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## When Losses Are Too Big: Evaluating the Economic Loss Doctrine in California

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# WHEN LOSSES ARE TOO BIG: EVALUATING THE ECONOMIC LOSS DOCTRINE IN CALIFORNIA<sup>†</sup>

*John T. Nockleby\**

*The pure economic loss doctrine is a rule developed by common law courts to shield a defendant from exposure to negligence suits where a party has not suffered physical injury or property damage, and the only losses someone suffers are economic in nature—such as lost profits or wages. Most recently, the California Supreme Court evaluated whether the doctrine should be applied in a case involving a massive environmental disaster, holding that the doctrine shielded a utility from liability for the economic losses to neighboring businesses caused by its putative negligence.*

*In October of 2015, a huge underground natural gas storage facility operated by Southern California Gas Company suffered a breathtaking blowout. Over a four-month period until the leak was capped, the facility blew 100,000 tons of natural gas into the atmosphere and surrounding communities. Public health officials directed the utility to evacuate nearly 15,000 residents within a five-mile radius of the storage facility. Numerous signs indicated Southern California Gas Company was not only negligent, but potentially grossly negligent in removing or failing to install safety valves on the injection wells and having no system in place to monitor several failing wellheads. Businesses within the evacuation zone that saw their revenues plummet brought suit against the company seeking recovery of the economic losses they suffered as a result of the evacuation.*

*This Article evaluates the California Supreme Court's decision, recognizing the worries that court and others have expressed concerning how to limit a cascade of economic losses stemming from potentially minor acts of negligence. However, the Article argues that a rule that might be justified in particular contexts (e.g., an automobile accident in*

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<sup>†</sup> Reviewing *Southern California Gas Leak Cases*, 441 P.3d 881 (Cal. 2019). Disclosure: I helped organize a group of California tort law professors to file an amicus brief in the California Supreme Court. See Application for Leave to File Amici Curiae Brief in Support of Petitioners; Proposed Brief of Amici Curiae California Tort Law Professors, *Southern California Gas Leak Cases*, 441 P.3d 881 (Cal. 2019) (No. S246669), 2018 WL 4277779.

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*a tunnel that might hold up thousands of commuters) should not apply to the destruction following enormous environmental disasters, where a single grossly negligent defendant might destroy the livelihoods of entire communities as well as the natural environment.*

*While critiquing the decision on moral, economic, and pragmatic grounds, the Article evaluates many leading cases to suggest how lines allowing recovery in special settings would not threaten undue liability. The Article argues that the economic loss rule should not apply in instances of massive environmental disasters, where significant losses suffered by nearby enterprises can be readily identified, and the number of potential claimants can be limited—such as here, where the five-mile zone during the four month evacuation period provides a ready, ascertainable limit on who might be able to claim their economic losses and for a limited period of time.*

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## I. INTRODUCTION: AN ENVIRONMENTAL DISASTER

In October of 2015, residents in the Porter Ranch community near Los Angeles discovered the pungent odor of natural gas in their neighborhoods.<sup>1</sup> What turned out to be an enormous natural gas blowout from a storage facility spread an “oily mist” throughout the community.<sup>2</sup> Thousands of residents suffered headaches, dizziness, and acute respiratory and central nervous system disorders.<sup>3</sup> Students at local schools complained of nosebleeds and vomiting.<sup>4</sup>

The leak was long-lasting and intense, and it took nearly four months to cap the source.<sup>5</sup> At its peak, the facility emitted fifty-five tons of natural gas every hour.<sup>6</sup> By the time the leak was controlled, it had set loose about 100,000 tons of natural gas, “releasing enough greenhouse gases into the atmosphere to erase several years’ worth of efforts to combat climate change in California.”<sup>7</sup> The blowout “spewed a volume of gas 220 times greater than the amount of oil released during the 2010 Deepwater Horizon oil spill in the Gulf of Mexico.”<sup>8</sup> The disaster has been described as the worst natural gas leak in United States history.<sup>9</sup>

The leak had sprung from an underground reservoir called the Aliso Canyon Storage Facility, operated and maintained by Southern California Gas Company (“SoCalGas”).<sup>10</sup> A depleted oil and gas field repurposed to store natural gas,<sup>11</sup> the facility has enormous capacity: it can hold 80 billion cubic feet of natural gas some 8,500 feet below

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1. Southern California Gas Leak Cases, 227 Cal. Rptr. 3d 117, 119 (Ct. App. 2017), *aff’d* 441 P.3d 881 (Cal. 2019).

2. *Id.*

3. *Id.* at 130.

4. Southern California Gas Leak Cases, 441 P.3d 881, 883 (Cal. 2019).

5. *Id.* at 884.

6. *Id.* at 883.

7. *Id.* at 884.

8. Plaintiffs’ Memorandum of Points and Authorities in Opposition to Demurrer of Defendants Southern California Gas Company and Sempra Energy to Second Amended Consolidated Master Class Action Business Complaint, Southern California Gas Leak Cases at 10, No. JCCP4861 (Cal. Super. Ct. May 8, 2017), 2017 WL 2361045.

9. Mark Chediak & Edvard Pettersson, *Biggest U.S. Gas Leak Followed Years of Problems, State Says*, BLOOMBERG (May 17, 2019, 1:19 PM), <https://www.bloomberg.com/news/articles/2019-05-17/corrosion-led-to-worst-u-s-gas-leak-ever-and-there-were-others>.

10. Southern California Gas Leak Cases, 227 Cal. Rptr. 3d 117, 130 (Ct. App. 2017), *aff’d* 441 P.3d 881 (Cal. 2019).

11. *Background on Aliso Canyon and Actions to Date*, CAL. PUB. UTIL. COMMISSION, <https://www.cpuc.ca.gov/CPUCNewsDetail.aspx?id=6442461346> (last visited Jan. 13, 2020).

ground.<sup>12</sup> SoCalGas adds to the facility during low usage months and, during seasons of demand, extracts it using 115 high-pressure injection and withdrawal wells.<sup>13</sup> The reservoir extends below the community of Porter Ranch.<sup>14</sup>

In response to the leaks, and the complaints of residents having dire health problems, the Los Angeles County Department of Public Health directed SoCalGas to relocate anyone within a five-mile radius of the storage facility.<sup>15</sup> The Los Angeles County Board of Education followed by closing schools in the area for the remainder of the 2015–2016 school year.<sup>16</sup>

As a result of the evacuation order, approximately 15,000 Porter Ranch residents left their homes for several months.<sup>17</sup> Not until February 18, 2016, nearly four months after the leak was discovered, were state officials able to report that the eruptions had been sealed off.<sup>18</sup> In May 2016, the Department of Public Health directed SoCalGas to provide comprehensive remediation for residences within that five mile radius.<sup>19</sup>

What caused the leak? According to subsequent filings and findings by government agencies, SoCalGas had been negligent in maintaining the facility.<sup>20</sup> Among other defaults, SoCalGas was alleged by plaintiffs in the *Southern California Gas Leak Cases*<sup>21</sup> to have removed or never installed safety valves on the injection wells.<sup>22</sup>

One of the wells, known as Standard Senson 25, or SS-25, suffered a blowout, which is what led to the devastation of the Porter Ranch community, the spread of the natural gas, and dislocation of the residents.<sup>23</sup> The SS-25 well—like the other wells tapping the field—

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12. *Id.*

13. *Id.*; see Petitioners’ Opening Brief on the Merits at 12, *Southern California Gas Leak Cases*, 441 P.3d 881 (Cal. 2019) (No. S246669), 2018 WL 3006424 at \*12. The California Public Utilities Commission (CPUC) maintains a website reporting on developments in the disaster. See *Background on Aliso Canyon and Actions to Date*, *supra* note 11.

14. Petitioners’ Opening Brief on the Merits, *supra* note 13, at 12.

15. *Id.* at 14.

16. *Id.*

17. *Id.*

18. *Southern California Gas Leak Cases*, 227 Cal. Rptr. 3d 117, 130 (Ct. App. 2017), *aff’d* 441 P.3d 881 (Cal. 2019).

19. *Id.* at 119.

20. See *Background on Aliso Canyon and Actions to Date*, *supra* note 11.

21. 441 P.3d 881 (Cal. 2019).

22. Petitioners’ Opening Brief on the Merits, *supra* note 13, at 12–14.

23. *Background on Aliso Canyon and Actions to Date*, *supra* note 11.

contained both a seven-inch exterior casing and an interior tube.<sup>24</sup> The exterior casing is typically filled with a brine.<sup>25</sup> The interior tube is used to pump gas, so if it develops a leak, the exterior casing will contain the leak.<sup>26</sup> In this case, plaintiffs alleged, SoCalGas used both the interior and exterior casing to inject and extract gas—all at high pressure.<sup>27</sup> Further, they alleged that the company failed to cement the casing at the surface area, dramatically increasing the risk of corrosion.<sup>28</sup>

Subsequent findings by the California Public Utility Commission (CPUC) buttress the plaintiffs' claims in the *Gas Leak Cases* that SoCalGas negligently operated and maintained the blowout well.<sup>29</sup> The SS-25 well was drilled between October 1953 and 1954.<sup>30</sup> However, the original borehole was abandoned because a drill string and tools were lost in the hole.<sup>31</sup> However, in 1973, SS-25 was converted to a gas storage well.<sup>32</sup> The CPUC confirmed that SoCalGas used both the tubing and casing to inject and withdraw gas.<sup>33</sup> Thus, according to the CPUC, the only barrier to the environment was the exterior casing.<sup>34</sup>

The CPUC retained a consultant to evaluate SoCalGas operations at the Aliso Canyon field.<sup>35</sup> The consultant found that the leak occurred because the outer seven-inch well casing ruptured due to corrosion.<sup>36</sup> It also concluded that in the years prior to the SS-25 blowout, SoCalGas had experienced over sixty casing leaks, but (amazingly) had not conducted detailed follow-up inspections or analyses.<sup>37</sup> Indeed, the consultant found, "SoCalGas lacked *any* form of risk assessment," and lacked *any* system to monitor their wells'

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24. *Id.*

25. Petitioners' Opening Brief on the Merits, *supra* note 13, at 13.

26. *Id.*

27. *Id.*

28. *Id.* at 12–13.

29. *See Background on Aliso Canyon and Actions to Date, supra* note 11.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Press Release, Cal. Pub. Utils. Comm'n, Root Cause Analysis for Aliso Canyon Finalized; California to Continue Strengthening Safeguards for Natural Gas Storage Facilities 1 (May 17, 2019), <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M292/K947/292947433.pdf>.

36. *Id.*

37. *Id.*

integrity.<sup>38</sup> Over a two-year period, after assessments mandated by state officials, more than half of the wells were shut down; the rest have been approved as adequately secured.<sup>39</sup>

Although the CPUC did not say so in describing its consultant's report, the consultant's conclusions would support a finding that SoCalGas had been *grossly* negligent in operating and maintaining the Aliso Canyon field.

## II. THE SOUTHERN CALIFORNIA GAS LEAK CASES

What happens to local businesses when 15,000 residents located within a five-mile evacuation zone of a community are suddenly required to relocate because of a disaster caused by the negligence of a company? The businesses lose customers, and owners and their employees are themselves required to evacuate if they do not want to experience health problems. "The slump hit local gas stations, stores, realtors, daycare facilities, preschools, manicurists, fitness studios, pharmacies, restaurants, doctors, and [others]."<sup>40</sup>

In *Southern California Gas Leak Cases*, seven small businesses located within the Porter Ranch evacuation zone filed a lawsuit against SoCalGas seeking lost profits for themselves and several hundred other businesses, covering their losses at least during the four months before the gas leak was stoppered.<sup>41</sup> SoCalGas filed a demurrer on the grounds that it owed "no duty" to the plaintiffs to protect them from what it described as "purely economic losses."<sup>42</sup>

The pure economic loss doctrine is a rule developed by common law courts to shield a defendant from exposure to negligence suits where the only loss someone suffers is economic in nature.<sup>43</sup> The doctrine has been employed in a number of separate contexts, and no small amount of confusion has resulted when courts and

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38. *Id.* at 2 (emphasis added).

39. *Id.*

40. *In re* Coordination Proceedings Special Title Rule (3.550) Southern California Gas Leak CA., No. JCCP4861, 2017 WL 2361919, at \*2 (Cal. Super. Ct. May 8, 2017).

41. Southern California Gas Leak Cases, 441 P.3d 881, 884, 896 (Cal. 2019); Southern California Gas Leak Cases, 227 Cal. Rptr. 3d 117, 119 (Ct. App. 2017), *aff'd* 441 P.3d 881 (Cal. 2019).

42. Southern California Gas Leak Cases, 441 P.3d at 884.

43. *Id.* at 885. The California Supreme Court employed that term "as a shorthand for 'pecuniary or commercial loss that does not arise from actionable physical, emotional or reputational injury to persons or physical injury to property.'" *Id.* (quoting Dan B. Dobbs, *An Introduction to Non-Statutory Economic Loss Claims*, 48 ARIZ. L. REV. 713, 713 (2006)).



commentators have failed to distinguish between at least two of them.<sup>44</sup>

The two contexts involve: (a) pre-existing relationships often reflected in contractual relationships, where the plaintiff is suing the defendant in negligence; and (b) stranger cases, where people suffer injury that is not implicated by a contractual relationship, and again the suit is based upon negligence. As will be apparent, the *Gas Leak Cases* involve only the second set, although the parties' briefs and the California Court of Appeal's decision comprehensively addressed both.

### A. Pre-Existing Relationships

Where products or services subject to a contractual relationship are involved, courts have generally triggered the economic loss rule to restrict recovery by one of the parties involved in the transaction.<sup>45</sup> Consider the famous *East River Steamship Corp. v. Transamerica Delaval, Inc.*<sup>46</sup> case, decided by the United States Supreme Court under admiralty law but influential as to products liability tort law.

In *Transamerica Delaval*, a charterer of a ship propelled by turbines manufactured by Transamerica sued for loss of business when the turbines proved defective; lacking power, the ships were out of commission for months.<sup>47</sup> The United States Supreme Court held that since the defective turbines damaged only themselves and not persons or other property, the charterers were barred from securing their

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44. Here I follow the lead of Dobbs, Hayden & Bublick. 3 DOBBS, HAYDEN & BUBLICK, THE LAW OF TORTS §§ 607, 613, at 462–69, 479–84 (2d ed. 2011); see also Oscar S. Gray, *Some Thoughts on "The Economic Loss Rule" and Apportionment*, 48 ARIZ. L. REV. 897, 898 (2006) (arguing that there is no single "economic loss rule" but instead a "constellation of somewhat similar doctrines that tend to limit liability" that work differently in different contexts, for not necessarily identical reasons "with exceptions where the reasons for limiting liability were absent"); Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 534–35 (2009).

45. See DOBBS, HAYDEN & BUBLICK, *supra* note 44.

46. 476 U.S. 858 (1986). The Court thought that the doctrine was needed to prevent warranty law from "drown[ing] in a sea of tort." *Id.* at 866. In its analysis, the Supreme Court noted that the law of product liability was based on the idea that injured persons should receive greater protection from dangerous products than is available through warranty law. *Id.* However, where a product defect results only in damaging itself, that is not the kind of harm that requires recovery in tort. *Id.* at 870–71. Where the only loss is to a product itself, a plaintiff's loss is essentially the loss of the product; in the Court's view a disappointed party's expectations can be adequately managed through contract and warranty law. *Id.*

47. *Id.* at 861.

economic losses through a negligence suit in tort.<sup>48</sup> They could recover, if at all, only in contract.<sup>49</sup> The doctrine was said to secure the boundary between contract and tort, limiting recovery to just contract damages when a product failed to perform as expected.<sup>50</sup>

Similarly, California courts have wrestled with the economic loss doctrine involving pre-existing relationships. In *Seely v. White Motor Co.*,<sup>51</sup> a consumer purchased a truck with defective brakes.<sup>52</sup> The truck overturned and caused only damage to the truck.<sup>53</sup> Plaintiff sued the manufacturer and the dealer for the property damage to the truck, the money he paid for the truck, and lost profits.<sup>54</sup> The court held that contract law—including warranty—was the appropriate remedy when the claim is that a product does “not match his economic expectations,” while tort law would address physical injury to people or property other than damage to the product itself.<sup>55</sup>

In *Robinson Helicopter Co. v. Dana Corp.*,<sup>56</sup> the California Supreme Court explained the rule as follows: “[W]here a purchaser’s expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only ‘economic’ losses.”<sup>57</sup> For purposes of this rule, “economic losses” consist of “damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits—without any claim of personal injury or damages to other property.”<sup>58</sup>

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48. *Id.* at 875–76.

49. *See id.*

50. *Id.* at 873; *see, e.g.*, Johnson, *supra* note 44, at 546 (“The underlying purpose of the economic loss rule is to preserve the distinction between contract and tort theories in circumstances where both theories could apply.”).

51. 403 P.2d 145 (Cal. 1965).

52. *Id.* at 147.

53. *Id.*

54. *Id.* at 148.

55. For the “other property” analysis, see *KB Home v. Superior Court*, 5 Cal. Rptr. 3d 587 (Ct. App. 2003). An injured “component” may be defined as “other property” if it is “a sufficiently discrete element of the larger product that it is not reasonable to expect its failure invariably to damage other portions of the finished product.” *Id.* at 596; *see Aas v. Superior Court*, 12 P.3d 1125, 1134–35 (Cal. 2000), *superseded by statute on other grounds*, 2002 Cal. Legis. Serv. Ch. 722 (S.B. 800) (West), *as recognized in Rosen v. State Farm Gen. Ins. Co.*, 70 P.3d 351, 356 (Cal. 2003).

56. 102 P.3d 268 (Cal. 2004).

57. *Id.* at 272 (alteration in original).

58. *Id.* at 273.

A similar version of the economic loss rule has also been applied to services contracts.<sup>59</sup> According to the *Restatement (Third) of Torts* authors, one subcontractor on a project cannot sue another subcontractor for economic losses caused by the other's negligent delay in completing the project.<sup>60</sup> However, where a contractor's negligence is claimed to have caused harm to portions of the property not part of the contract, the plaintiff has alleged a duty independent of any contract and may maintain the suit.<sup>61</sup>

Even in pre-existing contractual relationship cases, the California Supreme Court has developed an important exception, termed a "special relationship," which is potentially available to persons not in contractual privity.<sup>62</sup> The existence of a special relationship depends on balancing six factors: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty the plaintiff suffered injury; (4) the proximity of connection between the conduct and the injury; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing similar future harm.<sup>63</sup>

What is generally meant by the term "special relationship," is that the plaintiff's interest was contemplated by the contracting parties, although not specifically addressed in the contract. For instance, if a lawyer drafts a will, the beneficiary is not a party to the transaction but

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59. 3 DOBBS, HAYDEN & BUBLICK, *supra* note 44, § 615 at 493–95.

60. The *Restatement (Third) of Torts* authors explain:

A subcontractor's negligence in either case is viewed just as a failure in the performance of its obligations to its contractual partner, not as the breach of a duty in tort to other subcontractors on the same job, or to the owner of the project . . . . General rules are favored in this area of the law . . . because their clarity allows parties to do business on a surer footing. In this setting, a rule of no liability is made especially attractive by the number and intricacy of the contracts that define the responsibilities of subcontractors on many construction projects. That web of contracts would be disrupted by tort suits between subcontractors or suits brought against them by a project's owner.

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 6 cmt. b (AM. LAW INST., Tentative Draft No. 2, 2014).

61. See *Robinson Helicopter*, 102 P.3d at 274 n.7 (citing *Jimenez v. Superior Court*, 58 P.3d 450 (Cal. 2002)).

62. *J'Aire Corp. v. Gregory*, 598 P.2d 60, 63 (Cal. 1979) (finding a special relationship between a restaurant operator and a contractor hired by the property owner to renovate the space rented by the restaurant operator and allowing the operator to recover economic losses suffered because the contractor negligently failed to complete the work on time).

63. *Id.* at 63; *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958) (holding that the intended beneficiary of a will could recover against a notary whose negligence in preparing the will precluded the beneficiary's devise). There is a further exception for fraud, or where one party intentionally breaches the contract. *Robinson Helicopter*, 102 P.3d at 274.

is surely harmed “economically” if the lawyer fails to execute the will properly.<sup>64</sup> As the California Supreme Court put it, “[w]hat we mean by special relationship is that the plaintiff was an intended beneficiary of a particular transaction but was harmed by the defendant’s negligence in carrying it out.”<sup>65</sup>

Although the California Court of Appeal in the *Gas Leak Cases* devoted substantial attention to discussing pre-existing relationship cases, the concerns embodied by the economic loss doctrine in contractual situations (allowing parties to make their own contract relationships and preventing end-runs around contract damage limitations<sup>66</sup>) are not present in the *Gas Leak Cases*.<sup>67</sup> Instead, different issues need to be taken account of.

### B. Stranger Cases

A second context in which the pure economic loss rule has been applied concerns circumstances not involving pre-existing relationships. The second set of circumstances typically involves negligent behavior by a stranger that injures only the economic interests of a person.

Consider an auto accident on a busy highway or tunnel caused by a negligent driver that holds up traffic for miles and delays many commuters.<sup>68</sup> Those involved in the accident who are physically injured or whose property is damaged may sue for personal injuries and property loss, and may also generally recover economic losses

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64. See *Lucas v. Hamm*, 364 P.2d 685, 689–90 (Cal. 1961) (involving a lawyer); *Biakanja*, 320 P.2d at 18 (involving a non-lawyer, a notary).

65. *Southern California Gas Leak Cases*, 441 P.3d 881, 887 (Cal. 2019).

66. See *Robinson Helicopter*, 102 P.3d at 275–76.

67. *Total Renal Care, Inc. v. Childers Oil Co.*, 743 F. Supp. 2d 609, 619 (E.D. Ky. 2010) (“[The] central rationale of the economic loss rule loses its force when there is no contractual relationship between the parties.”).

68. See, e.g., Robert L. Rabin, *Tort Recovery for Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1536–38 (1985). The court also utilized this example to illustrate the economic loss doctrine. See Judge Kaufman’s example in *Petitions of Kinsman Transit Co.*:

To anyone familiar with N.Y. traffic there can be no doubt that a foreseeable result of an accident in the Brooklyn Battery Tunnel during rush hour is that thousands of people will be delayed. A driver who negligently caused such an accident would certainly be held accountable to those physically injured in the crash. But we doubt that damages would be recoverable against the negligent driver in favor of truckers or contract carriers who suffered provable losses because of the delay or to the wage earner who was forced to ‘clock in’ an hour late. And yet it was surely foreseeable that among the many who would be delayed would be truckers and wage earners.

*Cargill, Inc. v. City of Buffalo (Petitions of Kinsman Transit Co.)*, 388 F.2d 821, 825 n.8 (2d Cir. 1968).

such as lost pay or lost profits from business resulting from the driver's negligence. However, under the economic loss rule, other drivers—not physically injured nor suffering property damage—who are merely inconvenienced or who lose pay or profit because of the delay caused by the negligent driver, may not recover what are described as “pure economic losses.”<sup>69</sup>

In this second setting, the economic loss rule functions not as a mechanism for policing the boundary between contract and tort, but instead as a way of limiting the running of damages. While the delayed drivers in the highway illustration have lost pay or profit and can link their losses to the closing of the highway, courts have found it impossible to construct limits on liability that seem defensible. They worry that a negligent driver could be held liable to a thousand or more delayed vehicle operators, with no apparent way to distinguish one plaintiff from another or to limit ever-expanding liability exceeding any sense of moral culpability on the part of the negligent motorist.

Under circumstances such as these, the *Restatement (Third) of Torts* posits that purely economic losses “proliferate more easily than losses of other kinds” and “are not self-limiting” in the same way that personal injuries or property damages are.<sup>70</sup> Allowing recovery for such economic losses suffered by the delayed motorists create “liabilities that are indeterminate and out of proportion to [a defendant's] culpability” and, with those liabilities, “exaggerated pressure to avoid an activity altogether.”<sup>71</sup>

However, do the circumstances raised by the SoCalGas blowout create the same concerns when applied to the four hundred businesses in the evacuation zone?

### III. THE CALIFORNIA SUPREME COURT DECISION

In response to the plaintiffs' complaint charging the operator of the Aliso Canyon Storage Facility with negligence in operations and maintenance, SoCalGas filed a demurrer arguing that the economic loss rule barred the action.<sup>72</sup> Such a motion entails arguing that SoCalGas owed *no duty* to the plaintiff businesses to avoid creating

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69. See Rabin, *supra* note 68, at 1513, 1536–38.

70. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 1 cmt. c(1) (AM. LAW INST., Tentative Draft No. 1, 2012).

71. *Id.*

72. Southern California Gas Leak Cases, 441 P.3d 881, 884 (Cal. 2019).

risks that impose pure economic losses on them, or anyone else for that matter.

But why is this a question of duty? Why a question of duty rather than a question, for example, of damages (you owe a duty to avoid exposing others to loss, but economic damages are excluded where the only damage suffered is economic in nature) or proximate cause (you owe a duty, but recovery for pure economic losses may be restricted because they are too remote from the defendant's negligent act)?<sup>73</sup>

One possibility for why courts may treat pure economic loss as a question of duty rather than under a different doctrinal category is that they may see economic losses as not “truly” legal injury. If whatever losses the businesses in the evacuation zone suffer are not “harms,” then it makes sense to cut off analysis at the earliest analytical opportunity—that is, to say SoCalGas owes no duty to avoid negligently imposing pure economic losses on its neighbors because those are not true harms.<sup>74</sup>

But that is not how courts generally see the issue. If economic losses are associated with personal injury or property damage, they are clearly recoverable by the injured person. Additionally, many other torts (e.g., interference with contract, fraud, misrepresentation, slander of title, product disparagement, attorney malpractice) allow recovery for pure economic loss.<sup>75</sup> So, even though the consequence of treating the problem at hand as a duty question means that, in fact, SoCalGas owes *no duty* to avoid negligently inflicting pure economic losses on its neighbors, it is not because the businesses' lost profits are not true injuries.

Instead, the likely answer to why courts treat economic losses under a duty analysis lies in the fact that deciding the question at the level of duty, rather than types of damage or proximate cause, keeps the analysis squarely in the hands of judges who have the power to

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73. See Gray, *supra* note 44, at 900–01 (“Surely in principle we owe foreseeable victims of our negligence a duty of care—in the sense that we ought to exercise reasonable care toward them—regardless of how we may explain our non-liability to unforeseeable victims and regardless of any countervailing considerations we may accept as limitations of our liability for harm caused by our breach of that duty of care.”).

74. An analysis of the nature of harm and injury is beyond the scope of this Article. See JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 35 (2001).

75. Indeed, the principle harm rectified by these torts is the economic loss suffered by the injured person.

dismiss the lawsuit at the complaint stage.<sup>76</sup> Whether an enterprise owes a duty to someone to avoid injuring them is a question of law.<sup>77</sup> If a defendant owes “no duty” to avoid injuring someone, lawsuits are subjected to early dismissal for failure to state a claim (achieved procedurally in California through a defendant’s demurrer).<sup>78</sup> If an enterprise owes you no duty to avoid injuring you in a particular way, there is no point in conducting a trial, or even allowing discovery.

However, suppose the court in the *Gas Leak Cases* had instead approached the question as one of proximate causation instead of duty. Then, the defendant would owe a duty and the question would rise to whether the economic losses suffered by these businesses were proximately caused by the defendants’ negligence. A causation analysis would expose a number of steps involved in deciding the question of ultimate liability:

1. But for SoCalGas’s negligence, the gas would not have erupted from the SS-25 well casing;
2. But for the blowout, the government authorities would not have declared an emergency evacuation within a five-mile zone for four months;
3. But for the emergency evacuation, 15,000 residents would not have removed themselves from the business district;
4. But for the departure of the 15,000 residents for the four-month-long period of the evacuation, these businesses would not have lost significant income; and
5. Whatever income was lost could be clearly linked to the blowout and the evacuation, and not a result of some other development.

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76. That is because duty questions are questions of law to be decided by judges. Prior to Justice Cardozo’s decision in *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928), Professor Mark Geistfeld points out that the common law denied recovery for stand-alone emotional damages because they were thought to be too “remote” and not proximately caused by defendant’s negligence. See Mark Geistfeld, *The Analytics of Duty: Medical Monitoring and Related Forms of Economic Loss*, 88 VA. L. REV. 1921, 1934 (2002); see also Francis H. Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, 50 U. PA. L. REV. 141, 146 (1902). Geistfeld notes that a similar approach was followed when courts limited recovery for pure economic loss. Geistfeld, *supra*, at 1936; see, e.g., JOHN G. FLEMING, *THE LAW OF TORTS* 170 n.50 (5th ed. 1977).

77. E.g., *Ramirez v. Plough, Inc.*, 863 P.2d 167, 171 (Cal. 1993).

78. See, e.g., *Adams v. S. Pac. Transp. Co.*, 123 Cal. Rptr. 216, 220 (Ct. App. 1975) (“[A]ppellate determinations of the duty-of-care issue become crystallized as rules of law and hence as precedents.”), *disapproved on other grounds by J’Aire Corp. v. Gregory*, 598 P.2d 60 (Cal. 1979).

Looked at this way, a causation analysis may help illuminate why a duty analysis is attractive. The number of steps in the chain of causation that run from the gas eruption to business loss is not necessarily obvious, and subjects those losses to the argument that they are too remote or disconnected from the underlying tort.<sup>79</sup> It is so much simpler for a judge to rule that economic losses are not recoverable at all (“no duty”) rather than to have to evaluate distinctions among claimants based upon degrees of remoteness.

Nonetheless, several European jurisdictions that allow for recovery of pure economic loss would examine each of the causal links listed above and ask whether the business losses were too remote from the underlying negligence of the defendants.<sup>80</sup> Indeed, if the court here had evaluated the problem using proximate causation analysis, the nature of the difficulty with allowing recovery might have been clarified. Under my approach, which would allow recovery to these businesses, the plaintiffs would be required to establish clear causal links even to arrive at a plausible measure of damage.

A further, practical problem with a duty-based analysis is that important facts may not have been developed through discovery. A court employing a duty analysis decides cases in the abstract. Yes, the particular facts of “what happened here” are recounted as best as the plaintiff can describe them at the stage of a complaint prior to a full investigation, but what truly matters in a duty analysis is that the abstract evaluation of the general problem is divorced from the reality on the ground.

In any event, the trial court judge in this case, John Shepard Wiley Jr., overruled SoCalGas’s demurrer, setting the stage for an appeal.<sup>81</sup> The California Court of Appeal reversed, holding that the demurrer should have been granted to dismiss the plaintiffs’ negligence

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79. In addition, revising the pure economic loss rule to allow the claimants here to recover opens the door to a different problem: proliferating plaintiffs beyond the initial claimant. For example, those enterprises who sell to the businesses within the evacuation zone presumably also lost business opportunities, so any defense of recovery of pure economic losses will need to establish some limiting principle that explains why those who sell to the businesses in the evacuation zone should not also be able to recover. I address these concerns in Parts III(C) and IV, *infra*.

80. See *supra* notes 74, 76. See generally PURE ECONOMIC LOSS IN EUROPE (Mauro Bussani & Vernon Palmer, eds., 2003) (addressing, particularly Chapter 7, a series of hypothetical circumstances addressing how thirteen European countries would evaluate particular types of economic losses).

81. Southern California Gas Leak Cases, 227 Cal. Rptr. 3d 117, 119 (Ct. App. 2017), *aff’d* 441 P.3d 881 (Cal. 2019).



claims.<sup>82</sup> The California Supreme Court granted review and, in an opinion by Associate Justice Mariano-Florentino Cuéllar, affirmed the California Court of Appeal's decision.<sup>83</sup> Although in my view the court failed to recognize the downside implications of its decision, the opinion will no doubt be hailed as an endorsement of an unfortunate doctrine when applied to restrict recovery by businesses located within the ambit of environmental disasters.

The California Supreme Court's analysis can be boiled down to three distinct propositions.

### A. *No Special Relationship*

First, the court noted that no special relationship existed between the business owners and SoCalGas.<sup>84</sup> The court stated:

[Prior decisions] cut[] sharply against imposing a duty of care to avoid causing purely economic losses in negligence cases like this one: where purely economic losses flow not from a financial transaction meant to benefit the plaintiff (and which is later botched by the defendant), but instead from an industrial accident caused by the defendant (and which happens to occur near the plaintiff).<sup>85</sup>

Analytically, this argument is beside the point. The pre-existing relationship cases (where the court has nonetheless created important exceptions) are based on the idea that both contracting parties should be reliant on contract remedies if a problem in performance arises. Since the parties have voluntarily entered into a relationship with each other, the underlying theory is that they have the possibility that they could have addressed the issue during their negotiation.<sup>86</sup> Courts worry about “contract drown[ing] in a sea of tort.”<sup>87</sup> Additionally, when others within the ambit of contractual performance are injured,

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82. *Id.*

83. Southern California Gas Leak Cases, 441 P.3d 881 (Cal. 2019).

84. *Id.* at 892.

85. *Id.* at 889.

86. I am not offering a view on the pre-contractual opportunities that contracting parties may have to anticipate performance or product defects, but merely intending to distinguish that setting from the stranger cases, which from my perspective provide a much stronger basis for allowing economic losses to be recognized.

87. *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986); see Mark A. Geistfeld, *The Contractually Based Economic Loss Rule in Tort Law: Endangered Consumers and the Error of East River Steamship*, 65 DEPAUL L. REV. 393 (2016).

courts have often expanded liability under the “special relationship” doctrine.<sup>88</sup>

However, it would be a rare case in the stranger setting where a negligent party and the disaster victim have previously formed or anticipated a “special relationship.” Courts should not look for, or expect to find such a relationship. Seeking a “special relationship” under such circumstances is akin to expecting to find that the driver who backed into your car in the grocery store parking lot happened to know you in high school. The “relationship” is irrelevant to the nature of the problem.

Moreover, why should a doctrine developed in the pre-existing relationship context—where both participants have at least some capacity to recognize the limitations and potential risks of engaging the other party—support an argument against recognizing economic harm in stranger cases? No one subject to an environmental, social, and economic disaster as occurred here hopes to have a pre-existing special “relationship” with the party who caused the disaster.

Indeed, the existence of a pre-existing relationship offers a weaker basis for recovery than when a stranger causes harm.<sup>89</sup> In the stranger setting, there is no capacity for a victim to choose his transgressor—no opportunity for self-help or to avoid dealing with a potentially bad actor. At least in moral theory, the stranger case setting would implicate a stronger rationale for recognizing economic losses.

### *B. Liability Disproportionate to SoCalGas’s Fault*

Second, the *Gas Leak Cases* court worried about imposing liability out of proportion to the fault of the defendant.<sup>90</sup> However, in such a case as *SoCalGas*—in which the utility’s gross negligence in managing the Aliso Canyon Storage Facility created the largest gas disaster in the history of the country and unilaterally destroyed years

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88. See 3 DOBBS, HAYDEN & BUBLICK, *supra* note 44, § 615 at 490, 494–95.

89. The California Supreme Court has gradually extended the obligations of parties whose negligence in performing contracts injures others outside the contractual relationship. In the parallel context of auditor liability to businesses who relied on a negligently-prepared audit report, the court held that, in addition to the client who commissioned the report, an additional “narrow class of persons who . . . may reasonably come to receive and rely on an audit report [may recover on a theory of negligent misrepresentation] . . . Such persons are specifically intended beneficiaries of the audit report who are known to the auditor and for whose benefit it renders the audit report.” *Bily v. Arthur Young & Co.*, 834 P.2d 745, 767 (Cal. 1992).

90. *Southern California Gas Leak Cases*, 441 P.3d at 891–92 (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 1 (AM. LAW INST., Tentative Draft No. 1, 2012)).

of California's efforts to fight climate change—it seems odd, if not aberrant, to raise the specter of disproportionate liability. If any company is morally blameworthy for its part in destroying the planet and decimating the businesses of an entire community, surely SoCalGas shares responsibility.

As our society has dramatically changed over the decades, courts should be open to reconsidering dated common law doctrines, or even recent common law doctrines that disguise injustice in the language of law and economic euphemisms such as “overdeterrence.” When corporate entities managing potentially devastating technologies and materials create such social and environmental destruction as here, liability-limiting doctrines like the economic loss rule should be reconsidered.

It is not just the storage of natural gas that is at issue. Groundwaters polluted by hazardous chemicals,<sup>91</sup> oil spills that wreak havoc in the ocean and on hundreds of miles of coastline,<sup>92</sup> and other great hazards<sup>93</sup>—many enterprises escape full responsibility for the environmental and human disasters they create.

Allocating full responsibility to grossly negligent parties for the environmental and economic destruction they impose on communities and the earth may not ever be fully possible, but promulgating a rule that arbitrarily limits liability solely to those who have suffered personal injury or damage to tangible property does not come close to recognizing the true cost of activities that contaminate the earth and destroy—at least for a time—the economic life of entire communities. While fish in the ocean and birds in the air have no standing as they

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91. See, e.g., Bruce Finley, *Colorado Ramps up Response to Toxic “Forever Chemicals” After Discovery of Hot Spots Across Metro Denver*, DENV. POST (Sept. 10, 2019, 6:00 AM), <https://www.denverpost.com/2019/09/10/pfas-chemical-contamination-denver-colorado/>; *These Chemicals Are Forever: Water Contamination from PFOA, PFOS, and Other PFAS*, FOOD & WATER WATCH, <https://www.foodandwaterwatch.org/insight/these-chemicals-are-forever-water-contamination-pfoa-pfos-and-other-pfas> (last visited Jan. 13, 2020).

92. See, e.g., Hannah Waters, *The Oil Spill, Two Years Later*, SMITHSONIAN: OCEAN (April 2012), <https://ocean.si.edu/ocean-life/oil-spill-two-years-later>.

93. E.g., William Powell, *Remember Times Beach: The Dioxin Disaster, 30 Years Later*, ST. LOUIS MAG. (Dec. 3, 2012, 1:13 PM), <https://www.stlmag.com/Remember-Times-Beach-The-Dioxin-Disaster-30-Years-Later/>; see Carl B. Meyer, *The Environmental Fate of Toxic Wastes, the Certainty of Harm, Toxic Torts, and Toxic Regulation*, 19 ENVTL. L. 321, 328–30 (1988) (discussing toxic waste's growth).

are not “owned,” we have available proxies for at least some of these economic and social losses.<sup>94</sup>

The foremost priority should be to repair the environmental damage. Here, the responsible governmental agencies (federal, state, and local) have imposed some of the costs of the environmental harms on SoCalGas, but they have not imposed the full costs of the disaster. In the absence of remedial measures addressing SoCalGas’s responsibility for increasing global warming (among other environmental disasters), allocating responsibility for losses imposed on neighboring businesses provides a limited proxy for the huge losses that would otherwise be borne by the larger society.

In addition, where an entire community of over 15,000 people must evacuate their homes because of the gross negligence of a utility in deliberately ignoring safety protocols, are the “true” costs that enterprise imposes on a community reflected solely in damaged lungs and injury to tangible property? Is it truly “disproportionate” to assign liability to the utility for upending investment and income expectations for ongoing economic activity? Or, should courts require such utilities to reimburse local businesses that suffer complete loss of commerce during the period of a major evacuation caused by the utility?

In addition to the moral claims identified here, there is also an economic component to the analysis. In his opinion, Justice Cuéllar worried about “the dangers of indeterminate liability, over-deterrence, and endless litigation.”<sup>95</sup> But when a utility creates social and economic dislocation and foments environmental disaster, setting climate reduction goals back by several years, is there truly a risk of “overdeterrence”?<sup>96</sup> Where an enterprise can be shown to have harmed

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94. In the wake of economic and ecological devastation wrought by oil spills such as the Exxon Valdez disaster and the BP Gulf Oil spill, both Congress and California enacted statutes allowing businesses that depend on fisheries and use the natural environment in their businesses to recover their economic losses. *See* Oil Pollution Act, 33 U.S.C. §§ 2701 *et seq.* (2012); Lempert-Keene-Seastrand Oil Spill Prevention and Response Act, CAL. GOV’T CODE §§ 8670.1 *et seq.* (West 2012).

95. Southern California Gas Leak Cases, 441 P.3d at 894.

96. Jules Coleman offers a critique of an economic analysis that assigns victims of others’ wrongs to pay for their own losses:

From an economic perspective, one ought to avoid all and only those accidents that could be prevented by incurring cost-justified precautions. Accidents that can be prevented only by taking precautions that are themselves more costly than the accidents themselves ought not to be prevented. That means that the costs of those accidents will fall on victims . . . . In that case, arguably, the costs of pursuing optimal deterrence are falling

a business community through its gross negligence, a theoretical worry of “overdeterrence” to justify the denial of recovery for business losses simply ignores the economic devastation reflected in this case.

For decades, judges and scholars have seen the merit of requiring enterprises to bear the true “costs of accidents.”<sup>97</sup> Forcing responsible corporations to internalize costs of accidents they cause incentivizes such enterprises to take careful stock of *all* the risks their activities generate. Placing the costs of accidents, such as rectifying pollution, onto the cost structures of these enterprises creates an economic incentive to manage risk and secure better ways to minimize, and perhaps even eliminate, the costs of repairing the environment and surrounding communities in the future. The enterprises that manage dangerous devices and technologies have the knowledge and expertise to control the hazards—or can acquire it. Liability for economic losses as well as personal injury and property damage provides the necessary spur to manage all the risks.<sup>98</sup>

By holding that SoCalGas owes “no duty” to avoid negligently inflicting economic losses on neighboring businesses, the court here reversed the incentive structure.<sup>99</sup> Rather than forcing SoCalGas to take sufficient precautions knowing it may have to stand for extraordinary losses, the “no duty” result directs SoCalGas instead to ignore those losses in undertaking its evaluation of the necessary precautions.

However, if SoCalGas was required to internalize the losses suffered by neighboring businesses, a further felicitous distributional consequence would result: the enterprise that has control of the dangerous activity pays for a greater portion of the cost of the disaster.<sup>100</sup> To the degree that an enterprise can thereafter distribute

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unfairly—or at least, disproportionately—on victims. Why ought victims to be conscripted in this way?

Jules Coleman, *The Costs of The Costs of Accidents*, 64 MD. L. REV. 337, 345 (2008).

97. *E.g.*, GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

98. *See* COLEMAN, *supra* note 74, at 23 (“If the law is to provide the desired incentives, then injurers must face the full social costs of their conduct, not just the costs that might befall those to whom the injurers had a specific duty of care.”).

99. Judge Calabresi speculates that this outcome may stem from a “collective” decision to encourage such interference. GUIDO CALABRESI, *THE FUTURE OF LAW & ECONOMICS* 121 (2016). However, since judges make the decision under a “no duty” analysis, it is difficult to see how rejecting recovery of pure economic loss results from a collective democratic process.

100. *See* Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L.J. 142, 147–48 (2011) (“Consequently, courts could have formulated

the cost to its customers, the customers who benefit from the underlying activity—here, the storage and distribution of natural gas—would pay marginally higher rates. In short, the beneficiaries of the activity would bear the losses resulting from the hazards of the activity.

In the *Gas Leak Cases*, the California Supreme Court short-circuited this possibility. The businesses within the evacuation zone suffered greatly during the four months the community was evacuated until the gas leak was capped; yet, according to the court, SoCalGas owed “no duty” to avoid destroying these businesses.

### *C. Imposing Liability Creates Line-Drawing Problems*

Third, the court feared that “imposing such a duty would nevertheless create line-drawing problems across—quite literally—space and time.”<sup>101</sup> And further: “We see no workable way to limit geographically who may recover purely economic losses. Without one, the dangers of indeterminate liability, over-deterrence, and endless litigation are at their apex.”<sup>102</sup> Line-drawing problems are endemic to law, but the administrative difficulty of drawing them should not prevent a court from recognizing that the call of justice requires the effort.<sup>103</sup> As Justice Andrews stated in *Palsgraf v. Long Island Railroad Co.*,<sup>104</sup> “[w]e may regret that the line was drawn just where it was, but drawn somewhere it had to be.”<sup>105</sup> In Part IV, I will propose a workable line that achieves partial justice, but the key point

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the negligence rule so that it would efficiently promote deterrence without inefficiently increasing the costs of injury compensation. Instead of developing the negligence rule in this manner, however, courts have limited duty in order to limit liability for important categories of harms (as with most stand-alone emotional and economic harms), thereby inefficiently excluding large swaths of social harms from the standard of reasonable care.”). Harold Demsetz described one way to think of the phenomenon. Imagine that the actor (here, SoCalGas), owned all the property and businesses in the area. SoCalGas would then presumably take into account all the losses that might accrue as a result of its activities. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 355–57 (1967); see also Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1115–16 (1972) (internalizing externalities created by pollution is a frequent goal of nuisance law).

101. Southern California Gas Leak Cases, 441 P.3d 881, 892 (Cal. 2019).

102. *Id.* at 894.

103. See, e.g., *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1049 (5th Cir. 1985) (Wisdom, J., dissenting) (“In a sense, any line that the courts draw to limit recovery is arbitrary. But this dissent attempts to draw lines which comport more closely with principles of intrinsic fairness than the line based on physical damage.”).

104. 162 N.E. 99 (N.Y. 1928).

105. 162 N.E. 99, 103–04 (Andrews, J., dissenting).

here is simply to note that the court has repeatedly recognized in other contexts that administrative difficulties should not stand in the way of creating remedies.

Take, for example, the impediments to recognizing harm caused by negligent defendants causing only emotional distress to others. For generations, judges resisted claims that emotional injury unaccompanied by physical harm should be a recognized category of tort.<sup>106</sup> However, in the context of negligence, courts began allowing compensation for emotional distress parasitic upon physical injury.<sup>107</sup> They also began recognizing liability when the injuries were intentionally inflicted.<sup>108</sup> Even so, decades passed before jurists allowed compensation for negligent infliction of emotional distress unaccompanied by physical contact with one's person.<sup>109</sup> The change came first for direct victims<sup>110</sup> and subsequently for bystanders.<sup>111</sup>

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106. *Lynch v. Knight* (1861) 11 Eng. Rep. 854 (HL) 863 (“Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone.”); see e.g., Francis H. Bohlen, *supra* note 76, at 146.

107. E.g., *Kennedy v. Carriage Cemetery Servs., Inc.*, 727 F. Supp. 2d 925, 934 (D. Nev. 2010) (distinguishing “parasitic damages” for emotional harm from damages recoverable in torts for intentional or negligent infliction of emotional distress); *Bouillon v. Laclede Gaslight Co.*, 129 S.W. 401 (Mo. 1910); see Martha Chamallas & Linda K. Kerber, *Women, Mothers and the Law of Fright, A History*, 88 MICH. L. REV. 814 (1990); Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 140–46 (1992).

108. See Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939). The American Law Institute's first *Restatement of Torts*, published in 1934, stated that no recovery for either intentional or negligently inflicted emotional injury was allowed unless the defendant's conduct was independently tortious. RESTATEMENT (FIRST) OF TORTS § 46 (AM. LAW INST. 1934). Yet, according to G. Edward White, Prosser's Michigan Law Review article essentially pulled all the strands together to show how courts were creating a new intentional tort of emotional distress. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 102 (2003) (“A major contribution to the ‘creation’ of the ‘new tort’ had been made by Prosser himself.”).

109. See, e.g., *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354 (N.Y. 1896). In *Mitchell v. Rochester Ry. Co.*, a negligently driven team of horses came perilously near the plaintiff, leading her to collapse and suffer a miscarriage. *Id.* at 354. However, because she was not touched by the team, the court refused to allow recovery. *Id.* at 354–55; see also *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678 (N.D. 1972) (rejecting a mother's claim for emotional distress where a hospital employee dropped her baby onto the floor as she looked on because she was unable to establish any risk to herself).

110. See *Robb v. Pa. R.R. Co.*, 210 A.2d 709 (Del. 1965); *Moorhead v. Louisiana*, 353 So.2d 1103, 1105 (La. Ct. App. 1977) (permitting recovery for mental distress caused by plaintiff witnessing a bulldozer trespass and remove five trees from her property); 1 DOBBS, HAYDEN & BUBLICK, *supra* note 44, § 309, at 839–40.

111. See *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989); *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968).

In *Dillon v. Legg*,<sup>112</sup> for example, an automobile negligently operated by the defendant struck and killed a child while she was crossing a street.<sup>113</sup> The child's mother witnessed the child die.<sup>114</sup> The lower court found that the mother was not herself at risk of injury, and dismissed her claim for emotional distress.<sup>115</sup> However, despite the prevailing worry that recognizing the claim would "open the floodgates" to massive numbers of emotional distress suits, the *Dillon* court allowed this "bystander" claim to proceed.<sup>116</sup>

In a subsequent decision, *Thing v. La Chusa*,<sup>117</sup> the California Supreme Court concluded that bystander claims would be limited in the following way:

1. The plaintiff must be "closely related to the injury victim";
2. The plaintiff must be "present at the scene" at the time of the injury, and must be aware that the victim is being injured; and
3. As a result, the plaintiff suffers serious "emotional distress beyond which would be" expected of someone not related.<sup>118</sup>

In circumscribing emotional distress claims predicated upon a negligence cause of action, the California Supreme Court recognized that non-relatives might also be seriously affected by seeing someone killed in front of them, but determined that some limit on recovery was necessary to avoid a plethora of suits.<sup>119</sup>

Dissenting in *Thing*, Justice Broussard criticized the rigid rules imposed by the majority as arbitrary, inevitably leading to under-compensation for profound emotional distress.<sup>120</sup> Justice Broussard would have allowed recovery to anyone who might foreseeably be injured by the defendant's negligence.<sup>121</sup> Even though recoveries for emotional distress brought on behalf of bystanders would be restricted

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112. 441 P.2d 912 (Cal. 1968). *Dillon* overturned *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513 (Cal. 1963). In *Amaya*, a mother saw her seventeen-month-old child run over by a negligently operated ice truck. *Amaya*, 379 P.2d at 514. The California Supreme Court denied recovery to the mother since she did not allege that her emotional distress resulted from fear for her own safety, i.e., that she was personally in a zone of danger. *Id.* at 517.

113. *Dillon*, 441 P.2d at 914.

114. *Id.*

115. *Id.* at 915.

116. *Id.*; see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 22 (5th ed. 1984); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 494–95 (1998) (discussing judicial concerns about excessive liability).

117. 771 P.2d 814 (Cal. 1989).

118. *Id.* at 814.

119. *Id.* at 828–29.

120. *Id.* at 841 (Broussard, J., dissenting).

121. *Id.* at 842–43.



by these elements, the court's jurisprudence has allowed at least some relatives to recover instead of barring all claims.

In the *Gas Leak Cases*, Justice Cuéllar also expressed concern with potential indeterminacy of any incursion on a no-duty rule.<sup>122</sup> As Professor Jane Stapleton puts it, indeterminacy is the idea that the legal system “should refuse to recognize liability where the plaintiff class or the quantum that is alleged to be within the scope of the liability are so indeterminate that the uncertain scope of threatened liability would be intolerably unfair to defendants.”<sup>123</sup> Professor Stapleton includes in the indeterminacy context what she terms “ripple effects,” the idea that a party that suffered economic losses (such as a business) would, in turn, not purchase goods from a supplier, which, in turn, would not order supplies to produce the good.<sup>124</sup>

Professor Stapleton suggests a twofold response to the indeterminacy concerns. First, one needs to have a normatively justifiable reason to impose economic losses on an actor, and second, the boundaries of liability should be relatively ascertainable.<sup>125</sup>

To illustrate, Professor Stapleton cites the example of the Australian federal court decision in *McMullin v. ICI Australia Operations Propriety Ltd.*,<sup>126</sup> where the defendant sold an insecticide for use on cotton in a region where cattle grazed on cotton stubble.<sup>127</sup> After ingesting the remnants, the cattle became contaminated by the chemical in the insecticide, which led to devastating impact on many enterprises reliant on the cattle for their businesses.<sup>128</sup>

Several classes of businesses in *McMullin* that suffered economic losses were allowed to bring suit, including the owners of the cattle that had fed in the cotton fields, purchasers of the contaminated cattle, feedlot operators who did not own any of the offending bovines but were required to segregate them at great expense, and others that had

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122. Southern California Gas Leak Cases, 441 P.3d 881, 896 (Cal. 2019) (citing *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931)).

123. Jane Stapleton, *Comparative Economic Loss: Lessons from Case-Law-Focused “Middle Theory”*, 50 UCLA L. REV. 531, 544 (2002).

124. *Id.* (“Even if the class of victims suffering economic loss as a result of the defendant’s negligence is indeterminate, or even if the total economic loss suffered as a result of the negligence is indeterminate, there may be a normatively justifiable way to define a class of plaintiffs and a class of recoverable loss such that the size of the class and the quantum of recoverable loss are ascertainable, meaning that the defendant’s liability is not indeterminate.”).

125. *Id.*

126. *McMullin v. ICI Australia Operations Propriety Ltd* (1997) 72 FCR 1 (Austl.).

127. *Id.* at 2–4.

128. Stapleton, *supra* note 123, at 549.

unwittingly purchased meat derived from the cattle.<sup>129</sup> However, other enterprises that also suffered economic losses—such as cotton waste transporters—were not permitted to recover because their losses were not found to be directly connected to the contaminated animals.<sup>130</sup>

Many businesses that were affected by the contaminated cattle—including distant dealers who held cattle that could not be sold because no prospective buyers could be certain they were not infected—could be included in the “normatively justifiable” category.<sup>131</sup> However, in order to limit recovery to an “ascertainable” group, the *McMullin* decision distinguished those immediately impacted by the infected cattle from those who were also harmed, but never came into direct contact with the cattle.<sup>132</sup>

*McMullin* can be analogized to the *Gas Leak Cases*. A requirement of normative justification is satisfied by the general tort doctrine that one should not be able to shift losses stemming from one’s gross negligence onto one’s neighbors, particularly when the neighbors have no mechanism of protecting their own interests. Because of their proximity to the wellheads, the neighboring businesses here were especially vulnerable to the shoddy practices of SoCalGas.

To satisfy a goal of ascertainability, a pragmatic doctrine that limits recovery in order to avoid ripple effects of liability beyond reasonable boundaries, one needs to identify geographic and temporal boundaries to recovery of economic losses. In Part IV, I develop this more fully, but the short answer is that pure economic losses in the *Gas Leak Cases* could be fixed geographically and temporally by the boundaries of the evacuation zone for the period of time the evacuation was in effect. In addition, only those businesses that were themselves subject to an evacuation directive could claim “contact” with the offending contamination.

In sum, the fear that courts may not be able to cabin within manageable bounds liability for emotional distress has not prevented them from recognizing claims in which a negligent defendant produced severe consequences for those who were nearby but suffered no personal physical injuries. Additionally, courts in other

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129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

jurisdictions have dealt with the fear of unmanageability and excessive liability in the emotional distress context by creating practical limits to who may recover and under what circumstances. While the rules limiting recovery for negligent infliction of emotional distress are subject to the critique that they fail to acknowledge how serious emotional harms are,<sup>133</sup> they can be justified as a pragmatic compromise between a no duty rule and a foreseeability rule.

Similar to the emotional distress context, there are grounds in the *Gas Leak Cases* which would have provided ascertainable limits on the recovery of economic losses, and which would have addressed the major concerns raised by the court. To that alternative I will now turn.

#### IV. AN ALTERNATIVE APPROACH TO ECONOMIC LOSSES INVOLVING ENVIRONMENTAL DISASTERS

There was another possibility available to the court in the *Gas Leak Cases* that would have granted relief to the plaintiffs and paved the way for a significant and important reevaluation of the pure economic loss rule in stranger cases. The inklings of that alternative possibility can be found not only in the trial court's ruling and other important federal decisions affecting California but also in the California Supreme Court's own precedents.

##### *A. Complete Disruption of Business Activities by Grossly Culpable Actors Causing "Particular Damage"*

In overruling SoCalGas's demurrer, the trial court held that the economic loss rule did not apply to bar the negligence-based claims in this case.<sup>134</sup> In Judge Wiley's view,

[t]he economic loss rule . . . does not apply in a context like this one: a classic mass tort action where high transactions costs precluded transactions, where the risk of harm was foreseeable and was closely connected with [SoCalGas's] conduct, where damages were not wholly speculative, and where the injury was not part of the plaintiff's ordinary business risk.<sup>135</sup>

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133. See Chamallas, *supra* note 116.

134. Southern California Gas Leak Cases, 227 Cal. Rptr. 3d 117, 119 (Ct. App. 2017), *aff'd* 441 P.3d 881 (Cal. 2019).

135. *Id.* at 120.

In other words, can the economic losses suffered by these neighboring businesses be distinguished from losses suffered by the illustration involving highway drivers? Judge Wiley thought so, and I do too.

In Judge Wiley's view, there is a difference between negligence that affects people's lives momentarily, or that merely involves increased costs or ordinary business risks, and negligence that causes an environmental disaster that completely disrupts an entire community and the businesses within that community. By "ordinary business risk," Judge Wiley may have considered the reciprocal risks auto drivers expose each other to on the highway and the delays caused by casual negligence backing up traffic, or the risk that a fire in the neighborhood might close down a business for a day.<sup>136</sup> If so, those ordinary business risks are not ones for which a negligent defendant would be held responsible. However, mass tort cases present a different scenario requiring a different approach to economic losses.

In *Union Oil Co. v. Oppen*,<sup>137</sup> commercial fishermen sought damages for their prospective loss of fishing profits resulting from an oil spill in the Santa Barbara channel caused by an oil company's negligence in maintaining an oil rig.<sup>138</sup> Operating under a stipulation in which both parties agreed that the fishermen would be granted only such damages as would be available under California tort law,<sup>139</sup> the Ninth Circuit Court of Appeals held that the defendants owed a duty to the fishermen "to refrain from negligent conduct in their drilling operations, which conduct reasonably and foreseeably could have been anticipated to cause a diminution of the aquatic life in the Santa Barbara Channel area and thus cause injury to the plaintiffs' business."<sup>140</sup> The court noted that the fishermen's loss should be allocated to the party who could best prevent the loss, which was obviously the defendant oil company.<sup>141</sup>

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136. *See id.*; Byrd v. English, 43 S.E. 419 (Ga. 1903).

137. 501 F.2d 558 (9th Cir. 1974).

138. *Id.* at 558.

139. The *Gas Leak Cases* opinion attempted to distinguish *Union Oil* as a paean to seamen, a "favorite" of admiralty law. Southern California Gas Leak Cases, 441 P.3d at 891. However, even though the oil spill occurred in navigable waters, the Ninth Circuit was led by both parties in their stipulation to apply California tort law to the problem. Indeed, in the first part of the opinion, Judge Sneed concludes that the law of California applied to the case either directly, or because an admiralty court would borrow California law to decide the case. *Union Oil*, 501 F.2d at 562–63.

140. *Union Oil*, 501 F.2d at 566; *see* *Pruitt v. Allied Chem. Corp.*, 523 F. Supp. 975 (E.D. Va. 1981). *But see* *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985).

141. *Union Oil*, 501 F.2d at 569.

The *Union Oil* court recognized that it was creating an exception to the economic loss rule, for the fishermen had suffered no physical injuries or property damage, and the destruction of aquatic life consisted “merely” of ecological disaster since the oceans and their seafaring occupants are not “property.”<sup>142</sup> But the entire livelihoods of the commercial fishermen were destroyed, at least for a time, and the court determined that the defendants owed a duty to them to avoid negligent diminution of aquatic life.<sup>143</sup>

Notably, the *Union Oil* court was careful to say that its ruling would not necessarily extend to other parties suffering pure economic loss.<sup>144</sup> We can imagine a cascade of potential economic harm losses: the dockworkers and businesses that receive the fishing vessels’ catches and process them for sale, delivery vehicles devoted to distribution, and the restaurants that must obtain replacement seafood. One way to distinguish among these other businesses might be to ask: which businesses were directly and specially injured by the destruction of the fisheries? Surely the docks and businesses that received the fish should also be included in the realm of businesses able to recover since their livelihoods were completely dependent on the fishing vessels. The nearby restaurants that solely served fish from the nearby sea should also arguably have standing, but their standing may also depend on whether they have the capacity to receive alternative sources of fish.

Yet *Union Oil* hinted at what, in the court’s view, distinguished the fishermen from other businesses.<sup>145</sup> As Herbert Bernstein put it

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142. *Id.* at 568. “I am amazed at the publicity for the loss of a few birds,” *Union Oil* president Fred Hartley infamously said after the spill. Kate Wheeling & Max Ufberg, *The Ocean Is Boiling’: The Complete Oral History of the 1969 Santa Barbara Oil Spill*, PAC. STANDARD (Apr. 18, 2017), <https://psmag.com/news/the-ocean-is-boiling-the-complete-oral-history-of-the-1969-santa-barbara-oil-spill>. Wild fish are not property, at least not until they are captured. See *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805). See generally Michael C. Blumm & Lucas Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 684–90 (2005) (analyzing the history of wildlife appropriation in early America).

143. Of course, the commercial fishermen would still be required to prove their injuries in subsequent proceedings. *Union Oil*, 501 F.2d at 570.

144. *Id.*

145. Dissenting in *Testbank*, Judge Wisdom would not have limited recovery in *Union Oil* to just the fishermen:

Certainly the injury from the oil spill to others who make their living upon the water, such as boat charterers who are unable to put to sea, is as foreseeable and as direct as the injury to the fishermen. It is therefore unclear why these parties should not also be entitled to recovery. The court did attempt to distinguish fishermen in that they “lawfully and directly make use of a resource of the sea, viz. its fish, in the ordinary course of their

two decades ago, “[t]he answer may be that it makes a difference whether the interference with a use of resources effectively shuts down a business, at least temporarily, or just increases the costs of running a business.”<sup>146</sup> Using this lens, what enables the businesses that receive the catch to recover is that they lose out entirely; whereas the restaurant that can secure alternative sources of supply has its costs increased, but is not solely dependent on the catch of the day.

Bernstein’s distinction may help sort the environmental disaster from the traffic accident: is a business incidentally delayed or diminished, or does it face overwhelming loss as a result of a defendant’s negligence? Enterprises that face major loss of business as a result of an environmental disaster stand in a different position than those that experience a short-term delay, or an increase in costs, or that may, in Judge Wiley’s words, suffer “ordinary business risk.”<sup>147</sup>

If the destruction of a business resulting from a defendant’s negligence that is neither within the realm of reciprocal risk nor ordinary business risk defines a principle that cabins economic losses within a manageable sphere, the remaining question is whether the business plaintiffs in the *Gas Leak Cases* can offer a meaningful geographic and temporal distinction between their situation and that of other businesses located many miles away. In this case, the public health agencies provide a ready limitation: the five-mile evacuation zone during the four months until the gas leak was capped.

Justice Cuéllar was dismissive of the significance of the evacuation zone, finding it hard to distinguish between the business located 4.9 miles from the leak and one located 5.1 miles away.<sup>148</sup> In

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business”. Yet, if those who make use of a “resource of the sea” are entitled to recovery, then it seems a fortiori that those who make use of the sea itself in their business—a boat charterer, for example—would be entitled to recovery.

*Testbank*, 752 F.2d at 1035, 1044 n.23 (Wisdom, J., dissenting) (citation omitted).

146. Herbert Bernstein, *Civil Liability for Pure Economic Loss Under American Tort Law*, 46 AM. J. COMP. L. 112, 131 (1998).

147. Southern California Gas Leak Cases, 227 Cal. Rptr. 3d 117, 120 (Ct. App. 2017), *aff’d* 441 P.3d 881 (Cal. 2019).

148. Southern California Gas Leak Cases, 441 P.3d 881, 892 (Cal. 2019). Justice Cuéllar also noted that the authorities eventually extended the geographic evacuation zone beyond the five-mile radius. Southern California Gas Leak Cases, 441 P.3d at 892–93. In my view, wherever public health authorities draw the evacuation zone involving environmental disasters circumscribes the businesses that, provided they suffer significant business disruption, would have standing to bring suit for their economic losses.

his view, both may have suffered comparable economic losses and both should be treated the same.

Such an argument may have superficial appeal, yet, as Justice Holmes reminds us, drawing lines is the business of law.<sup>149</sup> The fact that an attentive driver violates a 55 mph speed limit by operating her vehicle at 56 mph, yet an inattentive driver proceeding at 54 mph is not sanctioned, simply recognizes that a line must be drawn somewhere to protect the public from undue risk created by speeding vehicles.

Moreover, to deny all recovery when it is difficult to justify differential treatment of entities on either side of a particular line does not make sense. Here, the Porter Ranch business located 5.1 miles away did not have to relocate or evacuate, nor did customers living nearby but on the distant side of the leak. Perhaps the 5.1-mile business also suffered, or alternatively, perhaps its operations saw increased activity because people were reluctant to enter the evacuation zone to conduct business.

More importantly, the fact that some injured businesses would not recover their losses does not justify denying businesses that can demonstrate significant destruction of their income during the evacuation period the possibility of recovery. If a line must be drawn somewhere, that line wherever drawn will permit some enterprises to recover while denying recovery to others who may also be harmed. Let's not forget that the line wherever drawn is established for pragmatic reasons, not for reasons of justice.

By analogy, in the emotional distress cases, the fact that the California Supreme Court restricts bystander recovery to close relatives means that cousins who grew up together, or aunts and uncles, or even best friends who see their loved one killed in front of them, will not be able to recover for their admittedly serious emotional distress. Meanwhile, the parent who paid little attention to the child when she was alive is permitted standing to sue. Everyone acknowledges that this rule is not "fair": non-immediate relatives or

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149. *Irwin v. Gavit*, 268 U.S. 161, 168 (1925) (Holmes, J.) ("[W]here to draw the line . . . is the question in pretty much everything worth arguing in the law."); see generally Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 369–73 (1985) (analyzing linguistic difficulties inherent in drawing lines). In a different context, Lee Bollinger criticizes an argument that points out that invoking instances on either side of a legal line can always be shown to be problematic: "[I]t is one of the most beguiling methods of obfuscation and diversion in legal argumentation . . ." See LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 35–39 (1986).

dear friends who can establish a close relationship with a decedent surely are as deserving of recovery as the distant parent. Yet courts and commentators justify the line on the pragmatic ground that it must be drawn somewhere to avoid limitless liability and liability disproportionate to the wrong.

In ruling against the plaintiffs here, Justice Cuéllar relied on the *Guste v. M/V Testbank*<sup>150</sup> case, a leading case reflecting a conservative, bright-line approach to the problem of economic loss. In the summer of 1980, two container ships collided on the Mississippi River, resulting in hazardous chemicals, including hydrobromic acid, forming a dense fog overhead and approximately twelve tons of pentachlorophenol (PCP) spilling overboard and polluting the navigation channel.<sup>151</sup> This was the largest such spill in United States history.<sup>152</sup> The Coast Guard closed the outlet to navigation for three weeks.<sup>153</sup> “[A]ll fishing, shrimping, and related activit[ies] [were] temporarily suspended in the outlet and the surrounding four hundred square miles of marsh and waterways.”<sup>154</sup>

“[S]hipping interests, marina and boat rental operators, wholesale and retail seafood [outlets] . . . , seafood restaurants, [and] tackle and bait shops” brought suit seeking recovery for their economic losses.<sup>155</sup> None claimed that they had suffered losses because the chemicals themselves injured their property. Hearing the case en banc, a majority of the Fifth Circuit judges determined that a “bright line rule” of “no duty” to avoid pure economic losses should prevail.<sup>156</sup> “The bright line rule of damage to a proprietary interest, as most, has the virtue of predictability with the vice of creating results in cases at its edge that are said to be ‘unjust’ or ‘unfair.’”<sup>157</sup>

Dissenting in *Testbank*, Judge John Minor Wisdom argued that the court’s rule “[was] out of step with contemporary tort doctrine [and] works substantial injustice on innocent victims.”<sup>158</sup> Judge Wisdom urged adoption of a different limitation on recovery for economic loss, requiring that plaintiffs seeking compensation not only

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150. 752 F.2d 1019 (5th Cir. 1985).

151. *Id.* at 1020.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 1020–21.

156. *Id.* at 1028.

157. *Id.* at 1029.

158. *Id.* at 1035 (Wisdom, J., dissenting).



show they are foreseeably damaged by the defendants' negligence, but in addition establish that they are "particularly damaged," an element gleaned from the public nuisance line of cases.<sup>159</sup>

"Particular damages" are those different in kind and degree from those suffered by the general public.<sup>160</sup> When a river or commercial artery is blocked, for example, boats or vehicles that utilized the public way would be able to recover their additional expenses to navigate the transportation.<sup>161</sup> Judge Wisdom recognized that although his approach "requires a case-by-case analysis, it comports with the fundamental idea of fairness that innocent plaintiffs should receive compensation and negligent defendants should bear the cost of their tortious acts."<sup>162</sup>

It's true that a bright line "no duty" rule of the court here and the majority in *Testbank* has the virtue of being clear in the same way that any immunity rule does: by rejecting any opportunity to show how a defendant's negligence caused great harm to the economy of a community. Justness and fairness are the victims of such a clear rule that forecloses responsibility for economic losses.

The fact that negligent ship operators in *Testbank* can operate to shut down navigation for three weeks on a major artery, and that the defendants in that case and the *Gas Leak Cases* can destroy the livelihoods of many other economic actors in the area of the disaster, creates a perverse incentive to continue shipping hazardous chemicals on the waterway or storing gas underneath urban areas. The beneficiaries of the shipment or storage of the hazardous materials escape responsibility for the costs of such activities that create great harm, and innocent businesses—local businesses in the *Gas Leak Cases* and shrimpers, seafood purveyors, and other businesses in transportation in *Testbank*—end up bearing the loss.

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159. *Id.* at 1046–51 ("Those parties who are foreseeably and proximately injured by an oil spill or closure of a navigable river, for example, and who can also prove damages that are beyond the general economic dislocation that attends such disasters should recover whether or not they had contractual dealings with others who were also damaged by the tortious act.")

160. *Id.* at 1047.

161. *Id.* at 1048–49; *see, e.g.*, *Burgess v. M/V Tamano*, 370 F. Supp. 247, 250 (D. Me. 1973) (denying motion to dismiss claims of fishermen and clam diggers seeking damages as a result of an oil spill in a Maine bay because those plaintiffs suffered particular "damage different in kind, rather than simply in degree, from that sustained by the public generally"), *aff'd*, 559 F.2d 1200 (1st Cir. 1977); *Pharr v. Morgan's L. & T.R. & S.S. Co.*, 38 So. 943, 944 (La. 1905) (allowing a steamboat operator to recover additional costs of leasing smaller vessels when the defendant damaged a bridge to such a degree that the steamboat could not pass underneath).

162. *Testbank*, 752 F.2d at 1035 (Wisdom, J., dissenting).

Moreover, the bright line rule adopted in these cases for administrative convenience obscures the role that judges play in deciding cases. As then-Professor Kathleen Sullivan explained, hard-and-fast “rules favor the judicial abdication of responsibility, while standards make the judge face up to his choices—he cannot absolve himself by saying ‘sorry, my hands are tied.’ On this view, [case by case adjudication] make visible and accountable the inevitable weighing process that rules obscure.”<sup>163</sup>

In sum, Judge Wisdom’s proposed limitation on recovery of economic losses, that the plaintiff’s loss be “particularly damaged,” provides a means to distinguish routine business risk from the kind of unique harm present both here and in *Testbank*. The shrimpers, clamdiggers, and seafood purveyors in *Testbank*, unable to carry on their business during the weeks that the four-hundred square-mile ban was in effect, should be able to recover their losses. Similarly, the businesses in the *Gas Leak Cases* that were within the five-mile evacuation zone and suffered loss for the four-month period of the evacuation should be able to recover for those losses.

Although the businesses in the *Gas Leak Cases* might have sought lost business profits for the period beyond the four-month evacuation period, I would not allow recovery of those losses because they are not reflective of particular damages associated with the ongoing discharge of the gas. While the gas leak might have caused diminution of business for a longer time than the four-month evacuation period, the evacuation timeframe provides a ready means of distinguishing the evacuation businesses’ losses from those outside the evacuation zone and timeframe. Again, as in the emotional distress context, the lines that are drawn achieve a partial justice but are limited by pragmatic considerations.

New Jersey courts have analyzed several cases that illustrate how a “particular damage” rule might function in practice. In *In re Paulsboro Derailment Cases*,<sup>164</sup> a freight train operated by the

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163. Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 67 (1992); see FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 104 (1991); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–1713 (1976); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 379–430 (1985). Ironically, Sullivan argued the case for Southern California Edison.

164. No. 13-784-RBK-KMW, 2015 WL 3545247 (D.N.J. June 8, 2015).

defendant railroad derailed over a bridge, and at least one of four tank cars carrying vinyl chloride leaked into the air and water.<sup>165</sup>

The plaintiffs, several schools operated by a municipality, alleged the defendants were negligent in operating the train and the bridge.<sup>166</sup> Because of the derailment, public health officials ordered the schools to be closed, “amounting to a loss of six days of curricular instruction valued at approximately \$134,223 per day.”<sup>167</sup> In a related case, “plaintiffs were individuals and businesses who incurred expenses and lost income as a result of the evacuation and shelter-in-place orders issued by the Borough after the derailment.”<sup>168</sup> The district court judge found that both groups of plaintiffs satisfied the “particular foreseeability” requirement of New Jersey courts when considering whether economic losses should be recoverable.<sup>169</sup>

The leading case in New Jersey, *People Express Airlines, Inc. v. Consolidated Rail Corp.*,<sup>170</sup> set forth a rule that allowed for recovery of economic losses.<sup>171</sup> A fire ignited in a railroad’s freight yard “when ethylene oxide . . . escaped from a tank car[] [and] punctured during a ‘coupling’ operation with another rail car.”<sup>172</sup> “[M]unicipal authorities . . . evacuated the area within a one-mile radius surrounding the fire,” including the local office of an airline, “to lessen the risk to persons within the area should the burning tank car explode.”<sup>173</sup> “Although the feared explosion never occurred,” and the plaintiff’s physical property was not affected, the plaintiff’s employees were prohibited from entering their business for twelve hours, and the airline sought compensation from the negligent defendants responsible for the leak and fire.<sup>174</sup> In allowing the case to survive a motion to dismiss, the New Jersey Supreme Court required the plaintiff airline to establish that it was a member of a distinctive class “in terms of the type of persons or entities comprising the class, the certainty or predictability of their presence, the approximate numbers of those in the class, as

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165. *Id.* at \*1.

166. *Id.*

167. *Id.*

168. *Id.* at \*3.

169. *Id.*

170. 495 A.2d 107 (N.J. 1985).

171. *Id.* at 115–16.

172. *Id.* at 108.

173. *Id.*

174. *Id.* at 108–09.

well as the type of economic expectations disrupted.”<sup>175</sup> Whereas “members of the general public . . . or persons travelling on a highway near the scene of a negligently-caused accident . . . [may be] foreseeable.”<sup>176</sup> However, no duty would be owed to them because “*their presence within the area would be fortuitous, and the particular type of economic injury . . . unpredictable and not realistically foreseeable.*”<sup>177</sup> Thus, the plaintiff would have to distinguish itself from the larger community or random passersby that might also have suffered delay in their travels, or who might have been temporarily inconvenienced by the defendants’ negligence.

A further illustration of how a “particular damage” principle might be applied is suggested by *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Center, Inc.*<sup>178</sup> In that case, a section of 540 Madison Avenue, a thirty-nine-story office tower located in Manhattan, partially collapsed.<sup>179</sup> “[B]ricks, mortar and other material fell onto Madison Avenue at 55th Street, a prime commercial location.”<sup>180</sup> The city closed off several blocks to foot traffic, and a twenty-four-hour delicatessen, a half block away, had to remain closed for five weeks.<sup>181</sup>

Although the New York Court of Appeals held that the delicatessen suffered injuries that were the same in kind as those suffered by all of the businesses in the community,<sup>182</sup> this conclusion seems wrong. The deli’s injuries are surely unique: not all businesses in Manhattan suffered equally, and if a business was required by city officials to close for five weeks on account of the defendant’s negligence, those injuries provide a ready means of distinguishing the deli’s losses from those outside the closure zone. The five-week shutdown also provides a ready means of establishing an articulable time limit on the running of damages.

What was undoubtedly on the New York Court of Appeals’ collective mindset is the fear of imposing indeterminate liability that has no end. However, if the Finlandia Center’s negligence created such risk of further injury, surely the disruption to nearby businesses

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175. *Id.* at 116.

176. *Id.*

177. *Id.* (emphasis added).

178. 750 N.E.2d 1097 (N.Y. 2001).

179. *Id.* at 1099.

180. *Id.*

181. *Id.*

182. *Id.* at 1103.

affected by road closure can be distinguished from losses outside the closure zone. It's not at all clear to me why a negligent defendant should not have to provide compensation to the businesses so distinctly affected by the road closure.

In short, caselaw at present seems to be open to providing compensation to the single owner whose business is disrupted, but not when hundreds or thousands of businesses are disrupted by a defendant's negligence. The striking feature of this result seems to protect the grossly negligent defendant who causes great disruption from being held responsible for the losses it causes.

### *B. Abnormally Dangerous Activities*

In the *Gas Leak Cases*, there are additional reasons to allow the plaintiffs to seek their economic losses. As urged above, the evidence is compelling that the operation of the Aliso Canyon Storage Facility is an abnormally dangerous activity. The court has yet to consider whether economic losses suffered by those maintaining such an activity create a different circumstance than a cause of action based on simple negligence.<sup>183</sup> This case did not decide whether the rule limiting economic losses extends beyond a cause of action based on negligence.<sup>184</sup>

Confining the analysis to negligence duty, as here, leaves for another day consideration of alternative theories of potential liability. In their complaint, the plaintiffs alleged a theory of strict liability based on the defendants' conduct of an abnormally dangerous activity.<sup>185</sup> In addition, the complaint discloses significant wrongdoing that in my view would have supported a finding of gross negligence, recklessness, and potentially even willful and wanton behavior by the utility—the latter of which would have supported a punitive damage award at least on behalf of governmental entities as well as persons

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183. Oscar Gray gives the example of economic loss in a strict liability context: where trespassing non-pure-bred livestock impregnate purebred breeding stock diminishing the value of the female, the owner is entitled to compensation for this loss of value. *See* Gray, *supra* note 44, at 900; *see also* Fuchser v. Jacobson, 290 N.W.2d 449 (Neb. 1980) (recognizing same result in either negligence or strict liability); Hall v. Umiker, 209 N.W.2d 361 (S.D. 1973) (strict liability).

184. Southern California Gas Leak Cases, 441 P.3d 881, 883 (Cal. 2019) (“So the claims before us are best not treated as compensable in negligence.”).

185. Southern California Gas Leak Cases, 227 Cal. Rptr. 3d 117, 120 (Ct. App. 2017), *aff'd* 441 P.3d 881 (Cal. 2019).

who may have suffered personal injury. Yet the court's analysis considers only a theory of recovery based upon simple negligence.

In addition to the analysis suggested above, distinguishing among causes of action may provide an alternative route for a future court. If the utility's activity, storing eighty billion cubic feet of natural gas in huge underground reservoirs underneath residential communities, is indeed an abnormally dangerous activity, then perhaps economic losses resulting from such activities should be treated differently than economic losses resulting from simple negligence. In this case, deciding on the pleadings based on simple negligence truncated any such analysis.

If the utility here could be shown to have acted in a grossly negligent or reckless manner, that would create additional justification for recognizing economic losses on the part of defendants risking substantial environmental and economic dislocation by their activities. If a defendant's operation is so deficient (as even the limited facts reveal here) as to amount to willful disregard of the ecological and economic health of the neighboring community, a standard that would prevent recovery for economic losses surely would treat the defendant as a favorite of the law instead of the gross wrongdoer it seems to be.

## V. CONCLUSION

In every generation, new challenges to common law doctrines arise. Burgeoning technologies, in a society that seems at every moment to create one or another environmental disaster, must be controlled. Some of those disasters affect the stability and security of the planet or undermine the economic security of a community. Courts faced with cases such as the *Gas Leak Cases* should recognize that a different dimension of risk-taking by grossly negligent defendants requires a different level of analysis than what is applied to a routine auto accident that merely inconveniences others but does not destroy their livelihoods for months on-end.

In this case, the worst natural gas leak in the history of the country, the California Supreme Court—burdened by nineteenth and twentieth century worries—had an opportunity to set the law of economic losses on a new path, one that recognized the harm and its extent caused by negligence of those in charge of extremely dangerous enterprises. But, despite having a reasonable alternative route, the court chose to reject a needed reform of doctrine. An alternative that

would have recognized claims of pure economic losses by these businesses, carefully circumscribed by the evacuation zone for the four-month period of the evacuation, would have achieved a greater measure of justice, and would have required the negligent operator to internalize some of the additional burdens the community suffered.

More challenges to the economic loss doctrine will come as new technologies arise and global warming changes the calculus of risk. Law that may have been adequate at one time may prove incapable of creating sufficient incentives to control the risks of future disasters.

When courts limit recovery to just those who suffered personal injury or property damage but not destruction of the livelihoods of businesses equally affected, as here, it limits the capacity of the system to force enterprises to internalize the true costs of not paying attention to the disaster-in-the-making. When the economic loss rule is applied to baleful conduct as evidenced here by SoCalGas, it permits that company to escape without paying anywhere near the full cost of its negligence, and thereby undermines the incentive structure provided by tort law.

When entities control the levers of enormous destructive power—power that can destroy communities and contaminate the environment—limiting damages as the California Supreme Court did in this case is truly unfortunate. We should be asking: does the economic loss doctrine as applied in this case serve justice?