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Strict Liability in the Principles of European Tort Law: The Black Hole and Central Building Site

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Abstract: The rule on strict liability is regarded by many specialists as the central building site of the Principles of European Tort Law (PETL). The following contribution first gives a brief overview of the current state of the law in Europe regarding this area, which is of enormous importance in European practice. It then presents rationales for the introduction of strict liability with a precise proposal for a rule restating the current state of the law from a European-wide perspective, while, at the same time, allowing the courts sufficient flexibility in reaching a decision in individual cases.

I Introduction: the PETL's concept of strict liability

Alongside rules on liability for fault and on liability for others, the PETL provide rules on liability which is independent of fault. In the European jurisdictions, this liability bears different names: liability for risk or *Gefährdungshaftung*, *responsabilidade pelo risco*, *risico-aansprakelijkheid*; objective liability or *responsabilité objective*; causal liability or *Kausalhaftung*. In the English-speaking world, liability independent of fault is usually called 'strict liability', and this is also the terminology used in Chapter 5 (arts 5:101 and 5:102) and in art 7:102 PETL.

According to the PETL's basic norm in art 1:101 PETL, strict liability is one of three concepts for attributing liability in tort:

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Chapter 1. Basic Norm
Art 1:101. Basic norm
(1) A person to whom damage to another is legally attributed is liable to compensate that damage.
(2) Damage may be attributed in particular to the person
(a) whose conduct constituting fault has caused it; or
(b) **whose abnormally dangerous activity has caused it;** or
(c) whose auxiliary has caused it within the scope of his functions.[1]

The PETL's concept of strict liability is then developed in further provisions, the first one being art 5:101 PETL containing the following general clause:

Chapter 5. Strict liability
Art 5:101. Abnormally dangerous activities
(1) 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.
(2) An activity is abnormally dangerous if
(a) it creates a foreseeable and highly significant risk of damage even when all due care is exercised in its management and
(b) it is not a matter of common usage.
(3) A risk of damage may be significant having regard to the seriousness or the likelihood of the damage.
(4) This Article does not apply to an activity which is specifically subjected to strict liability by any other provision of these Principles or any other national law or international convention.

However, there is a fluid transition and a grey area[2] between strict liability and fault-based liability under the PETL, addressed in art 4:201 PETL:

Art 4:201. Reversal of the burden of proving fault in general
(1) The burden of proving fault may be reversed in light of the gravity of the danger presented by the activity.
(2) The gravity of the danger is determined according to the seriousness of possible damage in such cases as well as the likelihood that such damage might actually occur.

Due to strongly diverging opinions among the original members of the European Group on Tort Law (EGTL), strict liability under the PETL does not apply to 'matters of common usage', see art 5:101 para 2 lit b PETL, and thus has only a very narrow scope of application. As a consequence, there are many areas where most European

1 Emphasis added.
2 *BC Steininger*, Art. 4:201 PETL: Revisiting the Grey Areas between Fault-Based and Strict Liability (2023) 14 Journal of European Tort Law (JETL) 89.

jurisdictions apply strict liability *de lege lata*, whereas art 5:101 PETL does not. The EGTL thus added an opening clause in art 5:102 PETL providing:

> **Art 5:102. Other strict liabilities**
> (1) National laws can provide for further categories of strict liability for dangerous activities even if the activity is not abnormally dangerous.
> (2) Unless national law provides otherwise, additional categories of strict liability can be found by analogy to other sources of comparable risk of damage.

II The current state of the law in Europe – an overview

For an analysis and criticism of EGTL's concept of strict liability, it is useful to provide an overview of the current state of the law of strict liability in Europe.

Providing such a comparative overview of the state of the law with regard to strict liability in Europe is not an easy task. The situation could hardly be more 'confusing and dazzling', even in many national jurisdictions and even more so from a European perspective.[3] Most European jurisdictions have special laws and statutes establishing strict liability. These present considerable diversity regarding the particular activities covered, the conditions of liability, and potential exceptions. In some jurisdictions, strict liability has been developed by case law.[4] Examples of strict liability include the use of motorised means of transport, as well as facilities for the management, storage, processing and dispensing of hazardous substances, but also other substances, like water. Other jurisdictions have developed general clauses for strict liability.[5]

A Damage caused by motorised means of transportation

Most European jurisdictions apply strict liability for damage caused by motorised road traffic, railways, suspension railways, aircraft and transport on water.

3 *C von Bar*, Gemeineuropäisches Deliktsrecht, vol 2 (1999) no 331.

4 For the case of product liability, see *P Machnikowski* (in this vol, 31).

5 For (much) more detail, see *C Oertel*, Objektive Haftung in Europa (2010).

1 Road traffic

Liability for road traffic accidents remains fault-based in very few European jurisdictions. This is the case in *English*[6] and in *Irish*[7] law and in *Italy*, where the Civil Code imposes liability based on a presumption of fault. However, the courts of these jurisdictions have tightened the standard of care, leaving hardly any space for an excuse and exemption from liability.[8] The liability regime for road traffic accidents in the (old) *Belgian* Civil Code is also, in principle, fault-based.[9] However, an insurance scheme was introduced in 1989, disconnecting insurance coverage partly from the scope of liability under the Civil Code.[10]

In turn, many European jurisdictions have adopted a system of strict liability for damage caused by the typical risks of road traffic and its accidents. In *Luxembourg*, it is based on judge-made law.[11] In other countries, it has a statutory basis, sometimes in the civil codes, such as in *Polish*[12] or *Portuguese*[13] law, and sometimes

6 *CT Walton* (ed), Charlesworth & Percy on Negligence (14th edn 2018) nos 6–37; *R Bagshaw*, The Development of Traffic Liability in England and Wales, in: W Ernst (ed), The Development of Traffic Liability (2010) 13, 39 ff.

7 *B McMahon*/*W Binchy*, Irish Law of Torts (2nd edn 1990).

8 For example, *English* law, where every driver of a motor vehicle 'must drive in as good a manner as a driver of skill, experience and care, who is sound in mind and limb, who makes no error of judgement, has good eyesight and hearing, and is free from any infirmity', *Lord Denning* in Court of Appeal 30 June 1971, *Nettleship v Weston*, All England Law Reports (All ER) 1971, 3, at 586 (inexperienced novice driver). See also: Queen's Bench Division 7 February 1980, *Roberts v Ramsbottom*, All ER 1980, 1, at 7 (unforeseen stroke). The driver can only escape liability if his actions were completely beyond any foreseeability or controllability on his part, such as in the case of a sudden spastic seizure. See also House of Lords 8 October 1969, *Henderson v H E Jenkins and Sons*, Appeal Cases (AC) 1970, 282: The owner of a lorry was held to be at fault for causing an accident even though he did not know and could not reasonably have known of the defect in the brakes which caused the accident.

9 Art 1382 ancien Code Civil Belge (Old Belgian Civil Code, aCCB); art 5.146 Avant-projet de loi portant insertion des dispositions relatives à la responsabilité extracontractuelle dans le Code civil (Preliminary draft law on the insertion of provisions on extra-contractual liability into the Civil Code – 'Avant Projet').

10 Art 29 bis § 1 loi du 21 novembre 1989 relative à l'assurance obligatoire de la responsabilité en matière de véhicules automoteurs (Act of 21 November 1989 on compulsory motor vehicle liability insurance – 'loi du 21 novembre 1989').

11 *G Ravarani*, La responsabilité civile des personnes privées et publiques (3rd edn 2014) no 833.

12 Art 436 Polish kodeks cywilny (*Polish* Civil Code, Polish CC).

13 Art 503 ff *Portuguese* Código Civil (*Portuguese* Civil Code, Portuguese CC).

in special liability laws, such as in *Danish*,[14] *German*,[15] *French*,[16] *Greek*,[17] *Dutch*,[18] *Austrian*,[19] *Swiss*[20] and *Turkish*[21] law. In the *Nordic* jurisdictions, insurance schemes apply, at least for personal injury, based on a strict compensation regime.[22]

The strict liability and insurance solutions in the area of road traffic differ quite considerably from country to country. They vary, for example, in terms of the vehicles they cover: in most cases, they only apply to motorised vehicles (with some exceptions for less dangerous vehicles[23]), except in *Italian* and *Portuguese* law. Here, strict liability also applies to bicycles (with the exception of bicycles operated by hand, used by paraplegics for example).[24] Other legal systems, such as *Belgian*,[25] *Austrian*[26] and *Portuguese*[27] law, include both road and rail vehicles in their scope of application. In *Polish* law, all 'mechanical means of transport propelled by natural forces' fall under strict liability. This includes land, water and air vehicles.[28]

14 § 101 ff of the *Danish* Færdselsloven (Road Traffic Act).

15 § 7 ff Straßenverkehrsgesetz (Road Traffic Act, StVG).

16 Art 6 Loi n° 85–677 du 5 juillet 1985 tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation (Act no 85–677 of 5 July 1985 to improve the situation of victims of traffic accidents and to speed up compensation procedures – *Loi Badinter*).

17 Art 1 *Greek* Motor Vehicle Liability Act (GMVLA).

18 Art 185 Wegenverkeerswet 1994 (Road Traffic Act 1994).

19 § 1, 2nd alternative Eisenbahn- und Kraftfahrzeughaftpflichtgesetz (Railway and Motor Vehicle Liability Act, EKHG).

20 Art 58ff Straßenverkehrsgesetz (Road Traffic Act, SVG).

21 Art 85ff Karayollari Trafik Kanun (*Turkish* Road Traffic Act, TRTA).

22 *Sweden: H Witte*, Report on the legal situation in Sweden, in: C von Bar (ed), Deliktsrecht in Europa (1993) 44f, 49–51; *Norway: P Lødrup*/*V Hagstrøm*, Report on the legal situation in Norway, in: C von Bar (ed), Deliktsrecht in Europa (1993) 55 f.

23 *Belgian* law excludes self-propelled wheelchairs, art 29bis § 3 loi du 21 novembre 1989. German (§ 8 no 1 StVG) and Austrian (§ 2 para 2 sent 2 EKHG) law exclude particularly slow-moving vehicles. Swedish law excludes, among other things, motor-driven vehicles driven by walkers, vehicles operated on fenced territory and motor-driven tools not subject to registration, § 1 sent 2 Trafikskadelag (Road Traffic Accident Act).

24 For *Italian* law*: A Thiene*, Art. 2054, in: G Cian/A Trabucchi (eds), Commentario Breve al Codice Civile (15th edn 2022) para II. For *Portuguese* law: *JS Monteiro*/*RM Ramos*/*HE Hörster*, Report on the Legal Situation in Portugal, in: C von Bar (ed), Deliktsrecht in Europa (1993) 16.

25 Art 29bis § 1 paras 1 and 2 loi du 21 novembre 1989.

26 See the title of the EKHG: Railway and Motor Vehicle Liability Act.

27 *Portuguese* law does not even conceptually distinguish between these vehicles, art 503 Portuguese CC.

28 *J Poczobut*, Report on the Legal Situation in Poland, in: C von Bar (ed), Deliktsrecht in Europa (1993) 26.

If two or more motorised vehicles collide, the solutions applied in European countries differ considerably once again.[29] Some jurisdictions immediately exclude this situation from the scope of strict traffic liability and assign it to fault liability. Others combine strict liability with fault-based liability, ultimately distributing the damage between the parties according to the degree of fault on both sides.

2 Transport by railway

Rail transport is another area where many European jurisdictions have enacted strict liability regimes.

Italian law is an exception, applying fault-based liability. Further, *Italian* courts even refuse to tighten the standard of care or the burden of proof.[30] In *English* law, publicly licensed railway operators are only liable on the basis of *negligence*.[31] The High Court has rejected[32] the application of strict liability based on the *rule* of *Rylands v Fletcher*.[33] As an exception, today without practical relevance, a special *English* Act from 1905 imposes strict liability for fires in fields next to a railway line caused by sparks from steam locomotives.[34]

In contrast, many European jurisdictions impose strict liability on vehicles operated on rail for any damage caused by the specific risks of railway operations. The *Polish* Civil Code, for example, applies its strict liability to all undertakings or installations 'operated by means of natural forces (steam, gas, electricity, liquid fuels, etc[35])' – and thus also to railway vehicles.[36] The *Portuguese* Civil Code imposes strict liability on all land vehicles,[37] which includes railways and underground trains.[38]

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29 More on the legal situation of strict road traffic liability in collisions: *K Ludwichowska-Redo*, Drive (back) into lane 5:101? A few remarks on the future of road traffic liability within PETL (2023) 14 JETL 99, 108f.

30 Corte di Cassazione 30 January 1980, Massimario del Foro italiano (Mass foro it) 1980, no 725. The Court states that in the event of a collision between a tram and a motor vehicle, the fault of the tram driver must be proven on the basis of the specific circumstances of the individual case.

31 *Sir Cockburn CJ* in Court of Exchequer Chamber 12 May 1860, *Vaughan v Taff Vale Rail Co*, All ER 1843 to 1860, 474.

32 Court of Queen's Bench 24 June 1868, *Jones v Festiniog Railway Company*, All ER 1861 to 1873, at 1998.

33 *Rylands v Fletcher* (1868) Law Reports (1st Series) LR 3 English & Irish Appeals (HL) 330.

34 Railway Fires Act 1905, amended by Railway Fires Act (1905) Amendment Act 1923.

35 Art 435 § 1 Polish CC.

36 *B Lewaszkiewicz-Petrykowska*, La responsabilité délictuelle fondée sur le principe du risque, in: G Weick (ed), Entwicklung des Deliktsrechts in rechtsvergleichender Sicht (1987) 188.

37 Art 503 *Portuguese* CC.

38 The fact that it was the clear intention of the Portuguese legislator to subject the railway operator or carrier to the strict liability of art 503 Portuguese CC is clear from art 508 para 3 subpara 2 *Portu-*

Other strict liability regimes have been created specifically for the risks posed by rail vehicles or to the commercial railway undertaking. This is the case for *Belgian,*[39] *Swiss,*[40] *German,*[41] *Austrian*[42] and *Swedish*[43] law. *French* law applies the general clause of the liability of the keeper of things under art 1242 para 1 CCF to railway accidents.[44] The operator of cableways is in turn subject to strict liability under a special law.[45]

3 Aviation

Liability for personal injury or damage to property caused by aircraft is often regulated in international conventions and in special national legal regulations. A basic distinction is made between (contractual) accident liability law for passengers, baggage and air cargo and non-contractual liability for damage caused by collisions or crashes of aircraft.

Liability for passengers, baggage and air cargo is governed by the Montreal Convention of 28 May 1999 for the Unification of Certain Rules for International Carriage by Air (Montreal Convention), which entered into force on 4 November 2003.[46] It is now in force in 137 states.[47] The Montreal Convention applies a (contractual) strict liability regime in the case of accidents occurring in connection with the international carriage of persons, baggage or cargo by aircraft.

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guese CC, which explicitly mentions railways in the context of the maximum liability provisions for strict liability for land vehicles.

39 Art 29bis § 1 para 2 loi du 21 novembre 1989 – 'véhicule automoteur lié à une voie ferrée'.

40 Art 40b Eisenbahngesetz (Railway Act, EBG).

41 § 1 Haftpflichtgesetz (Liability Act, HaftPflG).

42 § 1 EKHG, covering also ski-lifts, § 1 first alternative EKHG and § 2 para 1 sent 1 EKHG in conjunction with §§ 1, 2 no 3 Seilbahngesetz 2003 (Cableway Act 2003).

43 § 17 Järnvägstrafiklag (2018:181) (Railway Traffic Act).

44 Cour de Cassation (Cass) 15 March 2001, Bulletin civil (Bull civ) 2001 II, no 56; Cass 27 February 2003, Bull civ 2003 II, no 45.

45 Art 6 Loi du 8 juillet 1941 relative aux servitudes de survol au profit des téléfériques; Ordonnance n° 2015–1495 du 18 novembre 2015 relative à l'instauration de servitudes d'utilité publique pour le transport par câbles en milieu urbain.

46 At European level, some rules were anticipated, extended and supplemented to EU internal flights in Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents [1997] Official Journal (OJ) L 285/1, as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents [2002] OJ L 140/2. Currently, these regulations apply in parallel.

47 The Montreal Convention coexists with the Warsaw Convention for the Unification of Certain Rules for International Carriage by Air of 12 October 1929.

In scenarios not covered by the Montreal Convention, most national legal systems in Europe apply strict liability regimes to damage caused by the specific risks of aviation. One exception is *Dutch* law which, save for international conventions, applies general fault liability in the field of aviation.[48] In most other jurisdictions, strict liability applies. This is the case in *German*,[49] *English*,[50] *French*,[51] *Austrian*,[52] *Swiss*,[53] *Spanish*,[54] *Danish*[55] and *Portuguese*[56] law. In addition, the 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome Convention 1952)[57] establishes a strict liability regime, which has been ratified, inter alia, by *Belgium*, *Italy*, *Luxembourg*, *the Republic of Moldova*, *the Russian Federation* and *Spain*.

It is interesting to observe the diverse legal situation in Europe when aircraft collide in the air. *German* and *Austrian* law still apply the strict liability regime, but the extent of the claim for damages depends on the extent to which the damage was predominantly caused by fault attributable to one or the other aircraft.[58] *French* law excludes collisions from the scope of the special strict liability regime and refers to the general rules on tort liability.[59] This leads, for example, to the rules on the strict liability of the keeper of a thing according to art 1242 para 1 French Civil Code,[60] although it is argued in the literature that fault-based liability should apply instead.[61]

48 *R Clenton*, Aansprakelijkheid en schadevergoeding als nasleep van luchtvaartongevallen (1993) Nederlands juristenblad (NJB) 621ff. Instead, the general fault liability of Dutch law applies, art 6:162 Burgerlijk Wetboek (Civil Code – BW); strict liability for defective property (art 6:173 BW) is explicitly not applicable to aircraft, cf art 6:173 para 3 BW.

49 § 33 ff Luftverkehrsgesetz (LuftVG).

50 Sec 76 para 2 Civil Aviation Act 1982.

51 Art L6131-2 Code des Transports (Transport Code).

52 § 148 ff Luftfahrtgesetz (Aviation Act, *Austrian* LFG).

53 Art 64ff Luftfahrtgesetz (Aviation Act, *Swiss* LFG).

54 Art 119ff Ley de Navegación Aérea (Air Navigation Act).

55 § 127 Lov om Luftfart (Aviation Act).

56 Art 10 Decreto-Lei no 321/89 de 25 de Setembro Institui a obrigatoriedade de realização do contrato de seguro na actividade de transporte aéreo (Decree-Law on the obligation to conclude an insurance contract in aviation) and art 40 Decreto-Lei n° 238/2004 de 18 de Dezembro regime jurídico aplicável à utilização de aeródinos de voo livre e ultraleves (Decree-Law on the use of ultralight aeroplanes – Decree 238/2004) (Liability for damage caused by ultralight aircraft).

57 In 1978, the Rome Convention was modified by a 1978 Montreal Protocol.

58 *Germany:* § 41 para 1 sent 2 LuftVG; *E Giemulla*, Die Haftung bei der Verwendung von Luftfahrzeugen, in: W Schwenk/E Giemulla, Handbuch des Luftverkehrsrechts (5th edn 2019) no 265; § 154 para 1 sent 2 of the Austrian LFG.

59 Art 6131-1 Code des Transports.

60 Cour de Cassation 20 June 1973, Bulletin des Arrets de la Chambre Civile de la Cour de Cassation (Bull civ) 1973 II, no 200; *G Viney*/*P Jourdain*, Les conditions de la responsabilité (4th edn 2013) no 653 with further refs; *J-P Tosi*, Responsabilité aérienne (1978) 265.

61 *Tosi* (fn 60) 265f with further refs.

4 Transport on water

For transport by sea, several international conventions provide for strict liability for damage caused by the carriage of hazardous substances by sea. Other international conventions and national liability regimes provide for fault-based liability when ships collide. Finally, some rules in national jurisdictions establish strict liability for damage caused by transport at sea or on waterways.

For maritime transport, strict liability regimes exist for some typical specific sources of danger that can emanate from ships when travelling at sea. Firstly, there is the International Convention on Civil Liability for Oil Pollution Damage.[62] Secondly, in 1996, the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea[63] was adopted. Further, an international convention of 2001 concerns civil liability for damage caused by bunker oil spills.[64] The shipowner's liability is strict in each case: they are liable for the damage caused by a hazardous substance which was on board at the time of the harmful event.[65]

Ship collisions, on the other hand, are usually subject to fault-based liability. Examples are the Brussels Convention of 23 September 1910 for the Uniform Determination of Rules Relating to Collisions between Ships.[66] For ship collisions on inland waters, *French* law[67] applies the fault-based liability provided for in the Convention Relating to the Unification of Certain Rules Concerning Collisions in Inland Navigation.[68] Furthermore, *German*[69] and *Austrian*[70] law provide for fault liability.

62 Brussels, 29 November 1969, revised by amending protocols in 1984 and 1992 where the Convention was renamed 'International Maritime Organization Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969'.

63 London, 3 May 1996.

64 International Convention on Civil Liability for Bunker Oil Pollution Damage, London, 23 March 2001.

65 Art 3 para 1 of the Oil Pollution Convention; art 3 para 1 of the Bunkers Convention; art 7 para 1 of the HNS Convention.

66 Text at: <http://www.admiraltylawguide.com/conven/collisions1910.html>.

67 Geneva, 15 March 1960, Nations Unies, Recueil des Traités, 133.

68 Art L4131-1 Code des Transports.

69 § 92 ff Binnenschifffahrtsgesetz (Inland Navigation Act).

70 § 92 Gesetz betreffend die privatrechtlichen Verhältnisse der Binnenschifffahrt (Act on the Private Law Relations of Inland Navigation) in conjunction with § 734 ff Unternehmensgesetzbuch (Company Code).

B Operation of installations that pose particular risks to their environment

Further rules in Europe apply strict liability to dangerous installations. Here once again, the legal landscape is fragmented. One exception is the liability regime for the operation of nuclear power plants, which is widely dominated by international agreements.

In a first set of rules, strict liability regimes apply to installations used for the storage, transport or release of gases, vapours or liquids. Examples can be found in *Belgian* law (pipelines[71] and underground gas storage facilities[72]), *German* law (pipelines and installations for gases, vapours or liquids),[73] *English* law (water pipes operated by a publicly licensed water supplier (*undertaker*)[74] and underground gas storage facilities[75]), *Austrian* law (three laws: (i) installations for the transport or distribution of gas,[76] (ii) pipelines for the transport of goods (other than water and gas)[77], and (iii) installations for the transmission of natural gas[78]), *Portuguese* law (installations for the conveyance and distribution of gas[79]), *Swiss* law (pipeline installations for the transport of liquid or gaseous fuels[80]) and *Danish* law (installations for the production, transmission or distribution of gas or petroleum[81]).

71 Art 13 of the *Belgian* Loi du 12 avril 1965 relative au transport de produits gazeux et autres par canalisations (Act of 12 April 1965 on the transport of gaseous products and others through pipeline installations). The law was repealed in the Walloon part of Belgium by a Walloon decree of 11 March 1999 with effect from 1 October 2002.

72 Art 13 of the *Belgian* Loi relative à la recherche et à l'exploitation des sites-réservoirs souterrains destinés au stockage de gaz (Act of 18 July 1975 concerning the exploration and operation of underground gas storage facilities). The law was repealed in the Walloon part of Belgium by a Walloon decree of 11 March 1999 with effect from 1 October 2002.

73 § 2 HaftPflG.

74 Sec 209 para 1 Water Industry Act 1991.

75 Sec 14 Gas Act 1965.

76 § 1a Reichshaftpflichtgesetz (*Austrian* Act on Liability, RHPflG).

77 § 10 in conjunction with § 1 Rohrleitungsgesetz (Pipelines Act, *Austrian* RLG).

78 § 48 Gaswirtschaftsgesetz 2011 (Gas Industry Act, GWG).

79 Art 509 para 1 *Portuguese* CC.

80 § 33 para 1 Rohrleitungsgesetz (Pipelines Act, *Swiss* RLG).

81 § 7 of the Lov om naturgasforsyning (Natural Gas Supply Act, Act no 294 of 7 June 1972); § 5 para 1 of the Lov om etablering og benyttelse af en rørledning til transport af råolie og kondensat (Act on the Establishment and Use of a Pipeline for the Transport of Crude Oil and Condensate, Act no 291 of 10 June 1981); §§ 23 para 1 and 28 para 1 Lov om vandforsyning m.v. (Water Supply Act, Legal Notice no 337 of 4 July 1985). Source: *von Bar* (fn 3) no 334.

A second set of strict liability laws in Europe covers installations in connection with electrical energy. In *German*[82] and in *Austrian*[83] law, strict liability applies to damage caused in connection with electric power line installations. Further examples are found in *Swiss* law (low- or high-voltage installations[84]) and in *Portuguese* law (installations for the transmission and distribution of electricity[85]). *German*, *Austrian* and *Portuguese* law also apply strict liability to defective electricity installations.[86] Other special legal norms imposing strict liability for damage caused by installations for the production, transmission or distribution of electrical energy exist in *Danish*,[87] *Finnish*[88] and *Swedish*[89] law.

Third, strict liability is applied to installations which are dangerous for the environment. *German* law applies strict liability to specific, exhaustively enumerated installations likely to harm air, soil or water,[90] and another law provides for strict liability for installations that are hazardous to water.[91] *Austrian* law imposes strict liability for installations that cause air pollution harmful to forests.[92]

Nuclear installations are in a category of their own with respect to installations which are subject to strict liability. Because nuclear accidents potentially affect many States, international conventions govern this matter, one example being the Convention of 29 July 1960 on Third-Party Liability in the Field of Nuclear Energy (Paris Convention) amended by the Additional Protocols of 28 January 1964, of 16 November 1982 and of 12 February 2004 (entry into force: 1 January 2022).[93] The other important convention is the Vienna Convention on Civil Liability for Nuclear Damage dated 21 May 1963 in the version of the Protocol of 12 September 1997. By a Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988, the benefits of these special regimes of civil liabi-

82 § 2 HaftPflG.

83 § 1a RHPflG.

84 Art 27 para 1 Elektrizitätsgesetz (Electricity Act, EleG).

85 Art 509 para 1 Portuguese CC.

86 § 2 para 1 sents 2 and 3 of the *German* HPflG; § 1a para 1 sents 2 and 3 RHPflG; art 509 para 1 2nd clause *Portuguese* CC.

87 § 17 Lov om elektriske stærkstrømsanlæg og elektrisk materiel (Act on Electrical Power Installations and Electrical Equipment, Act no 251 of 6 May 1993). Source: *von Bar* (fn 3) no 334.

88 Sec 99 Sähköturvallisuuslaki (Electrical Safety Act, FFS 1135/2016).

89 § 28 f Elsäkerhetslag (Electrical Safety Act, SFS 2016:732).

90 These are listed exhaustively in Annex 1 to this Act. The list includes approximately 100 different types of installations.

91 § 89 para 2 Wasserhaushaltsgesetz (Water Resources Act, WHG).

92 § 53 ff Forstgesetz (Forestry Act, ForstG).

93 Convention on Third-Party Liability in the Field of Nuclear Energy of 29 July 1960, as amended by the Additional Protocol of 28 January 1964, by the Protocol of 16 November 1982 and by the Protocol of 12 February 2004 (Paris Convention), consolidated version.

lity for nuclear damage were mutually extended to the beneficiaries of these instruments. Finally, a further Convention on Supplementary Compensation for Nuclear Damage, dated 22 July 1998 is intended to supplement the system of compensation provided by the two instruments mentioned before.

The Vienna and Paris Conventions impose strict liability for loss and damage caused by a 'nuclear incident' originating in a 'nuclear installation'[94] or caused by certain substances transported to or from a nuclear installation.[95] A nuclear incident is defined by the Paris Convention as 'any event causing nuclear damage or any series of such successive events having the same origin'.[96] Damage caused or suffered in a State not party to the Convention does not fall within the scope of the Conventions.[97] Fault in the sphere of the operator is not a prerequisite for their liability.[98] In return, both Conventions allow for the States that host nuclear installations to limit liability to maximum amounts. However, under the Paris Convention, such liability shall be no less than € 700 million,[99] and under the Vienna Convention, liability shall be no less than 300 million Special Drawing Rights (SDRs).[100] While national transposition laws in *Germany* and *Austria* provide for unlimited liability under the Paris Convention,[101] *France* applies a maximum liability for the operator of € 700 million for each nuclear accident and € 70 million if the damage was caused by specific nuclear installations with reduced risk.[102]

C Sports and leisure activities

Another area of application for strict liability are recreational and sporting activities.

94 Definitions: art 1 lit a no ii Paris Convention; art 1 para 1 lit j of the Vienna Convention.
95 Art 3 of the Paris Convention; art 2 para 1 lit b, c Vienna Convention.
96 Definitions: art 1 lit a no i Paris Convention. For the similar definition in the Vienna Convention: art 1 para 1 lit l in association with lit k no i and ii.
97 Art 2 of the Paris Convention. The Vienna Convention had not given an explicit answer to this question. It was left to the decision of national law by art 3 of the Protocol of Amendment of 12 September 1997.
98 *OECD Council*, Exposé des Motifs of the Paris Convention, para 6; *IAEA*, The 1997 Vienna Convention, 9.
99 Art 7 of the Paris Convention in the version of the Protocol of 12 February 2004.
100 Art V of the Vienna Convention as amended by art 7 of the Protocol of 12 September 1997.
101 Sec 25 para 1 *German* Atomic Energy Law (AtomG).
102 Art 4 para 1 loi no 68–943, as amended by loi no 2006–686.

In some European jurisdictions, special liability provisions exist for the practice of hunting. This is the case in *Swiss* law,[103] *Spanish* law[104] and the laws of some *Austrian* provinces.[105]

The *Italian* courts consider hunting with firearms a dangerous activity subject to strict liability: art 2050 of the *Italian* Civil Code.[106] In the field of aviation sports, *Portuguese* law uses an explicit strict liability rule for damage caused on the ground by ultralight aircraft.[107] In other countries, such as *Germany*,[108] *France*,[109] *Austria*[110] and *Switzerland*,[111] strict liability in aviation sports follows on from the principles on strict liability for damage caused by aircraft on the ground. It is noteworthy that the strict liability rules in *France*[112] and in *Switzerland*[113] may give way to fault-based liability when pilots collide in the course of air sports.

In motor and cycle racing, strict liability is established in individual special acts, such as in *Swiss* law for car and cycle races.[114] In *German* law, accidents at motor races are subject to strict liability for road traffic accidents, but only in favour of the spectators,[115] and this does not apply between the racers themselves,[116] who are subject to fault-based liability.

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103 Art 15 para 1 Jagd(schutz)gesetz (Hunting Act, JSG). Although the wording of the provision does not mention fault, some academic voices read such a requirement as existing, eg see *A Keller*, Haftpflicht im Privatrecht, vol 1 (6th edn 2001) 352.

104 Art 33 para 5 Ley 1/1970 de caza (Act 1/1970 on hunting).

105 See Hunting Act for: *Burgenland*, § 105 ff; *Carinthia*, § 74 ff; *Lower Austria*, § 101 ff; *Upper Austria*, LGBl 32/1964, § 65 ff; *Salzburg*, LGBl 100/1993, § 91 ff; *Styria*, LGBl 23/1986, § 64 ff; *Tyrol*, LGBl 41/2004, § 54 ff; *Vorarlberg*, LGBl 32/1988, § 59 ff; *Vienna*, LGBl 6/1948, § 95 ff.

106 Corte di Cassazione 23 December 1968, no 4072, Giurisprudenza italiana (Giur it) 1969 I, 1, 2185; Corte di Cassazione 28 September 1964, quoted in *V Frattarolo*, La responsabilità civile per le attività sportive (1984) 190f.

107 Art 40 Decreto-Lei no 238/2004, de 18 de dezembro (Decree no 238/2004 on the use of ultralight airplanes).

108 § 33 ff LuftVG in connection with § 1 para 2 LuftVG.

109 Art 141-1 Code de l'aviation civile. See for application to a paragliding accident in *French* law, eg Cour d'appel de Toulouse 27 February 1996, cited in *P Le Tourneau*, Droit de la responsabilité 2004/2005 (4th edn 2004) no 8308.

110 § 148 ff *Austrian* LFG. See eg OGH 19 December 2005, 2 Ob 277/05g, unpublished, for the application of the *Austrian* LFG to a passenger accident during a tandem flight with a paraglider.

111 Art 64 ff *Swiss* LFG. This standard is also applicable to non-motorised aircraft, see *Keller* (fn 103) 268ff.

112 Cour d'appel de Grenoble 9 November 1998, La Semaine Judiciaire (Sem Jud) 2000, IV, no 1574.

113 BG 10 April 2008, 4.A_22/2008, unpublished, available at: <www.bger.ch>.

114 Art 72 SVG.

115 For example, RG 16 January 1936, RGZ 150, 73, 74 f.

116 Bundesgerichtshof (German Federal Court of Justice, BGH) 1 April 2003, Entscheidungen des BGH (Decicions of the Federal Court, BGHZ) 154, 316.

Finally, in the Alpine region, it has been discussed whether skiing is, or should be, subject to strict liability.[117] *French* courts apply the strict liability rule for the custody of things (art 1242 para 1 French Civil Code).[118] In *German*, *Austrian* and *Swiss* law, liability for fault is applied to accidents on the slopes.[119] The *Italian* legislator has introduced a special provision for the case of a collision of skiers. In this case, until evidence to the contrary is provided, both skiers are equally responsible for any injury caused.[120]

D General clauses on strict liability

A few jurisdictions in Europe have introduced general clauses on strict liability of varying scope.

French law has established a general clause for strict liability. Article 1242 para 1 CCF provides for the strict liability of the holder of a tangible object. This strict liability rule has been applied, among other things, to railways, ladders, toys, bowling balls and carpets.[121] There are no further requirements such as the defective nature of the object or particular dangerousness.[122] *Belgian* law provides for the strict liability of the owner of a defective object in art 1384 para 1 CCB.[123] Furthermore, there is special liability in *Dutch* law for movable objects which do not meet expectations related to their safety.[124]

117 *T Kadner Graziano*, The Distribution of Social Costs of Ski Accidents through Tort Law: Limits of Fault-Based Liability in Practice – and Alternative Regime (2016) 7 JETL 1

118 Cour d'appel Chambéry 15 February 1944, quoted from *W Rabinovic*, Les sports de montagne et le droit (1980) no 205.

119 For *German* law: BGH 11 January 1972, BGHZ 58, 40. For *Austrian* law: *F Zeilner*, Haftung und Schadensersatzansprüche bei Sportunfällen (2001) 32. For *Swiss* law: *HK Stiffler*, Schweizerisches Schneesportrecht (3rd edn 2002) no 20.

120 Art 19 legge 24 dicembre 2003, no 363: Norme in materia di sicurezza nella pratica degli sport invernali da dicesa e da fondo.

121 Cour de Cassation 15 March 2001, Bull civ 2001 II, no 56 (railways); Cour de Cassation 27 March 2003, Bull civ 2003 II, no 88 (ladders); Cour de Cassation 23 November 1978, Bull civ 1978 II, no 251 (toys); Cour d'Appel Limoges 12 December 1991, Recueil Dalloz (D) 1993, Recueil analytique Dalloz: sommaire (Somm) 336 (bowling balls); Cour de Cassation 28 April 1981, Bull civ 1981 I, no 137 (carpets).

122 *A Tunc*, La sécurité routière: esquisse d'une loi sur les accidents de la circulation (1966) 56f; *F Terré*/*P Simler*/*Y Lequette*, Droit civil, Les obligations (9th edn 2005) nos 765–767.

123 *Belgian* Cour de Cassation 26 May 1904, Pasacrisie belge (Pas) 1904 I, 246; *H Cousy*/*D Droshout*, Report on the legal situation in Belgium, in: H Koziol/BA Koch (eds), Unification of Tort Law: Strict Liability (2002) no 17.

124 Art 6:173 BW.

The civil codes of *Italy* and *Portugal* provide for general clauses on liability for dangerous activities.[125] In both legal systems, case law classifies activities as dangerous if they are dangerous 'in and of themselves or because of the means used'[126] or 'by their nature or because of the means used'.[127] Indicators of dangerousness are a threat of great harm and the probability of harm occurring.[128]

Finally, in the famous *Rylands v Fletcher*[129] decision, strict liability arises under the following – extremely narrow – requirements: it must be a thing from which, if it gets out of control, there is a high probability of danger ('*anything likely to do mischief if it escapes*'). Furthermore, the thing must have been transferred to or stored on land for the benefit of the owner of the land. The land must have been used in a *non-natural* way ('*non-natural use of land*'). The thing must have come from the defendant's land and escaped from there onto someone else's land. Finally, damage must have been caused by the object. Indeed, the extreme narrowness of this clause raises the question of whether it can still be described as a general clause. However, as this rule has influenced many discussions about the nature and scope of strict liability in Europe,[130] it shall not be omitted in this list of applications of strict liability.

III Criticism of the PETL proposal on the basis of the European legal situation

The EGTL followed the guiding idea of introducing a general clause for strict liability in the PETL.[131] However, in the Group's discussions, the advocates of a narrow scope of application of the general clause ultimately prevailed, inspired by the traditionally very narrow scope of strict liability in common law jurisdictions. The

125 *Italy*: Art 2050 ICC*; Portugal*: Art 493 para 2 *Portuguese* CC.

126 This is the wording of the ICC.

127 This is the wording of the *Portuguese* CC.

128 *G Schamps*, La mise en danger (1998) 40–43.

129 See above, fn 33.

130 See for example: *W van Boom*, Some Remarks on the Decline of Rylands v. Fletcher and the Disparity of European Strict Liability Regimes (2005) Zeitschrift für Europäisches Privatrecht (ZEuP) 619ff.

131 *BA Koch*/*H Koziol*, Generalklausel für die Gefährdungshaftung (2002) Haftung und Versicherung/ Responsabilité et Assurance (HAVE/REAS) 368; *B Koch*, The Work of the European Group on Tort Law – The Case of "Strict Liability" (2003) InDret, Working Paper no 129, 7 (available at: indret.com); *H Koziol*, Die "Principles of European Tort Law" der "European Group on Tort Law" (2004) ZEuP 234.

PETL's rule on strict liability thus contains only a 'lowest common denominator'[132], if at all.

Where the EGTL in art 5:101 para 1 PETL limit the scope of application of strict liability to *abnormally dangerous activities*, this narrow concept subsequently met with strong criticism.[133] The strict liability standard of the PETL does not contain any guidance as to when an activity would fulfil this criterion. In its explanations to art 5:101 para 2 lit b PETL, the EGTL states as a negative example that everyday activities, such as the operation of a pipeline network to supply the population with energy and water, would not fall within the scope of art 5:101 PETL because they would be '*matters of common usage*'.[134] Thereby, art 5:101 para 1 PETL fails to reflect many important areas of application for strict liability that can be observed in Europe. It has been criticised that everyday activities, such as, for example, the operation of a motor vehicle or the operation of a pipeline network for the supply of energy and water to the population, are not covered by the scope of strict liability under art 5:101 PETL, given that these activities are 'matters of common usage'.[135] However, as shown under section II above, many European jurisdictions apply strict liability in these areas. Doubts are therefore expressed as to whether 'abnormally dangerous activities' and 'matters of common usage' are meaningful criteria for describing today's scope of strict liability.[136] The overview on strict liability regimes in Europe provided above under section II illustrates in practical terms the criticism often expressed in the literature that the compromise proposed by the EGTL cannot satisfy as a signpost for future European tort law.[137]

132 *Koch* (2003) InDret no 129, 9.

133 *U Magnus*, Principles of European Tort Law, in: J Basedow/R Zimmermann/KJ Hopt (eds), Handwörterbuch des Europäischen Privatrechts (2009) 1190; *P Widmer*, Some reflections on the PETL and proposals for its revision (2024) 15 JETL 84.

134 *BA Koch*, Art. 5:101, in: European Group on Tort Law (EGTL) (ed), Principles of European Tort Law – Text and Commentary (2005) no 10.

135 *F Schlüchter*, Some remarks on the strict liability regime in Articles 5:101 and 5:102 PETL (2005) HAVE/REAS 260; *Koch* (2003) InDret no 129 (fn 132) 5.

136 *T Kadner Graziano*, Les Principes du Droit européen de la Responsabilité délictuelle (Principles of European Tort Law) – Forces et Faiblesses, in: B Winiger (ed), La Responsabilité européenne civile de demain/Europäisches Haftungsrecht morgen (2008) 219ff.

137 *Magnus* (fn 133) 1190.

IV An alternative proposal for the formulation of European principles of strict liability

Based on the analysis of the European legal situation and in view of the criticism of the compromise proposal of the EGTL, the question arises as to an alternative proposal for the regulation of strict liability in the PETL.

1 Arguments for strict liability

In order to develop a proposal for the formulation of European principles of strict liability, it is necessary to work out the reasons that can be identified in the European legal systems for the introduction of strict liability. It must be remembered that the basic principle in liability law is *casus sentit dominus*. This means that – in principle – it is the owner/victim who has to bear the damage to his or her person or property. He or she can only seek redress from a third party when there are specific grounds in law for his or her compensation. Only if such specific grounds can be identified in law does such a proposal have a chance of gaining consensus. The following arguments can be identified in European strict liability regimes, which justify the introduction of a liability rule which is independent from fault:

- operation of a hazardous activity;
- the correlation between the benefits and risks of a dangerous activity;
- the idea that the operator of a dangerous activity can better insure harm caused by their activities;
- the insurance concept;
- general interest in admitting dangerous activities; and
- compensation for structural disadvantages in evidence for the victim.

a Hazard

Hazard is the most widespread justification for the introduction of a strict liability regime in European jurisdictions. A person who creates a source of danger must be liable for the risks that emanate from it. European lawmakers emphasise various aspects in this regard.

Some strict liability regimes in Europe are justified with the abstract hazard created by a source of danger.[138] This means that a source of danger still leads to – unavoidable – damage even if the person who controls it has taken all reasonable care.[139] This justification is applied in many strict liability regimes, for example in the area of road, rail, air or maritime transport, or in the area of liability for industrial plants and liability for nuclear facilities, as well as in the area of sports and leisure activities.[140] In these cases, the danger characterising the hazardous activity must be 'special' or 'exceptional' or 'high'. This is the case when the danger noticeably exceeds the level of danger to which people are already exposed in their everyday interactions. Two aspects play a decisive role in this regard: the high probability of damage occurring, on the one hand, and the great extent of damage that may occur, on the other.[141]

In other cases, strict liability is applied to an object or action that is not actually dangerous, but which has acquired a concrete level of danger due to a defect or a fault. Examples are strict liability for disused pipeline systems that do not comply with the recognised rules of technology in *German*, *Austrian* and *Portuguese* law. Further, *Belgian* law links its strict liability of the custodian of a thing to a defect in the thing that causes the damage. *Dutch* law imposes strict liability for the condition of an object that does not meet the requirements that may be placed on the object in the given circumstances. However, comparative law literature points out that the condition of things falling short of safety expectations is close to fault and therefore weak as an argument for introducing strict liability. This aspect must be supported by other factors to make the keeper strictly liable.[142]

138 *Koch* (2003) InDret no 129 (fn 132) 2.

139 This is consistent with the EGTL's approach to a general clause of strict liability, which provides in art 5:101 para 2 lit a PETL that '[An activity is abnormally dangerous if] a) it creates a foreseeable and highly significant risk of damage *even when all due care is exercised in its management*' (emphasis added by the author).

140 See, for evidence on risk as a consideration for the introduction of strict liability in European legal systems as well as international conventions, *Oertel* (fn 5) 85f (motor vehicles), 133f (railways), 171 (air transport), 190 (watercraft and shipping), 210 (installations), 226 (nuclear installations), 233 (sports and leisure activities).

141 *von Bar*, Gemeineuropäisches Deliktsrecht (fn 3) no 315; *W van Gerven*/*J Lever*/*P Larouche*, Tort Law (2006) 579f; *BA Koch*/*H Koziol*, Comparative Conclusions, in: H Koziol/BA Koch (eds), Unification of Tort Law: Strict Liability (2002) no 50 ff.

142 *Koch*/*Koziol* (fn 141) no 57; *H Koziol*, Die Vereinheitlichung der Gefährdungshaftung in Europa, in: Österreichische Notariatskammer (ed), Festschrift für Nikolaus Michalek (2005) 224.

b Risk-benefit correlation

A further justification for strict liability is the correlation between the benefits and risks of a dangerous activity.[143] A person who engages in a dangerous activity for their own benefit should bear the costs of the damage (*cuius commodum, eius damnum*).[144] The idea of risk-benefit correlation can be found in the justifications for strict liability provisions in virtually all examined areas of strict liability.[145]

c Insurance concept

Further examples of strict liability in Europe justify their introduction with the idea that strict liability shifts the costs from a source of danger to the group of persons who benefit from this activity and who can better buy insurance for all damage caused by such activity.[146] This justification for the introduction of strict liability can be demonstrated in particular in the field of road traffic liability, railway liability and aviation.[147]

d General interest

Furthermore, some activities that cause inevitable danger for their environment bring benefits to the public nonetheless. Prohibiting such activities is considered a loss for society. This conflict of allowing an activity that is beneficial for the public but that inevitably causes damage to individuals is sometimes balanced by the introduction of a strict liability regime.[148] This consideration for the introduction of strict liability can be found, for example, in the field of road transport, railway liability and nuclear liability.[149]

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143 On these aspects as well *T Kadner Graziano*, The Purposes of Tort Law – Article 10:101 of the Principles of European Tort Law Reconsidered (2023) 14 JETL 23ff; *Widmer* (2024) 15 JETL 84.

144 *Koch*/*Koziol* (fn 141) no 71; *C van Dam*, European Tort Law (2006) 257.

145 See, for evidence on the risk-benefit correlation argument as a consideration for the introduction of strict liability in European jurisdictions, *Oertel* (fn 5) 86 (motor vehicles), 172 (aircraft), 190 (watercraft and shipping), 212 (installations), 233 (hunting).

146 *Koch*/*Koziol* (fn 141) no 72; *Koziol* (fn 142) 225; *van Dam* (fn 144) 257.

147 See, for evidence on the idea of insurance as a consideration for the introduction of strict liability in European legal systems, *Oertel* (fn 5) 87f (motor vehicles), 135f (railways), 172 (aviation).

148 *Koch*/*Koziol* (fn 141) no 74; *Koziol* (fn 142) 225; *van Dam* (fn 144) 257.

149 *Oertel* (fn 5) 88 (motor vehicles), 134 (railways), 226 (nuclear facilities).

e Compensation for structural disadvantages in evidence

In some cases, the lawmaker justifies the introduction of a strict liability regime with the argument that it is often difficult for the injured party to prove fault on the part of the tortfeasor.[150] This lack of proof on the part of the victim can result from various circumstances: for example, from the rapid course of the damaging event (such as in the case of motor vehicle accidents)[151] or from the complex factual situation, which puts the injured party at a structural disadvantage (such as in the case of complex piping or other industrial installations).[152]

2 Unilateral risk potential

When analysing the specific provisions of strict liability in European legal systems, it can be observed that strict liability is often limited to situations of non-reciprocal risks. This can be demonstrated with the example of liability for aviation or shipping. In the area of non-contractual liability in aviation, for example, the liability for damage caused by aircraft to third parties on the ground is strict.[153] On the other hand, a collision between two aircrafts is expressly excluded from strict liability. In contrast, many national laws and the treaty project, *Projet de convention relative à l'abordage aérien*[154] apply fault-based liability. In the area of maritime accidents, damage caused by the spillage of oil or other toxic substances is subject to strict liability, whereas collisions are resolved through fault-based liability. Similar tendencies can be observed in the area of road traffic liability[155] and in the area of liability for industrial plants.[156] This suggests that the application of strict liability is

150 See also *van Gerven*/*Lever*/*Larouche* (fn 141) 577; *R van den Bergh*/*L Visscher*, The Principles of European Tort Law: The Right Path to Harmonisation? (2006) German Working Papers in Law and Economics, Paper 8, 17f.

151 Thus, above all, in the justification of strict traffic liability by the *German* legislator in road traffic: see *Oertel* (fn 5) 87.

152 *Oertel* (fn 5) 211f.

153 See II.A.3 above, text accompanying fn 48 to 57.

154 French draft text of the *ICAO (International Civil Aviation Organization) Legal Bureau* in: ICAO (ed), Projet de Convention relative à l'Abordage aérien élaboré par le Conseil juridique de l'O.A.C.I en 1964 (1965) Revue Francaise De Droit Aérien et Spatial 101ff.

155 See *Ludwichowska-Redo* (2023) 14 JETL 99, 108f; *T Kadner Graziano*/*C Oertel*, Ein europäisches Haftungs- und Schadensrecht für Unfälle im Straßenverkehr? – Eckpunkte de lege lata und Überlegungen de lege ferenda (2008) 107 Zeitschrift für vergleichende Rechtswissenschaft (ZVglRWiss) 113, 128ff; *Oertel* (fn 5) 81ff.

156 *Oertel* (fn 5) 209.

particularly convincing in situations of non-reciprocal risks.[157] Thus, a comparison of the activity of the tortfeasor with that of the injured party must be made. The concept of non-reciprocal risks describes situations in which the tortfeasor exposes the injured party to a risk, whereas the victim did not expose the tortfeasor to any such risk.

3 Regulatory model for strict liability

Finally, the question arises as to whether particular instances of strict liability should be enumerated in a list or whether a general clause should be introduced, combined with a list of examples for its application. This question is closely linked to that of the degree to which decisions on strict liability should be taken by the legislator or the courts.

a Introduction of a general clause with standard examples instead of individual offences

One solution for shaping the scope of application of strict liability could be to grant the courts as much discretion as possible by means of a general clause formulated in abstract and general terms. However, this might lead to legal uncertainty. If judges are given the task of deciding on the introduction of new applications of strict liability, they would have to work out the criteria for strict liability in each individual case. As courts regularly do not have the human, financial and time resources for comprehensive comparative law research for strict liability, this risks leading to an inconsistent and contradictory legal situation from a European perspective.[158] The introduction of strict liability is a question that needs to be discussed in a political and legal-theoretical debate among all those actually and potentially affected by it.[159] This argues against resorting to a purely abstract general clause for strict liability. In contrast, it could instead provide arguments for the enumeration of individual cases of application for strict liability.

However, the fear of legal uncertainty should not reduce courts to the role of mere pronouncing bodies for the legislator. Judges should be given the opportunity to carefully adapt the scope of application of strict liability by analogy to a society

157 *GP Fletcher*, Fairness and Utility in Tort Theory (1972) 85 Harvard Law Review 537.

158 *W van Boom*, Some Remarks on the Decline of Rylands v. Fletcher and the Disparity of European Strict Liability Regimes (2005) ZEuP 619, 632f.

159 See *Lord Pearson*, in: House of Lords, 9 May 1972, *Morgans v Launchbury* [1972] 2 All ER, 606, 615.

that is constantly in social and technological motion. In doing so, the judge should not have to resort to a multitude of individual cases of application whose deviations in detail make it difficult for them to recognise and apply a common basic principle behind them.[160]

A solution to this conflict could be the formulation of a flexible basic principle of strict liability in a general clause, flanked by a catalogue of standard examples. These would provide guidelines for judges on how to further shape strict liability.[161] Such a model would have several advantages. First, standard examples provided by the legislator would bring a higher degree of legal certainty. The examples would enable those persons who engage in a certain activity or have certain installations, means of transport or substances under their care to assess which liability regime they will be exposed to. In turn, a general standard would offer sufficient flexibility to deal with technological developments and new sources of danger without a lengthy legislative process, because case law could extend the scope of application of strict liability to these new sources of danger in the given case. However, the judge would not be completely without assistance in his or her decision on the legitimacy of an analogy, because the standard examples would allow him or her to compare the specific situation to be assessed with the established areas of application of strict liability.

Finally, the legislator would have the possibility to regulate the scope of strict liability in its existing boundaries or to extend strict liability to completely new fields of application. It can be that certain forms of a strict liability regime require a decision by the legislator. One example of the shaping of existing areas of strict liability is the exclusion of certain vehicles from the strict liability regime in road traffic, as they have a lower risk potential due to their low mass or slowness (in *Belgian* law: self-propelled wheelchairs; in *German* and *Austrian* law: particularly slow-moving vehicles with the exclusion of autonomous vehicles).[162] One example of a legislative debate as to whether entirely new sources of risk should be subject to strict liability is the use of artificial intelligence (AI). The question of the appropriate liability regime for the use of AI in products or services of businesses is already being discussed at the European level. In its resolution of 20 October 2020, the European Parliament made recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL))[163]. This resolution of the European Parliament contains a proposal for a 'European Parliament and Council Regulation

160 Cf from *Austrian* law: *H Koziol*, Grundfragen des Schadenersatzrecht (2010) no 6/156ff.

161 In this sense also *Schamps* (fn 128) 870ff; *G Wagner*, Basic Structures of European Tort Law, in: R Zimmermann (ed), Basic Structures of European Tort Law (2003) 189, 286ff; *Oertel* (fn 5) 316f.

162 *Oertel* (fn 5) 55f.

163 OJ C 404/107–128.

on Liability for the Operation of Artificial Intelligence Systems'. Interestingly, art 4 of the proposal foresees strict liability for 'high-risk AI systems'. Apparently, the European Parliament had scenarios in mind where AI applications are used, among other things, in medical analysis or medical treatment, in automated public transportation (on land, on water or in the air) or in the automated 3D planning and printing of buildings and housing.[164] Nonetheless, it would be an interesting task to test the question of liability for artificial intelligence against common principles of strict liability based on comparative legal research.

b Flexible system

As shown above, several justifications can be identified in European legal systems for the introduction of strict liability for sources of danger.[165] This raises the question of how to express in a general clause the balancing act that lies behind the introduction of strict liability regimes in Europe. In this regard, the enumeration of individual cases of strict liability would have the advantage that the complicated balancing of the individual aspects arguing for the introduction of strict liability can be undertaken by the legislator, at least selectively. In order to make the various justifications behind the introduction of strict liability standards accessible to the judge and to counter the danger that a general clause only overemphasises individual aspects, such as the frequency and extent of the damage, a general clause could resort[166] to a flexible system (*bewegliches System*) in the sense of *Walter Wilburg's.*[167] It must be realised that the result of legal considerations – also in liability law – must be understood as the result of the interaction of various aspects.[168] The legislator is only responsible for determining the relevant aspects to be weighed up. It is then up to the judge to make his or her decision in the specific case at his or her discretion, guided by this flexible system.[169]

For the purposes of comparative law and the unification of law, the flexible system is said to have particular advantages, as it is suitable for developing rules in

164 Cf White Paper of the European Commission on Artificial Intelligence – A European approach to excellence and trust; COM (2020) 65 final.

165 See also *Koch* (2003) InDret no 129 (fn 132) 7.

166 *Oertel* (fn 5) 318.

167 See generally: *W Wilburg*, Die Elemente des Schadensrechts (1941); *W Wilburg*, Zusammenspiel der Kräfte im Aufbau des Schuldrechts (1964) 163 Archiv für die civilistische Praxis (AcP) 346.

168 *Wilburg*, Elemente (fn 167) 28; *Wilburg*, Zusammenspiel (fn 167).

169 *W Wilburg*, Die Entwicklung eines beweglichen Systems im bürgerlichen Recht, inaugural address of Walter Wilburg as Rector Magnificus of the Karl-Franzens University of Graz, 22 November 1950, 22.

which the aspects considered relevant in the different legal systems can be incorporated and in which as much consideration as possible can be given to the differently weighed evaluations.[170] For this reason, the EGTL, for example, has decided to use the flexible system as a methodological model for the PETL.[171] Thus, a flexible system seems suitable for describing the scope of strict liability in a general clause. This allows the legislator to provide the judge with the numerous justifications developed from comparative law, on the basis of which he or she can decide whether the individual case brought before him or her should actually be subjected to strict liability or not.

4 Proposed clause

Against this background, the introduction of the following general clause for strict liability would be conceivable:[172]

§ 1 Basis of liability
(1) A person to whom damage to another is legally attributable is liable to compensate that damage.
(2) Liability is to be based upon:
a) Fault
b) Creation of danger.

§ 2 Liability based on the creation of danger (strict liability)
§ 2.1 Basic principle
(1) Strict liability arises from the creation of, or the control over, a source of danger. The danger may derive from the particular nature or use of an object or from an activity, especially where damage is foreseeable even when exercising a reasonable degree of care.
(2) The damage resulting from a danger being created must be attributable. When assessing whether the damage resulting from a danger being created is attributable, the following aspects shall be taken into account:
a) The likelihood of damage occurring and the extent of the damage;
b) The danger created by the injuring party and the injured party respectively;

170 *H Koziol,* Das niederländische BW und der Schweizer Entwurf als Vorbilder für ein künftiges europäisches Schadensrecht (1996) ZEuP 587, 593f; *Koch* (2003) InDret no 129 (fn 132) 9; cf also *N Jansen*, Principles of European Tort Law? Grundwertungen und Systembildung im europäischen Haftungsrecht (2006) Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 732, 752ff; *Oertel* (fn 5) 319f.
171 *A Flessner*, European Private Law and the Movable System (2003) Juristische Blätter (JBl) 205; *Koziol*, ZEuP 2004, 234, 236.
172 German text in *Oertel* (fn 5) 321ff; English text in: *T Kadner Graziano*, Comparative Tort Law Cases, Materials, and Exercises (2018) 225f.

c) The possibility of attributing the negative consequences of the activity in question to those benefitting from it;
d) The possibility of spreading the negative consequences of the activity across all those carrying it out;
e) The interest in allowing activities which benefit the public good;
f) Insurability against risk of damage;
g) Any difficulties which typically arise for particular classes or categories of victims in establishing or proving fault.

§ 2.2 Examples
Damage which occurs as the result of a danger being created shall be attributed to the person having created the danger, in particular (but not limited to) where:
a) The damage in question was caused by a source of exceptional risk. An exceptional risk is present when the source of danger in question is particularly likely to cause damage or has the potential to cause particularly severe damage. Such a definition extends in particular to:
– the operation of land- or water-based vehicles, or aircraft;
– the operation of facilities for the storage or handling of substances having explosive, corrosive, toxic, radioactive or similar properties or being of large enough quantity to potentially cause serious damage;
– contact with explosive material, weaponry or other similar apparatus;
– mining activities; and
– sports activities which have the potential to cause serious damage due to the equipment used or speeds achieved.
b) The injuring party unilaterally exposed the injured party to a risk of damage without the latter producing an equal and reciprocal risk. Such definition extends in particular to damage inflicted by:
– a motor vehicle or train towards a pedestrian or cyclist;
– an aircraft towards persons on the ground;
– a motor vessel or a motor boat towards a swimmer;
– persons operating facilities within the scope of the second indent of § 2.2 (a) and persons owning or holding property in the vicinity; and
– persons hunting or doing sport in relation to spectators, other persons taking part in the event or innocent bystanders.
c) The risk was created in the course of a professional economic activity.

V Review of the proposal in light of the European legal situation

The above-mentioned clause would be better able to reflect the European legal situation described above – in cursory form – than the current art 5:101 PETL. As explained above, the criterion that the particularly dangerous activity should '*not be a matter of common use*' threatens to exclude areas of application of strict liability although they are frequently observed in European legal sys-

tems.[173] The suggested rule, which does not limit the scope of application to activities that are '*not a matter of common use*', allows, for example, to extend strict liability to damage caused by motor vehicles.

First of all, motor vehicles are a source of danger where, due to the speeds reached and the frequent confusion of traffic, damage is unavoidable despite the application of a *reasonable degree of care* (§ 2.1 (1) sent 2). This aspect alone speaks in favour of applying strict liability to damage caused by motor vehicles.

Further, the aggravated danger because of the risk of serious damage in accidents and the frequent number of accidents created by motor vehicles justify the attribution of that damage to the holder of the car as liable party even if no fault in causing the damage can be proven against him or her. However, the legal practitioner does not have to stop at this point but can also cite the other elements that speak in favour of the introduction of strict liability.

In any case, with respect to pedestrians and cyclists, the potential danger of the motor vehicle owner and driver will be *non-reciprocal.* In the event of an accident, a motor vehicle in motion and weighing several tonnes will, without doubt, inflict the most serious, and often fatal, injuries on a pedestrian. Conversely, a collision with a pedestrian often causes only minor damage to the motor vehicle and leaves the occupants unharmed.

Further, the introduction of strict liability for the owners of motor vehicles can be combined with the introduction of compulsory liability insurance. For the pedestrian, the risk of being hit by a motor vehicle is only one among many risks in everyday life. Conversely, a liability insurance system can very successfully distribute the damage created by road accidents among the community of motor vehicle users (this refers to § 2.1 para 2 lit c and f in the clause proposed above). This insurance community can make the damages, which are considerable in individual cases, more bearable for the individual through insurance premiums. Insurance companies can even control the risk they pose to the general public by cleverly structuring their premiums for particularly risky types of vehicles or groups of people.

Allowing individual motor vehicle traffic is also a desirable activity for society as a whole. Although it can be statistically proven that road traffic injures or even kills numerous people every year and causes considerable property damage, it should nevertheless not be banned. Therefore, the introduction of strict liability can help to make the use of motor vehicles bearable for society as a whole, despite their potential for harm (this refers to § 2.1 para 2 lit e in the clause proposed above).

Finally, the introduction of strict liability in road traffic could be supported by the fact that accidents often occur in a fraction of a second, and thus it is often

173 See II.A.1 above: Road traffic.

difficult for the injured party to prove the fault of one or the other party. This structurally disadvantageous situation for the injured parties can be countered by introducing strict liability (this refers to § 2.1 para 2 lit g in the clause proposed above). They receive compensation even if they would not have succeeded in proving fault for lack of suitable witnesses or other evidence.

This review might serve to demonstrate that the proposed concept for a general clause for strict liability, flanked by a catalogue of standard examples, might provide a valuable contribution to the EGTL's discussion about the scope and nature of strict liability in European jurisdictions.