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Edited by Mauro Bussani and Vernon Valentine Palmer
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Pure Economic Loss in Europe

Pure economic loss is one of the most discussed and controversial legal issues in Europe today, raising complex questions which affect the law of tort and contract. How far can tort liability expand without imposing excessive burdens upon individual activity? Should the recovery of pure economic loss be the domain principally of the law of contract? And is there a common core of principles, policies and rules governing tortious liability for pure economic loss in Europe?

This is the first comprehensive study of the subject, using a fact-based comparative method and in-depth research into the laws of thirteen European countries. Following a historical and analytical introduction to economic loss, experts from most European countries consider how their national systems would deal with the same practical problem, highlighting similarities and differences in a range of comprehensive issues. This is the third publication of The Common Core of European Private Law Project.

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CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW

The Common Core of European Private Law Project

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For the transnational lawyer the present European situation is equivalent to that of a traveller compelled to cross legal Europe using a number of different local maps. To assist lawyers in the journey beyond their own locality *The Common Core of European Private Law Project* was launched in 1993 at the University of Trento under the auspices of the late Professor Rudolph B. Schlesinger.

The aim of this collective scholarly enterprise is to unearth what is already common to the legal systems of European Union member states. Case studies widely circulated and discussed between lawyers of different traditions are employed to draw at least the main lines of a reliable map of the law of Europe.

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PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
 The Pitt Building, Trumpington Street, Cambridge CB2 1RP, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
 The Edinburgh Building, Cambridge, CB2 2RU, UK
 40 West 20th Street, New York, NY 10011-4211, USA
 477 Williamstown Road, Port Melbourne, VIC 3207, Australia
 Ruiz de Alarcón 13, 28014 Madrid, Spain
 Dock House, The Waterfront, Cape Town 8001, South Africa
<http://www.cambridge.org>

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First published 2003

Printed in the United Kingdom at the University Press, Cambridge

Typeface Swift 10/13 pt. System \LaTeX 2_ε [TB]

Pure economic loss in Europe / edited by Mauro Bussani and Vernon Valentine Palmer.
 p. cm. - (Cambridge studies in international and comparative law; [28]. The Common
 core of European private law project)

Includes bibliographical references and index.

ISBN 0 521 82464 8 (hbk.)

1. Damages—European Union countries. I. Bussani, Mauro. II. Palmer, Vernon V.
 III. Cambridge studies in international and comparative law (Cambridge, England:
 1996); 28. IV. Cambridge studies in international and comparative law (Cambridge,
 England: 1996). Common core of European law project.

KJC1620.P87 2003 346.03'094 - dc21 2002031345

A catalogue record for this book is available from the British Library

ISBN 0 521 82464 8 hardback

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General editors' preface

This is the third book in the series *The Common Core of European Private Law* which will publish its results within *Cambridge Studies in International and Comparative Law*. The project was launched in 1993 at the University of Trento under the auspices of the late Professor Rudolf B. Schlesinger. The methodology used in the Trento project is novel. By making use of case studies it goes beyond mere description to detailed inquiry into how most European Union legal systems resolve specific legal questions in practice, and to thorough comparison between those systems. It is our hope that these volumes will provide scholars with a valuable tool for research in comparative law and in their own national legal systems. The collection of materials that the Common Core Project is offering to the scholarly community is already quite extensive and will become even more so when more volumes are published. The availability of materials attempting a genuine analysis of how things are is, in our opinion, a prerequisite for an intelligent and critical discussion on how they should be. Perhaps in the future European private law will be authoritatively restated or even codified. The analytical work carried on today by the almost 200 scholars involved in the Common Core Project is a precious asset of knowledge and legitimization for any such normative enterprise.

We must thank not only the editors and contributors to these first published results but also all the participants who continue to contribute to *The Common Core of European Private Law Project*. With a sense of deep gratitude we also wish to recall our late Honorary Editor, Professor Rudolf B. Schlesinger. We are sad that we have not been able to present him with the results of a project in which he believed so firmly. No scholarly project can survive without committed sponsors. The Dipartimento di Scienze Giuridiche of the University of Trento, its

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xii GENERAL EDITORS' PREFACE

past and present directors and its excellent staff must first be thanked. The European Commission is partially sponsoring our annual general meetings, having included them in their High Level Conferences Program. The Italian Ministry of Scientific Research is now also funding the project, having recognized it as a 'research of national interest'. The Consiglio Nazionale delle Ricerche, the Istituto Subalpino per l'Analisi e l'Insegnamento del Diritto delle Attività Transnazionali, the University of Torino, the Fromm Chair in International and Comparative Law at the University of California and the Hastings College of Law have all contributed to the funding of this project. Last but not least, we must encourage all those involved in our ongoing Trento projects in contract law, property, tort and other areas whose results will be the subject of future published volumes. Our home page on the internet is at <http://www.jus.unitn.it/dsg/common-core>. There you can follow our progress in mapping the common core of European private law.

General Editors:

Mauro Bussani (University of Trieste)

Ugo Mattei (University of Turin and University of California, Hastings College of Law)

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Rodolfo Sacco (University of Turin)

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Preface

Prefaces, happily, are written last when the difficult work is already done. We only take the occasion to say a word about the timing of this project, and to thank those who contributed to it.

As the reader will appreciate, a case study of thirteen European jurisdictions involving the collaboration of twenty-two scholars takes considerable time to complete. This collective enterprise began more than six years ago. The selection of our reporters and contributors, the development of our questionnaire and the refinement of our working method were all settled and agreed upon in our initial meetings in Trento, Italy in 1996. First drafts of the national reports were written and completed in the period 1997–9, and then began a process of study, editing and re-drafting which continued for several years thereafter. The introductory chapters, as well as the editors' comparative remarks, were not completed until 2001. Even if this delay could be considered normal, we recognize that it entails the risk that perhaps some recent information or writings in a particular European system may not have been cited. Nevertheless, the general editors of this volume, together with the national reporters, can assure the reader that no material changes in the law have been omitted and that the work is generally current and reliable. For example, important recent developments, such as passage of the Act to modernize the Law of Obligations in Germany (effective 2002) and the most recent decisions of the European Court of Justice, have been taken into account and were added. Thus we are confident that the essential picture of pure economic loss in Europe has been captured.

It remains only to acknowledge our gratefulness to those who have made this book possible.

We express our deepest thanks to all our national reporters and contributors for undertaking this work in the spirit of international

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cooperation. We sadly note that our colleague Gary Schwartz passed away soon after writing his brilliant chapter on the American view of pure economic loss. In Gary, the world has surely lost one of its greatest tort scholars.

We must also thank Mrs Carla Boninsegna not only for her general role in organizing our meetings in Trento, but for her generous technical assistance with the bibliography and the submission of the manuscript in proper form to Cambridge University Press.

We are grateful to the deans of Tulane Law School, the directors of the Eason-Weinmann Center for Comparative Law of the same law school, the directors of the law departments of Trento and Trieste Universities, the Italian Ministry of Education and Scientific Research, the Italian National Research Council and the European Commission. Without the efforts and the contributions of all these institutions this book would not be what it is.

Finally, we wish to thank our colleagues Francesca Fiorentini, Christina Hultmark, Jane Stapleton, Walter van Gerven Konstantinos D. Kerameus and Tony Weir, whose friendship and patience encouraged us and eased the path towards the publication of the results of our research.

*Mauro Bussani and Vernon Palmer
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Cambridge University Press

0521824648 - Pure Economic Loss in Europe

Edited by Mauro Bussani and Vernon Valentine Palmer

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Relevant statutory and codified provisions (*In translation*)

Austria

Civil Code

Article 1295

- (1) A person is entitled to demand indemnification for the damage from a person causing an injury by his fault; the damage may have been caused either by the violation of a contractual duty or without regard to a contract.
- (2) A person who intentionally injures another in a manner in violation of public morals, is liable therefor; however, if the injury was caused in the exercise of legal rights, the person causing it shall be liable therefor only when the exercise of this right obviously has the purpose to cause damage to the other.

Article 1299

A person who claims publicly an office, art, trade or handicraft, or who assumes voluntarily without necessity a business which demands specialized knowledge or extraordinary diligence, warrants thereby that he trusts himself to possess the necessary diligence and extraordinary knowledge; therefore, such person is liable for the lack thereof. However, if the person who entrusted the business to him knew of his inexperience, or could have known thereof by applying the usual attention, such person is also guilty of negligence.

Article 1300

An expert is liable when he negligently gives, for a consideration, bad advice in matters of his art or science. In other cases, a person giving advice is liable only for damage which he has knowingly caused to another by giving the advice.

Article 1311

Mere accidents affect only the person to whose property or person they occur. However, if another person has occasioned the accident by his fault, or if such person has acted in violation of a law in endeavouring to prevent incidental injuries, or if he has interfered unnecessarily with the business of another, he is liable for any damages which would not otherwise have occurred [...]

Article 1330

- (1) If a person has suffered actual damage or loss of profit through libel and slander he is entitled to demand indemnity therefor.
- (2) This provision is also applicable where a person makes notorious matters which might endanger the credit, business or property of another person and which he knew or should have known were untrue. In such a case, the public revocation thereof may also be demanded. However, a person who makes a secret communication the untruth of which he does not know is not liable if he or the addressee has a legal interest therein.

Belgium*Civil Code**Article 1382*

Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation.

Article 1383

Each one is liable for the damage which he causes not only by his own act but also by his negligence or imprudence.

Article 1384

One is liable not only for the damage which he caused by his own act but also for that which is caused by the act of persons for whom he is responsible, or by things which he has in his keeping.

The father and the mother are liable for damage caused by their minor children.

Masters and principals [are liable] for damage caused by their domestics and employees in the functions for which they have been employed.

Teachers and artisans [are liable] for damage caused by their pupils and apprentices during the time when they are under their surveillance.

The above liability arises unless the father and mother and the teachers and the artisans prove that they could not prevent the act which gave rise to such liability.

Article 1385

The owner of an animal or he who avails himself of it while it is being put to his use is liable for the damage which the animal causes, whether the animal was in his keeping or whether it had strayed or escaped.

Article 1386

The owner of a building is liable for the damage caused by its collapse when it happens as a result of default of maintenance or through a defect in its construction.

Finland

Tort Liability Act 1974

Chapter 2 § 1

One who by intent or by negligence causes another a damage shall compensate it, as far as this Act does not prescribe otherwise.

Chapter 5 § 1

Compensation includes recovery for personal injury and property damage. If damage has been caused through an act sanctioned by criminal law or through an act of authority or if in other cases there are specially important reasons, compensation includes also recovery of such economic losses which are not in connection with personal injury or property damage.

France

Civil Code

Article 212

Spouses mutually owe each other fidelity, aid, assistance.

Article 1141

If the thing which one is obligated to give or to deliver to two persons successively is purely movable property, that one of the two who has been put in actual possession of it is preferred and remains owner of it, although his title is subsequent in date, provided, however, that the possession is in good faith.

Article 1149

Damages to a creditor are in general due for the loss which he incurred and for the gain of which he was deprived, apart from the exceptions and modifications hereinafter.

Article 1151

Even in the case where the inexecution of the agreement results from the wilfulness of the debtor, damages are to include, with regard to the loss incurred by the creditor and the gain of which he has been deprived, only what is an immediate and direct consequence of the inexecution of the agreement.

Article 1165

Agreements are effective only between the contracting parties; they do not harm a third party, and they benefit him only in the case provided in Article 1121.

Article 1382

Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation.

Article 1383

Each person is liable for the damage which he causes not only by his own act but also by his negligence or imprudence.

Article 1384

He is liable not only for the damage which he caused by his own act, but also for that which is caused by the act of persons for whom he is responsible, or by things which he has in his keeping. [...]

Masters and principals [are liable] for damage caused by their domestics and employees in the functions for which they have been employed.

Article 1385

The owner of an animal or he who avails himself of it while it is being put to his use is liable for the damage which the animal causes, whether the animal was in his keeping or whether it had strayed or escaped.

Article 1641

The seller is held to a guaranty against hidden defects in the thing sold which render it unsuitable to the use for which it is intended, or which so diminish such use that the buyer would not have purchased it, or would have given only a lesser price for it, had he known of them.

Article 2279

As to movable property, possession is equivalent to title.

Nevertheless, one who has lost or from whom was stolen a thing may claim it during three years, counting from the day of the loss or theft, against the one in whose hands he finds it, saving to that one his recourse against him from whom he holds it.

Germany*Civil Code**Article 823*

- (1) A person who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damages arising therefrom.
- (2) The same obligation is placed upon a person who infringes a statute intended for the protection of others. If, according to the provisions of the statute, an infringement is possible even without fault, the duty to make compensation arises only in the event of fault.

Article 824

- (1) A person who declares or publishes, (1) contrary to the truth, a statement which is likely to endanger the credit of another, or to injure his earnings or prosperity in any manner, shall compensate the other for any damage arising therefrom, even if he does not know of its untruth, but should know of it.
- (2) A person who makes a communication, the untruth of which is unknown to him, does not thereby render himself liable to make compensation, if he or the receiver of the communication has a lawful interest in it.

Article 825

A person who by cunning, by threats, or by the abuse of a relationship of dependence, induces a woman to permit extra-marital cohabitation, is bound to compensate her for any damages arising therefrom.

Article 826

A person who wilfully causes damage to another in a manner contrary to public policy is bound to compensate the other for the damage.

Greece

Civil Code

Article 57

A person who has suffered an unlawful offence to his personality has the right to claim the cessation of such offence as also the non-recurrence thereof in the future. If the offence was directed against the personality of a deceased person the right referred to above shall belong to the spouse the descendants the ascendants the brothers and sisters and the legatees appointed by testament. Tortious liability for damages is not excluded when true claim is based on the provision governing unlawful acts.

Article 59

In the cases referred to in the two preceding sections the Court may at the request of the person harmed and having regard to the nature of the offence order the person responsible to furnish reparation of the moral prejudice suffered by the person offended. Such reparation may consist of the payment of a sum of money of a publication or any other appropriate measure in the circumstances.

Article 197

In the course of negotiations for the conclusion of a contract the parties shall be reciprocally bound to adopt the conduct which is dictated by good faith and business usages.

Article 198

A person who in the course of negotiations for the conclusion of a contract has through his fault caused prejudice to the other party shall be liable for compensation even if the contract has not been concluded.

For the prescription of such claim shall be applicable by analogy the provisions governing prescription in the matter of claims arising from unlawful acts.

Article 281

The exercise of a right shall be prohibited if such exercise obviously exceeds the limits imposed by good faith or morality or by the social or economic purpose of the right.

Article 288

A debtor shall be bound to perform the undertaking in accordance with the requirements of good faith taking into consideration business usages.

Article 298

Damages shall comprise the decrease in the existing *patrimonium* of the creditor (positive damage) as well as loss of profit. Such profit shall be that which can be reasonably anticipated in the usual course of things or by reference to the special circumstances having regard to the preparatory steps taken.

Article 335

If at the time of furnishing of the performance such furnishing is in whole or in part impossible for reasons either of a general nature or relating to the debtor the latter shall be bound to compensate the prejudice resulting therefrom for the creditor.

Article 362

A person who promised a performance which at the time of the conclusion of the contract is not possible by reason either of general considerations or of considerations relating to the promisor shall be liable to compensate the damage caused to the creditor by non-performance. The provisions of section 337 are also applicable in this case by analogy.

Article 914

A person who through his fault has caused in a manner contrary to the law prejudice to another shall be liable for compensation.

Article 919

A person who has intentionally caused prejudice to another in a manner contrary to morality shall be liable for damages.

Article 929

In case of harm to the body or health of a person the compensation shall include in addition to medical expenses and the prejudice hitherto caused everything of which the victim shall be deprived in the future or the further burden he shall bear by reason of an increase in his expenses. An obligation to compensate shall also arise in regard to a third party who being entitled by the law to rely on the performance of a service by the victim has been deprived of such service.