

Pure Economic Loss in Europe

Edited by

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and

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1 The notion of pure economic loss and its setting

MAURO BUSSANI AND VERNON VALENTINE PALMER

Introduction

Pure economic loss is one of the most discussed topics of European tort law scholarship. Fascination with the subject (which may at first glance appear dry and technical) has developed into a wealth of literature about this frontier notion.¹ It stands at the cutting edge of many questions: how far can tort liability expand without imposing excessive burdens upon individual activity (or, as some may wish, to what extent should tort rules be compatible with the market orientation of the legal system)?² How should the tort law of the twenty-first century – or the provisions of a projected European code – approach this issue? As a

¹ The literature is overwhelmingly weighted to those countries where the concept is well recognized by practitioners, judge and scholars. See E. K. Banakas, *Civil Liability for Pure Economic Loss* (Kluwer, 1996); J. M. Barendrecht, 'Pure Economic Loss in the Netherlands', in E. H. Hondius (ed.) *Netherlands Reports to the Fifteenth International Congress of Comparative Law* (1998), at pp. 115–35; R. Bernstein, *Economic Loss* (2nd edn, Sweet & Maxwell, London, 1998); B. Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss* (Carswell, 1989); J. Kleineman, *Ren förmögenhetskada* (1987); C. Lapoyade Deschamps, 'La réparation du prejudice pur en droit français' in Banakas, *Civil Liability*, pp. 89–101; W. Posch and B. Schilcher, 'Civil Liability for Pure Economic Loss: An Austrian Perspective', in Banakas, *Civil Liability*, at pp. 149–76; J. Spier (ed.) *The Limits of Liability: Keeping the Floodgates Shut* (Kluwer, 1996) (discussion of eight 'Tilburg Hypotheticals' – four of which concern pure economic loss); C. von Bar, 'Liability for Information and Opinions Causing Pure Economic Loss to Third Parties: A Comparison of English and German Case Law', in B. Markesinis (ed.) *The Gradual Convergence* (Oxford University Press, Oxford, 1994), pp. 99 ff.; B. Markesinis, *The German Law of Obligations, vol. II The Law of Torts* (3rd edn, Oxford University Press, Oxford, 1997); J. M. Thomson, 'Delictual Liability for Pure Economic Loss: Recent Developments', 1995 SLT 139; J. Herbots, 'Le "duty of care" et le dommage purement financier en droit comparé', (1985) 62 *Revue de Droit International et de Droit Comparé* 7–33; L. Khoury, 'The Liability of Auditors Beyond Their Clients: A Comparative Study', (2001) 46 *McGill Law Journal* 413.

² P. Benson, 'The Basis for Excluding Liability for Economic Loss in Tort Law', in D. G. Owen, *The Philosophical Foundations of Tort Law* (Clarendon, Oxford, 1995), pp. 427, 431.

matter of policy, should the recovery of pure economic loss be the domain principally of the law of contract? To these and others we add our own modest question: is there a common core of principles, policies and rules governing tortious liability for pure economic loss in Europe? There has never been a universally accepted definition of 'pure economic loss'. Perhaps the simplest reason is that a number of legal systems neither recognize the legal category nor distinguish it as an autonomous form of damage. Nevertheless, where the concept is recognized, as in Germany and common law systems, it is apparently associated with a rule of no liability and there a definition is likely to be found.³ The contrasting approaches here obviously do not follow the familiar common law/civil law divide, for civil law is itself divided to some extent over this question.

Our own approach in this study was to make no supposition in advance about the nature or definition of this notion. We hoped it might be possible to allow a neutral, fact-based questionnaire to flush out the rules and responses of each national system. Therefore, in framing the questionnaire we did not hesitate to mix into the facts instances of property damage, personal injury and other infringements that particular traditions may regard as absolute rights (i.e. rights opposable to the world at large – *erga omnes*). In this way we were attempting to clarify the grey zones that exist between recoverable and non-recoverable loss. Consistent with the Cornell methodology,⁴ the questionnaire alleges facts

The same author, articulating a well-known *tòpos* among tort lawyers (see e.g. G. Viney, 'Introduction à la responsabilité', in J. Ghestin (ed.), *Traité de droit civil* (1995), p. 21; P. G. Monateri, *La responsabilità civile* (UTET, Turin, 1998) pp. 8 ff.), writes: '[T]he fact that every individual is somewhere and is making use of some external objects, with the result that he or his property is put into relation with them and is subject to being affected by conduct that affects them, is an inevitable incident of being active in the world ... [considered as] beings who exist in space and time and who are inescapably active and purposive, persons are necessarily and always connected in manifold ways with other things which they can affect and which in turn can affect them as part of a causal sequence.' Benson, 'Excluding Liability', at p. 443 (emphasis and footnotes omitted).

³ Gary Schwartz refers to 'the general economic loss no liability doctrine' in his essay 'The Economic Loss Doctrine in American Tort Law: Assessing the Recent Experience', in Banakas *Civil Liability*, at pp. 103–30.

⁴ The 'Cornell methodology' refers to the research project on 'Formation of Contracts' which Rudolph Schlesinger directed from 1957–68, R. B. Schlesinger (ed.), *Formation of Contracts* (2 vols, Oceana, New York, 1968). For Schlesinger's later views, see 'The Past and Future of Comparative Law', (1995) 43 *American Journal of Comparative Law* 477, 479. See also M. Bussani and U. Mattei, 'The Common Core Approach to European Private Law', (1997–98) 3 *Columbia Journal of European Law* 339 and, M. Bussani and U. Mattei, 'Le fonds commun du droit privé Européen', (2000) 52 *Revue Internationale de Droit Comparé* 29. M. Bussani, 'Current Trends in European Comparative Law: The Common Core Approach', in (1998) 21 *Hastings International and Comparative Law Review* 785.

and avoids the use of what could be classified as legal artifacts such as the expression ‘pure economic loss’ itself. Because there is no recognition of the term in some systems, and in any event less than complete consensus about its meanings in others, we rigorously excluded all use of the term in the hypotheticals.

For example, in the not-so-hypothetical ‘cable cases’, we posed variant forms of loss to see where and when the negative objection, if any, arises. To throw light on the rule from different patrimonial angles, we took the same facts but varied the victim, or varied the tortfeasor’s state of mind.⁵ Obtaining these permutations and combinations in collecting the data was an important objective of this study.⁶

Pure vs. consequential economic loss

The outcome of the research about the underlying notion of ‘pure economic loss’ can be shortly stated as follows. What is made clear by the national reports is twofold: the negative cast and the patrimonial character of that loss. In countries where the term is well recognized, its meaning is essentially explained in a negative way. It is loss without antecedent harm to plaintiff’s person or property. Here the word ‘pure’ plays a central role, for if there is economic loss that is connected to the slightest damage to person or property of the plaintiff (provided that all other conditions of liability are met) then the latter is called *consequential* economic loss and the whole set of damages may be recovered without question.⁷ *Consequential* economic loss (sometimes also termed

⁵ Thus the same negligent act might cause recoverable physical damage to one, but pure economic loss to another which is non-recoverable unless, perhaps, the act was intentional. The instructions to the national reporters asked them to assume that the conduct in the hypothetical was intentional if this would produce a significantly different result. It was recognized that in some cases the claimant might not be entitled to recover for pure economic loss unless in fact the act were intentional.

⁶ See particularly, as examples of this factual flexibility, Cases 6 (‘The Infected Cow’), 12 (‘Double Sale’) and 15 (‘A Closed Motorway – The Value of Time’). These are the same reasons that account also for the choice of not referring to any pigeonhole framework (such as the ones used, e.g., by I. Englard, *The Philosophy of Tort Law* (Dartmouth, Aldershot, 1993), pp. 211 ff.; Benson, ‘Excluding Liability for Economic Loss’, at 427 ff.; see also H. Kötz, ‘Economic Loss in Tort and Contract’, (1994) 58 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 3, 423; P. Cane, ‘Economic Loss in Tort and Contract’, (1994) 58 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 3, at 429 ff.) in presenting the study of the cases.

⁷ Perhaps another way to describe pure economic loss is to say that it does not arise as a consequence of some earlier physical loss, and it is not a court’s substituted value for physical loss.

parasitic loss⁸) is recoverable because it presupposes the existence of physical injuries, whereas pure economic loss strikes the victim's wallet and nothing else. In Sweden, where the legislator says that only victims of crimes may recover for pure economic loss, the Tort Liability Act 1972, §2, defines the notion exactly in these terms: 'In the present act, "pure economic loss" (*ren förmögenhetsskada*) means such economic loss as arises without connection to personal injury or property damage to anyone.'⁹ A similar definition seems to prevail in England and Germany.¹⁰

One will discern from these preliminary remarks that the distinction under discussion is highly technical, perhaps even artificial. This impression is based upon two technical features of the exclusionary rule. The first feature is that 'consequential' economic loss only describes a relationship of cause and effect *within the same patrimony* (plaintiff's). All relation of cause and effect running *between patrimonies* is technically excluded. Put another way, when pecuniary loss is described as 'pure' (rather than 'consequential') it is apparent that each patrimony is viewed as an interruption of causation. For example, an injury to B (say, the breadwinner of the family) may have an immediate and foreseeable economic consequence upon A (his dependent child). Yet this causal impact is disregarded by the way in which our subject is defined. The child's loss of support will not be called 'consequential' economic loss, though clearly it did arise as a 'consequence' of physical injury to a parent. It is apparent, then, that those legal systems which employ these labels conceive of economic loss as an isolated phenomenon, as if plaintiff's patrimony were a separate world, cut off from all others. It is also apparent that this logic defies economic and social reality. In the real world, 'a practically unlimited range of interests are intertwined in an almost unlimited variety of ways'.¹¹ The affairs of economic actors are highly interdependent, connected to one another by a web of rights

⁸ For this usage, see W. L. Prosser, W. P. Keeton, *On the Law of Torts* (5th edn, 1984), 43, at 291.

⁹ W. van Gerven, J. Lever and P. Larouche (eds.), *Tort Law: Scope of Protection* (Hart, Oxford, 1998), p. 44.

¹⁰ See Lord Denning's statement that 'it is better to disallow economic loss altogether at any rate when it stands alone, independent of any physical damage'. *Spartan Steel & Alloys Ltd v. Martin & Co. Ltd* [1973] QB 27, (1972) 3 All ER 557. Regarding *reiner vermögensschaden*, van Gerven et al., *Tort Law*, at p. 43, speaks of a 'worsening of one's overall economic position (loss of profit, diminution in the value of property, etc.) that is not directly consequential upon injury to the person or damage to a particular piece of property'.

¹¹ Benson, 'Excluding Liability for Economic Loss', at p. 431.

and duties that bind together contractual, proprietary and any other sort of legal interests. In these circumstances it is reasonably foreseeable that damage to any one interest may affect other interests. Indeed, it has been rightly said that 'no reverberation from the initial damage, so long as it arises through this interdependence of interests, can intelligibly be distinguished as extraordinary or unforeseeable'.¹² Yet the inevitable effect (of what we might call the exclusionary rule's 'atomistic' approach to causation) is that the scope of 'consequential' loss is artificially narrow, and accordingly the incidence of 'pure' economic loss is greatly multiplied.

A second technical aspect is that, although all countries following the exclusionary rule may be in 'acoustical' agreement on the proposition that 'consequential loss' is recoverable, they actually do not agree in concrete instances how it will be applied. Since consequential loss is a causal construct influenced (in its ultimate results) by policy considerations, it is perhaps unsurprising to find divergent interpretation at the national level. Some national courts have developed rules that require a more stringent connection between antecedent physical loss and the economic harm which results from it. Under such rules the court may conclude that plaintiff's loss was 'pure' (hence unrecoverable) because there was insufficient relation to prior physical harm sustained by plaintiff. Yet judges in other systems, employing less exigent notions, may deem the same loss 'consequential' and thereby permit its recovery.¹³

Despite the foregoing caveats about the artificial and technical aspects of this concept, we must not lose sight of the fact that consequential economic loss (and for the purpose of this generalization we apply this term even to systems which do not actually use it) is in principle recoverable in every European system within this study – whether the source of the loss is intentional or negligent conduct, or an activity subject to strict liability. Ignoring for the moment divergent European views toward the recoverability of 'pure' economic loss, here at least is an area of common ground that is worth noting.

Furthermore, the recoverability of economic loss, even when 'pure', is not regarded as doubtful when such loss stems from the infringement

¹² Ibid.

¹³ For further details, see Editors' Comparative Comments under Cases 1 ('Cable I – The Blackout') and 9 ('Fire in the Projection Booth'). Cf. C. von Bar, *The Common European Law of Torts*, vol. II (Oxford University Press, Oxford, 2000), pp. 30–5, 487–9.

of statutorily protected interests, such as those we will meet in our case studies,¹⁴ and those protected by antitrust, copyright and patent laws.¹⁵

Taken in the aggregate, the above considerations lead us to say that consequential loss and 'pure' economic loss are not different in kind or in principle, but distinguishable only by the circumstances in which they originate and the technical limits which have been imposed on their recoverability.¹⁶

¹⁴ See especially the answers to Case 4 ('Convalescing Employee'). Cf. C. von Bar, *Common European Law of Torts*, II, pp. 54–6.

¹⁵ The same could be said as to some other fields, particularly the field of 'business torts'. Although legal systems such as France, the Netherlands, UK and Portugal handle these problems with the help of the general law of obligations (the sixth book of the Dutch Civil Code devotes an entire chapter to unfair advertising), these subjects are not dealt with here. Since the rules in these areas largely depend on policy factors which are only partially common to our field and would deserve detailed investigation, reasons of space compelled the editors to place limits on the research. For a general survey, C. von Bar, *Common European Law of Torts*, II, pp. 4–200, 245–9 and, more closely related to our issue, 52–6; van Gerven et al., *Tort Law*, (Hart, Oxford, 2000), pp. 208–48, 358–94.

¹⁶ It is of interest to note that breach of European Community law may entail liability for pure economic loss. The liability of the Community institutions and its servants in the performance of their duties finds its source in art. 288(2) of the EC Treaty. The liability of a Member State has its origins in the case law of the European Court of Justice (ECJ), particularly the preliminary rulings pursuant to art. 234 of the EC Treaty. It is true that under these provisions, plaintiffs can recover only when they fall within a group of persons which the infringed provision was designed to protect, but no 'in principle' restriction is made regarding the interests that are protected. Indeed, since Community law is primarily concerned with economic matters, breaches of Community law will typically result in economic or purely economic losses. The compensability of these losses when caused by Community institutions has been clearly set forth in an ECJ case, Case C-104/89, 19 May 1992, *Mulder v. Council*, [1992] ECR I-3061. With regard to the Member States, their liability has been clearly endorsed by ECJ Case C-49/93, 5 March 1996, *Brasserie du Pêcheur v. Germany*, R v. *Secretary of State for Transport, ex p. Factortame*, [1996] ECR I-1029 (wherein the ECJ explicitly rejects the use of German and English national rules which would have prevented individuals from benefiting from the use of Community law to impose liability on Member States. The rejection was particularly important in the case of the English rule requiring proof akin to abuse of power to establish the tort of misfeasance in public office, and in the case of the German hierarchy of protected interests under BGB § 823. For a comparative survey, see van Gerven et al., *Tort Law*, (2000), at p. 889 ff; see *passim*, T. Heukels and A. McDonnell (eds.), *The Action for Damages in Community Law* (Kluwer, The Hague, 1997); P. Craig, 'Once More Unto the Breach: The Community, the State and Damages Liability', (1997) 113 LQR 67. See also Markesinis, *German Law of Obligations*, p. 902 ff.

It is a different, and still open issue, whether individuals are entitled to compensation under national law when other individuals infringe Community law and thereby cause economic loss. Under the laws of the Member States a right to recovery is generally acknowledged in cases of breach of a Community law provision which imposes direct obligations upon individuals – such as Arts. 81 and 82 of the EC

Actor's state of mind: intention vs. negligence

The exclusionary rule is associated with economic loss caused by negligent behaviour, not intentional wrongdoing. European systems do not begin to diverge until the question becomes one of liability for negligence. Here is a kind of rubicon which some fear to cross and others blithely dismiss. However, all systems agree that intentionally inflicted pure economic loss is recoverable in circumstances where the conduct in question is regarded as culpable, immoral or contrary to public policy. The significance of this point is of more practical importance than it may appear at first sight. Its range of application may be somewhat greater than the narrow, infrequent form of liability which the words 'intentionally inflicted' harm suggests. In some systems a broad, flexible meaning is given to the 'intention' element.¹⁷ Furthermore, though harder to prove than negligence, the incidence of financial fraud is not a rare occurrence. A consistent rule across Europe is therefore an important protection. Secondly, we think it is interesting to observe from the comparative point of view that the shift to higher degrees of culpability tends to broaden the scope of recovery in all systems. This at least suggests that the exclusionary rule should not be conceived as a simple rule based solely on the nature of plaintiff's damage. The material nature of the loss, in our view, is no more than one element in a complex balancing act which decides where and when limits will be imposed in tort. To tailor reasonable limits, judges and legislators must consider other important factors as well, including the actor's state of mind.¹⁸

Treaty, or other provisions having the so-called 'horizontal' direct effect: see W. van Gerven, 'Bridging the Unbridgeable: Community and National Tort Laws after Francovich and Brasserie', (1996) 45 ICLQ 507 and, recently, upholding 'horizontal' direct effect of arts. 81 and 82 of the EC Treaty, *Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd and Others*: ECJ, judgment of 20 September 2001, reference for a preliminary ruling: Court of Appeal (England and Wales) (Civil Division) United Kingdom, Case C-453/99, [2000] ECR I-7499.

¹⁷ See, e.g. von Bar 'Liability for Information', at 104.

¹⁸ The existence of a balancing process is not so apparent in open, liberal systems such as the French which appear to make little use of the distinction between intentional and careless fault, but the complex interaction of scienter with other factors clearly surfaces in the English and German systems. In those systems, where harm is intentionally inflicted, restrictions on the recoverability of the type of harm are dropped, and in addition, concepts of remoteness of causation are relaxed. As David Howarth correctly notes, the overall result is that intentionality removes restrictions on liability that do not exist in the first place in other jurisdictions; 'The General Conditions of Unlawfulness', in A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra and E. du Perron (eds.), *Towards a European Civil Code* (2nd edn, Kluwer, 1998), at p. 411.

The standard cases: a taxonomy

Broadly speaking, pure economic loss arises out of the interdependence of relationships and interests in the modern world. These relationships are sometimes two-dimensional and other times three-dimensional. In this section we attempt to draw up a taxonomy of the principal ways in which it arises within such relationships. Our list will not exhaust all the conceivable ways in which such damage may arise. Our only interest lies in tracing the most recurrent and typical patterns which we refer to as ‘standard cases’. Although we have sometimes borrowed and at other times given new names to these standard situations, we have not attempted to explain or employ all of the descriptive labels that writers and judges have used. These diverse and contradictory ideas are not always compatible with the results of our own study and would serve no purpose here. With these provisos in mind, we venture to set forth four categories that seem to be functionally and relationally distinct.¹⁹

Ricochet loss

‘Ricochet loss’ classically arises when physical damage is done to the property or person of one party, and that loss in turn causes the impairment of a plaintiff’s right. This situation is three-dimensional and certain authors call it ‘relational economic loss’.²⁰ A direct victim sustains physical damage of some kind, while plaintiff is a secondary victim who incurs only economic harm. To illustrate: A has a contract to tow B’s ship. C’s negligent act of sinking the ship makes it impossible for A to perform his contract and thus deprives him of expected profits. A’s financial loss is the ricochet effect of C’s negligence toward B. The loss is purely economic, since no property interest of A’s has been impaired.²¹ A ricochet loss can also arise from the impairment of an employment contract. For example, B is a key employee in A’s business or sporting team. C’s negligent driving leads to B’s death or incapacity, thus causing A’s

¹⁹ For a longer taxonomic list consisting of eight categories (in which we think there is considerable overlap), see W. Bishop and J. Sutton, ‘Efficiency and Justice in Tort Damages: The Shortcomings of the Pecuniary Loss Rule’, (1986) 15 *Journal of Legal Studies* 347, 360–61. Benson’s taxonomy consists of five situations, two of which he calls ‘exclusionary situations’. His three other situations are called ‘non-exclusionary’, Benson, ‘Excluding Liability for Economic Loss’, at pp. 427–30.

²⁰ See this terminology and analysis in Bernstein, *Economic Loss*, pp. 163 ff. and Feldthusen, *Economic Negligence*, pp. 199 ff.

²¹ The example closely follows *La Société Anonyme de Remorquage à Helice v. Bennets* [1911] 1 KB 243.

team or business to lose profits and revenues. Here B's injury is physical, but A's loss is purely financial. The 'Cable Cases',²² the *Meroni Case*,²³ and certain other hypotheticals studied in this volume²⁴ are also variations of ricochet harm. Concern about the indeterminate number and size of the claims for losses is often associated with cases falling within this category.

Transferred loss

Here, C causes physical damage to B's property or person, but a contract between A and B (or the law itself) transfers a loss that would ordinarily be B's onto A. Thus a loss *ordinarily falling on the primary victim* is passed on to a secondary victim. The transfer of the loss from its 'natural' to an 'accidental' bearer differentiates this from a case of ricochet loss, where the damage in question is not transferred but is a distinct damage to the interests of the secondary victim.²⁵ These transfers frequently result from leases, sales, insurance agreements and other contracts that separate property rights from rights of use or specifically reallocate risk bearing. To illustrate, A is time charterer of a ship owned by B. The day before the time charter is to go into effect and while the ship is in B's possession, C negligently damages the ship's propeller, thus necessitating repairs and a two-week delay, which causes A to lose all use of the ship. Here B suffers property damage, and ordinarily B as owner would recover for the consequential loss of the ship's use, but the right of use had been transferred to A by the boat charter. So A's loss is purely pecuniary because he has no antecedent property loss.²⁶ A similar effect can result under a sales contract which reserves title in B (seller) while the goods are in shipment, but places the risk of loss in transit upon the buyer A. If the goods (still technically owned by B)²⁷ are damaged in

²² See e.g. *Spartan Steel & Alloys v. Martin & Co. Ltd.* [1973] QB 27 and Cases 1 ('Cable I - The Blackout'), 2 ('Cable II - Factory Shutdown'), 3 ('Cable III - The Day-to-Day Workers').

²³ *Torino Calcio SpA v. Romero*, Cass. Civ., SU 26.1.1971, no. 174, GI, 1971, I, 1, 681. Case 5 ('Requiem for an Italian All Star') is modelled upon the *Meroni* case.

²⁴ See Case 10 ('The Dutiful Wife').

²⁵ This category receives extensive consideration in von Bar, *Common European Law of Torts*, I, pp. 507-512.

²⁶ The illustration is based upon *Robins Dry Dock v. Flint*, 13 F 2d 3 (2nd Cir. 1926), 275 US 303 (1927) as well as Case 8 ('The Cancelled Cruise').

²⁷ As is well known, who should be called the 'owner' of goods in shipment depends on the law applicable to the transfer of ownership, and above all on the validity and extent of the principle of transfer of possession. See von Bar, *Common European Law of Torts*, at p. 509, fn. 499.

transit by the carrier's negligence, then a loss normally incurred by the owner has been transferred to A. A's loss is purely financial since he has no property interest in the goods.²⁸

A similar result is reached when the transfer occurs by operation of law. For example B, A's employee, may be injured by the negligent driving of C and thus find himself unable to work for three months. Nevertheless, a statute requires A to continue to pay B's salary, even though no work is received in return. Thus what ordinarily would have been B's loss is statutorily transferred to A as a combined result of C's negligence and the effects of the pay continuation statute.²⁹

Transferred loss cases are liability neutral from the perspective of the tortfeasor and should avoid fears of indeterminate liability. An additional argument in favour of an award of compensation is that the tortfeasor who is clearly liable to the primary victim should not benefit from the accidental operation of rules which by pure chance exclude him from liability. According to von Bar, the concept of transferred loss is intended 'to prevent someone appealing to rules whose purpose is not to protect that person, but to protect others'.³⁰

Closure of public markets, transportation corridors and public infrastructures

Here, economic loss arises without a previous injury to anyone's property or person. There may be physical damage, but it is to 'unowned resources' that lie in the public domain.³¹ A single negligent act may necessitate the closure of markets, highways and shipping lanes which no person owns, yet the closure inflicts economic loss directly on individuals whose livelihoods closely depend upon the use of these facilities. This category raises the greatest concern about liability to an indeterminate class in an indeterminate amount. A financial ripple effect is then at its height. To illustrate: C negligently spills chemicals into a river, and all traffic on the waterway is suspended for two weeks during a clean-up effort. As a result, shippers must take more expensive overland routes, and marinas, boat suppliers, hotel operators and commercial

²⁸ This illustration is based upon *The Aliakmon* [1985] 2 All ER 44.

²⁹ The example is taken from Case 4 ('Convalescing Employee').

³⁰ Von Bar, *Common European Law of Torts*, I, pp. 510–511.

³¹ V. Goldberg, 'Recovery For Economic Loss Following the Exxon Valdez Oil Spill', (1994) 23 *Journal of Legal Studies* 1, 37.

fishermen in the area suffer severe economic loss.³² A similar chain of loss may arise when C negligently allows infected cattle to escape from his premises, and the government must order all cattle and meat markets to close. As a result broad classes of plaintiffs will suffer pure economic loss, including cattle breeders who are unable to sell their stock and butchers who are unable to obtain supplies.³³ As we note below, the ‘floodgates’ argument acquires great force in such contexts.

Reliance upon flawed data, advice or professional services

Those who furnish advice, prepare data or render services concerning financial matters often understand that the information will be furnished to a client and then relied upon by third persons with whom they have no contractual relation. If the advice, data or services are carelessly compiled or executed, this may not necessarily breach the provider’s contract with their client (even if there is breach, the damage will usually be strictly financial) but the relying third party will sustain pure pecuniary loss. For example: C, an accountant, carelessly conducts an audit of B, a publicly traded company, and vastly overstates the company’s net financial worth. Relying upon the accuracy of the audit, investor A buys shares in B at twice their actual value.³⁴ Here, A’s loss arises not in consequence of physical damage to B, but on the basis of misplaced reliance.³⁵ Similarly, erroneous information about a

³² This illustration resembles the facts of Case 15 (‘A Closed Motorway – The Value of Time’) as well as *Louisiana ex rel. Guste v. M/V Testbank (The Testbank)*, 752 F 2d 1019 (1985).

³³ See the facts in Case 6 (‘The Infected Cow’) and the case of *Weller v. Foot and Mouth Disease Research Inst.* [1966] 1 QB 569.

³⁴ See Case 17 (‘Auditor’s Liability’).

³⁵ According to Tony Honoré, losses attributed to plaintiffs’ ‘reliance’ pose a causation issue which is different in kind to causation in the context of physical damage. His discussion seems pertinent to the concern of some that this category of pure economic loss opens the floodgates of liability. When a person is said to ‘rely’ on another’s statement, he or she often has two or more (typically many more) reasons or motives for reaching a decision and acting on it. The question whether A’s statement ‘caused’ B’s response is highly indeterminate. A potential investor in Eldorado Mines, for example, may be influenced by a false statement in a prospectus as well as by advice from his stockbroker, by his own review of the company books, and so forth. How are we to say that from among all these reasons that the false statement in the prospectus ‘caused’ his financial loss? T. Honoré, ‘Necessary and Sufficient Conditions in Tort Law’, in D. G. Owen (ed.), *Philosophical Foundation of Tort Law* (Clarendon Press, Oxford, 1995), at pp. 382–3.

client's solvency may lead to financial losses. Thus A, before extending credit to B, takes the precaution of asking C (the merchant bank where B kept its account) for an assessment of B's creditworthiness. C carelessly replies that B is 'good for its ordinary engagements' (when in fact B would soon go into liquidation), and thereby influences A to advance credit and to lose a large sum.³⁶ Here, A's loss is purely financial, not because it ricochets off or is transferred from someone else's physical damage, but because it arises directly from A's reliance.

Professional services for a client may cause pecuniary loss to a non-client. B, an elderly man, asks C, his lawyer, to prepare a will in which he will leave £100,000 to A. C takes no action for six months, as a result of which B dies intestate and A receives nothing.³⁷ A's loss is purely economic.

Present vs. future loss

Examples given in the preceding paragraphs would suggest that patrimonial injury may take two distinguishable forms. It may relate to the existing – as opposed to the anticipated – wealth of the victim. In the first sense, plaintiff's present wealth may be simply depleted by poor financial advice, or by wasting time and petrol circumnavigating a motorway that was closed due to an accident. In the second sense, plaintiff may instead lose that which s/he expected to acquire, such as the profits from productive machinery suddenly shut down, or a testamentary legacy lost because of a defectively drawn instrument, or a sport club's reduced gate receipts due to the accidental death of its star player. Sometimes, when an expectation is destroyed *in utero* and proof that it would have materialized is difficult, it is called the loss of a chance.³⁸

³⁶ These facts are taken from the well-known case of *Hedley Byrne & Co. v. Heller & Partners Ltd* [1964] AC 465 (HL). For other instances of pecuniary harm from incorrect information, see Case 18 ('Wrongful Job Reference') and Case 20 ('An Anonymous Telephone Call').

³⁷ See *White v. Jones* [1995] 2 AC 207 (HL); *Lucas v. Hamm*, 15 Cal. Rept. 821 (1961) (cert. denied, 368 vs 987); *Ross v. Caunters* [1980] Ch. 297; and Case 14 ('Poor Legal Services').

³⁸ For example: a commission unlawfully rejects a candidate's application for a job or a fellowship. See e.g. Conseil d'Etat, 12.11.1965, in (1965) *Recueil Lebon* 613: 'le requérant, évincé d'un concours auquel il se serait présenté avec des chances sérieuses de succès en raison de ses titres et travaux, a subi un préjudice'. As to the debate, see G. Viney and P. Jourdain, 'Les conditions de la responsabilité', in J. Ghestin (ed.), *Traité de droit civil* (2nd edn, Paris, 1998), pp. 71 ff.; N. Jansen, 'The Idea of a Lost Chance', (1999) 19 *Oxford Journal of legal Studies*, 271 (discussing German and English experience); P. G. Monateri, 'La responsabilità civile', in R. Sacco (ed.), *Trattato di diritto civile* (Torino, 1998), pp. 283 ff., 583 ff.

As between these types of wealth, it is the loss of expected wealth – unrealised profits, cancelled legacies – which presents the sharpest question for tort systems to deal with. The difficulty is not simply that the demand for proof is more exigent – by definition, expectancies explore a future that only might have occurred – but also the appropriateness of affording protection in tort may be questioned. For when an economic expectation receives legal protection in tort, as in principle it does under French law, plaintiff can be compensated to the same extent *as if* he or she were protected by a contract with the tortfeasor.³⁹ In countries where an exclusionary rule of tort law exists, we may find a tendency to say that wealth expectancies should be protected in contract.⁴⁰ For example, German courts are generally unable to approach the question through tort, but at the same time they willingly stretch contractual concepts that make the defendant liable to plaintiff, although there is no actual contract between the parties.

In these circumstances it becomes difficult to tell where tort ends and contract begins. We seem to be at the frontier where functions meet and merge, for although it has been theorized that contract creates wealth whereas tort only protects that which we already have,⁴¹ the notion of pure economic loss presents, at a European level, a challenge to traditional views about the relationship between contract and tort law. A distinguished Austrian scholar, Helmut Koziol, has pointed out that we must not lose our way in the conceptual shadows of this borderland. Liability based on tort and liability based on breach of contract usually are taken as clearly separated contrasts. But I think they are the two ends of liability based on fault and that between them there is a connecting chain of intermediate

³⁹ See Viney and Jourdain, 'Conditions de la responsabilité', pp. 71 ff., 195 ff.; Viney, 'Introduction à la responsabilité', pp. 360 ff. See also our comparative Comments to Case 18 ('Wrongful Job Reference') regarding the distinction to be made between cases in which the lost chance is to be understood as a distinct loss in itself (an autonomous loss), as distinguished from the case where the concept is invoked as an equitable means of proving a loss.

⁴⁰ Note, for example, the tense unease in the following statement from a British judge: 'I do not consider that damages for loss of an expectation are excluded in cases of negligence arising under the principle in *Hedley Byrne*, simply because the cause of action is classified as tortious. Such damages may in principle be recoverable in cases of contractual negligence; and I cannot see that, for present purposes, any relevant distinction can be drawn between the two forms of action.' *per* Lord Goff of Chieveley in *White v. Jones* [1995] AC 207. On this subject see also J. Stapleton, 'The Normal Expectancies Measure in Tort Damages', (1997) 113 *Law Quarterly Review* 257; H. Reece, 'Loss of Chances in the Law', (1996) 59 *Mod. LR* 188.

⁴¹ J. A. Weir, 'Complex Liabilities', No. 6, *International Encyclopedia of Comparative Law*, XI (1976), p. 5: 'Contract is productive, tort law protective.'

stages. This understanding is important because one has not to sort liability in one of these two categories and, therefore, is able to avoid abruptly different treatment of rather similar cases.⁴²

Basic arguments for the exclusionary rule: the ‘floodgates’, ordering of human values and lessons of history

It will be useful to set out the fundamental arguments which are usually presented in support of an exclusionary rule. Naturally these arguments were developed by jurists in legal systems which take the position that such losses should not be generally recoverable in tort, except in defined and limited circumstances. However, the experience of other countries may suggest certain difficulties or counter-arguments which we will also mention.

The ‘floodgates’

This is the most important of the three arguments we will discuss. It is not only pervasive but has proved persuasive. It usually links up with, and reinforces, the other arguments. Though not always noticed, there are actually three distinct strands to the floodgates argument, and it is helpful to separate them. The first strand is the belief that to permit recovery of pure economic loss in some cases would unleash an infinity of actions that would burden, if not overwhelm, the courts. If defendant’s negligence necessitates the closure of trading markets or shuts down all commerce travelling on a busy motorway, there may be hundreds, perhaps thousands of people who would be financially damaged. Assuming a large number of these cases were to reach the courts, there would be administrative chaos. The justice system could not cope with the sheer numbers of claims.

The second strand is the fear that widespread liability would place an excessive burden upon the defendant who, for purposes of the argument, is treated as the living proxy of human initiative and enterprise. Von Jhering’s statement: ‘Where would it lead if everyone could be sued...!’⁴³ is a famous rendition of the argument. The potentially staggering liability would be out of all proportion to the degree to which defendant was negligent. It is also said that it is manifestly impossible

⁴² H. Koziol (ed.), *Unification of Tort Law: Wrongfulness* (Kluwer, 1998), p. 25.

⁴³ Quoted below, at p. 120, footnote 1 and accompanying text.

for defendant to predict in advance how many relational economic loss claims he might face when, for example, he injures the property of a primary victim. Whether there is a small or large class of secondary loss sufferers depends, fortuitously, upon the number of parties with economic interests linked to the exploitation of the property.⁴⁴

The danger of disproportionate consequences resulting from minor blameworthiness is of course an issue of fairness, no matter what kind of damages have been caused,⁴⁵ but some scholars believe that the danger is far greater in pure financial loss cases. Financial harm is assumed to have a greater propensity to travel far and wide. It has often been pointed out that the laws of Newton do not apply on the road to financial ruin.⁴⁶ Physical damage has at least a final resting point, but patrimonial harm is not slowed down by gravity and friction.⁴⁷ The harm has often been compared to the recovery of damages for nervous shock, since there too the loss can be 'pure' as opposed to consequential, and there too the danger of reverberating impacts is commonly given as a reason for restrictive rules.⁴⁸

⁴⁴ The rationales of predictability and practicality are discussed in Bernstein, *Economic Loss*, pp. 201–203.

⁴⁵ See, J. Waldron, 'Moments of Carelessness and Massive Loss', in D. Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford, 1995), at p. 387.

⁴⁶ Weir, *Encyclopedia of Comparative Law*, no. 14(d). This was also the view of Fleming James who stated that the 'physical consequences of negligence usually have been limited, but the indirect economic repercussions of negligence may be far wider, indeed virtually open-ended'. R. James, 'Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal', (1972) 25 *Vanderbilt Law Review* 43, 45.

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

⁴⁸ However, the analogy must not be pressed too far. Courts in emotional shock cases have been troubled by a number of rather different concerns, particularly the difficulty of defining the threshold harm (what degree of shock should be cognizable? what manifestation of the harm should be required?) and the difficulty of detecting false or fraudulent claims. In the case of pure economic loss, however, the problem of

The third strand of the argument maintains that pure economic loss is simply part of a broad modern trend toward increasing tort liability, a trend that must be kept under control. Allowing exceptions to the exclusionary rule is a slippery slope that may lead to reversal of the rule and may also encourage the development of other types of tort liability. The Tilburg Group, for example, argues that the floodgates must be kept shut in order 'to dam crushing liability' and to resist the general trend toward expansion of liability.⁴⁹ Their view may mean that the exclusionary rule should be invoked, even in factual instances where there is no danger of a flood of claims or of disproportionate recovery. No compensation should be made for fear of establishing an exception that erodes the rule and may receive analogical extension in the future.

In assessing the cumulative weight of the argument, there are in our view a number of considerations to bear in mind. To begin with, it should be remembered that the floodgates argument has never purported to be a scientific claim nor a claim based upon comparative law research. It is not very easy to test whether the dire prophecy of the 'nightmare scenario' is dream or reality. Is it founded on blind conservatism or does it have a rational basis?⁵⁰ For example, the central assertion that physical damage is different than financial damage because

defining the threshold of the harm is minimal (the threshold of financial damage always begins at zero); the factual existence of loss is objectively demonstrable and its measurement and proof are not easy but perhaps less problematic. The characteristic uncertainty of financial loss does not consist in defining or verifying the harm, but in establishing the causal link between it and defendant's conduct. The threat of fraud is also of less concern because such loss is free of the danger that claimants may simulate its symptoms. Accordingly, economic loss is less easily feigned than the manifestations of nervous shock. We therefore suggest that the most important similarity between the two areas centres upon judicial concern about expanding liability in favour of an indeterminate number of plaintiffs, for indeterminate amounts of damages. Cf. von Bar, *Common European Law of Torts*, II, pp. 76–84. For a discussion in American law, see R. L. Rabin, 'Tort Liability for Negligently Inflicted Economic Loss: A Reassessment', (1985) 37 *Stanford Law Review* 1513, at 1524–5.

⁴⁹ Six of eight hypotheticals chosen for comparative study by the Tilburg Group deal with the subject of pure economic loss. The floodgates metaphor plays a central role in their orientation. See Spier (ed.) *Limits of Liability* and also J. Spier, *The Limits of Expanding Liability* (Kluwer, 1998).

⁵⁰ For example, in 1939 the eminent American torts scholar, William Prosser, cuttingly observed: 'It is the business of the law to remedy wrongs that deserve it, even at the expense of a "flood of claims"; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the courts too much work to do': 'Intentional Infliction of Mental Suffering: a New Tort' (1939) 37 *Michigan Law Review* 874, at 877.

it is more contained and judicially manageable seems increasingly difficult to understand in view of today's mass torts, which sometimes involve innumerable physically injured victims asserting claims sometimes amounting to billions of dollars.⁵¹ These disasters range from single-event catastrophes such as the Exxon Valdez oil spill and the Bhopal gas leak, to multiple-event injuries such as the asbestos and DES (Diethyl Stilbestrol) tragedies which extend over a wide geographic area, producing literally thousands of actual claims that stretched judicial resources to their limits.⁵² The Exxon Valdez oil spill by itself produced more than 30,000 litigated claims.⁵³ The recent outbreak of foot and mouth disease in Europe which spreads physical and/or financial loss by the same prevailing wind may prove to be a bigger disaster. These examples would suggest that the law is normally content to impose liability even though the potential plaintiff class is large.⁵⁴ It would sound very odd if the defendant could argue that they should not owe a duty because they would have too many victims.⁵⁵ For many scholars, therefore, the justification for a no-recovery rule based upon a supposed difference in ripple effect, or in the sheer size of the plaintiff class, is hard to reconcile with the

⁵¹ The point is repeatedly emphasized by H. Bernstein, 'Civil Liability for Economic Loss', (1998) 46 *American Journal of Comparative Law* 111, at 126–8.

⁵² For a summary of the American scene, see C. H. Peterson and J. Zekoll, 'Mass Torts', (1994) 42 *American Journal of Comparative Law* 79. For a valuable analysis of the doctrine of pure economic loss in relation to the Exxon Valdez and Amoco Cadiz oil spills, see Goldberg, 'Recovery for Economic Loss'. On its facts, the Exxon Valdez accident caused enormous physical damage to the environment, that is, to things in the public domain such as shoreline, waters and wildlife. The individual litigants were directly affected as fishermen, tour operators, hotel owners. Their claims were viewed as a species of pure economic loss. However, such accidents could just as well occur in places where thousands of private owners would suffer property losses and consequential economic losses. The threat of an avalanche of claims, therefore, is hardly reduced by the metaphysical nature of the damage, and it is questionable that the law can construct a sensible rule based upon such a distinction.

⁵³ Goldberg, 'Recovery for Economic Loss', at 1.

⁵⁴ As Professor Jane Stapleton wrote in a private communication to the authors of these pages: 'we should not forget that modern procedural reforms, such as statutory provisions facilitating class actions, reflect society's concern to address the barriers to justice that might otherwise face the mass of victims that can result in today's complex society from a single piece of wrongdoing. They are a way of addressing, by lowering, the "costs of mass litigation" concern.'

⁵⁵ The judgment of *Griffiths v. British Coal Corporation* (23 January 1998, QBD.) upheld the largest personal injury claim in British history which led to a record settlement of £2 billion being agreed for the benefit of 100,000 ex-miners suffering from a range of chest illnesses, a sum considerably more than government received from the privatization of the coal industry: see J. Stapleton (2000) 120 *Law Quarterly Review* 506–11.

recovery of extremely large economic losses resulting from negligently caused physical injury.⁵⁶

The geographical distribution of the floodgates argument is another interesting facet of its development. While a perennial in some soils and climates, the argument has failed to take root in others. We have no clear explanation why this occurs. One might say that the theme resonates better in particular legal cultures, but what makes one culture or legal infrastructure more receptive than another? Until research is available, the question is open to speculation and to discussion of interesting clues. For example, litigation rates in Europe are known to be very variable, and it appears that some of the more litigious countries adhere to the no-recovery rule. Is it coincidence that both the exclusionary rule and floodgates argument flourish in Germany and Austria where the rates are among the highest in Europe? Does this factor explain why, in the neighbouring Netherlands, where rates are remarkably low, there is no categorical rule against recovery, nor even – so far as an outside observer can judge – any particular fear of docket inundation?⁵⁷ Consider England and Scotland where the floodgates argument has enjoyed significant success. Should we be surprised that an historically small, close-knit coterie of judges may be sensitive to the question of administrative overload? Does institutional structure and conditioning play a role in this question? Another relevant issue may be to investigate the way in which broad arguments of this kind circulate in international channels. The ruling ideas of influential exporting legal cultures (not merely substantive law ideas, but ‘soft’ formants such as the conventional wisdom

⁵⁶ See J. Stapleton, ‘Duty of Care Factors: a Selection from the Judicial Menus’, in P. Cane and J. Stapleton (eds.), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford University Press, Oxford, 1998), p. 59. The author, at pp. 65–6, argues: ‘Concern that, in a particular context, imposition of a duty of care might expose defendants to a large volume of claims (as opposed to an indeterminate number of claims – see below) are unconvincing given that the law is content elsewhere to impose liability where the potential plaintiff class is large. Indeed, it would be very odd if a defendant could argue in favour of his argument that he should not owe a duty that he had many victims!’

⁵⁷ For relevant figures, see E. Blankenburg, ‘Civil Litigation Rates as Indicators of Legal Culture’, in D. Nelkin (ed.), *Comparing Legal Cultures* (Dartmouth, 1997) at pp. 41 ff. where the author discusses the thesis that differences in legal culture may account for the disparities in civil litigation rates between neighbouring countries with very similar legal traditions and socio-economic conditions. For further comparisons, see B. S. Markesinis, ‘Litigation Mania in England, Germany and the USA; Are We So Very Different?’ (1990) 49 *Cambridge Law Journal* 133; P. Atiyah, ‘Tort Law and the Alternatives: Some Anglo-American Comparisons’, (1987) 36 *Duke Law Journal* 1002; A.A.S. Zuckerman (ed.), *Civil Justice in Crisis* (Oxford, 1999).

and dominant policy arguments) clearly have extraterritorial scope and impact. It does not seem accidental that in countries where English and German legal cultures have a decisive sphere of influence (e.g. English influence in Commonwealth countries and the United States; Germanic influence in Austria and Portugal), the floodgates argument has been received almost unquestioned. It is interesting that in countries where French leadership is acknowledged, one vainly searches for any trace or mention of floodgates anxiety. As stated earlier, our discussion is purely speculative and the subject merits deeper investigation.

In the scale of human values

A second argument is cast in terms of philosophical values. It maintains that intangible wealth is not, and should not, be treated on the same level as protecting bodily integrity or even physical property. People are more important than things, and things are more important than money.⁵⁸ Our legal interest in liberty, bodily integrity, land, possessions, reputation, wealth, privacy and dignity are all good interests, 'but they are not equally good'. The law protects interests according to their rank. And so 'a legal system which is concerned with human values (and the law is supposed to reflect the proper values of society) would be right to give greater protection to tangible property than to intangible wealth'.⁵⁹ The exclusionary rule is then a reflection of the lower value ascribed to unreified wealth.

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

⁵⁸ The argument has been made in England that 'The philosophy of the market place presumes that it is lawful to gain profit by causing others economic loss... Certainly there seems to have developed an understanding that economic loss at the hands of others is something we have to accept without legal redress, unless caused by some specifically outlawed conduct such as fraud or duress.' *The Aliakmon* [1985] 2 All ER 44, at p. 73, *per* Lord Goff.

⁵⁹ Tony Weir, *A Casebook on Tort* (9th edn, Sweet & Maxwell, London, 2000), p. 6.

first point may be less controversial than the second. No one doubts that resources are finite: judicial resources are not unlimited; tort liability cannot be extended indefinitely without stifling human initiative; and responsible defendants can be bankrupted by financial claims that leave claims for bodily injury unsatisfied. Therefore, it may be argued, that if pure economic loss were freely protected and allowed to compete on an equal footing with other, worthier claims for limited resources, the effect might be to crowd out 'better' interests and leave them unsatisfied. However, that conclusion depends on the answer to the second point, namely whether those limits would be surpassed by a presumption of recoverability. The answer to this question again seems to be conjectural, since it ultimately depends to some extent upon the same unverified assumptions inherent in the floodgates rationale. It also raises the question of how countries such as France and Belgium, which follow a rule of presumptive recovery of economic loss, have managed to avoid what the floodgates argument predicts. Is their experience proof that the argument is a gross exaggeration of the consequences, or does their experience tend to prove that these countries are simply using hidden and indirect means of controlling those consequences?⁶⁰

There is an additional question. The exclusionary rule is associated with the negligence standard. However, all systems in our study permit recovery when pure financial loss is inflicted wrongfully and intentionally. Thus, the exclusionary rule cannot be seen simply as an abstract ordering of interests but as a rule tied to the gradations of blame. It would be difficult to say whether the nature of the interest or the nature of the fault is the more important factor in the equation. Indeed we think it would be essentially misguided to assign such priorities because the rule, when it is applied and to the extent that it is a rule, is really the outcome of many other interacting factors as well.⁶¹ Not the least of these are many metalegal considerations, such as the size of the plaintiff class, the potential scope of the damages, public policy toward professional standards and so forth, which have varying degrees of cogency in actual context. Only through study of these factors in their liability context will we understand why the alleged rule operates selectively

⁶⁰ Genevieve Viney tends to regard French law in this perspective: 'on a privilégié l'emploi de méthodes indirectes et quasi-occultes', quoted in Spier *Limits of Liability*, at 3.

⁶¹ For a nuanced attempt to use various factors in a sliding scale to explain the lesser protection given to pure economic loss, see Koziol, *Unification of Tort Law: Wrongfulness*, pp. 29–30.