PURE ECONOMIC LOSS IN THE NETHERLANDS

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1 The legal context

1.1 Pure economic loss is not an issue in Dutch law, but ...

In Dutch law, liability for pure economic loss is not a problem. But is this really so? Well, at least it is hardly discussed as a general issue.[2] According to the Dutch law of torts there is no general principle which states that pure economic loss is not recoverable; nor, for that matter, a principle saying that it is recoverable. However, some issues emerging in the English or German systems as applications of the general notion that pure economic loss should not be compensated, arise in Dutch law as well. They appear under different headings, as we will see.

1.2 Pure economic loss and the general 'fault liability' of ' 162 BW

Why is pure economic loss not a general problem? The Dutch situation is not unlike the French one. There, § 1382 Cc is a general clause whose wording allows the assumption of liability for any act that causes any kind of damage, as long as the act can be called a '*faute*'. According to § 6:162.1 of the *Burgerlijk Wetboek* (Civil Code) of 1992 (BW), liability exists for damage caused by an unlawful act, an '*onrechtmatige daad*' which is '*toereken-baar*'.[3] Unlawful ('*onrechtmatig*') are: (1) an infringement of a subjective right; (2) an act or an omission violating a statutory duty; and (3) conduct contrary to the general standard of conduct acceptable in society, the '*maatschappelijke betamelijkheid*'.

1. The writer is indebted to Edith van den Akker and Ivo Giesen who commented on an earlier version of this report.

2. Exceptions are Kottenhagen 1992, Spier 1996 and Van Boom 1997 who analysed many of the problems dealt with in this paper.

3. 'Toerekenbaarheid' can generally be translated by accountability, responsibility or imputability, thus meaning that the defendant is responsible for the consequences of his act. This condition is almost always fulfilled, at least in the area of pure economic loss.

The third category can seen as the Dutch equivalent of the French liability for '*faute*' of § 1382 Cc. The reference to the '*bon père de famille*' is merely exchanged for that of the conduct acceptable in society, the '*maatschappelijke betamelijkheid*'.

The wide scope of this rule means that any act (or omission) that leads to any kind of damage can, in principle, be unlawful under Dutch law. The only requirement is, in the words of the *Hoge Raad* (the Dutch 'Supreme Court'), that the defendant should have acted in a different way to that which he did in order not to injure the interests of others. According to the *Hoge Raad* this implies that the defendant knew or should have known that this state of affairs existed: a (weak) kind of 'foreseeability' is therefore required.[4]

The Dutch BW does not hold a narrow view of the interests that are to be protected by tort law, like the German § 823.1 BGB with its reference to '*Rechte*' and '*Rechtsgüter*'. Subjective rights are protected by § 162.1 BW, but if no subjective right is infringed the plaintiff merely changes the basis of his claim to the general clause regarding the '*maatschappellijke betamelijkheid*'. German inventions like the '*Recht am Gewerbebetrieb*' and the '*Vertrag mit Schutzwirkung zugünsten Dritter*' are therefore not necessary in order to create liability for pure economic loss.

As in France under § 1382 Cc, the general 'fault' liability of § 162.1 BW develops on a case by case basis. Sometimes the *Hoge Raad* will set more general rules for broader categories of situations, often by applying a multi-factor test. For instance, whether a defamatory statement in the press is unlawful depends on the kinds of facts that are disclosed, the seriousness of the consequences of the publication for the person in question, the seriousness of the allegation seen from the perspective of the general interest, whether the allegations can be substantiated and other circumstances.[5] But such generalisations are not provided as frequently as they are under English law. There, the case by case development may amount to dogma, but at least the requirement of a duty of care in the law of negligence constantly invites a more general approach. This is an additional reason why pure economic loss is not recognised as a general problem: tort law according to the Dutch *Hoge Raad* is not a matter of drawing general lines, but of a delicate balancing of interests on a case to case basis.

4. HR 10 September 1994, NJ 1996, 196 (Staat/Shell).

5. HR 24 June 1983, NJ 1984, 801 (Gemeenteraadslid).

1.3 Other conditions for liability: 'relativiteit' (scope of the duty) and causation

This tendency to approach matters on a case to case basis again surfaced recently when the *Hoge Raad* delivered its views on the additional condition of '*relativiteit*' for general liability based on the '*maatschappelijke betamelijkheid*'. According to § 6:163 BW, liability is denied if the rule invoked by the plaintiff does not cover the interests of the plaintiff that are damaged by the defendant's actions. The German lawyer will note the resemblance with the theory of the '*Schutznorm*'. And the English concept of 'duty of care' is not so far removed either, in so far as it determines the scope of the interests protected.

The requirement of *relativiteit* could have been a useful tool for the courts to exclude certain (economic) interests from being protected under tort law, or at least to be able to build in an extra threshold for their protection. But the *Hoge Raad* declared that for liability based on the '*maatschappelijke betamelijkheid*' it is sufficient that the defendant was aware of the interest damaged by the unlawful act – the 'weak foreseeability requirement' discussed above. If the plaintiff damages the interest of another person of whom he could not have been aware, the '*relativiteit*' requirement is not met. But, the *Hoge Raad* continued, this is just another way of stressing that the plaintiff had not acted unlawfully in this respect, that is with regard to the interests of the plaintiff in question.[6]

Therefore, if in a certain situation the economic loss would not be recoverable, the courts will hold that the '*maatschappelijke betamelijkheid*' does not require them to grant protection in such a case. The general 'fault liability' embodied in § 6:162.1 BW is merely not established. As a consequence, the concept of '*relativiteit*' is now mainly used to limit liability in cases where statutory duties are invoked.

As in other systems, the damage suffered by the plaintiff should be related to, and have been caused by, the act of the defendant (§ 6:98 BW). The test for legal causation is rather open: the damage should be 'attributable' to the event that establishes liability. The courts will take into account the kind of damage suffered, the kind of liability involved and the other circumstances of the case in establishing the causal link. Foreseeability is relevant as well, although it does not figure as prominently in Dutch law as it does in English law.[7]

These criteria for causation have not yet been used in order to limit liability for pure economic loss, although the allusion to the 'kind of damage'

6. HR 10 September 1994, NJ 1996, 196 (Staat/Shell).

7. Asser/Hartkamp I 1996, no. 435.

and the 'kind of liability' in case law seem to be tailored for this purpose.[8] An application of these criteria is, however, likely in 'cable cases', (see § 4.3).

1.4 What kind of 'damage' can be compensated?

The kinds of damage that can be compensated are divided by § 6:95 BW into two categories. '*Vermogensschade*' is the damage to pecuniary interests, including damage to goods and economic loss, pure or consequential. It is to be compensated generally. '*Ander nadeel*' (other disadvantages) are to be compensated only if provided for under statutory law. Under § 6:106 BW compensation for such non-pecuniary loss is possible in cases of intentional damage, in cases of personal injury and in cases where the defendant's reputation has been injured.

An important exception to the possibility to recover for pure economic loss follows from the rule that only the injured person himself can recover in cases of personal injury.[9] So, for instance, the claims of the creditors of a victim of a car accident are barred. Even his relatives cannot recover their damage, unless they can show that they themselves have been injured. The only exception to this rule is the situation where a third party has incurred costs which are for the benefit of the victim, such costs being recoverable by the victim if he had incurred these expenses himself (see § 4.2).

1.5 ... but many problems involving Dutch tort law are problems relating to pure economic loss

The bottom line is that, apart from this rule excluding claims of pure economic loss by third parties in personal injury cases, there is no general rule limiting recovery for pure economic loss. Liability for pure economic loss is sometimes limited, however, by the refusal to assume general 'fault'

8. Asser/Hartkamp I 1996, no. 434. In HR 13 November 1987, NJ 1988, 210 (AGO/NCB) an intermediary was accused by an insurer of having withheld information, which led to the insurer making advance payments to the insured. The Court of Appeal dismissed the claim for lack of sufficient causation, because the payments would also have been made if the information had been given. But the *Hoge Raad* refers in an 'obiter dictum' to the kind of damage involved, pure economic loss, as a reason for caution in assuming a sufficient causal link in cases like this.

9. § 6:107 BW does not explicitly bar such 'third party' claims, but case law assumes this and this rule has not been challenged in legal literature, see Asser/Hartkamp I 1996, no. 472.

liability in specific situations. We will encounter some of these situations later on. For most situations, the outcomes are very similar to the ones that would be obtained under the English or the German systems. But sometimes, liability for pure economic loss is simply assumed. And that may be the most important distinction between Dutch law, on the one hand, and English and German law on the other. In these systems liability for pure economic loss must be established and deserved by the plaintiff: established by proving a duty of care or finding a way around § 823.1 BGB and deserved by providing sufficient policy reasons for accepting liability. Such a threshold does not exist in the Netherlands. A case of pure economic loss liability is just another instance of the case to case development of our general fault liability.

2 *Devices to limit liability for pure economic loss*

If the floodgates would open, and compensation for pure economic loss would become too burdensome, several safety valves are available. Fine-tuning fault liability, in order to limit liability from the outset, would be the most important device. We have also seen that legal causation can be used in order to limit liability for certain kinds of damage, like pure economic loss.

2.1 Contributory negligence; 'matiging' (ad hoc control of awards for damages); capping

Other devices by which to limit liability for pure economic loss, if necessary, can be found in the law relating to damages. Contributory negligence is embodied in § 6:101 BW. The only requirement for the application of contributory negligence, and thus for granting the plaintiff only partial compensation, is that 'circumstances that can be attributed to the plaintiff' were among the causes of the damage. Although not designed for this purpose, it is not beyond imagination that this rule can be used to limit liability. For instance, a plaintiff's reliance on the certified accounts of an auditor could be held to be contributory negligence in certain circumstances.[10]

'*Matiging*' is a Dutch concept which has no counterpart in other important Western jurisdictions, with the exception of the Swiss one. Section 6:109 BW states that awards for damages can be mitigated, if full compensation would

10. Van den Akker (forthcoming).

be clearly undesirable in a particular case. The courts have to take into account the 'kind of liability', the kind of relationship between the parties and the financial means of the parties. '*Matiging*' does not apply where the liability of the defendant is covered, or should have been covered, by insurance. When this rule was embodied in the 1992 *Burgerlijk Wetboek*, many thought that it would become a favourite tool for the courts, but relatively little has occurred since.[11]

Apart from this 'ad hoc' adjustment of damages, the 1992 BW also introduced the general possibility to 'cap' damages.[12] Some professional organisations and others have lobbied for their liability to be capped, but to date they have not been successful. Caps can be set by the Minister of Justice.

To sum up: Dutch law seems to be well prepared for the unlikely event that liability for pure economic loss can no longer be contained by the case to case development of the general 'fault' liability based on the '*maatschappelijke betamelijkheid*' or by the concept of causation.

2.2 *Other tools: the degree of fault*

Some countries have developed other tools to limit liability for pure economic loss, which do not have a direct equivalent under Dutch law. But some traces of these devices can be found in this jurisdiction as well. In Austrian and Swiss law, for instance, the degree of fault is a determinant factor for the amount of compensation.[13]

The degree of fault may theoretically be taken into account under Dutch law as well. It is one of the factors relevant for the decision to mitigate the damages on an ad hoc basis under § 6:109 BW.[14] Moreover, the degree of negligence is one of the 'other circumstances' that the courts may consider when determining the causal link.[15] But there are no unambiguous examples of cases where the degree of negligence was found to be important.

There is one area in which the degree of care is relevant, however. The personal liability of functionaries like directors of companies or other legal entities, receivers in bankruptcy, and public officials is dealt with by requiring a higher degree of negligence on the part of these persons, a degree

11. See Schadevergoeding (Bloembergen), Art. 109.
12. § 6:110 BW.
13. § 1324 ABGB and § 43.1 *Schweizerisches Obligationenrecht*.
14. Asser/Hartkamp I 1996, no. 498.
15. Asser/Hartkamp I 1996, no. 433.

which is certainly higher than that of the 'organisation' they work for.[16] This means that their acts may lead to liability on the part of the organisation fairly easily, but their personal liability requires more serious misconduct.[17]

2.3 *Other tools: 'certain and direct' damage*

Under French law the damage should be '*certain et direct*' in order to be compensated.[18] In our concept of causation, the element of 'directness' is probably implied. But whether the damage is a 'certain' consequence of the unlawful act is not an issue under Dutch law.[19] According to § 6:97 BW the courts have to establish the damage in the manner they deem appropriate for the damage in question. This rule relieves them from the duty of applying formal rules regarding evidence in the civil proceedings, when they award damages. But the rule does not state that they have to remain on the side of caution if the (amount of) damage is not entirely certain. On the contrary, the courts have been granted the possibility to make a rough estimate of the damage in such cases.

In practice, however, the Dutch courts have a reputation of being rather frugal in their awards for damages. The Calvinist Dutch culture is reflected in such court decisions.

3 Special areas I: Directly inflicted pure economic loss

Loss of profits or income, or damage to financial interests, can of course arise in many different ways. It is more or less a matter of tradition to determine which of these situations are treated as pure economic loss. As a starting point, I will take the Anglo-American variation of that tradition, where the discussion regarding pure economic loss primarily takes place within the area of the tort of negligence. So I will not deal with such pure economic loss as that caused by strikes and other labour disputes, by nuisance, by defamatory statements, by acts of unfair competition or by infringement of intellectual property rights. Furthermore, I will omit the liability of public officials, public agencies and the state, because of the many specific problems involved therein.

16. Asser/Hartkamp III 1998, nr. 261 e.v.
17. Van Maanen 1997, no. 73.
18. Le Tourneau et Cadiet 1996, no. 644 ff.
19. Although there might be a link with the notion of foreseeability discussed under 1.2 and 1.3.

When discussing specific areas, we can distinguish between pure economic loss caused directly by the plaintiff, on the one hand (§ 3.1 and 3.2), and pure economic loss suffered by the plaintiff as a consequence of damage that was inflicted on another party in the first place, on the other (§ 4.1 to 4.4). The latter category can be roughly described as damage '*par ricochet*'.

3.1 Pre-contractual liability

Dutch law is notorious for its pre-contractual liability. If a party breaks off negotiations regarding a contract, he could be held liable for the loss of profits that the other party could have expected, when the contract would have been concluded and carried out. The *Hoge Raad* accepted this far-reaching pre-contractual liability in 1982.[20] The conditions for this liability are not clear, however. In its 1982 decision, the *Hoge Raad* seemed to indicate that a sufficient requirement would be that the plaintiff believed that some agreement would result from the negotiations and that this belief was 'justified'. The lower courts have not often accepted liability, but Dutch legal practice has been profoundly changed by this decision. The legal uncertainty caused by the decision is a shadow which hangs over many negotiations.

Things may change, however, now that several comparative studies have appeared, demonstrating that Dutch law is out of tune with other European jurisdictions in this respect.[21] If at all accepted, a condition for pre-contractual liability in other jurisdictions is usually some degree of negligent conduct on the part of the defendant. Moreover, full compensation for lost profits is not possible.

In a recent case, the *Hoge Raad* seems to be retracing its way back on to the (European) main track. A 'justified belief' that an agreement would ensue, is no longer always a sufficient condition for liability. Other factors are to be taken into account as well, like whether the 'belief' of the plaintiff that a contract would ensue was caused by the actions of the defendant and also the nature of the interests of the defendant. If circumstances have changed during the negotiations, this could be relevant as well.[22]

In conflicts regarding the breaking down of negotiations, solutions other than full compensation for lost profits are possible as well. Under certain circumstances, Dutch law may award the plaintiff only the costs incurred

20. HR 18 June 1982, NJ 1983, 723 (Plas/Valburg).

21. Van Dunné 1991, Hondius 1991, Hesselink 1995.

22. HR 14 June 1996, NJ 1997, 481 (De Ruiterij/MBO).

during the negotiations. And sometimes a court order compelling the defendant to continue to negotiate 'in good faith' is granted.[23]

3.2 Product liability

Another category of pure economic loss is the one arising as a consequence of a product being defective. The plaintiff, for instance, may have used a defective product in its production process as a raw material or as a manufacturing tool. This may lead to damage to the plaintiff's goods, or it may cause the products of the plaintiff to be defective as well. A loss of reputation suffered by (the trademarks of) the plaintiff might also result.

In a recent Dutch case, a professional grower of roses used a pesticide which had been polluted with a chemical that had ruinous effects on the rose plants. The grower claimed for the damage incurred. Because of the damage to the roses, he subsequently had to sell his company. The *Hoge Raad* ruled that the tortious liability of the manufacturer of a product exists if that product is unfit for the purpose for which it is sold. Rather puzzling was that the *Hoge Raad* added: 'for the damage in question'.[24] This qualification leads to speculation whether the kind of damage (more of less total destruction of the roses) was decisive, or that any damage incurred by the user of a product that is not fit for its purpose can be recovered from the manufacturer.

At least the case shows that the *Hoge Raad* does not hesitate in granting economic loss that is consequential upon damage to property in product liability cases. However, there is no trace of the subtle distinctions of the English approach, where the question would probably be whether the lost profits claimed were a direct consequence of damage to a particular rose plant, or of the more general problems the company of the rose grower incurred.[25]

In this area, many issues still need to be resolved. For example, what if the product was fit for its purpose, but had detrimental side effects on other goods belonging to the plaintiff? The reasoning in the case of the rose grower can probably extended to this situation.

The product can also be used as a tool for production, like machinery. If production has to be stopped due to the machine failure, will the loss of profit be recoverable? The Dutch courts would almost certainly assume that

23. *Verbintenissenrecht*(Blei Weissmann), Art. 217-227.I, aant. 86 ff.

24. HR 6 December 1996, NJ 1997, 219 (Du Pont/Hermans).

25. Compare *Spartan Steel & Alloys Ltd* v. *Martin & Co. (Contractors)* Ltd [1972] 3 All E.R. 557 and Charlesworth & Percy On Negligence 1997, 2-115.

this kind of damage is foreseeable. However, they will probably also take into account the possibilities which the plaintiff had to limit its dependency on the machinery in question and to shift the risks of machine failure to the supplier of the machine. These issues will be more thoroughly explored in § 3.3.

Or the defective product might not damage any of the goods belonging to the plaintiff, but cause the products of the plaintiff to be defective. Damage to goods and personal injury will then probably be recoverable by the persons involved, either on the basis of the rule in the rose grower case, or on the basis of the rules resulting from the EC Directive on product liability.[26] But whether the damage to the reputation of the plaintiff can be recovered is still uncertain.

4 Special areas II: third party losses and 'higher degree' losses

A special category of pure economic loss is that of 'third party' losses. The plaintiff is not injured directly, but suffers damage *'par ricochet'*, because a 'first party' suffers damage. For example, the relatives of a person suffering personal injury may incur damage as well. A creditor of a person whose goods are destroyed, will probably also be worse off. When a person does not live up to his contractual duties, a third party may suffer loss in the process. Many different situations are conceivable. We will try to discover some general principles in the way Dutch law deals with these issues.

4.1 Pure economic loss for a third party as a consequence of personal injury: no recovery

We have already noted that claims by third parties incurring pure economic loss because of the personal injury of the direct victim are barred by § 6:107 BW. In its *Lapinus/Poly* decision, the *Hoge Raad* extended this principle to the claim of a company that incurred loss of income, because its employees were injured by pollution in the air stemming from a neighbouring manufacturing plant.[27] The general principle, however, is clearly that pure economic loss resulting from the personal injury of another person is not recoverable.

26. § 6:185 BW.

27. HR 12 December 1986, NJ 1987, 958.

4.2 Pure economic loss for a third party as a consequence of personal injury: transferred damage as an exception

The one exception to the above rule relates to transferred loss: expenses incurred by a third party for the benefit of the injured person can be claimed from the tortfeasor. The condition is that the injured person could have claimed these costs from the tortfeasor if he himself had incurred these costs.[28] An example is the payment of medical treatment by the relatives of a patient.

But, when we take a closer look, it is questionable whether the damage in question is really the damage of the third party. The role of the third party is merely that he sets in motion the measures that are necessary to help the injured person and to provide the financial means for this. It is not his own damage that the third party 'repairs' by these measures, but that of the injured person.

4.3 Pure economic loss for a third party as a consequence of damage to goods: no recovery

What is the situation if the loss of the third party follows from damage to the goods of the 'first' party? Loss of income or profits easily results from damage to another person's goods. The two most important categories are probably the following.

Damage to goods used for productive purposes → disruption of production process → no supply of products to customers → disruption to the production process of the customer → fewer sales → pure economic loss

Let us assume first that damage is inflicted on goods that are used by the second party for productive purposes. This in turn leads to a disruption of the production process of this second party. A customer needs the product for its own productive purposes and its production process is in turn disrupted, with loss of profit resulting therefrom. Damage to machinery or means of transport are obvious examples of situations where the customers of the owner of the goods might suffer pure economic loss. And also the famous cable cases fall into this category.[29] Because of damage to a cable, the production of energy or the supply of energy to a customer might cease and this customer may have to stop its production process as well, with pure economic loss

28. § 6:107 BW; see Asser/Hartkamp I 1996, no. 474.

29. See for Dutch literature and case law on the cable cases Kottenhagen 1992.

resulting. And the case of a 'captain of industry in a traffic jam' missing the appointment in which he could have concluded a very important contract, belongs to this category as well, if we were to view his car being stopped by the traffic jam as a disruption of his production process.

In an economy with as many interdependencies as ours, it might seem that claims based on facts like these will result very frequently. Normally, however, several 'buffers' will be available in a causal chain like this. These make it quite unlikely that the customer incurs pure economic loss in the end. The damaged goods or item of machinery can usually be replaced or repaired before serious disruption occurs. A stock of finished products can prevent the supply of products to the market from being interrupted. When there is interruption, the customer will probably be able to use another supplier. Even when he is dependent on the product of a particular supplier, he may be able to prevent economic loss by using his stock of the product or of the stock of his own finished product.

When we take a closer look at these buffers, we can see that they are concerned with two factors: 'time' and 'dependency'. The time that is needed to repair or replace the damaged goods runs against the time that it takes before the stocks that function as a buffer run out. In this respect, the tendency in many industries to work with 'just in time delivery' of supplies creates a higher exposure to damage. The procedures for repair or replacement have to work faster when stocks that may form a buffer become smaller. And of course every logistic manager in the world knows that dependency on suppliers should be limited as much as possible. If he has an alternative supplier, the customer can prevent pure economic loss.

This reasoning leads to strong arguments against recovery for pure economic loss in these types of situations. The party incurring the loss is in a good position to prevent the damage. He can take precautions by fine-tuning his stocks in relation to his supply alternatives. Moreover, he can make contractual arrangements with his suppliers in which the risk of disruption to the supplies is borne by these suppliers.[30] He has to think of these matters anyhow, because many other causes may also lead to disruption of his supplies. This reasoning is also applicable to the 'captain of industry in the traffic jam' situation. There are many possible causes of traffic jams other than tortious acts. So, it could be argued, he should have left earlier anyhow, if being in time for the appointment was so crucial.

These arguments also show why the cable cases became paradigmatic. The delivery of energy was 'just in time' long before this was the general trend in logistics. Keeping gas or electricity in stock was (and is) a difficult matter.

30. Kottenhagen 1992 raises the point that tortious liability for pure economic loss should not be used to circumvent contractual arrangements.

The dependency was (and is) in practice very high, because there will usually be only one supplier of these utilities. And suppliers were (and are) monopolists, who often succeed in transferring the risk of non-delivery to their customers contractually.

But this analysis of the cable cases also seems to indicate that they are extreme examples of this category, rather than normal versions of the phenomenon. Probably their extreme position should indeed lead to the development of a specific rule for these cases, instead of extending general principles derived from the cable cases to other instances of disrupted production processes.

Turning to Dutch law, the *Hoge Raad* seems to be willing to accept liability in these special cases. When a company that operated a dragline negligently damaged a gas main owned by a gas utility company, it was held responsible for the damage suffered by a third party because its production process was stopped. The dependency of this third party on the supply of gas was used as an argument in its favour: according to the *Hoge Raad* this showed the directness of the causal link between the negligent act and the damage. But the *Hoge Raad* also suggested that a very high degree of dependency would mean that the third party should have taken precautions. Because this issue had not been part of the debate in the proceedings however, the *Hoge Raad* did not pronounce judgment on this issue. So it remains open whether the lack of possibilities to take precautions should lead to an exception to the general principle that this kind of damage should be recoverable.

Although strict liability is a separate issue under Dutch law, it might be instructive to include this in this comparative enquiry. Dutch law has strict liability rules for defective chattels, defective premises, dangerous substances and damage caused by animals. The general idea behind these notions of strict liability is as follows if we omit the special defences which are difficult to explain and are hardly ever applicable in practice.[31] If chattels or premises present a known danger to persons or goods when defective, the person responsible for them will be liable if the danger materialises.[32] If dangerous substances present a known 'special' danger to persons or goods, the professional user or guardian of the substance will similarly be liable if the danger unfolds.[33] If animals cause damage by their unpredictable behaviour, liability exists for this damage.[34] The situations covered by these

31. Asser/Hartkamp III, nr. 177 ff.
32. § 6:173 BW for chattels and § 6:174 for premises.
33. § 6:175 BW.
34. § 6:179 BW.

instances of strict liability will normally only lead to personal injury or damage to goods. Consequential economic loss for the person affected is then recoverable as well.

But what if a third party suffers pure economic loss because of damage to the goods of a second party? The wording of the rules for chattels, premises and dangerous substances seems to indicate that this is not recoverable. A danger for a person or goods has to unfold. But the rules do not state that the person or the goods of the plaintiff should suffer damage. So, most writers assume that the pure economic loss of third parties is recoverable as well.[35] They refer to the rules regarding causation as a device to cut off liability for pure economic loss, if necessary.[36] In my opinion, the result that liability would ensue in these situations is undesirable in general, because the situation is similar to the one described earlier. The plaintiff is generally in the best position to manage the risks involved in the running of his business. Only when there is no realistic possibility of taking precautions, might the arguments for liability prevail. A situation like that would be the one of a hotel located next to a lake (belonging to somebody else) that is polluted by an act of the defendant. When the tourists stay away as a consequence of the pollution, the damage might be recoverable.[37]

Damage to goods used for productive purposes → disruption to the production process → no demand for supplies → fewer sales for supplier → pure economic loss

In the second category of cases, again damage to an item that is used for productive purposes leads to a disruption of the production process. But now the supplier of the second party incurs pure economic loss, because he can sell less of his own products to the second party. Now the damage does not travel down the line of production and distribution to the customers, like in the first category, but upwards to the suppliers.

In general, these situations do not seem very likely to lead to successful claims for pure economic loss. That a customer is lost appears to be viewed as a normal business risk. I do not know of any Dutch case law regarding this type of case, however. The above analysis, which shows that only (extreme) dependency might trigger liability, indicates that a situation where a supplier is very dependent on a certain customer might be the most interesting test case.

35. Spier & Sterk 1995, p. 27; Spier 1997, no. 101; Asser/Hartkamp III 1998, no. 175.

36. Asser/Hartkamp III 1998, no. 175.

37. This was at least suggested by the Explanatory Memorandum on the rules regarding liability for dangerous substances, p. 18/19.

4.4 Pure economic loss for a third party as a consequence of damage to goods: transferred damage as an exception

The general rule seems to be that third party losses caused by damage to the goods of another party are not recoverable, with a high degree of dependency being a factor that may lead to liability. But, like in the situation where the pure economic loss results from personal injury to another person, there is an exception.

When a cyclist broke a window-pane of a shop and the bailee of the shop paid the costs of repair, the *Hoge Raad* granted the claim of the bailee against the cyclist.[38] Here again, we are dealing with cases where the loss incurred by the first party is transferred to the third party, because this party has incurred expenses in order to remedy the loss. In a sense these claims are not pure economic loss claims, because the damage remedied by the third party is the damage to the goods or the personal injury suffered by the direct victim of the unlawful act.

The tendency in Dutch law seems to be to grant such claims. This prevents the complications that might arise if the third party would have to recover the expenses from the owner and the owner would in turn claim from the tortfeasor. Furthermore, there is no risk of a large amount of claims. The only danger seems to be that of double compensation, which can be dealt with in a pragmatic way.[39]

4.5 Pure economic loss for a third party as a consequence of the pure economic loss of a 'first party'

It is possible to imagine many situations in which a third party suffers pure economic loss as a consequence of a wrong inflicted on another party. Any wrong that affects the financial position of a company, may also influence the position of customers, suppliers, creditors and shareholders.

The *Hoge Raad* recently dealt with a case in which a shareholder claimed damages when his company suffered pure economic loss, because the value of his shares dropped. But the shareholder was unable to claim directly from the person who wrongfully inflicted this loss on the company. The company can claim this loss from the wrongdoer and this will be reflected in the value of the shares, according to the reasoning of the *Hoge Raad*.[40] The same reasoning will also apply to customers, suppliers and creditors. If the

38. HR 4 March 1955, NJ 1955, 301 (Bakfiets); see De Bie Leuvelink Tjeenk 1997, p. 208.

39. De Bie Leuvelink Tjeenk 1997, p. 228.

40. HR 2 December 1994, NJ 1995, 288 (Poot/ABP).

company is restored to its financial position by the wrongdoer, the interests of the persons who have relations with the company is also restored, at least in theory.[41]

But according to another decision of the *Hoge Raad* the outcome has to be different when a bank negligently withdraws credit from a company, and subsequently forces the shareholders to sell their shares. In this situation, the damage suffered by the shareholders cannot be compensated indirectly by a payment to the company, pushing up the value of the shares, because the shares were no longer in their possession.[42]

It is difficult to say what the potential of this exception is or could be. One of the questions here is whether the sale of the shares is in itself sufficient for the shareholders to be able to claim. A strong argument against this reasoning would be that the value of the claim will be reflected in the price of the shares. The liability of the wrongdoer towards the shareholder would then lead to double compensation. So, the undue influence to sell the shares was probably decisive. But this means that the case is not really a case of third party loss.[43]

4.6 Pure economic loss for a third party as a consequence of a breach of contract by a professional person

The relationship between a professional person and his client is primarily contractual under Dutch law. The threshold for assuming a contract is rather low: the consent of the parties or justified reliance on that consent by one of the parties.[44] In general, no formal requirements exist. Contracts can also be concluded by consent that is manifested by inaction or silence.[45] If a professional person has entered into a contractual relationship with a customer, there will be no limitation to the pecuniary damages to which the customer will be entitled when the professional has acted contrary to his duties under the contract.

Third parties without contractual ties with the plaintiff may also suffer pure economic loss, however, because of a breach of contract. An example is the situation well known in other jurisdictions where a lawyer fails to draft a will in time to the detriment of the plaintiff, who is then entitled to the

41. Of course it may take time and effort to obtain the compensation, but it would only complicate matters further if the third party would interfere with claims of his own.

42. HR 2 May 1997, NJ 1997, 662 (Kip en Sloetjes/Rabo).

43. Compare AG Mok in his opinion in the case under 3.7 and 3.8.

44. § 3:33 and 35 BW.

45. § 3:37.1 BW; Asser/Hartkamp II.

inheritance he expected.[46] To date the Dutch courts have not seemed reluctant to grant such claims to third parties. The public notary may have duties towards third parties, who are involved in the transactions of his clients.[47] The public notary who helped a bank with property transactions to the detriment of the creditors of the bank was held responsible because he knew or had to know that his co-operation would lead to a very serious danger of the bank becoming insolvent.[48] A lawyer who forgot to file a brief in court in time was liable for the pure economic loss of the persons who in turn rented the premises from the bailee he represented.[49]

But articles in law reviews are starting to appear that question this generous approach. Cases like Ross v. Caunters and White v. Jones are well known among the specialists in the field and provoke the same questions as they do in England.[50]

4.7 Reliance on information by the third party as a special case

Reliance on information is probably the most interesting area of liability for pure economic loss, because the floodgate argument is at its strongest here. Incorrect information is a virus that very easily reaches many places in the era of telecommunications and the internet. The chance that the information is relied upon by somebody is always present.

The problem is also well known in other countries and the German BGB has already tried to solve it.[51] But the position under Dutch law remains unclear. Relevant case law is difficult to find. It seems likely that liability will not be accepted in cases at the extreme end of the scale. A plaintiff might, for instance, rely on a weather report or on medical information presented on television. When there is no relationship between the issuer and the receiver of information except by way of the (indirect) transfer of this information, accepting liability would be going too far. Maybe this could be different when the circumstances are very unfavourable for the defendant: intent, a very convincing manner of presentation of clearly incorrect information, or wrong information that is by its nature very likely to be relied upon. But this is mere speculation as to how the courts will approach

46. Hof Amsterdam 19 januari 1984 & 31 januari 1985, NJ 1985, 740 assumed liability in this situation.
47. HR 15 September 1995 (Notaris/Curatoren THB III).
48. HR 23 December 1994 (Notaris/Curatoren THB II).
49. HR 2 April 1982, NJ 1983, 367 (Smael/Moszkowicz).
50. Jansen & Van der Lely 1998.
51. § 676 BGB on '*Haftung für Rat und Empfehlung*'.

the issues of general fault liability and causation in matters like these in the future.

A more familiar version of the problem is the reliance on financial information by investors when they decide whether they should buy shares or take (or keep) other financial interests in companies. The *Hoge Raad* held a bank liable for credit information issued to a creditor of its client.[52] Another bank was held liable for the misleading information contained in a prospectus.[53] A case regarding the liability of auditors towards persons relying on the financial reports regarding a company reached the *Hoge Raad*, but it did not decide the issue of the extent of the liability.[54]

In what direction the case law will move is not yet clear. In legal literature the general attitude is that the *Hoge Raad* should be cautious. The foreseeability criteria of the English case of Caparo v. Dickman are often referred to.[55] In an as yet unpublished manuscript Van den Akker argues that the public (or neutral) position of the professional and the reasons for the reliance of the plaintiff matter as well.[56]

4.8 Higher degree damages

Of course the pure economic loss of the plaintiff can also be the consequence of pure economic loss suffered by a third party. A fourth party might be placed in financial difficulty by the third party being injured economically by the second party suffering damage in his financial or other interests.

It is highly unlikely that such a claim will ever be allowed in the Netherlands. Many writers assume that 'higher degree' damages should only be compensated under very specific circumstances.[57] And this seems to be consistent with our analysis of the problems a third party might be faced with. A higher 'degree' generally means more buffers and more possibilities for the plaintiff to take precautions.

52. HR 10 December 1993, NJ 1994, 667 (Rabobank/Van Ittersum).
53. HR 2 December 1994, NJ 1996, 246 (Coopag).
54. HR 9 June 1995, NJ 1995, 692 (Finad/Worst).
55. Jansen & Van der Lely 1998, p. 44.
56. Van den Akker (forthcoming).
57. Spier 1996, p. 314; De Bie Leuvelink Tjeenk 1997, p. 234.

5 Conclusion

In § 1.5 we have seen that in the Netherlands in general no threshold exists for a pure economic loss claim. An issue of pure economic loss liability is just another instance of our 'fault liability', which develops on a case by case basis. Are we not afraid of opening the 'floodgates'? Water is silently flowing everywhere in Holland and the art of controlling it is in-built in our society. Perhaps the Dutch are too confident that they can control liability by a case to case development of tort law. But until now the argument that liability is extending too far has not been heard very often in the area of pure economic loss. When it was put forward, it mostly related to liability for personal injury, especially that of the employer for accidents and diseases relating to the workplace. Or to the liability for environmental damage caused in the past. The only instance of liability for pure economic loss that is disputed, is possibly the one of auditors and accountants towards third parties relying on their statements. But this problem is dealt with as a separate issue and not as a signal that something is wrong with the compensation of pure economic loss in general.

Are we looking to the legal systems of our neighbours? We are. In recent years liability for pure economic loss has become a separate object of study, mainly in writings that compare Dutch tort law to other systems.[58] But until now there have been no suggestions that the general reluctance to compensate pure economic loss in some other systems should be carried over to Dutch law.

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58. See note 2.

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