the resulting economic loss. This is so however foreseeable or reasonably avoidable the loss may be. Finally, whether a plaintiff has this right is determined by the law of property and possession or in general by the principles and rules of law that specify in rem rights. Thus, the determination essential to liability can be made on a case-by-case basis, in accordance with recognized and settled legal principles, and with the same certainty and ease of application as any private law determination of rights.¹⁵⁹

To conclude this effort to develop a public basis of justification for relational economic loss, this final Part addresses two main questions. Does *Robins's* requirement of an exclusive right reflect a general prerequisite for negligence liability that applies to both physical and economic loss? If so, what is the relation between this prerequisite and foreseeability? My aim is to place *Robins* within a wider framework of a general analysis of negligence. While this general analysis should ideally be drawn from the case law if it is to qualify as part of a

defendant for the advice contained in the misrepresentation, a right which arises out of a relation of 'proximity', a para-contractual right.'").

158. This same conclusion is reached in *Seale v. Perry*:

A duty . . . cannot exist by itself. To the duty seen as imposed on the defendant, there must be a correlative right in the plaintiff: for either to exit, both must be capable of being identified. . . . I venture to think that it is really the problem of identifying the right which the plaintiff is entitled to have protected which underlies the difficulties of allowing actions to be brought in cases where the plaintiff has suffered and suffered only economic loss. . . . I do not regard the emphasis on property damage or personal injury in decided cases . . . as either arbitrary or restrictive. I think a consideration of the right which must be correlative to any suggested duty reveals the reason for emphasis.

Id. at 200–02.

159. Besides meeting an important desideratum of a public legal basis justification, this feature of the proposed juridical, noneconomic approach to pure economic loss may, also be desirable from an economic standpoint. See Henry Smith, *Law and Economics: Realism or Democracy*, 32 HARV. J.L. & PUB. POL'Y 127, 141–42 (2009).

public basis of justification, it need not coincide with the conception of negligence that happens to be currently prevailing in legal scholarship or even in leading judicial formulations if these seem to be in tension with firm and definite premises of the law. I shall argue that *Robins* does reflect a more general principle of negligence and that this principle, in turn, suggests a conception of negligence, and more particularly of duty, that differs fundamentally from the one that is currently dominant among legal scholars.

A. *The Robins Principle Generalized*

To begin with the first question, what was Holmes's own view of the character and the scope of the reason for nonrecovery in *Robins*? The answer is clear. As we have seen, Justice Holmes presented it as a *requirement of justice*, framed in wholly general terms—the existence of a real or personal right with respect to the damaged item as against the defendant; in other words, terms inherently suited to apply to *any* claim in negligence or in fact, to claims in other parts of private law as well. While Justice Holmes did not make this point explicitly in *Robins*, he did so in his discussion of the “general principles of liability” in *The Common Law*:

[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 so to deliver it, and then it is a wrong *only* to the promisee.¹⁶⁰

In this passage and following, Justice Holmes supposes that conduct, whether an act or an 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 under that person's right, whether by virtue of possession, property, or contract; and finally, to be recoverable, the 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. Notice also that the question of whether the parties are related in the requisite way is conceptually distinct and prior to the question of whether the defendant has exercised due care. The

160. OLIVER WENDELL HOLMES, *THE COMMON LAW* 131 (Mark DeWolfe Howe ed., 1963) (1881) (emphasis added).

priority of duty is implicitly supposed by Holmes's understanding.¹⁶¹ Moreover, Justice Holmes assumes that, in addition to bodily integrity, there are only three elementary and general grounds of individual rights at common law which give persons standing to complain against others that they have done harms: possession, property, and contract.¹⁶² Thus, Justice Holmes does not present tort law, including negligence, as an additional original source of right, but, to the contrary, supposes that for the plaintiff to maintain a tort action, the plaintiff must already have the needed right on one of these other bases, including the right of bodily integrity.¹⁶³ Finally, he presents these rights as exclusionary: each consists in a right to exclude others from possessing, using, or disposing of what comes under one's right.¹⁶⁴ Whereas the rights of ownership and possession, being in rem, exclude indefinite others, contract rights are in personam—excluding only the definite person or persons who are parties to the contract.

Does modern tort law generally recognize this kind of protected interest as a prerequisite of liability, in addition to the foreseeability requirement? To show that it does, we should look for settled and representative instances of loss which, however foreseeable, are not actionable precisely because they do not arise from an injury to rights in the required way.

A natural place to begin is the settled point that one is not liable to competitors for causing them even foreseeable economic loss by drawing away business from them, even knowingly, so long as one has not done this by procuring or inducing breach of contract.¹⁶⁵ A duty to avoid causing economic loss must be framed so as not entail the possibility of such liability, with the consequence that there cannot be a general duty to avoid causing even foreseeable pure economic loss but, at most, a duty that arises only in certain circumstances and not in others.¹⁶⁶ 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 considerations that underlie the

161. There seems to be an internal tension (usually unnoticed) in Holmes's work, including in his judgments, between this view and the more dominant, purely policy-based conception of negligence.

162. See HOLMES, *supra* note 160, at 131.

163. Accord Richard A. Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 52 (1979) ("Tort law presupposes some prior, independent method for defining and recognizing property rights both in the person and in external objects."): 164. HOLMES, *supra* note 160, at 174, 193.

165. For a general summary of the law, see FLEMING, *supra* note 4, at 161–68, and KEETON ET AL., *supra* note 2, § 129 at 978–1013. For particularly clear American judicial discussions stating this principle, see *Citizens' Light & Heat Power Co. v. Montgomery Light & Water Power Co.*, 171 F. 553, 558–62 (M.D. Ala. 1909); *Beekman v. Marsters*, 80 N.E. 817, 818–20 (Mass. 1907); *May v. Wood*, 51 N.E. 191, 192–93 (Mass. 1898) (Holmes, J., dissenting); and *Walker v. Cronin*, 107 Mass. 555, 562–65 (1871). For the most important English decisions, see *Quinn v. Leathern*, [1901] A.C. 495 (U.K.); *Allen v. Flood*, [1898] A.C. 1 (H.L. 1897) (Eng.); *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A.C. 25 (Eng.); and *Lumley v. Gye*, (1853) 118 Eng. Rep. 749 (Q.B.).

166. See Perry, *Protected Interests*, *supra* note 19, at 263–65 (underlining and developing this point).

refusal to impose liability for competition losses. What might those considerations be?

One explanation is that economic competition contributes to the general welfare, and that such loss is the unavoidable concomitant of this welfare-enhancing activity.¹⁶⁷ Without denying this, a quite different, rights-based explanation is available: the defendant may permissibly cause the plaintiff even foreseeable competition losses because, in doing this, the defendant does not affect any of the plaintiff's rights that are exclusive as against the defendant.¹⁶⁸ How so?

Clearly, one does not have a possessory or property right in the continued custom or business of others. At most, plaintiffs may have a potential or actual contractual relation with third parties. If there is no contract, there is no right that can be injured. The fact that plaintiffs may wish, or even happen, to benefit from the business of others and may plan on this basis does not establish a right to this benefit as against defendants. And even if a plaintiff does conclude a contract with a third-party customer, the contractual rights and obligations run between the plaintiff and the third party, not between the plaintiff and the defendant. The fact that third parties may choose to breach their agreements with the plaintiff by giving the defendant their business does not, without more, make the defendant liable. This is the third party's decision. If all that the defendant has done is just to deal with the general public in an ordinary business manner, the fact that the defendant attracts third parties cannot be a wrong to the plaintiff. It is true that by doing business, the defendant provides the occasion for this decision to breach. But the defendant cannot avoid attracting these third parties without ceasing to do business.¹⁶⁹ Thus it is an inevitable consequence of the very activity in which *both* the plaintiff and the defendant are engaged.¹⁷⁰ The plaintiff cannot have a right against the defendant in this regard because any such right would be self-

167. For a general discussion of this point, see HENRY SIDGWICK, *THE ELEMENTS OF POLITICS* 60 (2d ed. 1897). See also Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897) ("Why is a man at liberty to set up a business which he knows will ruin his neighborhood? It is because the public good is supposed to be best subserved by free competition. Obviously such judgments of relative importance may vary in different times and places.").

168. All the decisions, both American and English, cited *supra* note 165, analyze this question in terms of the rights and correlative duties between the relevant parties. Particularly instructive discussions are found in *Beekman*, 80 N.E. at 818–19, *Walker*, 107 Mass. at 564, and the whole judgment of Bowen, L.J. in *Mogul Steamship*, [1892] A.C. at 25.

169. See, e.g., *Beekman*, 80 N.E. at 819–20 ("[A] plaintiff does not go far enough to render a defendant liable for unlawful interference with his contractual rights, when he proves that the defendant, in using the ordinary methods of promoting and increasing his own business, obtained business from the other party to the plaintiff's contract which that other party could not have given him without breaking his contract with the plaintiff, and that this was known to the defendant.").

170. See, e.g., *Citizens' Light*, 171 F. at 560–61 ("The trader who has made a contract with another person has a right, which the law will protect, to have that other keep it. Other traders have the correlative right to solicit the custom to which the contract relates. Whatever damage results to the first trader by the mere solicitation is privileged, so far as the solicitor is concerned, in the interest of proper freedom of competition.").

defeating. If this is all that the defendant's drawing away of actual or prospective customers entails, then it must be *damnum sine injuria*.

Of course, the defendant can be held liable for drawing customers away from the plaintiff by inducing or procuring their breach of contract. But this intentional tort requires something more than the defendant providing an occasion for third party breaches through its general and ordinary business dealings with the public. The defendant must do something that is directed toward the specific contractual relation between the plaintiff and the third party for the purpose of appropriating, injuring, or otherwise interfering with the relation itself.¹⁷¹ While ordinarily contractual rights exist only between the parties to the contract, in these circumstances where a defendant has so acted the law treats the plaintiff's contractual interest as a protected right not just against the other contracting party but also against the defendant—as a “quasi-property” right between them.¹⁷² This is essential to courts finding that the defendant has injured a protected interest in the plaintiff, so that the defendant can be held liable for the resulting economic losses—in contrast to the exclusion of liability for competition losses.¹⁷³ The conclusion that contractual rights can be protected assets in such involuntary transactions mirrors the settled point that contractual rights may often be assigned by voluntary transactions to third parties no differently than rights in rem.¹⁷⁴

This rights-based rationale for the nonrecovery of pure competition losses exactly parallels the legal treatment of relational economic loss. In both cases, the defendant has interfered with an asset, but not in any respect that is exclusive against the defendant as a matter of rights. Relational economic losses arise from the plaintiff not being able to use a damaged asset that the plaintiff neither owns nor possesses; since the asset does not belong to the plaintiff “against the world,” the plaintiff cannot hold it exclusive as against the defendant. Similarly, competition losses result from the defendant affecting an interest in the plaintiff which the latter has, at most, in relation to third parties, not with respect to what the plaintiff can assert to the exclusion of the defendant.¹⁷⁵

171. This specifies the “malice” requirement in the intentional tort of interference with contractual relations. The most thorough and instructive discussion of this tort is still Francis Bowes Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 678–86 (1923).

172. For judicial discussions of this point, see *Raymond v. Yarrington*, 73 S.W. 800, 803 (Tex. 1903), and, more recently, *OBG Ltd. v. Allan*, (2008) 1 A.C. 1, 32 (H.L.) (Lord Hoffman). For scholarly discussion, see KEETON ET AL., *supra* note 2, § 129, at 981, and Sayre, *supra* note 171, at 675–76.

173. It also meets the objections against the tort of intentional interference in Justice Coleridge's powerful and scholarly dissent in *Lumley v. Gye*, (1853) 118 Eng. Rep. 749 (Q.B.), as well as doubts raised by certain scholars against this decision. See JOHN AUSTIN, 1 JURISPRUDENCE 402 (4th ed. 1879); FREDERICK POLLOCK, TORTS 328 (8th ed.).

174. For further development of this analysis, see Benson, *supra* note 5, at 455–57.

175. Mention should be made here of another important decision that illustrates this same pattern of analysis. In *Tate & Lyle Indus. Ltd v. Greater London Council*, (1983) 2 A.C. 509 (H.L.) (Eng.), plaintiffs, sugar refiners, were prevented from transporting their raw sugar to their refinery on vessels because the channel was insufficiently deep due to siltation of the bed caused by the

This analysis pervades the law of torts. Indeed, it can be stated in terms of a familiar principle: there is no liability for nonfeasance but only for misfeasance. Professor Francis Bohlen wrote famously of the misfeasance/nonfeasance distinction that none is “more deeply rooted in the common law and more fundamental.”¹⁷⁶ While the interpretation of the misfeasance/nonfeasance distinction is not free from ambiguity or controversy, I suggest, in agreement with Bohlen and in light of what courts actually do,¹⁷⁷ that the distinction is best understood, not as a purely factual difference between act and omission, but as a *normative* idea that marks the limits of a conception of wrong that is utterly basic to the law of torts.¹⁷⁸ Misfeasance is conduct of any kind (act or omission) by one that can interfere with or otherwise affect something that comes under another’s right (in their person, property, and so forth) insofar as this right is exclusive against the first. Nonfeasance is simply conduct that falls short of this.

defendants, requiring the plaintiffs to take costly measures to dredge the channel bed. The lower courts held that the defendants should have realized that their activity might cause substantial siltation and that this was reasonably avoidable. The plaintiffs’ losses were foreseeable. In deciding whether the plaintiffs could recover their losses in negligence at the House of Lords, Lord Templeman wrote:

[The plaintiffs’ claim] . . . assumes that [they] possess the right to use their jetties in the sense that they are entitled to the maintenance of a depth of water . . . sufficient to enable vessels . . . to load and unload at the jetties. The question is whether [plaintiffs] possess any right to any particular depth of water. If they have any such right then they will have a remedy for interference with that right. But if they have no such right then interference with the depth of water causing damage to [their] business constitutes an injury for which [plaintiffs] have no remedy.

Id. at 530–31. After canvassing various possible grounds of such a right—the law of riparian rights, contract, public nuisance, and so forth—Lord Templeman concluded that the plaintiffs did not have any such right and therefore should be denied recovery. *Id.* at 544.

176. Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219 (1908).

177. One of the most helpful judicial statements is Lord Diplock’s in the landmark English House of Lords case, *Home Office v. Dorset Yacht Co.*, [1970] A.C. 1004, 1060 (H.L.). Given the opinion’s influence and clarity, it is useful to quote it in full:

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 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.

Id.

178. I develop and elaborate this view in Peter Benson, *Misfeasance As an Organizing Normative Idea in Private Law* (2009, on file with author).

Thus, there are examples of positive conduct (acts)¹⁷⁹ that are nonfeasance because they cannot possibly affect such rights; conversely, there are instances of inaction¹⁸⁰ which are misfeasance because they can do so. Moreover, the misfeasance principle is a general requirement that applies to both physical and financial loss.¹⁸¹ To illustrate and elucidate this understanding of the principle, I will briefly discuss the standard failure to rescue scenario where the defendant does not rescue the plaintiff from a danger to which the defendant has not contributed in any way.¹⁸² This is widely viewed as the paradigmatic instance of nonfeasance.

In the rescue scenario, the defendant can avert danger to the plaintiff's person or property by taking certain—perhaps even costless—measures. But the defendant does not, and the plaintiff suffers resulting injury. This loss is presumably a perfectly foreseeable outcome of the defendant's omission, and cause-in-fact is satisfied because a rescue would have prevented the plaintiff's loss.¹⁸³ Finally, it is assumed that there is no special relation between the parties, whereby the endangered plaintiff is entitled to rely on the defendant for assistance. It is settled common law that an action in negligence for this loss must fail.¹⁸⁴ The generally accepted reason for denying liability is that the defendant does not owe a duty to the plaintiff to rescue him or her from the danger.

One rationale for the absence of a duty is that the failure to rescue is a pure omission, and in negligence, pure omissions cannot be the basis of liability. The gist of the plaintiff's complaint is that the defendant has done nothing. On this

179. In addition to the competition loss cases discussed earlier, further examples include interference with the flow of percolating water in English law, *see* *Mayor of Bradford v. Pickles*, [1985] A.C. 587 (H.L.), or interference with the flow of light in American nuisance law, *see* *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (Fla. Dist. Ct. App. 1959). In *Fontainebleau*, the court rejected the plaintiff's claim explicitly on the basis that the plaintiff lacked the requisite right in the interest (namely, the free flow of light across the defendant's adjoining land) with which the defendant's building activity had interfered. *Id.* at 359–60. The question of the plaintiff's right was decided on the basis of general principles of property law and contract. *Id.* at 359. The court stated that it would not, via the law of nuisance, confer upon the plaintiff “‘incorporeal rights incidental to his ownership of land which the law does not sanction.’” *Id.* at 360 (quoting *Musumeci v. Leonardo*, 75 A.2d 175, 177 (R.I. 1950)).

180. One well known example is *Goldman v. Hargrave*, [1967] 1 A.C. 645, in which a landowner failed to put out a fire which was started when lightning struck a tree on his land, causing the fire to spread to his neighbor's land. Another example is the failure to take action where another is reasonably relying, to that person's detriment, on one's doing so. *See* cases cited *supra* note 148.

181. *See* *Home Office*, [1970] A.C. at 1060.

182. The following brief discussion draws on my analysis of failure to rescue in Benson, *supra* note 178.

183. For a helpful discussion of omissions and causation, *see* Richard W. Wright, *Acts and Omissions as Positive and Negative Causes*, in *EMERGING ISSUES IN TORT LAW* 287, 290–92 (Neyers et al. eds., 2007).

184. *See* *Home Office*, [1970] A.C. at 1060; *see also* RESTATEMENT (SECOND) OF TORTS § 314 (1965) (“The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.”).

view, the defendant owes no duty because he did not act *at all*. If there is a complete absence of conduct of any kind, it is a legal truism that, absent a special relationship between the parties, there should not be liability. One cannot wrong another simply by *being*, in contrast to *doing* something. In this way, the distinction between misfeasance and nonfeasance is equated with the difference between acts and omissions.

As an explanation of the failure to rescue cases, however, this analysis is not entirely satisfactory. In the circumstances described above, it is not self-evident that the defendant simply has done nothing. To the contrary, the defendant decides to use his or her capacities, external resources, and so on, not to assist the plaintiff, but for something else. This is, after all, a decision and a choice which the defendant has made. Courts are not mistaken when, in these and in related circumstances, they refer to acts of *both* commission and omission.¹⁸⁵ If, still, there is no liability, it must be, not because of a complete absence of any conduct, but in virtue of the lack of a *certain kind* of conduct which alone is morally relevant for the purposes of liability.¹⁸⁶ As I will now explain, the defendant did not do anything to affect the plaintiff's exclusionary rights.

Since it is the plaintiff's life or property that is in danger, the only legally recognized interests which the plaintiff can assert vis-à-vis the defendant are the plaintiff's rights of bodily integrity and property. But these interests are protected through rights to *exclude* the defendant. At least, this is how they function and are standardly interpreted within private law. Now, supposing, as we have, that the defendant has not in any way contributed to the danger, what the plaintiff can assert to the exclusion of the defendant is *just* his or her bodily existence or property *in this condition of danger*. This is what belongs to the plaintiff as his or her protected interest relative to the defendant. And it is this "asset" which the defendant must not injure or otherwise affect without the plaintiff's consent. But this is precisely what the defendant's decision not to rescue does: it simply leaves the plaintiff's condition untouched—as is. Holding the defendant liable would therefore compel the gratuitous conferral upon the plaintiff of a benefit over and above what belongs to him or her exclusively as against the defendant. The parties' merely exclusionary rights cannot require this of the defendant. Even though it may be true that the defendant's failure to rescue represents a possible choice and decision and so a course of conduct, it is

185. The English court referred to acts of commission and omission in *Southcote v. Stanley*, 156 Eng. Rep. 1195, 1197 (Ex. 1856).

186. In relation to other kinds of values and considerations, the non-rescuer's decision may very well be morally relevant and a basis for ascribing blame. In the recent House of Lords decision in *Stovin v. Wise*, Lord Hoffman formulates the misfeasance/nonfeasance contrast as that between "regulating the way in which an activity may be conducted and imposing a duty to act upon a person who is not carrying on any *relevant* activity." [1996] A.C. 923, 953–55 (H.L.) (emphasis added). The key question is: What is relevant activity for the purposes of this distinction? This Article suggests an answer.

not conduct that can possibly affect whatever rights the plaintiff has as against the defendant.

Even though the defendant's failure to rescue may represent a decision, and so a course of conduct, it is not conduct that can affect rights the plaintiff has to the exclusion of the defendant. As such, the defendant's conduct is nonfeasance because it is not the sort of doing that can possibly be a wrong or an injury. Moreover, although in a purely factual sense, the plaintiff may be worse off than if the defendant performed the rescue, the plaintiff has not, in legal contemplation, lost anything. Loss and benefit are legal conceptions, not merely factual ones. It is in this sense that we should understand the frequently stated formulation of the misfeasance/nonfeasance distinction in terms of a contrast between causing injury and simply failing to confer a benefit.¹⁸⁷

Far from reflecting a merely factual difference between acts and omissions, then, the distinction between misfeasance and nonfeasance expresses a fundamental normative idea that in a person's interactions with others, the law does not require one to benefit others, but only not to injure them. In contrast to morals—where positive duties of aid and beneficence can be enjoined—the idiom of tort law is restricted to merely negative prohibitions against injury.¹⁸⁸ The protected interests of others must be left alone. The misfeasance/nonfeasance distinction thus specifies a definite and limited version of the harm principle that restricts protected interests to those that come under one's exclusive rights against others. Interference with others' interests in a wider sense which may certainly affect their well-being or happiness is not grounds for liability. The fact that the misfeasance/nonfeasance distinction is a normative idea does not mean, however, that its moral acceptability is self-evident or beyond controversy. Quite the contrary, it is a difficult issue that requires careful and full consideration. But to address that here is beyond the scope of the present Article.¹⁸⁹

187. See, e.g., *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 898 (N.Y. 1928) ("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."). Prosser and Keeton cite this passage with approval. KEETON ET AL., *supra* note 2, at 375 n. 20. For Bohlen, this difference between causing loss and failing to benefit "lies at the root of the marked difference in liability at common law for the consequences of misfeasance and non-feasance." Bohlen, *supra* note 176, at 221.

188. Certainly one of the most influential expressions of this fundamental normative idea is Lord Atkin's in *Donoghue v. Stevenson*, [1932] A.C. 562, 580 (H.L.) ("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. You must take reasonable care to avoid *acts or omissions* which you can reasonably foresee would be likely to *injure* your neighbour.") (emphasis added). It is the substitution of an injunction against injury for the rule of love that signals the presence of misfeasance.

189. I discuss this question in Benson, *supra* note 178.

Robins, we now see, is a case of nonfeasance. It displays the same pattern of analysis that explains the failure to rescue case. A single principle applies, whether the conduct involves acts (in *Robins*) or omissions (in failure to rescue), and whether the loss is financial (*Robins*) or physical (failure to rescue). Understood in this way, the denial of recovery for relational economic loss is not merely consonant with, but indeed required by, the logic of tort law.¹⁹⁰

B. *The Basis of Duty and its Priority*

According to the dominant scholarly model of negligence,¹⁹¹ a general requirement exists to avoid foreseeable and unreasonable risks of harm to others, with harm understood broadly as anything that negatively affects others' well-being. Since everyone is presumed to be subject to this requirement, the question of duty is reducible to whether, in given circumstances, one's conduct entails such foreseeable consequences. This approach views no-duty situations, in which there is nevertheless foreseeable risk of harm, as exceptions to general principles that must be rationalized on some other basis. The pragmatic explanation of relational economic loss, which treats non-recovery as such an exception, reflects, and is just a particular instance of, this dominant model.

But these no-duty situations, including relational economic loss, cannot be so readily contained or explained away. They embody a basic premise of negligence that is general and peremptory. The failure to rescue cases and *Robins* do not merely deny that the imposition of unreasonable—but foreseeable—risk of loss is a sufficient basis of duty.¹⁹² These cases go further and stipulate a genuinely distinct and prior positive requirement: the loss must result from the defendant's interference with something that comes under plaintiff's exclusive rights as against the defendant. Whether there is a duty depends on whether this positive requirement is met. Because interaction can affect the interests and well-being of others, without necessarily implicating their rights to exclude, the question of duty must be genuinely distinct and irreducible.¹⁹³ For the same reason, the idea of reasonable care takes shape—and has legal meaning—only within a framework of interaction that satisfies this positive requirement. In

190. *Contra* James, *supra* note 4, at 44 (reasons for nonrecovery of pure economic loss “do not derive from the . . . logic of tort law”).

191. For the characteristics of the dominant model, I have drawn on the detailed and instructive discussion in Goldberg & Zipursky, *supra* note 6, at 1762–77, 1812–25.

192. This is also true of the reliance cases, as discussed earlier. See *supra* Part III.C.2.

193. Goldberg and Zipursky do not distinguish interests in this way. Without this distinction, however, they are compelled to explain *Robins* on the basis that pure economic “harms” should not in general be actionable because this would be too burdensome. *Id.* at 1833. On the other hand, they argue that contrary to the law, there should be in principle a duty of rescue in emergency situations given the importance of the interests at stake and the exceptional nature of the situation. *Id.* at 1836–37. It is not clear that the idea of duty, at least one that is rights based and not policy driven, is performing any work in these analyses. The problem stems, I think, from their assumption of the homogeneity of legally relevant interests.

itself, reasonable care is inherently indeterminate as to whom and what it applies. By carving out the kind of interests that are legally relevant, misfeasance specifies these aspects and provides reasonable care with a form of determinacy appropriate for the purposes of negligence. Given the requirement of misfeasance, duty must be not only distinct and irreducible but also lexically first¹⁹⁴ in the analysis of negligence: the other elements of negligence are specified and applied within a framework that satisfies this prerequisite of duty.

Against the current of the prevailing assumptions, *Robins*, and more generally the misfeasance principle, suggest the conceptual autonomy and the priority of duty as setting the basic legal relation within which the standard of care is applied and given legally relevant meaning. However, we have also seen that under this analysis the requisite exclusive interest alone is not a sufficient basis of duty—foreseeability is also necessary. As I will now explain, the requirements of an exclusive right and foreseeability are strikingly cohesive and integrated. Together, they specify a distinct form of what may be called a “relational analysis”¹⁹⁵ of negligence.

That an exclusionary right has this relational character seems clear. Indeed, this is the right’s very essence. The interest is protected only if it can be attributed to the plaintiff in his or her own right. It must belong to the plaintiff, not someone else. What is more, the plaintiff’s interest, *as* his or her own, must simultaneously be *as against the defendant*. Absent this intrinsically relational character, the plaintiff’s interest is not protected. By requiring that conduct affect an exclusionary right of bodily integrity, property, or possession,¹⁹⁶ negligence law necessitates a form of protected interest that is intrinsically relational and, as it were, privy between the parties.

Similarly, the foreseeability requirement has this relational character. In general moral terms, for consequences to be the outcome of choice and therefore imputable to the conduct of agents, the consequences must be avoidable and hence foreseeable. However, the modern law of negligence specifies a definite, strictly limited notion of foreseeability. For a plaintiff whose person or property the defendant has injured to have standing to sue for the loss, demonstrating that the defendant’s careless conduct foreseeably threatened just anybody’s protected interests or the interests of “society in general” is insufficient, indeed irrelevant. The conduct must be foreseeably dangerous *relative to the plaintiff*. The plaintiff must show that, as against him or her and not just someone else, the defendant’s conduct threatened harm. Risk that is not relational in this way is irrelevant to

194. I use this in Rawls’s sense of the term. See RAWLS, RESTATEMENT, *supra* note 13, at 46–47.

195. This term is used by a number of contemporary tort theorists, in particular Goldberg & Zipursky, *supra* note 6, at 1820.

196. Whether there are or can be other, generally recognized bases of exclusive rights in private law, I leave open in this Article.

the law of negligence.¹⁹⁷ There is no such thing as risk in the air, just as there is no negligence in the air.¹⁹⁸ Thus, the foreseeability requirement specifies a form of foreseeability that is also privy as between the parties. Only conduct that threatens injury to the plaintiff in this way can possibly wrong the plaintiff.

From a normative point of view, no one would deny that culpability for negligence must entail conduct that impacts upon the interests of others. We now see that the law of negligence, through its requirements of an exclusive right and of foreseeability, specifies this general idea of interaction in terms of a direct and immediate relation between two parties. Exclusive interest, foreseeability, and wrong are all terms of relation: each must be suitably personal as between the plaintiff and the defendant.¹⁹⁹ At the same time, it should be emphasized that their shared relational character is of a distinct kind, one that is rooted in and wholly reflective of the misfeasance requirement with its severely restricted notion of protected interest and all that this entails. There are many different categories of relations (often involving corresponding rights and duties)²⁰⁰ between individuals in modern society. Each relation presumably has its own qualitatively distinct character. Characterizing negligence simply as relational, or even as having the general form of correlativity, is insufficient.²⁰¹ The *particular* form of relation (and correlativity) *specifically implied by the misfeasance requirement* must be identified and elucidated.

Not only do the requirements of exclusive right and foreseeability share the same character, but, in addition, they are ordered and integrated in a particular way as prerequisites of duty in the analysis of negligence. Thus, as I have already suggested, the requirement of an exclusive right must be conceptually prior to the requirement of foreseeability. Viewed by itself, foreseeability, even if understood in terms of a relation between plaintiff and defendant, is indeterminate as to its object. The requirement of an exclusive right specifies it: what must be foreseeable is *just* interference with something that belongs to the plaintiff, such as his or her person and property, insofar as the defendant is

197. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 101 (N.Y. 1928). The majority judgment in *Palsgraf*, in my view, thus turns on the appropriate conception of foreseeability, that is, one that is relational as between the parties. This, in and of itself, specifies an essential condition of the plaintiff's right to sue, and so long as other doctrinal requirements are met (for example, requisite protected interest, cause in fact, proximate cause, and so forth), the plaintiff's right of action is complete. I do not think that, apart from these prerequisites, the decision suggests or needs a further, distinct substantive standing requirement, as Ben Zipursky argues in his interesting discussion of the decision. See Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 3–17 (1998). I agree, however, with Zipursky that the basis of the Cardozo judgment is this relational conception of negligence, *id.* at 8–10, not a “liability-limiting policy rationale,” *id.* at 15, that reflects a “fear of liability,” *id.* at 14.

198. See *Palsgraf*, 162 N.E. at 99.

199. *Id.* at 100 (“The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.”).

200. See JOHN RAWLS, A THEORY OF JUSTICE 239 (1971).

201. This is one of the very few points of disagreement which I have with the Goldberg-Zipursky relational conception of duty. See *supra* note 193.

excludable from it.²⁰² Reasonable foreseeability in negligence presupposes the framework of misfeasance, within which alone it has its legally relevant meaning and role.

At the same time, this framework is incomplete without the foreseeability requirement. Without this requirement, a defendant would be under a duty not to do anything—however unforeseeable—that in fact affects the plaintiff's person or property. It is not just that this would fail to recognize a defendant's capacity to plan and to choose. It would fail to recognize the defendant's own equal status as a rights-holder to exercise control over his or her own body and property. To be under an obligation not to use his or her own body or property in any way that, however unforeseeably, affects others would empty of any content one's equal rightful capacity to use one's things. It would entail the subordination of the defendant to the plaintiff inasmuch as the plaintiff would be asserting the very right of exclusive control over one's body and things denied the defendant. To respect the parties' equal status as rights-holders, the relation established by the requirement of an exclusive right must be completed by the foreseeability doctrine. Together, the two requirements of exclusive right and foreseeability specify the parameters of the plaintiff's protected interest and, correlatively, the content and scope of a defendant's duty in a way that respects their equality. They establish the fundamental legal relation that characterizes negligence.

This model of negligence, organized around a robust notion of duty that incorporates *both* elements of exclusive right and foreseeability, stands in stark contrast with the currently dominant model among tort scholars that takes the standard of care to be the central organizing idea in negligence and assigns to duty, which it roots in foreseeability alone, an ancillary and subordinate role. Whereas this dominant view *must* treat relational economic loss cases as exceptions to general principles of negligence, the alternative model I have proposed explains how the nonrecovery of relational economic loss is perfectly consonant with these principles. *Palsgraf v. Long Island Rail Road Co.* and *Robins* can stand together as variations on a single theme. Both decisions presuppose that negligence requires duty, and that duty requires both exclusive right and foreseeability. In *Palsgraf*, the existence of an exclusive right in the plaintiff (here, the right of bodily integrity) was not at issue; the only question was whether there had been reasonably foreseeable impact on the plaintiff's interest. But Justice Cardozo insisted that foreseeability be ascertained solely with respect to the plaintiff's interest, not another's. In *Robins*—as in the other nonfeasance cases—the issue *is* the existence of this interest. And Justice Holmes insisted that the plaintiff must have an interest strictly relative as against the defendant. In both cases, the plaintiffs failed because they could not establish a claim that was freestanding with respect to the requirements of duty, but

202. Thus, in specifying the sort of foreseeability that is essential to duty, Cardozo explicitly refers to the plaintiff's protected interests: "[N]egligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right." *Palsgraf*, 162 N.E. at 99.

instead attempted to piggyback on their fulfillment through the defendant's relation to a third party. *Pace James*, *Robins* and *Palsgraf* reflect the very same logic and theory of negligence.

V. CONCLUSION

It is virtually a dogma among tort scholars that the nonrecovery of pure economic loss in a variety of situations may be justified, if at all, only as a special, policy-driven rule—the so-called “economic loss rule”—which limits the usual operation of ordinary negligence principles, in particular foreseeability. This view rests in turn on a more general conception of negligence in which foreseeability is a sufficient condition of duty, and duty is merely ancillary to reasonable care. The dominant approach to economic loss embodies both a particular explanation of nonrecovery and this more general understanding of negligence.

My aim has been to challenge these views—both the particular explanation of economic loss and the general conception of negligence—through the systematic reconsideration of the rationale denying relational economic loss claims—the longest standing and most influential category of nonrecoverable pure economic loss. The prevailing policy-driven explanation of economic loss not only fails to account for core aspects of this part of negligence law, but necessarily obscures the character of and the basis for nonrecovery as set out in the economic loss decisions, above all in *Robins*—the leading decision regarding economic loss. The teaching of *Robins* is that, far from representing an exceptional and special policy-driven rule, the denial of relational economic loss claims rests on an entirely different basis: one that has nothing to do with foreseeability or with limitations on foreseeability, nor with any supposed peculiar feature of economic loss as a distinct kind of harm; but rather for a reason that is not only consonant with but in fact required by general and ordinary principles of negligence applicable to all losses. This alternative rationale provides a principled and readily practicable basis on which courts can decide the issue of liability for the whole range of relational economic loss scenarios without the need to engage in highly speculative and complex factual and policy determinations. It elucidates the necessary distinctions between nonrecoverable relational economic loss and the main instances where financial loss is recoverable, without vulnerability to the usual objections against the prevailing explanation. Finally, this rationale shows why alternative treatments of relational economic loss proposed by minority courts and certain foreign common law courts cannot meet *Robins*'s objection to recovery.

Beyond making sense of this longstanding yet highly contentious area of tort law, the proposed approach has important implications for the way general principles of negligence are to be understood. The reason for nonrecovery reflects a more general requirement that is fundamental to and pervasive in tort law. It illustrates the familiar, but sometimes mischaracterized, formula that there is no liability for nonfeasance, only for misfeasance, of which Professor

Francis Bohlen wrote that there is no distinction “more deeply rooted in the common law and more fundamental.”²⁰³ An important task of this Article has been to show that claims for relational economic loss are not actionable because, on analysis, they are nonfeasance and that the misfeasance/nonfeasance distinction is, as Bohlen suggested, a basic premise of tort liability in general. Understood in these terms, the relational economic loss cases are clearly consonant with—and indeed required by—general negligence principles. At the same time, the proposed approach brings into question the current model, in which foreseeability is a sufficient condition of duty, and duty is merely ancillary to reasonable care. The economic loss cases demonstrate that, far from being a sufficient basis of duty, foreseeability only applies to legal relations that satisfy the misfeasance principle. Together, the requirements of misfeasance and foreseeability establish the fundamental relation of duty under negligence law. Duty is not only an autonomous element, but is also lexically first in the analysis of negligence. And it is only within this framework that the standard of care has its meaning and relevance.

203. Bohlen, *supra* note 176, at 219–20.

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