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Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal

*Fleming James, Jr.**

I. INTRODUCTION

Under the prevailing rule in America, a plaintiff may not recover for his economic loss resulting from bodily harm to another or from physical damage to property in which he has no proprietary interest.¹ Similarly, a plaintiff may not recover for economic loss caused by his reliance on a negligent misrepresentation that was not made directly to him or specifically on his behalf.² Thus, the insurer of *A*'s life has no action against one who negligently causes *A*'s premature death;³ the employer has no action for sums that he has had to pay because defendant has negligently injured his employee;⁴ a ship's time charterer has

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1. Harper, *Interference with Contractual Relations*, 47 Nw. U.L. REV. 873, 884-93 (1953) (concluding as a general rule, liability for negligent interference with contractual relations does not exist); Comment, *Foreseeability of Third Party Economic Injuries—A Problem in Analysis*, 20 U. CHI. L. REV. 283 (1953).

2. *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931); 1 F. HARPER & F. JAMES, LAW OF TORTS § 7.6 (1956) [hereinafter cited as HARPER & JAMES]; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 107 (4th ed. 1971) [hereinafter cited as PROSSER].

3. *Connecticut Mut. Life Ins. Co. v. New York & N.H.R.R.*, 25 Conn. 265 (1856).

4. *Crab Orchard Improvement Co. v. Chesapeake & O. Ry.*, 115 F.2d 277 (4th Cir. 1940) (workmen's compensation payments); *The Federal No. 2*, 21 F.2d 313 (2d Cir. 1927) (expense for care and cure of seaman); *Chelsea Moving & Trucking Co. v. Ross Towboat Co.*, 280 Mass. 282, 182 N.E. 477 (1932) (workmen's compensation payments); *Northern States Constr. Co. v. Oakes*, 191 Minn. 88, 253 N.W. 371 (1934) (increased workmen's compensation insurance premiums). The same rule is applicable in the field of public employment. *United States v. Standard Oil Co.*, 332 U.S. 301 (1947); *Employers' Liab. Assurance Corp. v. Daley*, 183 Misc. 975, 51 N.Y.S.2d 567 (Sup. Ct. 1944), *aff'd*, 271 App. Div. 662, 67 N.Y.S. 233 (1947), *aff'd*, 297 N.Y. 745, 77 N.E.2d 515 (1948); *City of Philadelphia v. Philadelphia Rapid Transit*, 337 Pa. 1, 10 A.2d 434 (1940). See Annot., 57 A.L.R.2d 802 (1958). Some states, however, allow a master to recover damages for injury to his servants caused by defendant's negligence. Note 24 *infra*.

no action for loss of the ship's use while it is laid up for repairs necessitated by defendant's negligence;⁵ and a workman has no action for loss of wages during a layoff resulting from damage negligently caused to his employer's plant.⁶ Turning to the field of misrepresentation, we find that an accountant who prepares an audit for his client is not liable to one who advances credit to the client in reliance on the audit and suffers loss because the accountant negligently represents the client's financial position to be far better than it is.⁷

Common threads run through these cases, but they do not all fall within the same conventional divisions of tort law. In each of them, the defendant's wrong consists of negligence occurring in the course of lawful conduct—an accidental by-product of legitimate and useful activity. Also, the loss to plaintiff in each case is economic rather than physical, and would be readily recoverable if the test of duty—or remoteness—usually associated with the law of negligence were applied.

The reasons for this difference in treatment of indirect economic loss and physical damage do not derive from the theory or the logic of tort law. Economic interests are recognized and protected in some situations; for example, recovery for loss of earning capacity,⁸ even when this is measured by fees or profits,⁹ is allowed in personal injury cases, and recovery for loss of use is granted when a chattel is damaged.¹⁰ These interests are often protected against negligence, as the examples already given indicate. Moreover, the injury suffered by the plaintiff in those cases that denied recovery was often foreseeable enough to satisfy the requirements imposed in physical injury cases under the heading of scope of duty or remoteness. In some of those cases this foreseeability was expressly assumed by the court,¹¹ and in others, what happened to plaintiff was an almost inevitable result of the original injury to the third

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

6. *Stevenson v. East Ohio Gas Co.*, 73 N.E.2d 200 (Ohio Ct. App. 1946); *cf. Byrd v. English*, 117 Ga. 191, 43 S.E. 419 (1903) (economic loss to power company's customer caused by third party's negligent injury to power lines); *Thompson v. Seaboard A.L. Ry.*, 165 N.C. 377, 81 S.E.2d 315 (1914) (negligent destruction of standing timber that plaintiff had profitable contract to cut).

7. *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931). As late as 1968 one court noted that no appellate court decision, English or American, had held an accountant liable to a third party for negligent misrepresentation. *Rusch Factors, Inc. v. Levin*, 284 F. Supp. 85, 90 (D.R.I. 1968). *But see Ryan v. Kanne*, 170 N.W.2d 395 (Iowa 1969).

8. 2 HARPER & JAMES § 25.8.

9. *Id.*

10. *Id.* § 25.7.

11. Foreseeability of the loss was expressly assumed in *Weller & Co. v. Foot & Mouth Disease Research Institute*, [1966] 1 Q.B. 569.

party.¹² To be sure, some of the earlier decisions reasoned that plaintiff's consequential injury was not to be anticipated and was, therefore, too remote to satisfy notions of proximate cause.¹³ But judges who have been unwilling to accept narrow and unrealistic views of what is foreseeable—or of what a jury may find to be unforeseeable—remain generally unwilling to allow recovery for indirect economic loss.¹⁴ The explanation for this reluctance, repeated in decisions over the years, is a pragmatic one: the physical consequences of negligence usually have been limited, but the indirect economic repercussions of negligence may be far wider, indeed virtually open-ended.¹⁵ As Cardozo put it in a passage often quoted, liability for these consequences would be "liability in an indeterminate amount for an indeterminate time to an indeterminate class."¹⁶

Before the merits of this reason for denying liability are discussed, a few things about the history of the rule should be noted. One is the remarkable parallel between the American decisions on this point and those in the British Commonwealth.¹⁷ These developments were largely

12. See, e.g., *Seavey, Chandler v. Crane, Christmas & Co. Negligent Misrepresentations by Accountants*, 67 L.Q. REV. 466, 472 (1951) ("one who negligently destroys a factory building . . . is not liable to the employees thrown out of work, even though the result was almost inevitable"); Comment, *Liability for Negligent Interference with Contract Relations*, 23 CALIF. L. REV. 420, 421 (1935); Note, *Employer's Action for Loss of Services: Extension of the Doctrine of Lumley v. Gye to Negligent Interference with Contracts*, 18 CORNELL L.Q. 292 (1933).

13. See, e.g., *The Federal No. 2*, 21 F.2d 313, 314 (2d Cir. 1927). For a discussion of the treatment of foreseeability in earlier cases see *Flint v. Robins Dry Dock & Repair Co.*, 13 F.2d 3, 6 (2d Cir. 1926), *rev'd on other grounds*, 275 U.S. 303 (1927); Comment, *Liability for Negligent Interference with Contract Relations*, 23 CALIF. L. REV. 420, 421 (1935).

14. See sources cited notes 11-13 *supra* and note 39 *infra*.

15. An early statement of this position appears in *Connecticut Mut. Life Ins. Co. v. New York & N.H.R.R.*, 25 Conn. 265, 275 (1856). See also *Isbrandtsen Co. v. Local 1291*, ILA, 204 F.2d 495, 498 (3d Cir. 1953); *Stevenson v. East Ohio Gas Co.*, 73 N.E.2d 200, 203-04 (Ohio Ct. App. 1946); *Weller & Co. v. Foot & Mouth Disease Research Institute*, [1966] 1 Q.B. 569, 577; *Cattle v. Stockton Waterworks Co.*, L.R. 10 Q.B. 453, 457 (C.A. 1875); note 39 *infra* and accompanying text.

16. *Ultramares Corp. v. Touche*, 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931).

17. A leading English case is *Cattle v. Stockton Waterworks Co.*, L.R. 10 Q.B. 453 (C.A. 1875), in which defendant's negligence in allowing its pipes to leak increased the plaintiff's cost under a contract with a third person to construct a tunnel. In denying recovery, the court said that if the defendant were liable here, then in such a case as *Fletcher v. Rylands*, L.R. 1 Ex. 265 (1866), the defendant would be liable not only to the owner of the drowned mine or those workmen whose tools were lost, "but also to an action by every workman and person employed in the mine, who in consequence of its stoppage made less wages than he would otherwise have done." *Id.* at 457. Compare this dictum with *Stevenson v. East Ohio Gas Co.*, 73 N.E.2d 200 (Ohio Ct. App. 1946). In *Societe Anonyme de Remorquage a Helice v. Bennetts*, [1911] 1 K.B. 243, plaintiff was denied recovery for economic loss suffered when defendant negligently sank a barge that plaintiff was profitably engaged in towing. In *Chargeurs Reunis Compagnie Francaise de Navigation a Vapeur v. English & Am. Shipping Co.*, 9 Lloyd's List L.R. 464 (C.A. 1921) time charterers of a ship were

independent of each other; the courts in our country rarely have cited British authority, and British courts rarely cite our decisions.¹⁸ Nevertheless, the developments have been similar even to details in drawing the line on recovery. Thus, British decisions,¹⁹ which have allowed recovery for economic consequences to one whose property was physically injured,²⁰ but denied recovery for similar loss to one whose property suffered no physical impairment,²¹ have an almost exact American analogue.²²

Another interesting phase of the rule's history occurred a generation or so ago when there developed a lively movement in America, mostly among commentators, to expand recovery for indirect economic loss in a way that would bring it more closely into line with the law governing physical injury.²³ The logical inconsistency between the rules

denied recovery for hire they were compelled to pay the owner during the time it was laid up for repairs necessitated by defendant's negligence. *See also* *Kanstantinidis v. World Tankers Corp.*, [1967] P. 341, 362 ("There is no reported case, so far as I am aware, in the long history of chartering where a time charterer has recovered damages for pecuniary loss because of damage by a third party to the chartered vessel"). Perhaps the leading modern case is *Weller & Co. v. Foot & Mouth Disease Research Institute*, [1966] 1 Q.B. 569. Defendant negligently allowed cattle in vicinity of its premises to become infected, which resulted in temporary closing of the Guildford and Farnham cattle markets. Plaintiffs, cattle auctioneers doing business in these markets, were denied recovery for loss of commissions during the period of the closing. In the field of public employment the same rule is now applied. *Attorney General for N.S.W. v. Perpetual Trustees Co.*, [1955] A.C. 457 (P.C.); *Inland Revenue Comm's v. Hambrook*, [1956] 2 Q.B. 641.

18. There are occasional references to outstanding American decisions, such as *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931). *See, e.g.*, *Hedley Byrne & Co. v. Heller & Partners*, [1964] A.C. 465, 487, 488, 537 (H.L.).

19. These decisions have been criticized as arbitrary. *See Hedley Byrne & Co. v. Heller & Partners*, [1964] A.C. 465, 517 (H.L.) (Lord Devlin: "The interposition of the physical injury is said to make a difference. I can find neither logic nor common sense in this . . . I am bound to say, my Lords that I think this to be nonsense. It is not the sort of nonsense that can arise even in the best system of law out of a need to draw nice distinctions between borderline cases. It arises, if it is the law, simply out of a refusal to make sense").

20. *British Celanese v. A.H. Hunt, Ltd.*, [1969] 1 W.L.R. 961 (Q.B.); *S.C.M. (United Kingdom) Ltd. v. W.J. Whittall & Son, Ltd.*, [1970] 3 All E.R. 245 (C.A.) (contrast the statement of Denny, M.R., at 249-50, with that set forth in note 19 *supra*).

21. *Electrochrome, Ltd. v. Welsh Plastics, Ltd.*, [1968] 2 All E.R. 205 (Q.B.).

22. In *Byrd v. English*, 117 Ga. 191, 43 S.E. 419 (1903), recovery was denied for loss of profits suffered when the power to plaintiff's printing plant was cut off as a result of negligent damage to a utility company's equipment. In *Newlin v. New England Tel. & Tel. Co.*, 316 Mass. 234, 54 N.E.2d 929 (1944), recovery was allowed when a similar injury caused spoilage of plaintiff's mushroom crop. *See Comment, supra* note 1, at 284-85.

23. The leading article was Carpenter, *Interference with Contract Relations*, 41 HARV. L. REV. 728 (1928); *cf.* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 993 (1st ed. 1941) (raising the questions whether the restrictive rule may not be too narrow and whether the law may not be expected to move in the direction of allowing recovery for foreseeable economic loss, and adding that "[t]here is some slight authority looking rather vaguely in this direction"). *See also* F. HARPER, *LAW OF TORTS* 477-78 (1933) ("There is authority to support the rule of liability for negli-

governing recovery in the two fields was stressed as a significant factor in the movement. Judicial support for extension of liability was found in the decisions that allowed the master to recover for injury to his servant caused by the defendant's negligent conduct²⁴ and in those that held a telegraph company liable for economic loss to the addressee caused by negligent nondelivery, delay, or garbling of the message.²⁵ This movement, however, was unsuccessful and even lost the support of some of its leading adherents.²⁶

This failure of the movement to gain momentum takes on added significance when it is put into context. It coincided with a veritable ground swell in the law of negligence that pushed liability for physical injuries toward the full extent of what was foreseeable and shattered ancient barriers to recovery based on limitations associated with privity of contract and similar restrictive concepts.²⁷ The very judge who so

gently inducing a breach of contract or otherwise interfering with contract relations. Undoubtedly such a rule is sound, and it is likely to be followed in future cases"); Note, *Negligent Interference with Contractual Relations*, 45 *DICK. L. REV.* 211 (1941); Note, *Negligent Interference with Contractual Relations*, 36 *KY. L.J.* 142 (1947).

24. The master's action for damages based on defendant's negligent injury to his servant, *per quod servitium amisit*, is recognized at least in some states, as having continued existence. It is looked on, however, as a vestige of the time when service was regarded as a status, and there is a marked reluctance to apply the concept "so as to permit recovery for injury to other than menial or domestic servants who are in fact members of the master's household . . ." Annot., 57 *A.L.R.2d* 802 (1958). For typical decisions refusing to extend the doctrine to modern kinds of employment relationships see *Inland Revenue Comm. v. Hambrook*, [1956] 2 *Q.B.* 641; *United States v. Standard Oil Co.*, 332 *U.S.* 301 (1947); sources cited note 4, *supra*; *cf.* *Tidd v. Skinner*, 225 *N.Y.* 422, 122 *N.E.* 247 (1919). The only aspects of the ancient rule that have modern significance are the parent's action for loss of his child's services and the spouse's action for loss of consortium resulting from injury to the other spouse. Here there has been expansion of liability. See *Hitaffer v. Argonne Co.*, 183 *F.2d* 811 (*D.C. Cir.* 1950); Lambert, *Trends and Developments*, 33 *A.T.L.J.* 378, 390 (1970). This, however, has had no tendency to expand the remedies of business employers. See Annot., 57 *A.L.R.2d* 802 (1958).

25. Professor Carpenter relied in part on this line of cases. Carpenter, *Interference with Contractual Relations*, 41 *HARV. L. REV.* 728, 741 (1928). Other bases, however, exist for these decisions that have no relevance to the present problem. See Comment, *supra* note 22, at 296. Professor Carpenter also relied on English cases allowing a governmental unit to recover for expenses incurred because of defendant's negligently injuring a public employee. *E.g.*, *Bradford Corp. v. Webster*, [1920] 2 *K.B.* 135; see 41 *HARV. L. REV.* 728, 738 (1928). These decisions have been deprived of all authority by later decisions. See Comment, *supra* note 22, at 296; 75 *U. PA. L. REV.* 770 (1927); 27 *W. VA. L.Q.* 81 (1920); note 17 *supra*.

26. See Harper, *supra* note 1, at 892 (concluding that "as a general rule, liability for negligent interference with contractual relations does not exist"); PROSSER § 129. Compare "There is actually, however, very little [authority] looking even vaguely in this direction," with statement made 30 years earlier quoted in note 23 *supra*.

27. See, *e.g.*, 2 *HARPER & JAMES* §§ 18.3, 18.5, chs. 27-29 (1956, Supp. 1968) (developments in area described). Perhaps the most spectacular development has been in the field of products liability. See, *e.g.*, Prosser, *The Fall of the Citadel*, 50 *MINN. L. REV.* 791 (1966); Wade, *Strict Tort Liability of Manufacturers*, 19 *SW. L.J.* 5 (1965).

articulately declared the limitation on the scope of recovery for indirect economic loss was the leading spokesman for those who would have abolished the old restrictions that stopped recovery for physical injury short of what a reasonable man would anticipate.²⁸

The ultimate significance of these points of history is, of course, equivocal, but to those of us who believe in the essential long-run soundness of the judicial process, they suggest that the restrictive rule may represent good sense and that the pragmatic explanation offered in its defense deserves careful consideration.

II. PRAGMATIC OBJECTION TO RECOVERY FOR ECONOMIC LOSS

We come then to a consideration of the merits of the pragmatic objection and start by exploring some preliminary matters that should help in guiding the final inquiry. In this part of the discussion it is assumed that liability should be imposed for the foreseeable consequences of negligence unless there is good reason for withholding it.

It is submitted, to begin with, that the pragmatic objection is a legitimate kind of consideration. Logical symmetry of legal doctrine is a desirable thing, but the law's solutions must actually work. The need to meet a pragmatic test may call sometimes for a compromise between competing concepts that does not satisfy entirely the logic of either one. If a proposed rule would in fact impose ruinous consequences on useful activity, that fact should be *considered* in deciding whether the proposal should be accepted; indeed, this consideration should prevail if it is not counterbalanced by others.

On the other hand, the fear of crushing useful activity by liability too vast to be borne is no new thing in the law, and its history has not been altogether savory. This consideration, like the fabled cry of "wolf," often has been invoked when later events proved that the fear was groundless. Sometimes the fear has been voiced by a dissenting minority, and the decision overruling them has not been attended by the dire consequences that the dissenters predicted.²⁹ Sometimes the fear has

28. Cardozo pointed out in *Ultramares*: "The assault upon the citadel of privity is proceeding in these days apace." 255 N.Y. at 180, 174 N.E. at 445. Of course, the same eminent Judge already had written the opinions in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) and *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922).

29. A classic example is *Ashby v. White*, 92 Eng. Rep. 126 (K.B. 1703), 92 Eng. Rep. 710, 712 (noting action of House of Lords upholding C.J. Holt's position). This was an action for damages because of wrongful interference with plaintiff's right to vote in a parliamentary election. In his opinion upholding the action C.J. Holt said, "and it is no objection to say, that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense." 92 Eng. Rep. at 137.

prevailed for a while,³⁰ to be overruled by a later judicial generation.³¹ When this has happened, the fear that stayed the hand of liability in the earlier day has often not been realized when liability finally was imposed. This points to a danger: the factual basis for the fear must not be accepted too readily and should be examined critically on the basis of whatever data are at hand. The caveats, however, do not all run in one direction. As the fable itself suggests, although the cry of "wolf" may often be false, there *are* wolves, and wolves *are* dangerous. One should not blandly assume that it is impossible for a broad rule of liability to cripple desirable activity just because in other cases some rules of liability have not had this consequence. Another caveat should be noted. In those cases in which liability has been denied for a substantial period of time and then is imposed by a decision overruling the earlier restrictive ones, the later experience may not show that the fear of dire consequences on which the earlier decisions were based was a groundless fear at the time it originally prevailed. The fact, for example, that a mid-twentieth century economy can absorb modern extensions of products liability does not necessarily show that the mid-nineteenth century economy could have done so.

Another feature of the pragmatic consideration is that it is, at least in part, a species of the slippery-slope or opening-wedge argument. The fear that dire consequences will follow liability is often in part a fear that if recovery is allowed in *this* case, which by itself might be tolerated, the principle that allows it has no stopping place short of absurd and patently intolerable consequences. There are many possible answers to this kind of argument. One response is to show that there is a sensible and practical way to limit the principle to allow recovery in the present case and, at the same time, exclude it in cases assumed to be absurd. Thus, in *Watkins' Case*,³² in which recovery was first allowed for breach of an unsealed executory agreement, Justice Martin objected that "if this action be maintainable *sur cest matiere*, for every broken covenant in the world a man shall have an action of Tresspass." The answer that the law came to give to this objection was the doctrine of consideration,

30. This was true in the case of *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842), which held sway both in England and America for so many years.

31. The leading cases that departed from settled authority were *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); *Carter v. Yardley & Co.*, 319 Mass. 92, 64 N.E.2d 693 (1946).

32. *Watkins' Case*, Y.B. 3 Hen. 6. f.36b, pl. 33 (C.P. 1425) (Fifoot transl.) as reported in R. FIELD & B. KAPLAN, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 254-56 (2d ed. 1968).

which draws a line that excludes at least some of the absurdities that an unlimited rule would embrace.³³

This points up a lesson: Even if liability for indirect economic consequences of negligence may in some cases be too broad and open-ended to be endured, care should be taken to see whether that is true in all types of situations; if it is not true, one must examine whether a rule may be fashioned to separate the wheat from the chaff.

In this discussion it has been assumed that if the pragmatic consideration has any validity, it is in the field of indirect economic loss rather than that of physical damage. As one commentator put it, "only a limited amount of physical damage can ever ensue from a single act, while the number of economic interests a tortfeasor may destroy in a brief moment of carelessness is practically limitless."³⁴ There may be a good deal of truth in this statement, but surely it is an oversimplification. Even before the awful potential of atomic energy was understood, man had witnessed such terrible urban conflagrations as the London and Chicago fires. On the other hand, there are some situations in which economic loss—or at least a given type of economic loss—indirectly caused by negligence is not only foreseeable, but also just as limited as the physical consequences would be.³⁵ To a certain extent the present law accommodates these facts. There have been rules restricting liability for conflagration more narrowly than generally applicable tort principles would limit it,³⁶ and legislative provisions for atomic holocaust have the practical result of limiting the amount for which a private entrepreneur will be liable.³⁷ Moreover, indirect economic loss is recoverable in *some* cases in which circumstances define its extent, although this results from rules that were not reasoned out in these terms.³⁸ All this suggests that the prevailing distinction between indirect economic loss and physical

33. A similar development occurred in *Pasley v. Freeman*, 100 Eng. Rep. 450 (K.B. 1789), in which recovery was first allowed for fraud between parties not in privity with each other. To the objection that the imposition of liability here would open the door to recovery for any "bare naked lie," the answer was the development of the requirements for an action of deceit. *Id.* at 453.

34. Comment, *supra* note 1, at 298.

35. See notes 58 & 59 *infra* and accompanying text.

36. *E.g.*, *Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928) (water company not liable to property owner whose building was destroyed by fire because of defendant's negligent failure to furnish water in manner required by its contract with city); *Ryan v. New York C. R.R.*, 35 N.Y. 210 (1866) (limiting the extent of liability for the negligent spread of fire to the first fire set).

37. See Bangs, *The Price-Anderson Act: A Half Billion Dollars of Federal Indemnity*, 47 A.B.A.J. 1178 (1961); *cf.* Nuclear Installations Act 1965, 13 & 14 Eliz. II c. 57 § 16(1) (liability of "any person . . . in respect of any one occurrence . . ." limited to £5,000,000).

38. See notes 24 & 25 *supra*.

damage is probably a crude and unreliable one that may need re-examination if a limitation on liability for pragmatic reasons is to be retained.

Finally, since the current limitation involves pragmatic considerations, then *all* the factors that impinge practically on the situations covered by the rule should be examined, and this definitely includes certain questions of insurance.

III. APPRAISAL OF PRAGMATIC OBJECTION

We turn next to more specific aspects of our inquiry, and in this part it becomes apparent at once that definitive answers are not available at present. Only tentative answers will be offered, and these may suggest even more questions.

Although reliable quantitative data are lacking, it can be seen on the basis of common experience that some classes of indirect economic loss are indeed very broad and that this breadth will be difficult to measure after the event and even harder to forecast. Thus, in a recent English case, cattle auctioneers sought to recover for commissions lost when local markets closed because a threat of an epidemic of animal disease resulted from defendant's negligence. That court observed:

[I]n an agricultural community the escape of foot and mouth disease virus is a tragedy which can foreseeably affect almost all businesses in that area. The affected beasts must be slaughtered, as must others to whom the disease may conceivably have spread. Other farmers are prohibited from moving their cattle and may be unable to bring them to market at the most profitable time; transport contractors who make their living by the transport of animals are out of work; dairymen may go short of milk, and sellers of cattle feed suffer loss of business.³⁹

A moment's reflection will reveal that this list is only suggestive, with no pretense of completeness. Whether the potential breadth of this liability is so great that it would be insupportable if assessed against individual enterprises may not be altogether clear in every case. The potential breadth, however, taken together with the uncertainty about the extent of each plaintiff's injury, undoubtedly will have an adverse effect upon the feasibility of insuring against liability of this nature.

This brings us to the matter of insurance. In some fields of tort law the deterrent effect of liability looms large and fulfills an important function of the law—to contribute to the control of human behavior. In

39. *Weller & Co. v. Foot & Mouth Disease Research Institute*, [1966] 1 Q.B. 569, 577 (Widgery, J.). Similar statements made in industrial contexts appear in *Isbradtsen Co. v. Local 1291*, ILA, 204 F.2d 495, 498 (3d Cir. 1953); *Stevenson v. East Ohio Gas Co.*, 73 N.E.2d 200, 203-04 (Ohio Ct. App. 1946).

these fields insurance is often legally unobtainable. In the field of accidental injuries, however, the deterrent aspect of law is much less significant and is overshadowed by the need to administer efficiently losses that already have occurred as the more or less inevitable by-product of modern life. Since the wide and systematic distribution of losses according to insurance principles tends to minimize the social disutility of these losses, the presence of insurance is welcome, and certain facts about it become highly relevant in assessing pragmatic considerations favoring or opposing liability.

For present purposes, there are two basic kinds of insurance: liability—or third-party—insurance and loss—or first-party—insurance. Whenever the law imposes liability, potential defendants may protect themselves, at least in theory, by purchasing liability insurance. Regardless of whether the law imposes liability, however, potential accident victims may, at least in theory, protect themselves by first-party insurance against loss from this source, or the state may protect them by some form of social insurance. To the extent that the lawmaker—court or legislature—has a choice either to impose or withhold liability on pragmatic grounds, the following considerations seem relevant:

- (a) A liability system based on fault is the most expensive way to administer accident losses. It has been estimated that the benefits received under this system amount to only about 44 percent of its total cost.⁴⁰ In the area of private loss insurance the benefits received are about 82 percent⁴¹ of the total cost, and in social insurance programs the analogous ratio is almost 98 percent.⁴²

40. A. CONRAD, J. MORGAN, R. PRATT, C. VOLTZ, & R. BROMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS* 59 (1964). The percentages are computed from table 1-4. In the case of workmen's compensation, which is a liability system not based on fault, the analogous ratio is a little under 70%.

41. *Id.*

42. *Id.* The authors are careful to point out that these figures do not necessarily measure the relative overall efficiency of the respective systems because they "perform quite different functions, so that their expense rates are not really comparable." *Id.* at 60. This, of course, is true; many other values may be at stake in the choice. The great discrepancy in dollar costs, however, is a relevant and important factor, to say nothing of the burden that a liability system imposes on the courts. In Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 *YALE L.J.* 1172, 1178 (1952), the related point was made that property insurance—a form of loss insurance—"is a better risk distributing device than liability insurance for two reasons": (1) a property owner may easily determine how much insurance he needs while an enterprise can only guess at the amount of damage he may cause; (2) "property losses are adjusted more favorably (on the average) than liability losses." Keeton and O'Connell chose first-party insurance as opposed to third-party insurance to implement their proposed basic protection plan, partly for the reason that a claimant fares better dealing with a "related" insurance company—for example, one of which he is a customer—than with a company to which he is a stranger. See R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* 343-51 (1965).

(b) Serious practical problems face insurers in handling insurance against potentially wide, open-ended liability. From an insurer's point of view it is not practical to cover, without limit, a liability that may reach catastrophic proportions, or to fix a reasonable premium on a risk that does not lend itself to actuarial measurement.⁴³ It is, of course, possible to impose liability without regard to its practical insurability. If loss administration rather than deterrence is the principal aim, however, then lack of insurability should be considered an important factor in its own right and also a reflection of the difficulties that face enterprises forced to become self-insurers by the unavailability of insurance on the market.

These considerations tend to favor a rule that utilizes loss insurance rather than liability based on fault as a means to secure compensation for accident victims.⁴⁴ They tend to support, therefore, the present rule of nonliability for the indirect economic consequences of negligence, leaving those exposed to the risk to cover it by first-party insurance. A third consideration, however, tends to look in the opposite direction.

(c) In many situations first-party insurance is not readily available; in others it is available but not widely held. In either event a rule of nonliability will mean in practice that losses are not put in the channels of wide distribution, but are borne by the victims, unless the tab is picked up by some form of social insurance.

This fact may have different significance in different contexts. Many indirect economic losses fall upon businesses that are accustomed and able to make calculated provisions for losses of this kind. For them,

43. Mr. A.V. Alexander, one of the managing directors of Sedgwick, Collins & Co., Ltd., London, read a paper at the London workshop, described in the initial note to this article, in which he pointed out that "[f]rom the Insurers' standpoint a catastrophe exposure may be defined as one where the cost of a possible claim is out of all proportion to the premium income derived from the whole of the class of insurance in question." He cited as examples a massive power failure and a major atomic incident. In both these situations British law has imposed limits that keep the problem from getting out of hand. *Cf.* note 37 *supra*. But if the limits were removed and liability extended to indirect financial loss in either case "the aggregate possible exposure would run into unimaginable sums" that could not feasibly be covered by liability insurance at reasonable rates, or at all. *Cf.* Morris, *supra* note 42, at 1178.

44. Limitations on liability found in some of the fire cases perhaps may be justified on this ground. Note 36 *supra*; see Morris, *supra* note 42, at 1177-78. For arguments for and against a similar view in a different situation see Connolly, *The Liability of a Manufacturer for Unknowable Hazards Inherent in His Product*, 32 *INS. COUNS. J.* 303, 307 (1965); James, *The Untoward Effects of Cigarettes and Drugs; Some Reflections on Enterprise Liability*, 54 *CALIF. L. REV.* 1550, 1556-57 (1966); *cf.* Hellner, *Tort Liability and Liability Insurance*, 6 *SCAND. STUDIES IN LAW* 129, 139-41 (1962).

lack of insurance may reflect an intelligent business judgment that insurance coverage is not worth the premium. If that is true, it casts serious doubt on a premise heretofore assumed, namely, that there is no good reason—apart from what I have called the pragmatic objection—to differentiate between purely economic losses and physical injury to person and property. If the business community accepts a rule of nonliability for indirect economic losses without securing insurance protection against them by a relatively inexpensive method, then this fact at least suggests that these losses do not present a social problem serious enough to justify the cost to society in providing for their compensation by the most expensive method in its arsenal—liability based on fault.⁴⁵

Sometimes, of course, indirect economic loss may occur in a different form, like a wage loss,⁴⁶ and the failure to protect against it by first-party insurance scarcely suggests its social unimportance. Here the affirmative case for liability is strongest, but the pragmatic objection to liability is also strong.⁴⁷ Perhaps the optimum solution of this problem is to be found in some form of social insurance to take care of cases of great hardship.

(d) If first-party insurance is available and is widely held, then the problem becomes to a large extent one of whether a loss once paid by an insurer should be shifted again to another group of insurers, or to self-insurers.

Obviously, this second shifting of the loss represents an extra expense and a burden on the judicial machinery, and when it invokes liability based on fault, the expense and burden are likely to be substantial. After a loss already has been put into the channels of wide distribution through the device of loss insurance, there must be a very good reason indeed to justify again burdening the parties and society with this

45. A number of the participants in the London workshop also felt that the integrity of the body and the integrity of tangible property are entitled to a higher priority in the scale of man's proper values than the integrity of intangible wealth.

46. See *Stevenson v. East Ohio Gas Co.*, 73 N.E.2d 200 (Ohio Ct. App. 1946); see text accompanying note 6 *supra*.

47. Consider, for example, the power failure a few years ago that caused widespread industrial shutdown over New England and New York State. The aggregate wage loss resulting from this must have been staggering. Under existing law, small portions of it were borne either by individual employees or by employers, depending upon contract provisions. In his paper prepared for the London workshop, Mr. Alexander gave the economic consequences of a massive power failure as an example of open-ended, virtually uninsurable liability that might be, but is not, imposed. Cf. note 43 *supra*.

extra expense.⁴⁸ The pursuit of fault may be a sufficient reason in contexts in which the law can and should achieve individual deterrence, as in the case of some intentional or deliberate torts. In the field of accidents, however, this is not the case to any material extent, especially when it is not the blameworthy party who has to pay, but only another set of insurers. It is significant that insurers themselves often have recognized the waste entailed in the extra step of subrogation and voluntarily have foregone subrogation rights by "knock for knock" agreements,⁴⁹ and that in some countries the loss insurer's rights against third-party tortfeasors, through subrogation or otherwise, are disallowed or curtailed.⁵⁰

There is admittedly much incompleteness and speculation in the above discussion. That is due in large measure to the lack of available hard facts. If allowance is made for shortcomings, it still seems reasonable to conclude, on balance, that a prima facie case has been made for a rule denying liability for the indirect economic consequences of negligence, at least in those situations in which the pragmatic objection is valid. Since this is the present rule, it appears even clearer that the burden of proof, naturally resting on those who would change it, has not been met.

IV. LIMITS OF THE PRAGMATIC OBJECTION

It remains to be considered whether the present rule may be too broad—whether its sweep may exclude liability in some situations

48. See Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1535-37 (1966); cf. W. BLUM & H. KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM 84 (1965). This was the position originally taken by the author in James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L. REV. 537, 557-63 (1952).

49. The existence of this practice among insurers in some fields was pointed out in Mr. Alexander's paper at the London workshop. See also Hellner, *supra* note 44.

50. Rights of subrogation in Scandinavian law are limited to certain situations. See A. CONRAD, J. MORGAN, R. PRATT, C. VOLTZ, & R. BROMBAUGH, *supra* note 40, ch. 12; Hellner, *supra* note 44, at 140. Recent legislation in Israel gives an independent right of action to third persons who incur expenses or render services on account of persons injured by a defendant's negligence. "There is, however, an exception. A body corporate carrying on insurance business which repairs the harm under an insurance contract with the victim, is not entitled to recover under the Law. Paying insurance is the specific undertaking of insurers and part of the risks of their business. Their remuneration is, and should be, the premium paid by their clients. It would be a privileged business indeed if insurers could get the premium and at the same time be reimbursed after having made payment under the contract of insurance." Shalgi, *A Benefactor's Right of Action Against a Tortfeasor: A New Approach in Israel*, 29 MODERN L. REV. 42, 45 (1966). This line of reasoning may overlook the possibility that amounts recovered through subrogation claims might tend to reduce premiums; but since the possibility is a remote one in most cases, it may not seriously impair the force of the argument. See Fleming, *supra* note 48, at 1536.

to which the pragmatic objection has no valid application. Take, for example, the case of a ship's charterer who loses its use, and even may have to pay hire, during the time when the ship is laid up for repairs necessitated by defendant's negligence. If there were no charter, the owner who lost the vessel's use could recover for that loss measured by its reasonable value.⁵¹ If the defendant were liable to the charterer instead, it would not be a wide and open-ended liability, but a finite one that the tortfeasor or his liability insurer would expect to pay under frequently occurring circumstances. There seems to be no valid reason why defendant should escape this ordinary item of damage just because the loss in this case happened to be suffered by one who had no proprietary interest in the ship.⁵² What has been called the pragmatic objection simply has no application. There are some practical—or "pragmatic"—difficulties, but they are of a different nature and a lower order of magnitude. There are questions of proper parties, of the proper measure of damages, of the protection of defendant against multiple vexation and double liability, and of protection of the settlement process.⁵³ All these difficulties, however, are readily solvable by familiar procedural devices. The presence of both the charterer and owner as parties plaintiff in the suit could be required, and this would answer proper parties and multiple vexation questions.⁵⁴ The measure of damages, in any event, should be limited to reasonable value. Settlement in good faith with either party

51. *The Aurora*, 64 F. Supp. 502 (E.D. La. 1945), *aff'd sub nom.*, *Lojer v. Protich*, 153 F.2d 224 (5th Cir. 1946). See Harper, *supra* note 1, at 886.

52. British and American courts seem to agree that in the ordinary case there is no such interest in the ship. *Chargeurs Reunis Cie. Francaise de Navigation a Vapeur v. English & American Shipping Co.*, 9 Lloyd's List L.R. 464 (C.A. 1921); *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927).

53. In *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), the Supreme Court may have been influenced by the fact that the defendant already had settled with and obtained a release from the owners. It appears from the opinion of the court of appeals, however, that this settlement was made after the defendant had been given full notice of the charterer-plaintiff's claim and that it was intended by the parties to cover only the owner's interest. *Flint v. Robins Dry Dock & Repair Co.*, 13 F.2d 3, 4, 6 (2d Cir. 1926).

54. In *Agwilines, Inc. v. Eagle Oil & Shipping Co.*, 153 F.2d 869, 873 (2d Cir. 1946), Judge Clark dissented and suggested that the charterer might be viewed as an assignee or subrogee. "Nevertheless, the problem of excessive suits is still present in the case of the partial assignee or subrogee; and it is met in various ways, such as the required joinder of all persons in interest . . . or, in some jurisdictions, suit only by the original party. See cases collected in my text on Code Pleadings, 1928, 103, 110. Under modern principles of free joinder, there is much to be said for the first alternative of required joinder, with the added proviso that the defect may be waived by a defendant who does not assert it." *Id.* Judge Clark was the principal architect of the Federal Rules of Civil Procedure and the foremost procedure scholar of at least his generation. The difference between his views and those of the majority in this case did not turn on any disagreement upon the point treated in this article.

should be held to bar the other on the very appropriate analogy from the law of bailment.⁵⁵

Much the same is true in cases in which an employer is obliged to pay money to or for the account of his employee when he has been injured by defendant's negligence.⁵⁶ If these payments represent items that the employee is entitled to recover, or would be if it were not for the payment, then the pragmatic objection has no legitimate application. Whether recovery should be allowed in these cases, and if so by whom, may present very real problems that are as sensitive as any in the law of damages.⁵⁷ No attempt will be made to treat them here. The present point is that recovery should not be denied simply because in *other* situations indirect economic losses may be too wide and open-ended. In this situation they are just as finite when sought by the employer as they would be if sought by the employee.

In other cases there will be just a single loss, although the plaintiff's identity⁵⁸ and possibly the time of his injury⁵⁹ are clouded by uncertainty.

55. PROSSER at 96; *cf.* *The Winkfield*, [1902] P. 42 (C.A.).

56. *See* notes 4 & 17 *supra*.

57. The author's position is suggested in James, *supra* note 48, and 2 HARPER & JAMES §§ 25.19-.23. *See also* NEW YORK LAW REVISION COMMISSION, REPORT AND RECOMMENDATIONS 221-55 (1957); Fleming, *supra* note 48; Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1962); Schwartz, *The Collateral-Source Rule*, 41 B.U.L. REV. 348 (1961); Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1964).

58. Thus, in *M. Miller Co. v. Central Contra Costa Sanitary Dist.*, 198 Cal. App. 2d 305, 18 Cal. Rptr. 13 (1961), defendants were hired as engineers to make a report on soil conditions for the use of bidders on a sewer construction job. Plaintiff, the successful bidder, lost money because of negligent errors in the report. In that case the successful bidder was the very one, and the only one, likely to suffer the loss, although his identity could not be known when defendant made its error. *See* Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231, 249-50 (1966). The California court allowed recovery in this situation, as did the district court in *Texas Tunneling Co. v. City of Chattanooga*, 204 F. Supp. 821 (E.D. Tenn. 1962), *rev'd*, 329 F.2d 402 (6th Cir. 1964). Prosser hazards a guess that "of the two cases it is the *Miller* decision which is the more likely to be followed." Prosser, *supra*, at 250; *cf.* *Hedley Byrne & Co. v. Heller & Partners* [1964] A.C. 465; *Walnut Creek Aggregates Co. v. Testing Eng., Inc.*, 248 Cal. App. 2d 690, 56 Cal. Rptr. 700 (1967); *Ryan v. Kanne*, 170 N.W.2d 395 (Iowa 1969).

59. In *Rozny v. Mornul*, 43 Ill. 2d 54, 250 N.E.2d 656 (1969), the negligent mistake of a surveyor in depicting the boundary of a subdivision lot caused injury to a remote purchaser of the lot. In allowing recovery the court said: "The situation is not one fraught with such an overwhelming potential liability as to dictate a contrary result, for the class of persons who might foreseeably use this plat is rather narrowly limited, if not exclusively so, to those who deal with the surveyed property as purchasers or lenders. Injury will ordinarily occur only once and to the one person then owning the lot." *Id.* at 66, 250 N.E.2d at 662. While all this is true, loss in such a case may occur a very long time after the original error. *See, e.g., Howell v. Betts*, 211 Tenn. 134, 362 S.W.2d 924 (1962) (24 years later). This is one kind of open-endedness that makes an insurer unhappy, but it seems doubtful that liability should be denied for this reason alone. Compare the trend to reject the mere passage of time as an arbitrary limitation on liability in cases of defective products or premises. *E.g., Pryor v. Lee C. Moore Corp.*, 262 F.2d 673 (10th Cir. 1958) (derrick collapsing because of defective original weld after 15 years of safe use); *see HARPER & JAMES* 237 (Supp. 1968).

When that is the case, liability should not be denied on the basis of the pragmatic objection, and when all the elements usually required for an action grounded on negligence are present, it is submitted that liability should be imposed.⁶⁰

60. Conclusions somewhat similar to these can be found in Prosser, *supra* note 58; P.S. James, *The Fallacies of Simpson v. Thompson*, 34 MODERN L. REV. 149, 155-62 (1971). I gladly acknowledge my debt to these sources.