COMPENSATING FOR PURE ECONOMIC LOSS IN LIBERAL, PRAGMATIC, AND CONSERVATIVE REGIMES OF TORT: WAYS OF CONCEPT IMPLEMENTATION IN UKRAINE

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Abstract. One of the most controversial and ambiguous problems in the field of tort law at the international level is the problem of compensation for pure economic loss. To solve it, foreign doctrine and the case law of many developed countries have singled out their own approaches based on the features of specific legal systems. In this article, the author considers approaches to pure economic loss in European judicial practice of the 19th–20th centuries, and determines the ways in which they influenced the development of modern liability regimes. This article also touches on the modern judicial practice of the European Court of Justice. The second part of this paper summarizes the most important features of three modern regimes of tort liability by studying the examples of particular countries. The third section focuses on the approach and the ability to recover pure economic loss in Ukraine, and also provides suggestions on improving and adopting regulation from connected Western experience.

Keywords: pure economic loss, tort liability, Ukrainian civil and commercial law, European civil law, tort liability regimes.

Introduction

The concept of pure economic loss is the most difficult part of the doctrine of tortious liability. The term applies not to a special type of damage or method of calculation, but to a legal basis for recovering damages by tort. Among the features of pure economic loss, the following are important: a victim's losses do not arise as a direct consequence of damage caused to the rights of an individual (damage to property, personality, honor and dignity, etc.); and losses directly affect the financial sphere of the victim (for example, they consist of excessive costs incurred by them in the absence of any original damage to the person or the things of the victim). Despite the fact that the concept is not unknown in modern European case law, it still remains disputed and controversial. It is hard to predict in any specific case whether a court will award a plaintiff or find pure economic losses to be non-recoverable.

It could be said that various legal problems could fit under the concept of pure economic loss. One can begin with liability for negligent statements (on which the plaintiff reasonably relied), ricochet damage to third parties in case of personal injury, and liability for inducing (or profiting from) breach of contract. To assess the chances for being awarded in these situations, the most important issue that should be understood is how the general concept is treated in the legislation of a defined country. Further, we should consider whether and to what extent compensation for such losses is allowed in a particular jurisdiction.

It cannot be disputed that damage caused directly to person's health or property must be recovered under the legislation of a democratic state. However, it remains unclear as to how a person can protect themselves from monetary damage arising as a result of negligent actions that were not accompanied by any physical damage.

Recovery for pure economic loss remains a topic of hot debate among scholars in different European states – especially in Ukraine, where, at the current moment, it has not been properly studied.

In order to shed light on the possibility of recovery it is important to consider the so-called three regimes of tort, because the existence of distinctions on the attitude to pure economic loss inside Civil law systems – liberal, pragmatic, and conservative regimes – have been highlighted. This classification was created in order to predict how lawyers of

a particular country can justify their decision regarding the possibility or non-possibility of compensation for pure economic loss.[1] For example, in countries of liberal regime, like France or Belgium, the general clause does not exclude liability, on a general basis, for such kinds of damage. On the other hand, in German legal practice, there are concerns about "liability in indefinite quantities, to an indefinite circle of persons" – a feature of conservative regimes.

As was mentioned, in Ukraine the problem of pure economic loss has not been the subject of wide scientific debate. Today, the reformation of the Ukrainian Civil Code is ongoing, serving as a perfect opportunity to point attention towards pure economic loss and determine a single approach to liability. Assigning Ukraine to one of the regimes of tort and harmonizing legislation accordingly could become a potential direction of the evolution of civil liability and bringing legislation up to European standards.

Different scientists have paid attention to the problem of pure economic loss from all over the World. The most popular and comprehensive research was conducted by M. Bussani and V.V. Palmer, W. H. van Boom, H. Koziol, F. Parisi, D. Bogdanov, S. Selelionytė-Drukteinienė, B. Karnaukh, V. Goldberg, and others, and positions on pure economic losses are also expressed in judgements by the European Court of Justice (ECJ).

This topic is significant for students specializing in tort law problematics, legal entities, entrepreneurs, and Ukrainian legal scientists, because the gap in study is now being filled properly. It is also significant for legislators that are today trying to develop new, effective civil regulation.

The main aim of this article is to analyze the concept of pure economic loss, and ways in which different regimes of tort deal with pure economic loss on a practical level. This will involve determining whether it is possible to introduce the institute of pure economic loss into Ukrainian legislation. In order to achieve this aim, the following objectives were formulated:

1) to delve into the historical background of the concept of pure economic loss;

2) to study the three main regimes of tort liability and determine

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[1] Mauro Bussani and Anthony James Sebok, *Comparative tort law: global perspectives* (Cheltenham, UK: Edward Elgar Publishing, 2015), http://search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&db=nlabk&AN=1057217.

which options for compensation of pure economic loss exist;

3) to determine how pure economic losses are treated in Ukraine.

To achieve these aims, the author used: the method of content analysis, by looking deeply into scientific literature and collecting information from judicial practice and legal acts; the method of case study, by becoming acquainted with the legal regulations of European countries; the comparative method, by comparing international approaches to the Ukrainian one and determining to which Ukraine could be referred; and the non-empirical method, i.e., finding subject material for the research in the article from books, scientific articles, legal statutes, and judgements.

1. The general concept of pure economic loss: ways of development

In this part of the article, the wider concept of pure economic loss is proposed and the history of establishing this notion is researched. This is achieved by touching on Roman history, Medieval European judicial practice, and the modern approaches taken by the ECJ.

1.1. The concept of pure economic loss

Today, in most countries the concept of pure economic loss and ways to gain remedy for suffering these kinds of losses remains unexplored. The lack of a clear definition of pure economic loss at the legislative level and the uncertainty of the basic principles and rules of application of this concept in the theory of tort liability complicate this situation. This also leads to a diversity of points of view on this topic – not only inside different legal systems, but even within European countries.

As mentioned by M. Bussani and V.V. Palmer, European legal systems have still not selected a common approach to the issue of pure economic loss. In European jurisdictions where it is possible to recover pure economic loss, different definitions and understandings of this concept are used.[2] Some European countries do not recognize pure economic loss as a separate type of damage, and others do not recognize it at all. Discussions

[2] Mauro Bussani, Vernon Valentine Palmer and Francesco Parisi, "Liability for Pure Financial Loss in Europe: An Economic Restatement.", *The American Journal of Comparative Law* 51, 1 (2003): 113–162. https://doi.org/10.2307/3649142.

are being held both on the matter of deriving a generally accepted definition and across the appropriateness of reimbursement.

To explain widely and very generally, pure economic loss could be defined as monetary damage that does not arise from causing damage to life, property, or other legal interests.[3] These two generalized approaches, in respect of defining the features of pure economic loss, were suggested by Ludwig Von Bar in 1999.

Scholarly interest arose with a variety of approaches to the concept pure economic loss and the fact that some legal systems do not even recognize it, or divide it into a separate form of damage. This takes into consideration the idea in European law that pure economic loss is not a novelty, which started to develop from Roman times.

1.2. Historical background

The norms of *Corpus iuris civilis* under Justinian allowed plaintiffs to gain remedies in tort if a defendant caused them harm negligently or intentionally, with two limitations: damage must have been done physically, and the plaintiff must have been able to recover. Medieval jurists recognized that a plaintiff could, for example, claim damages for the disclosure of their secrets, claim for unprofessional service, or even receive compensation after unknowingly, relying on the principle of good faith, continuing to serve in slavery, not knowing that they were already free. However, medieval jurists did not divide between the concepts of loss and pure economic loss; they assumed that a person could recover from a situation where their *patrimonium* had decreased.[4]

It was only between the 16th and 18th centuries that scholars began to divide between the nature of loss and develop an independent concept that would allow a plaintiff to seek remedy not only for the thing that they actually lost, but also for lost income or profit in future. Natural law scholars also misinterpret and have different points of view on the amount of compensation for pure economic loss. For example, Thomas Aquinas took the following position: "...man is bound to make *restitutio* for whatever of

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[3] Ludwig von Bar, *A History of Continental Criminal Law* (The Lawbook Exchange Ltd., 1999).

[4] Mauro Bussani, Vernon Valentine Palmer, *Pure Economic Loss in Europe (The Common Core of European Private Law*) (Cambridge: Cambridge University Press, 2003).

another's he harmed. ... [if] someone harms another by preventing him from acquiring what he was on the way to have. And compensation of an equal amount need not be made for such harm, for it is less to have such thing virtually than to have it actually. ... he is bound, however, to make compensation according to the condition of persons and affairs."[5] Aquinas claimed that compensation for losing an unobtained benefit should be paid, but not in the entire amount, because when a person has something only potentially, it is only a matter of incident as to how they might lose that profit.

Another scientist, Soto, agreed with Aquinas only partly. Soto accepted that if someone caused damage unintentionally, then they should pay in lesser amounts than the value of the lost income, but if a person caused harm intentionally, then the owner should have the right to full restoration of what was not taken. "...Who destroys another's thing against [owner's] will is not only bound to restore the amount that it is worth in hope but, the amount it will be worth."[6]

The most categorical position, which would later find itself as one of the pillars of the early German understanding of pure economic loss, was expressed by Cajetan. He denied every right to grant recovery of damages for something a person never possessed physically.

This opinion was adopted by German lawyers from the 19th century, as they expressed the idea that a defendant should be liable for harm to physical property. As expressed by Oberlandesgericht of Lubeck in 1838, "...it would have the most serious consequences to grant a claim for every disadvantage that anyone suffers from the action of another."[7]

Prohibition for recovery of pure economic loss thus emerged in Ger-

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5 Tomas Aquinas, *Summa theologiae, II-II,* https://www.gutenberg.org/ebooks/18755, Q. 62, a. 4.

6 Dominici Soto, *De iustitia et iure libri decem,* https://books.google.lt/books/about/De_iustitia_et_iure_libri_decem_reuerend.html?id=ME0_ngAACAAJ&redir_esc=y, lib. 4, q. 6, a. 5.

7 Oberlandesgericht, Lubeck, Decision of 13 October 1838, A.A. Seuffert's (1867), Cit. by *Pure Economic Loss in Europe* (Cambridge University Press, 2003), https://books.google.lt/books?id=BbD4Za3oTo0C&pg=PA37&lpg=PA37&dq=Oberlandesgericht,+Lubeck,+Decision+of+13+October+1838&source=bl&ots=uQ3kn9F-63w&sig=ACfU3U3yxNsaU30LMod9Pnw0ImYyTltcNA&hl=lt&sa=X&ved=2ahUKEwiUv7yB7_L2AhUKAxAIHT9lBZcQ6AF6BAgDEAM#v=onepage&q=Oberlandesgericht%2C%20Lubeck%2C%20Decision%20of%2013%20October%201838&f=false.

many, where the Civil Code established the principle of protection of only absolute rights – but not contractual rights, because they were considered to be relative.[8] Today in Germany, economic harm can be recovered only if caused intentionally.

English courts made similar statements and suggested that one should not harm another's property, nor contractual rights. Such an opinion was expressed in the case of *Morrison v. Steamship Co. Ltd. v. Greystoke Castle* (1946). Sir William McNair made the following conclusion, according to the materials of the case: "Liability or damage arising from a contract with a third party gives no ground for a claim for damages in an action for negligence against a wrongdoer, unless the liability or damage arose from physical injury to the plaintiff's person or to property, owned by or in the possession of the plaintiff."[9]

For a long time, English courts have maintained the view of a special approach to negligent tortious claims. Material damages were compensated only in case of property damage or damage to life or health. This trend was interrupted by the case of *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* (1964), where an application was brought before the English court.

The House of Lords allowed pure economic loss to be recovered due to negligent actions. The plaintiff had brought an action against the defenders for a negligent misstatement concerning the financial status of the business client who had placed a large advertising order with the plaintiffs. The court believed that liability from a negligent misstatement could arise where there was a special relationship between parties. Another necessary condition is the existence of reasonable grounds for one of the parties to rely on the special knowledge or the statement provided by the defendant.

Responsibility arises if it is proven that the plaintiff reasonably relied on the information provided by the defendant. Such a reliance should be the direct reason for the pure economic loss suffered by the plaintiff. These principles of negligent misrepresentation and reliance have been applied

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8 Hao Jiang and Chi Hin Peter Chan, "The Rule against Recovery of Pure Economic Loss in China: A Misconceived Doctrine", *Tulane Law Review* (2021), https://scholars.cityu.edu.hk/en/publications/publication(b6b46b2f-701a-4963-85a4-7a14d466e7).html.

9 "Morrison Steamship Co Ltd v Greystoke Castle (Cargo Owners): HL 1946.", Swarb.co.uk., December 2, 2020, access 20 March 2022, https://swarb.co.uk/morrison-steamship-co-ltd-v-greystoke-castle-cargo-owners-hl-1946/#:~:text=Advertising-;.

repeatedly in cases of professional negligence.[10]

The Italian case of *Torino calcio c. Romero* (1971) became a perfect example of the general clause of liability that is characteristic of the liberal regime. On October 10th, 1967, Luigi Meroni, a player for the Torino football club Torino calcio, was killed in a car accident by Attilio Romero. Torino calcio demanded that Romero pay damages for its lost position in the Italian football league, as a result of being deprived of its star player, Luigi Meroni. The case was finally decided by the Court of Cassation.[11]

The Court of Cassation, when adopting its decision, used the Aquilian liability principle, which related to the ancient Roman lex Aquilia of the 3rd or 2nd century BC. This provided liability for causing damage to a slave or an animal that led to financial consequences for their master. The Court of Cassation decided this kind of liability is applicable not only to damage to things, but also to relative rights, as was the relation between Luigi Meroni and Torino calcio.[12]

The concept of compensation for pure economic loss has evolved and taken shape since Roman times. Although *Corpus iuris civilis* recognized the possibility to recover purely economic damages, the historical experience of certain countries, mentalities, and approaches to responsibility influenced the modern attitude to pure economic loss in modern Europe. At present, the liberal, pragmatic, and conservative regimes which exist in the Civil law system have their own principles, policies, and rules of application. There is still no consensus among the countries of Civil law on the phenomenon of pure economic loss.

1.3. The attitude of the European Court of Justice to pure economic losses

The ECJ has not paid a lot of attention to the pure economic loss con-

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10 Mrs Grace Xavier and Eliza Stephen, "Pure Economic Loss in Construction Cases – Revisited", *The Law Review 2021*: 60-79, https://www.researchgate.net/publication/354117838_Pure_Economic_Loss_in_Construction_Cases_-Revisited.

11 Jakub J Szczerbowski, "Heuristics and the Problem of Pure Economics Loss", *Principia* 65 (2018): 35–47, https://doi.org/10.4467/20843887pi.18.001.9884.

12 "Corte di Cassazione, sezioni unite, sentenza 26 gennaio 1971 n. 174", Allegato al n. 1: "L'ingiustizia del danno (1)", Lex Aquilia Giurisprudenza (Zanichelli, 2005), https://elearning.unite.it/pluginfile.php/166224/mod_folder/content/0/TUTELA%20AQUILIANA%20DEL%20CREDITO%20-%20CASO%20MERONI%20CASS%20CIV%20174%201971.pdf?forcedownload=1.

cept, but has covered some important issues.

The Court allows pure economic loss to be recovered for damage caused by a European Union institution. In the opinion of the ECJ, a plaintiff could recover if they found themselves within a group which the breached provision protected. Moreover, the ECJ addresses pure economic loss not as a single concept, but as one of many modalities of damage that could be caused.

In *Brasserie du Pêcheur v. Germany* and *R (Factortame) v. SS for Transport (No 3)*, the Court rejected the possibility of total exclusion of the pure economic loss concept from state legal regulation, but had not yet decided on grounds and scope for compensation. The defined approach here is that recovery could not be automatically derived from the fact that lost profit should be compensated.[13]

The ECJ also paid attention to the problem of establishing applicable international jurisdiction for international pure economic loss disputes. According to the general Brussels I rule, the court of the defendant's residence should proceed with international disputes. However, in case of economic harm, this could deprive the plaintiff of award simply due to the differences in the approach to pure economic loss within another state.

Recently, the ECJ established two factors that should be considered if such situations arise. Firstly, a connection between dispute and forum should exist, which would allow proceedings to be conducted effectively. Secondly, the place of consideration that the plaintiff could choose should be understandable and predictable for the defendant.[14]

In cases of international pure economic loss disputes, the matter of applicable jurisdiction should depend not only on a comprehensive inves-

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[13] Helmut Koziol, Reiner Schulze and Luisa Antoniolli, *Tort law of the European Community* (Vienna: Springer, 2008), https://search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&db=nlabk&AN=340412.

[14] In the *Konsumenteninformation v. Volkswagen AG* (Case C-343/19, EU:C:2020:534) case, brought against a German vehicle manufacturer by Austria (ECJ, Rs 343/19), the court ruled in favor of the plaintiffs, affirming their domestic regulation, instead of applying the Brussels I rule, that disputes should be resolved in the defendant's state. The plaintiffs referred to their right to sue in matters relating to tort in the country where damage occurred. However, with pure economic loss it seems impossible to accurately determine a clear localization of damage, so the question of where case should be heard remained uncertain. Although the court did not present the common rule nor circumstances for applying an exception and allowing the plaintiff's domestic regulation to be used, factors that should be considered were established.

tigation of existing relations between parties, but also on the ability of the judiciary of the plaintiff's state to investigate the case properly.

2. Liberal, pragmatic, and conservative regimes of tort liability

In this section, the three regimes of tort liability are studied: first, the liberal regime, via the example of the French liability model; second, the English pragmatic approach; and third, the conservative regime, represented by the German legal system.

2.1. What are the three regimes of tort?

Modern scholars have not yet developed a single approach or set of criteria to compensate for pure economic loss. Criteria for allowing recovery vary depending on a specific country's legal traditions, liability regime, and features of legislation. Palmer and Bussani divide three regimes of tort: liberal, pragmatic, and conservative. In their study, these scholars provide an opinion on revocability: if pure economic loss is caused by the breach of duty, established by law, it is revocable.[15] Looking through different judicial practice, it is also clear that when a party faces pure economic loss inside contractual relations, it is more likely that they can be compensated, but if the loss is caused without parties being bound by contract, then it is mostly impossible to recover.

There is no single relation on the revocability of pure economic loss. In one European country it could be practically impossible to recover such damages, but in a more permissive jurisdiction a victim could likely be rewarded. The most popular and convenient way to distinguish is the division of liability regimes into liberal, pragmatic, and conservative.

These models were highlighted from two alternative formulas of liability: there may be liability whenever a person causes damage to another, or the principle of *neminem laedre*; and there may be liability only in certain situations. Thus, every existing liability regime could be considered as a variation of these two polarities. Regimes were distinguished

[15] Laura M. Henderson, "Conceptualizing Pure Economic Loss in the European Union: An Observation of Liability Law in the Member States and the European Union", SSRN (December 2009), https://dx.doi.org/10.2139/ssrn.1658411.

to help lawyers and scientists understand the general and probable paths that judges in different countries will follow in deciding in cases of pure economic loss. These approaches themselves are based on the specifics of legal orders and the mentalities of different countries. The brightest representatives of their respective regimes are France, England, and Germany, along the examples of which it would be easy to proceed.

2.2. The liberal regime: The French Civil Code

The liberal regime group includes jurisdictions where tort law is based on the unitary general clause, i.e., the rule on compensation for damage caused (regardless of its nature), subject to all conditions of liability. In liberal jurisdictions, the concept of pure economic loss is not recognized as a separate one, and legal acts do not list the values that should be protected. Such a situation gives judges nearly unlimited freedom to decide which damage should be compensated in each particular case and to what extent.

Among countries where legislation defines a unified approach to compensation for damage we could mention France, Belgium, Italy, and Spain. The Civil Codes of these jurisdictions do not object to compensation for purely economic damage if all elements of fault liability are satisfied. Liberal regimes deal with pure economic loss with no need for the existence of a separate contractual relationship between the parties, but autonomously in tort.

The French regime is the benchmark in terms of offsetting pure economic loss. This is due to the fact that the unitary general clause is clearly expressed in French legislation, which means that any action of a person that causes harm to another obliges the person guilty of causing it to compensate for this harm (Art. 1382 of the French Civil Code). To rephrase, according to the unitary general clause, the infliction of harm in itself can already serve as the basis for the emergence of a tort obligation; that is, we can say that any infliction of harm, whether deliberate or reckless, is recognized as unlawful and is subject to compensation.

Along with this, France also recognizes the *neminem laedre* principle. Article 1383 widens the provision of not causing harm, and adds that every person is liable not only for their actions of fault, but also for negligence. Both articles are highly abstract and require commentaries that are

provided by the judiciary.

In the understanding of French legislators, it is forbidden to cause any kind of harm to a person, and the situations where damage could be justified are very rare exceptions.[16] For example, a popular supermarket could be opened by an entrepreneur near an old butcher's shop, and fair competition could force the butcher to close their stall. In this case, the entrepreneur would have caused economic loss to the butcher, but would not be liable. However, this is an exception, and the general rule enforces liability for damage caused.

Due to the abstract and archaic provisions of the Civil Code, the French courts had to elaborate on their legislation. Methods to prevent non-justified or irrational claims, requirements, and exceptions in cases of recovery for damage were developed by case law. In the opinions of judges, for damage to be recovered it should have been caused to a legally protected interest, harm should be obvious without any doubt, and the loss should be caused directly by the defendant's actions. Burden of proof of causation lays on the plaintiff, but they are not obliged to prove the existence of duty of care. Indirect causation is the main reason why the liberal regime does not recover pure economic loss.

An example of applying this control mechanism could be a case where a singer suffered an accident and had to cancel a show, so the organizer of the concert tried to sue the person that caused them physical damage and economic loss. Here, the causation was indirect, so the claim was dismissed by French Court of Cassation.[17]

Another control mechanism in France is the standard of behavior. For example, *le bon pere de famille* or head of a great family means that behavior should correspond to the principles of loyalty, honesty, and good faith.

Pure economic loss in France is not divided into an independent concept, and questions regarding recovery and liability for causing damage are considered to be non-contractual. Under French law, economic loss appears to be the result of an attack on someone's property; therefore, it has no independence and should be considered in connection with physical damage or injury. Moreover, the lack of clear understanding as to the criteria to hold a person liable for pure economic loss could possibly lead

16 Radik R. Lugmanov, "Tort Law as a Means of Recovering Pure Economic Losses (in Russian)", *Bulletin of Economic Justice of the Russian Federation* 2 (2019).

17 Cees Dam, *European Tort Law* (Oxford University Press, 2010).

to opposing judgements in similar cases. Although French judges remain among the most liberal in deciding such matters, this risk still exists.

Another significant and important feature of the French model is the non-cummuliarity of tort and contract obligations – this means that if a plaintiff and defendant are bound by contract, then they should sue under contractual provisions, whereas if parties had no contract between them then only then can they sue in tort. This leaves parties without options, taking only pre-designated paths, and such a strict division is only appropriate when terms and guarantees coincide. Despite this, every potential pure economic loss claim is more likely to be satisfied precisely in France.

Lacking a definite concept of pure economic loss and taking into account a unitary general clause that protects from any kind of damage caused, the liberal French regime has no principal objections to recovery of pure economic loss – it only depends on questions around whether the elements of *faute* are satisfied. The non-contractual nature of this concept also allows plaintiffs to avoid falling deeper into the principles of contract law and liability, instead dealing autonomously in tort. Finally, in a general sense, there are no limits to what constitutes an injury, although practically these boundaries have been established by case law.

Finally, France is familiar with the principle of full reparation, which means "to restore as exactly as possible, the equilibrium destroyed by the damage, and to place the victim in the situation, where he would find himself if the act causing the loss had not taken place."[18] This generous rule only finds exceptions in the nature of harm and whether it was caused directly by the defendant's actions, wherein the harsh standards of causal link should be complied with to recover damage in full. To conclude, France presents maximum permissiveness towards pure economic loss, and the French system allows for compensation even in so-called cable cases that are connected with rebound loss.

2.3. The pragmatic regime: English policy

The essence of the pragmatic tort liability regime is that courts consider each case separately, departing from universal principles. Each decision is made after a consistent, comprehensive assessment of the facts and

[18] Geneviéve Viney and Patrice Jourdain, *Traité de droit civil, sous la direction de Jacques Ghestin, Les conditions de la responsabilité, 2e éd.* (Paris, 1998), https://www.lgdj.fr/les-conditions-de-la-responsabilite-9782275033976.html .

evidence in a particular case, and the legal policy of the state is also taken into account. According to the general rule, there is no obligation to compensate for pure economic loss. Awarding compensation depends on the nature of the wrongful act, and in mostly cases damage should be caused deliberately and as a result of breaching contract duty.[19]

The case of *Spartan Steel v. Martin* (1972) is a well-known precedent, on the basis of which it is convenient to explain the differences between loss and pure economic loss. According to the case, "an electrical cable supplying electricity to a steel plant was damaged during construction work."[20] As a result, the heating in a furnace stopped, and molten metal took on a solid form.

The plant suffered: physical damage due to hardened metal in the furnace at the time of shutdown; indirect economic damage in the form of lost profits that the plant received from the sale of hardened metal; and pure economic loss as a loss of profit due to the inability to continue processing new metal, which, in turn, was caused by the de-energization of electrical equipment.[21] This example, taken from English case law, gave a name to a whole category of so-called cable cases.

In England, the general rule denies the possibility to prosecute for pure economic loss, but in judicial practice well-known exceptions exist that not only satisfied the plaintiff's claims, but became significant for the development of the entire concept.

The mostly significant precedent is *Hedley Byrne v. Heller* (1984). As a result of the reviewal of this case, judges established the Hedley Byrne principles, which are in use even today. This decision was radical for Eng-

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19 In *Murphy v. Brentwood*, the District Council (1992) rule was established, that "pure economic loss are only recoverable if they flow from a breach of contractual duty. In the absence of a special relationship of proximity, they are not recoverable in tort". Lord Bridge explained that liability for pure economic loss could be denied if there was no contract between parties. The absence of contractual relationships makes pure economic loss unrecoverable, because no duty of care in such a case could exist between plaintiff and tortfeasor. An exception could be made if the object of dispute could be a potential source of injury to persons or property. Lack of proper evidence or detailed technical investigation makes it impossible to bypass the general rule, as happened in the case of *Thomas & Anor v. Taylor Wimpey Developments Ltd & Ors* (2019).

20 Gary Coveney, "Who said you can't have it all? The perils of ignoring risk allocation in cases of relational economic loss", *Bond Law Review* 19, L (2007), Art. 4.

21 Tamar Gidron and Boaz Shnoor, "Pure Economic Loss–the Israeli Review", Papers. ssrn.com. (2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1428906.

land, and constructed the concept of reasonable certainty which allowed claimants to recover for negligently made statements which have caused damage.[22] The House of Lords then provided requirements which should be satisfied to gain remedy. There must be special relationships between parties, voluntary assumption of responsibility by the defendant, and reasonable reliance of the plaintiff on the information or advice of the other party.[23]

Another precedent that tried to widen the possibilities to recover pure economic loss was the Anns two-part test, introduced by Lord Wilberforce in 1978. This test consisted of two questions that should be answered in order to find a defendant liable.

First, one should ask whether, between the alleged wrongdoer and the person who has suffered the damage, there is a sufficient relationship so that carelessness may be likely to cause damage. Secondly, it is necessary to consider whether there are any considerations which ought to negate, reduce, or limit the scope of the duty of care.[24] Because of the introduction of the Anns test, the conformity mark was created in order to recover pure economic loss on par with other forms of damage. However, this rule did not exist for long in England, as judges felt that applying the Anns test led to criticism from the general public and even from within the courts. This led to the overruling of the Anns test and a move back towards the pragmatic understanding that, in general, there is no liability for pure economic loss.

Today, English judges and judges of other pragmatic regime countries (such as Scotland, Israel, and the Netherlands) ground their decisions on the recovery of pure economic loss on the duty of care criteria – that pure economic loss cannot be even considered by a court if there was no duty of care established. The existence of this duty is the only question that matters, and each new case requires an independent determination as to whether it should exist at all. There are no criteria at the legislative level to establish the existence of this duty; instead, this relies on the judge's discretion in each situation.

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22 The *Hedley Byrne* case allowed the claimant to recover for economic loss, which concerned negligently made statements that distinguished from negligent acts. The latter, traditionally, is not a ground for recovery of pure economic loss.

23 Catherine Elliott and Frances Quinn, *Tort law. 3rd edition* (2001).

24 "Anns v. Merton London Borough Council (1977) AC 728", https://www.casemine.com/judgement/uk/5a8ff8ca60d03e7f57ecd7a9.

Today, it is obvious that judges in pragmatic regimes are moving towards a more cautious, step-by-step approach without obligatory adherence to any general, unified rule. In Caparo Industries plc v. Dickman [1990], the House of Lords established more restrictive conditions for the duty of care to arise. Thus, the simple understanding of the defendant that the information received from them can be used by the plaintiff is not enough to create a duty of care,[25] and cannot be considered as reasonable reliance of the plaintiff on the information provided.

To sum up, in pragmatic regimes courts hold to the policy that pure economic loss should be compensated by using contract remedies, rather than through the courts by using an action for negligence.[26] Despite the traditional adherence of Anglo-Saxon judges to the exclusionary rule, there are cases of successful recovery of such loss.[27]

Tort-filed claims for pure economic loss may be successful if the plaintiff proves the existence of three circumstances: 1) the respondent's duty of care; 2) violation by the respondent of this duty; and 3) damage caused to the plaintiff resulting from its violation. If there is no obligation, for example, to take care of the plaintiff, then there could be no consequences for negligence under the pragmatic regime.[28]

2.4. The conservative regime: The German Civil Code

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25 "Caparo Industries plc v. Dickman [1990] 1 All ER 568", https://casebrief.fandom.com/wiki/Caparo_Industries_v_Dickman.

26 Chris Turner and Sue Hodge, (2007). *Unlocking torts. 2nd edition* (2007), 222.

27 See: Hedley Byrne & Co Ltd v. Heller & Partners Ltd [1964] AC 465, https://www.isurv.com/directory_record/2713/hedley_byrne_and_co_ltd_v_heller_and_partners_ltd; Henderson v. Merret Syndicates Ltd [1994] 3 All ER 506, https://lawprof.co/tort/kinds-of-damage-cases/henderson-v-merrett-syndicates-1994-3-all-er-506/, where House of Lords used the category of voluntary acceptance of responsibility by a person, which may be the basis for compensation for pure economic loss; White v. Jones [1995] 1 All ER 691, https://www.casemine.com/judgement/uk/5a8ff8cb60d03e7f57ecd7f1 - the Court considered the long delay of the solicitors to draw up the amended will as pure economic loss that could be reimbursed.

28 Mauro Bussiani and Vernon Valentine Palmer, *Pure Economic Loss in Europe* (Cambridge : Cambridge University Press 2003), https://beckassets.blob.core.windows.net/product/readingsample/380169/9780521824644_excerpt_001.pdf, Op. cit. P. 179–180 (Case 1: cable I — the blackout); p. 196 (Case 2: cable II — the factory shutdown); p. 214–215 (Case 3: cable III — the day-to-day workers); p. 231 (Case 4: convalescing employee); p. 247–248 (Case 5: requiem for an Italian all star); p. 316–317 (Case 9: fire in the projection booth); p. 333 (Case 10: the dutiful wife); p. 511–512 (Case 20: an anonymous telephone call).

In European Union states such as Germany, Sweden, Poland, and Austria, pure economic loss is considered as a type of damage in tort and, in general, is not revocable. These are countries of conservative regimes, which implies the most negative attitude towards the admissibility of compensation for pure economic loss. Inside these regimes, contrary to the liberal approach, lawyers apply doctrines and develop causation arguments not in order to determine how pure economic loss could be compensated but to reject as many claims as possible. A red line of this regime is that pure economic loss is not affected by the concept of existing absolute rights that should be protected in tort.

According to Article 823 of the BGB: "A person who, intentionally or through negligence, unlawfully inflicts harm on life or health, encroaches on the freedom, property or other right of another person, is obliged to compensate the victim for the harm caused."[29] The second part of this article clarifies that the obligation to compensate for harm arises only in the presence of fault.

The German legislation recognizes the right to compensate for negligence, but still specifies that such harm can only be recovered in the presence of fault. As such, according to the provisions of the BGB, certain conditions for allowing compensation in tort should be satisfied: the wrongfulness of the defendant's actions; the presence of guilt; a causal link between the harm and the delinquent's unlawful behavior; and the existence of damage. The German legislation also only considers damage that was directed *contra bonos mores* (against good morals).

Despite the fact that the norms of Article 823 BGB could seem wide, recovery for pure economic loss can be possible only if a law, the purpose of which was to protect a certain economic interest of another person, has been violated. In general, the BGB does not protect against loss of goodwill, market opportunities, or any other pure economic interests.[30]

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[29] "Bürgerliches Gesetzbuch (BGB) § 823 Schadensersatzpflicht", https://www.gesetze-im-internet.de/bgb/__823.html, (I), (II).

[30] See, e.g., BGH December 18, 1972 (BGH, 18.12.1972 - III ZR 121/70, https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BGH&Datum=18.12.1972&Aktenzeichen=III%20ZR%20121%2F70), NJW 1973, p. 463, at p. 464, stating that § 823 BGB does not protect against 'allgemeine Vermögensschäden und bloße Vermögenseinbußen durch Vertragsverletzungen' (BGH, 17.07.1973 - 1 StR 61/73, https://dejure.org/dienste/vernetzung/rechtsprechung?Text=NJW%201973,%201985; Bürgerliches Gesetzbuch (BGB) § 823 Schadensersatzpflicht, https://www.gesetze-im-internet.de/bgb/__823.html).

According to the existing German Civil Code, a claimant may only sue within the provisions of a contract. Compensation for pure economic loss under tort law is impossible, since the legal model of tort liability does not allow for such a remedy. This is another characteristic of conservative regimes: revocability of pure economic loss is a rare exception, and remedies must be determined either by contract terms or specific tort provisions.[31]

Palmer and Bussani proposed two reasons why the role of the contract is wide in this system. Firstly, tort law is considered too weak for recovering and safeguarding all financial interests that require protection. Secondly, giving prior role to these contracts seems safer for legislators since there is less risk of groundless recoveries and compensation would only be awarded if breach of contract provisions occurred.[32] Thus, according to the general rule in force in Germany, if loss occurred not as a result of causing physical harm to absolute benefits, as mentioned in Article 823 BGB, and not resulting from violation of contractual norms, then it cannot be compensated.

Legislators avoid the possibility of compensation for pure economic loss as much as possible, and Article 903 BGB mentions the following possibility: "The owner of a thing may, to the extent that a statute or third-party rights do not conflict with this, deal with the thing at his discretion and exclude others from every influence."[33] Such influence could affect not only physical possession, but also the impossibility of using the thing for its intended purpose, which, among other things, reduces its value.

The provisions of Article 903 definitely make it possible to compensate for economic loss; however, judicial practice does not contain a single answer as to in which cases the impossibility of using a thing itself, without the presence of physical damage, violates the rights of the owner in the context of Article 823. In analyzing cases that satisfy such claims,[34] it is

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31 Bussani, *supra note*, 6: 125.

32 *Ibid*, 150.

33 "Bürgerliches Gesetzbuch (BGB) § 903 Befugnisse des Eigentümers", https://www.gesetze-im-internet.de/bgb/__903.html.

34 For example "Schuten im Fleet"case BGH. 21.12.1970 — II ZR 133/68. Claim by owner of boats for blocking of waterway owned by German state caused by work to prevent collapse of house on collapsed bank Claim against German state for culpable breach of duty by constitutionally appointed organs to maintain waterway based on §§ 823 I, 89 and 31, not § 839 and Art 34 GG Interference with property right in

clear that loss can be satisfied only if the deprivation of the use of the thing was complete and lasted long enough. The denial of recovery under Article 903 could be seen in a case where an excavator damaged a cable, which resulted in a halt in production. The Court denied remedies[35] because the production could continue its work; despite damage being caused, troubleshooting did not take a long time, and the only consequence of the incident was a decrease in production volumes – not a complete halt.

In the German conservative regime, pure economic loss can be compensated for, but only in very limited and exceptional situations. The best guarantee that harm will be recovered is the existence of a clause inside a contract. The central BGB articles could also satisfy a plaintiff's claims, but only if a law aimed at protecting the victim existed and was breached. Thus, in order to compensate for pure economic loss in a pragmatic regime, it is necessary to establish the existence of a special rule that would provide protection to the economic interests of the victim.

3. Legal approaches to compensation for pure economic loss in Ukraine

In Part 3, Ukrainian legislation and tendencies for development are examined, and proposals based on the previous study are made.

Ukrainian civil law inherited from its Soviet predecessors a widely formulated provision of the Civil Code on tort obligations: "damage caused to the person or property of a person, as well as damage caused to the property of a legal entity, shall be reimbursed in full by the one, who caused the damage." According to the prevailing point of view in domestic law, this rule expresses the principle of general clause.[36] Such views are based on a broad interpretation of the term property, which includes not only things but also property rights, both absolute and relative. However, in the modern literature it is quite reasonable to point out that such a uni-

respect of trapped boat or BGH NJW 1984, 2569 II. Civil Senate (II ZR 234/83) case of building harbour against owner of barge. Owner of barge was found liable, for damage done to a third party by the fault of any of the crew in the execution of his functions.

35 BGH, 12.07.1977 - VI ZR 136/76, https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BGH&Datum=12.07.1977&Aktenzeichen=VI%20ZR%20136/76.

36 Gidron, *supra note*, 23.

tary general clause can be easily interpreted, as it protects only absolute rights.

Until recently, Ukrainian courts bypassed any possibility of compensation for pure economic loss on the ground of a broad interpretation of paragraph 1 of Art. 1064 of the Civil Code. As T. Krysan pointed out, "[the recent] practice of enumeration of a civil offense by the courts prevailed and the opinion, that if the plaintiff did not prove the composition of the offense (in many cases – without specifying what precisely plaintiff should prove) significantly reduced the value of damage, as means of legal protection."[37] Within the legal framework of a civil offense, the biggest problem was proving wrongdoing as an action that violated relative rights.

Most countries that are today considered to be candidates for entering the European Union have now completed the EU integration process, while Ukraine is only at the beginning of this journey. The harmonization of national legislation on pure economic loss with that of the European community remains a challenge. Therefore, in order to promote and improve the process of legal adoption in Ukraine, it is necessary to intensify cooperation between Ukraine and countries that pursue a similar goal, at both the governmental and expert levels, in the following areas:

1. Development of national programs for the adoption of the acquis communautaire and preparation for EU membership;

2. Establishment and proper functioning of parliamentary committees specializing in European integration. Exchange of experience at the level of compliance with European standards on pure economic loss (in particular ones, established on ECJ practice);

3. Different methodological approaches to convergence, taking into account the sources of EU law, CFSP, and JHA:

- directives,
- regulations;
- decisions;
- general principles of EU legislation;
- general positions, strategies, and actions.

4. Carrying out administrative and judicial reform aimed at the application of legal norms, including the basic principles of EU legislation on pure economic loss as a direct effect and application, the predominance of

[37] T.Y. Krysan, "Classification of losses in civil law of Ukraine", *Actual problems of state and law* 59 (2011): 596.

EU law, and general principles of law;

5. Creation of a mechanism for financing the process of convergence from the state budget and EU funds;

6. Coordination of translation and the development of adopted rules for the translation of community acts on pure economic loss;

7. Reforming the technique of lawmaking in accordance with the requirements for the quality of legal acts in the EU member states in order to avoid gaps, contradictions, vague wording, etc.;

8. Personnel changes and training in state bodies in order to perform the tasks of approximation.

Conclusions

It is safe to say that Ukrainian jurisprudence on compensation for pure economic loss is, at the current moment, gradually being created. Perhaps it is too early to talk definitively about a defined approach that would be systematically applied by courts at all levels. To talk certainly about the model of liability regime, the approach of the country should be predictable and backed up by well-established judicial practice, legislative norms, and traditions.

The European countries that were examined in the article established their regimes on the basis of hundreds of years of history and public mentality inherent to each specific state and their legislative traditions. Still, there is no common view of pure economic loss in the Romano-Germanic legal family.

The conclusion could be drawn that Ukraine should certainly pay attention to the experience of jurisdictions that are close in terms of their nature. However, the most important thing in the process of the integration of the pure economic loss concept into legislation is to study and rely on the country's own experience and legal traditions.

Amendments to the legislation should improve the whole legal system, bring Ukraine closer to the legislative level of the European Union, and provide a step towards development, but should in no way contradict existing legal norms or cause collisions. The Civil Code has all the necessary regulatory prerequisites to compensate for pure economic loss, but still needs a developed political and legal argumentation of such compensation which would guide the courts in complex disputes over the real problems of modern business.