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Pure Economic Loss From A Comparative Perspective

by

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DECLARATION

I, the undersigned, hereby declare that the work contained in this dissertation is my own original work and has not previously been submitted - in its entirety or in part - at any university for a degree,

Signed by candidate

Wolfgang Freiherr Raitz von Frentz

October 1993

PREFACE

I express my sincere thanks to my supervisor, Professor DP Visser (Acting Dean), for his guidance, constructive criticism and all-round assistance. I am particularly grateful to him for always finding time for me in his very busy schedule.

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CHAPTER I

PURE ECONOMIC LOSS IN ENGLAND

1. Introduction

English law originally did not provide an action in cases where pure economic loss was caused negligently. From the middle ages (i.e. from more or less the 13th century), when there arose a remedy called 'trespass', which was applicable only in cases of direct forcible injury,[3] until 1932,[4] compensation for pure economic loss was not recoverable. The later-developed remedy of 'case' - which originally covered conduct that had either not been forcible or had not been direct - was first extended to cover cases of negligence; and finally, in *Donoghue v Stevenson* [5], the House of Lords unequivocally recognised the general tort of negligence. Since then this 'new tort of negligence' [6] has been subject to extension into areas where previously no remedy existed or where the existing remedies appeared to be inadequate.[7] When, in 1948, the distinction between 'trespass' and 'case' was abolished, the tort of negligence, with its elements of breach of a duty, negligence and damage, truly became a generalised action.[8] As Lord Denning [9] said:

> 'Remedies now depend upon the substance of the right, not on whether they can be fitted into a particular framework.'

The first signs of a willingness to compensate pure economic loss occurred in 1947, when the House of Lords considered the case of *Morrison Steamship Co Ltd v Greystoke Castle Cargo Owners)* [10]. In that case ships A and B collided. The cargo on A was not damaged but under a rule of maritime law the owners of that cargo

3) Zimmermann *Obligations* 910
4) The attempt of Brett MR in 1883 to generalise the duty of care in *Heaven v Pender* (1883) 11 QBD 503 at 509 did not succeed
5) [1932] AC 562
6) Compare Zimmermann *Obligations* 911
7) Jackson & Powell *Negligence*
8) Zimmermann *Obligations* 911; Fleming *Torts* 7ed (1987) 94
9) *Nelson & Others v Larholt* [1948] 1 KB 339 at 343; see also Zimmermann *Obligations* 913 at footnote 73
10) [1947] AC 265

became liable, as a consequence of the accident, to pay a sum to the owners of A. It was held that the cargo owners could recover this pure economic loss in negligence from the owners of the ship B which had been partly to blame for the collision although the cargo owner's property was not damaged.[11]

After this decision of the House of Lords it could no longer be said that pure economic loss is 'of its nature irrecoverable.'[12] But the judgment was seen as a narrow exception to accommodate the very special case of compensation in the field of maritime law; thus in a case [13] where a plaintiff claimed damages from a person who had injured his business partners, the courts were not prepared to follow the *Greystoke Castle.*

It was to take another 20 years before the House of Lords in *Hedley Byrne* [14] authoritatively brought to an end the exclusion of pure economic loss from the purview of the tort of negligence.[15]

And then, once the principle of the actionability of the causing of pure economic loss had been accepted, the question arose as to how one should determine whether or not a duty of care was owed to the injured party, whether or not there was a breach of such duty of care and whether or not that duty arose *prima facie*. Although the courts were able, in the wake of *Hedley Byrne*, to find certain criteria to distinguish recoverable from non-recoverable pure economic loss,[16] they nevertheless still had to struggle through a jungle of policy considerations [17] in terms of which actions in cases of pure economic loss caused by acts were regularly denied, whereas liability for negligent statements became well established.

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11) *Morrison Steamship Co Ltd v Greystoke Castle (Cargo Owners) Supra*
12) Lord Devlin in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 518
13) For example *Burgess v Florence Nightingale Hospital for Gentlewomen* [1955] 1 QB 349; *Behrens v Bertram Mills Circus* [1957] 2 QB 1
14) *Hedley Byrne & Co Ltd v Heller & Partners Ltd* supra
15) See also *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 and *Anns v Merton London Borough Council* [1978] AC 728
16) Cf *Anns v Merton London Borough Council* supra at 751 ssq; also Hutchison *Misrepresentation* 287-324
17) Cf Zimmermann *Obligations* 1038 also footnote 261

Thus, for a while after the decisions of *Anns v Merton London Borough Council* [18] and *Junior Books Co Ltd v Veitchi Co Ltd* [19], the courts seemed to have adopted a widely-accepted, general principle - of which more will be said at a later stage - that allowed the recognition of a *prima facie* duty in certain situation. One result of this new approach was that, in two cases, the courts began to recognise a general approach (which will hereafter be called the doctrine of transferred loss)[20] for cases where the loss is not suffered by the owner of the infringed absolute right but as a result of contractual arrangements by a third party, e.g. a lessee.[21]

Very soon, however, the *Anns* decision began to be challenged in the courts.[22] Eventually the approach in *Anns*, towards determining whether there was a duty of care was finally and authoritatively overruled in *Murphy v Brentwood District Council* [23], with the result that the field of pure economic loss is again one where the principles on which liability is based are very uncertain.
However, although there still exists in England a reluctance to compensate negligently-caused pure economic loss, there always were certain groups of exceptions to the general rule that pure economic loss was not recoverable, namely the Fatal Accidents Acts 1846-1976, as amended by the Administration of Justice Act 1982 s 3 and, since 1964, also in instances of pure economic loss caused by negligent misstatements. Each of these exceptions has, of course, its specific limitations and external boundaries.

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18) Supra
19) [1983] 1 AC 520
20) Although in England this phenomenon is sometimes called 'ssumption of risk'(eg Marshall (1975) 24 *ICLQ* supra at 487) the term 'doctrine of transferred loss' is chosen since the term 'assumption of risk' is used in South Africa in a different context.
21) *Schiffahrt & Kohlen GmbH v Chelsea Maritime Ltd (The Irene's Success)* [1982] QB 481; *The Nea Tyhi* [1982] 1 Lloyd's Rep 606
22) *Caparo Industries v Dickman* [1990] 2 AC 605; see also the following cases: *Peabody Donation Fund (Governors) v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210; *Yeun Kun-Yeu & Others v Attorney General of Hong Kong* [1987] All ER 705; *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177; see also Horton Rogers (1978) 37 *LQR* 27; Markesinis (1986) 45 *CLJ* 384; Weir (1990) 49 *CLJ* 212; Hopkins (1990) 49 *CLJ* 214; Fleming (1990) 106 *LQR* 525; Fleming (1990) 106 *LQR* 349; Fleming (1989) 105 *LQR* 508; Wallace (1989) 105 *LQR* 46; Wallace (1991) 107 *LQR* 11; Huxley (1990) 53 *MLR* 369
23) [1991] 1 AC 398; which was followed by a 'flood' of literature, eg Wallace (1991) 107 *LQR* 228; Cooke (1991) 107 *LQR* 46; Nicholson (1991) 40 *ICLQ* 551; Todd (1992) 108 *LQR* 360; Stephen (1992) 108 *LQR* 360; McInnes (1993) 52 *CLJ* 12; Lorenz & Markesinis (1993) 56 *MLR* 558

The English courts' reluctance to compensate pure economic loss manifested itself primarily in the fact that - except in the years dominated by *Anns v Merton London Borough Council* [24] - a duty to compensate did not arise *prima facie* in cases of pure economic loss. To justify their reluctance to compensate pure economic loss, the courts relied on various policy considerations.[25]

One often-cited excuse is the danger of a multiplicity of claims.[26] Being exposed to a multiplicity of actions would firstly be unfair to a defendant who may have only made an 'inadvertent slip' totally disproportionate to the extent of the economic consequences.[27] Secondly, having a multitude of claims arising from one cause of action could prove to be a vexation to the courts.[28] But this last consideration loses much of its force when one considers that the courts have shown 'no reluctance to hold defendants liable for personal injuries suffered by a large but foreseeable class of victims, as some of the recent industrial disease litigation illustrates.'[29]

A similar line of reasoning points to the danger of holding the defendant liable for an overwhelming amount of damages.[30] Thus Widgery J [31], for example, fears the stifling of commerce.

Another argument is that the loss of profits (i.e. *lucrum cessans*) which is frequently in issue here, should not be regarded as being equal in importance to *damnum emergens*. This argument is raised even though it is obvious that economic loss is not

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24) Supra
25) Compare the comprehensive list offered by Marshall (1975) 24 *ICLQ* 748 at 750 and Hermann *Vermögen* 18 ssq
26) For example Lord Denning MR in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] 27 QB 1 at 38: 'The third consideration is this: If claims for economic loss were permitted for this particular hazard, there would be no end of claims.'
27) Marshall (1975) 24 *ICLQ* supra at 750
28) Marshall (1975) 24 *ICLQ* supra at 750 referring to *Simpson & Company v Thomson, Burrel* (1877) 3 App Cas 279 at 289-90; also Atiyah (1967) 83 *LQR* 248 at 249, 270
29) Stapleton (1991) 107 *LQR* 249 at 254
30) Herrmann *Vermögen* 19; whereas Stapleton (1991) 107 *LQR* supra at 254-255 does not see the 'opening of floodgates' problem as a problem of an overwhelming amount of damages, but only as one of foreseeability.
31) *Weller & Co Ltd v Foot & Mouth Disease Research Institute Ltd* [1966] 1 QB 569 at 585

always concerned with loss of profits.[32] One thinks, for example, of cases concerning loss of wages, payments by an employer to an injured worker, payment in terms of a contractual indemnity, or the incurring of expenses in other ways.

Furthermore there is also the view [33] that economic loss is less important than physical damage. But the fact that property may sometimes be a purely commercial asset, temporarily held, e.g. by a bailee, tends to dilute the force of this policy consideration. Also, such a view is irreconcilable with the fact that in certain cases consequential economic loss that flows originally from a physical injury is recoverable.[34] It should be kept in mind that compensation for personal injuries is essentially compensation for the economic consequences of the injury, not for the injury itself.[35]

Yet a further factor which influences the courts is a 'fancied anxiety not to trench upon the sphere of contract.'[36]
Finally, Lord Denning MR [37] mentions the danger of fictitious claims, although imposing the burden of proof on the plaintiff should suffice to ensure that any successful claim is genuine.[38]

Today in the English torts law system, cases of pure economic loss caused negligently are treated as a self-contained category. Situations concerning pure economic loss caused negligently can be subdivided into two categories.

First, there is the category that deals with pure economic loss caused by negligent misstatements.[39] In contrast to the following group it is concerned with liability in

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32) And even when it is, English law is committed in principle to awarding damages under this head in respect of consequential economic loss.
33) Compare Honoré (1965) 8 *JSPTL* supra at 298: '...no legal system will protect purely economic interests to the same extent as physical interests in the safety of person or property. On no rational scale of values is money as important as physical security.'
34) Marshall (1975) 24 *ICLQ* supra at 751
35) See for example *Baker v Willoughby* [1970] AC 467 at 462
36) Fleming *Torts* 4ed (1971) 164; with similar reasoning the courts refused compensation in *Murphy v Brentwood District Council* supra; much has been written about this but, as mentioned in the general introduction, it would be outside the scope of the thesis to go into details on this point.
37) *Spartan Steel & Alloys Ltd v Martin & Co Contractors) Ltd* supra at 38
38) Marshall (1975) 24 *ICLQ* supra at 750-751

situations involving two parties, in so far as the plaintiff is not a third party who suffered the pure economic loss consequential to the infringement of body or property of a second person.

Secondly, there are cases of pure economic loss which were caused negligently by conduct other than a negligent misstatement. Pure economic loss in these cases normally results from the negligent damage to the body or property of a third party. Within this category there are certain situations which are traditionally treated differently by the courts or in statutes, namely:[40] The actions of dependants of the victim of a fatal accident. The different categories will now be discussed *seriatim*.

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39) It is not always easy to distinguish words from acts. If, for example, a local authority inspector investigates foundations and through carelessness allows some defect to go unnoticed but nevertheless certifies compliance with safety regulations, it is aguable that the negligence occurs not in the writing of the certificate but in the conduct of the inspection. See *Dutton v Bognor Regis Ocean District Council* [1972] 1 QB 373; and also Dugdale & Stanton *Negligence* para 4.05.; MacGrath (1985) 28 *OJLS* 350 at 351 footnote 7 calls this distinguishing criterion a 'very vague method of predetermining liability'. At 377 he favours the following: '...it is seen that, as a general rule, negligent interference with contractual or business relations is not actionable, whereas on the other, the negligent performance of a gratuitous undertaking is, in general, actionable at the suit of the intended beneficiary of the performance.'

40) Compare Marrshall (1975) 24 *ICLQ* supra at 751 ssq, 772 ssq; until the Administration of Justice Act 1982 s 2 (c)(i) there existed the 'actio per quod servitium', an action in advantage for an employer in respect of employee's injury.

2. Negligent Misstatements

It could be argued that today liability for negligent misstatements is a totally self-contained category from which only limited lessons can be learned about liability for economic loss in general.[41] However, regardless of whether or not the question of negligent misstatements forms an integral part of the more general problem of liability for economic loss, its treatment by the courts illustrates how English law has attempted to limit liability in an area of law where the threats of multiplicity of actions and awards of large amounts of damages are present. The relevance of the approach of the courts in the negligent misstatement cases for the general category of pure economic loss is further underlined by the fact that the revolutionary cases in the field of negligent misrepresentation have always been referred to by the courts and writers when dealing with such cases.

As was indicated above, the courts were originally not prepared to impose a duty where pure economic loss was suffered as a result of reliance on either professional or private advice.[42] However, the courts' approach to this question changed dramatically with the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [43]. There it was decided that a person giving advice could be under a duty to a person suffering economic loss following reliance upon the advice if there was a 'special relationship' between the adviser and the plaintiff.[44]
But fears of too wide a potential liability led the Lords to adopt a more restrictive basis for the duty than in the case of physical damage. Mere forseeability of a person

41) See for example Marshall (1975) 24 *ICLQ* supra at 782
42) In the leading 1950s case of *Candler v Crane, Christmas & Co* [1951] 2 KB 164, the Court of Appeal held that accountants who showed an investor a company audit that they had negligently prepared, were under no duty to the investor when he suffered economic loss as a result of investing in reliance upon the audit.
43) Supra
44) Lord Devlin in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* supra at 517 used a convincing example to explain the lack of logic in the former requirement of an infringed right: 'If irrespective of contract, a doctor negligently advises a patient that he can safely pursue his occupation and he cannot and the patient's health suffers and he loses his livelihood, the patient has a remedy. But if the doctor negligently advises him that he cannot safely pursue his occupation when in fact he can and loses his livelihood, there is said to be no remedy...I am bound to say...that I think this to be nonsense.' Thus in his opinion a line between physical damage and economic loss cannot be justified 'on any intelligible principle'.

suffering loss through reliance was insufficient. The requirement that between defendant and plaintiff there must have been a special relationship in terms of which that reliance could be held to be reasonable was the way in which the House of Lords dealt with fears of too wide a potential liability.[45]

Nevertheless, the decision greatly expanded the potential liability of professionals. Accountants, lawyers, valuers, insurance agents and others whose negligent advice normally results in purely economic loss only, could now be liable to persons other than their clients.[46]

By the 1970s the Law Lords had moved so far as to hold that public policy primarily required the imposition of liability unless there was some other, and secondary, policy demanding total or partial immunity from suit.[47] It was in *Anns v Merton London Borough Council* [48], a case of pure economic loss caused negligently by a misstatement, where this two-stage approach was firstly clearly expounded.

The plaintiff, leaseholder of flats, the walls and floors of which, eight years after they had been built, began to crack and tilt, issued a writ against the local authority, claiming damages for negligent failure to inspect the foundations or to detect, on inspection, that they were shallower than was required by bye-laws or was indicated on the approved plans. On the preliminary point whether the claim was time-barred, the local authority appealed without success from an adverse decision of the Court of Appeal.

45) See *Hedley Byrne Co Ltd v Heller & Partners Ltd* supra
46) See in this regard the comprehensive studies by Dugdale & Stanton *Negligence* and Jackson & Powell *Negligence*
47) *Arenson v Casson, Beckmann, Rutley & Co* [1977] AC 405 at 419; Salmond & Heuston *Torts* 20ed (1992) 205
48) Supra

Thus Lord Wilberforce stated:[49]

> 'Through the trilogy of cases in this House - *Donoghue v Stevenson* [50], *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [51], and *Home Office v Dorset Yacht Co Ltd* [52] - the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has 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 whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.'

This decision was significant in two ways. Firstly, considered as a case concerning pure economic loss caused by a negligent statement made by a local authority, it extended the liability of public authorities remarkably. Secondly, it also revolutionised - at least for a few years - the tort of negligence as a whole.[53] This was because *Anns* offered a new abstract measure to determine whether one person owed a duty to another.

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49) *Anns v Merton Borough Council* supra at 751-752; 'this judgment was initially greeted with enthusiasm and seemed to herald a major advance in the field of economic loss (See *Junior Books Ltd v Veitchi Co Ltd* supra), but after some years doubts were expressed': Compare Salmond & Heuston *Torts* 19ed (1987) 222

50) Supra

51) Supra

52) Supra

53) Thus also in Canada (*City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641) and New Zealand (*Stieller v Porirua City Council* [1986] 1 NZLR 84) the *Anns*-doctrine has been both followed and further developed.

Whereas before *Anns* one had to determine a duty positively, by using the neighbour principle, now public policy primarily required the imposition of liability unless there was some other and secondary policy demanding a total immunity from suit. The reluctance to look, at the second stage for policy considerations which could lead to a denial of the *prima facie* duty was the reason that duties now existed which could never have been established in the pre-*Anns* days.

Anns was at first met with enthusiasm and appeared to signal an important step forward in the field of economic loss.[54] It was only Lord Denning [55] who criticised the development in the law of torts in those days:

> 'I sometimes wonder whether the time has come - may indeed be already with us - when the courts should cry Halt! Enough has been done for the sufferer. Now remember the man who has to foot the bill - even though he only be one of many.'

Indeed, it took only a few years for Lord Denning's doubts to be vindicated as others also began to express reservations.[56] Thus in 1985, it was stated in *Peabody Donation Fund (Governors) v Sir Lindsay Parkinson & Co Ltd* [57], again a building case, that the Wilberforce judgment did not contain a test which was universally valid for all cases. This decision had the consequence that the tendency to impose liability in building cases on some party outside the construction team - for example on the local authority - was halted.[58] It was decided that a building owner was not owed a duty by a local authority, but only by the architect and builders.

Just one year later the Court of Appeal adopted this restrictive approach in two more building cases.[59] And in 1987 in the Privy Council case of *Yeun Kun-Yeu v Attorney General of Hong Kong* [60] the new judicial direction was further affirmed by quoting

54) Salmond & Heuston *Torts* 20ed (1992) 205
55) Denning *The Discipline of Law* 280-281
56) Salmond & Heuston *Torts* 20ed (1992) 205
57) Supra at 240; compare Huxley (1990) 53 *MLR* supra at 374
58) Salmond & Heuston *Torts* 20ed (1992) 205
59) *Investors in Industry Commercial Properties Ltd v South Bedfordshire District Council* [1986] QB 1034; *Jones v Strout District Council* [1986] 1 WLR 141
60) Supra at 710; see Todd (1992) 108 *LQR* 360; Huxley (1990) 53 *MLR* supra at 374

from the judgment of Brennan J in the Australian case of *Sutherland Shire Council v Hyman* [61], in which the High Court had expressly refused to follow *Anns*:

> 'It is preferable, in my view, that the law should develop categories of negligence incrementally and by analoging with established categories, rather than by a massive extension of a *prima facie* duty of care restrained only by indefinable considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.'

Inspired hereby it was stated: 'In my view of the direction in which the law has since been developing, their Lordships consider that for the future it should be recognised that the two-stage test...is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care.'[62]

And in 1988 it was again a building case where the House of Lords [63] challenged the judgment of *Anns* by casting doubts on the correctness of this decision. Finally, and not surprisingly, also in a building case, the House of Lords was prepared, in 1990, to overrule *Anns*.[64]

In *Murphy v Brentwood District Council* the plaintiff bought two semi-detached houses. The plans of the houses had been passed by the council, when submitted, before construction began, for approval in terms of the relevant building regulations. The plaintiff considered that he had suffered a loss because he was forced to sell one of the houses for substantially less than it would have been priced at if it had not had the defect. The House of Lords stressed that the loss in this cases was purely economic and was therefore not recoverable in an action in negligence against the

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61) (1985) 60 ALR 1 at 43-44; Horton Rogers (1978) 37 *CLJ* 27

62) *Yuen Kun-yeu v Attorney General of Hong Kong* supra at 712

63) *D & F Estates Ltd v Church Commissioners for England* supra; see Fleming (1989) 105 LQR supra; Fleming (1990) 106 *LQR* supra; see also Wallace (1989) 105 *LQR* supra at 76 who welcomes the opposition to Anns; Wallace (1990) 106 *LQR* supra at 12

64) *Murphy v Brentwood District Council* supra; see the notes by Flemming (1990) 106 *LQR* supra; Cooke (1991) 107 *LQR* supra at 55 ssq; see also the note by O'Dair (1991) 54 *MLR* supra at 570 who heavily disapproves of the overruling of Anns: 'Murphy is a deeply disappointing decision both in relation to the substantive law on defective premises and in its implications for the judicial process.'

council.[65] It was further held that, when carrying out its statutory functions of building control, the local authority had no obligation to protect building owners or occupiers against such loss.

Rejecting Lord Wilberforce's generalised approach to determination of the existence of a duty of care, Lord Keith stated:

> 'As regards the ingredients necessary to establish such a duty in novel situations, I consider that an incremental approach on the lines indicated by Brennan J in *Sutherland Shire Council v Hyman* [66] is to be preferred to the two stage-test.'[67]

He went on: 'In my opinion there can be no doubt that *Anns* has for long been widely regarded as an unsatisfactory decision....My Lords, I would hold that *Anns* was wrongly decided as regards the scope of any private law duty of care resting on local authorities in relation to their function of taking steps to secure compliance with building bye-laws or regulations and should be departed from.'[68]

It is still uncertain where this new (or, in a way, old approach) towards determining the existence of a duty of care will lead the English law of torts. It is interesting to note that the Supreme Court of Canada in the recent decision of *Norsk Pacific Steamship Co Ltd v Canadian National Railway Co* [69] stated that 'the more flexible approach set out in *Anns* was preferable to the *Murphy* reasoning', which was expressly stated as not representing the law in Canada.[70] Referring to the *Murphy* case, La Forest J made the court's attitude clear by saying:

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65) Compare Salmond & Heuston *Torts* 20ed (1992) 206; see also *Department of the Environment v Thomas Bates & Son* [1991] 1 AC 499

66) (1985) 60 ALR 1 at 43-44; concerning the current position in Australian law see Nicholson (1991) 40 *ICLQ* supra at 567

67) *Murphy v Brentwood District Council* supra at 915; compare also Salmond & Heuston *Torts* 20ed (1992) 206-207

68) *Murphy v Brentwood District Council* supra at 923

69) [1992] 1 SCR 1021

70) *Norsk Pacific Steamship Co Ltd v Canadian National Railway Co* supra at 1054, 1163; see in this regard McInnes (1993) 52 *CLJ* 12; further the detailed note by Markesinis (1993) 109 *LQR* 5 at 11, where he puts emphasis on a comparative point of view.

'I fully support this court's rejection of the broad bar on recovery of pure economic loss...'[71]

Nevertheless, as far as England is concerned, it is clear that the *Murphy* case reduces the former wide liability of public authorities towards third parties. A further result will be that the tendency to extend liability in cases of pure economic loss as such - which began with *Anns* - is halted or seriously impeded. Nevertheless it is unlikely - although it was suggested by some [72] - that the whole field of negligent misstatements which has developed since *Hedley Byrne* will be altered significantly. Even before *Anns,* courts were prepared to compensate pure economic loss caused by negligent statements,[73] and there has never been a suggestion to overrule *Hedley Byrne* by any of the Law Lords.

However, the question whether pure economic loss caused by misrepresentation will be compensated is determined by the following: The fact that, in a particular case, there are a limited number of plaintiffs with whom the defendant has a special relationship; and the existence, or otherwise, of exemption clauses and immunities.

Throughout history, the courts' aim has been to avoid liability for 'an indeterminate amount for an indeterminate time by an indeterminate class'.[74] Thus, as Lord Denning pointed out in his well-known dissenting judgment in *Candler v Crane, Christmas & Co* [75], the problem is basically one of introducing limitations; consequently negligence in word cannot always be dealt with like negligence in act, as this would cast too wide the net of liability.[76]

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71) *Norsk Pacific Steamship Co Ltd v Canadian National Railway Co* supra at 1054

72) For example Stapleton (1991) 107 *LQR* supra at 258 predicts that the courts will be more restrictive: 'But such reversal can sometimes be achieved in the longer run, and it seems that, in the light of their general view of the legitimate level of protectionism to be adopted by the law of tort, the present House of Lords might in time arrive at such a "no-recovery" position.'; see also Percival (1991) 54 *MLR* 739 who reviews the influence of the earlier *Caparo* case on liability in business transactions; further O'Dair (1992) 55 *MLR* supra

73) Compare all the different categories of 'professional negligence' listed by Dugdale & Stanton *Negligence* and by Jackson & Powell *Negligence*

74) *Ultramares Corporation v Touche* supra at 179 per Cardozo CJ

75) Supra; a 'masterly analysis (requiring) little, if any, amplification or modification in the light of later authority': *Caparo Industries v Dickman* [1990] supra at 623; see also Nicholson (1991) 40 *ICLQ* supra at 554

76) *Hedley Byrne & Co v Heller & Partners Ltd* supra at 482-483, 494, 510, 534

The House of Lords, in *Hedley Byrne & Co v Heller & Partners Ltd* [77], expressly stated that recovery was only allowed to plaintiffs with whom the defendant had what was termed a 'special relationship' or , alternatively, a 'relationship equivalent to contract.'[78]

Concerning this 'special relationship' Heuston & Buckley suggest that what can be concluded from *Hedley Byrne* is that the requirement that there be such a relationship between the person who makes the statement and the person who receives and acts in reliance on it, is satisfied where the person giving the information knows the 'purpose' for which it is required; furthermore, he must be aware that it will be given to and relied upon by the recipient either individually or as one of a discernible class.[79]

But it must be asked whether the courts do not use more specific criteria to determine liability?

Factors that have been taken into account, either individually or in combination with others, in the determination of liability for negligent misstatements are concepts such as foresight, reliance [80], proximity [81] and voluntary assumption of responsibility [82].

Thus by some *Hedley Byrne* was thought to herald a general liability for causing 'foreseeable' economic loss by negligent conduct.[83] For example Honoré [84] took the opinion that '*Hedley Byrne* imposes no liability except in respect of the precise transaction known to the defendant or a substantially similar transaction.' But as it later turned out it did not have that effect; because it is particularly in cases where wrong information is given negligently that using reasonable foresight as the sole

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77) Supra
78) *Hedley Byrne & Co v Heller & Partners Ltd* supra at 486
79) Salmond & Heuston *Torts* 20ed (1992) 215 on *Caparo Industries v Dickman* supra
80) See Barker (1993) 109 *LQR* supra at 475 ssq
81) See Barker (1993) 109 *LQR* supra at 461 ssq
82) See Barker (1993) 109 *LQR* supra at 463 ssq
83) Weir *Tort* 50
84) Honoré (1965) 8 *JSPTL* supra at 289

criterion of liability would include such persons whom most agree should not be held liable.[85] Thus one can summarise in Lord Oliver's words:

> 'If it [pure economic loss] is to be categorised as wrongful it is necessary to find some factor beyond the mere occurrence of the loss and the fact that its occurrence could be foreseen.'[86]

Then for a while 'reliance' seemed to be the only certain requirement. But cases have arisen where liability has been imposed in the absence of any reliance by the plaintiff upon the defendant.[87] In *Ross v Caunters* [88] the beneficiary had in no way changed his position on the faith of the will, so that the concept of reliance is not really relevant. In any event, because a will can be changed at any time before death, the beneficiary can never rely on the will. Thus one can argue without hesitation that 'the specific version of the reliance model defines the scope of the duty of care too restrictively and fails to explain an increasing proportion of the case-law.'[89] Thus the criterion of 'reliance' does not seem to contribute to determining the duty of care in the field of pure economic loss.[90]

Also proximity, which was used by Lord Atkin himself to describe the nature of the neighbour principle [91], has often played a role. But in *Murphy v Brentwood District Council* Lord Oliver called it an 'elusive element' which 'persistently defies definition

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85) Compare Salmond & Heuston *Torts* 20ed (1992) 215, 216 who cite as examples persons who give advice during a railway trip and the marine hydrographer whose misplaced rock on a chart causes a shipwreck.

86) *Murphy v Brentwood District Councel* supra at 934

87) See *Ross v Caunters* [1980] Ch 297 and *Ministry of Housing v Sharp* [1970] 2 QB 233; '...cases which gave rise to certain difficulties of analysis': *Caparo Industries v Dickman* supra at 636; concerning *Ross v Caunters* see Rogers (1986) 103 *SALJ* 583; see also Lorenz & Markesinis (1993) 56 *MLR* supra at 560 who discussed the question of the continued validity of *Ross v Caunters* in the 'post-*Murphy v Brentwood*' era. This is answered in the positive as 'the economic and policy arguments that may have (implicitly) dictated the *Murphy* result are not duplicated in *Ross*.'; similarly Barker (1993) 109 *LQR* supra at 478

88) Supra; see Rogers (1986) 103 *SALJ* 583 ssq

89) Barker (1993) 109 *LQR* supra at 479 where she goes on to say: 'The conclusion that reliance is a defective foundation for duty is not new, and other roles have accordingly been suggested for it, which might explain its resistance in the modern case-law.'

90) Compare the conclusion drawn by Barker (1993) 109 *LQR* supra at 479

91) *Hedley Byrne Co v Heller & Partners Ltd* supra at 482

'[92] and 'is manifestly false if misused as a universal.'[93] And from the following example given by Heuston & Buckley [94] one sees that geographical proximity between the parties is not in itself sufficient to establish liability:

> 'A shopkeeper finds that a shop has been erected next door to him, the second shopkeeper selling the same class of goods at half the price charged by the first. The second man intends to injure the first, but the latter has no cause of action, though the two are physically neighbours.'

After having now considered the first three criteria one has the impression 'that to search for any single formula which will serve as a general test of liability is to pursue a will-o'-the wisp.'[95] However, some believed that the idea of 'voluntary assumption of responsibility' could supply an appropriate test.[96] Thus Lord Reid required 'the undertaking of some responsibility' toward the plaintiff.[97] But doubt has since been cast on this view because liability may, in some instances, be imposed in a way which conflicts with the subjectivity inherent in the idea of 'voluntary assumption of responsibility'.[98]

A further subjective measure to distinguish cases which are worthy of compensation from those which are not was found by courts when they activated the 'broad field of standard of care'. Thus in certain cases the question was asked whether the standard of care varies from one class of defendant to another. Contrary to the Privy Council's [99] opinion on the matter it was held that it is unnecessary to limit liability to persons who have a financial interest in the transaction in question [100] or to a professional adviser because, as the subject-matter of the advice becomes less closely connected

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92) *Murphy v Brentwood District Council* supra at 935
93) *Murphy v Brentwood District Council* supra at 934
94) Salmond & Heuston *Torts* 20ed (1992) 208 footnote 76
95) *Caparo Industries v Dickman* supra at 605, 633
96) Compare, concerning the application of this model, Barker (1993) 109 *LQR* supra at 463 ssq
97) *Hedley Byrne & Co Ltd v Heller & Partners Ltd* supra at 483, 487
98) See *Smith v Eric S Bush* [1990] 1 AC 831 at 862; compare also Salmond & Heuston *Torts* 20ed (1992) 216; Allen (1989) 105 *LQR* 511 at 513; Barker (1993) 109 *LQR* supra at 463 ssq
99) In *Mutual Life and Citizen's Assurance Co v Evatt (Clive Raleigh)* [1971] AC 793
100) Compare *Anderson (WB) & Sons Ltd v Rhodes (Liverpool) Ltd & Others* supra

with the defendant's professional field, so a progressively lower standard of care is required.

The idea of such a variable standard of care was rejected, in *Mutual Life & Citizens' Assurance Co v Evatt,*[101] where the majority decided that the content of the duty owed by those exercising a particular calling was 'to conform to that standard of skill and competence and diligence which is generally shown by persons who carry on the business of providing references of that kind.'[102]

Lord Diplock added that 'there is in their Lordships' view no halfway house between that and the common law duty which each man owes to his neighbour irrespective of his skill - the duty of honesty.'[103] But in reading his reasoning one must keep in mind that the force of the whole decision is much weakened by the powerful dissenting judgement of Lords Reid and Morris, who had themselves presided in *Hedley Byrne.* Besides that, as Marshall argues, Lord Diplock's opinion may in fact be similar to or, may not be as dissimilar as it seems from the concept of 'a universally applicable duty of reasonable care', because, for someone who is not a professional, simply being honest is synonymous with taking reasonable care.[104] However it could be argued that the decision is based on an idea of a uniform standard of care, i.e. one which is the same irrespective of the identity of the adviser. Nevertheless, reconciling this with the usual definition of the standard of care, namely 'such care as is reasonable in the circumstances', is difficult unless the adviser's identity is artificially excluded from these circumstances.

Heuston & Buckley advance further arguments against the inflexible approach of the Privy Council:[105]

> 'It may be conceded that it would hardly be desirable to impose liability on a bystander who carelessly misdirected one on his way to an important

101) Supra
102) *Mutual Life and Citizen's Assurance Co v Evatt (Clive Raleigh) Supra* at 804; see Marshall (1975) 24 *ICLQ* supra at 785
103) *Mutual Life Citizen's Assurance Co v Evatt (Clive Raleigh) Supra* at 804
104) Marshall (1975) 24 *ICLQ* supra at 785
105) Salmond & Heuston *Torts* 20ed (1992) 217-218

> appointment;[106] but it is very difficult to see how a company can authorise the giving of advice except as part of its business activities, so that it seems hard to hold that an insurance company is not liable for misleading advice about investments given to a policy-holder.[107] It is also hard to see how the defendant's financial interest can cause the plaintiff to trust the statement made to him.'

Nevertheless it could be suggested, as Marshall does, that this question may not be crucial, since the topic in English law is essentially one of professional negligence, and it is arguable that to place sole reliance on a non-professional's advice would not be justifiable.[108]

However, also these more subjective approaches (i.e. that of assumption of responsibility and that of a 'flexible' standard of care) have to be met with reservation. Thus in effect, whether a defendant is liable to compensate the plaintiffs' loss consequential to his advice is not determined objectively according to whether the defendant owed the plaintiff a duty of care in the particular situation but according to certain subjective factors which relate to fault. It is difficult to understand why these additional subjective factors should be significant only in the limited field with which this thesis is concerned. It is unreasonable that they 'should become relevant simply because the plaintiff's loss is economic, or because the

106) See also *Hedley Byrne & Co Ltd v Heller & Partners Ltd* supra at 495, 502, 510, 539; contra Lord Devlin at 529

107) See also Salmond & Heuston *Torts* 20ed (1992) 218 footnote 54: 'As was done in *Mutual Life and Citizens Assurance Co v Evatt (Clive Raleigh) Supra* at 811. The decision may not be followed: *Howard Marine Ltd & Dredging Co v Ogden (A) & Sons (Excavations)* [1978] QB 574 at 600.'; see also Horton Rogers (1978) 37 *CLJ* supra at 27 ssq

108) Marshall (1975) 24 *ICLQ* supra at 785-786; Besides this discussion there arose further question in the field of negligence. Although it is agreed, for example, that the level of skill and care required must be judged according to that of other members of the relevant profession, the courts disagree as to whether the required standard is that actually, and usually, achieved by members of that profession or that which the court considers ought to be reached by members of that profession. Another problem which arises in this context is whether the professional man should be judged by reference to the standard of skill and care appropriate to a practitioner with his particular qualifications and experience or the standard of skill and care appropriate to his profession generally. But to discuss all these questions fully would lead far beyond the borders of this thesis. (See further Jackson & Powell *Negligence* para 1.21-1.22)

defendant has spoken rather than acted.'[109] The judicial motivation for incorporating subjective factors in misstatement cases probably has nothing to do with any arguments that the plaintiff should be given relief in such cases on moral grounds. More likely, they are used to dispel 'customary fears' about opening the 'floodgates' of litigation.[110] Thus one gets the impression that judges require a flexible degree of care merely to enable them to reduce the potential volume of liability generated by cases of this kind.

As has now become clear, certain narrow requirements - not to call them 'soft concepts' [111] - such as foreseeability, reliance and proximity are not able to provide clear indications of when liability should be imposed nor does a variable approach towards fault. All these measures seem to dress issues of policy in the clothes of either narrow criteria or doubtful tests - a process which is misleading in the extreme.[112]

In 1982 Jackson & Powell offered a more flexible approach, which is more concerned with policy factors applied to the facts of a case than with specific requirements:

> 'Despite the danger of generalising...,' Jackson & Powell argue, 'there appear to be situations in which men are commonly held to owe a duty of care to third parties: Where the professional man issues a report or certificate which he knows that the client will show to a particular third party or class of third parties, in the hope of inducing a certain course of action. A classic example is the situation of a surveyor instructed to prepare a report and valuation of property, which the client proposes to offer as security for a loan. If the surveyor is aware of the purpose of the report, he normally owes a duty of care to the proposed mortgagee. Similarly if accountants are instructed to prepare accounts of a client

109) Barker (1993) 109 *LQR* supra at 473
110) Barker (1993) 109 *LQR* supra at 473
111) Stapleton (1991) 107 *LQR* supra at 257
112) Barker (1993) 109 *LQR* supra at 473, 474; see also Markesinis (1993) 109 *LQR* supra at 11 where he points out 'that duty, causation, foreseeability, proximity, unlawfulness, damage direct, are all verbal devices that help formulate judgments but do not really explain them.'

company for the purpose of being shown to a potential investor, then a duty of care is owed to that potential investor.'[113]

113) Jackson & Powell *Negligence* para 1.18

A similar approach has been expressly used by Lord Roskill in *Caparo Industries v Dickman*:[114]

> 'I think that before the existence and scope of any liability can determined, it is necessary first to determine for what purposes and in what circumstances the information in question is to be given.'

According to Heuston & Buckley, [115] 'a high degree of specificity' will be required by the courts regarding the 'purpose' of the statement and the 'identity' of those persons who would probably experience loss if the statement were made negligently. For example, one cannot require the same standard in regard to strangers with whom the defendant has no direct contact as in the case where individuals who directly ask for advice from the defendant and whose contemplated dealings are not only foreseeable but known.[116] The situation which is normally considered is the following: A professional or organisation gives information or advice within their field of expertise, to a layman who acts on this (usually previously requested) advice to his detriment.[117] The mere fact that the adviser has made an error will not be sufficient for the imposition of liability.

Jolowicz [118] puts forward the view that in certain cases of professional advice, 'a duty to be correct' would be appropriate, whereas, according to Lord Reid, the content of the obligation of the person giving advice is generally only to take 'such a degree of care as the circumstances required'.[119]

In this respect one could argue that, in almost all cases, the adviser will not be liable for forming an erroneous opinion, if his only negligence has been in making deductions from the factual information, or in his failure to collect enough new information.[120] So it was stated in *Hedley Byrne*:

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114) *Caparo Industries v Dickman* supra at 629; see also Stapleton (1991) 107 *LQR* supra at 259: 'The focus has been on how the economic loss was caused rather than on characteristics, such as potential for indeterminate liability, on which policy concerns should centre.'
115) Salmond & Heuston *Torts* 20ed (1992) at 216 footnote 39
116) For example Marshall (1975) 24 *ICLQ* supra at 786
117) Marshall (1975) 24 *ICLQ* supra at 783
118) Jolowicz (1972) 12 *JSPTL* 171 at 187
119) *Hedley Byrne & Co Ltd v Heller & Partners* supra at 468
120) Marshall (1975) 24 *ICLQ* supra at 784

> 'A person asking one's advice about investments is in a very different position from a person asking one's opinion. In the latter case there can be no fiduciary relationship.'[121]

Thus in cases where liability was thought to have arisen *prima facie* from the factual situation the negligence was in the transfer of information.[122] Even if the information given to the plaintiff was that X was creditworthy, this is frequently merely a statement on X's past financial record and present situation and not an opinion in the sense of a prediction about the future. If the defendants in *Hedley Byrne v Heller & Partners*[123] and in *Anderson v Rhodes*[124] had conscientiously used all information which was readily accessible to some part of their organisation, the erroneous advice would not have been given nor the loss suffered.[125]

It becomes obvious that what is decisive for each judgment are not strict principles, but in what 'circumstances' and for what 'purpose' the statement was made. To make this even clearer one has to consider recent cases that have arisen in the field of pure economic loss.[126]

For example, in *Caparo Industries v Dickman* [127] it was held that the auditors of accounts of public companies do not owe a duty of care to investors in order to satisfy the statutory requirements aimed at giving shareholders a greater share of the

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121) *Hedley Byrne & Co Ltd v Heller & Partners Ltd* supra at 476; it is therefore thought that Honoré's statement ((1965) 8 *JSPTL* supra at 289) that 'the information may take the form either of statements of existing fact or of predictions about the future' goes further than the law has yet done. There is no reason in principle why such a mistake cannot give rise to liability, but for it to do so in practice would pitch the standard of care much higher than can usually be reasonably demanded.

122) *Hedley Byrne & Co Ltd v Heller & Partners Ltd* supra; *Anderson (WB) & Sons Ltd & Others v Rhodes (Liverpool) Ltd & Others* [1967] 2 ALL ER 850. This was also the factual situation in *Candler v Crane, Christmas & Co* supra; and in *Mutual Life and Citizens' Assurance Co v Evatt (Clive Raleigh)* [1971] AC 793

123) Supra

124) Supra

125) Marshall (1975) 24 *ICLQ* supra at 784

126) On this see Salmond & Heuston *Torts* 20ed 1992 at 216-217

127) Supra; see also *McNaughton (James) Papers Group v Hicks Anderson* [1991] 2 QB 113

control of companies. The House of Lords was of the opinion that the 'purpose' for which the information was gathered does not lead to the imposition of liability.[128]

In a different case the court held that the mere fact that the parties are in a pre-contractual position - the tests of 'purpose' and 'identity' will usually be satisfied if the parties are in such a situation - will not always be a bar to the constitution of a 'special relationship'.[129] And the courts were even prepared to hold that the *Hedley Byrne* principle was wide enough to include statements made with the intention of inducing someone to contract with the person who made the statement, or with a third party.[130]

In some 'circumstances' liability can apparently arise even in cases where the plaintiff never relied upon the defendant at all. As stated above, the court has held that those to whom a solicitor owes a duty of care include not only his clients but also those whom he is aware may suffer loss resulting from his negligence,[131] for example where, due to non-compliance with the formalities required in respect of the execution of wills, a potential legatee does not receive his legacy.[132] But it must be recognised that this case was decided on its own 'circumstances': it does not imply that a solicitor generally owes a duty of care to prospective beneficiaries whenever he gives the maker of the will advice regarding later transactions concerning property which is covered by the will.[133]

Nevertheless there are few cases where tortious liability arises in such 'circumstances' where the plaintiff acted on a statement given by the defendant, with whom he was

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128) See also *Al Saudi Banque v Clark Pixley* [1990] Ch 313; *Al-Nakib Investments (Jersey) Ltd v Longcroft* [1990] 1 WLR 1390; concerning this case see Huxley (1990) 53 *MLR* supra at 369 ssq; but see also Salmond & Heuston *Torts* 20ed (1992) 216: 'By contrast representations made with a view deliberately to influence the conduct of the plaintiff may apparently give rise to liability even if the plaintiff is a bidder in a contested take-over situation and the defendants are the directors and advisers of the target company.' Compare *Morgan Crucible Co v Hill Samuel Bank* [1991] Ch 295

129) *Howard Marine Ltd & Dredging Co v Ogden (A) & Son (Excavations)* [1978] QB 574

130) *McInerney v Lloyd's Bank Ltd* [1974] 1 Lloyd's Rep 246

131) See *Al-Kandari v JR Brown & Co* [1988] QB 655

132) As in *Ross v Caunters* supra; as in *Gartside v Sheffield Young & Ellis* [1983] NZLR 37 (here the defendant had delayed preparing a will for an 89 year old testatrix).

133) See *Clarke v Bruce Lance & Co* [1988] 1 WLR 881

contractually bound; this is due to the courts' concern that settled areas of the law of contract should not be undermined by the law of negligence.[134]

Lastly the decision of *Smith v Eric S Bush* [135] must be mentioned. Here the plaintiffs succeeded because they satisfied both requirements. It was decided that when houses are valued for mortgagees the property surveyors are also burdened with a duty of care to the mortgagors who normally rely upon these valuations.

A moment's reflection on the cases discussed above makes it obvious that the underlying approach of the courts towards compensation of pure economic loss caused by negligent statements is one of applying policy considerations to the facts.[136]

As one can see, since *Hedley Byrne* [137], the fundamental rules concerning the compensation of pure economic loss have been overruled [138] or at least reconsidered [139] in England, and the same has happened in the field of pure economic loss caused by acts.

When courts begin challenging old 'rules', two questions arise: Firstly, where to find legal justification for the overruling, and secondly, how to fill the 'legal vacuum' that follows the abolished or at least shaken 'rule'? And the answer is that in such a phase of reconstruction English courts typically make use of so-called 'policy considerations' to meet the concerns of the just-mentioned questions.[140] Without

134) Salmond & Heuston *Torts* 20ed (1992) at 217
135) Supra; 'no decision of this House has gone further than *Smith v Eric S Bush*': per Lord Oliver in *Caparo Industries v Dickman* supra at 642; see Fleming (1990) 107 *LQR* supra at 350 ssq
136) See Markesinis & Deakin (1992) 55 *MLR* supra at 643: 'One of the main themes in this article has been the extent of the inconsistencies and the new uncertainties that can be found in the case law of the House of Lords on economic loss between *Anns* and *Murphy*. It has been argued that this is, partially at least, caused by the fact that the judges's intensely focused view of the facts of the case he is deciding has not been aided by the academic's broader approach to specific problems.'
137) *Hedley Byrne & Co Ltd v Heller & Partners Ltd* supra
138) Bell *Policy Arguments in Judicial Decisions* 60 ssq
139) Bell *Policy Arguments in Judicial Decisions* 53 ssq
140) Bell *Policy Arguments in Judicial Decisions* 40 ssq; see Fleming (1990) 106 *LQR* supra at 528 ssq where he dicusses the overruling of *Anns* by *Murphy v Brentwood* against the backround of policy considerations; further see Wallace (1991) 107 *LQR* supra at 232 who lists five policy considerations that

wanting to compile an exhaustive list, it can be said that these policy reasons are divisible into certain groups such as social factors, administrative factors, constitutional factors, considerations of fairness and the economic analysis approach.[141]

Characteristic of these policy considerations is, furthermore, the fact that none of them - and in so far they differ from 'requirements' - have to be applied or fulfilled in every case where compensation is granted. Rather the courts make their decisions by weighing the different factors when applying them to the facts of each case. In the field of pure economic loss courts most often put emphasis on considerations dressed in terms such as proximity, foreseeability and reliance, but as was pointed out, apply none of these exclusively.

It is natural that the process of deciding a variety of cases will inevitably make it possible to identify certain groups of cases and to decide, in regard to each group, whether the old 'rule' has stood the challenge or whether it has been replaced by a new 'rule'. As one can see, in the field of pure economic loss caused by statements this stage has not yet been reached. Meanwhile there are only relatively few cases that fill the lack of certainty which results from the fact that common law is not principle-based.

However one example where case law has already formed a more or less clear picture of liability in the field of pure economic loss caused by statements can be found in the field of exemption causes and immunities. The inclusion of an 'exemption clause' prevented recovery by the plaintiffs in the *Hedley Byrne* case [142]. It was soon

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might have led the Lords to overrule Anns; see also Steele (1993) 56 *MLR* 244 on Caparo: '...it nevertheless made policy a key element in understanding and (perhaps) resolving difficult negligence cases.'

141) Concerning the economic analysis approach in the House of Lords see Markesinis & Deakin (1992) 55 *MLR* supra at 622-623: 'It may be that, as Hoffman J recognized in *Morgan Crucible Co plc v Hill Samuel & Co Ltd* [1991] Ch 295, 303, "courts do not have the information on which to form anything more than a broad view of the economic consequences of their decisions. For this reason they are more concerned with what appears to be fair and reasonable than with wider utilitarian calculations." But at the same time, his Lordship recognized that "economic realities" inevitably enter into the prevailing conception of what is "fair, just and reasonable."'

142) *Hedley Byrne & Co Ltd v Heller & Partners Ltd* supra at 465; compare Marshall (1975) 24 *ICLQ* supra at 787; see also Salmond & Heuston *Torts* 20ed (1992) 219: 'It is not entirely clear whether the effect of the disclaimer

recognised that in cases where the duty is statutory in origin it is incapable of being disclaimed.[143] And since *Smith v Eric S Bush* [144] it has been clear that the Unfair Contract Terms Act 1971 can apply to disclaimers.

In *Pacific Associates v Baxter* [145] it was recently held that under certain circumstances a disclaimer can sometimes be affected even if it is inserted in a contract to which the person adversely affected by it is not a party.

In *Rondel v Worsley* [146] it was held that a special relationship exists between barrister and client which gives rise to a duty of care. That, intum, means that the barrister can be held liable in tort unless he can bring himself within ambit of the exceptional immunity of an advocate.[147]
A solicitor in his capacity as advocate is entitled to the same immunity as a barrister when sued in tort.[148] When an arbitrator is exercising the judicial function of deciding a dispute rather than of answering questions, he is held to be entitled to the same immunity as a judge.[149] A valuer is normally liable in negligence; only if the parties who appoint him so agree may he enjoy immunity.[150]

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in *Hedley Byrne* was to exempt the bank from a duty which already lay upon it or to prevent any duty from arising. The latter view seems to be based upon the "voluntary assumption of responsibility" analysis which may be considered artificial and has been criticised in the House of Lords.'; see *Smith v Eric S Bush* supra

143) *Ministry of Housing v Sharp* supra
144) Supra
145) [1990] 1 QB 993; but it must be provided that the contract forms are part of the background and structure of the situation which the person affected chose to enter; compare Salmond & Heuston *Torts* 20ed (1992) 219
146) [1969] 1 AC 191
147) Salmond & Heuston *Torts* 20ed (1992) 218: 'This immunity is quite distinct from the rule that there is no contractual relationship between barrister and client and is justifiable for a number of reasons on grounds of public policy.'
148) Courts and Legal Services Act 1990 s 62; compare Dugdale & Stanton *Negligence* para 6.07, who are referring to *Rondel v Worsley* supra at 232, 244, 267 and 284; See also *Saif Ali v Sydney Mitchell & Co* [1980] AC 198; Further Dugdale & Stanton: 'in *Losner v Michael Cohen & Co* (1975) 119 Sol J 340 , Lord Denning MR giving the judgment of the Court of Appeal, held that the defendants were negligent in preparing a case for the Magistrate Court and commented that it was 'well settled' that they were immune in respect of their conduct of the case in court'.
149) *Sutcliffe v Thackrah* [1974] AC 727
150) *Arenson v Casson, Beckman, Rutley & Co* supra

The future will show, whether one day the whole field of pure economic loss caused by statements will be able to be described clearly.

3. Pure Economic Loss Caused By Acts

Until 1983 one could probably have said without hesitation that the basic English rule concerning pure economic loss caused by acts - which arises in the field of the above cited exceptions could be stated as follows:[151]

A plaintiff suffering pure economic loss resulting from the defendant's negligent act which caused injury to the person or property of a third party will not succeed; but if his own person or property has been injured or damaged he may claim compensation both for that injury and for any consequential economic loss.[152]

The Court of Appeal, furthermore, has refused to grant 'parasitic damages', i.e., damages for non-consequential economic loss in cases where the plaintiff already has a claim for certain physical damage.[153] As an example, the important case of *Cattle v Stockton Waterworks Co* [154] may be cited. In this case Stockton Waterworks negligently permitted a main to leak and the water which thus escaped, flooded Knight's land, causing his work to be hampered and delayed. Blackburn J, prompted by a fear of indeterminate liability, refused to hold the company liable.

But then, in 1983, *Junior Books Co Ltd v Veitchi Co Ltd* [155] was decided, and a great deal of uncertainty resulted in relation to the recoverability of pure economic loss. In *Junior Books* the claim of the plaintiffs (respondents in the House of Lords) was for the cost of remedying defects in the floor of their factory which had been laid by the defendants (appellants). The defendants were specialists in that work. There was no contractual link between the plaintiffs and the defendants although the latter were subcontractors nominated under the contract between Junior Books and Ogilvie (Builders) Ltd, the main contractors. It was specifically averred that the plaintiff's architects relied on the defendants as flooring specialists to recommend a suitable material and to follow the appropriate procedures for laying the floor. The action

151) The exceptions are (as mentioned above)
- the Fatal Accidents Acts 1846-1959, 1976
- and since 1964 also negligent misstatements;
compare Salmond & Heuston *Torts* 18ed (1981) 191-192

152) See especially *Cattle v Stockton Waterworks & Co* (1875) LR 10 QB 453; *Weller & Co Ltd v Foot and Mouth Disease Research Institute* supra; *SCM (United Kingdom) Ltd v Whittall (WJ) & Son Ltd* [1971] 1 QB 337

153) *Spartan Steel & Alloys Ltd v Martin & Contractors* supra

154) Supra at 457

155) Supra

was brought after cracks had appeared in the surface layer of the flooring. By the time that the action was brought certain areas had lifted and required replacing. It was averred that the entire floor surface needed replacing at as early a date as possible to avoid the necessity of continual maintenance, which would be more expensive than immediate replacement or treatment. The total claimed - over £200.000 Sterling - fell under a number of heads, but all were aspects of the cost of putting right the defects of the floor produced by the defenders.

A majority of the House of Lords allowed the case to go to trial. There was a sufficient degree of proximity to give rise to a duty of care, and this duty was not limited to a duty to avoid causing foreseeable harm to persons or property other than the subject-matter of the work.[156] The basic question in *Junior Books*, i.e. whether that duty of care extended beyond a duty to prevent harm being done by faulty work to a duty to avoid such faults being present in the work itself, was answered positively.

The decision in *Junior Books* had at first been uniformly taken to relate to pure economic loss - the cost of repairing the defective floor - divorced from physical damage. But in later cases the House of Lords regarded *Junior Books* as an instance where the plaintiff had suffered actual damage to property.[157] In any event, a number of later decisions of the Court of Appeal[158] made it clear that *Junior Books* would not become a leading case for pure economic loss caused by acts. The view prevailed that the case was to be treated as a decision on its special facts, as indeed Lord Fraser and Lord Russell said it should be,[159] in that the nominated sub-

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156) Compare Salmond & Heuston *Torts* 20ed (1992) 212; see also *Pirelli General Cable Works Ltd v Oslar Faber & Partners* [1983] 2 AC 1 where the defendants had been engaged by the plaintiffs as consulting engineers and were alleged to have been negligent in their approval of the design of a chimney. A possible claim based on contract was time-barred. Thus it had to be decided when the cause of action on negligence (tort) arose. The Lords decided that the cause of action in tort only arose when the damage to the chimney in the form of cracking first occurred.

157) *Tate & Lyle Food & Distribution v Greater London Council* [1983] 2 AC 509 at 530; but as was said in *Muirhead v Industrial Tank Specialities Ltd* [1986] QB 507, 516, 'What matters is what *Junior Books* did decide, not what Lord Templeman said it decided.'

158) *Muirhead v Industrial Tank Specialities Ltd* supra; *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] QB 758; *Greater Nottingham Co-operative Society v Cementation Piling & Foundations Ltd* [1989] QB 71

159) *Junior Books Ltd v Veitchi Co Ltd* supra at 533, 538

contractor had voluntarily assumed a direct responsibility to the building owner.[160] Thus in two more recent cases [161] an action in tort was refused - as distinct from contract - for pure economic loss which an ultimate purchaser of manufactured goods suffers in his business by reason of a defect in those goods which have been purchased for use in his business;[162] this because a purchaser of an ordinary article of commerce disappointed by the quality of what he has obtained should still look to the vendor for redress, not to the manufacturer. And it has been further decided in *D & F Estates Ltd v Church Commissioners* [163] that *Junior Books* was 'so far dependent on the unique albeit non-contractual relationship between the pursuer and the defender in that case and the unique scope of the duty of care owed by the defender to the pursuer arising from that relationship that the decision cannot be regarded as laying down any principle of general application in the law of tort.'[164] After this decision [165] and that of *Department of the Environment v Thomas Bates & Son* [166] it was now clear that one will not succeed in a tortious action for the cost of fixing a defect of movable or immovable property, if there is no physical damage to this or other property. Pure economic loss is therefore primarily recoverable in terms

160) It has even been said that the decision may be limited to negligent work on a building by a sub-contractor: *Balsamo v Medici* [1984] 1 WLR 951, 959; see Beyleveld & Brownsword (1991) 54 *MLR* 48 who favoured a contractual approach: 'In recent years, the English Courts have been greatly exercised by the question of whether a remedy in negligence should be made available to enable plaintiffs to recover purely economic losses in what are essentially contractual situations. In this article we contend that, instead of tinkering about with negligence liability, we should tackle the matter directly *as a contractual problem*.'

161) *D & F Estates v Church Commissioners* supra; and *Department of the Environment v Thomas Bates & Son* supra

162) This comes very close to adopting the dissenting speech of Lord Brandon of Oakbrook, who thought that the decision of the majority involved 'a radical departure from long-established authority': *Junior Books Ltd v Veitchi Co Ltd* supra at 551

163) Supra at 222; see Wallace (1989) 105 *LQR* supra at 76 who sees policy arguments that point against the two-stage approach in *Anns*.

164) Salmond & Heuston *Torts* 20ed (1992) 212 even go a step further in their criticism: 'Given that *Junior Books v Veitchi* is taken to have been decided on the special closeness of the relationship between the parties in the case, the extreme narrowness of any principle which might be thought to survive from the decision is illustrated by the fact that plaintiffs may fail in situations in which the relevant relationship was, in a sense, even closer. That is to say if the relationship was actually contractual the terms of the agreement will govern, and they may preclude liability.'; *Greater Nottingham Co-operative Society v Cementation Piling & Foundation Ltd* supra

165) *D & F Estates Ltd v Church Commissioners for England* supra

166) Supra (applying *Murphy v Brentwood District Council* supra)

of the law of contract - and the law of torts seldom provides a remedy to those who fall through the net of contractual liability.[167] Put differently: If one now, after Murphy, considers *Junior Books* in the broad context of the tort of negligence it appears that this case was but a momentary interruption of a strict rule of law in England that, except in a few specific, closely limited situations, there can be no liability for pure economic loss caused by acts.[168]

But does this mean that there has been a return to the 'old authorities', and that they can still, or better, again, be called the leading cases? The answer is probably 'no', because the situation in English law was and still is not this straightforward. The English courts did not simply say that the reason for refusing a claim was that the loss was purely economic; they said that the legal reason for the rejection of a claim was that 'no duty of care was owed', or that the loss was 'indirect', or that it was 'too remote'. For example in *Weller's* case, instead of regarding *Hedley Byrne v Heller* [169] as an exception to the general principle that such loss could not be recovered, Widgery J [170] regarded it as an illustration of the rule that, in order for the plaintiff to be able to recover, the defendant must have owed a duty of care to the plaintiff:

> 'Also the decision in *Hedley Byrne* does not depart in any way from the fundamental rule that there can be no claim for negligence in the absence of a duty of care owed to the plaintiff...having recognised the existence of the duty in that particular fact situation it goes on to recognise that indirect or economic loss will suffice to support the plaintiff's claim.'

But Widgery J went on: 'What the case does not decide is that an ability to foresee indirect or economic loss to another as a result of one's conduct automatically imposes a duty to avoid that loss.'

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167) *Reid v Rush & Tampkins plc* [1990] 1 WLR 212

168) Thus from today's point of view, *Junior Books* can be understood 'as being an application or illustration of the two-stage approach in *Anns*, no doubt because Lord Roskill referred with emphatic approval to that approach. But it may be pointed out that no question arose as to the first stage, because counsel conceded that there was a breach of duty. But equally no question properly arose as to the second stage, because on the facts no issue involving restriction or negation of a new duty was raised. The issue was the scope or extent of an admitted duty.': Salmond & Heuston *Torts* 19ed (1987) 229-230

169) *Hedley Byrne & Co Ltd v Heller & Partners Ltd* supra

170) *Weller & Co Ltd v Foot & Mouth Disease Research Institute Ltd* supra at 587

Accepting Widgery's view that pure economic loss was in principle recoverable when the defendant owed a duty of care to the plaintiff, the question arises: In determining whether the defendant owed such a duty, what criteria should one use? To answer this question [171] one must try to find out what approach use the courts use in cases of pure economic loss caused by act in general (to be discussed under 2.2.1.) and whether the courts use a doctrine of transferred loss in special cases (to be discussed under 2.2.2.)?

3.1. What approach do the courts use in cases of pure economic loss caused by acts in general?

The position could have been, firstly, that legally, subject to certain exceptions such as the *Hedley Byrne* situation, no duty is owed to someone who has suffered pure economic loss.[172] But concerning this position it was emphasised by Marshall that this is exactly what Widgery J deliberately avoided saying.[173]
Secondly the position could have been that only those to whom physical damage can be foreseen are owed a duty of care - in this case they may even recover pure economic loss.[174] However this probably reflects how Widgery J interpreted 'duty' in the context. It is also the interpretation of Lawton J in *British Celanese Ltd v Hurt (AH) (Contractors) Ltd* [175], and of Lord Denning MR in *SCM (United Kingdom) Ltd v (WJ) Whittall & Son Ltd* [176] and in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [177], except that neither judge thought that liability was a necessary consequence of the existence of such duty; it can be argued that this is the most satisfactory explanation of the *Greystoke Castle* case.[178] But the imposition of an

171) Compare in this respect the approach chosen by Marshall (1975) 24 *ICLQ* supra at 776
172) See Marshall (1975) 24 *ICLQ* supra at 779
173) see Marshall (1975) 24 *ICLQ* supra at 779
174) See Marshall (1975) 24 *ICLQ* supra at 779
175) [1969] 1 WLR 959
176) Supra
177) Supra
178) *Morrison Steamship Co Ltd v Greystoke Castle, Cargo (Owners) Supra*; Thus, in the example of a 'joint venture' given by Lord Roche (at 280), where goods are on a lorry damaged by the defendant's negligence, physical damage to the goods by the defendant's negligence is foreseeable; so, runs the argument, a duty of care is owed to the owner of the goods, who can then recover even in respect of pure economic loss caused by delay; Marshall (1975) 24 *ICLQ* supra at 779

abstract duty which merely relates to the victim but not to both the victim and the sort of damage, stands in contrast to the reasoning in *King & Another v Phillips* [179], where Denning LJ expressly stated that 'there can be no doubt since *Bourhill v Young* [180] that the test of liability for shock is foreseeability of injury by shock.' Marshall submits that the view 'that the duty question is concerned with the type of loss as well as with the person to whom the duty is owed', is preferable.[181]

Thirdly, the law might be summarised correctly by Heuston & Buckley who call it the 'traditional approach' [182] or 'pre-*Junior Books* approach':

> 'The careless act of the defendant may cause economic loss to the plaintiff either directly or indirectly. If it caused indirectly, the principle established in England is that there is no liability for economic loss unless there is also proved loss to the plaintiff's person or property.[183] If the loss has been caused indirectly, it will usually have been through the act or omission of a third party. In such cases liability is even more restricted.'[184]

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179) [1953] 1 QB 429 at 441
180) [1943] AC 92
181) Compare Marshall (1975) 24 *ICLQ* supra at 780 who further stated the following in footnote 141: 'Thus, the distinction adopted by Lord Denning MR in *SCM (UK)* and *Spartan Steel* Cases - viz that where a plaintiff has suffered both physical and non-consequential economic loss, the reason for non-recovery is not absence of duty but remoteness of damage - is unnecessary and inconsistent.'
182) Salmond & Heuston *Torts* 19ed (1987) at 230
183) See Salmond & Heuston *Torts* 20ed (1992) 214: 'Thus in the *Spartan Steel* case, when the defendants negligently cut a cable carrying electric power to the plaintiffs' factory, thus interrupting the supply for 14.5 hours, the plaintiffs were held entitled to damages to the metal in their furnace (£ 368), and also for the loss of profit on the sale of that metal (£ 400), but could not recover for the loss of profit in four further melts (£ 1.767), which could have been completed but for the power cut. The requirement of the imposition of physical damage between the negligent act and the plaintiff's economic loss has been criticised as an illogical and capricious exception to the principle of reasonable foreseeability, but it is defensible on grounds of policy. It prevents the defendant's insurers being overwhelmed by claims arising out of an open-ended catastrophic risk, for example, a national power cut. But the limits of this principle have not yet been fixed. If the defendant carelessly damages the plaintiff's piece of paper, is there to be liability up to £ 100.000 because it is a pools ticket?'
184) Salmond & Heuston *Torts* 20ed (1992) 214-215 stated, referring to *Candlewood v Mitsui OSK Lines Ltd* (*The Mineral Transporter*) [1986] AC 1 and *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785: 'There

Considering Heuston & Buckley's 'traditional approach' it becomes obvious that there was no reason to distinguish between directly and indirectly caused loss. This was not because there were other, more preferable, considerations, but because this difference does not exist. Heuston & Buckley offer the cable case as one example of pure economic loss caused directly by acts. But logically the cut cable must have belonged to someone; either it belonged to the factory owner, in which case the loss was not purely patrimonial but consequential; or the cable belonged to the electricity company, which means that the electricity company was, because of the cutting of the cable, not able to fulfil its contractual obligation, i.e. to supply the factory owner with electricity. But then the factory owner's loss was caused indirectly. Following this line of argument, one can imagine no case of pure economic loss caused directly which is neither one of misrepresentation nor breach of contract. Not only is the system that Heuston & Buckley offer illogical, but the courts' argumentation was also not as simple.

Fourthly, the position that can be described might be that economic loss is most usually suffered under circumstances where there is no duty of care.[185] This position seems to be closest to reality; 'it has the consequences that the issue would not be predetermined, but might - at least theoretically - vary from one case to the next, with regard to the circumstances of which considerations of policy dressed in terms like "foreseeability", "causation", "directness" and "remoteness" would, *inter alia*, have to be considered.'[186] This is supported by Denning MR's comments in the *SCM* [187] and *Spartan Steel* [188] cases:

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are undoubtedly many situations in which the negligent act or omission of A causing injury to B may deprive C of valuable economic benefits. Thus B may have been made incapable of furnishing the contractual benefit which (unknown to A - if A does know, he might be liable for inducement of breach of contract) he is bound to render to C, or C may be the charterer of B's ship which has been damaged by A's negligence, or he may be the prospective purchaser of part of the damaged cargo in that ship, or C may be the wife or child or servant of B and obliged in consequence to nurse an irritable invalid or to seek new employment. But in none of these cases is C, the third party, thereby invested with any right of action against the wrongdoer. Within the space of one year both the Privy Council (*The Mineral Transporter* supra) and the House of Lords (*The Aliakom* supra) have emphatically reaffirmed these principles.'

185) *SCM (United Kingdom) Ltd v (WJ) Whittal & Son Ltd* supra at 345-346
186) Marshall (1975) 24 *ICLQ* supra at 780
187) *SCM (United Kingdom) Ltd v (JW) Whittal & Son Ltd* supra
188) *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* supra

'I must not be taken... as saying that economic loss is always too remote. There are some exceptional cases when it is the immediate consequence of the negligence and is recoverable accordingly.... We may not be able to draw the line with precision, but we can always say on which side of it any particular case falls.'[189] 'Sometimes I say: "There was no duty." In others I say: "The damage was too remote." So much so that I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable.'[190]

If, as these statements seem to suggest, each case must be decided on its own facts then one could argue that English law is still at a stage of not having satisfactory tests or means to approach the facts of the cases uniformly and comprehensively. Some further arguments for the fact that English law still struggles in such a position can be found in a statement given by Lord Denning MR in which he openly admits that duty and remoteness are hollow devices to conceal policy decisions. Duty, unless it is understood to have a policy function, is tautologous with the negligence issue, i.e., breach of duty.

Furthermore Lord Denning stresses that 'the distinction between "direct" and "indirect" has been used before, but has proved illusory.'[191] However also doubtful seems to be the usage of 'remoteness' as a certain judicial requirement, especially when it is used in a context relating to causation; thus in *Spartan Steel* [192] it was held that the pure economic loss on the three melts was too 'remote' while the consequential economic loss on the one melt was not; similarly, it was decided that the loss in the *Electrochrome* case [193] was too 'remote' whereas that in the earlier case *British Celanese Ltd v Hurt (AH) (Contractors) Ltd* [194] was held not to be.[195]

189) *SCM (United Kingdom) Ltd v (WJ) Whittal & Son Ltd* supra at 345-346
190) *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* supra at 37
191) *SCM (United Kingdom) v (JW) Whittall & Son Ltd* supra at 343
192) *Spartan Steel & Alloys v Martin & (Contractors) Supra*
193) *Electrochrome Ltd v Welsh Plastics Ltd* [1968] 2 All ER 205
194) Supra
195) Compare Marshall (1975) 24 *ICLQ supra* at 780

As there are apparently also no substantive tests in English law in the field of pure economic loss caused by acts, but only policy considerations, [196] deciding every case on its facts has the consequence of importing such a degree of uncertainty that it would be difficult to take financial (e.g. insurance) precautions and lawyers would be unable to give their clients guidance as to how their claims would fare in court. To conclude this section one can quote the opinion of a practising English lawyer:

> 'The only possible merit in the English approach is that the anomalous rules involved, i.e. the rules deducible from the actual outcome of cases, at least allow parties to know where they stand as regards liability.'[197]

3.2. Do the courts use a doctrine of transferred loss in special cases?

After having illustrated that English law is not in possession of certain criteria to approach the field of pure economic loss caused by acts it should be investigated whether they apply a doctrine of transferred loss in cases where the loss is not suffered by the holder of the absolute right but as a result of contractual arrangements by a third party. Treating this category of cases differently can be justified by the fact that naturally here one is not confronted with the danger of a multiplicity of claimants, as one is only concerned with the shift of the loss from the holder of the right to another person.

However, it can be stated right from the beginning that apart from the dicta in *Schiffahrt & Kohlen GmbH v Chelsea Maritime Ltd (The Irene's Success)* [198] and *The Nea Tyhi* [199], there is nothing explicit in the English cases to suggest the operation of a doctrine of transferred loss. Considering cases where the victim suffered loss which he would have not suffered but for the particular terms of the

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196) See Wallace (1991) 107 *LQR* supra at 239: 'There has been considerable recent discussion in the English courts (usually in cases where an affirmative duty of care is alleged in order to support a claim for economic loss), of the possibility of a still further ,if somewhat shadowy, category of economic loss duties "imposed" on policy grounds, notwithstnding the absence of the *Hedley Byrne* elements of reliance or assumption of responsibility.'

197) Marshall (1975) 24 *ICLQ* supra at 781

198) Supra

199) [1982] 1 Lloyd's Rep 606; some hint can also be found in *Spartan Steel & Alloys Ltd v Martin & Co Contractors Ltd* supra 38

contract in question, one can see clearly the rejecting attitude of the courts towards a 'doctrine of transferred loss'.[200] In *Cattle v Stockton Waterworks Co* [201], for example, Blackburn J described Cattle's loss disapprovingly:

> 'The plaintiff's claim is to recover the damage which he has sustained by his contract with Knight becoming less profitable, or, it may be, a losing contract.'[202]

It appears, from his judgment in *Simpson v Thomson*, that Lord Penzance was of the same opinion:

> 'Obligations which are rendered more onerous...advantages which are rendered less beneficial.'[203]

Likewise, in *Société Anonyme de Remorguage à Hélice v Bennetts* [204], where one party lost towage because a vessel being towed was negligently sunk, Hamilton J said:

> 'All that has occurred is that in the course of performing a profitable contract an event happened which rendered the contract no further performable and therefore less profitable to the plaintiffs.'

In *Margarine Union GmbH v Cambay Prince Steamship Co Ltd (The Wear Breeze)* [205], plaintiffs argued as follows: They had accepted delivery orders relating to the shipping of a quantity of copra. The plaintiffs were not holders of the bill of lading; the plaintiffs argued that as a consequence of the particular character of the contract they did not have a title to the goods, and only as a result of these circumstances could not claim physical damage; thus they were burdened with the risk as it exists between buyer and seller. However, finally the court refused to grant an action for the advantage of the plaintiff.

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200) Marshall (1975) 24 *ICLQ* supra at 781
201) Supra
202) *Cattle v Stockton Waterworks* supra at 458
203) Supra at 289
204) [1911] 1 KB 243 at 249
205) [1969] 1 QB 219

Nevertheless, in support of the courts judgment it must be confessed that in cases where risk has been split from loss as a result of terms of a contract the plaintiff must accept his legal situation as it results from his deliberate assumption of the risk; thus courts will not follow his argument that it shall only be on the owner of the property to carry the risk of injury or damage to the same.[206]

It was immediately after *Anns* that there were two cases that do not fit into this development. The first decision is that of Lloyd J in *Schiffahrt & Kohlen GmbH v Chelsea Maritime Ltd (The Irene's Success)* [207]. Here the question whether the defendant owed a duty of care, which would give rise to an action in tort, was answered by reference to Lord Wilberforce's two-stage approach. On the basis that the incidence of risk under a cif contract was, or ought to be, well-known to ship owners, it was held that according to the first question of the Wilberforce approach the requirements were fulfilled, giving rise to a duty of care. With regard to the second question Lloyd J said:[208]

> 'Another possible ground of policy for excluding the duty of care in the case of a cif buyer might be if it enabled him to side-step the carrier's contractual exceptions, including, for instance, the rights and immunities conferred on him by the Hague Rules. It is difficult to know how far that argument would carry the defendants, since the point was not canvassed at the hearing. But if I may express my own tentative view, it would be that it would require a much stronger argument of policy for the duty of care in the present case, arising out of so close a relationship as that which exists between a carrier and a cif buyer, to be excluded.'

In *The Nea Tyhi* [209] the plaintiffs were the endorsees of bills of lading relating to a part cargo of plywood carried in the defendants' ship, The Nea Tyhi, from Port Kelary to Newport. The plywood was stowed on deck and damaged during the voyage; because of that the plaintiffs sued the defendants for the damage both in contract on the bills of lading and in tort for negligence.

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206) Marshall (1975) 24 *ICLQ* supra at 782; contra: James (1971) 34 *MLR* 149 at 158
207) Supra
208) *Schiffahrt & Kohlen GmbH v Chelsea Maritime Ltd* supra at 484
209) Supra

The court gave an action in contract and did not therefore need to grant one on their alternative claim in tort. However, there were indications that, if it had been necessary to do so, it would, in relation to the question of title to sue, have followed *The Irene's Success* [210] rather than *The Wear Breeze* [211] for the reasons given by Lloyd J in the former case. Some say that Lloyd J's decision had the advantage, in a case where the legal ownership of the goods passed while they were still afloat, and damage was done to them progressively during the voyage, of obviating the need for a difficult inquiry into how much of the damage occurred before, and how much after, the time when the ownership passed.[212]

It must be recognised, however, that like *Junior Books*, also these two decisions can only be explained in terms of the two-stage approach of *Anns v Merton London Borough Council* [213]. Consequently, when *Anns* began to be challenged, the courts stopped following the progressive approach of *Schiffahrt & Kohlen GmbH v Chelsea Maritime Ltd* [214].

The shift should be clear after the five Lords in *The Aliakmon* [215] returned to the conservative view, i.e. that a doctrine of transferred loss does not play a role. *The Aliakmon* 'appeal arises in an action in the commercial court in which the appellants, who were the c and f buyers of goods carried in the respondents' ship, The Aliakmon, claim damages against the latter for damage done to such goods at a time when the risk, but not yet the legal property in them, had passed to the appellants. The main question to be determined is whether, in the circumstances just stated, the respondents owed a duty of care in tort to the appellants in respect of carriage of such goods; and, if so, whether and to what extent such duty was qualified by the terms of the bill of lading under which the goods were carried.'[216]

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210) *Schiffahrt & Kohlen GmbH v Chelsea Maritime Ltd* supra
211) *Margarine Union GmbH v Cambay Prince Steamship Co Ltd (The Wear Breeze) Supra*
212) *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd* supra at 814-815
213) Supra
214) Supra
215) *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd* supra
216) *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd* supra at 807

Lord Brandon, [217] differing from *The Aliakmon* QB-decision [218],said:

> 'With the greatest possible respect to Lord Goff the principle of transferred loss which he there enunciated, however useful in dealing with special factual situations it may be in theory, is not only not supported by authority, but is on the contrary inconsistent with it. Even if it were necessary to introduce such a principle in order to fill a genuine lacuna in the law, I should myself, perhaps because I'm more faint-hearted than Lord Goff, be reluctant to do so. As I have tried to show earlier, however, there is in truth no such lacuna in the law which requires to be filled. Neither Sir John Donaldson MR nor Oliver LJ (now Lord Oliver of Aylmerton) was prepared to accept the introduction of such a principle and I find myself entirely in agreement with their unwillingness to do so.'

And it becomes clear that the pre-*Schiffahrt and Kohlen GmbH* [219] approach has become the new approach, when one reads Lord Brandon's statement:

> 'My Lords, there is a long line of authority for a principle of law that in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of damage to it.'[220]

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217) *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd* supra at 820
218) *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd* [1985] QB 350 at 399
219) Supra
220) *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd* supra at 809; see Markesinis (1986) 45 *CLJ* 384

Then he referred to a line of authority [221] and stated his view a few pages later:

> 'The conclusion which I have reached is that *The Wear Breeze* was good law at the time when it was decided and remains good law today. It follows that I consider that the decision of Lloyd J in *The Irene's Success* [222], which even Clarke MR overruled, and the observations of Sheen J with regard to it in *The Nea Tyhi* [223] should be disapproved.'[224]

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221) Supra at 809-810 *Cattle v Stockton Waterworks Co* supra; *Simpson & Company v Thomson, Burrel* supra; *Sociétee Anonyme de Remorguage à Hélice v Bennetts* supra; *The World Harmony (Konstantinides and Another v World Tankers Corporation, Inc, and Others)* [1965] 2 All ER 139; *Elliot Steam Tug Company Ltd v Shipping Controller* [1922] 1 KB 127 at 139-140; *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd (The Mineral Transporter) Supra*
222) *Schiffahrt Kohlen GmbH v Chelsea Maritime Ltd (The Irene's Success) Supra*
223) Supra
224) *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd* supra at 820

4. Claims of Dependants of Victims of Fatal Accidents

Having discussed pure economic loss caused by negligent statements and acts, a third field, which has already for a long time been approached individually, will be considered: The claims of dependants of victims of fatal accidents. The reason for doing so lies in the hope of perhaps being able to draw some general principles out of this field, which lawyers seem to have approached successfully.

The cases considered in the following deal with the situation where B has died due to the negligence of A, and C has been caused economic loss by the death of B on whom he (C) was or would have been dependant. In English law the Fatal Accidents Act 1976 (following the Fatal Accidents Acts 1846-1959) contains a legislative exception to the principle of the English common law that pure economic loss is not compensable.

The conditions under which one is entitled to claim are set out in (previously in ss 2 and 5 of the 1846 Act, then in s 1 of the 1959 Act) section 1 of the 1976 Act, as amended by the Administration of Justice Act 1982, s 3:[225]

> 'If death is caused by any wrongful act, neglect, or default, which is such as would, if death had not ensued, have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.'

It is important to note that the theoretical basis of the action is the personal loss of the individual dependant.[226] Consequently a situation which gives rise to such an action must include negligence of the defendant with regard to the plaintiff as distinct from negligence with regard to the victim. But when one regards the high probability of an adult having at least one dependant, then it becomes obvious that this test will cause no difficulty in practice; thus, fault with respect to the victim will generally include fault with respect to the defendant.

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225) Compare Salmond & Heuston *Torts* 20ed 1992 at 555-556
226) *Seward (Mary) v the Owner of 'The Vera Cruz'* (1884) 10 App Cas 59 at 70; see also Flemming *Torts* 7ed (1987) 631

Concerning the action by dependants of victims of fatal accidents three questions will be examined:[227]

Does the dependant have an independent cause of action?
What is the amount of damages to which the dependant is entitled?
Which dependants can claim?

4.1. Does the dependant have an independent cause of action?

To answer this question is important since, if the plaintiff does not have an independent cause of action, then it means that it is not a question of economic loss and thus not a part of the field with which this thesis is concerned.

When one asks whether the action is independent, one asks whether it is separate from the action which the victim would have had, had he survived, and from any action transmissible to the victim's estate. The question was answered by Lord Blackburn in *Seward (Mary) v The Owner of 'The Vera Cruz'*[228] when he said:

> 'A totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which... is new in its species, new in its quality, new in its principle, in every way new.'

Although that statement might be theoretically true, restrictions of such a nature have been placed on its scope of application that it cannot be called an accurate description of the present English law.

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227) In this respect see the approach chosen by Marshall (1975) 24 *ICLQ* supra at 753

228) Supra at 70-71; compare also *Pigney v Pointer's Transport Services Ltd* [1957] 1 WLR 1121; the words of s 2 of the 1846 Act also suggest an independent action: 'Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been caused...; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively.'

The following restrictions are important:
A requirement of the plaintiff's action is that 'the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof.'[229] Thus, when the deceased had, for example, contractually excluded any liability to himself, then no action will be granted to the plaintiff for his pure economic loss in the shape of the loss of dependency.

If the victim has shown contributory negligence, the plaintiff's damages will be reduced according to the Fatal Accidents Act 1976, s 5. The reason might be 'that part of the loss flows not from the tort but from the victim's own negligence and the tortfeasor should not be required to pay for this.'[230]

Section 2 (3) of the Fatal Accidents Act 1976 provides that no more than one action shall be for and in respect of the same subject-matter of complaint.

According to the statute, the procedure for the assessment of damages is that the total loss suffered by all the dependants is added together and then this is divided into shares.[231]

In regard to the restrictions mentioned above one always has to keep in mind that it is not suggested that the basis of the action is the injury and loss of the deceased nor that the statute is inconsistent; but only that a particular kind of limitation is imposed.[232] That limitation is of such a kind that the defendant is not liable in circumstances where, if the victim had only been injured, he would not have been liable to the victim as plaintiff;[233] and the defendant is not liable for a higher amount of damages than he would have had to pay in the case of consequential economic loss where the victim had not died but had been incapacitated by his injuries.[234]

229) Fatal Accidents Act 1846, s 1; see also Salmond & Heuston *Torts* 20ed (1992) 557
230) Marshall (1975) 24 *ICLQ* supra referring to Law Commission Working Paper No 19 para 85
231) But it should be noted that each dependant is entitled to an individual judgment for a separate sum. Compare Salmond & Heuston *Torts* 20ed (1992) 561
232) Marshall (1975) 24 *ICLQ* supra at 754
233) Salmond & Heuston *Torts* 20ed (1992) 557
234) Salmond & Heuston *Torts* 20ed (1992) 557 ssq

4.2. What is the amount of damages to which the dependant is entitled?

The quantum of damages consists of the value of the dependency, i.e. the income of the victim up to the time when it is estimated that he would have died by natural causes, less the amount which he would have used for his own expenses. The result of this measure is the exclusion of the danger of overwhelming liability.[235] But as this limitation of damages is based on this particular factual situation and not on particular rules of law, it cannot be applied to economic loss in general.[236]

4.3. Which dependants can claim?

Sections 2 and 5 of the 1846 Act contained a list of all the relatives who could claim as dependants. Although this has been extended by the Fatal Accidents Acts of 1959 and 1976, there is still no general test for dependency, but an long exclusive list.[237]

However, finally one must realise, the Action of Dependants is a result of the thoroughly drafted Fatal Accident Acts and not an example where liability or the amount of damages are typically determined by the method usually used in the field of pure economic loss negligently caused. Furthermore, some limits are only typically available in the characteristic situation of the death of a supporter, as there is certainty of damage.

Thus the result might be disappointing, but it is true that the methods of limiting liability used for the action of dependants do not offer a substantive mechanism that could be used in the field of pure economic loss generally. Nevertheless, at least one similarity can be drawn between the action of dependants and the field of pure economic loss in general; the specific characteristic limits that only apply for the action of dependants are the result of the attempt to reduce the number of possible plaintiffs, the number of possible actions and the amount of damages.[238] Thus also the present situation in English law concerning the action of dependants is nothing else than the outcome of legal policy.

235) Salmond & Heuston *Torts* 20ed (1992) 557; see also Marshall (1975) 24 *ICLQ* supra at 757
236) Marshall (1975) 24 *ICLQ* supra at 758
237) See Halsbury's *Laws* Vol 34 para 17/Cumulative Supplement Part 2 Vol 34 para 17
238) Marshall (1975) 24 *ICLQ* supra at 756

CHAPTER II

PURE ECONOMIC LOSS IN SOUTH AFRICA

1. Introduction

In classical Roman law there was no specific precedent, in terms of the *lex Aquilia*, to cover pure patrimonial loss caused negligently by misrepresentation nor pure patrimonial loss caused in other ways, whereas pure patrimonial loss caused intentionally gave rise to an *actio doli.*

To make the *lex Aquilia* applicable *damnum* originally had to be caused directly i.e. *corpori corpore.* [239] In those instances where the Roman lawyers, whether by juristic interpretation, praetorian extension or later changes in Justinian's Digests, had been prepared to grant an *actio in factum* or an *actio utilis* based on the *lex Aquilia* to recover damages inflicted *nec corpori nec corpore*, the defendant's conduct still had to have been related to a specific corporal asset in the plaintiff's property.[240]

It was left to the courts and writers of the *usus modernus pandectarum* to extend the application of the *lex Aquilia* to such an extent that *damnum datum, sed non in corpore* was compensated. For example Lauterbach states:

> '*...praetor ex aequitate contra illum dat actionem subsidiariam in factum; et si advocatus per imperitiam parti damnum dederit; quot etiam procedit in aliis casibus, ubi quis damnum dedit sua culpa; sed non in corpus.*'[241]

239) D 9.2.7.1 (Julian); G 3.219; D 9.2.7.7 (Celsus)

240) For example: D 19.5.23 (Alfenus); or Inst 4.3.16; In both cases no physical damage was inflicted to the object but the object was lost to the owner. From the economic point of view loss of an object is equivalent to damage to property, as we still assume today; see also Zweigert & Kötz *Introduction* 292

241) Lauterbach *Collegium* Lib IX Tit II, XV; Zimmermann *Obligations* 1024 footnote 166

More relevant for Roman Dutch Law was Van Bynkershoek, who presented a case of pure economic loss caused by a transaction involving shares.[242] In that case two Peters had shares in a company - a father Folio 33 and a son Folio 128. When the father died he left two sons: Peter (major) and Ferdinand (minor). The father left a share worth £ 1000 to his sons. The testamentary executors in 1699 transferred Peter's share of £ 500 into his name but because Ferdinand a was minor, they could not do so in his case; accordingly his share was left in the father's name. In 1679, Peter asked for permission to have a £ 500 share transferred to Abraham, to whom he had sold his claim. On 7 August 1679 Peter's share of £ 500 was ceded. But the curators actually transferred a share of £ 500 Pounds from Folio 33 to Abraham, i.e. the father's share that was destined for Ferdinand. Whether Peter knew of this is uncertain. It suffices to say that he later noticed that he had in fact caused his brother's share to be transferred, and then in 1702, nevertheless ceded his own share to another. However, Peter had paid Ferdinand his dividends from time to time until 1703 when Peter became insolvent. Thus, at last Ferdinand found out about the fraud. Ferdinand now claimed, *inter alia*, the value of the shares he had lost as well as the dividends that he was unable to recover from the executors, who negligently transferred his shares instead of his brother's. Abraham claimed against the executors, because he was obliged to transfer the shares he received to Ferdinand. Both claims were concerned with negligently-caused pure economic loss. In respect of both claims Van Bynkershoek stated:

> '*Utrimque appellatum est, et prolixe in utraque lite disputatum, cujus culpa id damnum esset datum, cujusque adeo pecunia resarciri operteret.*'

Also other Roman Dutch lawyers went far beyond the Roman lawyers concerning the recoverability of pure economic loss caused negligently. For example Voet [243] was of the opinion that an *actio in factum* must be given to a prejudiced creditor against the *actuarius* who culpably omits to comply with the formalities concerning the creation of a hypothec, or who, when asked about it, declares that property is not encumbered by mortgage while that is in fact not true.

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242) Van Bynkershoek *Observationes* no 1195
243) Voet *Commentarius* 20.1.11

However, it has been suggested that the *lex Aquilia* never reached the stage where it became a general remedy to recover all forms of pure economic loss; there is reason to believe that in Roman-Dutch law the *actio legis Aquilia*, other than in cases of fraud, was only available to recover pure economic loss caused by the negligent misstatement of a professional person in his professional capacity.[244]

But the movement of the Roman-Dutch school towards a general remedy for culpable and wrongfully caused loss - a stage which was never actually reached [245] - was not immediately adopted by the South African courts. They took a far more restrictive approach and took very long to develop a general principle that pure economic loss caused negligently is recoverable.

At first South African law did not state its position clearly and authoritatively. On the one hand there were hints that negligently-caused pure economic loss was generally recoverable. For example, with reference to the Roman-Dutch law of inheritance, it was stated in *The Cape of Good Hope Bank v Fischer* [246]:

> 'It appears from both these authors [i.e. Voet and Matthaeus] that in their time the Aquilian law had received an extension by analogy to a degree never permitted under the 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 the wrongful acts of another.'

But then, on the other hand, certain decisions made it clear that the stage of the Aquilian action was such that one could say pure economic loss is in principle not recoverable. For example in 1894 it was remarked by a court, [247] in a case concerning a claim for wasted freight costs resulting from misdirection of goods, that 'independently of contract, false representation causing damage is not actionable unless it is fraudulent.' And again in *De Kock v Gafney* [248], a case of

244) Scott (1977) 44 *THRHR* 58, 165, 317
245) Scott (1977) 44 *THRHR* supra
246) *The Cape of Good Hope Bank v Fischer* (1886) 4 SC 368 at 376; concerning the history of pure economic loss in Roman-Dutch law see also Dendy (1990) 19 *BML* 177; Dendy (1990) 19 *BML* 207
247) *Dickson & Co v Levy* (1894) 11 SC 33 at 36 (this remark was *orbiter*)
248) (1914) CPD 377

GENERAL INTRODUCTION

When using the term 'pure economic loss' in the context of delict or torts, lawyers refer to loss that does not flow from physical damage to the person or property of the plaintiff. Ever since courts started to compensate cases of pure economic loss it has, however, been a vexed matter and there has been considerable debate about how to impose theoretical and practical limitations on this kind of liability so as to keep it within reasonable bounds. The concerns that arise from the imposition of liability for pure economic loss are aptly described by Burchell [1] when he states:

> 'The spectre of exposing defendants "to liability in an indeterminate amount, for an indeterminate time to an indeterminate class" has haunted the law of delict here and abroad and caused judges to display particular caution, even reluctance, in extending liability for negligence to the recovery of pure economic loss.'

In this dissertation I propose to study the problem of pure economic loss in the law of delict from a comparative perspective. The study begins with a consideration of the origins of this problem in three different countries, i.e. Germany with its codified system, England with its common law system and South Africa with its uncodified, mixed system. It then investigates how the underlying conflicts were treated in the different legal systems throughout their history and how they are dealt with today.

The main focus of the study will be to compare, on the one hand, the English and South African approach (where the problem of compensation of pure economic loss has been dealt with by extending the law of delict) and the German approach on the other hand (where the law of delict has in effect been extended by making use of the law of contract [2] as well as by a wide interpretation of the special articles in the BGB that relate to the law of delict).

In this way I hope to determine whether common principles or criteria are to be found in the actual development of the different legal systems and, if so, what these

1) Burchell *Delict* 47 with reference to *Ultramares Corporation v Touche* (1931) 255 NY 170

2) This against the will of the drafters of the BGB.

common principles or criteria are. The approach adopted is therefore a phenomenological one, rather than a theoretical-philosophical one.

I will, furthermore, place greater emphasis on German law, as the problem in South Africa and England has already been widely discussed in this country.

Lastly, the discussion will be restricted to cases where there was no contractual relationship between plaintiff and defendant in order to avoid the problem of the concurrence of delictual and contractual actions, which falls outside the main focus of this thesis.

misrepresentation to a purchaser of sheep which resulted in pure economic loss to the lessee of the sheep, such loss was held not to be actionable in the absence of fraud.

The reason for decisions such as this one was probably partly due to the fact that South African Courts did not rely solely on Roman-Dutch law but borrowed their approach from English cases such as *Derry v Peek* [249] that rejected the recoverability of pure economic loss.[250] Thus it is probably correct to say that originally the law of South Africa did not clearly provide a remedy for pure economic loss caused by a negligent statement.[251]

A major step forward to a form of Aquilian liability that results from every culpable and wrongful act which causes patrimonial damage was taken in *Perlman v Zoutendyk* [252]. In this case A, an auctioneer and sworn appraiser, had issued a certificate of valuation on B's land to C, in which he negligently placed too high a value on B's land. Relying on this valuation C (plaintiff) lent money to B and obtained a mortgage on the land as security. When B did not fulfil his contractual obligation C had the land sold in execution.
As a result of the insolvency of B and the fact that the land was worth far less than A estimated, C suffered damages. It seems certain that C would never have taken a mortgage on the land if he had not trusted the incorrect valuation, and thus C claimed the sum he lost from A as damages arising from A's negligence. In this case the court laid down the general precondition for compensating pure economic loss when it was stated:

> 'Roman-Dutch Law approaches a new problem in the continental rather than the English way, because in general all damage caused unjustifiably (*injuria*) is actionable, whether caused intentionally (*dolo*) or by negligence (*culpa*).'[253]

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249) [1889] 14 App Cas 337
250) According to Boberg *Delict* 60, this step shows the influence of *Derry v Peek* supra which in his opinion only decided that negligence will not suffice in an action based on deceit.
251) Neethling, Potgieter & Visser *Delict* 251
252) 1934 CPD 151; for comments on this decision see Behrmann (1941) 58 *SALJ* 25; McKerron (1954) 71 *SALJ* 316; Price (1950) 67 *SALJ* 411; Pauw (1975) 8 *De Jure* 23; Conradie (1943) 7 *THRHR* 133; Dendy (1989) 19 *BML* 177 at 178; Boberg *Delict* 63 ssq
253) *Perlman v Zoutendyk* 1934 CPD 151 at 155

Then the court went even further by offering the criteria that are required to impose a duty in cases of pure economic loss:

> 'Whether he owed that duty or not depends on whether as a reasonable man he should have foreseen the likelihood of harm being caused to someone in the position of the plaintiff....'[254]

This case also represented a first for South Africa, in that the court went further than merely stating the principle, but found on the facts that the duty actually existed:

> 'And it seems to me clear that a sworn appraiser who is a reasonable man and knows that his certificate of appraisement is to be used for the purpose of inducing someone to lend money on the mortgage of the property valued by him, ought to foresee that a negligently made valuation assessing the property at a grossly inflated value is likely to mislead and cause harm to the mortgagee.'[255]

But, after this promising start the court nevertheless chose a backdoor to avoid holding the defendant liable in this case. The court [256] held that the misrepresentation must be 'the sole cause' or 'the cause...so preponderingly important as to outweigh all others, or 'virtually equivalent to the sole cause' of the misstatement. Certainly in this case the court was of the opinion that the decision to lend money upon the security of the property had been influenced by many important considerations apart from the defendant's valuation; therefore the court was not prepared to hold the incorrect valuation as being the cause of C's loss.
Nevertheless, looking back now, it is clear that with *Perlman v Zoutendyk* the birth pangs had started that were to last for 45 years until, in 1979, Rumpff CJ [257] was to decide that the problem child should be brought into the world.

But regarding the controversy that followed on *Perlman v Zoutendyk* [258], one could have been forgiven for thinking that it would lead to a miscarriage. McKerron [259],

254) *Perlman v Zoutendyk* 1934 CPD 151 at 161
255) *Perlman v Zoutendyk* 1934 CPD 151 at 161
256) *Perlman v Zoutendyk* 1934 CPD 328 at 335-336
257) *Administrateur, Natal v Trust Bank van Africa Bpk* 1979 (3) SA 824 (A) at 831, as rendered into English at 825
258) Compare Boberg *Delict* 66

for example, called it 'the leading heresy in the law of delict'. Others [260] , however, acted as obstetricians by regarding the *Perlman* case as an affirmation of pure Roman-Dutch principles and a bastion against English infiltration [261] or as TW Price [262] said: 'a classic example of the method of Roman-Dutch law.' Although this case did lead to an immediate change in the law, a number of cases arose in which the *Perlman* approach was followed.

Thus, for example, in *Western Alarm System (Pty) Ltd v Coipi & Co* [263] the defendant was held liable for negligently informing the plaintiff that the burglar alarms which the defendant had fitted would not work properly unless the premises were rewired. The court took the opinion that the parties were in 'privity of relationship'.

The next important case was *Herschel v Mrupe* [264] which like *Perlman v Zoutendyk* [265] was also concerned with liability for negligent statements. In *Herschel v Mrupe* A's husband was killed in an accident in which he collided with B's bus. B negligently furnished A (plaintiff) with the incorrect name of the company where B's bus was insured. As a result of this A took steps against the wrong company and consequently wasted money. By a majority of four to one the Appellate Division held that B was not liable to A for the wasted costs.

Although, or perhaps because, this decision again adopted a much more conservative line it became a leading case for more than 20 years. *Herschel v Mrupe* was important in regard to the issue of negligence [266] as well as the issue of wrongfulness [267], but it is nevertheless impossible to detect exactly what it decided,

259) McKerron *Delict* 32, 218-219; McKerron (1954) 71 *SALJ* 316 at 316-317, 321; McKerron (1973) 90 *SALJ* 1
260) Pauw (1975) 8 *De Jure* 23 at 28; Van der Walt 1977 *TSAR* 269 at 270; Boberg *Delict* 66
261) Compare Boberg *Delict* 66
262) Price (1950) 67 *SALJ* 411 at 414
263) 1944 CPD 271; see also *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A)
264) 1954 (3) SA 464 (A) 494; see McKerron (1954) *Annual Survey* 124 at 127 ssq; McKerron (1954) 71 *SALJ* 316; Boberg (1961) *Annual Survey* 187 at 207; De Villiers (1958) 21 *THRHR* 277; Schwietering (1957) 20 *THRHR* 56; Dendy (1990) 19 *BML* 177 at 179-180; Boberg *Delict* 66 ssq
265) Supra
266) See for example *Herschel v Mrupe* supra at 496 ssq
267) Compare *Herschel v Mrupe* supra at 481

due to the diversity of reasoning in the judgments. One need not be as harsh as Price [268], when he said that 'only one judge ...correctly enunciates the proper rules of law ...but applies them wrongly to the facts', but clearly the uncertainty, caused by the five separate and widely differing judgments, was one of the reasons for the reluctance to abolish the unsatisfactory situation in regard to pure economic loss in South African law. Thus one can say that Van Heever JA's enthusiasm about the new area of delict in the field of pure economic loss was a little premature:

> 'Our law has grown out of its primitive myopy in the recognition of harmful causes. The manager of a crowded theatre who, without having reasonable ground for it [and is thus negligent], shouts "Fire!" during a performance, cannot be heard to say that he aimed a word, not blows, at the audience.'[269]

For example in *Union Government v Ocean Accident and Guarantee Corporation Ltd* [270] Schreiner JA voiced the fear of indeterminate liability but did not attempt to draw expressly any policy limits.

As late as 1972 it was still held, in *Combrinck Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd* [271], that the Aquilian action had not been extended so far that economic loss without 'physical injury to person or property' could be recovered with it.

And again, in *Atkinson Oats Motors Ltd v Trust Bank of Africa Ltd* [272] a remedy for the recovery of negligently-caused pure economic loss was denied.

Only in 1979, it would seem the new liberal view - in economic terms - won the battle. In *EG Electric Co (Pty) Ltd v Franklin* [273] the Eastern Cape Division was

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268) Price quoted in Boberg *Delict* 81
269) *Herschel v Mrupe* supra at 490-491; see Dendy (1990) 19 *BML* 177-180
270) 1956 (1) SA 577 (A); Millner (1956) *Annual Survey* 188 at 200 ssq ; McKerron (1956) 73 *SALJ* 121; Boberg *Delict* 54 ssq
271) 1972 (4) SA 185 (T) at 191-192; see the detailed discussion of this case by Boberg (1972) *Annual Survey* 130 at 131 ssq; see also Van der Walt (1972) 35 *THRHR* 224; McKerron (1973) 90 *SALJ* 1; for further reading see Boberg *Delict* 114 ssq
272) 1977 (3) SA 188 (W); see the note by Burchell (1977) *Annual Survey* 172 at 175

prepared to grant an action in a case obviously of pure economic loss caused by negligent statements. A sold his house to B (plaintiff). In terms of the contract of sale A undertook to provide B with a certificate to the effect that the electrical wiring of the house complied with the provisions of the relevant municipal regulations. C, a registered electrician, issued this certificate. However, when A tried to resell the house it turned out that the wiring did not comply with the regulations. As a result A had to spent a considerable amount to have the defects repaired, which loss he then claimed from C.

The court held that in that instance there was no danger of a multiplicity of actions; also that the loss was finite and that the defendant was aware of the identity of the possible claimant. Thus they came to the conclusion that the defendant had owed the plaintiff a duty to exercise care in supplying the certificate.

'If ever a case cried out for the imposition of liability for a negligent misstatement it was surely this one', Boberg [274] correctly remarked. In the same year the Appellate Division adopted a similar point of view in *Administrateur, Natal v Trust Bank van Afrika Bpk* [275], when they accepted that liability for a negligent misrepresentation based on the *lex Aquilia* existed in South African law. It was the first time that the availability of the Aquilian action for pure economic loss was authoritatively recognised by the Appellate Division, [276] and from that time onwards the question whether an action should, in principle, be available in cases of negligent statements causing damage, was settled.

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273) 1979 (2) SA 702 (E); see Burchell (1980) 97 *SALJ* 1; Neethling (1979) 42 *THRHR* 329; Boberg *Delict* 94 ssq; Dendy (1990) 19 *BML* 207 at 210

274) Boberg *Delict* 97

275) Supra; it is unnecessary to refer to the facts , because both in the Court *a quo* and on appeal it was held that in the particular circumstances of the case no action lay. But both courts did accept that in South African law such a right of action exists; see for further reading for example Dendy (1990) 19 *BML* 237 at 237 ssq; for more detail Boberg *Delict* 97

276) Although Rumpff CJ in *Administrateur, Natal v Trust Bank van Africa Bpk* supra at 833 disapproved of the term 'duty of care', he nevertheless stated that, in so far as the concept included public policy factors, it was a useful term in South African law.

The importance of this decision is underlined by this statement of Boberg:

> 'In this *Hedley Byrne* of South African law the advantage is all on our side.'

This was so, he said, because 'spared the task of extracting a *ratio* from a plurality of judgments, we are free to predict the future course of our law from the lucid approach of Rumpff CJ. And in doing so we are not burdened with arcane concepts of "special relationships", but may apply the broad and flexible principles of Aquilian liability with particular emphasis on the requirements of wrongfulness, fault and causation.'

Administrateur, Natal v Trust Bank van Africa was immediately accepted as having profoundly changed the law of delict in South Africa. Thus in *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* [277] Booysen J clearly stated:

> 'The legal basis of the plaintiff's claim is the *lex Aquilia.* In essence the Aquilian action lies for patrimonial loss caused wrongfully (or unlawfully) and culpably. Although the contrary view had long been held by many authorities, it seems clear that the fact that the patrimonial loss suffered did not result from physical injury to the corporeal property or person of the plaintiff, but was purely economic, is not a bar to the Aquilian action.'

However, although this case symbolises the breakthrough in the field of pure economic loss the question under which conditions an action should be given, remained. Thus, for example, the important question whether pure economic loss is, like physical loss, *prima facie* wrongful, with the result that the defendant has to persuade the court that the plaintiff ought not to have a remedy, was not clearly answered in *Administrateur, Natal v Trust Bank* [278].

277) 1982 (4) SA 371 (D) at 377; see Hartford (1984) 191 *SALJ* 42; Hartford (1985) 102 *SALJ* 213; Dendy (1990) 20 *BML* 45 at 46-47; Boberg *Delict* 139 ssq

278) Supra; see also the following articles: Hutchison (1981) 98 *SALJ* 486; Hutchison & Visser (1985) 102 *SALJ* 587; Burchell (1979) *Annual Survey* 180; Burchell (1980) 97 *SALJ* 1; Burchell (1981) 98 *SALJ* 1; Pauw (1980) 97 *SALJ* 221, 222-223; Van der Walt (1979) *TSAR* 145; Neethling &

Most academic writers [279] favoured that pure economic loss should be *prima facie* wrongful and this approach was also adopted by the court in *Coronation Brick v Strachan Construction* [280]. On the other hand the court in *Franschhoekse Wynkelder v SAR & H* [281] took the opposite approach, namely that pure economic loss is not *prima facie* wrongful, so that the plaintiff has to persuade the court that he ought have a remedy. In *Lillicrap, Wassenaar & Partners v Pilkington Brothers* [282] the question was finally answered, bringing to an end the uncertainty resulting from the previous ambivalent approach of the courts. In this case the Appellate Division made clear that pure economic loss is not *prima facie* wrongful.[283]

However, more recently there have been indications that the question whether pure economic loss is *prima facie* wrongful or not, has not yet been solved to everyone's satisfaction. One could even go so far as to state the opposite, namely that there are hints that the courts might choose a different path in the future. Thus in *International Shipping Co (Pty) Ltd v Bentley* [284] an auditor was held to be under a legal duty towards a plaintiff who in consequence of the auditor's certification that the statement complied in all respects with the requirements of the Companies Act 61 of 1973, when in fact they did not had lost a large amount of money which he had lent to the company. After the explanation of the court that a statutory duty rested on the

Potgieter (1980) 43 *THRHR* 82; Neethling & Potgieter (1980) *De Rebus* 179; Oelofse (1980) 43 *THRHR* 82; concerning *Administrateur, Natal v Bijo* see Burchell (1978) *Annual Survey* 237-240; Hutchison (1978) 95 *SALJ* 515

279) For example Boberg *Delict* 148; Neethling (1983) 43 *THRHR* 205; Burchell (1980) 97 *SALJ* supra 9; see about the dicussion also Dendy (1990) 20 *BML* 45 at 45 ssq

280) Supra

281) 1981 (3) SA 36 (C); Neethling (1983) 46 *THRHR* 205; Boberg *Delict* 136 ssq ; Dendy (1990) 20 *BML* 45 at 46

282) 1985 (1) SA 475 (A); as examples for the echo this case found in the literature see Hutchison & Visser (1985) 102 *SALJ* 587; Boberg *Delict* 3 ssq; Beck (1985) 102 *SALJ* 222; Van Warmelo (1985) 102 *SALJ* 227; Davis (1985) 9 *SA Insurance Law J* 54; Pearmain (1985) 7 *De Jure* 22; see also the more recent discussion of the case by Dendy (1990) 20 *BML* 67 ssq ; Dendy (1991) 21 *BML* 15; Dendy (1991) 21 *BML* 45

283) Concerning the actual development of liability for negligent misstatements inducing a contract (which is not subject of this thesis) see Mngqibisa (1992) 55 *THRHR* 504 who puts emphasis on the recent case of *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A); in this regard see also Van Aswegen (1992) 55 *THRHR* 27; Lewis (1992) 109 *SALJ* 381; Dendy (1991) *Annual Survey* 358 at 361 ssq ; Dendy (1990) 20 *BML* 11; Dendy (1991) 20 *BML* 219; Dendy (1991) 21 *BML* 45; for the pre-*Lillicrap* situation see Hutchison (1982) 11 *BML* 197

284) 1990 (1) SA 680 (A)

auditor and that he was aware that the defendant relied on his statements, it was held that 'there [are] no considerations of public policy which should induce the court to deny liability in a case such as the present.'[285] And although this part of the decision is strictly-speaking *obiter* [286] it was not long before there was a welcoming echo in the legal literature. Dendy [287] expressed the view that the *Bentley* case's fathers, i.e. Goldstone J and Corbett CJ 'will in time become the first nail in the coffin of the cautious approach adopted by the majority judges in *Lillicrap*, none of whom sat in *Bentley*.'

However, only one year later the same author [288] was forced to comment as follows on *Arthur E Abrahams & Gross v Cohen & Others*:[289]

> 'Whilst the decision of the court cannot, it is submitted, be faulted, it is unfortunate that Marais J chose, in much of his judgment, to adopt a cautious approach that it is for the plaintiff to adduce reasons why the defendant's behaviour in negligently causing pure economic loss ought to be branded wrongful, rather than for the defendant to show that there are valid reasons why a legal duty ought not to be recognised.'

Thus one can state with confidence that the *International Shipping Co (Pty) Ltd v Bentley* [290] was at least not immediately followed by other courts. However, whether it will be the *Lillicrap* approach or the new *Bentley* (*obiter*) approach that one will find in the coffin, is to be awaited with some interest.

Since courts had began to compensate pure economic loss, they obviously also had to begin to find theoretical and practical limitations to keep liability within reasonable bounds.[291] The grant of the Aquilian action requires conduct which is wrongful [292]

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285) *International Shipping Co (Pty) Ltd v Bentley* supra at 694
286) This because the auditor was finally held not to be liable as his conduct was not proved to have caused the loss suffered by the plaintiff: compare Dendy (1991) *Annual Survey* 127 at 134
287) Dendy (1990) *Annual Survey* supra at 134
288) In the (1991) *Annual Survey* 358 at 366 Dendy considers the rejection of the *Lillicrap* approach favoured by Boberg *Delict* 148-149 and himself in (1990) 20 *BML* 67 at 68 ssq and (1991) 21 *BML* 45 at 46
289) 1991 (2) SA 301 (C)
290) Supra
291) Concerning recent development in the field of pure economic loss relating to the law of bills of exchange see the introductory article by Dendy (1991) 20 *BML* 181; see also Hugo (1992) 1 *Stellenbosch Law Review* 115 where he puts

and negligent and also that the wrongful conduct must have caused *damnum*. In the search for common, reasonable criteria to limit liability the lawyers' main emphasis was the criterion of wrongfulness.

In the following part some of the criteria which played a role in determining wrongfulness shall be subject to further consideration. Pure economic loss and thus wrongfulness is regularly treated differently depending whether the loss was caused by acts or statements,[293] and thus these two manifestations of pure economic loss will be dealt with separately.

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emphasis on the 'revolutionary' case of *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783; see further the discussion in Dendy (1991) *Annual Survey* 358 at 363 of *Bonitas Medical Aid Fund v Volkskas Bank Ltd & Another* 1991 (2) SA 231 (W) where it was held that a collecting banker may in principle be held liable to the drawer of a cheque for loss resulting from negligent failure to collect the proceeds on behalf of the person entitled to them; see also Nagel & Greeff (1992) 55 *THRHR* 314

292) Concerning the question whether to use the term 'unlawfulness' or 'wrongfulness' in the delictual context see Kerr (1992) 55 *THRHR* 533

293) It has to be mentioned that the delictual liability of auditors and public accountants to third parties for negligent misrepresentation has since 1982 been regulated by legislation (Public Accountants' and Auditors' Act 51 of 1951 as amended by the Amendment Act 42 of 1982). As this field of pure economic loss has since been dealt with separately and also does not give further explanation for the field of pure economic loss in general this dissertation will not deal with this Act in detail; for further reading see Pretorius *Aanspreeklikheid van Maatskappy-Ouditeure teenoor Derdes op grond van Wanvoorstelling in die Finansiële State* 1 ssq

2. Pure Economic Loss Caused by Acts

2.1. Wrongfulness

It has always been an accepted premise in South African law that conduct causing damage was *prima facie* wrongful when the conduct injured the property or body of the plaintiff.[294] But when courts started to compensate cases of economic loss which were caused without infringing a personal or real right of the plaintiff, that definition of wrongfulness cited above could not satisfy any longer.

Today it is commonly accepted that wrongfulness lies either in the infringement of a subjective right [295] or in the breach of a legal duty;[296] the latter is an older and more often formulated test for wrongfulness in South African law, derived from English common law.[297]

However, for the compensation of pure economic loss courts almost invariably found the wrongfulness of an act to lie in the breach of a legal duty, i.e. the breach of a legal duty to avoid damage [298] as for example Howard J in *Shell & BP SA and Others v Osborne Panama SA* stated [299]:

294) Van der Walt 8 *LAWSA* para 20; Neethling, Potgieter & Visser *Delict* 37, 247; indirectly also Boberg *Delict* 32 according to *Cape Town Municipality v Paine* 1923 AD 207; concerning wrongfulness in cases of unlawful competition where the right to goodwill is involved, see supra

295) *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T); an example for an infringement of a subjective right is unlawful competition where the right to goodwill is involved or the interference with another's contractual relationship where a personal right is often existent. Compare *Coronation Brick (Pty) Ltd v Strachan Construction Co* supra

296) Visser in *Wille's Principles* 648 ssq; Van der Walt 8 *LAWSA* para 21-23

297) Van der Walt 8 *LAWSA* para 21; Visser in *Wille's Principles* 648 ssq

298) Neethling, Potgieter & Visser *Delict* 41-47, 247; eg *Coronation Brick (Pty) Ltd v Strachan Constuction Co (Pty) Ltd* supra at 384-387; *Franschhockse Wynkelder (Ko-OPp Bpk v SAR & H* supra at 40-41; *Shell and BP SA Petrolium Refineries (Pty) Ltd v Osborne Panama SA* 1980 (3) SA 653 (D) at 659; *Tobacco Finance (Pvt) Ltd v Zimnat Insurance Co Ltd* 1982 (3) SA 55 (ZH) at 61-62; *Zimbawe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd* 1985 (4) SA 553 (ZS) at 560-568; *Barlow Rand Ltd t/a Barlow Noordelike Masjinerie Maatskappy v Lebos and Others* 1985 (4) SA 341 (T) at 346-348; compare Dendy (199) 20 *BML* 45 at 45 ssq

299) Supra at 659; see Neethling (1981) 44 *THRHR* 78; Neethling (1983) 46 *THRHR* 205; Boberg *Delict* 132 ssq ; see also *Administrateur, Natal v Trust Bank van Africa Bpk* supra at 823- 834

> 'However, according to my understanding of the law, that [i.e. pure economic loss] is not sufficient to render the defendant delictually liable to compensate the second plaintiff for its loss. A further requisite for liability is the existence of a legal duty of care owed by the defendant to the second plaintiff as charterer of the Mobil Petroleum. This refers, of course to the policy-based aspect of the "duty of care" concept, by means of which the scope of delictual liability is judicially controlled. It is concerned with whether the defendant's conduct was unlawful or wrongful.'

When one considers this approach, one has to keep in mind that, where a subjective right is involved, wrongfulness might just as well lie in the infringement of this right, as wrongfulness determined by the breach of a legal duty is just the converse of wrongfulness determined by the infringement of a subjective right.[300] Nevertheless, the discussion below will concentrate on the concept of a breach of duty, as this is the measure by which wrongfulness is mostly determined in cases of pure economic loss. The criterion used to decide whether there was a legal duty to avoid pure economic loss was that of objective reasonableness or the *boni mores*.[301] This criterion requires a careful weighing up of various interests in every individual case.[302] Some examples are cited by Booysen J in *Coronation Brick v Strachan Construction* [303]:

300) *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* supra at 379-380 '...However desirable it therefore might be that a clear distinction should be made between unlawfulness, being the infringement of a right or the obverse, being the breach of a duty, and culpability, ...Those authorities who approach the matter from the point of view of the plaintiff state that any infringement of a subjective right of the plaintiff is unlawful and then proceed to inquire whether plaintiff had the right in any given case not to be inquired in the circumstances of that case.
Those authorities who approach the matter from the point of view of the defendant state that a breach of a duty of care owed to the plaintiff is unlawful and then proceed to enquire in each case whether such a duty existed. Logically speaking these two approaches should arrive at the same criterion for unlawfulness and it seems to me that they do ....'

301) *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* supra at 384; *Zimbabwe Banking Corp Ltd v Pyramid Motor Corp (Pvt) Ltd* supra at 562; *Withan v Minister of Home Affairs* 1989 (1) SA 116 (ZH) 132-133

302) Van Aswegen (1993) 56 *THRHR* 171 at 180 ssq ; see also Dendy (1991) *Annual Survey* 358 at 371 reffering to *Natal Fresh Produce Growers' Association v Ayroserve (Pty) Ltd* 1991 (3) SA 795 (N) at 799: 'The test for wrongfulness is the balancing of the respective parties' rights and duties. This requires the court to make a value judgment based on considerations of

> 'In determining whether conduct is of such a 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.'

It should be kept in mind that, in the field of pure economic loss, the courts need not consider the criterion of reasonableness directly in cases where the economic loss falls within certain established categories of wrongfulness: The defendant's right to compensation for loss of support resulting from his breadwinner's death, and the right of a breadwinner (husband or father) to compensation for medical expenses incurred on behalf of his dependant (wife or child).[304] All other claims for pure economic loss are approached individually.[305]

In order to determine the legal duty the courts - as stated above - use the *boni mores* criterion with particular emphasis upon foreseeability/knowledge and other policy considerations.[306]

2.1.1. Forseeability as a question of wrongfulness?

Concerning the question whether foreseeability should be a factor in limiting wrongfulness, as well as the question as to how foreseeability should be determined

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morality and policy. Some allegations upon which the court may exercise a value judgment must therefore be made by the plaintiff.'

303) Supra

304) Boberg *Delict* 104

305) Boberg *Delict* 104

306) Although foreseeability is always just used as one policy consideration, it will be dealt with separately as this term is regularly discussed as one of the important issues concerning the question how to keep liability within reasonable limits; Neethling, Potgieter & Visser *Delict* 248, see footnote 113 referring to *Coronation Brick (Pty) Ltd) v Strachan Construction Co (Pty) Ltd* supra at 384 ; Boberg *Delict* 35, by referring to Van der Walt 8 *LAWSA* para 22: '...there is no tautology in the practical application of the doctrine, for "the recognition of the duty of care in a particular situation is the outcome of a value judgment" dependent, not on the foreseeability of harm alone, but on "a comparative judicial evaluation of the relevant individual and social interests involved in the particular circumstances of the case."'; Bell *Policy Arguments in Judicial Decisions* ssq

for the purposes of wrongfulness, various views have been put forward.[307] When one considers the case law it is clear that the courts placed the discussion concerning foreseeability within wrongfulness, but did not choose either a subjective or objective view exclusively; thus they sometimes refer to what an average person would have foreseen and sometimes to what was foreseeable to the defendant in question personally. Nevertheless it cannot be contested that they more often adopted a more subjective foreseeability test.[308] Let us consider the two different views used by the courts.

On the one hand there is, for instance, Booysen CJ, in *Coronation Brick (Pty) Ltd v Strachan Construction (Pty) Ltd,* [309] to take a case representing a more objective approach in regard to foreseeability, who stated:

> 'It would seem therefore that in determining in a given case whether the defendant's conduct which resulted in [foreseen] or foreseeable economic loss was unlawful or wrongful the question is whether it would in all the circumstances be reasonable to recognise that defendant owed the plaintiff a legal duty or a duty of care or, to put it differently, whether the reasonable man in defendant's position would in all circumstances have recognised that he owed the plaintiff a duty of care.'

On the other hand the court in, for example, *Shell and BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama SA* [310] took a more subjective approach:

> '... moreover, it has not been shown that the defendant should have foreseen the possibility of loss (on account of delay and liability for

307) Schoeman's approach in (1986) 49 *THRHR* 287 at 302 to take foreseeability as a question of establishing a legal duty and not as a measure to limit an existing duty is in this discussion of less interest, as both ways lead to the same result.

308) See also the solution chosen by the legislature in s 26(5) (b) of the Public Accountants' and Auditors' Amendment Act 42 of 1982, according to which 'there is a legal duty on such a person to prevent misleading if he knew or it could reasonably be expected of him to know that the person to whom he furnished the information, would act on it. This statutory legal duty is apparently wider than the courts' principle of subjective foreseeability since mere reasonable foreseeability may suffice to indicate the presence of a legal duty.': Neethling, Potgieter & Visser *Delict* 255

309) Supra at 384

310) Supra at 659

demurrage) to the second plaintiff specifically.... From the defendant's point of view the class was unascertained because its membership depended on variables such as how many be out of commission as a result of the collision.'

In certain instances the courts did not even attempt to distinguish wrongfulness (breach of duty) and fault (negligence). For example Squires J in *Tobacco Finance (Pvt) Ltd v Zimnat Insurance Co Ltd* [311] stated that there are two prongs of an inquiry into the duty concept of negligence, the one fact-based, and the other policy-based. The first, as he understands the law, is really governed by the foreseeability test in deciding whether a defendant's behaviour was negligent in the circumstances; and the second by the range of relationships involved and the interests that should be permitted by the law. On this second level, the inquiry is divorced from the question of foreseeability and is really governed by broader considerations such as the ordinary notion of justice, the interests of the claimant or the defendant as balanced against the community as a whole, and the economic or even social effects of the claim, all of which collectively may be said to broadly reflect the policy of law.
In contrast to the ambivalent practice of the courts, Neethling argues [312] that the criterion of foreseeability should not play a role implied at all in the discussion of wrongfulness. He is of the opinion that reasonable foreseeability of harm has no role to play in determining the legal duty with regard to wrongfulness, and therefore that the function which foreseeability traditionally fulfils in the determination of the English law 'duty of care', should be banished from South African law.

Burchell does not follow the radical view of Neethling and, far from discounting foreseeability as a criterion which should be considered within the objective test of wrongfulness, he is of the view that 'where the plaintiff was merely foreseeable as a member of a class of persons, then liability could be limited by, for example, enquiring whether, in pure economic loss cases, that class of foreseeable plaintiffs was indeterminate or unascertained.' He then adds:

311) Supra at 61
312) Neethling (1983) 46 *THRHR* 205 at 206; see also Neethling, Potgieter & Visser *Delict* 248-249 footnote 118

'This would be a factor that could be considered under the unlawfulness or wrongfulness element.'[313]

Boberg [314] also holds the view that it does not in all cases suffice to discuss foreseeability merely in relation to fault. To understand the view properly, one has to consider Boberg's approach towards the whole test of wrongfulness in cases of pure economic loss. Boberg accepts as a starting point the *boni mores* test as the measure to determine the wrongfulness of an act. In his opinion, too, wrongfulness requires an objective test, i.e. whether an act violates the existing legal order in the view of the society (judged *ex post facto*). Thus, in the ordinary course of events, all circumstances regarding the way in which the harm was caused must be taken into account. Normally this would include only the objective circumstances, but Boberg favours certain exceptions, especially in cases of pure economic loss. Thus Boberg [315] argues that sometimes the crucial question whether the loss was caused wrongfully could be answered only with reference to the nature of the fault involved. Whether the fault in question takes the form of negligence or subjective intention could make a difference to the wrongfulness in question. By doing this Boberg does not want allow the subjective factors to play an absolutely determining role, as a subjective factor is only one of the factors in the totality of factors to be considered. In his opinion this makes the objective test of wrongfulness even more objective.[316]

An argument in favour of Boberg's view is that he [317] is able to explain convincingly the need to require intention to render certain cases of unlawful competition [318] wrongful, on the basis that if negligent acts were to be treated on the same basis as intentional acts all commerce would be stultified. It is, for example, imperative that one tests the intent of the injurer within wrongfulness as the wrongfulness of an act enables the courts to give an interdict in favour of the victim; thus considering intent merely within fault would cause many more acts to be halted by interdicts.

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313) Burchell (1981) *SALJ* 1 at 4-5
314) Boberg *Delict* 146; also Burchell (1981) 98 *SALJ* supra at 4-5
315) Boberg *Delict* 146, 791 ssq; Boberg (1991) *THRHR* 43 ssq who sees some support by Basson (1983) 24 *Codicillus* no 1, 8 at 11 779
316) Visser in *Wille's Principles* 654-655
317) Boberg (1991) *THRHR* 43 ssq
318) As stated above these are regularly cases of pure economic loss.

Furthermore, Boberg [319] points to a problem in the field of self-defence. He attempts to convince that a justification ground like self-defence requires not only an objective justification situation but also a defence motive on the side of the injurer. Otherwise a contract killer A, who shoots a person B without the knowledge that the victim B himself wanted to kill someone else, would be justified in so doing, although A's act was motivated by the expectation of remuneration. According to Boberg the view of society is that this behaviour contravenes its basic values and legal convictions.

At first glance Boberg's argument seems convincing but on further examination certain doubts arise. If one presumes that the contract killer's A's act was not justified because of his evil motive, then the dependants of the killed attempted killer B could sue A for their loss of support. Firstly, why should B's dependants have an action just because B was fortuitously shot by someone who did not know about B's intent to kill? Secondly, if one presumes that the murder committed by A was itself justified, would it, nevertheless, be sufficient to try him in criminal proceedings for attempted murder?

Neethling [320], who opts for a solely objective test, suggests that Boberg's approach is out of kilter with the structure of Aquilian liability, which requires that all subjective factors are located within fault. He argues that limiting liability in certain cases of pure economic loss by requiring intention as part of the element of wrongfulness in such cases, will result in an alteration of the fault requirement for Aquilian liability, as negligence will no longer be sufficient to render the defendant liable in these special cases. And thus the whole principle of Aquilian liability, as it exists in South Africa, would be altered. In his opinion, if there is a need to restrict certain cases of liability to intentional acts is the duty of the legislature to provide a suitable remedy.

Neethling argues, furthermore, that discussing a subjective factor like intention within wrongfulness distorts the nature of the intention that is normally required. It is well known that the subjective criterion of intention relates to the state of mind of

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319) Boberg *Delict* 791 ssq, 795-796; Labuschagne (1974) *Acta Juridica* 73; a solely objective test is favoured by Burchell & Hunt *Criminal Law* 322, 335; De Wet & Swanepol *Strafreg* 71 ssq, 87 ssq; Van der Merwe & Oliver *Die Onregmatige Daad* 74 ssq, 84 ssq

320) Neethling (1983) 46 *THRHR* 205

the defendant which includes knowledge of unlawfulness.[321] Thus it becomes obvious that, by taking intention into account within wrongfulness, further problems arise, which can be dealt with only by dividing the test into two parts: One concerned more with the intention regarding the facts of the act, the other more with the knowledge of unlawfulness.

Neethling [322] appears to favour limiting liability by using the test of remoteness i.e. a test of the specifically foreseeable plaintiff. He points out, that the foreseeability test of negligence differs from the foreseeability of and reasonable steps to guard abainst damage in general, whereas the latter involves reasonable foreseeability of damage to the plaintiff.[323] Nevertheless, this approach cannot escape the criticism of Burchell [324], that the use of reasonable foreseeability in determining negligence and remoteness of damage leads to an unnecessary duplication of inquiries.

But that Boberg's approach is likely to abandon the traditional borders of the Aquilian action becomes even more obvious, when one has regard to his own argument. Concerning the question how to determine wrongfulness in cases of pure economic loss he states:

> 'And that depends, not merely on whether his conduct was "objectively unreasonable", but also on whether the "legal convictions of the community demand that the conduct be regarded as unlawful and that the damage suffered ... be made good by [the defendant.]" Why should not the community take cognisance of the social implication of holding the defendant liable in deciding whether or not to do so?'[325]

This statement by Boberg shows very clearly that his test of wrongfulness tends to be a general test, i.e. a test whether to hold the defendant liable. This approach tends no longer to mirror the Aquilian test of liability, which is divided into an objective part (wrongfulness) and a subjective part (fault). And to throw these requirements overboard by a vague comprehensive test of liability, which will depend on the use of

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321) Burchell *Delict* 30-31
322) Neethling & Potgieter (1980) *De Rebus* 179 at 182
323) Neethling & Potgieter (1980) *De Rebus* supra at 182 footnote 55
324) Burchell (1981) *SALJ* supra at 4
325) Boberg *Delict* 147 referring to *Minister van Polisie v Evels* 1975 (3) SA 590 (A)

various policy considerations was not the intention of the creator of the child.[326] It was in the *Administrateur, Natal v Trust Bank van Africa Bpk* [327] case itself, where Rumpff CJ stated:

> 'In my opinion, the ground of action can and ought to be placed in the extended range of application of the *lex Aquilia*. From this it would follow that according to our current norms, unlawfulness is required and fault.'

One could, therefore, be forgiven if one gains the impression that Boberg's test is similar to the common law duty of care test, that naturally does not provide a sharp border between wrongfulness and fault.[328] The result of extending the Aquilian action to cover all parts of liability for caused loss, will lead to an alteration of the certain requirements with the consequence of even more uncertainty in the law of delict. Such a comprehensive test of liability was to be found in the single case of *Tobacco Finance (Pvt) Ltd v Zimnat Insurance Co Ltd* [329], but was never followed.

However, this is not the place to seek to find a final solution to that problem as it would lead far beyond the borders of this thesis. One has to keep in mind that in the practice of South African courts the question of wrongfulness in cases of pure economic loss requires the test of reasonable foreseeability: Because of this approach by the South African courts, whether it be right or wrong, the role of foreseeability will now be discussed as part of the inquiry into the determination of wrongfulness:[330] Thus this shall be the place where it will be discussed in this

326) Van Aswegen (1993) 56 *THRHR* supra at 192 points out that this is a general feature inherent in judicial decisions based on policy considerations: 'In many cases the policy considerations used to determine wrongfulness pertain rather to the question whether liability for such conduct would be appropriate, than to the question whether such conduct should in principle be regarded as permissible.'

327) Supra at 832-833

328) Dendy 105 (1988) *SALJ* 395 about the duty of care principle: 'Its use has frequently led, over the years, to the fusion in the minds of the confusion of two distinct elements of Aquilian liability, wrongfulness and negligence, since the presence of each in a particular case is often explained by saying that, in the circumstances, the defendant owed a duty of care to the plaintiff.'

329) Supra

330) See for example the recent case of *Benson v De Beers Consolidated Mines Ltd* 1988 (1) SA 834 (NC) at 841: 'I find myself unable to hold that under the particular circumstances, where the price of the shares was bound to go down

thesis.

- as it in fact did - defendant owed plaintiff a duty of care. I do not think that defendant could reasonably have foreseen the possibility that plaintiff would or even could suffer a loss as a consequence of the manner in and time at which the announcement was made'; compare Dendy (1988) *Annual Survey* 171 at 177-177

2.1.2. Forseeability as one of the policy considerations

To keep liability within reasonable bounds, the defendant's obligation to compensate loss caused by his conduct is limited to those people whom he knew would be prejudiced by his act at the moment when it was committed and to cases where the potential of harm being caused was foreseeable,[331] and both actual knowledge and reasonable foreseeability, as was indicated above, play a crucial role in the determination of the legal duty.[332]

In *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* where the defendant damaged the electrical cables to the plaintiff's factory, the court explained the determination of the legal duty as follows:[333]

> 'I believe that the attitude of the community to defendant's alleged conduct would be "but for heaven's sake, you knew precisely where the cables were; you knew that if they were cut plaintiff would suffer a substantial loss of income, surely there was a legal duty on you to take measures to avert the loss." It follows that it is my view that the alleged conduct of the defendant and its driver, if he had been duly warned, be branded unlawful and that the damage suffered showed be made good.'

In *Shell and BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama SA* [334] the criterion of foreseeability was also regarded as one of the policy considerations within the duty of care test. In this case the defendant's tanker Olympic Action collided with a mooring buoy, which was used by tankers for discharging oil. In the collision the buoy was damaged and while it was being repaired a number of tankers, including the Mobile Petroleum, were delayed in discharging their cargo of oil.

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331) Neethling, Potgieter & Visser *Delict* 248- 249 referring to *Coronation Brick (Pty) Ltd v Stracan Construction (Pty) Ltd* supra at 386-387; Schoeman (1986) 46 *THRHR* supra at 302

332) Neethling, Pogieter & Visser *Delict* 249 according to *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N) at 916-917

333) *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* supra at 386-387; special attention was given to this case, not only because it is a leading case, but also because similar cases have arisen in England and Germany.

334) Supra at 659

The Court held that the defendant's servants had negligently caused the damage to the buoy and therefore the master of the ship was vicariously liable to the owners of the buoy, i.e. the first plaintiff. As far as the second plaintiff, the time charterer of the Mobile Petroleum, was concerned, the court categorised the claim as one of pure economic loss, as the Mobil Petroleum was not owned by the second plaintiff. In that content Howard J [335] stated, after referring to the English case of *The World Harmony* [336], where it was held that a time charterer had no right of action to recover damages for pecuniary loss against the defendant who negligently sank or damaged the chartered vessel:

> 'Moreover, it has not been shown that the defendant should have foreseen the possibility of loss (on account of delay and liability for demurrage) to second plaintiff specifically. In the light of the evidence this kind of loss was only contemplated in relation to an unascertained class of potential victims, namely the owners or charterers of vessels intending the discharge oil at the SBM, and it is only because the second plaintiff is a member of that class that its loss was reasonably foreseeable.[337] From the defendant's point of view the class was unascertained because its membership depended on variables such as how many ships had joined or were committed to joining the queue and how long the SBM would be out of commission as a result of the collision.'

Thus the crucial point in the question of liability towards the second plaintiff was that, although economic loss in the form of demurrage to charterers of vessels may have been reasonably foreseeable to someone in the position of the defendant, such loss to the second plaintiff specifically was not reasonably foreseeable since economic loss was only contemplated in relation to an unascertained class of potential victims.[338] Therefore it was concluded that the defendant did not owe a

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335) *Shell & BP SA v Osborne Panama SA* supra at 659

336) *The World Harmony (Konstantinidis and Another v World Tankers Coporation, Inc, & Others)* supra at 154-156;

337) This statement of Howard J echoes the test favoured by Mason J in the Australian case of *Caltex Oil (Australia) (Pty) Ltd v The Dredge 'Willemstad'* 1977 11 ALR 227 at 293. Incidentally, in this case there was little or no danger of unlimited liability, as the number of potential plaintiffs was very small. Compare Burchell (1981) 98 *SALJ* 1 at 4

338) 'Furthermore, the vessel under time charter to the second plaintiff was not even exposed to the risk of damage resulting from the defendant's negligence, since

duty of care, in the policy-based (i.e. wrongfulness) sense [339] and that it would involve an unwarranted extension of the Aquilian action to allow the second plaintiff to recover damages for its economic loss.

In referring to *Shell & BP SA v Osborne Panama SA* [340] Burchell [341] adopts a more systematic approach to the foreseeability test within wrongfulness. He suggests that if there is reasonable foreseeability of the general nature of the harm to the plaintiff specifically, then the question of wrongfulness would be easier to answer.[342] Whereas if the plaintiff were to be foreseeable merely as a member of a class of persons, Burchell holds, then liability could be limited by, for example, enquiring whether, that class of foreseeable plaintiffs was indeterminate or unascertained.

The advantage of this flexible approach towards foreseeability (which relates on one side to the nature of the harm suffered and on the other hand to the identifiability of the sufferer) is obviously that the inquiry into negligence, which is essentially a factual one, would remain the same in all cases, whether involving pure economic loss or not. This because the need to avoid unlimited liability is satisfied already by requiring foreseeability of the general nature of the harm to the plaintiff specifically (or that the group of plaintiffs was at least ascertainable or determinable) in terms of wrongfulness. Consequently then there is no longer a need to dress policy-motivated limits in the form of specific fault requirements. Thus the test for negligence could remain the test of reasonable foreseeability of the general nature of the harm to the plaintiff (who was either specifically foreseeable or foreseeable merely as a member of a class of persons) and the failure to take reasonable steps to guard against this harm.

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it was not in the vicinity of the buoy when the collision occurred.' Compare Burchell *Delict* 50

339) According to what was stated above, the approach of Howard J is preferable to that of Schreiner JA in the *Union Government* case, where the learned judge of appeal tried to accommodate the policy consideration under the fault element: see *Union Government v Ocean Accident and Guarantee Corporation Ltd* supra at 585

340) Supra

341) Burchell (1981) 98 *SALJ* supra at 4-5

342) See *EG Electric (Pty) Ltd v Franklin* supra; *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* supra and Burchell (1980) 97 *SALJ* supra at 10-11

Finally, Booysen J's listing of policy considerations in *Mac Lelland v Hulet* [343] gives the most recent and systematic system offering of questions to be asked in the context of foreseeability, namely: Is the number of potential plaintiffs determinate and foreseeable and does actual knowledge by the defendant of the potential of harm being caused to a particular plaintiff single that plaintiff out from what might otherwise be a mass of unforeseeable plaintiffs?'

Although these two questions seem to include everything one can ask about foreseeability, it is striking that Burchell's approach to distinguish between the foreseeability concerning whether the plaintiff was a member of a certain or uncertain group was not followed. Thus this question will be an open one in future cases where this problem particularly arises.

2.1.3. Other policy considerations

Since the time when it became clear that pure economic loss is in principle recoverable, the courts started to look for acceptable criteria to limit liability. These policy considerations that are employed with the aim of protecting the defendant against an overwhelming potential liability or a multiplicity of actions which could be 'socially calamitous', will now be dealt with.[344] Invoking policy considerations, the Cape Court in *Franschoeckse Wynkelder (Ko-operatief) Bpk v SAR & H* refused to compensate the plaintiff's loss. Because there was no specific relationship between the parties, the court considered that the defendant did not owe a duty of care.[345] The court also held, it may be mentioned, that although the defendant might have been negligent not to have foreseen that the spray might contaminate the wines, the risk was so remote that the reasonable man would not have taken steps to guard against it.[346]

343) 1992 (1) SA 456 (D)
344) Neethling, Potgieter & Visser *Delict* 249; for further reading, Bell *Policy Arguments in Judicial Decisions*; Corbett (1987) 104 *SALJ* 54; concerning definition, philosophical background and the nature of the role of policy considerations see the thorough study by Van Aswegen (1993) 56 *THRHR* 171 who refers for further reading to De Vos & Van Loggerenberg (1991) *TSAR* 594; Mayer Maly (1987) 50 *THRHR* 61; Corder & Davis in *Essays on Law and Social Practice in South Africa* 1988; Hoexter (1986) 103 *SALJ* 436
345) *Franschhoekse Wynkelder (Ko-operatief) Bpk v SAR & H* supra at 41
346) *Franschoekse Wynkelder (Ko-operatief) Bpk v SAR & H* supra at 41

From the beginning, too, it was demanded that the loss should be finite. A further factor which could be taken into consideration would be whether the plaintiff, although not the owner, was in possession of, or occupied, the property that had been damaged;[347] this not only because possession plays an important role in conferring title to sue but also in curbing the potential for indeterminate liability.
It was also realised that the social utility of the act causing pure economic loss and the difficulty of taking reasonable steps to guard against the harm, although traditionally considered under negligence, are policy factors that could be considered under unlawfulness or wrongfulness.[348]

Policy factors were mentioned systematically in *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd*[349]. The court held, that in determining whether a conduct is of such a nature as to be determined unlawful the court must carefully balance and evaluate. Hereby they have to take into account the interests of the concerned parties and the social consequences of the imposition of liability in that particular type of situation. The court went on to elaborate that in coming to its conclusion a court should, *inter alia*, have regard to the probable or possible extent of the degree of risk that the loss would be suffered as a result of the conduct complained of the value to the defendant and/or society of the object which the defendant was seeking to achieve when he conducted himself in the manner complained of whether there were reasonable practicable measures available to the defendant to avert the loss, what the chances had been that those measures would have been successful; and whether the cost of such measures would have been reasonable proportionate to the loss which the plaintiff could have suffered. Finally it was held that one has to take into account the relationship of the parties athough a special relationship between plaintiff and defendant was not essential.

347) Burchell (1981) 98 *SALJ* supra at 5; see also *Smit v Saipem* 1974 (4) SA 918 (A)
348) Burchell (1981) 98 *SALJ* 1 at 5
349) Supra; more generally about policy considerations Neethling, Potgieter & Visser *Delict* 32-34

On reading these policy considerations it becomes evident that each case will depend on the particular circumstances. Consequently, one must draw the conclusion 'where, for instance, only one claim is subjectively foreseeable, while there is an element of speculation concerning the identity of other possible claimants - belonging, in other words, to "an unascertained class of potential victims" -, the first claims ought not to fail on the basis of policy considerations.'[350] But the other possible claimants will not succeed with their claims, as in those cases there was a lack of reasonable knowledge or the required foreseeability and thus of a legal duty to avert prejudice to them.[351]

Burchell [352] summarises - on the basis of Booysen J's judgment in *Mac Lelland v Hulet* [353] - the question of unlawfulness concerning compensation of negligently-caused pure economic loss, and brings it into a comprehensive system. Thus Burchell asks whether the recognition of liability will reflect a fair evaluation of the interests of the parties concerned and their relationship one to another, the social consequences of the imposition of liability and the extent of a duty which would be placed on other persons who find themselves in the position of the defendant.

For the question whether a duty will be imposed, Burchell further considers the ease with which the loss could have been foreseen, the degree of risk that the loss would be suffered, the availability of measures to the defendant which could or would have averted the loss and the prospect that those measures would have been successful; then he also wants to contemplate the ease with which a person in the position of the defendant could have taken such measures, and the cost to him of doing so. Furthermore he questions whether the law actually sanctions the conduct of the defendant, or, on the other hand, the defendant's conduct does actually fall into one of the accepted categories of unlawfulness, albeit in relation to a person other than the plaintiff? Last but not least he offers a further factor that is relevant in determining whether public policy issues point towards liability for negligently caused pure economic loss, i.e. whether the defendant possesses skill in the particular field in

350) Neethling, Potgieter & Visser *Delict* 250
351) Neethling, Potgieter & Visser *Delict* 250
352) Burchell *Delict* 52-53
353) Supra; in this case a shareholder of a company sued the directors of the same company for failing to carry out an undertaking to acquire certain land on behalf of the company, thereby causing the plaintiff's interest in the company to be diminished.

which he gives the negligent advice or statement, or professes skill in such field. Besides listing all these policy factors he recognises that the Appellate Division in South Africa has not yet been confronted with an argument in a case involving the alleged negligence of a legal practitioner similar to that in England, where it had been suggested that special policy factors may require the immunity of lawyers for conducting litigation negligently.

After having cited all these different policy factors, it is important to add that certainly every factor will not be relevant in each case, and those factors that are relevant in a particular instance do not operate independently. They are applied in various combinations to form the value judgment whether or not the particular activity is permitted according to the legal convictions of the community. And this value judgment is made from an objective point of view - that is to say, the question whether the activity is permitted, is not decided solely from the point of view of the actor, but from an objective vantage point taking into account all the relevant factors. Having now been confronted with all these policy considerations used by the courts in deciding cases relating to pure economic loss, the question arises as to why particularly this field should have been one of the homes for this phenomenon?

Firstly one can state that policy considerations have been applied in the field of negligently-caused pure economic loss for as long as this problem has been in issue in the courts. As already illustrated in the part dealing with English law, policy considerations come into play when one starts reconsidering or challenging old accepted rules or when one has to deal with a new field where a commonly accepted rule does not yet exist. When the courts had to decide, in the *Trust Bank* case, the question whether pure economic loss should be recoverable they (like all other courts previously confronted with this problem) had to decide whether the commonly accepted rule against recoverability should be followed. Logically the courts were not in a position to base their decision on positive law, as it was a positive law rule that was the subject of the decision (i.e. whether it shall be applied or not). However, the court, motivated by different considerations, took the step of granting an action and thus overruled the existing law. This case, although it can only be explained on the basis of a policy judgment, does not give an explanation as to why policy should play such a crucial role in the field of pure economic loss.[354]

354) Van Aswegen (1993) 56 *THRHR* supra at 192-193

The *Lillicrap* decision confirmed that the field of pure economic loss is one of the major playgrounds for judicial policy. In *Lillicrap* it was decided that a rule that pure economic loss is *prima facie* wrongful does not, and should not, exist. Such a rule would have degraded the need for judicial policy in each individual case. However, *Lillicrap* refused to impose *prima facie* wrongfulness, which resulted in the fact that we are today confronted with a wide and open rule which provides that wrongfulness in cases of negligently-caused pure economic loss has to be determined by the evaluation of the interests of the different parties concerned in the light of the interests of the community (*boni mores* test). The meaning of the concept of 'legal views of the community' was well illustrated by Van Aswegen:[355]

> 'However, the reference to the general accepted views of the community, does not simply imply a type of majority view based on a simple opinion poll. It presupposes a reflection of inherent values accepted in the community and apparent *inter alia* from the accepted legal standards and institutions of the community.'

In the special field of pure economic loss this test was usually based on various socio-economic considerations.[356] Originally these considerations where basically those that were aimed at avoiding an unlimited number of claimants and an indeterminate amount of liability. As was evident from the *Coronation Brick* case, it was attempted to achieve this aim by activating a sophisticated apparatus of different variations of foreseeability. However, as became obvious in the *Mac Lelland v Hulet* case this approach belongs to the past and foreseeability is today only one of many different considerations. What is striking in this new decision is the emphasis that the judges placed on considerations which relate to the economic analysis approach. Thus the court takes into account the value to the defendant and/or society of the object which the defendant was seeking to achieve when he conducted himself in the manner complained of; further it is taken into account whether there were reasonably practicable measures available to the defendant to avert the loss and whether the cost of such measures would have been reasonable proportionate to the loss which the plaintiff could have suffered.

355) Van Aswegen (1993) 56 *THRHR* supra at 193
356) Van Aswegen (1993) 56 *THRHR* supra at 180

It can be concluded when one considers the development of the courts' application of policy considerations in the field of pure economic loss over the last few years that the decision to render pure economic loss not *prima facie* wrongful, results in a partial departure from a positive law based law of delict based on inflexible requirements. As it is now incumbent upon the judge not only to apply a generally-accepted rule, but to consider various social-economic factors, his position as a law-maker is increasingly widened. On the other hand one has to register the fact that the advantage of the policy based approach, which tends to give the flexibility to adapt to new economic needs and to achieve a 'high degree of justice' in each individual case, can turn into the disadvantage of a far more uncertain law. This is so because a judgment based on policy applied to the specific facts of each individual case is far less predictable than one based on narrow rules. However, this danger of uncertainty is reduced if the courts openly present the considerations on which they base their decisions,[357] and through the subsequent analysis of those considerations in academic writing. Thus academics should be encouraged to offer systematic analyses of policy considerations - this might be called a paradoxon - which contribute to certainty in the field of negligently-caused pure economic loss. After a while the remaining uncertainty will also be reduced through the operation of the common law precedent rule,[358] but the flexibility of the new approach will remain.

Lastly one can state that the decision of *Mac Lelland v Hulet* [359] in the field of pure economic loss and the systematic approach of Burchell demonstrate very clearly the dynamic nature of uncodified South African law, if one considers, that in 1979 for the first time a claim for negligently-caused pure economic loss, based on Aquilian liability, was authoritatively recognised by the Appellate Division. One must, therefore, pay tribute to the courts and academic writers for developing in so a short

357) Van Aswegen (1993) 56 *THRHR* supra at 194 requires even more of judges and their judgments: 'However, because the judge is not the supreme legislator, and to minimise the most important objections to judicial law-making, he or she must perform this function with constraint and in a principled way...Policy decisions should fit in with existing legal rules, standards and underlying principles of law and justice. Judges should consciously strive not to succumb to personal, partisan or idiosyncratic preferences. Judges should apply the generally accepted legal views of the community unless such views conflict with immanent principles of justice.'

358) Van Aswegen (1993) 56 *THRHR* supra at 193 ssq

359)supra

time a system that makes it possible to predict with reasonable certainty the outcome of future claims.

One possible reason for this development might be the fact that South African law has, although it has naturally a principle based law of delict, has the advantage of the flexibility of an uncodified law. As a result of this, as just explained, South African law can open room for the operation of different policy considerations. Thus they are able to consider economical and social changes in new cases much more easily than other systems.

2.1.4. Doctrine of transferred loss

As it was done in the chapter dealing with English law now it shall be investigated whether South African courts apply a doctrine of transferred loss in cases where the loss is not suffered by the holder of the absolute right but as a result of contractual arrangements by a third party. As stated above, the writers on Roman-Dutch law gave some indication that economic or patrimonial loss, unconnected with any physical damage to a thing or any conduct in respect of a corporeal asset, did not necessarily present a bar to the recovery of damages.[360] The Aquilian action was subject to extension that resulted in Aquilian protection of the mere economic interest in a thing being extended to a fullo, to persons in similar relationships to the owner, and to the lessee of the services of a slave or servant.[361] These persons were allowed to recover damages assessed on the basis of their particular interest in the thing.[362] The possessor of a thing was also entitled to institute an action for recovery of damages.[363] Van der Walt even sees indications that Roman-Dutch law was prepared to make available the Aquilian action to every person who had an interest, real or personal, in a particular thing.[364]

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360) Voet *Commentarius* 20.1.11, 47.10.18; De Groot *Inleiding* 3.37.6, 3.37.9; Van Bynkershoek *Observationes* 1195

361) Voet *Commentarius* 9.2.10

362) Voet 9.2.10

363) De Groot 3.37.5 which was applied in *Smit v Saipem* supra, where the Appellate Division accepted that the Aquilian action was in principle available to an occupier who has an interest in the occupied thing: compare Van der Walt 8 *LAWSA* para 13

364) De Groot *Inleiding* 3.37.5, 3.37. 9; *Smit v Saipem* supra 929, 931; Compare Van der Walt *LAWSA* para 13

However, the accepted principle in modern South African law in the sphere of damages to property, is still that the owner or the holder of the real right is the plaintiff.[365] Thus the courts will not compensate a plaintiff's loss, which flows from a mere contractual interest in another's property (e.g. a purchaser without delivery to whom the risk has passed).[366] Although that is still the general principle concerning damage to property, South African courts were, however, prepared to extend a remedy to the hire-purchaser on the basis of his economic interest in the property.[367]

3. Pure Economic Loss Caused by Misrepresentation

Pure economic loss caused by a negligent statement gives rise to a very particular problem. It is not just the pure economic loss that distinguishes these cases from 'ordinary' delictual cases, but also the fact that it is merely information which causes the defendant to behave (or not to behave) in ways that cause him loss. Thus, cases of pure economic loss caused by negligent statements demand, apart from criteria discussed above, further, more specialised criteria to keep liability within reasonable bounds.

In *Administrateur, Natal v Trust Bank van Afrika Bpk* [368] the Appellate Division allowed, for the first time, an action based on Aquilian liability for the causing of pure economic loss by a negligent misstatement.[369]
In the *Trust Bank* case [370] the basis of liability for cases of pure economic loss caused by negligent misstatement and the criteria to keep such a liability within reasonable bounds are set out by Rumpff CJ: Besides mentioning that the action can and ought to be placed in the extended range of the *Lex Aquilia*, Rumpff CJ suggests

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365) Boberg *Delict* 104
366) Boberg *Delict* 104
367) Boberg *Delict* 104
368) Supra
369) Concerning the situation in the field of negligent statements before this case see Boberg (1961) *Annual Survey* 187 at 207 ssq where he referes to *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A); see also Boberg (1962) 79 *SALJ* 2 where he discusses *Currie Motors (Pretoria) (Pty) Ltd v Motor Union Insurance Co Ltd* 1961 (3) SA 872 (T)
370) *Administrateur, Natal v Trust Bank van Africa Bpk* supra at 832-833; for the situation before see *Suid-Afrikaanse Bantoetrust v Ross en Jacobz* 1977 (3) SA 184 (T); Burchell (1971) *Annual Survey* 141 at 173-174; Van der Walt (1977) *TSAR* 269

that the fear of the so-called 'limitless liability' can only then be allayed if in every given case it is the task of the court to decide whether in the particular circumstances there was a legal duty resting on the defendant not to make a misstatement to the plaintiff, and also whether the defendant, in the light of all the circumstances exercised reasonable care, *inter alia*, in determining the correctness of his representation. In the absence of a legal duty there is no unlawfulness. The court should also keep the ground of action within reasonable limits, it was said, by giving proper attention to the nature of the misstatements and the interpretation thereof and by giving proper attention to the problem of causation. However it is obvious that also in instances of this special kind of pure economic loss the requirement of wrongfulness is crucial in regard to the answering of the question whether one should compensate the loss so caused.

3.1. Wrongfulness

The above mentioned reasonableness or *boni mores* criterion is also applicable in these cases, just as it is in all cases concerning the question of wrongfulness.[371]

Where information is given informally there is, in principle, no legal duty to give the correct information.[372] Thus it is important to ascertain whether the misstatement was made in a business or professional context [373] or merely casually or in a social context;[374] certainly, an improper or malicious motive could render a misstatement unreasonable and thus wrongful.[375] Furthermore it is of interest whether the misstatement relates to a field of knowledge in which the defendant possesses or professes skill. Again a crucial consideration is whether the loss suffered was a reasonably foreseeable consequence of the misstatement.[376]

371) See Van Aswegen (1993) 56 *THRHR* supra at 180 ssq; Neethling, Potgieter & Visser *Delict* 252
372) Neethling, Potgieter & Visser *Delict* 252
373) Concerning a legal practitioner's liability towards a client's adversary see Midgley (1990) 53 *THRHR* 553; see also Wunsh (1988) *TSAR* 1
374) Corbett (1987) *SALJ* 52 at 59
375) Neethling, Potgieter & Visser *Delict* 252
376) Compare Burchell (1980) 97 *SALJ* supra; Neethling & Potgieter (1980) 43 *THRHR* supra

Last but not least one has to take into account whether the extent of the potential loss incurred is finite and identifiable with a particular claimant or claimants.[377] However, typical situations where liability is likely to arise are cases in which there is in principle a legal duty to furnish the correct information,[378] including where a person has a statutory duty to furnish correct information; where a person has a contractual undertaking to furnish correct information; (such a contractual duty also arises where the correctness of the information, explicitly or tacitly, is guaranteed); furthermore where a person, who by reason of a specific public office which he holds (such as a notary, a sworn appraiser or an auditor) has 'a kind of patent of credibility and efficiency conferred upon him by public authority' [379], furnishes information in his official capacity; and finally where a person, who by reason of his particular occupation claims to command professional knowledge and competence, furnishes information in a professional capacity.

Decisive for Aquilian liability also is that the existing legal duty was owed to the plaintiff. Because of that, the defendant's legal duty, and consequently his liability, are thus restricted to plaintiffs of whose identity he was certain at that time.

With regard to what was cited above concerning policy considerations, it is remarkable that the courts' main emphasis still lies on denying a legal duty where liability could lead to 'multiplicity of actions' that could be 'socially calamitous'. Finally, it is important to note that the courts created a further bar to liability by deciding in *Alliance Building Society v Deretitsch* [380] that the plaintiff himself must be the person who acted to his detriment as a result of the misrepresentation.[381]

3.2. Causation

As much as fault will not provide any special problems apart from what was said above, one has to keep an eye on the requirement of causation in cases of negligent

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377) Compare *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* supra at 916-917; Burchell (1980) 97 *SALJ* 1; Boberg *Delict* 123 ssq

378) Neethling, Potgieter & Visser *Delict* 252-253

379) Compare *Herschel v Mrupe* supra at 488; *EG Electric Co (Pty) Ltd v Franklin* supra at 705; *Perlman v Zoutendyk* supra at 328

380) 1941 TPD 203 at 216-217

381) Neethling, Potgieter & Visser *Delict* 255

statements; logically a statement cannot cause the loss directly; it requires consequential behaviour that causes the loss. Thus, causation is a criterion which can and must be used to keep liability in certain bounds, as Rumpff CJ stated in *Administator, Natal v Trust Bank van Africa Bpk.* [382]
Liability requires that there be a factual causal link between the misrepresentation, the misunderstanding and the damage, i.e. that the plaintiff must in fact have believed that the misrepresentation is true and he must have acted to his detriment as a result of the misrepresentation.[383] Concerning the last point it has to be mentioned that it is inevitable that the plaintiff himself must be the person who acted to his disadvantage as a result of the misrepresentation.[384] Thus if someone else acted to the disadvantage of the plaintiff motivated by the misrepresentation, the plaintiff does not have an action on the ground of negligent misrepresentation.

It must be acknowledged that (in the specific field of misrepresentation in contrast to other parts of delict) the factual causation is still held to be absent if the misrepresentation was not the only or at least the most important cause of the misunderstanding.[385]

4. An Established Category of Wrongfulness, i.e. the Dependant's Right to Compensation for Loss of Support Resulting from his Breadwinner's Death

Although compensation for pure economic loss was properly recognised only in 1979, there were always cases of that nature in South Africa which were recognised as wrongful. Besides actions in instances of wrongful competition or the right of the breadwinner to compensation for medical expenses incurred on behalf of his dependant there exists an action for compensation for loss of support resulting from

382) Supra at 833
383) Compare Neethling, Potgieter & Visser *Delict* 254-255
384) *Alliance Building Society v Deretitch* supra at 216-217
385) See *Perlman v Zoutendyk* 1934 CPD at 328, 335-336, where it was held that the negligent statement must be 'the sole cause', or 'the cause...so preponderatingly important as to outweigh all other', or 'virtually equivalent to the sole cause' of the misleading.; 'this reasoning still represents the law as in *Administrateur, Natal v Trust Bank van Africa* supra at 833 the court implied that consequently to the plaintiff's misleading himself through his own mistake the factual causation was missing': compare Neethling, Potgieter & Visser *Delict* 255 who refere to *Credé v Standard Bank of SA Ltd* 1988 (4) SA 786 (EC) at 790-791

one's breadwinner's death.[386] It will also be used as an example of an instance where the tradition of law was able to create criteria that excluded unlimited liability.[387] Furthermore it will be necessary to investigate whether the action of dependants is really one of pure economic loss.

The action of dependants for the recovery of loss suffered as a result of the wrongful killing of their breadwinner was alien to Roman jurists. And even though it is nowadays recognised that its origin was at least partly in Germanic law, its history is still, to a certain degree, uncertain.[388] In Roman-Dutch law, that much can be said, an action was available to dependants to recover compensation for their loss caused by the wrongful killing of their breadwinner.[389] Most Roman-Dutch writers probably considered the action of dependant as independent of that of the breadwinner.[390] However Voet and Mattaeus held the independent action to be an extension of the scope of the *lex Aquilian*.[391] An necessary requirement for this action was that the deceased owed a legal duty of support to the dependant and that the dependant was actually maintained by the deceased.[392] In opposition to the dependants, the heirs of a deceased were in principle not entitled to claim damages for the wrongful killing of the deceased,[393] whereas they were entitled to recover the funeral expenses as well as the medical costs resulting from the deceased's death.[394]

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386) For detailed reading Davel *Skadevergoeding aan Afhanklikes by die Dood van 'n Broodwinner* 1987

387) For comprehensive reading it shall be refered to Davel *Skadevergoeding aan Afhanklikes by die Dood van 'n Broodwinner*; see also Neethling, Potgieter & Visser *Delict* 236 ssq; Burchell *Delict* 233 ssq; Boberg (1964) 81 *SALJ* 194, 346; (1965) 82 *SALJ* 96, 247, 324 in which he offeres a comparative study of the dependants action (England, Scotland, Canada, Australia, New-Zealand and South Africa)

388) Van der Walt 8 *LAWSA* para 15 referring to Feenstra (1958) *Acta Juridica* 27, Feenstra (1972) *Acta Juridica* 227

389) Van der Walt 8 *LAWSA* para 15 referring to De Groot *Inleiding* 3.32.16, 3.33.2; Voet *Commentarius* 9 2 11

390) Van der Walt 8 *LAWSA* para 15 referring to De Groot *Inleiding* 3.32.16, 3.33.2; Feenstra (1958) *Acta Juridica* supra; Feenstra (1972) *Acta Juridica* supra

391) Van der Walt 8 *LAWSA* para 15 referring to Voet *Commentarius* 9.2.11

392) Van der Walt 8 *LAWSA* para 15 referring to De Groot *Ineiding* 3.33.2; *De Jure Belli ac Pacis*
2.17.13; see Feenstra (1958) *Acta Juridica* supra at 33

393) Van der Walt 8 *LAWSA* para 15 referring to De Groot *Inleiding* 3 32 10; 3 33 2

394) Van der Walt 8 *LAWSA* para 15 referring to De Groot *Inleiding* 3 33 2; Feenstra (1958) *Acta Juridica* supra at 29; compare *Lockhat's Estate v North British and Mercantile Insurance Co Ltd* 1959 3 SA 295 (A)

Today it is commonly accepted that the dependant of a person killed in a wrongful and culpable manner, may claim damages for loss of maintenance from the wrongdoer with the *actio legis Aquiliae*.[395] The criteria of this action were summarised in *Evins v Shield Insurance Co Ltd* [396] when the court required for the cause of action a wrongful act by the defendant causing the death of the deceased, concomitant *culpa* (or *dolus*) on the part of the defendant, a legal right to be supported by the deceased, and *damnum*, in the sense of a real deprivation of anticipated support.

The question arises, however, as to whether this action is really one of pure economic loss. This question can be answered in the affirmative, if the plaintiff's action is independent of that of the victim or victims.

4.1. Has the plaintiff an independent cause of action?

Theoretically the dependant's claim is based on the wrongful, culpable causing of damage to himself. The infringement of the dependant's personal subjective right to maintenance against the breadwinner constitutes the wrongfulness. This theoretically correct approach [397] was followed by the Apportionment of Damages Amendment Act [398], which provides that if the negligent conduct of both the deceased breadwinner and the third party contributed to the breadwinner's death and consequently to the dependant's loss of maintenance, they are regarded as joint wrongdoers; therefore both are treated as tortfeasors, as against the defendant.[399]

Finally the nature of the action becomes obvious reading *Evins v Shield Insurance Co Ltd* [400]:

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395) Boberg *Delict* 104
396) 1980 (2) SA 814 (A) at 839
397) Concerning the pre 1971 discussion in literature about whether the action is independent see McKerron (1936) 53 *SALJ* 413; McKerron (1950) 67 *SALJ* 62; Pollak (1931) 48 *SALJ* 191; Miller (1955) 72 *SALJ* 233; Schwietering (1957) 20 *THRHR* 138; Price (1949) 66 *SALJ* 269; Boberg (1974) 91 *SALJ* 19; Joubert (1958) 21 *THRHR* 12; for further reading see Boberg *Delict* 728 ssq, 733 ssq; Scott (1976) 9 *De Jure* 218
398) S 1(a) (1B) Act 58 of 1971
399) Compare Neethling, Potgieter & Visser *Delict* 237-238
400) Supra at 837-838

> 'An essential and unusual feature of the remedy is that, while the defendant incurs liability because he has acted wrongfully and negligently (or with *dolus*) towards the deceased and thereby caused the death of the deceased, the claimant (the dependant) clarifies his right of action not through the deceased or from his estate but from the facts that he has been injured by the death of the deceased and that the defendant is in law responsible therefore.'

Although it is clear from this passage that the dependants sue in their own right for loss of support resulting from the death of their breadwinner, this does not exclude the possibility that the wrongdoer's conduct may at the same time also constitute a delict against the breadwinner.[401] Thus it is not deniable that the dependant's claim is definitely based on a delict committed against himself.

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401) Neethling, Potgieter & Visser *Delict* 237

4.2. Restrictions

At this stage it is appropriate to investigate whether the independent Roman-Dutch action of dependants is subject to the same restrictions as the English action. Thus the question must be answered whether the plaintiff's action is restricted in a way that the act has to be such as would - if death had not occurred - have entitled the injured party to maintain an action and recover damages in respect thereof.

If it turns out to be so, the result would be that any defence which could have been raised successfully against a claim by the breadwinner were he alive, should also succeed against the dependant's claim. The effect of this approach would be that a ground of justification raised with regard to the breadwinner's death, a *pactum de non petendo in anticipando* concluded by him, and contributory negligence on his part must be considered.

And indeed the law as it stands today is to the effect that if the wrongdoer acted in accordance with the valid consent of the breadwinner, or caused his death in self-defence, his act will not be wrongful either against the breadwinner or the dependant. This result is not so obvious if one accepts the theoretically correct approach, i.e. that the delict is committed against the dependant.[402] However, Neethling, Potgieter & Visser explain that this result is still the same when one follows the theoretically correct approach:

> 'As against the breadwinner the presence of consent or self-defence excludes wrongfulness. As against the dependant these grounds of justification naturally have no direct operation since they are *res inter alios acta* as far as he is concerned. Nevertheless the infringement of the dependant's interest in receiving maintenance is also lawful because in the circumstances the infringement - and this speaks for itself - cannot be regarded as unreasonable or *contra bonos mores*.'[403]

On the other hand, in the case of a *pactum de non petendo in anticipando* concluded by the breadwinner the wrongdoer is not freed vis-à-vis the dependant, because the

402) Neethling, Potgieter & Visser *Delict* 239
403) Neethling, Potgieter & Visser *Delict* 240

patum de non petendo does not remove wrongfulness but is only an undertaking *inter se* not to sue. Even an older decision came to the same result: In *Jameson's Minors v CSAR* [404] the breadwinner was killed in a train accident caused by the negligent conduct of the railways. The breadwinner was a passenger in possession of what is known as a 'free pass' that excluded the liability of the railways in the specific circumstances. The court decided that such a *pactum* was no defence against the breadwinner's dependants. This decision can be based on the one hand on the theoretically correct approach to the action of dependants; on the other hand a breadwinner should in any case not be able to conclude a *pactum de non petendo* which burdens his dependants' action, as such action contradicts the *boni mores*.[405]

Further on the independence of the action of the dependants could perhaps be restricted in cases when the victim (breadwinner) has shown contributory negligence. Concerning this question the position, before the coming into operation of the Apportionment of Damages Amendment Act (1971), was as follows. The Apportionment of Damages Act 34 of 1956 left the common law principles concerning the action of dependants unchanged. According to this the so called last opportunity rule was applied.[406] This rule stated that if the breadwinner had the last opportunity to avoid the accident, it was a total defence against the dependant's action. On the other hand the dependant had the advantage of a full claim if the third party had had the last opportunity.

Today the position is dealt with by the Apportionment of Damages Amendment Act [407], with the effect that the breadwinner and the third party are regarded as joint wrongdoers as against the dependant and he can therefore claim his full compensation. Thus, in this way, too, it is recognised that the dependant's claim is regarded as based on a delict committed against the dependant himself.

Now, after focusing on the mechanism of the dependant's action in relation to contributory negligence and *pactum de non petendo* one can say without hesitation that, on spite of its limitation in cases of consent or self defence, the South African

404) 1908 TS 575
405) Neethling, Potgieter & Visser *Delict* 239-240; *contra* Boberg *Delict* 733-736, 742
406) *Union Government v Lee* 1927 AD 202
407) S 1(a)(1B) Act 58 of 1971

action of dependants today has a totally independent nature, as none of these grounds can constitute a bar to the action of the dependant;[408] therefrom one can conclude that it is an action which allows one to recover pure economic loss in special cases. To determine whether one can deduce any general principles out of this field relating to the question how to avoid unlimited liability or a multiplicity of claimants let us consider the action of dependants in this regard.

4.3. Which dependants may claim?

Fundamental to this remedy is the existence of a duty of support *ex lege* - that is a duty to support, created by operation of law and not by agreement - between the plaintiff and the person physically affected by the dependant's act.[409] This duty serves at once to distinguish the plaintiff from a person whose interest in the welfare of the physical victim is merely contractual.[410] This requirement does not upset the systematic aspects of the action if one considers that for each legal duty there is a concomitant personal right to maintenance, the infringement of which points to wrongful conduct against the dependant.[411] Such a common legal duty to support may arise either by marriage or blood relationship. Furthermore it is a requirement that the dependant should be in need of such a support and that the breadwinner is capable of providing it.[412]

Duties to support can for example arise between spouses; a right of maintenance exists between a child (even a major) and his father or his mother; and vice versa between a parent and his own child (even a minor);[413] and even grandparents have, in certain constellations, [414] a right to maintenance against their grandchildren.

408) See in this regard Dendy (1990) 107 *SALJ* 55

409) Concerning the position in cases of a customary union see Burchell *Delict* 236

410) *Vaughan, NO v SA National Trust & Assurance Co Ltd* 1954 (3) SA 667 (C); Neethling, Potgieter & Visser *Delict* 238

411) *Ismail v General Accident Insurance Co SA Ltd* 1989 (2) SA 468 (D) at 473

412) *Constantia Versekeringsmaatskappy Bpk v Victor* 1986 (1) SA 601 (A) at 612-613; see also Dendy (1986) *Annual Survey* 177 at 201 ssq; Parmanand (1985) *De Rebus* 113

413) See for example *Anthony v Cape Town Municipality* 1967 (4) SA 455 (A)

414) Only where their children are dead or unable to provide maintenance.; see *Barnes v Union and South West Africa Insurance Co Ltd* 1977 (3) SA 502 (EC)

Finally a brother (or sister) may also claim maintenance from brothers or sisters if their parents are unable to support them.

For the action of dependants to succeed, besides a legal duty to support, it is further required that the breadwinner must have supplied the maintenance during his life from income derived in a lawful manner.[415]

4.4. What is the amount of damages the dependant is entitled to?

The basis for the determination of the quantum is, that the claim for loss of support, must be calculable in pecuniary terms.[416] Normally the loss arises either in the form of loss of income or in the form of deprivation of domestic services.[417] The measure of damages is the difference between the dependant's position resulting from the loss of support and the position he could reasonably have been expected to be in had the deceased not died.[418]

Like in English law, the quantum of damages consists in the victim's earnings up to the time when he would have died had it not been for the accident, minus the amount which would have gone to his own personal use. But as stated above, this limitation of damages depends on the factual situation involved here and not on particular rules of law concerning the recoverability of pure economic loss.

Thus one can say the dependant's action is one situation where it was possible to create narrow and certain requirements that contribute to certainty in this field of pure economic loss. It is interesting that it was not the legislature that supplied these requirements, but the judiciary. Finally it should be noted that, although the courts claim to have based this action on the Aquilian liability, it is only partly identical with the Aquilian action. Thus one can probably say the action of dependants is

415) Neethling, Potgieter & Visser *Delict* 239

416) Davel (1985) 18 *De Jure* 46; Burchell *Delict* 237

417) Burchell *Delict* 123, 236 footnote 24; concerning the problem whether the dependants can recover damages for loss of support which the breadwinner paid out of the 'fruits' of illegal activities see Burchell & Dendy (1985) *Annual Survey* 179 at 209 ssq with reference to *Ferguson v Santam Insurance Ltd* 1985 (1) SA 207 (C)

418) See *Victor No v Constantia Insurance Co Ltd* 1985 (1) SA 118 (C) at 120; *Jameson's Minors v CSAR* 1908 TS 575 at 603

practically an action not dealt with according to the general Aquilian principles applied in the field of pure economic loss. Consequently it offers little help for the attempt to find common criteria to approach the field of pure economic loss.[419]

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419) Compare the Public Accountants' and Auditors' Act 51 of 1951 (as amended by the Public Accountants' and Auditors' Amendment Act 42 of 1982) where also one special field of pure economic loss was dealt with seprately from the general approach based on the *lex Aquilia*.

CHAPTER III

PURE ECONOMIC LOSS IN GERMANY

1. Introduction

The BGB, enacted in 1900 and drafted mainly by Pandectists, [420] was obviously inspired by the liberal economic system of the 19th century. The following statement by von Jhering gives some idea of the dominant ethos of the time:

> 'Just think what it would lead to if everyone could be sued in tort for gross negligence as well as fraud! Anything and everything - an unwitting utterance, carrying a tale, making a false report, giving bad advice, speaking an unconsidered judgment, recommending an undeserving serving-maid one used to employ, answering a traveller's question about the way or the time or whatever - all this, if grossly negligent, would make one liable for the harm it caused even if one were in perfect good faith; if the *actio doli* were so extended, it would become the veritable scourge of social and commercial intercourse, conversation would be gravely inhibited, and the most innocent language would become a snare.'[421]

Rather than the general principle of *alterum non laedere*, the BGB contains, in its fundamental statement regarding the German law of delict [422], i.e. in §823 I BGB[423], a specific list of rights, the infringement of which could lead to the recovery of damages.[424] Protected are life, body, health, freedom, property and 'any

420) Zimmermann *Obligations* 1036
421) Von Jhering *Jher Jhb* 4 1861 1, 12 sqq (translated by Zweigert & Kötz *Introduction* 193)
422) The provisions on liability for unlawful conduct (*Haftung aus unerlaubter Handlung*) are found in §§823-852 BGB, at the end of Book Two, which is devoted to the Law of Obligations (*Schuldverhältnisse*).
423) §823 BGB: '(I) A person who wilfully or negligently injures the life, body, health, freedom, property, or other right of another contrary to law is bound to compensate him for any damage arising therefrom.' (Translated by Lawson & Markesinis *Tortious Liability* 57)
424) Von Jhering *Jher Jhb* 4 1861 1, 12 sqq (translated by Zweigert & Kötz *Introduction* 193)

other right'. The 'or any other right' clause was intended to refer only to the interests which the legal order protects *erga omnes* - real rights such as patents, copyright, trade marks, servitudes and rent charges, possessory rights to acquire a thing such as is enjoyed by a conditional buyer and other industrial property rights regulated in special statutes.[425] For liability to ensue, the violation of these rights must have been unlawful as well as culpable (intentional or negligent), and there must have been a causal link between the defendant's conduct (which could be an act or an omission) and the harm suffered by the plaintiff. The courts and the majority of writers agree that the requirement of wrongfulness is satisfied by any invasion of a legal interest specified in §823 I BGB, which cannot be justified on the grounds of self-defence, necessity, or other justification grounds.[426] Finally, it is impossible to claim compensation for pure economic loss in terms of this article: The BGB allows one to claim pure economic loss on a basis of delict only in certain cases. The defendant who causes pure economic loss due to the culpable contravention of a statute designed to protect another, will be held liable to the plaintiff in terms of §823 II BGB [427]. Protective statutes of this kind include all those rules of private and public law, especially criminal law, the main purpose of which it is to protect an individual or a group of individuals rather than the public as a whole. Compensation for harm is claimable only if it results from the very danger that it was the purpose of the protective statute to guard against.[428]

Furthermore §824 BGB [429] renders a person liable in damages if he publishes facts which he knows or should have known to be untrue and which might prejudice another person's credit or cause him other harm in his trade or profession.

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425) Compare Zweigert & Kötz *Introduction* 294
426) Horn, Kötz & Leser *German Law* 141; Zweigert & Kötz *Introduction* 193
427) §823 BGB: '(II) The same obligation (as in §823 I BGB) attaches to a 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.' (Translated by Lawson & Markesinis *Tortious Liability* 57)
428) Horn, Kötz & Leser *German Law* 156
429) §824 BGB: 'A person who maintains or publishes, contrary to the truth, a statement calculated to endanger the credit of another, or to injure his earnings or prospects in any other manner, must compensate the other for any damage arising therefrom, even if he does not know of its untruth, provided he ought to know. A communication the untruth of which is unknown to the person making it does not thereby render him liable to make compensation, if

As in England and South Africa, the action by dependants of victims of fatal accidents forms an exception in the field of pure economic loss. In Germany the actions of the dependants are codified in §§844, 845 BGB, which offer certain, narrow requirements that protect the wrongdoer against unlimited delictual liability.[430]
Finally, §826 BGB [431] offers the possibility of suing for harm in the form of pure economic loss which was intentionally caused to another in a way which is contra bonos mores. The courts have used this provision to impose liability in a wide variety of cases where one party has caused harm to another by behaviour so offensive and improper as to shock the average person in the relevant sector of society.[432] Since the remedy is not applicable in cases of negligence, no further attention will be devoted to this paragraph.

Although there are moves [433] in Germany to extend the scope of §823 I BGB towards a position where it would embody the general principle of *alterum non laedere*, the legislative has until now not been prepared to alter the law in this way. It must be remembered, however, that, under social pressure and taking into account

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he or the recipient of the communication has a justifiable interest in it.' (Translated by Lawson & Markesinis *Tortious Liability* 57)

430) §844 BGB: '(I) In the case of causing death the person bound to make compensation must make good the funeral expenses to the person on whom the obligation of bearing such expenses lies.
(II) If the deceased at the time of the injury stood in a relation to a third party by virtue of which he was or might become bound by law to furnish maintenance to him, and if in the consequence of the death such third party is deprived of the right to claim maintenance, the person bound to compensation must compensate the third party by the payment of a money annuity, in so far as the deceased would have been bound to furnish maintenance during the presumable duration of his life; the provision of §843 II to IV BGB apply *mutatis mutandis*. The obligation to make compensation arises even if at the time of the injury the third party was only *en ventre sa mere*.';
§845 BGB: 'In the case of causing death, or of causing injury to body or health, or in the case of deprivation of liberty, if the injured party was bound by law to perform services in favour of a third party in his household or industry, the person bound to make compensation must compensate the third party for the loss of services by the payment of a money annuity. The provision of 843 II to IV apply *mutatis mutandis*.' (Translated by Lawson & Markesinis *Tortious Liability* 61)

431) §826 BGB: 'A person who wilfully causes damage to another in a manner *contra bonos mores* is bound to compensate the other for the damage.' (Translated by Lawson & Markesinis *Tortious Liability* 57)

432) Horn, Kötz & Leser *German Law* 156

433) Picker *JZ* 1987, 1041 ssq

of the need of society, the courts have for some time been prepared to deal with same fields of pure economic loss under §823 I BGB by interpreting the term 'property' broadly or by construing (while making use of the constitution) new absolute rights, namely the so called *Rahmenrechte* (frame rights). Already in 1904 they accepted a right to an *eingerichteten und ausgeübten Gewerbebetrieb* (established and operative business) [434], which is today covered by article 14 I GG [435]. In 1954 the right of personality was recognised as a sonstiges Recht in terms of §823 I BGB on the basis of article 2 I GG.[436] (Since the latter is dealt with under the actio iniuriarum and not under the lex Aquilia in South Africa, it, shall not be the subject of further discussion in this dissertation.) Subsequently the courts also found a way to grant 'contractual' actions in the absence of a contract between the two parties, i.e. in cases of so-called *culpa in contrahendo*, or even under certain circumstances where the parties were not even preparing to contract, i.e. in cases of the *Vertrag mit Schutzwirkung zugunsten Dritter* (a contract with a protective ambit towards a third party). Last but not least, the *Drittschadensliquidation* (liquidation of a third person's loss) must be mentioned, an instance of liability which was especially created to cover certain cases of pure economic loss.

We begin the investigation of the German approach towards the compensation of pure economic loss with a consideration of the law of delict.

2. Pure Economic Loss in the German Law of Delict

As mentioned before, the 25th title of the second book of the BGB is entitled *Unerlaubte Handlung*.[437] According to this rubric the central requirement for delictual liability is that the defendant should have acted in a forbidden manner.

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434) Markesinis *Comparative Law* 35

435) Article 14 I GG: 'Property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws.' (Translated by Karpen *The Constitution of the Federal Republic of Germany* 333); covered by the term 'property' is according to the Federal Constitutional Court also an established and operating business. (Compare BVerfGE 1, 264, 276 ssq; Badura in Benda/Maihofer/Vogel (editors) *Handbuch des Verfassungsrechts* 1983, 653, 692)

436) Horn, Kötz & Leser *German Law* 150

437) Cf by way of introduction *Introduction* 292 ssq

Furthermore, according to the *Verschuldensprincip* (fault-principle) of the BGB fault is also required. Thus, people are liable for their wrongful and culpable conduct.[438] However, a characteristic feature of the BGB is that its creators were not content with merely codifying this principle in one broad remedy. In stead the drafters created no fewer than 30 paragraphs to describe the various criteria or limitations of liability for *Unerlaubte Handlung.*

Although these paragraphs, with their specific, often narrow requirements seem natural to a modern German lawyer, the form of this now 93 years old law of delict has been the subject of discussion throughout its history until today.[439] For example the first draft of the BGB wanted to place the following clause at the beginning of the dealing with the law of delict (§704 I):[440]

> '*Hat jemand durch eine aus Vorsatz oder Fahrlässigkeit begangene Handlung...einem anderen einen Schaden zugefügt...so ist er dem anderen zum Ersatz des durch die Handlung verursachten Schadens verpflichtet.*'[441]

This wide general clause of delictual liability obviously has its model in article 1382 of the French Code Civil of 1803:

> '*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.*'[442]

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438) Obvioulsy this rubric does not actually describe all instances of liability mentioned under this title. The requirement of the *Unerlaubte Handlung* is not, for example, relevant to the liability of the holder of an animal, which is dealt with in §833 1 BGB. Obviously the possession of an animal is not wrongful. Also not wrongful is the attack of an animal (if not provocated by someone), but this expressly is not the reason for liability. The reason for liability is the fact of endangerment.

439) *MünchKomm*-Mertens Vor §§823-853 Rz 16 ssq

440) See Mugdan *Die Gesamelten Materialien Zum BGB Für Das Deutsche Reich* Band 2 *Recht Der Schuldverhältnisse* CXXII-CXXIII

441) 'A person who causes by his wilfully or negligently acting...any damage to another person, is bound to compensate him for any damage arising therefrom.'

442) 'Every one is responsible for the injury which he has caused not only owing to his own act, but owing to his negligence or his imprudence.' (Translated by Cachard *The French Civil Code* 380)

In the late 1930s a committee of the Akademie für *Deutsches Recht* (Academy of German Law) again attempted a reform of the German law of delict. One of the interesting results to come out of this commitee was a recommendation to introduce a comprehensive general clause into the law of delict, which was to be formulated as follows [443]:

> '(I) *Die vorsätzliche oder fahrlässige rechtswidrige Schädigung eines anderen verpflichtet zum Schadensersatz.*
> (II) *Rechtswidrig ist eine Handlung oder Unterlassung dann, wenn sie gegen eine von der Rechtsordnung aufgestellte Verpflichtung verstößt, die den Schutz der Persönlichkeit oder des Vermögens des Geschädigten bezweckt.*
> (III) *Rechtswidrig handelt immer, wer gröblich gegen anerkannte Grundsätze des völkischen Zusammenlebens verstößt.*'[444]

However, this recommendation was not adopted as part of the BGB and the further attempts - in the 1960's and 1970's - at reform of the BGB did not include a discussion as to whether or not to protect the *Vermögen* (patrimony) as a separate entity.[445]

In contrast to this position, §330 of the *Zivilgesetzbuch* of the former German Democratic Republic (of 19.6.1975) contained a general clause of delictual liability, which also protected the estate of a person. It was formulated as follows:

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443) Compare *MünchKomm*-Mertens Vor §§823-853 Rz 16 ssq; see also Nipperdy & Säcker *NJW* 1967, 1985

444) '(I) The deliberately or negligently wrongfully causing of damage to someone else bounds to compensation.
(II) Wrongful is an act or omission, if they breach the duty imposed by the legal order, which has as purpose to protect the personality or the patrimony of the victim.
(III) Wrongfully acts someone, who contravenes grossly to commonly accepted principles of national social existence.'

445) About the reform discussion see *MünchKomm*-Mertens Vor §§823-853 Rd 16 ssq

> *'Ein Bürger oder Betrieb, der unter Verletzung ihm obliegender Pflichten rechtswidrig einen Schaden verursacht, ist zum Ersatz des Schadens verpflichtet.'*[446]

However, §333 of the *Zivilgesetzbuch* limited the broad principle by denying compensation if there was no fault on the part of the defendant. And, furthermore, the *Zivilgesetzbuch* contained another limitation by stating in §332 that in cases of damage caused indirectly, the plaintiff will have an action only if this is expressly mentioned in a further statute or if it is required in exceptional circumstances because of considerations of fairness.

Recently Picker [447] once again opened up the discussion of a comprehensive reform of the law of delict with the aim of protecting the *Vermögen* (patrimony) by introducing a general clause relating to delictual liability. However, in spite of all these attempts, the main principles, especially the exclusion of one's 'patrimony' from comprehensive delictual protection, remained unchanged. Reasons for the reluctance to change are twofold:

First, it has been suggested that the requirement of wrongfulness would require further definition to operate successfully within a general clause of delictual liability. This is so because one could then no longer consider all harm caused as being *prima facie* wrongful. For example, someone who drives into a parking space makes it impossible for someone else to use it, but certainly is not acting in a 'forbidden manner'. Similarly, a variety of actions in the world of business competition results regularly in harm on the part of the competitor, but is nevertheless not necessarily forbidden.

Secondly, the introduction of a wide, general delictual clause might open up the question of how to determine who is entitled to claim. Often an action causes damage to a multitude of people. The injuring of an employee, for example, could also cause damage to the employer, as he has to pay the salary during the employee's convalescence without being entitled to the services of the employee. Similarly, in

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446) 'A citizen or a business, who by the breach of a duty cause wrongful damage, are bound to compensate the damage.'

447) Picker *JZ* 1987, 1041 ssq

the case of the killing of a customer, the supermarket owner, who has lost a customer will suffer damages due to his loss of that person's business.

Thus, the reason why the legislature was until now not prepared to amend the law of delict - and more specifically to amend §823 BGB - was to avoid problems such as these. This meant, however, that the courts, in circumstances where they deemed it proper to allow an action for pure economic loss caused negligently, had to find solutions by applying traditional remedies. One measure they used was to interpret extensively the available legislative provisions relating to delict. To explain this development, it is necessary to deal with each provision separately.

2.1. Pure economic loss in terms of §823 I BGB

As indicated above, the basic provision of the German law of delict - §823 I BGB - protects (besides life, body, health, freedom and ownership) those interests that are, somewhat enigmatically, styled 'other rights'. These include all the interests that the law protects *erga omnes*, for instance, real rights such as servitudes and rent charges, the right to one's good name, patent rights, and other industrial property rights that are regulated in special statutes.

However, one does not, according to the prevailing view, have an 'other right' in the sense of §823 I BGB in one's *Vermögen* (patrimony).[448] Consequently people who suffer loss caused indirectly - i.e. as a result of an infringement of another person's legally protected right - will normally not be entitled to compensation. Formulated differently, culpable behaviour which causes the victim only 'pure' economic harm, unconnected to any personal injury or damage to property or the invasion of any 'other right', does not give rise to a claim under §823 I BGB.[449] Thus the shop owner, who loses income due to the killing of his customer, will not be entitled to compensation. But on the other hand there is no doubt that a person who suffers personal injury and damage to his car in a traffic accident can claim compensation for all the economic loss (such as medical expenses or the cost of renting a car) which

448) Horn, Kötz & Leser *German Law* 149
449) Horn, Kötz & Leser *German Law* 149

flows from the personal injury or from the damage to the car.[450] This approach, with its narrow requirements, was, however, not acquiesced in by the courts:

2.1.1. Extension of the ambit of §823 I BGB by a wide interpretation of the term 'property'

One measure used by the German courts to cater for cases that are treated as instances of pure economic loss in other systems , was to extend the ambit of property by giving the term a wide interpretation.[451] Since §903 BGB [452] establishes the right of an owner to use his property in whatever way he deems fit, the courts extended the protection of property to include protection against the disturbance of the use of property, where such disturbance occurred in ways other than the complete withdrawal or withholding of the property.[453]

The courts considered mainly two questions in deciding whether or not the disturbance of the use of property should give rise to an action. First it was said that the disturbance of the use has to relate to the property itself and that the use has to be disturbed for everybody and not merely for the owner.[454] Consequently, in cases where a car owner's driving licence was wrongfully revoked, the courts refused to give an action, as other persons were still able to use the car;[455] on the other hand, the courts would probably not hesitate to impose liability if the registration papers of a car were to be withheld. Nevertheless, the *Bundesgerichtshof* held that there was not an infringement of property when the access to a supply pipe was impeded and held that it is required that the pipe should not be functional at all.[456]

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450) Horn, Kötz & Leser *German Law* 149

451) See in this regard the comparative study by Stoll & Visser (1990) 23 *De Jure* 347 concerning delictual damages for the loss of use of property in terms of South African and German law; see also the comparative note by Fleming (1989) *LQR* 508

452) §903 BGB: 'The owner of a thing may, to the extent that it is not contrary to the law or the rights of third parties, deal with the thing as he pleases and exclude others from any interference.' (Translated by Lawson & Markesinis *Tortious Liability* 62)

453) *MünchKomm*-Mertens §823 Rz 90 ssq; *Palandt*-Thomas §823 (4); *Erman*-Drees §823 Rz 22

454) BGHZ 63, 203, 206

455) BGHZ 63, 203

456) BGH *VersR* 1991, 105 ssq

Secondly, the *Bundesgerichtshof* required that the possibility of use should be removed, at least momentarily and entirely, and not merely be limited.[457] Thus it was held that there was an invasion of ownership in a case where the plaintiff's ship, though physically unimpaired, was marooned in a canal, the walls of which had collapsed owing to the defendant's negligence; but in regard to the ships that were merely locked out and consequently could not reach a certain location, the *Bundesgerichtshof* refused to hold the defendant liable.[458] At this point it must be mentioned, however, that the *Bundesgerichtshof* does not always adhere strictly to this approach. In a case of an interruption of electricity supply only an action for the consequentially destroyed property itself was given, although it cannot be denied that a factory without electricity supply is not usable at all.[459] Thus one can say that the question as to whether, and under which circumstances, the disturber of the use of property will be held to be an injury to property, has not yet been answered satisfactorily.

2.1.2. Extension of §823 I BGB by the criterion of a new right, i.e. the *eingerichtete und ausgeübte Gewerbebetrieb* (established and operative business)

The other measure to provide for cases that were originally treated as instances of irrecoverable pure economic loss, was the recognition of a new 'other right'.[460] A few years after the enactment of the BGB the *Rechsgericht* recognised the right of an 'established and operative business' as an 'other right' in terms of §823 I BGB.[461] The object of recognising this right was to protect the business owner in the entire field of his commercial activities against disturbance by others.[462] For example, according to the courts' developed case law the clientele and the business connections of an enterprise are protected.[463]

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457) Compare also BGHZ 55, 153; Möschel *Jus* 1977, 1 ssq
458) BGHZ 55, 153; compare also *Palandt*-Thomas §823 (4)
459) BGHZ 41, 123; *Erman*-Drees §823 Rz 22
460) *Erman*-Drees §823 Rz ssq; *MünchKomm*-Mertens §823 Rz 484 ssq; *Palandt*-Thomas §823 (5) G; see also Zweigert & Kötz *Introduction* 298
461) RGZ 58, 24, 30
462) *Erman*-Drees §823 Rz 38; compare BGHZ 45, 298, 307
463) *Erman*-Drees §823 Rz 38 ssq

The reason why the court recognised a 'business' as an 'other right' can be found in the legislature's failure to provide sufficient protection to business in all its forms. Originally the position was that if the damaging action was not done with an aim to compete in the field of trade, the *Gesetz gegen den unlauteren Wettbewerb* (Act against Unfair Competition) was not (and is today still not) applicable; in such a case only §826 BGB could be utilised, but that paragraph requires the intentional causing of harm, which must also have been contrary to the *boni mores*. However, the recognition of the 'established and operative business' as an 'other right' within §823 I BGB, enabled a business owner to claim compensation in cases of negligently caused harm. For example, the obligation to compensate harm resulting from the defendant's call to boycott the plaintiff's business was formerly based on §826 BGB. But obviously not every boycott is necessarily contrary to the *boni mores*. Intent will, furthermore, not always be provable or present on the part of the wrongdoer, as required by §826 BGB. (This is especially true in cases of error of law.) Consequently §826 BGB is often not applicable and the extension of §823 I BGB was a very necessary measure in order to compensate the business owner who suffered loss as a result of a wrongful boycott.[464]

In the legal literature the infringement of an 'established and operative business' is dealt with according to specific criteria. There is a move towards the creation of groups of cases according to the cases arising in practise. Thus, for example, Mertens chose a case law approach in the *Münchner Kommentar* and listed no fewer than fourteen groups of cases, where an infringement of an 'established and operative business' will normally be recognised.[465] Nevertheless according to the courts the following requirements must be fulfilled in order to constitute an invasion of the right of the 'established and operative business'.[466]

Firstly, the plaintiff must not have another action, which entitles him to compensation.[467] The liability for an 'established and operative business' is of a subsidiary character.[468] Thus, if one of the cited absolute rights of §823 I BGB is

464) Brox *Arbeitskampfrecht* Rdnr 335, 369; *MünchKomm*-Mertens §823 Rz 500, 509
465) *MünchKomm*-Mertens §823 Rz 495-516
466) *Erman*-Drees §823 Rz 34 ssq
467) BGHZ 36, 252, 257; 38, 200, 204; 45, 296; *MünchKomm*-Mertens §823 Rz 484, 487
468) BGHZ 43, 359; 45, 296, 307; *Palandt*-Thomas §823 (5) G

infringed or the requirements of §823 II BGB or §824 BGB are fulfilled, or the 'Act against Unfair Competition' is applicable, then liability for an infringement of the 'established and operative business' will be excluded.[469] Against this background the *Bundesgerichtshof* considered the following case.[470] C negligently cut an electricity cable belonging to A. As a consequence of this the incubated eggs at a chicken farm owned by B perished. Besides that, B suffered economic loss because he was unable to begin incubating further eggs until the cable was repaired. According to the *Bundesgerichtshof* C was obliged to compensate B for the rotten eggs, because this was an infringement of B's property. In regard to the consequential economic loss, i.e. the loss suffered because he could not use the incubator for a certain time to incubate further eggs, the court allowed the investigation of a possible infringement of B's 'established and operative' business.

Secondly, it is required that the business should actually be established and operating.[471] A business will be understood to be established and operating if it is set up for a long run and with the intention to make profit.[472] From the very beginning, therefore, it was made clear that this kind of protection could only avail business or commercial enterprises and not, for example, a legal partnership or a trade union or a club. This distinction, which has not escaped criticism, can perhaps be explained by the desire of the courts to keep within reasonable bounds the newly created right which was destined to under so further development.[473]

Thirdly it is necessary that the conduct of the defendant should in some way be 'business-connected', i.e. it must in some way be directed against the business activities as such. The courts were not satisfied if the conduct simply affected rights and interests that were separate from the business as a functioning unit.[474] Thus in the above mentioned chicken farm case, where C damaged A's cables, causing economic loss to B, who owned the chicken farm, the *Bundesgerichtshof* put emphasise on the fact that it would refuse to hold the cutting of the cable as being

469) BGHZ 36, 252, 257; 43, 359, 361; BGH *NJW* 1966, 2010, 2011; 1984, 1607, 1609; *MünchKomm*-Mertens §823 Rz 487
470) BGHZ 41, 123
471) *Erman*-Drees §823 Rz 36
472) Compare *Erman*-Drees §823 Rz 36; compare OLG München *NJW* 1977, 1106; BGHZ 3, 270; BGHZ 28, 320; BGH *NJW* 1969, 2047
473) Markesinis *Comparative Law* 36
474) BGHZ 29, 65; Horn, Kötz & Leser *German Law* 150

connected to B's chicken farm business. Consequently B would not be entitled to compensation for eggs which he was unable to incubate while being without electricity supply.[475] On the other hand, when pickets blocked the entry to a business, while they were labouring under an error as to the legality of this blockade (and thereby negligently and wrongfully caused loss to the business owner) the courts did not hesitate to hold this action as being business orientated.[476] The pickets were held liable to compensate the business owner's pure economic loss resulting from the blockade.

It must, furthermore, be pointed out that, just as in the case of property an 'established and operative business' is not only protected in respect of its physical existence but also in respect of its various other manifestations such as trade marks [477] business connections and outstanding debts.[478]

However the *Bundesgerichtshof* acknowledges that there is a real danger of unlimited liability as a consequence of too wide an interpretation of this right and consequentially emphasises that the protective ambit must not be extended unreasonably.[479]

2.1.3. *Haftungsbegründende Kausalität*

An action based on §823 I BGB requires, furthermore, that the infringement of the legally protected right was caused by the defendant and can be attributed to him (*Haftungsbegründende Kausalität*).

The first element of *Zurechnung* (attribution) is that of causation. The test for causation is contained in the *Äquivalenztheorie*. According to this theory causation is present when the infringement of the right cannot be imagined without the defendant's action (*conditio sine qua non*). But as the *Äquivalenztheorie* also includes improbable causal links, and to use only this test would therefore lead to a

475) See BGHZ 41, 123 (in this regard the decision was an *orbiter dictum*; however the same was already held authoritatively in BGHZ 29, 65)
476) Compare Brox *Arbeitskampfrecht* Rdnr 335, 349
477) BHHZ 28, 320
478) BGHZ 3, 270; *MünchKomm*-Mertens §823 Rz 485, 488
479) BGH *NJW* 1969, 2047

far too extensive liability. Consequently further criteria had to be developed to keep liability within acceptable limits.[480]

Thus the *Adäquanztheorie* was developed by the *Reichsgericht*,[481] according to which a causal connection is legally relevant only if the conduct of the defendant was a 'adequate' cause of the harm, i.e. only if the conduct was likely according to general human experience, to lead to the result which occurred, taking things as they normally happen and ignoring very peculiar and improbable turns of event. This is also known as the doctrine of the 'adequate' causal connection.)
The usefulness of the *Adäquanztheorie* is increasingly doubted,[482] and, in any event, it is clear that as the only criterion it is not sufficient or exhaustive, as there are cases where the adequate infringement of a legally protected right was held not to be attributable to the actor, but in other cases liability was held to exist, even though *Adäquanz* was absent. Thus when A causes an accident, then it is not unlikely that following cars - because the street is blocked - will drive on the pavement and by doing so cause damage to it. Nonetheless, the infringement of the right will not be ascribed to A.[483]

On the other hand despite the lack of *Adäquanz* one will attribute the injury to the defendant, if the actor's aim was to cause the specific consequence, for example where a well-aimed bullet hits the victim for which it was intended, even though this was extremely unlikely because of the long distance.

In addition the *Schutzzweck der Norm*-doctrine (purpose of the protective provision) was accepted as a further criterion besides the *Adäquanztheorie* (doctrine of the adequate causal connection).[484] According to this further doctrine, a person who causes harm by neglecting a particular statutory rule of conduct, will be held liable

480) In regard to all the limiting measures that were developed see *MünchKomm*-Mertens §823 Rz 1-44; *Palandt*-Thomas §823 (6) A
481) RGZ 158, 34; Horn, Kötz & Leser *Privat Law* 151; *MünchKomm*-Mertens §823 Rz 8, 20; *MünchKomm*-Grunsky Vor §249 Rz 40 ssq; *Palandt*-Thomas §823 (6) A
482) Compare *MünchKomm*-Mertens §823 Rz 20; *MünchKomm*-Grunsky Vor §249 Rz 42; critical Fränkel *Tatbestand und Zurechnung bei §823 I BGB* ssq; Huber *JZ* 1969, 677, 683
483) BGHZ 58, 162
484) Compare BGH *NJW* 1968, 2287; *Erman*-Drees Vor §823 Rz 58; whereas a minority of legal writers totally reject the application of the *Adäquanztheorie* (compare Huber JZ 1969, 677, 683; *MünchKomm*-Grunsky Vor §249 Rz 42);

for those consequences which, according to the meaning and purpose of the rule, the statute was meant to guard against.[485] In essence, then, this doctrine decrees that a statute does not usually afford absolute protection, but only protection against certain kinds of harm. If a fare dodger flees from a ticket conductor B, and B happens to get hurt during the pursuit, the position will be as follows: As a consequence of the protective purpose of §823 I BGB, only the kind of harm that was caused by the intensified risk of the pursuit, but not the harm that was caused by the general risk inherent in life, will be attributed to the fare dodger. Thus the *Bundesgerichtshof* was prepared to hold the defendant liable when the pursuing conductor fell on wet grass, but not when the harm was caused by a pulled muscle as a result of particular physical delicateness.[486]

2.1.4. Wrongfulness

According to the courts, [487] as well as the commonly accepted theories of academic writers [488], the infringement of a legally protected right in terms of §823 I BGB is *prima facie* wrongful - a conclusion which can only be upset if there is no ground of justification available. Thus, the *Tatbestandsmäßigkeit* [489] indicates the *prima facie* existence of wrongfulness (theory of the *Erfolgsunrecht*).[490]

According to a new theory, however, the wrongfulness of an act should not be determined according to the consequence of the act in question (ie infringment of the right), but should rather depend on an examination of whether the defendant's act

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485) Horn, Kötz & Leser *German Law* 152
486) BGH *NJW* 1971, 1982; for more about psychological causation compare *MünchKomm*-Mertens §823 Rz 15 b ssq
487) BGH NJW 1957, 785
488) *Palandt*-Thomas §823 (6) A; Baur 160 *ACP* 1961/62, 465; *Erman*-Drees §823 Rz 45
489) The requirement that the perpetrator's act must correspond to (or fulfil) the description of the remedy codified in the statute; compare Snyman *Criminal Law* 63 footnote 1 where he explains the term in the criminal law context: 'The term "Tatbestandsmäßigkeit", which is so often employed in German legal literature, cannot be translated into English in one single word. I must of necessity render it as "the requirement that the perpetrator's act must correspond to (or fulfil) the description of the prohibition"'.
490) Compare also Markesinis *Comparative Law* 41 ssq

contrary to law and as a result of that is adjudged to be wrongful (theory of the *Handlungsunrecht*).[491]

The difference between the two approaches can be illustrated with the facts of the following case. A drives his car (in accordance with the law) on the right hand side of the road (Germany !) around a corner and collides with a cyclist B, who is in the process of cutting the corner. Although B is hurt, A will not, according to the new theory, be bound to compensate B, as A was not acting wrongfully, i.e. he exercised the ordinary care, which the *Bundesgerichtshof* refers to as *verkehrsrichtiges Verhalten* [492]. However, the older, more common theory *Erfolgsunrecht* answers the question concerning the wrongfulness of the action in the affirmative, on the basis that A - although he exercised the required care - is not sanctioned to injure other road users.[493] Nevertheless, ultimately this theory will also not lead to A being liable, as the question as to whether he was acting negligently will be answered in the negative. As the example illustrates, the two theories will not normally lead to different results concerning the question whether to impose liability. The new theory answers the question as to liability entirely within wrongfulness and as a result of this dispenses with the necessity to discuss fault, whereas the latter theory renders the act wrongful, when a legally protected right was injured, but, provided the acting person was exercising the ordinary care, will refuse compensation because of the lack of fault.

Nevertheless, the different approaches of determining wrongfulness will play a crucial role when the requirement of fault is not in issue, i.e. in instances where an interdict is sought or cases where the owner may require the disturber to remove the injury that was done to the ownership, §1004 BGB [494].

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491) Compare Kupisch & Krüger *Deliktsrecht* 5
492) BGHZ 24, 21 is one case where the *Bundesgerichtshof* followed the new approach. However, it caused a storm in the legal literature. Critical Betterman *NJW* 1957, 986; Zippelius *NJW* 1957, 1777; Wussow *NJW* 1958, 891; May *NJW* 1958, 1263; Hafferburg *NJW* 1959, 1398; Dunz *NJW* 1960, 507; Böhmer *MDR* 1958, 743; Wieacker *JZ* 1057, 535; Stoll *JZ* 1958, 137
493) For example *Erman*-Drees §823 Rz 45; BGH *NJW* 1971, 31
494) §1004 BGB: '(I) If the ownership is interfered with otherwise than by dispossession or withholding of possession, the owner may demand from the disturber the removal of the interference. If further interference is to be apprehended, the owner may sue for an injunction.
(II) The claim is excluded, if the owner is obliged to tolerate the interference.' (Translated by Forrester, Goren, Ilgen *German Civil Code*)

Although one cannot dismiss the new theory outright, it is important to take into account that §823 I BGB clearly distinguishes between *Tatbestandsmäßigkeit*, wrongfulness and fault. Whether the defendant was exercising the ordinary care must therefore, according to the present law, not be determined within the element of wrongfulness, but only within the element of fault. Thus, a person who injures or kills another person although he exercises ordinary care, does not cause this result legally but wrongfully. But this *Unrechtsurteil* [495] does not include an *Unwerturteil* [496] as the person, who exercises the ordinary care, does not act negligently (§276 I 2 BGB) [497]; consequently the defendant will not be held liable according to §823 I BGB due to a lack of fault.

However, the principle that the *Tatbestandsmäßigkeit* indicates the wrongfulness does not really 'fit' the extensions of §823 I BGB, i.e. the right of the 'established and operative business', because as a so-called 'frame right' it is interpreted broadly.[498] The legally protected rights that are expressly listed in §823 I BGB have such clear limits that their infringement can, in the normal course of events regularly and without any problem, be held to be *prima facie* wrongful; but the principle that the facts of case indicate the existence or otherwise wrongfulness, has never been applied by the courts in cases concerning the 'established and operative business', even though the 'established and operative business' is regarded as one of the 'any other rights'.[499] Because of the lack of clear limits, it was impossible to hold, as one could in the case of the listed rights, that an act was *prima facie* wrongful when it went beyond the prescribed limits. For example when A starts a business that competes with that of B and advertises his business, this will have an adverse effect on B's business. It is obvious that the facts of the case will not establish *prima facie* wrongfulness, as otherwise free competition would cease. Only by taking the

495) The view that an act contravenes the law, ie that the act was wrongful.

496) The view that an act is reprehensible in moral terms, ie that the wrongful act was also committed culpably.

497) §276 BGB: '(I) The debtor is responsible, unless otherwise provided, for recklessness and negligence. A person who does not exercise the care required in ordinary intercourse acts negligently. The provisions of §827 and §828 apply.
(II) The debtor may not be released beforehand from responsibility for recklessness. (Translated by Lawson & Markesisnis *Tortious Liability* 56)

498) *Erman*-Drees §823 Rz 45; BGB *NJW* 1979, 1351; BAG *NJW* 1979, 2532

499) *Erman*-Drees §823 Rz 45

different interests of the plaintiff and defendant into account, can it be decided whether or not the infringement was wrongful.[500]

In cases of an infringement of an 'established and operative business' the interest in an undisturbed commercial business of one person stands in opposition to the free activity in that sphere of the other person. The right of the 'established and operative business' merely offers a *Rahmen* (frame) for the evaluation of the competing interests. For that reason it is called a *Rahmenrecht* (frame right). Not every disparagement injurious to the interests of a company - for example a negative value judgement within an objective test of goods - constitutes wrongfulness. To the advantage of the person who disparages the business of another, one must take into account to right of free expression of opinion and freedom of the press, article 5 GG [501]. Furthermore, the interest of the public in regard to information must be taken into account. On the other hand the disparagement will also have to be examined carefully. Thus when comparing care should be taken not to apply different standards, nor should it be neglected to take into consideration other important distinctions such as, for example, the different prices of items when one compares their quality.[502]

In some decisions the term *Sozialadäquanz* was adopted from criminal law.[503] Accordingly, conduct that falls within the borders of the historically developed social and ethical order of the community are *sozialadäquat* and thus not wrongful.[504] Nevertheless, the usefulness of this formula in practice is doubtful. In any event this term does not remove the responsibility of evaluating the competing interests in every single case.

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500) *MünchKomm*-Mertens §823 Rz 484

501) Article 5 GG: '(I) Everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.

(II) These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth, and by the right to inviolability for personal honour.

(III) Art and science, research and teaching, shall be free. Freedom of teaching shall not absolve from loyalty to the constitution. (Translated by Karpen *The Constitution of the Federal Republic of Germany* 228)

502) BGHZ 45, 296

503) BGHZ 24, 21

504) *Palandt*-Thomas §823 (6) A

2.1.5. Fault

To render the defendant liable §823 I BGB requires (besides the fulfilling of the *objective Tatbestand* and the fact that the harm must be caused wrongfully) that the defendant must have caused the harm culpably; and a precondition for culpability is that the defendant must be accountable.

As forms of fault §823 I BGB requires intent or negligence. Both must relate - it appears from §823 I BGB - to the infringement of one of the legally protected rights and to the fact that the harm was inflicted wrongfully , but not to the damage itself.[505] The definition for negligence is given in §276 I BGB, according to which a person who does not exercise ordinary care acts negligently. Ordinary care is not exercised if the wrongful consequence was foreseeable to a reasonable man and if the reasonable man would have been able to take steps against it.[506]

This requirement gave rise to a debate in the literature as to whether the standard required is one of an objective abstract character - as the majority suggests [507] - or of a subjective character as it is in criminal law [508]. The subjective approach would lead to the consequence that one has to take into account the special abilities or the lack of abilities of the defendant. To avoid the result that defendants (who accepted orders that required abilities which lay far beyond their skills and thus caused damage) will be freed from liability, criminal law jurisprudence invented the notion of *Übernahme Fahrlässigkeit* (assumption of negligence).[509] Thus a person accepts an order, which he - when exercising ordinary care - is able to recognise as requiring ability beyond his skills, and then causes loss, acts negligently.

505) BGHZ 69, 128, 142, 143; *Erman*-Drees §823 Rz 120 ssq
506) *Palandt*-Heinrichs §276 (4); BGHZ 39, 285; BGH *LM* §823 Nr 1; *MünchKomm*-Hanau §281
507) For example *MünchKomm*-Hanau §276 Rz 78; von Bar *Verkehrspflichten-Richterliche Gefahrsteuerungsgebote im deutschen Deliktsrecht* 137 ssq, 178; RGZ 95, 17; 119, 397; 152, 140; BGHZ 80, 186, 193; BGH *VersR* 1958, 268; 1968, 395; 1976, 776; 1981, 76
508) RGSt 39, 5; 67, 20; as supported by Nipperdy *NJW* 1957, 1777 ssq; Niese *JZ* 1956, 457 ssq
509) *Erman*-Battes §276 Rz 25; Nipperday *NJW* 1957, 1781; Hafferburg *NJW* 1959, 1398, 1400 ssq

The main argument offered by the supporters of the subjective approach against the objective theory is based on the fact that objective foreseeability was already a question of wrongfulness;[510] this in so far as the question asked within the *Adäquanztheorie* was one of objective foreseeability; thus to ask the same question again within fault would be pointless.[511] Moreover, imposing liability without taking subjective factors into account, means imposing liability without fault. An objective approach to negligence renders the whole requirement of fault useless and superficial. Ideally, so the argument goes, one should require subjective factors to determine whether or not the victim will be entitled to compensation for the harm that was wrongfully inflicted.

Contrary to this approach the majority favours an abstract, objective test.[512] Accordingly to their approach the decisive question is what a normal, orderly and conscientious man would behave like in the same situation.[513] It is not necessary that this behaviour must later turn out to have been objectively correct. It is sufficient to exclude the reproach of negligence by proving that every person confronted with the situation would have been reasonable in believing at the decisive moment that his decision was right.[514] As this test is of an abstract nature, the acting person's personal characteristics, his abilities, knowledge, experience and degree of his sense are of no consequence in determining negligence.[515]

Although the subjective approach's negligence seems to be more logical, the objective approach has the advantage of being reflected in the wording of the positive law. §276 I 2 BGB states expressly that 'ordinary care', (which undoubtedly relates to objective care) is required. In contrast to this the German Penal Code does not present us with a binding definition of negligence, so that in this field there is space for a subjective approach. But because the legislature clearly favoured an objective approach in the field of civil law it is also incumbent on the legislature to alter it to a

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510) Nipperdey in Enneccerus-Nipperdey *Allgemeiner Teil des Bürgerlichen Rechts* 2. Halbband 209 IV A 2b; Nipperdey *NJW* 1957, 1781; compare also von Caemmerer *VersR-Beiheft Karlsruher Forum* 1961 25 ssq; Weitenauer *VersR* 60, 1062/63 Bem 4a and b

511) Wiethölter *Der Rechtfertigungsgrund des verkehrsmäßigen Verhalten* 45 ssq

512) *Erman*-Battes §276 Rz 20

513) RGZ 152, 140

514) *MünchKomm*-Hanau §276 Rz 84 ssq; RGZ 163, 129, 132; BGHZ 12, 167; *Erman*-Battes §276 BGB Rz 20

515) RGZ 152, 140

subjective one, should this be deemed preferable. Statutory interpretation *contra legem*, either by legal writers or by the courts, is, in the long run, not really productive but rather counteracts the clarity and certainty of law, which is so cherished by German lawyers.

2.1.6. *Haftungsausfüllende Kausalität*

The defendant is bound to compensate loss that results from the wrongful and culpable infringement of a legally protected right.

Whereas the *Haftungsbegründende Kausalität* concerns the causation between the action and the infringement of the legally protected right, the *Haftungsausfüllende Kausalität* concerns the causal link between the infringement of the legally protected right and the loss.[516] The wrongdoer is not only bound to pay compensation for the direct loss that flows from the infringement of the protected right itself, but also for the loss that the defendant suffered consequential to the injured right, the so-called consequential loss.[517] For example, if a businessman's leg is injured (*Verletzungsschaden*) he is not able to run his business and suffers further loss. According to the formulation in §823 I and §842 BGB [518], the fault of the defendant does not need to relate to this consequential loss.

The extent of the loss that the perpetrator must compensated is determined according to §249 BGB ssq. The basic principle laid down in this paragraph is that 'a person who is bound to make compensation shall bring about the condition which would have existed if the circumstance making him liable to compensate had not occurred.'[519] However, it is important to recognise that the criteria and theories of

516) *Erman*-Sirp §249 Rz 22
517) *Erman*-Sirp §249 Rz 21 ssq
518) §842 BGB: 'The obligation to make compensation for damage on account of an unlawful act directed against the person of another extends to the detriment which the act occasions to his earnings or prospects. (Translated by Lawson & Markesinis *Tortious Liability* 60)
519) §249 BGB: 'The person who is bound to make compensation must restore the situtation which would exist if the circumstances making him liable to compensate had not occurred. If compensation is to be made for injury to a person or damage to a thing the creditor may demand, instead of restitution in kind, the sum of money necessary to effect such restitution.' (Translated by Lawson & Markesinis *Tortious Liability* 55)

attribution (*Äquivalenztheorie*, *Adäquanztheorie*, as well as the 'theory of the protective purpose of a statute') that were described in the discussion about *Haftungsbegründende Kausalität*, apply similarly to the *Haftungsausfüllende Kausalität*.[520] Thus, loss that can not be attributed will not be compensated.

2.1.7. Question of evidence

As to proof, it is, in principle, the plaintiff who is obliged to establish that he has suffered harm in respect of one of the legal interests protected by §823 I BGB and that the conduct of the defendant that caused this injury was unlawful and culpable.[521] In particular this means that the plaintiff must prove that the defendant did not meet the standard of care demanded of him in these special circumstances and that this was the cause of the harm suffered by him. In cases where the defendant's activity was a dangerous one, he is under a duty to act with the 'utmost' care, and this fact may help the plaintiff to establish his case. In other cases the court will usually hold that there is '*prima facie* evidence' (*Beweis des ersten Anscheins*) if the accident would not normally have happened unless the defendant had been negligent.[522] This will be sufficient unless the defendant can explain how, in this particular instance, the injury could have occurred despite his taking all the requisite precautions.[523] This rule is understood as being merely an aid in the evaluation of the evidence, not as shifting the burden of proof of the defendant.[524]

However, an exception in regard to the general rule that the burden of proof rests on the plaintiff will be made in cases where the plaintiff's claim for damages under §823 I BGB arises from harm caused by a defect in goods produced by the defendant; the *Bundesgerichtshof* held that in such a case there is a presumption of negligence which the defendant has to rebut.[525]

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520) *Erman*-Sirp §249 Rz 21 ssq
521) BGHZ 24, 21, 29; 51, 91, 104; *Erman*-Drees Vor §823 Rz 78
522) RGZ 165, 336; BGHZ 7, 198; 24, 308, 317; BGH *VersR* 65, 1048; BGH *NJW* 1966, 1263
523) *Erman*-Drees Vor §823 Rz 83; BGHZ 51, 91, 104
524) RGZ 159, 235, 239; BGHZ 39, 103, 107; *Erman*-Drees Vor §823 Rz 80
525) *Erman*-Drees Vor §823 Rz 83; BGHZ 51, 91, 104

2.2. Pure economic loss in terms of §823 II BGB

According to a second 'narrow' general clause of delictual liability - §823 II BGB - liability arises when there is a culpable contravention of a 'statute designed to protect another'.[526] Protective statutes in this sense include all those rules of private and public law, especially criminal law, the main purpose of which is to protect an individual or a group of individuals rather than the public as a whole.[527] The significance of §823 II BGB depends mainly on the nature of the protective statute which was violated in each particular case.
Some protective statutes are directed at the prevention of injuries to life, health and ownership which are in any event already protected comprehensively by §823 I BGB. Protective statutes of that kind are, for example, the criminal offences against life §§211 ssq *Strafgestzbuch* (Penal Code), body §§223 ssq *Strafgestzbuch* (Penal Code), freedom §§234 ssq *Strafgestzbuch* (Penal Code), and property §§242 ssq *Strafgestzbuch* (Penal Code), as well as §§303 ssq *Strafgestzbuch*. In connection with protective statutes like these, §823 II BGB is unable to give rise to an action, which is not also recognised by §823 I BGB, as these paragraphs relate to those interests which are already protected by §823 I BGB.[528] But §823 II BGB offers less protection than §823 I BGB in cases such as these, as the criminal law requirements are often of a much narrower nature, especially in regard to subjective factors like fault; thus §303 Penal Code requires intent for 'Petty Property Damages', whereas §823 I BGB requires only negligence. Nevertheless, §823 II BGB will also provide a further, independent action in this field, as long as the requirements of the protective statute are fulfilled.

Other protective statutes prohibit specific dangerous behaviour and not just the causing of an injury. Examples are the rules of the *Straßenverkehrsordnung* [529] and *Straßenverkehrszulassungsverordnung*[530]. Thus, speeding is forbidden independently of whether or not it leads to an accident. However, sometimes one is unable to determine whether a particular paragraph relates to forbidden behaviour only, as often the same rule is also designed to protect life, body and property from

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526) Introductory Zweigert & Kötz *Introduction* 296; see also Markesinis & Deakin (1992) *MLR* supra at 636 ssq
527) BGH *VersR* 1984, 1071 ssq
528) *Erman*-Drees §823 Rz 129
529) Road Traffic Act
530) Road Traffic Act

the very danger of injury. In relation to such 'behaviour-related protective statutes' (*verhaltensbezogene Gesetze*), §823 II BGB gains an independent meaning. Here, it is required that the fault must relate to the infringement of the protective statute, but not to the infringement of the right, as is required by §823 I BGB.[531] For example, a person transgresses §21 *Straßenvekehrsgesetz* [532] if he drives a car without a driving licence; if he acted culpably in relation to that fact, it is not required that he acted culpably in relation to the injuries which he caused while driving in order to be held liable for those injuries.[533]

Finally, the third group of protective statutes concerns rights which are not recognized in §823 I BGB, more specifically rights to a person's estate and finances as a whole (ie his patrimony).[534] Examples of such statutes are §§263 ssq Penal Code (Fraud) and §267 Penal Code (Breach of Public Trust). In relation to these kind of protective statutes §823 II BGB attains its most significant function. One is able to institute claims which could not have been instituted in terms of §823 I BGB. However, in this field §823 II BGB will often remain in concurrence with §826 BGB. But it will usually be easier to prove the violation of a protective statute than the fact of whether or not the causation of damage is *contra bonos mores*.

§823 II BGB is similarly important, in the regard to the situation where interests are protected in §823 I BGB merely as 'frame rights'. This general protection is, as was explained above, normally not applicable in regard to infringements regulated in special statutes.[535] For example, the protection of an 'established and operative' business during competition will depend on the *Gesetz gegen den unerlaubten Wettbewerb* (Unfair Competition Act) and the *Gesetz gegen Wettbewerbsbeschränkungen* (Law Against Restrictions On Competition).[536] In so far as these statutes do not independently confer a title to compensation, such title can be derived through §823 II BGB.[537]

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531) RGZ 145, 107, 115
532) Road Traffic Act
533) Compare *Erman*-Drees §823 Rz 137
534) See *Palandt*-Thomas §823 (9) ssq
535) BGHZ 43, 359; 45, 296, 307; *Palandt*-Thomas §823 (5) G
536) BGHZ 36, 252, 256
537) *Erman*-Drees §823 Rz 134: §823 II BGB is not aplicable, so far as the special requirement of §13 II UWG aplies.

For the purposes of this dissertation §823 II BGB is of most interest in regard of those statutes that are directed not merely at the protection of bodily integrity and property or at the prevention of the very danger of deliberately caused loss, but at the prevention of pure economic loss caused negligently.[538] If a director of a limited company, for example, culpably fails to start liquidation proceedings when the company becomes insolvent, and so commits an offence under §64 of the *GmbHG* (Company Act), he will be personally liable under §823 II BGB in connection with §64 *GmbHG* (Company Act). (Because of the absence of a legally protected right no action arises out of §823 I BGB; neither will an action arise out of §826 BGB, as intent is absent.) The very purpose of §64 of the *GmbHG* (Companies Act) is to protect creditors from harm of this type which is caused by delay in bringing the liquidation proceedings.[539]

§§42 and 53 BGB, in terms of which a club has a duty to declare itself bankrupt in the event of it having too high debts, also have the purpose of protecting creditors.[540]

Furthermore, §394 BGB constitutes a prohibition against setting off certain claims; this statute has the purpose of protecting the debtor of a claim which may not be set off.[541]

538) *MünchKomm*-Mertens §823 Rz 138
539) BGHZ 29, 100; Kühn *NJW* 1970, 589
540) *Erman*-Drees §823 Rz 133
541) *Erman*-Drees §823 Rz 133; RGZ 85, 108, 118; comprehensive lists of statutes with a protective purpose - including those with the purpose of protecting the estate and finances as a whole - can be found in *Erman*-Drees §823 Rz 132 ssq; *Palandt*-Thomas §823 (9) d; *MünchKomm*-Mertens §823 Rz 165 ssq; concerning the limited liability of an auditor in terms of §823 II BGB, read with special protective statutes, see Markesinis & Deakin (1992) 55 *MLR* supra at 636: 'This is because the *Aktiengesetz*, by reference to 323 of the Commercial Code (HGB), specifically regulates the legal position of auditors in the case of 'mandatory audits' (*Pflichtprüfungen*), namely annual, formation and special reports by restricting the aditor's liability for negligent breach of his duties to the company only. Shareholders (and potential shareholders) are thus excluded from the purview of this paragraph and are also denied an action under §823 II BGB on the ground that §323 HGB is not a norm enacted to protect their interests (*Schutzgesetz*).'

2.2.1. Special requirements of §823 II BGB

A precondition for an action based on §823 II BGB is that the facts in question must be covered by a protective statute; that means that harm is compensable only if it results from the very danger that it was the purpose of the protective statute to guard against.[542]

(i) The existence of a relevant protective statute

§823 II BGB requires, firstly, that the applicable statute should be of a protective nature.[543]

It has been held that every legal norm [544] which is at least partly designed to protect the interest of an individual, constitutes a protective statute.[545] On the other hand there are other norms that are directed at merely protecting the public at large [546] and it is not always easy to say whether a statute is directed at protecting the public at large or an individual. Thus the purpose of a particular protection is not always determinable.[547] In regard to old statutes the intent of the historical legislative is often not ascertainable; and even when it is the question arises whether this intention remains a valid basis.[548] Difficulties also arise in respect of newer statutes, as the statements given by the different persons, who are involved in the legislative process often differ remarkably in regard of what purpose they hoped to achieve with the new statute; thus one is confronted, of course, with the question as to which authority to follow.

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542) *Erman*-Drees §823 Rz 130; *Palandt*-Thomas §823 (9) b

543) Canaris *2. Festschrift für Larenz* 27, 52 ssq

544) Article 2 EGBGB: 'Every legal rule (*Rechtsnorm*) is law (*Gesetz*) within the meaning of the Civil Code and of the present Act.' (Translated by Wang *German Civil Code* 537))

545) Compare BGHZ 46, 17, 23; 12,146; 40, 306; BGH *NJW* 1973, 1547; BGH *NJW* 1974, 901

546) *Erman*-Drees §823 Rz 130; *MünchKomm*-Mertens §823 Rz 140

547) Concerning the arguments of how to determine whether a statute has the purpose of protecting an individual person: *MünchKomm*-Mertens §823 Rz 104 ssq; also Knöpfle *NJW* 1967, 697; Canaris *2. Festschrift für Larenz* 27, 47

548) Compare *MünchKomm*-Mertens §823 Rz 148; Schmiedel *Deliktsobligationen nach deutschem Kartellrecht* 218

A further weakness of the view that every legal norm which is at least partly designed to protect the interest of an individual constitutes a protective statute, is the fact that it takes the protective purpose of a statute into account in an undifferentiated way. §823 II BGB merely relates to protecting by offering an action of compensation. However, there exist various kinds of means, how one can protect a person and offering him compensation through the law of delict is just one of those. Thus a municipality can be prevented from competing against private business either by holding them liable to pay compensation or by using the municipality supervision.[549]

However, of the two problems described, the first (determining the purpose of the statute) is too comprehensive to be discussed into detail; therefore it will not be the subject of further discussion. Concerning the second problem, it will be necessary to extend the cited definition. According to the areas associated with the area where the statute in question belongs to one has to determine whether the protective purpose will actually be achieved by imposing claims of compensation in civil law.[550]

(ii) Protective ambit of the statute

The fact that the statute has a protective purpose does not fully answer the question whether, in a particular case, a compensatory claim is available. It is also necessary to inquire in each case whether damage lies within the protective ambit of the statute.

Firstly, most statutes with a protective purpose have a limited personal protective ambit, i.e. only certain persons will be protected.[551] Thus, for example, §§1, 38 I no 1 and 25 I of the *Gesetz gegen Wettbewerbsbeschränkungen* (Law Against Restraints On Competition) have the purpose to protect the competitor who has been excluded from the market. However, as the paragraphs were aimed specifically at protecting only against cartel agreements, only the excluded competitors are able to take

549) So for example BGH *JZ* 1962, 217 concerning the sale of bar ice by a municipal slaughter-house.
550) Similarly BGH *NJW* 1980, 1792; Schlosser *Jus* 1982, 657; Canaris *2. Festschrift für Larenz* 1983 27 ssq offers further restricting criteria; statutes with protective purposes are listed in *MünchKomm*-Mertens §823 Rn 166 ssq
551) *Erman*-Drees §823 Rz 130; *MünchKomm*-Mertens §823 Rz 140 ssq

advantage of the protective ambit of these statutes.[552] Furthermore, §263 Penal Code (Petty Fraud) has the purpose of protecting the victim of fraud deceived against the danger of suffering economic loss, but not the civil servant of the *Betrugsdezernat* (department for the protection against fraud) for injuries resulting from stress.

Secondly, the person's interest must be protected against exactly the kind of damage that he actually suffered. For example, the prohibition against parking a car without lights on the street at night, has the purpose of protecting other road-users' lives, bodies or property. The statute's ambit is restricted to injuries resulting from driving into the car or from abrupt braking. However, the protective ambit of the statute does not cover an injury of a third person resulting from an attempt to move the car from the road although such a person might be able to base his claim on §§683, 679, 670 BGB *Geschäftsführung ohne Auftrag* (management without mandate).

Again, cases might arise where it is difficult to decide what damage the statute is exactly aimed at protecting against. The two following examples - although they do not concern negligently caused pure economic loss - are good examples of the kinds of problems that could arise concerning the determination of the protective ambit of a statute. These examples concern the question whether a particular protective statute has the special purpose of protecting the violated legal right. Thus §263 Penal Code protects the 'estate and finances as a whole', but not the health, which was violated in the case of the stressed civil servant of the *Betrugsdezernat* (department for the protection against fraud). Secondary violations to the health will , however, not be excluded from the protective ambit of §263 Penal Code if they were an adequate consequence of the primary violation of the 'estate and finances as a whole'. The widow who was cheated out of her savings and thus was so upset about her loss might consequently suffer an heart attack. Here, according to §823 II BGB and §263 Penal Code the defrauder will have to pay compensation for the loss consequent upon the heart attack, although his fault did not relate to it. (Because of that lack of fault a claim based on §823 I BGB could, of course, not succeed.)

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552) BGHZ 64, 232, 237 ssq; BGH *DB* 1984, 1193; concerning §25 II GWB: BGH *NJW* 1965, 2249; concerning §26 II GWB: BGH *NJW* 1962, 196; concerning §27 GWB: BGH *NJW* 1959, 880

(iii) Violation of a statute with a protective purpose

§823 II BGB requires that the defendant causes the type of damage against which the statute was designed to protect the victim. Furthermore all objective and subjective elements required by the protective statute must be present. Thus, if a specific criminal law statute requires on the side of the perpetrator intent or greed, then intent has also to be present in terms of the private law action based on §823 II BGB.[553] The criminal law theories concerning error of law are also applicable.[554] However, exceptions will have to be made where the criminal law 'requirement' relates to the law of criminal procedure. Thus it is, for example, commonly accepted that the victim can refrain from the institution of criminal legal proceedings. It is not advisable to force a person to institute unwanted legal proceedings, just for the reason not to lose civil law claims.

2.2.2. Fault, damages and burden of proof

According to §823 II 2 BGB fault (at least negligence, §276 I 2 BGB) is required to render the defendant liable, if the violated statute with protective purpose had not already required fault. That is in accordance with the fault principle generally applicable in the terms of the BGB.

The extent of the compensation - as was for §823 I BGB - will also be determined according to §§249 ssq BGB.

However, the rules regarding the burden of proof are different once the plaintiff has established that the defendant was in breach of a particular statute; the defendant must rebut the ensuing presumption that the conduct was negligent.[555]

553) *Palandt*-Thomas §823 (9) d; *Erman*-Drees §823 Rz 137; BGHZ 46, 21
554) Horn, Kötz & Leser *German Law* 155
555) BGHZ 51, 91, 103 ssq; Horn, Kötz & Leser *German Law* 156

2.3. Endangerment of credit or earnings, §824 BGB

§824 BGB offers protection against the endangerment of credit or injury to earnings or earning prospects. It should be noted that if disadvantages such as these are caused by criminal violations of a person's reputation, liability can also arise out of §823 II BGB red with §§185 ssq Penal Code.

Basically §824 BGB requires a statement which damages the credit or earnings of another; it also requires that the acting person culpably did not recognise that it is contrary to the truth. Thus a person must maintain or publish, untruthfully, a fact calculated to endanger the credit of another, or to injure his earnings or earning prospects in any other manner. According to §824 BGB such facts could be objectively determinable events or conditions (for example insolvency), but not value judgements (for example 'bogus company').[556] A fact is untrue if it was contrary to the truth at the moment the statement was made.[557] Furthermore, the fact must be capable of causing economic disadvantage;[558] it is not necessary that the statement should also be defamatory. Consequently it is even enough, if one claims that someone else became insolvent without fault on his part, as long as this is suitable to cause harm to his financial reputation; thus §824 BGB does not protect personal dignity as such but the financial reputation.[559]

To avoid exposing the wrongdoer to a multiplicity of delictual claims, the *Bundesgerichtshof* requires that the statement deals specifically with the sufferer or the given statement must at least relate in any form with his activities or his commercial activities.[560] If, for example, someone maintains that electric organs are not suitable for the use in churches, a producer or dealer of such organs will not have an action based on §824 BGB, although they might have sufferd loss.[561]

556) *Erman*-Drees §824 Rz 5 ssq; *Palandt*-Thomas §824 (2)
557) *MünchKomm*-Mertens §824 Rz 34; RGZ 66, 227, 231
558) *Erman*-Drees §824 Rz 9; see also BGH *NJW* 1978, 21 51, 2152; BGH *LM* §824 Nr 10
559) *Palandt*-Thomas §824 (4); *Erman*-Drees §824 Rz 9
560) BGH *NJW* 1963, 1871; *DB* 1989, 921; *MünchKomm*-Mertens §824 Rz 37-39
561) *MünchKomm*-Mertens §824 Rz 38

2.3.1. Wrongfulness, fault and damages

As in all the other instances of *unerlaubte Handlung* §824 BGB, too, is only fulfilled if the action was committed wrongfully. Wrongfulness would be lacking in a case where someone merely looks after his legitimate interests in making a particular statement (*Wahrnehmung berechtigter Interessen*).[562] The perpetrator looks after his legitimate interests, when his interest in making the statement is greater than the interest of the sufferer in the omission of the statement.[563] In evaluating the interests of the parties one has primarily to take into account the right of freedom of speech (article 5 GG).[564] Furthermore, §824 II BGB decrees that 'a communication, the untruth of which is unknown [to the person making it] does not thereby render himself liable to make compensation, if he or the receiver of the communication has a lawful interest in it.'[565]

Negligent ignorance concerning the untruth of the statement is sufficient for §824 BGB.[566]

The statement or its dissemination must have caused damage to the defendant. Compensation *in natura* is possible and means the revocation of the statement, §249 1 BGB. In cases where this is not possible or sufficient-compensation will be made by a payment of money, §249 2 BGB.

562) Compare *MünchKomm*-Mertens §824 Rz 40 ssq
563) *MünchKomm*-Mertens §824 Rz 41 ssq; *Erman*-Drees §824 Rz 14-16
564) BVerfGE 7, 198 - (Lüth)
565) Translated by Forrester, Goren, Ilgen *German Civil Code* 135
566) *Erman*-Drees §824 Rz 10; *Palandt*-Thomas §824 (5); RGZ 115, 75

2.4. Civil Servant Liability, §839 BGB [567]

A civil servant who violates an official duty to a third party, is bound to compensate the loss suffered by the third party, §839 I 1 BGB.

This liability is broader than that according to §823 I BGB, as the culpable violation of an official duty can be present even if none of the requirements of §823 I BGB are fulfilled, i.e. for example in cases of pure economic loss. On the other hand, liability according to §839 BGB can also be much narrower. The civil servant who merely acted negligently can be held liable only if the victim cannot achieve compensation in a different way, §839 I 2 BGB.

The obligation to pay compensation is always excluded if the injured person culpably failed to avert the damage by using other means of legal redress, §839 III BGB.

§839 BGB has to be seen in connection with article 34 GG [568]. According to article 34 1 GG, if somebody in the execution of his entrusted public office violates an official duty to a third party, the state or the public body, in whose service he was, is bound to pay compensation.[569] State liability will be considered only if a civil servant takes action in a 'sovereign' (*hoheitsrechtlich*) sphere, whereas when he acts

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567) §839 BGB: '(I) If an official wilfully or negligently commits a breach of official duty incumbant upon him towards a third party, he shall compensate the third party for any damage arising therefrom. If only negligence is imputable to the official, he may be held liable only if the injured party is unable to obtain compensation otherwise.
(II) If an official commits a breach of his official duty in giving judgment in an action, he is not responsible for any damage arising therefrom, unless the breach of duty is subject to a public penalty to be enforced by criminal proceedings. This provision does not apply to a breach of duty consisting of refusal or delay in the exercise of his office.
(III) The duty to make compensation does not arise if the injured party has wilfully or negligently omitted to avert the injury by making use of a legal remedy.' (Translated by Lawson & Markesinis *Tortious Liability* 60)

568) Article 34 GG: 'If any person, in the exercise of a public office entrusted to him, violates his official obligations to a third party, liability shall rest in principle on the state or the public body which employs him. In the event of wilful intent or gross negligence the right of recourse shall be reserved. In respect of the claim for compensation or the right of recourse, the jurisdiction of the ordinary courts must be excluded.' (Translated by Karpen *The Constitution of the Republic of Germany* 241)

569) *Erman*-Drees §839 Rz 6; Bettermann *JZ* 1961, 482; *Palandt*-Thomas §839 (2) ssq

for 'non-sovereign' purposes the application of article 34 GG will be ruled out.[570] However, according to §839 BGB then personal liability of the civil servant will remain.[571]

To distinguish between 'non-sovereign' acts on the one hand and 'sovereign' acts on the other is important, as, according to §839 BGB, the civil servant himself is liable (*Eigenhaftung*), whereas according to article 34 GG only those public offices who employ the civil servant (*Anstellungskörperschaft*), in stead of the civil servant himself, are bound to compensate the victim (state liability).[572]

2.4.1. Liability in cases of sovereign acting

(i) General requirements

According to article 34 GG somebody must have acted *in Ausübung eines ihm anvertrauten öffentlichen Amtes* (while holding an office). A person *übt ein ihm anvertrautes Amt aus* (holds an office), if he is acting in a 'sovereign' way.[573] According to article 34 GG, read with §839 I BGB, activities which were performed by a person solely in the observance of the 'non-sovereign' interests of the public body will be excluded from liability.[574] Not only conduct concisting of the use of governmental means of coercion (for example the use of the powers of a bailiff) falls under the term 'sovereign conduct', but also the performance of an office holder in the field of the so-called *Leistungsverwaltung* ('performance administration'), for example a medical practitioner of the public health department [575] or a teacher of a state school [576].

The distinction between 'sovereign' and 'non-sovereign' conduct can be difficult to determine in individual cases. According to the *Bundesgerichtshof*, an act can be

570) *Erman*-Drees §839 Rz 6; compare Bettermann *JZ* 1961, 482
571) *Erman*-Drees §839 Rz 12 ssq
572) *Palandt*-Thomas §839 (2) B
573) *Erman*-Drees §839 Rz 14 ssq
574) *Erman*-Drees §839 Rz 14 ssq
575) *Erman*-Drees §839 Rz 14
576) BGHZ 13, 25; 34, 20

held to have been in the exercise of a public office (article 34 GG), provided the purpose of the activity falls within the field of the sovereign activity and, furthermore, there was a connection between the purpose and the damage producing act.[577] If a bailiff, for example, drives by car to the debtor to impound something, as the purpose (the seizure) is a matter of 'sovereigenty' (*Hoheitsrecht*) the participation in the traffic also forms a part of the exercise of a public office.[578]

For liability according to article 34 GG read with §839 BGB to arise, it is not required that the acting person has the status of a civil servant in the *verfassungsrechtlichen Sinn* (constitutional law meaning).[579] It is also not required that he was appointed a civil servant by handing over a document to him.[580] It is sufficient that he carried out a sovereign task, which makes him a so-called *Beamter im haftungsrechtlichen Sinn* (civil servant in the sense of liability).[581] Although a public employee is not a civil servant in terms of the constitutional law meaning, according to article 34 GG read with §839 BGB state liability will arise if he acts in the fulfilment of a sovereign task.[582]

The perpetrator must have acted in exercise of a public office. This requirement is not fulfilled if he performed the damaging act just *bei Gelegenheit* (by chance) in exercise of the public office.[583] For example, if the bailiff during the seizure steals a bike of the debtor, one might think that there is some connection between the seizure and the theft. But the necessary deeper connection is missing and thus article 34 GG is not applicable.

The civil servant must have committed a breach of an official duty incumbent upon him towards a third party. Official duties arise out of *Gesetz* (statutes), *Dienstvorschrift* (service regulations), *Verwaltungsvorschrift* (official regulations), *dienstlichen Anweisung* (service instructions) and *Befehl von Vorgesetzten* (orders of supervisors).[584] A civil servant has the obligation to comply with these rules, to

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577) BGHZ 42, 176; 108, 232; BGH *NJW* 1971, 2220
578) BGHZ 42, 176, 179; *Erman*-Drees §839 Rz 21
579) *Erman*-Drees §839 Rz 11 ssq
580) *Palandt*-Thomas §839 (3); BGH *NJW* 1972, 2088
581) *Palandt*-Thomas §839 (3)
582) *Palandt*-Thomas §839 (3); *Erman*-Drees §839 Rz 43
583) *Erman*-Drees §839 Rz 20
584) *Palandt*-Thomas §839 (4) a

exercise his office in an objective and non-biased way and also to act in a considerate way towards everybody.[585] A breach of a duty 'for example' will be held to exist when a civil servant acts beyond his competence, when he disregards his obligation to be discrete, when he violates criminal law statutes or when he commits some other delict (§§823 ssq BGB).[586] If the civil servant is able to choose between various options, he will not necessarily have broken his official duty if he makes an inexpedient decision, provided this decision is still within the bounds of the legal discretion he has.[587]

The official duty must be owed to a third party. Whether this is the case, must be decided according to the purpose of the official duty.[588] If the official duty exists solely in the interest of the public, §839 BGB and article 34 GG will be ruled out.[589] But it must be remembered that an official duty for the benefit of the public can simultaneously also have the purpose of protecting an individual from the danger of suffering loss.[590] The official duty exists in regard to the victim if he is one of the persons which the statute is designed to protect.[591] For example if it is a policeman's official duty to prevent criminal acts, this duty does not just exist solely in the interest of the public, but also in the interest of the endangered individual.[592] However, it is not sufficient that the official duty was owed to a third party, but it is also necessary to determine against which kind of damage the duty was meant to protect. Thus, for example, the planning and building permission procedure does not have the purpose of removing the responsibility from the owner of the planned house to supervise the building of the house personally.[593] Furthermore, it is true that the duty of the building authority to check the calculations in regard of the structural engineering of the planned house, constitutes a duty towards third parties, as this duty has the purpose to protect all people against the danger of a collapsing house. However, the building owner will not be able to claim compensation for money he

585) *Erman*-Drees §839 Rz 54
586) *Erman*-Drees §839 Rz 50 ssq
587) Concerning the variety of official duties see *Erman*-Drees §839 Rz 50 ssq, 101 ssq
588) *Erman*-Drees §839 Rz 57
589) *Erman*-Drees §839 Rz 58
590) *Erman*-Drees §839 Rz 58
591) BGH *NJW* 1991, 2696
592) *Erman*-Drees §839 Rz 125
593) Compare the comparative analysis by Markesinis & Deakin (1992) 55 *MLR* supra at 634 where they refer to BGHZ 39, 358

had to spend on the wrongly calculated and built house, as it is not covered by the protective ambit of the official duty to check the plans about the structural engineering of the house.[594]

Furthermore, according to §839 I BGB the act must have been wrongful. The breach of an official duty is normally wrongful when there is no justification ground present.

Additionally, the perpetrator must have acted culpably, i.e. deliberately or negligently, §276 I 2 BGB. Fault must relate only to the breach of the official duty; it is not required that the fault also relates to the damage itself.[595] If somebody breaches an official duty, but fault is absent, then he will not be liable according to article 34 GG read with §839 BGB. In this kind of constellation the *Bundesgerichtshof* grants a public law action in favour of the victim, based on *eingriffsgleichen Eingriff*[596] or *Aufopferung*[597], as long as protected interests are concerned (for example property or health).

Last but not least the breach of an official duty must have caused damage. Here damage is understood to be any kind of loss - even pure economic loss - which constituted an adequate consequence of the violating act.

(ii) Special requirements

As a further bar to state liability, §839 I 2 BGB provides that, if merely negligence is imputable to the official, he may be held liable only if the injured party is unable to obtain compensation otherwise. Consequently the liability of the employing body in cases of mere negligence is of a subsidiary nature. It does not matter what the nature of the defendant's other claim is, as long as it also has the effect of compensating the

594) *Erman*-Drees §839 Rz 130

595) *Palandt*-Thomas §839 (6); *Erman*-Drees §839 Rz 63-65

596) Claim for compensation against the state for unlawful public authority interference with private property (as distinct from lawful expropriation of property by a public authority, but having the same practical impact).

597) Claim to compensation against a public authority for impairment of health, eg illness consequential to vaccinations (completes the protection under the German law against infringement of the rights of the individual through the exercise of administrative powers by public authorities).

loss.[598] Thus, if, besides the state, also B also owes C compensation - the same amount for the same loss - and the claim against B is realisable,[599] then the action against the state is ruled out.
Nevertheless, the subsidiary clause of §839 I 2 BGB is nowadays considered to be antiquated. As a result of this there is a tendency to interpret it narrowly.[600] The reason for this approach becomes obvious on reading the following illustrative case: When a civil servant, in the exercise of a public office, acts as a road-user and, while doing so, negligently causes an accident, then , according to the courts, the principle of equity in delict has to be preferred to the privilege of §839 I 2 BGB.[601] The purpose of §839 I 2 BGB is to increase the standard of the civil servant's services.[602] But this purpose has to take a back seat when the civil servant is, like any private person, bound by the traffic regulations and thus equal to all the other road-users.[603] This approach was adopted by the *Bundesgerichtshof* also in the following case:[604] While driving to a seizure, a bailiff crashed into the car of A, whose passenger B suffered injuries. As the accident was caused partly due to the negligence of the bailiff and partly due to the negligence of A, according to the wording of §839 I 2 BGB, the state could refuse to pay and require B to sue A. But the *Bundesgerichtshof* refused to apply §839 I 2 BGB, with the result that both wrongdoers, the state and A were liable as joint wrongdoers, §840 BGB.

However, §839 I 2 BGB applies in cases where the civil servant acts in terms of special privileges, for example driving with blue light; here the civil servant is expressly not exercising the same rights as the other road-users.

Were it a judge who, by making a decision violated an official duty, then liability is restricted by even more requirements. According to §839 II 1 BGB the act that constitutes the breach of the official duty must also constitute a crime. In this regard one has to consider 'Misconstruction of the Law' (§336 Penal Code) and 'Serious Passive Bribery of a judge' (§332 II Penal Code); both require intention on the side of the judge and are consequently of no interest to this dissertation.

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598) *Erman*-Drees §839 Rz 72-74
599) *Erman*-Drees §839 Rz 79
600) BGH *NJW* 1979, 1600; 1984, 2097
601) BGHZ 68, 217, 220 ssq; BGH *NJW* 1980, 883; *Erman*-Drees §839 Rz 68
602) *Erman*-Drees §839 Rz 68
603) BGHZ 68, 217; BGH *NJW* 1991, 1171
604) BGHZ 85, 225; BGH *NJW* 1991, 1171

(iii) Exclusion of liability

According to §839 III BGB the obligation to compensate is excluded, if the victim had culpably omitted to avert the damage by using other available means of legal redress. This regulation is *lex specialis* to §254 BGB (contributory negligence). In contrast to §254 BGB, §839 III BGB does not offer the possibility of taking into account the contributory negligence of the victim for the determination of the loss that has to be compensated but always leads to the total exclusion of liability.

The relevant means of legal redress are not only those of 'civil procedure' like *Berufung* (appeal on questions of fact and law), *Revision* (appeal on a question of law only), or *Beschwerde* (appeal to the higher court from the dismissal of a motion or application concerning a procedural issue), but all means of legal redress that are directed against the act or omission which constitutes the breach of the official duty and have as an aim the removal, correction or the averting of the damage.[605]

In each individual case it must be investigated, whether the victim culpably (intentionally or negligently, §276 I 2 BGB) omitted to take means of legal redress and whether this particular means of legal redress would have been suitable and able to prevent or at least to reduce the damage.[606] If the means of legal redress would merely have prevented the damage partly, then the claim for compensation will be excluded correspondingly.[607]

(iv) Damages

Liability to compensate does not attach to the perpetrator, but only the *Staat* or the *Körperschaft* (state or body), *in deren Diensten er steht*, i.e. - with the exception of special cases - the employing state or body.[608]

If the wrongdoer was acting in a 'sovereign' way, liability will arise in terms of article 34 GG read with §839 BGB , article 34 1 GG. This special statute excludes the

605) BGHZ 28, 104
606) *Erman*-Drees §839 Rz 89-93
607) *Erman*-Drees §839 Rz 89 ssq
608) BGHZ 2, 350; 6, 215

application of vicarious liability §831 BGB [609] or other forms of liability such as §§31 and 89 BGB.[610]

According to article 34 GG read with §839 BGB the loss must normally be compensated in money and not *in natura*, because the state is liable to render that form of compensation which the wrongdoer is normally liable for (i.e. the civil servant or public employee, §839 BGB); it is beyond a civil servant's and public employee's competence to compensate *in natura*, for example by the granting of a sovereign act.[611] Otherwise it would be possible to claim for the removal of a wrongful sovereign act in civil proceedings; but in this regard only the public law courts have competence.[612] Nevertheless there is no doubt about natural restitution if the claim is for the delivery of *vertretbare Sachen* (goods).

2.4.2. Liability of civil servants in cases of 'non-sovereign' acting

(i) Requirements

The requirements for personal liability of a civil servant according to §839 BGB differ in two respects from the liability of a public body according to article 34 GG read with §839 BGB.

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609) §831 BGB: '(I) A person who employs another to do any work is bound to compensate for damage which the other unlawfully causes to a third party in the performance of his work. The duty to compensate does not arise if the employer has exercised ordinary care in the choice of the employee, and, where he has to supply appliances or implements or to superintend the work, has also exercised ordinary care as regards such supply or superintendence, or if the damage would have arisen, notwithstanding the exercise of such care.
(II) The same responsibility attaches to a person who takes over the charge of any of the affairs specified in §831 I 2, by contract with the employer.' (Translated by Lawson & Markesinis *Tortious Liability* 58)

610) BGHZ 34, 93, 104; BGH *NJW* 1971, 43, 44; *Erman*-Drees §839 Rz 1; *Palandt*-Thomas §839 (1); §31 BGB deals with liability of an association for organs; §89 BGB provides that the provision of §31 BGB applies *mutatis mutandis* to the treasury as well as to the corporations, foundations and institutions under public law.

611) *Erman*-Drees §839 Rz 98

612) BGHZ 39, 99; 34, 99, 104

The wrongdoer must be a civil servant within the constitutional law meaning.[613] Therefore it is necessary that, on appointment, a document was handed to him, which contained the words *unter Berufung in das Beamtenverhältnis*.[614] This restriction of the term 'civil servant' derives from the comparison of §839 BGB with article 34 GG. If the wrongdoer is not a civil servant in the constitutional law meaning, but for example a public employee, then §§823 ssq BGB (i.e. , for example, vicarious liability, §831 BGB) will apply to his acts in 'non-sovereign' matters, such as, for example, the buying of pencils for the administration.

The wrongdoer must have carried out tasks that are solely connected to the 'non-sovereign' interests of the public body. Consequently he must not have carried out any sovereign tasks.

(ii) Damages

The civil servant is personally bound to compensate the victim.[615] Also the compensation must normally be made by means of a money payment, §839 I BGB.

Apart from the civil servant, the public body is also liable, but only in terms of vicarious liability, §831 BGB (or §§31, 89 BGB), provided that the civil servant's breach of a public duty fulfilled one of the requirements of §§823-826 BGB.[616] The state is only liable in terms of vicarious liability, because, in cases of non-sovereign conduct liability of the state must not be stricter than the liability of any other employer.

In the case of the violation of an existing contractual obligation, the body is liable according to §278 BGB [617]. Claims against the public body exclude liability of the

613) *Palandt*-Thomas §839 (3)
614) Compare for example §6 II *Bundesbeamtengesetz* (Federal Civil Servant Act)
615) *Erman*-Drees §839 Rz 2; compare also Dorn *NJW* 1964, 137
616) *Erman*-Drees §839 Rz 3; RGZ 148, 286, 292
617) §278 BGB: 'A debtor is responsible for the fault of his statutory agent, and of persons whom he employs in fulfilling his obligation, to the same extent as for his own fault. The provision of §276 II BGB, does not apply.' (Translated by Lawson & Markesinis *Tortious Liability* 56)

civil servant towards the victim, if the civil servant breached his duty merely negligently, §839 I 2 BGB.[618]

2.5. Claims of dependants of victims of fatal accidents

An example of a codified action solely compensating instances of pure economic loss can be found in §§844, 845 BGB, which deals with the action by dependants of victims of fatal accidents and the compensation for loss of services. These statutes also represent the only exception in the BGB where a person other than the victim who was injured or killed, is allowed to claim compensation. Thus §844 BGB provides that in the case of the causing of the death of another, the person bound to make compensation must make good the funeral expenses of the person on whom the obligation of bearing such expenses lies.

Besides that it is provided that, if at the time of the injury the deceased stood in a relation to a third party by virtue of which he was or might become bound by law to furnish maintenance to him, and if in consequence of the death such third party is deprived of the right to claim maintenance, the person bound to make compensation must compensate the third party by the payment of a money annuity, in so far as the deceased would have been bound to furnish maintenance during the presumable duration of his life. The obligation to pay compensation arises even if at the time of the injury the third party was only conceived but not yet born.

Furthermore, §845 BGB is concerned with the case where loss arises because the injured party used to perform services in favour of the plaintiff; because of the injury the party is unable to perform and thus the plaintiff suffers pure economic loss. According to §845 BGB in the case of causing of the death of another, or the causing of injury to body or health, or in the case of deprivation of liberty, if the injured party was bound by law to perform services in favour of a third party in his household or industry, the person bound to make compensation must compensate the third party for the loss of services by the payment of a money annuity.

618) *Erman*-Drees §839 Rz 3; RGZ 155, 257, 269, 273

2.5.1. Has the plaintiff an independent cause of action?

Just as in South Africa and England, it has to be investigated, in order to ascertain whether §§844 ssq BGB 'concern' pure economic loss whether the plaintiff really has an independent cause of action.

According to the courts and legal writers the action of the dependant is in principle independent from the action of the injured or killed person (supporter).[619] However, also similar to the position in South Africa and England, there are certain restrictions in regard to that principle. The general principle is that the dependant will not be entitled to compensation if the victim himself is not or would not - if still alive - be entitled to compensation.[620]

Consequently, if the victim and the injurer had a contract, in which they agreed to exclude all claims arising out of the injury, then the defendant will also not have an action based on §§844, 845 BGB.[621]

A controversial question is whether the same rule applies in a case of a legal exclusion of liability between the wrongdoer and the injured person. The majority took the view, that one must decide each case individually according to the purpose of the statute that constitutes the legal exclusion of liability.[622] If the purpose of the statute demands that the wrongdoer be kept free from any obligation to pay compensation for the injury he inflicted, then also a third party like the dependant, will not have an action. That is, for example, the position of the dependants and relatives in the case of §636 *Reichsversicherungsordnung* (Empire Insurance Act).[623]

When there was contributory negligence on the part of the victim the independent action of the dependant is subject to further restriction, §846 BGB.[624] Presume, for example, actually some fault of the injured party has contributed to cause the damage

619) RGZ 117, 102; *Palandt*-Thomas §844 (1)
620) *Erman*-Drees §844 Rz 2
621) RGZ 117, 102
622) *Palandt*-Thomas §844 (1)
623) OLG Celle *NJW* 1959, 990; *Palandt*-Thomas §844 (1)
624) *Erman*-Drees §844 Rz 3

which the third party has sustained, according to §846 BGB [625] read with §§844, 845 BGB the provision of §254 BGB - i.e. the provision concerning contributory negligence [626] - applies to the claim of the third party. Consequently the third parties' claim for maintenance will be reduced according to the contributory negligence of the killed supporter.

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625) §846 BGB: 'If, in the cases provided for by §§844, 845, some fault of the injured party has contributed to cause the damage which the third party has sustained, the provisions of §254 apply to the claim of the third party.' (Translated by Lawson & Markesinis *Tortious Liability* 67)

626) §254 BGB deals with the consequences of contributory negligence:

'(I) If any fault of the injured party has contributed to the occurrence of the damage, the duty to compensate and the extent of the compensation to be made depend upon the circumstances, especially upon how far the injury has been caused predominantly by the one or other party.

(II) This applies also if the fault of the injured party was limited to an omission to call the attention of the debtor to the danger of unusual serious damage, of which the debtor neither knew nor ought to have known, or to an omission to avert or mitigate the damage. The provision of §278 BGB applies *mutatis mutandis*.' (Translated by Lawson & Markesinis *Tortious Liability* 61)

2.5.2. What is the amount of damages the dependant is entitled to?

As stated above, according to §§844, 845 BGB the person bound to make compensation must compensate the third party by the payment of a money annuity. Decisive for the size of the compensation is the value of the support the defendant would have had a claim for against his supporter for the presumed duration of his life - if he not had died - according to family law provisions.[627] Thus, it is important to note, the defendant is entitled to the payment of a money annuity only for the period that the supporter would - if still alive - have been obliged to support his dependant. In this regard one has to take into account the last income of the deceased and its expected development is relevant.[628]

2.5.3. Which dependants can claim?

In the case of §844 BGB it is required that the deceased at the time of the injury stood in a relation to a third party by virtue of which he was or might become bound by law to furnish maintenance to him. Legal obligations to furnish maintenance are regulated in §§1360 ssq, §§1570 ssq, §§1615a ssq, §§1736 ssq, §§1739, §§1754, 1755 BGB.[629] A limitation of the right of maintenance is that a person is entitled to maintenance only if he is not in a position to maintain himself, §1602 BGB.[630]

Legally obliged to maintenance are, for example, both partners to a marriage in respect of one another (§1360 BGB), divorced partners in respect of one another (§1570 BGB), parents in respect of their unmarried minor children (§1602 II BGB). According to §845 BGB a person can claim compensation when the injured party was bound by law to perform services in favour of a third party in his household or industry. Legally bound to perform services are children, as long as they are members of the parental household and are educated or supported by their parents, §1619

627) BGH *NJW* 1969, 382
628) BGH *VersR* 64, 597
629) Comprehensive lists of paragraphs dealing with legal obligations to furnish maintenance can be found in *Erman*-Drees §844 Rz 11; *Palandt*-Thomas §844 (4); *MünchKomm*-Mertens §844 Rz 16 ssq
630) The fact that a person has brought himself to such a condition through his own fault, does not affect his right to claim maintenance; it affects only the amount of maintenance which he is entitled to.

BGB. Originally a wife was also obliged to work in the household or business of her husband, §1356 (old version) BGB. This was, however held to be contrary to the right of equality, article 3 III GG.[631] Today a wife runs the household without the *Entscheidungsgewalt* (decision-making power) of her husband, but by doing that fulfils her obligation to support the family, §1360 BGB. Thus if the wife is killed, her husband is not entitled to compensation because of the loss of services in his household or industry, but might have a claim based on §844 II BGB, as his wife was obliged to provide maintenance according to §1360 BGB.

631) Compare *MünchKomm*-Wacke §1356 Rz 15

3. Pure Economic Loss in The German Law of Contract

As mentioned before, due to the fact that the German law of delict failed to develop in an entirely satisfactory way in regard to cases of negligently caused pure economic loss, the courts turned to the more flexible field of contract in order to effect compensation for such loss. To gain an impression of the variety of measures that were found to achieve that purpose (and in order to emphasise that German lawyers did not adopt a unitary approach to the problem of pure economic loss) the rest of this chapter will deal with each contractual approach separately. The consequential unavoidable lack of clarity concerning the unitary problem of pure economic loss will hopefully be offset by the understanding of the different remedies which deal with the problem.

3.1. Pure economic loss in terms of *culpa in contrahendo*

The theory of *culpa in contrahendo* was developed in 1861 by von Jhering in one of his 'judizien', and he based it on various Roman law texts.[632] It typically concerned cases in which one of the contracting parties suffered loss due to the invalidity of the contract for reasons of which the other party should have been aware. However, the BGB did not provide a principle on which the notion of *culpa in contrahendo* could be based comprehensively. The BGB laid down an obligation to compensate only in special cases.

Codified instances were, for example, §122 BGB which deals with the rescinding party's obligation to compensate and §§307, 309 BGB, which imposed the obligation to pay compensation for any damage which the other party has sustained by relying upon the validity of the contract, the performance of which he knew, or should have known, to be impossible or illegal; another example is §663 BGB which constitutes the obligation to compensate in cases of the omission to give notice of the refusal of an offer to take care of certain kinds of affairs in exchange for payment.

However, in due course it became commonly accepted that liability could be based on culpa in contrahendo (falling under the category of so-called 'quasi contractual liability'). The reason for this development can be found in the fact that the existence of a valid contract is a natural precondition for contractual liability and that non-contractual liability, i.e. delict (§§823 ssq BGB), does not seem to cover all cases that are 'worthy' of compensation.[633] Why this development proved necessary can be explained with the following example. B wants to buy a car from S and takes it for a test drive. Due to the fault of S the car has a break-down in a deserted area; B's only option is to order a taxi, to take him back to the garage. B has no contractual claim against S as no contract has been concluded at that stage. B also does not have a delictual claim, as the cost of the taxi - an instance of pure economic loss - does not fall within one of the protected rights of §823 I BGB, neither has a statute with a protective purpose been violated (§823 II BGB); S also did not cause B's loss intentionally in a manner that is in conflict with the *boni mores* (§826 BGB). If, on the other hand, B and S had concluded the contract of sale before the test drive, then

632) Compare von Jhering *Jhr Jb* 4 1861 1; see also *MünchKomm*-Emmerich Vor §275 Rz 33

633) *Erman*-Battes §276 Rz 110

B might have been entitled to compensation due to 'bad performance' (*Schlechterfüllung*).

Another reason why *culpa in contrahendo* is a particularly useful notion relates to employers' liability for delicts of employee's. If a damaging act had fulfilled the requirements of §823 I BGB and was the act of an insolvent employee, an action in delict against the employer would succeed, provided the employee caused the damage in the performance of his work and (in this regard German law differs from South African law) provided the employer is unable to prove that he fulfilled his duty of supervision or that the damage would have occurred notwithstanding the exercise of proper supervision, §831 BGB [634].

A further disadvantage of the delictual approach that contributed to the creation of a 'quasi-contractual' remedy is to be found in the fact that the action based on §831 BGB prescribes after 5 years (§852 BGB) whereas the action based on *culpa in contrahendo* only prescribes after 30 years (§195 BGB). To alleviate the situation the courts were prepared to generalise by way of analogy the notion of *culpa in contrahendo* inherent in the statutes cited above (§§122, 307, 309 BGB).[635] Subsequently *culpa in contrahendo* was justified on the ground that its application had in the meanwhile become a custom.[636]

The modern perception of the principle inherent in the doctrine of *culpa in contrahendo* can be stated as follows: Embarking on contractual negotiations already creates special duties for the participants and therefore also creates a special relationship.[637] In the case of a culpable breach of such a duty the participant is

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634) §831 BGB: '(I) A person who employs another to do any work is bound to compensate for damage which the other unlawfully causes to a third party in the performance of his work. The duty to compensate does not arise if the employer has exercised ordinary care in the choice of the employee, and, where he has to supply appliances or implements or to superintend the work, has also exercised ordinary care as regards such supply or superintendence, or if the damage would have arisen, notwithstanding the exercise of such care.
(II) The same responsibility attaches to a person who takes over the charge of any of the affairs specified in par I, sentence 2, by contract with the employer.' (Translated by Lawson & Markesinis *Tortious Liability* 58

635) *Erman*-Battes §276 Rz 112

636) *Palandt*-Heinrichs §276 (6) A; compare also §11 Nr 7 AGBG

637) RGZ 12, 251; 162, 152; *Palandt*-Heinrichs §276 (6) A

liable to pay compensation.[638] Furthermore the application of the doctrine *culpa in contrahendo* requires that there is, in effect, a loophole, i.e. the violation of the pre-contractual duty must not already be recognised in the BGB. Thus, for example, the violation of the pre-contractual duty must not consist in a delay of performance (§§286, 326 BGB) or due to supervening impossibility (§§323 ssq BGB).

The basis for the liability is not a *Rechtsgeschäft* (act of legal significance) such as, for example, a *Vorvertrag* 'preliminary contract' [639], but the fact that a person creates a situation of reliance, a so-called *Vertrauenstatbestand* by being prepared to participate in contractual negotiation as well as the fact that the other party actually relied on that situation.[640]

Culpa in contrahendo does not only apply when the parties were actually involved in negotiations. It could, for instance, apply at an earlier stage such as when a person enters a store, since the business contact is taken to begin at that stage.[641] However, mere social contact and geographical proximity are not sufficient to impose the burden of a special duty on shop owner.[642] Thus a person who enters a shop to warm himself and then suffers damage will only be able to claim in delict.

As mentioned above a particular advantage for a plaintiff to claim on the basis of *culpa in contrahendo* is the fact that in terms thereof there is 'strict' liability for the delict of an employee, §278 BGB.[643] Thus, based on *culpa in contrahendo* the employer is bound to compensate the victim's loss, if his employee had caused it, whereas a claim based on §831 BGB (vicarious liability) always is burdened with the eventuality of a successful *Entlastungsbeweis* (evidence for the defence) brought by the employee.

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638) *Palandt*-Heinrichs §276 (6) A
639) Binding agreement to conclude a contract the main points of which have already been agreed.
640) RGZ 120, 251; 162, 156; *Erman*-Battes §276 Rz 110; Ballerstedt 151 *ACP* 1950/51, 501
641) Larenz *MDR* 1954, 515; *Erman*-Battes §276 Rz 130; Dölle *ZStaatsW* 1943, 67
642) BGHZ 66, 54; *Palandt*-Heinrichs §276 (6) A
643) §278 BGB: 'A debtor is responsible for the fault of his legal representative agent, and of persons whom he employs in performing his obligation, to the same extent as for his own fault. The provision of §276 II BGB does not apply.' (Translated by Forrester, Goren, Ilgen *German Civil Code* 46)

The application of *culpa in contrahendo* covers many different situations of liability: The conclusion or otherwise of a contract can be totally irrelevant in regard to the occurrence of the damage;[644] On the other hand the damage might also be a consequence of the lack of a valid contract;[645] still further it might be a consequence of the burdening of someone with an (unwanted) contract.[646]

Finally, in a systematical sense *culpa in contrahendo* cannot be understood as *Rechtsgeschäftliche Haftung* (liability based on a legal transaction), as it often requires that a legal transaction was not entered into, for example that as a result of pre-contractual negligent conduct a contract was not concluded. Consequently *culpa in contrahendo* can be seen as merely another form of statutory liability; nevertheless, it is commonly called 'quasi contractual liability'.

3.1.1. Damage to body and property

The first group of cases is distinguished by the fact that one of the persons involved in the contractual negotiations is injured in his body or property by the other party.[647] For example a customer suffers injuries in a store, because an employee drops a heavy linoleum-role. In this situation the victim is entitled to compensation based on that special relationship.[648]

Often the victim might also be entitled to a delictual action. However the delictual action is sometimes the weaker mode of protection, for instance where, as stated above, the employer is able to render proof that he did not act culpably, which protects him from claims based on vicarious liability, §831 BGB. As cited above, §278 BGB does not offer the possibility of exculpation, with the result, that the employer is always liable for the culpable conduct of his employee.

However, as this first group is concerned with injuries to body and property and not pure economic loss, it will not be subject to further discussion in this dissertation.

644) To be discussed under [3.1.1.]
645) To be discussed under [3.1.2.(i)]
646) To be discussed under [3.1.2.(ii)]; concerning this see *Erman*-Battes §276 Rz 111
647) *Erman*-Battes §276 Rz 130
648) RGZ 78, 239

3.1.2. Economic loss

The remaining cases that need to be considered are those where one of the parties involved in contractual negotiations does not suffer an infringement of one of the rights protected by §823 I BGB, but rather suffers pure economic loss. Harm to the finances or estate of a party to the contract can arise when that party spends money, which turns out to have been in vain because the contractual negotiations fail or the contract was invalid *ex tunc*; or one party misses the opportunity to conclude a profitable contract because he relied on the conclusion of a different contract, but the negotiations in regard to this second contract were then stopped by the other party without good reason; or he concluded this other contract, but otherwise than indicated by the statements of the seller, the contract does not turn out to be very profitable, or far less profitable than the first contract that he could have concluded.

For all these situations the law of delict offers protection only if the damage was inflicted by the violation of a statute with a protective purpose (§823 II BGB) or if it was inflicted intentionally in a manner that is contra *bonos mores* (§826 BGB). But these criteria are often not fulfilled or at least intent cannot be shown to exist. Thus if someone owes any compensation in that kind of situation, then the action must be based on the special relation, i.e. *culpa in contrahendo*. Here one can distinguish between a number of further possible situations.

(i) Invalid contracts

If no valid contract has been concluded by the parties, the obligation to compensate can result only from *culpa in contrahendo* - apart from the few statutory obligation to compensate mentioned above. Here, again, one has to distinguish between yet two further situations.[649]

Firstly, the situation in which not even the appearance of a valid contract arose and secondly, the situation in which the parties actually concluded a contract, but this contract is or soon becomes invalid; consequently one party suffers loss due to his reliance on the validity of the contract.

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649) *Erman*-Battes §276 Rz 111

Cases of damage without the presence of a valid contract are usually concerned with the breaking off of contractual negotiations.[650] In the ordinary course of events a party must obviously be free to break off contractual negotiations, even when the other party has spent money or missed the opportunity to conclude a contract with some other person due to the fact that he relied on the future conclusion of the first-mentioned contract.[651] Nevertheless, according to the majority opinion, the loss the other party suffered as a result of his reliance on a future conclusion of a contract must, in certain circumstances, be compensated. For example, when one party breaks off the contractual negotiations without a convincing reason, after he had given the other party reason to be confident that the contract will be concluded.[652] Thus an employer might raise the expectation of an applicant that he will be offered the advertised job, with the result that this person might discontinue his old employment, relying on the fact that he had already found new employment.[653] Another example is when a future tenant has reason to be confident that he will be able to rent a not yet finished house and as a result of this starts helping with the building of the house.[654]

One body of opinion in the literature refuses to allow this wide extension of pre-contractual liability. It is argued that a person who wants to ensure the future conclusion of a contract can ask the other party for a legally binding offer.[655] Even though this argument is convincing at first blush, it does not really engage with the more differentiated approach of the majority of the legal writers in Germany (*herrschende Meinung*). The 'majority' would agree that, in principle, no obligations arise at the stage of negotiations. But their argument is that, although no obligation arises at that stage, a special relationship nevertheless comes into existence that gives rise to special duties between the parties.[656] Thus, if one party creates a situation of reliance with the result that the other party relies on the future conclusion of the

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650) See Küpper *Das Scheitern von Vertragsverhandlungen als Fallgruppe der culpa in contrahendo* ssq; also Küpper *Schadensersatz aus culpa in contrahendo beim gescheiterten Abschluss eines formbedürftigen Vertrages* ssq; Reinicke & Tiedtke *ZIP* 1989, 1093

651) *Erman*-Battes §276 Rz 121 ssq

652) BGHZ *ZIP* 1988, 88, 90

653) BAG *DB* 1974, 2060

654) BGH *LM* §276 [Fa] BGB Nr 3

655) Compare *MünchKomm*-Emmerich Vor §275 Rz 79; von Bar *JuS* 1982, 637, 638 ssq; von Craushaar *JuS* 1971, 127; Gottwald *JuS* 1982, 877; Larenz *Festschrift für Ballerstedt* 397, 415 ssq; Medicus *Gutachten und Vorschläge* 479, 494 ssq

656) *Erman*-Battes §276 Rz 122 ssq

contract, it seems to be justified, particularly in the light of §242 BGB (good faith), to hold the party liable who breaks off the contractual negotiation without good reason.[657]

That having been stated, it must, however, be noted that the 'majority' would agree with the 'minority's' refusal to allow the application of *culpa in contrahendo* in instances where the invalidity of the contract flowed from the fact that the legally required formal criteria were not fulfilled (for example the requirement of judicial or notarial attestation in the situation contemplated by §313 BGB when somebody binds himself to transfer ownership of a piece of land).[658] This formal requirement is meant to protect the parties and not to conclude contracts with far reaching consequences without further reflection. But the protective purpose of such a formal requirement would practically be nullified if the party who refuses to conclude the contract was exposed to the risk of liability to a disappointed 'partner'.[659] In other words, a person who knows that the validity of a particular contract requires further formalities will not be protected by his reliance on the future conclusion of the contracts.

Whereas in the constellations explained above the contractual negotiations already failed before the conclusion of the contract, the following discussion will deal with the further eventualities, such as where a contract was ostensibly concluded, but was in fact invalid, although one of the parties does not realise that and consequently suffered loss. Situations like this one are covered by §§122, 179, 307, 309 BGB. In situations covered by these statutory provisions - apart from the case of §179 BGB - the legal consequences are always the same: There is an obligation to compensate the disappointed party's negative interest; nevertheless it is important to note that the defendant's liability to pay compensation is limited by the rule that the amount must not exceed the value of the interest which the other party had in the validity of the contract (*positives Interesse*). However, the obligation to compensate will be excluded if the victim knew or ought to have known the reason for the invalidity of the contract.

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657) RGZ 151, 357; BGH *MDR* 1961, 49
658) *Erman*-Battes §276 Rz 118
659) Compare BGH *WM* 1957, 883, 885

The requirements for liability are, however, different under the various provisions of the BGB. According to §§122, 179 II BGB a defendant can only be held liable independently of whether fault was present, whereas according to §307 and §309 BGB one will just be held liable for culpable conduct. Nevertheless the courts extended the *Verschuldenshaftung* (fault liability) to cover further cases.

A leading case is the *Weinsteinsäureentscheidung*.[660] Two parties had sent telegrams in such an awkward way that the impression arose that a contract relating to the supply of about 100 kg wine acid had been concluded. Later it turned out that both parties intended to sell 100 kg of wine acid. According to the *Reichsgericht* the ostensibly concluded contract failed because there was no consensus; thus, no party was obliged to challenge his own statement because of an error of meaning, §119 I BGB; otherwise the rescinding party would have been obliged to compensate the other party for his loss suffered by relying upon the validity of the declaration, §122 BGB. In this case the *Reichsgericht* recognised in the culpable mode of expression of one of the parties a cause for liability on the basis of negative interest. A decision in similar vein was the one [661] where one party culpably failed to inform the other party about the prerequisite of a legal authorisation concerning foreign exchange for a valid conclusion of that contract.

One can summarise the common principle as follows: A person is liable to compensate anothers' harm (on the basis of *negatives Interesse*) - limited by the value of the interest which the other party had in the performance of the valid contract (*positives Interesse*) -, where he culpably fails to inform the other party about facts that are an obstacle to the validity of the contract. However, as such the principle is not very powerful, as the omission to give information is only culpable if there is a duty to give such information. Therefore the crucial question to be answered is: Under which circumstances does such a duty arise?

Firstly, a duty comes into existence when all the reasons for the invalidity of the contract arise from the 'sphere' of only one of the parties. For example in a particular case decided by the *Bundesgerichtshof* the obligation to inform the other party about

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660) RGZ 104, 265
661) BGHZ 18, 248, 252

the prerequisite of a legal authorisation arose from the fact that that party was a foreigner.[662]

Secondly, a party could be under a duty to inform the other party if he owed that other party special care according to a statute, or according to a contract, or because of previous conduct.[663] Here, informing the other party would be but a part of taking special care. However, it is commonly accepted that the obligation to render information is not open-ended. More particularly, in the case of the sale of a piece of land the seller is not obliged to inform the buyer about the form that is legally required by §313 BGB.[664] Thus, if they fail to choose the appropriate legal form, the buyer will not be entitled to compensation for the loss consequent upon the reliance on the validity of the contract. Nevertheless, the situation will be different, if, for example, the seller was , apart from the sale itself, under a further contractual obligation to take care in regard to the buyer (for instance a seller of an estate who also has the responsibility for the proper construction of a house) or if the seller prevents the fulfilling of a formal requirement by the giving of wrong information (prior conduct).[665] In such a case the courts are sometimes prepared to hold the lack of form according to §242 BGB (good faith) as insignificant, i.e. to argue that the lack of form is inadmissible [666] and that the buyer is consequently entitled to compensation (or to the performance of the contract).

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662) BGHZ 18, 248
663) *MünchKomm*-Emmerich Vor §275 Rz 43 ssq
664) *Erman*-Battes §276 Rz 118
665) *MünchKomm*-Förschler §125 Rz 41 ssq
666) Compare Köhler *BGB Recht der Schuldverhältnisse II, Einzelne Schuldverhältnisse Prüfe dein Wissen* 19 V 3; *MünchKomm*-Förschler §125 Rz 49 ssq

(ii) Valid contracts

In the cases discussed until now the loss arose in the context of an invalid contract. But of course the harm can also consist in the fact that, because of the fault of one party (for example bad advice), the other party is burdened with a valid contract, which is actually a nuisance.[667] According to §249 1 BGB an action based on *culpa in contrahendo* is directed at restoring the situation which would have existed if the circumstances giving rise to the liability to compensate had not occurred (negative interest). Normally this would imply the revocation of the contract.[668] Occasionally, the *Bundesgerichtshof* even allowed compensation in the form that the seller was ordered to reduce the purchase price.[669] However, there are two major arguments against an action based on *culpa in contrahendo* directed at the revocation of a contract.

Firstly one notes a conflict with the provision of §123 BGB, which deals with recission on the grounds of fraud or duress in circumstances where someone has been induced to make a declaration of intention by fraud or unlawful threats. According to §124 BGB (period of recission) the recission of a declaration under §123 BGB may take place only within the period of one year; this rule laid down by the legislature would obviously be undermined if one could, in a case of mere negligence - which would always include all the cases covered by §123 BGB - claim the revocation of a contract on the basis of *culpa in contrahendo* within thirty years, §195 BGB. However, the *Bundesgerichtshof* is prepared to allow this inconsistency to remain.[670]

More convincing is a 'minority' approach which provides a solution to that inconsistency by reducing the prescription period of claims based on *culpa in contrahendo* directed at the revoking of a contract to a period of one year. The explanation they offer for this approach consists in the argument that the legislature

667) *Erman*-Battes §276 Rz 125 ssq

668) According to an opinion supported by a minority, there will only be a title to compensation in money; compare Lieb *Festschrift Rechtswissenschaftliche Fakultät der Universität Köln* 251 ssq

669) See Tiedtke *JZ* 1989, 569; BGH *JZ* 1989, 592

670) BGH *NJW* 1968, 986; 1984, 2014; similarily Köhler BGB *Recht der Schuldverhältnisse II, Einzelne Schuldverhältnisse Prüfe dein Wissen* 14 V 4 d cc

expressly chose a one year period of perscription for similar constellations that are recognized in the code, i.e. those of recission (§124 BGB).[671]

Secondly, distinguishing between *culpa in contrahendo* directed at the revokation of a contract and liability for material defects (§§459 ssq BGB) is especially difficult and uncertain. For example, if the wrong information given by the seller concerns the characteristics or quality of goods, then it is unnecessary to correct the contract by imposing an obligation to compensate which is based on *culpa in contrahendo.* One should rather take the seller at his word and hold the goods to be faulty.[672] Consequently there would be no room for *culpa in contrahendo.* In that way one avoids the clash of different prescription periods, since in cases of liability for material defects a short prescription period of six months applies, §477 BGB.

Thirdly, the following question must also be answered: To what extent could a pre-contractual duty to take care in regard to the finances and estate of another arise? The existence of such a duty can be conceded only in exceptional cases. For example, even a guarantor who binds himself to the creditor of a third party to be responsible for the fulfilment of the obligation of the third party normally does not need to be informed about the special risks of providing security in this way.[673]

3.1.3. Liability of Third Parties

According to what was said above, persons who were involved in contractual negotiations and were willing to contract, owe special duties to each other and in case of a breach of such a duty they owe compensation. But often third parties are also involved in contractual negotiations (such as, for example, estate agents or representatives either by law or contract).

Ballerstedt wants to hold third parties liable in terms of *culpa in contrahendo* if they raised special reliance in their person, in circumstances where such reliance by one of

671) Compare *Erman*-Brox §123 Rz 8
672) This was held by BGHZ 60, 319
673) Compare *MünchKomm*-Förschler Vor §275 Rz 43 ssq

the contracting parties was reasonable.[674] Subsequently, the *Bundesgerichthof* adopted this approach.[675]

One group of cases, where the third party was held liable on the basis of *culpa in contrahendo*, is commonly referred to as the *Sachwalterfälle* (agent\trustee cases).[676] The reasons for the particular requirement of trustworthiness (which creates the crucial duty of care) were given as being special knowledge of the subject, personal reliability and the personal exertion of influence on the fulfilment of the contract.[677] In respect to the raising of special reliance in their person the *Bundesgrichtshof* treats these cases on an equal footing where the third party 'is in a close position to the object of negotions, as he himself is economically particularly interested in the conclusion of the contract and intends to make personal benefit as a result of it'.[678]

The imposition of this kind of personal liability is especially convincing where the third party appeared *mero motu* and acted in his own name and referred to his personal knowledge of the subject or where the third party used the legal form of representation for reasons that are alien to civil law.

One will often find the last-mentioned situation in the field of trade with second hand cars. Here the car dealer sells the cars in the name of the 'former' owner to avoid the obligation to pay further taxes. In these cases the car dealer will be held personally liable for his statements.[679]

Other than in the instances mentioned above, the courts have been reticent to hold a third party personally liable on the basis of *culpa in contrahendo*. Thus a managing director of a *GmbH* (limited company) who is also a shareholder of the company will

674) Ballerstedt 151 *ACP* 1950/51 501
675) BGHZ 72, 382; 74, 103
676) See for example BGHZ 56, 81
677) BGHZ 56, 81, 85
678) BGH *ZIP* 1988, 505, 506; compare futher Assmann *WM* 1983, 138 ssq; Assmann *Prospekthaftung* ssq; Bohrer *Die Haftung des Dispositionsgaranten* ssq; Grote *Die Eigenhaftung Dritter als Anwendungsfall der culpa in contrahendo* ssq; Hermann *JZ* 1983, 422 ssq; Kübler *Festschrift Kellermann* 243 ssq; Medicus *Festschrift Steindorff* 725 ssq; Schulze *Jus* 1003, 81 ssq
679) BGHZ 63, 382; BGHZ 79, 281

not be held personally liable merely because he is interested in the conclusion of the contract in his position as a shareholder.[680]

Arguments against a large-scale widening of liability of third parties based on *culpa in contrahendo* can be found in the fact that personal liability may be based on a variety of other special actions, the requirements of which need not be blurred by the application of a contourless *culpa in contrahendo*. The third party could be liable on the basis of an advisory contract; he might also be liable on the basis of delict (for exanmple, §823 II BGB read with §263 (Penal Code); he might have taken over personal liability as a result of standing surity, a promiss or a warranty.

Finally, for the sale of investments, the *Bundesgerichtshof* developed a special civil-law based *Prospekthaftung* (prospect liability) with a shortened prescription period.[681] Accordingly initiators of certain forms of investment companies are liable in terms of *culpa in contrahendo* for the correctness of the information offered in their brochure.[682]

680) BGH *NJW* 1986, 586; 1989, 292; this would obviously contradict §13 *GmbHG* (Company Act)
681) Compare BGHZ 83, 222; critical Morgen *NJW* 1987, 474
682) For further reading *MünchKomm*-Kramer Vor §241 Rz 78

3.2. Pure economic loss in terms of *Positive Forderungsverletzung*

Yet a further remedy, created by the courts and which also covers certain cases of pure economic loss, will be subject of the this section. It should be mentioned that *positive Forderungsverletzung* (positive violation of a contractual duty) is elaborated upon here, even though it was stated in the introduction that situations concerning pure economic loss where a contract between plaintiff and defendant exists, would be excluded. But as the next chapter will deal with *Vertrag mit Schutzwirkung zugunsten Dritter* (contract with a protective ambit towards a third party), and claims by such third parties are very often based on the uncodified *positive Forderungsverletzung* (positive violation of a contractual duty), hence the necessity of having to describe the remedy of *positive Forderungsverletzung.*

It is perhaps the easiest to begin this description with an example [683]: In a case that had to be decided by the *Reichsgericht* Indian maize was delivered to the buyer of horse-food. The Indian maize contained poisinous castor-corns; the buyer's horses subsequently died as a result of eating the horse-food. In this case the delivery of proper food is obviously still possible. Also - apart from the fact that there was no warning - the damage was not caused by default in the delivery (§286 I BGB) and consequently liability cannot be based on debtor-default, §286 I BGB. Cancellation of the contract or reduction of the price for the food (§462 BGB) would not satisfy him either. Finally a title to compensation did not arise out of §§463, 480 II BGB, as the seller of the food did not promise quality of the sold food, nor did he fraudulently conceal the defect of the food. It was Staub, who was able to justify this approach by demonstrating that apart from the breach of primary obligations such as 'imposibility' and 'debtor-default' there is also a further manifestation of *Leistungsstörung* (disturbance of performance).[684] Staub called this constellation *positive Vertragsverletzung* (positive violation of a contractual duty); here the debtor (the seller in our example) does not omit performance as he does in the cases of 'impossibility' and 'debtor-default', but he causes loss to the purchaser by acting positively (here by delivering poisonous food).

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683) RGZ 61, 289
684) Staub *Die positive Vertragsverletzung* ssq

The incompleteness of the legal system concerning the *Leistungsstörung* (disturbance of performance) was, however, subject to yet further cotroversy. Firstly Staub's approach was criticized by Himmelschein [685], and more recently by Emmerich [686]. In their opinion one has to understand the *Leistungsbgriff* (term of performance), and consequently also the term 'impossibility', in a much wider sense, than this is done by the 'majority'. In Himmelschein's opinion one factor pertaining to 'performance' is quality; thus performance with faulty goods means to have performed only partly in regard to the quality that was actually owed. In the case of the poisoned horse-food [687] this would mean the following: By delivering poisoned food leading to the consequential death of the horse, the performance of the obligation to deliver proper food was partially not fulfilled and became partially impossible. Thus, the defendant had to compensate the plaintiff for the loss he suffered consequent upon the impossibility, §325 BGB.

Considering the system and history of the BGB, one has to acknowledge that there are certain arguments that support Himmelschein's and Emmerich's approach. Had this new approach been elaborated earlier, the legal developement might perhaps have gone along an entirely different track. However, as the theory and practice adopted the approach of Staub, one has to accept the uncodified *positive Forderungsverletzung* as a third kind of *Leistungsstörung* (disturbance of performance).

Certainly, Staub's approach does not correspond in all points with the actual approach of the majority any longer.[688] The term *positive Vertragsverletzung* is commonly held to be inappropriate. Firstly, because not only the breach of contractual duties, but also duties that derive from other *Rechtsgründe* (legal justifications), for example bad performance of a legal obligation to compensate, lead to consequental loss. Today the term *Forderungsverletzung* instead of *Vertragsverletzung* is preferred. And secondly, also the adjective *positiv* does not describe the constellation adequatly. On the one hand it might be the positive conduct of the debtor that causes the

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685) Himmelschein 135 *ACP* 1932, 255 ssq; also Himmelschein 158 *ACP* 1959/60, 273 ssq

686) Emmerich *Recht der Leistungsstörung* 216 ssq; *MünchKomm-Emmerich* Vor §275 Rz 97; compare also *Erman*-Battes §276 Rz 57

687) RGZ 66, 289

688) Compare *MünchKomm*-Emmerich Vor §275 Rz 95; *Erman*-Battes §276 Rz 87 ssq

'impossibility' or 'default' (for example the debtor destroys the goods). But on the other hand even in the field where the *positive Forderungsverletzung* traditionally applies, *negative* acts are recognized, i.e. omissions of the debtor (for example the omission to inform a customer about the danger of delivered goods). So it would be more adequate to talk about *sonstige Vertragsveletzung*, but which would be too colourless.

One important group of the *positive Forderungsverletzung* could be called *Schlechtleistung* (malperformance), whereas less appropriate might be the term *Schlechterfülung* (bad fulfilling) [689], as it does not matter whether or not the performance on an instance of *positive Forderungsverletzung*, had *Erfüllungswirkung* (fulfilling effect).[690]

Finally, the systematical explanations for the not yet codified *positive Forderungsverletzung* will be investigated. Often liability arising from *positive Forderungsverletzung* is referred to as customary law.[691] Today this is correct in so far as it is impossible to deny liability based on *positive Forderungsverletzung* without violating the law.

However, aditionally it should be explained which provisions were used to justify such liability - a liability which (like *culpa in contrahendo*) is said to be of a quasie-contractual nature. For a long time courts referred to §276 BGB.[692] But this statute [693] merely cites the circumstances (facts) that one is responsible for (ie intent and negligence), but does not constitute any legal consequences (for example the obligation to provide compensation).[694] Simlarly colourless is the approach by which §242 BGB is used as a legal base.[695] The currently commonly accepted

689) So for example *MünchKomm*-Emmerich Vor §275 Rz 95
690) Concerning the term *positive Forderungsverletzung* see also *Palandt*-Heinrich §276 (7) A a
691) Compare *Palandt*-Heinrichs §276 (7) A a; Larenz *Schuldrecht Allgemeiner Teil* 300
692) RGZ 66, 291; 106, 25
693) §276 BGB '(I) A debtor is responsible, unless it is otherwise provided, for wilful conduct and negligence. A person who does not exercise ordinary care acts negligently. The provisions of §§827, 828 apply.
(II) A debtor may not be released beforehand from responsibility for wilful conduct.' (Translated by Forrester, Goren, Ilgen *German Civil Code* 46)
694) BGHZ 11, 83
695) BGHZ 11, 83, 84

explanation is to justify its existence on an analogy to the codified forms of breach of contract, as there are §§286, 326 BGB (compensation for default), and §§280, 325 BGB (liability in case of impossibility for which one is responsible).[696] Common is also the reliance on certain further statutes, that constitute the obligation to compensate in special cases of bad performance.[697]

3.2.1. Objective requirements

Concerning the objective requirements of *positive Forderungsverletzung* there is general agreement that it is subsidiary to the specially codified cases of 'impossibility' and 'debtor-default'.[698] According to the commonly accepted definition *positive Forderungsverletzung* is every breach of a (secondary) duty arising from a *Schuldverhältnis* (obligation) that does not constitute 'impossibility' or 'debtor-default'.[699] The infringement of a legally protected right is not required and as a result pure economic loss is also compensable.

However, it is self-evident that this vague definition is nothing more than a loose frame [700] for the courts and legal writers, who formed - according to the cases that arose - certain groups where compensation will be granted.[701]

More or less commonly accepted is the group dealing with instances of the inadequate performance of a *Hauptleistungspflicht* [702], as illustrated by the horse-food case. Here the appropriate performance does not become impossible, nor does the failure to perform represent default damage. Rather, the damage typically occures in regard to the creditor's legally protected rights, which stand outside the contract. In the horse-food case [703] damage did not arise in regard to the food that

696) Compare Larenz *Schuldrecht Allgemeiner Teil* 367
697) See for example §§463, 480 II, 538, 645, 618, 635, 671 II 2 BGB.
698) For example BGHZ 11, 83; BGH *NJW* 1978, 260; *MünchKomm*-Emmerich Vor §275 Rz 95
699) *MünchKomm*-Emmerich Vor §275 Rz 95
700) For example Wiedemann called it an *'amorphes Gebilde'* in *Festschrift Rechtswissenschaftliche Fakultät der Universität Köln* 367, 388 ssq
701) Compare all the groups of cases offered in *MünchKomm*-Emmerich Vor §275 Rz 98 ssq; *Erman*-Battes §276 Rz 91 ssq; *Palandt*-Heinrichs §276 (7) A-D
702) Compare *MünchKomm*-Emmerich Vor §275 Rz 98 ssq
703) RGZ 66, 289

was the subject of the contract, but it arose in regard to the horse itself. This kind of damage is called *Begleitschaden* (accompanying loss) [704].

A problem in regard to this group is that the consequences of inadequate performance is sometimes dealt with in statutory provisions concerning a particular obligation, for example in the case of sale, §463 II BGB (absence of promised quality), §480 BGB (warranty against defects in the case of purchase of fungibles), and in the case of a contract for work, §635 BGB (compensation for non-fulfilment in the field of a contract for work). These statutory provisions have a very short period of prescription, §§477 BGB (a six month prescription period for claims on warranties), §638 BGB (a prescription period varying from six month to five years in the field of a contract of work). As a result the question arises as to how one distinguishes between these special actions and the general actions based on *positive Forderungsverletzung* and what the prescription period of these general actions is.[705] The whole problem concerning the prescription periods that are specifically codified with separate statutes and their relation to the general prescription period of thirty years (§195 BGB) that is normally applicable in terms of positive Forderungsverletzung is one of the most difficult questions in German civil law today; as this problem also does not specifically concern pure economic loss a detailed discussion falls outside the scop of this dissertation.

A second group of *positive Forderungsverletzung* is characterized by the failure of performing further duties to protect against loss or to behave in a certain way.[706] On the one hand this group deals with the duty to protect a contracting party in a way that he will not suffer loss if during the performance of the contract his body or property should be injured.[707] This situation clearly does not concern pure economic loss and consequently it is of no particular interest in the context of this dissertation.

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704) Compare Larenz *Schuldrecht Allgemeiner Teil* 364

705) Compare *MünchKomm*-HP Westermann §463 Rz 41 ssq; *MünchKomm*-HP Westermann §477 Rz 26 ssq; *MünchKomm*-Soergel §635 RZ 55 ssq; *MünchKomm*-Soergel §638 Rz 10 ssq

706) Larenz *Schuldrecht Allgemeiner Teil* 364 ssq; *MünchKomm*-Emmerich Vor §275 Rz 119 ssq

707) *MünchKomm*-Emmerich Vor §275 Rz 129

On the other hand this group deals with duties which refer to the performance itself and thus to the appropriate carrying out of duties in terms of the *Schuldverhältnis* (obligation). For example the seller has a duty to inform the purchaser about the use of the bought thing; under certain circumstances he even has the duty to take care in regard to possible repairs and be able to supply the purchaser with spare parts or to provide the possibility of buying a replacement.[708] In the field of renting business flats,[709] there is a duty on the lessor not to rent another flat in the same house to a business competitor. Such a duty could naturally not arise before the conclusion of the contract.
The duties that refer to the appropriate performance of the *Schuldverhältnis* (obligation) are often difficult to distinguish from the constellations of *Schlechterfüllung* (malperformance) elaborated above. When a seller, for example, does not properly inform the purchaser of a chain saw about its correct use, this might have as a consequence damage of the chain saw as well as pure economic loss, due to the fact that he could not carry out the planned and intended amount of work.[710]

Liability based on *positive Forderungsverletzung* also plays a crucial role in the field of banker-client relationships. The bank and its customers (as a result of the banker-client contract, or the girocontract, or of other typical banking agreements) have a duty to exercise the care required in ordinary banking intercourse. In the case of the representation of a cheque to a bank therefore has the duty to choose the fastest, safest and most reasonable way for the cheque's collection.[711]

Furthermore, in the field of money transfers the bank has a duty to follow the orders of its customer strictly and to deliver his messages to the intended recipient.[712] The bank is allowed to chose a different way for the transfer of the money only if it reserved this right for itself.[713]

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708) *MünchKomm*-Emmerich Vor §275 Rz 104
709) Compare *MünchKomm*-Emmerich Vor §275 Rz 107
710) Compare BGH *MDR* 1978, 133
711) BGHZ 13, 127; 22, 304; 26, 55
712) BGH *JZ* 1977, 299; 1978, 313
713) BGH *NJW* 1978, 1825

However, a bank normally does not have a duty to check the economic reasonableness and usefulness of customers' orders. But the position will be different if the bank knows that the receiver is about to collapse financially.[714]

In principle the bank also does not have a duty to warn the customer not to give a credit to another bank customer. Also the bank normally does not owe a duty to a customer not to do business with a third party or to check the value of a surety that has been offered.[715]

Nevertheless, the bank does have, in the normal course of events, a duty to exercise special care when it gives information to customers. Every breach of such a duty renders the bank liable, unless the bank expressly excluded any liability for incorrect advice.[716]

Occasionally *positive Forderungsveletzung* is also applied in certain other situations.[717] Thus, for example, from time to time the courts applied it in cases of refusal to perform a contractual obligation.[718] However, it is mostly possible to handle these cases on the basis of the specifically codified actions dealing with debtor-default (286, 326 BGB) with the result that an action based on the subsidiary *positive Forderungsveletzung* will not be available since this would require the existence of a loophole. Consequently only cases where the default occurred without the prior demand of delivery might be of interest in regard to the application of *positive Forderungsveletzung* as in these cases the codified forms of debtor-default are not offering any compensation.[719] Thus, the *Bundesgerichtshof* held that the creditor might be allowed to claim compensation before the performance was due in case where, because of the debtor's statement that he will definitely not to perform, it is senseless for the creditor to wait until the date on which the performance was due.[720]

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714) BGHZ 23, 222, 227
715) BGH *NJW* 1982, 1520
716) Schwark *Anlegerschutz durch Wirtschaftsrecht* 77 ssq
717) Compare the comprehensive list in *MünchKomm*-Emmerich Vor §275 Rz 119 ssq
718) BGHZ 49, 56; more restrictive BGH *NJW* 1986, 842, 843
719) Medicus *Bürgerliches Recht* Rn 308; BGHZ 50, 175; 65, 372, 374 ssq; BGH *NJW* 1979, 811
720) BGH *NJW* 1985, 2021

3.2.2. Subjective requirements and wrongfulness

On the subjective side *positive Forderungsverletzung* requires fault - §276 BGB - as do all other disturbances of performance that lead to compensation. In how far 'softer forms of liability' that are required for certain contractual relations (e.g. that a donor is responsible only for wilful conduct and gross negligence, §521 BGB) also apply to the duty to protect must be deduced by interpretation.[721] Nevertheless, fault must pertain to the breach of the duty, but need not pertain to refer to the loss itself. Also, the creditor will be held liable for the fault of his employee, §278 BGB (responsibility for persons employed in performing obligation).

Furthermore, the *Forderungsverletzung* must have been wrongful. Normally every violation of a contractual duty is held to be wrongful, as long as there was no ground of justification present.

3.2.3. Burden of proof

Still subject to discussion is the question as to which facts have to be proved by the creditor when he wants to sue the debtor on the basis of *Positive Forderungsverletzung.*[722]

According to the common principle concerning the burden of proof the plaintiff must prove the facts that give rise to his action.[723] But as *positive Forderungsverletzung* was created by analogy to the remedies of impossibility and default, the majority of the legal writers are prepared to apply the principles of proof codified in §282 BGB (proof in case of impossibility), 285 BGB (no default if no responsibility) accordingly. As a result the onus is on the debtor to prove that he did not breach the duty culpably.[724]

721) For example BGHZ 93, 23; There the court applied the privilege constituted by §521 BGB in the case of a loss consequential to the damage caused by *Pülpe* which was sold as cattle food; compare Stoll *JZ* 1985, 384; Schubert *JR* 1985, 324; Schlechteriem *BB* 1985, 1356; Gerhard *Jus* 1970, 597; *JZ* 1970, 535

722) Compare *Palandt*-Heinrichs Vor §249 (8); §282 (1-2); *Erman*-Battes §282 Rz 6-8; *MünchKomm*-Emmerich Vor §275 Rz 150-164

723) *MünchKomm*-Emmerich Vor §275 Rz 150

724) Compare *MünchKomm*-Emmerich Vor §275 Rz 151

However, the courts have not followed this approach strictly.[725] §§282, 285 BGB are based on the suggestion that it is much easier for the debtor than for the creditor to explain the reason for the impossibility or default of the performance, as they regularly arise from his 'sphere'. Consequently, it is incumbant upon him to carry the burden to prove that he did not act culpably.[726] But the damage does not necessarily have its origin in the sphere of the debtors influence in all cases of *positive Forderungsveletzung*. As a result, the application of §§282, 285 BGB is only justified in cases where the cause for the damage in fact lay in the sphere of the debtor. Thus, the courts were, as a matter of course, prepared to reverse the burden of proof as codified in §§282, 285 BGB in cases of transportation contracts, contracts of work and catering contracts.[727]

3.2.4. Damages

As in the case of §280 BGB (liability in cases of impossibility for which one is responsible) as well as in the case of §286 BGB (compensation for default), it is commonly accepted that culpable *positive Forderungsverletzung* entitles the creditor to compensation for the loss that was caused by the breach of the duty.[728] Thus, the seller of the machine who owed further information to the buyer has to make good the loss the purchaser suffered due to the fact that he could not use the chain saw appropriately. The lessee of a flat, for example, has to compensate the loss of income which was suffered by his tenant because a competitor was allowed to establish a business in the same house.

The extent and form of the compensation is regulated according to §§249 ssq BGB; accordingly the defendant is primarily obliged to compensate 'in kind' and only in certain circumstances is he allowed to compensate in money.

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725) BGHZ 3, 162, 174; 59, 303, 309

726) BGH *WM* 1982, 849, 850

727) The courts decided this as early as in RGZ 148, 148; for further details see BGHZ 3, 162, 174; 8, 239; *MünchKomm*-Emmerich Vor §275 Rz 150 ssq; Musielak (176) *ACP* 1976, 465 ssq; Stoll *Festschrift von Hippel* 1967, 517 ssq; also Stoll 176 *ACP* 1976, 145 ssq

728) *MünchKomm*-Emmerich Vor §275 Rz 132 ssq; *Erman*-Battes §276 Rz 112

3.3. Contract with protective ambit towards a third party

In addition to §328 BGB (a contract *in favorem tertii*) the courts developed the notion of a 'contract with protective ambit towards a third party'.[729] The reason for this development can be explained on the basis of the following borderline case [730]: In the winter 1914 a monastery needed a medical doctor. The defendant agreed to transport the physician with a horse-drawn sleigh for a payment of money. During this sledge ride it happened that the physician was injured because of the fault of one of the defendant's labourers.

The defendant was able to exculpate himself in respect of the labourer's act in accordance with §831 I 2 BGB. The *Reichsgericht* held that contractual claims were normally not available in this particular case as the defendant owed the performance, i.e. the transport, only to the monastery. It was the aim of the contract that the plaintiff should not get an own right to the transport out of the contract. As a result of this the plaintiff would normally be not entitled to compensation from the defendant for the damage resulting from the bad performance. However, the *Reichsgericht* was of the opinion that the defendant's obligation to compensate the loss that was suffered by the doctor should not depend on the fact whether or not the plaintiff himself was personally entitled to the transportation. But the decision does not mention whether it is the doctor (the victim) or the monastery (the contracting partner) who is entitled to claim for compensation of the physician's loss.

If the position were that the monastery was entitled to the compensation of the doctor's loss, this would have required *Drittschadensliquidation* (liquidation of a third parties loss), i.e. the monastery would have had to liquidate instead of an own loss the physician's loss. In the ensuing development the courts decided against the application of *Drittschadensliquidation* in similar cases.[731] Thus, a new, today commonly accepted type of contract was born, 'the contract with protective ambit towards third parties'. Here the third party does not have a right to the performance,

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729) Compare *MünchKomm*-Gottwald §328 Rz 60; see also Markesinis (1987) 103 *LQR* 354, 358 ssq
730) RGZ 87, 289
731) *Palandt*-Heinrichs §328 (3) a

but in regard to certain forms of bad performance is entitled to compensation based on contractual remedies.[732]

The contract with protective ambit towards a third party was invented to offer a third party, even though he had not contracted with the defendant, a claim based on contract. This claim with the advantage of §278 BGB being applicable, offers a further remedy besides the delictual claims which have, as has been mentioned above, the disadvantage of the possibility of exculpation in cases of liability for employees, §831 I 2 BGB.[733]

In such an instance the protected third party is entitled to claim for compensation against the debtor in terms of contractual remedies that are normally available only to the a contracting party. The remedies that are available are those concerning malperformance, i.e. the breach of secondary contractual obligations, and not those concerning the breach of primary obligations such as impossibility or debtor-default. Thus, apart from the few codified remedies concerning the breach of secondary duties - for example §538 BGB (lessor's duty to compensate) - the remedies that are available to the third party to claim for compensation are *positive Forderungsverletzung* and *culpa in contrahendo*. As explained above, based on *positive Forderungsverletzung* or *culpa in contrahendo*, injuries to property, body as well as pure economic loss are compensable.[734]

Until recently it was the commonly held opinion that the protective ambit of a contract was restricted to loss that results from the inadequate performance - i.e. the breach of a secondary obligation, whereas loss resulting from failure to performance at all - i.e. the breach of a primary obligation - should not be compensated.[735] The argument put forward was that a person who is not entitled to performance cannot claim for compensation that, for all practical purposes, leads to the fulfilling of the contractual obligation.

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732) *Palandt*-Heinrichs §328 (3) b
733) *MünchKomm*-Gottwald §328 Rz 60; *Palandt*-Heinrichs §328 (3) a
734) BGHZ 49, 353
735) Compare Markesinis (1987) 103 *LQR* supra 358

Nevertheless, on occasion the *Bundesgerichtshof* held differently. For example, in a case [736] where a *Rechtsanwalt* (lawyer) culpably omitted to draw up a will, and the testator died soon afterwards, making it impossible to make it the *Bundesgerichthof* held the *Rechtsamwalt* liable to compensate the person who would have become heir according to the will, but failed to do so because of the *Rechtsanwalt's* culpable omission. The *Bundesgerichtshof* based this judgement on *positive Forderungsverletzung* in the context of the contract concluded between the testator and the lawyer, which was held to have a protective ambit towards the 'disappointed heir', although the *Rechtsanwalt* owed performance only to the testator. However it was decided that the 'legal heir' should be allowed to keep the estate of the deceased, as required by the correct application of the law of succession.[737] Thus in effect there were finally two 'heirs', causing German lawyers to call this case the *lachenden Doppelerben* 'laughing double heirs'.

This new approach argues that the question concerning the protective ambit does not only depend on the fact whether the loss resulted from non-fulfilment or inadequate fulfilment but on the specific character of each duty to perform.[738]

Whether a debtor also owes special protective duties to a third party, can be deduced by contractual interpretation, since a contract will normally not expressly contain such agreements.[739] Thus one has to examine whether the protective ambit in respect of third parties and the extent of the protected sphere can be established by interpretation of the contract.[740] But a protective ambit for third parties could already arise during contractual negotiations when, for example, a child accompanying its mother slips on a vegetable leaf in a supermarket and consequently suffers injuries.[741] Therefore it is inevitable, in cases where a valid contract does not yet exist and contractual interpretation has to be ruled out, to create a remedy by *richterliche Rechtsfortbildung* (judicial development of the law).[742] In such cases

736) BGHZ 66, 141; concerning this case see Lorenz & Markesinis (1993) 56 *MLR* supra at 560
737) Compare Lorenz & Markesinis (1993) 56 *MLR* supra at 560
738) Von Caemmerer *Festschrift für Wieacker* 1978 311, 321 ssq
739) Söllner *Jus* 1970, 159, 163
740) BGHZ 56, 273; BGH *NJW* 1984, 356
741) BGHZ 66, 51
742) *MünchKomm*-Gottwald §328 Rz 62; concerning the discussion about the basis of the 'contract with protective ambit towards a third party' see Markesinis (1987) 103 *LQR* 354, 359

the principle of good faith (§242 BGB) is the statutory basis for the title of the third party.[743]

The recognition of the notion of a contract with protective ambit in regard to third parties should not lead to the result that every third party who suffered loss as a result of a breach of a duty by the debtor, now has a contractual claim arising from the contract concluded between the creditor and debtor. Acceptance of that would lead to the complete disregard of the legal distinction between the direct and indirect victim. And besides that, one would be ignoring the fact that contractual liability must principally be confined to the people bound by the contract.[744] Rather the extension of the contractual duty beyond the group of the contractually bound parties must be done restrictively.

Thus the courts created certain criteria, which have to be fulfilled, before a third party is protected by the ambit of the contract. If the third party does so fall within the ambit of the contract, the third party is entitled to claim on the basis of contractual remedies for the compensation of loss that resulted from malperformance.

3.3.1. Requirements for a contract with protective ambit towards a third party

Provided that the inclusion of the third party into the protective ambit of the contract is not expressly agreed, the position is that according to the courts, the following criteria need to be taken into account:

(i) The agreement must typically expose the third party to the danger of *Schlechtleistung* 'malperformance', which is known as the requirement of proximity of performance, (*Leistungsnähe*) of the third party [745], and the exposed group of people must be narrow and easily identifiable.

A prime example where the *Bundesgerichtshof* accepted that a party was typically exposed to the danger of bad performance can be found in the field of lawyers'

743) Larenz *Schuldrecht Allgemeiner Teil* 187; *Palandt*-Heinrichs §328 (2) b
744) BGH *NJW* 1968, 1929
745) BGHZ 70, 329; *MünchKomm*-Gottwald §328 Rz 68; Markesinis (1987) 103 *LQR* supra at 360

liability.[746] A lawyer-client contract has a protective ambit towards a person whose financial interests are intended to be taken care of by the legal advice. The courts found that a child was a party that was typically exposed to danger in the case where the maintenance of such a child was subject to the contract,[747] or when land had to be transferred in his name or when his job is cancelled to his supposed advantage.[748]

(ii) The creditor must have a legitimate interest in the protection of the third party.[749]

Originally the courts just assumed typical exposure to danger when the creditor was responsible for the *Wohl und Wehe* (for better or for worse) of the third party because of a legal relationship of a *personenrechtlicher Einschlag* (personal law character).[750] On the whole, the relationship between creditor and plaintiff/third party must be sufficiently close so as to create an interest in the former to safeguard the rights of the latter.[751] This is especially obvious whenever the creditor is himself under a duty of care towards the third party. Thus, parents are responsible for the well-being of their children (§1626 BGB) and employers for the safety of employees (§618 BGB).[752] For example, as a result of the close relationship between children and parents courts have held that children are included in the protective ambit of the lease of a flat concluded by their parents.

Further, an interest will today be affirmed as existing if, according to the contract, the third party is typically expected to come typically into contact with the performance owed in terms of the contract and when one can find further indications in the contract of the existence of the parties' intent to protect the third party.[753] Thus, typically, a child of a lessee also lives in the flat and consequently is similarly exposed to the danger of defects of the flat. Or a purchaser, for example, is included in the protective ambit of a contract concluded between the seller and the valuer of

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746) Compare *MünchKomm*-Gottwald §328 Rz 82
747) BGH *NJW* 1977, 2073, 2074
748) LG München I *NJW* 1983, 1621
749) *MünchKomm*-Gottwald §328 Rz 69
750) BGHZ 56, 273
751) Markesinis (1987) 103 *LQR* supra at 361
752) Markesinis (1987) 103 *LQR* supra at 361
753) BGHZ 69, 82, 86

goods that are subject to a bill of sale, if the report will be used as a basis for the decision to buy.

In more recent judgements the *Bundesgerichtshof* [754] has refrained from strictly applying the *Wohl und Wehe*-requirement in specific situations of which the borders remain indistinct, and in these situations the main criterion can now be said to be the fact whether the performance relates to a third party.[755] The determination of whether the performance relates to a third party, is, again, mainly done by interpreting the contract. This new approach of the *Bundesgerichtshof* especially concerns persons who have some interest in information given by a professional adviser.

Nevertheless, courts were still be concerned to keep contractual liability towards third parties within certain limits, as this approach could have the result that even persons who are in a remote position vis-a-vis the creditor are included in the protective ambit of the contract. Limitations were, for example, laid down in a case decided by the *Bundesgerichtshof* where it was held that a contract concluded between a business owner and an auditor will have no protective ambit in regard to bankruptcy creditors.[756]

(iii) Further, it is required that the *Leistungsnähe and Wohl und Wehe* of the third party must have been foreseeable to the debtor at the time of the conclusion of the contract (*Vorhersehbarkeit*);[757] this is so because he must have been in a position to know what kind of risk he was exposing himself to. Thus information [758], investment advice or a report [759] obviously meant to be used by a third party entitles the third party to cover by the protective ambit of the contract.

754) BGH *NJW* 1984, 355; BGH *JZ* 1985, 951; BGH *VersR* 1986, 814; BGH *VersR* 1987, 262; BGH *VersR* 1989, 375; see also Markesinis & Deakin (1992) 55; *MLR* supra at 638 with further details in footnote 115 and 116
755) BGH *NJW* 1977, 1916
756) BGH *VersR* 1988, 179
757) BGHZ 75, 323; BGH *NJW* 1985, 2411; *MünchKomm*-Gottwald §328 Rz 71
758) OLG Düsseldorf *NJW* 1977, 1403, 1404
759) BGH *NJW* 1982, 2431

(iv) Last but not least, the third party must be in need of protection (*Schutzbedürftigkeit*). This need will normally be absent when the third party has a separate contractual action against the creditor.[760]

3.3.2. Contributory negligence

Contributory negligence of the third party as well as that of the creditor may be pleaded to reduce the third party's claim. This has always been accepted by the courts in cases where the creditor was a legal representative of the victim or when he was employed by the victim in performing an obligation (§278 BGB). But the situation is different when the creditor is not employed by, or a representative of, the third party (victim), as the suffering third party must not be entitled to more rights than the creditor would been entitled to.[761]

Finally, it must be mentioned that, although the criteria described above remain relevant in each case as requirements to keep liability within manageable bounds, the *Bundesgerichtshof* has, over time, created various groups of case law, that are now commonly accepted as instances where compensation is available on the basis of the contract with protective ambit towards third parties.

Groups that are of particular interest for the field of pure economic loss are those concerning liability of experts that give information or advice, i.e. for example that of lawyers or of banks. All these groups have in common that the service must obviously be done for the benefit of a third party. Thus, the valuation contract of the expert and the owner of the goods that are to be valued can have a protective ambit for the buyer. As was seen above, the contract between the testator and he lawyer can have a protective ambit for the advantage of the 'would-be heir'. And last but not least concerning the liability of bank in the giro business, the protective ambit for third parties can result from a contract between the bank and the girocentre [762] or from the girocontract between the transacting bank and the destination bank.[763]

760) BGHZ 70, 330; *MünchKomm*-Gottwald §328 Rz 71a ssq
761) Compare BGHZ 33, 247 where the legal notion of §334 BGB (defences of the debtor as against the third party in the field of a promise of performance for the benefit of a third party) was applied.
762) OLG Düsseldorf *WM* 1982, 575
763) OLG Frankfurt *BB* 1984, 807

3.4. Liquidation of a third party's damage

Normally only that loss will be compensated which was suffered as a consequence of the infringement of a right of a person who is entitled to an action. A person who has an action will in priciple not be able to have loss compensated which a third person suffered consequent upon to the facts that entitled him to the action.[764] This can be illustrated with the following example.

S sells a particular object to B, but does not transfer ownership yet. B sells it to T. Then S culpably destroys the thing, which is still his property, and consequently makes it impossible to render the contractually owed performance to B, i.e. the transfer of ownership. As a result of that, B is entitled to claim compensation from S according to §325 BGB, i.e. the profit he would have made by selling the thing to T. Certainly B is not entitled to claim to have the loss, which T suffered as a result of the non-performance, compensated. That would only be possible, if B himself were obliged to compensate T, as then T's loss would also form loss to B. But in this constellation B will not have to compensate T his loss, as it was not B's fault that he is not able to transfer the ownership to T. T personally has no title against S, as he has no contract with S. Thus, S's obligation to compensate will only be determined according to the loss B suffered; a further loss suffered by T does not matter in this regard.

However, whereas the just described rule is still the general principle in German Civil Law today, it is also accepted by the majority of the legal writers [765] and the courts [766] that in certain constellations someone can claim to have loss compensated which one did not actually suffer personally, but which was suffered by a third person; this legal construct is called liquidation of a third person's loss *Drittschadensliquidation* (liquidation of a third parson's loss).[767]

It is self-evident that this will be allowed only in certain exceptional constellations, which are limited by requiring certain narrow criteria to be present before such a

764) *MünchKomm*-Grunsky Vor §249 Rz 113
765) Critical for example Hagen *Die Drittschadensliquidation im Wandel der Rechtsdogmatik* ssq; compare Markesinis (1987) 103 *LQR* supra at 368 ssq
766) Compare *Erman*-Sirp §249 Rz 52; BGHZ 40, 91, 100 ssq; 49, 356, 361
767) See Lorenz & Markesinis (1993) 56 *MLR* supra at 52

claim will be allowed. Thus the only relevant instances are those where the loss, which would normally be suffered by the owner of the goods, was, because of exceptional circumstances, suffered by a third party.

As this principle is not yet recognised by the *Bürgerliche Gesetzbuch*, it was left to the courts to create the categories where the liquidation of a third party's loss-doctrine applies.[768]

3.4.1. Shift of loss as a consequence of a statutory rule concerning the burden of risk

Firstly, the cases where the loss shifts to a third party as a result of a statutory rule concerning the burden of risk need to be looked at under this heading.[769] A vase bequeathed to the legatee T, but which is still in possession of the heir H, is destroyed culpably by S. The ownership of the vase has passed to H's property at the moment of inheritance, §1922 BGB.

The legatee has a claim for transfer of ownership against the heir, §§2147, 2174 BGB. But as the transfer of ownership had not yet taken place, it was the property of H which was infringed when the vase was destroyed. Consequently H, as the owner, is entitled to compensation because of the destruction of his property, §823 I BGB. But H also rid himself of his obligation towards L (§275 BGB) as he was not at fault in regard to the impossibility of performance, i.e. the transfer of ownership. Consequently, his loss, the destruction of his vase, will be arithmetically compensated (according to the total value of his estate before and after the destruction of the vase) because of the exemption of the obligation to transfer ownership of the vase to L.

A similar situation arises as a result of §447 BGB [770] in the case of a *Versendungskauf* (dispatch-sale).[771] If the goods are destroyed during transport, the

768) Compare *Erman*-Sirp §249 Rz 57 ssq; *MünchKomm*-Grunsky Vor §249 Rz 117
769) *MünchKomm*-Grunsky Vor §249 Rz 120; *Erman*-Sirp §249 Rz 54
770) RGZ 62, 331, 335; BGHZ 40, 91, 100 ssq
771) In the case of a working-contract §644 BGB; compare BGH *NJW* 1970, 38; Hagen *Jus* 1970, 442; Hagen *Die Drittschadensliquidation im Wandel der Rechtsdogmatik* ssq

goods are still the property of the seller as ownership will only be transferred at the moment of its delivery to the acquirer (purchaser), §929 BGB. As a result of this it is the seller who is entitled to claim according to §823 I BGB, as it was still his property, that was destroyed. Apart from that, the seller has a title against the delivery service arising from the delivery contract concluded between him and the service, if the delivery service was responsible for the destruction of the goods. But in an economic sense the seller does not suffer any loss, as according to §447 BGB the risk of payment passes to the purchaser as soon as the seller has delivered the object to the forwarder, freighter, or other person or institution designated to carry out the transmission. Thus, though the goods will never reach the purchaser and consequently never become his property, he is obliged to pay the seller the price. But originally the seller was obliged to transfer the ownership of the now destroyed goods to the purchaser. Thus the seller suffered no loss in an economic sense. He lost the goods, but receives the price from the seller. But it is the purchaser who suffers the loss, as he does not become owner of the goods but has to pay the price for them; the seller does not have a title, as he was neither owner of the goods, nor party to the contract of transmission.

However, if one grants the seller a compensatory action against his contractual partner (the delivery service) for loss which was actually suffered by the purchaser, then one must consequential entitle the purchaser to claim against the seller for the transformation of the claim which the seller has against the delivery service, §281 BGB (delivery of a substitute in case of impossibility).[772]

3.4.2. Care-keeping cases

A further important group is that of *Obhutsfälle*. Its typical questions will be illustrated by way of the facts of the following case.[773]

B gives a thing belonging to D, which he has borrowed or rented, to C for the purpose of safekeeping, or to have it repaired. Because of the fault of a person employed by C in fulfilling his obligation, the thing is destroyed or damaged. B only

772) *MünchKomm*-Emmerich §281 Rz 2; *MünchKomm*-Grunsky Vor §249 Rz 120
773) *MünchKomm*-Grunsky Vor §249 Rz 121-122

suffers loss in that he loses the use of the thing, whereas D suffers the 'substantial loss'; here B will be allowed to claim in contract against C for the loss actually suffered by D.

And again, D will be entitled to claim against B for the transformation of the claim the latter has against C, §281 BGB.

3.4.3. Indirect representation

Last but not least the group concerned with indirect representation [774] must be mentioned. Here, the reason for the shift of loss can be found in the fact that, because of the indirectness of the representation, it is the representator who is legally involved in the contract, whereas the economic consequences will have to be carried by the represented person. The problem becomes more obvious if one considers the following constellation.

B buys in his own name a thing from S on the instruction and on account of T. Here there is no direct legal relationship between S and T. But if S is in delivery-default, then not B, who has a title out of the contract with S, suffers the loss, but T, in whose interest B concluded the contract. T - so we will presume - planned to make the goods subject to further treatment in his factory and already spends money for this purpose, which now turns out to be wasted.

Now the question arises, whether B should not be entitled to claim for compensation against S because of debtor-default (§286 BGB), just because the loss did not arise with him personally, but with T, in whose interest B concluded the contract?

For a long time there has been agreement that in these situations the third party's loss must be compensated.[775] It does not seem to be justified that the person responsible for the loss will not be held liable to make good the loss, only because, due to the particular facts of the case, the person who actually suffered the loss does not have title to sue.

774) Compare *Erman*-Sirp §249 Rz 53; *MünchKomm*-Grunsky Vor §249 Rz 119
775) Compare RGZ 90, 246; RGZ 115, 425; RGZ 170, 249; BGHZ 15, 227; BGHZ 49, 356, 360 ssq; BGHZ 57, 335

The main feature of all the groups described above is the fact that the loss suffered by the third person correlates with the lack of loss of the person who has title. Usually the loss arises with the person having the title; in these cases it will have shifted to a third party either as a result of a statutory rule concerning the burden of risk, or as a consequence of the legal relationship existing between the person having the title and the third party.[776]

The person liable to pay compensation is not burdened excessively if he has to compensate the sufferer's (T's) loss instead of the loss normally expected to be suffered by the title holder H, although in individual cases, always according to the particular circumstances, the loss might not correlate exactly with the loss that would have occurred in case H would have been the sufferer.

It is important to note that no duplication of the loss to be compensated takes place, as would be the case, if the wrongdoer, apart from being liable to compensate the person having a title, was also liable for the loss suffered by persons indirectly. In this regard the 'liquidation of a third parson's loss' differs fundamentally from the case of the 'contract with protective ambit for third parties', where such duplication of the loss being in question to be compensated takes place.[777] In cases of 'liquidation of a third party's loss' the third party does not have an own title; in these cases still only the person who is a victim either as a contractual party or in a delictual way as an owner or holder of a right protected by §823 I BGB, is entitled to compensation. The amount of damages is merely determined according to the loss which was suffered by a third party instead of that suffered by the person holding the title.

The obligation of the entitled person towards the third party, to transform the claim for compensation or to hand over the latter what he has obtained, results from either the legal relationship between the person holding the title and the third party - otherwise out of §281 BGB.[778]

776) The criterion of the shifting of loss was afforded special emphasis by Tägert *Die Geltendmachung des Drittschadens* ssq; critical Selb *NJW* 1964, 1765; compare also von Caemmerer *Zeitschrift des Bernischen Juristenvereins* 1964, 341 ssq; Reinhardt *Der Ersatz des Drittschadens* ssq

777) Concerning the difference between 'liquidation of a third person's loss' and the 'contract with protective ambit towards a third party' read *MünchKomm*-Grunsky Vor §249 Rz 117; *MünchKomm*-Gottwald §328 Rz 75; *Erman*-Sirp §249 Rz 52

778) *MünchKomm*-Grunsky Vor §249 Rz 120; *MünchKomm*-Emmerich §281 Rz 2

Finally it can be stated that the field of pure economic loss is a prime example of how the codified and principle-based German civil law works. It is easy to recognise that the BGB - like all other codifications - was certainly not able to provide a codified solution for each specific legal problem.

On the other hand one can see that the BGB is not so inflexible, that it is possible for judges - by using the principles inherent in the BGB - to find solutions for new problems that might arise. Even in the field of pure economic loss courts were able to bypass the inflexible law of delict by creating quasi-contractual remedies where there was no contract; and the courts were always able to base these new remedies on the BGB, even if it was 'only' §242 BGB (good faith).

Nevertheless, it is striking that the result of the German courts' approach in the new field always lead to the amplification of principles by the case law. Although German courts were engaged in applying specific requirements, finally various groups of cases arose that form exceptions to formally accepted requirements.

CHAPTER IV

Conclusion

Although a lengthy summary of all the aspects of the three legal systems discussed above would clearly be out of place here, it is important to pause for a moment to consider the most important features of each system, before drawing certain conclusions.

In dealing with the phenomenon of negligently caused pure economic loss the English common law system had the advantage of an uncodified, flexible tort of negligence operating according to the common law principle of precedent. Making use of this advantage, English law approached the problem in question exclusively as a matter concerning the law of torts and was able to deal with it in a unitary way. In spite of the fact that the English courts always recognised the danger of 'liability in an indeterminate amount, for an indeterminate time to an indeterminate class' and that they regarded this danger in a serious light, they took the important step of compensating negligently caused pure economic loss of 1964 in the landmark decision of *Hedley Byrne v Heller and Partners*. One of the most important questions that confronted courts when deciding cases falling within the new field, was that of whether pure economic loss is *prima facie* wrongful. Except for the period in which *Anns* and *Junior Books* held sway, the wrongfulness of the causing of pure economic loss always had to be positively shown to exist.

However, the circumstances under which a defendant owes such a duty are, in spite of the neighbour test, still uncertain. Ever since it was decided that pure economic loss is recoverable, the courts have been experimenting with various criteria for keeping liability within reasonable bounds. Criteria that were engaged for this purpose were *inter alia* foreseeability, reliance, proximity and assumption of responsibility. However,. it is certain that the use of these factors (whether applied exclusively or cumulatively) have not lead to a satisfactory test. A remarkable fact of the jurisprudence in regard to this field of liability was that in the days of *Anns* the courts actually applied a doctrine of transferred loss in two cases. These were cases where, as a result of a contractual arrangement, the holder of a right and the person

who actually suffered the loss are not identical. These cases were distinct from the rest of the field of pure economic loss in so far as the danger of a multiplicity of claimants did not exist. However, with the overruling of *Anns* this approach disappeared.

Nevertheless one can state with some certainty that since *Hedley Byrne* there has been a development towards the formation of various groups of cases concerning pure economic loss. Firstly it should be noted that the 'old' dependants' action is still dealt with separately. This field of pure economic loss can be stated as being a totally self contained category from which hardly any lessons can be learnt for the rest of the field. The limiting criteria develop with respect to this problem relate exclusively to the specific situation of the death of a breadwinner. Secondly it is evident that in England the problem of pure economic loss is approached differently according to whether the loss was caused by acts or statements. Whereas the courts are still extremely hesitant to offer any compensation for pure economic loss caused by acts, they were comparatively progressive in regard to pure economic loss caused by statements and granted actions in various instances. the result of this bias is that the amount of case law in regard to this sub-category of pure economic loss is proportionally greater than that dealing with pure economic loss caused by acts. This case law relates mainly to the field of professional negligence and the formation of new subcategories according to the different professions involved is already discernible.

Similar to the position in England, South Africa's Roman Dutch law also has an uncodified flexible law of delict which suits a unitary and comprehensive approach towards pure economic loss caused negligently. And when the Supreme Court, obviously influenced by *Hedley Byrne*, authoritatively held pure economic loss to be recoverable on the basis of Aquilian liability when deciding *Administrateur Natal v Trust Bank van Africa* in 1979, the traditional rejection of liability for this kind of loss was also abandoned in South Africa. Since then the courts have faced the same problems that English lawyers had to face and still have to live with. Firstly it had to be decided whether pure economic loss is *prima facie* wrongful. As in England, the South African courts answered the question in the negative in the case of *Lillicrap Wassenaar v Plikington Brothers*. From then onwards courts have been, and still are, engaged in grappling with the problem of how to determine the circumstances under

which the causing of pure economic loss is wrongful. The starting point for each decision about wrongfulness - and in this regard the position in South Africa differs from that in England - is the *boni mores* test which is used as a frame within which courts evaluate different policy considerations that are applied to the specific facts of a case.

However, also in South Africa - and in this regard it is again similar to English law - the formation of case law which is divisible into different systematical groups is notable. Here, too, the dependants' action (which is theoretically based on the Aquilian action) is treated separately according to specific criteria that were developed to cater for the circumstances characteristic of the situation relating to the death of a breadwinner. Thus, as is the case in England, hardly any benefit can be drawn from decisions in this area in regard to other cases of pure economic loss, and the fact that this field has the advantage of certain successful limiting factors has no effect on the other fields.

Furthermore, South African law also distinguishes between the group of cases were economic loss was caused by statements and that where it was caused by acts, and in this regard too, the approach is reminiscent of that in England. In the field of economic loss caused by acts the courts also hesitate (although not as much as in England) to award compensation, whereas in cases of negligent misrepresentation a more liberal approach is apparent and a concomitantly large amount of case law is in evidence. Unlike the English courts, however, South Africa has never attempted to invent a doctrine of transferred loss.

The German approach stands in striking contrast to those of South Africa and England. The reason for this is the codified exclusion of patrimony as one of the protected rights of §823 I BGB. As a result of the fact that the BGB does not offer a flexible broad principle of delictual liability which could be used to approach the problem, courts had to resort different means dealing with the problem. At the outset they made use of the paragraphs relating to the law of delict which offered compensation in specific, narrow instances of pure economic loss. These were, firstly, §823 II BGB, which offers compensation provided the loss has been inflicted by the violation of a protective statute, and, secondly, §824 BGB, which offers compensation if someone endangered the credit of another person. However, the fact

that the credit was endangered was not sufficient to give rise to title to sue: The causing of the loss also had to be wrongful. And whether the endangering of credit was wrongful was determined according to careful weighing up of the conflicting interests of the parties involved.

Thirdly, §839 BGB contains a special action dealing with civil servants' liability. This action, which has no equivalent in English or South African law, forms a lex specialis to §823 I BGB in regard to instances where a civil servant commits a wrong. Unlike §823 I BGB this paragraph does not contain an exhaustive list of protected rights, of which one has to be infringed in order for an action to arise, but requires the breach of a public duty which was owed by the civil servant towards the victim. Thus §839 BGB represents one instance where, albeit only for a special field of liability, a broad flexible principle was laid down according to which pure economic loss is compensated. Nevertheless, the causing of pure economic loss by a civil servant does not constitute the breach of a public duty *prima facie*, and the existence of the duty must be proved in each case. In this regard, one can say, the reality of this action does not differ from the practice concerning pure economic loss in the other two systems. Fourthly, it must be remembered that the dependants' action is codified in §§844, 845 BGB. Although these paragraphs deal in detail with the problem it is also true of Germany that one cannot draw any generally applicable lessons from this field.

Because the BGB contains only this small number of narrow exceptions according to which compensation for pure economic loss may be claimed, the courts set about the task of finding ways to bypass this barrier.

The first way that they found to achieve this objective was that of interpreting widely the term 'property' (which was protected in §823 I BGB). The second measure was an even clearer instance of the judicial activism of the German courts. Based on the fact that the 'established and operative business' was held to be protected by article 14 GG, the BGH decided to also give it civil law protection by recognising it as a 'sonstiges Recht' in terms of §823 I BGB. Again the broad and contourless nature of this right and the consequent danger of unlimited liability, caused the courts to hold that an infringement of the 'established and operative business' was not *prima facie* wrongful. Thus, today, apart from requiring that the infringing act has to be business

related, courts evaluate the interest of the business owner against that of the perpetrator by taking into account the values embodied in the constitution as well as various other social factors. Nevertheless, although courts managed to extend the law of delict to cover certain cases of pure economic loss, the law of delcit did not provide to stop to deal with all cases that were 'worthy' of compensation. The result was that the field of contract emerged as a more flexible instrument in attaining the desired goals in regard to the compensation of pure economic loss, and contract therefore became the terrain for further judicial activism in this regard. The outcome was *culpa in contrahendo*, *Vertrag mit Schutzwirkung zugunsten Dritter* and *Drittschadensliquidation*. The notion of *culpa in contrahendo* offers the victim a claim for loss suffered in a pre-contractual relationship as a result of a breach of a pre-contractual duty. Here the courts again held that this breach of duty has to be positively proved. More recently this contractual remedy was even applied in cases were parties were never prepared to contract, but where the victim had a particular reason for specifically relying on the information that was given. Similarly the notion of a *Vertrag mit Schutzwirkung zugunsten Dritter* offers a contractual claim in cases where a victim was not a party to a contract. His right to claim on the basis of the contract between the other two parties must, however, also be determined positively. Lastly it has to be pointed out that Germany is the only system to have established a doctrine of transferred loss, i.e. in the case of so-called liquidation of a third party's loss. However, there is some difference between this approach and the one applied in two instances in England. The most obvious difference relates to the fact that the English approach was based on delict, whereas the German one is based on contract. This second point of difference emerges when one considers that in England the sufferer had a direct claim against the wrongdoer. In Germany the path of the victim to compensation leads over a claim against the holder of the right who did not suffer the loss. The victim has a claim against the holder of the infringed right to transfer the claim which he has against the wrongdoer, and only then is the victim in a position to claim against the wrongdoer. However, this complicated way of doing things is merely a typical result of German constructivism. Finally it can be stated that in all the circumstances in which German courts compensate pure economic loss, the decision whether or not to do so is not based on a *prima facie* conclusion of wrongfulness, but further criteria have to be fulfilled and that courts evaluate the interests of wrongdoer and victim. Thus one can say that in all three systems the causing of pure economic loss is in effect not *prima facie* wrongful.

Furthermore, in all three systems judicial practice developed a certain amount of case law occurred according to which courts refine the criteria under which economic loss is compensatable further and further into more detailed categories.

A consideration of the three approaches concerning the compensation of pure economic loss, described in the earlier chapters, inevitably leads one to the conclusion that this field of liability offers an important illustration of how different in structure the three legal systems are.

Firstly, English law attempts to surmount the problem of when to compensate pure economic loss by avoiding the laying down of strict principles and, instead, applying various loosely defined criteria in an - at least to the continental eye - unsystematically way. The result is that the impression is created that the criteria employed in the cases (such as foreseeability, reliance, proximity etc.) are more or less 'hollow' requirements, as none of them are applied with any consistency. This statement does not exactly betray a secret, as it was Lord Denning himself who, concerning the distinction between loss resulting from physical injury and pure economic loss, made this confession:

> 'The reason lies in public policy....There is not much logic in this, but it is still the law.'[779]

As much as this statement seems to lend support to those continental lawyers who regard the common law as a mixture of illogical case law, in reality it does no more than reveal the essential truth about the method of the common law.

Whenever the English courts challenge established 'rules', as was done in *Donoghue v Stevenson* [780], *Hedley Byrne v Heller & Partners* [781], *Anns v Merton Borough Council* [782] and *Murphy v Brentwood* [783], those trained in codified legal systems tend to ask: Where do English judges find legal justification for their 'law making', for overruling established precedent and for filling a 'legal vacuum'? The answer is

779) *SCM (United Kingdom) Ltd v WJ Whittall and Son Ltd* supra at 700
780) Supra
7810 supra
782) Supra
783) Supra

simply that they reconstruct the law by applying policy considerations to the facts.[784] Thus, in deciding *Donoghue v Stevenson* [785], in 1932 the House of Lords established a general duty of care to one's neighbour in respect of injuries to person or property. To establish this new rule the court used a variety of policy considerations [786], although it was not prepared, as Lord Denning later was, to call them that openly. And by introducing this an open-ended rule the court left room for future courts to form yet further 'rules' in the field of the 'tort of negligence' by applying policy considerations. That made it possible in *Hedley Byrne v Heller & Partners* [787] for the courts to take another step forward and made pure economic loss actionable. And this time the recognition of the new 'rule' was mainly motivated by, and based on, policy considerations. Simlarly, the establishment of the next 'rule', i.e. the 'two-stage approach' in *Anns v Merton London Borough Council* [788], was based on policy. And finally, a few years later, its reversal in *Murphy v Brentwood* [789] was again the result of the evaluation of general policy considerations applied to the facts.

Characteristic of the policy considerations used is the fact that none of them - and in so far they differ from 'requirements' in German law - necessarily have to be applied or fulfilled in every case where compensation is given. Rather the courts reach their decision by weighing up the different factors against each other when applying them to the facts of the particular case. However English judges often, at least in earlier decisions, tended to hide the fact of law making through policy decisions behind criteria that seemed more certain. The most important of such criteria was undoubtedly that of foreseeability, having gained its position of importance in *Donoghue v Stevenson* [790]. Further criteria that were masks for policy included reliance and proximity.

Clearly different from the English way of employing 'policy' is the German approach. Here the courts were confronted with the result of German thoroughness in the form

784) Bell *Policy arguments in Judicial Decisions* 40 ssq, 53 ssq, 60 ssq; see also Visser (1992) *Acta Juridica* 175 at 192-193
785) Supra
786) Bell *Policy Arguments in Judicial Decisions* 40 ssq, 53 ssq, 60 ssq
787) Supra
788) Supra
789) Supra
790) Supra

of the *Bürgerliches Gesetzbuch*. The manifest exclusion of *Vermögen* (patrimony) as one of the protected rights in §823 I BGB appears to have had the same effect on German lawyers as Dr Frankenstein's creature had on him: It forgot its place and became instead a monster which dictated the future path of development. Thus, German lawyers, who pretended to judge according to the BGB and to base their decisions solely on its principles, found themselves under considerable pressure to find a way to compensate certain cases of pure economic loss. It did not take them a long time to create a new absolute right or to activate the extremely flexible law of 'quasi contract' to serve their needs.
Nevertheless, in order not to give the impression that they had strayed from the BGB, they found for each measure a basis in the code. And to serve the reputation of the certainty of German Civil law, they very quickly developed 'definite' requirements to distinguish the unsuccessful claims from those worthy of compensation. Nevertheless, as systematic as the German civil law is, it never succeeded in finding a proper place in its system for the uniform and comprehensive treatment of the phenomenon of pure economic loss, but rather denied its existence by splitting instances of its recognition into different areas of law.

Finally, the mixed South African system is again different from the aforegoing two systems, although it stands with one foot in each of those systems. The question which then arises is the natural one when one is confronted by a hybrid, namely whether only the most desirable characteristics of each parent were inherited. In the area of pure economic loss one could, with some confidence, answer this question in the affirmative.

On the one hand, South Africa has the advantage of having a principle-based legal system. The fact that it is able to approach the problem in question against the background of *'damnum iniuria datum'* enables the legal system to place the phenomenon of pure economic loss in the context of the rest of the law of delict. And because there is always a principle upon which to base a new approach, it is as bound by specific 'rules' deriving from leading decisions as the English system is. On the other hand, South Africa shares the flexibility of an uncodified legal system with the common law.
In approaching a new problem the South African system, unlike that of Germany, is not bound by the notions of bygone generations that are perpetuated in the shrine

which is the BGB. Thus the system is able to amend and even replace common law rules, by using policy considerations as is done in Britain. In contrast to the common law, however, when the application of a commonly accepted rule is denied, the system will not fall into a void, but will be able to rely on the broad underlying principle.

Furthermore, when it is required to decide a new borderline case [791], there will often not be any certain rule that is applicable but the courts will be able to approach the problem according the basic principle, so that a decision with its motivating considerations is always anchored on articulated principles.

The most interesting aspect to emerge from a comparison of the three systems is not, however, these well-known differences, but rather how they 'react' when they are confronted with similar problems. Although all the systems have certainly remained loyal to their character, it is striking that all three systems seem to have in common the development of certain groups of case law such as, for example, cable cases, Actions of Dependants', lawyers' liability and cases where as a result of a contract the economic loss does not fall on the owner of the damaged property.

These groups of cases are, of course, the natural result of the law in each system reacting to a relevant '*Lebenssachverhalt*'. (What is to say, a phenomenon created by the concatenation of particular facts and events.) Two such *Lebenssachverhalte* that occur in all three systems, as we have seen, are, on one hand, negligently caused power failures in an industrialised environment with its various consequences and, on the other hand, the negligent causing of the death of a breadwinner with its concomitant effect on the dependants. These phenomena are still treated in accordance with the general principles applicable to the field of law under which that law under which that phenomenon happens to fall in a particular country. Nevertheless, the law relating to each phenomenon tends to develop its own dynamic, due to the modification and refinement of the general principles imposed by the realities of the situation. Perhaps it is useful to dwell for a moment longer, from this slightly different perspective, on the two phenomena that have just been mentioned

791) Compare Bell *Policy Arguments in Judicial Decisions* 53, 60, where he emphasizes the decisive role of policy considerations in cases where courts are reconsidering the basis of existing rules or where they are overturning settled rules.

(since they occur in all three systems) with a view to placing the systematical aspects of each system in relative terms.

The first group of cases deals with the situation where the breadwinner is killed and a dependant therefore suffers loss. This phenomenon has presumably existed for as long as mankind itself, since it is, after all, natural that humans depend on each other. England has, atypical for its common law nature, chosen to codify the dependants' action. As was illustrated, the theoretical basis of the action is the personal loss of the individual dependant resulting from the killing of the breadwinner. Although the action is theoretically independent from that of the breadwinner, there are certain restrictions to this principle. The starting point for these exceptions is the rule that the dependant has an action if the neglect or default is such (if death had not ensued) that it would have entitled the party injured to institute an action and recover damages in respect thereof. One result of this rule is that the contributory negligence of the victim will be taken into account in measuring the amount of damages the dependant is entitled to. A further consequence of this rule is the fact that if the wrongdoer excluded liability in a contract made with the breadwinner, then the dependant is also not entitled to a claim for damages. The quantum of damages the dependant is entitled to consists of the value of the dependency, i.e. the amount he was entitled to receive from the breadwinner.

Unlike England, South Africa did not codify its dependants' action. As stated above, South Africa treats the phenomenon of pure economic loss as just one form of Aquilian liability. Thus basic requirements for the wrongdoer's liability are a wrongful act, fault and as a consequence of all this the causation of loss. South Africa also nowadays treats the dependants' action as independent from the action of the breadwinner. Thus theoretically the action is based on the wrongful and culpable causing damage to the dependant himself.

Similar to the position in England, South African law recognises certain exceptions to this principle. Firstly it is held that if the perpetrator killed the breadwinner in self-defence and therefore, in doing so, did not act wrongfully, the dependent will not be entitled to compensation. Secondly, the contributory negligence of the breadwinner is taken into account when a court determines the amount of damages the dependant is entitled to. However, in South Africa, otherwise than in England, a *pactum de non*

petendo in anticipando concluded between the breadwinner and the wrongdoer is held not to be available as a defence to the perpetrator against an action brought by the dependant.

Nevertheless, as in England, the damages are determined according to the loss of support, which may have consisted of the payment of maintenance or of the performance of domestic services. The amount of damages will be determined by comparing the dependant's position after the loss of support and the position he could reasonably have been expected to be in had the deceased not died.

Like England, Germany also codified the dependants' action in §§844, 845 BGB. The two paragraphs deal on one hand with the loss of maintenance (§844 BGB) and on the other hand with the loss of services, §845 BGB. Both actions are held to be in principle independent from the action of the injured or killed person. Nevertheless - and in this respect German reality again mirrors the English and South African position - certain restrictions to the independence of this action are accepted. For example, a codified restriction can be found in §846 BGB, which essentially provides that when there was contributory negligence on the part of the victim, the independent action of the dependent will be determined by taking the contributory negligence of the breadwinner into account. As in England, but differing from the position in South Africa, a contractual exclusion of liability between the breadwinner and the wrongdoer also restricts the independence of the action and in such a case the dependant has no action. However, like in the two other systems, the amount of damages is determined according to the value of the support the defendant would have had a claim to against the breadwinner.

Thus it can be said that, although the three approaches seem at first glance to be different (resulting from the fact that Germany and England codified the action and South Africa did not), in fact the three approaches are very similar. But before moving to the next group of cases, let us first consider one further aspect, i.e. the question which dependant's are entitled to compensation.

Even in today's complex industrial society, the circumstances are still such that, in the wide sense, people depend on each other. Thus, shopkeepers depend on customers, the state on its tax payers, children on parents and the parents on their children. If

one kills a person on whom someone else is dependant for support, this dependant suffers pure economic loss.

However, it is obvious that it is not possible to hold the person who caused the death of the breadwinner liable to make good all the loss suffered by 'dependants' as a consequence of the killing. The question arises where to draw the line between those who are entitled to compensation and those who are not. Also in regard to this question all three systems have come to similar results on the basis of the criterion of a legal right to demand support from the breadwinner.

England, although it has a codified [792] a list of dependants who are entitled to compensation, in essence follows the principle that those dependants who would have a legal right to maintenance against the breadwinner - if still alive - are entitled to compensation. (The relevant English legislation does not, of course, expressly state the basis of which the categories of dependants are allowed an action, but it is clear from a perusal of the list that, at least according to continental perceptions, is informed by the notion of a legal right to demand maintenance.)

Exactly the same approach has been adopted in Germany and South Africa. Thus if someone depended on a benefactor but did not have a legal right against him to demand support, the effect on him of the latter's death is similar to that in the situation where his benefactor decides to stop helping him. However, when one tries to find arguments in support of this criterion, one discovers that it is not all that easy to justify it. One might, for instance, argue that normally only poor people have a need for actions for maintenance, became a duty to maintain another is usually predicated upon the fact the person who is the object of the duty cannot maintain himself. But on the other hand it is of course also possible to argue that someone could voluntarily furnish maintenance to poor people.

A further argument might be that a legal obligation to furnish maintenance is closer to a proprietary interest than a merely voluntary payment. But, then again, if one kills an employee, who is contractually obliged to render work to his employer, the killer is not obliged to compensate the employer for his loss.

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792) Section 1 of the Fatal Accidents Act 1976 as amended by the Administraton of Justice Act 1982, s 3; compare Salmond & Heuston *Torts* 20ed (1992) 558

Yet a further consideration that could be raised in support of this criterion is that of foreseeability. But also this factor does not provide a really convincing basis. It is true that it is easier to foresee statutory obligations than contractual obligations or even voluntary help but it is also possible to imagine situations in which the perpetrator actually knows about the voluntary maintenance.

It has been suggested that the principle that was probably developed from Germanic customary law [793] and is still in force merely as a result of tradition. A further reason for accepting only a restricted number of plaintiffs might be that the rule is based purely on pragmatism, since, as it turns out, it is perfect as a factor to limit the number of claimants. There are probably also distinct social notions of justice that demand the restriction of liability in these kinds of constellations.

However some of the differences between the three systems are more apparent than real and that they reach similar results is not really surprising given the common socio-economic background. It seems to be justified to see in the similar results one example for increasingly convergent solutions of the systems under comparison that are largely the result of judicial activism, which has in other fields stretched legal concepts to a breaking point.[794]

The second group of cases deals with the situation where A cuts a cable which supplies B with electricity. As a result of the consequential power failure B suffers pure economic loss.

Out of the three leading English cases [795] concerning loss caused as a result of power failure one can clearly deduce a specific rule: Physical damage is the key to the plaintiff's success in recovering loss. Whenever physical loss occurred as a consequence of the interruption of the electricity supply - the remoteness of the damage did not matter - courts did not hesitate to compensate this harm and the loss consequential to the physical damage:

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793) Neethling, Potgieter & Visser *Delict* at 237 refering to *Victor v Constantia Ins Co Ltd* supra at 119

794) See Markesinis (1979) 83 *LQR* 78 at 122

795) *British Celanese Ltd v AH Hunt (Capacitors) Ltd* supra; *SCM (United Kingdom) Ltd WJ Whittall and Son Ltd* supra; *Spartan Steel & Alloys v Martin & Co (Contractors) Ltd* supra; concerning the English 'cable cases' see the thorough study by Hermann *Zum Schutze des Vermoegens* 44 ssq

'It is well settled that when a defendant by his negligence causes physical damage to the person or property of the plaintiff, in such a circumstances that the plaintiff is entitled to compensation for the physical damage, then he can claim in addition for economic loss consequential on it.'[796]

Whereas if 'only' pure economic loss arose in a particular instance, for example loss of production, the courts were not sympathetic towards the plaintiff:

'And when it does happen (the cutting of the supply of electricity), it affects a multitude of persons: not as a rule by way of physical damage to them or their property, but by putting them to inconvenience, and sometimes to economic loss.... But most people are content to take the risk on themselves. When the supply is cut off, they do not go running round to their solicitors. They do not try to find out whether it was anyone's fault. They just put up with it. They try to make up the economic loss by doing more work next day. This is a healthy attitude which the law should encourage.'[797]

However, the English courts did not base the decision to refuse to compensate pure economic loss purely on the fact of its nature, which is that it does not derive from any physical damage. In fact, the opposite was even stated in so many words:

'If defendants could reasonably foresee that their negligence might cause economic loss, it is recoverable, just as material damage is recoverable.'[798]

However on considering the outcome of the decided cases one could be forgiven for gaining the impression that physical damage is the key to the plaintiff's success as far as 'cable cases' are concerned.

A consideration which is often discussed is the fact that if the cause of the power failure falls within the sphere of the electricity company the company will normally not be obliged to pay any form of compensation to the victim as a result of a

796) *SCM (United Kingdom) Ltd v WJ Whittall (CA) Supra* at 697
797) *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* supra at 38
798) *SCM (United Kingdom) Ltd v WJ Whittall (CA) Supra* at 700

contractual liability.[799] Thus, so the argument goes, it should not make any difference whether the victim suffers loss as a result of a power failure having its cause in the sphere of the electricity company or resulting from the negligent cutting of a cable by someone else. But obviously this observation does not contribute to the process of distinguishing between physical and non physical loss, as both can be subject to contractual exclusion of liability in the contract between the electricity company and the customer and courts never hesitated to compensate the physical loss suffered resulting from the power failure caused by the cutting of a cable. Thus, when one takes the step to compensate Physical loss while being aware of the fact that, if it had been caused by a mistake within the electricity company no compensation could be paid, it does not give any longer an argument not to compensate also pure economic loss.

The decisive argument why the English courts were not prepared to compensate the sufferer of 'pure' economic loss was that it lacks any form of 'neighbourhood';[800] and the basic approach of the law as laid down in *Donoghue v. Stevenson* [801] is that there is no compensation without 'neighbourhood'. However, considering this reasoning one could easily misunderstand what the reason is and what the result is: Is pure economic loss not compensated because it lacks 'neighbourhood', or are the courts traditionally unwilling to compensate pure economic loss and therefore they refuse it any 'neighbourhood'?

Before being able to come to a conclusion it is necessary to examine in more detail the facts and requirements that lead to the denying of the 'neighbourhood'. The most favoured criteria are undoubtedly 'foreseeability' and 'remoteness'.[802] Whatever the circumstances, pure economic loss seems to be by nature far more remote [803] or less foreseeable than physical damage. Whether because pure economic loss is indeed geographically situated further away than physical loss, or whether it is rather the fact

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799) Compare *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* supra at 38

800) See for example *SCM (United Kingdom) v WJ Whittall (CA) Supra* at 702: 'If their house masters are negligent, and they escape and do damage, the Home Office are liable to persons in the neighbourhood, but not to those far away.'

801) Supra

802) See for example *SCM (United Kingdom) Ltd v WJ Whittall (CA) Supra* at 700

803) See *SCM (United Kingdom) Ltd v JW Whittall (CA) Supra* at 699-700

that loss resulting from physical damage is easier to see with legally trained eyes [804] remains a question, as according to Lord Denning what is decisive is the judges' 'good sense':

> 'However are we to say when economic loss is too remote or not? Where is the line to be drawn? Lawyers are continually asking that question. But the judges are never defeated by it. We may not be able to draw the line with precision, but we can always say on which side of it any particular case falls....Where, again, is the line to draw? Only where "in the particular case the good sense of the judge decides."'[805]

The deeper motivation for all these geographical considerations which determine the relations of neighbourhood seems to have its origin in the well-known 'policy', that a multiplicity of claims should be avoided.806 The courts seem to be aware that they were able to avoid a 'flood' by merely following the traditional approach, although they realised that it was not necessarily logical, as appears, for example, from the following statement of Lord Denning:

> 'There may be no difference in logic, but I think there is a great deal of difference in common sense. The law is the embodiment of common sense... The reason lies in policy.'[807]

Thus they were not willing to take the further step of serving logic by abandoning the traditional approach and offering compensation in the 'cable case' but preferred to avoid risking the danger of a 'flood'. As much as one can accept the goal the courts

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804) However it seems to be only Edmund Davies LJ in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* supra at 38 who is not shortsighted in one eye: 'It is common ground that both types of loss were equally foreseeable and equally direct consequences of the defendants' admitted negligence, and the only distinction drawn is that the former figure represents the profit lost as a result of the physical damage done to the material in the furnace at the time when power was cut off.'

805) *SCM (United Kingdom) Ltd v WJ Whittall (CA) Supra* at 702 with reference to *Bourhill v Young* supra

806) For example *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd.* supra at 36

807) *SCM (United Kingdom) Ltd v WJ Whittall (CA) Supra* at 699-700

attempted to reach with these judgments [808], it would have be more honest to follow the example of Winn L.J. [809] and to call the child by its name and, instead of elaborating again and again the neighbour-principle or proximity criteria or policy considerations, they should recognise that it has hardened into a 'rule', i.e. that pure economic loss caused by power failure will not be compensated.

Regarding the group of cable cases [810] that have arisen in Germany it is striking that one can deduce the same principle as one could do in England. Loss consequential to the infringement of any physical interest will be compensated without hesitation, whereas German courts do not try to do the same with pure economic loss. However, the reasoning is totally different to that in England.

Firstly, German law never attempted to hide the differential evaluation of physical and non-physical damage, but in fact expressly codified it. Thus, the fact that pure economic loss does not derive from any infringement of property is actually one of the 'reasons' for the refusal to compensate it.

A further reason that is often given for the refusal to compensate pure economic loss, is that the cutting of a cable is not 'directed against a business' or, put differently, it is too remote.[811] Thus the BGH has held:

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808) Not agreeing is only Edmund Davies LJ (*Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* supra at 40): 'It follows that this must be regardless of whether the injury (physical or economic, or a mixture of both) is immense or puny, diffused over a wide area or narrowly localised, provided only that the requirements as to foreseeability and directness are fulfilled. I therefore find myself unable to accept as factors determinant of legal principle those considerations of policy convassed in the concluding passages of the judgment just delivered by Lord Denning MR.'

809) *Winn LJ at SCM (United Kingdom) Ltd v WJ Whittall (CA) Supra* at 707: 'It seems to me that it is far more satisfactory in a sociological sense, and is in accordance with the present law to say that apart from the special case of imposition of liability for negligently uttered false statements, there is no liability for unintentional negligent infliction of any form of economic loss which is not itself consequential upon foreseeable physical injury or damage to property.'

810) BGH *NJW* 1959, 479; BGH *NJW* 1964, 720; BGH *NJW* 1968, 1279; BGH *NJW* 1975, 221; BGH *NJW* 1976, 1740; BGH *NJW* 1977, 2208; concerning the German 'cable cases' see Hermann *Zum Schutze des Vermögens* 23 ssq

811) Compare for example BGH *NJW* 1959, 479 (Translated by Markesinis *The German Law of Torts* 112 at 116); BGH *NJW* 1976, 1740 (Translated by Markesinis *The German Law of Torts* 199 ssq); BGH *NJW* 1964, 720, 722; BGH *NJW* 1975, 221, 22

> 'Just as an injury to an employer or the destruction of or damage to a lorry belonging to an enterprise is not specifically connected with the enterprise, the cutting of the cable by the defendant or his employee operating the tractors is not so connected either.'[812]

However, the courts do not want to close the door for the future, as they say '...a cut in the electricity supply cannot, in the absence of special circumstances which do not exist here, be regarded as an interference aimed at the area of operation of the enterprise concerned.'[813] Nevertheless, in the 34 years following this statement, courts have not found these special circumstances in one case, neither have they illustrated these circumstances abstractly. Thus it is fair to say that according to the courts it seems that there is a rule that the cutting of a cable is 'by nature' an indirect cause for the loss which the 'established and operating business' suffers.

Besides that, a special relationship between perpetrator and sufferer and consequently the obligation to compensate will depend on whether there are public law provisions that can be interpreted as having the purpose of protecting the victim. Thus, if there by chance in the state where the cable was cut there exists a building regulation with a protective ambit then the victim will have a title to compensation for its pure economic loss. However, there has only been one BGH decision in point, namely one in which it was held that a building regulation [814] of Land Nordrhein Westfalen has the purpose of protecting the victim against the loss in question. However 8 years later this decision was overruled:

The judges deciding the case agreed with the Appellate court in holding the plaintiff cannot invoke §18 III of the Regulation (*Land Baden Wuertemberg*) as a protective enactment for the purpose of 823 II BGB. In so far as this runs counter to the principles of the aforementioned decision of the BGH of 12 March 1968 815, the court rejects them.'[816]

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812) BGH *NJW* 1959, 479, 480 (Translated by Markesinis *The German Law of Torts* 112 at 118)
813) BGH *NJW* 1959, 479, 480 (Translated by Markesinis *The German Law of Torts* 112 at 118)
814) BGH *NJW* 1968, 1279
815) BGH *NJW* 1968, 1279
816) BGH *NJW* 1976, 1740 (Translated by Markesinis *The German Law of Torts* 119 at 120); compare BGH *NJW* 1977, 2208 (Translated by Markesinis *The German Law of Torts* at 123); similar reasoning in BGB *NJW* 1975, 221, 222,

Last but not least, the decision as to whether the victim has got a contractual claim against the cable cutting company out of a contract with protective ambit towards third partys concluded between the company and the local water authority (that gave the order for the earth removal operations) depends on the fact whether the local water authority was responsible for the victim's *Wohl und Wehe*.[817]

The reason why the cable cases are dealt with in terms of these more or less capriousess requirements can be found in the fact that in German law the unitary problem of pure economic loss is spread over various areas of law. Therefore, the criteria one uses relate more to the area in which a particular instance of pure economic loss is encountered. Consequently it is true to say German law does not offer a systematical way of approaching the entire problem of pure economic loss, but rather an area specific solution in areas such as loss caused by the power failure resulting from the cutting of a cable.

At this stage the position can be summarised in the following formula: Loss consequent upon an infringement of a proprietary interest will more or less be compensated unconditionally; on the other hand the compensation of pure economic loss caused by the cutting of a cable will depend on various considerations: on the fact whether cable-cutter and victim have a particular relationship; whether by chance there happens to be a certain kind of building regulation in the particular state in which the cable was cut; whether the cutting of the cable is, in the opinion of a court, in a direct relationship to the business of the victim. The most amazing point about the German approach towards pure economic loss is the fact that until now the German lawyers, who so favour a coherent system seem to have accepted this mixture of sometimes inconsistent criteria. The only feature all these requirements have in common is the fact that they embody the result of the fear of a too wide liability. This, of course, reminds one spontaneously of the English approach and the way that criteria are employed in that system. To a certain extent, therefore, English and German law have more in common than initially meets the eye.

Let us consider for a moment, then, the similarities between the English and the German approach towards cable cases. As mentioned, both systems have built their

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817) BGH *NJW* 1977, 2208 (Translated by Markesinis *The German Law of Torts* 122, 123)

approaches on the consideration that a flood of claims needs to be avoided. As far as cable cases are concerned for English law this appears clearly from a variety of statements by judges cited earlier. In the principle-based German law it is certainly more difficult to prove this intent. Nevertheless, in one case the BGH refused to hide behind systematical arguments any longer but stated:

> 'In any event, matters cannot be otherwise in the case of a power cut of this nature which affects every one and which is liable to cause widespread financial loss to persons who do not exercise any trade and to whom the general law of delict affords no claim for damages.'[818]

Although this fact does not prevent the two systems from using totally different measures and requirements to serve this aim, the end-result is the same; concerning loss caused as a result of a cut cable both systems are prepared to compensate loss flowing from the infringement of a proprietary interest but not that of a purely economic nature.

It may be presumed that both systems are still very much influenced by - and in the codified German law this is beyond doubt - the liberal economic policies of the industrial revolution in which property seen to be one of the most important interests that need to be protected. This very same influence is also reflected in English law in Lord Denning's 'illogical presumption' that the rejection to compensate pure economic loss caused by a power failure is somehow 'the embodiment of common sense'. However, as property today often consists only of a purely financial interest one might have to reconsider this attitude. For example it is common that a company uses only leased machinery. Further, due to contractual arrangements, the material that is the subject of the production often remains the property of the 'seller'. And after the manufacturing process it is automatically again in his property as a result of an *anticipiertes Besitzconstitut.* In such a case, the factory owner will not normally have an own delictual claim for the loss consequential to the damage of a machine, as it is for him only pure economic loss. Although in Germany one might be able to correct this result through the use of the concept of 'liquidation of a third party's loss' it might then be raised that the situation is now unsatisfactory because an infringement of an corporeal asset - although as regards the company owner it is still

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818) BGH *NJW* 1976, 1740 (Translated by Markesinis *The German Law of Torts* 199 at 122)

pure economic loss - is compensable, but not pure economic loss resulting from the fact that he has to pay his employees while they cannot work.

Compared to the two European approaches concerning the cable cases, the South African approach seems to face more realistically the reality of today's financial life. The South African law expressly does not follow the orthodoxy of protecting only loss consequential upon the infringement of proprietary interests. On the contrary, the courts have expressly pointed out that the fact that the patrimonial loss suffered did not result from physical injury to the corporeal property or person of the plaintiff, but was purely economic, is not a bar to the Aquilian action.[819]

Decisive for the South African courts is the fact whether the act in question would have been condemned by the society, i.e. whether it is wrongful. In deciding a case in accordance with this criterion the courts use various policy considerations. In the only (reported) cable case decided, the court said expressly that in deciding whether conduct of such a nature is to be determined wrongful, 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. Furthermore one should have regard to the probable or possible extent of the foreseeable or foreseen loss; the degree of risk that the loss would be suffered as a result of the conduct complained of; the value to defendant and/or society of the object which the defendant was seeking to achieve when he conducted himself in the manner complained of; whether there were reasonably practicable measures available to the defendant to avert the loss; what the chances had been that those measures would have been successful; and whether the costs of such a measures would have been reasonably proportionate to the loss which plaintiff could have suffered. Thus to be able to consider all this factors, it is important for a court to know all the relevant circumstances.[820]

A crucial factor in this case was that of foreseeability. The court put much emphasis on the fact 'that the defendant knew the precise whereabouts of these two cables; that the defendant knew that the cables were used to supply electricity to the plaintiff;...that defendant knew that if the cables were cut the effect would be to

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819) *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* supra at 377
820) *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* supra at 384

interrupt the supply of electricity to the said works and industries and that they would suffer a loss of production and hence income.'[821] In contrast to the English 'neighbour' principle it was expressly stated that a claim does not depend on a special relationship:

> 'It is true that there was no special relationship between the plaintiff and defendant but, as I understand the position, it is not a prerequisite for liability for pure economic loss.'

As reasonable and fair as it seems to be to hinge the outcome of a case such as this on foreseeability of the loss, so arbitrary it seems to hold a defendant, who cut a cable, liable depending on the fact whether it was on the point of being put in the melt.
Although the South African approach towards cable cases is so different to those of the English and German courts, it is important to note that all three are confronted with the problem of deciding in how far to compensate loss caused as a result of cut cables. And all the three systems face the danger of unlimited liability and a multitude of claims, and also South African lawyers see the danger that the recognition of a claim 'might give rise to a multiplicity of actions and the situation might be one of fraught with an overwhelming potential liability.'[822] One wonders whether the fact of this common concern will lead after a while to similar results and criteria - as with the dependants' action. However, as was made clear above, until now the South African courts are the only ones not to favour the easy and pragmatic solution - viz just to deny any claims for pure economic loss caused by the cutting of a cable - but to consider each case thoroughly by taking into account different social and economic considerations and finally to grant a claim, rather than 'simply' telling the sufferer to try to make good the loss by working a bit harder, as Lord Denning did.[823] This, to a certain extent, progressive approach gives reason for hope that in the future the European legal systems will also be able to distinguish compensable cable cases from those which are not.

Although the illustrated cases again highlight how different in structure the three systems under comparison are, it is noteworthy that they have all come to be concerned with the same problem, i.e. that of how to approach pure economic loss in

821) *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* supra at 385
822) *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* supra at 386
823) *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* supra at 38

cases where no contract exists. Naturally there exists a phenomenon that sometimes loss arises with one person that was in some way caused by an other person. Then the question arises, who shall be finally burdened in an economical way with the loss. As much as the systems in question found more or less detailed answers to this question, when the loss results from an injury to person or property, so much are they struggling in cases of pure economic loss. Thus all the three systems had to ask the question whether it shall be the person who caused the loss or whether it shall be the primary sufferer. This question was then, as one could see, approached by the so different systems with the use of their different methods. Nevertheless, although the difference in the structure of the three approaches cannot be denied, it is important to note that all three systems approach the solution to the problem on the same basis, i.e. the phenomenon of policy considerations. This fact is probably most remarkably in the context of the codified German system, as one often involuntarily assumes that a codification does not leave much space for judicial law making. And with such a strictly and clearly conceived system of liability as that of Germany, it is not surprising that some in fact argue that they see little room for a duty of care concept and for further expansion through judicial activism. But as soon as one considers, for example, von Jhering's above mentioned arguments against the delictual protection of *Vermögen* within §823 I BGB, everyone will have to agree that they were nothing other than pure policy considerations that could have been listed in a common law case decided by, for example, Lord Denning. Thus one can say that the BGB itself is, in a way, the codified outcome of various policy considerations. Some might argue that many parts of the BGB were not really the subject of careful consideration by the drafters, but were simply adopted from Roman law as interpreted by the Pandectists. However, this does not negate the fact that the basis remains one of policy, as the Roman law itself was originally case law based on policy applied to the facts. This was emphasised by Buckland and Mac Nair in the following way:

> 'Both the common lawyer and the Roman jurist...proceed from case to case, being more anxious to establish a good working set of rules, even at the risk of some logical incoherence, than to set up anything like a logical system.'824

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824) Markesinis (1987) 93 *LQR* supra at 85 quoting Buckland and McNair

Furthermore, it must be pointed out that even the German judges, who are sometimes unkindly referred to as *Subsumierautomaten*, do not only apply law but also create law. Thus German judges, although they will not normally say so expressly, are guided by nothing else than by policy considerations when they create new law. What other than policy considerations could motivate judges to recognise 'loopholes' in the BGB? What other than policy considerations could cause judges to create totally new actions?

All the systems are therefore guided by the phenomenon of policy considerations, the English and South African systems more openly, the German system more covertly. For example, all the three systems have regard to the danger of a flood of claims and the weakening of financial life. All three systems, on the other hand, also seem to be subject to a certain amount of social pressure that forces them to make some forms of pure economic loss recoverable. Furthermore it is important to note that the motivation for, and basis of, the actionability of pure economic loss in all three systems was policy. Many of the requirements or codified principles in these systems are nothing else than the outcome of such considerations. And these factors are, of course, subject to socio-economic changes, leading to an ongoing adaptation of the relevant principles and requirements.

A salient feature of the comparison of pure economic loss that although the starting point was different, the pressures on the three systems were similar and, inevitably, the results they finally achieved were not always so different.[825] While the German civil law system had, as a consequence of its inflexible law of delict, to rely on it law of contract to meet the new situation, the English and South African law had developed and expanded their law of torts/delict to serve the same aim. One obvious, but important consequence of this fact is that the distinction between contract and torts/delict is rapidly breaking down.[826] Thus the emerging notion of a general liability that lies at the root of the German contractual approach and The English and South African torts/delict approach is well mirrored in Lipstein's statement:

> 'Whether a general principle of liability for culpable injurious acts, or a system of individually protected interests is accepted as the basis of

825) Markesinis *LQR* (1977) 93 at 89
826) Markesinis *LQR* (1977) 93 at 122

> tortious liability, in the end it is necessary to look to the individual situation. The reason is that the range of protected interests changes with the evaluation of those interests in a changing society.'[827]

Thus one can argue with Markesinis 828 that the common determinator of all the systems under comparison is a wide, flexible and expansible theory of liability. Policy considerations - directly or indirectly - determine the imposition of liability and the form of pure economic loss that is to be held to be actionable. Furthermore policy considerations could indicate that negligently caused pure economic loss may not be actionable if that kind of harm is not known to the law of the country. It is also a question whether the plaintiff or defendant belongs to a class which should not, for reasons of policy, be able to sue or be sued in a court of law.

Finally, after having contemplated the three different systematical approaches towards pure economic loss and the two groups of cases South Africa seems to be the only country that treats all cases of pure economic loss according to the same principle, i.e. that it is in principle actionable on the lex Aquilia. Thus they have a comprehensive approach towards the entire field of pure economic loss, whether caused by statements or by acts, and treat each group according to specific policy considerations. This approach enables them to develop a new coherent field of law. The future will show whether it is this approach which will be more suitable to serve the needs of a complex financial world or an approach in which *Vermoegen* seems to be the most important interest.

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827) Lipstein (1963) 21 *CLJ* at 101
828) Markesinis (1977) 93 *LQR* supra at 109

SUMMARY

This dissertation deals with the phenomenon of negligently caused pure economic loss from a comparative perspective. Subject to comparison are the legal systems of three countries, i.e. England with its common law system, South Africa with its uncodified, mixed system and Germany with its codified civil law.

The first chapter considers the approach to negligently caused pure economic loss in English common law, where the problem of compensating such loss has been dealt with by extending the law of torts. This chapter places special emphasis on the borderline cases that arose in this field, i.e. *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [829] (which was the first case to authoritatively recognise the recoverability of pure economic loss caused by negligent statements), *Anns v Merton London Borough Council* [830] (which ruled pure economic loss to be prima facie wrongful) and thirdly *Murphy v Brentwood District Council* [831] (which overruled the Anns approach). Furthermore, it investigates to what extent courts make use of certain criteria in cases of pure economic loss and whether they apply a doctrine of transferred loss. Finally the chapter reviews the question in how far it is possible to draw general principles out of the actions of dependants of victims of fatal accidents.

In the second chapter the South African approach towards pure economic loss is illustrated. This chapter, too, puts emphasis on the important cases that arose on this field, namely *Administrateur Natal v Trust Bank van Africa Bpk* [832] (which is the first Supreme Court decision to hold authoritatively that pure economic loss is recoverable) and *Lillicrap Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* [833] (where it was decided that pure economic loss caused negligently is not *prima facie* wrongful). Subject to further examinations are the policy considerations used by the South African courts in deciding the individual cases. As was done in the first chapter, this chapter also asks the question whether a doctrine of transferred loss is applied by the courts.

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829) Supra
830) Supra
831) Supra
832) Supra
833) Supra

Finally, the chapter focuses on the action by dependants of a victim of a fatal accident.

The third chapter illustrates the German approach towards pure economic loss caused negligently and shows, firstly, that the law of delict has in effect been extended by a wide interpretation of the special paragraphs in the BGB that relate to the law of delict: On the one hand the recognition of an *eingerichteten und ausgeübten Gewerbebetrieb* as a protected right in terms of §823 I BGB and, on the other hand, the extension of the ambit of §823 I BGB by the wide interpretation of the term 'property'. Secondly, it is explained how German lawyers bypassed the narrow, inflexible German law of delict by making use of the law of contract, i.e. by the creation of remedies that are not expressly mentioned in the code, namely *culpa in contrahendo*, *Vertrag mit Schutzwirkung zugunsten Dritter* and *Drittschadensliquidation.*

The conclusion deals with the direct comparison of the three systems, placing special emphasis on the action by dependants of victims of fatal accidents and the so-called cable cases.

TABLE OF CASES

United Kingdom, United States and Commonwealth Countries

- *Admirality Commissioners v SS Amerika* [1917] AC 38
- *Al-Kandari v JR Brown & Co* [1988] QB 665
- *Al-Nakib Investments (Jersey) Ltd v Longcroft* [1990] 1 WLR 1390
- *Al Saudi Banque v Clark Pixley* [1990] Ch 313
- *Anderson (WB) & Sons Ltd and Others v Rhodes (Liverpool) Ltd and Others* [1967] 2 All ER 850
- *Anns v Merton London Borough Council* [1978] AC 728
- *Arenson v Casson, Beckman, Rutley & Co* [1977] AC 405
- *Argyll (Duchess of) v Beuselinck* [1972] 2 Lloyd's Rep 172

- *Baker v Willoughby* [1970] AC 467
- *Balsamo v Medici* [1984] 1 WLR 951
- *Banque Financière de la Cité SA v Westgate Insurance Co* [1989] 2 All ER 952
- *Behrens v Bertram Mills Circus* [1957] 2 QB 1
- *Bolam v Friern Hospital Management Commetee* [1957] 1 WLR 582
- *Bourhill v Young* [1943] AC 92
- *British Celanese Ltd v Hurt (AH) (Contractors) Ltd* [1969] 1 WLR 959
- *Burgess v Florence Nightingale Hospital for Gentlewomen* [1955] 1 QB 349

- *Caltex Oil (Australia) (Pty) Ltd v The Dredge 'Willemstad'* 1976 11 ALR 227
- *Candler v Crane, Christmas & Co* [1951] 2 KB 164
- *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd (The Mineral Transporter)* [1986] AC 1
- *Caparo Industies v Dickman* [1990] 2 AC 605
- *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453
- *Chaudry v Prabhakar* [1989] 1 WLR 29
- *City of Kamloops v Nielson* (1984) 10 DLR (4th) 641
- *Clarke v Bruce Lance & Co* [1988] 1 WLR 881

- *Department of the Environment v Thomas Bates & Son* [1991] 1 A.C. 499
- *Derry v Peck* [1889] 14 App Cas 337

- *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177
- *Donoghue v Stevenson* [1932] AC 562
- *Dutton v Bognor Regis Ocean District Council* [1972] 1 QB 373

- *Electrochrome Ltd v Welsh Plastics Ltd* [1968] 2 All ER 205
- *Elliot Steam Tug Company Ltd v The Shipping Controller* [1922] 1 KB 127 CA

- *Fish v Kelly* (1864) 17 CB (NS) 194

- *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37
- *Greater Nottingham Co-operative Society v Cementation Piling & Foundations Ltd* [1989] QB 71

- *Heaven v Pender* (1883) 11 QBD 503
- *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465
- *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004
- *Howard Marine Ltd and Dredging Co v Ogden (A) & Sons (Excavations)* [1978] QB 574
- *Hunter v Hanley* (1953) SC 200

- *Investors in Industry Commercial Properties Ltd v South Bedfordshire District Council* [1986] QB 1034

- *Jones v Strout District Council* [1986] 1 WLR 141
- *Junior Books Co Ltd v Veitchi Co Ltd* [1983] 1 AC 520

- *King & Another v Phillips* [1953] 1 QB 429

- *Losner v Michael Cohen & Co* (1975) 119 Sol J 340
- *Leigh and Sillivan Ltd v Aliakmon Shipping Co Ltd* [1985] QB 350; [1986] AC 785

- *Margarine Union GmbH v Cambay Prince Steamship Co Ltd (The Wear Breeze)* [1969] 1 QB 219
- *Mc Inerney v Lloyd's Bank Ltd* [1974] 1 Lloyd's Rep 246
- *Mc Naughton (James) Papers Group v Hicks Anderson* [1991] 2 QB 113

- *Midland Bank Co Ltd v Hett, Stubs & Kemp* [1979] Ch 384
- *Ministery of Housing v Sharp* [1970] 2 QB 233
- *Morgan Crucible Co v Hill Samuel Bank* [1991] Ch 259
- *Morrison Steamship Co Ltd v Greystoke Castle (Cargo Owners)* [1947] AC 265
- *Muirhead v Industrial Tank Specialities Ltd* [1986] QB 507
- *Murphy v Brentwood District Council* [1991] 1 AC 398
- *Mutual Life and Citizens Assurance Co v Evatt (Clive Raleigh)* [1971] AC 793

- *Nelson & Others v Larholt* [1948] 1 KB 339
- *Norsk Pacific Steamship Co Ltd v Canadian National Railway Co* [1992] 1 SCR 1021

- *Pacific Associates v Baxter* [1990] 1 QB 993
- *Peabody Donation Fund (Governors) v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210
- *Pigney v Pointer's Transport Services Ltd* [1957] 1 WLR 1121
- *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1

- *Reid v Rush & Tompkins plc* [1990] 1 WLR 212
- *Rondel v Worsly* [1969] 1 AC 191
- *Ross v Caunters* [1980] Ch 297

- *Saif Ali v Sydney Mitchell & Co* [1980] AC 198
- *Schiffahrt & Kohlen GmbH v Chelsea Maritime Ltd (The Irene's Success)* [1982] QB 481
- *SCM (United Kingdom) Ltd v (WJ) Whittal & Son Ltd* [1971] 1 QB 337
- *Seward (Mary) v The Owner of the'Vera Cruz'* (1884) 10 App Cas 59
- *Simpson & Company v Thomson, Burrel* (1877) 3 App Cas 279
- *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] QB 758
- *Smith v Eric S Bush* [1990] 1 AC 831
- *Sociéteé Anonyme de Remorquage à Hélice v Bernetts* [1911] 1 KB 243
- *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] 1 QB 27
- *Stieler v Porirua City Council* [1986] 1 NZLR 84
- *Sutcliffe v Thackrah* [1974] AC 727
- *Sutherland Shire Council v Heyman* (1985) 60 ALR 1

- *Tate & Lyle Food and Distribution v Greater London Council* [1983] 2 AC 509
- *The Nea Tyhi* [1982] 1 Lloyd's Rep 606
- *The World Harmony (Konstantinidis and Another v World Tankers Corporation, Inc, and Others)* [1965] 2 All ER 139

- *Ultramares Corporation v Touche,* (1931) 255 NY 170

- *Weller & Co Ltd v Foot & Mouth Disease Research Institute Ltd* [1966] 1 QB 569
- *Whitehouse v Jordan* [1981] 1 WLR 246

- *Yuen Kun-Yeu and Others v Attorney General of Hong Kong* [1987] All ER 705

South Africa

- *Administrateur, Natal v Trust Bank van Africa Bpk* 1979 (3) SA 824 (A)
- *Alliance Building Society v Deretitsch* 1941 TPD 203
- *Anthony v Cape Town Municipality* 1967 (4) SA 455 (A)
- *Arthur E Abrahams & Gross v Cohen & Others* 1991 (2) SA 301 (C)
- *Atkinson Oats Motors Ltd v Trust Bank of Africa Ltd* 1977 (3) SA 188 (W)

- *Barlow Rand Ltd t/a Barlow Noordelike Masjinerie Maatskappy v Lebos and Others* 1985 (4) SA 341 (T)
- *Barnes v Union and South West Africa Insurance Co Ltd* 1977 (3) SA 502 (EC)
- *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A)
- *Benson v De Beers Consolidated Mines Ltd* 1988 (1) SA 834 (NC)
- *Bonitas Medical Aid Fund v Volkskas Bank Ltd & Another* 1991 (2) SA 231 (W)
- *Cape Town Municipality v Paine* 1923 AD 207
- *Combrinck Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd* 1972 (4) SA 185 (T)
- *Constantia Versekeringsmaatskappy Bpk v Victor* 1986 (1) SA 601 (A)
- *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D)
- *Credé v Standard Bank of SA Ltd* 1988 (4) SA 786 (EC)

- *Currie Motors (Pretoria) (Pty) Ltd v Motor Union Insurance Co Ltd* 1961 (3) SA 872 (T)

- *De Kock v Gafney* 1914 CPD 377
- *Dickson & Co v Levy* (1894) 11 SC 33

- *EG Electric Co (Pty) Ltd v Franklin* 1979 (2) SA 702 (E)
- *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A)
- *Ferguson v Santam Insurance Ltd* 1985 (1) SA 207 (C)

- *Fish v Kelly* (1864) 17 CB (NS) 194
- *Franschhoekse Wynkelder (Ko-operatief) Bpk v SAR & H* 1981 (3) SA 36 (C)

- *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A)
- *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N)

- *Herschel v Mrupe* 1954 (3) SA 464 (A)

- *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A)
- *Ismail v General Accident Insurance Co SA Ltd* 1989 (2) SA 468 (D)

- *Jameson's Minors v CSAR* 1908 TS 575

- *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A)
- *Lockhat's Estate v North British and Mercantile Insurance Co Ltd* 1959 (3) SA 295 (A)

- *Mac Lelland v Hulet* 1992 (1) SA 456 (D)
- *Minister van Polisie v Evels* 1975 (3) SA 590 (A)
- *Natal Fresh Produce Grower's Association v Afroserve (Pty) Ltd* 1991 (3) SA 795 (N)
- *Ngubane v SA Transport Service* 1991 (1) SA 756 (A)
- *Perlman v Zoutendyk* 1934 CPD 151

- *Shell & BP South African Petroleium Refineries (Pty) Ltd v Osborne Panama* SA 1980 (3) SA 653 (D)
- *Smit v Saipem* 1974 (4) SA 918 (A)
- *Suid-Afrikaanse Bantoetrust v Ross en Jacobz* 1977 (3) SA 184 (T)
- *The Cape of Good Hope Bank v Fischer* (1886) 4 SC 368
- *Tobacco Finance (Pvt) Ltd v Zimnat Insurance Co Ltd* 1982 (3) SA 55 (ZH)

- *Union Government v Lee* 1927 AD 202
- *Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 (1) SA 577 (A)
- *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T)

- *Vaughan, NO v SA National Trust and Assurance Co Ltd* 1954 (3) SA 667 (C)
- *Victor v Constantia Insurance Co Ltd* 1985 (1) SA 118 (C)

- *Western Alarm System (Pty) Ltd v Coini & Co* 1944 CPD 271
- *Withan v Minister of Home Affairs* 1989 (1) SA 116 (ZH)

- *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd* 1985 (4) SA 553 (ZS)

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BGH *LM* §276[Fa]Nr 3
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BGH *LM* §824 Nr 10

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ABBREVIATIONS

A	Appellate Divison
AC	Law Reports, Appeal cases
ACP	*Archiv für die civilistische Praxis*
AD	Appellate Division Reports
AGBG	Gestz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen
All ER	All England Law Reports
ALR	Australian Law Journal Report
App Cas	Law Reports, Appeal Cases
BAG	Bundesarbeitsgericht
BB	*Der Betriebsberater*
BGB	Bürgerliches Gestzbuch
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
BML	*Businessmen's Law*
Bpk	Beperk (=Limited)
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
C	Cape Provincial Division
CA	Court of Appeal
CB (NS)	Common Bench Reports (New Series)
cf	confer
Ch	Law Reports, Chancery Division
CLJ	*Cambridge Law Journal*
Co	Company
CPD	Reports of the Cape Provincial Division
D	Durban and Coastal Local Division
D.	Digesta
DB	*Der Betrieb*
DLR	Dominion Law Reports
EC	Eastern Cape Local Division
ed	edition
eg	for example

G	Gaius
GG	Grundgesetz
GWB	Gesetz gegen Wettbewerbsbeschränkungen
HGB	Handelsgesetzbuch
ICLQ	*The International and Comparative Law Quaterly*
Jhr Jb	*Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts*
JR	*Juristische Rundschau*
JSPTL	*Journal of the Society of public Teachers of Law*
JUS	*Juristische Schulung*
JZ	*Juristenzeitung*
KB	King's Bench; Law Reports King's Bench Division
LAWSA	*The Law Of South Africa*
LM	*Lindenmaier, Möhring, et al, refernce work to the decisions of the Bundesgerichtshof*
Lloyed's Rep	LLoyd's LAW Reports
LQR	*Law Quaterly Review*
Ltd	Limited
MDR	*Monatsschrift für deutsches Recht*
MLR	*Modern Law Review*
MünchKomm	*Münchener Kommentar*
NJW	*Neue Juristische Wochenschrift*
NY	Reports of Cases Decided in the Court of Appeals of the State of New York
NZLR	New Zealand Law Reports
O	Orange Free State Provincial Division
OJLS	*Oxford Journal of Legal Studies*
OLG	Oberlandesgericht
para	Paragraph
Pty	Proprietary
QB	Queen's Bench; Law Reports Queen's Bench Division
QBD	Queen's Bench Division
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
s	Section
SA	South Africa; South African Law Reports
SALJ	*South African Law Reports*

SAR	Reports of the High Court of the South African Republic
SCR	Supreme Court Reports (Canada)
Sol Jo	*Solicitors Journal*
SC	Session cases (Scotland); Cape Supreme Court (South Africa)
ss	Sections
STVG	Straßenverkehrsgesetz
STVO	Straßenverkehrsordnung
THRHR	*Tidskrif vir Hedendaagse Romeins-Hollandse Reg*
T	Transvaal Provincial Division
TPD	Reports of the Transvaal Procincial Division
TS	Reports of the Transvaal Supreme Court
TSAR	*Tydskrif vir die Suid-Afrikaanse Reg*
UWG	Gesetz gegen den unlauteren Wettbewerb
VersR	*Versicherungsrecht*
v	versus
viz	videlicet
Vol	Volume
W	Witwaatersrand Local Division
WLR	Weekly Law Reports
WM	*Wertpapier-Mitteiluhngen*
ZH	Zimbabwe Highcourt
ZIP	*Zeitschrift für Wirtschaftsrecht und Insolvenzrecht*
ZS	Zimbabwe Supreme Court
ZStaatsW	*Zeitschrift Für Die Gesamte Staatswissenschaft*
§	Parapraph

LITERATURE

Allen D, 'Hedley Byrne Revalued' (1989) 105 *LQR* 511

Assmann HD, 'Entwicklungstendenzen der Prospekthaftung' *WM* 1983, 138

Atiyah PS, 'Negligence and Economic Loss' (1967) 83 *LQR* 10 248

Badura P, 'Eigentum'in *Handbuch des Verfassungsrecht* Benda/Maihofer/Vogel (editors) 1983, 653

Ballerstedt K, 'Zur Haftung für Culpa in contrahendo bei Geschäftsabschluß durch Stellvertreter' 151 *ACP* 1950/51, 501

Barker K, 'Unreliable Assumptions in the Modern Law of Negligence' (1993) 109 *LQR* 461

Basson DA, 'Die Nalatige Veroorsaking van Suiwer Ekonomiese Verlies 'n Dilemma vir die Toepassing van die Beginsels van die Reg Aangaande die Onregmatige Daad?' 1983 1 *Codicillus* 8

Battes R, in *Erman Handkommentar Zum Bürgerlichen Gestzbuch* 1 Band §§1-853 7ed 1981

Bauer F, 'Der Beseitigungsanspruch nach §1004 BGB Zugleich ein Beitrag zum Problem der Rechtswidrigkeit auf dem Gebiet des Güterschutzes' 160 *ACP* 1961/62, 465

Beck AL, 'Delictual liability for Breach of Contract' (1985) 102 *SALJ* 222

Bell J, *Policy Arguments in Judicial Decisions* 1983

Behrmann LB, '*Perlman v Zoutendyk*' (1941) 58 *SALJ* 25

Betterman KA, 'Vom Sinn der Amtshaftung' *JZ* 1961, 482

Betterman KA, 'Anmerkung zu BGH *NJW* 1957, 785' *NJW* 1957, 986

Beyleveld D & Brownsword R, 'Privity, Transitivity and Rationality' (1991) 54 *MLR* 48

Boberg PQR, *The Law of Delict: Vol I Aquilian Liability* (1984) (Cited as Boberg *Delict*)

Boberg PQR., 'The Law of Delict' (1961) *Annual Survey* 187

Boberg PQR., 'The Law of Delict' (1972) *Annual Survey* 130

Boberg PQR., 'Liability For Negligent Statements' (1962) 79 *SALJ* 2

Boberg PQR., 'Some Light On The Defence Of Volenti' (1974) 91 *SALJ* 19

Boberg PQR, 'Deductions from Damages in Actions for Wrongful Death' (1964) 81 *SALJ* 194, 346

Boberg PQR, 'Deductions from Damages in Actions For Wrongful Death' (1965) 82 *SALJ* 96, 247, 324

Boberg PQR, 'The Role of Fault in Determining the Lawfulness of Competition' (1991) 51 *THRHR* 43

Boberg PQR, 'Back To *Winterbottom v Wright*? Not Quite!' (1985) 102 *SALJ* 213

Böhmer E, 'Zum Entlastungsbeweis nach §831 I 2 BGB' *MDR* 1958, 745

Bohrer M, *Die Haftung des Dispositionsgaranten Ein Beitrag zu der Lehre von der negativen Vertrauenshaftung* (Dr jur thesis München 1980)

Brox H, in *Arbeitskampfrecht* Brox/Rüthers (editors) 2ed 1982

Burchell EM & Hunt PMA, *South African Criminal Law and Procedure (Vol 1) General Principles of Criminal Law* 2ed (1983) (cited Burchell & Hunt *Criminal Law*)

Burchell JM, 'The Law of Delcit' (1971) *Annual Survey* 141

Burchell JM, 'The Law of Delcit' (1977) *Annual Survey* 172

Burchell JM, 'The Law of Delict' (1979) *Annual Survey* 180

Burchell JM, 'The Law of Delict' (1979) *Annual Survey* 179

Burchell JM, 'The Law of Delict' (1978) *Annual Survey* 237

Burchell JM, 'The Birth Of A Legal Principle - Negligent Misstatement Causing Pure Economic Loss' (1980) 97 *SALJ* 1

Burchell JM, 'The Policy Limits For Recovery Of Pure Economic Loss' (1981) 98 *SALJ* 1

Burchell JM, *Principles of Delict* 1992 (cited as Burchell *Delict*)

Burchell JM & Dendy M, 'The Law of Delict' (1985) *Annual Survey* 177

Carchard H, revised edition of the *French Civil Code* 1930

Canaris CW, 'Schutzgesetze - Verkehrspflichten - Schutzpflichten' *2. Festschrift für Larenz* 1983, 27

Conradie AM, 'Verhaalbaarkeid Van Skade Aan 'N Werkgewer Toegebring Deur Die Onregmatige Besering Van Sy Werknemer' (1943) 7 *THRHR* 133

Cooke R, 'An Impossible Distinction' (1991) 107 *LQR* 46

Corbett MM, 'Aspects Of The Role Of Policy In The Evolution Of Our Common Law' (1987) 104 *SALJ* 52

Corder & Davis, 'Law and social practice: an introduction' in Corder (editor) *Essays on law and social practice in South Africa* 1988

Davel T, *Skadevergoeding aan Afhanklikes by die Dood van 'n Broodwinner* 1987

Davel CJ, 'Berekening van afhanklikes se skadevergoeding by die dood van hul broodwinner (vervolg)' (1984) 17 *De Jure* 263

Davel CJ, 'Berekening van afhanklikes se skadevergoeding by die dood van hul broodwinner (vervolg)' (1985) 18 *De Jure* 46

Davis DM, 'Professional Negligence and the *Lillicrap* Case-Part 2' (1985) 9 *SA Insurance Law J* 54

De Groot H, *De Jure Belli ac Pacis libri tres* Amsterdami 1631 (cited as De Groot *De Jure Belli ac Pacis*)

De Groot H, *Inleiding tot de Hollandsche Rechtsgeleerdheid* Lee RW (editor) 2ed 1953 (cited as De Groot *Inleiding*)

Dendy M, 'The Law of Delict' (1986) *Annual Survey* 177

Dendy M, 'The Law of Delict' (1988) *Annual Survey* 171

Dendy M, 'The Law of Delict' (1990) *Annual Survey* 127

Dendy M, 'The Law of Delict' (1990) *Annual Survey* 358

Dendy M, 'Clarity And Confusion On The Duty Of Care' (1988) 105 *SALJ* 395

Dendy M, 'Claims for Damages for Loss of Support, Dependants' or Breadwinners' Actions?' (1990) 107 *SALJ* 155

Dendy M, 'Wrongs to the Pocket-I: Opening of Foodgates of Liability' (1990) 19 *BML* 177

Dendy M, 'Wrongs to the Pocket-II: Unlawful Competition' (1990) 19 *BML* 187

Dendy M, 'Wrongs to the Pocket-III: The Birth of a Problem Child' (1990) 19 *BML* 237

Dendy M, 'Wrongs to the Pocket-IV: Nelgigent Misrepresentation' (1990) 20 *BML* 11

Dendy M, 'Wrongs to the Pocket-V: A Case of Prima Facie Wrongfulness?' (1990) 20 *BML* 45

Dendy M, 'Wrongs to the Pocket-VI: *Lillicrap* and Beyond' (1990) 20 *BML* 67

Dendy M, 'Wrongs to the Pocket-VII: When the Lights Go Out' (1991) 20 *BML* 115

Dendy M, 'Wrongs to the Pocket-VIII: The South African Law of Power Failures' (1991) 20 *BML* 151

Dendy M, 'Wrongs to the Pocket-IX: The Nelgigent Collection of Cheques' (1991) 20 *BML* 181

Dendy M, 'Wrongs to the Pocket-X: Breach of Contract as a Delict' (1991) 20 *BML* 219

Dendy M, 'Wrongs to the Pocket-XI: The *Pilkington* Saga' (1991) 20 *BML* 231

Dendy M, 'Wrongs to the Pocket-XII: *Pilkington* on Appeal' (1991) 21 *BML* 15

Dendy M, 'Wrongs to the Pocket-XIII: Life After *Lillicrap*' (1991) 21 *BML* 45

De Viliers IWB, 'Nalatige Wanvoorstelling: 'N Kentering' (1958) 21 *THRHR* 277

De Vos WLER & Van Loggerenber DE, 'The activism of the judge in South Africa' (1991) *TSAR* 592

De Wet NJ & Swanepol HL *Strafreg* 4th ed 1985

Dorn H 'Schadensersatzansprüche des Privatunternehmers wegen schädigendem Wettbewerbes durch Gemeindebetriebe' *NJW* 1964, 137

Dugdale AM & Stanton KM, *Professional Negligence* 1982 (cited as Dugdale & Stanton *Negligence*)

Dunz W,'Das verkehrsrichtige Verhalten - Bilanz eines Plenarbeschlusses' *NJW* 1960, 507

Dölle H, 'Außergesetzliche Schutzpflichten' *ZStaatsW* 1943, 67

Drees B, in *Erman Handkommentar Zum Bürgerlichen Gestzbuch* 1 Band §§1-853 7ed 1981

Emmerich V, *Recht der Leistungsstörung* 1978

Emmerich v, in *Münchener Kommentar Bürgerliches Gestzbuch* (Band 2) *Schuldrecht Allgemeier Teil* §§241-432 2ed 1985

Feenstra R, 'Over De Oorsprong Van Twee Omstyeden Paragrafen Uit De Inleidinge Van Hugo De Groot (III.33.2. en III. 34.2)' 1958 *Acta Juridica* 27

Feenstra R, 'The Historical Development Of Delictual Liability For Killing And For the Infliction of Bodily Harm' 1972 *Acta Juridica* 227

Fleming JG, *The Law Of Torts* 4ed 1971 (cited as Fleming *Torts* 4ed 1971)

Fleming JG, *The Law Of Torts* 7ed 1987 (cited as Fleming *Torts* 7ed 1987)

Fleming JG, 'Negligent Auditor And Shareholders' (1990) 106 *LQR* 349

Fleming JG, 'Requiem for Anns' (1990) 106 *LQR* 525

Fleming JG, 'Property Damage - Economic Loss: A Comparative View' (1989) 105 *LQR* 508

Forrester IS, Goren SL, Ilgen HM, Translation of *The German Civil Code* as amended to January 1975

Förscher H, in *Münchener Kommentar Bürgerliches Gesetzbuch* (Band 1) *Allgemeiner Teil* §§1-240 2ed 1984

Fränkel M, *Tatbestand und Zurechnung bei §823 I BGB* 1979

Gerhard W 'Die Haftungsfreizeichnung innerhalb des gesetzlichen Schuldverhältnisses' *JZ* 1970, 535

Gerhardt W, 'Der Haftungsmaßstab im gesetzlichen Schuldverhältnis Positive Vertragsverletzung, Culpa in contrahendo' *Jus* 1970, 597

Gottwald P, 'Die Haftung für Cic' *Jus* 1982, 877

Gottwald P, in *Münchener Kommentar Bürgerliches Gestzbuch* (Band 2) *Schuldrecht Allgemeier Teil* §§241-432 2ed 1985

Grote T, *Die Eigenhaftung Dritter als Anwendungsfall der Culpa in contrahendo* 1984

Grunsky W, in *Münchener Kommentar Bürgerliches Gestzbuch* (Band 2) *Schuldrecht Allgemeier Teil* §§241-432 2ed 1985

Hafferburg A, 'Der Begriff der Fahrlässigkeit im Zivilrecht' *NJW* 1959, 1398

Hagen H, *Die Drittschadensliquidation im Wandel der Rechtsdokmatik* 1971

Hagen H, 'Drittschadensliquidation bei Gefahrentlastung - BGH NJW 1970, 38' *Jus* 1970, 442

Halsbury's, *The Laws Of England* Vol 34 4ed 1980; Cumulative Supplement Part 2 Vol 25-52 1992 (cited as Halsbury's *Laws*)

Hanau P, in *Münchener Kommentar Bürgerliches Gestzbuch* (Band 2) *Schuldrecht Allgemeier Teil* §§241-432 2ed 1985

Hartford C, 'Some Problems On Unlawfulness In Aquilian Actions For Damages For Pure Economic Loss' (1984) 101 *SALJ* 42

Hartford C, 'The *Coronation Brick* case: A reply' (1985) 102 *SALJ* 191

Heinrichs H, in *Palandt Kurzkommentar zum Bürgerliches Gesetzbuch* 47ed 1988

Herrmann G, *Zum Nachteil des Vermögens* 1978 (Berkley-Kölner Rechtsstudien Kölner Reihe Band 16) (Cited as Herrmann *Vermögen*)

Hermann H, 'Die Sachwalterhaftung vermögenssorgender Berufe' *JZ* 1983, 422

Himmelschein J, 'Zur Frage der Haftung für fehlerhafte Leistung' 158 *ACP* 1959/60, 273

Himmelschein J, 'Erfüllungszwang und Lehre von den positiven Vertragsverletzungen' 135 *ACP* 1932, 255

Hoexter C, 'Judicial Policy in South Africa' (1986) 108 *SALJ* 436

Honoré AM, '*Hedley Byrne & Co v Heller and Partners*' (1965) 8 *JSPTL* 284

Hopkins CA, 'Economic Loss: The Uninsured Plaintiff' (1990) 49 *CLJ* 214

Horn N, Kötz H & Leser HG, *German Private and Commercial Law - An Introduction* (Translated by T Weir) 1982 (cited as Horn, Kötz & Leser *German Law*)

Horton RWV, 'Economic Loss In The High Court Of Australia' (1978) 37 *CLJ* 27

Huber U, 'Normzwecktheorie und Adäquanztheorie' *JZ* 1969, 677

Hugo C, 'The negligent collecting bank: recent decisions introduce a new era' (1992) 1 *Stellenbosch Law Review* 115

Hutchison DB, 'Damages For Negligent Misstatements Made In A Contractual Context' (1981) 88 *SALJ* 486

Hutchison DB, 'Negligent Statements: Why The Reluctance To Impose Liability' (1978) 95 *SALJ* 515

Hutchison DB, *Damages For Non-Fraudulent Misrepresentation In English And South African Law* (unpublished PhD thesis Cambridge) 1979 (cited as Hutchison *Misrepresentation*)

Hutchison DB, 'Negligent Misrepresentation Inducing Contract' (1982) 11 *BML* 197

Hutchison DB & Visser DP, '*Lillicrap* revisited: further thoughts on pure economic loss and concurrence of actions' (1985) 102 *SALJ* 587

Huxley A, 'Economic Loss in Negligence - The 1989 cases' (1990) 53 *MLR* 369

Jackson RM & Powell J, *Professional Negligence* 1982 (cited as Jackson & Powell *Negligence*)

James PS, 'The Fallacies of *Simpson v Thompson*' (1971) 34 *MLR* 149

Jolowicz W, in 'The Law of Tort and Non-Physical Loss: Report of Workshop Proceedings' (by Horton Rogers WV, Matthews MH, Smith RJ) (1972) 12 *JSPTL* 171

Joubert WA, 'Die realiteit Van Die Subjektiewe Reg En Die Betekenis Van N' Realistiese Begrip Daarvan Vir Die Privaktreg' (1958) 21 *THRHR* 12

Keer AJ, 'Unlawfulness or wrongfulness in the Aquilian action: some terminological and conceptual problems' (1992) 55 *THRHR* 533

Knöpfle R, 'Zur Problematik der Beurteilung einer Norm als Schutzgesetz im Sinne des §823 II BGB' *NJW* 1967, 697

Köhler H, *BGB Recht der Schuldverhältnisse II, Einzelne Schuldverhältnisse Prüfe dein Wissen* 1990

Kramer EA , *Müchener Kommentar Bürgerliches Gesetzbuch* (Band 2) *Schuldrecht Allgemeiner Teil* §§241-432 2ed 1985

Kübler F, 'Überlegungen zur Eigenhaftung des Unternehmenssanierers aus Culpa in contrahendo' *Festschrift Kellermann* 1991, 143

Kühn G, 'Gläubigerschutz nach §823 II BGB bei Überschuldung einer GmbH' *NJW* 1970, 589

Kupisch B & Krüger W, *Deliktsrecht* 1983

Küpper W, *Das Scheitern von Vertragsverhandlungen als Fallgruppe der Culpa in contrahendo* 1989

Küpper W, *Schadensersatz aus Culpa in contrahendo beim gescheiterten Abschluß eines formbedürftigen Vertrages* 1988

Labuschagne JMT, 'Noodtoestand' (1974) *Acta Juridica* 73

Larenz K, 'Bemerkungen zur Haftung für Cic' *Festschrift für Ballerstedt* 1975, 397

Larenz K, 'Cic, Verkehrspflichten und "sozialer Kontakt"' *MDR* 1954, 515

Larenz K, *Lehrbuch des Schuldrecht* Band I *Allgemeiner Teil* 12ed 1979

Lauterbach WA, *Collegium theoretico practici* Lib IX 1723-1726 (cited as Lauterbach *Collegium*)

Lehmann H in *Lehrbuch des Bürgerlichen Rechts Vol II Recht der Schuldverhältnisse* Enneccerus/Lehmann (editors) 1954

Lawson FH & Markesinis BS, *Tortious Liability For Unintentional Harm In Common Law And The Civil Law Vol II* 1982 (cited as Lawson & Markesinis *Tortious Liability*)

Lewis CL, 'Damages For Negligent Misrepresentation - The Appellate Division Leaps Forward' (1992) 109 *SALJ* 381

Lipsein K, 'Protected Interests in the Law of Torts' (1963) 21 *CLJ* 85

Lieb M, 'Vertragsaufhebung oder Geldersatz?' *Festschrift Rechtswissenschaftliche Fakultät der Universität Köln* 1983, 251

Lorenz W & Markesinis BS, 'Solicitors' Liability Towards Third parties' (1993) 56 *MLR* 558

MacGrath M, 'The Recovery of Pure Economic Loss in Negligence - An Emerging Dichotomy' (1985) 5 *OJLS* 350

Markesinis BS, 'Compensation For Negligent Inflicted Pure Economic Loss: Some Canadian Views' (1993) 109 *LQR* 5

Markesinis BS, 'The Imaginative Versus The Faint-Hearted: Economic Loss Still in a State of Chaos' (1986) 45 *CLJ* 384

Markesinis, BS, *A Comparative Introduction To The German Law of Tort* 1986

Markesinis BS, 'An Expanding Tort Law - The Price Of A Rigid Contract Law' (1987) 103 *LQR* 354

Markesinis BS & Deakin S, '"The Random Element of their Lordships" Infallible Judgment: An Economic and Comparative Analysis of the Tort of Negligence from *Anns* to *Murphy*' (1992) 55 *MLR* 619

Marshall D, 'Liability For Pure Economic Loss Negligetnly Caused - French and English Law Compared' (1975) 24 *ICLQ* 748

May E, 'Das verkehrsrichtige Verhalten als Rechtfertigungsgrund' *NJW* 1958, 1262

Mayer Maly T, 'The *boni mores* in historical perspective' (1987) *THRHR* 61

McInnes M, 'Contractual Relational Economic Loss' (1993) 52 *CLJ* 12

McKerron RG, 'Liability For Negligent Statements: *Herschel v Mrupe*' (1954) 71 *SALJ* 316

McKerron RG, 'The Law of Delict' (1954) *Annual Survey* 124

McKerron RG, *Law of Delict* 7ed 1971 (cited as McKerron *Delict*)

McKerron RG, 'Injuries To Servant: Claim By Master For Loss of Sevices' (1956) 73 *SALJ* 121

McKerron RG, 'Voluntary Assumption Of Risk As A Defence To An Action By Dependants' (1936) 53 *SALJ* 413

McKerron RG, 'Responsibility Of Drunken Driver To Passanger' (1950) 67 *SALJ* 62

McKerron RG, 'Liability For Mere Pecuniary Loss In An Action Under The Lex Aquilia' (1973) 90 *SALJ* 1

Medicus D, *Bürgerliches Recht* 13ed 1987

Medicus D, 'Zur Eigenhaftung des GmbH-Geschäftsführers aus Verschulden bei Vertragsverhandlungen' *Festschrift Steindorff* 1990, 725

Medicus D, 'Verschulden bei Vertragsverhandlungen' *Gutachten und Vorschläge Bd 1* BMJ (editor) 1981, 479

Mertens HJ, in *Münchener Kommentar Bürgerliches Gesetzbuch* (Band 3) *Schuldrecht Besonderer Teil* 2.Halbband §§652853 2ed 1986

Midgley JR, 'A Legal Practitioner's Liability Towards A Clients Adversary' (1990) 53 *THRHR* 553

Millner MA, 'The Law of Delict' (1956) *Annual Survey* 188

Millner MA, 'Voluntary Assumption of Risk' (1955) 72 *SALJ* 233

Mngqibisa NP, 'Liability For Negligent Misstatement Inducing A Contract' (1992) 55 *THRHR* 504

Möschel W, 'Der Schutzbereich des Eigentums nach §823 I BGB' *Jus* 1977, 1

Mugdan B, *Die Gesamelten Materialien Zum BGB Für Das Deutsche Reich* Band 2 *Recht Der Schuldverhältnisse* 1899 (Neudruck 1979) CXXII-CXXIII

Musielak HJ, 'Beweislastverteilung nach Gefahrenbereichen - Eine kritische Betrachtung der Gefahrenkreistheorie des Bundesgerichtshofes' 176 *ACP* 1976, 465

Nagel CJ & Greeff M, 'Die Deliktuelle Aanspreeklikheid Van Die Invorderingsbank' (1992) 55 *THRHR* 314

Neethling J, '*EG Electric Co (Pty) Ltd v Franklin* 1979 (2) SA 702 (EC)' (1979) 42 *THRHR* 329

Neethling J, '*Shell & BP South African Petroleium Refineries (Pty) Ltd v Osborne Panama SA* 1980 (3) SA 653 (D)' (1981) 44 *THRHR* 78

Neethling J, 'Die Onregmatigheidsvereiste by Deliktuele Aanspreeklikheid weens die Nalatige Veroorsaking van Suiwer Ekonomiese Verlies' (1983) 43 *THRHR* 205

Neethling J & Potgieter JM, 'Nalatige Wanvoorstelling as Deliktuele Aksiegrond' 1980 *De Rebus* 179

Neethling J & Potgieter JM, '*Administrateur, Natal v Trust Bank Van Africa Bpk 1979 (3) SA 824 (A)*' (1980) 43 *THRHR* 82

Neethling J, Potgieter LM & Visser PJ, *Law of Delict* 1992 (cited as Neethling, Potgieter & Visser *Delict*)

Nickolson K, 'Third Party Reliance Of Negligent Advise' (1991) 40 *ICLQ* 551

Niese W, 'Die moderne Strafrechtdogmatik und das Zivilrecht' *JZ* 1956, 457

Nipperdey HC, 'Rechtswidrigkeit, Sozialadäquanz, Fahrlässigkeit, Schuld im Zivilrecht' *NJW* 1957, 1777

Nipperday HC & Säcker EJ, 'Tatbestandsaufbau und Systematik der deliktischen Grundtatbestände' *NJW* 1967, 1985

Nippedey HC in *Lehrbuch des Bürgerlichen Rechts I Allgemeiner Teil des Bürgerlichen Rechts* Enneccerus/Nipperdey (editor) 2 Halbband 1960

O'Dair R, 'Professional Negligence: Some Further Limiting Factors' (1992) 55 *MLR* 405

Pauw P, 'Extension To Aquilian Liability?' (1980) 97 *SALJ* 221

Pauw P, 'Aanspreeklikheid vir "suiwer vermoenskade" in die Suid-Afrikaanse reg' (1975) 8 *De Jure* 23

Parmanand SK, 'Some clarification on contributory intent' (1985) 18 *De Jure* 113
Pearmain D, 'A delictual Remedy for Breach of Contract - To Be or not To Be?' (1985) 7 *De Jure ac Legibus* 22
Percival M, 'After *Caparo* - Liability in Business Transactions Revisited' (1991) 54 *MLR* 739
Picker E, 'Vertragliche und deliktische Schadenshaftung - Überlegungen zu einer Neustrukturierung der Haftungssysteme' *JZ* 1987, 1041
Pollak W, 'Civil Liability in the Law of South Africa for the Wrongful Causing of Death' (1931) 48 *SALJ* 191
Pretorus JT, *Aanspreeklikheid van Maatskappy-Ouditeure teenoor Derdes op grond van die Finansiële State* 1985
Price TW, 'Aquilian Liability For Negligent Statement' (1950) 67 *SALJ* 138, 257, 411
Price TW, 'Conception of "Duty of Car" in the Actio Legis Aquiliae' (1949) 66 *SALJ* 269
Reinhardt R, *Der Ersatz des Drittschadens* 1933
Reinicke D & Tiedtke K, 'Schadensersatzverpflichtungen aus Verschulden beim Vertragsabschluss nach Abbruch von Vertragsverhandlungen ohne triftigen Grund' *ZIP* 1989, 1093
Rogers O, 'The Action of the Disappointed Beneficiary' (1986) 103 *SALJ* 583
Salmond Sir JW & Heuston RFV *The Law Of Torts* by Heuston RFV & Chambers RS 18ed 1981 (cited as Salmond & Heuston *Torts* 18ed 1981)
Salmond Sir JW & Heuston RFV, *The Law Of Torts* by Heuston RFV and Buckley RA 19ed 1987 (cited as Salmond & Heuston *Torts* 19ed 1987)
Salmond Sir JW & Heuston RFV, The *The Law Of Torts* by Heuston RFV and Buckley RA 20th ed 1992 (cited as Salmond & Heuston *Torts* 20ed 1992)
Schlechteriem P, 'Anmerkung zum Urteil des BGH vom 20.11.1984, *BB* 1985, 1355' *BB* 1985, 1356
Schlosser H, 'Deliktischer Schadensersatzanspruch aus §823 II BGB ein eigenständiger Interessenschutz des Verkehrsopfers - BGH *NJW* 1980, 1792' *Jus* 1982, 657
Schmiedel B, *Deliktsobligationen nach deutschem Kartellrecht* 1.Teil 1974
Schoeman E, 'Die Nalatige Veroorsaking van Suiwer Ekonomiese Verlies - Aanspreeklikheidsbegrensing' (1986) 46 *THRHR* 287

Schubert W, 'Anmerkung zum Urteil des BGH vom 20.11.1984, *JR* 1085, 322' *JR* 1985, 324

Schulze R, 'Grundprobleme der Dritthaftung bei Verletzung von Auskunfts- und Beratungspflichten in der neueren Rechtsprechung' *Jus* 1983, 81

Schwark E, *Anlegerschutz durch Wirtschaftsrecht* 1979

Schwietering KC, 'Insake: *Herschel v Mrupe* 1954 (3) SA 464' (1957) 20 *THRHR* 56

Schwietering KC, '*Lampert v Hefner, NO* 1955 (2) SA 507 (A)' (1957) 20 *THRHR* 138

Scott SJ, 'Nalatige Wanvoorstelling as Aksiegrond in die Suid-Afrikaanse Reg' (1977) 37 *THRHR* 58, 165, 317

Scott WE, 'Enkele Opmerkings oor Volenti non fit Injuria as 'n Regverdigingsgrond in die Privaatreg' (1976) 9 *De Jure* 218

Selb W, 'Kritik formaler Drittschadensthesen' *NJW* 1964, 1765

Sirp W, in *Erman Handkommentar Zum Bürgerlichen Gestzbuch* 1.Band §§1-853 7ed 1981

Snyman CR, *Criminal Law* 1984

Soergel C, in *Münchener Kommentar Bürgerliches Gesetzbuch* (Band 3) *Schuldrecht Besonderer Teil* 1.Halband §§433-651k 2ed 1988

Söllner A, 'Mietrechtliche Sachmängelhaftung des Grundstückserwerbers gegenüber Dritten - BGHZ 49, 350' *Jus* 1970, 159

Stapleton J, 'Duty of Care and Economic Loss: A Wider Agenda' (1991) 107 *LQR* 249

Staub H, *Die positive Vertragsveletzung* 2ed 1913 Nachdruck 1969 mit Nachwort Schmidt E

Steele J, 'Two Cheers for *Caparo*: *Ravenscroft v Rederiaktiebolaget Transatlantic*' (1993) 56 *MLR* 244

Stoll H, 'Die Beweislastverteilung bei positiven Vertragsverletzungen' *Festschrift von Hippel* 1967, 517

Stoll H, 'Haftungsverlagerung durch beweisrechtliche Mittel' 176 *ACP* 1976, 145

Stoll H, 'Anmerkung zu BGH *JZ* 1985, 383' *JZ* 1985, 384

Stoll H, 'Zum Rechtvertigungsgrund des verkehrsrichtigen Verhaltens' *JZ* 1958, 137

Stoll H & Visser PJ, 'Some Thoughts on Delictual Damages for the Loss of Use of Property in Terms of South African and German Law' (1990) 23 *De Jure* 347

Tägert H, *Die Geltendmachung des Drittschadens* 1938

Thomas H in *Palandt Kurzkommentar zum Bürgerliches Gesetzbuch* 47ed 1988

Tiedtke K, 'Der Inhalt des Schadensersatzanspruchs aus Verschulden beim Vertragsschluß wegen fehlender Aufklärung' *JZ* 1989, 569

Todd S, 'Negligence Actions Against Insurance Investigators' (1992) 108 *LQR* 360

Van Aswegen A, 'Policy considerations in the law of delict' (1993) 56 *THRHR* 171

Van Aswegen A, 'Die Toets Vir Die Bestaan Vass 'N "Onafhanklike Delik" In Die Geval Van Kontrakbreuk' (1992) 55 *THRHR* 271

Van Bynkershoek C, *Observationes Tumultuariae II* Meyers EM, Blécourt AS, Bodenstein HDJ, Dorhout Mees TJ, De Jong FJ, Telders BM (editors) 1934 (cited as Van Bynkershoek *Oservationes*)

Van der Merve NJ & Swanepoel HL, *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 1989 (cited as van der Merve & *Swanepoel Die Onregmatige Daad*)

Van der Walt JC, 'Delict' 8 *LAWSA* 1; Cumulative Supplement Part 1

Van der Walt JC, 'Valatige wanvoorstelling en suiwer vermoënskade: die appèlhof spreek n' duidelike woord' 1979 *TSAR* 145

Van der Walt JC, '*Suid-Afrikaanse Bantoetrust v Ross en Jacobz* 1977 (3) SA 184 (T)' 1977 *TSAR* 269

Van der Walt JC, 'Die deliktuele aanspreeklikheid van die vervaardiger vir skade berokken deur middel van sy defekte produk' (1972) 35 *THRHR* 224

Van Warmelo P, 'Liability In Contract and in Delict' (1985) 102 *SALJ* 227

Visser DP, 'Responsibility to Return Lost Enrichment' (1992) *Acta Juridica* 175

Visser DP, in *Wille's Principles Of South African Law* 648 (cited as Visser in *Wille's Principles*)

Voet J, *Commentarius ad Pandectas* 1698 (cited as Voet Commentarius)

von Bar C, 'Vertragliche Schadensersatzpflichten ohne Vertrag' *Jus* 1982, 637

von Caemmerer E, 'Das Problem des Drittschadens' *Zeitschrift des Bernischen Juristenvereins* Bd 100, Heft 8 1964, 341

von Caemmerer E, 'Verträge zugunsten Dritter' *Festschrift für Wieacker* 1978, 311

von Caemmerer E, 'Die absoluten Rechte in §823 I BGB' *VersR-Beiheft Karlsruher Forum* 1961, 25

von Craushaar G, 'Haftung aus Cic wegen Ablehnung des Vertragsabschlusses - BGH *LM* §276 (Fa) BGB Nr 28' *Jus* 1971, 127

von Jhering R, 'Culpa in contrahendo oder Schadensersatz bei Nichtigen oder nicht zur Perfektion gelangten Verträgen' *Jhr Jb* 4 1861 1

von Morgen RDV, 'Die differenzierende Rechtssprechung des BGH zur Verjährung von Prospekthaftungsansprüchen: Eine "halbherzige" Lösung' *NJW* 1987, 474

Wacke A, in *Münchener Kommentar Bürgerliches Gesetzbuch* (Band 5) *Familienrecht* 1.Halbband §§1297-1588 2ed 1989

Wallace IN Duncan, 'Anns Beyond Repair' (1991) 107 *LQR* 228

Wallace IN Duncan, 'Negligence And Complex Structures' (1990) 107 *LQR* 11

Wallace IN Duncan, 'Negligence And Defective Buildings: Confusion Confounded?' (1989) 105 *LQR* 46

Wang CH, *German Civil Code* (Translation) 1907

Weir T, *A Casebook On Torts* 1988 (cited as Weir *Torts*)

Weir T, 'Statutory Auditor Not Liable To Purchaser Of Chares' (1990) 49 *CLJ* 212

Weitenauer H, 'Gedanken zum Problem der Rechtswidrigkeit und des Verschuldens' *VersR* 1961, 1057

Westermann HP, in *Münchener Kommentar Bürgerliches Gesetzbuch* (Band 3) *Schuldrecht Besonderer Teil* 1.Halband §§433-651k 2ed 1988

Wieacker F, 'Rechtswidrigkeit und Fahrlässigkeit im Bürgerlichen Recht' *JZ* 1957, 535

Wiethölter R, *Der Rechtfertigungsgrund des verkehrsmässigen Verhalten - Eine Studie zum zivilrechtlichen Unrecht* 1960

Wunsh B, 'Aspects of the contractual and deliktual liability of attorneys' (1988) *TSAR* 1

Wussow W, 'Zur Lehre von der Sozialadäquanz' *NJW* 1958, 891

Zimmermann R, *The Law of Obligations* 1990

Zippelius R, 'Erfolgsunrecht oder Handlungsunrecht' *NJW* 1957, 1777

Zweigert K & Kötz H, *An Introduction Into Comparative Law Vol II* 2ed 1987 (translated by Weir T) (cited as Zweigert & Kötz *Introduction*)