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Liability of Bias: A Comparative Study of Gender-Related Interests in Negligence Law

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Abstract

This Article examines a feminist argument concerning the gendered structure of tort law, according to which the limited recognition of indirect emotional harm reflects a bias against women and "femininity." This examination is carried out through a comparative analysis of two sorts. First, it considers the judicial treatment of emotional harm as compared with the treatment of pure economic loss – a harm which, for the purposes of this research, will be considered more "male" and men-oriented. The central thesis of the article is that, while it appears that both types of harm have ultimately gained very limited recognition, implying lack of gender-based adherence to one interest over the other, indirect-emotional harm could have had the upper hand in being more easily embraced into tort law. This is shown by exploring the relevant differences between these two types of harm from various perspectives, including the internal-doctrinal question within "tort law," its interrelations with contract law, and from the points of view of both economic analysis and corrective justice. Second, the article compares both Anglo-American law and Israeli law with respect to indirect emotional harm and economic loss, to reveal a significant departure in Israeli tort law–generally firmly founded on common law–from Anglo-American case-law which presents a relatively balanced no-liability rule for both losses. While Israeli courts generally maintain a similar rhetoric of limited liability to both types of harm, in the details of legal analysis and practical decisions, economic interests are recognized and protected extensively. By contrast, indirect emotional harm is only rarely the ground for imposition of liability. The article finally reflects on the phenomenon whereby the Israeli legal system that draws so heavily on dominant Anglo-American law and preserves its rhetoric, still administers very different legal and ideological standards. It is suggested that these differences be read as extremist application by Israeli courts of Anglo-American gender-based tendencies. Though

1 LLM candidate, Yale Law School, 2009. Ph.D. The Hebrew University (2005), Visiting Researcher, Harvard University Law School (2004-2005). I wish to thank Professor Mirjan Damaska for his thoughtful remarks on comparative analysis of Israeli law. I also wish to thank Professor James Whitman for his encouragement to pursue this project. Tsachi Keren-Paz's comments on earlier versions were I opening and Roni Mann has been one of her kind with her organizational thinking. Elad Rom's editing and research assistance were invaluable to me as well.

absorbed through seemingly neutral doctrines, these tendencies were now practiced and developed within a more gendered stratified society, which holds, at the same time, a legal rhetoric of advanced gender equality. This characteristic of Israeli legal system vis-à-vis women's rights sheds an interesting light on the differences the three systems share.

> "The law of torts values physical security and property more highly than emotional security and human relationships. This apparently gender-neutral hierarchy of values has privileged man, as the traditional owners and managers of property, and has burdened women to whom the emotional work of maintaining human relationships has commonly been assigned"[2].

Introduction

Feminist analyses of tort law have shown how common law tort law is structured in a discriminatory manner, by having different influence on men and women, and by leaving women in their inferior social status.[3] Prominent among these is the claim that tort law's attitude towards emotional and psychological interests within negligence liability is problematic, incoherent and reflects judicial rigidity. Feminists argued convincingly that this approach of tort law was primarily distributive, in view of society's perception of these interests, whether justifiably or not, as "feminine."[4] However, an objection can be raised to the seemingly non holistic nature of this feminist project in tort law.[5] One might argue that in order to conclude whether this bias against this "feminine" interest is gender-based, a similar review of courts' attitude towards other relatively-similar interests perceived as "masculine" needs to be taken.[6] This article responds to this possible objection by comparing the legal construction of the recognition of indirect-emotional harm - which is perceived as clearly "feminine"- to the legal construction of another form of harm, namely, economic loss - which is perceived as "masculine." I selected economic loss as a

2 Lesley Bender, *Changing the Values in Tort Law*, 25 TULSA L. J. 759, 814 (1990).

3 Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 UNIV. OF PENN. L. REV. 463 (1998). For an overview of most of the seminal writing see the references at Leslie Bender, *An Overview of Feminist Tort Scholarship* 78 CORNELL LR 575 (1993).

4 Martha Chamallas & Linda K. Kerber, *Women, Mothers and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990); Chamallas, *ibid*; Elizabeth Handsley, *Mental Injury Occasioned by Harm to Another: A Feminist Critique*, 14 LAW & INEQ. J. 391 (1996); Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 190 (1992).

5 Being aware of the legitimacy that my response awards this objection, I wish to clarify that I respect it as long as it is understood as suggesting that analyzing the "masculine" interests can *reinforce* the feminist claim regarding the gendered structure of tort law. Accordingly, I reject this objection if being understood as de-legitimizing this feminist claim, which was so lucidly and convincingly established in the past.

6 The claim that interests are perceived as gender related shall be substantiated later in this introduction. See text accompanying footnotes 11-36.

comparative yardstick, acknowledging that this harm, like indirect-emotional harm, raises substantial doubts as to its compatibility with the paradigmatic protection tendencies of interests embedded in negligence law, and challenges the boundaries of liability imposition within this wrong's framework.[7] In this sense, these two harms had a similar fixed starting point for comparison. In other senses, indirect emotional harm had a better launching pad than that of the economic loss', from various perspectives, including the internal-doctrinal question within "tort law," its interrelations with contract law, and from the points of view of both economic analysis and corrective justice. This comparison between these two types of harms constitutes the first of two comparative dimensions with which this article is engaged.

On its second comparative dimension, this article is concerned with three common law systems: the English, the American and the Israeli, the latter heavily relying on the formers, with the English and American systems heavily relying on one another in instituting the doctrines controlling this gender-related issue. Though Israel is a hybridist legal system, shaped by both common law as well as civil law influences, its tort law domain is perceived as paradigmatically common law and as reflecting and embracing Anglo-American general conceptions and specific legal doctrines.[8] The basis for comparing these legal systems is, therefore, well established and they can be easily compared. At the same time, differences to be revealed between these distinct systems will enable us to identify them as significant to understanding the impact of bias legal transplantations and to evaluate and analyze them more compellingly.

This Article's project, therefore, puts into a double-comparative test the hidden feminist presumption that while rejecting female-related interests, such as the emotional interest of indirect negligence victims, courts privileged male-related interests–such as economic interests–with a preferential status, using the same negligence law tool. This presumption, however, according to the findings in this Article, is only moderately proved truthful with respect to the Anglo-American context; Even though courts there were consistently reluctant to properly compensate for indirect emotional harm, they were still only slightly less restrictive in protecting purely financial interests of plaintiffs. These seemingly indiscriminative consequential

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7 The analogy between "interests" and "losses" in this case is clear and ful. Usually, there is no necessary correlation between the interest protected in tort law and the loss it incurs. However, in the case at hand, there is a full fit between these tortuous concepts. For these concepts see PETER CANE, TORT LAW AND ECONOMIC INTERESTS 6-8 (2nd. Ed., 1996).

8 Menachem Mautner, *Rules and Standards in the New Israeli Civil Code – The Jurisprudence of Legislation*, 18 MISHPATIM LR 321 (1998).

findings, however, are problematized through their evaluation in light of the fact that the point of departure of these two damages diverged in a manner that should have benefited indirect emotional harm over economic loss.

The Israeli case, however, presents a much different picture. A sharp distinction is established in this article between the Israeli tort system and its Anglo-American counterparts. Israeli courts have gone much farer with their protection of economic interests and further broadened the scope of liability, infringing, one after another, almost every possible boundary set by Anglo-American case law in this realm. At the same time, however, Israeli courts have further established boundaries and limitations on negligence liability for indirect emotional harm, ending up framing a very narrow and extremely arbitrary duty of care toward potential victims.[9] This Israeli extremity is particularly interesting in light of the courts' conservative rhetoric presenting these two types of interests as suffering from similar "negligence hostility." This way, absurdly, the more extreme the gap is between these two gender-related interests in terms of tort protectionism, the more it is denied by the court.

The comparative analysis therefore demonstrates how a legal transplantation is affected by its local receiver. It reveals that Israel carries a stronger endrocentric structure of tort law compared with its Anglo-American counterparts, from whom it is being inspired. Its gender bias is triple-dimensional: tort law strongly discriminates against female-gender-related interests (first), synchronically it strongly favors male-gender-related interests (second), and eventually, this discrimination is administered under a rhetoric smoke curtain, claiming that these interests are equally marginal to negligence liability, thereby making this phenomenon less noticeable (third). This third dimension is revealed through a thorough detailed comparative analysis which enables us to identify a characteristic of the Israeli legal system with regards to gender-based discriminatory rules: it rejects it through its rhetorical apparatus and cold black letter laws, yet sustains it through substance.[10]

My article proceeds in six parts: Part I introduces the notion of gender-related interests as the premise upon which my argument is built, as well as establish the economic interest as male-related and the indirect emotional harm as a female-related

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9 See the detailed construction of the two damages at YIFAT BITTON, RE-READING TORT LAW FROM A FEMINIST-EGALITARIAN PERSPECTIVE (Dissertation, served to the Hebrew University Senate, 2004) 71-143.

10 This kind comparative of analysis is considered to yield more comprehensive and more useful understanding of comparative law projects. See James Q. Whitman, *Enforcing Civility and Respect: Three Societies* 109 YALE LJ 1279, 1281 (2000)

interest. It also pinpoints the analysis within negligence law as having feminist significance. In part II, the similarities and differences between these two harms as perceived by tort conventions and principles will be introduced so as to create a common ground for their comparison. In part III the article will briefly present the course of legal recognition both harms have undergone in Anglo-American negligence law, followed by a presentation of their Israeli negligence law path. Part IV aims at shedding some light on the details of the course which enabled the sharp departure Israeli adjudication has taken on the matter from its Anglo-American counterparts. Probing deeper into Israeli tort law, this part introduces a unique phenomenon it displays, whereby courts' rhetoric attributes the same relative-illegitimacy to both economic loss and indirect emotional harm, while reality indicates they are subject to significantly differential treatment. These findings are best illustrated by comparing the leading cases to establish recognition of the two harms, and by pointing to the various methodological as well as substantial tools Israeli courts have used to differentiate their recognition path so distinctively. Part V of this article analyzes the harmful distributive implications of preferring economic loss over indirect emotional harm. Specific attention will be given in part XI to the comparative phenomenon whereby the Israeli legal system that draws so heavily on dominant Anglo-American law and preserves its rhetoric, still administers very different legal and ideological standards. It will be suggested that this legal transplantation phenomenon should be looked at as part of a broader mannerism, whereby Israel holds a rhetoric level which reflects an admirable rather than a reality-based legal stance with regards to women's rights.

Part I: Introducing Gender-Related Interests

1. On Gender Related Interests

This paper is based on the premise that values that society identified as feminine are being devalued compared to values identified as masculine, irrespective of these values' actual social merit.[11] We must first, therefore, establish the notion of values as gender related. These values, transform, within the context of tort law, into interests that are recognized or rejected by it. These interests bare gender significance, and can

11 This assumption is based in "the cultural feminism" theory; see JUDITH EVANS, FEMINIST THEORY TODAY – AN INTRODUCTION TO SECOND-WAVE FEMINISM 19-20 (1995). The author describes this view as- "'weak' cultural feminism").

thus be referred to as "gender-related interests," in spite of the difficulties and the risks entailed thereby.[12]

An argument that relies on the concept of gender related values can be supported by several rationales, such as the biological one, based on the belief that there is a genuine fundamental difference between men and women, as a matter of biological and psychological determinism. Another rationale is the social one based on the belief that the differences between men and women are gender oriented, and are the outcome of patriarchal social structuring, which has led each gender to adopt different life-experiences characterized with typical forms of behavior, preferences and even values.[13] In my research, however, I have chosen to put the argument primarily on the metaphoric level rationale. On this level, gender does indeed play a role in attributing values to the different genders and evaluating them accordingly, however, it is derived from a metaphorical level and relies on existing factual data. Gender has a significance which is not necessarily biological or social, but merely one which is attributed to it as a factual matter, on a metaphorical level.[14] The advantage of using the metaphorical argument lies in its simplicity. Within this context, we can classify values as "feminine" or "masculine" as a factual given status that is composed of metaphorical factors, which do not necessarily have a scientific-social explanation. Put this way, the research is immune from determinist or essentialist arguments, and the attitude to values, which are attributed to gender, can be examined irrespective of the reason for that attribution.[15]

2. Women and Emotions

Women are perceived by society as the "sensitive gender". By this I do not mean to say that women are more sensitive than men, but that emotion and the mental suffering, to which sensitivity may lead, are gender related values and are

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12 Difficulties: due to the fear of determinism and essentialism of the strict division of fluid life values in a multicolored society. The risks: due to the fear of stereotyping the gendered objects.

13 The first approach is perceived as old-fashioned, while the second approach receives a wide support (Evans, *supra* note 4, at pp 160-161). However, it seems as though the latter also bears some sense of social determinism, according to which there is no room for biologic or any other influences on the genders aside from their pre-intended structuring.

14 Here, I borrow Joanne Conaghan's proposal set at *Tort Law and the Feminist Critique of Reason* in FEMINIST PERSPECTIVES ON THE FOUNDATIONAL SUBJECTS OF LAW (ANNE BOTTOMELY ED) 47, 56-58 (1996). Connaghan designs the metaphoric relation in accordance with the distributive, gender-based, reality regarding those values.

15 My research avoids the trap of essentialism since it is not aimed at presenting a tort-based type of women, but rather to present a deconstructive challenge to the non-political evaluation of seemingly neutral values within tort law.

consequently more effective and apparent it women's lives. Ever since the time of Plato, reason has been attributed to man and emotion to women. Women are perceived as the ones who surrender to their emotions (especially the sexual ones), and therefore require the protection and restraint of the rational man.[16] During the period of the Enlightenment, when abstract and logical thinking was valued as the only legitimate form of knowledge, emotional-feminine intelligence was considered inferior. The philosophers of that time preferred, without a doubt, the rational and logical over the emotional, which was associated with women's weakness.[17] Needless to say, these stereotypes regarding women have persisted even to the present. World-wide polls, conducted by *Gallup* in 1996 and in 2001, showed that most of those surveyed, both men and women, tended to describe women as more emotional and loving than men. Only 6% of those questioned thought that "affection" was a manly trait.[18] A similar pattern of thinking was also found in Israeli society.[19] Even though the association between women and emotion is a stereotype, it is of great importance. Stereotypes are tools to structure reality, and they are absorbed into social consciousness, where they can establish "genuine" differences between men and women. Put aside the question of the true nature of these stereotypes and the wrong which can arise from them,[20] I would like to focus on the influence they exert on social awareness, which sees emotions and compassion as "women's issues". The existence of this perception strengthens the assumption that emotion and compassion interests are indeed gender-related, and therefore receive less protection in tort law.[21] Moreover, statistics show that the plaintiffs in indirect emotional harm claims are predominantly women.[22]

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16 Joan C. Williams, *Deconstructing Gender* 87 MICH. LR 797, 804 (1989).

17 Ibid, *ibid*.

18 NANCY LEVIT, THE GENDER LINE 33 (1998). The 2001 poll was based in America and resulted in 90% of those surveyed opinioning that the characteristic “emotions” applies to women rather than to men. See http://people.howstuffworks.com/women1.htm (last visited 2/14/2009).

19 A survey held by the Israeli government revealed that some human characteristic bear gender relativity. For example, traits such as gentleness, affection, tenderness and affection to children were described by Israeli people as "feminine". *The Status of Women as Perceived by the Israeli Public*, WOMEN STATUS 4: 3, 8 (1984).

20 Stereotypes, needless to say, are highly harmful to the single person subjected to them, as well as to the group to which he belongs. LEVIT, *supra* note 18, at 33-36, 202-204.

21 Emotional harms in general are more common among women than men. Lucinda M. Finley, *Symposium: The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1281-1282 (2004).

22 Statistical research reveals that women established the majority of plaintiffs in cases where emotional interests were the claim's subject. Historically, the “fright” claims represented two paradigmatic feminine harm: the first being prenatal damages induced by nervous shock, and the second being emotional and mental suffering due to harming one’s child (Chamallas & Kerber, *supra* note 2, at 814). Caring for one’s child is

3. Men and Economics

The economic superiority of men as well as the economic inferiority of women is a focal point for broad feminist criticism. Men are regarded as those who control financial and economical matters. The public sphere in which business activity takes place ejects women, who are located traditionally at the "private" spheres of life– comprising home and the family–outside the boundaries of the business world. Women's inferior position in the work force, employment in low-wage jobs, and socio-economic role as secondary providers in the family, are merely some of the factors shaping their economical subordination relative to men.[23] In addition, in our world, the acquisition and ownership of assets are controlled mainly by men,[24] *inter alia* because throughout history women were denied access to economic independence and autonomy.[25] The dichotomy of market / home is in complete harmony with the link that is made between women as those who are the primary care takers of their children, while the men are found in the public sphere of the "market" and manage the economic life of the family.[26] Consequently, men have a great interest in economic interests and their optimal protection, and it is likely that laws which are designed according this patriarchal pattern will operate to benefit them within the boundaries of this law.

4. Judges and Negligence Law

Any gender-related dynamic of tort law should be of interest for feminist analysis. Special interest, however, should be given to such dynamic being located with negligence law, as it carries significant policy-making characteristics. This tort is uniquely pragmatist in the way it accommodates social developments.[27] The element of judicial/political discretion is a central and important factor of this tort. Rejecting "feminine" interests within this setting, therefore, strengthens the effect of marginalization and the invisibility of women, assuming, as I assume, that what

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mainly a feminine burden, though researches proved that both genders are equally able to carry it (LEVIT, *supra* note 10, at 25 – 26, 29-32).

23 Levit, *ibid*, at 53.

24 For the systematic origins of this inferiority, see Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421, 422-423 (1992), notes 7-9. (The author offers an economical analysis of women's inferiority in a world founded on property rights).

25 SANDRA FREDMAN, WOMEN AND THE LAW 256-257 (1997).

26 ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION (REVISED ED., 1993).

27 Jane Stapleton, *In Restraint of Tort* in THE FRONTIERS OF LIABILITY 83, 83-84 (PETER BIRKS ED., VOL. 2, 1994).

judges say and do matters outside the realm of their specific rulings.[28] More specifically, within negligence law, the duty of care component functions as a "filter" for all those inherently negligent actions, whereby imposing liability is perceived as contradictory to the goals of the law of tort, or, at least, as not serving them properly.[29] It is a tool used by the court to determine the boundaries of tort liability.[30] Therefore, a study of how the duty of care emerges can clarify the way in which tort law tends to protect different interests.[31] Some characterize the duty of care as the court's chief tool in making allocation-based decisions.[32] This is no different in Israel, where the Court has also given expression to its creative normative power by establishing various duties of care in tort law.[33] Establishing a duty of care entails a declaration regarding what is worthy of tort protection, whether by virtues of the courts' function as constituting values or by virtues of it merely declaring their existence.[34] In practice, this question defines who an appropriate person is and what an appropriate injury is; generally appropriate, and not only appropriate for compensation. Tort law is therefore another venue by which the legal system can express what is desirable and what is not. Its protection decisions are designed not to solve a local dispute between individuals alone, but rather to establish general social principles in the area, to extents that exceed the boundaries of the concrete dispute before the court.[35]

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28 See, for example, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. (1989); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988).

29 That is the duty's function in common law tort law. See Dilan A. Esper & Gregory C. Keating, *Abusing "Duty"* 79 S. CAL. L. REV. 265 (2006) and ISRAEL GILEAD, *The Foundations of the Negligence Tort in Israeli Law*, 14 IYUNEY MISHPAT LR 319, 328, 338 (1988) (for Israeli tort law).

30 GILEAD, *supra* note 58, at 86 (calls the duty of care "monitoring mechanism"). The powerful perception of the duty of care is shared by fairly conservative tort law scholars. See JOLOWITCZ & WINFIELD, *supra* note 20, at 91 ("Duty is the primary control device"). Some see the specific question of liability for emotional distress and economic loss as pertaining to the concept of proximate cause rather than duty within negligence law, but even this view embraces the notions of policy considerations as prevailing in this realm. See KEETON , *supra* note 78, at 968-973.

31 The duty of care was held to "...Highlight(s) the question of the common law's protectionism". STAPLETON, *supra* note 78, at 249.

32 See, e.g., ABLE, supra note 274.

33 See SC 145/80 Vaknin v. Beit-Shemesh Municipality, P.D. 37 (i) 113, 123 (1982). A summary of this approach in Israeli case law is provided at IZAAK ENGLARD, *The Adjudication's Contribution to Developing Tort Law – Self Perception and Reality*, 11 IYUNEY MISHPAT LR 67, 76-92 (1986).

34 Courts' tort rulings are perceived, even in conservative writing, as arenas whereby the courts "reacted to the situation in the way in which the great mass of mankind customarily reacts." PROSSER AND KEETON ON TORTS 359 (PAGE W. KEETON & OTHERS EDS., 5th ED., 1984) (citing Bohlen).). In Israel, see the similar approach brought by Deputy Justice (then) Aharon Barak in SC 186/80 Ya'ari v. The State of Israel, P.D. 35(i) 769, 799 (1980). Critical analysis of the law perceives of it as embodying as well as reflecting social ideologies and developments. See Steven Vago, LAW AND SOCIETY 318-320 (6th ed.) (2000).

35 JOLOWITCZ & WINFIELD, *supra* note 38, at 91.

Part II: Indirect-Emotional Harm and Pure Economic Loss: An Inevitable Comparison (?)

1. Pure Economic Loss and Indirect Emotional Harm - Definitions

Defining pure economic loss is a difficult task since even courts themselves have failed to provide a definition which will determine the scope of this loss.[36] In rough terms, though, this damage can be defined by distinguishing it from other recognized forms of damages: physical harm (to person or property) and collateral economic loss. It is distinguished from the former by being intangible and potentially consequential upon it,[37] and from the latter by being independent, not collateral to some prior damage to the plaintiff's own body or property.[38] This damage is, therefore, termed "pure" because it arises independently without being collateral to other damage, and without other damages necessarily accompanying it. An example of such harm which readily springs to mind is A's tort claim against C for the loss of profit incurred by A after being compelled to close her business upon B's bridge–that was the passageway to her business–being destroyed by C's negligent behavior.[39]

Indirect emotional harm, on the other hand, is identified as the emotional and mental suffering caused to a person, A, arising out of an injury to her loved one, B, resulting from C's negligent behavior.[40] This damage is intangible and indirect by virtue of not arising from a physical injury to the plaintiff (A) herself, but rather from injury to a third party, B, to whom she is related. Although having a direct impact on the plaintiff, this damage is perceived as indirect since it is the outcome of an injury performed against someone else's body and not against the plaintiff's own self. A

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36 DAVID RONEN, *Pure Economical Loss from a Comparative Perspective*, 44 HAPRAKLIT LR, 504, 504 (2000); Tamar Gedron is also presenting a variety of reasons for the absence of this definition: TAMAR GEDRON, *The Duty of Care in the Negligence Injustice and Pure Economical Loss*, 42 HAPRAKLIT LR 126, 129-130 (1995). For the commonly used categories of pure economic loss, see ROBBY BERNSTEIN, ECONOMIC LOSS 2-5 (2nd ed., 1998).

37 BERNSTEIN, *supra* note, at 1. I prefer Izhak Englard's definition of the loss as a "*Damage which is lacking any physical intervention in the property or the body of the injured*"; IZHAK ENGLARD, THE PHILOSOPHY OF TORT LAW 212 (1993).

38 Such is the loss of income caused by physical injury. However, even substantial parasitic reliance of the economic loss would enable compensation for the whole damage. JAAP SPIER, OLAV HAAZEN, THE LIMITS OF EXPANDING LIABILITY – EIGHT FUNDAMENTAL CASES IN A COMPARATIVE PERSPECTIVE 10 (Jaap Spier ed., 1998).

39 See Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp., N.W.2d 124 (Iowa 1984).

40 My interest is limited to this specific type of emotional harm as "feminine". However, generally speaking, the recognition of emotional distress within Anglo-American law has been qualified and limited to intentional torts from the outset. It was only at more advanced stages that these limitations has been relaxed. See, e.g., the elaboration of these developments at Cohen v. Varig Airlines, 380 N.Y.S. 2nd 450, 459-456 (Civ Ct. 1975)

common example of such harm is that caused to a mother who suffers emotional harm as a result of an injury caused to her child in an accident, either by means of witnessing the accident or its immediate aftermath.

2. Pure Economic Loss and Indirect Emotional Harm -
The Myth of the Shared Destiny of "Sibling Harms"

Economic loss poses a particular challenge to feminist analysis of tort law, in that it has a lot in common with indirect emotional loss, to the point that they were scholarly considered similar form of damage.[41] The courts, too, has often drawn an analogy between the two harms:[42] Chronologically wise, the emergence of economic loss as establishing a legitimate tort claim paralleled that of emotional harm; both damages suffered from lack of sympathy once they were deemed to merit protection and compensation under negligence law; structurally, in the cases of indirect emotional harm as well as in a significant proportion of the cases of economic loss, the compensation sought was for relational, indirect damages, arising from the existence of a prior relationship between the injured party and another person. Both forms of harms are perceived as abstract, and therefore conceptually indigestible to the tort system. Compared with tangible harms such as property damage, it was argued that these harms could not be properly assessed using any appropriate yardstick.[43] Because of their nontraditional characteristics, indirect economic and emotional harms became the center of attraction for policy considerations, specifically via the question of whether they deserve to be protected by the developmental process of duty of care offered by negligence law. Consequently, both losses shared the myth of being "step children" or at least marginal to principles of negligence law.[44] This

41 GEDRON, *supra* note 36, at 127-128. This perception dominates also outside of Israel. BASIL MARKESINIS & SIMON DEAKIN, TORT LAW 21 (5th ed., 2003); JOHN A. JOLOWICZ & PERCY H. WINFIELD, WINFIELD & JOLOWICZ ON TORT 160, note 82 (W.V.H. ROGERS ED., 5th. ED.,1998); Dilan A. Esper & Gregory C. Keating, *Putting "Duty" in its Place - A Reply to Professors Goldberg & Zipursky*, (forthcoming) LOYOLA OF LOS ANGELES LAW REVIEW, symposium on Frontiers of Tort Liability (2008), at page 20 to the draft.

42 See e.g. Hevican v. Ruane [1991] 3 All E.R. 65 (the court uses the case of *Caparo Industries P.L.C. v. Dickman* [1990] 1 All E.R. 568 to justify imposing liability in negligence for indirect-emotional harm); Rovenscroft v. Rederiaktiebolaget Transatlantic [1991] 3 All E.R. 73 (the court uses the case of *Anns v. Merton* [1977] 2 All E.R. 492 to justify imposing liability for depression caused to a woman by her son's death); Jones v. Wright [1991] 3 All E.R. 88 (the minority judge uses *Caparo*, *ibid*, to deny liability for indirect-emotional harm from a plaintiff that was not the spouse nor a parent of the direct victim of the unlawful wrong); Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974) (The court relies on Dillon v. Legg, 441 P.2d 912, regarding indirect emotional harm, to justify compensation for pure economic loss).

43 DAVID HOWARTH, TEXTBOOK ON TORT 303-306 (1995) (economic loss), 235 (emotional harm).

44 This is well demonstrated in the Introduction wrote by Gary Schwartz, one of the authors of the drafts of the restatement (third) on tort. When describing the restatement project as one dealing with general principles of

shared common myth created around these losses signified, therefore, a tendency not to compensate; a myth which considered these damages as the last borders to be crossed before imposing liability in negligence.[45]

Pure economic losses, however, are not a homogenous concept. They can be divided into subgroups in a manner that conceptually could have justified a narrower comparison of damages, namely, that between indirect emotional harm and the economic type of loss commonly known as "relational economic loss".[46] These forms of damage are similar in that they are being caused to third parties consequential upon physical injury to the body (emotional harm and economic loss) or property (economic loss) of others. However, enumerating types of economic loss as divided is not practiced in Anglo-American case law and is barley recognized in Israeli case law, all of which use the rhetorical generalization of "pure economic loss."[47] This conceptual rhetorical generalization has helped shaping the myth of non-compensation as applying to all types of economic losses.[48] This generalization also allowed pretence of equal treatment to be given to economic interests and indirect-emotional alike.

Beyond these rhetoric-based reasons for comparing between the two harms as wholes, regardless of sub-categories, it seems that their similarity asserted *prima facie* also exists on a substantive level. First, the relational economic damage is unique by reason of the fact that it deals with the right to compensation of someone who has no relationship whatsoever with the tortfeasor, and in most cases also not with the principal victim himself. Therefore, the plaintiff has, in effect, no legal proximity to the tortfeasor, that is to say, his injury is not one which should have been foreseen,

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tort law, Schwartz clarifies: "Given the project's 'general' interests, the project does not cover such special topics as professional liability and landowner liability; and given its focus on the core of tort law, it does not itself consider liability for emotional distress or economic loss". (The introduction as brought at Martha Chamallas, *Removing Emotional Harm from the Core of Tort Law*, 54 VAND. L. REV. 751, 753 (2001)).

45 Franz Werro, *Tort Liability for Pure Economic Loss: A Critique of current Trends in Swiss Law* in CIVIL LIABILITY FOR PURE ECONOMIC LOSS 181, 188 (Efstathios K. Banakas ed., 1996); Robert Hayes, *The Duty of Care and Liability for Purely Economic Loss*, 12 MEL .U. L. REV. 79, 97, 100-102 (1979).

46 Bernstein, supra note 36, at 3.

47 See, in Israel, RONEN PERRY, PURE ECONOMIC LOSS RESULTING FROM NEGLIGENT INFLICTION OF HARM ON THE BODY OR PROPERTY OF A THIRD PARTY 4-5 (Dissertation, served to the Hebrew University Senate, 2000) (claiming that although analytically correct and required, in effect, dividing the loss into subgroups is typical to academic rather than judicial writing). Gedron concludes similarly, indicating that "There is no real distinction between cases where the economic loss is direct and cases where it's indirect. GEDRON, supra note 36, at 175. The same approach is apparent in Anglo-American courts. See BERNSTEIN, supra note 36, at 1-23.

48 Perry, *ibid*, at 5, 7. For the tendency to generalize, see Bruce Feldthusen, *The Recovery of Pure Economic Loss in Canada: Proximity, Justice, Rationality and Caos* in CIVIL LIABILITY FOR PURE ECONOMIC LOSS 131, 133-134 (EFSTATHIOS K. BANAKAS EDS., 1996). The tendency to generalize is also notable in the Australian case of Perre v. Apand Pty Ltd. [1999] 164 ALR 606.

proximately wise.[49] In contrast, paradigmatically, the indirect emotional harm suffered by a plaintiff is derived from prior familiarity and a close relation to the primary physically injured person.[50] Such plaintiffs could, therefore, be much more easily foreseen and defined as a limited group, based on the assumption that closely related people have loving relations, and therefore are potentially specifically vulnerable to such related injury. Secondly, in economic loss cases, where there was a prior relationship between the primary victim and the indirect one (the plaintiff), the indirect plaintiff could, in most cases, roll over his risk, placing it on the shoulders of the primary victim or the tortfeasor using, for example, contractual tools.[51] Such contractual action is highly problematic in pre pure emotional harm settings, where the relationship between the primary victim and the plaintiff is emotional, and there is no commonly known possibility of, nor moral legitimacy for, a-priori allocation of risks to the primary injured party or the tortfeasor.[52]

The final difference between the two types of damages is found in a symbolic level, whereby in relational economic loss, the plaintiff has no interest in the damaged property which has given rise to his loss. The demolition of a bridge leading to the plaintiff's business, condemning it to economic paralysis, is, again, a classic illustration of this notion. The absence of a proprietary interest on the part of the plaintiff in the damaged bridge is the main reason for his ineligibility to obtain "traditional" tort-based compensation. Moreover, had the destroyed bridge belonged to that same paralyzed business owner, the latter would have been entitled to full compensation for these losses as resulting from damage to *her* property. With regard

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49 This difficulty is manifested in the prominent example used by tort scholars, regarding the restaurant which is being negligently damaged and closed. Closing the restaurant might financially affect the restaurants suppliers, who's commodity is not required any more to operate the restaurant, what might have additional affect on the latter's suppliers etc.,. See DAN B. DOBBS, THE LAW OF TORTS 1286-1287 (2000). However, there are rare cases where the connection between the primer and the secondary victim is more evident and strong, such as in the case where the business partner of the plaintiff was negligently harmed, in a way that affects him financially.

50 Although cases of indirect emotional harm are frequently referred to as "bystander cases," almost all Anglo-American cases, an *all* cases in Israeli case law pertained to circumstances where the plaintiff has established familial close relations to the direct victim. Currently, "bystander" law is perceived as an exception to the non-recovery rule for negligent infliction of emotional distress. Absurdly enough, though, to become a "bystander," one should establish being "closely related" to the direct victim… See, i.e., Wilson v. United States, 190 F.3d 959, 961-962 (1999) (Alaska); or the somewhat oxymoronic provision that "...a bystander plaintiff should be permitted to recover under New Jersey law only if she could prove… an intimate familial relationship with the victim…" Blinzler v. Marriott Int'l 81 F.3d 1148, 1154 (1996) (New Jersey).

51 The typical case is demonstrated by the example of the fishermen paying to the harbor owner for allowing them to use his property for their fishing. *Ibid*, ibid.

52 The only preplanned insurance action relevant to the victim here is that of first-party insurance, an action which falls outside the realm of risk allocation between the parties involved in creating the risk, and is hence an alien to the concept of risk allocation as perceived by tort law. See JULES L. COLEMAN, RISKS AND WRONGS 205-209 (1992).

to indirect emotional harm, on the other hand, the familial-personal relations of the plaintiff and the primary victim can easily be conceptualized as a quasi-proprietary relationship, meaning that the plaintiff has an "interest" in the primary victim, as the product of the love vested in her, similar in essence to other intellectual property rights, and creating what I would term an “emotional property” right.[53] Applying this legal construction here, would render the plaintiff full eligibility for compensation under the traditional conditions for establishing proximity between the tortfeasor and the plaintiff in negligence claims.

To summarize, stating that indirect emotional harm should be compared with the subgroup of "relational economic loss" alone is wrong and stems from misleading perceptions of the two losses. The non-compensation myth that was built around economic loss as a unified set of losses, coupled with the substantive differences between relative economic loss and indirect emotional loss, to which I have just alluded, requires a rejection of this initial tendency. These characteristics allow us to consider the pure economic loss in its wider sense.

3. Similar but Distinct

In spite of the similarity between indirect-emotional harm and pure economic loss, these two losses, of course, diverge. However, as I shall hereby demonstrate, they diverge in a manner which indicates that there were good reasons for courts to actually prefer recognition of the former over the latter within negligence law jurisprudence;

(a) Intuitive Content of Tort Law

Emotional suffering has been relevant and acknowledged since the dawn of mankind and certainly since the dawn of tort law, whereas economic loss gained substantive significance only with the development of the 20th century economy. Accordingly, it might have been expected that the latter's status would be much shakier than the former's. Emotional harm reflects basic elements of human welfare,

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53 This right and morally justified entitlement has also ground in traditional tort law who considers family members as having "proprietary" rights in one another. However, the basic conception underlying this tradition was patriarchic whereas the one I propose is humane. An example for this conception is the humiliating tradition of the *per quod servitium amisit* claim, which allowed the man alone entitlement to compensation for loss of servitude by his "property": wife, child or slave, resulting from the tortfeasor's negligent. JOHN G. FLEMING THE LAW OF TORTS 723-725 (9th ed., 1998); RICHARD A. EPSTEIN, TORTS 451 (1999).

whereas economic loss does not have such superior qualities.[54] Furthermore, in terms of tort law's tradition, broadly speaking, we can relate to emotional harm as referring to "bodily" injuries, which are traditionally located at the core of tort law's interest, whereas economic loss relates to rather "property" injuries. As a result, we might expect more "tort empathy" towards emotional suffering.[55]

(b) The Goals of Tort Law

Here, too, indirect emotional harm enjoys an advantage arising from an unexpected source.[56] Looked at from the prism of corrective justice approaches to tort law, the type of damage caused to the injured party is irrelevant; however, in terms of economic approach to tort law (traditionally perceived by feminist theory as reactionary), the type of harm caused has a bearing on liability analysis. First, incurring economic loss is perceived to be an inherent and rather desirable risk in a healthy competitive commercial market.[57] Moreover, the injured party's economic loss is usually nothing more than the flip side of the coin which is the economic profit of another's. Therefore, the proponents of this theory might be indifferent to such loss since in terms of general welfare and "social loss", once the loss has occurred, the question "who will bear its burden" becomes less significant.[58] The elusive character of the economic loss also gives rise to concern that its uncertain nature will prevent a proper evaluation of its preventive value.[59] In contrast, emotional harm is not the modified converse of the profit of the tortfeasor, and therefore it is likely that it will not be perceived as a subrogation of benefit between him and his victim; indeed, it has been asserted against emotional harm that it lacks economic significance, however,

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54 Patrick Atiyah, one of the social critics of the tort law, thinks that after all tort law is preferring protection on body over protection on property. Patrick S. Atiyah, *Property Damage and Personal Injury – Different Duties of Care?* in NEGLIGENCE AND ECONOMIC TORTS 37 (THEO SIMONS ED., 1980. See also Valerie P. Hans & William S. Lofquist, *Juror's Judgments of Business Liability in* TORT CASES: IMPLICATIONS FOR THE LITIGATION EXPLOSION DEBATE, 26 L. & Soc'y Rev. 85 (1992).

55 See for example the words of the Canadian judge Stevenson in Canadian National Railway Co. v. Norsk Pacific Steamship Co. Ltd. (1992) 91 DLR (4th) 289. For an opposite approach, see the stand of the Canadian judge La Forest in London Drugs Ltd. v. Kuehn & Nagel International Ltd. (1992) 97 DLR (4th) 261.

56 Using the law and economic perspective here is a result of utilitarian rather than ideological considerations…

57 HOWARTH, *supra* note 43, at 309-310.

58 BERNSTEIN, *supra* note 25, at 20. See also Israel Gilead, *Tort Liability in Negligence for Pure Economic Loss* in ISRAEL REPORTS TO THE XV INTERNATIONAL CONGRESS OF COMPARATIVE LAW 79, 81 (ALFRADO M. RABELLO ED., 1999). For distinguishing between "private" pure economic loss - which lacks a collective meaning, and therefore is not justifiably compensable - and between the collective "social" one, and therefore justifiably compensable, see: T. Schwartz, *The Economic Loss Doctrine in American Tort Law: Assessing the Recent Experience*, in CIVIL LIABILITY FOR PURE ECONOMIC LOSS 103, 127-129 (Efstathios K. Banakas ed., 1996). See also GILEAD, *ibid*, ibid.

59 This might lead to over-deterrence which will paralyze the business market. GILEAD, *ibid*, at 82

this assertion has been disproved. Furthermore, this damage is considered relevant to the core economic rationale of tort law, such as internalizing the cost of the damage and preventing unwanted behavior.[60]

(c) Conceptual Compatibility with Tort Law

The two harms are claimed to be equally disfavored by negligence jurisprudence due to being intangible, a trait that stands in discrepancy with tort law's nature. However, characterizing the two harms as similarly abstract is inaccurate. The abstract nature of emotional harm stems not only from its innate structure but also from a wider ideological rationale, according to which the assets of humanity, as emotions, are not tradable and therefore are hard to evaluate.[61] In contrast, the abstract nature of economic loss ensues, *inter alia*, from practical rather than moral difficulties of evaluating it, for example within extra-contractual relations, detached from a concrete business context and so forth.[62] On the other hand, it is noteworthy that, contrary to emotional harm, economic loss is fiscal and is, therefore, more suitable, technically, for fulfilling the *restitutio in integrum* tort maxim by compensating the victim with money, for monetary harm.

(d) Function of the Duty of Care

Jane Stapleton, who researched the implications of structuring the duty of care with regard to economic loss, has argued that when creating a duty in negligence, account should be taken not only of substantial policy considerations, as stated above, but also of structural implications a recognition of a duty to care entails.[63] Stapleton criticizes the current manner practiced by courts whereby they use predetermined and–in terms of their definition–overly broad "liability pockets" (as in economic loss cases)[64] or unreasonable or "quasi-tort-law" devices, where their decision is

60 Stanley Ingber, *Alternative Compensation Schemes and Tort Theory: Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 799-819 (1985).

61 Howarth, *supra* note 32, at 324.

62 Ibid, at 303-306.

63 Jane Stapleton, *In Restraint of Tort*, in THE FRONTIERS OF LIABILITY (Peter Birks ed., vol. 2) 83, 101 (1994).

64 The over broadness of these “liability pockets” results in two diverse undesirable effects: on the one hand, it induces courts to artificially identify a case as belonging to a specific compensated category (as her examples in pages 85-86 demonstrate), on the other hand, it prevents recognizing justified cases, due to the need to create broad categories of non-liability (as the case of Junior Books proves, which could be better handled on a contractual level). Ibid, at 90.

allocation based (as in economic loss and indirect-emotional harm cases).[65] Stapleton proposes the use of parameters that would dictate duties of care that are appropriate, consistent, retain the proper boundaries of liability in negligence and grant the courts a real anchor for their judgments. I find Stapleton's considerations–initially focused on economic loss alone–useful to evaluating the structural traits of constituting a duty to care for both damages at the heart of this paper. Stapleton's remarks manifestly touch upon this comparison and indicate that recognizing indirect emotional harm is more conceptually compatible with the notion of "duty" in negligence law, than pure economic loss's is:

First Criterion: **The injured party's ability to protect herself against the loss**-[66] One should not relate here to the injured party's technical ability to insure himself, but rather to the significance of the insurance and an examination of the actual options which were open to her on the matter. This parameter emphasizes the preference given to the recognition of indirect-emotional harm, against which the injured party cannot protect himself other than through personal insurance, which removes any liability from the shoulders of the tortfeasor and therefore has no deterrent effect upon him. Moreover, in the case of the emotional indirect damage, family and love relations cannot and should not commonly be subject to such prior management by the eventual random injured party.[67] With relation to pure economic loss, nevertheless, the injured party generally has control over whether to engage in the business relations and interactions which eventually led to his damage. A buyer of a house can decide who to contact with in a manner that would increase the danger of construction defects. The protective options applicable in these cases are also much broader and varied, and often can be expressed in contractual stipulations which enable a correct and comprehensive risk management in the transaction, and the deterrence of those primarily negligent actors. Again, the same house buyer can protect himself from construction defect derived costs by contractually stipulating that they be incurred by the seller.

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65 Stapleton, *ibid*, at 85.

66 *Ibid*, at 90-91.

67 HOWARTH, *ibid*, at 238, 254. Howarth suggests considering these relations as stemming from deep human commitment for love rather than from free and rational choice. Still, this human behavior is common to most of us, and therefore can be identified as irrecoverable, according to the reciprocity principle as dictating tort law. See Thomas T. Uhi, *Bystander Emotional Distress: Missing an Opportunity to Strengthen the Ties that Bind* 61 Brooklyn L. Rev. 1399, 1444-1446 (1995).

Second Criterion: **Preferring linear over a peripheral claims -** Stapleton points to this parameter as one of the most important considerations in economic loss cases. Originally and substantively, tort law was supposed to enable direct and local claims between tortfeasors and their direct victims. It is assumed that suing the direct tortfeasor will eventually lead to an action against the primary tortfeasor, even if this requires a chain of law suits to be instituted. This stance, as well, strengthens the status of indirect-emotional harm compared to that of economic loss. The relational trait of economic loss carries a risk of incorrect identification of the accident's real injured party. In some cases, the economically injured party may also receive two-fold compensation arising out of both some contractually secured preliminary relationships he has with the direct injured party, and out of the tort cause established against the tortfeasor himself; the same tortfeasor that will probably be found liable for the losses caused to the direct victim additionally. This may even put the indirect injured party in a better position than he would have been at but for this damage.[68] In contrast, indirect-emotional harm, do not carry this kind of risk: the injured party alone suffers the damage for which he is being compensated.[69] Additionally, in pure economic loss cases, typically, there is indeed a linear tortfeasor who is negligent and can be sued, and through whom other tortfeasors can be reached. Thus, for example, in the case of the purchase of a defective house one can first sue the owner who sold the house to the buyers, and the latter can sue the contractor. In the case of indirect emotional harm, there is almost no room for a claim against the primary and direct victim, since he himself was injured in the accident. In addition, in the rare cases where the direct victim was also responsible for his own injury, the indirect injured party is generally expected to have an emotional barrier to instituting a claim against that person who, by very reason of the indirect victim's love for him, was the cause of his injury. Moreover, in cases of indirect emotional harm, the main victim acts as an "instrument" causing the indirect damage, as opposed to cases of economic loss, where often the linear tortfeasor is a genuine and active wrongdoer, sometimes acting as a joint tortfeasor with the peripheral wrongdoer, who is not sued for extraneous reasons, for example, because he is insolvent or cannot be clearly identified, or is

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68 For example, A sings a contract with B, which is being breached due to C's negligent behavior toward B. A can receive damages for the breach from C, using the tort route, even though enjoying full enforcement of the contract, using the contractual route. Moreover, B here is the primary victim who should, legally speaking, have the power to decide whether A should be compensated. HOWARTH, *ibid*, at 239.

69 Compensating the secondary emotional victim intends to cover losses that are hers only, and which are distinct and different in character from the losses that the primary victim bears.

contractually exempted of liability. An illustration would be the case where a lawyer mishandles the sale of a mortgaged house and has the benefit of the customarily acquired insurance cover for his actions, as opposed to the owner of a house, who does not have insurance, and hence bears less effectiveness in suing.[70]

Third Criterion: **Preserving the natural falling location of the damage –**[71] Stapleton stresses the importance of refraining from establishing a duty of care which results in the person who ought to bear the liability benefiting from its imposition on another. The court should ensure that it is not turned into a tool in the hands of the primary victim and tortfeasor for altering the expected reasonable understanding as to who should bear the loss. This problem does not exist in cases of indirect emotional harm, where there is no other tortfeasor from whom the injured party can obtain compensation, and where he therefore has no opportunity to manipulate options of compensation. In contrast, this problem is known in cases of economic loss, as the abovementioned lawyer example proves. Another prominent example is cases where it was contractually agreed between the linear parties that no liability would be imposed on one of them, compelling the injured party to turn to the peripheral tortfeasor as his last and only resort.

Forth Criterion: Preserving the "dignity" of the law -[72] Stapleton emphasizes the court's obligation to create duties of care that will enjoy public support, in order to strengthen the status of tort law in society and encourage their continued use by the public. The court should therefore refrain from creating embarrassing duties of care, which contain standards that are incompatible with the life experience of the public. A clear example of these kinds of standards can, unfortunately, be found in the duty of care regarding indirect emotional harm. Stapleton uses the example that a normal loving relationship between family members is not sufficient to establish a duty of care so as to give rise to an entitlement to compensation for this damage. An infamous example of such ruling is English House of Lord's *Alcock* case, where the court refused to regard a relationship between brothers as sufficient to establish harm to one of them upon the tragic death of the other.[73]

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70 *Ibid*, at 93.
71 *Ibid*, at 94.
72 *Ibid*, ibid.
73 *Ibid*, at 95.

(e) The Two Losses and Considerations from Outside of Tort Law

Economic loss protects economic interests, which are protected by a series of legal fields, particularly and almost exclusively within the area of contract law.[74] The typical situation in which economic loss arises entails contractual interactions in which the injured party is positioned in a direct or indirect "contractual environment" which is closely connected to his loss.[75] Accordingly, activating tort law and using it in order to protect economic interests strengthens and reinforces the primary *contractual* protection already enjoyed by these interests.[76] Thus, limited tort protection of economic loss can be justified on the ground that it prevents blurring the distinction between these branches of law, particularly where it unnecessarily further widens the application of tort law beyond its traditional limits.[77] An additional primary concern is that imposing tort liability for economic loss would be an inappropriate intervention in the contractual relations between the parties as it might violate the balance that contract law imposes on the parties, vis-à-vis each other, as expressed by the contractual risk-allocation they agreed on.[78] Efforts should, therefore, be made to establish sounder protection mechanism to economic interests in contract law rather than in tort law.[79]

Indirect-emotional harm, in contrast, does not receive any preferential protection in other fields of law, and it seems as though it is accorded almost no protection other than in tort law.[80] In Anglo-American law, contractual protection of feelings is,

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74 See for example: Jolowitcz & Winfield, *supra* note 20, at 133:"...most claims for breach of contract involve economic loss and nothing else" .and:"Where commercial loss is suffered by parties to a transaction, contract law is adequate to deal with the problem and also usually more appropriate" .Also see Dobbs, *supra* note 49, at 1283.

75 Some even define the loss accordingly: "Economic loss is interference with contractual rights and potential business". Howarth, *supra* note 43, at 267.

76 A.J.E. JAFFEY, THE DUTY OF CARE 30 (1992). Pure economic loss usually stems from a contractual interaction, whereas physical harm – be it bodily or mentally - usually results from non-voluntary, non-consensual human interactions. See *London Drugs*, *supra* note 54, at 272-273 (Justice La Forest).

77 Howarth, *supra* note 43, at 300. The intuitive reason for resisting the expansion of tort liability is that it serves as another coercive mean to constrain the autonomy of the person. ALAN CALNAN, JUSTICE AND TORT LAW 95 (1997).

78 Jane Stapleton, *Duty of Care and Economic Loss: A Wider Agenda*, 107 L.Q. REV. 249, 271-275, 285-294 (1991); COHEN NILLY & FRIEDMAN DANIEL, CONTRACTS 615-621 (part I, 1991); KEETON ET AL., TORT AND ACCIDENT LAW 968-973 (4th ed. 2004).

79 Ronen, *supra* note 36 at 527.

80 Though limited, protection against indirect-emotional harm is still granted by tort law: "the *tort* system is the *only* place to which injured people can turn when the non-pecuniary fabric of their lives has been torn". Lucinda M. Finley, *Tort Reform: An Important Issue for Women*, 2 BU. W. J. L. & SOC. POL. 10, 14 (1993).

without a doubt, minor and exceptional to the known economic context within which they operate.[81] In Israel in specific, equivalent contractual protection of feelings,[82] which enables awarding compensation for non-pecuniary damage, is highly limited and rarely used.[83] Emotional harm is compensated in contract law as a damage which is secondary in importance, and is collateral to the economic loss. Moreover, using tort law to protect economic and commercial relations seems to fall outside their natural purpose, which is the protection of the corporal and property interests of individuals. Indeed, the use of tort law in economic loss cases represents a highly problematic intervention in the balance created by contract law in these respects.[84]

4. Summary

The points of similarity and difference between indirect-emotional harm and economic loss increase the feminist interest in investigating their course of recognition. Indirect-emotional harm has had a better legal starting point than economic loss, particularly bearing in mind that the argument that it might encourage frivolous claims which would overburden the system, was rejected as groundless[85]. It might have been expected, therefore, this loss would gain faster and easier recognition compared with economic loss. A contrary discovery can lead to the conclusion that these losses possess an "added value" (or "reducing value") causing them to develop in a way other than expected. I would argue that this added value can be ascribed to the two losses being gender related, resulting in preference given to the male-related interest by granting it protection in all three patriarchal legal systems that is stronger than the protection granted to female-related interests.

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81 NICHOLAS J. MULLANY & PETER R. HANDFORD, TORT LIABILITY FOR PSYCHIATRIC DAMAGE 51-56 (1993) (discussing the contractual protection of emotions). Douglas J. Whaley, *Paying for the Agony: The Recovery of Emotional Distress Damages in Contract Actions* 26 SUFFOLK U. L. REV. 935. This is also the position stated at RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981), which provides that recovery for emotional disturbance will be excluded in the absence of the circumstances of bodily harm or when the contract or breach is such that serious emotional disturbance was a particularly likely to result.

82 Article 13 to Contracts Act (Remedies for breach of Contract), 1970 states: “has the breach of the contract caused non-pecuniary harm, the court may order compensation to the plaintiff in a sum to be determined by his context-based nuanced discretion”. (1970) I.L.B. 16.

83 Courts indicate that this article should be activated only in rare and extreme circumstances. See, e.g.,DC 360/99 Cohen v. The State of Israel (2002), SC 3437/93 Eged v. Adler 54 P.D.(i) 817, 836 (1998).

84 Howarth, supra note 43, at 267; Gedron, *supra* note 17, at 183.

85 See Bitton, *Supra* note 3, at 81-82, 94-95.

Part III: Economic Loss[86] and Indirect Emotional Harm: A Comparative Gaze on Boundaries and Recognition[87]

A. Anglo-American Law

1. Economic Loss

Tort liability for economic loss which is not pure but rather accompanying or is collateral to other physical damage has been recognized since the dawn of time.[88] The recognition of economic loss when it is "pure," that is, independent and stemming alone from the wrong, has also existed in traditional torts, such as breach of contract and deceit.[89] The difficulty in compensating for pure economic loss arises only when one seeks its protection using the negligence tort. Negligence law imposes liability for all types of behavior which are regarded as creating an unreasonable and foreseeable risk. This wide definition allows negligence law's protection to encompass injury caused to a circle of people broader, more remote than the direct and commonly known circle of injured people in tort law.[90] It is, therefore, the natural legal refuge for a person suffering indirect economic injury, seeking compensation for his losses which originated from a contractual connection he had with a third party, the direct victim.[91]

The common law tradition has established a "no liability" rule in negligence for economic loss.[92] Although a single case which shaped the rule cannot be easily identified, it is evident that the rule arose from a number of decisions made mainly by English and American courts,[93] as well as in other common law legal systems.[94]

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86 From convenience reasons, this damage would be referenced hereinafter as "economic loss".

87 For further analysis in the subject of economic loss in general, and in the Anglo-American law in particular, see PETER CANE, TORT LAW AND ECONOMIC INTERESTS (2nd ed., 1996); Stapleton, *supra* note 46.

88 SALMOND & HEUSTON ON THE LAW OF TORTS 206 (HEUSTON R.F.V. & BUCKLEY R.A. EDS., 21st ed., 1996).

89 Howarth, *supra* note 43, at 474 (breach of contract), 275 (deceit). These injustices are characterized as "intentional torts".

90 Ronen, *supra* note 17, at 505.

91 Cohen, *supra* note 57, at 173-184. Cohen as well does not distinguish between different categories of economical loss.

92 People Express Airlines Inc. v. Consolidated Rail Corporation, 100 N.J. 246, 251 (New Jersey 1985) (stating that American and English courts have "a virtually, *per se* rule barring recovery for economic loss"). Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. LR 1513, 1513 (1985); Howarth, supra note 43, at 267.

93 BRUCE FELDTHUSEN, ECONOMIC NEGLIGENCE 5 (4th ed., 2000) (American law); Patrick S. Atiyah, *Negligence and Economic Loss* 83 L.Q. REV. 248, 248-256 (1967) (English law).

94 See THE LIMITS OF EXPANDING LIABILITY, *supra* note 19, at 69-72 (Austria), 129-130 (Greece), 137-143 (Italy), 157-158 (The Netherland), 190-191 (Sweden). These different legal systems adopted a non-recovery rule similar in scope to that shaped by the Common law.

In England, the decision in *Hedley Byrne & Co. v. Heller & Partners*[95] is considered the first to recognize economic loss for negligent misstatement. Although perceived as creating an exception to the traditional rule of non-compensation,[96] and as having limited value as a precedent–relevant only to the unique context in which it was considered[97]–this case launched a wave of recognition of causes that had been rejected in the past and of new emerging causes for pure economic loss.[98] A more sweeping acceptance of pure economic loss was reached only by the end of the 1970's. In *Anns v. Merton*,[99] the House of Lords formally and officially recognized the possibility of imposing liability in negligence for pure economic loss.[100] This case was followed by the important ruling of *Junior Books v. Veitchi*,[101] which established the test for accountability that would eventually became the source for generally shaping the duty of care in negligence in the UK.[102] However, the *Anns* rule did not survive for long, and after much hesitation and problematic applications, it was finally rescinded by the House of Lords in *Murphy v. Brentwood District Council*,[103] which shaped the currently prevailing rule regarding pure economic loss. Today, the imposition of liability for pure economic loss is guided by the need to examine each case on its own merits and determine the duty of care required in the light of the appropriate policy considerations. Therefore, the duty of care in relation to economic loss is imposed only if the court is persuaded that it would be right, logical, appropriate and reasonable to do so.[104] An exception to this rule is the recognition of economic losses consequential upon negligent misstatement, misrepresentation or professional negligence, where liability is more easily imposed.[105]

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95 Byrne & Co. v. Heller & Partners [1964] A.C. 465.

96 Atiya thus analyzes this case at Atiya, *supra* note 93, at 258-265.

97 Stapleton, *supra* note 46, at 260-261.

98 See the review of the adjudication in the field at Feldthusen, *supra* note 93, at 8.

99 *Anns*, *supra* note 21.

100 Though relating to the issue of buildings' physical safety, the case is perceived as relating to the issue of economic loss, since the building's safety required that the plaintiff use and lose their money in order to fix the building.

101 Junior Books v. Veitchi, [1983] 1 A.C. 520 (H.L.). Though initially perceived as central to economic loss theory, the case was later described as a case that "...can not be regarded as laying down any principle of general application in the law of tort". See D&F Estates Ltd v. Church Commissioners Ltd, [1989] A.C. 177, 202.

102 The impact this case had on negligence analysis was enormous. See Lord Wilberforce's reflection in Murphy v. Brentwood District Council, [1990] 2 All E.R. 908, 924-925.

103 *Ibid*.

104 *Caparo*, *supra* note 21, at 585

105 In these cases a strong assumption of liability is established by the negligent party vis-à-vis the claimant. Feldthusen, *supra* note 93, at 4.

The Unites States' tort case law proved less dominant in this area by simply following its English counterpart. One can generalize about the development of the different categories of pure economic losses and state that this form of damage followed a course similar to the English one, where a denial of compensation has ruled in the beginning of the century, a limited recognition was established during the 1960's,[106] endured through the 1970's,[107] and undergone a problematic expansion, which finally led to the current regression in recognition.[108]

The leading case to establish the nonrecovery rule was *Robins Dry Dock & Repair Co. v. Flint*.[109] Despite this general rule, however, some cases have imposed liability for negligent interference with purely economic interests. Moreover, some statutes have imposed liability for pure economic loss, most notably in the statute regarding oil spills in navigable waters.[110] Additionally, in a few cases the courts have proposed a general modification of the non-recovery rule. In the most important case, *People Express*,[111] the defendant was allegedly negligent in the management of highly dangerous chemicals. The area nearby, including the plaintiff's airline office, had to be evacuated, resulting loss of profit and business operations for the airline. No physical harm ever occurred. The New Jersey Supreme Court concluded that the general rule against liability was wrong and held that the defendant would owe a duty of reasonable care to protect against economic loss when "particular plaintiffs or plaintiffs comprising an identifiable class" have suffered stand-alone economic loss, provided the defendant knew or had reason to know that such harm was likely.[112] In a prior, much looser opinion, a federal court has also favored a general regime of negligence liability for economic loss.[113] Notwithstanding these cases, today, courts generally hold that there is no duty to protect against negligent interference with

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106 Feldthusen's perception of the Glanzer v. Shepard, (1922) 135 N.E. 274 (C.A.) case as the first to recognize misrepresentation has no further academic support. Feldthusen, *ibid*, at 5. Dobbs, for example, identifies as such the case of Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303. Dobbs, *supra* note 49.

107 The leading case being Union Oil Co. v. Oppen, 501 F. 2d 558, where the court awarded compensation to fishermen claiming loss of future benefits caused by contamination of the fishing area water by the defendant's negligent water pollution.

108 A detailed review of the case law regarding this issue is provided by DOBBS, *supra* note 49, at 1282-1287 and Schwartz, *supra* note 33, at 104-114.

109 Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927). Dobbs, *supra* note 49, at 1284.

110 33 U.S.C.A para. 2702 (b) (2) (E). There is also a federal statue, the Medical Care Recovery Act, which allows the federal government to recover its expenses in treating a member of the armed forces who is injured by a tortfeasor. See 42 U.S.C.A para. 2651.

111 People Express Airlines, Inc. v. Consolidated Rail Corp., 495 A.2d 107 (1985).

112 Ibid, at 116. Alaska has at least partially approved this idea. See Mattingly v. Sheldon Jackson College, 743 P.2d 356 (Alaska 1987).

113 Petitions of Kinsman Transit Co., 388 F.2d 821 (2d Cir.1968). See also Dobbs, *supra* note 49, at 1285-1286.

purely economic interests.[114] The Second and Third Restatements of Torts have adopted this nonrecovery rule for pure economic loss as well.[115]

2. Indirect-Emotional Harm

Only towards the last third of the previous century was indirect emotional harm systematically recognized in Anglo-American law. Here, it was the American legal system who led the way in 1968, when recognizing for the first time the duty of care toward an indirect-emotionally injured party. In *Dillon v. Legg*,[116] the Supreme Court of California recognized a mother's rights for compensation for her emotional harm upon watching her little girl die in an accident. The court decided to depart from the "danger zone" rule which had dominated these cases, denouncing it as an egoistic rule compensating only those who were so concerned about their own safety and not for the safety of another.[117] Court's invigorating suggestion was to examine the liability issue within the traditional framework of the duty of care, including through the application of its foreseeability and proximity tests–as structured in the general law of the tort of negligent.[118] The court recommended assessing the reasonable foreseeability of the damage according to three factors: 1. the degree of proximity of the plaintiff to the zone of the accident, in terms of time and place;[119] 2. her means of perceiving the accident; 3. the degree of personal closeness between the plaintiff and the primary victim.[120] These parameters were defined by the court as aimed only at providing guidelines for assessing reasonable foreseeability rather than being preliminary conditions for liability. It was also held that the decisions in future cases

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114 TORT LAW AND PRACTICE 415 (Dominick Vetri et al., eds., 3rd ed., 2006). See also, Anita Bernstein, *Keep it Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773 (2006).

115 See Restatement (Second) of Torts § 402A (1965) (products liability limited to "physical harm" to user or consumer, or their property); Restatement (Third) of Torts § 21 & cmt. d (2007) ("[A] defective product may destroy a commercial business establishment, whose employees patronize a particular restaurant, resulting in economic loss to the restaurant. The loss suffered by the restaurant generally is not recoverable in tort and in any event is not cognizable under products liability law.").

116 Dillon, *supra* note 42.

117 Thus, the suffering of the sister of the victim, who played next to her, would be recognized, but the suffering of the mother, who stood far from her at the accident, would not be recognized. *Ibid*, at 915.

118 "We see no good reason why the general rules of Tort law, including the concepts of negligence proximate cause and foreseeability long applied to all other types of injury should not govern the case now before us and … mechanical rules of thumb which are at variance with these principles do more harm than good (*Ibid*, at 924.

119 This requirement signified the desertion of the former demand that the plaintiff be present at the danger zone of the accident. The court has subsequently settles for presence in the accident's "aftermath" scene, whereby the impact of the accident is still evident in the plaintiff's injured (or dead) relatives. *Ibid*, at 922.

120 The court decided that a mere "bystander" who has no family relations to the victims should not be considered entitled to compensation. *Ibid*, at 920-921.

of this kind would not be made on the basis of strict principles but rather on a case by case developmental course as was customary in common law.[121]

The Californian Supreme Court followed *Dillon* for two decades, until declaring, in *Thing v. La Chusa*,[122] that the recovery rule it has set as based on "reasonable foreseeability", was too broad.[123] Reassessing *Dillon*, the Court held that it provided virtually no limit on liability for nonphysical harm.[124] Its worrying alternative shamelessly stated that "drawing arbitrary lines is unavoidable if we are to limit liability…".[125] Accordingly, the criteria for liability imposition in similar cases were further limited.[126] Nevertheless, a number of jurisdictions continue to apply the foreseeability rule as set forth in *Dillon*, rejecting completely or in part the limitations subsequently established by *Thing*.[127] Today, all jurisdictions allow negligent infliction of indirect emotional suffering claims, but they all set very strong limitations on them,[128] with none of the jurisdictions succeeding in setting a coherent and comprehensive rule for these claims.[129]

The English legal system has taken a similar step to the American's only in 1983. In *Mcloughlin v. O'Brian*,[130] the plaintiff's husband and three children were involved in a car accident. About an hour after the accident occurred, the plaintiff arrived at the hospital, where she discovered the enormity of the disaster, causing her "severe shock, organic depression and a change of personality".[131] Being distant from the “zone of the danger,” the plaintiff was ineligible for compensation. The House of Lords adopted the *Dillon* ruling and recognized the mother's right for compensation

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121 “We cannot now predetermine defendant's obligation in every situation by a fixed category... We can, however, define guidelines... The evaluation of these factors will indicate the *degree* of the defendant's foreseeability... In light of these factors the court will determine whether the accident and harm was *reasonably* foreseeable... courts, on a case-to-case basis, analyzing all the circumstances, will decide...” *Ibid*, ibid.

122 *Thing v. La Chusa*, 48 Cal. 3d 644, 771 P.2d 814 (1989).

123 *Ibid*, at 663-664.

124 *Ibid*, at 663.

125 *Ibid*, at 666.

126 The entitlement became limited to cases where the said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress- a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances." *Ibid*, at 668.

127 VETRI, LEVINE, VOGEL AND FINLEY, TORT LAW AND PRACTICE (3rd ed., 2006), p. 316.

128 See, e.g., the case of *Clohessy v. Bachelor*, 675 A.2d 852 (Conn. 1996), where the Supreme Court of Connecticut preferred *Thing*'s factors over *Dillon's*, adding a prerequisite of Death or serious injury caused to the primary victim.

129 DIAMOND, LEVINE AND MADDEN, UNDERSTANDING TORTS 151 (3rd ed., 2007) (footnote 22).

130 McLoughlin v. O’Brian, [1983] 1 A.C. 410.

131 *Ibid*, at 416-417. The hurtful facts of the case were elaborated by Lord Wilberforce in a nontraditional manner that revealed his human empathy to the plaintiff.

regardless. Lord Wilberforce, writing for the majority, based his entire decision on the foreseeablility test within the general duty of care in negligence law, and called for the use of the basic rule of adjudication in the common law, whereby a logical development is pursued from case to case while preserving the boundaries of the legal principle underlying the leading case in the area.[132] While reviewing the guiding principles in the *Dillon case*, he has softened most of them but without replacing them with new "guiding rules."[133] Lord Bridge, concurring, also warned against the rigidity of these rules, and of the danger that they might create arbitrary boundaries between different equally justified cases.[134] He suggested that these rules be used to assess the extent of the foreseeability of the damage that was ultimately caused to the plaintiff, and not as a measure for determining whether there was a duty and liability towards the plaintiff.[135] Despite the positive nature of this decision, its “golden era” ended toward the close of the century in England as well. Most notably, this turn has been taken at the *Alcock v. Chief Constable of S. Yorkshire* case,[136] discussing the claims of indirect plaintiffs, loved-ones of the victims of the notorious collapse of the Hillsborough Football Stadium. In this ruling, the House of Lords has taken the opportunity to “clarify” and delimit the boundaries of *McLoughlin*, mainly through drawing a distinction between first and secondary (indirect) injured parties, whereby the latter’s right for compensation was confined to strict limitations.[137] Further limitations were applied by requiring that the injury be sustained through a sudden shock and that the plaintiffs, if not bearing “closest family ties” (namely, spouses and parent-children) with the direct victim, show specific emotional attachment to her.[138] The fair use of the foreseeability doctrine was therefore eventually abandoned in favor of rigid rules, which created arbitrary distinctions between equally eligible victims.[139]

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132 *Ibid*, at 417-419.

133 Setting the "aftermath" doctrine was, as previously mentioned, the most substantial softening practice. *ibid*, at 422.

134 *Ibid*, at 442.

135 *Ibid*, at 442-443. The controversy between the majority justices revolved around the question of whether the duty of care in these cases should be designed according to the general idea of foreseeability or rather by the newly set rules. See Richard Kidner, Casebook on Torts 146 (5th ed., 1998).

136 3 WLR 1057 [1991]

137 *Ibid*, at 1103, 1103, 1105, 1110. Further endorsement of this distinction was held at *Page v. Smith* 2 All ER 736 [1995]

138 *Ibid*, at 1102. More specifically, the court has refused considering siblings as automatically recognized as eligible for compensation in this respect. See, i.e., *ibid*, at 1083-1087

139 See Bitton, *supra* note 3, at 99-100.

3. Has the feminist presumption been proved truthful?

The review of Anglo-American attitudes towards indirect emotional harm and pure economic loss reveals a rather balanced picture. Even though courts were consistently reluctant to properly compensate for indirect emotional harm, they were still only slightly less restrictive in protecting purely financial interests of plaintiffs. Presumably, this balanced picture proves wrong the feminist hidden assumption that disfavoring indirect emotional harm is derived from its gender-related value and therefore unique to female-related interests.

These seemingly indiscriminative consequential findings, however, should be evaluated in light of the fact, previously established, that the point of departure of these two types of harm diverged in a manner that should have benefited indirect emotional harm over economic loss. It would therefore be reasonable to assume that much more strenuous legal and rhetorical maneuvers were required of courts to curb the recognition of the indirect emotional harm as compensable under negligence law, as feminist analysts of tort law have indeed proved.[140] With regards to pure economic loss, the nonrecovery rule seems to fit much easily and naturally its lower starting-point.[141]

With regards to Israeli law, the balanced picture stays on the rhetoric canvas alone. Israeli case law presents a much sharper distinction between the two damages, and can much more easily be identified as proving the feminist hypothesis of double discrimination. It administers tort law as a double discriminative mechanism, whereby female-related interests are being devaluated while male-related ones are being endorsed. A third layer of discrimination is added by the unified rhetorical manner in which these opposite courses are being taken.

B. Israeli Law

1. Economic Loss

In Israeli law, economic loss has been approached differently than in Anglo-American law. A meticulous examination of the different stages of development of this doctrine shows that courts in Israel, which were strict about preserving the boundaries of the indirect-emotional harm, tended to breach substantial

140 See the writing references at *supra* note 2.

141 This conclusion should be read as limited to the comparative perspective of this loss vis-à-vis indirect emotional loss. It does not imply a normative stance as to the extent to which this loss should be recognized by virtues of its own importance.

boundaries whenever they concerned economic loss. These breaches also stood in sharp contrast to the main restrictions imposed on this loss in common law, to which Israeli law was bound at that time. In most cases, breaching was practiced without the Israeli court bothering to pay any particular attention to it.

This extremity is most evident when considered in light of the most traditional restrictions that were set for liability for pure economic loss in common law tradition: First, as mentioned, common-law tort law, as opposed to contract law, has not been shaped to deal with losses linked to prior relations and negotiations that preceded those losses. Rather, it is concerned with losses which occur in a sudden manner between strangers and which raise problems of harm and not of business bargaining.[142] Consequently, the existence of contractual relations between some of the parties to the tort dispute is seen in common law as a factor that prevents any possibility and justifiability of tort intervention and expansion by tort law.[143] These worries were not even discussed by Israeli courts when it imposed liability in negligence for economic loss even when his entailed interference with the economic balance that had been created by the contractual relationship between the parties to the tort dispute.[144] This approach led Israel's Supreme Court more than once, to impose liability for pure economic loss even when its decision clearly interfered in the contractual balance that was agreed upon by the parties to the tort dispute themselves.[145]

The main difference between Anglo-American law and Israeli law is reflected, without doubt, in Israeli law's recognition of "relative pure economic loss," when the injured party has had no interest in the property in respect of which the loss was caused. Anglo-American tort law has been very strict with its non-recognition

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142 Feldthusen, *supra* note 93, at 168. Indeed, accidents can occur between related parties, such as doctors and patients, but usually, they lack a former, financially negotiable phase typical to the business oriented context in which economic losses happen.

143 For the numerous reasons and justifications for distinguishing tort liability from contractual circumstances see COLEMAN, *supra* note 52. A great example for this difficulty is the English verdict in the case of Leigh & Sullivan Ltd. V. Aliakmon Shipping Co. Ltd., [1985] 1 Q.B. 350. The verdict was approved by the House of Lords in [1986] 1 A.C. 785. Also see the court's words in the case of Margarine Union G.M.B.H. v. Cambay Prince Steamship Co. Ltd., [1969] 1 Q.B. 219, 252 :"[I]t is wrong to introduce into the law of tort the concept of passing of risk between buyer and the seller under a contract for the sale of goods."

144 Gedron, supra note 36, at 139-144; DOBBS, *supra* note 27, at 1283, and see also the text in notes 43 to 67.

145 See the precedence setting decisions at SC 106/54 Weinstein v. Kadima 8 P.D. 1317 (1954) (the contract set the liability of the defendant (an engineer) vis-à-vis the third party which ordered the professional work from him. Court allowed the builder too to sue the engineer for the former's economic loss); SC 86/76 Amidar v. Aharon 32 P.D.(ii) 337 (1978) (the court overcomes, using the tort claim, a contractual provision exempting the defendant of any future claims of damage regarding the contract).

of this loss, whereas Israeli law has shown some signs of recognition even in this highly controversial area.[146] In addition, even in relation to the common law's acknowledged exception to the no-liability rule abovementioned, namely, when the pure economic loss is a consequence of negligent misrepresentation and misstatement, the course of recognizing liability in Anglo-American law has been regulated, restrained and even hesitant.[147] This description is also very different from the highly advanced and continuingly expanding process of recognition of this set of losses in Israeli law, as demonstrated by a comprehensive research of this liability, its formation and development in Israeli adjudication.[148] The research concludes that during this process, the courts displayed a consistent trend towards narrowing the application of the basic principles restricting liability which had been established at the first case on the matter–the *Weinstein* case–thereby broadening the liability in the area.[149] This judicial trend is expected to be continued, according to the research, and it evidenced a willingness to use negligent misrepresentation cases as a vehicle to abandon the cautious, conservative and hesitant rules found in the common law.[150] There, negligent misrepresentation was shaped as an exception to the rule denying liability for pure economic loss, whereas in Israel, it was practically set as the new order[151].

Thirdly, in most cases in which the liability for pure economic loss was restricted in Anglo-American law, this was done in order to place another stone in the dam preventing the tort flood from bursting due to unwanted imposition of liability.[152] In Israeli law, as well, imposing liability for economic loss almost always arose in a factual setting that entailed additional policy considerations and

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146 SC 593/81 Ashdod Vehicle Factory v. Chizic 41 P.D.(iii) 169 (1987). *Weinstein*, ibid.

147 STREET ON TORTS 215 (MARGARET BRAZIER, JOHN MURPHY EDS., 10th. ed., 1999).

148 Gilead, *supra* note 33. Gilead examines a forty-five year development in light of the main measurements determined for limiting the liability back in the *Weinstein* case: The foreseen reasonable reliance of the plaintiff, the special relations between the two parties and the assumption of liability on the side of the defendant.

149 For example, in the cases of *Amidar*, supra note 145 and SC 783/83 Kaplan v. Novogrotzky P.D. 38(iii) 477 (1984), the court has waived the prerequisite of the adviser being a professional. In SC 790/81 *American Microsystems Inc v. Elbit Systems* P.D. 39(ii) 785 (1985), court waived the prerequisite of the defendant knowing the identity of the potential person to whom the information is designed, and knowing the purpose for which the information was given to.

150 Gedron, supra note 36, at 171-172.

151 Gilead, *supra* note 58 at 126.

152 The *Murphy* case, for example, raised the issues of public authorities' liability and the liability for omission in negligence, on top of the issue of the loss being purely economic: "The critical Question... is not the nature of the damage in itself..." Lord Oliver, *Murphy*, *supra* note 102, at 933. Some consider these issues as the main shapers of the non-recovery rule. Jolowitcz & Winfield, *supra* note 38, at 133.

difficulties. Nonetheless, not only it did not discourage the courts from imposing liability, but rather, in numerous cases, imposition of liability was a mean for significant break from prevailing restrictions on negligence liability. Thus, for example, liability for economic loss was imposed even when it required applying it to public authorities as an exception to the standard prevailing at the time, granting substantial immunity to governmental authorities.[153] Another example was shown just recently when pure economic loss has been used as a tool for breaching a clear boundary of the duty of care in imposing liability for a loss consequential upon pursuing legitimate legal proceedings. In *Trade Inc. v. Shalom Weinstein Company Inc.*,[154] the plaintiff won recovery for pure economic loss he bore by the defendant due to their former mutual involvement in civil proceedings, whereby the latter neglected to apply for an interim order of attachment to secure the outcome of a judgment.[155] The case was grounded, among other, in misrepresentation on the part of the defendant, thereby breaking through the last boundaries placed on the imposition of liability for a negligent misrepresentation, which had previously been restricted to acts performed in a business context alone. More so, as opposed to the traditional analysis of misrepresentation, requiring the plaintiff's reliance on the display as a main measurement for imposing liability, in *Trade*, the trying court, rather than the defendant itself, was the one who relied on the false *statement* presented by the defendant, thereby causing loss to the plaintiff.[156]

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2. Indirect Emotional Harm

Constructing a narrow duty of care for indirect emotional harm, Israeli Law has made problematic use of rules developed in Anglo-American case law in this area. The first opportunity offered to the Israeli Supreme Court to discuss pure

153 Monumental decisions are SC 209/85 *Kiryat-Ata Municipality v. Ilanco LTD* P.D. 42(i) 190 (1988); SC 324/82 *Bnei-Brak Municipality v. Rothberg* P.D. 45(iv) 102 (1991). The recent most significant case to endorse the imposition of liability on local public authority for pure economic loss is SC 653/97 *Baruch and Zipora Center Co. v. Tel-Aviv-Jaffa Municipality* P.D. 53(v) 817 (1999), where liability in negligence was imposed on the urban planning authority for dragging its feet in granting building permission to land owners. The owner was compensated for the financial benefits he could have had, had the permission given on time.

154 SC 1565/95 *Trade and See Services LTD. v. Weinstein Co. LTD*, P.D. 54(v) 638 (2000). This circumstantial context was previously declared as having no ground of raising tort liability. See SC 572/74 *Roytman v. United Eastern Bank LTD* P.D. 29(ii) 57 (1975) and SC 735/75 *Roytman v. Aderet* P.D. 30(iii) 75 (1976).

155 Court's decision was put more narrowly: "…should a plaintiff, asking for temporary seizure injunction, is under a duty of care to the defendant, not to harm him financially while doing so?". *Trade*, ibid, at 647.

156 The only boundary on such claims was set by one Justice, who has added the requirement that the tortfeasor be extremely reckless.

emotional loss, identified as "nervous shock", was in 1958 in *Stern v. Shamir*,[157] where a mother, whose son had drowned in a cesspit due to the defendant's negligence, sued for compensation for the emotional harm caused to her by his death.[158] Her suit was dismissed by the trial court on the ground of diagnosing her emotional condition as "nervousness and hysteria," which the court did not consider to amount to "mental illness".[159] The Israeli Supreme Court affirmed, and added the requirement of physical manifestation of pure emotional harm, holding that in Israeli case law, emotional harm is not subject to compensation unless it leads to bodily injury or a notable illness.[160] An additional ground for denying compensation, set as a duty policy consideration, was that it was inconceivable to allow recognition of injury to a party whose harm arose from hearing of the disaster rather than witnessing it. The court reasoned its non-recognition by referring to prevailing English case laws on the issue.[161]

After a history of rejecting claims for indirect emotional harm[162]–and 22 years after American law and a decade after English law–this harm was first recognized by the Israeli Supreme Court in 1990, in *Al-Socha v. The Estate of the late David Dahan*.[163] After engaging in a detailed review of the history of recognizing this loss in the common law, the court decided to introduce within Israeli tort law a new "secondary duty of care" towards these indirect injured parties.[164] However, when establishing the duty, the court was very careful to draw its boundaries and delineate them, step by step, while emphasizing the fundamental necessity to narrow the duty's application.[165] by the time this process ended, the court

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157 SC 294/54 *Stern v. Shamir*, P.D. 12(i) 421 (1958).

158 The mother-plaintiff sued mainly for the "shock", as the Court describes it. *Ibid*, at 443.

159 *Ibid*, ibid.

160 The Court relied here on the case of SC 4/57 *Nadir v. Kahanovitz* P.D. 11 1464 (1957). However, in the *Nadir* case, the Justices have rejected the legal rule as unfair, and eventually stated that the mental suffering incurred there was additional to bodily one, and therefore, compensable.

161 *Stern*, supra note 157, at p. 443. In later ruling, Israeli courts recognized suits by such plaintiffs, provided that they were present at the scene of the accident. See, i.e., DC 582/72 *Shakuey v. Salman* P.M. 1979(ii) 79 (1979) (a mother who lost her son at a car accident and suffered 10% permanent psychiatric disability). This requirement also invalidated the claim of a man who's wife and son were killed in a car accident, in DC 53/66 *Caradi v. Platzgein* P.M. 51 161 (1967). The plaintiff argued that due to being overwhelmed with sorrow, he neglected to nurture his hours, which was his source of income.

162 See the survey at SC 5803/95 *Zion v. Zach* P.D. 51(ii) 267, 274 (1997).

163 SC 452,444/87 *Al-Socha v. The Estate of the late David Dahan*, P.D. 44(iii) 397 (1990).

164 *Ibid*, at 431.

165 *Ibid*, at 432.

presented a restricted and entirely modeled duty of care according to which:[166] 1. Applied to plaintiffs who have substantial family ties to the directly injured victim;[167] 2. Relates to any exposure to the suffering of the victim, regardless of being instrumental or direct;[168] 3. Closeness in place or time to the scene of the event is not required. It is sufficient to show that the harm was caused as a result of the other person's suffering; 4. A substantial emotional harm to the plaintiff is required. This ruling placed Israeli Law in a relatively good starting point. Its duty seemed even wider than that prevailing at the time in Anglo-American law.[169] But its legacy, as very soon became clear, was fundamentally different.

Following *Al-Socha case*, courts in Israel consistently and continually acted in every possible way to narrow the scope of the duty of care this case has set for protection against indirect emotional harm. At the center of this process stood the conceptual transformation of the parameters suggested as factors to guide courts' discretion into rigid preliminary conditions for determining the sustainability of the case.[170] Firstly, the requirement of severity of the loss was construed in the *Hativ* case[171] as a requirement to prove permanent and severe psychiatric disability.[172] This stringent interpretation, whereby judges are obsessed with psychiatric disability percentages,[173] needless to say, is unprecedented in Anglo-American case law, from which Israeli case law has ordinarily nourished.[174] Other commonwealth systems also made no reference to these standards of

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166 See the analysis of the case also at Ariel Porat, *Tort law: The Negligence Injustice according to the Supreme Court's adjudication from a Theoretical Perspective* in YEARBOOK OF THE ISRAELI LAW 1991 221, 267-268 (ARIEL ROZEN-TZVI, ED., 1992), and also by Justice Shamgar himself at SC 642/89 *The Estate of the late Meir Shneider v. Haifa Municipality* P.D. 46(i) 470, 474-476 (1992).

167 This demand was less harsh than the one ruling in England at that time, which allowed compensation among first tier family relations alone. However, Justice Shamgar stressed that only in extreme and rare cases should second tier plaintiff be considered as compensation entitled. *Al-socha*, supra note 163 at 432.

168 *Al-Socha* case, ibid, at 432-433.

169 This is how the case was perceived by legal agents. See, e.g., *Shneider*, *supra* note 166 at 475.

170 Mullany & Handford, *supra* note 81, at 44-45.

171 SC 3798/95 *Hasne LTD v. Hatib*, P.D. 49 (v) 651 (1995).

172 A comprehensive survey I conducted on the matter reveals that in the average, only plaintiffs with a permanent disability of 20% and up will be considered for compensation. Bitton, *supra* note 9, at 110-111.

173 Markesinis considers the plaintiff's reasonable sensitivity a major factor. He also primers and sees as sufficient, the close relationship between the plaintiff and the direct victim. Markesinis & Deakin, *supra* note 38, at 133.

174 I found no evidence, either in case law or academic writing, for using the severity of the emotional harm as a criterion for compensation. See, e.g., PROSSER AND KEETON ON TORTS 366 (PAGE W. KEETON ET. AL. EDS., 5th ed., 1984). Moreover, in one of the cases, the House of Lords granted compensation to a plaintiff that was described as being at risk of suffering from prolonged grief symptoms in the near future. Revenscroft v. Rederiaktiebolget Transatlantic [1991] 3 All E.R. 73, 77.

psychiatric permanent disability.[175] Secondly, even the rescinded requirement of presence at the scene of the accident has been misleadingly interpreted as requiring that even an injured party who *was* present at the scene of the accident be compelled to meet the strict conditions set out in the *Al-Socha* case - a requirement which stood in sharp discrepancy even with the stringent *Alcock* ruling.[176] Fourthly, the requirement that the harm be caused in a process of shock, which was completely rejected in the *Al-Shocha case*, was restored through the front door as one of the core requirements for imposing liability.[177] According to this incoherent ruling, the more prolonged the direct victim's suffering is, the less exposed to liability the tortfeasor was.[178]

C. Three Systems, One Departure

Comparing Anglo-American and Israeli law's approaches towards pure economic loss and indirect-emotional harm shows diverging trends: in Anglo-American law, an approach which dismissed the recognition of economic loss while introducing exceptions to the general rule, has taken root. In Israel, contrastingly, though adhering to Anglo-American rhetoric, courts practically acknowledged the importance of economic loss, saw it as a growing part of negligence jurisprudence, and were willing to move further away from the traditional restrictive rules set by its counterparts.[179] Reading through Israeli case law, it is rare to find a reference to "economic loss" as such;[180] this loss is no longer regarded significant a parameter for narrowing liability under negligence

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175 THE LAW OF TORTS IN NEW ZEALAND 46-52 (STEPHEN M.D. TODD ED., 1991).

176 See *Zach*, *supra* note 162. This case was the first to analyze the *Al-socha* case.

177 SC 7836/95 *General Medical Services v. The Estate of the late Tammy Keren* P.D. 52 (iii) 199. The Israeli Supreme Court dismissed a suit brought by two daughters whose mother had died as a result of a medical malpractice. The decision was based, *inter alia*, on the determination that the harm caused to them, arising from the fact they had been exposed for several years to their mother's suffering from misdiagnosed cancer until her eventual death, did not fall within the boundaries of the *Al-Socha case*.

178 This was the case's *ratio decidendi*. The Court also stated, as *obiter dictum*, that the girls were not sufficiently damaged, since despite their emotional suffering they managed to function normally. *Ibid*, at 205.

179 Gedron, *supra* note 36, at 184; ;Gilead, *supra* note 58, at 126 (Gilead's conclusion was limited, as mentioned, to misstatement and misrepresentation cases).

180 In SC 915/91 *The State of Israel v. Levi* P.D. 48(iii) 45 (1994), Chief Justice (retired) Shamgar pointed to economic loss as one of the indicators relaxing proximity between rival parties in negligence dispute. However, this was not a conclusive indicator and the case dealt primarily with means to narrow the liability of public authorities. Moreover, no further enhancement or discussion of that statement was taken in following case law.

law.[181] Indirect emotional harm, on the other hand, received some recognition in Anglo-American law which was later constricted. Nonetheless, even in its narrowed form today, the limits shaping this liability do not resemble the severity of its Israeli counterpart, which has confined and continues to confine the scope of protection given against this harm. This difference between Israel and Anglo-American law is further magnified by the fact that the latter have additional compensation schemes for indirect emotional harm consequential upon the death of a close relative.[182] Israel, on the other hand, lacks any such alternative causes. Furthermore, Anglo-American tort law also has set the rules concerning indirect emotional harm and pure economic loss under a fault liability regime of negligence law for these accidents. In Israel, on the other hand, a non-fault, strict liability rule dominates the realm of car accidents, to which almost all the case law referred. Under such no-fault liability regime, using fault-based policy considerations of the kind negligence law offers is practically out of place, unnecessary and unprecedented outside the realm of these cases.[183]

In the next Part I will bring to the fore the details of the course of departure of the Israeli system from the Anglo-American ones, demonstrating how it has been formed. Exposing this specific manner of departure will avail us, at the last part of the article, to provide a more meaningful comparative and contextual explanation to this it.

Part IX: Economic Loss and Indirect Emotional Harm in Israel - Similar Narratives, Different Realities

The Anglo-American tort narrative, which presents pure economic loss and indirect emotional harm as equally exceptional harms, suffering from the same difficulty of judicial objection and restricted recognition, resumed a place of honor in the Israeli tort canons as well.[184] A closer analysis of the separate development lines

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181 See Justice Shamgar's reservation himself, *ibid*, at 70. Also see Gedron who claims that in cases of public authorities' liability in specific, the courts do not relate any unique attention to the nature of the loss, but rather to the tortfeasor's identity, *supra* note 36, at 164.

182 Usually shaped as a regulatory rule allowing some relatively substantial amount of damages for such lost. *See*, for example, *supra* note 248.

183 Israel Gilead, *On the Fit between the Tortuous and the Contractual Aspects of the Car Accidents Statute*, 23 MISHPATIM 389, 390 (1994).

184 The most famous monumental case in which this notion was held is SC 243/83 *Gordon v. Jerusalem Municipality* P.D. 39(i) 113, 139-143 (1985), followed by every case (though only few) discussing "economic loss", as such. This notion was reinforced in Israeli literature. See, e.g., AMOS HERMAN,

of these harms, however, indicates otherwise. Israeli tort law affords wide and systematic protection to a person's economic interests, particularly when bearing in mind the further protection given to them in other legal fields.[185] On the other hand, the protection given to indirect emotional interests is weak, vague, strict, and suffers from a tendency to be constricted. Examining these structures of recognition side by side emphasizes and illustrates their differences. For this purpose, I have chosen to focus on the constituting point of these two duties of care, by comparing the pioneer and groundbreaking judgments of each duty of care in Israeli law: the judgment in the *Weinstein* case, where liability for pure economic damage was first recognized,[186] and the judgment in the *Al-Socha* case, where, for the first time, an ordered doctrine imposing liability for indirect emotional harm was established.[187] The decisions will be compared through a spectrum of various parameters that illustrate the different attitudes they embody.

1. The Rhetorical Structuring of the Duty of Care

a. Economic Loss – The *Weinstein* Case

The *Weinstein* case, issued in the 1950's, established that an engineer giving his professional opinion, owed a duty of care towards a builder, who suffered economic loss as a result of this negligent opinion.[188] Positioning *Weinstein* as the starting point of the journey tracking the historical development of pure economic loss in Israeli tort law represents not only analytical-historical accuracy, but also substantive historical significance. This judgment was delivered in Israel while in Anglo-American legal tradition no recognition was accorded to pure economic loss in negligence,[189] at a period when the common law had almost crucial sway over tort decisions of the Israeli Supreme Court, rendering the case a breakthrough for the legal independence

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INTRODUCING TORT LAW (2006). In his book, which is the most recent and updated comprehensive textbook on Israeli tort law, the author dedicates a whole chapter to "unique negligence situations", whereby he numerates economic loss and indirect emotional harm as similarly "problematic".

185 This conclusion is also shared by Jane Stapleton, *In Restraint of Tort*, in THE FRONTIERS OF LIABILITY 83, 87 (PETER BIRKS ED., vol. 2, 1994).

186 *Weinstein*, *supra* note 145.

187 *Al-socha*, *supra* note 163.

188 This case revolved around pure economic loss, whereby the plaintiff, a builder, suffered economic loss due to the refusal of the group who hired his services to pay for his construction work, which fell below the common standard. The builder argued that his failure was the result of the engineer's negligent plans which he was required to follow by the group who hired him. The builder, therefore, sued the engineer for his negligent planning, which caused the damage to the building, in which he had no property rights in. The builder also had no interactions with the planning engineer during undertaking and performing the work.

189 Gilead, *supra* note 58, at 89.

of the young state's courts at that time.[190] In spite of argumentations raised to relax its innovative nature,[191] one cannot ignore the judgment's status as positioning the economic interest in Israeli tort law as one possessing sufficiently supreme value to justify breaking fundamental legal boundaries. Being the first case ever to recognize liability in negligence for economic loss, one might have expected this judgment to bear restrained and humble reasoning. Yet, the judgment appears to be decisive, autonomous and provocative. However, while the rhetoric of Court still stood relatively in line with the general non-recovery rule notion, its substance recognized pure economic loss as protected under negligence law. This rhetoric-substance nexus is revealed by a close reading of the judgment.

After reviewing the English case law, which determined a clear no-recovery rule on the subject,[192] the court determined, already at the opening of its rationale, that the element of foreseeability could not exclude a certain type of loss *per se*.[193] This standpoint required that the judges overcome the contrasting English law and rely on its minority opinions.[194] The court examined the definition of "loss" in the Israeli tort Ordinance, and determined that its “basket provision” could definitely be inclusive of economic loss alone, linguistically wise.[195] To strengthen this argument, the court also stressed that plaintiffs have the right to compensation for significant losses, and that economic loss was one such damage, though intangible by nature.[196] Next, the court has acknowledged that there had existed some "important and practical reasons" which necessitated careful treatment of cases in which the loss was caused by a misstatement.[197] This acknowledgement, nevertheless, did not lead the court to

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190 Daniel Mor, The Tort Ordinance's Forty Years of Rulings, 39 HAPRACKLIT LR 344, 348-349 (1990).

191 Mor tries to present the case in a more conservative manner, by arguing that it could be supported by using broad interpretations of the legal tools of that time. *Ibid*, at 349.

192 The no-recovery rule was declared in Candler v. Crane Christmas & Co., [1951] 1All E.R. 426.

193 "The type of loss in itself should not determine the limits of the scope of liability". *Weinstein*, *supra* note 145, at 1332. The Court relied on the general rule used to determining the scope of liability as was stated at Donoghue v. Stevenson, [1932] A.C. 562.

194 *Weinstein*, *ibid;* see the references at 1332-1333. The Court also distinguished the case before him from other no-recovery cases as being irrelevant to the issue this case raised. See the references at *ibid*, at 1334-1340.

195 At the time the ruling was held, the court was statutorily obliged to use the original English version of the Ordinance – which was the byproduct of the colonial English sovereign – when interpreting it. Starting at 1980, a legislative reform granted the Court the power to use Israeli independent interpretation methods.

196 *Weinstein*, *supra* note 145, at 1334. This seems, however, like a misinterpretation of the phrase "substantial damage" which was until then understood as tangible damage, a traditionally basic requirement to gaining tort recognition for one's suffering.

197 *Ibid*, at 1340.

enumerate a blacklist of policy considerations or declare this loss to be "problematic", but rather motivated it to set restrictions for coping with its unwanted implications.

This narrative that was built by the court in its judgment presented, therefore, "a narrative of acceptance": shortly after describing the facts, the court presented its opinion under which liability in negligence for this type of loss had to be imposed. Only in its *obiter dictum*,[198] did the court mention that certain "problems" existed in imposing liability for this loss, and then hurried to emphasize that these problems would not interfere with its recognition. In the final stage, the court very briefly reviewed each "problem" and followed with a suitable solution, entailing the imposition of some limitations on the scope of liability.[199] Though eventually set, these limitations' positioning within the greater narrative enabled them to be seen in a "softer" light, as ones that did not base a rule of non-recovery, but rather a rule of a "restrained acceptance".

The court's description of well-known policy considerations in this field–such as the fear of a flood-tide of cases and the imposition of liability disproportionate to fault–as "economic rationales" or "practical rationales" also de-dramatized their meaning.[200] It relocated them from the arena of substantive policy considerations, where they exerted critical influence on the character of tort law, on its ideological goals and on society as a whole, to the arena of minor, technical and local problems to be easily solved by instant solutions, namely, "…as mentioned, merely to limit the cases in which the duty of care will be imposed in respect of negligent statements…".[201] The new duty of care was also limited to plaintiffs belonging to a group of people to which the defendant addressed his professional opinion.[202] These limits display the simplicity with which the court managed to solve the "problems" it had listed, mainly through the use of the well known tort rule of reasonable foreseeability,[203] leaving room for later judicial interpretation and creativity without restricting future judgments to stringent or mathematical rules of any kind. The court

198 The court's discussion on this subject is four pages length, and starts only after twenty pages have already been written from the beginning of the verdict. *Ibid*, at 1340.

199 Again, the Court's supportive attitude is reflected also in quantitative criterion: Out of the four pages in which he discussed the nature of the loss, only four sentences were dedicated by the court to presenting the problems, while all the rest of the writing was dedicated to solving them.

200 *Weinstein*, *supra* note 145, at 1341.

201 Ibid, at 1342.

202 *Ibid*, Ibid.

203 Except for the argument regarding inappropriate intervention with negotiation rights, all the rest of the justifications used by the court to justify its ruling related directly and solely to what the Court identified as "proximity", allowing the reasonable "foresight" of the loss. *Ibid*, at 1342-1347.

did not give special emphasis to the listed difficulties and did not display any "real fear" of them. The court did not engage in dramatic speech such as a reference to the mechanism of compensation as a limited national resource or to the legal system as one committed to setting realistic boundaries for this type of loss. All these actions were taken by the court later, however, when it structured the duty for indirect emotional harm.

To conclude, the Court in *Weinstein* presented a new duty of care in tort law, according to which "a professional owes a duty not to be negligent when preparing an opinion if he prepares it for the purposes of a certain transaction of a defined scope, and he will owe this duty to the injured party, if he intends the latter to rely on it, whether or not he knows the specific identity of the person to whom the opinion will regard…".[204] Above all, this formulation of the duty demonstrated the court's use of well known tort principles and parameters, which ensured that liability would be imposed whenever circumstances indicated that the tortfeasor could normatively and technically foresee the economic loss. Thus, the court created a duty of care that had flexible boundaries, evidencing an inner coherent logic and enabling appropriate future development. And indeed, this ruling has created a reasonable and comfortable basis for consistent expansion of the duty, leaving behind it a heritage of practiced recognition for this loss.[205] However, throughout its judgment, the Court has dialogued with the English non-recovery rule regarding economic law, revolved around it and set the new duty as a justified exception to it. Though refraining, on the rhetorical level, from discharging itself from its legal obligation to comply with the non-recovery rule, the Court, in the substance of its decision, breached and infringed it.

b. Indirect Emotional Harm - The *Al-Socha* Case

As opposed to this complex yet inclusive narrative, an entirely different picture emerges in the *Al-Socha* case. Here, the Court opened his discussion with a survey of the Israeli legal tradition in this area, firstly referring to the *Stern* case,[206] where it had been held that no compensation would be awarded for emotional shock *per se*. Later,

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204 *Ibid*, at 1344. Added to the above was the requirement that the professional ""in the circumstances… could not have a reasonable ground to assume that his opinion would be doubled-checked, in an independent examination, prior to it being acted upon". *Ibid*, at 1346.

205 Gilead, *supra* note 58.

206 *Stern*, *supra* note 157.

it described the recognition of the duty for indirect emotional harm as limited to cases where the injured party witnessed the accident, while generalizing on the issue as pertaining to "bystanders" rather than as one involving plaintiffs witnessing an accident to a loved-one.[207] Following these problematizing comments, the Court went on to reviewing English law's account of the harm. It opened with a clarification that this account had been built out of an excess of caution originating from considerations which were described as "central", and as "policy related":[208] the risk of a flood of cases; the risk of fraudulent claims and the problem of identifying the causal connection; a tradition of recognizing this loss only when accompanied by physical injury and the fear of imposing an excessive burden on the behavior of tortfeasors. As its review progressed, these considerations were not invalidate, but rather emphasized as dictating limitations on the pure foreseeability test as a yardstick for setting a duty of care, reinforcing the reader's instinctive acceptance of the need to substantially limit the duty to protect tort law from the dangers it entails.[209] A similar usage was carried with the review of American law, as the Court detailed the difficulties embedded in recognizing liability for this loss, thereby justifying the need in preserving its boundaries.[210] By the time it reached the point of appropriating a way to approach this loss **today**, the Court has presented a heavy burden of important policy considerations and endless limitations, which would naturally lead to construct a restrained and limited duty of care, the primary justification for which relied on a "solid" tradition of well-based fears.

Reaching to its precedence-setting decision, the Court has taken, again, the last opportunity to enumerated, the abovementioned list of policy considerations, referring to them as requiring a constriction of the duty of care, the existence of which, as noted, it still did not even proclaim![211] Thus, the Court constructed the duty through a narrative of restraint. This restraint, it has been opinioned, was required to prevent what might otherwise lead to what is described as no less than a veritable catastrophe:[212]

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207 This is the general and inaccurate conclusion of Chief Justice (retired) Shamger (*Al-Socha*, *supra* note 163, at 408).

208 See, e.g., *ibid*, at 416, 419, 421.

209 See, e.g., *ibid*, at 410-411 (the *Hambrook* case), 418 (the *McLoughlin* case), 418-419 (the *Jaencsh* case).

210 See the description of the American case laws at *ibid*, at 425.

211 *Ibid*, at 432.

212 *Ibid*, ibid.

> "… [The] tortfeasor, who negligently caused a physical injury to someone, will be obliged to compensate a large number of people, whose feelings and mental stability have been affected in any way by the negligent event. This result is unacceptable, of course, both with respect to the heavy burden on the tortfeasor in particular and on human behavior in general, and with respect to the burdening of the legal system, which is being asked to harness itself to the issue in order to offer the protection of the law to the interest of not being emotionally hurt. An exclusive application of the foreseeability test would cause a multiplicity of claims, including, probably, claims for trivial losses, and frivolous and fabricated claims. The legal system, which even today has great difficulty in coping with the abundance of cases, by reason of various limitations that are imposed on it, would face a doubling and even a tripling of the claims in connection with every accident; a reasonable legal policy cannot lend a hand to this…".

The Court's words speak for themselves. They create a sentiment of fear of total boundaries breaking. The apocalyptic description of the impoverishment of innocent tortfeasors, the flooding of the courts, their exploitation by fraudulent claimants and paralysis of the entire legal system, seem to require the immediate imposition of any restrictions, even though at that time these cataclysmic arguments have already been disproved one by one in seminal judgments in the common law.[213] In particular, presenting the claimants as persons who wish "to harness" the legal system to aid them, is troublesome. Choosing this word choice, the Court made the legal system inaccessible to these claimants, estranged and excluded them. It presented the legal system as one that is passively forced to take part in their caprices and not as a system that is actively "harnessed" in a sympathetic manner for reclaiming their justified rights. The starting point for the construction of the duty of care here is the screening of only appropriate losses. Its construction is that of a "stepchild" to the general losses and not of a "lost child" or “new child” pleasuring her tort law parents, as the economic loss’s experience has been constructed.

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213 The Court refers to *McLoughlin*, *supra* note 130, where the House of Lords refutes the traditional objections raised against recognizing the indirect emotional suffering. *Ibid*, at 421, 425-426

At this point, the court turned to the limitations dictating the duty, shaping it to meet exceptional and unique foundations. The court constructs the duty in a manner strange to familiar negligence law reasoning, while openly acknowledging the application of arbitrary parameters.[214] Here too, Court ceased the opportunity to reiterate some of the arguments against constituting the duty, and presented them in an absurd manner, i.e. concentrating on describing the situation which might arise were these limitations not applied.[215] This presentation has "naturally" urged the necessity of using restraining policy considerations, a necessity which was further intensified by the fact that these considerations were not countered at any stage of the ruling, thereby presented as enduring legitimate reasons for limiting liability.[216] This narrative of fear of a dangerous duty was the seal of approval given to subsequent courts to further strengthen the limitations on the duty of indirect emotional harm, as indeed actually occurred.[217]

The divergent manner with which the two damages were treated went far beyond narrating means and implications;

2. Reshaping the Scope of Tort Liability - Ancillary Consequences to the Harms' Recognition

Comparing between the two judgments, their contrasting influences exerted by the expansion of the limits of liability in negligence is noticeable. The indirect character of the economic loss is seen as the main reason for using it in Anglo-American tradition as a central device for limiting liability in negligence, in general, and limiting the liability in negligence of public officials, in particular.[218] In contrast, in Israel, as I have demonstrated, imposing liability for economic loss led in most cases to changing the nature of the standard of care by which negligence was founded and/or for expanding tort liability into new fields of human activity. The *Weinstein* case, more than any other, symbolized this trend, not only by being the first case to recognize pure economic loss in negligence, but also by being the first to hold that a person who gives an opinion owes a duty to act without negligence, even if his

214 *Ibid*, at 423.

215 Shamgar goes back, again, to the fear of fraudulent suits and of compensating mild suffering. *Ibid*, at 436.

216 The fear of fraudulent suits and of petty suits is brought as the main justification for limiting the duty to only plaintiffs suffering from highly substantial mental diseases such as Psychosis and Neurosis. *Ibid*, ibid.

217 The fear of petty and fraudulent suits was endorsed in later writing at Porat, *supra* note 166, at 267,270.

218 Gilead, *supra* note 58.

opinion does not pose a risk of physical injury to another. In contrast to this picture of a breach of varied tort boundaries,[219] a conservative picture emerges from the case law concerning indirect emotional harm.[220] Here, a negligent physical injury to a primary victim was involved in any case, so that the tortfeasor was already under a liability to compensate her. The expansion of the duty of care towards indirect emotionally injured parties entailed a change in the boundaries of the *consequences* of the negligent act alone, and not the boundaries of the *behavior* itself that led to it.[221] This difference between the two harms indicates that the Court's greatest difficulty with imposing liability for indirect-emotional harm originated from it being devaluated in its own right. By contrast, most of the reluctance attributed to pure economic loss derived from viewing it as a device for expanding negligence liability's boundaries rather than seeing it as problematic or inappropriate *per se*. Supportive of this hypothesis in English law is the expressed words of Lord Oliver in the *Aliakmon* case, to the effect that the quality and type of damage had never been a problem in imposing liability for economic loss, but rather the circumstances in which it occurred were what interfered with the provision of compensation.[222] In contrast, the entire discussion concerning indirect emotional harm mostly revolves the nature of this damage as being (in)appropriate for compensation.[223]

3. Silence v. Obsessive Discussions

The *Weinstein* case was the first and one of the only cases, in which the Israeli Court termed the pure economic loss before it as somewhat "problematic."[224] However, the simple solution given by Court to its problematic features, immediately thereafter, left a clear heritage of strengthened justly recognized loss. Manifestly, since this case, the court has almost never referred to the unique nature of the damage before it as

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219 In *Trade*, *supra* note 154, for example, the Court had to conclude first that there is a *lacuna* on this matter in Israeli law, despite the fact that the Israeli Civil Procedure Act, 1984 allowed compensation in the case of harmful seizure proceedings only if the case was ruled in favor of the party against whom the seizure was held. In *Trade*, the injured party has not won the original case, and was therefore ineligible for such compensation according to this act. Filing a tort law claim, therefore, was his only legal chance for compensation.

220 This is said excluding relational economic loss, where the wrongdoing is obvious and the question refers solely to the scope of his liability. Perry, *supra* note 47, at 8.

221 Levit, *supra* note 4, at 190. The no recovery rule for indirect emotional harm is also incompatible with the tendency to compensate for a generally foreseeable damage.

222 *Aliakmon*, *supra* note 143, at 379-380

223 Handsley, *supra* note 4, at 458.

224 Attentively or not, the court has not use the common terminology of "economic loss", but rather related to the case as concerning "monetary harm". *Weinstein*, *supra* note 145, at 1331.

"economic loss", and has chosen to focus its duty considerations discussion on fundamental questions regarding the type of circumstances before it rather than in the type of loss it protected.[225] For example, in the groundbreaking *Trade* case,[226] the court did not even once use, in its long and detailed judgment, the phrase "economic loss" or any equivalent term,[227] even though the judgment engaged in multiple breaches of the boundaries set for negligence, in order to protect the plaintiff against this loss. This trend of ignoring the identification of the damage as purely economic in nature, and disregarding the difficulties entailed by it, is a recurring theme in the case law protecting pure economic interests.[228] An Israeli scholar who explored economic loss adjudication opinioned the obvious on the reason for this silence, namely that it is simply the judicial assumption that according protection against this loss is understandable and justifiable *per se*.[229] The court's lack of clarification regarding its attitude towards this loss has left open the question of its desirability.[230] Consequently, pure economic loss that is traditionally and repeatedly defined by common law as problematic, controversial and challenging the natural boundaries of negligence law, was not attributed special treatment in Israeli law, silently legitimating it much like any other recognized form of loss which does not require special deliberation.[231] In clear contrast stands the heritage left behind by the *Al-Socha* case: The exaggerated and repeated remarks by the Court concerning the nature of the harm as problematic and dangerous led to a legacy of consistently repeated obsessive deliberations, where the courts consciously and openly trouble themselves, each time again, with the question of the desirability of this type of damage and the

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225 Gedron claims that the economic loss, as such, was never discussed directly by the Israeli courts. However, this conclusion is inaccurate. There are evidences of rare used of this loss as pertinent to liability imposition. See SC 451/66 *Kornfeld v. Samueloff* P.D. 21(i) 310 (1967) and DC 1586/63 *Brikman v. Atid LTD* P.M. 58 76 (1973). Also, since *Levi*e, *supra* note 180, where economic loss was identified as creating remoteness between parties, there have been insignificant 3 mentioning of this loss in Israeli courts, two of which were held by a district court and only one by the Supreme Court.

226 *Trade*, *supra* note 154.

227 The harm to the plaintiff was described by the court as “loss of earning due to the inability to utilize the corporation’s assets”. *Ibid*, at 647.

228 Especially in cases where the court imposed liability on public authorities. Gedron, *supra* note 36, at 179.

229 Gilead, *supra* note 58, at 117. Gilead illustrates this trend using cases where liability to defective product was imposed to redress for economic loss.

230 This is also Gilead’s conclusion. *Ibid*, at 126. For that reason, Gilead himself finds it difficult to deduct a clear rule regarding economic loss based on the vast judicial overview he conducted.

231 See, e.g., DC 307/93 *Menora Insurance Com. v. The Drainage Authority* TK-MH 2001 (i) 1888, 1899 (2001), where the court stated: The courts have acknowledged the viability of a duty of care not to harm one’s economic interest, even when not derived from a harm to their physical interest.

boundaries for liability it should bear.[232] Consequently, the likelihood of the concrete injured party to recover in these cases decreases each time again and a clear message is sent to the other courts: when compensation for indirect emotional harm are pleaded, great caution should be exercised and it should very rarely be awarded.

4. Legal transplantation in Israeli Tort Law – The Commitment to Common Law Rule

The principle of commitment to common law through the statutory obligation to apply English law dominated Israeli law when the first cases concerning indirect emotional harm and economic loss were decided.[233] According to this principle, Israeli courts were compelled to follow English rulings when adjudicating tort cases. This commitment was qualified: the Israeli judge was required to identify the leading principle in the English ruling in the area in which he was required to make a decision, and fully apply it to the case before him, unless applying English law would have contradicted Israeli social values.[234] An examination of the use made by the Israeli courts of this methodological principle reveals the attitude displayed by the courts towards these losses. Even though *prima facie* both losses suffered from lack of sympathy in English law at the time when Israeli courts had made a decision regarding them, in actual fact each was treated differently.

The judgment in *Weinstein* not only clearly illustrates how it was possible to get liberated from the English ruling in the tort law alone, but rather symbolized this possibility of freedom and the creation of local independent rulings, in general.[235] The Court in *Weinstein* did not hesitate to challenge the Anglo-American ruling which had been firmly and long-lastingly established, to declare it to be irrational.[236] Though never self-declared as rebelling against English law, both the case law and the

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232 See, e.g., *Sneider*, *supra* note 166, at 472-473; *Zach*, *supra* note 162166, at 273-274; DC 697/94 *Razon v. Haddassah Organization* TK-MH 97(iii) 2825 (1996).

233 Article 2(1) to The Civil Tort Ordinance of 1944, which was then in effect. *Weinstein*, *supra* note 145, at 1328-1334. See the Court's expressed declaration of this obligation at *Stern*, *supra* note 157, at 427.

234 The limits of this judicial obligation are elaborated at Izaak Englard, Aron Barak, Mshael Cheshin, Tort Law – The General Principles 55-72 (2nd ed., Gad Tedeschi ed., 1978)

235 Only recently, the *Weinstein* case was revisited and declared a tort ruling which required at that time a Further Hearing procedure, due to the expansion of the duty of care in negligence entailed by it, and the disobedience it proved with English law: "It seems like the precedent regarding expanding the liability for economic interests (see, e.g., 106/54 Weinstein v. Kadima…), should have been subjected to further judicial scrutiny after decided". SC 983/02 *Jacobob v. The State of Israel* P.D., 56(iv) 385, 395 (2002). Only rarely does the Israeli Supreme Court holds a second, additional deliberation, with an enlarged panel of judges called upon to reevaluate their fellow-judges' former decision.

236 See, e.g., *Weinstein*, *supra* note 145, at 1332 ("there is no rational foundation") and at 1339 ("lack of reason").

literature that followed, have identified *Weinstein* as a case in which "the court dared" to act against the binding English law rule, serving as a center of attraction for future similar breaches of boundaries.[237] In the *Amidar* case, for example, the court sought to impose liability on a defendant who was not an expert in the field in which he negligently advised, thereby diverging from the limitation embedded in English law, according to which liability for negligent misstatement was conditional upon being given by an expert in his area of business expertise.[238] Moreover, the court stressed blatantly his ability to act in a manner contrary to existing English rule, even though, ultimately, a decision on the matter was not required at this specific case.[239] Throughout the Court's stages of 'liberating' itself from English law in the *Amidar* case, the Court used the *Weinstein* case as an authoritative precedence.[240]

A converse and conservative trend may be seen in the cases concerning indirect emotional harm. This trend already began in cases preceding *Al-Socha*, such as the *Stern* case,[241] which considered a claim for compensation for emotional harm caused to a mother as a result of her son's death in a cesspit. In dismissing the mother's claim, the Court made full use of English rulings. It declared its commitment to the English non-recovery rule, using it as an unimpeachable source. The Court refrained from examining the English rule's unconvincing logic, its arbitrary distinctions, the heavy criticism it had already attracted at that time and its discrepancy with the local Israeli Tort Ordinance.[242] This was particularly incoherent with the fact that in the beginning of its judgment, the court used the platform to make the unprecedented decision that it was not bound to implement English precedents literally, but rather was required to bring to the surface the relevant principle of English law in the field "and after doing so, [the court = Y.B.] would **apply** this principle to the concrete case before it, while paying attention to the special

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237 *Amidar*, *supra* note 145, at 348; DC 1820/90 Ma'ale Efraim printing LTD v. Ellerman Lines Plc, P.M. 1995(ii) 17 (1995). The literature also conceives *Weinstein* in a similar manner. See Englard, Barak & Cheshin, *supra* note 234, at 52.

238 *Amidar*, *ibid*, at 340-341.

239 The Court at *Amidar*, *ibid*, at 348, followed: "most surely, now that the days of Israeli obligation to common law rules are over, it is time for us to seek our way based on what is right and just in our eyes".

240 *Ibid*, at 348.

241 *Supra* note 157.

242 Josef Gross, The Rule of Nervous Shock, 16 HAPRAKLIT LR 145, 152 (1959). Gross stresses that at this stage the de facto separation of Israeli law from English law could have lead to a more tolerant attitude toward nervous shock.

conditions prevailing in Israel and conforming to the concepts and views of the members of Israeli society ".[243]

This comment, which was apt in the particular case, was not implemented in it. The court did not conduct any examination regarding the applicability of its ruling to the concepts and views on life in Israeli society. Even though there is no guaranty that this sort of examination would have led to a different ruling, there is no doubt that its absence prevented a genuine discussion of the issue. Hypothetically, it may be that in the Israeli society of that time, in which concern for others, human socialization and community activity were the shaping factors and were deemed to be invaluable, it was certainly possible to demand recognition of this type of damage, in which care for another grounded the harm.[244] The *Weinstein* ruling, given in 1956, had favored the advantages of independent and original local rulings, and without a doubt could have been used as a sufficient legal basis for a similar decision in *Stern*, which was heard in later years and could have brought forward by decades the protection against indirect emotional harm.[245]

Though the years had passed and times had changed, even in the 1990 *Al-Socha* case, where the Israeli judiciary already attained complete independence from English law, this problematic bond remained unchallenged. Even though the court presented itself as challenging parts of the Anglo-American ruling,[246] in fact, it created a system of principles which were guided by this ruling, and indeed gave rise to a duty that developed with time into one which was even more stringent than its Anglo-American counterpart. This outcome was particularly problematic in light of the fact that in reviewing the limited recognition given to indirect emotional harm in English law, the Court ignored a critical factual element, whereby this limited recognition was accompanied by a statutory duty to compensate those injured as a result of bereavement of a close family member.[247] This legislation always ensured

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243 *Stern*, *supra* note 157.

244 Similarly, in a later case, in which the court expressed open criticism of the English ruling that refused to recognize emotional harm, the court still regarded itself as bound by the ruling. *Nadir*, *supra* note 160, at 1468-1470.

245 Gross has severely criticized Court's adherence to the English rule regarding nervous shock which was already infamous at hat time. Gross, *supra* note 242, at 277.

246 *Al-socha*, *supra* note 163, at 423-433.

247 Sec. 1A to the Fatal Accidents Act, 1976, Ch. 30 inserted by sec. 3 to the Administration of Justice Act, 1982: "1A. Bereavement (1) An action under this act may consist of or include a claim for damages for bereavement. (2) A claim for damages for bereavement shall only be for the benefit: (a) of the wife or husband..."

some degree of compensation, even if not substantive, for this type of harm.[248] The absence of such comparable provision in Israeli law fundamentally changes the practical meaning of a rule of non-recovery shaped within it.

5. *Weinstein v. Al-Socha*

The ruling in *Weinstein* was constructed in the light of traditional tort principles while easily overcoming familiar tort obstacles. The general duty of care that was established with respect to pure economic loss thus allowed the creation of a heritage of a developing recognition alongside constant removal of restrictions, amounting to an eventual establishment as an independent, logical and autonomous duty of care.[249] Contrastingly, the ruling *Al-Socha* was based on problematic tort rules, relied on restrictive principles and a controversial Anglo-American tradition. It created a complicated and rigid heritage for later judgments, which obsessively preserved these boundaries and even narrowed them, alongside with abandoning principles which necessitated a balanced formulation of the duty of care, which might have been helpful to the courts when exercising their discretion in each case on its merits and in light of its unique circumstances. Moreover, a comparison of these two central judgments shows that not only the duty of care, as a core concept in tort law, was understood differently in each case, but also the type of damage in each case was perceived differently: In contrast to the warm approach taken by the court in *Weinstein* to the type of damage before it, the court *Al-Socha* did not consider, even once, the importance of recognizing the emotional interest of caring to others, and did not acknowledged its rightful place in the array of appropriate harms. Thus, indirect emotional harm was understood to be inappropriate *per se*, while it was also understood that compensation should be awarded for it as something of a necessity, not requiring any special justifications, with applied justified limitations.

Part X: Protecting against Economic Loss while Neglecting Indirect Emotional Harm: Distributive Ramifications

248 At the 1991 amendment to this act, the compensation sum has been raised up to 7,500 pounds. Similar eligibility for expanded circle of plaintiffs is statutorily available in Scotland, where the sum is not cupped. See PETER CANE, ATIYAH'S ACCIDENTS, COMPENSATION AND THE LAW 74 (6th ed., 1999).

249 *Weinstein* has less than 20 references in following Israeli case laws, whereas *Al-socha* hold an impressive score of over 60 mentioning in almost every case regarding indirect emotional suffering. This statistic is particularly startling given the fact that the former case has a 36 years of existence leverage on the latter.

The article's analysis thus far reveals a comparative resemblance as well as departure. Even though all three legal system show a gender bias against indirect emotional harm, whilst its Anglo-American counterparts present a more balanced model, whereby male-related interests are subject to strict rules of limited recognition and female-related interests are being only mildly less appreciated, Israeli tort law takes the gap between gender-related interests to extreme. It hence ends up much more culpable than the former legal systems with respect to feminist accusations. Israel's differential treatment carries, therefore, distributional ramifications that are broader than those stressed by feminist analysis of the maltreatment of indirect emotional harm alone. The distributive implications here are multiplied by the triple-dimensional bias Israeli law uniquely demonstrates: tort law strongly discriminates against female-related interests (first), synchronically, it strongly favors male-related interests (second), and eventually, this discrimination is administered under a rhetoric smoke curtain, claiming that these interests are equally marginal to negligence liability, thereby making this favoritism less apparent to the naked eye (third).

1. Double Discrimination: Preferring Male-Related Interests while Discriminating against Female-Related Interests

As those for whom emotional harm is particularly relevant, and for whom their emotional interest is a substantial "asset", women find themselves injured twice and consequently discriminated against twice, by virtue of the restrained attitude taken by tort law towards emotions.[250] The first injury occurs when a woman is required to meet the strict requirements of tort law, in order to prove the grounds of her claim for indirect emotional harm. In addition, even if she succeeds in this task, she will absorb the second injury to her, when her compensation is set relatively low by reason of the lower evaluation of the violated interest.[251] In Israel, in specific, the victim is further discriminated against when pure economic loss, which is a form of damage mainly suffered by men, attracts greater protection and relatively fewer limitations. Even though these tort law's entitlements are not structured as a zero-sum game, women are still being discriminated against by this proposition, since culturally

250 It has been statistically established that women are compensated twice as much as men are when it comes to evaluating a plaintiff's "Pain and Suffering". Accordingly, women are more likely to be affected by any institutionalized reduction of this type of damage. Thomas Koenig, Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 81-84 (1995).

251 Lisa M. Ruda, *Caps on Noneconomic Damages and the Female Plaintiff: Heeding the Warning Signs*, 44 Case Wes. RES. L. REV. 197, 219-226 (1993).

and traditionally, women do not receive economic appreciation for their work in the labor market, and therefore they have limited access to protected economic interests and to the benefits arising from them, in any case. As a whole, therefore, they excerpt much less from tort law, than men do.

2. Applying Traditional Dichotomies to Preserve Traditional Discrimination

Feminist theory requires a cautious scrutiny of every fervent use of legal dichotomization. The common feminist argument is that these dichotomies were primarily designed to serve for decades as tools to repress and weaken women by positioning them on the "weak" side of the values hierarchy in the relevant dichotomy. The analysis so far indicates the influence of one of the most prominent and most harmful dichotomies to women, namely, the private/public dichotomy. This dichotomy has been used throughout the patriarchal tradition as a tool for the preservation of the inferior status of women in society.[252] For many years, traces of this dichotomy were seen in tort law, for example, by way of preventing women from suing their husbands for causing injury to them, or by preventing women from instituting any suit for damages except through the legal personality of the husband.[253] The abolition of most of these restrictions, which often were one-sided and primarily harmed women, did not lead to the disappearance of the influence they had on tort law as a whole and the masculine epistemology they represented.

The history of recognizing indirect emotional harm reveals the traces of this dichotomy as contributing to formulating the tort dichotomy that distinguishes between pure economic loss and emotional harm, attributing pure economic loss to men and emotional harm to women, and concomitantly preferring the first to the second. Pure economic loss is without a doubt attributed to the "public" sphere. The loss concerns market-economic activity, which is part of the "public" sphere and stands diametrically opposed to the very clear "private" sphere of pain, worry, care and love.[254] Thus, the isolation of women in the private sphere is perpetuated, and a

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252 FEMINISM: THE PUBLIC & THE PRIVATE (JOAN B. LANDES ED., 1998).

253 Nadin Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law* in THE POLITICS OF LAW – A PROGRESSIVE CRITIQUE 151 (DAVID KAIRYS ED., REVISED ED., 1990). This had tremendous impact also on the substance that tort law ha to offer women. See Bitton, *supra* note 3, at 28-32.

254 Another manifestation of the adherence of tort law to "the public" is the preference given to corporations over individual litigants, especially in mass tort cases. *LESLIE BENDER, Feminist (Re) Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 860-895 (1990).

message is sent to society regarding the inferiority of women's damages and the fact that they are to be abandoned on the social sidelines.[255] By ignoring their typical injuries in the private sphere, the court expresses the view that women's central function in this sphere does not carry the same social importance as men's central function in the economic sphere does.[256]

3. Preferring the Wealthy to the Impoverished

As is well typical to feminist criticism, it proves to be valuable to weakened communities other than women alone. Here too, according preference to pure economic loss over indirect emotional harm has a socio-economic significance beyond the gender lines. It embodies the capitalistic approach, in which the law is a tool for strengthening the status of the wealthy by overprotecting industrial capital, and insufficiently protecting human capital and its derivatives. Richard Abel raised this argument regarding the massive protection accorded by tort law against damage to property. In his opinion, this protection stems from a clear political decision to strengthen the wealthy and preserve the notion of capitalism, in the rhetorical guise of legal decisions made by virtue of binding legal rules. This leads to the establishment of incoherent and arbitrary compensatory rules,[257] such as the restrictions imposed on compensation for indirect emotional injury. Abel focuses on the distributive outcome of this preference which perpetuates social gaps and prefers those who own property. In his opinion, only an ex-ante equal allocation of property resources in society could have justified this ex-post protection.[258]

An analysis of the findings in this article enables us to entertain an important paraphrase of Abel's idea. The protection of pure economic loss is in fact the protection of a manifest capitalist interest – money. Often, it also protects colonialist entities, as companies having money as their sole interest.[259] Tort protection of money strengthens property owners and not human capital in its most basic sense – mental sanity. Apart from being capitalistic by nature, this protection also fails to treat the entire population equally, due to the fact that not everyone enjoys the privilege of

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255 Taub & Schneider, supra note 253, at 154-156.

256 Another discriminating manipulation in tort law was practiced through the mental-physical dichotomy. Chamallas & Kerber, *supra* note 2, at 864.

257 Richard L. Abel, *Should Tort Law Protect Property Against Accidental Loss?*, 23 SAN-DIEGO L. REV. 79 (1986), Abel, *supra* note 274.

258 *Ibid*, at 104.

259 Howarth, *supra* note 43, at 326 (presenting this argument and its countering argument).

owning money. In contrast, emotional interests of connectedness are general human asset, and therefore protecting them against harm affords equal protection to all. Moreover, even if we accept the theory that the common law has "gone bad" and has returned to the policy of avoiding the imposition of liability for pure economic losses, the origin of this still seems to be generated by "masculine-economical" concerns, whereby courts have understood that imposing liability for economic loss entails excessive interference in the “free” economic relations between individuals as works against the notion of “free competition”.[260] They have also appreciated the central role played by the tort of negligence and its strong influence on commercial life and on the economic relations between ordinary citizens and professionals.[261] Thus, the profits from this development remain in the possession of those primarily concerned with the management methods of the economic world.

Richard Abel proposes a solution to the unequal protection of interests, namely, that tort law should no longer function as a compensatory mechanism for property damage but rather it should be confined solely to the protection of the body. Protection to property will be given to those who enjoy the privilege of owning property (or money), by choosing to insure themselves against the risks arising from this ownership, thus not imposing the burden of compensation upon society as a whole. Within such newly structured policy, it would be difficult to remain convinced by arguments concerning flood-tides and the restrictions on the tort compensation system. These arguments would become less relevant upon the system being initially limited to only the most important type of harm, which threatens all, rich and poor, alike: bodily harm.[262]

Abel's idea may seem too revolutionary at first glance; however, a closer look reveals that it shares a common ground with one of the rationales brought up by the courts for denying recovery for pure economic loss, namely, that the indirect victim had been able or was under a duty to regulate in advance the risk–which eventually

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260 Bryan v. Maloney, (1995) 69 ALJR 375, 385 (Canadian Supreme Court Judge Brennan’s opinion).

261 Stapleton, *supra* note 87, at 296.

262 Able grounds his objection to compensating emotional harm mainly at the “comodifying” effect this might have on human feelings. To this we can also add the suggestion made by the feminist tort scholar, Leslie Bender, namely, that this kind of harm should be granted a remedy which is more appropriate than a compensation writ, which is merely financial, e.g., compelling the tortfeasor to perpetuate the memory of the deceased direct victim. Bender, *supra* note 254, at 895-908.

materialized–to his money by way of insurance or by using contractual tools.[263] This reasoning is not far removed from Abel's abovementioned idea.

I do wish however to raise my concerns as to the usefulness of Abel's incisive proposal of according no protection in tort law to pure economic loss altogether. Such a sweeping conclusion may also place at risk the group of people whom Abel's initial intention was to protect: lower class population, which might also benefit from the protection given by tort law to pure economic interests, in the case that one of its members is financially affected by a bad deal. Moreover, this protection may actually be much more required by a poor person than it is to an upper-class victim, since the former is under a greater risk of being fallen into a bad deal, precisely because of her inherent contractually inferior position.[264] Another concern should relate to these people's money which is immeasurably more valuable to them under the diminishing marginal value of the money principle.

4. Third Discriminatory Layer: Limiting Vulnerability to Critique

According to the liberal myth, only discrimination which is motivated by unacceptable distinctions between men and women is prohibited.[265] This article's analysis of protected interests in negligence law actually reveals fully-fledged the importance of seeking consequential discrimination, whereby courts do not attribute–be it consciously or not–a gender-based dimension to their preferences.[266] Probing into Israeli law discloses a further discriminatory dimension, the rhetoric one, which makes this gender preference much harder to uncover and criticize. Exploring the patriarchal structuring of tort law, Leslie Bender warned against the **absence** of doctrines reflecting feminine experiences.[267] The warning I voice here is actually directed against **existing** doctrines which present as similar two duties of care applied today by Israeli tort law to protect against pure economic loss and indirect emotional harm. These two types of damage, which are presented in the tort rhetoric as "step-

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263 Feldthusen, *supra* note 93, at 204-209. The author points to self-insurance as the main mechanism through which economic losses should be handled.

264 IAN AYRES, PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION (2001); Peter Siegelman, *Race Discrimination in "Everyday" Commercial Transactions: What Do We Know, What Do We Need To Know, and How Can We Find Out, in A National Report Card on Discrimination* in AMERICA: THE ROLE OF TESTING 69 (MICHAEL FIX & MARGERY AUSTIN TURNER EDS., 1999).

265 Chamallas, *supra* note 3, at 466-467.

266 In the cases where the gender was specified, it was in a concrete manner, such as in *Dillon*, *supra* note 42, where the court indicated that the plaintiff was "a mother".

267 Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEG. EDUC. 3, 37 (1988).

children" of tort law, both suffering from a similar attitude of rejection,[268] actually receive different treatment, leaving indirect-emotional harm on the sidelines of tort law and most types of economic loss at its center. This reality makes courts' insistence on similarity between the damages and maintenance of this myth even more problematic. Revealing the false reality behind this rhetorical smoke curtain is imperative either by virtues of illuminating it to the courts or to its audience. Discriminating is one thing, discriminating while advancing a massage of equality is another. Criticism is more likely to be openly and easily established in the former case, in a manner that will open the floor for sincere discussion of possible adoption of more equality striving alternatives.

5. The Common Loss to All Systems

Emotional stability is perceived by all three legal systems' courts to have limited importance.[269] This perception constitutes another medium through which the importance of interests in society is being defined and graded by the court,[270] and furthermore, the way in which the class of people worthy of obtaining protection is determined and defined. Those who suffer emotional harm will also suffer from the lack of trust of the court in their damage; from demands for high levels of proof and a history of hostile precedents, to a perception that somehow they possess some personality defect, which distinguishes them from the reasonable person,[271] implying that they belong, socially, to an unworthy and unreasonable class of persons, punished through non-compensation.[272]

Nancy Levit has warned against a trend of undervaluing emotional harm, pointing out its negative implications not only to women, but to society as a whole.[273] Firstly, it allows tortfeasors who violate other persons' rights to avoid paying for this wrong. Thus, both the idea of corrective justice in tort law and the goal of deterrence

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268 See the text accompanying *supra* notes 184.
269 Levit, *supra* note 4, at 172.
270 SALMOND & HEUSTON ON THE LAW OF TORTS, *supra* note 88, at 38-39.
271 Fleming proposes to compensate also people with high emotional sensitivity, since this is a human trait that should not be held against them. JOHN G. FLEMING, THE LAW OF TORTS 180-181 (9th. ed., 1998).
272 Levit, *supra* note 4, at 175-176.
273 *Ibid*, at 188-189.

underlying it are impaired. Secondly, it testifies to the inferior value awarded to emotion and human soul in society in view of the social position of the award of compensation when prioritizing different values.[274] Thirdly, it can narrow the essence of a person to his mere physical being, while disregarding his most important spiritual quality. This results in a diminishing evaluation of emotional interactions between human beings.[275]

Part XI: Reading between the Lines and between Legal Systems

Armed with a comparative analysis and its implication, I shall turn, at this final stage, to briefly reflect on the phenomenon whereby the Israeli legal system that draws so heavily on dominant Anglo-American law and preserves its rhetoric, as a legal transplantation, still administers very different legal and ideological standards. The reasons for the differences between Israel and its sources of knowledge and inspiration are probably varied, and reflect different lines of association and differentiation between these legal systems. However, my main interest lays in illuminating, through this research, a specific characteristic of Israel with regards to women's rights. I thus wish to suggest that the obvious differences between the three systems be read as extremist application, by Israeli courts, of Anglo-American gender-based tendencies. Though absorbed through seemingly neutral doctrines, these tendencies were practiced and developed in Israel which is on the one hand, more gender-stratified, compared with England and the United States,[276] and on the other hand, holds, synchronically, a very equal legal rhetoric with regards to women. Israel, therefore, can be characterized–with astonishing resemblance to what was shown throughout this article–as having pretence of high commitment to gender equality, while in details failing to follow this commitment.[277]

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274 For a similar stance, see Richard L. Abel, *A Critique of Tort Law*, 2 TORT L. REV. 99, 104 (1994).

275 Some consider this ideal even as the fundamental ground for the whole "right discourse." See, RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY (1989).

276 My rough assertion is based on the comprehensive findings of the Human Development Report, which provides an analytical tool developed by the United Nations Development Program. The report has two composite indexes-the Gender-Related Development Index (GDI) and the Gender Empowerment Measure (GEM)-both aimed at ranking countries on a global scale by their performance with respect to gender equality issues. The latest report, from 2000, indicates that on both the GDI and the GEM ranking, Israel is ranked 23, whereat the Unites States is ranked 3 and the United Kingdom at 10 (pages 161, 165 to the report). The HDR can be found in full version at http://hdr.undp.org/en/media/HDR_2000_EN.pdf.

277 For a comprehensive review of the gender stratification in Israel, see Ruth Halperin-Kaddari, Women in Israel; A State of Their Own (2004).

Established as a young state with socialist aspirations advocated by its dominant founders, Israel has promised from the beginning equality to its female members.[278] As opposed to its English and American counterparts, who initially exercised blatantly unequal treatment of its women community by both de jure and de facto mechanisms[279], Israel held a seemingly fully equal starting point. Israel has professed its gender equality ideology through some of its constitutive legal institutions: firstly, within its Declaration of Independence stating that: "The state of Israel…will ensure complete equality…irrespective of…sex",[280] followed by the Women's Equality Act, 1951, providing that "A man and a woman shall have equal status with regard to any legal action."[281] Another socialist pretence of equal share in establishing the young state was also manifested through the formally equal obligatory draft to the army.[282] In Israel, where the army was in fact the leading force in "building the nation," this equal rule carried great symbolic as well as financial promise to Jewish women.[283]

These institutionalized guaranties of equality make the unequal realities, revealed through a detailed gaze on Israeli law, even more painful: women were and are still subjected by law to one of the main causes of homegrown Israeli women-only suffering:[284] the discriminatory authority of religious courts, with regards to, marriage and divorce rights.[285] The promise embedded in joint military service for

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278 Obviously, this promise was made mainly towards Israel's *Jewish* women community. See Pnina Lahav, *Assessing the Field. New Departures in Israel Legal History, Part Three: A "Jewish State . . . to Be Known as the State of Israel": Notes on Israeli Legal Historiography* 19 LAW & HIST. REV.387, 407-412 (2001). Lahav describes the historic circumstances which defined the "audience" and "referees" of the call for gender equality of the Declaration as exclusively Jewish.

279 For England, see E. Ling-mallison, Law Relating to Women (1930). For America, sources are endless. See, e.g., Ashlyn K. Kuersten, Woman and the Law (2003); Judith A Baer, Women in American Law: The Struggle toward Equality from the New Deal to the Present (3rd. ed.) (2002). For a survey of both systems see SEX DISCRIMINATION AND THE LAW : HISTORY, PRACTICE, AND THEORY (BARBARA A. BABCOCK ET AL. EDS.) (1996).

280 Israeli Declaration of Independence, Second part.

281 Other rules provided, very early after the establishment of Israel, protection against discrimination in the labor market. See Employment Service Law, 1959, 13 L.S.I. 29, where employers are prohibited from discriminating on the basis of sex.

282 It is important already at this point to stress the mythical component of this Israeli tale. For a detailed discussion over the limits of the so-called equal draft duty see Noya Rimalt, *Equality with a Vengeance: Female Conscientious Objectors in Pursuit of a Voice and Substantive Gender Equality*, 16 COLUM. J. GENDER & LAW 97, 102-121 (2007)

283 See Nitza Berkowitz, '*Women of Valor': Women and Citizenship in Israel* 2 ISRAELI SOCIOLOGY 277 (1999)

284 See more broadly, Halperin-Kaddari, *supra* note 277, at 263-286 and Yifat Bitton, Public Hierarchy – Private Harm: Negotiating Divorce within Judaism, in (RE)INTERPRETATIONS: THE SHAPES OF JUSTICE IN WOMEN'S EXPERIENCE 61 (LAUREL S. PETERSON AND LISA DRESDNER EDS., 2008).

285 Section 1 to the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953 (Laws of the State of Israel [LSI] 139) states that: "[m]atters of marriage and divorce of Jews in Israel, being nationals or residents of the state, shall be under the exclusive jurisdiction of rabbinical court." This grants exclusive jurisdiction

equality–albeit non-feminist in many respects–was soon shattered, as well: initially by the practice of complete prohibition on assigning women to combat positions, and later, after the ban has been removed by the Supreme Court,[286] through non-formal gendered division of labor and representations.[287] Since these first steps of statehood's legislation, Israel has further produced an impressive abundance of black letter rules protecting women's rights and needs, especially in the labor market sphere, and still, the inferior status of women in this sphere has not changed significantly.[288] Furthermore, many of its labor law regulations are shaped by and actively shape the notions of women as the national asset of the Jewish state rather than workers requiring protection of versatile interests.[289]

Judicial activism for women's rights has proved moderate success as well. Some Israeli feminists has even gone as far as denouncing some of the Supreme Court's most significant landmark decisions in favor of women as embracing the Israeli social narrative of women's subordination.[290] Others claim that women's rights advancement was a result of Israel's overall socio-economic advancement, rather than of special care for their rights as such or concern about their unique inferior position.[291] For that reason, with regards to basic parameters of measuring women's status in society, Israel scores much higher than it does with regards to more substantial and complex parameters.[292] This gap can be also associated with the gap

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over these matters to the male-only religious judges who sit on the state rabbinical courts (dayanim) and subjects the couple-litigants to the religious Jewish (halakhic) rulings. Similar ordinances subjects Muslim, Druse and Christian Israeli citizens to their relevant religious tribunals. This discriminatory rule applies thus to almost all Israeli women, not just Jewish ones.

286 HCJ 4541/94 *Miller v. Minister of Defense* 49 P.D.(iv) 94 (1995).

287 *See* Orna Sasson-Levi, *Subversiveness Within Oppression: Gender Identities for Women Soldiers in 'Male' Roles*, *in* WILL YOU LISTEN TO MY VOICE? REPRESENTATION OF WOMEN IN ISRAELI CULTURE 277 (Yael Atzmon, ed., 2001) (a study focusing on the attitudes of women soldiers who served in combat duties, which found that they tended to isolate themselves from other women, whom they perceived as weak and spoiled)

288 See the comprehensive research at VERED KRAUS, SECONDARY BREADWINNERS: ISRAELI WOMEN IN THE LABOR FORCE (2002)

289 See Nitza Berkovitch, *Motherhood as a National Mission: The Construction of Womanhood in the Legal Discourse in Israel* 20 WOMEN'S INTERNATIONAL FORUM 605 (1997).

290 See Daphne Barark-Erez, *The Feminist Battle for Citizenship: Between Combat Duties and Conscientious* Objection 13 CARDOZO JOUR. OF LAW & GENDER 531 (2007). See also the Palestinian stance in that respect, at HASSAN JABARIN, *Toward Critical Approaches of the Palestinian Minority: Citizenship, Nationality, and Feminism in Israeli Law* in ARMY, SOCIETY AND LAW 217 (Daphne Barak-Erez ed., 2002). For a less critical view of women's rights in Israel as a success story see Yoav Dotan, *The Spillover Effect of Bills of Rights: A Comparative Assessment of the Impact of Bills of Rights in Canada and Israel*, 53 AM. J. COMP. L. 293 (2005).

291 Halperin-Kaddari, *supra* note 277, at 12.

292 *Ibid*, at 11-12.

between Israel's black letter laws' basic pretence, and its more substantial, complex application of legal doctrines.

The case of the limited protection of female-related interests in negligence law can therefore be read as exemplary of this systematic trait of Israel's legal practice, whereby the formal, black letter and rhetoric levels significantly differ from the detailed, practical levels of law making.[293] The tort devil, for Israeli women, is in the details—not in the recognition of the doctrine but in its application—in Israel's peculiar conflation of law articulation and judicial rhetoric with law application.

As a more farfetched conclusion I suggest looking at the differences in gender equality of the three systems as reflected in the seemingly anecdotal protection tendency of gender-related interests within tort law. Going back to the relative gender-based stratifications of each system, an international index aimed at ranking countries on a global scale by their performance with respect to gender equality issues indicates the relatively stable rating of the three systems as such: America is ranked 3, United Kingdom 10 and Israel is ranked 23 (out of 174 countries). Interestingly enough, this ranking seem to fit the findings in this article. Being less restrictive on indirect emotional harm, America leads, followed by English law and its more restrictive manner of recognition, mainly reflected through the Alcock case, with both heading Israel, which performs as having the utmost protection gap between the harms.

Pointing to this interesting correlation I do not presumptuously imply that a necessary causation between the two is established. However, ignoring such interesting finding altogether seems to be not less counter-presumptuous. Any distributive justice critique of tort law, including feminist analysis, is vulnerable to criticism of randomness, illegitimacy and ineffective as stemming from the fact that tort law is a private mechanism for resolution of private disputes having no strong

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293 Indeed, recently, the Supreme Court of Israel has finally begun its move towards a better, more reasonable and more just appreciation of the indirect emotional harm. In the case of *Levi v. Sa'arei Tzedek Medical Center*, SC 754/05 *Levi v. Sa'arei Tzedek Medical Center* (not published) (2007), given recently, the Court declared the rules regarding indirect emotional harm to be insufficient and arbitrary. Interestingly enough, this case signifies a broader trend, where the indirect emotional harm in Israeli case law has turned into the main conceptual tool in developing tort protection of yet another feminine life-experience, that of prenatal and natal damages. In these cases, where the indirectness of the harm to the mother is contrasted with the direct harm to the baby/fetus, the question of whether to impose liability for indirect emotional harm is frequently raised. See, e.g., SC 2299/03 *The State of Israel v. Terlowski* (not published) (2007). Relaxing the limitations on this harm in these cases only strengthens my argument, that masculine perspectives rule the shaping of tort law doctrines. For men, one might say, pregnancy and birth are the most obvious, in physical terms, moments of human connectedness, where protection to that interest should be granted. For women, in contrast, it is only the beginning of a long, mutual journey.

relevance to "public sphere" considerations. Though answerable on much firmer grounds,[294] these arguments seem to be also weakened by this startling correlation between the status of women in general and their status within this seemingly anecdotal tort law doctrine.

Final words

Izaac Englard, a renowned Israeli tort law philosopher and a former Justice wrote a landmark book presenting basic notions of Israeli as well as Anglo-American tort law. Moving from discussing emotional harm to economic loss, he wrote:[295]

> "If until now the discussion of the practical problems of modern tort law may have appeared to concentrate on *relatively marginal issues*, the present topic is placed at *the very heart* of tort liability".

These words illustrate, even if only incidentally, the conceptual gap concerning the status of these interests in tort law within these three systems.[296] Tort law is a knowledge produced inside the social power structure. As part of it, it is influenced by it and influences it. It is shaped in the light of perceptions of the social attribution of losses as gender-related, and consequently, has an influence on the attitude towards them. In spite of the neutral discourse practiced in this area, it represents a clear picture of the gendered power relations, in which the male gender related interests enjoy greater protection than that granted to female gender related interests.

The call for a change of tort law's unsatisfactory protection of emotional interests is normatively sound by virtues of its own merits as well as by comparison to the protection given to pure economic loss. It is also easy to implement, practically wise. Common law tort law is flexible and can easily be modified.[297] In particular, the tort of negligence, and its duty of care component, exemplifies regimes of standards, open to creative interpretation rather than pre-dictated rules.[298] Within the three common-law legal systems observed, the court exerts an enormous influence on the way in which the final legal outcome is shaped, and can easily accommodate a

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294 TSACHI KEREN-PAZ, TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE 23-67 (2007)

295 Englard, *supra* note 36, at 211 (I've added the highlights- Y.B).

296 Englard's point of reference here, however, seems to be descriptive rather than normative.

297 Bender, *supra* note 3, at 575.

298 Duncan Kennedy, *Forms and Substance*, 89 HARV. L. REV. 1687, 1751-1770 (1975-1976). The negligence tort is a paradigmatic manifestation of a standard regime. See MARK KOLMAN, A GUIDE TO CRITICAL LEGAL STUDIES, 37-38 (1987).

political tendency to equalize gender related values.[299] A strong sense of morality, social justice and the need for substantive equal access to tort law, and its appropriate application, all require that this kind of change be carried out.

299 Such a trend can also be used without difficulty in the Israeli tort law, in view of the local courts' characterization of the tort of negligence: "The categories of negligence are never closed, they are never rigid and they are never frozen in place, but rather they are determined according to the sense of morality and social and societal justice and the changing needs of society". *Ya'ari*, *supra* note 34, at 779.