vendors could be based on the law in the chattel field that a rebuilder or reconditioner of goods has substantially the same duty as a manufacturer.66

At first glance, the imposition of Section 15 of the Uniform Sales Act to real estate transactions would appear to present a dilemma to the prospective home buyer, confronting him with the alternatives of purchasing a house with which he is not familiar or assuming the risks of defects. Upon further analysis, however, it becomes clear that section 15(3) negates implied warranties only "as regards defects which such examination ought to have revealed." Since the average purchaser has little technical knowledge of houses, it cannot be presumed that his superficial inspection "ought" to reveal any but the most patent defects. However, because the layman presumably realizes the limitation of his knowledge, inspection does not preclude his reliance upon the "skill or judgment" of the vendor.67

Even under a liberal application of implied warranties to real property, the purchaser of a secondhand house from an individual vendor has only a limited possibility of recovery from his vendor. If the injuries resulted, however, from defects existing before the purchase by this individual vendor from a large-scale, commercial developer, the injured homeowner may be able to recover from the developer. Recovery would be grounded on an analogy to the principle found in the law of chattels that when a seller holds himself out to the public as the producer of the article he sells, he is liable as if he were the producer.68 It is arguable that the large-scale developer places himself in the position of the builder, for he seeks public faith in his name and in his competence.

The above discussion has indicated several lines of argument that the courts could utilize to extend greater protection to purchasers of real estate. With the growth and commercialization of building construction, it is possible that such arguments will be used to allocate more equitably the burden of injuries from defective housing.

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FORESEEABILITY OF THIRD-PARTY ECONOMIC INJURIES—A PROBLEM IN ANALYSIS

The problem of analysis presented by two independent streams of legal doctrine converging to form the basis for a possible new tort has occasioned much judicial confusion. Protection of plaintiff's economic interest incidentally damaged as a result of a negligent tort either to himself or to his individual property has traditionally been afforded by general tort law. But where the defendant


67 For the necessity of such reliance, see Uniform Sales Act, 1 U.L.A. § 15(1) (1950).

has committed a tort directly upon the plaintiff's contract or other economic relation with a third party, an independent body of doctrine stemming from *Lumley v. Gye* has afforded him relief. The conjoining of these two separate legal areas is effected in the situation where the plaintiff's economic interest is damaged as a consequence of the defendant's negligence to a third party. Resulting analytic difficulties have spread their effects into such apparently distant fields as subrogation and collateral benefits. In large measure, these difficulties could have been averted by proper judicial understanding of the basis for protecting economic interests, both in general tort law and in the decisions following *Lumley v. Gye*.

I

Judicial incongruity in refusing recovery for contractual and other purely economic losses resulting from plaintiff's economic connection with a third party whom the defendant has negligently injured is best illustrated in the courts' inconsistent handling of "proximate cause" and "foreseeability" doctrines in similar cases involving physical property losses. In *Newlin v. The New England Telephone and Telegraph Co.*, recovery was allowed for damages occasioned by the defendant's negligence in maintaining a telephone pole which when it fell across a power line resulted in cutting off the supply of heat to plaintiff's fragile mushrooms. Although the role relationship between the third-party power company and the plaintiff was contractual, the destruction of plaintiff's mushrooms was seen as a "sufficiently foreseeable" consequence of defendant's threshold negligence to the power line. In striking contrast is the case of *Byrd v. English* where, on otherwise identical facts, the plaintiff was refused recovery for loss of profits resulting from his inability to secure the power service essential to the running of his printing presses. Damages resulting from the destruction of economic relations as a consequence of a negligent tort to a third party are consistently held to be "unforeseeable." Judicial holdings that the defendant's threshold negligence was not the "proximate cause" of the plaintiff's damaged relationship afford an equally effective means of denying liability. A "proximate cause" rather than a "foreseeability" analysis may also be employed to achieve liability in physical property damage cases such as *Newlin v. The New England Telephone and Telegraph Co.*

3 A "threshold" tort is a tort which first establishes the wrongful nature of some particular act which the defendant has committed. The problem then becomes one of delimiting the scope of the resulting consequences for which he is to be held liable.

4 117 Ga. 191, 43 S.E. 419 (1903).
As the temporal sequence of events involved in the Newlin and Byrd cases was substantially identical, any explanation of their differing results in terms of the "foreseeability" of harm caused to the respective plaintiffs is meaningless. The damaged mushrooms of the Newlin case were obviously no less "foreseeable" than the harm caused to the Byrd plaintiff by interruption of his power service. Yet the Byrd case holds that damages for loss of profits resulting from power-service interruption are "unforeseeable." The physical property damage of the Newlin case is logically as "foreseeable" or "unforeseeable" as the purely economic damage involved in the Byrd case.

The classic guide to intelligent "foreseeability" analysis has for a generation been afforded by the Palsgraf opinion. Yet the liability issues presented by the Palsgraf opinion are clearly distinguishable from those involved in the Newlin and Byrd cases. The Palsgraf case involved threshold negligent harm to one person occasioning as a highly unusual consequence totally unexpected personal injuries to a third person. Even where the threshold tort is intentional, responsible legal opinion is divided as to whether totally unexpected damages to third persons are recoverable. Judicial reluctance to impose liability under these highly extraordinary circumstances is understandable. The third person or property directly injured is closely analogous to an "intervening cause" with reference to the damage suffered by third parties. In any event, the courts have ordinarily denied liability in cases involving third parties only where the harm caused was totally unexpected. Cases such as In Re Polemis, allowing recovery by a shipowner whose ship was destroyed by fire resulting from the defendant's negligent dropping of a plank into a gas-filled hold are merely harsh examples of the familiar "unit of liability" principle. In terms of the persons or property unit negligently injured, the fault system requires that the defendant take his unit of liability, however great, as he finds it, but does not make him responsible for damages caused to third parties by the exceptional condition of the person or property unit directly injured. The tort-lecture dilemma of a Polemis case involving ten ships, each owned by the same person, the aggregate value of which add up to the value of the Thrasyoulos, has been solved by denying liability for the destruction of the additional nine ships. With only one

8 From one standpoint, of course, no harm is ever totally unexpected.
9 Compare, Billman v. Indianapolis C. & L. R. Co., 76 Ind. 166 (1881), with Thompson v. Louisville & N. R. Co., 91 Ala. 496, 8 So. 406 (1890).
10 Seaboard Air Line R. Co. v. Mullin, 70 Fla. 450, 70 So. 467 (1915); Strobeck v. Bren, 93 Minn. 428, 101 N.W. 795 (1904).
bewildered dissent, nonliability has also been reached in cases where a plaintiff has sought to enlarge the defendant's liability by arguing that negligent damage to property is really damage to its owner and that the defendant must take the peculiarly situated property owner as he admittingly takes his peculiarly situated property—as is. An English court, for example, in Liesbosch Dredger v. S. S. Edison, refused recovery for damages incurred as a result of an unusually impecunious shipowner's inability to rent another ship after his own ship had been negligently damaged by the defendant.

Cases such as Palsgraf and Liesbosch Dredger, involving totally unexpected damage resulting from exceptional occurrences, are not authority for limitation of liability in cases such as Newlin and Byrd involving generally foreseeable property or economic injury. The vast factual gap separating a Newlin-Byrd- from a Palsgraf-type case highlights this fact. Judicial discrimination against economic as compared with other forms of property damage cannot, then, be explained in terms of "foreseeability."

Aside from the classic statement of Justice Holmes, the recent case of Stevinson v. East Oil & Gas Co. has been the first decision to frankly articulate the real basis for a denial or protection to economic interests injured as a result of negligent torts to third parties. Denial of recovery is not induced by a simple fear of economic injuries. The court recognized that purely economic interests are often legally protected, and that a person to whom a defendant is directly negligent is entitled to recover for any economic losses, such as the loss of wage payments, resulting from his injury. Rather, recovery is denied out of a judicial desire to prevent potentially unlimited liability for negligence. Other instances in which judicial fear of unlimited liability for negligence has been

14 Bowman v. Williams, 164 Md. 397, 115 Atl. 182 (1933).
17 "As a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong." Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 309 (1927).
18 47 Ohio Law Abs. 586, 591, 592, 73 N.E. 2d 200, 203 (1946). "While the reason usually given for the refusal to permit recovery in this class of cases is that the damages are "indirect" or are "too remote" it is our opinion that the principal reason that has motivated the courts in denying recovery in this class of cases is that to permit recovery of damages in such cases would open the door to a mass of litigation which might very well overwhelm the courts so that in the long run while injustice might result in special cases, the ends of justice are conserved by laying down and enforcing the general rule so well stated by Mr. Justice Holmes in Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 309."
19 E.g., Reynold v. Clark, 5 Boyce (28 Del.) 250, 92 Atl. 873 (1914).
significant are afforded by the famous decisions of Ryan v. New York Central R. Co. and Ultramares Corp. v. Touche. In the Stevinson case, involving the negligent obstruction of a factory building necessitating a large-scale layoff, the possibility of unlimited liability seemed fairly real. As the court felt that no workable liability line could be drawn between workers out of their jobs and restaurant owners supplying the workers' lunches, recovery was confined to the owners of the factory building. The rationale underlying compensatory damage awards would not be perverted by punishing the defendant wholly out of proportion with his degree of fault.

The firmly-embedded status of the rule denying protection for injured economic interests is well illustrated by judicial refusal of protection even where the threshold tort to the third party is intentional. Considering the intentional nature of the tort ultimately causing the injury, this result seems rather surprising. The Stevinson case aside, all relevant legal analogies seem to point in the direction of liability. Battery cases in which a defendant is held liable to a third person whom he had no intention of injuring and the many trespass cases in which the defendant, although admittedly without fault aside from his trespass, is required to pay damages for completely unforeseeable injuries to persons and property highlight the discrimination against economic interests. Recovery has even been allowed where a third-party relative of a person intentionally injured has suffered emotional harm as a result of such injury. Although relief would have been denied in similar cases involving negligent torts, the anti-social

20 35 N.Y. 210 (1866). Even in personal injury cases the court appeared willing to deny recovery for the expectant economic interest of the person injured.

21 255 N.Y. 170, 185, 174 N.E. 441, 447 (1931). "The extension, if made, will so expand the field of liability for negligent speech as to make it nearly, if not quite, coterminous with fraud."

22 From the defendant's standpoint, however, all compensatory damages are probably considered primitive. It is more important that the damages be appropriate to the act than to fully compensate the plaintiff. See Morris, Primitive Damages in Tort Cases, 44 Harv. L. Rev. 1173 (1931).


24 E.g., Petersen v. Hoffner, 59 Ind. 130 (1877). See generally, Prosser on Torts 47, 48 (1941).


26 Watson v. Delitz, 116 Iowa 249, 89 N.W. 1068 (1902); Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890); Contra: Koontz v. Keller, 52 Ohio App. 265, 3 N.E. 2d 695 (1936); Phillips v. Dickerson, 85 Ill. 11 (1877).

27 E.g., Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935). Contra: Hambrook v. Stokes Brothers, [1925] 1 K.B. 141. It is interesting to note the extreme solicitude for property owners, for if there is a trespass to land the owner could recover for mental suffering because of fear of her children's safety, while if she were a guest on the property she could not recover. Bowman v. Williams, 164 Md. 397, 165 Atl. 182 (1933).
nature of intentional torts is felt sufficient to justify liability despite the real
danger of fraud.\textsuperscript{28} Even assuming the validity of the \textit{Stevinson} rationale for a
denial of liability in cases where the threshold tort is only negligent, this ration-
ale seems to have no application whenever the original tort is intentional. In the
latter case, imposition of large-scale liability would often be counterbalanced by
the highly culpable nature of the defendant's conduct.

II

Categorical refusal to permit recovery for purely economic injuries caused by
negligent torts to third parties has engendered confusion in areas other than
that of "proximate cause." Inadequate analysis of the ordinary \textit{Stevinson} rule of
nonliability, even assuming the rule to be justified, has lead to its application in
extremely inappropriate circumstances. In the case of \textit{The Agwidale},\textsuperscript{29} for ex-
ample, certain damages were disallowed for the defendant's negligent injury to a
ship chartered to the government under a contract entitling the plaintiff-owner
to a proportionate part of the ship's rental value, regardless of the ship's condi-
tion. The owner was denied recovery to the extent that his losses were reduced
by his governmental contract, while the government was denied all relief, as
only its "economic interests" had been injured.

Absent the governmental contract, there is no doubt that the plaintiff-owner
might have recovered the full amount of the injured ship's "use" or rental value
for the period during which the ship was being repaired.\textsuperscript{30} Recovery of use value
does not hinge upon the existence of definite contracts dependent upon the
chattel's being in good repair. Market value of the chattel's use is recoverable in
any event and is analogous, in negligent personal injury cases, to recovery of
wage payments.\textsuperscript{31} The clear result of \textit{The Agwidale} decision is to allow the
defendant to appropriate for himself the benefits of the fortuitous governmental
contract. \textit{The Agwidale} rule requires innocent parties to bear the liability burden
attributable under ordinary "proximate cause" analysis to the defendant.

\textit{The Agwidale} case, refusing recovery by the party forced to bear the brunt of
tortfeasor liability, brings into sharp focus the close interrelationship between
several legal doctrines. The doctrine of subrogation, allowing indemnitor re-
cov ery against the tortfeasor in cases where the injured party's cause of action
is expressly assigned, has never consciously been extended to allow "implied

\textsuperscript{28} It \textit{w}uld seem that it is easier to feign an emotional injury than an economic injury.

\textsuperscript{29} 61 F. Supp. 191 (S.D. N.Y., 1945). See Damages-Reduction-Mitigation or Where Third
Party is Obligated to Compensate Injured Plaintiff-Libel, 31 Minn. L. Rev. 201 (1947).

Damages: Loss of Prospective Profits Recoverable in an Action for the Negligent Injury of a
Chattel, 35 Cornell L.Q. 862 (1950).

\textsuperscript{31} Reynold v. Clark, 5 Boyce (28 Del.) 250, 92 Atl. 873 (1914). If an actual wage or con-
tract exists, plaintiff can recover its value; if a contract does not exist, the reasonable value of
his services or the use of his chattel are recoverable. Cincinnati N.O. & T.P.R. Co. v. Perkins,
205 Ky. 798, 266 S.W. 652 (1924); El Monte, 252 Fed. 59 (C.A. 5th, 1918).
indemnitor” recovery in cases such as The Agwidale. Absent an express assignment, the courts have normally been unable to bridge the gap from what is considered a non-redressable economic harm to cases where the tortfeasor is being fortuitously relieved of his normal burden of liability. A few cases, however, seem consistent with the theory that subrogation doctrines are being extended to mitigate the effects produced by an indiscriminate application of the Stevinson rule. In Cue v. Breeland, for example, a builder under contract to keep a bridge constantly in repair was permitted to recover for increased expenditures necessitated by the defendant’s negligent injury to the bridge. “Implied subrogation” theory may also explain the few master-servant cases allowing relief where the employer has continued to make wage payments during a negligently injured employee’s illness. In no case granting recovery, however, has subrogation doctrine been explicitly discussed.

However inconsistent with the courts’ traditional refusal to employ subrogation rules to relieve against hardship in cases such as The Agwidale, de facto indemnity contracts which increase rather than diminish tortfeasor liability have been dealt with quite differently. In Byrd v. English, for example, where the plaintiff-customer was denied recovery for loss of profits due to his inability to secure service from a power company, the court indicated complete willingness to allow recovery by the power company itself had the company been obligated to indemnify its customers for economic damages resulting from loss of power service. As the Stevinson rule has been adopted to prevent potentially-unlimited liability for economic damage, judicial willingness to permit such liability whenever indemnity contracts have been negotiated by the party directly injured seems unreasonable. Especially is this true under the particular facts of Byrd v. English. In addition to the large-scale recovery which the court was willing to

Although there is little difference between agreeing to pay for injuries to persons and property, and a contract to continue to pay salaries or rent, the persons who pay for the first have a right of subrogation and those who agree to pay the latter do not. Traveler’s Ins. Co. v. Great Lakes Engineering Works Co., 184 Fed. 426 (C.A. 6th, 1911); United States v. Standard Oil Co., 332 U.S. 331 (1947). For collections of cases, consult Right of third person not named in bond or other contract conditioned for support of, or services to, another, to recover thereon, 11 A.L.R. 2d 1010 (1950); Right of indemnitor of one joint tortfeasor to contribution by or in-demnity against other joint tortfeasor or indemnitor of the latter, 75 A.L.R. 1486 (1931).

Chelsea Moving & Trucking Co. v. Ross Towboat Co., 280 Mass. 282, 182 N.E. 477 (1932). See Torts: Employer’s Action for Loss of Services: Extension of the Doctrine of Lumley v. Gye to Negligent Interference with Contracts, 18 Cornell L.Q. 292 (1933). The possibility of the extension of subrogation to these cases can be found by its broad construction in Sheldon, Law of Subrogation § 1 (2d ed., 1893): “The doctrine of subrogation is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by the latter.”

78 Miss. 864, 29 So. 850 (1901).


117 Ga. 191, 43 S.E. 419 (1903).
allow the power company for payments made to its customers, the company would also have benefited to the extent that the existence of the indemnity contracts necessitated higher service charges to its customers. Fortunately, many courts have refused to follow the Byrd decision on this point.\textsuperscript{37}

The subtle influence on the Stevinson doctrine in cases involving subrogation and indemnity is even more observable in cases where the “collateral benefits” rule is employed. The collateral-benefits rule permits a person who has been negligently injured to recoup all damages resulting from his injury without deduction of insurance and other like payments.\textsuperscript{38} As the Agwidale case illustrates, however, not every benefit is treated as falling within the rule. The courts have divided as to the “collateral” status of a great variety of contracts which incidentally result in effective indemnity to the injured party.\textsuperscript{39} Preferring “double recovery” to a fortuitous reduction of tortfeasor liability, most decisions have balked at allowing the tortfeasor to avail himself of the injured party’s contracts.\textsuperscript{40}

Analytically and perhaps even historically, the collateral-benefits rule can be viewed as a virtually necessary correlative of the rule prohibiting recovery for economic injuries resulting from negligent torts to third parties. The close interrelationship between the two doctrines is well illustrated by the recent case of United States v. Standard Oil Co.,\textsuperscript{41} in which recovery was refused for hospital expense and salary payments made to a soldier relieved from duty because of negligent injuries inflicted by the defendant. The courts have developed the collateral-benefits rule to prevent the defendant, under such circumstances, from pleading the government’s salary and hospital expense payments in mitigation of the soldier’s damages. The solution thus arrived at, although permitting “double recovery” by the person negligently injured, is clearly more justifiable than the Agwidale alternative of bestowing the defendant’s contractual benefits upon the negligent tortfeasor. An even more desirable alternative, however, would seem to be afforded by expansion of subrogation doctrines to allow “implied indemnitor” recovery against the tortfeasor. The single weakness of this alternative, the danger that the injured party may settle with the tortfeasor for an unjustifiably low figure, could easily be averted by providing the “indemnitor” with a direct rather than a derivative action. But whether the action is direct or derivative, the tortfeasor should be allowed to plead the “indemnitor’s” judgment in mitigation of the injured party’s damages.


\textsuperscript{39} Compare Shea v. Rettie, 287 Mass. 454, 192 N.E. 44 (1934), with Dinkwater v. Dinsmore, 80 N.Y. 390 (1880).

\textsuperscript{40} See generally, Mitigating Effect on Damages of Social Welfare Programs, 63 Harv. L. Rev. 330 (1949); Damages-Reduction-Mitigation or Where Third Party is Obligated to Compensate Injured Plaintiff, 31 Minn. L. Rev. 201 (1947).

\textsuperscript{41} 332 U.S. 301 (1947).
III

Despite the almost universal acceptance of the Stevinson rule of nonliability in third-party economic injury cases, it has long become fashionable to state that the rule is rapidly giving way. Although eminent legal writings may be cited in support of the existence of such a tendency,\textsuperscript{42} even cursory case analysis seems to prove them false. Erosion of the traditional nonliability rule is purportedly seen in such decisions as \textit{Cue v. Breeland}\textsuperscript{44} and in the more recent developments stemming from \textit{Lumley v. Gye}. Historical anomalies are also relied upon as pointing in the direction of liability. The distinguishing mark of this “new” development lies in the liability requirement that the harm caused to the economic interest be “particularly foreseeable.”

Cases such as \textit{Cue v. Breeland},\textsuperscript{44} in which a builder under contract to repair a bridge was permitted recovery for its negligent injury, have already been explained as involving a desirable, although unnoticed, extension of the law of subrogation.\textsuperscript{49} The few decisions allowing recovery for the use value of negligently injured chattels also lend but superficial plausibility to the contention that third-party economic harms are being redressed.\textsuperscript{46} Market value of an injured chattel’s use has long been recoverable.\textsuperscript{47} Existing contracts by which the chattel owner or his lessees contemplate profits through the injured chattel’s use are merely employed as convenient measures of use value. Without exception, all third-party chattel injury cases in which recovery has been allowed are explainable in terms of \textit{Cue v. Breeland}.\textsuperscript{48}

Two distinct bodies of case law do allow recovery for economic harms caused by negligent torts to third parties and are directly contrary to the general rule of nonliability. Neither of these exceptions, however, can fairly be considered as repudiating the general rule. Each must be considered in its historical setting.

Early in common-law history, a master was permitted to recover expenses resulting from the defendant’s negligent injury to his servant.\textsuperscript{49} This extreme

\textsuperscript{42}“The question may at least be raised whether ... the law may not be expected to move in the future in the direction of recovery.... There is some slight authority looking ... vaguely in this direction.” Prosser On Torts 993 (1941).

\textsuperscript{44} 78 Miss. 864, 29 So. 850 (1901).

\textsuperscript{45} Ibid.

\textsuperscript{46} See cases cited note 32 supra.


\textsuperscript{48} Pope’s Adm’t v. Terrill, 308 Ky. 263, 214 S.W. 2d 276 (1948); Brooks Transportation Co. v. McCutcheon, 154 F. 2d 841 (App. D.C., 1946).

\textsuperscript{49} See cases cited note 46 supra.

solicitude for the master-servant relationship can be explained on the basis of the medieval conception that the master possessed a distinct property right in his servant. The defendant's negligence was considered as involving a direct tort against the master. In its origin, the master-servant exception is comparable to a modern action for negligent injuries to a chattel.\(^5\) The chattel owner is allowed recovery both for the cost of the chattel's repair and the loss of use value entailed during the period in which the repairs are being made. A similar historical rationale underlies the husband's traditional right to recover damages for loss of consortium due to the defendant's negligent injuries to the wife.\(^6\)

Neither the master-servant nor consortium exceptions fit the "foreseeability" principle supposedly underlying the erosion of the *Stevinson* nonliability rule. In neither case is the extent of the harm caused the same regardless of the particular party bearing the loss, as in *Cue v. Breeland*.\(^2\) Nor is the particular plaintiff "foreseeable" as required by *Lumley v. Gye*. Both exceptions are perfectly analogous to the *Stevinson* case, although the third party's economic injuries are redressed rather than ignored.

The master-servant and consortium exceptions constitute the most significant basis for the future extension of protection to the economic interests of third parties in cases where the tortfeasor does not specifically know of the particular interests harmed. Recent developments in the anomalous master-servant cases indicate no tendency towards the expansion of liability. The Supreme Court, for example, as noted above,\(^3\) in the recent case of *United States v. Standard Oil Co.*,\(^4\) refused to extend the master-servant category to encompass the government-soldier relationship. An English court, however, on an identical set of facts, allowed the government's action to be maintained.\(^5\) Employer recovery, when granted, has usually been confined to employer payments which incidentally reduce the tortfeasor's liability to the servant.\(^6\) In consortium cases, narrow liability limits have also ordinarily been maintained. Contrary to the usual rule, however, recovery for loss of consortium has in a few recent cases been extended to permit actions by the wife and children in cases involving negligent injuries to the husband.\(^7\) Even in their broadest application, however, neither master-servant nor consortium cases afford much of an inroad on the *Stevinson* rule of nonliability. Limitation of recovery in each case to a single

\(^{50}\) See cases cited note 46 supra.

\(^{51}\) For a general discussion, consult Prosser On Torts 916 (1941).

\(^{52}\) 78 Miss. 864, 29 So. 850 (1901).

\(^{53}\) See note 41 and accompanying text supra.

\(^{54}\) 332 U.S. 301 (1947).


third-party plaintiff confines the scope of liability within extremely narrow limits.

Recent extensions of *Lumley v. Gye* and the cases imposing liability upon telegraph companies for negligent transmission of messages are also offered as support for the view that economic damage resulting from threshold negligence to third parties is recoverable. While the *Lumley v. Gye* and telegraph decisions differ significantly, they are alike in requiring, as a condition of liability, particular knowledge of the injured economic interest. The only real analogical parallels to the “generally foreseeable” layoff of the *Stevinson*-case factory workers are furnished by the master-servant and consortium cases.

The basis for the original decision in *Lumley v. Gye* was the defendant’s intent to injure a third party by inducing another to breach his contract of employment. Thus stated, the defendant’s act can be considered as involving a direct tort relating either to the injured party’s contract or to the injured party himself. Confined to its bare facts, *Lumley v. Gye* has little relevance to the liability issues raised by threshold negligent harm to one person causing economic harm to another.

Recent extensions of *Lumley v. Gye*, however, have abrogated the necessity of establishing the defendant’s intention to injure the third party. The typical situation is presented where the defendant, with specific knowledge of the plaintiff’s contract with a third party but with no intention of injuring it, intentionally commits a tort, such as battery, upon the third party which disables him from performing. A majority of courts, judicially analyzing this problem in terms of *Lumley v. Gye*, have allowed the plaintiff to recover his loss of profits resulting from the third party’s inability to perform. In striking contrast to these decisions is the large body of cases in which recovery has been denied in the absence of the defendant’s specific knowledge of the plaintiff’s contract.

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69 E.g., Western Union Telegraph Co. v. Mathis, 215 Ala. 282, 110 So. 399 (1926).

70 Primrose v. Western Union Telegraph Co., 154 U.S. 1 (1894); The Poznan, 276 Fed. 418 (S.D. N.Y., 1921).

71 Reichman v. Drake, 89 Ohio App. 222, 100 N.E. 2d 533 (1951); French v. U.S. Fidelity & Guaranty Co., 88 F. Supp. 714 (D.N.J., 1950); see, also, cases cited note 58 supra.

72 Sandlin v. Coyle, 143 La. 121, 78 So. 261 (1918).

73 Reichman v. Drake, 89 Ohio App. 222, 100 N.E. 2d 533 (1951); French v. U.S. Fidelity & Guaranty Co., 88 F. Supp. 714 (D.N.J., 1950); see, also, cases cited note 58 supra.

fendant's intentional act, instead of being tortious in itself, as in the battery case, merely consists of a breach of contract with a third party resulting in a specifically foreseeable economic loss to the plaintiff, the courts have been more reluctant to impose liability.\textsuperscript{65} Judicial decisions are about evenly divided.\textsuperscript{66} \textit{Lumley v. Gye}, as such, has been extended no further then the two situations just described.

Doctrinal confusion of the varying liability tests applicable to cases involving third parties, however, has resulted in a welter of conflicting decisions. In the recent case of \textit{Baruch v. Beech Aircraft Co.},\textsuperscript{67} for example, the defendant's mechanic prepared an airplane for flight by the plaintiff's drunken pilot with specific knowledge that the pilot's contract did not allow him to fly while intoxicated. The court, visualizing the mechanic's conduct as a direct negligent tort to the plaintiff's contract with the pilot, refused recovery for the plaintiff's damaged airplane on the theory that \textit{Lumley v. Gye} was inapplicable to merely negligent acts. The \textit{Baruch} decision is an excellent illustration of the close interrelationship of \textit{Lumley v. Gye}, the \textit{Stevinson} rule, and cases such as \textit{Newlin v. The New England Telephone and Telegraph Co.} A \textit{Lumley v. Gye} analysis could have resulted in liability only if the court had been willing to extend the doctrine beyond any decided case. An application of the \textit{Stevinson} rule, through an analogical inversion of the threshold negligence to the plaintiff's contract and the resulting damage to the plane, dictated nonliability. Reliance on the \textit{Newlin} case, however, would have produced recovery. A negligent tort to the plaintiff's contract resulting in damage to the \textit{plaintiff's own property} is a fortiori from the \textit{Newlin} rule allowing recovery for property damage to \textit{one person} occasioned by the defendant's threshold negligence to a \textit{third person}. The analogy afforded by \textit{In Re Polemis},\textsuperscript{68} while not as sharp as the \textit{Newlin} case, would also have brought relief.\textsuperscript{70} The court's failure to employ the \textit{Newlin} analysis is explicable as a confused attempt to avoid what was probably argued as a backdoor encroachment on the \textit{Stevinson} doctrine through a further extension of \textit{Lumley v. Gye}. Yet the rationale underlying the \textit{Stevinson} doctrine requires a restriction of liability only where the possibility of damage is unlimited. The amount of prop-


\textsuperscript{67} 175 F. 2d 1 (C.A. 10th, 1949).

\textsuperscript{68} 316 Mass. 234, 54 N.E. 2d 929 (1944).

\textsuperscript{69} \textit{In Re Polemis & Furness, Withy & Co.}, [1921] 3 K.B. 560.

\textsuperscript{70} The doctrine of the Polemis case calls for liability if there is a threshold tort to a person or property for all the damages that are caused by that tort even if unexpected. If the defendant's negligence was to the contract, he would be liable for all the damages resulting from the loss of the contract.
However anomalous, the one judicial decision granting damages for economic harm resulting from negligence to a third party makes no reference to *Lumley v. Gye*. In the case of *Midvale Coal Co. v. Cardox Corp.*, recovery was allowed to an employer for increased insurance rates due to compensation payments made to employees injured as a result of the negligent construction of products specifically known to be purchased for use in the employer's business. While the exact doctrinal basis for the court's decision is unclear, heavy reliance was placed on the defendant's specific knowledge of the use for which the products were intended.

The *Midvale* case, in basing its decision on the "particular-general foreseeability" distinction is closely analogous to the recent extensions of *Lumley v. Gye*. The courts have ordinarily refused recovery for economic harms resulting from torts to third parties only where the harm caused is "generally" as distinguished from "particularly" foreseeable. Analytically, the result of this distinction is to increase the defendant's liability, not in relation to his fault, but in proportion to his awareness of other people's affairs. An extraordinarily well-informed defendant in the *Stevinson* case, for example, would have been liable to every worker in the negligently obstructed factory. Despite the analytical absurdity involved, the strikingly general acceptance of the distinction is possibly indicative of a judicial desire to allow recovery for third-party economic harms whenever the liability limits appear necessarily narrow. This explanation would accord with the long-continued toleration of the master-servant and consortium cases, and of the recent extensions of *Lumley v. Gye*.

The large body of telegraph cases allowing the sendee to recover for the negligent misdelivery and transmission of messages can be variously explained. Telegraph companies are closely analogous to common carriers, and are burdened with the well-established common-carrier doctrine of "public duty." Negligent telegram transmission is simply a breach of duty for which a tort action lies by any injured member of the public. An alternative explanation of the

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The obvious difference between actual physical damage and economic damage lies in the fact that a single act can only destroy a limited amount of property. The number of economic interests that can be destroyed at one time, however, may be close to infinity.

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152 Ohio St. 437, 89 N.E. 2d 673 (1949), modified, 157 Ohio St. 526 (1952). The decision is contrary to an otherwise unanimous body of authority. See, e.g., Northern States Contracting Co. v. Oakes, 191 Minn. 88, 253 N.W. 371 (1934). The cases are collected in 92 A.L.R. 1205 (1934).

In a concurring opinion, Taft, J. indicates that recovery is allowed because the employer had been forced to compensate the State Insurance Comm. instead of the tortfeasor, in that the State Insurance Comm. had a choice to raise the insurance rate or to pursue the tortfeasor.

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telegraph cases can be based on the doctrine of third-party beneficiary. The injured sendee is often the only party damaged, and to refuse recovery would result in a negative economic bonus to the telegraph company. The telegraph cases scarcely afford support for the view that the Stevinson doctrine is fast giving way. In addition to the independent bases upon which these decisions can be explained, liability is sharply restricted to known parties. Thus, no recovery is allowed against a telegraph company for injuries suffered by investors as a result of reliance upon erroneously transmitted stock market data.

IV

The distinction between third-party economic harms which are "generally," as distinguished from "particularly," foreseeable rests in large measure upon the assumption that an expansion of liability to encompass the latter would result in an overwhelming degree of liability for mere negligence. The validity of this assumption necessarily depends upon the degree to which economic interests would be protected if the Stevinson rule were to be judicially abolished. While this question is in its nature unanswerable, some indication of the interests which would be protected can be gleaned from an analysis of those currently afforded protection under the law of Lumley v. Gye.

In the Lumley v. Gye area, intentional interferences with contracts unenforceable because of the Statute of Frauds, formal defects, lack of mutuality and consideration, or even uncertainty of terms have generally been held actionable. A significant number of cases purporting to adopt a rule of protection, however, are actually cases in which the act inducing the breach was intentionally tortious of itself. A few courts have even held that unenforceable contracts are never entitled to protection. The reasoning of this latter group
of cases is that an inducement to do an act which a person has a legal right to do is not the "proximate result" of the damage suffered. While in cases involving "at will" business contracts, this reasoning may be justified in terms of the parties' intentions to preserve their respective contractual freedoms, even this explanation lacks merit whenever the parties intended but failed to consummate a legally enforceable business contract.

A sharp distinction must be drawn between "at will" employment and "at will" business contracts. Historically, employment relationships have occupied a singular legal position and were early the subject of statutory protection against interference.\(^5\) This fact coupled with the greater unity of interest between "at will" master and servant as compared with business relationships have combined to afford the former a far higher degree of protection.\(^8\)

Recovery for intentional interference with prospective advantages has also been given. Where a third person, out of an officious desire to intermeddle or through the use of means tortious in themselves intentionally prevents the receipt of a gift, contest prize or other reward, liability has frequently resulted.\(^7\) Relatively few cases have granted relief, however, where the act which has induced the deprivation of the advantage has not been tortious in itself.\(^8\) In all of the above cases, damage problems are particularly acute and at times result in the complete denial of liability.\(^9\) The liability decisions stemming from \textit{Lumley v. Gye}, involving intentional interferences, have generally been paralleled in the telegraph cases, where the interference is merely negligent.\(^20\)

In the light of the foregoing cases, the rationale underlying the \textit{Stevinson} court's refusal to permit recovery by the economically damaged factory employees seems prima facie justified. An assumption that a contrary result might in some cases produce an unconscionable degree of liability for mere negligence may well be warranted in view of \textit{Lumley v. Gye} protection of interests as shadowy as pure expectancies. Countervailing considerations are presented, however, by the differing degrees in which the courts have been willing to protect economic interests; and by the fact that "fluid" market conditions should some-

\(^5\) Statutes of Labourers, 23 Edward III, c. 2 (1349), 25 Edward III, c. 5 (1350-51).


Generally, "at will" business contracts are made so that either party to them can accept better offers. It is expected that they will have a short life. Employment "at will" contracts, however, are generally permanent and the function of the "at will" provision is to allow adjustment within the contract for changed economic conditions.


\(^8\) Ross v. Wright, 286 Mass. 269, 190 N.E. 514 (1934).


\(^{20}\) E.g., Western Union Telegraph Co. v. Tatum, 49 So. 2d 673 (Ala. App., 1950).
times afford assurance that little or no damage would be recoverable in cases involving “at will” or expectant business or employment relationships.

The fact that fears of large-scale liability underlying the Stevinson rule are probably justified heavily detracts from the possible validity of a second and entirely different rationale which might have induced judicial refusal to protect third-party economic interests. The very fact that the courts have been willing to impose liability in personal and physical property damage cases, while refusing protection to purely economic interests, may suggest that unlimited liability fears have nothing to do with discrimination against economic interests. Vague apprehensions of fraud, satisfied easily by the visible damage of personal and property cases, coupled with an assumption of permanently “fluid” laissez-faire market conditions, might constitute an equally sound basis for refusing protection. Theoretically at least, jobs and business contracts are immediately replaceable in the market place. If this is the true basis for denying recovery, evolving social judgments concerning laissez-faire might well produce a reversal of the traditional nonliability rule. It is probable, however, that the second possible basis for denying protection has never occurred to the courts. The obvious fact that economic interests are frequently nonreplaceable and that the non-employment of property occasioned by destruction of the relationship upon which its use depends involves just as much social loss as the destruction of a similar amount of physical property affords convincing support for such a view. The most plausible reason for judicial discrimination against economic interests is furnished by the fact that only a limited amount of physical damage can ever ensue from a single act, while the number of economic interests a tortfeasor may destroy in a brief moment of carelessness is practically limitless.

Decisions refusing recovery for economic damage caused by negligent torts to third parties seem well established. Historical exceptions aside, no decision can be found in which a defendant has ever been held liable in the absence of specific knowledge of the injured economic interest. Unjustifiably, the Stevinson rule has even been followed in third-party cases where the threshold tort is intentional. Apparent judicial discrimination against third-party economic as distinguished from personal and property interests results from a justifiable fear of unlimited liability for negligence. Similar considerations do not apply in cases involving personal and property interests.

The pervasive influence of the Stevinson rule is well illustrated in the courts’ refusal of relief in cases where the plaintiff is compelled to bear the loss of the interferor’s tort to a third party. Visualizing the plaintiff’s loss as “economic,” the courts have developed the collateral-benefits rule to avoid the injustice of allowing the tortfeasor to avail himself of the injured party’s “indemnity” contracts. Failure to extend familiar subrogation principles to permit the “implied indemnitor’s” recovery against the tortfeasor seems unwarranted. Significantly
perhaps, the courts have never explicitly discussed the close interrelationship of the Stevinson, subrogation, and collateral-benefits rules.

Scholarly attempts to link the recent extensions of Lumley v. Gye with master-servant and consortium cases on the theory that each constitutes a significant inroad on the Stevinson doctrine cannot be supported. While the master-servant and consortium decisions are true exceptions to the Stevinson rule, each has an historical setting which divorces it from the stream of modern liability development. The recent decisions under Lumley v. Gye, while dispensing with the "intentional harm" requirement, have never been extended to encompass liability for merely negligent acts. The one case granting relief for "negligent" interference does so entirely without reference to these recent extensions.

Master-servant and consortium exceptions aside, all of the cases purportedly carving inroads into the Stevinson rule involve the requirement that the injured relationship be "particularly foreseeable." While the particular-general limitation is analytically nonsensical, it is explicable as a significant judicial attempt to grant recovery for third-party economic harm whenever the possibilities of unlimited liability are absent. This explanation also accords with the continued vitality of the master-servant and consortium cases. As yet, however, the courts have failed to appreciate the true basis for the particular-knowledge requirement and have made ignorance of other people's affairs, instead of the tortfeasor's degree of fault, the basis for imposing liability. But the Stevinson doctrine, in general, seems justified. The harshness that it has engendered could have been avoided had proper analysis guided its use.

THE MULTIEMPLOYER LOCKOUT

The NLRB and the courts in the Seventh and Ninth Circuits have sharply divided on the legality of a defensive multiemployer lockout conducted by unstruck employers in response to a strike against a single member of the employer group.1 In this context, the lockout involves not a permanent discharge but a temporary severance of employment until the strike has been lifted. Absent such

1 The defensive lockout should be distinguished from the so-called "bargaining lockout," which is designed to break a bargaining impasse independently of any union strike action. Management control over the terms of employment eliminates any real need for such a weapon, hence its infrequent use. However, Judge Lindley of the Seventh Circuit apparently believes in the legality of both the defensive and bargaining lockouts. See Morand Bros. Beverage Co. v. NLRB, 190 F.2d 576 (C.A. 7th, 1951). For a discussion of both types of lockouts, see The Multi-Employer Lockout, 3 Utah L. Rev. 122, 128 (1952). In Continental Baking Co., NLRB Trial Examiner's Intermediate Report and Recommended Order IR-827, at p. 11 (1952), one NLRB Trial Examiner suggested a view favoring the legality of the defensive lockout but not the bargaining lockout. The Examiner, bound by the Board's decisions, declared the defensive lockout in that case unlawful, but added his thought that "the better view would be that an employer may resort to a lockout as a defensive measure after a strike is called, but if he does it beforehand he discriminates unlawfully against his employees. Preventative warfare would be barred to the employer as vitally affecting the right to strike which is guaranteed by the Act."