

The influence of reasonableness on determining delictual or tort liability for pure economic loss – comparative conclusions*

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OPSOMMING

Die invloed van redelikheid op die bepaling van deliktuele aanspreeklikheid vir suiwer ekonomiese verlies – vergelykende gevolgtrekkings

In hierdie artikel sal die invloed van redelikheid op die bepaling van deliktuele aanspreeklikheid vir suiwer ekonomiese verlies in die Suid-Afrikaanse, Amerikaanse, en Franse reg oorweeg word. Daar is tans geen algemene, duidelike definisie van suiwer ekonomiese verlies nie. In die Suid-Afrikaanse en Amerikaanse reg word dit eenvoudig beskryf as vermoënsverlies wat nie die gevolg is van saakbeskadiging of persoonlikheidskrenking nie. In al drie jurisdiksies kan die verweerder se opsetlike of nalatige optrede, hetsy deur middel van 'n aktiewe handeling hetsy 'n versuim, die oorsaak wees van suiwer ekonomiese verlies. In die Suid-Afrikaanse en Amerikaanse reg is daar oor die algemeen 'n onwilligheid om skadevergoeding vir suiwer ekonomiese verlies toe te ken, terwyl dit nie die geval is in die Franse reg nie. In al drie jurisdiksies is dit egter duidelik dat daar 'n behoefte is om suiwer ekonomiese verliese binne redelike perke te hou. In al drie jurisdiksies lyk dit of die howe op spesifieke reëls, faktore, of beleidsoorwegings staatmaak om die elemente van deliktuele aanspreeklikheid vir suiwer ekonomiese verlies te bepaal, en die implisiete of eksplisiete invloed van redelikheid blyk algemeen binne die verskillende elemente van deliktuele aanspreeklikheid.

1 INTRODUCTION

Much has been written on determining delictual liability for pure economic loss in South African law.¹ In this article, because of length constraints, my purpose is not to delve into all the delictual elements of liability in relation to pure

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¹ For a comprehensive list of contributions as well as case law on the topic, see Wessels “Wrongfulness in pure economic loss cases: ‘The traditional approach’ and the ‘new approach’” 2020 *THRHR* 151–152 n 1.

economic loss in detail but rather to point out the influence of reasonableness in determining delictual liability for pure economic loss in South African law. A look at the influence of reasonableness on determining delictual or tort liability in American and French law as a common law and a civil law system, respectively, may provide valuable insight. South African and French law follow a generalising approach to determining a delict in that, generally, all the elements of a delict must be present in order to found liability, whereas American law follows a system of discreet torts, with the tort of negligence and numerous intentional torts each with its own specific requirements.² In this article, to begin with, I shall discuss the influence of reasonableness in determining delictual liability for pure economic loss in South African law. This will be followed by a discussion of the influence of reasonableness in determining delictual or tort liability for pure economic loss in American and French law. My conclusion will then provide a comparative analysis of the differences and similarities in the approaches of the three jurisdictions in determining delictual or tort liability for pure economic loss.

2 SOUTH AFRICAN LAW

There is no precise definition of pure economic loss in the South African law of delict.³ Neethling and Potgieter refer to it as “financial loss that does flow from damage to property or impairment of personality, but which does not involve the *plaintiff’s* property or person; or if it does, the *defendant* did not cause such damage or injury”.⁴ Pure economic loss can be difficult to quantify as the loss can be uncertain and may seem endless.⁵ In *Administrateur, Natal v Trust Bank van Afrika Bpk*,⁶ the court alluded to the proper determination of the elements of wrongfulness, negligence, and causation that would assist in allaying the fear of indeterminate liability in cases of pure economic loss. All the elements of a delict (conduct, wrongfulness, fault, causation, and loss) must, however, be present to found liability for pure economic loss.⁷ As I shall show below, the influence of reasonableness is apparent in determining delictual liability for pure economic loss in South African law in that the courts try to limit liability within reasonable limits by making use of the specific elements of wrongfulness (the criterion of reasonableness), negligence (reasonable foreseeability), and legal causation (the flexible standard with reference to reasonableness, as well as directness and reasonable foreseeability).⁸

2 See Ahmed “The influence of reasonableness on the element of conduct in delictual or tort liability – comparative conclusions” 2019 *PER/PELJ* 2-5 with regard to the fundamental differences and similarities among these different legal systems; Wessels “Establishing legal certainty in novel pure economic loss cases” 2020 *THRHR* 335ff with regard to the generalising approach followed in South African law.

3 In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* 2006 1 SA 461 (SCA) 465, Harms JA referred to *Neethling-Visser-Potgieter Law of delict* 7 ed (2015) as well as the Stair Memorial Encyclopaedia *The laws of Scotland* (1996) vol 15 para 273.

4 *Law of delict* 8 ed (2020) 349.

5 *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 378; Loubser & Midgley (eds) *The law of delict* (2018) 274.

6 1979 3 SA 824 (A).

7 *Telematrix* 468; *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd* 2017 1 SA 613 (CC) para 21; Neethling & Potgieter (2020) 350.

8 Loubser & Midgley 274.

Conduct may be in the form of an omission or a commission. Insofar as fault is concerned, the pure economic loss may be caused intentionally or negligently. For example, pure economic loss may be caused by a negligent misrepresentation (which could take place in the form of a commission or an omission),⁹ or by an intentional interference (commission) with contractual relations.¹⁰ To determine negligence, the reasonable person standard is used. It depends on whether the reasonable person in the position of the defendant would have foreseen the possibility of his conduct causing pure economic loss and would have taken reasonable steps to prevent the loss.¹¹ Intention consists of two elements – direction of the will, and subjective awareness that the willed conduct is wrongful with reference to the criterion of reasonableness (consciousness of wrongfulness).¹² With regard to factual causation, it depends on whether there is a factual causal link between the defendant's conduct and the pure economic loss sustained.¹³ In respect of legal causation, the courts use the flexible test – whether there is a close enough relationship between the defendant's conduct and the pure economic loss to be imputed to the defendant “in view of policy considerations based on reasonableness, fairness and justice”.¹⁴ Subsidiary tests, such as reasonable foreseeability and the direct consequences criterion, may also play a role in determining legal causation.¹⁵ Of all the elements in determining delictual liability for pure economic loss, wrongfulness is the most discussed, as is the element of duty of care in the tort of negligence in American law.¹⁶

There is no general legal duty to prevent pure economic loss. Accordingly, the causing of pure economic loss is not *prima facie* wrongful.¹⁷ In terms of the traditional approach to determining wrongfulness,¹⁸ wrongfulness is established where there is an infringement of a right,¹⁹ or, more commonly in cases of pure economic loss, a breach of a legal duty to prevent economic loss.²⁰ According to the recent new approach of the courts, wrongfulness turns on whether it is reasonable to impose delictual liability on the wrongdoer for the (pure economic) loss sustained.²¹ There has been much debate about the introduction of this

9 As a form of *damnum iniuria datum*, see *Mukheiber v Raath* 1999 3 SA 1065 (SCA); Neethling & Potgieter (2020) 359.

10 *Country Cloud Trading v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) 10. See the examples provided by Neethling & Potgieter *Delict* (2020) 368–369; Loubser & Midgley 274–275.

11 With regard to the test for negligence in instances of pure economic loss caused by negligent misrepresentation, see Neethling & Potgieter (2020) 364.

12 A person can direct his will directly (*dolus directus*), indirectly (*dolus indirectus*), or by actually subjectively foreseeing the possibility of a harmful consequence ensuing, reconciling himself with such possibility, and nevertheless continuing with the conduct (*dolus eventualis*) (Neethling & Potgieter (2020) 160–163).

13 The courts use the but-for or *conditio sine qua non test* (Neethling & Potgieter (2020) 364).

14 *S v Mokgethi* 1990 1 SA 680 (A) 40–41.

15 See Neethling & Potgieter (2020) 365.

16 See para 3 below.

17 *Country Cloud Trading* paras 22–23.

18 See Wessels (2020) 155ff.

19 Such as with an interference with a contractual relationship.

20 *Fourway Haulage SA Pty Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) 156; *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 832–833; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 26–27; Loubser & Midgley 276; Neethling & Potgieter (2020) 350.

21 Wessels (2020) 158ff.

recent new approach,²² which is now a part of our law, although, as I shall show below, the established authors of textbooks on the law of delict still refer to the traditional approach, in some detail too, no doubt because our courts have not discarded the traditional approach but actually refer to both approaches.²³

According to the traditional approach, to determine whether there was a breach of a legal duty, the *boni mores* criterion is applied which requires a value judgement, taking all circumstances into account (including constitutional imperatives) and involving policy considerations.²⁴ In applying the *boni mores* criterion, the interests of the parties involved is also weighed against the public interest.²⁵

Neethling and Potgieter²⁶ refer to the following factors²⁷ in applying the *boni mores* or reasonableness criterion in order to determine whether there is a legal duty to prevent pure economic loss: reasonable foreseeability of harm;²⁸ whether the defendant knew or foresaw that his or her negligent conduct may cause pure economic loss;²⁹ practical measures that could have been taken to avert the loss (is the cost involved reasonably proportionate to the loss suffered by the plaintiff and could the harm be averted with relative ease?);³⁰ where the defendant as a professional possessing certain knowledge and competence has a duty not to cause economic loss;³¹ the degree of the risk of economic loss that may be suffered by the plaintiff (the greater the degree of the risk, the more likely the defendant would have been expected to prevent the loss);³² the extent of the loss (if it is indeterminate, it may be unlikely that the defendant had a legal duty to prevent the economic loss);³³ where a statutory provision may indicate whether there is a legal duty on a person to prevent economic loss;³⁴ vulnerability to the risk of loss; and various other factors.³⁵

22 *Idem* 151ff.

23 *Masstores* paras 20–24; *Brentmark (Pty) Ltd v Puma Energy South Africa (Pty) Ltd* 2021 4 All SA 106 (WCC) paras 53, 71; Wessels (2020) 162–163.

24 *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 797; *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pty) Ltd* 1985 4 SA 553 (ZS) 562–563; Neethling & Potgieter (2020) 351.

25 *Coronation Brick* 384; *Indac Electronics* 797–798; *Zimbabwe Banking Corporation* 562, 564; Neethling & Potgieter (2020) 351–352.

26 352–357.

27 There is no *numerus clausus* of the factors that may be used by the adjudicators in applying the *boni mores* criterion in order to determine whether there is a legal duty to prevent pure economic loss (Neethling & Potgieter (2020) 352). Wessels (2020) *THRHR* 158 refers to all these factors as “policy considerations”. Van der Walt and Midgley *Principles of delict* 3 ed (2016) 138 refer to some of them as “policy factors”.

28 *Coronation Brick* 384. *Cf MTO Forestry (Pty) Ltd v Swart* NO 2017 5 SA 76 (SCA) 85, where Leach JA held that foreseeability of harm should not play a role in determining wrongfulness; *Fourway Haulage* 163, where Brand JA stated that reasonable foreseeability of harm should rather be dealt with under legal causation instead of wrongfulness.

29 *Coronation Brick* 386; *BOE Bank Ltd v Ries* 2002 2 SA 39 (SCA) 49; *Indac Electronics* 799; Neethling & Potgieter (2020) 352.

30 See *Coronation Brick* 384; Loubser & Midgley 276; Neethling & Potgieter (2020) 353.

31 See *Indac Electronics* 799; Loubser & Midgley 276; Neethling & Potgieter (2020) 353.

32 *Coronation* 384; *Indac Electronics* 799; Loubser & Midgley 276; Neethling & Potgieter (2020) 354.

33 Loubser & Midgley 276.

34 See *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 31, 33 (it was stated that there was no legal duty on the council to avoid pure economic loss); *Minister of Law and Order*

Loubser and Midgley,³⁶ in addition to the factors mentioned above, refer to the importance of whether there is a special relationship between the parties,³⁷ and “fraud or dishonesty” as factors that may lead to the conclusion that the causing of pure economic loss was unreasonable and wrongful.³⁸ Van der Walt and Midgley³⁹ also refer to the principles of equity and fairness that may lean for or against allowing a claim for pure economic loss.

Generally, the courts are reluctant to award compensation for pure economic loss. In addition to the factors referred to above, the courts consider a number of policy considerations to determine the presence of a legal duty to prevent pure economic loss.⁴⁰ The common policy considerations the courts refer to for not imposing liability for pure economic loss include:⁴¹ the concern of indeterminate liability;⁴² the opening of the floodgates to a high influx of claims⁴³ (the courts would more readily impose liability for a single loss occurring once to a single plaintiff);⁴⁴ where the parties could have protected themselves from loss or liability by other means;⁴⁵ the plaintiff’s vulnerability to the risk of pure economic loss (where the plaintiff could have protected himself from vulnerability to risk of loss by other means such as by contract);⁴⁶ the law of delict should not undermine and interfere with contractual relations where the law of contract may be applied;⁴⁷ and liability on the defendant would be refused if such imposition is

v Kadir 1995 1 SA 303 (A) 319 (the court held that the police did not have a legal duty to take down particulars of witnesses to a hit and run motor vehicle accident which would be required by the road accident victim in a civil claim); Neethling & Potgieter (2020) 356 n 184.

35 See *Ries v Boland Bank PKS Ltd* 2000 4 SA 955 (C) 970; Neethling & Potgieter (2020) 356–357.

36 276–278.

37 For example, where persons offer professional services or where a fiduciary duty is present. If there is no special relationship, a legal duty may not be present to prevent harm, the authors refer in this regard to *Franschoekse Wynkelder (Ko-operatief) Bpk v South African Railways and Harbours* 1981 3 SA 36 (C) 41. See further *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar* 2010 5 SA 499 (SCA) 508–509.

38 *Minister of Finance v Gore NO* 2007 1 SA 111 (SCA) 140.

39 138.

40 *Gore* 138.

41 See the policy considerations referred to in *Delphisure Group* 508–509; Loubser & Midgley 270–280; Neethling & Potgieter “‘Vulnerability to risk’ as a factor determining delictual liability for pure economic loss” 2015 *THRHR* 636–637; Loubser & Midgley 278–280.

42 See *Coronation Brick* 377–378; *Fourway Haulage* 161; *Country Cloud Trading* 11; Loubser & Midgley 278. However, no indeterminate liability was found in *Delphisure Group* 509.

43 *Shell and BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama* SA 1980 3 SA 653 (D).

44 *Greenfield Engineering Works Pty Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 901 (N) 916–917; *Fourway Haulage* 161.

45 Such as by obtaining insurance or by contractual means (*Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 3 SA 138 (SCA)). See also *Indac Electronics* 799; Loubser & Midgley 278; Neethling & Potgieter (2020) 356.

46 *Indac Electronics* 799; *Fourway Haulage* 162; *Country Cloud Trading* (the the court held that the appellant was not vulnerable to risk and could have claimed its loss in terms of contractual relations); Neethling & Potgieter (2020) 356.

47 See *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 4 (A) 500; *Country Cloud Trading* 19.

deemed an additional burden that would hamper his activities.⁴⁸ The courts try to contain liability relating to pure economic loss within “reasonably predictable limits”.⁴⁹

In order to illustrate the influence of reasonableness in determining whether delictual liability will follow based on claims for pure economic loss, two examples from case law will be considered briefly, one which involves intentional conduct and the other negligent conduct.

In *Country Cloud Trading*,⁵⁰ the respondent (the Department) entered into a building contract with iLima. Under financial strain at a later stage, iLima borrowed R12 million from the appellant (Country Cloud, a third party) in terms of a loan agreement. The loan agreement was conditional upon the Department’s managing agent paying back the R12 million to Country Cloud from the moneys that would be owed to iLima by the Department in respect of the building contract. The Department subsequently cancelled the building contract with iLima. iLima went into liquidation. Country Cloud sued the Department in respect of its pure economic loss relating to the loan.⁵¹ The court *a quo* dismissed the claim. The Supreme Court of Appeal, on appeal, also dismissed Country Cloud’s claim. It held that as a result of policy considerations of indeterminate liability⁵² and that the plaintiff was not vulnerable to risk,⁵³ it was unreasonable to impose delictual liability on the Department (with reference to the recent new approach to determining wrongfulness). The Supreme Court of Appeal, in response to Country Cloud’s allegation that the Department unlawfully interfered with a contractual relationship, held that the claim could not be framed within the specific form of *damnum iniuria datum* where, if proven, the conduct would be deemed *prima facie* wrongful; yet the court found intent in the form of *dolus eventualis* on the part of the Department.⁵⁴ Country Cloud then appealed to the Constitutional Court alleging, *inter alia*, that the department unlawfully interfered with the contractual relationship (loan agreement) between iLima and Country Cloud.

The Constitutional Court confirmed that Country Cloud’s claim was for pure economic loss and that there was no unlawful interference in a contract which would have been deemed *prima facie* wrongful.⁵⁵ Country Cloud was deemed to be a third party and a stranger to the contract.⁵⁶ Intent in the form of *dolus eventualis* was, however, acknowledged.⁵⁷ In concluding that wrongfulness was absent, the court⁵⁸ stated that there was no risk of indeterminate liability, the

48 *Fourway Haulage* 162; Neethling & Potgieter (2020) 356–357; Loubser & Midgley 278.

49 Loubser & Midgley 274. See also Van der Walt & Midgley 138.

50 In this case, the court was confronted with a novel case involving a stranger (third party) to the contract as a result of intentional repudiation of the contract.

51 *Country Cloud Trading* 5–6.

52 In the sense that if a non-contracting party to the original contract succeeded in a claim for pure economic loss (in delict) against a contracting party as a result of cancellation of the contract, it would open the floodgate to claims by any non-contracting parties (strangers) suffering loss which could lead to indeterminate liability.

53 *Country Cloud Trading* 7–8.

54 This was confirmed by the Constitutional Court – *Country Cloud Trading* 13.

55 *Country Cloud Trading* 2.

56 11.

57 14.

58 16.

plaintiff was not vulnerable to risk, and accordingly there was no “pressing need for the law of delict to step in to protect the plaintiff against loss”.⁵⁹ The court held that Country Cloud did not persuade the court that the Department was responsible for the economic loss, that Country Cloud was wronged, or that the Department “owes a duty to Country Cloud”. The claim for pure economic loss was dismissed. The court was not prepared to extend delictual liability where there were existing contractual relations and other reasonable avenues that the appellant could have followed, such as trying to recover the loss from a party to the contract that stood as surety for the loan amount.⁶⁰ The court alluded to both the approaches to determining wrongfulness – it was not reasonable to impose liability on the Department for the pure economic loss sustained by iLima, and there was no legal duty upon the Department to act reasonably *ex post facto* in preventing the pure economic loss sustained by iLima.⁶¹ The Constitutional Court⁶² referred to both the element of wrongfulness and legal causation with respect to policy considerations that assist in excluding liability for pure economic loss.

In *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole*,⁶³ the appellant sued a firm of auditors based on a negligent misstatement (a profit certificate) by one of the auditors of the firm which led to the appellant sustaining loss as a result of relying on the certificate. Brand JA⁶⁴ stated that factual causation was present, and that the auditor was actually grossly negligent. In determining wrongfulness, Brand JA stated that public and legal policy considerations dictate whether the firm of auditors should be “held legally liable for the loss resulting from the misstatement or whether it should be afforded legal immunity”.⁶⁵ In particular, he⁶⁶ referred to three factors to consider whether it was reasonable to impose liability on the firm of auditors: “whether the representation was made in a business context and in response to a serious request”; “whether the plaintiff was dependent upon the defendant to provide the information or advice sought”; and whether the plaintiff was vulnerable to risk.⁶⁷ In respect of the first factor it was found that the request was indeed serious and made in a business context. However, with regard to the second factor, it was doubted whether the appellant was dependant on the certificate as he could have obtained independent advice.⁶⁸ As for the third factor, whether the appellant was vulnerable to risk, Brand JA stated that the appellant was initially covered against the risk but through its own conduct deprived itself of contractual remedies and failed to remove itself from a “disadvantageous transaction”.⁶⁹ Accordingly, the appellant was the author of its

59 *Country Cloud Trading* 20–22. In this case the court held that Country Cloud could have claimed from the contracting party who stood as surety for the loan amount.

60 *Country Cloud Trading* 22–23. See also *Lillicrap; Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 3 SA 138 (SCA).

61 In *Masstores*, the court reiterated that the *Country Cloud* did not “lay down that in inducement cases the wrongfulness enquiry need not be concerned with the duty not to cause harm or the infringement of rights” (para 24).

62 *Country Cloud Trading* 8–10.

63 2013 5 SA 183 (SCA).

64 192.

65 *Ibid.*

66 194.

67 195–197.

68 194–195.

69 196–197.

own misfortune and made itself vulnerable to risk. It may be argued that the first two factors could lead to a conclusion of the existence of a legal duty upon the firm of auditors to act reasonably in preventing the pure economic loss, while the third consideration would not. Thus, based on a weighing of the different factors and in light of all the circumstances, it may be argued that there was no legal duty on the firm of auditors to act reasonably in preventing the pure economic loss.

In respect of legal causation, Brand JA stated that wrongfulness and legal causation, which are both determined by legal and public policy, and serve the same purpose in preventing the imposition of liability, and that by the appellant not extricating itself from the transaction when it had an opportunity to do so, resulted in not only wrongfulness not being established but also legal causation.⁷⁰ The court also referred to the reasonable foreseeability criterion in determining legal causation, stating that, essentially, the loss was not reasonably foreseeable, as the auditor did not reasonably foresee that the appellant would not protect itself contractually.⁷¹ Also, according to the direct consequences criterion and the flexible approach to determining legal causation, legal causation was absent.

It is apparent that the influence of reasonableness in determining delictual liability for pure economic loss is linked to policy considerations. Both the tests for determining wrongfulness and legal causation are based on policy considerations. However, care should be taken when determining the elements of wrongfulness and legal causation. In respect of pure economic loss, the question of wrongfulness depends on whether according to the *boni mores* there was a legal duty to act reasonably *ex post facto* in preventing the pure economic loss (according to the traditional approach). According to the recent new approach to determining wrongfulness, it depends on whether public policy dictates that it is reasonable to impose liability on the defendant for the pure economic loss. In determining legal causation in terms of the flexible approach, the question is whether it is fair, just, and reasonable that the defendant should be held delictually liable for the pure economic loss factually caused by his conduct. If the pure economic loss is indeterminate, then the consequences may be considered too remote and legal causation may be absent. Turning to the influence of reasonableness on the other elements, the questions that must be answered are: was the conduct unreasonable when judged according to the standard of the reasonable person *ex ante* (negligence);⁷² in respect of intention, did the defendant direct his will towards causing the pure economic loss, and was he conscious of the wrongfulness or consciousness of the unreasonableness of his conduct? In *Country Cloud Trading CC v MEC, Department of Infrastructure Development*,⁷³ the court found that the Department had intention in the form of *dolus eventualis*. Thus, it may be concluded that the influence of reasonableness on claims for pure economic loss in South African law is mainly explicit.

70 197.

71 198–200.

72 Reasonable foreseeability and preventability must be considered. If it is found that the wrongdoer acted negligently, contributory negligence may however be present on the part of the plaintiff. In *Flionis v Bartlett* 2006 3 SA 575 (SCA), the court found contributory negligence on the part of Bartlett and negligence on the part of Flionis.

73 2015 1 SA 1 (CC).

3 AMERICAN LAW

Pure economic loss is referred to as loss that does not stem from physical harm to the plaintiff's property or person.⁷⁴ Pure economic loss can be dealt with in tort law in two ways, either through the tort of negligence (where the loss was caused negligently), or through intentional torts (usually requiring intent or malice).⁷⁵ For example, the tort of deceit may be used for economic loss caused by fraud, whereas the tort of injurious falsehood may be used for economic loss caused by false statements made of the plaintiff's products.⁷⁶ These torts as well as other intentional torts are further supplemented by two catch-all torts – interference with a contract, and interference with an economic opportunity.⁷⁷ The courts are, generally, reluctant to award compensation for pure economic loss whether caused negligently, with malice, or with intention (referred to as the “economic loss rule”).⁷⁸

Dobbs, Hayden, and Bublick⁷⁹ identify five commonly occurring factual settings where economic loss occurs:

- “(1) The defendant's improper communications to third persons cause the plaintiff financial harm.^[80]
- (2) The defendant's false statements to the plaintiff ... induce the plaintiff to enter into an economically damaging transaction.^[81]
- (3) The defendant appropriates some intangible value belonging to the plaintiff, a trade secret for example.
- (4) The defendant provides a defective tangible product or services, causing pure economic harm such as losses in production or added costs without physical harm to other property.
- (5) The defendant causes physical harm to person or property of another person which in turn causes pure economic harm to the plaintiff.^[82]”

With regard to the tort of negligence, generally, the elements of duty, breach of the duty, causation, and harm must be present. This applies also in order to found liability for the pure economic loss caused negligently.⁸³ The defendant must owe the plaintiff a duty of “reasonable care under the circumstances”; the

74 See *Bayer CropScience LP v Schafer* 385 SW 3d 822 (Ark 2011); Dobbs, Hayden & Bublick *Hornbook on torts* (2016) 1064.

75 Dobbs, Hayden & Bublick 1060.

76 With regard to other specific intentional torts and the requirements for these torts, see, generally, Dobbs, Hayden & Bublick 1060–1157.

77 As a result of length restrictions, these torts will not be discussed. However, see, generally, Dobbs, Hayden & Bublick 1089–1112.

78 Dobbs, Hayden & Bublick 1061.

79 *Idem* 1063.

80 For example, where the defendant tells the plaintiff's customers that there is a defect in the products he is selling, and if customers stop buying the products from him, he may have a claim for economic loss resulting from intentional interference with business relations or contracts. With regard to either intentional or negligent misrepresentations causing economic loss, see Dobbs, Hayden & Bublick 1113–1142.

81 These claims occur mainly as a result of misrepresentation, deceit, or fraud. Where the plaintiff relies on a statement made, one of the questions asked is whether the plaintiff was justified in relying on the statement (Dobbs, Hayden & Bublick 1064).

82 For example, where a defendant cuts the power supply to a manufacturing plant resulting in loss of production and in turn loss of sales, a claim for such loss will most likely be barred (see Dobbs, Hayden & Bublick 1065).

83 Coleman “Mistakes, misunderstandings, and misalignments” 2012 *Yale LJ* 548.

defendant must breach such duty by unreasonably risky conduct that deviates from the standard of the reasonable person; the defendant's conduct must "in fact" cause the plaintiff's harm (factual causation), and the defendant's conduct must be the "proximate cause" of such harm; and there must be some form of legally recognised harm (pure economic loss).⁸⁴ The duty element is most often discussed, as it is no doubt the starting point of liability for pure economic loss.

In instances where A negligently causes physical harm to B or his property, subsequently resulting in C sustaining economic loss, A will not be held liable for the economic loss sustained by C. C is considered a stranger. This rule is referred to as the "stranger rule" and its denying liability for pure economic loss was confirmed in *Robins Dry Dock & Repair Co v Flint*.⁸⁵ In this case, the plaintiff hired a steamboat from third parties, the owners. The boat's propeller broke. The owners hired the defendant to replace the propeller. The defendant's employee negligently dropped the propeller. A new one was ordered. There was a two-week delay, during which the plaintiff was unable to use the boat, which resulted in him sustaining pure economic loss. The plaintiff sued the defendant for his loss. The Supreme Court held that the defendant did not owe a duty of reasonable care to the plaintiff, as the plaintiff did not own the boat. He accordingly had no proprietary interest in the boat. The *Restatement (third) of torts*⁸⁶ sanctions this rule.⁸⁷ This rule where no duty is owed applies to instances where a factory loses power supply due to another's negligence and ceases production and sales of products to third parties. Thus, no duty of reasonable care is owed to the third parties who suffer pure economic loss.⁸⁸ The same principle applies where roadways are blocked as a result of the negligent conduct of the defendant subsequently affecting the plaintiff's business resulting in pure economic loss.⁸⁹

Some of the reasons advanced for denying liability for pure economic loss include: liability could hinder economic freedom and competition;⁹⁰ indeterminate liability⁹¹ is unfair and unjust;⁹² the law of contract may be applicable as opposed to tort law and should not be undermined;⁹³ and the plaintiff should assess his risk,

84 Dobbs, Hayden & Bublick 205.

85 275 US 303, 48 S Ct 134, 72 L Ed 290 (1927).

86 (*Liability for economic harms*) § 1 (2012). The *Restatement of torts* is body of work produced by the American Law Institute that combines black letter law applied throughout the different states in America. The volumes although not binding, they, *inter alia*, summarise case law, restate the common law, and provide guidance on what the rule of law should be.

87 With regard to either intentional or negligent misrepresentations causing economic harm (§ 7 (2014)). See Dobbs, Hayden & Bublick 1066.

88 See *Kaiser Aluminium & Chem Corp v Marshland Dredging Co* 455 F 2d 957 (5 Cir 1972) as well as the other cases cited by Dobbs, Hayden & Bublick 1067 n 47.

89 See *532 Madison Ave Gourmet Foods Inc v Finlandia Ctr Inc* 96 NY 2d 280, 750 NE 2d 1097, 727 NYS 2d 49 (2001); Dobbs, Hayden & Bublick 1067.

90 Dobbs, Hayden & Bublick 1071.

91 Where A's loss results in B's loss and C's loss causes a domino effect. There may be liability to indeterminate persons, for an indeterminate time and an indeterminate sum (*Louisiana ex rel Guste v M/V Testbank* 752 F 2d 1019 (5th Cir 1985); *Ultramar Corp v Touche* 255 NY 170, 174 NE 441 (1931); Dobbs, Hayden & Bublick 1071–1072).

92 Dobbs, Hayden & Bublick 1072–1073.

93 See *eToll Inc v Elias/Savion Advertising Inc* 811 A 2d 10 (Pa Super Ct 2002); *Heath v Palmer* 181 Vt 545, 915 A 2d 1290 (2006); *Smith Mar Inc v L/B Kaitlyn Eymard* 710 F 3d 560 (5th Cir 2013); Dobbs, Hayden & Bublick 1079, 1081.

which includes economic loss he may sustain, and should either insure against such loss or contract with another for protection, especially where the cost of insurance is relatively low.⁹⁴ Some courts bar economic loss claims when the parties are considered “sophisticated business entities”⁹⁵ or the plaintiff is the “sophisticated party”.⁹⁶ If the plaintiff is, however, lacking bargaining power he may be entitled to a claim in tort for economic loss and need not be limited to a claim in contract.⁹⁷ For the duty in tort to be actionable, it must not be intertwined with a contract (known as the “contract rule”).⁹⁸ The “stranger rule” and the “contract rule” limit liability for pure economic loss, generally, whether in the tort of negligence or the intentional torts such as deceit and fraud.⁹⁹

Exceptions apply to the general rule where there is a special relationship between the parties and a duty of care to prevent economic loss or protect economic interests exists. A special relationship exists in instances where it would be equitable to impose such a duty.¹⁰⁰ Examples of special relationships that may lead to liability for pure economic loss apply to professionals, such as accountants,¹⁰¹ insurance brokers,¹⁰² and attorneys.¹⁰³ For example, in *Biakanja v Irving*,¹⁰⁴ a notary drafted a will but did not ensure that it was attested by two witnesses as required by law. The plaintiff (the testator’s sister) would have been the sole heir in terms of a valid will but because the will was not valid, the plaintiff received only one-eighth of the testator’s estate. The main question was whether the defendant owed a duty to exercise due care in protecting the plaintiff from the loss, and so was liable for the damage caused by his negligence. The court found the notary liable in negligence, “stating that the question was a matter of policy to be determined by balancing various factors” which included the “extent to which the transaction was intended to affect the plaintiff”, foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff would suffer loss, the “closeness” between the defendant’s conduct and the loss

94 *Below v Norton* 751 NW 2d 351 (Wis 2008).

95 See *Cumberland Valley Contractors v Bell County Coal Corp* 238 SW 3d 644, 652 (Ky 2007); *425 Beecher LLC v Unizan Bank Nat’l Ass’n* 186 Ohio App 3d 214, 927 NE 2d 46 (2010); Dobbs, Hayden & Bublick 1083.

96 Sophisticated parties are experienced and knowledgeable, and thus they are presumed to be aware, or should have been aware, of the terms of an agreement (*Desert Healthcare District v PacifiCare FHP Inc* 94 Cal App 4th 781, 793, 114 Cal Rptr 2d 623, 632 (2001); *Grynberg v Questar Pipeline Co* 70 P 3d 1 (Utah 2003); Dobbs, Hayden & Bublick 1083–1084).

97 See *Alloway v General Marine Indus LP* 149 NJ 620, 628, 695 A 2d 264, 268 (1997); Dobbs, Hayden & Bublick 1083.

98 *Huron Tool & Eng’g Co v Precision Consulting Servs Inc* 209 Mich App 365, 532 NW 2d 541 (1995); see Dobbs, Hayden & Bublick 1084.

99 Dobbs, Hayden & Bublick 1088.

100 See *Blahd v Richard B Smith Inc* 141 Idaho 296, 301, 108 P 3d 996, 1001 (2005); Dobbs, Hayden & Bublick 1073.

101 See, for example, *Congregation of the Passion, Holy Cross Province v Touche Ross & Co* 159 Ill 2d 137, 161, 636 NE 2d 503, 514, 201 Ill Dec 71, 82 (1994); Dobbs, Hayden & Bublick 1074.

102 See, for example, *Graff v Robert M Swendra Agency Inc* 800 NW 2d 112 (Min 2011). See also the other cases referred to by Dobbs, Hayden & Bublick 1074 n 95, as well as other special relationships where a duty to prevent pure economic loss may be owed.

103 See *Collins v Reynard* 154 Ill 2d 48, 607 NE 2d 1185 (1992); *Clark v Rowe* 428 Mass 339, 701 NE 2d 624 (1998); Dobbs, Hayden & Bublick 1074.

104 1958 49 Cal 2d 647.

suffered, “the degree of moral blame attached to the defendants conduct, and the policy of preventing future harm”.¹⁰⁵

A duty of reasonable care not to be negligent in supplying information is also one of the circumstances where an exception applies to the general rule. The defendant undertakes the duty or it exists as a result of a special relationship. The plaintiff relies on the inaccurate or incorrect information and is led reasonably to expect reasonable care of his interests.¹⁰⁶ There must be justified reliance (reasonable reliance) on the statements made. Put differently, would the reasonable person attach significance to the statement made?¹⁰⁷ The statement must be materially factual and not, for example, a mere opinion on future uncertain projections or statements about a product amounting to mere “puffing” or “exaggeration”.¹⁰⁸

With regard to intentional causing of pure economic loss, the example of fraudulent misrepresentation will be referred to briefly. For example, in instances where the defendant intentionally makes a material misrepresentation of fact, opinion, or law for the purposes of inducing another to act or refrain from acting, the defendant will be liable for the economic loss caused as a result of the plaintiff’s justifiable reliance on the misrepresentation.¹⁰⁹ The following must be proven: an intentional misrepresentation¹¹⁰ of fact that proximately causes pecuniary harm, is material and intended to induce reliance, and does induce such reliance by the plaintiff that is reasonable or justifiable.¹¹¹

The influence of reasonableness on the requirements for a claim for pure economic loss is partly explicit and partly implicit. The influence of reasonableness is implicit where policy considerations are considered. It is apparent that there is a reluctance to award compensation for pure economic loss. In order to limit liability, the courts may use a number of rules or policy considerations. I submit that compensation for economic loss is awarded where it is, generally, reasonable and fair, depending on the circumstances of the case. For example, the “stranger rule” negates the element of a duty to prevent economic loss in the tort of negligence. From the outset, a court may state that there is no duty of reasonable care to prevent pure economic loss. Some of the other reasons advanced for denying liability for pure economic loss – such as that liability is indeterminate and accordingly the defendant should not be held liable,¹¹² that it is unfair and unjust to hold the defendant liable,¹¹³ the law of contract may apply as opposed to tort law,¹¹⁴ that the plaintiff should bear the loss because he should

105 Bernstein “Civil liability for pure economic loss under American tort law” 1998 *American Journal of Comparative Law Supplement* 111–117.

106 See, generally, Dobbs, Hayden & Bublick 1123–1127.

107 See *Restatement (second) of Torts* § 538(2)(b) (1965).

108 See *Ruff v Charter Behaviour Health Sys of Nw Ind Inc* 699 NE 2d 1171 (Ind Ct App 1998); *Sales v Kecoughtan Housing Co Ltd* 279 Va 475, 690 SE 2d 91 (2010); *Restatement (second) of torts* § 537 (1965); Dobbs, Hayden & Bublick 1131–1132.

109 *Restatement (third) of torts: Liability for economic harms* § 9 (2014).

110 See *Derry v Peek* 14 App Cas 337 (1889) which has been followed in American judgments. In *Derry*, it was stated that fraud is proven when the representation has been made knowingly (*scienter*), or without belief that it is true or carelessly and recklessly whether it is true or false (see further, Dobbs, Hayden & Bublick 1120).

111 Dobbs, Hayden & Bublick 1118–1119.

112 *Idem* 1071–1072.

113 *Idem* 1072–1073.

114 *Idem* 1079, 1081.

protect himself from loss by obtaining insurance where the cost of insurance is relatively low,¹¹⁵ or that the plaintiff is the “sophisticated party”¹¹⁶ – are all reasons that tend to the reasonableness of not holding the defendant liable for the economic loss. Compensation for pure economic loss is awarded where a special relationship exists, and, according to the circumstances of the case, it would be equitable to impose a duty of care to prevent economic loss.¹¹⁷ In respect of negligent misrepresentation, the defendant may have a duty of care to prevent the economic loss if a special relationship exists between the parties, for example, that of the accountant and the client. The influence of reasonableness is explicit with regard to the requirement of reasonable reliance on the negligent misrepresentation which leads the plaintiff to reasonably expect that reasonable care is applied to looking after his interests.¹¹⁸ In terms of reasonable reliance, the reasonable person standard is applied, in that the question asked is whether the reasonable person would attach significance to the statement made.¹¹⁹ The statement itself must be materially factual.¹²⁰ With regard to intentional causing of pure economic loss, such as where a fraudulent misrepresentation is made intentionally, the influence of reasonableness as shown above is apparent in that there must be a reasonably close link (proximity) between the misrepresentation made and the economic loss, as well as reasonable reliance on the misrepresentation by the plaintiff.

4 FRENCH LAW¹²¹

French law, generally, does not deny compensation for damage to movable or immovable property, and there is no differentiation for the purpose of compensation between damage to property and pure economic loss.¹²² The idea of pure economic loss is generally unfamiliar in French law.¹²³ Van Dam¹²⁴ points out that in French law pure economic loss as a topic does not even exist. All that is required, is the infringement of a legitimate interest (an interest deemed worthy of protection by society). Then damages may be recovered. And there must be damage that is direct and certain.¹²⁵ This stems from articles 1240–1241 of the French Civil Code which generally states that any human conduct “which causes harm to another creates an obligation in the person by whose fault [whether it be negligent or intentional conduct] it was caused to make reparation for it”.¹²⁶ Delictual liability for pure economic loss is controlled by all three elements of *faute* (encompassing wrongfulness and fault),¹²⁷ causation, and damage, but more specifically by the elements of damage and causation.¹²⁸ In

115 See *Below v Norton*.

116 Dobbs, Hayden & Bublick 1083–1084.

117 *Idem* 1073.

118 See, generally, Dobbs, Hayden & Bublick 1123–1127.

119 See *Restatement (second) of torts* § 538(2)(b).

120 See *Restatement (second) of torts* § 537; Dobbs, Hayden & Bublick 1131–1132.

121 For a brief comparative overview of some jurisdictions that include French law, see Wessels (2020) 319–328.

122 Van Dam *European tort law* (2013) 203; Knetsch *Tort law in France* (2021) 160.

123 Moréteau in Koziol (ed) *Basic questions of tort law* (2015) 75; Van Dam 354.

124 Van Dam 210. See also Steiner *The law of tort* (2018) 260.

125 *Idem* 203.

126 Knetsch 45.

127 *Idem* 47; Steiner 255.

128 Van Dam 209.

French law, there are no specific rules requiring intention for delictual liability. In most instances negligence is sufficient, while in others strict liability is imposed. Liability for intentional conduct is, however, relevant with respect to the abuse of rights. The courts refer to the defendant's mental state in terms of intention to harm (*intention de nuire*), fraudulent fault (*faute dolosive*), or attenuated forms of intention such as bad faith (*mauvaise foi*) or culpable levity of conduct (*légèreté blamable*).¹²⁹

Damages for pure economic loss are awarded in the same way that damages are awarded for any other loss.¹³⁰ The idea of an indeterminate number of plaintiffs is resolved with the element of causation¹³¹ and the floodgates idea is not found in so many words in French legal doctrine.¹³²

Moréteau¹³³ refers to a hypothetical example of a motor vehicle running out of fuel and being immobilised in a tunnel, causing a huge traffic jam during peak traffic time. Thousands of people are delayed and miss, *inter alia*, business opportunities, flights, and examinations. The courts would either find that the damage due to missed opportunities is not the direct consequence of the driver's negligence; or if causation is admitted, "that it simply caused a loss of chance thus minimising compensation"; or that driving in a busy tunnel is considered voluntary assumption of risk (where liability may be excluded). The element of causation is essentially used to control "unreasonable or excessive claims".¹³⁴ However, in dealing with the elements with regard to pure economic loss as compared to personal injury or damage to property, different standards may be applied. In respect of *faute*, the reasonable person is not the standard but rather "whether one has complied with the principles of *loyauté, honnêteté, et bonne foi* (loyalty, honesty, and good faith)".¹³⁵ The damage must be "directly caused", "personal, certain and legal".¹³⁶ Generally, the courts use the notions of directness and indirectness, or certainty and uncertainty of causing damage, to allow or disallow a claim for pure economic loss.¹³⁷ However, in most instances a direct cause is easily established.¹³⁸ Compensation for pure economic loss is awarded in cases of non-performance of a contractual obligation (loss of anticipated profit).¹³⁹

A look at a few examples illustrate in what circumstances damages may be awarded for pure economic loss. In a hypothetical example where a factory plant loses its supply of electricity as a result of the negligent act of a building company and suffers a chain of loss, the loss suffered by the customers of the plant and their customers, in French law is considered damages by rebound (*dommages par ricochet*). The factory plant's loss is considered to be a direct consequence of the building company's act. Damages for such loss are easily

129 *Idem* 227.

130 *Idem* 210.

131 Moréteau 75.

132 *Idem* 76; Knetsch 42.

133 Moréteau 75.

134 *Idem* 76; see also Knetsch 160.

135 Van Dam 210.

136 *Ibid.*

137 *Ibid.*; Steiner 260.

138 Van Dam 210–211.

139 See article 1149 of the CC; Moréteau 34.

awarded (damage to property as well as consequential loss). In principle, damages by rebound are recoverable and may be considered direct but are not easily awarded by the courts.¹⁴⁰ In the example, the plaintiffs would have to prove that their damage was the result of the damage that occurred to the factory plant and not other economic factors. Furthermore, they would have to prove that the loss was unavoidable. If, for example, they could have contracted with another supplier which, I submit, really refers to mitigation of loss or limiting loss to a reasonable loss, then the loss is not unavoidable.¹⁴¹

In a reported case,¹⁴² a plaintiff who owned buses was able to recover bus fares as a result of an accident that delayed the buses from their routes, causing a loss of revenue from bus fares. The court held that the loss was neither hypothetical nor indirect. In another instance,¹⁴³ where the defendant caused the suspension of gas to a factory so that it was unable to continue with production, the defendant was held liable for economic loss. The *Cour de Cassation* (the highest court in the French legal order, one of the four apex courts in France) held that the loss suffered by the plaintiff “was a direct consequence of the cutting of the gas main and that the damage was recoverable”. Therefore, it was reasonable to compensate the plaintiff for the loss sustained. Where a power supply cable was damaged causing the plaintiff’s factory to suspend activities for an hour and ten minutes, the court awarded the plaintiff damages in respect of salaries paid to his employees for the hour and ten minutes they remained idle. It was thus reasonable to compensate the plaintiff for the loss sustained.¹⁴⁴ In all three examples mentioned above the loss was considered a “direct consequence” of the defendant’s conduct.

Pure economic loss was not recoverable from the defendant in the following instances: where the defendant caused an accident preventing a singer from performing at a concert, resulting in loss as a result of cancelling the concert;¹⁴⁵ and where the defendant caused an accident, resulting in the plaintiff (creditor) being unable to recover the debt from the deceased’s estate.¹⁴⁶ In both instances, the *Cour de Cassation* found the damage to be indirect. Thus, it is apparent that it was considered unfair and unreasonable to compensate the plaintiff under the circumstances as the loss was considered too remote.¹⁴⁷ In a case where a couple gave funds to a bank employee to buy and manage stocks, the employee used the funds for herself and did not buy any stocks.¹⁴⁸ Upon the couple finding this out, they sued the employee. The *Cour de Cassation* confirmed that the couple were entitled to damages, but not for loss of profits expected from the stock’s portfolio.

140 The hypothetical example can be compared with the English case *Spartan Steel & Co Ltd v Martin* [1973] 1 QB 27.

141 See Galand-Carval in Spier (ed) *Unification of tort law: Causation* (2000) 58.

142 Cass civ 2 28 April 1965, D 1965 777 note Esmein. See Van Dam 211; Van Gerven, Lever 7 Larouche *Tort* (2000) 197–198.

143 Cass civ 2 8 May 1970 69-11446, Bull civ 1970 II 60 122. See also CÉ 2 June 1972, AJDA 1972 356 where economic loss was recoverable due to the defendant breaking a high-tension cable (Van Dam 211).

144 CÉ 2 June 1972; see Van Gerven, Lever & Larouche 198–199.

145 Cass civ 2 14 November 1958, Gaz Pal 1959 31; see Van Dam 211.

146 Cass civ 2 21 February 1979 77-13951, Bull civ 1979 II 56 42, D 1979 IR 344, JCP 1979 IV 145; see Van Dam 211.

147 Van Dam 210–211.

148 Cass crim 19 February 1975 74-90694, Bull crim 59 161.

The *Cour de Cassation* held that profits that were expected from any rise in the stock price were hypothetical and not certain. Therefore, where the loss cannot be established with certainty, it may be unreasonable to compensate the plaintiff for such uncertain loss. There is no doubt that assessing and quantifying the pure economic loss in this case would have been difficult.

In another case,¹⁴⁹ an art collector purchased a Van Gogh painting (*jardin á Auvert*) at a New York Gallery in 1955 for FF150 000. In 1981, the collector applied for an export licence with the intention of taking the painting to Geneva. The license was refused. He sued the French government, as they classified the painting as a national heritage. He was unable to sell the painting to a foreign purchaser and the loss was valued at FF250 million. The state was held liable and was ordered to pay the collector FF145 million. This decision was criticised and Moréteau¹⁵⁰ opines that it should perhaps have been dealt with by the administrative courts and under the doctrine of unjustified enrichment.

An expected loss in French law can be compensated. The loss of the chance to obtain the expected benefit is compensable provided that the “expectation is reasonable and serious enough”.¹⁵¹ In French law, even though it is apparent that compensation is generally easily awarded, with regard to compensation for pure economic loss, the loss must be certain and direct. These requirements apply as limitations to liability.

The influence of reasonableness on determining whether liability should be imposed for the pure economic loss sustained by the plaintiff is implicit. It is implicit because of the various degrees of the influence of reasonableness on the different elements of delictual liability for pure economic loss. There must be an infringement of a legitimate interest and the damages must be certain and direct. It seems that the “reasonable person” in respect of determining fault is not required. Rather, the question is whether one has complied with the principles of loyalty, honesty, and good faith.¹⁵² The requirement that the damage must be certain and direct limits liability to instances where the damage can be ascertained and is not indeterminate. This lends to the reasonableness, or unreasonableness, of imposing liability for pure economic loss.

5 COMPARATIVE CONCLUSIONS

In South African and American law, pure economic loss is generally described as patrimonial loss which does *not* stem from physical harm to the plaintiff’s property or person. In French law, pure economic loss is not defined, and economic loss could be considered as direct damage or damage by rebound.¹⁵³

In all three jurisdictions conduct (in the form of an omission or a commission) must be present whether or not explicitly mentioned as a requirement, and the pure economic loss may be caused by intentional or negligent conduct.¹⁵⁴ In South African and American law, in respect of negligence, it would depend on

149 CA Paris 6 July 1994, D 1995 245 note Edelman; see Moréteau 87.

150 See Moréteau in Koziol (ed) *Basic questions of tort law* 88.

151 See Borghetti in Winiger (ed) *Digest of European tort law volume 2: Essential cases on damage* (2021) 434–435.

152 Van Dam 210.

153 See paras 2, 3 and 4 above.

154 *Ibid.*

whether the defendant's conduct was unreasonable, when judged according to the standard of the reasonable person.¹⁵⁵ In French law, in respect of fault in the form of negligence, the reasonable person test may be replaced by the question as to whether the defendant has complied with the principles of loyalty, honesty, and good faith.¹⁵⁶ Thus, in all three jurisdictions the objective reasonableness of the defendant's conduct is considered when determining negligence.

In respect of intention in South African law, what must be determined is whether the defendant directed his will towards causing the pure economic loss, and whether he was conscious of the wrongfulness or unreasonableness of his conduct.¹⁵⁷ If one considers fraudulent misrepresentation in American law, the defendant will be liable for the economic loss caused as a result of the plaintiff's reasonable reliance on the misrepresentation only if there was an intentional misrepresentation of fact and an intention to induce such reliance on the part of the plaintiff.¹⁵⁸ In French law, with regard to intentional conduct, the courts consider the defendant's mental state, whether it be the intention to harm, fraudulent fault, or attenuated forms of intention such as bad faith or culpable levity of conduct.¹⁵⁹ Thus, in all three jurisdictions the focus is on the culpable, reprehensible state of mind of the defendant.

In South African and American law, the courts seem to follow a similar approach in that they are reluctant to award damages for pure economic loss. Depending on the circumstances of the case, the courts justify their reasons for either acknowledging or excluding a claim for pure economic loss by referring to policy considerations.¹⁶⁰

In South African law, the policy considerations may apply in negating the element of wrongfulness and or legal causation. As mentioned above,¹⁶¹ wrongfulness may lie in the infringement of a right or breach of a legal duty to prevent pure economic loss (according to the traditional approach). In applying the *boni mores* or reasonableness criterion in order to determine whether there is a legal duty to prevent pure economic loss, a number of factors are considered as well as policy considerations. Wessels,¹⁶² in support of the recent new approach to determining wrongfulness submits that the question that must be asked is – “would it be reasonable to impose delictual liability on the defendant?”. This requires the court to make a value judgement taking into account “relevant policy considerations” and “constitutional rights and norms”.

In American law, economic loss claims are barred where parties are considered to be sophisticated parties. Policy considerations, the “economic loss rule”, the “contract rule”, the “stranger rule”, and the consideration of whether or not it is fair and just to compensate the plaintiff for the economic loss suffered, are applied. There are exceptions that apply to the general economic loss rule, especially where a special relationship exists. If one looks at the example of pure economic loss caused by a negligent misstatement, the questions asked are

155 See para 2 and 3 above.

156 See para 4 above.

157 See para 3 above.

158 *Ibid.*

159 See Van Dam 227.

160 See paras 2 and 3 above.

161 Para 2.

162 (2020) 339–340.

whether a duty of reasonable care not to be negligent in supplying information exists, and whether the reasonable person would attach significance to the statement made.¹⁶³

Here South African law seems to follow a similar approach in that the question is whether there was a legal duty on the defendant to furnish the correct information. The presence of a special relationship between the parties may be a factor indicative of a legal duty to furnish the correct information.¹⁶⁴ Furthermore, the particular use of the reasonable person – would the reasonable person attach significance to the statement made – “embodies the *boni mores* as legal convictions of the community”.¹⁶⁵

In French law, the courts are more liberal and damages for economic loss may in principle be recovered where there is an infringement of any legitimate economic interests.¹⁶⁶

In determining legal causation in South African law, the question according to the flexible approach is whether it is fair, just, and reasonable that the defendant should be held delictually liable for the pure economic loss factually caused by his conduct. Reasonable foreseeability as well as whether the pure economic loss was a direct consequence of the defendant’s conduct also play a role in determining legal causation. If the pure economic loss is, for example, indeterminate, then the consequences may be considered too remote and legal causation may be absent.¹⁶⁷ American law follows a similar approach in that the defendant’s conduct must be the proximate cause of the pure economic loss.¹⁶⁸ In French law, the pure economic loss sustained, must be personal, certain, and direct. The spectre of an indeterminate number of plaintiffs is met with the element of causation, and the plaintiff would have to prove that the loss was reasonably unavoidable. If, for example, a plaintiff could have contracted with another supplier, then the loss is not unavoidable. If the pure economic loss is indirect, hypothetical, or uncertain, then damages are not awarded. It is unfair and unreasonable to compensate the plaintiff under the circumstances, as the loss is too remote. In respect of lost opportunities relevant to pure economic loss, the courts may either find that the damage is not the direct consequence of the defendant’s conduct, or the cause of a reasonable loss of chance, or that the plaintiff voluntarily assumed the risk of harm which would exclude liability. The element of causation seems to be the main element used to control unreasonable or excessive claims.¹⁶⁹

In all the jurisdictions discussed with regard to pure economic loss, it is evident that there is a need to control pure economic loss claims within reasonable limits. All three jurisdictions also seem to rely on established rules, factors, and policy considerations within the different elements of liability, specifically wrongfulness, duty, fault, legal causation and damage to either allow or exclude a claim for pure economic loss.

163 See para 3 above.

164 Neethling & Potgieter (2020) 360–363.

165 *Idem* 363.

166 See para 4 above.

167 See para 2 above.

168 See para 3 above.

169 See para 4 above.