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Global Perspectives

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10. The bounds between negligence and strict liability

*Franz Werro and Erdem Büyüksagis**

1. INTRODUCTION

Two opposite and competing arguments are normally invoked to ground tort liability. The first seeks to justify liability as a consequence of unreasonable conduct: essentially, liability arises wherever there has been an (unintentional) lack of due care. This type of liability is based on what we will call here 'fault' or, in keeping with common law terminology, 'negligence'. The second justification put forth in arguing for liability relies on the risk attaching to a certain activity or (defective) thing.[1] This second type of liability is incurred irrespective of the defendant's (careful) behaviour. In the present study, we will refer to it as 'strict' liability.

A closer examination of the relevant legislation and case-law shows that both lawmakers and the courts tend to mix the two justifications, seeking a middle ground between them. Thus, for example, there are laws that impose a heightened duty of care on persons that carry out hazardous operations or keep dangerous things.[2] In other cases, there may be a presumption of fault that attaches to the realization of certain harms. As a result, the situation is one in which there are not simply two alternative paths, but rather a single wide road with several lanes, offering different mixes of the two types of liability.[3] This does not, of course, mean that the dichotomy between negligence and strict liability is no longer relevant.[4] In our opinion, the distinction between them is real, and should be maintained as a means of accentuating the moral and social implications of tort law.

* We wish to express our gratitude to Hal Wyner, MLaw, for his skilful editing suggestions and useful comments on the text.

[1] Erdem Büyüksagis and Willem H. van Boom, 'Strict Liability in Contemporary European Codification: Torn between Objects, Activities, and Their Risks', Georgetown Journal of International Law 2013, p. 609 ff; Franz Werro, 'Liability for Harm Caused by Things', in Arthur S. Hartkamp, Martin W. Hesselink and Ewoud H. Hondius et al. (eds), Towards a European Civil Code, 4th ed., Alphen aan den Rijn 2011, p. 921 ff.

[2] Michele Graziadei, 'What Went Wrong? Tort Law, Personal Responsibility, Expectations of Proper Care and Compensation', in Helmut Koziol and Barbara C. Steininger (eds), European Tort Law 2008, Vienna/New York 2009, p. 2 ff; Richard W. Wright, 'Proving Facts: Belief versus Probability', in Helmut Koziol and Barbara C. Steininger (eds), European Tort Law 2008, Vienna/New York 2009, p. 79 ff.

[3] Franz Werro (fn 1) p. 923; Hans Stoll, Richterliche Fortbildung und gesetzliche Überarbeitung des Deliktsrechts, Heidelberg 1984, pp. 17–18.

[4] For a different opinion, see Cees van Dam, European Tort Law, 2nd ed. Oxford 2013, p. 306; Peter M. Gerhart, 'The Death of Strict Liability', Buffalo Law Review 2008, p. 245 ff.

However that may be, strict liability is often defined in restrictive terms and limited to risks specifically designated in the statutory regimes.[5] Because of this, risks that may appear to be similar in many ways do not always trigger the same kind of liability. As the application of statutory provisions by analogy is not usually permitted, only risks specifically named in a statute will trigger such liability. A number of authors have criticized this approach, calling for the introduction of a 'general clause' of strict liability. In an effort to mitigate the apparent randomness of certain legislative choices,[6] various proposals have recently been put forward that would enable the courts to consider certain general categories of risks as justifying strict liability.[7]

A number of arguments can be made for the proposition that the ideal solution would be to base liability on defendant conduct in all cases where due care ought, in principle, to be sufficient to avoid harmful outcomes. Conversely, liability based solely on risk should arise only where careful conduct is not capable of ensuring that no harm will be caused. In such cases, the result alone – that is, the realization of a particular hazard – should be taken to justify liability. In the following, we will examine those arguments, considering also the ways different legal systems choose between the different approaches to liability – and the ways in which cultural bias no doubt influences those choices.

We will begin with a brief review of the arguments generally adduced in favour of negligence-based and strict liability (sec. 2). We will then focus on some recent developments and proposals that seek to clarify the dividing line between the two (sec. 3). We will finally present an overall assessment and analysis of the various ways in which negligence and strict liability interface with one another (sec. 4).

2. GENERAL GROUNDS OF LIABILITY

In most legal systems, liability is principally grounded either on unreasonable conduct or on risk. This gives rise, based on the cause, to two types of liability: the first is commonly referred to as 'fault-based' liability (A); the second as 'strict' liability (B).

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[5] For a recent overview and analysis, see Erdem Büyüksagis and Willem H. van Boom (fn 1).

[6] Hein Kötz, Haftung für besondere Gefahr: Generalklausel für die Gefährdungshaftung, AcP 1970, p. 1, 41; Helmut Koziol, 'Umfassende Gefährdungshaftung durch Analogie', in Hermann Baltl (ed.), FS für Walter Wilburg, Graz 1975, p. 173; Pierre Widmer, Die Vereinheitlichung des schweizerischen Haftpflichtrechts – Brennpunkte eines Projekts, ZBJV 1994, p. 385, 405; Geneviève Schamps, La mise en danger: un concept fondateur d'un principe général de responsabilité, Brussels 1998, p. 843. In general, see Bernhard A. Koch and Helmut Koziol (eds), Unification of Tort Law: Strict Liability, The Hague 2002.

[7] Michael R. Will, Quellen erhöhter Gefahr: Rechtsvergleichende Untersuchung zur Weiterentwicklung der deutschen Gefährdungshaftung durch richterliche Analogie oder durch gesetzliche Generalklausel, Munich 1980, p. 277; Bernhard A. Koch, 'Strict Liability', in European Group on Tort Law (ed.), Principles of European Tort Law: Text and Commentary, Vienna/New York 2005, p. 101, 103–04; Christoph Oertel, Objektive Haftung in Europa, Tübingen 2010, p. 311.

A. Fault

Fault-based liability arises in consequence of a failure to act with proper care. Provided there exists a duty of care (i), a breach of that duty amounts to what may be termed 'fault', triggering liability (ii).

i. Duty to act with reasonable care

In most jurisdictions – with some rare exceptions, such as New Zealand, where a non-fault-based compensation system was introduced for all personal injury[8] – losses are borne, as a matter of principle, by the person who has sustained them (*casum sentit dominus*).[9] Liability for the loss is transferred to the person who causes it only if there is a specific reason to do so, giving rise to an obligation to repair the damage caused.

In Continental European systems, there is a long tradition of transferring liability to the injurer in accordance with the latter's fault. The fundamental principle, in the view of Rudolf von Jhering and his contemporaries, 'is as simple as the chemical fact that what burns is not the light but the oxygen in the air'.[10] In the common law, by contrast, the principle of 'no liability without fault' did not find immediate acceptance. It did nevertheless manage to impose itself over time, but quite late compared with the civil law countries.[11] Before the principle of fault-based liability had established itself,[12] there were only isolated instances of tort liability, mainly in connection with nominate *intentional* torts.[13] Instances in which strict liability was imposed (*e.g.*, for damage caused by animals, nuisance or libel), were seen either as historical anomalies or exceptions.[14]

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[8] Stephen Todd, 'Forty Years of Accident Compensation in New Zealand', Thomas M. Cooley Law Review 2011, p. 189 ff.

[9] The Maltese *Code Civil* is one of the rare codes that explicitly opens the chapter on 'Torts and Quasi-Torts' with this principle; see Article 1029: 'Any damage which is produced by a fortuitous event, or in consequence of an irresistible force, shall, in the absence of an express provision of the law to the contrary, be borne by the party on whose person or property such damage occurs.' The reality, however, is that the cost of accidents is borne less and less by the victims, as insurance schemes and welfare benefit systems generally intervene to support victims in a number of situations. Insurance has come to play such an important role that the very future of tort law has occasionally been questioned. For foundational work, see Stephen D. Sugarman, 'Compensation for Accidental Personal Injury: What Nations Might Learn from Each Other', Pepperdine Law Review 2010–2011, p. 597 ff; John G. Fleming, Jan Hellner and Eike von Hippel (eds), Haftungsersetzung durch Versicherungsschutz, Frankfurt a.M. 1980.

[10] Rudolf von Jhering, 'Das Schuldmoment im römischen Privatrecht', in Rudolph von Jhering (ed.), Vermischte Schriften juristischen Inhalts, Leipzig 1879 (repr.: Aalen 1968), p. 163 (authors' translation).

[11] Richard A. Posner, 'A Theory of Negligence', Journal of Legal Studies 1972, p. 29 ff.

[12] *Donoghue v Stevenson* [1932] All ER Rep 1; [1932] AC 562.

[13] For an overview of the evolution of the law of torts, see John G. Fleming, The Law of Torts, 9th ed. Sydney 1998, p. 21 ff; W. Page Keeton et al. (eds), Prosser et Keeton on Torts, 5th ed. [4th repr.] St. Paul 1991, p. 33 ff; Geoffrey Samuel, Tort: Cases and Materials, 2nd ed. London 2008, p. 1 ff.

[14] W. Page Keeton et al. (fn 13) p. 21 ff; Geoffrey Samuel (fn 13) p. 91 ff.

Fault, as the principal justification for tort liability, can be explained as a consequence of the philosophy of individual responsibility. The Hegelian concept of man as a morally responsible agent finds practical expression in the legal notion of personal responsibility. Conduct can be condemned as reprehensible only if the actor was guilty of either intentional or negligent misconduct. The fault doctrine thus has historical links with the notion of individual freedom.

At the same time, liability for careless behaviour has also been explained as deriving from a more or less generalized duty to act with reasonable care.[15] This is not the place for a detailed discussion of when such a duty arises,[16] but it will be useful to recall that among the civil law regimes, there is a marked difference between the French and the German approaches. As a matter of principle, German law foresees a duty of care only with respect to certain legally protected interests (*Rechtsgüter*), such as life, property, personality, and so on (see § 823 BGB); unless there has been a prejudice to one of these 'higher' interests, or a violation of a special 'rule of protection' (*Schutznorm*), 'pure' economic losses (*reine Vermögensschäden*) are not compensable under the German tort regime.[17] French law, by contrast, does not discriminate in this manner, and proceeds on the premise that the rules of tort must provide protection against all losses unreasonably caused.[18] The underlying assumption in the French regime is that there exists a general duty of care in all cases where an absence of care would give rise to a foreseeable risk of harm.[19]

The approach taken in the common law is pragmatic. The law of torts offers protection against pure economic losses circumstantially: in certain instances it is compensable,[20] in others not.[21] It is worth noting, as well, that where the recovery of pure economic loss is denied, this is done not because the duty of care in negligence actions is limited under the common law to a closed list of 'protected' interests – as it is under German law. Rather, the reason is simply that there is no legal basis for imposing a general duty of care in the specific case under consideration. For such a

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[15] Konrad Zweigert and Hein Kötz, Einführung in die Rechtsvergleichung, 3rd ed. Tübingen 1996, p. 600 ff; David Horwarth, 'The General Conditions of Unlawfulness', in Arthur S. Hartkamp, Martin W. Hesselink and Ewoud H. Hondius et al. (fn 1) p. 845, 874 ff.

[16] How to determine whether or not there does in fact exist a duty is one of the more notorious conundrums among law students, professors, lawyers and judges. Cp. Benjamin C. Zipursky, 'The Inner Morality of Private Law', American Journal of Jurisprudence 2013, p. 27, 33.

[17] For an analysis of German law, see Christian von Bar, Verkehrspflichten: Richterliche Gefahrsteuerungsgebote im deutschen Deliktsrecht, Berlin/Bonn/Munich 1980, p. 131 ff. See also Helmut Koziol, Basic Questions of Tort Law from a Germanic Perspective, Vienna 2012, N 6/48. A comparative law overview is offered by Ken Oliphant, 'The Nature of Tortious Liability', in Ken Oliphant (ed.), The Law of Tort, 2nd ed. London 2007, p. 1, 9 ff.

[18] See Article 1382 FrCC.

[19] Suzanne Galand-Carval, 'Fault under French Law', in Pierre Widmer and Willem H. van Boom (eds), Unification of Tort Law: Fault, The Hague 2005, p. 89, 92f.

[20] See *e.g. Ross v Caunters* [1980] Ch 297; *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520.

[21] Joseph Barton, 'Drowning in a See of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims', William and Mary Law Review 2000, pp. 1789, 1797.

duty to accrue, a sufficient relationship of proximity between the defendant and the plaintiff is required.[22] While it is true that a duty of care with respect to pure economic interests is more often recognized in common law courts than in Germany,[23] the fundamental assumption is that the protection of such interests is best served by contract.[24]

Regardless of the scope of the duty of care in negligence cases, the question also arises as to the level of care that is owed. As a general rule, the standard used is that of what a 'reasonable person' would do in the same circumstances.[25] The law thus imposes a duty of reasonable effort.[26] The question as to whether a defendant, upon whom a duty of care was incumbent, and who failed to act accordingly, may raise a defence based on his state of mind, or his personality, as an excuse for the breach, will be dealt with briefly in the next section.

ii. Breach of the duty of reasonable care

Where a person fails to comply with a duty of care, such breach may trigger liability. While this seems simple enough, the manner in which the breach is labelled gives rise to complications that further illustrate the differences between the French and German regimes. Under French law, failure to comply with the duty of care is a '*faute*' and, as such, automatically triggers liability, regardless of the defendant's personal capacity to

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[22] *Caparo Industries PLC v Dickman* [1990] 1 All ER 568 HL; *Anns v Merton LBC* [1978] AC 728, 751: 'The position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist … One has to ask whether, as between the alleged wrongdoer and the person who suffered damage, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises.' According to some scholars, the notion of duty should be defined in terms of policy choices (fairness, justice between the parties, etc). See, *e.g.*, Jane Stapleton, 'The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable', Australian Bar Review 2003, p. 135, 136; W.V. Horton Rogers, Winfield and Jolowicz on Tort, 18th ed. London 2010, pp. 181 and 189.

[23] Joseph Barton (fn 21) p. 1797.

[24] Herbert Bernstein, 'Civil Liability for Pure Economic Loss under American Tort Law', American Journal of Comparative Law 1998, p. 111, 114 ff. See also the famous precedent set in *Robins Dry Dock & Repair Co. v Flint* 275 U.S. 303 (1927). In this case, the plaintiffs, who themselves had no contract with the defendant, were denied direct recovery of their pure economic loss.

[25] See Oliver W. Holmes, The Common Law, 1881 (reproduction: Stilwell 2005), p. 46: 'If … a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.'

[26] John Gardner, 'Obligations and Outcomes in the Law of Torts', in Peter Cane and John Gardner (eds), Relating to Responsibility: Essays in Honour of Tony Honoré, Oxford 2001, pp. 1, 10.

have acted otherwise.[27] Under German law, by contrast, the breach is a seen as a '*widerrechtliche Handlung*' (unlawful act), and thus triggers liability only if it is possible also to impute blame to the defendant for commission of the act. Only such blameworthy acts are understood under German law as giving rise to 'fault' (*Verschulden*), which is treated as a separate prerequisite for liability.[28] In the common law, a non-intentional breach of duty is referred to as negligence.[29] In most instances, this is defined in objective terms, and the courts tend not to take into consideration personal excuses, with the occasional exception of insanity.[30]

We will not attempt here to reconcile the various regimes with each other. For present purposes it will be sufficient to note the general principle that where there is a failure to exercise the care incumbent upon an ordinarily prudent and careful person, this gives rise to objective fault, and thus to objective wrongdoing. The next step is to consider whether a defendant's unlawful act may be legally attributable to him. We will leave aside here the issue of intention, which, obviously, rests on the premise that the defendant had the capacity to act in conformity with the law, but deliberately chose not to. More interesting are the cases in which the defendant did not act with the intent to harm the plaintiff, but failed to act with the proper degree of care which he should and could have exercised in order to avoid causing harm. As mentioned, under French law, an objective lack of care on the part of the defendant is all that is needed to put him at 'fault' and render him liable.[31] Lack of discernment or personal incapacity is not an allowable excuse.[32] Under other regimes, such as that of Germany, excusable personal incapacity may constitute a defence, at least in theory.[33] In still other jurisdictions, such as those of Austria or Japan, the courts will examine whether the defendant, based on an assessment of his individual capacity, would have been capable of acting with the care needed to avoid the harm.[34] In Switzerland and in Italy, some scholars have argued

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[27] Philippe le Tourneau, 'La verdeur de la faute dans la responsabilité civile (ou de la relativité de son déclin)', Revue trim. de droit civil 1988, p. 505 ff; André Tunc, 'A Codified Law of Tort: The French Experience', Louisiana Law Review 1979, pp. 1051, 1054.

[28] Konrad Zweigert and Hein Kötz (fn 15) p. 600 f.; Erwin Deutsch, *Fahrlässigkeit* und erforderliche Sorgfalt: Eine privatrechtliche Untersuchung, Berlin/Bonn/Munich 1963, p. 229 f.

[29] John C.P. Goldberg and Benjamin C. Zipursky, 'Torts as Wrongs', Texas Law Review 2009–2010, pp. 917, 918.

[30] James Goudkamp, 'Insanity as a Tort Defence', Oxford Journal of Legal Studies 2011, p. 727 ff. For a general approach to tort law defences in common law, see James Goudkamp, Tort Law Defences, Oxford 2013.

[31] Henri Mazeaud, Léon Mazeaud and André Tunc, Traité théorique et pratique de la responsabilité délictuelle et contractuelle, 6th ed. Paris 1965, N 389.

[32] Geneviève Viney, Patrice Jourdain and Suzanne Carval, 'Les conditions de la responsabilité', in Jacques Ghestin (ed.), Traité de droit civil, 4th ed. Paris 2013, N 444.

[33] Rüdiger Wilhelmi, Risikoschutz durch Privatrecht, Tübingen 2009, p. 346f; Erwin Deutsch, Der Begriff der Fahrlässigkeit im Obligationenrecht, FS für Max Keller, Zurich 1989, p. 105, 111f; Stefan Grundmann, in MünchKomm, BGB, V. II, § 276 N 56.

[34] For Austrian law, see Helmut Koziol (fn 17) N 6/81. For Japanese law, see Article 713 of the Japanese Civil Code quoted by Eri Osaka, 'Reevaluating the Role of the Tort Liability System in Japan', Arizona Journal of International and Comparative Law 2009, p. 393, 394; according to that provision, 'a person who has inflicted damages on others while he/she lacks the capacity to appreciate his/her liability for his/her own act due to mental disability shall not

that fault should be contingent upon a subjective assessment of blameworthiness, so that wrongdoers who did not have the personal capacity to avoid their harmful conduct may be excused.[35] This approach has, however, been rejected in Switzerland, both by the Federal Supreme Court[36] and by the majority of legal scholars.[37] Except in cases where there is a lack of discernment based on insanity or minority, fault is analysed, essentially, without regard for the personal capacities of the defendant. Fault thus consists in conduct contrary to what could reasonably be expected of a person licensed to engage in a given (possibly specialized) activity in the specific circumstances of time and space in which the defendant found himself. No distinction is made between such fault and the breach of a (possibly statutory) duty.

B. Risk

Under a regime of strict liability, the underlying principle is that liability ought to result from the materialization of a specific risk, which is linked either to a thing or an activity under the defendant's control, irrespective of any actual lack of care on his part. A milder form of strict liability can be found where a lack of care on the defendant's part is presumed upon the materialization of a particular hazard and occurrence of certain injuries; as noted, if such a presumption is not subject to refutation, the liability is strict (i). The determining factor for imposing such liability is usually that the injuries in question tend to occur even where due care is exercised, or that they can be avoided only at excessive cost (ii).

i. Materialization of a particular hazard

Fault-based liability found easy justification in artisanal economies. However, with the advent of the industrial revolution, new and greater risks of harm emerged and continued to multiply. Small domestic undertakings evolved into major multinational companies and, in the process, inherently dangerous products and activities, manufactured or conducted on a large scale, became a ubiquitous element of daily life.[38] With this development, the adequacy of fault-based liability, as a matter of principle, became questionable. The creation of hazards, as such, increasingly came to be seen as grounds

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be liable to compensate for the same; provided, however, that this shall not apply if he/she has temporarily invited that condition, intentionally or negligently'.

[35] Pierre Widmer, Die Vereinheitlichung des Schweizerischen Haftpflichtrechts: Brennpunkte eines Projekts, ZBJV 1994, p. 385, 410. For Italy, see Mauro Bussani, La colpa soggettiva. Modelli di valutazione della condotta nella responsabilità extracontrattuale, Padova 1991.

[36] ATF 128 III 76; ATF 116 II 519; ATF 121 III 358; ATF 95 II 340: 'Zunächst fragt sich, ob der Beklagten grobe Fahrlässigkeit vorgeworfen werden kann. Das ist dann der Fall, wenn sie Sorgfaltspflichten verletzt hat, die sich jedem verständigen Menschen in der gleichen Lage aufdrängen mussten.'

[37] Franz Werro, Die Sorgfaltspflichtverletzung als Haftungsgrund nach Art. 41 OR, ZSR/RDS 1997, p. 343, 346 ff; Heinrich Honsell, Die Reform der Gefährdungshaftung, ZSR/RDS 1997, p. 297, 306; Karl Oftinger and Emil W. Stark, Haftpflichtrecht, Vol. I, 5th ed. Zurich 1995, § 5 N 13.

[38] Erdem Büyüksagis and Willem H. van Boom (fn 1) p. 612; Gert Brüggemeier, Modernising Civil Liability Law in Europe, China, Brazil and Russia, Cambridge 2011, p. 10 ff.

for assigning liability. At a certain point, it was even argued that a right to, or 'guaranty' of, safety should be treated as an entitlement, and some scholars proposed that it was the duty of tort law to provide automatic protection against harm to the physical integrity or property of individuals.[39]

Although legislators were generally reluctant to subscribe expressly to this view, they nevertheless began gradually to adopt strict liability schemes wherever they identified specific risks arising in association with certain activities. As the hazards multiplied, the scope of such legislation grew accordingly, and came to cover activities ranging from the owning and operating of aircraft, railways and motor vehicles, to the running of nuclear power plants, the manufacture of chemical substances, and more. As noted, the rationale adopted was that such activities inherently carry with them a high risk of causing injury to others, even when they are conducted with a reasonable degree of care. For such activities, lawmakers have imposed strict liability as a matter of policy, effectively converting the defendant into a sort of insurance provider.[40] Irrespective of any negligence on their part, defendants have been held liable wherever harm occurred as a consequence of a risky activity in which they were engaged.

In civil law jurisdictions, strict liability normally rests on statutory provisions whose scope is limited to the activity specifically described in the statute.[41] Many European, as well as non-European, countries (*e.g.*, Japan,[42] China,[43] Russia,[44] Turkey[45]) have passed legislation imposing strict liability in connection with such things as, for example, aircraft ownership, nuclear power stations, environmental pollution, railway operations and owning or holding motor vehicles. As a rule, liability is limited to losses resulting from personal injury and property damage.[46] In some countries, however, courts have widened the scope of liability to include other harmful outcomes.

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[39] See Boris Starck, Essai d'une théorie générale de la responsabilité civile considérée en sa double fonction de garantie et de peine privée, Paris 1947. For a treatment of the question in English, see André Tunc, 'A Little-Noticed Theory in the Law of Tort: Boris Starck's Theory of Guaranty', University of Pennsylvania Law Review 1973, p. 618 ff.

[40] See Peter Cane, 'Retribution, Proportionality, and Moral Luck in Tort Law', in Peter Cane and Jane Stapleton (eds), The Law of Obligations: Essays in Celebration of John Fleming, Oxford 1998, p. 141 ff.

[41] Erdem Büyüksagis and Willem H. van Boom (fn 1) p. 612 ff; Franz Werro, 'Tort Law at the Beginning of the New Millennium: A Tribute to John G. Fleming's Legacy', American Journal of Comparative Law 2001, pp. 147, 157.

[42] See the Act of Compensation for Nuclear Damage, the Air Pollution Control Law and the Water Pollution Control Law.

[43] See Articles 65 ff of the Tort Liability Law of the People's Republic of China.

[44] See the examples mentioned in Article 1079 of the Civil Code of the Russian Federation.

[45] In addition to the statutory provisions governing the liability of aircraft owners, car keepers and polluters for environmental damage, the Turkish courts have considerably expanded the scope of liability imposed on owners of 'a building or any other work' so that it applies to many other instances of injury (*e.g.*, injury caused by electrical installations or railway accidents). See Erdem Büyüksagis, 'The New Turkish Tort Law', Journal of European Tort Law 2012, p. 44, 67.

[46] See, *e.g.*, Article 58(1) of the Swiss Road Traffic Act: 'Where a person is injured or killed, or sustains damage to property, due to the operation of a motor vehicle, the possessor of the vehicle shall be liable' (authors' translation).

In some jurisdictions, the use of strict liability has been legislatively extended beyond the category of hazardous activities. Famously, Article 1384(1) of the French Code Civil (FrCC or *Code civil français*) imposes liability for injury caused by a *thing* that a person has under his guard, which has been construed in the case-law as meaning that liability exists regardless of whether the thing in question is defective or not.[47] The classic precedents on which the French courts now base themselves include such cases as, for instance, the fatal injury of a tugboat employee by an exploding boiler (*Teffaine*),[48] the destruction of adjoining property when a shipment of uncovered resin caught fire (*des Résines*)[49] and the non-fatal injury of a small girl who was hit by a truck driven by a department store deliveryman (*Jand'heur*).[50]

Among common law precedents, the closest parallel to guardian liability, as provided for in Article 1384(1) FrCC, is found in the 1868 *Rylands v Fletcher* decision.[51] In that ruling, the UK courts awarded damages to compensate harm caused by a hazardous thing. *Rylands*, however, did not establish a principle of English tort law, but has remained a rather narrow exception.[52] Nor has the *Rylands* doctrine been adopted by other common law jurisdictions, such as Canada[53] or Australia,[54] or in such mixed legal systems as South Africa.[55] It is, nevertheless, worth noting that the idea expressed in *Rylands* did inspire the authors of the American Restatement (Second) of Torts to include a strict liability rule for abnormally dangerous activities.[56]

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[47] Franz Werro (fn 1) p. 921 ff; Edward A. Tomlinson, 'Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking', Louisiana Law Review 1998, p. 1299 ff; André Tunc (fn 27) p. 1069.

[48] Cass. Civ., 16 June 1896, DP 1897, I, 433. In its decision, the French Supreme Court held that the explosion was not a case of *vis major* and that, accordingly, under Article 1384 FrCC, the owners of the tug were liable.

[49] Cass. civ., 16 Nov. 1920, 1920 D. Jur. I 169 (note Savatier), 1922 S. Jur. I 97 (note Hugueney).

[50] Ch. Réunies [Chambres Réunies], 13 Feb. 1930, 1930 D. Jur. I 57 (rapport Marc'hadour) (conclusions Matter) (note Ripert), 1930 S. Jur. I 121 (note P. Esmein). According to this decision, the keeper of a thing is under a presumption of liability, which can be refuted only by evidence of fault on the part of the injured party or of a third party or of the occurrence of *vis major*. In French law, this basic rule still remains valid.

[51] [1868] LR 3 HL 330.

[52] Keith M. Stanton, 'The Legacy of Rylands v Fletcher', in Nicholas J. Mullany and Alan M. Linden (eds), Torts Tomorrow: A Tribute to John Fleming, Sydney 1998, p. 84 ff; Gary T. Schwartz, 'Rylands v Fletcher, Negligence and Strict Liability', in Peter Cane and Jane Stapleton (fn 40) p. 209 ff.

[53] Jean-Louis Baudouin and Allen M. Linden, Tort Law in Canada, Alphen aan den Rijn 2010, p. 165.

[54] The Australian High Court considers the doctrine of *Rylands* as a kind of negligence rule. See John Murphy, 'The Merits of Rylands v Fletcher', Oxford Journal of Legal Studies 2004, p. 643 ff.

[55] Christopher Roederer, 'The Transformation of South African Private Law After Ten Years of Democracy: The Role of Torts in the Consolidation of Democracy', Columbia Human Rights Law Review 2006, p. 447 ff.

[56] American Restatement (Second) of Torts, Section 519 provides: '(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the

Occasionally, courts in civil law jurisdictions will derogate from the principle of fault-based liability, even in the absence of a specific statutory rule, usually by adopting a broad reading of the laws in effect. Thus, for example, the Japanese Supreme Court has increased the standard of care in pollution cases so as to render it virtually impossible for the injurer to escape liability by reversing the burden of proof.[57] The Turkish Supreme Court has upheld liability on the part of owners of mobile phone base transceiver stations, qualifying the stations as hazardous for the people who live nearby, while nevertheless allowing that they are a technological necessity.[58] The Swiss Federal Supreme Court has ruled that the owner of a building may be held liable for the consequences of an elevator accident, even where the elevator was maintained using state-of-the-art practices – thus widening the basis for owner liability beyond defectiveness or negligence as foreseen in Article 58 of the Swiss Code of Obligations.[59] Similarly, Russian courts have held builders liable for damage caused to neighbouring property by explosions at a construction site, despite the fact that they had acted in accordance with the recognized standards for such activities and were in compliance with the terms of an official permit.[60]

There is, in other words, a growing tendency among the courts in various jurisdictions to hold defendants liable for harmful outcomes even where they have not in any way been remiss in their conduct. In such cases, whether or not it was within the defendant's power to avoid causing the harm is not considered material.

ii. Unavoidability of risk or pursuit of profit as a determining factor

As a conceptual prerequisite, strict liability, in its most stringent form, is imposed, by law or by the courts, irrespective of any careful or careless behaviour on the part of the defendant. As we have seen, it can ensue from the conduct of a certain activity or even from merely being the guardian of a thing that is considered inherently hazardous. In both cases, the underlying notion – though not always expressly stated – is that there exists a significant residual risk – a risk, that is, that cannot be eliminated even where reasonable care is shown.[61] Accidents that result from residual risk are said to be 'unavoidable', in the sense that human agency cannot realistically prevent them. In legal regimes where 'the fact of the thing' (*le fait de la chos*e) is not, in and of itself, sufficient to trigger liability, as it does under French law, the question arises as to what

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harm. (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.' Restatement (Third) follows the same approach in § 20 (see below Section III. B.2). On the use of the *Rylands* rule as the point of departure for this provision, see *e.g.* Jake W. Looney, '*Rylands v. Fletcher* Revisited: A Comparison of English, Australian and American Approaches to Common Law Liability for Dangerous Agricultural Activities', Drake Journal of Agricultural Law 1996, p. 149, 161.

[57] Eri Osaka (fn 34) p. 397.

[58] Yargıtay 4. Hukuk Dairesi [Supreme Court, 4th Civil Chamber] 29 Jan. 2004, main No. 2003/16434, decision No. 2004/971. For an analysis, see Erdem Büyüksagis (fn 45) p. 68.

[59] TF, 4C.386/2004. For an analysis of this case, see Franz Werro, La responsabilité civile, 2nd ed. Bern 2011, N 740.

[60] Nadejda Drujinina, Die Entwicklung des Russischen Haftungsrechts, th. Göttingen 2004, pp. 146–147.

[61] Erdem Büyüksagis and Willem H. van Boom (fn 1) p. 612.

sorts of things may give rise to strict liability. Many goods, such as foodstuffs, drugs, chemicals or machines, even when produced in keeping with today's best manufacturing practices (*e.g.*, Six Sigma),[62] can be marred by unavoidable defects capable of provoking accidents.[63]

The law generally tolerates a range of activities or objects in which residual risk inheres, provided they are deemed conducive to the common weal.[64] When accidents occur as a result of residual risk, the deterrence mechanisms associated with fault-based liability are of no avail. As already noted, negligence liability is generally explained as being based on the notion that a person who creates a risk of accident ought to be held liable for any damage ensuing from such risk, since the cost of accident avoidance is lower than the potential losses that will be suffered if the risk is realized.[65] Hence, when the costs of additional care are disproportionate to the potential loss, fault-based liability no longer makes sense. In order to ensure adequate compensation, therefore, the legal system shifts in such cases to a regime of strict liability: liability is imposed on the person designated as being responsible for a harmful outcome that, on the objective test, is either unavoidable or is avoidable only at excessive cost.

In some legal regimes, in addition to the unavoidable character of the accident, courts also consider whether the conduct of an activity that has the potential of causing such accidents is motivated by the pursuit of profit. In Canadian courts, for example, where a defendant creates a heightened risk with the intent of earning profits, or for other self-serving purposes, there is a greater likelihood that strict liability will be imposed.[66] Conversely, where the defendant acted with the intention of promoting public welfare, he may expect more sympathy from the bench.[67] Whatever the justification, the scope

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[62] Armin Töpfer and Swen Günther, 'Steigerung des Unternehmenswertes durch Null-Fehler-Qualität als strategisches Ziel: Überblick und Einordnung der Beiträge', in Armin Töpfer (ed.), Six Sigma, 4th ed. Berlin 2007, p. 3; Robert Dirgo, Look Forward: Beyond Lean and Six Sigma, Fort Lauderdale 2005, p. 59.

[63] For an analysis of the concept of 'residual risk' in product liability, see Erdem Büyüksagis, La notion de défaut dans la responsabilité du fait des produits, Analyse économique et comparative, th. Fribourg, Zurich/Basel/Geneva 2005, p. 284 ff. For a general overview on the notion of residual risk, see David Rosenberg, The Hidden Holmes, His Theory of Torts in History, Cambridge 1995, p. 127 ff.

[64] Israel Gilead, 'On the Justifications of Strict Liability', in Helmut Koziol and Barbara C. Steininger (eds), European Tort Law 2004, Vienna/New York 2005, p. 28. The author argues that, 'while fault-based liability is liability imposed on undesirable conducts, strict liability is perceived as liability which is also imposed on, or "specializes" in, desirable conducts'. *Id.* at 29. See also Franz Werro, Vernon V. Palmer and Anne-Catherine Hahn, 'Strict Liability in European Tort Law: An Introduction', in Franz Werro and Vernon V. Palmer (eds), The Boundaries of Strict Liability in European Tort Law, Durham 2004, p. 5 ff.

[65] Michael Faure, 'Economic Analysis of Fault', in Pierre Widmer and Willem H. van Boom (fn 19) p. 314; Pierre Widmer, 'Liability Based on Fault', in European Group on Tort Law (fn 7) p. 79.

[66] Jean-Louis Baudouin and Allen M. Linden (fn 53) p. 164.

[67] *Id.* at 164.

of strict liability currently varies widely from one legal culture to another.[68] In some countries, operating a motor vehicle is considered to be an ultra-hazardous activity, in others not. For this reason alone, it is important to stress that there is no 'common core' of globally applied legal standards in the matter of strict liability.[69]

3. CASE-LAW DEVELOPMENTS AND LEGISLATIVE REFORM PROPOSALS

As we have seen, strict liability is normally based either on the hazardous thing standard (A) or on the hazardous activity standard (B). We shall now examine how the courts have adapted the application of these standards to the realities of contemporary life. We will also look at some proposals in this regard, as found in the legal literature.

A. The Hazardous Thing Standard

Courts have used the hazardous object standard as a means of coming to terms with evolving societal risks; legislative reform proposals, backed by the scholarly literature (i) seek to anchor that practice in statute (ii).

i. Case-law developments

In France, the courts have played a tremendous role in widening the application of Article 1384 FrCC far beyond what its authors could have imagined, so that in today's practice the scope of strict liability has indeed become larger than that of fault-based liability.[70] The case-law on the question has been developed mainly through the well-known *Jand'heur* decision by France's highest civil appeals court, the *Cour de cassation*.[71] In that case, the Court held that Article 1384(1) FrCC imposes general strict liability for all harm caused by a thing.[72] In consequence, the guardian of the thing cannot escape liability by demonstrating that the damage was caused by *force majeure*.[73] In other words, liability applies even where the potential injurer could not

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[68] For a comparative overview, see Erdem Büyüksagis and Willem H. van Boom (fn 1) p. 611 ff; Walter van Gerven, Jeremy Lever and Pierre Larouche, Cases, Material and Text on National, Supranational and International Tort Law, Oxford 2000, p. 537.

[69] For a comparative and historical analysis, see, *e.g.*, Franz Werro, Vernon V. Palmer and Anne-Catherine Hahn (fn 64) p. 3; Gerhard Wagner, 'Grundstrukturen des Europäischen Deliktsrechts', in Reinhard Zimmermann (ed.), Grundstrukturen des europäischen Deliktsrechts, Baden-Baden 2003, p. 270 ff; Geneviève Schamps, La mise en danger: un concept fondateur d'un principe général de responsabilité, Brussels 1998, p. 843 ff.

[70] Louis Josserand, De la responsabilité du fait des choses inanimées, th. Paris 1897, p. 106; André Tunc, 'Rapport sur les choses dangereuses et la responsabilité civile en droit français', in Association Henri Capitant des Amis de la Culture Juridique Française (ed.), Les choses dangereuses, Paris 1971, p. 50, 51. For a comparative analysis illustrating the different character of French law, see Franz Werro (fn 1) p. 926.

[71] Cour de cassation [Cass.] ch. réun. 13 Feb. 1930, DP 1930 I, p. 57, note Ripert (Fr.).

[72] Geneviève Viney, Patrice Jourdain and Suzanne Carval (fn 32) N 634.

[73] Franz Werro (fn 1) p. 928 f.

have prevented the accident from occurring. *Jand'heur* thus construes the broadly formulated text of Article 1384 FrCC, which states that 'a person is liable not only for the damages he causes by his own act, but also for that which is caused … by things in his custody', as imposing a general clause of strict liability for the keeper of things.[74] Tunc certainly had a point in likening this procedure to the construction of a pyramid on a pinhead.[75]

The evolution of strict liability doctrine in France has also played a role in the development of the laws on strict liability in neighbouring countries.[76] In Belgium, for example, in addition to the specific, statutorily designated instances in which strict liability is imposed, Article 1384(1) of the Civil Code (BeCC or *Code civil belge*) is applied so as to impose general liability on the guardian of a thing, but subject to the condition that the thing is defective.[77] Because defectiveness is a condition of liability, the Belgian liability regime for hazardous things could be construed as being less broad than that in France.[78] In practice, however, the Belgian courts have widened the scope of such liability by presuming the presence of a defect wherever the thing exhibits an abnormal feature that causes injury.[79]

In Italy, Article 2051 Italian *Codice Civile* (ItCC) provides that 'each person is responsible for damage caused by things in his custody, unless he can demonstrate the occurrence of a fortuitous event.'[80] This provision initially covered only accidents caused by the condition of the thing or by the realization of a risk typically associated with its use.[81] In such cases, the fault of the guardian was presumed.[82] At first glance, this liability would seem less strict than that imposed by French courts. Nevertheless, Italian courts have interpreted this 'intensified liability for fault' in such a way that the custodian cannot escape liability, unless he proves that a *caso fortuito* – understood as an act of God – was the cause of the harm.[83] Construed in this way, the Italian approach to strict liability for things is similar to that of France and Belgium.

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[74] Geneviève Viney, Patrice Jourdain and Suzanne Carval (fn 32) N 702.

[75] André Tunc (fn 27) p. 1051 ff.

[76] Christoph Oertel (fn 7) p. 246.

[77] Cour de Cassation [Cass.] [Court of Cassation], Oct. 6, 1961, Revue Critique de Jurisprudence Belge 1963, p. 5, note Lagasse; Cass., Feb. 12, 1976, Pas. 1976, p. 652.

[78] Jean-Sébastien Borghetti, La responsabilité du fait des choses, un régime qui a fait son temps, RTD civ. 2010, p. 1.

[79] Tribunal de Commerce [Comm.] [Commerce Tribunal] Sint Niklaas, 2 Dec. 1958, Rechtskundig Weekblad 1959–1960, p. 1904, reprinted in Michael G. Faure andDavid Grimeaud, Deterrence, Insurability, and Compensation in Environmental Liability: Future Developments in the European Union, Vienna 2003, p. 75.

[80] Article 2051 Codice Civile [C.c.].

[81] Cass. 28 Oct. 1995, n. 11264, Giustizia civile 1995, p. 1804; see also Michele Fornaciari, La responsabilità da cose in custodia, Giustizia Civile 2009, p. 297; Francesco Gazzoni, Manuale di diritto private, 11th ed. Naples 2003, p. 706.

[82] Lorenzo Mezzasoma, Il danno da cose negli ordinamenti italiano e spagnolo, Naples 2001, p. 245.

[83] Massimo Franzoni, L'illecito, 2nd ed. Milan 2010, p. 504 ff; Marco Comporti, 'Fatti illeciti: le responsabilità oggettive', in Francesco D. Busnelli (ed.), Il Codice civile: Commentario, Milan 2009, p. 294 ff.

A comparable situation obtains under Portuguese law. Article 493 of the Portuguese Civil Code (PoCC or *Código Civil Português*) provides that fault is to be presumed wherever there exists a duty of oversight over any movable or immovable thing.[84] The manner in which this provision is currently interpreted by the courts makes it difficult for a custodian to escape liability.[85] To do so, he must prove that he took all measures necessary in order to avoid the realization of hazard.[86] This imposes a duty of care that goes far beyond the standard of 'reasonable care'. In effect, the fact that harm occurred is taken as evidence that the custodian did not exercise sufficient control over the hazardous object, since if he had done so, it would not have caused injury.[87]

By contrast, under the Dutch regime, the scope of strict liability is more limited. For certain types of things – such as animals, ships, aircraft, and so on – there are specific rules. In addition, there are also more general provisions. The rules in respect of movable objects are set forth in Article 6:173 of the Dutch Civil Code (BW or *Burgerlijk Wetboek*); those applicable with regard to real property are found in Article 6:17 BW. Under both provisions, in order for liability to arise, the thing in question must be inherently hazardous to persons and things.[88] In addition, it must fail to meet reasonable safety standards.[89] Article 6:17 BW imposes liability for serious harm caused by particularly dangerous substances only on such individuals as use or possess such substances for commercial purposes.[90] At first glance, it could appear that the legislative intent of these provisions was to extend the scope of strict liability to cover all dangerous things not governed by the special rules.[91] In actuality, however, they effectively reduce that scope – at least as compared with the regime foreseen in Article 1384(1) FrCC. Under the Dutch rules the hazardous nature of the thing must result from a defect, for the existence of which the burden of proof lies with the plaintiff.[92] Strict liability in France, on the other hand, derives not from the hazardous nature of the thing that causes harm (which may or may not be defective), but from the fact that the liable party was the custodian or the guardian (*le gardien*) of that thing.[93]

Outside of Europe, strict liability rules based on the French model are also to be found in some Latin American countries.[94] Article 1193 of the Venezuelan Civil Code,

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[84] Article 493 Código Civil [PoCC] [Civil Code].

[85] Jorge S. Monteiro and Maria Manuel Veloso, 'Fault Under Portuguese Law', in Pierre Widmer and Willem H. van Boom (fn 19) p. 181.

[86] André D. Pereira, 'Portuguese Tort Law: A Comparison with the Principles of European Tort Law', in Helmut Koziol and Barbara C. Steininger (fn 64) p. 623, 636 ff.

[87] Jorge S. Monteiro and Maria Manuel Veloso (fn 85) p. 181.

[88] Articles 6:173–6:174 Burgerlijk Wetboek [Civil Code]; Edgar du Perron and Willem H. van Boom, 'Netherlands', in Bernhard A. Koch and Helmut Koziol (fn 6) p. 227 ff.

[89] HR 17 Dec. 2010, RvdW 2011, 7 m.nt.; HR 20 Oct. 2000, NJ 2000, 700 m.nt.

[90] Jaap Spier et al., Verbintenissen uit de wet en schadevergoeding, The Hague 2012, p. 120 f; Ingrid Greveling and Willem H. van Boom, 'The Netherlands', in Bernhard A. Koch (ed.), Damage Caused by Genetically Modified Organisms, Berlin 2010, p. 403, 414; Edgar du Perron and Willem H. van Boom (fn 88) p. 227.

[91] BW Article 6:173(3).

[92] Jaap Spier et al. (fn 90) p. 113.

[93] Article 1384 FrCC.

[94] Ramon A. Dominguez, Le fondement de la responsabilité délictuelle dans certaines législations de l'Amérique latine, RIDC 1967, p. 917 ff.

for example, states that a person may escape liability for damage caused by things under his control, only if he is able to prove that the damage caused was attributable to *force majeure*, to a fortuitous event, or to the fault of either a third party or the victim. A similar rule on strict liability for harm caused by hazardous things is contained in Article 1913 of the Mexican Civil Code. There it is foreseen that a person who uses inherently hazardous equipment, instruments, devices or substances is obliged to compensate any harm caused thereby, even where he has not acted unlawfully.

ii. Legislative reforms and proposals

As seen in the foregoing overview, regimes that impose strict liability based on 'control' or 'custody' over a thing also tend to draw distinctions in their qualification of the hazard posed by the thing in question.

This same policy has been followed in the Draft Common Frame of Reference (DCFR). Article VI.-3:206[95] DCFR contains a general clause on risk liability, foreseeing that keepers of certain substances, such as chemicals, and the operators of installations, are to be held liable for personal injury, property loss and consequential loss caused by such substances or by emissions from such installations, subject to

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[95] 'Non-Contractual Liability Arising Out of Damage Caused to Another', in Christian von Bar et al., Principles, Definitions, and Model Rules of European Private Law: Draft Common Frame of Reference; Article VI.-3:206 DCFR (Accountability for damage caused by dangerous substances or emissions) provides as follows:

(1) A keeper of a substance or an operator of an installation is accountable for the causation by that substance or by emissions from that installation of personal injury and consequential loss, loss within [Article] VI.-2:202 (Loss suffered by third persons as a result of another's personal injury or death), loss resulting from property damage, and burdens within [Article] VI.-2:209 (Burdens incurred by the State upon environmental impairment), if:
   (a) having regard to their quantity and attributes, at the time of the emission, or, failing an emission, at the time of contact with the substance it is very likely that the substance or emission will cause such damage unless adequately controlled; and
   (b) the damage results from the realisation of that danger.

(2) 'Substance' includes chemicals (whether solid, liquid or gaseous). Microorganisms are to be treated like substances.

(3) 'Emission' includes:
   a. the release or escape of substances;
   b. the conduction of electricity;
   c. heat, light and other radiation;
   d. noise and other vibrations; and
   e. other incorporeal impact on the environment.

(4) 'Installation' includes a mobile installation and an installation under construction or not in use.

(5) However, a person is not accountable for the causation of damage under this Article if that person:
   a. does not keep the substance or operate the installation for purposes related to that person's trade, business or profession; or
   b. shows that there was no failure to comply with statutory standards of control of the substance or management of the installation.

certain conditions.[96] Liability is contingent, first, on (a) whether it is 'very likely' that the substance or emission, if not adequately controlled, will cause such damage; and (b) whether the damage results from the realization of that danger.[97] In addition, pursuant to Article VI.-3:206 (5) DCFR, liability also depends on whether the person who exercises control over a substance or an installation makes use thereof for commercial purposes. This means that strict liability does *not* apply if the keeper of hazardous substances, installations or energies does not exercise control over them in furtherance of his trade, business or professional interests.[98]

The DCFR proposal is similar in some ways to a general strict liability clause for things – as applied, for example, in France – but is, in fact, clearly less comprehensive. First, it is limited to certain dangerous substances rather than to things in general. Secondly, under the French regime, the defendant can refute the presumption of liability only by demonstrating that the damage resulted from a foreign cause not attributable to the object itself (act of God).[99] Under the terms of Article VI-3:206 (5b) DCFR, by contrast, it is sufficient for the keeper of a dangerous substance to prove that he has complied 'with statutory standards of control of the substance or management of the installation' in order to escape liability.[100] Thus, although Article VI-3:206 DCFR also provides for a system of liability based on presumed fault devolving from control over a dangerous substance or emission,[101] the terms under which such liability is imposed are far less severe than those foreseen in Article 1384(1) FrCC.

B. The Hazardous Activity Standard

Like the hazardous object standard, the hazardous activity standard has triggered developments both in the case-law (i) and in proposals for legislative reform (ii).

i. Case-law developments

In order to award compensation where they felt it was due, courts have occasionally gone beyond the dangerous activity standard set by statute in imposing liability. The extent to which they have been willing to do this varies from one jurisdiction to the next, and in some instances courts have also refused to take such a step. Deferring to a presumed legislative intent, the German courts, for example, have consistently rejected arguments based on analogy as a means of extending the scope of special statutory regimes.[102] In doing so, they have reaffirmed the notion that liability, as a matter of principle, is based on fault, and that only the legislator has the authority to introduce exceptions to that principle.[103]

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[96] Article VI.-3:206(1) DCFR.
[97] Article VI.-3:206(1)(a) DCFR.
[98] Article VI-3:206(5)(a) DCFR.
[99] Geneviève Viney, Patrice Jourdain and Suzanne Carval (fn 32) N 391; Franz Werro (fn 1) p. 923.
[100] Article VI-3:206(5)(b) DCFR.
[101] Franz Werro (fn 1) p. 942; see also DCFR (fn 95) p. 3543.
[102] BGH 25 Jan. 1971, NJW 1971, p. 607.
[103] Christian von Bar (fn 17) p. 157. For a recent study on this subject, see Kerstin Rohde, Haftung und Kompensation bei Strassenverkehrsunfällen, Tübingen 2009, p. 12.

While German courts have thus declined to anticipate the legislative process, they have nevertheless succeeded in expanding the scope of liability to a certain extent by introducing a broader understanding of negligence-based liability. This has been done by imposing a higher duty of care on certain defendants, based on duty to assure public safety – the so-called *Verkehrssicherungspflicht*.[104] Such a duty with respect to third parties has been imposed, for example, on architects on the rationale that poor construction would expose the public to safety risks.[105] Hence, the duty of the defendant to act with reasonable prudence has effectively been replaced in the case-law by a duty to act with the utmost care.[106]

A similar approach is found in other countries where the courts are barred from accepting arguments based on analogy as grounds for extending strict liability. In Turkey, prior to the adoption of the new Code of Obligations, in which a general clause of strict liability has been introduced, it was the Supreme Court (*Yargıtay*) that first extended the scope of fault liability.[107] Thus, for example, in the case of an eight-year-old boy who was electrocuted while attempting to retrieve a kite that had become stuck on the top of an electric pole, the *Yargıtay* assigned liability to the electric company, finding that the absence of a warning sign on the pole constituted inadequate safety maintenance.[108]

In Switzerland, the courts have admitted claims based on a violation of the so-called *Gefahrensatz*, a judicial doctrine that deems illicit the creation of undue risk. The rule was developed by the courts as a means of imposing liability on businesses, and effectively deprives defendants of any possibility of proving that they were not at fault.[109] In a seminal case decided by the Swiss Federal Supreme Court, the exoneration clause was construed so narrowly as to make it impossible for the defendant, an employer (and product manufacturer), to meet the burden of proof.[110] The Court ruled that the employer could avoid liability only by showing that he had taken all measures that, on the objective test and with the highest degree of probability, could reasonably be deemed likely to have prevented the accident.[111] By setting such a high evidentiary

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[104] Reinhart Geigel, Der Haftpflichtprozess, Munich 2011, p. 445; Hein Kötz and Gerhard Wagner, Deliktsrecht, 11th ed. Munich 2010, p. 75; Basil Markesinis and Hannes Unberath, The German Law of Torts: A Comparative Treatise, 4th ed. Oxford 2002, p. 86; Jörg Fedtke and Ulrich Magnus, 'Germany', in Bernhard A. Koch and Helmut Koziol (fn 6) pp. 147–148.

[105] Based on the authors' translation of BHG 28 Oct. 1986, NJW 1987, p. 1013.

[106] Erdem Büyüksagis and Willem H. van Boom (fn 1) p. 617.

[107] Erdem Büyüksagis (fn 45) p. 67.

[108] Yargıtay Hukuk Genel Kurulu [YHGK] [Supreme Court – Grand Civil Chamber], 12.03.2003T/2003/4-144E/2003/161K.

[109] Pierre Widmer and Pierre Wessner, Revision und Vereinheitlichung des Haftpflichtrechts, Erläuternder Bericht, Bern 2000, p. 14;. See also Franz Werro (fn 59) N 480; Gordon Aeschimann, La responsabilité civile du fait de l'organisation: droit et société, Geneva 2010, p. 15.

[110] ATF 110 II 456, c. 2, 3; see also Pierre Widmer, Produktehaftung: Urteilsanmerkung Zivilrecht, Recht 1986, p. 50.

[111] Franz Werro (fn 59) N 497.

barrier, the Court has effectively transformed fault-based liability in such (defective product) cases into strict liability.[112]

The Swiss courts have applied this standard in manufacturing defect cases,[113] holding that manufacturers must organize their businesses in such a way that final product safety controls make possible the detection of any and all defects that may occur in the course of the manufacturing process. This stance effectively ignores the fact that some manufacturing defects are simply inevitable, even where reasonable care has been exercised.[114] The Federal Supreme Court has nevertheless set an upper limit to the negligence standard, holding in a case in which the plaintiff had invoked a design defect, that the presumption of lack of care was capable of being refuted by establishing that the consumer ought to have been cognizant of the hazard created by the product and to have taken that hazard into account. One way of underpinning such an argument, it was held, is to produce evidence that, over an extended period of time, no similar accident had been caused by the same type of product.[115] The decision provides an interesting example of the interplay between Swiss and European civil liability law, illustrating the manner in which Switzerland's courts will be attempting to navigate between the Swiss conception of manufacturer's liability based on presumed fault (Art. 55 of the Swiss Code of Obligations (CO)) and the European notion of product liability based on defect, as defined in EU Directive 85/374.[116] Because the terms of that directive have been transposed into Swiss law, in the form of the Swiss Federal Statute on Product Liability, the Swiss courts have been left with little choice but to seek a middle way between the two competing doctrines.

ii. Legislative reforms and proposals

Like the Study Group on a European Civil Code, the European Group on Tort Law has also opted in favour of a general strict liability rule. As the source of liability, however, it has chosen the exercise of 'an abnormally dangerous activity', rather than 'control of dangerous things'.[117] Thus Article 5:101 of the Principles of European Tort Law (PETL) provides that:

> [a] person who carries on an abnormally dangerous activity is strictly liable for damage characteristic to the risk presented by the activity and resulting from it. An activity is abnormally dangerous if it creates a foreseeable and highly significant risk of damage even when all due care is exercised in its management and it is not a matter of common usage.[118]

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[112] Pierre Widmer, 'Ex nihilo responsabilitas fit, or the Miracles of Legal Metaphysics', Journal of European Tort Law 2011, p. 135, 142; Gordon Aeschimann (fn 109) p. 16.

[113] ATF 110 II 456, c. 2, 3; TF, 4C.386/2004.

[114] Erdem Büyüksagis, La relativité de la sécurité du produit: différentes circonstances, différents défauts, différents régimes de responsabilité, ZSR/RDS 2010, p. 29, 46.

[115] TF, 4C.307/2005, c. 4.2. On the nature of employer's liability, see also Franz Werro (fn 59) N 480: 'L'art. 55 al. 1 CO présume en effet le manque de diligence de l'employeur de même que le lien de causalité entre ce manquement et le dommage'.

[116] Franz Werro (fn 59) N 530.

[117] Bernhard A. Koch (fn 7) p. 104.

[118] Article 5:101 PETL.

This provision is similar to § 20 of the American Restatement (Third) of Torts, which also imposes strict liability for 'Abnormally Dangerous Activities'. Much like the European proposal, Restatement § 20 defines an abnormally dangerous activity in the following terms: (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and (2) the activity is not a matter of common usage.[119] The European provision also resembles Article 2050 ItCC and Article 493 PoCC, which impose liability on persons who cause injury to another person by 'carrying out an activity dangerous in itself or as a result of the means employed, or of the objective circumstances under which the activity was carried out'.[120] Under Article 2050 ItCC, a person can avoid liability only by proving that he has taken 'all measures appropriate for the avoidance of damage' or 'all precautions required by the circumstances'.[121] Italian courts did hold that the storing of personal data constitutes a dangerous activity, while a bank's use of automated teller machines (ATMs) does not, despite the fact that such devices create opportunities for criminals to cause injury to third parties.[122]

In order to avoid possible complications with regard to the definition of such notions as 'foreseeable risk' or 'matter of common usage', the Turkish lawmaker, like the

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[119] Restatement (Third) Torts § 20 (2010). See also Restatement (Second) of Torts: Sections 519 and 520. It is worth mentioning that even in American law, which makes explicit provision for strict liability for abnormally dangerous activities, there are many cases in which it is held that a person who, for his own purposes, keeps dangerous things is strictly liable to others for harm caused by those things. Consider the often cited New Jersey Supreme Court case *Department of Environmental Protection v Ventron Corp*. When considering the dangerousness of disposing of mercury-laden wastes, the court quoted reports to the U.S. Congress and academic papers recognizing that the disposal of toxic wastes could cause consequent environmental harms. Basing itself on the assessments by those authorities, the court concluded that mercury and other toxic wastes are abnormally dangerous. See *Dep't of Envtl. Prot. v Ventron Corp*., 468 A.2d 150, 157 (N.J. 1983), *overruling Marshall v Wood*, 38 N.J.L. 339 (N.J. Sup. Ct. 1876), quoted in Gerald W. Boston, 'Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier', San Diego Law Review 1999, p. 597, 651.

[120] Article 493 PoCC provides: 'Whoever causes injury to another in the performance of an activity dangerous by its nature or by reason of the means employed, is liable for the damage, if he does not prove that he has taken all adequate measures aimed at preventing the damage'; Article 2050 ItCC: 'Whoever causes injury to another in the performance of an activity dangerous by its nature or by reason of the instrumentalities employed, is liable for damages, unless he proves that he has taken all suitable measures to avoid the injury.' (translated by Mauro Bussani and Vernon Valentine Palmer (eds), Pure Economic Loss in Europe, Cambridge 2003, p. 174).

[121] Cass., 19 Jul. 2002, n.10551, Giustizia civile 2002, p. 1283: 'This Court holds that air navigation cannot be considered per se a dangerous activity, thereby excluding applicability of Art. 2050 of the Italian Civil Code, however, in actual fact, this element of dangerousness arises each time the said activity is not carried out according to its normal and specific conditions, that is, not in compliance with flight plans, in conditions of safety, in normal atmospheric conditions; Article 2050 would therefore be applicable whenever air navigation fails to be carried out in conditions of safety or when the conditions in which it is carried out are irregular.'

[122] Since 2003, the storing of personal data also constitutes a dangerous activity according to Article 15 of the Italian Legislative Decree no. 196 of 30 June 2003: 'Whoever causes damage to another as a consequence of the processing of personal data shall be liable to pay damages pursuant to Article 2050 of the Civil Code' (authors' translation).

drafters of the French Reform of Law of Obligations (FrRLO), has preferred to avoid any mention thereof.[123] Thus Article 1362 FrRLO, as published by the Catala Working Group, sets forth the following rule:

> Unless [otherwise provided by law], any person who undertakes an abnormally dangerous activity, even lawfully, is bound to compensate any harm that ensues from that activity. Abnormally dangerous activities include those that create a risk of serious harm capable of affecting a large number of individuals simultaneously. Any person who undertakes such an activity may discharge himself from liability only by establishing the fault of the victim.[124]

This provision, which adopts conduct of 'dangerous activities' as the criterion for strict liability, is comparable to the first paragraph of Article 50 of the – since abandoned – Swiss Draft Project (SwDP).[125] The rule there foreseen is that a person who carries on a specifically hazardous activity is liable for any damage caused by realization of the risk associated with that activity.[126] Under the terms of Article 50 SwDP it is also not possible for a defendant to escape liability by proving that he exercised all such due care as may be expected of a specialist in such activities.[127]

The newly adopted Turkish Code of Obligations (TurCO or *Türk Borçlar Kanunu*), which was partially derived from the SwDP[128] and which entered into effect on 1 July 2012, has chosen the same solution.[129] Unlike Article VI-3:206(5b) DCFR,[130] Article 71 TurCO does not consider whether the person who carries out the activity was in compliance with statutory standards.[131] The Turkish rule also differs from that set forth

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123 Willem H. van Boom andAndrea Pinna, 'Le droit de la responsabilité civile de demain en Europe: Questions choisies', in Bénédict Winiger (ed.), La responsabilité civile européenne de demain/Europäisches Haftungsrecht morgen, Geneva 2008, p. 261, 269–270.

124 Avant-projet de reforme du droit des obligations (Articles 1101 à 1386 du Code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil) Article 1362, available at www.henricapitant.org (accessed 22 March 2015).

125 Article 50(1) of the abandoned Swiss Draft Project (SwDP 1999) states: 'Where damage is caused by the realization of a risk characteristic of an ultra-hazardous activity, the person conducting the activity is liable, even where such activity is permitted by law' (authors' translation).

126 *Id*.

127 Pierre Widmer and Pierre Wessner (fn 109) p. 133.

128 It is worth mentioning that the SwDP has since been abandoned by the Federal Council. See Press Release, Fed. Department of Justice and Police, Prolongation des délais de prescription en matière de responsabilité civile (21 Jan. 2009), available at www.ejpd.admin.ch/content/ejpd/fr/home/dokumentation/mi/2009/2009-01-21.html (accessed 22 March 2015). On the impact of Swiss law on other legal orders, particularly on Turkish civil law, see Erdem Büyüksagis, 'What Europeans Can Learn from an Untold Story of Transjudicial Communication: The Swiss/Turkish Experience', in Mads Andenas and Duncan Fairgrieve (eds), Courts and Comparative Law, Oxford 2015, Chapter 37.

129 Erdem Büyüksagis (fn 45) p. 67.

130 Article VI.-3:206(5)(b) DCFR.

131 Türk Borçlar Kanunu [Turkish Code of Obligations] Article 71. For an English version of the Turkish Code of Obligations, see Erdem Büyüksagis, 'Extracts from the New Turkish Code of Obligations', Journal of European Tort Law 2012, p. 90 ff. For French and German translations, see Erdem Büyüksagis, Le nouveau droit turc des obligations: Perspective comparative avec les droits suisse et européen, Basel 2014, p. 115 ff.

in Article 5:101(2) PETL, in that Article 71 TurCO defines the dangerousness of the undertaking in terms of the frequency or seriousness of the risk that it causes, without taking recourse to such notions as 'foreseeable risk' or 'matter of common usage', which would considerably reduce the effectiveness of a general clause on strict liability.[132]

Finally, it is worth noting that, in some new codes, general strict liability clauses have been included that do not define risk, thus leaving the courts a large amount of leeway for imposing strict liability where it is not foreseen by statute. Article 927 of the Brazilian Civil Code of 2002, for example, reads that 'a duty to compensate shall exist, irrespective of negligence, where specifically stated by law, or where the activity performed by the party who caused the damage is of such nature as to entail, a certain risk to third parties'. The notion of 'a certain risk' remains undefined.[133] Similarly, Article 69 of the new Tort Liability Law of the People's Republic of China (2010)[134] and Article 1079 of the Civil Code of the Russian Federation (1995) both state that a person who causes any harm to another person while engaging in an ultra-hazardous activity must assume liability therefor. Neither statute, however, provides a definition for the notion of 'ultra-hazardous activity'.[135] Accordingly, the courts are vested with considerable powers for anticipating the choices of lawmakers by filling in any gaps they may discover in the statutes – at least in theory. The extent to which they will make use of those powers depends on factors that are, for the moment, difficult to judge in view of the dearth of available case-law.[136]

4. AN ASSESSMENT

Strict liability rules were devised, for the most part, as a means of dealing with various hazards to society that emerged, typically, in connection with the process of industrialization. On the whole, these rules have tended to reduce the once paramount role of fault-based liability in tort. They have, however, also given rise to some controversy, as uncertainties as to the bounds of strict liability remain.[137] The foregoing review of the current situation lays the groundwork for some critical reflections on the open issues, in

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[132] For a critique of Article 5:101(2) PETL, see Franz Werro, 'The Swiss Tort Reform: A Possible Model for Europe? – Selected Remarks, Including a Short Assessment of the Principles of European Tort Law', in Mauro Bussani (ed.), European Tort Law: Eastern and Western Perspectives, Bern 2007, p. 81, 97.

[133] Cláudio Filkenstein, 'Civil Liability', in Fabiano Deffenti and Welber O. Barral (eds), Introduction to Brazilian Law, Alphen aan den Rijn 2011, p. 105, 110; Gert Brüggemeier (fn 38) p. 199.

[134] Mo Zhang, 'Tort Liabilities and Tort Law: The New Frontier of Chinese Legal Horizon', Richmond Journal of Global Law and Business 2011, p. 415, 441; Gert Brüggemeier (fn 38) p. 237; Helmut Koziol and Yan Zhu, 'Background and Key Contents of the New Chinese Tort Liability Law', Journal of European Tort Law 2010, p. 328 ff.

[135] Nadejda Drujinina (fn 60) p. 145.

[136] For an optimistic view in the European context, see Franz Werro (fn 132) p. 90.

[137] See Gert Brüggemeier (fn 38) p. 96; Franz Werro, Vernon V. Palmer and Anne-Catherine Hahn (fn 64) p. 3; Erdem Büyüksagis and Willem H. van Boom (fn 1) p. 631.

particular with regard to the inherently hazardous activity standard (A), and the hazardous object standard (B).

A. On the Inherently Hazardous Activity Standard

As we have seen, a number of laws or draft proposals choose the qualification of certain activities as 'inherently hazardous' as a basis for imposing strict liability. Some of the difficulties this creates can be seen in the ways such 'general clauses' of liability for hazardous activities, as found in the Portuguese and Italian tort regimes, have been handled by the courts there.[138] Thus, for example, the operation of water conduits, ATMs, aircraft and trains, plaster works and trading in gaseous liquids have been held not to constitute hazardous activities, while, conversely, the manufacture of pharmaceuticals, the storing of personal data, hunting, giving horseback riding lessons, organizing fireworks, the use of noisy drilling equipment, and the burning of garden trash near a main road causing environmentally hazardous substances to escape, have all been qualified as inherently hazardous activities giving rise to strict liability.[139] The impression that there is something arbitrary in these categorizations is difficult to escape.

One possibility for achieving a more coherent classification of activities subject to strict liability would be to establish an objective benchmark that could be generally applied by the courts. This is the idea behind the American Restatement (Third) of Torts,[140] for example, which limits the scope of strict liability to activities that are both inherently dangerous and 'uncommon',[141] and defines what is meant by the latter term. As set forth in § 20 of the American Restatement, 'an activity is plainly of common usage if it is carried out by a large fraction of the people in the community'.[142] One difficulty that we see here, however, is that under this definition, such routine activities as driving a car would fail to qualify for strict liability, despite their manifestly hazardous nature. This is hardly a satisfying outcome if one considers that the entire *raison d'être* for strict liability in tort regimes is to allow for the compensation of harm caused by activities that inherently entail unavoidable risks even where due care is shown.[143] Operating a motor vehicle is only one such example.

At the same time, however, without an additional qualification such as that of uncommon usage, the hazardous activity standard could easily be used to bring about an undesirable widening of the scope of strict liability at the expense of negligence liability. Medical surgery, engineering activities, certain forms of training workouts, or

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138 See *supra* 3.B.2.

139 Examples are quoted by Christian von Bar (fn 17) pp. 377–378.

140 Restatement (Third) of Torts: Phys. & Emot. Harm § 20 cmt. j (2010) ('[T]he more common the activity, the more likely it is that the activity's benefits are distributed widely among the community; the appeal of strict liability for an activity is stronger when its risks are imposed on third parties while its benefits are concentrated among a few.')

141 For a critique of the 'uncommon activity' criterion, see Christoph Oertel (fn 7) p. 272; Kenneth W. Simons, 'The Restatement (Third) of Torts and Traditional Strict Liability: Robust Rationales, Slender Doctrines', Wake Forest Law Review 2009, p. 1355, 1375 f.

142 Restatement (Third) of Torts: Phys. & Emot. Harm § 20 cmt. j (2010).

143 Richard A. Posner, Economic Analysis of Tort Law, 8th ed. New York 2011, p. 228.

even the sale of French fries to the overweight or the offer of recreational activities to the unfit, could all become candidates for qualification as activities subject to strict liability, even where reasonable diligence would normally be sufficient for eliminating the risk of accidental harm.

In view of these difficulties, some authors have argued for a definition of inherently hazardous activities as activities that create a risk of serious harm capable of affecting a large number of individuals. The advantage of such a definition is that it would provide the courts with a basis for refusing the extension of strict liability to minor accidents that occur with relatively high frequency. At the same time, however, application of that standard would require the collection of objective data (*e.g.*, as to the number of lives placed at risk, the impact on society as a whole or the seriousness of the injuries sustained) which, at present, is not available.[144] As things currently stand, there does not appear to be any clearly identifiable general principle that would explain why certain activities have triggered legislative action rendering them subject to strict liability, while other, equally hazardous activities, have not.[145] Ultimately, the choices thus far made can best be seen as a reflection of prevailing cultural attitudes in the respective societies.

B. On the Defective or Inherently Hazardous Thing Standard

As we have seen, in certain jurisdictions, judicial precedent has established strict liability on the grounds that those who keep, control or use machines and substances place potential victims in a hazardous situation unilaterally, giving rise to 'non-reciprocal risks'.[146] In France, for example, certain gases and liquids, electricity and even X-rays, as well as such objects as motor vehicles, television sets, tennis balls, mailboxes and supermarket floors, have thus been included within the ambit of strict liability.[147] Further, it was established in the *Jand'heur* case (involving an automobile) that liability pursuant to Article 1384(1) FrCC is to be allowed even where the harm 'caused by the thing' occurred when the thing (the automobile) was used (driven) by the guardian, rejecting the view that because of the guardian's act fault-based liability should apply instead (Article 1382 FrCC), which would place upon the victim the burden of proving defendant's fault.[148]

The extraordinary inclusiveness with which the French courts have construed the term 'thing' strikes us as perhaps overly generous. It would be preferable, in our view, to limit strict liability '*pour le fait de la chose*' to accidents resulting from objects that are defective or inherently hazardous by their very nature. Whether such a limitation

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[144] Erdem Büyüksagis, 'Quelques réflexions sur l'euro-compatibilité des dispositions du Projet turc', in Bénédict Winiger (fn 123) p. 121, 129.

[145] Peter Cane (fn 40) p. 171 and 187.

[146] Gerhard Wagner, 'Strict Liability in European Private Law', in Jürgen Basedow et al. (eds), Max Planck Encyclopedia of European Private Law, Oxford 2012, p. 1609, in which the author points out that: 'Time and again, scholars of comparative law have called for a general clause of strict liability for keepers of a source of danger.'

[147] Geneviève Viney, Patrice Jourdain and Suzanne Carval (fn 32) N 635; John Bell, Sophie Boyron and Simon Whittaker, Principles of French Law, 2nd ed. Oxford 2008, p. 383.

[148] Geneviève Viney, Patrice Jourdain and Suzanne Carval (fn 32) N 658 f.

can be considered as implicit in the *Jand'heur* ruling is not entirely clear. It should be kept in mind, however, that the thing in question in that case was a delivery truck, and that the courts have been faced with a growing number of accidents devolving from the particular dangers inherent in the use of motor vehicles of all types.

However that may be, some degree of harmonization between the various regimes for strict liability is gradually being introduced through international conventions, as, for example, in the cases of commercial aviation[149] and nuclear energy.[150] At the European level, the European Product Liability Directive (85/374/EEC) has instituted strict liability for distributors of defective products, that is, of objects that expose the public to an unforeseeable, excessive hazard.[151] This approach to strict liability, based on the standard of defective or inherently hazardous objects, offers the major advantage of leaving room for negligence liability in cases of reasonably foreseeable and avoidable harm.

5. CONCLUSION

A review of the tort regimes in various jurisdictions shows that each legal system tends to develop its own understanding of negligence and strict liability. Also at the European level, the different proposed principles and model rules differ in the bounds they draw between fault-based and strict liability.

As we have seen, fault-based liability is often preferred in cases where it appears that harmful outcomes can be avoided if reasonable care is shown. As a rule, the test used to determine whether there has been negligence consists in comparing the conduct of the defendant with that which could be expected of a reasonably prudent person in like circumstances. Use of this objective standard eliminates the need for evaluating the personal capacity of a given defendant to behave in such manner, so that the determination is not contingent upon the personal qualities of the particular individual whose conduct is in question.

In some jurisdictions, the judgment as to whether a loss merits compensation, or not, is made in accordance with the standard of reasonableness, and not based on the nature of the interest in question (*e.g.*, life, physical or mental integrity, property rights, pure

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[149] Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air of 12 Oct. 1929, p. 137 LNTS 11 and its subsequent amendments, as well as Regulation 2027/97 of 9 Oct. 1997 [1997] OJ L 185/1.

[150] See the Paris Convention on Third-Party Liability in the Field of Nuclear Energy of 29 Jul. 1960, JO, 11 Feb. 1969, the Brussels Convention supplementing the Paris Convention of 31 Jan. 1963 (1963) 2 ILM 685, the Brussels Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material of 17 Dec. 1971, JO, 2 Aug. 1975, and subsequent protocols resulting from these conventions.

[151] See the recent decision of the Court of Justice of the EU (CJEU) on the Boston Scientific Case (Joined Cases C-503/13 and C-504/13: Judgment of the Court (Fourth Chamber) of 5 March 2015 (requests for a preliminary ruling from the Bundesgerichtshof- Germany). In this case, the Court ruled that 'the potential lack of safety which would give rise to liability on the part of the producer … stems from the abnormal potential for damage which [the product] might cause to the person concerned'.

economic interests). In other words, irrespective of the nature of the loss, liability is held to rest on objective fault, that is, on the fact that, given the circumstances of the case – including the degree of proximity between the tortfeasor and the victim – and the foreseeability of the harm, the person deemed to have caused that harm did not act as could reasonably be expected of him. Determination of the proximate cause requires that all relevant factors – including such elements of tort law policy as compensation, deterrence, risk spreading and fairness – be taken into account.

By contrast, strict liability is often based on recognition of the fact that reasonably careful behaviour cannot preclude the occurrence of accidents in certain risky situations. In such cases, it tends to replace fault-based liability, so that the (un)reasonable behaviour of the defendant may be disregarded. In some jurisdictions, it is imposed in connection with either by the use of (hazardous) objects or the conduct of (hazardous) activities. Depending on how it is defined, the hazardous activity standard can give rise to an undue widening of the scope of strict liability. For that reason, it would perhaps be expedient to qualify as hazardous only those activities that create a risk of serious harm capable of affecting a potentially large number of individuals.

Strict liability for those who keep, control or use dangerous or defective equipment and substances derives, in principle, from the fact that such persons expose their potential victims to non-reciprocal risks. In some jurisdictions it is held that simple ownership, use or control of a dangerous or defective object creates a duty to compensate victims of harm caused by such an object. Where this is so, the question of the manner in which the keeper of the dangerous or defective object created the risk of injury is not considered relevant, and a defendant may be held liable even if the accident was not foreseeable. Imposing liability based solely on 'the fact of the thing', irrespective of the nature or cause of the hazard it poses, as tends to be the case under the French tort regime, could lead to a blurring of the proper bounds of fault-based liability. For this reason, it would seem advisable to reserve strict liability for parties who create a hazardous situation where the costs of additional care would outweigh the likely value of the risk avoided.