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THE FAILED PROMISE OF A GENERAL THEORY OF PURE ECONOMIC LOSS: AN ACCIDENT OF HISTORY?

Anthony J. Sebok*

INTRODUCTION

A festschrift in honor of the work and career of Robert Rabin offers the tort scholar an overwhelming range of topics from which to draw inspiration. Rabin’s range and contributions are broad. In this Article, I have chosen to closely examine Rabin’s contributions to the problem of pure economic loss in American law. Although this Article is critical of some of Rabin’s claims at various points in his career, I hope the closeness with which I have attempted to read his work in this area indicates how deep my respect is for the work he has done.

Between 1985 and 1986, Robert Rabin and Gary Schwartz each published an article on the emerging issue of pure economic loss in American tort law.1 The near-simultaneous timing of these articles may have been a quirk of academic calendaring—Schwartz later remarked that “the only reason Rabin and I chose to address the problem [was] that the two of us were invited to attend a conference—in England—on the topic of negligence law and economic loss.”2 Regardless of the reason for the simultaneous examination of the topic, the contrast between Rabin’s and Schwartz’s approaches is interesting for a number of reasons. First, as I shall attempt to demonstrate, Rabin and Schwartz differed in important ways over the proper interpretation of claims for pure economic loss in tort law. Second, Rabin’s view of pure economic loss in tort law has shifted, as evidenced by his

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next major treatment of the topic in 2006. This Article will consider the significance of that shift.

II. THE PROMISE OF J’AIRE

Like many American tort scholars, Schwartz was skeptical of the significance of pure economic loss. He wrote in 2003 that not much had changed since he wrote about the subject in 1986 and that it “remain[ed] a backwater within the discourse of American tort law.” His 1986 article offered two reasons for this. The first was that “any effort to formulate any single general theory” of pure economic loss was doomed to failure. There are, Schwartz noted, too many diverse kinds of torts that involve economic injuries, and nothing binds them together, despite the recent ambitious attempts by “a number of scholars.” This was classic Schwartz—the criticism of tort theorists who sought to reduce all of torts to a single grand theory characterized some of his most important writing.

But Schwartz’s critique was more than a plea for pluralism. He feared that “a generic tort for the negligent infliction of economic harm” would risk “improperly ignoring or disparaging the authority and intelligence” of existing legal doctrines that already inhabited the world of economic relations and loss. Although the immediate examples Schwartz offered to illustrate his point were the torts of malicious prosecution and abuse of process, the balance of his article reveals his true concern—that the “deployment of tort generalizations” could interfere with another very important field of private law: contract law. His article used two California cases to illustrate his point:

4. Schwartz, Economic Loss, supra note 1, at 37–40; see also Bruce Feldthusen, What the United States Taught the Commonwealth About Pure Economic Loss: Time to Repay the Favor, 38 Pepp. L. Rev. 309, 313 (2011) (“[P]ure economic loss had not yet been recognized as an organizing category of negligence law. . . . My supervisors simply did not recognize the term.”).
5. Schwartz, American Tort Law, supra note 2, at 96.
6. See Schwartz, Economic Loss, supra note 1, at 38.
8. See, e.g., Gary T. Schwartz, Mixed Theories of Tort Law: Affirming both Deterrence and Corrective Justice, 75 Tex. L. Rev. 1801 (1997) (arguing that tort law can be explained only by a blend of the leading tort theories of the day).
10. Id. at 39–40.
J'Aire Corp. v. Gregory\textsuperscript{11} and Seely v. White Motor Co.\textsuperscript{12} Schwartz thought poorly of J'Aire and praised Seely,\textsuperscript{13} but that did not make his contribution unique. The interesting feature of his 1986 article was his characterization of J'Aire's flaws and Seely's virtues, which illustrated the risks and rewards of allowing tort to overwhelm contract law.

J'Aire involved a suit between the tenant of a commercial space and a contractor who had been hired by the building's landlord to prepare the space for the tenant.\textsuperscript{14} The contractor failed to timely complete the work as promised, and as a result, the landlord could not deliver the space to the tenant, who suffered a loss of expected profits.\textsuperscript{15} Schwartz found many things about Seely to be fishy. His first reaction was to ask why the tenant did not sue the landlord for breach of contract.\textsuperscript{16} It turned out that Schwartz actually contacted the lawyer for the tenant and asked him this question. The response, as reported by Schwartz, was that the tenant had a long-standing and friendly relationship with the landlord that the tenant did not want to disturb by a lawsuit.\textsuperscript{17} Schwartz's second reaction was to ask why the tenant did not claim against the contractor in contract as a third-party beneficiary to the contract between the contractor and the landlord. Here too, Schwartz ferreted out the answer: the tenant's lawyer admitted to Schwartz, "[C]ontracts were never my strong point in law school."\textsuperscript{18}

Schwartz's faux-naïve inquiries about the actual history of J'Aire are of a piece with his subsequent theoretical argument against the case. He did not argue that the California Supreme Court got its tort law wrong according to some set of principles that define and govern negligence as much as he argued that the California Supreme Court allowed human factors (the tenant's desire to maintain good relations with the landlord and the lawyer's ignorance) to drive it to create a cause of action where none was needed. Significantly, Schwartz's critique went beyond making the argument that the rule in J'Aire would be hard to cabin, although he made this point as well in a series of clever hypotheticals.\textsuperscript{19}

Schwartz's argument went further. He concluded from the fact that it would be hard to draw lines in the application of the J'Aire rule and

\begin{itemize}
  \item \textsuperscript{11} See id. at 40–50 (citing 598 P.2d 60 (Cal. 1979)).
  \item \textsuperscript{12} See id. at 51–56 (citing 403 P.2d 145 (Cal. 1965)).
  \item \textsuperscript{13} Id. at 78.
  \item \textsuperscript{14} J'Aire, 598 P.2d at 62.
  \item \textsuperscript{15} Id.
  \item \textsuperscript{16} Schwartz, Economic Loss, supra note 1, at 41.
  \item \textsuperscript{17} Id. at 41.
  \item \textsuperscript{18} Id. at 43.
  \item \textsuperscript{19} See id. at 42–50.
\end{itemize}
the fact that another body of law already provided answers—albeit ones that favored the defendant—that the resources of tort law were not adequate to explain why there was no duty on the part of the contractor.20 Schwartz conceded that his argument "treat[ed] tort and contract as dichotomous."21 Yet, he defended his decision to place the plaintiff’s economic interests at risk in J'Aire on the contract side not by reference to how tort would handle the problem, but by reference to the fact that it fell outside the domain of tort entirely.22

While I am not sure that Schwartz was altogether fair to Rabin when he included Rabin among the scholars who had “attempted to develop a general theory to cover the problem of tort law and economic loss,”23 Schwartz’s characterization of Rabin as “strongly sympathetic” to J'Aire in 1985 seems correct.24 To be precise, in his 1985 article, Rabin did not praise the California Supreme Court’s reasoning—he twice called its reasoning relating to foreseeability “muddled.”25 But Rabin praised J'Aire for two reasons. First, he felt that the court’s reasoning implied the rejection of the view that pure economic loss was “a singular problem” whose difficulties were not a product of larger theoretical issues shared throughout tort law.26 What made pure economic loss cases hard, in other words, was a problem found throughout tort law, “widespread tort liability.”27 In fact, Rabin claimed, where this feature was absent, cases involving pure economic loss “[did] not receive distinctive treatment”; they were treated as garden-variety negligence cases.28

Rabin’s second reason for praising J'Aire was that its discussion of foreseeability in negligence law, albeit muddled, helped illuminate the generic feature of tort law, which made pure economic loss cases seem *sui generis* to people like Schwartz. Pure economic loss cases were hard because they were the latest and perhaps most novel iteration of the problem of widespread tort liability—a problem faced by courts in

20. See id. at 40–43.
21. Id. at 49.
22. See Schwartz, Economic Loss, supra note 1, at 49–50.
23. Id. at 37–38 (citing Rabin, Tort Recovery, supra note 1).
24. Id. at 40.
25. Rabin, Tort Recovery, supra note 1, at 1518, 1522.
26. See id. at 1514.
27. Id. at 1514–15.
28. Id. at 1515. Rabin referred to Williams v. State, 644 P.2d 137 (Cal. 1983), regarding municipal liability for the lost opportunity to recover damages in a tort suit due to a police officer’s failure to obtain the identity of the driver who struck the plaintiff, and George A. Hormel & Co. v. Maez, 92 Cal. App. 3d 963 (Cal. 1979), regarding a driver’s liability for negligently striking a pole, causing an electrical surge that burned out a machine in the plaintiff’s factory and idled two employees. Rabin, Tort Recovery, supra note 1, 1515–16.
previous generations in the context of other debates over the limits of negligence liability.\textsuperscript{29} Rabin noted:

The common thread running through [judicial] limitations on recovery for emotional distress, consortium, and economic loss is not difficult to identify. Contrary to the assertion in \textit{J'Aire}, it does not rest on the presence or absence of foreseeability. Rather, it is an age-old concern about extending liability \textit{ad infinitum} for the consequences of a negligent act.\textsuperscript{30}

Rabin’s claim that the \textit{J'Aire} court was correct to treat pure economic loss as merely a species of the more general problem of negligence was aided by some specific features of California negligence law—features that may have been unique for that place and time.\textsuperscript{31} The court, Rabin noted, built its argument for a duty between the contractor and the tenant out of “situationally diverse injury cases,” none of which had anything to do with economic injury.\textsuperscript{32} The court relied upon \textit{Dillon v. Legg}, which expanded the rule for negligent infliction of emotional distress (NIED);\textsuperscript{33} \textit{Rowland v. Christian}, which removed the special categories of duty for landowners;\textsuperscript{34} \textit{Brown v. Merlo}, which expanded the duty of drivers to guests;\textsuperscript{35} \textit{Rodriguez v. Bethlehem Steel Corp.}, which expanded the scope of loss of consortium;\textsuperscript{36} and \textit{Weirum v. RKO General, Inc.}, which expanded duty broadly to include the foreseeable consequences of speech.\textsuperscript{37}

Ironically, Rabin noted, these cases, which arguably represented the high watermark of the California Supreme Court’s expansion of duty, owed their distinctive approach to duty to a 1958 case called \textit{Biakanja v. Irving}.\textsuperscript{38} This case was one of the earliest exceptions to the rule excluding pure economic loss and involved a legatee who lost an inheritance due to the carelessness of a notary.\textsuperscript{39} The California Supreme Court was much more aware in \textit{Biakanja} than \textit{J'Aire} that it was dealing with economic loss. Still, despite this fact (or because of it) it set out a test of duty that seemed to go out of its way to establish the

\textsuperscript{29} See Rabin, \textit{Tort Recovery}, supra note 1, at 1522-24.
\textsuperscript{30} Id. at 1526.
\textsuperscript{31} See id. at 1518 (describing the California Supreme Court’s activism in tort law over the previous twenty years as “arguably without parallel” in the United States).
\textsuperscript{32} Id. at 1519.
\textsuperscript{33} 441 P.2d 912 (Cal. 1968).
\textsuperscript{34} 443 P.2d 561 (Cal. 1968).
\textsuperscript{35} 506 P.2d 212 (Cal. 1973).
\textsuperscript{36} 525 P.2d 669 (Cal. 1974).
\textsuperscript{37} 539 P.2d 36 (Cal. 1975).
\textsuperscript{38} Rabin, \textit{Tort Recovery}, supra note 1, at 1518.
defendant's duty without regard to the fact that the plaintiff's injury was purely economic:

The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.40

As Rabin noted, "Biakanja v. Irving, the foundation case in establishing the duty criteria for all varieties of tortious harm, was itself a case of exclusively economic loss."41 For Rabin this was interesting because the next case that followed Biakanja and involved pure economic loss, Heyer v. Flaig, did not emphasize the economic loss aspect at all;42 Rabin thought it was obvious why it would not.43 There was nothing unique about the loss that required any special analysis given the goals of California's multifactor test for duty. Thus, Rabin concluded that the result in J'Aire—given Biakanja and Heyer, both of which came before it—was "no great surprise."44 I think it likely that Schwartz would have disagreed even with this simple claim.

But Rabin's goal in his 1985 article was not just to praise J'Aire or to place it within the context of the emerging Rowland-style duty analysis emerging from the California courts. He was well aware of the

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40. Id. at 19.
41. Rabin, Tort Recovery, supra note 1, at 1519 (second emphasis added). Another interesting contribution of Rabin's 1985 article was the link it drew between the factors listed in Biakanja and the test made famous in Rowland. See id. at 1518-19. Rowland's test was slightly different; the default rule of duty to act reasonably would be defeated depending on the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.


Of course, not everyone would agree that a defender of Biakanja ought to be proud of any genealogical link to Rowland. For example, John Goldberg and Ben Zipursky have argued that Rowland's multifactor balancing test is not really a test for duty at all, but rather a "form of duty skepticism," and further that Rowland-type duty skepticism has had a baleful influence on the Restatement (Third). See John C. P. Goldberg & Benjamin C. Zipursky, The Restatement (Third) and the Place of Duty in Negligence Law, 54 Vand. L. Rev. 657, 694-97 (2001).

42. 449 P.2d 161 (Cal. 1969).
43. See Rabin, Tort Recovery, supra note 1, at 1520-21.
44. Id. at 1521.
reaction of skeptics like Schwartz, who saw the courts’ treatment of pure economic loss as anomalous, and he tried to explain its natural evolution in California’s duty analysis. That is, given that some cases involving pure economic loss elicited no special comment at all, why was there a presumption that pure economic loss cases were either outside of tort entirely or, if within tort, required a special justification?

Rabin argued economic loss cases like Biakanja, Heyer, and J’Aire only looked easy because of a contingent feature buried in their facts that rendered them nontreating to the courts.45 Because the plaintiff was easily identifiable to the respective defendant before the defendant’s breach of duty, the courts were not concerned about imposing a duty on the defendant after the fact.46 Rabin called cases such as these—where the defendant (a notary, lawyer, or contractor) knew in advance that his carelessness would affect the economic interests of an identifiable third party (a legatee, an heir, or a tenant)—“third-party situations”47 or “triangular configurations.”48 The resistance to imposing duty in cases of pure economic loss was overcome, from the perspective of the California courts, because they could line up each of the Rowland factors in cases of pure economic loss just like they did in a third-party situation like Tarasoff v. Regents of the University of California.49 The key to imposing the duty in J’Aire and Tarasoff was that the plaintiffs’ injuries, whether economic or physical, were foreseeable.50

But Rabin cleverly used the triumphalism in J’Aire against itself. He reminded the reader that foreseeability was not as easy or obvious to determine in the important cases that formed the canon of the Rowland-style duty analysis.51 The “tough” cases, in Rabin’s mind, were case like Dillon and Borer v. American Airlines, Inc.,52 in which foreseeability was a necessary but not sufficient condition for duty.53 The recent history of negligence law, Rabin argued, showed that the same concern that led courts to reject and then arbitrarily limit duty in cases of NIED and loss of consortium had led courts to declare that

45. See id. at 1521.
46. Id.
47. Id.
48. Id. at 1527.
50. See Rabin, Tort Recovery, supra note 1, at 1521.
51. See id. at 1522.
52. 563 P.2d 858 (Cal. 1977).
53. See Rabin, Tort Recovery, supra note 1, at 1522–23.
there was no duty in cases of pure economic loss. The real challenge to the Rowland-style duty analysis was not determining whether an unreasonable act would foreseeably interfere with another's interest, but rather deciding what to do if it turned out that the tort liability resulting from the foreseeable interferences would be "widespread" and thus somehow outside the practical scope of the tort system.

For Rabin, J'Aire was an easy case because it did not pose to the courts the challenge of widespread liability. According to Rabin, "there is a simple and straightforward explanation for the sustained reluctance of the courts to extend liability for economic loss beyond 'the triangular configuration' to situations of widespread harm." That explanation was the "normative" constraint in tort—even under the Rowland-style duty analysis—on "disproportionate penalties for wrongful behavior." As long as the quantum of damages resulting from a tort claim was proportionate to the "private wrongs" committed by the defendant, negligence law could accommodate the claim, regardless of the type of injury to which it referred—physical, emotional, economic, or otherwise.

Rabin's observation that the fear of widespread harm provided the real backstop to duty in negligence law led him to draw a number of conclusions, some optimistic and some pessimistic. The first and mostly optimistic conclusion was that there was nothing intrinsic to pure economic loss that made it any less the proper subject of duties in negligence than personal injury and NIED. The second and slightly pessimistic conclusion was that foreseeability played a much less important role in explaining the line drawn between duty and no-duty cases than the California courts purported. The third and most interesting conclusion was that, from a historical perspective, fear of widespread liability could be overcome. Rabin noted that Lord Abinger cited the fear of widespread liability to justify limiting duty in negligence to privity in Winterbottom v. Wright. The fear of widespread liability was also cited in Ryan v. New York Central Railroad

54. See id. at 1523.
55. See id. at 1524.
56. Id. at 1534 (footnote omitted).
57. Id.
58. See id. at 1526–27.
59. See Rabin, Tort Recovery, supra note 1, at 1526.
60. Id. at 1533.
61. Id. at 1529; see also Winterbottom v. Wright, (1842) 152 Eng. Rep. 402 (Ex. Div.) 405 ("[I]f the plaintiff can sue, every passenger, or even any person passing along the road . . . might bring a similar action.").
Co.\textsuperscript{62} and \textit{H.R. Moch Co. v. Rensselaer Water Co.}\textsuperscript{63} Rabin noted that, in cases of personal injury and property, the widespread liability argument gradually lost its force.\textsuperscript{64} By 1985 the risk of widespread liability played no role in limiting otherwise good claims against a product manufacturer, "[n]or would tort liability be in doubt in the structural collapse of a negligently constructed building, even if a large number of injuries occurred."\textsuperscript{65}

According to Rabin, the problem of widespread injury arising from foreseeable interference with the person and property of another "has dissolved" by "case law that has steadily eroded the duty limitations" to the point where it no longer exerted any pressure at all, so that the \textit{Rowland} factors—especially foreseeability—could operate without any resistance.\textsuperscript{66} In the case of other types of injury, the concern for widespread harm still played an important role in blocking the operation of the \textit{Rowland} factors, which explained the arbitrary rules for \textit{NIED} and loss of consortium produced in the 1970s and 1980s and the persistence of the so-called exclusionary rule for pure economic loss.\textsuperscript{67}

Rabin did not underplay the significance of the problem posed by the concern for widespread harm for pure economic loss, but he wanted to be clear about the kind of problem it was. It was not, as he had argued, a problem that arose out of the fact that the interest protected by cases like \textit{J'Aire} was purely economic.\textsuperscript{68} That was a contingent feature of the problem, as evidenced by the fact that another interest, pure emotional distress, was experiencing the same pattern of resistance (albeit in a lesser form).\textsuperscript{69} The problem was a normative problem concerning the operation of moral luck in tort law.\textsuperscript{70} To put it bluntly, pure economic loss cases, as a class, were more likely to

\begin{footnotesize}
62. Rabin, \textit{Tort Recovery}, supra note 1, at 1530 (quoting \textit{Ryan v. N.Y. Cent. R.R.}, 35 N.Y. 210, 216–17 (1866) ("To hold that the owner must not only meet his own loss by fire, but that he must guarantee the security of his neighbors on both sides, and to an unlimited extent, would be to create a liability which would be the destruction of all civilized society.")).

63. \textit{Id.} at 1531; \textit{see also} \textit{H.R. Moch Co. v. Rensselaer Water Co.}, 247 N.Y. 160, 168 (1928) ("We are satisfied that liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty.")).

64. Rabin, \textit{Tort Recovery}, supra note 1, at 1531–32.

65. \textit{Id.} at 1532. After 2001, Rabin had the opportunity to consider an analogous situation, albeit with tragically different facts. See Robert L. Rabin, \textit{Indeterminate Future Harm in the Context of September 11}, 88 \textit{Va. L. Rev.} 1831, 1860 (2002) (arguing that the question of duty on the part of airlines and building-owner defendants to persons inside the World Trade Center "is an issue that can be addressed under the guise of foreseeability, if a court sees fit to do so").


67. \textit{Id.} at 1533.


69. \textit{See id.} at 1524.

70. \textit{See id.} at 1534.
\end{footnotesize}
expose the conflict between the reach of duty in negligence and "[t]he Anglo-American judicial tradition['s] . . . deep abhorrence to the notion of disproportionate penalties for wrongful behavior."  

This Article is not the proper place to examine the validity of Rabin's claim that there is a special sensitivity in to disproportionate punishment in Anglo-American common law jurisdictions. What interests me is the way Rabin treated this "moral fact": in his hands, it was a justification for limitation of pure economic loss in cases where injury was foreseeable but widespread. Earlier in his article, Rabin divided the universe of pure economic loss cases. In the first group were the triangular configurations, discussed above. In the second group were cases in which the defendant's negligence caused "collateral" economic loss to the plaintiff, usually by negligently damaging some property (or sometimes the person) of a third party upon which the plaintiff (foreseeably) relied. The classic example of this is the negligent destruction of a bridge upon which the plaintiff relied to bring customers to his commercial establishment. The law of negligence, argued Rabin, could handle the triangular configuration cases and regularly did so in California without even emphasizing the fact that they were cases of pure economic loss. But the same courts treated the collateral economic loss cases differently, emphasizing their uniqueness as pure economic loss cases. In both sets of cases, Rabin noted, the question (and test) of foreseeability was the same, and therefore, he concluded that the different treatment was motivated by the normative objection to holding defendants in the collat-

71. Id.
72. It is worth mentioning that the American legal system has a host of punitive elements that are not found in civilian systems (or even to the same extent as other common law systems). Consider, for example, punitive damages and the death penalty. Furthermore, it would seem that the criminal sanctions imposed by American jurisdictions are generally harsher than in civilian systems. Ironically, the common (and somewhat fair) stereotype is that civilian jurisdictions have permitted negligence for pure economic loss more broadly than the United States. It is possible, of course, that Rabin's observation was true when he said it and that it was consistent with the further claim that other judicial traditions (such as the civilian tradition) are even more hostile to disproportionate penalties for wrongful behavior. But that would merely beg the question of whether a concern for moral luck is feature of tort law.
73. See Rabin, Tort Recovery, supra note 1, at 1526.
74. Id. at 1527.
75. Id.
76. Id. at 1528.
77. Id.; see also Aikens v. Debow, 541 S.E.2d 576, 590 (W. Va. 2000) (holding that the defendant owed no duty to the plaintiff motel owner for lost profits during the period required for repair after the defendant's truck had negligently struck a bridge over the highway).
78. See Rabin, Tort Recovery, supra note 1, at 1518-21.
79. See id. at 1528.
80. See id. ("Again, foreseeability provides no guidance.").
eral economic cases liable for damages far in excess of their wrongdoing.81

Rabin's article left the reader with the impression that he thought the law had struck the right balance when it came to pure economic loss. While he never explicitly endorsed the idea that duty liability ought to be limited when it results in disproportionate penalties, that is not surprising—Rabin probably did not feel obliged to defend a widely shared moral value. His task would have been to accurately identify the reasons used by the courts and to see whether they were using them consistently and intelligibly. A court would be working within the Rowland-type approach to duty by invoking fear of widespread loss to limit duty. In any case, while Rowland did not end with the invocation of foreseeability, it allowed courts to balance foreseeability of injury against other factors, including:

- the moral blame attached to the defendant's conduct,
- the policy of preventing future harm,
- the extent of the burden to the defendant
- and consequences to the community of imposing a duty to exercise care with resulting liability for breach,
- and the availability, cost, and prevalence of insurance for the risk involved.82

Rabin did just that—he pointed out that collateral economic loss cases may involve foreseeable injuries, but they fare poorly on most of the other Rowland factors.83 As already noted, they flunk the test of moral blame—if not of the defendant's conduct, then of the moral justification for imposing the costs of the accident on the defendant.

Rabin ended the article by noting that many collateral economic loss cases might also fail the consequentialist factors of the Rowland test.84 Using the example of a driver who negligently blocks the Brooklyn Battery Tunnel,85 Rabin noted that it is unlikely that the threat of liability for all the foreseeable economic losses flowing from the tunnel's blockage would produce additional deterrence, nor would the availability of insurance favor liability.86 In collateral economic loss cases, "economic and moral foundations" supported the common law's historical rejection of liability for foreseeable pure economic loss. The article concluded with cautious praise for the status quo achieved by the J'Aire court:

81. See id. at 1534.
83. See Rabin, Tort Recovery, supra note 1, at 1537–38.
84. See id. at 1536–38.
85. This example was drawn from Cargill, Inc. v. City of Buffalo (In re Kinsman Transit Co.), 388 F.2d 821, 825 n.8 (2d Cir. 1968).
86. Rabin, Tort Recovery, supra note 1, at 1536–38.
87. Id. at 1535–36.
In the final analysis, judges have seen fit to distinguish between "direct" and "indirect" economic losses as best they can. The lines have not always been clearly drawn and some may be indefensible. But the central tendency to deny liability for categories of widespread loss has appealed to an enduring sense of fairness.\textsuperscript{88}

\section*{III. Reality Bites: \textit{People Express}}

Rabin's next extended discussion of pure economic loss (other than his casebook) was in a 2006 contribution to a symposium on economic tort law in honor of Daniel B. Dobbs.\textsuperscript{89} The article was somewhat different in tone and structure than the 1985 article. Whereas in 1985 Rabin focused on the development of recovery for pure economic loss in California, in his 2006 article, Rabin shifted his focus to New Jersey. Rabin's treatment of the California cases he reviewed in 1985 was generally positive; he viewed the development of the duty identified in \textit{J'Aire} as a natural extension of the multifactor approach begun in \textit{Biakanja} (a pure economic loss case) and brought to fruition in \textit{Rowland} (a personal injury case).\textsuperscript{90} However, his treatment of the New Jersey cases was much more skeptical. The major New Jersey case that rejected the rule of no duty to avoid foreseeable pure economic loss was \textit{People Express Airlines, Inc. v. Consolidated Rail Corp.}\textsuperscript{91} Like \textit{J'Aire}, it came on the heels of many progressive decisions that expanded duty in cases involving personal injury. There was even a case in this prior history that played a role quite similar to that played by \textit{Biakanja—H. Rosenblum, Inc. v. Adler}, in which the Supreme Court of New Jersey held that an auditor could be liable to third parties other than his client for negligent misrepresentations causing pure economic loss.\textsuperscript{92} Despite these superficial similarities, there was no suggestion that the New Jersey cases were defensible applications of the general principles of negligence law. Quite the contrary, Rabin was sorry to report that "the bold thrust of the New Jersey court in limiting the no-duty domain of negligently inflicted economic loss is largely a historical artifact. . . . [\textit{People Express}] stands as a lonely outpost. . . . \textit{Rosenblum} has been treated as an outlier."\textsuperscript{93}

Rabin's pessimism was not just a result of the fact that he was reporting bad news for those who may have hoped that negligence would become more welcoming to pure economic loss in the years

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{88} Id. at 1538.
\item\textsuperscript{89} See Rabin, \textit{Respecting Boundaries}, supra note 3.
\item\textsuperscript{90} See Rabin, \textit{Tort Recovery}, supra note 1, at 1519.
\item\textsuperscript{91} 495 A.2d 107, 118 (N.J. 1985).
\item\textsuperscript{92} 461 A.2d 138, 153 (N.J. 1983).
\item\textsuperscript{93} Rabin, \textit{Respecting Boundaries}, supra note 3, at 858.
\end{itemize}
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since J'Aire and People Express. He also adopted a decidedly more critical tone when describing the theoretical status of claims in negligence for pure economic loss. In 1985 Rabin emphasized that pure economic loss cases were just like other cases in negligence\textsuperscript{94} and that the result of seeing pure economic loss cases as just like other negligence cases illuminated the way that the concern for disproportionate penalties played the same role it had played in the determination of duty in other kinds of negligence.\textsuperscript{95} In 2006, Rabin began his article by stating, "I want to emphasize that the constraints imposed by the economic loss rule do not, as I see it, reflect any single normative principle."\textsuperscript{96} More specifically, rather than seeing the law of pure economic loss as a product of a "simple and straightforward" dynamic\textsuperscript{97}—the tension between foreseeability and the norm against excessive punishment—Rabin concluded in 2006 that he saw no common theme that explained the pattern of rules governing whether pure economic loss would fall inside or outside the negligence concept.\textsuperscript{98} He found that there were three different kinds of pure economic loss cases, not two, and the factors that explained why duty was or was not extended to those cases had nothing to do with each other.\textsuperscript{99}

Let me be clear that I am not accusing Rabin of contradicting himself. Rather, it is that he took the same analysis of duty in negligence and emphasized different implications and possibilities in 2006 compared to 1985. In both articles he argued, in contrast with Schwartz, that the modern duty rules of pure economic loss are explained by general principles of negligence—that is, that the same factors underpin the duty rules in pure economic loss and personal injury, including NIED and loss of consortium. Given that “the mantle of progressivism” shared by New Jersey and California (as Rabin put it)\textsuperscript{100} was a product of the “balancing of factors” approach in \textit{Rowland} and its progeny, it would follow that these general principles of negligence would continue to guide the development of duty rules for pure economic loss. Further, given that the product of the balancing-of-factors

\begin{itemize}
\item \textsuperscript{94} See Rabin, \textit{Tort Recovery}, supra note 1, at 1518 ("[M]y contention [is] that economic loss does not present a singular problem of liability in tort.").
\item \textsuperscript{95} See id. at 1534 (stating that “there is a simple and straightforward explanation for the sustained reluctance of the courts to extend” duty in pure economic loss cases).
\item \textsuperscript{96} Rabin, \textit{Respecting Boundaries}, supra note 3, at 859 (emphasis added).
\item \textsuperscript{97} Rabin, \textit{Tort Recovery}, supra note 1, at 1534.
\item \textsuperscript{98} See Rabin, \textit{Respecting Boundaries}, supra note 3, at 859.
\item \textsuperscript{99} See id. at 869 ("[In one set of cases], the economic loss rule highlights the tension between tort and contract . . . . From another vantage point, the rule tests the enduring tort concern over the prospect of crushing liability . . . . In still other cases, it tests the limits of fiduciary obligations . . . .").
\item \textsuperscript{100} See Rabin, \textit{Respecting Boundaries}, supra note 3, at 857.
\end{itemize}
approach in Rowland was judged by Rabin to have produced rules concerning personal injury and pure economic loss that "appealed to an enduring sense of fairness,"\textsuperscript{101} it would not be unreasonable to conclude that the application of the same general principles to pure economic loss cases after 1985 would have produced results that also appealed to an enduring sense of fairness.

This is, I think, a fair reading of Rabin’s 1985 account, but not a necessary reading. As he noted in 2006, his account of the role of normative judgments in concerning widespread loss in California’s emerging theory of duty was “historical,” not normative, and as such, it was a hostage to fortune.\textsuperscript{102} His historical account of the efforts by courts since J’Aire to treat pure economic loss just like the law of recovery for NIED and loss of consortium presented a historical account that felt very different from the one offered in 1985. It was not a description of how courts balanced one normative commitment (the fear of widespread loss) against a set of factors employed by judges generally in all negligence cases (such as foreseeability), but rather a description of how courts have invoked various idiosyncratic formalistic categories under the guise of policy considerations\textsuperscript{103} to create, as Jane Stapleton scornfully put it, “crude pockets” of liability.\textsuperscript{104} It was, in short, a concession that the law of pure economic loss does not lend itself to a simple and straightforward normative explanation.

A number of reasons may explain the change in Rabin’s attitude toward the capacity of negligence law to provide a satisfactory theoretical account of duty in pure economic loss cases. I will suggest two. First, the universe of cases under Rabin’s scrutiny seems to have expanded in his 2006 article. I say “seems” because, as I will argue—and this will comprise my second reason—the deeper cause of Rabin’s pessimism was not that he discovered that the universe of pure economic loss cases was broader and more complex than he had first thought, but because he discovered that the balancing-of-factors approach, which had seemed to have performed satisfactorily in J’Aire, was not even capable of solving the class of cases he discussed in 1985.

Rabin conceded in his 2006 article that he had focused on only a slice of the pure economic loss universe, and he set out to correct (or supplement) his earlier article.\textsuperscript{105} He now characterized pure eco-

\textsuperscript{101}. Rabin, Tort Recovery, supra note 1, at 1538.
\textsuperscript{102}. Rabin, Respecting Boundaries, supra note 3, at 859 & n.13.
\textsuperscript{103}. See id. at 859.
\textsuperscript{105}. Rabin, Respecting Boundaries, supra note 3, at 859 n.13.
nomic loss cases as falling within the following prototypical categories: tort as an alternative remedy in the context of disappointed economic expectations (Category I);\textsuperscript{106} tort as a potential remedy when the defendant creates a dangerous condition or causes physical harm resulting in economic loss to a stranger (Category II);\textsuperscript{107} and third-party effects of negligent misrepresentation or negligent performance of an obligation (Category III).\textsuperscript{108}

The first category referred to cases of pure economic loss in the context of products liability. Rabin cited \textit{Seely} and \textit{East River Steamship Corp. v. Transamerica Delaval Inc.}\textsuperscript{109} Rabin reported that when faced with the question of whether to extend tort law to pure economic losses suffered by the owners of a product, courts—including the California Supreme Court—had universally refused.\textsuperscript{110} The reason for this was that public policy did not warrant tort's supremacy over contract in cases where the only injury to the owner was economic; in cases where the owner's injury was to her body or other property, public policy did warrant tort's supremacy.\textsuperscript{111} This is a version of the argument that Schwartz made in 1986, but with a different emphasis and an odd omission. When Schwartz made this argument, he emphasized the interplay of contract law and tort law as a means to handle anyone's interest in economic well-being, not just the owners'.\textsuperscript{112} His point was that what was true in \textit{Seely} was equally true in \textit{J'Aire}; as long as the plaintiff in either case could have bargained with someone to protect his economic interests (and not necessarily the defendant or the manufacturer) then tort law should "take a back-seat" to private ordering.\textsuperscript{113} Seen from this perspective, \textit{J'Aire} ought to fall into Category I in Rabin's 2006 taxonomy. But we never find out where Rabin actually believes it \textit{should} fall because of a surprising omission in his 2006 article: it \textit{never} discusses \textit{J'Aire}.

Category II referred to cases of pure economic loss in which the defendant's negligence affects the world, such that the plaintiff is

\begin{itemize}
\item \textsuperscript{106} Id. at 860.
\item \textsuperscript{107} Id. at 861.
\item \textsuperscript{108} Id. at 864.
\item \textsuperscript{109} Id. at 860-61; see also E. River Steamship Corp. v. Transamerica Delaval Inc., 476 U.S. 858 (1986); Seely v. White Motor Co., 403 P.2d 145 (Cal. 1965).
\item \textsuperscript{110} Rabin, \textit{Respecting Boundaries, supra} note 3, at 860-61. The fact that the owner would recover through a showing of defect without fault seems to be regarded by most commentators as an irrelevancy in discussions over this rule. The effect of the \textit{East River} rule is that an owner could not recover outside of contract from a manufacturer even if the owner could prove negligence in the manufacture of the product.
\item \textsuperscript{111} Rabin, \textit{Respecting Boundaries, supra} note 3, at 861.
\item \textsuperscript{112} Schwartz, \textit{Economic Loss, supra} note 1, at 49-50.
\item \textsuperscript{113} See Rabin, \textit{Respecting Boundaries, supra} note 3, at 861.
\end{itemize}
blocked from pursuing her economic well-being. These cases are perhaps the most familiar, and they can sometimes be classified under one or more subheadings. Some scholars have focused exclusively on these cases. Rabin's statement that he focused "primarily" on this category is curious because his lengthy discussion of J'Aire could have been seen (and would have been seen by Schwartz) as a discussion by proxy of Category I. In any event, J'Aire is a Category II case if one equates the contractor's delay in preparing the landlord's property as the equivalent of the driver's negligent blockage of the Brooklyn Battery Tunnel. And that is how Rabin developed his argument in 1985—he moved from a discussion of foreseeable but limited pure economic loss in cases like J'Aire (which he called triangular configurations) to a discussion of foreseeable but limitless pure economic loss in cases like the Brooklyn Battery Tunnel example (which he called cases of collateral economic loss); both of these classes of cases would fall within what Rabin called Category II.

Oddly, there is no reference in 2006 to the argument made in 1985 that there was limited loss in the triangular configuration cases and that limitless loss in the collateral pure economic loss cases made a sensible difference within the Rowland model of duty. In fact, one is left in 2006 with the impression that Rabin found it understandable that public policy would justify an absolute bar to recovery in Category II. Whereas the reason cited for barring Category I cases was a social commitment to privileging contract over tort in cases involving pure economic loss, the public policy reason that explained the bar to pure economic loss cases in Category II was "the ripple-effect con-
cern."\textsuperscript{117} This public policy concern was different from the normative abhorrence of disproportionate punishment, cited by Rabin in 1985, in a subtle but important way. In 1985, Rabin took comfort in the fact that the anxiety over disproportionate punishment could be addressed by courts by drawing a line between pure economic loss cases in which the victim was an easily identifiable "intended beneficiary" (and hence losses would not be limitless) and those in which there were no limit regarding the number of victims or their respective losses.\textsuperscript{118} By redefining the problem as one of the inescapable interdependence of society,\textsuperscript{119} Rabin essentially erased the line he drew between triangular configuration cases and collateral cases—every Category II case became a collateral case.

What is especially peculiar in his discussion of the reasons for an absolute bar to recovery in Category II cases is that Rabin dismissed an argument he cited in 1985 for permitting recovery in some Category II cases; namely, triangular configurations like \textit{J'Aire}. In 2006, Rabin pointed out that \textit{unlike} cases involving emotional distress, there are no "guideposts for establishing generic characteristics of those most likely to suffer serious harm."\textsuperscript{120} It is hard to see how Rabin's 1985 defense of \textit{J'Aire}—that it was a noncontract, pure economic loss case in which the plaintiff was an easily identifiable "intended third-party beneficiar[y]" and hence losses would not be limitless—can be squared with this statement.\textsuperscript{121}

One reason that Rabin may have felt no urgency to defend pure economic loss in Category II cases is that he thought that \textit{J'Aire}, and pure economic loss in general, could be best defended if viewed as a Category III case. His third category brought Rabin full circle: it includes the case that he observed anchor the \textit{Rowland} revolution: \textit{Biakanja v. Irving}.\textsuperscript{122} Rabin divided Category III into two groups. Group I contained negligent misrepresentation cases—the familiar accountancy negligent misrepresentation cases ranging from \textit{Ultrimares Corp. v. Touche}\textsuperscript{123} to \textit{Rosenblum}.\textsuperscript{124} Group II contained cases of negligently performed obligations such as \textit{Biakanja}, in which a will was

\begin{itemize}
\item \textsuperscript{117} \textit{Id.} at 861–62 (internal quotation marks omitted). Rabin's chief example of this principle in operation was 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097 (N.Y. 2001).
\item \textsuperscript{118} Rabin, \textit{Tort Recovery}, supra note 1, at 1527–28.
\item \textsuperscript{119} Rabin, \textit{Respecting Boundaries}, supra note 3, at 862.
\item \textsuperscript{120} See \textit{id.} at 864.
\item \textsuperscript{121} See Rabin, \textit{Tort Recovery}, supra note 1, at 1523.
\item \textsuperscript{122} 320 P.2d 16 (Cal. 1958).
\item \textsuperscript{123} 320 P.2d 16 (Cal. 1958).
\item \textsuperscript{124} Rabin, \textit{Respecting Boundaries}, supra note 3, at 857–58, 865.
\end{itemize}
negligently prepared and an heir accordingly lost an expected inheritance, and more modern cases such as *Duncan v. Afton, Inc.*, in which an employer relied upon a negligently performed drug test and terminated an employee. In Group I of Category III, the plaintiff has to point to a misrepresentation, whereas in Group II, the plaintiff has to point to a performance; in both cases a third party is relying upon the defendant's action and the plaintiff's economic interests are foreseeably affected by the defendant's negligence.

Rabin noted that it was much harder for courts to maintain an absolute bar on Category III cases, and as a result, there were far more inroads for duty in cases of negligent misrepresentation and negligent performance of services, although the lines drawn by the courts between duty and no-duty were still somewhat hard to define. Rabin observed that the rule embraced by the *Restatement (Second) of Torts* for negligent misrepresentation had certain features that explained its success among courts. The *Restatement* rule followed a middle path between the "near privity" rule of *Ultramares* and the mere-foreseeability test that, arguably, was adopted in *Rosenblum*: it stated that a negligent actor whose misrepresentation could foreseeably injure the economic interests of others owed a duty only to that "limited group of persons" the actor intended to benefit or knew would be benefited by the information provided. The concern that animated the adoption of the absolute prohibition on Category II—the ripple-effect concern—is addressed rhetorically, if not practically, by the *Restatement*’s assertion that only a limited class of persons will be deemed to have been owed a duty.

While there is no similar black letter rule for negligent performance of a service, Rabin noted that the emerging pattern of cases followed the pattern set out in *Biakanja*: the defendant had been requested by the third party to perform a service whose end and purpose would affect the economic interests of the plaintiff. Rabin argued that in these cases the concern that animated the adoption of an absolute

125. *Id.* at 863; *see also* *Biakanja*, 320 P.2d at 17–18.
129. *Id.* at 866.
prohibition of duty in Category I—the possibility that tort should “take a backseat” to contract—made no sense, given that the contract doctrine protecting third-party beneficiaries could not protect the legatee and that public policy would counsel that liability should be placed on the negligent drug tester, who could, if she wished, write a separate indemnification contract with the third party who hired her.

The problem with placing J'Aire in Category III is that it proves only too well Rabin’s conclusion that the rules for pure economic loss in this category require the “micro-scrutiny of competing policy considerations.” If the tenant had brought his case to Rabin in 2006, what would Rabin have predicted? Would he have said, as he did in 1985, that given the precedents of Biakanja and Heyer, a court finding duty on the part of the contractor should be “no great surprise”? And if not, why? Would he have tried to distinguish J'Aire from Biakanja and Heyer by pointing out that the tenant could have relied on contract to protect his interest or that, because there were others who depended economically on the tenant, recognizing his economic interest would trigger a ripple-effect concern and hence require a finding of no-duty? In 1985 Rabin argued, in effect, that the tenant in J'Aire satisfied the multifactor balancing test required by Rowland because, in contrast to some pure economic loss cases, his case did not create a risk of disproportionate punishment: the defendant would not have to pay a huge sum of money to compensate the set of foreseeable victims for their pure economic loss. Would the tenant in 2006 be required, in the name of various so-called public policy concerns, to prove that he could not have contracted around the risk or that he belonged to a class of persons for whose economic benefit the defendant had acted? These new requirements could be presented as matters of public policy, but it is not clear what public policy they serve. Rather they seem, as Stapleton observed, to be the return of formalistic legal barriers to extending duty to parties who would otherwise satisfy the Rowland test.

132. Id. at 861.
133. See id. at 868.
134. See id. at 869.
135. Rabin, Tort Recovery, supra note 1, at 1521.
136. Id. at 1523.
IV. Facing Reality: Could J'Aire Have Delivered on Its Promise?

At this point I want to offer a defense of Rabin's 2006 article. It is clear that Rabin was offering an accurate description of contemporary duty analysis in pure economic loss cases. That is, it was certainly the case that American tort law had turned decidedly more hostile toward pure economic loss compared to 1985. I would like to suggest that Rabin's own choices in his article—his recasting of the types of pure economic loss cases and his choice not to offer J'Aire and the Rowland approach to duty as an alternative—have also reflected an uncomfortable analytical observation: the approach to pure economic loss represented by J'Aire was itself ad hoc and could not form the foundation of a larger, general principle for determining duty in pure economic loss cases.

First, an inconvenient fact: J'Aire has not fared well, even in California. In 1985 it seemed that one could argue, as did Rabin, that in triangular configuration (Category II) cases, the balancing of factors required by Rowland would support a finding of a duty to avoid pure economic loss if the plaintiff's loss was a foreseeable consequence of the defendant's negligence and there was no risk of widespread harm or disproportionate loss. Schwartz argued that this was a mistake and that the presence of contractual relations—either between the plaintiff and the defendant, as in most products liability cases, or between the plaintiffs and some third party, as in J'Aire and many homeowners' cases—would doom any effort to extend tort law into what is otherwise the province of contract.\(^\text{137}\) In Aas v. Superior Court of San Diego County, the California Supreme Court, mirroring Schwartz's argument, reasoned that in matters of pure economic loss, tort and contract are dichotomous and contract should take precedence.\(^\text{138}\)

Aas involved a suit by homeowners and a homeowners association against a developer, general contractor, and subcontractors on a condominium project.\(^\text{139}\) The plaintiffs alleged defects that, while not actually causing damage to any other property (or persons), required repair.\(^\text{140}\) The question presented to the court, therefore, was whether the "plaintiffs [could] recover in negligence from the entities that built their homes a money judgment representing the cost to repair, or the

\(^{137}\) Schwartz, Economic Loss, supra note 1.
\(^{138}\) See 12 P.3d 1125 (Cal. 2000).
\(^{139}\) Id. at 1128.
\(^{140}\) Id.
diminished value attributable to, construction defects that have not caused property damage?"\footnote{141}

The California Supreme Court framed the case as a choice between \textit{Seely} and \textit{J'Aire}.\footnote{142} On the one hand, like in \textit{Seely}, the homeowners (but not the homeowners association) were direct purchasers of a defective product. On the other hand, there were differences between the facts of this case and those of \textit{Seely}. For one thing, in addition to the homeowners association, which had not been in privity with the defendants, a number of homeowners who lacked privity with the defendants because they did not buy the condominium units from the defendant developer but from third parties who, presumably, had bought the units from the defendant.\footnote{143} Of course, following Schwartz, one could say that even these parties could have formed contracts to protect their economic interests against the negligence of the defendant; the aftermarket purchasers could sue the direct purchasers under a warranty, and perhaps even the homeowners association could ask the homeowners to indemnify it for the pro rata costs imposed by each defective home, so that the homeowners could turn around and recapture that from the defendants.

The foregoing, however, only illustrates in what ways \textit{Aas} also looked like \textit{J'Aire}. The plaintiffs, who were not in privity with the defendant developer, were in a triangular configuration (Category II) case. The developer had negligently performed a service for a third party; it was foreseeable that the negligent performance of the act would cause pure economic loss to the plaintiffs; and the plaintiffs were a limited class of persons (for example, the homeowners and the homeowners association). Finally, it was not apparent from the facts that the resulting liability would be limitless or would impose disproportionate punishment on the defendant. In short, the defendants' alleged conduct was not like blocking the Brooklyn Battery Tunnel; it was much more like failing to properly prepare a will or properly prepare a building intended to be used by a known tenant.

As some observers have noted, the \textit{Aas} court did not directly repudiate \textit{J'Aire}.\footnote{144} Its application of \textit{J'Aire} turned on an interpretation of the word "injury," which suggested an implicit rejection of the idea

\footnotesize{\begin{itemize}
\item \footnote{141. Id. at 1130.}
\item \footnote{142. Id. at 1136 ("[T]he law of construction defects . . . [has] diverged into two theories: strict products liability [recognized in \textit{Seely}], . . . and the tort recognized in \textit{J'Aire}.") (citations omitted)).}
\item \footnote{143. See id. at 1135.}
\item \footnote{144. See, e.g., Clay Wilkinson & Eric Brown, \textit{Loss Horizon: The Economic Loss Doctrine Is Designed to Establish a Demarcation Between Contract and Tort Law}, L.A. Law., Feb. 2011, at 25, 29.}
\end{itemize}}
that, outside of a few exceptions, there is a duty in negligence to avoid foreseeable pure economic loss. The court noted that J'Aire would require it to apply the factors in the Rowland test, which the J'Aire court described as “fairly subjective.”\textsuperscript{145} One factor stood out from all the others as a clear loser for the plaintiffs: “the degree of certainty that the plaintiff suffered injury.”\textsuperscript{146} The court held that this factor presented an “objective obstacle”.\textsuperscript{147}

Construction defects that have not ripened into property damage, or at least into involuntary out-of-pocket losses, do not comfortably fit the definition of appreciable harm . . . . [T]he physical harm traditionally compensable in tort is lacking—to ask in the words of factor (2) whether the harm to plaintiffs was “foreseeable” simply begs the question: What harm?\textsuperscript{148}

The harm alleged by the homeowner plaintiffs was, of course, that the existence of defects lowered the value of the homes and that the removal of the defects would require future expenditures;\textsuperscript{149} the harm alleged by the homeowners association referred to only future expenditures.\textsuperscript{150} The court’s amazement that lost value realized in the event of a future sale and future expenditures could be damages in tort is hard to take seriously; these concepts have been applied without comment in damage calculations throughout California in the context of future medical expenses and lost earnings.\textsuperscript{151} The plaintiffs pointed this out; they noted that it seemed a trivial matter that they might be required to first voluntarily pay for the repairs, incur the costs, or sell the homes and then sue under J'Aire.\textsuperscript{152} The court’s response was that the plaintiffs were confusing “the measurement of alleged damages” with a legal argument that they had “suffered the type of harm cognizable in tort, as opposed to contract.”\textsuperscript{153}

At this point it is obvious that the court was not weighing the various factors listed in Rowland to see whether there was a duty; it was simply asserting that, as a matter of law, there was no injury in tort,

\textsuperscript{145} Aas, 12 P.3d at 1137. Oddly, the court went back to the six factors cited in Biakanja. Id. at 1136. It conceded that foreseeability was relevant but balked at conceding that other public policy factors, such as the degree of the defendants’ fault and the policy of preventing future harm, clearly tipped in the plaintiffs’ favor. Id. at 1138–39.

\textsuperscript{146} Id. at 1137 (quoting J'Aire Corp. v. Gregory, 598 P.2d 60, 63 (Cal. 1979)).

\textsuperscript{147} Id.

\textsuperscript{148} Id. at 1137–38 (third alteration in original) (citation omitted) (internal quotation marks omitted).

\textsuperscript{149} See id. at 1128.

\textsuperscript{150} Id.


\textsuperscript{152} See Aas, 12 P.3d at 1138.

\textsuperscript{153} Id.
only in contract, and therefore there was no duty in tort. The discussion of the other factors, regardless of which way they tipped, was irrelevant. The court decided that the economic interests of parties not in privity with the defendant developer would be treated just like those of a consumer in privity with a manufacturer, pace Seely.\(^\text{154}\)

*Aas* may not have been the most elegantly reasoned critique of *J'Aire*, but its import was clear: there was no general duty in negligence to avoid foreseeable harm in triangular configuration cases; something else was doing the work of limiting duty other than fear of widespread harm; and other public policy factors, such as the primacy of contract, would trump the tort claims of parties who were not even in privity with the defendant. The question is, why was the reasoning of *J'Aire*, which seemed ascendant in 1985, reversed so completely in subsequent years?

### V. Conclusion

This Article is not the proper place for a complete survey of the rise and fall of the progressive impulse in tort law to which Rabin referred at the beginning of his 2006 article. All it has attempted is to focus on one episode of that rise and fall, and even in that area, all it has really done is chronicle the reactions of one scholar to the rise and fall of progressivism in that one episode. However, I will conclude by hazarding an explanation by way of asking a counterfactual: what would the *J'Aire* approach to pure economic loss have looked like had it been allowed to grow?

Rabin’s focus in his 2006 article was not on *J'Aire* but on *People Express*. As I argued above, while Rabin could have characterized *J'Aire* as a Category II case, like *People Express*, he did not.\(^\text{155}\) This would have forced him to deal with the question that is implied in his discussion of *People Express* and 532 Madison Avenue, which is whether the approach adopted in *J'Aire* could distinguish between Category II cases on the basis of a principle universal to all parts of negligence law, such as the norm against disproportionate punishment.\(^\text{156}\)

To give an example of what such a project might have looked like, one could look to another jurisdiction that has, arguably, continued

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\(^\text{154}\) This conclusion is consistent with Schwartz’s discussion of Aas. See Schwartz, *American Tort Law*, supra note 2, at 118 (approving of Aas).

\(^\text{155}\) See supra note 116 and accompanying text.

\(^\text{156}\) See Rabin, *Tort Recovery*, supra note 1, at 1534 (stating that “there is a simple and straightforward explanation for sustained reluctance of the courts to extend” duty in pure economic loss cases).
the *J'Aire* project. As noted above, Stapleton's view of the American approach to pure economic loss is that it took a wrong turn by maintaining an approach that has been abandoned, in varying degrees, by other commonwealth jurisdictions. According to Stapleton,

> [N]on-U.S. common law jurisdictions, particularly in the New World, have developed a matrix of substantive legal concerns governing the issue of recognition of liability [for pure economic loss] that has replaced, or is in the process of replacing, the artificial pockets approach that still bedevils the area in the United States.\[157]\n
And what is this approach? The title given to it by Stapleton—“middle theory”\[158]\—does not say very much about where it fits in the debate between Schwartz and Rabin described above. And, despite Stapleton's claim that middle theory is consistent with Schwartz's own approach (a claim about which I am quite skeptical),\[159]\ I think that a brief review of its methodology reveals that it is not too different from the approach adopted by the *J'Aire* court.

In an article published in 2002, Stapleton discussed the various lessons that the United States could learn from other common law jurisdictions, especially Australia and Canada. The reason that Stapleton suggested that American academics and judges could learn from the experience in other common law jurisdictions was that, compared to the other common law jurisdictions, American legal commentary on pure economic loss was generally ignored by American judges and therefore played no role in shaping the law.\[160]\ The experience in the Commonwealth has apparently been a happier and more productive one for both law professors and courts. According to Stapleton, after a bad start with *Hedley Byrne & Co. v. Heller & Partners Ltd.*, which limited pure economic loss in a Category II case to an arbitrary pocket of activity, “rigorous academic criticism” helped push English courts towards a “breakthrough” and the House of Lords extended liability in a case that had a roughly analogous structure to *Aas*.\[161]\ Academic criticism was especially effective in helping Australian and Canadian courts to shift away from the pockets approach of *Hedley Byrne* to “a

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158. *Id.* at 532.
159. *Id.* at 534–35.
160. *Id.* at 534. Stapleton actually attributes this observation to Schwartz. *Id.* Why is it necessarily a bad thing for courts to ignore the commentary of law professors? Res ipsa loquitur.
161. *Id.* at 551 (citing *Junior Books, Ltd. v. Veitchi Ltd.*, [1983] 1 A.C. 520 (appeal taken from Scot.) (finding the subcontractor to have a duty for pure economic loss to the purchaser)); *see also* *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] 1 A.C. 465 (appeal taken from Eng.). As Stapleton noted, the United Kingdom retreated somewhat toward the American approach in a series of cases limiting the promise of *Junior Books*. Stapleton, *supra* note 104, at 554–57.
more subtle approach" that utilized "core values and concerns that are common across the tort of negligence."

A brief survey of the features of the middle theory reveals the following. First, it rejects that there is any "normative justification" within negligence law "for the pockets approach to the duty issue." Second, while middle theory views foreseeability as a necessary condition, it analogizes pure economic loss to "nontraditional physical loss" cases such as NIED and regards it as part of negligence law for which courts have developed principles to limit liability to some subset of all foreseeable plaintiffs. Finally, the principles that the courts should apply, while fact sensitive, are not based on ad hoc public policy claims (such as the so-called primacy of private ordering) but on normative concerns that include "that the boundaries of liability be ascertainable" to the defendant ex ante ("the indeterminacy concern") and that the plaintiff should either have been "especially vulnerable" or unable to "secure[] appropriate self-protection."

This review of the middle theory is likely to be open to the criticism that, by being so summary, it is inaccurate and perhaps therefore unhelpful. Still, I think it is accurate enough to illustrate that it seems somewhat similar in both structure and content to the interpretation of J'Aire offered by Rabin in 1985. The two features shared by both are the two-step process by which pure economic loss liability is rendered possible but not certain by foreseeability and the role played by judicial mechanisms to respond to the fear of widespread, or disproportionate, liability. On this point, Stapleton’s characterization of the problem sounded very similar to Rabin’s:

After an intense debate among academics, it is now recognized by Commonwealth courts that, while the total extent of economic loss and the total number of victims in an economic loss case may be indeterminate, this factual feature need not be fatal to a claim. There is no legal problem of indeterminacy if: first, the law can, on a normatively justifiable basis, restrict those who can sue, and second, this normatively justified class is reasonably determinate in terms of its numbers (that is, the size of the class is ascertainable by parties in the defendant’s position). A parallel double requirement (that is, normative justification plus reasonable ascertainability) applies to the issue of the amount for which members of the class can claim.

162. Stapleton, supra note 104, at 552.
163. Id. at 554 (emphasis added).
164. Id. at 583.
165. See id. at 582–83.
166. Id. at 537–38.
167. Id. at 547.
168. Stapleton, supra note 104, at 583.
Indeterminacy, in other words, is now seen as merely one manifestation of the institutional concern that the boundaries of liability should be ascertainable and based on normatively justifiable arguments.169

Recall that Rabin noted that "general tort principles" could be employed to explain why some pure economic loss cases, like J'Aire, could be admitted by the tort system while others, like the Brooklyn Battery Tunnel example, could not.170 In fact—and this should be no surprise—following the quote above, Stapleton then invoked the Brooklyn Battery Tunnel example as precisely the class of cases that Commonwealth courts were equipped to exclude from negligence law.171

If middle theory worked in the Commonwealth, then there is some reason to believe that it could have worked in the United States if cases like J'Aire had been allowed to develop. However, as Rabin noted in 2006, Category II cases were rejected as a class by American courts, despite exceptions like People Express. The reason was that there seemed to be no way to draw limits within classes of plaintiffs, as illustrated by cases like 532 Madison Avenue.172 Therefore, the question is: could middle theory have provided an acceptable solution to the Category II cases that loomed so large in Rabin's 2006 article?

A preliminary analysis based on the description of various cases Stapleton holds out as examples from which America might learn suggests that middle theory cannot respond to the concerns raised by Rabin in 2006. For the sake of brevity, I will offer one case as an example.

In Perre v. Apand Property Ltd., the High Court of Australia reversed a no-duty ruling by a lower court.173 The defendant negligently supplied infected seed to a farmer who grew a diseased crop of potatoes.174 Although the disease had not spread, a regulation prevented growers of potatoes within a twenty-kilometer radius of the farm with the diseased crop from exporting their potatoes to market.175 The plaintiffs were a group of farmers who either grew or processed potatoes on land within twenty kilometers of the farmer who had received

169. Id. at 544.
170. See Rabin, Tort Recovery, supra note 1, at 1524.
171. See Stapleton, Comparative Economic Loss, supra note 104, at 544 (arguing that if the court could not find a normative reason to distinguish between any subset of all the foreseeable victims, then the court should find no duty).
172. Rabin, Respecting Boundaries, supra note 3, at 861.
174. Id. at 180.
175. Id.
the defective seed. The lower court held that, although the farmer who received the diseased seed could recover, the plaintiffs could not recover because the court could not find any way to distinguish the plaintiffs from others whose economic interests were affected by the defendant's negligence but whose land or operations were outside of the twenty-kilometer limit.

The High Court held that there existed a class of pure economic loss plaintiffs who were "ascertainable and limited. ... That class should be defined as the owners of, and the growers of potatoes on, land within 20 km of [where the diseased potatoes were grown] ... Whether or not [the defendant] knew who were the members of the class is beside the point." Stapleton approved of this outcome:

[B]y limiting the scope of liability to only those ripples of economic loss associated with plaintiffs who were vulnerable to the defendant's conduct in the sense of being exclusively dependent on the defendant taking care, the High Court ... controlled the problem of indeterminacy of liability (as opposed to indeterminacy of total loss)

Yet the court noted that in allowing the plaintiffs' claims, it would have excluded growers whose potatoes had been processed by the processors within the twenty-kilometer boundary even though their potatoes too would not have been permitted to go to market. Similarly, while the court would have permitted the pure economic loss claims of the plaintiffs because they owned a processing plant within the twenty-kilometer boundary, it would not have allowed claims by processors outside the twenty-kilometer boundary who lost business because the farmers within the boundary could not send crops to them.

The distinctions drawn by the High Court in Perre do not seem to meet the challenge raised by Rabin in 2006 in the context of 532 Madison Avenue. In that case, the New York Court of Appeals held that no duty was owed to businesses that suffered pure economic loss because of the closure of a street due to a negligently maintained scaf-
The reason that court held that the businesses near the scaffold on the closed street were owed no duty was not, as Rabin noted, because of a fear of *crushing* liability, but because of the lack of any principled basis to distinguish between the classes of foreseeable plaintiffs.\(^1\)\(^8\)

In an economically interdependent world, proximity seems to be a random device that reproduces the same evils as the pockets of liability method scorned by Stapleton. But if the Commonwealth approach produces a proximity test when faced with a Category II case like *532 Madison Avenue*, then it is doubtful that it represents an approach that could satisfy the concerns that led the courts to impose an absolute prohibition of duty in Category II cases. And if we think that the Commonwealth approach resembles the approach counseled by *J'Aire*, then there is reason to suspect that the disappearance of *J'Aire* from Rabin’s discussion of pure economic loss is because he recognized that it would not be able to meet the challenges he identified in 2006.

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\(^{183}\) See Rabin, *Respecting Boundaries*, supra note 3, at 861.