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Ingeborg Schwenzer and Beat Schönenberger

Civil Liability for Purely Economic Loss in Switzerland*

A. Introduction

Most controverted of all is the question whether the law of negligence allows recovery for purely economic losses¹.

John Fleming's description of the situation concerning economic loss in the common law can equally be regarded as the ideal introduction for the situation in Switzerland. This very sentence captures the legal discussion concerning the recovery of purely economic loss in three general aspects.

First, it shows that the issue of 'economic loss' itself is a subject for legal discussion in Swiss Law. The problem of purely economic loss is not divided into different groups of typical cases which are discussed separately from each other, like e.g. cases of negligent misrepresentation, negligent performance of a service or losses which occur as a consequence of physical damage to a third party (better known as 'cable cases')². At least in the field of scholarly discussion, Swiss Law groups all cases of economic loss together, enabling the issue to be dealt with on a more theoretical level. Many readers from Continental and Commonwealth jurisdictions will take this approach for granted and may probably not even find it worth mentioning. But as Feldthusen³ has stated, there are these two opposing ways of approaching purely economic loss; in order to allow a comparative analysis this question needs to be looked at in advance.

Furthermore, this sentence helps us to set up the legal framework of economic loss cases in Swiss Law. Although the structure of Swiss Tort Law does not allow a categorisation under the title of 'law of negligence', the use of this term leads us in the right direction. As Swiss Contract Law allows full recovery also of purely economic losses, the problem is

* We would like to dedicate this article to the remembrance of John G. Fleming (1919 - 1997). All of us owe him a debt of gratitude for being 'the essential starting point for all those interested in the (common) law of torts' (see KLAR, *Tort Law*, 2nd ed., Toronto 1996, preface).

¹ FLEMING, *An Introduction to the Law of Torts*, 2nd ed., Oxford 1985, p. 34.

² That is the very situation in the United States, see FELDTHUSEN, *Economic Negligence*, 3rd ed., Toronto/Calgary/Vancouver 1994, p. 5. Notwithstanding we will deal with typical case groups in the second part of this article.

³ See FELDTHUSEN, *supra*, note 2, p. 3 ff.

formulating a statutory provision regulating economic loss but to leave it to judiciary discretion to find adequate solutions without opening the flood-gates of indeterminate liability.

B. Doctrinal Framework of Purely Economic Loss

I. Definition

Purely economic loss can only be defined by stating what it does not encompass¹³. This type of loss can neither be categorised as damage to persons nor to property. Hence purely economic loss consists of all financial losses neither consequent on the death or injury of a person nor on physical damage to personal property¹⁴.

II. Doctrinal Restrictions of Recovery

Bearing in mind the difficulties for establishing liability for purely economic loss in comparison with physical damage, Kramer aptly described it discrimination of purely economic losses¹⁵. The doctrinal reasons for this discrimination are mainly found in the context of the basic norm of tortious liability (art. 41 para. 1 CO)¹⁶. The elements for cause of action are listed therein. Hence only those losses which are caused by negligent (or even wilful) and unlawful acts or omissions are to be compensated by the wrongdoer¹⁷. As we can see, this provision does not contain a general rule of non-recoverability of purely economic loss; its very wording states compensation of all kinds of loss and does not exclude certain types of losses. Nevertheless art. 41 para. 1 CO is often referred to as containing a very restrictive rule for recovery of economic losses or even seen as a norm which, in principle, excludes that type of loss from compensation in tort¹⁸. The reason for that lies in the definition of the element of *unlawfulness* (Widerrechtlichkeit, illicéité, illiceità).

¹³ LORANDI, *supra*, note 7, p. 20.

¹⁴ See e.g. REY, *Ausservertragliches Haftpflichtrecht*, Zürich 1995, N 329; TERCIER, *De la distinction entre dommage corporel, dommage matériel et autres dommages*, Festschrift ASSISTA, Genève 1979, p. 247, 254; BGE 118 II 176, 179; 119 II 127, 128 f. Feldthusen's definition is equally useful for Swiss Law: «A *pure* economic loss is a financial loss which is not causally consequent upon physical injury to the plaintiff's *own* person or property». FELDTHUSEN, *supra*, note 2, p. 1.

¹⁵ KRAMER, *supra*, note 7, p. 132.

¹⁶ *Whoever unlawfully causes damage to another, whether willfully or negligently, shall be liable for damages.* (Translation: SWISS-AMERICAN CHAMBER OF COMMERCE (ed.), *Swiss Code of Obligations*, English Translation of the Official Text, Volume I, Contract Law, Zurich 1990).

¹⁷ See also WERRO, *supra*, note 4, p. 182.

¹⁸ E.g. BGE 119 II 127, 128 f.; WERRO, *supra*, note 4, p. 181.

as patrimony in itself is not seen as an absolute right²⁷, in order to establish liability for purely economic loss, it is necessary to find a suitable protective norm which was violated by the wrongdoer²⁸. Such provisions for the protection of patrimony interests can mainly be found in the criminal law (such as criminal fraud) but also competition law. As these norms are still considered exceptional²⁹, it is understandable why economic loss in relation to physical damage is discriminated. The definition of unlawfulness leads to the result that purely economic loss is in principle not unlawful and therefore, in most cases, not recoverable³⁰.

This applies not only to the basic norm of art. 41 para. 1 CO but to all provisions requiring the element of unlawfulness. Norms which exclude certain types of losses (such as economic loss³¹) state at the same time that these losses are not seen as unlawful in the context of that provision³².

Within the general part of Tort Law, there is a provision which does not require unlawfulness as an element for establishing liability. In accordance with the civil law tradition Swiss Law equally implied the idea of the *actio doli* into its codification³³. Art. 41 para. 2 CO states that a person is liable for every loss which he or she causes wilfully and *contra bonos mores*³⁴. Although this norm would enable to establish liability also for economic loss it does not play an important role in the case law³⁵. Courts in Switzerland remain faithful to the wording of this provision and do not apply it in cases of (even gross) negligence³⁶. Furthermore, its field of application declines more so because of the expansion of the term unlawfulness within art. 41 para. 1 CO or by the establishment of new forms of liability for purely economic loss³⁷. From the few cases where this provision can be applied those which are worth mentioning are the intentional interference

²⁷ See GABRIEL, *supra*, note 20, N 242; HONSELL, *supra*, note 23, § 2 N 5; DESCHENAUX/TERCIER, *supra*, note 20, § 6 N 22.

²⁸ Note that in case of violation of intellectual property rights, the damage can be categorised as purely economic loss because it is not consequent on physical harm to the person or property. This proves that exceptionally in cases of economic loss absolute rights can be infringed (see LORANDI, *supra*, note 7, p. 22; RASCHEIN, *Die Widerrechtlichkeit im System des schweizerischen Haftpflichtrechts*, doctoral thesis, Bern 1985, p. 299). These cases are normally not discussed under the heading of economic loss, and therefore, equally left apart in this article.

²⁹ WERRO, *supra*, note 4, p. 183.

³⁰ BGE 118 Ib 163 f.; 118 Ib 473, 476.

³¹ Such exclusionary provisions are e.g. art. 1 para. 1 PrHG; art. 58 para. 1 SVG; art. 27 EIG; art. 64 para. 1 LFG; art. 33 para. 1 RLG.

³² See SCHWENZER, *supra*, note 23, N 53.02; 54.03.

³³ See also § 826 BGB.

³⁴ *Equally liable for damages is any person who willfully causes damage to another in violation of boni mores.*

³⁵ REY, *supra*, note 14, N 796 (with more references).

³⁶ In German Law exactly this extension happened especially in cases of misrepresentation.

³⁷ See SCHWENZER, *supra*, note 23, N 51.01. See also below.

exceeds the duties imposed by statute or company regulations⁴⁵. The same must be said for situations in which special norms are not available at all such as general information by banks⁴⁶ or the liability for work references⁴⁷.

2. Extension of the Classical Concept of Unlawfulness⁴⁸

A possibility to extend liability for purely economic loss within the provision of art. 41 para. 1 CO consists of 'creating' norms for the protection of patrimony interests. This happens either by expanding the range of protection of existing norms or by applying protective norms where in fact there are none.

The former was done by the Federal Tribunal to establish liability in so-called cable cases⁴⁹, where a provision of the Criminal Code for the protection of energy supply was applied as a protective norm⁵⁰. The court held that this provision was not only meant to protect the public interest in being supplied with energy, but also the private (economic) interest of each consumer⁵¹. Having in mind the wording of the margin title (disturbance of public utilities), this wide interpretation remains questionable and has therefore been criticised⁵².

The latter strategy was applied in cases of liability for information towards extracontractual third parties (misrepresentation)⁵³. In Swiss Law there is no provision that implements a general duty to provide true and accurate information⁵⁴. But in order to establish liability, the Federal Tribunal referred to an equivalent unwritten rule. The only legal basis for that can be seen in the principle of *good faith* laid down in art. 2 para. 1 CC⁵⁵. The problem is that this provision is neither accepted by the court

⁴⁵ BGE 112 II 258, 261 ff.

⁴⁶ See BGE 111 II 471.

⁴⁷ See BGE 101 II 69.

⁴⁸ See GAUCH/SWEET, *supra*, note 7, p. 122 ff.; GAUCH, *supra*, note 23, p. 232; WERRO, *supra*, note 4, p. 186 ff.

⁴⁹ For a more detailed discussion of this group of economic loss cases, see below, subtitle C.I.

⁵⁰ Art. 239 Criminal Code.

⁵¹ See especially WERRO, *supra*, note 4, p. 187, note 39.

⁵² See e.g. MERZ, *Obligationenrecht, Allgemeiner Teil, I. Teilband, Schweizerisches Privatrecht, Band VI/1*, Basel/Frankfurt a.M. 1984, p. 191 f.; KRAMER, *supra*, note 7, p. 133; for more references see LORANDI, *supra*, note 7, p. 24, note 46.

⁵³ For more detailed discussion of this group of economic loss cases below see *infra* subtitle C.II. In accordance with the terminology of FELDTHUSEN, (*supra*, note 3), we will further refer to this group as cases of misrepresentation.

⁵⁴ See KUHN, *Die Haftung aus falscher Auskunft und falscher Raterteilung*, SJZ 1986, 345, 353. Such duties are only implemented on special professionals such as auditors, see *supra*, *infra* subtitle B.II.1.

⁵⁵ *Every person is bound to exercise his rights and fulfil his obligations according to the principles of good faith.* (Translation: WYLER/WYLER, *The Swiss Civil Code, English Version, Volume I, Zürich 1987*).

A more radical – but still tortious – solution ignores the element of unlawfulness completely and in all forms in case of nuisance. This happens by clearly stating that the loss in question is purely economic and that liability shall be established, although the behaviour causing the damage was not unlawful. This approach ignores the requirement of unlawfulness and establishes liability even for *lawful acts*⁶³. Accordingly, the Federal Tribunal held that a landowner responsible for a construction project had to compensate his neighbour for considerable and unavoidable losses, such as a decline in business, even if he is entitled to build by an official construction permit⁶⁴. The applied provision of art. 679 CC⁶⁵ entitles *neighbours* to claim damages in case of nuisance by a neighbour landowner. It is widely accepted that this right to claim damages not only applies to neighbours with a proprietary title but also to tenants⁶⁶. In the situation of tenants, it can be said that only their obligatory rights are infringed. Hence the damage must be defined as purely economic loss. Nevertheless, the complicated question of unlawfulness is not even asked. Here we find another hint that the law in action seems to ignore the classical concept of unlawfulness as it implements liability for purely economic loss without the violation of a protective norm⁶⁷.

Another way to avoid the requirement of unlawfulness, is by applying legal constructions where this element is not mandatory. This means that in order to implement recovery for purely economic loss the basis of liability has to be non-tortious⁶⁸. We would like to refer to those constructions which do play an actual role in economic loss cases in Switzerland.

One traditional possibility in establishing liability for purely economic loss without referring to a contractual claim is the concept of liability for breach of precontractual duties, better known to Continental readers as

⁶³ See GAUCH/SWEET, supra, note 7, p. 126; GAUCH, supra, note 23, p. 233; WERRO, supra, note 4, p. 188.

⁶⁴ BGE 83 II 375; 91 II 100; 114 II 230; see for further theoretical explanations GAUCH/SWEET, supra, note 7, p. 126, note 73.

⁶⁵ *Where damage is caused or threatened by an owner of land who exceeds his rights of ownership, the party injured can apply to the court for an order that the damage shall be made good or for an injunction to restrain the continuance of the wrong and for damages for the wrong done.*

⁶⁶ BGE 119 II 411, 415; REY, supra, note 14, N 1113 ff. (with more references).

⁶⁷ See also GAUCH/SWEET, supra, note 7, p. 126.

⁶⁸ We follow the traditional opinion that not every breach of a contractual (or near-contractual) obligation is unlawful (BGE 74 II 23, 26; see e.g. SCHWENZER, supra, note 23, N 50.06; BREHM, Berner Kommentar, Art. 41 N 41; DESCHENAUX/TERCIER, supra, note 20, § 6 N 23). Theoretically it can also be advocated that art. 41 para. 1 is the basic norm for all forms of liability. A contractual liability e.g. could be based on the argument that the breach of the contractual obligation meets with the requirement of unlawfulness *between the contractual parties* (see especially JÄGGI, Zum Begriff der vertraglichen Schadenersatzforderung, Festgabe für Wilhelm Schönenberger, Freiburg i.Ue. 1968, p. 181 ff.). Although this idea is highly dogmatic and does surely not help to solve economic loss cases involving third parties (i.e. mainly cases of misrepresentation and negligent performance of a service) it was proposed to implement it into the revised General Part of Tort Law (see art. 13 para. 2 draft for a General Part of Tort Law).

declarations⁷⁹. In the second case⁸⁰, it was decided that the Swiss Wrestling Association had to pay damages to a wrestler who was excluded from participation in the world championship tournament. He had fulfilled all the qualifications required by the wrestling association, but after changing the rules at short notice, another wrestler was favoured. The court held that the wrestling association, which had no contractual relationship with the plaintiff, had violated the principle of *good faith*. Notwithstanding the requirement of unlawfulness not being met, this should provide a cause of action in case of breach of confidence. The Federal Tribunal found that the same idea is already realised in the liability for breach of precontractual duties (*culpa in contrahendo*), liability for negligent misrepresentation and the liability for breach of confidence in a group (Swissair-case) which are all to be understood as aspects of a general principle of a *liability for breach of confidence*⁸¹. The details of this newly established liability still remain quite vague, and the necessity of the whole concept seems questionable⁸².

A 'classical' way to bypass the shortcomings of Tort Law is the use of contractual constructions because the law of contract does not discriminate against purely economic loss. All types of damage are principally recoverable⁸³. Generally it can be stated that in Switzerland, contract law does not play an important role in connection with economic loss cases. The few possibilities which are mentioned by legal scholars⁸⁴ never found their way into the case law or were even expressly declined⁸⁵.

In a case concerning the liability of auditors⁸⁶, the Federal Tribunal, after noting that 'all these theories were not much echoed in Switzerland', discussed the contractual instruments of *shifting of interest* (Drittschadensliquidation; déplacement de l'intérêt), *contract with protective effect vis-à-vis third parties* (Vertrag mit Schutzwirkung gegenüber Dritten; contrat comportant un effet de protection envers les tiers)⁸⁷ and *third-party-beneficiary-contract* but refused to apply any of them in the very case. The

⁷⁹ To our knowledge it has never been argued how the use of the name of the parent company could establish liability of the subsidiary company. For further discussions, see AMSTUTZ/WATTER, case note Swissair-case, AJP 1995, p. 502 ff.; DRUEY, case note Swissair-case, SZW 1995, p. 93 ff.; GONZENBACH, Senkrechtstarter oder Bruchlandung?, recht 1995, p. 117 ff.; SCHNYDER, Haftung aus erwecktem Konzernvertrauen im schweizerischen Recht und mögliche Auswirkungen auf das Kollisionsrecht, Collisio Legum per Gerardo Broggin, Milano 1996, p. 485 ff.

⁸⁰ BGE 121 III 350

⁸¹ BGE 121 III 350, 354 ff.

⁸² See SCHWENZER, supra, note 23, N 52.03; WIEGAND, case note, ZBJV 1997, p. 114 ff.

⁸³ See SCHWENZER, supra, note 23, N 14.17.

⁸⁴ See e.g. GABRIEL, supra, note 20, N 778 ff.; 796 ff.; GAUCH/SWEET, supra, note 7, p. 125 f.; GAUCH, supra, note 23, p. 233.

⁸⁵ The contrary is true for the situation in German law where contractual constructions play a decisive role mainly for cases of misrepresentation and negligent performance of a service.

⁸⁶ BGE 117 II 315, 318 ff.

⁸⁷ See SCHWENZER, supra, note 23, N 87.01 ff. (with more references).

ricochet)⁹³. The plaintiff suffers loss because property belonging to a third party – in this case a cable for power supply – is damaged. On a theoretical level, these cases face a double discrimination since the recovery of indirect loss is equally restricted⁹⁴. In principle only a person directly affected by damage is entitled to sue. Financial loss which is consequential to the loss of another person (i.e. secondary loss) is not recoverable⁹⁵. Only in case of wrongful death, art. 45 para. 3 CO declares the indirect losses of dependants as recoverable. This norm is generally interpreted as the exception to the rule of non-recoverability⁹⁶. The categorical bar to secondary loss has been more and more criticised⁹⁷.

The Swiss Federal Tribunal decided the three cable cases showing both elements of secondary and economic loss⁹⁸. Interestingly, the two doctrinal problems were treated as one.

In the first two cases, the court held that an injured party could be seen as directly affected if the loss had resulted from a violation of a specific norm for the protection of his interests⁹⁹. The questions of unlawfulness and secondary loss are, hence, one and the same; whenever a damage has occurred in an unlawful manner, it is equally treated as direct loss. The necessary protective norm was found in art. 239 of the Criminal Code, a norm protecting the public interest in energy supply¹⁰⁰ and accordingly, the wrongdoers were held liable for the loss of profits¹⁰¹. In both cases the court did not separately discuss the question of recoverability of purely economic loss.

But in the third cable case this very question became crucial. The reason for that can be found in the different statutory provisions which were applied in the three cases as the basis for liability. While in the first two cases the claims were based on provisions requiring the elements of art. 41

⁹³ GAUCH/SWEET, *supra*, note 7, p. 123.

⁹⁴ See e.g. MEIERHANS, *Der immer noch nicht bewältigte Reflexschaden*, recht 1994, p. 202 ff.; REY, *supra*, note 14, N 350 ff.; DESCHENAUX/TERCIER, *supra*, note 20, § 3 N 29 ff.; SCHWENZER, *supra*, note 23, N 14.19 ff. (with detailed references).

⁹⁵ See e.g. REY, *supra*, note 14, N 356; HONSELL, *supra*, note 23, § 1 N 51; BGE 99 II 223; for further citations see MEIERHANS, *supra*, note 94, p. 204, note 21.

⁹⁶ See BREHM, *supra*, note 68, art. 41 N 19.

⁹⁷ See SCHWENZER, *supra*, note 23, N 14.22; STARK, *Zur Frage der Schädigungen ohne Vermögensnachteile*, *Festschrift Keller*, Zürich 1989, 311, 320. LORANDI (*supra*, note 7, p. 22) sees the doctrine of non-recoverability already as overcome.

⁹⁸ BGE 101 Ib 252; 102 II 85; 106 II 75. BGE 97 II 221 was not a typical cable case as there seems not to have been secondary loss, see BREHM, *supra*, note 68, Art. 41 N 17; KRAMER, *supra*, note 7, p. 132 f., note 29. In case of nervous shock only the element of secondary loss is fulfilled. Therefore, the discussion includes only cable cases and no other forms of secondary losses. Note that the Federal Tribunal treats nervous shock as direct loss (BGE 112 II 118, 124; REY, *supra*, note 14, N 353).

⁹⁹ BGE 101 Ib 252, 255; 102 II 85, 89 f.

¹⁰⁰ See the discussion *supra*, *infra* subtitle B III 2.

¹⁰¹ In both cases no physical damage occurred.

information contracts. In older cases, it was mandatory that advice or information either had to be given in the course of a specific business or was paid for¹⁰⁸. Now a contractual liability for negligent advice is also accepted if there is a pre-existing contractual relationship between the parties¹⁰⁹.

Information appears in various forms. Among the most significant cases where the Federal Tribunal applied normal tort provisions we find credit information by banks, information concerning a former employee in a work reference, statements by public authorities and, exceptionally, auditing reports¹¹⁰. As already stated, we will not deal with those misrepresentation cases where special statutory provisions for the recovery of purely economic loss can be applied such as the liability for misleading statements in a prospectus or the liability of auditors in general. In these cases, the recoverability of purely economic loss is widely accepted.

In several cases the Federal Tribunal allowed recovery of economic loss caused by negligent statements.

The Federal Tribunal held that the auditing company of a bank, was liable to the creditors of a bank although the special provisions of company law concerning the liability of auditors were not applicable¹¹¹. In a series of cases, the court awarded damages to parties relying on statements not appearing in a specified form¹¹². In all cases they were given information which was relevant for the establishment or the continuation of some economic relations which turned out to be a losing business; they invested into a company¹¹³, did not sell shares in time notwithstanding rumours about the bad economic situation of the company¹¹⁴, paid money into a savings deposit after being misinformed about the possible class of claim in case of bankruptcy¹¹⁵, entered a business partnership with a person whose identity was misrepresented to him¹¹⁶ or delivered goods on credit to a company after wrongfully being informed about the economic situation of the intended client. In the latter case, the information was not given directly to the

¹⁰⁸ See esp. KRAMER, *supra*, note 77, N 66; KUHN, *supra*, note 54, p. 348 ff.; KAISER, *supra*, note 107, p. 25 ff.

¹⁰⁹ See WEBER, *Basler Kommentar*, art. 394 N 19.

¹¹⁰ For the latter see *supra*, *infra* subtitle B. III. 1.

¹¹¹ BGE 117 II 315.

¹¹² BGE 41 II 77; 57 II 81; 68 II 295; 80 III 41; 111 II 471; for older cases see KUHN, *supra*, note 54, p. 348, note 1; FISCHER, *supra*, note 107, p. 19 f. The claim was denied for lack of fault in BGE 53 II 336, 341 ff. In BGE 30 II 258, 267 ff. the court distinguished between advice and mere opinions. For the latter, intentional behaviour was seen as necessary to establish liability which could not be proved.

¹¹³ BGE 41 II 77.

¹¹⁴ BGE 57 II 81.

¹¹⁵ BGE 68 II 295.

¹¹⁶ BGE 80 III 41.

objective point of view apt to mislead the plaintiff¹²¹. Still on a case-by-case basis, the principle of liability for negligent misstatements was further developed. The Federal Tribunal could state accordingly later that *a person is held liable if he or she is asked because of his special knowledge, and then wilfully gives the requested information and thereby either intentionally or negligently makes untrue statements – although it is obvious that the required information is crucial for the decision in question. The person asked accepts a position of responsibility which imposes a ‘duty of care’ and in case of violation of that duty damages are owed*¹²².

In these cases the Federal Tribunal did not mention any further requirements. Nevertheless it was stated by scholars that the crucial element to establish liability for negligent misrepresentation is the breach of confidence on which the injured party relied¹²³. This requirement was first accepted by the Federal Tribunal in an unpublished decision¹²⁴, later it appeared in form of the independent action for breach of confidence (Swissair-case¹²⁵).

We also find a case where the outcome was negative for the plaintiffs¹²⁶. Producers of soft cheese claimed recovery of their loss of profits from the Federal Government. Sales of soft cheese had fallen sharply after an information campaign by the Government about certain risks of a possible contamination with listeria. These bacteria had been found in a special type of soft cheese, Vacherin Mont d’Or. The Federal Tribunal held that no norms for the protection of patrimony interests had been violated¹²⁷. Even so the discussion of protective norms did not remain the essential point, and the court gave much attention to stating that the Government had not acted against any duties to take reasonable care. The claim was dismissed.

It can be concluded that in Switzerland, liability for purely economic loss in case of misrepresentation is widely accepted¹²⁸. On the one hand,

¹²¹ BGE 41 II 77, 82; see also FISCHER, *supra*, note 107, p. 19 f. The Federal Tribunal did not deal with the question of unlawfulness in BGE 68 II 295, 303 where the misstatement was seen as breach of a precontractual duty (*culpa in contrahendo*).

¹²² Translation by the authors: ... *schadenersatzpflichtig wird, wer aufgrund seines Fachwissens in Anspruch genommen wird, wunschgemäß Auskünfte erteilt ... und dabei wider besseres Wissen oder leichtfertig Angaben macht...; von denen er sich sagen muss, dass ihre Kenntnis den in Frage stehenden Entschluss beeinflussen könnten. Der Befragte übernimmt dabei eine Garantienstellung, die eine ausservertragliche Sorgfaltspflicht und bei deren schuldhafter Verletzung eine Schadenersatzpflicht begründet.* (BGE 116 II 695, 699).

¹²³ See FISCHER, *supra*, note 107, p. 23 ff.; also KAISER, *supra*, note 107, p. 173 f.

¹²⁴ Case 4C.211/1989, cited in BGE 121 III 350, 355; see also WIEGAND, *supra*, note 82, p. 116.

¹²⁵ See *supra*, text accompanying note 75.

¹²⁶ BGE 118 Ib 473; see esp. WERRO, *supra*, note 4, p. 193.

¹²⁷ For details see WERRO, *supra*, note 4, p. 193, note 66.

¹²⁸ Note that in many cases damages were reduced for contributory negligence.

they should have specified the conditions of provision¹³². The court saw the element of unlawfulness fulfilled by the creation of an undue risk in not taking the necessary precautions to protect third parties from loss¹³³.

In both cases liability was based on the tortious action of art. 41 para. 1 CO, although a protective norm was again not available. In the first case, the court assumed unlawfulness without referring at all to protective norms. It was taken from the aptness of wrongful crediting to mislead third parties. In the second case, the bank had violated provisions of the Uniform Rules and Usage of the International Chamber of Commerce in Paris. As these rules are not part of objective law (i.e. regulations implemented by the state legislator), the court held that this violation did not meet with the requirement of unlawfulness. Instead the court assumed liability because of an unlawful omission applying the doctrine of undue risk¹³⁴.

In a more recent case the Federal Tribunal applied a statutory norm conferring third-party-beneficiary-rights against a bank not in privity with the plaintiff¹³⁵. The question of unlawfulness and the fact of prescription of an eventual tortious action could be bypassed. It was also stated that a direct claim must also be granted for policy reasons (distribution of risk among the parties)¹³⁶. This reasoning resembles the way the requirement of unlawfulness was handled if the actions were tortious.

2. Public Duties

In several cases the Federal Tribunal ruled on the question of liability for the alleged wrongful performance of public duties. For claims against the State¹³⁷ the crucial point was whether the authorities or persons in charge had acted unlawfully.

In two cases, the court entered judgement for the plaintiffs who had suffered economic loss as a result of errors on the part of the judge. In the first case, the judge had not paid attention to all relevant materials and had, therefore, ruled that the plaintiff's rights could not be secured by the creation of a mortgage by registration¹³⁸. The ruling was wrong but could not be corrected by the court of Appeal. The Federal Tribunal held that the fact of not paying careful attention to all relevant materials was unlawful. In the second case, a judge informed the creditor of a company only three

¹³² BGE 93 II 329; the facts were stated by WERRO, *supra*, note 4, p. 193 f., note 68.

¹³³ BGE 93 II 329, 339 ff.

¹³⁴ See e.g. REY, *supra*, note 14, N 753 ff.; SCHWENZER, *supra*, note 23, N 50.32 f.

¹³⁵ BGE 121 III 310; see *supra*, text accompanying note 88.

¹³⁶ BGE 121 III 310, 317 f.

¹³⁷ Claims are normally based on provisions of public law implementing State liability for wrongful acts of its representatives.

¹³⁸ BGE 79 II 424.

The latter cases have already been mentioned as an example for liability for lawful acts¹⁴⁷. The damage mainly appears as loss of profits because of a decline in a store's business due to the neighbouring building site. The Federal Tribunal allowed the cause of action for damages in these cases¹⁴⁸. In addition the court entered judgement for the plaintiffs who had taken special security measures against the activities due to a neighbouring shelter for drug addicts; the defendant Canton running this shelter was held liable for damages¹⁴⁹.

While the Federal Tribunal took a liberal position in cases of neighbour law, it remained faithful to its discriminatory position against purely economic loss when deciding claims between non-contractual parties both involved in a construction project¹⁵⁰. The court rejected a claim by a contractor against an architect hired by the owner of a construction project¹⁵¹ as well as the one of a contractor against the engineering company for negligently causing additional costs that were not otherwise compensable¹⁵². In the latter case, tortious liability to the non-contractual injured party was denied, while the engineering company was clearly liable for breach of contract towards the landowner. For that reason, partial compensation could be granted by application of the rule regarding recourse among persons jointly liable for the causation of damage (art. 51 CO). In both cases the reason for the rejection of a tortious cause of action was the type of damage for which no protective norm was available. Art. 229 of the Criminal Code dealing with the crime of violating fundamental rules of safe construction, was not interpreted as a protective norm against the occurrence of economic loss¹⁵³. On the same ground the Federal Tribunal denied a tortious claim of a buyer against a contract-seller of a house for damages caused by costs for reinforcing an embankment because of a landslide¹⁵⁴.

¹⁴⁷ Supra, text accompanying note 63.

¹⁴⁸ BGE 83 II 375; 91 II 100; 114 II 230; see also REY, supra, note 14, N 1123 ff.

¹⁴⁹ BGE 119 II 411.

¹⁵⁰ See WERRO, supra, note 4, p. 194 f.

¹⁵¹ BGE 115 II 42; the facts are stated by WERRO, supra, note 4, p. 194.

¹⁵² BGE 119 II 127.

¹⁵³ BGE 119 II 127, 129; see the contrary interpretation of art. 239 Criminal Code in cable cases; infra subtitle C. I.

¹⁵⁴ BGE 117 II 259, 270; this decision was criticised, see GAUCH, supra, note 23, p. 233; WERRO, supra, note 4, p. 195 f.

VI. Precontractual Duties

The doctrine of *culpa in contrahendo*¹⁶³ deals with wrongful acts or omissions in a precontractual stadium. By analysing the case law, we find two main situations which group together singular precontractual duties for the protection of economic interests¹⁶⁴.

On the one hand, there are cases where liability is imposed due to the non-formation of a valid contract. According to the principle of freedom of contract a party is generally free to break off negotiations. But a party may not start negotiations without the true and real intention to contract¹⁶⁵. In case of breach of this duty, he or she can be held liable¹⁶⁶. This can also be the case if someone knowingly concludes an illegal (void) contract¹⁶⁷, does not inform the other party about formal conditions for making the contract valid or does not fulfil his or her duty to obtain a required permission from a public authority¹⁶⁸.

On the other hand a party can be held liable when the formation of a contract turns out to be detrimental to the other party. In these cases liability is based on a breach of specific duties of information and disclosure which need to be specified on a case-to-case basis¹⁶⁹. As duties to inform generally play an important role this doctrine can also be applied as basis of liability in misrepresentation cases¹⁷⁰.

VII. Environmental Liability

Also the causation of damage to the environment can be seen in connection with economic loss. Ecological damage often appears without the infringement of individual rights¹⁷¹. Therefore all costs which are consequential to damage to the environment, such as pollution of air, water or ground, must be qualified as purely economic loss. This is also the case if, for example, a population of fish in a river is extinguished without violating a proprietary fishing right.

Despite the dogmatic difficulties, the Federal Tribunal held two companies that had caused water pollution liable for the costs of rehabilitating the

¹⁶³ See *supra*, text accompanying note 69.

¹⁶⁴ See GAUCH/SCHLUEP, *Schweizerisches Obligationenrecht, Allgemeiner Teil*, 6th ed., Zürich 1995, N 948 ff.; SCHWENZER, *supra*, note 23, N 47.07 ff.

¹⁶⁵ BGE 105 II 75, 79 f.

¹⁶⁶ BGE 77 II 135, 137; for further references see KRAMER, *Berner Kommentar*, art. 22 N 12 ff.

¹⁶⁷ BGE 36 II 193, 203.

¹⁶⁸ BGE 98 II 23, 28 f.

¹⁶⁹ For detailed references see KRAMER, *Berner Kommentar*, art. 22 N 33 ff.

¹⁷⁰ E.g. BGE 68 II 295.

¹⁷¹ The possible aspects of ecological damage are presented by MÜLLER-CHEN, *Entwicklungen im europäischen Umwelthaftungsrecht*, SZIER 1997, p. 213, 228 ff.

Although the importance of this concept is stressed repeatedly, the case law has found different ways to bypass its narrow restrictions, namely by 'creating' suitable norms for the protection of patrimony interests. This is possible by a wide interpretation of statutory norms as it was done by the Federal Tribunal in some of the cable cases. Another possibility is to refer to very general rules, such as the principle of *good faith* (misrepresentation cases), the doctrine of *undue risk* (negligent financial service) or the prohibition of *arbitrary acts* by State authorities (public duties), in order to meet with the requirement of unlawfulness. These rules alone though cannot be seen as protective norms in general. It is only on a case-by-case basis that these principles are interpreted accordingly. The use of non-tortious ways, for which the element of unlawfulness and subsequently a violation of a protective norm must not be fulfilled, is not very common in Switzerland to establish liability for purely economic loss. Traditionally, only the concept of *liability for breach of precontractual duties* (*culpa in contrahendo*) is widely accepted as an independent cause of action. Although contract law could extend its range of application in cases of misrepresentation and financial services, e.g. by the acceptance of information contracts without consideration, contractual actions are (in contrast to Germany) still relatively uncommon to establish liability in economic loss situations. Recently, the Federal Tribunal found a new way by accepting an independent *liability for breach of confidence*.

The arbitrariness of judicial treatment of economic loss is not only due to the question of availability of a protective norm, but even more to the uncertainty whether the strict rule of non-recoverability is going to be applied or not. This can be best shown by the group of so called Building Cases. The Federal Tribunal remained faithful to the traditional concept between non-contractual parties involved in a building project. Contrary to that, the liability for purely economic loss also goes quite far if neighbour law can be applied. Despite the closer relationship within the parties of the first case group¹⁷⁹, their claim for damages is handled more restrictively.

Bearing in mind the complicated situation concerning economic loss, it seems important to us to find a new approach to this legal problem.

The starting point of this approach must be a clear commitment that a general exclusion of purely economic loss cannot be accepted any longer as the basic rule of Tort Law¹⁸⁰. A look at the case law proves the truth of this

¹⁷⁹ The relationship has been qualified as being 'the functional equivalent to privity'. *Williams and Sons Erectors v. South Carolina Steel*, 983 F2d 1176 (2nd Cir 1993); the reference is taken from WERRO, *supra*, note 4, p. 195, note 72.

¹⁸⁰ See GAUCH/SWEET, *supra*, note 7, p. 136; WERRO, *supra*, note 4, p. 191; similar: Bericht der Studienkommission für die Gesamtrevision des Haftpflichtrechts/Rapport de la commission d'étude pour la révision totale du droit de la responsabilité civile, *supra*, note 12, p. 44.

enacted in Switzerland neither favours the compensation of physical damage nor discriminates against purely economic loss by making its recovery only dependant on protective norms. Accepting the new concept of unlawfulness would, therefore, even mean to be more faithful to the real character of statutory Tort Law. On the other hand it would not amount to a total equalisation of all kinds of loss. The recovery of economic loss can still be dealt with more restrictively; a human being simply owes more duties towards other persons' personal integrity than towards their economic interests. Whether this is also true in relation to property damage seems at least questionable¹⁸⁴. But the concept of duty of care would leave room for discussion.

The new concept also embodies with the essence of case law in relation to economic loss. A careful analysis of the reasoning shows that the element of unlawfulness is often established without really applying protective norms. This can be observed in the older cases of misrepresentation and negligent service, where the term unlawfulness often not even appears. In fact the idea of a breach of a duty of care is also the essential point in all other cases within the group of misrepresentation and service. How tortious liability is established in more recent cases of negligent misrepresentation is often interpreted as 'creating protective norms'¹⁸⁵. In the very cases¹⁸⁶ the court noticeably did not refer again expressly to protective norms but only to unlawfulness. Therefore, it can be concluded that this condition is fulfilled if a duty for the protection of the interests infringed is violated¹⁸⁷. This is also possible if no protective norm is violated, as it is especially the case if the principle of *good faith* based on a special relationship of confidence is violated. A duty can also develop after the creation of an *undue risk*; although this principle can not be qualified as a protective norm itself. In an old case concerning breach of public duties, the Federal Tribunal even expressly stated that unlawfulness could only be established by referring to the relevant duties of the authority, and the following cases were dealt with accordingly. It must be stressed that it is not only the duty that matters but the *breach* of it. In more recent cases, claims for damages were rejected not because none of the protective norms were

¹⁸⁴ See also Stevenson J. in *Canadian National Railway v. Norsk Pacific Steamship Co.* (1992) 91 D.L.R. (4th) 289, 383: *Some argue that there is a fundamental distinction between physical damage (personal and property damage) and pure economic loss and that the latter is less worthy of protection ... but I am left unconvinced. Although I am prepared to recognise that a human being is more important than property and lost expectations of profit, I fail to see how property and economic losses can be distinguished.*

¹⁸⁵ See especially GAUCH/SWEET, *supra*, note 7, p. 122 ff.; also *supra*, *passim*.

¹⁸⁶ BGE 111 II 471 ff.; see also BGE 116 II 695, 699.

¹⁸⁷ See also KUHN, *supra*, note 54, p. 353.

Much will be said against this new concept. The fear of 'opening the floodgates of indeterminate liability' will be articulated again. But this concept does not mean that every loss should be compensated¹⁹¹. The boundaries of liability can even be stricter. Furthermore, it will be argued that this concept causes much uncertainty and the outcome of a case could not be predicted anymore. This might be right, but the level of uncertainty and unpredictability will not be any higher than present. Nobody knows today whether a court will apply the strict rule of Tort Law or whether it will allow cause of action for damages either by a wide interpretation of unlawfulness or by applying another basis of liability. It is true that the question of duty to take care must be answered on a case-to-case basis. In order to further certainty of the law, it will be important to discuss all the (policy) factors openly. These factors differ from case group to case group; therefore the discussion of 'purely economic loss' should probably be abandoned in exchange for a discussion of relevant factors of liability in each case group. For this, comparative considerations will be extremely helpful.

List of Abbreviations

A.C.	Appeal Cases
AFG	Bundesgesetz über die Anlagefonds vom 18. März 1994
AJP	Aktuelle Juristische Praxis
Art.; art.	article
BankG	Bundesgesetz über die Banken und Sparkassen vom 8. November 1934
BGB	Bürgerliches Gesetzbuch (Germany)
BGE	Entscheidungen des Schweizerischen Bundesgerichts
C.A.	Court of Appeal
CC	Swiss Civil Code (= Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907)
cf.	confer
Cir	Circuit
CO	Swiss Code of Obligations [= Bundesgesetz vom 30. März 1911 betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht)]
D.L.R.	Dominion Law Reports
DM	Deutsche Mark; German Mark
e.g.	exempli gratia; for example
ed.	edition; editor
EIG	Bundesgesetz betreffend die elektronischen Stark- und Schwachstromanlagen vom 24. Juni 1902
f.	following page/number
ff.	following pages/numbers
F2d	Federal Reporter Second Series
GSchG	Bundesgesetz über den Schutz der Gewässer vom 24. Januar 1991
H.L.	House of Lords

¹⁹¹ See also WERRO, *supra*, note 4, p. 189.