NEGLIGENT INJURY TO REPUTATION: DEFAMATION PRIORITY AND THE ECONOMIC LOSS RULE

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I. INTRODUCTION

This Note considers cases in which plaintiffs seek reputational damages without pleading defamation. Some courts allow reputational damages under a negligence theory if those damages are parasitic, that is, if the plaintiff has physical damages as well.[1] However, this Note focuses on instances of "stand-alone" reputational injury, where plaintiffs suffer no physical injury to their person or property. Plaintiffs in such cases have included an employee who was fired for "failing" a carelessly conducted drug test,[2] a dentist who blamed his substandard restoration work on defective supplies,[3] and a doctor whose patient was injured by the side effects of a manufacturer's drug.[4]

These claims do not demonstrate publication in the traditional sense; nonetheless, many courts hold that they implicate defamation law. These courts reason that when a claim "sounds" in defamation, ordinary negligence is not an alternative theory of recovery.[5] This Note uncovers various rationales for this "priority of defamation"—rationales that are generally under-articulated by the courts themselves. The Note also examines applications of the economic loss rule

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1. *See, e.g.*, Cargill, Inc. v. Boag Cold Storage Warehouse, Inc., 71 F.3d 545, 551 (6th Cir. 1995) (allowing reputational damages in negligence and noting that economic damages are not barred "where there is [physical] injury or death").

2. Duncan v. Afton, Inc., 991 P.2d 739 (Wyo. 1999).

3. Catalano v. Heraeus Kulzer, Inc., 759 N.Y.S.2d 159 (App. Div. 2003).

4. Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054 (Wash. 1993).

5. *See, e.g.*, Ross v. Gallant, Farrow & Co., 551 P.2d 79, 82 (Ariz. Ct. App. 1976).

to claims for negligent injury to reputation and suggests that courts sometimes implicitly endorse the economic loss rule in these cases by rejecting claims with a broad version of defamation priority.

A. Some Introductory Cases

Sometimes courts hold that reputational damages are only recoverable in defamation actions. One example is *Morrison v. National Broadcasting Co.*[6] In *Morrison*, the plaintiff was a university professor who in the late 1950s participated on a game show that was later exposed as rigged.[7] After the scandal, the professor claimed an "intentional wrong" and sought damages for injury to his reputation.[8] The court held that the claim sounded in defamation, stating that "unlike most torts, defamation is defined in terms of the injury, damage to reputation, and not in terms of the manner in which the injury is accomplished."[9]

Another decision that exclusively associated reputational injury with defamation was *Lawrence v. Grinde.*[10] In *Lawrence*, the plaintiff sued his attorney for negligently failing to disclose a settlement payment in bankruptcy filings, which led to his indictment for fraud.[11] In his legal malpractice suit, the plaintiff sought reputational damages[12] and argued that when he was tried for fraud as a result of the defendant's negligence, "he was in effect libelled."[13] The Iowa Supreme Court picked up on this language and dismissed the claim, stating that the plaintiff was "impermissibly trying to recover for [libel] without proving all the elements of [libel]."[14]

But, despite the *Lawrence* plaintiff's claim that "he was in effect libeled," he was not actually "trying to recover for libel"—he pled negligence.[15] Why would the court treat it as a defamation claim? Is *Morrison* correct in stating that "defamation is defined in terms of the injury"?[16] As the First Circuit pointed out in *Jorgensen v. Massachusetts Port Authority*: "Defamation is a type of tortious wrong. Injury to reputation is a particular item of damages. We are not convinced that . . . damages for injury to reputation may only be recovered in a defamation action."[17] The case law validates that position. True, defamation is the traditional and most favored method of recovering damages for injury to reputation,[18] but it is

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6. 227 N.E.2d 572 (N.Y. 1967).
7. *Id.* at 573.
8. *Id.*
9. *Id.* at 574.
10. 534 N.W.2d 414 (Iowa 1995).
11. *Id.* at 416–17.
12. *Id.* at 417.
13. *Id.* at 418.
14. *Id.* at 420 (quoting Jorgensen v. Mass. Port Auth., 905 F.2d 515, 520 (1st Cir. 1990)).
15. *Id.* at 417–18, 20.
16. Morrison v. Nat'l Broad. Co., 227 N.E.2d 572, 574 (N.Y. 1967).
17. *Jorgensen*, 905 F.2d at 520.
18. *See* Hall v. United Parcel Serv. of Am. Inc., 555 N.E.2d 273, 276 (N.Y. 1990) ("Injuries to an individual's personal and professional reputation . . . have long been compensated through the traditional remedies for defamation."); Gobin v. Globe Pub. Co.,

generally not the only method: Plaintiffs also recover for injury to reputation under intentional dignitary torts like malicious prosecution and abuse of process, and under intentional economic torts, such as interference with contract and fraud.[19] Why then would courts be loath to allow reputational injury under an ordinary negligence theory?[20] This Note presents possible explanations.

B. Preliminary Ideas on the Priority of Defamation

In *Morrison*, the court's decision that the plaintiff's claim sounded in defamation was dispositive: The one-year statute of limitations applicable to libel and slander had lapsed, and the court dismissed the case for that reason.[21] A similar result was reached in *Jimenez-Nieves v. United States*.[22] There, the plaintiff sought recovery under the Federal Tort Claims Act ("FTCA") for damages incurred when the Social Security Administration concededly made a typographical error.[23] As a result of the error, checks that the plaintiff cashed were subsequently dishonored, the plaintiff's credit rating tumbled, and he came under investigation for fraud.[24] He pled negligence and sought reputational damages.[25] While the FTCA waives sovereign immunity for negligence claims, it does not do so for libel or slander.[26] Obviously aware of the exclusion, Jimenez-Nieves did not plead defamation; however, the First Circuit looked beyond the language of the pleading[27] and still found that the "plaintiff's claim [fit] 'the traditional and commonly understood legal definition' of the tort of defamation."[28] Accordingly, it

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649 P.2d 1239, 1243 (Kan. 1982) ("It is reputation which is defamed, reputation which is injured, reputation which is protected by the laws of libel and slander.").

19. *See* DAN B. DOBBS, THE LAW OF TORTS § 440 (2000) (malicious prosecution, etc.); *id.* § 455 (intentional interference with contract); *id.* § 483 (fraud); *see also* Zieve v. Hairston, 598 S.E.2d 25, 32 (Ga. Ct. App. 2004) (holding that reputational damages can be recovered in fraud).

20. Throughout this Note, I use the term "ordinary negligence," or simply "negligence," to denote the tort of negligence as opposed to more specific torts, such as defamation, in which negligence as a level of fault might nonetheless apply.

21. *Morrison*, 227 N.E.2d at 575.

22. 682 F.2d 1 (1st Cir. 1982).

23. *Id.* at 2.

24. *Id.*

25. *See id.*

26. 28 U.S.C. § 2680(h) (2000). The Federal Tort Claims Act ("FTCA") waives sovereign immunity by giving plaintiffs a cause of action for torts committed by employees of the United States acting in the scope of their duties. *Id.* § 1346(b). Libel and slander, however, are excluded from the FTCA, so immunity still bars those claims. *Id.* § 2680(h).

27. *Jimenez-Nieves*, 682 F.2d at 6 ("In examining a complaint we are bound to look beyond the literal meaning of the language used to ascertain the real cause of the complaint."); *accord* Morrison v. Nat'l Broad. Co., 227 N.E.2d 572, 574 (N.Y. 1967) ("In applying a Statute of Limitations . . . 'we look for the reality, and the essence of the action and not its mere name.'" (quoting Brick v. Cohn-Hall-Marx Co., 11 N.E.2d 902, 904 (N.Y. 1937))).

28. *Jimenez-Nieves*, 682 F.2d at 6 (quoting Hoesl v. United States, 451 F. Supp. 1170, 1175 (N.D. Cal. 1978), *aff'd*, 629 F.2d 586 (9th Cir. 1980)).

dismissed all claims relating to injury to reputation as barred by the FTCA's defamation exclusion.[29]

The focus on the unpled tort of defamation in *Morrison* and *Jimenez-Nieves* now makes some sense. It would be unfair to the defendant to allow a plaintiff to avoid the limitations on a claim that sounds in defamation merely by rewording the claim as one for negligence. But to apply the rule logically it must be determined when a claim actually *sounds* in defamation as opposed merely to having some elements in common with a potential defamation action. As discussed above, *Morrison*'s definition of defamation, based solely on the damages sought, appears too restrictive.

Practically speaking, if the defense raises a plausible argument that the plaintiff is trying to plead around clear-cut limitations on her claim, the court might resolve muddled questions of law in favor of the defense. If the court suspects that the plaintiff is trying to do something "sneaky," it might apply the rough-and-ready analysis that if something looks like a duck and quacks like a duck, it must be a duck; simply, if a claim has suspiciously defamation-like qualities, it must be defamation.

Putting aside the concern that the plaintiff might be trying to "plead around" a clear limitation on her claim, there are broader policy justifications for the position that ordinary negligence is not an alternative to defamation—that is, for the "priority of defamation." Furthermore, identifying those justifications clarifies when a claim sounds in defamation and partially unites the priority of defamation with a larger tort principle, the economic loss rule.

C. Rationales for the Priority of Defamation—An Outline of this Note

The first, and narrower, rationale for the priority of defamation is that ordinary negligence law is not equipped to handle the free speech protections that limit defamation actions. A necessary correlative to this rationale is that *communication* must be at issue for a claim to sound in defamation; otherwise, free speech would be of no concern. Many cases do indeed focus on the necessity of communication for a claim to sound in defamation, and I present them in Part II of this Note. I also suggest in Part II that defamation is preferable to ordinary negligence for communication-based claims.

The second, and broader, rationale for the priority of defamation has to do with the legitimacy of reputational damages generally. Clearly, many courts are skeptical of reputational damages—doubting whether they are provable by plaintiffs or foreseeable to defendants—and they use the priority of defamation to keep such damages out of ordinary negligence.[30] The reasoning would go

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29. *Id.*

30. *See, e.g.*, Hamilton v. Powell, Goldstein, Frazer & Murphy, 306 S.E.2d 340, 344 (Ga. Ct. App. 1983), *aff'd*, 311 S.E.2d 818 (Ga. 1984) (refusing reputational damages under negligence and stating that "[t]he civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries"); Lawrence v. Grinde, 534 N.W.2d 414, 419 (Iowa 1995) ("The refusal by the courts to allow recovery of reputation damages in *mere negligence actions* is motivated by policy considerations such as . . . the desire to avoid disproportionality between liability and fault, and the goal of only

something like this: Reputational damages are disfavored—if you want them, you can sue for defamation; but if for any reason you cannot win in defamation, too bad. This position generally minimizes the communication aspect of defamation and, as in *Morrison*, focuses on the reputational *injury* and regards defamation as a limited repository for disfavored damages. I address this justification for the priority of defamation in Part III.

The broader rationale for the priority of defamation essentially maintains that stand-alone reputational damages are not the *kind* of damages that negligence law should address. This is starting to sound like the economic loss rule ("ELR"). Indeed, I argue that in many cases the priority of defamation carries out rationales behind the ELR. Conversely, in the context of reputational injury claims, the ELR might sometimes be justified as effectuating the priority of defamation.[31] Furthermore, even if a reputational-injury claim does not implicate defamation law at all, the ELR can operate on its own to preclude recovery. I address the application of two "versions" of the ELR to reputational injury in Part III.

II. THE PRIORITY OF DEFAMATION

A. **Quinones**—*Finding a Duty that Does Not Implicate Defamation*

Unlike the *Morrison* court, the First Circuit in *Jimenez-Nieves* did not define defamation solely by the damages sought. Rather, it found that plaintiff Jimenez-Nieves's "negligence" claim satisfied the Restatement's definition of "defamation"—a false and defamatory communication with the requisite fault and damages.[32] The First Circuit specifically distinguished its decision[33] from that of the Third Circuit in *Quinones v. United States*,[34] a case with similar facts. Plaintiff Quinones was a retired federal agent who alleged that negligently maintained employment records—incorrectly stating that he had been a substandard employee—damaged his reputation and prevented him from obtaining another job;

allowing liability or damages when the prospect of injury was reasonably foreseeable to the defendant.") (emphasis added).

31. That is, I agree with Professor Dobbs's suggestion that one function of the ELR is to shunt stand-alone non-physical injury claims to more specific torts, like defamation, by refusing their recovery in ordinary negligence. Dan B. Dobbs, *An Introduction to Non-Statutory Economic Loss Claims*, 48 ARIZ. L. REV. 713, 715, 721 (2006). The idea is that the more specific torts (with their distinct elements) are better equipped to handle these injuries. Given this rationale for the ELR, there is a unity of purpose between the ELR and both rationales for defamation priority. *See infra* Part III.C.

32. *Jimenez-Nieves*, 682 F.2d at 6. The court explained, "To create liability for defamation there must be '(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting to at least negligence; and (d) [sometimes special harm].'" *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 558 (1977)). In turn, "Publication of defamatory matter is its *communication* intentionally or by a negligent act to one other than the person defamed." RESTATEMENT (SECOND) OF TORTS § 577 (1977) (emphasis added).

33. *Jimenez-Nieves*, 682 F.2d at 6.

34. 492 F.2d 1269 (3d Cir. 1974).

he sued under the FTCA.[35] Again, the issue was whether this putative negligence claim would be barred by the FTCA's libel and slander exclusion.[36]

The *Quinones* court adopted the plaintiff's suggestion that the case involved two distinct duties: (1) the government's duty to the plaintiff *to maintain* his employment records accurately, and (2) the government's duty to the plaintiff *to communicate* those records accurately.[37] With this formulation, the plaintiff released the court from having to reconcile a negligence claim with the statutory bar to a defamation claim. The court held that only the allegations respecting the second duty were barred by the libel and slander exclusion and that allegations respecting the first could proceed under negligence.[38]

In responding to *Quinones*, the *Jimenez-Nieves* court said:

> The [*Quinones*] court held that the claim was not one for defamation, although the injury was to reputation, because "negligence is conceptually distinct from defamation," and because "the negligence alleged here was distinct from . . . mere writing or speaking." However, we decline to follow the Third Circuit in this case because we do not believe that the fact that a defamation is caused negligently makes it any the less a defamation.[39]

The *Jimenez-Nieves* court usefully points out that "it is commonly held that defamation can be caused by negligence."[40] The allegation of a negligent act, therefore, is not by itself particularly useful in distinguishing defamation from ordinary negligence. However, the *Jimenez-Nieves* court was wrong to suggest that the *Quinones* court allowed the plaintiff's claim because it found a negligent act. Rather, the *Quinones* court allowed the plaintiff's claim because it recognized a negligent act that was not a communication, an act that was "distinct from mere *writing* or *speaking*."[41] The *Jimenez-Nieves* court itself noted that the crux of liability for defamation is "a '*communication*' that tends 'to harm the reputation of another.'"[42] By allowing the plaintiff's reputational claim to survive, the *Quinones* court implicitly rejected the idea that a claim seeking reputational damages automatically sounds in defamation.

Perhaps the *Quinones* court teased out a separate duty—to maintain accurate personnel records—on which to anchor liability because it believed that the real injury caused by inaccurate records should be triable without regard for a body of law weighing affronts to personal dignity against free expression. Or maybe it was just that the court was sympathetic to the injury and worked to find a way to avoid the dismissal that would necessarily result if the entire claim sounded in defamation. Still, the holding of *Quinones* is questionable because the court

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35. *Id.* at 1272.
36. *Id.* at 1271. For the FTCA's libel and slander exclusion, see *supra* note 26.
37. *Quinones*, 492 F.2d at 1280–81 (emphasis added).
38. *Id.* at 1281.
39. *Jimenez-Nieves*, 682 F.2d at 6 (quoting *Quinones*, 492 F.2d at 1281).
40. *Id.*
41. *Quinones*, 492 F.2d at 1281.
42. *Jimenez-Nieves*, 682 F.2d at 6 (quoting RESTATEMENT (SECOND) OF TORTS § 559 (1977)) (emphasis added).

found a duty to maintain accurate records, which seems meaningless independent of the duty not to communicate *in*accurate ones—the latter duty concededly implicating defamation.[43] In other words, since the injury in *Quinones* undoubtedly resulted from communication, it is hard to see how liability could rest on anything distinct from communication.[44] The only reason to recognize a duty to maintain accurate personnel records is to prevent the communication of inaccurate ones. At the very least, the *Quinones* court's avoidance of defamation relies on spurious analysis and makes the law less predictable, which has undoubtedly fueled the rejection of the opinion by other courts.[45] However, there could be other consequences for such an approach, which I discuss below in Part II.D.

B. Jorgensen*—Defining Communication More Narrowly*

Quinones, like *Jimenez-Nieves* and *Lawrence* (the bankruptcy-filing case), really does seem to be a case based on communication. There are other reputational-injury cases, however, that are not so easily classified. *Jorgensen v. Massachusetts Port Authority*[46] helps identify them.

In *Jorgensen*, the plaintiffs were airline pilots at the helm of a World Airways DC-10 that skidded off an icy Logan Airport runway into Boston Harbor.[47] The plaintiffs sued the Massachusetts Port Authority ("Massport") for negligent failure to keep the runway clear of ice and claimed as damages, *inter alia*, injury to their reputations that resulted from their connection to the accident.[48] They did not plead defamation.[49]

The First Circuit in *Jorgensen* first addressed whether under Massachusetts law the tort of defamation encompassed all injury to reputation

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43. *See Quinones*, 492 F.2d at 1281 ("To the extent the complaint before us is based on allegations respecting this second alleged duty, i.e., the duty on the part of the government to disseminate accurate information, such a claim is barred by the libel and slander exception to the Federal Tort Claims Act, as conceded by appellant at oral argument.").

44. For a case with similar facts, rejecting *Quinones* in favor of *Jimenez-Nieves*, see *Talbert v. United States*, 932 F.2d 1064, 1066 (4th Cir. 1991), in which the court explains, "Because the damages [that the plaintiff] alleges appear to flow from past or future communication of the contents of the personnel files and the resulting injury to [his] reputation, the gravamen of [the plaintiff's] negligence claim is the government's communications of untrue statements about [him]."

45. *See Talbert*, 932 F.2d at 1066–67 ("Artful pleading cannot alter the fact that [the plaintiff's] claim 'resounds in the heartland of the tort of defamation . . . .'" (quoting *Jimenez-Nieves*, 682 F.2d at 6)); *accord* Baker v. United States, 943 F. Supp. 270, 274–75 (W.D.N.Y. 1996); Moessmer v. United States, 579 F. Supp. 1030, 1031 (E.D. Mo. 1984).

46. 905 F.2d 515 (1st Cir. 1990).

47. *Id.* at 517.

48. *Id.* One pilot "argued that his reputation as a safe pilot was harmed by the accident, despite the fact that Massport's negligence was found to be a proximate cause of the accident." *Id.* He was furloughed following a personnel cutback and had difficulty finding another job. *Id.* The other pilot said that his connection to the accident harmed his reputation, "leading to his ostracism by fellow workers." *Id.* at 518. "This, in turn, he claimed, . . . led to his resignation . . . and a corresponding loss of earning capacity." *Id.*

49. *Id.* at 517.

claims.[50] Finding no Massachusetts precedent on point, the court instead discussed at length its own holding in *Jimenez-Nieves*.[51] The court raised the possibility that "*all* claims alleging injury to reputation sound in defamation" and even suggested that *Jimenez-Nieves* could be construed to so hold.[52] The *Jorgensen* court cited *Morrison*, the New York game show case, for the proposition that defamation is uniquely defined solely in terms of the injury suffered.[53] New York courts, for one, have applied this rule indefatigably, at least on the question of the applicable statute of limitations.[54] The *Jorgensen* court, however, did not read *Jimenez-Nieves* so broadly: "As we read *Jimenez-Nieves*, it holds that where the injury is to reputation *and* the conduct is the communication of an idea, the claim sounds in defamation."[55] The *Jorgensen* court also noted approvingly[56] that the *Jimenez-Nieves* court broadly defined "communication" as "bringing an idea to the perception of another, either explicitly or implicitly."[57] The *Jorgensen* court did not disagree with the characterization of the claim in *Jimenez-Nieves* as one for defamation, noting that "[we] observed that the Social Security Administration's conduct in stopping payment on plaintiff's checks constituted communication because it had brought defamatory ideas about the plaintiff (presumably, that he had committed welfare fraud or was a poor credit risk) to the perception of others."[58]

However, the *Jorgensen* court went on to hold that in the instant case, the conduct of Massport was not a communication.[59] The court did not require a traditionally communicative act—such as spoken or written words,[60] which after all existed in *Jimenez-Nieves*—but instead focused on the causal chain to determine if communication was present. The court reasoned that the allegedly

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50. *Id.* at 519.

51. *Id.* at 520 (discussing Jimenez-Nieves v. United States, 682 F.2d 1 (1st Cir. 1982)).

52. *Id.*

53. *Id.* (citing Morrison v. Nat'l Broad. Co., 280 N.Y.S.2d 641, 644 (1967)). For the *Morrison* court's definition of defamation, see *supra* text accompanying note 9.

54. *See* Santagada v. Lifedata Med. Servs., Inc., No. 92 Civ. 6110, 1993 WL 378309, at *5 (S.D.N.Y. Sept. 22, 1993) ("[I]f an action is one solely or primarily claiming injury to reputation, it is in the nature of a defamation action for purposes of the applicable statute of limitations, regardless of the conduct that allegedly caused the injury."). *But see infra* text accompanying note 70.

55. *Jorgensen*, 905 F.2d at 520. Here the *Jorgensen* court agreed with the *Quinones* court's view of defamation, discussed *supra* Part II.A.

56. *Jorgensen*, 905 F.2d at 519.

57. *Id.* at 519. As pointed out in *Jimenez-Nieves*, 682 F.2d 1, 6 (1st Cir. 1982), this definition is based on the Restatement's own comment. *See* RESTATEMENT (SECOND) OF TORTS § 559 cmt. a (1977) ("The word 'communication' is used to denote the fact that one person has brought an idea to the perception of another.").

58. *Jorgensen*, 905 F.2d at 519 (citing *Jimenez-Nieves*, 682 F.2d at 6).

59. *Id.* at 520.

60. Words are not required for defamatory communication. *See* Alaska Statebank v. Fairco, 674 P.2d 288, 294 (Alaska 1983) (holding that the defendant's wrongful repossession of plaintiff's store used as collateral for a secured debt "was clearly defamatory despite the fact that the statement communicated by the repossession was not actually verbalized"); *see also* DOBBS, *supra* note 19, § 412, at 1122 & n.4.

negligent act, the failure to clear the runway of ice, did not itself communicate any ideas about the capability of the plaintiff pilots—only the subsequent accident might have done so. Therefore, the court held, the pilots' claims were not preempted by defamation law.[61]

The *Jorgensen* analysis echoes the decision by the United States District Court for the Southern District of New York in *Horstein v. General Motors Corp.*[62] That case resulted from the routine inspection by New York City police officers of the Vehicle Identification Number ("VIN") on a parked car.[63] Because the VIN of the plaintiff's Chevrolet was incorrectly marked "Buick," the officers assumed that the label had been altered.[64] They impounded the car and arrested its owner, plaintiff Horstein, for possession of stolen property.[65] After the charge was dismissed, Horstein sued GM for the negligent manufacture and release of a vehicle with an improper VIN label, claiming, *inter alia*, injury to reputation.[66] Like the defendant in *Morrison*,[67] defendant GM urged that the claim for reputational damages be dismissed as time-barred by the statute of limitations applicable to libel and slander claims.[68]

While New York state courts rigidly hold that injury to reputation claims sound in defamation,[69] the district court in this case refused to do so.[70] In its analysis the court distinguished the earlier *Morrison* case, first by noting that, unlike Morrison, Horstein was not claiming reputational damages alone, but also damages for the dispossession and lost use of his car.[71] Next the court dwelled extensively on the fact that Horstein did not "claim that defendant communicated the idea to the public that he was a criminal"—that is, did not directly impugn his reputation—but rather, "created a condition of affairs in which it was reasonably foreseeable that he would be mistakenly arrested for possession of stolen property."[72] The court alighted on the plaintiff's claim that the defendant's act was

61. *Jorgensen*, 905 F.2d at 520.
62. 391 F. Supp. 1274 (S.D.N.Y. 1975).
63. *Id.* at 1276.
64. *Id.*
65. *Id.*
66. *Id.*
67. Morrison v. Nat'l Broad. Co., 227 N.E.2d 572, 575 (N.Y. 1967); *see supra* text accompanying note 21.
68. *Horstein*, 391 F. Supp. at 1278.
69. *See supra* note 54 and accompanying text.
70. *Horstein*, 391 F. Supp. at 1279.
71. *Id.* at 1278. Here the court is suggesting that a claim is less likely to sound in defamation if reputational damages are not the only damages sought. To anticipate the discussion in Part III.A, *infra*, this argument is analogous to the idea that the economic loss rule does not apply when economic losses are parasitic. *See infra* notes 169–70 and accompanying text. Interestingly, however, Horstein's other damages might not help him before a court intensely concerned with the economic loss rule because "dispossession and lost use" (which are really trespass to chattels damages) are arguably stand-alone economic losses themselves. Professor Dobbs makes a similar point in the context of conversion. Dobbs, *supra* note 31, at 722. But the physical seizure should prevent the rule anyway. *Id.*
72. *Horstein*, 391 F. Supp. at 1278.

causally removed from injury to reputation, so it did not sound in defamation—reasoning very similar to that in *Jorgensen*.[73]

C. Applying Jorgensen

There are reputational-injury cases that arguably involve communication where the courts were not concerned about defamation at all. For example, there is a line of cases where the plaintiffs were healthcare providers whose patients were injured during treatment, allegedly due to the defendants' negligence.[74] In *Oksenholt v. Lederle Laboratories*, the Oregon Supreme Court allowed the plaintiff physician to proceed with his negligence claim for reputational damages against a drug manufacturer.[75] The physician alleged that the manufacturer negligently failed to warn him of the side effects of a certain drug that blinded one of his patients.[76] Though the court did not address defamation, the *Jorgensen* analysis might have removed any conflict anyway. That is, *Oksenholt* would not implicate defamation because the defendant's failure to warn the plaintiff of the dangers of its drug did not communicate anything about the plaintiff. To paraphrase *Horstein*, the failure to warn only created a condition of affairs in which it was reasonably foreseeable that the plaintiff would become known as an unsafe physician.[77] In fact, perhaps the seeming lack of defamatory communication meant that defamation itself was not a plausible means of recovery, leaving negligence as the only non-statutory redress.[78] If the plaintiffs in these healthcare cases were to make out defamation claims, the courts would have had to accept the very broadest conception of "communication."[79]

The *Jorgensen* analysis, however, does not vindicate the Wyoming Supreme Court's failure to address defamation law in *Duncan v. Afton, Inc.*[80] In *Duncan*, the plaintiff employee was fired when an on-the-job drug test revealed a high level of alcohol in his system.[81] The plaintiff claimed that the result was

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73. *See supra* text accompanying notes 59–61.

74. *E.g.*, Kennedy v. McKesson Co., 448 N.E.2d 1332, 1333 (N.Y. 1983) (permitting dentist to seek reputational damages from a defendant who negligently repaired an anesthetic machine, resulting in the death of the plaintiff's patient); Wash. State Physicians Ins. Exchange & Ass'n v. Fisons Corp., 858 P.2d 1054, 1071 (Wash. 1993) (permitting physician to recover from drug manufacturer whose drug severely injured plaintiff's patient); Oksenholt v. Lederle Labs., 656 P.2d 293, 296 (Or. 1982) (same).

75. *Oksenholt*, 656 P.2d at 296.

76. *Id.* at 295.

77. *See supra* text accompanying note 72.

78. Note that in one of the physician cases the court grounded liability in a state consumer protection act. *Fisons*, 858 P.2d at 1060–61.

79. In concluding that a typographical error was a communication, the *Jimenez-Nieves* court said, "the [Restatement] makes clear, 'communication' is interpreted broadly 'to denote the fact that one person has brought an idea to the perception of another.'" Jimenez-Nieves v. United States, 682 F.2d 1, 6 (1st Cir. 1982) (quoting RESTATEMENT (SECOND) OF TORTS § 559 cmt. a (1977)). See *supra* Part II.A for discussion of the case. However, it is in some sense easier to adopt a very broad definition of "communication" when doing so denies a claim, as in *Jimenez-Nieves*, rather than establishes one.

80. 991 P.2d 739 (Wyo. 1999).

81. *Id.* at 741.

inaccurate and sued the company that had collected his urine sample, alleging that it had done so negligently.[82] The court held that the collection company owed a duty to the plaintiff and that reputational damages were recoverable.[83] One might argue that defamation law was not implicated because, under the *Jorgensen* analysis, the negligently conducted test was one causal step removed from the reputational injury, caused by the communicated false positive. Like the accurate record keeping in *Quinones*, proper handling of the drug-test sample might be seen as a duty distinct from accurate reporting. But, as in *Quinones*, it is a stretch to focus on a non-communicative act, here the handling of the drug-test sample, when the plaintiff's injury was actually caused by the defendant's subsequent communication.[84] This claim surely hits square in the middle of defamation law.[85]

D. The Importance of Communication as a Dividing Line

1. Negligence as an End Run Around Defamation

Cases in which communication is the focus for deciding whether a claim sounds in defamation are intellectually satisfying and make the law more predictable, because defining defamation solely by the damages sought seems too restrictive. But if there is no lapsed statute of limitations nor any broad defamation immunity in a particular case, one might ask why the determination of whether a claim sounds in defamation really matters.

In *Ross v. Gallant, Farrow & Co.*,[86] the defendants audited the local branch of an electricians' union and reported to a union official that the plaintiff business manager had improperly withdrawn union funds.[87] The plaintiff sued under both defamation and negligence, and the trial court rejected both claims.[88] The Arizona Court of Appeals began by recognizing that the defendant auditors enjoyed a qualified privilege for their work-related communications under Arizona defamation law.[89] So, to recover under defamation the plaintiff needed to show that the audit reports constituted knowing or reckless falsehood.[90] Finding no evidence of this in the record, the court affirmed dismissal of the libel claim.[91] Turning to the alleged negligence, the court noted that it was based on the exact same facts as the alleged libel.[92] Accordingly, the court agreed with the trial court

82. *Id.* Technically, Duncan alleged that the defendant collection company was negligent in training its employees, in failing to employ proper collection procedures, and in failing to warn Duncan's employer that urinalysis can be unreliable. *Id.*

83. *Id.* at 745–46.

84. *See supra* note 44 and accompanying text.

85. See *supra* note 32 for the Restatement's elements of a defamation action.

86. 551 P.2d 79 (Ariz. Ct. App. 1976).

87. *Id.* at 80.

88. *Id.*

89. *Id.* at 81.

90. *Id.* In other words, the plaintiff needed to show "actual malice." *See* Phoenix Newspapers, Inc. v. Church, 447 P.2d 840, 849 (Ariz. 1968) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)).

91. *Ross*, 551 P.2d at 81.

92. *Id.* at 82.

that the negligence was "subsumed by the claim of libel," and therefore affirmed the negligence dismissal as well.[93]

To round out its brief discussion of the negligence claim, the court replied to the plaintiff's reliance on a Texas appellate decision, *Shatterproof Glass Corp. v. James*.[94] In *Shatterproof*, the plaintiff business lost money it loaned to a third party on the basis of an allegedly negligent and misleading audit report prepared by the defendant.[95] The Texas court allowed recovery of economic loss sustained in reasonable reliance on a negligently performed audit.[96] The *Ross* court held that *Shatterproof* was distinguishable because the plaintiff there did not claim reputational damages.[97] The court noted that "[w]here one is damaged in his reputation by either oral or written communication of another, the law has established a specific set of rules upon which liability is based, commonly referred to as the law of defamation."[98]

Accordingly, the *Ross* court held that defamation was "the gist of the claim" before it, so (again, despite the pleading)[99] the rules of defamation applied.[100] The court further held that where defamation is the gist of the claim, "[c]ommon law *negligence is not an alternative* basis for recovery."[101] The court stated that this "is not necessarily a result of logic; it is a product of the historical development of the law of defamation."[102] Nonetheless, the Arizona court's discussion does suggest some underlying logic to the priority of defamation. The court noted that *Shatterproof* "did not require the court to reconcile its decision with the well-settled law of defamation"[103]—that is, the claim did not sound in defamation.[104] In contrast, in *Ross*, the plaintiff's reputational-injury claim did sound in defamation and was a loser due to a qualified privilege. The court might

93. *Id.*

94. 466 S.W.2d 873 (Tex. App. 1971).

95. *Id.* at 874.

96. *Id.* at 880. With this holding the court was guided by what would become the RESTATEMENT (SECOND) OF TORTS § 552 (1977) (at that time, Tent. Draft No. 12, 1966). Section 552 represents a much wider scope of auditor liability than that set out by Judge Cardozo in the famous case *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), which required privity of contract between the plaintiff and the defendant auditor. Many courts have since joined the rejection of *Ultramares*. For an extensive discussion of modern responses to *Ultramares* across the states, see *Bily v. Arthur Young & Co.*, 834 P.2d 745, 752–60 (Cal. 1992).

97. *Ross*, 551 P.2d at 82.

98. *Id.* The court need not have restricted communication to "oral or written." *See supra* note 60.

99. *See supra* note 27 and accompanying text.

100. *Id.*

101. *Id.* (emphasis added).

102. *Id.*

103. *Id.*

104. It is a bit tricky to see why *Shatterproof* did not sound in defamation. This Note focuses on the communication element of defamation, but the *Ross* court suggests that the *defamatory content* element was missing in *Shatterproof*. That is, since the *Shatterproof* plaintiff neither directly pled defamation nor claimed reputational injury, there was no allegation of defamatory meaning. *See* RESTATEMENT (SECOND) OF TORTS § 558 (1977).

have reasoned that it would be unfair to allow the plaintiff to make an end run around the "well-settled" law of defamation.

This reasoning might also help explain the Iowa Supreme Court's decision in *Lawrence*, the bankruptcy-filing case.[105] There, dismissing the plaintiff's negligence claim, the court stated, "There is a distinct difference between the level of fault associated with libel, which requires an intentional act, and a negligent act devoid of willfulness or wantonness."[106] However, common law defamation does not require a willful intent to injure reputation; defamation, generally, cannot be so easily distinguished from negligence.[107] In speaking of "wantonness" the Iowa Supreme Court probably had in mind the level of fault that would be necessary to destroy the judicial privilege, if it were not absolute, that could probably have been asserted by the defendant in *Lawrence* had the plaintiff pled libel.[108] Since the defendant's conduct was privileged under defamation law, the Iowa Supreme Court in *Lawrence* might have reasoned that the plaintiff should not be allowed to circumvent the privilege by claiming negligence.

2. A Proposed Course of Action

Ross and *Lawrence* suggest that, in addition to encouraging predictability in the law and treating defendants fairly, enforcing the priority of defamation forces communication-based reputational claims to confront the well-developed strictures of defamation law. Defamation privileges exist to prevent the threat of liability from stifling First Amendment rights or socially useful communications.[109] If a court disagrees with the effects of a privilege on a particular set of facts, the court should directly confront the privilege itself, rather than punt by allowing the claim to proceed under a different theory.[110] Addressing the privilege would further develop the contours of defamation law and dam one

105. Lawrence v. Grinde, 534 N.W.2d 414 (Iowa 1995) (introduced *supra* Part I.A).

106. *Id.* at 420. The court continued, "To sanction reputation damages in this case would be tantamount to holding that a negligent act which has resulted in reputation damages is equally blameworthy as an intentional or wanton act designed to damage an individual's reputation." *Id.*

107. *See supra* note 32 and text accompanying *supra* note 40.

108. *See* DOBBS, *supra* note 19, § 412 (noting that the judicial privilege "protects defamatory matter in pleadings, and statements made by attorneys . . . so far as they are involved in and related to judicial proceedings").

109. *See* Curtis Pub. Co. v. Butts, 388 U.S. 130, 151–52 (1967) ("The law of libel has . . . changed substantially since the early days of the Republic, and this change is 'the direct consequence of the friction between it and the highly cherished right of free speech.' . . . Truth has become an absolute defense in almost all cases, and privileges designed to foster free communication are almost universally recognized." (quoting State v. Brown, 206 A.2d 591, 597 (N.J. Super. Ct. App. Div. 1965))).

110. Judge Posner argues in the context of insurance bad faith that a new tort should not be recognized just because punitive damages are not allowed in contract law—the better solution would simply be to allow punitive contract damages in these situations. Richard A. Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. L. REV. 735, 745–47 (2006). My argument is similar.

source by which ordinary negligence is becoming bloated at the expense of other torts.

For example, cases involving employee drug or polygraph testing are reputational cases that end up in negligence probably because of privilege problems in defamation.[111] I suggested above that such cases "sound" in defamation,[112] but some courts assume that a privilege would block defamation recovery.[113] Courts should address the privilege directly rather than avoid the question with a negligence analysis. A direct approach is particularly appealing since the negligence "out" has exempted courts from the task of determining exactly which defamation privilege would apply and whether the privilege makes any sense.[114] Interestingly, a preliminary draft of the new Restatement, even though it does not cover defamation actions, suggests that defamation law could be a basis of liability in the drug-test cases.[115]

One might argue that not all communication claims need to be forced into defamation out of deference to speech protections, because not all kinds of speech merit such protection. But if a reputational-injury claim sounds in defamation, the extent of any defamation privilege is probably best determined in a defamation action. The court is more likely to provide a satisfactory analysis of defamation privilege if the parties actually brief a defamation suit.

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111. *See, e.g.*, Stinson v. Physicians Immediate Care, Ltd., 646 N.E.2d 930 (Ill. App. Ct. 1995) (drug test); Elliott v. Lab. Specialists, Inc., 588 So. 2d 175 (La. Ct. App. 1991) (drug test); Hall v. United Parcel Serv. of Am., Inc., 555 N.E.2d 273 (N.Y. 1990) (polygraph test); SmithKline Beecham Corp. v. Doe, 903 S.W.2d 347 (Tex. 1995) (drug test). Of these cases, only *Hall* discussed defamation law. *Hall*, 555 N.E.2d at 276–77.

112. *See supra* Part II.C.

113. *See Hall*, 555 N.E.2d at 276.

114. For example, the *Hall* court said that a potential defamation action against the defendant polygraph tester would be "circumscribed by rules of qualified privilege that, in closely analogous circumstances, foreclose recovery" and then cited an employee-evaluation case and two credit-report cases. *Id.* But it is not clear, to me at least, that all of these fact patterns should be covered by a single defamation privilege or, for that matter, by any privilege at all. *See generally* DAN B. DOBBS & ELLEN M. BUBLICK, CASES AND MATERIALS ON ADVANCED TORTS: ECONOMIC AND DIGNITARY TORTS chs. 3–5 (2006). Finally, it should be noted that the *Hall* court ultimately denied liability by holding that the employee-testing situation should await legislative action. *Hall*, 555 N.E.2d at 277–78. This approach at least avoids potential economic loss problems with liability in ordinary negligence. *See* discussion *infra* Part III; *see generally* RESTATEMENT (THIRD) ECON. TORTS & RELATED WRONGS §13 (Preliminary Draft No. 2, 2006).

115. RESTATEMENT (THIRD) ECON. TORTS & RELATED WRONGS § 13 illus. 21 (Preliminary Draft No. 2, 2006). Professor Feinman argues that defamation would be an inadequate theory of liability in the drug-test cases because it would depend upon the states' using a negligence fault-standard for defamation and it would not reach a case where the testing company reported that an employee had an infectious disease. Jay M. Feinman, *The Economic Loss Rule and Private Ordering*, 48 ARIZ. L. REV. 813, 821 n.48 (2006). However, Professor Feinman points out that most states *do* use a negligence standard. *Id.* Furthermore, there is authority that a report of the plaintiff having an infectious disease *is* defamatory. DOBBS, *supra* note 19, § 403; *see, e.g.*, McCune v. Neitzel, 457 N.W.2d 803 (Neb. 1990) (AIDS).

One might also argue that the special protections of defamation law could be imported into negligence when needed, much as they are imported into other tort claims that often involve speech, such as malicious prosecution, misrepresentation, and interference with contract.[116] But this does not solve the problem: If courts imported defamation rules into the drug-test cases, for example, they must still confront the purported privilege. What's more, the limitations on defamation actions should be respected for reasons unrelated to the protection of speech. Recall that both *Morrison* and *Jimenez-Nieves* enforced *procedural* limitations on defamation actions. These procedural limitations might also have broader policy implications. Arguably, the short statute of limitations common for defamation actions[117] and the defamation exception in the FTCA[118] exist because defamation actions protect a very intangible interest akin to emotional well-being. Defamation is therefore close to being a disfavored tort. As the Georgia Court of Appeals put it, rather strongly, in a case denying reputational injury in negligence: "The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries."[119] Therefore allowing plaintiffs to make an end run around the limits on defamation also upsets, for better or worse, the law's prioritization of causes of action.[120]

III. NON-COMMUNICATIVE INJURY TO REPUTATION

When reputational-injury claims are not handled by defamation law and proceed on a negligence theory, the economic loss rule ("ELR") becomes relevant.[121] The ELR takes various forms and is given widely varying scope.[122]

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116. *See, e.g.*, Blatty v. N.Y. Times Co., 728 P.2d 1177, 1182 (Cal. 1986) (explaining that the limitations "established in defamation actions . . . are not peculiar to such actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement"); Reader's Digest Ass'n v. Superior Court, 690 P.2d 610, 624 (Cal. 1984) ("[C]onstitutional [speech] protection does not depend on the label given the stated cause of action . . . ."); Lacoff v. Buena Vista Pub. Inc., 705 N.Y.S.2d 183 (N.Y. Sup. Ct. 2000) (dismissing statutory and common law misrepresentation claims because statements were protected by First Amendment).

117. *See* DOBBS & BUBLICK, *supra* note 114, at 184 ("Statutes of Limitation for libel and slander are often very short.").

118. Of course, it cannot be gainsaid that the government's desire to limit liability wherever possible is an overarching rationale for the libel and slander exclusion in the FTCA.

119. Hamilton v. Powell, Goldstein, Frazer & Murphy, 306 S.E.2d 340, 344 (Ga. Ct. App. 1983), *aff'd*, 311 S.E.2d 818 (Ga. 1984) (quoting Chapman v. W. Union Tel., 15 S.E. 901 (1892).

120. Though the courts do not argue this way, I could make the point by painting defamation in a more favorable light: It could be that allowing stand-alone reputational injury in negligence actually denigrates reputational injury by dragging it from the *presumed* status it often enjoys in defamation to being just one more item of damage *requiring proof* in negligence.

121. Arguably, the ELR has no role in limiting recovery in tort theories other than ordinary negligence or products liability. This limitation could be justified because many other tort theories require a higher level of fault than mere negligence, and some (such as interference with contract) are aimed specifically at the recovery of economic loss. However, sometimes courts extend the ELR beyond ordinary negligence. *See, e.g.*, BRW,

But, generally, the ELR precludes claims for stand-alone economic harm under theories of ordinary negligence or products liability. The rationales and applications of the ELR are dealt with extensively in other places, including a number of articles in this issue of the *Arizona Law Review*.[123] In this part of the Note, I focus only on how two "versions" of the ELR can impact reputational-injury claims. Sometimes, courts explicitly apply the ELR to bar reputational claims on their own terms. Additionally, I argue, some courts implicitly follow the liability-limiting thrust of the ELR by holding that ordinary negligence is not an alternative to defamation. In this way defamation priority and the ELR are united.

A. Two Versions of the ELR and Reputational Injury[124]

*1. The Contractual (*Seely*) Version of the ELR*

One version of the ELR dates back to Chief Justice Traynor's opinion in *Seely v. White Motor Co.*[125] and focuses on the interplay between tort law and contract law. This "contractual" ELR essentially prevents plaintiffs from using tort to recover damages that merely represent the lost benefit of a contractual bargain.[126] In the context of stand-alone reputational injury, the contractual ELR applies quite straightforwardly when the reputational harm is merely lost business goodwill owing to a contractual partner's failure to perform satisfactorily.

For example, in *Lucker Manufacturing v. Milwaukee Steel Foundry*, plaintiff Lucker had a business relationship with Shell Oil Company.[127] For its production of a mooring system for Shell, Lucker contracted defendant Milwaukee Steel to produce six metal components according to Lucker's specifications.[128] One of these components failed a "load test."[129] As a result, Shell increased its construction standards, and Lucker's costs rose significantly.[130] Lucker sued Milwaukee Steel to recover (1) the cost of the component, (2) the increased cost of completing the project, and (3) damages for lost goodwill and business

Inc. v. Dufficy & Sons, Inc., 99 P.3d 66, 74–75 (Colo. 2004) (ELR bars negligent misrepresentation); Digicorp, Inc. v. Ameritech Corp., 662 N.W.2d 652, 657, 667 (Wis. 2003) (overturning, on ELR grounds, damages that were based in part on intentional misrepresentation).

122. *See* DOBBS & BUBLICK, *supra* note 114, at 445 ("[T]he economic loss rule . . . may be formulated in various ways and given greater or lesser scope."). However, it is likely that the new Restatement will go a long way toward solidifying the ELR as a discrete tort principle.

123. Symposium, *Dan B. Dobbs Conference on Economic Tort Law*, 48 ARIZ. L. REV. 687 (2006).

124. I borrow from Professor Dobbs and Professor Bublick the idea that the ELR can be usefully analyzed with references to *Seely* and *Robins Dry Dock*. *See* DOBBS & BUBLICK, *supra* note 114, at 444–45, 469.

125. 403 P.2d 145 (Cal. 1965).

126. *See generally* DOBBS & BUBLICK, *supra* note 114, at 441–53.

127. 777 F. Supp. 413, 414 (E.D. Pa. 1991).

128. *Id.*

129. *Id.*

130. *Id.*

reputation.[131] The court summarily rejected the first two items as barred by the contractual ELR;[132] the bulk of the opinion addresses goodwill.[133]

The district court began its analysis by noting that the U.S. Supreme Court's principal contractual ELR precedent, *East River Steamship Corp. v. Transamerica Delaval, Inc.*,[134] did not specifically rule out damages for loss of goodwill.[135] Plaintiff Lucker argued that the ELR did not cover goodwill damages because they are "akin to damages to persons or property."[136] The court disagreed, concluding that Lucker's reputational damages were "in the nature of economic loss and should therefore be excluded from tort recovery by the economic loss rule."[137] The court noted that negligence and products liability are concerned primarily with safety, and that "goodwill is not the type of injury that tort law is designed to redress."[138] Further, the court stressed the primary rationale of the contractual ELR by holding that goodwill "resulting from successful completion of the Shell contract" represented just another potential benefit of the bargain with Milwaukee and should therefore only be recoverable, if at all, under contract.[139]

Applying the contractual ELR makes sense in cases like *Lucker* where the plaintiff seeks to recover for injury to commercial goodwill from a party with whom it is in privity.[140] Arguably, near privity would be sufficient where the plaintiff could have bargained for a guarantee even though it dealt with an

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131. *Id.*

132. *Id.* at 415–16.

133. The cases examined in this Note generally include claims for injury to *professional* reputation—"goodwill" is a commensurate item. *See* Dugan v. Dugan, 457 A.2d 1, 3 (N.J. 1983) ("[G]oodwill is essentially reputation that will probably generate future business.").

134. 476 U.S. 858 (1986). In *East River*, the Court specifically adopted the *Seely* version of the ELR to limit strict products liability in admiralty cases. *Id.* at 871. Relying extensively on the contract-tort-distinction rationale of *Seely*, Justice Blackmun stated that tort products liability did not offer remedy for purely economic harms owing to a defective product, including damage to the product itself. *Id.* at 866–67.

135. *Lucker*, 777 F. Supp. at 416. The court says the same for *East River*'s "Pennsylvania progeny." *Id.*

136. *Id.*

137. *Id.*

138. *Id.*; *see also* Daanen & Janssen, Inc. v. Cedarapids, Inc., 573 N.W.2d 842, 847 (Wis. 1998) (stating that by suing in tort for economic damages the plaintiff was "attempting to recover in tort what are essentially contract damages"). The idea is that tort law applies only "in situations where society recognizes a duty to exist wholly apart from any contractual undertaking." Collins v. Reynard, 607 N.E.2d 1185, 1186 (Ill. 1993).

139. *Lucker*, 777 F. Supp. at 416. Though the plaintiff expressed concerns otherwise, the *Lucker* court asserted that, under Pennsylvania law at least, goodwill damages *are* recoverable under warranty theories. *Id.* at 417.

140. *See* Cloverhill Pastry-Vend Corp. v. Cont'l Carbonics Prods., Inc, 574 N.E.2d 80, 82–83 (Ill. App. Ct. 1991) (holding that the ELR barred plaintiff's claim for reputational injury caused when consumers of plaintiff's baked goods found metal left in dough by the defendant's machine); *accord* Catalano v. Heraeus Kulzer, Inc., 759 N.Y.S.2d 159 (App. Div. 2003) (holding that the ELR barred reputational damages sought by a dentist whose patients' restorations failed prematurely, allegedly as a result of defendant supplier's poor products).

intermediate retailer and was not in direct privity with the manufacturer.[141] The *Lucker* court underscored the economic nature of goodwill by suggesting that goodwill losses could also be insured against.[142] But, even in cases between commercial entities, the contractual ELR has less force in cases where the plaintiff could not have allocated its risk with the defendant because they were not in any sort of bargaining relationship.[143]

*2. The No-Duty (*Robins*) Version of the ELR*

A second version of the ELR, associated with Justice Holmes's opinion in *Robins Dry Dock & Repair Co. v. Flint*,[144] focuses on potentially wide-spread damages and the extent of the law's protection generally.[145] In *Robins*, Justice Holmes stated:

> [N]o authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with the other unknown to the doer of the wrong.[146]

He added, "The law does not spread its protection so far."[147] That last phrase shows that Justice Holmes was concerned about stopping "domino-effect" liability.[148] This version of the ELR applies specifically when parties *are not* in privity. It is essentially a negligence no-duty rule: There is no tort duty to protect the stand-alone non-proprietary interests of "strangers."[149]

In *Catalano v. Heraeus Kulzer, Inc.*, a dentist sought reputational damages in products liability, alleging that the defendant supplier's restoration materials were defective and caused his work to be unsatisfactory.[150] The New York appellate court stated that "there was no actual privity of contract between the parties or a relationship so close as to approach that of privity."[151] Further, the court held that the dentist's claim was precluded by the ELR, noting specifically

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141. *See Daanen & Janssen*, 573 N.W.2d at 848 (holding, in a case that did not involve reputational injury, that the contractual ELR applied even in the absence of privity).

142. *Lucker*, 777 F. Supp. at 416–17.

143. *See, e.g.*, Cargill Inc. v. Boag Cold Storage Warehouse, Inc., 71 F.3d 545, 550 (6th Cir. 1995). For discussion of *Cargill*, see *infra* text accompanying notes 162–71. Employee-testing cases, such as *Duncan v. Afton*, would also fall into this category. But this Note suggests that the priority of defamation might get these cases out of negligence. *See* discussion *supra* Part II.D and *infra* Part III.C.

144. 275 U.S. 303 (1927).

145. *See generally* DOBBS & BUBLICK, *supra* note 114, at 453–69.

146. 275 U.S. at 309.

147. *Id.*

148. *See* DOBBS & BUBLICK, *supra* note 114, at 469 ("[The *Robins*] version of the economic loss rule . . . may have been based on the very real possibility that economic harm has a domino effect, causing a lengthy chain of traceable economic harms to others."). For a famous application of *Robins* in a domino-effect case, see *Louisiana ex rel Guste v. M/V Testbank*, 752 F.2d 1019, 1021–30 (5th Cir. 1985).

149. *See* Dobbs, *supra* note 31, at 715.

150. 759 N.Y.S.2d 159, 161 (App. Div. 2003).

151. *Id.*

that "[t]he plaintiff, who sought to recover damages for loss of professional reputation and business goodwill, suffered no personal injury or property damage as a result of the alleged failures."[152]

The *Robins*-type ELR has also surfaced in non–products liability reputational-injury cases. In *Duncan v. Afton, Inc.*,[153] the plaintiff employee was fired when a drug test required by his employer revealed a high level of alcohol in his system.[154] The plaintiff claimed that the result was inaccurate and sued the company that had collected his urine sample, alleging that it had done so negligently.[155] Raising the ELR as a defense, the defendant argued that it did not owe the plaintiff a duty because it did not have a contract with him.[156] The court noted that the "privity requirement has long been imposed to eliminate the threat of indeterminate, unchecked liability for economic damages" and acknowledged that such a requirement could prohibit liability in the instant case.[157] The court avoided the problem, however, by claiming that "the privity requirement should be discarded when the legal theory is negligence or negligent misrepresentation."[158] This latter holding by the court is too broad. The privity requirement has been discarded in negligence for physical injury,[159] but *Robins* still has force in economic-injury cases. There is some authority, however, for the idea that the ELR does not bar negligent misrepresentation.[160]

Thus, the *Duncan* court seemed to take solace especially in the plaintiff's claim of negligent misrepresentation. The court cited the Restatement (Second) of Torts section 552 to show that privity was not required for such an action.[161] But negligent misrepresentation was clearly not appropriate on the *Duncan* facts. The plaintiff employee did not rely on any representation to his own detriment; rather, the plaintiff's employer relied on the defendant's drug-test report, to the plaintiff's detriment. The court's reasoning was an unconvincing attempt to get around the application of *Robins*.

Another case where the court finessed the ELR is *Cargill Inc. v. Boag Cold Storage Warehouse, Inc.*[162] In *Cargill*, the plaintiff turkey producer sold turkeys to a distributor who temporarily stored the birds at the defendant's cold storage warehouse.[163] While the turkeys were at the warehouse, the defendant negligently allowed them to thaw and refreeze.[164] After the turkeys were delivered

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152. *Id.*

153. 991 P.2d 739 (Wyo. 1999).

154. *Id.* at 741.

155. *Id.* Technically, Duncan alleged that the defendant collection company was negligent in training its employees, in failing to employ proper collection procedures, and in failing to warn Duncan's employer that urinalysis can be unreliable. *Id.*

156. *Id.* at 742.

157. *Id.*

158. *Id.*

159. *See* MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).

160. *E.g.*, Moorman Mfg. Co. v. Nat'l Tank Co., 435 N.E.2d 443, 452 (Ill. 1982).

161. *Duncan*, 991 P.2d at 743.

162. 71 F.3d 545, 550 (6th Cir. 1995).

163. *Id.* at 548.

164. *Id.*

to retailers, it was discovered that some were spoiled, resulting in a recall at the height of the plaintiff's selling season.[165] The plaintiff did not have a contractual relationship with the defendant and sued in tort for multiple harms including injury to reputation.[166]

The Sixth Circuit in *Cargill* got around the ELR partly by relying on the idea that the ELR does not apply to "transactions in services."[167] If widely accepted, this caveat would exempt many of the reputational-harm cases discussed in this Note. However, many rationales for the ELR suggest that its application need not be restricted to sales-of-goods cases.[168] The *Cargill* court also relied on the fact that the ELR does not bar parasitic economic losses.[169] Emotional or reputational-harm damages are parasitic when, instead of being stand-alone, they are claimed in addition to damages for physical harm. Though Cargill no longer had title to the turkeys when the negligence occurred, it was forced to pay for a costly recall once the spoiled birds were discovered. Therefore, Cargill had damages very close to "property damage" in addition to its reputational injury.[170] Cargill's reputational damages were therefore almost parasitic, and the court rejected application of the ELR on those grounds.[171] The ELR exception for parasitic losses, which might seem merely formal, can be grounded in policy. Namely, while reputational damages might seem too attenuated to serve as a *basis* of liability, they can be allowed once liability is determined on other grounds.

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165. *Id.*

166. *Id.*

167. *Id.* at 550.

168. *See, e.g.*, Dobbs, *supra* note 31, at 727. However, some courts hold that the ELR only applies to sales-of-goods cases because U.C.C. remedies are supposedly adequate there. *See, e.g.*, Heidtman Steel Prods., Inc. v. Compuware Corp., 168 F. Supp. 2d 743, 749–50 (N.D. Ohio 2001).

169. *See* Tourist Village Motel, Inc. v. Mass. Eng'g Co., Inc., 801 F. Supp. 903, 907 (D.N.H. 1992) (holding that the ELR does not bar parasitic economic loss); Hamilton v. Powell, Goldstein, Frazer & Murphy, 306 S.E.2d 340, 343 (Ga. Ct. App. 1983), *aff'd*, 311 S.E.2d 818 (Ga. 1984) ("[D]amages for injury to reputation . . . are generally not recoverable in an action premised on mere negligence where no physical injury is suffered by the plaintiff . . . .").

170. *Compare* Cargill v. Boag Cold Storage Warehouse, Inc., 71 F.3d 545, 551 (6th Cir. 1995) (allowing reputational damages and noting that "[t]he economic loss doctrine [barring economic damages] does not apply where there is [physical] injury or death"), *with* Cloverhill Pastry-Vend Corp. v. Cont'l Carbonics Prods., Inc., 574 N.E.2d 80, 83 (Ill. Ct. App. 1991) (refusing reputational damages and noting, "We must keep in mind that plaintiff is not seeking to recover for personal injury or for injury to property . . . . [P]laintiff is seeking to recover purely economic damages").

171. *Cargill*, 71 F.3d at 551. To nit-pick the court's decision, it actually articulated a less convincing reason. The court stressed that Cargill could have impleaded Boag if a consumer had sued Cargill after getting sick from eating a bad turkey, and the court reasoned that this consumer's potential physical injury was what denied application of the ELR. However, Cargill's claiming its own reputational injury against Boag in such a suit would violate Justice Holmes's clear rule that person *A* does not have a suit against person *B* just because person *B* (Boag) physically injured person *C* (a consumer).

B. How Broadly the ELR Applies to Reputational-Injury Cases

Robins presents a no-duty rule defining the reach of the law's protection. Strictly speaking, the *Robins* rule applies only to parties who are not in contractual privity. But, since the contractual ELR necessarily applies to parties who *are* in privity, privity does not determine application of the ELR writ large. For any version of the ELR to preclude stand-alone reputational injury, reputational damages claimed under a negligence theory must count as "economic loss."[172] I believe they often should. But not all courts seem prepared to so hold.[173]

As the *Lucker* court convincingly argued, goodwill damages in some cases merely represent benefit-of-the-bargain damages and should therefore be barred by the contractual ELR. Beyond these cases, characterizing reputational injury as "economic loss" is less clear. However, courts consistently require that reputational damages in negligence be proved in "economic" terms like lost wages.[174] Furthermore, given the policy aims of the *Robins* ELR, at least, the more practical question is whether reputational injury is capable of a domino-effect. And in the case of business goodwill, it seems possible. In *Cargill*, the defendant's negligence in allowing the turkeys to thaw only caused one "domino" to fall—when the turkey producers claimed reputational harm—but imagine the plausible scenario of the distributor and retailers also suing for lost reputation. I suggest that there are few instances of non-communicative reputational injury that is neither lost "potential benefit of th[e] bargain"[175] nor runs afoul of the *Robins* ELR's check on domino-effect damages.

Rare exceptions might be the physician cases like *Oksenholt v. Lederle Laboratories*, where the plaintiff sued after the defendant's drug injured one of his patients.[176] But even in these cases, the ELR question should persist because there are so many rationales for the rule. That is, resolution outside of ordinary negligence might still be preferred. The *Oksenholt* court avoided the question of

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172. *See Cloverhill Pastry-Vend Corp.*, 574 N.E.2d 80, 83 (Ill. Ct. App. 1991) (refusing reputational damages and noting, "We must keep in mind that plaintiff is not seeking to recover for personal injury or for injury to property . . . . [P]laintiff is seeking to recover purely economic damages").

173. *See, e.g.*, Marlow v. Winston & Strawn, No. 90 C 5715, 1992 WL 56687, at *5 (N.D. Ill. Feb. 11, 1992) ("Injury to reputation is a noneconomic injury under Illinois law."), *vacated on other grounds by* Collins v. Reynard, 607 N.E.2d 1185 (Ill. 1993). Professor Anderson maintains that defamation is not an *economic tort*. David A. Anderson, *Rethinking Defamation*, 48 Ariz. L. Rev. 1047 (2006). I agree, but I think that it is a separate question whether reputational injury claimed outside of defamation counts as *economic loss*.

174. *See, e.g.*, Jorgensen v. Mass. Port Auth., 905 F.2d 515, 526 (1st Cir. 1990) (requiring "particular evidence of specific lost job opportunities" before allowing reputation damages in "ordinary negligence"). As Professor Dobbs points out, reputational injury even looks like "economic loss" in certain defamation actions, based on the proof required. *See* Dobbs, *supra* note 31, at 721 & n.27. But that, in and of itself, does not mean that the ELR should reach defamation claims. *See id.* at 721; *supra* notes 121, 173.

175. Lucker Mfg. v. Milwaukee Steel Foundry, 777 F. Supp. 413, 416 (E.D. Pa. 1991); *see supra* text accompanying note 139.

176. 656 P.2d 293, 296 (Or. 1982). For discussion of this case and other physician cases, see *supra* notes 74–79 and accompanying text.

whether reputational injury was "economic loss." It declined to apply the ELR on the grounds that the defendant's failure to warn was a violation of federal regulation and was therefore negligence per se.[177] However, even if the finding of negligence per se was sound, it does not addresses all the concerns of the ELR. Determining that the defendant was negligent does not necessarily mean that the law should recognize the plaintiff's damages.

In another physician case, with facts very similar to *Oksenholt*, the court grounded liability in a consumer protection act.[178] This reminds us that holding that the ELR blocks non-communicative reputational-injury cases in negligence does not necessarily leave plaintiffs without a means of recovery. Instead, where applicable, a court could ground liability in a statutory cause of action, or in a more specific tort such as negligent infliction of emotional distress or misrepresentation, to which the economic loss rule by its own terms might not apply.[179] These alternatives to ordinary negligence are arguably better-equipped to handle cases of controversial non-physical injury, as they might have the legislature's imprimatur, might more specifically isolate the conduct considered tortious, and might utilize a standard of fault higher than mere negligence. Forcing non-communicative reputational-injury cases out of ordinary negligence would have the meritorious effect of further developing narrowly-tailored negligence alternatives, much as the use of defamation priority encourages development of the law of defamation.

C. Reputational Loss Rules

In *Greives v. Greenwood*, the Indiana Court of Appeals refused damages for injury to reputation in a claim brought by cattle breeders against a veterinarian who negligently inoculated two of their cows.[180] The inoculation brought plaintiffs under suspicion of harboring diseased animals and led to the quarantine of their herd.[181] Even though the defendant did not raise a defense based on the claim's sounding in defamation,[182] the court rejected reputational damages.[183]

The *Greives* court opined that "the loss of business reputation was not a foreseeable consequence of the negligent inoculation of two cows."[184] Here the court focused on the specific facts of the case, which suggests that more

177. *Id.* at 297–98 (note this caution despite clear privity). The court took care to explain that it was not basing liability on the fact that the defendant injured a third party, but rather on the defendant's duty to the plaintiff to provide accurate information about its drugs.

178. Wash. State Physicians Ins. Exchange & Ass'n v. Fisons Corp., 858 P.2d 1054, 1060–61 (Wash. 1993).

179. *See supra* notes 121, 160.

180. 550 N.E.2d 334, 336 (Ind. Ct. App. 1990).

181. *Id.*

182. And indeed the claim would not sound in defamation under *Jorgensen*-type analysis. *See supra* Part II.B–C.

183. *Greives*, 550 N.E.2d at 338.

184. *Id.*

foreseeable injury to reputation would be recoverable in negligence.[185] This "unforeseeable" conclusion is questionable. The cattle breeaers in their professional capacities would be the obvious victims (other than the cows!) of any negligent inoculation of their animals; if property damage and lost profits are foreseeable types of injury,[186] then injury to professional reputation does not seem too far behind.

The court also stated, "Damages for loss of reputation are only available in actions for libel, slander, abuse of process, malicious prosecution and third party contract interference."[187] It offered the explanation that "these intentional torts afford th[e] remedy [of reputational damages] because the result is foreseeable."[188] By holding that reputational damages *are* foreseeable in defamation and certain other nominate torts, the *Greives* court effectively dismissed its fact-specific foreseeability determination in favor of a preemptive rule that reputational damages are *always* unforeseeable and therefore are never recoverable under an ordinary negligence theory.[189]

But of course there is no such thing as a kind of injury that is always unforeseeable. The broad statement that reputational damages are *a priori* "unforeseeable" in negligence shows that the *Greives* court was skeptical of reputational damages in general and was loathe to leave their limitation to case-by-case foreseeability analysis;[190] the court wanted a rule of law. The contractual ELR

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185. For a study of negligent-injury-to-reputation claims that focuses on foreseeability, see Kate Silbaugh, Comment, *Sticks and Stones Can Break My Name: Nondefamatory Negligent Injury to Reputation*, 59 U. CHI. L. REV. 865 (1992).

186. *Greives*, 550 N.E.2d at 338–39. The defendants were allowed to recover for loss of two cows and for loss of profits. *Id.*

187. *Id.* at 338 (citations omitted).

188. *Id.*

189. *Id.* ("The trial court did not err in summarily disposing of this issue as loss of reputation damages *are not recoverable in a negligence action as a matter of law.*") (emphasis added). Earlier, this Note suggested that the court in *Lawrence*, the negligent-bankruptcy-filing case, might have refused damages in negligence to prevent the plaintiff from making an end run around a privilege that would have blocked a defamation claim. *See supra* text accompanying notes 105–08. However, the *Lawrence* court, like the *Greives* court, actually justified its holding with the language of intent and foreseeability:

> The refusal by the courts to allow recovery of reputation damages in *mere negligence actions* is motivated by policy considerations such as the need to prevent costly, meritless litigation, the desire to avoid disproportionality between liability and fault, and the goal of only allowing liability or damages when the prospect of injury was reasonably foreseeable to the defendant.

Lawrence v. Grinde, 534 N.W.2d 414, 419 (Iowa 1995) (emphasis added).

190. According to Professor Rabin,

> The common thread running through the limitations on recovery for [non-physical harm] is not difficult to identify. . . . [I]t does not rest on the presence or absence of foreseeability. Rather, it is an age-old concern about extending liability *ad infinitum* for the consequence of a negligent act. Foreseeability proves too much . . . . Although it may set

might have been appropriate on the *Greives* facts. Instead, the court used a broad defamation-priority rule, limiting reputational damages to defamation, tortious litigation, and contract interference—causes of action where reputational harm is almost unequivocally within the scope of the risk and where the required fault is often greater than negligence.[191] Essentially, the court resorted to the broad defamation-priority rule because of proximate cause concerns—the same reason that courts often resort to the *Robins*-type (no-duty) ELR.[192]

Finally, *Hall v. United Parcel Service of America*,[193] a negligent-polygraph case similar to the employee drug-testing cases, is another instance of a court skeptical of stand-alone reputational injury in negligence. The court recognized that the plaintiff could not have won in defamation because of a qualified privilege.[194] However, in *refusing* the plaintiff's claim in negligence, the court did not seem primarily concerned about the plaintiff making an end run around defamation barriers. Rather, the court noted that reputational injuries were typically handled by defamation law[195] and was hesitant to allow reputational injury an inroad into negligence via what it termed "a new tort cause of action."[196] The court was simply hesitant to expand (as it saw it) tort law by recognizing a duty of care in negligence to prevent stand-alone reputational injury. Again, the court ruled out reputational injury in negligence as a matter of law.

The *Greives* and *Hall* courts used defamation priority as a kind of reputational loss rule that has much in common with the *economic* loss rule. The courts used defamation-priority to force reputational-injury claims out of negligence as a matter of law—partly because the claims might be better-handled

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> tolerable limits for most types of physical harm, it provides virtually no limit on liability for nonphysical harm.

Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1526 (1984).

191. In many defamation actions, fault greater than negligence is required by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. *See generally* DOBBS & BUBLICK, *supra* note 114, at 87–122. Abuse of process and malicious prosecution require common law malice, *id.* at 271, 280, and third-party contract interference requires "improper" means or motive, RESTATEMENT (SECOND) OF TORTS § 766, 766A (1977). See also *Advanced Drainage Systems, Inc. v. Lowman*, 437 S.E.2d 604, 606 (Ga. Ct. App. 1993), holding that reputational damages are available in negligence only upon a showing of willfulness or wantonness.

192. *See* Oscar S. Gray, *Some Thoughts on "The Economic Loss Rule" and Apportionment*, 48 ARIZ. L. REV. 898 (2006).

193. 555 N.E.2d 273 (N.Y. 1990).

194. *Id.*; *see supra* note 114.

195. *Hall*, 555 N.E.2d at 276.

196. *Id.* Despite its unwillingness to recognize the plaintiff's claim in negligence, the New York Court of Appeals in *Hall* suggested an alternative means for recovery in such a case:

> The conclusion that some governmental regulation and oversight may be desirable, however, does not necessarily lead to the further conclusion that a new tort cause of action should be established to address the problem. . . . [S]ome social problems "are best and more appropriately resolved by the legislative branch of our government."

Id. at 277 (quoting Murphy v. Am. Home Prods. Corp., 448 N.E.2d 86, 89 (N.Y. 1983)).

by other tort theories,[197] but more generally to effectuate a broad no-duty principle in negligence[198] for stand-alone reputational interests. This suggests that had the defendants in these cases argued the ELR, the courts might have found the plaintiffs' reputational damages to be "economic loss" at least for the purposes of applying the liability-limiting doctrine of the ELR.

CONCLUSION

When a plaintiff seeks damages for reputational injury without pleading defamation, a court should consider whether the claim nonetheless sounds in defamation law. I have suggested that a claim does so when reputational injury is a direct result of a defamatory communication about the plaintiff. When a claim does sound in defamation, courts have good reasons to refuse ordinary negligence as an alternative theory of recovery. Resolving these claims under defamation respects the limitations on defamation recovery and encourages the development of defamation-privilege law.

Some courts have held that reputational damages are not recoverable in non-defamatory negligence claims as a matter of law, even when a claim would not sound in defamation under my analysis. This reminds us that under negligence analysis, the economic loss rule ("ELR") might apply to stand-alone reputational damages if they count as "economic loss." Though, intuitively, reputational injury seems distinct from economic loss, for the purposes of the ELR that intuition must be scrutinized. Where reputational damages can be characterized as mere benefit-of-the-bargain damages, courts have used the ELR explicitly to bar their recovery. And even outside the commercial context, some courts bar reputational damages in negligence as a matter of law, holding that such damages are available only under defamation and a few other specific tort theories, such as contract interference. Courts cite the preferableness of other tort theories and the limits on duty in ordinary negligence analysis when resorting to this broad version of "defamation priority." Given that these same concerns sometimes fuel the ELR, stand-alone reputational injury might be deemed "economic loss" in a wide range of ordinary negligence cases.

197. *Cf. supra* note 31.
198. *See supra* text accompanying note 149.

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