

Compensation for Pure Economic Loss in Finnish Tort Law

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1 Introduction

In Finland, as in many other legal systems, there has traditionally been a reluctance to award compensation for *pure economic loss*, that is, economic loss unconnected with personal injury or property damage. Such loss may typically be caused, for instance, by the negligence of accountants, consultants, architects, attorneys, engineers, surveyors and directors of corporations. An infringement of the rules on intellectual property protection may also result in pure economic loss. Further, in the context of environmental impairment one can find a variety of examples. For instance, fishermen may suffer reduced catches as a consequence of sea pollution. Hoteliers, restaurateurs, shopkeepers, etc., whose establishments are located in adjacent tourist resorts, may suffer economic loss when tourists avoid the area because the beach has become polluted.

As already noted, the Finnish legislator and the courts have taken a restrictive attitude towards compensation for pure economic losses occurring outside *contractual relationships*. Such compensation is in general awarded only to a limited extent. The Finnish Tort Act of 1974 (Skadeståndslagen 412/74) provides that compensation for pure economic loss shall be paid only if it is caused by a criminal act, by an administrative body in the exercise of its authority or if there otherwise exists a particularly weighty reason for awarding compensation (Chap. 5, § 1). In addition, some special laws contain provisions on compensating pure economic loss (see *infra* under 3.2.).

The aim of the present survey is to outline the current legal position in Finland regarding compensation for pure economic loss. It will also discuss some possible developments of this branch of law. The study is restricted to *liability in tort*. In contractual relations pure economic losses are generally compensated.¹

¹ The distinction between contractual and non-contractual obligations is, however, not entirely clear. The Supreme Court has extended the principles regarding contractual liability also to

2 The Compensation Framework

In the Finnish Tort Act there is no explicit definition of *pure economic loss*.² However, both in legal literature³ and in court practice⁴ pure economic loss has been defined as “economic loss unconnected with personal injury or property damage” (cf. Chap 5, § 1 of the Tort Act). A clear conceptual distinction is made in relation to *consequential* (or *indirect loss*), that is, economic loss in connection with personal injury or property damage.⁵ This type of loss occurs, for instance, when an injured person loses income or a property owner loses profit because he is not able to use a damaged property.

The Tort Act does not specify who is entitled to claim compensation for property damage. Traditionally, the right to claim damages has been restricted to persons having a proprietary or possessory right to the damaged property.⁶ Such individual and concrete rights are those held by the owner, mortgagee, or lessee, etc. of a property.⁷ However, there seems to be in Finland a development – albeit cautious – towards extending the right to claim economic loss beyond those having a proprietary or possessory interest in the damaged property. Compensation may be awarded if there is a reasonably close link between the person (natural or legal) suffering the loss and the damaged property. The position of the person suffering the economic loss should be comparable to someone holding proprietary or

persons not having directly made the contract. See e.g., the Supreme Court decisions 1992:165, 1995:78, 1995:150, 1998:57, 1998:160, and 1999:19. See also the comment by M. Hemmo in (1999) *Lakimiesuutiset* 7-8, at p. 117 *et seq.* Cf. the Supreme Court decision 1999:33 where the Ministry of Commerce and Industry had given wrongful information about the financial position of a shipyard that later was bankrupt. The state had to pay compensation to suppliers who had lost money relying on the information. The case is commented by H. Halila in (1999) *Lakimies* 5, at p. 725 *et seq.*

² During the legislative proceedings a definition was considered unnecessary, see E. Routamo, *Varallisuusvahingon korvaamisen ongelmia*, (1985) *Lakimies*, at p. 83. Cf. the Swedish Tort Act of 1972 (1972:207) which defines pure economic loss as “economic loss occurring without connection to *someone* (my emphasis) suffering personal injury or property damage” (Chap. 1, § 2). On this definition, see e.g., H. Andersson, *Trepartsrelationer i skadeståndsrätten* (1997), at p. 17 *et seq.*, and J. Kleineman, *Ren förmögenhetsskada. Särskilt vid vilseledande av annan än kontraktspart* (1987), at p. 133 *et seq.*

³ See e.g., E. Routamo & P. Ståhlberg, *Suomen vahingonkorvausoikeus* (2000), at p. 231 *et seq.*, and H. Saxén, *Skadeståndsrätt* (1975), at p. 62.

⁴ See e.g., the Supreme Court decisions 1991:32, 1991:79, and 1992:44.

⁵ See e.g., H. Saxén, *supra* note 3, at p. 61.

⁶ Traditionally, the concept of proprietary rights has referred above all to individual rights over things which normally can be transferred from one person to another and entail a more or less absolute power to use the thing to the exclusion of others. However, there has been a certain tendency during the last decades to redefine it so as to include certain claim-rights and possessory rights which are not “owned” in the traditional sense. See P. Wetterstein, *A Proprietary or Possessory Interest: A ‘Conditio Sine Qua Non’ for Claiming Damages for Environmental Impairment*, in P. Wetterstein (ed.) *Harm to the Environment: The Right to Compensation and the Assessment of Damages* (1997), at p. 31 with references.

⁷ See e.g., the discussion in the Supreme Court decision 1994:94. The looser and less concrete the link with the property which has been damaged, the less certain that the right to compensation exists. See H. Saxén, *supra* note 3, at p. 69.

possessory rights.⁸ Reference can be made to the following Supreme Court decisions:

1960 II 127: A driver of a car had negligently collided with a pole for electricity distribution. As a result of the collision two factories nearby lost their electricity supply for several hours and had to close down temporarily. The factories, which did not have any proprietary or possessory rights in respect of the damaged pole, were awarded compensation for their economic loss.⁹

In the decision *1994:94*, in which a helicopter had collided with a power line resulting in economic loss to a company which did not own the line, the Supreme Court approved in principle that the right to compensation should not be tied without exceptions to proprietary or possessory rights over the power line. According to the Court there should be a restricted right to compensation also in other cases, especially when there is a close link (comparable to a user's right) between the damaged electrical lines and the company suffering economic loss. However, in the case in question the Supreme Court considered that the company was in the position of a third party (see *infra*) which did not have the right to compensation under the Aviation Act of 1923.

A more flexible attitude towards the compensation issue is to be welcomed. The right to claim compensation for economic loss should not be too tied to the distinction between the *law of property* and the *law relating to legal obligations*. A flexible approach makes it possible to take into account specific circumstances *in casu* and the need for awarding compensation.¹⁰ The position of the person suffering economic loss is strengthened (cf. the prerequisites for awarding compensation for pure economic loss, *infra* under 3.1, and the position of the third-party claimant, *infra*).

It must be borne in mind, however, that such an approach may create problems for the courts in drawing the line between compensable and non-compensable economic loss.¹¹ When is the link between the damaged property and the person suffering economic loss comparable to someone holding proprietary or possessory rights?¹²

Furthermore, the definition of pure economic loss, that is, "economic loss unconnected with personal injury or property damage", causes problems of interpretation: Does it cover all economic losses that are not compensated within

⁸ See also H. Saxén, *Adekvans och skada* (1962), at p. 179 *et seq.*

⁹ Cf. the Supreme Court decision 1948 I 4 which obliged an owner of an aircraft, which had damaged power lines *belonging to* a factory, to compensate the latter's economic losses.

¹⁰ See also M. Hemmo who discusses the Supreme Court decision 1994:94 in (1995) *Lakimies*, at p. 1126 *et seq.*, and J. Tuomisto, *Tyypipakosta aikaprioriteettiin. Näkökohtia esineoikeudellisen sivilissuojan perusteista* (1993), at p. 33 *et seq.* Cf. also Chap. 5, § 20, subpara. 2 of the *Consumer Protection Act* (38/78) which gives a family member of the buyer the same right to claim damages for non-conformity as the buyer has.

¹¹ See e.g., E. Routamo, *Liikennevahinko* (1967), at p. 101 *et seq.*

¹² Cf. from Swedish law H. Andersson, *Skyddsändamål och adekvans. Om skadeståndsansvarets gränser* (1993), at p. 567 *et seq.*

the *concept of property damage* (including consequential losses) – provided that the demands regarding *adequate causality* (cf. *infra* under 3.2) are fulfilled – or are there any limitations in this regard?

Finnish tort law has generally been restrictive in giving a person, who has not directly suffered loss, the right to claim compensation. Liability does not, therefore, usually include *third-party damage*, that is, economic losses affecting a person as a result of primary damage to another person (usually personal injury or property damage).¹³ For instance, no compensation is payable to a person who loses his job or to a buyer who loses a delivery because a factory is damaged. Some exceptions to the general rule exist.¹⁴

It seems a bit unsatisfactory that compensation is awarded for economic losses unconnected with personal injury or property damage (pure economic losses) in accordance with the Tort Act Chap. 5, § 1, while losses affecting a person as a result of primary damage to another person are as a general rule not compensated. Such a distinction seems too formal and non-flexible. Also in the latter cases the courts ought to have some freedom to take into account special circumstances, e.g., the aim and purpose of the relevant tort rule,¹⁵ the behaviour and acts of the person liable,¹⁶ and the need for awarding compensation.¹⁷ Cf. the discussion above regarding the development to extend the right to claim economic loss beyond those having a proprietary or possessory interest in the damaged property.

As a conclusion one can say, that there is a development away from tying the right to claim economic losses strictly to the distinction between the law of property and the law relating to legal obligations. Furthermore, the rule that economic losses affecting a person as a result of primary damage to another person are not compensated, restricts the possibilities of awarding compensating for economic losses. The general rule that third-party damage is not compensated needs to be smoothened.

An overview of the prerequisites for awarding compensation for pure economic loss, both under the Tort Act Chap. 5, § 1, and according to special laws, is given in part 3 of the present survey.

¹³ See e.g., H. Saxén, *supra* note 3, at p. 77 *et seq.*, and Government Bill 1973:187 (Bill submitted by the Finnish Government to Parliament for a Tort Act), at p. 23.

¹⁴ For instance, compensation is awarded for the necessary care of a child, spouse, etc. See the Tort Act Chap. 5, § 4. Cf. also the *environmental impairment liability* under 3.2.2. *infra*.

¹⁵ Cf. H. Andersson, *supra* note 12, at p. 566 *et seq.*

¹⁶ Cf. H. Saxén, *supra* note 3, at p. 79, who is of the opinion that a third party should get compensation if the loss has been intentionally caused.

¹⁷ In an article concerning oil pollution damage (P. Wetterstein, *Oil Pollution and Pure Economic Losses*, *Annuaire de Droit Maritime et Océanique*, Tome XIV, 1996, at p. 46 *et seq.*) I have recommended not giving the right to recover pure economic losses to claimants with only a *contractual relationship* to those primarily suffering loss or damage as a result of contamination. This should only be a starting point, however, because strict adherence to such a rule does not allow taking into account all the differing cases and circumstances. Some exceptions may be needed. See *infra* under 3.2.2.2.

3 The Prerequisites for Compensating Pure Economic Loss

3.1 The Tort Act of 1974

The Tort Act is the general law concerning non-contractual liability for damage or injury. It does not cover liability governed by *special rules of law* (Chap. 1, § 1).¹⁸ In the Tort Act liability is based on fault, including vicarious liability, such as employer's liability (Chap. 2, § 1, Chap. 3). The prerequisites for compensating pure economic loss are written into Chap. 5, § 1. The provision has a restrictive character.¹⁹ As noted before, compensation is paid only if the loss is caused by 1) a criminal act, 2) by an administrative body in the exercise of its authority or 3) if there otherwise exists a particularly weighty reason.²⁰

3.1.1 Criminal Act

Before the Tort Act was adopted, the right to compensation for pure economic losses was in principle restricted to losses caused by criminal behaviour, although there were some exceptions.²¹ Subsequently, this rule was written into the Tort Act. The Government Bill mentions *fraud, forgery, usuary, and bankruptcy crimes* as criminal conduct covered by the provision in question.²² The provision aims at criminal conduct *in abstracto*, that is, compensation for pure economic loss may be awarded although the culprit avoids penalty because of, for instance, minority or the crime being statute-barred.²³ The claimant must show, however, that there exists a causal link between the criminal act and the loss suffered.²⁴

¹⁸ A special law preempts the Tort Act only to the extent that the relevant liability issue is governed by the special law. See e.g., P. Wetterstein, *Globalbegränsning av sjörättsligt skadeståndsansvar. En skadeståndsrättslig studie* (1980), at p. 200 *et seq.* Consequently, the right to compensation for pure economic loss may in some instances be awarded according to the Tort Act when a special law is silent on the issue. See also E. Routamo & P. Ståhlberg, *supra* note 3, at p. 232.

¹⁹ See e.g., H. Saxén, *supra* note 3, at p. 72.

²⁰ For the legislative history of the provision, see e.g., M. Ylöstalo, *Vahingonkorvauslain 5 luvun 1 §:n tulkintaa*, (1975) Lakimies, at p. 239 *et seq.*

²¹ As such exceptions M. Ylöstalo, *supra* note 20, at p. 241, mentions economic losses caused by infringements of intellectual property rights and by acts contrary to good practices.

²² Government Bill 1973:187, *supra* note 13, at p. 23. See also the Supreme Court decision 1982 II 177 in which the defendant was convicted for having launched an emergency rocket without due cause. The state was awarded compensation for the search costs.

²³ See Government Bill 1973:187, *supra* note 13, at p. 23, and also E. Routamo & P. Ståhlberg, *supra* note 3, at p. 233. It is to be noted, however, that minority, unsoundness of mind, etc., may result in adjustment of tort liability (the Tort Act, Chap. 2, §§ 2-3). Furthermore, the right to claim compensation may also be statute-barred. The general time limit for bringing claims under the Tort Act is ten years from the occurrence of the damage. However, if the time limit for criminal prosecution is longer, compensation can be sought within the longer time limit (Chap. 7, § 2). On all these questions, see the detailed analysis by J. Lappalainen, *Vahingonkorvausvaatimuksesta rikosjutussa. Prosessioikeudellinen tutkimus* (1986), at p. 477 *et seq.*

²⁴ On the demand of causality between the criminal act and the economic loss, see e.g., E. Routamo & P. Ståhlberg, *supra* note 3, at p. 250 *et seq.* See also the Supreme Court decision 1988:95. If the criminal act is not proved, compensation for pure economic loss is not awarded. See J.

An interesting question is, whether there should be exceptions to the rule that pure economic losses are compensable when caused by criminal acts? I do agree with *H. Saxén* when he argues, that the right to compensation for pure economic loss should not be tied to criminal acts without exceptions. The motives for making an action a criminal offence do not always harmonise with the intents behind a compensatory rule. One has to take into consideration, *inter alia*, the aim and purpose of the relevant penal rule, the behaviour of the culprit, the consequences of tying the compensation sanction to the criminal act, and the need to award compensation for pure economic loss in the specific circumstances.²⁵

During the legislative proceedings of the Tort Act it was considered important to extend the right to compensation for pure economic losses beyond losses caused by criminal acts.²⁶

3.1.2. Exercise of Public Authority

Pure economic loss caused by the state, the municipalities, and other public organs in the exercise of their authority shall be compensated without any requirements for criminal conduct.²⁷ The liability rule is written into the Tort Act, Chap. 3, § 2, according to which a public organ is responsible to compensate damage caused during the exercise of its authority or power, but only to the extent that reasonable care has not been followed when taking into account the duties to be performed, the way in which the duties should be performed, and the purpose of such duties. Fault or negligence on part of the person exercising public authority is, thus, a condition for liability.²⁸ As the notion “reasonable care” implies, a wide room for discretion is left to the courts.

According to the Government Bill all types of faults do not constitute liability for public organs under Chap. 3, § 2. The duties and obligations of public authorities vary, and hence the standard of *reasonable* care demanded of them. Public

Lappalainen, *supra* note 23, at p. 487 *et seq.*, who discusses the question in view of taxation crimes.

²⁵ As an example of a case where compensation for pure economic loss should not be awarded *H. Saxén* (*supra* note 3, at p. 73) mentions negligent driving of a car which has defective brakes (which is a criminal offense) causing a road blockade resulting in economic loss for other road users. In another context I have discussed the problem of compensating pure economic loss in view of the distinction between individual defined rights and public rights. A successful claim for pure economic losses usually presupposes that an individual defined right has been infringed. Does a pure economic loss, when the infringed right is exercised on a public bases (e.g., the use of roads, waters, lands for travelling), qualify for compensation? On this question, see *P. Wetterstein*, *supra* note 6, at p. 31, 45 *et seq.* I will return to the question when dealing with environmental impairment liability under the Finnish Environmental Damage Compensation Act of 1994, see *infra* under 3.2.2.1.

²⁶ See e.g., *H. Saxén*, *supra* note 3, at p. 72, and *M. Ylöstalo*, *supra* note 20, at p. 238 *et seq.*

²⁷ Damage occurring in connection with exercise of public authority is, however, often caused by criminal conduct (breach of authority). See *J. Lappalainen*, *supra* note 23, at p. 467 note 92.

²⁸ It should be noted, however, that the state, the municipalities, and other public organs are liable according to the Tort Act, Chap. 3, § 1, subpara. 2, also for negligent acts of their employees, civil servants etc., when these are not acting in the exercise of public authority (vicarious liability). In such cases compensation for pure economic loss can be awarded if a particularly weighty reason for doing so exists (Chap. 5, § 1).

authorities act “for the common good” and they cannot refuse to deal with matters where they may be in danger of making errors and mistakes. Restriction of liability is especially important when the exercise of public authority involves control and information activities, while higher demands can be put on more established areas of public administration, like the judiciary and “traditional” areas of administration.²⁹ The principle of “reasonable care” has, however, also been criticised.³⁰

Concerning the question of burden of proof, it has been stated, that not too high demands should be put on the person claiming compensation. The claimant should be able to show that there has been fault or negligence³¹ as a consequence of which he has suffered damage. It is then the task of the public organ to prove the reasons for the fault/neglect and that these reasons exempt the public organ from liability.³²

The Tort Act does not specify the meaning of “exercise of public authority”. In legal literature it has been suggested, that this expression comprises decisions and acts by which the public organs exercise power over the citizens.³³ Such decisions and acts may involve, *inter alia*, paying due care and attention to legal rights in court, issuing summons, police actions, military actions, granting building permissions, taxation, and arranging and upkeeping pilotage services.³⁴ The fact that the relationship between the person suffering damage and the public organ is often similar to a contractual relation motivates compensation for pure economic loss.³⁵ Such compensation has been awarded, for instance, in the following Supreme Court decisions:³⁶

1989:14: The registration authority had mistakenly written a wrong annual model into the registration document of a car. This was considered an action of “exercise

²⁹ See Government Bill 1973:187, *supra* note 13, at p. 17. See also E. Routamo & P. Ståhlberg, *supra* note 3, at p. 180 *et seq.*, and the detailed presentation by P. Kukkonen, *Vahingonkorvaus virassa aiheutetusta vahingosta. Siviilioikeudellinen tutkimus virassa aiheutetun vahingon korvaamisesta vahingonkorvauslain mukaan* (1996), at p. 423 *et seq.* A. Saarnilehto, *Vahingonkorvauslaki oikeuskäytännön valossa* (1996), at p. 68 *et seq.*, also presents court practice concerning the standard of reasonable care put on public organs.

³⁰ See e.g., P. Wetterstein, *Det offentligas skadeståndsansvar – särskilt med hänsyn till sjöfartsförhållanden*, (1999) *Marlus* Nr. 253, at p. 5. It may be added, that court practice does not verify that there has been special restriction of liability in cases concerning exercise of public authority. Cf. also E. Routamo & P. Ståhlberg, *supra* note 3, at p. 181 *et seq.*

³¹ It is enough that the claimant shows that a mistake or error has been made, he or she does not have to identify the civil servant who has been negligent. See e.g., E. Routamo & P. Ståhlberg, *supra* note 3, at p. 272.

³² See H. Saxén, *Tillägg till skadeståndsrätt* (1983), at p. 432. See also A. Saarnilehto, *supra* note 29, at p. 71.

³³ See e.g., H. Saxén, *supra* note 3, at p. 262.

³⁴ P. Kukkonen, *supra* note 29, at p. 532. See e.g., the Supreme Court decisions 1995:61 and 1999:32. Reference may also be made to B. Bengtsson, *Det allmännas ansvar enligt skadeståndslagen* (1996), at p. 39 *et seq.*, who discusses the concept of “exercise of public authority” in view of the Swedish Tort Act which contains a provision (Chap. 3, § 2) similar to the Finnish Tort Act, Chap. 3, § 2. On the “exercise of public authority” in maritime matters, see P. Wetterstein, *supra* note 30, at p. 2 *et seq.*

³⁵ See H. Saxén, *supra* note 3, at p. 263.

³⁶ See also e.g., 1980 II 121, 1981 II 24, 1985 II 39, 1986 II 6, 1986 II 32, 1993:75,76, 1995:111, and 1996:78.

of public authority” and consequently, the state was obliged to pay compensation to a person who had suffered economic loss because of having relied on the information in the registration document.

1989:50: An information officer had given wrongful information about important Finnish rules and regulations concerning, *inter alia*, employment matters, to a Canadian citizen who had been planning to return to Finland. Considering that the information officer had been exercising public authority, the Court obliged the Finnish state to pay compensation to the claimant.

The above-mentioned principle (*supra* under 2), that liability does not usually include third-party damage, may, however, lead to it, that compensation is denied. *H. Saxén* mentions as an example a public organ which causes economic loss to a third-party when exercising public authority: an employer cannot get compensation for his economic loss when the driving license of his employee has been mistakenly suspended.³⁷ Furthermore, compensation may be denied because the person claiming damages has not fulfilled his duties in accordance with the Tort Act, Chap. 3, § 4.³⁸

3.1.3 “A Particularly Weighty Reason”

When the Tort Act was being drafted it was considered important that pure economic losses could be compensated – albeit exceptionally – also outside the situations mentioned above, that is, losses caused by criminal conduct or by a public organ in the exercise of its authority. It was felt that some room should be left for the development of this branch of law through court practice.³⁹ According to the Tort Act Chap. 5, § 1 compensation can be awarded if there exists a *particularly weighty reason*.

The somewhat unclear legislative history of the provision⁴⁰ and the “open” wording *particularly weighty reason* cause problems of interpretation. It is not an easy task to try to find criteria for its interpretation. However, some guidelines have been suggested in the literature.

The degree of fault or negligence on part of the person/activity causing the economic loss is relevant. For instance, intentional behaviour (e.g., acts contrary to good practice) or gross negligence may trigger the obligation to compensate pure

³⁷ *H. Saxén, supra* note 32, at p. 397.

³⁸ Chap. 3, § 4 provides, that a person, who has suffered loss as a result of a wrongful decision given by a state or municipal authority, has to lodge an appeal for rescission of the decision. If he fails to appeal without a just cause, he loses his right to claim compensation for losses he could have avoided by appealing. In Chap. 3, § 5 there are some further restrictions to the right to claim damages. On these provisions, see e.g., *H. Saxén, supra* note 3, at p. 265 *et seq.*, and *supra* note 32, at p. 433, and *A. Saarnilehto, supra* note 29, at p. 71 *et seq.*

³⁹ On the legislative proceedings, see e.g., *M. Ylöstalo, supra* note 20, at p. 239 *et seq.*, and *E. Routamo, supra* note 2, at p. 77 *et seq.*

⁴⁰ See the references *supra* in note 39, and also *P. Ståhlberg, Kaksi täysistuntoratkaisua sopimuskumppanin työntekijän vahingonkorvausvastuusta. III Näkökohtia vähemmistön lausunnoista*, (1993) *Defensor Legis*, at p. 415 *et seq.*

economic loss.⁴¹ Furthermore, the scope of the loss, its implication for the person suffering damage, and his possibilities to protect himself against such loss may be of relevance.⁴² Reference has also been made to the main rule in Chap. 2, § 1 of the Tort Act (according to which damage caused by fault or negligence shall be compensated) as an argument in favour of a broad interpretation of *particularly weighty reason*. Analogies should be made to situations where pure economic loss is compensated without the prerequisite in Chap. 5, § 1, for instance, under contract law, company law, and the law on intellectual property.⁴³

Regarding the practice of the Supreme Court, reference can be made to the following decisions:⁴⁴

1983 II 187: Using advertisements in newspapers, a labour organisation had executed a blockade against an employer who had dismissed an employee. The purpose of the blockade was to put pressure on the employer. By intervening in the dispute between the employer and the employee, who had resort to legal remedies, the organisation caused economic loss to the employer. The Supreme Court considered that the organisation had acted contrary to good practices. However, because also the employer had acted improperly, there was not particularly weighty reason for awarding compensation for pure economic loss.

1991:79: An editor had written a newspaper article similar to a product test, in which he and another person expressed their views on baby carriages manufactured by five different producers. The article had given the readers the impression of an impartial test and contained wrongful information about one of the imported baby carriages. The article was published well noticeable in a context dealing with child care in a widely spread newspaper. The Supreme Court considered that there was particularly weighty reason to oblige the editor and the editor-in-chief of the newspaper, who had acted against good editing practice, to pay compensation for pure economic loss to the importer of the baby carriage.

1990:26: A person had made an insurance contract concerning a market garden. The insurer denied compensation for damage which occurred in the garden, because coverage would have presupposed a special clause in the contract. When making the insurance contract, the agent of the insurance company had wrongly informed the insured that the damage was covered under the general insurance terms. The Supreme Court obliged the agent and the insurance company to compensate the insured with an amount corresponding to the unpaid insurance claim.

1992:44: An attorney was considered having negligently caused economic loss to heirs, when he had assisted in selling assets belonging to the estate without checking that a will had become valid at law. The Supreme Court considered that

⁴¹ See e.g., H. Saxén, *supra* note 3, at p. 73 *et seq.*, and M. Ylöstalo, *supra* note 20, at p. 243. Cf. also A. Arti, *Vahingonkorvauslaki* (1981), at p. 198.

⁴² See e.g., P. Ståhlberg, *supra* note 40, at p. 421.

⁴³ P. Ståhlberg, *supra* note 40, at p. 420.

⁴⁴ See also e.g., 1997:181, 1998:115, and 1999:33.

there was a particularly weighty reason to award compensation for the loss, because an attorney has a special obligation to act carefully and properly, and to take into consideration also the interests of other heirs to an estate, not only those of his own client.

It can be concluded that there is a great deal of uncertainty awaiting guiding precedents. The interpretation of *particularly weighty reason* is left to the courts and their consideration of the circumstances *in casu*. The wording of the provision indicates, however, that compensation for pure economic loss should not be awarded too lightly.⁴⁵ The criteria suggested in the literature (cited *supra*), which also to some extent seem to have been approved in court practice,⁴⁶ offer help for the interpretation. In addition, elements such as the preventive and reparative function of the compensation, and the rules and values of the sphere of life within which the question of compensation arises, should be taken into account.⁴⁷

3.2 *Special Legislation*

As noted in the introductory part (1), some special laws contain provisions on compensating pure economic loss. Compensation under special legislation is not tied to the general prerequisites in Chap. 5, § 1 of the Tort Act.

3.2.1 *Miscellaneous*

In the field of *intellectual property law* one can find many provisions awarding compensation for pure economic loss. A condition for compensation is usually, that the intellectual property rights have been intentionally or negligently infringed. Such provisions are, for instance, § 57 of the *Copyright Act* (Upphovsrättslagen 404/61), § 58 of the *Patents Act* (Patentlagen 550/67), § 36 of the *Registered Designs Act* (Mönsterrättslagen 221/71), and § 38 of the *Trade Marks Act* (Varumärkeslagen 7/64).⁴⁸

According to the *Companies Act* (L om aktiebolag 734/78) Chap. 15, § 1, a founder, a member of the board of directors, a member of the supervisory board and the managing director are liable for damage which they intentionally or negligently cause to the company. They are correspondingly liable for damage

⁴⁵ The aim of the Tort Act is primarily to compensate personal injury and property damage. See also P. Ståhlberg, *supra* note 40, at p. 415.

⁴⁶ Cf. also the decisions of the Supreme Court, 1991:32 and 1991:61, and of the Vaasa Court of Appeal, 16.6.1997, S 96/486, in which claims for compensation were denied, because the Courts considered that the requirements for *especially strong reason* had not been fulfilled.

⁴⁷ See P. Wetterstein & K. Långkvist, *ITF:s/sjömansunionens blockader av främmande fartyg*, in P. Wetterstein (ed.) *Finsk jurisdiktion över främmande fartyg (del II)* (1986), at p. 777 with references.

⁴⁸ It should be noted, however, that illegal use of the rights enumerated in these Acts renders the culprit, irrespective of his fault or neglect, liable to pay compensation for the use. This compensation is not characterised as pure economic loss, since there is no need on part of the claimant to show economic loss. See e.g., E. Routamo & P. Ståhlberg, *supra* note 3, at p. 237 *et seq.*, and the Supreme Court decision 1991:32.

caused to shareholders or others when acting contrary to the Companies Act or the by-laws of the company. Also a shareholder, who is an accessory to actions contrary to the Companies Act or the above-mentioned by-laws, is liable for damage which he intentionally or by gross negligence causes to the company, to another shareholder or to other persons (Chap. 15, § 3).⁴⁹ These provisions cover compensation also for economic losses. As an example, reference may be made to the following Supreme Court decision:

1992:66: A shareholder, who had followed wrongful instructions given by the board of directors, had lost his right to buy in shares of the company. A member of the board, acting contrary to the by-laws of the company, was found liable to compensate the loss. Also the company was liable to pay damages.

Provisions on compensating pure economic loss are included also in, *inter alia*, Chap. 17 of the *Co-operative Society Act* (L om andelslag 247/54), § 15 of the *Employment Contract Act* (L om arbetsavtal 320/70), Chap. 5, § 22 of the *Consumer Protection Act* (Konsumentskyddslagen 38/78), § 13 of the *Act on Consumer Protection in Estate Agency* (L om konsumentskydd vid fastighetsförmedling 686/88; see the Supreme Court 1997:125) and § 42 of the *Personal Register Act* (Personregisterlagen 471/87).

3.2.2 Environmental Impairment Liability

3.2.2.1 The Environmental Damage Compensation Act

The question of compensating pure economic loss has gained increasing interest in the context of environmental impairment liability. The *Environmental Damage Compensation Act* (L om ersättning för miljöskador 737/94), *infra* the EDCA, entered into force on June 1, 1995. The EDCA covers a rather large area of environmental infringements.⁵⁰ The basis of liability in the EDCA is a rule of strict liability.⁵¹ However, there is a rule in the EDCA (§ 4) according to which damage to the environment is recoverable under the Act only if it is not reasonable to

⁴⁹ As regards the liability of accountants, see e.g., the Supreme Court decision 1992:98.

⁵⁰ According to § 1 of the EDCA, compensation for damage caused to the environment by activity performed in a specific area shall be payable. The damage should be caused by (1) pollution of water, air or land; or (ii) noise, vibration, radiation, light, heating or smell; or (iii) other comparable disturbance. The EDCA does not cover pollution from means of transport. However, the maintenance of traffic areas, such as roads, ports and airfields, is covered (§ 1, subpara. 2). Furthermore, the EDCA does not cover liability based on contract, and compensation for damage which is regulated by special legislation is also excluded. On the applicability of the EDCA, see e.g., P. Wetterstein, *The Finnish Environmental Damage Compensation Act – and some Comparisons with Norwegian and Swedish Law*, (1995) *Environmental Liability*, at p. 41, and the detailed survey by E.J. Hollo & P. Vihervuori in *Ympäristövahinkolaki* (1995), at p. 23 *et seq.*

⁵¹ On strict liability (combined with liability insurance or other forms of financial guarantee) as an important component in a modern, practicable and functional system of compensation, see P. Wetterstein, *supra* note 50, at p. 42 *et seq.* with references. It may be noted, that the Supreme Court applied the principle of strict liability to especially hazardous activity already before the EDCA was adopted. See e.g., 1969 II 42 and 1995:108.

tolerate the disturbance taking into account, among other things, the local circumstances, the situation that led to the disturbance as a whole, and how common this kind of disturbance is in comparable circumstances. The obligation to tolerate disturbances is not applicable to personal injury or more significant property damage. Neither does it affect damage caused by criminal or intentional behaviour.⁵²

According to § 7 of the EDCA, strict liability is laid upon the operator, that is, the person who carries on the activity causing environmental damage.⁵³ Furthermore, since the EDCA covers environmentally harmful activity in general, it applies strict liability also to private persons not engaged in business or commerce.

In addition to compensation for personal injury and property damage⁵⁴ the EDCA covers pure economic losses, which shall be compensated with the exception of insignificant losses (§ 5). Thus, the EDCA broadens the right to compensation in relation to Chap. 5, § 1 of the Tort Act (*supra* under 3.1.). Economic losses of this type may hit hoteliers, restaurateurs, shopkeepers, etc., when their turnovers drop as a result of damage affecting the area adjacent to their establishments. The wording *insignificant losses* leaves it to the courts to determine when compensation is payable. According to the explanatory notes to the Act, citizens should not be encouraged to pursue claims for insignificant losses.⁵⁵ Damage caused by criminal behaviour is, however, always compensable according to the EDCA.

Despite the above-mentioned “limits of tolerance”, a rather broad right to compensation for pure economic losses seems to exist under the EDCA. The courts will have to find criteria (e.g., by using “traditional” tests for tort liability, involving factors such as foreseeability and remoteness of damage) in order to arrive at a reasonable delimitation of the right to compensation. I will return to the question *infra* (3.2.2.2.), when dealing with oil pollution.

A successful claim for pure economic loss under Finnish law generally presupposes that an *individual* defined right has been infringed.⁵⁶ In the case of

⁵² On the “limits of tolerance”, see e.g., P. Wetterstein, *supra* note 50, at p. 43, and Government Bill 1992:165 (Bill submitted by the Government to Parliament for an Environmental Damage Compensation Act), at p. 24 *et seq.*

⁵³ From court practice, see e.g., the Supreme Court decision 1999:124 and the Turku Court of Appeal decision 16.2.2000/367. Further, according to § 7, persons comparable with an operator (taking into consideration control, financial, etc., aspects) also have strict liability, e.g., a parent company could be held liable for activities of its subsidiary. See Government Bill 1992:165, *supra* note 52, at p. 26 *et seq.* Also the transferee of an activity is liable if he knew or should have known about the damage or disturbance (or the risk of it) at the time of the transfer.

⁵⁴ Compensation for personal injury and property damage is payable according to Chap. 5 of the Tort Act. In this respect the EDCA did not introduce any changes.

⁵⁵ See Government Bill 1992:165, *supra* note 52, at p. 25. On the expression *insignificant losses*, see also E.J. Hollo & P. Vihervuori, *supra* note 50, at p. 171 *et seq.*

⁵⁶ However, in the field of water law compensation has been awarded for economic loss resulting from infringement of public rights. See e.g., the Supreme Court decision 1934 II 263: An electricity distributing co-operative society had drawn a line over a waterway at such low height that a ship could not pass. The shipowner was awarded compensation for economic loss resulting from delayed loading. See also H. Saxén, *supra* note 3, at p. 71.

environmental impairment, however, interest is often directed towards cases where public rights have been infringed. Reference may be made to claimants who suffer economic losses in the exercise of their common public rights (using roads, waters, and lands for travelling, fishing, hunting, picking berries and mushrooms, etc.). To what extent compensation is awarded when the right is exercised on a *public* basis remains somewhat unclear under the EDCA. During the preparation of the EDCA it was not considered feasible to include in the Act a general rule on compensation for infringed public rights. However, the Legal Committee of Parliament expressed the view that so-called *general users* should have the right to compensation for pure economic loss.⁵⁷

Since environmental impairment may often result in economic losses, there seem to be good reasons for extending the right to compensation to encompass infringement of public rights. Risk-spreading and preventive considerations (cf. the *polluter pays* principle⁵⁸) would favour such a right. Compensation should, however, be restricted to those who as a consequence of not being able to use their public rights suffer economic losses in the exercise of their *commercial activity*. Such losses may, for instance, hit commercial fishermen and people who are dependent upon unrestricted travel in the conduct of their businesses. Also people who are dependent upon the ecosystem for their subsistence should be able to recover.⁵⁹

3.2.2.2 Oil Pollution Liability

Chap. 10 of the *Finnish Maritime Code* (Sjölagen 674/94), *infra* the FMC, contains provisions on oil pollution liability. These provisions are mainly based on international treaties (Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, and Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971⁶⁰). The provisions lay strict – albeit limited – liability for oil pollution damage on the shipowner (with some exceptions, see Chap. 10, § 3). The definition of *pollution damage* explicitly

⁵⁷ See Opinion of the Legal Committee of the Parliament concerning Governmental Bill 165/1992, 1994 vp-LaVM 10-HE 165/1992 vp, 6. The concept of *general user*, however, remains somewhat unclear. E.J. Hollo & P. Vihervuori, *supra* note 50, at p. 177 *et seq.*, seem to include common public rights under this notion.

⁵⁸ In accordance with this principle it is primarily the polluter who bears the cost of damage, since it would seem reasonable that the person who derives economic benefit from his activity should pay for the damage caused. The cost of pollution shall be channelled to the polluter so that the market price of goods will better reflect the true social costs of their production and that he be persuaded to evolve and choose production methods less harmful to the environment. The theoretical basis of the “polluter pays” principle is thus the “internalization of external costs”. The principle has been supported by the OECD and was incorporated in EC law through the 1987 Single European Act (Art. 130r) and in the 1992 Maastricht Treaty and the 1997 Amsterdam Treaty (Art. 174). On the “polluter pays” principle, see e.g., H.Chr. Bugge, *Forurensningsansvaret* (1999), at p. 192 *et seq.*, A. Kiss & D. Shelton, *Manual of European Environmental Law* (1997), at p. 43 *et seq.*, and M-L. Larsson, *Law of Environmental Damage. Liability and Reparation* (1999), at p. 90 *et seq.*

⁵⁹ For the discussion, see P. Wetterstein, *supra* note 6, at p. 45 *et seq.*

⁶⁰ These Protocols entered into force on 30 May 1996.

mentions *loss of profit* (Chap. 10, § 1),⁶¹ making it clear that loss of profit from impairment of the environment is recoverable – also when it is unrelated to damage to the claimant's property. Consequently, in the case of a pollution incident affecting a coastline, both fishermen losing income and hoteliers, restaurateurs, and shopkeepers who obtain their income from tourists at seaside resorts will in principle be able to recover – provided that they are able to prove that they have suffered loss of profit as a result of such contamination.⁶² Furthermore, as regards lost profit, it seems that the draftsmen of the definition did not intend to make a distinction between the infringement of private and public rights (cf. the discussion *supra*).

Accepting the right to compensation for pure economic losses poses the question of how far that right extends in cases of environmental impairment. The impact of such impairment can reach interests beyond those directly suffering losses. I have specifically in mind claimants with a *contractual relationship* to those primarily suffering loss or damage as result of the impairment. An environmentally harmful incident may have so far-reaching consequences that it is doubtful whether those indirectly suffering economic losses should be compensated – even if one accepts the polluter pays principle as a starting point. A non-restrictive attitude could cause large and complicated compensation issues. Widespread natural resource damage raises the spectre of enormous and virtually indeterminate liability.

Furthermore, allowing recovery for those exercising common public rights makes the question of a reasonable delimitation of the right to compensation even more topical. For instance, interruption of traffic as a result of environmental impairment may give rise to a large variety of claims for economic losses: claims from ships using waterways,⁶³ from firms and other businesses whose employees regularly use roads and ferries to commute, etc. Should all these costs be laid upon the polluter? Would this be suitable in view of principles and aspects such as cost-efficiency, insurability (third party/first party insurance), and procedural rationality?

It is not possible within the confines of this short presentation to analyse more in depth the complicated matter of developing criteria concerning the admissibility of claims for pure economic losses. However, some short comments can be made.

Such criteria (or parameters) should meet various requirements. They should enable claimants – and also polluters/insurers – to foresee with some degree of

⁶¹ *Pollution damage* means: “loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken”.

⁶² The explicit mentioning of *loss of profit* in the definition of *pollution damage* is in line with the practice of the International Oil Pollution Compensation Fund established under the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. The IOPC Fund has considered as recoverable economic losses those suffered by persons who depend directly on earnings from coastal or sea-related activities, e.g., loss of earnings suffered by fishermen and by hoteliers, restaurateurs, operators of beach facilities, etc. See P. Wetterstein, *supra* note 6, at p. 37 with references.

⁶³ Cf. the Supreme Court decision 1934 II 263 mentioned *supra* in note 56.

certainty whether a particular claim will be admissible. At the same time, the criteria should retain sufficient flexibility to change and consider each case on its merits.

The principles and notions of adequate causation, foreseeability, and remoteness of the damage⁶⁴ afford only limited guidance on the delimitation problem.⁶⁵ Where to set the bounds for what damage shall be compensated in this respect is also largely a question of policy, that is, how restrictive shall liability be in the case of environmental impairment. A reasonable balance between all the relevant, and also conflicting (claimant/polluter), interests ought to be achieved.

When trying to develop criteria concerning the admissibility of claims, a starting point could be to consider not giving the right to recover pure economic losses to claimants with only a *contractual relationship* to those primarily suffering loss or damage as a result of environmental impairment. Economic losses in consequence of contractual ties can be very unpredictable and differ with the time and place. Furthermore, contractual clauses and insurance aspects are relevant for the compensation issue in contractual relations.⁶⁶

However, strict adherence to such a rule cannot take into account all the differing cases and circumstances.⁶⁷ Some exceptions may be needed, for instance, regarding employees of those directly suffering damage, such as employees of fishermen, hoteliers, restaurateurs, etc.⁶⁸ Legal policy and social reasons may support giving the right to claim for pure economic losses to employees made redundant as a consequence of environmental impairment. Furthermore, reference may be made to the discussion above (*supra* under 2) concerning the development towards extending the right to claim economic loss beyond those having a proprietary or possessory interest in the damaged property. Consequently, compensation for economic loss could be awarded also in contractual relations when there is a reasonably close link between the person suffering the loss and the damaged property.⁶⁹

As regards the position of those claimants who suffer pure economic losses more directly, that is, without the above-mentioned contractual ties, it may be noted that principles of proximity, for instance, geographic or economic proximity,⁷⁰ are

⁶⁴ On these principles in Finnish tort law, see e.g., E. Routamo & P. Ståhlberg, *supra* note 3, at p. 253 *et seq.*, and H. Saxén, *supra* note 3, at p. 133 *et seq.*, who regarding strict liability mentions (at p. 216) that in order to fall within the bounds of adequacy/foreseeability the damage caused should be connected in some way with the risk of damage characteristic of the activity (operating hazards).

⁶⁵ See P. Wetterstein, *supra* note 6, at p. 39 *et seq.*

⁶⁶ It must be kept in mind that tort action is a very expensive administrative device for compensating victims of accidents. Those having indirectly suffered financial harm may find it easier to arrange for cheaper, alternative compensation, for instance, first party insurance.

⁶⁷ Cf. the text under 2 *supra*, where I endorse the smoothening of the general rule that third-party damage is not compensated. Account should be taken of special circumstances, e.g., the aim and purpose of the relevant tort rule, and the need for awarding compensation.

⁶⁸ Cf. in this respect E.J. Hollo & P. Vihervuori, *supra* note 50, at p. 175, who deny employees' right to claim compensation from the polluter in cases where environmental damage leads to partial or total stoppages.

⁶⁹ Cf. also E.J. Hollo & P. Vihervuori, *supra* note 50, at p. 175 *et seq.*

⁷⁰ See P. Wetterstein, *supra* note 6, at p. 41 *et seq.* with references.

only of limited help when trying to develop delimitation criteria. But the claimant's *burden of proof* should also be noted in this context. First, he must establish a link of causation between the economic loss and the environmental impairment, a task that is often difficult to fulfil.⁷¹ Further, the claimant must prove that he has suffered actual economic loss. The amounts claimed must be substantiated by sufficient proof. It is to be observed, however, that the further away (both geographically and in terms of economic dependence) the claimant is from the pollution/contamination, the more difficult it may be for him to prove the link of causation, the alleged economic loss, etc. Consequently, the rules of the claimant's burden of proof reduce the need for *criteria* concerning the admissibility of claims for pure economic loss.

4 Compensation Scheme

As a summary of the current legal position in Finland regarding compensation for pure economic loss reference is made to the following compensation scheme:

Right to Claim

Proprietary or
Possessory Right

Individual defined right
and to some extent public rights

	Consequential loss	Pure economic loss		
Property damage		Tendency to <i>extend the right to claim economic loss</i> ; Supreme court 1960 II 127 and 1994:94	Tort Act of 1974 Chapt. 5, § 1	Special legislation
Personal injury			<i>Third-party damage</i> not usually compensated	<i>Delimitation</i> problems especially in the <i>environmental impairment</i> context

⁷¹ However, the EDCA contains a rule that the claimant has to prove that there exists “a probability” of a causal link between the alleged offending activity and the damage. In judging this probability account should be taken of, *inter alia*, the nature of the activity and the damage, and other possible causes of the damage (§ 3). According to the explanatory notes to the Act “probability” means a high level of probability; in mathematical terms, clearly over 50 per cent. On this rule, see P. Wetterstein, *supra* note 50, at p. 44 *et seq.*