APPORTIONMENT, VICTIM RELIANCE, AND FRAUD: A COMMENT

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Judge Calabresi, in the 1995 Monsanto Lecture, characterized apportionment of liability—the subject of the panel presentation by Professors Andy Klein, Oscar Gray, and Tony Sebok and his co-authors at the Dan B. Dobbs Conference[1]—as the most important development in tort law since the advent of liability insurance, which occurred at the beginning of the 20th century.[2] A lot of water has run over the torts dam since that time, including market share liability, the fall of privity, strict products liability, workers' compensation, and the law and economics movement. Bob Rabin includes apportionment with those other four developments as the five most significant over the past century.[3] Although there was scattered early recognition that liability could be divided and was not an all-or-nothing proposition,[4] the advent of contribution in the middle of the 20th

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1. Because Cathy Sharkey's intriguing presentation on technology and trespass is not included in this issue of the *Arizona Law Review*, I limit myself to the matter of apportionment of liability.

2. Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 868 (1996).

3. Robert L. Rabin, *Past as Prelude: The Legacy of Five Landmarks of Twentieth-Century Injury Law for the Future of Torts*, *in* EXPLORING TORT LAW 52 (M. Stuart Madden ed., 2005).

4. *See, e.g.*, Raisin v. Mitchell, (1838) 173 Eng. Rep. 979 (C.P.) (splitting damages between plaintiff and defendant); *see also* 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 22.1, at 268 nn.19–21 (2d ed. 1986) (explaining a number of scattered, early indications that liability could be apportioned, including under Roman law). Even at the time of *Raisin*, *Butterfield v. Forrester*, (1809) 103 Eng. Rep. 926 (K.B.), which is credited with establishing the rule that contributory negligence by a plaintiff bars recovery, had already been decided. Two earlier, but less celebrated cases, also had employed plaintiff's fault to bar recovery. *See* Clay v. Wood, (1803) 170 Eng. Rep. 732 (Esp.); Cruden v. Fentham, (1798) 170 Eng. Rep. 496 (Esp.).

century is the first widespread recognition in American law that liability can be apportioned. Indeed it was not until the latter third of that century that fine-grained apportionment with gradation down to one percent of the harm first appeared. Here we are today, more than half a century after apportionment emerged, continuing to discuss the scope of apportionment—here with regard to economic torts, a subject that Mark Gergen, the Reporter for that Restatement, will be required to resolve.

Both Professor Oscar Gray and Professor Andy Klein's papers address the question of apportionment, but Oscar's article begins with his ruminations about the coherence of an "economic loss" project.[5] His thoughts serve a valuable function of reminding us that tort law addressing economic loss is a constellation of many different strands of human behavior, economic activity, and legal principles. The Reporter is aware of this; his Prospectus and most recent Draft reflects the variety of different claims that might be made for economic loss and, importantly, the variety of policies that are in play in determining the existence and scope of these diverse claims.[6]

Oscar reminds us that this thing called economic loss is, as Professor Rabin said earlier in the symposium, hydra-headed, but I do not take his comment to question the wisdom of organizing a Restatement around it.[7] There are no lines in nature that provide boundaries throughout the body of what passes as law, as American Law Institute ("Institute") Director Lance Liebman reminded us at the conference. Imposing an organizing principle on a body of information is a pragmatic endeavor: The question is whether the organization is helpful for the human purposes for which the organizing principle is employed. And organizing a torts Restatement on the basis of the interest protected—given the way tort law operates and courts write opinions—while not a matter of natural law surely makes sense.

Having expressed equanimity at the way the Institute has carved up pieces of tort law for restating, I recognize that there will be inevitable boundary problems, and Oscar calls our attention to one of them. He suggests that the earlier portions of the Restatement (Third) of Torts should not be read as having decided any matters about the availability of a claim for economic loss. He finds such an assumption, I believe, in a Comment in the most recent Draft of the Economic Torts Restatement.[8] I concur with Oscar's view that the Physical Harm Restatement says nothing about recovery for economic loss based on negligence or strict liability for abnormally dangerous activity. Section 21 of the Products

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5. Oscar S. Gray, *Some Thoughts on the "Economic Loss Rule" and Apportionment*, 48 ARIZ. L. REV. 897 (2006); Andrew R. Klein, *Comparative Fault and Fraud*, 48 ARIZ. L. REV. 983 (2006).

6. Mark P. Gergen, *Prospectus for the Restatement Third of Economic Torts* (undated and unpublished) (on file with the American Law Institute). *See generally* RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS (Preliminary Draft No. 2, 2006). Bob Rabin makes a similar point in his commentary. *See* Robert L. Rabin, *Respecting Boundaries and the Economic Loss Rule in Tort*, 48 ARIZ. L. REV 857, 858–59 (2006).

7. *See* Gray, *supra* note 5, at 898.

8. RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS § 8 cmt. a (Preliminary Draft No. 2, 2006).

Liability Restatement does explicitly address the matter of recovery for stand-alone economic loss, and, in the absence of a good reason that has emerged in the years since that Restatement was published, that determination should be respected. But there is no comparable provision to Section 21 in the Physical Harm Restatement, which on its face speaks to recovery for physical harm and property damage[9] and says nothing about the conditions for recovery for economic loss. The Economic Torts Restatement will be the first of the Third Restatements to address this issue.

Oscar's observations about the potpourri that includes economic torts makes me grateful to Andy Klein, who takes on the question of whether we should employ comparative responsibility in the intentional misrepresentation context, and that is just the right level of generality at which to consider questions of apportionment in the economic torts context.[10] That is, whether comparative responsibility should be employed in fraud cases is a different matter than whether comparative responsibility should apply for negligent misrepresentation. I am comforted in making this claim by the fact that it appears that the Reporter agrees with me on this.[11]

With regard to employing apportionment for fraud, there are at least two sticking points, as Andy points out: (1) The applicability of comparative responsibility notions to non-physical harm torts; and (2) the application of comparative responsibility to intentional torts. I would add a third: If comparative responsibility is applied to fraud claims to which aspects of fraud is it applicable? Is apportionment limited to the "justifiable" portion of justifiable reliance? Or does it apply only to unreasonable conduct independent of the plaintiff's reliance?[12] Or does it apply to both? That is, both in relying on the representation and in subsequent conduct, the plaintiff may act unreasonably.

As Andy explains, the use of "justifiable" to modify "reliance" is meant to distinguish it from "reasonable" reliance, so that characteristics of the plaintiff are relevant to the inquiry rather than an objective standard that ignores the foibles of the individual plaintiff being employed.[13] Yet some courts have, despite the position of the Second Restatement, conflated justifiable with reasonable.[14] Even in those courts that employ a subjective test for whether reliance is justifiable, this

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9. In the most recent draft, the Physical Harm Restatement also addresses recovery for pure emotional harm. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (Council Draft No. 6, 2006).

10. Klein, *supra* note 5, at 984–87.

11. Gergen, *supra* note 6, at 32.

12. This is the implication of Geosearch, Inc. v. Howell Petroleum Corp., 819 F.2d 521 (5th Cir. 1987) (applying Texas law).

13. *See* RESTATEMENT (SECOND) OF TORTS § 545A cmt. b (1977); Klein, *supra* note 5, at 984 n.6.

14. *See, e.g.*, Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1369 (11th Cir. 1997) (alternatively using justifiable and reasonable to modify reliance); Stanford v. Owens, 265 S.E.2d 617, 622 (N.C. Ct. App. 1980) ("We think that this question of justifiable reliance [for negligent misrepresentation] is analogous to that of reasonable reliance in fraud actions, where it is generally for the jury to decide whether plaintiff reasonably relied upon representations made by defendant.").

requirement, while providing a threshold that would limit the impact of a plaintiff's carelessness in relying on defendant's misrepresentation, would still result in barring a claim when the plaintiff subjectively acted unreasonably.

Thus, I come to the question of whether comparative responsibility should be applied to the justifiability of reliance,[15] which would transform the "justifiable" aspect from a prima facie element to a matter subject to apportionment between the misrepresenter and the victim who should have known better.[16]

There is an obvious coherence problem in employing a fault standard, whether determined objectively or subjectively, to bar a claim of intentional wrongdoing.[17] It could be, as Andy suggests, that justifiability serves a different end from ensuring diligence by victims of misrepresentations: It may be a surrogate for causation[18] because of the difficulty of determining actual reliance—a matter that ordinarily resides only in the mind of the victim.[19]

As with any issue for which evidence is sparse or unreliable, especially that which resides only in a party's mind, proof problems are significant. We often employ surrogates—circumstantial evidence—in such situations. Thus, for example, some courts employ an objective standard for causation in informed consent cases, eschewing the testimony of the plaintiff–patient and instead inquiring if a reasonable patient, aware of the omitted information, would have acted differently.[20]

If the requirement of justifiable reliance is simply a means to determine whether actual reliance—i.e. factual causation—exists, then its retention seems warranted. Here, I confess that I am sufficiently unfamiliar with the corpus of fraud cases that arise to have a feel for the extent to which justifiability serves the factual-cause purpose and the extent to which it bars claims in which reliance

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15. The idea of justifiable reliance being congruent with a plaintiff's contributory negligence is not new. Seventy-five years ago, Leon Green made that suggestion. *See* Leon Green, *Deceit*, 16 VA. L. REV. 749, 763 (1930).

16. I put to the side the procedural issue of whether, if apportionment is employed, the matter would remain one for which the plaintiff would have the burden of proof or would, as with contributory or comparative fault, be placed on the defendant as an affirmative defense.

17. Indeed, it was hornbook law until the advent of comparative responsibility that contributory negligence was not a defense to an intentional tort. That is no longer the case, although how far the extension of apportionment to intentional torts will go remains to be seen. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 3 cmt. d (Proposed Final Draft No. 1, 2005); Ellen M. Bublick, *Comparative Fault to the Limits*, 56 VAND. L. REV. 977 (2003).

18. Or scienter, as Dan Dobbs suggests. *See* DAN B. DOBBS, THE LAW OF TORTS § 474, at 1360–61 (2000). My intuition is that reliance that is justified has more concordance with actual reliance than it does with the defendant's intent and therefore is more useful as a surrogate for actual reliance than whether the defendant intended to deceive the plaintiff.

19. Klein, *supra* note 5, at 987.

20. *See, e.g.*, Matthies v. Mastromonaco, 733 A.2d 456 (N.J. 1999).

genuinely exists alongside a careless plaintiff.[21] I have confidence that in the course of the Economic Torts Restatement, this matter can be satisfactorily resolved. I would add that, if indeed justifiability is serving this surrogate function, the emphasis in modern Restatements on transparency would counsel that the Economic Torts Restatement make this role for justifiable reliance explicit.

On the other hand, perhaps the reason why reliance must be justified is not because it is the best circumstantial evidence of actual reliance. Instead, justifiability is required as an element of a plaintiff's prima facie case, without which the plaintiff cannot recover. If that is the case, then we have a troubling problem with coherency. This problem stems from the difference in treatment between intentional misrepresentation and negligent misrepresentation. Let me explain with a hypothetical.

Consider a business aviation service that provides recommendations on the right airplane for any business's needs. The service recommends an appropriate airplane for a sole proprietorship that carries small freight overnight. The plane turns out to be inappropriate because its maximum load capacity is insufficient for the purposes required by the purchaser. The service may have engaged in fraud in recommending an inappropriate plane because, through a complicated web of offshore companies, the service has connections to the plane's manufacturer. However, the web is complicated, and the plaintiff may or may not be able to untangle it. Alternatively, the plaintiff alleges the recommendation was negligent.

The plaintiff–owner negligently relies on the service company's misrepresentation, as she could have determined the load capacity of the plane before purchasing it with reasonable research.[22] She also is negligent in failing to check the airplane's weight and balance before taking off with an especially large load of freight, after the plane has been delivered and used satisfactorily for some time without discovering its load capacity. The overweight condition results in a forced off-airport landing. The landing damages the pilot, the plane, and the pilot's freight business.

In the pilot's suit for personal injury and property damage to the plane based on negligent misrepresentation, I assume that comparative responsibility principles will be applied to the pilot's reliance on the defendant's misrepresentation[23] and in failing to check the weight and balance of the plane before taking off.

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21. Andy Klein identifies two such cases, but he does not address their representativeness. Klein, *supra* note 5, at 988–89.

22. I confess that I have constructed this hypothetical so that actual reliance exists along with plaintiff's being unjustified in doing so. Thus, justifiability does not, in this situation, serve as a surrogate for actual reliance.

23. I assume this because I have not been able to find any case that squarely confronts whether the "reasonable" reliance required by section 311 of the Restatement (Second), which subjects a negligent misrepresenter to liability for physical harm, is subject to apportionment based on comparative responsibility. The closest judicial pronouncement I found is a dissent by Justice Mosk in *Garcia v. Superior Court*. 789 P.2d 960, 971 (Cal. 1990) (Mosk, J., dissenting). In *Garcia*, plaintiff alleged that defendant's negligent misrepresentation about the danger posed by a criminal who had been paroled resulted in

What about in the suit for damage to the business?[24] For the plaintiff's negligent misrepresentation claim, a number of jurisdictions apply comparative principles.[25] Does that mean that comparative principles apply to whether plaintiff's reliance was reasonable[26] as well as to the plaintiff–pilot's poor pre-flight planning?

With regard to whether a plaintiff may recover, albeit a reduced measure of damages even if her reliance was unreasonable, I have doubts that that is what courts mean when they say they will apply comparative principles to negligent misrepresentation claims. My reading of a handful of cases suggests that some courts are less than clear about which aspects of plaintiff's conduct to which comparative fault principles apply.[27] That might mean that our hypothetical plaintiff's claim is barred because of a lack of reasonable reliance, and we need not consider the impact of her negligence in failing to check the weight and balance of

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the death of plaintiff's decedent. The majority held that the plaintiff had to allege and prove reasonable reliance on the misrepresentation. Justice Mosk, dissenting, argued that a negligent misrepresentation claim for personal injury is merely a variant on a standard negligence action and should not have the trappings of misrepresentation law, including reasonable reliance, imposed. In the course of illustrating the difference made by this distinction, he stated—without citation to any support—about the negligent misrepresentation claim for economic loss: "In addition, the defense of comparative negligence may not be raised to a cause of action for negligent misrepresentation." *Id.* at 971. This suggests, in the context of a discussion contrasting the difference between physical harm and economic-loss misrepresentation claims, that comparative responsibility would be available for a misrepresentation claim in which personal injury occurred. Even at the time of Justice Mosk's statement about comparative negligence in economic loss cases, he was wrong about the state of the law generally. *See* Sonja Larsen, Annotation, *Applicability of Comparative Negligence Doctrine to Action Based on Negligent Misrepresentation*, 22 A.L.R.5TH 464, § 3 (1994).

24. Some of the lost profits may be a result of the temporary incapacity of the pilot or the damage to the plane rendering it unavailable for use in the business. That economic loss would be derivative of the personal injury and property damage and recoverable in the claim for those damages.

25. *See* Larsen, *supra* note 23.

26. Unlike with fraud, the Restatement (Second) requires that a plaintiff's reliance be reasonable to recover for negligent misrepresentations that cause economic loss. RESTATEMENT (SECOND) OF TORTS § 552A (1977). Recognizing the then-emerging trend toward comparative fault, the Restatement (Second) declared it too early to determine if comparative principles should apply to the reasonableness of reliance. *Id.* § 552A cmt. b.

27. *See* Fullmer v. Wohlfeiler & Beck, 905 F.2d 1394 (10th Cir. 1990) (comparative fault inapplicable to plaintiff's reliance under Utah law); Geosearch, Inc. v. Howell Petroleum Corp., 819 F.2d 521 (5th Cir. 1987) (applying Texas law); Prime Retail Dev., Inc. v. Marbury Eng'g Co., 608 S.E.2d 534 (Ga. Ct. App. 2004); Wichita Fed. Sav. & Loan Ass'n v. Black, 781 P.2d 707, 720 (Kan. 1989) (discussing amendment of Kansas statute that withdrew claims for economic loss from comparative fault statute), *superseded by* 1993 Kan. Sess. Laws ch. 288, § 2. *But see* Robinson v. Poudre Valley Fed. Credit Union, 680 P.2d 241, 243 (Colo. Ct. App. 1984) (applying comparative responsibility to plaintiff's reliance); Florenzano v. Olson, 387 N.W.2d 168, 176 (Minn. 1986) (applying comparative fault principles to reliance of plaintiffs in negligent misrepresentation case); Gurnsey v. Conklin Co., 751 P.2d 151, 157 (Mont. 1988).

the airplane before taking off. Thus, the plaintiff can recover for personal injury and property damage but not for harm to her business.

At first blush, such an outcome does not cry out with incoherency concerns. For a variety of reasons, we have always been more cautious about permitting recovery for pure economic loss than for physical harm.[28] But as I think a little harder, it is not a comfortable result. None of the typical reasons for limiting liability for economic loss is present,[29] and, based only on the culpability of the plaintiff in failing to check against the possibility of negligence by the defendant, recovery is denied. Deterrence may provide the answer—that is we have stronger reasons for imposing incentives on persons to protect against economic loss to themselves than for protecting against personal injury, but let me defer that matter for a bit.[30]

Perhaps we do mean to say that comparative principles apply to whether plaintiff was justified in relying on a negligent misrepresentation, even in an economic loss case.[31] Then plaintiff's claim for lost profits, rather than being barred, would have the damages apportioned.

This reveals the real incoherence problem: If courts refuse to use comparative principles for intentional misrepresentations, the plaintiff's fraud claim will be barred because of the absence of justifiable reliance by the plaintiff.[32] That is an outcome we would be hard pressed to justify.

This incoherency is a direct result of a point that Andy made but not, in my judgment, with sufficient emphasis. The case for employing comparative responsibility for the requirement of justifiable reliance is quite different from the more general question of permitting its use for other intentional torts or even for conduct of the plaintiff in a fraud case other than with regard to reliance. Using comparative responsibility with regard to whether reliance is justified would enhance the recovery of victims of fraud, while its use otherwise diminishes the recovery of such victims.[33] The general reluctance to employ comparative responsibility for intentional torts is perverse when applied to the issue of justified reliance—here, instead of an affirmative defense that bars or reduces a plaintiff's recovery, we have a prima facie element that requires a plaintiff be free of fault.

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28. *Compare, e.g.*, RESTATEMENT (SECOND) OF TORTS § 311 (no requirement reliance be justified for intentional misrepresentation causing physical harm), *with id.* § 537 (reliance must be justified for recovery in fraud claim for economic loss).

29. *See, e.g.*, Dan B. Dobbs, *An Introduction to Non-Statutory Economic Loss Claims*, 48 ARIZ. L. REV. 713 (2006); Richard A. Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. L. REV. 735 (2006); Jay M. Feinman, *The Economic Loss Rule and Private Ordering*, 48 ARIZ. L. REV. 813 (2006).

30. *See infra* text accompanying notes 34–36.

31. *See supra* note 27.

32. *See also* Larsen, *supra* note 23.

33. Thus, concerns of some commentators about the use of apportionment based on a plaintiff's comparative fault in intentional torts are inapplicable to using apportionment with regard to whether reliance was justified. *See* Bublick, *supra* note 17; Ellen M. Bublick, *Citizen No-duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413 (1999).

I'd like to consider the role that deterrence concerns might play in deciding whether to employ comparative responsibility principles to plaintiff's conduct other than in relying on the misrepresentation in fraud cases. I have always found the economists' claims for the need for a contributory negligence rule in personal injury cases unpersuasive for reasons explained by Oscar: There is a large deductible that personal injury victims pay, even when they are compensated by the tort system, reflecting a shortfall in the ability of monetary damages to make a plaintiff whole.[34] That is, the fear of broken bones or death, whether compensated or not, serves as an overwhelming incentive for potential victims to take precautionary measures. The continued durability of a role for plaintiff's fault—even if now in the form of a reduction in damages rather than completely barring claims—I have always thought had to be grounded in fairness concerns rather than efficiency.[35]

Economic loss is different. Since the loss is economic, money damages can do the work of restoring a plaintiff to her position ex ante. Nevertheless, I still do not think it is the case that tort damages fully restore a plaintiff's loss. How many of us would be willing to trade an appropriate liability insurance policy for a lawsuit against an insurance agent who negligently misrepresented the fact that liability insurance had been procured, after a substantial claim arises? Not only will the costs of pursuing such a claim, including attorney's fees, constitute a deductible, but the time and unpleasantness of dealing with a lawsuit against the insurance agent increase the gap between loss and recovery.[36]

In sum, the deterrence case for employing comparative responsibility in fraud claims for economic loss may be stronger than for intentional torts involving personal injury, but I think that in the end, fairness concerns weigh more significantly than instrumentalist concerns. In that regard, I don't see any obvious reason to distinguish among cases based on the type of harm suffered. Indeed, despite Oscar's aversion to apportionment that disadvantages plaintiffs, he does not distinguish physical harm from economic loss torts in assessing the case for apportionment.

By contrast with Professors Klein and Gray, Professors Goldberg, Sebok, and Zipursky (because naming three authors repeatedly is cumbersome, I refer to them hereinafter as "GSZ") focus on the reliance requirement to establish fraud.[37] To summarize their paper, *The Place of Reliance in Fraud*, they view the reliance requirement in fraud as a piece of evidence supporting their significant and

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34. *See* Michael Green, *The Magic of Gary's Scholarship*, 50 UCLA L. REV. 337, 368 & n.153 (2002).

35. *See* Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697 (1978).

36. Fairness has been the basis, in my judgment, for refusing to employ contributory negligence in intentional tort cases, but the advent of comparative fault has produced significant inroads in that rule. Not only does comparative responsibility mean that, if applied in an intentional tort, the more culpable party will not be exonerated, but the fact finder can take into account the greater culpability of the defendant in assigning comparative percentages to the parties.

37. John C.P. Goldberg, Anthony J. Sebok & Benjamin Zipursky, *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001 (2006) [hereinafter GSZ].

ongoing work explaining tort law as a system attending to relationships and providing redress for wrongs occurring in the context of those relationships. The requirement of victim reliance in fraud, which they urge should not be relaxed,[38] reflects a wrong in that the defendant's misrepresentation affects the plaintiff's decision making by providing false information. Reliance *by the plaintiff* is required because otherwise the fraud has not affected the integrity of the plaintiff's decision making. The requirement that the plaintiff's harm be connected by reliance to the defendant's misrepresentation reflects the overarching framework of tort—relational wrongs—according to GSZ.[39]

GSZ examine other sources of protection against intentional misrepresentations, predominantly legislative, and recognize that, in a number of respects, those other remedial schemes do not reflect the same commitment to plaintiff reliance (or indeed causation) that the common law reveals. In one respect, I quite agree with GSZ. These legislative efforts do not contradict their thesis about the role that fraud plays in the structure of tort law. Legislation addresses a variety of policies, goals, and politics that can be quite removed from the core of tort law as it has developed through the common law process.[40]

The GSZ contribution does not address the question that Klein and Gray attack on whether the plaintiff's reliance must be *justifiable*, and whether, if reliance exists but is unjustified, a plaintiff should be afforded relief, albeit discounted on the basis of comparative responsibility. The *Place of Reliance*, rather, is limited to the role of the *plaintiff's* reliance in fraud and what it can tell us about the larger structure of tort law. I emphasize *plaintiff* reliance because misrepresentations, by their nature, cause harm through the mechanism of *someone's* reliance on the truth of the statement. Unlike drugs and dynamite, misrepresentations are not capable of causing harm without the intervention of human cognition.[41]

GSZ recognize that intentional misrepresentations play a role in a host of other tort claims, and they do so without a requirement of plaintiff reliance. Thus, fraud by a pharmaceutical manufacturer may result in a patient being prescribed a drug by a physician that injures the patient, a falsehood uttered to others may harm

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38. *Id.* at 1026. Their concern is not with apportionment of liability, but that causation occurs through the mechanism of the plaintiff being deceived by the defendant rather than causation existing because the misrepresentation deceives someone else.

39. "The key to unlocking the puzzles surrounding reliance is to appreciate that tort is a law of relational wrongs." *Id.* at 1025.

40. Thus, legislation that changes or modifies specific aspects of tort law do not reveal much about what structure there is to tort law. In another respect, however, legislative contributions should be recognized when considering the overall torts landscape, reflecting the multitude of influences that, in my view, shape what it is. *See infra* text accompanying notes 70–77.

41. Thus, reliance is required for factual causation to exist when the plaintiff's claim is based on a tortious misrepresentation. *See* RESTATEMENT (SECOND) OF TORTS § 546 (1977) (identifying reliance as a required element for the existence of causation). Some communications may cause harm without deceiving anyone because the truth can hurt, and reliance is thus not the mechanism by which harm results. But for a misrepresentation to cause harm—virtually by definition—reliance is necessary.

a plaintiff's reputation, or media distortion of the danger involved in a product may harm the manufacturer.[42] Yet these claims, based on a false statement not relied on by the plaintiff, are not inconsistent, according to GSZ, with their view that plaintiff reliance is a key component of fraud and the relational structure of tort law because fraud protects a distinct interest. Fraud protects a plaintiff's "interest in being able to make certain kinds of decisions in certain settings free of misinformation generated by others."[43] Unlike the examples above, in which bodily integrity, reputation, and economic interests, respectively, are the protected interest, fraud is about protecting an individual's decision making from improper manipulation.

The interest GSZ identify is a close relation to the idea of informed consent—patients should be free to make intelligent, informed decisions about their medical care. To be sure, the informed consent obligation imposed on physicians is a positive one—they must provide that information to their patients—while the fraud obligation is a negative one—those providing information should not intentionally mislead others. Despite that difference, there is a close correspondence in the protected interest.

The claim that fraud protects an individual's right to informed decision making is a provocative one. It calls to mind an insightful article by Aaron Twerski and Neil Cohen about informed consent.[44] Explaining the difficulties of proving that inadequate information provided to a patient is a cause of harm suffered as a result of medical treatment acceded to by the patient, Twerski and Cohen suggest a reconceptualization of the interest protected by informed consent

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42. *See* Auvil v. CBS "60 Minutes," 67 F.3d 816, 818 (9th Cir. 1995) (concerning a report that "[t]he most potent cancer-causing agent in our food supply is a substance [Alar] sprayed on apples to keep them on the trees longer and make them look better" dismissed for failure to prove falsity).

43. GSZ, *supra* note 37, at 1002 ("interest in being able to make certain kinds of decisions in settings free of misinformation generated by others"); *id.* at 1004 ("the victim's ability to make certain decisions free from misinformation"); *id.* at 1005 ("the phenomenon of being misled stands at the very heart of the tort action for fraud"); *id.* at 1011 ("'fraud' . . . is the wrong of interfering with a particular interest of the victim, namely her interest in making certain kinds of choices in certain settings free from certain forms of misinformation"); *id.* at 1026 (interest protected is "the victim's interest in exercising a certain kind of decisional liberty free from misinformation"). To be sure, at other times, GSZ suggest that economic interests are also protected by the tort of fraud when a plaintiff suffers such loss through the mechanism of a corrupted decision. For example, they state, "The most familiar and important setting for fraud is, of course, deception that interferes with decisionmaking in an exchange setting, and that results in financial loss to the victim, as well as gain to the defrauder." *Id.* at 1011. This may be merely empiric-descriptive, rather than an evidentiary characterization (in support of their thesis), but it is not congruent with the claims about unimpeded decision making being the interest protected. *See, e.g.*, *id.* at 1012 ("To commit fraud, in other words, is to violate a relational legal directive that enjoins the making of a misrepresentation of fact for the purpose of deceiving another into making a choice that is to the other's detriment.").

44. *See* Aaron D. Twerski & Neil B. Cohen, *Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation*, 1988 U. ILL. L. REV. 607.

law.[45] Rather than bodily integrity as the protected interest, Twerski and Cohen contend the law should recognize a patient's dignitary interest in making an informed decision about medical treatment as the crux of what this tort protects. Accepting Twerski and Cohen's reconceptualization of the interest protected would broaden the tort to all whose decision making was compromised by inadequate information, regardless of whether they suffered personal injuries as a result. The right of autonomous and informed choice about an important matter in life would be the right protected and the harm compensated.[46]

According to the GSZ thesis, the unique protected interest and concomitant harm are what distinguishes fraud from other torts based on misrepresentations in which victim reliance is not required. The insistence on victim reliance for fraud claims thus is a piece supporting the thesis that the meta-principle upon which tort duties are based is relationships—fraud does not exist except when the defendant's wrong causes harm to the victim to whom it is directed.

I have always been skeptical about claims that any meta-principle, regardless of what it is, explains tort law. And I am not dissuaded from that view by the evidence that GSZ provide with regard to the victim reliance requirement for fraud.

GSZ begin with a prominent fraud case, *Rosen v. Spanierman*,[47] as an example of the essential nature of victim reliance in fraud. In *Rosen*, a couple selected a piece of artwork, which was to be an anniversary present from the wife's mother, who paid for the art. Years later, the couple discovered that the painting was a counterfeit. The couple and the mother brought suit against the dealer who had sold the artwork. Because the wife's mother had not dealt with the art dealer nor heard and relied on the dealer's assurances of authenticity, GSZ find support for their victim reliance as indicia of relationship thesis in the court's determination that she had failed to state a claim. They state,

> True, the dealer's alleged false statement [caused the mother] to pay a sum of money she would not have otherwise paid. But there was

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45. Twerski and Cohen built on earlier work that identified the right to autonomous decision making as central to the idea of informed consent. *See* JAY KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT (1984); Marjorie Maguire Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219, 223–29 (1985).

46. Personal injury resulting from a decision skewed by inadequate information would be recoverable as consequential damages in the Twerski and Cohen scheme, save for concerns about the difficulties of making the determination about causation, that is, that the patient's decision would have been otherwise if the information had been provided. Twerski & Cohen, *supra* note 44, at 648, 662. The two authors disagree on the wisdom of leaving an opportunity open for plaintiffs who could make such a causal showing. While the Twerski–Cohen prescription has found very little favor in the United States, the Israeli Supreme Court endorsed such a view of the right protected by informed consent. *See Da'aka v. Karmel Hospital* [1999] 53(iv) P.D. 526 (Isr.), in which the evidence showed that the patient would have agreed to the treatment even if the information had been provided. A discussion in English of the case can be found in Israel Gilead, *Israel*, *in* INTERNATIONAL ENCYCLOPEDIA OF LAWS: TORT LAW 75 (R. Blanpain ed., 2003).

47. 894 F.2d 28 (2d Cir. 1990).

> no evidence that *she* had been *misled* by the content of the defendant's misrepresentations . . . and the phenomenon of being misled stands at the very heart of the tort action for fraud.[48]

However, an alternative explanation for the outcome in *Rosen* is that the mother's fraud claim failed, not because of a lack of her reliance, but because she had suffered no harm. Recognizing that she could not claim she had directly relied on the dealer's misrepresentations, the mother argued that she was an indirect recipient of the misrepresentation through her daughter and son-in-law, an extension of the reliance-relation that GSZ acknowledge has occurred[49] reflecting a larger evolution and expansion of duty adverted to by Bob Rabin in his article in this Symposium.[50] The court responded to this claim by acknowledging that an indirect communication could be sufficient, but reasoned that the mother had not suffered any harm—she had paid for a gift that she had intended to pay for and was no worse off for it:

> However, we fail to see how [the mother] relied *to her detriment* on any representation. . . . [The mother] made a gift with no expectation of repayment. Thus, from a legal standpoint, [the mother] is in no worse position than if the painting had been authentic. She parted with $15,000 in exchange for the gratitude that accompanied a gift. She is no worse off if the painting is not an original.[51]

The court proceeded to conclude that the married couple did have a valid fraud claim against the dealer because they were stuck with a worthless piece of art instead of the valuable genuine work that they thought they purchased. This is consistent with the interpretation that the mother lost because the pecuniary loss due to the fraud—the difference in value between the genuine and counterfeit artwork—was borne by the couple and not by the mother.[52]

The court also responded to the mother's claim that she was an indirect recipient of the defendant's misrepresentation. That claim did not seek recovery based on another's reliance; rather, the mother claimed that her children served as a conduit for the defendant's misrepresentation. The mother could not prevail on

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48. GSZ, *supra* note 37, at 1005.

49. *Id.*

50. *See* Rabin, *supra* note 6, at 8–13 (2006). For a more fulsome treatment of this matter, see Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1980).

51. *Rosen*, 894 F.2d at 33–34 (emphasis in original).

52. GSZ caution that *Rosen* should not be read as holding that the mother had no fraud claim because the daughter and son-in-law did. GSZ, *supra* note 37, at 1005. I agree that whether one party has a claim does not affect whether another does. However, which of several parties suffered the harm—the difference in the value between genuine artwork and a counterfeit—does determine who has the claim and who doesn't. Thus, a plaintiff-shareholder may not bring suit for harm resulting from tortious harm to the corporation in which the shareholder owns stock. *See, e.g.*, Healthsource, Inc. v. X-Ray Assocs. of N.M., 116 P.3d 861, 869 (N.M. Ct. App. 2005). The basis for limiting the claim to the corporation is the same as the reason for limiting the fraud claim to the married couple in *Rosen*: If both parties are permitted to sue and recover, the defendant would pay twice for the harm caused.

this claim because there was no showing that the dealer intended that the mother rely on his statements or that they were transmitted to her by her daughter and son-in-law.

Summit Properties Inc. v. Hoechst Celanese Corp.,[53] another case relied on by GSZ, is also not unmitigated support for their theory about the role of victim reliance in fraud. *Summit Properties* was a RICO case and therefore entailed interpretation of a federal statute. As GSZ explain in another section of their article that addresses consumer protection and securities statutes, how reliance is treated by legislatures does not tell us a whole lot about the common law of torts. And the remedies available for violations of RICO (a statute designed to fight organized crime)—treble damages and attorney's fees—weighed heavily in the court's decision to overturn a prior case and require reliance by the victim.

More supportive of the GSZ thesis than *Rosen* or *Summit Properties* is the trial court's decision in *Cummings v. Kaminski*.[54] The *Kaminski* court states as a ground for dismissal that the plaintiff had not relied on the alleged misrepresentation.[55] But the court states an alternative ground for its decision: There was no harm suffered by the plaintiff because she was not entitled to the benefits obtained by the defendant as a result of the misrepresentation.[56] Thus, both reliance and harm were lacking.[57]

Given the difficulty of proof of a theory through positive evidence—it only takes one pink swan in the face of thousands of white ones to disprove the theory that all swans are white—it seems appropriate to place the burden of proof on the skeptic like me who expresses doubt about the GSZ thesis. I confess that I have not found a common law fraud case in which causation exists and the court states that victim reliance does not matter. Thus, although I am dubious about much of the case law that GSZ proffer in support of their theory about what fraud teaches us about the structure of tort law, I'd like to proceed to consider the implications of their claim about fraud and victim reliance and then consider other tort remedies available for intentional misrepresentations that cause economic loss through non-victim reliance.[58]

Let me return to *Rosen* and modify its facts to consider further the claim by GSZ that fraud is about protecting the integrity of decision making. Suppose that the couple transmitted the dealer's misrepresentation to the mother, and she responded by stating, "That's plainly the best gift I could get you for your

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53. 214 F.3d 556 (5th Cir. 2000).

54. 290 N.Y.S.2d 408 (Sup. Ct. 1968).

55. *Id.* at 410.

56. *Id.*

57. *Pegram v. Hebding*, 667 So. 2d 696 (Ala. 1995), on which GSZ also rely, is about like *Cummings*. The court found that failing to disclose information to the Board of Directors by the defendant could not be the basis of a fraud claim by a discharged employee, and the court stated that this was because the Board was the party that had been allegedly deceived by the defendant. But that occurred immediately after the court concluded that, even if the Board had been deceived by the non-disclosure, plaintiff had not suffered cognizable harm.

58. *See infra* text accompanying notes 65–68.

anniversary. It will appreciate better than a pure financial investment, and you will have the pleasure of enjoying it while it becomes more valuable. You must get that piece of work for your anniversary, and I will pay for it."

Would the mother have a claim for fraud? I think not, and this highlights my difficulty with the GSZ position on reliance. Their explanation of the tort is that it protects decision making, and here the mother's decision making has been corrupted by a false statement that was designed to affect behavior. I would expect GSZ to reason that she has a claim, putting aside her damages.[59] I think she would not have a claim because she has not suffered *pecuniary harm*, the ground the *Rosen* court relied on to conclude she could not recover. Thus, rather than pecuniary harm merely being consequential damages—consequential to the improper impediment to autonomous decision making—pecuniary harm is the interest protected by the law of fraud. Indeed, hornbook law is that a plaintiff cannot recover in the absence of pecuniary loss.[60] Unlike torts like trespass, in which the invasion simpliciter of real property interferes with a legally protected interest for which nominal damages are available, that is not the case with fraud.[61]

But if economic harm is required (and therefore constitutes the protected interest) for intentional misrepresentations, what does fraud contribute to the GSZ theory that tort law is about duties deriving from relationships? Given that other misrepresentation torts protect against economic interests and do not require victim reliance, I have doubts that it contributes very much.

GSZ intimate a modestly different position—that the distinctive aspect of fraud is that harm (of any sort) occurs through the mechanism of corrupted decision making by the victim.[62] Recall though that for a misrepresentation to cause harm, reliance by *someone* is required.[63] And if reliance exists, then by definition it entails harm through the mechanism of corrupted decision making. If other torts permit recovery for misrepresentations that cause the same types of harm but through the causal mechanism of reliance by someone other than the injured party, as they do,[64] then I don't understand why the fact that a specific tort, fraud, is limited to requiring *victim* reliance is evidence supporting GSZ's view of tort law. The relationship of deceiver and deceived does not cabin recovery for misrepresentation.

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59. Indeed, GSZ reason that fraud is analogous to trespass in its absolute protection of decision making free from fraudulent infringements as trespass provide absolute protection from trespass on real property, regardless of whether any consequential damages are suffered. GSZ, *supra* note 37, at 1011. As I explain, I think that is incorrect.

60. Dobbs, *supra* note 17, § 469, at 1343–45; *see also* Leon Green, *Deceit*, *supra* note 15.

61. GSZ do acknowledge that some consider fraud to be exclusively about economic interests. GSZ, *supra* note 37, at 1011 n.36. They take issue with that claim, not on the ground that uncorrupted decision making is the interest protected and so economic loss is not required, but because other interests beyond economic security, including personal injury, are also protected by fraud.

62. *See* GSZ, *supra* note 37, at 1011.

63. *See supra* note 41 and accompanying text.

64. *See infra* text accompanying notes 65–68.

Thus, there is substantial protection for economic interests that are harmed through misrepresentations to persons other than the victim. The tort of injurious falsehood protects economic interests against false statements made for the purpose of causing harm to others.[65] It does not require reliance by the plaintiff, only that there be a causal connection between the misrepresentation and the harm.[66] And courts have used the "f" word in describing this claim.[67] While this tort began modestly enough as "slander of title," it has evolved to cover a wide range of circumstances in which intentional misrepresentation causes economic harm, yet has no element of reliance by the plaintiff. Similarly, defamation involves a misrepresentation that provides protection for, among other harms, economic loss, through the reliance of persons other than the victim.[68]

There may well be misrepresentations that cause harm though third-party reliance for which courts do not provide any remedy, whether under the rubric of fraud or some other basis. I also confess to not having an explanation of why some third-party reliance claims are recognized and others are not—though I suspect there are answers that exist. Whatever those answers may be, however, the relationship between injured and injurer is the same and therefore is not part of the explanation for different treatment. Nor is the interest invaded the basis for the distinction, as the harm in these cases is economic loss, the same type of harm for which fraud provides a remedy.

In expressing my dubiety about the GSZ thesis, I do not mean to assert that relationships play no role in tort law. There are pockets of tort law in which relationships play a significant role in determining duties and their scope. Physicians' duties to their patients are purely a result of that relationship. The enhanced duty of care of common carriers has historically carried significant

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65. *See* RESTATEMENT (SECOND) OF TORTS § 623A (1977).

66. *See* JOHN FLEMING, THE LAW OF TORTS 668–72 (6th ed. 1983). The tort of passing off—falsely claiming someone else's goods are yours to the detriment of the economic interests of the competitor—has historically been viewed as a variant of fraud. *See* 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 5:2 (4th ed. 2005).

67. *See* Hygienic Specialties Co. v. H. G. Salzman, Inc., 302 F.2d 614 (2d Cir. 1962) ("Traditionally, a plaintiff complaining of 'palming off' must prove the perpetration of fraud, 'i.e., that the defendant is so foisting his product on the market that there is resulting confusion or a likelihood of confusion as to its source in the mind of the buying public.'" (quoting Speedry Prods., Inc. v. Dri Mark Prods., Inc., 271 F.2d 646, 648 (2d Cir. 1959))); Nat'l Fire Protection Ass'n, Inc. v. Int'l Code Council, Inc., No. Civ. A. 03-10848 DPW., 2006 WL 839501, at *28 (D. Mass. Mar. 29, 2006) (holding that there was "no evidence here from which a jury could find that [defendant's] unauthorized use of [plaintiff's] mark was willful and amounted to fraud or palming off inferior goods"); Keaton & Keaton v. Keaton, 842 N.E.2d 816, 819 (Ind. 2006) ("'Passing off' is nothing more than a subspecies of fraud."); Gulf Coast Bank v. Gulf Coast Bank & Trust Co., 652 So. 2d 1306, 1315 (La. 1995) ("The law of trademark infringement originally was based on deceit and fraud and evolved into a distinct tort of 'passing off' . . . ."); *see also* William R. Warner & Co. v. Eli Lilly & Co., 265 U.S. 526 (1924) (characterizing palming off as fraud).

68. The relationship among an intentional misrepresentation, defamation, and third-party reliance is starkly demonstrated in *Globe Commc'ns Corp. v. R.C.S. Rizzoli Periodici, S.P.A.*, 729 F. Supp. 973 (S.D.N.Y. 1990).

weight because of the carrier–passenger relationship, although its influence has waned as tort law has tended toward a universal reasonable-care standard.[69] Affirmative duties are based on real relationships that exist outside tort law, such as employers with their employees and schools with their students. Despite the contrary claims of GSZ, the general standard of care for those creating risks to others does not strike me as relationally based, save in an unimportant way. To say that it is my relationship with those put at risk when I start lobbing cherry bombs from a river cliff that imposes a duty on me to take care seems to inject an unnecessary artificiality in usage into the explanation. It is my creation of risk that imposes a duty—even if there are limits to the scope of my liability for creating that risk. One might describe the limits of that liability as relational, but outside law that would be an uncommon usage and even within legal discourse it is far from prevalent. Of course, so long as we have a factual causation requirement, one could say that plaintiff and defendant share a relationship of injurer and victim, but that, again, entails an odd and analytically unhelpful usage of the idea of relationship.

My disagreement with the GSZ thesis stems from my dubiety that there is any top-down meta-theory that explains tort law. I have previously expressed skepticism about the law and economics positive account of tort law.[70] That work was fueled by the same doubts about the existence of any "intelligent design" (here I mean some overarching principle that determines its course, rather than there being some sentient entity) for tort law. As the late Gary Schwartz convincingly documented, tort law is better explained by recognizing that it contains strands of both corrective justice and deterrence.[71] Indeed, I would extend Gary's vision further: Tort law is too multi-variegated, too influenced by the fortuity of the development of a "paradigm" (to borrow from Thomas Kuhn) established by an academic and judicial movement, such as led to the adoption of strict products liability;[72] by something as serendipitous as an influential judge coining a memorable phrase, as Cardozo did with "danger invites rescue";[73] by changes in

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69. *Compare* Andrews v. United Airlines, Inc., 24 F.3d 39 (9th Cir. 1994), *with* Bethel v. N.Y. City Transit Auth., 703 N.E.2d 1214 (N.Y. 1998).

70. Michael D. Green, *Negligence = Economic Efficiency: Doubts* >, 75 TEX. L. REV. 1605 (1997).

71. Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997).

72. *See* George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

73. *See* Wagner v. Int'l Ry. Co., 133 N.E. 437, 437 (N.Y. 1921). The rescue doctrine, for which Cardozo and *Wagner* are given credit (although they were not the first), is difficult, at least at times, to square with ordinary duty rules and makes *Moore v. Shah*, 458 N.Y.S.2d 33 (App. Div. 1982), a much more difficult case for me than it is for GSZ, *supra* note 14, at 14–15, who find the outcome supported by the notion that the doctor who committed malpractice breached no duty to the patient's father who donated his kidney to help his son, the patient, who needed a kidney transplant as a result of the malpractice. The same might be said about a number of rescuers who are, nevertheless, successful in their tort suits based on the rescuer doctrine. *See* 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 14.15, at 331 (2d ed. 1986) ("[R]escuers are treated as if they were foreseeable, although to do so may sometimes involve some stretch of the imagination."); RESTATEMENT (THIRD)

culture, political winds, or media coverage, as has been prevalent during the decades of tort reform;[74] by popular dissatisfaction with the operation of the tort system, which produced workers' compensation and thereby withdrew a substantial swath of the accidental-injury universe from the tort domain;[75] by a scholarly article;[76] or by numerous other contingencies or fortuities that affect the course that the tort river follows.[77]

The work of Stephen Jay Gould on evolution is instructive. He inquired what would happen if we rewound the videotape of natural history and replayed it. Identifying some apparently innocuous random event, Gould took delight in demonstrating how different the course of events would have been if that trivial event had not occurred, notwithstanding the powerful impact of evolution.[78] Like Gould's view of natural history, tort law reflects many influences over its history and cannot be distilled and explained by any top-down intelligent design.

Thus, I find a more plausible account of tort law in a children's song, "Mama's Soup Surprise." Bruce Springsteen explains that he never ate very much as a child, until one day his mother made a very special soup for him. After finishing it, he asked her what was in it, and she replied:

> Oh, chicken lips and lizard hips
> And alligator eyes
> Monkey legs and buzzard eggs
> And salamander thighs
> Rabbit ears and camel rears

OF TORTS: LIAB. FOR PHYSICAL HARM § 32 cmt. b & reporter's note (Proposed Final Draft No. 1 2005).

74. As is illustrated by the withdrawal of tort liability of gun manufacturers from all theories that seek to impose liability in the absence of a defect in the gun by federal legislation in 2005. Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-03.

75. *See* ORIN KRAMER & RICHARD BRIFFAULT, WORKERS COMPENSATION: STRENGTHENING THE SOCIAL COMPACT (1991).

76. To cite two examples, the first of which is a particularly difficult development for those who deny the deterrent function of tort law, market-share liability and lost opportunity were both influenced by a piece of scholarship, including one by a student author. *See* Sindell v. Abbott Labs., 607 P.2d 924, 927 (Cal. 1980) (seminal case adopting market share liability, citing to and relying on Naomi Scheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978)); Joseph H. King Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisiting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981) (widely cited article by courts adopting lost opportunity doctrine).

77. "You've got to know the *shape* of the river perfectly. It is all there is left to steer by on a very dark night. . . ."

> . . .
>
> "Do you mean to say that I've got to know all the million trifling variations of shape in the banks of this interminable river as well as I know the shape of the front hall at home?"
>
> "On my honor, you've got to know them better . . ."

MARK TWAIN, LIFE ON THE MISSISSIPPI 45–46 (Signet Classic 2001).

78. *See generally* STEPHEN JAY GOULD, WONDERFUL LIFE: THE BURGESS SHALE AND THE NATURE OF HISTORY (1989).

And tasty toenail pies
Stir 'em all together
And it's mama's soup surprise[79]

I recognize that my kitchen-sink claim about tort law is one that cannot be disproved, as there is always *something* that might be employed to explain why some feature or another of tort law is the way that it is. That means that rather than resolution through scientific method, my claim will be accepted or rejected based on how others read the tea leaves and how persuasive the contending claims are. But law and natural science are quite different disciplines and ultimately, beliefs have more room for maneuvering based on the evidentiary sources available than for scientific endeavors, at least in the natural sciences. This will, I am confident, produce continuing debate among torts scholars about its core principle(s).

CONCLUSION

To continue with the issue most recently at hand, GSZ begin their article by asking what role reliance plays if it requires something more than causation. They find the answer in the structure of tort law and the centrality of relationships to that structure. By contrast, I would suggest that the reason why fraud requires *victim* reliance beyond factual causation is because of the historical fact that fraud claims came to tort law from contract law, in which there was necessarily a relationship between the parties, and reliance was congruent with causation.[80] And it may have remained a requirement for the same reason that the privity rule had such sway in the 19th century: Courts were concerned about how to constrain the potential liability that tort law might impose on parties far removed from the transaction between two identifiable parties.[81] As courts became more comfortable with the workings of tort law in an industrialized society, liability could extend further as it did with *MacPherson*[82] and the extension of liability for intentional misrepresentations that go beyond deceiving only the plaintiff.[83] Courts may deny recovery to some plaintiffs who suffer economic loss based on misrepresentations relied on only by third parties. But when they do, it's not because of the interest harmed or the lack of a relationship in which defendant deceived plaintiff.

As for the use of comparative responsibility in fraud claims, Andy and Oscar make a persuasive case for employing it with regard to the requirement that reliance be justified, so long as that requirement is truly about the reasonableness, subjective or objective, of the plaintiff's reliance. If it is serving some other purpose, such as permitting courts to dispose of cases in which reliance is highly unlikely, then that purpose should be identified in the Economic Torts Restatement and a more straightforward method of accomplishing this goal provided. The case

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79. Bruce Springsteen, *Chicken Lips and Lizard Hips*, *on* FOR OUR CHILDREN (Walt Disney Records 1991).

80. For a similar, albeit more general, explanation of fraud as being colored by its contractual heritage, see FLEMING, *supra* note 67, at 595.

81. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 107, at 743 (5th ed. 1984).

82. MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).

83. *See* GSZ *supra* note 37, at 1009–1010; *see also supra* text accompanying notes 65–68.

for apportionment when a plaintiff engages in unreasonable behavior other than in relying on the misrepresentation is closer, but I do not shrink in horror automatically at using a plaintiff's fault to reduce recovery when defendant has committed an intentional tort.

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