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ARTICLES

NEGLIGENT PERFORMANCE OF SERVICE CONTRACTS AND THE ECONOMIC LOSS DOCTRINE*

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INTRODUCTION

In its enigmatic opinion in *Moorman Manufacturing Co. v. National Tank Co.*,[1] the Supreme Court of Illinois made a blanket declaration that economic loss was not recoverable in tort.[2] The *Moorman* decision has been criticized for the absoluteness of such a statement and it is readily apparent that economic loss is in fact recoverable under certain circumstances in tort.[3] Nevertheless, the concept of barring the recovery of economic loss in tort is generally a sensible one.

One of the perplexing problems unresolved in *Moorman* is the application of its holding to service contracts. In theory, the doctrine of economic loss clearly applies.[4] Yet, in practice, courts have been reluctant to invoke the doctrine to avoid tort liability. This article reviews the differing standards permitting tort recovery for negligent performance of service contracts and the meaning of the economic loss doctrine. It then evaluates the propriety of applying the economic loss doctrine to service con-

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1. 91 Ill. 2d 69, 435 N.E.2d 443 (1982).

2. *Id.* at 86, 435 N.E.2d at 450-51.

3. *See* Bertschy, *The Economic Loss Doctrine in Illinois After Moorman*, 71 ILL. B.J. 346, 348-52 (1983).

4. The theoretical background of the economic loss doctrine, *see infra* text accompanying notes 52-92, is not premised upon the nature of the item to which loss is suffered. Instead, it is based upon the nature of the undertaking between the parties in suit or their predecessors. Thus, *Moorman*, although arising in a product sales context, also applies theoretically to the sale of services.

tracts, and analyzes the implication of the economic loss doctrine upon tort recovery for negligent performance of service contracts.

THE CONTRACT-TORT OVERLAP

Traditionally, and in theory, the line between contract law and tort law is distinct. Contract law applies to those obligations which are voluntarily undertaken between parties and is grounded in the contracting parties' mutual expectations. Tort law, on the other hand, imposes a social responsibility regardless of undertaking. It imports by law a required standard of conduct for the protection of others against unreasonable risk. A failure to conform to the prescribed standard, and a resulting injury, engenders liability even absent contract. Whether a tort duty should be imposed is determined by reference to foreseeability, the likelihood of injury, the nature of the risk, the magnitude of the burden of guarding against injury and the consequences of placing that burden upon the defendant.[5]

The measure of damages between the two causes of action is also distinct. Damages for contractual breach encompass the loss directly resulting from the breach and extend to those losses reasonably within the contemplation of the parties at the time of contracting.[6] Contractual damages can be liquidated or

5. Lance v. Senior, 36 Ill. 2d 516, 518, 224 N.E.2d 231, 233 (1967) (host's knowledge of guest's hemophiliac condition not enough to impose tort duty). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53, at 326-27 (4th ed. 1971). Prosser recognizes the difficulty of stating an adequate rule as to when a tort duty exists. In addition to the factors described herein, the convenience of administration, the policy of preventing future injuries, and moral blame and sometimes considered. Moreover, "[c]hanging social conditions lead constantly to the recognition of new duties." *Id.* at 327. Prosser concludes that "[n]o better general statement can be made, than that courts will find a duty where . . . reasonable men would recognize it and agree that it exists." *Id.*

6. Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854) (loss of profits recovered when party was informed of need for no delay). *See also* Bartinikas v. Clarklift of Chicago North, Inc., 508 F. Supp. 959, 962 (N.D. Ill. 1981) (loss of investment opportunities held not to be in contemplation of parties); Rivenbark v. Finis P. Ernest, Inc., 37 Ill. App. 3d 536, 539, 346 N.E.2d 494, 497 (1976) (loss of profits recoverable if reasonably ascertainable). Numerous Illinois cases identify the measure of damages for breach of contract as that amount needed to put the parties in the same position as they would have been if the contract had been performed. *See, e.g.*, Crum v. Krol, 99 Ill. App. 3d 651, 663, 425 N.E.2d 1081, 1089-90 (1981) (recovery permitted for increase in value of land in breach of contract action). This statement is ultimately limited, however, by *Hadley*. *See* Rivenbark v. Finis P. Ernest, Inc., 37 Ill. App. 3d 536, 539, 346 N.E.2d 494, 497 (1976) (damages must be within contemplation of parties); Pluard v. Gerrity, 162 Ill. App. 527, 529-30 (1911) (damages must be ascertainable); Illinois Smelting & Ref. Co. v. Western Union Tel. Co., 146 Ill. App. 163, 167 (1909) (loss of profits not recoverable). *See also* 15 ILL. L. & PRAC. *Damages* § 145 (1968).

limited.[7] In tort, damages extend to all losses *proximately* resulting from the breach of duty.[8] Punitive damages may be recovered for egregious behavior.[9] The concept of liquidated or limited damages is inapposite in tort recovery or, where apposite, generally unenforceable. Moreover, the period statutorily specified and the means of calculating the limitations period for contract and tort are different.[10]

While remaining separate causes of action, contract and tort have occasion to overlap and apply dually to certain factual situations. Four relationships in particular have been recognized as giving rise to both contract and tort implications: (1) carrier/passenger; (2) innkeeper/guest; (3) business invitor/invitee; and (4) one who voluntarily takes custody of another under circumstances such as to deprive the other of his normal opportunities for protection.[11] The underlying relationship in each of these circumstances originates in contract, thus,

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7. *See, e.g.*, Curtin v. Ogborn, 75 Ill. App. 3d 549, 394 N.E.2d 593 (1979). In *Curtin*, the court noted that a liquidated damages provision will be enforced when (1) the parties so intended, (2) the amount was reasonable at the time of contracting, (3) the amount stated in the provision bears some relation to the actual damage, and (4) the actual damages would be difficult to prove. *Id.* at 554-55, 394 N.E.2d at 598. *But see* Arduini v. Board of Educ., Pontiac Tp. High Sch., 93 Ill. App. 3d 925, 931, 418 N.E.2d 104, 108 (1981) (liquidated damage clause is unenforceable if it is a penalty), *rev'd on other grounds* 92 Ill. 2d 197, 441 N.E.2d 73 (1982).

8. For a discussion of proximate cause, see W. PROSSER, *supra* note 5, at ch. 7. One commentator has distinguished tort and contract damages by noting that "[t]he rule applicable in actions for breach of contract, that the damages recoverable are limited to those which may reasonably be supposed to have been within the contemplation of the parties, is generally deemed not to be applicable in tort actions, although there are some holdings to the contrary." 22 AM. JUR. 2D *Damages* § 80, at 115 (1965). *See also id.* at § 18 (discussing distinctions between tort and contract damages).

9. The particular wording of the standard, however, may differ from state to state. In Illinois, for example, punitive damages may be recovered when torts are committed with "fraud, actual malice, deliberate violence or oppression, or when the defendant acts wilfully, or with such gross negligence as to indicate a wanton disregard of the rights of others." Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 186, 384 N.E.2d 353, 359 (1978) (punitive damages recovered in action for retaliatory discharge).

10. The statutes of limitation in Illinois are five and ten years for oral and written contracts, respectively, ILL. REV. STAT. ch. 110, §§ 13-205, 13-206 (1981), and four years for breach of any contract for sale. ILL. REV. STAT. ch. 26, § 2-725 (1981). The tort standard varies from one year (slander) upwards and is often tolled by a discovery rule. ILL. REV. STAT. ch. 110, § 13-201 (1981). *See generally* 25 ILL. LAW & PRAC., *Limitations* (1965).

11. *See* Burks v. Madyun, 105 Ill. App. 3d 917, 435 N.E.2d 185 (1982). *Burks* observed that the existence of a duty, "the legal obligation imposed upon one for the benefit of another," is a question of law to be determined by the court. *Id.* at 919, 435 N.E.2d at 188. In making this determination, *Burks* found, Illinois courts have relied upon the Restatement (Second) of Torts, § 314(A) (1965) which identified these four special relations as occasions giving rise to a duty to protect another. *Burks*, 105 Ill. App. 3d at 919-20, 435 N.E.2d at 188.

the viability of contractual remedies. Each relationship, however, is also of special social significance and thereby falls within the orbit of those factors defining the boundaries of tort, hence, the imposition of tort liability. These four relationships clearly do not encompass the entirety of the contract-tort overlap; the overlap includes any contractual relation to which such special social significance attaches because of the nature of the contract or the special circumstances which arise during the performance of the contract.[12]

The contract-tort overlap has special implications respecting service contracts. In the attorney/client, physician/patient, accountant/client and architect/client relationships, it has been accepted that both theories of recovery are potentially applicable to instances of malpractice.[13] The professional standing and

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12. The most conservative approach to imposing tort liability for breach of contract, which includes only those "special socially significant cases," is also encompassed within the more liberal approaches. *See infra* notes 17-20 and accompanying text.

13. *See, e.g.*, Zostautas v. St. Anthony De Padua Hosp., 23 Ill. 2d 326, 178 N.E.2d 303 (1961) (patient's mother brought breach of contract and malpractice action against doctor). In *Zostautas*, the court observed:

> In the development of the law, the relationship of physician and patient has given rise to actions of a hybrid nature . . . sounding in tort or in contract . . . and both theories are often advanced in alternative counts, as in the instant case . . . .
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> Although these actions of malpractice in breach of contract may arise out of the same transaction, they are distinct as to theory, proof and damages . . . . Actions in contract may be based upon an express promise by the physician . . . or may be based upon the implied obligation arising out of the defendant's employment as a physician to use proper skill and care . . . or to furnish proper medical aid . . . . In such actions, liability is predicated on the failure to perform an agreed undertaking rather than upon negligence, and the damages are restricted to the payments made, the expenditure for nurses and medicines, or "other damages that flow from the breach thereof" . . . and do not include the patient's pain and suffering as in malpractice actions . . . .

Id. at 328-29, 178 N.E.2d at 304-05. *See also* Annot., 54 A.L.R.2d 324 (1957) (accountant liability); Annot., 92 A.L.R.3d 396 (1979) (accountant's malpractice liability).

With respect to architects, it has been observed:

> Architects and engineers hold themselves out as competent to produce work requiring: (a) skill in the preparation of plans, drawings or designs suitable for the particular work to be executed; (b) knowledge of the materials to be used and the proper application for use; (c) knowledge of construction methods and procedures. Presumably, if the architect or engineer fails to use reasonable care to produce a satisfactory structure, he may be sued either for an implied term of his contract or in negligence . . . .

Bell, *Professional Negligence of Architects and Engineers*, 12 VAND. L. REV. 711 (1959), *quoted in* St. Joseph Hosp. v. Corbetta Constr., 21 Ill. App. 3d 925, 943, 316 N.E.2d 51, 64 (1974).

For the implications of legal malpractice, see Christison v. Jones, 83 Ill. App. 3d 334, 405 N.E.2d 8 (1980). In *Christison*, the court held that a legal malpractice action was of a hybrid nature, more like a tort, and, therefore,

the trust and confidence reposed in the defendant, as well as the professional training and expertise of the defendant, draw such cases within tort. Outside of such professional relations, however, the law is tangled and ambiguous with respect to tort responsibilities engendered by a contractual relationship.

Although a review of the cases throughout the country reveals a continuum of different rules and applications in this area, it is helpful for purposes of discussion to group the cases into three basic categories. The first category of cases permits a tort recovery only where a traditional tort analysis finds a positive tort duty existing under the circumstances.[14] Second are

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was not assignable. *Id.* at 336-37, 405 N.E.2d at 9-10. Accordingly, the bankruptcy trustee did not become possessed of the debtor's cause of action against his attorney for malpractice. *Christison* did not explicitly consider, however, whether a cause of action could be brought against an attorney for breach of contract; it would seem that there are circumstances where the failure of an attorney to perform could clearly give rise to a cause of action for breach of contract, such as the failure of an attorney to prepare a proper will or deed.

14. *See, e.g.*, Wolfe v. Continental Casualty Co., 647 F.2d 705 (6th Cir. 1981) (only if there is a duty independent of the contract can there be a cause of action in tort); Peitzman v. City of Illmo, 141 F.2d 956 (8th Cir. 1944), *cert. denied*, 323 U.S. 718 (conduct that is a mere breach of contract is not actionable in tort), *reh. denied*, 323 U.S. 813 (1944); Meyer v. Bell & Howell Co., 453 F. Supp. 801 (E.D. Mo. 1978) (complaint must state a claim which would amount to an independent, willful tort to allow punitive damages); Iron Mtn. Sec. Storage v. Am. Specialty Foods, 457 F. Supp. 1158 (E.D. Pa. 1978) (no "recovery for breach of implied contractual duty of good faith . . . where breach occurred in ordinary commercial contract" setting); Escambia Treating Co. v. Aetna Casualty & Sur. Co., 421 F. Supp. 1367 (N.D. Fla. 1976) (recovery of punitive damages arising out of contract breach only allowed where acts constitute independent tort); Pendleton v. Aetna Life Ins. Co., 320 F. Supp. 425 (E.D. La. 1970) (claimant must show breach of legal duty independent of contractual duties); Merrin Jewelry Co. v. St. Paul Fire & Marine Ins. Co., 301 F. Supp. 479 (S.D.N.Y. 1969) (claim in tort allowed only if facts constituting breach of contract also establish independent breach of legal duty); Felder v. Great American Ins. Co., 260 F. Supp. 575 (D.S.C. 1966) (when action for tort arises out of a contract in order to recover there must be a breach of duty which exists apart from the contract); Am. Casualty Co. of Reading, Pa. v. Memorial Hosp. Ass'n, 223 F. Supp. 539 (E.D. Wis. 1963) (without privity, generally no tort action can arise from a breach of a contractual duty); United States v. Newburg Mfg. Co., 36 F. Supp. 602 (D. Ma. 1941) (mere "breach of contract, however deliberate or intentional, does not become a tortious wrong"); Monroe v. East Bay Rental Serv., 111 Cal. App. 2d 574, 245 P.2d 9 (1952) (tortfeasor's liability may arise from breach of a duty imposed by contract); Am. Express Co. v. Arnedoe, 133 Ga. App. 437, 211 S.E.2d 392 (1974) (tort action based on contractual relation requires duty originally imposed by law); Wittke v. Horne's Enter., Inc., 118 Ga. App. 211, 162 S.E.2d 898 (1968) (contractual duty must also be imposed by law to allow recovery based on tort); Sutker v. Pennsylvania Ins. Co., 115 Ga. App. 648, 155 S.E.2d 694 (1967) (duty imposed by law necessary to maintain tort action based on contractual relation); Mauldin v. Sheffer, 113 Ga. App. 874, 150 S.E.2d 150 (1966) (breach of contract does not allow party to sue in tort unless legal duty also imposed); John Deer Co. of St. Louis v. Short, 378 S.W.2d 496 (Mo. 1964) (violation of contract not basis for liability in tort); Helm v. Inter-Insurance Exch., 354

those cases which permit tort recovery for negligent performance of contractual duty without any further tort analysis.[15] The third category includes those cases which permit tort recovery for negligent performance of contractual duty where the resulting harm is physical and the risk was foreseeable.[16]

Mo. 935, 192 S.W.2d 417 (1946) (breach of contract constitutes tort only "where the law casts its separate obligation"); Avesato v. Paul Tishman Co., 142 N.Y.S.2d 760 (1955) (breach of contract not basis for damages in tort absent violation of legal duty); Rosenbaum v. Branster Realty Corp., 276 A.D. 167, 93 N.Y.S.2d 209 (1949) (absent a violation of a legal duty, failure to perform a contract never constitutes a tort); O'Hagan v. Del Prado, 53 N.Y.S.2d 843 (1945) (tort recovery for breach of contract only allowed upon showing of fraud, overreaching, conversion or willful and malicious interference with contract rights); McCreech v. Howard R. Ware Corp., 53 N.Y.S.2d 192 (1945) (violation of contract not recoverable in tort where no general duty exists); Shubitz v. Consol. Edison Co. of New York, 59 Misc. 2d 732, 301 N.Y.S.2d 926 (1969) ("failure to perform contractual obligation is never a tort unless it is also a violation of a legal duty"); Schisgall v. Fairchild Publications, 207 Misc. 224, 137 N.Y.S.2d 312 (1955) (generally "even an intentional breach of contract does not create tort liability"); Toone v. Adams, 262 N.C. 403, 137 S.E.2d 132 (1964) (nonperformance of contractual duty only constitutes tort if breach of independent legal duty also shown); Greene v. Charlotte Chem. Laboratories, Inc., 254 N.C. 680, 120 S.E.2d 82 (1961) (omission to perform contractual obligation never constitutes tort unless it also constitutes a legal duty); Pitts v. Southwestern Sales Corp., 179 Okla. 274, 65 P.2d 184 (1937) (when cause of action arises merely from breach of contract, there is no tort); Kisle v. St. Paul Fire & Marine Ins. Co., 262 Or. 1, 495 P.2d 1198 (1972) ("damage solely caused by failure to perform a contract is not recoverable in tort"); Harper v. Interstate Brewery Co., 168 Or. 26, 120 P.2d 757 (1942) (claimant may sue in tort for breach of contract only if duty was created by law).

15. Sanderson v. Crowley, 180 F.2d 124 (5th Cir. 1950) (wrongful conversion arising out of breach of contract provides basis for tort recovery); Tapley v. Yeomans, 95 Ga. App. 161, 97 S.E.2d 365 (1957) (action for a tort may arise from a violation of a duty from a contract); Jordan v. Sinclair Ref. Co., 257 Ia. 813, 135 N.W.2d 120 (1965) (if a contract imposes a legal duty on a person, neglect of that duty is a tort founded on contract); Green Constr. Co. v. Williams Form Eng'g, 506 F. Supp. 173 (W.D. Mich. 1980) (negligent performance of a contract can give rise to tort liability); Trans-Carribean Airways, Inc. v. Lockheed Aircraft Serv. Int'l, 14 A.D.2d 749, 220 N.Y.S.2d 485 (1961) (generally, negligent performance of a contract gives rise to an action in tort and for breach of contract); Montgomery Ward Co. v. Scharrenbeck, 146 Tex. 153, 204 S.W.2d 509 (1947) (negligent performance of a contract may cause a tort); Coastal Constr. Co. v. Tex-Kote, Inc., 571 S.W.2d 400 (Tex. Civ. App. 1978) (negligent performance of a contract is a tort as well as a breach of contract); Butler v. Lopez, 367 S.W.2d 868 (Tex. Civ. App. 1963) (a tort may arise from the negligent acts performed in a contract); Liles v. Winters Indep. School Dist., 326 S.W.2d 182 (Tex. Civ. App. 1959) (a breach of contract may be a tortious act).

16. *See, e.g.*, Ajax Hardware Mfg. Corp. v. Industrial Plants Corp., 569 F.2d 181 (2d Cir. 1977) (negligent performance of a contract may give rise to a claim in tort); Cluett, Peabody & Co. v. Campbell, Rea, Hayes & Large, 492 F. Supp. 67 (M.D. Pa. 1980) (must exercise reasonable care even if not contractually required to do so); Abel Holding Co., Inc. v. American Dist. Tel. Co., 147 N.J. Super. 263, 371 A.2d 111 (1977) (when party is under public duty to exercise care, he may be held liable for his negligence); Colton v. Foulkes, 259 Wis. 142, 47 N.W.2d 901 (1951) (if there is a duty created from

The most widely followed rule is that the negligent undertaking of a contractual duty in and of itself does not constitute a tort. A tort relationship arises only if public policy warrants the imposition of a duty, separate and apart from contract, between the parties. This decision is premised upon the traditional tort determinatives: foreseeability, likelihood of injury, the nature of the risk, the magnitude of the burden of guarding against injury, and the consequences of placing that burden upon the defendant.

An example of this category of cases is *Aspell v. American Contract Bridge League of Memphis, Tennessee*,[17] wherein a voluntary association of bridge players disciplined and discharged one of its members. The discharged member brought suit for wrongful discipline and framed the suit in tort, seeking compensation for injuries to her reputation and for punitive damages. The court found that the relationship between the members of the voluntary bridge association was a contractual one.[18] Hence, the discipline and discharge of one of its members was at first a breach of contract, and the breach would not be a tort unless the law imposed an independent duty which existed apart from the contract itself. The court then undertook a lengthy evaluation of whether such a positive tort duty should be imposed and ultimately held against the discharged member.[19]

Adhering to the same rule, the Georgia courts have stated:

> It is axiomatic that a single act or course of conduct may constitute not only a breach of contract but an independent tort as well, if in addition to violating a contract obligation it also violates a duty owed to plaintiff independent of contract to avoid harming him . . . . Such an independent harm may be found because of the relationship between the parties, or because of defendant's calling or because of the nature of the harm. . . . However, not all breaches of contract are also independent torts . . . . [W]here defendant's negligence ends merely in non-performance of the contract and where defendant is not under any recognized duty to act apart from the contract, the courts generally still see no duty to act affirmatively except the duty based on—and limited by—defendant's consent. . . . [I]n those circumstances, an action in tort may not be maintained for what is a mere breach through nonaction or through ineffective performance (which is the same thing) of a contract duty—the duty must arise independent of contract to constitute a tort.[20]

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the terms of the contract and that duty is performed negligently, it may constitute a tort).

17. 122 Ariz. 399, 595 P.2d 191 (1979).

18. *Id.* at 401, 595 P.2d at 193-94.

19. *Id.* at 402, 595 P.2d at 194-96.

20. Travelers Ins. Co. v. King, 160 Ga. App. 473, 475, 287 S.E.2d 381, 383 (1981), *quoting* Orkin Ext. Co. v. Stevens, 130 Ga. App. 363, 203 S.E.2d 587 (1973). Both cases relied on 2 HARPER & JAMES, TORTS § 18.6 (1956). In *Trav-*

A limited number of jurisdictions follow the more lenient rule of the second category permitting virtually any negligent performance of a contractual duty to be deemed a tort.[21] Some of these cases involve circumstances under which a tort duty would probably be imposed under a traditional tort analysis due to the nature of the risk and the type of injury suffered. The courts in these cases, however, have not employed a tort analysis and have relied upon a blanket rule that negligent performance of a contract gives rise to a duty in tort.[22] Moreover, many of the other cases falling within this category have permitted tort relief even where a traditional tort analysis would not lead to the same result.

One such case is *Tapley v. Youmans*.[23] In *Tapley*, the court held that a sharecropper could maintain an action against the landlord in tort where the landlord, under contractual obligation to lease the land to the sharecropper for a certain year, refused to permit the sharecropper to go forward and complete the labor essential to the cultivation and harvesting of the crops.[24] Another case permitting tort recovery without applying a traditional tort analysis is *Kunzman v. Cherokee Silo Co.*[25] In *Kunzman*, damages were suffered because of cracks in a silo which permitted air to enter the silo and oxidize certain grain. The plaintiff farmer brought suit against the contractor who built the silo. Although the question of whether a tort could be maintained was not directly presented to the court, the court noted:

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elers, plaintiff recovered in tort when his insurance company stopped payment on a settlement check without notice to the insured, the plaintiff. The appellate court affirmed, not because the insurance company failed to perform its duty to pay a valid claim under the insurance contract constituted tortious negligence, but because the company's conduct constituted an independent injury, *i.e.*, tortious interference with an existing property right. Once the plaintiff became the named payee on the check, Georgia law recognized a property right in the check on behalf of the plaintiff. Stopping payment without notice to the plaintiff thereby interfered with plaintiff's property right in the check. 160 Ga. App. at 474. 287 S.E.2d at 382-84.

21. *See supra* note 14.

22. *See, e.g.*, Sanderson v. Crowley, 180 F.2d 124 (5th Cir. 1950). In *Sanderson*, the court stated, "[i]t is well settled, however, that a tort may be committed by one of the parties to a contract, either in the breach or in the partial performance thereof . . . ." *Id.* at 127. The plaintiffs had brought a suit against the defendants for the breach of a contract in failing to deliver yearlings and calves in the proportion called for by the terms of the contract. Although the court found fraudulent inducement by the defendants to pay certain sums of money, the court, in viewing the verdict, simply held that any breach of contract was a tort. *Id.* at 125-28.

23. 95 Ga. App. 161, 97 S.E.2d 365 (1957).

24. *Id.* at 176, 97 S.E.2d at 373.

25. 253 Ia. 885, 114 N.W.2d 534 (1962).

> [A] tort may be dependent upon, or independent of, contract. If a contract imposes a legal duty upon a person the neglect of that duty is a tort founded on contract; so that an action *ex contractu* for the breach of the contract, or an action *ex delicto* for the breach of duty, may be brought at the option of plaintiff.[26]

One particularly noteworthy example of this line of cases is *Butler v. Lopez*.[27] In *Butler*, the plaintiffs alleged, among other things, that the defendants were liable to them in damages for permitting certain slush pits to dry out without being filled or restored, for not using reasonable care or diligence to minimize the damage to land from salt water, and for permitting salt water to run into a fresh water tank used for watering livestock.[28] The plaintiffs, in each allegation, referred to specific contractual obligations requiring the defendants to take such actions.[29] The court held that the actions alleged constituted a tort.[30] In reaching this determination, the court reasoned:

> A contract may create the state of things which furnishes the occasion of a tort. The relation which is essential to the existence of the duty to exercise care may arise through an express or implied contract. Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract. In such a case, the contract is mere inducement creating the state of things which furnishes the occasion of the tort. In other words, the contract creates the relation out of which grows the duty to use care. Thus, a person who contracts to make repairs can be held liable for his negligence in doing the work. . . . The sound rule appears to be that where there is a general duty even though it arises from the relation created by, or from the terms of the contract, and that duty is violated, either by negligent performance or negligent nonperformance, the breach of the duty may constitute actionable negligence.[31]

Some of the cases falling within this general category draw a distinction between misfeasance and nonfeasance of contrac-

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26. Kunzman v. Cherokee Silo Co., 253 Ia. 885, 891, 114 N.W.2d 534, 537 (1962), *quoting* Matthys v. Donelson, 179 Ia. 1111, 1119, 160 N.W. 944, 946 (1917).

27. 367 S.W.2d 868 (Tex. Civ. App. 1963).

28. *Id.* at 870-71.

29. *Id.*

30. *Id.* at 872.

31. *Id.* at 872 (quoting Montgomery Ward & Co. v. Scharrenbeck, 146 Tex. 153, 156, 204 S.W.2d 508, 510 (1947)). These cases represent the position set forth in 57 AM. JUR. 2D *Negligence* § 47 (1971): "As a general rule, there is implied in every contract for work or services a duty to perform it skillfully, carefully, diligently and in a workmanlike manner, and a negligent failure to observe any of these conditions is a tort, as well as a breach of contract. Thus, a person who contracts to make repairs can be held liable for his negligence in doing the work." *Id.* at 395-96.

tual obligation.[32] In cases drawing this distinction, nonfeasance does not give rise to liability in tort.[33] Where there is misfeasance, however, such as negligent performance of a contractual duty, tort liability arises.[34]

The third category of cases, represented by the *Restatement (Second) of Torts*, is not in accord with either of the preceding approaches. The Restatement provides as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
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> (a) his failure to exercise such care increases the risk of such harm, or
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> (b) the harm is suffered because of the other's reliance upon the undertaking.[35]

Under all three categories, physical harm to a person resulting from negligent performance of a contract almost always is compensable in tort. It is, however, the remaining scope of the Restatement that distinguishes the third category from the preceding two. More than mere negligent acts are required. Foreseeability and physical harm are the keys to liability. Consideration of the additional tort determinants of likelihood of injury, nature of the risk and the like, however, are not required.

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32. *See* W. PROSSER, HANDBOOK ON THE LAW OF TORTS, § 92, at 614 (4th ed. 1971).

33. *Id.* at 614-18.

34. *See, e.g.*, Trans-Carribean Airways, Inc. v. Lockheed Aircraft Serv. Int'l, Inc., 14 A.D.2d 749, 220 N.Y.S.2d 485 (1961). In *Trans-Carribean*, the court stated:

> Plaintiff and defendant entered into a contract whereby defendant agreed to service and maintain plaintiff's airplane. The first cause of action alleges breach of the agreement; the second alleges negligence in the performance of the agreement; and the third alleges negligence and breach of contract. The allegations of negligence include "making faulty repair." A person undertaking to perform work is charged with the common law duty to exercise reasonable care and skill in the performance of the work (citations omitted) . . . . Negligent performance of the work gives rise to an action in tort and for breach of contract. Generally, failure or omission to perform the work at all is not a tort; it may sustain an action for breach of contract for nonperformance. But engagement upon the work, and the failure to do what was required in the exercise of care or the alleged faulty performance on the part of the defendant, entitles plaintiff to recover as damages the difference between the value of the airplane before and after the defendant's faulty performance. Consequently there is present damage to the plaintiff as well as the violation of a duty imposed by law, the combination of which gives rise to actionable negligence.

Id. at 750-51, 220 N.Y.S.2d at 486-87.

35. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

An example of a case which required foreseeability and physical harm without these additional tort determinants is *Weeg v. Iowa Mutual Insurance Co.*[36] In *Weeg*, the court set forth the rule as follows:

> Negligence which consists merely in the breach of a contract will not afford ground for an action by anyone, except a party to the contract, or a person for whose benefit the contract was avowedly made . . . . But where in omitting to perform a contract, in whole or in part, one also omits to use ordinary care to avoid injury to third persons, who, as he could with a slight degree of care foresee, would be exposed to risk by his negligence, he should be held liable to such persons for injuries which are the proximate result of such omission.[37]

In Illinois, all three approaches have been adopted at one time or another.[38] Therefore, the status of Illinois law remains ambiguous. In an early case, *Grandt v. Chicago, Burlington & Quincy Railroad Co.*,[39] the court stated that an action in tort may lie for a breach of duty imposed by law, independently of any contract.[40] This would suggest that some duty beyond the contract must be imposed to support tortious liability. In a more recent case, *Masters v. Central Illinois Electric & Gas Co.*,[41] it was observed by the court that "the mere breach of an executory contract where there is no general duty is not the basis of . . . [a tort] action."[42]

Support for the second approach, premising liability on the negligent performance of contractual obligations, can be found in *dicta* in at least two Illinois cases. For instance, in *Hassell v. Sterling Federal Savings & Loan Association*,[43] the court commented: "Any negligence, i.e., a potential breach of duty, must arise out of a positive duty which the law imposes because of the existence of the contractual relationship as mortgagor and mortgagee, or because of the negligent manner in which some act the contract provides for is done . . . ."[44] In *Masters*, the court referred to this same rule, but enigmatically added that a mere breach of an executory contract would not constitute a tort.[45] This may be a throwback to the first category discussed above or

36. 82 S.D. 104, 141 N.W.2d 913 (1966).

37. *Id.* at 108, 141 N.W.2d at 916.

38. *See infra* notes 39-51 and accompanying text.

39. 195 Ill. App. 187 (1915).

40. *Id.* at 192.

41. 7 Ill. App. 2d 348, 129 N.E.2d 586 (1955).

42. *Id.* at 369, 129 N.E.2d at 597.

43. 132 Ill. App. 2d 1005, 271 N.E.2d 7 (1971) (recovery of damages sought for failure to renew fire insurance policy).

44. *Id.* at 1008, 271 N.E.2d at 9.

45. *Masters*, 7 Ill. App. 2d at 369, 129 N.E.2d at 597.

may instead reflect the nonfeasance/misfeasance distinction described previously.

The third approach has also been embraced in other Illinois cases. The fountainhead of these cases is *Normoyle-Berg & Associates v. Village of Deer Creek*,[46] in which the relationship of a supervising engineer to a general contractor, although noncontractual, was held to give rise to a tort duty of reasonable care.[47] The damages suffered in *Normoyle-Berg* were additional construction expenses above those originally anticipated, and were claimed by the contractor to have resulted from the negligent supervision of the project by the defendant engineer.[48] The court imposed the tort duty reasoning that the "supervising engineer must be held to know that a general contractor will be involved in a project and will be directly affected by the conduct of the engineer."[49] Furthermore, *Normoyle-Berg* is interesting because of the absence of physical harm; the loss suffered was only monetary.[50] Thus, *Normoyle-Berg* goes further than the Restatement in imposing tort liability for negligent performance of a service contract.[51]

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46. 39 Ill. App. 3d 744, 350 N.E.2d 559 (1976).

47. *Id.* at 746, 350 N.E.2d at 561.

48. *Id.*

49. *Id.*

50. *Id.* at 745, 350 N.E.2d at 560.

51. *Normoyle-Berg* has been followed in at least two other cases. In W.H. Lyman Constr. Co. v. Village of Gurnee, 84 Ill. App. 3d 28, 403 N.E.2d 1325 (1980), the plaintiff was a general contractor who successfully bid on a sanitary system project. Plaintiff computed his bid on the basis of project specifications prepared by the defendant architect. When plaintiff began work on the project, it discovered the sewer had to be constructed through subsurface soil that was water bearing soil and silt rather than the clay indicated by the soil borings. A high ground water table was also revealed. Manhole equipment as designed could not be installed due to high water pressure. Plaintiff requested approval to install the manhole equipment under an alternative method of sealing forbid by the project plans. Approval was delayed by the defendant architects for months, causing delay and resultant profit loss to the plaintiff. Plaintiff brought suit against the architects for negligent design, contract administration and supervision. *Id.* at 30, 403 N.E.2d at 1327. This portion of the case was dismissed by the trial court for failure to state a cause of action against the architects. *Id.* at 31, 403 N.E.2d at 1327. On appeal, this ruling was reversed on the basis of *Normoyle-Berg Assoc.*, the court holding that the defendant architects owed the plaintiff a duty of care in their design and administration of the project. *Id.* at 40, 403 N.E.2d at 1334.

Another case that followed *Normoyle-Berg* was Bates & Rogers Constr. Corp. v. North Shore Sanitary Dist., 92 Ill. App. 3d 90, 414 N.E.2d 1274 (1980). In *Bates & Rogers*, the plaintiff contractor and subcontractor brought suit against the owner and engineers of a construction project. As against the engineers, plaintiffs alleged that defendants were guilty of negligence in designing the switchgear, in failing to cure design defects and failing to provide electrical service to the job in a timely manner, and in carelessly preempting an important contractual relationship between plaintiffs and a supplier, all of which allegedly resulted in cost overruns to the plaintiff. *Id.*

In sum, support can be found in the law of Illinois for all three approaches to tort liability for negligent contractual performance. Each approach conflicts with the others and the effect has been confusion and inconsistency in theory and practice. Adopting a single rule would be desirable. Recently, developments concerning the recovery in tort of economic loss point toward the appropriateness of uniformity, adhering to the first approach in determining whether tort duties should be imposed for negligent performance of service contracts.

Application of the Economic Loss Doctrine

The key to understanding the term "economic loss" is an analysis of the cases giving rise to what might be conveniently termed the "economic loss doctrine."[52] Economic loss is not a particular type or element of damage so much as it is an identification of harm originating from a particular source, namely, defeated consumer expectations.

The two most prominent cases on economic loss are *Santor v. A & M Karagheusian, Ind.*,[53] and *Seely v. White Motor Co.*[54] In *Santor*, the plaintiff purchased carpeting which was manufactured by the defendant and sold by a third party. Shortly thereafter, lines began to appear to the carpeting. The plaintiff brought suit against the manufacturer for the cost of the carpeting.[55] Although a claim in strict liability was not alleged by the plaintiff, the Supreme Court of New Jersey nevertheless commented that such a theory of relief would be viable under the circumstances, despite the absence of damage to other property.[56] The court was of the opinion that the responsibility of the manufacturer should be no different whether damages occurred solely to the article sold or whether there was also damage to other property.[57]

In *Seely*, the Supreme Court of California held that damages from defeated consumer expectations could not be recov-

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at 91-92, 414 N.E.2d at 1276. The trial court dismissed the counts on the ground that they failed to state a cause of action; that is, the engineers owed no duty to the contractors as a matter of law. This was reversed by the appellate court and the cause was remanded for further proceedings. *Id.* at 98, 414 N.E.2d at 1281. *See* Ernst, Inc. v. Manhattan Constr. Co. of Texas, 551 F.2d 1026 (5th Cir.), *cert. denied*, 434 U.S. 1067 (1977); *See also* Annot. 65 A.L.R.3d 249, 256-59 (1975).

52. *See also infra* text accompanying notes 90-92.

53. 44 N.J. 52, 207 A.2d 305 (1965).

54. 63 Cal. 2d 9, 403 P.2d 145 (1965).

55. *Santor*, 44 N.J. at 54, 207 A.2d at 307.

56. *Id.* at 58-59, 207 A.2d at 311-13.

57. *Id.* at 58, 207 A.2d at 312.

ered in tort.[58] The plaintiff had purchased a truck manufactured by the defendant which overturned, possibly as a result of brake failure. Plaintiff suffered damages to the truck and loss of profits from an inability to use the truck.[59] The plaintiff recovered on the warranty and the defendant appealed the judgment, arguing that warranty had been superceded by the doctrine of strict liability.[60] The court held against the defendant, expressly limiting tort remedies to cases involving personal injury or damage to other products.[61] The court rejected the *Santor* approach, commenting that "[o]nly if someone had been injured because the rug was unsafe for use would there have been any basis for imposing strict liability in tort."[62]

In the court's opinion in *Seely*, Justice Traynor provided a lucid exposition of the rule underlying the court's decision:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.[63]

Subsequent to this decision, the economic loss issue has been faced by a substantial number of jurisdictions, the greatest number of which follow the approach taken in *Seely*.[64]

The first Illinois case to consider and describe economic loss as "economic loss" was *Alfred N. Koplin & Co. v. Chrysler Corp.*[65] At least one prior case, however, *Rhodes Pharmacal Co.*

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58. *Seely*, 63 Cal. 2d at 18, 403 P.2d at 151.

59. *Id.* at 13, 403 P.2d at 147-48.

60. *Id.* at 15, 403 P.2d at 149.

61. *Id.* at 15-19, 403 P.2d at 149-52.

62. *Id.* at 23, 403 P.2d at 151.

63. *Id.*

64. *See* Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 76-77, 86-88, 435 N.E.2d 443, 446, 451 (1982).

65. 49 Ill. App. 3d 194, 364 N.E.2d 100 (1977).

v. Continental Can Co.,[66] addressed the issue implicitly. In *Rhodes Pharmacal*, the plaintiff purchased cans which were manufactured by the defendant and sold by a third party. The purchaser filled the cans with an aerosol substance and began distributing the cans for commercial resale. The cans thereafter deteriorated from poor manufacture and the aerosol product was destroyed. As a result, substantial refunds had to be made and the purchaser's trade name suffered damage. The purchaser sought recovery in tort against the defendant for improper manufacture. The court denied recovery in tort, stating simply that it was not persuaded that a tort remedy was appropriate.[67]

In *Koplin*, the plaintiff alleged that it suffered loss from the breakdown of two air conditioning units and sought recovery in tort. The appellate court properly viewed the case as one of economic loss and evaluated it in light of the competing schools of thought represented by *Santor* and *Seely*.[68] Following the approach taken in *Seely*, the court rejected the plaintiff's tort claim reasoning that "[t]he province of contract law is that group of situations which involve the reasonably foreseeable commercial expectations of purchasers and sellers. This area of law is governed by statutory law (*e.g.*, the Uniform Commercial Code) and the common law of contracts."[69]

One point which remained unclear from the early Illinois cases that addressed the issue of economic loss was the significance of physical harm. *Koplin* suggested that physical harm to other property would take all of the damage outside the orbit of economic loss.[70] *Fireman's Fund v. Burns Electronic Security*[71]

66. 72 Ill. App. 2d 362, 219 N.E.2d 726 (1966).

67. *Id.* at 368, 219 N.E.2d at 730. The court did, however, allow plaintiff a recovery under a breach of implied warranty theory. *Id.* at 373, 219 N.E.2d at 732.

68. *Koplin*, 49 Ill. App. 3d at 197-204, 364 N.E.2d at 102-07.

69. *Id.* at 203-04, 364 N.E.2d at 107. Since the decision in *Koplin*, several other Illinois cases have joined its adherence to *Seely*. *See* Heat Exchangers, Inc. v. Arron Friedman, Inc., 96 Ill. App. 3d 376, 421 N.E.2d 336 (1st Dist. 1981) (economic loss caused by failure to perform essentially contractual duties not recoverable in tort when parties in privity of contract); Album Graphics, Inc. v. Beatrice Foods Co., 87 Ill. App. 3d 338, 408 N.E.2d 1041 (1st Dist. 1981) (no remedy in tort where breach of contract causes economic losses where recovery is provided under contract); Herlihy v. Dunbar Builders Corp., 92 Ill. App. 3d 310, 415 N.E.2d 1224 (1st Dist. 1980) (purely economic damages due to defects in construction not recoverable in tort).

70. *Koplin*, 49 Ill. App. 3d at 203 n.11, 364 N.E.2d at 106 n.11 (construing Admiral Oasis Hotel Corp. v. Home Gas Indus., Inc., 68 Ill. App. 2d 297, 216 N.E.2d 282 (1965)). As this author observed in a prior article, the *Koplin* example does not truly constitute economic loss. Leakage of coolant by an air conditioner would be a peripheral hazard. Bertschy, *supra* note 3, at 348, n.24 (1983).

implied the opposite: Damage resulting from the failure of an item to perform as expected, including damage suffered to other property, was not recoverable in tort. "For example, if a fire alarm fails to work and a building burns down, that is 'economic loss' even though the building was physically harmed."[72]

In the case of *Moorman Manufacturing Co. v. National Tank Co.*,[73] the Supreme Court of Illinois was, for the first time, squarely presented with the issue of economic loss. In *Moorman*, the plaintiff had purchased a large steel grain storage tank manufactured by the defendant which developed a large crack shortly after erection. Plaintiff sought to recover for its damages in tort.[74] Although this was an instance of economic loss, the appellate court would have permitted recovery in tort.[75] The appellate court rejected *Koplin* and its progeny, concluding that the existence or absence of physical injury was inapposite. Thus, the court rejected a distinction between tort and contract theories based upon the type of harm suffered and favored an approach which limited tort recovery only by the factors of foreseeability and proximate cause.[76]

The Illinois Supreme Court reversed the appellate court.[77] The court discerned that the case presented only an instance of disappointed commercial expectations, a loss for which contract law alone provided a framework for recovery.[78] The court defined economic loss with reference to commercial expectations: "the defect is of a qualitative nature and the harm relates to the consumer's expectation that a product is of a particular quality so that it is fit for ordinary use . . . ."[79] The court found that the law of sales, as established in the Uniform Commercial Code (UCC), provided a thorough system governing the economic relations between buyers and sellers of goods, including those situations where commercial expectations were frustrated.[80] The rules of warranty prevented a manufacturer from being held liable for damages of unknown and unlimited scope, whereas if a defendant was held liable in tort for commercial loss, the defendant "would be liable for business losses of other purchasers

71. 93 Ill. App. 3d at 298, 417 N.E.2d at 131 (1980).

72. *Id.* at 300, 417 N.E.2d at 133.

73. 91 Ill. 2d 69, 435 N.E.2d 443 (1982).

74. *Id.*

75. Moorman Mfg. Co. v. National Tank Co., 92 Ill. App. 3d 136, 414 N.E.2d 1302 (1980).

76. *Id.* at 138-47, 414 N.E.2d at 1306-11.

77. *Moorman*, 91 Ill. 2d at 94-95, 435 N.E.2d at 454-55.

78. *Id.* at 85-91, 435 N.E.2d at 450-53.

79. *Id.* at 88, 435 N.E.2d at 451.

80. *Id.* at 78-80, 435 N.E.2d at 447-48.

caused by the failure of the product to meet the specific needs of their business, even though these needs were communicated only to the dealer."[81] Moreover, theories of action based upon the unreasonably dangerous nature of a product (strict liability) had little relevance when neither personal injury nor property damage was involved.[82] Thus, where the plaintiff's losses were merely a commercial loss of the type that the law of warranty was designed to protect, recovery would be limited to contract.

The supreme court defined economic loss in the context of commercial expectations. It suggested that there was a definite line which could be drawn between contract and tort cases.[83] The court attenuated the strength of these comments, however, by recognizing that the nature of the defect, the type of the risk and the manner in which the damage arose were factors in determining whether a tort remedy would be appropriate.[84] Thus, the court held that where there was a sudden or calamitous loss, a tort recovery was appropriate.[85] A serious risk of harm to people and property was thereby presented. Where the damage suffered was merely a commercial loss arising from a qualitative defect, however, and the harm related solely to the consumer's expectations that the product was of a particular quality, the court held that recovery was to be limited to contract.[86]

Shortly after the decision in *Moorman*, the supreme court again had occasion to consider the economic loss issue in *Redarowicz v. Ohlendorf*.[87] In *Redarowicz*, the plaintiff was the second consumer purchaser of a home constructed by the defendant. Plaintiff complained that he had suffered loss because the wall and chimney began moving away from the rest of the house due to negligent construction. The court refused to permit plaintiff to maintain a suit in tort against the defendant, characterizing plaintiff's loss as economic loss which was unrecoverable in tort.[88] *Redarowicz* is of particular significance here because the plaintiff and defendant were not in privity and recovery was denied even though the UCC would not have applied.[89]

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81. *Id.* at 79, 435 N.E.2d at 447.

82. *Id.* at 77, 435 N.E.2d at 446-47.

83. *Id.* at 81, 88, 435 N.E.2d at 448, 451.

84. *Id.* at 82-85, 435 N.E.2d at 449-50.

85. *Id.* Justice Simon in his concurrence described these losses in helpful terms: "[h]azards peripheral to the product's function." *Id.* at 97, 435 N.E.2d at 455 (Simon, J., concurring).

86. *Id.* at 85-86, 435 N.E.2d at 450.

87. 92 Ill. 2d 171, 441 N.E.2d 324 (1982).

88. *Redarowicz*, 92 Ill. 2d at 176-78, 441 N.E.2d at 326-27.

89. *Id.* at 176-78, 441 N.E.2d at 326-27. Since *Redarowicz*, Illinois courts have rendered several other decisions concerning economic loss. *See* Fox-

Unfortunately, few cases involving economic loss truly exhibit an understanding of that concept. The term "economic loss" does not specify an element of loss. Instead, it specifies losses originating in a particular source; namely, qualitative defects which defeat commercial expectations. Economic loss is not simply a loss of profits or similar intangible loss, nor merely the costs of replacement. These items of damage are frequently recovered in tort actions.

The existence or absence of physical harm is also not a controlling element in determining whether damage is economic loss. This point was recognized by Illinois Supreme Court Justice Simon in his special concurrence in *Moorman*:

> There is no fundamental reason to define economic loss primarily as the absence or opposite of physical harm. The appellate court opinion in this case demonstrates at length the illogical results of the no-physical-harm approach, especially if combined with the view that once there is any physical harm, all damages are recoverable, including those that would be considered economic loss when not accompanied by the physical harm. Physical harm should not guarantee recovery, and the absence of physical harm should not necessarily defeat recovery. For example, if an oven malfunctions and has to be repaired or replaced, that is clearly economic loss; if the roast inside is burned to a crisp (physical harm), should that make all the losses recoverable? . . . . [I]f a product simply fails to live up to its promise, if it does not accomplish what it was supposed to the way it was supposed to, that is only an invasion of a contract-like interest: the user has lost the benefit of his bargain. If a refrigerator fails, the food inside may spoil, but there is no tort . . . the only risk is to commercial expectations.[90]

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croft Townhome Owners Ass'n v. Hoffman Rosner Corp., 96 Ill. 2d 150, 449 N.E.2d 125 (1983) (allegedly defective siding leading to premature deteriorations—no recovery in tort); Black, Jackson & Simmons Ins. Brokerage, Inc. v. International Business Mach. Corp., 109 Ill. App. 3d 132, 440 N.E.2d 282 (1982) (computer purchaser suffered lost profits, salary, office supplies, accounting and legal expenses when computer system failed to properly function—no recovery in tort). *See also* Dundee Cement Co. v. Chemical Laboratories, 712 F.2d 1166 (7th Cir. 1983) (lost business or profits from blocked access to plaintiff's business—no recovery in tort). Although the author does not think *Dundee* was truly an economic loss case, it was analyzed as such. *Cf.* Maxfield v. Simmons, 96 Ill. 2d 81, 449 N.E.2d 110 (1983) (contractor could have cause of action for an implied right of indemnity or contribution if the alleged tortious conduct by supplier and manufacturer caused problem); Palatine Nat'l Bank v. Greengard Assoc., 119 Ill. App. 3d 376, 456 N.E.2d 635 (1983) (lost profits arising from negligent design and construction of a storm and surface water removal by professional engineers not recoverable in tort); Baughn v. General Motors Corp., 118 Ill. App. 3d 201, 454 N.E.2d 740 (1983) (brake failure caused by sudden and dangerous occurrence is recoverable in tort).

90. *Moorman*, 91 Ill. 2d at 95-96, 435 N.E.2d at 455 (Simon, J., concurring).

The touchstone of economic loss is a qualitative defect which defeats consumer expectations, and the underpinnings of the economic loss doctrine are fundamentally sound. A simple example is illustrative. Assume two dolls, one made in an average quality production shop in this country and the other a poorly made foreign import. Assume further that the average quality doll carries a price tag of $19.95; the other, a price tag of $5.95. If the poor quality doll begins to fray at the seams and lose its stuffing before the average quality doll, would an action in tort lie against the manufacturer and retailer of the cheaper doll? Quite clearly not. The law imposes no general duty. This is simply a case of qualitative defect defeating consumer expectations. In other words, economic loss.

The example can be enlarged. Assume the construction of two identical homes by two different contractors. One charges $100,000 for his work; the other charges $60,000. Several years later the $60,000 home shows evidence of aging in a much more dramatic fashion than the $100,000 home; the paint is fading, the brick mortar is falling out and/or the concrete is settling unequally. Does an action lie here in tort? This query might give greater pause than the doll example above, but the result should be the same. The defect is a qualitative one that has an impact on consumer expectations. If tort liability is imposed, how could damages be calculated? Clearly, the purchaser of the $60,000 home should not be put in the same place as the purchaser of the $100,000 home. Under similar circumstances, the Supreme Court of Illinois in *Redarowicz v. Ohlendorf*[91] declined to permit recovery in tort.[92]

It might be argued that the missing element in the above examples is an objective standard (for a $5.95 doll or $60,000 home) and that, once such a standard is established, tort can be a viable theory of recovery. This argument overlooks the fact that the parties themselves, in their contract, have specified the standard which will apply between them (for example, through the existence or absence of a warranty) and it voids their expec-

91. 92 Ill. 2d 171, 441 N.E.2d 324 (1982).

92. *Id.* at 176, 441 N.E.2d at 327. *Redarowicz* concerned poor construction that resulted in an accelerated deterioration of a house. One of the arguments made against the imposition of tort was the difficulty of ascertaining an appropriate standard of care. *Id.* at 177-78, 441 N.E.2d at 327. For instance, the question was raised as to whether a contractor building a lower cost home should be penalized for using lesser strength mortar or lower quality lumber than another contractor. The plaintiff, seeking to impose the tort duty, argued that the cause of action should be permitted if a standard of care could be established through the evidence. The court rejected this argument without comment. *Id.* at 176. 441 N.E.2d at 326.

tations entirely to institute new and different standards after the fact.

The heart of the economic loss doctrine is this: where the only harm suffered is to consumer expectations and the loss originates in a qualitative defect, a tort remedy will not lie. As indicated below, this has substantial implications for a tort cause of action for negligent performance of contractual obligations.

Is Economic Loss Ever Recoverable in Tort?

In the course of its opinion in *Moorman*, the Supreme Court of Illinois commented, at several points, that economic loss was not recoverable in tort.[93] *Moorman* has been criticized for these statements, as well as for its intimations that a line could be drawn between contract and tort, and that those theories of relief were incompatible.[94]

The *Moorman* opinion implicitly admits to the importance of conducting a tort analysis in the economic loss context. The opinion emphasizes the significance of examining three factors in determining whether a cause of action in tort would be appropriate: (1) the nature of the defect which caused the damages; (2) the type of risk posed; and (3) the manner in which the damage arose.[95] These factors constitute a part of the traditional tort analysis described above.[96] The court in *Moorman* evaluated the facts presented in that case against these three factors.[97] Thus, although some of the court's comments are to the contrary, *Moorman* can be viewed as a case which involved an implicit tort analysis of a particular loss and which determined that there was no duty arising on its facts.

There is no valid reason for drawing a line of demarcation between contract and tort as if they are competing theories of law. Contract and tort are commonly found to exist on the same facts. The key is whether, in a contractual context, the factors giving rise to a tort are also present. This is the significance of the supreme court's review of the facts in *Moorman* against the traditional tort standards.

It is particularly significant that the supreme court, in the course of its opinion in *Moorman*, specifically identified two

93. *Moorman*, 91 Ill. 2d at 81, 88, 91, 95, 435 N.E.2d at 448, 451, 453, 455.

94. *See* Bertschy, *supra* note 3, at 350. The discussion following was first broached in this article.

95. *Moorman*, 91 Ill. 2d at 85, 435 N.E.2d at 449-50 (quoting Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1173 (3d Cir. 1981).

96. *See supra* note 5.

97. *Moorman*, 91 Ill. 2d at 85-86, 435 N.E.2d at 450.

prior cases of economic loss where recovery was permitted in tort. One of these cases, *Rozny v. Marnul*,[98] is a particularly helpful illustration of the recovery of economic loss in tort. In *Rozny*, plaintiffs brought suit against the defendant, a surveyor, for the surveyor's preparation of an inaccurate survey. That survey had been prepared by the defendant several years before for a different party than the plaintiffs. Plaintiffs obtained the survey and relied upon it in situating and constructing a garage on their property. After the garage was constructed, it was found to encroach on neighboring property due to improper location of the garage in reliance upon the inaccurate survey.[99]

The loss suffered by the plaintiffs was clearly economic loss. It was so described by the supreme court in *Moorman* and it was the result of a qualitative defect which defeated consumer expectations: the survey did not do what it was intended to do, that is, reveal the true boundaries of the property.[100] Nevertheless, the supreme court, in *Rozny*, permitted recovery in tort because of certain special factors present in that case:

> (1) The express, unrestricted and wholly voluntary "absolute guarantee for accuracy" appearing on the face of the inaccurate plat;
>
> (2) [d]efendant's knowledge that this plat would be used and relied on by others than the person ordering it, including plaintiffs;
>
> (3) [t]he fact that potential liability in this case is restricted to a comparatively small group, and that, ordinarily, only one member of that group will suffer loss;
>
> (4) [t]he absence of proof that copies of the corrected plat were delivered to any one;
>
> (5) [t]he undesirability of requiring an innocent reliant party to carry the burden of a surveyor's professional mistake;
>
> (6) [t]hat recovery here by a reliant user whose ultimate use was foreseeable will promote cautionary techniques among surveyors.[101]

Accordingly, despite some of the statements in *Moorman*, economic loss is recoverable in tort where public policy considerations warrant the imposition of a social duty. There must be a showing of harm beyond mere disappointed expectations, as in *Rozny*. There is no absolute bar, however, prohibiting the re-

98. 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

99. *Id.* at 56-58, 250 N.E.2d at 657-58.

100. *Moorman*, 91 Ill. 2d at 89, 435 N.E.2d at 452. The Supreme Court referred to the loss in *Rozny* as an intangible economic interest. *Id.* It was an "economic loss" because the survey had a qualitative defect (it failed to identify lot lines as it was intended) and this defect defeated commercial expectations in the survey.

101. *Rozny*, 43 Ill. 2d at 67-68, 250 N.E.2d at 663. The other case mentioned in *Moorman* in which economic loss would be recoverable under a tort theory was Soules v. General Motors Corp., 79 Ill. 2d 282, 402 N.E.2d 599 (1980), which involved intentional misrepresentation.

covery of economic loss in tort where such a showing can be made.

APPLICATION TO SERVICE CONTRACTS

The legal analysis of economic loss to date has primarily occurred in the context of products. Theoretically, however, the principles apply equally to service contracts. Economic loss refers to qualitative defects which impair consumer expectations. Just as in the case of qualitative defects in products, qualitative defects in services can defeat the purchaser's commercial expectations. For example, a negligent, careless and mistake-ridden performance by a renowned pianist defeats the commercial expectations of those who paid $25.00 for a ticket to view the performance. If the only harm suffered is that of defeated commercial expectations, the same reasons which justify barring tort recovery in the products context compel denying tort relief respecting services. Certainly a suit against the careless pianist could not be maintained in tort. Tort law does not protect consumer expectations, and there is no basis for applying this rule to products and not to services.

Although one Illinois appellate court has declined to extend the principles of economic loss to the performance of contractual services, the decision predated *Moorman* and was premised on the inapplicability of the economic loss doctrine outside the area of products liability.[102] The Illinois Supreme Court has now ruled that the economic loss doctrine applies outside the products area and has explicitly applied the principles of economic loss to realty, barring recovery for negligent construction of a residence in *Redarowicz v. Ohlendorf*.[103] Moreover, *Moorman* itself referred favorably to the Third Circuit Court of Appeals case *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*,[104] which applied the doctrine of economic loss to prohibit recovery in tort for negligent performance of contractual services.[105]

In *Jones & Laughlin Steel*, the plaintiff brought a suit against Johns-Manville arising from a defective roofing system.

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102. Bates & Rogers Constr. Corp. v. North Shore Sanitary Dist., 92 Ill. App. 3d 90, 414 N.E.2d 1274 (1980). For a discussion of *Bates & Rogers*, see *supra* note 51.

103. 92 Ill. 2d 171, 441 N.E.2d 324 (1982). In extending *Moorman* to the facts of the case, the supreme court made no comment about applying the doctrine outside of the products field.

104. 626 F.2d 280 (3d Cir. 1980).

105. Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 83, 435 N.E.2d 443, 449-50 (1982), *citing* Jones & Laughlin Steel Corp. v. Johns-Manville Sales, Corp., 626 F.2d 280 (3d Cir. 1980).

Johns-Manville had been retained by the plaintiff to recommend and supply suitable roofing materials. After being briefed on the design of the roof and informed of the weather conditions in the area surrounding the building, a representative of Johns-Manville recommended a specific type of roof because of its durability and ease of repair. The representative further suggested a particular type of insulation because it could withstand the uplift caused by extremely high winds, was virtually waterproof and had outstanding dimensional stability. The plaintiff accepted these recommendations and included the roofing system in the architectural plans for the plant.[106] Shortly after the roof was completed, the roof began to blister, wrinkle and crack. This permitted water to enter into the plaintiff's mill, which in turn damaged some of the steel products under construction and caused electrical problems. Thereafter, portions of the roof began to tear away and, on several occasions, winds at high speeds below that which the roof was designed to withstand blew off portions of the roof.[107]

The plaintiff obtained judgment against Johns-Manville on four separate tort theories: (1) strict liability for defects in the roofing product; (2) strict liability for defects in the design of the roof; (3) strict liability for public misrepresentation regarding the roofing product; and (4) negligent performance of an undertaking to render services.[108] On appeal, the Third Circuit Court of Appeals reversed the judgment.[109] The Third Circuit applied a choice of law analysis and determined that it would adhere to the law in Illinois.[110] The court perceived the issue as one of economic loss. Though *Moorman* had not been decided, the court correctly forecast that the Supreme Court of Illinois would follow the *Seely v. White Motor Co.*[111] line of cases.[112] Examining the judgment in light of the economic loss doctrine, the Third Circuit held that no recovery could be obtained in tort.[113]

Unfortunately, *Jones & Laughlin* did not specifically address the application of the economic loss doctrine to negligent contractual performance. Yet implied in the Third Circuit's decision was that the doctrine was applicable to service contracts.

106. *Jones & Laughlin Steel*, 626 F.2d at 282. During the construction of the roof itself, Johns-Manville supervised the insulation work which was actually performed by roofing contractors.

107. *Id.*

108. *Id.* at 283.

109. *Id.* at 281.

110. *Id.* at 283-84.

111. 63 Cal. 2d 9, 403 P.2d 145 (1965).

112. *Jones & Laughlin*, 626 F.2d at 287 n.13.

113. *Id.* at 289-90.

One of the independent bases of the judgment was "negligent performance of an undertaking to render services."[114] To reverse the judgment in full, the court necessarily found that this specific cause of action was nonrecoverable in tort.

A recent Illinois appellate court case has also applied the economic loss doctrine in a context which principally involved service contracts. In *Palatine National Bank v. Greengard Associates*,[115] the plaintiff brought suit against the defendant for negligent performance of a contract. With respect to negligence, the complaint alleged that the plaintiff had entered into a written agreement with the defendant requiring the defendant to provide professional engineering services, including the design of a system to dispose of storm and surface water from real estate as well as the calculation of grading requirements for different phases of the project. The plaintiff alleged that it thereby became the duty of the defendant to use the degree of care and skill usually and customarily followed by other engineers in similar circumstances, that the defendant failed to exercise such care and skill and that the plaintiff suffered damages when the storm and surface water system failed.[116] The appellate court affirmed the dismissal of the tort count noting that

> [i]t is now settled in Illinois that when a defect of a product is of a qualitative nature and the alleged harm relates to the consumer's expectation that the product is of a particular quality resulting in solely economic injury, without personal injury of other property damage, the appropriate remedy lies in contract, and not tort.[117]

The distinction between product and service is a nebulous one at best and almost totally nonexistent when viewed in the context of commercial expectations. Consider, for example, the purchase of a new car which, when delivered to the customer from the dealer, is discovered to have "drips" in the paint finish on the left rear door. A tort cause of action would not be the appropriate remedy for the loss in value of the car. Next, consider the contrasting example of a car owner who contracts to have his car painted and the car is returned to him with "drips" in the paint finish on the left rear door. Should this owner be

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114. *Id.* at 282.

115. 119 Ill. App. 3d 376, 456 N.E.2d 635 (1983).

116. *Id.* at 377, 456 N.E.2d at 637.

117. *Id.* at 379, 456 N.E.2d at 638 (citations omitted). Although the author agrees that *Palatine National Bank* was properly viewed as an instance of economic loss, he believes the opinion can be criticized for failing to consider wether such economic loss would be recoverable in tort. For example, *Rozny*, involving negligence by a surveyor, was an example of economic loss but recovery was permitted in tort because of the particular public policy considerations involved. *Palatine National Bank* does not contain such an analysis.

permitted any other remedy than the car purchaser above? Any distinction in remedies between these two cases would be indefensible. Both involve the same type of loss, defeated consumer expectations, and neither is appropriate for a recovery in tort.

One of the difficult questions in the application of the economic loss doctrine to service contracts is whether privity is required to apply the principles of economic loss. The Supreme Court of Illinois, although it did not explicitly comment on the issue, applied the economic loss doctrine absent privity in *Redarowicz v. Ohlendorf*.[118] *Redarowicz* can be distinguished, however, because the parties were in the chain of ownership of the home, a concept foreign to service contracts.

The question of privity can be resolved by referring to the underlying theory of the economic loss doctrine: qualitative defects that defeat consumer expectations are not recoverable in tort. In the case of service contracts, the qualitative defect is the defective performance of a contract. Hence, the economic loss doctrine should be held applicable to the negligence of any party who is performing a duty in which the plaintiff has a contractual expectation.[119] For example, negligent performance by a subcontractor which causes loss to the owner is economic loss even though the owner and subcontractor have no contract. The work that the subcontractor is doing is derived from a contractual expectation the owner has with the general contractor. The "chain of ownership" applicable to the *Redarowicz* context, could be termed the "chain of contractual responsibility" in the service context. Therefore, from a theoretical and practical standpoint, the principles of the economic loss doctrine must be applicable to the negligent performance of service contracts. Where the only harm and loss is to contractual expectations, recovery in tort should be denied.

The Implications of the Economic Loss Doctrine on Recovery for Negligent Performance of Service Contracts

The economic loss doctrine carries significant implications for tort recovery for negligent performance of service contracts. The cases involving tort recovery arising out of contractual performance can be placed into three basic categories: (1) cases permitting a tort recovery only after a traditional tort analysis

118. 92 Ill. 2d 171, 441 N.E.2d 524 (1982).

119. The author poses the following question: If the application of the economic loss doctrine required privity, would the other side of this rule be that tort damages could be recovered only absent privity?

finds that a positive tort duty exists under the circumstances; (2) cases permitting a tort recovery for mere negligent performance of a contractual duty; and (3) cases permitting a tort recovery for negligent performance of a contractual duty where the resulting harm is physical and the risk is foreseeable. Evaluated in light of the principles of economic loss, only the first category presents an appropriate basis for imposing tort liability for negligent performance of a service contract.

The first category requires the finding of a positive duty outside the contract before tort liability will be established. This duty may arise from the contract or from the partial performance of the contract, as in the case of professional malpractice or where a partial performance presents a substantial risk of harm to the public. The duty, however, is not founded solely on defeated consumer expectations. Instead, the duty is based on public policy, an analysis which considers foreseeability, likelihood of injury, the nature of the risk, the magnitude of the burden of guarding against injury and the consequences of placing that burden upon the defendant.

Rozny v. Marnul[120] is illustrative of the above principle. In *Rozny*, the surveyor's responsibility originated in contract. As conceded by the Illinois Supreme Court, the damage suffered by the plaintiffs was economic loss. Nevertheless, plaintiffs could recover their damages in tort because of the public policy considerations which warranted imposition of a tort duty.

Thus, the first category of negligent performance cases falls squarely within the body of law which has evolved around the principle of economic loss. Damages suffered by reason of negligent performance of contracts are qualitative defects impacting upon contractual expectations. Such damages are therefore nonrecoverable in tort unless public policy warrants the imposition of a social duty.

The second category, permitting tort recovery for mere negligent performance of a contract, does not comport with the doctrine of economic loss. Failure to perform a contract, whether it consists of a complete failure to perform or partial performance, is only a failure to meet contractual requirements. The contractual requirements of one party are the contractual expectations of the other party. Failure by one party to satisfy its contractual requirements thus defeats the contractual expectations of the other party. Defeated contractual expectations are precisely that type of damage which the principle of economic loss holds

120. 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

to be unrecoverable in tort.[121] The second category of cases would establish the appropriate rule only if *all* contractual requirements were to be accepted as imposing public policy duties. In order to accept this position, the traditional tort analysis would have to be abandoned.[122]

Moreover, if mere negligent performance of a contract presented a cause of action in tort, it would necessarily follow that an intentional breach of contract would constitute a tort. In Illinois, however, one may intentionally breach a contract with impunity (although he will be liable for contract damages).[123]

The nonfeasance/misfeasance distinction relied upon in some of the cases placed in the second category[124] fails to reconcile these cases with the economic loss doctrine. Whether the action of the defendant is a complete failure to act or a negligent failure to perform properly, the result is still a qualitative defect which defeats contractual expectations. The qualitative defect is the flawed performance; a performance of lesser grade than what was desired. The result is a loss of contractual expectations. The "why" of the low quality performance resulting in the loss of expectations is irrelevant.

Additionally, the nonfeasance/misfeasance distinction cannot lead to a rule of uniform application. There are instances where nonfeasance itself will give rise to a tort. A good example is where a surgeon is retained to perform an appendectomy. A complete failure to perform the appendectomy would certainly be a tort.

The third category of cases falls under the principles of the Restatement (Second) of Torts, imposing tort liability for negligent contractual performance where there is physical harm and the risk of such harm is foreseeable at the time of the contractual undertaking.[125] Like the second category, this third standard also fails when scrutinized under the principles of economic loss. The keys to the Restatement approach are foreseeability and physical harm.

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121. *See, e.g.*, Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 88, 435 N.E.2d 443, 451 (1982).

122. If the law were to adopt the position that all contractual breaches were torts, there would be no need to examine foreseeability, likelihood of injury, the nature of the risk, the magnitude of the burden of guarding against injury, and the consequences of placing that burden upon the defendant. Any traditional tort analysis, thus would be obviated.

123. Album Graphics, Inc. v. Beatrice Foods Co., 87 Ill. App. 3d 338, 350, 408 N.E.2d 1041, 1050 (1980).

124. *See supra* notes 32-34 and accompanying text.

125. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

The Restatement first looks to what risks were foreseeable at the time of the contractual undertaking. Economic loss, defeated commercial expectations, is foreseeable damage at the time of contracting and thereby in all cases satisfies the first criteria under the Restatement.[126] The "physical harm" criteria is somewhat restrictive but even this criteria fails to square the Restatement in its entirety with the economic loss doctrine. The existence of physical harm does not in and of itself withdraw a case from the economic loss category. Justice Simon, in his concurrence in *Moorman Manufacturing Co. v. National Tank Co.*,[127] recognized that the presence or absence of physical harm did not define the boundaries of economic loss. Justice Simon commented:

> There is no fundamental reason to define economic loss primarily as the absence or opposite of physical harm. The appellate court opinion in this case demonstrates at length the illogical results of the no-physical-harm approach . . . . Physical harm should not guarantee recovery, and the absence of physical harm should not necessarily defeat recovery . . . .
>
> [I]f a product simply fails to live up to its promise, if it does not accomplish what it was supposed to the way it was supposed to, that is only an invasion of a contract-like interest: the user has lost the benefit of the bargain. If a refrigerator fails, the food inside may spoil but there is no tort . . . . [T]he only risk is to commercial expectations . . . .[128]

The Illinois cases that might be placed within this third category do not involve physical harm. They impose liability solely on the factor of foreseeability. In *Normoyle-Berg Associates v. Village of Deer Creek*,[129] a supervising engineer was held liable to a general contractor for cost overruns suffered as a result of the supervising engineer's negligence. The court held that a supervising engineer would be held to have known that a general contractor would be involved and directly affected by the engi-

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126. The foreseeability criteria is nothing more than a restatement of the rule of Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854). The fact that damages are foreseeable at the time of undertaking does not compel the imposition of tort. If this were so, all contract cases would be tort cases. Defeated contractual expectations would be recoverable in tort as a matter of course. Indeed, these points have been recognized in the "foreseeability" tests rejected in the 1977 Illinois case of Laflin v. Estate of Mills, 53 Ill. App. 3d 29, 368 N.E.2d 522 (1977). Moreover, foreseeability is not the sum total of the traditional tort determinates. Foreseeability is not a gage of the likelihood of injury, the nature of the risk, the magnitude of the burden of guarding against injury or the consequence of placing the burden upon the defendant. If the Restatement approach was adopted, it would abandon the tort analysis traditionally used in resolving the imposition of public policy duties.

127. 91 Ill. 2d 69, 435 N.E.2d 443 (1982).

128. *Id.* at 95-96, 435 N.E.2d at 455 (Simon, J., concurring).

129. 39 Ill. App. 3d 744, 350 N.E.2d 559 (1976).

neer's conduct.[130] In *W.H. Lyman Construction Co. v. Village of Gurnee*,[131] a supervising engineer was found to have a tort duty to a contractor to avoid negligent preparation of specifications and negligent contract administration.[132] The court once again looked to foreseeability.[133] In *Bates & Rogers Construction v. North Shore Sanitary District*[134] the engineer was held to have a duty to a contractor to avoid negligent design and administration of the project; once again on the basis of foreseeability.[135] Each of these cases involved economic loss. The harm suffered by the plaintiffs, additional costs of construction due to delays and mistakes resulting in a reduction of profits, defeated the commercial expectations of the plaintiffs.

In the aftermath of *Moorman*, the methodology explicitly utilized to impose tort liability in these three cases was in error. If correct, such precedent would compel the imposition of a tort duty upon the contractor of a residential home to build the home in a non-negligent fashion, because it would be entirely foreseeable that negligent construction methods might cause severe financial harm to the owner. This, however, was the factual situation presented to the Supreme Court of Illinois in *Redarowicz v. Ohlendorf*,[136] wherein the court held that there was no tort duty requiring non-negligent construction.[137]

In sum, it is solely the first categorization of the tort-contract overlap cases, holding that tort liability can be imposed for negligent performance of a service contract only where traditional tort determinants are satisfied, which is consistent with the economic loss doctrine. The remaining categories embrace rules which would permit tort recovery in cases solely involving economic loss. With the advent of the economic loss line of cases, such relief is no longer appropriate.[138]

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130. *Id.* at 746, 350 N.E.2d at 561.

131. 84 Ill. App. 3d 28, 403 N.E.2d 1325 (1980).

132. *Id.* at 39-40, 403 N.E.2d at 1333-34.

133. *Id.*

134. 92 Ill. App. 3d 90, 414 N.E.2d 1274 (1980).

135. *Id.* at 96-97, 414 N.E.2d at 1279-80.

136. 92 Ill. 2d 171, 441 N.E.2d 324 (1982).

137. *Id.* at 176-78, 441 N.E.2d at 326-27.

138. It has been the law in Illinois that there is an implied obligation in every construction contract that the contractor will perform his tasks in a workmanlike fashion. Wiersema v. Workman Plumbing, Heating & Cooling, Inc., 87 Ill. App. 3d 535, 409 N.E.2d 159 (1980); Dean v. Rutherford, 49 Ill. App. 3d 768, 364 N.E.2d 625 (1977). This introduces a standard of care into the construction contract which is identical to that which would be imposed if tort was applicable. Nevertheless, the duty is derived from an implied contract, not tort. Could it be that the similarity in standards and terminology has led to the confusion and leniency in permitting tort remedies in such situations?

CONCLUSION

The status of the law in Illinois concerning tort recovery for negligent performance of contracts is ambiguous. Cases can generally be placed into three categories: (1) those cases which permit tort recovery only where an independent tort duty can be established; (2) those cases which permit tort recovery for any negligent performance of contract; and (3) those cases which permit tort recovery for negligent performance of contract only where the risk of harm was foreseeable at the time of undertaking the contract.

The recent development of the economic loss doctrine in Illinois is theoretically applicable to service contracts. Evaluated in light of the principles of economic loss, only those cases where a tort duty can be established independent of contract present proper cases for permitting recovery for negligent performance of contract in tort. Permitting tort relief in cases falling within the other two categories would lead to results which would be entirely inconsistent with the theories behind contract and tort causes of action.