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Tort Liability for Services
Where Did We Come from, Where Are We Going to?

I. The Past: The Traditional Doctrine
   A. Tort Liability Concept in General

In the past, torts primarily had the task to solve questions of liability in case of personal injury or damages to property (so-called absolute rights). In Switzerland, these issues were handled by and large in a satisfactory way by tort theory and practice. However, in the last decades torts increasingly had to cope with the question of economic loss. Legal doctrine and courts came to realize that tort law was less prepared to adequately solve these problems. In order to understand the difficulties of tort liability with regard to economic loss, it is necessary to give a brief overview of the elements of liability according to the traditional torts concept; this is the task of the first section. The second section describes recent developments concerning tort liability for negligent performance of services. The third and last section describes our proposal how liability for services should be approached; the proposal relates not only to compensation for economic loss but also to the preferable structure of tort analysis in general.

According to the prevailing doctrine, tort liability for fault requires four elements: damages, unlawfulness, adequate causality, and fault.¹ In a comparative view, it is important to explain the meaning of such terms in order to avoid misunderstandings by scholars of other jurisdictions. The term fault in German or Swiss law is, for example, not identical to the French term faute. The concept of faute contains the element of fault as well as of unlawfulness² and finds its counterpart in the Anglo-American duty of care-concept. On the other hand, the breach of a duty of care refers to acts or omissions whereas the concept of unlawfulness according to

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Swiss or German law is primarily based on an infringement of absolute rights and only partly relates to acts or omissions (see infra III.A/B).

When analyzing a tort liability case, Swiss doctrine usually starts with the requirement of damages. This is questionable for two reasons: First, not the question of damages should be the starting point of a liability analysis but the wrong committed, the unlawfulness. Second, this approach does not properly differentiate between the reasons for liability (torts) and the consequences of liability (remedies). Damages as a type of remedies (and the most important one) cannot be a requirement of liability but constitutes one of the consequences of liability. This distinction is observed in most legal systems and helps to analyze in a more sophisticated manner the issues and problems of liability.

Unlawfulness is not statutorily defined. The courts understood this term originally as a breach of statute. In the second half of the last century the courts started to define unlawfulness in accordance with the German provision in § 823 BGB. Accordingly, there is a twofold definition of unlawfulness: infringement of an absolute right (§ 823 I BGB) and violation of a protective statute (§ 823 II BGB); economic damages are consequently only recoverable if the law contains a provision which protects the infringed interest.

The third requirement is causality between the act and the result. These three elements are necessary for all types of liability, that is for strict liability as well as for fault-based liability.

In fault-based liabilities the fourth element of liability is fault. Fault is defined as an intentional or negligent act or omission. Whether someone has acted negligently has to be assessed objectively, i.e., without regard to the knowledge and capabilities of the liable person. Due to the definition of unlawfulness as infringement of an absolute right, the element of "fault" also covers the question of careless behavior, i.e., the breach of a duty of care. The concept gets into trouble when the unlawfulness is based on a violation of a protective statute; the element of "fault" is then reduced to the actor's mental capacity.

B. Liability for Pure Economic Loss

The description of the elements of liability makes evident why tort liability for services encounters difficulties. The problem lies in the definition of unlawfulness. A service usually leads not to personal injuries or damage to property but "only" to pure economic loss. Such losses are unlawful if a statutory provision can be found which protects the concerned economic interest. In the absence of such a provision a loss cannot be recovered.

The problem of pure economic loss is disputed not only in Switzerland, it is one of the main problems of tort law in all jurisdictions. Various of the most cited torts cases in the last decade relate to negligent infliction of economic loss. Scholars and courts alike are still seeking the most convenient approach to this issue. The difficulties of the courts to cope with economic losses can be illustrated by some recent cases decided by the Swiss Supreme Court.

The typical examples of pure economic loss are the so-called "cabell cases". Angloamerican authors label these examples "relational economic loss". Swiss case law has two leading cases in this field: In the first case a construction company damaged an electricity pole causing a power outage for several hours. Two firms sued to recover their financial losses. The Supreme Court upheld the claims and awarded damages based on Art. 239 Penal Code; according to this provision, an infringement of a plant supplying water or energy constitutes a criminal offense.


11 Cf. also the illustrative account by Widmer, P., "Report on Swiss Toris", in: Spier, J. (supra fn. 9), 197 et seq.

12 Cf. FELDTHEUSER, B. (supra fn. 9), 2.

13 BGE 102 II 85; see also the similar case in BGE 101 II 252.
later the Supreme Court had to decide a similar case: Again an electricity pole had been damaged leading to a power outage which affected an entire industrial park. The damage was caused by a farmer’s tractor. The Supreme Court denied this time the claims of the suing firms. The court held that liability was based on strict liability according to Art. 58 Traffic Code which protects only against personal injury and damages to property.  

Another category of pure economic loss are the negligent misrepresentation cases. The leading case in this field concerns information given by a bank to a business partner (“third party”) of one of its clients. The bank informed the third party that from a financial point of view it could recommend entering into business relations with its client. Based on this information the third party supplied products to the bank’s client which shortly thereafter went bankrupt. The third party sued the bank and the Supreme Court awarded damages. The court rightly stated that the information was not given in fulfillment of a contractual duty and that the case had to be analyzed in a torts perspective. It then went on to explain that an information can lead to liability in tort if (i) the provider of the information has been asked because of her special knowledge, (ii) she carelessly provides wrong statements, respectively does not disclose important facts, and (iii) she can reasonably forsee that the third party will rely on the accuracy of the information provided. The case is almost identical to the leading English case *Hodley Byrne & Co. Ltd. v. Heller & Partners Ltd.* rendered by the House of Lords. In addition, in both cases the banks provided the information "without responsibility". Unlike the Swiss Supreme Court, the dislaimer of responsibility led the English House of Lords to deny liability. A few years later the Swiss Supreme Court had again to decide a negligent misrepresentation case. The owners of an Emile Gallé lamp asked an art auction company to assess the value of the lamp. Due to an internal communication mistake an expert assumed that the object was a serial lamp and assessed a low value. The owner sold the lamp thereafter at a low price to a third person. As it turned out the lamp was actually a unique object of considerable value. The owner sued the art auction firm and the Supreme Court upheld the claim. Despite the fact that the firm had intended to render the information as a favor, the court assumed that the parties had entered into a binding contract; the case could therefore be decided on

the ground of breach of contract. The approach of assuming a contract where neither party had in fact intended to enter into an agreement was also used in another case: creditors who had relied on a firm valuation negligently prepared by an audit company incurred losses and sued the audit company.  

Two other interesting cases concerned information provided by public authorities. In the so-called *Tschermonobyl* case the authorities, in the aftermath of the nuclear incident, gave recommendations regarding the consumption of vegetables. These recommendations caused a considerable reduction of business. A farmer sued the state for compensation for his loss. The Supreme Court awarded damages based on the strict liability in Art. 21 Nuclear Liability Statute. The court had therefore not to decide whether the information given was inaccurate or inadequate. Shortly thereafter the Supreme Court was confronted with a similar case concerning alleged health-problems caused by certain types of cheese. The authorities again issued recommendations, this time concerning the consumption of cheese. The Supreme Court denied the claim of producers of "Vacherin Mont d’Or" for damages with the argument that the provided information was accurate and could therefore not be qualified as an unlawful act.  

C. Conclusion: Eclectic Approach to Solving Economic Liability Cases

Overall, it seems fair to conclude that the Supreme Court succeeded in finding a ground for liability in cases where it considered compensation to be justified: The court relied either on a provision in the Penal Code, on fictitious contracts, or on "unwritten" statutory provisions. The varying approaches to the cases of pure economic loss show that the traditional torts system is not well fitted to solve the problems of this field. In Switzerland as well as in other countries, tort scholars have attempted to develop a general theory in order to solve the problem of tort law and economic loss. Increasingly, scholars agree that the types of cases are different and any single general theory must remain incomplete or inaccurate. The economic loss problem is, as SCHWARTZ rightly states,

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13 BGE 106 II 75.
14 BGE 111 II 471; confirmed in BGE 116 II 695, 699; cf. the references to other cases in SCHOELER, H., "La responsabilité des banques pour renseignements financiers inexact", Festschrift Deschenaux, Freiburg 1977, 387, n. 3. Cases where the negligent misrepresentations are contained in a document include BGE 101 II 69, BGE 93 II 329, 339 et seq., and BGE 124 III 363, 368.
15 Appeal Cases 1964, 465.
16 BGE 112 II 347, 350 et seq.
17 BGE 112 II 258, 260; such fictitious agreements are frequently used by German courts, cf. MünchnerKomm/SIEB,R, § 676 BGB n. 12 et seq.; STAUBLING/WEITZMANN, § 676 BGB n. 7 et seq.
18 BGE 116 II 440, 479.
19 BGE 118 I 473, 477.
"multiform rather than unitary in character." Contrary to this view, the Swiss Supreme Court still attempts to base liability for pure economic loss on a general theory; the most recent approach is the so-called liability for breach of confidence (Vertrauenshaftung).

II. The Present: Liability for Breach of Confidence

A. The New Concept

Despite increasing criticism by legal scholars,21 the Swiss Supreme Court has hitherto been unwilling to develop an alternative concept of unlawfulness. It clearly found itself in a dilemma: On the one hand, it felt itself to be bound by historical tradition dictating the much lamented discrimination of pure economic loss. On the other hand, it recognized the arbitrariness of the distinction between losses resulting from the infringement of absolute rights and those of a "merely" economic nature. It would seem that the obvious thing to do would have been to depart from the traditional view. However, the Supreme Court decided on a perhaps more interesting but methodically questionable course by adopting a new concept of liability, namely for breach of confidence.22

The concept of liability for breach of confidence was developed by the German scholar Canaris.23 German doctrine and case law, however, did not embrace this new notion of liability.24 This did not deter the Swiss Supreme Court from adopting Canaris' theory and introducing liability for breach of confidence as a third cause of action, situated somewhere between contractual and tort liability.25 It differs from contractual liability insofar as the involved parties are not bound by a contractual consensus, yet contrary to the typical torts situation the parties are said to find themselves in a special relationship characterized by mutual confidence and duties of loyalty.26

This new line of case law commenced in 1994 with the Swissair decision.27 In this case, Swissair was held liable to customers of an independent subsidiary (IGR) which had filed for bankruptcy. Swissair was found to have induced confidence in its subsidiary's economic soundness by letting the subsidiary use the Swissair logo and emphasize its affiliation to the Swissair group in its letter footer and publicity campaign. In the latter, the subsidiary had declared that "wherever you find IGR, you'll find Swissair, too; for although IGR is an independent subsidiary of the Swissair group, it embraces the same corporate maxims. This naturally benefits the... reliability of IGR."28

The Swissair finding was confirmed in the Wrestler decision of 1995,29 in which the Swiss Amateur Wrestling Association (SAWA) was held liable in damages toward a potential candidate for the world wrestling championship title. Despite having fulfilled the association's selection criteria, the wrestler was subsequently prevented from competing due to a sudden change of rules by the association. Absent a contract, the Supreme Court was able to circumvent the restrictions of the traditional concept of unlawfulness and to establish liability by classifying the association's actions as a breach of confidence.

These two leading cases have since been confirmed and discussed in a string of decisions dealing with diverse factual situations.30 One line of cases deals with the Swissair-notion of "liability for breach of corporate

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21 See infra III.
22 Excellent articles on the various aspects and implications of this new form of liability can be found in Chappuis, Ch./Winiger, B. (eds.), La responsabilité fondée sur la confiance – Vertrauenshaftung, Journales de la Responsabilité Civile 2000, Zürich 2001. For further references to literature on the subject see SCHWENZER, I., Schweizerisches Obligationenrecht Allgemeiner Teil, 2nd ed., Bern 2000, § 52.
26 Cf. BGE 121 III 350, 356: "[Die] vertrauenshaftung ... suprapo, entre le léa et le responsable, una relación particolare (Sondervorbindung), soit un rapport spécial de confiance et de fidélité.
28 "Oberall wo IGR steht, steht Swissair darunter. Und selbstverständlich auch dahinter. Denn die IGR ist zwar ein selbständiges Unternehmen der Swissair Beteiligungen AG, arbeitet aber nach den gleichen unternehmerischen Maximen wie ihre Mutter. Dass sich das von Anfang an auf... die Zuverlässigkeit von IGR ausübte, liegt auf der Hand": BGE 120 II 331, 314 et seq.
30 For an overview of Swiss case law see WALTER, H.P., "La responsabilité fondée sur la confiance dans la juridiction du Tribunal Fédéral", in: Chappuis, Ch./Winiger, B. (supra fn. 22), 147, 151 et seq.; For a summary in French of case law on liability for breach of confidence see Annex 1 in: Chappuis, Ch./Winiger, B. (supra fn. 22), 203 et seq.; the unpublished decisions on liability for breach of confidence can be found in Annex 2, loc.cit., 213 et seq.
B. Shortcomings of Tort Liability?

Defenders of the breach of confidence-concept readily admit that the general clause of Art. 41 I CO would indeed allow for compensation for pure economic loss. However, they argue that the circumvention of tort law via the introduction of a new form of liability is justified because of alleged shortcomings of Swiss tort law. In particular, reference is made to the tort rules on liability for servants, the tort statute of limitations, and the allocation of the burden of proof with regard to the fault-requirement.

Unlike other legal systems based on the rule of *respondeat superior*, masters are not strictly liable for servants in Swiss law. A master is only liable for his servant if he himself was at fault (Art. 55 CO). Contrary to the general tort rule in Art. 41 I CO, however, the master’s fault is presumed; in order to rebut this presumption, he must show that he took all necessary precautions in selecting, instructing, and supervising the servant. This is also the solution of § 831 BGB. In contract law, on the other hand, the master cannot exculpate himself by showing that he took these same precautions (Art. 101 CO, § 278 BGB). In practice, however, there is very little difference between the two provisions. Both Swiss and German Courts have imposed strict requirements on the master. In Swiss law, the possibility of exculpatory proof under Art. 55 CO has indeed lost all practical relevance; there has not been a single case dealing with this question since the famous *Schachtfräher* decision in 1984. The statutory possibility of exculpation has thus been practically replaced by the master’s strict liability. Accordingly, the provision of Art. 55 CO cannot be called upon as justification for the “flight from tort law.”

With regard to the statute of limitations, it is true that a party claiming damages in tort is disadvantaged vis-à-vis a party claiming damages in contract. Whereas claims for contractual damages are generally subject to a ten year limitation period (Art. 127 CO), tort claims are subject to a limitation period of one year beginning on the day the damaged party has knowledge of the damages actually suffered and the identity of the tort-feasor (Art. 60 I CO; so-called “relative limitation period”); in any case, tort claims are barred by the statute of limitations after a ten year period.

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33 Obiter diccatum BGE 120 III 331, 337; BGE 124 III 363, 369.

34 See supra I.B.

35 See supra BGE 120 III 331, 337, which boldlystates in an obiter diccatum that majority opinion considers liability for incorrect information to be based on the breach of confidence-concept. See also WALTER, H.P., ZSR 2001 I, 79, 88.

36 Doubts with regard to the Supreme Court’s methodological approach are also voiced by CHAPPUIS, Ch., Sempach, 1997, 165, 169 et seq.


41 It is disputed whether liability under Art. 55 CO is a strict or a fault-based liability: see SCHWENZER, L. (supra fn. 22), N 23.12 et seq. with further references.

42 SCHWENZER, L. (supra fn. 22), N 23.23; ZWEIGERT, K./KÖTZ, H. (supra fn. 9), 673.

43 On § 831 BGB see von BAR, Ch. (supra fn. 22), n. 185 et seq.

44 Cf. ZWEIGERT, K./KÖTZ, H. (supra fn. 9), 674; SCHWENZER, L. (supra fn. 22), N 23.12.

45 SCHWENZER, L. (supra fn. 22), N 23.22; ZWEIGERT, K./KÖTZ, H. (supra fn. 9), 672, 674.

46 BGE 110 I 456.

beginning on the day of the harmful act (Art. 60 I CO, so-called "absolute limitation period"). Because of the brevity of the relative limitation period, claiming in tort is less attractive than claiming in contract. While from a comparative view one might indeed consider a period of one year too short, this issue should be dealt with uniformly for all tort claims. Introducing a third track of liability which by its nature is a liability for tort and subjecting this liability to a different limitation period leads to an unequal treatment of delictual claims. This is hardly a satisfying solution.  

Another "deficiency" which is called upon as justification for the breach of confidence-concept concerns the distribution of the burden of proof. Under the general tort provision of Art. 41 I CO, it is the party claiming damages who must prove the tort-feaso's fault. In contract law, the burden of proof is distributed differently. According to Art. 97 CO, the fault of the party causing damage is presumed; in order to escape liability, he must rebut this presumption. This different distribution of the burden of proof does not, however, have any practical consequences if one subscribes to the modern doctrine of unlawfulness which, unlike traditional doctrine, focuses on conduct. Under this theory, the damaged party must prove the unlawfulness of an act or omission (Verhaltensunrecht) rather than the unlawfulness of a certain result (Erfolgsunrecht). The unlawfulness of a party's conduct is, however, also an indication of that party's fault, as the test for fault under Swiss law is an objective one. Thus, the fault-requirement to a great extent loses any independent meaning.  

At second glance, the alleged deficiencies of Swiss tort law thus have little practical impact, if any. The discussed tort provisions and the differences to the corresponding contractual provisions cannot provide the justification necessary for the introduction of a new form of liability.

C. The Required "Special Relationship"
According to the Supreme Court, liability for breach of confidence is established when three distinct criteria are met in an instant case: First, the parties in question must find themselves in a "special relationship of confidence" (rapport particulier de confiance, Sonderverbindung) as opposed to the coincidental encounter typical of tort liability. Second, the party whose liability is in question must have evoked the other party's justified confidence. Third, this confidence must subsequently be disappointed by said party, resulting in the other party's loss. Legal scholars have rightly pointed out that trust and confidence cannot be considered to be characteristic of any one type of liability, as the protection of confidence is an aim pursued also by contractual and tort liability. Thus, liability for breach of confidence would appear to revolve primarily around the requirement of a "special relationship" between the party causing and the party suffering loss.

The requirement of a special relationship is intended to distinguish liability for breach of confidence from tort liability. Torts are said to centre around the violation of general, unspecified duties owed to a general, unspecified number of persons. Typical examples would be the protection of absolute rights such as property or physical integrity. One might say that tort liability covers the realm of general, non-specific relationships. The requirement of a special relationship for liability for breach of confidence, on the other hand, suggests a certain intensity and exclusivity distinguishing it from the general tort relationship. Where such a relationship exists, the tort requirement of unlawfulness need not be fulfilled. The pivotal question is therefore: when can a relationship be considered special?

53. CF. BGE 120 II 331, 335 et seq.; BGE 121 III 350 et seq. On these three criteria see Widmer, C., ZSR 2001 I, 101, 114 et seq., with further references to unpublished Swiss case law: Chappuis, Ch., Sem,lud 1997, 165, 170 et seq.; ibid., "Responsabilité fondée sur la confiance: un tour d'horizon", in: Chappuis, Ch./Winiger, B. (supra fn. 22), 21, 22 et seq. See also Marchand, S., "Responsabilité fondée sur la confiance: vie et mort d'un orthothorique juridique", in: Chappuis, Ch./Winiger, B. (supra fn. 22), 163, 168 et seq.

54. BGE 120 II 331, 336; BGE 121 III 350, 356; BGer, ZB/J 2000, 289, 291; BGer, ZB/J 1999, 173, 175. The criterion of a Sonderverbindung can be traced back to Keller, M., "Ist eine Treu und Glauben verletzende Schädigung widerrechtlich?", rech 1987, 136 et seq. and REY, H., "Rechtliche Sonderverbindungen und Rechtsfortbildung", FS Keller, Zürich 1989, 231 et seq. For a discussion of Keller's and REY's theories and a comparison with the concept of Sonderverbindung in Swiss case law see Chappuis, Ch. (supra fn. 25), 227, 234 et seq.

55. BGE 120 II 331, 335 et seq.; BGE 121 III 350, 355 et seq.; BGer, ZB/J 1999, 173 et seq.

56. See references in fn. 55.


58. See, e.g., Walter, H.P., ZSR 2001 I, 79, 96 et seq.

59. See supra L.A.
An analysis of the pertinent Swiss case law does not help clarify the concept. In the Swissair case for example, it was held that a special relationship comes into being when a parent company’s statements evoke the trust of the subsidiary’s business partners in the subsidiary’s financial soundness. A special relationship can thus exist between a parent company and a practically unlimited number of the subsidiary’s potential business partners. The sheer number of these relationships makes it difficult to perceive them as being in any way exclusive. Nor is it clear in what way the trust evoked by Swissair should be more specific and intense than the “general” trust protected by torts. The assumption of a special relationship in the Swissair case seems somewhat artificial, and it is perhaps not surprising that the Supreme Court does not discuss said requirement at great length. Interestingly enough, the special relationshiprequirement was not even mentioned in a more recent decision also dealing with the liability of a parent company for breach of confidence.

In the Wrestler case, the Supreme Court considered the special relationship between association and wrestler to flow from the monopolistic position of the former vis-à-vis the latter. Indeed, it was the association to decide which wrestler would represent Switzerland in the world wrestling championship. While this position of power should undoubtedly be counterbalanced by the association’s liability in cases of abuse, the question again arises whether the relationship between association and wrestler might truly be deemed special. The association had a monopolistic position with regard to all potential wrestling candidates. As in the Swissair case, it is doubtful whether a relationship which exists with over a thousand persons can truly be considered special, specific and exclusive. Nor is it apparent in what way the ensuing duties of loyalty might differ from general tort duties. By comparison, the liability of a company for abuse of market power under Swiss antitrust law is undisputedly a liability in tort.

The requirement of a special relationship is supposed to delimit liability for breach of confidence. In the Swissair and Wrestler decisions, however, this delimitative function had very little meaning. The only truly unproblematic constellation with regard to the special relationship criterion are those where the factual situation itself delimits the number of potentially damaged persons. Thus in the case of the formally invalid sales contract, the parties had for tax reasons chosen to have only part of the sales price notarized. In Swiss law, such a manoeuvre leads to the invalidity of the contract – the notarized contract is invalid because it does not correspond to the parties’ actual intentions, whereas the real contract containing the true sales price is invalid because it does not comply with the formal requirements of Art. 216 I CO. In the case before the Supreme Court, the buyers had paid the notarized portion of the price but then refused to pay the higher price actually agreed upon, claiming the formal invalidity of the contract. The court, invoking the new doctrine, granted the seller damages for breach of confidence equalling the outstanding part of the contract price. This decision is atypical insofar as it does not genuinely deal with the tort issue of pure economic loss. The breach of confidence concept was rather relied upon in order to compensate for perceived shortcomings of contract law. The Supreme Court’s aim was to grant the seller a right to fulfillment of the invalid contract, albeit under the title of damages.

The demarcation line between general tort relationships and special relationships remains unclear. This uncertainty, however, is but the consequence of the aim primarily pursued by the pertinent case law, which is to allow for compensation for economic loss despite the traditional concept of unlawfulness. Liability for breach of confidence is in truth a compensatory instrument for remedying the shortcomings of the traditional concept of unlawfulness, albeit covertly. This approach brings to mind the words of LLEWELLYN: “Covert tools are never reliable tools.”

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60 Critical with regard to the use of the Sonderverbindung-criterion in the Swissair decision also CHAPPUIS, C. (Supra fn. 25), 227, 227 et seq.: “Il s’agit d’un lien fort clos ...”.
61 BGE 124 III 297 (Dispadrom decision), see supra II A, fn. 31.
62 The SAWA is composed of three regional associations which in turn comprise 37 associations. Approximately 1200 wrestlers are member of these 37 associations.
63 See WIDMER, C., ZSR 2001 I, 101, 116, with references.
64 See, e.g., WALTER, H.P., ZSR 2001 I, 79, 95, 97.
65 See supra, fn. 32.
66 Art. 18 I CO.
67 See supra fn. 32, N 31.26 et seq.
68 On the legal consequences of formally invalid contracts under Swiss law see SCHWENZER, I. ( supra fn. 22), N 31.34; WIEGAND, W., recht 1999, 225, 227. It is difficult to comprehend why the Supreme Court preferred to rely on the new breach of confidenceconcept instead of following one of the many doctrinal proposals developed precisely for the purpose of mitigating the effects of formal invalidity. For these various approaches see GAUCH, P.; SCHILLER, W.R.; SCHMID, J., Schweizerisches Obligationenrecht, Allgemeiner Teil, 7th ed., Zürich 1998, N 558 et seq.
69 Supra, fn. 25, see supra fn. 32, N 31.26 et seq.
70 See WIDMER, C., ZSR 2001 I, 101, 113 et seq.
71 Harvey, Rev. 700, 703 (1939).
D. Generalization of the Culpa in Contrahendo-Concept?

In a legal system where the judge’s role is traditionally limited to interpreting codified law, the introduction of a new form of liability calls for legitimization. The case law in question suggests that such legitimization might be drawn from the nexus between liability for breach of confidence and the precontractual liability doctrine of culpa in contrahendo.73 There are, however, marked differences between the two.

The doctrine of culpa in contrahendo provides the uniform basis for precontractual liability in Swiss law.74 A hybrid between contractual and tort liability developed by JHERING75 in the 19th century, the culpa in contrahendo-concept was originally conceived as an instrument with which to remedy shortcomings of contract law.76 JHERING’s main aim was to establish liability in cases where, according to the then dominant "will theory", there was no valid contract because of mistake.77 Over time, however, the culpa in contrahendo-principle was stretched far beyond JHERING’s theory in order to cover typically delictual situations par excellence arising in a precontractual context.78 The German supermarket cases exemplify this development particularly well.79 In the first supermarket decision, a shopper was struck by a roll of linoleum which an employee had accidentally knocked over.80 Later decisions dealt with prospective customers and customer’s children who had slipped on banana skins and vegetable leaves.81 In these cases, the German Supreme Court called on the

culpa in contrahendo-doctrine with the sole aim of circumventing German tort law.82 Recent German and also Swiss doctrine, however, argues that the infringement of general tort duties should lead to tort liability regardless of the precontractual context, thus placing emphasis on the contractual focus of the culpa in contrahendo-principle.83

The Swissair decision emphasizes the parallels between liability for culpa in contrahendo and liability for breach of confidence, indeed stating that the latter is nothing but a generalization of the former.84 Liability for breach of confidence would thus merely express the general principle underlying the culpa in contrahendo-doctrine, i.e. the principle that disappointing the trust and confidence of a party to which one is bound by a special relationship can lead to liability. Establishing a link between a doctrinal principle dating back to the 19th century and a new concept of liability makes the latter seem more familiar and thus more acceptable. However, while liability for breach of confidence is meant to compensate for alleged shortcomings of tort law, culpa in contrahendo typically deals with the breach of contract-related precontractual duties, i.e. duties of good faith and fair dealing which by their very nature are focused toward a contract.85 It is this contractual nexus which distinguishes liability for culpa in contrahendo from liability for breach of confidence.86

E. Dangers of Breach of Confidence Theory

The aim and function of liability for breach of confidence is to allow for the compensation for pure economic loss despite the restrictive interpretation given to the tort requirement of unlawfulness.87 In truth, therefore, liability for breach of confidence constitutes a departure from the traditional concept of unlawfulness. While it is probably safe to say that legal scholars who are sceptical about the new form of liability do actually agree with the outcome of the discussed cases, it seems a methodologically doubtful approach to formally adhere to a concept of unlawfulness only to then hollow it out by introducing a new form of liability. The new cause of action is,
firstly, superfluous in view of the general clause contained in Art. 41 I CO (see infra III) and, secondly, does not give more guidance to the courts but on the contrary generates numerous uncertainties.

Uncertainties first arise with regard to the prerequisites for liability.88 These prerequisites, i.e. the existence of a special relationship, the eliciting of justified confidence and the subsequent breach of this confidence, lack definite contours. We have already pointed out that the distinction between special relationships and general tort relationships is vague.89 Matters are further complicated by the fact that the criteria of special relationship and eliciting trust are not always clearly distinguished in the pertinent case law. In the Swissair decision for example, the Supreme Court considered there to be a special relationship between Swissair and its subsidiary’s business partners because of the trust evoked by Swissair.90

Perhaps even more important are the uncertainties regarding the modalities of liability for breach of confidence.91 As this new concept is positioned between contract and tort,92 it is uncertain whether tort provisions, contract provisions or perhaps indeed a combination of both apply.93 The latter seems to be the solution favored by the Supreme Court, in fact, its references to the doctrine of culpa in contrahendo (which is governed by contract as well as tort rules)94 indicate that the same shall be valid for liability for breach of confidence. As a consequence, only the reliance interest might be protected in an action for breach of confidence.95 In its decision on the formally invalid sales contract,96 however, the Supreme Court protected the damaged party’s expectation interest. Legal doctrine suggests various approaches. Some scholars propose a case-by-case approach, reasoning that tort rules, contract rules or tort and contract rules combined should apply depending on the “character and intensity” of the special relationship.97 Thus, for instance, a claim might be subject to the one year tort limitation period or to the ten year contract limitation period, depending on whether a court deemed the special relationship to be of a

88 For a different opinion see Walter, H.P., ZSR 2001 I, 79, 97 et seq.; ibid. (supra fn. 30), 147, 157 et seq.
89 Supra IIC.
90 See BGE 120 II 331, 336; on the lack of distinction between the two criteria in the Swissair decision see Widmer, C., ZSR 2001 I, 119; Chappuis, Ch. (supra fn. 25), 227, 238.
91 See Schwenzer, I. (supra fn. 22), N 52.04; Marchand, S. (supra fn. 53), 163, 173 et seq.; Chappuis, Ch. (supra fn. 53), 21, 32 et seq.
92 See supra IIA.
93 On this issue see also Walter, H.P., ZSR 2001 I, 79, 99 et seq.
94 See Schwenzer, I. (supra fn. 22), N 48.02 et seq. with references to case law.
95 Cf. BGE 124 III 363, 369.
96 See supra IIC.

88 Concerns with regard to security in law and previsibility of result are also voiced by Marchand, S. (supra fn. 53), 163, 173: “[N]on seulement le justiciable ne sait plus quand il est responsable, mais encore ne sait-il pas, lorsqu’il l’est, s’il est présumé fautif, dans quelle mesure il répond des actes de ses auxiliaires [et] pour combien de temps ... Olivier W. Holmes ... considérait que la science juridique était la prévisibilité de la décision du juge. S’il a raison, la science juridique suisse est vulnérable.”
99 Chappuis, Ch. (supra fn. 25), 227, 238 et seq.
100 See Widmer, C., ZSR 2001 I, 123 et seq.
101 VON BAR, Ch. (supra fn. 2), preface, XXIII. See also Kramer, E., AcP 200 (2000), 400.

III. Back to the Future: Taking over the Duty of Care-Concept

A. Comparative Overview

Tort law is case law. This is true not only for Angloamerican but also for Continental jurisdictions. Therefore, a comparative approach to problems in this field is particularly important and has various advantages: Comparative law helps, for example, to analyze more profoundly the issues concerned; this is especially true for countries which, as is the case for Switzerland, have little case law, or as von Bar states: "The person who looks, not only at his own, but also at surrounding laws, broadens the range of possible debate". A comparative approach also helps to achieve a gradual convergence of the different legal systems, thus facilitating the unification of the law of torts. In the following we can only give short summaries of the approaches in France, in Angloamerican jurisdictions, and in Germany. An extensive analysis was recently presented by von Bar.

The French Code civil contains in its Art. 1382, 1383 a general clause which states merely that a person is liable not only for intentional acts but also for negligently caused damage. The elements necessary for a cause of
action are faute, causation and damage. Various other European countries have adopted the French model; some of these countries, including Switzerland, have, however, divided the element of faute into the two elements of unlawfulness and fault. The element of damage does not differentiate between absolute rights and economic losses. The French system thus allows without difficulty to compensate for pure economic loss. It has to be noted, however, that French case law is not always very consistent. It is, for example, hard to understand why the owner of a soccer team can claim compensation if a player has been killed when, by contrast, an opera house is not entitled to damages if one of its actors has been injured. In one case a public transportation entity could claim compensation for loss incurred because of a traffic jam caused by an accident; in general, however, such losses are not recoverable.

Angloamerican jurisdictions adopt a different approach. There is no one recognized definition of a tort but rather various acts or omissions which under certain conditions give rise to a remedy—i.e. there is no "law of tort" but a "law of torts". While traditional torts, such as battery, assault or trespass, are associated with intent, the dominant cause of action for accidental injury today is negligence. The elements necessary for negligence are a breach of a duty of care, a loss or damage resulting to the interests of another, and a reasonably close causal connection between the conduct and the resulting loss or damage. The decisive question in our context is whether duties of care extend to purely economic loss. After some confusion in the middle of the last century, it is today no longer disputed that in negligence there are duties covering economic loss. The various Angloamerican jurisdictions have in part developed in different ways. New Zealand and Australian courts seem, for example, to embrace a more expansive position than English courts. The probably most recent, and certainly still emerging category concerns liability for services.

The authors of the German BGB had the "express intention of stealing the limelight from the French Ce", and with regard to torts they deemed "even the starting point of their French counterparts ... unacceptable". Consequently, the BGB does not only divide faute into unlawfulness and fault but differentiates between three categories: infringement of an absolute right (§ 823 I BGB), breach of a protective statute (§ 823 II) and intentional violation of "bonos mores" (§ 826 BGB). The basic regulation is the infringement of an absolute right; the other two categories are secondary. It soon became evident that the restriction of the courts' power to develop the law of torts was unsatisfactory. "The German BGB had closed the gates too tightly, just as the leniency of the Code Civil had opened them too widely." One of the shortcomings of the German system is the "discrimination" of pure economic loss; the statute does not in general allow to compensate for negligent infliction of economic loss. German courts tend to overcome this gap by broadening the scope of contract liability, in particular by expanding the concept of culpa in contrahendo, by recognizing contractual duties for the benefit of third parties, or even by adopting a combination of these concepts, i.e. liability for culpa in contrahendo for the benefit of third parties.

B. Misguided Focus on the German Concept

The Swiss statute incorporates the French approach by providing a general clause in Art. 411 CO. In the law reform which took place at the beginning of the last century, however, an element of the German system was introduced by providing in Art. 411 II CO that intentional wrongs are actionable. The latter provision has had almost no impact and there is practically no case law referring to it.

The decisive distinction between the German concept on the one hand and the Angloamerican or French concepts on the other hand lies in the
definition of unlawfulness: Whereas the duty of care- and faute-concepts are based on acts or omissions, the German concept is – as mentioned – primarily oriented toward the infringement of an absolute right.

In the first half of the last century, Swiss courts did not adhere to the German concept but rather defined unlawfulness as a breach of a statutorily or otherwise recognized duty. The change came in the middle of the last century. This is at first glance surprising in view of the criticism of the German concept by German scholars and given the fact that the Swiss CO contains a general clause. It becomes more understandable if one takes into account that in 90% of the cases in which the Swiss Supreme Court refers to other jurisdictions, it cites German authorities.

The fascination of the German doctrine for the Supreme Court seemed to be especially powerful in the field of torts: indeed, it not only adopted the German concept of unlawfulness but also the definition of damages (Differenzhypothese) and the theory of adequate causation. Interestingly enough, these theories were not even second-guessed when they lost adherence in German doctrine. Accordingly, to this day Swiss courts as well as the majority of scholars define unlawfulness in accordance with the German provision in § 823 BGB.

With due delay, courts and scholars in Switzerland had to acknowledge the shortcomings of the German approach. It is interesting to see that at about the same time, the same development occurred also in Austria and Italy. In both countries the courts, contrary to the general clauses in their legal provisions, had adopted the German concept. However, once the unsatisfactory consequences of this concept had been detected, the courts returned to their previous approach and abandoned the restrictive German position. Contrary to what one might expect, the Swiss Supreme Court chose not to follow the examples of the Austrian and Italian courts and return to its earlier understanding of unlawfulness; instead, it decided to stick to the German concept and to try to overcome any shortcomings by recognizing the above-mentioned breach of confidence-theory developed by the German author CANARIS for circumventing the limitations of § 823 BGB.

In order to avoid misunderstandings: It is not disputed that a general clause as contained in Art. 41 I CO or in Art. 1382, 1383 of the French CC calls for limitations. It is, however, highly questionable to restrict a general clause by adopting the German concept and to then take over theories expressly designed to overcome the self-imposed limitations. This is – as has been outlined above – precisely the state of tort theory in present Swiss case law.

Even more surprising is the fact that the proposed tort law reform adopts exactly this misguided approach: It takes over the narrow concept of § 823 BGB only to then broaden the scope of liability by declaring a violation of the bona fide-principle (Treu und Glauben) unlawful. It has to be noted that the German legislator implemented the narrow concept of torts because of its scepticism vis-a-vis judge-made law of delict; the powers of the judiciary were to be restricted as far as possible by means of a code. This scepticism might have been understandable at the time of the implementation of the BGB more than a century ago; nowadays, however, such an approach seems out of place. But even if one approves of such a restriction of the judiciary’s power via a narrow definition of unlawfulness, it is hard to reconcile this principle with the leeway given by declaring a violation of the good faith-principle unlawful. The latter is in fact nothing but a general clause in disguise.

The commentary on the proposed revised statute on torts mentions that its definition of unlawfulness is influenced by the German BGB but seems not to take note of the fact that the law in Germany has moved away from the written statute. In fact, already two years after the enactment of the BGB the German Supreme Court started to develop duties of care relating to the infringement of absolute rights (Verkehrssicherungspflichten). A quick glance at any German commentary makes evident where the focus of liability lies: not the protected rights, but rather the duties protecting these rights are at the center of attention.

117 Cf. supra fn. 6.
119 GERBER, A., "Der Einfluss des ausländischen Rechts in der Rechtsgeschichte des Bundesgerichts", in: The Responsiveness of Legal Systems to Foreign Influences, Reports Presented to a Colloquium on the Occasion of the Tenth Anniversary of the Swiss Institute of Comparative Law, Zürich 1992, 141, 143 et seq.
120 ROBERTO, V. (supra fn. 3), 101 et seq.
121 ROBERTO, V. (supra fn. 24), 149.
123 Revision und Vereinheitlichung des Haftpflichtrechts, Vorentwurf by WIDMIR, P./WESNER, P., Art. 40 states: (1) Widerrechtlich ist eine Schuldigkeits, die ein von der Rechtsordnung geschütztes Recht verletzt. (2) Besteh die Schuldigung im Verhalten einer Person, so ist dieses dann widerrechtlich, wenn es gegen ein Gebot oder Verbot der Rechtsordnung, gegen den Grundzweck von Treu und Glauben oder gegen eine vertragliche Pflicht verstößt. See also the commentary on this provision in the Erklärender Bericht by WIDMIR, P./WESNER, P. (supra fn. 46), 98 et seq.
124 VON BAR, CH. (supra fn. 2), n. 17.
125 ROZH (1902) 23, 276.
Overall, the implementation of the proposed revision of the tort statute would amount to a doubtful set-back of the liability doctrine; it is also not conceivable why Switzerland should take over a provision which in its "home-country" gave rise to overboarding controversy and to manifold attempts to revise its concept.126

C. A Revised Concept of Tort Liability

In order to solve the problem of compensation for economic loss, it is necessary to review the concept and prerequisites of tort liability. As already stated, the crucial issue lies in the definition of unlawfulness and the role of fault.127 The difficulties and inconsistencies of the traditional definition have also been mentioned. It suffices to add that focussing on the protected rights also makes little sense from a logical point of view: If a conduct is admissible, it cannot then suddenly become unlawful simply because it caused damage to an absolute right. What is admissible and what is unlawful must be established from the outset in order for a legal system to fulfill its aims and give guidance with respect to conduct it considers socially unacceptable.128 A revised theory of tort liability has therefore to focus on the duty-concept.

A departure from the traditional definition of unlawfulness with its focus on absolute rights does not amount to a "new" doctrine. As already stated, the Swiss Supreme Court only took over this so-called "traditional" approach in the middle of the last century.129 We propose to follow the examples of Austrian and Italian jurisdictions, to abandon the misguided implementation of the German concept into the general clause of Art. 41 I CO and to return to the former concept of unlawfulness.130

Tort liability would accordingly be based on the following elements: The first element is unlawfulness. In accordance with Anglo-American and French jurisdictions, however, unlawfulness should in our opinion be understood as a violation of a duty of care (Sorgfaltspflichtverletzung).131 Such duties can either be incorporated in a statute (which need not necessarily be criminal) or established by case law. The second element is the infringement of an interest protected by the violated duty. In other words, the plaintiff, the type of loss or damage, and the manner in which the loss or damage occurred have to lie within the purpose of the statutory or judge-made duty. The third element is a reasonably close ("adequate") causal connection between the violated duty and the protected interest. The fourth element of fault is reduced to the issue of the actor's mental capacity.132 The question of remedies arises only once the elements of liability are fulfilled. Contrary to current doctrine in Switzerland, the law of torts and the law of damages are issues which have to be treated separately.133

The "key"-element of liability is "duty". The paramount importance of the element of "duty" is also stressed by Prosser/Keeton: "It is quite possible, and not at all uncommon, to deal with most of the questions which arise in a negligence case in terms of "duty"." 134 A difficult issue is how the courts should develop and establish duties. It has to be pointed out from the outset that there is no single, general principle for determining the existence of a duty of care. This is in particular true for general duties of care with respect to economic loss. It is not feasible to declare all infringements of economic interests unlawful and then reduce the scope of liability by other criteria. The adequate approach is rather one of categorisation135 which has been described by Brennan J of the High Court of Australia136 as follows: "It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extensi

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126 Cf. von bar, ch., Verkehrsrechtliche, köln et al. 1980, 204 et seq., 230 et seq.; münchener kommerz 251 et seq. who suggests to recognize in the ambit of § 833 BGB an unwritten third paragraph covering the liability for economic losses.


128 SOEGEL/ZNIEFFER, Bürgerliches Gesetzbuch, 12th ed., Stuttgart et al., § 823 BGB n. 2.

129 SOEGEL/ZNIEFFER, Bürgerliches Gesetzbuch, 12th ed., Stuttgart et al., § 823 BGB n. 2.

130 See also HÖNSEL, H., Schweizerisches Hafthaftricht, 2nd ed., Zürich 2000, § 6 n 21; WERBO, F. (supra fn. 9), 190; SCHWEND, D. SCHWEIZERBERGER, B. (supra fn. 9), 397 et seq.; ROBERTO, V. (supra fn. 3), 91 et seq.

131 Such an approach is also favored by von bar, ch. (supra fn. 2), n. 61 et seq.; BRÜGEMEIER, G. (supra fn. 127), 43 et seq.

132 This separation is well established in Anglo-american jurisdictions. See, e.g., COOPER-STEPHENS, K.D., SABINO, J., Personal Injury Damages in Canada, Toronto 1981, 26: "The focus of legal rules falling within the ambit of "liability" - designed to resolve issues of breach and injury - is on defendant's responsibility. The rules are dominated, at least conceptually, by notions of fault and moral accountability. In contrast, the focus of legal rules falling within the ambit of "damages" - designed to resolve issues of loss and compensation - is on the plaintiff's deprivation. These rules are dominated by the principles of compensation and restitution. The two sets of rules, with their markedly different policy orientation, do not blend well into an integrated whole."

133 See also ROBERTO, V., v. 1999, 519 et seq.

sion of a prima facie duty of care restrained only by indefinable considerations which ought to negative, or to reduce or limit the scope of duty or the class of persons to whom it is owed."

General considerations which influence the development of duties are the recognizable danger of injury, the likelihood and consequences of the injury, the utility of the type of conduct, and alternative courses open to the actor. In the USA, the well-known Judge Learned Hand developed a test whereby a duty exists if the cost of preventing the damage is smaller than the probability of its occurrence multiplied by the expected amount of losses. Contrary to the beliefs of certain proponents of the Economic Analysis of Law, such formulae have only a limited value in determining the duty issue. With regard to "everyday mistakes" by individuals, for example, in most instances no additional cost is associated with the requirement of being more vigilant. Besides, it is rarely possible to establish the amounts necessary to render the formula operative. Ultimately, the creation of a duty by a court depends on whether it is just and reasonable to impose a specific conduct.

D. Duties of Care for Economic Loss

Most of the service cases can also be qualified as cases of negligent misrepresentation. The criteria developed by the Swiss Supreme Court with respect to erroneous statements of banks towards third persons can further be applied to other cases of negligent misrepresentation or service cases respectively. In our opinion, however, the criteria developed by the Supreme Court should be amended by two requirements in accordance with Angloamerican case law: The information provider, due to her business position or special knowledge, must assume responsibility for the information given, and the party deceived must be justified in her belief that the representation is true, and in taking action on that basis. Once a tort liability for negligently provided information is recognized by case law, there is no need to adhere to the concept of "fictitious" contracts.

should also be taken into account that Angloamerican cases of negligent performance of a service often relate to the following circumstances: a client is damaged by a third person but only the service provider (and not the client herself) has a contractual claim against the third person. Such cases do not, however, pose problems in Swiss law. The provision in Art. 401 I CO explicitly provides a legal basis for a contractual claim by the client.

An interesting category which cannot be qualified as a case of negligent misrepresentation concerns invalid wills. The typical constellation is the following: A lawyer negligently fails to draw up a will prior to a client's death and as a consequence the intended beneficiary is deprived of her inheritance. The deprived beneficiary sues to recover the lost gift, even though she neither knew about nor relied on the intended gift. The case raises the problem that the estate has no claim because it does not incur a loss; quite to the contrary, the estate benefits by the lawyer's negligence. It seems evident that in order to grant the deprived beneficiary the possibility of recovering her loss, a duty of care needs to be recognized by the courts. However, such a claim can eventually lead to a doubling of the estate.

Whether aside from this special constellation there are similar cases of negligently performed services which require a duty of care is uncertain. Suffice to say that even according to the proposed European guideline concerning tort liability for services, only injuries to persons and damage to property fell within the scope of liability.

It has to be stressed that there are substantial differences between and amongst the various types of pure economic loss. While there are certain similarities between cases of negligent misrepresentation and negligent performance of a service, other types of economic loss are quite distinct. It only leads to confusion to try to treat, for example, negligent misrepresentation cases and economic loss resulting to a third party as a consequence of physical damage to a third party ("relational" economic loss) alike. Each category has to be treated separately and is a subject for specific analysis.

136 Cf. Prosser/Ketton (supra fn. 105). 169 et seq.; see also the definition of faute in French law as a conduct "qui s'écarte de la conduite normale sur laquelle chacun est en droit de compter".
140 In this direction also the position of the House of Lords, cf., e.g., Caparo Industries v. Dickman, (1990) 2 A.C. 605 et seq.
141 Prosser/Ketton (supra fn. 105), 745 et seq., in particular 753; Feldthüsen, B. (supra fn. 9). 43 et seq.
142 Feldthüsen, B. (supra fn. 9). 2.
144 Feldthüsen, B. (supra fn. 9). 3 et seq.