SYMPOSIUM INTRODUCTION

ECONOMIC TORTS: GAINS IN UNDERSTANDING LOSSES

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If money talks, readers might well expect to find a wealth of discussion about the economic torts. These torts arguably include at least fraud in its many varieties, misrepresentation, certain types of professional malpractice, tortious interference with contract expectancies and interests, disparagement, bad faith, breach of fiduciary duty, and conversion of intangibles.[1] Although these torts constantly raise issues of financial significance to individuals, businesses and the economy as a whole, academic discourse on these subjects in the United States has been sparse, and academic teaching of them has been largely neglected. It is my great hope that the economic torts symposium held here at the University of Arizona in Tucson on March 3–4, 2006, heralds the start of a more robust and sustained conversation.

This symposium, entitled the Dan B. Dobbs Conference on Economic Tort Law in honor of my distinguished colleague and coauthor, was coordinated to accompany the American Law Institute's newly initiated Restatement of Economic

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* Professor of Law, University of Arizona James E. Rogers College of Law. For the symposium itself, I would like to offer real thanks to Dean Toni Massaro of the University of Arizona James E. Rogers College of Law, Lance Liebman, Elena Cappella and Mike Traynor of the American Law Institute, and Howard Roin, Herbert Zarov and my many friends at my former law firm, Mayer, Brown, Rowe & Maw LLP, for helping create this conference and for assisting at every juncture; to the Arizona Law Review, which took on this major project with enthusiasm and dedication; to Donna Ream for her tireless efforts and constant good cheer; to Randy Wagner and the many law students who helped bring the actual event together; and to the exceptional young men in my Advanced Economic Torts class for their insight and good company throughout the year. For comments and edits on an earlier draft of this paper, I am particularly grateful to Dan Dobbs, Barbara Lopez and the editors of the *Arizona Law Review*, particularly Matthew Clark and Travis Wheeler.

1. They may also include claims for spoliation, wrongful death, harm to reputation, and a number of other causes of action. *Compare* Richard A. Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. L. REV. 735 (2006) (suggesting that injury to reputation does not fall within the category of economic torts), *with* Travis M. Wheeler, Note, *Negligent Injury to Reputation: Defamation Priority and the Economic Loss Rule*, 48 ARIZ. L. REV. 1103 (2006) (suggesting that it should).

Torts project—a project ably led by Professor Mark Gergen. The symposium itself was cosponsored by the University of Arizona, the American Law Institute, and Mayer, Brown, Rowe & Maw LLP.[2]

The two-day program focused on important themes that cut across individual causes of action. Specifically, the days were divided into five panels: the Economic Loss Rule and Its Limits; Principles of Recovery in Economic Torts; Economic Torts: A View from Experience; Emerging Influences on Liability: Comparative Apportionment and Technology; and Integration and Completion: The Torts Restatement Whole. Through these panels and morning and lunchtime speakers, more than thirty prominent academics, judges, and practitioners offered commentary on issues related to economic torts. A wide range of luminaries also participated in the audience of more than one hundred attendees.

The panels addressed a number of questions: When should actors be liable for conduct that causes others to suffer pure economic loss? To what extent do basic elements and principles of negligence law have a role to play in defining economic tort claims? What aspects of economic tort cases are particularly important to the causes of action as they work in action? Do widespread views of increasing litigation match empirical evidence? How do conceptual changes in other areas of law like apportionment of responsibility impact the economic torts? And finally, how can the various pieces of the restatement, written and not yet written, be woven into one coherent fabric?

This extensive volume records many of the symposium speakers' answers to these and other questions.[3] Throughout the works, there are both broad areas of agreement among authors and sharp fields of conflict. Of course, both are particularly valuable at exactly this moment—when the Restatement (Third) of Economic Torts is being conceived and revised. By the time of the symposium presentations in Tucson, a first draft of the Restatement was available.[4] When the authors' papers were due, a second draft had been issued.[5] At the time of this writing, a third edition has emerged.[6] Some might say responding to a changing Restatement is like shooting at a moving target. But in fact, I think that very little

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2. Thanks are also due to James E. Rogers for his support of conferences at the University of Arizona, and to West Publishing and the Tucson Federal Bar Association for supporting particular aspects of the program.

3. This issue of the *Arizona Law Review*, Volume 48 Number 4, collects the revised versions of papers that were presented at, or were prepared for presentation at, the Dan B. Dobbs Conference on Economic Tort Law. I would also like to thank the many Conference participants whose work is not published in this issue but whose commentary added greatly to the richness of our discussion in Tucson: presenters Bernard Bell, Lucinda Finley, Deborah Hensler, Charles Kalil, and Catherine Sharkey, commentator Ted Schneyer, and moderators Elena Cappella, Justice Andrew Hurwitz, Darian Ibrahim and Herbert Zarov.

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

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

6. RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS (Council Draft No. 1, 2006).

shooting has been done, and instead the entry point of these works is to hand the craftsman a hammer or perhaps a saw and suggest (in a more or less pointed manner) ways in which the shape of the project might be reconfigured. Indeed, the Restatement project provides a perfect focal point for attempts to crystallize some doctrines and principles amidst the confusion that currently pervades economic tort law.

I. ECONOMIC LOSS

In this symposium issue, the first and by far the largest set of Articles address the elephant in the room—the economic loss doctrine. The recent Restatement (Third) of Torts: Liability for Physical and Emotional Harm broadened duties to use reasonable care to avoid physical harms to self and others.[7] Against that backdrop, the first question for this symposium was the appropriate scope of duty (or perhaps liability) in the context of economic rather than physical harms. The first draft of the Economic Torts Restatement articulated what seemed like a general rule that parties *did not* need to use reasonable care to protect against pure economic harms, absent specific nominate torts or equitable doctrines which might impose liability.[8] Many symposium commentators expressed skepticism that courts had created, or should create, such a broad no-duty rule.[9] Instead, commentators suggested that the rules for limiting recovery for economic losses were less monolithic, and more modest and pragmatic in scope and purpose.[10] The newest version of the Restatement of Economic Torts adopts a more restrained view—recognizing liability for some types of economic loss without a background rule of non-liability, but limiting even recovery under the nominate torts in the face of various policy factors.[11]

The change away from the blanket non-liability rule seems welcome.[12] It was not clear why nominate torts created before the year 2006 would be etched in stone (or at least in actionable Restatement provisions), but that the creation of all other potential causes of action for economic loss sounding in negligence, products

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7. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM §§ 3, 7 (Proposed Final Draft No. 1, 2005).

8. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. LOSS § 8 (Preliminary Draft No. 1, 2005).

9. Dan B. Dobbs, *An Introduction to Non-Statutory Economic Loss Claims*, 48 ARIZ. L. REV. 713, 733 (2006); Oscar S. Gray, *Some Thoughts on "The Economic Loss Rule" and Apportionment*, 48 ARIZ. L. REV. 897, 898 (2006) (stating that "[t]he core concept of this constellation, not quite a 'rule,' seems to me to be an inhibition against liability in negligence for economic harm . . ." and arguing that "crystallization" into a rule would be problematic); Robert L. Rabin, *Respecting Boundaries and the Economic Loss Rule in Tort*, 48 ARIZ. L. REV. 857, 869 (2006).

10. *See* Dobbs, *supra* note 9, at 714; Gray, *supra* note 9, at 898; Rabin, *supra* note 9, at 858–59 *; see also* Anita Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773, 782 (2006); Jay M. Feinman, *The Economic Loss Rule and Private Ordering*, 48 ARIZ. L. REV. 813, 813 (2006).

11. RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS § 8, at 3–4 (Council Draft No. 1, 2006).

12. *See* Gray, *supra* note 9, at 897, 901–02 (but expressing residual misgivings); Feinman, *supra* note 10, at 818–19.

liability, or strict liability would be forever barred. Tort law is a dynamic field; some might say too dynamic. But a complete halt to this ebb and flow seemed to go too far to the opposite extreme.

In the area of economic loss, as in other areas of tort law, views about the appropriate scope of liability have varied across jurisdictions and over time. Interestingly, Jay Feinman's chronicle of the growth of recovery for negligent infliction of economic loss after the 1950s in the United States[13] finds a parallel in Helmut Koziol's observation of a similar trend towards increased recovery for economic losses in modern times in the European Union.[14] The congruence puts at issue whether increased legal protection of economic interests in contemporary times might serve a particular economic or normative function. Moreover, rules of liability vary across not just time but jurisdiction—in the United States and in Europe.[15] Indeed, in a number of contexts such as wrongful death and spoliation, parties have been permitted to recover for pure economic losses with nary a mention that these were even contexts involving claimants' pure economic loss.[16] As Oscar Gray points out, we should be careful of drawing broad generalizations about liability and non-liability in cases of economic loss when the reality of liability in these cases may be more quixotic and context specific.[17] As Gray notes, in particular contexts even strict liability has been recognized as a ground for recovery for pure economic loss.[18]

But if the parameters for recovery of economic loss are not fixed, what standards can be used and rationales employed to evaluate the appropriate scope of liability? Here the hot disputes begin. One conflict between commentators concerns the appropriate goal(s) of the economic torts. Judge Posner, who looks at

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13. Feinman, *supra* note 10, at 815–17.

14. Helmut Koziol, *Recovery for Economic Loss in the European Union*, 48 ARIZ. L. REV. 871, 875 (2006).

15. Rabin, *supra* note 9, at 857–58, points out some variance in the United States; Koziol, *supra* note 14, at 874–75, and Willem H. van Boom, *Pure Economic Loss: A Comparative Perspective*, *in* PURE ECONOMIC LOSS 1, 2 (Willem H. van Boom, Helmut Koziol & Christian A. Witting eds., 2004), point out variances within the European Union.

16. *See, e.g.*, Stinnes Corp. v. Kerr-McGee Coal Corp., 722 N.E.2d 1167 (Ill. App. Ct. 2000) (holding that doctrine barring recovery for economic losses did not apply to negligent spoliation claim in which plaintiff was required to settle a lawsuit that it could not adequately defend against absent critical evidence, because prior Illinois cases had previously recognized spoliation claims). Economic losses are also actionable in a number of intellectual property cases, at times even absent a showing to actual harm. *See* Jason Lee, What's the Harm? (or: Comments on Harm Awareness in Copyright Law) (unpublished paper, on file with author).

17. *See* Gray, *supra* note 9, at 899–900 ("It is difficult to foresee all the circumstances in which the question will arise as to whether liability should be extended for economic harm caused by conduct that is considered tortious.").

18. *See* Gray, *supra* note 9, at 900 (providing an example of trespassing animals that impregnate purebred breeding stock). The consumer fraud acts may also permit strict liability recovery for economic losses in some cases. *See, e.g.*, Miller v. Keyser, 90 S.W.3d 712, 716 (Tex. 2002) (holding that defendant "may be held liable under the [Deceptive Trade Practices Consumer Protection Act] even if he did not know that his representations were false or even if he did not intend to deceive anyone").

the economic torts through an economic lens, begins with an appeal for efficiency analysis here of all places.[19] He argues that when tortious conduct causes only economic harm, the bid for economic analysis has particular force. Specifically, he urges that when tortious behavior causes economic loss, recovery should be afforded only to compensate for social and not private costs, or at least only for private costs when they are not largely disproportionate to social costs.[20] Professor Rabin, by contrast, disputes that judges care about social cost, or that they should. Rather than choose a single normative principle as a guide, Professor Rabin discerns multiple policy objectives.[21] Disagreeing with Judge Posner about whether an intended legatee should be able to recover from an attorney who negligently misdrafts a will, Professor Rabin writes, "[f]airness and deterrence considerations both cut in favor of recovery, and these are the salient features for a court, not an assessment of social utility cut loose from the nexus of the parties to the litigation."[22] At the very start then, the appropriate role of private versus social costs is at issue, along with the question of whether the context of economic rather than physical harms affects that answer.

In addition to conflict about the goals of economic tort liability, commentators disagree about the appropriate scope of tort law vis-à-vis other bodies of law, most notably contract. While commentators agree that many economic torts walk a veritable tightrope between contract and tort, the commentators vary in the direction to which they wish to see economic loss cases lean and possibly fall.

Many commentators agree that parties who are unable to contract merit special consideration in tort.[23] However, commentators are sharply divided about what, if anything, parties' ability to contract in advance regarding economic losses implies for tort actions. For Mark Gergen, if parties could have contracted in advance for protection against economic loss, that mere opportunity may preclude tort liability.[24] But Dan Dobbs and Jean Braucher dispute that a failure to contract should have any preclusive effect. Professor Braucher, adopting a law-in-action perspective, focuses on the significant transaction costs of shopping for contract terms and the near impossibility of meaningful negotiations in mass market transactions given the prevalence of contracts of adhesion.[25] In light of that reality, the idealized picture of private parties individually negotiating terms of liability for

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19. *See* Posner, *supra* note 1, at 735.

20. *Id.* at 736–37, 741.

21. *See* Rabin, *supra* note 9, at 863.

22. *Id.*

23. *See* Dobbs, *supra* note 9, at 726; Gray, *supra* note 9, at 899; Ellen S. Pryor, *The Economic Loss Rule and Liability Insurance*, 48 ARIZ. L. REV. 905 (2006); Rabin, *supra* note 9, at 863, 867–68.

24. RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS § 8(4) (Council Draft No. 1, 2006); Mark P. Gergen, *The Ambit of Negligence Liability for Pure Economic Loss*, 48 ARIZ. L. REV. 749, 764 (2006).

25. Jean Braucher, *Deception, Economic Loss and Mass-Market Customers: Consumer Protection Statutes as Persuasive Authority in the Common Law of Fraud*, 48 ARIZ. L. REV. 829, 832–33 (2006).

economic loss becomes more unlikely and less satisfying.[26] Professor Dobbs would also shift the focus of the tort-versus-contract question away from the parties' opportunity to bargain about contract, toward the actual expectations and intent of the parties who either did or did not do so. According to Professor Dobbs, using the opportunity to contract as a way to preclude liability means that the "[f]reedom to contract . . . becomes its opposite . . . a *duty* to contract."[27] Dobbs further observes that a rule denying tort recovery to parties who do not avail themselves of an opportunity to contract becomes a catch-22 with respect to tort claims—"the negligence claim is always lost, irrespective of the parties' intent . . . ."[28] If the parties contract about liability for economic loss, their tort claims are governed by contract, not tort. If they fail to contract, they "should have done so, and the court will automatically eliminate the negligence claim."[29] In the insurance context, Professor Ellen Pryor finds similarly unpersuasive no-coverage arguments based on the idea that the insured's damage could have been the subject of bargaining between the parties and therefore is not an "accident" or "occurrence" within the meaning of the insurance coverage agreement.[30]

What happens to parties' tort claims in the face of their opportunity to contract relates to a broader unsettled issue—when are contractual protections or existing nominate torts an adequate form of redress so that tort law ought stay at bay? Conversely, when are contractual protections inadequate such that imposing them in lieu of tort recovery would result in unfairness or suboptimal precaution?

Many commentators are particularly concerned about economic tort actions when those claims might be pursued as an end run around contract law[31] or particular nominate torts,[32] or likely to displace other forms of redress like restitution and unjust enrichment.[33] But while authors agree that tort law shouldn't displace contract or other established law, it is not always clear when the intervention of tort law, with its big-stick remedies, would displace an existing avenue of redress, and when it would simply provide an appropriate supplement to it. [34] In a number of situations, as in breach of fiduciary duty, a variety of remedies peacefully coexist.[35] On the issue of whether contract remedies are adequate, Ian

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26. *See also* Feinman, *supra* note 10, at 823 (arguing that in many real contracting situations parties fail to allocate risks).

27. Dobbs, *supra* note 9, at 724–25.

28. *Id.* at 724.

29. *Id.* This concern is particularly valid if the Restatement permits parties to contract out of liability, but not into it, as has been proposed.

30. Pryor, *supra* note 23, at 915–18.

31. Howard Roin & Christopher Monsour, *Economic Torts: A View from Experience*, 48 ARIZ. L. REV. 973, 974–75 (2006); Posner, *supra* note 1, at 745.

32. *See* Dobbs, *supra* note 9, at 723; Wheeler, *supra* note 1, at 1113–15.

33. Dobbs, *supra* note 9, at 714, 717–18; Gergen, *supra* note 24, at 766; Roin & Monsour, *supra* note 31, at 975–76 (also expressing concern when economic torts are pursued in place of actions for personal injury).

34. Feinman, *supra* note 10, at 819 (expressing concern that an actor's obligation to the plaintiff may be "resolved by another body of law" in Restatement terms, even when the other body of law doesn't provide a remedy).

35. *See* Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925, 930, 956 (2006)

Ayres and Greg Klass, Jean Braucher, and Judge Posner all agree that damages in contract law are not fully compensatory.[36] But what flows from that observation in terms of the appropriate scope of tort law? Ian Ayres and Greg Klass view the inadequacy of contract damages as a reason to retain tort actions for promissory fraud in some cases. Similarly, Jean Braucher sees the inadequacy of contract damages as a reason not to let an economic loss rule cut off fraud actions and leave consumers to remedies in warranty. While not addressing fraud, Judge Posner argues that in the context of bad faith at least, the inadequacy of contract damages is not a reason to add tort claims; instead, it is a reason to authorize punitive damages in rare contract cases to deter "opportunistic conduct not otherwise deterred."[37]

On the issue of when a tort action might subvert not contracts but other nominate torts, Travis Wheeler highlights the difficulty courts face in deciding when new tort claims complement existing actions and when new actions detract from them.[38] Wheeler's Note looks at claims for negligently caused injury to reputation and examines courts' decisions about whether these claims inappropriately seek to side-step defamation law and its limits.[39] But courts have been hard pressed to decide whether actual distinctions exist between cases brought as negligent infliction of reputational harm and those understood as defamation, and whether they justify differential treatment. For example, a line could be drawn between cases in which the underlying reputational injury is based on a written or oral communication and cases in which it is not. Should this sort of distinction warrant recognition of additional tort claims? Or should negligent infliction of reputational harm claims usually, or even always, be routed to the defamation context? If the claims were routed to defamation law they would likely fail, but courts would then be forced to consider whether the underlying rules of defamation law and related privileges warrant expansion to provide redress for the harms suffered.[40]

Equally unclear is when to take account of the fact that, in many contexts, plaintiffs can take self-protective measures. Judge Posner argues that courts should

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(suggesting that a tort action for breach of fiduciary duty complements the availability of other types of remedies such as restitution).

36. Ian Ayres & Gregory Klass, *New Rules for Promissory Fraud*, 48 ARIZ. L. REV. 957 (2006); Braucher, *supra* note 25, at 855; Posner, *supra* note 1, at 745.

37. Posner, *supra* note 1, at 745 ("If it is a good idea to award [punitive] damages when a contract is broken in bad faith, then the rule denying punitive damages for breach of contract should be modified to allow them to be awarded in such cases.").

38. *See* Wheeler, *supra* note 1.

39. *Id.* at 1113–15.

40. The employee drug testing cases might be best handled as defamation claims, but commentators assert that the qualified privilege should then be modified not to preclude the claims. David A. Anderson, *Rethinking Defamation*, 48 ARIZ. L. REV. 1047, 1059 n.77 (2006); Wheeler, *supra* note 1, at 1103, 1113. Not only might conduct be considered speech, but speech might be considered conduct. Commentator Bernard Bell examined the line between speech and conduct, and noted theories that make some speech the equivalent of conduct. *See* Bernard Bell, Comments at the Dan B. Dobbs Conference on Economic Tort Law (on file with author) (citing KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989)).

be reluctant to recognize liability for economic torts when the plaintiff could have taken precautions either to avoid the loss or to insure against it. As Judge Posner notes, there are a number of strategies through which businesses in particular can minimize their economic losses—minimize inventory, adopt a corporate form that provides for discharge of debt through bankruptcy, purchase insurance, or self insure.[41] Mark Gergen agrees that self-protection ought to be a factor. However, relying on the prior work of Jane Stapleton, he remains agnostic about whether the plaintiff's ability to pass on the loss through insurance, rather than avoid the loss altogether, ought to be a factor.[42] The plaintiff's ability to take self-protective measures might also be relevant to the desirability of recognizing particular claims such as breach of fiduciary duty[43] and certain insurance recoveries.[44]

Parallel to the concern that tort law might overrun contracts is the concern that excessive deference to contract law might oust worthwhile tort actions.[45] Jay Feinman in particular expresses skepticism that current contract law, with its formalist overtones, is up to the task of appropriate regulation on its own.[46] Particular concern has been raised that rules restricting recovery for economic loss not be turned against the nominate torts themselves. For example, Dan Dobbs and Jean Braucher argue strongly against (and no one argues for) an economic loss rule so broad that it precludes actions for scienter fraud.[47] Ian Ayres and Greg Klass weigh in against this development as well.[48] The concern about economic loss rules encroaching on tort claims is heightened in the context of statutory causes of action. Professor Braucher argues forcefully against using this prudential common law policy to undo legislatively enacted causes of action such as the consumer fraud statutes. Perhaps a marker of the chaos that reigns with respect to courts' understanding (or misunderstanding) of the economic loss rules is that courts have actually used this doctrine to preclude statutory consumer fraud claims in a few cases.[49] Whether economic loss rules should affect nominate torts that are neither

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41. Posner, *supra* note 1, at 738.

42. Gergen, *supra* note 24, at 765.

43. DeMott, *supra* note 35, at 945–49.

44. Pryor, *supra* note 23, at 914 (suggesting that when a party could have required the purchase of a performance bond, which covers the failure to perform a contract as promised, that party's argument that a commercial general liability policy should cover economic losses might be less persuasive). In the promissory fraud context, the business plaintiff's ability to protect itself by setting a higher deposit also seems relevant. *See* IAN AYRES & GREGORY KLASS, INSINCERE PROMISES 10 (2006) (suggesting that students who provide relatively small deposits to secure positions in an entering class do not necessarily represent by their payment that they will attend the school).

45. *See* Feinman, *supra* note 10.

46. *Id.* at 823–25.

47. *See* Dobbs, *supra* note 9, at 728–30; Braucher, *supra* note 25; *cf.* All-Tech Telecom, Inc. v. Amway Corp., 174 F.3d 862, 865–67 (1999) (raising the possibility that the commercial fraud tort could be eliminating it, but noting problems that would arise from that result and ultimately declining to decide the issue).

48. Ayres & Klass, *supra* note 36, at 962 (doubting whether holdings that use the economic loss rule to bar some fraud claims "make sense under any coherent reading of the economic loss doctrine").

49. Braucher, *supra* note 25, at 847–49 (citing cases).

intentional nor statutory remains to be debated. [50] The current Restatement (Third) of Economic Torts suggests that some nominate torts might be subject in each case to judicial reevaluation based on broad policy factors including the adequacy of contractual remedies to provide redress.[51]

But if there are differences of view among the commentators about the goals of liability and the most suitable marriage between contract and tort—and there are—there are also some agreements. First among them is the widespread agreement that context matters.[52] Economic loss is the ultimate harm suffered by plaintiffs in a wide range of situations. Article after article in this symposium illustrates the multiple and varied contexts in which plaintiffs suffer pure economic loss: a business whose operations were shut down by a railroad yard's toxic spill, a business whose sales were harmed by another firm's negligent obstruction of the public sidewalk, a consumer who was defrauded about the quality of goods purveyed by a mass-market seller, an employee who lost a job due to a drug-testing company's negligent procedures, a child who suffered loss of maintenance due to the negligently caused death of his parent. Commentators uniformly agree that not all economic loss cases invoke the same interests or call for the same treatment. As such, rather than a single blanket rule, there is a need for analysis of the fairness and policy implications of recovery in each context.

The context-by-context analysis might be easy, or at least more focused, if there were a uniform taxonomy of economic loss cases. But as Anita Bernstein counsels before embarking on her own thorough taxonomy, no single organizing system prevails. The articles in this symposium support that view.[53] While commentators address a plethora of overlapping case illustrations—negligent auditors and attorneys who misdraft wills—the discussions are sometimes difficult to align across conceptual formats.

Yet despite different organizational structures, when narrower sets of cases are discussed in context, alignments of desired outcomes and rationales often appear. In terms of rationales, many authors echo similar themes for imposing some limits on recovery of economic loss. Indeterminate liability is problematic.[54] Expansive liability for economic loss might be cumbersome for businesses and others to accommodate.[55] Economic interests may be less significant than physical

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50. *See* Dobbs, *supra* note 9, at 721 ("The economic loss rule should not apply to bar claims brought under the rules of specific torts that are shaped to deal with the specific kind of claim the plaintiff presents. Instead the plaintiff's claim should stand or fall under those specific torts."). *But see* Posner, *supra* note 1, at 736 (suggesting that nominate torts claims should be overturned if they are inefficient).

51. RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS § 8 (Council Draft No. 1, 2006).

52. Gray, *supra* note 9, at 899–900.

53. Bernstein, *supra* note 10, at 782–83; Dobbs, *supra* note 9 (focusing on economic loss with parties who are strangers and with parties in a contractual or other relationship); Posner, *supra* note 1, at 741 (separating cases into those that involve a wide gap between private and social costs and those that do not).

54. Dobbs, *supra* note 9, at 715–16; Koziol, *supra* note 14, at 875; Posner, *supra* note 1, at 737–38; Rabin, *supra* note 9, at 862.

55. Koziol, *supra* note 14, at 875–77.

interests.[56] When other forms of redress are available—through nominate torts or contractual remedies—these avenues should not be impeded. As Professor Bernstein in particular emphasizes, complexity in this area is a hazard.[57] The potential for errors by judges and juries must also be taken into account.[58] These same rationales, though widely held and sometimes persuasive, are problematic.[59] For example, rules of non-liability for economic loss are difficult to square with the rule that parties generally *do* owe each other a duty to use reasonable care to protect against physical harms to property, not just people. Similarly, it seems incongruous to preclude a plaintiff from recovery for stand-alone economic harm and yet permit a plaintiff who suffers minimal physical injury to recover for extensive economic losses.[60]

In terms of outcomes, commentators also express a number of shared preferences. Specifically many commentators find recovery for pure economic loss more palatable in certain types of cases, particularly transferred loss or quasi-third-party beneficiary cases.[61] Furthermore, many commentators find liability more question-begging in cases involving potentially indeterminate liability.[62] Here too, though shared, the views are not without problems. While courts might appropriately fear limitless liability for conduct that causes wide-ranging economic loss, the specter of no liability might also raise concerns. If parties who cause limited economic losses are called upon to pay damages while recovery is foreclosed against those who generate massive losses, a rational actor might be more willing to risk cascading rather than limited harms. Just as the old common law rule that made it more expensive to negligently scratch than to kill ultimately gave way, an analogous rule for economic losses might eventually meet the same fate. While courts must draw a line somewhere in the ripples of economic loss that

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56. Gergen, *supra* note 24, at 765 (noting that deterrence may be less important with economic rather than physical injuries); Koziol, *supra* note 14, at 877; Rabin, *supra* note 9, at 869.

57. *See* Bernstein, *supra* note 10; *see also* Posner, *supra* note 1, at 740 (analogizing to antitrust cases and suggesting that at times it may be too difficult to calculate the losses, which might suggest that courts should forego these suits).

58. All-Tech Telecom, Inc. v. Amway Corp., 174 F.3d 862, 865–67 (7th Cir. 1999); Gergen, *supra* note 24, at 752 (asserting that where redress in an area is not complete, the cost of errors in tort must be considered in the decision about whether to afford a cause of action).

59. Bernstein, *supra* note 10, at 774–76.

60. See Anthony Broadman, Impure Economic Loss: The Breakdown of the No-Recovery Rule (unpublished paper, on file with author), illustrating the problem by virtue of variations on the case of *Mercury Skyline Yacht Charters v. Dave Matthews Band*, No. 05 C 1698, 2005 WL 3159680 (N.D. Ill. Nov. 22, 2005), in which a boat-charter company lost passengers and profits due to publicity about an incident in which a rock band's tour bus dumped waste that landed on the boat.

61. Dobbs, *supra* note 9, at 733; Posner, *supra* note 1, at 741; Rabin, *supra* note 9, at 868.

62. Dobbs, *supra* note 9, at 733; Posner, *supra* note 1, at 741; Rabin, *supra* note 9, at 868.

foreseeably emanate from a negligent act, that line need not deny liability for all losses. In appropriate cases, courts may decide to capture a few ripples.[63]

Perhaps given the many contexts of economic loss and reasons for denying and acknowledging recovery, the best we can do at this point is to recognize factors to guide decisions. Indeed, a number of commentators would weigh flexible factors in deciding on liability, rather than articulating strict rules. (David Anderson's overview of the sixty plus Restatement (Second) of Torts provisions concerning the tort of defamation perhaps provides too vivid a glimpse of the opposite hell of drafting all applicable doctrines with particularity.[64]) But there are different views about which factors might prove useful. Helmut Koziol's flexible system of recovery would include ten factors for establishing liability for economic loss.[65] Roughly clustered, the factors would look at the nature of the plaintiff's interest (the clarity of the interest, the importance of the financial loss), the foreseeability of injury to the plaintiff (the parties' special relationship, the danger of the defendant's conduct, the plaintiff's dependence or reliance on the defendant), the burden of liability on the defendant (whether liability would be indeterminate, whether the defendant was already under an existing duty to avoid the conduct because it risked some other type of harm, the obviousness or knowledge of the plaintiff's interest to the defendant), the defendant's intent, and whether the defendant acted with economic interest and thus benefited economically from his actions. Mark Gergen proposes a different set of factors for consideration.[66] Calling on work by Stephen Perry and Jane Stapleton, Professor Gergen would adopt a default rule that would permit liability when an actor "appears to invite reliance,"[67] and also in limited additional circumstances. Liability would attach unless: (1) the liability would be indeterminate; (2) the claimant could have obtained redress through contract; or (3) another person had the ability and incentive to avoid or redress the claimant's harm.[68] Both sets of these factors have some overlap with another set of factors sometimes used to guide liability decisions—the California Supreme Court's *Biakanja* balance of factors test—but not much.[69] There is more convergence in the principles underlying the different proposed sets of factors than may be apparent on their face—for example appearing to invite reliance may serve as a measure of the foreseeability of injury to the plaintiff. However, if a system of factors is adopted, further sorting among them will be required.

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63. Van Boom, *supra* note 15.
64. Anderson, *supra* note 40, at 1056.
65. Koziol, *supra* note 14, at 882–85.
66. Gergen, *supra* note 24.
67. *Id.* at 750.
68. *Id.*
69. Feinman, *supra* note 10, at 815 (citing these factors, which include whether the transaction was intended to affect the plaintiff, the foreseeability of harm, the certainty that the plaintiff suffered injury, the closeness of connection between the defendant's conduct and the plaintiff's injury, the moral blame attached to the defendant's conduct, and the policy of preventing future harm—a formula that looks akin to the strength of the plaintiff's case by prima facie negligence factors and the need for deterrence).

Whatever the ultimate composition of the factors, another issue is how those factors will be applied. Commentators helpfully illustrate their multifactor approaches in relation to actual cases. Under the current draft of the Restatement, broad questions about other areas providing appropriate redress and the like would not be used to decide upon the desirability of particular types of tort claims overall, but rather each judge hearing each nominate tort claim would need to undertake for herself this sort of lightly bounded policy-factor inquiry. It is difficult to envision whether varied judicial analyses of these broad factors portends greater articulation of judicial reasoning and context-specific analysis or burdensome processes that disserve judicial economy and decisional consistency.

Concerns about whether judges speaking to broad factors with different voices would reach consistent holdings seem warranted given the dialogue in this symposium. Even when commentators agree on similar goals—for example, that tort claims should be permitted when they involve a delimited set of victims and when the defendant does not have adequate incentive to protect the plaintiff—they may still differ on the application of those principles. For example, Judge Posner would allow a tort claim against negligent service providers in the context of employee drug testing, while Mark Gergen was less persuaded by that outcome.[70]

In judicial policy analysis, there is yet another concern. If many of the problems inherent in permitting recovery for economic loss are practical concerns, how will courts draw principled lines for deciding when to permit and when to limit recovery in this area? As Professor Gray and Professor Feinman note, after courts' false predictions in *Winterbottom v. Wright*, courts should be cautious of assumptions about the effects of indeterminate liability.[71] As Ellen Pryor notes, some economic losses would be covered by commercial general liability policies as written, as insurance exclusions are not coextensive with the economic loss rules.[72] If limits on liability are levied for practical reasons, it may be difficult for courts to judge how extensive those limits need be.

II. PRINCIPLES OF RECOVERY IN ECONOMIC TORTS

Not only do decisions about when to permit tort claims for economic losses create messy problems, but deciding on the internal doctrines required to establish those claims presents another disorderly task. Instead of applying the tort-specific elements that pervade the nominate torts, courts could adopt a more generalized structure for analyzing economic tort claims—the kind of overarching system that is commonly employed in negligence law. Professor Ken Simons looks at the "lack of generality problem" in intentionally caused economic torts, as well as the idea of creating a general claim for intentionally caused economic harm.[73]

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70. *See* Posner, *supra* note 1, at 742–43; Gergen, *supra* note 24, at 770–71.

71. Feinman, *supra* note 10, at 815 (discussing *Winterbottom*, which established the now defunct privity bar based on the fear that indeterminate liability would lead to absurd consequences if third-party actions were allowed); Gray, *supra* note 9, at 898.

72. Pryor, *supra* note 23, at 923–24. However, insurers might have more reason to contract out of liability in coverage agreements if more claims for economic loss are permitted.

73. Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1083–85 (2006).

Conveniently, the Second Restatement's prima facie tort could serve in this capacity. The prima facie tort subjects an actor to liability if he intentionally causes injury to another and his conduct is culpable and not justifiable.[74] The prima facie tort could serve as an umbrella claim, with certain nominate torts serving as specific variations. But while Simons notes the simplicity of such a plan, he nevertheless discredits it. The biggest problem with that approach is that intentionally caused economic loss, unlike intentionally caused physical injury, is generally not wrongful. Instead, intentionally caused economic harm is often justified, as in the case of most business competition. As such, the prima facie tort, like an open-mouthed whale taking in plankton, would ingest too much. Consequently, very few states have latched on to the prima facie tort at all, let alone placed it in a significant role.[75] Simons concludes that the messy jumble of specific nominate torts is both necessary to protect distinct an incommensurable interests, and an inevitable and desirable aspect of tort law.[76]

Faced with that jumble of nominate torts, Deborah DeMott braves the tangle of case law that comprises the tort of breach of fiduciary duty. Professor DeMott starts with the somewhat limited teachings of the Restatement (Second) of Torts, which defines breach of fiduciary duty in a single section literally filed in the miscellaneous-rules division. Branching out from this starting point, DeMott discerns her own criterion for determining when a relationship should qualify as a fiduciary relationship for the purpose of tort law. In particular, to establish duty and breach, DeMott would examine "whether the plaintiff (or claimed beneficiary of the fiduciary duty) would be justified in expecting loyal conduct on the part of an actor and whether the actor's conduct contravened that expectation."[77] The plaintiff would be justified in expecting loyal conduct based on a handful of factors, including the history of the parties' relationship, the defendant's allegiances, and the plaintiff's inability to protect himself. With this plan, courts would not get simple lists of fiduciary and non-fiduciary relationships, and yet their decision-making would be both cabined and flexible.

The tort of fraud, and its constitutive elements, attracts particular attention from articles in the symposium Drawing on their book, *Insincere Promises*, Professors Ian Ayres and Greg Klass emphasize that legally binding promises not only function to place a promisor under an obligation to perform, but also carry an implicit representation that the promisor intends to perform the promise (and certainly "does not intend not to perform").[78] Focusing on this latter representational aspect of promising, Ayres and Klass suggest reforms that would afford legal recognition to a wide array of representations that parties might make

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74. RESTATEMENT (SECOND) OF TORTS § 870 (1979).

75. DAN B. DOBBS & ELLEN BUBLICK, ADVANCED TORTS: ECONOMIC AND DIGNITARY TORTS—BUSINESS, COMMERCIAL AND INTANGIBLE HARMS 422 (2006). One benefit to adoption of the prima facie tort might be the creation of a more robust theory of privileged conduct, including a right to compete. *See* Matthew Clark, Prima Facie Tort for Sale: Who's Buying? (unpublished paper, on file with author).

76. Simons, *supra* note 73, at 1085; *see also* Dobbs, *supra* note 9, at 733.

77. DeMott, *supra* note 35, at 936.

78. Ayres & Klass, *supra* note 36, at 958–59.

about their promises. Under Ayres and Klass' view, parties might even disclaim their intent to perform. Absent such a disclaimer, when evaluating the promisor's intent to keep the promise at the time it was made, Ayres and Klass would focus not on the promisor's subjective desire to follow through, but on the objective probability of performance at the time of the promise. A default rule would provide that a promisor impliedly represents that there is at least a 50% chance of performance. This plan might allow courts to develop a more accurate understanding of the varied representations that are actually made in specific transactions. Moreover, it could aid transactors who are more interested in the probability of performance than in the moral blameworthiness of the transactor's intent.

While Ayres and Klass' prestatement format makes their plan easy to put into action, no doubt there will also be some potential barriers to its adoption. One difficulty for courts might be the increased complexity of examining the specific nature and meaning of each representation. Another problem, much discussed in the tort context of lost chance of recovery, is the difficulty for courts of working with probabilities. While some representations may be easy to classify in terms of probability—FedEx's 96% on-time delivery promise—other promises may be more difficult to calculate in these terms. Even in the easy cases, probabilities are not singular and fixed,[79] as when FedEx has a 96% on-time delivery average, but the subcategory of letters going to Florida has only an 85% on-time delivery average, and letters delivered on Tuesday have only a 60% chance of such delivery. When the promisee has a letter going to Florida on Tuesday, must the promisor calculate and disclose each subset of probability to avoid committing fraud by providing the overall 96% probability of on-time delivery, which would provide a misleading picture?

While Professors Ayres and Klass focus on fault-related elements in fraud, Professors Goldberg, Sebok and Zipursky turn their attention to causation. In particular, they examine whether this staple of common law negligence actions could be substituted for fraud's traditional element—reliance. They conclude that it could not. According to Goldberg, Sebok and Zipursky, the reliance element not only stands in for actual causation, but also serves additional functions of its own. Those functions include defining the tort of fraud as an interest in making certain kinds of decisions free of misimpressions induced by others, and establishing that the defendant's conduct was wrongful, not in general, but as to the plaintiff, such that she has a right to recover. Although other causes of action like state consumer fraud acts, may do without the reliance element, these actions are regulatory and so unlike tort claims, don't need the relational aspect to afford redress. Meanwhile, tort claims that don't require the plaintiff's reliance can be also distinguished on the ground that they protect different interests.[80]

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79. *See* David Buechel, Insincere Promises: Good Faith Misrepresentations form the Academy (unpublished paper, on file with author).

80. *See* John C.P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *The Place of Reliance in Fraud: A Comment*, 48 ARIZ. L. REV. 1001 (2006).

Professor Mike Green draws an apt comparison between Goldberg, Sebok and Zipursky's theme of decision making without misimpressions and Aaron Twerski and Neil Cohen's important work on informed consent.[81] Ultimately, however, Green disagrees with Goldberg, Sebok and Zipursky that reliance is required for purposes beyond establishing actual cause or perhaps harm. Nor does he agree that a meta-theory, whether about the relationship-based nature of tort duties or any other, describes tort law—seeing the tort law as a far more eclectic mix.[82]

Other commentators raise the issue not of the elements of fraud, but of their application in particular contexts. According to Jean Braucher, states' development of consumer fraud law, though taken on under a mantle of statutory consumer fraud acts, may be relevant to the development not only of the statutory law, but also to common law fraud actions.[83] Indeed, when the drafters of the Uniform Deceptive Practices Act adopted their model act, they specifically inscribed in their prefatory notes their hope that the development of the common law would not be stunted by their efforts.[84] Of course it was, but the statutes—and the wide-ranging protections courts have created under them—raise the question of whether consumers who fall victim to fraud or to economic losses more generally ought enjoy broader legal protections than others even under non-statutory claims.[85]

Another work that addresses the actual application of tort doctrines is Howard Roin and Christopher Monsour's view from experience. Roin and Monsour make the important point that when economic tort elements are designed, drafters should not only envision the classic single-plaintiff-versus-single-defendant tort pattern, but also recognize the other contexts in which these elements will be played out. In particular, Roin and Monsour emphasize the importance of the class-action context to many of these claims.[86] Their concern is that plaintiffs may turn to economic torts to skirt class-certification problems raised in traditional tort and contract actions. The concern about this diversion, particularly when claims are multiplied in the millions, may be especially salient given the commonly held view that economic tort cases, and economic tort class actions, are increasing in number. (Although some statutory causes of action like civil RICO claims and state consumer fraud actions may not be addressed by the Restatement, these claims often permit recovery for economic losses and are likely a part of that increase). Though unfortunately not a part of the symposium writings,[87] at the Conference itself Professor Deborah Hensler reviewed the limited empirical data available to either establish or disprove claims that the number of

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81. Michael D. Green, *Apportionment, Victim Reliance, and Fraud: A Comment*, 48 ARIZ. L. REV. 1027, 1036–37 (2006).

82. *Id.*

83. Braucher, *supra* note 25, at 849–55.

84. REVISED UNIF. DECEPTIVE TRADE PRACTICES ACT prefatory note (1966).

85. Braucher, *supra* note 25, at 844; *see* Gray, *supra* note 9, at 897, 902–03.

86. Roin & Monsour, *supra* note 31.

87. *See supra* note 3.

economic tort cases being filed is increasing. Her review of some available evidence did point in the direction of an increase.

III. EMERGING INFLUENCES ON LIABILITY: COMPARATIVE APPORTIONMENT

Once economic tort claims are recognized, a relatively new challenge is to decide whether recent doctrines like comparative apportionment will apply to them. As Professor Andy Klein notes, this was an issue that was discussed in prior Restatement projects and reserved for this very day.[88] Whether comparative apportionment is allowed may depend on both the context of the apportionment claims—for example, whether the defendant is claiming the comparative fault of the plaintiff, one defendant is claiming the fault of another defendant, or the defendants are arguing between themselves about contribution—and the context of the underlying causes of action and defenses for which comparative apportionment is sought. [89]

In terms of the causes of action and defenses sought to be compared, Professor Klein argues that comparative apportionment makes particular sense in cases of fraud. This is so because the plaintiff's prima facie case typically, or at least frequently, requires the plaintiff to prove justifiable reliance, which Klein argues is akin to requiring the plaintiff to prove that she was not negligent in relying on the misrepresentation. Accordingly, adopting comparative fault in fraud cases might enhance and not diminish fraud victims' recoveries if comparative fault were used as a substitute for the all-or-nothing justifiable reliance requirement. This potential benefit to the defrauded plaintiff renders fraud cases unlike other intentional tort contexts for the purposes of apportionment—a proposition with which Professor Green, Reporter of the Restatement of Apportionment, agrees.[90]

But as Professor Green is careful to observe, this rationale for comparative apportionment in fraud cases might apply only to some comparative fault defenses (those that essentially allege plaintiff's unreasonable reliance) and not to others. Ken Simons echoes Mike Green's caveat that not all forms of victim fault are the same for purposes of responsibility.[91] Allowing some comparative fault claims to be raised in cases of fraud does not require allowing them all.

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88. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1(e) (2000).

89. Ellen M. Bublick, *The End Game of Tort Reform: Comparative Apportionment and Intentional Torts*, 78 NOTRE DAME L. REV. 355 (2003) [hereinafter Bublick, *Tort Reform*]; Gray, *supra* note 9, at 902.

90. Green, *supra* note 81, at 1033. Ian Ayres and Greg Klass also note that comparative fault might be a concept particularly appropriate to promissory fraud. Ayres & Klass, *supra* note 36, at 961.

91. Simons, *supra* note 73, at 1065 ("[I]t is one thing for a victim to provoke a fight, and another to walk absent-mindedly in a dangerous section of the city.").

While comparative fault may be particularly appropriate in some fraud actions given the element of justifiable reliance, assertions that arming defendants with these defenses will actually aid plaintiffs seem harder to validate. In a variety of situations, particularly when justifiable reliance is not a major hurdle to plaintiff recovery (as when the justifiable reliance element is primarily a stand in for another aspect of plaintiff's case), plaintiffs may be worse off once comparative fault defenses are added to the mix. , Diminution of fraudfeasors' liability might also result when adding a comparative fault defense does not ultimately lessen the plaintiff's initial burden to prove justifiable reliance.

To examine comparative apportionment in cases involving justifiable reliance, it is interesting to juxtapose Professor Klein's argument with Professor DeMott's and think about whether and how comparative apportionment would apply to claims of breach of fiduciary duty. Breach of fiduciary duty, as Professor DeMott envisions it, focuses on the plaintiff's justified expectation of loyalty and the defendant's breach of that expectation. Framed in that way, the tort shares more than a few attributes with fraud; in fraud the plaintiff justifiably relies on a defendant who then provides materially false information. Because the plaintiff in a breach of fiduciary duty case too would have to show justifiable reliance in order to obtain recovery, Professor Klein and Green's argument in the fraud context might suggest that comparative fault might also be appropriate to the breach of fiduciary duty context because it would lessen plaintiff's burden to show justifiable reliance.[92] Furthermore, in breach of fiduciary duty, unlike fraud, the defendant might be a negligent, and not an intentional, tortfeasor.[93] This distinction would ordinarily suggest that comparative fault defenses should be more readily accepted in breach of fiduciary duty cases than in cases of fraud.

And yet, Professor DeMott suggests that the plaintiff should have an entitlement to rely on a fiduciary even when the plaintiff could have foreseen a lack of care, and potentially avoided the damage by non-reliance.[94] Specifically, "a plaintiff's expectation of loyal conduct may be justifiable even when the plaintiff has some basis to doubt whether an actor will fulfill the expectation." This would be true, for example, when the actor occupies a fiduciary role but has a history of transgressions.[95]

It may be possible to reconcile this entitlement concept in breach of fiduciary duty with comparative fault in fraud if the plaintiff's entitlement in the breach of fiduciary duty context is only strong enough to retain the defendant's duty and not to bar the comparative fault claim. The cases may also be reconciled by asserting that fiduciaries unlike fraudfeasors occupy a role that requires care for

92. *See supra* note 90.
93. DeMott, *supra* note 35, at 931.
94. *Id.* at 938–39.
95. *Id.*

even negligent plaintiffs.[96] Nevertheless, the entitlement concept seems at least in tension with the idea that comparative fault principles should be invoked with respect to questions of justifiable reliance.

In addition to the importance of which underlying claims and defenses are proposed for comparison, the context of the parties involved in the claimed apportionment will certainly matter as well. The context Professor Klein discusses involves a claim of defendant fault and a defense of plaintiff comparative fault. In other cases, one defendant seeks to offset its liability based on the fault of another defendant. Oscar Gray is certainly right to point out that in many of these situations, court decisions about whether to include or exclude economic tort claims from apportionment systems will be controlled by statutory language.[97] Moreover, in the context of contribution, Professor Gray is also right to suppose that in business contexts, a number of these apportionments will be worked out not by the courts but by the parties in side contracts;[98] whether courts will honor those side agreements is another important matter.[99]

IV. INTEGRATION AND COMPLETION: THE TORTS RESTATEMENT WHOLE

One problem with any type of categorization is the difficulty of leaving remnants cut out from the central cloth. That has been an issue in the Restatement of Torts. Most notably, dignitary harms have not yet found a comfortable place in the Restatements. After resistance to their inclusion, claims for emotional distress are just now being inserted into the Restatement of Physical Injuries (along with an appropriate title change). But what should be done with other dignitary harms?

One of the most significant left-over dignitary harms is defamation law. Should it be restated? David Anderson expresses doubts that defamation law in particular should be included in the Economic Torts Restatement, in large part because of its poor fit under the heading of economic torts (though one wonders if the new tag line "and related torts" on the end of recent versions of the Economic Torts project was meant for precisely this purpose). In addition, according to Professor Anderson, defamation law's limited practical importance in the face of constitutional and other hurdles, and the continued relevance of the Restatement (Second) of Torts, makes that cause of action less urgent to restate. But on the other hand, Anderson notes that a "clear, authoritative, and up-to-date statement of the law of defamation would be useful," and that at present the "law of defamation

96. Ellen M. Bublick, *Comparative Fault to the Limits*, 56 VAND. L. REV. 977, 1017–20 (2003). However, at times fraudfeasors may have superior information, which would require special care. *Id.* at 1007–11.

97. *See* Gray, *supra* note 9, at 903.

98. *Id.*

99. *In re* WorldCom, Inc. Sec. Litig., No. 02 Civ. 3288(DLC), 2005 WL 613107, at *11 (S.D.N.Y. Mar. 15, 2005) (finding it understandable that underwriters would try to contract to apportion liabilities between them, but finding that public policy dictated that contract would not apply in a securities case).

gives us the worst of worlds" because of its elaborate and cumbersome structure.[100] If the ALI doesn't take on the project, Anderson writes, "it's hard to see who will."[101] Ultimately, it's a mixed picture.

If such a Restatement is undertaken, Anderson suggests that it would be helpful to think about which reputational interests ought to be protected.[102] This sentiment is echoed by Travis Wheeler.[103] The issue of a duty of care to protect reputational interests warrants examination for defamation claims, as well as claims of negligent infliction of reputational injury. The scope of other dignitary, though not necessarily reputational injuries (interests in privacy, for example), merit examination as well. Although the initial plans for the Restatement of Economic Torts included abuse of process as an economic tort claim and excluded malicious prosecution, the creation of blended actions such as malicious abuse of process makes such a division difficult to maintain.[104]

Whether more needs be done with the intentional torts is also an issue. Though Ken Simons concludes that the intentional torts are not in need of restating, he then raises a number of complexities in the intentional tort doctrines which are controversial and unresolved—whether battery, for example, requires a single intent or a dual intent.

Of course, how intent is interpreted is important, not only to a stand-alone intentional torts project, but to each segment of the Restatement, including the Restatement of Economic Torts. As Deborah DeMott notes in the context of breach of fiduciary duty, intent cannot be interpreted so broadly that intent to become a fiduciary renders that claim an intentional tort. Were that sort of intent to engage in conduct sufficient to establish an intentional tort, Professor DeMott counsels, intent to drive might turn every car accident an intentional tort as well.[105] The scope of the intent is important. Given the breadth of intended acts and harms, Professor Simons is careful to point out that intent is not always worse than negligence. Sometimes intentional torts involve acts of particularly low culpability, as when the intent at issue is not intent to harm. An example would be a trespass in which the defendant intended to enter the land not realizing that it was the land of another.[106] Similarly, the intentional tortfeasor might be a low-culpability intentional tortfeasor, like a child.[107]

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100. Anderson, *supra* note 40, at 1047, 1052.

101. *Id.* at 1059.

102. *Id.* at 1057–59.

103. In terms of an underlying duty of care to protect purely reputational interests, Wheeler wonders whether a no-duty or no-liability rule akin to the economic loss rule might be prudent. Wheeler, *supra* note 1, at 1126–27.

104. *See* Devaney v. Thriftway Mktg. Corp., 953 P.2d 277 (N.M. 1997). The variance in abuse of process torts across jurisdictions is addressed in Jose Ceja, Abuse of Process (unpublished manuscript, on file with author).

105. DeMott, *supra* note 35, at 932.

106. Bublick, *Tort Reform*, *supra* note 89, at 369, 417–18 (arguing that comparisons between intentional tortfeasor defendants and negligent plaintiffs are

Given this mix within the category of intentional torts, Professor Simons suggests an element analysis—having different states of mind apply to different elements of the claim, as is done in the criminal law.[108] He also suggests separating out and examining the reason for which the intentional tort designation is being made.[109] These recommendations would permit courts to recognize more varied contexts and outcomes, but also seems to abandon the idea that negligent and intentional torts might be differentiated in any meaningful way for a broad array of purposes. Would workers' compensation allow recovery for an employer's tort that was intentional with respect to one element but negligent with respect to another? Another possibility would be to follow in a different direction Professor Simons' third recommendation—that intentional torts follow a different paradigm than reasonableness and protect carefully defined interests.[110] Following the Restatement of Physical Injury, intentional torts could be limited to those torts that involve not just intent to act, or intent to engage in an unreasonable act, but rather intent to harm.[111] So limited, one might say that certain "intentional torts," like trespass, may or may not fall within the category of intended harms, and must be differentiated further to decide upon certain kinds of treatment. Some courts have taken this approach.[112] This sort of differentiation between cases in which harm was intended and cases in which it was not would preserve a distinction between intentional and negligent torts, but only in those core cases that merited the distinction in the first place.

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This is just the start of the discussion. Many more issues concerning the economic torts have already been raised. Still other issues can and should be added to the mix. The papers in this volume ask and answer and struggle with questions that will be pivotal to the development of the law of in this area. Readers will no doubt find there is much to learn from all of them.

So have at it. We desert dwellers are all too accustomed to drought. For those who have waited for the flow of scholarship in this area, I hope you will enjoy this cascade of ideas from Tucson.

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infrequently made but that exceptions include low-culpability intentional torts or tortfeasors); Simons, *supra* note 73, at 1089.

107. *Id.*.

108. *Id.* at 1090.

109. *Id.* at 1096–97.

110. *Id.* at 1097–1101.

111. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 1(b) ("In general, the intent required to show the defendant's conduct in an intentional tort is the intent to bring about harm (more precisely, to bring about the type of harm that the particular tort seeks to protect against).") (Proposed Final Draft No. 1, 2005).

112. For example, Simons notes that false imprisonment, although labeled an intentional tort, does not necessarily involve intent to harm. Simons, *supra* note 73, at 1081–82. In such a case, a New Mexico court allowed the application of comparative fault to a false imprisonment claim. *See* Garcia v. Gordon, 98 P.3d 1044 (N.M Ct. App. 2004).