



NEDERLANDSE VERENIGING VOOR RECHTSVERGELIJKING
NETHERLANDS COMPARATIVE LAW ASSOCIATION

Pure Economic Loss: The Ways to Recovery*

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1. Preliminary Remarks on Methodology

1.1. Aim and Method of the Study

The general purpose of this study is to inquire to what extent, in the comparative law dimension, there is unity and/or diversity in the rules concerning compensation for pure economic loss.

Our collective inquiry has been carried out on the basis of a factual approach and the most important tool of the research has been a fact-based questionnaire.

To make clear how the general methodological framework has been implemented, we first discuss: a) the advantages and efficiencies of our factual approach; b) the reasons for adopting a three-level response.

1.2. The Factual Approach

Stating it in very simple terms, our specific enterprise, seeks to find the common and uncommon features of the ‘pure economic loss’ law in different national systems. Yet, the goal is not to impose new rules and categories. Echoing the declaratory theory fashionable among

* Session IIA5. National Reports received from: Belgium, J.-F. Gerkens; Canada, J. Blom; Croatia, M. Baretic & S. Nikšić; England, P. Giliker & E. Banakas; France, R. Lorentz; Greece, Ch. Deliyanni–Dimitrakou; Germany, N. Jansen & M. Reimann; Israel: T. Gidron & B. Shnoor; Japan, Y. Nomi; Poland, T. Pajor; Portugal, M. A. Carneiro da Frada & M. João Pestana de Vasconcelos; Quebec, D. Jutras; Romania, S. Angheni; Spain, M. Angeles Parra; USA, D. Gruning. The national reports are on file with the authors. The Questionnaire is printed at the end of this article.

common lawyers since Blackstone, “the emphasis is not so much to create uniform rules as to find similar solutions and rules in the existing laws (and if they cannot be found, to state the differences) and to analyze and compare the legal reasoning behind them”¹

It is true that through the use of the comparative method many common features that remained obscure in traditional legal analysis of the field may be unearthed. But this is because the instruments and techniques provide more accurate and correct analysis, not because they force convergence where this does not exist. It is also true that a research such as ours may be a useful instrument for legal harmonization, in the sense that it provides reliable data to be used in devising new common solutions that may prove workable in practice. But this has nothing to do with our research, which is simply devoted to producing reliable information.

1.3. The Three-Level Response

The preliminary problem we had to resolve was how to obtain comparable answers to the questions we wished to pose about different legal systems. The answers had to refer to identical questions interpreted as identically as possible by all the respondents. Besides, the answers had to be self-sufficient in two ways. First they had to be complete answers: additional explanations should not be required. The level of specificity that was to be expected, therefore, was to be on a par with the most detailed rules. Second, they had to be authoritative answers which could be accepted at “face value.” The editors would therefore refrain from superimposing their own views upon the scenario depicted by the national contributors.

To obtain consistency, each hypothetical case was formulated with the view of taking account of any relevant circumstance occurring in any of the legal systems under consideration, so that these circumstances would be considered in – and hence become comparable with – the analysis of every other system.

In this way another important objective was achieved. Often, the circumstances that operate explicitly and officially in one system are officially ignored and considered to be irrelevant in another system and yet, in that other system, they operate secretly, slipping silently in between the formulation of the rule and its application by the courts. Thus, one of the special features of our work is that it has made jurists think explicitly about the circumstances that matter, by forcing them to answer identically formulated questions, by asking them about the results that would be reached in particular cases, not about a doctrinal system.

² W. van Gerven, *Casebooks for the Common Law of Europe: Presentation of the Project*, 4 Eur. Rev. Private L. pp. 67 ff., 69 (1996).

As a result, the responses may have given a picture of the law substantially different from the one usually found in the monographs, handbooks or casebooks circulating in their own country.

As a general guideline, we have drafted our questionnaire with a sufficient degree of specificity so as to require the reporters' answers to address all the factors in his or her system which have practical impact on the operative rules. This is our best guarantee that rules formulated in an identical way (by an identical code provision, for instance) but which may produce different applications, or even different doctrinal rhetoric, were not regarded as identical. This has also allowed us to expose the elements that play an official and declared role in one system, versus those that play a more cryptic, unsystematic and unofficial role in another system – the role of such cryptic elements being of course crucial when drafting the map of the applied law.²

As previously mentioned, these considerations were particularly important because the systems within our study belong to the common law as well as to the civil law tradition. The structure of the judicial process and the “style” of the legal system (in the broad sense described by Zweigert & Kötz and John Merryman),³ could not be neglected if we were to obtain correct results. It is indeed in the structure of the legal process, which municipal lawyers take as given, that most of the differences can be detected, understood and possibly explained.

All this hopefully leads one to understand why we asked every contributor to set her/his answers up on three levels, labeled I. “Operative Rules”, II. “Descriptive Formants” and III. “Metalegal Formants”. In the interest of readability we have taken these working titles out of the responses; nevertheless we have left intact the inner structure of each response. Thus the three levels are maintained and are now simply indicated by the division of the responses into paragraphs marked I, II and III.

The level dealing with “Operative Rules” is designed to be a concise summary. The reporters were asked to summarize the basic applicable rules and to state the outcome to the case that would be reached under national law. Reporters were also asked to indicate whether the reasoning and outcome would be considered clear and undisputed or only doubtful and problematic.

The level called “Descriptive Formants” has a twofold goal. On one hand, the aim is to reveal the reasons which lawyers feel obliged to give in support of the “operative rules”, and the extent to which the various solutions are consistent either with specific and general

² See R. Sacco, *Comparazione giuridica e conoscenza del dato giuridico positivo*, in R. Sacco (Ed.), *L'apporto della comparazione alla scienza giuridica*, 241 (1980).

³ K. Zweigert & H. Kötz, *Introduction to Comparative Law*, 63 ff. (3rd ed. trans. T. Weir, 1998); J. H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (2^d ed., 1985).

legislative provisions, or with general principles (traditional as well as emerging ones). The reporter was therefore obliged to investigate how the hypothetical case has been solved by case law in the given legal system; whether this is or is not the solution given by the other legal formants; whether all these formants are concordant, both from an internal point of view (the source of disaccord may be minority doctrines, including dissenting opinions in leading cases, opposite opinions in scholarly writings, etc.), and from a diachronic point of view (whether the various solutions are recent achievements or were identical in the past); whether the solution is considered to be a question of fact or a question of law. The latter factor may determine not only the degree to which the solution can be enforced by supreme courts against lower courts, but also the impact of judicial precedent on the solution. On the other hand, the goal at this level is to understand whether the solution depends on legal rules and/or institutions outside private law, such as procedural rules (including rules of evidence), administrative or constitutional provisions.

Finally, the level called “Metalegal Formants” asks for a clear picture of the other elements affecting the operative and descriptive levels, such as policy considerations, economic factors, social context and values, as well as the structure of the legal process (organization of courts, administrative structure, etc.): that kind of data the researcher can never leave out whenever the aim is to understand what the law is.⁴

The following case studies, then, cannot be dissociated from the techniques by which our information and insights have been produced.

The answers to nine hypotheticals provide the nucleus of our evidence, and these answers were obtained from fifteen jurisdictions: Belgium, Canada, Croatia, England, France, Germany, Greece, Israel, Japan, Poland, Portugal, Québec, Romania, Spain and USA.

Seven of the hypotheticals were previously used in our 2003 study “Pure Economic Loss in Europe”.⁵ We decided to use these cases once again because they relate best to the taxonomy of our subject (discussed below) and elicit the most revealing answers in both common and civil law jurisdictions. They retain their relevance and value, particularly in a study that is not restricted to Western Europe.⁶

To these seven we added a new case (Case 8) dealing with ‘spoliation of evidence’, because it provides a different way of testing attitudes to pure economic harm stemming

⁴ As sometimes happens in collective enterprises such as this one, not each and every national reporter has perfectly abided by the guidelines that we established at the outset of the project. Nevertheless there is, we believe, broad enough compliance in most cases to produce the advantages that we had hoped for.

⁵ See M. Bussani & V. V. Palmer (Eds.), *Pure Economic Loss in Europe* (2003) – Chinese version by Law Press China (2005).

⁶ It is true that this could lead to some repetitions as to the countries previously studied, but we could not be sure which countries would be included and which reporters would be appointed.

from the loss of a chance. We also added Case 9 treating poor advice on a pension scheme investment, which places our subject in an increasingly relevant context, namely the financial alternatives to public welfare devices.

We believe that these nine cases provide a manageable survey that is, on the one hand, sufficiently comprehensive, and, on the other hand, not unduly burdensome on the national reporters, with whom we did not have the benefit of discussing the merits of each hypotheticals as we did in our earlier work.

2. The Notion of Pure Economic Loss and Its Setting

2.1. Introduction

Notwithstanding its apparent dry and technical nature, pure economic loss is one of the most discussed topics of comparative tort law scholarship. Fascination with this frontier notion has developed into a wealth of literature.⁷ It stands at the cutting edge of many questions: How far can tort liability expand without imposing excessive burdens upon individual activity (or, as some may wish, to what extent should tort rules be compatible with the market orientation of the legal system)?⁸ How should the tort law of the 21st century approach

⁷ The literature is overwhelmingly weighted to those countries where the concept is well-recognized by practitioners, judges and scholars. See e.g., Bussani & Palmer, *supra* note 5; J. Stapleton, *Comparative Economic Loss: Lessons from Case-law-focused 'Middle Theory'*, 50 *UCLA Law Review* 531 (2002); J. Stapleton, *Extra-Contractual Recovery of Pure Economic Loss in Europe*, in M. Bussani (Ed.), *European Tort Law. Eastern and Western Perspectives*, 225 (2006); B. Markesinis & H. Unberath, *The German Law of Torts. A Comparative Treatise* 203-256 (4th ed. 2002); C. von Bar, *Liability for Information and Opinions Causing Pure Economic Loss to Third Parties: A Comparison of English and German Case Law*, in B. Markesinis, *The Gradual Convergence*, 99 ff. (1994); J. M. Thomson, *Delictual Liability for Pure Economic Loss: Recent Developments* 139 (1995); B. Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss* (4th ed. 2000); B. Feldthusen, *Liability for Pure Economic Loss: Yes, But Why?*, 28 *West. Aust. L.R.* 84 (1999); S. Banakas (Ed.), *Civil Liability for Pure Economic Loss* (1996); J. M. Barendrecht, *Pure Economic Loss in the Netherlands*, in E. H. Hondius (Ed.), *Netherlands Reports to the Fifteenth International Congress of Comparative Law*, 115-135 (1998); R. Bernstein, *Economic Loss* (2nd ed. 1998); J. Kleineman, *Ren förmögenhetsskada* (1987); C. Lapoyade Deschamps, *La réparation du préjudice pur en droit français*, in Banakas, *supra* pp 89-101; J. Spier (Ed.) *The Limits of Liability: Keeping the Floodgates Shut* (1996) (discussion of eight "Tilburg Hypotheticals" – four of which concern pure economic loss); J. Herbots, *Le Duty of Care et le dommage purement financier en droit comparé*, 62 *Rev. de Droit International et de Droit Comparé*, 7-33 (1985); L. Khoury, *The Liability of Auditors Beyond Their Clients: A Comparative Study*, 46 *McGill Law Journal* 413 (2001); W. H. van Boom, H. Koziol & C. A. Witting (Eds.), *Pure Economic Loss* (2004); G. Dari Mattiacci & H. B. Schäfer, *The Core of Pure Economic Loss* (June 2005), Amsterdam Center for Law & Economics Working Paper no. 2005-03, available at SSRN: <http://ssrn.com/abstract=784984>, pp. 1 ff.; P. Giliker, *Revisiting pure economic loss: lessons to be learnt from the Supreme Court of Canada?*, 25 *Legal Studies* 49 (2005); M. Bussani, V. V. Palmer & F. Parisi, *Liability for Pure Financial Loss in Europe: An Economic Restatement*, 51 *American Journal of Comparative Law* 113-162 (2003); M. Bussani, V. V. Palmer & F. Parisi, *The Comparative Law and Economics of Pure Economic Loss*, George Mason University School of Law Working Papers Series. Working Paper 28 (June 2005), <http://law.bepress.com/gmulwps/gmule/art28>.

⁸ P. Benson, *The Basis for Excluding Liability for Economic Loss in Tort Law*, in D. G. Owen, *The Philosophical Foundations of Tort Law* 427, 431 (1995). The same author, articulating a well known *tòpos* among tort lawyers (see e.g., G. Viney, *Introduction a la responsabilité* 21 ff. (1995)) writes:

this issue? As a matter of policy should the recovery of pure economic loss be the domain principally of the law of contract? To these and others we add our own modest question: What are the principles, policies and rules governing tortious liability for pure economic loss in comparative law?

There has never been a universally accepted definition of “pure economic loss”, nor any of its many synonyms.⁹ Perhaps the simplest reason is that a number of legal systems neither recognize the legal category nor distinguish it as an autonomous form of damage. Nevertheless where the concept is recognized, as in Germany and common law systems, it is apparently associated with a rule of no liability and there a definition is likely to be found.¹⁰ The contrasting approaches here, as we will see, do not follow the familiar common law/civil law divide, for the civil law is itself divided to some extent over this question.

Our own approach in this study was to make no supposition in advance about the nature or definition of this notion. We hoped it might be possible to let a neutral, fact-based questionnaire flush out the rules and responses of each national system. Therefore in framing the questionnaire we did not hesitate to mix into the facts instances of property damage, personal injury and other infringements that particular traditions may regard as absolute rights (*i.e.* rights opposable to the world at large – *erga omnes*). In this way we were attempting to clarify the grey zones that exist between recoverable and nonrecoverable loss. Consistent with

[T]he fact that every individual is somewhere and is making use of some external objects, with the result that he or his property is put into relation with them and is subject to being affected by conduct that affects them, is an inevitable incident of being active in the world ... as beings who exist in space and time and who are inescapably active and purposive, persons are necessarily and always connected in manifold ways with other things which they can affect and which in turn can affect them as part of a causal sequence.

Id., at 443 (emphasis and footnotes omitted).

⁹ Some recommend the term “commercial loss,” since all legally compensable losses are economic: *Miller v. United States Steel Corp.*, 902 F.2d 573 (7th Cir. 1990) (Richard Posner Jr.). Others prefer “free-standing economic loss”: E. Silverstein, *On Recovery in Tort for Pure Economic Loss*, 32 U. Mich. J. L. Ref. 403 (1999); or “stand-alone”: D. B. Dobbs, *Country Report, United States*, in J. Spier (Ed.), *The Limits of Expanding Liability: Eight Fundamental Cases in a Comparative Perspective* 211 (1998). See also the reference to “pecuniary loss” or “pecuniary harm” in the Restatement (Second) of Torts §§ 766-766C. The authors of this Report made recourse to the alternative expression “pure financial loss” in the essay written with F. Parisi (2003), *supra* note 7.

¹⁰ Gary Schwartz refers to “the general economic loss no liability doctrine” in his essay *The Economic Loss Doctrine in American Tort Law: Assessing the Recent Experience*, in Banakas, *supra* note 7, pp. 103-130. In one of the leading works on French tort law the term préjudice purement économique has been inserted (G. Viney & P. Jourdain, *Les conditions de la responsabilité*, Vol. 2, nos. 250 ff. pp 19 ff.), but a meaning is attached to it which is different in comparison with most of the other European jurisdictions. It appears mainly as an overarching term for the ‘atteintes au seul patrimoine’ and the ‘conséquences économiques des atteintes à l’intégrité physique de la personne’. The ‘préjudices purement économiques’ understood in this way are therein compared with the ‘atteintes aux intérêts non exclusivement économiques’, to which the different ‘dommages moraux’ belong. In the De Chirico case (Cass. 4.5.1982, n. 2765, 1982(I) Foro it 2864) the Italian Corte di Cassazione developed a “right” to the integrity of one’s economic assets (or patrimony), case law to which the Corte di Cassazione has continually adhered. See the Italian Report under Case 11 (A Maestro’s Mistake), in Bussani & Palmer, *supra* note 5, p. 345.

our factual methodology,¹¹ the questionnaire alleges facts and avoids the use of what could be classified as legal artifacts such as the expression “pure economic loss” itself. Because there is no recognition of the term in some systems, and in any event less than complete consensus about its meanings in others, we rigorously excluded all use of the term in the hypotheticals.¹²

2.2. Pure vs. Consequential Economic Loss

The outcome of the research, about the underlying notion of ‘pure economic loss’, can be shortly stated as follows. What is made clear by the national reports is twofold: the negative cast and the patrimonial character of that loss. In countries where the term is well recognized its meaning is essentially explained in a negative way. It is loss without antecedent harm to plaintiff’s person or property. Here the word “pure” plays a central role, for if there is economic loss that is connected to the slightest damage to person or property of the plaintiff (provided that all other conditions of liability are met) then the latter is called *consequential* economic loss and the whole set of damages may be recovered without question.¹³

Consequential economic loss (sometimes also termed parasitic loss)¹⁴ is recoverable because it presupposes the existence of physical injuries, whereas pure economic loss strikes the victim’s wallet and nothing else.¹⁵

The reader will discern from these preliminary remarks that the distinction under discussion is highly technical, perhaps even artificial. This impression is based upon two technical features of the exclusionary rule. The first feature is that “consequential” economic loss only describes a relationship of cause and effect *within the same patrimony* (plaintiff’s). All relation of cause and effect running *between patrimonies* is technically excluded. Put

¹¹ On the ‘factual approach’, see the seminal research project on “Formation of Contracts” which Rudolph Schlesinger directed over the years 1957-1968. This monumental work was published in 1968 in two volumes. For Schlesinger’s later views, see *The Past and Future of Comparative Law*, 43 *Am. J. Comp. Law* 477, 479 (1995). See also M. Bussani & U. Mattei, *The Common Core Approach to European Private Law*, 3 *Columbia J. Eur. L.* 339 (1997-1998) and, by the same authors, *Le fonds commun du droit privé Européen*, 52 (1) *Revue Internationale de Droit Comparé* 29 ff. (2000); M. Bussani, *Current Trends in European Comparative Law. The Common Core Approach*, 21 (4) *Hastings International and Comparative Law Review* 785 (1998).

¹² These are the same reasons that account also for the choice of not referring to any pigeon-hole framework (such as the ones used e.g. by I. England, *The Philosophy of Tort Law* 211 ff. (1993); Benson, *supra* note 8, pp. 427 ff.; see also H. Kötz, *Economic Loss in Tort and Contract*, 58(3) *RabelsZ* 423 ff. (1994); P. Cane, *Economic Loss in Tort and Contract*, 58(3) *RabelsZ* 429 ff. (1994) in presenting the study of the cases.

¹³ Perhaps another way to describe pure economic loss is to say it does not arise as a consequence of some earlier physical loss, and it is not a court’s substituted value for physical loss.

¹⁴ For this usage, see W. Keeton, Prosser and Keeton on the Law of Torts, sec. 43, p. 291 (5th ed. 1984).

¹⁵ In Sweden, where the legislator says that only victims of crimes may recover for pure economic loss, the Tort Law Act, §2, defines the notion exactly in these terms: “In the present act, ‘pure economic loss’ (ren formögenhat-sskanda) means such economic loss as arises without connection to personal injury or property damage to anyone.” (see Bussani & Palmer, *supra* note 5, p. 6.) A similar definition seems to prevail in England and Germany. See Lord Denning’s statement that “... it is better to disallow economic loss altogether at any rate when it stands alone, independent of any physical damage.” *Spartan Steel & Alloys Ltd. v. Martin & Co. Ltd.* (1973) Q.B. 27, (1972) 3 All E.R. 557.

another way, when pecuniary loss is described as “pure” (rather than “consequential”) it is apparent that each patrimony is viewed as an interruption of causation. For instance an injury to B (say the breadwinner of the family) may have an immediate and foreseeable economic consequence upon A (his dependent child). Yet this causal impact is disregarded by the way our subject is defined. The child’s loss of support will not be called “consequential” economic loss, though clearly it did arise as a “consequence” of physical injury to a parent. It is apparent, then, that those legal systems which employ these labels conceive of economic loss as an isolated phenomenon, as if plaintiff’s patrimony were a separate world, cut off from all others. It is also apparent that this logic defies economic and social reality. In the real world “a practically unlimited range of interests are intertwined in an almost unlimited variety of ways.”¹⁶ The affairs of economic actors are highly interdependent, connected to one another by a web of rights and duties that bind together contractual, proprietary and any other sort of legal interests. In these circumstances it is reasonably foreseeable that damage to any one interest may affect other interests. Indeed it has been rightly said that “no reverberation from the initial damage, so long as it arises through this interdependence of interests, can intelligibly be distinguished as extraordinary or unforeseeable.”¹⁷ Yet the inevitable effect (of what we might call the exclusionary rule’s “atomistic” approach to causation) is that the scope of “consequential” loss is artificially narrow, and accordingly the incidence of “pure” economic loss is greatly multiplied.

A second technical aspect is that, although all countries following the exclusionary rule may be in “acoustical” agreement on the proposition that “consequential loss” is recoverable, they actually do not agree in concrete instances how it will be applied. Since consequential loss is a causal construct influenced (in its ultimate results) by policy considerations, it is perhaps unsurprising to find divergent interpretation at the national level. Some national courts have developed rules that require a more stringent connection between antecedent physical loss and the economic harm which results. Under such rules the court may conclude that plaintiff’s loss was “pure” (hence unrecoverable) because there was insufficient relation to prior physical harm sustained by plaintiff. Yet judges in other systems, employing less exigent notions, may deem the same loss “consequential” and thereby permit its recovery.¹⁸

Despite the foregoing *caveats* about the artificial and technical aspects of this concept, we must not lose sight of the fact that consequential economic loss (and for the purpose of this generalization we apply this term of art even to systems which do not actually use it) is in principle recoverable in every legal system within this study – whether the source of the loss

¹⁶ Benson, *supra* note 8, p. 431.

¹⁷ *Id.*

¹⁸ For further details, see Editors’ *Comparative Comments* under cases 1 (Cable I – The Blackout) and 9 (Fire in the Projection Booth), in Bussani & Palmer, *supra* note 5, pp. 189-91, 326-27. Cf. Ch. von Bar, *The Common European Law of Torts*, vol. II (2000), pp. 30-35, 487-489.

is intentional or negligent conduct. Ignoring for the moment, then, the divergent views toward the recoverability of “pure” economic loss, here at least is an area of common ground that is worth noting.

Furthermore the recoverability of economic loss, even when ‘pure’, is not regarded as doubtful when such loss stems from the infringement of statutorily protected interests,¹⁹ and those protected by antitrust, copyright and patent laws.²⁰

Taken in the aggregate, the above considerations lead us to say that consequential loss and “pure” economic loss are not different in kind or in principle, but distinguishable only by the circumstances in which they originate and the technical limits which may have been imposed on their recoverability.²¹

¹⁹ See especially the answers to Case 4 (Convalescing Employee), in Bussani & Palmer, *supra* note 5, p. 222 *et seq.* Cf. Von Bar, *supra* note 18, p. 54-56.

²⁰ The same could be said as to some other fields, particularly the field of ‘business torts’. Although legal systems such as France, the Netherlands, the UK and Portugal handle these problems with the help of the general law of obligations (the 6th book of the Dutch civil code devotes an entire chapter to unfair advertising), these subjects are not dealt with here. Since the rules in these areas largely depend on policy factors which are only partially common to our field and would deserve detailed investigation, reasons of space compelled the editors to place limits on the research. For a general survey, Von Bar, *supra* note 18, p. 4-200, 245-249 and, more closely related to our issue, 52-56; W. van Gerven, J. Lever & P. Larouche, *Tort Law* 208-248, 358-394 (2000).

²¹ It is of interest to note that breach of European Community law may entail liability for pure economic loss. The compensability of these losses when caused by Community institutions has been clearly set forth in ECJ, 19 May 1992, *Mulder v. Council*, [1992] ECR I-3061. With regard to the member States, their liability has been clearly endorsed by ECJ 5 March 1996, *Brasserie du Pêcheur v. Germany*, r. v. Secretary of State for Transport, ex pa. *Factortame*, [1996] ECR I-1029, wherein the ECJ explicitly rejects the use of German and English national rules which would have prevented individuals from benefitting from the use of Community law to impose liability on member States. The rejection was particularly important in the case of the English rule requiring proof akin to abuse of power to establish the tort of misfeasance in public office, and in the case of the German hierarchy of protected interests under BGB 823. See also ECJ 23 May 1996, *The Queen v. Ministry of Agriculture, Fisheries and Food*, ex pa. *Hedley Lomas (Ireland) Ltd.*, [1996], ECR I-2553 (England declared liable for the damage caused – to an entrepreneur – by the refusal, in breach of Article 34 of the Treaty, to issue export licences in Spain); ECJ 1 June 1999, *Klaus Konle v. Republik Österreich*, [1999], ECR I-3099 (Austria paid damages for the infringement of the house buyers’ rights which were encroached by the Austrian system of land acquisition, since it distinguished the treatment of residents from that of non-residents); ECJ 30 September 2003, *Gerhard Köbler v. Republik Österreich* [2003], OJ C 275 of 15.11.2003 (which stated the principle that Member States are obliged to compensate the damage caused to individuals by infringements of Community law even if the alleged infringement stems from a decision of a court adjudicating at last instance and misinterpreting the national rules). For a comparative survey, see Van Gerven, Lever & Larouche, *supra* note 20, pp. 889 ff.; see *passim*, T. Heukels & A. McDonnell (Eds.), *The Action for Damages in Community Law* (1997); P. Craig, *Once More Unto the Breach: The Community, the State and Damages Liability*, 113 LQR 67 ff. (1997). See also B. S. Markesinis, *The German Law of Obligations*, Vol II, *The Law of Torts*, 902 ff (3rd ed. 1997); G. Anagnostaras, *The Allocation of Responsibility in State Liability Actions for Breach of Community Law: a Modern Gordian Knot?*, 26 Eur. L. Rev. 139 (2001); S. Deakin, A. Johnston & B. S. Markesinis, *Tort Law* 404 ff. (5th ed. 2003); G. Brüggemeier, *Common Principles of Tort Law. A Pre-Statement of Law* 152 ff. (2004).

It is a different, and still open issue, whether individuals are entitled to compensation under national law when other individuals infringe Community law and thereby cause economic loss. See W. van Gerven, *Bridging the Unbridgeable: Community and National Tort Laws after Francovich and Brasserie*, 45 ICLQ 507 ff. (1996), and see also, upholding ‘horizontal’ direct effect of arts. 81 and 82 EC Treaty, *Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd and Others* [2001] ECR I-6297 – Case C-453/99. More recently, see Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), OJ L 001, 04/01/2003, pp. 1, 2 (according

2.3. State of Mind and Cause of Action

The exclusionary rule is associated with economic loss caused by negligent behavior, not intentional wrongdoing. Legal systems under review do not begin to diverge until the question becomes one of liability for negligence. Here is a kind of Rubicon which some fear to cross and others blithely dismiss. All systems agree, however, that intentionally inflicted pure economic loss is recoverable in circumstances where the conduct in question is regarded as culpable, immoral or contrary to public policy. The significance of this point is of more practical importance than it may appear at first sight. Its range of application may be somewhat greater than the narrow, infrequent form of liability which the words “intentionally inflicted” harm suggests. In some systems a broad, flexible meaning is given to the “intention” element.²² Furthermore, though harder to prove than negligence, the incidence of financial fraud is not a rare occurrence. A consistent rule is therefore an important protection. Secondly, we think it is interesting to observe from the comparative point of view that the shift to higher degrees of culpability tends to broaden the scope of recovery in all systems. This at least suggests that the exclusionary rule should not be conceived as a simple rule based solely on the nature of plaintiff’s damage. The material nature of the loss, in our view, is no more than one element in a complex balancing which decides where and when limits will be imposed in tort. A crucial part of the balancing is the state of mind of the tortfeasor. Yet, in view of the well-known liability continuum, whose sliding scale ranges from intention to negligence to strict liability,²³ we purposefully did not impose on our reporters any presupposition on the state of mind, or the absence thereof, for the discussion of the hypotheticals.

to which “national courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full”), as well as the Commission’s Green Paper on Damages actions for breach of the EC antitrust rules (SEC(2005) 1732/COM/2005/0672 final), and its annex (Commission staff working paper – Annex to the Green Paper – Damages actions for breach of the EC antitrust rules [COM(2005) 672 final]), which “address the conditions for bringing damages claims for infringement of EC antitrust law.”

²² See e.g., Von Bar, *supra* note 7, p. 104.

²³ See e.g., M. Bussani, *La colpa soggettiva. Modelli di valutazione della condotta nella responsabilità extracontrattuale* 83 ff. (1991); V. Palmer, *A General Theory of the Inner Structure of Strict Liability: Common Law, Civil Law and Comparative Law*, 62 *Tul. L. Rev.* 1303 (1988); F. Werro & V. V. Palmer, *The Boundaries of Strict Liability in European Tort Law* 3-35 (2004); P. Cendon, *Il dolo nella responsabilità extracontrattuale* 415 ff. (1975); W. V. H. Rogers, *England*, in B. A. Koch & H. Koziol (Eds.), *Unification of Tort Law: Strict Liability*, 101 (2002); see also H. Koziol, *Die Principles of European Tort Law der European Group on Tort Law*, 2 *ZEuP* 239 ff. (2004) and the embracing formulation in Art. 1:101 II PETL (wherein, however, the main tool used to devise the ‘sliding scale’ consists in the reversal of the burden of proof: see Art. 4:201 ff. PETL).

2.4. The Standard Cases: A Taxonomy

Broadly speaking, pure economic loss arises out of the interdependence of relationships and interests in the modern world. These relationships are sometimes two-dimensional and other times three-dimensional. In this section we attempt to draw up a taxonomy of the principal ways in which pure economic loss arises within such relationships. Our list will not exhaust all the conceivable ways in which such damage may arise. Our only interest lies in tracing the most recurrent and typical patterns which we refer to as the “standard cases.” Although we have sometimes borrowed and other times given new names to these standard situations, we have not attempted to explain or employ all of the descriptive labels and tags that writers and judges have used. These diverse and contradictory ideas are not always compatible with the results of our own study and would serve no purpose here. With these provisos in mind, we venture to set forth four categories that seem to be functionally and relationally distinct.²⁴

2.4.1. “Ricochet loss”

Ricochet loss classically arises when physical damage is done to the property or person of one party and that loss in turn causes the impairment of a plaintiff’s right. This situation is three dimensional and certain authors call it “relational economic loss.”²⁵ A direct victim sustains physical damage of some kind, while plaintiff is a secondary victim who incurs only economic harm. To illustrate, A has a contract to tow B’s ship. C’s negligent act of sinking the ship makes it impossible for A to perform his contract and thus deprives him of expected profits. A’s financial loss is the ricochet effect of C’s negligence toward B. The loss is purely economic since no direct property interest of A’s has been impaired.²⁶ A ricochet loss can also arise from the impairment of an employment contract. For instance, B is a key employee in A’s business or sporting team. C’s negligent driving leads to B’s death or incapacity, thus causing A’s team or business to lose profits and revenues. Here B’s injury is physical, but A’s loss is purely financial. The “Cable Case,”²⁷ the “Injured Key-Player” case,²⁸ the “Evidence

²⁴ For a longer taxonomic list consisting of eight categories (in which we think there is considerable overlap), see W. Bishop & J. Sutton, *Efficiency and Justice in Tort Damages: The Shortcomings of the Pecuniary Loss Rule*, 15 J. of Legal Studies 347, 360-61 (1986). Benson’s taxonomy consists of five situations, two of which he calls “exclusionary situations.” His three other situations are called “non-exclusionary.” Benson, *supra* note 8, pp. 427-430.

²⁵ See this terminology and analysis in Bernstein, *supra* note 7, pp. 163 ff. and Feldthusen, *supra* note 7, pp. 199 ff. (1989). Cp. R. Perry, *Relational Economic Loss: An Integrated Economic Justification for the Exclusionary Rule*, 56 Rutgers L. Rev. 711 (2004).

²⁶ The example closely follows *La Société Anonyme de Remorquage à Helice v. Bennets* [1911] 1 KB 243.

²⁷ See e.g. *Spartan Steel and Alloys v. Martin & Co.* [1973] QB 27 and Case 1 (A Cable Case: The Laid-off Workers) of our questionnaire.

²⁸ See e.g. *Torino Calcio SPA v. Romero*, cass. Civ., SU 26.1.1971, n. 174, GI, 1971, I,1, 681; and Case 2 (The Injured Key-Player) of our questionnaire.

Spoliation”²⁹ case, are all variations of ricochet harm. Concern about the indeterminate number and size of the claims for losses is often associated with cases falling within this category.

2.4.2. “Transferred loss”

Here C causes physical damage to B’s property or person, but a contract between A and B (or the law itself) transfers a loss that would ordinarily be B’s onto A. Thus a loss *ordinarily falling on the primary victim* is passed on to a secondary victim. The transfer of the loss, or part of it, from its “natural” to an “accidental” bearer differentiates this from a case of ricochet loss where the damage in question is not transferred but is a distinct damage to the interests of the secondary victim.³⁰ These transfers frequently result from leases, pending sales, insurance agreements and other contracts that separate property rights from rights of use or specifically reallocate risk bearing. To illustrate, A is time charterer of a ship owned by B. The day before the time charter is to go into effect and while the ship is in B’s possession, C negligently damages the ship’s propeller, thus necessitating repairs and a two week delay, which causes A to lose all use of the ship. Here B suffers property damage and ordinarily B as owner would recover for the consequential loss of the ship’s use, but the right of use had been transferred to A by the boat charter. So A’s loss is purely pecuniary because he has no antecedent property loss.³¹ A similar effect can result under a sales contract which reserves title in B (seller) while the goods are in shipment but places the risk of loss in transit upon the buyer A. If the goods (still technically owned by B)³² are damaged in transit by the carrier’s negligence, then a loss normally incurred by the owner has been transferred to A. A’s loss can be seen as purely financial since he has no direct property interest in the goods.³³

The same result can be reached when the transfer occurs by operation of law. This occurs, for example, when C causes physical injury to A and A’s spouse, who is obliged by law to care for him/her, must discontinue working thereby suffering a pure economic loss.³⁴ To give another illustration B, A’s (ordinary) employee, may be injured by the negligent driving of C and thus find himself unable to work for three months. Nevertheless a statute requires A to

²⁹ See Case 8 (Evidence Spoliation).

³⁰ This category receives extensive consideration in C. von Bar, *The Common European Law of Torts*, vol. I, pp. 507-512 (1998).

³¹ The illustration is based upon *Robins Dry Dock v. Flint*, 13 F2d 3 (2^d Cir. 1926), 275 U.S. 303 (1927) as well as Case 4 (The Cancelled Cruise) in our questionnaire.

³² As is well known, however, who should be called the “owner” of goods in shipment depends on the law applicable to the transfer of ownership, and above all on the validity and extent of the principle of transfer of possession. See Von Bar, *supra* note 18, p. 509, n. 499.

³³ This illustration is based upon *The Aliakmon*, [1985] 2 AER 44.

³⁴ See Case 5 (The Dutiful Spouse).

continue to pay B's salary, even though no work is received in return. Thus what ordinarily would have been B's loss is statutorily transferred to A as a combined result of C's negligence and the effects of the pay continuation statute.³⁵

Transferred loss cases are liability neutral from the perspective of the tortfeasor and should avoid fears of indeterminate liability. An additional argument in favor of an award of compensation is that the tortfeasor who is clearly liable to the primary victim should not benefit from the accidental operation of rules which by pure chance exclude him from liability. According to von Bar, the concept of transferred loss is intended "to prevent someone appealing to rules whose purpose is not to protect that person, but to protect others."³⁶

2.4.3. Closures of Public Markets, Transportation Corridors and Public Infrastructures

Here economic loss arises without a previous injury to anyone's property or person. There may be physical damage, but it is to "unowned resources" that lie in the public domain.³⁷ A single negligent act may necessitate the closure of markets, highways and shipping lanes which no person owns, yet the closure inflicts economic loss directly on individuals whose livelihoods closely depend upon the use of these facilities. This category raises the greatest concern about liability to an indeterminate class in an indeterminate amount. Financial ripple effect is then at its maximum. To illustrate, C negligently spills chemicals into the river, and all traffic on the waterway is suspended for two weeks during a cleanup effort. As a result shippers must take more expensive overland routes, and marinas, boat suppliers, hotel operators, and commercial fishermen in the area suffer severe economic loss.³⁸ A similar chain of loss may arise when C negligently allows infected cattle to escape from his premises, and the government must order all cattle and meat markets to close. As a result broad classes of plaintiffs will suffer pure economic loss, including cattle raisers who are unable to sell their stock and butchers who are unable to obtain supplies.³⁹ As we note below, the "floodgates" argument acquires great force in such contexts.

³⁵ The example is taken from Case 4 (Convalescing Employee), in Bussani & Palmer, *supra* note 5, p. 222.

³⁶ Von Bar, *supra* note 30, pp. 510-511.

³⁷ V. Goldberg, *Recovery For Economic Loss Following the Exxon Valdez Oil Spill*, 23 J. Legal Studies 1, 37 (1994).

³⁸ This illustration resembles the facts of Case 15 (A Closed Motorway – The Value of Time), in Bussani & Palmer, *supra* note 5, p. 418; as well as Louisiana ex rel. Guste, v. M/V Testbank (The Testbank), 752 F2d 1019 (1985).

³⁹ See the facts in Case 3 (The Infected Animal) of our questionnaire and the case of *Weller v. Foot & Mouth Disease Research Inst.* [1966] 1 QB 569.

2.4.4. Reliance upon Flawed Data, Advice or Professional Services

Those who furnish advice, prepare data or render services concerning financial matters often understand that the information will be furnished to a client and then relied upon by third persons with whom they have no contractual relation. If the advice, data or services are carelessly compiled or executed, this may not necessarily breach the provider's contract with his/her client (even if there is breach, the damage will usually be strictly financial) but the relying third party will sustain pure pecuniary loss. For instance, C an accountant carelessly conducts an audit of B, a publicly traded company, and vastly overstates the company's net financial worth. Relying upon the accuracy of the audit, investor A buys shares in B at twice their actual value.⁴⁰ Here A's loss arises not in consequence of physical damage to B, but on the basis of misplaced reliance.⁴¹ Similarly, erroneous information about a client's solvency may lead to financial losses. Thus A, before extending credit to B, takes the precaution of asking C (the merchant bank where B kept its account) for an assessment of B's creditworthiness. C carelessly replies that B is "good for its ordinary engagements" (when in fact B would soon go into liquidation) and thereby influences A to advance credit and to lose a large sum.⁴² Here A's loss is purely financial, not because it ricochets off or is transferred from someone else's physical damage, but because it arises directly from A's reliance.

Professional services for a client may cause pecuniary loss to a non-client. B, an elderly man, asks C, his lawyer, to prepare a will in which he will leave \$100,000 to A. C takes no action for six months, whereupon B dies intestate and A thereby receives nothing.⁴³ A's loss is purely economic.

⁴⁰ See Case 6 (Auditor's Liability) of our questionnaire.

⁴¹ According to Tony Honoré, losses attributed to plaintiff's "reliance" pose a causation issue which is different in kind than causation in the context of physical damage. His discussion seems pertinent to the concern of some that this category of pure economic loss opens the floodgates of liability. When a person is said to "rely" on another's statement, he or she often has two or more (typically many more) reasons or motives for reaching a decision and acting on it. The question whether A's statement "caused" B's response is highly indeterminate. A potential investor in Eldorado Mines, for instance, may be influenced by a false statement in a prospectus as well as by advice from his stockbroker, by his own review of the company books, and so forth. How are we to say that from among all these reasons that the false statement in the prospectus "caused" his financial loss? T. Honoré, *Necessary and Sufficient Conditions in Tort Law*, in D. G. Owen (Ed.), *Philosophical Foundation of Tort Law*, 382-383 (1995). See also M. Coester & B. Markesinis, *Liability of Financial Experts in German and American Law: An Exercise in Comparative Methodology*, 51 *Am. J. Comp. L.* 275 (2003).

⁴² These facts are taken from the well-known case of *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] AC 465 (HL). For other instances of pecuniary harm from incorrect information, see Case 18 (Wrongful Job Reference), in Bussani & Palmer, *supra* note 5, p. 473 and Case 7 (Ruined Credit) of our questionnaire.

⁴³ See *White v. Jones*, [1995] 2 AC 207 (HL); *Lucas v. Hamm*, 11 Cal. Rept. 727 (1967); *Ross v. Caunters* [1980] Ch. 297; and Case 14 (Poor Legal Services), in Bussani & Palmer, *supra* note 5, p. 403.

2.5. Present vs. Future Loss

Examples given in the preceding paragraphs would suggest that patrimonial injury may take two distinguishable forms. It may relate to the existing as opposed to the anticipated wealth of the victim. In the first sense, plaintiff's present wealth may be simply depleted by poor financial advice, or by wasting time and petrol circumnavigating a motorway that was closed due to an accident. In the second sense, plaintiff may instead lose that which s/he expected to acquire, such as the profits from productive machinery suddenly shut down, or a testamentary legacy lost because of a defectively drawn instrument, or a sport club's reduced gate receipts due to the accidental death of the club's star player. Sometimes, when an expectation is destroyed *in utero* and proof that it would have materialized is difficult, it is called the loss of a chance.⁴⁴

As between these types of wealth, it is the loss of expected wealth – unrealized profits, canceled legacies – which presents the sharpest question for tort systems to deal with. The difficulty is not simply that the demand for proof is more exigent – by definition expectancies explore a future that only might have occurred – but also the appropriateness of affording protection in tort. For when an economic expectation receives legal protection in tort, as in principle it does under French law, plaintiff can be compensated to the same extent *as if* he or she were protected by a contract with the tortfeasor.⁴⁵ In countries where an exclusionary rule of tort law exists, we may find a tendency to say that wealth expectancies should be protected in contract.⁴⁶ For instance German courts are generally unable to approach the question through tort law, but at the same time they unreluctantly stretch contractual concepts that make the defendant liable to plaintiff, though there is no actual contract between the parties.

In these circumstances it becomes difficult to tell where tort ends and contract begins. We seem to be at the frontier where functions meet and merge, for though it has been theorized

⁴⁴ For example: a commission unlawfully rejects a candidate's application for a job or a fellowship. *See e.g.*, Conseil d'Etat, 12.11.1965, in Rec. Lebon, 1965, 613 ("le requérant, évincé d'un concours auquel il se serait présenté avec des chances sérieuses de succès en raison de ses titres et travaux, a subi un préjudice.") As to the debate, *see* Viney & Jourdain, *supra* note 10, pp. 71 ff.; N. Jansen, *The Idea of a Lost Chance*, 19 Oxford J. Leg. St. 271 ff. (1999) (discussing German and English experience). *See also* Case 8 (Evidence Spoliation) of our questionnaire.

⁴⁵ *See* Viney & Jourdain, *supra* note 10, pp. 71 ff., 195 ff.; Viney, *supra* note 8. *See also* our comparative Comments to Case 18 (Wrongful Job Reference), in Bussani & Palmer, *supra* note 5, pp. 486-87, regarding the distinction to be made between cases in which the lost chance is to be understood as a distinct loss in itself (an autonomous loss), as distinguished from the case where the concept is invoked as an equitable means of proving a loss.

⁴⁶ Note, for example, the tense unease in the following statement from a British judge:

I do not consider that damages for loss of an expectation are excluded in cases of negligence arising under the principle in *Hedley Byrne*, simply because the cause of action is classified as tortious. Such damages may in principle be recoverable in cases of contractual negligence; and I cannot see that, for present purposes, any relevant distinction can be drawn between the two forms of action.

Per Lord Goff of Chieveley in *White v. Jones*, [1995] AC 207. On this subject *see also* J. Stapleton, *The Normal Expectancies Measure in Tort Damages*, 113 Law Q. Rev. 257 (1997); H. Reece, *Loss of Chances in the Law*, 59 MLR 188 (1996).

that contract creates wealth whereas tort only protects that which we already have,⁴⁷ the notion of pure economic loss presents a challenge to traditional views about the relationship between contract and tort law.⁴⁸

2.6. In Search of a Rationale for the Exclusionary Rule: A Legal and Economic Appraisal

It will be useful to set forth the fundamental arguments which are usually presented in support of an exclusionary rule. Naturally these arguments were developed by jurists in legal systems which take the position that such losses should not be generally recoverable in tort, except in defined and limited circumstances. Different theoretical approaches, as well as the experience of other countries, however, may suggest certain counterarguments, which we will also mention.

2.6.1. Foreseeability

A common explanation of the economic loss rule relates to the element of foreseeability of the harm. It has been suggested that tort rules based on foreseeability were developed for physical damage and are not workable outside such context. The evolution of the economic loss rule is explained as a pragmatic development of the law: applying the traditional foreseeability test to cases of pure financial loss would lead to ruinous levels of liability.⁴⁹

Two objections to the foreseeability explanation should be considered at this point: one factual, the other theoretical.⁵⁰

First, the likelihood and extent of economic loss have a degree of foreseeability that does not differ qualitatively from the foresight of other non-economic consequences of a typical tort situation. The closure of public services such as a motorway⁵¹ is clearly on point. As a matter of foresight, congestion and traffic delays and consequential economic loss are unavoidable and foreseeable consequences of a closed motorway. Yet, most legal systems

⁴⁷ J. A. Weir, *Complex Liabilities*, No 6, p. 5, XI International Encyclopedia of Comparative Law (1976). (“Contract is productive, tort law protective.”)

⁴⁸ A distinguished Austrian scholar has pointed out that we must not lose our way in the conceptual shadows of this borderland.

Liability based on tort and liability based on breach of contract usually are taken as clearly separated contrasts. But I think they are the two ends of liability based on fault and that between them there is a connecting chain of intermediate stages. This understanding is important because one has not to sort liability in one of these two categories and, therefore, is able to avoid abruptly different treatment of rather similar cases.

H. Koziol (Ed.), *Unification of Tort: Wrongfulness* 25 (1998).

⁴⁹ Feldthusen, *supra* note 7, pp. 10-11. The author asserts that the “remoteness” of the damage from the initial conduct of the defendant is the characteristic and endemic issue which distinguishes pure economic loss, as a practical matter, from cases involving physical damage.

⁵⁰ See Bussani, Palmer & Parisi (2005), *supra* note 7.

⁵¹ See the case study n. 15, in Bussani & Palmer, *supra* note 5, p. 418.

exclude the recoverability of economic losses of truckers and other professional travelers who suffered an economic prejudice from closure of the public motorway.⁵² The fact that pure economic loss is frequently foreseeable, however, should not mean that it is always recoverable due to foreseeability alone. Foreseeability may simply be a necessary condition of liability and not its sole determinant.

Second, from an efficiency standpoint, the optimal level of liability could include both foreseeable and unforeseeable consequences.⁵³ To the extent causation is established, efficiency simply requires that the tortfeasor face all the consequences of his wrongful action, such that the *ex ante* level of expected liability coincides with the *ex ante* level of expected harm. Any departure from such a criterion of liability would not adequately provide the incentive to avoid the complete harm.

Both factually and theoretically, therefore, the rule cannot be justified by an unforeseeability notion. Many accidents produce a chain of costly economic consequences which can be statistically estimated and causally linked to the wrongful action. As a policy matter, the presence or absence of foreseeability is a factual and legal question that enters the equation of liability in the ways specified by the legal system, but no *a priori* distinction can (or should) be made between economic and non-economic consequences of a tort.

2.6.2. Absolute versus Relative Rights

The boundaries of compensable loss in torts have been expanding. Legal scholars have described the domain of protected interests as having gradually expanded along the following path: (a) protection of absolute rights; (b) protection of relative rights; and (c) protection of other (legitimate) expectations.⁵⁴ The recovery of economic loss confronts a dogmatic obstacle because the “unreified” economic interests often relate to the parties’ unfulfilled contractual expectations or other expectations of economic significance. Several *Ricochet loss* cases are on point. The loss to the victim derives from the wrongful act of a party who is contractually unrelated to the victim and whose act prevents a third party from fulfilling the victim’s contractual expectation. Other cases are similarly related to the infringement of a yet unmaturing economic interest. Such cases of tortious interference with contractual expectations and pregnant economic interests have traditionally posed a problem in civil law

⁵² *Id.*

⁵³ See however, R. Posner, *Economic Analysis of Law* 188–89 (2003), asserting that when a risk is unforeseeable, liability would not deter an actor from creating it.

⁵⁴ See e.g., R. L. Rabin, *The Historical Development of the Fault Principle: A reinterpretation*, 15 Ga. L. Rev. 925, 927-961 (1981); Viney, *supra* note 8, p. 6; Bussani, *supra* note 23, p. 99.

systems. Economic loss derived from the breach of a contractual expectation, in fact, does not enjoy *erga omnes* protection, since the action could only be brought against the breaching party, not against a third party that (negligently) interfered with the contractual interest.

This argument is grounded in well-established tradition. The civilian distinction between absolute or relative right – based upon the nature of the underlying interests protected by the legal system – has traditionally served as a theoretical framework providing a default template of remedies and rules concerning the standing and scope of protection of such rights. At the same time, the distinction has created some artificial inertia in the adaptation of the legal system to new changing realities.

It can be argued that this explanation proves too much and ultimately begs the question of what should be the desirable protection of pure economic interests.⁵⁵ First, if the rationale for the exclusionary rule is that “relative” rights (such as economic interests and contractual expectations) should not be protected *erga omnes*, the explanation would suggest that all such relative rights would remain uncompensated if violated by a third party. This explanation contradicts the fact that the exclusionary rule is associated with the negligence standard, but not cases of intentional breach.⁵⁶ Furthermore, all “consequential” economic losses (*i.e.*, losses that are related to a previous loss of the victim suffered because of the infringement of an absolute right of the victim) are fully recoverable in all European jurisdictions. These elements show that the exclusionary rule is not simply the consequence of dogmatic path dependence but a reflection of other policy concerns.

2.6.3. The Floodgates

This is the most important of the arguments we are discussing. It is not only pervasive but has proved persuasive in many quarters. It usually links up with and reinforces the other arguments. Common law countries, mixed jurisdictions and a number of civil law countries all share similar concerns about the danger of excessive liability entailed by pure economic loss claims. In this context, another frequently invoked explanation for the exclusionary rule concerns the problems of open-ended liability and derivative litigation, *i.e.*, the extension of liability for the remote consequences of a wrongful act.⁵⁷ The common premise of this

⁵⁵ See Bussani, Palmer & Parisi (2005), *supra* note 7.

⁵⁶ All European legal systems considered in the Bussani & Palmer, *supra* note 5, study permit recovery when pure financial loss is inflicted intentionally.

⁵⁷ Recent literature has pointed out that the judicial applications of the economic loss rule have been one aspect of a general attempt to limit tort liability. Schwartz, *supra* note 10; G. T. Schwartz, *American Tort Law and the (Supposed) Economic Loss Rule*, in M. Bussani & V. Palmer (Eds.), *Pure Economic Loss in Europe* (2003); see also B. Markesinis, *An Expanding Tort Law – The Price of a Rigid Contract Law*, 103 *Law Q. Rev.* 354 (1987); J. Stapleton, *Duty of Care Factors: A Selection from the Judicial Menus*, in P. Cane & J. Stapleton (Eds.), *The Law of Obligations: Essays in Celebration of John Fleming* (1998). This goal is supported by the fact that the economic loss rule is fundamentally at odds with the overall tendency to expand the scope of liability in other

argument is that in a complex economy, pure economic losses are likely to be serially linked to one another. The foregone production of a good, for example, often generates losses that affect several downstream individuals and firms who would have utilized the good as an input in their production process, and so on. In such world of economic networking, it becomes necessary to set reasonable limits to the extent to which remote economic effects of a tort should be made compensable. Open-ended liability arguments have a well-established doctrinal lineage.⁵⁸

Though not always noticed, there are actually three distinct strands to the floodgates argument, and it is helpful to separate them. The *first* strand is the belief that to permit recovery of pure economic loss in some cases would unleash an infinity of actions that would burden if not overwhelm the courts. If defendant's negligence necessitates the closure of trading markets or shuts down all commerce traveling a busy motorway, there may be hundreds, perhaps thousand of persons who would be financially damaged. Assuming a large number of these cases reach the courts, there would be administrative chaos. The justice system could not cope with the sheer numbers of claims.

The *second* strand is the fear that widespread liability would place an excessive burden upon the defendant who, for purposes of the argument, is treated as the living proxy of human initiative and enterprise. The potentially staggering liability would be out of all proportion to the degree to which defendant was negligent. It is also said that it is manifestly impossible for defendant to predict in advance how many relational economic loss claims he might face when, for example, he injures the property of a primary victim. Whether there is a small or large class of secondary loss sufferers depends, fortuitously, upon the number of parties with economic interests linked to the exploitation of the property.⁵⁹

The danger of disproportionate consequences resulting from minor blameworthiness is of course an issue of fairness no matter what kind of damages have been caused⁶⁰ but some scholars believe that the danger is far greater in pure financial loss cases. Financial harm is assumed to have a greater propensity to travel far and wide. It has often been pointed out that the laws of Newton do not apply on the road to financial ruin.⁶¹ Physical damage has at least

areas of tort law (*e.g.*, personal injury and harm to property). Such opposite tendency is explained by the fact that expanded liability in those areas rarely yields problems of derivative and open-ended litigation.

⁵⁸ Von Jhering's statement "Where would it all lead if everyone could be sued ...!" is indeed a famous rendition of this general concern. Jherings Jahrbücher 4, 12-13 (1861). See also N. Jansen, *Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability*, 24 Oxford J. Legal Studies 443, pp. 444 ff. (2004).

⁵⁹ The rationales of predictability and practicality are discussed in Bernstein, *supra* note 10, pp. 201-203.

⁶⁰ See J. Waldron, *Moments of Carelessness and Massive Loss*, in D. Owen (Ed.), *Philosophical Foundations of Tort Law*, 387 (1995).

⁶¹ Weir, N^o 14(d). This was also the view of Fleming James who stated that the "physical consequences of negligence usually have been limited, but the indirect economic repercussions of negligence may be far wider, indeed virtually open-ended." *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 Vand. L. Rev. 43, p. 45 (1972).

a final resting point, but patrimonial harm is not slowed down by gravity and friction.⁶² The harm has often been compared to the recovery of damages for nervous shock, since there too the loss can be ‘pure’ as opposed to consequential, and there too the danger of reverberating impacts is commonly given as a reason for restrictive rules.⁶³

The *third* strand of the argument maintains that pure economic loss is simply part of a broad modern trend toward greater and greater tort liability, a trend that must be kept under control. Allowing exceptions to the exclusionary rule is a slippery slope that may lead to reversal of the rule and may also encourage the development of other types of tort liability.⁶⁴

2.6.4. The ‘Floodgates’ Revisited

2.6.4.1. Facts and geography

In assessing the cumulative weight of the argument, there are in our view a number of considerations to bear in mind. To begin with, it should be remembered that the floodgates argument has never purported to be a scientific claim nor a claim based upon comparative law research. It is not very easy to test whether the dire prophecy of the “nightmare scenario” is dream or reality. Is it founded on blind conservatism or does it have a rational basis?⁶⁵ For

⁶² See however, J. Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 Vand. L. Rev. 941, p. 974 (2001):

The reference to the laws of physics reflects a long-standing fallacy in traditional running down cases that control of liability for consequences can be achieved by some ‘billiard ball’ notion of the laws of physics. That is, this reference rests upon the faulty notion that “claims for physical damage, whether to person or property, are inherently limited by the laws of physics which teach that physical forces will ultimately come to rest. After I have run you over and broken your leg, we have “come to rest” in a crude sense. Yet if you later suffer negligent treatment at a hospital that damages your other leg, the law may well say this injury is within the appropriate scope of my liability for consequences. What is doing the work in this judgment is not some inherent limit on my liability set by the law of physics but a judgment about the appropriate scope of liability for consequences in light of, among other things, the perceived purpose underlying the recognition of the obligation in the first place.

⁶³ The analogy, however, must not be pressed too far. Courts in emotional shock cases have been troubled by a number of rather different concerns, particularly the difficulty of defining the threshold harm (what degree of shock should be cognizable? what manifestation of the harm should be required?) and the difficulty of detecting false or fraudulent claims. In the case of pure economic loss, however, the problem of defining the threshold of the harm is minimal, (the threshold of financial damage always begins at zero); the factual existence of loss is objectively demonstrable and its measurement and proof are not easy but perhaps less problematic. The threat of fraud is also of less concern because such loss is free of the danger that claimants may simulate its symptoms. Accordingly economic loss is less easily feigned than the manifestations of nervous shock. We therefore suggest that the most important similarity between the two areas centers upon judicial concern about expanding liability in favor of an indeterminate number of plaintiffs, for indeterminate amounts of damages. Cf. Von Bar, *supra* note 18, pp. 76-84. For a discussion in American law, see Rabin, *supra* note 54, pp. 1524-1525.

⁶⁴ The Tilburg Group, for example, argues that the floodgates must be *kept shut* in order “to dam crushing liability” and to resist the general trend toward expansion of liability. Six of eight hypotheticals chosen for comparative study by this Group deal with the subject of pure economic loss. The floodgates metaphor plays a central role in their orientation. See Spier, *supra* note 7 and also J. Spier, *The Limits of Expanding Liability* (1998).

⁶⁵ For example, in 1939 the eminent American torts scholar, William Prosser, cuttingly observed:

It is the business of the law to remedy wrongs that deserve it, even at the expense of a ‘flood of claims’; and it

instance, the central assertion that physical damage is different than financial damage because it is more contained and judicially manageable seems increasingly difficult to understand⁶⁶ in view of today's mass torts which sometimes involve innumerable physically injured victims asserting claims sometimes amounting to billions of dollars.⁶⁷ These disasters range from single-event catastrophes like the Exxon Valdez oil spill and the Bhopal gas leak, to multiple-event injuries like the asbestos and DES tragedies which extend over a wide geographic area, producing literally thousands of actual claims that stretched judicial resources to their limits.⁶⁸ The Exxon Valdez oil spill by itself produced more than 30,000 litigated claims.⁶⁹ The recent outbreak of foot and mouth disease in Europe which spreads physical and/or financial loss by the same prevailing wind may prove to be a bigger disaster. These examples would suggest that the law is normally content (or not reluctant at all) to impose liability even though the potential plaintiff class is large.⁷⁰ It would sound very odd if the defendant could argue that s/he should not owe a duty because s/he would have too many victims.⁷¹ For many scholars, therefore, the justification for a no-recovery rule based upon a supposed difference in ripple effect or in the sheer size of the plaintiff class is hard to reconcile with the recovery of extremely large economic losses resulting from negligently caused physical injury.⁷²

is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the courts too much work to do.

Intentional Infliction of Mental Suffering: a New Tort, 37 Mich. L. R. 874, p. 877 (1939).

⁶⁶ The point is repeatedly emphasized by H. Bernstein, *Civil Liability for Economic Loss*, 46 Am. J. Comp. Law 111, pp. 126-128 (1998).

⁶⁷ It should be noted that comparative tax law shows that damages awards for personal injuries usually go tax-free, as any other physical damage to property that is to be considered not income-bearing. The opposite solution is maintained by Western legal systems whenever at stake is a harm whose recovery is meant as restoration of taxable income. See E. Marella, *The Western Approach to Taxation of Damages: The Substitution Myth*, in M. Bussani (Ed.), *European Tort Law. Eastern and Western Perspectives*, 121 (2006).

⁶⁸ For a summary of the American scene, see C. H. Peterson & J. Zekoll, *Mass Torts*, 42 Am. J. Comp. Law 79 (1994). For a valuable analysis of the doctrine of pure economic loss in relation to the Valdez and Amoco Cadiz oil spills, see Goldberg, *supra* note 37. On its facts the Exxon Valdez accident caused enormous physical damage to the environment, that is, to things in the public domain such as shoreline, waters and wildlife. The individual litigants were directly affected as fishermen, tour operators, hotel owners. Their claims were viewed as a specie of pure economic loss. Such accidents, however, could just as well occur in places where thousands of private owners would suffer property losses and consequential economic losses. The threat of an avalanche of claims, therefore, is hardly reduced by the metaphysical nature of the damage, and it is questionable that the law can construct a sensible rule based upon such a distinction.

⁶⁹ Goldberg, *supra* note 37, p. 1.

⁷⁰ As Professor Jane Stapleton wrote in a private communication to the authors of these pages:

we should not forget that modern procedural reforms, such as statutory provisions facilitating class actions, reflect society's concern to address the barriers to justice that might otherwise face the mass of victims that can result in today's complex society from a single piece of wrongdoing. They are a way of addressing, by lowering, the 'costs of mass litigation' concern.

⁷¹ The judgement of *Griffiths v. British Coal Corporation* (23 January 1998, Q.B.D.) upheld the largest personal injury claim in British history which led to a record settlement of £2 billion being agreed for the benefit of 100,000 ex-miners suffering from a range of chest illnesses, a sum considerably more than government received from the privatisation of the coal industry.

⁷² See Stapleton, *supra* note 57. The author, at 65-66, argues that

Concern that, in a particular context, imposition of a duty of care might expose defendants to a large volume

The geographical distribution of the floodgates argument is another interesting facet of its development. While a perennial in some soils and climates, the argument has failed to take root in others. We have no clear explanation why this occurs. One might say that the theme resonates better in particular legal cultures, but what makes one culture or legal infrastructure more receptive than another? The answer is not clear. Until research is available, the question is open to speculation and to discussion of interesting clues. For instance, litigation rates in Europe are known to be very variable, and it appears that some of the more litigious countries adhere to the no-recovery rule. Is it coincidence that both the exclusionary rule and floodgates argument flourish in Germany and Austria where the rates are among the highest in Europe?⁷³ Consider England and USA where the floodgates argument has enjoyed significant success. Should we be surprised that an historically small, close-knit coterie of judges may be sensitive to the question of administrative overload? Does institutional structure and conditioning play a role in this question? Another relevant issue may be to investigate the way in which broad arguments of this kind circulate in international channels. The ruling ideas of influential exporting legal cultures (not merely substantive law ideas, but “soft” formants such as the conventional wisdom and dominant policy arguments) clearly have extra-territorial scope and impact. It does not seem accidental that in countries where English and German legal cultures have a decisive sphere of influence (*e.g.* English influence in Commonwealth countries and the United States; Germanic influence in Austria and Portugal) the floodgates argument has been received almost unquestioned. It is interesting that in countries where French leadership is acknowledged, one vainly searches for any trace or mention of floodgates anxiety. As stated earlier our discussion is purely speculative. The subject merits deeper investigation.

2.6.4.2. Private versus social loss: the optimal scope of liability

Economic analysis calls for a different response to each of the above three open-ended liability concerns.⁷⁴ From an economic point of view, the first strand of open-ended liability arguments is both factually and theoretically accurate. The justice system would unavoidably

of claims [as opposed to an indeterminate number of claims – see below] are unconvincing given that the law is content elsewhere to impose liability where the potential plaintiff class is large.

⁷³ Does this factor explain why in neighboring Netherlands, where rates are remarkably low, there is no categorical rule against recovery, nor even – so far as an outside observer can judge – any particular fear of docket inundation? For relevant figures see E. Blankenburg, *Civil Litigation Rates as Indicators of Legal Culture*, in D. Nelkin, *Comparing Legal Cultures*, 41 ff. (1997) where the author discusses the thesis that differences in legal culture may account for the disparities in civil litigation rates between neighbouring countries with very similar legal traditions and socio-economic conditions. For further comparisons, see B. S. Markesinis, *Litigation-mania in England, Germany and the USA; Are We So Very Different?*, 49 *Camb. L. J.* 133 (1990); P. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 37 *Duke L. J.* 1002 (1987).

⁷⁴ See Bussani, Palmer & Parisi (2005), *supra* note 7.

face an increase in administrative costs as a result of the proliferation of tort claims. Tort policy should account for such administrative costs, which ultimately affect the total social cost of accidents.

The second strand of arguments looks theoretically flawed. According to this variation of the open-ended liability argument, the potentially staggering liability faced by tortfeasors would be disproportionate to the degree of the defendant's negligence. The danger of harsh consequences from minor blameworthiness is an issue of fairness no matter what kind of damages have been caused,⁷⁵ but some scholars believe that the danger is far greater in pure financial loss cases. These concerns seem to be misplaced.⁷⁶ In order to maintain efficient precaution incentives, parties should under most circumstances face the full range of economic consequences of their activities, no matter how severe the harm. Furthermore, given the experience of the Liberal regimes, where the floodgates argument has not been a restraint and yet no dire consequences have resulted, it is not clear that the argument rests upon an empirical foundation.

The third strand of arguments does not appear to apply particularly to situations of pure economic loss, since they could well relate to other kind of losses, pecuniary, non-pecuniary, or purely economic. This view argues that the exclusionary rule should be invoked even where there is no danger of a flood of claims or disproportionate recovery. No compensation should be made for fear of establishing an exception that erodes the rule or an exception that may receive analogical extension in the future.

2.6.4.3. A notion of social loss

In order to further understand the economic significance of the pure economic loss rule, it may prove useful to proceed in two steps: first analyzing the notion of socially relevant economic loss, then applying that concept to the design of optimal liability rules.

From the perspective of law and economics, tort remedies are necessary to specify and quantify externalities. An externality is a cost imposed on a third party outside the voluntary mechanisms of the marketplace. In principle, tort liability could ensure that the entire social

⁷⁵ See Waldron, *supra* note 60, p. 387.

⁷⁶ See Stapleton (2006), *supra* note 7, p. 232, where the author underscores how:

the economic realities of litigation ensure that, in the modern era, the typical pure economic loss claim reaching common law appellate courts involves, not a consumer, but a business, often a repeat player such as a bank, whose aim may well be wider than victory in the isolated case such as the establishment of a favorable precedent.

For example, in the pension mis-selling case of *Gorham v. British Telecommunications Ltd Plc* ([2000] EWCA Civ 234), the defendants appealed against the success at trial of the plaintiff, a widow, but made it clear that the defendants

have no intention of taking the sum awarded by the [trial judge] back from Mrs. Gorham. They contest the appeal ... with the object of establishing that they do not owe the claimants a legal duty because so many other consumers were in her position.

Stapleton, *id.* at n. 29.

cost of an activity is addressed by the responsible party. In this context, the amount of “social” loss is given by the sum of all private losses imposed by a given action on the various parties less the sum of all external benefits generated by such conduct. According to this criterion, liability in torts could not be exclusively linked to the private losses of the parties, but could be further limited to the socially relevant harm.⁷⁷ The application of this version of the exclusionary rule would contribute to the minimization of the total cost of accidents.

Some activities, while imposing private losses on some third parties, may create benefits for others. A legal system aiming at creating optimal incentives for potential tortfeasors could impose a dual system of liability: imposing positive liability for the negative externalities and recognizing negative liability for the positive externalities. From an efficiency point of view, the creation of a negative liability rule is as important a remedy as a positive liability rule in a standard tort situation.

As a policy matter, several legal limitations concerning compensable harm, including some variations of the economic loss rule, might be explained as ways to confine liability to only socially relevant externalities. The issue of pure economic loss is best understood contrasting a case of pure economic loss with a traditional situation of physical harm. Generally in cases of physical harm, the action correlates with the extent of the private and social cost of the harm. Any loss suffered by an individual occasions a private cost to the victim, which in turn counts as a social cost for the community. A different logic applies in the case of pure economic loss. In the case of foregone profits or earnings, for example, there is no one-to-one relationship between the private loss of the victim and the resulting social loss. To the contrary, the private loss may exceed the social loss, and the discrepancy between the two values may be substantial. This may lead to paradoxes where a private loss yields a social gain. In pure economic loss cases, we may have situations of wrongful behavior that occasion an economic loss for one victim but which may impose no cost, or may even generate a net benefit, to society at large. Whenever wrongful behavior creates a private loss, the magnitude of which differs from the resulting social loss, an economic analysis indicates that the victim could only be compensated for the portion of the private loss (if any) which represents a social cost. Where a private loss to the victim yields a net gain to society at large, the same

⁷⁷ Applying this principle requires focusing on the tortfeasor’s expected *ex ante* liability, rather than on the victim’s actual compensation. This may occasionally require courts to set aside some other general principles of tort law. For example, the collateral-benefits rule, which allows the victim to recover the full value of a loss without deducting insurance payments for the same damage may be quite efficient. First, it creates efficient precaution incentives on the tortfeasor. Second, in most situations, the double payment from the insurance and the tortfeasor does not in fact amount to allowing the victim to recover double. As pointed out by Posner, and Landes & Posner, the insured plaintiff already paid for the insurance benefit under the form of insurance premium, rendering full liability necessary to make him whole: Posner, *supra* note 53; W. M. Landes & R. A. Posner, *The Economic Structure of Tort Law* (1987). More generally, the risk of duplicate recovery should not necessarily generate over-deterrence, given the relevance of the *ex ante* expected liability, rather than actual *ex post* compensation, on individual incentives.

law and economics perspective concludes that the ‘wrongful’ behavior could actually be encouraged and economically subsidized by the legal system.⁷⁸ Put differently, an ideal set of liability rules could provide both positive liability for negative externalities (*i.e.*, losses to third parties) and negative liability for positive externalities (*i.e.*, benefits to third parties).

This dual function of liability rules would, in the abstract, consist of a combination of damage remedies paid to the victims and financial subsidies paid to the tortfeasor. If an individual occasions an unjustified transfer of wealth from one party to another and is made liable for the loss suffered by one victim, he could, by the same logic, be allowed to recover the value of the benefit from other third parties who received an unexpected benefit from his action. The important point here is that a zero net liability rule for the alleged tortfeasor does not necessarily require a rule denying compensation for those who suffered a private loss. Here lies an important element that drives the intellectual and dogmatic tension behind the economic loss rule. From an economic perspective, the legal notion of pure economic loss is thus an imperfect proxy for the economic category of socially relevant cost, which should guide the optimal design of liability rules.

2.6.4.4. Illustrations and examples

A clear application of the notion of social loss as a guide to the recoverability of pure financial loss is shown by Case 3 (The Infected Animal) of our Questionnaire. Here the closure of the meat market causes private loss, to be sure, but not necessarily a net social loss. As we have explained elsewhere,⁷⁹ in a perfectly elastic market response, the accident would occasion no socially relevant economic loss (*i.e.* the pure economic loss of one party would be offset by the pure economic gain of others, with no net social loss). With imperfect market elasticity, however, there could be positive social loss. A private economic loss of one party would not generate a social loss of equal magnitude, except in the purely abstract case of a perfectly inelastic market (*i.e.*, situation where the market cannot compensate for the production shortage and thus satisfy the excess demand). In most cases, the pure economic loss of the victims thus constitutes a gross over-estimate of the true social loss, and the exclusionary rule correctly avoids excessive liability and over-deterrence.

Another illustration comes from the transferred loss cases, where a tortfeasor causes physical damage to a victim’s property or person, but a contract, or the law itself, transfers the loss to a third party.

⁷⁸ On this point, J. Arlen, *Tort Damages*, in B. Bouckaert & G. De Geest (Eds.), 2 *Encyclopedia of Law and Economics* 682, 713 (2000), observes that, if an incumbent monopolistic firm loses part of its market share to a competitor selling the same product at a lower price as a result of the tortious activity of the latter, the alleged tort, while occasioning the victim’s lost profits, may actually be at the origin of a social welfare gain.

⁷⁹ See Bussani, Palmer & Parisi (2005), *supra* note 7.

From an economic point of view, the main criterion for understanding the transferred loss problem flows from the following consideration. Rational parties account for the effect of their expected liability in setting the price for their contract. The clearest example can be found in the insurance case. If insurance companies are allowed to exercise a subrogation action to obtain compensation from the original tortfeasor in all cases of transferred loss, the average net recovery from subrogation claims will be discounted from their expected liability cost. In turn, this will lower the insurance premium for all potential primary victims. The same holds in the converse case in which an exclusionary rule prevents the secondary victim from recovering the economic loss. If any other contractual relation or legal rule transfers the loss from a primary to a secondary victim, the underlying contract price would likewise reflect the expected cost of such transferred risk. For instance, in the event of a pay continuation statute, the employer discounts the risk of an injury of his workers from the expected value product of his work force. The equilibrium market wages would reflect the mandatory welfare coverage, shifting back on the workers most of the cost of such forced insurance. Identical conclusions would apply under a lease contract. Consider an exclusionary rule that states, if a third party occasions damage to the rented property, the lessee would be barred from recovering the economic loss from the lost use of the rented space. Under such rule, the lessee would discount from the rent the expected economic loss from potential accidents. In principle, equilibrium market prices would reflect the lower protection and lower expected value of the lessee's interest, with lower rental prices.

The above considerations suggest that the application of the exclusionary rule in transferred loss cases is likely to have no incentive or wealth effects. Criteria of efficiency and distributive justice are neutral to the question whether the exclusionary rule should apply to this class of cases.

2.6.5. In the Scale of Human Values

Another argument against recovery of pure economic loss is cast in terms of philosophical values. It maintains that intangible wealth is not and should not be treated on the same level as protecting bodily integrity or even physical property. People are more important than things, and things are more important than money.⁸⁰ Our legal interest in liberty, bodily integrity, land, possessions, reputation, wealth, privacy and dignity are all good interests, "but they are not equally good." The law protects the better interests better. And so "a legal system which is

⁸⁰ The argument has been made in England that

The philosophy of the market place presumes that it is lawful to gain profit by causing others economic loss, ... Certainly there seems to have developed an understanding that economic loss at the hands of others is something we have to accept without legal redress, unless caused by some specifically outlawed conduct such as fraud or duress; ...

The Aliakmon, [1985] 2 AER 44, p. 73 (per Ld. Goff).

concerned with human values (and the law is supposed to reflect the proper values of society) would be right to give greater protection to tangible property than to intangible wealth.”⁸¹ The exclusionary rule is then a reflection of the lower value ascribed to unreified wealth.⁸²

It is important to notice that this view has a silent premise: these interests must be ranked because the law *cannot* simultaneously protect all interests fully. Even if one accepts, for sake of argument, that wealth is less important than other values, still there would be no justification for a rule restricting its recovery unless we had to do so in order to protect other, more meritorious interests. Thus the philosophical point is persuasive to the extent that (1) there is indeed a finite limit to the law’s ability to protect interests and (2) giving full protection to pure patrimonial wealth would clearly exceed that capacity and therefore impinge on other protections or the interests of third persons. The first point may be less controversial than the second. No one doubts that resources are finite: Judicial resources are not unlimited; tort liability cannot be extended indefinitely without stifling human initiative; and responsible defendants can be bankrupted by financial claims that leave claims for bodily injury unsatisfied. It may be argued, therefore, that if pure economic loss were freely protected and allowed to compete on an equal footing with other, worthier claims for limited resources, the effect might be to crowd out “better” interests and leave them unsatisfied. That conclusion depends, however, on the answer to the second point, namely whether those limits would be surpassed by a presumption of recoverability. The answer to this question again seems to be conjectural since it ultimately depends to some extent upon the same unverified assumptions inherent in the floodgates rationale. It also raises the question how countries like France and Belgium, which follow a rule of presumptive recovery of economic loss, have managed to avoid what the floodgates argument predicts. Is their experience proof that the argument is a gross exaggeration of the consequences, or does their experience tend to prove that these countries are simply using hidden and indirect means of controlling those consequences?⁸³ There is an additional question. The exclusionary rule is associated with the negligence standard. All systems in our study, however, permit recovery when pure financial loss is inflicted intentionally. Thus the exclusionary rule cannot be seen simply as an abstract ordering of interests but as a rule tied to the gradations of blame. It would be difficult to say whether the nature of the interest or the nature of the fault is the more important factor in the equation. Indeed we think it would be essentially misguided to assign such priorities because the rule, when it is applied and to the extent that it is a rule, is really the outcome of many

⁸¹ T. Weir, *A Casebook on Tort* 6 (9th ed. 2000).

⁸² But shouldn’t one care about memories, sentiments, pains, personal well-being and all the other values-conveying occurrences that most of the time represent the real and only wealth of a person and, probably, her/his closest link to the notion of ‘human values’?

⁸³ Geneviève Viney tends to regard French law in this perspective: “on a privilégié l’emploi de méthodes indirectes et quasi-ocultes.” Quoted in Spier, *supra* note 7, p. 3.

other interacting factors as well.⁸⁴ Not the least of these are many metalegal considerations, such as the size of the plaintiff class, the potential scope of the damages, public policy toward professional standards and so forth, which have varying degrees of cogency in actual context. Only through study of these factors in their liability context will we understand why the alleged exclusionary rule operates selectively and situationally, never mechanically, and indeed leaves untouched a number of defined situations where one may even speak of a limited core of protection for pure economic loss.

2.6.6. In Historical Perspective

Some scholars assert as an historical matter that pure economic loss has traditionally been left unprotected by the law. If the assertion were generally true, it may have important normative implications for the present and the future. Professor Kötz deduces a teleological point in the evolution of tort law: The primary *purpose* of the law in England and Germany, he maintains, has “always been” to provide protection against personal injuries and harm to physical property. Pure economic loss seems left out of historical development, at least in those two countries.⁸⁵ Another writer argues that the rules of tort, because they are products of history, are today ill-adapted to the problem of pure economic loss.⁸⁶

Whether these views do justice to the past, however, is open to question. James Gordley, who explores the history of pure economic loss in some detail, notes that many early civilians said that plaintiff could recover if he suffered “damage” and damage meant simply a diminution of his *patrimonium*. They did not distinguish between loss of a physical asset and other kinds of loss. They occasionally put cases in which the plaintiff would recover what we today would regard as pure economic loss, though he cautions that they did not know or use this term and did not recognize an autonomous category by that name.⁸⁷ For instance there was the dependent’s action for loss of support due to wrongful death, which clearly existed on the continent in Grotius’ time. This was in effect an action for the recovery of pure economic loss sustained by wife and children, but it was not referred to in those terms. Evidence of this kind would suggest that there was no *per se* rule against compensation for pure economic

⁸⁴ For a nuanced attempt to use various factors in a sliding scale to explain the lesser protection given to pure economic loss, see Koziol, *supra* note 48, pp. 29-30.

⁸⁵ Kötz, *supra* note 12, p. 428.

⁸⁶ Feldthusen, *Economic Negligence*, *supra* note 7, pp. 10-11. The author asserts that the “remoteness” of the damage from the initial conduct of the defendant is the characteristic and endemic issue which distinguishes pure economic loss, as a practical matter, from cases involving physical damage.

⁸⁷ See J. Gordley, *The Rule Against Recovery in Negligence for Pure Economic Loss: An Historical Accident*, in Bussani & Palmer, *supra* note 5, pp. 26-29 and the citations to the views of Durandis, Baldus, Brunnemann, Lauterbach and Grotius.

harm in the civilian tradition.⁸⁸ Indeed, Gordley's account characterizes the rise of the exclusionary rule both in England and Germany as a late development of the nineteenth century⁸⁹ and the peculiar outgrowth of analytical thinking. He concludes that the rule is an "accident" of legal history, not a pervasive feature of it.

3. The Liability Regimes – Their Façades and Interiors

3.1. Introduction

Whether the recovery of pure economic loss is tackled by legal systems through tort or contractual remedies is a question which depends on both the factual elements of the case on the table and the domain respectively assigned to the two remedial fields. Thus, the goals of this chapter are twofold. First we wish to provide a theoretical matrix that situates the issue of pure economic loss within each liability regime and at the same time arranges these systems in some functional and explanatory way. This matrix will hopefully permit us to see how each country stands in relation to one another, what influences they have experienced, where their operational rules derive from, and possibly also, to pave the way to an appreciation of the degree to which, if any, there is a common approach to this subject. Putting the initial focus of the survey on tort law rules is nothing but a tribute paid to reality. All legal systems under review officially start with conceiving of (or simply debating) compensation for pure economic loss within the tort compound. We will try to make clear, however, how far contract law, in some systems, is able to penetrate in the tort citadel whenever the latter is unfit to meet the needs at stake.

The second goal of our essay is somewhat more practical. We wish to provide a clear framework which the reader can use to understand the country responses which are to be read in connection to this Report. These responses are highly condensed summaries reflecting individual national styles, particular code provisions, leading cases, and doctrinal influences,

⁸⁸ See R. Zimmermann, *Law of Obligations* 1024-25 (1996); V. Palmer, *The Fate of the General Clause in a Cross-Cultural Setting: The Tort Experience of Louisiana*, 46 *Loyola L.Rev.* 535, p. 551 (2000).

⁸⁹ Insurance practices tend also to show the late development of the rule. Development of business interruption insurance, often called "consequential loss insurance," belongs to the late 19th century, and even now the availability of such insurance is still rather limited. A prevalent restriction is that interruption insurance is essentially "follow-on" coverage to another insured peril, such as fire. Under the wording of standard fire policies, there is no compensation for interruption unless it results from a fire. This is not really compensation for pure economic loss, however, but rather compensation for parasitic loss. See G. J. R. Hickmott, *Principles and Practice of Interruption Insurance* 3-4 (1982); D. C. Jess, *The Insurance of Commercial Risks, Law and Practice* 244-251 (1986); C. Lahnstein, *Pure Economic Loss and Liability Insurance*, in Van Boom, Koziol & Witting, *supra* note 7, p. 162; B. Dufwa, *Insurance in a European Tort Law Perspective*, in M. Bussani (Ed.), *European Tort Law. Eastern and Western Perspectives*, 133 (2006).

and these would be somewhat incomprehensible without a general introduction to each country's liability regime. We hope in this chapter to build a conceptual bridge between the systems and the responses.

3.2. Two Alternative Formulas: from Façades to Operative Rules

In modern legal systems we may at first sight observe two alternatives. There may be liability whenever a person causes damage to another; there may be liability only in certain typical situations. The former, known as the principle of *neminem laedere*, is the solution of the French *Code Civil*. The latter, enacted in the German BGB, was the solution traditionally associated with Roman law and traditional common law. In both of these just-mentioned systems, there was a list of actions that a plaintiff could bring against the person who had injured him: in Roman law, actions for theft, robbery, insult, and damage wrongfully done; in English law, for trespass, assault, libel and so forth. Every tort system in our study may be seen as a variant of these two alternatives, and each individual tort structure is at least the beginning point for the analysis of the recoverability of pure economic loss. These imposing structures, however, are not necessarily the most reliable means of viewing liability rules or of predicting outcomes: if we were to depend upon them as the exclusive criteria of classification, this would not present the systems in a helpful way. As we explain below, a functional and explanatory analysis must distinguish appearances from reality. It must take into account a wide variety of factors, traits and formants in order to arrive at the essential differences and similarities between the systems.

In situating the problem of pure economic loss within a comparative perspective this introduction will cast a glance upon the liability regimes under review and compare the exterior architecture to the interior working of the legal systems. In this respect we are often called upon to distinguish between the system's façade and its interior, viz. operational rules that lie behind or within it. What we mean by 'the façade' is simply the exterior wrapper, the outer appearance, or even better, the initial and dominant perception received by the observer regarding the recoverability of pure economic loss. In a codified system this perception is usually conveyed by the black-letter words the legislator has used; in an uncoded system it may be the words of judges hardened into precedents or the writings of old institutional writers. In either case the façade will be the objective set of public signals which *apparently* controls our issue. At first glance a given system may seem committed to a wide principle of recovery; another system may seem committed to a general rule of no recovery though a series of exceptions may be made. Or another system may seem resolutely opposed to all recovery because pure financial loss is regarded as an unprotected interest. These initial perceptions, we repeat, are due to the system's façade.

In resorting to the façade metaphor, we do not wish to imply that initial perceptions are always false and misleading. Obviously that would simply overstate the case. Nor can we say that all façades are mere camouflage for hidden forms of lawmaking. To the contrary, we have found that in a few systems the first impression given by the legislator or judge as lawgiver is also the lasting impression left by the jurisprudence and the doctrine. Even here we think the word façade is appropriate and useful to indicate a genuine or authentic impression that in fact withstands further scrutiny. Nevertheless, it is also clear that for certain systems the deeper one delves into the doctrine, the cases and the operational rules, the more one is surprised by the contradictions and contrasts between outer appearance and inner reality. What began as a general clause may be administered as a scheme of protection focused upon absolute rights – *i.e.* what German jurists refer to as rights to life, body, health, freedom, property opposable to the world at large: *erga omnes*.⁹⁰ That, however, may not be the end of the story. For what appears to be a scheme of absolute rights may be a decoy for an expansion of contractual actions which function much like tort remedies. It is for this reason that accepting façades at face value can be hazardous; they are very rarely a sufficient basis for a functional classification of these systems.

3.3. General vs Specific Characteristics

Conscious, therefore, that façades are sometimes *trompe l'œil* and that interior solutions are the principal interest of our study, we have attempted to organize the material into three functional and explanatory groupings which we call the liberal, pragmatic and conservative regimes of tort. Before introducing these systems country by country, it will be useful to explain what we think are the distinguishing characteristics of these ‘regimes’. It is important to understand, however, that these may be subject-specific characteristics that have limited relevance outside of the context of pure economic loss. We emphasize this caveat for an obvious reason. Our purpose is not to describe the *general* characteristics of any of these systems: that would be worth a treatise unto itself in each case, and would have nothing to do with the precise issue we have selected. We must therefore confine our “characteristics” to the subject at hand, without any pretension that they may be applied widely to other subjects not studied here.

3.4. The Liberal, Pragmatic and Conservative Regimes of Tort

Keeping in mind which are the jurisdictions covered by this study, within the *liberal regimes* we group together seven countries: Belgium, Croatia, France, Greece, Japan, Québec and

⁹⁰ Discussed by Gordley, *supra* note 87, pp. 47-70.

Spain. A leading characteristic of a liberal regime is the presence of a unitary general clause in the codified law which does not, a priori, screen out pure economic loss. Lacking a *numerus clausus* of protected interests imposed by the legislator, these regimes have no in-principle objection to allowing compensation for stand-alone economic harm. In principle, the recoverability of such a loss is not an antecedent abstract question but only an outcome dependent upon whether the normal elements of fault liability are satisfied. These systems are not simply liberal in appearance and approach but in their results as well. As compared to other regimes, they appear to yield the greatest number of successful actions in our hypothetical cases.

A second characteristic is that liberal regimes reach solutions to questions of purely pecuniary loss almost exclusively on the basis of extracontractual liability and not by crossing over to contract principles. The liberal regimes deal with pure economic loss autonomously in tort, unlike many conservative regimes where recourse to contractual and statutory solutions is a standard means of tempering the rigidity of the law of tort.

A final characteristic of this regime, but one difficult to discern and substantiate, is the possible use of surreptitious techniques to keep this liability issue under control. To the extent that judges in liberal regimes have any policy restraining recovery for pure economic loss, as some observers suspect they do,⁹¹ they do not admit or deal with it openly. It would of course be possible to carry out such a policy covertly through subtle manipulation of the ordinary requirements of the general clause (particularly the causation requirement) but judicial tendencies of this kind would be unavowed, uncertain and difficult to detect, concealed even from a fact-based method such as ours. The term pure economic loss and the debatable issues surrounding it therefore would remain generally unrecognized in the literature and jurisprudence of these countries.

The *pragmatic regimes* embrace Canada, England, Israel and USA. Our choice of the term *pragmatic* relates to a shared approach to the problem and has little to do with how often a plaintiff succeeds. The judges in Canada appear to be considerably more receptive to this form of loss than the judges in England, but it is the similarity in their reasoning, their technique and their candor which prompts us to group them together.

These systems are characterized by a cautious case-by-case approach which carefully studies the concrete socio-economic implications of granting recovery for pure economic loss.⁹² Results are not driven by the dictates of wide tort principle, nor by a checklist of absolute rights. The principal method of screening recoveries is through the 'duty of care' concept. The duty of care question is a matter of judicial policymaking that is overtly carried

⁹¹ See e.g. Khoury, *supra* note 7; B. Markesinis, *La politique jurisprudentielle et la réparation du préjudice économique en Angleterre: Une approche comparative*, 1983 RIDC 31, 44.

⁹² It is important to note that the cases proceed on the basis of the judge's perception of the socio-economic consequences: there is no evidence of the economic effects of a finding of liability.

out by the judges. Each new situation requires an ad hoc determination that a ‘duty’ to guard against this harm should exist at all. Unless this issue is decided affirmatively, there is no reason to proceed further and consider whether the normal elements of tortious liability have been satisfied.

Thus there is an abstract prior question to be answered, but unlike the approach in the conservative regimes, the question has not been prejudged by a legislator, nor in our view, by a rigid conception of absolute rights. The judges themselves are expected to make a policy choice, and they exercise this function openly and discursively. And there seems to be no flight into contract law as relief against their own decisions which refuse liability in tort.⁹³ The tort scheme dominates the field.

Among the *conservative regimes* we have placed Germany, Poland, Portugal and Romania. A striking characteristic of these regimes is that pure economic loss does not figure among the so-called “absolute rights” which receive protection under their tort law. Its exclusion from BGB §823.1’s enumeration is well known and clear, but even in conservative systems where no enacted list is to be found, the same result has been achieved by other means. As developments in Portugal amply show, the judiciary’s and/or the doctrine’s readiness to import German doctrinal influence may result in a philosophy of absolute rights that is superimposed upon the general clause. The second characteristic is that the recoverability of pure economic loss is therefore an exception and any remedy must be found elsewhere in the system, either on the basis of more specific tort provisions or by an expansive application of contract principles. If we focus, however, upon recoveries permitted by the tort law system and make that the point of comparison, the system is quite conservative in its results. Answers to our questionnaire basically yielded far fewer successful actions than in the other regimes. This gives rise to a third characteristic: the recovery of pure economic loss in these systems often receives extensive lateral support from the law of contracts and/or certain statutory mechanisms, and when that lateral contribution is added to the overall picture, results in these systems are considerably liberalized. To the extent that these contractual actions have been stretched to function as tort remedies, the tort façade progressively becomes a misleading indicator.

Having considered these general characteristics rather abstractly, we turn to discuss each country’s approach in greater detail.

⁹³ Of course, English contract law which insists upon the requirement of consideration and rather restrictive notions of privity makes recourse to contractual solutions theoretically very difficult.

3.5. The Liberal Regimes

3.5.1. France – An Enigmatic Liberalism

1. The general formula *neminem laedere*, “injure no one,” is the basis of Article 1382 of the Code Napoléon, which reads “any act whatever of a man which causes damage to another (*tout fait quelconque de l’homme qui cause à autrui un dommage*) obliges him by whose fault it occurred to make reparation.” Art. 1383 adds that “Each one is liable for the damage he causes not only by his own act but also by his negligence or imprudence.” Because of its encompassing reach as well as its indeterminate potential, this unitary principle does not screen out recovery for pure economic loss. It does not set forth a *numerus clausus* of protected interests: the legislator imposes no a priori check upon the judge’s free sense of what constitutes recoverable harm.⁹⁴ As the national rapporteur observes, “pure economic loss” has no currency or standing in France, neither as a legal expression nor as a head of damage.

In view of the unitary principle, therefore, the question whether causing pure economic loss is a source of tortious liability becomes a judicial question, a matter of jurisprudence and the advice of doctrine. Put another way, the protection of pure economic loss in France must be viewed as an oracular outcome, for there is no external, pre-existing concept of unlawfulness concerning this loss to determine or to exclude liability.

Nevertheless the seamless quality of the general provision is not necessarily the determinant formant of a liberal or conservative approach to our subject. Behind virtually identical façades, national courts have been capable of reaching diametrically opposite results. On the one hand judicial thought may become imbued with an “implied” list of absolute rights, restrictively conceived in accordance with metalegal formants like internal history, social policy and justice. In that event, the tort system, despite a *façade de libéralisme*, may approach the question of pure economic loss little differently from systems in which the legislator has deliberately controlled recovery through crafted solutions.

French doctrine in the nineteenth century had something in common with this approach. All French authors of the first half of the nineteenth century (and many thereafter) thought that Articles 1382 and 1383 contained the kind of solution which the German BGB adopted later in Sections 823-826.⁹⁵ In twentieth-century France, however, a new orientation emerged.

⁹⁴ Of all the European codes, writes von Bar, “the French Code Civil gives the courts the least guidance.” *supra* note 30, p. 22.

⁹⁵ The historical evolution of French delictual thought is lucidly traced by R. Sacco in *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AJCL 359 (Part Two) (1991). As Professor Sacco indicates, the writings of Toullier and Huc show that the articles of the Code civil were originally understood by the doctrine as applying to interference with ‘absolute rights’ of the victim or to statutory standards of conduct protecting victims’ rights. *See also* K. K. Zachariae, *Droit civil francais*, No. 444 (1854) (stating that harmful acts are not delicts unless they are “illicite”, “c’est à dire qu’il ait porté atteinte a un droit appartenant a autrui.”); C. Aubry &

The same text now sustains an expansive law of tort in which harm to almost any legal interest, including a purely economic interest, is unlawful and therefore recoverable.⁹⁶ Under the prevailing view, the prohibition on causing harm is the general rule, and the instances in which one is at liberty to cause harm are exceptions. Articles 1382 and 1383 have consistently been found not to contain any *a priori* limitations on the scope or nature of protected rights and interests, nor to contain an *a priori* class of protected persons. Thus there has been no difficulty in admitting the economic loss of victims by ricochet, whether it be the expenses of a father forced to make repeated voyages to the bedside of his son who was injured in Greece through defendant's negligence,⁹⁷ or the expenses of an unmarried cohabiting partner of the injured victim.⁹⁸ The French general clause is considered hostile to the theory called Aquilian relativity ('relativité aquilienne') which explores the 'purpose' of legal rules to find the ambit of a defendant's liability to plaintiff, thus deemphasizing the role of causation. But in French law there is no relational "duty of care" requirement as in English and Canadian law and the role of causation is not deemphasized.⁹⁹ In this optic, the concept of unlawfulness nearly becomes invisible: one could say it has been globally reassigned to the subsidiary determinations of fault, causation and damage.

While the unlawfulness question may have disappeared from view, it may possibly be operating at a different level, the level of judicial policy working tacitly within rather capacious notions. Obviously, the French judge retains at least some rough concept of unlawfulness, for there are still areas where a person is free to cause harm, including pure

C. Rau, *Le droit civil français*, vol. VI, no. 117,119, 120 (1942); F. Laurent. *Principes de droit civil*, vol. XX, no. 404 (1887). See further, Von Bar, *supra* note 18, p. 33, n. 76. This rights-based position is fundamentally restated by Planiol who attempted to draw up "a table" of legal obligations protected by Article 1382. He defined fault as the breach of a "pre-existing obligation" and wrote that Article 1382 did not mean "any act whatsoever" but only an act illegitimate in character. M. Planiol, *Traité Elementaire de Droit Civil*, No. 863, vol. II, part I (12th ed 1939).

⁹⁶ K. Zweigert and H. Kötz say that in France,

it is immaterial whether the harm complained of by the plaintiff is physical harm to person or property or not. Indeed the very idea of 'purely economic loss' is not to be met with in judgements or books; liability under art. 1382 Code civil attaches to a person even if his negligence affects nothing but the plaintiff's future income or business prospects.

supra note 3, p. 617.

⁹⁷ Cass. 1st Ch. 20 Dec. 1960, D. 1961.141, note Esmein.

⁹⁸ See W. van Gerven, *Tort Law – Scope of Protection*, 144-146 (1998); Y. Chartier, *La Réparation du Préjudice*, nos. 184-198 (1983). The National Report points out that up until the 1970s French courts denied the recovery of economic loss to a concubine due to the death of her partner by making the argument that she failed to present an "intérêt légitime juridiquement protégé." This requirement, however, was later abandoned by the Cour de Cassation (Cass. Ch. Mixte, 27 févr. 1970, 201, note Combaldieu; JCP, 1970, II, 16305, concl. Lindon, R., note Parlange). Thereafter the jurisprudence permitted, for example, both a wife and mistress of the victim, simultaneously, to recover their economic loss from the tortfeasor. CA Riom 9 Nov. 1978, JCP 1979, II, 19107, note Almairac. The survivor of a homosexual couple has similarly recovered. TGI Belfort, 25 juil. 1995, JCP 1996, II, 22724, note Paulin.

⁹⁹ Viney, *supra* note 8, p. 566; van Gerven, *supra* note 98, p. 32.

economic harm, without incurring liability under the *Code Civil*.¹⁰⁰ An entrepreneur may deliberately set up business next door to a business competitor and through fair competition drive him into bankruptcy.¹⁰¹ These instances, however, are exceptions that have been carved away from the general presumption in favor of actionability. They emerge from an inductive search of the case law. By developing justifications for non-liability based on the existence of particular factors, it has become possible to absolve a person who causes harm without abandoning the general principle that a person should make reparation for all harm he or she causes. The exercise of policy is more difficult to detect, however, at the discrete level where the judge creates no exception but simply attributes a negative result in the particular case to a tenuous causal link or perhaps to the indeterminateness of the plaintiff's loss. Here unlawfulness is not a severable hurdle but simply the result of applying subsidiary elements of act, fault, causation and damage. Judgments denying relief at that level are not unknown in the jurisprudence. For example, a partnership could not recover for deals that failed to be concluded when the company president who was negotiating them was negligently injured.¹⁰² A creditor whose borrower was negligently killed could not recover from the tortfeasor the sums which the decedent could not repay.¹⁰³ The reasoning in these cases seems unexceptional: the harm was not considered a "certain" or "direct" consequence of the negligent act. Obviously a latent concern with saddling excessive liability upon the tortfeasor may have influenced these pronouncements, but no one can be sure of what the 'attendu que' template may disguise.¹⁰⁴

¹⁰⁰ For instance, a doctor who negligently fails to terminate a woman's pregnancy incurs no liability to the parents for the extra expenditures of supporting a healthy but unwanted child. Civ. 1^{re}, 25 juin 1991, D. 1991. 566, note Ph. Le Tourneau. It has been held, however, by the Cour de Cassation en Assemblée Plénière (17.11.2000, JCP, 2000, n. 50, II.10438, pp. 2293 ff.), that an infant could claim damages resulting from being born with a handicap in circumstances where the negligence of his mother's doctor prevented her from exercising her choice to avoid giving birth to a handicapped child.

¹⁰¹ See Viney, *supra* note 8, p. 375.

¹⁰² Cass., 2nd civ. Ch., 12 June 1987, JCP 1987.IV.286. Cf. the opposite solution given by Japanese judges to a similar case, under the corresponding national report.

¹⁰³ Cass. 2nd Civ. Ch., 21 Feb. 1979, JCP 1979.IV.145. On similar facts, see Cass. Civ. 2e. 25 juin 1975, Bull. Civ., II, no. 195. B. Markesinis, *supra* note 91, pp 45-46, argues that the latter affords an excellent example of a concealed policy to place limits upon the recovery of pure economic loss via the manipulation of causal requirements. The plaintiff's debtor was killed in a car accident and the debtor's heirs refused to accept his succession. Accordingly the succession could not pay the debts of the deceased, including the debt owed to the plaintiff, so the plaintiff sought redress from the tortfeasor responsible for the car accident. The Court of Appeal ruled, however, that the plaintiff's loss should not be viewed as the "certain" result of the defendant's act and it was thus unrecoverable. In view of the length of time for repayment and the risks that the debtor might discontinue his work, the anticipated repayment was aleatory. The Cour de Cassation, however, quashed this decision, ruling that repayment of a loan of money is never aleatory in a juridical sense, and returned the case to another Court of Appeal. The Court of renvoi in turn ruled that while the loss was certain, it was not "direct", since the refusal of the heirs to accept the debtor's succession broke the chain of causation with a *nova causa interveniens*. Bordeaux, 17 mai 1977, D., 1978 (observ. Larroumet), and this decision was confirmed by the Cour de Cassation. Cass. Civ. 2e, 21 fév. 1979, J.C.P. 1979, IV, 145.

¹⁰⁴ There might be a relative lack of emotive appeal in pure economic loss as compared to the flesh and blood of physical damages. If cases of pure economic loss are intuitively less esteemed by French judges, as Lapoyade

It is interesting to note, however, that French law sometimes relaxes its own causal requirements quite openly when it allows plaintiffs to recover for the loss of a chance (*perte d'une chance*). The effect is most striking in cases where the web of causation is dense and problematic, as in Case 2, when the key player of the All Stars was injured in an auto accident and the team declined in the standings and suffered lost revenues. According to the rapporteur, a French judge would be inclined to award the team an amount representing at least the loss of the chance to remain atop the standings. Indeed he is of the opinion that this same doctrine would be applied by a French court in three of the nine hypothetical cases. Though the recovery would only be partial, it attenuates the requirement that the damage be "certain", yet without giving the appearance of imposing overdeterrence.

2. A particularity of French law is the *non-cumul* of tort and contract actions. Unique in all of Europe,¹⁰⁵ this rule, in our view, probably propels French tort law in the direction of allowing reparation for pure economic loss. Like Molière's *Gentilhomme* who spoke prose or poetry and nothing in between, the French plaintiff discovers that s/he must sue in contract, if she has one with defendant; if there is no contract, s/he must sue defendant in delict.¹⁰⁶ If plaintiff is refused relief in contract for pure economic loss, s/he cannot then sue in tort, for there is generally no concurrence of actions. The rule has been praised for bringing certainty of application to a system which, since its general delictual clause incorporates pure economic loss within its reach, would otherwise lack the theoretical means to prevent unrestrained concurrence or to exclude from its compass *dommage purement contractuel*.¹⁰⁷ We would argue that it has another important effect as well. This forced choice has, in our view, encouraged the attitude that contract and tort should be broadly equivalent conduits for the recovery of pure economic loss. This is not to claim that the two actions operate in an identical manner. They do not. For instance, the prescriptive period is usually shorter for

Deschamps suggests (*supra* note 7, pp 89-101) then perhaps one might expect cold detachment in the causal analysis that discourages recoveries.

¹⁰⁵ See G. Viney, *La Responsabilité: Conditions*, No. 216-231, vol iv (1982); Von Bar, *supra* note 30, p. 449 ff; T. Weir, *Complex Liabilities*, No. 52, in vol XI, IECL (1976); S. Banakas, *Liability for Incorrect financial Information: Theory and Practice in a General Clause System and in a Protected Interests System*, 7 Euro. Rev. P. L. 261, 268 (1999).

¹⁰⁶ There are a few recognized exceptions to the rule (for details, see P. Malaurie & L. Aynès, *Droit Civil: Les Obligations*, Nos. 526-528, pp 370-373 (1st ed. 1985); Viney, *supra* note 8, p. 403, 411 ff.) but these are not germane to the discussion in the text.

¹⁰⁷ Von Bar, *supra* note 18, pp. 452 ff.; P. Schlechtriem, *The Borderland of Tort and Contract – Opening a New Frontier?*, 21 Cornell Int'l Law J. 467 f. (1988).

most actions in contract,¹⁰⁸ and clauses limiting liability do not operate in delict.¹⁰⁹ Rather, our point is attitudinal. Having left the litigant without an option, French law can ill afford to discriminate on the sheer nature of the damage (as some “conservative” systems do) against tort plaintiffs presenting pure economic loss cases. That would be so unfair to one class of litigants that we think the rule, in the French context, serves to ease objections to this form of loss and to foster the expectation that tort law will achieve results in parallel with the law of contract.

3. To sum up, as the country report on France demonstrates, the expression “pure economic loss” is almost unknown. The Gallic judges do face the usual range of ‘the injured key-player’ cases, cable cases, mistaken professional advice cases and the like. But the French answers to the questionnaire show that this form of loss cannot be rejected on grounds of principle and damages might be granted in nearly every hypothetical situation. That being so, it is difficult to disagree with our national reporter’s statement that the French tort system is “trés réparateur.”

From a comparative perspective France’s accent on reparation holds great interest. It presents an appearance of maximum permissiveness toward pure economic loss as well as an appearance of maximum indifference to the strong policy arguments usually made elsewhere against its recovery.¹¹⁰ Bernard Rudden draws attention to the paradox that “the French seem to ignore almost all of Cardozo’s warnings without suffering ill effects.”¹¹¹ Against all predictions that the sky will fall, the French judge is serene. To those who argue that the floodgates of liability must be firmly closed, the French experience must seem counterintuitive, an empirical enigma awaiting an answer.

¹⁰⁸ Contractual periods vary from one, two, five or ten years, depending on the type of contract, and contractual prescription begins to run from a relatively fixed date. *See* Code civil arts. 2270, 2272-2277. Prescription in delict, however, is generally ten years after manifestation of the damage and thus the life of an action is liable to be much greater than in contract. Code Civil Art. 2270-1 (Loi 5 July 1985). Note, however, that tort actions based on defective products will prescribe in three years from the date of the victim’s knowledge of his own damage and the wrongdoer’s identity (CC 1386-17) but in no event after the product has been in circulation ten years (CC 1386-16).

¹⁰⁹ For further differentiations, *see* Malaurie & Aynès, *supra* note 106, at n°s 517-520, pp. 360-362.

¹¹⁰ There is hardly any specialized literature on this subject within France and almost no internal criticism of its liberal attitude. As the National Reporter rightly says, the subject “ne fait pas couler autant d’encre en France que dans les pays de common law.” *See* exceptionally, however, the strong remarks of Viney, *supra* note 8.

¹¹¹ B. Rudden, *Torticles*, 6/7 *Tulane Civ. Law Forum* 105, 107 (1991-1992).

3.5.2. In the Belgian Looking Glass

1. The tort provisions of the Belgian Civil Code are a mirror image of the Code Napoléon. Belgium possesses the same unitary principle found in France and has taken essentially a liberal position (though in our eyes not quite as liberal as France's) on reparation for pure economic loss.

Belgian jurists approach questions of tort liability by verifying the existence of the 'usual elements' of fault, causation and damage, rather than by preliminary reference to a *numerus clausus* of protected rights or interests. There is in consequence no material means by which recovery of this kind of loss can be preemptorily blocked before the tripartite elements are examined. In Belgium, as in France, Articles 1382-1383 of the Civil Code have been consistently regarded as not containing any a priori limitations on the scope of protected interests or on the classes of protected persons.¹¹² Since there is no limitation on the class of protected persons, there is no need to prove that a duty of care was owed to the plaintiff.¹¹³ This suggests that Belgian jurists, like their French counterparts, made the same transition of thought from a rights-based to a legitimate interest-based interpretation of their general formula.

As stated earlier, Belgian law presents a favorable attitude towards liability for pure economic loss, but in our judgment it takes a slightly more guarded, less liberal view than France, despite the commonality of starting points.

The broad contractual principle, "réparation intégrale du dommage" (drawn from Art. 1149 C.c.), has been extended to the law of tort by way of interpretation.¹¹⁴ The principle of "full" reparation strongly suggests that there should be no reason to exclude from the field of tort a form of damage so commonly recoverable in contract. The principle argues that a victim should be fully compensated irrespective of the kind of loss that s/he has suffered.¹¹⁵ Furthermore, the gapless appearance of the delictual principle of article 1382 suggests approaching this type of liability in terms which are no different from any other

¹¹² Neither questions of "fault" or "damage" depend upon a showing that any right to receive revenues has been violated. The violation of plaintiff's "legitimate interest in obtaining monetary support or payments" is sufficient. Thus a concubine (whose claim for lost support could not be based upon a "right to be supported out of wedlock") was permitted to recover her "pure" economic loss against a tortfeasor whose negligence caused the death of her partner. She qualified as a *victime par ricochet* (i.e. as a secondary victim) and the legitimacy of her interest in receiving support was recognized. *See* Van Gerven, *supra* note 98, p. 146.

¹¹³ The theory of Aquilian relativity has been formally condemned by the Belgian Cour de Cassation. Cass., 28 april 1972.

¹¹⁴ R. O. Dalcq, *Traité de la responsabilité civile, II, le lien de causalité, le dommage et sa réparation* (1962), p. 452, n° 3416; Cass., 13.4.1995, J.T., 1995, p. 649; Cass., 23.12.1992, Pas., 1992, I, 1406.

¹¹⁵ Belgium, however, does not fully follow the French rule of non-cumul and does not separate tort and contractual liability as rigidly. As a matter of principle Belgian law permits the plaintiff to opt between contractual and delictual actions (*concours des responsabilités*). *See* J. L. Fagnart, *Examen de la jurisprudence concernant la responsabilité civile, 1968-1975*, No. 2, p. 9 (1976) and *cf.* Van Gerven, *Lever & Larouche, supra* note 20, pp. 41 ff.

question of liability. Thus fault, causation and damage may be examined using standard rather than special rules. For instance, pure economic loss should simply meet the same causal requirements that any other type of damage must satisfy with respect to proof of its existence or certainty.¹¹⁶ To judge the causal link between defendant's act and plaintiff's damage, the courts normally apply the more factual causal theory called "equivalence of conditions."¹¹⁷ This causal test is satisfied when the damage would not have occurred, as it occurred, if the fault had not been committed. In principle this "but for" test should leave little room for judicial policy to screen out pure economic loss at the causal level.

Despite this factual façade, however, the courts and a part of the doctrine have accepted until very recently a rule of causation which on occasion "interrupts" the causal link when plaintiff is said to have incurred the loss due to an "autonomous" obligation. The theory clearly restricts the recovery of loss, but one cannot say that it is directly aimed at the issue of pure economic loss. Moreover, the national reporter writes that the Court of Cassation, after strongly affirming this theory in 1988, seems in later decisions to have produced a "revirement" in the jurisprudence, but the scope of it is not clear.¹¹⁸

2. The Belgian Report concludes by emphasizing that the concept of "dommage purement financier" has almost no importance in Belgian law, and the solutions to the hypothetical cases are never the consequence of the character of the loss itself. The doctrine of loss of a chance, which is similar to the French doctrine,¹¹⁹ is evoked in three cases (Case 2 – 'The Injured Key-Player', Case 6 – 'Auditor's Liability', and Case 8 – 'Evidence Spoliation') because these hypotheticals raise the issue of the 'certainty' of the damage, not because the damage is purely financial. The controversial theory of the interruption of causation arises in 'The Infected Animal' case not because the damage is purely financial but because the case involves an

¹¹⁶ The courts ease problems of proving the certainty of the loss (a problem frequently encountered in proving unrealized profits) by resort to estimating the value of the lost chance to the profit (la perte d'une chance). Dalcq, *supra* note 114, p. 254, n° 2817; J. L. Fagnart, *La responsabilité civile*. Chronique de jurisprudence 1985-1995, p. 23, n° 11; R. O. Dalcq & G. Schamps, *La responsabilité délictuelle et quasi-délictuelle, examen de jurisprudence (1987-1993)*, 1995 R. C.J.B., p. 737.

¹¹⁷ Cass., 12.1.1988, Pas., 1988, I, 563; Cass., 15.5.1990, Pas., 1990, I, 1054; Cass., 23.5.1990, Pas., 1990, I, 1079; Cass., 23.6.1990, Pas. 1990, I, 1126; Cass., 8.10.1992, Pas., 1992, I, 1124.

¹¹⁸ The Cour de Cassation may deem the causal link "interrupted" when plaintiff's damage results from an "autonomous" obligation that would have forced plaintiff to incur the loss at all events, even when it is triggered by defendant's tortious act. The theory was confirmed in a decision of 13 April 1988 by the Cour de Cassation (plenary session) *Journal des Tribunaux* 1988, p 649. As to the revirement in later decisions, which may be only partial, see the arrêts of 19 February 2001 (Pasicrisie 2001, pp 322ss; 327ss; 329 ss; 332ss (Commentaire, De Temmerman RDC 2001, 289s); 20 février 2001 (Pasicrisie 2001, pp. 334 ss); 30 January 2002 (JLMB 2002, 1296; observations J-F Jeunehomme).

¹¹⁹ See J. Bore, *Indemnisation pour les chances perdues, une forme d'appréciation quantitative de la causalité d'un fait dommageable*, *Semaine Juridique* 1974, Doctrine, 2620; cf. C. Eyben, *La théorie de la perte d'une chance défigurée ou revisitée?*, 2005 RGDC, pp. 307-321.

autonomous act by public authorities which may interrupt causation. Thus he concludes that when the Belgian jurisprudence does refuse to grant recovery for purely financial damage, the result is never due to the particular nature of the damage.

3.5.3. The Spanish Countercurrents

1. Spain presents a codistic model very much akin to that of France. Art. 1902 Sp. C.c. reads: “He who causes damage to another by action or omission, through fault or negligence, shall be obliged to repair the damage caused.” Within this general framework victims are allowed to sue for their economic losses even when they arise independently of physical harm. (*see e.g.* Case 1 ‘A Cable Case: The Laid-off Workers’). The legislator imposes no *a priori* check upon the judges and whether pure economic loss is recoverable becomes a question for case-law and the opinion of scholars. Under the prevailing view, the principle of *neminem laedere* appears to be the general rule, and the instances in which a person is at liberty to cause harm can be classified – like in the other liberal systems – as exceptions to the general rule. Thus Spanish jurists usually approach questions of tort liability by verifying the existence of fault, causation and damage, rather than any preliminary reference to an *a priori* list of protected rights or interests.

The results obtained from the Spanish report show that recovery for pure economic loss would be possible or probable in as many as seven cases (Cases 1, 3, 4, 5, 6, 8 and possibly 9). The Reporter advises that an action would not succeed in two cases (Cases 2 and 7), not because of any objection in principle but simply because of the problem of establishing causation and certainty of damage. As we shall see from the discussion of the examples below, however, it appears that Spain’s approach to causation and damages is more rigorous and perhaps less generous than in other liberal regimes.

In Case 3 (The Infected Animal) for instance, it is reported that a recovery may be possible but only if the economic losses of the farmers and butchers are considered ‘foreseeable’ and provided their claims for lost profits would satisfy what the Reporter calls the “rigorous” requirements of Spanish law. The question of recovery seems to be possible in principle but not necessarily probable. The application of the same criteria to Case 2 (The Injured Key-Player), however, leads to the conclusion that an action by the basketball team is “almost certain not to succeed” under the general tort article (Art. 1902), even though that solution would be favored by a large part of the doctrine. It would not likely succeed in practice because of the difficulty of proving the causal link between the car driver’s initial negligence and the club’s eventual drop in standings and attendance, and the club would not be able to recover because of Spain’s restrictive criterion for proof of lost profits. Interestingly, no

mention is made of applying the doctrine of loss of a chance which, as we have seen, plays a large role in France and Belgium in overcoming the problem of proving a causal connection and certainty of damage in these same cases.

2. The Reporter also mentions that even if the causal nexus and certainty of damage can be established in Case 2, the Spanish judge always possesses the power under Art. 1103 of the Civil Code to moderate or reduce the damage if it appears to be disproportionate to the negligence. This power gives reason to believe that the Spanish legislator is aware that crushing liability and overdeterrence of the tortfeasor may arise from the open-ended terms of Art. 1902 and requires a counterweight.

The other possible counterweight within the system would be the subtle exercise of a policy to limit recoveries of pure economic by the judges. The exercise of this policy, however, is difficult to detect at the discrete level where the judge creates no exception but simply attributes a negative result in the particular case to a tenuous causal link or perhaps the uncertainty of the plaintiff's loss. In this perspective, the limits one can find to the recovery are the following: a) the technical parameters of causation;¹²⁰ b) restrictive rules on proof of lost profits; c) the judicial prerogative to reduce awards of damages whenever the defendant is liable for 'ordinary' negligence.¹²¹

The latter remark, suggests that a balance has been struck between Spain's liberal façade and actual interpretive outcomes. To be sure, this balance is most often arrived at through the technicalities of causation, but that is simply another way (and the most usual way in the systems so far examined) to allow judges and scholars to make critical choices.

3.5.4. Japan – A Resilient Liberalism

1. Japanese tort law presents a liberal façade. Art. 709 of the Civil Code establishes that negligence, infringement of legal interest and causation are the only general requirements to be met in order to attain a damages award. The original wording of the provision included the expression "infringement of right" instead of "infringement of legal interest". But scholars first and then courts ended by considering it too narrow a label and eventually persuaded the legislator, in 2005, to replace the old with the new formula.¹²²

¹²⁰ See Case 15 (A Closed Motorway – The Value of Time), in Bussani & Palmer, *supra* note 5, p. 418.

¹²¹ If reliable figures could be collected, the exercise of the power to moderate damages is a datum whose weight, in assessing the actual impact of the operative rules, would deserve the highest consideration in studying every single tort law system.

¹²² See the Introduction to the Japanese Report.

In line with the liberal regimes is also the Japanese widespread attitude to deny or allow recovery relying on the technicalities of the cause of action rather than on overtly expressed policy arguments. The latter, however, surface in the legal reasoning with less reluctance and a greater transparency than in the other liberal regimes.

For instance, recourse to policy arguments is implicit whenever the question of what is the reasonable amount of damages to be put upon the defendant is at stake (as in Case 5, for the wife's recovery, and Case 8 with regard to the loss of a chance of getting a favourable judicial ruling). To no surprise, however, the ostensible tool of these reasonings is the reference to the classical arguments related to the presence-absence of the elements of causation and fault (along with the flexible 'foreseeability' requirement).

Other times policy considerations affect more noticeably the scrutiny of the technical elements of the cause of action. The sway of these policies is particularly clear in Case 2 (where causation ends up being established only when the key-player is deemed irreplaceable) in Case 3 (esp. with regard to the denial of the butchers' recovery), in Case 6 (where the analysis of auditor's liability issue appears to be ultimately driven by the concern for boundless damage claims) and in Case 7 (where recognition of causation is uncontroversial, due, at least in part, to the lack of any fear of undeterminate liability).

2. Another general feature of Japanese tort law is the German-inspired attention constantly paid to the possible contractual dimension. This attitude is fostered by those Japanese scholars who keep on looking at German legal thought as a model, thereby supporting a limited recoverability in tort of the victim's loss.¹²³ Under the operative rules, however, one can easily notice how contractual remedies – that in Japan concur with tort law remedies – are nowadays simply regarded as possible supplementary actions to protect the legal interest at stake. For example, a contractual solution can arise in Case 4, at least under the reporter's construction of the contractual terms between the owner of the ship and the time charterer. Similarly, it may arise in Case 8, for the plaintiff claiming damages under the 'spoliation of evidence' circumstances, and in Case 9, for the spouse seeking redress against the insurance broker.

3. On the whole, Japanese results, in terms of recoverable losses, are in line with the liberalism of the façade. The same can be said as to the way local formants (doctrine, jurisprudence and legislation) have been able to overcome the influence of 'absolute rights' thinking. One should appreciate, indeed, that these results have been reached despite the long-standing role played by both the original wording of the key tort law provision and

¹²³ See the discussion carried out by the Japanese Reporter esp. under Cases 6 and 7. Cp. H. Oda, *Japanese Law* 204 (2^d ed., 1999); K. Okubo, *Compensation for Pure Economic Loss under Japanese Law*, in Van Boom, Koziol & Witting, *supra* note 7, pp. 56 ff.

the prestige attached to ‘conservative’ German legal thought. This is why Japan – as far as compensation for pure economic loss is concerned – may be considered a liberal regime ‘malgré tout’.

3.5.5. Greece’s Liberal Credentials

1. The delictual framework in Greece begins with articles 914 and 919 of the Civil Code. They read respectively: ‘A person who through his fault has caused in a manner contrary to law prejudice to another shall be liable for compensation’; and ‘A person who has intentionally caused prejudice to another in a manner contrary to morality shall be liable in damages’. The first provision states a broader principle than the second: liability under article 914 may include both *negligent* and *intentional* conduct which is contrary to ‘law’ in a broad sense, but liability under the second provision only arises for an *intentional* wrong contrary to *morality*.

As to the notion of unlawfulness, we see that the Greek legislator has not carved out a list of protected ‘absolute’ rights or interests,¹²⁴ but has simply cast the notion in the most general language: plaintiff’s injury must be ‘contrary to law’. No attempt has been made to exclude pure economic loss, nor indeed any other type of damage from the purview of the notion ‘prejudice to another’. Apparently the Greek system gives no *a priori* importance to the intrinsic nature of the damage. Thus it appears that whether plaintiff may receive compensation for pure economic loss requires: an inquiry into defendant’s violation of specific legal commands, such as special statutes or related code provisions¹²⁵. Under these terms recovery of pure economic loss is obtainable in tort for the time charterer (at least as to the lost earnings, Case 4), for the victim of the ‘evidence spoliation’ (Case 8), as well as for the third party victims of negligently performed professional services (be they the direct loss bearers, as in Cases 6 and 7, or the surviving spouse of the ill advised investor, as in Case 9). Even if these terms are not met the case may involve what has been called the issue of ‘broadening the prerequisite of unlawfulness’.¹²⁶ According to the prevailing view, such a broadening process occurs principally by tying the standard of ‘good faith’ (arts. 281, 288) to

¹²⁴ Van Gerven, *supra* note 98, p. 74.

¹²⁵ See the Greek Report, esp. at I.1. Unlawfulness under the Greek code will be shaped in diverse ways through the abuse of rights (art. 281), the duty to act in good faith (art. 288), harm to someone’s body or health (art. 929), statutory violations, and even conduct which ‘violates the spirit of the legal system’, Von Bar, *supra* note 18, p. 28.

¹²⁶ Pursuant to the Greek Reporter, the local legal debate distinguishes two basic forms of pure economic loss: the ‘two-party loss’, caused directly by the tortfeasor’s behaviour without compromising the person or the property of the injured or of a third party; and the ‘three-party loss’, caused to a third party’s patrimony by a physical loss incurred by the person or the property of someone else (in its turn, the ‘three-party’ loss can be appreciated either as a ricochet one, or as a transferred loss). See the Greek Report, esp. sub IV.

the unlawfulness question: everyone should behave as good faith and business usages require. Greek jurisprudence indicates that the breach of any duty of care imposed by good faith is unlawful.¹²⁷

It is not surprising that fault and unlawfulness are interactive concepts that cannot always be kept apart. For example, unlawfulness may be considerably ‘broadened’ by the degree or manner of fault under article 914, on the argument that the negligence of the defendant *eo ipso* constitutes unlawful behaviour. According to our Greek reporter, the legal debate about the auditor’s liability (Case 6), and the undisputed success of the plaintiff’s claim against the insurance broker (Case 9), illustrate this last kind of unlawfulness.

2. As in other liberal regimes, claims for pure economic loss may founder upon the shoals of causation. Greek writers and judges favour two standard tests of causation. The first establishes that the defendant’s act must be shown to be the ‘causa adequata’ of the plaintiff’s damage, meaning to Greek jurists – besides the need of proving that the conduct of the tortfeasor was in general apt to cause a result such as the one that actually occurred¹²⁸ – that the damage must be *ex ante* foreseeable.¹²⁹ This requirement affects the legal debate and the operational outcomes under Case 2 (concerning the claim brought by the basketball team for the three months loss of its best player), Case 3 (with regard to the loss incurred by the meat market buyers and sellers), and Case 5 (as to the losses sustained by the ‘dutiful spouse’).

The second test of causation is grounded on the theory of ‘the protective purpose of the legal rule’. According to the latter, the defendant’s act must reach and infringe upon an interest thought to be protected by the purpose of the law.¹³⁰ Our national reporter underlines how this perspective – besides the relevance it has for the above Cases 2, 3 and 5 – is particularly pertinent in framing the arguments leading to the denial of recovery for the laid-off workers in Case 1.

The limits of causation are thus the limits of the protected interests. Both means leave ample room for controlling the recovery of pure economic loss where it seems excessive.

3.5.6. Croatian Thriving Liberalism

1. Liberalism in Croatia pervades any single formant of the law. The main tort law rules are to be found in Arts. 1045 and 1046 of the Obligations Act (*Zakon o obveznim odnosima* –

¹²⁷ See the Greek Report, esp. at I.1. and under Case 9.

¹²⁸ See e.g. Van Gerven, Lever & Larouche, *supra* note 20, p. 397; H. L. A. Hart & T. Honoré, *Causation in the Law* 465 ff. (2nd ed. 1985).

¹²⁹ See the Greek Report, sub II.3.

¹³⁰ See the Greek Report, sub II.3.

hereinafter: the ZOO).¹³¹ They read: Art. 1045 “Conditions of liability: 1. One who causes damage to the other is obliged to compensate for it unless he proves that damage has originated without his fault. 2. Simple negligence shall be presumed. 3. For damage caused by a thing or activity which generates an enhanced danger, the liability shall be strict. 4. Liability shall be strict in other cases provided by law.”; Art. 1046 “Damage: Damage is the decrease of someone’s patrimony (regular damage), hindering of its increase (loss of profit) and infringement of a personal right (non-patrimonial damage).”

A remarkable feature of this legislative framework is that even in negligence cases the fault of the defendant is presumed, thus blatantly paving the way to a pro-plaintiff interpretive scheme which is even more open-ended than in any other liberal regime. Moreover, the absence of a statutory type-cast set of rights as the exclusive pillars of tort law protection plainly lead Croatian scholars and judges to assume that (a) violation of any right or interest of the victim is sufficient for liability to be established;¹³² (b) the above provisions can not be intended, as a matter of principle, to screen out any kind of loss from the scope of protection. Indeed – as is stressed by our reporters – Croatian tort law “does not treat pure economic loss any differently from any other loss ... even if inflicted by simple negligence of the tortfeasor.”¹³³

2. Limits to compensation of pure economic loss may come in Croatia, as in any other liberal regime, from subtle manipulations of the technical elements of the cause of action. One of the most exploited technicalities is the recourse made to the “adequate causation” requirement, according to which the conduct of the defendant is deemed to be the (adequate) cause of the damage if that conduct is in general apt to cause a result such as that which happened.¹³⁴ It is the need to meet this requirement which leads Croatian judges and scholars to be very cautious about establishing the liability of the cattle raiser (Case 3) and of the insurance broker (Case 9).

Still in line with the general characteristics of the liberal regimes, limits on the recovery of pure economic loss arise from the ‘certainty of damage’ requirement – and its evidentiary

¹³¹ On 1 January 2006 the new Obligations Act came into force in Croatia and thus derogated the Obligations Act of 1978. As our national reporter underlines, however, tort law rules of the ZOO of 2006 have not been changed substantially.

¹³² Croatian Law assumes unlawfulness “in its objective sense, meaning that the wrongful act or omission is contrary to some legal provision or any other rule which forms legal order.” See the national Report, sub 1.

¹³³ Croatian Report, sub 1. As far as possible damages award is concerned, however, one has to keep in mind that Article 1091.1 ZOO [Greece, Spain] stipulates that

The court may, taking into account material position of the victim, condemn the responsible person to compensation in a lower amount than actual damage, if the damage has not been caused with intention or gross negligence and the financial capacity of the responsible person is poor and payment of the full compensation would cause his indigence.

¹³⁴ See e.g. Van Gerven, Lever & Larouche, *supra* note 20, p. 397; Hart & Honoré, *supra* note 128, pp. 465 ff.

issues. This explains the doubtful answers given by the national reporter to Case 8 (with regard to the plaintiff's loss of a chance of being awarded damages) and to Case 3 again (concerning the loss of profits incurred by the plaintiffs).

A feature differentiating Croatian law from the sister regimes is the local concern for results to be in compliance with art. 1095 ZOO ("Compensation of the damage in case of body injury or impairment of health"). Its apparent neutral wording is as follows:

1. In the case of bodily injury or the impairment of health, the tortfeasor is obliged to compensate the victim for the costs of medical treatment and other expenses connected therewith, as well as for lost profits due to the inability to work during the recovery period. 2. If, due to complete or partial inability to work, the injured person has suffered a loss of profit, or if, for the same reason, his needs are permanently increased or his prospects for further promotion lost or diminished, the tortfeasor is obliged to pay a certain annuity to the victim, as compensation for the damage suffered.

Yet, the strict *a contrario* interpretation given by Croatian scholars and judges to this provision makes any ricochet loss-bearer (such as the basketball team in Case 2 and the care-taking wife in Case 5) unable to recover.

3. On the whole, as we said earlier, Croatian tort law façade and its operative rules are in harmony. Policy considerations remain in the background of both scholarly and judicial reasoning. Technical assessments of the elements of the cause of action are in the forefront of discussions. The general clause approach enables in principle every economic loss (including pure ones) to be compensated, regardless of the nature of the infringed right or interest and without any need of seeking additional support from contractual remedies.

Compensation for pure economic loss therefore appears to sail smoothly across the Croatian sea.

3.5.7. Quebec: A Mixed Jurisdiction within the French Tradition

1. There is no *a priori* obstacle to the compensation of pure economic loss in Quebec. According to our reporter, Quebec civil law is clearly a "liberal" regime which shares many of the key characteristics of tort systems of Belgium, Croatia, France, Greece, Japan and Spain. Its tort law rests on a unitary general clause found in article 1457 of the Civil Code of Quebec (1994). This provision reads as follows: "1. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another. 2. Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person, and is liable to reparation for the injury, whether it be bodily, moral or material in nature. 3. He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody."

2. Three further characteristics bear out its classification as a liberal regime. First, wrongdoing and unlawful behaviour are never understood or described in relational terms. In other words, the unitary general clause contains no conceptual equivalent to the restrictive, relational concept of the “duty of care” which plays a decisive role in Anglo-American common law. Instead, in Quebec any failure to meet the ordinary standard of “reasonable behaviour in the circumstances” can be viewed as fault and would therefore qualify as wrongful. Second, there is no set of protective interests that are described or defined by a limitative list. Article 1457 does not speak of absolute rights and its reference to ‘injury’ is comprehensive (bodily, moral or material) and cannot be used to exclude pure economic loss in a categorical way. Third, and resulting from these characteristics, the notion of causation plays the most significant role in determining the overall scope of liability: “... the only conceptual tool which can be used to keep tort liability within reasonable boundaries is the requirement that the injury be a ‘direct and immediate’ consequence of the wrongdoing.” Noting that the importance of this requirement is matched only by its conceptual indeterminacy, the national reporter cautions that any instrumental role that causation may have as a control over liability of this kind is difficult to assess since it can be easily hidden from view: “Whatever constraints are imposed on the compensation of pure economic loss through the concept of causation, they normally operate beneath the surface, if at all.”

The tendency to resolve liability at the causal level is well illustrated by Case 1. The workers may be able to establish they suffered an injury due to the fault of another under Art. 1457 CCQ but there is still the question whether their loss of wages is the immediate and direct effect of the negligent act of severing the electrical line. Their injury is arguably indirect, arising by ricochet, because it resulted from another injury to a more immediate victim, the Black Factory. At the same time, the question is not that simple since it is settled in Quebec that the question should *not* be approached through a formal question as to “Who is the immediate victim?” but must be addressed on a case-by-case basis, taking into account all circumstances. Thus if liability is to be excluded the result will be represented as a feature of the particular circumstances of the case, not as the result of formal concepts circumscribing the scope of liability. As the Québec reporter notes, this assessment is open-ended, fact-based, and unpredictable, though he believes the plaintiff has a fair chance of success in every case. Similarly in the case of the escape of the infected animal (Case 3), the difficult question is whether a Court would find a causal link between the fault of the cattle raiser in allowing the animal to escape and the economic injuries suffered by other cattle raisers, traders and butchers when the meat market had to be closed. The reporter states that Quebec civil law provides no clear answer to this particular question, but again the standard is whether these losses are direct and immediate effects of the negligent act. On this causal point there is no consistent “analytical grid” to apply. Some decisions focus upon the foreseeability of these

outcomes, others upon the effect of intervening events that make the injury seem too remote, others might exclude this as an “indirect” loss caused par ricochet. It appears that wherever the causal link is deemed tenuous (as in Cases 1, 2, 3, and 8), the reporter is uncertain as to liability. By contrast, in Cases 5, 6, 7 and 9 he finds no obstacle to recovery. He concludes: “there is no way to predict what causal effect a Court would give to the decision of the authorities to close the cattle and meat market.”

3. Of course this focus upon causal reasoning makes clear that the floodgates argument and concerns over indeterminate liability are “not part of the conceptual arsenal of judges in Quebec”, yet at the same time, “There is no way to assess what role these concerns may be playing underneath the jurisprudential surface.”

3.6. The Pragmatic Regimes

3.6.1. England’s Cautious and Opportunistic Judges

1. The English façade tends to make a continental lawyer think more of the criminal law (where all crimes are typically nominate) than the law of tort.¹³⁵ Most of these torts arose in defence of protecting a plaintiff’s life, limb and property and are far removed from affording relief for pure economic loss. There are, to be sure, a series of intentional economic torts, notably actions for deceit, interference with trade, inducing breach of contract, passing off, misfeasance in public office,¹³⁶ intimidation and conspiracy, and if the defendant has intentionally caused such loss, the claim for pure economic loss may fit into one of these pigeonholes. If the loss was occasioned by negligence, however, these actions are unavailable. The plaintiff’s chief recourse must therefore be to the tort of negligence.

The generic tort of negligence would appear, at first glance, to hold great promise for the recovery of pure economic loss. Animated by the ‘neighbour principle’ which *Donoghue v. Stevenson* announced in 1932, this tort has been compared to a general clause covering all forms of negligent behaviour. This is generally true within the realm of protection from physical harm (bodily injury or damage to property).¹³⁷ But according to a leading authority,

¹³⁵ Von Bar, *supra* note 18, Rn. 254, p. 281. The language of the common law has always made a connection between civil and penal redress. ‘We “commit” a tort as we “commit” an offence. We can be “guilty” of either or both; and all our crimes are nominate.’ Rudden, *supra* note 111, p. 126.

¹³⁶ Cf. S. Arrowsmith, *Civil Liability and Public Authorities* (1992). See *David v. Abdul Cader* [1963] 1 WLR 834; [1963] 3 All ER 579 (PC); and, obiter, *X (some minors) v. Bedfordshire County Council* [1995] 2 AC 633, [1995] 3 WLR 152, [1995] 3 All ER 353 (HL); *Three Rivers DC and Others v. Governor and Company of the Bank of England* [2000] 2 WLR 1220 (HL).

¹³⁷ 1932 Sc (HL) 31. Even here the principle has been overridden in certain exceptional situations where, for reasons of policy, it was inadvisable to impose a duty of care, though harm to plaintiff’s property was the foreseeable result of defendant’s negligence. See, for example, *The Nicholas H* [1995] 3 All ER 307.

Murphy v. Brentwood DC,¹³⁸ negligence is not primarily applicable to the compensation of pure economic loss. This means that the nature of the plaintiff's damage controls the existence of a duty to avoid causing it. Indeed, the common law as a matter of policy begins with the proposition that there is, as a rule, no duty of care to avoid causing pure economic loss. The occasions upon which such a duty is recognized are exceptional and must be kept as such. This deep misgiving is based upon an instinctive fear of wide liability, customarily expressed by recourse to the floodgates metaphor or the 'nightmare scenario' (particularly clear, in this respect, is the denial of liability to the laid-off workers in Case 3), but more fundamentally by a cautious case-by-case approach which studies the economic and social implications of each extension. The judges are willing to impose a 'duty of care' in the particular case brought before them only when satisfied on utilitarian grounds that it is socially and economically convenient to do so (see *e.g.*, the discussion carried on by our national reporter under Case 5, where the ricochet loss of the care-taker spouse is compensated only if the claim is brought by the injured husband and up to the ordinary market value of the wife's services).

2. These exceptional cases are highly fact-sensitive and cover narrow fact situations. The exceptions began with *Hedley Byrne & Co. Ltd v. Heller & Partners*¹³⁹ and then grew in number. The general principle of no liability for pure economic loss survives, but with a number of exceptions that may be increased in the future if the courts find it 'fair, just and reasonable' to do so.¹⁴⁰ Thus far, the exceptions are limited to negligent misstatements made and relied upon (in a context of 'virtual' contract¹⁴¹ – which is the subject matter of the discussion in the 'pension scheme' hypothetical: Case 9),¹⁴² negligent interference with

¹³⁸ [1991] A.C. 398.

¹³⁹ [1964] A.C. 465.

¹⁴⁰ On the meaning of this phrase, which reserves judicial options for future development (in marked contrast to the more principled methodology announced in *Anns v. Merton London Borough Council* [1978] A.C. 278, see *e.g.* *Caparo Industries Plc v. Dickman* [1990] 2 A.C. 605.

¹⁴¹ *Hedley Byrne*, *supra* note 42, [1964] A.C. 465. However, one should be aware that if, after a misrepresentation, the parties actually enter into a contract with each other, it is doubtful whether there is any practical need to resort to the rule of *Hedley Byrne*, since liability may end up being based on contract under s. 2(1) of the Misrepresentation Act 1967. The text provides that

Where a person has entered into a contract after a misrepresentation has been made to it by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.

Through this rule 'the tort of negligence became otiose' in this context: *Von Bar*, *supra* note 18, p. 449.

¹⁴² *Cp.* *Gorham v. British Telecommunications Plc.* [2000] 1 W.L.R. 2129. *Gorham* concerned a case where British financial institutions which mis-sold over a million personal pensions from the late 1980s to the mid 1990s were held to owe a duty of care not only to their customers but also to third party beneficiaries to whom the duty was owed solely in tort, and as a consequence a total of over £10 billion has been paid in compensation to those suffering pure economic loss. See *The Financial Services Authority, Annual Report 2003-2004*, (HMSO, June 2004) Section 2, p. 30.

the performance of a contract,¹⁴³ negligent defamation in the writing of a reference for a former employee,¹⁴⁴ professional negligence in the drawing up of a will,¹⁴⁵ and breach of statutory duty.¹⁴⁶ What appears characteristic and consistent in these exceptions is the limited quantitative exposure of the defendant to a defined number of plaintiffs, or even better, a single plaintiff. The danger of unbounded financial repercussion is avoided. The total liability can be calculated in advance as not exceeding the value of a lost legacy, a lost job or a lost investment. The plaintiff is a particular individual – the potential legatee of a will, the intended beneficiary of a pension scheme, or a former employee – whose interests are very distinctly contemplated by the defendant at close range. But the presence of other factors which demonstrate a closer degree of proximity between the parties than mere foreseeability of economic harm may be insisted upon, such as defendant's 'assumption of responsibility' for the plaintiff's economic well-being coupled with the plaintiff's reliance upon it.¹⁴⁷ The class of claimants is thereby limited, as if an invisible privity paradigm structured the resulting bond in tort.¹⁴⁸ It may be noted that although actions may be brought concurrently, a contract action cannot be used in these circumstances for there is no 'consideration' and therefore no contract between plaintiff and defendant. Given its insistence on consideration, England's rigid contract law cannot protect legal strangers against such losses (this is the most important reason why, according to our reporter, plaintiff would not recover his/her loss under the 'spoliation of evidence' hypothetical – Case 8). Therefore, it was faced with the choice either to expand its tort law opportunistically or to deny these actions altogether.¹⁴⁹

3. The English judges express their pragmatism in an open manner. Policy decisions are not cloaked behind a particular view of causation or of *culpa*, as we have already noticed in several continental systems. The unlawfulness issue is isolated as a preliminary policy decision. Thus, in English law the façade of judge-made tort law approaches the inner reality of the process. The use of legal policy, especially in tort cases involving patrimonial injury, is

¹⁴³ *Junior Books v. Veitchi* [1983] 1 A.C. 520. This Scottish case, however, has been disapproved in almost every later English case. Stapleton, *supra* note 57, p. 59 & 80, n. 82–3; J. M. Thomson, *A Prophet Not Rejected in His Own Land*, 110 *Law Quarterly Review* 361 (1994).

¹⁴⁴ *Spring v. Guardian Assurance PLC* (1993) 3 AER 273 (CA). *See also* the discussion carried on by the national reporters under Case 7 ('A Ruined Credit').

¹⁴⁵ *White v. Jones* (1993) 3 AER 481 (CA), [1995] 2 WLR 187 (HL).

¹⁴⁶ For relevant references, *see* Von Bar, *supra* note 18, pp. 328 ff.

¹⁴⁷ The phrase 'assumption of responsibility' originates in *Hedley Byrne*, [1964] AC 465, at 528 (Lord Devlin). It seems to make recourse to an underlying contract model to earmark occasions when it is appropriate to impose a duty of care: the assumption of responsibility and reliance upon it must be voluntary. *See* Lord Goff's speech in *Henderson v. Merrett Syndicate Ltd.* [1995] 2 AC 145, [1994] 3 AER 506, discussing the role played by voluntariness. *See also* Thomson, *supra* note 7, p. 59; and the Conclusions to the English report.

¹⁴⁸ The opposite view is maintained in Germany. *See* section 3.7.1.

¹⁴⁹ Markesinis, *supra* note 57, p. 354.

a distinct feature of internal common law culture.¹⁵⁰ English legal policy should not, however, be confused with continental concepts such as French notions of ‘ordre public’ or the German concept of ‘Treu und Glauben’. Unlike these Continental concepts, the English concept of legal policy does not assume a legal rule, for which it is, then, judicially used as a limit of its application, but creates one for the case at issue – a rule that can moreover change, every time that legal policy is invoked again.

The English judges refuse to be driven by the logical implications of the neighbourhood principle into recognition of a wide theory of fault. Besides proximity and foreseeability, something else is required in order to summon forth a ‘duty of care’ in the field of patrimonial loss. The English judge wishes to remain architect of this common law development.

3.6.2. The American (in)dependence

1. United States tort law is usually depicted as largely common law and primarily State law.¹⁵¹ Most of its groundings can be found in a ‘common core’ of common law and can be on the whole caught as similar in all states. Yet, despite this shared foundations, tort law remain a province that does not live on an overall unified regime across the nation.

This is in large measure the result, on the one hand, of the common law development of tort law through the history: an English-style judicial stratification of rights to recover damages under specific headings, each containing its own specific requirements. On the other hand, the picture has to be framed in a context where courts always had, and still have the power to shape the elements of the cause of action of existing torts and to find out new ones.¹⁵²

Untenable naïveté would be, however, that of deeming states’ tort law as moving like adrift icebergs, in isolation one to another. Indeed, one should consider first that most state legislatures have been affected by instances and pressures coming from two opposite power group acting across states boundaries: on one side the “defense” lobby representing the insurance industry, on the other the plaintiffs’ interest represented by the American Trial Lawyers Association (ATLA).¹⁵³ On the top of this – as our national reporter reminds us of –, there are at least three main factors pushing towards a nation-wide approximation of tort law rules. The first is the already mentioned shared reservoir of common law language,

¹⁵⁰ Note, however, that an attempt was made in *Henderson v. Merrett Syndicate Ltd* [1995] 2 A.C. 145, [1994] 3 A.E.R. 506, to lay down general criteria for the existence of a duty of care to protect pure economic loss without resort to a policy argument. According to Thomson, *supra* note 7, pp. 85 ff, the importance of this case has not been sufficiently recognized. *See also* Banakas, *supra* note 105, pp. 261, 271, 277 ff.

¹⁵¹ J. G. Fleming, *The American Tort Process* (1988), pp. 34 ff.; J. C. P. Goldberg, A. J. Sebok & B. C. Zipursky, *Tort Law: Responsibility and Redress* (2004), pp. 12 ff., 88 ff

¹⁵² Fleming, *supra* note 151, pp.32 ff.

¹⁵³ *See* Fleming, *supra* note 151, pp. 40 ff., 145 ff.

notions and technicalities. The second is the US Supreme Court driving role and prestige, which represents, to the extent it decides cases of this kind, a firm support for the spreading of uniform solutions. The latter goal is explicitly endorsed by the third factor, *i.e.* the existence of the American Law Institute (ALI) and its work in restating the law. In the words of our national reporter, “[A]n ALI restatement is an organized series of rules, justified by comments and illustrations drawn mostly from state and federal cases. Because of the reputation enjoyed by the ALI among judges and practitioners and because restatement ‘black letter’ rules are accompanied by thorough research, they are often used and cited. In this fashion, an ALI restatement of a rule can confirm that it is accepted by all or nearly all of the states.” But even when one or more states disagree(s) on a rule, the restatement formula is bound to frame the national legal debate, inside and outside courtrooms.

2. The Restatement (Second) of Torts¹⁵⁴ offers to our reporter the starting point to the analysis of US law on the recoverability of pure economic loss. Section 766C of the Restatement bars the compensation of this loss, if negligently inflicted, with wording and arguments that – though echoing the ruling of a famous federal case¹⁵⁵ – have become ever since fairly common in the legal debate. It reads: “One is not liable to another for pecuniary harm not deriving from physical harm to the other, if that harm results from the actor’s negligently (a) causing a third person not to perform a contract with the other, or (b) interfering with the other’s performance of his contract or making the performance more expensive or burdensome, or (c) interfering with the other’s acquiring a contractual relation with a third person.”

The survey made by the US national reporter in answering the questionnaire underlines that this no-liability rule is now extended to many other areas of the law of torts,¹⁵⁶ so that the so called pure economic loss rule should be meant, in general terms, as a denial of liability for the negligent infliction of any of such losses.

There is no recovery indeed in the factual setting hinged on the cutting of electrical cables (Case 1), nor in the cases concerning the injury to a key team player (Case 2) and the closure of cattle markets (Case 3). No compensation for pure economic loss is available to the lessee

¹⁵⁴ The Restatement (Second) of Torts was complete in 1979. The original Restatement of Torts was published in stages, volumes I and II in 1934, volume III in 1938, and volume IV in 1939.

¹⁵⁵ *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). *See e.g.*, Bernstein, *supra* note 66.

¹⁵⁶ While the rule of non-liability recognized by the Restatement was largely absent from torts textbooks that law schools relied on in the 1960s and 1970s, at the time of the Second Restatement, there was only one significant article dealing with the issue of negligence liability and economic loss. That had been published in 1972 by Fleming James Jr, *supra* note 61, who had identified a “pragmatic” objection to liability, an objection concerned with the prospect of a liability that would be unduly open-ended. *See* Schwartz, *supra* note 57, pp. 94, 95 ff.

of a ship negligently damaged by a third party (Case 4) as well as irrecoverable is, by the wife of an injured husband, the loss of profits incurred by the spouse while looking after the primary victim (Case 5).

3. This is not the entire picture though. Let us start with saying that it is unsettled whether a US plaintiff seeking redress for negligent spoliation of evidence (*i.e.* for the lost opportunity to secure to him/her-self a court award of damages. Case 8) would recover.¹⁵⁷

A quite easier path towards recovery is opened to the plaintiff loss when it is due to negligently performed professional services. The inaccurate Auditor in Case 6, the careless Credit Rating Institute in Case 7 and, most likely, the negligent Insurance broker in Case 9 will be indeed responsible for the pure economic losses of some persons (beyond their clients) with whom they had no contractual tie. Although there may be specific requirements that must be met in certain states that are not clearly imposed in others (for example, Mississippi and Wisconsin require a showing that the plaintiff's "reliance" upon the published audit was foreseeable by the defendant) still it seems fair to say that in many situations (provided indeterminate and excessive liability is excluded) plaintiffs may recover losses caused by negligent professionals.

In addition to the above, one should notice that: a) in Case 5 the loss (by ricochet) amounting to the market value of service rendered is recoverable by the victim's spouse;¹⁵⁸ b) in situations like Case 4 (an example of 'transferred loss') courts can allow compensation whenever they find the contract between defendant and plaintiff's co-contractant was "intended to affect" the plaintiff;¹⁵⁹ and c) a finding that the plaintiff was "particularly

¹⁵⁷ Compare *Austin v. Consolidation Coal Co.*, 501 S.E.2d 161 (Va. 1998) and 94 Cal.App.4th 1285, 115 Cal. Rptr.2d 68 (Cal.App. 3^d Dist., 2002) (rejecting negligent spoliation claim) with *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846 (D.C. 1998) (accepting claim) and *Safeguard Management, Inc. v. Pinedo*, 865 So. 2d 672 (Fla. Dist. Ct. App. 4th Dist. 2004) (stating that plaintiff negligently deprived of proof may benefit from a favorable presumption as a matter of evidence law). *Coprich v. Superior Court*, 95 Cal. Rptr. 2d 884 (Ct. App. 2000) makes the point that if the plaintiff wishes a third party to preserve the relevant evidence, the plaintiff should secure from the third party an agreement that it will do so and such a contractual agreement is then appropriate for judicial enforcement. See also Schwartz, *supra* note 57, pp. 112 ff.; J. Judge, *Reconsidering Spoliation: Common-sense Alternatives to the Spoliation Tort*, 2001 Wisconsin Law Review 441; B. S. Wilhoit, *Spoliation of Evidence: the Viability of Four Emerging Torts*, 46 UCLA Law Review 631 (1998).

¹⁵⁸ See the US report ad vocem.

¹⁵⁹ *J'Aire Corp. v. Gregory* 598 P.2d 60 (Cal. 1979) at 63 (the defendant was a contractor that had undertaken to renovate the owner's building; the plaintiff was a restaurant that was a tenant in that building; because of delays by the contractor in completing the renovations, the plaintiff was unable to reopen the restaurant at the expected time, and therefore suffered pure economic losses; court affirming the tenant's negligence claim against the contractor). See also *Venore Transportation Co. v. M/V Struma* 583 F.2d 708 (4th Cir. 1978) as discussed by the national reporter under Case 4.

foreseeable”¹⁶⁰ by the defendant at the time of its negligence can lead to an award of damages in settings like Case 1 (A Cable Case: The laid-off Workers) and Case 3 (The Infected Animal).

4. In summarizing terms, against the façade of no-recovery US law displays conspicuous exceptions concerning – beside intentionally inflicted pure economic loss¹⁶¹ – specific facets of ricochet losses and, above all, the large area of liability for negligent rendering of professional services.¹⁶²

Exceptions and differing state rules are not, however, the only signal of the firm hold kept by US judges (and scholars) on the development of pure economic loss law.¹⁶³ The pragmatism and the candor of the overall attitude shaping the operative rules are corroborated by the variety of policies upholding the results.

According to our national reporter, the pursuit of the allocation of the loss upon the party best able to spread it, through insurance or otherwise, supports the operative rules discussed under Cases 2 and 4 (where plaintiffs may secure to themselves, respectively, key-man and business interruption insurance). A common policy in many cases within the questionnaire¹⁶⁴

¹⁶⁰ *People Express Airlines, Inc. v. Consolidated Rail Corp.* 495 A.2d 107 (N.J. 1985) at 116-118 (defendant negligently responsible for a fire, which caused the temporary evacuation of a surrounding area; because of evacuation, plaintiff, an airline with facilities within the area, suffered business losses). As to the series of cases presenting problems similar to those addressed by *People Express*, compare 532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc., 711 N.Y.S.2d 391 (App. Div. 2000) (affirming liability) with *Goldberg, Weprin & Ustin, LLP v. Tishman Construction Corp.*, 713 N.Y.S.2d 57 (App. Div. 2000) (rejecting liability). See also Schwartz, *supra* note 57, pp. 105 ff.; Goldberg, Sebok & Zipursky, *supra* note 151, pp. 91 ff.

¹⁶¹ See J. G. Fleming, *The Law of Torts* (8th ed. 1992), pp. 684 ff.

¹⁶² Beyond the limits of questionnaire, as to the liability of professional laboratories issuing ‘false positive’ results for drug or alcohol tests undergone by existing or potential employees and the liability of adoption agencies for the economic losses suffered from the adopting families because of agencies’ failure to disclose information about the physical or mental health problems of the adopted children, see Schwartz, *supra* note 57, pp. 112 ff.

¹⁶³ Stapleton, *Extra-Contractual Recovery*, *supra* note 7, p. 226 stresses that

it becomes manifest that US courts are increasingly allowing claims for pure economic loss, a phenomenon that directly threatens the neatness of this “supposed” US rule of exclusion of liability

(footnote omitted). Beyond the boundaries of our Questionnaire, the same author then points out that

some US courts allow claims by the plaintiffs who have been exposed to a health risk such as the mineral asbestos and, though they are not yet sick, are claiming the financial cost of medical monitoring from the party that was negligent in exposing them to the risk. Next and perhaps most explosively, in the US there is increasing resort to public nuisance claims where recovery for economic loss is well settled. It is a most important fact that, as early as 1991 a US federal court awarded 10,000 commercial fishermen US\$ 286.8 million in compensatory damages (based on the market value of the fish they would have caught had the season not been disrupted by the oil spill) from ExxonMobil under public nuisance for their pure economic losses following the Exxon Valdez oil spill in Alaska.

On the latter point, see also D. S. Bardwick, *The American Tort System’s Response to Environmental Disaster: The Exxon Valdez Oil Spill as a Case Study*, 19 Stan. Envtl. L.J. 259, 278 (2000); D. Lebedoff, *Cleaning Up: The Story Behind the Biggest Legal Bonanza of Our Time* (1997); Th. Eisenberg, *Damage Awards in Perspective: Behind the Headline-Grabbing Awards in Exxon Valdez and Engle*, 36 Wake Forest L. Rev. 1129, 1139–48 (2001).

¹⁶⁴ See Hypotheticals 1, 3, and 4. As our national reporters underlines,

[I]n these Hypotheticals, the harm to plaintiff could be characterized as too remote from defendant’s negligent

is the refusal to recognize liability without intelligible limits – through traditional application of remoteness, or lack of duty, regarding the particular harm suffered by a particular victim. The concern for the need of maintaining a high standard of professional services supports the rulings affirming defendants' related liability in Cases 6, 7 and 9,¹⁶⁵ and the undesirability of encouraging so-called 'derivative' litigation underlies the 'spoliation of evidence' results (Case 8).¹⁶⁶

One could say, to use Gary Schwartz's words, that "[W]hat all of this makes clear is that cases involving negligence and economic loss are multifarious in terms of the issues and problems they raise. Accordingly, no single rule can even begin to determine how all such cases should be decided."¹⁶⁷ What is certain is that the erosion of the unitary no-recovery rule was not driven by an opposite plan of building a pro-plaintiff façade but rather by a case by case approach, attentive to each state (common) law and oriented by openly verbalized policy choices.

3.6.3. Canadian Variations on a Common Law Theme

1. The Canadian common law of torts is derived from English law and, to quote the National Report, it remained "practically identical" to the English law even after the abolition of Canadian appeals to the Privy Council in 1949. Marked divergences between the systems first began to arise in the 1960s and today, he reports, there is no area showing more plainly the distinction between Canadian common law and English law than the courts' approach to pure economic loss. We shall not neglect these differences of approach, yet to us the similarities are also of great significance. In our view Canada has simply developed well-tempered variations on the English theme and has earned its place among the pragmatic regimes.

2. As the national reporter points out, Canadian development in the field of pure economic loss has been a series of steps that stake out categories and situations where a duty of care has been recognized. The first important step came in *Rivtow Marine Ltd v. Washington Iron Works* (1974) when the Supreme Court, moving beyond the trail blazed in *Hedley Byrne* (1963), held that the charterer of a defectively manufactured log barge could recover against the manufacturer for its economic losses when it had to take the barge out of service for repairs. By 1984, in *Kamloops (City) v. Nielsen*, the Court settled upon a two-part test for the

act, or defendant could be said to have no duty to parties such as the workers, the other cattle market participants, and the vessel lessee, respectively.

¹⁶⁵ See also Bussani & Palmer, *supra* note 5, pp. 534-35. We referred to this policy in our Editors' Comparative Comments to Cases 14 (Poor Legal Services), p. 417; 17 (Auditor's Liability), p. 471; and 20 (An Anonymous Telephone Call), p. 519.

¹⁶⁶ See also Schwartz, *supra* note 57, p. 113.

¹⁶⁷ Schwartz, *supra* note 57, p. 119.

recoverability of pure economic loss which was called the *Anns/Kamloops* test because it is in part derived from the approach of the English case of *Anns v. Merton* [1978].¹⁶⁸ While this test is no longer used in England, the Supreme Court of Canada “continues to place it in the forefront of pure economic loss cases and other novel duty of care cases.”

The test asks two questions: (1) Is there a sufficiently close relationship between the defendant and the plaintiff so that, in the reasonable contemplation of the defendant, carelessness on its part might cause damage to plaintiff? If so, (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise? Under this test a positive answer to step (1) means that a prima facie duty of care is recognized, though it may be limited or excluded under step (2). A striking feature of step (2) is that judicial policy considerations are openly invoked. Here, as the national report succinctly puts it, a metalegal consideration is treated as a descriptive formant. A category of presumptively irrecoverable loss, because it fails both limbs of the test, is generally referred to as “relational economic loss”.¹⁶⁹ Sometimes the same concept is called “contractual relational economic loss” because there is a contract between the primary victim and the secondary victim who has suffered pure economic loss.

This analytical template is referred to or lies behind the reasoning in all the answers to the case studies.

3. The *Anns/Kamloops* methodology has been the basis in Canada for isolating a set of categories or situations (and some descriptive tags to go with them) where a duty of care to avoid causing pure economic loss to another has been recognized. According to the national report, there are now six categories of pure economic loss in which a duty of care has been found. These areas are: negligent professional advice; negligent performance of a service (other than professional advice); failure to warn of a physical danger to person or property; negligent exercise of a public authority’s statutory power to regulate or administer; negligent construction or manufacture of a thing necessitating remedial expenditures to remove the defect; and finally, several narrow exceptions to presumptive non recoverability of the so called “relational economic loss.”¹⁷⁰ Outside of these categories, the test appears to provide reasons to deny recoveries. For example, it was laid down in the Supreme Court in *Bow Valley* [1997] that ‘relational economic loss’ is presumptively irrecoverable. For this reason

¹⁶⁸ The House of Lords retreated in *Murphy v. Brentwood DC* [1991] AC 398 to the view that the tort of negligence is not primarily applicable to the compensation of pure economic loss, and that as a general rule there is no duty of care to avoid causing pure economic loss.

¹⁶⁹ We have elsewhere pointed out that this term is more or less as a synonym for ‘ricochet loss’, the term we have preferred to use in our own standard taxonomy. See section 2.4.1.

¹⁷⁰ See e.g. *Canadian National Ry. Co. v. Norsk Pac. S.S. Co.*, [1992] 1 S.C.R. 1021, 91 D.L.R. (4th) 289.

the report states that there would likely be no recovery in Cases 1, 2 and 4. The employees' claim for lost wages in Case 1 is an example of "contractual relational economic loss" and the problem of indeterminate liability would be considered an "insuperable" obstacle. This would cause it to fail the second limb of the *Anns/Kamloops* test. The claim of the All Stars (Case 2) is similarly regarded as an instance of "contractual relational economic loss" and it would fail both limbs of the test. Shipwreck's claim in Case 4 would be denied (on the assumption that Shipwreck is a time charterer, not a demise charterer) because it is seeking the recovery of relational economic loss.

3.6.4. Israel's Inductive Approach

1. According to the National Report, Israeli law recognizes *in principle* the duty to compensate for pure economic loss. The 'exclusionary rule' found in other legal systems has not been adopted – at least not openly or formally – by the Israeli legal system. The source of this duty to compensate is rooted in the Civil Wrongs Ordinance – both in general torts and particular torts – and in tort statutes. The Reporter states, "As long as the liability framework is more limited and defined, and the risk of over extending liability is not great, the courts are willing to ignore the initial problematic nature of this type of loss, and to impose liability for PEL [Pure Economic Loss], sometimes without any reference to the nature of the loss." Difficulty may arise, however, when the basis for liability is the tort of negligence. According to the Reporter, "The duty of care – upon which liability is based in the tort of negligence – is worded so broadly as to enable it to be expanded or restricted according to the court's discretion. Such discretion has been applied expansively by the Israeli case law in general, and in cases of PEL in particular."

2. In our view Israel's approach to this subject is largely inductive and piecemeal. In the cases presented here, it proceeds cautiously and ad hoc, without resort to clear rules or guidelines, and screens the question of economic loss through the "duty of care" component of the tort of negligence. According to the National Reporter, the Israeli judge confronted with our factual hypothets would frame the result using customary terms, like the "foreseeability" of the harm, but that determination would reflect a weighing of various policy alternatives. For example, in the case of factory workers who lost wages due to a severed electrical cable (Case 1), recovery is denied in the form of a denial of the duty to 'foresee' the economic ricochet loss, but the Reporter does not fail to note various policy rationales that undoubtedly would influence the court to that conclusion. Overall, the Israeli judge would likely deny relief in four cases and grant relief in three cases. As already mentioned, the judge would find that no 'duty of care' existed toward the factory workers (Case 1) who lost two days' pay due to the negligent

breaking of an electricity line. Similarly no ‘duty of care’ would be owed to the All Stars team (Case 2) for the economic effects of an injury to its best player. Cattle raisers, market traders and butchers (Case 3) would not recover for the escape of an infected animal which forced closure of a meat market. There would be no ‘duty’ and no recovery for the spoliation of forensic evidence (Case 8) regarding the mechanical condition of a leased automobile. On the other hand, in Case 9 (The Pension Scheme) an Israeli court would probably find a duty of care and impose liability. In two other cases the Israeli judge would likely allow a claim for pure economic loss (Cases 5 and 7). Recovery in these instances is due to the presence of a specific statute governing the result rather than the general tort of negligence. Thus the dutiful wife (Case 5) who cared for her bed-ridden husband would recover for her economic losses pursuant to Sections 2 and 5 of the 1964 Torts Amendment Law. A business owner (Case 7) whose credit with the bank was damaged by a false and unverified report of his impending bankruptcy would recover against the credit institute under various statutes, including the Credit Data Service Law of 2002.

3. The National Report brings to light two characteristics about the Israeli approach. First, “the courts have refrained, time and again, from dealing with the issue of PEL in an organized and comprehensive manner.” The result is that, with the notable exception of cases of negligent misrepresentation, Israeli law lacks clear rules regarding PEL in general and lacks specific rules for the typical cases. It is characteristic of the Israeli judge to focus “only on the factual situation of the specific cases without creating clear guidelines to be applied in the future on other problematic cases.” The prevalent trend is to analyze the duty of care issue using customary liability criteria (such as the “foreseeability of the harm” criterion) mostly ignoring the problematic type of loss or treating it as only one factor, usually not a dominant one, among other relevant factors which together should dictate the decision favored by the court. Policy plays an undoubted part in these determinations, but its role has not materialized into workable guidelines. No clear rules regarding a possible clash between contract law and tort law appear to exist, nor is there much academic writing furthering the development of such rules.¹⁷¹

The second characteristic, as already mentioned, concerns the area of negligent misrepresentation, which is a conspicuous exception to this picture. Practically in this context alone are heard the familiar policy refrains which restrict recovery in other systems: *i.e.* the floodgates, overdeterrence of the tortfeasor, absence of overall social harm, the effect of liability upon insurance costs for consumers, and considerations relating to the possible

¹⁷¹ The one exception to this lack of rules is found in cases of negligent misrepresentation. As shown in Case 6, the courts decide such cases in terms of the existence of a special relationship between the parties, the reasonableness of the plaintiff’s reliance upon the information, and upon the assumption of responsibility by the defendant.

clash between Contract and Tort. These policies have resulted in structured rules and tests of liability the terms of which are special relations, reasonable reliance, and assumption of responsibility.

3.7. The Conservative Regimes

3.7.1. Germany: Narrow in Tort But Wide in Contract

1. As we have seen, in spite of their conspicuous theoretical and actual differences liberal and pragmatic regimes sometimes end up screening and refining the pure economic loss issue through the inner technicalities of tort law. To the contrary, the German legal system seems to deny even preliminary access to this kind of damages. Indeed, this prophylactic role is vested in a text that envisions liability only for injuries to certain enumerated rights. According to §823.1 of the BGB, individuals are liable if they wilfully or negligently injure “the life, body, health, freedom, property or other right” of the victim. Deliberately excluded in this list of so-called ‘absolute rights’ is any reference to injuries of a purely financial kind. It is therefore undisputed that, as a basic rule, pure economic loss is not recoverable in tort. This explains the negative outcomes of our national report as to the claims of the laid-off workers (Case 1), the plaintiffs affected in their business by the closure of the meat market (Case 3), the direct tort law action brought by the basketball team (Case 2), the claims of the care-taker wife (Case 5), the victim of the ‘evidence spoliation’ (Case 8) and the surviving wife of the ill advised investor (Case 9).

Compensation may be obtained in tort in some exceptional situations, but the plaintiff must find a cause of action in some provision other than §823 BGB. An example is the Pay Continuation Statute (*Entgeltfortzahlungsgesetz*), which establishes that the employer is automatically subrogated to the worker’s claim against the tortfeasor to the extent that the employer has continued to pay the worker under the statute. As a result, the basketball team, under Case 2, could successfully sue the injurer of its key-player by lodging the subrogated claim.¹⁷² Another provision relevant to the resolution of an hypothetical is §824 BGB. It offers indeed a solid ground to the liability of the Credit Rating Institute (Case 7), inasmuch it establishes that a person who declares or publishes, contrary to the truth, a statement which is likely to endanger the credit earnings or prosperity of another is liable for “any damage” arising therefrom, even if he does not know of its untruth but should know of it.¹⁷³

¹⁷² See the German Report sub Case 2.

¹⁷³ Here the protection against pure economic loss is the crux of the rule, even though its scope is narrowed by the privilege granted in Art. 824, sec. 2 (“A person who makes a communication, the untruth of which is unknown to him, does not thereby render himself liable to make compensation, if he or the receiver of the communication has a lawful interest in it.”). See the discussion carried on by the German Reporters under Case 7

2. On the surface, German tort law rules have changed little since their enactment more than a century ago. The real change has been accomplished through case law. While this is certainly not a phenomenon peculiar to German law,¹⁷⁴ nevertheless it is worth stressing if we are to understand a system that attempted a rigid legislative solution.

For instance, German law requires the violation of a right, an “absolute” one, but new rights have been added to the traditional set through interpretation. In this way German law developed, *e.g.*, the protection of (lawful) possession as an absolute right¹⁷⁵ – on this basis the time charterer can recover its lost earnings under Case 4 –, as well as the so-called “right of the established and ongoing commercial enterprise” (which is discussed by our reporter under Case 7, involving the liability of the Credit Rating Institute). Something similar happened to sec. 2 of §823 BGB, where wording about the infringement of “a statute intended for the protection of others” became a vehicle to compensate pure financial losses arising out of such infringement, provided that type of loss can be included within the sphere of the statutory aim.¹⁷⁶

But this is not all. §826 BGB provides that a person is liable if s/he intentionally causes harm to another in a manner contrary to public policy. To understand the subjective requirements of this provision, it is not deemed necessary that “the defendant actually intended to cause harm”; it will be enough “if he was conscious of the possibility that harm might occur and acquiesced in its doing so.”¹⁷⁷ The role this rule plays with regard to our issue can be appreciated if one looks at the factual situations to which it has mainly been applied. These are, for example, participating as a third person in a breach of contract committed by a contracting party, delaying someone’s bankruptcy in order to obtain personal benefit at the expense of other creditors, giving false information or omitting to give information in circumstances where there is a duty to give it.¹⁷⁸

3. In solving questions of pure economic loss, contract remedies are more widely employed in Germany than in other countries. The reason for contract’s enlarged role is probably

and Case 6 (where the auditor’s liability is denied). For further references *see*, in English, Van Gerven, Lever & Larouche, *supra* note 20, pp. 65 ff, 189; Markesinis & Unberath, *supra* note 7, pp. 291 ff.

¹⁷⁴ Towards the end of the last century, French courts developed a case law imposing liability for making a void contract, for seduction, for misleading information, for unfair competition, and so forth – all pursuant to a code that left open the meaning of “dommage” and the interests to be protected. The courts in Germany, at the same time, felt the need to impose liability in the same types of cases, so that the legislator, in drafting the code, was able to enumerate the cases in which liability would be imposed: Sacco, *supra* note 55, inst. II. *See also*, Gordley, *supra* note 87, pp. 36-46.

¹⁷⁵ *See e.g.* H. Sprau, in O. Palandt, Bürgerliches Gesetzbuch (64th ed., 2005), §823, no. 13, p. 1241

¹⁷⁶ Von Bar, *supra* note 30, pp. 45 ff., 49.

¹⁷⁷ Zweigert & Kötz, *supra* note 3, p. 463; Markesinis & Unberath, *supra* note 7, p. 889; G. Brüggemeier, *supra* note 21, pp. 59 f.

¹⁷⁸ K. Larenz & C. W. Canaris, Lehrbuch (13th ed., 1994), p. 276. *See other references in* Von Bar, *supra* note 7, pp. 104 ff.

twofold : on the one hand, apart from rules permitting the concurrence of tort and contract actions, tort law is considered too weak and narrow to safeguard all financial interests that merit legal protection.¹⁷⁹ On the other hand, contract claims may seem to be the relatively safer path to those who dread unleashing the floodgates of tort, since there is certainly less danger of boundless damages occurring in a breach of contract situation. For whatever reason, courts and scholars certainly expanded the sphere of contractual liability beyond the limits marked by the BGB.¹⁸⁰ This was accomplished through the exploitation of various devices, including the once¹⁸¹ longer prescriptive period in contract (thirty years as opposed to three), the greater ease of establishing breach of contract rather than fault (§282 BGB) and the stronger regime of vicarious liability in contract (§278 BGB). The range of contractual duties was stretched to include ‘implied’ duties of care, so that liability might arise not only from the violation of the parties’ express obligations but also the breach of a host of judicially-imposed duties of care. German interpreters likewise extended these duties over time so that in some cases they precede the conclusion (*culpa in contrahendo*)¹⁸² and/or survive the termination or the performance of the contract itself.¹⁸³

The most important innovation of all, however, was that courts and commentators lowered the privity barrier in contract and applied these duties in favor of those who were not parties to any contract. The principal instrument in this regard is the “contract with protective effects for third parties” (*Verträge mit Schutzwirkung für Dritter*) which brings strangers to a contract under its umbrella and permits them to sue a promisor for breach of one of the contract’s secondary obligations, notably (for our subject) some breach causing purely financial harm to the plaintiff.¹⁸⁴ The function of the contract with protective effects is arguably tort-like in that the protected third party need not stand in a close personal relationship to the injurer nor be specifically identified in advance.¹⁸⁵ At the same time it is operationally free of the “absolute rights” requirement of German tort law and permits recovery of purely financial harm.¹⁸⁶

¹⁷⁹ See the conclusions to the German Report, sub c).

¹⁸⁰ E.g., N. Jansen, *Die Struktur des Haftungsrechts. Geschichte, Theorie und Dogmatik außervertraglicher Ansprüche auf Schadensersatz* (2003), pp. 524 ff., 534 ff., 541 ff.

¹⁸¹ On this point the ‘Gesetz zur Modernisierung des Schuldrechts’ – in BGBl, 29 November 2001, I, Nr. 61, p. 3138 ff., in force as from 1 January 2002 – has totally changed the legal landscape, establishing different terms for the prescription of tort (up to 30 years) and contract (up to 10 years) actions. See H-P Mansel, *Die Neuregelung des Verjährungsrecht*, 2002 NJW, p. 89 ff.; W. Däubler, *Neues Schuldrecht – ein erster Überblick*, 2001 NJW, p. 3729 ff.; M. Schwab, *Das neue Schuldrecht im Überblick*, 2002 JuS, 1, p. 1 ff.

¹⁸² Under this doctrine contractual duties may arise as soon as the parties set up a pre-contractual “contact”, thus well before any contract is concluded and even when none is ever in fact concluded. See Markesinis & Unberath, *supra* note 7, pp. 704 ff.

¹⁸³ See also the discussion carried on by the German Reporter under Case 8.

¹⁸⁴ See the German reporter’s answers to Case 6 (Auditor’s Liability) and Case 9 (the pension scheme).

¹⁸⁵ E.g., D. Medicus, *Bürgerliches Recht* (20th ed., 2004), no. 844 ff., pp. 592 ff.

¹⁸⁶ Other kinds of economic losses may also be handled by contract law. This will include the multi-purpose device of pre-contractual liability (*culpa in contrahendo*) and the extended application of the joint and several liability rules to redress the loss incurred by the contractor. But these are not the only possibilities

All these rules are firmly established today¹⁸⁷ and, as a result, many cases that an English, American, or Italian lawyer would consider solely a matter of tort law are actionable in Germany in contract.

3.7.2. German Conservatism in Portugal

1. Tort law in Portugal shows the deep influence of German legal thought and its negative approach to the recovery of pure economic loss. The evidence in support of this is quite clear.

Among the provisions devoted by the Civil Code to the *Responsabilidade civil*, the opening section (art. 483.1) reads: “Whoever, whether by wilful misconduct or by negligence, unlawfully infringes the rights of another person or any legal provision intended to safeguard the interests of others must compensate the injured party for damage arising from such violation.” Although lacking the *numerus clausus* list of protected rights, this norm is not interpreted in Portugal as a French-like general clause. Rather, Art. 483.1 is a somewhat misleading façade whose actual interior resembles BGB §823.1.

Portuguese courts and scholars recognize that in using the word “unlawfully”, Vaz Serra, the author of the 1966 code, intended to protect only “absolute rights” and this “legislative” intent is generally read into the provision. Accordingly, the subjective rights doctrine in Lusitania has the same scope as the absolute rights limitation in Germany and the Portuguese wrongdoer is liable (a) when s/he violated an absolute right (purely financial loss is thus excluded) or (b) when the damage falls within scope and aim of a protective statute; while the violation of a protective statute may give rise to compensation for pure economic loss, this is an exception to the general rule of no recovery. The Portuguese terrain is therefore decidedly hostile to damages for this type of loss. Indeed, the impossibility of framing the

under German law. Another institution of possible application in this field (but not relevant to our cases) is Drittschadensliquidation which Markesinis describes as a quasi-contractual judge-made doctrine that allows a creditor to a contract to claim in contract for loss resulting from its non- or defective performance, even though the loss falls not upon him but upon a third party); Markesinis & Unberath, *supra* note 7, p. 553 f. In the context of this General Report, for the description of such a notion in terms of “transferred loss”, see section 2.4.2.

¹⁸⁷ Indeed, the Act on the Modernization of the Law of Obligations 2001 (Gesetz zur Modernisierung des Schuldrechts, in BGBL, 29 November 2001, I, Nr. 61, p. 3138 ff., which came into force on 1 January 2002) has altered the legal landscape. Besides the new terms for the prescription of tort and contract actions (see *supra* note 10), it codifies both the principles of culpa in contrahendo (see §311 ss. 2 and 3 as well as §241 s. 1 BGB) and the ‘contract with protective effects for third parties’ (see §311, s. 3 BGB). For a general discussion of the reform, see W. Ernst (Ed.), *Zivilrechtswissenschaft und Schuldrechtsreform* (2001); W. Däubler, *Neues Schuldrecht – ein erster Überblick*, 54 NJW 3729 (2001); M. Schwab, *Das neue Schuldrecht im Überblick*, 1 JuS 11 (2002). See also C.-W. Canaris (Ed.), *Schuldrechtsmodernisierung* (2002); B. Dauner-Lieb, et al. (Eds.), *Das neue Schuldrecht – ein Lehrbuch* (2002); S. Lorenz & T. Riehm, *Lehrbuch zum neuen Schuldrecht* (2002); P. Huber & F. Faust, *Schuldrechtsmodernisierung: Einführung in das neue Recht* (2002); G. Wagner, *Das Zweite Schadensersatzrechtsänderungsgesetz*, 55 NJW 2049 (2002); D. Zimmer, *Das neue Recht der Leistungsstörungen*, 55 NJW 1 (2002); S. Meier, *Neues Leistungsstörungenrecht*, 2002 Jura 118; R. Doehner, *Die Schuldrechtsreform von der Hintergrund der Verbrauchsgüterkauf-Richtlinie* (2004). For an English presentation of crucial contractual aspects of the reform see R. Zimmermann, *Breach of Contract and Remedies under the New German Law of Obligations*, in *Centro Studi e ricerche di diritto comparato e straniero* (Ed.), 48 Saggi, conferenze e seminari (2002). For a rule-by-rule commentary, see B. Dauner-Lieb, et al. (Eds.), *Anwaltkommentar Schuldrecht, Erläuterungen der Neuregelungen zum Verjährungsrecht, Schuldrecht, Schadensersatzrecht und Mietrecht* (2002).

plaintiff interest either in terms of 'absolute right' or as specifically protected by a statutory provision leads our national reporters to deny the recovery: to the laid-off workers (Case 1), to the basketball team (Case 2), to the meat market actors (Case 3), to the victim of an 'evidence spoliation' (Case 8).¹⁸⁸

Portuguese scholars and judges do not work out the notion of unlawfulness in an open-ended perspective. They usually handle the problem of recoverability by reference to those discrete provisions, scattered throughout the legal system, which are construed as safeguarding the particular right or interest in issue. For instance, a plaintiff can recover losses stemming from the infringement of rights to personality or to business reputation, inasmuch as these rights are established by particular provisions of the Civil Code (arts. 70 ff. and art. 484: see Case 7, involving the liability of the Credit Rating Institute). Thus, recourse can be made to some statutory provisions regulating the securities market in order to establish the auditor's liability vis-à-vis a third party (Case 6), or to art. 495 of the Civil Code, which entitles care-takers of the injured victim to recover their losses from the tortfeasor (see Case 5). A Portuguese court may also find unlawfulness under art. 485, which decrees liability when the defendant has "assumed" liability for information negligently given: this provision is relevant to the discussion of the surviving spouse's claim against the insurance broker who wrongly advised her deceased husband (Case 9).

2. To be sure, the attempt to fashion a general clause of civil liability out of art. 334 (sanctioning the *Abuso do direito* on the lines of § 826 BGB) has so far obtained only a little scholarly support;¹⁸⁹ and it is equally true that the scope and the nature of *culpa in contrahendo* cause of action is still disputed.¹⁹⁰ Nevertheless, all these imported concepts testify to the strong and long-lasting influence of German legal science on the peninsula. Thus, it is hardly surprising that infringements of pure economic interests are generally not reparable unless a specific provision addresses the question, or plaintiff benefits from the existence of a pertinent protective law. Nor is it any wonder that many of the answers to the questionnaire seek lateral support from contractual remedies,¹⁹¹ and that all of this is consonant with the attitude of Portuguese scholars who continually resort to German sources and concepts (including the 'contract with protective effect of third parties').¹⁹²

¹⁸⁸ Viceversa, inclusion of possession within the 'absolute rights' compound, allow the time charterer (Case 4) to recover its loss of profits.

¹⁸⁹ See esp. J. F. Sinde Monteiro, *Responsabilidade por conselhos, recomendações ou Informações* (1989), p. 545-582.

¹⁹⁰ See the Portuguese Report, Introduction and answers under Case 6 (auditor's liability) and Case 9 (the pension scheme).

¹⁹¹ As it is the case for the discussion of hypotheticals n. 6 (Auditor's Liability), n. 8 (Evidence Spoliation) and n. 9 (The Pension Scheme).

¹⁹² See e.g. the discussion carried on by the Portuguese Reporters under Case 6 (Auditor's Liability) and Case 9 (The Pension Scheme).

3.7.3. Romania – A Covert Shift

1. Romanian façade is shaped along the lines of the French inspired code provisions. The tort law key rules (arts. 998 and 999 of the local Civil Code) respectively read: “Any act of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it” and “Everyone is liable for the damage he causes not only by his own act, but also by his negligent conduct or by his imprudence.” Yet, as is stressed by the national reporter, here the French influence extends even to the judicial adoption of the ‘non cumul’ principle, according to which compensation via tort law is not practicable whenever the victim is entitled to sue the same defendant with a contractual action.

The principle seems to be embraced by case law only,¹⁹³ but certainly it looms large over the Romanian way of understanding the civil liability issues and at the same time it brings about an original attitude. The no-concurrence principle in Romania leads the national reporter to a sedulous perusal (one could even say: exploitation) of any contractual actions lurking in our hypotheticals. This seems to be the most important reason for which recoveries of pure economic loss under the tort law umbrella are very few in these lands. Indeed, according to the report, the only defendants exposed to extracontractual liability are the Credit rating institute (Case 7, where a contractual remedy against the lender seems available too) and the evidence spoliator (Case 8).

By contrast, Romanian judges might be inclined to allow a contractual recovery in the aforementioned hypothetical concerning the borrower’s credit record (Case 7), as well as in Case 4 (where the lessee can seek redress from the lessor), and Case 6 (the audited company being exposed to the contractual remedies of the investor). The other claims raised by our questionnaire are instead doomed to be unsuccessful – occasionally because the defendant’s behaviour is considered not to be negligent: Case 9; most of the times because a direct causal link is deemed to be missing: Cases 2, 3, 5 – or considered uncertain as in Case 1 (where the only solid ground available to the laid-off workers’ recovery seems to be a remedy hinged on labour law provisions).

2. Thus, on the whole, the friction between legislative façade and the practical outcomes can be seen, from the Carpathian mountains, as conducive to a conservative balance. This assumption is not due only to the sheer number of cases where compensation for pure economic loss is awarded. The main feature of the regime at issue resides, as in the other systems belonging to the same grouping, in a superimposed philosophy that strictly limits the access to recovery in tort.

¹⁹³ See Romanian Report, III, 1.2.

Compensation for pure economic loss in tort is therefore an exception and any remedy has to be found elsewhere in the system, either on the basis of specific statutory provisions or by an extended application of contractual rules. In this framework, the ‘non cumul’ principle seems indeed to be a key factor in keeping mutually apart the liberal appearances and the operational rules.

3.7.4. Poland: A Conservative Regime with a Unitary General Clause

1. Poland’s approach to this subject is proof once again that the formal shape of the civil law is no assurance of its actual approach to questions of pure economic loss. The Polish example is interesting because, as in Portugal, Romania and Austria,¹⁹⁴ we begin with a general clause (Art. 415 CC) modelled on the pattern of Article 1382 of the French Civil Code, which seemingly encompasses a seamless formula permitting adaptation to new needs and efficiently eliminating the risk of gaps in delictual protection. Nevertheless, Polish jurists have developed various devices, doctrines and arguments that restrict the reach of the provision and limit recovery of pure economic loss in ways comparable to those found in other conservative regimes. It is most interesting, however, that Poland achieves this balance without superimposing a set of ‘implied’ absolute rights on the tort general clause, as in the case of Portugal. It does not recognize the so-called contract with protective effects for third persons, as in Germany, and there is also no hierarchy of protected interests recognized under Art. 415 CC. Every patrimonial loss, including pure economic loss, is in principle subject to compensation. The principle of full compensation found in Art. 361 CC supports the same idea.

2. Polish jurists and legislators express their conservatism in a different way. First, and most importantly, the interpretation of the tort general clause is apparently animated by a shared consciousness concerning the danger of imposing excessive liability. There is a widespread feeling that the general clause, “if improperly applied”, could lead to excessive broadening of tort liability. Accordingly the legislature was prompted to build safeguards into the code to avoid this risk. Art. 361.1 CC is one of these limitations. It narrows the scope of liability by stating that one is liable to compensate only for the “normal consequences” of an act or omission. The principle of “normality of consequences”, which common lawyers may recognize as a legislative formulation of the principle of remoteness of damage, serves as a tool to keep liability for wide-ranging economic damage within reasonable limits. A second limitation derives from a bold reading of Art. 446 CC. This article provides that if an injured person dies, then certain persons – normally those related to the deceased – are entitled to

¹⁹⁴ On Austrian tort law system *see* Bussani & Palmer, *supra* note 5, pp. 152-54.

claim compensation for their own losses. Polish scholars and judges regard this provision as the exception that proves the existence of an opposite rule under the code, namely that Art. 446 is an exception to the rule that only the person *directly* injured by an act is entitled to make a claim for compensation. According to our national reporter, this means that the claims of persons injured only indirectly, namely *par ricochet*, may be categorically rejected, even when the damage is considered a “normal consequence” of the act of the tortfeasor.¹⁹⁵

3. These two tools are clamps upon causal indeterminacy. In some cases both apply and reinforce one another. Thus in the All Stars case (Case 2), relief was denied not only because the team was considered an indirect victim of the negligent act against its star player, but because the damages of the team were not considered a normal consequence for which the tortfeasor should be responsible. Thus it seems that to the extent that plaintiff’s injury is deemed to be indirect under Art. 446, his damage will appear to be more remote along the chain of consequences under Art. 361.1. In those cases where relief of pure economic loss would be clearly denied (Cases 1, 2 and 3), one or both of these reasons was the decisive ground. Even in cases where pure economic loss might be recovered (Cases 4 and 5), the Reporter suggests that the judge would need to requalify the plaintiff, not as an indirect victim (which might appear to be the case at first glance), but as the direct victim of the defendant’s act. Thus causal directness continues to set the dogmatic framework of the reasoning for both favourable and unfavourable outcomes.

3.8. Conclusion

In our survey of the liability regimes, we have attempted to set forth a coherent way of describing the various approaches of the legal systems to the issue of pure economic loss. What is then the answer to the question posed in the introduction to this chapter? The answer is that a common theoretical matrix of pure economic loss does not exist.

The ways of approaching the problem are multifarious. We find the issue absorbed within the mainstream of the general clause in the liberal regimes and, in some others, we find it driven by the fear of “liability in an indeterminate amount for an indeterminate time to an indeterminate class.”¹⁹⁶ This fear is, of course, managed through technical devices. These are, basically, the duty of care element in the pragmatic regimes, the unlawfulness requirement in the conservative systems – though some of these conservative regimes seek intense ‘lateral’ support to the recoverability of pure economic loss through contract law rules.

¹⁹⁵ See the same conclusions under a similar provision in Croatian law, *supra*, at section 3.5.6.

¹⁹⁶ *Ultramares Corp’n v. Touche* (1931) 255 NY 170 at p.179 per Cardozo CJ.

Comparative analysis, however, makes clear a further point. Our classification of the systems into liberal, pragmatic and conservative regimes is designed to provide a framework that the reader may use to understand how jurists of a particular country reason their way to solutions. These however are only façades, starting points, and not the end of the journey. Here our cautionary distinction between exterior appearances and operational interiors plays a capital role. We have seen that the façades are frequently deceptive edifices that conceal a complex theoretical substructure. Indeed, the usual way of approaching legal systems' notions and rules is strongly affected by what we can call the 'façade effect', that is to say, by a (covert or explicit)¹⁹⁷ set of assumptions which sometimes drive the observer far away from the actual rules and rationales one finds at work in the given legal system.

Therefore, without an in-depth factual analysis many of the actual questions raised by the pure economic loss issue are bound to receive either no answer or only a misleading one.

4. Summary and Survey of the Cases and Results

4.1. Introduction to the Summary

Our task is now to summarize and compare the results contained in the national reports. In order to give the reader a helpful overview, we have arranged the results in a series of charts, and at the end of the section we discuss a number of findings and make comparative comments based upon them. Chart I organizes the answers country by country, and we have continued to use the Liberal, Pragmatic and Conservative regimes as our ordering principle. Chart II compares two theories of relief, delictual and contractual, and shows the extent to which legal systems make recourse to contractual ideas as an alternative to tort. Here the countries are simply arranged by the degree to which they rely on these two grounds instead of the single ground of tort. Chart III breaks down the results for a number of widely-recognized paradigm cases (fitted to our taxonomy),¹⁹⁸ and once again the results are organized in terms of the Liberal, Pragmatic and Conservative regimes.

In compiling these results, we consciously followed a conservative way of interpreting the results. We placed the responses into one of three categories: Yes, No, and Problematical. A "yes" means that compensation for pure economic loss would be granted. (We also distinguished, however, between an affirmative grant of recovery in delict and recovery in contract or on some other basis). We consciously sought to minimize the dangers of our own editorial perspective in interpreting the results. Even so, it is difficult to eliminate all chance

¹⁹⁷ See Sacco, *supra* note 95, pp. 21-27.

¹⁹⁸ See section 2.4.

of misclassification on our part. Naturally we will submit our compilation to the country reporters for verification, but the reader will appreciate that measuring degrees of certainty and uncertainty is a somewhat hazardous enterprise on which reasonable minds may differ.

4.2. Three Comparative Charts¹⁹⁹

4.2.1. Chart I: Country-by-Country Comparisons

	Belgium	Canada	Croatia	England	France	Germany	Greece	Israel
Yes (delict)	1, 2, 4, 5, 6, 7, 8, 9	7, 8, 9	1, 3, 4, 6, 7, 9	7, 9	1, 2, 3, 4, 5, 7, 8, 9	4, 7	4, 5, 7, 8, 9	5, 9
Yes (contract)						2, 8, 9	2, 8	
Yes (statute)		5 (Ontario only)					6	7
No		1, 2, 3, 5, 6	2, 5, 8	1, 2, 3, 4, 5, 6, 8		1, 3, 5, 6	1	1, 2, 3, 8
Problematical	3	4			6		3	4, 6
	Japan	Poland	Portugal	Quebec	Romania	Spain	USA.	
Yes (delict)	3 (C.R. & M.T.), 4, 5, 6, 7, 8, 9	4, 6, 8, 9	4, 5, 7, 9	1, 5, 6, 7, 9	7, 8	1, 3, 4, 5, 6, 8	5, 6, 7, 9	
Yes (contract)	8, 9		8		4, 6, 7			
Yes (statute)		7			1			
No	1, 3 (B.)	1, 2, 3, 5	1, 2, 3	2, 8	2, 3, 5, 9	2, 7	1, 2, 3	
Problematical	2		6	3, 4		9	4, 8	

4.2.2. Chart II: Comparison of Type of Recovery

The following chart arranges the protection of pure economic loss along a contract/delict spectrum. It tabulates the recoveries of pure economic loss (the “Yes” responses) in the conceptual language used by each system. The ½ sign refers to cases where the recovery can be attained both in tort and contract.

Recoveries by:	Belgium	Canada	Croatia	England	France	Germany	Greece	Israel
Contract	-	-	-		-	3	1 ½	-
Statute or other ground	-	1 (Ontario only)	-		-			1
Delict	8	3	6	2	8	2	4 ½	2
Recoveries by:	Japan	Poland	Portugal	Quebec	Romania	Spain	USA	
Contract	1 ½	-	1	-	2 ½	-		
Statute or other ground		1						
Delict	6 ½	4	4	5	1 ½	6	4	

¹⁹⁹ In the following charts Case numbers can be read as follows: Case 1, ‘A Cable Case: The Laid-off Workers’; Case 2, ‘The Injured Key-Player’; Case 3, ‘The Infected Animal’; Case 4, ‘The Cancelled Cruise’; Case 5, ‘The Dutiful Spouse’; Case 6, ‘Auditor’s Liability’; Case 7, ‘A Ruined Credit’; Case 8, ‘Spoliation of Evidence’; Case 9, ‘The Pension Scheme’. As to Japan, C.R. means cattle raisers, M.T. market traders and B. butchers, in Case 3 (The Infected Animal).

4.2.3. Chart III: Broadly Recognized Fact Patterns

	Liberal regimes (Belgium, Croatia, France, Greece, Japan, Quebec, Spain)	Pragmatic regimes (Canada, England, Israel, USA)	Conservative regimes (Germany, Poland, Portugal, Romania)
<i>Ricochet Loss</i>			
Cable Case	5-Yes (Greece and Japan: No)	4-No	4-No
Injured Key- Player	3-Yes (Croatia, Quebec, Spain: No – Japan: Problematical)	4-No	4-No
Evidence Spoliation	5-Yes (Croatia and Quebec: No)	2-No (Canada: Yes; USA: Problematical)	4-Yes
<i>Transferred Loss</i>			
The Dutiful Spouse	6-Yes (Croatia: No)	2-No (Israel and USA: Yes)	3-No (Portugal: Yes)
<i>Professional Services</i>			
The Pension Scheme	7-Yes	4-Yes	3-Yes (Romania: No)
A Ruined Credit	6-Yes (Spain: No)	4-Yes	4-Yes
Auditor's Liability	6-Yes (France: Problematical)	USA: Yes; Canada and England: No; Israel: Problematical	Germany: No Poland and Romania: Yes; Portugal: Problematical
<i>Closure of the Public Markets</i>			
The Infected Animal	5-Yes (Belgium and Quebec: Problematical)	4-No	4-No

4.3. Reappraising the Divides

The above comparisons bring to light a number of insights. The first is that the recoverability of pure economic loss cannot be approached in terms of some distinctive trait or characteristic of the “legal families” of Western world. The question is simply not a civil law versus common law issue. It is evident to us that common law countries, mixed jurisdictions and some civil law countries all share similar concerns about the danger of excessive liability entailed by this form of damage. The issue is the subject of thriving debate, case law development and doctrinal writings within each family, though not necessarily within every system.²⁰⁰ The approach of the conservative civilian regimes and the common law as well simply contrasts with the liberalism of certain civilian countries like France and Belgium where the protection of economic loss is widespread and the issue is barely recognized. Belgium and France permit delictual recoveries in eight cases, but in Germany the number is only two. Croatia allows delictual recovery six times, Israel only two times. Japan grants recovery in seven cases, as compared to three in Canada. If any split is to be recognized,

²⁰⁰ Thus we respectfully disagree with Professor Van Dunné’s recent assertion that this issue reflects a ‘civil law-common law split’ or a ‘true Continental Divide’ (J. van Dunné, *Liability for Pure Economic Loss: Rule or Exception? A Comparatist’s View of the Civil Law-Common Law Split on Compensation of Non-physical Damage in Tort Law*, 4 *European Review of Private Law* 397, 399 (1999)). If we look at the results shown by Chart One, this conclusion is hardly tenable.

it would appear, in our view, to lie between those countries which have an overt system of protected (vs. *unprotected*) interests (such as Germany) and those which do not.²⁰¹ It is this criterion which seems to underlie differences within the civilian camp and which draws English law conceptually closer to German law. And metalegal disagreements, not surface methodological differences, are the primary sources of a system of protected interests.

These divergent patterns are seen most clearly in some of the more famous cases of pure economic loss. As Chart III indicates, the results from *Cable Case* are nearly evenly divided. Five liberal regimes would allow recovery of the loss, but all conservative and pragmatic regimes would deny it. In the Case of *The Dutiful Spouse*, a similar split occurs, 9 yes, 6 no. In the *Injured Key-Player* type of case, the split widens to 3 yes, 11 no: while three liberal regimes are positive on recovery all four pragmatic and three conservative systems are against a remedy. Once again we would emphasize that these results do not correspond to an alleged common law/civil law divide. They are better described as a political divide over the appropriate areas or situations where this interest should receive selective protection. The picture is of course not simply one of divergence. In some selective areas the results point to a consensus. Widespread agreement exists with respect to certain paradigm cases. In both *The Pension Scheme* and *The Ruined Credit* cases there is virtual unanimity in favor of the plaintiff's recovery of his/her financial loss: fourteen jurisdictions indicate yes. In the case of the *The Infected Animal*, the consensus takes the opposite tack: all the pragmatic and conservative regimes oppose relief, while five liberal systems would permit it and two (Belgium and Quebec) regard it as problematical. These selective areas of consensus confound claims of a polarization of legal systems along the common law/civil law lines. A realistic map of pure economic loss law must be more detailed and nuanced than some could have supposed.

4.4. Certainty vs Uncertainty

A second point of interest in the above charts concerns the degree of legal certainty in the answers. For example, the German system reported no problematical case, Quebec and Israeli report produced two, while France and Spain yielded one each. We therefore wonder whether greater predictability and certainty (less indeterminacy) about pure economic loss seems to be characteristic of the conservative regimes and whether there is any discernible trend in the results yielded by the liberal or pragmatic regimes. As interesting as the question is, we do not think this evidence leads to any valid generalization. The reasons for those patterns can

²⁰¹ See Banakas, *supra* note 105. See also K. Lipstein, *Protected Interests in the Law of Torts*, 1962-63 *Camb. L.J.* 85.

be manifold. They may stem from a variety of accidental factors, including the cautiousness of the reporter or the evolutionary stage of the question in a particular country or the variable interplay of legal formants tackling the issue within the same system.²⁰²

Of course one could question whether legal certainty of the above kind is a real asset – not only for loss bearers in our societies,²⁰³ but also in relation to the perennial need of any legal system to continue to develop new solutions that fulfill the demands of law-users. These questions, however, involve the eternal debate about the proper balance between flexibility and predictability in the law²⁰⁴ (as well as between uniformity and diversity of the law, in a supra-national context)²⁰⁵ and might well be seen as a research issue far beyond the boundaries of our present study.

5. General Conclusions of the Study

5.1. Irrelevance of Legal Families

The question of the recoverability of pure economic loss is a generic question for all legal systems. As we pointed out earlier, it is not just a civil law versus common law issue. Civil law countries are found amongst the liberal, pragmatic and conservative regimes, and thus to the extent that Western landscape is divided, the civil law countries are themselves divided, not *from* the common law, but *along with* the common law. An important question is how to understand the various differences and similarities between these systems, and whether there is any common-core of agreement on this question, but this will have little to do with the ‘legal families’ in which they happen to be placed.

²⁰² For instance, to say in a given case that the solution is not problematic in France perhaps places no stress upon the existence of covert means by which the *juges du fond* may render an adverse or surprising judgment. A different observer might have chosen to underscore the problematical side instead of giving an affirmative answer “in principle.” Further, the jurisprudence and/or a strand of doctrine in one jurisdiction may point to opposite outcomes (competing formants) or the precise hypothetical situation may not have been previously treated with as much clarity as in another jurisdiction.

²⁰³ One could question the influence that some social and economic factors may have on the flowering of this issue in recent years. C. von Bar (*supra* note 7, pp. 99, 108) underlines the fact “that the wealth of modern men consists more and more of ‘pure economic interests’” and that “in our modern economy there always exists the possibility of re-acquisition, with the result that the distinction between ownership (meaning the interest in preserving individual tangible objects) and money (representing the possibility of acquiring ownership) has lost some of its importance” (emphasis added).

²⁰⁴ It would not be possible to mention the great number of reference works on this subject. *See*, however, as to the different legal traditions, R. v. Jhering, *Der Zweck im Recht* (1877); A. Hägerström, *Das Prinzip der Wissenschaft. Eine logisch-erkenntnistheoretische Untersuchung. I. Die Realität* (1908); F. Gény, *Méthode d’interprétation et sources en droit privé positif* (2nd ed., 1919); R. Pound, *The Spirit of Common Law* (1921).

²⁰⁵ *See* R. Sacco, *La diversité des droits*, in P. Cerami (Ed.), *Mélanges en l’honneur de C.A. Cannata* 411 s. (1999); A. T. von Mehren, *The U.S. Legal System: Between the Common Law and Civil Law Traditions*, in Centro di studi e ricerche di diritto comparato e straniero (Ed.), *Saggi e conferenze* 40 (2000); M. Bussani, *The Contract Law Codification Process in Europe: Policies, Targets and Time Dimensions*, in S. Grundmann & J. Stuyck (Eds.), *An Academic Green Paper on European Contract Law* 176 (2002).

5.2. Absence of Methodological Consensus

Clearly it is more difficult to find a common set of principles or a common set of methods when we limit our horizons to the field of tort alone. Comparisons focused solely upon tort rules and structures have a tendency to highlight (to exaggerate?) the structural and technical diversities, rather than commonalities between these systems. Anyone who collects general impressions through the monocle of tort will of course notice that Liberal regimes permit recovery far more frequently than Conservative regimes (*e.g.* France and Belgium 8 recoveries, compared to German and Israel 2 times).

Methodologically speaking, the tort scene strikes us as diverse and unsettled. Our research reveals that four principal methodologies dominate the European landscape, and though some countries resort to more than one of these methods (thus adding to the complexity) generally each has one characteristic means of dealing with the issue of pure economic loss.²⁰⁶ Thus the compensation issue may be left to (1) flexible causal determinations (the characteristic method found in the Liberal Regimes) (2) preliminary judicial screening using a “duty of care” analysis (the approach particularly prominent in all the pragmatic regimes) (3) recourse (in Croatia and Poland) to causation techniques aiming to exclude “third party loss” and (4) a scheme of absolute rights that, by deliberate omission, leaves this interest unprotected (the approach of Germany and Portugal). Perhaps a simpler way to summarize all this methodological diversity is to remember the initial point of departure. The liberal regimes rely upon general clauses and start from an inclusive position, the conservative regimes impose a limited listing of protected interests and start from an exclusionary position. The first group allows recovery *in principle*, the second denies it *on principle*. One grants recoveries through tort actions, the other must deny relief in tort if it cannot find an exception, and failing that, it must turn to paracontractual actions like contracts with protective effects for third parties. Indeed the resort to contractual actions as a means of overcoming the narrowness of tort protection reveals still another methodological split: Some countries deal with this issue solely in tort while others rely heavily on flexible contractual devices to palliate the sternness of their tort approach. The German courts would allow contractual recoveries of pure economic loss in about thirty per cent of our hypotheticals, which surpasses the recoveries that the BGB permits in tort.²⁰⁷ In this same vein we have already seen that formal structures and legal jargon are sometimes façades which hide a deeper reality and no great reliance should be placed upon them. German and French law may appear to have radically opposed starting

²⁰⁶ These four methods are discussed under the Editors’ Comparative Comments to Case 2 (Cable II - Factory Shutdown), *in* Bussani & Palmer, *supra* note 5, pp. 205-207.

²⁰⁷ See Chart II above, for a comparison of contractual and delictual bases of recovery.

points, but in both countries the practice of the courts seems to adopt a more intermediate position.²⁰⁸ All in all, it is fair to conclude that there is no *methodological* consistency that can be suggested by this research.

5.3. Awareness of the Time Factor

Furthermore, any general assessment of common tendencies in legal systems must take into account the factor of time. The attentive reader will have noticed that national attitudes toward pure economic loss are not always stable. Indeed some recent developments should serve as a warning that we could be describing a “provisional” picture in which some positions are still evolving and changing. As the Canadian report reminds us “Divergences between [Canadian and English] tort law began to appear in the 1960s and have steadily gained in importance. Nowhere is the distinction between Canadian common law and English law more marked today than in the courts’ approach to pure economic loss.” Likewise, as we learned from our prior study, in the past forty years Italy in effect changed its stripes from a system of ‘protected interests’ to a general clause system. Within that same period England and Scotland admitted as many as five exceptions to the rule of no recovery. If we take an even longer view we may note that France abandoned in the 20th century a more restrictive attitude that had been current throughout the previous century (based in an unlawfulness conception) in order to match more closely its codistic liberal façade.²⁰⁹ Moving along an opposite path, Austrian history shows a departure from the liberal façade of the ABGB in the second half of the 19th century, and since then its legal system has been accepting bodily German doctrinal thought on pure economic loss together with the usual justifications for its control.²¹⁰ Our point is simply that legal positions have not stood still and some have abruptly changed and may change again. Old, and even current, snapshots of the law, therefore, may be of limited utility in determining the existence or non-existence of a reliable picture.

5.4. The Substantive Picture

Having concluded that methodological consensus does not exist, we now consider to what extent there is any substantive agreement on pure economic loss.

Whether there is a core of principles governing pure economic loss, however, could depend to a large extent upon our instinctual reformulation of the question by our national traditions and cultures. Yet comparative law, if it teaches anything, teaches us to resist this. Culture

²⁰⁸ Zweigert & Kötz, *supra* note 3, p. 628.

²⁰⁹ This historical turnabout is discussed in Bussani & Palmer, *supra* note 5, Part One, Chapter V, n. 5 (i).

²¹⁰ See in Bussani & Palmer, *supra* note 5, Part One, Chapter V, n. 6 (ii) the discussion of Austria’s “massive interior transplant.”

and tradition have summary ways of telling us to which field this question belongs (tort or contract?) and thus may project a prejudice about its proper resolution and the coherence or incoherence of national solutions. To those who believe that pure economic loss is the natural preserve of tort, there may be little consensus. But to those who would say that it is the natural preserve of contract we think there will appear to be even less. Our comparative and fact-based approach to the question makes us skeptical of these labels. The issue is situated at the frontier of the law of obligations where there is both tort and contract, or where tort behaves like contract and contract behaves like tort. We believe that the issue can be discussed except in factual terms.

This discussion requires us to weigh in the balance the degree of agreement on three subjects: (a) consequential economic loss, (b) intentionally caused economic loss, and (c) the selective protection of negligently caused economic loss. In the aggregate these elements will permit us to see the contours of a ‘limited convergence’ on pure economic loss.

- (a) *Consequential Loss*. We have already highlighted that if economic loss is connected to the slightest damage to person or property of the plaintiff the whole may be recuperated without question – provided that all the other requirements for the action to be successful are met.²¹¹ This ‘parasitic’ loss is recoverable because it presupposes the existence of physical harm to the victim, whereas pure economic loss strikes the victim’s wallet and nothing else. Consequential loss of this kind is protected in every system within this study and can be seen as one area of substantive agreement, but this generalization must be qualified in two senses. Firstly, we are really saying that consequential loss can be unobjectionably recovered both in those countries that recognize such distinctions and in those countries that do not. The common result, therefore, is entirely distinct from the diverse reasoning which produces it. Secondly, while consequential economic loss is protected in principle in those countries that have an exclusionary rule, still the scope attributed to this causal notion varies significantly within those countries and produces some non-uniform applications.²¹²
- (b) *Intentional Harm*. Here is an additional building block to the common core. All systems agree that intentionally inflicted pure economic loss is recoverable in circumstances where the conduct in question is regarded as culpable, immoral or contrary to public policy. To be sure, in this kind of cases it may not always be easy for the plaintiff to satisfy the burden of proof (though this may be reduced somewhat by the broad meaning given in some systems to the “intention” element), but it is significant from the comparative point of view that the shift to higher degree of culpability is sufficient reason to impose liability in all systems.
- (c) *Key Areas of Selective Protection*. Earlier we noted several important areas of substantive divergence where no common position appears to exist, but we also pointed out, as an alternative perspective, that pure economic loss could also be seen as selectively protected across Europe. To see the subject as selectively protected is to acknowledge that there exist pockets of “privileged” loss-types in the conservative and pragmatic countries where compensation is awarded. When these isolated recoveries are joined to the corresponding awards in the more liberal countries, a kind of ‘limited convergence’ for negligently caused economic loss stands in relief. Admittedly this type of ‘limited convergence’ may seem like an artificial construct that focuses upon results alone to the exclusion of

²¹¹ Of course courts theoretically have a range of analytical devices at their disposal to exonerate the defendant from liability for consequential economic loss, *e.g.*: the act was not a breach of duty, the damage was too remote, or the plaintiff had voluntarily assumed the risk. But what is worth noting is the attitudinal change that comes over the judge once the economic loss is causally connected to plaintiff’s own physical harm. The importance the legal systems place on physical security from careless acts is so well recognised and accepted that courts rarely feel the need to justify or explain.

²¹² For full details, *see* the analysis in Editors’ Comparative Comments to Case 1 (Cable I – The Blackout), *in* Bussani & Palmer, *supra* note 5, pp. 189-91.

the differentiating methods and theories by which those results were reached. Yet, as stated earlier, it is in keeping with the nature of our fact-based inquiry to look behind cultural-linguistic obstacles in order to compare national solutions. In penetrating to this level, we have uncovered three areas where substantive consensus exists.

The first is when plaintiff's loss is due to negligently performed professional services. There is widespread agreement that the Auditor in Case 6, the Credit Rating Institute in Case 7, and the Insurance Broker in Case 9, will be responsible for the economic losses of some persons (beyond their clients) with whom they had no contractual tie. Although there may be specific requirements that must be met in some systems that others do not clearly impose (for example, English emphasis upon showing the "reliance" of the third party) still it seems fair to say that in many situations (provided indeterminate and excessive liability is excluded) plaintiffs may recover losses caused by negligent professionals regardless of the general features and traditions of a given tort law system. This seems to reflect the collective view that a high standard of professional services can and ought to be maintained.²¹³

A second area of agreement exists in the area of compensation for "transferred" economic loss.²¹⁴ This agreement undoubtedly arises because jurists in both liberal and conservative countries have recognized that transferred loss is liability neutral from a tortfeasor perspective and whatever difficulties it poses are more of a technical nature than of policy or equity. Thus in the case of the Canceled Cruise (Case 4) the ship's lessee essentially claims the loss of profits that might have equally been lost by the ship's owner had he or she seen fit to operate the boat in the cruise business instead of leasing it for that purpose. Nine countries, including three conservative regimes which, as we know, do not generally protect pure economic loss in tort, would protect the economic interest of the ship's lessee in these circumstances. A majority of the countries would also compensate the Dutiful Spouse (Case 5) for the reasonable value of the care she rendered to her injured husband. Since all countries in this study agree that a husband who receives physical injuries may seek compensation not only for his injuries but for the reasonable cost of health care services, it is clear that the wife's claim can be seen as the transferred loss of the husband. Nine countries, including one conservative regime, would protect the economic claims of the wife in these circumstances.

These results suggest to us that perhaps all cases of transferred loss form part of a 'limited convergence'.

The third and last area of substantive agreement involves an interesting example of ricochet loss. Ten jurisdictions, and conservative regimes all figure in this list, would grant

²¹³ We referred to this policy in our Editors' Comparative Comments to Cases 14 (Poor Legal Services), 17 (Auditor's Liability) and 20 (An Anonymous Telephone Call), in Bussani & Palmer, *supra* note 5, pp. 417, 471, 519.

²¹⁴ The reader will recall that we have previously defined and classified "transferred loss" in our Introduction.

relief in the case of *Evidence Spoliations*. As we noted earlier, these results are surely influenced by the absence, in these fact situations, of any spectre of indeterminate or widespread liability.

5.5. Summary on the ‘Limited Convergence’

When we step back from the tableau of conclusions presented above, we think that the general contours of agreement and disagreement may be discerned. On the one hand, it is clear that the legal systems under review are particularly divided over methodology, theories of relief, and causes of action. There is no methodological consensus, for the systems retain their distinctive façades and their characteristic ways of controlling or regulating the issue. Further, and now approaching the question at a more substantive level, legal systems are also split over the outcomes that should occur in a number of loss situations. Here it is apparent that metalegal factors, such as the floodgates, philosophical values and historical conservatism, drive the outcomes. On the other hand, we have attempted to show that a ‘limited’ convergence deserves to be recognized at the substantive level. As just seen, jurisdictions at issue basically agree to the recoverability of consequential loss, intentionally caused loss, and losses due to negligent professional services, transferred losses, and perhaps in other circumstances where the risk of indeterminate liability is under control. These are the contours of selective protection. While financial interests are not as comprehensively protected as other interests, there is indeed a considerable frame of protection. Across façades, regimes and traditions, pure economic loss is recoverable whenever the latter is a direct consequence of the infringement of a right or of an interest that the legal system means to protect. If we judge by developments of the past forty years, this frame has been increasing and is likely to continue to grow.

The Questionnaire

Case 1 – A Cable Case: The Laid-off Workers

While maneuvering his mechanical excavator, an employee of the Holly road works company cut the cable belonging to the public utility which delivers electricity to the Black factory. The unexpected black-out causes the loss of two days of production. Black has to lay off a number of workers hired on a day-to-day basis. These workers are now claiming compensation from the Holly road works company for the loss of two days’ pay.

Case 2 – The Injured Key-Player

Thomas is pivot in the All-Stars basketball team. A few days before the end of the championship, Thomas is hit by a car and unable to play for three months. In the absence of its best player, the team (until then at the top of the league standings) drops to fourth place. This results in considerable losses for the team owners. Can the All-Stars recover against the car driver?

Case 3 – The Infected Animal

A cattle raiser allowed an infected animal to escape from his premises. The escape of the infected animal obliged the authorities to close the cattle and meat market for ten days. The cattle raiser is being sued by:

- (a) other cattle raisers who for ten days have not been able to sell their cattle;
- (b) the market traders who have lost their supplies; and
- (c) the butchers who during this time have not been able to conduct their business.

Case 4 – The Cancelled Cruise

A collision prevented a passenger liner from sailing for a month. The Shipwreck Company, which had leased the ship, was forced to cancel two cruises in the Caribbean. Shipwreck sued those responsible for the collision, claiming compensation for its expenses uselessly incurred prior to the collision, and for its loss of earnings due to cancellation of the two cruises.

Case 5 – The Dutiful Spouse

A man was seriously injured and confined to bed for two months, during which time he was entirely unable to look after himself. His wife, who owns and runs a small shop, was forced to close her business while she looked after her husband. She is now suing the perpetrator of the accident for loss of earnings during the period of her enforced idleness.

Case 6 – Auditor's Liability

Donna audits the accounts of Caterpillar, Inc. inaccurately. Paul relies on these published accounts to launch a take-over bid. This is successful but Paul then discovers that the accounts overestimated the value of the company and that the price Paul paid per share was twice its actual value.

Case 7 – Ruined Credit

Dieter, the owner of a small business, has a long-standing agreement with First National Bank. One day, Credit Inc., a credit rating institute, receives an anonymous phone call that Dieter's business is about to go Bankrupt. Credit, Inc. makes no further inquiry and thus does not learn that the allegation is totally unfounded. Instead, Credit Inc. calls First National Bank and reports the information. First National Bank immediately cancels all of Dieter's loans. As a result, Dieter suffers economic damages. He now sues Credit Inc. to recover his loss.

Case 8 – Evidence Spoliation

Nicholas was driving an Alfa Romeo GT automobile rented to him by RAC when he was involved in a head-on collision with another automobile. The engine of the rented vehicle intruded into the passenger compartment causing severe and permanent injuries. Following the collision, RAC took possession of the wrecked automobile and informed Nicholas that the car would be held for sixty days awaiting his inspection. Prior to that time, however, a RAC employee severed the front of the car and removed the engine. The severing of the car made it impossible to determine within a reasonable degree of certainty whether or not the vehicle had design, manufacturing and/or maintenance defects which proximately caused Nicholas' injuries.

Nicholas sues RAC for negligent spoliation of the evidence and tortious interference with a prospective civil action against Alfa Romeo.

Case 9 – The Pension Scheme

Mr Smith became an employee of ALPHA, as an account manager, having previously been employed by OMEGA and, while so employed, was a member of their occupational pension scheme. He was told by ALPHA that he was eligible to join the ALPHA occupational pension scheme. As an employee, he would, unless he wished to opt out, be automatically joined to the scheme and deductions will be taken from his first salary payment. Before making up his mind, Mr Smith contacts an Insurance Broker. Based upon a careless reading of the materials provided, the Broker vaunts the economic virtues and performances of OMEGA Pension Fund ("OPF") and suggests that Mr Smith should opt out of the ALPHA scheme and stay in the OPF scheme, which he in fact did.

On Mr Smith's death, Mrs Smith, his widow, finds out that payments from OPF are 100,000 Euro less than what she would have received from ALPHA. Mrs Smith sues the Broker.

Cite as: Vernon Valentine Palmer & Mauro Bussani, *Pure Economic Loss: The Ways to Recovery*, vol. 11.3 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (December 2007), <<http://www.ejcl.org/113/article113-9.pdf>>.