

# THE AMBIT OF NEGLIGENCE LIABILITY FOR PURE ECONOMIC LOSS

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This article proposes general criteria to define when an actor is subject to negligence liability for pure economic loss. As Jane Stapleton has observed, common law courts usually proceed in the field of economic negligence by establishing discrete pockets of liability that are not connected to general principles.<sup>1</sup> The general principles that courts have proposed to resolve novel claims are not very helpful. The mushy six factor balancing test in *Biakanja v. Irving*<sup>2</sup> dominates the American landscape. The Commonwealth's leading contender originates in the two-part test sketched by the House of Lords in *Anns v. Merton London Borough Council*,<sup>3</sup> which imposes liability if there is foreseeability and sufficient proximity between the negligent conduct and the loss but only in the absence of "considerations calling for a limitation of liability." Building on this test, the Canadian Supreme Court has said there is prima facie liability if there is negligence, foreseeability, and "proximity." The concept of proximity serves as a stuff sack to hold such diverse factors as "the relationship between the parties,

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1. Jane Stapleton, *Comparative Economic Loss: Lessons From Case-Law-Focused "Middle Theory"*, 50 UCLA L. REV. 531, 531 (2002).

2. 320 P.2d 16 (Cal. 1958).

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.

*Id.* at 19.

3. [1978] A.C. 728 (H.L.) (appeal taken from Eng.). The House of Lords rejected the test in *Murphy v. Brentwood District Council*, [1991] 1 A.C. 398 (H.L.) (appeal taken from Eng.), concluding that liability should be limited to the reliance situation in *Hedley Byrne*.

physical propinquity, assumed or imposed obligations and close causal connection” along with “sufficient special factors to avoid the imposition of indeterminate or unreasonable liability.”<sup>4</sup>

Drawing on the work of Stephen Perry and Jane Stapleton, this Article proposes criteria that better define when and why an actor is subject to negligence liability for pure economic loss. Perry proposes that an actor owes a duty of care to another when the actor reasonably appears to invite the other to rely on the actor to render a service or supply information.<sup>5</sup> More pointedly, Perry’s criterion of liability requires that it appear that one of the actor’s *purposes* is to invite the other’s reliance on the actor’s performance. I call this the criterion of invited reliance. On the other hand, Stapleton identifies two general reasons to preclude negligence liability: (1) imposing liability for such harm would expose an actor to indeterminate liability; and (2) alternative means exist to prevent or redress the harm.<sup>6</sup> I add a third reason to preclude liability—(3) an actor’s liability is traditionally resolved by another body of law. I call these the *reasons precluding liability*.

These two sets of criteria divide the field of economic negligence into three areas. Perry’s criterion of invited reliance—the inner circle—defines when an actor generally is subject to negligence liability for pure economic loss unless a

4. Canadian Nat’l Ry. v. Norsk Pac. S.S. Co., [1993] 1 F.C. 67. A later case describes this as a two-stage inquiry with stage one addressing whether there is prima facie liability based on negligence, foreseeability, and relational proximity, and stage two going to whether reasons of policy preclude liability, with avoiding indeterminate liability principal among the reasons. Cooper v. Hobart, [2001] 3 S.C.R. 537. The conceit is that stage one goes to “the relationship between the parties” while stage two goes to “the effect of recognizing a duty of care on other legal obligations, the legal system, and society more generally.” The policy against indeterminate liability is usually the basis of no-liability decisions under the second stage. See, e.g., Hercules Mgmt. Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165 (holding that company auditor was not liable to shareholders for negligently failing to detect and disclose adverse material information); Bow Valley Huskey (Bermuda) Ltd. v. Saint John Shipbuilding Ltd., [1997] 3 S.C.R. 1210 (holding builder and manufacturer not liable for economic loss resulting from their negligence to companies that leased oil rig). Bruce Feldthusen observes that in practice Canadian courts have taken the incremental approach of English courts, generally finding liability only in the familiar pockets while avoiding “the proximity road to nowhere so long taken by the Australian High Court.” Bruce Feldthusen, *The Anns/Cooper Approach to Duty of Care for Pure Economic Loss: The Emperor Has No Clothes*, 18 CONSTRUCTION L. REPS. (3d) 67 (2003).

5. Stephen R. Perry, *Protected Interests and Undertakings in the Law of Negligence*, 42 U. TORONTO L.J. 247 (1992). There are other points of interest in Perry’s article. He gives a novel justification for the lesser protection afforded against economic loss. *Id.* at 262–70. Perry describes economic interests as “inherently vulnerable” and makes the point that they are subject to intentional interference unlike personal and property interests. *Id.* at 264. Also worth noting is Perry’s justification for liability in cases of invited reliance. See *id.* at 289–90. Perry grounds the liability on the interest in personal autonomy arguing that when *A* apparently invites *B* to rely on *A*’s performance of a task, to *B*’s detriment, *A* has impinged on *B*’s autonomy by altering his choice. *Id.*

6. Stapleton, *Comparative Economic Loss*, *supra* note 1, at 536; Jane Stapleton, *Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence*, 111 L.Q. REV. 301, 302 (1995).

rule dictates otherwise. The reasons precluding liability—the outer circle—do just that. In the area between these two circles, where liability is not precluded by the reasons, and there is no liability under the criterion of invited reliance, a court may impose liability. In the United States this is done by a situation-specific rule. This formal requirement has two upshots. One is that the possibility of liability initially poses a question for the court, which may impose liability only by a situation-specific rule.<sup>7</sup> Another upshot of this formal requirement is that, absent a situation-specific rule imposing liability, when conduct results in pure economic loss, a claim of negligence should go to the jury only if the judge concludes that a reasonable person could find a duty under the criterion of invited reliance. Further, the jury instruction should follow Perry's criterion unless there is a more specific rule determining liability.

This still leaves a rather large area of discretion. There is a coherent and descriptively accurate account of the factors that determine liability in this area, though how these factors play out in particular situations depends on institutional and social considerations, legal culture, judicial philosophy, and judicial temperament. These vary greatly across the common law world. Stapleton's key insight is that liability should be imposed only when it is necessary because other means are inadequate to deter unreasonable conduct or prevent or redress harm.

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7. Courts that employ open-ended criteria to determine negligence liability for pure economic loss almost always treat it as a question for the court whether an action lies in a novel case. *Onita Pacific Corp. v. Bronson*, 843 P.2d 890 (Or. 1992), makes this point explicitly regarding negligent misrepresentation. Oregon courts also treat as a question of law whether the parties stand in a "special relationship," which is the basis for finding a duty of care more generally. See *Bennett v. Farmers Ins. Co.*, 26 P.3d 785 (Or. 2001); *Conway v. Pac. Univ.*, 924 P.2d 818 (Or. 1996); *Hampton Tree Farms, Inc. v. Jewett*, 892 P.2d 683 (Or. 1995). In California, the *Biakanja* balancing test goes to the existence of a duty and not to breach or proximate cause, and so whether there is liability under the test is a question for the court. See *J'Aire Corp. v. Gregory*, 598 P.2d 60, 63 (Cal. 1979) ("In each of the above cases, the court determined that defendants owed plaintiffs a duty of care by applying criteria set forth in *Biakanja* . . ."); *Biakanja v. Irving*, 320 P.2d 16, 18 (Cal. 1958) ("The principal question is whether defendant was under a duty . . ."). In *Bily v. Arthur Young & Co.*, the California Supreme Court explained the application of *Biakanja*:

Plaintiffs argue that the kinds of factors we have discussed can be adequately assessed by the triers of fact on a case-by-case basis. According to the argument, if the auditor's error is economically insignificant or the causal relationship between reliance on the audit report and financial injury is too attenuated, the trier of fact will simply find "no negligence" or "no proximate cause." We are not so confident. In applying the *Biakanja* factors . . . we are necessarily required to make pragmatic assessments of the consequences of recognizing and enforcing particular legal duties.

834 P.2d 745, 767 (Cal. 1992).

A handful of New York cases are the exception. Under New York law, a duty of care exists in supplying information if the parties stand in a "special relationship of trust or confidence." This has been held to be a question for the jury when reasonable people might disagree. See *Kimmell v. Schaefer*, 675 N.E.2d 450, 453 (N.Y. 1996); *AFA Protective Sys. v. Am. Tel. & Tel. Co.*, 442 N.E.2d 1268, 1269 (N.Y. 1982). But see *Murphy v. Klein*, 682 N.E.2d 972, 975 (N.Y. 1997) (holding as a matter of law insurance agent has no duty to advise a client about the adequacy of coverage).

Having found a need for liability, a court must then consider the efficacy of tort liability as a means to deter unreasonable conduct or redress harm. The efficacy of tort liability is a function of its administrative costs and the risk of error in determining fault, causation, and damages. In most cases where there is disagreement about liability, there is both a need for the intervention of tort law because of the inadequacy of other means to deter or redress unreasonable conduct causing harm, but also there are reasons to be skeptical about the efficacy of tort liability because of administrative costs or risk of error. Traditionally, when there is both a need for but also doubt about the efficacy of tort liability, the common law has erred on the side of preserving freedom of action, rather than on the side of protecting against harm, when conduct causes solely pecuniary harm.

Part I of this Article explains Perry's criterion of invited reliance and shows it is an accurate statement of when an actor generally owes a duty of care in supplying information or rendering a service in cases in which negligence results in pure economic loss. Part II shows that the criterion of invited reliance is not a necessary condition for negligence liability for pure economic loss, as there are many instances of liability where the criterion is not satisfied. Part III explains the reasons precluding liability and shows they are an accurate statement of when the law will and will not provide redress for unreasonable conduct that foreseeably causes pure economic loss. Finally, Part IV shows that a concern for the inefficacy of tort liability because of administrative costs or risk of error best explains when tort liability is not imposed despite the inadequacy of other means to prevent or redress (arguably) unreasonable conduct (arguably) causing harm.

## I. INVITED RELIANCE

Stephen Perry argues that the concept of an "undertaking" best explains when an actor has a duty of care in rendering a service or supplying information when the actor's negligent performance of the task results in pure economic loss. While the claim is not original to Perry,<sup>8</sup> I draw on his definition of a culpable undertaking because it is especially sharp:

An undertaking by one person *A* to perform a service for another person *B* is conduct engaged in by *A* that *A* knows or should know could reasonably be taken by *B* as indicating that *A* intends *B* to believe that *B* may rely on *A* to perform the service in question.<sup>9</sup>

The gist of what is necessary for there to be a duty, Perry explains, is "an [apparent] intention to induce another person to believe that he or she may rely on one in some respect."<sup>10</sup> Perry's concept of undertaking requires more than that the

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8. This is Bruce Feldthusen's position. BRUCE FELDTHUSEN, *ECONOMIC NEGLIGENCE* 48–54, 120–21 (4th ed. 2000). Feldthusen cites academic and case authority for "an apparent intention to be bound" standard. See *Kingu v. Walmar Ventures Ltd.*, [1986] 10 B.C.L.R.2d 15; *San Sebastian v. Minister Administering the Envtl. Planning & Assessment Act*, [1986] 162 C.L.R. 340; *R. Lowe Lippmann Figdor & Franck v. A.G.C. (Advances) Ltd.*, [1992] 2 V.R. 671; Joost Blom, *The Evolving Relationship Between Contract and Tort*, 10 CAN. BUS. L.J. 257, 294 (1985).

9. Perry, *supra* note 5, at 281.

10. *Id.* at 282.

actor be able to foresee that another is relying on the actor to perform a task. The actor also must have reason to know that the other believes the actor intends to invite the other's reliance. Perry illustrates with the example of Kant who, Perry observes, is under no duty to continue pathologically regular walks in Konigsburg even if Kant knows a citizen relies on Kant to set his watch. He adds: "Matters would stand differently, however, if Kant had told the citizen that he could rely on Kant in this respect."<sup>11</sup>

A variation on the Kant example highlights the difference between this rule and the rule that determines a culpable undertaking when conduct results in physical harm. If a watchful parent, call him Vigil, regularly stands at a corner to ensure his child safely crosses the street on the way to school, and if Vigil knows parents of other children have come to rely on him being there and so allow their children to walk to school unescorted, Vigil has a duty to notify the other parents before leaving the crossing unattended.<sup>12</sup> It is sufficient for liability that Vigil has reason to know that leaving the corner unattended exposes children to a risk of physical harm because their parents rely on him being there. It is unnecessary that Vigil reasonably appear to invite this reliance.

Most of the bite in Perry's criterion of liability lies in the requirement that the actor appears *to intend* to invite the claimant's reliance. I gather Perry means it must reasonably appear that one of the actor's purposes is to invite the claimant's reliance.<sup>13</sup> In Vigil's case, liability does not require that the other parents think that one of Vigil's purposes in watching the corner is to enable them to allow their children to go to school safely unescorted. Indeed, it would be odd for them to think that is Vigil's purpose because he would appear to be there to enable his child to go safely. I read Perry as making the strong claim that, for there to be a culpable undertaking when an actor's conduct causes pure economic loss, it must reasonably appear to the claimant that one of the actor's goals is to invite the claimant to believe he may rely. Thus, there is a duty when Kant tells a citizen he may rely on Kant to set his watch. Once his reliance is overtly invited, the citizen

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11. *Id.* at 285.

12. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 42 cmt. h, illus. 6 (Proposed Final Draft, 2005).

13. Peter Cane, *Mens Rea in Tort Law*, 20 OXFORD J. LEGAL STUD. 533, 535 (2000), observes that this is the usual definition of intent outside of tort law but that in tort law intent often is equated with the concept of recklessness. He explains: "A person intends a particular consequence of their conduct if their purpose is to produce that consequence by their conduct. A person is reckless in relation to a particular consequence of their conduct if they realise that their conduct may have that consequence, but go ahead anyway." *Id.* As for why recklessness suffices to make out intent in tort law, Cane hypothesizes:

[T]he person who intends that their conduct should produce a particular consequence, and the person who is reckless as to whether their conduct will produce a particular consequence, both engage in the conduct deliberately. It is this element of deliberateness in relation to conduct that links intention and recklessness and leads to their assimilation in tort law. Doing deliberately something of which the law disapproves is worse than doing it without deliberateness; and it is this line between deliberate and non-deliberate conduct to which tort law gives prime significance.

*Id.* at 536.

would reasonably think that one of Kant's goals is to induce the citizen to believe he may rely on Kant to set his watch. Note we can be agnostic about Kant's reasons for wanting to invite the citizen's reliance. It suffices for liability that Kant leads the citizen to believe Kant wants him to be able to rely.

This definition of a culpable undertaking is immune to some of the usual objections to using a concept of an undertaking to define when there is liability.<sup>14</sup> One such objection conceives that what is necessary for liability is that the actor appear to have intended to assume responsibility for the resulting harm if the actor should perform the undertaking negligently. This is an impossibly high criterion when an actor does not benefit from the other's reliance because "no one but a fool" would consciously accept such a risk gratuitously.<sup>15</sup> When Kant tells a citizen he may rely on Kant to set his watch, the citizen probably would not think Kant expected (much less intended) to assume responsibility for the citizen's loss if Kant accidentally was late one day, for neither the citizen nor Kant would think that likely given Kant's habits. Often when liability is found in a gratuitous undertaking the task is easily performed. In such a case, an actor may well intend to invite another's reliance without considering the possibility that he will be responsible for the resulting harm in the off chance of a slip-up.

A different objection conceives that a culpable undertaking occurs when an actor has reason to know that the other relies on the actor's competent performance of the undertaking.<sup>16</sup> This is an unhelpfully low criterion even if we add the further limitation that an actor owes a duty of care only insofar as the actor's conduct creates a risk of harm to others.<sup>17</sup> The criterion is satisfied whenever an actor has reason to know another is relying on the actor to use care in conduct to ameliorate a risk of harm created by the actor.<sup>18</sup> For example, when a driver brakes for a red light and sees another driver beginning to cross on the green, the braking driver has reason to know the crossing driver is relying on her to stop in just this way. While we could say drivers rely on each other to respect the

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14. The concept of an undertaking is ambiguous so it is best to use more precise terms, such as invited reliance, to describe when there is liability. The RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 42 (Proposed Final Draft, 2005) employs the concept of undertaking to define when an actor has a duty of care in rendering a service that may cause physical harm to another. As the discussion in text shows, whatever the concept means in that context, Perry's definition of a culpable undertaking is different.

15. D.M. Gordon, *Hedley Byrne v. Heller in the House of Lords*, 2 U. BRIT. COLUMBIA L. REV. 113, 149–50 (1964–1966).

16. See Stapleton, *Comparative Economic Loss*, *supra* note 1, at 541 ("[T]his idea was at first imperfectly expressed in terms of a requirement of 'reliance.' But academic commentators trenchantly pointed out that in a sense we all 'rely' on others acting carefully in how they go about their business. A pedestrian relies on drivers to act carefully.")

17. This is a general requirement for a duty of care. It appears most prominently in the law when there is a duty to act. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 37 (Proposed Final Draft, 2005).

18. More precisely, there would be a duty of care when (1) an actor's conduct creates a risk of harm to another if the actor does not use care; (2) the other could ameliorate this risk of harm by a precaution; (3) the other does not take the precaution in the apparent belief the actor will use care; and (4) the actor has reason to know the other has not taken the precaution when the negligence occurs.

rules of the road, we would not say that drivers respect the rules of the road with the purpose of inducing others to drive, nor would we say in this particular situation that when a driver slows for a red light, she does so with the purpose of inducing other drivers to cross in her path. Liability exists in this situation when negligence results in physical harm. As you shall see, this criterion does not describe when there is liability for conduct causing solely pecuniary harm.

The criterion of invited reliance describes a line that runs through the law of economic negligence.<sup>19</sup> Liability usually exists on one side but not the other. Several negligent spoliation cases hold that an actor who takes possession of evidence knowing it is valuable to another has no duty of care to the other unless the actor expressly agrees to preserve the evidence on behalf of the other.<sup>20</sup> The mere fact the actor knows another relies on him to preserve the evidence is insufficient for liability. On the other hand, if the actor assures the other he will preserve the evidence, the other would reasonably believe the actor intends to invite his reliance, and so there is a duty and liability. *Goodman v. Kennedy* is on one side of the line.<sup>21</sup> The case holds that an attorney for the issuer of a security owes no duty to a purchaser of the security in advising the issuer about the security's characteristics, even though the attorney knows the purchaser is privy to his advice and will rely upon it.<sup>22</sup> On the other hand, an issuer's attorney would be subject to liability to a purchaser if the attorney knew the purchaser had been told by the issuer that the attorney's opinion was being supplied for the purpose of assuring the purchaser on the point.<sup>23</sup> In *Goodman*, the attorney did not reasonably appear to invite the purchaser's reliance; in the second situation, he does. On one side of the line are many cases holding that an actor owes no duty of care to another when the actor inspects property to assure himself or a third party of the

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19. The criterion is also consistent with the doctrine of gratuitous agency. An actor undertakes a duty of care as a gratuitous agent when the actor by word or deed leads "another reasonably to rely upon the performance of definite acts of service by [the actor] as the other's agent, caus[ing] the other to refrain from having such acts done by other available means." RESTATEMENT (SECOND) OF AGENCY § 378 (1958). For a fuller account, see Warren Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913 (1951).

20. *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1117 (Kan. 1987), is a leading case. An A.L.R. annotation collects cases and observes: "The majority of jurisdictions considering the actionability of negligent spoliation, however, have not recognized the tort, either for parties or nonparties to the underlying dispute." Benjamin D. Vernia, Annotation, *Negligent Spoliation of Evidence, Interfering with Prospective Civil Action, as Actionable*, 101 A.L.R.5TH 61 § 2(a) (2002). *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*, 807 N.E.2d 865, 868 (N.Y. 2004), goes further by precluding a promissory estoppel claim when an alleged promise to preserve the evidence was not in writing. *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267 (Ill. 1995), is a leading case imposing liability.

21. 556 P.2d 737 (Cal. 1976).

22. *Id.* at 743-44.

23. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(2) & cmt. e (2000). The black letter law says there is a duty to a nonclient if the "the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies." *Id.* § 51(2).

property's value.<sup>24</sup> On the other side, courts routinely find a duty when a property inspector knows its report will be given to the purchaser for the purpose of satisfying a condition of a purchase agreement.<sup>25</sup> The criterion of invited reliance also is satisfied in cases in this vein that atypically find liability. For example, one case holds that a lender owes a duty to a borrower to inspect property securing the loan when the borrower paid an inspection fee and was told by the lender that funds would not be disbursed to the builder until the work passed inspection.<sup>26</sup> These atypical facts create the appearance that the lender intends to invite the borrower to rely on its inspection.

The criterion of invited reliance is consistent with much of the law of unjustifiable reliance in the law of negligent misrepresentation,<sup>27</sup> if one adds that, for there to be a duty of care in supplying information, an actor must appear to intend to invite a recipient to attach significant importance to the information in

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24. Many cases hold that a lender owes no duty to the buyer when a lender evaluates construction to protect its security. *E.g.*, *Meyers v. Guarantee Sav. & Loan Ass'n*, 144 Cal. Rptr. 616, 620 (Ct. App. 1978); *Butts v. Atlanta Fed. Sav. & Loan Ass'n*, 262 S.E.2d 230, 232-33 (Ga. Ct. App. 1979); *Daniels v. Army Nat'l Bank*, 822 P.2d 39, 43 (Kan. 1991); *Rzepiennik v. U.S. Home Corp.*, 534 A.2d 89, 93 (N.J. Super. Ct. App. Div. 1987); *Henry v. First Fed. Sav. & Loan Ass'n*, 459 A.2d 772, 774 (Pa. Super. Ct. 1983); *Peterson v. Mut. Sav. Inst.*, 646 S.W.2d 327, 329 (Tex. App. 1983). Others hold that a title insurer owes no duty to the insured when it evaluates title to determine insurability. *E.g.*, *Brown's Tie & Lumber Co. v. Chi. Title Co.*, 764 P.2d 423, 427 (Idaho 1988); *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 562 A.2d 208, 220 (N.J. 1989); *Stewart Title Guar. Co. v. Cheatham*, 764 S.W.2d 315, 319 (Tex. App. 1988); *Greenberg v. Stewart Title Guar. Co.*, 492 N.W.2d 147, 152 (Wis. 1992); *Hulse v. Am. Title Co.*, 33 P.3d 122, 134-35 (Wyo. 2001). But there are cases taking the contrary view. *E.g.*, *Title Ins. Co. of Minn. v. Costain Ariz., Inc.*, 791 P.2d 1086, 1089-90 (Ariz. Ct. App. 1990); *Shada v. Title & Trust Co. of Fla.*, 457 So. 2d 553, 557 (Fla. Dist. Ct. App. 1984); *Ford v. Guarantee Abstract & Title Co., Inc.*, 553 P.2d 254, 266 (Kan. 1976); *Heyd v. Chi. Title Ins. Co.*, 354 N.W.2d 154, 158-59 (Neb. 1984).

25. *See, e.g.*, *Buchanan v. Scottsdale Envtl. Constr. & Dev.*, 787 P.2d 1081, 1082-83 (Ariz. Ct. App. 1990); *Hardy v. Carmichael*, 24 Cal. Rptr. 475, 480-81 (Ct. App. 1962); *Robert & Co. v. Rhodes Haverty P'ship*, 300 S.E.2d 503, 504 (Ga. 1983). Compare *Buchanan v. Georgia Boy Pest Control Co.*, 287 S.E.2d 752, 754-55 (Ga. Ct. App. 1982), which analyzes the claim as one of third-party beneficiary and remands to determine whether the inspection contract was intended to benefit the purchaser. The annotation at 32 A.L.R.4th 682 collects cases. Francis M. Dougherty, *Liability of Termite or Other Pest Control or Inspection Contractor for Work or Representations*, 32 A.L.R.4th 682 (1984).

26. *Rudolph v. First S. Fed. Sav. & Loan Ass'n*, 414 So. 2d 64, 71 (Ala. 1982).

27. The RESTATEMENT (SECOND) OF TORTS § 552(1) (1977) makes a person who negligently supplies misinformation liable for a loss resulting from the other's reliance only if such reliance is "justifiable." The doctrine is puzzling. In the law of fraud it can be explained as a tool judges use to screen out cases where the evidence the defendant lied or the plaintiff relied is weak. *See* DAN B. DOBBS, *THE LAW OF TORTS* 1360-61 (2000). This explanation will not do in the law of negligent misstatement because the doctrine is used to screen out claims in some cases where misstatement and reliance seem palpable. While the doctrine operates like a defense of contributory negligence, in most states it has not given way to comparative fault. *But see* *Lawyers Title Ins. Co. v. Baik*, 55 P.3d 619, 627 (Wash. 2002) (taking the position that comparative fault principles should govern a claim of unjustifiable reliance).



making the decision that resulted in the harm.<sup>28</sup> The cases generally hold that reliance on opinion<sup>29</sup> or prediction<sup>30</sup> is not justifiable when the actor does not supply the opinion in a professional or fiduciary capacity. They hold that a claimant's reliance on an actor to disclose information is not justifiable when the claimant could readily ascertain the matter itself and the claimant and the actor are in an arms-length relationship.<sup>31</sup> They also hold that reliance on information supplied by an adversary in litigation is not justifiable.<sup>32</sup> In all of these situations it may be said that an actor does not reasonably appear to intend to invite a claimant to attach significant importance to the information in making a decision because of the conditions stated in the particular rule. For example, there is no liability in giving an opinion (other than in a professional or fiduciary capacity) because usually when people give a non-expert opinion they do not intend to invite the recipient to attach significant importance to the opinion in making a decision.

The criterion of invited reliance (with the addendum described above) also jibes with one-off justifiable reliance cases like *Stewart Title of Idaho, Inc. v. Nampa Land Title Co., Inc.*<sup>33</sup> In that case, an agent of a title company mistakenly told an agent of an escrow company over the phone that defects in title disclosed in a preliminary report had been cleared. The escrow agent's release of funds on this

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28. The weight a recipient is expected to place on information goes to the appropriate level of care, causation, contributory negligence, and scope of liability. Making it an element of duty precludes liability where the claimant either is at fault for placing undue weight on the information or where the information was a small factor in the decision resulting in the loss.

29. See, e.g., *Rolex Employees Ret. Trust v. Mentor Graphics Corp.*, 749 F. Supp. 1042 (D. Or. 1990).

30. See, e.g., *Hydro Investors, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 20–21 (2d Cir. 2000) (New York law); *Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver, N.A.*, 892 P.2d 230, 237 (Colo. 1995).

31. See, e.g., *McGee v. Vt. Fed. Bank*, 726 A.2d 42, 44–45 (Vt. 1999).

32. See, e.g., *Beeck v. Kapalis*, 302 N.W.2d 90, 96 (Iowa 1981); *Devore v. Hobart Mfg. Co.*, 367 So. 2d 836, 839 (La. 1979).

33. 715 P.2d 1000 (Idaho 1986); see also *Wash. Mut. Bank, FA v. Advanced Clearing, Inc.*, 679 N.W.2d 207, 212–13 (Neb. 2004) (holding that reliance on defendant's Medallion Stamp to determine authenticity of signature on draft is not justifiable when plaintiff's internal policies stated that employees were not to take stamp as signature guarantee). *Eternity Global Master Fund Ltd. v. Morgan Guaranty Trust Co. of New York*, 375 F.3d 168 (2d Cir. 2004) (applying New York law), is also consistent. There, plaintiffs were sophisticated investors who claimed the defendant bank negligently misstated they would be able to sell their positions in credit default swaps in a secondary market. *Id.* at 174. The court held the plaintiff's reliance not justifiable, observing that "the misrepresentation alleged was made in a single phone call in February 2001, eight months before Eternity signed the disputed CDS contracts, in the context of an express disclaimer of any commitment to unwind the CDS transactions." *Id.* at 189. For these reasons, the bank did not reasonably appear to intend to invite the plaintiffs to attach significant importance to the information in deciding whether to do the deal. *Id.* at 189–90. The court explained that when reliance had been found to be justifiable the "relationship between the parties . . . extended beyond the typical arms length business transaction [because] defendants initiated contact with plaintiffs, induced them to forbear from performing their own due diligence, and repeatedly vouched for the veracity of the allegedly deceptive information." *Id.* at 188.

basis resulted in a loss. The custom in the trade was to get a written explanation of how defects had been cleared, something both agents should have understood as both were experienced. There was no suggestion that the escrow agent told the title agent she planned to release the funds on the basis of the phone call. The case holds that the escrow agent's reliance was not justifiable. Given the industry practice, the title agent did not reasonably appear to intend to invite the escrow agent to release funds on the basis of the oral information.

Under American law, often a claimant may recover under the doctrine of promissory estoppel when an actor negligently performs a gratuitous undertaking having invited the claimant's detrimental reliance.<sup>34</sup> The criterion of invited reliance has a broader reach than the doctrine of promissory estoppel on one dimension.<sup>35</sup> A promise is a type of signal from an actor to a claimant indicating the actor intends to invite reliance. While this signal need not take the form of express words of promise or commitment (that is, an overt invitation to rely may do, as in Perry's example where Kant tells the citizen he may rely on Kant to set his watch), the absence of an overt invitation to rely may lead a fact-finder to conclude there was no promise to perform an act though the fact-finder would find

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34. This part of tort law and the doctrine of promissory estoppel are intertwined historically. Some of the roots of the doctrine of promissory estoppel are in tort law, in particular in cases of gratuitous agency and noncontractual bailment. Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 680 (1984); Benjamin F. Boyer, *Promissory Estoppel: Principle from Precedents II*, 50 MICH. L. REV. 873, 873 (1952). For a testament to the historic primacy of the tort concept, see SAMUEL J. WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 8:1 (4th ed. 1992) ("It remains the law to this day that a gratuitous or voluntary undertaking may render one liable for the consequences of negligent failure to carry out the undertaking. However, in most cases of this sort, the cause of action is generally grounded in tort, rather than in contract.").

We could dispense with the doctrines of gratuitous agency and bailment, and even the doctrine of negligent misrepresentation, and use the doctrine of promissory estoppel to establish an actor's duty and liability. For example, there is a duty under the doctrine of gratuitous agency when an actor undertakes to perform "a definite act of service" as an agent for another, meaning the actor must undertake to perform the action on behalf of the other and subject to the other's control and consent. Gratuitous agency could be subsumed in promissory estoppel for in every case of gratuitous agency it should be possible to find at least an implicit promise to perform the act competently. But it is difficult to prune the law of redundant doctrines, and, on balance, it may be unadvisable. Retaining the narrower doctrine focuses the claim and provides more telling analogies. It also obviates the question whether "injustice can be avoided only by enforcement of the promise," which must be answered in the affirmative before redress is available under the doctrine of promissory estoppel. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

35. The doctrine of promissory estoppel has a much broader reach than the criterion of invited reliance on another dimension. A promissory estoppel action lies when an actor invites reliance by undertaking to supply another with resources, for example money, property, or the use of property. A negligence action lies only for negligence in supplying information or rendering a service. In addition, under the doctrine of promissory estoppel there is liability for nonfeasance as well as misfeasance. Traditionally, a tort action lies only for misfeasance and not for nonfeasance, though this distinction is waning. See *Fultz v. Union-Commerce Assocs.*, 683 N.W.2d 587 (Mich. 2004); *Sommer v. Fed. Signal Corp.*, 593 N.E.2d 1365 (N.Y. 1992); RESTATEMENT (THIRD) OF TORTS § 42 cmt. e (Proposed Final Draft No. 1, 2005).

an apparent invitation to rely. Thus, a fact-finder could find negligence liability under the criterion of invited reliance, but not liability based on promissory estoppel.

*Arthur Pew Construction Co. v. Lipscomb*<sup>36</sup> is a case in point. In return for a share of the profits, the plaintiff agreed to provide a scoundrel with financial support to enable the scoundrel to keep profitable government construction contracts. Worried about the scoundrel absconding with the payments, the plaintiff arranged for the scoundrel and the defendant bank to execute a government form assigning contract payments to a bank account on which plaintiff and the scoundrel were joint signatories. When the plaintiff learned of an unsuccessful scheme by the scoundrel to empty the account, he told an officer of the defendant bank he was worried that the scoundrel might try to get the money paid directly to himself by releasing the assignments. A release required the bank's approval. The plaintiff alleged that the officer assured him, "Don't worry about that. . . . [N]obody at [the bank] is going to release those assignments." The officer denied giving this assurance but admitted the plaintiff warned him of his concern. The scoundrel went to another branch of the bank and inveigled an employee to sign a release. Before this was discovered, \$300,000 was diverted from the account and could not be recovered from the scoundrel. The plaintiff sought to recover this money from the bank, pleading promissory estoppel and negligent performance of an undertaking. The jury found for the bank on the promissory estoppel claim and for the plaintiff on the negligence claim. If a juror believed the bank officer's version of events, she might well find the officer did not promise to prevent execution of a release, but that the officer did reasonably appear to invite the plaintiff to rely on the officer to make a reasonable effort to prevent a release from being executed.

The criterion of invited reliance is a default rule for determining liability in the absence of a more specific rule. Often, as with the rules on justifiable reliance on opinion, prediction and omission in the law of negligent misrepresentation, the rules can be explained as context-specific applications of the general criterion. But some rules exculpate an actor from liability though a reasonable person could or would find invited reliance. An example is the rule in the law of negligent misrepresentation that there is no negligence liability when information is supplied in a nonbusiness context.<sup>37</sup> Another example is the rule in

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36. 965 F.2d 1559 (11th Cir. 1992) (applying Georgia law). The case is rare authority that a claimant may establish an actor's negligence liability under something like the criterion of invited reliance when the claimant cannot establish liability under the doctrines of promissory estoppel, negligent misrepresentation, gratuitous agency, or bailment. Most cases in which there is liability under the criterion of invited reliance either apply or can be explained by one of these other doctrines.

37. The RESTATEMENT (SECOND) OF TORTS § 552 (1977) states a duty of care is owed only when an actor supplies information in "the course of his business, profession, or employment" to guide another in a business transaction. It provides as an example of where no duty is owed a lawyer giving curb-side advice. *Id.* § 552 cmt. d. This is a basis for finding no duty in several cases. *E.g.*, *Gordinier v. Aetna Cas. & Sur. Co.*, 742 P.2d 277 (Ariz. 1987) (denying claim by daughter-in-law against mother-in-law, who was employed by insurance company, for negligent advice regarding coverage); *Johnston v. Correale*, 612 S.E.2d 829, 833 (Ga. Ct. App. 2005) (denying claim against domestic partner who negligently misadvised plaintiff about reliability of a contractor); *G.A.W. v. D.M.W.*, 596

the law of negligent misrepresentation precluding indeterminate liability.<sup>38</sup> For example, a financial news service is not subject to liability to its subscribers for negligently reporting financial information though the service reasonably appears to invite the subscribers to rely on the accuracy of the information.<sup>39</sup>

## II. LIABILITY WITHOUT INVITED RELIANCE

The criterion of invited reliance does not define the outer limits of liability for pure economic loss.<sup>40</sup> This Part canvasses instances where the law imposes negligence liability (and sometimes strict liability) though the criterion is not satisfied. The explanation for these instances will be developed in Parts III and IV.

Sometimes there is liability when a claimant does not rely on an actor. A large group of such cases resemble third-party beneficiary claims in modern contract law. *A* is hired by *B* to perform a task to benefit *C*, and *A* is held liable in tort to *C* for pure economic loss resulting from *A*'s negligent performance of the task. A leading example is the liability of an attorney who botches a bequest to a disappointed heir.<sup>41</sup> A dated example is the liability of a telegraph company to the recipient of a telegram for failing to deliver a message.<sup>42</sup> A recent and contested

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N.W.2d 284, 291 (Minn. Ct. App. 1999) (denying claim for negligent misstatement that plaintiff was father of defendant's child, which induced plaintiff to provide support). There is a similar rule in contract law precluding liability on informal social agreements or agreements within the family. *See* *Morrow v. Morrow*, 612 P.2d 730 (Okla. Civ. App. 1980); RESTATEMENT (SECOND) OF CONTRACTS § 21 cmt. c (1981).

38. Rules vary from state to state and range from a rule requiring "near privity," to the rule in the Restatement (Second) requiring information be supplied to a "limited group," to a foreseeability standard. Jay Feinman, *Liability of Accountants for Negligent Auditing: Doctrine, Policy, and Ideology*, 31 FLA. ST. U. L. REV. 17 (2003), is a good review of the current state of the law on auditor liability.

39. *See, e.g.*, *First Equity Corp. v. Standard & Poor's Corp.*, 869 F.2d 175 (2d Cir. 1989) (New York law) (securities information service); *Ginsburg v. Agora, Inc.*, 915 F. Supp. 733 (D. Md. 1995) (Maryland law) (newsletter); *Daniel v. Dow Jones & Co.*, 520 N.Y.S.2d 334 (Civ. Ct. 1987) (on line financial news service).

40. Perry asserts that reasons of principle justify imposing a duty of care when conduct foreseeably risks solely pecuniary harm, but only if there is an undertaking as he defines it. Perry, *supra* note 5, at 250. He leaves the door open to imposing a duty of care in the absence of an undertaking for reasons of policy—for instance, loss spreading and deterrence—while asserting that such policy concerns play a "subsidiary" role in tort law. *Id.* at 249. Those who believe negligence liability generally serves the purpose of deterrence would disagree strenuously with this assertion.

41. *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958), is a leading case and involves a non-lawyer (notary). The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 cmt. f reporter's note (2000) collects cases on both sides of the issue involving legal malpractice. For recent cases involving a lawyer and non-lawyer, respectively, see *Harrigfeld v. Hancock*, 90 P.3d 884 (Idaho 2004), and *Hatteberg v. Norwest Bank Wisconsin*, 700 N.W.2d 15 (Wis. 2005).

42. *See, e.g.*, *McPherson v. W. Union Tel. Co.*, 155 N.W. 557 (Mich. 1915).

example is the liability of an insurance agent who negligently fails to procure insurance to a would-be beneficiary of the insurance.<sup>43</sup>

Other cases of negligence liability for pure economic loss without reliance do not resemble third-party-beneficiary claims. A finder of lost property owes a duty of care to the owner.<sup>44</sup> A notary owes a duty of care to the person whose signature is being forged when she is asked to authenticate a forgery.<sup>45</sup> Sometimes an actor who negligently supplies false information regarding a claimant to another has been held liable to the claimant for harm resulting from the other's response to the information. For instance, courts have split on the liability of a drug tester to an employee for harm resulting from a false positive.<sup>46</sup> I will come back to these cases in Part IV.

In yet other cases where there is liability the claimant relies on the actor but the actor does not reasonably appear to invite the reliance.<sup>47</sup> *Davis v. Nevada National Bank*<sup>48</sup> is a particularly compelling example. The Davises repeatedly asked their construction lender to withhold payment to their home builder because of serious deficiencies in the builder's work. The lender failed to do so, which resulted in a loss to the Davises when they were unable to recover from the builder. The case held that the lender had a limited duty to stop disbursing funds to the builder after the borrower complained of serious deficiencies in the builder's work and asked the lender to stop disbursements pending the lender's investigation of the complaint. The lender did nothing to invite the Davises to rely on it to safeguard their interests in disbursing funds; the loan agreement said the lender

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43. See *Rae v. Air-Speed, Inc.*, 435 N.E.2d 628, 632-33 (Mass. 1982) (adopting a third-party beneficiary theory as an alternative basis of liability); see also *Parlette v. Parlette*, 596 A.2d 665, 670 (Md. Ct. Spec. App. 1991) (holding person that insured intended to be named as beneficiary has claim against broker); *Carter Lincoln-Mercury, Inc. v. EMAR Group, Inc.*, 638 A.2d 1288, 1296 (N.J. 1994) (holding third party has claim against broker for negligence in selecting financially incapable insurer). *Napier v. Bertram*, 954 P.2d 1389, 1395 (Ariz. 1998), comes out the other way, holding that a broker is not liable to third parties for negligently failing to procure uninsured motorist coverage for a cab. *Jones v. Hyatt Insurance Agency, Inc.*, 741 A.2d 1099, 1102-03 (Md. 1999), holds that the claim may only proceed on a third-party-beneficiary theory and thus denies a claim because the contract statute of limitations had run.

44. For the rule that a finder undertakes a duty as a bailee, see *Wood v. Pierson*, 7 N.W. 888 (Mich. 1881). Bailment often is classified as a contract. A bailment, however, does not require a promise and consideration or reliance and may arise upon a defective contract. Bailment requires that the defendant voluntarily have taken possession of the plaintiff's property. See N.E. PALMER, BAILMENT 15-24 (1979); PERCY H. WINFIELD, THE PROVINCE OF THE LAW OF TORT 92-103 (photo reprint 1975) (1931).

45. See *McComber v. Wells*, 85 Cal. Rptr. 2d 376 (1999); *McWilliams v. Clem*, 743 P.2d 577 (Mont. 1987).

46. See *infra* note 86.

47. Some negligent misstatement cases fall under the public duty rationale of the RESTATEMENT (SECOND) OF TORTS § 552(3) (1977). For example, on this basis a mechanic who did maintenance to repair corrosion on an aircraft but failed to record the work in the repair log as required by federal law was held liable to a buyer who would not have purchased the plane had the problem been recorded. *B.L. Jet Sales, Inc. v. Alton Packaging Corp.*, 724 S.W.2d 669, 673 (Mo. Ct. App. 1987).

48. 737 P.2d 503 (Nev. 1987).

had no responsibility to the borrower in disbursing funds; and the lender never indicated it would act on the Davises' requests.

Some courts impose upon a listing broker of residential property a duty to the buyer to inspect for hidden defects.<sup>49</sup> Typically in these cases the broker and the seller say nothing to indicate they want the plaintiff to rely on the broker to find and reveal hidden defects. One could find invited reliance nonetheless, but that argument would rest on tendentious factual assumptions.<sup>50</sup> Instead, reasons of policy best justify the liability. One justification cites the importance of the home as an asset and the superior ability of brokers to identify defects. Another justification is that the liability reinforces a broker's duty to disclose known defects by precluding feigned claims of unreasonable ignorance.

Like the liability under the criterion of invited reliance, all of the above instances of liability resemble contract liability. The actor voluntarily undertakes a duty to use care in performing some task or accomplishing some goal, and the duty usually runs to a specific person (or class of persons). In addition, the rules determining breach, scope of liability, and damages resemble the rules of contract law.

Other instances of negligence or strict liability for pure economic loss resemble the liability under modern accident law. An example is the liability under the doctrine of public nuisance placed on an actor who harms or obstructs public property or a public resource.<sup>51</sup> To recover under that doctrine, a claimant must show that it or a class in which it is a member suffered a harm that can be measured with reasonable certainty and that is distinguishable from and greater than the harm to the general public. The liability of Exxon to commercial and native fishermen for income lost as a result of the Exxon Valdez oil spill is a famous case in point.<sup>52</sup> Another example is the liability in narrowly defined situations for repair or monitoring expenses incurred by a claimant to prevent or mitigate a risk of serious bodily harm created by an actor's negligence, abnormally

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49. *Easton v. Strassburger*, 199 Cal. Rptr. 383 (1984), is a leading case. In the same vein is *Berryman v. Riegert*, 175 N.W.2d 438 (Minn. 1970), and other cases collected in Diane M. Allen, Annotation, *Real-Estate Broker's Liability to Purchaser for Misrepresentation or Nondisclosure of Physical Defects in Property Sold*, 46 A.L.R.4TH 546 § 3 (1986). For the position that a listing broker is under no duty to inspect, see *Teter v. Old Colony Co.*, 441 S.E.2d 728 (W. Va. 1994).

50. If home buyers generally believe listing brokers may be relied upon to inspect for and disclose hidden defects, and if listing brokers are aware of this general belief, then by the mere act of listing a home a broker would appear to invite this reliance. *Invercargill City Council v. Hamlin*, [1996] 1 N.Z.L.R. 513 (P.C.), might be explained on this basis. The case allows a claim by a home buyer against the local authority for negligently failing to discover a foundation defect in approving construction. *Id.* at 515. Apparently there was a custom in New Zealand for home buyers to rely upon inspections done by the local authority rather than do their own inspection. *Id.* at 521.

51. See RESTATEMENT (SECOND) OF TORTS §§ 821B-821C (1979).

52. See Deborah Bardwick, Note, *The American Tort System's Response to Environmental Disaster: The Exxon Valdez Oil Spill as a Case Study*, 19 STAN. ENVTL. L.J. 259, 278 (2000).

dangerous activity, or defective product. The liability of asbestos manufacturers for the cost of removing asbestos from a building is a case in point.<sup>53</sup>

While some of these instances of negligence (and sometimes strict) liability for pure economic loss generate no controversy, others rank among the most contested terrain in tort law today. To understand why this is such contested terrain we must determine what reasons preclude liability in the cases where the absence of liability is uncontroversial, although an actor's unreasonable conduct causes harm to a claimant. We shall see that in the contested cases the reasons precluding liability do not apply but there are reasons to be skeptical about the efficacy of negligence liability.

### III. REASONS PRECLUDING LIABILITY

Jane Stapleton supplies a good part of the answer to the question of what reasons preclude liability.<sup>54</sup> She proposes two general criteria to determine when

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53. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 21 cmt. e (1998). Many cases allow recovery of asbestos removal and abatement costs. *E.g.*, *City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975 (4th Cir. 1987) (applying South Carolina law); *Hebron Pub. Sch. Dist. No. 13 v. U.S. Gypsum Co.*, 690 F. Supp. 866 (D.N.D. 1988); *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646 (D.R.I. 1986); *Town of Hooksett Sch. Dist. v. W.R. Grace & Co.*, 617 F. Supp. 126 (D.N.H. 1984); *Board of Educ. of Chi. v. A, C & S, Inc.*, 546 N.E.2d 580, 587–88 (Ill. 1989); *Sch. Dist. of Independence v. U.S. Gypsum Co.*, 750 S.W.2d 442 (Mo. Ct. App. 1988); *Kershaw County Bd. of Educ. v. U.S. Gypsum Co.*, 396 S.E.2d 369, 371 (S.C. 1990). *But see Adams-Arapahoe Sch. Dist. No. 28-J v. GAF Corp.*, 959 F.2d 868 (10th Cir. 1992). *See generally* Richard C. Asness, *Tort Liability for Asbestos Removal Costs*, 73 OR. L. REV. 505 (1994).

54. *See generally* Stapleton, *Comparative Economic Loss*, *supra* note 1; Stapleton, *Duty of Care*, *supra* note 6. Christian Witting, *Duty of Care: An Analytical Approach*, 25 OXFORD J. LEGAL STUD. 33 (2005), criticizes Stapleton's position. While a few of Witting's points are spot on, most of his argument does not engage Stapleton's project. Witting objects to determining liability on the basis of "policy," in which he lumps floodgate and indeterminacy arguments, distributive arguments, and consequentialist arguments more generally. *Id.* at 39–40. Witting's objections on this score are good as far as they go. Most policy arguments are not much more than sloganeering. Witting goes on to argue that "proximity-based reasoning provides a secure basis for answering the duty question." *Id.* at 33. By "proximity-based reasoning" he means a series of loosely-connected factors and some situation-specific rules that bear on an actor's liability for negligent misstatement. I cannot imagine that Stapleton would object to the effort to make a fairly well-developed body of law, such as the law of negligent misstatement, clearer by identifying factors, or even better rules, that determine liability in particular situations. Nor do I imagine that she would object to Witting's list of factors. (Witting's dismissal of indeterminacy as a reason to preclude liability is a bit odd. He dismisses indeterminacy on normative grounds, while he justifies his factors on descriptive grounds without making a normative argument. There is a very good descriptive argument for a criterion precluding indeterminate liability. For example, this is a prominent feature in the law of negligent misstatement and public nuisance and a familiar rationale for the economic loss rule. It also is a mainstay of commonwealth law.) But all of this is beside the point. Stapleton's criterion precluding liability when alternative means exist to prevent or redress unreasonable conduct causing harm may rest on policy considerations, but it does not require that courts engage in policy analysis. And the criterion precluding indeterminate liability does not require much in the way of policy analysis. I do not think Stapleton would claim these criteria resolve

an actor is not subject to negligence liability for pure economic loss. One criterion is a familiar limitation on liability for negligent misstatement<sup>55</sup> and a familiar justification for the economic loss rule.<sup>56</sup> The criterion precludes negligence liability when it would expose an actor to a risk of indeterminate liability, meaning, paraphrasing Cardozo's familiar statement, liability that would be so uncertain in time, class, or amount that an actor cannot fairly or practically be expected to account for the potential liability in determining the conduct giving rise to the potential liability. Stapleton qualifies this restriction by proposing that, when negligent conduct causes widespread harm, the law may impose liability for a determinate subset of a more general harm if the "plaintiff class (and the quantum for which they can sue) can be described so that it is ascertainable and based on normatively justifiable arguments."<sup>57</sup> An example is the liability of a polluter to fishermen for income lost as a result of harm to a fishery if one thinks there is a normatively justifiable basis for allowing fishermen to recover but not others who are harmed by the loss of the fishery.

Stapleton's other general criterion precludes liability when other mechanisms exist to regulate the actor's unreasonable conduct or to prevent or redress the harm. Breaking the criterion down, liability is precluded when: (1) the claimant could reasonably have avoided the harm;<sup>58</sup> (2) the claimant could have obtained redress for the harm from the actor by contract with the actor or through a chain of contracts reaching back to the actor;<sup>59</sup> or (3) another person has the ability

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hard and novel issues of liability, such as the issue posed in *Perre v. Apand Pty Ltd.*, (1999) 198 C.L.R. 180 (Austl.), which is whether a crop producer who negligently uses genetically modified seed is liable to other producers who are locked out of profitable markets by association. But neither do Witting's proximity-based factors resolve liability in this situation. I am not sure what Witting would have a court do in this situation. Stapleton's criteria at least get some relevant considerations on the table. And it is difficult to explain why we would want a court to ignore policy or the consequences of its decision even though such analysis tends to be facile.

55. See *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931).

56. See Fleming James Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43, 44-45 (1972); Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1530 (1985).

57. Stapleton, *Comparative Economic Loss*, *supra* note 1, at 569. This has a formal and a substantive aspect. The formal aspect requires that the plaintiff class and quantum of damages be described in terms that make liability (tolerably) determinate. The substantive aspect requires that imposing liability for such losses be normatively justifiable.

58. Stapleton, *Duty of Care*, *supra* note 6, at 305. While this runs contrary to the trend towards abolishing the claimant's fault as a bar to recovery, see RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIAB. § 3 (2000), it is consistent with numerous cases in the law of negligent misrepresentation holding that unreasonable reliance is unjustifiable. *E.g.*, *Regensburger v. China Adoption Consultants, Ltd.*, 138 F.3d 1201 (7th Cir. 1998) (applying Illinois law); *Dickerson v. Williams*, 956 P.2d 458 (Alaska 1998); *Howard v. McFarland*, 515 S.E.2d 629 (Ga. Ct. App. 1999); *Cmty. Fed. Sav. & Loan Ass'n v. Foster Developers, Inc.*, 348 S.E.2d 326 (Ga. Ct. App. 1986).

59. Sometimes courts express this as a preference for private ordering. See *Bily v. Arthur Young & Co.*, 834 P.2d 745, 764-65 (Cal. 1992); *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986, 992-93 (Wash. 1994).



and incentive to avoid or redress the claimant's harm or to deter the actor's unreasonable conduct.<sup>60</sup> These sub-criteria echo familiar justifications for the economic loss rule and for other limitations on liability. Stapleton's important contribution is to identify a unifying theme.<sup>61</sup>

Stapleton insists on a general gloss. She argues that insurance (and presumably other means for a claimant to pass a loss on) does not count as an alternative means to prevent harm that should stay the intervention of tort law. Instead, avoiding harm for her means preventing it from coming about, and obtaining redress for harm means passing the loss back to the negligent actor or otherwise sanctioning the actor. This gloss seems right when it comes to unreasonable conduct causing physical harm, so long as the policy justifying the intervention of tort law is not loss spreading. Certainly the gloss is descriptively accurate. On the other hand, it is less clear that the gloss is right when it comes to conduct causing solely pecuniary harm. When a claimant's private loss is not a social loss, as often is true of economic losses, the ability of the claimant to pass the loss on seems a plausible reason to stay the intervention of tort law. As for the gloss's descriptive accuracy, while there are pockets of liability for insurable solely pecuniary harm absent invited reliance,<sup>62</sup> the strength of the general rule of non-liability when loss is purely economic makes it difficult to exclude *a priori* any plausible reason for denying a claim. In fact, a few cases explicitly cite the claimant's ability to pass along a solely pecuniary loss as a reason to deny a

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60. Courts and commentators recognize deterrence of an actor by the prospect of other liability as a reason for denying recovery for relational economic loss when an accident causes significant physical harm and far-flung pecuniary harm. See FELDTUSEN, *supra* note 8, at 203–04. This limitation also appears on the surface of the third-party liability, such as the liability of an attorney who botches a bequest to the disappointed beneficiary. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(3) (2000) (imposing a duty to a third party only when “the absence of such a duty would make enforcement of those obligations to the client unlikely”).

61. Australian cases make a claimant's vulnerability, or the inability to protect oneself from an actor's failure to exercise reasonable care, a precondition of imposing negligence liability. *Woolcock St. Invs. v. CDG Pty Ltd.* (2004) 216 C.L.R. 515, 548–49. *Woolcock* held that a purchaser of a commercial property had no recourse in tort against an engineer for alleged negligence in the design and construction of a building that resulted in foundation defects, when the purchaser declined to test the foundation and did not obtain contractual protection from the risk. *Id.* at 520–21. The court distinguished *Bryan v. Maloney*, (1995) 182 C.L.R. 609, which allowed a subsequent purchaser of residential property to recover from a builder for a defect in construction, and emphasized the factors of proximity and reliance, but made no mention of vulnerability. *Woolcock*, 216 C.L.R. at 520–22. Several judges in *Perre v. Apand Pty Ltd.*, (1999) 198 C.L.R. 180, cited the claimant's vulnerability as a reason to allow a negligence claim by a potato producer against a nearby potato producer whose use of a genetically altered seed resulted in a ban on selling potatoes from the region in a lucrative market. See *e.g., id.* at 236.

62. For example, that the plaintiff could or does have fraud or theft insurance protecting against the loss presumably does not exculpate a notary who negligently certifies a forged signature as the plaintiff's.

negligence claim.<sup>63</sup> It is best to remain agnostic about the gloss in the field of economic negligence and mull over the relevance of insurability as the issue arises.

In addition to Stapleton's two general criteria, courts also preclude negligence liability when an actor's liability is traditionally resolved under another body of law.<sup>64</sup> The negligence principle that an actor has a duty to exercise reasonable care when the actor's conduct creates a foreseeable risk of harm to another, and the corollary that an actor is subject to liability for harm foreseeably resulting from a failure to exercise reasonable care, if applied to its limit to all unreasonable conduct causing harm, would displace much of private law.<sup>65</sup> For example, it is the law of restitution and unjust enrichment, and the doctrines of subrogation, indemnity, and contribution, and not tort law, which resolve the liability of *A* to *C* when, as a result of *A*'s unreasonable conduct causing or threatening harm to the person or property of *B*, *C* incurs an expense to protect *B* from harm or to alleviate or compensate the harm.<sup>66</sup> Thus, a city that pays to remove lead paint from privately owned buildings must look to the law of restitution and unjust enrichment, and not tort law, to obtain compensation from paint manufacturers. Likewise, contract law and the law of restitution determine an actor's liability for negligence in expressing assent to a contract, and the law of equitable estoppel determines an actor's liability when the actor's failure to assert a right or defense causes another person to change position to that person's detriment.

These reasons for precluding liability are descriptively accurate. They are absent when there is negligence (or strict) liability for pure economic loss though the criterion of invited reliance is not satisfied. Consider a few of the cases noted in Part II. A notary is liable to a person whose signature is forged when the notary negligently authenticates the forgery. The victim of a forgery cannot protect herself by contract with the notary from negligent authentication. Nor is the victim always able to recover from a bona fide purchaser, who might be protected because of the apparently proper authentication.<sup>67</sup> The victim's only redress may

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63. See, e.g., *Great Cent. Ins. Co. v. Ins. Servs. Office, Inc.*, 74 F.3d 778, 785-86 (7th Cir. 1996).

64. A common reason for refusing to allow a products liability action for solely pecuniary harm is that such claims are best left to contract, warranty, and sales law. *Seely v. White Motor Co.*, 403 P.2d 145, 149 (Cal. 1965). *Isler v. Texas Oil & Gas Corp.*, 749 F.2d 22, 23 (10th Cir. 1984), contains a strong statement of the desirability of using contract law to determine obligation in a consensual undertaking. Other cases endorse this position. See, e.g., *Ford Motor Credit Co. v. Suburban Ford*, 699 P.2d 992 (Kan. 1985), cert. denied, 474 U.S. 995 (1985); *Grynberg v. Questar Pipeline Co.*, 70 P.3d 1 (Utah 2003); *Snyder v. Lovercheck*, 992 P.2d 1079 (Wyo. 1999).

65. William Powers Jr., *Border Wars*, 72 TEX. L. REV. 1209, 1214 (1994).

66. See RESTATEMENT (SECOND) OF TORTS § 766C illus. 2-3 (1979).

67. Generally, authentication is conclusive as to a bona fide purchaser if the victim actually signs the instrument but does so as a result of duress or fraud. It is not conclusive if the victim is not present and the signature is forged. See, e.g., *Tex. Osage Co-op Royalty Pool v. Kemper*, 170 S.W.2d 849, 851 (Tex. Civ. App. 1943). However, in the latter case, while the victim will be able to set aside the conveyance, it may not be able to recover its loss in the interim. The victim may also incur considerable expense setting aside the conveyance.

be against the forger (good luck there) and the notary. Or consider the law on gifts that are botched as a result of a third party's negligence. Most courts allow a disappointed donee to proceed against the third party in a botched bequest or in a botched inter vivos gift if the mistake is discovered when the donor is dead. No court allows the donee to proceed against a responsible third party for a botched inter vivos gift when the donor is alive and competent. The self-evident distinction is that in the latter case the donor is able to correct the error.

Recall *Davis v. Nevada National Bank*.<sup>68</sup> The court held a home construction lender liable for ignoring repeated pleas by the borrower that the lender not disperse funds to a builder because of gross deficiencies in the builder's work. Once the problem arose, only the lender was in a position to prevent the loss and, if the defects did not imperil the lender's security, the lender had little incentive to withhold payment unless the law intervened to cast the loss on it. In *Davis*, the borrower could not reasonably have been expected to secure protection against this eventuality in advance by contract. As the court noted, neither the borrower nor the lender would have had this eventuality in mind had they thought about the significance of the term stating the lender had no responsibility to the borrower in disbursing funds. Another factor favors the imposition of liability: The potential benefit to borrowers of requiring construction lenders to investigate formal complaints of serious defects in construction before disbursing funds significantly outweighs the expected cost to banks.

The relationship between the reasons precluding liability and the criterion imposing liability in cases of invited reliance is a bit more complex. The obvious connection is that inviting reliance creates vulnerability by lulling a claimant into inaction.<sup>69</sup> The complications lie in the connections between the other reasons precluding liability and the situations where there is no liability in tort though the criterion of invited reliance is satisfied. Much of this is straightforward. As noted earlier, liability for negligent misrepresentation is precluded when it would be indeterminate, as in the case of an auditor that invites the public to rely on audited financial statements.<sup>70</sup> Other rules cabin tort liability to preserve the traditional domain of contract. For example, contract law, and not the law of negligent misrepresentation, generally resolves an actor's liability for supplying inadvertently inaccurate information regarding a pending contract between the actor and a claimant.<sup>71</sup> Some of the complications involve the possibility of concurrent liability in contract and tort. It is difficult to explain why there should be concurrent liability at all, and once there is concurrent liability, why it should exist in some situations but not others. For example, there is no good explanation (other than history) why there is concurrent liability in contract and tort for professional malpractice but not for unworkmanlike construction.<sup>72</sup> Happily, once

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68. *Davis v. Nev. Nat'l Bank*, 737 P.2d 503 (Nev. 1987); see *supra* note 48 and accompanying text.

69. The connection is made in *Woolcock St. Investments v. CDG Pty Ltd.*, (2004) 216 C.L.R. 515.

70. See *supra* notes 38–39 and accompanying text.

71. See RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS § 14 (Preliminary Draft No. 2, 2006).

72. See *id.* § 10 & cmt. c.

it is recognized that the rules in tort on scope of obligation (standard of care and scope of liability) and on damages correspond with contract law, little of consequence turns on the availability of a concurrent tort claim.

#### IV. THE EFFICACY OF TORT LIABILITY

Sometimes there is no tort liability though alternative means are not adequate to deter unreasonable conduct in a situation, or to prevent or redress the harm, and no other body of law resolves an actor's liability to a claimant. *Huggins v. Citibank, N.A.*<sup>73</sup> illustrates. The case holds that a credit card issuer who issues a card to an identity thief is not subject to negligence liability in favor of the person whose identity is stolen. The preclusion of liability is partly explained by the fact that the issuer's financial responsibility for the thief's charges gives it some incentive to use care independent of any tort liability. This explanation is insufficient, however, for the card issuer does not bear all the costs of identity theft. The plaintiff in *Huggins* incurred a significant out-of-pocket cost to clear his name, and his bad credit had the potential to cause other losses, such as the loss of a prospective job, an apartment, or credit. In addition, the plaintiff claimed considerable emotional distress.<sup>74</sup>

The best explanation for the preclusion of liability in *Huggins* is a concern for its efficacy, in particular the risk of error in determining fault, causation, and damages.<sup>75</sup> The complaint challenged the policies of several national banks in issuing credit cards. It would be difficult for a court to determine what care a credit card issuer should take to guard against issuing a card to an imposter. Relevant considerations include not only the immediate cost of checking identity, but also the cost of false negatives. Moreover, a reasonable level of care might leave some risk that a card would be issued to an imposter, rendering causation uncertain. Further, damages other than the out-of-pocket costs of clearing credit would likely be speculative.

The inefficacy of tort liability best explains the preclusion of indeterminate liability. Victor Goldberg has made this point regarding liability for economic loss following an accident on the scale of the Exxon Valdez oil spill.<sup>76</sup> The easiest loss to measure is the market value of the property or resource that is destroyed or the cost of repairing or replacing the property or resource.<sup>77</sup> While

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73. 585 S.E.2d 275 (S.C. 2003).

74. *Id.* at 276.

75. The efficacy of tort liability depends on a court's ability to accurately determine what is reasonable or appropriate conduct, causation, and damages. This is true regardless of one's theory of the purpose of tort liability. If the purpose of tort liability is deterrence, then its efficacy also depends on people's ability to predict liability. The administrative cost of tort liability also bears on its efficacy. Strict liability finesses the question of the reasonableness of an actor's conduct but puts more weight on the questions of the reasonableness of the claimant's conduct, causation, and damages.

76. Victor P. Goldberg, *Recovery for Economic Loss Following the Exxon Valdez Oil Spill*, 23 J. LEGAL STUD. 1 (1994).

77. When the damage is to public property or a public resource, there may be no owner to recover the market value of the property or resource. Goldberg challenges the

other losses predictably result from an accident such as the Exxon Valdez oil spill, Goldberg concludes that on balance it is best to cut-off liability at victims who suffer physical damage because "it avoids the possibility of grossly overassessing injurers for the reliance losses of numerous third parties."<sup>78</sup> Compensating reliance losses requires a determination of the extent to which a claimant has assets committed to exploiting the harmed property that are not re-deployed,<sup>79</sup> and of the reasonableness of the claimant's pre-accident and post-accident conduct.<sup>80</sup> Often this will require numerous individualized determinations of causation, damages, and a claimant's fault. Further, imposing liability for such losses would over-deter because there will be some off-setting gains as other assets are used more intensively.<sup>81</sup>

A balancing of the need for tort liability with its efficacy explains the pattern of results in the general category of cases where *A* sues *B* for negligently supplying *C* with inaccurate information inducing *C* to act to *A*'s detriment. Typically, courts reject such claims out of hand.<sup>82</sup> A particularly weak case, *Semida v. Rice*,<sup>83</sup> shows how *C*'s role in these cases both reduces the need for tort liability and raises doubts about its efficacy. In *Semida*, one partner in a two-man partnership withdrew after a series of difficulties and disagreements that culminated in a partial audit reporting financial irregularities involving the other partner. As a consequence, the partners lost a profitable contract. In addition to suing the withdrawing partner, the other partner sued the auditor claiming that the report was inaccurate and negligently prepared. The plaintiff had challenged the report at the time of receipt, leading the auditor to resolve some of the irregularities, but the auditor left other irregularities uncorrected. The court dismissed the claim on summary judgment, and properly so. A determination of the inaccuracy of a partial audit and of the auditor's negligence would be difficult,

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conventional view that fishermen or some other class of persons who rely on the property should recover their loss as a surrogate. *Id.* at 4-7.

78. *Id.* at 37.

79. *Id.* at 15-17.

80. *Id.* at 17-19.

81. *Id.* at 19-27.

82. *See, e.g.,* Vogel v. Foth & Van Dyke Assocs., Inc., 266 F.3d 838 (8th Cir. 2001) (applying Iowa law) (negligent statement that adjacent land was suitable for landfill); Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 142 F.3d 26 (1st Cir. 1998) (applying Massachusetts law) (misinformation given by competitor to accreditation authorities regarding unaccredited law school); Great Cent. Ins. Co. v. Ins. Servs. Office, Inc., 74 F.3d 778 (7th Cir. 1996) (applying Illinois law) (negligence in correcting filed rate caused plaintiff insurer to lose profits); Rodriguez v. ECRI Shared Servs., 984 F. Supp. 1363 (D. Kan. 1997) (defendant's negative evaluation led to plaintiff's termination); Pannell v. Associated Press, 690 F. Supp. 546 (N.D. Miss. 1988) (libelous newspaper stories); Debcon, Inc. v. City of Glasgow, 28 P.3d 478 (Mont. 2001) (defendant negligently advised city to accept other bid); Jaindl v. Mohr, 661 A.2d 1362 (Pa. 1995) (negligent accusation that employee was a thief); S.C. State Ports Authority v. Booz-Allen & Hamilton, Inc., 346 S.E.2d 324 (S.C. 1986); Behn v. Ne. Appraisal Co., Inc., 483 A.2d 604 (Vt. 1984) (negligent appraisal led to plaintiff receiving lower offer); Century Ready-Mix v. Campbell County Sch. Dist., 816 P.2d 795 (Wyo. 1991) (negligent evaluation of subcontractor's work led to its being replaced).

83. 863 F.2d 1156 (4th Cir. 1988) (applying Virginia law).

and even if the plaintiff could establish unreasonable errors, the causal connection between these and the dissolution of the partnership would remain speculative. Moreover, if the report was critical to the partner's decision to withdraw, he had an incentive to ensure that the report was as accurate as it could be in the circumstances as he bore part of the loss. Thus, there is little need for tort liability in a case like *Semida v. Rice* and there is good reason to be concerned about its efficacy because of the difficulty of determining breach and causation.

Few litigated claims of this general type are as weak as the claim in *Semida v. Rice*. Nevertheless there is an institutional need for rules that resolve the potential for liability in the broad category of cases on grounds that do not formally turn on contestable factual and normative issues. Often, as in *Semida v. Rice*, the other party is harmed by a mistake and has the ability to sanction the actor or correct the mistake. Preclusion of liability is doubly justified when, as in *Semida v. Rice*, it is difficult to establish the information was erroneous, that the actor was negligent, or that the actor's negligence caused the claimed loss. This explains the absence of any general rule of negligence liability for the situation where *B* supplies information to *C* inducing *C* to act to *A*'s detriment.

The islands of liability within this category of cases can be explained by the particular need for and efficacy of tort liability in the situation. Negligence claims have prevailed in a handful of cases that bear a family resemblance with *Glanzer v. Shepard*.<sup>84</sup> In this category, *C* underpays *A* or *A* overpays *C* for a performance rendered between the two as a result of an error by *B* in measuring the value of the performance.<sup>85</sup> There is a need for tort liability in this situation (assuming *A* cannot recover from *C* for the over- or underpayment in a restitution claim) because *C* benefits from *B*'s error and so has no immediate self-interest in preventing such an error. In addition, tort liability might be efficacious because error, negligence, causation, and damages would be clear cut when an error is mechanical or gross.

Courts are split on whether an employee discharged as a result of a damning drug or polygraph test may sue the tester to challenge the accuracy and competency of the test.<sup>86</sup> A case can be made for allowing the claim. For a variety

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84. 135 N.E. 275 (N.Y. 1922). In this situation, *A*'s primary recourse should be a restitution claim against *C*. In addition, when a restitution claim is precluded by a term making *B*'s decision final and binding as between *A* and *C*, then a court must determine whether the term also is best read to preclude *A*'s recovery from *B*. See Victor P. Goldberg, *A Reexamination of Glanzer v. Shepard: Surveyors on the Tort-Contract Boundary*, 3 THEORETICAL INQUIRIES IN L. 475 (2002).

85. See, e.g., *Cities Serv. Co. v. Derby & Co.*, 654 F. Supp. 492 (S.D.N.Y. 1987); *Plata Am. Trading, Inc. v. Lancashire*, 214 N.Y.S.2d 43 (Sup. Ct. 1957); *Forte Bros., Inc. v. Nat'l Amusements, Inc.*, 525 A.2d 1301 (R.I. 1987).

86. *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347 (Tex. 1995), rejects a negligence claim based on a drug test. *Hall v. United Parcel Service of America, Inc.*, 555 N.E.2d 273 (N.Y. 1990), holds the same for a polygraph exam. *Erpelding v. Lisek*, 71 P.3d 754 (Wyo. 2003), holds the same for a psychological evaluation. *Duncan v. Afion, Inc.*, 991 P.2d 739 (Wyo. 1999), reaches a contrary result and allows a negligence claim for a drug test. *Sharpe v. St. Luke's Hospital*, 821 A.2d 1215 (Pa. 2003), allows a claim against a hospital for mishandling the plaintiff's urine sample. For a collection of cases on both sides

of reasons, an employer may be willing to accept what is an unreasonably high error rate from an employee's perspective. Whether a court can determine negligence, causation, and damages with a fair degree of confidence in the accuracy of these determinations is impossible to say in the abstract. These issues are straightforward if error is undisputed, negligence is gross, the test is error-free when competently done, the adverse job action followed automatically from the damning result, and the employee did not have a realistic opportunity to challenge the result or the action. Flip these assumptions, and the issues become problematic. In a case between the two extremes, it may come down to whether a court prefers to err on the side of protecting the employee from harm or preserving the employer's freedom of action.

Theory runs out at this point. When a court weighs the need for tort liability against concerns about its efficacy, the particular balance struck will depend on institutional and social considerations, legal culture, judicial philosophy, and judicial temperament. For example, American courts are unlikely to follow *Spring v. Guardian Assurance plc*,<sup>87</sup> which made an employer liable to an ex-employee when the employer negligently gave inaccurate damning information about the employee to another company, costing the employee a lucrative position. American courts will resist characterizing the relationship between an employer and employee as a "special relationship," as the English court did. Further, American courts will worry that the threat of litigation will deter firms from supplying candid information. This worry is fed by the high cost of litigation, a fear of jury trials (a uniquely American phenomenon in civil litigation), and a fear of overly litigious claimants. These concerns are manifested in the conventional wisdom that the potential liability for defamation (where a privilege immunizes merely negligent error) has had a baleful effect on reference practices.<sup>88</sup> In a climate where people are skeptical about the wisdom of imposing liability for knowingly supplying a negative reference courts are unlikely to impose negligence liability.

## CONCLUSION

Viewed from a distance, the criteria of negligence liability for pure economic loss are remarkably robust. They hold across the common law world and independent of one's views of the purpose of negligence liability. The criterion of

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of the issue, as well as cases addressing other theories of liability, including defamation, see Claudia G. Catalano, Annotation, *Employee's Action in Tort Against Party Administering Polygraph, Drug, or Similar Test at Request of Actual or Prospective Employer*, 89 A.L.R.4TH 527 (1991). *Devine v. Roche Biomedical Laboratories, Inc.*, 637 A.2d 441 (Me. 1994), allows a claim by the employer against the drug tester for negligently misrepresenting the trustworthiness of the test. See also Amy Newman & Jay M. Feinman, *Liability of a Laboratory For Negligent Employment or Pre-Employment Drug Testing*, 30 RUTGERS L. J. 473 (1999), advocating allowing the action.

87. [1995] 2 A.C. 296.

88. See Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir)rationality and the Demise of Employment References*, 30 AM. BUS. L.J. 123 (1992). In footnote 1, the authors collect credible reports that significant numbers of firms decline to give references because of the risk of litigation. As the title suggests, they argue these fears are not borne out by the cases.

invited reliance defines generally when there is liability unless some rule dictates otherwise. The reasons precluding liability, and particularly the criterion precluding liability when alternative means exist to redress unreasonable conduct or prevent harm, explains when there is no liability. The important disagreements about liability occur in cases where there is a need for liability to protect people from unreasonable conduct but there are also worries about the efficacy of tort liability because of administrative costs and the risk of error. Shortcomings in legal doctrine or analytical errors may explain some of these disagreements. But I expect some rest on disagreements on fundamental points, such as the purpose of negligence liability or relevant values and their weight, or on institutional differences. And many of these cases simply present novel and difficult problems where reasonable people will disagree about the wisdom of imposing negligence liability to deter or redress harmful conduct.