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THE PUZZLE OF THE ACTUAL INJURY REQUIREMENT FOR DAMAGES

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Courts often state that an award of damages should be tied to the "actual injury" sustained by the plaintiff as a result of the defendant's legal misconduct. The frequency with which the statement is made and applied, however, may be profitably compared with the numerous instances when the concept is elided or ignored. This Article examines a representative sampling of decisions where the actual injury concept is nominally treated as a rule. The Article argues, however, that courts have not developed a consistent, coherent approach to applying an actual injury requirement that would allow it to be called a "rule." More realistically, it is a generally applied principle that usually represents an intuitive sense as to when compensatory damages are appropriate and how much should be awarded.

I. INTRODUCTION

It is a staple of judicial remedies discourse that the purpose of a remedy is *restitutio in integrum*, which means to place the person in the position the person would have occupied had the wrong not occurred.[1] This rightful position principle is applied with particular force to awards of damages, which are, after all, tied to the idea that the plaintiff has suffered an injury for which he should be

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1. Milliken v. Bradley, 433 U.S. 267, 280 n.15 (1977) (involving structural injunction and stating that "the ultimate objective of the remedy is to make whole the victims of unlawful conduct"); Butler v. German, 822 P.2d 1067, 1069 (Mont. 1991) (involving mandatory injunction: "[t]he fundamental purpose of any remedy is to return the plaintiff to his or her rightful position, 'the position or state the party would have attained had the [wrong] not occurred'") (alteration in original); *see also* Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 725 (2001) (noting that the general purpose of a remedy is to "return a plaintiff to her rightful position—the position she would have been in but for the constitutional wrong"); *cf.* Pucino v. Uttley, 785 A.2d 183, 188 (R.I. 2001) (stating that equitable remedy is appropriate when no adequate legal remedy exists that will restore plaintiff to the party's rightful position). I do not address in this Article whether this goal is actually attained by the rules applied or is even consistently attainable other than as an aspirational goal.

compensated.[2] Indeed, the connection seems obvious and intuitive. Yet, it has also provoked and produced disagreement in judicial decisions.

To say that the person needs to be restored or returned to the rightful position suggests a positional gap or difference between where the person presently is and where the person ought to be. Courts often capture this idea with the term "actual injury," i.e., the difference between the two positions ("is" versus "ought to be") represents the person's actual injury. An award of damages equal to the injury will, thus, place the person in the equivalent position the person would have been had the wrong not occurred. With the award, the person's position, from a "balance sheet" perspective, is the same as if the person had not been injured in the first place.

This approach suggests, however, a converse proposition that has generated significant dispute. If the person has not sustained actual injury, is the person's present position the person's rightful position, at least insofar as an award of damages is concerned?[3] In that situation, judicial intervention is unnecessary because, absent injury, there is nothing for the law to redress. Consequently, the person cannot obtain damages. This converse proposition is usually described in American law as the "actual" injury requirement, and it has been used in a wide variety of contexts, albeit with much disagreement, to preclude or limit damages awards.

In this Article, I examine a number of divergent situations when courts consider the actual injury requirement as a condition to awarding damages. The situations are diverse, and no common theme or structure appears that acts as a reconciling principle. This

2. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 15 (3d ed. 2002) ("[T]he fundamental principle of damages is to restore the injured party as nearly as possible to the position he would have been in but for the wrong . . . .").

3. The concern with actual injury may be muted when other remedies, such as an injunction, are considered. An injunction, however, requires standing, and actual injury is a component of the modern test of standing. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–181 (2000). Standing, however, is usually satisfied when the plaintiff alleges an invasion of a legally protected interest. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). A statute may create a legal right, the invasion of which amounts to actual injury for purposes of the standing requirement. Korman v. Walking Co., 503 F. Supp. 2d 755, 759 (E.D. Pa. 2007) (involving alleged violation of the Fair and Accurate Credit Transactions Act of 2003, 15 U.S.C. § 1681n (2006), an amendment to the Fair Credit Reporting Act, because defendant provided sales receipt that failed to eliminate specific portions of the plaintiff's credit card information as required by statute); Ramirez v. MGM Mirage, Inc., 524 F. Supp. 2d 1226, 1230–31 (D. Nev. 2007) (same).

suggests that the actual injury requirement operates more as an instrumental rule that courts use to achieve results they believe are fair, just, and appropriate under the circumstances.

Before we begin, however, it may be helpful to note a point that is often ignored, which is whether the actual injury requirement is a remedy rule or a liability rule. In some cases, e.g., negligence, actual injury is part of the prima facie cause of action. In other contexts, the focus is directly on the remedial issue. The *Restatement (Second) of Torts* distinguishes between injury (invasion of a legally protected interest), harm (loss or detriment), and physical harm (impairment of body or property).[4] The concepts of injury and harm are, thus, used in different ways, making context and purpose a critical feature in comprehending how the specific concept is being used in the particular instance. The elusiveness of the distinction between injury as a wrong and injury in the sense of redress can be challenging.[5]

Chick Hearn, the former play-by-play announcer for the Los Angeles Lakers, coined a phrase that, I believe, nicely captures the dilemma: "No harm, no foul."[6] Hearn coined the phrase to refer to contact between players (a foul), which was a rule ("rights") violation that the referee did not call because the contact did not interfere with the play and flow of the game.[7] Some may argue that the phrase best captures the concept that absent injury there is no violation of a right. Others may believe that the proper interpretation of the phrase is that "no foul" means no referee's whistle, which is the remedy for the infraction. This illustrates the often blurred distinction between the notion of no right being violated and no remedy for the right's violation. This Article collects decisions that address the issue from both perspectives. As a rule, the distinction is not expressly addressed by the courts and does not appear to have directly influenced decisional outcomes.

4. RESTATEMENT (SECOND) OF TORTS § 7 (1965).

5. 1 DAN B. DOBBS, LAW OF REMEDIES § 1.1, at 3 n.14, §3.1, at 279 (2d ed. 1993) (noting the overlap between injury as necessary to a complete cause of action and injury as necessary for an award of damages pursuant to a cause of action).

6. Linda E. Carter, *The Sporting Approach to Harmless Error in Criminal Cases: The Supreme Court's "No Harm, No Foul" Debacle in* Neder v. United States, 28 AM. J. CRIM. L., 229, 230 n.3 (2001).

7. *Id.* at 242 n.74.

II. THE ACTUAL INJURY REQUIREMENT: SOME EXAMPLES

Often, but with numerous exceptions, courts require that the plaintiff sustain—and demonstrate that the defendant's misconduct caused the plaintiff to sustain—actual injury before allowing the plaintiff to recover damages as a result of the defendant's misconduct. The list that follows is illustrative of the issue, though it is neither designed nor intended to represent all of the contexts in which the law treats actual injury as a condition to a damages award.

A. Actual Injury and Statutory Damages

Modern statutes often specify a statutory damages award when the statute has been violated.[8] A question that courts have grappled with in this area is whether statutory damages may be awarded solely on the showing of a statutory violation or whether the award is conditioned on the further showing that the violation caused actual injury to the plaintiff.[9]

Decisions addressing the actual injury requirement for statutory damages awards all purport to rely on statutory language, but the decisions do not adopt a consistent approach to the resolution of the question. In *Doe v. Chao*,[10] a Privacy Act[11] case involving improper disclosure of the plaintiff's social security number, the Court held that the Act's actual injury requirement for compensatory damages awards also applied to the Act's specific provision mandating a

8. For example, under the Fair and Accurate Credit Transactions Act, 15 U.S.C. § 1681n (2006), an amendment to the Fair Credit Reporting Act, a person who obtains a consumer report "under false pretenses or knowingly without a permissible purpose" is liable for "actual damages sustained by the consumer reporting agency *or* $1,000, whichever is greater" 15 U.S.C. § 1681n(b) (2006) (emphasis added). A similar result occurs for violations of the Truth in Lending Act, 15 U.S.C. § 1640(a) (2006). Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (2006); Mourning v. Family Publ'ns Serv., Inc., 411 U.S. 356, 376–77 (1973); Baker v. G. C. Servs. Corp., 677 F.2d 775, 780 (9th Cir. 1982); Woolfolk v. Van Ru Credit Corp., 783 F. Supp. 724, 727 n.3 (D. Conn. 1990).

9. If actual injury is required, courts differ as to the nature and type of injury that will satisfy the requirement. Brian Sheppard, Annotation, *Award of Damages Under Privacy Act, 5 U.S.C.A. § 552a*, 189 A.L.R. FED. 455 §§ 10–15 (2003) (collecting conflicting decisions as to whether proof of "actual damages" requires showing economic loss or may be satisfied by showing of noneconomic loss, e.g., emotional distress).

10. 540 U.S. 614 (2004).

11. 5 U.S.C. § 552 (2006).

minimum $1,000 award for intentional or willful violations of the Act.[12]

The relevant provision of the Privacy Act provides:

> In any suit brought . . . in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—
>
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000 . . . .[13]

The majority in *Chao* read the "but in no case" language as a gloss on the grant of actual damages rather than as an independent, supplemental remedy.[14]

On the other hand, in *Kehoe v. Fidelity Federal Bank & Trust*,[15] a Driver's Privacy Protection Act[16] case involving improper disclosure of personal information contained on driver's license records, the Eleventh Circuit Court of Appeals held that a plaintiff could recover statutory damages notwithstanding the plaintiff's failure to show any actual damages resulting from the violation.[17]

The relevant provision of the Driver's Privacy Protection Act provides:

> (a) Cause of action. A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.
>
> (b) Remedies. The court may award—

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12. *Id.* at 627.

13. 5 U.S.C. § 552a(g)(4).

14. 540 U.S. at 620 (2004); *cf.* Safeco Ins. Co. of Am. v. Burr, 127 S. Ct. 2201, 2207 (2007) (stating that a plaintiff that claims no actual harm could obtain statutory and punitive damages for a willful violation of the Fair Credit Reporting Act (§ 1681n(a)).

15. 421 F.3d 1209 (11th Cir. 2005), *cert. denied*, 547 U.S. 1051 (2006). The court noted the absence of legislative history regarding the question before the court. *Id.* at 1214 n.4.

16. 18 U.S.C. §§ 2721–25 (2006); *see also* Russell v. ChoicePoint Servs., Inc., 300 F. Supp. 2d 450 (E.D. La. 2004) (holding that Driver's Privacy Protection Act claim could not be stated absent a showing of "impermissible use" of the protected personal information).

17. *Kehoe*, 421 F.3d at 1217.

> (1) actual damages, but not less than liquidated damages in the amount of $2,500. . . .[18]

In contradistinction to *Chao* the court treated the "but not less than" language not as a gloss on actual damages, but as an independent, supplemental remedy.[19]

The different approaches of the above two decisions are of interest. First, in *Chao* the Court emphasized the placement of the statutory damages allowance in the same sentence as the allowance for recovery of actual damages,[20] while in *Kehoe* that fact was disregarded. Second, in *Chao* the Court noted that allowing recovery of statutory damages without proof of actual damages would amount to recognition of presumed damages,[21] but in *Kehoe* the Eleventh Circuit noted that damages for violation of the right of privacy are a "quintessential example of damages that are uncertain and possibly unmeasurable."[22] Third, the Court in *Chao* saw a natural fit between the allowance of actual damages and the mandatory statutory minimum award.[23] The Eleventh Circuit in *Kehoe*, on the other hand, found that the dissimilarity between the terms "actual damages" and "liquidated damages" suggested that the remedies were separate and independent rather than interconnected.[24] Lastly, the Court in *Chao* rejected reliance on other privacy statutes to glean whether the "but no less than" language should be limited to cases when the plaintiff proved some actual damages.[25] In contrast, the *Kehoe* court found that Congress's use of similar (or dissimilar) language in other privacy statutes was of significance in determining the meaning of the Driver's Privacy Protection Act issue before the court.[26]

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18. 18 U.S.C. § 2724 (2006).

19. 421 F.3d at 1215.

20. Doe v. Chao, 540 U.S. 614, 622–23 (2004).

21. *Id.* (rejecting inclusion of "presumed damages" gloss of Privacy Act violations because legislative history indicates that Congress, in enacting the Privacy Act, deferred the issue for further study by the Privacy Protection Study Commission). While the Commission subsequently recommended such an approach, Congress has not enacted the Commission's recommendation into law. *Id.*

22. 421 F.3d at 1213 (noting that uncertainty as to the measurement of actual damages is a reason for relying on liquidated damages).

23. 540 U.S. at 621.

24. 421 F.3d at 1213.

25. 540 U.S. at 626–27.

26. 421 F.3d at 1215–16. There are sufficient differences between *Doe v. Chao* and *Kehoe v. Fidelity Bank* that a plausible claim can be made (as it was made in *Kehoe*) that *Kehoe* is not

B. Actual Injury & Liquidated Damages

The decisions are in conflict as to whether a contractual liquidated damages provision is enforceable when the plaintiff has not sustained actual injury as a result of the defendant's breach of performance obligations assumed under the contract.[27] The conflict nominally arises out of two distinct views regarding the role of courts in enforcing liquidated damages provisions. One view holds that the parties' intent should control. When the parties consensually agree that upon breach, the non-breaching party may claim liquidated damages rather than actual damages, the parties' contractual intentions should be respected.[28] The contrary view holds that the parties' contractual intent must be measured against the implied assumption that the purpose of a liquidated damages provision is an alternative measure of plaintiff's damages. If the plaintiff has not sustained any damage, the necessary condition for the award of damages does not exist.[29]

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inconsistent with *Doe*. The *Kehoe* court went to some lengths to distinguish *Chao*. *Id.* at 1214–15. Moreover, a petition for certiorari was denied. Fid. Fed. Bank & Trust v. Kehoe, 547 U.S. 1051 (2006). Yet, for all the distinctions, there remains an aspect of *Kehoe* that is interesting, the use of the term "liquidated" to distinguish *Chao* and avoid its approach as a proper resolution of the question.

The *Kehoe* court treated liquidated damages as a substitute for an award of compensatory damages. 421 F.3d at 1213 (noting that "liquidated damages are a contractual substitute for actual damages") (citation omitted). The court relied on decisions involving liquidated damages provisions in bargain settings between private parties. The court cited no authority for giving the term "liquidated damages" the same construction in the legislative context as it received in the private context, aside from the assertion that "Congress's decision to use the technical term 'liquidated damages' in the DPPA suggests that it intended to incorporate the locution's well-understood meaning." *Id.* at 1215 n.5 (citation omitted); *see infra* notes 27–31 and accompanying text.

The traditional understanding of the term "liquidated" is "fixed" or "certain." The *Kehoe* court chose to focus on the phrase "liquidated damages" rather than the term "liquidated" damages to distinguish its case from *Chao*. Ironically, the original usage of the phrase "liquidated damages" was to "settle and clarify." OXFORD ENGLISH DICTIONARY 1012 (2d ed. 1991). Neither of which seems to have been accomplished.

27. 3 DOBBS, *supra* note 5, § 12.9(2), at 250; JAMES M. FISCHER, UNDERSTANDING REMEDIES § 17.2 (2d ed. 2006); *see* Gregory Scott Crespi, *Measuring "Actual Harm" for the Purpose of Determining the Enforceability of Liquidated Damages Clauses*, 41 HOUS. L. REV. 1579 (2005).

28. *See* Colonial at Lynnfield, Inc. v. Sloan, 870 F.2d 761 (1st Cir. 1989); Wallace Real Estate Inv., Inc. v. Groves, 881 P.2d 1010, 1015–16 (Wash. 1994).

29. *See* Hubbard Bus. Plaza v. Lincoln Liberty Life Ins. Co., 649 F. Supp. 1310, 1316 (D. Nev. 1986), *aff'd*, 844 F.2d 792 (9th Cir. 1988); Vines v. Orchard Hills, Inc., 435 A.2d 1022 (Conn. 1980); RESTATEMENT (SECOND) OF CONTRACTS § 356(1), cmt. b (1965) (tying actual injury to contexts when a substantial sum is provided for as liquidated damages); *cf.* Atel Fin. Corp. v. Quaker Coal Co., 321 F.3d 924, 926 (9th Cir. 2003) (holding that, under California law,

Closely tied to this issue is the extent to which, if at all, a court would treat the actual damage requirement as subject to contract modification by the parties.[30] Liquidated damages provisions expressly purporting to dispense with an actual injury requirement have not been considered by the courts. Permitting the parties to contract around an actual damage requirement would be consistent with the view that the parties' intent should control. On the other hand, rejecting an actual injury requirement would increase the risk that the liquidated damages provision was a disguised penalty clause, which courts will not enforce.[31]

C. Actual Injury & Potential Injury

Can a person receive compensation for an injury that is foreseeable but not yet experienced? Courts have traditionally said no, unless the person can show that the wrongdoer's actions would more likely than not result in the person's future actual injury.[32] Even here, the future injury rule is generally limited to bodily injury claims. If the future loss is a personal injury, e.g., reputational injury or injury to privacy interest, the person has to wait until the apprehended harm is actually realized before he can seek compensation (damages) for his losses.

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when a liquidated damages clause was written so that it was triggered by "loss of a bargain upon the occurrence of an event of default," a liquidated damages provision was not activated when the non-breaching party was reimbursed for its losses occasioned by the breach). *See generally* RICHARD A. LORD, 24 WILLISTON ON CONTRACTS § 65:33 (4th ed. 2004) (discussing the necessity of establishing actual harm or damages).

30. *Cf.* AFLAC, Inc. v. Williams, 444 S.E.2d 314, 317 (Ga. 1994) (holding that liquidated damages provision that failed to include non-breaching party's duty to mitigate evidenced that provision was a penalty, rendering provision unenforceable); Browning-Ferris Indus. of Nebraska, Inc. v. Eating Establishment—90th & Fort, Inc., 575 N.W.2d 885, 890 (Neb. Ct. App. 1998) (stating that "a contracting party [cannot] negate the general duty to mitigate damages by merely inserting a liquidated damages provision in a contract"); Crespi, *supra* note 27, at 1590 (arguing that actual injury should not include mitigatable losses because "the inclusion of those damages in actual harm or actual loss when reviewing enforceability would create perverse incentives for the injured party that could encourage economic waste").

31. Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc., 361 N.E.2d 1015, 1018 (N.Y. 1977) (stating that enforcement of liquidated damages provision that was actually a penalty clause "would lead to the most terrible oppression in pecuniary dealings") (citation omitted).

32. FISCHER, *supra* note 27, §§ 9.1–9.2 (discussing single, lump sum award principle and requirement that future loss must be reasonably probable or certain to occur before compensation for that future loss may be awarded); *see generally* David Carl Minneman, Annotation, *Future Disease or Condition, or Anxiety Relating Thereto, As Element of Recovery*, 50 A.L.R. 4TH 13 (1986) (discussing approaches and collecting authorities).

Recently, however, some courts have become more lenient in permitting a recovery for apprehended risk, dispensing with the traditional limitations of the preponderance of the evidence standard and the limitation of the ability to recover future injury to bodily injury claims. Two examples of this development are (1) medical monitoring and (2) preventive measures to avoid imminent loss.[33]

1. Medical Monitoring

An award of damages for medical monitoring represents the cost to the person of medical procedures so that the person may determine if she has contracted a disease or ailment. In the typical case, a wrongdoer has exposed a person to a risk of injury, but the person cannot show she is more likely than not to sustain actual injury. Medical monitoring permits that person to more quickly determine if and when she is injured. Medical monitoring costs are separate and independent of any damages award the person, as a plaintiff, would receive if she were actually injured as a result of the wrongdoer's conduct.[34] Medical monitoring is, thus, the converse of the typical injury case when the plaintiff recovers medical expense caused by her injury. In the medical monitoring context, the expense precedes the injury.[35] Jurisdictions vary in their willingness to recognize recoveries in this area[36] and the recovery thresholds when they do.[37]

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33. These examples are not exclusive, but represent part of a larger trend to compensate persons whose risk of encountering harm is enhanced by the conduct of others. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625 (2002).

34. Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 823 (Cal. 1993); *see* 2 DOBBS, *supra* note 5, § 8.1(3), at 380.

35. 2 DOBBS, *supra* note 5, § 8.1(3), at 379–81; FISCHER, *supra* note 27, § 72.4 (discussing medical monitoring recoveries). Some courts finesse the issue by treating the award as ancillary to the issuance of an injunction ordering the defendant to provide medical monitoring. *Id.* § 8.10, at 539–40; *see* Richard Bourne, *Medical Monitoring Without Physical Injury: The Least Justice Can Do for Those Industry Has Terrorized with Poisonous Products*, 58 SMU L. REV. 251, 257 (2005) (arguing that courts should provide equitable relief, but not damages, by compelling defendants to pay for future medical monitoring to address the increased risk of future bodily injury caused by defendants' activities).

36. *See* Lowe v. Philip Morris USA, Inc., 183 P.3d 181, 187 (Or. 2008) (holding that a plaintiff who alleged that her exposure to defendant's products significantly increased the risk that she would contract lung cancer but who did not allege present physical effect from exposure nor reasonable probability of future harm could not state a claim for recovery of costs of medical monitoring).

37. *See* Henry v. Dow Chem. Co., 701 N.W.2d 684, 688 (Mich. 2005) (rejecting medical monitoring absent an allegation of a present physical injury). *Compare* Redland Soccer Club, Inc. v. Dep't of the Army, 696 A.2d 137, 145 (Pa. 1997) (adopting "significantly increased risk of contracting a serious latent disease" standard), *with* Abusio v. Consol. Edison Co. of N.Y., Inc.,

2. Measures to Prevent Imminent Loss

Traditionally, courts have distinguished between pre-injury preventive measures and post-injury ameliorative measures. The law of mitigation of damages not only encouraged, but often required post-injury amelioration.[38] Pre-injury preventive remedial measures, however, stood on a different footing. Unless the victim contributed to his losses by acting negligently, e.g., engaging in contributory negligence or comparative fault, the victim's pre-injury acts or omissions were not legally relevant to the assessment of damages.[39] The general liability rule was that a person did not have a duty to apprehend that the tortfeasor may breach a duty of care owed to him.[40] Consequently, he was not required to engage in activities to avoid the risk of injury posed by a possible tortfeasor. Because there was no duty to act, a person who expended funds to avoid or mitigate

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656 N.Y.S.2d 371, 372 (App. Div. 1997) (adopting a rational basis test). *See generally* 2 STEIN ON PERSONAL INJURY DAMAGES § 7:31 (3d ed. 1997) (collecting decisions allowing medical monitoring recoveries); Allan L. Schwartz, Annotation, *Recovery of Damages for Expense of Medical Monitoring to Detect or Prevent Future Disease or Condition*, 17 A.L.R. 5TH 327 (1994) (discussing approaches and collecting authorities).

38. FISCHER, *supra* note 27, § 13 (discussing the mitigation of damages requirement). The mitigation requirement may also be seen as an extension of a view of remedies that emphasizes redress by the least costly means to achieve restoration to the rightful position. *See* Richard Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. L. REV. 735 (2006) (giving least cost avoidance as one of several reasons for the adoption of the economic loss rule). Professor Posner argues:

> The upshot of this analysis is that efficiency may be promoted by shifting the legal responsibility for an accident from the injurer to the victim. This is simply generalizing to tort law the contract-law rule of *Hadley v. Baxendale*; and indeed I did this many years ago in a case called *Evra*, which was much like *Hadley* except that there was no contractual relation between injurer and victim. The point in Hadley . . . was that the carrier could not estimate the loss that the customer would incur from a delay in the delivery of the repaired mill shaft to the customer, but the customer could estimate this cost and, therefore, was in a better position to avoid the loss by taking appropriate precautions or by buying insurance. (footnote omitted).

Id. at 739; *see also* 1 DOBBS, *supra* note 5, § 3.9, at 380–86 (discussing the mitigation requirement).

39. The distinction between pre-injury and post-injury duties leads to some interesting classification issues. For example, does the plaintiff's failure to use a seat belt or safety equipment, which results in an exacerbation of his injuries but does not cause or contribute to the injury itself, constitute preinjury contributory negligence or postinjury failure to mitigate damages? LAYCOCK, *supra* note 2, at 125–26 (discussing the issue).

40. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 33, at 170–72 (4th ed. 1971) (stating that a reasonable person may assume that others will act reasonably under the circumstances, but that a reasonable person may not act indifferently to obvious risks); *cf.* RESTATEMENT (SECOND) OF TORTS § 496C (1965) (stating that a person who proceeds with knowing appreciation of the risk may be deemed to have impliedly assumed the risk of loss).

the harm that would accrue, if a tortfeasor breached the duty of care, was without a remedy for the cost he voluntarily incurred to avoid that apprehended harm from occurring.[41]

Emerging case law, however, has relaxed the actual injury requirement when there is a reasonable likelihood of bodily injury or property damage unless mitigative efforts are undertaken. The usual situation involves a person whose product or conduct poses a risk of actual injury to the plaintiff or to third parties, rather than the case in medical monitoring in which the risk is solely to the plaintiff. For example, an automotive defect may create a serious risk of injury to passengers if the vehicle is involved in a collision.[42] Similarly, a building may have been negligently designed or constructed so that it poses a risk of danger to inhabitants or passersby if it collapses.[43] Although the decisions are few, courts are increasingly receptive to the view that public policy should encourage immediate repair to prevent the risk of future injury even though the plaintiff does not meet the usual predicate for recovery (actual bodily injury or property damage).

D. Actual Injury & Injury Thresholds

One way to finesse or minimize the actual injury requirement is to set a low threshold for its satisfaction. For example, both injury at the chromosomal level and the thickening of body tissue have been deemed bodily injury.[44] This approach has also been used to satisfy

41. An action to avoid the defendant's unjust enrichment might be possible. The claim would be for the money the defendant saved by not taking reasonable precautions to avoid the risk of harm to the victim. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 21 cmt. f (Tentative Draft No. 2, 2002) (A "[s]aved expenditure is no less a benefit than cash in hand. . . ."); LAYCOCK, *supra* note 2, at 598–600 (discussing use of restitution to recover the benefit derived by defendant from not spending money to prevent unreasonable risk or injury to others).

42. *See, e.g.*, Lloyd v. Gen. Motors Corp., 916 A.2d 257 (Md. 2007) (collecting decisions). *Lloyd* involves an allegedly defectively designed front seat that could collapse in a collision causing injury to the person sitting in the seat and any person behind him. *Id.* at 262

43. *See, e.g.*, Winnipeg Condo. Corp. No. 36 v. Bird Constr. Co., [1995] 1 S.C.R. 85 (Can.) (involving metal separating from a high-rise building and falling to the ground).

44. *See* Herber v. Johns-Manville Corp., 785 F.2d 79, 81 (3d Cir. 1986) (holding that pleural thickening of lung tissue satisfies bodily injury requirement); Werlein v. United States, 746 F.Supp. 887, 901 (D. Minn. 1990) (holding that subcellular injuries could satisfy the bodily injury requirement to permit recovery of medical monitoring costs). *But see* Burns v. Jaquays Minning Corp., 752 P.2d 28, 31 (Ariz. Ct. App. 1987) (rejecting subclinical cellular injury as satisfying bodily injury requirement). All of these cases involve the interpretation of the term "bodily injury" under general liability policies. General liability insurance policies typically require the

the impact requirement to recover for the negligent infliction of emotional distress.[45] Similarly, courts have deemed the initial incorporation of a defective product into another product to amount to property damage to the latter, even though the product as a whole remains serviceable.[46] There is some tension here between these low threshold cases and the old adage *de minimis non curat lex* (the law does not concern itself with trifles),[47] but the tendency appears to be to favor compensation.

E. Actual Injury & Injury Characterization

1. Economic Measurement

If a person negligently impacts another's property, may the owner recover the full cost of repair if the repair cost is greater than the difference in value before and after the impact? Assume the pre-impact market value of the property is $100; the post-impact market value is $100 (because the impact inflicted only minor cosmetic damage that did not affect the property's utility); but the cost of repairing the cosmetic damage caused by the impact is $50.[48]

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occurrence of bodily injury within the policy period to trigger coverage obligations on the part of the insurer. ROBERT H. JERRY II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW § 65(c)(2)(i) (4th ed. 2007).

45. Anderson v. W.R. Grace & Co., 628 F.Supp. 1219, 1226–27 (D. Mass. 1986) (treating subcellular, chromosomal harm as satisfying the physical harm requirement for recovering negligently inflicted emotional distress damages).

46. Eljer Mfg., Inc. v. Liberty Mut. Ins. Co., 972 F.2d 805, 807 (7th Cir. 1992) (characterizing defective products as ticking time bombs). *Contra* Traveler's Ins. Co. v. Eljer Mfg., Inc., 757 N.E.2d 481, 498–99 (Ill. 2001) (rejecting incorporation as damage theory). *See generally* Jay M. Zitter, Annotation, *Strict Products Liability: Recovery for Damage to Product Alone*, 72 A.L.R. 4TH 12 (1989) (noting split in decisions and collecting authorities); 63B AM.JUR. 2D *Products Liability* § 1923 (2008) (collecting decisions treating incorporated product and product into which the former is incorporated as a single product and therefore rejecting the claim that damage to other property occurred). The finding of damage to other property is often critical to avoiding the economic loss rule. FISCHER, *supra* note 27, § 11.2.

47. Brandt v. Bd. of Educ. of Chi., 480 F.3d 460, 465 (7th Cir. 2007) (noting that courts have applied the adage generally).

48. Hewlett v. Barge Bertie, 418 F.2d 654 (4th Cir. 1969). In *Hewlett*, a barge that was in a dilapidated but usable state was cosmetically injured by defendant. Plaintiff sought cost of repair damages, i.e., the amount of money it would require to fix the minor dents in the barge. *Id.* at 656. As a practical matter, the injury did not lessen the economic value of the barge or interfere with the use to which it was being put, and was capable of being put, at the time of the collision. *Id.* at 657. The court allowed the cost of repair damages. *Id.* at 657–58. The court commented at several points that the defendant failed to establish that diminution in value was less than cost of repair, *id.*, which would support the use of cost of repair as the measure of diminution in value. FISCHER, *supra* note 27, § 7.3. The dissent thought the point evident:

Allowing a recovery in excess of the property's diminution in value suggests that the proper characterization of the rightful position is that the owner is entitled to have property free of the cosmetic damage even though her position (from a "balance sheet" perspective) has not changed. Before the impact, the owner had property free of cosmetic damage worth $100; after the impact, the owner has property worth $100 with cosmetic damage. The owner's position is impaired from an aesthetic point of view but not from an economic point of view. Should that difference matter? Does restoring the owner to her original, pre-impact position mean that her property should not have cosmetic damage? The great majority of courts do not permit an award of cost-of-repair damages in this context. Courts distinguish between "harm" and "legal harm." Sustaining a cosmetic defect to one's property may constitute harm in the everyday sense of the term, but it does not constitute legal harm (actual injury) as courts require to support an award of damages. Most courts would see the owner's position as being unchanged by the impact. Before the impact, the owner's property was worth $100; after the impact, the property is still worth $100. Chick Hearn's phrase "No harm, no foul" is here merely an inversion of the legal maxim "For every wrong, there is a remedy." Unless the referee (judge) blows the whistle, the misconduct is not classified as a wrong. Therefore, no remedy is provided.[49] To use the nomenclature of the *Restatement*, one may suffer an injury (invasion of a legal right), but that invasion may not result in harm (loss or detriment).[50]

> If my brothers are right, the libellant is unduly enriched. He must hope greatly that another errant navigator will hit his battered barge again, and still another yet again, so that each time he may happily pocket the estimated cost of theoretical repairs which neither he nor anyone else will ever dream of undertaking while retaining all along a barge as seaworthy and useful to him and of undiminished worth if he chooses to sell it.

Hewlett, 418 F.2d at 661; *see also* 1 DOBBS, *supra* note 5, § 5.13(1) (discussing measure of recovery when personal property is damaged, but not destroyed).

49. Ex parte Mountain Top Indoor Flea Mkt., Inc., 699 So. 2d 158, 161 (Ala. 1997) ("[T]he law doesn't say for every injury there is a remedy. It says for every wrong there is a remedy.") (citation omitted).

50. *See supra* text accompanying note 3.

2. Economic Actuality

The actual injury determination is often affected by the presence of collateral payments, the receipt of which may negate a claim that harm was sustained. A simple case may be when a contractor damages a support beam while installing it. An injury has occurred because the support beam is damaged. In the usual case, however, the contractor simply redoes the work with no delay in completing the project and no increase in the price. This is a good example of "No harm, no foul" in every sense of the phrase.

What happens, however, if we alter the situation? Patient receives medical treatment from Physician for her injuries caused by Tortfeasor. Physician would normally charge $500, a reasonable amount, for the treatment. However, because Patient is a member of a Health Maintenance Organization ("HMO") that has contracted with Physician, Physician agrees to accept $250 as full payment for the treatment.[51] In defining Patient's actual injury, which is here the medical expense, Patient received treatment reasonably and objectively worth $500, but Physician, who provided the treatment, agreed to accept from the HMO $250 as payment in full. Should we treat the injury as worth $500 or $250? Jurisdictions have split over this issue.[52]

3. Decision Timing

A determination about whether a person has sustained actual injury may depend on the time when the determination is made. Consider, for example, the case of Owner whose house has been condemned and will be razed to build a highway. Before Owner receives the condemnation award and while he still has title, the house is destroyed through the negligence of Tortfeasor. Has Owner sustained an actual injury that he may recover from his insurer? In

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51. To simplify the issue, I make two assumptions. First, we can exclude Patient's fees to the Health Maintenance Organization and any co-pays Patient must provide when obtaining the treatment. Second, we can assume that the Health Maintenance Organization will not seek to recover the difference between Physician's usual rate and the contract rate from any person involved in the hypothetical.

52. FISCHER, *supra* note 27, § 72.2 (discussing split in authorities as to proper measure of medical expense loss when a physician agrees to accept a discount from the amount billed to a patient as full satisfaction of the billing); *see* Arthur v. Catour, 833 N.E.2d 847 (Ill. 2005) (permitting plaintiff to introduce billed amount of medical expenses as evidence of "reasonable value" of medical expenses incurred, rather than amount actually paid for medical services rendered; however, plaintiff could not testify that total billed amount was paid).

one sense, Owner has a destroyed house. In another sense, however, no actual injury has occurred because Owner's interest in the house has been transmuted into the condemnation award. Jurisdictions have disagreed over which viewpoint should control.[53] One viewpoint holds that the matter is viewed solely as between the insurer and the policyholder.[54] The contrary view holds that the court should look at the substance of the whole transaction, including acts of third parties, to determine whether an actual loss occurred.[55]

We can vary the facts slightly to further illustrate the problem. Assume the house is destroyed by an Act of God rather than third-party negligence. Should the insurer's obligation to pay property damage be excused because the owner/insured's interest has been transmuted into the condemnation award? Should the question of actual injury be treated differently depending on whether the payor is a negligent tortfeasor or an insurer? Again, jurisdictions are split.[56]

The issue of timing and the existence of actual injury can arise in other contexts. For example, should a bankruptcy discharge affect

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53. See Royal Ins. Co. v. Sisters of Presentation, 430 F.2d 759 (9th Cir. 1970), for a discussion on whether a Sisterhood could assert a property damage claim under roughly similar facts. The convent in which the Sisterhood resided was condemned as unfit for human habitation, so the local bishop agreed to exchange an adjoining property upon which a new convent was to be built. *Id.* at 760. Before the demolition of the old convent was complete, the old convent was destroyed by fire. *Id.* Although the court's decision focused on the legal issue of whether under the circumstances the Sisterhood had an "insurable interest" in the old convent, the court made several comments pertinent to the actual injury inquiry:

> The trial court waved aside the fact that the new convent had been received and occupied by the Sisters, referring to it as a 'collateral benefit' that could have no effect on the supposed insurance obligation. The court cited *Hughes v. Potomac Ins. Co.*, for this proposition. The 'collateral benefit' rule deals with nothing more than the effect of overlapping indemnities for a particular loss. *Hughes* and the cases therein cited simply hold that an insurer is liable for the full loss despite the fact that indemnification after the loss was made by a third party. In contrast, the new convent built by the Bishop in the present case did not operate to relieve the Sisters from a loss, but instead was only one element or transactions which, as a whole, prevented the Sisters from suffering any loss in the first place.

Id. at 762–63 (citation omitted); *see also* LEE R. RUSS & THOMAS F. SEGALLA, 3 COUCH ON INSURANCE § 41:13 (3d ed. 1995) (discussing effect of condemnation proceedings and award on ability of owner/condemnee to recover on insurance policy covering condemned property when property is lost or damaged).

54. Alexandra Rest. v. N.H. Ins. Co., 71 N.Y.S.2d 515, 521 (App. Div. 1947), *aff'd*, 79 N.E.2d 268 (N.Y. 1948).

55. Ramsdell v. Ins. Co. of N. Am., 221 N.W. 654 (Wis. 1928). *See* Citizens Ins. Co. v. Foxbilt, Inc., 226 F.2d 641, 644 (8th Cir. 1955) (discussing split in authorities).

56. *See* JERRY & RICHMOND, *supra* note 44, § 46(b) (discussing decisions and noting the split in authorities); *see also* RUSS & SEGALLA, *supra* note 53, § 41:13 (same).

the trustee's assertion of a legal malpractice claim against the attorney whose neglect caused the discharged claim to be entered against the bankrupt person in the first place? In one sense, a harm occurred—the attorney's neglect led to a judgment against the client (the bankrupt person). On the other hand, an intervening event (the client's bankruptcy) dissipated that event of its economic significance. Which viewpoint should control?[57]

As one last example, assume Pam has a five-year contract to clean a high-rise office building. Dan tortiously induces the owner of the building to breach Pam's contract and hire Dan to perform the services. Pam sues Dan for tortious interference. However, while the suit is pending and while four years remain on Pam's contract with Owner, the building is destroyed, a fact that would operate to terminate Pam's contract with Owner. Assume further that the court concludes Dan tortiously interfered with Pam's contract rights. What is Pam's actual injury? Is it the five years that she expected the contract to be in force or the one year it actually was in force before the building was destroyed? In other words, should the court define "actual" injury based on what the world looked like at the time of tortious interference (ex ante) or at the time of trial when the injury is to be quantified (ex post)?[58]

F. Actual Injury & Claim Validation

The law may recognize certain actions as being wrongful and certain consequences as being foreseeable, yet because of validation concerns it may still exhibit hesitancy over recognizing a right of recovery in situations satisfying both criteria.

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57. *See* RONALD E. MALLEN & JEFFREY M. SMITH, 3 LEGAL MALPRACTICE § 25:7, at 804 (4th ed. 2008); *see generally* David Gray Carlson, *Indemnity Liability, Insolvency*, 25 CARDOZO L. REV. 1951 (2004) (discussing the distinction between indemnity and liability in context of insolvency such as bankruptcy proceedings).

58. *See* 3 DOBBS, *supra* note 5, § 12.19(1), at 434–35 (discussing whether date of breach or events subsequent to breach should be measure of loss); Konrad Bonsack, *Damages Assessment, Janis Joplin's Yearbook, and the Pie-Powder Court*, 13 GEO. MASON L. REV. 1 (1990) (discussing whether the goal of compensatory damages is to restore the plaintiff to his rightful position based on the facts as they existed as of the date of the wrongdoing or as of the date of trial); Mark Glick & Avner Kalay, *How to Value a Lost Opportunity: A Real Options Approach*, 11 GEO. MASON L. REV. 673, 677–81 (2003) (arguing that preference for ex ante approach marginalizes a person's desire to choose to be a risk taker by forcing the person to accept a risk-neutral recovery).

1. Negligent Infliction of Emotional Distress

The nimbleness of negligence and emotional distress to encompass myriad situations and the lack of objective measures of thresholds (or limits) for each concept have caused jurisdictions to pause before allowing recovery of distress damages for simple negligence (e.g., negligent infliction of emotional distress ("NIED")).[59] Generally, jurisdictions require some corroborating fact that lends genuineness to the NIED claim. When a person sustains actual bodily injury or is physically proximate to an identifiable risk of bodily injury (zone of danger), there are objective criteria that validate the genuineness of the claim. When these factors are absent, jurisdictions may rely on foreseeability concepts or pre-set criteria to distinguish actionable from non-actionable claims. In this latter context, however, courts often couple the NIED action with another validation corollary: physical manifestation of injury.[60] It is not sufficient for plaintiff to claim and describe her defendant-induced distress; rather, the plaintiff must show that her distress had an observable physical manifestation, e.g., vomiting, insomnia, or headaches, and that the physical manifestations of distress were long-lasting, rather than merely transitory.[61] Here, the actual injury requirement—in the guise of the physical manifestation rule—exists not as the basis for the award, which is the usual justification under the rightful position thesis, but as corroboration or necessary evidence that the plaintiff's claimed injuries are genuine and deserve compensation.

2. Rescission

For a damages claim based on the plaintiff's decision to stand on the bargain, a court may inquire whether the plaintiff's affirmance of the bargain should permit him to seek expectancy losses. How

59. 2 DOBBS, *supra* note 5, § 8.3(5); FISCHER, *supra* note 27, § 12; *see* Bourne, *supra* note 35, at 261–66 (discussing the limited success plaintiffs have achieved in seeking recovery based on NIED in the context of "exposure cases").

60. Bourne, *supra* note 35, at 261–66 (collecting decisions).

61. RESTATEMENT (SECOND) OF TORTS § 436A cmt. c (1965) (characterizing certain manifestations of emotional distress, such as fright, nausea, and rage, as insufficient to satisfy the "physical manifestation" requirement necessary to recover distress damages negligently inflicted on the plaintiff, as compared to distress that results in a more serious injury, such as a miscarriage); *cf.* Bourne, *supra* note 35, at 266 (arguing that greater success of medical monitoring theory of recovery over NIED in context of exposure cases is due, in part, to concreteness and objectiveness of medical monitoring; the injury is defined as economic).

should injury be defined when the plaintiff claims the bargain benefits, but further claims that he has not received all he is entitled to receive? One function of equating actual injury with economic loss is to provide some degree of certainty as to the consequences of breach insofar as a potential damages award is concerned, i.e., that the breach resulted in actual losses to the plaintiff. This type of certainty has been highly valued in American law and is reflected in the general requirement that the plaintiff establish the amount of any general damages he claims and that he establish both the actuality and the amount of any special or consequential damages he claims.[62]

If, however, the plaintiff chooses to disaffirm the bargain as a result of the defendant's breach, the need for limiting actual injury to realized economic losses dissipates. There is no concern that the plaintiff is receiving more or less than he contracted for or lost due to difficulty in measuring contract expectancies or consequences of breach. The remedy of rescission restores to each party the consideration he had given when entering into the bargain. Concerns that plaintiff might possibly exploit the relationship by disaffirming the bargain are ameliorated by the requirement for disaffirmance (rescission) that the breach be substantial,[63] or that other grounds for rescission exist that justify undoing the bargain and restoring the

62. Sanchez-Corea v. Bank of Am., 701 P.2d 826, 836 (Cal. 1985) (holding that to recover lost profits for breach of contract the evidence must affirmatively show "with reasonable certainty *both* their *occurrence* and the *extent* thereof") (citation omitted); *see* Wooton v. Viking Distrib. Co., Inc., 899 P.2d 1219, 1226 (Or. Ct. App. 1995) (stating that the evidence must show both the existence of loss and the amount of the loss). In *Kenford Co., Inc. v. County of Erie*, 493 N.E.2d 234 (N.Y. 1986), the court commented:

> Loss of future profits as damages for breach of contract have been permitted in New York under long-established and precise rules of law. First, it must be demonstrated with certainty that such damages have been caused by the breach and, second, the alleged loss must be capable of proof with reasonable certainty. In other words, the damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes.

Id. at 235 (citation omitted). Lost profits (special damages) are different from benefit-of-the-bargain damages (general damages). The difference between special and general damages can be quite contentious as a matter of classification. *See* 3 DOBBS, *supra* note 5, § 12.2.3; LAYCOCK, *supra* note 2, at 57–61; DOUG RENDLEMAN, REMEDIES: CASES AND MATERIALS 537–39 (7th ed. 2006).

63. This is not to say that exploitation is nonexistent. The buyer may threaten rescission to induce a price concession by the defendant. However, this exploitation is inherent in all contexts in which litigation is possible.

parties to their prebargain status.[64] These requirements provide a somewhat objective standard and are bolstered by the fact that the plaintiff's legal theory is that he does not want the bargain benefits. In this context, the actual injury requirement is satisfied by the fact that the plaintiff was wrongfully induced to enter the bargain.[65]

The above considerations lessen the threshold for actual injury when the plaintiff rescinds the bargain. The very act of seeking rescission corroborates that the defendant's misconduct actually injured the plaintiff in the sense that the plaintiff did not receive that for which he bargained. The absence of a meaningful actual injury requirement for rescission may explain some of the constraints courts have imposed,[66] or sought to impose,[67] on the availability of the remedy.

3. Fraud

The recovery of damages under a claim of common law fraud is often dependent on a showing of actual loss resulting from the fraud, although some courts have dispensed with the requirement.[68] There are two measures of general fraud damages: out-of-pocket and benefit-of-the-bargain. Under the out-of-pocket measure, the defrauded party recovers the difference between the value parted with (usually the consideration) and the value received. Under the benefit-of-the-bargain measure, the defrauded party recovers the difference between that which the party would have received had the

64. FISCHER, *supra* note 27, § 136 (noting that rescission of a bargain is usually limited to situations in which the rescinding party can show fraud, duress, substantial (material) breach, or mistake going to the basis of the bargain).

65. The inducement to enter into a bargain need not be morally wrongful to permit a party to escape; mistake is a ground for rescission. Dairyland Power Coop. v. United States, 16 F.3d 1197, 1202 (Fed. Cir. 1994); Wellman Sav. Bank v. Adams, 454 N.W.2d 852, 855 (Iowa 1990).

66. A plaintiff may elect to rescind because rescission is a better remedy than affirmance. The law of rescission is largely oriented around the theme of not permitting the plaintiff to obtain rescission or of conditioning its availability to prevent unfairness to the defendant, particularly when the defendant is not a wrongdoer; nonetheless, rescission is available. FISCHER, *supra* note 27, § 132.1 (discussing notice requirement), §132.2 (discussing tender requirement), § 133 (discussing election doctrine).

67. Earl v. Saks & Co., 226 P.2d 340, 346 (Cal. 1951) (rejecting pecuniary loss requirement that lower courts had imposed as condition to rescission of bargain or contract for misrepresentation); *see* 2 DOBBS, *supra* note 5, § 9.3(2), at 581 (stating that the restitutionary nature of rescission supports nonrecognition of actual damages requirement).

68. FISCHER, *supra* note 27, § 122.3; 2 DOBBS, *supra* note 5, §§ 9.2(1), 9.2(4), particularly 9.3(2) ("The ordinary rule is that the plaintiff must demonstrate the existence of actual damages to have a common law action for damages based on misrepresentation.") (citation omitted).

representation(s) been true and the value of what was actually received.[69] Jurisdictions that apply the out-of-pocket measure of fraud damages may compress the measure of damages with the fact of damage. For example, a plaintiff who is fraudulently induced to purchase property suffers no injury under the out-of-pocket measure if the property is worth what the plaintiff paid for it. The out-of-pocket measure more faithfully follows the principle of *restitutio in integrum*, while the competing benefit-of-the-bargain measure more faithfully tracks contract-based expectancies.[70] The type of measure a jurisdiction adopts reflects that jurisdiction's view as to what harms the law of fraud is designed to prevent—out-of-pocket economic loss or fraudulently induced expectations.

4. Defamation and Disparagement

The law of defamation has traditionally allowed a plaintiff to recover presumed damages, although this principle has been significantly restricted recently due to First Amendment free speech concerns.[71] At common law, the plaintiff was required to establish an injury in the sense that the published material tended to injure the plaintiff's reputation. Consequently, the allowance of presumed damages was more in the nature of a substitute for the quantification of the loss rather than the actuality of loss.[72]

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69. FISCHER, *supra* note 27, § 122.1; 2 DOBBS, *supra* note 5, § 9.2(1), at 551–52.

70. This is not to denigrate or take sides in the debate of whether lost expectancies are actual losses. E. ALLAN FARNSWORTH, CONTRACTS, § 12.8, at 757–58 (4th ed. 2004) (discussing argument for recovery of expectancies); FISCHER, *supra* note 27, § 6.1 (same).

71. FISCHER, *supra* note 27, § 105; 2 DOBBS, *supra* note 5, § 7.2(4).

72. PROSSER, *supra* note 40, § 111, at 739 ("Defamation is rather that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him.") (citation omitted). This distinction is somewhat blurred in the constitutionalization of the cause of action. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) ("The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication."). The *Restatement (Second) of Torts* puts forth the following caveat:

> The Institute takes no position on whether the traditional common law rule allowing recovery in the absence of proof of actual harm, for the harm that normally results from such a defamation, may constitutionally be applied if the defendant knew of the falsity of the communication or acted in reckless disregard of its truth or falsity.

Id. § 621 caveat (1977). These statements are ambiguous as to whether the presumed damages doctrine substitutes for proof of actual injury (damage) or as a substitute for proof of compensable injury presumed from the publication of the defamatory statement (damages).

In some instances, courts require the plaintiff to allege and establish actual pecuniary loss as a condition to recognition that she has been defamed. Unless the defamatory meaning of the publication is clear, in which case presumed damages are permitted, the plaintiff has to show that she has sustained special damages flowing from the alleged defamatory statement(s).[73] This "special damages" requirement is also the rule insofar as product disparagement claims are concerned—the plaintiff must show an actual, pecuniary loss as part of the prima facie case for product disparagement.[74]

5. Trespass to Chattels

A plaintiff must establish that the defendant's wrongful intrusion into the plaintiff's ownership and possessory interests in personal property has resulted in actual, pecuniary loss before the plaintiff may maintain an action for trespass to chattels.[75]

6. Constitutional Torts/Civil Rights

The general rule is that the plaintiff must show actual injury from the defendant's violation of a constitutionally protected right or civil right before the plaintiff may recover damages.[76] The Supreme Court has generally rejected the extension of the presumed damages concept into this area.[77]

7. Punitive Damages

The dominant rule in the United States is that a plaintiff must demonstrate actual injury as a condition precedent to receiving an

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73. FISCHER, *supra* note 27, § 105 ("'Special damages' are actual pecuniary losses, such as loss of employment, that directly result from the defamatory statement."); PROSSER, *supra* note 40, § 112, at 760.

74. FISCHER, *supra* note 27, § 109 (noting that the approach taken by the *Restatement (Second) of Torts*, which allows incurred attorneys fees to satisfy the special damages requirement, has not been adopted by the courts).

75. *Id.* § 83.3; PROSSER, *supra* note 40, § 14, at 77.

76. FISCHER, *supra* note 27, § 111.

77. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 310 (1986) (applying actual damage requirement to substantive due process violation claims); Carey v. Piphus, 435 U.S. 247, 264 (1978) (applying actual damage requirement to procedural due process violation claim). There is some disagreement as to whether the above decisions encompass the universe of possible claims. *See* 2 DOBBS, *supra* note 5, § 7.4(2); FISCHER, *supra* note 27, § 111, at 686–87 (noting decisions that have read *Stachura* narrowly and have proceeded to permit presumed damages for constitutional rights violation).

award of punitive damages.[78] The rationale for the requirement is that absent actual injury, courts perceive an award of punitive damages as a windfall to the plaintiff.[79] That said, the jurisdictions are often liberal in identifying the type of injury that satisfies the requirement.[80]

III. SOME OVERLAPPING THEMES

A. Tentative Observations

The prior collection of examples may appear to be a pastiche, but I believe that view places too much emphasis on the situational differences. For example, one might contend that in the case of statutory remedies the difference between the decisions permitting recovery of statutory damages without proof of actual injury and the decisions denying recovery of statutory damages absent a showing of actual injury, simply reflect differences in statutory language and legislative history. Usually there are differences in the exact text of the remedy language in the statute, and the legislative history often reflects the different concerns that led to the enactment of separate legislation.

That said, the argument that text and legislative history explain the differences in results suffers from the fact that on the specific point—whether an award of statutory damages requires proof of actual injury—legislative history is silent and textual differences, as *Doe v. Chao* and *Kehoe* evidence, prove less than illuminating. What is significant is the vast difference in each court's approach to the problem of statutory construction. Even accounting for the slight

78. Richard C. Tinney, Annotation, *Sufficiency of Showing of Actual Damages to Support Awards of Punitive Damages—Modern Cases*, 40 A.L.R. 4TH 11, 18 (1985).

79. People Helpers Found., Inc. v. City of Richmond, Va., 12 F.3d 1321, 1327 (4th Cir. 1993).

80. Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 156 (Wis. 1997) (permitting recovery of punitive damages when only nominal damages were awarded for intentional trespass to land that inflicted no actual harm to property but invaded owner's right of exclusive use); Pulla v. Amoco Oil Co., 882 F. Supp. 836, 875 n.33 (S.D. Iowa 1994) (collecting decisions holding that award of nominal damages will support an award of punitive damages), *modified*, 72 F.3d 648 (8th Cir. 1995). There is some disagreement as to the type of nominal damages that will support an award of punitive damages. *See* Abner v. Kan. City S. R.R. Co., 513 F.3d 154, 158–60 (5th Cir. 2008) (collecting decisions). Some jurisdictions state that only nominal damages awarded due to measurement difficulties will support an award of punitive damages, but when nominal damages are awarded simply because the plaintiff was a prevailing party, punitive damages may not lie. Shell Oil Co. v. Parker, 291 A.2d 64, 71–72 (Md. 1972).

variances in language used in each statute, in the end, the dissimilarities in approaches generate the different results.[81]

Some of the examples may reflect concerns with the right of action itself. This concern may reflect disfavor with the action itself[82] or concern that the actual injury requirement is needed to prevent overutilization of courts to resolve petty disputes.[83] The difficulty here is that these concerns are somewhat impressionistic.[84] Judges do show a keen awareness of the link between caseloads and remedies;[85] on occasion, courts have specifically used that rationale as a justification for affixing an actual injury requirement to the cause of action.[86] However, it is difficult to ascertain the importance of the caseloads factor to the actual injury requirement.

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81. *See supra* notes 21–26 and accompanying text (discussing inconsistent approaches in the two decisions as to the same issue, whether statutory damages award is dependent on proof of actual injury resulting from the statutory violation).

Justice Scalia wrote a concurrence to the denial of certiorari in *Kehoe* in which he pointedly emphasized the substantial liability that the award of statutory damages could impose. Kehoe v. Fid. Fed. Bank & Trust, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring). This concern has also been voiced regarding Fair and Accurate Credit Transactions Act ("FACTA") claims:

> [T]his Court disagrees with some cases in the District Court for the Central District of California, which have recently suggested that a class action is not a superior method in FACTA cases because, where there is no evidence of actual harm and the minimum statutory damage award would "destroy Defendant's business", the damage award would be so disproportionate as to violate due process.

Klingensmith v. Max & Erma's Rest., No. 07-0318, Inc., 2007 WL 3118505 at *2 (W.D. Pa., Oct. 23, 2007) (citations omitted). For further discussion of FACTA claims, see *supra* notes 8 and 14.

82. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 5.9, at 257 (2d ed. 1993) ("Fraud was a so-called 'disfavored action' at common law because it raised questions of defendant's morality.").

83. *See* RESTATEMENT (SECOND) OF TORTS § 218 cmt. e (1965); *see also* Zaslow v. Kroenert, 176 P.2d 1, 7 (Cal. 1946) (explaining that trespass to chattels involves less serious interference with one's right to personal property than necessary to establish tort of conversion (exercise of wrongful dominion and control over personal property).

84. For example, the adage that fraud actions are disfavored can be found in old and modern cases; its use, however, is directed to justifying the special pleading rule, not the actual injury rule. Jeff Sovern, *Reconsidering Federal Civil Rule 9(b): Do We Need Particularized Pleading Requirements in Fraud Cases*, 104 F.R.D. 143, 144–45 (1985).

85. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 98 (1996); Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 873 (1983); *see also* Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 434–36 (1997) (discussing a number of potential claims that could inundate federal courts if NIED claim was allowed based on fear of future disease).

86. FISCHER, *supra* note 27, § 112, at 696–97 ("Although the '[actual] injury' requirement has been questioned and criticized as outmoded, many courts find that it serves as a necessary counterweight to discourage frivolous litigation, particularly given the general refusal in this

When the loss is derivative of some other injury, the law is more tolerant in allowing a damage recovery without requiring proof of actual injury regarding the derivative loss. For example, when a victim sustains bodily injury, pain and suffering is recognized as a component of the damages award in most jurisdictions as a matter of course.[87] Contrast this with the situation where the claim, usually now referred to as emotional distress, is asserted without an associated claim of bodily injury. In this context, the availability of damages is much more restricted.[88] This suggests that the actual injury requirement serves as a gatekeeper, designed to allow admission only to genuine claims.[89]

A related example of derivative loss is the recovery of loss of use damages when personal property has been physically damaged or destroyed. Even though the person with the right to use the property may have suffered no actual "loss of use" injury from the damage to the property—for example, because the property was not being used and would not be used, or because there were available substitutes—most jurisdictions still recognize a right to recover the hypothetical loss as an actual loss.[90] Actual injury to property creates a right to recover damages for the derivative right to use because actual injury is presumed from the primary loss.[91] This allowance for loss of use recoveries is, however, inconsistent with the application of the actual injury rule in other contexts. When a third-party redresses the loss,

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country to award a prevailing defendant his attorney's fees incurred in the successful defense.") (footnote omitted).

87. *Id.* § 6.4 (noting general rule to treat pain and suffering as general damages rather than special damages); *id.* § 73 (discussing elements and legal treatment of pain and suffering claim).

88. 2 DOBBS, *supra* note 5, § 7.2(6); FISCHER, *supra* note 27, § 12.1 (discussing how judicial caution recognizes stand alone claims for recovery of economic distress).

89. *See* RESTATEMENT (SECOND) OF TORTS § 436 cmt. b (1965) (expressing concern that claims for emotional distress can be easily falsified). Whether the claims should receive compensation is an altogether different matter. *Compare* Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 164 (2004) ("[P]ain and suffering damages cannot be justified in any thoughtful way when one unprepossessedly considers such damages in the context of the goals of tort law. Pain and suffering damages and the policy goals of modern tort law are conceptually and operationally incompatible."), *with* David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 271–72 (1989) (arguing that pain and suffering awards are justified under deterrence criteria).

90. FISCHER, *supra* note 27, § 80.3 (discussing loss of use decisions).

91. At least this is the case with consumer users. The cases are divided in the context of commercial users. *See id.*; *see also* PROSSER, *supra* note 40, § 14 (stating that in trespass to chattels cases, loss of possession satisfies the actual injury requirement).

some courts treat the redress provided by the third-party as cabining the loss.[92]

Unlike the derivative-loss cases involving noneconomic loss, the issue here does not appear to be tied to a concern over claim validation, at least in the consumer context. Rather, the relaxation of the actual injury requirement appears to be tied to an appreciation of more fully compensating the victim for the loss. Perhaps there is also a concern that not compensating for loss of use would lead to under-deterrence, although that argument does not appear to have been urged in court decisions or in remedies scholarship.[93] It does, however, explain decisions like *Jacque v. Steenberg Homes, Inc.*,[94] in which the court affirmed a $100,000 punitive damages award tied to a one dollar nominal damages award.[95] In that case, the defendant sought and was denied permission to cross plaintiffs' property.[96] Alternatives were expensive, so the defendant simply disregarded the denial and trespassed.[97] Even if the plaintiffs did not suffer any actual harm, the deliberately wrongful conduct would not have been meaningfully deterred by a one dollar award.[98] This suggests that, at

92. For example, the cases when physicians accept discounted fees. *See supra* notes 51–52 and accompanying text.

93. Deterrence is a largely assumed consequence in most scholarly commentary. The empirical literature is conflicting as to whether legal rules specifically influence (e.g., deter) behavior. *Cf.* Gary T. Schwartz, *Realty in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 379 (1994) (concluding that an argument of some moderate deterrent effect can be gleaned from the empirical data). Schwartz further notes that even if a deterrent effect exists, the effect must be measurable, and this latter task is inherently imprecise. *Id.* Professor Katyal comments:

> Both torts and taxes are areas where the government attempts to price conduct in ways that minimize certain distortions in behavior. The insights of substitution from these areas of law suggest a rather different way of thinking about deterrence in criminal law; instead of examining whether a penalty deters a particular activity, it is also important to inquire about the cost of that deterrence. Just as torts analysts ask what the price of strict liability is, and just as the tax wonks examine whether particular changes to the tax code will change income-producing behavior, scholars and policymakers might gain a fuller appreciation of the impact of deterrence through the vehicle of substitution.

Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2401–02 (1997). For a discussion of the literature in this field, see DON DEWEES, DAVID DUFF & MICHAEL TREBILCOCK, EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY (1996).

94. 563 N.W.2d 154 (Wis. 1997).

95. *Id.* at 156.

96. *Id.* at 157.

97. *Id.*

98. The *Steenberg Homes* court further commented:

the core, what is being protected in wrongful use cases like *Steenberg Homes* is the bare legal right of freedom from invasion or disruption by the defendant. By extension, the compensatory award for loss of use validates the right and serves to deter rights violations by imposing a real cost on the rights violator. This is true even when the rights holder sustains no actual economic loss but the defendant's wrongful conduct deprives the owner of the right to use the damaged property.

Another way of manipulating the actual injury requirement is through the characterization of loss, such as in the earlier hypothetical in which the owner of personal property sustains damage to the property that is aesthetic but not economic.[99] Under the dominant test, the owner's aesthetic and emotional interests in the property are disregarded. When the injury to the property is classified as aesthetic, the owner sustains no economic loss; she sustains no actual injury, and her rightful position is not legally affected by the claimed injury to her property.

Equating actual injury with economic loss advances a number of values that traditionally have resonated well with courts. One value is the avoidance of economic waste. Is it reasonable to expend money to repair property when doing so does not add to its economic value?[100] Consider the problem of the contractor's breach that does not affect the fair market value of the finished product. Assume a builder constructed a residence according to specifications, except that the residence faces north instead of east. If the economic value of the house is the same either way, has the buyer suffered an actual

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> [T]he individual has a strong interest in excluding trespassers from his or her land. Although only nominal damages were awarded to the Jacques, Steenberg's intentional trespass caused actual harm. We turn next to society's interest in protecting private property from the intentional trespasser.
>
> Society has an interest in punishing and *deterring* intentional trespassers beyond that of protecting the interests of the individual landowner. Society has an interest in preserving the integrity of the legal system. Private landowners should feel confident that wrongdoers who trespass upon their land will be appropriately punished. When landowners have confidence in the legal system, they are less likely to resort to "self-help" remedies.

Id. at 160 (emphasis added).

99. *See supra* Part II.E.1.

100. McKinney v. Christiana Cmty. Builders, 280 Cal. Rptr. 242, 245 (Ct. App. 1991) ("Courts normally will not award [damages] which *exceed* diminution in value because the basic objective of compensatory damages is to make an injured party whole, but no more than that.") (citiations omitted).

injury? Should the buyer recover damages based on what it would cost to rebuild the residence so that it faced east?[101] Should the buyer be awarded a recovery measured by the cost of altering a perfectly good residence and rebuilding it exactly as it should have been constructed, except for the new orientation? There may be a concern that allowing recoveries in these types of cases would incentivize buyers to claim aesthetic injury to obtain concessions from contractors. Is this concern enhanced by the absence of a decline in market value due to the alleged improper orientation? If the market does not value the east-facing as highly as the north-facing orientation, does that mean that the buyer's claims are subjective and unworthy of judicial recognition?

The actual injury requirement encourages some objectification of the right that has been violated. Rights have value, but how does one identify their value? Courts will have to determine legitimate from illegitimate aesthetic values without a standard that permits objective measurement. These difficult questions can be avoided by limiting recovery to actual injury as measured by economic loss.

We might be more inclined to support aesthetic recoveries when the parties clearly signal ex ante that aesthetic values are important. For example, if a person enters into a contract to have his residence built in the English Tudor style, a contractor who provides a French Colonial structure has breached the essential point of the bargain.[102] Similarly, some forms of property may have unique societal and cultural values that justify recoveries that exceed diminution in value.[103] However, this is an area where courts have been less than

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101. This example is based on *Grossman Holdings Ltd. v. Hourihan*, 414 So. 2d 1037 (Fla. 1982).

102. *See* Lyon v. Belosky Constr., Inc., 669 N.Y.S.2d 400 (App. Div. 1998) (holding that cost of replacement was the proper measure of damages). The court stated:

> Plaintiffs contracted to build a custom home at significant expense which, in fact, exceeded the fair market value of the home as completed per the drawings. . . . It is clear from the record that the aesthetic appearance of the home, both inside and out, was of utmost importance to plaintiffs. Our review of the photographs of the home as constructed compared with the design drawings convinces us that plaintiffs did not get the benefit of their bargain and that requiring defendants to remedy the problem would not, under these particular circumstances, result in unreasonable economic waste. Accordingly, we find that Supreme Court applied the appropriate measure of damages.

Id. at 401–02 (citation omitted).

103. *See, e.g.*, Orndorff v. Christiana Cmty. Builders, 266 Cal. Rptr. 193, 195 (Ct. App. 1990) (permitting homeowner to recover cost of repair damages even though cost of repair exceeded home's diminution in value, as long as difference was not unreasonable). The court emphasized

consistent.[104] The issue may be influenced by a governmental signal as to how actual injury should be defined.[105]

Adoption of a rule based on the avoidance of economic waste is not costless. Defining actual injury in terms of economic loss may operate to shift the risk of variance in bargain expectancy to the plaintiff and away from the defendant. If that shift occurs, the concern might legitimately be that the plaintiff may be saddled with something that does not meet his expectations, but which has not caused him to sustain any economic losses.

For example, in the context of the wrongly sited residence, the buyer did not receive the benefit of the bargain, but the law provided no remedy except to the extent the buyer could show that the breach resulted in diminution of economic value. A contractor might exploit this rule by cutting corners and costs in the knowledge that as long as any contract breach does not affect the market value of the performance (measured not by the cost of performance but by the value of the product produced), the contractor does not face a credible threat of liability for the breach. Not allowing the nonbreaching party to recover damages for aesthetic changes or omissions might encourage contractors to breach. If a concern over encouraging buyer extortion lies behind the decision to limit buyers to economic losses resulting from contractors' breaches, should we not be equally concerned with a response that may encourage contractors to cut corners?[106]

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the importance of homeownership in American culture. *Id.*; *see* 3 DOBBS, *supra* note 5, § 12.19(1) (discussing greater than diminution in value recovery in the context of personal taste contracts); FISCHER, *supra* note 27, § 90 (collecting decisions).

104. FISCHER, *supra* note 27, § 82 (discussing recoveries when pets are killed or injured as a result of wrongdoing by another and noting dominant rule is to limit recovery to diminution in economic value).

105. *See* Sunburst Sch. Dist. No. 2 v. Texaco, Inc., 2007 MT 183, ¶¶ 46–47, 338 Mont. 259, ¶¶ 46–47, 165 P.3d 1079, ¶¶ 46–47 (stating that limiting landowners to market value recoveries rather than greater restoration cost recoveries would enable defendants to exercise private right of eminent domain).

106. When the breaching party profits from the breach, but the breach does not actually injure the nonbreaching party, an action for unjust enrichment may lie to deter opportunistic breaches. Earthinfo, Inc. v. Hydrosphere Res. Consultants, Inc., 900 P.2d 113, 119 (Colo. 1995) (holding that "mere breach" of contract would not permit restitution of gains obtained by breach, yet commenting that when "the defendant's wrongdoing is intentional or substantial, or there are no other means of measuring the wrongdoer's enrichment, recovery of profits may be granted"); Andrew Kull, *Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts*, 79 TEX. L. REV. 2021, 2046–47 (2001) (suggesting that the remedy of disgorgement

A different, but complementary, justification for the actual injury requirement may be found in the distinction between property rights and liability rules as developed by Calabresi and Melamed in a highly influential *Harvard Law Review* article.[107] Although the focus of the article was somewhat different from that addressed here,[108] the property right/liability rule distinction illustrates some observed differences in the application of the actual injury requirement. Basically, if the interest is defined as a property right, the law allows recovery of damages without a showing of actual injury. Otherwise, the law is that if the interest is only protected by a liability rule, actual injury may be required as a precondition to awarding damages.

Assume the following:

> Contractor uses an empty lot to store dirt while she excavates on an adjoining lot. At the conclusion of the work, Contractor removes the dirt and restores the lot to its preexisting state. During the period the lot was used as a fill site for the dirt, Owner was unaware of the use and no plans or activities of Owner were thwarted by the unauthorized use. Has Owner suffered an actual injury such that he may recover damages for the unauthorized use of the lot by Contractor?

Under the hypothetical facts,[109] Owner suffered no economic loss in fact. Owner lost no opportunity to exploit his ownership interest, nor was the land damaged in any way. Did Owner suffer any actual injury under the circumstances? To say that the answer is "no" is troubling.

The land was used without Owner's permission. To treat this as not amounting to actual injury diminishes Owner's rights. Strangers

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of benefits may be appropriate when needed to deter opportunistic breaches of contractual obligations, despite a general opposition to that remedy).

107. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

108. The focus of the Calabresi and Melamed article was on entitlements. *See supra* note 107. If an entitlement was enshrined in a property right it could not be transferred without the consent of the property right owner. An entitlement protected by a liability rule could be taken without the entitlement owner's consent as long as fair compensation (i.e., damages) was paid for the invasion of the entitlement. *Id.*

109. The hypothetical is based on *Don v. Trojan Constr. Co.*, 2 Cal. Rptr. 626, (Cal. Ct. App. 1960). Note the parallel to *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997) (discussed *supra* note 80 and text and notes 94–98).

may use the land as long as Owner is not harmed regarding his plans for the land or the land is not physically harmed. Such a rule would substantially diminish what we commonly understand (and value) as the right of a property owner to exclude unconsented uses.

Moreover, to say that Owner lost no opportunity to exploit his ownership interest may be criticized because there was a loss in the sense that Owner lost the ability to bargain with Contractor for the use of the land. Contractor may contend that she had neither interest nor intent to contract with Owner for the use of the lot, but that misdirects us from the real issue. Should the law encourage or require that contractors bargain with owners for the use of the latter's property? If we accept that contractors should, that obligation would be compromised unless bypassing bargaining was generally treated as actual injury even if a particular owner suffered no economic losses or injury to the property as a result of a particular contractor's unauthorized use of the property.[110]

Even if there is proof of actual attempts to bargain, unsuccessful attempts are hardly a measure of what was lost. Unsuccessful attempts at bargaining or no bargaining requires the court to substitute its own views as to economic value for that of the parties. If the contractor knows that the worst-case result is that he must pay economic damages based on the use value of the property, this might encourage strategic bargaining or no bargaining depending on the likelihood of detection.[111] Limiting the award to actual economic loss may not deter deliberate wrongful use of the property by non-owners, such as Contractor in the hypothetical, or accurately compensate Owner for the wrongful use.[112]

Because Owner has a legally recognized property interest, the general approach is to permit him to recover damages without requiring proof of actual injury.[113] This approach is, however,

110. This point distinguishes this problem from *Metz v. Soares*, 142 Cal. App. 4th 1250, 1257–58 (2006). In *Metz* the court held that mere loss of the abstract right to use would not support a loss of use award. *Id.* In that context, however, the loss was inadvertent, not deliberate.

111. One approach might be to use a multiplier based on the probability of detection, but courts tend to adopt this approach only when the legislature specifically commands. Another approach would be to permit punitive damages.

112. *See Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶¶ 46–47, 338 Mont. 259, ¶¶ 46–47, 165 P.3d 1079, ¶¶ 46–47 (noting judicial reluctance to allow private parties to exercise power of eminent domain); *see also supra* text accompanying note 105.

113. Don v. Trojan Constr. Co., 2 Cal. Rptr. 626 (App. Ct. 1960). The RESTATEMENT (SECOND) OF TORTS comments:

usually limited to cases when there has been a deliberate physical interference with the property right, such as dumping or the removal of resources.[114] When the interference is less invasive or non-physical,[115] a court may require actual injury as a condition to an award of damages or limit the property owner/entitlement holder to nominal damages.[116] On the other hand, if the property owner contracts to allow his property to be used as a dump site and the defendant breaches the contract by depositing more material than authorized, the entitlement holder must show actual injury to recover damages.[117] The contract creates a liability, but it does not rise to the level of a property right.

To illustrate and contrast property and liability rules, consider a problem involving DVD rentals, which raises the question of the actual injury requirement in bargain transactions. Bargain transactions, like tort claims in general, require actual injury as a necessary condition for the recovery of damages. While exceptions

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> The owner of the subject matter is entitled to recover as damages for the loss of the value of the use, at least the rental value of the chattel or land during the period of deprivation. This is true even though the owner in fact has suffered no harm through the deprivation, as when he was not using the subject matter at the time or had a substitute that he used without additional expense to him.

Id. § 931 cmt. b (1979).

114. *See* RESTATEMENT TORTS § 931, cmt. b (1939).

> The owner of the [land] is entitled to recover as damages for the loss of the value of the use, at least the rental value of the . . . land during the period of deprivation. This is true even though the owner in fact has suffered no harm through the deprivation, as where he was not using the [land] at the time. . . .

Id.

> A takes possession and detains for six months B's land which has a rental value for the period of $1000. B is entitled to receive this amount as damages although he never had used and would not have used the land during such period.

Id. Illus. 1.

115. *See* Pub. Serv. Co. of Colorado v. Van Wyk, 27 P.3d 377 (Colo. 2001) (collecting decisions regarding actual injury requirement when invasion of right involves "electronic magnetic radiation"); *cf.* H.E. Stevenson v. E.I. DuPont De Nemours & Co., 327 F.3d 400 (5th Cir. 2003) (holding that, under Texas law, entry of airborne particulate matter onto the plaintiff's property constituted a trespass, but the failure of the plaintiff to establish the pre-tort value of the property precluded an award of damages based on diminution in value).

116. RESTATEMENT (SECOND) OF TORTS § 158 (1965). The actual injury requirement for trespass is confined to cases when the substantiality of the trespass is in question as, for example, the situations described in *supra* note 113. Martin v. Reynolds Metals Co., 342 P.2d 790, 797 (Or. 1959).

117. FARNSWORTH, *supra* note 70, at § 12.9 (discussing the general requirement that recovery of breach of contract damages is predicated on actual loss, although loss may be measured in various ways); *see supra* note 62 and accompanying text.

to the actual injury requirement exist in tort, in transactions involving disrupted bargains, where the disappointed party seeks to recover a loss of expectancy or out-of-pocket loss, the actual injury requirement is consistently applied.[118] What losses does a store sustain as a result of the patron's failure to return a DVD on time?[119] The store does not sustain any direct out-of-pocket expense. The number of DVDs purchased as stock-in-trade is independent of the individual patron's actual conduct. The store may purchase additional DVDs to cover anticipated delayed returns, but this is done ex ante and not as a consequence of the patron's delayed return. Nor does the store usually purchase DVDs to replace the DVD that is rented but not returned by the patron. Even if it did, the rental price, calculated by the usual rental period, would likely already absorb these "costs." Any oversupply or undersupply of DVDs is the result of a business decision as to the amount of stock to carry, not the result of the particular patron's actions. Moreover, the store usually does not lose any sales as a result of the patron's failure to timely return the DVD. Of course, if the store can show an actual lost sale due to the unavailability of the unreturned DVD, the situation is different.

The store may claim an expectancy loss based on the bargain with the patron. The patron agreed to pay the store for the time the patron had the DVD. However, it is difficult to extend this expectancy beyond the initial rental period. The patron's agreement to pay for periods beyond the initial rental period resembles an agreed remedy provision, absent affirmative conduct by the patron to re-rent the DVD.[120]

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118. *See supra* note 62 and accompanying text.

119. This issue arose in *Schlosser v. Welk*, 550 N.E.2d 241 (Ill. App. Ct. 1990), which involved overdue videotapes rented by a former employee. *Schlosser* differs from the given hypothetical in that the videotapes were taken by an employee (who was terminated the same day the videotapes were taken), permissibly, for the employee's personal use. *Id.* at 242. The employee contended that she simply forgot to return the videotapes. *Id.* The court found that the employee benefited from her possession of the videotapes even though she did not watch the tapes. *Id.* at 243. The fact that she did not watch them, however, influenced the court's measure of the benefit the former employee derived from her possession of the tapes. *Id.* The court reduced the amount of damages awarded to the store to one day's rental fee for each tape, even though the former employee possessed each tape for approximately two months. *Id.* The court did not supply a reason for why one day's rental value was an appropriate measure of the benefit received.

120. *See supra* Part II.B. The situation may be recast as a wrongful retention of the store's property (DVDs) by the patron. Even here, however, the store's ability to claim damages due to

Some of the differences in the decisions regarding whether actual injury is a condition to a damages award may reflect worldview, policy-based disagreements over what it means to compensate the plaintiff to restore her to her rightful position. This viewpoint is illustrated in the decisions addressing whether the plaintiff should be compensated in pre-tax or post-tax dollars when the award itself is exempt from tax recognition.[121]

The post-tax measure of loss is supported by the argument that post-tax dollars are what the plaintiff lost as a result of the defendant's misconduct.[122] Hence, post-tax dollars are what should be awarded to restore the plaintiff to her rightful position.[123] The pre-tax dollar measure of loss is supported by the argument that taxation is a collateral matter between the plaintiff and the government, coupled with the concern that injecting tax calculations into the award would be unduly speculative and conjectural.[124]

There is a strong correlation here between the advocates of pre-tax and post-tax measures and the positions asserted in other contexts where the plaintiff suffered an actual loss. The pre-tax measure that damages should restore what was actually lost is similar to concerns raised when third-party payments to the plaintiff's treating physician remedy the plaintiff's loss[125] and when post-loss events nullify or obviate the victim's loss.[126]

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wrongful retention may require that the store demonstrate actual injury because the invasion of the property right is not usually seen as inherently sufficient to justify absolute protection. See *supra* text accompanying note 75 for a discussion of the actual injury requirement in the context of trespass to chattels.

121. *E.g.*, 26 U.S.C. § 104(a)(2) (2000) (excluding from gross income "the amount of any damages . . . received . . . on account of personal physical injuries or physical sickness"); 2 DOBBS, *supra* note 5, § 8.6(4) (discussing effect of non-recognition of income for taxation on calculation of personal injury damages).

122. Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490, 493–94 (1980).

123. *Id.*

124. FISCHER, *supra* note 27, § 17.4. The concern over speculation and conjecture seems somewhat specious given the already high level of "guestimation" that is used to calculate the award. *See id.* § 9.3 (discussing assumptions used to calculate future loss and discount rate); *see also id.* § 71.2 (discussing assumptions used to calculate loss of earning capacity).

125. *See supra* Part II.E.2.

126. *See supra* Part II.E.3. The issue also arises in the liquidated damages area. Some courts require that real world facts at the time of the breach confirm the subjective view of actual loss in event of a breach, which the parties held at the time of contract formation. FISCHER, *supra* note 27, § 181.3. Under this view, it is not sufficient that the parties actually contemplated a loss if there was a breach. The breach must actually result in a loss for the liquidated damages clause to be enforceable. This requirement acts very much like an actual injury requirement, although it is analytically distinct from the requirement.

B. Tenative Suggestions

As suggested earlier, it is easier to collect examples in this area than it is to find a common unifying theme that classifies and sorts the cases into a coherent scheme. There is no taxonomy or lexicon that addresses the actual injury requirement as a separate, freestanding value. Rather, it appears more as a conclusion or afterthought to other concerns, such as genuineness of the claim, avoidance of economic waste, protection of property rights, etc. Analysis is particularly difficult because the examples do not line up and point in a specific direction. If they did, one could perhaps identify an underlying worldview out of the decisions. Instead, the decisions go back and forth and swirl like eddies, rather than flow like currents. The application of the actual injury requirement is highly contextual, although the contextual considerations must be teased out of the decisions. Courts do not admit that context matters, but there is no other way to read the decisions. Let me offer some thoughts as to what may lie behind the disparate examples of the applications of the actual injury rule.

First, the refusal to recognize or permit a damages award for violation of a right absent a showing of actual injury does not necessarily depict a disregard or marginalization of the right. Most cases of rights violations result in actual injury. In many contexts, the injury threshold is set sufficiently low.[127] It is the unusual case that presents the clean, no actual injury profile.

Second, the larger concern that should drive analysis in this context is not the presence or absence of actual injury, but the consequence of requiring actual injury as a condition to protecting the right. Put simply, the issue is whether individuals should be allowed to violate a legal standard as long as the violation does not cause actual economic harm to a specific individual protected by the standard. Looked at from this vantage point, the incentives may seem skewed, but I suggest that view may be mistaken. As noted above, the likelihood that a rights violation would lead to no actual injury is small.

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127. For example, in the constitutional tort/civil rights context, the general rule is to allow the victim to satisfy the actual injury requirement by demonstrating that the violation caused him emotional distress. *See supra* text accompanying note 77. *But cf.* Brandt v. Bd. of Educ. of Chi., 480 F.3d 460, 465 (7th Cir. 2007) (suggesting that injuries resulting from being suspended from school for a short duration of time "are minuscule to the point of nonexistent").

More importantly, the converse situation (permitting a damages recovery in the absence of actual injury) might create perverse incentives. If a plaintiff could receive compensation for a rights violation without establishing actual injury, this would tend to monetize the value of the right. One policy consequence of this might be that rights violations may increase whenever the benefit of a rights violation is deemed to outweigh the cost of paying the victim. This would, in effect, import the concept of efficient breach into violations of rights.[128] One remedial consequence might be the loss of injunctive relief in this context.[129] At present, the absence of a damages remedy supports the allowance of injunctive relief. Moreover, success on the claim for injunctive relief allows the prevailing plaintiff to recover attorney's fees. If, however, rights violations can be monetized, the case for injunctive relief is weakened because the legal remedy (damages) is no longer inadequate relative to the equitable remedy (injunctive relief).[130] Ironically, permitting recovery of damages without a showing of actual injury (monetizing the right) might cause the value of the equitable remedy to depreciate. The concern is also expressed in the judicial reluctance to permit a damages action to discourage certain rights violations when the consequence of permitting a damages recovery would commodify the right, such as allowing defendants the right to expropriate private property by paying compensation.[131]

Third, in some cases, "slippery slope" concerns may caution against redressing mere violations of law or legal duty. Imposing an actual injury requirement and treating the "harm" as not satisfying

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128. Evra Corp. v. Swiss Bank Corp., 673 F.2d 951, 957–58 (7th Cir. 1982) (noting that there is little evidence of general judicial enthusiasm for the project). Even Judge Posner, I believe, would limit the intrusion of efficient breach principles into tort to those situations where the underlying obligation is bargain-related. Judge Posner argues:

> The law is not as clear as it could be in differentiating between "interferences" with contract that result in an efficient breach and should therefore not be deemed a tort and subjected to sanctions that would either prevent the efficient breach or require a roundabout recontracting, and interferences that induce breaches that reduce efficiency.

Posner, *supra* note 38, at 744.

129. 1 DOBBS, *supra* note 5, § 2.5 (noting that the absence of a legal remedy is justification for providing an equitable remedy); FISCHER, *supra* note 27, § 21.1.

130. *See supra* note 1 and accompanying text.

131. *See supra* note 107–108 and accompanying text. The aftermath of the Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), in which the Court refused to invalidate public condemnation for private use, well illustrates both the intensity of the issue and the lack of consensus as to its proper resolution.

the requirement accomplishes that objective. For example, should a defendant's decision to bypass an opportunity to bargain with the plaintiff be treated as a divisible, actual injury?[132] There may be concern that treating the failure to bargain as an injury could lead to identifying it as a wrong. That eventuality may cause courts to not want to take the first step as they might have reasonable concerns over the prospect of creating liability for the failure to bargain. Courts may also be concerned with their ability to measure the harm resulting from the failure to bargain. Is the harm any different from the harm sustained by the underlying act? Should failure to bargain be seen as separate from the primary wrong or as indivisible from the primary harm? These concerns may encourage judicial caution that expresses itself in non-recognition of a remedy or, if a rights violation is recognized, in a non-damages remedy, such as restitution.[133]

Ultimately, whether the actual injury requirement should be jettisoned or retained becomes a case-specific inquiry: what values will be advanced or retarded in this specific context if the actual injury rule is applied? Thus, the diversity in the decisions is expected, rather than surprising. One can, and does, encounter overlaps because the key inquiry is the same: should actual injury be required? The results vary, however, with the case. For example, retention of the actual injury requirement may make sense in the constitutional tort/civil rights context because we do not want to: (1) diminish the right by monetizing it, (2) encourage violations based on cost/benefit criteria,[134] or (3) undermine the availability of injunctive relief to police respect for the right. These factors may not, however, travel well when applied to the other contexts discussed in this Article where the actual injury requirement is considered and applied.

Let me present one last case to illustrate the difficulty in arriving at a consistent approach to the question. In *Franklin Medical Associates v. Newark Public Schools*,[135] the injured party was the

132. *See supra* notes 109–117 and accompanying text (discussing hypothetical of unauthorized use of land).

133. FISCHER, *supra* note 27, §§ 41, 43, 85, 93.5, 94.5.

134. This is not suggesting that cost/benefit analysis is bad. Private cost/benefit calculations may, however, vary from the public calculations that were made (at least in theory) when the right was recognized.

135. 828 A.2d 966 (N.J. Super. Ct. App. Div. 2003).

school system (Newark Public Schools) that entered into a health maintenance contract with a third-party (Franklin Medical Associates) (Franklin) to provide health care services to the school system's employees.[136] As a result of bribes paid to one of the school system's employees by Franklin, the school system's employees were directed to Franklin for medical services.[137] The school system, as the payor of the bills incurred by its employees, did not sustain an actual injury because the treatment was medically proper and consistent with the contract between the school system and its employees. The court held, however, that the bribe did interfere with the school system's right of loyalty arising out of its relationship with its bribed employee.[138] The court held that on these facts the school system could recover the amount of the bribe ($60,000) as damages, notwithstanding the absence of actual injury.[139]

The recovery of damages against the briber has not been without controversy.[140] Ultimately, the decision to permit recovery rests on the goal of deterrence, which is an often relied on, but hard to justify, reason for a particular result.[141] Requiring the briber to pay the amount of the bribe as damages raises the costs of the rights violation. When the right is highly valued and when other remedies are unlikely to effectively prevent violations,[142] a damages award

136. *Id.* at 970.

137. *Id.*

138. The court characterized the relationship as fiduciary. *Id.* at 975. While that may be a bit of an overstatement, the point is not critical to the analysis.

139. *Id.* at 974.

140. In a typical case the bribe is paid to obtain a contract. Here courts often presume that the bid was inflated as a result of the bribe; hence the bid taker was damaged as a result of the overpayment. United States v. Killough, 848 F.2d 1523, 1532 (11th Cir. 1988). Professor Dobbs comments:

> What damages can the victimized employer claim? When the victim is a buyer of the briber's goods, it may be assumed that the briber would have sold at a lower price if he had not had to pay the bribe. The idea is that the briber who gives 10% kickback to the purchasing agent would just as soon give a 10% discount to the victim; or alternatively, that if the briber expects to benefit by at least the amount of the bribe, he must be inflicting an injury in the same degree.

2 DOBBS, *supra* note 5, § 10.6, at 699 (footnote omitted) (emphasis added).

141. *See supra* note 93 (noting difficulty in determining extent to which, if at all, legal rules meaningfully deter).

142. While an action for unjust enrichment will lie against the bribee, establishing an action for unjust enrichment is a difficult and time-consuming task. Even if the briber "benefits" from the bribe—as, for example, by the wrongful direction of business to it—tying the benefit to the bribe may be difficult. The briber's revenues or profits may bear no real relationship to the bribe; rather, they are the product of the services provided. Disgorgement, even if available in a private

may be seen as an appropriate method for deterring wrongdoing,[143] at least in the abstract.

To summarize, the divergency in the cases regarding the necessity of actual injury as a condition to an award of compensatory damages may reflect concerns that accentuate or marginalize the requirement. In the accentuate category are:

(1) a desire to discourage litigation;

(2) a concern over claim validity;

(3) a desire that parties signal their preferences ex ante rather than ex post; and

(4) a desire to avoid economic waste.

In the marginalize category are:

(1) a desire to compensate more fully to ensure adequate deterrence;

(2) a desire to allocate properly non-pecuniary incentives to encourage respect for rights; and

(3) a desire to protect rights from unconsented to invasions by encouraging bargaining.

IV. CONCLUSION

Richard Abel wrote recently on the placement and attention to the subject of damages in the Torts curriculum. In doing so, he made a comment that I found interesting in its relationship to the topic of this Article:

> The reason for not going into greater detail is suggested [by Jaffe]. Professor Jaffe asserted that questions of liability have "great doctrinal fascination" but that damage questions "and particularly their magnitude . . . do not lend themselves so easily to discourse. Professors dismiss them airily as matters of trial administration." The reason for the different treatment is not so much a "judgment of relative

context, may appear to be disproportionate to the wrong. FISCHER, *supra* note 27, § 51. *But cf.* United States v. Rogan, 459 F. Supp. 2d 692, 726–27 (N.D. Ill. 2006) (holding that the government could recover false payments made pursuant to a kickback scheme because the government would not have made any payments if it knew about the scheme).

143. Sometimes a court might achieve this result by presuming that the violation resulted in injury. *See* 2 DOBBS, *supra* note 5, § 7.3(4), at 317–18 (suggesting that awards of statutory damages for violation of privacy are the equivalent of presumed damages); *see also supra* notes 135–143 and accompanying text (discussing damages resulting from receiving a bribe).

> importance . . . as the relative adaptability of the subjects to conceptualization."[144]

My suspicion is that a room of Remedies professors would not share Jaffe's views and, of course, the Remedies professors would be correct. Remedies, no more and no less than Torts, or any other law subject for that matter, is on the surface a bundle of technical rules. It is what lies beneath the rule that is important. What policies and judgments go into the making and filling of the rules? What policies and judgments go into the decision to recognize and apply the rule in a particular instance or ignore the rule or choose between competing rules? Is there a pattern to the interstices of the structure of rules applicable to the problem? The actual injury requirement illustrates these points. On the surface, the actual injury requirement is commonplace. It is cited and used by courts in a variety of contexts as I have attempted to demonstrate in this Article. Yet, beneath the rule and its application lays a basic, inchoate question: should the court encourage litigation respecting a claim that a right was violated by allowing the victim to recover damages without showing that the rights violation produced actual injury? The judicial response appears to be "it depends." Given the diversity of applications of the actual injury requirement and the differences in its applications, this may be as close to a unifying theme as one can identify.

144. Richard Abel, *General Damages Are Incoherent, Incalculable, In Commeasurable, and Inegalitarian (But Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253, 254 (2006) (quoting MARC. A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 431 (3d ed. 1983) (citations omitted).