

# Pure Economic Loss in Indonesia: Shall It Be Abandoned or Adopted?

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## ABSTRACT

For almost 25 years, pure economic loss has become the biggest controversy in tort law, as there has not been unified views whether the court shall granted or rejected pure economic loss claim. Pure economic loss occurred when negligence causes third party merely financial or economic loss. This journal will provide interesting cases in Indonesia that can be categorized as pure economic loss. Furthermore, this journal will further explain some views against the conceptual and applicability of pure economic loss, generally such rejection is based on: foreseeability principle, absolute versus relative rights, the floodgates, the floodgates in conjecture and geography. On the contrary, those who agree to pure economic loss claim that pure economic loss shall be limited by law or compensate within contract law regime. Subsequently, this journal will provide law and economics approach and some legal scholar's opinion over pure economic loss. In conclusion, Indonesia law practitioners, especially legislatures and judges shall recognize the danger of pure economic loss and determine at what extend pure economic loss is allowed under Indonesian law.

**Keywords:** *pure economic loss, negligence, compensation, perbuatan melawan hukum*

## 1. INTRODUCTION

Compensation for economic losses following intentional tort present no special difficulty, as recovery is undisputable. However, when the tortfeasor is merely negligent and economic loss characterized by court as the only perceived damage for the victim,[1] innumerable country has debate whether the victim shall be justified to be compensated, if such case happened. In many country, such case referred to as pure economic loss, which over the last decades, legal scholars, practitioners, courts and legislatures have faced as probably one of the main problems in expanding tort law.[2] The question that shall be address is how should tort law of the twenty-first century approach this pure economic loss issue? As a matter of policy, should the compensation for pure economic loss be the domain of the law contract?[3]

This journal will be divided into 5 sections, namely: introduction, literature review, cases study, analysis, and conclusion. Second section will provide theories about pure economic loss under Indonesian law. Third section will explain some Indonesia cases that can be categorized as pure economic loss and how Indonesia Panel of Judges adjudicate the case. Fourth section will provide some pros and cons over pure economic loss, law and economic approach over pure economic loss, and legal scholar's view on pure economic loss. Last section of this journal will summarize this journal.

## 2. LITERATURE REVIEW

### 2.1. *Pure economic loss*

Generally, there are three (3) interests being protected by negligence, which includes: (a) protection against personal injury, (b) damage to property, and (c) economic interest.[4] When the victim suffers economic loss and damage to property and personal, such case referred as consequential loss[5], which is universally viewed as recoverable. However pure economic loss, as abovementioned, the victim only suffers economic or financial loss.

John Cooke conveys example to dissecting consequential loss and pure economic loss, whereas A drives his car negligently and collides with B's car. This cause personal injuries to B and damage B's car. B in this case, may recover damage from A for both these losses as B suffers consequential loss.

On different case, C asks his solicitor, D, to draw up a will leaving C's property to E. D negligently drafts the will with the result that E is unable to take his bequest under the will. E may sue D in negligence, for the value of his lost bequest. The interest protected here is E's economic interest, such cases known as pure economic loss.[6]

### 2.2. *Negligence in Indonesian Law*

Cantu divide civil law liability into 2 group such as: fault-based liability and liability without fault. Fault-based

liability consist of intentional tort and negligence. Within intentional tort regime, 'fault' refers to intention from Defendant caused damage to Plaintiff. Whilst in negligence regime, 'fault' refers to the violation of reasonable care in society. Whereas liability without fault is civil liability which is not based on fault as stated above.[7]

Tunc declares that the basis of civil law liabilities, under civil or common law, is based on liability-based rule. In civil law system, the liability is based upon 'every act whatever of man that cause damage to another, obliges him by whose fault it happened to repair it'.[8] Under Indonesian law, this act refers to provisions for perbuatan melawan hukum (hereinafter called PMH).

According to Galligan there are 4 requirements to execute negligence, which consist of: (a). duty, (b). breach duty of care, (c). damage to the plaintiff, and (d). causation. As we can see above, there is no requirement to assess whether the Defendant has 'fault' upon the action. This has similarity to PMH in Indonesia, particularly that PMH required the Plaintiff to prove (a). illegal action (infringement of rights, infringement of obligation, or breach of propriety/ breach of equity), damage, and causation. At glance, we can conclude that the differences between PMH and negligence is PMH has 'fault' element to prove.[9]

Nevertheless, there are some views related to 'fault' element in PMH Indonesia, which stated by Djojodirjo who claim that lawmakers open the possibility for defining 'fault' as 'illegal action'. Fault according to Djojodirjo defined as the mistake of predict the wrong action. Agustina has same view related to 'fault' element in PMH, when she had discussion with Vollmar related subjective fault and objective fault. Finally, Agustina declare that when we perceived 'fault' element as objective fault, the tortfeasor shall fulfill the 'fault' element when the tortfeasor doesn't do what he/she should have done. Therefore, 'fault' and 'illegal action' element has combined into 1.

Furthermore, van Schilfgaarde declare that objective fault is standard of optimal level of care which exist in common law. Therefore, according to van Schilfgaarde, when examining the existence of 'fault' in the defendant, usually the judge would decide whether defendant has the common knowledge about the possibility of danger and effort taken to prevent danger arises using prudent man standard.[10] According to explanation above, we can conclude that if we view 'fault' element in PMH with objective fault, there is no differences exist between PMH and negligence, in civil and common law.

### **2.3. Types of Pure Economic Loss**

Mauro Bussani and Vernon Valentine Palmer further divide pure economic loss into 4 types, as follows:[11]

#### *2.3.1. Ricochet Loss*

Ricochet Loss arises when physical damage is done to property or person on a party, which in turn cause Plaintiff economic loss. The direct victim suffers physical damage, while secondary victim suffers economic loss. As an illustration, A is key employee at B's company, one day C negligently drive and hit A which leads to A incapacity, causing B losing revenue as A is their key employee. In this case, A suffers physical damage toward body, while B suffers pure economic loss (losing revenue in case A able to work for B).

#### *2.3.2. Transferred loss*

Transfer loss occurred when a party has agreement to transfer loss the suffered to other party. Conceptually, A cause physical damage to B's property or person, but B has contract C, in which agreed that loss B suffered transfer to C. Such transfer frequently results from leases, sales, insurances agreements and other contracts, separating property rights from right of use or risk bearing. To illustrate, A charters a ship owned by B. During dry dock repairs, C negligently damages the ship, necessitating further repairs and a two weeks delay, during which A losses all use of the ship, while B suffers property damage. A in this case, suffers pure economic loss, while B suffers physical damage to property.

#### *2.3.3. Closure of public service and infrastructure*

Closure of public service and infrastructure occurred without a previous injury to anyone's property or person. There may be physical damage, yet it is to unowned source which lie in the public domain.

#### *2.3.4. Reliance upon flawed information or professional services*

Reliance upon flawed information or professional services arises when expert make service concerning their expertise and give their work to client. If the information provided by the service has defect substantially, and used by other party (not named the client) who will suffers economic loss. Other party here suffers pure economic loss, as they relied on the service provided by the expert. To illustrate, A, an accountant, carelessly conduct an audit to B, a publicly traded company, and negligently states the company's net financial worth. C relied to A service and buy B with the hope of getting profit in accordance to the service. Suddenly, C suffers economic loss as B apparently bankrupt.

### 3. CASE STUDY

Indonesia law is silent on pure economic loss, however various cases in Indonesia has the characteristic of pure economic loss. The following are some sample of cases in Indonesia which has characteristic of pure economic loss:

#### 3.1. 36/Pdt.G//2017/PN.Bla

This case happened at village Tempuran, whereas Defendant closes road, which has been for a long time, at village Tempuran. Plaintiff, as the consequences, can't access the road to their home and their business is bothered as the Plaintiff operate their business at their home. In the Plaintiff prayer for relief, the Plaintiff requests:

- a) 50 % Loss of revenue compared to before the road closed
- b) Loss of 40 human resource as the consequences of hard access to the home
- c) Some vehicle can't be moved as the road is closed
- d) Inconvenience of the customer, as they have to access to the home using small boat which utterly dangerous for the customer;

This case reminds us the type of closure of public service and infrastructure as the plaintiff don't owned the road. Moreover, in the Plaintiff's prayer for relief they just suffers economic loss, therefore this is pure economic loss case. In the consideration for decision, the judge based their argument on article 6 of Indonesia Law number 5 year 1960 concerning Agrarian Law (Agrarian Law).[12] Based on article 6 of Agrarian Law, the function of land in Indonesia must be in line with social functions, therefore the defendant's action clearly harmed the plaintiff.

However, Panel of judges further explain that the plaintiff can't prove causation element on Plaintiff loss and Defendant's action. In this case, judge granted plaintiff's claim partially, as the defendant has to pay court fee, but judge didn't granted plaintiff's damage.

#### 3.2. 2066 K/Pdt/2006

Syahril, the employee working at Defendant since 1984, has died carrying out duty from defendant in the middle of the ocean. The Plaintiff, Syahril's wife, file a claim against the defendant to remedy some losses that she suffers. According to article 1370 Indonesian Civil Code, when husband or wife died, their heir may ask for damage to the responsible party. The plaintiff argue that she suffers losses, as following:

- a) Expected loss rated from wages and income for 10 years, in accordance to the remaining time period of contract, in sum Rp.84.000.000
- b) Money from left right for vacation to Syahril, in sum Rp.7.000.000
- c) Allowances for home and medicine for 10 years, in sum Rp.18.000.000

- d) Allowances for wife and children for 10 years, in sum Rp.30.000.000

The Panel of Judges argue that Syahril died as the consequences of the defendant's negligence, therefore defendant deemed as guilty of the death of Syahril. Furthermore, defendant shall compensate loss suffered by plaintiff. This case has the characteristic of pure economic loss as proven by all plaintiff's loss are economic loss.

#### 3.3. 419/Pdt.G/2014/PN.Sby

Plaintiff is the heir of Mr. Noto Buang, who owned a home placed at Tembok Gede Gang III/No. 48 B Surabaya. In the Statement of Claim, the Plaintiff postulates that the only road for access to their home is narrowed by Defendant's action. Plaintiff argues that they only have access as big as 1,5 m. Plaintiff feel the inconvenience as consequences for defendant's action and the Defendant indirectly pushing plaintiff to rent another home. Plaintiff just suffers economic losses, therefore this case can be called as pure economic loss. Interestingly, judge did not grant plaintiff claim, as plaintiff still has 1,5 m to access to their former home, the Judge argued in the consideration of decision.

## 4. ANALYSIS

### 4.1. Rejection over pure economic loss

We set out below some rejection related to the application of pure economic loss:

#### 4.1.1. Foreseeability principle

Mostly the rejection to pure economic loss due to the fact that the Defendant may not foresee his action may damage Plaintiff. The concern if court grant pure economic loss holistically is that the civil liability shall grow abroad extremely.[13] According to Fransesco Parisi, from the efficiency standpoint, if the Defendant not foresee the Plaintiff damage, the norm will not create incentive for tortfeasor to damage defendant.[13]

#### 4.1.2. Absolute versus relative rights

Pure economic loss deemed to infringe Plaintiff's relative rights, but are all relative right can't be granted by the Panel of Judges? In fact, consequential loss is a loss which infringes absolute and relative rights, furthermore considering the fact that there is no argument which stipulates that the court shall not grant consequential loss. Therefore, refusal towards granting pure economic loss is

purely legal policy that adopted by the country, in wake of concern to utterly broad civil liability.[14]

#### *4.1.3. The floodgates*

Floodgates argument has been accepted by almost every country that pure economic loss might bring excessive liability to Defendant, which can create unjust situation for the Defendant. Moreover, the concern of excessive application of lawsuit if country suddenly allowed pure economic loss, which in turn can create administrative chaos. Then the concern that the court doesn't have enough human resource that can handle the lawsuits.[15]

#### *4.1.4. The floodgates in conjecture and geography*

Allowing pure economic loss will have a bad influence because of the many lawsuit different country.[16]

### **4.2. Support Over Pure Economic Loss**

Following are argument which support pure economic loss:

1. Pure economic loss shall be allowed, only if it is allowed by the law.  
This argument shall deny the concern of excessive of liability, as the law is made by process and rationalization by legislature. Therefore, there shall be no existence of excessive liability, as it has considered by the legislature.
2. Compensating pure economic loss by contract law.  
Portugal and Germany has adopted this method, whereas pure economic loss concern shall be compensated by contract law. By using contract, definitely there is some foreseeable legal relation between plaintiff and defendant. Moreover, contract will deny the floodgates argument as the nature of contract is limited.[17]

### **4.3. Law and Economic Approach**

From law and economic perspective, civil liability, especially tort is to provide compensation such as the situation the same as before the occurrence of tort.[18] Law and economics provided some view on how to make the law efficient.[20] According to such perspective, law might give incentives to everyone who subject to it, whereas if law prohibited some action, then everyone would get incentive not do the action prohibited.

In pure economic loss cases, in order to provide actors with the correct incentives to prevent losses, damages should be based on the social losses caused by the actors. In cases of pure economic loss, the private losses of the victim often

exceed the social losses. The private losses of the victim might be (partially) offset by private gains elsewhere, so that there is no loss of wealth, but rather a redistribution. To illustrate, firm A cannot produce because a power cable was negligently damaged, firm B might be able to produce and sell more products which are substitutes for the products of firm A. In the law and economics literature, this is regarded as an important reason not to compensate pure economic loss.[21]

Nevertheless, Shafer and Ott further explained, it cannot always be argued that in cases of pure economic loss, no social losses occur. First, the products of firm B might not be perfect substitutes, so that consumers suffer a loss of consumer surplus. This problem occurs even more in cases of services rather than products.[22] Rizzo argues that compensating pure economic loss through tort law causes high tertiary costs, so that the claims should be channeled through contract law.[23]

Finally, Dari-Mattiacci argues that the true problem of pure economic loss is caused by the fact that the activity of the injurer causes both negative and positive externalities. Simply adding those does not provide actors with the correct incentives. Dari-Mattiacci does not view overcapacity as inefficient, but as a care measure that parties can take to avoid or lower the pure economic loss. Injurers should receive correct care and activity incentives, while victims and third parties should get an incentive to maintain optimal overcapacity. In order to achieve this, liability has to be decoupled: the injurer is liable for the pure economic loss but is compensated for the benefits of third parties, the victim is not compensated for pure economic loss but is compensated for benefits of third parties, and the third parties are allowed to keep their benefits. No traditional tort rule can achieve this result.[24]

### **4.4. Vernon Palmer and Mario Bussani**

Vernon Palmer and Mauro Bussani had committed empirical study related to pure economic loss, accordingly whether pure economic loss accepted or rejected depend on what regime the country adopted. There are 3 regime namely: liberal, pragmatic, and conservative.

Liberal regime has some characteristics such as: have no in-principle objection to allowing compensation for stand-alone economic loss. As compared to other regimes, this regime appeared to yield the greatest number of successful pure economic loss cases. While pragmatic regime is characterized by a cautious case-by-case approach which carefully studies the concrete socio-economic implications of granting recovery for pure economic loss. Conservative regime on the other hand, unlike liberal and pragmatic regime, overtly set forth by the legislator or not adopted by legal actors, enabling judges to screen out the only financial losses from the recoverable ones.[25]

Vernon Palmer and Mauro Bussani further explain that there are some type of pure economic loss which shall be allowed by the court, such as:[26]

#### 4.4.1. *Consequential loss*

as we have discussed above, there are no argument whether consequential loss shall be granted.

#### 4.4.2. *Intentional harm*

all legal systems agreed that intentionally inflicted pure economic loss shall be granted by court

#### 4.4.3. *Key areas of selective protection*

pure economic loss could also be seen as selectively granted in accordance to the law by every country.

### **4.5. *Indonesia Law Position Regarding Pure Economic Loss Issue and Anticipated Next Step***

In spite all the rejection towards pure economic loss, pure economic loss shall be granted if the liability is not overly extend, as we can see from the abovementioned rejection, all the rejection toward pure economic loss is based on the concerned of overly extend liability. From case under number 2066 K/Pdt/2006, Indonesia court has granted pure economic loss, although the concept of pure economic loss has not recognized pure economic loss explicitly. Since Indonesia adopted civil law, therefore the primary source of law in Indonesia is law itself. However, as stated above, Indonesian law is silent upon pure economic loss. Therefore, it is appropriate and suitable to civil law system, if Indonesia set more relevant law and regulations that regulates which pure economic loss is allowed, as not every pure economic loss case create overextended liability. Furthermore, law and economics perspective is not applicable in Indonesia, as for the law and economics the approach shall be case by cases basis, and it is contrary to the Indonesia civil law system. To solve this issue, every legislature in Indonesia shall recognize the danger of pure economic loss, and consider this issue when they enacted new law. Therefore, there is no provisions under Indonesia law that put Defendant in overextended liabilities. From Judge perspective, it is advisable if Indonesia Supreme Court enacted Indonesia Supreme Court Circular Letter or Supreme Court Regulation to regulates how far should civil liability extend under Indonesian law. Therefore such regulations or Circular letter can be reference for the Panel of Judges to adjudicate any pure economic loss cases.

## **5. CONCLUSION**

Pure economic loss has become controversial debate on tort law, Indonesia although silent on the existence of pure economic loss, Indonesia's court has granted pure economic loss case. Law and economic might give interesting perspective to solve pure economic loss issue,

however, such approach may not able to be applied in Indonesia, as the approach of law and economics is pragmatism regime and therefore not appropriate to Indonesia's civil law system. Therefore, legislatures, practitioners, and Judges need to recognize the danger of pure economic loss. legislature shall thoroughly discussed the danger of pure economic loss in determining next law in Indonesia and shall not make provisions from which allowed overextended liability for defendant. Furthermore, Supreme Court shall set new Supreme Court Circular Letter and/or Supreme Court Regulation to regulates the extend of liability under Indonesian law, as the Panel of Judges hold the discretion to adjudicate any pure economic loss cases.

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[11] Mauro Bussani dan Vernon Valentine Palmer, "Liability for Pure Economic Loss in Europe: An Economic Restatement," *The American Journal of Comparative Law Vol 51 No 1* (2003), pg. 118-120.

[12] Every right over land shall has social function.

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[15] *Ibid.* pg. 24.

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[19] Richard Posner, *Economic analysis of Law*, Ed.3., (England: Wolters Kluwer Law & Business, 2014), pg. 48.

[20] Posner defines efficiency as exploiting economic resources in such a way that human satisfaction as measured by consumers' willingness to pay for goods and services is maximized.

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