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A RETURN TO PRINCIPLES OF CORRECTIVE JUSTICE IN DECIDING ECONOMIC LOSS CASES

*Andrew W. McThenia & Joseph E. Ulrich**

CASES involving negligently inflicted economic loss unaccompanied by injury to persons or property pose special problems for courts. Neither past decisions nor economic theory provide coherent guidelines addressing all the myriad factual settings in which such losses occur. Longstanding precedent forecloses many claims that concerns of basic fairness and even social policy would allow. The economic analysis approach, which may appear more logical in theory, sometimes produces arbitrary and even inequitable results in practice.[1] This economic model regards tort law as an instrument of social control that deters inefficient conduct and maximizes social wealth[2] rather than as a means of effectuating justice between individual litigants—the corrective justice view.[3]

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* Professors of Law, Washington & Lee University. We would like to express our appreciation to our colleagues, Lewis H. LaRue and Brian Murchison, for their comments on an earlier draft of this article.

[1] Recent scholarship has attempted to rationalize past decisions and to provide a model for resolving future cases by applying an economic analysis to all claims of negligently inflicted economic loss. Judge Learned Hand proposed a formula in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947), based on the proposition that the law will impose liability where the costs of an accident exceed the costs of its prevention. He found that a person's duty to prevent injuries from an accident "is a function of three variables: (1) The probability that [the accident will occur]; (2) the gravity of the resulting injury, if [it] does; (3) the burden of adequate precautions." Id., quoted in Pruitt v. Allied Chem. Corp., 523 F. Supp. 975, 978 n.11 (E.D. Va. 1981). Law and economics scholars at the University of Chicago argue that their analytical system, based on the Hand formula, is applicable to most unintentional tort cases. See R. Posner, Tort Law, Cases and Economic Analysis 1-9 (1982); Posner, A Theory of Negligence, 1 J. Legal Stud. 29 (1972); Shavell, Strict Liability Versus Negligence, 9 J. Legal Stud. 1 (1980).

[2] "One of the main purposes of law, from an economic standpoint, is the control of externalities. . . . Property rights and liability rules . . . are devices by which people are given incentives to internalize the costs and benefits of their actions so that an efficient allocation of resources is achieved." Posner, Some Uses and Abuses of Economics in Law, 46 U. Chi. L. Rev. 281, 305 (1979).

[3] Professor Epstein described the traditional or corrective justice view as follows:

> The traditional view—largely unchallenged until recent years—was to look at the law of torts as a study in corrective justice, as an effort to develop a coherent set of principles to decide whether *this* plaintiff was entitled to compensation from *this*

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Although seemingly abandoned in some judicial decisions and academic literature, principles of corrective justice still occasionally guide courts in economic loss cases. This article examines *Pruitt v. Allied Chemical Corp.*,[4] an economic loss case in the United States District Court for the Eastern District of Virginia. The article discards both precedent and economic analysis as explanations for the result and questions their value in adjudicating such claims. It concludes that the court's concern for corrective justice predominated over considerations of precedential rulemaking and economic efficiency. By actively encouraging an out-of-court settlement rather than further litigation, the court sought a resolution acceptable to both sides.

I. A Synopsis of the Facts and Holding of *Pruitt*

Pruitt was one of several lawsuits spawned by the kepone disaster.[5] Several categories of plaintiffs involved at all levels of the commercial fishing industry[6] sought recovery for economic losses caused by the wrongful discharge of kepone into the James River by defendant Allied Chemical Corporation (Allied). Plaintiffs sought lost profits resulting from first, an inability to sell seafood

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defendant as a matter of fairness between the parties. Issues of public policy and social control were of course not absent, but they did not dominate judicial or academic attitudes either to particular cases or to general theory.

C. Gregory, H. Kalven & R. Epstein, Cases and Materials on Torts xxii (3d ed. 1977) (emphasis in original).

[4] 523 F. Supp. 975 (E.D. Va. 1981).

[5] Kepone, a highly toxic pesticide, was manufactured at the Hopewell, Virginia plant of Allied Chemical Corporation (Allied) from 1966 through 1974. Although Allied began contracting out the work to Life Science Products Co. (Life Science) in 1973, it continued to produce kepone until March 1974. Transcript of Sentencing at 7-12, United States v. Allied Chem. Corp., No. CR-76-0129-R, slip op. (E.D. Va. Oct. 5, 1976). Following reports of illness among Life Science workers, Virginia Health Department officials ordered the plant closed in July 1975. Sometime thereafter it was discovered that Allied, and later Life Science, dumped thousands of pounds of this toxic chemical into the Hopewell sewage treatment plant, a plant not designed to remove toxic wastes. Five Years After, Wash. Post, July 20, 1980, at C1, col. 1. In late 1975, the state of Virginia ordered portions of the James River and the Chesapeake Bay closed to fishing, a ban originally expected to last until 1985 but gradually relaxed over the years. See On the James Again: No Big Deal, Wash. Post, July 4, 1981, at B1, col. 3. Representatives of the Virginia seafood industry claimed that the fishing ban cost the industry between $18 and $20 million.

[6] *Pruitt*, 523 F. Supp. at 976 n.1, 979 n.19. Employees of each of the plaintiffs also sued in their own right, but their claims were denied without separate discussion as too indirect. Id. at 976 n.1, 980.

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allegedly contaminated by kepone and second, a drop in price resulting from the decline in consumer demand for Virginia seafood caused by kepone publicity.[7]

The court divided the plaintiffs into three categories. Fishermen, shellfishermen, and oysterbed lessors whose livelihoods depended wholly or partly on harvesting the resources of the James River and the Chesapeake Bay (the "commercial fishermen") comprised the first group.[8] The second category encompassed firms in the chain of distribution of seafood purchased from commercial fishermen, including wholesalers, retailers, processors, distributors, and restaurateurs (the "distributors").[9] The third group, consisting of boat owners, marina owners, and tackle and bait shop owners, suffered losses in sales of goods and services to sportsfishermen. To protect sportsfishing interests, the court allowed this group of plaintiffs (the "surrogates") to press their claims as surrogates for sportsfishermen unlikely to seek legal redress for their individually small losses.[10]

Allied moved to dismiss the distributors' and surrogates' unintentional tort claims[11] for failure to state claims on which relief could be granted, arguing that the losses were too remote to have been proximately caused by Allied's negligence.[12] Although the complaint urged many different theories of liability, including claims under admiralty law and the Federal Water Pollution Control Act,[13] the central issue before the *Pruitt* court was whether the distributors and surrogates would be permitted to maintain actions in negligence and nuisance. The court dismissed the distributors' claims, but held that the surrogates had stated legally cognizable

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[7] Id. at 976.

[8] Id.

[9] Id. at 979 n.20.

[10] Id. at 980.

[11] Defendant's alleged intentional torts included malicious injury to plaintiffs' interests and violation of Va. Code Ann. §§ 18.2-499, -500 (1975) (conspiracy to willfully injure plaintiff in its business or property). These counts were left for further proceedings. *Pruitt*, 523 F. Supp. at 976 n.2.

[12] Judge Merhige emphasized that "none of the plaintiffs has suffered direct harm to his or its property." *Pruitt*, 523 F. Supp. at 976 n.3. This included the commercial fishermen because they "obviously do not own the marine life that they harvest or the water in which that life flourishes." Id. But see infra note 34 and accompanying text; infra text accompanying notes 54-55.

[13] 33 U.S.C. §§ 1251-1376 (1976).

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causes of action on both counts.[14]

II. The Limited Value of Precedent in Adjudicating Economic Loss Claims

The Second Restatement of Torts precludes recovery for pure pecuniary losses caused by negligence, but permits redress for similar losses inflicted intentionally.[15] Commentators justify the Restatement position by arguing that it aids the administration of tort litigation by presenting the trial judge with a workable rule.[16] Courts recognize that once they permit recovery for pure economic loss, defining a stopping point becomes nearly impossible.[17] Judge Merhige acknowledged this problem in *Pruitt*: "[T]he set of potential plaintiffs seems almost infinite. . . . The court thus finds itself with a perceived need to limit liability, without any articulable reason for excluding any particular set of plaintiffs."[18] Denying recov-

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[14] *Pruitt*, 523 F. Supp. at 980, 982. The court disallowed the admiralty claims of the distributors and the surrogates. Id. at 981-82. It held that although it could allow the claims of the marina owners and others as surrogates in tort, their losses were too indirect to establish a claim in admiralty. The statutory claims were dismissed as to all parties. Id. at 982-83.

Professor Kalo recently criticized *Pruitt* based on his belief that the surrogates' state law claims should have been disallowed and all claims instead determined under general maritime law. Kalo, Water Pollution and Commercial Fishermen: Applying General Maritime Law to Claims for Damages to Fisheries in Ocean and Coastal Waters, 61 N.C.L. Rev. 313, 357-62 (1983). Although the surrogates' claims were within the federal courts' admiralty jurisdiction, Professor Kalo argues that substantive law would deny those claims. State law thus should not be able to expand recovery to plaintiffs other than those permitted recovery under federal maritime principles because the ripple effect of expanding liability might dilute the compensable claims of commercial fishermen. Id. at 361.

[15] Restatement (Second) of Torts § 766C comment a (1977).

[16] See, e.g., W. Prosser, Handbook of the Law of Torts § 129 (4th ed. 1971). See also Green, The Duty Problem in Negligence Cases, 28 Colum. L. Rev. 1014, 1035-45 (1928) (importance of a legal rule's "workability" cannot be underestimated).

[17] The indirect economic repercussions of an act of negligence extend very far in a modern economy because economic relations are inherently intertwined. To assign liability by tracing cause and effect would impose too severe a penalty for negligence, unduly limiting freedom of action for fear of incurring such liability. See Perlman, Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine, 49 U. Chi. L. Rev. 61, 69-76 (1982).

As one commentator has noted, "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." Comment, Foreseeability of Third-Party Economic Injuries—A Problem in Analysis, 20 U. Chi. L. Rev. 283, 298 (1953). Courts often conceal such concerns behind discussions of "proximate cause" and "remoteness of injury." See, e.g., cases cited infra notes 27, 44.

[18] *Pruitt*, 523 F. Supp. at 979-80.

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ery for negligently inflicted pecuniary loss unless accompanied by injury to person or property thus appears a convenient way to avoid the problem entirely.

Applying the Restatement rule often leads to results which seem unfair, however.[19] In many situations, economic loss resulting directly or indirectly from negligence is as foreseeable and as limited in scope as is injury to persons or property.[20] Moreover, a broad, categorical rule denying recovery without regard to individual circumstances is necessarily insensitive to the equitable and social policy concerns that support allowing such claims in particular cases. Judges have often realized this failing and riddled the traditional doctrine with exceptions.[21] Negligently inflicted economic loss is thus often recoverable at common law.[22]

A. The Distributors' and Surrogates' Claims

Notwithstanding these exceptions, precedent supported Allied's motion to dismiss the distributors' claims on grounds of remoteness.[23] With few deviations,[24] courts presented with similar facts have generally denied recovery to nonfishermen for pecuniary losses. Indeed, many such cases have expressly precluded recovery by injured parties operating beyond the water's edge,[25] and no

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[19] See Epstein, Intentional Harms, 4 J. Legal Stud. 427, 428-31 (1975). Professor Epstein describes the rule as both "unjust and inefficient." Epstein, Causation and Corrective Justice: A Reply to Two Critics, 8 J. Legal Stud. 477, 501-02 n.71 (1979). See also Note, Negligent Interference with Economic Expectancy: The Case for Recovery, 16 Stan. L. Rev. 664 (1964) (refusal to allow recovery for negligent interference with economic expectancy unwise where recovery merited and socially desirable); Note, Negligent Interference with Contract: Knowledge as a Standard for Recovery, 63 Va. L. Rev. 813 (1977) (noting recent court challenges to the rule).

[20] James, Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal, 25 Vand. L. Rev. 43, 50 (1972).

[21] For numerous exceptions to the general rule, see W. Prosser, supra note 16, § 130, at 952 nn.79-82.

[22] Rizzo, A Theory of Economic Loss in the Law of Torts, 11 J. Legal Stud. 281, 283 (1982).

[23] See infra note 40 and accompanying text. As the *Pruitt* court noted, the Supreme Court of Virginia has never directly considered the question of recovery for negligently inflicted economic loss. *Pruitt*, 523 F. Supp. at 977.

[24] See Maddox v. International Paper Co., 105 F. Supp. 89 (W.D. La. 1951), aff'd, 203 F.2d 88 (5th Cir. 1953) (owner of limited access to river entitled to compensation); Masonite Corp. v. Steede, 198 Miss. 530, 23 So. 2d 756 (1945) (owner of fishcamp entitled to compensation). Judge Merhige cited these two cases in *Pruitt*, 523 F. Supp. at 977 n.9.

[25] See, e.g., Union Oil Co. v. Oppen, 501 F.2d 558, 570 (9th Cir. 1974). Parties operating at

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court has ever permitted parties as far removed from the pollution as were the distributors to recover any damages. *Pruitt*'s conclusion that the damages suffered by the distributors were "not legally cognizable, because insufficiently direct"[26] is thus entirely traditional.

Even ignoring the dictates of precedent, denial of the distributors' claims seems sensible. Both the commercial fishermen and the distributors sought recovery for damages to commercial interests. Permitting both to recover could lead to doublecounting of losses because any seafood the fishermen harvested would have been bought and sold several times before reaching the ultimate consumer. Doublecounting is undesirable whether one views tort law as a mechanism of social control or as a vehicle for corrective justice. As Judge Merhige pointed out, "[c]onsiderations both of equity and social utility suggest that just as defendant should not be able to escape liability for destruction of publicly owned marine life entirely, it should not be caused to pay repeatedly for the same damage."[27] Furthermore, unless one assumes a market imperfection caused by the loss of supply of Virginia seafood, the distributors ought to be able to discover sufficient alternative sources of supply. To the extent they were able to do so, these plaintiffs were hurt less directly by Allied's pollution than the fishermen, who may have had less flexibility to shift operations to other areas.[28]

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the water's edge or on the water are generally limited to commercial fishermen or businesses serving sports and commercial fishing. See also Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Me. 1973) (commercial fishermen and clam diggers may sue for negligently inflicted economic loss but businessmen may not), aff'd, 559 F.2d 1200 (1st Cir. 1977).

[26] *Pruitt*, 523 F. Supp. at 980. Judge Merhige emphasized that "[i]n fact, none of the plaintiffs . . . suffered direct harm to his or its property." Id. at 976 n.3. But see infra text accompanying notes 54-55.

[27] *Pruitt*, 523 F. Supp. at 979. See also id. at 979 n.18 ("A tortfeasor should 'pay for loss of use . . . once, but no more.' ") (quoting Venore Transp. Co. v. M/V Struma, 583 F.2d 708, 710 (4th Cir. 1978)).

Judges fear doublecounting in many fields of law. See, e.g., Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (direct purchasers from an antitrust wrongdoer may recover treble damages but indirect purchasers may not). Torts involving the family present similar problems. See Green, Protection of the Family Under Tort Law, 10 Hastings L.J. 237 (1959). In Southern Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533 (1918), Justice Holmes summarized the prohibition against doublecounting: "The general tendency of the law, in regard to damages at least, is not to go beyond the first step."

[28] Cf. infra text accompanying note 38. Judge Merhige also considered the harm inflicted on the surrogates more direct than that suffered by the distributors. Like the commercial fishermen, the surrogates could not easily move their businesses to other areas.

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Prior to dismissing the distributors' claims, however, Judge Merhige in a curious aside suggested that there *was* a principled basis for awarding lost profits to the distributors. Such an award would be limited to the replacement value of the actual investment of each individual distributor in the materials and labor of his business. This method avoids doublecounting because individual investment losses would not duplicate the commercial fishermen's lost profits.[29] Although Judge Merhige ultimately dismissed the unintentional tort claims, the aside assumes heightened significance when one remembers that the distributors' *intentional* tort claims against Allied remained.[30] Had the litigation proceeded to trial, the doublecounting issue might have again precluded recovery. By suggesting the alternative damage theory, the court not only increased the likelihood of distributor compensation at trial, but, more importantly, strengthened the distributors' bargaining posture in settlement negotiations.

In contrast to the court's conventional ruling on the distributors' claims, allowing the surrogates to maintain a cause of action in negligence can only be described as imaginative. As previously noted, there were no sportsfishermen plaintiffs in the litigation.[31] Had they been plaintiffs, however, precedent would have precluded recovery of damages for harm to this "occasional Sunday piscatorial pleasure."[32] The loss to this class of plaintiffs has long been considered legally de minimis.[33]

The court delicately finessed this problem by finding, first, that commercial fishermen possessed a "constructive property interest in the Bay's harvestable species."[34] Judge Merhige then concluded that there was "no valid distinction between recognition of commercial damages suffered by those who fish for profit and personal harm suffered by those who fish for sport."[35] The court brushed

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[29] *Pruitt*, 523 F. Supp. at 979.

[30] See supra note 11.

[31] See supra text accompanying note 10.

[32] Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997, 1014 (1966) (recovery may be premised on injury to business interests but not to recreational interests) (citing Hampton v. North Carolina Pulp Co., 223 N.C. 535, 546, 27 S.E.2d 538, 545-46 (1943)).

[33] Generally, a private plaintiff may recover for a public nuisance only if he demonstrates damage particular to him and not shared in common with the rest of the public. Prosser, supra note 32, at 1005.

[34] *Pruitt*, 523 F. Supp. at 978. See infra text accompanying notes 54-55.

[35] 523 F. Supp. at 978.

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aside the problem of sportsfishermen's de minimis recovery with the nebulous reasoning that "[o]nly if some set of surrogate plaintiffs is entitled to press its *own claims* which flow from the damage to the Bay's sportfishing industry will the proper balance of social forces be preserved."[36] To achieve this balance, the court denominated the nonfishermen operating at the water's edge as surrogate plaintiffs and permitted them to maintain a claim based on their own lost profits. Had the court followed precedent, however, the surrogates would have suffered the same fate as the distributors.[37]

This is an interesting use of a legal fiction. Neither the sportsfishermen nor the surrogates could recover in their own right under common-law theories of either negligence or nuisance. The surrogates nevertheless acquired "legally cognizable" rights by piggybacking on the sportsfishermen. Whether the surrogates would recover anything at trial was unknown, of course, but at the very least the court substantially improved the surrogates' chances of negotiating a favorable settlement.

The rulings on both the surrogates and the distributors suggest that Judge Merhige was primarily concerned with balancing the equities among the parties. His admonition to Allied to be content with his ruling on the surrogates makes this concern explicit:

> Defendant hardly has reason to complain of the equity of the Court's holding. First, it benefited above from the Court's exclusion of the claims of innocent businessmen [distributors] who are probable victims of their alleged acts. . . . Second, the "directness" of the harm, at least to [the surrogates], is high here.[38]

Although precedent apparently precluded the claims of both the distributors and the surrogates, such statements by the court were likely to induce Allied to settle their seemingly nonrecoverable claims. Perhaps a belief that this result would be more equitable than summary dismissal motivated Judge Merhige to propose a novel method of damage calculation for the distributors and to create an imaginative theory of recovery for the surrogates.

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[36] Id. at 980 (emphasis added).

[37] See supra text accompanying notes 26-29.

[38] 523 F. Supp. at 980.

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B. The Commercial Fishermen's Claims

Judge Merhige's treatment of the commercial fishermen's claims is likewise distinctive, especially because the justiciability of their claims was not even an issue before the court. The fishermen asked for all lost profits caused by both an interruption of supply (destruction of the fishery) and a decline in demand.[39] Unless the fishermen could establish an ownership interest in the fishery, however, both the Restatement and the recent decision of the United States Court of Appeals for the Fourth Circuit in *Marine Navigation Sulphur Carriers, Inc. v. Lone Star Industries, Inc.*[40] would preclude recovery. Courts usually require plaintiffs to show an ownership interest in the fish or the fishing grounds to establish a legally cognizable claim in either negligence or nuisance[41] because no one has a legally protected interest in wild animals until they are reduced to possession.[42]

Even without recognizing a clear property right in the fish, however, the *Pruitt* court might have allowed the commercial fishermen's claims by adopting the reasoning of the United States Court of Appeals for the Ninth Circuit in *Union Oil Co. v. Oppen.*[43] In order to foster environmental protection policies, the *Oppen* court permitted commercial fishermen damaged by an oil spill to maintain actions in negligence for pecuniary losses. The court held that California tort law entitled the commercial fishermen's business expectancy (loss of potential sales of fish) to protection against injury.[44] The court made no effort to consider the case as one involv-

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[39] Id. at 976.

[40] 638 F.2d 700 (4th Cir. 1981).

[41] The right of commercial fishermen to recover in nuisance is predicated on the existence of a public nuisance, such as pollution, which inflicted a particular harm to their interest in the fishery. See, e.g., Tlingit & Haida Indians v. United States, 389 F.2d 778 (Ct. Cl. 1968) (economic interests of fishermen entitled to greatest protection in admiralty); Carson v. Hercules Powder Co., 240 Ark. 887, 402 S.W.2d 640 (1966) (possessory interest of riparian owner in fishing along stream); Hampton v. North Carolina Pulp Co., 223 N.C. 535, 27 S.E.2d 538 (1943) (destruction of fish destroyed plaintiff's means of livelihood). See also Prosser, supra note 32. Restatement (Second) of Torts § 821e (1977) supports recovery for losses negligently inflicted where a plaintiff employs nuisance theory. Surprisingly, there is no cross reference from § 821e to the general rule of nonliability for negligently inflicted economic loss set forth in § 766C.

[42] See, e.g., Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805).

[43] 501 F.2d 558 (9th Cir. 1974).

[44] To support its holding that a California court would reject the Restatement rule regarding pure economic losses caused by negligence, the court cited Biakanja v. Irving, 49

ing injury to a property interest in the fish.[45] Rather, the court suggested that relief to the fishermen would encourage the defendant, who was in the best position to prevent such accidents, to use greater care.[46]

Although the Fourth Circuit in *Marine Navigation* expressly refused to adopt the *Oppen* exception,[47] *Pruitt* is arguably distinguishable. The *Marine Navigation* plaintiffs, various commercial parties who used the James River in connection with their businesses, sued the owner and charterer of a vessel which had struck a bridge, closing the river to marine traffic for several months.[48] The court denied plaintiffs' claims for business interruption and loss of trade because the claimants did not allege or show physical damage to their properties or persons. In its holding, the court distin-

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Cal. 2d 647, 320 P.2d 16 (1958). In *Biakanja* the defendant notary prepared a will for the testator leaving all his property to the plaintiff. The defendant's failure to obtain a proper attestation of the will deprived the plaintiff of the expected bequest. The California Supreme Court sustained the plaintiff's negligence claim on the ground that the notary had a duty to exercise reasonable care to protect the plaintiff from this type of loss. The *Oppen* court concluded on the basis of *Biakanja* that "California does not blindly follow the general rule upon which the defendants here rely." *Oppen*, 501 F.2d at 566.

Oppen's reliance on *Biakanja* may be misplaced, however, because the defendant notary faced a finite number of potential plaintiffs. The duty imposed by the California court ran only to those people who could be harmed by the failure to have the will attested. Defendants in economic loss cases, by contrast, may be exposed "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class." Ultramares Corp. v. Touche, 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931) (Cardozo, C.J.). This difficulty was uppermost in Judge Merhige's mind. See *Pruitt*, 523 F. Supp. at 979 ("the set of potential plaintiffs seems almost infinite").

[45] Professor Epstein criticizes the *Oppen* decision for failing to consider who held property rights in the fish. After pointing out that nobody owns a wild animal until after achieving capture, he argues:

> [S]o it is with unowned fish in *Oppen*. The plaintiffs who do not own the fish cannot complain if the Union Oil Company captures them. As they cannot complain of capture, they cannot complain of destruction after capture. As they cannot complain of destruction after capture, they cannot complain of it before capture. No theory of tortious liability can make up the plaintiffs' deficit attributable to their want of ownership.

Epstein, Nuisance Law: Corrective Justice and Its Utilitarian Constraints, 8 J. Legal Stud. 49, 52 (1979).

[46] *Oppen*, 501 F.2d at 569 (relying on the analysis of G. Calabresi, The Costs of Accidents (1970)). Posner roundly criticizes Judge Sneed, the author of the *Oppen* opinion, for his inept use of economics to bolster an otherwise satisfactory result. See Posner, supra note 2, at 298-301.

[47] *Marine Navigation*, 638 F.2d at 702. Judge Merhige did not cite *Marine Navigation* in *Pruitt*.

[48] Id. at 701-02.

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guished economic loss claims caused by oil pollution from those caused by the physical collision of vessels. It found that the oil pollution exception was a special one based on the direct harm to marine life and environmental policies discouraging such injuries.[49] Although the Fourth Circuit found this rationale inapplicable to *Marine Navigation*, it would clearly extend to the facts of *Pruitt*: kepone's harm to aquatic life is equally direct and the public policy concerns are identical.

Because the fish involved in *Oppen* were actually destroyed by pollution[50] and those in *Pruitt* were merely tainted by unfavorable publicity, however, adopting the *Oppen* exception would not necessarily require an award of damages to the *Pruitt* fishermen. The *Pruitt* fishermen alleged losses occasioned by their inability to harvest. Discovery revealed, however, that local fishermen were able to harvest enough edible fish to fulfill their usual requirements, but that their customers would not pay normal prices for Virginia seafood.[51] Indeed, the issue raised in *Pruitt* was novel and goes beyond *Oppen*, because the *Oppen* court made it quite clear that in

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[49] Id. at 702.

[50] *Oppen*, 501 F.2d at 569 (oil spill can "dimimish aquatic life").

[51] See Brief in Support of Motion for Partial Summary Judgment app., Pruitt v. Allied Chem. Corp., 523 F. Supp. 975 (E.D. Va. 1981). The testimony of the named plaintiff, Lorie Pruitt, is typical:

> Q. Would you tell me, as best you can, how kepone affected your business?
> A. Well, the publicity of it in the cities that we shipped our crabs, and the guys that were buying the crabs, they wouldn't pay us what they normally would. Maybe they were scared that, you know, with the publicity they lost a lot of their business. And we just didn't catch the crabs on account of restricted areas that we couldn't go in. And, like I say, the publicity of the kepone was mixed into crabs and fish, and it just hurt the sale of them.
> Q. In 1976 and 1977, did you have more crabs than you could sell?
> A. Yes, we had more crabs in the parts that were restricted that we couldn't go in and get them.
> . . . .
> Q. Here is my question Mr. Pruitt. How was it that the publicity hurt your business? Was it that the people wouldn't buy your crabs?
> A. Wouldn't buy the crabs. They were scared to eat the crabs.
> Q. So you bad more crabs than you could sell, is that right?
> A. Yes.

Id. at app. 5-6 (quoting Deposition of Lorie Q. Pruitt at 33-34, Pruitt v. Allied Chem. Corp., 523 F. Supp. 975 (E.D. Va. 1981)).

A sigu erected in January 1976 over the Lord Baltimore Inn in Richmond assuring customers that it sold only "Fresh ocean oysters. No Kepone" offers a typical example of kepone publicity. See On the James Again: No Big Deal, Wash. Post, July 4, 1981, at B1, col. 3.

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order to recover, commercial fishing plaintiffs would be required to show "that the oil spill did in fact *diminish aquatic life*, and that this diminution reduced the profits the plaintiffs would have realized."[52]

Allied thus did not contest the general right of commercial fishermen to recover for actual destruction of the fishery (a loss of supply), but, citing *Oppen*, argued instead that commercial fishermen could not recover lost profits caused by a drop in consumer demand.[53] Judge Merhige did not directly address this argument, but instead construed it as an admission by Allied that the commercial fishermen could recover for any lost profits caused by Allied's negligence: "In fact, even defendant in the present action admits that commercial fishermen are entitled to compensation for any loss of profits they may prove to have been caused by defendant's negligence."[54] The court then converted Allied's "concession" that the fishermen would be entitled to lost profits into a "constructive property right"[55] in the fish of the polluted waters. This implies an ownership interest in the fish that would allow recovery on either a negligence or nuisance theory as well as under *Oppen*. If the fish belong to plaintiffs and Allied's negligence has harmed their commercial value, this becomes a case involving negligent injury to plaintiffs' property rather than pecuniary losses, a circumstance markedly increasing the chances of total recovery. Because recovery by the fishermen was not even an issue properly before the court, plaintiffs could not feel *assured* of a substantial damage award. Their bargaining position, however, like that of the distributors and surrogates, must have improved substantially.

C. Pruitt *and Principles of Corrective Justice*

Although much about *Pruitt* seems out of the ordinary, it is even more unusual that the opinion was written in the first place. Of all the claims asserted by the plaintiffs against Allied, the unintentional tort counts were the least significant. In a major piece of

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[52] *Oppen*, 501 F.2d at 570 (emphasis added).

[53] Brief in Support of Motion for Partial Summary Judgment at 7-11, Pruitt v. Allied Chem. Corp., 523 F. Supp. 975 (E.D. Va. 1981). Allied had asserted the same position throughout the litigation. See Reply Brief in Support of Allied Chemical Corporation's Motion to Dismiss at 11-12, Pruitt v. Allied Chem. Corp., 523 F. Supp. 975 (E.D. Va. 1981).

[54] *Pruitt*, 523 F. Supp. at 978.

[55] Id.

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litigation raising nearly every conceivable claim in tort, how does a motion to dismiss the unintentional tort claims of two minor groups of plaintiffs become the focal point for such a wide-ranging discussion of the issues?

The forgoing analysis suggests that the motion to dismiss provided Judge Merhige with a ready vehicle to enter the case and force a settlement. Early settlement not only avoided the time and expense of further litigation, but assured some compensation to plaintiffs hurt by Allied's wrongful dumping of kepone. To achieve this objective, Judge Merhige allowed the claims of the surrogates without supporting precedent and hinted in dictum at an expanded right of recovery for the commercial fishermen and the distributors.

Such a conclusion comports with Judge Merhige's well-known preference for settling disputes through individually tailored remedies rather than protracted litigation and the application of formal rules. Judge Merhige made this point explicitly during the Westinghouse uranium litigation:

> [The position of some of the plaintiffs] does not take realistic account of the litigation risks either before this Court or on appeal, nor does it take account of the *equitable considerations which weigh in favor of compromise.*
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> . . . .
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> . . . [T]hese are cases which I think everyhody admits should be settled if at all possible, in the public interest, and they really are business problems by businessmen, as I have been urging from the very first.
>
> I expect the utilities and Westinghouse to enter into serious and intense negotiations . . . .[56]

Encouraging settlement is entirely consistent with the corrective justice model of tort law. Corrective justice requires a court to

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[56] E. Farnsworth & W. Young, Cases and Materials on Contracts 981 (3d ed. 1980) (quoting trial record of the Westinghouse uranium litigation). Judge Merhige made special efforts to encourage settlement in these cases:

> Judge Merhige did some imaginative things to spur out-of-court settlements. On three consecutive evenings in September, 1976, he hosted cocktail parties on the veranda of his handsome Georgian house in Richmond, providing the lawyers and executives a chance to talk informally over mint juleps. Then he appointed a special master to oversee the settlement process.

A Businesslike Way to Resolve Legal Disputes, Fortune, Feb. 28, 1979, at 80, 82.

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render "to each person whatever redress is required because of the violation of his rights by another."[57] Economic loss claims, however, present special problems because legal characterization of the plaintiff's "right" is often difficult.[58] The unusual problems posed by economic loss cases such as *Pruitt* and *Oppen*, as well as the narrow context of a motion to dismiss, thus make Judge Merhige's approach to corrective justice peculiarly appropriate.

III. Applying Economic Analysis to *Pruitt*

Despite similarities to the corrective justice view of tort law, *Pruitt* makes numerous references to economic analysis and appears to base at least part of its rationale for the holding on deterrence theory. Deterrence theory is founded on the notion that the "compensation of individual parties is not an end in itself, but only a means to enlist private parties to help police, by private action, the harmful activities of others."[59] *Pruitt*'s conclusions that Allied must bear costs associated with the destruction of the Bay's wildlife[60] and that the surrogates could stand in for the sportsfishermen in order to promote "the proper balance of social forces"[61] appear consistent with this premise. Although deterrence played some role in the court's decision, however, economic theory[62] provides an inadequate explanation for the opinion as a whole.

Where the costs of an accident exceed the costs of its prevention,[63] proponents of deterrence theory would impose liability on the party who could have avoided the harm most cheaply. That party was clearly Allied; the plaintiffs had nothing to do with ei-

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[57] Epstein, supra note 45, at 52.

[58] As one commentator has noted referring to *Oppen*, "[N]o general theory of tort law, however powerful or profound, can tell us who owns what at the outset. The result in *Union Oil v. Oppen* may in fact he correct. Yet the method of analysis, spurred on by a commendable distaste for pollution, is fatally flawed." Id.

[59] C. Gregory, H. Kalven & R. Epstein, supra note 3, at xxiii.

[60] *Pruitt*, 523 F. Supp. at 978.

[61] Id. at 980.

[62] We have attempted to direct our comments to Professor, now Judge, Richard Posner's theory. His system, which is developed from a few simple principles, is quite complicated. He described his economic technique in Posner, The Economic Approach to Law, 53 Tex. L. Rev. 757 (1975), and applied this method to various areas of law in R. Posner, Economic Analysis of Law (2d ed. 1977).

[63] See supra note 1.

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ther the original decision to dump kepone into the river or its harm to marine life. To properly deter such conduct, the court must first calculate the net social losses caused by the pollution and then reimpose these costs on Allied. In order to assess net social losses, economists distinguish technical from pecuniary diseconomies. A technical diseconomy results from an action denying someone the use of a scarce resource and effecting a net reduction in society's wealth.[64] A pecuniary diseconomy results from a shift in demand altering the way wealth is distributed in a society but without reducing the total amount.[65]

In applying this distinction to the claims of the commercial fishermen, *Pruitt* presents a peculiar problem. One must first determine whether fish contaminated by kepone or tainted by kepone publicity are equivalent to destroyed fish.[66] Because kepone contamination and the surrounding publicity prevented the harvested fish from being put to their best use, they are arguably equivalent to destroyed fish and therefore a net social loss: a technical diseconomy. Conversely, if kepone publicity has caused consumer preferences to shift from otherwise edible fish to some substitute, then only a redistribution of resources has occurred: a pecuniary diseconomy. Both arguments are equally plausible; the choice is necessarily an arbitrary one.

The analysis produces similar confusion when applied to the surrogates' claims. If the kepone disaster caused the sportsfishermen to cease fishing, the surrogates standing in for them ought to win. If sportsfishermen accustomed to using the Chesapeake Bay have

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[64] R. Posner, supra note 1, at 467-68.

[65] Id. Posner uses the *Oppen* facts to illustrate this distinction. He hypothesizes that as a result of the oil spill, all of the resort business shifts from the Biltmore Hotel in Santa Barbara to the Fontainebleau in Miami Beach, a loss of $2 million to one, but a gain of $2 million to the other. Commercial fishermen lose $1 million, but no one else is affected. The fishermen's $1 million loss represents a technical diseconomy: a net loss of a scarce resource. The $2 million shift in resort business, however, represents only a pecuniary diseconomy: a shift in demand affecting the distribution of resources without reducing net social wealth. Because the fishermen's $1 million loss equals the net social costs of Union Oil's negligence, allowing the Biltmore to recover would create overdeterrence unless Union Oil can recover the $2 million gain from the Fontainebleau. In order to recover, a plaintiff needs to prove not only that defendant's wrong was the legal cause of its harm, but also that the harm reflected a technical diseconomy. Id. The fact that wealth is distributed differently because of defendant's negligence is unimportant to Posner. See Posner, The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication, 8 Hofstra L. Rev. 487 (1980).

[66] See supra text accompanying notes 50-52.

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merely moved to other available fishing spots, the surrogates ought to lose. Determining how sportsfishermen actually reacted to this debacle, however, presents obvious evidentiary problems. One might plausibly assume that the sportsfishermen did not alter their habits but merely changed location. Such an assumption places the burden of proof on the surrogates which, as a practical matter, precludes recovery.[67] Yet one might equally plausibly assume that sportsfishermen sulked at home, creating a net social loss for which liability could be found.

One of the seductive aspects of the economic approach to tort law is that it purports to supply a workable system of rules to decide all cases. Ironically, however, applying the analysis to *Pruitt* yields inconclusive results. Furthermore, because the economic approach measures damage awards according to a tort's effect on society as a whole, individuals made worse off as a direct result of negligent conduct may be left uncompensated. The out-of-pocket losses are just as painful to the injured party regardless of whether they result from actual destruction of a resource or simply redistribution of resources elsewhere.

Whether or not Judge Merhige would agree with these specific comments on the economic approach, it is clear that he made no attempt to calculate the actual social costs of kepone pollution. Such a loss would be the value of the wildlife lost to the citizens of Virginia plus the amount necessary to clean up and restore the area to its previous condition.[68] Only the Commonwealth of Virginia, or possibly an environmental group, could seek such a measure of damages. The damages sought by plaintiffs here are differ-

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[67] To prove a case, plaintiff would have to locate a large number of fishermen who quit fishing because of the pollution rather than enjoy this pastime at a new site. It is doubtful that the expense of the investigation would be worthwhile. As so often happens in hard cases, determinations on the burden-of-proof question effectively decide the case. See, e.g., Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944) (leaving burden of proof on plaintiff would have effectively precluded recovery); Kingston v. Chicago & N.W. Ry. Co., 191 Wis. 610, 211 N.W. 913 (1927) (burden of proof placed on defendant to show fire started by him and uniting with another was not proximate cause of damages).

[68] Whether dredging kepone-laced bottom sediment would have ever been possible is unknown. A Japanese firm apparently offered to dredge the 42,000 pounds of the pesticide from the river bottom for $1 billion, but the operation has not been undertaken. See On the James Again: No Big Deal, Wash. Post, July 4, 1981, at B1, col. 3. Recent studies indicate that sediment accumulations on the river bottom are burying kepone at the rate of four to eight inches per year. See Study Confirms Burial of Kepone, Richmond Times Dispatch, July 21, 1981, at B1, col. 7.

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ent; they reflect particular losses suffered by this group of litigants. Because the redress sought by the plaintiffs does not necessarily mirror the social costs suffered by society, there is no reason to believe that the damages awarded to these private parties would correspond to the correct amount of deterrence.[69] Significantly, Judge Merhige based his favorable ruling for the surrogates on a constructive property right in the fish, not on a calculation of social losses.[70] Such an approach squarely aligns with the corrective justice model, which frames the inquiry in terms of rights violated and not fluctuations in net social wealth. Moreover, to the extent the court was concerned with deterring environmental pollution, the *Pruitt* litigation provided an inappropriate vehicle for addressing this problem. In terms of deterrence, the criminal cases brought against Allied by the United States Government had provided an ideal forum in which to consider the issue unhampered by the incongruity between social costs and plaintiffs' losses. Judge Merhige had presided at all of the criminal trials against Allied, fining it $13.2 million[71] for violations of the Refuse Act of 1899[72]

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[69] Compare the analysis in the text with that of Professors Epstein and Posner in their dispute over the analysis and result in *Oppen*. Professor Epstein argued that because the *Oppen* court failed to decide who owned the fish, it could not reach the question of whether fishermen were entitled to recover from polluters. See Epstein, supra note 45, at 52. Posner responded that liability rules could be created independently of property rights and that the creation of a tort right was necessary to make companies like Union Oil "reduce the divergence between private and social costs that is created when oil companies do not take into account the effects of oil spills on fish." Posner, Epstein's Tort Theory: A Critique, 8 J. Legal Stud. 457, 468 (1979). To this Epstein responded that he agreed with the result in *Oppen*, but that the decision raised certain problems, most importantly that "the courts cannot simply designate by whim certain individuals as owners or holders of franchises or profits. It is not clear that [courts] can assign certain individuals mere tort rights, which constitute but a fraction of ownership or franchise rights." Epstein, Causation and Corrective Justice: A Reply to Two Critics, 8 J. Legal Stud. 477, 502 (1979). Moreover, Epstein argued that if the goal is to deter overconsumption of valuable natural resources, an enviroumental group or the government would be a more suitable plaintiff than fishermen. Id.

We agree with Professor Posner to the extent that he would permit fishermen to recover, but for a different reason: we believe the loss imposed on fishermen by the defendant is unfair. We further agree with Professor Epstein that if deterrence is the goal, the state or environmental group is a better representative, but contend the fishermen should recover nonetheless.

[70] See supra text accompanying notes 34-37.

[71] Judge Merhige later reduced Allied's fine to $5 million after the company agreed to donate $8 million to an enviroumental clean-up fund. Before the decision in *Pruitt*, Allied and its insurers had paid out more than $15 million in damages as a result of the pollution of the James River and the Chesapeake Bay. Five Years After, Wash. Post, July 20, 1980, at C1, col. 1.

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and the Water Pollution Control Act Amendments of 1972.[73] His paramount concern in imposing this penalty, at that time the largest fine ever imposed against a corporate polluter, was explicitly deterrence:

> They say sentencing is for punishment, deterrence and retribution. I have never been very good at the retributional aspect of it. I do think deterrence is important. . . .
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> . . . .
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> I hope after this sentence, that every corporate official, every corporate employee that has any reason to think that pollution is going on, will think, "If I don't do something about it now, I am apt to be out of a job tomorrow."[74]

The primary issue in *Pruitt*, by contrast, was the compensation of injured parties in that particular case. Judge Merhige's opinion was apparently crafted with the intent to encourage the litigants to negotiate a settlement providing some compensation for all injured plaintiffs. This approach to economic loss cases comports squarely with the corrective justice view.

IV. Conclusion

The court's own description of its judgment as "an attempt to tailor justice to the facts of the instant case"[75] affirms *Pruitt*'s consistency with the corrective justice ideal. Such a statement poses the issue in *Pruitt* as one of fairness among the various parties rather than one of economic efficiency or the maximization of social wealth. Issues of public policy and social concern were not ignored, but they did not dominate the court's decisionmaking process.

Superficially, the Restatement[76] or economic analysis might have provided a more orderly decision than Judge Merbige's approach

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[73] 33 U.S.C. § 407 (1976).

[73] Id. §§ 1251-1376. In order to determine the amount of the criminal fines, Judge Merhige simply imposed the statutory maximum penalty on each count of the indictment. The maximum fine was $2500 for counts 1-456 and $25,000 for counts 457-940. United States v. Allied Chem. Corp., No. CR-76-0129-R, slip op. at 5-6 (E.D. Va. Oct. 5, 1976).

[74] United States v. Allied Chem. Corp., No. CR-76-0129-R, slip op. at 4 (E.D. Va. Oct. 5, 1976).

[75] *Pruitt*, 523 F. Supp. at 980.

[76] See supra notes 15-22 and accompanying text.

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did.[77] His opinion in *Pruitt*, however, simply provided a backdrop and an inducement for the parties to settle. Instead of announcing a rule, by necessity arbitrary in economic loss cases, it set forth in general, often ambiguous terms the broad range of options available to a deciding court, carefully balancing the equities on both sides. By refusing to impose order arbitrarily and by treating the litigants fairly, Judge Merhige succeeded in forcing the parties to a compromise. Because we believe that individuals should resolve their differences themselves without invoking the machinery of the state insofar as possible and that justice comes from the parties themselves and not from those who administer it, we think Judge Merhige's solution was proper.

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[77] Observing the myriad of formulaic approaches by which judges determine liability in tort cases, one commentator has noted:

> The search never ends for some neat formula by which the adjudication of a controversy can be made easy and simple. Every tort lawyer is familiar with the formulas built around such terms as proximate, remote, reasonable, natural, direct, immediate, probable, foreseeable, and their numerous refinements. These and similar terms have had their day when their very mention was supposed to unlock the mysteries of some complex case and produce an incontrovertible result.

Green, Foreseeability in Negligence Law, 61 Colum. L. Rev. 1401, 1402-03 (1961).

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