14. A comparative law sketch of pure economic loss

Vernon Valentine Palmer

1. INTRODUCTION

The recoverability of pure economic loss stands at the cutting edge of many crucial questions that have drawn theoretical and judicial attention over the last decades.\(^1\) To what extent should tort rules be compatible with the market orientation of the legal system?\(^2\) Or, as some may phrase it, how far can tort liability expand without imposing

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\(^2\) P. Benson, The Basis for Excluding Liability for Economic Loss in Tort Law, in: D.G. Owen (ed.), The Philosophical Foundations of Tort Law (1995), 427, 431. The same author, articulating a well-known tòpos among tort lawyers (see e.g., G. Viney, Pour ou contre un principe général de responsabilité pour faute?, 49 Osaka Univ. Law R. 2002, 33, 37 ff.) writes: ‘[T]he fact that every individual is somewhere and is making use of some external objects, with the result that he or his property is put into relation with them and is subject to being affected by conduct that affects them, is an inevitable incident of being active in the world … as beings who exist in space and time and who are inescapably active and purposive, persons are necessarily and always connected in manifold ways with other things which they can affect and which in turn can affect them as part of a causal sequence.’ Ibid., at 443 (emphasis and footnotes omitted). See also D. Howarth, Three Forms of Responsibility: On the Relationships Between Tort Law and the Welfare State, 60 C.L.J. 2001, 553.
excessive burdens upon individual activity? As a matter of policy should the recovery of pure economic loss be the domain principally of the law of contract? This chapter pursues the modest goal of sketching possible answers to these questions. Thus, it will first (sections 2–4) outline the notion and the factual situations where this loss is likely to occur. Then, it will discuss the broad spectrum of differing approaches to this kind of damage in Western tort law (section 5) as well as the basic arguments for an exclusionary rule (section 6). Finally, the chapter will sketch conclusions about the past and future developments of doctrines and rules about pure economic loss (section 7).

2. THE DISTINCTION BETWEEN PURE AND CONSEQUENTIAL ECONOMIC LOSS

There has never been a universally accepted definition of ‘pure economic loss’. What is universally clear instead is the negative cast and the patrimonial character of that loss.

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In countries where the term is well recognized its meaning is essentially explained in a negative way. It is loss without antecedent harm to plaintiff’s person or property. Here the word ‘pure’ plays a central role, for if there is economic loss that is connected to the slightest damage to person or property of the plaintiff (provided that all other conditions of liability are met) then the latter is called consequential economic loss and the whole set of damages may be recovered without question. Consequential economic loss (sometimes also termed parasitic loss) is recoverable because it presupposes the existence of physical injuries, whereas pure economic loss strikes the victim’s wallet and nothing else.

Thus, before going any further, it will be useful to give some specific examples of the factual situations usually subsumed under the label ‘pure economic loss’.

3. THE STANDARD CASES: A TAXONOMY

Broadly speaking, pure economic loss arises out of the interdependence of relationships and interests. These relationships are sometimes two dimensional and other times three dimensional. Our aim is to draw up a taxonomy of the principal ways in which this loss arises within such relationships. This list will surely not exhaust all the conceivable ways in which such damage may arise. The real interest lies in tracing the most recurrent and typical patterns, which I simply call the ‘standard cases’. With these provisos in mind, I may venture to set forth four categories that seem to be functionally and relationally distinct.

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

6 For this usage, see W. Keeton, Prosser and Keeton on the Law of Torts, 5th ed. (1984), s. 43, at 291.

7 In Sweden, where the legislator says that only victims of crimes may recover for pure economic loss, the Tort Law Act, §2, defines the notion exactly in these terms: ‘In the present act, “pure economic loss” (reiner vermögensschaden) means such economic loss as arises without connection to personal injury or property damage to anyone.’ See van Gerven et al. (eds), Tort Law: Scope of Protection (1998), 44. A similar definition seems to prevail in England and Germany. See Lord Denning’s statement that: ‘it is better to disallow economic loss altogether at the time when it stands alone, independent of any physical damage’. Spartan Steel & Alloys Ltd. v. Martin & Co. Ltd (1973) Q.B. 27, (1972) 3 All E.R. 557. Regarding reiner vermögensschaden, W. van Gerven, J. Lever and P. Larouche, Tort Law (2000), at 68, speak of a ‘worsening of one’s overall economic position (loss of profit, diminution in the value of property, etc.) that is not directly consequential upon injury to the person or damage to a particular piece of property’.

8 Although I have sometimes borrowed and other times given new names to these standard situations, I will not attempt to explain or employ all of the descriptive labels and tags that writers and judges use. These diverse and contradictory ideas are not always compatible with the results of the study mentioned above (n. 3) and would serve no purpose here.

9 For a longer taxonomic list consisting of eight categories (in which I think there is considerable overlap), see W. Bishop and J. Sutton, Efficiency and Justice in Tort Damages: The Shortcomings of the Pecuniary Loss Rule, 15 J. Leg. Stud. 1986, 347, 360–361. Benson’s
A. Ricochet Loss

Ricochet loss classically arises when physical damage is done to the property or person of one party and that loss in turn causes the impairment of a plaintiff’s right – certain authors call this situation ‘relational economic loss’. A direct victim sustains physical damage of some kind, while the plaintiff is a secondary victim who incurs only economic harm. To illustrate, A has a contract to tow B’s ship. C’s negligent act of sinking the ship makes it impossible for A to perform his contract and thus deprives him of expected profits. A’s financial loss is the ricochet effect of C’s negligence toward B. The loss is purely economic since no property interest of A’s has been impaired.

Ricochet loss can also arise from the impairment of an employment contract. For instance, B is a key employee in A’s business or sporting team. C’s negligent driving leads to B’s death or incapacity, thus causing A’s team or business to lose profits and revenues. Here B’s injury is physical but A’s loss is purely financial.

B. Transferred Loss

Here C causes physical damage to B’s property or person, but a contract between A and B (or the law itself) transfers a loss that would ordinarily be B’s on to A. Thus a loss ordinarily falling on the primary victim is passed on to a secondary victim. The transfer of the loss from its ‘natural’ to an ‘accidental’ bearer differentiates this from a case of ricochet loss where the damage in question is not transferred but is a distinct damage to the interests of the secondary victim. These transfers frequently result either by operation of law or from leases, sales, insurance agreements and other contracts that separate property rights from rights of use or specifically reallocate risk bearing.

To illustrate, A is the time charterer of a ship owned by B. The day before the time charter is to go into effect and while the ship is in B’s possession, C negligently damages the ship’s propeller, thus necessitating repairs and a two-week delay, which causes A to lose all use of the ship. Here B suffers property damage and ordinarily B as owner would recover for the consequential loss of the ship’s use, but the right of use –

taxonomy consists of five situations, two of which he calls ‘exclusionary situations’. His three other situations are called ‘non-exclusionary’. P. Benson, supra n. 2, at 427–430.


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

The Meroni Case (Torino Calcio SPA v. Romero, Cass. Civ., SU 26.1.1971, n. 174, GI, 1971, I, 1, 681) and certain other hypotheticals dealt with in our general studies (above n. 3) are also variations of ricochet harm. See the ‘Cable Cases’ and authorities such as Spartan Steel and Alloys v. Martin & Co. [1973] QB 27. Concern about the indeterminate number and size of the claims for losses is often associated with cases falling within this category.

and the risks related to it – were transferred to A by the boat charter. So A’s loss is purely pecuniary because he has no antecedent property loss.\(^{14}\)

A similar effect can result under a sales contract which reserves title in B (seller) while the goods are in shipment but places the risk of loss in transit upon the buyer A. If the goods (still technically owned by B)\(^ {15}\) are damaged in transit by the carrier’s negligence, then a loss normally incurred by the owner has been transferred to A. A’s loss is purely financial since he has no property interest in the goods.\(^ {16}\)

An equivalent result is reached when the transfer occurs by operation of law. For instance B, A’s employee, may be injured by the negligent driving of C and thus find himself unable to work for three months. Nevertheless a statute requires A to continue to pay B’s salary, even though no work is received in return. Thus what ordinarily would have been B’s loss is statutorily transferred to A as a combined result of C’s negligence and the effects of the pay-continuation statute.\(^ {17}\)

### C. Closures of Public Markets, Transportation Corridors and Public Infrastructures

Here economic loss arises without a previous injury to anyone’s property or person. There may be physical damage, but it is to ‘unowned resources’ that lie in the public domain.\(^ {18}\) A single negligent act may necessitate the closure of markets, highways and shipping lanes which no person owns, yet the closure inflicts economic loss directly on individuals whose livelihoods closely depend upon the use of these facilities.\(^ {19}\) To illustrate, C negligently spills chemicals into a river, and all traffic on the waterway is suspended for two weeks during a cleanup effort. As a result shippers must take more expensive overland routes, and marinas, boat suppliers, hotel operators and commercial

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\(^{14}\) The illustration is based upon Robins Dry Dock v. Flint, 13 F. 2d 3 (2d Cir. 1926), 275 U.S. 303 (1927) and a case (‘The Cancelled Cruise’) in our Questionnaires. For an evaluation of the role that this landmark admiralty case has had on the economic loss rule in the United States, see V.V. Palmer, The Great Spill in the Gulf … and a Sea of Pure Economic Loss: Reflections on the Boundaries of Civil Liability, 116 Penn State L. Rev. 105 (2011).

\(^{15}\) As is well known, who should be called the ‘owner’ of goods in shipment depends on the law applicable to the transfer of ownership, and above all on the validity and extent of the principle of transfer of possession. See Ch. von Bar, The Common European Law of Torts, vol. I (1998), at 509, fn. 499.

\(^{16}\) This illustration is based upon The Aliakmon [1985] 2 AER 44.

\(^{17}\) The example is taken from Case 4 (‘Convalescing Employee’) in M. Bussani and V.V. Palmer (eds), Pure Economic Loss in Europe (2003), 222. Transferred loss cases are liability neutral from the perspective of the tortfeasor and should allay fears of indeterminate liability. An additional argument in favour of an award of compensation is that the tortfeasor who is clearly liable to the primary victim should not benefit from the accidental operation of rules which by pure chance exclude him from liability. According to von Bar, the concept of transferred loss is intended to ‘prevent someone appealing to rules whose purpose is not to protect that person, but to protect others’: The Common European Law of Torts, vol. I (1998), 510–511.

\(^{18}\) V. Goldberg, Recovery For Economic Loss Following the Exxon Valdez Oil Spill, 23 J. Legal Studies 1994, 1, 37.

\(^{19}\) This category raises the greatest concern about liability to an indeterminate class in an indeterminate amount.
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A similar chain of loss may arise when C negligently allows infected cattle to escape from his premises, and the government must order all cattle and meat markets to close. As a result broad classes of plaintiffs will suffer pure economic loss, including cattle raisers who are unable to sell or deliver their stock to butchers, who are unable to obtain supplies.

D. Reliance upon Flawed Data, Advice or Professional Services

Those who furnish advice, prepare data or render services concerning financial matters often understand that the information will be furnished to a client and then relied upon by third persons with whom they have no contractual relation. If the advice, data or services are carelessly compiled or executed, this may not only breach the provider’s contract with his/her client but cause a relying third party to sustain pure pecuniary loss. For instance, C, an accountant, carelessly conducts an audit of B, a publicly traded company, and vastly overstates the company’s net financial worth. Relying upon the accuracy of the audit, investor A buys shares in B at twice their actual value. Here A’s loss arises not in consequence of physical damage to B, but on the basis of misplaced reliance. Similarly, erroneous information about a client’s solvency may lead to financial losses. Thus A, before extending credit to B, takes the precaution of asking C

21 For an account of the disaster, see V.V. Palmer, The Great Spill in the Gulf … and a Sea of Pure Economic Loss (n. 14); M. Gilles, Public–Private Approaches to Mass Tort Victim Compensation: Some Thoughts on the Gulf Coast Claims Facility, 61 DePaul L. Rev. 419 (2012). The disaster prompted BP to create a $20 billion trust fund to pay thousands of claims for pure economic loss. The reason such claims are being paid is due to the provisions of the US Oil Pollution Act of 1990, which imposes strict liability and expressly makes the responsible party liable, inter alia, for claims of pure economic loss.
23 According to Tony Honoré, economic losses based upon someone’s ‘reliance’ pose a causation issue which is different in kind from causation in the context of physical damage. His discussion seems pertinent to the concern of some that this category of pure economic loss opens the floodgates of liability. When a person is said to ‘rely’ on another’s statement, he or she often has two or more (typically many more) reasons or motives for reaching a decision and acting on it. The question whether A’s statement ‘caused’ B’s response is highly indeterminate. A potential investor in Eldorado Mines, for instance, may be influenced by a false statement in a prospectus as well as by advice from his stockbroker, by his own review of the company books, and so forth. How can one say that from among all these reasons that the false statement in the prospectus ‘caused’ his financial loss? See T. Honoré, Necessary and Sufficient Conditions in Tort Law, in: D.G. Owen (ed.), Philosophical Foundation of Tort Law (1995), 382–383. See also M. Coester and B. Markesinis, Liability of Financial Experts in German and American Law: An Exercise in Comparative Methodology, (2003) 51 AJCL 275.
(the merchant bank where B kept its account) for an assessment of B’s creditworthiness. C carelessly replies that B is ‘good for its ordinary engagements’ (when in fact B would soon go into liquidation) and thereby influences A to advance credit and to lose a large sum.\textsuperscript{24} Here A’s loss is purely financial, not because it ricochets off or is transferred from someone else’s physical damage, but because it arises directly from A’s reliance.

Professional services for a client may cause pecuniary loss to a non-client. B, an elderly man, asks C, his lawyer, to prepare a will in which he will leave EUR 100,000 to A. C takes no action for six months, whereupon B dies intestate and A thereby receives nothing.\textsuperscript{25} A’s loss is purely economic.

4. PRESENT VERSUS FUTURE WEALTH

To the above taxonomy let us add an important distinction.

Examples given so far would suggest that patrimonial injury may take two distinguishable forms. It may relate to the existing as opposed to the anticipated wealth of the victim. In the first sense, the plaintiff’s present wealth may be simply depleted by poor financial advice, or by wasting time and petrol taking overland routes because of the closure of a waterway. In the second sense, the plaintiff may instead lose that which s/he expected to acquire, such as a testamentary legacy lost because of a defectively drawn instrument, or a sport club’s reduced gate receipts due to the accidental death of the club’s star player. Sometimes, when an expectation is destroyed in utero (and proof that it would have materialized is difficult, as when a commission unlawfully rejects a candidate’s application for a job or a fellowship),\textsuperscript{26} it is called the loss of a chance.\textsuperscript{27}

As between these types of wealth, it is the loss of expected wealth – unrealized profits, cancelled legacies, loss of chances – which presents the sharpest question with which tort systems must deal. The difficulty is not simply that the demand for proof is more exigent – by definition expectancies explore a future that only might have

\textsuperscript{24} These facts are taken from the well-known case of Hedley Byrne & Co. v. Heller & Partners Ltd [1964] AC 465 (HL). For other instances of pure economic harm from incorrect information, see Case 18 (‘Wrongful Job Reference’), in M. Bussani and V.V. Palmer (eds), Pure Economic Loss in Europe (2003), 473 and Case 7 (‘Ruined Credit’), in V.V. Palmer and M. Bussani (eds), Pure Economic Loss. New Horizons in Comparative Law (2008), 2.


\textsuperscript{26} See, e.g., Conseil d’Etat, 12.11.1965, in Rec. Lebon, 1965, 613: ‘le réquérant, évincé d’un concours auquel il se serait présenté avec des chances sérieuses de succès en raison de ses titres et travaux, a subi un préjudice’.

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occurred. The difficulty also concerns the appropriateness of affording protection in tort. For when an economic expectation receives legal protection in tort, as in principle it does under French law, the plaintiff may end up being compensated to the same extent as if he or she were protected by a contract with the tortfeasor. In countries where the recovery of pure economic loss is barred by an exclusionary rule of tort law, there is a tendency to say that wealth expectancies should only be protected in contract. For instance, German courts are generally unable to approach the question through tort, but at the same time they show little hesitation in stretching contractual concepts to make the defendant liable to the plaintiff, though there is no actual contract between the parties.

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28 See G. Viney and P. Jourdain, Les conditions de la responsabilité, 3e éd., in: J. Ghestin (ed.), Traité dr. civ. (2006), 71 ff., 195 ff.; G. Viney, Introduction à la responsabilité, 2e éd., in: J. Ghestin (ed.), Traité dr. civ. (1995), 360 ff. See also our comparative Comments to Case 18 (‘Wrongful Job Reference’) of the volume M. Bussani and V.V. Palmer (eds), Pure Economic Loss in Europe (2003), 486-487, regarding the distinction to be made between cases in which the lost chance is to be understood as a distinct loss in itself (an autonomous loss), as distinguished from the case where the concept is invoked as an equitable means of proving a loss.

29 Note for example the tense unease in the following statement from a British judge: ‘I do not consider that damages for loss of an expectation are excluded in cases of negligence arising under the principle in Hedley Byrne, simply because the cause of action is classified as tortious. Such damages may in principle be recoverable in cases of contractual negligence; and I cannot see that, for present purposes, any relevant distinction can be drawn between the two forms of action.’ Per Lord Goff of Chieveley in White v. Jones [1995] AC 207. On this subject see also J. Stapleton, The Normal Expectancies Measure in Tort Damages, 113 L. Q. Rev. 1997, 257; H. Reece, Loss of Chances in the Law, 59 MLR 1996, 188.

30 Most of these ‘stretches’ have now been given official sanction in Germany through the reform of many BGB provisions carried out by the Act on the Modernization of the Law of Obligations [Gesetz zur Modernisierung des Schuldrechts] – in BGBl, 29 Nov. 2001, I, Nr. 61, 3138 ff. This Act, effective as from 1 Jan. 2002, has deeply affected the portion of legal landscape which concerns our topic. It establishes, for instance, new terms for the prescription of tort (up to 30 years) and contract (up to 10 years) actions, and codifies both the principles of culpa in contrahendo (see § 311 s. 2 and s. 3 as well as § 241 s. 1 BGB) and of the ‘contract with protective effects for third parties’ (see § 311, s. 3 BGB). For a general discussion of the reform, see H.-P. Mansel, Die Neuregelung des Verjährungsrecht, 55 NJW 2002, 89 ff.; W. Däubler, Neues Schuldrecht – ein erster Überblick, 54 NJW 2001, 3729 ff.; M. Schwab, Das neue Schuldrecht im Überblick, JuS, 1, 2002, 1 ff. See also R. Zimmermann, Breach of Contract and Remedies under the New German Law of Obligations, in: Centro Studi e ricerche di diritto comparato e straniero (ed.), 48 Saggi, conferenze e seminari 2002; C.-W. Canaris (ed.), Schuldechtsmodernisierung (2002); B. Dauner-Lieb, Th. Heidel, M. Lepa and G. Ring (eds), Das neue Schuldrecht – ein Lehrbuch (2002); S. Lorenz and Th. Richm, Lehrbuch zum neuen Schuldrecht (2002); P. Huber and F. Faust, Schuldechtsmodernisierung: Einführung in das neue Recht (2002); G. Wagner, Das Zweite Schadenersatzrechtsänderungsgesetz, 55 NJW 2002, 29, 2049 ff.; D. Zimmer, Das neue Recht der Leistungsstörungen, 55 NJW 2002, 1, 1 ff.; H. Otto, Die Grundstrukturen des neuen Leistungsstörungsrecht, Jura 2002, 1 ff.; R. Schwarze, Unmöglichkeit, Unvermögen und ähnliche Leistungshindernisse im neuen Leistungsstörungsrecht, Jura 2002, 73 ff.; S. Meier, Neues Leistungsstörungsrecht, Jura 2002, 118 ff. For a commentary, rule by rule, see B. Dauner-Lieb, Th. Heidel, M. Lepa and G. Ring (eds), Anwaltkommentar
From a comparative point of view, whenever legal systems show these attitudes it becomes difficult to tell where tort ends and contract begins. All these circumstances seem to be once more at the frontier where functions meet and merge, for though it has been theorized that contract creates wealth whereas tort only protects that which one already has, the notion of pure economic loss presents a challenge to traditional views about the relationship between the two concepts.

5. THE LIABILITY REGIMES

Comparative law research also shows that the question of the recoverability of pure economic loss is not just a civil law versus common law issue. As we will see, civil law countries are themselves divided, not from the common law, but between themselves and the common law. The various differences and similarities between these systems have little to do with the ‘legal families’ matrix in which they happen to be placed. Instead, as indicated below, there is a broad spectrum of approaches, methods and policies at work in the different jurisdictions. One must look into the variety of such approaches, methods and policies through the lenses of the general characteristics of liability regimes. For a more detailed discussion and analysis of the solutions and doctrines which support this variety, the reader should refer to our previous publications about recovery of pure economic loss in Europe and beyond.

A. Façades v. Interiors

In modern legal systems one may at first sight observe two alternatives. There may be liability whenever a person causes damage to another; there may be liability only in certain typical situations. The former, known as the principle of *neminem laedere*, is the solution of the French *Code Civil*. The latter, enacted in the German BGB, is the solution traditionally associated with Roman law and common law. Every tort system, at first glance at least, may be seen as a variant of these two alternatives. But any comparative study must go beyond this impressionistic analysis, and recognize that these imposing structures are not necessarily the most reliable means of viewing liability rules or of predicting outcomes: if one were to depend upon them as the exclusive criteria of classification, this would not present the systems in a helpful way.

An explanatory analysis must distinguish appearances from reality, and it must take into account a wide variety of factors and traits in order to arrive at the essential differences and similarities between the systems.

This is why, in situating the problem of pure economic loss within a comparative perspective, I will distinguish between the system’s façade and its interior, viz. operational rules that lie behind or within it. What is meant by ‘the façade’ is simply...
the exterior wrapper, the outer appearance, or even better, the initial and dominant perception received by the observer regarding the recoverability of pure economic loss. In a codified system this perception is usually conveyed by the black-letter words the legislator has used; in an uncodified system it may be the words of judges hardened into precedents, or the writings of old institutional writers. In any case, the façade will be the objective set of public signals which apparently control our issue. At first glance a given system may seem committed to a wide principle of recovery; another system may seem committed to a general rule of no recovery, but with a series of exceptions. Or another system may seem resolutely opposed to all recovery because pure financial loss is regarded as an unprotected interest. These initial perceptions are due to the system’s façade.

Resorting to the façade metaphor does not imply that initial perceptions are always false and misleading. Obviously that would simply overstate the case. Nor can one say that all façades always are mere camouflage for hidden forms of lawmaking. Nevertheless, it is clear that for certain systems the deeper one delves into the doctrine, the cases and the operational rules, the more one is surprised by the contradictions and contrasts between outer appearance and inner reality. What began as a general clause may be administered as a scheme of protection focused upon absolute rights – that is, what civilian jurists refer to as rights to life, body, health, freedom, property, which are opposable to the world at large: *erga omnes*.³³ That, however, may not be the end of the story. For what appears to be a scheme of absolute rights may be a decoy for an expansion of contractual actions which function much like tort remedies. It is for this reason that accepting façades at face value can be hazardous; they are very rarely a sufficient basis for a functional classification of these systems.

Conscious, therefore, that façades are sometimes *trompe l’œil* and that interior solutions should be the principal interest of any comparative study, one should organize legal systems into three functional and explanatory groupings, which may be called the liberal, pragmatic and conservative regimes. Before introducing these groupings, it may be useful to remind the reader (a) that the distinguishing characteristics of these ‘regimes’ have been selected as much according to the outcomes and results they allow, as to the methodological approach they display when dealing with pure economic loss issues; and (b) that these are subject-specific features that have limited, or no, relevance outside of the context of pure economic loss.

### B. Liberal, Pragmatic and Conservative Approaches

The comparative research reveals that some jurisdictions – France, Belgium, Italy, Croatia, Greece, Spain, Quebec, Japan – take a liberal stance toward pure economic loss. A leading characteristic of their tort systems is the presence of a unitary general clause which does not, a priori, screen out pure economic loss. Lacking a *numerus clausus* of protected interests imposed by the legislator, these regimes have no

in-principle objection to allowing compensation for stand-alone economic harm. The unlawfulness of causing such a loss is not an antecedent abstract question but only an outcome dependent upon whether the normal elements of fault liability are satisfied. These systems are not simply liberal in appearance and approach but in their results as well. A second characteristic is that liberal regimes reach solutions to questions of purely pecuniary loss almost exclusively on the basis of extraccontractual liability. The liberal regimes deal with pure economic loss autonomously in tort, unlike other (conservative) regimes where recourse to contractual and statutory solutions is a standard means of tempering the rigidity of the law of tort.34

The tort law of Germany, Austria, Portugal, Denmark, Poland, Sweden and Finland is distinctly more conservative toward the issue. A remarkable feature in the first three is that pure economic loss is not listed among the so-called ‘absolute rights’ which are protected by their tort law general rules.35 Recovery, therefore, must be sought elsewhere in the system, if at all, either on the basis of more specific tort provisions or by an expansive application of contract principles. The latter is not infrequently the answer in Germany and Austria. In these jurisdictions, there is an extensive resort to the law of contracts (and/or special statutes) as a corrective for the narrowness of tort law.36

34 A further characteristic of this regime, but one difficult to discern and substantiate, is the possible use of surreptitious techniques to keep this liability issue under control. To the extent that judges in liberal regimes have any policy restraining recovery for pure economic loss, as some observers suspect they do (see, e.g., L. Khoury, The Liability of Auditors Beyond Their Clients: A Comparative Study, 46 McGill LJ 413 (2001); B. Markesinis, La politique jurisprudentielle et la réparation du préjudice économique en Angleterre: Une approche comparative, 35 Rev. Int. Dr. Comp. 31, 44 (1983)), they do not admit or deal with it openly. It would of course be well to carry out such a policy covertly through subtle manipulation of the ordinary requirements of the general clause (particularly the causation requirement), but judicial tendencies of this kind would be unavowed, uncertain and difficult to detect. The term ‘pure economic loss’ and the debatable issues surrounding it therefore would remain generally unrecognized in the literature and jurisprudence of these countries.

35 The exclusion in §823, s.1 BGB, is well known, but as developments in Austria and Portugal amply show, the influence of German doctrine has resulted in a philosophy of absolute rights superimposed upon those countries’ general clauses. See M. Bussani and V.V. Palmer (eds), Pure Economic Loss in Europe (2003), 148–156.

36 The sophisticated, though complicated functioning of German civil liability law makes it a fragile item to import. This caveat did not stop the People’s Republic of China from adopting, in December 2009, a comprehensive reform of tort liability, which – besides keeping a typical Chinese flavour through the emphasis placed on the need to avoid conflicts and of favouring the extrajudicial settlement of disputes – follows closely the German tort law model. This explains why, somewhat like §823(1) BGB, the new Chinese Liability Law (Article 2(2)) contains a list of those rights and interests whose infringement can give rise to civil liability – namely ‘right to life, right of health, right to a name, right of reputation, right of honour, right of portrait, right of privacy, freedom of marriage, right of guardianship, ownership, usufruct, real right for security, copyright, patent right, exclusive right to use trademark, right of discovery, share ownership, right in succession. By contrast, the Chinese drafters disregarded any consideration of the role that lateral devices, esp. of a contractual and statutory nature, had and have in supporting the narrowness of German tort law. Therefore, as difficult as it can be to second guess future developments, it is likely that one of the main challenges for Chinese tort law scholars and
The striking characteristic of Polish and Scandinavian regimes, instead, is their use of causation rules in order to restrain recovery for this kind of loss as much as possible. Lacking a legislative barrier to the recovery of pure economic loss in tort, they have developed different doctrines and technical arguments about causation that strictly control compensation. Thus recoverability is an exception and any remedy must be found elsewhere in the system, namely on the basis of more specific tort provisions. The apparently neutral notions of remoteness and ‘directness’ of damage become powerful tools in the hands of Polish and Scandinavian judges to keep liability for wide-ranging economic damage within ‘reasonable’ limits.

Canada, England, Israel, the Netherlands, the United States and South Africa display a pragmatic attitude. The choice of the term ‘pragmatic’ relates to a shared approach to the problem and has less to do with how often a plaintiff succeeds. It is the similarity in their reasoning, their technique and their candour which prompts this grouping.

The pragmatic systems are characterized by a cautious case-by-case approach which carefully studies the concrete socio-economic implications of granting recovery for pure economic loss. Results are not driven by the dictates of wide tort principle, nor by a checklist of absolute rights. In most of these legal systems the principal method of screening recoveries is through the ‘duty of care’ concept. The duty of care question is a matter of judicial policymaking that is overtly carried out by the judges. Each new situation requires an ad hoc determination that a ‘duty’ to guard against this harm should exist at all. Unless this issue is decided affirmatively, there is no reason to proceed further and consider whether the normal elements of tortious liability have been satisfied.

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

C. A Question Beyond Legal Families

The above survey of the liability regimes presents a coherent way of describing the various approaches of the legal systems to the issue of pure economic loss. What emerges clearly from that picture is that a common theoretical matrix of pure economic loss does not exist.

The ways of approaching the problem are multifarious. In the liberal regimes the issue is absorbed within the mainstream of the general clause, but in some others it is driven by the fear of ‘liability in an indeterminate amount for an indeterminate time to judges will come from the need to carve out rationales and techniques allowing them either to corroborate or to ignore the (implicit) exclusionary rule.

37 It is important to note that the cases proceed on the basis of the judge’s perception of the socio-economic consequences. There is no empirical evidence of the economic effects of a finding of liability.
an indeterminate class’.38 This fear is, of course, managed through technical devices. These are, basically, the duty of care element in the pragmatic regimes and exclusionary causal determinations and/or the unlawfulness requirement in the conservative systems.

Comparative analysis, however, makes clear a further point. The classification of the systems into liberal, pragmatic and conservative regimes provides a framework that the reader may use to understand how jurists of a particular country reason their way to solutions. The façades are frequently deceptive edifices that conceal a complex theoretical substructure. Therefore, without an in-depth factual analysis, many of the actual questions raised by the pure economic loss issue are bound to receive either no answer or a misleading one.

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

D. In Search of a Comparative Common Core

A different question is whether today there is a transnational core of methods and rules governing the recoverability of pure economic loss. The answer depends to a large extent upon our instinctual reformulation of the question by our national traditions and cultures. Yet comparative law, if it teaches anything, teaches us to resist this, and to discuss the issue in factual terms.

i. Absence of methodological common core

Methodologically speaking, the tort scene strikes us as diverse and unsettled. Comparative research reveals that four principal methodologies dominate the landscape. Though some countries resort to more than one of these methods (thus adding to the complexity), generally each has one characteristic means of dealing with the issue of pure economic loss. Thus the compensation issue may be left to:

1. flexible causal determinations (the characteristic method found in Spanish, Italian and French regimes);
2. rigid causation techniques aiming straightforwardly to exclude ‘third-party loss’ (Croatia, Poland, Sweden and Finland);
3. preliminary judicial screening using a ‘duty of care’ analysis (the approach particularly prominent in the US, England and Scotland); and

38 Ultramares Corporation v. Touche (1931) 255 NY 170 at p. 179 per Cardozo CJ.
4. a scheme – either explicit or covert – of absolute rights that, by deliberate omission, leaves this interest unprotected in tort (the approach of Germany, Austria and Portugal).

Perhaps a simpler way to summarize the position is to say that some regimes rely upon general clauses and start from an inclusive position, and others impose a limited listing of protected interests and start from an exclusionary position. The first group allows recovery in principle; the second denies it on principle. The first grants recoveries through tort actions; the second must deny relief in tort if it cannot find an exception, and, failing that, it may turn (as German law does) to para-contractual actions like ‘culpa in contrahendo’ or ‘contracts with protective effects for third parties’. Indeed, the resort to contractual actions as a means of overcoming the narrowness of tort protection reveals still another methodological split: some countries deal with this issue solely in tort while others rely heavily on flexible contractual devices to palliate the sternness of their tort approach.

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

The answer may be given taking into account three subjects: (a) consequential economic loss, (b) intentionally caused economic loss and (c) the selective protection of negligently caused economic loss. In the aggregate these elements will permit us to see the contours of a ‘limited convergence’ on pure economic loss across the legal systems.

a. Consequential loss
It has already been noted that if economic loss is connected to damage to person or property of the plaintiff, the whole may be recuperated – provided that all the other requirements for the action to be successful are met.39 This ‘parasitic’ loss is recoverable because it presupposes the existence of physical harm to the victim, whereas pure economic loss strikes the victim’s wallet and nothing else. Consequential loss of this kind is protected in every system and can be seen as one area of substantive agreement. Moreover, consequential loss can be unobjectionably recovered both in those countries that recognize such distinctions and in those countries that do not. The common result, therefore, stands in opposition to the diverse reasoning which produces it.

39 See also R.J. Rhee, A Production Theory of Economic Loss, 104 Northwestern Univ. L. Rev. 2010 49 f.; R. Perry, The Economic Bias in Tort Law, III. U. L. Rev. 2008 1573, 1754 ff. Of course courts theoretically have a range of analytical devices at their disposal to exonerate the defendant from liability for consequential economic loss, e.g.: the act was not a breach of duty, the damage was too remote or the plaintiff had voluntarily assumed the risk. But what is worth noting is the attitudinal change that comes over the judge once the economic loss is causally connected to the plaintiff’s own physical harm. The importance the legal systems place on physical security from careless acts is so well recognized and accepted that courts rarely feel the need to justify or explain.
b. Intentional harm  Here is an additional building block to the common core. The exclusionary rule is only associated with economic loss caused by negligent behaviour, not intentional wrongdoing. Indeed the legal systems are not deeply split until one broaches the question of liability based on negligence. Here is the Rubicon of scienter which some fear to cross and others blithely dismiss. All systems agree, however, that intentionally inflicted pure economic loss is recoverable in circumstances where the conduct in question is regarded as culpable, immoral or contrary to public policy. The significance of this point is of more practical importance than it may appear at first sight. Its range of application may be somewhat greater than the narrow, infrequent form of liability which the words ‘intentionally inflicted’ harm suggest. In some systems a broad, flexible meaning is given to the ‘intention’ element. Furthermore, though harder to prove than negligence, the incidence of financial fraud is not a rare occurrence. A consistent rule is therefore an important protection. Secondly, from the comparative point of view, it is interesting to observe that the shift to higher degrees of culpability tends to broaden the scope of recovery in all systems. This at least suggests that the exclusionary rule should not be conceived as a simple rule based solely on the nature of the plaintiff’s damage, and that the material nature of the loss is no more than one element in a complex balancing process which decides where and when limits will be imposed in tort. A crucial part of this balancing is the state of mind of the tortfeasor.

c. Key areas of selective protection  To see the subject as selectively protected is to acknowledge that there exist pockets of ‘privileged’ loss-types in the conservative and pragmatic countries where compensation is awarded. When these isolated recoveries are joined to the corresponding awards in the more liberal countries, a kind of ‘limited convergence’ for negligently caused economic loss stands in relief. Admittedly this type of ‘limited convergence’ may seem like an artificial construct that focuses upon results alone to the exclusion of the differentiating methods and theories by which those results were reached. Yet, as stated earlier, it is in keeping with the nature of a fact-based inquiry to look beyond cultural-linguistic obstacles in order to compare national solutions. In penetrating to this level – besides many other nationally idiosyncratic exceptions, and statutory protections – one uncovers two broad areas where substantive consensus exists.

The first is when the plaintiff’s loss is due to negligently performed professional services. There is widespread agreement that professionals such as lawyers, auditors and insurance brokers may be responsible for the economic losses of some persons (beyond their clients) with whom they had no contractual tie. Although there may be specific requirements that must be met in some systems that others do not clearly impose (e.g. emphasis upon showing the ‘reliance’ of the third party), still it seems fair to say that in many situations (provided indeterminate and excessive liability is excluded) plaintiffs may recover losses caused by negligent professionals regardless of the general features and traditions of a given tort law system. This seems to reflect the

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collective view that a high standard of professional services can and ought to be maintained.41

A second area of agreement exists in the area of compensation for ‘transferred’ economic loss – the cases in which a loss ordinarily falling on the primary victim is passed on to a secondary victim, via a contract provision or by operation of law. This agreement undoubtedly arises because jurists in both liberal and conservative countries have recognized that transferred loss is liability neutral from a tortfeasor perspective and whatever difficulties it poses are more of a technical nature than of policy or equity.

Beyond this point legal systems also split over the outcomes that should occur in a number of loss situations. Here it is apparent that metalegal factors, such as the floodgates, social values and historical conservatism, drive the outcomes. Yet, the above ‘limited’ convergence deserves to be recognized. Jurisdictions basically agree to the recoverability of consequential loss, intentionally caused loss, losses due to negligent professional services, transferred losses, and perhaps in other circumstances where the risk of indeterminate liability is under control. Moreover, across façades, regimes and traditions, pure economic loss is recoverable whenever the latter is a direct consequence of the infringement of a right or of an interest that the legal system protects statutorily. These are the contours of selective protection. While financial interests are not as comprehensively protected as other interests, there is indeed a considerable frame of protection. Judging by developments of the past 40 years, this frame has been increasing and is likely to continue to grow.

6. THE EXCLUSIONARY RULE

To better understand, from a comparative perspective, most of the domestic arguments about the recoverability of pure economic loss, one must bear in mind the fundamental reasons which are usually presented in support of an exclusionary rule. Naturally these arguments are developed by jurists in legal systems which take the position that such losses should not be generally recoverable in tort (except in defined and limited circumstances). Different theoretical approaches, as well as the experience of other countries, however, may suggest certain counterarguments, which are equally worthy of mention.

A. The Floodgates

This is the most important of the arguments, because it is not only pervasive but has proved persuasive in many quarters. It usually links up with and reinforces the other arguments. Common law countries, and a number of civil law countries, share similar concerns about the danger of excessive liability entailed by pure economic loss claims. In this context, another frequently invoked explanation for the exclusionary rule concerns the problems of open-ended liability and derivative litigation, that is, the

41 See Editors’ Comparative Comments, in M. Bussani and V.V. Palmer (eds), Pure Economic Loss in Europe (2003), 417, 471, 519.
extension of liability for the remote consequences of a wrongful act. The common premise of this argument is that in a complex economy, pure economic losses are likely to be serially linked to one another. Damage to a particular good, for example, often generates losses that affect several downstream individuals and firms which would have utilized the good as an element in their production process, and so on. In such a world of economic networking, it becomes necessary to set reasonable limits as to the extent to which remote economic effects of a tort should be made compensable.42

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

The second strand is the fear that widespread liability would place an excessive burden upon the defendant who, for purposes of the argument, is treated as the living proxy of human initiative and enterprise. The potentially staggering liability would be out of all proportion to the degree to which the defendant was negligent. It is also said that it is manifestly impossible for a defendant to predict in advance how many ricochet economic loss claims s/he might face when, for example, s/he injures the property of a primary victim. Whether there is a small or large class of secondary loss sufferers depends, fortuitously, upon the number of parties with economic interests linked to the exploitation of the property.43

The danger of disproportionate consequences resulting from minor blameworthiness is of course an issue of fairness no matter what kind of damages have been caused,44 but some scholars believe that the danger is greatly magnified in pure financial loss cases.45 Financial harm is assumed to have a greater propensity to travel far and wide.

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42 Open-ended liability arguments have a well-established doctrinal lineage. See N. Jansen, Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability, 24 Oxford J. Legal Studies 2004, 443, 444 ff. R. von Ihering’s statement ‘Where would it all lead if everyone could be sued!’ is a famous rendition of this general concern. Jherings Jahrbücher 4, 12–13 (1861).

43 The rationales of predictability and practicality are discussed in R. Bernstein, Economic Loss, 2nd ed. (1998), 201–203.


45 The harm has often been compared to the recovery of damages for nervous shock, since there too the loss can be ‘pure’ as opposed to consequential, and there too the danger of reverberating impacts is commonly given as a reason for restrictive rules. The analogy, however, must not be pressed too far. Courts in emotional shock cases have been troubled by a number of rather different concerns, particularly the difficulty of defining the threshold harm (what degree of shock should be cognizable? what manifestation of the harm should be required?) and the difficulty of detecting false or fraudulent claims. In the case of pure economic loss, however, the problem of defining the threshold of the harm is minimal (the threshold of financial damage always begins at zero); the factual existence of loss is objectively demonstrable and its
It has often been pointed out that the laws of Newton do not apply on the road to financial ruin. Physical damage has at least a final resting point, while patrimonial harm is not slowed down by gravity and friction.

B. The Floodgates Revisited: Conjecture and Geography

In assessing the cumulative weight of the argument, there are a number of considerations to bear in mind. To begin with, it should be remembered that the floodgates argument has never purported to be a scientific claim nor a claim based upon comparative law research. It is not a simple thing to test whether the dire prophecy of the ‘nightmare scenario’ is dream or reality. Is it founded on blind conservatism or does it have a rational basis? For instance, the central assertion that physical damage is different from financial damage because it is more contained and judicially manageable seems increasingly difficult to understand in view of today’s mass torts, which sometimes – as said above – involve innumerable physically injured victims asserting measurement and proof are not easy but perhaps less problematic. The threat of fraud is also of less concern because such loss is arguably free of the danger that claimants may simulate symptoms. Accordingly economic loss is less easily feigned than the manifestations of nervous shock. The most important similarity between the two areas centres upon judicial concern about expanding liability in favour of an indeterminate number of plaintiffs, for indeterminate amounts of damages.

46 T. Weir, Complex Liabilities, XI International Encyclopedia of Comparative Law (1976), n. 14(d). This was also the view of Fleming James, who stated that the ‘physical consequences of negligence usually have been limited, but the indirect economic repercussions of negligence may be far wider, indeed virtually open-ended’: J. Fleming, Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal, 25 Vand. L. Rev. 1972, 43, 45.

47 See, however, J. Stapleton, Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences, 54 Vand. L. Rev. 2001, 941, 974: ‘The reference to the laws of physics reflects a long-standing fallacy in traditional running down cases that control of liability for consequences can be achieved by some “billiard ball” notion of the laws of physics. That is, this reference rests upon the faulty notion that claims for physical damage, whether to person or property, are inherently limited by the laws of physics which teach that physical forces will ultimately come to rest. After I have run you over and broken your leg, we have “come to rest” in a crude sense. Yet if you later suffer negligent treatment at a hospital that damages your other leg, the law may well say this injury is within the appropriate scope of my liability for consequences. What is doing the work in this judgment is not some inherent limit on my liability set by the law of physics but a judgment about the appropriate scope of liability for consequences in light of, among other things, the perceived purpose underlying the recognition of the obligation in the first place.’

48 For example, in 1939 the eminent American torts scholar, William Prosser, cuttingly observed: ‘It is the business of the law to remedy wrongs that deserve it, even at the expense of a “flood of claims”; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the courts too much work to do.’ W. Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich. L. R. 874, 877 (2nd ed. 1998).

49 The point is repeatedly emphasized by H. Bernstein, Civil Liability for Economic Loss, 46 Am. J. Comp. Law 1998, 111, 126–128.
claims sometimes amounting to billions of dollars.\footnote{It should be noted that comparative tax law shows that damages awards for personal injuries usually go tax-free, like any other physical damage to property that is to be considered non-income bearing. The opposite solution prevails in Western systems, however, whenever recovery is meant as restoration of taxable income. See E. Marello, The Western Approach to Taxation of Damages: The Substitution Myth, in: M. Bussani (ed.), European Tort Law. Eastern and Western Perspectives (2006), 121.} This would suggest that the law is normally content (or not reluctant at all) to impose liability even though the potential plaintiff class is large.\footnote{As Professor Jane Stapleton wrote in a private communication to the author: ‘we should not forget that modern procedural reforms, such as statutory provisions facilitating class actions, reflect society’s concern to address the barriers to justice that might otherwise face the mass of victims that can result in today’s complex society from a single piece of wrongdoing. They are a way of addressing, by lowering, the “costs of mass litigation” concern.’} It would sound very odd if the defendant could argue that s/he should not owe a duty because s/he would have too many victims.\footnote{The judgment in Griffiths v. British Coal Corporation (January 23rd 1998, Q.B.D.) upheld the largest personal injury claim in British history. It produced a record settlement of £2 billion for the benefit of 100,000 ex-miners suffering from a range of chest illnesses, a sum considerably more than government received from the privatization of the coal industry: see J. Stapleton, Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences, 54 Vand. L. Rev. 2001, 941, 962.} But it is certain that the justification for a no-recovery rule based upon a supposed difference in ripple effect or in the sheer size of the plaintiff class is hard to reconcile with the recovery of extremely large economic losses resulting from negligently caused physical injury.\footnote{See, e.g., J. Stapleton, Duty of Care Factors: A Selection from the Judicial Menus, in J. Stapleton and P. Cane (eds), The Law of Obligations: Essays in Celebration of John Fleming (1998), 59, 65 ff.}

The geographical distribution of the floodgates argument is another interesting facet of its development. While a perennial in some soils and climates, the argument has failed to take root in others. There is no clear and agreed upon explanation why this occurs. One might say that the theme resonates better in particular legal cultures, but what makes one culture or legal infrastructure more receptive to this theme than another? The answer is not clear. Until research is available, the question is open to speculation and to discussion of interesting clues. Consider England, where the floodgates argument has enjoyed significant success. Should one be surprised that a historically small, close-knit coterie of judges may be sensitive to the question of administrative overload? Does institutional structure and conditioning play a role in this question? Another relevant issue may be to investigate the way in which broad arguments of this kind circulate in international channels. The ruling ideas of influential exporting legal cultures (not merely substantive law ideas, but ‘soft’ formants such as the conventional wisdom and dominant policy arguments) clearly have extra-territorial scope and impact. It does not seem accidental that in countries where English and German legal cultures had a decisive sphere of influence (e.g. English influence in Commonwealth countries and the United States; Germanic influence in Austria and Portugal) the floodgates argument has been received almost unquestioned. It is interesting that in other countries one vainly searches for any trace or mention of floodgates anxiety. Yet things may not be so simple. How does one...
explain developments in a ‘liberal’ regime like Japan, where the floodgates argument is considered rather muted and moderate, yet the Japanese Civil Code is considered German inspired and the country’s public law and judicial organization bear a heavy American imprint? The subject merits deeper investigation.

C. In the Scale of Human Values

Another argument against recovery of pure economic loss is cast in terms of social values. It maintains that intangible wealth is not and should not be treated on the same level as protecting bodily integrity or even physical property. People are more important than things, and things are more important than money. Our legal interest in liberty, bodily integrity, land, possessions, reputation, wealth, privacy and dignity are all good interests, ‘but they are not equally good’. The law protects the better interests better. And so ‘a legal system which is concerned with human values (and the law is supposed to reflect the proper values of society) would be right to give greater protection to tangible property than to intangible wealth’. The exclusionary rule is then a reflection of the lower value ascribed to unreified wealth. The European Group on Tort Law, for example, has explicitly set forth a hierarchy of protected interests in European tort law, based on the principle that ‘the higher its value, the precision of its definition and its obviousness, the more extensive is its protection’. According to these authors, pure economic loss and contractual relationships rank low in the scale, viz. below life, mental and bodily integrity, human dignity, liberty and property rights.

It is important to notice that this view has a silent premise: these interests must be ranked because the law cannot simultaneously protect all interests fully. Even if one accepts, for sake of argument, that wealth is less important than other values, still there would be no justification for a rule restricting its recovery unless one had to do so in order to protect other, more meritorious interests. Thus the theoretical point is persuasive to the extent that (1) there is indeed a finite limit to the law’s ability to protect interests; and (2) giving full protection to pure economic interests would clearly exceed that capacity and therefore impinge on other protections or the interests of third persons.

The first point may be less controversial than the second. No one doubts that resources are finite: judicial resources are not unlimited; tort liability cannot be extended indefinitely without stifling human initiative; and responsible defendants can be bankrupted by financial claims that leave claims for bodily injury unsatisfied. It may be argued, therefore, that if pure economic loss were freely protected and allowed to

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54 The argument has been made in England that ‘[t]he philosophy of the market place presumes that it is lawful to gain profit by causing others economic loss … Certainly there seems to have developed an understanding that economic loss at the hands of others is something we have to accept without legal redress, unless caused by some specifically outlawed conduct such as fraud or duress’: The Aliakmon, [1985] 2 AER 44, 73 (per Lord Goff).


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

compete on an equal footing with other, worthier claims for limited resources, the effect might be to crowd out ‘better’ interests and leave them unsatisfied. That conclusion depends, however, on the answer to the second point, namely whether those limits would be surpassed by a presumption of recoverability. The answer to this question again seems to be conjectural since it ultimately depends to some extent upon the same unverified assumptions inherent in the floodgates rationale. It also raises the question of how countries like France, Italy, Japan, Spain, the Netherlands, Greece, Croatia and Belgium, which follow a rule of presumptive recovery of economic loss, have managed to avoid the dire consequences which the floodgates argument predicts. Is their experience proof that the argument is a gross exaggeration of the consequences, or does their experience tend to prove that these countries are simply using other means of controlling those consequences?

There is an additional question. The exclusionary rule is associated with the negligence standard. All systems, however, permit recovery when pure financial loss is inflicted intentionally. Thus the exclusionary rule cannot be seen simply as an abstract ordering of interests but as a rule tied to the gradations of blame. It would be difficult to say whether the nature of the interest or the nature of the fault is the more important factor in the equation. Indeed, it would be essentially misleading to assign such priorities because the rule, when it is applied and to the extent that it is a rule, is really the outcome of many other interacting factors as well.58 Only through study of these factors in their liability context can one understand why the alleged exclusionary rule operates selectively and situationally, never mechanically, and indeed leaves untouched a number of defined situations where one may even speak of a limited core of protection for pure economic loss.

D. In Historical Perspective

Some scholars assert as an historical matter that pure economic loss has traditionally been left unprotected by the law. If the assertion were generally true, it may have important normative implications for the present and the future. Professor Kötz deduces a teleological point from the study of the past: the primary purpose of the law in England and Germany, he maintains, has ‘always been’ to provide protection against personal injuries and harm to physical property. Pure economic loss seems left out of historical development, at least in those two countries.59

Whether these views do justice to the past, however, is open to question. James Gordley, who explored the history of pure economic loss in some detail, notes that many early civilians said that a plaintiff could recover if he suffered ‘damage’ and damage meant simply a diminution of the economic value of his assets. They did not distinguish between loss of a physical asset and other kinds of loss. They occasionally put cases in which the plaintiff would recover what today would be regarded as pure economic loss, though he cautions that they did not know or use this term and did not

58 For a nuanced attempt to use various factors in a sliding scale to explain the lesser protection given to pure economic loss, see H. Koziol (ed.), Unification of Tort Law: Wrongfulness (1998), 29–30.
recognize an autonomous category by that name. For instance, there was the dependant’s action for loss of support due to wrongful death, which clearly existed on the continent in Grotius’ time. This was in effect an action for the recovery of pure economic loss sustained by wife and children, but it was not referred to in those terms. Evidence of this kind would suggest that there never was a per se rule against compensation for pure economic harm in the civilian tradition. Indeed, Gordley’s account characterizes the rise of the exclusionary rule both in England and Germany as a late development of the nineteenth century and the peculiar outgrowth of analytical thinking and rising capitalism. He concludes that the rule is an ‘accident’ of legal history, not a pervasive feature of it.

7. CONCLUSION: THE RELEVANCE OF TIME

The above comparisons bring to light a number of insights. The first, as already mentioned, is that the recoverability of pure economic loss cannot be approached in terms of some distinctive trait or characteristic of the ‘legal families’ of the world. The question is simply not a civil law versus common law issue. It is evident that common law countries and some civil law countries share similar concerns about the danger of excessive liability entailed by this form of damage. The approach of the conservative civilian regimes and the common law as well simply contrasts with the liberalism of certain civilian countries where the protection of economic loss is widespread and its controversial nature is barely recognized.

The second point to be highlighted is that any general assessment of common tendencies in legal systems, however, must take into account the factor of time. National attitudes toward pure economic loss are not always stable. Indeed some recent developments should serve as a warning that any picture could appear as a still-life whenever it does not take into consideration the inner dynamics of the law. A Canadian

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60 See J. Gordley, The Rule Against Recovery in Negligence for Pure Economic Loss: An Historical Accident, in M. Bussani and V.V. Palmer (eds), Pure Economic Loss in Europe (2003), 26–29 and ibid. the citations to the views of Durandis, Baldus, Brunemann, Lauterbach and Grotius.


62 Insurance practices tend also to show the late development of the rule. Development of business interruption insurance, often called ‘consequential loss insurance’, belongs to the late nineteenth century, and even now the availability of such insurance is still rather limited. A prevalent restriction is that interruption insurance is essentially ‘follow-on’ coverage to another insured peril, such as fire. Under the wording of standard fire policies, there is no compensation for interruption unless it results from a fire. This is not really compensation for pure economic loss, however, but rather compensation for parasitic loss. See G.J.R. Hickmott, Principles and Practice of Interruption Insurance (1982), 3–4; D.C. Jess, The Insurance of Commercial Risks, Law and Practice (1986), 244–251; C. Lahnstein, Pure Economic Loss and Liability Insurance, in W.H. van Boom, H. Koziol and C.A. Witting (eds), Pure Economic Loss (2004), 162; B. Dufwa, Insurance in a European Tort Law Perspective, in M. Bussani (ed.), European Tort Law. Eastern and Western Perspectives (2006), 133.
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scholar has noted, ‘[d]ivergences between [Canadian and English] tort law began to appear in the 1960s and have steadily gained in importance. Nowhere is the distinction between Canadian common law and English law more marked today than in the courts’ approach to pure economic loss.’ Likewise, in the past 40 years Italy has in effect changed its orientation, shifting from a system of ‘protected interests’ to a system under a general clause. Within that same period England and Scotland admitted as many as five exceptions to the rule of no recovery. If one takes an even longer view one may note that France abandoned in the twentieth century a more restrictive attitude that had been current throughout the previous century (based on an unlawfulness conception) in order to match more closely its codistic liberal façade. Moving along an opposite path, Austrian history shows a departure from the liberal façade of the Austrian civil code (ABGB) in the second half of the nineteenth century, and since then its legal system has been accepting bodily German doctrinal thought on pure economic loss together with the usual justifications for its control. Still, in the past decades German law has conspicuously stretched its contract law in order to meet the need of a less narrow attitude toward pure economic loss recovery, and most of the US ‘exceptions’ to the ‘exclusionary rule’ have broken through in the same decades. Legal positions evolve. They never stand still.

65 This historical turnabout is discussed in M. Bussani and V.V. Palmer (eds), Pure Economic Loss in Europe (2003), 126 ff.
66 See the discussion of Austria’s ‘massive interior transplant’ in M. Bussani and V.V. Palmer (eds), Pure Economic Loss in Europe (2003), 152 ff.