Pure Economic Loss

A Comparative Perspective

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1 AN INTRODUCTION TO THE PROBLEM – ELEMENTAL DIFFERENCES IN APPROACH

1.1 Introduction

1.1.1 Challenges to European Tort Law

1. Over the last decades, legal scholars, practitioners, courts and national legislatures have felt themselves increasingly faced with the challenges posed by the phenomenon of pure economic loss.[2] Today, "pure economic loss probably is one of the main problems in expanding tort law".[3] In some countries, it is associated with uncontrollable and unforeseeable floods of claims to which there may be no end.[4] This has fuelled strong sentiments against the recovery of pure economic loss, which in turn has led to doctrines with ominous names such as 'the exclusionary rule' and the 'bright line rule', clearly devised to keep the floodgates shut.[5]

2. In other countries, these concerns seem to be fully absent, and economic loss apparently is treated as any other loss.[6] That contrast in itself

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[2] Admittedly, one could argue on the exact starting point for the debate on pure economic loss (*e.g.*, Andrew Burrows, 'Improving Contract and Tort: The View from the Law Commission', in: *Understanding the Law of Obligations*, Oxford 1998, p. 213, states: "Over the last twenty-five years, no area of civil liability has proved more troublesome than pure economic loss (...)"). The root of the phenomenon could well be traced back into the early 1800s. See J. Gordley, 'The Rule against Recovery in Negligence for Pure Economic Loss: An Historical Accident', in: Bussani/Palmer 2003. See also *infra*, § 3.1.

[3] W.V.H. Rogers, J. Spier, and G. Viney, in Spier 1996, p. 8.

[4] Bussani/Palmer 2003, § 1-1/2. *Cf.* Perlman 1982, p. 70; Honsell 1996, § 2 no. 5 ('uferlosen Ersatzpflicht'). The seminal case in this respect is *Ultramares Corporation vs. Touche Niven & Company* (1931) 255 NY 170, where Cardozo J. contended that accountants should not be held liable by third parties for a negligent audit because "the defendant would be exposed to a liability in an indeterminate amount for an indeterminate time to an indeterminate class." On that case, see below, § 3.2.

[5] P. S.Atiyah, , Economic Loss in the United States, *OJLS* 1985, p. 488; Bernstein 1998, p. 11; Markesinis/Unberath 2002, p. 54.

[6] Fokkema/Markesinis 1987, p. 63.

might already justify a comparative paper on the protection of pure economic interests. But equally important, so it seems, is comparative research into the question of whether the legal reasoning applied for either allowing or dismissing claims for pure economic loss is *convincing*. Is the fear of indeterminacy of the possible extent and content of liability for pure economic loss reasonable? If this is the case, is excluding claims for pure economic loss altogether the appropriate measure? At first glance, not protecting any pure economic interest at all would seem to be just as inefficient and unfair as protecting all of them in full. Is there no acceptable middle solution between these two opposites?

3. Admittedly, for a number of European legal systems, *not* protecting pure economic interests is 'the easy way out', whereas offering protection in extraordinary cases where it is most needed turns out to be quite difficult. In these legal systems, pure economic interests as such are not protected by tort law, so the policy decision of protecting specific pure economic interests encourages stretching existing doctrines and concepts inside and outside of the tort law realm. However, stretching and trying to fit different pigeons into the same hole challenges legal ingenuity and inevitably raises the question of what the real considerations behind the strict legal reasoning are. Other legal systems that do not seem to experience dogmatic obstacles in either recognising or dismissing claims for pure economic loss are (or should be) faced with the difficult task of developing coherent and an overt policy-oriented reasoning for either recognising or dismissing these claims. They do not always succeed (or bother, for that matter).

4. In this paper, I will take a closer look at the tort law principles of the main European jurisdictions with respect to pure economic loss. I will focus on the legal techniques and reasoning as well as on the possible covert reasons behind the inherent policy choices. Generally speaking, details will be omitted, as will the specific statutory regimes that possibly fill up certain loopholes left by the law of tortious liability.

1.1.2 A matter of definition

5. There is no consensus on the exact content of the phenomenon of 'pure economic loss' (or, for that matter, pure economic *interests*).[7] This is hardly surprising because – as will be revealed below – there is no common approach to this specific category of loss. Moreover, the phenomenon of pure economic loss covers a vast variety of very different situations.[8] However, there seem to be some generally accepted demarcation lines that can serve as a starting point. First, pure economic loss is always contrasted with damage resulting from death or injury or damage to tangible objects.[9] Von Bar distinguishes two possible approaches in this respect;[10] the first approach would be that pure economic loss is damage that occurs independent of death or personal injury or damage to a tangible object (the damage-oriented approach). The second approach would be that pure economic loss is suffered in absence of the infringement of a legally protected right or interest (*i.e.* the interest-oriented approach). However, in neither approach can the injured party point to his impaired health or his damaged property. What the two approaches have in common is that, even if physical damage to person or property has occurred, it was not suffered by the claiming party but by someone else.[11]

6. Of course, on a more concrete level, it is open for debate which heads of damage can qualify as *resulting* from death, injury, etc. In fact, the division between damage to life, health, and tangible property on the one hand, and pure economic loss, on the other, has prompted the various legal systems to file *consequential* economic loss under the heading of loss indirectly resulting from death, injury, or property damage.[12] As a result, the

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[7] V. Bar 2001, p. 523. On the various categories of economic interests in general, see Cane 1996, pp. 11-12.

[8] As Kötz 1994, p. 423, rightly observes.

[9] See, however, footnote 19 below.

[10] V. Bar 1999, no. 25.

[11] Therefore, the definition given by Gilead 1999, p. 203 seems to fit my purpose best: 'Economic loss is defined as "pure" when it is not consequent on bodily injury to the [claimant] or on physical damage to land or chattel in which the plaintiff has a proprietary interest.'

[12] Bernstein 1998, pp. 136 ff. Much effort has also been put into defining and subsequently stretching the meaning of *infringement*, *i.e.*, allowing for claims where the physical integrity of the object has not been altered or violated (*e.g.*, theft or the use of an object without consent). See the overview presented by v. Bar 1999, no. 37-38, no. 45, Van Gerven 2000, pp. 183-184, p. 206. *Cf.* Markesinis 1983, pp. 36-38; v. Bar, in: Spier 1998, p. 122. See on this topic also Jansen 2001, p. 36.

jurisdictions that attach legal consequences to the distinction have necessarily developed an impressive body of case law on questions like whether the alteration of the information on a computer hard disk by a computer virus is to be considered as damage to a tangible object, and whether the poor construction of a building that necessitates rebuilding should be looked upon as a matter of physical damage or as a pure economic loss.[13]

7. The category of pure economic loss can sometimes, on closer inspection, be subdivided even further. Let us take the example of the ubiquitous *cable case*: if a power cable is cut as a result of negligent excavation by a building contractor, and the machinery of an enterprise suffers *physical* damage as a result of the power cut, the loss of production would have to be divided into the part of the loss that is suffered during the time of repair of the machinery (that part being *consequential* upon the physical damage) on the one hand, and the part of the loss that – after repairs – had been suffered anyway because of the power cut as such (that part being *pure* economic loss, and therefore – generally speaking – outside the scope of tort law protection).[14] As far as damage to the products that were being manufactured at the moment of the power cut is concerned, the manufacturer can claim if and insofar the products have been physically damaged. If, however, the damaged products can be re-used after re-melting, the products are not considered to be damaged – at least, that is the stance of German tort law.[15]

8. One final remark on terminology. In one way or another, a distinction is made between *directly inflicted* pure economic loss[16] (e.g., in case of unfair competition damaging an enterprise's goodwill, or the pure economic loss suffered as a result of reliance upon a negligent financial statement), and *relational* economic loss, in most cases suffered by a third party as a consequence of physical damage to someone else's person or prop-

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[13] v. Bar 1999, no. 31-33; Zweigert/Kötz 1998, p. 600. Atiyah 1967, p. 267, with reference to these distinctions, finds that 'these results are capricious'. See also Winfield/Jolowicz, pp. 133-134; *cf.* Jansen 2001, p. 36.

[14] Bernstein 1998, p. 140; Markesinis/Unberath 2002, p. 55-56. See further *infra*, § 2.4.2.

[15] On the meaning of physical damage in this context, *cf.* BGH BGHZ 41, 123 (quoted by Van Gerven 2000, p. 185).

[16] Sometimes referred to as non-relational economic loss (*e.g.* La Forest J., in: *Norsk Pacific Steamship Co. Ltd. v. Canadian National Railway Co.* [1992] 1 *S.C.R.* 1021, partially reprinted in Markesinis/Unberath 2002, pp. 243 ff.).

erty).[17] Although the terminology used here is not generally accepted,[18] both categories are commonly considered to be instances of pure economic loss.[19]

1.2 Survey of the Various Legal Systems and their Approaches to the Problem

1.2.1 The German approach: Codified categories of protected rights

9. § 823 BGB, the core provision of German tort law, offers protection to certain legally acknowledged rights: human life, body and health, freedom, property, and other or similar rights ("ein sonstiges Recht").[20] Taking this 'catalogue' of protected rights as a starting point, case law has developed numerous duties aimed at protecting these rights in specific circumstances. After enactment of the BGB, the courts were soon confronted with the question of whether pure economic interests were protected as such under § 823. The simple answer is negative: § 823 BGB does not protect against loss of goodwill, market opportunities, or any other pure economic interests.[21] But that is not the full picture.[22]

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[17] On relational economic loss, see below, § 2.4.1 ff.

[18] For a division into 'two party pure economic loss' and 'three-party pure economic loss', see Kostas N. Christodoulou, 'Pure Economic Loss: Aspects of an Anglo-American Legal Issue Under Greek Law, 51 *Rev. Hellenique de Droit International et Étranger* (1998), p. 601.

[19] Possibly, Swedish law takes a more strict conceptual approach. See B.W. Dufwa, in: Spier 1998, p. 191, and W.V.H. Rogers, in: Spier 1998, p. 40. See also H. Koziol, in: Koziol 1998, p. 30, who seems to restrict the category of 'pure economic interests' to chances to profit (thus excluding contractual expectancies). *Cf.* Lapoyade Deschamps 1996, p. 98.

[20] For an overview of the German approach, see Zweigert/Kötz 1998, pp. 598 ff., v. Bar, in: Spier 1996, pp. 22 f. *Cf.* Van Gerven 2000, pp. 71-72. For an English translation of, and an introduction to, § 823, and 826 BGB, see Van Gerven 2000, p. 63.

[21] See, *e.g.*, BGH December 18, 1972, *NJW* 1973, p. 463, at p. 464, stating that § 823 BGB does not protect against 'allgemeine Vermögensschäden und bloße Vermögenseinbußen durch Vertragsverletzungen'.

[22] For an overview of the possibilities for recovery of pure economic loss, see Van Gerven 2000, pp. 187 ff., and Markesinis 1987, pp. 356 ff.

Protective statutes

10. First, a source of protection may be found in *statutory provisions*: if a pure economic interest is protected by a specific statute, § 823 Abs. 2 BGB offers the appropriate tort remedy.[23] In the end, ascertaining the protective ambit of a statute is a matter of interpretation of that specific statute, but the court's willingness to interpret in a certain manner comes into play as well. It is interesting to note that there seems to be a difference of approach within the Germanic jurisdictions with regard to the question whether a statute that aims at protecting a public interest may also be said to protect individual interests as well.[24]

Other rights

11. Second, the absence of a general clause protecting pure economic interests has prompted the German courts to extend the ambit of the category of 'other rights'. As a result, the German courts, soon after the enactment of the BGB, acknowledged the existence – within the framework of § 823 BGB – of a special but uncodified 'other right'[25] to the undisturbed exploitation of 'established and operative business'.[26] It has been used to protect against intentional acts of unfair competition (*viz.*, boycotts, blockades, and industrial espionage) but courts have rejected its application to pure economic loss sustained *as such* in the course of business dealings. In order to receive protection against infringement of the 'right to business', it is required that the damaging act was *directed against* the business as such – as it might be in the case of unfair competition,[27] but not necessarily in the case of a delay of a lorry driver stuck in a traffic jam.[28]

Intentional wrongful behaviour

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[23] On that topic, see Van Gerven 2000, pp. 227-228.

[24] See below, § 2.4.2.

[25] The category of 'other rights' currently also includes a wide range of personality rights (varying from privacy to .

[26] 'Recht am eingerichteten und ausgeübten Gewerbebetrieb', as introduced by RG February 27, 1904, *RGZ* 58, 24. On that topic, see Markesinis/Unberath 2002, pp. 71 ff.; Van Gerven 2000, p. 189; Herbots 1985, p. 11. *Cf.* Jansen 2001, p. 36.

[27] Cf. BGH *BGHZ* 45, 296; *BGHZ* 65, 325.

[28] Cf. BGH December 9, 1958, BGHZ 29, 65; Van Gerven 2000, p. 187; Markesinis/Unberath 2002, p. 203.

12. Third, next to the protection of specific interests, there is the residual category of liability for *wilful* infliction of damage *contra bonos mores* (§ 826 BGB).[29] Pure economic loss is covered by this category as well, but since its ambit is restricted to intentional unconscionable acts,[30] it essentially seems to cover cases of unfair competition. Unsurprisingly, competition as such – even in the definition of 'wilful infliction of pure economic loss on competitors' – is not affected by this type of liability, because it is not considered to be *contra bonos mores*.[31] So, the cases covered by this general clause are basically the cases that would fit into the common law intentional torts of *fraud, conspiracy, deceit, passing off, inducing breach of contract, malicious falsehood,and unlawful interference with trade*.[32]

Gap-filling contractual remedies

13. Fourth, what the injured party is denied by tort law may well be allowed by *contract* law. The gaps that the German approach to the protection of specific interests leaves are sometimes filled by contract law, or rather quasi-contract law. As a result, the infliction of pure economic loss is sometimes redressed by the doctrine of *Schutzwirkung zugunsten Dritter* (protective effect of a contract for the benefit of a third party).[33] This doctrine allows a third party to claim protection under the obligation undertaken by a party to a contract, although the contracting parties did not explicitly confer any right upon the third party. This concept, which would be

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[29] For Austria: § 1295, Abs. 2, ABGB; for Switzerland Art. 41 Abs. 2 OR; for Greece Art. 919 Greek Civil Code.

[30] Markesinis/Unberath 2002, p. 889; Van Gerven 2000, p. 231; Weir 1997, pp. 46 f. According to German case law, 'intent' ('Vorsatz') includes *dolus eventualis*; see Zweigert/Kötz 1998, p. 603. Of course, extending the legal meaning of the word 'intent' is a method for extending the protection of pure economic interests. On that issue, see v. Bar 1994, pp. 103 *ff.*

[31] Markesinis/Unberath 2002, p. 889.

[32] Zweigert/Kötz 1998, p. 607. It is interesting to note that common law scholars have suggested to replace most of these torts with one umbrella-like concept of liability for damage that is inflicted intentionally and without justification (*i.e.*, the concept of § 826 BGB). See the authors mentioned by Carty 2001, p. 263.

[33] On *Schutzwirkung*, see, *e.g.*, Markesinis 1987, pp. 360 ff.; Markesinis/Unberath 2002, pp. 59 ff., pp. 271 ff.; W. Bayer, Der Vertrag zugunsten Dritter, Tübingen 1995, pp. 182 ff. Moreover, the dogma of *culpa in contrahendo* is used to redress pure economic loss caused by reliance on fair precontractual dealings. See Erwin Deutsch, Der Ersatz reiner Vermögensschäden nach deutschem Recht, in: Banakas 1996, p. 62.

unthinkable under any jurisdiction faithful to the *consideration* requirement, has proved very useful in protecting pure economic interests. For instance, where a negligent statement (*e.g.*, an auditor's report) is delivered to a party to a contract, but where a third party foreseeably relies upon the statement, this third party may claim damages under the protective effect of the contract.[34] Although the third party would not be able to claim on the basis of § 823 for lack of infringement of any legal right, he might be within the protective scope of the contract that was negligently performed. This would allow him to claim for compensation on the basis of breach of a contractual obligation.[35]

Similar approaches in other jurisdictions

14. To conclude, despite the fact that German courts have been very creative in upholding the restrictive exclusionary rule while at the same time finding an equitable solution in favour of the injured party, there is no general clause protecting pure economic interests.[36] A similar approach is taken in Austrian and Swiss case law.[37]

1.2.2 The Common Law approach: Is it fair, just and reasonable?

15. The common law is not built upon a general clause on extra-contractual liability, but instead distinguishes between a number of torts, each of which has its own protectionary ambit.[38] Some of these torts most definitely allow the recovery of pure economic loss, but are generally speaking restricted to wilful, deliberate, or intentional acts. The most prominent of these torts are fraud, conspiracy, deceit, passing off, inducing breach of contract, malicious falsehood, and unlawful interference with trade.[39]

16. The tort of negligence does not require intentional wrongdoing, and therefore its scope is much wider than the specific 'economic' torts mentioned above. However, as far as the tort of negligence is concerned, the

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[34] Kötz 1994, pp. 427 f.

[35] See H. Kötz, *European Contract Law*, Vol. 1 (*Formation, Validity, and Content of Contracts; Contract and Third Parties*), Oxford 1997, pp. 252-254.

[36] Van Gerven 2000, p. 206.

[37] See footnote 20.

[38] For a general overview, see Zweigert/Kötz 1998, pp. 605 ff.

[39] See generally Carty 2001.

courts show considerable restraint in allowing claims for pure economic loss. Although recovery of pure economic loss is not barred *as such*, the elements that build up the tort of negligence tend to disfavour claims for pure economic loss.[40] Generally speaking, the tort of negligence is actionable if the injured party shows that he has been injured by the breach of a duty to take reasonable care to avoid damage owed to him in the specific circumstances of the case by the person that caused the damage. Essential elements in case law on the tort of negligence have traditionally been 'foreseeability' and the 'proximity' test (also referred to as the 'neighbour' principle).[41] However, for the last decade or so, the English courts have been emphasising more and more that the imposition of a duty is strongly dependent on policy considerations; the ultimate test being whether such imposition is to be considered 'pragmatic' and 'fair, just and reasonable'.[42] Moreover, a direct interplay between 'duty' and 'damage' is relevant: the nature of the damage influences the existence and the extent of the duty.[43]

17. It has been suggested that, in case of physical damage to person or property, the duty is mainly based on the reasonable foreseeability of the harm.[44] However, in case of pure economic loss much more is required than bare foreseeability. The mere fact that the ensuing damage is the foreseeable result of an act, omission, or statement is insufficient ground for a claim in negligence:[45] there must be a violation of a *duty vis-à-vis* the injured party. In practice, the courts are reticent in phrasing duties to protect against pure economic loss; they seem to have departed from earlier attempts at formulating 'tests' in two or more stages, and nowadays are more

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[40] See Zweigert/Kötz 1998, p. 613; W.V.H. Rogers, in: Spier 1996, pp. 82 ff.; Van Gerven 2000, p. 210, pp. 244-245; Dwyer 1991, pp. 310 ff. *Cf.* the overview presented by v. Bar 1992, pp. 413 ff.

[41] Note that Bernstein 1998, p. 78, distinguishes 'proximity' from the 'neighbour' requirement. On both these concepts, which are most important for a full understanding of the tort of negligence and its evolution, see, e.g., Bernstein 1998, pp. 24 ff., Rogers, in: Spier 1996, pp. 83 ff.

[42] Bernstein 1998, pp. 84 ff., pp. 102 ff.

[43] Cf. Laddie J., in: *BCCI (Overseas) Limited (In Liquidation) v Price Waterhouse and Another*, The Times, February 10, 1997, as quoted by Bernstein 1998, pp. 36-37, and Viscount Simonds, in: *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd* [1961] AC 388, at 425, quoted by Bernstein 1998, p. 38.

[44] W.V.H. Rogers, in: Spier 1996, p. 85. Note however, that, even in case of foreseeable physical harm, policy considerations may stand in the way of a duty; see Winfield/Jolowicz, p. 147 ff.; W.V.H. Rogers, in: Spier 1996, p. 88.

[45] Khoury 2001, p. 432, with references to case law in footnote 124.

inclined to take a step-by-step approach, judging each case on its own merits.[46]

1.2.3 The French approach: Fault and causation

18. French tort law is not familiar with a separate category of 'pure economic loss'.[47] Article 1382 of the French Civil Code merely states that anyone who causes damage to another by his fault (*faute*) is obliged to compensate.[48] Judging from a number of Cour de Cassation decisions, that are quite extraordinary and far-reaching in result in comparison to English and German law, the French legal system seems to be most receptive to claims for pure economic loss.[49] In 1965, the Cour de Cassation allowed a claim of a bus company against someone who had negligently caused a traffic accident, which in turn caused a traffic congestion, which in turn caused the city buses to arrive too late, thus causing a drop in bus fares.[50] This decision is remarkable in comparison to the English and German reticence in similar cases. The same dichotomy applies in *cable cases*, where the production line of a factory is brought to a halt because of a negligently caused power cut. If the factory does not suffer from physical damage to its machinery, both the English common law and the German BGB deny any claim for losses suffered. French law, however, in principle allows such a claim as a direct consequence of the severance of the cable.[51]

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[46] Markesinis/Unberath 2002, pp. 53 ff. Critical: Stapleton 1991, pp. 284 ff. On the development towards this step-by-step approach, see, *e.g.*, D. Howarth, in: Banakas 1996, pp. 27 ff. *Cf.* Van Gerven 2000, p. 210; v. Bar 1992, pp. 413 ff., and v. Bar 1996, no. 285, who asserts that, although it is certain that the rule in *Hedley Byrne v. Heller* in principle allows recovery of pure economic loss on the basis of negligence, there is no clear line on the conditions for recovery.

[47] Lapoyade Deschamps 1996, p. 89; Zweigert/Kötz 1998, p. 67; Marshall 1975, p. 749. *Cf.* v. Bar 1999, no. 25, no. 44, footnote 279, referring not only to France, but also to Belgium, Luxembourg and Spain.

[48] For a translation of, and an introduction to, Art. 1382/1383 Code Civil, see Van Gerven 2000, p. 57.

[49] *Cf.* Khoury 2001, p. 453.

[50] Cass. Civ. 2e, April 28, 1965, *D.* 1965, Jur. 777, quoted by Van Gerven 2000, p. 197.

[51] See Cass. Civ. 2e, May 8, 1970, *Bull. civ.* 1970.II.122, Conseil d'État June 2, 1972, *AJDA* 1972, 356, quoted by Van Gerven 2000, pp. 197 ff.

19. This does not mean that 'anything goes' in French law. The mere fact that the French concept of *faute* is an abstract general clause that does not distinguish between physical damage to persons and property, on the one hand, and pure economic loss, on the other, does not necessarily make the French courts more generous in allowing claims for pure economic loss.[52] In practice, however, it cannot be denied that French tort law allows a wider range of pure economic loss claims than most other jurisdictions.[53]

20. French law sets its own boundaries: the *faute* concept only protects the legitimate interests (*intérêt légitime juridiquement protégé*),[54] and only insofar as the damage is the direct, and certain consequence of the negligent act.[55] Effectively, although many claims are feasible in theory, most of them are rejected in practice for lack of sufficient direct causation or for lack of certainty of the damage.[56] Whenever a claim is dismissed in court on the grounds of insufficient causation, the genuine reason might well be the policy consideration that the limits of liability have been reached, that a tortfeasor should not be burdened with limitless and *a priori* indeterminate duties.[57] This might have prompted the rejection by the Cour de Cassation of a ricochet claim of a creditor who suffered from the injuries sustained by his debtor.[58]

21. In cases of relational economic loss, where dependents suffer loss of support as a result of the death or injuries of the primary victim, the French courts have granted compensation, entirely on the basis of Art. 1382 Civil Code.[59] Note however, that every class of secondary victims is judged on their own merits, which has resulted in the dismissal of claims for pure

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[52] Cf. v. Bar 1999, no. 26; Markesinis 1983, pp. 44 ff.; Jansen 2001, p. 35.

[53] This seems to be somewhat underestimated by Markesinis 1983, and La Forest J., in *Norsk Pacific Steamship Co. Ltd. v. Canadian National Railway Co.* [1992] 1 *S.C.R.* 1021, partially reprinted in Markesinis/Unberath 2002, pp. 243 ff., who both emphasize that the French legal system is fully aware of the need for limits to liability for pure economic loss.

[54] Lapoyade Deschamps 1996, pp. 96-97.

[55] See Lapoyade Deschamps 1996, pp. 92 ff.; Khoury 2001, p. 453. *Cf.* v. Bar 1999, no. 470; Jansen 2001, p. 35; Marshall 1975, pp . 768 ff. Although there also seem to be other instruments of judicial restraint (e.g., with respect to the calculation of damages), their exact importance is difficult to ascertain. See Viney, in Spier 1996, p. 131; Lapoyade Deschamps 1996, pp. 99-100.

[56] Markesinis 1983, pp. 44 ff.

[57] G. Viney, in: Spier 1996, pp. 131-132.

[58] Cass. Civ. 2e, February 21, 1979, *JCP* 1979.IV.145. *Cf.* § 2.2.

[59] Zweigert/Kötz 1998, pp. 617-619. *Cf.* Lapoyade Deschamps 1996, pp. 94-95.

economic loss of business partners, creditors, and employers for lack of sufficient causality.[60]

1.2.4 Other approaches

22. Austrian, Swiss, and Italian law seem to take a position halfway between the German and the French approaches.[61] Although the respective codes more or less adhere to a general clause, the existing case law seems to have been built upon the foundations of protection of specific legal rights such as health and property.[62] In one respect, however, Italian law has taken a considerable step away from the German approach. The concept of "danno ingiusto" (wrongful injury) in Art. 2043 Civil Code[63] was long considered to offer protection against infringements of absolute rights, but, in the 1971 *Meroni* decision, the Italian Supreme Court acknowledged the *entire patrimony* to be a legally protected right, thus *de facto* permitting claims for pure economic loss.[64] Moreover, the *Meroni* decision in principle allows claims of creditors who suffer loss as a result of the injuries of

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[60] *Cf.* footnote 58. See also La Forest J., in *Norsk Pacific Steamship Co. Ltd. v. Canadian National Railway Co.* [1992] 1 *S.C.R.* 1021, partially reprinted Markesinis/Unberath 2002, pp. 243 ff..

[61] Widmer/Wessner 2001, § 1.2.2.8, F.D. Busnelli, G. Comandé, in: Koziol 1998, pp. 69-70. On Spanish law, which seems to take a somewhat more relaxed position, M. Martín Casals, J. Ribot, in this volume, nr. 8 ff.

[62] Note that while the Austrian and Swiss codifications seem to have adopted a general clause (§ 1295 ABGB and Art. 41 OR, respectively), in legal practice however, their approach is quite similar to the German one. See Koziol 1995, pp. 359-361; Banakas 1996, p. 11 footnote 43; Honsell 1996, § 2, no. 5 and 13; H. Koziol, in: Spier 1996, p. 45; H. Koziol, in: Spier 1998, p. 69. For possible future developments of Swiss law with respect to a genuine general clause, see Widmer/Wessner 2001, pp. 101 ff.

[63] F.D. Busnelli, in: Spier 1998, p. 140.

[64] See Corte di Cassazione January 26, 1971, No. 174, *Foro It.* 1971-I-342 (*Torino calcio spa v. Romero*), as quoted in Van Gerven 2000, pp. 130 ff. See Zaccari, in this volume. *Cf.* Monateri, in: Banakas 1996, p. 197. Compare also Corte di Cassazione, May 4, 1982, *Giur. it.* 1983-I-1-786 (*De Chirico*), quoted by Van Gerven 2000, p. 202, where the right to patrimonial integrity was a founding element in a case of liability for a negligent statement of authenticity. See Zaccari, in this volume. *Cf.* v. Bar 1996, no. 22, v. Bar 1999, no. 45; Bussani/Palmer 2003, Part 2, Case 5 (Italy).

the debtor.[65] In contrast, most jurisdictions deny protection of the patrimony as such.[66]

23. Mention should also be made of Dutch law. Under the Dutch 1838 Civil Code, a remarkable development took place in the early 1900s, which oddly enough started out with an approach similar to the German list of protected rights and ended in a mixture of the German and French approaches. First, the Dutch Supreme Court would only allow claims for infringement of life, health, and absolute rights, or with regard to acts contrary to statutory provisions. However, in a 1919 landmark case, the Supreme Court acknowledged that a claim in tort may also be based on the fact that the act committed was 'contrary to unwritten standards of conduct seemly in society'.[67] In this industrial espionage case, a printer seduced the employee of one of his competitors to disclose certain trading secrets to him, thus inflicting pure economic loss upon his competitor. Although neither any protected right was infringed nor any statutory duty breached, the Supreme Court ruled – admittedly without a solid basis in the 1838 Civil Code – that tortious liability could also arise whenever the act was contrary to an unwritten standard of 'seemly behaviour'. Ever since the 1919 Supreme Court decision, this concept has ruled Dutch tort law; it was ultimately codified in the 1992 Civil Code.[68]

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[65] See below, § 2.2.

[66] Note that the French Cour de Cassation rejected the ricochet claim of a creditor in Cass. Civ. 2e, February 21, 1979, *JCP* 1979.IV.145. *Cf.* v. Bar 1999, no. 44, footnote 278 with further references to German, Austrian, Greek, Portugese, Swedish and Finnish law; Zweigert/Kötz 1998, p. 600; Th. Liakopoulos, G. Mentis, 'Civil Liability for Pure Economic Loss in Greece', 51 *Rev. Hellenique de Droit International et Étranger* (1998), p. 68; Honsell 1996, § 2, rdnr 5, § 4, no. 4; B. Schilcher/W. Posch, in: Banakas 1996, p. 150. See, however, Widmer/Wessner 2001, pp. 98-99, who rightly observe that the patrimony is in several respects a protected interest, because statutory provisions (notably the Penal Code) offer protection against fraud, deceit, etc.

[67] HR January 31, 1919, NJ 1919, p. 161.

[68] Art. 6:162 Burgerlijk Wetboek states: "(1). A person who commits a wrongful act vis-à-vis another person, which can be imputed to him, is obliged to repair the damage suffered by the other person as a consequence of the act. (2). Save grounds for justification, the following acts are deemed to be wrongful: the infringement of a subjective right, an act or omission violating a statutory duty, or conduct contrary to the standard of conduct seemly in society. (3). A wrongful act can be imputed to its author if it results from his fault or from a cause for which he is answerable according to law or common opinion." Translation based in part upon P.P.C.

24. It is plausible that the concept of 'seemly behaviour' itself is comparable to the open-ended category of *bonos mores* as it is used in, *e.g.*, § 826 BGB. In Dutch law, however, it has a much broader application than it has in German law: whereas German law requires intentional wrongdoing, in Dutch law pure and simple fault suffices. In effect, the Dutch legal system seems to have blended the German approach by protecting specific categories of subjective rights with a more flexible approach that leaves room for protection of pure economic interests through a general clause.[69]

1.2.5 Alternative and supplemental instruments

25. Of course, it is not desirable to impute all negative consequences of a single negligent act to a single negligent person. Just imagine the consequences if a negligent farmer turned out to be responsible for the recent pan-European outbreak of foot and mouth disease. The farmer would face liability for a potentially endless sequence of events and subsequent economic loss. Apart from the fact that the farmer would inevitably end up bankrupt, the mere threat of liability in itself might also stifle social and economic life in general.[70] The effect of unlimited liability might be that economic growth in that specific area would be negatively influenced. Even the most 'permissive' legal systems concede that 'there must be an end to it'. Therefore, in every legal system that in principle allows claims for pure economic loss, alternative and supplemental instruments are used to limit the extent of liability for pure economic loss.

Limiting the protectionary scope of legal rules

26. To that end, the instrument of *limiting the scope* of the duty to avoid damage is used. Courts assess the protective ambit of a statutory duty and limit the ambit of uncodified duties of care.[71] This is illustrated by a Dutch

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Haanappel/E. Mackaay, *New Netherlands Civil Code: Patrimonial Law (Property, Obligations and Special Contracts)* (1990) and J. Spier, in: H. Koziol (ed.), *Unification of Tort Law: Wrongfulness*, the Hague 1998, p. 87.

[69] Barendrecht 1998, p. 116.

[70] *Cf.* Von Bar 1999, no. 23; Perlman 1982, p. 70; J. Sinde Monteiro, in: Spier 1998, p. 64.

[71] Fokkema/Markesinis 1987, pp. 67-68; B. Schilcher/W. Posch, in: Banakas 1996, p. 150, p. 151 (referring to the concept of *Schutzbereich der Norm*). *Cf.* v. Bar. 1994, pp. 121-122. Under common law, this test is performed when answering the

case in which an insurance company tried to claim in tort from the person that had indirectly caused the losses sustained by the insurance company as a result of its contractual obligation towards the injured policyholder to indemnify him for the damages caused by the tortfeasor. In principle, the insurance company would be entitled to a recourse right on the basis of subrogation, but in this specific case it had not (for reasons that can be left unmentioned). It was decided that the insurance company could not claim in tort, because the tortious acts committed by the defendant could not be considered to be tortious *vis-à-vis* the insurance company.[72] In this approach, the liability of the tortfeasor is limited by limiting the protectionary scope of that specific ground of liability. This approach is sometimes referred to as the *Schutznorm theory*, which basically means that a wrongful act as such will not infer liability unless the standard of conduct that was violated purports to protect against *such damage as suffered by the injured person*.[73]

Causation

27. Moreover, in all European jurisdictions, the concept of causation renders it possible to exclude unwanted floods of claims on the basis of *remoteness*, *unforeseeability*, or indirectness of the damage incurred.[74] Whenever a legal system in principle allows claims for pure economic loss, the emphasis is in-

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question of whether the duty to take reasonable care was *owed to* the injured party, and, in turn, one of the founding elements in that duty requirement is *proximity*. See Winfield/Jolowicz, pp. 99-101.

[72] HR January 24, 1930, *NJ* 1930, p. 299. Compare, along a similar line of reasoning, *Simpson & Co. v. Thomson* (1877) 3 App Cas 279 (HL). See also *Insurance Co. v. Brame* 95 U.S. 754 (1877), where it was decided that the insurer's damage was an incidental circumstance, and a remote and indirect result. *Cf.* Atiyah 1967, pp. 250-231; Marshall 1975, pp. 772 ff; Rabin 1985, pp. 1523-1524, especially footnote 37.

[73] In the Netherlands, this doctrine was introduced by HR May 25, 1928, *NJ* 1928, pp. 1688 ff. See currently Art. 6: 163 BW, which reads: 'No obligation to repair damages arises whenever the violated norm does not purport to protect from damage such as suffered by the injured person'. *Cf.* J. Spier (see *supra* note 68), p. 113; Barendrecht 1998, p. 117. Note that the connected doctrine of *Schutzzweck* was used in German law to decide that a certain statutory duty not to damage power cables did not purport to protect factories from suffering pure economic loss in case of rupture. See below, § 2.4.2.

[74] *Cf.* Banakas 1996, p. 48.

evitably placed upon causation principles in order to channel claims and to ensure that the right balance between admission and restriction is kept.[75]

28. However, the traditional instruments of causation do not always seem to be up to the job. For example, legal systems that use the concept of foreseeability to limit the number of claims for pure economic loss face the problem that, in modern society, it is quite foreseeable that a single negligent act is apt to cause a wide variety of pure economic losses. A foreseeability test simply is no longer adequate to withhold compensation of pure economic loss from claimants.[76] The range of liability would still be very wide indeed.[77] An accountant knows very well that several investors will place reliance upon his statements, so it can hardly be argued that the foreseeability test is not met.[78]

29. Therefore, in the causality domain, alternative methods of fencing off claims should be used. Such an alternative mechanism is offered by the Dutch law of causation. According to Dutch law, if the *condicio sine qua non* test is met, the *imputation* test is applied. This test basically means that compensation can only be claimed insofar as the damage is related to the event giving rise to liability in such a fashion that the damage, also taking into account its nature and that of the liability, can be imputed to the debtor as a result of this event.[79] As far as the nature of the damage suffered is concerned, both case law and doctrinal writing are inclined[80] to stretch the limits of causation *very far* whenever death and personal injury is involved (thus including rather unforeseeable injuries),[81] somewhat *less far* when damage to property is involved, and the *least* far in the case of loss related to neither of the former two categories (*i.e.*, pure economic loss).[82] In practice, this might lead to dismissal of a claim for pure economic loss, based

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[75] Barendrecht 1998, p. 117.

[76] Khoury 2001, p. 432, with further references in footnote 124. Note, however, that sometimes the courts do try to uphold the foreseeability test by requiring that there is *specific* or *particular* foreseeability.

[77] Cf. Widgery J. in *Weller & Co v. Foot and Mouth Disease Research Institute* [1966] 1 QB 569, quoted by Bernstein 1998, p. 14.

[78] Rabin 1985, p. 1528.

[79] See Asser-Hartkamp I, no. 424 ff.

[80] however, it must be stressed that no general principles have yet been formulated. See Spier 1996, p. 103.

[81] See Spier 1996, p. 101, Asser-Hartkamp I, no. 433 ff.

[82] See, *e.g.*, C.J.H. Brunner, 'Causaliteit en toerekening van schade', *Verkeersrecht* 1981, pp. 210 ff.

on the reasoning that the loss suffered cannot in all reasonableness be imputed to the act or occurrence that led to liability.[83]

30. To illustrate this point, mention may be made of a decision of the Amsterdam Court of Appeal.[84] A shopkeeper contended that the City of Amsterdam was liable in tort for the negligent manner in which the City had cleared a building of squatters. For two weeks after the eviction, there were riots in the vicinity of the building. As a result, the shopkeeper lost a substantial number of customers in these and subsequent weeks. The Amsterdam Court of Appeal decided that *even if* a duty was owed to the shopkeeper to vacate the building most cautiously in order to avoid riots, and even if this duty had been neglected, the loss that had occurred could not reasonably be imputed to the City. The Court decided that the nature of the damage (*viz.*, pure economic loss) required a closer cause-and-effect connection than would be the case had the damage consisted of personal injury or damage to property.[85]

31. Admittedly, the advantage of the 'imputability' approach is that it leaves room for 'policy decisions' with regard to the extent of tortious liability, whereas the obvious disadvantage is that the use of the 'imputability' formula can only be convincing if it is escorted by *arguments* that uphold the policy decision. The conclusion that pure economic loss requires a closer cause-and-effect connection is a *statement* rather than an argument. This problem will be investigated in more detail in § 3.1.

1.2.6 Concluding remarks

32. Based on this first overview, I think it is fair to say that, from a dogmatic point of view, there is no uniformity between the various legal sys-

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[83] Note, however, that the nature of the damage is but one element in a multi-factor approach: the degree of blameworthiness is a relevant factor as well.

[84] Hof Amsterdam May, 27, 1986, NJ 1987, no. 712.

[85] Note, however, that, in a similar case, the District Court of Dordrecht (December 24, 1986, BR 1987, pp. 835 ff.) decided that the municipality of Dordrecht was liable in tort for loss of customers of a shopkeeper's. In that case, the shopkeeper experienced an unexpected loss of customers as a result of contamination of the soil of the entire neighbourhood where nearly all his customers lived. As the customers were evacuated from their homes, the shopkeeper lost his clientele. The Court considered the municipality in principle to be liable. See R.J.P. Kottenhagen, Buitencontractuele aansprakelijkheid voor economische schade, *Bouwrecht* 1991, pp. 343-344.

tems.[86] Some adhere to a strict exclusionary rule, others simply allow claims for pure economic loss while reaching reasonable limits with the damage requirement and the causation requirement. Other systems take a middle way. To illustrate this point in a more concrete fashion, in Chapter 2, the focus will be on specific cases.

33. Before doing that, I would like to make a final remark on *strict liability*. In the preceding paragraphs, I concentrated upon the general principles of *fault based* liability, but it seems that strict liability moves along similar lines in the various legal systems. Where some duties in tort are imposed first and foremost to protect life and limb rather than pure economic interests, the same can be said of strict liabilities. Several jurisdictions limit the protectionary ambit of strict liability to physical damage.[87] However, this is not necessarily always the case: some jurisdictions do not make any difference. It is interesting to note that, under the CLC 1969 regime, compensation of economic loss suffered by fisheries and fishery-related industries as a result of oil tanker spillage is thought to be possible.[88]

2 SPECIFIC TOPICS IN THE AREA OF PURE ECONOMIC LOSS

2.1 Deliberate and Intentional Infliction of Pure Economic Loss

[86] In this sense, Jansen 2001, p. 37. For an overview, see also Jacques Herbots, Economic loss in the legal systems of the continent, in: Furmston 1986, pp. 137 ff.

[87] v. Bar 1999, no. 34. *Cf.* P. Widmer, in: Spier 1998, pp. 201-202; Barendrecht 1998, pp. 127-128.

[88] For a thorough analysis of the IOPC Fund decisions (which are indirectly based on the CLC 1969 strict liability regime), see Colin de la Rue, Charles B. Anderson, *Shipping and the Environment*, London 1998, pp. 441 ff. Note, however, that, in a recent decision, a more restrainted approach was followed with regard to fishery-related industry. The strict liability of oil tanker owners, as laid down in the CLC 1969, was held not to cover a smolt supplier's loss of income, indirectly caused by the drop in market demand for Shetland salmon following the *Braer* grounding at Shetland. See *Landcatch Ltd. v. The Braer Corporation and Assuranceforeningen Skuld* [1999] 2 Lloyd's Rep. 316, reported by Edward Watt, *LMCLQ* 2000, pp. 16 ff.

34. The intentional infliction of pure economic loss in itself is not wrongful.[89] On the contrary, capitalist economics are firmly founded on the 'jungle principle' of trying to gain as much economic benefit to the detriment of competitors.[90] With regard to this 'principle', it is sometimes argued that a distinction should be made between depriving someone of the *hope* of economical advantageous arrangements, on the one hand, and infringement upon an existing contract, on the other. Allowing the former is perfectly logical in a market economy, whereas allowing the latter would collide with the competitive economy principle of *pacta sunt servanda*.[91] From this point of view, it would seem that the infringement upon existing contracts should not be tolerated extensively. I shall turn to this matter below in § 2.2.

35. As far as the deliberate infliction of pure economic loss (*e.g.*, to competitors) without infringement of existing rights *in personam* is concerned, most jurisdictions seem to take a restrictive approach as long as no rights *in personam* are infringed. The line of wrongfulness is only crossed whenever either the means with which this goal is pursued are unlawful or grossly disproportionate means to an end. Perhaps, the principle might then be rephrased as follows: intentional infliction of pure economic loss is wrongful if it lacks *justification.*[92]

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[89] Dobbs 1980, p. 338, with references to American case law; B. Schilcher/W. Posch, in: Banakas 1996, p. 151; Dwyer 1991, p. 311.

[90] Goff LJ, in *The Aliakmon* [1985] 2 *All ER* 44, p. 73, refers to the 'market place philosophy'. *Cf.* v. Bar 1994, p. 107. See also Reid LJ, in *Dorset Yacht Co. v. Home Office* [1970] *AC* 1004, pp. 1026 f.

[91] Cane 1996, p. 124. *Cf.* Cane 1996, p. 194.

[92] In this sense Du Perron 1999, p. 107. *Cf.* Dobbs 1980, p. 345, with references to Pound and Holmes; Cane 1996, pp. 121-122, who argues that intentional interference with a contract with intrinsically lawful means may amount to unfair competition if it is done purely to injure another or improve one's own competitive or financial position. To a certain extent, authority for this point of view can also be found in § 826 BGB, stating that liability for pure economic loss can arise in case of intentional acts *contra bonos mores*. On that topic, see above no. 12. On the other hand, there is also case law indicating that the mere act of inducing a debtor to default on his contractual obligations is tortious *vis-à-vis* the creditor. See Du Perron 1999, pp. 112-113. Note also that, in contrast to the above-mentioned view, Cane 1996, at p. 193, objects to a possible recognition of a tort of intentional causing (pure economic) loss without justification.

36. It would seem that a great deal depends on what exactly is meant by 'intent':[93] if an act is solely aimed at hampering someone else's dealings, in most cases, there will hardly be any relevant justification.

2.2 Are Contracts Protected in Tort?

37. Contracts are the instrument par excellence for creating, protecting, endorsing, and pursuing pure economic interests.[94] Traditionally, the contractual allocation of pure economic risks and opportunities has been the exclusive domain of the parties to the contract. Third parties are neither bound nor endowed by *res inter alios acta*. From the tort law point of view, this would leave the contracting parties unprotected against infringements of their contract, merely because third parties are in no way bound to respect the contracts to which they are not a party.[95] This would be inconsistent with the need of any market economy for contractual stability,[96] and therefore none of the European legal systems seem to take this restrictive approach. The various legal approaches differ, however. Sometimes, it is argued that rights *in personam* of a party to a contract are to be protected on equal footing with rights *in rem*.[97] However, most legal systems deny contracts the status of protected right, although they do seem to admit that third parties have a certain duty in tort *to respect contracts* to which they are not parties.[98] The extent and ambit of this duty, however, differs from country to country.

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[93] Admittedly, the exact meaning of 'intent' is rather unclear. See, *e.g.*, Carty 2001, p. 261.

[94] Cane 1996, pp. 454-455. *Cf.* La Forest J., quoted by Bernstein 1998, p. 20.

[95] Extensively on the underlying rationale, see Dobbs 1980, pp. 350-356.

[96] On that perspective, see, *e.g.*, Jon Danforth, Tortious Interference with Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity, 81 *Col.L. Rev.* (1981), 1491 ff., especially pp. 1508 ff.

[97] *Cf.* Zweigert/Kötz 1998, p. 604; Benjamin L. Fine, Analysis of the Formation of Property Rights Underlying Tortious Interference with Contracts and Other Economic Relations, 50 *U. Chicago L. Rev.* (1983) 1116 ff., where a striking analogy is made (with reference to appropriate case law) between obtaining a contract and the pursuance of a wild animal.

[98] See, *e.g.*, H. Koziol, *Die Beeinträchtigung fremder Forderungsrechte*, Vienna 1967, pp. 185 ff.; Du Perron 1999, pp. 101 ff., and, extensively, Weir 1997, pp. 20 ff. See also D. Medicus, Die Forderung als 'sonstiges Recht' nach § 823 Abs. 1 BGB?, in *Festschrift Erich Steffen* 1995, pp. 333 ff., at pp. 339 ff.

38. Most legal systems restrict the application of this duty to *intentional* wrongful infringements of contracts.[99] For instance, in the common law, there are a number of specific 'economic torts' applicable to *intentional* wrongful interference with contracts.[100] Under German law, although one might be tempted to file contractual rights under the protective umbrella of "other rights" in § 823 BGB, it is commonly understood that "other rights" do not cover rights *in personam*, *viz.*, 'relative rights'.[101] The patrimony as such is not protected either.[102] In effect, contracts are only protected within the context of § 826 BGB, which sets intentional wrongful conduct as a prerequisite.[103]

39. Under French law, third parties must respect the contracts of others,[104] but the extent of this duty remains unclear. For example, it is not clear whether the mere knowledge of the existence of a contract which might be infringed by the acts of the tortfeasor is sufficient for liability, or that some form of *collusion* of two parties is required.[105] It is clear that under Spanish law, no proof of collusion is required: knowledge of the contract and simple disregard seem to suffice.[106]

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[99] v. Bar 1996, no. 36 ff., 260, 309, 427; Du Perron 1999, p. 150; Cane 1996, p. 120; Koziol 1997, no. 4/35-36. *Cf.* the overview offered by Bussani/Palmer 2003, Part 2, Case 12 (double sale), which shows that, according to most legal systems, it is not sufficient for a claim in tort that a third party has knowledge of the existence of a prior contract.

[100] Carty 2001, pp. 279 ff.; it should be noted, however, that it is not always clear what 'intention' exactly means; see Carty 2001, p. 261, p. 279.

[101] Becker 1996, pp. 439 ff. (with further references); Van Gerven 2000, p. 186; Herbots 1985, p. 10.

[102] BGH December 18, 1972, *NJW* 1973, p. 463.

[103] The wrongfulness requirement in § 826 BGB (or more accurately: the *contra bonos mores* requirement) is not fulfilled by mere knowledge of the contract that is being infringed; instead, a particular degree of indifference to the affected party is required (see Weir 1997, p. 123, quoting BGH June 2, 1981, *NJW* 1981, p. 2184). A relevant element may be that the means used are *disproportionate*. For an overview of § 826 BGB, see above, no. 12.

[104] Van Gerven 2000, p. 238.

[105] Van Gerven 2000, p. 239; *cf.* Weir 1997, pp. 55 ff. See also the overview presented by Vernon V. Palmer, A Comparative Study (From a Common Law Perspective) of the French Action for Wrongful Interference With Contract, 40 *Am. J. of Comp Law* (1992) 297 ff.

[106] M. Martín Casals, J. Ribot, in this volume, nr. 14.

40. Some jurisdictions adhere to a multi-factor approach, in which intent is not required but instead negligent infringement is only considered to be tortious after weighing the various circumstances and the interests involved.[107] For instance, in Dutch case law, the relevant circumstances are knowledge of the existence of the right *in personam*,[108] knowledge of possible severe damage the contracting party could suffer, the special position of trust the third party enjoys with one of the contracting parties, etc.[109]

41. A related matter is whether a third party can be held liable for bringing about an event that either renders the debtor's performance more onerous or provokes the existence of a contractual obligation itself. Most legal systems show great reticence in allowing such claims.[110] For example, a tortfeasor is not liable in tort *vis-à-vis* a first party insurer for bringing about the event that was covered under the policy.[111]

42. A related topic, which courts of various countries have been faced with, concerns the case in which a third party negligently brings about the death of a contractual debtor.[112] When someone negligently causes another

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[107] For Dutch law, see Asser-Hartkamp III, no. 51b. Compare also § 767 Rest. 2d on Torts (1979), which states *seven* relevant factors. It is interesting to note the point raised by Carty 2001, p. 288; she argues that strict and clear rules on liability are in the public interest, because flexibility of economic torts trigger litigation rather than competition. From this perspective, rigidity should be preferred over flexibility and multi-factor approaches.

[108] Note that mere knowledge of the existence of a right *in personam* is not enough to render an infringement wrongful. See, *e.g.*, HR January 3, 1964, *NJ* 1965, no. 16, HR November 17, 1967, *NJ* 1968, no. 42, HR 18-6-1971, NJ 1971, no. 408, HR 27-1-1989, NJ 1990, no. 89.

[109] See, *e.g.*, HR January 12, 1962, *NJ* 1962, 246, HR May 17, 1985, *NJ* 1986, 760, HR December 8, 1989, *NJ* 1990, 217, HR October 15, 1999, *NJ* 2000, 101.

[110] See, *e.g.*, *Cattle v. Stockton Waterworks Co.* (1875) LR 10 QB 453, dealt with by Cane 1996, p. 126. *Cf.* Carty 2001, p. 241; Marshall 1975, pp. 776 ff; Witting 2001, pp. 486 f. See also the comparative overview provided by Bussani/Palmer 2003, Part 2, Case 8 (dealing with the loss suffered by the lessee of a commercial ship as a result of a collision).

[111] In a Dutch case, described above, § 1.2.5, it was decided that an insurance company could not claim in tort for the 'loss' suffered as a consequence of the tortious act of the defendant *vis-à-vis* the policyholder, *unless* the defendant had inflicted the damage on the policyholder with the intent to inflict losses upon the insurance company.

[112] See the overview of solutions to this type of case, presented by Bussani/Palmer 2003, Part 2, Case 5.

person's death or disability, this usually causes this person to unfulfil his contractual obligations *vis-à-vis* his creditors (*viz.*, his employer, bank, etc.). Would the creditor be allowed to claim on the basis that he suffers pure economic loss because the debtor is unable to perform his obligations due to the tortious acts of a third party? Most jurisdictions answer these questions in the negative, but the applied legal reasoning differs. [113]

43. Under German law, a contractual right is not a protected right under § 823 BGB, leaving the creditor unprotected unless § 826 BGB can be invoked (which requires intention). According to Dutch law, the creditor's claim is rejected because killing his debtor is not deemed to be unlawful *with respect to the interests of the creditor*. If, however, by killing the debtor, the tortfeasor purposely aimed at damaging the interests of the creditor, then there probably would be the possibility of a claim in tort.[114]

44. French law does not allow ricochet claims of creditors suffering damage as a result of the death or injuries of their debtors either.[115] In a 1979 decision, the French Cour de Cassation specifically rejected the ricochet claim of a creditor.[116] Italian law is more generous, as the *Meroni* case proves. On that case and its implications, see § 1.2.4.

45. Since the case of 'killing a debtor' in certain respects is a case of relational loss, it will be dealt with it in more general terms in § 2.4.1.

2.3 Reliance, Negligent Statements, and Defective Services

2.3.1 Negligent statements

46. Negligently drafted reports, statements, opinions, and similar documents can cause damage to others than the direct contractual counterpart.

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[113] See, *e.g.*, K.D. Kerameus, K. Roussos, in: Spier 1998, pp. 130-131; Markesinis/Unberath 2002, pp. 55 f.; Cane 1996, pp. 126-127. *Cf.* Becker 1996, pp. 446-454 (on the employer's claim for loss).

[114] Du Perron 1999, p. 117. For a similar reasoning, c*f.* HR October 26, 2001, *NJ* 2002, no. 216 (killing a child with the intention of hurting the mother is a direct tort vis-à-vis the mother).

[115] Cf. Rogers, in: Spier 1996, p. 83.

[116] See Cass. Civ. 2e, February 21, 1979, *JCP* 1979.IV.145; *cf.* Zweigert/Kötz 1998, pp. 618-619. See also Marshall 1975, pp. 766 f.

Some statements are foreseeably relied upon by third parties, and it seems reasonable to expect the professional issuer of a statement to take the interests of these third parties to heart.[117] This does not only raise the fundamental question of whether a contracting party, in the course of performing the contract, should also perform properly having regard to the interests of others, but also the question in what cases it is reasonably foreseeable that others rely upon the statement, and the more general concern whether foreseeability as such is enough reason to 'open the floodgates'. All of these questions seem to surface in all jurisdictions in one way or another.[118] Sometimes, the flood is turned by adjusting the foreseeability requirement. For instance, in the famous *Ultramares* case, the defendant accountants actually knew that the certified accounts would be exhibited to banks, creditors, and stockholders.[119] What they did not know was the *identity* of these third parties and the extent or number of contracts in which their statement would be used.[120] Imposing liability under these circumstances would lead to *ex ante* unforeseeable financial burden, the court argued. If foreseeability is used in such a narrow sense, then in fact the scope of liability for negligent statements is quite narrow.

47. If one were to turn to the approach taken in the common law, the best that can be said is that every case should be judged on its own merits. In principle, if a statement is directed towards one person, it cannot simply be relied upon by another person.[121] However, the circumstances of a specific case can decide otherwise. In the 1964 *Hedley Byrne* decision, the House of Lords seemed to open up the tort of negligence to accommodate third

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[117] It should be noted that, according to some jurisdictions, someone who is planning on relying on a statement of someone else is (under specific circumstances) held *to investigate* the statement. See, *e.g.*, for the Netherlands: HR December 22, 1995, *NJ* 1996, 300; *cf.*, K.A.J. Bisschop, De buitencontractuele aansprakelijkheid van de accountant, *NTBR* 1994, p. 23; HR December 2, 1994, *NJ* 1996, 246. Omitting the performance of such an investigation may amount to contributory negligence or might even block liability in full.

[118] *Cf.* the overview offered by Bussani/Palmer 2003, Part 2, Case 11 (a case modelled after the Italian *De Chirico* case) and Case 17 (auditor's liability *vis-à-vis* investor), Case 18 (wrongful job reference).

[119] *Ultramares Corporation vs. Touche Niven & Company* (1931) 255 NY 170. See *infra*, § 3.2.2.

[120] Bernstein 1998a, p. 115.

[121] *Cf.* G.T. Schwartz, in: Banakas 1996, p. 117, p. 120 (emphasising the dangers of *free rider behaviour*).

party claims for this category of pure economic loss.[122] In this case, clients of a bank relied upon a negligent credit statement made by another bank. The bank that had issued the statement was held to owe a duty of care *vis-à-vis* the investors because issuing such a statement implied a 'voluntary undertaking to assume responsibility' and because it was reasonably foreseeable that the third party would most probably rely on the statement.[123]

48. Much effort has been put into determining the exact scope of the *Hedley Byrne* decision,[124] especially in relation to later case law that would suggest a more restrictive approach to tortious liability for negligent statements.[125] For example, in *Caparo Industries plc v. Dickman*, the House of Lords rejected the existence of a duty of care owed by an accountant for a negligent audit.[126] The accountant had been employed by the company and had reported to the directors. On the basis of a copy of the audited accounts, a shareholder decided to invest more money in the audited company. No duty was found to be owed either to the investors' public at large, or to the shareholders of this specific company; the audit was meant to provide the shareholders with information on the financial management, but not to provide investment advice. This rather artificial split between protection of the shareholders in their company-oriented interests and non-

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[122] A similar open-ended duty seemed to be accepted in *Anns v. Merton London Borough Council* [1978] AC 728. *Cf.* v. Bar 1992, pp. 415-416; v. Bar 1996, no. 281 ff. This case in essence imposed a duty of care on local authorities *vis-à-vis* buyers of houses to carefully exercise their powers to inspect. In respect of pure economic loss, however, this duty has been negated (and *Anns* was overruled in this respect) in *Murphy v. Brentwood District Council* [1991] AC 398 (HL). See W.V.H. Rogers, in: Spier 1996, p. 83 footnote 29, and Witting 2001, pp. 484 f.

[123] *Hedley Byrne and Co. v. Heller and Partners* [1964] AC 465. For an analysis of *Hedley* and subsequent developments in common law case law, see, *e.g.*, C. Gosnell, English Courts: the Restoration of a Common Law of Pure Economic Loss, 50 *U. of Toronto L. J.* (2000), 135-154. *Cf.* Khoury 2001, pp. 429 ff.

[124] For example, the exact scope of the concept of 'voluntary assumption of responsibility' remains clouded to this day. See Bernstein 1998, p. 552, Markesinis/Deakin 1999, p. 91. *Cf.* v. Bar 1994, pp. 111-114; Smillie 1982, pp. 232 ff., pp. 255 ff.; Dwyer 1991, pp. 313 ff; Stapleton 1991, pp. 259 ff.

[125] Banakas 1996, pp. 28 ff.; Banakas 1999, pp. 268 ff. *Cf.* Gosnell (*supra* footnote 123), pp. 137 ff.; Susan Watson, Andrew Willekes, Economic Loss and Directors' Negligence, [2001] *J.B.L.* 217, at 228 ff.

[126] *Caparo Industries plc v. Dickman* [1990] 2 AC 605. See Van Gerven 2000, pp. 215 ff., Bernstein 1998, pp. 560 ff., Khoury 2001, pp. 431 ff. On a comparison of *Caparo* with German law, see: v. Bar 1994, pp. 98 ff.

protection of their investment interests would indicate that there is considerable reluctance to expose accountants to the full consequences of their negligence.[127] Thus, *Caparo* should be understood in the context of fear for opening the floodgates.[128]

49. Under German and French law, there is a more relaxed view of liability for negligent statements. In a case similar to *Caparo*, the German Bundesgerichtshof allowed a claim on the basis of an extensive interpretation of § 826 BGB (by stretching the 'intent' requirement). [129] In German law, *Expertenhaftung* is also dealt with upon the basis of the 'protective effect of a contract for the benefit of a third party', whenever it was foreseeable that the expert opinion would be used by a third party as a basis for investment decisions.[130] It has been ruled that this derivative claim does not only cover the damage of the third party relying on the expert opinion, but also the damage of a fourth party that decides to lend money to the third party to invest on the basis of the expert opinion.[131]

50. According to French law, there are no specific requirements for liability for negligent statements other than the general requirements of *faute* and *causalité*. If a statement is issued negligently, then causation is the main tool for restricting unbridled liability.[132] A relevant aspect in the reliance upon statements is that an investor is soon held to independently verify the auditor's statement before relying upon it.[133]

2.3.2 Reliance and near-contract relationships

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[127] On the split between audit and other services, see Rogers, in this volume.
[128] On that topic, see 3.2.
[129] BGH November 26, 1986, NJW 1987, p. 1758, quoted by Van Gerven 2000, p. 234 (*cf.* p. 246).
[130] Bayer 1995, pp. 189 f.
[131] Kötz 1994, p. 428.
[132] See Cass. comm. October 17, 1984, *JCP* 1985.II.20458, note Viandier, quoted by Van Gerven 2000, p. 241. See also, with ample reference to case law, Khoury 2001, pp. 457 ff., and Banakas 1999, pp. 262 ff.
[133] For a similar approach in Dutch law, see *supra*, footnote 117.

51. In case of 'reliance'-induced pure economic loss, most jurisdictions offer some form of protection.[134] In German law, the doctrine of *culpa in contrahendo* is used to cover reliance-induced damage (*e.g.*, in case of negligent statements).[135] Although the dogmatic foundations of reliance-based liability (in German doctrine also referred to as 'the third way', *der Dritte Spur*, between tortious and contractual obligations) are uncertain, in practical terms, it serves well to fill the gaps left by the exclusionary rule. However, tort law itself can also prove helpful, as the case of the negligent auditor (see above, no. 49) shows.

52. The common law seems to leave room for compensation as well. If the relationship between the injurer and injured party very much resembles a contractual relationship in the sense that one party has, as it were, undertaken a certain performance and the injured party has relied upon this undertaking, one might qualify this as an 'equivalent to contract' proximity that could provide the basis for a duty of care.[136] Likewise, if a statement is prepared for a particular, identified person, there might well be sufficient

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[134] *Cf.* Banakas 1999, pp. 283 ff. The reliance test is used in other jurisdictions as well. *Cf.* the overview offered by Bussani/Palmer 2003, Part 2, Case 19 (precontractual fair dealing). For Italy, see: Corte di Cassazione May 4, 1982, Giur. it. 1983-I-1-786 (*De Chirico*), quoted by Van Gerven 2000, p. 202. *Cf.* v. Bar 1996, no. 22, v. Bar 1999, no. 45. For Dutch law, see, *e.g.*, HR December 10, 1993, *NJ* 1994, no. 667, and J.M. Smits, 'Aansprakelijkheid voor aan derden verschafte informatie; enige dogmatische en praktische kanttekeningen bij derden-aansprakelijkheid', in: R.P.J.L. Tjittes, M.A. Blom, *Bank & aansprakelijkheid*, Zwolle 1996, pp. 91 ff.

[135] v. Bar 1994, pp. 18 ff. For Swiss law, see Honsell 1996, § 4 no. 20 ff. For reliance-based liability for precontractual dealings in Dutch law, see J.M. van Dunné, 'Netherlands', in: Ewoud H. Hondius (ed.), *Precontractual liability: reports to the XIIIth Congress, International Academy of Comparative Law, Montreal, Canada, 18-24 August 1990*, Deventer 1991, pp. 225 ff. and J.H.M. van Erp, 'The formation of contracts', in: A.S. Hartkamp *et al.* (eds.), *Towards a European Civil Code*, 1st ed. Nijmegen/Dordrecht 1994, pp. 129-130.

[136] The seminal case in this respect is *Hedley Byrne and Co. v. Heller and Partners* [1964] AC 465. Cf. *Junior Books Ltd. v. Veitchi Co. Ltd*. [1983] 1 AC 520, in which the House of Lords allowed the claim of a building owner against a subcontractor for poor building quality. Note that this case has been isolated in subsequent cases, so no general conclusions may be attached to it. See Winfield/Jolowicz, pp. 141-142, and John Murphy, Expectation losses, Negligent Omissions and the Tortious Duty of Care, 55 *Cambridge L.J.* (1996), 44 ff.

proximity for the existence of a duty of care.[137] So, what probably is needed for liability is a special relationship between the maker of the statement and the party who has relied upon it. If the maker knew that the statement would guide a certain third party,[138] and the statement was made in order to guide this third party, then there is no indeterminacy problem and a sufficient degree of proximity is present for a duty to arise. So, in line with *Hedley Byrne*, it was held in *Smith v. Eric Bush* that a surveyor had breached his duty of care by negligently issuing a valuation to the seller of real estate, upon which reliance was placed by the counterpart of the seller, the buyer.[139] This relationship may be referred to as 'bordering on a contractual relationship'.[140] Under German law, such a relationship would be referred to as a *Vertragsnähe Beziehung*, and liability might be based on the concept of *Schutzwirkung zugunsten Dritter*.[141]

2.3.3 The expected inheritance

53. Whenever a solicitor or civil law notary-public negligently omits to draft a requested will, and the testator dies, the intended beneficiaries that would have benefited from the will, had it been properly drafted, suffer pure economic loss. In *White v. Jones* it was held by the House of Lords that a lawyer who negligently fails to draw up a will in favour of a specific third party is in breach of a duty of care *vis-à-vis* the intended beneficiary.[142] This is a prototypical case that can serve as an important 'test' of the dogmatic boundaries of any legal system: should the pure economic expectancy of inheritance be protected?

54. According to a number of jurisdictions, the solicitor or civil law notary is liable for the loss, but the legal reasoning is not similar.[143] In some jurisdictions, it is held that the contractual duties of a notary purport to protect not only the client, but also those who were supposed to benefit from the will. Some jurisdictions then conclude that this extended protection is based on

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[137] Cf. Rogers, in: Spier 1996, p. 86.
[138] *Cf.* Markesinis/Unberath 2002, p. 296-298.
[139] *Smith v. Eric Bush* [1990] 1 AC 831.
[140] Cane 1996, pp. 458-459. *Cf.* Gilead 1999, pp. 204-205.
[141] See above, no. 13.
[142] *White v. Jones* [1995] 2 AC 207, Van Gerven 2000, p. 219.
[143] For an overview of the various legal systems, see Bussani/Palmer 2003, Part 2, Case 14.

tort[144], but others allow a claim on the basis of *contract*, simply by extending the protectionary ambit of contractual obligations to cover the interests of certain third parties as well.[145] This seems to be the German approach to the case.[146] The House of Lords prefers a claim in tort as a legal basis for compensation.[147] Under Spanish law, the Civil Code explicitly provides a legal basis for liability of notaries vis-à-vis third parties.[148]

55. On the policy level, the arguments that are frequently used in favour of allowing a claim of disappointed would-be beneficiaries are, first, that there is no danger of an indeterminate liability because the identity of the possible injured party is known and the financial implications as well, and second, that the negligent solicitor would 'walk free' if the intended beneficiary would not be allowed a claim.[149]

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[144] *Ross v. Caunters* [1979] 2 All ER 580. For Dutch law, see Amsterdam Court of Appeal January 19, 1984, January 31, 1985, *NJ* 1985, no. 740. *Cf.* Fokkema/Markesinis 1987, p. 68; HR October 4, 1996, *NJ* 1997, no. 594. Compare, on the subject of liability of banks *vis-à-vis* third parties, Smits, *supra* footnote 134, pp. 91 ff. See also Rabin 1985, pp. 1519 ff., referring to American case law to the same effect.

[145] *Cf.* G.T. Schwartz, in: Banakas 1996, pp. 116-117.

[146] See the inheritance case cited by Lord Goff in *White v Jones*: BGH July 6, 1965, *NJW* 1965, p. 1955. See also v. Bar 1994, p. 122; Zweigert/Kötz 1998, pp. 614-615; Van Gerven 2000, pp. 245-246. *Cf.* Cass. civ. 1e, November 1977, *JCP* 1979.II.19243 and Cass. civ. 1e, January 14, 1981, *JCP* 1982.II.19728.

[147] W. Lorenz, B. Markesinis, Solicitors' Liability Towards Third Parties: Back into the Troubled Waters of the Contract/Tort Divide, 56 *Modern Law. Rev.* (1993), pp. 561-562; Van Gerven 2000, p. 222. Although the English Contract (Rights of Third Parties) Act 1999 has relaxed the strict doctrine of privity, the case in *White v. Jones* would probably still be decided on the basis of the tort of negligence. See Winfield/Jolowicz, p. 130; E.J.A.M. van den Akker, *Beroepsaansprakelijkheid ten opzichte van derden* (thesis Tilburg), the Hague 2001, pp. 17-18, with reference to Law Commission Report no. 242, *Privity of Contract: Contracts for the Benefit of Third Parties*, 1996, pp. 81 ff. The reasoning in this respect seems to be that the solicitor does not promise to take reasonable care in order to confer a benefit on the beneficiary, but to enable the testator to confer these benefits (which would actually be conferred if the testator dies without having subsequently changed his will again).

[148] M. Martín Casals, J. Ribot, in this volume, nr. 21.

[149] See B. Feldthuysen, in: Banakas 1996, p. 139; Victor P. Goldberg, Accountable accountants: Is third-party liability necessary?, 17 *JLS* (1988), p. 310.

2.4 The Ever Decreasing Circles of Pure Economic Loss

2.4.1 Relational loss in general

56. In this paper, the term 'relational economic loss' is used to describe the situation where C suffers pure economic loss indirectly caused by the physical damage to B's person or property, for which A is liable *vis-à-vis* B.[150] The damage of C is commonly referred to as *Reflexschäden* (*indirekte Schäden*[151]), *dommage par ricochet*, or *ricochet loss*.[152] Sometimes, the topic of relational loss is restricted to cases where B and C have a contractual relationship causing C to 'depend' on the integrity of B's health or property,[153] but I think other relationships might come into play as well.

57. There are countless situations in which third parties such as C suffer from B's physical damage. In cases of relational loss with regard to property damage, the common law takes the *exclusionary rule* as a starting point.[154] As a result, whenever A's contractual expectancy is frustrated by the fact that the *object* of the contract, to which only B has a proprietary interest, was damaged by negligence of C, B cannot claim from C in negligence.[155] The exclusionary rule would state a clear dividing line: B, being *directly or*

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[150] *Cf.* W.V.H. Rogers, in: Spier 1998, p. 37; Witting 2001, p. 486; B. Feldthuysen, in: Banakas 1996, p. 132 footnote 6; p. 143; Winfield/Jolowicz, p. 134. What I will not go into is the problem of *Aktivlegimitation*, *i.e.*, the question of who is entitled to the claim, *e.g.*, where loss inflicted upon a company is indirectly suffered by its shareholders. The question of whether shareholders have a separate claim in tort for the reduction of the value of their stock is not dealt with here.

[151] On that term, see also M. Martín Casals, J. Ribot, in this volume, nr. 3.

[152] Bussani/Palmer 2003, § 1-4. Note that the terminology has no fixed meaning. Du Perron 1999, p. 114, distinguishes within the term 'relational loss' between *transferred loss* (in the same sense as I will deal with it in § 2.4.3) and *reflex loss* (by which he refers to, *e.g.*, cable cases).

[153] *E.g.*, Widmer/Wessner 2001, § 1.2.2.1.8, consider *Reflexschäden* (also referred to as *indirekte Schäden*) to be the pure economic loss suffered by C as a *creditor* of B.

[154] Bernstein 1998, p. 11; Cane 1996, p. 454. *Cf. Weller v. Foot & Mouth Disease Research Institute* [1966] 1 QB 569.

[155] The Aliakmon [1986] 1 AC 785. *Cf.* Markesinis 1987, pp. 384 ff., v. Bar 1999, no. 40-41.

primarily injured, can claim his own damages, C, being an *indirectly* injured party, cannot claim at all.[156]

58. The exclusion of claims for relational loss is sometimes said to be justified by the uncertainty of the legal ambit and consequences that would be brought about by allowing a claim.[157] Alternatively, the emphasis is placed upon the injured party being merely a secondary victim. This would imply a causal interference between the negligent act and the damage stemming from the *special relationship* between primary and secondary victim. His own 'voluntarily assuming a risk' causes the damage rather than the tortfeasor's act, and if the secondary victim has assumed the risk attached to certain objects, he should bear that risk in contract and not be allowed to shift it in tort.[158]

59. This argument is sometimes used to explain why an insurance company cannot sue the tortfeasor in his own right, but must rely on a derivative claim (*viz.*, subrogation, recourse, *Legalzession*, etc.). In some jurisdictions, the legal basis of the exclusion is found in the relative character of wrongfulness: if B's property or health is protected in tort as an absolute right, then it is obvious that infringing upon that right is wrongful *vis-à-vis* B and not *vis-à-vis* C.[159]

60. It is interesting to note that most jurisdictions that deny claims for relational loss do allow certain exceptions to this rule, notably in the area of 'transferred loss'. I will return to 'transferred loss' shortly (see below, § 2.4.3) What is interesting here is that, in these cases of transferred loss (notably in case of personal injury and death), especially spouses and children are granted some form of compensation for the loss of financial support and sometimes for non-pecuniary loss.[160] There is of course a lot to be said for compensation

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[156] See the comparative overview provided by Bussani/Palmer 2003, Part 2, Case 8 (dealing with the loss suffered by the lessee of a commercial ship caused by a collision). *Cf.* Winfield/Jolowicz, pp. 135 ff.

[157] Lord Brandon, in *The Aliakmon* [1986] 1 AC 785, at 816.

[158] For this line of reasoning, see the case law mentioned by Bernstein 1998, pp. 199-200, and 227-228. For a somewhat similar approach followed under Spanish law, see M. Martín Casals, J. Ribot, in this volume, nr. 37 ff.

[159] *Cf.* recently BGH November 21, 2000, *VersR* 2001, p. 648 (with regard to personal injury and *Drittschaden*). A similar reasoning is sometimes applied in Dutch case law; see HR January 24, 1930, *NJ* 1930, p. 299.

[160] On non-pecuniary loss, see W.V. Horton Rogers, *Damages for Non-Pecuniary Loss in a Comparative Perspective*, (Tort and Insurance Law Vol. 2), Vienna 2001. See also M. Martín Casals, J. Ribot, in this volume, nr. 32 ff.

of family members, but it is remarkable to see that all the rhetoric of the proponents of the *exclusionary rule* and clear policies not to open the floodgates somehow does not seem to apply to the pure economic loss of relatives of victims of personal injury. Sometimes, it is argued that the choice to allow compensation of family members is in itself not inconsistent with the restrictive policy. Since families are by definition limited in size, and average family incomes can be calculated with the aid of statistics, the circle of possible claimants is not as indeterminable as might be the case with respect to property damage.[161] Allowing claims for relational loss to members of a family does, however, raise the question of demarcation, *viz.*, which person is and is not a family member.[162]

2.4.2 Interference with resources: traffic jams and cable cases

61. The exclusionary rule in regard of relational loss is very powerful in cases of interference with the use of resources.[163] Power cuts, disfunctioning telecommunication systems, blocked streets, and damaged infrastructures are but a few examples of highly disrupting events that invariably cause vast pure economic losses. Or, as Bussani and Palmer put it, the *financial ripple effect* is then at its maximum.[164] The fear of this ripple effect is widespread: some even suspect it to be potentially endless, since the laws of physics do not apply to the causation of pure economic loss.[165] This is said to potentially result in limitless, unforeseeable and incalculable liability, if no specific legal boundaries were put in place.[166]

62. These arguments seem to be widely accepted. For instance, in the prototypical *traffic jam* caused by negligence, most European jurisdictions deny any recovery of pure economic loss on the basis that such inconveniences are

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[161] Perlman 1982, p. 73.
[162] On that question, see, *e.g.*, Marshall 1975, pp. 759 ff.
[163] On that topic, *e.g.*, Bernstein 1998a, p. 122.
[164] Bussani/Palmer 2003. *Cf.* Smillie 1982, pp. 240 f. For a definition of 'ripple effect', *cf.* Rabin 1985, p. 1536.
[165] On this argument, see, *e.g.*, James 1972, p. 50; Perlman 1982, pp. 71-72; G.T. Schwartz, in: Banakas 1996, pp. 105-106; Cane 1996, p. 127, p. 455.
[166] See B. Schilcher/W. Posch, in: Banakas 1996, p. 150, referring to case law of the Austrian OGH.

inherent to everyday life.[167] In my opinion, this reasoning is not convincing. I believe that the concept of 'everyday life risks', even if opposed to *special* risks, is a vague notion that does not by itself reveal the inherent *policy choices* behind the denial. The fact that a damaging event is widespread does not in itself justify absence of liability, so there always is a need for further elaboration on the inherent policy choices. However, this point of view is not commonplace. Some authors even emphasise that these events occur very often, in a large number of cases there is no liable person, and if there is then the damage is predominantly the result of *slight* negligence, resulting in *massive* pure economic loss of a non-homogenous (and therefore rather incalculable) nature.[168]

63. If we take a closer look at the ubiquitous case of the contractor's careless digging operation, which results in the severing of an electricity cable owned by a public utility company and the consequent halt of production at a factory dependent on the electricity, the differences in approach in the various legal systems emerge in full. In essence, *cable cases* raise the question of whether the various legal systems acknowledge that damaging an object belonging to A can also seriously impede, frustrate, and indeed damage the economic interests of B, C, and D, etc., who depend on the proper functioning of this object.

64. According to the German exclusionary rule, if those dependent on electricity for their business are not harmed in either of the legally protected interests (life, body and health, freedom, property, or any other right), there is no claim. Although there have been attempts to persuade the courts that a power cut in itself should be regarded as the infringement of the acknowledged right to an 'established and operative business', the Bundesgerichtshof decided in 1958 that this 'other right' is not interfered with when a negligent act causes a power cut, which causes a halt to the production of an enterprise.[169] As a result, only a case of *physical damage* to a machine

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[167] J. Sinde Monteiro, in: Spier 1998, pp. 64-65; Du Perron 1999, pp. 131-132. Cf. K.D. Kerameus, K. Roussos, in: Spier 1998, p. 131, asserting that detrimental traffic jams are 'a socially acceptable negative result of traffic accidents'. Compare the doctrine of the *Sozialadäquanz* , as described by Koziol 1997, no. 4/37; compare also the concept of 'ordinary business risk', referred to in the 1979 California Supreme Court decision *J'Aire Corp. v. Gregory* (598 P. 2d 60 (Cal. 1979)), quoted by G.T. Schwartz, in: Banakas 1996, p. 105.

[168] Rabin 1985, p. 1533.

[169] BGH December 8, 1958, *BGHZ* 29, 65; *cf.* BGH June 8, 1976, *BGHZ* 66, 388; Markesinis/Unberath 2002, p. 209. *Cf.* v. Bar, in: Spier 1998, pp. 121-122.

due to a power cut can support a claim in tort (including subsequent losses).[170]

65. As far as the outcome is concerned, the position taken in German law is very similar to the English approach chosen in *Spartan Steel Alloys Ltd. v. Martin & Co. (Contractors) Ltd.*[171] In *Spartan*, a dividing line was drawn between pure economic loss and loss consequential upon the physical damage to machinery. Whereas the latter category would suffice for the purpose of the duty of care test, the former would not.

66. Austrian and Swiss case law are modelled in a fashion similar to German law.[172] However, in Austrian case law, there is said to be a tendency towards allowing the protective ambit of a possible contract between the owner of the power cable and the contractor that causes the damage to cover the pure economic interests of consumers as well.[173] In Swiss case law, it has been decided that the penal statutes prohibiting the interference with public electricity and water utilities serve to protect the individual interests of consumers as well.[174] So, in effect, the tortious liability in cable cases seems to have somewhat progressed away from the German exclusionary rule.

67. The restrictive approach taken in German and English law offers a stark contrast with French, Italian, Spanish, and Dutch law. According to French law, a claim in tort is allowed if fault, damage, and causation are proved. No specific legal obstacles stand in the way of compensation; physical damage to property is not required.[175] What is required is the strict application of the causation requirement. In effect, the damage suffered must be real, which may imply that any claim for loss of profit must be substantiated by past performance.

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[170] Bussani/Palmer 2003, Part 2, Case 1/2 (Germany).

[171] [1973] 1 QB 27 (CA), Van Gerven 2000, p. 177. *Cf. SCM v. Whittall* [1971] 1 QB 337. See also Dwyer 1991, pp. 315 ff.

[172] Bussani/Palmer 2003, Part. 2, Case 2 (Austria), stating that a claim in tort would not be allowed. See also Portuguese law, as stated in Bussani/Palmer 2003, Part 2, Case 2 (Portugal).

[173] H. Koziol, in: Spier 1998, pp. 72-73.

[174] P. Widmer, in: Spier 1998, pp. 200-201. See also, on German case law denying such a protective aim in German statutes, Markesinis 1983, p. 35; Herbots 1985, p. 13.

[175] Civ. 2eme May 8, 1970, *Bull. Civ.* II 1970, no. 160; see Bussani/Palmer 2003, Part 2, Case 1/2 (France).

68. Spanish law seems to take a position that is similar to French law, although not many relevant court decisions are available.[176]
69. Italian law, in principle, allows a claim in tort against the negligent contractor who damages the power cable, since it is considered to be a violation of the right *in personam* (the contractual right to electricity).[177]
70. Dutch law seems to favour the French solution as well. According to a 1977 Supreme Court decision, an excavator has the duty to the owner of the facility and to the consumers of the electricity to excavate carefully.[178] This duty is owed not only to the owner, who would 'merely' suffer material damages and consequential economic loss, but also to third parties who are foreseeably dependent on the undisturbed flow of electricity.[179]
71. Although it was submitted by the defendant that if the scope of the above mentioned duty was indeed extended to include consumers of the gas as well, this would open the door for numerous claims. It is interesting to note that the Supreme Court simply brushed this argument aside by remarking that the mere circumstance that those who are at fault and are therefore liable are at risk of being confronted with an extensive number of claims does not affect the duty imposed upon them by law.
72. The defendant further claimed that the causal connection between the act of damaging the gas main and the interruption of production was not sufficient for legal imputation of the damage to the tortious act. The defendant's main argument was that this specific form of damage was unforeseeable and that the damage was caused first and foremost by the factory's excessive dependence on the public gas facilities. In dismissing this argument, the Supreme Court gave an essential decision on the doctrine of causation. The Court decided that foreseeability is a factor that may be taken into account in the process of ascertaining causal connection. However, it is not a decisive element of causation. Other circumstances must be taken into consideration as well.

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[176] See M. Martín Casals, J. Ribot, in this volume, nr. 42 f.
[177] Zaccari, in this volume; F.D. Busnelli, in: Spier 1998, p. 142; Bussani/Palmer 2003, Part. 2, Case 1/2 (Italy).
[178] On the subject, see Spier and Bolt 1996, p. 311.
[179] HR July 1st, 1977, *NJ* 1978, no. 84. See also HR March 14, 1958, *NJ* 1961, no. 570. For detailed comparative law remarks, see R.J.P. Kottenhagen, 'Over bris de cables, Kabelbruchfälle en cable cases', *BR* 1992, pp. 653 ff.; Fokkema/Markesinis 1987, pp. 69 ff. On the topic of calculation of loss of production, see HR April 18, 1986, *NJ* 1986, no. 567.

73. Finally, the Court dismissed the defendant's argument of excessive dependence. In the Court's opinion, this dependence clearly showed the closeness of the causal connection of cause and effect.[180] The Court concluded that there was a sufficient causal link and that possible far-reaching social side effects such as an avalanche of claims are not decisive.
74. Effectively, according to Dutch law, it is immaterial whether the injured party sustained damage to machinery or not: if the power cut affected its business, a claim for the ensuing damage is permissible. Note, however, that the damages must be 'real' in the sense that the injured party cannot claim the value of the products that would have been produced if there had not been a power cut.[181] A similar approach seems to be taken in French law.[182]

2.4.3 Transferred loss

75. *Transferred* loss might be considered to be a subcategory of 'relational loss' in general; the phrase refers to the situation in which damage that would normally have been suffered by the injured party is sometimes in fact suffered by a third party because of a special relationship between the injured and the third party.[183] An example of contractually transferred loss is a contract between A, the owner of an object, and B, someone who takes upon him to bear the financial risks of damage to the object. Whenever the object is damaged, A is compensated according to his contract with B, and B in turn suffers the pure economic loss. Strict application of the exclusionary rule would not allow recovery, although there are strong arguments

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[180] The Supreme Court was not requested to decide whether this excessive dependence did in any way constitute so-called *contributory negligence* (comparative negligence). The defendant did not raise this line of defence. According to the present art. 6: 101 ss. 1 C.C., there are grounds for reduction of the amount allowed in damages whenever circumstances imputable to the injured party have contributed to the damage. Excessive dependence may justify a contributory negligence defence. On this specific topic, see Barendrecht 1998, pp. 125-128.
[181] HR April 18, 1986, *NJ* 1986, no. 567.
[182] See *supra*, marginal no. 67.
[183] I would prefer the wording 'special relationship' to 'contract' (Bussani/Palmer 2003, § 1-4b), because, in my opinion, the problem is in fact broader than just contractual transfers of loss. Kötz 1994, p. 425, seems to equate 'transferred loss' to *Drittschadenliquidation*.

in favour of recovery: as long as the total amount in damages awarded to B does not exceed the amount that A would have been able to claim had the damage not been transferred by some special relationship between him and B, in theory, there is no fundamental objection to allowing B's third party claim. Moreover, the possibility of recovery (either by A or B)[184] would enhance deterrence and would avoid the tortfeasor from receiving a windfall.[185]

76. From a policy perspective, it does not matter whether recovery for transferred loss is put in the hands of either A or B. Sometimes, A is allowed to claim damages that were in fact suffered by B. Such solutions are adopted when the claimant has a contractual relationship with the tortfeasor, whereas the third party – who, in turn, is somehow contractually related to the claimant – has not and would for that reason be denied a claim for pure economic loss. This approach is taken in the German doctrine of *Drittschadenliquidation*.[186]

77. If B is allowed to claim in his own right, usually a 'cap' is introduced in the sense that any *defence* that can be raised *vis-à-vis* the primary victim (*viz.*, contributory negligence, contractual exclusions, limitation period), may also be raised against the third party to whom the loss has been transferred.[187] This is true, *e.g.*, for the doctrine of *Schutzwirkung*,[188] as it is for the recourse rights based on some form of *cessio legis*.[189] In fact, the introduction of a 'cap' on the third party's claim tackles the indeterminacy problem; it avoids the augmentation of the total burden of liability, and instead merely alters the identity of the claimant. This would, in my view, favour admitting a claim for transferred loss.[190]

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[184] Note that, in the abstract, it does not matter whether B is allowed to claim in his own right, or A is allowed to claim on behalf of B (which would amount to some sort of *Drittschadenliquidation*). *Cf.* Bishop/Sutton 1986, pp. 365-366.

[185] On these arguments in general, see § 3.3. *Contra* Smillie 1982, pp. 244 ff.

[186] See Deutsch (supra note 33), pp. 69-70. For England, see Bernstein 1998, p. 207. Compare also the problem posed by the case of the expected inheritance (§ 2.3.3).

[187] Du Perron 1999, p. 123.

[188] Fikentscher 1997, no. 262. *Cf.* Van den Akker (see supra note 147), p. 185 footnote 88.

[189] On that topic, see, *e.g.*, Magnus 2002 (forthcoming).

[190] In this sense, *The Aliakmon* [1985] QB 350 C.A., at 399 (Goff LJ), quoted by Bernstein 1998, p. 205. *Cf.* W.V.H. Rogers, in: Spier 1996, p. 87; Barendrecht

78. The same reasoning applies to transferred loss in case of death and personal injury. From this perspective, there can be no real objection to allowing an employer to claim the cost of sick pay insofar as these costs reflect the amount that the injured employee could have claimed from the liable party if his employer had not been obliged to step in.[191] Some jurisdictions in fact accept this line of reasoning.[192] In others, however, the exclusionary rule has been upheld and employers' claims for transferred loss have been rejected.[193] In some cases, specific statutory solutions have been reached.[194]

3 WHY SHOULD PURE ECONOMIC LOSS BE TREATED DIFFERENTLY?

3.1 Systematic Hierarchy, Policy or Accident of History?

79. The previous chapters have made it clear that, as far as pure economic loss is concerned, there clearly is no dogmatic unity between the various European legal systems. Since there is no generally accepted concept of wrongfulness, and the national courts' and legislatures' policies on pure economic interests seem to vary as well, it proves difficult to identify a common European denominator.

1998, p. 129; Markesinis 1987, pp. 368-369; Dobbs 1980, p. 339; Atiyah 1967, p. 270.

[191] James 1972, p. 57; Bernstein 1998a, pp. 128-129.

[192] See Zaccari, in this volume, and B. Schilcher/W. Posch, in: Banakas 1996, p. 160. A more general rule is also offered by Art. 6: 107 of the Dutch Civil Code: "If a person suffers physical or mental injury as a result of an event for which another person is liable, that other person is not only obliged to compensate the damage of the injured person himself, but also to indemnify a third person for costs (...) incurred for the benefit of the injured, which the latter, had he incurred them himself, would have been able to claim from that other person." Please note that Dutch law, generally speaking – and not only in respect of death and personal injury –, favours claims for transferred loss. See, with further references, Du Perron 1999, pp. 119 ff. *Cf.* Barendrecht 1998, pp. 124-125.

[193] See Bernstein 1998, pp. 179 ff.; *cf.* G.T. Schwartz, in: Banakas 1996, p. 109; Marshall 1975, pp. 763 ff.

[194] A number of countries allow recourse claims of employers for sick pay. For an overview, see Magnus 2002 (forthcoming).

80. In the common law, the arguments put forward to discard claims for pure economic loss can be traced back well into the 19th century.[195] Pure economic loss was not considered to be the approximate and direct consequence of tortious acts (1875).[196] There was a fear that claims might be indefinitely multiplied, thus giving rise to rights of action which, in modern communities, might be both numerous and novel (1877).[197] However, more recently some common law authors have persuasively argued that the exclusionary rule on pure economic loss was in fact a 'historical accident', because most of the raised concerns related to the fear for a wide range of claimants *per se*.[198]

81. Accident or not, a similar development occurred in the same timeframe on the other side of the Channel. The prevailing concern of the 19th century draftsmen of the German BGB was that a general clause would empower *the courts* with the authority to decide whether other tort claims than those associated with the contained categorisation in § 823 BGB – in short: the infringement of acknowledged subjective rights and protective statutory provisions – should be allowed or dismissed. It was thought that a general clause might endow the courts with too much discretionary power and tip the balance of powers within German society, and it was therefore rejected.[199] Since then, however, the German courts have shown little reluctance in filling some of the gaps left by the legislature with the aid of the uncodified 'other right' to the undisturbed exploitation of 'established and operative business', and with the doctrine of 'the protective effect of a contract for the benefit of a third party'.

82. In the common law courtrooms, some 'gap filling' has been done as well, although not to the same extent as in German law. In both jurisdic-

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[195] For a detailed discussion of this topic, see J. Gordley, 'The Rule against Recovery in Negligence for Pure Economic Loss: An Historical Accident', in: Bussani/Palmer 2003. *Cf.* Atiyah 1967, pp. 248 ff., Banakas 1996, p. 11, pp. 28 ff., and James 1972, pp. 45 ff. See also Jansen 2001, pp. 36-37, who seems to trace the differences in approach back to the French revolution; Jansen's argument in essence is that French law stresses the need for *fraternité*, whereas Britain and Germany seem to have focused on *liberté* and *egalité*.

[196] *Cattle v Stockton Waterworks Co.* (1875) LR 10 *QB* 453; see Witting 2001, pp. 486 f.

[197] *Simpson and Co v Thomson, Burell* (1877) 3 *AC* 279.

[198] Bernstein 1998, pp. 11-12; Parisi 2001, pp. 3-4.

[199] Zweigert/Kötz 1998, p. 599; Markesinis 1983, p. 33; Markesinis/Unberath 2002, p. 53-56; Deutsch (supra footnote 33), p. 58. *Cf.* Van Gerven 2000, p. 66.

tions, however, the 20th century 'gap filling' exercise has not led to a complete rejection of the exclusionary rule. What lies behind the tendency towards relaxing the exclusionary rule is hard to prove, but it is easy to make an educated guess. On an abstract level, an explanation might be that, in the 1900s, 'immaterial' wealth has substantially increased, which would explain the boost of the level of legal protection that it is granted.[200] On a more concrete level, it might well be that judges are increasingly willing to adapt tort law to the needs of society. If this is true, I cannot but endorse that development. In my view, society does not only need the protection of health and tangible wealth, but also – that is, to a certain extent – the protection of justified expectancies, contractual positions, dependent relationships, and other pure economic interests.

83. This raises the question of what would happen if a European country were to (re)draft its Civil Code today: would the exclusionary rule survive? This seems to be a *matter of policy*.[201] At the end of the day, it would come down to the need to pinpoint well-contemplated limits to compensation.[202] Therefore, as far as unification of European tort law is concerned, it seems unavoidable to deal with the pure economic loss problem explicitly. However, some authors suggest that a European Civil Code should not deal with the problem by imposing a special regime on pure economic loss, but that the general requirements for tortious liability should suffice.[203] In my opinion, this does not solve the problem but rather shifts it to the judiciary level – which would seriously stand in the way of true *unification* of the European legal systems.[204] Admittedly, the problem of divergence is not solved on a dogmatic level but can only be tackled on a more policy-oriented level.[205] The question therefore remains whether pure economic loss should be given special treatment. This question suggests a closer look at the policy arguments in tort law with respect to pure economic loss.

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[200] For a collection of these kind of arguments, see v. Bar 1994, pp. 108-109.

[201] This was recognised by, *e.g.*, Lord Denning in *Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors) Ltd* [1973] QB 27, at p. 36.

[202] As Widmer/Wessner 2001, § 1.2.2.1.8 point out: 'Dieses – wesentlich politische – Problem besteht darin, vernünftige Grenzen der Schadenersatzpflicht abzustecken.' *Cf.* V. Bar 1999, no. 23.

[203] V. Bar 2001, p. 523. Critically on this point of view: Jansen 2001, p. 37.

[204] Compare, in general, with regard to the dangers of a general clause: Koziol 1998, p. 626.

[205] As Banakas 1999, p. 283, rightly observes.

First, I will deal with the floodgates argument (§ 3.2). Subsequently, I will turn to other policy arguments (§ 3.3)

3.2 Floodgates and The Fear of Indeterminacy

3.2.1 What is meant by 'floodgates'?

84. A much-expressed fear is that allowing claims for pure economic loss would be like *opening the floodgates*.[206] Or, as Lord Denning put it, 'there would be no end of claims'.[207] In other legal systems, courts and lawyers alike are not impressed with the floodgate argument. Viney observes: 'Cet argument me parait dangereux car il manque totalement de rigueur'.[208]

85. On either side, the rhetoric is powerful, but what exactly does the term 'floodgate' refer to?[209] A first meaning might be that *the courts* would be flooded with claims similar to the one adjudicated.[210] A second meaning is that an individual tortfeasor would be flooded with claims, resulting in financial ruin.

86. The first meaning lacks clear empirical backing, and is sometimes dismissed out of hand as 'peu convaincant'.[211] If we look at continental jurisdictions that allow claims for pure economic loss, it must be admitted that the 'admissive' continental courts are in fact *not at all* flooded with pure

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[206] On that argument, see Cane 1996, pp. 455 ff.; Bussani/Palmer 2003, § 1-6A; Koziol 1995, p. 363; Du Perron 1999, p. 126; Smillie 1982, p. 230; Khoury 2001, p. 431.

[207] *Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors) Ltd* [1973] QB 27, at 38. *Cf.* Cane 1996, p. 456, who refers to Morgan J. in *Stevenson v. East Ohio Gas Co.* (1946) 73 NE 2d 200. Lord Atkin's speech in *Donoghue v. Stevens* echoes the floodgate fear as well, when he introduces the 'neighbour principle' in order to limit the number of sustainable claims: 'But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy' (*Donoghue v. Stevenson* [1932] AC 562, at 580).

[208] G. Viney, in: Koziol 1998, p. 60; in a similar sense, Cane 1996, p. 456.

[209] Stapleton 1991, pp. 253 ff.

[210] Bernstein 1998, pp. 546-547; W.V.H. Rogers, in: Spier 1998, p. 48.

[211] Markesinis 1983, p. 38.

economic loss claims for cable ruptures, traffic jams, and so forth, and that the relevant insurance markets have not been brought to any crisis as a result of the broad recoverability of pure economic loss.[212]

87. The second meaning possibly deserves more attention. First, however, it should be stressed that not all cases of pure economic loss pose the threat of 'inundation'.[213] For instance, in cases of transferred loss, there is no such threat.[214] In other cases (*e.g.*, cases of relational loss, negligent statements, etc.), the threat may be real, but this does not mean that allowing claims for these losses in principle would necessarily lead to unbearable financial consequences. Perhaps that is why the above-mentioned 'admissive' jurisdictions seem to have coped so well: although they allow such claims for pure economic loss, in practice, they limit the extent of liability with other instruments such as causation, proof of damage, the duty of the victim to mitigate damages, etc.[215]

3.2.2 Indeterminacy of numbers and amounts

88. One of the most quoted reasons for barring recovery for pure economic loss is the statement of the American judge Cardozo in the famous 1931 Ultramares case that accountants should not be held liable by third parties for a negligent audit because 'the defendant would be exposed to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.'[216] This quote has since assumed a life of its own, because, from the

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[212] See, *e.g.*, Fokkema/Markesinis 1987, pp. 70-71, Lapoyade Deschamps 1996, p. 90, J. Spier/O.Haazen, in: Spier 1998, p. 7. But see also Markesinis 1983, p. 47, warning for inundation of the English courts when compared to the large number of claims dealt with by the French Cour de Cassation.

[213] James 1972, p. 50.

[214] See above, § 2.4.3.

[215] J. Spier/O.Haazen, in: Spier 1998, p. 12. See also Barendrecht 1998, p. 126, who argues that in the 'cable cases', intervening causes seem to limit the extent of the liability. Moreover, in the Netherlands, courts are allowed to reduce the amount in damages whenever full compensation would lead to clearly unacceptable results such as bankruptcy of the debtor (see Art. 6:109 BW). On that topic, see below § 4.3.

[216] *Ultramares Corporation vs. Touche Niven & Company* (1931) 255 NY 170.

context, it appears that Cardozo was not referring to restraint in respect of claims for pure economic loss but to liability for negligence *in general*.[217]

89. What Cardozo's words imply is that the courts, when allowing a claim – irrespective of whether it is it in regard of pure economic loss or in regard of personal injury –, must take the full range of potential consequences of that decision into account. If the foreseeable result thereof would be indeterminacy, then the courts should dismiss the claim.[218] This seems to be a sound principle, but it does raise the question of what indeterminacy exactly is.

90. Indeterminacy is generally associated with unforeseeability of the number of potential victims, the accidental nature, and the amount of the loss suffered. As far as the number of potential victims is concerned, in tort law there is, by definition, some degree of *ex ante* indeterminacy. As opposed to *contractual* relationships, that enable the parties to the contract to assess (*ex ante*) the pure economic interests involved, *tortious* relationships may involve parties that have not been in contact and have not had the opportunity to assess the number, nature, and extent of possible claims arising from negligence.[219] However, the contrast between tort and contract is not always this evident. Even in tort, if the number of possibly injured persons and the likelihood of their damage is (*ex ante*) calculable, there should be no indeterminacy problem. In that case, there can be no objection – at least not from the indeterminacy presumption – against allowing claims for pure economic loss.

91. As far as the nature and the amount of the loss is concerned, this hardly seems a fully convincing argument against the recovery of pure economic loss as such. As Bernstein rightly observes, 'it will nearly always be a question of pure fortuity' as to whether there will be a large or a small number of injured parties, and – it might be added – as to whether the injury is physical or of a purely economic nature.[220] A negligent pilot might cause a ship to collide with a bridge, causing property damage and blocking the free flow of traffic, but he might also cause the ship to sink, the

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[217] Bernstein 1998, p. 13, p. 544. In this respect, Cardozo's words would rank *ex aequo* with the statement by Von Jhering ('where would it all lead…'; see Gordley, *supra* note 195, at § 3) on the list of misused (or misunderstood) quotes.

[218] Bernstein 1998, p. 200. *Cf.* Rabin 1985, p. 1533; Robert L. Rabin, in: Furmston 1986, pp. 33 f.

[219] This contrast with contractual relationships is emphasised by Honsell 1996, § 2 no. 5.

[220] Bernstein 1998, p. 201; W.V.H. Rogers, in: Spier 1998, p. 47.

hazardous cargo to pollute the river, causing a major clean-up operation, impeding fishermen to go about their business for months to come, affecting tourism and destroying the local bird colonies.[221] The point is that there will always be an element of fortuity and indeterminacy in tortious liability, even as far as liability for personal injury or damage to property is concerned.[222] In fact, damage to a wide range of victims can more easily be associated with death and injury than with pure economic loss.[223] Nevertheless, it is sometimes argued that the extent of claims is likely to be very much wider than that of claims arising out of material damage and injury.[224] Whether this assertion is accurate remains open for debate, and is in any case dependent on the nature of the pure economic loss. It seems to be true for *relational pure economic loss*, which is dependent on death, injury, or damage to tangible property. So, in effect, any claim for relational pure economic loss would be sustained *next to* the primary claim, but it is doubtful whether the *ex ante* indeterminacy-problem is bigger in case of a negligent audit than it is in case of a defectively designed drug.

3.3 Other Policy Considerations

92. At the end of the day, judicial decision-making in tort law – regardless of whether tort law is based upon a civil code or not – is always *a matter of policy*. But even seen from this practical angle, matters of policy require coherent reasoning and convincing argumentation, which, in my opinion, is sometimes (somehow) lost out of sight. In assessing the relevant policy factors, the common law seems to be comfortable with allowing reasoned policy considerations to be mixed with rather vague 'gut feeling'-like arguments.[225]

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[221] See the examples from case law presented by Bernstein 1998, pp. 200 ff.

[222] Bernstein 1998a, p. 126; Cane 1996, pp. 456-457. Contra: Perlman 1982, pp. 71-72.

[223] This argument is fiercely defended by Bernstein 1998, pp. 147-148; *cf.* Bernstein 1998a, p. 126; Rabin 1985, p. 1532.

[224] Gibbs J., quoted by Bernstein 1998, p. 149. *Cf.* Rabin 1985, pp. 1531 ff.

[225] To illustrate this point, it should be noted that the policy approach is taken by common law courts on other subjects as well, for example, on the matter of liability of statutory bodies for failure to apprehend dangerous criminals on the loose (*Hill v Constable of West Yorkshire* [1989] 1 AC 53).

93. For example, I am inclined to find the argument that allowing claims for pure economic loss fuels false or inflated claims rather unconvincing.[226] Furthermore, I suspect that some arguments are used inconsistently. For example, there is the *deterrence* argument, according to which there is no real need for liability for pure economic loss, especially in those relational loss cases where there is already liability *vis-à-vis* the owner of the damaged object or the injured victim or his relatives.[227] In my view, consistent application of this argument in other cases should lead to the conclusion that where there is no relational loss, but, for instance, a negligent auditor's report causing the public to buy shares in the audited company, there *should* be liability in order to secure the deterrence objective of tort law. A number of jurisdictions, however, have rejected this conclusion. So, at best, the argument seems to be invoked quite randomly.

94. Sometimes, the lesser degree of protection offered to pure economic interests is said to be justified by the fact that pure economic interests are (considerably) less worthy of protection than life, limb, and property.[228] Apart from the counter argument that, on the level of individual cases, pure economic loss can be as devastating to a person's life or to an enterprise as the effects of death and personal injury,[229] the argument would suggest the *necessity* to make choices. This need for making choices presupposes, however, that compensation is a scarce commodity of which the limits have been reached. Although this argument intuitively sounds appealing, the 'admissive jurisdictions', *e.g.*, France, Italy, and – to a lesser extent – the Netherlands, hardly provide any empirical backup for the assumption that these limits have actually been reached. Moreover, if we were really serious about different levels of protection, we would certainly have to consider drawing different demarcation lines. For example, would we still find it satisfactory that subrogated first party insurers can claim for prop-

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[226] The argument was raised by Lord Denning, in his speech in *Spartan Steel*, (at p. 38). *Cf.* Dobbs 1980, p. 357 footnote 86 (referring to similar arguments raised in *Dillon v. Legg*, 68 Cal. 2d 728).

[227] On that argument, see Bernstein 1998, p. 203. *Cf.* La Forest J., in *Norsk Pacific Steamship Co. Ltd. v. Canadian National Railway Co.* [1992] 1 *S.C.R.* 1021, partially reprinted in Markesinis/Unberath 2002, pp. 243 ff.

[228] W.V.H. Rogers, in: Spier 1998, p. 43; Koziol 1998, p. 625, p. 627; Atiyah 1967, p. 269; Weir 1997, pp. 9-11. Fokkema/Markesinis 1987, p. 63, find the argument to be 'unconvincing'.

[229] Rogers, Spier and Viney, in Spier 1996, p. 14.

erty damage and personal injury if in fact the insurers' loss is, from a practical point of view, purely economic?[230]

95. It has also been suggested that pure economic interests are subject to a lesser degree of protection, partly because of an obvious difference between tangible objects and pure economic interests: the former can be recognised from the outside and are therefore foreseeable, whereas the latter are not.[231] True as this difference may be in fact, it should not be a reason for fully withholding protection from pure economic interests. In my view, it should be taken into account when addressing issues such as whether the injured party's interest was foreseeable and should have been taken into consideration by the tortfeasor.

4 DIRECTIONS FOR THE FUTURE

4.1 Fully excluding pure economic loss is neither fair nor just or reasonable

96. There are a growing number of exceptions to the exclusionary rule. Some authors have therefore argued that the more modern view of tort law would be not to fundamentally treat life, health, and property differently from pure economic interests.[232] I think that there is a fundamental truth in this, because, from an economic point of view, in case of a power cut it seems most arbitrary to allow a manufacturer to claim in tort for damage to his machinery but to bar any claim for 'damage' to his work force or – more generally speaking – his turnover. In terms of capital investment, machinery and the work force are equally important.

97. In my opinion, there should be no fundamental or dogmatic obstacle to claims for pure economic loss. The tortfeasor should not be allowed to walk free merely because of the nature of the damage he caused. The exclusionary rule does not provide any incentives for damage avoidance. Denying a claim in tort to victims of pure economic loss would not only leave

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[230] The argument is raised by J. Spier/O. Haazen, in: Spier 1998, p. 11.

[231] Koziol 1997, no. 4/25; Koziol 1998, p. 625, p. 627. This reasoning is supported in part by those jurisdictions that set knowledge as a prerequisite for liability for infringing rights *in personam*. On that topic, see, *e.g.*, Du Perron 1999, pp. 152-153; *cf.* Cane 1996, p. 120.

[232] Markesinis 1983, pp. 49-50.

them without any compensation,[233] but would also lead to a lack of incentives for careful behaviour.[234]

98. The rejection of obstacles does not mean, however, that any claim should be sustained. Or, as Zweigert and Kötz put it: 'Modern conditions require that some economic interests be protected against merely negligent invasion, or, to put it the other way round, there are now certain situations where it seems fair to impose on the citizen special duties to take care to avoid causing mere financial injury.'[235] Maybe, the direction for the future is to focus on these 'certain situations' rather than either fully rejecting or fully allowing claims for pure economic loss.

99. In my opinion, it is clear that strict application of the exclusionary rule can lead to unfair and unjustified differences in legal protection. But having said that, it is difficult to replace the exclusionary rule with a more satisfying set of flexible rules that both enable the courts to do justice in any given case and, at the same time, provide a clear dividing line between categories of pure economic loss that should or should not be compensated.[236]

100. Some have suggested that some form of a general clause in tort law can serve as a springboard for judging pure economic loss.[237] For instance, it has been argued that a balancing of the interests concerned should decide the outcome and that it should be left primarily to the legislature to enact

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[233] W.V.H. Rogers, in: Spier 1996, p. 87; Banakas 1996, pp. 42-43; Cane 1996, p. 183. This element of the decision in *White v. Jones* is particularly emphasized in the speech delivered by Lord Goff.

[234] The decision in *White v. Jones* may be seen in the light of deterrence as well. It was admitted that, if a claim was denied to the disappointed beneficiaries, the solicitor would in fact be immune to the consequences of his negligence: the testator would not suffer any damage, whereas the intended beneficiaries would not be able to claim under the contract between solicitor and testator. It is interesting to note that the argument put forward in *White v. Jones* is sometimes used in the context of claims for transferred loss as well, and also in regard of the mirroring claim for the benefit of someone else (*viz. Drittschadenliquidation*). See W. Puhle, *Vertrag mit Schutzwirkung zugunsten Dritter und Drittschadenliquidation*, Frankfurt 1982, pp. 76 ff., pp. 87 ff. See also Du Perron 1999, p. 127, with further references with respect to Dutch law.

[235] Zweigert/Kötz 1998, p. 604.

[236] On that approach, see Koziol in this volume.

[237] It seems that v. Bar 2001, p. 523, is of this opinion.

specific protective statutes.[238] In fact, some jurisdictions do indeed use a set of relevant factors and circumstances to decide the wrongfulness of infliction of pure economic loss.[239] Although this approach may sound appealing from a theoretical corrective justice point of view, in practice, it may well lead to a decrease in predictability of tort law (which was not really predictable to begin with anyway).

4.2 Following the path of categorisation

101. Authors from several jurisdictions have suggested that the problems with which legal systems are faced by the phenomenon of pure economic loss might be tackled efficiently by *categorising* the different instances of pure economic loss in order to judge each of these situations on its own merits.[240] Quite some experience with this approach has been built up within international oil pollution funds (notably, the IOPC Fund and the voluntary TOVALOP Scheme): operating from the starting point of compensation of pollution 'damage' in general, these institutions have worked their way through the process of including and excluding various categories of economic loss.[241] I think that lessons might be learnt from their experience, and it seems that this approach has, in some way, been suggested by other as well. Some authors have suggested that the ripple effect might be taken quite literally as a demarcation method: if a ripple consists of ever decreasing circles, it might be efficient – be it, admittedly, somewhat arbitrary at times – to discard of the exclusionary rule and instead allow the *first two or three circles* adjacent to the primary victim to claim compensation (provided that all the other requirements for liability are met).[242]

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[238] Koziol 1998, p. 627. Note, however, that Koziol adds that liability should only arise if the injurer has acted with the *intent* of harming the injured party.

[239] As far as tortious infringement of contracts is concerned, see § 2.2.

[240] On this category approach, see, *e.g.*, Rabin 1985, p. 1518; B. Feldthuysen, in: Banakas 1996, p. 134, J.M. van Dunné, 'Liability for Pure Economic Loss: Rule or Exception?', 4 *Eur. Rev. of Priv. L* (1999), p. 406.

[241] On this topic, see Colin de la Rue, Charles B. Anderson, *Shipping and the Environment*, London 1998, pp. 441 ff., and App. 13/2 at p. 1195. *Cf.* E.H.P. Brans, *Liability for Damage to Public Natural Resources – Standing, Damage and Damage Assessment*, the Hague 2001. Note that the TOVALOP scheme was abandoned in 1997.

[242] See, *e.g.*, W.V.H. Rogers, in: Spier 1998, p. 39; J. Spier, in: Spier 1998, p. 159 ff. *Cf.* H.K. Köster, *Causaliteit en voorzienbaarheid. De betekenis van de begrip-*

4.3 Turning the flood as it comes

102. Some courts have argued that the exclusionary rule is based upon the presumption of indeterminacy, so that, whenever this presumption was rebutted in a concrete case, the rule is not applied.[243] Although, at first sight this may seem a strange line of reasoning, on closer inspection there is much to be said for this approach.[244] Why not wait for the flood to come and then act accordingly? If a defendant can substantiate his claim that liability would open the floodgates and would render the financial burden limitless or otherwise unbearable, *then* the courts should be able to turn the tide. Therefore, the courts should be endowed with the power to reduce damage awards in exceptional cases. In fact, this approach has been codified in both the Portuguese and the Dutch Civil Codes. According to these provisions, the courts are allowed to reduce the amount in damages whenever full compensation would certainly lead to clearly unacceptable results such as the bankruptcy of the debtor.[245]

5 CONCLUDING REMARKS

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pen causaliteit en voorzienbaarheid voor de omvang van de buitencontractuele schadevergoeding, inaugural lecture Amsterdam 1963, p. 17; Du Perron 1999, pp. 130-131.

[243] See the case law mentioned by Bernstein 1998, p. 211. *Cf.* the remarks made by J. Spier/O. Haazen, in: Spier 1998, p. 11.

[244] J. Spier/O. Haazen, in: Spier 1998, p. 14, convincingly show that the idea of ad hoc mitigation by the courts is not as exotic as one might think: the opposite (*viz.*, ad hoc imposition of liability on the basis of equity and financial capacity).

[245] Art. 6:109 BW; Art. 494 Código Civil. See Barendrecht 1998, pp. 119-120, and J. Sinde Monteiro, in: Spier 1998, p. 182, p. 183, respectively. Note that Swiss law, in principle, allows reduction on similar grounds (Art. 43 OR; see also more explicitly Art. 52 Abs. 2 Vorentwurf Widmer/Wessner 2001). Austrian law implicitly allows reduction in proportion to the gravity of the *fault*. In German law, the concept of reduction on the basis of financial capacity is – to a certain extent – also known, because employees are sometimes protected against liability *vis-à-vis* their employers (and recourse claims of employers) in case of *schadensgeneigte Arbeit*. On this topic, see P. Abas, *Rechterlijke matiging van schulden*, 3d ed., Deventer 2001.

103. None of the European jurisdictions have come up with convincing reasons for either *fully including* or *excluding* certain losses from tort law protection.[246] Perhaps that is because the legal systems have relied upon simple solutions for a complex problem. My impression is that the exclusionary rule is a simple rule, and therefore not a proper solution. However, I would not advocate an unconditional abolition of the exclusionary rule, because that would also be too simple a solution. Having said that, I do think that, in taking a step-by-step approach, the following guidelines for the future might be helpful. The first proposition is to acknowledge that there is no single pure economic loss category, and that the exclusionary rule therefore has no exclusive foundation. In that respect, categorising seems to be the proper way to proceed. That *modus operandi* will enable us to single out the cases in which the floodgate fear is justified. For example, I do not think that there is any floodgate threat in cases of transferred loss. Should the exclusionary rule not be relaxed at least on this point?

104. The second proposition is that the introduction of several safety valves in any legal system would enable courts to relieve excessive pressure on the tort system. A general reductionary power for the courts might be helpful in overcoming the floodgate fear, as would, *e.g.*, the use of causation and the victim's duty to mitigate damages.

105. In short, there is no single convincing solution to this phenomenon of diversity. However, it is clear that completely denying its existence will certainly not make it go away.

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[246] Jennifer Payne (book review Banakas 1996), *C.L.J.* [1997], p. 429.

6 SELECTED LITERATURE

Asser-Hartkamp I
A.S. Hartkamp, *Verbintenissenrecht; deel I – De verbintenis in het algemeen* [Mr. C. Asser's handleiding tot de beoefening van het Nederlands Burgerlijk recht], 11th ed., Deventer 2000

Asser-Hartkamp III
A.S. Hartkamp, *Verbintenissenrecht; deel III - De Verbintenis uit de wet* [Mr. C. Asser's handleiding tot de beoefening van het Nederlands Burgerlijk recht], 10th ed., Deventer 1998

Atiyah 1967
P.S. Atiyah, Negligence and Economic Loss, 83 *LQR* (1967), 248-276

Banakas 1996
Efstathios Banakas (ed.), *Civil Liability for Pure Economic Loss*, The Hague 1996

Banakas 1999
Stathis Banakas, Liability for Incorrect Financial Information: Theory and Practice in a General Clause System and in a Protected Interest System, 3 *European Rev. of Private Law* (1999), 261-286

v. Bar 1992
Christian v. Bar, Negligence, Eigentumsverletzung und reiner Vermögensschaden, 56 *RabelsZ* (1992), 410-443

v. Bar 1994
Christian v. Bar, Liability for Information and Opinions Causing Pure Economic Loss to Third Parties: Comparison of English and German Case Law, in: Basil Markesinis (ed.), *The Gradual Convergence*, Oxford 1994, p. 98-127

v. Bar 1999
Chistian v. Bar, *Gemeineuropäisches Deliktsrecht – Band II*, München 1999

v. Bar 1996
Chistian v. Bar, *Gemeineuropäisches Deliktsrecht – Band I*, München 1996

v. Bar 2001
Christian v. Bar, Konturen des Deliktsrechtskonzeptes der Study Group on a European Civil Code – Ein Werkstattbericht -, *ZeuP* 2001, 515-532

Barendrecht 1998
J.M. Barendrecht, "Pure economic loss in the Netherlands", in: E.H. Hondius (ed.), *Netherlands Reports to the Fifteenth International Congress of Comparative Law*, Antwerpen 1998, p. 115-135

Becker 1996
Christoph Becker, Schutz von Forderungen durch das Deliktsrecht?, 196 *AcP* (1996), 439-490

Bernstein 1998a
H. Bernstein, Civil Liability for Pure Economic Loss Under American Tort Law, 46 *Am. J. of Comp. L.* (1998), 111-131

Bernstein 1998
R. Bernstein, *Economic Loss*, 2d ed. London 1998

Bishop/Sutton 1986
W. Bishop, J. Sutton, Efficiency and Justice in Tort Damages: The Shortcomings of the Pecuniary Loss Rule, 15 *Journal of Legal Studies* (1986), 347-370

Bolt and Spier 1996
A.T. Bolt, J. Spier, *De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad* [Handelingen NJV 1996-I], Zwolle 1996

Bussani/Palmer 2003
Mauro Bussani, Vernon Valentine Palmer, *The Frontiers of Tort Liability: Pure Economic Loss in Europe*, (The Common Core of European Private Law), forthcoming 2003

Cane 1996
P. Cane, *Tort Law and Economic Interests*, 2nd ed. Oxford 1996

Dobbs 1980
Dan B. Dobbs, Tortious Interference with Contractual Relationships, 34 *Ark. L. Rev.* (1980), pp. 335-376

Dwyer 1991
John Dwyer, Negligence and Economic Loss, in: xxxx (FS Atiyah) 1991, pp. 309-332

Fikentscher 1997
W. Fikentscher, *Schuldrecht*, 9th ed. Berlin 1997

Fokkema/Markesinis 1987
D.C. Fokkema, B.S. Markesinis, All or nothing? The Compensation of Pure Economic Loss in English and Dutch Law, in: F.A.M. Alting von Geusau et al., *Ex Iure*, Arnhem 1987, pp. 63-72.

Furmston 1986
Michael Furmston (ed.), *The Law of Tort – Policies and Trends in Liability for Damage to Property and Economic Loss,* London 1986

Van Gerven 2000
Walter van Gerven, Jeremy Lever, Pierre Larouche, *Cases, Materials and Texts on National, Supranational and International Tort Law*

(Ius Commune Casebooks for the Common Law of Europe), Oxford 2000

Gilead 1999
Israel Gilead, The Limits of Tort Liability in Negligence and Pure Economic Loss, in: H. Hausmaninger et al. (eds.), *Developments in Austrian and Israeli Private Law*, Vienna 1999

Herbots 1985
J. Herbots, Le "Duty of Care" et le Dommage Purement Financier en Droit Comparé, 62 *Rev. de Droit Int. et de Droit Comp.* (1985), 7-33

Honsell 1996
H. Honsell, *Schweizerisches Haftpflichtrecht*, 2nd ed. Zürich 1996

James 1972
Fleming James, Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal, 25 *Vanderbilt L. Rev.* (1972), 43-58

Jansen 2001
Nils Jansen, Auf dem Weg zu einem europäischen Haftungsrecht, *ZeuP* 2001, 30-65

Khoury 2001
L. Khoury, The Liability of Auditors beyond their Clients: A Comparative Study, 46 *McGill L.J.* (2001), 413-471

Kötz 1994
H. Kötz, Economic Loss in Tort and Contract, 58 *RabelsZ* (1994), 423-429

Koziol 1998
H. Koziol, Rechtswidrigkeit, bewegliches System und Rechtsangleichung, 120 *JBl* (1998) 619-627

Koziol 1997
Helmut Koziol, Österreichisches Haftpflichtrecht, Bd. I, Allgemeiner Teil, 3rd ed. Vienna 1997

Lapoyade Deschamps 1996
Christian Lapoyade Deschamps, La réparation du préjudice économique pur en droit français, in: Efstathios Banakas (ed.), *Civil Liability for Pure Economic Loss*, the Hague 1996, p. 89-101 (reprinted in (1998) *Rev. Int. de Droit Comparé* 367-381)

Markesinis 1983
B.S. Markesinis, La Politique Jurisprudentielle et la Réparation du Préjudice Économique en Angleterre: Une Approche Comparative, (1983) *Rev. Int. de Droit Comparé*, pp. 31 ff

Markesinis 1987
B.S. Markesinis, An Expanding Tort Law – The Price of a Rigid Contract Law, 103 *L.Q.R.* [1987] 354-397

Markesinis/Unberath 2002
B.S. Markesinis, H. Unberath, *The German Law of Torts: A Comparative Treatise*, 4th ed. Oxford 2002

Marshall 1975
D. Marshall, Liability for pure economic loss negligently caused – French and English law compared, 24 *Int. & Comp. L.Q.* (1975), 748-790

Parisi 2001
Francesco Parisi, Liability for Pure Financial Loss: Revisiting the Economic Foundations of a Legal Doctrine, Law & Economics Research Paper No. 01-21, http://papers.ssrn.com/abstract=279731, in Bussani/Palmer 2003 (forthcoming)

Perlman 1982

H. Perlman, Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine, 49 *U. Chicago L. Rev.* (1982) 61

Rabin 1985
Robert L. Rabin, Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment, 37 *Stanford L. Rev.* (1985), 1513-1538

Smillie 1982
J.A. Smillie, Negligence and Economic Loss, 32 *U. Toronto L.J.* (1982) 231-280

Spier 1996
J. Spier (ed.), *The Limits of Liability - Keeping the Floodgates Shut*, The Hague 1996

Spier 1998
J. Spier (ed.), *The Limits of Expanding Liability – Eight Fundamental Cases in a Comparative Perspective*, The Hague 1998

Stapleton 1991
Jane Stapleton, Duty of care and economic loss: A wider agenda, 107 *LQR* (1991), 249-297

Weir 1997
T. Weir, *Economic Torts*, Oxford 1997

Widmer/Wessner 2001
Pierre Widmer, Pierre Wessner, *Vorentwurf zu einem Bundesgesetz über die Revision und Vereinheitlichung des Haftpflichtrechts – Erläuternder Bericht*, Bundesamt für Justiz 2001

Winfield/Jolowicz
W.V.H. Rogers, *Winfield & Jolowicz on Tort*, 15th ed. London 1998

Witting 2001
Christian Witting, Distinguishing between property damage and pure economic loss in negligence: a personality thesis, 21 *Legal Studies* (2001), pp. 481-514

Zweigert/Kötz 1998
K. Zweigert, H. Kötz, *Introduction to Comparative Law*, 3d ed. Oxford 1998