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*

Abstract: *In tort law 'pure economic loss', in the absence of physical damage caused to the plaintiff, is a complicated concept, and liability is difficult to establish (eg false information, negligent services, or 'cable' cases). Under civil law liability is accepted in principle, although with exceptions, whereas in common law this kind of damage traditionally is rejected, and accepted in exceptional cases only. This situation, however, is changing rapidly in the former British dominions. The discussion includes policy issues, such as the 'floodgates' argument and the modern use of old concepts as negligence and causation.*

Resumé: *En droit de la responsabilité, la notion de dommage purement économique, en l'absence de préjudice corporel subi par la victime, est une notion complexe pour laquelle la responsabilité est difficile à établir. Les systèmes de droit civil l'admettent généralement, sous réserve de certaines exceptions, tandis qu'en common law ce type de dommage est traditionnellement rejeté, hormis dans certains cas exceptionnels. Cette situation est cependant en train de changer rapidement dans les anciennes colonies britanniques.*

Zusammenfassung: *lm Deliktsrecht ist der Begriff 'reiner Vermogensschaden' - ohne dem Kläger zugefügten physischen Schaden - kompliziert, und eine Haftung ist schwierig begründbar (Z.B. falsche Information, Vernachlässigung von Pflichten, oder 'Kabel'-Fälle). Im Bereich des Zivilrechts ist die Haftung im Grundsatz - wenn auch mit Ausnahmen - akzeptiert, während im Bereich des Common Law diese Art von Schadensersatz traditionell abgelehnt und nur in Ausnahmefallen bejaht wird. Gleichwohl verändert sich dieser Rechtszustand zur Zeit rapide in den früheren britischen Herrschaftsgebieten.*

* *European Review of Private Law*, 1999 (4), p. 397-428.

Die Diskussion umfaßt grundsatzliche Fragestellungen wie das 'floodgates'-Argument und die heutige Anwendung von hergebrachten Konzepten wie Fahrlässigkeit und Kausalität. [398]

I. Introduction. The Mapping of Pure Economic Loss**

1. There are few subjects in private law which are a better topic for a comparison of law than the present one, *pure economic loss* (*'reine Vermogensschaden', 'dommage économique pur', 'zuivere vermogensschade'*). The acceptance of this legal phenomenon to a large extent depends on the jurisdiction concerned and it furthermore shows a wide divergence in its application: completely accepted and a common ground for compensation in some countries, and hardly ever accepted in others, with as ever, the in-betweens. Whatever the choice that is made in the law of a specific country, the exceptions to the rule *pro* or *contra* pure economic loss usually are the stakes of legal battle in litigation and doctrine, in some areas producing a vast amount of literature and case law.

Before embarking upon this fascinating subject, a brief indication of the contents of our topic is needed, to be elaborated later. We are dealing here with a compensation of the loss concerned that is sought in *tort;* in the neighbouring field of *contract*, however, the issue of pure economic loss generally is not controversial. The Roman maxim of *damnum emergens, lucrum cessans* (compensation of damage incurred, and lost profit) has left its mark here (compare for instance: Article 1149 French Code civil).

Tort, therefore, is our domain; in that field cases of *physical damage* to tangible property or life and limb for our purpose are excluded; here the plaintiff may claim 'consequential damages' caused by the harmful event which constitutes a tort, such as decline of value, loss of profits, earnings, etc. Nonetheless, economic loss is involved here; these matters, however, are dealt with in the context of the doctrines of causation and damage assessment. In that area of law, 'economic' loss commonly is seen as an integral part of the concepts of damage and causation, and subjected to the intricacies of these highly complex notions.

What makes economic loss *pure*, is the lack of physical damage to the plaintiffs property or person that caused consequential damage of an intangible nature. However, physical damage not necessarily is non-existent in pure economic loss cases: it may well be that *another person* incurred such damage, in tort or contract, whereas the loss was suffered (mainly) by the plaintiff, who, as a third person, was not involved directly in the relation of the parties causing and receiving the harm, respectively. There may be a link between the plaintiff and the party harmed, contractual or otherwise, as a *third-party beneficiary*, or 'intended beneficiary', but he also may be unconnected to that party, only having a com-

** This article is the General Report dealing with this topic, written for the 1998 Bristol congress of the International Academy of Comparative Law; it is based on the National Reports of a dozen countries, of both civil law and common law jurisdiction. Publication of all Reports is planned after a September 1999 Symposium held in Rotterdam, in a book on this subject, edited by the author. In this article reference to sources in the countries discussed is kept brief and incidental, since the full presentation of the comparison of law will be available in due course.

mercial or financial interest in the matter.

[399] This being said, the temperature of abstraction is rising ominously, I realise, and although in the comparative setting in which we presently are, this common academic disease is not looked upon as cynically as is the case in circles of Bar and Bench - not to mention Industry - I think it will be instructive, especially for the non-specialist reader, to give some archetypical examples of pure economic loss, as accepted by courts around the globe. This 'global' presentation, in both senses of the word, only serves as an appetiser; later on we will go into the categories represented by the cases that are mentioned here by way of illustration.

a. False information
Defendant, a sworn appraiser, had issued a certificate of valuation to P., valuing P.'s land at L. 4.500. The inspection was conducted negligently, an area with roads running across the property had not been taken into account. The true value of the land was at most L. 390. On the basis of the valuation P. had borrowed money from the plaintiff, in the sum of L. 1.450, secured by a mortgage. P. subsequently went insolvent and the security proved worthless. Plaintiff sued defendant for the amount of the loan he was unable to recover from P.'s insolvent estate, with success.
(*Perlman v Zoutendyk*, South Africa, 1934)

b. Defective services
The defendant solicitor had negligently delayed in preparing a will for his client; when the latter died, before the new will could be executed, the plaintiff lost the benefit she would have received under it. Her claim was admitted by the court.
(*White v Jones*, UK, 1993)

c. Relational cases
Defendants had caused an oil spill in the course of drilling operations off the California coast. Plaintiffs, a group of commercial fishermen, sought recovery for their loss of profits as a result of the oil spill, due to the diminution of the aquatic life in the Santa Barbara Channel area. The fishermen were allowed to recover their lost profits from defendants.
(*Union Oil* v *Oppen*, U.S.A., 1974).

2. I would like to return to the jurisdictional divide mentioned earlier: countries where pure economic loss is accepted as a matter of course on the one hand, and countries where it is rejected with comparable self-evidence, on the other hand. Interestingly enough, the divide is to be found along the civil law - common law split: pure economic loss is common in civil law, but uncommon in common law, not to say despised by the courts. Therefore, it is a true Continental Divide.

The one extreme is French law, of which the National Reporter has remarked, in his opening sentence: 'Ce thème est particulièrement difficile à traiter on même concevoir, pour un juriste français, car celui-ci, a priori, ne connaît ni le problème, ni même l'expression!'

[400] At the other end of the scale we find the law of the UK and the U.S.A., where the basic principle is that economic loss is not recoverable. This no-liability rule, however, is not without important exceptions.

Between these extremes of laissez-faire, laissez-aller on the one hand, and

open hostility on the other hand, mid-way there is an example of restricted use of pure economic loss in German law, and some related jurisdictions in the Germanic tradition. Compensation of pure economic loss is excluded in the regulation of tort in the German Civil code, unless the behaviour is intentionally *contra bonos mores*, which in practice is hard to establish. Exceptions to the general rule of no-liability, however, are thriving, be it along the line of extension of the concept of 'rights' or the use of contractual liability, construed as an ancillary duty of care, a kind of collateral obligation, which allows the application of contract law rules to compensate pure economic loss.

The jurisdictions reported (and unreported) in the course of the IACL conference can be placed along the above scale, at one of the extremes or somewhere in the middle. Not surprisingly, they can be grouped around the core jurisdictions mentioned before: French Code civil related jurisdictions (Western continental systems), common law systems inspired by the English and American approach, and finally Germanic jurisdictions comparable to the German Civil code (Eastern continental systems). As ever, no comparison goes on all fours: South-African law, for example, in its Roman-Dutch law based upon the Lex Aquilia - the corner stone of Western continental law - in its orientation of the last decades is directed at English law (the links with Dutch law being severed during the Apartheid regime in that period, it may be noted).

Incidentally, South-African law serves as a good example of a *caveat* that should be made in advance: in many legal systems the uncertainty as to what the state of the law is regarding pure economic loss is manifest.

The common law world in recent years has fallen apart in regard to the approach to pure economic loss; the firm denial of compensation of such damage in tort by the House of Lords, culminating in *Murphy* in 1990, a case concerning defective building and third party interests, has found no following in Commonwealth countries.[1] With its hostile approach to pure economic loss by the courts, the UK increasingly is getting into an isolated position, in which it is joined, incidentally, by the American courts, in most States.

In my survey of pure economic loss in the national laws reported, I will use the division of the three 'Families of Law' discussed: the French/Western continental system, the German/Eastern continental system, and the Common law system. *'Ordnung muss sein'*, which asks for hard measures; in some instances there may be legitimate hesitation whether the law of a country could be assigned to a certain Family of Law. In that respect, I ask for pardon beforehand; however, some comfort may be found in the idea that all families have rather peculiar members in their ranks, which usually remain at a certain distance and therefore are unfamiliar to the others, not to speak of the black sheep of the family which are simply [401] ignored. It perhaps is even more comforting to realise that some families are so big, that one cannot know all its members well, and as a consequence some of them are neglected. This image may be more accurate in the sphere of legal families, but, it is submitted, it cannot serve as an excuse to the comparative lawyer.

Be that as it may, this General Report is written along the following Family lines, which may also serve as a tableau de la troupe:

A. Eastern continental law: the laws of Germany, Switzerland, Austria and

[1] *Murphy v Brentwood District Council*, (1990) 2 *All ER* 908 HL.

Finland.

B. Western continental law: the laws of France, Italy, Netherlands, Poland, and South Africa.

C. Common law: the laws of the UK (with references to the laws of Commonwealth countries, not reported), United States and Israel.

3. Before going into the presentation of family pictures, some further introductory remarks. In some countries pure economic loss in certain areas of the law is accepted, but based on special laws. Sometimes statutory law is involved indirectly, since it may give rise to a norm of behaviour, the infringement of which can be qualified as a tort *(eg* criminal law). Instances of such cases were reported in several jurisdictions, however, they are not part of the main theme of pure economic loss: its acceptance by the courts in tort law, the law of negligence. Therefore, they will not go unnoticed, but will play only a minor role in this survey.

Another aspect of our topic that should be mentioned, is the attention it is getting the common law world, with a central position for English case law. A considerable number of articles have appeared in law reviews, several books have been published advocating a number of views. To a large extent, the source of this academic abundance must be found in the uncertainty and confusion raised by the jurisprudence of the House of Lords, with the case of *Murphy* as its peak. Emotions are getting involved in the debate, and are getting high, even to continental standards. What to think of the following titles of law review articles that have appeared in the last few years:

'A Requiem for Anns' (by John Fleming); 'Negligence after Murphy: Time to Re-think' (by David Howarth); 'The Random Element of their Lordships' Infallible Judgment: An Economic and Comparative Analysis of the Tort of Negligence from Anns to Murphy' (by Markesinis and Deakin).[2] The last authors are not [402] withholding their criticism in their discussion of the House of Lords' recent decisions in this field:

> Yet, arguably, the most disturbing feature of these rich pronouncements is not so much that they display a change of heart but an unsystematic and not fully thought-out series of shifts without proper regard to what was said earlier or what may follow in the future (at p. 620).

And what to think of Howarth's comment on the use of the concept of 'proximity' by the House of Lords in pure economic loss cases?:

> 'What the "proximity" concept and analogical reasoning have in common is that they both allow judges to avoid committing themselves. Since nobody can say what "proximity" means, it can be asserted in every case to require whatever result is

[2] See, respectively: 106 *LQR (Law Quarterly Review)* (1990), 525; 50 *Cambridge Law Journal* (1991), 58, and 55 *Modern Law Review* (1992), 619; compare also Howarth, *Textbook on Tort*, London 1995, Ch. 6. Critical articles also appeared by J. Stapleton, 107 *LQR*, (1991), 249 and vol 111 *LQR* 1995, 301. An instructive overview is given by D. Hutchinson: 'Murphy's Law: the Recovery of Pure Economic Loss in the Tort of Negligence', *Stellenbosch Law Review* 1995, 3.

convenient.'

> 'The unavoidable conclusion seems to be that the Law Lords simply do not know what to do about negligence, and have very little notion of where to go next' (at p. 60).

The author's conclusion is, under the heading: 'What to be done?':

> The English law of negligence appears, in sum, to be confused and aimless for three main reasons. First the judges seem to have no clear idea of what the law of negligence is for; secondly, they harbour vague fears about Americanisation; and thirdly, their conceptualisation of the law rests on an idea that, if not inherently flawed, at least invites confusion and misuse, namely the duty of care (at p. 91).

Another author in this field gave the following description of the House of Lords' line in *Murphy,* whereby the 1978 decision in Anns case was explicitly overruled: 'The inevitable result is confusion, complexity and high levels of litigation which the recent elimination of the *Anns* cause of action will do relatively little to reduce'.[3] When we realise that on the other side of the channel many lawyers have not even heard of the subject that is getting English lawyers so excited that they leave their famous weapon of understatement aside and go *va banque* against their supreme appellate court, there must be something going on in Albion that is worth while to investigate.

In doing so, some books on this subject should be mentioned for back-ground reading, namely:

> B. Feldthusen, *Economic Negligence. The Recovery of Pure Economic Loss*, 3rd ed., Carswell, Canada, 1994; [403]
> E.K. Banakas (ed.), *Civil Liability for Pure Economic Loss*, Kluwer Law International, London-The Hague-Boston, 1996 (Proceedings of a 1994 conference in Norwich, UK).

The general aspects of torts and economics are treated by several authors, compare:

> J. Feinman, *Economic Negligence*, 1995 (U.S.A.);
> P. Kane, *Tort Law and Economic Interests,* 2nd ed. Clarendon Press, Oxford, 1996;
> T. Weir, *Economic Torts,* Clarendon Press, Oxford, 1997.

4. The discussion on English law may be swept aside by the continental lawyer as another example of 'insular peculiarity' (to borrow the phrase with which the concept of 'consideration' in contract law was coined by the English Law Revision Commission in 1937, a concept that is still alive, and also being an obstruction in the legal development of the present field of law, as we will see in due course), but it nonetheless is instructive to get an insight in our topic.

The breadth of the debate in English law on the acceptance of pure economic loss in the law of negligence, to a great extent is caused by three factors. First, the number of cases it took the House of Lords to overrule *Anns*, namely 12 decisions in fifteen years, and their verbose character: 298 pages of law reports or

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[3] Stapleton, *LQR* 1991, at 295.

approximately 180.000 words, as Markesinis and Deakin have calculated.[4] Secondly, the Law Lords refrained from placing their views in the context of legal doctrine. As Markesinis and Deakin remark, the argument in the House of Lords has been carried on in isolation from outside influences. The authors suggest that 'the law will benefit if judges continue with the slowly emerging practice (adopted by some of them) of talking with academics and not ignoring their criticisms.'[5]

Thirdly, the House of Lords in its acceptance of the no-liability rule on pure economic loss uses new concepts, outside the traditional tort doctrine, partly derived from the landmark case *Hedley Byrne* (1963) whereby compensation of pure economic loss in case of negligent misstatement (by a bank) was accepted.[6] These are, basically: 'special relationship', 'reliance by third party' which has to be 'reasonable', the 'assumption of responsibility' by the party making the statement. [404] In short, the imposition of a duty of care in the circumstances should be 'just and reasonable'.[7]

Much of the confusion and complexity involved is caused by these new concepts. When we go into this matter later, it will be observed that most authors criticising the House of Lords' approach to pure economic loss, advocate a return to the common tort doctrine and its concepts of carelessness, remoteness, causation and duty of care.

From a comparative point of view, this part of the debate is particularly interesting for the continental lawyer. Another interesting aspect of the debate, is the way the foundation of the approach to pure economic loss compensation is chosen, by either the English highest court or its opponents, to wit, in regard to the 'floodgates' argument and the 'Americanisation' of the compensation scheme. This calls for a policy-oriented discussion, and also for the input of economics of law, in its bread-and-butter appearance that is digestible for the average tort lawyer. These themes, presented by several National Reporters, pre-eminently deserve a comparative treatment. In this context, alternative forms of compensation for pure economic loss, through first-party insurance or extra-judicial compensation systems, and the role of the legislature in that respect, are also to be discussed.

It is abundantly clear, that the 'floodgates' argument, usually connected to Lord Denning's famous opinion in *Spartan Steel* in 1973, is the 'invisible hand' behind the House of Lords' philosophy on the subject, and one may add, that of the highest courts in other countries when they are withholding from plaintiffs

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[4] 455 *Modern Law Review* 1992, 620, not including the Court of Appeal's decisions on this subject. The authors have found 'a plethora of contradictions' in the case law they studied, which might have been avoided if the facts had been placed in the wider picture of tort law. The judgments 'are just as notable for their expansive style as they are for their neglect of academic authority and lack of boldness'. The major part of the Law Lords' opinions consists of quotations. See p. 642.

[5] Idem, at 621. The so-called 'non-citation rule', another insular peculiarity, in the last decade is rapidly becoming obsolete, although the process in which this is taking place illustrates the policy influences in the choice of academics cited and followed by the House of Lords. An example of the role of a conservative academic view in the field of nuisance is found in the cases of *Cambridge Water* (1993) and *Canary Wharf* (1997). See my article on this subject in: 47 *Ars Aequi* (1998), 387, Special on Anglo-American Law (in Dutch).

[6] *Hedley Byrne v Heller & Partners*, (1963) 2 *All ER* 575.

[7] See the cases: *Peabody* (1985), *Caparo* (1990) and *Murphy* (1990), compare Markesinis and Deakin, 55 *Modern Law Review* 1992, 641; Hutchinson, 111 *LQR* 1995, 7.

the possibility of compensation for pure economic loss.[8] The split between the academic world and that of the judiciary, characterised by Lord Goff's well-known distinction between the 'diffused view of the general' versus the 'intense view of the particular', respectively, is luminous.[9] As Lord Steyn has remarked, 'in a practical world the common law cannot spread its protection too widely'.[10] Meanwhile, the non-protected third parties, often consumers, are left out there, to find their recourse somewhere else, where it is uncertain if it can be obtained at all, since contractual remedies, or insurance coverage and the like, usually are lacking. As a consequence, the *Spartan Steel* dictum regarding 'floodgates' often will lead to a Spartan solution for the empty-handed third beneficiary. John Fleming has rightly criticised the crude alternative means of protection argument as reflecting 'the primacy of private ordering, expressing the ideology of the free-marketers of the '80's'.[11]

The legal policy aspects come to the fore when Commonwealth highest courts have taken distance from *Murphy's Law* of the House of Lords and are quite instructive for the comparative lawyer. The House of Lords, in its role as Privy [405] Council hearing Commonwealth decisions, seems to realise the policy implications of this issue. In the New Zealand case of *Invercargill City Council* v *Hamlin* it recently gave some interesting remarks in that respect. Commenting on the departure from English case law by the New Zealand courts, the Privy Council stated:

> [This] particular branch of the law of negligence … is especially unsuited for the imposition of a single monolithic solution … the first and most obvious reason is that there is already a marked divergence of view among other common law jurisdictions. Their Lordships cite these judgments in other common law jurisdictions not to cast any doubt on Murphy's case, but rather to illustrate the point that in this branch of law more than one view is possible: there is no single correct answer.[12]

Seeking for the explanation of diverging views in different common law jurisdictions regarding the liability in tort of local authorities against third party house owners, the Privy Council regarded such issue 'to be based at least in part on policy considerations'. Discussing local differences, the Council concludes: 'Whether circumstances are in fact so very different in England and New Zealand may not matter greatly. What matters is the perception' (idem).

The last observation of the Lords is all too true: there is a clear difference in view, regarding the policy that should prevail in the case presented. In an earlier decision the House of Lords also took distance from a leading New Zealand Court of Appeal case brought forward by the plaintiff, which embodied an approach contrary to the one accepted by the English highest court in its rejection of *Anns* (1977) in recent years. In *D and F Estates* (1989) the policy-oriented character of

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[8] *Spartan Steel & Alloys v Martin & Co (Contractors)*, (1973) 1 *QB* 27 (Court of Appeal).

[9] Compare the bitter comments of Markesinis and Deakin in this respect, 55 *Modern Law Review* 1992, at 620; 643 ff.

[10] In: *White v Jones* (1993), at 751.

[11] Cf. 'Tort in a Contractual Matrix', 5 *Canterbury LR* (1995), 269, at 277, cited with approval by Stapleton, *oc* 1995, 345.

[12] See I.N. D. Wallace' Note in 112 *Law Quarterly Review* 1996, with citations; the case is *Invercargill City Council v Hamlin*, 1994 3 *NZLR* 513 (New Zealand Court of Appeal), confirmed in Privy Council (1996) 2 *WLR* 367.

the issue was stressed, but from a different angle compared to the above 1996 decision.[13] Here the role of the legislature was emphasised by the court, leading to a reserved attitude of the judiciary, as far as the policy making in this field is concerned. Since this is one of the issues in the pure economic loss debate, I would like to give some attention to it.

At stake was the liability of a real estate/project development company against third party house owners, for defects that occurred in the construction of the building. Lord Bridge, discussing the New Zealand approach to pure economic loss, was of the following opinion:

> As a matter of social policy this conclusion may be entirely admirable (…) As a matter of legal principle, however, I can discover no basis on which it is open to the court to embody this policy in the law without the assistance of the legislature and, it is again, in my opinion, a dangerous course for the Common law to embark upon the adoption of novel policies which it sees [406] as an instrument of social justice but to which, unlike the legislature, it is unable to set carefully defined limitations (Italics are mine, v.D.).

Not surprisingly, Markesinis had a very critical comment to this statement:

> Apart from the fact that the very last words of the statement itself are disproved by the carefully crafted rule laid down in D and F Estates, the proposition that our courts should abdicate to the legislator their creative role is hardly compatible with either past reality or foreign conception of what English courts can do.[14]

5. I come to the closure of my introductory remarks, which already anticipated upon the main lines of discussion of our subject.
It should, finally, be noted that in the following the subject of pure economic loss is treated according to the category it belongs to, which asks for the division into *groups* of pure economic loss cases. This approach, advocated by the Canadian author Feldthusen some time ago in his influential book on the subject, was suggested by me in my Questionnaire to the National Reporters. This suggestion was followed in most Reports, which makes a comparison easier.
The Groups that came out ultimately, can be described as follows:

I. False information (or negligent misstatements)
II. Negligent services
III. Defective products / buildings
IV. Third-party beneficiary / ‘cable cases’
V. Public duties / powers
VI. Precontractual dealings
VII. Environmental damage

As will be noticed, the categories I - IV have a more dogmatic background, in that they present different aspects of the tortfeasor’s behaviour that has caused pure economic loss to a third party. The categories V - VII, however, indicate a spe-

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[13] *D and F Estates v Church Commissioners for England* (1989) 1 *AC* 1977 HL.

[14] Markesinis, ‘The destructive and constructive role of the comparative lawyer’, 57 *RabelsZ*, 1993, 438, also published in: *Foreign Law and Comparative Methodology*, Hart. Publ., Oxford, 1997, 36, at 39. Compare also my *Ars Aequi* article, 1998, at 42 ff.

cial situation involved, which may coincide with one of the other categories as far as the type of behaviour concerned. The doctrinal clarity that is reached thereby, however, should not be overstated; it also serves as a division that is attractive for plain practical purposes.

It is about time now, to present the three Families of Law and their relation to the concept of pure economic loss, at war or in peace. After that, I will come back to these introductory remarks in my Analysis and Conclusions of the Report. In the following presentation the groups of pure economic law cases will only play a subsidiary role, it is submitted; it proved impractical to try to keep a strict division of the materials reported according to groups. [407]

II. The Three Families of Law and Pure Economic Loss. An Overview

A. The Eastern Continental branch

1. German law

In German tort law, with its basic norm in para 823, section 1 BGB (Civil Code), liability in negligence is only accepted in cases of bodily injury (life and health) and damage to property and rights comparable to property; pure economic loss caused by negligence is excluded from compensation, as legislative history clearly shows.[15] The drafters of the code, at the turn of the century, on purpose changed an earlier draft permitting compensation of pure economic loss, and fixed the protected interests as 'life, body, health, liberty, property or an other right'.

The general principle thus firmly established, in legal practice all energy was put into the development of exceptions to this principle. Under para 823, section 2 BGB, the violation of a legal provision designed to protect individuals and their interests, may lead to liability in tort. As a consequence, in case of fraud this article, in connection with the relevant article of the Criminal Code (para 263 StGB), may give rise to a claim for pure economic loss. There are numerous other 'protective laws', and it is a matter of construction of the statutory provision involved, to establish that the protective norm was intended by the legislature to prevent pure economic loss. However, only a limited number of such cases has been reported. It has sometimes been successful in 'cable cases', where in a 1968 decision of the Bundesgerichtshof a local building code was characterised as protecting the economic interests of persons dependent on the supply of electricity, water, gas, etc.[16]

This approach was abandoned eight years later; in Swiss law, however, it still is an accepted foundation for a pure economic loss claim (see *infra).* In the German system, damage to property is a prerequisite for liability in tort for pure economic loss.

There are a few other statutory exceptions to the principle of non-compensation of pure economic loss. First, par. 826 contains a general clause allowing such compensation, but only in case of intentional behaviour *contra bonos mores.* The requirement of intentional violation of standards of decent behaviour makes this an action that only in exceptional cases may be successful.

The liability of the government and its civil servants under German law

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[15] Compare the National Report by P. Schlechtriem, Freiburg i. B.

[16] BGH *NJW* 1968, 1279.

is based on para 839 BGB and article 34 GG (Constitution); application in the field of pure economic loss is faltering, since the public duty that was violated should have a 'protective scope' with regard to citizens, and should be directed at the protection also of their pure economic interests. Thus, in building permit cases, the local authority may escape liability, if that last aspect cannot be established by the plaintiff, and only safety regulation was envisaged by the legislator. However, in [408] cases where the soil was not fit for the purpose of building family homes, the courts have held the local government unit liable for pure economic loss, caused by its employees' negligence.

The restricted possibilities for recovering pure economic loss, gave rise to several theories and techniques to reach that goal. The majority of these deal with the extension of concepts as 'property' (including its possession and use) and 'rights'. Most successful in the latter category is the concept of a 'right to an established and operating business', already conceived before enactment of the Civil Code in 1900. Furthermore, many theories were developed by academics which however did not get support in case law *(eg* based on reliance on expert knowledge, or in general: reliance loss; duty of care of professionals for negligent statements, as 'protective norms').

A successful approach is based on violation of *ancillary duties of care,* a kind of extension of *contractual* liability, although it is not necessary that a valid contract actually was concluded between parties. This legal construction proved valuable when an action in tort would fall short due to the exculpation of the defendant; the ancillary contract action then will lead to the imposition of strict (vicarious) liability. The archetype here, is the case of a banana skin left on the floor of a department store, which escaped the staff's attention, causing a customer to slip and fall, and harm himself. Originally designed for hazardous situations, endangering life and limb, gradually it was developed into a more general remedy, creating ancillary duties regarding sellers (instructions as to the proper use of the goods), banks (warning a client about the dangers of an intended investment) or architects, tax consultants and lawyers (disclosure of malpractice).

Where no contractual relation exists between parties, the courts are willing to assume the formation of a contract, to apply the above construction of ancillary duties. Thus a request for advice or information easily is transformed into a contract, which brings compensation of pure economic loss within the plaintiff's reach. This trend in case law gave rise to many theories of academics, mentioned earlier, to appease the conscience of legal doctrine and to bring the results of case law in conformity with the legal system.

Another imaginative use of contractual concepts is found in the liability of principals for servants; here para 831 BGB gives the principal an excellent position as far as exculpation is concerned. A protective duty of care is construed by the courts in the interest of third-party beneficiaries, an obligation to take care of their well-being; the principal can be sued in contract by the third party, thereby evading the former's exculpation. Again, originally meant for perils of life and limb (accidents in defective apartments or in the maintenance of installations), it soon developed into a general remedy, under which banks and professionals could be held liable misinformation by third parties, including damage by way of pure economic loss.

This last field is still heavily debated in Germany, and recently concepts of foreseeability of damage to third persons, the need for protection of these persons and their reliance on the expertise of the defendant have been introduced by the

courts. This last aspect is of particular importance in cases of precontractual liability; an action for damages, including pure economic loss, may be available to [409] the frustrated contract partner, but also to his intermediaries, and even, in exceptional cases, to third parties.

2. Swiss law

The situation under Swiss law in many respects is comparable to that in German law.[17] The basic norm for liability in tort for negligence is found in article 41, section 1 CO (Code of Obligation law), which generally is seen as in principle excluding compensation of pure economic loss. The concept of unlawfulness ('Widerrechtlichkeit') is central here, the violation of a general norm containing a duty related to the protection of others. As in German law, there is the dichotomy of the infringement of absolute rights (regarding personal integrity, proprietary rights and intellectual property), leading to direct liability without the requirement of negligence, and the violation of a protective norm. Furthermore, Swiss law also contains the liability for all kinds of loss that was caused by behaviour which was intentionally contra bonos mores (article 41, section 2 CO). Here too, its application in practice is negligible.

As its German neighbour, the Swiss legal practice has found ways to extend liability for pure economic loss. Besides case law, that kind of compensation is also accepted in statutory provisions, such as those directed at the liability of auditors for negligent misstatements (towards shareholders and creditors of the company audited) and directors of companies.

The extension of liability in general, is realised in two ways: by extending the range of protective norms or by creating such norms. An example of the former approach is the application of norms of the Criminal Code in 'cable cases' (the protection of energy supply), an example of the latter is the creation of a general duty to provide true and accurate information (against third parties), based on the principle of good faith (article 2, section 1 CC).

Another legal construction to evade the tort law regime regarding pure economic loss, is the avoidance of unlawfulness altogether. This can be done in several ways. First the lee side of impairment of absolute rights, as property rights, may be sought, where the straightforward rule reigns. Whereby the infringement of the right by itself creates liability for resulting damage, without taking into account the tortfeasor's behaviour that caused the damage (negligence). In this view, the Swiss courts were willing to consider the impairment of property related rights, such as the use of property, as physical damage. That may, for instance, be the case when goods cannot be sold due to rumours about its lacking quality. A spectacular application of this approach is the acceptance of the vegetable growers' claims during the Chernobyl disaster, confronted with a dramatic decline in the sale of their products; their damage was seen as physical, irrespective of the actual contamination of the vegetables caused by the nuclear disaster.

Another striking solution is found in the use of the action in the tort of nuisance. Here the requirement of unlawfulness is ignored and as a consequence, even lawful acts may lead to liability, for instance in case of building with an [410] official permit. If damage is caused to neighbours, claims for decline of business are accepted by the courts, also from tenants, although they could not base their claims on property rights (under article 679 CC). In a recent English

[17] See the National Report by I. Schwenzer and B. Schönenberger, Basel.

case, Canary Wharf (1997), the House of Lords decided to the contrary, in a conservative approach stressing the foundation of an action in nuisance, namely the impairment of property rights (see also infra). Another comparative note would be, that the acceptance of strict liability on the basis of nuisance is also the general approach of French case law, where the Cour de Cassation has held explicitly that the type of liability in nuisance is of an independent character, not based on the tort law articles 1382 and 1384 CC.[18]

Finally, an important exception to the non-compensation rule of Swiss law regarding pure economic loss is found in the Federal Tribunal's case law based on liability for breach of confidence. Introduced in the area of precontractual liability, where the court held that this kind of liability has an independent character, in between contract and tort, it recently developed into a general doctrine, 'Vertrauenshaftung'. In the 1994 Swiss Air case, a company had made use of the name of its parent company for advertising and public relation purposes; upon its bankruptcy, the parent company, Swiss Air, was held liable to third parties for breach of confidence in the group ('Haftung für erwecktes Konzernvertrauen'). In a 1995 case, Swiss Wrestling Association, the duty regarding a third party was based on the principle of good faith.[19]

Other constructions, using contract law in a direct way, have proved less successful in the courts.

3. Austrian law

The Austrian legal structure in the field discussed, basically is the same as the German one.[20] Although the central article on liability in tort, para 1295 ABGB, refrains from enumerating the rights protected by law and only refers to 'damages', the general opinion is that the rights known from the German para 823, section 1 BGB are under absolute protection also in Austrian law. Thus there is a rebuttable presumption when such 'tangible' rights and values are impaired (physical integrity and personality rights), that the injury was 'unlawful'. Another familiar cause of liability is the violation of bonos mores, in section 2 of para 1295 ABGB.

Similar to the other Germanic systems of law, Austrian legal practice is in search for exceptions to the rule of non-compensation for pure economic loss. The concept of *contract* is crucial, especially para 1300 ABGB, containing liability for negligent information in a contract for information that was concluded for consideration. If no consideration is given, the advisor can only be held liable for damage knowingly caused to another person. In recent case law, the courts have been very liberal in the construction of the notion of 'for consideration', accepting the lack of payment for the service, or payment received from other parties. Under the influence of German case law, contracts may be concluded tacitly, in the view [411] of Austrian courts, thereby approaching the concept of a 'business contact'. In cases of a bank giving financial information to third parties, a distinction is made between information concerning the bank's own clients and those regarding other persons. In the latter situation only intentional behaviour will give rise to the bank's liability.

Third party damage leads to complications in this area; the courts have

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[18] Cour de Cassation Civ. 2e, 19 nov. 1986, *Bull. civ.* II, nr 172.

[19] BGE 120 II 331, *Swiss Air*; BGE 121 III 350, *Swiss Wrestling Assoc.*

[20] See the National Report by W. Posch, Graz.

held that only when it is clear that the party seeking advice or expert opinion is also acting in the interest of a third party, the latter will be protected under the doctrine of 'contracts implying the protection of a third party'. In 'cable cases' this kind of damage has led to arbitrary court decisions; compensation of loss of production of a third party, consumer of energy, was denied, since no 'direct' infringement took place and fear for 'floodgates' was expressed by the court. Only impairment of property rights would lead to a different decision.

4. Finnish law

Tort law in Finland is based on the Finnish Tort Act of 1974, a system comparable to the Germanic jurisdictions described, based on fault liability.[21] In the Act no explicit definition of pure economic loss is given; property damage is playing a central role in the law of damages, and recently there seems to be a cautious development towards extending the right to claim economic loss beyond those having a proprietary or possessory interest in damaged property. Exemplary for this trend are some 'cable cases', decided in 1960 and 1994. In general, Finnish law is characterised by a traditional reluctance to award compensation for pure economic loss. The Tort Act provides that such compensation should only be paid if the damage is caused by a criminal act, an act of an administrative body in the exercise of its authority or if otherwise there is 'a particularly weighty reason for awarding compensation'. Thus, damage caused by a local authority's negligently granting building permits may lead to compensation of pure economic loss to the party consequently suffering damage.

With the criterion of a *particularly weighty reason*, the legislature has left room for further development in case law and legal doctrine in this area. Much is still uncertain though, but it is suggested by authors and illustrated in some case law, that factors that may be of importance here, are intentional behaviour, gross negligence and the possibilities of the victim to protect himself against the loss in question. Analogy is to be sought with the practice of compensation of pure economic loss in contract law, company law and the law of intellectual property, it is suggested by the National Reporter (giving examples of those areas of law). Additional elements presented in the literature, are the preventive and reparative function of the compensation, and the rules and values prevailing in the victim's situation.

In the field of environmental damage, Finnish law has some interesting examples of compensation for pure economic loss, under the Finnish Environmental Damage Act, 1995, and the Finnish Maritime Code of 1994 (which [412] is based on the international conventions on oil pollution at sea). Under these acts, persons hindered in their commercial activities by the pollution of the environment, may claim damages, including loss of profits.

Fishermen, hoteliers, restaurateurs and shopkeepers dependent on tourists at seaside resorts in principle will be able to recover loss of profit as a result of the contamination of seashores. In this context, the limitation issue presents itself; it is submitted by the Reporter, Wetterstein, that the traditional notions of tort law, as causation, foreseeability, remoteness, afford only limited guidance on this delimitation problem, which is largely a matter of policy, to be solved by a balancing of the relevant, conflicting interests. Third parties, in contractual relationship with the victims of pollution, should be excluded form compensation, it

[21] See the National Report by P. Wetterstein, Turku/Abo.

is suggested; here contract clauses and insurance aspects should prevail. Meanwhile, exceptions could be made for employees of directly hit victims (fishermen, hoteliers, etc.), which may have to be fired as a consequence of the environmental impairment of the region. Extension of the right to claim to parties having a proprietary or possessory interest in damaged property may also be considered, and further economic loss in contractual relations where there is a reasonably close link between the person suffering loss and the damaged property. Finally, it is observed by the Reporter that the burden of proof resting on a 'distant' plaintiff may play a mitigating role, since it will increasingly be difficult to establish a causal connection, the remoter his position is. This may reduce the need for criteria to limit the accessibility of compensation for pure economic loss of third parties.

B. The Western Continental branch

1. French law

As noted before, under French law there is some difficulty to distinguish compensation of pure economic loss as a legal issue: it is not known as such, and if discovered in the course of a legal debate, it is dealt with in the context of the existing requirements of compensation of damage in tort.[22] To a large extent, therefore, the acceptance of compensation for pure economic loss is regarded as self-evident by the French lawyer. Problem cases in that area are solved within the application of the rules of negligence, damage assessment and causation; as a consequence, a separate doctrine of pure economic loss never came into existence, nor the debate that tends to accompany such doctrine in other jurisdictions.

Interesting as it may be, it would lead us too far away from this overview of our subject if we would trace the solutions found in French law for situations of pure economic loss under different headings. It may suffice to give some examples of compensation awarded in cases that are familiar in this domain. A first observation would be that, since the character of liability, strict or fault based, is of importance here, pure economic loss is also accepted in the 'third kind' of liability, that based on nuisance, characterised by no-fault liability.

[413] Another area where this type of damage is accepted is that of pre-contractual dealings; in the *Rover-France* case (District Court Riom, 1992) damages of Ffr 3 million were awarded for breaking off '*pourparlers*' in a final stage, which included plaintiffs economic loss due to the lost profits in the operation of an automobile concession that was negotiated between parties.[23]

Some legal notions developed in the law of damages may have special importance for our subject, such as '*perte d'une chance*', the loss of chance. Developed in the area of bodily injury, this firmly established doctrine is also applied in other fields, and could be of interest when claiming pure economic loss.

Third-party reliance is found in French law under a far more intriguing name, as '*préjudice en cascade*', or '*par ricochet*'. Basically a problem of causation, it creates questions of 'directness' of the damage incurred by third parties. In 'cable cases' this has led to compensation of lost profits due to standstill of the production process.

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[22] See the French Report by C. Lapoyade Deschamps, Bordeaux.

[23] Riom 10 juin 1992, *RTDCiv.* 1993, 343.

2. Italian law

Tortious liability under Italian law is centered in article 2043 CC, a rule similar to that of the French article 1382 CC; both systems of tort law have much in common.[24] The general acceptance of pure economic loss as a part of the law of damages and causation is also typical for Italian law; as a consequence, issues such as the 'floodgates' argument come under the heading of causation, where excessive compensation and therefore unjust proportions are being curbed. In the area of consequential damages, the concept of indirect damage is bringing elasticity to the requirement of direct and immediate consequences of the harmful act.

The primacy of the infringement of absolute subjective rights came to an end in the 1970's, when the Italian Supreme Court in principle accepted the action for damages in pure economic loss of a third-party beneficiary. In the case of *Gigi Meroni* (1978) a soccer club, Torino-calcio, lost one of its best soccer players in a car accident; its claim based on '*la lesione del credito da parte di terza*' was accepted by the court. However, the club still had to prove that it had suffered a definite and irreparable loss and that it could not with equal economic advantage, obtain from others the services which they had lost. It did not succeed in that respect, since the lower court rightly had ruled that the club, in substituting another player for the deceased Meroni, 'had regained, and actually increased, the level of profitability'.[25] This case illustrates that the concept of pure economic loss is not an abstract notion; the damage incurred by the plaintiff should be concrete and real. As a matter of fact, in a previous case, where the same soccer club lost its entire soccer team in an air crash, compensation still was denied by the same court.

In another typical Italian case, concerning a confectioner, *Puddu*, who suffered on pure economic loss, was more lucky: in this 'cable case' lost profit caused by the interruption of the electricity supply was compensated.[26]

[414] In other third-party beneficiary cases a different path was taken by the highest court, namely the acceptance of a new absolute, subjective right, the *right of patrimonial* integrity ('*il diritto soggettivo all'integrità patrimoniale*'), which deserves protection in tort law. This legal construction was applied in the case of an authentic signature of a painter on a false painting, done in mistake *(De Chirico* case, 1982), and also in products defamation cases, concerning the abuse of well-known product images, or the incorrect handling of labelled products (cases of 1986 and 1988).[27] Despite protests in academic circles, which stressed the redundancy of the concept under the general rules of tort law, the court in 1993 gave another decision on the same basis.

Thus, the borders of compensation of damages in tort apparently are shifting. Meanwhile, the policy of the highest court in admitting claims for damages regarding pure economic loss, remains unclear to academic observers.

3. Polish law

The Polish legal structure of tort law strongly resembles the French system; article 415 CC is modelled after article 1382 CC of France.[28] The acceptance of compen-

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[24] Compare the National Report by G. Ponzanelli, Milano.

[25] Cass. 29 March 1978, n. 1459, *Foro It.* 1978, I, 833.

[26] Cass. 24 June 1972, n. 2135, *Foro It.* 1973, I, c.99 ff.

[27] Cass. 4 May 1982, n. 2765, *Giust. Civ.* 1982, I 1745, note Di Majo., *De Chirico.*

[28] Compare the National Report of B. Lewaszkiewicz-Petrykowska, Lódz.

sation of pure economic loss is taking place along the same line we found in French law, in a juxtaposition of contract and tort law, requiring integral compensation of damage, whether physical or not. The acceptance of non-physical damage makes the concept of 'patrimonial damage' appropriate; compensation of lost profits is a natural part of that concept.

The cases discussed in the National Report regarding pure economic law, outside the realm of bodily injury and property damage cases leading to consequential damages of the victim and plaintiff, are examples of breach of contract. In one case of 1979 a building contract concerning a extensive delay of completion of the building (2 years) had caused lost profits of the owner, a pig farmer. The Polish Supreme Court in the damage assessment required the establishment of the damage *in concreto*, since there were doubts whether the plaintiff would have succeeded in pig farming anyway. This decision has met criticism from academic quarters. Another case dealt with defective banking services, and a client that sued his bank for damages.

The only 'pure' pure economic loss case reported appears to be a 1988 decision concerning negligent information given by an insurance company employee, the omission to inform the insured party (and tortfeasor) about the possibility of an 'auto-casco' insurance, supplementary to the liability insurance. The state insurance company was held liable against the victim for the compensation that could have been claimed under the supplementary insurance policy.[29]

4. Dutch law

Tort law in The Netherlands is also structured along French lines; the new article 6:162 CC, replacing article 1401 that was identical to article 1382 French CC, is [415] still within the French tradition.[30] Therefore, the concept of pure economic loss in itself does not raise temperatures in Dutch legal circles, it is the application in specific cases that counts, where usually the conventional notions of tort liability, damage assessment and causation, are at stake. The perils of 'floodgates' can be managed through several legal instruments, including the discretion of the court to mitigate damages awarded (article 6:109 CC). The circumstances which the court may take into account are the type of liability, the financial position of the parties and the degree of negligence involved. A general cap on damages is also a possibility, a measure which is left to the legislature (article 6:110 CC). In assessment of damage the court is not bound by formal rules of evidence and a rough estimate may suffice (article 6:97 CC).

Above all, article 6:98 CC embodies a modern version of the doctrine of causation, comparable to case law in France and Germany: the causal link is based upon *reasonable imputation*, that is, the court will take into account the type of damage incurred, the type of liability involved and the other circumstances of the case, including the reasonable result achieved. This rule is derived from a famous 1970 decision of the Dutch Supreme Court (*Drinking water extraction area*), whereby the concept of foreseeability, that was the leading concept of the 'adequation' doctrine since the 1920's, was replaced. For technical and policy reasons the drafters of the 1992 Civil Code refrained from including the concept of 'reasonableness' in the text of the provision, although it is generally seen as an integral part of it.

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[29] Cour Suprême 24 avril 1988, *OSNCP* 1990, texte 104.

[30] See the National Report by J.M. Barendrecht, Tilburg.

As is common in such legal framework of tort law, pure economic loss comes in many disguises and is discussed only in the context of its occurrence in Dutch legal practice. In the area of pre-contractual dealings, for instance, the Dutch Supreme Court has accepted a far-reaching liability of the party responsible for breaking off negotiations in a final stage, which even may include the compensation of lost profits. Accepted in a building case in 1982 (*Plas v Valburg*), the court's approach since then has seen many restrictions to the application of the rule.

In third-party beneficiary cases pure economic loss may be claimed, but under restrictions related to the type of tort involved. A company's claim based loss of profit due to illness of its employees, for instance, which was caused to air pollution from a neighbouring industrial installation, was denied in a 1986 decision of the Hoge Raad.

In the traditional 'cable cases' compensation for pure economic loss caused by energy disruption was granted by the Hoge Raad in the case *Van Hees v Esbeek* of 1978; the foreseeability of damage was of importance, in the court's opinion, but also the 'other circumstances of the case', such as the type of liability and damage. In this context, the far-reaching societal consequences of liability, were considered to be of no importance, the court ruled. However, in a 1986 decision, *ENCI v Lindelauf*, the highest court took a different view, and held that lost profits, calculated on the basis of the products (bricks) market value, would not be compensated, [416] since only actual damage could be claimed.[31] This decision is known under the heading of damage assessment, where a choice must be made between assessment *in abstracto* or *in concreto.* Recently, case law is definitely moving in the direction of the last method of computation, in contract and tort law.

The rationale of the decisions in the 'cable cases' is still debated. Several Dutch authors have stressed the relevance of contractual arrangements of the party suffering losses with the suppliers, and the taking of preventive measures in general. Thus the degree of the plaintiffs dependency on the energy supply should be of importance here, in considering his claim for damages. The National Reporter, Barendrecht, is asking attention for that argument.

In another setting, a claim of shareholders against a person which negligently brought damage to the company, causing decrease of the shares' value, was denied by the Supreme Court in a 1994 decision. In cases of defective services, however, courts have approved of claims of third parties that incurred damage due to negligence of a solicitor or notary public, the archetypical will that was not drafted in time, or a property transaction that went wrong, a brief that was filed in court too late. The position of banks that failed in giving reliable financial information is less clear, and also that of auditors acting negligently.

5. South African law

The tort law of South Africa, with its Aquilian foundation going back to Roman times, and its orientation to common law, is the perfect country in this over-

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[31] The cases discussed here, are: HR 1 July 1977, *NJ* 1978, 84, note GJS, *Van Hees v Esbeek* (gas disruption); HR 18 april 1986, *NJ* 1986, 567, note G., *ENCI v Lindelauf* (electricity disruption). Compare also my treatise *Verbintenissenrecht*, Kluwer, Deventer, 3rd ed. 1997, Vol. 1, 567 ff.; Vol. 2, 318 ff.

view for the transition from continental law to common law branches.[32] In its continental style tort law, South African law in principle has admitted claims fur pure economic damages. Already in a 1934 decision, Perlman v Zoutendyk, recoverability of pure economic loss caused by negligence was accepted. Upheld in the 1954 case of Herschel v Mrupe, in the 25 years that followed, however, uncertainty and confusion prevailed regarding this type of damage and its recoverability.[33] The decision of the Appellate division, the South African highest Court, in the Trust Bank case of 1979, seemed to bring clarity, but not for long. The statement of Rumpff, CJ, in that case, in which he announced the birth of the concept of pure economic loss, is too nice to be left unquoted:

> In the present instance the labour pains have continued for so long that the time has arrived to give birth to the child, even if this has to be done by means of Caesarean section. One must, I think, add at once that it is foreseeable that this child will become a problem child. With the necessary [417] love, and especially discipline, however, it is capable of fulfilling a useful role in the life of the law.[34]

Justice Rumpff's words at the cradle, in his role as the good fairy, so to speak, have predictive value for our subject and are also worth while quoting. In his statement the position of the conventional requirements of tort liability and the 'floodgates' argument in their relation to compensation of pure economic loss are discussed.

> In my opinion, the basis of the claim in the present matter must be placed within the extended ambit of the lex Aquilia. From this it follows, according to our governing criteria, that both wrongfulness and fault must be present in order for a claim to lie. The fear of so-called "indeterminate liability" can be exorcised only if, in each given instance, it is the task of the court to decide whether in the particular circumstances a legal duty rested upon the defendant not to make a misstatement to the plaintiff, and also whether, in the light of all the circumstances, reasonable care ought to have been taken, inter alia, to determine the correctness of the defendant's statement. In the absence of a legal duty, the element of wrongfulness is missing.
>
> The court will also keep claims within reasonable limits by devoting proper attention to the nature and interpretation of the misstatement, and also by giving the requisite attention to the problem of causation. In any event, it frequently occurs that a court is asked to resolve similar problems arising out of misrepresentations in the contractual context or out of estoppel. This is a well-known judicial task (at 832-833C, translation by Dendy).

Since that time, new uncertainties have arisen in regard to the viability of a pure economic loss claim under South African law. A dark shadow was cast upon it in *Lillicrap's* case of 1985, where a breach of contract was the issue of the dispute, what was to become a leading policy statement, elaborated in a number of decisions that followed.[35] The basic message was a conservative view of compen-

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[32] Compare the National Reports by M. Dendy, Johannesburg, and M.M. Loubser, Stellenbosch.

[33] See *Perlman v Zoutendijk*, 1934 CPD 151; *Herschel v Mrupe* 1954 (3) SA 464 (A); *Administrateur, Natal v Trust Bank van Afrika Bpk*, 1979 (3) SA 824 (A).

[34] At 831B-C, translation by the Reporter, M. Dendy.

[35] *Lillicrap, Wassenaar and Partners v Pilkington Brothers*, 1985 1 SA 475 (A).

sation for this type of damage; it was left to the plaintiff to convince the court that it should be accepted, that is, it must be demonstrated that there are policy reasons for it. One has the impression that the English case of *Junior Books* (1983), which caused a conservative reaction of the judiciary of South Africa, as was the case in England, had set the tone for this case law.

Since 1990 a 'judicial rebellion against the conservatism of the majority decision in *Lillicrap*' has occurred, as National Reporter Dendy noted. In several cases the trend was set in the lower courts that the burden of proof is resting upon the defendant that sound policy reasons exist for refusing the plaintiff's claim. One judge even held that 'the artificial distinction between economic loss and damage [418] to person or property does not exist'. The *Lillicrap* decision, however, still has to be overruled expressly by the Supreme Court of Appeal (as the Appellate Division is called under the 1996 Constitution). In the view of the National Reporter it is unlikely that the highest court will be prepared to revert to the conservative approach adopted in its decisions of the 1980's.

In regard to the 'floodgates' argument, the Reporter submitted that it is wrong to conclude either that physical harm is always finite or that pure economic loss is of necessity indeterminate. A number of the leading South African decisions on pure economic loss illustrate that the loss was confined to the damage incurred by the plaintiff in question, and could be assessed according to the misstatement made, in relation to the real value concerned (*eg* auditing mistake), or the actual costs incurred due to the negligent behaviour of the defendant *(eg* legal costs of proceedings, that were without cause).

C. The Common Law branch

1. UK law

The state of English law on our subject, the turmoil after Murphy's case (1990), was mentioned to some extent already in my Introduction (supra, nr 2 ff). Here the picture is completed, although nothing more than a rough sketch is intended, by adding the recent developments in this field.[36] Before going into the law after Murphy, some general remarks on the acceptance of claims for pure economic loss in some specific area's of law. That is the case when the loss was inflicted by illegal intentional acts, the so-called economic torts, such as deceit or fraud, intimidation and conspiracy.

Murphy's Law can be summarised as follows. A duty of care in the tort of negligence is concerned with safety from physical injury, whether to person or property. Therefore, the protection of property as such is not intended, nor the compensation of pure economic loss in that context. As a consequence, costs for repair of defective property are not recoverable in negligence, nor the diminution of its value. This applies not only to subsequent buyers of defectively built premises, but also to the building owner, although the latter may have an action against the builder for repair or demolition costs of buildings that create a danger of physical injury on neighbouring land or on the highway.

In Reporter Banakas' view, the simple, clear statement of principle in Anns case (1978) was overruled by the House of Lords in *Murphy.* Thereby the court 'placed center-stage the aggressive, and possibly arbitrary, use by judges of the duty of care as an instrument of *ad hoc* utilitarianist policy'. It is submitted by

[36] Compare the National Report by E.K. Banakas, Norwich.

the Reporter that the moral aspect of the question of economic loss liability is not taken into account, and also the utilitarianist view is open to question (liability of local authorities may raise local taxes, but could also lead to public pressure on incompetent employees that should be removed out of office. 'Why is *more,* rather [419] than *less,* immunity from liability of public authorities, in the public interest?', the Reporter wonders.

The rule of *Murphy*'s case has stressed the existence of property damage, in whatever kind, as a prerequisite of compensation for pure economic loss. In recent cases illustrations are found to what length English judges are prepared to go to stay within the concept of property damage in the light of *Murphy.*

Thus, contamination of the air space within a building with radionuclides emanating from a nuclear plant at Sellafield was not considered to be damage to property *(Merlin* v *British Nuclear Fuels,* QB 1990).

A remarkable development in a different direction is the decision in another toxic tort case, *Blue Circle Industries v Ministry of Defence* (Ch.D., 1996); neighbouring marshland was contaminated with radioactive material, due to an overflow of ponds during a storm.[37] The owner could not sell the land for some time, while a cleanup was executed; the loss of value was partly caused by the general fall in rental values in that period. Carnwath, J. deciding for the plaintiff, held that the case fell on the 'physical damage' side of the line, and that the loss was a foreseeable consequence of the contamination. This decision was upheld in the recent decision of the Court of Appeal of June 10, 1998 ((1992) 2 *WLR* 295).

> The Court of Appeal was of the opinion that the damage could be seen as physical, and the consequence economic, in the sense that the property was worth less and required the owner to expend money to remove the topsoil. The marshland was only part of the plaintiff's estate, and the defendant alleged that damage should be restricted to the cost of reinstatement of the marshland or the diminution of its value. The Court of Appeal held, however, that all losses of the plaintiff were reasonably foreseeable for the defendant and not too remote; it was reasonably foreseeable that damage to the marshland would affect both the use and the value of more than the marshland; contamination of the marshland meant that the estate as a whole was worth less than it was before the contamination.

In recent defective building cases the liability of architects, builders and designers was denied under the rule of Murphy; no special relationship or proximity was found as regards lessees of a supermarket that was destroyed by fire, tenants and land owners *(Tesco* cases, 1997; compare also a 1997 *Scottish Outer House* case in the same line).

As is the case in some continental jurisdictions, the breach of a statutory duty may give rise to an action for pure economic loss. Of the numerous instances, the Shipping Oil Pollution Act 1971 should be mentioned in regard to off-shore pollution. This is not a promising part of the law for our subject, since *Murphy* has cast it shadow here too; presently it is held that health and safety statutes are not intended to provide owners of buildings with remedies for financial losses [420] resulting from defective buildings, in the absence of present or imminent danger of physical injury, or property damage to the building itself.

The same holds for cases of breach of public authority duties. The days of Lord Denning's statement in *Sharp* (1970), that 'English law does not allow a

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[37] (1996) 141 SJ LB 11 (ChD).

public officer to shelter behind a *"droit administratif"'* are long gone. The House of Lords in two 1995 cases, concerning the duty to protect children against the risk of physical abuse, and the duty to provide for sufficient education, respectively, denied claims for damages based on breach of statutory duty against the authorities involved.

Also in cases concerning the liability of authorities based on negligence in issuing certificates for airworthiness or seaworthiness, claims for damages were dismissed, since the duties were directed at safety, and not at the protection of commercial interests (cases of 1994, 1995, and 1997).

Thus, the continuation of the restrictive approach to public authority liability for pure economic loss is perfectly clear from these cases.

The state of liability for defective professional services, at present is a far cry from Lord Denning's well-known dissent in *Candler* (1951), where he held that accountants are liable, not only to their client, but also to any third person to whom they knew their client would show the reports and who would take action upon it. An opinion which was the ouverture to *Hedley Byrne*, in 1963, the landmark decision in this part of the law. The shadow of *Murphy* can be seen again, foreseeability of economic loss does not suffice, 'some factor beyond' it must be found (Lord Oliver in *Murphy).* In the recent Court of Appeal decision in *BCCI* ((1998) *PNLR* 564, extensively discussed by the English Reporter), the search for principles of professional liability since *Hedley Byrne* is continued, which leads to 'three separate but parallel paths' (Nourse L.J.).[38] The first path had led to the adoption of a *threefold* test. This test is derived from previous case law, and contains three essential questions:

a. Was it reasonably foreseeable that the plaintiff would suffer the kind of damage which occurred?
b. Was there sufficient proximity between parties?
c. Was it just and reasonable that the defendant should owe a duty of care of the scope asserted by the plaintiff?

The second path is the use of the concept of 'assumption of responsibility'; the third path is the use of an incremental approach by the court, the development of the law in 'measured steps', guided by the factual situation in each case. In sum, the Court of Appeal held that in special and 'unusual' circumstances, which established the existence of a special relationship based on an assumption of responsibility, the duty of care owed by professional accountants employed to audit accounts of a bank could extend to another bank, although the latter had made use of its own auditors.

[421] In a number of recent cases, a central theme in the handling of professional liability is at stake, the *intended reliance* of the third party on the expertise opinion of the defendant. This concept, going back to *Hedley Byrne*, has led to decisions with diverging outcomes in the field of medical tests in the course of employment.

In the area of economic loss of third-party beneficiaries, the case of *White v Jones* (1995, negligence of solicitor in drawing up a will), already presented in my Introduction, could have been the landmark case for a new branch of professional

[38] (1998) 142 SJ LB 86; *The Times* 4 March 1998.

liability.[39] Nothing of the kind occurred however; its existence was justified by a 'lacuna in the law', as was explained in subsequent cases. If no such lacuna is present, a third party's claim will be dismissed by the courts.

The 'three paths' philosophy was followed once more in another recent case concerning *Natural Life Health Foods* (April 1998), another juggling with notions as assumption of responsibility and reliance, and the yielding to 'practical justice' (Lord Steyn), which has brought the Reporter to muse what the way ahead might be for English law.[40] He noted that the same Law Lord has stated that liability for negligent misstatements since *Hedley Byrne* to a large extent resulted from the effect of the principles of consideration and privity of contract (blocking the acceptance of a contract between parties), but that it was open to question how long these principles will continue to be maintained. Lord Steyn continued:

> It may become necessary for the House of Lords to re-examine the principles of consideration and privity of contract. But while the present structure of English contract law remains intact the law of tort, as the general law, has to fulfil an essential gap-filling role. In these circumstances there was, and is, no better rationalisation for the relevant head of tort liability than assumption of responsibility.

This observation is of particular interest to the comparative lawyer, in the light of continental constructions repairing shortcomings of tort law in this area, with the help of the principles of contract law, as was clearly demonstrated in the presentation of German law (ancillary duties owed to third parties, based on contract law). This illustrates that there may be bright prospects in the development of this branch of the law of damages when the divide between tort law and contract law can be overcome. We will come back to this issue in the next paragraph, the analysis of the subject discussed so far.

The use of the tort of nuisance to claim pure economic loss, under English law is of restricted value. In public nuisance, the interference with navigable waters, for instance, economic loss can be claimed, as was held in the *Tate and Lyle Industries* case of 1983. The option of private nuisance, however, is largely barred by the decision in *Canary Wharf* (1997), mentioned earlier, whereby the House of Lords reserved the action in nuisance to persons with enjoyment of rights over land. Therefore, only persons with the right to the exclusive possession of land [422] affected, can sue for damages.[41] This is contrary to the situation in some continental jurisdictions, such as France and Switzerland (see *supra).*

As was already mentioned before, English law in the field of pure economic loss is getting isolated in the Commonwealth jurisdictions: the view of the House of Lords in *Murphy* is not followed by the courts in Canada, Australia, New Zealand, Singapore and Hong Kong.[42] Especially the Canadian case of *Norsk* (1992) is a good example of a well reasoned decision, in which the debate with the academic world is not shunned (it is a case of obstruction of waterways).

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[39] (1995) 2 AC 207; (1995) 1 *All ER* 691.

[40] *Williams and another v Natural Life Health Foods Ltd and Mistlin*, issued 30 April 1998, Official Transcript.

[41] *Tate and Lyle Industries Ltd and another v Greater London Council and another*, (1983) 2 AC 509; *Hunter and others v Canary Wharf Ltd*; *Hunter and others v London Docklands Development Corp.*, (1997) 2 *All ER* 426.

[42] Compare the notes by D. Wallace, *LQR* 1996 and 1997, quoted above.

The decision has received criticism in Canada, however, especially from Feldthusen, who in that context surprisingly expressed his sympathy for the English approach. We cannot go into that debate, but in my impression the use of the concept of causation in a modern guise would be helpful to clarify the issues brought up by the Justices LaForest and McLachlan. Unfortunately, also the developments in the other Commonwealth countries must be left aside, due to the absence of National Reports.[43]

2. Law of the United States of America

American law is generally opposed to recovery of pure economic loss in negligence, but there are important exceptions to the rule of no-liability.[44] The foundation of the rule can be found in Justice Holmes' opinion in Robins Dry Dock, a case of 1927, where time charterers of a ship claimed damages for loss of the use of the ship from the defendant, a dry dock company. It was held that plaintiffs had no property rights in the ship, and that the injury to the ship's propeller therefore was no wrong to them. Another seminal case is Ultramares (1931), dealing with defective services (auditing), of the New York Court of Appeals, with Chief Justice Cardozo; liability was denied, since defendants-accountants did not know the identity of the persons that would use the balance sheet and the extent of the number of transactions involved. This test of 'quasi-privity' was upheld by the New York court for fifty years, in which it was followed by nine states.

A more liberal position was taken by the Restatement of Torts Second and a number of American states. Instead of insisting on 'quasi-privity', the test is whether the defendant supplied information for the guidance of others in their business conduct and the plaintiff belongs to a group of persons which the defendant knew would receive that information, provided the plaintiff's transaction is similar to the one the defendant intended to influence (para 552). This *intended beneficiary model* was accepted in at least 17 state and federal decisions by 1992, including the Supreme Court of California, in *Bily's case* of that year.

[423] The 'anachronistic protection' for accountants has raised criticism and as an alternative the application of foreseeability was suggested; this was adopted by the New Jersey Supreme Court 15 years ago, a move that found following by two other states. Liability of accountants is creating the bulk of litigation in professional liability in America, although there are also cases regarding negligent attorneys and notaries public. An example of the last type is the case *Biakanja* (1958) of the California Supreme Court, concerning a defective will, with an outcome similar to that in the English case of *White v Jones*, dicussed before.[45] In the field of products liability the question whether pure economic loss can be recovered in tort was brought before the U.S. Supreme Court in 1986, in the landmark case of *East River*.[46] Although a maritime case, it is influential beyond maritime law. The manufacturer of defective turbine engines was sued by the bare boat charterers for cost of repairs and loss of profits. The

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[43] The Canadian Report was delayed and is left out of this overview. Recently, new and interesting developments seem to take place in Canadian tort law. A Report on New-Zealand law is in progress.

[44] See the National Report by H. Bernstein, Durham, NC.

[45] *Biankaja v. Irving*, 320 P.2d 16 (Cal. 1958).

[46] *Eastman River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 870.

Supreme Court dismissed the claim with the argument that a manufacturer is under no duty to prevent a product from injuring itself (which, incidentally, is in line with Justice Traynor's influential decision in the Californian *Seely* case of 1965); furthermore, public policy is only concerned with safety and the damage claimed is most naturally understood as a claim under warranty law which sufficiently protects the purchaser. An exception to this case law regarding defective products is found in the area of asbestos contamination, where costs of removal have been compensated.

Interference with the use of resources is another important branch of cases. Obstruction of waterways in *Kinnsman*, where the Buffalo River in New York was blocked for two months, did not lead to the acceptance of pure economic loss claims by the U.S. Court of Appeals in the 1960's; the loss was considered to be 'too remote' or 'indirect'. In a water pollution case, however, a group of commercial fishermen was successful in their litigation (*Union Oil v. Van Oppen*).[47] Their loss of profits, caused by an oil spill in the course of drilling operations on the California coast, was considered reasonably foreseeable, and on policy grounds an exception to the rule of non-recoverability of pure economic loss was made. A related case is the New Jersey case of *People Express Airlines* of 1985, where a tank car accident on a nearby railroad yard, resulting in the escape of a dangerous chemical, caused the evacuation of plaintiff's offices. Like in the California case, the court was of the opinion that *foreseeability* was a sufficient standard. A similar decision concerning lost profits caused by delay in the construction of a restaurant is the Californian case of *J'Aire* (1979).[48]

The handling or pure economic loss by the American courts has brought about an ongoing discussion in legal literature, which, however, like in England, does not seem to have provided helpful guidance to the courts. The National Reporter, Herbert Bernstein, criticises the use of the 'floodgates' argument and the [424] 'pragmatic concern' *(inter alia* by Rabin), which in physical damage cases never has been of such importance, considering the mass tort cases in American practice. He also refers to emotional distress cases, where liability is accepted by the courts, without being held back by the widespread liability that may arise. Most American writers, however, are in favour of the no-liability rule in regard to pure economic loss, and are opposed to the tendency exhibited in the California and New Jersey cases mentioned before.

3. Israeli Law

The characteristics of Israeli tort law, as defined in sections 35 and 36 of the Civil Wrong Ordinance, are familiar; the law of negligence is composed of three elements: carelessness (not acting as 'a reasonable prudent person'), duty of care and damage that is causally related to carelessness.[49] Causation is based on reasonable foreseeability, which is directed not at the specific loss or the specific manner of its occurrence but rather at the general type of loss or occurrence. Although Israeli law of negligence in its orientation is directed at English law, there are major differences; the legislature has turned negligence into a distinct, independent and open-ended tort, as the Reporter observes.

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[47] 501 F.2d 558 (9th Cir. 1974).

[48] *People Express Airlines Inc. v. Consolidated Rail Corp.*, 495 A.2d 107 (N.J. 1985); *J'Aire Corporation v. Gregory*, 598 P.2d 60 (Cal. 1979).

[49] Compare the National Report by Gilead, Jerusalem.

Nevertheless, the landmark case of *State of Israel v Levi* (1994), accepting two levels in negligence: proximity and policy considerations, shows remarkable similarity to English law.[50] In that case it was held that *prima facie* duties of care, if recognised at all, should be restricted to bodily injury. As a consequence, pure economic loss is not included in the general acceptance of a duty of care.

In the field of negligent misstatements, pure economic loss claims have found limited acceptance in Israeli tort law. It was recognised in the seminal case of *Weinstein* (1954), which preceded its English counterpart of *Hedley Byrne* (1963), to which it is akin in the court's reasoning.[51] The case concerned a leaking container, due to negligence in design by an engineer. Accepting compensation of pure economic loss in principle, the Supreme Court nonetheless was sensitive to issues of over-deterrence and indeterminate liability, the problems of uncertainty and open-ended liability. Relevant elements in this use of the concept of 'proximity' were: act of professionals, in the course of business activity, with reference to the same transaction that caused the loss to plaintiff, a determinate group of individuals who were intended to rely on the representation, the maximum loss must be determinable in advance.
In the 45 years that followed, the Supreme Court has relaxed some of these restrictions, but basically has not deviated from the principle accepted in Weinstein. In this context the notion of 'special relations', introduced in *Hedley Byrne*, was taken over by Israeli courts. In that course also other familiar concepts from English law were used, such as 'reasonable reliance' and 'assumption of responsibility'. The Reporter in his survey of case law in this area, concludes that a [425] delicate balance was struck by the courts between considerations of fairness to both parties, the need for deterrence, the risks of over-deterrence and indeterminate liability. That last aspect seems to be the major factor that has shaped case law in Israel, it is noted.

Another major category of cases where pure economic loss was accepted by Israeli courts is liability for negligent services, professional malpractice; public authorities may also fall under this liability. In these cases reliance is playing a lesser role than the previous category of defective services. It should be observed that in the area of defective services contractual and statutory arrangements are prevailing. In third-party beneficiary cases, the existence of a 'very special' relationship is necessary for the acceptance of a pure economic loss claim by the courts. In the field of defective products, Israeli law is not clear. In cases of physical damage incurred by other persons, the courts are restrictive in admitting pure economic loss claims. In all, Israeli case law seems most progressive in the area of negligent misstatements, certainly compared to English law. In other parts of the law, however, the picture still is rather vague.

III. Analysis and Conclusions. A Scheme for Debate: 7 Theses

Summa summarium
So much being said, it is time to come to conclusions, based on a depth analysis of the materials presented thus far. The impression seems justified, that the debate on pure economic loss will be continued for a while, and that the ultimate solution, whether in civil or common law, to the issues raised, is not within a hand's reach.

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[50] (1994) 48 (iii) P.D. 45.
[51] *Weinstein v Kadima Cooperative Association Ltd*, (1954) 8 P.D. 1317.

Be that as it may, for the present author another argument is more conclusive: the National Reporters that have been quoted extensively will convene to discuss topic in the course of the publication shortly (at the Rotterdam Symposium mentioned at the outset of this article), a discourse that is better served by the presentation of main issues for discussion. Thus, the reader is also encouraged to give thought to the best way to come to grip with this challenging subject.

Therefore, my conclusions following here, have taken the form of *theses*, some of which are of a descriptive nature - which may not meet much opposition, especially from traditional academic quarters - whereas some others are of a more provocative character, to stimulate the taking of clear positions in the debate. The theses are numbered, seven in all (hopefully bringing luck to jurists in distress), and are starting in a generalistic manner, progressively becoming of a more legal-technical nature. As may be expected from an author based in a city such as Rotterdam, where law, commerce and common sense in a long tradition are taken together in legal practice, the theses have a strong policy-making orientation.

I herewith express the hope that the seven theses may contribute to further development of the concept of pure economic loss in the field of tort liability. Progress is only reached if one is willing to go back to the sources, an insight propagated by that scholar of European standing, Erasmus of Rotterdam: *ad fontes*! [426]

Seven theses on pure economic loss liability

1. Basics: the nature of pure economic loss

In principle there is no difference between damage arising from physical injury (bodily harm, property damage) and that known as pure economic loss.

Comment
This thesis was treated at several places in this article; a nice quotation, derived from Mervyn Dendy's paper, may suffice here in its defence. The following statement from Lord Devlin in *Hedley Byrne* says it all:

> The interposition of … physical injury is said to make a difference of principle. I can find neither logic nor common sense in this. If irrespective of contract, a doctor negligently advises a patient that he can safely pursue his occupation and he cannot and the patient's health suffers and he loses his livelihood, the patient has a remedy. But if the doctor negligently advises him that he cannot safely pursue his occupation when in fact he can and he loses his livelihood, there is said to be no remedy … I am bound to say, My Lords, that I think this to be nonsense. It is not the sort of nonsense that can arise even in the best system of law out of the need to draw nice distinctions between borderline cases. It arises, if it is the law, simply out of a refusal to make sense. The line is not drawn on any intelligible principle (1964 *AC* at 517; cited by Dendy in his Report on South African law).

2. Central issue: 'floodgates'

The 'floodgates' argument, understandable as it is from the point of view of a court's policy to keep the issue manageable, and prevent indeterminate liability, for several reasons is a non-issue.

First, the argument has no distinguishing character, since if it is taken seri-

ously, it should also apply to physical damage. In that area, however, 'mass tort' actions are accepted in most jurisdictions (including the UK since 1999); the 'floodgates' argument apparently does not have that predominant function.

Secondly, in a number of important decisions it can be demonstrated to be not applicable in the case at hand, where the damage incurred was restricted and foreseeable.

Thirdly, the effect sought with the argument can be reached by the use of a modern concept of causation, that is, the *reasonable imputation* of causation, and therefore, liability. In conventional tort law, the courts have a routine in applying that instrument, which is also based on policy.

Comment

For the defence of this thesis, reference is made to section II of this article (especially sub 13, Dutch law, as far as causation is concerned); it is strongly supported [427] by several National Reporters. Compare also the impressive statement by Rumpff CJ, quoted above (see nr 14, South African law).

3. The novel notions of pure economic loss. Back to basics

Instead of creating new notions, such as: 'assumption of responsibility', 'proximity', 'intended reliance', 'just and reasonable' result, etc., the courts should stick to the conventional concepts of tort law. These concepts, developed continuously in legal doctrine and practice, present enough room for the above notions found relevant by the courts thus far. Furthermore, they are the right setting for policy making, as it has been for ages. Therefore, 'back to basics'. As a result, the discussion may become focussed where it should be: whether the policy followed by the court is acceptable from the point of view generally accepted in society.

Comment

As under 3.

In English law, it may be observed, something went wrong since the days of Lord Denning (advocating policy decisions) and Lord Wilberforce (introducing the two-stage test in *Anns).*

4. Pure economic loss and logistics for its development: Groups of cases

The wide range of circumstances that are of importance when dealing with pure economic loss claims, call for a division in groups of cases, presented above (nrs I to VII).

Comment

See the discussion of these classes of cases, above, sub nr 5.

5. Development of compensation for pure economic loss: lessons from the comparison of law

1. In the further development of this type of compensation, attention should be given to the use of the tort of *nuisance* in this area of the law.

Comment
Compare the developments in Swiss and French law, reported *supra*, nrs 7 and 10, and for a contrast, that in English law, idem, nr 15.

2. The role of *contract law* in this context deserves attention, either to repair shortcomings of tort law in regard to compensation of pure economic loss, or to give a better foundation of such compensation needed in some areas (*eg* defective services).

[428] *Comment*
See the examples in German and Austrian law, supra, nrs 6 and 8; see again, for a contrast: English law, nr 15.

6. Pure economic loss, policy making and basic economics

A policy-oriented approach of pure economic loss should also contain an understanding of what basic economics of law can tell the tort lawyer. Therefore, attention should be given to aspects as:

- the position of the plaintiff from a point of view of alternative means of protection, depending on what social group he belongs to (consumers, commercial entities, government, etc.);
- the question whether there was an allocation of the risk involved in an arrangement with third parties, which had been accepted by the plaintiff and which could be circumvented by his claim against the defendant;
- the question whether the damage in dispute would be better suited for legislative action;
- the question whether alternative, extra-legal dispute resolution schemes are available, that would serve the interests of the plaintiff.

Comment
See for these aspects the above presentation sub II, passim. Several authors have presented comparable views, of which Jane Stapleton deserves special reference (above, oc 1991 and 1995). The liability of accountants is an example of successful extra-legal dispute resolution, a Dutch example is discussed with approval by Markesinis and Deakin, 55 Modern Law Review 1992, at p. 645, an alternative for the approach in the Caparo case.

7. Policy making: environmental liability and 'surrogate plaintiffs'

In relational economic loss cases sometimes there is 'no first set of victims', for instance in environmental damage to natural resources, 'the loss of the commons'. Here a class of indirect victims should be admitted (as is done in some cases), such as fishermen, who play a surrogate role. This role also should be granted to governments, acting in public trust, and NGO's (environmental groups), with the same objectives.
Comment
This approach was followed in the Californian *Union Oil* case, and also in the

French *Amoco Cadiz* case, the oil spill off the coast of France.
See further Victor P. Goldberg, 23 *J. of Legal Studies* (1994), 1, at 37 ff.