# Necessity or Nuisance? A Comparative Review of the Approach towards the Recovery of Pure Economic Loss in English Law with that of French Law

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## Abstract

English judges are reluctant to allow claims in damages for pure economic loss. This is primarily due to the "floodgates" argument or , in other words, the fear that by allowing such claims the courts would be inundated with an administratively unmanageable number of cases. The purpose of this essay is to assess whether such a cautious approach is necessary. In order to do so, the approach in England will be compared to that in France. This article will, firstly, determine whether the approach taken in France with regards to pure economic loss is, in style, as restrictive to that taken in England. Secondly, this article will analyse whether the potential difference in style leads to a difference in substance – is there a difference in the outcome of particular cases? It will conclude , on the basis of the comparison of the two legal systems, that the approach taken in England is indeed unnecessarily restrictive.

## I. Introduction

In recent years, the English courts have been extremely reluctant to allow claims for negligently caused pure economic loss.[1] The reasons behind this are numerous, as are the tests which have been employed in an attempt to limit liability in this particular field of negligence. The aim of this paper is to assess the necessity of such a cautious approach. Kahn-Freund once said that comparative law "is not a topic, but a method. Or better: it is the common name for a variety of methods of looking at law; and especially for looking at

[1] Simon Deakin, Angus Johnston and Sir Basil Markesinis, *Tort Law* (6th edn, Oxford University Press 2008), 157.

one's own law."[2] Therefore, the best way to assess whether such strict limitations with respect to recovery of pure economic loss are justified and necessary would be to compare them to those imposed in another legal system.

This article will, firstly, determine whether the approach taken in France with regards to pure economic loss is, in style, as restrictive to that taken in England. Secondly, this article will analyse whether the potential difference in style leads to a difference in substance. For example, is there a difference in the outcome of particular cases? Or, more specifically, a difference in cases of *dommage par richocet* – that is when "when physical damage is done to the property or person of one party and that loss in turn causes the impairment of a claimant's right" [3] – and negligent misstatement. Finally, it will be assessed, based on the observations made during the analysis of the two legal systems, whether English law is indeed too cautious in restricting claims for purely economic loss.

## II. Background

It is a long established legal maxim that *ubi jus ibi remedium*[4] (where there is a right, there is a remedy). Nevertheless, this seems to be no more than an optimistic theory which, in practice, has been unachievable in legal systems across Europe, particularly in the area of economic loss caused by negligent conduct.

It is probably worth highlighting before proceeding that the type of economic loss considered in this essay is not only negligent (non-intentional) but also pure. Whilst a common definition of pure economic loss does not exist, [5] The

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[2] Otto Kahn-Freund, 'Comparative Law as an Academic Subject' [1966] 82 LQR 40, 41.

[3] Vernon Valentine Palmer and Mauro Bussani, 'Pure Economic Loss: The Ways to Recovery' (2007) 11[3] EJCL 1, 11.

[4] Tracy A Thomas, '*Ubi Jus Ibi Remedium*: The Fundamental Right to a Remedy Under Due Process' (2004) 41 San Diego L.Rev 1633, 1637.

[5] Vernon Valentine Palmer and Mauro Bussani, 'Pure Economic Loss: The Ways to Recovery' (2007) 11[3] EJCL 1, 6 <http://www.ejcl.org/113/article113-9.pdf> accessed 10 February 2012.

European Centre of Tort and Insurance Law has described it as being "loss that is neither consequential upon death nor personal injury of the claiming victim nor upon the infringement of the victim's property."[6] This would, however, exclude recovery for loss caused *par ricochet*. It is therefore submitted that, as Gilead has stated, it is more precise to define it as "[loss] not consequent on bodily injury to the [claimant] or on physical damage to land or chattel in which the claimant has a proprietary interest."[7]

This distinction between different types of economic loss is of paramount importance as it is widely accepted that both loss intentionally caused and consequential economic loss are recoverable.[8] The reason for this is mainly one of policy, with the number of claimants being restricted to those who have suffered intentional or some direct harm to their person or property that results in consequential loss. The recoverability of purely economic loss on the other hand differs significantly between legal systems.

In English law there would seem to be no interdependency between different heads of tort: each head protects a particular interest through the use of particular rules. It could be argued that this type of system may be beneficial as each case may be dealt with in a more appropriate manner. However, the absence of a general principle of delictual liability (acts that harm or otherwise cause damage to another[9]) means that a claimant who fails to meet a particular set of circumstances will receive no compensation. This is because they either do not fall under one of the heads of tort because they fail to meet certain requirements such as the presence of a duty of care, a

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[6] European Centre of Tort and Insurance Law 'Pure Economic Loss' http://ectil.org/ectil/Projects/Completed-Projects/Pure-economic-loss.aspx accessed 22 February 2012.

[7] Israel Gilead 'Non-Consensual Liability of a Contracting Party: Contract, Negligence, Both or In-Between?' (2006) Theoretical Inq L 511, 513.

[8] Simon Deakin, Angus Johnston and Sir Basil Markesinis, *Tort Law*, (6th edn, Oxford University Press 2008), 157.

[9] Robert Joseph Pothier, *Le Traité des Obligations* (1761): "...on appelle délit, le fait par lequel une personne, par dol ou malignité, cause du dommage ou quelque tort à un autre."

subsequent breach of duty and a causal link in the case of negligence or, alternatively, because they *do* meet a particular set of circumstances but are precluded from obtaining damages due to the existence of self-contained categories for which recovery is generally not allowed. Pure economic loss is an example of the latter.[10]

The courts' consistent reliance on whether it is 'fair, just and reasonable'[11] to impose a duty would suggest that it is on the basis of policy considerations, (such as the floodgate argument) that English law is in essence so reluctant to impose liability for pure economic loss.[12] Furthermore, the exceptions to the general rule of irrecoverability, such as the Fatal Accidents Act 1976 and the cases of negligent misstatement, seem to have the common element of excluding the risk of opening the "floodgates" to an indeterminate amount of claims. It is submitted for this reason that in the absence of such fears the English courts may be more willing to extend the recoverability of economic loss.

This 'exclusionary rule,'[13] whilst popular in England, is unknown in French Law. The civil legal system in France also distinguishes between various sub-categories of delict, but the basis of liability rests on a mere five articles contained in the Civil Code.[14] Upon reading article 1382[15] - which states that any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred to compensate it,[16] it is clear that the French are unfamiliar with the existence of a separate category of pure economic loss

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[10] Giuseppe Dari-Mattiacci, 'Tort Law and Economics' (Utrecht University Working Paper, 2003)< http://papers.ssrn.com/sol3/papers.cfm?abstract_id=347801> accessed on 22 February 2012, 2.

[11] *Caparo Industries plc v Dickman* [1990] UKHL 2

[12] See *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] 1 QB 27.

[13] D Marshall 'Liability for Pure Economic Loss Negligently Caused – English and French Law Compared' (1975) 24 ICLQ 748.

[14] See Articles 1382, 1383, 1384, 138 and 1386, Code Civil.

[15] Article 1382, Code Civil: "tout fait quelconque de l'homme, qui cause a autrui un dommage oblige celui par la faute duquel il est arrive à le réparer"

[16] Vernon Valentine Palmer and Mauro Bussani, 'Pure Economic Loss: The Ways to Recovery' (2007) 11[3] EJCL 1, 34.

and use the general principle of *faute* (fault) to determine when someone will be liable to pay damages. This is further qualified by article 1383[17] to include liability for harm caused to by negligent or careless conduct. However, it is not to be assumed purely on this basis that the French are more generous in allowing claims for pure economic loss. The absence of a distinction between types of harm merely means that it may be claimed *en principe* (in principle) but it must be remembered that the French courts have other 'tools' which aid them in limiting liability. For a claim to be successful, the damage concerned must usually infringe *un interet legitime juridiquement protégé* (a legitimate and legally protected interest) and the damage caused must be direct and certain consequence of the negligent act.[18]

Nonetheless, it is still evident that there is a significant difference in style between the two systems: pure economic loss caused by negligent conduct is, at least in theory, recoverable in French law whereas in England it is *prima facie* not, due to policy considerations.

## III. Differences of substance

It is, as mentioned above, the purpose of this article to determine whether the 'floodgate fears' of the English courts justify the general exclusion of recoverability for pure economic loss. If the French courts are not inundated with an overwhelming amount of claims this may indicate that the application of the general principles are sufficient in limiting the number of potential claims. This would render the English approach unduly excessive. The functioning in practice of the two different approaches shall now be analysed with regards to (i) *dommage par ricochet* in the context of fatal accidents and personal injury and (ii) negligent misstatements.

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[17] Article 1383 Code Civil: "Chacun est responsable du dommage qu'il a causé, non seulement par son fait, mais encore par sa négligence ou son imprudence."

[18] Jean Carbonnier, *Droit Civil Volume 4: Les Obligations* (10th edn, PUF 2009).

*Dommage par ricochet* arises when damage is done to the person or property of the victim but causes loss of a purely economic type to a secondary victim. This includes the loss caused to a dependent (upon the death of a person the dependent financially relies upon).[19]

In England, an apparent exception is made to the general rule of irrecoverability under the Fatal Accidents Act 1976. As can be expected in the common law system, the scope of recoverability is limited by the requirement that the dependant fall within one of the categories of persons legally entitled to claim under an exhaustive list set out under s 1 of the 1976 Act. It is an important characteristic of this claim that the claimant's action for damages is accepted as being theoretically independent from the action of the primary victim, in the absence of death. A logical explanation for this is that to say otherwise would mean that this type of ricochet loss is not purely economic but consequential upon personal injury or, more specifically here, death.

However, this does not seem to be the case in practice in English law, where certain restrictions are imposed by considering the conduct of the deceased primary victim as demonstrated by the dismissal of a claim when the primary victim would not have had an action himself if he had not died. This is an example of the common law system attempting to reduce the number of potential claimants in such claims. However, this is not the only hurdle that need be overcome. Even if the claimant satisfies s 1 of the 1959 Act and can prove that the primary victim would have been able to sue in negligence if he had survived, he may not receive damages equivalent to his pure economic loss if the primary victim was contributory negligent. Furthermore, the policy consideration that such claims may result in the defendant being liable for unlimited amount of damages has been addressed under s 3(2) of the 1976 Act,[20] which states that the total damage to all dependants will be assessed as a

[19] Vernon Valentine Palmer and Mauro Bussani, 'Pure Economic Loss: The Ways to Recovery' (2007) 11[3] EJCL 1, 22.
[20] Fatal Accidents Act 1976

lump sum and then subsequently divided between them. This mechanism ensures that the quantum of damages is independent of the number of dependants.

It is submitted that, based on these considerations, the Fatal Accidents Act 1976 is not a true exception to the irrecoverability of pure economic loss as the success of claimants seems to be dependant not only upon the conduct of the defendant with respect to the claimant, but also upon the conduct of the deceased victim, thus meaning that this type of ricochet loss is treated in English law as an extension of personal injury. This is an example, once again, of the English law's reluctance in allowing general recovery for pure economic loss due to policy arguments.[21]

It is a well-known fact that the English prefer to have particular rules for particular types of tort, which reflects the influences of Roman law, whereas the French prefer general rules of liability favoured by natural law.[22] This is reflected in the common law approach to ricochet loss due to fatal accidents and is also a true reflection of the approach taken in civil law.[23]

In France the liability of a defendant with respect to the dependent of someone he has killed is based upon the general application of article 1382. The only cases in France which seem to be made on the basis of policy considerations are with regards to concubines and claims for economic loss upon the birth of a healthy child.[24] However, these policy considerations are not made on the basis of the type of harm claimed being pure economic loss but upon the fact that it would be immoral to allow such claims. These cases excluded, it is at least *en principe*, possible for anyone to claim as long as they can prove they were dependent upon

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[21] See D Marshall 'Liability for Pure Economic Loss Negligently Caused – English and French Law Compared' (1975) 24 ICLQ 748.

[22] John Bell, Sophie Boyron and Simon Whittaker, *Principles of French Law* (2nd edn, OUP 2008)

[23] FH Lawson and BS Markesinis, *Tortious Liability for Unintentional Harm Volume I* (CUP 1982)

[24] Jean Carbonnier, *Droit Civil Volume 4: Les Obligations* (10th edn, PUF 2009) 143-172.

the primary victim. In practice however, the application of the general principles does seem to limit the number of successful claims as it is difficult to prove that the loss suffered was caused by the defendant's negligence. Indeed, the requirement that the defendant's negligence be the direct and certain cause of the harm is a veritable limit to the recovery of compensation; something which is further limited by the onus of proof being placed upon the claimant. Furthermore, the courts require evidence of an actual undertaking of support on behalf of the deceased with regards to the claimant and, in those cases were the loss is merely one of chance, the chance must be real and substantial. Thus, it has been said that the practical consequences of this are that the number of possible claimants in French law is not much more extensive than that in England.[25]

One type of claim that is allowed in France, whilst being excluded in England, is recovery of loss suffered as a result of the injury of any employee. The nearest English law has come to accepting such a type of loss is in historically allowing *actio per quod seriatim amisit* (claims for loss of consortium). However, the basis for such an action was significantly different to that in France. The interest infringed was seen as proprietary in the primary victim, which would consequently mean that the basis of the claim was one of consequential harm and not one of pure economic loss, as in France. Furthermore, the *actio* was limited to loss of services of a domestic employee and then only when the latter was injured and not killed; thus it cannot in any way be deemed to be as extensive as the French approach.[26] Instead of extending liability for negligently caused economic loss, the English seem to have made it more restricted by abolishing

[25] See D Marshall 'Liability for Pure Economic Loss Negligently Caused – English and French Law Compared' (1975) 24 ICLQ 748.
[26] See D Marshall 'Liability for Pure Economic Loss Negligently Caused – English and French Law Compared' (1975) 24 ICLQ 748, 765.

this type of claim under the Administration of Justice Act 1982.[27]

The French, on the other hand, allow recovery for this type of claim on the basis of article 1382 but, as in the scenarios previously examined, limits the scope of liability through the use of general principles such as those mentioned earlier e.g. the requirement that the harm be direct and certain. So in the famous *Colmar* case[28] a football club lost one of its star players due to an accident was awarded damages in order to recover the loss with regards to a transfer fee as it was both a direct and certain result of his injury. However, no such damage was awarded for loss of profits made on people attending football matches on the basis that it was uncertain whether it was 'in fact' caused by the defendant's negligence. Loss of profits is evidently something that can be influenced by many factors and is therefore is by its very nature uncertain and irrecoverable. The requirement of uncertainty in particular has precluded the recoverability of the vast majority of claims for loss of profits whilst allowing claims in meritorious cases.[29]

For the reason above mentioned, it is submitted that also in claims of employers in respect of economic loss upon the death or injury of an employee, that the general principles in France used for limiting liability have been sufficient.

## IV. Negligent Misstatements

In the 1964 case of *Hedley Byrne v Heller*,[30] where a bank negligently provided the claimant with incorrect information regarding a prospective client's credit history, the House of Lords seemed to extend the tort of negligence so as to permit claims for pure economic loss suffered by third parties. As mentioned earlier, the courts are usually reluctant in allowing

[27] Administration of Justic Act 1982, s 1 and 2.
[28] Colmar, Ch dét à Metz, 20 avril 1955; *Football Club de Metz v Wiroth,* JCP 1955.II.8741.
[29] See D Marshall 'Liability for Pure Economic Loss Negligently Caused – English and French Law Compared' (1975) 24 ICLQ 748, 771-772.
[30] [1964] AC 465.

claims for pure economic loss on the basis that it does not meet the three part-test set out in *Caparo v Dickman*. It is to be noted, however, that the recovery for such a loss is dealt with in French law under the law of contract. Furthermore, Lord Devlin stated that the categories of relationship which give rise to liability for economic loss in negligence include those which are equivalent to contract, namely, where there is "an assumption of responsibility in circumstances which, but for the absence of consideration, there would a contract."[31] Thus this is not a genuine example of the English courts permitting recoverability under pure economic loss, as it is only due to the excessive requirements in the formation of contracts or, more specifically, consideration, where it is allowed. This, together with the excessive restrictions upon the recovery under the Fatal Accidents Act, highlights the apparent absence of a true exception to the non-recoverability of pure economic loss in England.

## IV. Conclusion

Based on the comparison of the two legal systems it can be concluded that there is a need for the exclusionary approach taken in England. The policy considerations which seem to be behind the irrecoverability of pure economic loss do not justify the excessive reaction of the English courts. Whilst it has been suggested by Marshall that the principles of general liability used in civil law are also actually policy considerations masquerading as legal principles [32] it is submitted that, regardless of their true nature, they are an efficient way to limit the scope of liability for economic loss whilst allowing such claims when it is fair to do so.

[31] Ibid, 529 (Lord Devlin).
[32] See D Marshall 'Liability for Pure Economic Loss Negligently Caused – English and French Law Compared' (1975) 24 ICLQ 748, 768-770.

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