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ALL ALONG THE WATCHTOWER: ECONOMIC LOSS IN TORT (THE IDAHO CASE LAW)

DALE D. GOBLE*

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I. INTRODUCTION

Recovery of solely economic losses in tort is problematic. There is an often-expressed concern that, if economic loss were recoverable in tort, "contract law would drown in a sea of tort."¹ There is also a belief that "[p]ermitting recovery of all foreseeable claims for purely economic loss could make a [tortfeasor] liable for vast sums."² Set off against such concerns is the tenet that "[t]he risk reasonably to be perceived defines the duty to be obeyed."³ The tension among these viewpoints and the policies and perspectives underlying the respective domains of tort and contract have combined to produce a rich and sometimes-contradictory body of case law.

The dissension between tort and contract reflects in part alternative approaches to structuring human relations. Tort is a domain of socially imposed duties; contract, on the other hand, is based on nominally consensual duties created by agreement. Tort establishes and enforces those *safety* requirements society deems minimally necessary; contract enforces representations of the *quality* of the things to be exchanged between the parties. Tort generally — though not always — requires fault (negligence or intent) as a predicate of liability; contract does not require fault, only a failure to perform the obligation as warranted. Tort protects interests in person, property, and relations by providing remedies designed to restore the status quo ante; contract protects the expectations of the parties at the time of the promise by providing benefit-of-the-bargain remedies. In short, tort protects existing interests and entitlements against intrusions, while

1. *East River Steamship Corp. v. Transamerica Delval, Inc.*, 476 U.S. 858, 866 (1986). See also GRANT GILMORE, *THE DEATH OF CONTRACT* 87 (1974) ("contract' is being reabsorbed into the mainstream of 'tort.'").

2. *East River Steamship*, 476 U.S. at 874.

3. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928) (Cardozo, J.). As the Idaho Supreme Court long ago noted, "It is contrary to natural justice to say . . . that the plaintiffs . . . must suffer their loss in silence, and the defendant . . . is under no obligation to compensate plaintiffs for their loss." *Wilson v. Boise City*, 6 Idaho 391, 399, 55 P. 887, 890 (1899).

contract permits the reallocation of those entitlements. In a society where ideas of individual autonomy often masquerade as founding principles, the socially imposed duties of tort may seem less congenial than the personally assumed duties of contract. This is particularly likely in an age when the myth of the individual is again abroad in the land and the glorification of self-interest and laissez-faire ideology is the order of the day.⁴ The choice has a broader dimension as well. As Grant Gilmore noted, a legal system that emphasizes freedom of contract "must ultimately work to the benefit of the rich and powerful, who are in a position to look after themselves."⁵

One of the leading Idaho cases on the recovery of economic loss in tort — *Clark v. International Harvester Co.*⁶ — strikes a balance between tort concerns for safety and contract's focus on quality:

The law of negligence requires the defendant to exercise due care to build a tractor that does not harm person or property. If the defendant fails to exercise such due care it is of course liable for the resulting injury to person or property as well as other losses which naturally follow from that injury. However, the law of negligence does not impose on International Harvester a duty to build a tractor that plows fast enough and breaks down infrequently enough for Clark to make a profit in his custom farming business. This is not to say that such a duty could not arise by a warranty — express or implied — by agreement of the parties or by representations of the defendant, but the law of negligence imposes no such duty.⁷

As the court states, one marker along the boundary between the realms of tort and contract is the nature of the loss plaintiff suffers:⁸ as a general rule, a person who suffers "pure" economic loss⁹ cannot

4. For ideologically pure statements, see CHARLES FRIED, *CONTRACT AS PROMISE* (1981); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

5. GILMORE, *supra* note 1, at 95.

6. 99 Idaho 326, 581 P.2d 784 (1978).

7. *Id.* at 336, 581 P.2d at 794 (footnote omitted).

8. There are, of course, other markers along the boundary. For example, the Idaho Supreme Court has held that emotional distress cannot be sought when the relationship between the parties arises out of a contract. In such cases, plaintiff must seek punitive damages. See *Brown v. Fritz*, 108 Idaho 357, 669 P.2d 1371 (1985). *But see Walston v. Monumental Life Ins. Co.*, 129 Idaho 211, 218-20, 923 P.2d 456, 463-65 (1996) (emotional distress may be recovered in a relationship based on contract when there is a special relationship between the parties).

9. "Pure" economic loss is an economic loss independent of physical injury to the plaintiff's person or property. The qualification is essential because economic losses are fully recoverable when a plaintiff has also suffered personal injury or property damage. *E.g.*, *L & L Furniture Mart, Inc. v. Boise Water Corp.*, 120 Idaho 107, 813 P.2d 918

recover in tort; recovery for such losses is restricted to contract. More formally, there generally is no tort duty to avoid conduct that causes *only* economic harm; duty to prevent economic harm must generally be assumed in contract. When a person suffers neither personal injury nor property damage — when she seeks to recover *pure* economic losses — the rationale for tort recovery is at its weakest because the plaintiff and her property were not endangered. In such cases, leaving the parties to their bargained-for agreement reinforces the core principles of both domains of law: disappointed but not endangered plaintiffs are relegated to contract and their agreed-upon responsibilities.

Not all cases involving pure economic loss implicate the tort/contract boundary. The absence of a contract between the parties renders the boundary issues largely irrelevant. That is, contract is not implicated when the parties are not in privity. Although this now seems obvious, it was not always understood. In fact, until the first decades of this century, the existence of a contract for the sale of product served to preclude the manufacturer's liability to a person not in privity with the manufacturer even for *physical injuries* to that person.¹⁰ In the leading case — *Winterbottom v. Wright*¹¹ — the court held that plaintiff, a coachman, could not sue the repairer of the stagecoach he was driving when its wheel fell off, laming him. The court thought the possible liability too expansive:

There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.¹²

It was more than seventy years before Benjamin Cardozo authored *MacPherson v. Buick Motor Co.*¹³ holding that the driver of an automobile could sue the remote manufacturer in tort for injuries when the wheel fell off his car:

(Ct. App. 1991) (property damage); *Rindlisbaker v. Wilson*, 95 Idaho 752, 519 P.2d 421 (1974) (personal injury).

10. This distinction has a long and particularly well-known history since it is the central storyline in the series of cases tracing the evolution of products liability. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 6-19 (1948).

11. 152 Eng. Rep. 402 (Exch. 1842).

12. *Id.* at 405 (Abinger, C.B.); see also *Huset v. J.I. Case Threshing Mach. Co.*, 120 F. 865 (8th Cir. 1903).

13. 111 N.E. 1050 (N.Y. 1916).

We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.¹⁴

Although the court in *Winterbottom* relied on the contract between the owner of the stagecoach and its repairer, it did so for liability-limitation reasons. The court did not fear the demise of contract but rather the unlimited damages that tort seemingly allowed: "[I]f the [driver of the coach] can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach might bring a similar action."¹⁵ Privity of contract was important because it served to limit liability, not because the prohibition against a tort action reinforced contract principles. Similar concerns with unlimited liability still motivate courts. In a companion case to *Clark — Just's, Inc. v. Arrington Construction Co.*¹⁶ — the Idaho Supreme Court noted:

Though the rule [against recovery of pure economic loss] has been expressed in different ways, the common underlying pragmatic consideration is that a contrary rule, which would allow compensation for losses of economic advantage caused by the defendant's negligence, would impose too heavy and unpredictable a burden on the defendant's conduct.

...
 ... In contrast to the recognized liability for personal injuries and property damage, with its inherent limitations of size, parties and time, liability for all the economic repercussions of a negligent act would be virtually open-ended.¹⁷

Economic loss cases thus may implicate two different concerns. On the one hand, when there is a contract between the parties, the socially imposed duties of tort are a potential threat to the bargained-for duties of contract: contract may "drown in a sea of tort."¹⁸ On the other hand, when there is no contract between the parties, the expansive, rippling-circle of potential economic loss with its specter of un-

14. *Id.* at 1053. *MacPherson* and its progeny are examined in William L. Prosser, *The Assault Upon the Citadel*, 69 *YALE L.J.* 1099 (1960).

15. *Winterbottom*, 152 *Eng. Rep.* at 405 (Abinger, C.B.).

16. 99 *Idaho* 462, 583 P.2d 997 (1978).

17. *Id.* at 470, 583 P.2d at 1005 (citations omitted); see also *Cain v. Vollmer*, 19 *Idaho* 163, 112 P. 686 (1910).

18. *East River Steamship Corp. v. Transamerica Delval, Inc.*, 476 U.S. at 866.

limited and disproportionate liability gives courts justifiable pause.¹⁹ Although pure economic loss is present in both situations, the rationales for denying recovery are markedly different in the two situations.

At the same time, the *per se* rule against the recovery of economic loss in tort has long been riddled with exceptions, qualifications, and clarifications. This not only demonstrates the degree to which Idaho courts are uncomfortable with a *per se* no-duty rule, it also reveals the degree to which the nonliability rule is artificial when "[t]he risk reasonably to be perceived defines the duty to be obeyed."²⁰

A recent decision by the Idaho Supreme Court — *Duffin v. Idaho Crop Improvement Ass'n*²¹ — offers an opportunity to review the Idaho caseload on recovery for economic losses in tort. The court in *Duffin* presented its own review of the case law, concluding that the cases present "a general rule prohibiting the recovery of purely economic losses in all negligence actions" subject to two exceptions.²² A more comprehensive review will demonstrate, however, that the law is actually a good deal less tidy than the court suggests.

II. DUFFIN v. IDAHO CROP IMPROVEMENT ASS'N

Eric and Melanie Duffin grew potatoes on their farm near Aberdeen, Idaho. Following discussions with the president of Crater Farms, Inc. (CFI), the Duffins agreed to plant seed potatoes produced by CFI if the seed was "certified." Certification is conferred by the Idaho Crop Improvement Association (ICIA), the delegatee of certain statutory authorities conferred on the University of Idaho. The certification program is intended to maintain genetic purity and to ensure that the seed is free of diseases and pests; it is conferred after a series of inspections and tests. ICIA certified the CFI seed potatoes; CFI delivered the potatoes to the Duffins in March and early April, 1988. At the end of April, however, an additional ICIA inspection determined that the CFI potatoes were infected with bacterial ring rot. ICIA therefore informed CFI that no further shipments could be sold as certified. Neither CFI nor ICIA informed the Duffins of the problem. The Duffins subsequently discovered that their crop was also infected. They brought suit against CFI on various contractual theories and

19. In the classic Cardozo phrase, to hold an accountant liable to non-contracting parties for negligently auditing books exposed the accountant to liability "in an indeterminate amount for an indeterminate time to an indeterminate class." *Ultramares Corp. v. Touche, Niven & Co.*, 175 N.E. 441, 444 (N.Y. 1931).

20. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928) (Cardozo, J.).

21. 126 Idaho 1002, 895 P.2d 1195 (1995). A companion case — *Feld v. Idaho Crop Improvement Ass'n*, 126 Idaho 1014, 895 P.2d 1207 (1995) — presented essentially identical facts and was decided on the basis of *Duffin*.

22. *Duffin*, 126 Idaho at 1007, 895 P.2d at 1200.

against ICIA for negligence, alleging that they had suffered three types of economic losses:

- (1) the excess of the price paid for the seed because it was "certified";
- (2) lost revenues which resulted from reduced yields; and
- (3) lost revenues which resulted from having to sell the crop immediately upon harvest, rather than by way of the more lucrative contracts the Duffins had already negotiated, or by waiting until the open market prices were higher.²³

The trial court granted ICIA summary judgment, holding that the Duffins' claim was for pure economic loss and thus could not be recovered in a tort action²⁴ and that the Duffins could not recover for negligent misrepresentation.²⁵ The Duffins appealed the dismissal of ICIA; the supreme court reversed the trial court's decision on the economic loss issue but affirmed its decision on negligent misrepresentation.

The supreme court began its analysis of the economic-loss issue with the two cases that define the issue in Idaho, *Clark v. International Harvester Co.*²⁶ and *Just's, Inc. v. Arrington Construction Co.*²⁷ The court concluded that the decisions precluded recovery for pure economic loss in tort because in such cases "the defendant's conduct did not invade an interest of the plaintiff to which the law of negligence extended its protection."²⁸ That is, there was no duty in tort to avoid conduct that invades an exclusively economic interest: "Following *Just's*," the court wrote, "this Court has adhered to a general rule prohibiting the recovery of purely economic losses in all negligence actions."²⁹

This general rule applied only to "pure" economic loss. Economic losses are recoverable when they are accompanied by either personal injury or property damage.³⁰ Thus, if the Duffins had suffered either

23. *Id.* at 1005, 895 P.2d at 1198.

24. *Id.* at 1006, 895 P.2d at 1199.

25. *Id.* at 1009-10, 895 P.2d at 1202-03. The trial court also held that ICIA was an instrumentality of the state and that the Idaho Tort Claims Act therefore applied. *Id.* at 1008-09, 895 P.2d at 1201-02. The case presented additional issues on the existence of warranties and the effectiveness of disclaimers in the dealings between the Duffins and CFI. The trial court denied cross-motions for summary judgment on these issues; the supreme court affirmed those decision. *Id.* at 1010-13, 895 P.2d at 1203-06.

26. 99 Idaho 326, 581 P.2d 784 (1978).

27. 99 Idaho 462, 583 P.2d 997 (1978).

28. *Duffin*, 126 Idaho at 1007, 895 P.2d at 1200.

29. *Id.*

30. The court actually writes that "there are exceptions to the general rule of non-recovery" of "purely economic losses in a negligence action." *Duffin*, 126 Idaho at 1007, 895 P.2d at 1200. The first of these, it states, is that "economic loss is recoverable in tort as a loss parasitic to an injury to person or property." *Id.* This "exception" is not in fact an exception to the "general rule prohibiting the recovery of purely economic losses in

personal injuries or property damage, they could also recover for any economic losses arising from the same event. The distinction between "pure economic loss" and other economic loss required the court to distinguish between personal injury, property damage, and economic loss. It did so by reaffirming a distinction initially announced in *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*³¹ damage to property that was the basis of the transaction between the parties is economic loss while damage to non-transactional property is property damage. Since the damage in *Duffin* was to the seed potatoes that were the basis of the transaction among the parties, the court held that the damages were economic loss rather than property damage. And since that loss was not accompanied by either personal injuries or property damage it presumptively fell within the general rule against the recovery of pure economic loss in tort.

The rule against recovery of pure economic loss is not, however, absolute. The court therefore turned to two exceptions to the general rule against recovery of economic loss in tort that it recognized.

The court's first exception — that economic loss "might be recovered in tort where the occurrence of a unique circumstance requires a different allocation of the risk"³² — is enigmatic. At a trivial level, of course, all cases present "a unique circumstance" — what Paul Simon has aptly called "the myth of fingerprints."³³ Presumably some "unique circumstances" are important and others are not. The court, however, fails to offer anything beyond a citation to *Just's*³⁴ and the assertion that "the certification of seed potatoes is not a 'unique circumstance' requiring a re-allocation of the risk."³⁵ Neither the enigmatic phrase nor the mere assertion of its inapplicability are of much assistance in determining the content or the scope of the exception.

The second exception, the court stated, "is applicable in cases involving a 'special relationship' between the parties."³⁶ It was this exception that the court found applicable in *Duffin*:

all negligence actions," since the losses are not "purely economic" when they are accompanied by either personal injury or property damage.

31. 97 Idaho 348, 351, 544 P.2d 306, 309 (1975).

32. *Duffin*, 126 Idaho at 1007-08, 895 P.2d at 1200-01.

33. "Over the mountain/Down in the valley/Lives a former talk-show host/Everybody knows his name/He says there's no doubt about it/It was the myth of fingerprints/I've seen them all and man/They're all the same." PAUL SIMON, *All Around the World or The Myth of Fingerprints*, on GRACELAND (Warner Brothers Records 1986).

34. *Just's* simply states the same enigmatic "unique circumstances requiring a different allocation of risk" exception, *Just's, Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 470, 583 P.2d 997, 1005 (1978), and in turn cites *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974).

35. *Duffin*, 126 Idaho at 1008, 895 P.2d at 1201.

36. *Id.*

ICIA has held itself out as having expertise in the performance of a specialized function [and] . . . it has engaged in a marketing campaign . . . the very purpose of which is to induce reliance by purchasers on the fact that seed has been certified. Under such circumstances, ICIA occupies a special relationship with those whose reliance it has knowingly induced.³⁷

This relationship between ICIA and the Duffins imposed a tort duty on ICIA to take care to protect the Duffins from economic loss. The court, therefore, reversed the grant of summary judgment and remanded for further proceedings.

The Duffins also brought a claim for negligent misrepresentation. The district court granted defendants a summary judgment on this claim; the supreme court affirmed summarily: "we expressly hold that, except in the narrow confines of a professional relationship involving an accountant, the tort of negligent misrepresentation is not recognized in Idaho."³⁸

The Idaho Supreme Court used *Duffin* to summarize the case law on recovery for economic loss in tort. In the court's analysis, although economic loss may be recovered when a plaintiff has also suffered either personal injury or property damage, it generally may not be recovered when it is the only loss suffered. Such losses — "pure" economic losses — may be recovered in tort in only two situations: when there is an undefined "unique circumstance" that requires a different allocation of the risk and when there is a "special relationship" between the parties. Finally, the court independently discussed and sharply limited the possible reach of the tort of negligent misrepresentation.

The court's decision in *Duffin* offers an accessible overview of the legal issues presented by economic loss. The court's preliminary map of the borderlands between contract-based and tort-based claims is, however, markedly incomplete. Rather than the relatively well-defined domains it presents, the borderlands are a contested region of indistinct and shifting frontiers. To understand this terrain, it is help-

37. *Id.* In addition, the court concluded that a second defendant — the Federal-State Inspection Service — had done nothing "actively . . . to induce reliance" and therefore did not have a special relationship with the purchasers of certified seed. *Id.*

38. *Id.* at 1010, 895 P.2d at 1203. The decision to which the court implicitly refers is *Idaho Bank & Trust Co. v. First Bancorp*, 115 Idaho 1082, 772 P.2d 720 (1989). *Idaho Bank & Trust* held that an accountant can be held liable for negligent misrepresentation under specific circumstances. *Id.* at 1083, 772 P.2d at 721. Although the court's statement in *Duffin* is absolute, the extent to which the prohibition applies to claims for personal injury or property damage, the language is *dicta*.

ful to begin with an examination of the question of what counts as "economic loss."

III. UNCERTAINTY AT THE BORDER OF ECONOMIC LOSS AND PROPERTY DAMAGE

Tort damages come in three varieties: personal injury, property damage, and economic loss. In most cases, the classification of losses presents no conceptual difficulties: the driver of a delivery truck runs a stop sign and hits a car (property damage), injuring its driver (personal injuries), and causing the driver to miss work while recuperating (economic loss); a passenger in the car — although not injured — misses an important meeting and loses a sale (economic loss). In such cases, "economic loss" presents no definitional issues: lost wages, lost profits, and the like are all "economic."

Although the distinction between personal injury and other losses is clear — both factually and ethically³⁹ — the line between property damage and economic loss is more problematic because the two types of loss may overlap — sometimes substantially. The most significant area of overlap involves injury to a product. For example, if the delivery truck had been damaged in a single-vehicle accident caused by the failure of its own brakes, is the damage "property damage" or "economic loss" in a suit against the product seller? In other words: does the existence of a contract between the parties affect the characterization of the type of loss? If the delivery truck had been a car would the claim be for property damage? That is: does the fact that the property is held to produce income rather than for personal use, affect the characterization of the type of loss? What is the justification if such external factors affect the characterization of the type of loss?

As the court noted in *Duffin*,⁴⁰ the distinction between economic loss and property damage was given its present contours in Idaho in *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*⁴¹ The case was brought by the purchaser of an airplane to recover for extensive damages to the plane caused by engine failure during takeoff. Differing statutes of limitations required the court to distinguish between tort and contract actions — which in turn led the court to dis-

39. Cf. *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 351, 544 P.2d 306, 309 (1975) ("A plaintiff can seek recovery of damages . . . for personal injury, property damage, and economic loss. Although personal injuries stand distinctly apart from the other two categories, a delineation between the latter two is necessary.")

40. *Duffin*, 126 Idaho at 1007, 895 P.2d at 1199.

41. 97 Idaho 348, 544 P.2d 306 (1975).

tinguish between personal injuries, property damage, and economic loss:

Although personal injuries stand distinctly apart from the other two categories, a delineation between the latter two is necessary. Property damage encompasses damage to property other than that which is the subject of the transaction. Economic loss includes costs of repair and replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use.⁴²

The court in *Salmon Rivers* thus drew the line between property damage and economic loss based on the identity of the property: if the property that is damaged is the subject of the transaction — the delivery truck that crashes due to brake failure — the loss is “economic.” The airplane engine that failed causing the craft to crash in *Salmon Rivers* thus was economic loss.⁴³ Similarly, a tractor that was underpowered,⁴⁴ a roof coating that failed to perform,⁴⁵ and a rental unit with substantial structural problems⁴⁶ were economic losses in suits against sellers and manufacturers of the products. It is only when other, non-transactional property is injured that the loss is “property damage.”

Although the court enunciated a bright-line rule, its subsequent decisions have dimmed the distinction. The court has on occasion treated the loss of transactional property as property damage and on others has interpreted injury to non-transactional property as economic loss. For example, in *Oppenheimer Industries v. Johnson Cattle Co.*,⁴⁷ plaintiff sought to recover in negligence for the failure of a state brand inspector to demand proof of ownership of cattle being offered for sale. Under the State Brand Board’s regulations, the inspector was required to demand proof of ownership when the brands on the cattle were “fresh.” Despite the presence of fresh brands, the inspector failed to demand proof of ownership — and the seller was in fact a cattle rustler. The court allowed the negligence claim despite the fact that the loss involved property that was the subject of the transaction. It did so, not on the ground that the claim fell within an exception to the general no-duty rule, but rather on the ground that the injury was not economic loss: “Oppenheimer is not still in possession of defective

42. *Id.* at 351, 544 P.2d at 309.

43. *Id.*

44. *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978).

45. *State v. Mitchell Constr. Co.*, 108 Idaho 335, 699 P.2d 1349 (1984).

46. *Tusch Enters. v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987).

47. 112 Idaho 423, 732 P.2d 661 (1987).

goods. Rather, Oppenheimer has suffered the *loss* of its *property* (i.e. the cattle) due to the negligence of the deputy brand inspector."⁴⁸ Since the loss was property damage, a negligence action was permissible.

As the court in *Duffin* tacitly acknowledged, *Oppenheimer's* distinction between lost and damaged property is logically insupportable.⁴⁹ If a defective product entirely self-destructs — if the engine failure had demolished the airplane in *Salmon Rivers* rather than merely damaged it — would the loss thereby be transmuted into property damage? Or would the fact that the owner still had possession of the wreckage be sufficient to prevent a claim for property damage? If the crash had caused a loss of only ninety-five percent of the value, would the claim therefore be one for economic loss? A distinction that turns on such fortuitous results is nonsensical.

The court has also wobbled in the opposite direction, refusing to allow tort claims in situations where non-transactional property was damaged. For example, in *G & M Farms v. Funk Irrigation Co.*,⁵⁰ plaintiff purchased an irrigation system that failed to deliver the necessary volume of water; plaintiff suffered reduced crop yields. The damage thus was to non-transactional property — the growing crops — rather than to the transactional property — the irrigation system. Nonetheless, the court asserted that this was an economic loss and refused to allow a negligence claim.

Although the *G & M Farms* decision is inconsistent with the definition announced in *Salmon Rivers* and reaffirmed in *Duffin*, it is eminently reasonable: the irrigation system was purchased in the course of the commercial endeavor of producing crops. The plaintiff hoped to make a profit from sale of the crop; the damages sought were not intended to replace the damaged property, but rather to compensate the company for its lost profits. The court would have exalted form over substance if it had focused on the fact that crops were non-transactional property and held the injury to be property damage.⁵¹

48. *Id.* at 426, 732 P.2d at 664. Alternatively, the court might have held that the loss of the cattle was property damage because the category "transactional property" applies only to transactions between a buyer and a seller. Such a distinction would narrow the term "transactional," but would do violence either to the term or to the rationale for the definition.

49. *Duffin*, 126 Idaho at 1007 n.5, 895 P.2d at 1200 n.5.

50. 119 Idaho 514, 808 P.2d 851 (1991).

51. Counter-examples to *G & M Farms* are also available. For example, in *Shields v. Morton Chemical Co.*, 95 Idaho 674, 518 P.2d 857 (1974), a bean farmer who sought to recover for lost profits when he was required to recall a crop of seed beans rendered unusable by a defect in a pesticide-fungicide manufactured by defendant was permitted to proceed under alternative theories of strict liability in tort, negligence, and breach of warranty. In a subsequent case, the court categorized the losses in *Shields* as "property damage" — even though the loss occurred in the context of a commercial trans-

A subsequent decision by the court of appeals offers a rationale for decisions such as *G & M Farms*. In *Myers v. A.O. Smith Harvester Products*,⁵² milk production at a dairy farm was reduced by problems with a feed storage and delivery system. The trial court granted defendants' motions for summary judgment on the tort claims, concluding that only economic loss was involved and that such losses could not be recovered in a tort action. Although the court of appeals cited the supreme court's definition of "economic loss" from *Salmon Rivers*, it acknowledged that the Myers' losses did not fall within that definition. Instead, the court recast the term: "Arguably, the Myers did allege property damage resulting from a defective product. However, these injuries did not result from a calamitous event or dangerous failure of the product. Rather, they arose from the failure of the product to match the buyers' commercial expectations."⁵³ Disappointed but not endangered purchasers are to be left to their contract remedies. The court therefore upheld the summary judgment on the tort claims.

The definition of pure economic loss as applied to damage to tangible property thus is more complicated than the court acknowledged in *Duffin. Salmon Rivers* as modified by *Myers* distinguishes "economic loss" from "property damage" on the basis of two factors: first, damage to property that is the subject of the transaction forming the basis of the suit is economic loss — regardless of the manner in which the loss occurred;⁵⁴ second, damage to other, non-transactional property is economic loss when the damage occurs through a non-calamitous event or a non-dangerous failure.⁵⁵ Stated from the opposite perspective: to be classified as property damage rather than economic loss, the property must be both non-transactional property and damaged as a result of a calamitous event or a dangerous failure.

The Idaho courts have been less than clear on the principles underlying these definitional lines. Since tort is concerned with safety, the prohibition of tort claims for non-calamitous losses to non-

action indistinguishable from that in *G & M Farms*. See *Clark v. International Harvester Co.*, 99 Idaho 326, 332, 581 P.2d 784, 790 (1978).

52. 114 Idaho 432, 757 P.2d 695 (Ct. App. 1988) (*review denied*).

53. *Id.* at 436, 757 P.2d at 699. The holding in *Myers* was prefigured in *Clark* where the court quoted extensively from Prosser's *Handbook on the Law of Torts* that a seller might be liable in negligence for damage to the defective product where the damage is caused by an accident but not when "there is no accident." *Clark v. International Harvester Co.*, 99 Idaho at 333, 581 P.2d at 791 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 101, at 665 (4th ed. 1971)). The court in *Clark* did not, however, emphasize the point, and the issue was not presented by the facts.

54. *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 351, 544 P.2d 306, 309 (1975).

55. *Myers*, 114 Idaho 432, 757 P.2d 695.

transactional property such as those in *G & M Farms* and *Myers* is consistent with policy underlying this body of law. Similarly, as the court of appeals noted in *Myers*, contract principles are applicable to non-calamitous losses to non-transactional property since such claims are "for lost profits and consequential business losses" resulting from an ineffective product.⁵⁶ These are the types of losses that are appropriately addressed within a contract framework — a framework that has been developed precisely to allocate business losses.⁵⁷ The refusal to allow claims for such losses to be brought in tort thus accords with both fundamental tort principles — since safety was not at issue — as well as fundamental contract principles — since the allocation of such business losses is the *raison d'être* for contract damage rules.

The absolute prohibition against recovering for damage to transactional property, on the other hand, is more problematic. For example, if plaintiff purchases an airplane that crashes, the fact that plaintiff is miraculously uninjured seems fortuitous — and the line prohibiting a tort claim seems on its face unprincipled. Nonetheless, on such facts the court in *Salmon Rivers* simply announced the distinction between transactional and non-transactional property without any discussion of its basis.⁵⁸ To the extent that the tort goal of risk reduction is relevant, then endangerment should be the touchstone for potential tort liability. As the Oregon Supreme Court decided when presented with a similar issue, "the distinction [is] between the disappointed users [who are relegated to contract] and the endangered ones [who may sue in tort]."⁵⁹

Although the line between "endangered" and "disappointed" corresponds to the difference between safety and quality that underlie the respective domains of tort and contract, most courts have concluded that the bright-line prohibition is a satisfactory balance of the

56. *Id.* at 436, 757 P.2d at 699.

57. *Id.*

58. See *Salmon Rivers*, 97 Idaho at 351, 544 P.2d at 309. Plaintiff in a subsequent case also involving a malfunctioning aircraft raised the issue, arguing that the economic loss was caused by the plaintiff's refusal to use the aircraft given the "potential for calamitous personal injury or property damage" if it again fell out of the sky. *Management Catalysts v. Turbo West Corpac, Inc.*, 119 Idaho 626, 631, 809 P.2d 487, 492 (1991) (Bistline, J., dissenting) (quoting Appellants Brief). The court did not reach the question.

The court has reached a similar result at other points of contact between tort and contract. For example, in 1985 the court held that emotional distress could not be recovered in an action for breach of contract; if the conduct was sufficiently outrageous, recovery might be available in punitive damages. *Brown v. Fritz*, 108 Idaho 357, 699 P.2d 1371 (1985). In a subsequent decision the court refused to allow emotional distress for the negligent repair of an aircraft — even though the discovery of the problem occurred when the plane was airborne. *Hathaway v. Krumery*, 110 Idaho 515, 716 P.2d 1287 (1986) (per curiam).

59. *Russell v. Ford Motor Co.*, 575 P.2d 1383, 1387 (Or. 1978) (Linde, J.).

competing policies⁶⁰ — particularly when the efficiency advantages of a clear rule are added to the scales.⁶¹ For example, the United States Supreme Court concluded that drawing the line between economic loss and property damage between endangered and disappointed was “too indeterminate to enable manufacturers easily to structure their business behavior.”⁶² Furthermore, the Court thought that the distinction ignored the simple fact that, regardless of the nature of the event producing the loss, the loss “is essentially the failure of the purchaser to receive the benefit of its bargain — traditionally the core concern of contract law.”⁶³ Contract law — particularly its warranty provisions — offers a preferable method for allocating risks to economic expectations, the Court concluded, because it provides tools for limiting the scope of otherwise unpredictable economic losses.⁶⁴ In short, the rule defining damage to transactional property as “economic loss” is justified by the concern with the potentially unlimited liability that might arise in tort.

This seems to be the position that has evolved in Idaho: *Salmon Rivers* defines losses to transactional property as economic loss; *Myers* adds damage to non-transactional property that occurs from a non-calamitous event. Although there are inconsistent decisions, they are

60. This appears to be the majority rule. *E.g.*, *East River Steamship Corp. v. Transamerica Delval, Inc.*, 476 U.S. 858, 870-71 (1986); *Seely v. White Motor Co.*, 403 P.2d 145, 151 (Cal. 1965). There is, however, substantial diversity on the topic. *See* *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 489 A.2d 660, 663 (N.J. 1985) (commercial buyer may recover for pure economic loss only in contract); *Santor v. A&M Karagheusian, Inc.*, 207 A.2d 305, 312 (N.J. 1970) (consumer may recover pure economic loss in strict liability in tort); *Russell v. Ford Motor Co.*, 575 P.2d at 1387 (tort recovery for pure economic loss permitted when the user is “endangered” rather than “disappointed”); *Berg v. General Motors Corp.*, 555 P.2d 818, 822 (Wash. 1976) (pure economic loss may be recovered in negligence).

61. The most frequently cited justification for rules is efficiency: by providing a clear line between competing universes, a rule reduces the costs of litigation over the boundary. Those whose claims fall on the contract side of the line will forebear when they can only hope to recover in tort. The gain, of course, is purchased at some loss of equity since a case-by-case determination produces fairer results. Contrariwise, the gains in equity are purchased at the cost of increased indeterminacy and inefficiency. *See East River Steamship*, 476 U.S. at 870.

62. *Id.* at 870. The rationale obviously assumes the conclusion: contract rules protect contract interests better than do tort principles.

63. *Id.*

64. “A warranty action also has a built-in limitation on liability, whereas a tort action could subject the manufacturer to damages of an indefinite amount” because “foreseeability is an inadequate brake. . . . Permitting recovery to all foreseeable claims for purely economic loss could make the manufacturer liable for vast sums.” *Id.* at 874.

aberrational⁶⁵ or poorly reasoned.⁶⁶

However the inconsistency in the case law is to be resolved, it is important to note that it involves a fairly narrow range of situations. The more common examples of economic loss — such as lost profits — are not in dispute: the problem stems solely from a sometimes uncertain boundary between tort and contract when tangible property is damaged. Furthermore, this uncertainty is most likely to be present in only a single type of case involving economic loss: cases involving the sale of goods. And economic loss may occur in a much more diverse group of cases.

IV. THE CASES: A TYPOLOGY

Although the court in *Duffin* spoke of “a general rule prohibiting the recovery of purely economic losses” in tort⁶⁷ except in two situations — when “unique circumstances” or a “special relationship” are present⁶⁸ — the actual typology of the cases is more complicated. Rather than an orderly rule-with-two-exceptions, the Idaho economic-loss cases resemble a shifting map of the Balkans with their various factual patterns and the conflicting policies. Although it may not be true that the no-duty rule is more honored in the breach than in the application, it is nonetheless true that the rule is subject to a significant number of exceptions and qualifications.

Pure economic loss cases can be divided into six categories:

1. *Cases involving shoddy goods in which there is a contract between plaintiff and defendant.* Defendant contracts with plaintiff for the sale of a product that fails to perform as expected. For example, defendant sells plaintiff a tractor which causes plaintiff economic losses when he is unable to plow the desired number of acres per hour.⁶⁹
2. *Cases involving shoddy goods in which there is no contract between plaintiff and defendant.* Most commonly, plaintiff contracts with a third party to purchase goods; the third party in

65. For example, in a decision decided before *Salmon Rivers* but reaffirmed after that decision, the court held that non-transactional property damaged in a non-calamitous event was “property damage” rather than “economic loss.” *Shields v. Morton Chem. Co.*, 95 Idaho 674, 518 P.2d 857 (1974); *Clark v. International Harvester Co.*, 99 Idaho 326, 332, 581 P.2d 784, 790 (1978) (categorizing the losses in *Shields* as “property damage”).

66. See *Oppenheimer Indus. v. Johnson Cattle Co.*, 112 Idaho 423, 426, 732 P.2d 661, 664 (1987).

67. 126 Idaho at 1007, 895 P.2d at 1200.

68. *Id.* at 1008, 895 P.2d at 1201.

69. See *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978).

turn contracts with defendant, who breaches the contract; plaintiff seeks to recover against the remote manufacturer in negligence. For example, plaintiff seeks a metal building to house his business. He contracts with a local contractor to erect the structure. The contractor in turn orders the building from a fabricator. When the building turns out to be less-than-desired, plaintiff seeks to sue the fabricator.⁷⁰

3. *Cases involving the misperformance of a service contract between defendant and plaintiff.* Defendant, for example, contracts with plaintiff to insure plaintiff's business against the risk of fire. When the property is subsequently destroyed by fire, plaintiff discovers that defendant had failed adequately to insure the inventory.⁷¹
4. *Cases involving the misperformance of a service contract between defendant and a third party that causes economic loss to plaintiff.* Defendant, for example, contracts with a city to redevelop its blighted urban core and agrees both to take steps to mitigate potential losses to businesses in the core and to complete the work by a specified date. A business in the redevelopment area suffers economic losses when customers avoid shopping at her store because of the inconvenience the construction causes.⁷² A recurrent variation on this category of cases involves what are often characterized as "misrepresentations." For example, an accountant contracts with a company to prepare an opinion on the financial condition of a company. A third party loans money based on the opinion. When the company defaults on its loans, the third party brings a negligence action against the accountant.⁷³
5. *Cases in which economic loss is caused by damage to a relational interest: the breach of a tort — rather than a contract — duty owed to a third party causes economic loss to the plaintiff.* For example, defendant allows a visitor to bring a greyhound onto fairgrounds where a horse race is being held. The dog decides to join the race with disastrous results for a jockey whose mount collides with the dog. The jockey's employer brings an

70. See *Adkison Corp. v. American Bldg. Co.*, 107 Idaho 406, 690 P.2d 341 (1984).

71. See *McAlvain v. General Ins. Co. of Am.*, 97 Idaho 777, 554 P.2d 955 (1976).

72. See *Just's, Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 583 P.2d 997 (1978).

73. See *Idaho Bank & Trust Co. v. First Bancorp*, 115 Idaho 1082, 772 P.2d 720 (1989).

action for the losses he suffers because the jockey is unable to ride for him.⁷⁴

6. *Cases involving economic loss in which a legislative standard creates the duty of care.* Two examples suggest the diverse range of the cases in this category. In the first, plaintiff contracts with a third party to care for plaintiff's cattle. The third party rebrands the cattle and sells them at auction. When plaintiff discovers its loss, it brings suit against the State Brand Board, contending that one of the Board's inspectors had violated its regulations which require inspectors to demand proof of ownership when brands were "fresh."⁷⁵ The second — and far more common — example involves the Idaho wrongful death statute: defendant, for example, runs a stop sign and kills a spouse and father, causing economic loss to his heirs.⁷⁶

A. Shoddy Goods: Contracts Between Plaintiff and Defendant for the Sale of Goods

Shoddy goods often cause economic loss — if only because the purchaser fails to receive the value desired. This category of case is the clearest situation in which the boundary between tort and contract is at issue: the relationship between the parties has its origin in contract and the losses suffered are exclusively economic. Not surprisingly, this is also the situation in which the no-duty rule has its most general application.

In *Taylor v. Herbold*,⁷⁷ defendant purchased 7,000 cwt. of potatoes from plaintiff; he failed to take delivery as required by the contract. Plaintiff brought a contract action for the potatoes purchased but unclaimed. He also brought a second action for "tortious damages" arising from the breach of the contract. Plaintiff sought these damages for the approximately 3,000 cwt. that remained in his cellar, contending that, because other buyers in the area knew of the dispute between plaintiff and defendant, they were unwilling to purchase the remaining 3,000 cwt. in the undivided 10,000 cwt. pile. The supreme court affirmed the trial court's judgment *n.o.v.* for the defendant on the tort claim, holding that a breach of contract does not give rise to a tort unless the duty to act with due care arises independently of the contract.

74. See *Cain v. Vollmer*, 19 Idaho 163, 112 P. 686 (1910).

75. *Oppenheimer Indus. v. Johnson Cattle Co.*, 112 Idaho 423, 732 P.2d 661 (1987).

76. *E.g.*, *Moon v. Bullock*, 65 Idaho 594, 151 P.2d 765 (1944).

77. 94 Idaho 133, 483 P.2d 664 (1971).

The court predicated its decision on a "general rule": the breach of a contract — without more — does not give rise to a duty in tort. In explaining its decision, the court posited two types of situations in which "something more" would be present and a tort duty would arise independently of the contractual relationship between the parties. First, one of the parties might act negligently toward the other party without regard to the contract between them: the contract, in other words, would merely bring the parties into physical proximity.⁷⁸ Second, in at least some situations, a contract might itself give rise to a relationship that imposes a duty of due care on one of the parties. Such situations, the court wrote, "primarily involv[e] cases in which one of the parties was engaged in a public calling or public transportation."⁷⁹ In the case before it, the court concluded neither exception was applicable: Herbold had done nothing beyond breaching his contractual duty to take delivery of the potatoes. He therefore was not liable in tort.

The court reached a similar conclusion in *Clark v. International Harvester Co.*,⁸⁰ a negligence claim for a defectively designed tractor. Plaintiff, a custom farmer, experienced recurrent difficulties in attaining sufficient pulling power from the tractor and he eventually

78. See *id.* at 138, 483 P.2d at 669 (finding an exception for "those situations in which misfeasance rather than nonfeasance was the issue"). For example, the court of appeals has held that a defendant who had contracted to install a water heater could be liable in negligence if the water heater lacked a pressure relief valve:

Negligence in the sense of nonperformance of a contract will not sustain an action sounding in tort, in the absence of a liability imposed by law independent of that arising out of the contract itself; rather, active negligence or *misfeasance* is necessary to support an action in tort based upon a breach of contract. *Taylor v. Herbold* . . . Here Galbraith's claim does not assert nonperformance by Vangas of a contract to install a water heater. The water heater was, in fact, installed. Rather, the complaint, in substance, alleges misfeasance by Vangas in installing a water heater which lacked a pressure relief valve.

. . . The contract for sale and installation of a water heater (complete with a pressure relief device) established the relationship, and certain obligations, between the parties. But each of them also brought into this relationship a more general duty. This is the duty that "one owes . . . to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury."

Galbraith v. Vangas, Inc., 103 Idaho 912, 914, 655 P.2d 119, 121 (Ct. App. 1982) (quoting *Alegria v. Payonk*, 101 Idaho 617, 619, 619 P.2d 135, 137 (1980) (quoting *Kirby v. Sonville*, 594 P.2d 818, 821 (Or. 1979))). Because the *Taylor* court does not emphasize the fact that the loss was solely economic, it does not note that its first exception will rarely, if ever, produce exclusively economic loss.

79. *Taylor*, 94 Idaho at 138, 483 P.2d at 669.

80. 99 Idaho 326, 581 P.2d 784 (1978).

brought suit, seeking to recover for lost profits due to "down time" and for the costs of repairing and replacing allegedly defective parts. The court reversed a judgment for plaintiff, holding that such pure economic losses could not be recovered in a tort action. The issue, the court stated, was

the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees it will.⁸¹

The conjunction of *Taylor* and *Clark* creates a broad prohibition against tort⁸² recovery of pure economic losses arising from the breach of a contract between plaintiff and defendant for the sale of goods. It is a rule that the court has almost consistently followed. The court has held that a negligence claim for shoddily constructed rental housing units did not state a cause of action because plaintiff suffered only economic loss,⁸³ that a plaintiff could not rely upon negligence in seeking to recover for the construction of a prefabricated building when the negligence caused neither personal injury nor property

81. *Id.* at 334, 581 P.2d at 792 (quoting *Seely v. White Motor Co.*, 403 P.2d 145, 151 (Cal. 1965)).

82. Although *Clark* was a negligence action, the court's discussion focused more broadly on "tort" actions including strict liability in tort claims. *See id.* at 333-36, 581 P.2d 791-94. The case has subsequently been cited as deciding that "economic loss . . . will not support a tort action in either negligence or strict liability." *State v. Mitchell Constr. Co.*, 108 Idaho 335, 336, 699 P.2d 1349, 1350 (1984). The issue appears never to have been argued. This ambiguity may account for the *Duffin* court's seeming vacillation on the scope of the general rule. Although the court states that there is "a general rule prohibiting recovery of purely economic losses in all *negligence* actions," it also writes that there are exceptions which allow recovery of such losses "in tort" under some circumstances. *Duffin*, 126 Idaho at 1007, 895 P.2d at 1200 (emphasis added).

The prohibition includes only *non-intentional* torts. Pure economic losses can be recovered in fraud, an intentional tort that is located on the fuzzy tort-contract boundary. *See, e.g., Zuhlke v. Anderson Buick, Inc.*, 94 Idaho 634, 496 P.2d 95 (1972); *Edmark Motors, Inc. v. Twin Cities Toyota, Inc.*, 111 Idaho 846, 727 P.2d 1274 (Ct. App. 1987).

83. *Tusch Enters. v. Coffin*, 113 Idaho 37, 40-41, 740 P.2d 1022, 1025-26 (1987).

damage,⁸⁴ that an irrigation system which failed to provide sufficient water volume because of an allegedly negligent design was not actionable in tort,⁸⁵ and that the cost of repairing or replacing an allegedly defective roof on a new building could not be recovered in either negligence or strict liability.⁸⁶

B. Shoddy Goods: Contracts for the Sale of Goods in Which There is No Privity Between Plaintiff and Defendant

The court has reached the same no-duty conclusion when the purchaser of goods sues a remote manufacturer alleging pure economic loss. Given the length of the distribution chain for most products, this category of cases is a common one. Purchasers are unlikely to be in privity of contract with the actual manufacturer or assembler of a product. For example, Ronald Corrado contracted with Adkison Corporation for the construction of a building to house his aircraft mechanic business.⁸⁷ Adkison in turn contracted with Rural Systems, Inc. (RSI) the dealer for American Building Company (ABC) to provide a built-to-order metal building. In placing the order with ABC, RSI made a mistake. The building as delivered also had additional problems. Corrado and Adkison sued ABC in both contract and tort for the economic losses they suffered.

The court affirmed a directed verdict for the defendant on the tort claims. Holding that "the law of contract should control actions for purely economic loss and not the law of torts," the court concluded that "actions for purely economic losses must be viewed in a contract setting with relevant contract principles."⁸⁸

C. Poor Service: Contracts Between Plaintiff and Defendant

Just as shoddy products can cause economic loss, so can poor service. Furthermore, service contracts present factual patterns that are superficially very similar to those in the sale of shoddy goods: plaintiff and defendant have a contract; defendant breaches the contract; plaintiff seeks to recover not (or not only) in contract but (also) in tort. Again, this is a situation in which the boundary between tort

84. *Adkison Corp. v. American Bldg. Co.*, 107 Idaho 406, 411, 690 P.2d 341, 346 (1984).

85. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 527, 808 P.2d 851, 864 (1991).

86. *State v. Mitchell Constr. Co.*, 108 Idaho 335, 336, 699 P.2d 1349, 1350 (1984).

87. *See Adkison*, 107 Idaho 406, 690 P.2d 341.

88. *Id.* at 410, 410-11, 690 P.2d at 345, 345-46.

and contract is at issue: the relationship between the parties has its origin in contract and the losses suffered are exclusively economic.

Despite the seeming similarities, the differences between sales and service contracts are more significant. Most fundamentally, the difference between the sale/purchase of a product and the sale/purchase of a service is the difference between the mass-produced and the personal.⁸⁹ The purchaser of a product seldom obtains it directly from the manufacturer; the purchaser of a service, on the other hand, is quite likely to deal directly with the provider. While the personal element in service contracts is declining with the rise of the service economy — and a concomitant increasing scale of service providers that is approaching something akin to mass-production — nonetheless, service contracts remain more personal and idiosyncratic: even taking a mass-produced VCR into the franchised warranty service provider requires a level of personal interaction that the purchaser of a product seldom has with its manufacturer.

These differences — as imprecise as they are — appear to lie at the core of the court's differing treatment of sales and service contracts — a difference that the court has often stated as a conclusion that service contracts can form the basis for a relationship between the parties that is sufficiently "special" to give rise to a tort duty to act with care in providing the service.⁹⁰ Thus, for example, the court

89. The change from hand-made to mass-produced with its resulting depersonalization of the contract for the purchase of products was one rationale for changing the law of products liability from contract to tort. Contract allowed the producer to avoid responsibility for the danger it built into a product by avoiding any contact with the actual purchaser/user. See, e.g., *Greenman v. Yuba Power Co.*, 377 P.2d 897, 901 (Cal. 1962) (Traynor, J.); *Escola v. Coca Cola*, 150 P.2d 436, 440, 443-44 (Cal. 1944) (Traynor, J., concurring); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053-54 (N.Y. 1916) (Cardozo, J.).

90. "Special relationships" as a source of the duty of care are not limited to cases involving economic loss. To understand the role of such special relationships in tort, it is helpful to note briefly the bigger picture. Duty in negligence can be conceived as falling into four broad categories:

(1) *a general duty to act with care when the actor creates a risk*: when an individual acts in a manner that imposes a foreseeable risk of harm on others, the actor generally has a duty to act with due care to minimize the risk. E.g., *Wilson v. Boise City*, 6 Idaho 391, 55 P. 887 (1899).

(2) *a general no-duty when the individual does not create the risk*: when the individual did not create the risk, she generally does not have a duty to act either to minimize the risk or to protect individuals subject to it. E.g., *Fagundes v. State*, 116 Idaho 173, 774 P.2d 343 (Ct. App. 1989). The distinction is often characterized as the difference between *misfeasance* — which subjects the actor to a duty to act with care — and *nonfeasance* — which does not give rise to a duty to act to protect. The distinction between misfeasance and nonfeasance can be paper thin. See, e.g., *Kunz v. Utah Power & Light Co.*, 526 F.2d 500 (9th Cir. 1975); *Alegria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980).

(3) *exceptions to the no-duty-to-act rule*: in some situations, the court has been willing to impose a duty to act when the individual did not herself create the risk. For ex-

has held that agreements to send a telegraph message,⁹¹ to insure plaintiff's business,⁹² or to repair his truck⁹³ are special relationships that do not fall within the no-duty-in-tort rule. Such situations are distinguishable from situations involving the sale of goods, the court has stated, because the sale of goods does "not involve the rendering of personal services by one with specialized knowledge and experience."⁹⁴

ample, when the individual assumes a duty, *e.g.*, *Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 796 P.2d 506 (1990); *Davis v. Potter*, 51 Idaho 81, 2 P.2d 318 (1931), or there is a special relationship between defendant and plaintiff, *e.g.*, *S.H. Kress & Co. v. Godman*, 95 Idaho 614, 515 P.2d 561 (1973); *Clark v. Tarr*, 75 Idaho 251, 270 P.2d 1016 (1954), or between defendant and a third party whose conduct is the source of the risk, *e.g.*, *Davis v. Potter*, 51 Idaho 81, 2 P.2d 318 (1931), the court has imposed duties to protect others from harm.

(4) *limited duty situations* are situations in which the court has been unwilling to apply the general duty-to-act-with-care standard to activities that cause certain types of injuries. The paradigm example is emotional distress: concern with unlimited liability and potentially fraudulent claims has led the court to fashion duty rules that stop far short of the traditional "foreseeability" limitations on tort liability. *See, e.g.*, *Brown v. Matthews Mortuary, Inc.*, 118 Idaho 830, 801 P.2d 37 (1990); *Czaplicki v. Gooding Joint Sch. Dist. No. 231*, 116 Idaho 326, 775 P.2d 640 (1989). Economic loss falls into this category.

In addition to the broad similarities among the different types of limited duty situations, there are also similarities between the types of factual patterns and policies that will lead to the creation of a duty-to-act under the third category and the patterns and policies that will lead to more expansive liability for the limited duty interests in the fourth category. The most striking of these is the "special relationship" category: the court has been willing to impose a duty-to-act when there is a sufficient relationship between either plaintiff and defendant, *e.g.*, *Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 796 P.2d 506 (1990) (landlord/tenant's employee); *Bauer v. Minidoka Sch. Dist. No. 331*, 116 Idaho 586, 778 P.2d 336 (1989) (school/student); *Merritt v. State*, 108 Idaho 20, 696 P.2d 871 (1985) (jailer/jailed); *Straley v. Idaho Nuclear Corp.*, 94 Idaho 917, 500 P.2d 218 (1972) (quasi-common carrier/passenger); *Clark v. Tarr*, 75 Idaho 251, 270 P.2d 1016 (1954) (common carrier/passenger); *McClain v. Lewiston Interstate Fair & Racing Ass'n*, 17 Idaho 63, 104 P. 1015 (1909) (race promoter/jockey), or between defendant and the third party who has created the risk, *e.g.*, *Alegria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980) (bartender/consumer); *Davis v. Potter*, 51 Idaho 81, 2 P.2d 318 (1931) (doctor/nurse). These "special relationships" are conceptually indistinguishable from the "special relationships" involved in the pure economic loss cases. One recurrent source of "special relationships" in the duty-to-act context are service contracts. *See, e.g.*, *S.H. Kress & Co. v. Godman*, 95 Idaho 614, 515 P.2d 561 (1973) (boiler repairer had a duty to inspect the external safety devices on boiler and thus was potentially liable for boiler explosion not caused by the repairer's work); *Clark v. Tarr*, 75 Idaho 251, 270 P.2d 1016 (1954) (common carrier had a duty to protect passengers from risk of alternative transportation after bus broke down).

91. *Strong v. Western Union Tel. Co.*, 18 Idaho 389, 109 P. 910 (1910).

92. *McAlvain v. General Ins. Co. of Am.*, 97 Idaho 777, 554 P.2d 955 (1976).

93. *Dick v. Reese*, 90 Idaho 447, 412 P.2d 815 (1966).

94. *McAlvain*, 97 Idaho at 780, 554 P.2d at 958; *see also Duffin*, 126 Idaho at 1008, 895 P.2d at 1120. Although the court did not note it, the law applicable to the sale of products does offer an analogue to the factual patterns that characterize "special relationships" — and the Uniform Commercial Code has provided an implied warranty that re-

In *Duffin*, the court stated its intention "to define the parameters" of the "special relationship' exception."⁹⁵ The term, it wrote, "refers to those situations where the relationship between the parties is such that it would be equitable to impose such a duty."⁹⁶ Unfortunately, this definition is singularly unhelpful because the key term — "equitable" — provides so little guidance. Although the court does supplement its definition with an examination of case law, it looks at a single case — *McAlvain v. General Insurance Co. of America*.⁹⁷ As a result, the court's analysis is incomplete and potentially misleading.⁹⁸ In part, the analytical problems with the opinion may be traceable to the fact that duty questions arise episodically and piecemeal in the process of deciding cases; to define the category thoroughly requires an analysis of a large number of cases that are not easily collected.⁹⁹ In part, the problem is also due to the court's narrow focus on the relationship question as a subset of the economic loss issue rather than as a recurrent source of a duty of care.

Whatever the source of the problem, the court's definition is doubly under-inclusive. First, it failed to note that "special relationship" is a source of duty applicable to more than just economic loss cases: a special relationship, for example, is an exception to the nonfeasance/misfeasance divide in negligence. That is, a special relationship may be the source of a duty to protect someone from a risk not of the duty-bound person's making.¹⁰⁰ The court's analysis thus does not include the full range of special-relationship cases. Second, the existence of a special relationship is not the sole source of exceptions to the no-duty-to-prevent-economic-loss-in-tort rule. Other factors — such as the status of the defendant¹⁰¹ — may give rise to a duty to take care to prevent economic loss. Although the court stated that it

flects such relationships. The Code provides that, when a purchaser informs the seller of the purchaser's particular needs and the seller makes a recommendation upon which the purchaser relies, the seller has impliedly warranted the product to be fit for the purchaser's particular purposes. IDAHO CODE § 28-2-315 (1995).

95. *Duffin*, 126 Idaho at 1008, 895 P.2d at 1201.

96. *Id.*

97. 97 Idaho 777, 554 P.2d 955 (1976).

98. The court did not canvas the many decisions that have recognized relationships as sufficiently "special" to create a duty in negligence. Thus, it did not fully articulate the factors required to denominate a relationship as "special."

99. Cases involving special relationships are difficult to collect because they fall through the cracks in both the older digesting system and the newer computerized systems: the digests do not have a category for "special relationship" and not all cases that involve the issue employ the terminology.

100. See, e.g., *S.H. Kress & Co. v. Godman*, 95 Idaho 614, 515 P.2d 561 (1973).

101. E.g., *Strong v. Western Union Tel. Co.*, 18 Idaho 389, 109 P. 910 (1910).

was canvassing the topic,¹⁰² it in fact omitted a number of cases and categories that should be included in any complete summary.

1. The Status of the Service Provider as a Source of Duty

One of the earliest sources of duty in tort involved the so-called "public callings." At the common law, common carriers, innkeepers, and the like had tort duties of due care imposed on them beyond any duties they may have assumed in contract.¹⁰³ It thus is not surprising that businesses which fit within the category — or which are sufficiently analogous to it¹⁰⁴ — are also subject to liability for pure economic loss in tort.¹⁰⁵

For example, in *Strong v. Western Union Telegraph Co.*¹⁰⁶ plaintiff brought an action for damages caused by a telegraph message that had inadvertently misquoted the price of cattle being bought and sold. Although the contract between the telegraph company and the sender expressly stated that the company would not be liable for the results of a mistransmission and offered the sender the opportunity to have the message verified for an additional charge, the court set aside the contractual limitation on the ground that public policy precluded defendant from contracting away liability for its own negligence.¹⁰⁷ In reaching this decision, the court emphasized the quasi-public nature of the company as evidenced by its charter:

While [the telegraph company] may make rules and regulations in regard to the conduct of its business, the reasonableness or unreasonableness of such rules must be determined with reference to public policy, precisely as in the case of common carriers. Public policy is that principle of law under which freedom of contract or private dealing is restricted by

102. *Duffin*, 126 Idaho at 1007, 895 P.2d at 1200.

103. See generally Norman F. Arterburn, *The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411 (1927).

104. See *Straley v. Idaho Nuclear Corp.*, 94 Idaho 917, 500 P.2d 218 (1972) (a private bus line that acted like a common carrier would be treated as a common carrier).

105. Public callings are exceptions to several doctrines. For example, the court has imposed liability on public callings in situations that would otherwise be characterized as nonfeasance. See, e.g., *Clark v. Tarr*, 75 Idaho 251, 270 P.2d 1016 (1954); *Rosendahl v. Lemhi Valley Bank*, 43 Idaho 273, 251 P. 293 (1926); see also David S. Bogen, *The Innkeeper's Tale: The Legal Development of a Public Calling*, 1996 UTAH L. REV. 51, 51-53 (discussing theories on basis of public callings and the extension of the category into other legal areas); Leslie E. John, Comment, *Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort*, 74 CAL. L. REV. 2033, 2043-44 (1987) (exception to exclusion of punitive damages).

106. 18 Idaho 389, 109 P. 910 (1910).

107. Cf. *Lee v. Sun Valley Co.*, 107 Idaho 976, 695 P.2d 361 (1984) (state-licensed outfitter could contractually limit liability for its own negligence).

law for the good of the community — the public good. A stipulation in a contract which exempts the corporation from damages for its own negligence is void when applied to a telegraph company as well as when applied to a common carrier.¹⁰⁸

Having concluded that the company was precluded from disclaiming liability, the court invoked traditional tort principles: transmission of messages — particularly transmissions involving commercial transactions — involved a foreseeable risk of harm and thus a duty to act with care.¹⁰⁹

Similarly, in *Lane v. Oregon Short Line Railroad*¹¹⁰ plaintiff was able to sue in tort for the loss of lambs shipped over the defendant's line — despite the fact that the contract with the carrier provided that the shipper would, "at his own risk and expense, load, unload, care for, feed and water the stock until delivery."¹¹¹ En route to their destination, the lambs were unloaded for feeding into pens defendant provided. Plaintiff left the lambs unattended overnight in the pens. When he returned the following morning, thirty-eight lambs were missing. Although the court reversed a jury verdict for the plaintiff, it did so on the grounds that plaintiff had failed to prove that defendant was negligent rather than on the grounds that plaintiff could not recover for pure economic loss in tort:

It is the duty of a carrier transporting livestock to furnish reasonable and proper facilities and opportunities for feeding, watering and resting them. . . .

It is claimed that the failure to provide the gates with patented locks was negligence. No inference of negligence can be drawn from such failure, unless there was a showing of such circumstances that a prudent person would have provided locks, as, for example, that others in the community locked their pens and corrals in which livestock was kept at night, or that sheep or other livestock had escaped from the pens previously, or that it was customary for railroad stockyards to be provided with locks.¹¹²

Such public calling cases emphasize the nature of one type of "special relationship." As the court in *Strong* noted, these cases share a common core: one individual is required to surrender control over a

108. *Strong*, 18 Idaho at 400-01, 109 P. at 913 (citation omitted).

109. *Id.* at 402, 109 P. at 914.

110. 34 Idaho 37, 198 P. 671 (1921).

111. *Id.* at 39, 198 P. at 671.

112. *Id.* at 40, 198 P. at 671.

risk to another person who therefore assumes responsibility for protecting the first individual —

the public are compelled to rely absolutely on the care and diligence of the company in the transmission of messages, and by reason of those powers and the relation it sustains to the public, it is obligated to perform the duties it is chartered to perform with the care, skill and diligence [of] a prudent man¹¹³

When a traveler checks into an inn and deposits his weapons (think broad swords and six shooters¹¹⁴) with the innkeeper, the traveler becomes dependent for his personal safety on the care of the innkeeper.¹¹⁵ When a traveler books passage on a common carrier, the traveler is forced to rely upon the skill of the carrier.¹¹⁶ When an individual stores property in a warehouse, that person gives up her power to protect the property and the warehouseman becomes responsible for their safe storage.¹¹⁷

The relationship has extended beyond the traditional common law public callings. Thus, when an individual leases personal property such as a barge,¹¹⁸ a truck,¹¹⁹ cattle,¹²⁰ or sheep¹²¹ to another, the lessee has a duty to act with due care to return the property in reasonable condition to the lessor. In each of the cases, one person gives up the power to protect himself or his property against risk and necessarily relies upon another person to guard against that risk. The courts have responded to such control/dependence relationships by imposing a duty of care.

2. Service Providers with Special Knowledge, Judgment, or Skill

A closely related category of special relationships involve professionals and others with special knowledge, judgment, or skill. Histori-

113. *Strong*, 18 Idaho at 404, 109 P. at 915 (emphasis added).

114. As one commentary on public callings has noted: "Frequently in defining rules of law we must delve deeply into the past to find the reason for the rule of conduct or liability." *Arterburn*, *supra* note 103, at 411.

115. Although "[a]n inn is a refuge from the perilous world outside," the duties imposed on innkeepers flowed from the fact that the "[d]angers outside the inn were less significant than the dangers within." *Bogen*, *supra* note 105, at 91.

116. *See, e.g., Clark v. Tarr*, 75 Idaho 251, 270 P.2d 1016 (1954).

117. *E.g., Shockley v. Tennyson Transfer & Storage, Inc.*, 76 Idaho 131, 278 P.2d 795 (1955). *Cf. Rosendahl v. Lemhi Valley Bank*, 43 Idaho 273, 251 P. 293 (1926) (plaintiff stored bonds in a safe deposit box that was robbed).

118. *Carscallen v. Lakeside Highway Dist.*, 44 Idaho 724, 260 P. 162 (1927).

119. *Ford v. Transport Holding Corp.*, 96 Idaho 388, 529 P.2d 784 (1974).

120. *Glover v. Spraker*, 50 Idaho 16, 292 P. 613 (1930).

121. *Cluer v. Leahy*, 44 Idaho 320, 256 P. 760 (1927).

cally, the public-calling category and the specialized-service-providers category were nearly synonymous. One early English legal treatise, for example, stated that

if a Smith prick my horse with a nail, &c. I shall have my action of the Case against him, without any warranty by the smith to do it well. . . . For it is the duty of every Artificer to exercise his art right, &c. truly as he ought.¹²²

As *Strong* demonstrates, however, the rationales invoked in the public calling cases — the public nature of the businesses and the control/dependence nature of the relationship — have diverged from those applicable to service providers who possess special knowledge, judgment, or skill. While *Strong* emphasized the “public utility nature” of the telegraph, the leading Idaho case on the liability of service providers emphasized the special expertise of the defendant and the resulting reliance of the plaintiff.

a. Professional Service Providers

In *McAlvain v. General Insurance Co. of America*,¹²³ plaintiff purchased a business through defendant, a real estate agent who also sold insurance. The agent handled both the sale and the plaintiff's subsequent insurance requirements. Plaintiff requested sufficient insurance to cover the business and its inventory fully. The agent, however, insured the business for less than the full amount — a fact that the owner discovered after the business burned. The court rejected the defendant's argument that it had only contractual duties to the plaintiff:

A person in the business of selling insurance holds himself out to the public as being experienced and knowledgeable in this complicated and specialized field. The interest of the state that competent persons become insurance agents is demonstrated by the requirement that they be licensed by the state, pass an examination administered by the state, and meet certain qualifications. An insurance agent performs a personal service for his client, in advising him about the kinds and extent of desired coverage and in choosing the appropriate insurance contract for the insured. Ordinarily, an insured will look to his insurance agent, relying, not unreasonably, on his expertise in placing his insurance problems in the agent's

122. ANTHONY FITZ-HERBERT, *THE NEW NATURA BREVIVM* § 94d, at 225 (London: corrected & rev'd ed. 1666).

123. 97 Idaho 777, 554 P.2d 955 (1976).

hands. When an insurance agent performs his services negligently, to the insured's injury, he should be held liable for that negligence just as would an attorney, architect, engineer, physician or any other professional who negligently performs personal services.¹²⁴

These factors — the expertise of the agent, the reliance of the client, and the personal relationship between them — the court asserted, distinguished the plaintiff's claim in *McAlvain* from that in *Taylor* which involved only the sale of potatoes and thus did not involve "the rendering of personal services by one with specialized knowledge and experience" present in *McAlvain*.¹²⁵ As the court in *Duffin* stated, in *McAlvain* the court "emphasized the fact that an insurance agent holds himself out to the public as having expertise regarding a specialized function, and that, by so doing, the agent induces reliance on his superior knowledge and skill."¹²⁶

This rationale is generally applicable to professionals and the court has consistently applied tort standards of liability to a broad range of professionals — accountants,¹²⁷ architects,¹²⁸ attorneys,¹²⁹ surveyors,¹³⁰ notary publics,¹³¹ and title companies¹³² — despite the contractual source of the relationship between the parties and the fact that the loss is purely economic.

In such cases, the contract forms the basis of the relationship. As a result, the scope of the obligation assumed under the contract or the conduct of the parties pursuant to the agreement is potentially rele-

124. *Id.* at 780, 554 P.2d at 958 (citations omitted); see also *Bales v. General Ins. Co. of Am.*, 53 Idaho 327, 24 P.2d 57 (1933) (insurance company was liable in negligence when its agent failed to renew an insurance policy on plaintiff's oats); *Wallace v. Hartford Fire Ins. Co.*, 31 Idaho 481, 174 P. 1009 (1918) (insurance company was liable in negligence when its agent failed to write an insurance policy on plaintiff's drugstore).

125. *McAlvain*, 97 Idaho at 780, 554 P.2d at 958.

126. *Duffin*, 126 Idaho at 1008, 895 P.2d at 1120.

127. *Mack Fin. Corp. v. Smith*, 111 Idaho 8, 720 P.2d 191 (1986); *Streib v. Veigel*, 109 Idaho 174, 706 P.2d 63 (1985); *Owyhee County v. Rite*, 100 Idaho 91, 593 P.2d 995 (1979).

128. *Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill*, 103 Idaho 19, 644 P.2d 341 (1982).

129. *E.g.*, *Thompson v. Pike*, 122 Idaho 690, 838 P.2d 293 (1992); *Fitzgerald v. Walker*, 113 Idaho 730, 747 P.2d 752 (1987), following remand, 121 Idaho 589, 826 P.2d 1301 (1992); *Marias v. Marano*, 120 Idaho 11, 813 P.2d 350 (1991); *Zumwalt v. Stephan, Balleism & Slavin*, 113 Idaho 822, 748 P.2d 406 (Ct. App. 1987).

130. *Williams v. Blakely*, 114 Idaho 323, 757 P.2d 186 (1988).

131. *Osborn v. Ahrens*, 116 Idaho 14, 773 P.2d 282 (1989).

132. *Merrill v. Fremont Abstract Co.*, 39 Idaho 238, 227 P. 34 (1924); *Hillock v. Idaho Title & Trust Co.*, 22 Idaho 440, 126 P. 612 (1912). *Cf. Anderson v. Title Ins. Co.*, 103 Idaho 875, 655 P.2d 82 (1982) (where defendant undertook to insure plaintiffs' title and did not undertake to abstract that title, it was liable in contract for the amount of the policy and was not liable in tort).

vant to a determination of whether the defendant breached the imposed duty in tort. For example, when the litigation involves situations in which defendant has not acted — situations that have traditionally been labeled “nonfeasance” — questions of the existence of an agreement are potentially relevant. In *Bales v. General Insurance Co. of America*,¹³³ the agent for the insurance company agreed to renew an insurance policy on plaintiff's oats that were located in a warehouse. When the warehouse burned, it was discovered that the agent had failed to renew the policy. Noting that liability was predicated on “the negligence of [defendant's] agent whereby he failed to execute an agreement to renew a policy of insurance,”¹³⁴ the court evaluated and rejected a series of contract defenses — lack of mutuality and indefiniteness of terms — before concluding:

Again we call attention that this is not an action on a contract of insurance, but is an action for damages growing out of the breach of a duty which [defendant] owed [plaintiff] to renew the insurance on his oats.

....

... The failure to perform [this duty] in this case caused [plaintiff] to be without the protection of a policy of insurance when his oats were destroyed, and rendered [defendant] liable for his resulting damage.¹³⁵

In the absence of a contract, defendant had no duty to do something for the plaintiff and, in the absence of an obligation to act, would not have breached a tort duty owed to plaintiff.¹³⁶

More commonly, the plaintiff and defendant will have engaged in conduct that will both provide evidence of the existence of a promissory relationship and surmount the misfeasance/nonfeasance dichotomy. For example, in a case involving an attorney who contacted a former client about a potential investment and who then provided the requisite legal advice for the deal, plaintiff argued that the attorney had assumed a duty to exercise care to protect his interests — even though there was no formal relationship between the parties. The

133. 53 Idaho 327, 24 P.2d 57 (1933).

134. *Id.* at 330, 24 P.2d at 57.

135. *Id.* at 335, 337, 24 P.2d at 59, 60.

136. The misfeasance/nonfeasance dichotomy recurs in cases such as *Taylor v. Herbold* where defendant agreed to purchase plaintiff's potatoes and then failed to remove them from the cellar. The court rejected tort liability in part because “active negligence or misfeasance is necessary to support an action in tort based on a breach of contract; mere nonfeasance . . . is not sufficient.” *Taylor v. Herbold*, 94 Idaho at 138, 483 P.2d at 669 (quoting 1 C.J.S. *Actions* § 49(c) (1955)). The existence of a “special relationship” thus overcomes the nonfeasance by obligating the duty-bound person to act.

court agreed that the facts could be so understood, noting that a letter from the client to the attorney "can be viewed as an offer for Runft [the attorney] to enter a unilateral contract. Although the breach of an assumed duty claim sounds in tort, evidence to support the existence of an assumed duty can be contractual in nature."¹³⁷ Thus the letter and the attorney's subsequent actions were sufficient to create a triable issue on whether the attorney had assumed a duty to protect plaintiff from his subsequent economic losses in the business deal.

Not all white-collar or professional services give rise to special relationships. For example, in *Black Canyon Racquetball Club, Inc. v. Idaho First National Bank*,¹³⁸ plaintiff sought loans from the bank to expand and remodel its business. Following protracted negotiations, the bank refused to make the loans plaintiff sought. Plaintiff responded by filing suit alleging that defendant had made an oral contract to loan the funds and that it had also breached several tort duties. After concluding that there was no contract, the court turned to plaintiff's tort claims which were partially predicated upon the argument that the relationship between the bank and a customer was analogous to that between an insurer and an insured. The court disagreed. The relationship between a bank and its customers was not a special relationship because it lacked the "personal" and "non-commercial" nature that characterized the relationship between insurer and insured; "[r]ather, the transaction here was a commercial one, which would have created a debtor-creditor relationship."¹³⁹ The lack of the "personal" element was fatal to the claim.

Just as not all professional relationships are special, so all special relationships are not professional: as the court in *Duffin* recognized,¹⁴⁰ the *McAlvain* rationale has also been applied beyond the traditional bounds of what can be categorized as "professional" occupations. The extension of the duty of care beyond public callings and professionals has, however, proved more problematic.

137. *Jones v. Runft, Leroy, Coffin & Matthews, Chartered*, 125 Idaho 607, 612, 873 P.2d 861, 866 (1994).

138. 119 Idaho 171, 804 P.2d 900 (1991).

139. *Id.* at 176, 804 P.2d at 905. The court has reiterated this conclusion on several occasions. *E.g.*, *Eliopoulos v. Knox*, 123 Idaho 400, 848 P.2d 984 (Ct. App. 1992), (*review denied* (1993)); *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 824 P.2d 841 (1991).

140. "Although *McAlvain* dealt with the existence of a professional or quasi-professional relationship, we do not limit the 'special relations' exception exclusively to such cases." *Duffin*, 126 Idaho at 1008, 895 P.2d at 1201.

b. Non-Professional Service Providers

The court's handling of cases involving non-professional service providers has not been entirely consistent. Two lines of decisions reveal the contours of the problem.

The first series of cases involve disputes that result from contracts to drill wells or install machinery or repair equipment. For example, *Knoblock v. Arenguena*¹⁴¹ was a dispute that arose out of an oral agreement to drill a well. After plaintiff completed the well, defendant refused to pay contending that the hole was not sufficiently straight to accommodate a pump. The court began with the proposition that defendant's agreement to drill the well "carried with it an implied obligation to do the work in a good and workmanlike manner" because

[a]ccompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract.¹⁴²

After reviewing the evidence, the court concluded that the trial court's finding that "the well was not such a well as would be drilled in a good and workmanlike manner so as to fulfill the purpose for which it was intended" was supported by substantial evidence and affirmed the judgment for plaintiff.¹⁴³

Similarly, in *Dick v. Reese*,¹⁴⁴ the court imposed a negligence standard onto a contract for the repair of a truck. The law, the court held, "implies a contract that the work shall be done with due care and competent skill."¹⁴⁵ Thus, the "garageman must exercise ordinary care and skill in making the repairs."¹⁴⁶ The court has reached a similar conclusion in other cases.¹⁴⁷

141. 85 Idaho 503, 380 P.2d 898 (1963).

142. *Id.* at 507-08, 380 P.2d at 901 (emphasis added) (quoting 38 AM. JUR. *Negligence* § 20 at 662 (1954)).

143. *Id.* at 505, 380 P.2d at 899.

144. 90 Idaho 447, 412 P.2d 815 (1966).

145. *Id.* at 451, 412 P.2d at 817 (quoting 8 AM JUR. 2D *Bailments* § 220 (1963)).

146. *Id.* at 452, 412 P.2d at 817 (citations omitted); *see also* *Beare v. Stowes' Builders Supply, Inc.*, 104 Idaho 317, 658 P.2d 988 (Ct. App. 1983).

147. *See, e.g., Chenery v. Agri-Lines Corp.*, 106 Idaho 687, 690-91, 682 P.2d 640, 643-44 (1984) (action seeking to recover for dropping a pump back into a well when defendant was seeking to remove the pump for repairs sounded in tort rather than contract).

On the other hand, the court has on occasion adopted an extremely formalistic approach.¹⁴⁸ For example, in *Steiner Corp. v. American District Telegraph*,¹⁴⁹ defendant installed a fire alarm system in plaintiff's business and contracted to maintain the system, including monthly inspections. When the building caught fire, the alarm system failed. Defendant, it was subsequently determined, had not checked the system for eight months prior to the fire. Plaintiff's argument that defendant was liable for negligently rendering a service was rejected by the court on the ground that defendant's conduct was "nonfeasance":

The actions alleged to have caused damage to Steiner were clearly acts of omission or nonfeasance, as opposed to active negligence or misfeasance. Steiner alleges that ADT failed to properly perform its duty to inspect and maintain the fire alarm system. Thus, a clear duty must be shown to exist by operation of law, separate and apart from the contractual duty to maintain the equipment. It is clear from the allegations in this complaint that such a separate duty cannot be shown. Apart from this contract, ADT could not be said to have a duty to maintain equipment in Steiner Corporation's building. Steiner has not pointed to any statutory duty of suppliers of fire alarm systems, nor pointed to any common law duty of a supplier to his customer. The only duty to which ADT could be held under the facts of this case is that which arose by virtue of the contract obligating it to maintain this fire alarm system.¹⁵⁰

The difficulty with this approach is its artificiality. Consider, for example, this parallel restatement of *Knoblock*: Arenguena's allegations that Knoblock failed to properly perform his duty to drill the well must fail in the absence of a clear duty, shown to exist by operation of law, separate and apart from the contractual duty to drill the well. But apart from his contract to drill the well, Knoblock had no duty to do so.

The duty that the court found in *Knoblock v. Arenguena* — a duty to drill with due care — is no less a conclusory statement than the opposite conclusion reached in *Steiner Corp. v. American District Telegraph*. For example, *American District Telegraph* had serviced the fire alarms for some period of time — it had, in other words,

148. Cf. Ralph J. Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131 (1995).

149. 106 Idaho 787, 683 P.2d 435 (1984).

150. *Id.* at 790-91, 683 P.2d at 438-39.

"acted." Should the fact that it stopped "acting" be determinative of plaintiff's legal rights? If Knoblock had simply given up on his efforts to straighten the well at some point — stopped acting — would Arenaguena have been limited to his contractual claim? The ultimate problem is that the misfeasance/nonfeasance dichotomy is highly manipulable; it often becomes a conclusory label rather than a factual description.

The *Steiner* court alternatively held plaintiff's negligence claim was barred by the contract's exculpatory clause. The court rejected the argument that the exculpatory clause should be voided as contrary to public policy because there was neither "an obvious disadvantage in bargaining power" nor a "public duty" such as that imposed on public utilities and common carriers.¹⁵¹

Another irrigation-well case reached a similar conclusion. In *Rawlings v. Layne & Bowler Pump Co.*,¹⁵² plaintiff contracted with defendant for the sale and installation of an irrigation pump. The pump was installed carelessly and plaintiff brought a negligence action for the resulting crop losses. Without commenting on the choice, the court treated the issue exclusively as a question of contract law and upheld an exculpatory clause in the contract.¹⁵³

It is possible to distinguish the cases based on the existence of an exculpatory clause in the service contract. Under this reading *Knoblock* and *Steiner* simply establish contrary presumptions: when a clause is included, it will generally be enforced;¹⁵⁴ when there is no clause, on the other hand, there is a presumption that a service contract includes "a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract."¹⁵⁵

Similarly, the cases might be distinguished by the existence of a "special relationship" between the parties. Although it is possible to characterize the relationship between the pump repairer and the pump owner as "special" — it is predicated upon a personal relationship involving the expertise of the repairer and the reliance of the

151. *Id.* at 791, 683 P.2d at 439.

152. 93 Idaho 496, 465 P.2d 107 (1970).

153. *Id.* at 498-99, 499-500, 465 P.2d at 109-10, 111-12. *Cf.* *Anderson & Nafziger v. G.T. Newcomb, Inc.*, 100 Idaho 175, 178-79, 595 P.2d 709, 712-13 (1979) (discussing *Rawlings*). *See also* *Lee v. Sun Valley Co.*, 107 Idaho 976, 695 P.2d 361 (1984).

154. The court has stated that such clauses will not be enforced when there is "an obvious disadvantage in bargaining power" or defendant is engaged in a "public calling." *Steiner*, 106 Idaho at 791, 683 P.2d at 439; *Rawlings*, 93 Idaho at 499-500, 465 P.2d at 111-12; *Strong*, 18 Idaho 389, 109 P. at 913.

155. *Knoblock*, 85 Idaho at 507-08, 380 P.2d at 901 (quoting 38 AM. JUR. *Negligence* § 20 at 662 (1954)).

owner — the relationship does not seem intuitively to be any more special than that between the fire alarm installer and the building owner. The difficulty is that the designation of some relationships as "special" tends to be conclusory because the court has provided little explicitly on how to determine when a relationship is "special." Although the court has stated that "[t]he 'special relationship' exception generally pertains to claims against professionals who perform personal services, such as physicians, attorneys, architects, engineers and insurance agents,"¹⁵⁶ the court's application of the "special relationship" category has been broader than the traditional meaning of the term "professionals." The court has found a special relationship not only when physicians, attorneys, architects, engineers and insurance agents are involved, but also when the service provider is a well driller,¹⁵⁷ a pump repairer,¹⁵⁸ an automobile repairer,¹⁵⁹ a boiler repairer,¹⁶⁰ a water-heater installer,¹⁶¹ an aircraft mechanic,¹⁶² a plumber,¹⁶³ and a title company.¹⁶⁴

The cases in which the court has found special relationships share a web of recurrent factors rather than a finite list of elements. As a threshold matter, the cases generally involve personal relationships. As the court has noted, it is this personal element that distinguished the case from cases involving the sale of goods, cases that do "not involve the rendering of *personal* services by one with specialized knowledge and experience."¹⁶⁵ In addition, the cases often involve some expertise on the part of the defendant and a corresponding reliance by the plaintiff coupled with a foreseeable risk that is within the expert's control. The court's statement in *McAlvain* about the relationship of the insured to the insurance agent is broadly applicable to

156. *Eliopoulos v. Knox*, 123 Idaho 400, 408, 848 P.2d 984, 992 (Ct. App. 1992) (citations omitted) (*review denied* (1993)).

157. *Knoblock*, 85 Idaho 503, 380 P.2d 898. *Cf.* *Hibbler v. Fisher*, 109 Idaho 1007, 712 P.2d 708 (Ct. App. 1985) (expressing doubt on the application of the no-duty rule to construction of a water system at a trailer court — an issue not assigned as error).

158. *Chenery v. Agri-Lines Corp.*, 106 Idaho 687, 682 P.2d 640 (Ct. App. 1984) (*review denied*).

159. *Dick v. Reese*, 90 Idaho 447, 412 P.2d 815 (1966); *see also* *Beare v. Stowes' Builders Supply, Inc.*, 104 Idaho 317, 658 P.2d 988 (Ct. App. 1983).

160. *S.H. Kress & Co. v. Godman*, 95 Idaho 614, 515 P.2d 561 (1973).

161. *Galbraith v. Vangas, Inc.*, 103 Idaho 912, 655 P.2d 119 (Ct. App. 1982).

162. *Hoffman v. Simplot Aviation, Inc.*, 97 Idaho 32, 539 P.2d 584 (1975).

163. *Mico Mobile Sales & Leasing, Inc. v. Skyline Corp.*, 97 Idaho 408, 415, 546 P.2d 54, 61 (1975).

164. *Hillock v. Idaho Title & Trust Co.*, 22 Idaho 440, 126 P. 612 (1912).

165. *McAlvain v. General Ins. Co. of Am.*, 97 Idaho 777, 780, 554 P.2d 955, 958 (1976) (emphasis added); *see also* *Hoffman v. Simplot Aviation, Inc.*, 97 Idaho 32, 37, 539 P.2d 584, 589 (1975) ("In circumstances involving the rendition of personal services the duty upon the actor is to perform the services in a workmanlike manner.").

these relationships: "Ordinarily, an insured will look to his insurance agent, relying, not unreasonably, on his expertise in placing his insurance problems in the agent's hands."¹⁶⁶ It is possible to substitute "attorney" or "architect" or "accountant" for "insurance agent" without distorting the sentence or its point. "Well driller" and "automobile repairer" also do not significantly misstate the underlying relationship — nor, for that matter, does or should "fire alarm provider."

D. Poor Service: Service Contracts Between Defendant and a Third Party

The second category of service contract cases involve the misperformance of a service contract between defendant and a third party; breach of this contract results in economic loss to plaintiff. Can the plaintiff recover her losses?

The cases fall into two, overlapping groups. In the first, defendant breaches a contract to perform a service owed to a third party. For example, a construction company contracts with a city to redevelop its blighted urban core and agrees both to take steps to mitigate potential losses to businesses in the core and to complete the work by a specified date. A business in the redevelopment area suffers economic losses when customers avoid shopping at her store because the construction company fails to meet its contractual obligations.¹⁶⁷

The second group of cases is a variation that has traditionally been characterized as "misrepresentation."¹⁶⁸ For example, a bank contracts with an accounting firm to prepare a financial statement of its business. The accountant prepares an audit; plaintiff subsequently loans the bank money based on the audit. After the borrower-bank goes into receivership, the lender sues the accountant.¹⁶⁹

Although there are paradigmatically pure cases — cases in which the misperformed service involves no misrepresentation and misrepresentation cases that involve no misperformed service — the two groups often overlap. That is, the misrepresentation in many

166. *McAlvain*, 97 Idaho at 780, 554 P.2d at 958.

167. *Just's, Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 583 P.2d 997 (1978).

168. Although these third-party cases are often categorized as negligent misrepresentation, it is important to note that these are not the only type of cases that can be so characterized. For example, if the owner of an automobile takes it into a repair shop complaining of strange noises and the repairer tells her, "Everything is just fine" when he has no basis for his statement, the repairer's conduct might also be characterized as a negligent misrepresentation. *E.g.*, *Pabon v. Hackensack Auto Sales, Inc.*, 164 A.2d 773 (N.J. 1960); see also *Intermountain Constr. Co. v. City of Ammon*, 122 Idaho 931, 841 P.2d 1082 (1992) (allegations that city had negligently misrepresented the cost of building permits).

169. *Idaho Bank & Trust Co. v. First Bancorp.*, 115 Idaho 1082, 772 P.2d 720 (1989).

cases involves statements about a negligently performed service. Consider, for example, the famous Cardozo opinion *Glanzer v. Shepard*.¹⁷⁰ Plaintiff contracted to purchase 905 bags of beans from a third party, agreeing to pay a specified price per pound. The seller contracted with defendant to weigh the beans. Defendant provided both the seller and plaintiff with a statement of the weight. Defendant unfortunately had misweighed and plaintiff — who had overpaid — brought suit to recover his loss. Cardozo characterized the facts as involving a misrepresentation. Defendant, in Cardozo's view, had misrepresented the weight of the beans; for Cardozo, the issue was whether defendant could be held liable for that misrepresentation in the absence of a contract with the plaintiff. Note, however, that the case can with equal accuracy be characterized as the negligent performance of service: defendant had negligently misweighed the beans.¹⁷¹ Similarly, in *McAlvain v. General Insurance Co. of America*,¹⁷² defendant's conduct can be viewed either as the negligent performance of a service (insuring the business) or as a negligent misrepresentation (representing that the business had been fully insured).

1. "Pure" Services

The leading Idaho case is *Just's, Inc. v. Arrington Construction Co.*¹⁷³ The construction company and the City of Idaho Falls entered into a contract for the renovation of the city's blighted urban core. The contract required defendant to take specified steps to minimize the disruption to businesses in the area being renovated. Defendant failed to comply with the mitigation measures and did not finish the renovation in a timely manner. Plaintiff brought a contract action claiming to be a third-party beneficiary of the contract between the company and the city; it also joined a tort claim, contending that defendant's negligent conduct had caused it economic loss. Citing concerns for unlimited and disproportionate liability, the court refused to allow plaintiff to recover in tort.¹⁷⁴

170. 135 N.E. 275 (N.Y. 1922).

171. The alternative characterization question extends beyond the third party service contract context to include many service contracts in which there is a contract between the parties. For example, *McAlvain v. General Insurance Co. of America*, 97 Idaho 777, 554 P.2d 955 (1976), can be viewed either as a negligent performance of a service case (failing to insure the business fully) or a negligent misrepresentation case (misrepresenting the status of the insurance on the business).

172. *Id.*

173. 99 Idaho 462, 583 P.2d 997 (1978).

174. *Id.* at 470, 583 P.2d at 1005. The court, however, did hold that plaintiff was a third-party beneficiary of the contract between defendant and the city. *Id.* at 467, 583 P.2d at 1002.

The court's concern is the recurrent one: the fear that liability will exceed fault. As the court noted in *Just's*, the traditional tort liability-limiting mechanism — foreseeability — provides no real limit in many pure economic loss situations: "In contrast to the recognized liability for personal injuries and property damage, with its inherent limitations of size, parties and time, liability for all the economic repercussions of a negligent act would be virtually open-ended."¹⁷⁵ If *Just's* were permitted to recover, there would be no reason to deny recovery to *Just's* suppliers and creditors and its suppliers' suppliers and creditors *ad infinitum*.

2. "Pure" Misrepresentation

The current Idaho law on recovery of economic loss for negligent misrepresentation is traceable to two Cardozo decisions: *Glanzer v. Shepard*¹⁷⁶ — the bean weighing case — and *Ultramares Corp. v. Touche, Niven & Co.*¹⁷⁷ In *Ultramares*, a company contracted with the accounting firm Touche, Niven & Co. to prepare a certified balance sheet of its assets and liabilities. The firm prepared thirty-two copies of the audit, one of which was used to obtain a loan from Ultramares. Unfortunately, the borrower was insolvent at the time of the audit and the loan became a loss. Ultramares sued the accounting firm for its negligence in completing the audit.

In *Glanzer*, the court held the bean weigher liable; in *Ultramares*, the court refused to extend liability to the accountant because "a thoughtless slip or blunder . . . may expose [defendants] to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."¹⁷⁸ Cardozo distinguished *Glanzer* as involving a relationship between the bean weigher and the bean purchaser that was "so close as to approach privity."¹⁷⁹ For the court, the privity substitute served to limit the weigher's potential liability; no similar limit was present in *Ultramares*.

The next significant case was decided in 1985 when the New York Court of Appeals handed down *Credit Alliance Corp. v. Arthur Andersen & Co.*¹⁸⁰ The case involved an extension of credit to a third party based on a consolidated financial statement prepared by an accounting firm. The court reexamined and reaffirmed its prior decisions in *Glanzer* and *Ultramares*, concluding that an accountant could

175. *Id.*

176. 135 N.E. 275 (N.Y. 1922).

177. 174 N.E. 441 (N.Y. 1931).

178. *Id.* at 444.

179. *Id.* at 446.

180. 483 N.E.2d 110 (N.Y. 1985).

be held liable to a noncontractual party if three requirements were satisfied: "(1) the accountant must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to that party or parties."¹⁸¹ The court thought that these requirements were a sufficient privity substitute that restricted potential liability within manageable bounds.

The New York case law is relevant because of the Idaho Supreme Court's decision in *Idaho Bank & Trust Co. v. First Bancorp.*¹⁸² *Idaho Bank & Trust* was a negligence action brought by a lender against an accounting firm that had been employed by the borrower to prepare a financial statement of the borrower's business. The accountant prepared an audit; The lender loaned money based on it. After the borrower went into receivership, the lender sued the accountant. On appeal from an order dismissing the claim, the court noted the unlimited liability issue and then simply and without additional analysis adopted the decision of the New York Court of Appeals in *Credit Alliance*.¹⁸³ The tripartite test for liability for negligent misrepresentation thus became Idaho law.¹⁸⁴

E. Tort Duties Owed to Third Parties

Although many pure economic loss cases lie on the boundary between tort and contract, this is not universally true. When one person breaches a tort duty owed to a third party, that breach may affect the economic interests of others. For example, when a person is killed or injured in an automobile accident, the decedent's business partners may well suffer economic loss as a result of the death or injury. Such economic interests generally are not recoverable in tort. In *Everett v. Trunnell*,¹⁸⁵ for example, the court summarily rejected such a claim, noting that "a partnership has no right to recover for the negligent injury to a partner."¹⁸⁶

181. *Id.* at 118.

182. 115 Idaho 1082, 772 P.2d 720 (1989).

183. *Id.* at 1083-84, 772 P.2d at 721-22.

184. The court subsequently reaffirmed its conclusion that negligent misrepresentation, "as recognized in *Idaho Bank & Trust Co. v. First Bancorp.*, 115 Idaho at 1082, 772 P.2d at 720 (1989), is a viable cause of action in Idaho." *Hudson v. Cobbs*, 118 Idaho 474, 479, 797 P.2d 1322, 1327 (1990).

185. 105 Idaho 787, 673 P.2d 387 (1983).

186. *Id.* at 790, 673 P.2d 390. *Cf. Zaleha v. Rosholt, Robertson & Tucker, Chartered*, 98 Idaho Sup. Ct. Rep. 205 (1998) (plaintiff cannot recover for her collateral claims for injuries allegedly done to her husband).

The most extensive discussion of the rationale for this position was set out in *Cain v. Vollmer*.¹⁸⁷ Cain was the master of an apprentice jockey who sued for profits he lost as a result of physical injuries to the apprentice. Although the court had previously allowed the jockey to recover his lost wages,¹⁸⁸ it rejected the master's claim, emphasizing the distinction between the master's action for lost profits and the jockey's action for personal injury and the resultant loss of earning capacity:

In this case the one seeking damages is a race-horse man — one who follows the races and enters his horses and . . . depends on making his money by winning prizes in the various races. That there is a wide difference between the nature and character of damages asked in each of these cases cannot escape the attention of anyone. The one is direct; the other is proximate and dependant on innumerable secondary and intervening causes. The jockey earned a salary and certain sums for "outside mounts" whether he won the race or not. This was his earning capacity. On the other hand, the jockey alone cannot win the race; he must have a fleet horse . . . and upon the whole these imaginative profits may dwindle into real losses.

....

. . . [T]he profits it is claimed appellant would have realized depend on so many intervening circumstances and contingencies, the unfavorable happening of any of which would dissipate these prospective gains. We are fully satisfied that prospective profits to a race-horse man for races that have never been run and race meets and associations that have never been held and against all contestants, is entirely too remote, uncertain and indeterminable to be allowed.¹⁸⁹

The court's concern is apparent: the economic losses that the race-horse man sought were uncertain and therefore potentially unlimited.

In addition to this fear of speculative awards and unlimited liability, the decision in cases such as *Everett* rest upon the common law belief that tort actions are personal to the injured party¹⁹⁰ — a belief that reflected the concern with limiting liability to reasonable

187. 19 Idaho 163, 112 P. 686 (1910).

188. *McClain v. Lewiston Interstate Fair & Racing Ass'n*, 17 Idaho 63, 104 P. 1015 (1909).

189. *Cain*, 19 Idaho at 167-69, 112 P. at 687-88.

190. *Moon v. Bullock*, 65 Idaho 594, 151 P.2d 765 (1944); *Kloepfer v. Forch*, 32 Idaho 415, 184 P. 477 (1919).

bounds. The combination of these concerns supports a broad prohibition against allowing recovery for losses attributable to the breach of a tort duty owed to a third party rather than to the plaintiff.

F. Legislative Standards as a Source of Duty

An often-neglected category of cases involves a legislative standard that creates the applicable tort duty of care. This is a quite heterogeneous group of cases.

The loss may be caused by the misperformance of a service contract between defendant and a third party when defendant is under a statutory obligation to protect plaintiff's interests. For example, an abstracter prepared an abstract of title to a parcel of land for the landowner. The abstracter failed to note that the land had been mortgaged. Plaintiff purchased the land relying on the abstract. When he was subsequently required to redeem the parcel, plaintiff brought an action against the abstracter who argued that his liability was determined by contract and thus did not extend to plaintiff with whom it was not in privity. In *Merrill v. Fremont Abstract Co.*,¹⁹¹ the court held that this general rule had been abrogated by statute: "it was evidently the intention of the Legislature to include within its protection any person that might suffer damage by reason of the neglect or omission of the abstracter . . . due to carelessness."¹⁹² The statute, in other words, created a tort duty owed to people not in privity of contract with the title company.

In other situations, the statutory duty to protect against economic loss may exist independently of contract. For example, in *Oppenheimer Industries v. Johnson Cattle Co.*¹⁹³ plaintiff had contracted with Bohlen Cattle Company to care for cattle that Oppenheimer owned. Bohlen subsequently rebranded some 1,681 head of cattle and sold them at auction. When Oppenheimer discovered its loss, it brought suit against the State Brand Board, contending that one of the Board's inspectors had violated its regulations which required inspectors to demand proof of ownership when brands were "fresh." The court agreed: the regulation imposed a duty on brand inspectors to demand proof of ownership — and the beneficiaries of that duty included cattle owners.¹⁹⁴

191. 39 Idaho 238, 227 P. 34 (1924).

192. *Id.* at 244-45, 227 P. at 36.

193. 112 Idaho 423, 732 P.2d 661 (1987).

194. *Id.* at 425, 732 P.2d at 663. The court's analysis in *Oppenheimer* is less than clear. Although the court holds that the regulation creates a duty to protect cattle owners, its decision muddles the distinction between property damage and economic loss by holding that the loss of the cattle was property damage. This is incorrect under *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 544 P.2d 306 (1975), since

By far the most common example of a legislatively created duty, however, is the state's wrongful death act. The common law viewed the claim arising from the breach of a tort duty as personal to the injured person; as a result, the law did not recognize claims for injuries resulting from the death of a third party. Decedent's heirs had no better claim for their losses than did decedent's partners.¹⁹⁵ This was reversed by statute.¹⁹⁶ As a result, a decedent's heirs may now recover for their economic losses attributable to tortious conduct resulting in the death.

V. A TRANSITIONAL SUMMARY

This brief review of the Idaho case law on recovery of economic loss demonstrates that it is a good bit more complex than the general-rule-with-two-exceptions explanation that the court presents in *Duffin* — and even this more complex typology suffers from over-precision. There are, for example, a not-readily-classifiable group of decisions such as *Hudson v. Cobbs*.¹⁹⁷ The case grew out of a complex real estate transaction gone bad. Plaintiff purchased an office complex only to discover that some of his "tenants" had signed sham advance rental agreements into order to enable the seller to convert a short-term loan into long-term financing and sell the property to him. After the bank foreclosed, plaintiff brought an action seeking to recover for negligent misrepresentation as well as fraud. The court held that the only duty that the "tenants" had to the plaintiff was under the contract to lease office space; plaintiff's claim was in contract and not in tort.¹⁹⁸ The examples could be multiplied.

Although incomplete, the typology does contain the majority of economic loss cases. It also reveals the underlying policy concerns.

the cattle were the transactional property. As the court in *Duffin* tacitly acknowledged, *Oppenheimer's* distinction between lost and damaged property is logically insupportable. *Duffin*, 126 Idaho at 1007 n.5, 895 P.2d at 1200 n.5. It thus is better to consider *Oppenheimer* to involve a statutory duty to protect against economic loss.

In a subsequent decision, the court has seemingly confused duties based on statutory standards and duties based on the relationship between the parties. In *Tomich v. City of Pocatello*, 127 Idaho 394, 901 P.2d 501 (1995), the owners of a small airplane that was stored at a municipal airport brought an action to recover for the destruction of the airplane when the tie-downs failed in a wind storm. The court affirmed a judgment for the owner on the ground that there was a special relationship between the owner of the airplane and the owner of the airport. The court relied upon certain statutory obligation to support its conclusion that there was a special relationship. The court, however, fails to explain why statutes create a special relationship, seeming to confuse these two sources of a duty in tort.

195. See *Everett v. Trunnell*, 105 Idaho 787, 673 P.2d 387 (1983).

196. IDAHO CODE § 5-311 (1990).

197. 118 Idaho 474, 797 P.2d 1322 (1990).

198. *Id.* at 477-78, 797 P.2d at 1325-26.

VI. POLICY AND RATIONALES

The case law reflects two dominant policy concerns. On the one hand, the court has sought to preserve contract against the encroachment of tort. The prohibition against recovering pure economic loss in tort serves this goal:

The law of negligence requires the defendant to exercise due care to build a tractor that does not harm person or property. If the defendant fails to exercise such due care it is of course liable for the resulting injury to person or property as well as other losses which naturally follow from that injury. However, the law of negligence does not impose on International Harvester a duty to build a tractor that plows fast enough and breaks down infrequently enough for Clark to make profit in his custom farming business.¹⁹⁹

On the other hand, the court has also expressed repeated concern over the potential for unlimited liability inherent in pure economic loss situations. Again, the prohibition against recovering pure economic loss in tort serves this policy goal:

[A] . . . rule, which would allow compensation for losses of economic advantage caused by the defendant's negligence, would impose too heavy and unpredictable a burden on the defendant's conduct.

. . . In contrast to the recognized liability for personal injury and property damage, with its inherent limitations of size, parties and time, liability for all the economic repercussions of a negligent act would be virtually open-ended.²⁰⁰

The sometimes-conflicting, sometimes-reinforcing interaction of these policies on the underlying rationales for tort and contract liability accounts for at least part of the court's apparent scatter-shot approach to pure economic loss cases.

A. Tort vs. Contract

1. Shoddy Goods

On a doctrinal level, cases involving the sale of goods present the clearest situation in which the core principles of both tort and con-

199. *Clark v. International Harvester Co.*, 99 Idaho 326, 336, 581 P.2d 784, 794 (1978).

200. *Just's, Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 470, 583 P.2d 997, 1005 (1978) (citations omitted).

tract support the same result: neither the potato seller nor the tractor or shop buyer is endangered by their contractual partners — and when person or property is not endangered, society's interest in imposing safety standards through tort law is not implicated.²⁰¹ Instead, the buyers were disappointed by the quality of their contractual partner's performance — and quality (*i.e.*, warranty) is a contract concern. As the court stated in *Clark*, tort is concerned with protecting persons and property rather than with guaranteeing the purchaser a profit.²⁰² If plaintiff wants a profitable tractor, he must be sure that the seller promises to provide him such a tractor.

Shoddy goods causing only economic loss thus creates the least tension between tort and contract — and presents the simplest case for the judiciary.²⁰³

2. Poor Service

Cases involving the misperformance of service contracts are impossibly diverse because the variety of services is so great: one person hires another to drill a well, to teach children reading and mathematics, to insure a business, to run a drill press, to install and maintain a fire alarm system, or to audit a company's books. Despite the diversity, however, service contracts do share underlying similarities.

Most significantly, service contracts are employment contracts. As such, they have a different feel than contracts for the purchase of goods in which the purchaser and the manufacturer seldom meet face-to-face. While the personal element in service contracts is declining

201. In *Taylor*, the court stated this distinction as the difference between misfeasance and nonfeasance: where defendant has not created a risk (misfeasance) but simply failed to act, it has not endangered plaintiff and thus has not invaded any tort interest. *Taylor v. Herbold*, 94 Idaho at 138-39, 483 P.2d at 669-70. The same concern is present in *Myers* where the court of appeals refused to allow a tort action for property damage because the "injuries did not result from a calamitous event or dangerous failure of the product." *Myers v. A.O. Smith Harvestore Products*, 114 Idaho 432, 436, 757 P.2d 695, 699 (Ct. App. 1988) (*review denied*).

202. *Clark*, 99 Idaho at 336, 581 P.2d at 794.

203. In addition to this doctrinal basis, the court has also provided a rationale for restricting recovery to contract claims based on the constitutional allocation of powers between the judicial and the legislative/executive departments of state government. As the court noted in *Clark*, the legislature had enacted the Uniform Commercial Code which "contains a comprehensive and finely tuned statutory mechanism for dealing with the rights of parties to a sales transaction." *Id.* at 334, 581 P.2d at 792; see also *Duffin*, 126 Idaho at 1007, 895 P.2d at 1200; *Adkison Corp. v. American Bldg. Co.*, 107 Idaho 406, 410, 690 P.2d 341, 345 (1984). To replace these statutory mechanisms with tort law would alter the balance struck by the legislature — the UCC, for example, with its tolerance, if not permissiveness, of disclaimers is generally more favorable to sellers — and would arguably have a "corrosive effect" on the constitutional power granted to that body. *Clark*, 99 Idaho at 335, 581 P.2d at 793.

with the rise of the service economy, service contracts remain more personal because they involve some direct contact between the contracting parties — a level of personal interaction that the purchaser of a product seldom has with its manufacturer.

It is this rather imprecise difference — the personal nature of the relationship — that forms the basis for the differing treatment of service contracts. As the court has commented in a related context, “the special relationship that exists between insurer and insured” is based on “the unique ‘personal’ (non-commercial) nature of insurance contracts.”²⁰⁴ Of course not all service relationships give rise to a tort duty of care; something more than a personal relationship is necessary. That something more is covered by the unhelpful label of “special relationships,” a mixed group that includes relationships that embody at least two different sets of recurrent factors. On the one hand, there are relationships in which one person surrenders the power to protect himself against a risk and thereby becomes dependent upon another for his protection. Common carriers, innkeepers, and other falling within the common-law category of “public callings” are examples of this type of special relationship. The category, however, is broader than the common-law public-callings classification since it includes a range of “custodial” relationships.²⁰⁵ On the other hand, there are relationships in which the service provider has some expertise, specialized judgment or skill. Although the court has not been either entirely clear or entirely consistent in its decisions including or excluding service providers, the factors that appear to unite the cases include the service providers special knowledge, judgment, or skill in a field that lies outside the knowledge of the “reasonable person” and that involves a risk of harm. Although such service providers are often professionals — doctors, lawyers, and architects — the category also includes providers of specialized services such as automobile mechanics, well drillers, boiler repairers, water-heater installers, and the like. Beneath the variability are a web of similarities: a personal relationship involving control/expertise of a risk on one side and dependence/reliance on the other.

The conclusion that a service provider owes a duty of care to the service purchaser — that the relationship between them is “special”

204. *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 99, 730 P.2d 1014, 1019 (1986). *Cf. Hoffman v. Simplot Aviation, Inc.*, 97 Idaho 32, 37, 539 P.2d 584, 589 (1975) (“In circumstances involving the rendition of *personal* services the duty upon the actor is to perform the services in a workmanlike manner.” (emphasis added)); *McAlvain v. General Ins. Co. of Am.*, 97 Idaho 777, 780, 554 P.2d 955, 958 (1976) (“An insurance agent performs a personal service for his client”; contracts for sale of goods do “not involve the rendering of personal services by one with specialized knowledge and experience.”).

205. *See, e.g., Merritt v. State*, 108 Idaho 20, 696 P.2d 871 (1985) (jailer/inmate); *Bauer v. Minidoka Sch. Dist. No. 331*, 116 Idaho 586, 778 P.2d 336 (1989) (school/pupil).

— is often consistent with both tort and contract rationales. On the one hand, when a person (the service purchaser) either surrenders the power to protect himself against a risk (the passenger on a common carrier) or purchases the service because of the expertise of the provider in guarding against a risk (the lawyer for her knowledge of the intricacies of drafting a will), imposition of a tort duty reinforces societal risk-reduction objectives. If the service provider were under no duty of care to protect the service purchaser, the purchaser would be largely unprotected. The imposition of a duty in such cases thus is consistent with tort principles.

On the other hand, contract objectives are also likely to be advanced in such cases because an obligation to act with due care is likely to correspond to the parties' implicit understanding of the relationship: one purchases the common carrier's best efforts or the lawyer's reasonable drafting ability. Indeed, courts are generally unwilling to find liability under contract's no-fault theories of recovery. As the court noted in a case involving an aircraft mechanic,

[i]n circumstances involving the rendition of personal services the duty upon the actor is to perform the services in a workmanlike manner. . . . "In both instances the standard of care is imposed by law and under either [tort or contract] theor[ies] there is no difference in the standard of care required of the party rendering the personal service."²⁰⁶

Services, in short, generally are measured against a negligence, reasonable-care standard — regardless of whether the court writes in terms of contract or tort.²⁰⁷

B. Unlimited Liability

The second recurrent policy concern is the possibility of unlimited or (at least) disproportionate liability. The commercially interconnected nature of modern society has increased the possibility that a single event can spread decreasing economic ramifications like widening circles through a pond of water. A moment's inattention could

206. *Hoffman v. Simplot Aviation, Inc.*, 97 Idaho 32, 37, 539 P.2d 584, 589 (1975) (quoting *Pepsi Cola Bottling Co. v. Superior Burner Serv.*, 427 P.2d 833, 840 (Alaska 1967)); see also *Mico Mobile Sales & Leasing, Inc. v. Skyline Corp.*, 97 Idaho 408, 415, 546 P.2d 54, 61 (1975).

207. The rationale is often stated most clearly in cases asserting that a doctor breached a contractual duty to cure the patient. In *Flowerdew v. Warner*, 90 Idaho 164, 168, 409 P.2d 110, 112 (1965), the court rejected such a claim, noting that "in the absence of a specific agreement, an agreement of a practitioner with his patient is one for services and treatment, not for a particular result." See also *Ogle v. De Sano*, 107 Idaho 872, 693 P.2d 1074 (Ct. App. 1984); *Trimming v. Howard*, 52 Idaho 412, 16 P.2d 661 (1932).

result in devastating liability. The concern is not the size of the potential loss to any one person but rather the unknown potential extent of liability, the unknown number of persons and companies that might be injured. As the Idaho Supreme Court noted, allowing recovery of pure economic loss might "impose too heavy and unpredictable a burden" because, unlike liability for personal injury or property damage, with their "inherent limitations of size, parties and time, liability for all the economic repercussions of a negligent act would be virtually open-ended."²⁰⁸

This concern is insignificant in cases in which there is a contract between the parties. When defendant contracts to sell goods or to provide a service to plaintiff, privity provides a limit to potential liability. While the defendant doubtless takes the plaintiff as she finds him,²⁰⁹ it is an identified plaintiff rather than an unknowable and indefinite group of plaintiffs. This limitation is not present when defendant contracts with a third party — particularly when the contract is for the provisions of services that involve representations that can pass along an unforeseeably convoluted chain.

1. Shoddy Goods

When American Building Company (ABC) fabricated a metal building to specifications provided by its local dealer,²¹⁰ it doubtless knew (at least in general terms) that there was a contractor and an ultimate purchaser. Although ABC might not have known their actual identities, it at least knew that such entities existed and its potential liability to them was bounded by the passage of the goods down the distribution stream; the fact that ABC was unlikely to have known the purposes for which Corrado purchased the building — and thus the magnitude of his potential losses — is not problematic since his generic identity was known. If economic losses were restricted to these foreseeable parties — the contractor and ultimate purchaser — the concern with unlimited liability would not affect decisions in cases. Economic loss, however, is not so circumscribed: when the building was unsuitable for Corrado's aircraft maintenance business, Corrado was not alone in suffering economic losses. Commercial entities who would have used Corrado's service were forced to find alternative and potentially more costly alternatives; Corrado's parts sup-

208. *Just's, Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 470, 583 P.2d 997, 1005 (1978); see also *Cain v. Vollmer*, 19 Idaho 163, 112 P. 686 (1910).

209. See, e.g., *Blaine v. Byers*, 91 Idaho 665, 429 P.2d 397 (1967); *Garrett v. Taylor*, 69 Idaho 487, 210 P.2d 386 (1949). There is no reason to assume that the traditional rule is inapplicable to economic losses. The driver who runs down a millionaire can expect to pay more than the driver who kills a bum.

210. *Adkison Corp. v. American Bldg. Co.*, 107 Idaho 406, 690 P.2d 341 (1984).

pliers lost sales to Corrado for work that was not done; Corrado's suppliers' suppliers also lost sales — the losses rippled outward in nearly untraceable paths.

The nearly untraceable, speculative nature of the losses raises a corollary concern: the potential for fraudulent claims. Corrado doubtless had a variety of potential suppliers. Which of those he would have chosen had the building not been defective so that he could have pursued his aircraft maintenance business is speculative — and the speculative nature multiplies at each stage of the distribution chain. Although this rippling effect is present in all economic loss cases involving shoddy goods, when there is no contract between the parties the courts lack a ready and principled reason (such as privity) to limit liability. These concerns originally supported rules limiting recovery in contract to parties in privity. While the significance of privity has been substantially reduced in contracts for the sale of goods,²¹¹ there are doubly sound policy reasons for maintaining the barrier when the damages sought are such indirect economic losses.

2. Poor Service

When there is a contract between the parties for the provision of a service, privity of contract provides a limit for potential liability by identifying the affected party. When the court decides that a service-based relationship is sufficiently "special" to be reinforced with a tort duty, the existence of a contract between the parties offers a principled limit to the potential liability of the service provider.

When there is no contract between the parties, the threat of unlimited liability becomes the overriding concern. In "pure" service cases such as *Just's, Inc. v. Arrington Construction Co.*, the widening circle of distributors and suppliers who lose sales raises this specter. Although the court might have fashioned a principled privity substitute in *Just's* — it did find the retailer to be a third-party beneficiary of the contract between Arrington Construction and the City of Idaho Falls²¹² — the traditional negligence liability-limiting mechanism — foreseeability — does not do so because the ever-widening circle of loss is eminently foreseeable.

This problem is compounded when the service includes a representation. When an accountant contracts with a company to prepare a

211. The Uniform Commercial Code and the Idaho Products Liability Reform Act explicitly and implicitly remove privity requirements in transactions for the sale/purchase of goods. See IDAHO CODE § 28-2-318 (1995) (express and implied warranties may not be limited by seller when personal injuries occur); IDAHO CODE § 6-1407(1) (1990) (product sellers other than manufacturers generally not liable when manufacturers are answerable for "harm" to claimants).

212. *Just's*, 99 Idaho at 466-67, 583 P.2d at 1001-02.

financial statement, she has no control over and is unlikely even to know of the uses to which the company may put the statement. If the accountant is careless in preparing the statement, she is exposed to potentially unlimited liability. Such concerns initially led courts peremptorily to deny liability. The *per se* denial of any liability seems unfair, however, in some situations. For example, if the accountant knew the purposes for which the statement was prepared, concerns for unlimited liability are less persuasive. In *Glanzer v. Shepard*,²¹³ the bean weigher not only knew of the purpose of his weighing but also knew the identity of the buyer; the relationship between weigher and purchaser, the New York court subsequently wrote, was "so close as to approach privity."²¹⁴ When courts have found such principled limits on liability, they have been willing to impose liability on those whose negligent misrepresentations have caused economic loss to persons with whom they are not in privity.²¹⁵ This is, for example, the explicit rationale for the tripartite test in *Credit Alliance*.²¹⁶ The prongs of the test are designed to provide a nonarbitrary basis for restricting liability within manageable limits.

3. Breach of Tort Duties Owed to Third Parties

Concern for unlimited liability also lies at the center of the cases denying liability to third parties who suffer economic losses when a defendant breaches a tort duty to a third party. When the Lewiston Interstate Fair and Racing Association allowed Norman and his sister Norma Vollmer to bring their greyhound onto the fair grounds, they breached their duty to Benjamin Franklin McClain, Jr., a jockey in the afternoon's races. McClain was permitted to recover for his economic losses as well as his physical injuries when the Vollmer's dog decided to join the race.²¹⁷ McClain's employer, however, was denied recovery of his economic losses. The court's evident concern was the speculative and illimitable nature of the losses:

We are fully satisfied that prospective profits to a race-horse man for races that have never been run and race meets and associations that have never been held and against all con-

213. 135 N.E. 275 (N.Y. 1922).

214. *Ultramares Corp. v. Touche, Niven & Co.*, 174 N.E. 441, 446 (N.Y. 1931) (explaining the decision in *Glanzer*).

215. *E.g.*, *Idaho Bank & Trust Co. v. First Bancorp.*, 115 Idaho 1082, 772 P.2d 720 (1989).

216. *Credit Alliance v. Arthur Andersen & Co.*, 483 N.E.2d 110 (N.Y. 1985).

217. *McClain v. Lewiston Interstate Fair & Racing Ass'n*, 17 Idaho 63, 104 P. 1015 (1909).

testants, is entirely too remote, uncertain and indeterminable to be allowed.²¹⁸

C. Some Conclusions

When there is a contract between the parties, judicial concern focuses on preserving some space for contract in a tort universe; when there is no contract between the parties, judicial concern focuses on the potential for unlimited liability. Contrariwise, when there is a contract between the parties, there is no significant concern for unlimited liability; when there is no contract between the parties, the concern to preserve some breathing space for contract is minimal.

Similarly, the tort concern for safety of person and property and the contract attention to representations about the quality of the bundles being exchanged interact in recurrent patterns. When safety is threatened — particularly human safety — tort concerns are dominant; endangered persons are a primary concern. When safety is not an issue — when the person is disappointed rather than endangered — contract considerations are more important.

Law, of course, is not mathematics. Individual cases require judgment. But in applying that judgment, judges should be attentive to underlying policies and the patterns they produce.

VII. *DUFFIN*: A REPRISE

Back to *Duffin*.

Recall that the Duffins purchased seed potatoes from Crater Farms, Inc. (CFI) on the condition that the seed was "certified" by the Idaho Crop Improvement Association (ICIA) as free of diseases and pests. CFI delivered the potatoes to the Duffins in March and early April, 1988. At the end of April, however, an ICIA inspection determined that the CFI potatoes were infected with bacterial ring rot; ICIA therefore informed CFI that no further shipments could be sold as certified. Neither CFI nor ICIA informed the Duffins of the problem. The Duffins subsequently discovered that their crop was infected with bacterial ring rot. They brought suit against CFI in contract and against ICIA for negligence, alleging that they had suffered a variety of economic losses.²¹⁹

The supreme court reversed the trial court's summary judgment for ICIA, holding that ICIA had a duty to protect the Duffins against economic loss because of the special relationship between the par-

218. *Cain v. Vollmer*, 19 Idaho 163, 169, 112 P. 686, 688 (1910).

219. *Duffin v. Idaho Crop Improvement Ass'n*, 126 Idaho 1002, 1004-06, 895 P.2d 1195, 1197-99.

ties.²²⁰ The court also held that the Duffins had failed to state a claim for misrepresentation.²²¹ These two conclusions merit additional attention.

A. Special Relationships

Although the court stated its intention to use *Duffin* "to define the parameters of [the special relationship] exception," its analysis is at best tantalizingly elliptical. "The term 'special relationship,'" the court wrote, "refers to those situations where the relationship between the parties is such that it would be equitable to impose such a duty. In other words, there is an extremely limited group of cases where the law of negligence extends its protections to a party's economic interest."²²² Unfortunately, however, the proffered standard — "equitable" — advances the analysis only marginally since it is itself subject to substantial uncertainty. Why, for example, is it equitable to hold ICIA liable to the Duffins, a commercial enterprise with whom it had no dealings? Are there factors or patterns to the types of relationships that the court is willing to characterize as "special"? In short, *why* is *this* relationship "special"?

It is, of course, possible to construct several explanations for the court's use of the term: it may have felt, for example, that the Duffins were less sophisticated than ICIA and thus deserving of additional judicial solicitude. The court has in the past suggested that "an obvious disadvantage in bargaining power" might justify disregarding an exculpatory clause.²²³ But such speculation is problematic for at least two reasons. Most fundamentally, it *is* speculation. The court has not stated that some factor such as unequal bargaining power or lesser commercial sophistication is the basis for its use of the term "equitable." Second, if such concerns underlie the court's conclusion, it could have as easily reached the conclusion within the context of contract law which has quasi-tort concepts such as "unconscionability" and "reasonableness" to handle such problems.

The basic difficulty is precisely this point: the court does not offer guidance on the factors or factual patterns that give rise to the designation "special." This need not be a complete or a final list; it need not be set in stone. Judging requires judgment and necessarily involves

220. *Id.* at 1008, 895 P.2d at 1201.

221. *Id.* at 1010, 895 P.2d at 1203.

222. *Id.* at 1008, 895 P.2d at 1201.

223. *E.g.*, *Steiner Corp. v. American Dist. Tel.*, 106 Idaho 787, 791, 683 P.2d 435, 439 (1984); *Rawlings v. Layne & Bowler Pump Co.*, 93 Idaho 496, 499, 465 P.2d 107, 110 (1970).

an occasional false start or wrong turn. But the court does need to elucidate the factors that inform its judgment.²²⁴

In place of an explicit discussion of parameters to the special-relationship exception, the court offers a discussion of a single case: *McAlvain v. General Insurance Co. of America*.²²⁵ *McAlvain* was a suit by the purchaser of a hardware store against the real estate agent who sold him the property. The defendant was also an insurance agent and plaintiff requested defendant obtain sufficient fire insurance to cover the property and its inventory. When a fire subsequently destroyed the building, the purchaser discovered that it had not been completely insured; he brought an action in tort to recover his losses. The supreme court affirmed a jury verdict for the purchaser emphasizing the relationship between insurer and insured:

A person in the business of selling insurance holds himself out to the public as being experienced and knowledgeable in this complicated and specialized field. The interest of the state that competent persons become insurance agents is demonstrated by the requirement that they be licensed by the state, pass an examination administered by the state, and meet certain qualifications. An insurance agent performs a personal service for his client, in advising him about the kinds and extent of desired coverage and in choosing the appropriate insurance contract for the insured. Ordinarily, an insured will look to his insurance agent, relying, not unreasonably, on his expertise in placing his insurance problems in the agent's hands. When an insurance agent performs his services negligently, to the insured's injury, he should be held liable for that negligence just as would an attorney, architect, engineer, physician or any other professional who negligently performs personal services.²²⁶

The court also noted that the personal nature of the relationship was the factor that distinguished the case from cases involving the sale of goods, cases that do "not involve the rendering of personal services by one with specialized knowledge and experience."²²⁷

The *Duffin* court characterized *McAlvain* as holding that a person such as an insurance agent who "holds himself out to the public as having expertise regarding a specialized function, and that, by doing so, . . . induces reliance on his superior knowledge and skill" has a

224. Cf. Dale D. Goble, *Of Defamation and Decisionmaking: Weimer v. Rankin and the Abdication of Appellate Responsibility*, 28 IDAHO L. REV. 1, 6-7 (1991).

225. 97 Idaho 777, 554 P.2d 955 (1976).

226. *Id.* at 780, 554 P.2d at 958 (citations omitted).

227. *Id.*

duty to protect the person whose reliance is sought.²²⁸ That is, the *Duffin* court read *McAlvain* to establish the principle that an expert whose conduct induces reliance has a duty to protect the person who relies from economic loss. The relationship between the Duffins and ICIA was analogous:

ICIA has held itself out as having expertise in the performance of a specialized function [and] it has engaged in a marketing campaign . . . the very purpose of which is to induce reliance by purchasers on the fact that seed has been certified. Under such circumstances, ICIA occupies a special relationship with those whose reliance it has knowingly induced.²²⁹

Thus, the court concluded, there was a special relationship between the Duffins and ICIA that justified the imposition of a tort duty on ICIA to protect the Duffins from economic loss.

In recapitulating *McAlvain*, the court subtly but significantly shifted emphasis. While the *McAlvain* court gave at least equal weight to the personal nature of the relationship between insured and insurer, the *Duffin* court emphasized the purchaser's reliance on the certifier's expertise. This shift in emphasis masks a dramatic shift in doctrine.

Unlike *all* of the court's previous special-relationship cases, there was no personal relationship between ICIA and the Duffins. Indeed, there was no evidence that ICIA had ever had *any* contact with the Duffins or that it even knew of their existence. ICIA dealt with seed producers such as CFI; it did not deal with the purchasers of the seed. In fact, the district court had dismissed the Duffins' misrepresentation claim because they had no evidence that "ICIA knew the Duffins would rely on its representations."²³⁰

Of course, the fact that the court has not previously found a special relationship in the absence of a personal relationship does not mean that it is powerless to do so or that the decision to do so is flawed. The court might well choose to treat the "personal relationship" element simply as one factor among several that are relevant to the conclusion that the relationship is sufficiently special to impose a duty. Nonetheless, the court abandons the requirement without any discussion of the role that this element has played in previous decisions — and thus appears not to have considered the potential problems that its new holding may encounter.

228. *Duffin*, 126 Idaho at 1008, 895 P.2d at 1201.

229. *Id.* In addition, the court concluded that a second defendant — the Federal-State Inspection Service — had done nothing "actively . . . to induce reliance" and therefore did not have a special relationship with the purchasers of certified seed. *Id.*

230. *Id.* at 1006, 895 P.2d at 1199.

The personal nature of the relationship in special relationship cases plays at least two roles. On the one hand, it provides the moral justification for the imposition of a tort duty in addition to the assumed contractual duties. As the court in *McAlvain* stated, the personal element in "special relationships" is the distinguishing factor that sets special-relationship cases apart from the sale of goods cases such as *Taylor v. Herbold*.²³¹ The court has emphasized "the unique 'personal'" nature of the concept in a variety of contexts.²³² There are, of course, other rationales that can justify the imposition of a duty — the court in *Duffin*, for example, emphasizes ICIA's conduct that was intended to induce reliance.

A second — and perhaps even more important — role is that the personal nature of the relationship serves to limit potential liability. The imposition of a duty without some limit raises the specter of "too heavy and unpredictable a burden" because liability for "the economic repercussions of a negligent act would be virtually open-ended."²³³ When a service provider knows the service purchaser, the provider's potential liability is necessarily circumscribed. Abandoning the requirement that the relationship be personal also abandons the implicit liability limitation: ICIA, for example, is potentially liable to all purchasers of certified seed — an indeterminate group.

There are other mechanisms that the court might employ to limit liability in a principled manner. The court in *Duffin* offers that reliance as a limiting mechanism, stating that ICIA "occupies a special relationship with those whose reliance *it has knowingly induced*."²³⁴ It seems unlikely, however, that induced reliance can successfully fill the role of liability-limiting mechanism. The conduct cited by the court to justify its holding — ICIA held itself out, it knew that certified seed had a higher value, it engaged in a marketing campaign for certified seed²³⁵ — does not provide a limitation on potential liability comparable to the abandoned personal relationship. Under the court's approach, ICIA became potentially liable to every potato farmer in the

231. Cases involving the sale of goods do "not involve the rendering of personal services by one with specialized knowledge and experience." *McAlvain v. General Ins. Co. of Am.*, 97 Idaho 777, 780, 554 P.2d 955, 958 (1976). *Taylor* involved the breach of contract to purchase potatoes. *Taylor v. Herbold*, 94 Idaho 133, 483 P.2d 664 (1971).

232. *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 99, 730 P.2d 1014, 1019 (1986) (bad faith claim involving insurance contract); *Hoffman v. Simplot Aviation, Inc.*, 97 Idaho 32, 37, 539 P.2d 584, 589 (1975) (aircraft mechanic).

233. *Just's, Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 470, 583 P.2d 997, 1005 (1978); see also *Cain v. Vollmer*, 19 Idaho 163, 112 P. 686 (1910).

234. *Duffin*, 126 Idaho at 1008, 895 P.2d at 1201 (emphasis added). But recall that the trial court had found that there was no evidence that "ICIA knew the Duffins would rely on its representations," *id.* at 1006, 895 P.2d at 1199, a finding that raises questions about "knowingly induc[ing]."

235. *Id.*

state — “a liability in an indeterminate amount for an indeterminate time to an indeterminate class.”²³⁶

Furthermore, the court's citation of *Glanzer* as an example of such knowing inducement is problematic because *Glanzer* is inapplicable: both the crucial factual predicates and the justification for the decision turn on the personal relationship between the bean weigher and the purchaser. The weigher not only knew the identity of the purchaser but also personally provided him with a copy of the weight receipt.²³⁷ It was this fact that prompted Cardozo to characterize his decision in *Glanzer* as involving a relationship “so close as to approach privity.”²³⁸ It was this personal relationship between the weigher and purchaser that provided a substitute for privity and allowed the court to impose a tort duty on the weigher. In *Duffin*, the evidence indicates that ICIA had never had *any* contact with the Duffins or any knowledge of them as individuals. The reliance that ICIA induced in the Duffins was no different than the reliance it “induced” in thousands of potato farmers. This reliance provides no significant limitation to potential liability. The court's abandonment of the personal element of special relationships thus is problematic because it offers no apparent basis for limiting ICIA's liability.

The potential thus created for unlimited liability is part of a more basic difficulty. The court has mischaracterized the essential nature of the case. Not only was there no personal relationship between ICIA and the Duffins, there was no privity between the parties: ICIA had not contracted with the Duffins to certify the potatoes. Rather, it had contracted with CFI to provide testing and certification services. The case thus involves a service contract between defendant and a third party — it is, in other words, analogous to cases such as *Just's*²³⁹ and *Idaho Bank & Trust*²⁴⁰ rather than to *McAlvain*.²⁴¹

This problem implicates the court's second decision — the conclusion that the Duffins did not state a claim in negligent misrepresentation.

236. *Ultramares Corp. v. Touche, Niven & Co.*, 174 N.E. 441, 444 (N.Y. 1931).

237. *Glanzer v. Shepard*, 135 N.E. 275 (N.Y. 1922).

238. *Ultramares Corp. v. Touche*, 174 N.E. 441, 446 (1931).

239. *Just's* held that a business located in a city's blighted urban core could not recover in tort for business losses traceable to the breach of a contract between the city and a construction company that was redeveloping the core. *Just's*, 99 Idaho 462, 583 P.2d 997.

240. *Idaho Bank & Trust Co. v. First Bancorp.*, 115 Idaho 1082, 772 P.2d 720 (1989).

241. In *McAlvain*, defendant had a contract with plaintiff to insure his business; that contract provided the basis for a relationship between the parties that the court thought sufficiently special to justify the imposition of a tort duty in addition to the contractually assumed duties. *McAlvain*, 97 Idaho 777, 554 P.2d 955.

B. Negligent Misrepresentation

The Duffins also predicated their case on a claim for negligent misrepresentation. The district court had granted summary judgment on this claim and the supreme court affirmed summarily: "we expressly hold that, except in the narrow confines of a professional relationship involving an accountant, the tort of negligent misrepresentation is not recognized in Idaho."²⁴²

The difficulty with this summary decision is that *Duffin* in fact is a negligent misrepresentation case. The defining characteristic of such cases is that defendant has a contract with a third party to provide that person with a service — weighing beans in *Glanzer*, preparing a certified balance sheet in *Ultramares*, or preparing a financial statement in *Idaho Bank & Trust* — the service is performed negligently — the beans are misweighed or insolvency is undetected — and the representation that embodies the completed service — the receipt or balance sheet or financial statement — reaches the plaintiff who relies upon it to her detriment. This is what occurred in *Duffin*: ICIA contracted with CFI to test its seed potatoes so that they could be certified if they met the requirements; ICIA failed to detect the presence of bacterial ring rot in the potatoes and negligently certified them; the Duffins relied upon the certification — a representation that they were disease-free — to their detriment.

The court, of course, has the power to extend liability and to craft new exceptions. In previous cases, the court has relied upon the special-relationship concept to justify the imposition of a tort duty in addition to the parties' assumed contract duties and there is nothing inherently troubling about relying upon the special-relationship concept as the basis for allowing recovery for negligent misrepresentation. A special relationship can readily serve as a privity substitute to limit liability — this was after all the rationale in *Glanzer*.²⁴³ But *Glanzer* involved a personal relationship: the bean weigher not only knew the identity of the purchaser but also provided a copy of the weight receipt to him personally.

This, then, is the ultimate problem with the court's decision in *Duffin*: the court *both* expanded the special-relationship concept by removing the requirement that there be a personal relationship be-

242. *Duffin*, 126 Idaho at 1010, 895 P.2d at 1203. The decision to which the court implicitly refers is *Idaho Bank & Trust Co. v. First Bancorp*, 115 Idaho 1082, 772 P.2d 720 (1989), where the court held that an accountant can be held liable for negligent misrepresentation under limited circumstances. While the court's statement is absolute, the facts of the case do not rule out maintaining a claim for negligent misrepresentation where the person had suffered either personal injury or property damage.

243. *Glanzer v. Shepard*, 135 N.E. 275 (N.Y. 1922).

tween the parties *and* extended it to a new group of cases in which there was no privity between the parties. This means that the court creates the potential for unlimited liability because both the personal nature of the relationship and privity that had previously served to limit liability are no longer required.

Additionally, the policy concerns that traditionally have dominated this area of law do not justify the extension. The Duffins were not endangered by the potatoes; the tort concern for safety of person or property was not implicated. Instead, the Duffins were disappointed by the quality of the seed potatoes because they were not as they were represented to be — the traditional contract concern. Given this, it is difficult to see why the Duffins should not be left to the contract they had with the seller, CFI.

VIII. CONCLUSIONS

There seems to be a natural desire to compose sweeping summaries: “the movement of the progressive societies has hitherto been a movement *from Status to Contract*”;²⁴⁴ or: “Contract . . . is dead”;²⁴⁵ or, again: “economic loss generally cannot be recovered in torts.”²⁴⁶ The difficulty with such statements — however much apparent order they may bring at a global level — lies in the loss of detail.

The Idaho Supreme Court’s desire to write a simple summation of the law on recovery of economic loss in tort led it into oversimplification. Not only has the court previously allowed recovery of economic loss in more than two limited exceptions, but it has also developed a far more complex body of law on the question. *Duffin*’s oversimplification of that body of case law raises significant questions: what does the court mean when it speaks of a “special relationship”? Its nod to “equitable” and its emphasis on expertise and induced reliance, seem unbounded when stripped of the requirement that the relationship be personal. Similarly, the court’s extremely summary disposition of the negligent misrepresentation claim is problematic, since *Duffin* itself seems to be such a claim. How is the court’s rejection to be understood? And if *Duffin* is not a negligent misrepresentation case, does it *sub silencio* overrule *Just*’s since both cases arise out of the breach of a contract with a third party?

Ultimately, this article is a plea that the court require more. Idaho has more than a century’s worth of tort cases. They form a rich narrative that examines recurring issues from a variety of perspectives. The question of whether economic loss should be recoverable in

244. HENRY S. MAINE, *ANCIENT LAW* 182 (Frederick Pollock new ed. 1930) (1861).

245. GILMORE, *supra* note 1, at 3.

246. *Duffin*, 126 Idaho at 1007, 895 P.2d at 1200.

tort actions, for example, has been discussed in the context of contract between the parties for the sale of goods or services, in the context of contract for the sale of goods or service where the parties to the suit are not the parties to the contract, and when there is no contract. Each of these situations involves different factual issues; they raise different policy concerns. The court should not be too quick to lump this variety into a simple general-rule-with-two-exceptions pigeonhole — to do so is to lose the learning that is embodied in the narrative. Rather, the court should add to the narrative, enriching the jurisprudence by adding its own stories, its own explanations.