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# Strict Liability in Austrian and German Law

On the concept of strict liability in the age of technological advancement

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## I Strict liability as a solution for risks associated to technological advance

Traditionally, strict liability played a minor role in German *Deliktsrecht*.<sup>1</sup> For many scholars of the 19th century, liability depended solely on fault, or *culpa*. In their view, liability was intertwined with the responsibility of the individual human actor, and tort law was depicted as a reaction of the law to the abuse of freedom.<sup>2</sup> Rudolf von Jhering famously wrote: ‘Kein Übel ohne Schuld’<sup>3</sup> (‘No wrong without fault’) and ‘Nicht der Schaden verpflichtet zum Schadensersatz, sondern die Schuld’<sup>4</sup> (‘It is not the occurrence of harm which obliges one to make compensa-

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1 JM Scherpe, Technological Change and the Development of Liability for Fault in Germany, in: M Martín-Casals (ed), The Development of Liability in Relation to Technological Change (2010) 134ff; S Lohsse, The Development of Traffic Liability in Germany, in: W Ernst (ed), The Development of Traffic Liability (2010) 75ff; H-P Benöhr, Die Entscheidung des BGB für das Verschuldensprinzip, Tijdschrift voor Rechtsgeschiedenis 46 (1978) 1ff; R Zimmermann, Law of Obligations, Roman Foundations of the Civilian Tradition (1990) 1130ff; monographically R Ogorek, Untersuchung zur Entwicklung der Gefährdungshaftung im 19. Jahrhundert (1975).

2 See, in particular, J Esser, Grundlagen und Entwicklung der Gefährdungshaftung, Beiträge zur Reform des Haftpflichtrechts und zu seiner Wiedereinordnung in die Gedanken des allgemeinen Privatrechts (2nd edn 1969) 50ff.

3 R v Jhering, Das Schuldmoment im römischen Privatrecht (1867) 8.

4 v Jhering (fn 3) 40 (translation by T Weir in: K Zweigert/ H Kötz, Introduction to Comparative Law [3rd edn 1998] 630).

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tion, but fault'). At the same time, the principle of fault was, and still is, a risk distribution mechanism: in the absence of fault, the loss lay where it fell – *casum sentit dominus*. Fault-based liability is contingent upon proof of fault, ie intent or negligence: If the defendant has taken due care, the damage is borne by the claimant.

However, the fault principle can lead to unjust results.<sup>5</sup> How should a victim prove fault in a case in which a spark from a railway ignites a cornfield? How should a train passenger injured in a collision with a cow obstructing the rail track prove fault of the conductor? What if the accident were unavoidable; how could anyone be at fault? Should the individual pay the price of technological advances by assuming the loss? An adequate answer to the risks entailed by new technologies was the introduction of strict liability. A simple answer is: The person or entity responsible for a specific danger is liable for all damage regardless of fault. And, in fact, here the English term of strict liability is remarkably clear.

The introduction of strict liability is rightfully characterised as a reaction to the technological changes emerging in the late industrial revolution in Austria and Germany that commenced in the early the 19th century.<sup>6</sup> The persuasiveness of this observation becomes quite evident when taking a brief glance at areas in which special statutes imposing strict liability began to be introduced over the last two hundred years: railways, cars, airplanes, power cables, atomic energy, medicines, etc. From the vantage point of the year 2021, many of these areas are again subject to lively public discussion due to heightened awareness of climate change and the challenges of digitalisation. Atomic energy was abandoned in Austria already more than forty years ago, and the last power plant is scheduled for closure in Germany within the next years. Other European countries, however, such as France, continue to rely heavily on this form of energy supply. Furthermore, even the Germans' beloved cars are under attack. Older diesel engines are barred from some urban centres, and regulators and scholars alike

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<sup>5</sup> See, in particular, *V Mataja*, Das Recht des Schadensersatzes vom Standpunkte der National-ökonomie (1888) 19ff; on Mataja's work, cf *I Englard*, Victor Mataja's Liability for Damages from an Economic Viewpoint: A Centennial to an Ignored Economic Analysis of Tort, *International Review of Law and Economics* 10 (1990) 173ff.

<sup>6</sup> Cf *W Ernst*, General Introduction: Legal Change? Railways and Car Accidents and how Law Coped with them, in: W Ernst (ed), *The Development of Traffic Liability* (2010) 1ff; monographically *M Eckardt*, Technischer Wandel und Rechtsrevolution, Ein Beitrag zur ökonomischen Theorie der Rechtsentwicklung am Beispiel des deutschen Unfallschadensrechts (2001); for general and comparative observations see *M Martín-Casals*, Technological Change and the Development of Liability for Fault, in: M Martín-Casals (ed), *The Development of Liability in Relation to Technological Change* (2010) 134ff.

have begun to discuss ways of handling self-driving cars.<sup>7</sup> And, finally, it is now *en vogue* to discuss how to handle automated systems, liability for AI and whether or not one should introduce strict liability for malfunctioning computers.<sup>8</sup>

In this article, I am concerned not with the full range of current controversies, but with the structure of strict liability in Austrian and German law. I shall first analyse the doctrinal foundations of strict liability (ii) and then go on to discuss the kinds of defences provided with respect to existing strict liability (III). To conclude (IV), I shall address the problem of whether or not liability law is structured in a ‘dual-lane’ way.

## II On the Austrian and German doctrinal foundations of strict liability – ‘liability for endangerment’ (*Gefährdungshaftung*)

Compared to the English term, strict liability, the German word, *Gefährdungshaftung* (‘liability for endangerment’, or ‘liability based on dangerousness’) already provides a substantive statement about the basis of this form of liability<sup>9</sup>. As Gerhard Wagner points out: ‘the concept of *Gefährdungshaftung* [...] makes the element of attribution explicit in its name: the defendant is liable because he created or controlled a source of danger that poses an increased risk of harm to others.’<sup>10</sup> This idea is applied above all in cases of technical equipment and installation, as well as animals. The justification for installing strict liability is often described as

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7 See eg C Armbrüster, Automatisiertes Fahren – Paradigmenwechsel im Straßenverkehrsrecht? Zeitschrift für Rechtspolitik (ZRP) 2017, 83 ff; J-E Schirmer, Robotik und Verkehr, Was bleibt von der Halterhaftung? Zeitschrift für rechtswissenschaftliche Forschung (RW) 2018, 450 ff; BA Koch, Produkthaftung für autonome Fahrzeuge, in: S Laimer/C Perathoner (eds), Mobilitäts- und Transportrecht in Europa, Bibliothek des Wirtschaftsrechts 2 (2021) 113 ff; H Eidenmüller/G Wagner, Law by Algorithm (2021) 11 ff.

8 See eg C Wendehorst, Strict Liability for AI and other Emerging Technologies, Journal of European Tort Law (JETL) 2020 (11) 150 ff; Eidenmüller/Wagner (fn 7) passim; G Teubner, Digitale Rechtssubjekte? Zum privatrechtlichen Status autonomer Softwareagenten, Archiv für die civilistische Praxis (AcP) 218 (2018) 155 ff.

9 H Koziol, Basic Questions of Tort Law from a Germanic Perspective (2012) no 6/139.

10 G Wagner, Entry ‘Strict Liability’, in: J Basedow et al (eds), The Max Planck Encyclopedia of European Private Law, vol II (2012) 1607; see also H Koziol, Die Vereinheitlichung der Gefährdungshaftung in Europa, in: Festschrift N Michalek (2005) 217, 219; id (fn 9) no 6/148.

a ‘correlate for the approval of technical risks’<sup>11</sup>. Or, as Helmut Koziol writes, ‘that those who derive the *benefit* should bear the *harm*’<sup>12</sup>. Of course, this should not lead to the misunderstanding that a railroad enterprise simply pays a ‘price’ for harming third parties in the course of train operations. On the contrary, strict liability represents a modern way of reconciling interests. Some risks in a technological society cannot simply be excluded. However, via strict liability, a legal system can introduce a just system of risk distribution and thereby – I will not go into details here – give incentives for damage prevention.

The principle of ‘dangerousness’ (*Gefährlichkeit*) is a key element in understanding the current status of strict liability in Austria and Germany.<sup>13</sup> As I go on to show in the following sections, ‘dangerousness’ served *firstly*, as a political justification for the legislator to introduce strict liability provisions, *secondly* as a basis for creating new strict liability cases by the Austrian judicatory and, *thirdly*, as an element introduced by academics to draft a blanket clause for the German as well as Austrian Civil Code that has yet to be implemented by the legislator.

## A The starting point: the Prussian Railway Operators Act

The first ever legislative act on strict liability was introduced by the Prussian state for railways in the year 1838.<sup>14</sup> The Prussian Railway Operators Act (*Preußisches Gesetz über die Eisenbahn-Unternehmungen*) not only regulated strict liability for railway companies, but at the same time also provided the first stock corporation provisions.<sup>15</sup> Notably, and contrary to the experience that legislators lag behind when it comes to technological change, the act came into force only four days after the first train ever went into operation between Berlin and Potsdam.<sup>16</sup>

§ 25 of the Prussian Railway Operators Act imposed strict liability on railway companies for all damage to persons or property of operating trains: ‘The company is liable to pay damages arising during train transportation to transported

<sup>11</sup> G Wagner, *Deliktsrecht* (14th edn 2021) ch 8/8.

<sup>12</sup> Koziol (fn 9) no 6/139 (emphasis in original).

<sup>13</sup> For a general overview, see eg W Rother, *Der Begriff der Gefährdung im Schadensrecht*, in: *Festschrift für Karl Michaelis* (1972) 250ff; monographically BC Steininger, *Verschärfung der Verschuldenshaftung* (2007).

<sup>14</sup> Lohsse (fn 1) 80ff; Scherpe (fn 1) 140ff; Zimmermann (fn 1) 1131.

<sup>15</sup> Cf E Kießling, *Das Preußische Eisenbahngesetz von 1838*, in: W Bayer/M Habersack (eds), *Aktienrecht im Wandel*, vol I (2007) 126ff.

<sup>16</sup> Lohsse (fn 1) 81; Zimmermann (fn 1) 1131.

goods and persons, as well as to other persons and goods, and the company can only exonerate itself from liability provided that the damage was caused through fault of the claimant or an unavoidable external chance. The dangerous nature of the undertaking as such does not constitute chance in this sense.<sup>17</sup>

The mastermind and father of the first provision was no less than Friedrich Carl von Savigny.<sup>18</sup> This is interesting insofar as Savigny only very briefly mentions cases of strict liability in his ‘Law of Obligations’. He refers to them as *obligations ex variis causarum figuris*.<sup>19</sup> Nevertheless, Savigny was not blind to the challenges of the industrial age that lay ahead.<sup>20</sup> As member of the Council of State (*Staatsrat*), he convinced the other members to alter the initial draft of the *Staatsministerium* that was still fault based. In the original draft, the company would only have had to pay damages if an employee had been at fault and no compensation was obtainable from the latter.<sup>21</sup> Savigny remained unconvinced by this approach, as it would often be impossible for the victim to single out the employee at fault.<sup>22</sup> Furthermore, the company should also be liable for the ‘faulty condition of the track or the equipment’ or the ‘inevitable nature of the enterprise itself’<sup>23</sup>. Thus, Savigny argues:

‘So far, it does not seem to have been possible to reduce the fire hazard of the fast-moving steam engines, which in England has frequently been the cause of considerable damage. In such cases no one can be blamed for anything. However, it would be unreasonable for the neighbouring landowners or travellers to let themselves be damaged in this way; rather, it seems just that the company would bear the damage resulting from the inevitable dangerousness of their trade, with

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17 § 25 of the Prussian Railway Operators Act (translation (partly) based on Scherpe (fn 1) 142 f): ‘Die Gesellschaft ist zum Ersatz verpflichtet für allen Schaden, welcher bei der Beförderung auf der Bahn, an den auf derselben beförderten Personen und Gütern, oder auch an anderen Personen und deren Sachen, entsteht und sie kann sich von dieser Verpflichtung nur durch den Beweis befreien, daß der Schade entweder durch die eigene Schuld des Beschädigten, oder durch einen unabwendbaren äußeren Zufall bewirkt worden ist. Die gefährliche Natur der Unternehmung selbst ist als ein solcher, von dem Schadensersatz befreiender, Zufall nicht zu betrachten.’

18 T Baums, Die Einführung der Gefährdungshaftung durch F. C. Savigny, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung (ZSS (GA)) 104 (1987) 277ff.

19 FC Savigny, Das Obligationenrecht als Theil des heutigen römischen Rechts, vol 2 (1853) 330f.

20 Baums, ZSS (GA) 104 (1987) 278.

21 Cf Baums, ZSS (GA) 104 (1987) 278.

22 In his written statement to the Staatsrat, Savigny writes (Baums, ZSS (GA) 104 (1987) 279): ‘Ebenso wird es dem Beschädigten oft unmöglich sein, bei einem augenscheinlich kulpösen Schaden das eigentlich schuldige Individuum auszumitteln. Für die Gesellschaft ist dies weit leichter.’

23 Savigny (see Baums, ZSS (GA) 104 (1987) 279).

the exception of any self-incurred damage, or such damage caused by external unavoidable causes.<sup>24</sup>

There are two striking aspects in Savigny's argumentation: In the operation of railways, damage may occur although 'nobody can be blamed for it'. However, the liability of the railway company can be ensured by justifying it on the basis of the 'inevitable dangerousness of their trade'. This, in a nutshell, is the basic idea for installing strict liability, still influential today, for Austrian and German law.

## B Enumeration, analogy and blanket clause

So, what has happened from the early days of continental European industrialisation through to the contemporary age of digitalisation? It would seem helpful for a comparative working tort lawyer to address this question by analysing the current status of regulation in the field of strict liability from a methodological standpoint. We must look at three aspects, namely, the almost total absence of any strict liability norms in the civil codes (i); the analogous application of provisions that order strict liability (ii); and the academic attempts to draft blanket clauses (iii).

The German Civil Code from 1900 (*Bürgerliches Gesetzbuch*, BGB) as well as the Austrian Civil Code dating from 1811 (*Allgemeines Bürgerliches Gesetzbuch*, ABGB) contain almost no practical relevant strict liability provisions.<sup>25</sup> § 833 BGB of the German Civil Code is a good example. It deals with a rather specific case, namely, the strict liability for animals which serve no commercial or professional purpose. This is basically the result of the agricultural lobby that successfully pressurised the legislator to amend the BGB in 1908.<sup>26</sup>

The current legal situation in both Austria and Germany is to be seen against this background: strict liability is regulated in an ever growing number of special

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24 Ibid, 279: 'So z.B. scheint es bis jetzt nicht gelungen, die Feuersgefahr bei den schnell bewegten Dampfmaschinen ganz abzuwenden, und in England ist auf diese Weise mehrmals großer Schaden entstanden. In einem solchen Falle nun kann keiner Person irgend eine Schuld beigemessen werden. Allein es ist doch auch nicht den benachbarten Grundbesitzern oder den Reisenden zuzumuten, sich auf diese Weise beschädigen zu lassen; vielmehr scheint es gerecht, daß die Gesellschaft den Schaden trage, welcher aus der unvermeidlichen Gefährlichkeit ihres Gewerbes hervorgeht, mit Ausnahme desjenigen Schadens, den der Beschädigte selbst verschuldet oder der durch äußere unabwendbare Ursachen entstanden ist.'

25 For Austria, see *H Koziol*, Österreichisches Haftpflichtrecht, vol I, Allgemeiner Teil (4th edn 2020) no C3/7; for Germany, see *P Heck*, Grundriß des Schuldrechts (1929) § 151 f.

26 Cf *G Wagner* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch (8th edn 2020) § 833 no 3.

statutes outside of the civil law codification, including areas such as rail transportation, cars, airplanes, nuclear power, and environmental pollution in general, etc.<sup>27</sup> It is on this basis that the German judicatory formulated what is known in German jurisprudence as the principle of enumeration (*Enumerationsprinzip*).<sup>28</sup> Behind this somewhat highfalutin formulation lies a simple rule: courts should not create new cases of strict liability by way of analogy.<sup>29</sup> Proponents of this approach believe in the distinct legislative prerogative of the *Bundestag* in the field of strict liability. Some German scholars have argued that the cases of strict liability must be predictable, and that the criterion of dangerousness is too vague and uncertain to justify analogy.<sup>30</sup> These arguments are hardly convincing. I would even go so far as to say that it is a source of embarrassment that German lawyers point to the enumeration principle while at the same time courts were, and still are, eager to develop a vast number of duties of care (*Verkehrssicherungspflichten*) in fault liability.<sup>31</sup> The tenacity with which both German mainstream tort law scholars and courts embrace the principle of enumeration is most likely not a matter of adhering to good arguments, but a matter of path-dependency on an all too often repeated standpoint.

The Austrian judicatory took a much more convincing approach, as it accepted that strict liability laws can be applied analogously.<sup>32</sup> Examples of case law from the Austrian Supreme Court of Justice (*Oberster Gerichtshof*, OGH) range from the development of a liability of factory owners for emitting dangerous flue gas<sup>33</sup> or, in cases of a racehorse<sup>34</sup> in action. The decisive factor for the Austrian courts seems to be the evaluation of the dangerousness and the comparability of an existing specific, strict liability norm in the case at hand.<sup>35</sup> This is not the place

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<sup>27</sup> For a general, comparative overview, cf *Koziol* (fn 10) 217, 220ff. for Austria, see *BA Koch/H Koziol*, Austria, in: *BA Koch/H Koziol* (eds), *Unification of Tort Law: Strict Liability* (2002) 13 no 18; *H Koziol/P Apathy/BA Koch*, *Österreichisches Haftpflichtrecht*, vol III, *Gefährdungs-, Produkt- und Eingriffshaftung* (3rd edn 2014); for Germany, see *J Fedtke/U Magnus*, Germany, in: *BA Koch/H Koziol* (eds), *Unification of Tort Law: Strict Liability* (2002) 52 no 13.

<sup>28</sup> BGHZ 55, 229, 234; *K Larenz/C-W Canaris*, *Lehrbuch des Schuldrechts*, Band II, Halbband 2, *Besonderer Teil* (13th edn 1994) 601.

<sup>29</sup> This standpoint was already established by the German Supreme Court (*Reichsgericht*, RG), cf RGZ 78, 171, 172 (*Graf Zeppelin Luftschiff*).

<sup>30</sup> See eg *Larenz/Canaris* (fn 28) 602.

<sup>31</sup> For a general overview see *Koziol/Apathy/Koch* (fn 27) A10 no 1ff.

<sup>32</sup> Cf *H Koziol*, *Umfassende Gefährdungshaftung durch Analogie?* in: *Festschrift Wilburg* (1975) 173ff; *Koziol/Apathy/Koch* (fn 27) A10 no 1.

<sup>33</sup> SZ 31/26.

<sup>34</sup> 6 Ob 55/02 k, *ecolex* 2003, 95.

<sup>35</sup> Cf *Koziol/Apathy/Koch* (fn 27) A10 no 11.

to discuss the subtleties of how to construct and justify new legal rules by way of analogy. It is nevertheless important to mention two general points. *Firstly*, Austrian judges do not recklessly create new strict liability provisions out of thin air.<sup>36</sup> They rather cautiously develop new case law. *Secondly*, creating strict liability by way of analogy has its limitations.<sup>37</sup> In a world in which legislators tend to create highly detailed regulations, the margin for arguing in favour of an analogy shrinks. One example would be that, according to the German Environmental Liability Act (*Umwelthaftungsgesetz*), farms with 1,700 fattening pigs are subject to strict liability, whereas those with only 1,699 pigs are not.<sup>38</sup> By introducing the number 1,700, the legislator used its discretion to shape the scope of the Act. The reasons for choosing this number might be arbitrary – something which may be of concern to constitutional lawyers, but not to civil lawyers. All in all, creating new fields of strict liability by way of analogy can help recalibrate and fine-tune the system. This tool, however, does have limitations.

This leads me to the final methodological observation on how to regulate strict liability: blanket clauses.<sup>39</sup> The idea behind this approach is to introduce a general clause of strict liability into the civil code. Proposals for fixing the patchwork of the existing special statutes were formulated in the last fifty years for German law,<sup>40</sup> Swiss law,<sup>41</sup> Austrian law,<sup>42</sup> and, in recent years, on a broad basis, by European tort scholars.<sup>43</sup> None have so far succeeded. In Austria, in particular, an extremely controversial debate ensued.<sup>44</sup> Without tracing the lines of this conflict here, the two conflicting poles are easy to identify. The opponents of a blanket clause lament the lack of legal certainty, and the vagueness of the concept of dangerousness. The proponents of a blanket clause seek to remove the patchwork, and to establish no less than a just system of risk distribution.

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<sup>36</sup> Cf Koziol/Apathy/Koch (fn 27) A10 no 12.

<sup>37</sup> Wagner (fn 11) ch 8/23.

<sup>38</sup> This example is taken from Wagner (fn 11) ch 8/23.

<sup>39</sup> Koziol (fn 9) no 6/156ff; Wagner (fn 10) 1609.

<sup>40</sup> H Kötz, Haftung für besondere Gefahr, Generalklausel für die Gefährdungshaftung, AcP 170 (1970) 1ff.

<sup>41</sup> P Widmer/P Wessner, Revision und Vereinheitlichung des Haftpflichtrechts, Erläuternder Bericht, <[www.bj.admin.ch/dam/data/bj/wirtschaft/gesetzgebung/archiv/haftpflicht/vn-ber-d.pdf](http://www.bj.admin.ch/dam/data/bj/wirtschaft/gesetzgebung/archiv/haftpflicht/vn-ber-d.pdf)>.

<sup>42</sup> I Griss/G Kathrein/H Koziol, Entwurf eines neuen österreichischen Schadensersatzrechts (2005).

<sup>43</sup> Cf Wagner (fn 10) 1609.

<sup>44</sup> From an outsider perspective, see G Wagner, Reform des Schadensersatzrechts, Juristische Blätter (JBl) 2008, 2ff.



## C What about computers?

The enumeration principle, on the one hand, and the idea of a blanket clause, on the other, represent two different concepts as to how the legislator may address the principle question of liability without fault. In a legal system, strict liability is an essential instrument for implementing a powerful risk distribution mechanism. Its importance is likely to increase in the future as it provides a simple and efficient tool for distributing risks for damage without thereby blaming any human agent. Conceptionally, there is no difference to the trains in the 19th century. And Savigny's characterisation of railroad accidents, namely, that 'no one can be blamed for anything' is no less relevant in our times. As I see it, however, one question still remains open for discussion. How adaptable is the principle of 'dangerousness' in the age of digitalisation? Can we address and encompass within dangerousness the risks associated with automatisisation? According to a statement by Gunter Teubner in a recent conference lecture, risks associated with digital automatisisation do not have the same attributes as those cases we refer to when seeking to understand dangerousness in strict liability.<sup>45</sup> For Teubner, when autonomous systems act, there is no inevitability of damage, a high certainty of incidents as in road accidents, or enormous damage caused by nuclear incident. But how does he know? As yet, the question as to how our perception of risk and the way in which dangerousness of autonomous systems will evolve remains unanswered.

## III Defence

One cannot fully understand the function of strict liability in Austrian and German law as long as one overlooks existing reasons for defence. I shall begin with an overview of the different existing defences before going on to focus on two specific and important practical reasons: *force majeure* and inevitable events.

### A Systematising bases of defence

Austrian and German law have at least five chief reasons used as a defence in strict liability scenarios.<sup>46</sup> Historically, the oldest one is *höhere Gewalt*, *vis major*,

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<sup>45</sup> Teubner, AcP 218 (2018) 191ff.

<sup>46</sup> For Austria, see Koch/Koziol (fn 27) 25ff no 71ff; for Germany, see Fedtke/Magnus (fn 27) 162ff no 46ff.

Act of God or the King's or Queen's enemies. To juxtapose these terms is obviously highly problematic since doing so frequently triggers very different images, concepts and ideas in the heads of jurists throughout the world.<sup>47</sup> However, essentially two different 'forces' are at stake: God and man. When talking about God in the field of damages, we refer not to the mighty hand of our 'Lord', but to the forces of nature, or simply natural hazards: hurricanes, floods, earthquakes, volcanic eruption, etc. By contrast, there are man-made events, such as wars, strikes, crimes, etc. Of course, in times of climate change, some would argue that even natural hazards are triggered by human acts or environmental abuses. Leaving aside these considerations, evidently the idea of what remains within the sphere of the controllable has changed as a result of technological advances. The Austrian jurist, Adolf Exner, illustrated this point in the following way: 'The old man considered lightning a form of *vis major*; we domesticated it and let it work for us like a pet.'<sup>48</sup>

Further reasons for a (total) release or distribution of liability are so-called unavoidable events, fault of the injured or third party, and consent. Not all reasons for defence are available in all strict liability scenarios. One can clearly identify a graduation among the cases based on the weightiness of the reasons for imposing strict liability. Strict liability is excluded by *vis major* in German law in cases involving trains, cars, water pollution, and environmental liability.<sup>49</sup> In Austria, for example, strict liability is excluded on the basis of *vis major* in cases of damage caused by electricity and gas. Furthermore, liability for vehicles is excluded where persons are able to prove that the injury was caused by an unavoidable event. *Vis major*, or the excuse of an 'unavoidable event', is not accepted in Austria and Germany in cases relating to nuclear energy<sup>50</sup> – this would have been possible under art 9 of the Treaty of Paris<sup>51</sup> – or for aircraft. Essentially, companies running airplanes and atomic installations cannot excuse themselves from the effects of war, unrest and terrorist attacks. This makes sense, as there must be incentives for such companies to take effective precautions.

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<sup>47</sup> For a detailed comparative as well as historical reconstruction, see *E v Caemmerer*, Entry "höhere Gewalt", in: F Schlegelberger (ed), *Rechtsvergleichendes Handwörterbuch des Zivil- und Handelsrecht des In- und Auslandes*, vol IV (1933) 239ff; *N Janssen*, *Die Struktur des Haftungsrechts* (2003) 607ff.

<sup>48</sup> *A Exner*, *Der Begriff der höheren Gewalt (vis major) im römischen und heutigen Verkehrsrecht* (1888) 15.

<sup>49</sup> § 7 subsec 2 German Road Traffic Act (*Strassenverkehrsgesetz*, StVG).

<sup>50</sup> For an exception, however, see § 26 subsec 1 sent 2 German Atomic Energy Act, *Atomgesetz* (AtG); for further details, see *S Fontana* in: *Beck'scher Online-Kommentar zum BGB* (BeckOGK-BGB), 1.11.2021, § 26 AtG no 8ff.

<sup>51</sup> Cf BeckOGK-BGB/*S Fontana*, 1.1.2019, § 25 AtG no 33ff.

By contrast, as a rule of thumb, fault as pertaining to the injured party is accepted in all strict liability scenarios in Austria and Germany.<sup>52</sup> Contributory negligence can lead to a reduction in the amount of damages awarded or even exclude compensation altogether.<sup>53</sup> Each of the statutes refers to the General Rule § 254 BGB of the German Civil Code or, in the case of Austria, § 1304 ABGB. Neither does fault of a third party exclude liability; rather, all contributors are jointly liable. Finally, consent may exclude liability.<sup>54</sup> However, the scope for exemption differs according to statute. This is not the place for a more detailed discussion.

## B Force majeure (*höhere Gewalt*) and inevitable events (*unvermeidbare Ereignisse*)

It is still necessary to elaborate a little further on the legal construction of *force majeure* and inevitable events. Contrary to Austrian law, in 2002, the German legislation abandoned inevitable events as a mechanism for excluding strict liability in all relevant constellations, such as the German Road Traffic Act, the German Liability Act or the Environmental Liability Act. I address these reasons in greater detail further on.

But allow me to first discuss *höhere Gewalt*. Today, *höhere Gewalt* or *force majeure* represents the sole exclusionary factor of strict liability in Germany. None of the statutes, however, define what is meant by *force majeure*. § 7 subsec 2 of the German Road Traffic Act, for example, simply formulates: ‘The duty to compensate is excluded if the accident is caused by *force majeure*.’ According to well-established German case law, *force majeure* can be defined as an exceptional external event, and cannot be avoided even with the utmost care.<sup>55</sup> In eras of technical advance, it is hard to find convincing examples. Naturally, snowstorms, landslides, falling rocks can be dangerous, but in most cases, they are not exceptional. Hurricane Kyrill in 2009 was not considered an act of God by the higher

<sup>52</sup> Cf for Austria: § 15 AtomHG; 7 EKHG; § 1 a subsec 4 RHPfG; for Germany: § 9 StVG; § 4 HPfG; § 27 AtG; § 34 LuftVG; § 11 UmweltHG.

<sup>53</sup> For Austria, see *Koch/Koziol* (fn 27) 25 no 79; for Germany, see *Fedtke/Magnus* (fn 27) 164 no 50; *C v Bar*, The Common European Law of Torts, vol 2 (2000) no 517 ff.

<sup>54</sup> For Austria, see *Koch/Koziol* (fn 27) 26 no 76 ff; for Germany, see *Fedtke/Magnus* (fn 27) 163 no 49.

<sup>55</sup> RGZ 101, 94, 95; BGHZ 7, 338, 339 = Neue juristische Wochenschrift (NJW) 1953, 184; BGH, Neue Zeitschrift für Verkehrsrecht (NZV) 1988, 100; *W Filthaut*, Fragen zum Begriff der höheren Gewalt i. S. v. §§ 1 II HaftPfG und 7 II StVG unter Berücksichtigung der neueren Rechtsprechung, NZV 2015, 161 ff.

regional court of Celle, because damage could have been avoided by rail closure.<sup>56</sup> Furthermore, terrorist attacks are frequently not considered as instances of *force majeure*.<sup>57</sup> Ostensibly, this standpoint seems counter-intuitive, since terrorist attacks normally occur as an exceptional event in a given society. However, this clearly depends on the circumstances. With a situation of heightened security following terrorist threats, the latter may also (sadly) become a frequent occurrence and thus no longer appear exceptional. By contrast, incidents caused in railway transportation due to suicide are considered as instances of *force majeure* – despite the fact that approximately 1,000 incidents occur each year in Germany.<sup>58</sup> German courts argue that such incidents are unavoidable for economic reasons, because the German *Bahn* is unable to counteract these tragic cases with reasonable care.<sup>59</sup>

It is especially in this specific field of law that the Roman paroemia *omnis definitio in iure civili periculosa est* (Dig 50. 17. 202 [Javolenus]) – every definition in civil law is dangerous – is of particular relevance. However, referring briefly to the basic definition of *force majeure* in German law, it would appear that one aspect may be particularly disturbing, namely, why do German lawyers include elements of liability for misconduct in the definition, and introduce a normative standard of care? Permit me to reiterate: according to well-established German case law, *force majeure* may be defined as an external event which is both exceptional and cannot be avoided in spite of utmost care being taken. The combination of an objective element in an exceptional event on the one hand, and a subjective element of care on the other, would appear surprising. How can an event be exceptional, when one may contemplate avoiding it? The reverse is far more likely: precisely because it is exceptional, one never considers avoiding it. The aforementioned Viennese scholar, Adolf Exner, published a brilliant monograph on this specific question in 1888.<sup>60</sup> He opposed the predominant subjective approach to defining *vis major* as established by the famous commercial lawyer, Levin Goldschmidt.<sup>61</sup> For Exner, *force majeure* is an event which, *firstly*, occurs outside of the sphere of an act causing personal injury or damage to property, and which, *secondly*, by the nature and force of its occurrence, obviously exceeds the

<sup>56</sup> OLG Celle, I-6 U 129/09, BeckRS 2001, 06510.

<sup>57</sup> Wagner (fn 11) ch 8/35.

<sup>58</sup> Filthaut, NZV 2015, 161, 164.

<sup>59</sup> OLG Hamm, NJW-RR 2005, 393.

<sup>60</sup> Der Begriff der höheren Gewalt (*vis major*) im römischen und heutigen Verkehrsrecht (1888).

<sup>61</sup> L. Goldschmidt, Das receptum nautarum, cauponum, stabulariorum, Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR) 3 (1860) 58ff, 331ff; on Goldschmidt, see v Caemmerer (fn 47) 246; R Zimmermann, Gastwirthaftung in Deutschland, in: Festschrift K Luig (2007) 291ff.

coincidences expected in the ordinary course of life.<sup>62</sup> Court proceedings should be relieved from unanswerable questions of standard of care, and the injured party should be granted an easy and efficient way to claim damages. Exner's book, which contains many visionary and thought-provoking passages, ought to be read and discussed again.

The concepts of excluding strict liability on grounds of *force majeure* and 'inevitable events' are intimately connected. In fact, as most Austrian scholars point out, the concept of inevitable events contains the constellation of *force majeure*.<sup>63</sup> This is a conceptually sound assessment, as long as one adheres to the subjective element defining *force majeure*. Historically, at least in Germany, the excuse of 'inevitable incidents' was introduced in 1908, partly owing to successful lobbying by the automotive industry.<sup>64</sup> Industry representatives feared harsh consequences for car owners and consequently – as the argument goes – obstacles to the development of the industry itself.<sup>65</sup> The concept of inevitable events was developed as a solution to delimit the scope of *force majeure*. Regulation came in the form of the German Road Traffic Act, and can be found still today in § 9 of the Austrian Act on Liability for Railways and Motor Vehicles (*Eisenbahn- und Kraftfahrzeughaftpflichtgesetz*, EKHG). § 9 subsec 2 EKHG reads as follows:

'An event is in particular considered unavoidable if its cause is attributable to the conduct of the person harmed, a third party not employed in the operation or an animal, provided that the operator or keeper, as well as the persons employed with consent over the course of the operation, exerted all due care in accordance with the circumstances of the case; and, furthermore, that the accident was not directly caused by an exceptional operational danger as induced by a third party not employed in the operation, or by an animal.'<sup>66</sup>

The person operating a car or railway has to prove utmost care in respect to the situation in question.<sup>67</sup> One acknowledged example of an inevitable event is a child who suddenly runs onto a road full of traffic.

In 2002, the German legislation abandoned the concept of 'unavoidable events' in the German Road Traffic Act and Liability Act on the grounds of two

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<sup>62</sup> Exner (fn 48) 86.

<sup>63</sup> See Koziol/Apathy/Koch (fn 27) A2 no 72.

<sup>64</sup> See Lohsse (fn 1) 93 ff.

<sup>65</sup> See Lohsse (fn 1) 94f; on the reappearance of the argument today, see G Wagner, *Produkthaftung für autonome Systeme*, AcP 217 (2017) 707, 759.

<sup>66</sup> Translation based on E Karner/K Oliphant/BC Steiniger, *European Tort Law*, Basic Texts (2nd edn 2018).

<sup>67</sup> Koziol/Apathy/Koch (fn 27) A2 no 71.

arguments.<sup>68</sup> *Firstly*, the legislator argued that it is dogmatically unsound to have recourse to an excuse within the system of strict liability based on considerations of standard of care.<sup>69</sup> *Secondly*, the position of children and persons in need of help should be strengthened. In view of children's irrational behaviour, or their inability to act safely in traffic situations, recourse to this excuse should no longer be available. I personally find the reasons given for the recalibration of strict liability convincing. Naturally, one should similarly further reflect on the conceptual basis of *force majeure* and objectify its elements.

## IV Intermediate areas of liability: of graduations, mixed-cases and grey zones

According to the classical position as formulated by Josef Esser, liability law is structured on a dual-lane structure (*Zweispurigkeit des Haftungsrechts*).<sup>70</sup> Liability is either fault-based or strict. By contrast, Helmut Koziol has rejected this approach. 'Treating tort law as a dual-lane phenomenon would be doubly wrong because it is by no means based only on the two liability grounds of fault and dangerousness but rather ... on a much larger number of factors for liability, not all of which are of sufficient weight in themselves to establish liability but only in combination with the others. Hence, it is more fitting to follow W Wilburg in speaking of a multiple-lane structure.'<sup>71</sup> Should one wish to draw an analogy to the science of colours, Koziol claims that there are more than two primary colours in the landscape of tort law. There are sound reasons for this claim.

Fault-based liability and strict liability may produce the same results when applied to a scenario in which there is a source of danger. Dangerousness has an effect on the evaluation of standards of care in fault liability.<sup>72</sup> The higher the risk and probability of its realisation, the greater are the efforts required to avert damage.<sup>73</sup> Nevertheless, practically important differences remain when it comes to the question of proving fault on the one hand, and causality of a dangerous installation for effected harm in strict liability on the other. Furthermore, it ought

<sup>68</sup> Cf G Wagner, Das Zweite Schadensersatzrechtsänderungsgesetz, NJW 2002, 2049, 2060 f.

<sup>69</sup> Bundestags-Drucksachen (BT-Drucks) 14/7752.

<sup>70</sup> J Esser, Die Zweispurigkeit unseres Haftpflichtrechts, Juristenzeitung (JZ) 1953, 129 ff.

<sup>71</sup> Koziol (fn 9) no 1/12.

<sup>72</sup> Koziol (fn 9) no 6/189.

<sup>73</sup> Wagner (fn 10) 1607: 'The more serious the danger, the closer fault-based liability moves toward strict liability'.

not to be overlooked that, even in cases of strict liability, duty of care plays a role when it comes to contributory negligence. Moreover, as we have already seen, subjective elements or standard of care also play a role in defining *force majeure* according to the prevailing opinion (see above under III 2). Two additional aspects complete the picture: The ‘invention’ of multiple duties of care in fault liability when combined with a reversal of the burden of proof might – when in the guise of fault liability – practically create de facto strict liability. And, finally, according to scholarly analysis<sup>74</sup> of product liability in Germany, there is also the reverse case, namely, that strict liability turns out to be fault liability: although the producer is liable for the defects of a product without fault, a defect may nevertheless only be assumed if the manufacturer can be accused of a breach of duty of care.

Last but not least, I would like to refer to Helmut Koziol’s observation, namely, that one may observe ‘different levels of strictness’ in strict liability.<sup>75</sup> As we have already seen, there are strict liability cases that admit of no defence: one is liable because one runs an atomic installation or airplane. No war, terrorist attack or tsunami will excuse one from paying damages. Conversely, liability is possibly excluded by a defence. ‘[T]his already brings liability based on danger very much into the vicinity of fault-based liability’<sup>76</sup>. This assessment must, of course, turn out differently if, following Adolf Exner, one constructs *vis major* as a purely objective event.

## V Conclusion

In 2019, I visited an exhibition on Marc Rothko at the *Kunsthistorisches Museum*.<sup>77</sup> When entering the first room, I was struck by the simplicity of the paintings and the appearance of the rough oily surfaces. For some viewers, this is why they dismiss Rothko as unimportant, or even trivial. I had not yet quite made up my mind. Feeling a little tired, I then had a coffee beneath the museum’s huge cupola. By the time I re-entered the exhibition, the sun had come out again. Filtered through the skylights, it illuminated the room. I was amazed by the sudden difference in atmosphere. The colours of Rothko’s painting exhibited incredible intensity. It was then that I discovered just how refined the structures were. My impressions

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<sup>74</sup> G Wagner, AcP 217 (2017) 707, 711; see also, questioning the classification, Koziol (fn 9) no 6/202.

<sup>75</sup> Koziol (fn 9) no 6/191.

<sup>76</sup> Koziol (fn 9) no 6/191.

<sup>77</sup> S Haag/J Sharp (eds), Mark Rothko, Kunsthistorisches Museum (2019).

of Rothko may perhaps be comparable to strict liability – at first glance an apparently very simple mechanism. A closer inspection of its structure, though, reveals the rich variations available for handling risk distribution in society.