THE DILEMMA OF PURE ECONOMIC LOSS: A CRITICAL LEGAL ANALYSIS

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ABSTRACT

Patrimonial loss, which involves physical injury or damage to property, is typically redressed by law. However, pure economic loss, which occurs without any accompanying physical harm, is often not compensated. This type of loss arises from wrongful acts or omissions by individuals, entities, or authorities, particularly in financial contexts. In recent years, Sri Lanka has faced significant economic challenges, with both the nation and its citizens experiencing substantial financial losses. Despite a comprehensive legal framework, the redress for pure economic loss in delict remains untouched. This paper examines the legal treatment of pure economic loss within the context of delictual and tort liability, focusing on the question of whether such losses should be compensable. A comparative analysis is conducted between Sri Lankan law, South African law, and English law, with reference to both primary and secondary legal sources. Relevant international legal instruments are also considered. The study argues that the substantive economic rights of individuals should be protected in cases where pure economic loss arises due to the wrongful conduct of others. This paper evaluates the policy considerations that underpin the recognition of pure economic loss claims in selected jurisdictions and suggests potential reforms to the Sri Lankan legal framework.

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1. INTRODUCTION

Interference with individuals' personal integrity and property rights is a primary concern of the law-making process. Generally, fundamental rights include the right to life, liberty, and the freedom to enjoy civil and political rights. However, financial rights have not been recognized as a fundamental right in all jurisdictions.

The Legislature makes decisions on financial matters, which must be taken for the well-being of the nation.[1] In 2022, Sri Lanka was declared a bankrupted country, and the nation is still suffering both physically and financially. People invest in various projects to make money, but many have faced financial losses due to bankrupted private entities in Sri Lanka. Financial companies, as well as some individuals entrusted by the people, have misused public finance. The financial authorities failed to monitor and control the situation. Although the Legislature passed a statute on financial business in response to this issue, the financial losses experienced by third parties were not adequately addressed.[2]

Section 56 of the Finance Business Act 2011 states that upon conviction, the liable person must deliver their liabilities to depositors and creditors under the supervision of the court. However, in practice, this has not been strictly implemented with regard to financial losses faced by the people. Furthermore, the guidance and supervision needed to be paid over entities by the authorities in Sri Lanka are not adequately performed. This has caused social injustice as it indirectly leads to unjust enrichment, resulting in social insecurity, instability, and public unrest, directly affecting a person's right to well-being.

This paper aims to examine the existing delictual/tort principles in the absence of any statutory solution to the above issue. Delicts/torts are rich in principles. However, it is questioned why principles such as pure economic loss are not adequately used to compensate needy victims. This is a comparative analysis of Sri Lanka with a few selected common law jurisdictions.

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[1] *Athula Samarasiri and another* v. *Ranil Wickremesinghe and another* SC FR No. 195/2022.

[2] Finance Business Act, No. 42 of 201.

2. PATRIMONIAL LOSS

In delict, damage or loss is assessed in monetary terms, and damages are granted by the court to compensate someone who has suffered a legally compensable loss.[3] It requires proving damage caused to the plaintiff's patrimony (*damnum*) or diminution in it due to the defendant's unlawful and negligent conduct. This does not mean mere injury to patrimony but includes the actual loss suffered by the plaintiff. Boberg states that while a delict may diminish the value of an estate, it prevents its value from increasing.[4] It includes actual losses and prospective losses consequential to patrimonial loss. Therefore, it is essential to show that the loss occurred due to physical damage.

Tort law explains 'damage' as recoverable only if it includes actual damage or injury, resulting in damage to the plaintiff's patrimony. The elements of delict and tort law regarding patrimonial loss show remarkable similarity in principle. This necessitates the actual functional feature of the damage, and therefore, mere creation of a risk or threat is not actionable under the tort of negligence as well as the law of delict. However, this definition may not fit correctly for a complex society where comprehensive financial transactions occur. As a result, some legal systems have expanded the definition of patrimonial loss to include pure economic loss too.

2.1 Pure Economic Loss

Pure economic loss operates independently of physical damage to person or property. The use of the term ‘pure’ is significant in this sense. It does not connect to any physical property.[5] This is contrasted to the longstanding principle of consequential damage.[6] Considering the distinction, Lord Bridge stated in the *Caparo Industries plc* v *Dickman*

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3 P Q R Boberg, *Law of Delict*, Juta, Johannesburg, 1984, p 475, Jonathan Burchell, *Law of Delict*, Juta, Johannesburg, 1993, p 34.

4 P Q R Boberg, 1984, p 476.

5 M Bussani & V. V Palmer, *The Notion of Pure Economic Loss and its Setting,* in M Bussani and V. V Palmer (eds), *Pure Economic Loss in Europe* (Cambridge University Press 2003).

6 R J Robert, 'A Production Theory of Pure Economic Loss' (2010) 104 (1) Northwestern University Law Review 49-104.

that,

> 'One of the most important distinctions always to be observed lies in the law's essentially different approach to the different kinds of damage which one party may have suffered in consequence of the acts or omissions of another… It is one thing to owe a duty of care to avoid causing injury to the person or property of others. It is quite another thing to avoid causing others to suffer purely economy loss'.[7]

As noted by the court in this judgement, compensating the loss which is purely economic involves significant effects in the society due to several reasons. The court might think that it does not connote any actual damage, therefore no duty of care is owed by the defendant towards a third party.

Analysing the scope, Farnsworth states that,

> 'Pure economic loss' means a financial loss unaccompanied by personal injury or property damage -in other words, a loss of money and nothing else. A vanished investment, a decline in business, or a lost inheritance are typical examples. Pure economic loss is the typical result of a breach of contract, but sometimes- and perhaps at the same time - it may be caused by negligence and therefore become the subject of efforts to recover in tort.[8]

Pure economic loss was initially considered with breach of contract.[9] However, the extention made to the delict/tort law action based on property damage is argued to be kept within clear limits.[10]

This paper examines how justification of liability for pure economic loss in delict/tort must be generalised on defensible grounds. It is obvious that the generalisation of liability under the tort action should not be too broad on the one hand and not too limited on the other.[11] To this effect,

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7 [1990] 2 AC 605,618.

8 W Farnsworth, 'The Economic Loss Rule' (2016) 50 Valparaiso University Law Review 545.

9 *Jayamohan v Hatton National Bank LTD* [2001] 3 SLR 352.

10 Jurisdictions such as Belgium, Italy and France are considering the liability under pure economic loss as per policy reasons.

11 W Farnsworth, 'The Economic Loss Rule' (2016) 50 Valparaiso University Law

Farnsworth further states that,

> The various doctrines that determine when plaintiffs can recover in tort for pure economic loss do have points in common, and they invite a rational and simple account of their relationships if one can be devised. The task at hand, then, is to see what generalizations might fairly be made about recovery in tort for pure economic loss generalizations broad enough to be useful but narrow enough to be accurate without requiring so many exceptions that the value of generalizing is lost.[12]

The United States of America (USA) strictly adheres to a policy that plaintiffs cannot recover for negligently caused pure economic loss. This rule is known as the *'exclusionary rule*.' Even countries that are in favor of tort liability for pure economic loss have been criticized for not having a clear principle for allowing recovery of damages.[13] Furthermore, moderate legal systems believe that economic loss does not entail an 'absolute right'; therefore, it is not protected under the principles of tort law.[14] Analyzing the main and counterarguments, it is observed that many jurisdictions are reluctant to address the issue without compelling reasons. Wrongdoers are fully protected in this context, whereas victims of pure economic loss are left empty-handed. As a result, successful cases are very few.

2.2 The Effect of the 'Exclusionary Rule

The exclusion of liability in cases of pure economic loss is proliferating due to several important reasons highlighted by the authors.[15] The rule is also known as the 'economic loss rule.' Understanding the reasons for the exclusion of liability is helpful in understanding the various schools of thought on this matter.

Review 551.

12 ibid.

13 J de Mot, 'Pure Economic Loss' in Michael Faure (ed), Tort Law and Economics (Edward Elgar Publishing 2009) 201.

14 Absolute rights that are protected in tort law are the rights related to person and his tangible property.

15 F Parisi, V Palmer and M Bussani, 'The Comparative Law and Pure Economic Rights' (2007) 27 International Review of Law and Economics 29-48.

One such reason is the lack of 'foreseeability.' As pure economic loss does not involve any physical damage, some argue that the damage is not foreseeable. This argument is strengthened when a third party suffers pure economic loss due to the negligent words or acts of the defendant, as 'proximity' comes into play. Foreseeability is a longstanding requirement of the law of negligence, and liability is established when there is a failure to reasonably foresee harm. This argument is pragmatic for cases involving physical damage, where the facts and causal link are very clear. However, modern cases are much more complex, making it difficult to determine causation. For instance, inaccurate financial disclosures by a company may attract thousands of stakeholders to invest money in its projects, which could lead to bankruptcy. The question here arises as to whether foreseeability is a suitable standard to determine liability.

Secondly, economic interests are often prioritized less than the safety of bodily integrity. There is a policy argument behind the consideration that not every loss can be compensated equally. It is accepted that the plausible interests of the people are prioritized in a legal system. This argument carries weight in a welfare society, as financial matters are considered only after catering to the needs of personal well-being, since the State is the only actor. However, economic theorists argue that there is no empirical data to suggest that compensating pure economic loss would decrease the effective protection of other, worthier claims.[16]

Thirdly, one of the valid reasons for the exclusionary rule is the 'indeterminacy' of liability. Referring to the uncertainty of liability that pure economic loss imposes, Justice Cardozo in the case of *Ultramares Corporation v Touch*[17] stated that the liability of a defendant in such a case is 'an indeterminate amount for an indeterminate time to an indeterminate class'.[18] This statement has garnered significant attention from the legal and business communities worldwide, especially entrepreneurs. As a consequence, there is a mounting 'indeterminate fear' against imposing liability for pure economic loss.

Fourthly, an argument has been made that the degree of liability of a defendant is not proportionate to the wrong done on his part. As no

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[16] ibid (2003) 29-48.

[17] (1931) 174 NE 441, 444.

[18] ibid.

yardstick is apparent to measure the extension of liability in this regard, the defendant is not aware of whether he/she is liable for certain losses. Another concern is that while pure economic loss establishes a special situation where a duty of care arises, the fear of limitless liability may overtax the judicial process.

Moreover, the availability of insurance and the insurability of economic transactions in modern business are concerns.[19] The risk of economic loss in transactions is obvious in any society, and insurance to cover such losses is increasing with attractive policies. Some argue that plaintiffs could recover pure economic loss more quickly through such policies than through tort actions.

One of the main arguments for the exclusion of liability in tort is the availability of contractual remedies. It is evident that contractual obligations are prioritized if the parties have formed a valid contract. This judicial attitude is clearly visible in many countries, including Sri Lanka.[20]

The exclusionary rule has been established based on three main factors. Firstly, the fear of extending tort liability to unknown classes. Secondly, the so-called uncertainty may open the floodgates of litigation against possible defendants. Thirdly, available alternative remedies can play a pivotal role rather than expanding tort liability. However, the issue has become increasingly significant in modern times as such losses are reported from various sectors of society.

3. CLAIMING PURE ECONOMIC LOSS AS AN ECONOMIC RIGHT

Claims of pure economic loss raise the argument that the conduct of the defendant violates a substantive legal right. Individuals engage in financial transactions with the intention of gaining profit and/or new opportunities.

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[19] K Barker, P Cane, M Lunney, and F Trindade, *The Law of Torts in Australia* (5th edn, Oxford University Press 2012) 482.

[20] W Farnsworth, The Economic Loss Rule, 50 Val. U. L. Rev. (2016) 545, See further, *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* (CCT 185/13) [2014] ZACC 28; 2015 (1) SA 1 (CC); 2014 (12) BCLR 1397 (CC) (3 October 2014), *Jayamohan v Hatton National Bank LTD* [2001] 3 SLR 352.

Reputed entities known for excellence in financing attract people who invest money and wealth in such projects believing they are capable of making profits. They have the 'right to development' for better living, advocated in international law and domestic laws to guarantee the economic well-being of people. Several international instruments recognize the economic right as a direct provision, while other regimes ensure it when focusing on civil, political, social, and cultural rights.[21] Additionally, the right to freely pursue economic development is guaranteed by national legislation in various countries.[22] It can be argued that any intervention in this right can be challenged as it undermines the anticipated right to economic development of an individual.

3.1 Economic Rights in the International Law

The right to advance economic benefit can be equated to the right to own property, as money is considered movable property. Therefore, it can be argued that the capacity to earn profits for economic well-being is ensured under Section 17 of the United Nations Declaration of Human Rights, which provides for the right to own property. [23]Additionally, it is recognized that a person has the right to social security in the realization of economic and other rights. Moreover, it is stated that economic, social, and cultural rights must be protected to enhance personal dignity and personality. Both rights are guaranteed by Section 22 of the Human Rights Declaration, which provides that,

> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

[21] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) arts 22-25.

[22] Yemi Osinbajo and Olukonyisola Ajayi, 'Human Rights and Economic Development in Developing Countries' (1994) 28 International Lawyer 727. https://scholar.smu.edu /til/vol28/iss3/7 accessed 15 March 2024.

[23] Article 17 (1) everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.

Furthermore, Article 1 of the International Covenant on Economic, Social, and Cultural Rights of 1966 (ICESCR) ensures the right to freely pursue economic development. Importantly, the Covenant imposes a responsibility on the State to enhance the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[24]

Therefore, it is clearly understood that an individual's right to economic development is an evolving concern in international law. It is also evident that the current advancement of the world economic order believes that economic stability is necessary for the physical and physiological well-being of people.[25] Thus, intervening in such a right is an invasion of a property-related right in the perspective of international law.

3.2 Economic Rights in Sri Lanka: Can They be Achieved?

It is unusual to claim economic rights under the Constitutional regime of Sri Lanka, as the Constitution does not directly confer such a right. However, the economic empowerment of the people has been practiced by the Sri Lankan courts. Thus, it could be argued that the absence of a specific Constitutional provision on economic rights does not indicate that it is not recognized in this jurisdiction.

Article 14(1)(g) indirectly recognizes economic freedom by stating the freedom to engage in any lawful occupation, profession, trade, business, or enterprise by oneself or in association with others. Individuals need the freedom to engage in business with others to make profits, and any intervention damaging this right is a violation of a fundamental right.

Furthermore, Articles 27(2)(b), 27(2)(d), 27(7), and 27(8) are significant in relation to the State's responsibility in enhancing economic justice in the country. The State is responsible for maintaining economic justice by policymaking to uplift economic advancements of the people. While these duties do not bring liability to the State,[26] the Constitution empowers such

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[24] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 2.

[25] Zeshan Khan, 'International Economic Rights' (2000-2001) 4 Gonzaga Journal of International Law.

[26] 'The provisions of this Chapter do not confer or impose legal rights or obligations and

responsibility over the State.

Article 27(2)(b) lamoids for the State's duty for the promotion of the welfare of the people by securing and protecting a social order in which justice (social, economic, and political) guides all institutions of national life. Article 27(2)(d) renders the State's duty for the rapid development of the whole country by means of public and private economic activity, directing and coordinating such activity towards social objectives and the public weal.

Moreover, the State must eliminate economic and social privilege and disparity, as well as the exploitation of man by man or by the State, and ensure the economic system operates in a way that does not contravene the common good.[27] The Constitution of Sri Lanka aims at economic freedom and justice through its indirect recognition, imposing obligations on the State and other actors through these articles.[28]

Within this framework, anyone can engage in a business or enterprise for their own development and sustenance. Officials are duty-bound to navigate the economy in the right direction as trustees of the country. Recent case law on the economic and social collapse of the country illustrates this. In the case of *Athula Samarasiri and another v. Ranil Wickremesinghe and another*,[29] the court stated that public trust demands resolving issues and any conduct leading to further aggravation of issues detrimental to the public is a breach of trust. While compensation was not granted in this case, the court admitted that public officials are obligated to act in accordance with their duty of trusteeship. Violating this duty negligently or intentionally constitutes a violation of the right to equal protection of the law guaranteed under Article 12(1) of the Constitution.[30]

are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall be raised in any court or tribunal'.

[27] Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art 27(7).

[28] Article 27(8); ''The State shall ensure that the operation of the economic system does not result in the concentration of wealth and the means of production to the common detriment''.

[29] *Athula Samarasiri and another* v. *Ranil Wickremesinghe and another* SC FR No. 195/2022.

[30] ibid.

Two arguments can be brought in relation to this decision. Firstly, economic rights can be claimed as a basic right in the Sri Lankan regime, even without attached property losses. Secondly, the same arguments regarding public officials' duty towards the community can be raised in delictual action. Therefore, this case serves as a guide for the issue at hand.

3.2.1. Pure Economic Loss: A Delict in Sri Lanka?

The term 'pure economic loss' is rarely found in the Sri Lankan legal context. One of the earliest instances in Sri Lankan legal history involving such a concept was the case of *Chissel v Chapman*.[31] In this case, the defendant, a medical practitioner employed by a company, examined the plaintiff and reported to the authority that the plaintiff was not fit to be employed in the company due to his health condition. The plaintiff claimed that the report was unfavorable due to gross negligence and incompetence on the part of the defendant. However, there was no allegation that the defendant had acted maliciously or dishonestly.

While the court did not explicitly use the term 'pure economic loss' in this case to recognize the loss, its duty was to determine whether such loss could be recovered under Roman-Dutch law. Deciding the case on the basis of negligence, the court found that the action was not maintainable because the law did not impose any duty of care on the defendant towards the plaintiff other than the duty not to cause him physical injury. The court determined that the doctor's duty was owed to his employer, not the plaintiff, and the plaintiff failed to prove negligence on the part of the defendant. It was decided in this case that under Roman-Dutch law, no liability attaches for pecuniary loss sustained by a person due to incorrect statements made negligently but honestly by the defendant to someone else. However, Gratiaen J. considered the possibility of sustaining a case regarding economic loss which is not necessarily injurious.

Considering delictual liability under the Aquilian Action, Gratiaen J. further stated that,

> The *Lex Aquilia* proper is concerned only with liability for acts which cause physical injury to person or property through fraud or negligence; but in order to meet the more complex situations

[31] 56 NLR 121.

> which arise under modern conditions, the incidence of liability has also been extended to cases where dolus, as opposed to mere culpa (negligence) causes pecuniary loss to the aggrieved party.[32]

Based on this opinion, Justice further stated that if the defendant had, through some improper motive expressed to the Company, even a non-defamatory opinion that the plaintiff was not fit for service, he would be liable to compensate the plaintiff for consequential pecuniary loss under the *Aquilian Action*.

On the other hand, Gratiaen J. considered negligence unaccompanied by an improper motive as a question of law with wider importance in deciding whether the court has extended liability for negligence beyond legitimate limits under the general law of Ceylon. According to the general rule, a false statement made negligently can be actionable if made directly to the plaintiff, with the existence of a relationship such as contractual or fiduciary being significant. However, this case involved non-contractual liability as the report was made to the employer. The court opined that the extension of the scope of liability should be done with caution in the future.

In the case of *People's Bank v New Lanka Merchants*,[33] a customer of a firm was told that the balance cash and goods would be delivered to him only upon realization of a cheque. An employee of the firm inquired from a bank employee whether the cheque had been realized. Since the bank employee confirmed that the cheque had been realized, the firm released the goods and the balance cash to its customer. Later, it was found that the cheque had been dishonored, involving both the value of goods and the balance cash payments. The latter is connected to pure financial loss. The court admitted that the employee of the defendant bank had a duty of care within his/her professional capacity to pass correct information to a third party who relied on the same. The court further emphasized the fact that the plaintiff was entitled to act upon the correctness of the information given. [34] Thus, the reliance and vulnerability of the plaintiff who acted upon the representation was the concern of the Court. The Appeal Court awarded damages to the plaintiff confirming the judgment of the District

32 56 NLR 121, p 124.

33 1990 1 Sri. LR 67.

34 ibid.

Court for the loss occurred on the ground of negligence.

However, had the court recognized the subsequent loss as a pure economic loss caused by the representation at that point, it would have been a landmark in the law of delict because it could have been an invitation to a new duty situation in tort/delict in Sri Lanka.

Policy considerations are very important in deciding on new duty situations. This was evident in *James Finley and Company Ltd v. Stassen Exports Ltd and another*.[35] This case has no direct relationship with the issue; however, it was based on a false misrepresentation in trade. The case was brought under the *Code of Intellectual Property Act*[36] depending on the facts. The importance noted in this judgment is the criterion adopted concerning wrongful acts generally. Justice Wigneswaran held in this case that the criteria of what is right or wrong conduct in industrial or commercial matters are based on the 'social convictions of a particular community' at a given time. This is decided based on what is reasonable at a time and whether a legal duty is owed by a person towards the other not to make any misrepresentation. If so, primarily the liability arises to remedy the damage. It showcases the willingness of the court to consider looming situations which may give rise to delictual liability.

Pure economic loss occurring within contracts has been recognized in Sri Lanka. In the case of *Jayamohan v Hatton National Bank Ltd,*[37] the Plaintiff-Respondent claimed that the Defendant, in his capacity as a Cashier, paid a sum of money to a person who was not entitled to such money in any manner.

> The pure economic loss suffered by a claimant being a natural and probable or indeed foreseeable type of harm arising from, the breach of his agreement by the Defendant - Appellant, there is no doubt that the recovery of pure economic loss, is admissible in law.[38]

The court stated that while the principle of 'assumption of risk' in the case

[35] 1990 1 Sri. LR 67.

[36] No. 52 of 1979.

[37] 52 Sri.LR 2001, 392.

[38] ibid, page 393.

of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[39] may have some overlaps in contracts and torts, such is established here, therefore the defendant, as an employee of the said bank, was liable to pay pure economic loss. Thus, it is obvious that the claimant managed to obtain compensation within the contractual arrangement for pure economic loss.

However, the concept of pure economic loss has not been recognized in the law of delict in Sri Lanka *per se*. Even though the field is set for the battle by recognizing the concept in the law of obligation, in contracts, the necessary criteria determining the loss are not explained in delicts. Interestingly, 'loss of opportunity' which may bring purely financial loss was discussed in a recent case decided by the Supreme Court in the case of *C. Karunanayake and Another v. Mannapperuma Mohotti Appuhamilage Thushari Ranga Mannapperuma*.[40] In this case, one student was prevented from sitting for the General English paper in the G.C.E. Advanced Level (A/L) examination because she was unable to produce the admission card to the Chief Supervisor of the examination. As a result, she was unable to complete her G.C.E. A/L requirement in a single sitting. She claimed damages for the mental pain and suffering and the prospective future loss occurred due to the negligent wrongdoing of the Chief Supervisor. The damage occurred was due to a 'loss of opportunity' to sit for the examination and complete the A/L requirement for future job prospects. Loss of opportunity is considered a mode of pure financial loss independent of property damage nowadays; however, any further discussion of such extension has not been made in the case. Instead, concerning the possibility of changing Roman Dutch law to adopt to the social need, it was stated that:

> It would thus be seen that particularly since the Roman-Dutch law remains in the domain of the 'Common law' of Sri Lanka, it has been possible for judges of apex courts to interpret and apply it subject at time to suitable adaptations to suit contemporary conditions of life in Sri Lanka, complexities of modern human behaviour and social norms.[41]

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[39] [1964] A.C. 465.

[40] SC Appeal No. 130/15, WP/PHC/Appeal No. WP/HCCA/GPH/10/2008(F), DC Attangalla No. 59/M (decided on 21 February 2022).

[41] ibid, Kodagoda J.

Indicating the salutary provision in Article 4(c) of the Constitution of 1978, with regard to developing the common law of Sri Lanka by the judiciary, Justice Kodagoda stated that:

> The common law is vibrant, flexible and accommodates the ever-changing demands of contemporary human civilization, evolving human conduct and norms and collective values of society. If the common law remained static without evolving and developing with the passage of time, unwritten law would have gone into oblivion long time ago. The growth of the common law in fact depends upon judicial activism. If judicial activism reflected in progressive judgments (a) do not impinge on the written law, (b) does not cause an erosion of the core legal principles found in the common law, (c) do not violate legislation and obstruct legislative intent, (e) are in public interest and (f) are orchestrated towards the delivery of justice, such judgments must be recognized as manifestations of proper and meaningful exercise of judicial power. Such judgments would in my view be very much in compliance with Article 4(c) of the Constitution.[42]

Further, the court went on to state with regard to the 'infringement of a right' by a negligent act and the resultant pecuniary loss that:

> In contemporary society, legal rights cannot be limited to interests in corporeal property. The impact of the infringement of a legal right cannot necessarily be linked to patrimonial loss. The absence of patrimonial loss makes the infringement not less important to the victim or to society. Thus, the need arises to provide relief to a victim whose rights have been infringed even though such infringement may not have resulted in any calculable patrimonial loss.[43]

Based on the claim, the court finally awarded general damages for mental trauma suffered by the claimant and nominal damages for the infringement of a right by the appellant. The established Roman Dutch law can be

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[42] "The judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law''

[43] ibid, P.73, Emphasis is mine.

developed in situations where a legally recognized right of the Plaintiff has been infringed by its breach or denial, as a result of actionable negligence by the Defendant. In other words, reasonableness of the conduct was concerned. This judicial approach is progressive and very much in line with the contention of Article 4(d) of the Constitution.[44]

The legally recognized economic right would certainly be a basic right of the people. In particular, this is justified when a community or private life of individuals is collapsed due to gross negligent acts and omissions of the authorities. The duty owed by persons to persons may depend on the facts. It may be from authority to individuals and/or from individuals towards another individual.

Consequently, it can be said that the judicial environment is set up to adopt to the changing situations which require a remedy for economic loss. Pure economic loss is among these, and it has been partly adopted in the Mannapperuma case. The criteria determining delictual liability for pure economic loss in this context would be needed to consider hereinafter.

4. PURE ECONOMIC LOSS IN A COMPARATIVE PERSPECTIVE

2.1.Common Law of Tort

The development of English law regarding pure economic loss indeed underscores two key points. Firstly, such losses have traditionally not been treated on par with damages caused to a person, often receiving secondary consideration in tort compensation.[45] Secondly, historically, recovery of damages for economic loss was typically limited to cases of intentional wrongdoing, such as fraud.[46]

Against this backdrop, *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd*. stands out as a pivotal case in tort law. The central issue revolved around whether an individual could seek damages for losses incurred due to their

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[44] "The fundamental rights which are by the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978 declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided''.

[45] *Derry v Peek* (1889) 14 App. Case.337.

[46] (1964) AC 465 HL.

reliance on an innocent yet negligent misrepresentation. Despite the case ultimately failing due to the exclusionary language absolving the respondent bank of duty of care, Lord Reid made a significant statement.

> ... Then there are cases where a person does not merely make a statement, but performs a gratuitous service. I do not intend to examine the cases about that, but at least they show that in some cases that person owes a duty of care apart from any contract, and to that extent they pave the way to holding that there can be a duty of care in making a statement of fact or opinion which is independent of contract. [47]

The case of *Hedley Byrne v. Heller*[48] indeed established a significant precedent regarding the duty of care owed by professionals in handling their professional matters. The crux lies in whether the defendant could foresee the possibility of damage to a third party in the course of their business activities. This duty of care is not contingent upon the existence of an enforceable contractual relationship between the parties. Liability may arise based on the specific facts of the case, particularly when a party is in a special relationship and relies upon information provided, independent of any contractual arrangement with the party making the statement.

Ann Hocking's[49] argument regarding the influence of Lord Denning's dissenting judgment in *Candler v. Crane, Christmas & Co.*[50] and *Nocton v. Lord Ashburton*[51] holds weight. Lord Denning's dissent in *Candler* emphasized the potential for professional liability even in the absence of a contract or fraud, albeit with certain limitations.[52] He suggested that liability should extend to professionals whose occupation involves examining and reporting on matters relied upon by third parties in the ordinary course of business, beyond their clients.

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[47] ibid.

[48] [1964] AC 465 (HL).

[49] Barbara Ann Hocking, *Liability for Negligent Words,* the Federation Press,1999, p 26.

[50] [1951] 2 KB 164.

[51] [1914] AC 932.

[52] [1951] 2 KB 164 at 181.

This dissenting opinion found approval in *Hedley Byrne v. Heller*.[53] Furthermore, in *Nocton*, the House of Lords affirmed the broader principle of fiduciary duty owed by a solicitor to a client, hinting at a wider application of such liability principles.[54]

In line with the precedent set by *Hedley Byrne v. Heller*[55], the principle of "reliance" extends beyond mere business transactions to interpersonal relationships in normal life, forming a complex framework of *laissez-faire*. This case signalled the need for a general rule regarding financial damages, as echoed in *Junior Books Ltd. v. Veitchi Co. Ltd*,[56] where liability was established despite the absence of physical damage, based on the defendant's sufficient proximity and knowledge of the plaintiff's reliance on their expertise.

Building upon this trend, the House of Lords in *Anns v. Merton London Borough Council*[57] unanimously held a local authority liable for economic loss due to negligence in discovering a defect in building foundations. Lord Wilberforce's two-staged test, known as the "*Anns formula*," established that negligence could arise where a building posed imminent danger to safety or health, even for subsequent purchasers. In elaborating on the approach to determining duty of care, Lord Wilberforce emphasized a two-stage analysis in *Anns v. Merton London Borough Council*. It's crucial not to simply fit the facts of a case into precedents but to assess the relationship between the alleged wrongdoer and the victim in terms of proximity or closeness. If there exists a sufficient proximity such that the wrongdoer could reasonably foresee that their negligence might cause harm to the victim, then a *prima facie* duty of care arises. However, this is just the first stage. The second stage involves considering whether any factors negate, reduce, or limit the duty of care, such as the class of persons to whom the duty is owed or the types of damages that may result from a breach of that duty. This comprehensive approach ensures that the duty of care is assessed in a nuanced manner, considering all relevant circumstances and

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[53] Supra note 48.

[54] [1914] AC 932.

[55] Supra note 48

[56] [1983]1 AC 520.

[57] [1978] A.C. 728.

potential limitations.

Indeed, the *Anns formula* established a structured approach to determining duty of care, requiring an assessment of proximity based on foreseeability and a consideration of policy reasons that may negate the duty. This framework allowed the court to balance factors that may militate against liability on policy grounds. Importantly, if a plaintiff could demonstrate that they fell within the scope of the defendant's duty of care, it wasn't necessary to rely solely on previously recognized situations.

This flexibility allowed for the consideration of new circumstances, broadening the scope of duty of care to encompass negligent acts involving pure economic loss and beyond.[58] However, this approach was subsequently overruled by English courts.[59] As Buckley stated the primary concern regarding the *Anns* concept of establishing a "*prima facie* duty of care" was that it could potentially lead to an overly broad imposition of liability, particularly in situations where there was no clear precedent or existing authority.[60] Critics worried that this approach might prioritize finding liability without adequately considering important factors that could weigh against imposing such a duty. In essence, there was a fear that the *Anns formula*, by emphasizing foreseeability and proximity to establish a *prima facie* duty of care, might overlook or downplay other critical factors, such as policy considerations or the potential for unintended consequences.

This concern reflected a broader tension within tort law between the need for legal certainty and predictability on one hand, and the necessity for flexibility to address novel or evolving circumstances on the other. As a result, this apprehension about the potential implications of the *Anns* approach played a significant role in its subsequent reconsideration and revision by English courts.

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[58] R Bradgate, 'Anns: The Retreat Continues' (1988) 51 The Modern Law Review 382-385.

[59] *Peabody Donation Fund* v *Sir Lindsay Parkinson* [1984] 3 All ER 529, *Leigh & Sillavan Ltd* v *Aliakmon Shipping* [1986] 2 All ER 145, *Curran v NI Co-ownership Housing* [1987] 2 All ER 13, *Yuen Kun-yeu v AG of Hong Kong* [1987] 2 All ER 705, *Rowling v Takaro Properties* [1988] 1 All ER 163, *CBS Songs v Amstrad* [1988] 2 All ER 484.

[60] A R Buckley, *The Law of Negligence* (4th edn, Lexis and Nexis Butterworths Common 2005) 4.

The retreat from the *Anns* approach stemmed from concerns about the potential for a flood of litigation from what some perceived as "fashionable plaintiffs." By applying the exclusionary rule, the courts introduced various exceptions over time. These exceptions aimed to address concerns such as market financial difficulties, the fear of indeterminate liability for stakeholders, and the possibility of companies spreading risk.

As a result, the English courts reversed the *Anns formula's* approach, emphasizing the incremental development of negligence law through analogy with established categories rather than extending a prima facie duty of care. This shift was epitomized in *Caparo Industries v Dickman*,[61] where the court held that, in addition to foreseeability and a sufficient proximate relationship, liability must also be fair, just, and reasonable. This three-staged test aimed to avoid automatically imposing a duty of care on defendants.

This change in approach was firmly established in *Murphy v Brentwood District Council*.[62] The Court of Appeal, following *Anns*, found the local authority liable for a decrease in property value due to imminent danger. However, the decision was unanimously overturned by six Lords of Appeal and the Lord Chancellor. Lord Keith, analyzing the case, emphasized that the *Anns* approach extended beyond the duty to take reasonable care to prevent harm to safety or health. Instead, it focused on property value diminution due to a local authority's negligence. Therefore, Lord Keith stated that,

> The existence of a duty of that nature should not, in my opinion, be affirmed without a careful examination of the implications of such affirmation. To start with, if such a duty is incumbent on the local authority, a similar duty must necessarily be incumbent also on the builder of the house if the builder of the house is to be so subject, there can be no grounds in logic or in principle for not extending liability on like grounds to the manufacturer of a chattel. That would open up an exceedingly wide field of claim...[63]

The court's effort to distinguish the issues in *Murphy v Brentwood District*

61 [1990] 2 AC 605 at 628, [1990] 1 All ER 568.

62 [1991] 1 AC 398.

63 ibid.

Council from older authorities before *Anns* underscored the recognition that the case ventured beyond the scope of a "special relationship". This categorization marked the area as newly discovered, with the court affirming that the *Anns* test did not rely on established principles but instead introduced a new and indeterminate species of liability.

However, contrary to expectations, the decision did not lead to the introduction of new categories of duty situations. Instead, it resulted in an overwhelming number of cases reverting to the old authorities of English common law. This incremental approach to new duties has persisted in English law into the latter part of the 21st century, with the court exhibiting significant concern about the societal implications of these new duties.[64] Consequently, contemporary authors argue that this represents a dramatic return to the conventional methodology of the common law.[65]

In concluding a speech on pure economic loss and assumption of responsibility, Lord Philip Sale recently emphasized that assumption of responsibility is not merely an opaque conclusionary label but rather a concept deeply rooted in the law of obligations, serving a useful and principled objective.[66] Yet, he cautioned against overextending the concept and losing sight of its true substantive role. He urged that for cases of pure economic loss beyond the core category, other justifications for recovery should be sought, without diluting or distorting the assumption of responsibility concept. Furthermore, he emphasized the importance of not devaluing the concept's use in its core area of application by attempting to explain other cases through over-extension.[67]

The English law approach exemplified in *Murphy v Brentwood District*

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[64] *Robinson v. Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736.

[65] J Goudkamp and D Nolan, 'Robinson v Chief Constable of West Yorkshire Police: Taking Duty Back to Basics' (2023) 16(1) Journal of Tort Law 125-142 https://www.degruyter.com/document/doi/10.1515/jtl-2023-0008/html accessed 1 April 2024.

[66] P Sale, 'Pure Economic Loss in the Law of Tort: The History and Theory of Assumption of Responsibility' (Lecture, Annual Tort Law Research Group, Western University, Ontario, 26 September 2022) https://www.supremecourt.uk/docs/speech-lord-sale-2022.pdf accessed 13 March 2024.

[67] ibid.

Council[68] has indeed been diverged from by other common law jurisdictions. These jurisdictions are endeavoring to progress based on the general principle laid down in *Hedley Byrne v. Heller*,[69] which emphasizes the social and economic interactions of the era.

For example, in *City of Kamloops v Nielsen*,[70] the Canadian court adopted the *Anns* two-staged test with slight modifications to determine the existence of a duty of care.[71] In this case, Wilson J applied Lord Wilberforce's second step of the test, known as the 'operational duty', which is based on policy considerations, to ascertain whether the city had the statutory power to regulate construction to safeguard its inhabitants from injury. Consequently, recovery of economic loss was allowed due to dangerous defects posing a threat to safety.[72]

Similarly, Australian law has attempted to summarize principles applicable to all pure economic losses. Notably, in *Brayan v Maloney*,[73] the court imposed liability on a builder for pure economic loss suffered by a subsequent purchaser due to a structural defect, even in the absence of a direct relationship between them. The court emphasized the existence of a necessary relationship of proximity based on relevant facts, departing from the *Murphy* test and not applying *Anns*.[74] This approach was further developed in *Perre v Apand Pty. Ltd*,[75] where the High Court laid down a framework for recognizing new duty situations, such as pure economic loss, in common law.

The High Court highlighted two approaches to address new duty situations

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[68] [1991] 1 AC 398 (HL).

[69] Supra note 48.

[70] [1984] 2 S.C.R. 2.

[71] 1984 10 DLR (4th) 641.

[72] *Winnipeg Condominium Corp. No.36* v. *Bird Construction Co* [1995] 121 DLR 193, See further, *Cooper* v *Hobart* (2001) 206 DLR (4th) 193 (S.C.C); S.G. A Pitel, 'Negligence: Canada Remakes the Anns Test' (2002) 61 The Cambridge Law Journal 252-254

[73] [1995] HCA 17 182 CLR 609.

[74] H Luntz, D Hambly, K Burns, J Dietrich, and N Foster, *Torts: Cases and Commentary* (7th edn, LexisNexis Butterworths Australia 2013), p846.

[75] (1999)198 CLR 180.

like pure economic loss: applying general theories or taking an incremental approach favored by judges. McHugh J. likened this to ancient mariners navigating cautiously along the coast rather than venturing into the open sea of rigid systems.[76] The court stressed that duty determination should reflect recognized principles and policies, emphasizing that new situations do not mean remedies are unavailable, as negligence categories are never closed.[77] In *Woolcock Street Investments Pty. Ltd v CDG Pty Ltd*,[78] the court distinguished it from *Brayan v Maloney*, stating a commercial property purchaser wasn't as vulnerable as a residential one, lacking means to protect against damages. McHugh J. outlined five factors for determining duty in pure economic loss claims, including foreseeability, avoiding indeterminate liability, protecting autonomy, vulnerability to harm, and defendant's knowledge. The court underscored vulnerability's importance in assessing liability.[79] In *Actron Investments Queensland Pty Ltd v D.S.S Project Management Pty Ltd and Others*,[80] the Queensland Supreme Court mandated plaintiff vulnerability establishment.

Across these jurisdictions, vulnerability, along with foreseeability, has been considered a central factor in determining liability for pure economic loss. Vulnerability is assessed with caution, alongside considerations such as the indeterminacy of liability, knowledge of risk, and assumption of responsibility based on public policies.[81]

Moshood Abdussalam highlights the importance of a comparative analysis of the public cost-benefit implications of the defendant's actions in assessing damages, particularly in cases of pure economic loss.[82] This

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[76] (1999)198 CLR 180 *para* 93.

[77] Lord Macmillan, *Donoghue v Stevenson* [1932] AC 562 at 619.

[78] 2004 HCA 16.

[79] T Carver, 'Case Note: Woolcock Street Investment Pty Ltd v CDG Pty Ltd, Beyond Bryan: Builder's Liability and Pure Economic Loss' (2005) 29 Melbourne University Law Review 270.

[80] 2016 QSC 306.

[81] See, *Invercargill CC v Hamlin* [1994] 3 NZLR for the approach of New Zealand where ground situation of the country is rather different to another.

[82] Moshood Abdussalam, 'Redefining Legal Responsibility for Pure Economic Loss in the Innovation Economy' (2020) 6 Canterbury Law Review., Further in China, some argue that Pure Economic Loss must be compensated if any socially relevant losses are involved. If not, compensation can be granted if third one is protected against

approach reflects a reluctance to make drastic changes in negligence standards and instead identifies new duty situations in pure economic loss based on the discussed issues.

In summary, these Commonwealth jurisdictions are striving to adapt a common formula governed by the law of negligence, demonstrating a reluctance to significantly alter negligence standards while addressing new duty situations in pure economic loss.

4.2 Roman Dutch Law

4.2.1. South Africa

The modern Aquilian Action in South Africa addresses cases involving pure economic loss. As in other jurisdictions, South Africa is concerned about the potentially limitless liability of various financial stakeholders in this context. However, the common law court was receptive to novel situations within their general legal principles. Referring to pure economic loss, once the court stated that,

> The birth pangs of such a right of action have endured so long that the time has arrived, perhaps even with a Cesarean section, that the child should be brought into the world. It should immediately be added that it can be foretold that this child will be a problem child. With the necessary love, and especially discipline, it can however play a useful role in legal life.[83]

This illustrates the judicial mind relating to purely economic losses at the initial stage where it was concerned in the absence of property loss. The discipline that they referred to maintained has been always kept in mind to avoid uncertainty.

Boberg noted that while South African law allows recovery for pure economic loss under Aquilian liability, it approaches such claims

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such a loss; see, Y Yan and MG Faure, 'Recovery of Pure Economic Loss in China: Current Situation, Problems and Future Prospects' (2020) 11(3) Journal of European Tort Law 286 -313. https://doi.org/10.1515/jetl-2020-0144.

83 *Administrator, Natal v Trust Bank van Afrika Bpk [1979] 3 SA 824 (A) (Rumpff CJ at 831), referring to a statement published in (1974) 91* South African Law Journal 408.

cautiously, primarily through the concept of wrongfulness.[84] In the modern Aquilain action, wrongfulness is prioritized and tested in determining delictual liability than fault.[85] The very reason is that wrongfulness invents into the quality of the conduct of the defendant in the perspective of legal policy. The inquiry into the quality of the conduct involves legal policy which militates the scope of liability. This is different from the investigation into the element of fault in the Aquilian action, in which concerned with the blameworthiness of the conduct.

Neethling explains that wrongfulness lies either in the infringement of a substantive right, or in the breach of a legal duty to avoid damage. It may involve any norms or duty violations.[86] To argue that a substantive right is violated on the part of the plaintiff, he/she should establish that such a right persists and it is interfered with by the defendant. Such rights may be conferred through any statute or common law.[87]

On the other hand, wrongfulness may depend on the existence of a legal duty. This is a determination subject to judicial scrutiny based on public policy criteria consistent with constitutional norms.[88]

In determining which approach works for the recovery of pure economic loss, it is observed that the concept of legal duty has been promulgated. The development of the area of pure economic loss in South Africa, are generally noticed in the cases of negligent misstatement and misrepresentation.

In *Administrateur, Natal v Trust Bank van Afrika Bpk*,[89] a case of misrepresentation, the court delineates the boundaries of Aquilian liability concerning new situations. Despite initially considering pure economic

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84 supra note 3, p 104.

85 Neethling and Potgieter, *Law of Delict* (8th edn, LexisNexis 2020) 155.

86 ibid, p 350.

87 ibid, p 55.

88 *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* [2008] ZASCA 134; 2009 (2) SA 150 (SCA) at 156 para 12, *Sampson v Legal Aid South Africa* (2201/2021) [2022] ZANCHC 49; (2023) 44 ILJ 422 (NCK) (2 September 2022).

89 1979 (3) SA 824 (A) A.

loss positively in *Perlman v Zoutendyke*,[90] subsequent cases reversed this approach. Rumpff C.J. further emphasized the importance of legal duty in determining liability, echoing the continental approach and stated that,

> In my opinion the ground of action can and ought to be placed in the extended range of application of the *lex Aquilia*. From this it would follow that, according to our current norms, unlawfulness is required and a guilty mind. The fear of the so-called "limitless liability" can then only be allayed if in every given case it is the task of the Court to decide whether in the particular circumstances there was a legal duty resting on the defendant not to make a misstatement to the plaintiff, and also whether the defendant, in the light of all the circumstances, exercised reasonable care, *inter alia*, in determining the correctness of his representation. In the absence of a legal duty there is no unlawfulness. The Court will also keep the ground of action within reasonable limits by giving proper attention to the nature of the misstatement and the interpretation thereof and also by giving proper attention to the problem of causation. [91]

Addressing the issue of 'limitless liability' which may echo in the South African context regarding pure economic loss in different perspectives, Rumpff CJ led the court to the right direction. In doing so, the CJ said that it is the 'legal duty' which plays the crucial role in determining delictual liability. The existence of legal duty in a particular case depends on facts. This is the essence of wrongfulness.

Essentially, wrongfulness, a fundamental requirement in the modern Aquilian action, is not automatically assumed in new situations.[92] Instead, it serves to evaluate whether imposing liability is socially desirable. This approach, separate from fault, allows courts to assess the acceptability of damage-producing activities based on public policy and constitutional norms.[93]

The test for determining wrongfulness is reasonableness (*boni mores*),

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[90] 2 (1934) CPD151.

[91] Supra note 89, p 833-834.

[92] Other than wrongfulness, fault, causation, loss and the damage must be proved by the plaintiff to obtain compensation under the Aquilian action in South Africa.

[93] supra note 3, p 30.

assessing whether breaching a duty aligns with public conviction or legal duty. This is also known as 'reasonableness'. This is an objective test. In South Africa, imposing liability for pure economic loss involves judicial intervention based on public policy criteria consistent with the Constitution.[94] Neethling describes this as the policy-based aspect of the duty of care concept which is judicially controlled in the context of delict.[95] Recovery of pure economic loss is also assessed using the *boni mores* test.

In this exercise, the knowledge, foreseeability, practical measures, professional knowledge and competence, extent of risk and loss, vulnerability and statutory provisions may play a crucial part in determining whether there is a legal duty to act or not.[96] In this test, the court is enabled to concentrate on all the necessary facts to come to a reasonable conclusion after weighing up the interests of the parties and the community.

The capability of the test and its utilization in the debated issue is to evaluate any given situations and decide whether the conduct is acceptable or not on the one hand and to measure the demarcation of delictual liability on the other.

Further, R. Ahamed suggests that right emphasis on wrongfulness through *boni mores* test, provides the court with the flexibility to make value judgments considering constitutional rights and norms.[97] It is in par with the opinion of Neethling because the significant role that it plays in determining delictual liability. In the South African law, wrongfulness plays a crucial role in liability determination, surpassing fault. Element of fault refers to the facts of the case but, public conviction guides the assessment of legal duty, ensuring liability operates within acceptable limits.[98] This is the silver line which underpins delictual liability in South

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[94] Section 39(2) of the Constitution of the Republic of South Africa, 1996, provides as follows: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

[95] Neethling, 2020, p 351.

[96] ibid, pp352-356.

[97] R Ahmed, 'The Influence of Reasonableness on Determining Delictual or Tort Liability for Pure Economic Loss – Comparative Conclusions' (2023) 86 THRHR 401.

[98] J Burchell, *Law of Delict* (Juta, Johannesburg 1993) 24., Neethling and Potgieter,

Africa balancing the competing rights of the parties and the community. There is no need to create new delicts, but the general principles equally apply to the issue.

In considering a doctor's liability for a negligent misstatement in the *Mukkheiber v Raath*,[99] the court stated that 'the danger of limitless liability in particular as far as negligent misrepresentation as a cause of action is concerned can be averted if careful consideration is given to the dictates of public policy, keeping in mind that public policy can easily become an unruly horse'.[100]

The Supreme Court of Appeal emphasized that pure economic loss includes loss of profit, additional expenses, and diminution in property value also. Drawing on *Perre v Apand*[101] in Australia, the court in *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd*[102] held that liability for economic loss resulting from negligent driving did not impose an additional burden on the defendant.

Considering vulnerability as a relevant and influential factor *inter alia*, the court distinguished previous decisions and recognized the gradual development of the law on pure economic loss. Brand J in *Country Cloud Trading CC v MEC, Department of Infrastructure Development*[103] further emphasized wrongfulness as a safety valve, enabling the court to curb liability where imposing it would be untenable.

Consequently, proving unlawfulness is a general rule in the Aquilian liability in South Africa, controlling challenging situations like pure economic loss by focusing on policy considerations and allowing courts to make value judgments based on societal rights and interests.

Law of Delict (8th edn, LexisNexis 2020) 352.

99 [2002] 1 All SA 226 (SCA).

100 1999 (3) SA 1065 (SCA).

101 [1999] HCA 36; (1999) 198 CLR 180.

102 *Per* Brand JA, 2009 (2) SA 150 (SCA).

103 See Brand J, in *Country Cloud Trading CC v MEC, Department of Infrastructure Development* (751/12) [2013] ZASCA 161 (26 November 2013).

5. CONCLUSION

The absence of a well-defined statutory framework concerning pure economic loss is keenly felt in contemporary legal systems, including Sri Lanka. While courts do address pure economic loss to some extent, their approaches vary across jurisdictions. Generally, courts exercise caution when encountering new duty situations to avoid uncertain legal liabilities. However, it's also essential to safeguard economic rights while balancing the stability of a country's financial landscape.

Economic rights are increasingly recognized in international law and are enshrined in the Constitution of Sri Lanka since 1978. However, the judiciary in Sri Lanka has yet to independently recognize economic rights. Although pure economic loss is acknowledged in contractual contexts, its treatment in delictual liability remains largely unexplored, aside from isolated cases such as *Chissel v Chapmen*. Recently, the concept of "loss of opportunity" was deemed a pecuniary loss in the Mannapperuma case, leading to nominal damages being awarded.

The concern now revolves around defining pure economic loss within the context of delictual liability to enable potential plaintiffs to seek compensation while averting limitless liability. To apply the test of "special reliance" as per the *Hedley Byrne v Heller* case, the court must evaluate the relationships between parties, as duty of care hinges on proximity. However, this criterion may not capture the complexities of modern financial transactions, where third parties may be indirectly involved due to a business's public financial credibility. Consequently, modern jurisdictions deviate from the proximity rule, emphasizing assumption of responsibility.

The Roman Dutch law based South African approach offers an innovative perspective. Embracing the positive indications in the Constitution regarding individual rights, South African jurisprudence justifies economic rights as substantive rights. Echoing the sentiments of the Australian case *Perre v Apand*,[104] South African courts advocate for the evolution of common law to accommodate societal changes. The "public conviction of the community" standard (*boni mores*) establishes duty while delineating the boundaries of delictual liability. Absent legal duty implies no liability, helping prevent limitless liability and controlling litigation

[104] (1999) 198 CLR 180 (HCA).

floods.

In conclusion, modern common law systems cautiously embrace new situations while ensuring compensation for pure economic loss without undermining delict/tort law principles. In the Sri Lankan context, two options are proposed: firstly, establishing pure economic loss as a violation of substantive rights via statute; secondly, adopting the criterion of *boni mores* to determine delictual liability for pure economic loss. Regarding the latter, the approach taken by the South African court is worthier to adopt, as it comprises a thorough and balanced evaluation process in compensating needy victims of pure economic loss under the general principles of *Aquilian* liability.