

The compensation of pure economic loss in tort law in Portuguese legal scholarship

von

Marta Livia dos Santos Silva, Porto¹

Introduction

For the past few decades, the compensation of "pure economic loss" has been one of the most discussed topics in Civil Law². Although it is still not recognised nor distinguished as

¹ I would like to thank to Susan Singleton for her very helpful linguistic assistance and José Carlos de Medeiros Nóbrega for the generous comments.

² There are numerous publications on the topic. Cf., in Europe: F. FAUST, "Der Schutz vor reinen Vermögensschäden - illustriert am Beispiel der Expertenhaftung". *Archiv für die zivilistische Praxis*, 210, 3-4, August 2010, pp. 555-579; M. BUSSANI & V. V. PALMER, "Pure Economic Loss: The Ways to Recovery". *General Reports of the XVIIth Congress of the International Academy of Comparative Law*. Utrecht, 2007; H. KOZIOL, "Recovery for Economic Loss in the European Union". *Arizona Law Review*, Vol. 48, 4, 2006, pp. 871-895; J. J. GANUZA & F. GÓMEZ, "Should We Trust the Gatekeepers? Auditors and Lawyer's Liability for Clients' Misconduct". *Indret, Revista para la Análisis del Derecho*, 310, Barcelona, 2005 (http://www.indret.com/pdf/310_en.pdf, last visited: 01.04.2011); A. MENEZES LEITÃO, "Os danos puramente económicos nos sistemas da Common Law - II (Jurisprudência Norte-americana)". *Estudos em homenagem ao Prof. Joaquim Moreira da Silva Cunha*. Coimbra, 2005, pp. 19-38; F. BLOBEL, "Der europäische Deliktgerichtstand und reine Vermögensschäden". *The European Legal Forum*, 3-2004, München, pp. 187-191; A. MENEZES LEITÃO, "Os danos puramente económicos nos sistemas da Common Law - I". *Estudos em homenagem ao Prof. Joaquim Moreira da Silva Cunha*. Coimbra, 2002, pp. 197-218; H. HONSEL, "Der Ersatz reiner Vermögensschäden in Rechtsgeschichte und Rechtsvergleichung". *Festschrift für Werner Lorenz zum 80. Geburtstag*. München, 2001, pp. 483-508; G. O'SULLIVAN, "Negligence: Is Pure Economic Loss a Lost Cause? Recent Changes in English Law & their Possible Influence on Irish Law". *The Irish Student Law Review*, Vol. 1, 2001, pp. 109-125; C. L. DESCHAMPS, "La réparation du préjudice économique pur en droit français". *Revue Internationale de Droit Comparé*, 50, 2, 1998, pp. 367-381; G. W. DECKU, *Zwischen Vertrag und Delikt: Grenzfülle vertraglicher und deliktischer Haftung, dargestellt am Beispiel der Berufs- und Expertenhaftung zum Schutze des Vermögens Dritter im deutschen und englischen Recht*. Frankfurt am Main, 1997; C. v. BAR, "Negligence, Eigentumsverletzung und reiner Vermögensschaden. Zu den Grenzen der Fahrlässigkeitshaftung für reine Vermögensschäden in der neuen Entwicklung des Common Law". *Rechtszeitschrift für ausländisches und internationales Privatrecht*, 56, 1992, pp. 410-443; H.-S. CHOI, *Die vorvertragliche Haftung (Chupa in contractando) und der deliktische Schutz primärer Vermögensinteressen: rechtsvergleichende Untersuchungen zum deutschen, englischen und französischen Recht*. Frankfurt am Main, 1990; J. KLEINEMAN, *Ren förmögenhetskada: särskilt vid vilseländande an annan än kontraktspart*. Stockholm, 1987; A. B. WILKINSON & A. D. FORTE, "Pure Economic Loss". *The Juridical Review*, June 1985, pp. 1-28 and K. OPOKU, "Delictual Liability in German Law". *The International and Comparative Law Quarterly*, 21, 2, 1972, pp. 1230-1269. Legal scholars have also been approaching pure economic losses from an economic point of view. See, amongst others, G. DARI-MATTIACCI & H.-B. SCHAFFER, "The Core of Pure Economic Loss". *International Review of Law and Economics*, vol. 27, 1, 03/2007 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=784984, last visited: 01.04.2011); M. BUSSANI & F. PALMER, "The Comparative Law and Economics of Pure Economic Loss". *International Review of Law and Economics*, 2005 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=742104, last visited: 01.04.2011); G. DARI-MATTIACCI, "The Economics of Pure Economic Loss and the Internalisation of Multiple Externalities". *Pure Economic Loss: Tort and Insurance Law 9*. Wien, 2004, pp. 167-190; M. BUSSANI, V. V. PALMER & F. PARISI, "Liability for Pure Economic Loss in Europe: An Economic Restatement".

an autonomous form of damage in several European jurisdictions³, it is considered one of the most complex issues of the Law of Obligations.

The approach to pure economic loss raises questions of legal, economic and political nature which are, not only of academic, but also of undeniable practical relevance.

This contribution does not purport to cover the several issues raised by this matter. It is only intended to provide a number of insights into the compensation of pure economic losses in tort law according to the Portuguese legal scholarship⁴ and the Portuguese Civil Code⁵. I leave the extensive treatment of the subject to future works.

1. The definition and classification of pure economic loss in Portugal under European influence

Different designations have been used by Portuguese legal scholars to refer to pure economic losses.

American Journal of Comparative Law, 51, 2003, pp. 113-162; F. PARISI, "Liability for Pure Financial Loss: Revisiting the Economic Foundations of a Legal Doctrine", *Pure Economic Loss in Europe*. Cambridge, 2003, pp. 75-93 and GÓMEZ POMAR & J. A. RUIZ GARCIA, "La noción de daño puramente económico: una visión crítica desde el análisis económico del derecho". *Estudios Jurídicos en Homenaje al Prof. Luis Díez-Picazo*. Vol. 2, Madrid, 2002, pp. 1993-2024 (English version: GÓMEZ POMAR & J. A. RUIZ GARCIA, *The Plural - and Misleading - Notion of Economic Loss in Tort: A Law and Economics Perspective*. *Indret, Revista para el Análisis del Derecho*. Barcelona, 2002, http://www.indret.com/pdf/102_en.pdf, last visited: 01.04.2011). A few compendia have been published on the topic as well. That was the case of the comparative study on compensation for pure economic loss in several European countries and Japan, performed under the supervision of the European Centre of Tort and Insurance Law (ECTIL) (Cf. W. H. VAN BOOM, H. KOZIOL & C. WITTING eds., *Pure Economic Loss: Tort and Insurance Law 9*, Wien, 2004) and also the case study publication concerning thirteen European jurisdictions, performed by the Common Core of European Private Law ("Trento Project") (Cf. M. BUSSANI & V. V. PALMER eds., *Pure Economic Loss in Europe*. Cambridge, 2003). The pioneer initiative of gathering in a single volume the contributions of experts from Canada, Europe and the United States on civil liability for pure economic loss was performed by Efsthathios Banakas (E. K. BANAKAS, *Civil Liability for Pure Economic Loss*. London, 1996).

³ So C. v. BAR & U. DROBNIG, *The Interaction of Contract Law and Tort and Property Law in Europe*. München, 2004, p. 119 and C. v. BAR, *Gemeineuropäisches Deliktsrecht*. München, 1999, p. 31.

⁴ Two doctoral theses have been written so far about the subject of pure economic losses in Portugal: A. MENEZES LEITÃO, *Normas de protecção e danos puramente patrimoniais*. Coimbra, 2009 and, on liability for advice, recommendation or information, J. SINDE MONTEIRO, *Responsabilidade por conselhos, recomendações ou informações*. Coimbra, 1989. There are other legal materials about the topic. See M. J. PESTANA DE VASCONCELOS, "Algumas questões sobre a ressarcibilidade delitual de danos patrimoniais puros no ordenamento jurídico português", *Novas tendências da responsabilidade civil*. Coimbra, 2007, pp. 147-206; A. M. MIRANDA BARBOSA, *Liberdade vs. responsabilidade: a precaução como fundamento da imputação delitual?*. Coimbra, 2006; M. A. CARNEIRO DA FRADA & M. J. PESTANA DE VASCONCELOS, "Danos económicos puros: ilustração de uma problemática". *Estudos em homenagem ao Professor Doutor Marcello Caetano*. Vol. II. Coimbra, 2006, pp. 151-176 and M. FRANÇA GOUVEIA, "Cable cases e intervenção de terceiros - Ac. do STJ de 22.5.2003, proc. 892/03". *Cadernos de Direito Privado*, 10, 2005, pp. 30-45.

⁵ Hereafter Port. CC.