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

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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 in which interests that can be identified as gendered are subject to different levels of recognition resulting from gender bias. Using a comparative methodology, the article contends that negligence law regarding pure-economic loss and indirect-emotional harm is constructed along lines of gender bias. The argument is underlined by the notion of gender-related interests, establishing pure-economic loss as male-related and indirect-emotional harm as female-related. On its first comparative analysis, the similarities and differences between these two harms as perceived by tort conventions and principles should have yielded leverage to indirect-emotional harm as fitting more squarely with tort law's fundamental conceptions than its counterpart, pure-economic loss. However, the course of legal recognition both harms have undergone in Anglo-American negligence law reveals that both losses were relatively similarly alienated from negligence law.

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Seeking further resources from which to draw on the significance of the gendered nature of these interests within negligence law, the article then proceeds to its **second** comparative dimension. Here it reviews Israeli negligence law, where indirect-emotional harm and economic loss function as legal implantations imported from Anglo-American law. Notwithstanding its deepest Anglo-American legal roots, Israeli negligence law, nonetheless, reveals a sharp departure in its adjudication on the matter from the Anglo-American tradition. Probing deeper into Israeli tort law, illuminates a unique phenomenon whereby the rhetoric of the court attributes the same relative-illegitimacy to both economic loss and indirect-emotional harm. However, reality indicates they are subject to significantly different treatment. This biased pattern bears harmful distributive implications as it embodies a two-dimension discrimination practice whereby in addition to disadvantaging female-related interests, negligence law unequally prefers male-related interests. Specific attention is given in the article to the comparative phenomenon whereby the Israeli legal system that draws so heavily on dominant Anglo-American law administers negligence law upon more discriminatory standards thereby reflecting the gendered nature of Anglo-American negligence law.

> "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, serving as an andocentric legal institution that reflects typical male perspectives as the norm through its core concepts such as duty, causation, foreseeability and compensation.[3] Prominent among these feminist critiques was the claim that tort law's attitude towards emotional and psychological interests within negligence liability is problematic, incoherent and reflective of judicial rigidity. Feminists argued, convincingly, that this approach of tort law was primarily distributive in view of society's perception of these interests

2. Martha Chamallas (with Linda K. Kerber), *Women, Mothers and the Law of Fright: A History*, 88 MICH. L. REV. 814, 814 (1990).

3. *See generally,* 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).

(whether justifiably or not) as "feminine."[4] These feminists' main target of criticism was the limited recognition given to plaintiffs who were indirectly-emotionally harmed. According to feminist studies, these plaintiffs, who were by large women, brought to the court their quest for compensation for the emotional harm they suffered consequential to the defendant's injury of their loved ones.[5] The courts, in retreat, have established a very narrow rule of recognition for this loss, positioning it at the margins of tort law and its societal implications. Feminist analyses of the leading cases in this field showed how the legal tools used in the adjudication to settle these cases reflected an androcentric mindset. Women were perceived as highly sensitive and hysterical in a manner rendering the harm caused to them (usually to their pregnancy) unforeseeable and hence, not compensable.[6] Other feminist analysis showed how shaping the rule stood in contrast with acceptable and traditional negligence law reasoning.[7] The fact that women were disproportionally affected by these rulings added another gendered dimension to its feminine-related characteristic.[8]

Consequently, feminists charged negligence law with androcentrism and saturation with male bias:[9]

> "It is a variant of disparate impact analysis...noncontroversial legal standards can sometimes systematically disadvantage women. When I speak of 'male bias' I am including practices that have a negative, even if unintended, impact."

However, an objection can be raised to the seemingly incomplete nature of this feminist project in tort law.[10] One might argue that current

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4. *See generally*. Chamallas, *ibid,* at 465-466; Chamallas & Kerber, *supra* note 2, at 814-815; Elizabeth Handsley, *Mental Injury Occasioned by Harm to Another: A Feminist Critique*, 14 LAW & INEQ. J. 391, 458-485 (1996); Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 190 (1992).

5. Chamallas & Kerber, *ibid*, at 814.

6. Chamallas and Kerber, *supra* note 2, at 816-825.

7. Handsley, *supra* note 4.

8. Chamallas and Kerber, *supra* note 2, at 814. The authors refer to two other researches as substantiating this fact: Leon Green *"Fright" Cases*, 27 U. ILL. L. REV. 761 (1933) (indicated that 35 out of the 40 claims he analyzed were brought by women, therefore related to this claim as "women-dominated.") The second source was Hubert Winston Smith, *Relation of Emotions to Injury and Disease: Legal Liability to Psychic Stimuli*, 30 VA. L. REV. 193 (1944), who found a ration of 1:5 in favor of women as bringing these claims to the courts.

9. Martha Chamallas, *Importing Feminist Theories to Change Tort Law*, 11 WIS. WOMEN'S L.J. 389, 391. Also *see* Leslie Bender, *Is Tort Law Male? Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents*, 69 CHI.-KENT L. REV. 313 (1993).

10. 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

feminist analyses focus on female-related interests and female experiences in order to conclude that tort law is androcentric looks only at one side of the equation of this legal field's gendered nature. Such an objection is not designed to weaken what I would term "first tier feminist analysis of tort law," but rather to explore the horizontal scope of the gendered structure of tort law and the extent to which it applies. Responding to this challenge, the article aims at adding the "male" side of the tort equation into its feminist analysis by applying a comparative review of courts' attitudes towards a seemingly-similar interest which can be perceived as "masculine."[11] Hence, it offers a "second tier feminist analysis of tort law" which seeks to provide a more holistic review of negligence law's gender bias, complementing its predecessors' critique. First tier feminist critique has proved that negligence law carries one dimension of discrimination embodied in its unjustified negative attitude towards female-related interests whereas this second tier analysis is interested in determining whether a subsequent dimension is added to it through privileging male-related interests. My analysis is carried by comparing the legal construction of the recognition of indirect-emotional harm–perceived as clearly "feminine"–to the legal construction of another form of harm, namely economic loss–which as will be soon elaborated, should be perceived as "masculine."

I have selected economic loss as a comparative yardstick not only due to its gendered attributes, but also because it shares many other main characteristics with indirect-emotional harm. Just like indirect-emotional harm, it raises substantial doubts as to its compatibility with the paradigmatic protection tendencies of interests embedded in negligence law. It also challenges the boundaries of liability imposition within this wrong's framework.[12] The intimate relation these harms share-which are acknowledged by the courts themselves-has set the stage for comparing them as having a similar fixed starting point. However, in other respects, indirect-emotional harm provided a better launching pad than that of the economic loss on different levels. These include internal-doctrinal questions within tort law, the losses' interrelations with contract law, and both economic analysis and corrective justice considerations. These differences indicated that indirect-emotional harm made a better and a

objection if being understood as de-legitimizing this feminist claim, which was so lucidly and convincingly established in the past.

11. The claim that interests are perceived as gender related shall be substantiated later in this introduction. *See* text accompanying footnotes 16-37.

12. The analogy between "interests" and "losses" in this case is clear and full. 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).

more natural fit to negligence law's scope of protection, whereas economic loss raised substantial challenges to it, rendering the losses' eligibility for similar protection questionable. Based on these differences I hypothesized that among these two losses, indirect-emotional harm will enjoy better recognition within negligence law adjudication. However, a review of the leading cases discussing these interests proved this hypothesis wrong. It revealed that both types of harm have ultimately gained a relatively similar position of very limited recognition within negligence law.

Standing alone, this finding could be read as implying a lack of gender-based adherence to one interest over the other. Yet, read against the above-mentioned comparative context, the "balanced" finding seems to reflect the one dimension discrimination against indirect-emotional harm which should have had the upper hand in being more easily embraced into tort law. The courts' usage of similar explanatory discourse in justifying the two losses' "shared destiny" as deserving an "exclusionary rule" of non-liability, strongly supports this proposition as well. It exemplifies courts' disregard of their important inherent differences.

The finding does not strongly support the counter, somewhat intuitive postulation, that negligence law carries simultaneously a second dimension of discrimination whereby it treats male-related interests as deserving over-protection. In this respect, the holistic feminist analysis of Anglo-American negligence law demonstrates that a bias against feminine interests within a fixed setting does not necessarily entail a counter bias privileging male interests. This revelation might also be read as weakening the feminist assertion regarding the gendered characteristic of the indirect-emotional and economic interests.

Seeking further resources from which to draw on the significance of the gendered nature of these interests within negligence law, regardless of the seemingly balanced picture laid-out by Anglo-American law, the article proceeds to its second comparative dimension where it compares Anglo-American and Israeli negligence law with respect to indirect-emotional harm and economic loss.

Israel's tort law domain is paradigmatically common-law, reflecting and embracing Anglo-American general conceptions and specific legal doctrines which function as legal transplantations and as a main source of adjudication.[13] Therefore, the basis for comparing these legal systems

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

is well-established. At the same time, differences to be revealed between these systems enable us to identify them as significant to understanding the impact of gender-bias legal transplantations and to analyze them more compellingly. On a more substantial level, the comparative analysis serves in this article as a tool to evaluate the feminist contention that common-law tort law is androcentric and perceives interests as gender-related. My hypothesis is that gender-biased doctrines of one system, once transplanted in another, would adapt the patterns of gender bias characteristic to the new legal system. Being a legal implantation within Israeli law, the Anglo-American doctrines regarding both these interests were expected to adjust to their new legal surroundings by adapting to the local "receptors" of the gendered perceptions they represent and adopt their mannerisms. The comparative perspective here is therefore meant to problematize the seemingly balanced picture presented in Anglo-American law, since the Israeli case presents a much different picture, whereby three dimensions of discrimination within this realm can be identified.

Israeli courts have gone much farther with their protection of economic interests and further broadened their scope of liability, infringing upon almost every possible boundary set by Anglo-American case law in this realm (first dimension of discrimination). At the same time, Israeli courts have further established boundaries and limitations on negligence liability for indirect-emotional harm, finally framing a very narrow and extremely arbitrary duty of care toward potential victims (second dimension of discrimination).[14] This Israeli extremity is particularly interesting in light of the courts' use of Anglo-American rhetoric presenting these two types of interests as suffering from similar "negligence hostility." This way, the extreme gap between these two gender-related interests in terms of tort protectionism is denied by the court (third dimension of discrimination).

The article suggests that this comparative analysis related phenomenon of departure from the mother-systems supports the feminist analysis of the two interests as being gendered and resulting in gender-bias. Though absorbed through seemingly neutral doctrines, the extremist application by Israeli courts of Anglo-American gender-based tendencies was an exercise of legal transplantations adapting to their new settings. These doctrines were now developed within a more gender-stratified socio-legal system which maintains at the same time a legal rhetoric of

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

advanced gender equality. Shaped accordingly, these doctrines were applied in Israel in a gendered manner that added other dimensions of discrimination to negligence law, rendering it triple-dimensional. This discriminatory structure can be easily associated with the Israeli legal system's typical administration of women's rights, whereby Israel holds a rhetoric level which reflects an admirable rather than a reality-based legal stance.[15]

The comparative analysis also presents Israeli courts as exemplifying a stronger version of gender disparity analysis whereby gender-related interests are set within a zero-sum game structure where what men gain in negligence liability rules, women lose, or alternatively stated: while men gain, women lose. The regressive distributive implications of this structure are discussed thereafter.

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 establishes pure-economic loss as male-related and indirect-emotional harm as female-related. Part I also pinpoints the significance of critically analyzing negligence law from a feminist perspective. In Part II, the similarities and differences between these two harms as perceived by tort conventions and principles will be introduced 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 path in Israeli negligence law. 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 whereby court rhetoric attributes the same relative-illegitimacy to both economic loss and indirect-emotional harm. However, 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 presents the harmful distributive implications of the two dimension discrimination practice of preferring economic loss over indirect-emotional harm. Specific attention is given in Part XI to the

15. This kind of comparative 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) Whitman here stresses that a comparative analysis should go beyond comparing "black letter" laws, and search for further tools of comparison that seek the practical application of these laws by the courts etc.

comparative phenomenon whereby the Israeli legal system that draws so heavily on dominant Anglo-American law administers negligence law with more discriminatory standards thereby reflecting the gendered nature of Anglo-American negligence law.

PART I: INTRODUCING GENDER-RELATED INTERESTS AND LOSSES

1. ON GENDER-RELATED INTERESTS

This paper is premised on the notion that societal values identified as feminine are being devalued compared to masculine values, irrespective of their actual social merit.[16] Therefore, we must first establish the notion of values as gender related. Within the context of tort law, masculine and feminine values transform into interests that are valued by it as recognized and protected or rejected by it.[17] These interests bear gender significance, and can thus be referred to as "gender-related interests," in spite of the difficulties and the risks entailed.[18]

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.[19]

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 genders and evaluating them accordingly. However, it derives from a metaphorical level and relies on existing factual data. Gender has a significance which is not necessarily

16. 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".

17. The manner in which tort law values interests, however, is not dichotomous. The interests are located along a continuum of strong protection and total rejection ends.

18. 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.

19. The first approach is perceived as old-fashioned, while the second approach receives a wide support (Evans, *supra* note 16 at 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.

biological or social, but merely one which is attributed to it as a factual matter on a metaphorical level.[20] 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 towards values which are attributed to gender can be examined irrespective of the reason for that attribution.[21]

2. WOMEN, EMOTIONS AND INDIRECT-EMOTIONAL HARM

Women are perceived by society as the "sensitive gender." By this I do not mean that women are more sensitive than men, but that emotion and mental suffering to which sensitivity may lead are gender-related values. Hence, they are consequently more effective and apparent in 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 and therefore require the protection and restraint of the rational man.[22] During the period of the Enlightenment, when abstract and logical thinking was valued as the only legitimate form of knowledge, philosophers of that time preferred the rational and logical over the emotional which was long associated with women's weakness.[23] 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 the thought that "affection" was a manly trait.[24] A similar pattern of thinking was also found in Israeli society.[25]

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20. 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.

21. 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.

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

23. Williams, *ibid*, at 804.

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

25. 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).

Even if the association between women and emotion is a result of a socially constructed stereotype, it is still of great importance. Stereotypes are tools to structure reality. Thus, they are absorbed into social consciousness where they can establish "genuine" differences between men and women. Putting aside the question of the "true" nature of these stereotypes and the wrong which can arise from them.[26] I will focus on the influence they exert on social awareness which sees emotions and compassion as "women's interests." The existence of this perception strengthens the assumption that emotion and compassion are indeed female-related interests and therefore, receive less protection in tort law.[27]

Indirect-emotional harm is tightly rooted in this basic notion of emotionality. It is identified as the emotional and mental suffering caused to a person within a relationship setting. A prominent example is of A's claim against C who negligently harmed B. Within this setting, A suffers emotional and mental pain arising out of a physical injury to her loved one, B, with B's injury resulting from C's negligent behavior.[28] 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 self. A clear example of such harm, and the most common one, 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. Within this setting, this loss relates more particularly to emotions related to the care of others, which is more typically considered a female virtue.[29] Moreover, statistics show that plaintiffs with indirect-emotional harm claims were

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26. 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 24, at 33-36, 202-204.

27. 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).

28. 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 have 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).

29. The "Ethics of care' is attributed to women mainly through the work of Carol Gilligan, IN A DIFFERENT VOICE (1982). Researches also indicate that most care work is burdened by women. *See, e.g.*, Julie Holliday Wayne and Bryanne L. Cordiero, *Who is a Good Organizational Citizen? Social Perception of Male and Female Employees Who Use Family Leave*, 49 SEX ROLES 233, 235 (2003).

predominantly women, thereby implying that women are also disproportionally affected by liability rules governing these claims.[30]

It is therefore the female-related trait of this loss that triggered the interest of first tier feminist analysts of tort law in reframing the qualified recognition this loss has gained within negligence law as reflecting a gender bias against women.

3. MEN, ECONOMICS AND PURE-ECONOMIC LOSS

The economic superiority of men as well as the economic inferiority of women indeed rely on discriminatory gender stereotypes but are a very viable reality.[31] Men control financial and economical resources and are therefore primary addressees of their policy effects.[32] The public sphere in which business activity takes place ejects women, who are located traditionally in the "private" spheres of life–comprised of the 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.[33] In addition, in our world, the acquisition and ownership of assets are controlled mainly by men,[34] *inter alia* because throughout history women were denied access to economic independence and autonomy.[35] The dichotomy of market and home is in complete harmony with the link that is made between women as those who are the primary caretakers of their children, while the men are found in the public sphere of the "market" and manage the economic life of the family.[36] Consequently,

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30. 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 harms: 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 mainly a feminine burden, though research has proven that both genders are equally able to carry it (LEVIT, *supra* note 24, at 25 – 26, 29-32).

31. Joan Williams, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 64-76 (2000).

32. According to the U.S. Census Bureau, as of 2002, Women-owned firms account for 28.2 percent of all nonfarm businesses, 6.4 percent of their employment and 4.2 percent of their receipts. *See* http://www.census.gov/csd/sbo/womensummaryoffindings.htm

33. LEVIT, *supra* note 24, at 53.

34. 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 notes 7-9 (1992). (The author offers an economical analysis of women's inferiority in a world founded on property rights).

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

36. For the notion of the dichotomy between the market and the family as discriminatory and incoherent, *see, generally,* Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. (1983).

men disproportionately benefit from nurturing of economic interests. Hence, laws which are designed according to this patriarchal pattern will likely operate to predominantly benefit men.

Pure-economic loss fits squarely into this theoretical framework. Defining it is a difficult task, as demonstrated by the courts' failure to provide a definition which will determine the clear scope of this loss.[37] However, in rough terms 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[38] and from the latter by being independent, not collateral to some prior damage to the plaintiff's own body or property.[39] Therefore, this damage is 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 the case where A, who is a business owner, to which the only passageway is B's bridge, suffers financial loss after being compelled to close her business upon B's bridge being destroyed by C's negligent behavior. A's tort claim against C constitutes a claim for pure-economic loss.[40] Pure-economic loss is typically generated within a contractual setting and relates mainly to a loss of money, thereby rendering it particularly relevant to the business sphere where as mentioned above, women suffer substantial disadvantage compared with men.

Economic loss, therefore, bears gender significance that pertains mainly to men and is thus an important site for "second tier" feminist analysis that would complement the existing feminist scholarship in this field and would provide a fuller picture of the gendered protection tendencies of negligence law.

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37. David Ronen, *Pure Economical Loss from a Comparative Perspective*, 44 HAPRAKLIT LR, 504, 504 (2000) (Hebrew); Tamar Gedron also presents 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) (Hebrew). For the commonly used categories of pure-economic loss, *see* ROBBY BERNSTEIN, ECONOMIC LOSS 2-5 (2nd ed. 1998).

38. BERNSTEIN, *ibid*, 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).

39. 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).

40. These were the facts reflected in Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124 (Iowa 1984).

4. JUDGES AND NEGLIGENCE LAW

Any gender-related dynamic of tort law should be of interest for feminist analysis. Special interest should be given to such a dynamic located within negligence law since it carries significant policy-making characteristics. This tort is uniquely pragmatic in the way it accommodates social developments.[41] The elements of judicial/political discretion are the central and important factors in negligence law. Therefore, rejecting "feminine" interests within this setting strengthens the effects of marginalization and the invisibility of women, assuming that what judges say and do matters outside the realm of their specific rulings.[42] More specifically, within negligence law the duty of care component functions as a "filter" for all inherently negligent actions. Hence, judges reject imposition of liability where it is contradictory to the goals of tort law or at least, not serving it properly.[43] It is a tool used by the court to determine the boundaries of tort liability.[44] Therefore, a study of how the duty of care emerges can clarify the way in which tort law is being used to protect different interests.[45] Some perceive the duty of care as the court's chief tool in making allocation-based decisions, susceptible to political influences.[46] This characteristic is no different in Israel where the Supreme Court has also given expression to its creative normative power by establishing various duties of care in tort law.[47] Establishing a duty of care entails a declaration regarding what is worthy of tort protection, whether by virtues of the courts' function as

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

42. For the practice of storytelling as having powerful political and societal effects *see* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988).

43. 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) (Hebrew) (for Israeli tort law).

44. The powerful perception of the duty of care is shared by fairly conservative tort law scholars. *See* W.V.H. ROGERS ED, WINFIELD & JOLOWICZ ON TORT 91 (5th ED. 1998) ("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* PAGE W. KEETON ET AL, PROSSER AND KEETON ON TORTS 968-973 (5th ED. 1984).

45. The duty of care was held to "...Highlight(s) the question of the common-law's protectionism". Jane Stapleton, *Duty of Care and Economic Loss: A Wider Agenda*, 107 L.Q. REV. 249, 249 (1991).

46. *See, e.g.*, Richard Abel, A Critique of Tort Law, 2 Tort LR 99, 110-115 (1994).

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

constituting values or by virtues of it merely declaring their existence.[48] In practice, this question defines who an appropriate person is and what an appropriate injury is generally "appropriate" and not only appropriate for compensation purposes. Tort law is therefore a venue by which the legal system can express what is desirable and what is not. Courts' tort protection decisions are designed not to solve a local dispute between individuals alone, but rather to establish general social principles in the area that can exceed the boundaries of the concrete dispute before the court.[49]

5. WOMEN, MEN, NEGLIGENCE LAW AND DISTRIBUTIVE EFFECTS

Privileging male-related interests, in addition to undermining female-related interests, can be roughly termed as obvious as they accumulate and intersect. It adds another tier of discrimination to the latter in a manner that creates a new harm, bigger than the sum of its parts. However, I postpone the elaboration on these effects to a later stage in this article so as to present them only after a fuller picture of the interests and their treatment is revealed.[50] This structure will enable the reader to better understand the mechanics behind these distributive effects as presented by the different systems. On a feminist note, I stress that contextual analysis of this kind proves more useful than an abstract one.[51]

PART II: INDIRECT-EMOTIONAL HARM AND PURE-ECONOMIC LOSS:

A. "NATURAL" COMPARISON ?

1. WHY PURE-ECONOMIC LOSS?

I have selected pure-economic loss as a comparative yardstick since it poses a particular challenge to feminist analysis of tort law in that in addition to being distinctively "male," it has a lot in common with indirect-emotional loss to the point that they were considered similar in

48. 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." KEETON, *supra* note 44, at 359. For Israel, see the similar approach brought by (then) Deputy Justice Aharon Barak in SC 186/80 Ya'ari v. The State of Israel, P.D. 35(i) 769, 799 (1980) (Hebrew). 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).

49. ROGERS, *supra* note 44, at 91.

50. *See infra*, part V to this article.

51. Martha Minow and Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990) (stressing the importance of contextual analysis).

scholarship[52] and in adjudication.[53] chronologically, the emergence of economic loss as establishing a legitimate tort claim parallels that of emotional harm; both damages suffered from a 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 harm 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.[54] Because of their nontraditional characteristics, indirect economic and emotional harms became the center of attraction for policy considerations, specifically whether they deserve protection by the developmental process of the duty of care offered by negligence law. Consequently, both losses shared the myth of being "step-children" marginal to principles of negligence law.[55] These shared commonalities subjected these losses to a non-compensable dynamic, also known as "the exclusionary rule." Negligence law, which bears a hierarchy of losses that it protects, has posited these two losses at the bottom, setting them as the last borders to be crossed before imposing limitless liability.[56]

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52. Gedron, *supra* note 37, at 127-128. This perception dominates also outside of Israel. BASIL MARKESINIS & SIMON DEAKIN, TORT LAW 21 (5th ed., 2003); ROGERS, supra note 44, at 160, note 82; 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.

53. *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 (1968), regarding indirect-emotional harm, to justify compensation for pure-economic loss).

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

55. 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 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)).

56. 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);

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."[57] These forms of damage are similar in that they are being caused to third parties consequential to physical injury upon 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 barely recognized in Israeli case law, both of which use the rhetorical generalization of "pure-economic loss."[58] This conceptual rhetorical generalization has helped shape the exclusionary rule as applying to all types of economic losses, also allowing the pretence of equal treatment to be given to economic interests and indirect-emotional harm alike.[59]

Beyond these rhetorical reasons for comparing between the two harms as separate 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 because 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 in effect has no legal proximity to the tortfeasor; i.e., his injury is not typically one which should have been proximately foreseen.[60] In contrast, paradigmatically, the indirect-emotional harm suffered by the plaintiff is derived from prior familiarity and a close

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Robert Hayes, *The Duty of Care and Liability for Purely Economic Loss*, 12 MEL. U. L. REV. 79, 97, 100-102 (1979).

57. Bernstein, supra note 38, at 3.

58. *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 37, at 175. The same approach is apparent in Anglo-American courts. *See* Bernstein, supra note 37, at 1-23.

59. 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 Chaos* 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.

60. 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 restaurant's suppliers, whose 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 primary and 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.

relation to the primary physically injured person.[61] Therefore, such plaintiffs could be much more easily foreseen and defined as a limited group, based on the assumption that closely related people have loving relations; therefore, they are potentially specifically vulnerable to such related injury. Second, 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 mainly through the use of contractual tools.[62] Such contractual action is highly problematic in pre-indirect-emotional harm settings where the relationship between the primary victim and the plaintiff is emotional, and there is no commonly held tradition of, or moral legitimacy for, an *a priori* allocation of risks.[63]

The final difference between the two types of damages exists on a symbolic level, whereby in relational economic loss, the plaintiff has no interest in the damaged property which caused 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. Absent a proprietary interest in the damaged bridge, the plaintiff is ineligible 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 *his* property. On the other hand, with regard to indirect-emotional harm, on the other hand, the familial-personal relations of the plaintiff and the primary victim can be reconceptualized 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 intellectual property rights and creating what I

61. Although cases of indirect-emotional harm are frequently referred to as "bystander cases," almost all Anglo-American cases, and *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, e.g.,* Wilson v. United States, 190 F.3d 959, 961-962 (Ala. 1999); 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 (NJ, 1996).

62. 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.

63. 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).

would term an "emotional property" right.[64] Applying this legal construction here would make the plaintiff fully eligible for compensation under the traditional conditions for establishing proximity between the tortfeasor and the plaintiff in negligence claims through property rights in the injured subject.

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

2. SIMILAR BUT DISTINCT

Notwithstanding the similarities between indirect-emotional harm and pure-economic loss, these two losses soon diverge. However, the differences dividing them, however, as I shall demonstrate, indicate that courts should have preferred recognizing the former as deserving protection within negligence law jurisprudence.

(a) Paradigmatic Content of Tort Law

Emotional suffering has been acknowledged and relevant 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, the latter's status would expectedly be much shakier than that of the former. Emotional harm reflects basic elements of human welfare, whereas economic loss does not have such superior qualities.[65] Furthermore, in terms of tort law's tradition, broadly speaking, we can associate emotional harm with bodily injuries which

64. This right and morally justified entitlement also has 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 concept 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 negligence. JOHN G. FLEMING THE LAW OF TORTS 723-725 (9th ed., 1998); RICHARD A. EPSTEIN, TORTS 451 (1999).

65. 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).

are traditionally located at the core of the tort law more strongly than property injuries which are associated with economic loss.[66] As a result, one would expect more "tort empathy" towards emotional suffering.

(b) The Goals of Tort Law

Here too, indirect-emotional harm enjoys an advantage arising from an unexpected source.[67] Viewed 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.[68] 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. Therefore, the proponents of this theory might be indifferent to such loss: in terms of general welfare and "social loss," once the loss has occurred, the distributive question of "who will bear its burden" becomes less significant.[69] The elusive character of the economic loss also gives rise to a concern that its uncertain nature will prevent a proper evaluation of its preventive value.[70] In contrast, emotional harm is not the modified converse of the profit of the tortfeasor; therefore, it will likely not be perceived as a subrogation of benefit between him and his victim. Indeed, it has been asserted that emotional harm lacks economic significance; however, this assertion has been disproved.[71] Furthermore, this damage is considered relevant to the

66. *See*, *e.g.*, the words of the Canadian judge Stevenson in Canadian National Railway Co. v. Norsk Pacific Steamship Co. Ltd. (1992) 91 DLR (4th) 289, in paragraph 308.

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

68. HOWARTH, *supra* note 54, at 309-310.

69. Bernstein, *supra* note 35, at 20; Bishop, *Economic Loss in Torts*, 2 OXFORD JOUR. LEGAL STUD. 1 (1982). This is the Israeli contention as well, as brought by Israel Gilead, *Tort Liability in Negligence for Pure Economic Loss* in ISRAEL REPORTS TO THE XV INTERNATIONAL CONGRESS OF COMPARATIVE LAW 79, 81 (ALFREDO M. RABELLO ED., 1999). For a counter opinion *see* STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 136 (1987) (stating that some economic loss claims do involve losses of "social welfare".) 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 EDS., 1996). *See* also Gilead, *ibid*, at 81.

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

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

core economic rationale of tort law such as internalizing the cost of the damage and preventing unwanted behavior.[72]

(c) Conceptual Compatibility with Tort Law

These two harms are claimed to be equally disfavored by negligence jurisprudence because they are intangible which is a trait at odds with other traits of tort law. 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 are therefore hard to evaluate.[73] In contrast, the abstract nature of economic loss ensues, *inter alia*, from practical rather than moral difficulties of evaluating it. These include extra-contractual relations, detached from a concrete business context and so forth.[74] On the other hand, contrary to emotional harm, economic loss's fiscal nature renders it 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 the above substantial policy considerations but also of structural implications that a recognition of a duty to care entails.[75] Stapleton criticizes the current court practice of using predetermined and–in terms of their definition– overly broad "liability pockets", (as in economic loss cases)[76] or unreasonable or "quasi-tort-law" devices, where their decision is allocation based (as in pure-economic loss and indirect-emotional harm cases).[77] Stapleton proposes the use of parameters that would dictate duties of care that are appropriate and consistent, retain the proper boundaries of liability in negligence and grant the courts a real anchor for

72. *Ingber, ibid*, at 799-819.

73. HOWARTH, *supra* note 54, at 324.

74. HOWARTH, i*bid*, at 303-306.

75. Stapleton, *supra* note 41, at 101.

76. 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). Stapleton, *ibid*, at 90.

77. Stapleton, *ibid*, at 85.

their judgments. I find Stapleton's considerations, initially focused on pure-economic loss alone, useful to evaluating the structural traits of constituting a duty of care for both losses. Stapleton's remarks manifestly touch upon the comparison between these losses and indicate that recognizing indirect-emotional harm is more conceptually compatible with the notion of "duty" in negligence law than pure-economic loss:

First Criterion: **The injured party's ability to protect herself against the loss**.[78] 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 herself except 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.[79] 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 her damage and how to allocate the risks it entails. A buyer of a house can decide who to contract with in a manner that would decrease the danger of construction defects. The protective options applicable in these cases are also much broader and varied; often they 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 herself from construction-derived defect costs by contractually stipulating that they be incurred by the seller.

Second Criterion: **Preference to linear over peripheral claims.** Stapleton points to this parameter as one of the most important considerations in pure-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 lawsuits. This stance as well, strengthens

78. Stapleton, *ibid*, at 90-91.

79. HOWARTH, *supra* note 54, 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).

the status of indirect-emotional harm compared to that of pure-economic loss. The relational trait of pure-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. The first arises out of some contractually secured preliminary relationships he has with the direct injured party. The second arises out of the tort claim established against the tortfeasor himself. Additionally, this is the same tortfeasor that will probably be found liable for the loss incurred by the direct victim. This may even put the indirect injured party in a better position than he would have been in but for this damage.

Consider, for example, A, the business owner from our former example, who signs a contract with B to use his bridge as the passageway to his restaurant. Using the tort route, A can receive damages from C for the economic loss inflicted upon him by shutting his business. Concurrently, he can enjoy contractual benefits from B by using the contractual route.[80] In contrast, indirect-emotional harm does not bear this kind of risk: the injured party alone suffers the damage for which he is being compensated.[81] Additionally, in pure-economic loss cases, typically there is indeed a linear tortfeasor who is negligent and can be sued. Through her, other tortfeasors can be reached. Thus, for example, in the purchase of a defective house, one can first sue the owner who sold the house to the buyers and the seller can sue the construction 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 indirectly injured party is generally expected to have an emotional barrier to instituting a claim against that person who by the 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. This is opposed to cases of pure-economic loss, where the linear tortfeasor is often a genuine and active wrongdoer, sometimes acting as a joint tortfeasor with the peripheral wrongdoer, who is not sued for extraneous reasons. For example, this is because he is insolvent, or cannot be clearly identified, or is contractually exempted from liability. An illustration occurs where a lawyer mishandles the sale of a mortgaged house and has the benefit of

80. 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.

81. 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.

the customarily acquired insurance coverage for his actions, as opposed to the owner of a house, who does not have insurance, and hence bears more risk in being sued.[82]

Third Criterion: **Preservation of the damage's initial fall location.**[83] Stapleton stresses the importance of not establishing a duty which will benefit the person who ought to bear the liability by imposing it 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 with no opportunity to manipulate options of compensation. In contrast, this problem is known in cases of economic loss, as the above-mentioned lawyer example proves. Another prominent example is a case of a contractual agreement between the linear parties that no liability would be imposed on one of them. Such an agreement practically compels the injured party to turn to the peripheral tortfeasor as his last and only resort for compensation.

Fourth Criterion: Protection of negligence law's "public dignity."[84] 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 experiences 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 a ruling is the *Alcock* case from the English House of Lord's, 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.[85]

82. HOWARTH, *supra* note 54, at 93.
83. HOWARTH, *ibid,* at 94.
84. HOWARTH, *ibid.*
85. HOWARTH, *ibid*, at 95.

(e) The Two Losses and the Boundaries of Tort Law

Pure-economic loss protects economic interests which are protected by other legal fields, prominently within the area of contract law.[86] Typically, pure-economic loss arises from contractual interactions in which the injured party is positioned in a direct or indirect "contractual environment" which is closely connected to his loss.[87] Accordingly, activating tort law and using it to protect economic interests strengthens and reinforces the primary *contractual* protection already benefiting from these interests.[88] Thus, limited tort protection of economic loss can be strongly supported and justified on the ground that it prevents blurring the distinction between these branches of law, particularly where it unnecessarily widens the application of tort law beyond its traditional limits.[89] An additional primary concern is that imposing tort liability for pure-economic loss would be an inappropriate intervention in the contractual relations between the parties. 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.[90] Therefore, efforts should be made to establish sounder protection mechanisms to economic interests in contract law rather than in tort law.[91]

In contrast, indirect-emotional harm does not receive any preferential protection in other fields of law and seemingly is accorded almost no protection other than in tort law.[92] In Anglo-American law, contractual protection of one's feelings is without a doubt, minor and exceptional to

86. *See*, *e.g.*: ROGERS, *supra* note 44, 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 60, at 1283.

87. Some even define the loss accordingly: "Economic loss is interference with contractual rights and potential business." HOWARTH, *supra* note 54, at 267.

88. 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 Ltd. v. Kuehn & Nagel International Ltd. (1992) 97 DLR (4th) 261, 272-273 (Justice La Forest).

89. HOWARTH, *supra* note 54, 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).

90. Stapleton, *supra* note 45, at 271-275, 285-294; COHEN NILLY & FRIEDMAN DANIEL, CONTRACTS 615-621 (part I, 1991) (Hebrew); KEETON ET AL., TORT AND ACCIDENT LAW 968-973 (4th ed. 2004).

91. Ronen, *supra* note 37 at 527.

92. 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).

the recognized economic context within which they operate.[93] Israel as well lacks equivalent contractual protection of feelings.[94] Awarding compensation for non-pecuniary loss is highly limited and rarely used.[95] Emotional harm is compensated in contract law as a loss which is secondary in importance, collateral to the economic loss, and requires that some contractual interaction generate the harm. 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 pure-economic loss cases represents a highly problematic intervention in the balance created by contract law in these respects.[96]

3. SUMMARY

The points of similarity and difference between indirect-emotional harm and pure-economic loss increase the feminist interest in investigating their course of recognition. Indirect-emotional harm has had a better legal starting point than pure-economic loss, particularly bearing in mind that the argument that it might encourage frivolous claims to overburden the system, was rejected as groundless.[97] Therefore, it might have been hypothetically expected that this loss would gain faster and easier recognition compared with economic loss. A contrary discovery suggests that these losses possess a gendered "added value" (or "reducing value") causing them to develop in a way other than expected. This added value can generate one-dimension discrimination as argued by the first tier feminist critique of tort law, or two-dimension discrimination, whereby preference is given to the male-related economic interest by granting it over-protection that is also stronger than the protection granted to female-related emotional interest.

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93. 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 (1992). 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.

94. Article 13 to the Israeli 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) L.S.I. (Laws of the State of Israel) 16.

95. 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) (Hebrew).

96. HOWARTH, supra note 54, at 267; Gedron, *supra* note 37, at 183.

97. *See* BITTON, *supra* note 14, at 81-82, 94-95.

The fact that the two losses share many similar traits with respect to their unnaturalness as the subjects of negligence law protection on the one hand, and that they diverge in a manner which should have benefited indirect-emotional harm over pure-economic loss, on the other hand, strengthens their comparison against possible objection. True, there can be other variables that have influenced the way the courts have constructed their limited recognition of these losses. Some, for example, have contended that the emotional harm is hard to evaluate, whereas economic loss is easier to predict and prove.[98] However, notwithstanding this possible objection, most of the distinctive and "problematic" traits of these losses and the concerns that they raise have been presented here in detail and are therefore recognized in my argument and incorporated into it. Furthermore, no other scholarly argument exists today that has undertaken to compare the two losses at any rate other than the one presented here. Confining my argument to the feminist traits of these two losses, the comparison seems established and justified regardless of some possible other influences on the recognition path these two losses bear.

PART III: ECONOMIC LOSS AND INDIRECT EMOTIONAL HARM: A COMPARATIVE GAZE ON BOUNDARIES AND RECOGNITION[99]

1. ANGLO-AMERICAN LAW

(a) Economic Loss

Tort liability for economic loss, which is not pure but rather accompanying or collateral to other physical harm, has been recognized since the dawn of time.[100] The recognition of pure-economic loss which is independent, stemming alone from the wrong, has existed in traditional torts such as breach of contract and deceit.[101] The difficulty in compensating for pure-economic loss arises only when one seeks its protection under the tort of negligence. Negligence law imposes liability for all types of behaviors which are regarded as creating an unreasonable and foreseeable risk. This broad definition allows negligence law's protection to encompass injury caused to a circle of people broader and

98. Arguably, economic loss's fiscal nature renders it more suitable, technically, for fulfilling the *restitutio in integrum* tort maxim by compensating the victim with money, for monetary harm.

99. For further analysis in the subject of economic loss in general, and in the Anglo-American law in particular, see CANE, *supra* note 12; Stapleton, *supra* note 45.

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

101. Howarth, *supra* note 54, at 474 (breach of contract), 275 (deceit). These injustices are characterized as "intentional torts".

more remote than the direct and commonly known circle of injured people in tort law.[102] It is therefore the natural legal refuge for a person suffering indirect economic injury to seek compensation for his loss from a third party.[103]

The common law tradition has established a "no liability," non-recovery rule in negligence for economic loss.[104] Although it is hard to point to a single case which shaped the rule, the rule already arose from a number of decisions made mainly by English and American courts.[105] It is also prevalent in other common-law systems.[106]

In England, the decision in *Hedley Byrne & Co. v. Heller & Partners*[107] is considered the first to recognize economic loss for negligent misstatement. *Hedley* was perceived as having created an exception to the traditional rule of non-compensation[108] and as having limited precedential value, being relevant only to the unique context in which it was considered.[109] Still, 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.[110] A more sweeping acceptance of pure-economic loss was reached only by the end of the 1970's. In *Anns v. Merton*,[111] the House of Lords formally and officially recognized the possibility of imposing liability in negligence for pure-economic loss.[112] This case was followed by the important ruling of *Junior Books v. Veitchi,*[113] which

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102. Ronen, *supra* note 37, at 505.

103. COHEN AND FRIEDMAN, *supra* note 90, at 173-184. The authors also do not distinguish between different categories of economical loss.

104. People Express Airlines Inc. v. Consolidated Rail Corporation, 100 N.J. 246, 251 (NJ 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 (1985); Howarth, *supra* note 54, at 267.

105. 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).

106. *See* THE LIMITS OF EXPANDING LIABILITY, *supra* note 39, at 69-72 (Austria), 129-130 (Greece), 137-143 (Italy), 157-158 (The Netherlands), 190-191 (Sweden). These different legal systems adopted a non-recovery rule similar in scope to that shaped by the Common-law.

107. Byrne & Co. v. Heller & Partners [1964] AC 465 HL.

108. Atiya thus analyzes this case at Atiya, *supra* note 105, at 258-265.

109. Stapleton, *supra* note 45, at 260-261.

110. *See* the review of the adjudication in the field at FELDTHUSEN, *supra* note 105105, at 8.

111. *Anns*, *supra* note 53.

112. 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 hence lose their money in order to fix the building.

113. Junior Books v. Veitchi, [1983] 1 AC 520 HL. Though initially perceived as central to economic loss theory, the case was later described as a case that "...cannot be regarded as laying

established the test for accountability that would eventually become the source for generally shaping the duty of care for negligence in the UK.[114] However, the *Anns* rule did not survive for long; after problematic applications, it was finally rescinded by the House of Lords in *Murphy v. Brentwood District Council*[115] which shaped the currently prevailing rule regarding 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 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 just, logical, appropriate and reasonable to do so.[116] An exception to this rule is the recognition of economic losses that are based upon negligent misstatement, misrepresentation or professional negligence, where liability is more easily imposed.[117]

Tort case law in the U.S. 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 loss and state that this form of damage followed a course similar to the English one, where a denial of compensation demanded the beginning of the century, a limited recognition was established during the 1960's,[118] endured through the 1970's,[119] and has undergone a problematic expansion which finally led to the current regression in recognition.[120]

The leading case to establish the non-recovery rule of no liability in negligence for pure-economic loss was *Robins Dry Dock & Repair Co. v. Flint*.[121] Despite this general rule however, some cases have imposed liability for negligent interference with purely economic interests.

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down any principle of general application in the law of tort". *See* D&F Estates Ltd v. Church Commissioners Ltd., [1989] AC 177 HL, 202.

114. 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.

115. *Murphy*, *ibid*.

116. *Caparo*, *supra* note 53, at 585.

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

118. Feldthusen's perception of the Glanzer v. Shepard, 135 N.E. 274 (Cal. 1922) 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 60.

119. The leading case is Union Oil Co. v. Oppen, 501 F. 2d 558 (1973) where the court awarded compensation to fishermen claiming loss of future benefits. These were caused by contamination to their fishing water by the defendant's negligent water pollution.

120. A detailed review of case law regarding this issue is provided by DOBBS, *supra* note 60, at 1282-1287 and Schwartz, *supra* note 69, at 104-114.

121. Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927); DOBBS, *ibid*, at 1284.

Moreover, some statutes have imposed liability for pure-economic loss, most notably in the statute regarding oil spills in navigable waters.[122] Additionally, in a few cases the courts have proposed a general modification of the non-recovery rule. In the seminal case, *People Express*,[123] the defendant was allegedly negligent in the management of highly dangerous chemicals. The area nearby had to be evacuated, including the plaintiff's airlines office, had to be evacuated, resulting in loss of profits and business operations for the airlines. Importantly, the dangerous chemicals caused no physical harm. The New Jersey Supreme Court concluded that the general rule against liability was incorrect 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 to occur.[124] In a prior, much looser opinion, a federal court has also favored a general regime of negligence liability for economic loss.[125] Notwithstanding these cases, today courts generally hold that there is no duty to protect against negligent interference with purely economic interests.[126] The Second and Third Restatements of Torts have adopted a clear non-recovery rule for relative economic loss.[127]

(b) 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 that led the way in 1968 when it recognized the duty of care toward an indirect-emotionally injured party for the first time. In *Dillon v. Legg*,[128] the Supreme Court of California

122. 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.

123. *People Express*, *supra* note 104.

124. *People Express, ibid*, at 116. Alaska has at least partially approved this idea. *See Mattingly v. Sheldon Jackson College*, 743 P.2d 356 (Alaska 1987).

125. Petitions of Kinsman Transit Co., 388 F.2d 821 (2d Cir.1968). *See* also DOBBS, *supra* note 60, at 1285-1286.

126. 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).

127. *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, comment 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.").

128. *Dillon*, *supra* note 53.

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.[129] The Court's invigorating suggestion was to examine the liability issue within the traditional framework of the duty of care, including the application of its foreseeability and proximity tests–structured in the general law of the tort of negligence.[130] 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;[131] 2) her means of perceiving the accident; 3) the degree of personal closeness between the plaintiff and the primary victim.[132] The parameters were defined by the Court with the sole intention of providing guidelines for assessing reasonable foreseeability rather than being preliminary conditions for liability. It was also held that decisions in future cases would not be made on the basis of strict principles but rather on a case by case developmental course customary in common-law.[133]

The California Supreme Court followed *Dillon* for two decades until declaring, in *Thing v. La Chusa*,[134] that the recovery rule it had set based on "reasonable foreseeability" was too broad.[135] Reassessing *Dillon*, the Court held that it provided virtually no limit on liability for nonphysical harm.[136] Its worrisome alternative shamelessly stated that "drawing

129. 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; *Dillon*, *ibid*, at 915.

130. "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" *Dillon*, *ibid*, at 924.

131. This requirement signified the desertion of the former demand that the plaintiff be present at the danger zone of the accident. The court 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. *Dillon, ibid*, at 922.

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

133. "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..." *Dillon*, *ibid*, at 920-921.

134. *Thing v. La Chusa*, 48 Cal. 3d 644 (1989).

135. *Thing*, *ibid*, at 663-664.

136. *Thing*, *ibid*, at 663.

arbitrary lines are unavoidable if we are to limit liability…"[137] Accordingly, the criteria for liability imposition in similar cases were further limited.[138] Nevertheless, a number of jurisdictions continue to apply the foreseeability rule in *Dillon*, rejecting the limitations subsequently established by *Thing*.[139] Today, all jurisdictions allow negligent infliction of indirect-emotional suffering claims but they all set very strong limitations.[140] In fact, no jurisdiction has succeeded in establishing a coherent and comprehensive rule for these claims.[141]

It was not until 1983 when the English legal system took a step quite similar to the American legal system. In *McLoughlin v. O'Brian*,[142] 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."[143] Being outside 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 to compensation despite the fact that she was outside the zone of danger. Lord Wilberforce, writing for the majority, based his entire decision on the foreseeability test within the general duty of care in negligence law. His decision specifically 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.[144] Reviewing the guiding principles in the *Dillon case,* Lord Wilberforce has softened most of them but without replacing them with

137. *Thing*, *ibid*, at 666.

138. The entitlement became limited to cases where the said plaintiff: (1) is closely related to the injury victim as to share a household or be being parents, siblings, children or grandparents of the 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." *Thing*, *ibid*, at 668.

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

140. *See 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. New York rejects *Dillon* as a yardstick, it still adheres to the "zone of physical danger" rule for even the immediate family members of the victim. *See Bovsun v. Sanperi*, 461 N.E.2d 843 (N.Y.1984).

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

142. *McLoughlin v. O'Brian*, [1983] 1 A.C. 410.

143. *McLoughlin, ibid*, at 416-417. Lord Wilberforce elaborated the hurtful facts of the case in a nontraditional manner that revealed his human empathy for the plaintiff.

144. *McLoughlin, ibid*, at 417-419.

new "guiding rules."[145] Lord Bridge, concurring, also warned against the rigidity of these rules as creating arbitrary boundaries between different cases, all equally justified.[146] He suggested that these rules be used to assess the extent of the foreseeability of the damage ultimately caused to the plaintiff and not as a measure for determining whether there was a duty and liability towards the plaintiff.[147] Despite the positive nature of this decision, its "golden era" ended toward the close of the century in England. Most notably, this turn has been taken at the *Alcock v. Chief Constable of S. Yorkshire* case,[148] discussing the claims of indirect plaintiffs who were the loved-ones of the victims of the notorious collapse of the Hillsborough Football Stadium. In this ruling, the House of Lords was able to "clarify" and delimit the boundaries of *McLoughlin*, mainly by drawing a distinction between first and secondary (indirect) injured parties whereby the latter's right for compensation was confined to strict limitations.[149] 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.[150] As a result, the fair use of the foreseeability doctrine was eventually abandoned in favor of rigid rules which created arbitrary distinctions between equally eligible victims.[151]

(c) Has Second Tier Feminist Analysis Proved Two-Dimension Discrimination in Anglo-American Tort Law?

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 compensate properly for indirect-emotional harm, they were only slightly less restrictive in protecting purely financial interests of plaintiffs. Independently, this finding could be read as implying a lack of gender-based adherence to

145. Setting the "aftermath" doctrine was, as previously mentioned, the most substantial method of softening the preliminary requirements in these indirect-emotional harm cases. *McLoughlin, ibid*, at 422.

146. *McLoughlin, ibid*, at 442.

147. *McLoughlin, 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).

148. *Alcock v. Chief Constable of S. Yorkshire*, 3 WLR 1057 [1991].

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

150. *Alcock, ibid*, at 1102. More specifically, the court has refused considering siblings eligible for compensation in this respect. *See*, *e.g.*, *Alcock, ibid*, at 1083-1087.

151. *See* BITTON, *supra* note 14, at 99-100.

one interest over the other. Read against the losses' comparative context, however, the finding should be viewed as reflecting the one dimension discrimination against indirect-emotional harm which, as was hypothesized, should have had the upper hand in being more easily embraced into tort law. With regards to pure-economic loss, the non-recovery rule seems to fit more easily and naturally than its lower starting-point.[152] Furthermore, the courts' usage of similar explanatory discourse in justifying the two losses' "shared destiny" as deserving an "exclusionary rule" of non-liability which largely ignored their inherent differences, strongly supports this proposition as well. Nonetheless, the findings do not strongly support, nonetheless, the counter postulation that negligence law carries, simultaneously, a second dimension of discrimination. Namely, that tort law over-protects male-related interests. In this respect, the holistic feminist analysis of Anglo-American negligence law demonstrates that a bias against feminine interests within a fixed setting does not necessarily entail a counter bias privileging male interests[153].

Seeking further resources from which to draw on the significance of the gendered nature of these interests within negligence law regardless of the seemingly balanced picture laid-out by Anglo-American law, I have decided to proceed to a second comparative dimension, where Anglo-American and Israeli negligence law will be compared with respect to indirect-emotional harm and economic loss.

2. ISRAELI LAW

Israel's tort law domain is paradigmatically common-law, reflecting and embracing the general conceptions and specific legal doctrines of Anglo-America.[154] Structured along the lines of the British Empire's colonial legal regime, the Israeli Tort Ordinance—the primary authoritative source of tort adjudication—practically functions as a legal

152. 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.

153. Notwithstanding this disposition, a broader view of tort law and contract law as united points of reference, however, strongly supports the supposition that gender bias dimensions are twofold, namely, that along with discriminating against female-related interests, the law discriminates in favor of male-related interests. This bias is encompassed in realizing the strong protection allowed by contract law to economic interests, that coupled with the minimal shield it offers emotional harm, strengthens the position of pure-economic loss, while leaving the indirect-emotional harm at its inferior position.

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

transplantation within the Israeli legal system.[155] Consequently, the formal basis for comparing these legal systems is well established. At the same time, unveiling the differences between these two systems will enable us to identify and understand the impact of gender-bias legal transplantations. In turn, we can evaluate and analyze them more compellingly. The comparative analysis serves in this article as a tool to evaluate the feminist contention that common-law tort law is androcentric and that it perceives interests as gender-related.

My hypothesis is that gender biased doctrines of one system, once transplanted in another, would adapt the patterns of gender bias characteristic of the latter's legal system. Being a legal implantation within Israeli law, the Anglo-American doctrines regarding both these interests are expected to have adjusted to their new legal surroundings by adapting to the local "receptors" of the gendered perceptions they represent and adopt their mannerisms.

This comparative analysis is therefore meant to problematize the seemingly balanced picture presented in Anglo-American law since the Israeli case presents a much different picture, whereby three dimensions of discrimination within this realm can be identified. It therefore distorts the seemingly balanced picture revealed by Anglo-American law and reveals indirect-emotional harm as well as economic loss as carrying strong gendered attributes that influence their respective recognition. My contention is that acting as legal implants, the gendered traits in these losses—be they latent, as in the case of pure-economic loss, or vibrant, as in the case of indirect economic harm—were enhanced within the Israeli context for reasons I will discuss at the last part of this article.

(a) 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 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

155. The Tort Ordinance of 1964 is an approximate *translation* of the 1922 Cyprusian Ordinance which embodied the main principles of the common-law tort law imposed on Cyprus by the British Empire mandate. The Cyprusian ordinance has been applied as the law of the land in Palestine through the British Empire's Mandate and was incorporated to the Israeli state upon its establishment. *See* Gad Tedeschi and Andre Rosenthal, THE TORT ORDINANCE, ITS FORMATION AND HISTORICAL SOURCES V-IV (1963) (Hebrew).

was bound at that time. In most cases, breaching was practiced without an explicit notice of Israeli courts, thereby de-dramatizing its significance.

This extremity is most evident 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 relations and negotiations. Rather, it is concerned with losses which occur in a sudden manner between strangers and which raise problems of harm, not of business bargaining.[156] Consequently, in cases involving contractual relations between some of the parties any intervention and expansion of the contractual setting by tort law was unwelcome.[157] These crucial worries, however, were not even discussed by Israeli courts when they imposed liability in negligence for economic loss even when contractual relations existed between the parties to the tort dispute.[158] More than once, this approach led Israel's Supreme Court to impose liability for pure-economic loss even when its decision countered a contractual clause, clearly interfering in the contractual balance agreed upon by the parties to the tort dispute.[159]

Undoubtedly, the main departure Israeli law has taken from Anglo-American law relates to the former's recognition of "relative pure-economic loss" as compensable. Anglo-American tort law has been relatively strict with its non-recognition of this loss, whereas Israeli law has shown signs of recognition even in this highly controversial area.[160] Moreover, even in relation to the common-law's acknowledged exception to this no-liability rule, namely when the pure-economic loss is a consequence of negligent misrepresentation and misstatement, the

156. Feldthusen, *supra* note 59, at 168.

157. For the numerous reasons and justifications for distinguishing tort liability from contractual circumstances *see* COLEMAN, *supra* note 63. 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 HL The verdict was approved by the House of Lords in [1986] 1 AC 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."

158. Gedron, *supra* note 37, at 139-144; DOBBS , *supra* note 60, at 1283.

159. *See* the precedence setting decisions at SC 106/54 *Weinstein v. Kadima*, 8 P.D. 1317 (1954) (Hebrew) (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 to sue the engineer for the former's economic loss); SC 86/76 Amidar v. Aharon, 32 P.D.(ii) 337 (1978) (Hebrew) (the court overcomes, using the tort claim, a contractual provision exempting the defendant of any future claims of damage regarding the contract).

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

course of recognizing liability in Anglo-American law has been regulated, restrained and even hesitant.[161] This description also diverges from the highly advanced and still expanding process of recognition of this set of losses in Israeli law, as demonstrated by a comprehensive research of this liability and its formation and development in Israeli adjudication.[162] The research concludes that during this process, the courts displayed a consistent trend towards narrowing the interpretation of the basic principles restricting liability which had been established at the first case to decide on pure-economic loss–the *Weinstein* case–thereby gradually broadening the liability in the area.[163] According to the research, this judicial trend will continue using negligent misrepresentation cases as a vehicle to abandon the cautious, conservative and hesitant rules found in the common-law.[164] 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[165].

Israeli negligence law's deviation from Anglo-American law is revolutionary in yet another respect. In most cases in which the liability for pure-economic loss was restricted in Anglo-American law this was to place another stone in the dam preventing the tort floodgate from bursting due to unwanted imposition of liability.[166] In Israeli law as well, imposing liability for economic loss almost always arose in a factual setting that entailed additional policy considerations and difficulties. Nonetheless, not only it did not discourage the courts from imposing liability but rather, in numerous cases, imposition of liability was a means for a significant break from prevailing restrictions on negligence liability. Pure-economic loss has therefore functioned as a catalyst for

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

162. Gilead, *supra* note 69. 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.

163. For example, in the cases of *Amidar*, supra note 159 and SC 783/83 *Kaplan v. Novogrotzky* P.D. 38(iii) 477 (1984) (Hebrew), 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) (Hebrew), the 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.

164. Gedron, *supra* note 37, at 171-172.

165. Gilead, *supra* note 69, at 126.

166. 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 114, at 933. Some consider these issues as the main shapers of the non-recovery rule; ROGERS, *supra* note 4439, at 133.

revolutionary decisions. For example, liability for economic loss was imposed even when it required applying it to public authorities as an exception to the then prevailing standard of granting substantial immunity to governmental authorities.[167] Another example occurred just recently when pure-economic loss was 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.*,[168] 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.[169] The case was grounded, inter alia, 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. As opposed to the traditional analysis of misrepresentation requiring the plaintiff's reliance on the display as a main measurement for imposing liability, the Court in *Trade*, rather than the defendant itself, was the one who relied on the false *statement* presented by the defendant, thereby causing loss to the plaintiff.[170]

(b) 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. In 1958, in *Stern v. Shamir* the first opportunity was offered to the Israeli Supreme Court to discuss pure emotional loss, identified as "nervous shock".[171] In this case, a mother, whose son had

167. Monumental decisions are SC 209/85 *Kiryat-Ata Municipality v. Ilanco LTD* P.D. 42(i) 190 (1988) (Hebrew); SC 324/82 *Bnei-Brak Municipality v. Rothberg* P.D. 45(iv) 102 (1991) (Hebrew). 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) (Hebrew), 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 earned, if the permission was given on time.

168. SC 1565/95 Trade and *See* Services LTD. v. Weinstein Co. LTD, P.D. 54(v) 638 (2000) (Hebrew). 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) (Hebrew) and SC 735/75 *Roytman v. Aderet* P.D. 30(iii) 75 (1976) (Hebrew).

169. The 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.

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

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

drowned in a cesspit due to the defendant's negligence sued for compensation for the emotional harm she suffered due to her son's death.[172] 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 "mental illness."[173] The Israeli Supreme Court affirmed and added the requirement of physical manifestation of pure emotional harm. It held that in Israeli case law, emotional harm is not subject to compensation unless it leads to bodily injury or a notable illness.[174] 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 law on the issue.[175]

After a history of rejecting claims for indirect-emotional harm[176] (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*.[177] After engaging in a detailed review of the history of recognizing this loss under common-law, the Court decided to introduce a new "secondary duty of care" towards these indirect injured parties within Israeli tort law.[178] However, when establishing the duty the Court was very careful to delineate its boundaries, step by step, while emphasizing the fundamental necessity to narrow the duty's application.[179] By the time this process ended, the Court presented a restricted and entirely modeled duty of care which:[180]

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172. The mother-plaintiff sued mainly for the "shock", as the Court describes it. *Stern, ibid*, at 443.

173. *Stern, ibid*.

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

175. *Stern*, *supra* note 171, at 443. In a later ruling, Israeli courts recognized suits by such plaintiffs, provided that they were present at the scene of the accident. *See, e.g.*, DC 582/72 *Shakuey v. Salman* P.M. 1979(ii) 79 (1979) (a mother who lost her son from a car accident and suffered 10% permanent psychiatric disability). This requirement also invalidated a man's claim whose 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 his overwhelming sorrow, he neglected to feed his horses. The horses eventually died out of hunger and as a result, plaintiff's source of income ceased.

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

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

178. *Al-Socha, ibid,* at 431.

179. *Al-Socha, ibid,* at 432.

180. *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

1) Applied to plaintiffs who have substantial family ties to the directly injured victim;[181] 2) Relates to any exposure to the suffering of the victim, regardless of being instrumental or direct;[182] 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 at a relatively positive starting point. Its duty seemed even broader than that prevailing at the time in Anglo-American law.[183] Nonetheless, it soon became very clear that its legacy was fundamentally different.

Following *Al-Socha*, courts in Israel consistently acted in every possible manner to narrow the scope of the duty of care that this case had 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.[184] First, the requirement of severity of the loss was construed in the *Hativ* case[185] as a demand to prove highly severe and permanent psychiatric disability.[186] This stringent interpretation, whereby judges are obsessed with psychiatric disability percentages rather than with proven emotional harm,[187] is unprecedented in Anglo-American case law. There, susceptibility to medical diagnosis is the only limit set forth by the court for the harm's severity.[188] Other commonwealth systems also do not refer to these

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ISRAELI LAW 1991 221, 267-268 (ARIEL ROZEN-TZVI, ED., 1992) (Hebrew), 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) (Hebrew).

181. 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 177 at 432.

182. *Al-Socha*, *ibid*, at 432-433.

183. This is how the case was perceived by legal agents. *See*, e.g., *Shneider*, *supra* note 180, at 475.

184. MULLANY & HANDFORD, *supra* note 93, at 44-45.

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

186. A comprehensive survey I conducted on the matter reveals that on average, only plaintiffs with a permanent disability of 20% and higher will be considered for compensation. BITTON, *supra* note 14, at 110-111.

187. Markesinis considers the plaintiff's reasonable sensitivity a major factor. He also emphasizes and sees as sufficient, the close relationship between the plaintiff and the direct victim. MARKESINIS & DEAKIN, *supra* note 52, at 133.

188. *See, e.g., Marzolf v. Stone*, 960 P.2d 424 (Wash.1998). On the other hand, see the dissenting opinion in *Shell v. Mary Lanning Memorial Hospital Ass'n*., 498 N.W.2d 522 (Neb.1993), stating: "I hope our society has not reached the point where we need a doctor to tell us what emotional impact results from loss of a child." In England, the House of Lords was even more lenient by granting compensation to a plaintiff that was described as being at risk of suffering from

standards of psychiatric permanent disability.[189] Second, 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.[190] Third, the requirement that the harm be caused in a process of shock, which was completely rejected in the *Al-Socha case*, was restored through the front door as one of the core requirements for imposing liability.[191] According to this incoherent ruling, the more prolonged the direct victim's suffering means exposure to liability by the tortfeasor was.[192]

3. THREE SYSTEMS, ONE DEPARTURE

Comparing Anglo-American and Israeli law approaches in assessing 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. Conversely, in Israeli law, though entertaining Anglo-American rhetoric and using it as a primary legal resource to adjudicate the cases, the courts have in fact acknowledged the importance of economic loss. They perceived it as a growing part of negligence jurisprudence and were willing to move farther away from the traditional restrictive rules set by its counterparts.[193] Reading through Israeli case law, it is rare to find a reference to "economic loss" as such;[194] this loss is no longer regarded as

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prolonged grief symptoms in the near future. *Revenscroft v. Rederiaktiebolget Transatlantic* [1991] 3 All E.R. 73, 77 HL.

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

190. *See Zach*, *supra* note 176. This case was the first to analyze the *Al-Socha* case, *supra* note 177.

191. 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 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, which did not fall within the boundaries of the *Al-Socha case, ibid*.

192. 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. *Al-Socha, ibid*, at 205.

193. Gedron, *supra* note 37, at 184; Gilead, *supra* note 69, at 126 (Gilead's conclusion was limited, as mentioned, to misstatement and misrepresentation cases).

194. In SC 915/91 *The State of Israel v. Levi* P.D. 48(iii) 45 (1994) (Hebrew), Chief Justice (retired) Shamgar pointed to economic loss as one of the indicators relaxing proximity between rival parties in negligence disputes. However, this was not a conclusive indicator and the case dealt primarily with narrowing the liability of public authorities. Moreover, no further discussion of that statement can be identified in the subsequent case law.

a parameter for narrowing liability under negligence law.[195] 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 continue 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 has additional compensation schemes for indirect-emotional harm contingent upon the death of a close relative.[196] Israeli law, 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. Conversely, in Israeli law, a non-fault, strict liability rule dominates the realm of car accidents, to which almost all the case law referred. Under such a no-fault liability regime, it is pointless to entertain policy considerations of the kind that fault-based negligence law offers. Such considerations are practically irrelevant to a no-fault regime and unprecedented in any other car accident adjudication.[197]

In the next Part, I will delineate the details of the course of departure of the Israeli system from the Anglo-American ones, specifically focusing on its formation. Exposing this specific manner of departure—through an extensive review of current and past case law—will avail us, in the last part of the article, to provide a more meaningful and contextual comparative explanation for the difference between the systems as gender-based.

PART IV: ECONOMIC LOSS AND INDIRECT-EMOTIONAL HARM IN ISRAEL - SIMILAR NARRATIVES, DIFFERENT REALITIES

The aforementioned Anglo-American tort narrative presents pure-economic loss and indirect-emotional harm as equally exceptional harms, suffering from the same difficulty of judicial objection and restricted recognition. This similarity narrative resumed a place of honor in the

195. *See* Justice Shamgar's reservation himself, *ibid*, at 70. Also *see* Gedron, who claims that in cases of public authorities' liability specifically, the courts do not relate any unique attention to the nature of the loss, but rather to the tortfeasor's identity, Gedron, *supra* note 37, at 164.

196. Usually shaped as a regulatory rule allowing some relatively substantial amount of damages for such loss. *See*, *e.g.*, *supra* note 260.

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

Israeli tort canons as well.[198] However, a closer analysis of the separate development lines of these harms 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.[199] 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 illuminates their differences as adjudicative projects, albeit unintended, creating two dimension discrimination within tort law. For these purposes, 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,[200] and the judgment in the *Al-Socha* case, where, for the first time an ordered doctrine imposing liability for indirect-emotional harm was established.[201] 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.[202] Positioning *Weinstein* as the starting point, 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 in Anglo-American legal tradition;

198. The 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, INTRODUCING TORT LAW 78 (2006) (Hebrew). In his book, which is the most recent and updated comprehensive textbook on Israeli tort law, the author dedicates a whole chapter to what he identifies as "unique negligence situations". There, he relates to economic loss and indirect-emotional harm as similarly "problematic".

199. This conclusion is also shared by Jane Stapleton, *supra* note 41, at 87.

200. *Weinstein*, *supra* note 159.

201. *Al-Socha*, *supra* note 177.

202. 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 invested property rights. The builder did not have any interactions with the planning engineer prior to or during performing the work.

no recognition was accorded to pure-economic loss in negligence,[203] during a period when the common-law had overwhelming influence over tort decisions of the Israeli Supreme Court. This rendered the case a breakthrough for the legal independence of the young state's courts at that time.[204] In spite of arguments raised to relax its innovative nature,[205] one cannot ignore that the judgment's status positioned the economic interest in Israeli tort law as one of supreme values to justify breaking fundamental legal boundaries. This was the very first case to recognize liability in negligence for economic loss. While one would expect such precedent to bear restrained and humble reasoning, it in fact proves to be autonomous and provocative. However, while the rhetoric of the court still stood relatively in line with the general non-recovery rule, its substance recognized pure-economic loss as largely protected under negligence law. This rhetoric-substance nexus is revealed by a meticulous reading of the judgment.

After reviewing the English case law, where a clear no-recovery rule prevailed,[206] the Court determined that the element of foreseeability could not exclude a type of loss *per se*.[207] This required that the judges deny the contrasting English law and rely on the latter's minority opinions.[208] Reviewing the definition of "loss" in the Israeli Tort Ordinance, the Court determined that the language of the "basket provision" was broad enough to include pure-economic loss.[209] The Court stressed that plaintiffs' right to compensation should be extended to all significant losses, however tangible.[210] Noting that some "important and practical reasons" necessitated careful treatment of cases involving

203. Gilead, *supra* note 69, at 89.

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

205. 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. *Mor, ibid*, at 349.

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

207. "The type of loss in itself should not determine the limits of the scope of liability". *Weinstein*, *supra* note 159, at 1332. The Court relied on the general rule used in determining the scope of liability as was stated in *Donoghue v. Stevenson*, [1932] A.C. 562.

208. *Weinstein*, *ibid*, at 1332*; 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. *Ibid*, at 1334-1340.

209. At the time the ruling was rendered, 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.

210. *Weinstein*, *supra* note 159, at 1334. This seems, however, like a misinterpretation of the phrase "substantial damage" which was until then understood as a tangible damage, a traditionally basic requirement to gaining tort recognition for one's suffering.

misstatements,[211] the Court did not engage in enumerating a blacklist of policy considerations or declaring this loss to be "problematic," but rather it set restrictions for coping with its unwanted implications.

Structured in this way, the judgment created a "rhetoric of acceptance" of pure-economic loss. Upon admitting the importance of the imposing liability for this loss and only in its *obiter dictum*,[212] the Court mentions that certain "problems" existed, emphasizing that these problems would not interfere with its recognition. At the end of its reasoning, the Court briefly reviewed each "problem" and subsequently proposed a suitable solution, entailing the imposition of some limitations on the scope of liability.[213] Positioning these limitations at the margins of the ruling "softened" them as allowing "restrained acceptance" of the loss without resulting in a non-recovery rule. The Court chose to describe 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," thereby de-dramatizing their importance as merely technical and local problems to be easily solved.[214] Using the well-known tort rule of reasonable foreseeability,[215] the Court displayed the simplicity of solving the "problems" it had listed. It also left room for future judicial interpretation and creativity without restricting future judgments to stringent rules of any kind.

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…"[216]

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211. *Weinstein, ibid,* at 1340.

212. The court's discussion on this subject is confined to four pages, and is located at the decision's last part. *Weinstein, ibid*.

213. Again, the Supreme 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.

214. *Weinstein*, *supra* note 159159, at 1341.

215. The Court has almost exclusively used the criterion of "proximity", representing the reasonable "foresight" of the loss, to set the limits of the duty. *Weinstein, ibid,* at 1342-1347.

216. *Weinstein*, *ibid,* at 1344. Added to the definition above was the requirement that the professional "in the circumstances… could not have a reasonable ground to assume that his opinion

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 should have seen 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. Indeed, this ruling has created a reasonable and acceptable basis for consistent expansion of the duty, leaving behind a heritage of practiced recognition for this loss.[217] However, throughout its judgment, the Court has referred to the English non-recovery rule regarding economic law. 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 this rule.

(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 its discussion with a survey of the Israeli legal tradition in this area, referring to the *Stern* case[218] where the Court held that no compensation should be awarded for emotional shock *per se*. It described the recognition of the duty for indirect-emotional harm as limited to cases where the injured party witnessed the accident, while generalizing the issue regarding "bystanders" despite the involvement of plaintiffs witnessing an accident to a loved-one.[219] Following these problematic comments, the Court went on reviewing the English law's account of the harm. It opened with a clarification that the law's position on this matter had been originating from considerations which were described as "central" and as "policy related":[220] 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. Thus, the Court reinforced the reader's instinctive acceptance of the need to substantially limit the duty to protect tort law from the dangers it entails.[221] A similar usage was carried

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would be doubled-checked, in an independent examination, prior to it being acted upon." *Ibid,* at 1346.

217. Gilead, *supra* note 69.

218. *Stern*, *supra* note 171.

219. This is the general and inaccurate conclusion of Chief Justice (retired) Shamger (*Al-Socha*, *supra* note 177, at 408).

220. *See, e.g.*, *Al-Socha, ibid*, at 416, 419, 421.

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

with the review of American law as saturated with difficulties in recognizing liability for this loss, thereby justifying the need in preserving its boundaries.[222] By the time it reached the point of appropriating a way to approach this loss *today,* the Court presented a heavy burden of important policy considerations, endless limitations and comparative gaze which led him "naturally" to construct a restrained duty of care, primarily justified on a "solid" tradition of well-based fears.

Reaching its precedent-setting decision, the Court has again taken the last opportunity to enumerate the list of policy considerations. It referred to them as requiring a constriction of the duty of care, the existence of which as noted, was yet to be proclaimed by the Court![223] Thus, the Court constructed the duty through a narrative of restraint required to prevent what is described as no less than a veritable catastrophe:[224]

> "… [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 threats embedded in recognizing the loss seem to require the immediate imposition of any restrictions, even though these cataclysmic arguments had already been disproved, one by one, in seminal judgments under the

222. *See* the review of the American case laws at *Al-Socha, supra* note 177, at 425.

223. *Al-Socha, ibid*, at 432.

224. *Al-Socha, ibid*, at 432.

common-law.[225] In particular, presenting the claimants as persons who wish to "harness" the legal system to aid them is troublesome. This rhetoric made the legal system inaccessible to these claimants and consequently excluded them. The legal system is portrayed as one that is passively forced to take part in their caprices and not actively "harnessed" in a sympathetic manner for reclaiming these claimants' justified rights.

At this point, the Court set the limitations dictating the duty, shaping it to meet exceptional and unique foundations. It constructed the duty not using traditional negligence law reasoning but instead constructed the duty openly-- acknowledging the application of arbitrary parameters.[226] It justified this deviance in an absurd manner, i.e., by concentrating on the situation which might arise had these limitations not applied.[227] The frightening policy considerations therefore, were not countered at any stage of the ruling, which in turn presented enduring legitimate reasons for limiting liability.[228] The starting point for the construction of the duty of care was that of a "stepchild" to the general losses and not of a "lost child" or "new child" pleasuring her "tort law parents" as the way economic loss's experience has been constructed. 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, which is indeed what actually occurred.[229]

As the following analysis demonstrates, the divergent manner with which the two damages were treated went far beyond rhetoric and attitudes.

2. RESHAPING THE SCOPE OF TORT LIABILITY - ANCILLARY CONSEQUENCES TO THE HARMS' RECOGNITION

Comparing these two judgments, the contrasting influences exerted by the expansion of the limits of liability in negligence is striking. The indirect character of the economic loss is seen as the main reason for using it in the Anglo-American tradition. Generally, it is a central device

225. The Court refers to *McLoughlin*, *supra* note 142, where the House of Lords refutes the traditional objections raised against recognizing the indirect-emotional suffering. *Al-Socha, ibid*, at 421, 425-426.

226. *Al-Socha, ibid*, at 423.

227. Shamgar goes back, again, to the fear of fraudulent suits and of compensating mild suffering. *Al-Socha, ibid*, at 436.

228. 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. *Al-Socha, ibid*.

229. The fear of petty and fraudulent suits was endorsed in later writing at Porat, *supra* note 180, at 267,270.

for limiting liability in negligence, in particular in limiting the liability in negligence of public officials.[230] In contrast, in Israeli law, as I have demonstrated, imposing liability for pure-economic loss has led, in most cases, to changing the nature of the standard of care by which negligence was based and/or for expanding tort liability into new fields of human activity. The *Weinstein* case symbolized this trend more than any other case because not only was it the first case to recognize pure-economic loss in negligence but it was also the first case to hold that a person who gives an opinion owes a duty to act without negligence, even if his opinion does not pose a risk of physical injury to another. In contrast to this image of breach of varied tort boundaries,[231] a conservative image emerges from the case law concerning indirect-emotional harm.[232] In indirect-emotional cases, negligent physical injury to a primary victim was inherently involved, so that the tortfeasor was already under an obligation 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 in the boundaries of the *behavior* itself that led to it.[233]

This difference between these two harms indicates that the Court's greatest difficulty with imposing liability for indirect-emotional harm originated from its being devalued in its own right. By contrast, much reluctance attributed to pure-economic loss derived from viewing it as a device for expanding boundaries for negligence liability rather than seeing it as problematic or inappropriate *per se*. Supportive of this hypothesis in English law are 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 interfered with the provision of compensation.[234] In contrast, the entire discussion concerning indirect-

230. Gilead, *supra* note 69.

231. In *Trade*, *supra* note 168, 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 had 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.

232. This breach excluded relational economic loss, where the wrongdoing is obvious and the question refers solely to the scope of his liability. PERRY, *supra* note 58, at 8.

233. 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.

234. *Aliakmon*, *supra* note 157, at 379-380.

emotional harm mostly revolves the nature of this damage as being [in]appropriate for compensation.[235]

3. SILENCE V. OBSESSIVE CONTEMPLATIONS

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."[236] However, the simple solution given by Court to its problematic features, immediately thereafter, left a clear heritage of a firmly recognized loss. Manifestly, since this case, the Court has almost never referred to the unique nature of the damage before it as "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.[237] For example, in the groundbreaking *Trade* case, in order to protect the plaintiff against economic loss, [238] the Court never used the phrase "economic loss" or any equivalent term,[239] even though the lengthy and detailed judgment engaged in multiple breaches of the boundaries set for negligence. This trend of ignoring the identification of the damage as purely economic in nature and disregarding the difficulties entailed by that is a recurring theme in the case law protecting pure-economic interests.[240] An Israeli scholar who explored economic loss adjudication opined the obvious as to the reasoning for this silence, namely that it is simply the judicial assumption that according protection against this loss is understandable and justifiable *per se*.[241] The Court's lack of clarification regarding its attitude towards this loss has left open the question of its desirability.[242]

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

236. Attentively or not, the court has not used the common terminology of "economic loss", but rather related to the case as concerning "monetary harm". *Weinstein*, *supra* note 159159, at 1331.

237. Gedron claims that the economic loss, as such, was never discussed directly by the Israeli courts. Gedron, *supra* note 37. However, this conclusion is inaccurate. There are evidences of rare usage 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*, *supra* note 194, where economic loss was identified as creating remoteness between parties, economic loss has been noted for only three times by Israeli courts, twice by district courts and only once by the Supreme Court.

238. *Trade*, *supra* note 168.

239. The harm to the plaintiff was described by the court as "loss of earning due to the inability to utilize the corporation's assets." *Trade*, *ibid*, at 647.

240. Especially in cases where the court imposed liability on public authorities. Gedron, *supra* Gedron, *supra* note 37, at 179.

241. Gilead, *supra* note 69, at 117. Gilead illustrates this trend using cases where liability for a defective product was imposed to redress for economic loss.

242. This is also Gilead's conclusion. Gilead, *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.

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.[243] In clear contrast stands the heritage left behind by the *Al-Socha* case: The exaggerated and repetitive 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 with the question of the desirability of this type of damage and the boundaries for liability it should bear.[244] Consequently, the likelihood of the injured party to recover in these cases decreases each time. Furthermore, a clear message is sent to the other courts: when compensation for indirect-emotional harm is plead, great caution should be exercised and it is very rarely 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 pure-economic loss were decided.[245] 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 English law would have contradicted Israeli social values.[246] An examination of the use made by the Israeli courts of this methodological principle reveals the attitude displayed by the courts towards these losses. Though both losses were subject to restraints under English law in actuality, at the time when Israeli courts had made a decision regarding them, each was treated differently.

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

244. *See, e.g.*, *Sneider*, *supra* note 180, at 472-473; *Zach*, *supra* note 176, at 273-274; DC 697/94 *Razon v. Haddassah Organization* TK-MH 97(iii) 2825 (1996) (Hebrew).

245. Article 2(1) of The Civil Tort Ordinance of 1944, which was then in effect (1944 The Official Newspaper of Palestine, no. 94). *Weinstein*, *supra* note 159, at 1328-1334. *See* the Court's expressed declaration of this obligation in *Stern*, *supra* note 171, at 427.

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

The judgment in *Weinstein* not only clearly illustrates how it was possible to become free from the English ruling in the tort law alone, but also symbolized this possibility of freedom and the creation of local independent rulings in general.[247] The Court in *Weinstein* did not hesitate to challenge the Anglo-American ruling which had been firmly and long-lastingly established and declared the ruling irrational.[248] Though never self-declared as rebelling against English law, both the case law and the 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.[249] In the *Amidar* case, for example, the Court sought to impose liability on a defendant, not an expert, in the field in which he negligently advised. Thus, in its ruling the Court diverged 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.[250] Moreover, the Court explicitly stressed his ability to act in a manner contrary to existing English rule, even though ultimately a decision on the matter was not required in this specific case.[251] 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.[252]

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 in the *Stern* case[253] 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

247. 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 and the disobedience it proved within 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) (Hebrew). It is extremely rare for the Israeli Supreme Court to hold a second, additional deliberation, with an enlarged panel of judges who are called upon to reevaluate their fellow-judges' former decision.

248. *See, e.g.*, *Weinstein*, *supra* note 159, at 1332 ("there is no rational foundation"), 1339 ("lack of reason").

249. *Amidar*, *supra* note 159, at 348; DC 1820/90 Ma'ale Efraim printing *LTD v. Ellerman Lines Plc*, P.M. 1995(ii) 17 (1995) (Hebrew). The literature also conceives *Weinstein* in a similar manner. *See* Englard, Barak & Cheshin, *supra* note 246, at 52.

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

251. In *Amidar*, *ibid*, at 348, the Court 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."

252. *Amidar*, *ibid*, at 348.

253. *Stern*, *supra* note 171.

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.[254] 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, would **apply** this principle to the concrete case before it, while paying attention to the special conditions prevailing in Israel and conforming to the concepts and views of the members of Israeli society."[255]

This comment, 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 Israeli society at that time, in which concern for others, human socialization and community activity were the shaping factors deemed to be invaluable, it was certainly possible to demand recognition of this type of damage, in which care for another grounded the harm.[256] The 1956 *Weinstein* ruling favored the advantages of independent and original Israeli local rulings. It undoubtedly could have been used as a sufficient legal basis for a similar decision in *Stern*. In other words, the 1958 Stern case could have brought forward by decades the protection against indirect-emotional harm, granted in the 1990 Al-Socha case.[257]

Though years had passed and times had changed, even in the 1990 *Al-Socha* case, where the Israeli judiciary had already attained complete independence from English law, this problematic bond remained unchallenged. Notwithstanding challenging parts of the Anglo-American

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

255. *Stern*, *supra* note 171.

256. Similarly, in a later case, the court expressed open criticism of the English ruling that refused to recognize emotional harm, however, the court still regarded itself as bound by the ruling. *Nadir*, *supra* note 174, at 1468-1470.

257. Gross has severely criticized the court's adherence to the English rule regarding nervous shock which was already infamous at that time. Gross, *supra* note 254, at 277.

ruling,[258] the courts in fact created a system of principles which were guided by this ruling. Indeed, it 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 since while 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 typical indirect-emotional injured family members.[259] This legislation always ensured some degree of compensation for this type of harm, even if not substantive.[260] 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* - SUMMARY

The ruling in *Weinstein* was constructed along the lines of traditional tort principles while easily overcoming familiar tort obstacles. The general duty of care established with respect to pure-economic loss thus allowed the creation of a heritage of developing a recognition alongside a constant removal of restrictions, amounting to an eventual establishment as an independent, logical and autonomous duty of care.[261] In contrast, the ruling *Al-Socha* was based on problematic tort rules and relied on restrictive principles and a controversial Anglo-American tradition. It created a rigid heritage for later judgments which obsessively preserved these boundaries and even narrowed them. The distorted formulation of the duty of care simply discharged lower courts from exercising their own discretion in other case based on their merits their unique circumstances. Moreover, a comparison of these two central judgments shows that not only was the duty of care as a core concept in tort law understood differently in each case, but the type of damage in each case was also perceived differently. In contrast to the Court's warm approach in *Weinstein* to the type of damage before it, the Court in *Al-Socha* did

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258. *Al-Socha*, *supra* note 177, at 423-433.

259. Sec. 1A to the Fatal Accidents Act, 1976 (1976 c 30): "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..." UK Parliament Act, 22nd July 1976.

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

261. *Weinstein* has less than 20 references in successive Israeli cases, whereas *Al-Socha* holds an impressive score of over 60 citations in almost every case regarding indirect-emotional suffering. This statistic is particularly startling given the fact that the former case is 38 years older than the latter.

not consider, even once, the importance of recognizing the emotional interest of caring for others, and did not acknowledge its rightful place in the array of appropriate harms. Thus, indirect-emotional harm was understood to be inappropriate *per se*.

Despite their differences, neither men nor women are mentioned as bearing relevance on the duties set in *Al-Socha* and *Weinstein*. In this respect, these rulings are classic demonstrations of what is best known as "second generation discrimination" practice whereby subtle, unintentional and hard-to-track-back practices are exercised as exclusionary means. Israeli courts did not need to use any blatant or explicit gender-related reasoning to wind-up having with a highly gendered course of ruling.[262] Finding clear female anti-sentiments or male pro-sentiments in the courts' decisions regarding indirect-emotional harm or pure-economic loss is impossible, as well as not required to constitute its gendered nature. Probing into the different paths of recognition borne by the two losses satisfies the realization of their distinctive status and relative importance. The regressive distributive effects these paths entail, to be hereby presented, also contribute to understanding their gendered significance, regardless of the judiciary's actual consciousness or intentionality.

PART V: DISTRIBUTIVE RAMIFICATIONS OF A TRIPLED BIAS

Even though all three legal systems show a gender bias against indirect-emotional harm, they still differ substantially. While Anglo-American negligence law presents a one-dimension bias against female-related interests, Israeli tort law takes the gap between gender-related interests to the extreme by setting gender-related interests at a zero-sum game structure where what men gain in negligence liability rules, women lose. Alternatively stated: while men gain, women lose.[263] Israeli law demonstrates triple-dimensional bias, whereby 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 rhetorical smoke screen, claiming that these interests are equally marginal to negligence liability, thereby making this favoritism less apparent to the naked eye (third). Hence, it

262. The distinction between first and second generation discrimination and its vast implications is introduced in Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

263. *See* Rose, *supra* note 34 (laying out the different possibilities of the positioning of gendered interests).

ends up much more culpable than the former legal systems with respect to feminist accusations of being gender-structured.

As indicated by the first tier of tort law feminist analysis, Anglo-American negligence law's one-dimension bias has clear distributive implications. It perceives emotional stability as having limited importance[264] and implies that those who suffer emotional harm will also suffer from the lack of trust of the court in their damage. Additionally, these people will probably suffer 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[265] and punishes them through non-compensation.[266] Women, as the ones to whom maintaining an emotional relationship of caring is assigned, mainly inside the family, are disproportionately burdened by the restricted recognition of indirect-emotional harm. They are, therefore, particularly vulnerable to this recognition's regressive effects.[267] The Israeli system's three-dimension discrimination scheme adds more crucial distributive implications to this existing unfairness. I shall hereby turn to these implications.

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. Consequently, they are discriminated against twice by virtue of the restrained attitude taken by tort law towards emotions.[268] 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. Even if she succeeds in this task, she will absorb the second injury when her compensation is set relatively low by

264. Levit, *supra* note 4, at 172.

265. Fleming also proposes to compensate people with high emotional sensitivity, since this is a human trait that should not be held against them. FLEMING, supra note 64, at 180-181.

266. Levit, *supra* note 4, at 175-176.

267. This claim is the common thread shared by feminist writing on this topic. Particularly, it is stressed *generally* by Chamallas, *supra* note 0, at 465-466 ; Chamallas & Kerber, *supra* note 2, at 814-815; Handsley, *supra* note 0,, at 458-485. *See* also Levit, *supra* note 0, at 190.

268. Statistically it has been established that women are compensated twice as much as men 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).

virtue of the lower evaluation of the violated interest.[269] In Israeli law, specifically, 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 entitlements do not have an intrinsic structure of a zero-sum game, women are still being discriminated against by this proposition since culturally and traditionally women do not receive economic appreciation for their work in the labor market. Therefore, they have limited access to protected economic interests and to the benefits arising from them. Therefore, as a whole, they benefit much less from tort law than men do.

2. PREFERRING THE WEALTHY TO THE IMPOVERISHED

One of the most important of contemporary critiques of law, feminist analysis here proves to be valuable not only to women, but rather to further weakened communities. 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, a Marxist analyst of the law, 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[270] 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.[271]

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

269. 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).

270. Richard L. Abel, *Should Tort Law Protect Property Against Accidental Loss*, 23 SAN DIEGO L. REV. 79 (1986)

271. Abel, *Ibid*, at 106-110, 117-119.

their sole interest.[272] 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; this is due to the fact that not everyone enjoys the privilege of owning money. In contrast, the emotional interests embedded in connectedness should be considered a general human asset; therefore, protecting them against harm affords equal protection to all. Moreover, even if we accept the theory that the common-law has "gone bad" by returning to the policy of avoiding the imposition of liability for pure-economic loss, the origin of this theory 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".[273] Courts 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.[274] 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 policies, 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 rich and poor alike--bodily harm.[275]

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272. HOWARTH, *supra* note 54, at 326 (presenting this argument and its countering argument).

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

274. Stapleton, *supra* note 45, at 296.

275. Able grounds his objection to compensating emotional harm mainly at the "co-modifying" effect this might have on human feelings. In conjunction with this objection, we can also add the suggestion made by the feminist tort scholar, Leslie Bender, namely, that this kind of harm should be granted as 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 victim. Leslie Bender, *Feminist (Re) Torts: Thoughts on the Liability Crisis, Mass Torts, Power and Responsibilities* 1990 *DUKE L. JOUR.* 848, 895-908 (1990).

Abel's idea may seem too revolutionary at first glance. However, a closer look reveals that his ideas share a common ground with one of the court-backed rationales for denying recovery for pure-economic loss. Namely, that the indirect victim was under a duty to regulate in advance the risk to his money–which eventually materialized–by way of insurance or by using contractual tools.[276] This reasoning is not far removed from Abel's abovementioned idea.

I do wish, though, 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 useful for a lower class victim than it is to an upper-class victim since the former is under a greater risk of entering into a bad deal, precisely because of her inherent contractually inferior position.[277] Another concern is that the money earned by lower class individuals is immeasurably more valuable to them under the diminishing marginal value of the money principle.

3. THIRD DISCRIMINATORY DIMENSION: LIMITING SUSCEPTIBILITY TO CRITIQUE

According to the liberal myth, only discrimination which is motivated by unacceptable distinctions between men and women is prohibited. Disparate treatment, as opposed to disparate impact which is of a consequential nature, is considered the main discrimination method worthy of research and exploration.[278] This article's analysis of protected interests in negligence law reveals the importance of seeking consequential discrimination whereby courts do not attribute–at least not openly–a gender-based dimension to their decisions.[279] This article's probing into Israeli law discloses a further discriminatory dimension, the rhetoric one, which makes gender preference much more difficult to

276. FELDTHUSEN, *supra* note 105105, at 204-209. The author points to self-insurance as the main mechanism through which economic losses should be handled.

277. 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).

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

279. In the cases where the gender was specified, it was in a concrete manner, such as in *Dillon*, *supra* note 53, where the court indicated that the plaintiff was "a mother".

uncover and criticize. Pure-economic loss and indirect-emotional harm are presented in the tort rhetoric as "step-children" of tort law, both suffering from a similar attitude of rejection, while actually receiving different treatment. This treatment leaves indirect-emotional harm on the sidelines of tort law and most types of economic loss remain as the central focal point. This reality makes courts' insistence on similarity between the damages and maintenance of this myth even more problematic. It is thus imperative to reveal the false reality behind this rhetorical smoke screen as a means to illuminate it to the judges and to their learned audiences. Discriminating is one thing, but discriminating while advancing a message 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 discussions of the possibility to adopt fair and impartial alternatives.

PART VI: READING BETWEEN THE LINES AND BETWEEN LEGAL SYSTEMS

Armed with a comparative analysis and its implications, I shall turn briefly to reflect on the phenomenon whereby the Israeli legal system draws heavily on dominant Anglo-American law. While it preserves its rhetoric as a relatively binding legal transplantation, it nonetheless administers exceptionally different legal and ideological standards. The reasons for the differences between Israeli law and its sources of knowledge and inspiration are probably varied, reflecting different lines of association and significant demarcations between these legal systems. However, my main interest lies in illuminating, through this research, a specific gendered characteristic of Israel with regards to women's rights which is reflected in its treatment of gender-related interests in negligence law.

The comparative analysis undertaken by the article was intended to serve as a tool to evaluate the feminist contention that common-law tort law is androcentric. My hypothesis was that gender-related interests in one system, albeit latent or vital within specific doctrines, would adapt the patterns of gender-bias characteristics of another legal system, once transplanted. Thus, I suggest that the apparent differences between the three legal systems are not to be read as a signifier of discontinuity between them, but rather as an extremist application by Israeli courts based upon Anglo-American gender-based tendencies. Though absorbed through seemingly neutral doctrines, these tendencies were practiced and developed in Israel, adapting to its unique gender bias settings. Israel is

generally more gender-stratified compared to England and the United States.[280] Yet, it holds, synchronically, a seemingly equal legal rhetoric regarding women's rights. Israel, therefore, can be characterized as having an astonishing resemblance to what has been portrayed throughout this article. It has the pretence of a high commitment to gender equality, while its details fail to follow its commitment.[281] This specific gender bias structure can be easily traced not only within Israel's negligence law protection of pure-economic loss and indirect-emotional loss, but also within Israel's general antidiscrimination laws.

Established as a young state with socialist aspirations advocated by its dominant founders, Israel has promised equality to its female members from the beginning.[282] As opposed to its English and American counterparts, who initially exercised blatantly unequal treatment of their female communities by both de jure and de facto mechanisms,[283] Israel held an arguably equal starting point. Israel has professed its gender equality ideology through some of its constitutive legal institutions: First, within its Proclamation of Independence stating that: "The state of Israel…will ensure complete equality…irrespective of…sex,"[284] followed by the Women's Equality Act of 1951, providing that "A man and a woman shall have equal status with regard to any legal action."[285] Another means by which Israel has presented its formal commitment to a socialist stance of equal share in establishing the young state was its

280. My rough assertion is based on the comprehensive findings of the Human Development Report (HDR), 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).The purpose of the indexes is to rank countries on a global scale by their performance with respect to gender equality issues. The latest report, compiled in 2000, indicates that on both the GDI and the GEM ranking, Israel is ranked 23rd, whereas the United States is ranked 3rd and the United Kingdom is ranked 10th (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.

281. For a comprehensive review of the gender stratification in Israel, *see generally*, RUTH HALPERIN-KADDARI, WOMEN IN ISRAEL; A STATE OF THEIR OWN (2004).

282. 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 define the "audience" and "referees" of the call for gender equality of the Declaration as exclusively Jewish.

283. For England, *see generally*, E. LING-MALLISON, LAW RELATING TO WOMEN (1930). For America, sources are practically 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 the Anglo-American systems, *see generally*, SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY (BARBARA A. BABCOCK ET AL. EDS.1996).

284. Proclamation of Independence (second part), (1948) L.S.I. (Laws of the State of Israel) 3.

285. 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.

obligatory draft to the army.[286] In Israel, where the army was in fact the leading force in "building the nation," this equal rule carried with it great symbolic as well as financial promise to Jewish women.[287]

These institutionalized guaranties of equality makes Israel's unequal realities, revealed through Israeli law, even more painful: women were and still are subjected by law to one of the main causes of "homegrown" Israeli women-only suffering.[288] This suffering results from the domination of religious rules and religious courts over the realm of marriage and divorce rights whereby women are particularly discriminated.[289] The promise embedded in joint military service for equality (albeit non-feminist in many respects) was soon shattered. It was initially shattered by the practice of complete prohibition in assigning women to combat positions, and later, after the ban was removed by the Supreme Court,[290] through non-formal gendered division of labor and representations.[291] Since these first steps of statehood legislation, Israel has further produced an impressive abundance of black-letter rules protecting women's rights and needs, especially in the labor market.[292] Nonetheless, the inferior status of women in this particular sphere has not changed significantly.[293] Furthermore, many of its labor law regulations are actively shaped through the notions that women are the national

286. It is important at this point to stress the mythical component of this Israeli tale. For a detailed discussion of 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).

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

288. 'Homegrown" indicates that this suffering is unique to Israel, where is has grown. *See* more broadly, HALPERIN-KADDARI, *supra* note 281, 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).

289. 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 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.

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

291. *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).

292. For an updated review of labor law's commitment to gender equality *see* Leora F. Eisenstadt, *Privileged but Equal? A Comparison of U.S. and Israeli Notions of Sex Equality in Employment Law*, 40 VAND. J. TRANSNAT'L L. 357, 365-367 (2007).

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

assets of the Jewish state rather than workers requiring protection of varied interests.[294]

Judicial activism for women's rights has proven to be moderately successful,[295] notwithstanding some landmark decisions made in their favor.[296] Some Israeli feminists have 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.[297] Others claim that the advancement of women's rights was a result of Israel's overall socio-economic advancement and not based on the special care for their rights or concerns about their uniquely inferior position.[298] For this reason, when measuring a woman's status in society, Israel scores much higher than it does with regard to more substantial and complex parameters.[299] This gap can also be associated with the gap between the basic pretense of Israel's black letter laws which are more substantial and embody a more complex application of various legal doctrines. Another pattern of this rhetorical and practical dichotomous gap has been revealed by Israeli feminist scholar Frances Raday. In a profiling survey she evaluated the judicial activism tendencies of Israel's Supreme Court justices concerning the right to equality. Raday concludes that regardless of the progressive force of most of the justices' rhetoric, which advocated socio-dynamic expanding

294. *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).

295. *See, generally*, WOMEN'S STATUS IN LAW AND SOCIETY (FRANCES RADAY, CARMEL SHALEV & MICHAL LIBAN-KOBI, EDS. 1995) (Hebrew); Frances Raday, *Feminist Legal Theory, Legislation and Litigation in Israel – a Retrospective* in STUDIES IN LAW, GENDER AND FEMINISM, (DAPHNA BARAK-EREZ AT EL EDS. 2008) (Hebrew).

296. *See, e.g.*, HCJ 153/87 *Shakdiel v. Minister of Religious Affairs* P.D. 42(II) 221 (1988) (appointing women to municipal religious committees), HCJ 953/87 *Poraz v. Mayor of Tel-Aviv* P.D. 42(II) 309 (1988) (allowing women to vote for municipal Rabbis), *Miller*, *supra* note 290 (enforcing equal drafting to the air force pilots training course), HCJ 2671/98 Women's lobby v. Minister of Labor P.D. 53(III) 630 (1998) (instatement of a public duty to equal representation for women in governmental entities), HCJ 3358/95 Hoffman v. Israel Prime Minister P.D. 54(II) 345 (2000) (allowing women to publically pray at a religious site, traditionally reserved for men alone).

297. *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).

298. HALPERIN-KADDARI, *supra* note 281, at 12.

299. HALPERIN-KADDARI, *ibid*, at 11-12.

perceptions of the concept of equality, a closer analysis reveals that these progressive moves lacked operative activism.[300]

The case of the differential protection of gender-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 rhetorical levels significantly differ from the detailed, practical levels of law making.[301] The tort devil, for Israeli women, can be found in the details—not in the recognition of the duty but in its application—in Israel's peculiar conflation of law articulation and judicial rhetoric with law application. Drawing from medical language, one can conclude that the legal transplantation of negligence law's protection of gendered interests has proved extremely successful: the implant has completely adapted to Israel's original body and works in perfect harmony with its defining characteristics.

This structural finding may invoke an even more far-fetched conclusion. The relative gender-based stratification of each of the countries in my analysis can be tracked using the United Nations' GDI (Gender Development Index) and GEM (Gender Empowerment Measure) rating system which is an international index aimed at ranking countries on a global scale by their performance with respect to gender equality issues. According to these ratings systems, America is ranked third and the United Kingdom is ranked tenth. Israel is ranked twenty-third (out of 174 countries) regarding the protection of women's rights. Interestingly enough, these rankings seem to fit the findings in this article. America led the relatively less restrictive approach to indirect-emotional harm with the *Dillon* case, followed by English law and its more restrictive manner of recognition, mainly reflected by the *Alcock* case. Both these nations are nonetheless positioned behind Israel which performs as

300. Frances Raday, *Social Science in the Law: The Israeli Supreme Court: Social Science Insights: On Equality -- Judicial Profiles*, 35 ISR. L. REV. 380, 450-451 (2001).

301. 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),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.

having the utmost protection gap between pure-economic loss and indirect-emotional harm, and holds a record number of discrimination dimensions that work against women. However, the differences in the gender equality ratings of the three systems are reflected in the survey of their protection tendencies of gender-related interests within a specific doctrine of tort law.

Pointing to this interesting correlation, I do not contend that a necessary causation between the two is established. However, ignoring such interesting findings altogether seems erroneous. Any distributive justice critique of tort law, including feminist analysis, is vulnerable to criticisms of randomness, illegitimacy and ineffectiveness, stemming from the fact that tort law is a private mechanism for resolution of private disputes having no strong relevance to "public sphere" considerations. Though firmly grounded,[302] these arguments seem to be weakened by this startling correlation between women's status in general in these countries and their status within the framework of a seemingly anecdotal tort law doctrine.

The difference between the Anglo-American and Israeli legal systems—namely, the fact that the former did not advance pure-economic loss within the ambit of tort law—can also be explained by shifting the gaze to the Anglo-American systems. Anita Bernstein, a prominent feminist critic of tort law, contends that the complex nature of economic loss contributed tremendously to its unsuitability to afford protection under negligence law.[303] Another contention may be that the attentiveness of Anglo-America in maintaining clearer boundaries between tort law and contract law also shaped its reluctance to protect economic interests within a tort law regime.[304] I chose, however, to focus on the Israeli trajectory which offers a positive (as opposed to a hypothetical) account of the gendered tendencies of legal systems that are derived from feminist analysis of interests that can be proven to be gender-related.

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

303. Bernstein contends that the non-recognition of pure-economic loss is rooted in the wish "…[T]o remain intelligible to prospective plaintiffs, tortfeasor-defendants, and jurors (in the United States), tort law must articulate its demands simply, with a relatively low common denominator in mind." Pure-economic loss is held by this article to posses all the contrasting complex-adding traits. Bernstein, *supra* note 126, at 778.

304. *See* the text accompanying *supra* notes 86-96. For a discussion of the thesis that courts have denied liability when the party suffering physical harm might have indemnified the victim of economic loss through a "channeling contract"-a contract that would reduce the amount of litigation by allowing the victim of physical harm to recover economic losses of others as well, *see* Rizzo, *A Theory of Economic Loss in the Law of Torts*, 11 JOUR. LEGAL STUD. 281 (1982).

FINAL WORDS

Izhak Englard, a well-known Israeli tort law philosopher and a former Supreme Court Justice, wrote a landmark book concerning basic notions of Israeli law as well as Anglo-American tort law. Moving from discussing emotional harm to economic loss, he wrote:[305]

> "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 all three systems.[306]

Tort law arises from knowledge which is produced within social structures. It is thus shaped in light of perceptions of the social attribution of losses as gender-related. Consequently, it directly influences the attitudes towards these losses. Despite the neutral discourse practiced in this area, negligence law 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 necessity for a change in tort law's unsatisfactory protection of emotional interests is normatively established by virtues of its own merits as well as by comparison to the protection given to pure-economic loss. Such change is also easy to implement in practice. Common-law tort law is flexible and can be easily modified.[307] Particularly, the tort of negligence and its duty of care component exemplifies regimes of standards that are open to creative interpretation rather than pre-dictated rules.[308] Within the three common-law legal systems surveyed, the courts exert an enormous influence on the way in which the final legal outcome is shaped and can easily accommodate a political tendency to equalize gender related values.[309] Carrying out this kind of change should be the

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305. ENGLARD, *supra* note 38, at 211.

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

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

308. 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).

309. 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,

courts' mission if they are committed to achieving substantive equal access to tort law and to allowing its fair and appropriate application.

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 38, at 779.