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Liability for Pure Economic Loss in English and Swedish Law of Tort

- a comparative analysis with special regard
to problems concerning misrepresentation
in non-contractual relations

Master thesis
20 points

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Comparative law

Spring 2004

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Summary

According to Chapter 2 Section 2 of the Swedish Tort Liability Act, pure economic loss arising in non-contractual relations shall be compensated if the tortfeasor has caused the loss through the commission of a crime. Although never intended, until recently, the general view was that in the absence of legislation, damages could only be awarded for pure economic loss outside contractual relations if suffered in connection with a crime. Through a string of cases starting with the landmark decision in NJA 1987, p. 692 (the so called *Kone* case), the traditional Swedish restrictive view on pure economic loss seems to have given way for a more flexible approach where circumstances in the specific case and the need for awarding compensation are now taken into account. The basis for this expansion of liability is that liability can arise in non-contractual relations if the third party is found to have had a justifiable reason to place his trust in the act of the tortfeasor and the latter has or ought to have realised that the loss could occur as a result of the tortious act. By using this “justifiable reliance” principle which was laid down in *Kone*, the Swedish Supreme Court has concluded that professionals may be liable for losses suffered by others than their contractual parties even if no crime has been committed.

This general principle seems to be in well harmony with the English principle on recovery for pure economic loss in respect of professional negligent misstatements, advice and performance of services as enunciated by the House of Lords in the case of *Hedley Byrne & Co v Heller & Partners* in 1963 and as extended under *Henderson v Merrett Syndicates Ltd*. Liability will be imposed where a “special relationship” arises between the parties. Such a relationship will arise if the claimant has placed “reasonable reliance” on the defendant’s special skill and care and the defendant has made a “voluntary assumption of responsibility” for the statement or service given.

One of the purposes of the present study is to account for some of the differences and similarities in the approach on this issue in the English and Swedish legal systems. The study has been carried out within a case oriented comparative methodology, in order to provide a picture of how Sweden and England deal with the problem of pure economic loss compared with each other.

The present work is in part descriptive and in part analytical. Chapters Two through Five provide a general presentation of the two legal systems as well as a presentation of liability for pure economic loss. The basic purpose of this descriptive part has been to outline the legal development of pure economic loss in order to show how the present position regarding liability has developed successively under the influence of case law, legislation and legal writings. The main issue there is to highlight some of the two systems underlying policy assumptions, which are in some respects both similar and

different. In Chapters Six and Seven, a special legal problem is examined. Interest is there focused on claims by third parties for negligent advice and information. Both real and fictitious cases are introduced and analysed in order to show how the two legal systems deal with the same problem. The solutions to the problems that arise in this area are linked to the general position regarding pure economic loss and consequently, the first descriptive part of the work is an essential base for the analysis. At the same time, the conclusions found in the last two Chapters are expected to provide a clearer understanding of the general argumentation regarding pure economic loss.

Abbreviations

AC	Law Reports Appeal Cases, House of Lords
AJCL	American Journal of Comparative law
All ER	The All England Law Reports
App Cas	Law Reports, Appeal Cases
BLR	Building Law Reports
JT	Juridisk Tidskrift
KB	King's Bench Reports
LJ	Law Judge
MLR	Modern Law Review
NE	North Eastern Reporter
NJA	Nytt juridiskt arkiv avd. 1
PC	Privy Council
Prop	Proposition
SFS	Svensk författningssamling
SOU	Statens offentliga utredningar
SvJt	Svensk juristtidning
TLR	Times Law Reports
WLR	Weekly Law Reports
QB	Queen's Bench Reports

1 Introduction

1.1 Subject and purpose of the thesis

Personal injury and property damage may both have economic consequences. In cases where economic losses arise directly out of physical loss, most legal system's tort law (Sw. *skadeståndsrätt*) provides for compensation. This is not controversial. What is disputed is the use of tort law to provide compensation for losses which are merely financial in nature, that is to say, losses which have no connection to personal or physical harm. Such losses are termed "pure economic losses".

In England, the one area where liability for pure economic loss has clearly been established concerns negligent misstatements and negligence in the performance of a service. In Sweden, a string of cases have also imposed liability in such situations and it is these situations that are the subject of the present study.

Professional advice is sought for in many contexts. At the same time, knowledge has also become very specialized. The experts sell their knowledge on a contractual basis, and the buyers rely on that knowledge when making important decisions. In principle, if the provider of advice has been negligent, and the advice relied upon turns out to be false, it seems only fair that he should be held liable to compensate the resulting economic loss. It is however, also a feature of modern business conditions that information spreads easily. Even persons that are not parties to the contract with the provider of the advice may become aware of his statement and rely on it when making financial decisions. When they suffer damage they, too, are likely to want to sue the specialist professional.

An expert may argue that since he is giving the advice to a specific contractual party, he should not be liable towards a potentially indeterminate number of other persons. Nevertheless, English as well as Swedish courts have imposed liability on the experts in these situations. The general purpose of this study is to account for some of the doctrinal differences in the approach adopted on this issue in the two systems and highlight some of their underlying policy assumptions, which can be both similar and different. This in turn, may lead to insights about the respective role their courts are prepared to play in shaping the law in this complex area of professional negligence.

In addition, the study sets out to answer the following questions:

1. Is there a common core of principles, policies and rules governing liability for pure economic loss in the English and Swedish jurisdictions?

2. Which significance has the fact that the legal rules on recovery for economic loss has in England developed through case law, and in Sweden by way of codification? To put it differently, is it a civil law vs. common law issue?
3. Which legal system provides most legal certainty regarding recovery for pure economic loss in cases of negligent misstatements and services?
4. Based on seven fictive case scenarios, how are each solved under the laws of England respective Sweden?

1.2 The comparative method and its specific problems in the analysis

In addressing the object of this thesis, the aim is to make the comparative description and analysis of the English and Swedish law as objective as possible and not viewed from either a Swedish nor English perspective. With a view to provide the reader with a better understanding of the text, English legal terms which may be unfamiliar to the Swedish reader, are in the running text provided with a Swedish translation.

To attempt the presentation of a foreign system to a lawyer or law student who belongs to another legal family is not an easy task but it is probably best to start the study with a brief outline of the main features of the legal systems concerned. The study also contains well-selected foreign decisions and the reader will discover that a number of judgments from both the Swedish and English legal system are described in detail. Furthermore, seven fictitious cases are introduced in order to show how the two legal systems deal with the same problem. This approach attempts to equip the reader with factual situations which are familiar to him from his own practice or studies. This is, however, not enough. The foreign judicial answer, once found, must also be seen in a wider context of its environment and not be taken as containing the whole truth. For the purpose of this study, the wider context in which the particular foreign rule lives is important but impossible to account for in full in this thesis. Nevertheless, if the work is properly done, it will hopefully lead to a mutual understanding on how the respective systems have and are approaching the complex problem of pure economic loss.

One final point should be made at the outset. Instead of producing separate sections on English and Swedish law which would require the reader to compile his or hers own list of similarities and differences, a different presentation has been opted for. As often as possible, the author's own mixed appreciation has been inserted in order to assist the reader in comprehending the two systems common and diverging points of reference.

The methodology chosen is a case oriented comparative methodology which can analyse whether the solutions in the two legal systems are indeed similar, notwithstanding the legal rules on which they are based. As the title suggests, this is more an exercise of a comparative analysis, than an attempt to present each system in detail.

1.3 Material

The Section in Chapter Two concerning the English legal structure is based on “Basic English law” by W.T. Major and on “Komparativ rättskunskap” by Michael Bogdan. The part describing the Swedish legal system relies upon “Swedish law in the new Millennium”, edited by Michael Bogdan.

Chapter Three is mainly based on the author’s own notes from lectures at Kingston University held by Senior Lecturer Mark Saunders on the law of torts in 2002. Furthermore, the definitive English textbook “Street on torts”, has been used to provide further understanding of the subject. The material is also based on several fundamental and important decisions by the House of Lords, which have formed the basis of the “duty of care” doctrine.

With respect to Chapter Four, the starting-point of the presentation is the Swedish Tort Liability Act (Sw. *Skadeståndslagen* (SFS 1972:207)) with complementary comments based on the main Swedish textbook on tort law, “Skadeståndsrätt” by Hellner and Johansson. Again, the author has to some extent also in this chapter relied on “Swedish law in the new Millennium” referred to above.

Regarding the English definition of pure economic loss in Chapter Five, the House of Lords case *Spartan Steel & Alloys Ltd v Martin & Co Ltd* (1972) 3 All ER 557 has been cited and regarding the Swedish definition, the answer was found in the Swedish Tort Liability Act 1972 with complementary comments based on the preparatory work to the Act, Prop. 1972:5. The two fictitious cases presented in the Chapter are borrowed from a comparative study in the recently published “Pure economic loss in Europe”, edited by Bussani and Palmer. This study is the first comprehensive comparative study of pure economic loss, using an in-depth research into the laws of thirteen European countries and has proved to be very helpful throughout the work of the present study.

With respect of the presentation on the development of recovery for pure economic loss, the English part is based on a number of House of Lords cases and the Swedish development is mainly based on Jan Kleieman’s thesis “Ren förmögenhetsskada” supplemented by articles by Swedish legal scholars. The preparatory work to the Tort Liability Act 1972 has also provided some guidance and precedents of the Swedish Supreme Court have been utilised to describe the legal development on the subject at hand.

In Chapter Six, the description of the “special relationship”, needed to infer a duty of care in relation to pure economic loss under English law, is made through a furrow analysis of the landmark decision of *Hedley Byrne v Heller* [1963] 2 All ER 575. Furthermore, “Tort law” by Deakin, Johnston and Markesinis has also been helpful in clarifying some questions and suggesting further related precedents. The Section presenting the “justifiable reliance” theory relies heavily on Kleineman’s “Ren förmögenhetsskada” from 1987. Subsequent Swedish Supreme Court cases, using the justifiable reliance theory, have been referred to in order to show how the Swedish law has moved away from the strict application of the rule in the Tort Liability Act which restricts recovery for pure economic loss when caused by a crime. In addition, an article by Michael Frie has been relied upon in the analysis of these cases.

The Section in Chapter Seven, describing the problem of indeterminate liability, is based on a New York Court of Appeal judgment which introduced “the floodgate argument” in the Common law. Further, Kleineman’s “Ren förmögenhetsskada” has again proved to be useful of the understanding of the Swedish approach.

Regarding the Section describing the problem of the close connection between tort and contract law, the above referred work of Kleineman has again been proved useful. Moreover, a number of Swedish Supreme Court cases as well as House of Lords cases have been compared and analysed in order to highlight the differences and similarities in the Swedish respectively the English approach.

Finally, the five fictitious cases, presented in Chapter Seven, are borrowed from the case study in the above mentioned work of Bussani and Palmer. A vast number of both English and Swedish precedents are also discussed and analysed together with the author’s own comparative comments on the issue of liability for providers of negligent information or advice.

1.4 Structure

Chapter Two sets the stage by outlining the general features of the English and Swedish legal systems. The English Common law tradition is very different from the Swedish legal tradition in respect of its judicial structure and sources of law. The distinction is important for the understanding of the comparative analysis in the subsequent chapters.

Chapters Three and Four provide the reader with an outline of the English and Swedish law of tort. In Chapter Three, the English tort of negligence is described with focus on the “duty of care” doctrine as introduced by *Donoghue v Stevenson* [1932] AC 562 and developed through subsequent cases. Thereafter, the main principles of the Swedish Tort Liability Act 1972 are introduced in Chapter Four, supplemented with the author’s own comparative comments.

In Chapter Five the object of the study, pure economic loss, is defined and two fictitious cases are presented and solved under the laws of England and Sweden. These cases are provided in an attempt to assist the reader in the understanding between the different kinds of economic losses. Thereafter, the development of recovery for pure economic loss is outlined in order to make the understanding of the present attitude towards this kind of loss more clear.

Chapter Six provides for a detailed analysis of the landmark decision of *Hedley Byrne v Heller*. This House of Lords case is the leading case in England on liability for pure economic loss caused by a negligent misstatement in a non-contractual relationship. In order to establish a duty of care, the case introduced a “special relationship” requirement between the parties. The case has had a great influence on the law in this field, not just in the Common law, but also to some extent in Swedish law. The second part of the Chapter presents the Swedish “justifiable reliance” theory as introduced by Kleineman, who was *inter alia* influenced by the *Hedley Byrne* case. The Chapter also contains some comparative thoughts on these two principles.

Chapter Seven focuses on claims by third parties for negligent advice or information in both England and Sweden. Firstly, the problem of indeterminate liability in these situations is discussed. Secondly, the relationship between tort and contract law is discussed in the context of these claims. Both English and Swedish courts have sometimes blurred the line between contract and tort, and this becomes especially apparent in these types of claims. The Chapter then proceeds with a comparative analysis of both real and fictitious claims against providers of negligent advice, information, references and other financial services such as surveyors, lawyers, employers, credit institutes and auditors.

Finally, in Chapter Eight, an attempt is made to connect the comparative criteria introduced in Chapter One to create a final conclusion of the study.

2 General features of the English respectively the Swedish legal system

2.1 The English judicial structure and sources of law

The common law tradition is typically identified with a case based system but although cases play a dominant role, the primary sources of English law include not just case law, which is a body of principles derived from court decisions regulated by the doctrine of precedent (*stare decisis*), but also statutes, which is the law contained in legislative enactments. In more recent years, legislation has become not just an authoritative source of law, but sometimes the primary source of law where no cases are relevant to the issue at hand, or even when decided cases do exist. The law applicable may depend on the particular facts of the case and/or the interpretation of the “intention of the legislature” in the statute concerned.

The doctrine of precedent governs this case law system. Thus, decisions of higher courts are generally binding on lower courts. The part of the case which is considered binding on a subsequent court is the *ratio decidendi* (the reason for the decision), which is broadly the legal principle established by the case. Any other comments by the judge are, *prima facie*, classified as *obiter dicta*, i.e. comments uttered in passing which are not strictly binding on the court. However, the ultimate status of a judicial statement may depend on what a subsequent higher court says about it.

Not all decisions by the English courts form precedent. It is only the decisions of higher courts which are published systematically¹ that are binding on lower courts. The judicial structure in England is relatively complicated and of trifling importance to the present topic. The following discussion provides therefore only for a brief outline of the English judicial structure concerning civil jurisdiction.

County Courts are courts of first instance which resolve comparatively minor civil matters and decisions of these courts do not form precedent. Appeals are for most issues made directly to the Court of Appeal.

The *High Court of Justice* is also a court of first instance but unlike the County Courts, does set precedent in important cases. A precedent of the High Court is binding on the County Courts but not for other High Court

¹ Important precedents from higher courts are published in *Law Reports*.

judges. High Court decisions are of course not binding on higher courts, but may serve as a persuasive authority.

The *Court of Appeal* is exclusively a court of appellate jurisdiction. Its jurisdiction involves *inter alia* appeals from the High Court and County Courts. The precedents of the Court of Appeal which are publicised are binding on all lower courts and generally, also for the Court of Appeal itself.

The judicial role of the *House of Lords* is chiefly as the senior appellate court. The decisions of the House of Lords are binding on all lower courts. Former decisions of the House are normally treated as binding on the House itself but previous decisions may be departed from when it appears right to do so.

English law is not codified in the civil law sense of being contained in enacted collections of authoritative and *prima facie* exhaustive rules of law. Civil law, *ex facie*, is codified in the authoritative sense but England has not, by tradition, enacted any code on the lines of the Continental codes. England has neither a written constitution nor any comparable, comprehensive piece of constitutional legislation.

Although statutes are an authoritarian source of law in English law, the typical English legal attitude towards statutes is that statutes are passed to consolidate or clarify existing law and are intended to build on existing case law, which may legitimately be invoked to interpret any ambiguities or uncertain meanings in a statute. Hence, while civil law codes (and, therefore, judges) think in terms of solutions to problems, derived from systematic and authoritative expositions of the law through general clauses and principles, English law judges see their primary function as the arbiters of disputes and that their task is to resolve disputes. English judges pay, therefore, special attention to the particular facts of a case, examine the legal question to be decided (the “issue”) and make a ruling based on a careful study of whether that case “fits” into any previously decided case whose facts happened to be similar. If they found that there was a similar case decided by a higher court, they would usually apply the *ratio* of that case to the present one.

If an English judge does not wish to follow a previous decision, he has the option of “distinguish” it (i.e. to point to differences between a case and a previously decided case so as not to be bound by the precedent) on the basis of its facts, or law, or both. If there is a statute that appears to govern the instant case which is in conflict with a judicial decision, the rule is that the statute will prevail.

Academic or scholarly writings are cited occasionally in English courts, but not usually in a favourable light. Doctrinal writing in common law countries

does not have the status of authoritative sources of law as in Continental countries such as Sweden.²

2.2 The Swedish judicial structure and sources of law

Scandinavian law has by some writers in comparative law been considered to be a unity within the family of Roman-Germanic law and have by others been characterised as holding an intermediate position between the civil law and the common law system. It has however been submitted that there can be no doubt that Scandinavian law is far more closely akin to continental civil law than to common law.³

The working material for Swedish lawyers consists mainly of statutes and other regulations, international treaties, preparatory work to the law (Sw. *förfaranden*), court decisions, commercial practice, standardised agreements and legal literature. The larger part of this material has the status of officially binding legal sources but all material may be used to determine what the law is.

Statutes and other regulations are as sources of law at the centre of everything. Depending on who has been the enacting body, one can distinguish between four different categories: constitutional acts, acts, ordinances and statutory instruments. Constitutional acts and ordinary acts are the most important legal sources. The constitutional acts enjoy the highest rank in the hierarchy of legal sources in Sweden and ordinary acts, ordinances and statutory instruments, in that order, are lower-ranking norms.

Proposals for legislation have to pass many stages before the publishing of the final Act. In order to interpret and apply the final text of the Act, the preparatory work (i.e. drafts of text and reasons which are discussed and criticised) is very important. All the documents which are produced during legislative proceedings may explain the meaning of the enacted text and have to be used in this way. For an English lawyer, the concept of consulting the preparatory works to interpret an act is a novelty and not commonly used in the English legal system.⁴

As in the English common law system, precedent also constitutes a source of law but not to the same extent as in England. The Swedish court system

² For the interested Swedish reader, see further M. Bogdan, *Komparativ rättskunskap*, 1996, pp. 105-146.

³ M. Bogdan, *Swedish law in the new Millennium*, 2000, pp. 40-41.

⁴ See *Pepper v Hart* [1993] 1 All ER 42 where the House of Lords broke with the conventional view of not using Parliamentary materials. The House of Lords held that in some exceptional cases, consulting *Hansard* (i.e. the reports of debates) would be permitted as a source of assistance in the process of statutory interpretation if the legislation in question contained ambiguous wording.

is basically divided into three hierarchy levels and decisions of the courts at the top of the hierarchy, namely the Swedish Supreme Court, the Supreme Administrative Court, the Labour Court and the Market Court, are viewed as precedents. The role of precedent in Swedish law is expressed in the provisions on appeals to the Supreme Court. Leave to appeal to the Supreme Court may be granted under certain conditions and the most important is if “it will be of importance for guidance in application of law that the appeal is tried by the Supreme Court”.⁵ The term “guidance” is to be taken literally; precedent is not formally binding in the sense as it is in the above discussed English common law tradition. Judges in lower courts should, however, and do, accept guidance to develop a coherent body of judicial practice. The concept of precedent “for guidance” differs from the binding precedents in the English common law system, and as will be illustrated below in the discussion of recovery of pure economic loss, interpretation of Swedish precedent has to be done differently from interpretation of an English court decision. It is *inter alia* not necessary to identify what is the *ratio* respectively *obiter* of the case in order to make out what the binding rule of law is. *Ratio* and *obiter* are not terms generally used by Swedish lawyers, but they may be useful in the interpretation of a court decision. The significance of the distinction is, however, of a much lesser importance than in the English legal system. As mentioned in Section 2.1, by identifying the *ratio*, binding and non-binding statements by the English court are distinguished but in Sweden, it is no more than an instrument to attribute greater or lesser persuasive importance to different arguments in the judgment.⁶

Unlike the English Court of Appeal cases, Swedish Court of Appeal judgments are not regarded as binding precedents. They are, however, important means to provide guidance for the inferior courts and to achieve uniform and consistent implementation of the law in the lower courts.⁷

⁵ Chapter 54, Section 10, Code of Judicial Procedure (SFS 1942:740).

⁶ M. Bogdan, *ibid*, 2000, p. 61.

⁷ M. Bogdan, *ibid*, 2000, p. 62.

3 The English law of tort

3.1 General remarks

From a Swedish perspective, the term “the law of torts” suggests that the subject field which in Swedish law is described as “utomobligatoriskt skadestånd”, i.e. recovery for loss in a non-contractual situation, is structured differently from what a Swedish lawyer is used to.

The classic definition of a tort declares:

“Tortious liability arises from the breach of a duty primarily fixed by law; such duty is towards persons generally and its breach is redressable by an action for unliquidated damages.”⁸

The law of tort defines the obligations imposed on one member of society to his or her fellows and provides for compensation for harms caused by breach of such obligations.⁹ At the heart of the dispute is often the question of who should bear the relevant loss. Should it lie where it falls on the unfortunate claimant or is the conduct of the defendant such that the law should shift the loss to him? These are core issues that become especially important in the tort of negligence and in particular on the issue of recovery for economic loss.

The kinds of interests protected by English tort law are in principal not different from those protected under Swedish law. The routes to establish liability might as will be shown in the following be different, but the core interests the law will protect are mainly the same.

As in the Swedish tort system, in England, social security and insurance arrangements run alongside the tort system. In Sweden, however, the interaction between tort and insurance has been taken much further and tort liability in particular fields has almost been completely replaced by a general no-fault scheme of compensation. For the purpose of recovery for pure economic loss, insurance plays, however, a much lesser role in both legal systems.

⁸ Winfield, *Province of the Law of Tort*, 1931, p. 92 as referred to in *Street on torts*, 1999, ed. by Brazier and Murphy, p. 3.

⁹ Brazier and Murphy, *ibid*, p. 4.

3.2 The tort of negligence

In order to understand the English legal development on recovery of pure economic loss, it is vital to look at the general underlying principles in the tort of negligence.

The English legal system has long recognised that, in certain circumstances, persons guilty of careless conduct are liable in damages to their victims. The tort of negligence emerged as protecting against three different types of harm: personal injury, damage to property, and economic loss. The tort of negligence protects each of these to different extents but common to all three is the set of principles which negligence comprises of. These principles requires that the injured party must establish that the defendant owed him a *duty* to take care to protect him from the kind of harm suffered, that he was in *breach* of that duty, and that it was the defendant's breach of duty which was found to be the *cause* of the claimant's injury. Duty, breach and causation must be established in every successful claim in negligence and the following sections seek to identify the fundamental principles addressing the definitions of these three terms.

3.3 The duty of care doctrine

The doctrine of the duty of care is essentially a legal concept which dictates the circumstances in which a person will be liable to another in negligence. If the law does not impose a duty of care on the defendant towards the injured party, the defendant will not be liable to that party in negligence.

Duty of care occupies a large amount of space in English textbooks, not because of its importance in most tort cases, it is generally quite clear whether the defendant does owe the claimant a duty or not, but because every time a new duty of care is recognized, it has vast implications for the numbers of tort cases being brought in the future.

The duty of care doctrine has its origin in one case: *Donoghue v Stevenson*.¹⁰ Mrs D and a friend went into a café for a drink and Mrs D asked for a ginger beer, which her friend bought. Mrs D poured out and drank some of the ginger beer, which was supplied in an opaque bottle, and when she poured out the rest, the remains of a decomposing snail fell out of the bottle. Mrs D became ill and sued the manufacturer. The House of Lords agreed that manufacturers owed a duty of care to the consumer of their products, this duty had been breached, causing harm to Mrs D, and she was entitled to claim damages.

Lord Atkin stated in *Donoghue v Stevenson* that the general criterion for when a duty of care would exist was that “[y]ou must take reasonable care

¹⁰ [1932] AC 562.

to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.” This has become known as the “neighbour principle”. By “neighbour”, Lord Atkin meant “persons who are so closely and directly affected by my act that I ought to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”.¹¹ The test of foreseeability is objective, the court asks what a reasonable person could have been expected to foresee.

Reasonable foresight is, however, not the only criterion for establishing whether a duty of care is owed. Over the time, a variety of factual situations in which a duty of care arose were established and the courts began to seek precedents in which a similar factual situation had given rise to the existence of a duty of care. If they came across a new factual situation, a duty of care would only be deemed to arise if there was a policy reason for doing so. Policy reasons play a great part of the English judiciary and it means that the courts take into account not just the legal framework, but also whether society would benefit from the existence of a duty.

In *Anns v Merton London Borough*,¹² Lord Wilberforce proposed an extension of the situations where a duty of care would exist, arguing that it was no longer necessary to find a precedent with similar facts. He suggested that the courts should instead use a two-staged test. First, they should establish whether the parties satisfied the requirements of Lord Atkin’s neighbour test, i.e. whether the claimant was someone to whom the defendant could reasonably be expected to foresee a risk of harm. If so, a *prima facie* duty of care arose. The second stage involved asking whether there was any policy reason to deny the existence of a duty of care in the specific case. This case led to an expansion of the situations in which a duty of care could arise since the first stage of the test presented no hurdle to litigants at all and the courts were left to restrict the scope of negligence liability by reference to policy considerations (at the second stage of the test).

In *Junior Books v Veitchi*,¹³ the House of Lords seemed to go even one step further. The House appeared to suggest that what were previously good policy reasons for limiting liability should now not prevent an extension as long as the situation fell under the neighbour principle. They therefore allowed recovery for pure economic loss in circumstances where this had not previously been permitted (i.e. where the economic loss arose from defective products). Thus, the *Anns* test could be applied with little regard for precedents and concerns were raised that the bounds of liability would be extended beyond what was reasonable. The growth in liability also raised concerns about uncertainty and problems of insuring against new types of liability.

¹¹ [1932] AC 562 at p. 580.

¹² [1977] 2 All ER 492.

¹³ [1983] 2 All ER 301.

In the case of *Murphy v Brentwood District Council*,¹⁴ the House invoked the 1966 Practice Statement (which allows them to depart from their own previous decisions) to overrule *Anns*. The broad extension of a *prima facie* duty of care was thereby swept aside, leaving the courts to impose duties of care only when they could find precedent in comparable factual situations.

In *Caparo Industries plc v Dickman*,¹⁵ the House of Lords stated that there were now three questions to be asked in deciding whether the defendant owed a duty of care to the claimant. Was the loss *reasonably foreseeable*? Was there a relationship of *proximity* between the parties? Is it *fair, just and reasonable* to impose a duty of care? This three-stage test seems to provide a broad framework for the establishment of a duty of care, but has in practice come to differ according to the type of damage sustained, i.e. if it is a question of personal injury, damage to property or pure economic loss.

After it has been established that there de jure exists a duty of care between the claimant and the defendant, the court has to consider if there has been a breach of that duty.

Breach of a duty essentially means that the defendant has fallen below the standard of behaviour expected in someone undertaking the activity concerned. The standard of care is objective: the defendant's conduct is tested against the standard of care which could be expected from a reasonable person.¹⁶

The negligence must of course cause damage: if no damage is caused, clearly there can be no valid claim in negligence. In the vast majority of negligent economic cases this is not an issue: there will be an obvious economic loss.

The final requirement before liability may be inferred is that it must also be proved that the defendant's breach of duty actually caused the damage suffered by the claimant, and that the damage caused was not too "remote" from the breach. Causation is established by proving that the defendant's breach of duty was, de facto, a cause of the damage. To decide this issue the question that needs to be asked is whether the damage would not have occurred but for the breach of a duty; this is known as the "but for" test.¹⁷

As well as proving that the defendant's breach factually caused the damage, it must be proved that the damage was not too remote from the defendant's breach. Like the issue of duty of care, the remoteness test is a legal test, rather than a factual one, which forms one of the ways in which the law draws the line between damage which can be compensated and which

¹⁴ [1990] 2 All ER 908.

¹⁵ [1990] 1 All ER 568.

¹⁶ This principle was established in *Vaughan v Menlove* (1873) 3 Bing NC 468.

¹⁷ See for example *Barnett v Chelsea and Kensington Hospital Management Committee* [1968] 1 All ER 1068.

cannot. This has the effect that there are sometimes circumstances where the defendant will de facto undoubtedly have caused the damage, but de jure, it is considered that they should not have to compensate the claimant for it. The test for remoteness is the foresight of a reasonable person: was the kind of damage suffered by the claimant reasonably foreseeable at the time of breach of duty?¹⁸

¹⁸ This standard test was set down in *Overseas Tankship (UK) v Morts Dock & Engineering Co (The Wagon Mound)* [1961] AC 388 (PC).

4 The Swedish law of tort

4.1 General remarks

In the 1970's and 1980's the compensatory function of the Swedish tort law was regarded as of essence; losses should be distributed, above all, by means of insurance.¹⁹

This general trend in tort law seems partly to have been broken in the 1990's. Commercial considerations have to some extent overshadowed the idea that even negligent parties should be protected against devastating economic consequences of an accident. In the last decade, criticism against the Swedish welfare state has been directed against the system of tort and insurance law; the country's weak economic growth has made it difficult to maintain the same protection through insurance as before. Another important factor is Sweden's membership in the European Union and the general interest in the Western economic cooperation. The predominant idea is that international considerations in the tort law have played too small a part in the work to reform. The ideas of loss distribution and social security still dominate the general attitude of the courts but prominent legal authors have recommend that Sweden should turn to foreign legal systems for guidance when reform questions appear.²⁰

4.2 Main principles in the Tort Liability Act 1972

The main Swedish rules on liability in tort are found in the Tort Liability Act 1972 (Sw. *Skadeståndslagen* (SFS 1972:207)).

Chapter 1 Section 1 of the Tort Liability Act implies that the Act has an extensive validity:

“The provisions issued in this Act about liability for damages, is applicable if nothing else is specially prescribed or brought about by contract or otherwise follows from provisions about damages in contractual relations.”

The provision gives the impression that the Act covers the whole law of torts. This is, however, an illusion. A closer look at the content of specific Sections in the Act, one finds that Chapter 1-4, which provides for the requirements for tort liability, exclusively deals with liability for “*culpa*”,²¹ i.e. negligence.

¹⁹ M. Bogdan, *ibid*, 2000, p. 299.

²⁰ M. Bogdan, *ibid*, 2000, p. 300.

²¹ The Latin term *culpa* means carelessness, negligence or blame.

The Tort Liability Act does neither imply that there are both legal rules and rules introduced through case law, which without statutory support imposes liability regardless of negligence, i.e. strict liability, or that the Act only contains *one* part of the Swedish law of torts. Moreover, several provisions in the Act are so generally formulated that they do not provide for a real guidance for the application of the law. This is especially evident in the central provision in Chapter 2 Section 1:

“Anybody who intentionally or negligently causes a personal injury or a damage to things shall compensate it, as far as this Act does not prescribe otherwise.”

In effect, this means that just as in the English jurisdiction it is case law, (and to some extent the legislative preparatory works) which provides the guidance. The reasons for this are partly historical and partly objective; terms such as intent, negligence, and causation are not suitable to be defined through statutory provisions.²² As the reader will notice throughout this study, there is extensive case law defining the limits of recovery for pure economic loss, not only in England, but also in Sweden.

The law on tort liability in the Swedish legal system has as its basis liability founded on individual wrongful behaviour. In this respect it is like the English tort of negligence. Reference is made to the *culpa* rule. This rule is primarily anchored in extensive statutory rules.

The objective prerequisite for liability includes that damage must have occurred, that the property that has been damaged belongs to another than the tortfeasor (Sw. *skadevållare*), and that the tortfeasor has a duty to try and avoid such damage. Regarding the subjective prerequisite for liability, the question to be asked is what degree of care a person must observe, in order to fulfil his duty to avoid causing any damage.²³

In this context, the term *duty* to avoid causing damage is not meant to serve as guidance for the assessment of liability. The term is merely a rewrite because the law makes demands on people’s actions.²⁴ The above discussed English term, “duty of care”, has more far-reaching functions than the Swedish term. It limits *inter alia* the liability in a way which from a Swedish perspective is a matter of causation and issues regarding liability for “third party damages” (Sw. *tredjemansskada*). Comparisons between English and Swedish law regarding the duty assessment are therefore very difficult to make.

Regarding the subjective prerequisite for liability, the *culpa*-rule imposes liability for intent or carelessness. When assessing the degree of carelessness which is needed to impose liability, a number of circumstances

²² Hellner and Johansson, Skadeståndsrätt, 2000, p. 26.

²³ Hellner and Johansson, *ibid*, p. 101.

²⁴ Hellner and Johansson, *ibid*, p. 104.

are adhered to. The courts look for guidance in statutes, precedents and customary usage (Sw. *sedvana*). When guidance cannot be found in these sources of law, the courts are referred to a discretionary judgement. How they go about the issue in such circumstances cannot be summarized in a simple formula but must be investigated in a detailed analysis. Even though this assessment is important, for the purpose of this study, it is impossible to account for in full and therefore, only a short outline is provided.²⁵

To a large extent, the discretionary assessment of liability which the Swedish judge performs, is the same as the English judge does in order to establish the degree of care demanded of the tortfeasor. The prerequisites demanded for sufficient care depend on three factors: the risk that the conduct will injure others, the seriousness of the injury and the means available to avoid the risk. These three factors are balanced against each other and it is then decided if these circumstances demands that the defendant should have acted differently from what he did.²⁶

²⁵ For further analysis, see Hellner and Johansson, *ibid*, p. 125 ff.

²⁶ Hellner and Johansson, *ibid*, p. 130 ff.

5 Recovery for pure economic loss

5.1 The definition of pure economic loss

Pure economic loss is one of the most discussed topics of European tort law scholarship.²⁷ The literature is overwhelmingly weighted to countries such as England, where the concept is well recognized by practitioners, judges and scholars. In contrast, the only comprehensive literature to be found in this area in Sweden is the 1987 dissertation of Jan Kleineman.²⁸

There is no common definition of “pure economic loss”, but it is generally understood to deal with matters of tortious liability for loss that is neither consequential upon death nor personal injury of the claiming victim nor upon the infringement of the victim’s property. Here the word “pure” plays a central role. If there is the slightest economic loss connected to damage to person or property of the claimant, (provided that all other conditions of liability are met) then that loss is called consequential economic loss (Sw. *allmän förmögenhetsskada som utgör följskada till en person- eller sakskada*) and the whole set of damages may be recovered without question. Consequential economic loss is recoverable because it presupposes the existence of physical injuries, whereas pure economic loss only damages the claimant’s financial situation.

In Sweden, where the legislator says that only victims of crimes may recover for pure economic loss, Chapter 1 Section 2 of the Tort Liability Act 1972, defines the notion exactly in these terms:

“In the present act, pure economic loss means such economic loss as arises without connection to personal injury or property damage to anyone.”

A similar definition prevails in England. In the English case of *Spartan Steel & Alloys Ltd v Martin & Co Ltd*,²⁹ Lord Denning stated that “it is better to disallow economic loss altogether at any rate when it stands alone, independent of any physical damage”.³⁰

Spartan Steel v Martin provides a good illustration of the difference between the various types of losses. Here the defendants had negligently cut an electrical cable, causing a power cut that lasted for 14 hours. Without electricity to heat the claimant’s furnace, the metal in the furnace solidified, and the claimants were forced to shut their factory temporarily. They

²⁷ Bussani and Palmer, *Pure Economic Loss in Europe*, 2003, p. 3.

²⁸ J. Kleineman, *Ren förmögenhetsskada*, 1987.

²⁹ [1973] QB 27.

³⁰ [1973] QB 27 at p 39 A.

claimed damages under three heads: damage to the metal that was in the furnace at the time of the power cut (physical damage to property); loss of the profit that would have been made on the sale of that metal (economic loss arising from damage of property); and loss of profit to metal which would have been processed during the time the factory was closed due to the power cut (pure economic loss). A majority of the Court of Appeal held that the first two claims were recoverable but the third was not. The defendants owed the claimants a duty not to damage their property, and therefore to pay for any loss directly arising from such damage, as well as for the damage itself, but they did not owe them any duty with regard to loss of profit.

Here, it is worth noting that under English law, the boundaries of the term pure economic loss are set out on basis of the injured party and “pure economic loss” includes such economic loss which he suffers in a certain situation, without *him* suffering any other personal injury or property damage through the same course of event that caused the economic loss. The definition in the Swedish Tort Liability Act 1972 states that pure economic loss is a loss without connection to personal injury or property damage to *anyone*. This difference in the respective definitions has the effect that some losses that according to Swedish law are considered consequential economic loss are considered as a pure economic loss according to English law. Moreover, some losses, which in Swedish law are described as irrecoverable third party damages (Sw. *tredjemansskada*), are in English law pure economic losses. If for example someone else than the injured party (C) suffers personal injury or property damage and as a consequence C suffers economic loss, this loss would not be considered a pure economic loss in Sweden. According to English law, it would.

5.1.1 Case study 1 – the blackout

The above considerations can be illustrated by the following fictitious case.³¹ While manoeuvring his mechanical excavator, an employee of a road works company cut the cable belonging to the public utility which delivers electricity to the claimant factory. The unexpected blackout caused damage to the machinery and the loss of two days of production. The factory owner is claiming compensation from the excavator not only for the damage of machinery but also for the damage caused by the loss of production.

5.1.1.1 England

In England, the factory owner can recover the cost of repair of the damaged machinery, and for the loss of profit which it would have obtained from the use of the damaged machine in processing material which was actually damaged by the shutdown. The claimant would however not be able to

³¹ The facts of the fictitious case are borrowed from *Pure Economic Loss in Europe*, 2003, p. 171, ed. by Bussani and Palmer.

recover the profit it would have made if it had been able to process undamaged material during the two-day period.

Regarding the damage to the machinery, the claim will be in negligence. Liability in negligence depends on proof by the claimant of the following:

1. that he suffered damage recognized as recoverable in negligence. Property damage is clearly recognized as a recoverable damage, see the identical case of *Spartan Steel v Martin*;
2. that the defendant owed him a duty of care (*Donoghue v Stevenson*). If the employee of the road works company knew (or ought to have reasonably foreseen) the presence of the cable, then he owed a duty of care to all persons in the vicinity which he ought to foresee might be physically affected in their person or property by the breaking of the cable and the subsequent power cut. See again *Spartan Steel v Martin*;
3. that the defendant had breached his duty. The employee had breached his duty if he had failed to take the care of a reasonable excavator in similar circumstances; and
4. that there was a causal link between the breach of the duty and the claimant's damage. Legal causation depends on foreseeability of the kind of harm actually suffered (*The Wagon Mound*³²). The claimant must show that a reasonable person in the position of the employee was able to foresee physical damage to property as a likely consequence of the power cut.

Regarding the claim concerning loss of two days of production: if that loss of production was production which was lost during the shutdown of the machinery for necessary repairs, and it was not loss of materials that were being processed when the machinery came to a stop, it is a loss of production which would not be recoverable in negligence, see *Spartan Steel v Martin*. There is neither a duty of care to protect against such loss. It is, however, clear from *Spartan Steel* that if the shutdown would actually damage the materials then being processed, the claimant factory would be entitled to the profits from these materials.³³

5.1.1.2 Sweden

In Sweden, the factory owner would also be able to recover damage to the machinery, while compensation for the loss of the two days of production is less clear.

³² [1961] AC 388 (PC).

³³ Bussani and Palmer, *ibid*, 2003, pp. 179-180.

Regarding the damage to machinery, the factory can recover its losses by proving fault on the part of the road works company's employee³⁴ under the general liability principle for "property damages" in the Swedish Tort Liability Act Chapter 2 Section 1.

Swedish law is rather strict regarding the prerequisite of a causal connection, but a case such as the present would probably not raise any causation problems.

Instead, the recovery of damage caused by loss of production could be barred under the general principle in Swedish tort law which limits compensation for economic loss to the loss consequent upon personal injury or property damages suffered by the same subject, while the economic loss suffered by those who are third parties to the original injury or damage shall remain without compensation.

On this basis, in NJA 1988, p. 62, the Swedish Supreme Court granted indeed compensation only for damage to the machinery. The loss caused by the plants being made inactive was seen as a loss for which the factory was a third party since the factory was not the owner of the cable which caused the blackout.

The state of Swedish law on this point remains, however, much in doubt. The limits to compensation of third party losses in cable cases have been criticized by scholars,³⁵ and the decision of NJA 1988, p. 62 contains several dissenting opinions. In another cable case, NJA 1966, p. 210, the Supreme Court declared that third party losses can be compensated when the claimant has "a concrete and near interest" linked to the cable. In that case, the special interest was represented by the cable being owned by a group also including the claimant company, which therefore had a "decisive influence" on the use of the cable.³⁶

5.1.1.3 Comparative comments

This case indicates that pure economic loss and consequential economic loss are issues that are not uniformly conceived or applied in England and Sweden. In England, the nature of the loss has a decisive effect upon the duty of care and causation analysis. An English court would accordingly rule that the factory owner may receive compensation for damage to its machinery, and it may recover lost profits on materials that were in the

³⁴ The claim would, however, most probably be brought against the road works company instead of its employee, since the former would be fully liable on the basis of the vicarious liability rule contained in the Swedish Tort Liability Act Chapter 3 Section 1, while personal liability on the part of the employee is subject to the limits set by Chapter 4 Section 1 of the mentioned Act. See Bussani and Palmer, *ibid*, p. 188, n. 59.

³⁵ See, e.g. H. Andersson, *Skyddsändamål och adekvans* (Uppsala, 1993), p. 567, as referred to in Bussani and Palmer, *ibid*, p. 189, n. 61.

³⁶ Bussani and Palmer, *ibid*, 2003, pp. 188-189.

process of manufacture and were damaged by the stop of production. Except from this possibility, there will be no other compensation for loss of production by the damaged machines. Even though this lost production is connected to the property damage, it arose independently of the damage to the factory's machinery and is consequently regarded as pure economic loss. Sweden offers even less protection than England because its rules ignore the distinctions between pure and consequential economic loss where third parties have been damaged. In such circumstances the Swedish courts apply a test that excludes both pure and consequential loss without examining their nature.³⁷

5.1.2 Case study 2 – the factory shutdown

Under the same facts as the above scenario, another factory owner experienced no damage to his machinery, but his plant was rendered idle and he lost two days of production.³⁸

5.1.2.1 England

The factory owner would not be able to recover his loss of two days production under English law. This is a pure loss of production, not connected with any physical damage to property, and such a loss of production is not recoverable in negligence under the authority of *Spartan Steel v Martin*. There is neither a duty of care to protect against such loss, again *Spartan Steel v Martin*. The case of *Murphy v Brentwood DC* follows *Spartan* and confirms that the pure economic loss of production is, as a matter of legal policy, not recoverable.³⁹

5.1.2.2 Sweden

The result will almost certainly be the same in Sweden; the factory owner cannot recover the damages incurred by the loss of production. This depends on the same reasons which made compensation for loss of production doubtful in the “blackout case” referred to above. The problem for the compensation of loss of production results from the classification of such loss as a “third party” loss, i.e. a loss not incurred by the same subject who has suffered the property damage (in this case, the owner of the cut cable).⁴⁰

³⁷ Bussani and Palmer, *ibid*, 2003, pp. 189-191.

³⁸ The facts of the fictitious case are borrowed from Bussani and Palmer, *ibid*, 2003, p. 192.

³⁹ Bussani and Palmer, *ibid*, 2003, p. 196.

⁴⁰ Bussani and Palmer, *ibid*, 2003, pp. 204-205.

5.1.2.3 Comparative comments

The defendant's conduct in cutting the cable has not harmed the factory owner's machinery (as in the "blackout case" above); it has only made his factory inactive and interrupted his production. There is no claim of consequential economic loss; the owner's claim only involves the loss of an expectation, i.e. his lost profits and nothing else.

England and Sweden choose different paths to control the compensation issue, but the end result is the same. Sweden precludes recovery categorically since the loss of production is a non-recoverable "third party loss". England resolves the issue, not by way of causation as in Sweden, but by establishing that there is no "duty of care" to protect against such loss.⁴¹

5.2 The original approaches and development of recovery for pure economic loss

5.2.1 General remarks

By examining how the approach towards pure economic loss has developed, characteristic features of how the present attitude towards these losses may be understood more clearly. Liability for pure economic loss has in both English and Swedish law been recognised as a separate problem relatively late. A common feature is also that a great disunity on the question of exactly how the liability for pure economic should be shaped can be found in the respective countries' case law and legal literature.

In both the English and Swedish legal system, it is an accepted legal political assessment, to be restrictive in imposing tort liability for pure economic losses. In principle, the Common law is as unhappy as Swedish law is with the idea of sanctioning compensation through tort law rules for pure economic loss. Each system, however, has over time been forced, in response to changing societal circumstances, to introduce an ever-growing number of exceptions to their basic standpoint. The resulting position is no longer easy to predict and the task of reconciling leading judgments with each other has become almost impossible. This, it is submitted, is true for both systems and the search for the ideal answer has not yet come to an end.

5.2.2 England

In England, the initial position on pure economic loss in negligence was laid down in the case of *Candler v Candler, Christmas & Co.*⁴² A firm of accountants had done some work for a client, knowing that the figures

⁴¹ Bussani and Palmer, *ibid*, 2003, pp. 205-207.

⁴² [1951] 1 All ER 426.

produced would also be considered by a third party. As a result on relying on the figures, the third party suffered financial loss, but the Court of Appeal held that the accountants owed no duty of care to the third party; their responsibility was only to the client with whom they had a contractual relationship.

This remained the situation until 1963, when the House of Lords stated in the landmark decision of *Hedley Byrne v Heller*⁴³ that there were some situations in which negligence could provide a remedy for pure economic loss caused by things the defendant had said or information he had provided. In effect, there needed to be a “special relationship” between the parties. Such a relationship would arise where the defendants supplied advice or information, knowing that the claimants would rely on it for a particular purpose.⁴⁴

Lord Devlin emphasized the connection with the principles laid down in recovery for damages within a contractual relationship. A “special relationship” could be held to exist even though the parties were not in a contractual relationship.

The House marked clearly dissociation from the old general attitude that pure economic losses should not be able to be recovered in negligence. The case did not, however, make clear in which situations such a recovery would be allowed.

During the 1990s, a number of cases extended *Hedley Byrne* beyond liability for negligent statements or advice, and established that it can also cover negligent provision of services. This was specifically stated in *Henderson v Merrett Syndicates Ltd*⁴⁵ and confirmed in *Williams and Reid v Natural Life Health Foods Ltd and Mistlin*.⁴⁶

In *Henderson v Merrett Syndicates Ltd* a number of claims arose out of the near-collapse of the Lloyds of London Insurance market. The Lloyd’s insurance organization made considerable losses on many of its policies. The losses were borne by people who had invested in Lloyd’s by underwriting the policies. These people (known as “names”) alleged negligence on the part of the underwriting agents who had organized the syndicates in which the names had been grouped into. The underwriting agents argued that the position with the names should be governed by the terms of the contracts between the parties and not by the law of tort which favoured some of the names because of the more advantageous limitation period in tort.

⁴³ [1963] 2 All ER 575.

⁴⁴ The case is discussed more fully in Section 6.2.

⁴⁵ [1994] 3 All ER 506.

⁴⁶ [1998] 2 All ER 577.

The House of Lords held that the managing agents had assumed a direct responsibility for the names' economic welfare and a *prima facie* duty of care arose. Accordingly, the agents acting indirectly on behalf of the Lloyd's names owed a duty of care to the names because they had assumed such responsibility. Liability was thus incurred notwithstanding that the parties were not in a contractual relationship.

In *Williams v Natural Life Health Foods Ltd* the claimants entered a contract with a company to franchise a health food store. The company's literature included financial projections concerning the future profitability of the franchise, but they turned out to be inaccurate. The claimants' business traded at a loss and they sought to prove that the defendant (the managing director and principal shareholder of the company) had personally assumed responsibility for the negligent advice provided by the company, which had subsequently been wound up. Although it was held in this case that the defendant had not personally assumed responsibility to the claimants, Lord Steyn stated that the extended *Hedley Byrne* principle established in *Henderson* does not merely apply to negligent statements, but also covers the negligent performance of services and can even found a tort duty concurrently with contract.

It thus appears that pure economic loss is now recoverable under the *Hedley Byrne* principle where it is caused by either negligent advice or information, or by negligent provision of services, under the extended *Hedley Byrne* principle as stated in *Henderson*. It is not recoverable where it is caused by defective products⁴⁷, nor is it recoverable when caused by negligent acts other than the provision of services.⁴⁸

5.2.3 Sweden

The fundamental rules on liability for damages in Sweden derives from Chapter 6 of the Swedish Penal Act of 1864 (Sw. *Strafflagen*). It was not until 1972 that Sweden received an independent Tort Liability Act. The new Act did not, however, contain any major changes from the rules contained in the Penal Act.⁴⁹ The reform of the rules purported only to adapt the fundamental tort liability rules to the development of society that had already taken place.⁵⁰ Subsequent changes of the Tort Liability Act have only had a limited significance and as a consequence of its historical development, the Act has been described as a patchwork quilt, containing both general principles and detailed rule with several lacunas.⁵¹

To Chapter 2 Section 1 in the Swedish Tort Liability Act 1972, which says what is required for liability, Chapter 2 Section 2 adds the clarification that

⁴⁷ *Murphy v Brentwood District Council* [1990] 2 All ER 908.

⁴⁸ *Londonwaste v AMEC Civil Engineering* (1997) 83 BLR 136.

⁴⁹ J. Hellner, "Behöver vi en ny skadeståndslag?", *JT* 1995/96, pp. 282-283.

⁵⁰ Prop. 1972:5, p. 100.

⁵¹ Hellner, *ibid*, *JT* 1995/96, p. 284.

pure economic loss is only recoverable according to the rules which govern the recovery of loss of personal injury and damage to property, if it is caused by a crime:

“Who causes pure economic loss through the commission of a crime shall compensate it according to what is established in §§ 1-3 concerning personal injury or damage to property.”

In the preparatory works to the Tort Liability Act, a very limited space was designated to a discussion of the problem of pure economic loss, and a motive to why a prerequisite of a crime should be transferred from the old Penal Act to the new Tort Liability Act seems to be missing.⁵² At the same time (1972) in England, *Hedley Byrne* had already been decided and the general principle of when pure economic loss could be recovered had been established and closely analysed for almost a decade following the *Hedley* decision. Such an analysis seems to be missing in the Swedish discussion. A real line of development regarding liability for pure economic losses in non-contractual situations of the type that can be found in English law does not exist in Swedish law. As is to be illustrated below, there are, however, cases where the Supreme Court has allowed damages without statutory support.

In this context, the question arises of *why* there is such a close connection between crime and tort liability in Swedish law. It may be argued that the connection is a remaining effect of the historical development of tort rules, deriving from criminal law. On the other hand, one should be careful of making this assumption since all remaining types of damages are “liberated” from this historical inheritance. Jan Hellner has pointed out that legal policy reasons do not always provide guidance in assessing why a certain legal rule is valid. Sometimes, it just has to be accepted that a certain rule exists without finding any rational motive to justify it.⁵³ It has been suggested that the Swedish connection between crime and tort liability for pure economic loss, is precisely such an example of a historical given fact, where no certain or definite explanation of the rule may be found.⁵⁴ The only expression of the legislator’s will regarding tort liability was until 1972 the Swedish Penal Act of 1864. Chapter 6 Section 1 of the Act stated that compensation was to be granted for damage caused by the commission of a crime. Damages were awarded for both physical and property damage as well as pure economic loss. This connection to criminal liability was preserved in the rule on pure economic loss in the Tort Liability Act 1972 and the only reason of why tort liability for pure economic loss should still be connected with penal liability appears to be because the statutory rule says so. It is undisputed that the law should be restrictive in imposing tort liability for pure economic loss, but the question of why the restriction should still today be connected with penal liability seems to be an open question. It is submitted that since the line had to be drawn somewhere, it could just as well be drawn with the

⁵² See for example SOU 1963:33 Skadestånd 1, pp. 12 and 44.

⁵³ Hellner, “Ersättning till tredje man vid sak- och personskada“, *SvJT* 1969, p. 337 ff.

⁵⁴ Kleineman, *ibid*, 1987, p. 21.

historical prerequisite of a criminal act since the legislator's intention was that further expansion of recovery should be developed through case law and not by Parliament.

Swedish lawyers have historically had a very dogmatic and positivistic view on the law and its development⁵⁵ and this is the case even though a realization that punishment and tort protected different interests had been recognized by the mid 1800s. Despite the general positivistic view that liability cannot be imposed in the absence of an expressed statutory rule, the courts have nevertheless imposed liability in the absence of a crime. This is due to the fact that the Swedish Parliament did not intend the rules of Chapter 2 Section 2 to be conclusive in all cases: the official commentary to the Tort Liability Act states that the wording of the Act is not meant to deprive the court of the possibility of establishing liability of pure economic loss should it be appropriate in a context outside criminal law. Consequently, the Act does not constitute an obstacle of future development through case law regarding an expansion of liability in certain situations.⁵⁶ In this respect, one can again spot a similarity between the English and Swedish system. The development of new situations in which liability for pure economic loss may be imposed in English law has exclusively occurred through analogous application of decided cases and as will be shown, the same is for the most part true of the Swedish development. This proposition leads to the problem of the opposition of legal rules and legal principles. It is not possible in the form of a statutory provision (the rule on recovery for pure economic loss in the Act consists of one sentence) to define general principles of liability; consequently, the problem is best solved by the courts.⁵⁷

The fact that tort liability still has a close connection to the assessment of criminal liability may, from an English perspective, appear somewhat odd. Influenced by Anglo-American law, Professor Jan Kleineman discussed and criticised in detail what he calls "the exclusionary rule" (Sw. "*spärregeln*"), i.e. the rule in chapter 2 section 2 of the Tort Liability Act, accordingly where pure economic loss is recoverable if caused through a crime.⁵⁸ According to Kleineman, this does not, however, mean that pure economic loss is *not* recoverable if it was not caused by the commission of a crime. He submits that an *e contrario* (i.e. in the reverse) interpretation of the rule has led to a limitation of recovery for pure economic loss which constitutes a weakness in the Swedish law of torts.⁵⁹

The tendency to interpret chapter 2 section 2 of the Tort Liability Act *e contrario* is nowadays much weaker, especially since the case of NJA 1987,

⁵⁵ Michael Frie, "Liability for Pure Economic Loss in Swedish law of Tort", *Bird & Bird Dispute Resolution*, September 2002, issue 3, p.1.

⁵⁶ Prop. 1972: 5, p. 568.

⁵⁷ Cf. Kleineman, *ibid*, 2003, pp. 125-128.

⁵⁸ Kleineman, *ibid*, 1987.

⁵⁹ Kleineman, *ibid*, 1987, see Chapters 4 and 5.

p. 692.⁶⁰ Jan Hellner, has, however, submitted that even though this is true according to cases of misrepresentation in non-contractual relations, such as the case of NJA 1987, p. 692 itself, the connection to criminal acts is still strong regarding other types of damages.⁶¹ Hellner submits further that the courts, in cases where tort liability appears to be justified on grounds of public policy, have pressed the criminal rules to the utmost in order to justify liability, even though no legislative support exists.⁶²

Chapter 2 Section 2 of the Tort Liability Act must be read in the context of the rule in Chapter 1 Section 1 of the Act. The section states that the Tort Liability Act is also applicable to contractual liability, if the contracting parties have not agreed otherwise or follows from the rules on contractual damages. Consequently, liability for pure economic loss may arise in contract or through legislative support. Thus, if a contract is considered to be at hand, no prerequisite of a criminal act is needed. It is quite self-evident that the rules on liability for pure economic loss in contractual relations are quite different from those in tort, but the relationship between them and where to draw the line is certainly arguable as will become more evident in Chapter 7 Section 3 below.

The legal reasoning of early cases regarding negligently caused pure economic losses in non-contractual relations, appears to circle around causation arguments. The fact that the parties did not stand in a real contractual relationship does not seem to have caused the courts too much trouble. Pre-Act decisions do not contain any reasoning concerning the exclusionary rule demanding criminal connections nor are there any traces of contract constructions, which emerge after the Tort Liability Act coming into force. Characteristic for these earlier cases is also the fact that there are no restrictions as a matter of principle for pure economic losses. The outcome of these cases was very heterogeneous; it depended *inter alia* on issues like exclusionary clauses or the individual character of the relationship between the parties.⁶³

Decisions after the Tort Liability Act coming into being concern themselves more with the problem of the exclusionary rule. Justice (Sw. *justitieråd*) Knutsson made a statement in NJA 1976, p. 282 of great importance since it clearly shows how he perceives the Supreme Court's possibility to create new legal principles concerning pure economic loss after the coming into being of Chapter 2 Section 2 of the Tort Liability Act:

“Pure economic loss shall according to the Tort Liability Act Chapter 2 Section 4 [now Section 2] be recovered if it has been caused by crime. For

⁶⁰ A more detailed discussion of the case NJA 1987, p. 692 follows in Section 6.3.

⁶¹ Hellner, *ibid*, *JT* 1995/96, p. 285 and n. 13.

⁶² Hellner, *ibid*, *JT* 1995/96, p. 285 and n. 14.

⁶³ For a more detailed analysis of pre-Act decisions, see Kleineman, *ibid*, 1987, pp. 206-243.

the damage to be recoverable in any other case, except in contract, statutory support is in principle required.”⁶⁴

He does, however, note that the preparatory work do not hinder a legal development in case law to extend the liability. In the case before him, no crime, contract or any other statutory provision existed, and consequently, no damages were awarded. The case concerned intellectual property law and new legislation regarding the right to intellectual property was to be expected shortly. Justice Knutsson submitted on one hand that there were judicial policy reasons for an extension of the liability of pure economic losses and also that the Tort Liability Act did not prevent this. On the other hand, he did not want to forestall the expected legislation, and that is why he refrained to grant damages, even though he was of the opinion that good reasons for this existed.

According to Kleineman, the reasoning of Justice Knutsson illustrates the need for a real discussion in Sweden regarding the forms for a legal development by way of case law.⁶⁵ He submits that there is often a disregard in the discussion that precedents shall not only provide for clarity for future cases but also create justice in the individual case. Justice Knutsson did note that the law was unclear but since satisfying legislation from a judicial policy perspective was to be expected in the near future, it was not suitable to introduce tort liability through case law. According to Kleineman, the judge declined as a consequence to create justice despite the understanding that he had the means to do so. Kleineman even goes so far as suggesting that this extreme positivistic view on the development of the law is one of the main causes to the proposition that the introduction of Chapter 2 Section 2 frees the judge from creating material justice.⁶⁶ With this proposition in mind, the following chapter provides a detailed analysis on how the courts have dealt with this very problem.

⁶⁴ NJA 1976, p. 282 at p. 287.

⁶⁵ Cf. Strömholm, *SvJT*, 1984, p. 923 ff.

⁶⁶ Kleineman, *ibid*, 1987, p. 245 and n. 139.

6 The *Hedley Byrne* principles and the justifiable reliance theory

6.1 General remarks

The best established area in the English economic loss field is negligent misrepresentation. This is credit to the very important decision of the House of Lords in *Hedley Byrne v Heller*.⁶⁷ The question was under what circumstances the law would recognise *any* legal duties in speech (as opposed to a negligent act) apart from contract. Almost all the English misrepresentation cases involve the negligent performance of professional services. Accounting and surveying are common examples. The liability of those who provide services in a professional capacity is generally regulated by the law of contract. The legal ground for imposing liability for damages in a contractual relationship is the contract itself. Accordingly, liability for pure economic loss is quite normal. However, in practice, the effects *vis-à-vis* third persons create the most difficult problems. It is these situations that will be analysed in the present chapter.

In 1987 Professor Jan Kleineman presented the sole detailed study in Sweden on pure economic loss. Kleineman criticised the formalistic and restricted view on liability and introduced a theory of “justifiable reliance”, a theory very much alike the English *Hedley Byrne* principle of assumption of responsibility and reliance.

The Swedish Supreme Court used the same model almost immediately following the presentation of Kleinman’s work when deciding the landmark decision of NJA 1987, p. 692, the so called *Kone* case. In this case, the Supreme Court imposed liability on a property valuer for providing misleading information to a third party in a property value report.

Since then, the Swedish Supreme Court has in a string of cases confirmed and confined the principles laid down in *Kone*. It is now an accepted general principle that professionals may be liable for losses suffered by others than their contractual parties even if no crime has been committed. The court has concluded that not only property valuers⁶⁸ but also bankruptcy receivers⁶⁹ and tax advisers⁷⁰ can have a liability to compensate pure economic loss

⁶⁷ [1963] 2 All ER 575.

⁶⁸ NJA 1987, p. 692.

⁶⁹ NJA 1996, p. 700.

⁷⁰ NJA 1992, p. 243. The Supreme Court did, however, describe the relationship between the tortfeasor and the loss maker as contractual but this conclusion was based on the fact that a justifiable reliance existed.

outside contractual relations. This general principle of justifiable reliance will in the following sections be examined and compared with the English *Hedley Byrne* principle.

The English cases illustrating the principles as laid down in *Hedley Byrne* will be presented firstly, and secondly, the relevant Swedish cases will be dealt with. This outline is chosen since the English cases have no doubt had a great influence on the Swedish discussion of the problem regarding recovery for pure economic loss in non-contractual relations, primarily through the study of Professor Kleineman.⁷¹ It has even been submitted that *Kone* constitutes the Swedish counterpart to the decision in *Hedley Byrne*, not least because its well written and thorough analysis of the problem.⁷² For these reasons, a greater part of this chapter is dedicated to these two landmark decisions.

6.2 The *Hedley Byrne* principle

6.2.1 *Hedley Byrne v Heller*

The claimants in *Hedley Byrne* were an advertising agency who had become doubtful about the financial status of one of their clients, Easipower Ltd. To make sure their client were creditworthy, Hedley Byrne made enquiries of the defendant bankers, Heller, with whom Easipower had an account. The defendants replied twice that Easipower were financially sound, but on both occasions included a disclaimer – “without responsibility on the part of this Bank or its officials”.

Relying on the advice, Hedley Byrne entered into a contract with Easipower. Easipower later went into liquidation and Hedley Byrne subsequently suffered financial loss. Hedley Byrne claimed this loss from Heller.

In view of the disclaimer, the House of Lords held that no duty of care was accepted by Heller, and none arose, so the claim failed. The House did, however, and more importantly consider what their conclusions would have been if there had been no disclaimer, and this is where the importance of the case lies. Their Lordships stated *obiter* that in appropriate circumstances, there could be a duty of care to give careful advice and that breach of that duty could give rise to liability in negligence. The fact that the damage was purely financial did not affect the question of liability.

⁷¹ See for example Chapter 7 of Kleineman, *ibid*, 1987, where an overview of the liability for pure economic loss in English law is presented.

⁷² J. Kleineman, ”Om den befogade tillitens skadeståndsrättsliga relevans”, *JT* 2001/2002, p. 626-627.

This decision was a radical departure from previous principles in two ways. First, as *Candler v Candler, Christmas & Co*⁷³ shows, liability had not previously been imposed for pure economic loss but the House approved the dissenting judgment of Lord Denning in *Candler* and held that the majority had decided the case wrongly. Secondly, it had long been considered, on the basis of *Derry v Peek*⁷⁴ that a false statement could only give rise to liability if made intentionally or recklessly, and it was assumed that negligence did not suffice. The House of Lords rejected this view.

The House chose to describe the situation before them as equivalent to contract but within the scope of the duty of care doctrine. They laid down a number of requirements which claimants would need to satisfy in order to establish a duty of care under *Hedley Byrne*. Since a statement, once put into circulation, may be relied upon in different ways by many people, there has to be a “special relationship” between the parties in order to limit the liability. The nature of the “special relationship” was not fully defined by the House but the requirements appear to consist of a voluntary assumption of responsibility by the party giving the advice, reliance by the other party on that advice or information, and that such reliance was reasonable.

6.2.2 The “special relationship”

In *Hedley Byrne*, Lord Reid described the “special relationship” as arising in circumstances where

“it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the enquirer was relying on him”.⁷⁵

In such circumstances, a person would generally have three options. They could say nothing, give an answer but explain that it was given without reflection that the enquirer would rely on it, or simply give the advice or information. Anyone who chose the latter option could be deemed to have accepted responsibility for exercising the degree of care which was required in the circumstances.

Lord Morris similarly explained that a duty of care would arise where

“a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who he knows, or should know, will place reliance on it”.⁷⁶

⁷³ See above, Section 5.2.2.

⁷⁴ (1889) 14 App Cas 337.

⁷⁵ [1963] 2 All ER 575 at p 583 B.

⁷⁶ [1963] 2 All ER 575, at p. 594 C.

For this assumption to arise, the person giving the advice would usually need to have some skill or experience in the relevant area. Lord Reid stated that the “special relationship” requirement meant that *Hedley Byrne* only covers situations where advice is given in a business context. It thus seems that the advice must be given within a business context in order for a potential liability to arise. If for example a lawyer, in a social setting such as a party, discusses a dispute with one of his fellow guests, the advice given will not result in negligence if given carelessly.

Some English cases have suggested that even in a business context, the special relationship will only exist if the defendants are in the business of providing the actual type of advice that the claimant sought. In *Mutual Life and Citizens Assurance Co v Evatt*,⁷⁷ an insurance company had carelessly given false information about a company in which the claimant had invested. The Privy Council held that there was no duty of care since the defendants were in the business of providing insurance, not providing investment advice, and could therefore not be liable for such advice. It was further held that *Hedley Byrne* should be restricted to cases involving people whose profession centres on the giving of advice, such as accountants, solicitors and surveyors.

6.2.2.1 Voluntary assumption of responsibility

The voluntary assumption of responsibility is generally deemed to arise where the defendant has chosen to give advice or information, or to allow it to be passed on to a third party, when, as Lord Reid pointed out in *Hedley Byrne*, they also have the option to stay silent or stress that the advice should not be relied upon. This has implications in cases where the defendant has issued some kind of disclaimer, as was the case in *Hedley Byrne* itself, as the disclaimer suggests that the defendants have not voluntarily assumed responsibility, nor is it reasonable for the claimant to rely on them.

The mere existence of a disclaimer will, however, not necessarily prevent liability. In *Smith v Eric S. Bush*⁷⁸ (which will be discussed in more detail in Section 7.4 below) it was stated that a disclaimer does not in itself prevent a duty of care to arise. The disclaimer might, however, affect liability for breach of that duty. This was further discussed in *First National Commercial Bank v Loxleys*,⁷⁹ where the court was asked to strike out a claim (Sw. *avskriva målet*) because the defendants argued that their disclaimer prevented a duty of care from arising. The Court of Appeal refused to strike out the action, pointing out the position in *Smith v. Bush*. However, it commented that in *Henderson v Merrett Syndicates Ltd*,⁸⁰ importance had been placed on the assumption of responsibility as an

⁷⁷ [1975] 1 All ER 150, (PC).

⁷⁸ [1989] 2 All ER 514.

⁷⁹ [1995] 2 All ER 673.

⁸⁰ See above, Section 5.2.2.

indicator of whether a duty of care existed. The court suggested that this development might mean that it was possible for the existence of a disclaimer to mean there was no duty of care on the ground that there was no voluntary assumption of responsibility.

In a number of cases the courts have used the assumption of responsibility concept in order to restrict liability, by looking at who the person giving the statement can be deemed to have assumed responsibility to. In *Caparo Industries plc v Dickman*,⁸¹ Lord Bridge cited the classic words of Cardozo CJ in the case of *Ultramares Corp v Touche*⁸² and talked of the claimant needing to be an individual to whom the defendant knows the information will be conveyed, or “a member of an identifiable class”.⁸³ Later cases have attempted to clarify this, though not always successfully or consistently.

In *Goodwill v British Pregnancy Advisor Service*,⁸⁴ the claimant was not known to the defendant, but claimed to be a “member of an identifiable class”. An attempt was made to use *Hedley Byrne* in a new factual context. The claimant had become pregnant by her boyfriend. Three years before their relationship began, he had undergone a vasectomy performed by the defendants. They had informed him after the operation that it had been successful and that he would not need to use contraception in the future. Nevertheless, the claimant became pregnant. She sued the defendants for negligence, claiming the cost of bringing up her daughter. The Court of Appeal held that in order to have an action for pure economic loss arising from reliance on advice provided by the defendants, a claimant had to show that the defendants knew that the advice was likely to be acted on by the claimant (either as a specific individual or one of an ascertainable group) for a particular purpose which the defendants knew about at the time they gave the advice, and that the claimant had acted on the advice to his or her disadvantage. It was held that at the time when the advice was given, the claimant was not known to the defendants; she was simply one of potentially large class women who might at some stage have sexual relationship with their patient. They could not be expected to foresee that years later, their advice to their patient might be communicated to and relied on by the claimant for the purpose of deciding whether to use contraception. Under these circumstances, the relationship between the defendants and the claimant was not sufficiently proximate to give rise to a duty of care.

6.2.2.2 Reasonable reliance by the claimant

Reliance under *Hedley Byrne* requires that the claimant depended on the defendant using the particular skill and judgment required for the task which the defendant had undertaken. It is important to stress that merely general reliance on the defendant to exercise care will not suffice.

⁸¹ [1990] 1 All ER 568.

⁸² 174 N E 441 (1931), see also Section 7.2 for a further discussion of the case.

⁸³ 174 N E 441 (1931), at p. 450.

⁸⁴ [1996] 1 WLR 1397.

It must not only be proved that the claimant relied on the defendant, but also that it was reasonable to do so. The courts have held that this will not be the case where a claimant relies on information or advice for one purpose, when it was given for a different one. In *Caparo Industries plc. v Dickman*,⁸⁵ the claimants, Caparo, owned shares in a company whose accounts were audited by the defendants for the purpose of the annual audit required by the English Companies Act 1985. The claimants made a takeover bid for the company and when it was completed, Caparo discovered that the company was almost worthless. In assessing the likely value of the company, Caparo claimed to have relied on the figures in the annual statutory audit. The audit was negligently prepared and gave a misleading impression of a healthy profit which did not in fact exist. Caparo sued the auditors, but the claim failed. The accounts were produced for the purpose laid down in the Companies Act 1985, that of enabling the existing shareholders as a body to exercise control over the company. They were not prepared for the purpose of providing information for investors.

Lord Bridge held that there was no special relationship between Caparo as potential investors and the auditors. He said that an essential ingredient of the required proximity in situations as the present was to prove that the defendant knew that his statement would be communicated to the claimant and that the claimant would be very likely to rely on it. He drew a distinction between situations where “the defendant giving advice or information, was fully aware of the nature of the transaction which the claimant had in contemplation” and those in which “a statement is put into more or less general circulation and may foreseeable be relied upon by strangers to the maker of the statement, for any one of a variety of purposes which the maker of the statement has no specific reason to contemplate”.⁸⁶

6.3 The justifiable reliance theory

Influenced by Anglo-American law including the *Hedley Byrne* principle, Kleineman proposed in 1987 the introduction of a theory of justifiable reliance; if the loss marker had a justifiable reason to rely on the act by the tortfeasor and the tortfeasor realised this the loss ought to be compensated even if no contractual relationship existed.⁸⁷ This theory was used in the above mentioned case of *Kone*.⁸⁸ Here, a real estate valuator issued a certificate to an estate agent which negligently assessed certain property to be five times higher in value than it in fact was. On the strength of the certificate, the estate agent obtained a bank loan of 1 million krona, partially secured by a mortgage up to 800,000 krona. The loan proved to be

⁸⁵ [1990] 1 All ER 568.

⁸⁶ [1990] 1 All ER 568 at p 576 C-F.

⁸⁷ Kleineman, as referred to by Michael Frie, *ibid*, *Bird & Bird Dispute Resolution*, September 2002, issue 3, p. 2.

⁸⁸ NJA 1987, p. 692.

unrecoverable due to the eventual bankruptcy of the borrower and the inadequacy of the security which had been given, so the bank sued the valuer for negligence and was awarded compensation. The court recognized that a third party who provides information to a contracting party, knowing that the information will be relied upon by someone else, may be liable in tort for pure economic loss sustained by the relying party, despite the fact that carelessly providing false information does not amount to a crime.

The Supreme Court concluded:

“To make general statements regarding the limits for the valuer’s liability to pay damages is hardly possible. The following contemplations regards only valuation certificates...concerning real property given by the one who professionally undertakes the commission to value such property. The purpose of such a certificate is often to serve as basis for decisions in connection with legal dispositions of properties, primarily purchases and mortgages. The assignee may be the owner of the property, a lender or an intended purchaser. It must be clear to the valuer that the certificate may be used for different purposes and by different people...There are overwhelming reasons supporting the view that a person who has justifiably placed his confidence in a valuation certificate shall not suffer the consequences of a loss which depends ultimately on the fact that the certificate shall not suffer the consequences of a loss which depends ultimately on the fact that the certificate issuer has acted negligently. Liability for damages regarding a person who performs valuation of real property in his professional capacity should not be therefore, as a rule, limited to loss sustained by the assignee, but it should also embrace loss sustained by a third party, unless a reservation concerning exemption from such liability has been made in the certificate.”⁸⁹

The court found that the valuer was liable towards the lender since the lender had indeed placed justifiable reliance to the certificate.

Like the House of Lords in *Hedley Byrne*, which stressed the importance of the relevance of the reasonable reliance, so did the Supreme Court in *Kone*. The Supreme Court seems to argue the case in line with most of the same reasoning as is expressed in *Hedley Byrne*. As been illustrated above,⁹⁰ the Swedish legal tradition does not allow for single cases to have the same importance as in the English common law system, but nevertheless, the judgment seems to be of great importance and has provided guidance for subsequent cases.⁹¹

Before this case, Swedish law had great difficulties to master situations in which liability for pure economic loss resulting from negligent information

⁸⁹ NJA 1987, p 692 at p 703.

⁹⁰ See Section 2.2.

⁹¹ Kleineman states that the judgment has also had a great effect on insurance companies’ claims adjusting activities, Kleineman, *ibid*, *JT* 2001/2002, p. 627.

in non-contractual relationships arose. The discussion seemed merely to circle around the question if liability at all could arise in such situations, if no contractual relation existed between the alleged tortfeasor and the claimant.

One of the differences in Swedish legal development compared to the English is that legal development through cases law in Sweden, which puts earlier precedent in a larger context, usually takes a lot longer in Sweden than in England. This is of course due to the fact that Sweden is a much smaller jurisdiction than England. *Kone* was for a long period of time a rather isolated judgment and the Supreme Court had not had the opportunity to evaluate its own findings in other similar factual scenarios. It may be argued that *Kone* had solved the problem once and for all but the justifiable reliance theory was by no means undisputed.⁹²

In a more recent case, NJA 2001, p. 878, the principle of justifiable reliance was, however, once again confirmed by the Supreme Court. As in the case of *Kone*, it was a valuation made by a property valuer that was the subject for review. The court made a detailed analysis of the issue of whether a bank which had granted a loan against mortgage in property had a justifiable reason to rely on the information presented in the valuation report and how this was effected by the fact that the valuer in his report had stated that the report was intended to be used in a dispute (as evidence). The court held that a statement in the valuation certificate regarding its purpose was a clear signal to the bank not to rely on the report itself in its lending without first contacting the valuer in order to establish whether the report could be used as the basis for the loan. Since it was not proved that this had been done, the court found for the defendant and ruled that the bank was not entitled to damages because of the valuer's negligence.

An important ground for the reasoning of the Supreme Court was their interpretation of *Kone*. They stated that their decision did not automatically give support to the notion that a third party can use a valuation certificate with a liability for damages for the valuer in case the statement contains negligently caused misrepresentations. The Supreme Court further pointed out that the determining factor is if the reliance on the certificate was justifiable.

It has been submitted that this case constitutes an important clarification of the principles of liability for pure economic loss under Swedish law and that it is now clear that the courts do not accept that Chapter 2 Section 2 of the Tort Liability Act 1972 should automatically result in a delimitation of liability unless criminal acts have occurred.⁹³

The two valuation cases seems thus to make clear that compensation for pure economic loss may arise outside contractual relationships and criminal

⁹² Kleineman, *ibid*, JT 2001/2002, p. 628.

⁹³ Michael Frie, *ibid*, *Bird & Bird Dispute Resolution*, September 2002, issue 3, p. 2.

activities. Instead of extending the principles of contractual liability to persons which have not directly made the contract (as previous has been the case in Sweden), the courts can use the justifiable reliance principle as laid down in *Kone*. The advantage of this solution is that the court can then take into account a large quantity of legal arguments and factual circumstances such as the aim and purpose of a relevant tort rule, the behaviour and acts of the tortfeasor and the need for awarding compensation.⁹⁴

Furthermore, the Supreme Court has also held an auditor liable towards a third party, but this case was decided on the basis of an analogy with an express statutory provision in the Swedish Companies Act 975 (Sw. *Aktiebolagslagen* (SFS 1975:1385)). It should, however, be noted that the claimant in the Supreme Court decided not to argue the case on the principle of justifiable reliance outside contractual relations and the court was consequently not able to test the principle in this case .⁹⁵

⁹⁴ Michael Frie, *ibid*, p. 3.

⁹⁵ NJA 1996, p. 224. For a more detailed discussion of this case, see Section 7.7.1.

7 Claims by third parties for negligent advice or information

7.1 General remarks

This chapter focuses on liability for misrepresentation made to non-contractual parties, i.e. situations where a person misleads another, with whom the wrongdoer does not stand in a contractual relationship with. The solutions to the problems that arise in this field are very much interlinked to the above discussed general position regarding pure economic loss and the conclusions drawn in the above sections of the work are used as a basis for the analysis. At the same time, the conclusions found in this part are expected to provide a clearer understanding of the problems of recovery for pure economic loss. This will *inter alia* be achieved by a case study. Five hypothetical cases are introduced and solved according to English respectively Swedish law. The purpose of this is to inquire to what extent, if any, there exists a common core of principles and rules concerning compensation for pure economic loss within the two jurisdictions.

7.2 The problem of indeterminate liability

Where the misrepresentation does not constitute a criminal act, neither the Swedish law on tort nor contract provides a general rule which provides an answer on the scope of tort liability. In these situations, where negligent words cause pure economic loss, English law seems to provide a somewhat clearer answer. There, liability will be imposed if there is a sufficient “special relationship” between the parties. This term is, however, not crystal clear. The question thus arises; how far does the liability in these situations extend – *de lege lata* – in English and Swedish law?

The number of potential claimants may be extensive and damages that follow a single negligent statement may extend to large amounts. There is also the problem of causal connection in time between the making of the statement and the final damage. There may be a long period of time between the point in time when the information was put in circulation and the time it was relied on. The economic loss may further appear on an even later point in time. A line has to be drawn somewhere between damages that are recoverable and those which are not and the issue arises of how the class of people who may recover is limited.

This uncertainty of how far the liability may be reached appears to be one of the main explanations for the development of exclusionary rules (*Sw. spärregler*) in this area. The fear of “liability in an indeterminate amount for an indeterminate time to an indeterminate class”, the so called “floodgate

argument” plays an important role in the assessment of liability for pure economic loss in the English legal system. These words origins from the famous dictum of Cardozo CJ in the American case of *Ultramares Corpn v Touche*.⁹⁶ In the *Ultramares* case, the New York Court of Appeals refused to hold accountants, who had carelessly audited the accounts of a company, liable to an investor who lost heavily in reliance on the bill of health given to the company by the defendants. This was despite the fact that they had been fully aware that the balance sheet, when certified by them, would be exhibited to “banks, creditors, stockholders, purchasers, or sellers, according to the needs of the occasion”.⁹⁷

It was long considered that the risk of the courts being flooded with cases hard to judge, would make the judges inclined to retain a simple rule, even though they may see the application of the rule as offensive in the individual case. This argument has had a great influence on the legal development in the common law system. The argument is still present in the legal reasoning, but is not blocking the development in the way it did before. In the English case of *Junior Books*,⁹⁸ the warnings of Cardozo CJ can be traced, but for Lord Fraser, the floodgate argument stands out as “...unattractive, especially if it leads, as I think it would in this case, to drawing an arbitrary and illogical line just because a line has to be drawn somewhere. But it has to be considered, because it has had a significant influence on leading judges to reject claims for economic loss...”.⁹⁹ The change came in the above discussed case of *Hedley Byrne v Heller* where the defendants did not know the identity of the claimants (Hedley Byrne) since the request for advice had come from the claimant’s bankers (National Provincial). Nevertheless, this was not regarded as an obstacle to liability.¹⁰⁰ The floodgate argument shall thus not be seen as granting an immunity for accountants and similar financial service providers, but as *a factor* to consider in cases where there is uncertainty to impose liability or not.¹⁰¹

In Sweden, the concern for indeterminate liability is not as clearly discussed as in the common law system but may be an explanation to the rigid exclusionary rule in the Tort Liability Act 1972 Chapter 2 Section 2. Considerations towards the victims of the damages have, however, brought about a more flexible approach towards the rigid attitude towards liability for pure economic losses.¹⁰²

Since the Swedish positivistic view of the law, which often demands legislative support to impose liability, has militated against a legal development through case law at a point in time when the barriers against economic claims in the English common law system started to break, the

⁹⁶ 174 N E 441 (1931) at p. 450.

⁹⁷ 174 N E 441 (1931) at p. 442.

⁹⁸ [1982] 3 WLR 477.

⁹⁹ [1982] 3 WLR 477 at p 482 B.

¹⁰⁰ See the speech per Lord Morris in [1963] 2 All ER 575 at p. 580.

¹⁰¹ Kleineman, *ibid*, 1987, p. 379.

¹⁰² Kleineman, *ibid*, 1987, p. 419.

Swedish law on liability for pure economic loss in non-contractual relations is a rather complex issue from a comparative perspective. Even though the cases that in the following will be discussed seem to deal with different issues, the purpose is to investigate a number of situations with a common denominator in both systems. It is submitted that the common denominator is the significance of *reliance* as an independent factor to delimit those cases of pure economic loss which may be recovered against those which may not. The Swedish cases which will be discussed are especially those where the relationship between the parties have been described as “quasi contractual” (Sw. *kvasikontraktuell*) or “equivalent to contract” (Sw. *kontraktstliknande*). The objective is to seek for a common core of factors which constitutes a liability for negligently caused economic losses in relation to specific cases concerning the liability of surveyors, lawyers, auditors and other providers of advice or financial information.

7.3 Relations equivalent to contract

7.3.1 The problem

There are naturally a number of situations in which liability for damages may be imposed in a contractual relationship. The question arises if liability for a negligent statement may be imposed even when the misrepresentation is not connected to a contract but the situation nevertheless is of a contractual character.

As opposed to English law, Swedish law takes a rather flexible attitude towards the issue of what is regarded as constituting a contract. An explanation of why the English legal system has chosen to mainly develop the liability for pure economic loss in the law of tort rather than in contract is that the principles of “privity” (Sw. *ung. intressegemenskap mellan avtalsparter*) and “consideration” (Sw. *vederlag* or *motprestation*), which do not have their equivalence in Swedish law, limit the possibilities to expand the liability for damages in contract. Thus, when an analyse is made of “a relationship equivalent to contract” in English law, it is within the law of tort.¹⁰³

The Swedish Supreme Court has had difficulties in deciding which the requirements are in order to regard a relationship as contractual. This may be illustrated by the case of NJA 1980, p. 383. Here, a managing director of the Office of Composition (Sw. *ackordcentral*) had in the capacity as trustee (Sw. *god man*) made an estate inventory deed (Sw. *bouppteckning*) for a limited company. As a result of his negligence, the estate inventory was misleading. The defendant, the Office of Composition, made an agreement with the claimant, a person outside the composition proceedings

¹⁰³ Kleineman, *ibid*, 1987, p. 439.

(Sw. *ackordsförfarandet*), where the claimant undertook to guarantee on certain conditions a certain composition for the company. The claimant sued the Office for the loss he suffered as a consequence of the misleading inventory deed. The Supreme Court regarded the mentioned agreement as being of such character as a contract between the claimant and the defendant that the liability for damages was founded in contract. Since the claimant's undertaking was dependent on the reliance he placed in the estate inventory deed and the Office must have realised this, the court allowed the claim.

One thing can be concluded from this case. The Supreme Court unanimous agreed that in the absence of a contractual relationship between the claimant and the defendant, no liability to pay damages could be imposed, neither on the trustee nor the Office. None of the courts contemplated on the fact that the trustee could have a direct liability towards a third party. Here, it is justified to draw a comparative parallel with English law; if the case were to be analysed under the English *Hedley Byrne* principle of "reasonable reliance",¹⁰⁴ would the outcome still be the same?

It should be noted that the claimant had de facto been misled by the negligently made estate inventory deed and there was sufficient causal connection between the reliance and the damage. The Supreme Court stated that the person who drafted the inventory "...must have known that [the claimant's] undertaking was significantly based on the reliance..." which he considered to be able to place on the inventory deed.¹⁰⁵ Here, the principle in English law of "voluntary assumption of responsibility" appears. As discussed above, this prerequisite emanates from what the defendant knew or should have known. The voluntary assumption of responsibility is generally deemed to arise from the fact that the defendant has chosen to give information, when, they also have the option to stay silent or stress that the information should not be relied upon. It may be argued that the negligence of the trustee is connected to a different measure (i.e. the drafting of the estate inventory deed) than the one where the damage occurred (i.e. the guaranteed composition), but the same person, now in the capacity of the director of the Office, uses the inventory deed in the agreement with the claimant, who, in reliance of the deed, makes a financial arrangement. It is submitted that between the tortfeasor and the claimant it actually existed a "special relationship" which made the reliance the claimant placed on the deed, reasonable. The English courts have held that the reliance is not reasonable in cases where the claimant relies on the information for one purpose, when it is given for another purpose.¹⁰⁶ There is, however, a distinction between situations where "the defendant giving information... was fully aware of the nature of the transaction which the claimant had in contemplation" and those in which "a statement is put into more or less general circulation and may foreseeable be relied upon by strangers to the maker of the statement, for any variety of purposes which the maker of the

¹⁰⁴ See above, Section 6.2.

¹⁰⁵ NJA 1980, p 383 at p 396.

¹⁰⁶ *Caparo Industries plc v Dickman* [1990] 1 All ER 568, see above Section 6.2.2.3.

statement has no specific reason to contemplate”.¹⁰⁷ It is submitted that since the maker of the statement in this case was fully aware of the claimants composition guarantee, the reliance was clearly reasonable. The case is concerned with a professional, who had been negligent and his position and function are based on the fact that his measures presents trust. It is the same person who made and used the information, which should have realised that it, if it were faulty, would lead to a disposition. The provider of the information knew of the disposition since he was the one who himself had called for it and he was also the one who performed it.

With reference to the above discussed “floodgate argument”,¹⁰⁸ would this then prevent the claim from being allowed if it was to come in front of an English court?

There was a gap in time between the point in time when the inventory deed was negligently drafted and the point in time when the loss occurred. Is there an impending risk that the liability will be lasting for “an indeterminate time”? It is submitted that since the maker of the statement was himself part in the agreement which caused the claimant’s loss, the prerequisite of a sufficient close relationship, which is a condition for liability when the number of potentially claimants are almost indeterminate, is fulfilled.

The conclusion must thus be that if this case was to be tried in England and consequently analysed by applying the *Hedley Byrne* principles, the result would be the same: claim allowed. The Swedish Supreme Court decided the case in contract, but the end result is the same. It is further submitted that this fiction of contract is not necessary to come to a material just result, as the English principles of “special relationship” shows. The Supreme Court even went so far as to regard the making of the estate inventory deed as a step in the making of the contract. The court appears further to feign that the trustee was negligent “... also as representative of the Office of Composition at the entering of the agreement with [the claimant]....”.¹⁰⁹ In contrast to English courts, Swedish courts have in these difficult cases, stretched the law of contract to the maximum limit.

The case of NJA 1980, p. 383 is quite similar to the English case of *Esso Petroleum Co Ltd v Mardon*.¹¹⁰ Here the claimant had leased a petrol station on the strength of Esso’s advice that he could expect to sell at least 200,000 gallons a year. In fact he only managed to sell 78,000 gallons in 15 months. In reliance of the advice, the claimant lost the capital he had invested and he was also forced to take out a larger loan in order to uphold the business. The Court of Appeal held that in making the prediction, the petrol company had undertaken a responsibility to the claimant who had he relied on their skill

¹⁰⁷ [1990] 1 All ER 568 at p. 576 E.

¹⁰⁸ See above Section 7.2.

¹⁰⁹ NJA 1980, p 383 at p. 396.

¹¹⁰ [1976] 2 All ER 5.

in the petrol market and consequently, his claim was allowed. An attempt to reach a material just result by way of contractual fictions like the Swedish Supreme Court cannot be found in the English judgment. “A special relationship” can exist without a contractual relationship. This had already been established in *Hedley Byrne*. In *Hedley Byrne*, Lord Devlin stressed the connection with the principles of contract and stated that in non-contractual relationships there was instead a liability for:

”...relationships which...are “equivalent to contract”, that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract.”¹¹¹

In *Esso Petroleum*, Lawson J cited *Hedley Byrne* and accentuated that the petrol company was liable on non-contractual grounds. He submitted that *Hedley Byrne* indirectly had changed the law of contract since the precedent made it possible to evade the contractual principles that earlier were regarded as exclusively controlling precontractual representations.

7.3.2 Case study 3 – the careless architect

The above considerations regarding recovery for negligent advice and information may also be illustrated in short by the following fictitious case.¹¹²

An owner hires a contractor to build a house. The owner also hires an architect to supervise the construction. Because of poor supervision by the architect, the contractor has to do the same work twice. Can the contractor sue the architect for his loss if the owner does not have to pay for the additional work?

7.3.2.1 England

Under English law, the contractor can probably sue the architect for negligent advice under the *Hedley Byrne* principle. As has been stated above, *Hedley Byrne v Heller* serves as authority for allowing claims for economic harm due to negligent advice or information. If it can be proven that the architect knew, or ought to have known that the contractor would reasonably rely on his advice, there will be a valid action in negligence. “Reasonable reliance” of the contractor is evident in the present case since the defendant is a professional applying his skills to supervise the claimant: see *White v Jones*.¹¹³

¹¹¹ [1932] AC 562 at p 610 F.

¹¹² The facts of the fictitious case are borrowed from Bussani and Palmer, *ibid*, 2003, p. 271.

¹¹³ [1995] 1 All ER 691 and see Bussani and Palmer, *ibid*, 2003, p. 277.

7.3.2.2 Sweden

Here the result would be the opposite. The contractor has no claim against the architect under Swedish law.

The loss is a pure economic loss since the loss did not arise in connection with anybody suffering bodily injury or property damage. Even though the text and the preparatory works of the Swedish Tort Liability Act 1972 do not completely bar compensation for losses not caused by a crime (see the Tort Liability Act Chapter 2 Section 2), should the courts find strong reason for it, there is no basis for suggesting that an exception would be admitted in a case such as this. The lack of a contractual relationship seems to make it impossible to bring a contract claim either.¹¹⁴

7.3.2.3 Comparative comments

Here the line between tort and contract becomes apparent. In England, the main reason for allowing the claim is that in many cases of wrongful advice or information the parties are so close (working in a business relationship), that there would have been a claim in contract, but for the absence of either consideration or privity. In cases where there is such close relationship and reliance, the courts do not wish for the innocent party to stand the risk of professional fault. The limits of this liability are, however, narrowly defined by the courts. They have repeatedly denied recovery of losses suffered by more than one person, not in personal contact with the defendant. In Sweden, the courts have been even more restrictive in using their discretion to apply an exception to the rule that pure economic loss is not compensated outside contractual relations (or when not caused by a crime).¹¹⁵

7.4 Surveyors' liability

A surveyor may cause financial loss to the person requiring the survey, i.e., the contractual party, but in general, it is often a third party who suffers a loss. If for example the valuation is relied upon to grant a credit, the creditor may suffer a loss if the valuation is negligently made. The relationship between the parties is, however, often similar to that of a contract. That liability may be imposed on a property valuer for providing careless and misleading information to a third party in a property value report is settled law in both Swedish and English law.

In Sweden this was established in the above discussed case of *Kone* and reaffirmed in NJA 2001, p. 878.¹¹⁶ These cases are very similar to the English case of *Smith v Eric S Bush*.¹¹⁷ Here it was established that in

¹¹⁴ See further Bussani and Palmer, *ibid*, 2003, pp. 288-289.

¹¹⁵ See further Bussani and Palmer, *ibid*, 2003, pp. 278 and 289.

¹¹⁶ See above, Section 6.3.

¹¹⁷ [1989] 2 All ER 514.

addition to a surveyors' contractual duty to his own client to use reasonable care and skill, a surveyor valuing property may also find himself liable in tort to third parties. In the case, the claimant bought a house on mortgage and, in common with the widespread practice of such purchasers (particularly at the lower end of the market), did not commission her own independent survey but relied on that carried out for the building society. Unfortunately, the building society's surveyor negligently failed to notice major defects in the property. The House of Lords held that he was liable to the claimant in tort. He should have known that the purchaser, as well as the building society, was likely to rely on his valuation.

An important factor in categorising the claimant's reliance as reasonable in this case was the fact that the size of the house price was relatively small when compared with the cost of commissioning an independent survey. Thus, it must be noted that the courts may not regard it reasonable for all purchasers to rely on the mortgagee's valuer, for example, very expensive houses or commercial property.

7.5 Lawyers' liability and the "wills cases"

7.5.1 The problem

In a comparison between surveyor's liability against a third party and lawyer's liability in an equivalent situation, the latter appears to be a more complex issue. As opposed to surveyors, a legal advisor's situation is often of a contractual nature.

In England, it was established in 1978 in the case of *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp*,¹¹⁸ that alongside the contractual relationship existing between a solicitor (Sw. *advokat*)¹¹⁹ and his client, a solicitor owes to his client a duty of care in tort. This marked a radical departure from the previous position as previously understood, based upon a well-known decision of the Court of Appeal in 1938 that a solicitor's duty to his client was in contract only.¹²⁰ A unanimous House of Lords in *Henderson v Merrett Syndicates Ltd* expressly confirmed the proposition that professional people may owe duties to their clients concurrently in both contract and tort.¹²¹

¹¹⁸ [1978] 3 All ER 571.

¹¹⁹ A solicitor is a lawyer who prepares cases in English courts or is appointed to represent a party in the English High Court. Cf. "barrister". For a more detailed discussion of the differences between an English solicitor and barrister, see Bogdan, *Komparativ Rättskunskap*, 1993, pp. 135-137.

¹²⁰ *Groom v Crocker* [1938] 2 All ER 394.

¹²¹ [1994] 3 All ER 506.

Shortly after the decision in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* came the famous first instance case of *Ross v Caunters*,¹²² in which it was held that a solicitor owed a duty of care in tort not only to his own client but also, in certain circumstances, to third parties who might be adversely affected by his negligence in advising or acting on behalf of his client.

In that case a solicitor was held liable to the proposed beneficiary (Sw. *testamentstagare*) under a will whose gift was rendered void due to the failure of the testator, as a result of the solicitor's negligence when advising and acting for him, to comply with the formalities of the Wills Act 1837. Although a controversial decision for many years, the correctness of *Ross v Caunters* was confirmed by the House of Lords in *White v Jones*.¹²³ Here, the defendant solicitors had, due to their negligence, wholly failed to comply, before his death, with the request of the testator that a will should be drawn up to the benefit the claimants. A remedy under the *Hedley Byrne* principle was extended and the claimants were entitled to recover damages from the defendants in negligence. The House stated that by accepting instructions to draw up a will, a solicitor came into a special relationship with those intended to benefit under it and this, in consequence, imposed a duty on the solicitors to act with due expedition and care on behalf of the beneficiaries. Even though it is difficult to argue that the intended beneficiaries relied on the solicitor's statement (since they might not even have known about it), the assumption of responsibility by the solicitor towards his client was enough to extend the liability to the beneficiaries.¹²⁴

These two decisions may seem to have an extensive scope regarding a solicitor's liability towards third parties but the decisions do not imply that solicitors owe a general duty of care to beneficiaries. In *Ross v Caunters* itself, Sir Robert Megarry stated:

“In broad terms, a solicitor's duty to his client is to do for him all that he properly can, with, of course, proper care and attention...The solicitor owes no such duty to those who are not his clients. He is no guardian of their interests. What he does to his client may be hostile and injuries to their interests, and sometimes the greater the injuries the better he will have served his client. The duty owed by a solicitor to a third party is entirely different. There is no trace of a wide and general duty to do all that properly can be done for him. Instead, in a case such as the present, there is merely a duty, owed to him as well as the client, to use proper care in carrying out the client's instructions for conferring the benefit on the third party.”¹²⁵

¹²² [1979] 3 All ER 580.

¹²³ [1995] 1 All ER 691.

¹²⁴ In *Gorham v British Telecommunications plc* [2000] 1 WLR 219, the Court of Appeal confirmed that *White v Jones* is not confined to claims relating to wills. The case concerned the negligent advice of an insurance company regarding a pension. The insurance company was held liable to pay damages to the intended beneficiaries, which suffered financial loss as a consequence of the company's negligence.

¹²⁵ [1979] 3 All ER 580 at p. 599.

These remarks were clearly directed at cases in which the claimant never relied on the solicitor's advice. If a third party actually did rely on that advice, then he should be able to claim against the solicitor simply on the principle in *Hedley Byrne* itself without invoking the rule in *White v Jones*.

Ross v Caunters and *White v Jones* shows that reliance, which is so important in the other above discussed cases of professional negligence, does not seem to have the same importance in the wills cases. The beneficiary may well be completely unaware of the will until he receives the knowledge of its existence and the unfortunate information about its invalidity.

Regarding a solicitor's liability towards third parties under Swedish law, the general rule in contract is that a party is only liable towards the other contractual party, not to third parties. As has been discussed above, there are exceptions to this rule. No precedent in however be found Swedish law equivalent to *Kone* regarding a valuer's liability can regarding lawyer's liability. A distinguished Swedish legal author, Bertil Bengtsson, has questioned "...a quasi contractual liability in such situations..." but suggested that there may be a liability in cases of serious breaches of good advocate mores (Sw. *god advokatsed*).¹²⁶ Another legal writer, Jan Hellner, has made statements against a liability towards third parties but states that

"...the [solicitor] may have obligations towards the [client's] opposite party. In some cases the [solicitor] may be considered to stand in a contractual relationship even with the [third party], and he may then be liable in negligence."¹²⁷

The *Kone* case shows that the courts, in certain situations, are prepared to make deviations from the principle of a contract's subjective limitation and protect people, who, without being contractual parties, have a close and protective worthy interest in the contract being completed in a non-negligent way. Kleineman suggest, however, that it should be required that there is a clear connection to a contract between other parties as well as an obvious, and for the tortfeasor, clearly apprehended interest for a defined class of people, which is worthy protection by the law.¹²⁸

In 1939, a Swedish case was decided which resembles the above cited English wills cases.¹²⁹ Here, a trust (Sw. *stiftelse*) had been set up through a will. A solicitor¹³⁰ had been commissioned by the estate administrator (Sw. *boutredningsman*) to prove (Sw. *bevaka*) the will, but did unfortunately this

¹²⁶ Bertil Bengtsson citing Holger Wiklund, *Särskilda avtalstyper 1*, p. 174, n. 82.

¹²⁷ Jan Hellner, *Speciell Avtalsrätt II: Kontraktsrätt*, 1984, p. 192 as cited by Kleineman, *ibid*, 1987, p. 548.

¹²⁸ Kleineman, *ibid*, 1987, p. 450.

¹²⁹ NJA 1939, p. 374.

¹³⁰ In this context, the correct Swedish translation of solicitor is "jur. kand" and not "advokat", cf. n. 115.

at the wrong forum. The Court of Appeal, with which the Supreme Court agreed, regarded the estate administrator as the trust's "representative". The fact that he handed over the assignment to the solicitor led to the solicitor being held liable for the pure economic loss, which the trust suffered by being forced into a settlement agreement (Sw. *förlikningsavtal*) with the heirs. Under the agreement, the trust waived an amount for the benefit of the heirs in exchange for them respecting the will. The trust suffered a loss as a consequence of the heirs being able to oppose (Sw. *angripa*) the will, since the probate of the will (Sw. *testamentsbevakning*) had not properly been performed. The trust, which was the beneficiary of the will, thus suffered a loss caused by the solicitor's negligence to make sure the will remained in force.

The solicitor received his assignment by the estate administrator, who derived his position from the will. According to Kleineman, there is, however, nothing in the case that suggests that there existed any contractual relationship between the trust and the solicitor.¹³¹ No references were made to the exclusionary rule nor did any fictions of contract appear in the court's reasoning. It must, however, be noted that the case was heard before the enactment of the Tort Liability Act 1972, and the outcome might have been different today.

In this case, as well as in the English wills cases, a distinct feature is that lack of reliance by the injured party on the deed did not deter the court to impose liability. The beneficiaries might not even have known about the existence of the will. However, in NJA 1939, p. 374, the special circumstances of the case that the damaged party, the trust, was constituted through the will, resulted in that the issue whether the trust relied on the will or not, could consequently not be discussed.

7.5.2 Case study 4 – poor legal services

The above considerations regarding recovery for negligent legal services can be illustrated by the following fictitious case.¹³²

A grandfather wanted his grandson to inherit most of his estate. However, his wish was frustrated by a number of errors committed by the notary drawing up his will. What chances does the grandson have of receiving compensation from the notary for the damage incurred?

7.5.2.1 England

¹³¹ Kleineman, *ibid*, 1987, pp. 237-238.

¹³² The facts of the fictitious case are borrowed from Bussani and Palmer, *ibid*, 2003, p. 403.

Under the authority of *White v Jones*, the grandson will be able to recover from the negligent notary the monies that the grandfather intended him to inherit under his will.

The House of Lords concluded in *White v Jones* that solicitors drawing up wills for clients are liable to identified beneficiaries for errors which causes the beneficiaries rights under the will to be frustrated. Even though the case has been criticized for using a tort remedy to redress a situation of obvious injustice, instead of leaving it to the legislator to provide for a statutory remedy, the House of Lords case is authority for recovery of the economic loss of beneficiaries resulting from a defective will.¹³³

7.5.2.2 Sweden

Jan Hellner has quoted this example in the classical Swedish textbook on torts as one of “uncertain solution”.¹³⁴ Compensation is likely to be awarded, but this is far from certain.

A prima facie interpretation of the Swedish tort legislation would exclude compensation because this is a pure economic loss but, and as discussed above, courts have been very restrictive in granting exceptions to the general principle in the Tort Liability Act 1972 Chapter 2 Section 2.

There is no case law concerning cases such as this, apart from the above mentioned case from 1939 which affirmed the responsibility of a lawyer who committed a mistake in the procedure for enforcing a will. It may however be argued, that a sort of contractual relation between the lawyer and the beneficiary was possible to identify.¹³⁵ Jan Kleineman has proposed an extension of the lawyer’s liability in cases such as the present, quoting i.e. Anglo-American case law as a model to follow.¹³⁶

It may also be possible to draw an analogy with the *Kone* case. It can be argued that the lawyer in the case at hand acted negligently, since he was aware that his actions would most probably affect the beneficiaries. But this possibility has not yet been tested in court.¹³⁷

7.5.2.3 Comparative comments

The fictitious case is based on circumstances which show that there is no direct contact between the wrongdoer and the claimant. The grandchild might not even be aware that his grandfather has sought legal advice. Consequently, it is hard to see how he can be said to rely on the notary’s

¹³³ Bussani and Palmer, *ibid*, 2003, p. 407.

¹³⁴ Hellner, *Skadeståndsrätt*, 1995, p. 79.

¹³⁵ Cf. the reasoning of Kleineman as referred to in Section 7.5.2.1.

¹³⁶ Kleineman, *ibid*, 1987, pp. 555 ff.

¹³⁷ See further Bussani and Palmer, *ibid*, 2003, pp. 416-417 and Kleineman, *ibid*, 1987, p. 552, n. 82.

skill as required under *Hedley Byrne*. However, this factor does not prevent the English courts from awarding damages to the claimant.

Sweden takes a rather uncertain approach to the problem although there is some support in NJA 1939, p. 374 to impose liability even without reliance. In England, there is clearly support to infer liability in such situations under the rule in *White v Jones*. The reason for the attitude of English courts to allow claims such as these is probably the need to maintain the highest possible public confidence in a certain standard of legal services.¹³⁸

7.6 Liability for incorrect credit information and references

7.6.1 The problem

References about a person's solvency or references for employment purposes may lead to different kinds of damages. The person who the reference is about may suffer a loss by not receiving the sought credit or employment. These situations may in Sweden constitute the *crime* of defamation (Sw. *förtal*) and accordingly lead to liability to pay damages under the rule in Chapter 2 Section 2 of the Tort Liability Act 1972 on pure economic loss.¹³⁹ In English law, these situations were formerly governed solely by the complex principles of the *tort* of defamation. The *tort* of defamation provides in particular that such references are normally protected by qualified privilege, so that a referee would normally not be liable for errors in his reference to the person *about whom* it was written, as long as he did not act maliciously (Sw. *uppsåtlig*).¹⁴⁰ The law has, however, since been changed by the decision of the House of Lords in *Spring v Guardian Assurance plc*¹⁴¹ (see below).

The situation may, however, arise where the provided reference about someone is not too negative, but too positive. In such a situation the statement can hardly be of a defamatory character, but it may mislead a third party to grant a credit he otherwise would not have granted or to employ a person he would not have employed but for the reference. The third party may in these circumstances suffer pure economic loss if for example the debtor cannot fulfil his obligations.

In England, the possibility of liability in negligence to the person to whom a carelessly favourable reference is addressed would seem to be established by *Hedley Byrne* itself.¹⁴² Regarding the person who the reference is about,

¹³⁸ Bussani and Palmer, *ibid*, 2003, p. 417.

¹³⁹ See for example NJA 1962, p. 31.

¹⁴⁰ R.A. Buckley, *The modern law of negligence*, 1999, p. 117.

¹⁴¹ [1994] All ER 3 129.

¹⁴² See *Spring v Guardian Assurance plc* [1994] All ER 129 at p. 161, per Lord Slynn, and at p. 352 and p. 177, per Lord Woolf. But cf. per Lord Goff at p. 320 and p. 147.

the leading case is *Spring v Guardian Assurance plc*. Here, an employee sued his former employer in negligence for writing, carelessly, but without malice, an inaccurate reference about him to a prospective employer. Their Lordships held that, in principle, liability could exist in such circumstances.¹⁴³ Lord Woolf concluded that to hold careless employers liable for inaccurate references would be “wholly fair” and “would amount to a development of the law of negligence which accords with the principles which should control its development”.¹⁴⁴ The majority in the House of Lords agreed that the preservation of the law of defamation would not be sufficient to deny the claimant a remedy. The case, endorsing a wider interpretation of *Hedley Byrne*, marks a reversal of the foregoing English trend to restrict the development of negligence.¹⁴⁵

A careless reference such as the above described would in Swedish law probably be governed under the crime of defamation (i.e. if the statement would amount to a crime, if not, recovery is probably excluded)¹⁴⁶ or if the statement consists of inaccurate information regarding someone’s credit worthiness, under Section 21 of the Swedish Act on Credit Information 1973 (Sw. *Kreditupplysningslagen (1973:1173)*)¹⁴⁷ Liability for pure economic loss to the person to whom a carelessly favourable reference is addressed is, however, solely governed under contract principles. Thus, if no contract is deemed to exist between the provider of the inaccurate statement and the injured party requesting the information, no recovery for pure economic loss is allowed. It may be that the person requiring the information does not receive it directly from the maker of the statement but from whom the statement is about. In such circumstances, the person suffering economic loss as a result of relying on the information is without a remedy. There is no room for reasoning about “a special relationship”, as would be the case if such a situation were to come in front of an English court. However, if the relationship between the parties is considered as “equivalent to contract”, a remedy may be available. An illustrative case is NJA 1947, p. 21.

In this case a horse trader wanted to buy a number of horses of the claimant. The claimant commissioned a credit report about the horse trader through the claimant’s bank (bank A). Bank A turned to the manager of another bank (bank B). This bank informed bank A that there was no risk in granting a credit to the horse trader. The purchase price was paid by an acceptance of a bill (Sw. *växelaccept*) and the horses were delivered. After yet another

¹⁴³ There appears to have been some difference of emphasis among the members of the majority as to the precise basis of recovery. Lord Goff founded his decision exclusively on *Hedley Byrne* (see [1994] 3 All ER 129 at pp.143-44), whereas the others seemed to have been prepared to contemplate the application of somewhat wider principles relating to recovery for damages for pure economic loss in situations of high “proximity” (see e.g. per Lord Woolf [1994] 3 All ER 129 at p. 168).

¹⁴⁴ [1994] 3 All ER 129 at p. 172.

¹⁴⁵ Vera Birmingham, *Tort Nutcases*, 2002, p. 71.

¹⁴⁶ Cf. NJA 1962, p. 31. See further Kleineman, *ibid*, 1987, p. 220 ff.

¹⁴⁷ See further Kleineman, *ibid*, 1987, Chapter 9.6.

request regarding the purchaser's solvency, bank B gave a positive answer. After some time, the horse trader went bankrupt and could consequently not perform his obligations. After it became apparent that the manager of bank B had been negligent in providing the credit report, the claimant sued the bank. Despite the fact that the credit report had been supplied to the claimant through bank A, the Supreme Court held that a contractual relationship existed between bank B and the claimant.

The circumstances resemble the case of *Hedley Byrne*. As in *Hedley*, the defendant escaped liability, but unlike the English case, there was no exclusion clause in the Swedish case that exempted the defendant from liability. The only reason why the Supreme Court did not allow the claim was because there was a lack of causal connection between the credit report and the loss. It appears as the lack of causation comes from the fact that the claimant did not rely on the report. One must, however, be very careful in making conclusions on this issue. It may be that the lack of causal connection existed in the fact that the claimant lacked capacity to recover the horses, even if he had received correct information. As a consequence of the brief judgment (as oppose to the very detailed analysis on the issue in *Hedley Byrne*), which leaves little of guidance for future cases, Kleineman advocates that a position regarding the question whether theories of reliance were decisive for the decision or not, must be made very carefully. He further submits that the question whether the court regarded the actual knowledge of bank B, regarding the purpose of the information, as important for liability or not is unclear.¹⁴⁸

What is clear from the case is that bank B knew that the report could come to be relied upon in an agreement of credit, but the report could also possibly be relied upon in a number of transactions and be passed on to other lenders than the present. Here the often cited English "floodgate argument" appears again. It must be noted that no such argument can be found in the case (or any other Swedish case for that matter), but from a comparative perspective, it may be interesting to analyse the case with regard to the mentioned argument. It is submitted that the reference provider could not be entirely sure of how many potential claimants there could be, nor could he be sure on extent of the damages or for what period in time the reference could be relied on. Kleineman submits that the potential number of claimants could be just as large regardless if the user of the information stands in a contractual relationship with the supplier or if he is a third party.¹⁴⁹ If he his right, the solution chosen by the Swedish Supreme Court to "simply" look at the relationship between the parties in the dispute (i.e. if there is a contractual relationship or not), without any considerations of "reasonable reliance" and "assumption of responsibility", seems to make Swedish law in this field rigid, or at least less flexible than English law.

¹⁴⁸ Kleineman, *ibid*, 1987, pp. 458-459.

¹⁴⁹ Kleineman, *ibid*, 1987, p. 459.

7.6.2 Case study 5– wrongful job reference

The above considerations regarding recovery for negligent references can be illustrated by the following fictitious case.¹⁵⁰

A company offered a job to the claimant on condition that it received a satisfactory character reference. The claimant asked his former employer to send such a reference. The former employer did so but mistook the claimant for another former employee who had a record of dishonesty. When the company received the reference referring to the claimant's dishonesty, it gave the job to another person. The claimant wishes to sue his former employer.

7.6.2.1 England

The claim will succeed. In *Hedley Byrne*, the case was concerned with a negligently favourable reference; here the problem is a negligently unfavourable reference. As seen above, the House of Lords considered this question in *Spring v Guardian Assurance* and decided that an employer owed a duty of care when preparing a reference in respect of a former employee. Liability will be imposed if the employee, although otherwise successful, fails to get the job because of the misleading reference. The case at hand falls clearly under the *ratio* of *Spring*.¹⁵¹

7.6.2.2 Sweden

Under Swedish law, the former employer will on the other hand most likely not be held liable.

Again, this is a pure economic loss in the Swedish meaning, which is not recoverable when not caused through a crime.¹⁵² As mentioned earlier, courts have been very restrictive in granting exceptions to this general principle.

7.6.2.3 Comparative comments

Here, England and Sweden do not agree on the recoverability of the employee's losses. England treats the case either under the "*Hedley Byrne* duty of care" rule, or on an assumption of responsibility by the former

¹⁵⁰ The facts of the fictitious case are borrowed from Bussani and Palmer, *ibid*, 2003, p. 473.

¹⁵¹ Bussani and Palmer, *ibid*, 2003, pp. 478-479.

¹⁵² See the Swedish Tort Liability Act Chapter 1 Section 2 and Chapter 2 Section 2. The act does not constitute the crime of defamation since no intent can be inferred, see the Swedish Penal Code (Sw. *Brottsbalken* (SFS 1962:700)), Chapter 5 Section 1 and Holmquist, Leijonhufvud, Träskman, Wennberg, *Brottsbalken – en kommentar*, Del 1, 2000, p. 255 ff.

employer, together with reliance placed on it by the employee.¹⁵³ Negligent references have touched a sensitive chord in English judges and the issue is a moral one.¹⁵⁴ The court strikes a balance between various competing policies and principles and it is clear from *Spring* that the damage to the individuals future prosperity outweighs the possibility that some referees will be deterred from giving frank references or any at all.¹⁵⁵

In Sweden on the other hand, cases of wrongful information given on a non-professional basis such as the one at hand, has by case law been kept close to the general principle. Kleineman¹⁵⁶ has criticised this restrictive approach but so far, there are no signs of a change in the present law.¹⁵⁷

7.6.3 Case study 6 – an anonymous telephone call

The above considerations regarding recovery for incorrect credit information can be illustrated by the following fictitious case.¹⁵⁸

The owner of a small business (the claimant) has a longstanding agreement with a bank. One day, a credit rating institute, receives an anonymous phone call that the claimant's business is about to go bankrupt. The credit rating institute makes no further inquiry and thus does not learn that the allegation is totally unfounded. Instead, the credit rating institute calls the claimant's bank and reports the information. The bank immediately cancels all of the claimant's loans. As a result, the claimant suffers economic damages. He now sues the credit rating institute to recover his loss.

7.6.3.1 England

Whether the claimant will recover his loss or not is uncertain. This is a case in which English law may go either way, in developing new categories of negligence. As the case of *Murphy v Brentwood DC*¹⁵⁹ shows, English judges consider novel claims in negligence on a case-by-case basis. The line of authorities before the case of *Spring v Guardian Assurance*, is against recognizing a duty of care owed by an investigator to the investigated person.¹⁶⁰ But *Spring* clearly established liability for negligent employment references, and it may be argued that courts can easily extend this liability to

¹⁵³ Lord Goff of Chieveley granted the appeal in *Spring* on basis of a duty of care deriving from the *Hedley Byrne* principle and saw the issue in terms of assumption of responsibility and reliance (see Lord Goff's speech in *Spring* at p.319). The other three Law Lords approached the issue in terms of the three-part test of the existence of a duty of care, namely: foreseeable loss, proximity of relationship and fair, just and reasonable.

¹⁵⁴ Bussani and Palmer, *ibid*, 2003, p. 479.

¹⁵⁵ See for example the speech of Lord Lowry in *Spring* [1995] 2 AC 296 at p. 326.

¹⁵⁶ Kleineman, *ibid*, 1987, p. 513 ff.

¹⁵⁷ Bussani and Palmer, *ibid*, 2003, p. 486.

¹⁵⁸ The facts of the fictitious case are borrowed from Bussani and Palmer, *ibid*, 2003, p. 507.

¹⁵⁹ [1990] 2 All ER 908. See above Section 3.3.

¹⁶⁰ See for example *Wright v Jockey Club* [1995] TLR 342.

negligent credit references such as the present case. It should, however, be noted that new formulations of principle cannot be used in novel cases to alter a previous line of decisions holding that no duty exists in similar circumstances.¹⁶¹ Furthermore, the existence of special statutory rules providing remedies to consumers against incorrect entries in credit files held on them by credit agencies,¹⁶² or imposing special duties on holders of computerized personal data,¹⁶³ may further discourage the courts to create a new category of tort liability.¹⁶⁴

There is also the problem of “reliance” by the claimant. The lack of direct reliance between the credit agency and the investigated person may be seen as lack of the necessary “close proximity”, required under the principle of *Hedley Byrne* for incorrect information. It may well be that English courts think that it would hinder the work of credit agencies to supply speedy and efficient administration of private consumer credit, if liability in negligence were imposed.¹⁶⁵

7.6.3.2 Sweden

In Sweden, the situation is more certain; the claimant will recover his loss.

There is a valid claim against the credit agency since the activity of credit rating is regulated by the Act on Credit Information 1973¹⁶⁶ which imposes strict liability on the professionals involved, who can avoid it by showing that they have used the “required care and attention”. Facts such as those described in the example at hand, would certainly suggest the liability of the credit rating institute.¹⁶⁷

7.6.3.3 Comparative comments

In Sweden, strict liability (i.e. regardless of fault by the defendant) is imposed on the Credit Agency through the Act on Credit Information. This solution is, no doubt, used as a means to encourage the maintenance of a high standard of services. In England, the situation is a bit more problematic; liability depends on the circumstances of the case. If there is a “close proximity” and a “direct assumption of responsibility”, liability may well be imposed. It has been suggested that it will not be very long until

¹⁶¹*The Aliakmon* [1986] 2 All ER 145 at p. 153, per Lord Brandon.

¹⁶² The Consumer Credit Act 1979, Section 159, gives consumers the right to require rectification of incorrect entries and speedy notification (within 28 days) to be sent to future addressees of the information. A breach of this statutory duty by the credit agency may well lead to damages for any ensuing financial loss to the consumer.

¹⁶³ See Data Protection Act 1998, Sections 7-15.

¹⁶⁴ Bussani and Palmer, *ibid*, 2003, pp. 511-512.

¹⁶⁵ Bussani and Palmer, *ibid*, 2003, p. 512.

¹⁶⁶ See Section 21 of the Act.

¹⁶⁷ Bussani and Palmer, *ibid*, 2003, p. 519.

England will join Sweden and most other European countries, in imposing liability in the circumstances of the case at hand.¹⁶⁸

7.7 Auditors' liability

7.7.1 The problem

In recent years, it has become more common in both Sweden and England that creditors and shareholders direct their claims towards a company's auditors when irregularities occur. A very important English case is *Caparo Industries plc v Dickman*,¹⁶⁹ which was decided in the House of Lords in 1990. In Sweden, auditor's liability has been extended after a case decided in the Supreme Court, NJA 1996, p. 224, in which the court made an extensive interpretation of the rule in the Swedish Companies Act 1975, Chapter 15 Section 2.¹⁷⁰

In England, accountant and auditors owe the usual professional duty of reasonable care and skill to their contractual clients. As has been discussed above, there has also been a far-reaching expansion of the liability of accountants to third parties for negligence under the *Hedley Byrne* principle. The expansion of the law effected by that case and subsequent decisions is obviously of particular importance to accountants, whose work will often foreseeably be relied on by other persons as well as their clients.

In *Caparo Industries plc v Dickman*, the claimants owned shares in a public company whose accounts were audited by the defendants for the purpose of the annual statutory audit. The claimants purchased further shares and made a successful takeover bid for the company. They subsequently suffered a substantial loss and brought an action against the auditors. It was alleged that the shares had been purchased in reliance on the audit which was negligently prepared and gave a misleading impression of the company's financial position. The action failed. The House of Lords considered that to hold auditors liable to the investing public generally, notwithstanding the foreseeable possibility of their reliance on the accounts, "would be to create a liability wholly indefinite in area, duration and amount and would open up limitless vista of undesirable risk for the professional man".¹⁷¹ Their Lordships focused upon the legislative policy underlying the requirement for annual audited accounts, which was considered to be to enable shareholders to exercise their powers of control over the company and not for the purpose of individual speculation with a view to profit.¹⁷²

¹⁶⁸ See Bussani and Palmer, *ibid*, 2003, p. 520.

¹⁶⁹ [1990] 1 All ER 568.

¹⁷⁰ Lars Pehrson, "Omfattande ansvar för bolagsrevisorer", *JT* 1996/97, p. 134.

¹⁷¹ [1990] 1 All ER 568 at p. 593, per Lord Oliver.

¹⁷² See the English Companies Act 1985, Pt VII.

Caparo does, however, not mean that auditors can never incur liability in tort to those who rely on their statements. In the pre-*Hedley* decision of *Candler v Crane, Christmas & C*¹⁷³ a statement of accounts was prepared for the specific purpose of enabling an investor to decide whether or not to put money into the company. The relationship between the parties was much closer in this case, and the purpose of the advice much more specifically related to a particular transaction, than it was in *Caparo*. If similar facts would occur today, it is likely that a duty would arise. In *Morgan Crucible Co plc v Hill Samuel & Co Ltd*,¹⁷⁴ decided after *Caparo*, the Court of Appeal refused to strike out a claim brought by a take-over bidder against directors and auditors of the target company which, when he took it over, turned out to be less valuable than he had been lead to believe. Here, statements had been made with the purpose of influencing the conduct of an *identifiable* bidder: the auditors could accordingly have owed him a duty of care. At present, this appears to be as far as English law will go. If the statement is made to a large class of recipients, or for a number of purposes only one of which is related to the transaction which subsequently goes wrong, a tort claim will not be likely and the claimant will be limited to whatever contractual rights he may have.¹⁷⁵

In Sweden, the greatest risk for an auditor to be held liable in tort towards a third party is probably under the rules in the Swedish Companies Act 1975. Under Chapter 15 Section 2 of the Act, liability is imposed towards the company, shareholders and others. In relation to other subjects than the company, the auditor is only liable if he is in breach of the rules under the Companies Act or the articles of association (Sw. *bolagsordning*). Chapter 15 Section 2 must be applied together with Chapter 15 Section 1. Construed together, the sections infer liability where the auditor caused the damage intentionally or by negligence in his professional capacity as auditor.

The class of potential claimants includes the company's creditors. This liability against a company's creditors is highlighted in the case NJA 1979, p. 157. Here, a creditor who had not received payment from a limited company for a certain claim, brought an action against the company's auditor under the Companies Act 1944, Section 209, equivalent to what is now Chapter 15 Section 2 the Companies Act 1975. The claimant argued that the defendant had neglected to remark in the auditor's report, (Sw. *revisionsberättelse*) that the director of the company had approved an invoice, which did not correspond to any performance the company had received. He further submitted that both the director and the auditor had caused the claimant pure economic loss since the company subsequently went into bankruptcy. The director as well as the auditor argued that there was no causal connection between the approval of the invoice and the

¹⁷³ [1951] 1 All ER 426.

¹⁷⁴ [1991] 1 All ER 148.

¹⁷⁴ [1991] 1 All ER 148.

¹⁷⁵ See in particular the judgment of Neill LJ in *James McNaughton Paper Group Ltd v Hicks Anderson & Co* [1991] 2 QB 113, and see M. Percival, "After Caparo", (1991) 54 *MLR* 739.

claimant's loss, since the amount corresponding to the amount of the invoice, would have been used to cover preferential claims (Sw. *förmånsberättigade fordringar*) if the invoice had not been approved. The case thus became a causation case and the Supreme Court held that there was no causal connection between the report and the damage.

For the auditor to be held liable, the negligent performance would need to cause insolvency for the company or make an existing insolvency worse. The court stated that it was true that the act could cause, despite the fact that the company even after its performance was solvent, a creditor to suffer economic loss and a diminution of the company's capital. The risk of insolvency occurring at a later point was thereby increased. Such an indirect damage through a general impairment of the company's finances did not, however, give rise to allow the creditor's claim. Even after the approval of the invoice, the company could in effect pay all that its debts at their respective due dates.

The case implies an extensive restriction of an auditor's liability towards a third party. If the auditor's negligent performance do not directly cause insolvency, but just a general impairment of the financial status of the company, the loss incurred, is then regarded as non-recoverable third party damage.

In NJA 1996, p. 224, however, no prerequisite of insolvency was required. NJA 1979, p. 157 was distinguished on its facts and an auditor in a limited company was by the Supreme Court held liable against a bank for negligently value the company assets, which affected the bank's decision to grant credit. The background of the decision was the following. The defendant was an auditor in Scandinavian Clinics AB (Clinics). The company was doing badly and in an attempt to reconstruct the company, Clinics acquired a new company, Scandinavian Clinics Försäljnings AB (Försäljningsbolaget). The defendant was elected auditor in this company as well. Försäljningsbolaget acquired a considerable part of Clinic's assets. In order to pay the purchase-sum, Försäljningsbolaget received a loan in the claimant bank. Försäljningsbolaget could, however, not repay the loan and the bank consequently brought an action against the auditor. The bank argued that the accounts, which the auditor produced in connection with the transfer, showed an incorrect value of Clinic's assets and the bank had relied on the accounts when granting the credit.

The Supreme Court distinguished NJA 1979, p. 157 on its fact since, there, the amount which the auditor negligently contributed the company to lose, only indirectly damaged the company's creditors. In NJA1996, p. 224 on the other hand, the bank suffered a loss as a direct consequence of the granting of credit. Consequently, no prerequisite of insolvency was required in the latter case.¹⁷⁶

¹⁷⁶ NJA 1996, p. 224 at p. 236.

In NJA 1996, p. 224, liability was inferred under Chapter 15 Sections 1 and 2 of the Companies Act 1975. The bank had, however, in the Appellate Court also argued the case on the grounds of general principles of tort (Sw. *allmänna skadeståndsrättsliga grundsatser*). Since the case involved no criminal act, and previous case law had only extended the liability outside the exclusionary rule in the Tort Liability Act Chapter 2 Section 2 in cases concerning valuation reports and solidity information, the Court of Appeal was not prepared to extend the liability to also include auditors.¹⁷⁷ The submission was consequently dropped in the Supreme Court and the court did not have the opportunity to discuss the theory of justifiable reliance as a tool to infer liability also in auditing cases.

The outcome of NJA 1996, p. 224 has been subject to some criticism.¹⁷⁸ In order for a company auditor to be held liable under the Companies Act towards the company, shareholders, or other third parties, a prerequisite that the damaging act occurred in the course of the auditor's assignment as company auditor, must be fulfilled.¹⁷⁹ If the damaging act lies outside the scope of the auditing assignment, then the Companies Act is not applicable. In such situations, liability is inferred under general tort principles. The criticism of the case lies in the fact that the defendant auditor in NJA 1996, p. 224 did not cause the financial loss in his capacity as company auditor. If the bookkeeping at all was within the course of the defendant's assignment as the company auditor, it was in the capacity as auditor for Clinics, and not Försäljningsbolaget. The liability of the defendants must, however, be based in the defendant's capacity as Försäljningsbolaget's auditor, since it was this company which received the loan from the bank.¹⁸⁰ It has further been submitted that the drawing up of the balance sheet was not within the auditor's assignment, since an auditor is not responsible under the Companies Act Chapter 10 Section 7 to draw up financial reports for part of the year. This responsibility rests on the board of directors. The finding of the Supreme Court to infer liability on the auditor under the Companies Act Chapter 15 Section 2, results accordingly in that *all* the work the auditor does for the company will fall under the liability rule in the mentioned Section. The limitation in Chapter 15 Section 2 that liability will only be inferred on what the auditor does within the assignment as the company auditor, will consequently be disregarded.¹⁸¹

It has further been asserted that the case should have been argued on the basis of general tort principles, instead of inferring liability under the Companies Act.¹⁸² In such a case, the principle of justifiable reliance as established in the case of *Kone*, would have been argued and maybe extended to also include auditor's liability.

¹⁷⁷ NJA 1996, p. 224 at p. 233.

¹⁷⁸ See Lars Pehrson, *ibid*, *JT* 1996/1997, p. 133 ff.

¹⁷⁹ The Swedish Companies Act 1975, Chapter 15 Sections 1 and 2.

¹⁸⁰ Pehrson, *ibid*, *JT* 1996/97, p. 136.

¹⁸¹ Pehrson, *ibid*, *JT* 1996/97, p. 139.

¹⁸² Pehrson, *ibid*, *JT* 1996/97, p. 141.

From a comparative perspective, the English and Swedish legal system choose to deal with these complex issues in different ways but it is submitted that both systems have a rather restricted approach to auditor's liability. In Sweden, the liability is restricted under the rules in the Swedish Companies Act as well as case law suggesting that the negligence of the auditor must also cause insolvency (at least when the damage is an indirect result of the negligence) and in England the liability is restricted through the notion of sufficient close "proximity" between the auditor and the third party.

This restricted view is clearly in both systems due to the fact that there otherwise would be a risk of liability towards a wide class of potential claimants. In *Caparo v Dickman* itself, Lord Roskill stated that:

"The submission that there is a virtually unlimited and restricted duty of care in relation to the performance of an auditor's statutory duty to certify a company's accounts, a duty extending to anyone who may use those accounts for any purpose such as investing in the company or lending the company money, seems to me untenable."¹⁸³

If a situation similar to the facts of NJA 1996, p. 224 was to come in front of the English courts, it is submitted, that the outcome of the case would probably be the same, although argued differently. It may well be that an English court on the grounds of the *Hedley Byrne* principle, would regard the relationship between the auditor and the bank sufficiently proximate to infer liability, since the auditor knew that his statement would be communicated to the bank in connection with a particular transaction of a particular kind and that the bank would be very likely to rely on it. The auditor had not just participated in the valuation of the company's assets but also participated in the negotiations with the bank regarding the loan.

7.7.2 Case study 7 – auditor's liability

The above considerations regarding auditor's liability can be illustrated by the following fictitious case.¹⁸⁴

An auditor audits the accounts of a company inaccurately. The claimant relies on these published accounts to launch a takeover bid. This is successful, but the claimant then discovers that the accounts overestimated the value of the company and that the price the claimant paid per share was twice its actual value.

7.7.2.1 England

¹⁸³ [1990] 1 All ER 568 at p. 582.

¹⁸⁴ The facts of the fictitious case are borrowed from Bussani and Palmer, *ibid*, 2003, p. 453.

Under English law, the claimant will have no claim against the auditor. The case is very similar to the above mentioned case *Caparo Industries plc v Dickman*. In that case, the House of Lords held that an accountant auditing the accounts of a target company owes no duty of care to a takeover bidder. If a particular takeover bidder has emerged prior to the accountant's statements, the outcome may well be different, see *Morgan Crucible v Hill Samuel Bank*.

The decision in *Caparo* was based on lack of "proximity" between the auditor and the takeover bidder. The policy of the House of Lords was clearly to protect accountants, concerned at their increasing exposure to liability in negligence.¹⁸⁵

7.7.2.2 Sweden

In Sweden, on the other hand, the auditor will most probably be held liable. The auditor would be held liable under the special liability rule for auditors in the Swedish Companies Act 1975. However, while the liability of the auditor towards the company presupposes mere negligence, liability towards "shareholders and others" also presupposes a breach of a provision of the Companies Act or of the individual company's charter. Consequently, there is a slight margin of doubt of the auditor's liability, depending on the kind of inaccuracy caused by the auditor's action. Still, this should probably not present a major problem since the abovementioned Act impose, *inter alia*, the respect of "good auditing practice".¹⁸⁶

7.7.2.3 Comparative comments

In Sweden, there exist statutory rules which impose liability upon auditors. In all cases where the statute do not apply, as well as in the English legal system where no protective statute is at the claimant's disposal, the solution to the present fictitious is dependent on the opinions and decisions of scholars and judges.

The problem raised by the fact that there is no direct contact between the victim and the defendant is by English judges dealt with under the criterion of "proximity" between the claimant and the defendant. This means that it must be proved that the defendant knew that his statement would be communicated to the claimant, either as an individual or as a member of an identifiable class, and that the claimant would be very likely to rely on this statement when deciding to undertake the transaction.¹⁸⁷ In practice, this means that errors committed in an audit of business accounts will in English courts entail liability towards investors only if the audit was made with a particular view to these investors, e.g. if the company hired the accountant

¹⁸⁵ Bussani and Palmer, *ibid*, 2003, p. 461.

¹⁸⁶ Bussani and Palmer, *ibid*, 2003, pp. 470-471.

¹⁸⁷ See the ruling in *Caparo Industries plc v Dickman*, esp. p. 576 C.

in order to provide potential buyers with the relevant information and if the accountant had agreed thereto.¹⁸⁸

¹⁸⁸ Bussani and Palmer, *ibid*, 2003, pp. 471-472.

8 General conclusions of the study

In this work I have attempted to describe the various approaches of the English and Swedish legal system to the issue of pure economic loss. What is then the answer to the questions posed in the introduction chapter?

I will start with the issue regarding the significance of the fact that the legal rules on recovery for economic loss have in England developed through case law, and in Sweden by way of codification.

From an English perspective, Swedish tort liability may appear rigid since the Swedish development on pure economic loss has traditionally been dependent on legislative support. The English common law tradition of developing new categories of tort liability by analogy to decided cases appears to be more flexible. The Swedish Supreme Court has, however, at least regarding cases of misrepresentation in non-contractual relations, during the last two decades been extending the scope of liability for pure economic loss, without “real” legislative support.

The design of the English law of tort is due to its history and the nature of common law growth. The structure, very different from codified civil law systems such as the Swedish, is the work of thousands of judicial architects and no central planners. Even though England indeed has statutes imposing liability, its non-contractual liability law remains judge-made.

In Sweden, the tort façade is very different. For historical reasons, Swedish tort is built upon a narrow criminal law base that sharply restrains compensation for pure economic loss. The general principles are enacted in the Tort Liability Act 1972. Until the enactment of this statute, civil liability rested upon criminal law statutes which were applied by analogy to civil wrongs. The courts were very reluctant to find civil liability where there was no violation of criminal law and furthermore, in the absence of a crime, compensation was only allowed in cases where there was a physical damage to persons or property. The modern rule in the Tort Liability Act regulating pure economic loss reflects the rather restrictive attitude developed within the context of this historical development.

The English tort of negligence on the other hand, appears at first glance to allow for an extensive recovery of pure economic loss. The tort of negligence has its origin in Lord Atkin’s “neighbour principle” as announced in *Donoghue v Stevenson*, and the principle seems to suggest that the tort would cover all forms of negligent behaviour. This is generally true when we are concerned with the protection from physical harm, but negligence is not primarily applicable to the compensation of pure economic loss. This is also true in Swedish law, since the *culpa* rule in Chapter 2

Section 1 of Tort Liability Act restricts reparation to bodily injuries and property damage.

English law begins, as a matter of policy, with the proposition that there is, as a rule, no duty of care to avoid causing pure economic loss. The same is true for Sweden. The liability for pure economic loss under Chapter 2 Section 2 of the Tort Liability Act ends up as an exception to the general rule in Chapter 2 Section 1. The difference between the Swedish and English exceptions to the general rule of no recovery is that in Sweden, recoverability depends upon the commission of a punishable act, whereas in England exceptions are made on a case-by case basis, where the key words are the defendants “assumption of responsibility” for the claimant’s economic well-being coupled with the claimant’s reliance upon it.

Compared to English law, the Swedish statutory approach of only allowing victims of a crime to be compensated for pure economic loss, suggests a quite restrictive and narrow solution. However, there seems to be at least some flexibility left in the Swedish liability system. The legislature did not intend the exception rule in Chapter 2 Section 2 to be treated as a definitive or exhaustive rule. In effect this means that the Swedish courts may, just as the English, impose liability for pure economic loss when they find it appropriate to do so.

In England, the judges are willing to impose a “duty of care” in the particular case before them only when it is socially and economically convenient to do so. The situations where such a duty is recognized are however exceptional and should be kept so. This approach is based on a fear of wide liability, expressed by the floodgate metaphor, but more fundamentally by a cautious case-by-case approach which places special regard on the economic and social implications of each extension. The exceptional cases where a duty has been recognized cover narrow fact situations and are consequently very fact sensitive. The exceptions to the general principle of no liability for pure economic loss began with *Hedley Byrne v Heller* and then multiplied. The principle of no liability is still present today, but with a number of exceptions that may be increased in the future if the courts find it “fair, just and reasonable” to do so, in other words, on grounds of public policy.

The landmark case decided by the Swedish Supreme Court in 1987, the *Kone* case, shows that the judiciary in Sweden is moving towards the same direction as in England. Accordingly, it now seems to be the position in Sweden that compensation under the Tort Liability Act 1972 is *at the outset* available only when the economic loss is caused by a crime. The judge is however, not necessarily prevented from allowing compensation outside the Act in exceptionally important circumstances, based on a “justifiable reliance” principle such as the one in *Kone*, which also very much resembles the principles established in *Hedley Byrne*. It thus appears that auditors, valuers, lawyers and other professional providers of financial services, may have their liability towards third parties either determined by

an application of the general principle of justifiable reliance as established in *Kone* or through analogies of statutory provisions.

A difference which may be noted between the discretionary power of the English and Swedish judges to impose liability for pure economic loss in exceptional cases, is that the English judges' decisions are policy decisions which are not concealed behind causation arguments, or of *culpa*, as noticed in the Swedish system. The unlawfulness issue is isolated as a preliminary policy decision. This use of legal policy is a distinct feature of the English common law culture. The English judges seem to refuse to be limited by logical implications of the neighbourhood principle into recognition of a wide theory of fault. Besides proximity and foreseeability, something else is required in order to impose a duty of care for pure economic loss. The English judges are the architects of this common law development. The Swedish judges have not moved this far away from their traditional dogmatic and positivistic view on the law and its development yet, but beginning from a very conservative approach of liability, the Swedish system seems to be moving, albeit slowly and gradually, towards the more English pragmatic approach in the field of pure economic loss.

In my point of view, the above comparison shows that the recoverability of pure economic loss cannot be approached in simple terms of a civil law vs. common law issue. It is evident that that both systems share similar concerns about the danger of excessive liability entailed by this form of damage. The issue is the subject of debate, case law development and doctrinal writings within each system, though not necessarily to the same extent.

Another important question, which I from the starting-point of the study sought out to answer, is how to understand the various differences and similarities between the two systems on the subject of pure economic loss, and whether there is any common core of agreement on this question.

The present research does not seem to suggest that there exist any *methodical* common core in the English and Swedish legal system. England seems to decide the question whether to impose liability or not in pure economic cases by way of a preliminary judicial screening using a "duty of care" analysis and Sweden seems to recourse to a causation technique aiming to exclude "third party loss". For example, in case study 2, ("the factory shutdown"), the factory owner's "pure" loss of production due to carelessness was not recoverable in negligence because, as a matter of judicial policy, there is no duty of care to protect against such loss. This "duty of care" screening is applied on each duty scenario as it arises and reduces the pressure for judicial policy to be expressed through causal analysis. Thus the duty situation is quite fact sensitive. Even though no duty was imposed in that case, a duty of care to protect against pure economic loss may be recognised, on an exceptional basis, in other cases.

Sweden, on the other hand, does not control the compensation issue by way of a “duty of care” doctrine; the outcome is rather dependant on causation issues. No recovery was possible in the factory shutdown case because the loss of production would be classified as an unrecoverable “third party loss” because it was not suffered by the same person who suffered the property loss (i.e. the owner of the cut cable). The Swedish law is in effect resorting to a “two-party concept” of direct causation, which categorically rules out recovery of pure economic loss in these circumstances. The negative side of this approach is that it lacks flexibility, but on the positive side, it produces certainty of the outcome.

General assessments of common or non-common tendencies in the two legal systems must also take into account the factor of time. Throughout the study it has become apparent that the attitudes in both countries towards pure economic loss have not been stable. Recent developments show that the positions are still evolving and changing. In the past 40 years, England has admitted many exceptions to the rule of non-recovery and Sweden has recently abandoned a more restrictive attitude and moved towards a more liberal and flexible approach. The point is, the respective legal positions have not stood still and some have suddenly changed and may change again. Therefore, the current study of the law may be of limited use in determining the existence or non-existence of a common core.

Having concluded that there is no methodological consensus in the two systems, the question remains as to whether there exists a *substantive* common core on pure economic loss.

There seems to be consensus in the two systems on the view on consequential economic loss. As have been already highlighted, if economic loss is connected to the slightest damage to person or property of the claimant, the whole set of damages may be recovered without question. This is of course provided that all other requirements for the claim to succeed are fulfilled. This is the case in both countries. There is willingness in both Swedish and English judges to allow claims once the economic loss is causally connected to the claimant’s own physical harm. Consequential economic loss is recoverable because it requires physical harm to the victim, whereas pure economic loss strikes the victim’s wallet and nothing else.

There seems to be some consensus also where the claimant’s loss is due to negligently performed professional services. There is a certain agreement that the careless lawyer in case study 4, the negligent credit rating institute in case study 6 and the negligent auditor in case study 7 will be responsible for the economic losses of some persons beyond their clients with whom they had no contractual relations. This is also true in the survey cases as established in *Kone* and *Smith v Bush*. Although the outcomes are not without doubt in the respective countries and although England imposes specific requirements that must be met (the requirement of showing the “reliance” of the third party), it still seems fair to say that in many situations, it is likely that claimants may recover losses caused by negligent

professionals, regardless of which country's tort rules it is that will solve the issue. This seems to reflect the view that a high standard of professional services can and ought to be maintained.

Thus, English and Swedish law basically agrees to the recoverability of consequential loss and losses due to negligent professional services, and perhaps in other circumstances where the risk of indeterminate liability is under control. Even though financial interests are not as extensively protected as other interests, it is submitted that there is at least some common core frame of protection in the two systems. Pure economic loss is recoverable in both traditions whenever the loss is a direct consequence of the infringement of a right or of an interest that the legal system means to protect. To judge by the developments of the past four decades, the common frame has been increasing and is likely to continue to grow.

The final point of interest concerns the degree of legal certainty regarding the recovery of pure economic loss. For example, the Swedish system seems to produce uncertainty in the outcome of the "blackout case" (case study 1) and the "poor legal service case" (case study 4) while England seems to produce more uncertainty in the anonymous telephone case (case study 6). The question thus arises whether greater predictability and certainty about pure economic loss seems to be characteristic of one or the other of the two compared legal systems. As interesting as the question is, I do not think that the "evidence" produced in this study points to any valid generalization towards one or the other direction. If there is any tendency, I am tempted to argue that the Swedish system where the structure results from codified texts tends to yield towards more definite and predictable outcomes. However, as has been shown in the study, the principles regarding recovery for pure economic loss in non-contractual relations stem from vast exceptions from the general statutory rule, which has been developed through case law. Thus, I am hesitant to call this tendency much more than a possibility and the evidence is mixed. In some cases, the outcome may be harder to predict in England and in some, in Sweden. There can be many reasons for these patterns. They may arise from a variety of accidental factors, including the evolutionary stage of the question in the two countries. The problem of pure economic loss has been analysed and debated to a large extent in England for about four decades, while Sweden has fairly recently started to notice the problem.

It could of course be questioned whether legal certainty really is an asset, not only for loss bearers but also in relation to the constant need of any legal system to continue to develop new solutions that will satisfy the demands of society. The general arguments in support of codified systems are that statutory rules allow little room for interpretation and increase the legal certainty and transparency, and consequently empower the debate about the content of the law. On the other hand, arguments in support of judge-made law suggest that more power to the courts than the legislator prevents misuse of power of accidental political majorities and increases the fact sensitivity of cases, and with that, the justice. These questions involve,

however, the everlasting debate about the proper balance between flexibility and predictability in the law and concerns issues far beyond the boundaries of the present study.

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