

# RECOVERY FOR ECONOMIC LOSS IN THE EUROPEAN UNION

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## INTRODUCTION

A comparative analysis of European legal systems reveals that pure economic interests enjoy less protection under tort law than, for example, personality or property rights, but also, that there is quite some uncertainty regarding the prerequisites for compensation and that there exists no consistent system for determining recoverability. This Article begins by outlining the concept of pure economic loss before proceeding to briefly evaluate familiar arguments against the recoverability of such losses in tort, except in defined and restricted circumstances. Integral to the argument is the anxiety to prevent opening the floodgates of litigation, a two pronged, pervasive rationale designed to limit infinite legal actions and the potentially onerous burden on the defendant. A weighty objection against far reaching liability for pure economic loss is that such harm is often unforeseeable and its parameters are indeterminable. Indeed, the exclusionary rule—barring recovery of pure economic loss—also echoes the subordinate value attributed to financial damage and desires to avoid an overly vigilant culture in a bid to limit such liability. These considerations, it is argued, do not lead to the conclusion that the protection of pure economic loss is undesirable in all cases but only that far reaching protection is objectionable. Thus, the pivotal issue centers around the extent to which tort law might reasonably permit the recovery of pure economic loss.

It seems noticeable that under contract law, liability for pure economic loss is neither controversial nor restricted. By considering this and the justifications behind customary exceptions under the exclusionary rule, it becomes apparent that certain factors make a reward for pure economic loss more probable. Thus, the law protects financial interests more readily where, *inter alia*, potential claimants are restricted in number, a proximate/special relationship exists, no additional duties of care are imposed on the actor, or the tortfeasor acted with

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\* Vienna/Graz (Austria). This Article is a revised version of a paper originally presented at the Dan B. Dobbs Conference on Economic Tort Law hosted by the University of Arizona James E. Rogers College of Law in Tucson, Arizona, on March 3–4, 2006. Articles from the Conference are collected in this issue, Volume 48 Number 4, of the *Arizona Law Review*.

intent. Accordingly, the Basiswertung (the basic values) of these factors when weighed against policy considerations against recoverability, determine whether the expansion of tortious liability to protect a particular type of economic loss can be justified. This Article illustrates this balancing exercise through various examples.

This Article aims to illuminate the golden thread that permeates the boundary between recoverable and non-recoverable economic losses so as to underline decisive factors for a consistent and comprehensive system to determine when such losses should be recoverable.

### I. DEFINITION

Comparative studies<sup>1</sup> show that significant differences exist in definitions of pure economic loss. Although a precise definition of pure economic loss is not required when working out specific problems of liability, a presentation of the main and distinguishing features of such harm does provide useful background.

Von Bar<sup>2</sup> points out that, according to an interest-oriented approach, pure economic loss is a harm suffered in absence of the infringement of a legally protected right or interest. But this definition raises the question of the meaning of “protected interest.” Contractual relationships, for example, are under certain conditions protected against infringements by third parties. Thus, one has to say that to some extent even pure economic interests enjoy protection. So, in going as far as von Bar’s definition of pure economic loss, the differentiation between pure economic loss and other patrimonial loss would not make much sense because there is nearly always some protection even for economic interests and therefore there would be nearly nothing left for pure economic interests. The really interesting cases fall outside the scope of pure economic loss. Therefore, “protected interest” must have a more restrictive definition.<sup>3</sup> According to Bruce Feldthusen’s definition<sup>4</sup> “a pure economic loss is a financial loss which is not causally consequent upon physical injury to the plaintiff’s own person or property.” Heinrich Honsell’s definition has the same gist: Pure economic loss is a harm that solely affects assets without injury to an “*absolutely protected* interest.”<sup>5</sup> Therefore, we can say that pure economic loss is a harm not causally consequent upon an injury to the person (life, body, health, freedom or other rights to personality) or to property (tangible and intangible assets).

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1. See Willem H. van Boom, *A Comparative Perspective*, in PURE ECONOMIC LOSS 1, 2 (Willem H. van Boom, Helmut Koziol & Christian A. Witting eds., 2004).

2. CHRISTIAN VON BAR, GEMEINEUROPÄISCHES DELIKTSRECHT II ¶ 25 (1999).

3. See Willem H. van Boom, *supra* note 1, at 3; Israel Gilead, *The Limits of Tort Liability in Negligence and Pure Economic Loss*, in DEVELOPMENTS IN AUSTRIAN AND ISRAELI PRIVATE LAW 203 (Herbert Hausmaninger et al. eds., 1999).

4. BRUCE FELDTHUSEN, ECONOMIC NEGLIGENCE: THE RECOVERY OF PURE ECONOMIC LOSS 1 (4th ed. 2000).

5. Heinrich Honsell, *Der Ersatz reiner Vermögensschäden in Rechtsgeschichte und Rechtsvergleichung*, in FESTSCHRIFT W. LORENZ 483 (Thomas Rauscher et al. eds., 2001).

Thus pure economic loss is at stake in the following cases:

- *D* breaches his contractual obligation by not delivering a machine in time to *P* thus causing a stoppage in *P*'s business activities. Of course, this is an example of contractual liability where—in contrast to tortious liability—pure economic loss has to be compensated, in principle without restrictions.
- *D* enters into negotiations with *P* and misleads *P* who, as a result, concludes a contract very unfavorable to him. This case is not in the core area of contractual liability but may—according to some legal systems—be covered by tort law.
- *D* misleads *P*, but *P* uses the misinformation to conclude a contract with *X* and not with *D*. For example, *X* asks the expert *D* to determine the value of a painting. *P* relies on this expert opinion and concludes a contract for sale with *X* at the price ascertained by *D*. The painting turns out to be a copy and worth much less than the value assessed by *D*. Here, undoubtedly tort law is applicable.
- Bank *D* provides a prospectus and makes an application to list shares. *P* buys shares which rapidly lose their value because the prospectus omitted some important information which has since become known to the public.
- Auditor *D* certifies the accounts of company *X*. On the basis of this certification, *P* grants a loan to *X* which shortly afterwards goes bankrupt.

Tort law provides further examples:

- *D* interferes with the contract between *P* and *X* by inducing *X* to breach the contract.
- *P*, a competitor of *D*, suffers a severe drop in sales as a result of *D*'s publicity campaign.

The following cases form a special group. In these cases *D* causes an injury to a person or to property, but this damage is suffered by a person other than *P*, who only sustains an interference with his pure economic interests.

- *D* destroys *X*'s property, which is the object of the contract concluded between *X* and *P*. For example, *D* damages a cable owned by *X*, an energy supplier. Customer *P* suffers a loss because his enterprise cannot carry out its business activities.
- *D* kills *X*. *X*'s child *P* suffers a loss of maintenance.

## II. THE RESTRAINT IN LIABILITY FOR PURE ECONOMIC LOSS

As country and comparative reports show,<sup>6</sup> contract law protects pure economic loss, and many legal systems are very reluctant to compensate pure economic loss under tort law. For instance, German law restricts recovery for protected interests as a matter of course. The first sub-paragraph of § 823 BGB of the German Civil Code reads:

A person who willfully or negligently injures the life, body, health, freedom, property or other right of another contrary to law is bound to compensate him for any damage arising therefrom.<sup>7</sup>

Although this statement seems broad on its face, it receives a much more narrow application to pure economic loss. Because “other right” has—in light of the other expressly stated protected interests—to be interpreted as “absolute right” and as pure economic interest is no right at all, such interest is, according to widespread academic and judicial opinion in Germany, not generally protected but protected only in very exceptional cases.<sup>8</sup>

To some extent, such restricted protection of economic interests occurs even under those legal systems that in principle do not recognize a special category of “pure economic loss,” especially the broadminded Spanish and French legal systems.<sup>9</sup> For example, Article 1382 of the French Code Civil has no restriction concerning pure economic loss: “Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.”<sup>10</sup> Nevertheless, there is quite some difference between liability for causing pure economic loss or for injury of a person or damage to property.

Very similar is the situation under Austrian law. Like its counterpart in the French Code Civil, section 1295, sub-paragraph 1 ABGB (Austrian General Civil Code) states broadly: “Every person is entitled to demand indemnification for the damage from a person causing an injury by his fault . . . .”<sup>11</sup> But, as under

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6. See CIVIL LIABILITY FOR PURE ECONOMIC LOSS (Efsthathios K. Banakas ed., 1996); PURE ECONOMIC LOSS IN EUROPE (Mauro Bussani & Vernon Valentin Palmer eds., 2003); PURE ECONOMIC LOSS, *supra* note 1; Jaap Spier & Olav Haazen, *Preliminary Observations*, in THE LIMITS OF EXPANDING LIABILITY 9 (Jaap Spier ed., 1998).

7. Translated by BASIL S. MARKESINIS, THE GERMAN LAW OF TORTS 14 (4th ed. 2002).

8. See *id.* at 52; Mauro Bussani & Vernon Valentin Palmer, *The liability regimes of Europe—their facades and interiors*, in PURE ECONOMIC LOSS IN EUROPE, *supra* note 6, at 120, 148; Erwin Deutsch, *Der Ersatz reiner Vermögensschäden nach deutschem Recht*, in CIVIL LIABILITY FOR PURE ECONOMIC LOSS, *supra* note 6, at 55; Mathias Reimann, *Case 3: cable III—the day-to-day workers*, in PURE ECONOMIC LOSS IN EUROPE, *supra* note 6, at 218.

9. See Miquel Martín Casals & Jordi Ribot, *Pure Economic Loss under Spanish Tort Law*, in PURE ECONOMIC LOSS, *supra* note 1, at 62; Christophe Radé & Laurent Bloch, *Compensation for Pure Economic Loss Under French Law*, in PURE ECONOMIC LOSS, *supra* note 1, at 41.

10. Translation taken from Legifrance, Le service public de l'accès au droit, [http://www.legifrance.gouv.fr/html/codes\\_traduits/code\\_civil\\_textA.htm](http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm) (last visited Nov. 6, 2006).

11. Translation taken from Bussani & Palmer, *supra* note 8, at 152.

French law, a person who causes pure economic loss is liable only under rather strict prerequisites, for example, intent.<sup>12</sup>

Nowadays, however, there seems to be a tendency under many legal systems to protect pure economic interests to a greater extent.<sup>13</sup> In particular, banks have to compensate pure economic loss in many cases even if there is no contractual relationship between the claimant and the bank.<sup>14</sup> The difficulty is that there is widespread disagreement among the various legal systems as to the extent of compensation required.

### III. THE RELEVANT FACTORS FOR VARYING PROTECTION

The decisive question is why tort law—especially where the code does not explicitly provide for it—distinguishes between compensation for injury to person or property, on the one hand, and for pure economic loss on the other. I feel that the key to defining the range of liability for pure economic loss lies in the answer to this question. Thus we must identify the relevant factors that determine the differing degrees of protection for the two kinds of damage by casting a glance at the outcomes under different legal systems (Part IV) and asking which ideas lie behind these solutions (Part V). On the basis of these outcomes, Part VI suggests a flexible system of liability for pure economic loss.

#### A. *The Floodgates Argument*

One of the main reasons given for restricting compensation for pure economic loss under tort law is that without such restriction, the liability of the tortfeasor would be unlimited and thus unreasonable. A decisive factor for restricting liability for pure economic loss is, therefore, the floodgates argument.<sup>15</sup> But the term “floodgates” can be interpreted in different ways. One meaning might be that *the courts* would be flooded with claims.<sup>16</sup> But this does not seem to be the real concern of the objection.<sup>17</sup> More important is a second meaning, namely that “the defendant would be exposed to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.”<sup>18</sup> In other words, if tortfeasors faced extensive liability for pure economic loss, everyone would run an incalculable risk by acting negligently. Thus, the threat of overdeterrence would arise.<sup>19</sup>

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12. See Bernhard Schilcher & Willibald Posch, *Civil Liability for Pure Economic Loss: An Austrian Perspective*, in CIVIL LIABILITY FOR PURE ECONOMIC LOSS, *supra* note 6, at 149; Helmut Koziol, *Characteristic Features of Austrian Tort Law*, in DEVELOPMENTS IN AUSTRIAN AND ISRAELI PRIVATE LAW, *supra* note 3, at 160 (also regarding the exceptions).

13. Willem H. van Boom, Helmut Koziol & Christian A. Witting, *Outlook*, in PURE ECONOMIC LOSS, *supra* note 1, at 191.

14. See Susanne Kalss, *The Liability of Banks*, in PURE ECONOMIC LOSS, *supra* note 1, at 77.

15. See van Boom, *supra* note 1, at 33; Spier & Haazen, *supra* note 6, at 10; W.V. Horton Rogers, *Comparative Report on Case 2 (Cable case)*, in THE LIMITS OF EXPANDING LIABILITY, *supra* note 6, at 46.

16. See also FELDTUSEN, *supra* note 4, at 11.

17. See van Boom, *supra* note 1, at 33.

18. See *id.* at 34.

19. Cf. Gilead, *supra* note 3, at 201.

Nevertheless, Jaap Spier and Oliver Haazen<sup>20</sup> rightly pose the question: “But how to explain to victims of an oil mill explosion which caused economic loss to surrounding parties that their claim will be *dismissed* if they *merely* suffered economic loss (loss of profit), while it will be met if their mill seized up, which induced only minimal cost of repair?” They point out that damage to property and even personal injury may have immense effects. Yet, from the perspective of a single case, the floodgates argument will more often than not be of marginal importance. As most accidents presumably do not cause a whole series of losses, Spier and Haazen ask why the floodgates argument should bar claims in such cases.

The answer may be that compensation for pure economic loss cannot solely depend on whether the individual claimant’s loss is high or low. Indeed, if we examine competition law, we can see that it is not the amount of loss caused to the competitor that is decisive but, rather, the unfairness. The size of the loss is irrelevant to the floodgates argument: The system should not compensate those who experience minimal losses, while it leaves victims who suffer very severe harm to bear such losses themselves. Seen from the victim’s point of view, it should be the other way around, as a severely injured victim more urgently needs protection than someone who suffers only minimal injury.

However, the floodgates argument is not only based on the idea that the amount of the victim’s compensation in a single case could be enormous. After all, even without compensation for ordinary pure economic loss, the tortfeasor has to compensate all *consequential* pure economic losses if personal injury or damage to property can be imputed to him. Furthermore, if the amount of damages alone were the problem, it could be solved by imposing ceilings on liability. Of course, it would be inconsistent to do so only in cases of pure economic loss; the argument for caps on damages could be extended to cases of personal injury or damage to property. But no one advocates such restrictions with respect to the latter kinds of loss when caused by the defendant’s fault; only under strict liability do some legal systems impose ceilings.<sup>21</sup> Thus, the amount of loss in a single case is not the decisive factor in the floodgates argument.

Furthermore, if the huge amount of the claimant’s loss were the only important factor in the floodgates argument, the additional question raised by Spier and Haazen<sup>22</sup> would be very disturbing. They comment, “Indeed, tort law aims to compensate loss caused by wrongful acts. Why should this be different for pure economic loss?” Admittedly, it does seem inconsistent that a wrongdoer who caused damage to property should have to compensate the costs of repair but would not be liable for pure economic loss caused by his faulty behavior.

Since the amount of the victim’s loss by itself cannot form the basis of a cogent distinction between compensable and noncompensable harm, one has to search for other reasons to support such a distinction. The second basis of the

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20. Spier & Haazen, *supra* note 6, at 10–11.

21. See Bernhard A. Koch & Helmut Koziol, *Comparative Conclusions, in UNIFICATION OF TORT LAW: STRICT LIABILITY* ¶ 139 & quoted country reports (Bernhard A. Koch & Helmut Koziol eds., 2002).

22. Spier & Haazen, *supra* note 6, at 10.

floodgates argument seems to be the following: If a tortfeasor could be extensively liable for pure economic loss, there would almost always be a vast *number of claimants* and, therefore, everyone would run an incalculable risk by acting negligently. This result would lead to overdeterrence and an unreasonable restriction on freedom of action for all individuals.<sup>23</sup> Such restrictions upon freedom can only be avoided by imposing no duties of care with respect to other persons' pure economic interests. Therefore, pure economic interests are only protected to a limited extent. Acts causing pure economic loss cannot, for the most part, be described as wrongful—fair competition, for example, causes damage to competitors. If it were correct to say that, as a rule, conduct causing pure economic loss is not wrongful, there would be no inconsistency in denying damages for pure economic loss. As tort law only aims to compensate loss caused by *wrongful* acts, there would no longer be any reason for compensating pure economic loss. But, of course, this alters the decisive question: One would have to ask which reasons could explain the denial of duties of care in regard to pure economic interests and to what extent they are valid.

### ***B. The Nature of the Interest***

In defining the scope of protection for certain interests, one must consider not only their owner's understandable desire for protection but also the interest of free movement of those people required to respect the interests of others (as well as the interests of the public at large). The rights to life, liberty, and property have reasonably clear contours and are rather obvious. Contractual rights only have clear contours in isolated cases, but their content varies from case to case, and they tend not to be as obvious. Pure economic interests do not have clear contours even in the isolated case, and they are by no means obvious.<sup>24</sup>

Far-reaching protection for interests which neither are obvious nor have clear contours—as in the case of pure economic interests—would restrict everyone's freedom of movement to an unreasonable extent by imposing a necessary obligation to adhere to extensive duties of care. Therefore, the protection of such interests has to be restricted.<sup>25</sup>

### ***C. The Value of the Interest***

Further, the level of protection also should depend on the value of the interest.<sup>26</sup> The fundamental rights of personality rank highest; rights *in rem* and

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23. Cf. RUDOLF REINHARDT, DER ERSATZ DES DRITTSCHADENS 96 (1933); Eduard Picker, *Vertragliche und deliktische Schadenshaftung*, 1987 *Juristenzeitung* [JZ] 1052; Efsthios K. Banakas, *Tender is the Night: Economic Loss—the Issues*, in CIVIL LIABILITY FOR PURE ECONOMIC LOSS, *supra* note 6, at 9; Helmut Koziol, *The Auditor-Case*, in THE LIMITS OF EXPANDING LIABILITY, *supra* note 6, 28.

24. See Helmut Koziol, *Conclusions*, in UNIFICATION OF TORT LAW: WRONGFULNESS 132 (Helmut Koziol ed., 1998); Helmut Koziol, *Generalnorm und Einzeltatbestände als Systeme der Verschuldenshaftung: Unterschiede und Angleichungsmöglichkeiten*, 1995 *Zeitschrift für Europäisches Privatrecht* [ZEuP] 361 [hereinafter Koziol, *Generalnorm*].

25. See Koziol, *Conclusions*, *supra* note 24, at 132 & referenced country report.

26. See *id.*; Rogers, *supra* note 15, at 43.

intangible property rights rank slightly lower.<sup>27</sup> Pure economic or pure immaterial interests, for example the chance to net a profit or to enjoy a holiday, fall at the lower end of the scale.<sup>28</sup> This point likewise speaks against far-reaching protection of pure economic interests, if such protection would restrict everyone's freedom of movement to a great degree.

#### *D. First Conclusions*

In defining the scope of protection, one must always weigh, on the one hand, the interests of those persons whose protection is at stake and, on the other hand, the interests of all other persons who have to respect the protected sphere. Of course, everyone has an understandable desire for protection of his own pure economic interests. But these interests rank low and, therefore, do not carry substantial weight. In contrast, the interests of those who would have to respect the protected sphere are rather weighty. Their freedom of movement would be severely restricted by far-reaching protection of pure economic interests because, first, the impending amount of compensation in each case might be enormous; secondly, the number of claimants would be great in number; thirdly, pure economic interests are neither obvious nor clearly defined. Therefore, such far-reaching protections would impose a strain on other persons bound to respect them.

It has to be stressed that these arguments do not lead to the result that pure economic interests are not protected at all; they only counsel against far-reaching protection. Where additional arguments speak in favor of protection (or arguments against protection do not apply or deserve less weight), protection of pure economic interests may be more reasonable. The difficult questions to be solved are when and to what extent protection is reasonable and whether a consistent system of principles can be worked out. I think the best way to start with this demanding task is to examine the different legal systems and to learn from their methods of solving the problem.

### IV. THE ACCEPTED SCOPE OF PROTECTION OF ECONOMIC INTERESTS

#### *A. Contractual Liability*

In contract law, all European legal systems accept the contracting party's unrestricted liability for pure economic losses inflicted upon the other party.<sup>29</sup> The remarkable difference between contract law and tort law can teach us quite a lot

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27. According to Christian Witting, *Distinguishing Between Property Damage and Pure Economic Loss in Negligence: A Personality Thesis*, 21 J. LEGAL STUD. 481 (2001), the hierarchy of interests protected by tort law can be explained in terms of the importance of property to the constitution of persons: As an individual's personality is partly constituted by the property he or she owns, property can be seen as essential to the way in which individuals constitute and define themselves.

28. See FELDTHUSEN, *supra* note 4, at 12; Rogers, *supra* note 15, at 43.

29. See Koziol, *Generalnorm*, *supra* note 24, at 360; Peter Wetterstein, *Compensation for Pure Economic Loss in Finnish Tort Law*, in TORT LIABILITY AND INSURANCE 565 (Peter Wahlgren ed., 2001).



about the conditions under which even tort law might reasonably permit the recovery of pure economic losses. Of course, we need to determine why far-reaching liability for pure economic loss is unanimously accepted under contract law. There are several reasons this is so:<sup>30</sup>

First, the floodgates argument has no relevance in contract law: In the case of a breach of contract, only pure economic loss of the partner to the contract is at stake. Therefore, there is no danger that liability might extend to a vast number of claimants.<sup>31</sup>

Second, a contract only incorporates duties owed by one party to the other. Therefore, freedom of movement of contracting parties is not as severely restricted as in the case of duties binding upon all.

Third, the contracting party's pure economic interests which might be negatively affected by a breach of contract are generally rather obvious to the other party and clearly outlined.

On the other hand, parties to a contract seem to be in need of wide protection against infringement of their interests, including their pure economic interests because they make themselves economically vulnerable to the other party and to that other's influence.<sup>32</sup> Thus, as a result of such close contact, each party has the wide-ranging opportunity to affect the pure economic interests of the other. As a consequence, parties to a contract are dependent on the careful behavior of the other party, especially with respect to its pure economic interests. Without far-reaching protection of pure economic interests, contractual obligations would be too risky.

Finally, it is significant that, as a rule, both parties to a contract pursue business interests.<sup>33</sup> If someone pursues his own business interests and thereby endangers another person to some higher degree than—according to fundamental ideas accepted by all European legal systems—higher duties of care seem to be reasonable.

### ***B. Near-Contractual Relationship***

There is widespread acceptance<sup>34</sup> that the parties to a business venture owe special duties of care to each other even before concluding the contract. As a result, one party is liable on the basis of *culpa in contrahendo* if he causes pure economic loss to the other by misrepresentation. Interestingly, this rule does not

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30. For further evidence, see Helmut Koziol, *The Borderline Between Tort Liability and Contract*, in UNIFICATION OF TORT LAW: WRONGFULNESS 25 (Helmut Koziol ed., 1998).

31. Cf. Helmut Koziol, *Delikt, Verletzung von Schuldverhältnissen und Zwischenbereich*, 1994 Juristische Blätter [JBl] 212.

32. Cf. Claus-Wilhelm Canaris, *Schutzgesetz—Verkehrspflichten—Schutzpflichten*, in 2. FESTSCHRIFT FÜR KARL LARENZ ZUM 80. GEBURTSTAG 88 (Claus-Wilhelm Canaris & Uwe Diederichsen eds., 1983).

33. Cf. RUDOLF WELSER, *VERTRETUNG OHNE VOLLMACHT* 76 (1970); Franz Bydlinski, *Zur Haftung der Dienstleistungsberufe in Österreich und nach dem EG-Richtlinienvorschlag*, 1992 JBl 345.

34. See van Boom, *supra* note 1, at 22.

deal with contractual liability in the true sense of the word but deals, rather, with liability in the area between contractual and delictual<sup>35</sup> liability.

The willingness of courts and scholars to support the compensation of pure economic losses extends beyond the area of *culpa in contrahendo* into other areas of proximate or special relations,<sup>36</sup> which can be characterized as being close to contract.<sup>37</sup> Bruce Feldthusen<sup>38</sup> (with reference to John Smillie)<sup>39</sup> points out that the very close association of *culpa in contrahendo* with the law of contract is of great importance in the recognition of duties of care regarding pure economic interests. He shows that the link between the two constantly exhibits itself in misrepresentation, services, and products liability cases. This idea, I feel,<sup>40</sup> is very useful in explaining the scope of compensation of pure economic loss because it loosens the strict borderline between delictual and contractual liability<sup>41</sup> by showing that there is no clear contrast but, rather, a connecting chain of intermediate stages.

In my opinion, the basic underlying reasons for distinguishing between tort and breach of contract only apply to the core of each respective area. Only some of these arguments apply in the vast intermediate area where these reasons can be given in full or (more likely) with less intensity. Therefore, one must accept that no clear dividing line lies between the core of tort and the core of breach of contract—instead the two are connected by many links.<sup>42</sup>

### C. Statement to Guide Third Parties

Unsurprisingly,<sup>43</sup> many legal systems agree in holding the maker of a statement liable if he knew that his statement would guide third parties and if he made such statement in order to guide these third persons;<sup>44</sup> one might say—in a

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35. In favor of delictual liability are, for example, Christian von Bar, *Vertragliche Schadensersatzansprüche ohne Vertrag?*, 1982 *Juristische Schulung* 637; Gert Brüggemeier, *Gesellschaftliche Schadensverteilung und Deliktsrecht*, 182 *Archiv für die civilistische Praxis [AcP]* 418 (1982); ULRICH BÄLZ, *ZUM STRUKTURWANDEL DES SYSTEMS ZIVILRECHTLICHER HAFTUNG* 33, 48 (1991).

36. See *Hedley Byrne v. Heller & Partners* [1963] 2 All E.R. 575.

37. See Gilead, *supra* note 3, at 205.

38. FELDTUSEN, *supra* note 4, at 18.

39. John A. Smillie, *Negligence and Economic Loss*, 32 U. TORONTO L.J. 231 (1982).

40. Koziol, *supra* note 30, at 25.

41. Peter Cane, *Economic Loss in Tort and Contract*, 58 *Rabels Zeitschrift* 430 (1994), stresses that in some countries contract can be used to impose liability in cases which in other countries are treated in non-contractual terms. This also shows that there does not exist a strict borderline between tort and contract.

42. See Canaris, *supra* note 32, at 88; Austrian Supreme Court [Oberster Gerichtshof, OGH] in 1995 JBI 552.

43. See FELDTUSEN, *supra* note 4, at 21, 31, who stresses the similarity to contract law.

44. See van Boom, *supra* note 1, at 19; FELDTUSEN, *supra* note 4, at 43.

broader sense—that he assumes responsibility for such statements.<sup>45</sup> This situation arises in the case of an expert's statement because the expert ordinarily evokes confidence by declaring his expert knowledge. Further, third parties will most likely rely<sup>46</sup> on an expert's opinion and, therefore, be guided by such statements.

This rule may prove decisive in the case where an expert makes a statement intended to guide only one single person, for example, an expert who values a picture or real estate at the borrower's request, with the knowledge that his statement will be provided to a third party, for example a bank. But the expert's liability is also invoked even if the number of third parties who would be guided by the statement was rather large, for instance in the case of an auditor's annual account<sup>47</sup> or of a prospectus for the issue of shares.<sup>48</sup>

#### **D. Consequential Loss**

It is generally agreed that, even under tort law, financial loss has to be compensated where it is consequential upon the infringement of protected rights. This is true even if the amount of loss was unforeseeable by the defendant.<sup>49</sup>

#### **E. Intentional Infliction of Harm**

As van Boom's Comparative Report<sup>50</sup> points out, in the case of intentional action, the line of wrongfulness is crossed more easily, namely whenever the means used to pursue a goal are either unlawful or grossly disproportionate.<sup>51</sup> Van Boom rephrases the principle as follows: Intentional infliction of pure economic loss is wrongful if it lacks *justification*.

#### **F. Infringement of Contracts**

Van Boom<sup>52</sup> rightly points out that contracts are the instrument *par excellence* for creating, protecting, endorsing, and pursuing pure economic interests. Further, he reports that most legal systems deny contracts the status of protected right, although they do seem to admit that third parties have a certain duty in tort *to respect contracts* to which they are not party. The extent and ambit of this duty differs from country to country, but most legal systems restrict the application of this duty to *intentional* wrongful infringements upon contracts.

It is noteworthy that in the case of the infringement of contracts, while most legal systems deny special protection to contracts, they nevertheless accept

45. Cf. *Hedley Byrne v. Heller & Partners* [1963] 2 All E.R. 575. Christian Witting, *Justifying Liability to Third Parties for Negligent Misstatements*, 20 OXFORD J.L. STUD. 628 (2000), convincingly criticizes this justification.

46. Regarding the reliance justification, see Witting, *supra* note 45, at 626.

47. See Koziol, *supra* note 23, at 28.

48. See Kalss, *supra* note 14, at 87.

49. Cf. von Bar, *supra* note 2, ¶ 142.

50. Van Boom, *supra* note 1, at 15; see also Rogers, *supra* note 15, at 40, 43; W.V. Horton Rogers, *Auditors' Liability*, in PURE ECONOMIC LOSS, *supra* note 1, at 93.

51. Under Finnish law a criminal act is required. See Wetterstein, *supra* note 29, at 569.

52. Van Boom, *supra* note 1, at 16.

lower prerequisites for establishing liability than in other cases of pure economic loss. From that point of view, the protection of these contractual interests goes further than protections from other intentional inflictions of harm. Intentional infringement is sufficient—unlawful or grossly disproportionate means are not required.

### ***G. Relational Loss***

According to van Boom's Comparative Report, most jurisdictions that deny claims for pure economic loss nevertheless admit certain exceptions to this rule. He points out that, in cases of relational loss (notably in cases of personal injury and death), spouses and children in particular receive some form of compensation for the loss of financial support and sometimes for non-pecuniary loss. He finds it remarkable that the rhetoric used by the proponents of the *exclusionary rule* and the clear policies not to open the floodgates do not seem to apply to pure economic loss suffered by relatives of victims of personal injury.<sup>53</sup>

Another interesting exception to the rule is accepted in cases of transferred loss, that is damage that would normally have been suffered by the injured party, but that is in fact suffered by a third party because of a special relationship between the injured party and the third party.<sup>54</sup>

## **V. THE TEN COMMANDMENTS OF LIABILITY FOR ECONOMIC LOSS**

On the basis of this short overview I want to try to summarize the most relevant rules for establishing liability for pure economic loss.

### *1. Restricted numbers of potential claimants*

Both the floodgates argument and the undisputed liability for pure economic loss under contract law point to this first rule: *The lower the danger of an unlimited number of potential claimants, the more acceptable is liability for pure economic loss.* This rule is—besides breach of contract—of importance particularly for the cases of *culpa in contrahendo*, and also in cases for loss of maintenance.

### *2. No additional duties of care*

It has to be pointed out that, even under tort law, pure economic loss must be compensated by the wrongdoer if the loss is consequential upon the violation of protected rights, namely property or personality rights of the victim. The first reason for this is that the number of plaintiffs is not enlarged by allowing such liability, and, therefore, the floodgates argument does not apply to such an obligation. Second, and more importantly, by protecting the pure economic interests of persons whose other protected interests have been violated, no one is burdened with additional duties of care, and, therefore, freedom of movement is not further restricted. To some extent the second argument also has some weight when the protected rights of one person are violated and consequentially the pure

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53. Van Boom, *supra* note 1, at 25.

54. *See id.* at 29; Cane, *supra* note 41, at 435.

economic interests of another person are violated. For example, this happens when a tortfeasor kills the father of a child who then suffers loss of maintenance.

Moreover, a comparative overview<sup>55</sup> shows that, in principle, third party pure economic loss (relational loss) has to be compensated if transferred loss is at stake. For example, the tortfeasor injures an employee whose employer has to continue to pay a salary, although the employee is unable to work. I think that this argument is related to the floodgates argument: If pure economic loss of a third party is a loss transferred from the victim whose protected rights have been violated, then liability for compensating such loss leads neither to the imposition of additional duties of care reducing the freedom of movement, nor to an enlargement of the number of claimants and/or to an expansion of liability. The situation for the tortfeasor is no different than if he had to compensate the consequential economic loss of the person whose rights he had violated.

As a result we can express the second rule as follows: *Liability for economic loss is more reasonable the less protection of financial interests leads to additional duties of care and further restriction of freedom of movement.*

### 3. Proximity and special relations

As liability under contract law and, furthermore, liability for *culpa in contrahendo* prove, the factor of proximity or special relationship is very important in establishing liability for pure economic loss. The reason for this is that the opportunity to cause damage is much greater if there is close contact between the parties, so that each of them has to rely on the other to exercise proper care with respect to his interests. Furthermore, where proximity is present, it is easier and more appropriate to take care of the other's interest. Therefore, the third rule reads: *The closer the proximity between the parties, the more acceptable is liability for pure economic loss.*

### 4. Dangerousness

It is a commonly accepted rule that the greater the dangerousness (or risk) of some behavior, the more diligence is required.<sup>56</sup> This idea seems to be very relevant for establishing duties of care in regard to pure economic interests<sup>57</sup> and, therefore, in accepting liability for causing pure economic loss.

There is a noticeable tendency to impose liability for misrepresentation if the statement has been made by an expert. In my opinion, the reason for this is that everyone feels more inclined to be guided by a statement if it is made by an expert because one may assume that it is correct and reliable; therefore, when an expert makes a representation, the risk that another will rely upon it is higher. Of course, the same may be true if the statement is made by a non-expert who is expected to have special knowledge of certain facts. Therefore, the fourth rule is as follows:

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55. Cf. Rogers, *supra* note 15, at 40.

56. See Helmut Koziol, *Austrian report*, in UNIFICATION OF TORT LAW: WRONGFULNESS 17 (Helmut Koziol ed., 1998); Koch & Koziol, *supra* note 21, ¶ 158.

57. Cf. Witting, *supra* note 45, at 637.

*The greater the probability that other persons are guided by a statement, the more justifiable is liability for pure economic loss caused by a false statement.*

#### 5. Dependence

The level of dependence on a statement also weighs on establishing liability for pure economic loss. It is akin to the last mentioned factor, namely dangerousness: If the addressee of a statement depends on it in making his arrangements, he will be prepared to a great degree to behave according to this statement and, therefore, the danger of being misguided by such statement is rather high. Furthermore, the addressee of a statement seems in special need of protection if he has no other reasonable opportunity to acquire the information needed for his arrangements. This idea arises in the cases of an auditor's annual account<sup>58</sup> and of a prospectus for the issue of shares.<sup>59</sup> Therefore, the fifth rule can be stated as follows: *The greater the dependence on the statement, the more justifiable is liability for pure economic loss caused by a false statement.*

#### 6. Obviousness and actual knowledge

As mentioned above, it is widely accepted that far-reaching protection of interests requires the obviousness of these interests.<sup>60</sup> Pure economic interests typically are not obvious; but obviousness can be replaced by actual knowledge of the interest in a concrete case. The reason is that the protection of interests which are neither obvious nor known to other persons restricts the freedom of movement to a rather high degree. Therefore, according to prevailing opinion, the protection of contracts against infringement by third parties is tied to their knowledge of the contract. Thus, the sixth rule reads: *Liability for pure economic loss is more acceptable if the financial interest was known by the defendant.*

#### 7. Clear contours

As has also been mentioned above, clear contours of a certain interest speak in favor of protection. Pure economic interests generally do not have clear contours, but such contours may take shape when the interest is the subject matter of a contract, allowing protection to extend further. Of course, one might argue that, in such a case, the interest at stake is no longer purely economic, but instead an established right. But van Boom rightly points out that most legal systems do not award contracts the status of a protected right (that is, a so-called absolute right). I feel it is merely a question of terminology whether in the case of contracts one speaks of pure economic interests or a right with minor protection rather than of absolute rights. What remains important is that the protection of financial interests is broader if the interests have clear contours, even if this is true only in the isolated case. Therefore, we can formulate the seventh rule as follows: *The clearer the contours of economic interests the more reasonable is liability for an infringement of such interests.*

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58. See Koziol, *supra* note 23, at 35; Rogers, *Auditors' Liability*, *supra* note 50, at 95.

59. Kalss, *supra* note 14, at 87.

60. See Koziol, *Conclusions*, *supra* note 24, at 132.

### 8. Negligence and intent

In the area of contract law, liability is strict or else negligence is sufficient to establish it. Negligence is also sufficient to establish liability for pure economic loss if relations exist between the parties which are near-contractual in nature. I refer here to *culpa in contrahendo*. But a comparative overview shows that, under core tort law, intention to cause damage remains a decisive factor in establishing liability for pure economic loss.<sup>61</sup> Therefore, the eighth rule is: *Liability for pure economic loss is more acceptable if the tortfeasor acted with intent.*

### 9. Importance of the financial loss for the plaintiff

As van Boom points out, in cases of personal injury and death, spouses and children in particular receive some form of compensation for their relational loss of financial support. He thinks it remarkable that all of the rhetoric of the proponents of the *exclusionary rule* and of clear policies not to open the floodgates is not applied to the relatives' pure economic loss.

Two reasons speak in favor of such an exception: First, the wrongdoer violated the highest ranking rights, namely the rights to life and health. Therefore, no additional duty of care in favor of those entitled to maintenance restricts freedom of movement. Second, the relative's financial interest is typically highly important to the damaged party: His livelihood was based on financial support from the victim. Thus, one must conclude that this economic interest ranks higher than, for example, the interest to earn a profit. Therefore, the ninth rule reads: *Liability for pure economic loss is more acceptable the more important the financial interest typically is for the plaintiff.*

### 10. Defendant's economic interest

A further important factor in establishing liability for pure economic loss is that the defendant acted in pursuance of his own business interests. This is one of the decisive reasons for accepting far-reaching contractual liability for pure economic loss.<sup>62</sup> Furthermore, in recognizing the liability of an expert for damage caused by his incorrect statement, it is decisive that he acted in his own economic interest, that is, he received a fee.<sup>63</sup> If he acted without any economic interest, liability can be assumed—if at all—only when the expert knew that his statements were incorrect. Thus, the tenth rule can be worded: *Liability for pure economic loss is more reasonable the more clearly the defendant acted in his own economic interest.*

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61. Cf. Wetterstein, *supra* note 29, at 573.

62. If the parties take up contact without business interests, no duties to take care to pure economic interests are established. Cf. OGH in 1990 JBI 801 and 1991 Österreichisches Bankarchiv [ÖBA] 525 (with commentary by Claus-Wilhelm Canaris).

63. Cf. § 1300 ABGB [Allgemeines Bürgerliches Gesetzbuch, General Civil Code]; Koziol, *supra* note 23, at 35.

## VI. DEVELOPMENT OF A FLEXIBLE SYSTEM OF LIABILITY FOR PURE ECONOMIC LOSS

### A. *The Idea of a Flexible System in General*

The previous reflections have shown that a number of guiding ideas are relevant. According to W. Wilburg's idea of a flexible system,<sup>64</sup> all these ideas deserve consideration in establishing liability. But one not only has to determine the relevant factors, but also the different weights to be assigned to each factor. This leads to the conclusion that liability may lie even if one of the relevant factors is not present at all or present only to a lesser degree, provided that the weight of the other relevant factors is higher than normally required. Wilburg<sup>65</sup> stresses: "If an element comes into play with special intensity, it may in and by itself suffice to justify liability for damage." Further: "This system is capable of encompassing all imaginable cases and their special qualities. In contrast to previous principles, it is elastic and does not break like an object made of glass when the value judgment concerning the force of individual elements, such as the dangerousness of an enterprise, changes in the course of time. The addition of new aspects and forces also is made possible."

As Bernhard Schilcher<sup>66</sup> pointed out, one has to start by determining the legal *Basiswertung* (basic values). In the case of pure economic loss, we have to find out the weight of the factors normally required under tort law to establish liability. One has to assume that, as a matter of principle, liability is only established if the weight of all given factors corresponds to the weight required by the basic evaluation.

### B. *Combination of the Rules and "Basiswertung"*

Following Wilburg's idea of a flexible system, the solutions to the complex problems of liability for pure economic loss require the determination of the *Basiswertung* and further the combination of the ten rules listed above. I feel it important to point out not only the basic evaluation under tort law but also the basic evaluation under contract law. They are very different and—as already pointed out—inform us of the importance of certain factors.

The basic evaluation under *contract* law reads that the liability of a party to a contract for non-performance is either strict or, at most, based on minimal

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64. WALTER WILBURG, DIE ELEMENTE DES SCHADENSRECHTS (1941); WALTER WILBURG, THE DEVELOPMENT OF A FLEXIBLE SYSTEM IN THE AREA OF PRIVATE LAW (Herbert Hausmaninger trans., 2000) [hereinafter WILBURG, FLEXIBLE SYSTEM]; Walter Wilburg, *Zusammenspiel der Kräfte im Aufbau des Schuldrechts*, 163 AcP 364 (1964); see also FRANZ BYDLINSKI, JURISTISCHE METHODENLEHRE UND RECHTSBEGRIFF 529 (2d ed. 1991); CLAUS-WILHELM CANARIS, SYSTEMDENKEN UND SYSTEMBEGRIFF IN DER JURISPRUDENZ 74 (2d ed. 1983); Bernhard A. Koch, *Wilburg's Flexible System in a Nutshell*, in YEARBOOK ON EUROPEAN TORT LAW 2001 545 (Helmut Koziol & Barbara Steininger eds., 2002).

65. WILBURG, FLEXIBLE SYSTEM, *supra* note 64, at 9.

66. BERNHARD SCHILCHER, THEORIE DER SOZIALEN SCHADENSVERTEILUNG 204 (1977).



negligence and covers pure economic loss without further prerequisites. In opposition is the basic evaluation under *tort* law: Liability for pure economic loss is established only after a serious prerequisite is met, namely intentional infliction of pure economic loss which lacks justification.

From these very different *Basiswertungen* we find that *proximity* (or ‘special relations’) between the parties to a contract and, further, the very *limited number* of possible claimants are decisive factors for far-reaching protection of pure economic interests. If these prerequisites are not proven, then, as a rule, liability can only be established in cases of very severe fault (that is, on the basis of intent and lack of justification). But one notices that these prerequisites take on lesser importance if other factors (relevant under contract law) are present. Part VII illustrates the relevance of this combination of factors in establishing liability for pure economic loss.

## VII. EXAMPLES OF THE OUTCOME

### A. Relational Loss Caused by Personal Injury

Van Boom<sup>67</sup> uses the phrase “relational economic loss” to describe the situation where *P* suffers pure economic loss indirectly caused by the physical damage to *X*’s person or property, for which *D* is liable vis-à-vis *X*. According to prevailing opinion, claims for relational loss are excluded from the general rule prohibiting recovery for pure economic loss.<sup>68</sup> This has been justified based on the uncertainty of the legal ambit and consequences that would follow by allowing a claim by *P*. Alternatively, the emphasis is placed upon *the injured party* being merely a secondary victim. This stance is justifiable because nearly all the factors which argue against liability apply to these cases. Only the argument that no additional duties of care would be imposed on *D* rings true: He is at any rate prohibited from injuring *X*, irrespective of *P*’s pure economic interests, so that the protection of the latter, who may be harmed indirectly, would not impose additional duties of care upon *D*. But this argument by itself has not enough weight to overrule all the counter arguments. Only if this argument joins with other factors does *D*’s liability for *P*’s pure economic loss appear reasonable.

Van Boom<sup>69</sup> points out that in cases of wrongful death, spouses and children in particular receive some form of compensation for the loss of *maintenance*. In such cases, the exception of the exclusionary rule seems justified because at least two important factors speak in favor of compensating *P*’s loss of maintenance: *D* is not burdened by additional duties of care as he has to respect *X*’s life; *P*’s existence depends on the financial support of *X* and, therefore, the importance of his economic interests ranks high.

Furthermore, van Boom<sup>70</sup> refers to the dependant’s loss as a “transferred loss.” As mentioned above, this argument favors compensating economic loss. But, in fact, this argument does not apply: In case of death, the estate has no claim

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67. Van Boom, *supra* note 1, at 24.

68. *See id.* at 18.

69. *Id.* at 25.

70. *Id.* at 25.

for compensation based on the earnings that the deceased would have realized without the tortfeasor's wrongful behavior. Therefore, the dependant's loss represents an additional loss. Nevertheless, van Boom's observation is justified in a wider sense: If the victim would not have been killed but only wounded and, therefore, rendered unable to earn income, the tortfeasor would have had to compensate the loss, and the victim could have paid the maintenance. One could say that by killing the person obliged to pay maintenance, the loss has been transferred to the dependants. I feel such transfer is an additional argument, as the tortfeasor should not be treated better for killing instead of wounding.

The phrase *transferred loss* refers to the situation where damage that would normally have been suffered by the injured party (*X*) is in fact suffered by a third party (*P*) because of a special relationship between the injured and the third party.<sup>71</sup> According to widespread opinion, either *X* or *P* has a claim against tortfeasor *D*. Such an exception from the exclusionary rule is justifiable because the defendant is not burdened with additional liability as long as the total amount of damages awarded does not exceed the amount that *X* would have been able to claim. The floodgates argument is not applicable in such cases.

### ***B. Relational Loss Caused by Injury to Property***

In the famous "Cable cases," the question arises whether the manufacturing plant's pure economic loss is recoverable if the defendant cuts off the power supply which belongs to the supplier of energy.<sup>72</sup> Of a similar nature is the question whether a plaintiff who has been detained by a traffic jam negligently caused by the defendant can recover his resulting pure economic loss.<sup>73</sup> The answers given by European courts and scholars in the first mentioned case differ considerably;<sup>74</sup> they are not as diverse in the second case.<sup>75</sup> Van Boom<sup>76</sup> rightly finds it unconvincing to deny recovery of pure economic loss in such cases solely on the basis that such inconveniences are inherent to everyday life.

Nevertheless, a glance at the decisive factors for establishing liability for pure economic loss shows that the overwhelming majority of arguments speak against compensation of such loss in the cases under discussion: First of all, they present classic examples of boundless losses with potentially cascading damages, and, therefore, the floodgates argument is very substantial. Further, there is no proximity between the claimants and the defendant; and the third parties' pure economic interests are neither obvious nor do they have clear contours. Moreover, in principle, such pure economic interests have lesser importance. There is a sole argument that points in the opposite direction: The defendant would not be burdened by additional duties of care—irrespective of the third party's economic interests he should have respected the owner's property in the Cable cases and he

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71. See *id.* at 29.

72. Cf. *id.* at 26; Rogers, *supra* note 15.

73. See Case 3, in THE LIMITS OF EXPANDING LIABILITY, *supra* note 6.

74. Van Boom, *supra* note 1, at 25; see Wetterstein, *supra* note 29, at 567.

75. See J. Sinda Monteiro, *Comparative Law Report on Cases 3 and 4*, and the *Country reports on case 3*, in THE LIMITS OF EXPANDING LIABILITY, *supra* note 6.

76. Van Boom, *supra* note 1, at 26.

should have acted according to road traffic rules in the traffic jam cases. Therefore, in weighing the pros and cons, one must conclude that in such cases third parties' pure economic losses do not deserve compensation.

In cases of damage to property, the same arguments used in cases of personal injury apply for putting aside the exclusionary rule and favoring compensation of third parties' pure economic loss when *transferred loss* is at stake. For example, *X* makes a legally binding promise to *P* to donate to him his house. Before the conveyance of the property from *X* to *P*, *D* negligently burns down the house. As *X* had to transfer the house to *P* without any return favor, *X* suffers no loss at all. *P* suffers pure economic loss as he had no property rights in the house. But the damage suffered by *P* represents a loss transferred by contract from *X* to *P*. Therefore, as already mentioned above, more and stronger arguments call for compensation of such loss.

### *C. Experts' Liability*

According to the basic evaluation, experts' liability for third parties' pure economic loss is only established in the case of intentional infliction of such loss which lacks justification. Thus, one has to bear in mind that there ought to be a good reason for permitting the recovery of economic loss in cases where third parties have, to their detriment, either directly or indirectly relied upon an expert's opinions without charge.<sup>77</sup> As a result, liability will be established only in the numerically insignificant cases of the expert's deliberately misleading statement.<sup>78</sup>

But it is widely accepted that liability is much broader if the expert's opinion is meant for third parties and aims at influencing their arrangements. In such cases, proximity as well as a high degree of dangerousness are present. Therefore, the expert's liability is similar to that under contract law, and negligent conduct is sufficient for establishing liability.<sup>79</sup>

### *D. Expected Inheritance*

If a notary public negligently fails to draft a will requested by his client, the intended beneficiaries that would have benefited from the properly drafted will suffer pure economic loss.<sup>80</sup> In a number of jurisdictions, the notary public is liable for the loss. One of the arguments usually advanced in favor of allowing the claim by disappointed beneficiaries is that there is no danger of indeterminate liability because the identities of the potentially injured parties are known as are the financial implications. In addition, one has to acknowledge that the notary's client will suffer no harm; all the loss is transferred to the beneficiaries. Thus, the floodgates argument is of no relevance. Furthermore, proximity arises to some extent because the beneficiaries belong to the client's sphere; the notary public is not burdened by additional duties of care; the interests of the beneficiaries are

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77. Cf. BRUCE FELDTHUSEN, *supra* note 4, at 45.

78. See § 1300 ABGB [Allgemeines Bürgerliches Gesetzbuch, General Civil Code]; Rogers, *supra* note 50.

79. Cf. RUDOLF WELSER, HAFTUNG FÜR RAT, AUSKUNFT UND GUTACHTEN 86 (1983).

80. See van Boom, *supra* note 1, at 23.

obvious and have clear contours; inheritance typically is of real importance to the beneficiaries and, finally, the notary public receives a fee.

*E. Auditors' Liability*<sup>81</sup>

Some arguments clearly speak *against* auditors' liability for third party losses, that is, losses of persons who are not parties to a contract with the auditor. First, if auditors' liability to all third parties, for example all investors, is at stake, the number of potential claimants would rise and thus the floodgates argument seems very weighty. Second, there is no close contact between the auditor and the investors; therefore, proximity similar to that between parties to a contract is not present. Third, as a rule, the auditor will not know exactly which persons will rely on his statement and what arrangements they will make on the basis of his annual account. Fourth, the economic interests of third parties may be very different and, therefore, are not clearly outlined. Fifth, third parties receive the information for free. Sixth, the financial loss will not be as serious as the loss of maintenance in the case of the person's death.

On the other hand, many factors speak out *in favor* of such liability. First, the contract with the company requires the auditor to draft the annual account carefully. Therefore, it would not be necessary to burden the auditor with additional duties of care in order to hold him liable for the loss of third parties.

Second, although, as a rule, there is no close contract-like proximity between the auditor and third persons, the contract between the expert and the company may nevertheless include a third party within its protective purpose. Indeed, that protective purpose may also be established by a law providing for the *publication* of the annual account.<sup>82</sup> Furthermore, a proximity of relationship may be present if the expert intended to influence the dispositions of third parties.

Third, the auditor's statement is dangerous to a high degree because he is an expert. Further, the statutory annual account has to be published and, thus, aims to inform third parties. Therefore, a careless annual account is a source of danger for all those who make arrangements relying on the account, especially by buying shares or granting a loan. But one notes that a false annual account does not create a special danger for those who are already shareholders: Of course, they can argue that they would have sold their shares earlier if they had been informed by a correct annual account that the company's actual financial situation was critical; but as a rule, they could not have avoided their loss by selling earlier because the price of the shares would have gone down the very moment the correct annual account was published.

Fourth, minor investors depend on the auditor's published statement to some extent since they have no other way to learn about the company; therefore,

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81. For more details see Rogers, *Auditors' Liability*, *supra* note 50, at 93; Koziol, *supra* note 23, at 25; ABSCHLUSSPRÜFER. HAFTUNG UND VERSICHERUNG (Helmut Koziol & Walter Doralt eds., 2004).

82. Cf. Efstathios K. Banakas, *supra* note 23, at 24; Helmut Koziol, *Rechtsvergleichender Überblick und Schlussfolgerungen*, in ABSCHLUSSPRÜFER. HAFTUNG UND VERSICHERUNG 150 (Helmut Koziol & Walter Doralt eds., 2004).

they are forced to rely on the expert's opinion. But one has to admit that the same is not true for a bank that has granted a loan or for a company making a take-over bid. The bank can obtain information on its own. Therefore, one could ask the question whether the account has to be published in the interest of all third parties or solely in the interests of certain groups, for example the small investors.<sup>83</sup> But what about outside suppliers or other contracting partners who grant a respite through contract? Of course, it would be very difficult to draw a convincing line between those persons the law wants to be informed by the publication and other persons. Furthermore, it seems reasonable to say that the law provides for an annual account and its publication as a sort of compensation for the limited liability of trading companies; this argument would speak for a very broad scope of protection. Last but not least, from an economic point of view it would not seem reasonable that certain third parties are not allowed to rely on the existing annual account but should be required to order a new one.

Also, although the economic interests of third parties usually will not be obvious or known to the auditor, in special cases they may be. For instance, the situation might arise if the auditor knows that the company wants to present the account to a bank; or if he knows that his statement will be mentioned in the prospectus for the issuance of shares and that the investors will therefore rely on his account; or if he knows that the statutory annual certification has to be published.

In addition, in certain cases, the economic interests of third parties may be clearly defined, for example the interests of a bank granting a loan on the basis of the account or the interests of investors buying shares on the basis of the prospectus which mentions the positive annual account.

Furthermore, the auditor receives a fee for drafting the annual account and, therefore, has an economic interest in supplying the statement. One could object that the auditor receives the fee from the company and not from the investors, who want to buy shares, or from the banks, who consider granting a loan to the company. But this argument deserves little attention: In the case of a statutory audit, the company has to provide an annual account by an auditor; it has to present the annual account to the shareholders' meeting, and it has to publish the auditor's certification. Therefore, the fee paid by the company includes consideration for the presentation and publication of the annual account. In addition, the fee negotiated by the auditor takes into account the risk he runs of liability to third persons.

Based on the pros and cons concerning the auditor's liability to third parties, one may reach the following conclusions:

Because of the floodgates argument and all the other arguments against the auditor's liability, the *Basiswertung* precludes liability of the auditor to third parties unless one of the factors in favor of liability obviously presents itself.

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83. See Rogers, *Auditors' Liability*, *supra* note 50, at 95; Koziol, *supra* note 23, at 35.

Therefore, liability will attach where the auditor has drafted the false account with intent.<sup>84</sup>

Also, if the auditor is informed by his contracting party (the company) that the account he has to draft will be presented to a certain third party, who will use it as a basis for further arrangements, the auditor will be liable to this third party for the damage he caused by a false statement. In such a case, the floodgates argument is not at all important, proximity is established and the auditor knows the interest of the third party. Therefore, liability, under these facts, would be established in the case of an auditor's negligence.

In addition, in the case of a statutory account, the auditor knows that it will be *published* together with the certification and, therefore, that he provides information for all third parties. Thus, proximity is present, but the floodgates argument seems weighty. Furthermore, the economic interests of third parties lack clear definition, and the economic loss does not appear to be as serious as in the case of loss of maintenance. Therefore, it seems that some additional factors have to be established (or given to a higher degree than usual) before the auditor's liability for pure economic loss to third parties seems reasonable.

In this regard, one can point out that small investors are forced to rely on the published account and this factor strongly speaks in favor of establishing liability. On the basis of this argument, we would have to distinguish between small investors on the one hand and banks, as well as important outside suppliers or persons attempting take-over bids who all have other opportunities to obtain information. But, as mentioned above, it seems very difficult to draw a definite line and, furthermore, it would be inefficient if some persons would not be allowed to rely on the existing account but be required to make new inquiries.<sup>85</sup> Therefore, if one does not espouse this result, because of practical considerations, then all third parties have to be treated in the same way.

To take into account the inevitable dependency of third parties, a rule emerges to the effect that duties owed to third parties must be of a restricted nature. To put it the other way around: The auditor's liability is only established if he neglected fundamental auditing rules; otherwise, his behavior is not wrongful in relation to third persons. But I am not in favor of such restriction: First of all, one must point out that small investors have to rely on the auditor's statement as they do not have the opportunity to obtain other information and, therefore, such restrictions of liability do not seem reasonable. Secondly, one has to take into consideration the auditor's duties of care to the company and that no additional duties of care are imposed on the auditor even if he has to take care of third parties' economic interests.

As a result, in the case of a *published statutory account*, the auditor's liability to third parties should not be limited to certain groups of persons and,

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84. See Rogers, *Auditors' Liability*, *supra* note 50, at 100.

85. See FELDTUSEN, *supra* note 4, at 101.

further, should not be restricted to liability for neglecting fundamental auditing rules.<sup>86</sup>

On the other hand, one has to see to it that the auditor's duties of care will not be overstretched and one has to examine thoroughly the scope of the plaintiff's reasonable reliance and to determine properly whether a claimed loss has been caused by reliance on the published account. Further, as the arguments against liability are very weighty, it might seem reasonable by reference to some judicial decisions<sup>87</sup> to limit the auditors' liability to certain maximum amounts, but only if minimal negligence is at stake. Thus, in cases where less significant factors favor liability, the interests of the auditors, especially insurability, receive greater weight.

Finally,<sup>88</sup> it would be reasonable to restrict the auditor's liability to those losses which were foreseeable to him at the time of concluding the contract with the company.<sup>89</sup> The first argument is that even the liability in regard of third persons has to be explained by the contract with the company, as this is the basis of the auditor's duty to draft the annual account carefully. Second, the auditor should have the opportunity to calculate his fee considering his risks of liability and the possible amount of damages. Therefore, the auditor should not be liable for a bank's loss if it extended credit up to an unforeseeably high amount, and the same holds true for an investor's loss, if the issuance of shares had not been planned at the time of concluding the auditing contract.

#### ***F. Infringement of Contracts***

According to overwhelming opinion,<sup>90</sup> third parties are in principle not bound to respect contracts to which they are not a party. Therefore, as contractual rights do not rank among protected rights, one must classify a loss suffered by a creditor and caused by the interference of a third party as a pure economic loss. Nevertheless, van Boom points out that none of the legal systems under discussion treats interference with a contract exactly in the same restrictive way as other types of pure economic loss.

It is justifiable to draw such a distinction and to protect contractual rights to a greater extent than other pure economic interests. First of all, if the defendant induces the debtor to breach the contract, and thus harms the creditor, the floodgates argument does not speak against compensation of the loss suffered by the creditor: There is no danger that an unlimited number of persons will claim because only one person, the creditor, suffered loss through the inducement of his debtor. Further, the economic interests of the creditor have materialized, and the position of the creditor is accepted by law. This recognition should lead to higher

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86. In this sense, see the decision of the Austrian Supreme Court from 27 November 2001 in 2002 ÖBA 820 (with commentary by Walter Doralt).

87. *Id.*

88. For more details see Koziol, *supra* note 82, at 161.

89. *Cf.* Art. 74 sentence 2 of the Final Act of the U.N. Conference on Contracts for the International Sale of Goods, Official Records, Annex I at 230 (Apr. 10, 1980), U.N. Doc. A/ Conf. 97/18, *reprinted in* 19 I.L.M. 668 (1980)..

90. *See* van Boom, *supra* note 1, at 16.

protection. Denying such protection would be—as van Boom points out<sup>91</sup>—inconsistent with the need of any market economy for contractual stability.

Contractual relations, however, are not obvious and generally do not have clear contours, as the contents of contracts differ from case to case. Therefore, general protection would restrict the freedom of movement of third parties severely, as they would be compelled to investigate the existence of a contract and its contents. As a result, protection of contractual relations seems reasonable only in cases where third parties are aware of a contract. But even under this condition liability for every negligent inducement to breach a contract would be too far-reaching, and van Boom's Comparative Report<sup>92</sup> demonstrates that most legal systems agree with this conclusion and restrict liability to *intentional* infringements of contracts. I think that the reason for this restriction is that "psychological causation" is at stake.<sup>93</sup> One has to take into account that in principle everyone has to decide himself how he wants to behave, and, therefore, only he himself is liable for his decision. Furthermore, freedom of movement would be restricted intolerably if everyone would have to avoid any remark or other behavior which could lead to a wrongful decision of another person. Therefore, only intentional and thus highly dangerous influence must be avoided.

### VIII. THE PRINCIPLES ON EUROPEAN TORT LAW AND THE NEW AUSTRIAN DRAFT

The Principles on European Tort Law drafted by the European Group on Tort Law reflect some of the ideas touched upon above. Article 2:102 reads as follows:<sup>94</sup>

#### Art. 2:102. Protected interests

- (1) The scope of protection of an interest depends on its nature; the higher its value, the precision of its definition and its obviousness, the more extensive is its protection.
- (2) Life, bodily or mental integrity, human dignity and liberty enjoy the most extensive protection.
- (3) Extensive protection is granted to property rights, including those in intangible property.
- (4) Protection of pure economic interests or contractual relationships may be more limited in scope. In such cases, due regard must be had especially to the proximity between the actor and the endangered person, or to the fact that the actor is aware of the fact that he will cause damage even though his interests are necessarily valued lower than those of the victim.

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91. *Id.* at 16.

92. *Id.* at 17.

93. HELMUT KOZIOL, ÖSTERREICHISCHES HAFTPFLICHTRECHT I ¶¶ 4, 52 (3d ed. 1997).

94. For further detail see Helmut Koziol, *General Conditions of Liability*, in PRINCIPLES OF EUROPEAN TORT LAW: TEXT AND COMMENTARY 29 (2005).



(5) The scope of protection may also be affected by the nature of liability, so that an interest may receive more extensive protection against intentional harm than in other cases.

(6) In determining the scope of protection, the interests of the actor, especially in liberty of action and in exercising his rights, as well as public interests also have to be taken into consideration.

Also the Austrian Draft on the Law of Damages, completed in the spring of 2005, is based on similar ideas. Section 1293, sub-paragraph 2 of the draft points out that the protection of an interest depends not only on its rank and value, the precision of its definition, and its obviousness, but also on the interests of others in free development and in the exercise of their rights, as well as on the public interests. On this general basis, section 1298 of the draft provides:<sup>95</sup>

§ 1298. (1) Duties of care in regard of pure economic interests exist in particular in a relationship under the law of obligations, at business contact, in case of statements on which the addressee perceptibly depends on or which are intended to arouse the reliance of the addressee, as well as on account of provisions on behavior to protect assets; further if the offender is aware of causing damage and if there exists a stark imbalance between the endangered interests and the interests of the offender.

(2) A person who knows the contractual rights of an other person must not work towards the breach of contract by the debtor, unless he protects by that his own right which he has established before or without being aware of the other's contractual right. A person who just takes advantage of a debtor's decision to breach the contract is only liable, if he is aware of the debtor's obligation or if this obligation is obvious and if he fails to prove that the damage would have occurred even without his activity.

### CONCLUSION

Of course, further study is required to work out the relevant factors more precisely. More comparative results, more profound examination of the reasons behind the solutions, more penetrating consideration of which reasons are adequate, and more detailed weighing of interests are all required. Add to these reflections of law and economics, for example, and studies of liability in the area of capital markets. Nevertheless, I hope that I have been able to provide some signposts to indicate the direction needed for future research.

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95. Cf. Attila Fenyves, *Haftung für schuldhaftes oder sonst fehlerhaftes Verhalten*, in ENTWURF EINES NEUEN ÖSTERREICHISCHEN SCHADENERSATZRECHTS 51 (Irmgard Griss, Georg Kathrein & Helmut Koziol eds., 2006).