NEGLIGENTLY INFLICTED PURE ECONOMIC LOSS IN THE CASE OF DEFECTIVE BUILDINGS

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A COMPARISON OF SOUTH AFRICAN, ENGLISH AND GERMAN LAW

MINOR DISSERTATION

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NEGLIGENTLY INFLICTED PURE ECONOMIC LOSS IN THE CASE OF DEFECTIVE BUILDINGS - A COMPARISON OF SOUTH AFRICAN, ENGLISH AND GERMAN LAW

A. INTRODUCTION

The problem of liability for negligently inflicted pure economic loss appears in many fields of civil liability. Of course this debate does not stop in case of defective buildings after the negligent conduct of a builder or an inspector. The ultimate purchaser of a building or a third party may suffer damage to his person, property or purse through a product that is defective or even through one that is not.[1] He will demand legal redress, and solutions in determining under what conditions it should be successful need to be found. In this context the individual`s interest must outweigh the socio-economic utility of damage producing activity, the ensuing liability must be constructed so that it affords adequate protection without stifling beneficial industrial progress.[2]

Pure economic loss- The concept of pure economic loss comprises - on the one hand - patrimonial loss that does not result from any damage to property or injury to personality, and - on the other hand - financial loss that in fact does flow from damage to property or injury to personality, but which does not involve the plaintiff´s property or person.

Further, it can be devided into several categories:

- Economic loss consequential upon to the person or property of the plaintiff; this category is not regarded as pure economic loss and has always been recoverable.[3]

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[1]Boberg, p.193.
[2]Loc cit.
[3]Hutchison, Murphy´s Law, p.32.

- Economic loss as a result of a negligent misstatement, as it appeared in the English case of Hedley Byrne.[4]
- Economic loss caused by negligent rendering of professional services.[5]
- Economic loss caused by the acquisition of defective products or property.[6]
- Economic loss caused to the plaintiff as a result of physical injury to the person or property of a third party (relational economic loss).[7]

In determining the scope of liability for negligently inflicted pure economic loss several general considerations can be made. These thoughts cannot be confined to the legislations of the respective countries but are of general nature, though - as will be shown in detail - the different states are approaching the problem of negligently inflicted pure economic loss in different ways. While England and South Africa prefer solutions via the means of the delict law, German courts apply a contractual or semi-contractual approach. Both solutions serve the purpose of limiting the number of cases in which negligently caused pure economic loss has to be recovered. Although the German contractual approach is denied by the English and South African courts, in both countries the principle remains that economic loss is beyond any doubt recoverable in contractual relationships, but it is very difficult to obtain recovery in delict.
The most important consideration is the problem of confining the scope of liability within certain boundaries, because the negligent conduct of a party can cause damage to many other parties that are - or are not - linked with the damage producing party. How long shall a person or a party be held liable for its conduct and when shall the principles of risk of life or risk of

[4] loc cit.
[5] loc cit.
[6] loc cit.
[7] loc cit.

business take over? A general principle that a party is liable for every loss it creates, no matter wether it may be indirect, remote or relational damage would certainly paralyse the industrial process because the risk of an undertaker could no longer be within calculable limits.

In the English discussion about the recovery of pure economic loss this argument of indeterminate liability is associated with the term of "opening the floodgates" to liability. The exposition of the defendants to a potential liability "in an indeterminate amount for an indeterminate time to an indeterminate class" is regarded as undesirable by the English courts.[8] For example there is a consensus that a car manufacturer should not be liable for the potentially massive economic losses when one of its defective cars ceases to function in the Dartford tunnel during the rush hour.[9]

The second form of the floodgates concern is linked with the indeterminancy of each claim. It is said that the plaintiff is in the best position to foresee the likely extent of his lost profits while the defendant will often be unable even to guess at it let alone take preventative action.[10]

Another important aspect of the limitation of indeterminate liability is the question of insurability, since an indeterminate number of possible claims render the risk of production uninsurable at a reasonable cost.[11]

Moreover, legal certainty is a concern that should be taken into contemplation while delineating the liability for pure economic loss. As will be demonstrated especially the English jurisdiction suffered from insufficient predictability in the course of the cases. In this discussion legal certainty was promoted as being the principle advantage of the no-liability rule.[12]

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[8] E.g. Junior Books v. Veichti Co Ltd. (1983), A.C. 520 at pp. 539, 544-546.
[9] Stapleton, Duty Of Care And Economic Loss: A Wider Agenda, p. 254.
[10] H.Perlmann, Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine, pp. 70-72.
[11] Hutchison/Van Heerden, p.21.
[12] Candlewood Navigation Corpn. Ltd. v. Mitsui O.S.K. Lines Ltd. (1986) 1 A.C. 1 at p.25.

After all the judicial creativity on the whole topic should be fairly restricted, because it should be better be left to parliamentary legislation.

B. South African Law

The development for the recovery of pure economic loss under the South African tort law started in the beginning of this century. Up to the late nineteenth century the Aquilian Liability was by and large confined to culpable acts causing physical damage to person or property. Then, in 1886, in the case of *Cape of Good Hope Bank v. Fischer*[13] De Villiers CJ stated that *the Aquilian law had received an extension by analogy to a degree never permitted under Roman law. The action in factum was no longer confined to cases of damage done to corporeal property, but was extended to every kind of loss sustained by a person in consequence of an wrongful act of another...*

Indeed, in the twentieth century, was the Aquilian law then freed from the former confines by the extension to all kinds of conduct and harm, e.g. liability for omissions, negligent misstatements and economic loss. This development was made possible by the redefinition of the concept of wrongfulness, which offered an adequate means in expanding the boundaries of the Aquilian action.[14]

Traditionally, the South African tort law concerning the recovery of pure economic loss was strongly influenced by the English Law, which adopted a very restrictive approach and denied claims for economic loss in the nineteenth century. Probably this is why in the case of *Dickson and Co. v. Levy*[15] in 1894 the Cape Supreme Court rejected its decision in *Cape of Good Hope v. Fischer* and held that, independently of contract, a false representation causing damage was not actionable unless made

[13](1886) 4 SC 368, 376.
[14]Hutchison, Aquilian Liability II, p.595.
[15](1894) 11 SC 33.

fraudulently. Unlikely it was coincidental that in the meantime the English courts, after long debates, had reached precisely the same conclusion.[16]

On the other hand, in the modern debate about the recovery of pure economic loss South African courts seemed to decide the cases different from the attitude adopted by the English Courts. In the early 1970s, when the courts were confronted with claims in delict for economic loss caused by negligent breaches of contract, they decided not to follow the decisions given by the House of Lords in *Anns* and *Junior Books*. Instead of that they favoured a cautious, incremental approach to the extension of the law of delict into new areas, especially when the claim involved pure economic loss. The case of *Lillicrap Wassenaar & Partners v. Pilkington Brothers (SA) (Pty) Ltd.* in 1985 presented the high point of this conservative phase.[17]

Hence, in principle, the Aquilian action is now available to claim damages for pure economic loss.

In cases of pure economic loss the wrondoer´s conduct must comply with the general delictual requirements to found liability.[18] In South African law the mechanism of control not to open indeterminate liability is found primarily in the Aquilian requirement of wrongfulness. The concept of wrongfulness corresponds closely to the English notion of duty of care.[19] In South African law the wrongfulness lies either in the infringement of a subjective right, or in the breach of a legal duty to avoid damage. This also applies for pure economic loss.[20] Most always courts find the wrongfulness in an act causing pure economic loss in the breach of a legal duty.[21] The yardstick

[16]Hutchison, Aquilian Liability II, p.610.
[17]Hutchison/Van Heerden, p.8.
[18]Neethling, p.246.
[19]Hutchison/Van Heerden, p.4.
[20]Neethling, p.247.
[21]E.g. Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd 1982 4 SA 371 (D) 384-387; Fraenschhoekse Wynkeleder (Ko-op) Bpk v SAR & H 1981 SA 36 (C) 40-41; Shell and BP SA Petrolium Refineries (Pty) Ltd v Osborne Panama SA 1980 3 SA 653 (D) 659 .

must be used to decide whether there was a legal duty to avoid pure economic loss damages in the circumstances; the general criterion is reasonableness or boni mores. This criterion implies a careful weighing up of the interests of the parties involved, also taking account the public interest.[22] In the case of *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* the court described this point as follows:

It would seem therefore that in determining a given case whether the defendant's conduct which resulted in a foreseen or foreseeable economic loss was unlawful or wrongful the question is whether it would in all circumstances be reasonable to recognise that the defendant owed the plaintiff a legal duty of care...

Although it is not possible to lay down hard and fast rules, certain guidelines have been laid down by our Courts. A defendant's conduct, including an omission, is regarded as unlawful when the circumstances of the case are of such nature that it not only incites moral indignation but also that the legal convictions of the community demand that it ought to be regarded as unlawful and that the damage suffered by the plaintiff ought to be made good by the defendant... In determining whether the conduct is of such nature as to be determined unlawful, the Court must carefully balance and evaluate the interests of the concerned parties, the relationship of the parties and the social consequences of the imposition of liability in that particular type of situation..

In applying the principle of reasonableness in order to establish the legal duty with regard to pure economic loss, the courts emphasised two particular factors. These are the defendant's knowledge that negligent conduct on his part would bring about a pure economic loss to the plaintiff and policy considerations.

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[22]Neethling, p.247.

Knowledge - In determining the legal duty the fact that the defendant indeed knew or subjectively foresaw that his negligent conduct would cause damage to the plaintiff plays a very important, perhaps even a decisive, role. The wrongfulness of the defendant's conduct is thus limited to encompass those people whom he knew would be prejudiced by his act at the moment when it was committed. The liability is limited to those plaintiffs whose identity was known by the defendant at the time of committing the act. Hence the number of possible plaintiffs is limited and an unlimited liability excluded.[23]

Policy considerations - The scope of delictual liability in cases of pure economic loss is judicially controlled by various relevant policy concerns.[24]

The first policy consideration applicable to economic loss in particular is the problem of indeterminate liability.[25] When a situation is fraught with an overwhelming potential liability, for example where the conduct complaint of would probably result in a multiplicity of actions, an unlimited liability could be socially calamitous.[26] In those circumstances the court held the view that the defendant had no legal duty to avoid the damage.[27] The release in cases with an overwhelming potential liability providing the defendant to go free should only occur where the defendant would indeed incur into too wide liability. This implies that in a case of multiplicity of actions each claim would definitely succeed because the defendant's conduct would comply with all the requirements of the Aquilian action.[28] The liability will strongly depend on the particular circumstances of

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[23]Neethling, p.249.
[24]Neethling, p.249.
[25]Hutchison/Van Heerden, The Tort/Contract Divide seen from a South African Perspective, p.20; Neethling, p.249.
[26]Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd 1982 4 SA 371 (D) 383-387; Fraenschhoekse Wynkeleder (Ko-op) Bpk v SAR & H 1981 SA 36 (C) 39-40; Atiyah, Negligence and Economic Loss,p.270.
[27]Fraenschhoekse Wynkeleder (Ko-op) Bpk v SAR & H 1981 SA 36 (C) 39-40.
[28]Neethling, p.250.

each case, e.g. where only one claim is subjectively foreseeable, while there is a element of uncertainty concerning the identity of the other possible claimants, the first claim should not fail on the grounds of policy considerations.[29] In respect of other possible claims liability is only excluded in such cases by the absence of subjective knowledge and thus a legal duty to avoid damage to the claimants.[30]

The criterion of "an overwhelming potential liability" gained some criticism as it might not be meaningfully and rationally applied by the courts. To decide whether the scope of the wrongdoer´s liability is wide or overwhelming might prove extremely difficult and the delimitation a task for the legislature.[31]

An important aspect of the limitation of indeterminate liability is the question of insurability. The indeterminate number of possible claims render the risk uninsurable at a reasonable cost.[32] A very restricted liability for pure economic loss would lead to the result that it was the claimant´s task to have a first party insurance. On the other hand, the economic analysis of insurance suggests that the extent to which a person can insure cheaply against a preventable risk depends on two variables. The first is the extent to which the individual is able to control and therefore reduce the risk. The greater his control the more easy will he be able to insure. The second factor is the extend to which he is able to asses accurately the damage which will occur if the risk materialises. Again, the greater his capacity to do so the easier will he be able to insure. Construction industry professionals are thus far better placed than purchasers of property to minimise the risk of latent defects, so it is likely that the former are cheaper insurers than the latter.[33]

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[29]loc cit.
[30]Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd 1982 4 SA 371 (D) 386-387.
[31]Neethling, p.250; Schoeman 1986 THRHR 303; Basson 1983 1 Codicillus 12.
[32]Hutchison/Van Heerden, p.21.
[33]O`Dair, Murphy v Brentwood District Counsel: A House with firm Foundations?, p.564.

The next policy consideration is that the plaintiff should not be allowed to circumvent either contractual obligations between the plaintiff and the defendant, or a non-contractual but clear understanding between the affected parties via tort law.[34]

In the situation where the plaintiff and the defendant are not in direct contractual privity but their relationship was based on a contractual matrix (e.g. Lillicrap - post assignment) , English law prevents an undermining of the deliberate arrangements. In South Africa, this position is controversial, as the case of Lillicrap will demonstrate.

In situations where parties are in direct contractual privity with each other the specific provisions in the contract like exclusion, limitation and arbitration clauses should take precedence over the more general law of delict.[35]

Other policy considerations that should be taken into account are international treaties and conventions as well as alternative remedies of the plaintiff to protect himself or herself (like e.g. insurances).[36]

I.LILLICRAP, WASSENAAR AND PARTNERS v PILKINGTON BROTHERS (SA) (PTY) LTD

The case of Lillicrap was a good example for the very cautious approach of the South African courts adopted concerning the extension of the recovery for damages of pure economic loss. Liability only arose, when there were good policy considerations for the extension of the Aquilian action.[37]

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[34]Huchtison/Van Heerden, p.21.
[35]Huchtison/Van Heerden, p.22.
[36]Hutchison/Van Heerden, p.23-24.
[37]Hutchison, Aquilian Liability II, p.632.

In mid-1975 Lillicrap, a civil engineer, contracted with Pilkington Brothers to conduct soil tests on the site of a proposed float glass plant, to design the plant, and to supervise its construction - all in accordance with P's specific detailed requirements. The tests having been conducted and the design prepared, the construction of the plant commenced under L's supervision. During that period (in mid-1976) P - with L's concurrence - assigned its contract with L to S, the main contractor for the construction of the plant. Thereafter the parties stood to each other in relationship of owner (P) - main contractor (S) - subcontractor (L), with privity of contract between P and S and between S and L, but with none between P and L. Nevertheless, L remained all the time aware that the work was being done for P as owner of the plant, and that any defect in the plant would cause loss to P.

Alas, when the plant was finished it did not come up to scratch. Minute movements and changes of level between its crucial components made it totally unsuitable for the manufacture of plate glass, though it may have served the purposes of less sensitive enterprises. The movements were attributable to the instability of the soil upon which the plant had been build. The foundations were inadequate, alleged P, and it would cost some R3,5 million to put matters right. This sum P then demanded from L by the way of delictual damages, basing its claim on averments that L had owed a duty of care both before and after the assignment of the contract between them, and L had negligently committed a breach of that duty by failing to carry out his own contractual obligations with proper professional skill and care. P's election to sue in delict may be attributed to the fact that its contractual remedy had already prescribed.[38]

At first, the court held that, in principle, there is no objection in South African law that the same facts can give rise to a contractual and Aquilian action. The mere fact that the plaintiff

[38]Boberg, Back to Winterbottom v Wright? - Not quite!, p.213.

might have framed his action in contract does not per se debar him from claiming in delict, providing that all the requirements of the Aquilian action are met.[39]

The majority of the court was of the opinion that the defects in the construction of the plant did not create a danger of damage to the plaintiff's property, the defects in the construction only rendered it unsuitable or less suitable for its purpose.[40] Grosskopf, for the majority, questioned the nature of wrongfulness upon which the defendant relied, as only pure economic loss existed.[41] The court applied the criterion of reasonableness involving policy considerations whether the Aquilian action should be extended or not. In this regard Grosskopf found it significant that the plaintiff did not contend that the defendant would have been under a duty to the plaintiff to exercise diligence if no contract had been concluded requiring it to perform professional services.[42] He compared this case to the case of *Van Wyk v Lewis*, where the doctor had the same duties without contracting with the patient, e.g. if he had operated on a person found unconscious in the street. In Grosskopf's opinion, the damages which the plaintiff claims, are those which would place him in a position he would have occupied if the contract had been properly performed.[43]

Although he conceded that the Aquilian action was no longer restricted to instances of physical harm, he denied that there were policy considerations which promoted an extension of the delictual liability to cover the facts of the present case.[44] He stated that the Aquilian action did not fit in a contractual setting, because parties entering such a contract normally regulate those features which they consider important for the purpose of the relationship which they are creating. They contemplate that

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[39]1985 (1) SA 496.
[40]At 497-498.
[41]At 498.
[42]At 499.
[43]At 499.
[44]At 500.

their contract should define the scope of their mutual rights and obligations. The imposition of Aquilian liability in a contractual setting would blur the distinction between voluntary obligations and the obligations imposed by law.[45] Before the assignment the contractual duties should not be circumvented by the use of the law of delict in any case. After the assignment the relationship of the parties was still strongly influenced by the contract and they had a reasonable expectation that their rights would still be regulated by the arrangements in the contract.[46]

At last the court doubted that there was a damage in the delictual sense as the plaintiff´s patrimony may have been enhanced by the building of the plant, despite its alleged defects.[47] The plaintiff was claiming the equivalent in money of its bargain, which was the contractual measure of damages.[48]

This judgement ran counter to the view of some critics. In the court a quo it was stated that the loss was physical rather than purely economic by refering to the English case of *Dutton v. Bognor Regis Urban District Council.* The action was also accepted on the ground that the damage was based on conduct rather than on words. Though Margo J conceded that the decision would have been the same had P`s loss been purely economic.[49]

Boberg, in reviewing the decision, stated that delictual duties with an contractual origin could arise quite frequently.[50] E.g. has a garage no duty to repair a motorist's brakes unless it first contracts to do so. After contracting it acquires the duty to exercise reasonable care in repairing the brakes not only to the motorist but also to third parties that might get involved.[51]

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[45]At 500.
[46]At 505.
[47]At 506.
[48]Huchtison/Van Heerden, p.12.
[49](1983) 2 SA p.157,163ff.
[50]Boberg, Back to Winterbottom v Wright? - Not Quite!, p.217.
[51]at 218.

The distinction was made whether the dishonoured obligation depends on a contract not only for its origin but also for its content. If the duty is devoid of content apart from the terms of the contract, its dishonour is actionable in contract only.[52] He instanced a contract to make a machine capable of manufacturing 5000 bolts an hour. If people are injured by the use of the machine, its maker is liable in contract and delict. But if it is the machine´s only vice to merely produce 3000 bolts an hour, the default amounts solely to a breach of contract. But if the machine causes a loss of production because it breaks down through negligence in the building of it, an action should lie both in contract or in delict.[53]

The decisive question wether there where positive policy considerations which favoured the extension of the delictual liability on the facts in this case was not answered satisfactorily. Lillicrap was a case with a clearly identifiable plaintiff, so that the thread of indeterminate actions was not existent. Above that, the court disregarded the relation of contractual privity and -in the post-assignment situation- the proximity that could not be closer short of an actual contract. If there was no clause excluding the liability in the former contract, no contractual intention could be circumvented by just applying the law. As only an arbitration clause existed, a solution with an existing claim in tort could have been found.

The decision in Lillicrap represented the cautious, incremental approach South African courts chose to apply for the recovery of pure economic loss. It certainly did not comply with the decisions in *Anns* and *Dutton*, though South African tort law was strongly influenced by the English. On the other hand, this conservative policy leads to similar results that were achieved in English law after the u-turn in *Murphy*, though it was not based

[52] 1983 (2) SA 157 (W) at 1721.
[53] loc cit.

on the denial that pure economic loss is recoverable in tort but only in contract.

II.TSIMATAKOPOULOS v HEMINGWAY, ISAAC & COETZEE CC AND ANOTHER

Another South African decision concerning the recovery of pure economic loss in the case of a defective building was *TSIMATAKOPOULOS v HEMINGWAY, ISAAC & COETZEE CC AND ANOTHER.* In this case, the plaintiff, the owner of certain immovable property which he had purchased from the second defendant, one C (who was subsequently sequestrated and who took no part in the proceedings), sued the two defendants for damages, alternatively, as against the second defendant, a reduction in the purchase price of the property. In May 1987, C engaged the first defendant (HIC), a firm of engineers, to design a retaining wall on one of the boundaries on the property. C rejected the first design submitted because the wall would be too expensive to build. HIC therefore submitted a second design with lower cost implications. Hereafter, HIC´s mandate was terminated and HIC was no further involved in any of the construction or engineering work performed on C´s property.

The second design prepared by HIC was approved by the relevant local authority and a retaining wall was duly built on C´s property substantially in accordance with such design. C then had a swimming pool built on his property at a slightly higher level than that indicated in the approved design. As a result of the construction of the pool, earth fill was placed between the edge of the pool and the retaining wall. (It was , however, agreed between the parties to the subsequent litigation that, even if the pool had been constructed at the level indicated on the approved design, the retaining wall would nevertheless have failed as a result of the pressure exerted by the earth fill and

that a reasonable engineer in position of HIC ought to have foreseen this happening.)

In May 1989, C sold his property to the plaintiff (T). Towards the end of 1989, the retaining wall began to tilt as a result of the pressure exerted on it by the fill, obliging T to take steps to restore the stability of the wall. This work was executed towards the end of 1990, at a cost about R 45 000 to T. (It would appear from the agreed statement of facts that this was considered by the parties to constitute economic loss.)

T then claimed the cost of restoring the stability of the wall as damages from HIC and C .

In terms of Rule 33(4) of the Uniform Rules of Court, the parties requested that the court rule only on the question whether HIC owed T a duty of care.[54]

As the only topic in question was whether there was a duty of care the only concerns were the foreseeability of the damage and the application of policy considerations.

The case was compared to *Lillicrap's* case, especially the defendant wanted to apply its principles, stating that the decision in *Lillicrap* was directly against imposing liability.[55] But Foxcroft J rejected this on two grounds.

Lillicrap's case dealt with the question whether the breach of a contractual duty that does not infringe the plaintiff's right of property or person can ground Aquilian liability. It did not exclude an Aquilian action in coexistence with liability for a breach of contract.[56]

Above that, there was never a contract between the plaintiff and the defendant, which contributes a second distinction between Lillicrap and this case.[57]

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[54]1993 (4) SA 428 (C); Hutchison/Van Heerden, p.17.
[55]At 432.
[56]At 432.
[57]At 433.

The defendant argued that to allow the plaintiff's claim would open the door to a possible multiplicity of actions, because the defendant could be sued by any successor in title.[58]

Foxcroft rejected this 'floodgates' argument, because the defective wall can only fall over once as a result of the admitted negligence. Therefore the spectre of an unlimited class of plaintiffs could not haunt on the present facts.[59]

After this, Foxcroft referred to the English case of *Murphy v Brentwood District Council* but then denied the importance of that decision in South Africa, because of the artificial distinction between economic loss and damage to person or property that cannot be found in the South African law.[60]

This statement even contradicted to Foxcroft's ground for distinguishing the *Lillicrap* case.[61]

As a result, the plaintiff was able to claim the Aquilian remedy for the damage he had suffered.

This case again illustrates the preference of South African courts between two policy factors: Either to impose liability where there is no contractual nexus between the parties with the result that no contractual rule can be circumvented or to impose liability exactly in these situations to pay regard to the actual proximity and faith between the parties. As will be seen the German courts favour the latter approach, whereas the South African strongly vote for the former.

C.THE ENGLISH LAW

In respect of the recovery of pure economic loss, English law does not refer to any special rules, but decides it on the ground of the common tort law, if no contractual relationship exists. As

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[58]At 433.
[59]At 434.
[60]At 435.
[61]Huchtison/ Van Heerden, p.20.

a general rule, negligently inflicted pure economic loss is not recoverable in the tort of negligence. It is a form of loss to which normally no duty of care exists.[62]

The dominating aspect in the tort of negligence was the question wether negligence should recognise more extensive recovery of pure economic losses.[63] The essential topics in this discussion are wether a breach of a contractual duty can give rise to a delictual claim of a third party and wether pure economic loss can be recovered in the tort of negligence at all.
The debate concerning this topic has centered in recent years on the possible recovery of pure economic loss, whereas, in former times, the court in *Winterbuttom v. Wright*[64] held that a breach of a contractual duty could not, at the same time, constitute a delict towards a third person. This judgement was inspired by the fear of generating a multiplicity of tort claims from each breach of contract. The case was treated to have developed a general rule against independent tort actions in such cases. This rule was later described as the "privity fallacy" and meant that a plaintiff who was a third party to a contract could not make claim in tort, that is a claim based on an independent tort duty, if the conduct of the defendant identified as tortious also happened to constitute a breach of contract.[65]
This "privity fallacy" was finally rejected in the case of *Donoghue v. Stevensen*, after, for almost hundred years, it presented an automatic bar to recovery in tort that the behaviour constituting the alleged breach was a breach of a contract with a third party.[66]
After this policy had been abandoned, the debate focused on the recovery of pure economic loss in principle.

[62]Stanton, The Modern Law of Tort, p.332.
[63]Stanton, p.332.
[64](1842) 10 M&W 109; 152 ER 402.
[65]Stapleton, Duty of Care and Economic Loss, p.250.
[66]Stapleton, Duty of Care and Economic Loss, p.252.

I.A General Theory?

A search for a general theory governing the recovery of pure economic loss under the tort of negligence might seem doomed to failure. As will be described in the course of the cases, extremely limited areas of recovery of such losses are now recognised and the recent approach to this topic seems to favour abandoning any search for general theory in favour of ad hoc development of the law in relation to the different situations which may arise. In the modern debate on the recovery of pure economic loss in negligence a limited, but significant, recognition of a general basis for the recovery of such losses in tort stems from the decision of the House of Lords in the case of *Hedley Byrne & Co. Ltd. v. Heller and Partners LTD.*.[67] Before *Hedley Byrne* it was generally presumed that pure economic loss was irrecoverable in the tort of negligence. Liability could only be achieved if the plaintiff was able to prove that as a result of negligence of the defendant, he had suffered injury to his person or loss of or damage to his property.[68] *Hedley Byrne* was a case of pure economic loss in the category of negligent misstatements and it was not clear at the time wether the case created an exceptional area for recovery of financial losses confined to this special field or wether it had the wider significance of opening the way to the recovery of pure economic loss caused by both negligent statements and acts.[69] The wider interpretation, that negligent acts which cause pure economic loss can give rise to a duty of care was argued with success in the cases of *Anns v. Merton LBC* (1978) and *Junior Books v. Veichti* (1983), concerning economic loss in the case of defective buildings. In *Anns*, Lord Wilberforce´s two stage test for a duty of care was fostering a rapid expansion in the ambit of the tort of negligence. After this period of innovation

[67]Stanton, p.336.
[68]Hutchison, Murphy`s Law, p.10.
[69]Stanton, The Modern Law of Tort, p.337.

and expansion between 1970 and 1984, from 1984 the English law entered a phase of orthodoxy and returned back to the application of the old exclusionary rule.[70]

There are various reasons given by the courts for treating claims for pure economic loss differently from those for physical damage. The most important argument is that the recovery of pure economic loss in the tort of negligence would lead to an indeterminate potential of liability.

II.The English Cases

1.Donoghue v. Stevenson

The development of recovery for pure economic loss in cases of negligent conduct started with the case of *Donoghue v. Stevenson* in 1932. In this very important case the plaintiff alleged to have suffered a disease from the decomposed remains of a snail that were in a bottle of ginger beer she consumed in a cafe. The claim raised the important issues of principle concerning a manufacturer's liability in tort to persons who were not in a contractual relationship with him. In his speech Lord Atkin emphasised that liability for negligence in tort is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. He reasoned about the neighbour principle, stating that, in law, you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Neighbours are those persons who are closely and directly affected by one`s act that one ought to have them in contemplation as being so affected when one is directing one`s mind to the acts or omissions which are called in question.[71] This proposition was immediately denounced as being to wide, first, in that it was said to apply only to physical damage to life,

[70]Hutchison, Murphy`s Law, p.16.
[71]Stanton, The Modern Law of Tort, p.29.

limb, health, or property. Secondly, it was treated as an obiter dictum and hence not binding, the ratio decidendi of the decision being confined to the liability of a manufacturer of goods towards ultimate consumers.[72]

Moreover, it was criticised that the neighbour test did not provide a distinctive element which justifies the intervention of law, as it failed to draw a firm line between the lawer`s conception of negligence and that of a moralist.[73]

The expansion of the duty of care, on the authority of Lord Atkin`s words, ultimately led to the position being reached that a duty of care is almost always owed in relation to negligently caused personal injuries, death and property damage.

Then, in the 1970s negligence liability expanded rapidly into the area of economic losses and challenged the traditional preserve of the law of contract. The generalised principle of negligence liability resulted in the presumption that a duty of care would be imposed in situations within the neighbour test, unless good policy reasons could be discerned for rejecting it. This approach is usually contextualised with Lord Wiberforce`s two stage test in *Anns*.[74]

2.Dutton v. Bognor Regis UDC

The first case in the 1970s concerning defective buildings was *Dutton v. Bognor Regis UDC*[75] in 1972, where the plaintiff bought the house not from the builder, but from an intervening purchaser. The house had been negligently built on an old rubbish tip, and such a building requires special foundations, which were not properly laid by the builder. The building inspector employed by the local authority negligently failed to notice that the foundations were inadequate and passed them. Later, as the foundations subsided the walls started to crack.

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[72]Markesinis/Dias, p.63.
[73]Stanton, The Modern Law of Tort, p.30.
[74]Stanton, The Modern Law of Tort, p.30.
[75](1972) 1 QB 373.

The action against the builder was compromised on the basis of the law as it then stood, namely that builders who built on their own land and later sold the premises were not liable. The action against the Council continued, as it was sued for damages in respect of the costs of repairs and the diminution in value of the house. The action was met, inter alia, with the objection that since the builder/vendor was immune, the surveyor and his employer, the Council, should also be immune. In the Court of Appeal it was decided otherwise. Having taken the view that the surveyor was liable it had to be discussed wether the builder or vendor has no immunity against claims in these constellations. It was decided that the builder/vendor had no immunity. Since in this case the builder was no longer party to the action, some doubted wether this part of the judgement was obiter or part of the ratio. After the decision in *Anns* the matter was no longer in dispute.[76]

The preferable interpretation of *Dutton* was to abolish the ordinary landlord`s or vendor`s immunity for dangers positively created by them before letting or selling the premises. On the other hand, the immunity for negligent non-feasance, such as failure to warn and, in the case of a landlord, failure to carry out repairs, was not affected by *Dutton.*[77] The decision of overruling the landlord`s immunity for dangers positively created before the demise of the property was also one of the aims of the Defective Premises Act. In Section 3(1) it provides that where work of construction, repair, maintenance or demolition or any other work is done in relation to premises, any duty of care are owed, because of the doing of the work, to person who might reasonably be expected to be affected by defects in the state of the premises created by the doing of the work shall not be abated by the subsequent disposal of the premises by the person who owed the duty.

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[76]Markesinis/Dias, p.211.
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Dutton presented a challenge to the traditional refusal of the law to allow the tort of negligence to be a remedy for defects of quality. Recovery was allowed for defects in the structure of buildings on the basis that the defect was an "imminent threat to health and safety" of persons using the property. The Court presumed that it was an impossible distinction to allow tort damages for personal injuries or damage to other property but to deny it in relation to remedial work undertaken to avert such damage. This opinion was uphold, even though it meant that the result of doing this was indirectly, and to a limited extent, to give protection to the property owner`s expectation that he had made a good bargain when purchasing it. The health and safety requirement was used to justify the recovery of damages in tort for quality defects. The courts at times tried to circumvent the difficulties by denying that economic loss was at issue. It was said that in *Dutton* physical damage was involved because

[77]Markesinis/Dias, p.211.

the building itself was suffering physical damage. The distinction between an item which was damaged in being defective in itself and requiring repair or replacement and one which caused damage to persons or other property was lost from sight.[78] Neither the *Hedley Byrne* principle, because reliance would be required, nor the principle of *Donoghue v. Stevenson*, because the fact that the damage was pure economic loss was ignored, were applied in a meaningfull way. Instead of that the neighbour principle was applied and it was said that the council owed the plaintiff a duty of care because the harm was foreseeable and because policy considerations favoured the imposition of liability.[79]

3.Anns v. Merton London Borough Council

After the decision of *Dutton* the next relevant case concerning defective buildings was *Anns v. Merton London Borough Council*[80] in 1978. The case went up to the House of Lords on a point of law, so that the precise facts remain in some doubt. The assumption underlying the decision, however, was that the local authority`s inspector carelessly failed to inspect the foundations of a building, which were not according to specifications, with the result that loss was suffered by the plaintiff when the building later developed structural defects and depreciated in value.[81]

In *Anns* the decision of *Dutton* was approved, the action was again founded on the fact that "the state of the building was such that there was a present or imminent danger to the health or safety of the persons occupying it". Local authorities were under a common-law duty to take reasonable care to secure compliance with the relevant bylaws, and following the principle

[78]Stanton, The Modern Law of Tort, p.349.
[79]Hutchison, Murphy`s Law, p.20-21.
[80](1978) AC 728.
[81]Markesinis/Dias, p.229.

in *Donoghue v. Stevenson* builders could similarly be held liable to subsequent owners or occupiers.[82]

In *Anns*, though, Lord Wilberforce redefined and updated the old neighbour principle of Lord Atkin. The two-stage test for a duty of care was introduced which accomodated pragmatic policy considerations alongside the traditional test of foreseeability.[83]

"First one has to ask wether, as between the alleged wrondoer and the person who had suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider wether there are any considerations which ought to negative, or to limit the scope of the duty or class of person to whom it is owed or the damages to which a breach of it may give rise..."[84] The requirement of neighbourhood or proximity was treated like reasonable foresight of the damage, and as a consequence of this foreseeability a duty of care arose in cases of negligence, unless there were convincing policy considerations for denying or limiting the duty. After foreseeability was established, the defendant had to prove that a duty of care did not exist on the grounds of policy.[85]

Like in *Dutton* the judges in *Anns* tried to sidestep the difficulties of pure economic loss by denying it was at issue. Again, it was said that physical damage was involved because the buildings themselves were suffering physical damage.[86]

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[82]Hutchison, Murphy`s Law, p.22.
[83]Hutchison, Murphy`s Law, p.6.
[84](1978) AC 751-752.
[85]Hutchison, Murphy`s Law, p.6.
[86]Stanton, p.349.

4.Batty v. Metropolitan Property Realisations Ltd.

Another case of economic loss concerning the depreciation of value was *Batty v. Metropolitan Property Realisations Ltd.*. In these cases the buildings or products are not as good as they should be because of the defendant`s carelessness and are thereby lessened in value. The question is wether a plaintiff, who for some reason cannot sue in contract, can nevertheless recover the depreciation in value in tort. One way a plaintiff used to be able to do so was by using the argument that producing a defect in a thing is, in a sense, damaging the thing itself and so treating the case as one of damage to property.[87] This happened again in *Batty v. Metropolitan Property Realisations Ltd..*[88] *Anns* was carried further by the Court of Appeal in *Batty*, where builders and developers, acting jointly, built houses on land which they should have realised was subject to landslips. Three years after the plaintiffs acquired one of these a landslip damaged their garden, but not the house, which nevertheless became valueless in view of the danger. Both defendants where held liable for this loss. It must be noticed that the house itself suffered no damage, though it can be argued that as the garden was damaged, there was damage to the premises as a whole. However, the tenor of the judgement suggested wider liability than in *Anns* since *Batty* concerned defective work producing a future defective and dangerous product.[89]

Like in *Dutton* and *Anns*, in *Batty* the truth of the matter was that the courts were deliberately starting to recover pure economic losses but were trying to disguise that fact for the sake of expediency.[90]

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[87]Markesinis/Dias, p.81.
[88](1978) QB 554.
[89]Markesinis/Dias, p.82.
[90]Hutchison, Murphy`s Law, p.22.

5.Junior Books Ltd. v. Veichti Co. Ltd.

The high point of the expansion of liability for pure economic loss came with the decision of the House of Lords in *Junior Books v. Veichti.*[91] This was a claim by the owner of a factory against a specialist subcontractor who had negligently laid the floor in a factory which was erected by construction company X. Although Junior Book`s architect had nominated Veichti to do the work, there was no contractual nexus between the parties, as Veichti was engaged by X. The plaintiff sought compensation in tort for the cost of relaying the floor and the costs of the consequential disruption of his business, but did not allege that the defects had created a risk of injury to persons or property in the factory.

In spite of this, the majority in the House of Lords allowed the claim. They favoured the position that a claim for the value of a defective product can either lay in contract or in tort. In his leading speech, Lord Roskill said that nowadays the proper control does not lie in asking wether the proper remedy should lie in contract instead of in delict or in tort, not in somewhat capricious juridical determination wether the particular case falls on one side of the line or the other, not in somewhat artificial distinctions between physical and economic or financial loss when the two sometimes go together and sometimes not ... but in the first instance in establishing the relevant principles and then deciding wether the particular case falls within or without those principles.[92]

Lord Roskill applied the Anns two-stage test and held that the degree of proximity was as close as it could be short of actual privity of contract. Moreover he said that there were no policy factors warranting a restriction of the duty of care arising from such proximity. The fact that such a claim has never been

[91](1983) 1 A.C. 177.
[92](1983) 1 A.C. 545.

allowed before was no reason not to allow it then; it was the next logical step forward in the development of this branch of law. There was no reason why a claim for pure economic loss should be disallowed when one for economic loss coupled with physical loss had always been allowed.[93]

In the dissent, Lord Brandon held that through a wholly undesirable extension of the tort law the majority was imposing obligations of inherently contractual nature, namely, warranties that the products in question measured up to a certain standart of quality, on manufacturers or distributers of products. In his opinion the determination of this standart in absence of a contract between the parties presented an insoluble problem. On the other hand, if this standart was determinated with reference to the contract between the defendant and a third party, the defendant should also be allowed to rely on exclusion or limiting clauses also contained in that contract.[94]

This decision opened the door to two possible interpretations. It could either mean that the recovery of pure economic loss was possible whenever such losses were foreseeable or pure economic loss could be recovered only in neo-contractual relationships, since the parties in *Junior Books* were not quite in a contractual relationship, but they were one stage short of being in one. This close proximity justified allowing tort to overcome a problem created by the harsh rules of privity of contract.[95]

Subsequent interpretations largely relegated this case to the status of a decision on its own special facts. Later, it was even said that this case involved damage to the pursuers` property.[96]Certainly the pursuers were the owners of the floor, but to say this meant there was damage to their property is

[93](1983) 1 A.C. 546; Huchtison, Murphy`s Law,p.25.
[94](1983) 1 A.C. 552; Huchtison, Murphy`s Law,p.25.
[95]Stanton, p.350.
[96]Leigh and Sillavan Ltd. v. Aliakmon Shipping Co.Ltd. (1986) A.C. 785, 817.

tantamount to saying that supply of an article which is shoddy and breaks is actionable in negligence and that is not the law. Alternatively, the defenders could be regarded as having damaged the pursuers` building by installing the defective floor, but it does not seem that the House of Lords decided the case on this basis.[97]

6.Pirelli v. Oscar Faber

In *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners* [98] the House of Lords decided that a cause of action based on damage to property accrues only when physical damage occurs to that property, even if the plaintiff could not reasonably have been expected to have discovered that damage at the time when it occurred or reasonably soon afterwards.

In this case, the facts were that in 1969 the plaintiff had engaged the defendant, a firm of consulting engineers, to advise on and design an addition to its factory premises, including a provision of a 160 ft high chimney. This was built shortly afterwards by a nominated sub-contractor who subsequently went into liquidation. The concrete used the chimney was unsuitable for its purpose and in the early 1970 cracks developed at the top of the chimney. The plaintiff did not discover these cracks until November 1977, and the court held that the plaintiff could not with reasonable diligence have discovered the cracks before October 1972. The writ was issued more than six years after the date when the cracks had developed, but less than six years after the date when the plaintiff could with reasonable diligence have discovered the cracks. S.2 of the Limitation Act provided a six-year limitation period from the date on which the cause of action accrued. It

[97]Winfield & Jolowicz, Tort, p.99.
[98](1983) 2 A.C. 1.

was therefore crucial for the plaintiff to establish that the true date when the action accrues is when the plaintiff could with reasonable diligence have discovered the defect. As the plaintiff failed to do this, the court decided that, except in the case of a building which is doomed from the start, a cause of action in tort accrues when physical damage first appears. Therefore the plaintiff`s claim was statute-barred.

The plaintiff`s claim was essentially a claim for pure economic loss, representing the diminution in value of the chimney stack by virtue of the cracks which had appeared in it.[99]Thus, in principle, the recovery of pure economic loss was possible; the decision in *Junior Books* was adhered.

7.Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson

Another aspect of economic loss is the occurrence of such loss through the breach of statutory duties. If it is not the kind of damage contemplated by the statutory duty in question, no action lies in respect of it, however foreseeable it may have been.[100]In *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson*[101] the plaintiffs` architects received the approval of a local authority for a drainage system for the development of a site owned by the plaintiffs. Later the architects gave instructions for the installation of a different drainage system from which had originally been approved. This conduct put the plaintiff in breach of statute. During the construction the deviation from the plans came to knowledge of the local authority`s inspector, who did nothing about it. Two years later the drainage had to be reconstructed with financial loss to the plaintiff. The House of Lords decided that the local authority was not liable. It was held that the purpose of the

[99]Bernstein, Economic Loss, p.254.
[100]Markesinis/Dias, p.224.
[101](1985) A.C. 210.

statutory power, which the local authority had failed to exercise, was not to indemnify the plaintiffs against loss resulting from their own breach of duty by relying on the advice of their architects. Its purpose was on the contrary the protection of occupiers of buildings and the public against dangers to health and personal safety. It was not to safeguard building developers or anyone else against pure economic loss.[102]

8.Simaan General Contracting Co. v. Pilkington Glass Ltd.

A careful interpretation of *Junior Books* was that the courts allowed recovery of negligently inflicted pure economic loss in tort where there existed a relationship of very close proximity between the tortfeasor and the victim. This test had the capacity of providing the basis of a general theory governing the recovery of such losses. However, the decision in *Simaan General Contracting Co. v. Pilkington Glass Ltd.*[103] by the Court of Appeal rejected this suggestion. In this case a nominated supplier of glass for a building was excused from tort liability to the main contractor when the colour of glass which was supplied failed to meet the contractual specification with the result that the main contractor did not receive payment from the building owner. In this constellation, the relationship between the contractor and the nominated supplier of materials for the purposes of the contract was similar in terms of proximity to that between the owner and building subcontractor which had existed in *Junior Books*.[104] However, the court decided that the tort of negligence could not penetrate the preserve of contract to the extent of providing a remedy a person whose work failed to meet the contractual expectations and that the plaintiff's remedy was to pursue his contractual claims. It was held that the recognition of duties in tort might create difficulties if the

[102]Markesinis/Dias, p.79-81.
[103](1988) 1 All E.R. 791.
[104]Stanton, p.337.

contract contained exclusion clauses. Dillon L.J. went as far to say that he doubted wether future citation from *Junior Books* could serve any useful purpose.

9.D. & F. Estates Ltd. v. Church Commisioners for England

In *D. & F. Estates Ltd. v. Church Commisioners for England*[105] the House of Lords finally rejected liability in tort. In this case builders, who had contracted to build a block of flats, employed subcontractors to carry out the plastering. The subcontractors` conduct was negligent with the result that some of the plaster fell down after the flats had been let. The issue was wether the builders were liable to the plaintiffs, the occupiers of a flat, for the cost of repairing the defective work on the ground that the builders ought to have known that the plaster-work was defective. Lord Bridge held that "economic loss is recoverable in contract by a buyer or hirer of the chattel entitled to benefit of a relevant warranty of quality, but is not recoverable by a remote buyer or hirer of the chattel...If the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic."

This decision cast doubt on the interpretations in *Dutton* and *Anns* that to build a defective building is to cause damage to property, and *Batty* was disapproved. The question wether damage sustained by one part of a structure as a result of the defective construction of another part, which is separate from the first and might be regarded as other property of the plaintiff, was left open.[106]

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[105](1988) 3 WLR 368, 385.
[106]Markesinis/Dias, p.83.

10.Murphy v. Brentwood District Council

Finally, in *Murphy v. Brentwood District Council* [107] the House of Lords confirmed the return to orthodoxy. Lord Oliver said that in an uninterrupted line of cases since 1875, it has consistently been held that a third party cannot successfully sue in tort for the interference with his economic expectations or advantage resulting from the person or property of another person with whom he has or is likely to have a contractual relationship. This meant that the authority of the case *Cattle v. Stockton* was fully restored.

The facts in *Murphy* were very similar to those in *Anns*. A local authority was again sued for the cost of remedying defects in a building, allegedly caused by the authority`s negligence in approving defective foundations. In *Murphy* the House of Lords overruled its own previous decision of *Anns* on the scope of the local authority`s duty of care when exercising statutory functions in respect of building regulations. The reason was simply that the loss was of pure economic nature. The authority of *Anns* had not been directly in issue in *D. & F. Estates* and it had been arguable that the case was authority for the existence of an exceptional area of tortious recovery under which defects which created an imminent threat to health and safety were still actionable in tort in spite of the reassertion of the traditional principle of the forms of recoverable loss. This result would have applied to the negligence liability of the local authorities and builders but not to architects and engineers who were outside the ratio of *Anns*. In *Murphy* the House of Lords rejected the "imminent threat to health and safety" approach as unworkable and assimilated the negligence liability of local

[107](1991) 1 A.C. 398.

authorities and builders to the traditional rules which had been revived by *D. & F. Estates.*[108]

The most important impact of *Murphy* and *D. & F. Estates* was that the balance shifted decisively in favour of bringing actions relating to defects in items such as buildings in contract rather than in tort. The large number of cases that were decided in tort between 1972 and 1988 no longer represent the actual law because they deal with pure economic loss which is now recoverable in contract only. Hence, in most of the cases of defective buildings the loss will not be recoverable as such claims are usually for the costs of repairing defective property. Professional persons working in the construction industry, who are likely to be out of privity of contract with the person finally damaged, have regained much of the immunity that seemed lost before. [109]

D. The German Law

I. Liability in the German BGB

1. Liability under § 823 (1) BGB

In cases of damage to person or property the loss can be brought under the heading of § 823 (1) BGB. § 823 (1) BGB says that a person who wilfully or negligently injures the life, body, health, property, or other right of another contrary to law is bound to compensate him for any damage arising therefrom.[110] Concerning liability for damages to property this topic is limited to damage to other things than the defective product.[111] Liability under § 823 (1) BGB in cases of damage to the defective product as damage to the consumer´s property

[108]Stanton, p.351.
[109]Stanton, p.351.
[110]Translated version of § 823 BGB in: Markesinis, German Law of Torts, p.12.
[111]Markesinis, p.82

can only arise if the damage of the property represents damage which is the duty of the manufacturer to take care to avoid in the interest of the acquirer in the integrity of his property. It is distinguished those cases where the damage consisted simply of the fact that the defect in the thing made it less value and constitutes an infringement of the acquirer's bargain, i.e. whether the damage and the initial defect are substantially similar (which is ruled by the law of contract of manufacture / sales), or the damage is deepening into the undamaged part of the acquirer's property (infringement of his interest of integrity). E.g., to make someone owner of a defective building does not mean to invade into an already existing ownership.[112]
This is how the distinction between economic loss and damage to property is conducted. Only in the latter case liability arises in the regime of § 823 (1) BGB.[113]
The liability in § 823 (1) BGB is confined to infringements of the enumerated rights, above that there is no compensation for pure economic loss.

2. Liability under § 823 (2) BGB

§ 823 (2) BGB says that the same obligation (as in § 823 (1)) attaches to person who infringes a statutory provision intended for the protection of others. If according to the purview of the statute infringement is possible even without fault, the duty to make compensation arises only if some fault can be imputed to the wrongdoer. [114] Liability arises when the defendant is in breach of a special statute which is correctly deemed to be protective statute in the sense of § 823 (2) BGB.
For example, the Machinery Protection Act renders manufactures and distributors of a whole range of machinery, tools etc. strictly liable for personal injury or death suffered by

[112]BGH 39, 366.
[113]BHG NJW 1985, p.2420; Markesinis, p.574.
[114]Translated version of § 823 BGB in: Markesinis, German Law of Torts, p.12.

all users, but excludes liability for property damage or economic loss.[115]

3. Liability imposed by contractual or quasi-contractual relationships

Liability might also be imposed by contractual or quasi-contractual means. The basic differences in German law concerning liability in the law of delict and in the contractual area are the topics of vicarious liability, the burden of proof and prescription.

Whereas in contract, debtors are fully liable for the faults of persons they employ (according to § 278 BGB), in delict there is the possibility of exculpation for the employer (according to § 831 BGB).[116]

Concerning the problem of burden of proof, in tort law the general rule is that the plaintiff has to show that the product left the enterprise in a faulty condition and that the defendant has not organised his business in such a way as to enable the defect to be detected.[117] In the law of contract, according to § 282 BGB, the burden of proof might be reversed.

Finally, in tort law, § 853 BGB determines the period of prescription within three years, whereas a regular claim prescribes after 30 years (despite of special regulations concerning some kinds of contracts with shorter periods).[118]

While delineating the scope of delict and contractual law, these issues have to be beard in mind.

In the context of builder´s liability in cases of pure economic loss the *contract with protective effects vis-a-vis third parties*, the theory of *transferred loss* and two minor theories will be discussed.

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[115]Markesinis, German Law of Torts, p.89.
[116]Markesinis, p.85.
[117]Markesinis, p.84.
[118]Markesinis, p.84.

a. Contract with protective effects vis-a-vis third parties

The institute of the *contract with protective effects vis-a-vis third parties* can be qualified as a judge-made doctrine in order to enlarge the ambit of some special kinds of contracts.[119] While the jurisdiction based this institute on § 157 BGB (broad interpretation of contracts; implied intentions of the parties; end-aim of transactions), academic writers prefer to invoke § 242 BGB (good faith) as its legal origin.[120]

To broaden the contractual scope, three clear conditions have to be fulfilled. First, the third party must come into contact with the performance of the contractual debtor and be endangered or otherwise effected by any misperformance in roughly the same way as the contractual creditor. This requirement is known as proximity of performance. Secondly, the contractual creditor must have some interest in protecting the third party, and thirdly, the debtor must know these two elements when entering into the contract.[121]

A fourth, but contentious, criterion is whether the third party is in need of this protection, i.e. can it make use of own claims (e.g. in tort) to avoid damage.

The mere existence of any type of relationship between the creditor and the third party will not automatically include the latter in the protective scope of the creditor´s contract with the debtor. The relationship between the creditor and the third party must be sufficiently close so as to create an interest in the former to safeguard the rights of the latter.[122] In earlier decisions the BGH required that it is necessary for the creditor to be responsible for the third party. Later, this narrow policy was abandoned. The crucial issue was whether, in the light of

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[119]Markesinis, An Expanding Tort Law - The Price of a Rigid Contract Law, p.359.
[120]loc cit., p.360.
[121]loc cit., p.360.
[122]loc cit., p.361.

the circumstances, the contracting parties intended to create a duty of care in favour of the third party.[123]

The question remains if the *contract with protective effects vis-a-vis third parties* can be applied in cases of builder´s liability, as liability for defective buildings is normally ruled by the regime of contract of manufacture in §§ 631ff BGB.

The *contract with protective effects vis-a-vis third parties* can only be applied if the creditor intended to create a duty of care in favour of the third party. Such a relation between the creditor and the third party does not, as a rule, exist in a contract of sale or a contract for doing a job.[124] Hence, one can deduce, that the ordinary relation between the manufacturer, the seller and the ultimate purchaser of a product is not to be understood within the ambit of the *contract with protective effects vis-a-vis third parties.* Although in the constellation where a sub-contractor causes, through his negligence economic loss not just to his co-contractor but also to the owner of the building the *contract with protective effects vis-a-vis third parties* might be applied (e.g. the English case of Junior Books v. Veichti).[125]

In these cases it is argued that the sub-contractor must not be made more extensively liable towards the third party than he would be if sued by his co-contractor.[126]

b. Theory of Transferred loss (Drittschadensliquidation)

The *theory of transferred loss* is a quasi-contractual judge-made doctrine which allows a creditor to a contract to a claim (in contract) for loss resulting from the non-execution or bad execution of the contract, which falls not upon him but upon a third party.[127] The doctrine of *transferred loss* is based on the notion of good faith and prevents that the defaulting party in

[123]loc cit., p.366.
[124]Markesinis, German Law of Torts, p.497.
[125]Markesinis, German Law of Torts, p.51.
[126]loc cit, p.51.
[127]loc cit, p.55.

the contract does not benefit from the fact that in these cases the loss has been shifted from the creditor to the third party. In absence of this doctrine, the defaulting party would not be liable to his creditor, because the latter has suffered no loss; nor would he be liable to the third party (in contract) since there is no such contractual link.[128] In the typical cases a tort claim would also fail, since there is only pure economic loss which can not be compensated in § 823 (1) BGB.

The doctrine of *transferred loss* can only be applied after a close scrutiny, the third party can only rely on it in a very limited number of legal constellations.[129] That applies - apart from the rare cases of responsibility for risks[130]- where the creditor contracted for the third party`s account[131], or where the thing that the debtor promised to take care of belonged not to the creditor but to a third party.[132] In the cases of indirect agency, like e.g. in the owner - main contractor - subcontractor situation, a "union of interests" has to be created. Such a union of interests does not exist in a mere contract of sale, it cannot be interpretated in accordance with the requirement of good faith so as to afford a basis of compensation to a third party injured through defects in the thing bought.[133] Hence, cases like these without an existing union of interests are not covered by the theory of transferred loss. Otherwise the manufacturer and supplier of necessaries and luxuries would have to make good damage to the ultimate consumer not only in delict but also in contract.[134]

In the context of the contract of manufacture there is a rule concerning the separation of risk and property where the theory of transferred loss can be applied. If the debtor of a contract of

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[128]loc cit, p.55.
[129]loc cit, p.55.
[130]BGHZ 40, 91, 100.
[131]BGHZ 25, 250, 258.
[132]BGHZ 15, 224.
[133]BGHZ 40, 90.
[134]BGHZ 51, 91.

manufacture is installing a thing in the creditor`s house, the creditor becomes the owner of that thing according to § 946 BGB. This can happen before the contractual obligation is fulfilled, because, according the law of contract of manufacture in §§ 631ff, the creditor has to accept the performance first. If, in the time between the transfer of the ownership and the acceptance of performance, the thing breaks down by the conduct of a third party, there is the typical situation for the application of the theory of transferred loss. The owner of the house has a claim in tort against the third party because of the violation of his ownership. On the other hand has the owner of the house not suffered any damage, since he still has a claim against the manufacturer who owes the performance until it is accepted. The manufacturer has suffered damage, because he has to fulfil his contractual obligation two times. On the other hand has he no claim against the third party, since he was not the owner of the installed thing any longer when it was destroyed and there was no contractual connection between them. In this case the loss is shifted to the manufacturer and he can sue the third party.

Thinking in English or South African categories the floodgate argument might be brought forward against the theory of transferred loss, - but - can easily be rejected since only one party suffered loss and the other party involved will have no incentive to sue. On the other hand, if the situation is left unchallenged, the defaulting party might never face the consequences of his negligent conduct.[135]

c. Die "Haftung des Warenbestellers"

In addition to these contractual theories two other theories exist which deal with the justification of imposing stricter forms of liability. Both were discussed and finally rejected by the BGH.

[135]Markesinis, An Expanding Tort Law, p.369.

The first one is Diederichsen`s "Haftung des Warenbestellers".[136] It proposes that in these cases there is relationship between the manufacturer and the ultimate consumer that basically is considered as on of reliance irrespective of any awareness of any advertisements by the manufacturer so long as the defective goods were purchased from a sales network set up by the manufacturer and were already defective when they left his factory. This relation is considered as sui generis, since it is not regulated by written law and still has to be shaped by a judge.[137]

The "Haftung des Warenbestellers" was rejected by the BGH because of its dislike of any theory that cannot be traced back to a clear provision of the Code. Moreover the BGH refused to discover new forms of strict liability without any legislative intervention. A last objection to this theory is the problem why this liability should be limited to cases where the products are sold bearing the manufacturer`s name and be excluded whenever the same products are sold unidentified in a department store.[138]

The "Haftung des Warenbestellers" tries to pay regard to the relationship of a manufacturer of a product and the ultimate purchaser that undoubtedly exists. A similar relationship would exist between a builder of a defective house and its ultimate owner, though, according to its terms would not be applicable. However, in my opinion, the "Haftung des Warenbestellers" is too far reaching since it fails to contribute a reasonable distribution of risks in a modern society.

A similar approach to stricter forms of liability was made by Lorenz.[139] He as well emphasises the relationship between the producer of goods and the ultimate purchaser and attaches

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[136]Diederichsen, Die Haftung des Warenherstellers (1967), p. 297ff, 327ff, 345ff.
[137]Markesinis, The German Law of Torts, p.87.
[138]Markesinis, The German Law of Torts, p.87.
[139]Lorenz, Warenabsatz und Vertrauensschutz, Karlsruher Forum 1963, p.14ff.

considerable significance to the reliance of the ultimate consumer on the conduct of the manufacturer. Unlike Diederichsen, Lorenz attempts to base his solution on a specific provision of the BGB, namely §122. This provides that if a declaration of an intention is void, either it was not seriously intended or it was made in error, the person who made the declaration must compensate the other party for the damages he has sustained as a result of relying upon the validity of the declaration. Lorenz wants to extend this provision analogically to cover the relationship between a manufacturer and the ultimate consumer, since the manufacturer, by advertising for his products, creates the expection of the consumer that the product will be free of defects.

This theory was rejected on various grounds by the German Supreme Court. At first, it was doubted that modern advertising techniques have such an effect on the ultimate consumer. Secondly, it is by no means clear that § 122 BGB is capable for such an extention, since it faces a situation entirely different from the relationship between the manufacturer and the ultimate consumer. Above that, § 122 BGB imposes a very strict form of liability, since it does not depend on fault. The extension of § 122 BGB would lead to the result that the manufacturer is liable towards the contractor or the immediate purchaser based on fault, whereas his liability towards the ultimate consumer could arise without fault. At least this result is a convincing reason not to apply this theory.[140]

II. German Cases

1. Decision of the BGHZ 39, 358

In this German case the facts were similar to those in *Dutton*. It was a case that dealt with damage to the building and not damage caused by a defective product. The basic questions

[140]Markesinis, The German Law of Torts, p.88.

were if it was a case of economic loss or physical damage and should the answer be left to the law of contract or be found the regime of tort law.

The plaintiff site-owner claimed for damages from a local authority which had issued a building permit without adequately checking the architect`s calculations regarding the load-bearing capacity of the foundations, as marked on the plan. Because of this error, the building collapsed while in process of construction, and both the builder and the architect were insolvent. The plaintiff`s claim was dismissed by the BGH.[141]

The claim was based on § 839 BGB in connection with Art. 34 GG (liability for officials). In this respect it must be shown that one of the defendant local autority`s officials in the exercise of a public function attributed to him was in breach of an official duty of care which he owed to the plaintiff. The court held that in approaching wether, in giving a building permission when it should not have done so, the local authority was in breach of official duties owed to the plaintiff, the purpose of the duty must be considered. As official duties are in the first instance imposed in the interest of the state and the public, liability only exists where the official duty which was broken is deemed to protect the third parties themselves. The existence of such liability and its range must be determined by the purpose of the public provision which the duty is based on. Only if this provision aims at protecting individuals against financial loss, liability can exist. While the building regulations of the public law (§ 2 II Provincial Building Ordinance) imposes duties to serve the protection of the public, they also protect every individual member of the public who might be threatened by the unsafe condition of the building. The owner of the building may also be a beneficiary of this protective function if he suffers damage to his body, health, or property as a result of a

[141]BGHZ 39, 358; NJW 1963, 1821; Markesinis, The German Law of Torts, p.581.

collapse while he is visiting or inhabiting it, but only if the harm is a consequence of the danger from which it is the function of the official verification of the technical specifications to protect the public and hence the was individual endangered. The court decided that this was not the case here. Though the plaintiff was a member of the public and was entitled to be protected, the damage was confined to the building itself and no *other* property was damaged. Since to make someone the owner of a defective building does not mean to invade into an existing ownership, liability could not arise.[142]

2. Decision of the BGHZ 39, 366

This case also involved a defective building where contractual remedies were not possible.

In 1951 the plaintiff contracted with the defendant builder to have a house built on his land and with the defendant architect to have the construction supervised. Cracks appeared in the ceiling because the concrete used was well below the requisite strength. The plaintiff claimed damages for the reconstruction of the ceilings which were in danger of collapse. Because it was out of time for a contract claim the plaintiff based his claim on the delictual provisions § 823 I BGB and § 823 II BGB in connection with § 330 of the Criminal Code (StGB) or § 367 no.15 StGB. These claims were dismissed by the BGH.

At first, the claim for damage of the plaintiff's property under § 823 I BGB was out of question. The land owned by the plaintiff has not suffered damage by constructing the defective building, if one compares it to its former state, since the plaintiff has never owned the land and the building in an undefective condition. To make someone the owner of a defective building does not mean to invade into an already existing ownership.

[142]BGHZ 39, 358; NJW 1963, 1821; Markesinis, The German Law of Torts, p.581.

The claim based on § 823 II in connection with § 330 StGB was also rejected. Under § 330 StGB a person who is supervising or erecting a building in breach of generally recognised rules of building practice acts in such way as to cause danger to others` is guilty of an offence. The court held that this provision was only designed to protect lives and health of individuals. Hence, as the paintiff`s claim aimed at compensation only it falls out of the range of protected interests under § 330 StGB.
Finally, the claim based on § 823 II BGB in connection with § 367 I no.15 StGB was rejected. Under the last-named provision a builder or builder worker who constructs a building in deliberate deviation from the building plan approved by the authority violates this law. Again, the court decided that this provision is not designed to offer protection against harm of the sort for which the plaintiff claims damages.[143]

In both of these German cases there were basically two questions, first, was physical damage or pure economic loss involved and secondly, should the solution lie in contract law or could an extended tort law be applied?[144]
The first question was answered differently than in the equivalent cases *Dutton* and *Anns* in England. Since it was found out that there was "substantial idendity" (Stoffgleichheit) between the defect and the subsequent harm, it was soon very clear that economic loss and no physical damage was the case. Pure economic loss normally directs the judicial analysis into the realm of contract law, but in these cases contractual remedies were not available, because, in the first case, there was no contractual link between the owner and the public authority, and, in the second case, contractual claims had already been prescribed.

[143]BGHZ 39, 366; NJW 1963, 1827; Markesinis, The German Law of Torts, p.583.
[144] Markesinis, The German Law of Torts, p.585.

Hence, the only possible recovery could be found in the extended tort law. For this purpose it had to be found out if the respective provisions were designed to offer protection against economic loss, or, even stronger, if in the second case the scope and extent of the tort duty was influenced by the underlying contract.[145] This second question could be answered very easily from a German point of view, since a private contract can never determine the ambit or the interpretation of a public provision. Above that, it was decided by the court that the respective provisions only serve public interests which do not include protection against pure economic losses.

In *Dutton* and *Anns* both of these questions were decided contrarily. At first, it was decided that physical damage was involved because the building itself was suffering physical damage. The also in English law known distinction between the defective item itself and the damage to other property was disregarded in these decisions.[146] The argument of an imminent threat to health and safety of the persons who are using the building made the court to presume that the remedial work to avert damage of health and of other property should also be recoverable, and thus a duty of care existed.

Whereas in *Dutton* and *Anns* the English decisions were running counter to the jurisdiction of the BGH, thirteen years later, in *Peabody Donation Fund v. Sir Lindsay Parkinson and Co. Ltd.,* the House of Lords moved much closer to the German approach. In similar circumstances the court held that the purpose of the statuary power, which a local authority had failed to exercise, was not to safeguard building developers or anybody else against pure economic loss.

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[145] Markesinis, The German Law of Torts, p.585.
[146] Stanton, The Modern Law of Tort, p.349.

E. Comparative Part

The comparative part will only focus on the areas of law concerning the recovery of negligently inflicted pure economic loss in cases of defective buildings, where the tortious and the contractual approach come to different results. Since the House of Lords law after the decision in *Peabody* comes to very similar conclusions concerning sustantial identity and the breach of public provisions as the BGH, different results are more or less only achieved in situations where the German contract with protective effects vis-a-vis third parties might be applicable. In England this is the *Junior Books v. Veichti* situation, in South Africa it is *Lillicrap* (post-assignment).

The requirements of the contract with protective effects vis-a-vis third parties are proximity of performance, the interest of the contractual creditor in protecting the third party and the knowledge of the debtor when entering into the contract. It shall be assumed that these requirements are fulfilled in *Junior Books* and *Lillicrap*.

Even if *Junior Books* was in the end decided like the BGH would have done according to the requirements of the contract with protective effects vis-a-vis third parties, a new decision by the House of Lords in the era after *Murphy* would be contrary, since *Dillon L.J.* in *Simaan General Contracting Co. v. Pilkington Glass Ltd.* doubted that the future citation from *Junior Books* could serve any useful purpose.

Hence, the crucial question is wether either the tortious or the contractual approach is preferable or wether any of these could be more appropriate by the means of extending its ambit.

I. Expanding the law of delict?

Since the House of Lords clearly voted for the "bright line" of no liability, it shall be discussed wether this abandonment was necessary.

First, in the English discussion about the recovery of pure economic loss one very often encounters the argument that there is no precedent very a claim based on an extended tort law.[147] Although this attitude warrants certain legal certainty, it is the universal argument against legal change, as applicable to pure economic loss as to any other area of law.[148]

At the same time there are statements that an expanding tort law would disrupt the commercial expectations[149] or creates a large new area of liability and consumer protection in which courts perceive difficulties in determining the precise extent and limits of liability[150] that should better be left to Parliament. Regarding the course of the English cases one cannot deny these apprehensions, but does this really mean that an extension of the tort law is not feasible?

One aspect of the "floodgates" concern is the indeterminate number of potential plaintiffs, as economic loss can ripple down a chain of parties. In the sector of defective buildings this threat might not be of major weight, because it can always only one party be the owner of the defective property, and thus the number of possible claims is very restricted. Above that even the amount of the possible claim can be reasonably foreseen by the defendant. This argument was used in the South African case of *Tsimatakopoulos v. Hemingway, Isaac & Coetzee CC and Another*, as it was said that the defective wall could only fall over once as a result of the admitted negligence.[151] Although the floodgate concern could be rejected in the area of defective buildings, this decision resulted in the imposition of a

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[147] E.g. Murphy v. Brentwood District Council 3 W.L.R. p.414, 432.
[148] Stapelton, Duty of Care and Economic Loss, p.253.
[149] Candlewood Navigation Corpn. Ltd. v. Mitsui O.S.K. Lines Ltd. (1986) 1 A.C. 1 at p.15.
[150] Murphy v. Brentwood District Council 3 W.L.R. p.414, 419.
[151] 1993 (4) SA 428 (C) p.434.

transmissible warranty which was not part of either contract. There still might be some doubt wether the mere rejection of one concern is sufficient to extent the delict law, or wether there should be some positive reasons to impose liability, like e.g. reliance or proximity.

The principal advantage against the extension of the tort law is its legal certainty.[152] In this context it suffice to look at the legal changes that were conducted by the House of Lords. But still, the question remains, if sufficient legal certainty could be achieved by employing sharp-edged substantive concepts such as skill, reliance, and proximity - each containing a precise catalogue of special requirements - in an extended tort law. In the surveyable area of defective buildings the answer would probably be affirmative. The German institute of the contract with protective effects vis-a-vis third parties with its special conditions might be a good example that a certain degree of legal predictability can be achieved even in difficult circumstances.

Apart from a limited jurisdiction in the area of negligently caused pure economic loss in the context of defective buildings, there are proposals to step beyond this "pockets of law" approach, since a few special fields of recovery were recognised in English law.[153] *Jane Stapleton* suggests to replace the pockets of law with an agenda of policy concerns. She criticises that by applying the pockets of relevant case law the consideration of important policy factors could be precluded.

In establishing wether a duty of care exists in the first step of her "policies analysis" it shall be examined if a case is able to pass the floodgate concern.

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[152] Candlewood Navigation Corpn. Ltd. v. Mitsui O.S.K. Lines Ltd. (1986) 1 A.C. 1 at p.25.
[153] Stapleton, Duty of Care and Economic Loss, p. 284.

Where floodgates are not the problem (unlike the Dartford Tunnel example), the second pre-condition should be satisfied. This second matter of policy is that adequate protection from the risk of the loss was not reasonably available elsewhere. These are the cases where the plaintiff for example simply made a bad bargain like in the case of *Tsimatakopoulos v. Hemingway, Isaac & Coetzee CC and Another.* The damage could have been avoided by a better contract of sale, e.g. an assignment of the claims of the former owner to the purchaser of the property.

The third pre-condition is that a duty of care cannot be imposed where it would invade into an area with which Parliament has dealt in a way clearly intended to be exhaustive, or an area which for other reasons ought to be left to Parliament to deal with.

As a last principle it should be necessary for the imposition of a tort duty that the plaintiff cannot circumvent either his contractual bargain, or even a non-contractual but clear understanding between the parties as to where the risk should lie.[154]

This catalogue could even be carried out further, as it only enumerates reasons why a duty of care should not be imposed. As liability for pure economic loss in the tort of negligence should rather be exceptional than the rule some positive reasons for the imposition of a duty of care, like reliance, proximity or skill, could be added.

On the other hand, in situations of reliance or proximity the imposition of liability very often would fail because of its impact on the principle of privity of contract, as it happens in the sub-contractor cases like *Lillicrap*.

Probably because of difficulties like this Whittaker has already argued to develop true exceptions to privity of contract where

[154] Stapleton, Duty of Care and Economic Loss, p. 286.

these can be justified as a matter of policy, even where parties did not intend to create rights beyond privity. It is submitted that the courts should allow direct exceptions to privity where justice requires them, especially where they are demanded by the nature of the contract the parties have entered. [155] The existing English tort of negligence is still criticised as by no means "the best solution we have".[156]

II. A contractual approach?

Since I believe that the English abandonment of liability in the tort of negligence was not necessary because of the fairly convincing approach that was promoted by Stapleton, it still has to be discussed wether a contractual approach to economic loss would be preferable in England and South Africa.

While, under the present English law, it is permitted to parties of a contract to create rights to third parties, the English Law Commission has suggested that it should be reformed so as to allow them to do so.[157] It is submitted that in this context an analysis of the liability of a building sub-contractor to the owner of a building in terms of a contract with protective effects vis-a-vis third parties should be allowed.[158]

A solution by the means of the tort law can be advantageous in many respects, which at the same time partially constitute the disadvantages of the contractual approach. At first, the tort law is very flexible and is able to be suitable for a wide range of situations, whereas the contract with protective effects vis-a-vis third parties can only be applied in a very limited number of cases.[159]

A further disadvantage of the contract with protective effects vis-a-vis third parties is that it can apply in situations where all

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[155] Whittaker, Privity of Contract and the Tort of Negligence, p. 192.
[156] Fleming, Comparative Law of Torts, p.241; Whittaker, Privity of Contract.., p.192.
[157] Law Commision, Privity of Contract, Consultation Paper No.121 (1991).
[158] Markesinis, Eternal and Troublesome Triangles, 1990, 106 LQR p. 556, 559-560.
[159] Whittaker, Privity of Contract and the Tort of Negligence, p.197.

the conditions are fulfilled, the parties know that there is proximity and an interest of protection, but are not aware of the extending liability. This is why this figure should not be based on § 157 BGB (broad interpretation of contracts) any longer - like the BGH still does -, as this implied contractual intention might be fictitious and viewed from the result rather than really intended by the parties. Even if the contract with protective effects vis-a-vis third parties is now mostly based on the principle of good faith in § 242 BGB, the real intention of the parties might get neglected.

On the contrary, making use of the tort of negligence to impose liability allows circumvention of contractual privity without any formal conflict with its rules. [160]

In the field of liability for defective buildings *Whittaker*[161] submits that this is not an area where it is appropriate for the courts to extend liability under the contracts under which the builders work for the benefit of persons beyond privity. Here the legislature should build on the pattern of liabilities already created by the Defective Premises Act 1972 where the present liability is insufficient. He argues that there are too many difficulties concerning the range of questions of an judicial resolution involved if such a liability were created satisfactorily by the courts. For example he questions how the defectiveness of the building should be judged.[162]

On the other hand, the most obvious advantages of a contractual approach would be that there is no difficulty in recognising liability for pure economic loss, and, moreover, would such a recognition not open the floodgates to liability, as it would be owed only to the third party beneficiary.[163]

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[160] Whittaker, Privity of Contract and the Tort of Negligence, p.203.
[161] Whittaker, Privity of Contract and the Tort of Negligence, p.229.
[162] Whittaker, loc. cit.,n. 179.
[163] Whittaker, Privity of Contract and the Tort of Negligence, p.195.

A contractual approach gives easy solutions in determining the standard of care that is owed to the plaintiff since it can be defined by the terms of the contract. In a solution via the tort law more concern about the duty of care would be appropriate because the tort duty owed by the defendant might differ from the contractual obligations.

The contractual debtor could oppose all his exemption clauses and defences against the third party that he may have against his contractual creditor. The anti-circumvention concern can be rejected this way.

As the tort law and contract measure the damages differently, a contractual solution would favour the award of full expectation damages to the third party.

Above that, in a contractual solution the debtor could be made liable for misfeasance as well as for non-feasance, whereas in the traditional tort theory liability would be denied where the defendant has remained inactive.

Finally, the contractual approach brings advantages in respect of jurisdiction and limitation period. It would be more practicable if the relationship between the debtor and the creditor as well as between the debtor and the third party would be subject to one regime and be governed by one jurisdiction.[164]

To create a legal pattern of liability by the legislature, like it was proposed by Whittaker, is probably always the best solution that can be achieved as it warrants legal certainty and is the most legitimate way of introducing new law.

But since this might not happen in the next time or not at all, the convincing concept of the contract with protective effects vis-a-vis third parties deserves some consideration in England and South Africa in the meantime.

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[164] Markesinis, An Expanding Tort Law, p.391-392.