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RISK AND STRICT LIABILITY:
THE DISTINCT EXAMPLES OF GERMANY,
THE US AND RUSSIA

Gert Brüggemeier

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
DEPARTMENT OF LAW

*Risk and Strict Liability:
The Distinct Examples of Germany, the US and Russia*

GERT BRÜGGEMEIER

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Abstract

Enlightenment, natural law and economic liberalism engendered the grand concept of modern private law. Nearly simultaneously the ongoing process of industrial revolution paved the path into another modernity. Its new paradigms were technical risks, enterprises and insurance. Insurability of losses caused by risky commercial activities created the demand for 'stricter' forms of liability beyond fault. The paper presents three different answers to these challenges to civil responsibility. Germany is but a prominent example for the continental EU member states with its mixed system of social insurance, special legislation on strict liability and general fault liability. The US adheres to the negligence system with only marginal corrections. The liability law of the new Russian civil code combines the French and German legal legacy with the revolutionary ideas of the 1922 code leading to two general clauses of quasi-strict and strict liability.

Keywords

Industrial revolution, technical risks, negligence, enterprise liability, strict liability, industrial accidents, railways, automobiles, aviation, hazardous activities, social insurance, liability insurance

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RISK AND STRICT LIABILITY: THE DISTINCT EXAMPLES OF GERMANY, THE US AND RUSSIA

*Gert Brüggemeier**

Sociological risk research distinguishes between the concepts of danger and risk. *Dangers* are the natural events, which have always imperilled mankind: tempests, wild animals on land and sea, epidemics, earthquakes and tsunamis. By contrast, *risks* are man-made contingent perils, in particular in relation to industrial or technical development.¹ The nineteenth Century industrial revolution² which began in Europe and the USA spread in different stages of development to the rest of the world and is now said to have led to *another modernity* – ‘risk society’ or ‘age of risk’.³ This development was of less influence on private law in general, especially contract law. For civil liability law, however, it was a clear watershed.

This has long been ignored. There was a long tradition of the (personal) law of liability prior to the industrial revolution. This was the classic delictual/tortious liability for human wrongdoing – fault-based liability. And there is an emerging bulk of (impersonal) law of liability after the industrial revolution. Its new paradigms are technical risks, enterprises and insurance. A societal mechanism of distribution of risks and losses is replacing the honourable culture of individual responsibility. The basis of this new risk pooling and liability channelling on risk taking enterprises is loss spreading by insurance – especially state social insurance and private third party (liability) insurance. Against this backdrop, “stricter” forms of liability came to the fore – quasi-strict enterprise liability and no fault-liability.⁴ Both types of industrial liability for the first time showed up archetypically in the German Imperial Liability Act (*Reichshaftpflichtgesetz – RHPfLG*) of 1871.⁵

Notwithstanding these social upheavals civil law in general and law of delict in particular of the continental European codifications adhere to their pre-industrial moral heritage: namely, Roman law (*iniuria/culpa*) and natural law. In a similar way the law of torts of the Anglo-American Common Law remained pre-industrial until the 20th Century. The social consequences of the industrial revolution radiated only very gradually and in differing forms into the private law of all old industrial countries or were accommodated by functional equivalents, such as loss spreading through insurance schemes.⁶

* Visiting Professor, European University Institute. Professor (em.) of Private Law and Comparative Law, Law Faculty, University of Bremen.

¹ N. Luhmann, *Soziologie des Risikos*, 1991; id., *Risk: A Sociological Theory*, 1993 (tr. R. Barrett); D. Lupton, *Risk*, 1999; G. Bechmann (ed.), *Risiko und Gesellschaft*, 2d edn 1997; see also J. Steele, *Risks and Legal Theory*, 2004.

² Cf. as locus classicus A. Toynbee, *Lectures on the Industrial Revolution of the 18th Century in England*, 1884; see also H. Heaton, *Industrial Revolution*, in 8 *Encyclopedia of Social Science* 3 (1934).

³ Cf. U. Beck, *Risiko-Gesellschaft. Auf dem Weg in eine andere Moderne*, 19..; id., *Risk Society*, 1992 (tr. M. Ritter); J. Simon, *The Emergence of a Risk Society: Insurance, Law and the State* (1987) 95 *Soc. L. Rev.* 61.

⁴ Especially on quasi-strict enterprise liability (comprising employers’ vicarious liability *and* liability of businesses for systemic fault with reversal of the burden of proof for „fault“) cf. Brüggemeier, *Haftungsrecht. Struktur, Prinzipien und Schutzbereich*, 2006, pp. 117-184; id., *Modernising Civil Liability Law in Europe, China, Brazil and Russia*, 2011, pp. 70.

⁵ See below in the text.

⁶ On Germany from an evolutionary economics point of view cf. M. Eckardt, *Technischer Wandel und Rechtsevolution*, 2001, pp. 272; for the US: K.S. Abraham, *The Liability Century*, 2008; as comparative-historical accounts cf. J.M. Kleeberg, *From Strict Liability to Workers Compensation*, 36 *Intern. Law & Politics* 53 (2003); M. Martin-Casals (ed),

“Strict liability” was such a new element in private law. Until today, the concept of strict liability for risks and its contours have remained nebulous. This contribution undertakes a comparative-historical approximation having regard also to the cultural underpinnings of the three different legal responses to identical societal challenges presented here.⁷

(Contd.) _____

The Development of Liability in Relation to Technological Change, 2010 and W. Ernst (ed), The Development of Liability for Traffic, 2009.

⁷ The insight that the perception of risk is a ‘cultural construct’ is another approach to understand these differences. Cf. M. Douglas/A. Wildavsky, Risk and Culture, 1982.

I. Germany – Risk Absorption through Social Insurance and Scattered *Gefährdungshaftung*

The notion of strict liability in civil law⁸ commonly understood as liability without fault comprises very different elements:⁹ *inter alia* contractual warranty; successors to the Roman law *actio ex recepto*;¹⁰ no-fault liability of employers for delicts/torts of employees’;¹¹ civil liability for sacrifice of assets;¹² neighbour-liability for nuisance;¹³ traditional Roman law no-fault liability (wild animals, things that fall from buildings);¹⁴ liability for defective products;¹⁵ and strict liability for risks of technical plants and facilities, regardless of their defectiveness.¹⁶ Here, *Gefährdungshaftung* as one element of the class of strict liability is used exclusively in the latter context as liability for technical-industrial risks. This *Gefährdungshaftung* is in its distinct German form the product of industrialisation: steam engines, mines, railways and other motorisation on ground, water and in the air.¹⁷ This new technical-industrial world with its industry- and transport-related accidents forced legal practitioners and legislatures to seek new regulatory strategies for dealing with these risks outside of the well-trodden paths of romanist-pandectist legal doctrine.¹⁸

In Germany, the first answer to industrial accidents was *Unternehmenshaftung* (enterprise liability) pursuant to § 2 *RHPflG* 1871,¹⁹ before 1884 the great new alternative concept of compulsory state insurance for accidents at workplace (replacement of liability with the principle of loss spreading)

⁸ In the common law strict liability is used as an umbrella term to lump together anything from near-absolute liability to little more than a reversed burden of proof. Cf., *inter alia*, Winfield & Jolowicz on Tort, 17th edn, 2006, at paras. 1-38.

⁹ As stock-takings for the Germanic laws cf. R. Bienenfeld, *Die Haftungen ohne Verschulden*, 1933; L. Lenz, *Haftung ohne Verschulden*, 1975; as actual comparative studies cf. F. Werro/V.V. Palmer (eds), *The Boundaries of Strict Liability in European Tort Law*, 2004; B. Koch/H. Koziol (eds), *Unification of Tort Law: Strict Liability*, 2002; and (monographically) G. Schamps, *La mise en danger: un concept fondateur d’un principe général de responsabilité*, 1998 (albeit without German law).

¹⁰ E.g. inn keepers’ liability in German law (§§ 701 BGB). On the Roman law’s *actio ex recepto* cf. M. Kaser, *Römisches Privatrecht*, vol. I, 2nd edn 1971, pp. 488; R. Ogorek, *Untersuchungen zur Entwicklung der Gefährdungshaftung im 19. Jahrhundert*, 1975, pp. 81.

¹¹ Ship owners’ liability (§ 485 Commercial Code – *Handelsgesetzbuch* (HGB)); § 3 (1) *Inland Navigation Act - Binnenschiffahrtsgesetz*; corporate liability for delicts of executives (§ 31 BGB).

¹² On this cf. Konzen, *Aufopferung im Zivilrecht*, 1969; Roth/Lemke/Krohn (ed.), *Der bürgerlich-rechtliche Aufopferungsanspruch als Problem der Systemgerechtigkeit im Schadensersatzrecht*, 2001.

¹³ See (historically) A. Thier, *Zwischen actio negatoria und Aufopferungsanspruch: Nachbarrechtliche Nutzungskonflikte in der Rechtsprechung des 19. Und 20. Jahrhunderts*, in U. Falk/H. Mohnhaupt (eds), *Das Bürgerliche Gesetzbuch und seine Richter (1896-1914)*, 2000, pp. 407; (actually) M. Wellenhofer, *Verschuldensunabhängige Haftung im Nachbarrecht*, in *Gedächtnisschrift M. Wolf*, 2011, pp. 323; (comparatively) J. Gordley (ed), *The Development of Liability between Neighbours*, CUP 2009.

¹⁴ Liability for animals (*actio de pauperie*); liability for things thrown or falling from buildings (*actio de deiectis vel effusis*). Cf. Kaser, *Das Römische Privatrecht* I, pp. 163, 610.

¹⁵ For the EU see Directive (85/374 EEC) on liability for defective Products, OJ L 210/19 of 7.8.1985; from a comparative historical point of view cf. S. Whittaker (ed), *The Development of Product Liability*, 2010.

¹⁶ Cf. the account of F. Dietz, *Technische Risiken und Gefährdungshaftung*, 2006, pp. 42-147.

¹⁷ Cf., *inter alia*, F.W. Henning, *Die Industrialisierung in Deutschland 1800 bis 1918*, 1993.

¹⁸ On this, cf. Eckardt, *Technischer Wandel*, pp. 205. See also L. von Stein, *Zur Eisenbahnrechtsbildung, 1872*, at 15: “Germany is sheerly unexhausted of treatises on Ulpian and Papinian, however the law of railways is completely unknown.”

¹⁹ See more on this below in the text.

came into force, a model which continental European states adopted successively.²⁰ The German answer to the “age of railways” was a sort of strict civil liability (1838/1871)²¹, out of which the modern *Gefährdungshaftung*²² developed. The form in which this liability answer was presented, was that of narrow *special legislation*. This relationship of rule and exception was underscored by the *BGB* legislator, when it insisted not to overload the *BGB* and its personal fault liability (subject paradigm) with special provisions of stricter liability.²³ Still today, this bias determines the relationship between the law of delict and *Gefährdungshaftung*. There followed incrementally with nearly each particular technological innovation a new special regulation:²⁴ Railway, automobile, aircraft, energy installations, atomic energy, liability of industrial undertakings for environmental damage,²⁵ and genetic technology²⁶. Strict liability of the manufacturer for defective products takes a special place internationally, *between* quasi-strict enterprise liability and *Gefährdungshaftung*. Nothing further is said on that theme here.²⁷

This *Gefährdungshaftung* of commercial risk takers has in the Germanic legal discourse been consistently justified with three arguments. 1. Social progress by technological innovations with their contingent potentiality of risk may only be bought at the price of a “guarantee liability” of the risk-taker. 2. Risk-taking enterprises can distribute the losses caused by risk exposure to others by spreading (insurance, prices, salaries); and 3. Enterprises can minimise risk through control and safety precautions.²⁸

²⁰ Inter alia France 1898. Also the common law jurisdictions of England and the USA pursued the path of special legislation, at least as far as accidents in the workplace were concerned: Workers’ Compensation Acts/Statutes (strict employers’ liability with compulsory liability insurance; abolition of the tort system): England 1897 (shifting in 1947 to a National insurance system); and - with some delay - USA 1910-1920. On the US see more below in the text.

²¹ To be more precise, it was a peculiar liability regime of un rebuttable presumption of fault (of the railway company or of its employees). For more detail on this subject see Brüggemeier, *Verschuldenshaftung, Unternehmenshaftung, Gefährdungshaftung*, in *Festschrift H. Rüßmann*, 2013, pp. 265.

²² The concept of *Gefährdungshaftung* (as strict liability for technical risks) was thoroughly unknown to the legal academia and to law practitioners during the 19th century. Things changed around the turn of the 20th century when in France strict liability for the ‘acts of things’ (*responsabilité des gardiens des choses* – Art. 1384 (1) C. civ) gained acceptance.

²³ *Protokolle* vol. II, at p. 2785. See also Art. 105 EGBGB (Introductory Act to the *BGB*) 1896.

²⁴ Cf. F. Dietz, *Technische Risiken und Gefährdungshaftung*, 2006.

²⁵ *Water Resources Management Act/Wasserhaushaltsgesetz* of 1957; *Environmental Liability Act/Umwelthaftungsgesetz* of 1990.

²⁶ *Act on Genetic Engineering/Gentechnikgesetz* of 2008.

²⁷ Cf. S. Whittaker, *Development of Product Liability*, 2010. The correct understanding is that products liability for manufacturing defects (“flaws”) is strict, whereas for design and warning defects it is negligence liability. Cf. also fn 129.

²⁸ From V. Mataja, *Das Recht des Schadensersatzes vom Standpunkt der Nationalökonomie*, 1888 to the *travaux préparatoires* of the Draft Bill on Amending the Law of Damages of 19.12.1975, *Bundesrats-Drucksache 777/75*, at p. 7: “Leading to a stricter liability is the thought that under the given circumstances, determined by the technical industrial development, certain activities and facilities are indispensable and therefore must be tolerated. This is true notwithstanding their inherent risks which cannot be completely controlled so that injuries to third parties cannot be avoided even with use of utmost care. Who with knowledge of these risks exposes others to these risks must be prepared to compensate the resulting damage regardless whether evidence for fault can be brought in the concrete case. It is appropriate to let the entrepreneur of such risky activities bear the loss because he is in the position to control the risks and to spread the respective losses, especially by liability insurance.”

1. The Railway

a) § 25 Prussian Railway Act of 1838

The railway was developed in England. The ‘age of the railway’ began at the latest in 1830 as the first steam locomotives came into regular use between Liverpool and Manchester.²⁹ Railway liability law however had its origin in 1838 in Prussia, in what was then a principally agrarian state, in which there was at the time only one 34 km long stretch of railway between Berlin and Potsdam. There, in 1838, a railway Statute came into force, which regulated the conditions for the state licencing of private railway companies.³⁰ The Statute also contained a provision on liability (§ 25):

The [railway] company is liable for all damage incurred by persons and goods *during transportation by rail* and by *other persons and their goods*, and it may only exonerate itself from such liability by proving that the damage arose from the personal fault of the injured person or through *unavoidable external factors*. The *risky nature of railways per se* shall not constitute one such factor.³¹

§ 25 of the Railway Act combines traditional and modern elements. The Prussian minister of administration originally intended to establish a liability of railway companies based on a presumption of fault. The slightly distinct final liability rule was particularly influenced by a written opinion *F.C. von Savigny* had been asked to deliver to the Prussian State Council.³² For the Romanist *Savigny* the quasi-contractual guarantee liability of the *actio ex recepto* seemed to have served as a blueprint. According to this, nautical carriers (*nautae*), innkeepers (*caupones*), and stables (*stabularii*) were liable independent of fault for the goods brought by guests onto their premises.³³ This liability could be avoided only in instances of acts of God.

This element of *receptum* liability came again to the fore when the focus was on ‘transportation by rail’. The primary goal of § 25 was the protection of the integrity of transported persons and goods. The scope of protection was extended to other persons and their things. What was intended by this expression remained unclear. This concerned first the victims of accidents related to the railways, for example in the context of railway crossings. *Savigny* took the view that the protection should also encompass injury caused during the normal use of ‘risky’ railways, in particular, the damage to neighbouring land through vibrations or sparks. This aimed at the protection of the interests of the Prussian landed gentry. Whilst this approach was restrictively interpreted in the case-law,³⁴ courts have instead extended the area of application of § 25 to railway personnel.³⁵ Railway employees were

²⁹ The world’s first modern railway is said to be the Stockton and Darlington Railway, opened in 1825 in Yorkshire, England. The first German railway (with an English locomotive) operated in 1835 between Nuremberg and Fürth.

³⁰ On this cf. W. Schubert, *Das preußische Eisenbahngesetz von 1838*, *Journal of Legal History (ZRG)*, Germanic dep. (GA), (1999) 116, 152.

³¹ § 25 Gesetz über die Eisenbahn-Unternehmungen (Act on Railway Companies), *Prussian Gazette* 1838, 505, at 510 (emphases added – G.B.)

³² Cf. T. Baums, *Die Einführung der Gefährdungshaftung*, *Journal of Legal History (ZRG)*, Roman. Dep. (RA), (1987) 104, 277 and generally Lenz, *Haftung ohne Verschulden*, pp. 57.

³³ On this see Kaser, *Das Römische Privatrecht*, vol. I, pp. 84-86; Ogorek, *Untersuchungen*, pp. 81. There are similarities to the common law’s no-fault liability of common carriers. See also below in the text.

³⁴ For references see Kleeberg, 36 *Intern. Law & Politics* 53, 74 ff. (2003). The courts excluded in cases of expropriation procedures or of contractual relations between railway and land owner the respective damages claims of land owners. This can be interpreted as an early variant of the Coase-theorem. Cf. R. Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.*, 1, 29 et seq. (1960).

³⁵ Kleeberg, 36 *Intern. Law & Politics*, 53, 78 et seq. (2003).

during the regulatory process, if mentioned at all, without exception regarded as potential wrongdoers whose fault had to be imputed to the company. By this case law, contrary to the intention of the legislator, accidents of railway employees ‘during transportation’ led to damages claims.

The liability of the railway company was excluded in cases of contributory negligence³⁶ and unavoidable external factors. A step towards modern *Gefährdungshaftung* is the clarification that the inherent risks of the railway are not in themselves excluding factors.³⁷ The central weakness of § 25 *PrEBG* is again related to its roots in *receptum* liability. § 25 was of mere dispositive effect and was thereby subject to contractual waiver.³⁸ Regular use was made of this disposability in the contracts of carriage with passengers and (after the judicial extension to accidents at work) in the employment contracts of railway personnel. The rapid extension of the railway network in Prussia was not however hindered by this legal regime.³⁹

Other states within and without the German Confederation (1818-66), in particular Austria⁴⁰ and Switzerland,⁴¹ adopted this approach to liability. Where this was not the case, the courts came to conclusions which were comparable to findings of no-fault liability, using fictitious constructs.⁴² The Judgment of the Superior Appellate Court of Munich dated 14th June 1861 has achieved some fame: the regular operation of a railway was considered a “culpable activity”, which made the railway responsible under fault liability for damage to property caused by the escape of sparks.⁴³ Outside of Prussia, i.e. the area of application of § 25 *PrEBG*, recourse was also had to the concept of civil compensation for sacrifice of assets (*Aufopferung*)⁴⁴ – a comparable oscillation between overstressing fault liability (especially in France) and tending towards no-fault compensation under property law characterise the legal development in the other European industrial states.⁴⁵

³⁶ It was due to the culpa compensatio doctrine of the *Ius Commune* of those days. This corresponded to the doctrine of contributory negligence of 19th century common law.

³⁷ At second glance however it turned out, that the “risk” was by no means restricted to the new steam locomotives, instead also horse drawn vehicles were subsumed by the courts under § 25 *PrEBG*.

³⁸ Waiver was no longer at the disposition of the parties, as far as transportation contracts are concerned, by the General German Commercial Code (*Allgemeines Deutsches Handelsgesetzbuch* – Art. 423 *ADHGB*) of 1861 – and with respect to “other persons and goods”, i.e. especially employment contracts of the railway personnel, by a Supplementary Act to the Prussian Railway Act of 3.5.1869 (*Pruss. Gaz.* 1869, 665); supposedly inspired by § 2 (2) Austrian Railway Liability Act of 5.3.1869 (cf. fn. 41).

³⁹ For figures cf. Scherpe, Germany, in Martin-Casals (ed), *Liability in Relation to Technological Change*, 134, at 149-55.

⁴⁰ Gesetz betr. die Haftung der Eisenbahn-Unternehmungen für die durch Ereignungen auf Eisenbahnen herbeigeführten körperlichen Verletzungen oder Tötungen von Menschen von 5.3.1869 (*Austrian RGBl.* at p. 109).

⁴¹ Schweizerisches Eisenbahn-Haftpflichtgesetz of 1.7.1875, encompassing also inland shipping and funiculars.

⁴² For further references cf. Scherpe, in Martin-Casals, *Liability in Relation to Technological Change*, 134, at 144-46.

⁴³ Seuffert’s *Archive* 14 (1861), 354, 358: The operation of a railway entails “necessarily and inherently a culpable behaviour”. For comments on this cf., inter alia, S. Meder, *Schuld, Zufall, Risiko*, 1993, pp. 232. A clear opposite opinion was then decided by the Imperial Court (*Reichsgericht* - *RG*), 7.12.1886, *RGZ* 17, 103: *actio negatoria* under *Ius Commune*.

⁴⁴ *RG*, 11.5.1904, *RGZ* 58, 130; 21.12.1908 *RGZ* 70, 150. When the *BGB* came into force 1.1.1900 in the German Empire (1871-1918), the matter was treated with a balancing of neighbours’ interests under property law (§ 906 (2) *sen. 2 BGB*). Cf. Thier, *Zwischen actio negatoria und Aufopferungsanspruch*, in Falk/Mohnhaupt, *Das Bürgerliche Gesetzbuch und seine Richter*, pp. 407.

⁴⁵ A comparative account of the damage-by-sparks cases can be found in Martin-Casals (ed), *Liability in Relation to Technological Change*, 2010 (covering England, France, Germany, Italy and Spain).

b) § 1 Imperial Liability Act (*Reichshaftpflichtgesetz – RHPfIG*) of 1871

§ 1 *RHPfIG* of 1871 adopted the same basic approach as § 25 *PrEGB* and transposed it into a railway liability law for the entire territory of the new German Empire. Its rationale remained ambivalent. The preparatory materials (*Motive*) explicitly speak of presumed fault, although this notion, as distinguished from the Austrian Act of 1869, does not show up in the official text.⁴⁶

If in the operation of a railway a person is killed or injured, the railway company is liable for the resulting damage unless it can prove that the accident was caused by either an act of God or the fault of the killed or injured person.⁴⁷

§ 1 *RHPfIG* determines in a precise way the basis of liability, the scope of protection and the exceptions to liability. Instead of treating near-contractual transportation, the focus is now on the *technical operation*. However the damage caused by regular operation does not lead to damages but instead injuries incurred by *accidents* in the operation of a railway do. The scope of protection of this liability is restricted to persons,⁴⁸ namely the killing and injury of transported persons, of railway personnel and third parties. Damage to property is, as distinct from Prussian law, no longer included, without any explanation being given for this in the preparatory materials.⁴⁹ Transported goods were covered by carriage contracts. In spite of its focus on injury to persons, there is no mention of compensation for *pain and suffering* neither in the text of the *RHPfIG* nor in the preparatory materials. Although foreign to Roman law, pain and suffering awards were recognised in Germanic law and spread throughout the case law of 19th Century's *ius commune*.⁵⁰ In addition moral damages were also included in Austrian railway liability law.⁵¹ Importantly, railways' liability under the *RHPfIG*, this time in accordance with the Austrian model, is in the form of *binding law* and thereby no longer to the disposition of contractual parties. Finally, the Act of 1871 does not provide for a ceiling to railway companies' liability. Liability caps were generally unknown in the laws of those days.

In respect of exclusion of liability, on the one hand, it rested on acts of god, which replaced the notion of the unavoidable external factor. On the other hand, liability remained excluded in case of contributory negligence of the injured person. That changed after the coming into force of the *BGB* on 1st January 1900. Thereafter, a regime of comparative negligence applied with a proportional reduction of the amount of damages instead of forfeiture (§ 254 *BGB*).⁵² As far as economic damages are concerned, otherwise than under the *PrEG*, consequential damages (lost profit, annuity payments for dependents) were recoverable.

⁴⁶ Reichstags-Drucksachen 1871, Suppl. Vol. no. 16, p. 70. The formula of an "always presumed fault" is to be found explicitly in § 1 Austrian Railway Liability Act of 1869 (cf. fn 41).

⁴⁷ § 1 Reichshaftpflichtgesetz of 7.6.1871, RGBl. 1871, 207.

⁴⁸ A nation-wide extension of railway liability to damage to property occurred with the *Sachschadenhaftpflichtgesetz* (Act on Liability for Property Damage) of 1940, RGBl. 1940 I, 691. This implied the final abolition of § 25 *PrEG*.

⁴⁹ The unspoken reason for this restriction may be the overarching target of the *Reichshaftpflichtgesetz*: i.e. providing compensation for physical injuries by industrial accidents. See on this below in the text.

⁵⁰ For references cf. Ogorek, *Untersuchungen*, pp. 65/66.

⁵¹ § 1 *EBHG*, § 1325 *ABGB*. The reason for this reference to the general law of damages (§§ 1293-1341 *ABGB*) in the Austrian railway law may be the explicit understanding of this type of liability as one for presumed fault (of the railway company or the railway personnel). As displayed above, the same was true for the German law.

⁵² RG, 24.11.1902, RGZ 53, 75. The opposite old law remained in force with regard to the liability for property damage under § 25 *PrEG* (in force in Prussia till 1940. Cf. fn. 49): RG, 3.5.1906, RGZ 63, 270.

2. Industrial Labour Accidents

The *Reichshaftpflichtgesetz* attempted also a legal solution of the most virulent social problem of ongoing industrialisation – accidents in the workplace. An extension of the no-fault type of railway liability to other risky industries was promoted in the then socio-political discussions about a private law contribution to the problem of industrial accidents. This initiative floundered against resistance from heavy industry.⁵³ Instead, the result was a direct liability of an enumerated class of risky enterprises for the fault of executives and other enterprise representatives (§ 2 *RHPfIG*). This singular statutory rule of enterprise liability for mere fault of representatives is a concealed forerunner to the modern liability of organisations for systemic fault.⁵⁴ Plainly, it is to be distinguished from the classic cases of employers' liability for employees' torts (§ 831 *BGB*/Art. 1384 (3) *C. civ.*/vicarious liability) or the corporate liability for executives' delicts (§ 31 *BGB*), which in principle lead to joint and several liability. Here, the liability is channelled exclusively on the enterprise. Although this provision of law is still in force today, it has achieved no practical significance.⁵⁵ The problem of industrial accidents remained - even after 1871 – socio-politically and legally contentious.⁵⁶ In 1884, this issue was resolved in an entirely different way, instead of damage compensation through private liability law the principle of distribution of loss was used, by way of introducing a compulsory state insurance scheme for accidents at workplace.⁵⁷ Through their burden of financing the claims, there were economic incentives on employers to invest in accident avoidance. This social insurance scheme has been extended in the 20th Century to accidents 'on the job' and at public schools generally, and also includes accidents during the transport to and from work or school.

3. Third Party (Liability) Insurance

Both of the two new grounds for liability under *Reichshaftpflichtgesetz* 1871, the nation-wide no-fault liability of the railway companies under § 1 and the liability of industrial enterprises under § 2 had the further effect that they contributed significantly to the emergence of an independent new branch of private insurance industry in Germany – liability or third party insurance. The availability of liability insurance with its concomitant possibility of risk and loss distribution in turn served to have the reverse effect in fostering the further spread of stricter forms of liability: The chance to externalise the risks of business activities on insurers made it more sensible for the courts to internalise the losses caused by these activities as costs on the risk creating enterprises.

4. Automobiles and Aircraft

Towards the end of the 19th Century, the railway was complimented by further revolutions in transport technique: steamship, automobile and airplane. German no-fault liability law was extended to cover automobiles and aircrafts. *Steamships* have been spared to date (in contrast e.g. to Switzerland and Russia⁵⁸).⁵⁹

⁵³ Cf. Ogorek, Untersuchungen, pp. 98; Eckardt, Technischer Wandel, pp. 261.

⁵⁴ On organisations'/enterprises' liability for systemic fault cf. references in fn. 4

⁵⁵ On § 3 *Haftpflichtgesetz* 1978 (= § 2 *RHPfIG* 1871) cf. W. Filthaut, Commentary on the *Haftpflichtgesetz*, 2009: "practical relevance is small" (§ 3 para. 2).

⁵⁶ On the interdisciplinary proceedings in the 'Verein für Socialpolitik', founded 1873, cf. *Die Haftpflichtfrage*, Schriften des Vereins für Socialpolitik, vol. 19, 1880.

⁵⁷ Eckardt, Technischer Wandel, pp. 272. One year before, in 1873, a workers' health insurance has been established. On this in general cf. M. Stolleis, *Geschichte des Sozialrechts in Deutschland*, 2002.

⁵⁸ On Russia see below in the text.

⁵⁹ The preparatory materials (Motive) of the *Reichshaftpflichtgesetz* brought as an argument for this sparing out, that the respective cases of steam ships were covered by the liability of ship owners under Art. 451 *ADHGB*. Cf. Reichstag-

a) The Automobile

The vehicle with combustion engine (*automobile*) was invented in Germany (*C. Benz* 1886); the first boom the automobile experienced was however in France. In Germany, at the first official count in 1907, there were 10000 personal cars and 15000 motorcycles registered.⁶⁰ In 1909 the Act on Automobile Traffic (*Gesetz über den Verkehr mit Kraftfahrzeugen – KFG*) came into force, which contained a relatively detailed section on the liability of car operators.⁶¹ § 7 read:

If in the operation of an automobile a person is killed, his body or health injured or property damaged, the operator of the automobile is obliged to compensate the resulting damage.

This provision marks the very beginning of modern *Gefährungshaftung*. The eggshells of *receptum* liability and of quasi-contractual carriage as well as any presumption of fault are thrown away. The target of the law was the taming of the risks of automobile traffic. In contrast to railway liability laws therefore, these norms concentrated exclusively on the protection of other persons outside the motor vehicle, in particular, pedestrians. Liability was triggered where a person was killed or injured, or if property was damaged “*in the operation of a car*”. The passengers⁶² and the employees of a commercial car operator were left out. The latter fell under the coverage of industrial accident insurance, the former under contract law. The addressee of this strict liability was the *owner* or *operator* of the automobile. Any authorised driver, non-identical with the operator, was only liable for fault, which in case of accident was presumed. In the second half of the 20th Century, the liability aegis was progressively widened to cover passengers who (paid or unpaid) were transported by automobiles.⁶³

Instead of *force majeure* or act of God, the ‘inevitable event’⁶⁴ constituted an exclusionary ground. It took nearly 100 years until there was in 2002 a return to the exclusionary ground of the *force majeure* (known already from § 1 *RHPfIG*).⁶⁵ § 12 *KFG* contained for the first time ceilings to liability. These served to check the increasing premiums of liability insurance so as to ensure their affordability. In 1939, following the Scandinavian and English model, compulsory liability insurance for car owners was introduced. The aim of liability insurance is so far primarily at ensuring the financial security of the policy holder, with compulsory insurance as the guarantee that compensation of the victim came to

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Drucksache (fn 48), p. 70 (left col.). Art. 451 ADHGB (= § 485 HGB) however provides only for a no-fault liability of ship owners for delicts/torts of employees (i.e. vicarious liability).

⁶⁰ Verband der Automobilindustrie (ed), *Tatsachen und Zahlen aus der Kraftverkehrswirtschaft 1969/70, 1970*, p. 207.

⁶¹ RGBl. 1909, 437: §§ 7-20; see on this W. Schubert, *Das Gesetz über den Verkehr mit Kraftfahrzeugen vom 3.5.1909* (2000) 117 ZRG (Germ. Dep.) 238; H. Ritschl, *Vom Verkehrschaos zur Verkehrsordnung*, 1968.

⁶² In the American law of negligence a similar result of reduction of drivers’ liability towards passengers was effectuated through the so-called Guest-Statutes. They were enacted in the late 1920s. The car operator was liable only for gross negligence. Most of these Statutes ceased to be in force.

⁶³ Since 1939: paid transport by public carriers (§ 8 (2) *KFG*); since 1957: generally paid transport (former § 8a *StVG*); since 2002: also unpaid transport of persons (§ 8a *StVG*).

⁶⁴ § 7 (2) sent. 2 *KFG*: “An event is in particular regarded as inevitable when it is caused by the conduct of the injured or of a third party not employed by the car operator or by an animal and the operator as well as the driver paid highest due care under the given circumstances.”

⁶⁵ The astonishing reason brought forward after nearly 100 years of validity of § 7 (2) *KFG* was that an exclusion of liability due to an inevitable event was inappropriate and a foreign element in the German law of *Gefährdungshaftung*. Bundestag-Drucksache 14/7752 of 7.12.2001, at p. 30.

the fore.⁶⁶ Far from harmonising the law of road traffic liability itself, the EU in the meantime has thoroughly unified this law of automobile liability insurance.⁶⁷

b) The Airplane

In 1908 the age of airplanes began (flight of the *Wright* brothers in England/journey of *Zeppelin's* blimp in Germany). Already in 1922 the German legislator passed an Act on Air Traffic (*Gesetz über den Luftverkehr – LVG*).⁶⁸ § 19 read:

If in the operation of an aircraft by an accident a person is killed, his/her body or health injured or property damaged, the operator of the aircraft is obliged to compensate the damage.

The regulatory approach is in line with automobile liability. Liability caps are contained; compulsory liability insurance provided for. No exclusionary ground was introduced. Although causation ‘by an accident’ was explicitly incorporated in the text of the law, the judiciary went further by extending the umbrella of protection of § 19 *LuftVG* so as to include damage to persons and property on the ground caused e.g. by low flying aircrafts.⁶⁹

As far as the *international* carriage of passengers and cargo by air is concerned this national law was soon replaced by international conventions. In 1929 the Warsaw Convention (WC) was passed.⁷⁰ It originally provided for a regime of quasi-strict liability of air carriers (i.e. presumption of fault).⁷¹ This was a compromise between the strict liability of French contract law (*obligation de résultat*) and the strict law of other continental European countries like Germany on the one side and the respect for the supposed needs of the developing aviation industry on the other side. The liability was limited by fixed amounts for death or personal injury of the passengers.⁷² Although Art. 17 WC also focused on an ‘accident’, its interpretation has been stretched by courts from the materialisation of technical risks to man-made incidents (including terrorist acts or sexual assaults by co-passengers).⁷³ Its successor, the Montreal Convention of 1999 (MC),⁷⁴ was less a newly conceived legal document but more a

⁶⁶ Act on the Introduction of Compulsory Insurance for Operators of Motor Vehicles, RGBl 1939 I, pp. 2223. Cf. R. Dubischar, *Die Kfz-Pflichtversicherung und ihre Wandlungen*, in Hadding (ed), *Festschrift Zivilrechtslehrer 1934/1935*, 1999, pp. 59.

⁶⁷ See now the Consolidated Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of obligation to insure against such liability, OJ L 263/11 of 7.10.2009. Cf. in this context H. Heiss, *Liability Insurance*, in R. Schulze (ed), *Compensation of Private Losses*, 2011, pp. 213.

⁶⁸ RGBl. 1922 I, p. 681.

⁶⁹ RG, 4.7.1938, RGZ 158, 34 (silver foxes); Bundesgerichtshof (BGH), 27.1.1981, BGHZ 79, 29 (helicopter); BGH, 1.12.1981, VersR 1982, 243.

⁷⁰ [Warsaw] Convention for the Unification of Certain Rules Relating to International Carriage by Air of 12 Oct. 1929 (amended at The Hague on 28 Sept. 1955 and by Protocol No. 4 of Montreal 1975).

⁷¹ Art. 17. The air carrier could rebut the presumption by showing that it has taken ‘all necessary measures’ to avoid the damage (Art. 20). This liability regime of Arts. 17, 20 WC comes close to the strict liability under 7 (1) (2) KFG 1909. Cf. above in the text.

⁷² Art. 22. Liability was unlimited if the passenger (or his/her relative) could prove that the accident was caused by intentional or reckless behaviour of the carrier’s personnel (Art. 25).

⁷³ As landmark case cf. *Air France v. Saks*, 470 U.S. 392 (1985); on this in general (albeit exclusively from an Anglo-American law perspective) see G. Leloudas, *Risk and Liability in Air Law*, 2009.

⁷⁴ [Montreal] Convention for the Unification of Certain Rules Relating to International Carriage by Air of 28 May 1999. 103 of the 191 International Civil Aviation Organisation (ICAO) Member States have ratified the Convention (as of Aug. 2012).

consolidation of the WC and its amendments hitherto into a single treaty. MC established a two tiered system of responsibility of air carriers (Arts. 17/21): 1) Strict liability up to an amount of 113 100 SDR⁷⁵ for each killed or injured passenger. Force majeure and acts of god are not recognised as exclusionary grounds. 2) Unlimited quasi-strict liability for exceeding extents of damages. The carrier can exonerate itself from this liability by showing evidence that (i) the damage was not due to its fault or that (ii) it was solely caused by the fault of a third party. The principles of comparative fault/negligence apply in both cases. Any damages claim of a passenger falling under the ambit of this Convention is bound to its rules and limits.⁷⁶ (The crew members are under their respective national social insurance or workmen compensation schemes.) By EU law this liability regime has been extended to all carriages effectuated by EU or EEA⁷⁷ air carriers regardless whether it is a domestic, inner-union or international flight.⁷⁸

Many steps have been undertaken to work out an international convention on air carriers' liability for *damage to third parties*⁷⁹ on the ground (Rome Convention). These drafting works have not yet come to a final result.⁸⁰ This scenario remains so far under the respective national law; as does the responsibility for accidents caused by *military* aviation leading to governmental liability.

5. Characterisation

The German model to tackle the emerging new risks of industrialisation developed out of an authoritarian-welfare-state's proneness to preventive risk regulation. This model had two tracks: state social insurance and 'stricter' forms of civil liability (enterprise liability and *Gefährdungshaftung*) beyond the fault principle. The first was in the *Bismarck* era not to be separated from the political context of the attempted state domestication of the new class of industrial workers and their organisations (socialist parties; trade unions) and their integration into the society of imperial Germany. The special legislation on no-fault liability came from politics, too. The different heads of liability for technical risks developed before and after 1900 in the shadow of the great systematic codification of the *BGB*. This lay in the hands of pandectist academics and practitioners. The *BGB* was conceived as 'the' liberal constitution of the Empire (party autonomy/freedom of contract/fault/property). Political attempts to incorporate strict liability provisions into the *BGB* failed.⁸¹ The statutory norms of no-fault liability notwithstanding their individual differences came about as *ad hoc* pragmatic technical exceptions from the prevailing fault principle, which were to be interpreted narrowly; further, no analogy was available.⁸² This exceptionality, disparate aegis⁸³ and

⁷⁵ Special Drawing Rights of the International Monetary Fund (= \$ 175 800 as of Dec. 2011).

⁷⁶ Exclusionary rule of Art. 29 MC. Cf. *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999); *Sidhu v British Airlines* [1997] A.C. 430 (HL), both on Art. 24 Warsaw Convention.

⁷⁷ European Economic Area (comprising Iceland, Liechtenstein and Norway).

⁷⁸ Cf. Regulation (EC) No 889/2002 of the EU Parliament and Council of 13 May 2002 on air carrier liability in the event of accidents, OJ L 140/2 of 30.5.2002 (amending Council Reg. (EC) No 2027/97).

⁷⁹ 'Accidents' to passengers when embarking or disembarking are covered by the Conventions.

⁸⁰ On the drafting processes of the Rome Convention see Leloudas, *Risk and Liability*, pp. 153.

⁸¹ For more details on this neglected subject of legal history see Lenz, *Haftung ohne Verschulden*, pp. 263-275.

⁸² RG, 11.1.1912, RGZ 78, 171 (no extension of railway liability on aircrafts). An analogy with strict liability provisions was however practiced in Austria. Cf. H. Koziol, *Umfassende Gefährdungshaftung durch Analogie?*, in *Festschrift Wilburg*, 1975, pp. 173.

⁸³ Mainly uncertainty about the 'ground of liability': accident or plain materialisation of a characteristic risk or just every event correlated with the risky activity. In addition: different scope of protection: from the limitation to personal injury to the extension to property damage to the occasional coverage pure economic loss; different exclusionary grounds: from the act of God to the inevitable event back to force majeure; some heads of *Gefährdungshaftung* even being without any exclusionary grounds. Different regulations concerning liability caps and compulsory insurance.

distance to the ‘grand idea of private law’⁸⁴ have until today hindered the development of a scientific doctrine of *Gefährdungshaftung*, which could give political orientation to coherent legislation. Academic initiatives aiming at a fundamental overhaul, that is the unification of the individual headings plus a general clause of *Gefährdungshaftung*⁸⁵ or the complete replacement of the disparate provisions on *Gefährdungshaftung* with a unifying general clause⁸⁶ have to date failed.⁸⁷

Mutatis mutandis the same is true for *enterprise liability*. It started as an unsuccessful, nearly forgotten statutory rule (§ 2 *RHPflG*) and became then after the turn of the 20th Century the subject of judge made law.⁸⁸ The courts tried to pave a way for organisational responsibility filling the gap in the *BGB*’s law of delict between the employers’ vicarious liability for presumed own fault (§ 831) and the law of individual fault liability (§ 823 (1) et seq.). Not recognised by the individualistic Romanist *BGB*, enterprise liability is – like *Gefährdungshaftung* - still struggling to lose its label as illegitimate child of private law.

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Moral damages (pain and suffering) remained first precluded, whereas they were always available in the case of the strict liability of animal keepers and in the air liability law for military aircraft and later on in the nuclear law. Moral damage is still generally not recoverable under *Gefährdungshaftung* in Swiss law. In Austria, after its absorption into Nazi-Germany 1938, the German non-compensation-of-moral-damage-rule came in force, but was then dismissed again in 1959. In Germany a general recoverability came about but in 2002.

⁸⁴ Elegantly presented by E.J. Weinrib, *The Idea of Private Law*, 1995.

⁸⁵ This path has been pursued by the Chinese legislator when codifying the law of delict in 2010 (Arts. 70-74). Cf., inter alia, Brüggemeier, *Modernising Civil Liability Law*, pp. 194.

⁸⁶ This solution can be found in the Russian (see below) and the Brazilian Civil Code.

⁸⁷ On the reform discussion in Germany see, inter alia, E. Deutsch, *Generalklausel für Gefährdungshaftung*, *Karlsruher Forum* 1968; H. Kötz, *Haftung für besondere Gefahr – Generalklausel für Gefährdungshaftung*, *AcP* 170 (1970), 1; E. v. Caemmerer, *Reform der Gefährdungshaftung*, 1971; Kötz, *Gefährdungshaftung*, in: Federal Minister of Justice (ed.), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, vol. II, 1981, pp. 1779 with further references.

⁸⁸ Cf. RG, 25.2.1915, RGZ 87, 1; BGH, 26.11.1968, BGHZ 51, 91; BGH, 18.9.1984, BGHZ 92, 143. For more detail on this subject see Brüggemeier, *Haftungsrecht*, pp. 127.

II. USA: Negligence-Centred Torts System and Ousted Strict Liability

The common law of the United States like English common law in the first place recognised manifest personal civil wrongs (torts). A large part comprises intentional injurious behaviour, for example trespass. In the 19th Century, the new all-encompassing tort of negligence emerged. It soon became the unifying principle of American tort law. It also stood in the centre of the social management of the liability law consequences of the industrial revolution. The post-civil war and post-depression period to the close of the 19th Century is characterized by the emergence of big firms, the development of liability insurance, and culminated then in the constitutional disputes and political discussions about the replacement of the traditional torts system in parts through alternatives like the (no-fault) workers compensation legislation of the early part of the 20th Century.⁸⁹

At that point, the USA was already the leading industrial nation of the world, but also the nation with the highest incidence of industrial accidents (certainly by comparison with comparable industrial nations like England and Germany).⁹⁰

1. Industrial Accidents

If in continental Europe natural law and enlightenment philosophy were the basis for the eminence of the subject-paradigm in private law, simply superimposed with doctrines of economic liberalism, it was the other way around in the USA. Here, economic liberalism, the ideology of free entrepreneurship and individual responsibility determined the discussion in law and politics up until the 20th Century.

The legal situation of the victims of accidents at work in the second half of the 19th Century was judged by common law.⁹¹ The business-employer was liable to the injured worker under the tort of negligence only in cases of carelessness, which was, as a rule, not provable. Additionally, the enterprise-employer could even in cases of its fault (i.e. fault of its executives), rely upon the worker's voluntary *assumption of risk*. The worker was treated as if he had accepted the risks of injury in employment by the formation of his contract as it was.⁹² If the worker came to injury through the fault of a fellow worker, the employer might be vicariously liable. This doctrine of *vicarious liability* rendered the business-employer liable without personal fault for the torts of its employees. It is a strict liability of businesses for the wrongful acts of their employees committed within the scope of their employment. Here, however, the *fellow servant rule* stood in its way.⁹³ Pursuant to this rule, the employer was not liable for damage done by an employee to another employee during his employment.⁹⁴ Frequently, also *contributory negligence*⁹⁵ affected the victim's claim. Already slight contributory fault of the victim led – like in the contemporary German *ius commune* – to a complete forfeiture of liability. The 'unholy alliance' of these three common law defences (assumption of risk,

⁸⁹ Generally on this time of so-called Gilded Age cf. L.M. Friedman, *A History of American Law*, 3d edn. 2005, Part III, ch. 1: "Blood and Gold".

⁹⁰ For references cf. Kleeberg, 36 *Intern. Law & Politics*, 53, 116-123 (2003) and Friedman, *History of American Law*, 2005, p. 362.

⁹¹ As locus classicus cf. O.W. Holmes, *The Common Law*, 1881.

⁹² This complied with the liberal principles of contract law only in cases where the worker had been payed out with additional money for this assumption of risk. This did regularly not happen.

⁹³ In England: *Priestley v. Fowler*, 3 Mees & Wels 1 (1837); in USA: *Farwell v. Boston & Worcester RR Corp.*, 45 Mass. (4 Met.) 49 (1842).

⁹⁴ Instead the victim had to sue the fellow worker.

⁹⁵ Cf. W.S. Malone, *The Formative Era of Contributory Negligence*, 41 *Ill. L. Rev.* 151 (1946).

fellow servant and contributory negligence) had the bitter consequences that the victims of industrial accidents and their (surviving) dependents had to shoulder the financial burden of the accident alone, which often catapulted them into abject poverty.⁹⁶

This complete failure of the common law of torts in the field of industrial accidents eventually spurred the legislature into action. Until the end of the 19th Century, individual states enacted so-called Employers' Liability Acts. They were in their content and scope thoroughly varied. They did by no means abolish the negligence system. The limited common aim of these Acts was simply to make the common law defensive bulwark against the damages actions of victims of industrial accidents more permeable. It is noteworthy that the courts in the USA, contrary to the approach in England and Prussia, ruled out contractual waivers of these limitations of liability.⁹⁷

In 1910, 23 states and the federal government had passed Employers' Liability Acts. The *Federal Employers' Liability Act* (FELA) originated in 1906 and was limited to the interstate railway transport. It eliminated the fellow servant rule, replaced contributory with *comparative* negligence⁹⁸ and abolished assumption of risk, to the extent that the railway company had acted in violation of legal provisions. Tellingly, FELA 1906⁹⁹ was declared unconstitutional by the US Supreme Court, before an amended version in 1911 passed the constitutionality test.¹⁰⁰

If the Employers' Liability Acts trimmed the fringes of the common law of torts, the *Workmen Compensation Statutes* entered uncharted territory.¹⁰¹ Between 1910¹⁰² and 1920, they were introduced in 43 states and rolled out a private law variant of the *Bismarckian* industrial accidents insurance. Workmen compensation statutes were characterised by three elements: 1. Abolition of the traditional negligence liability in tort; 2. Strict liability of the employer, save for intentional self-harm by the employee; 3. Swift but limited compensatory payments in the case of injury and death. In particular compensation for pain and suffering is excluded.

The businesses were under an obligation to take out special workmen compensation insurance, unless the firm was allowed to go down the road of 'self insurance'.¹⁰³ The insurance costs were to be passed through product prices to the consumer. As the degree of union-type organisation of the personnel permitted, the employers also attempted to offset these costs by reducing salaries.

⁹⁶ See on this J.F. Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law*, 2004. – On the - often criticised - thesis of the 'subsidization of economic growth through the torts system' cf. especially M.J. Horwitz, *The Transformation of American Law, 1870-1960*, 1977, pp. 63.

⁹⁷ Witt, *The Accidental Republic*, 2004, p. 51 ("against public policy").

⁹⁸ I.e. transition from forfeiture of liability to proportional shares (quota) depending on the degree of fault.

⁹⁹ *The Employers' Liability Cases*, 207 US 463 (1908).

¹⁰⁰ *Second Employers' Liability Cases*, 223 US 1 (1912).

¹⁰¹ Cf. K.S. Abraham, *The Liability Century*, 2008, pp. 39: the "original tort law reform".

¹⁰² The first Workers' Compensation Statute in the US was enacted 1910 in New York and then declared unconstitutional by the N.Y. Court of Appeals: *Ives v. South Buffalo Ry.*, 94 N.E. 431 (1911): "The statute, judged by our common law standards, is plainly revolutionary." It required an amendment to the state's constitution of New York and a judgement of the US Supreme Court (243 U.S. 188 (1917)), stating the compatibility with the US Constitution, to bring the Statute finally into legal force.

¹⁰³ See especially P.V. Fishback/S.E. Kantor, *A Prelude to Welfare State: The Origins of Workers' Compensation*, 2000.

2. Railway, Automobile, and Airplane

a) The Railway

Soon after its breakthrough in 1830 in England, the railway took off in the USA. The railroad created America. In 1840, the railways spanned less than 3000 miles; in 1850, 9000 miles; in 1860, 30000; and in 1870 the railways stretched to 53000 miles.¹⁰⁴ In respect of liability for accidents, the common law of torts, i.e. negligence, dominated here too.

To this extent, the common law shared a peculiarity with the Roman law of *receptum* liability. It traditionally recognised the quasi-contractual strict liability of common carriers of goods. Common carriers¹⁰⁵ are today state-regulated transport undertakings, which offer freight and public transportation services. To the category of common carriers belong amongst others airlines, railways, bus companies, and taxi firms. In the 19th century railway companies were strictly liable as common carriers only for damage to transported goods. Cases of physical injury to persons, passengers as well as railway employees,¹⁰⁶ remained under the regime of negligence liability.¹⁰⁷ For railway employees, this first changed with the passing of the respective Employers' Liability Acts¹⁰⁸ (like FELA 1906), and then through the Workmen Compensation Statutes from 1910 onwards. In respect of passengers, general contract law and torts law (negligence) persisted.

An interesting question goes to the responsibility for the damage to third parties, in particular in cases of crashes on railway crossings and where animals are on the railways, as well as in respect of damage caused by sparks flying from the locomotives.¹⁰⁹ In cases of individual wrongful acts of railway employees, this was an instance of vicarious liability. Where no such wrongs obtained (the majority of cases), the injured parties had no recourse.

The conflicts which arose from this over the distribution of damages between the land owners, who are legally using their premises, and the legal operation of the 'risky' railways belong to the since forgotten history of strict liability in the USA. From the middle of the 19th Century onwards many states enacted so-called *Spark Fire Statutes* and *Cattle Injury Statutes*. These made the railway liable for all damage caused in its running without fault.¹¹⁰ None of these rules remains in force today. They disappeared with those specific risks. The relevant law is again the general law of torts.

Railway liability served in these times of unprecedented societal change as a fertile ground for legal-political debate. This is made clear by an oft-cited case: *Ryan v. New York Central R.R.* (1866).¹¹¹ Through the sparks from a locomotive, a woodpile on the railway's own land caught fire. The fire spread and engulfed a neighbouring building, which burned to the ground. The owner brought a

¹⁰⁴ J.F. Stover, *American Railroads*, 1961, pp. 19, 26, 144/145.

¹⁰⁵ On the traditional liability of Common Carriers' cf. O.W. Holmes, *Common Carriers and the Common Law*, 13 *Am. L. Rev.* 609 (1879); J.H. Beale, *The Carrier's Liability*, 11 *Harv. L. Rev.* 158 (1898).

¹⁰⁶ This led to claims for the enactment of a Railway Compensation Plan which follows the model of the Workers' Compensation legislation. Cf. A.A. Ballantine, 29 *Harv. L. Rev.* 705 (1916).

¹⁰⁷ On this generally cf. B.Y. Welke, *Recasting American Liberty. Gender, Race, Law, and the Railroad Revolution, 1865-1920*, 2001.

¹⁰⁸ The first Employers' Liability Act covering railways was passed 1856 in Georgia. It abolished the defence of the fellow servant rule.

¹⁰⁹ This has also been a favourite academic subject of the Law & Economy analysts. Cf., inter alia, Coase, 3 *J.L. & Econ.* 1, 29 et seq. (1960); R. Posner, *Strict Liability*, 2 *J. Legal Stud.* 206 (1973); Grady, 17 *J. Legal Stud.* 15 (1988).

¹¹⁰ The Spark Fire Statutes passed the constitutionality tests they were put to by the railway companies, whereas many Cattle Injury Statutes had been declared unconstitutional. Cf. Witt, *Accidental Republic*, 2004, at pp. 135/136 with references.

¹¹¹ 35 N.Y. 210 (1866).

damages action in negligence.¹¹² Even in this case, where carelessness was admitted, the action was dismissed. That the building was set alight by the fire which spread from the woodpile of the railway company and not directly by the sparks from its locomotive led the court to the conclusion that this was an indirect injury to the plaintiff's property. It presented the problem of imputation; in the language of the common law, the issue of proximate cause. The New York Court of Appeals denied that the plaintiff's damage was attributable to the railway (with little persuasive justification), declaring the damage too remote.¹¹³ The consideration which appeared to have motivated the decision was less the protection of the railway companies against excessively high damages claims, and more that the party whose property was damaged by fire should bear the burden for taking out (first party) insurance for just that risk. Home owners' first party insurance was already commonly available, whereas liability insurance was at the time unknown. 30 years later, with liability insurance available, the decision would have been made on the basis of which of the parties might have been the 'better insurer'. (The Court overlooked the circumstance that already in those days the railway company could spread the loss by passing on the cost to its customers).

b) The Automobile

The automobile was in fact invented in Germany; its 'second invention' however happened in the US. With the passage to industrial mass production in 1908 (*H. Ford's Model T*) the numbers of automobiles produced expanded exponentially: In 1900 there were only 8000 cars in the US. 1915 saw 2 million cars; 1920, 9 million; and 1930, 23 million.¹¹⁴ Although the automobile took some time getting used to, American lawyers did not consider that the *Rylands v. Fletcher* doctrine or the principle of 'strict liability for ultrahazardous activities'¹¹⁵ could be applied to accidents occasioned in the propulsion of automobiles. The mantra then was that it was not the car that was hazardous; rather the risk was caused by its drivers. In terms of tort liability, car accidents fell and still fall within the negligence regime.¹¹⁶

At the beginning of the 1930s, at the first height of the motorisation wave and indeed the first height of motor-accidents, with 30000 deaths in one year, the model of strict liability with obligatory insurance was up for debate (the Columbia Plan).¹¹⁷ This Plan was not however followed in the turmoil of the world economic crisis. During the second peak of automobile expansion in the 1960s, there was a renewed and intensified discussion of automobile safety and of no-fault regimes.¹¹⁸ The legal-political reaction was twofold. A new regulatory approach was pursued with the passing of the National Traffic and Motor Vehicle Safety Act in 1966 by which a safety agency was established.¹¹⁹ The law

¹¹² "by careless management or through the insufficient condition of its [the sued railway company] engines". Organisational fault or per-se culpable activity?

¹¹³ The spreading of the fire to the neighbouring house of the plaintiff was regarded not to be the 'natural and expected result' of the burning of the woodpile on the railway company's premise.

¹¹⁴ For figures cf. Abraham, *Liability Century*, at p. 70

¹¹⁵ On both see below in the text.

¹¹⁶ For the US: inter alia, *Maloney v. Rath*, 445 P.2d 513 (Cal. 1968); for England: *Wing v. London General Omnibus Co.* [1909] 2 KB 652.

¹¹⁷ Report by the Committee to Study Compensation for Auto Accidents to Columbia University Council for Research in the Social Sciences, 1932.

¹¹⁸ R. Keeton/J. O'Connell, *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance*, 1965; for more detail on this subject see Abraham, *Liability Century*, pp. 92.

¹¹⁹ National Highway Traffic Safety Administration (NHTSA). For critical accounts of the outcomes of this safety administration cf. S. Peltzman, *Regulation of Automobile Safety*, 1975; J.L. Mashew/D.L. Harfst, *The Struggle for Automobile Safety*, 1990.

concerning liability remained unchanged. Most states introduced compulsory liability insurance; several other states installed various forms of no-fault first party insurance.¹²⁰

c) The Airplane

Liability for domestic air traffic accidents in the US did not follow in a straightforward manner the well trodden path of railway, motor vehicle and maritime law, i.e. the negligence system. The law changed when aviation developed. In the early days of aviation damage to person and property on the ground was to the fore. In contrast to the driving of automobiles, the operation of aircrafts was regarded as an ultrahazardous activity and the operators were held strictly liable for all damage caused by airplanes. As early as 1922 this principle was also expressed in the Uniform Aeronautics Act. Its section 5 providing for strict liability has been adopted by a large number of states. The view that aviation was ultrahazardous dominated also the discussions and proceedings of the American Law Institute (ALI) when drafting the First Restatement of the Law of Torts in the 1930.¹²¹ Doubts as to whether aviation is an ultrahazardous activity began to increase after World War II. The first to face this new approach were the passengers. Courts often dismissed their claims because of assumption of the risk of flying. Other courts applied the doctrine of a rebuttable presumption of fault of the air carrier. The Restatement (Second) of Torts in 1977 passed – after highly controversial discussions within the ALI – a new paragraph 520A. Addressing only the problem of damage to person or property on the ground caused by airplanes, a majority of ALI members adhered to the position that the damage results from an “abnormally dangerous activity”. The Third Restatement has now left this question explicitly unanswered.¹²² The prevailing approach nowadays is quasi-strict liability for air carriers. They and their personnel have to use utmost care and in case of an accident a breach of care is presumed.

International flights are under the umbrella of the respective International Conventions. The US ratified the Warsaw Convention 1934; today the Montreal Convention of 1999 is in force with its two-tiered system of liability as far as passengers and their baggage are concerned.¹²³ Crew members are under workmen compensation schemes and general torts law respectively.

3. Strict Liability for Particularly Hazardous Activities

Next to the important case of statutory strict liability of employers in cases of industrial accidents (workers’ compensation) and the historical strict liability for railways, the common law in the US seems to recognise strict liability only in a very limited area: liability for ultrahazardous activities.¹²⁴

This development is also, in the American common law, closely connected to the English case of *Rylands v Fletcher* stemming from the 1860s (which at first blush seemed to be an odd starting point for a law of strict liability¹²⁵ as it was indubitably a case of negligence):¹²⁶

¹²⁰ Cf. Prosser & Keeton on the Law of Torts, 5th edn, 1984, pp. 600,

¹²¹ ALI, Restatement of the Law: Torts, vol. 3, 1938, see comments to § 520. For more detail on the subject of strict liability for ultrahazardous activities and the ALI-Restatement movement see below in the text.

¹²² ALI, Restatement (Third) of Torts: Liability for Physical and Emotional Harm, vol. 1, 2010, p. 272.

¹²³ See above in the text.

¹²⁴ A second (hybrid) area is the liability for ‘defective’ products which in French and American law developed out of the contractual warranty liability. Products liability is internationally treated as a special case. In the US the liability for manufacturing defects (flaws) is strict; according to a prevailing view design and warning defects are under a negligence liability. Cf. ALI, Restatement (Third) Torts: Products Liability, 1998; Owens, Products Liability, 2d edn. 2008.

¹²⁵ In the English common law it never assumed such a function. *Rylands* belongs here to the law of *private nuisance*. See especially *Cambridge Water Co. v. Eastern Counties Leather plc* [1994] 2 AC 264; cf. E. Reid, Liability for Dangerous Substances (1999) 48 ICLQ 731. The Australian courts did completely away with *Rylands* and integrated it into

J. Rylands ran a large textile factory in a region which was heavily impacted by farming and mining. He drilled a small reservoir in the earth in order to provide his factory steamers with water. The reservoir burst because the floor underneath was carved out of abandoned mining shafts. The escaping water put the neighbouring mining works of Fletcher out of use. Both were tenants of the land, owned by the Earl of Wilton. Rylands had contracted competent engineers to construct the reservoir but they did not pay due care. They ought to have inspected the floor of the reservoir more closely.

Fletcher did not however sue the engineers, but sued Rylands, the wealthy industrialist.¹²⁷ Vicarious liability was ruled out because Rylands's engineers were independent contractors and not employees. The Court of Exchequer dismissed the action against Rylands. It found that Fletcher's case was not made out on any of the pleaded causes of action (negligence, nuisance, trespass). The Appellate Court reversed the first instance decision and granted Fletcher's claim. Mr. Justice Blackburn founded a new strict liability cause of action in the case of highly hazardous activities.¹²⁸ This decision was upheld in the House of Lords. However, Lord Cairns reverted to the underlying neighbour concept: if a person puts their land to an unnatural use, they will be liable for damages flowing therefrom irrespective of fault.

Reception of this concept in the USA had two phases.¹²⁹ In the foreground, was the refusal to introduce strict liability for the risks of industrial undertakings in the industrialised states of the North East in the 1870s and 1880s. Strict liability was seen as 'obstacle in the way of progress and improvement'. Representative of this is the well-known case of an exploding steam boiler: *Losee v. Buchanan*.¹³⁰ It is however noteworthy that outside of liability law there were early attempts by the authorities to regulate the safety of the new technical modes of transportation.¹³¹

The second phase began at the end of the 19th Century. The negative effects of unbridled industrialisation were impossible to ignore. Mining accidents and spectacular dam bursts led to a reconsideration of strict liability *à la Rylands v Fletcher*. The concern to protect national industry against the costs of damages claims decreased at the beginning of the 20th Century. That said, the courts made heavy work of the open recognition of strict ('absolute') liability.¹³²

(Contd.)

negligence: *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 20; cf. J. Swanton, Another Conquest in the Imperial Expansion of the Law of Negligence (1994) 2 Torts L.J. 101.

¹²⁶ 3 H. & C. 774 (Exch. 1865); L.R. 1 Exch 265 (Exch.Ch. 1866); L.R. 3 H.L. 330 (1868); on this case cf. inter alia, A.W.B. Simpson, Legal Liability for Bursting Reservoirs: The Historical Context of *Rylands v. Fletcher*, 13 J. Legal Stud. 209 (1984); K.S. Abraham, *Rylands v. Fletcher: Tort Law's Conscience*, in R. Rabin/S. Sugarman (eds), *Torts Stories*, 2003, pp. 207; K. Oliphant, *Rylands v. Fletcher and the Emergence of Enterprise Liability in the Common Law*, in H. Koziol/B. Steiniger (eds), *European Tort Law*, 2004, pp. 81.

¹²⁷ The second defendant was the chief executive of the factory (i.e. managerial liability)! But this suit was dropped later on.

¹²⁸ "We think that the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." [1866] LR 1 Exch. 265, 279 (Ex. Ch., Blackburn, J.)

¹²⁹ Cf. Prosser, *The Principle of Rylands v. Fletcher*, in *Selected Topics on the Law of Torts*, 1953, pp. 135; Note, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age*, 110 Yale L.J. 333 (2000).

¹³⁰ 51 N.Y. 476, 484 (1873): a strict liability standard would "create a liability which would be the destruction of all civilized society"; see also *Brown v. Collins*, 53 N.H. 442 (1873) and *Marshall v. Welwood*, 38 N.J.L. 339 (1876).

¹³¹ E.g. as early as 1837 Congress had begun to regulate the safety of steamships. Cong. Globe, 25th Cong., 2d Sess. 455 (1837).

¹³² Cf. *Green v. General Petroleum Corp.*, 270 P. 952 (1928); *Exner v. Sherman Power Const. Co.*, 54 F.2d 510 (2d Cir. 1931); on this generally cf. C.O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359 (1951).

A watershed moment was when the American Law Institute incorporated *Rylands* into the First Restatement of Torts in the 1930s. § 519 acknowledged strict liability for ultrahazardous activities.¹³³ In defining what constituted the same, recourse was had to *Rylands* itself: the magnitude of risk which flowed from the activity (*Blackburn*) and its ‘uncommonality’ relative to the local habits (*Cairns*). Since technical-industrial risks and ‘unnatural’ use did not fit particularly well together, now there is a generalised concept referred to as *uncommon usage*. This is doubly misleading.

For one thing, the phrase undermines the constitutive moment of the technical risk and its contingency. All modern technical risks – from the railway and the steamer to the automobile and aircraft up to nuclear power plants – have in a short time become generally accepted common goods. Further, it is misleading to refer to usage by the great part of the population,¹³⁴ in that here, with one exception, the car, these activities are not everyday activities of the normal person. Rather, they are industrial activities, which are simply not part of the pursuits of the common person. These are *per se* uncommon usages in the sense of the Restatement. These infelicities have not been eliminated in further restatements.

40 years later, § 520 of the Restatement (Second) of Torts listed factors, which the courts should take into account when classifying activities as ‘abnormally dangerous’: The first three concern the extent of risk; the next two the unusual nature of usage:¹³⁵

1. existence of a high degree of risk of some harm to the person, land or chattels of others;
2. likelihood that the harm that results will be great;
3. inability to eliminate the risk by the exercise of reasonable care;
4. extent to which the activity is not matter of common usage;
5. inappropriateness of the activity to the place where it is carried on; and
6. extent to which its value to the community is outweighed by its dangerous features.

The last factor contains a new risk-utility element. The liability could in spite of great danger and unusual use, fall away where the advantages of the activity for the society outweigh the possible risks. The Third Restatement 2010 has limited itself again to the two criteria: particular hazardousness and uncommon usage. The public policy reservation was dropped.¹³⁶

This *Rylands*-type liability for hazardous undertakings has in both respects, scope of application and extent of case law, remained limited.¹³⁷ It still has but a residual role in today’s American law of torts.

¹³³ ALI, Restatement of the Law: Torts, vol. 3, 1938, §§ 519, 520

¹³⁴ ALI, Restatement of the Law: Torts, 1938, p. 45: “An activity is a matter of common usage if it is customarily carried on by the *great mass of mankind* or by *many people in the community*.” (emphasis added - G.B.) This criterium does indeed not allow to qualify driving cars on highways as ultrahazardous activity.

¹³⁵ ALI, Restatement (Second) Torts, vol. 3, 1977, §§ 519, 520.

¹³⁶ ALI, Restatement (Third) Torts: Liability for Physical and Emotional Harm, vol. 1, 2010, § 20.

¹³⁷ One of the few generally recognised class of cases is *explosives*: production, storage, transport, application. Cf., inter alia, W.K. Jones, Strict Liability for Hazardous Enterprise, 92 Colum. L. Rev. 1705 (1992).

4. Characterisation

For at least 150 years the traditional torts system with negligence liability at its core, which includes a ‘grass roots’ civil jury that determines the question of negligence in individual states’ courts,¹³⁸ a powerful legal profession and an equally formidable insurance industry has become so deeply rooted in American society that attempts to change the system have repeatedly faltered. The new super-tort negligence has proved so robust and flexible that it could, next to the traditional liability of human beings, also encompass the liability of large scale industrial companies.¹³⁹ The *Learned Hand formula* or cost-benefit standard of negligence is a representative expression of this enterprise liability.¹⁴⁰ The individualism of the reasonable person survives in the disguise of the efficient risk taker.

The one really enduring breakthrough in strict liability succeeded *outside* the torts system through the workers’ compensation legislation. Attacks from the academy urging uptake of this exemplar and instantiation of a strict liability concept have thus far had little success.¹⁴¹ Within the torts system this seed has not germinated beyond strict liability for abnormally dangerous activities. The relevance of the hybrid forms of liability *between* negligence and strict liability such as vicarious liability; statutory negligence and strict liability for defective products are however not to be ignored.¹⁴²

To summarize: The US torts system is characterised by a fundamental ambivalence: On the one hand adherence to individualism under the unifying principle of negligence focusing on responsibility, fault and incentives; on the other hand adherence to actuarialism by the balancing of probabilities and practicing loss spreading via insurance schemes. The US torts law got struck on its passage from individual blame to corporate blame to no-blame; between the morality of corrective justice and the neutrality of collective justice. Proposals to do away in parts or as a whole with the allegedly fortuitous and expensive torts system for personal injuries remained rare exceptions.¹⁴³

Pressing modern problems, which the law of torts cannot or ought not solve are covered outside of the common law through no-fault compensation funds. An example of this is the treatment of hazardous industrial waste through the *Comprehensive Environmental Response, Compensation, and Liability*

¹³⁸ 7th Amendment (1791) of the US Constitution: “In suits at common law, ..., the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the US, than according to the rules of the common law.”

¹³⁹ On the buffer function of negligence between old trespass torts and modern strict liability (“absolute liability”) cf. the classic article of C.O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359 (1951). See also G.W. Boston, *Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier*, 36 San Diego L. Rev. 597 (1999); G.E. White, *The Unexpected Persistence of Negligence, 1980-2000*, 54 Vand. L. Rev. 1337 (2001).

¹⁴⁰ *United States v. Carroll Towing Co.*, 159 F. 169 (2d Cir. 1947); see on this case in greater detail, inter alia, P.J. Kelley, *Teaching Torts: The Carroll Towing Company Case*, 45 St. L.U.L.J. 731 (2001); S.G. Gilles, in Rabin/Sugarman, *Torts Stories*, 2003, pp. 12. The equation $N = B < P \times L$ has been made by R. Posner the characteristic of the tort of negligence *per se*: Cf., inter alia, R. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29 (1972). But see also R.W. Wright, *Hand, Posner, and the Myth of the ‘Hand Formula’*, 4 [2003] *Theoretical Inquiries in Law* No.1, Art. 4 (stating after an analysis of cases that the Hand formula is an ‘academic myth’).

¹⁴¹ See especially the law professors W. Douglas, A. Ehrenzweig, L. Friedman, C.O. Gregory, F. James, F. Kessler, W. Prosser in the middle of the 20. Century: later on G. Calabresi, *The Costs of Accidents*, 1970. – As an actual account of “strict enterprise liability” cf. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 Vand. L. Rev. 1285 (2001). See also the (unapproved) report to the ALI, *Enterprise Responsibility for Personal Injury*, 2 vols, 1991.

¹⁴² In US products liability law the liability for manufacturing defects (‘flaws’) is strict; the liability for design and warning defects is governed by negligence. There is, except few cases like asbestos, no liability for development risks. Cf. ALI, *Restatement (Third) of Torts: Products Liability*, 1998; Owen, *Products Liability*, 2. edn. 2008.

¹⁴³ As a proponent of a comprehensive social insurance scheme cf. S. Sugarman, *Doing Away with Personal Injury Law*, 1989; as supporters of a private first party insurance as alternative cf. J. O’Connor, *Ending Insult to Injury. No-Fault Insurance for Products and Services*, 1975; G. Priest, *New Legal Structure of Risk Control*, 119 *Daedalus* 207 (1990). – In England P.S. Atiyah shifted from an attendant of a social insurance scheme to a proponent of a system of private first party insurance. Cf. P. Atiyah, *The Damages Lottery*, 1997.

Act (CERCLA, the so-called Superfund) 1980 or the treatment of the consequences of oil spills through the Oil Pollution Act (OPA) 1990¹⁴⁴ as well as The September 11th Victim Compensation Fund established 2001¹⁴⁵. It served to impede tort damages claims being brought against US airlines by the relatives of the deceased victim-passengers of the four airplanes crashed by terrorist attacks and for the personal injuries on the ground, i.e. the persons killed or injured in and around the twin towers of the World Trade Center.¹⁴⁶

¹⁴⁴ The Act was passed after the Exxon Valdez disaster in Alaska and provides for a strict liability in cases of oil pollution. The damages are however restricted to 75 Mill. US Dollars.

¹⁴⁵ Title IV of the Air Transportation Safety and System Stabilization Act (ATSSA) of 22.9.2001.

¹⁴⁶ On this see the report the fund's special master K.R. Feinberg, *What is Life Worth?*, 2005

III. Russia – The Revolutionary Legacy: General Clauses of Quasi-strict Liability and Strict Liability

1. Tsarist and Soviet Law

Tsarist Russia at the end of the 19th Century was still a long way from becoming an industrial state after the English, German or American model. Its law was compiled in a 15 volumes collection of statutes, the *Svod Zakonov Rossiiskoi Imperii (SZ)* from 1833, completed under Tsar Nikolaus I. In the 1860s Russia set about a great law reform. One target was to adapt the law to the challenges of the beginning industrialisation. Already in 1852 a fault liability of railways had been adopted.¹⁴⁷ By 1878, under German and Austrian influence, Russia amended this provision in Book X of the SZ by a rule of presumed fault governing liability of railway and steamship companies for personal injury. The Courts of Tsarist Russia developed this into a veritable strict liability, which was only excluded in cases of contributory fault of the victim, fault of third parties or *force majeure*. In 1903, this strict liability was extended to factories and mines.¹⁴⁸

After the adoption of the *BGB* in the German Empire in 1896, in Russia attempts were also made to produce a modern Civil Code. They never came to a conclusion. It is noteworthy that in the last completed draft of a law of obligation 1913, there were two elements, which were to influence the post-revolutionary law: a general clause for fault liability after the model of the French civil code (§ 2601) and a rule of no-fault liability for dangerous things (§ 2635).¹⁴⁹ World War I and the October Revolution of 1917 created an entirely new situation.

From 1918, the use of Tsarist law was generally forbidden. In the context of the new economic policy (NEP) after 1921 certain private economic activities were again permitted. Thus legal gaps became visible which needed to be closed. A civil code was drafted quickly for the Russian Socialist Federate Soviet Republic (RSFSR)¹⁵⁰ and was completed in 1922.¹⁵¹ The Code contained elements of Tsarist and foreign civil (French and German) law. The code came into force in 1923 and contained only 435 short paragraphs. The section on extra-contractual liability contained 13 rules. Its kernel comprised two general clauses: 1. liability for damage caused by human conduct (§ 403), and 2. liability for damage from sources of heightened danger for their surroundings (§ 404). The latter norm was an unspoken continuation of pre-Soviet law of strict liability, but was, in the interests of protecting the socialist state property, very narrowly interpreted by the courts.¹⁵² Both general clauses were (with revolutionary vigour) straightforwardly conceptualised as causal liability.

In § 403, there were three exclusionary grounds: i) proof that the damage could not be prevented by the person; ii) proof that causing the damage was justified; iii) proof that the damage was the result of the intention or negligence of the injured party. The first exclusionary ground developed in the late 1930s into the possibility of proving that one had not behaved negligently. § 403 thus turned into a

¹⁴⁷ Art. 683, Book X of *Svod Zakonov*, ed. 1857.

¹⁴⁸ Regulations of 2.6.1903.

¹⁴⁹ Reprinted by M. Will, *Quellen erhöhter Gefahr*, 1980, at p. 194. The draft contained also a provision on compensation for pain and suffering. – In general to the pre-soviet time cf. W.E. Butler, *Russian Law*, 3d edn 2009, pp. 15-85; on the law of delict cf. C.S. Wölk, *Das Deliktsrecht Russlands*, 2003, pp. 39

¹⁵⁰ The Soviet Union (Union of Soviet Socialist Republics - USSR) came into being on 30. December 1922 as a federation of the RSFSR with Ukraine, Belorussia and the Federate Transcaucasian Republic.

¹⁵¹ Cf. on this generally R. Schlesinger, *Soviet Legal Theory. Its Social Background and Development*, 1945; N. Reich, *Sozialismus und Zivilrecht*, 1972.

¹⁵² Cf. B. Rudden, *Soviet Tort Law*, 42 N.Y.U.L. Rev. 583, 606 (inter alia with the example of no-liability of railways for damage by escape of sparks under § 404).

provision of presumed fault. With regard to § 404, liability was excluded where it was proved that the damage flowed from *force majeure* or from intention/negligence of the injured party.¹⁵³ Accidents and sickness at the workplace and in private life were the remit of social insurance; private hazards, such as car driving, were uninsurable.¹⁵⁴ Both general clauses survived in substance throughout all the legal reforms in the Soviet period¹⁵⁵ and appear again in the new Russian civil code.

2. Liability Law of the Russian Federation

By the end of 1991, the USSR had disintegrated and the individual republics became independent again. The Russian Federation was born.¹⁵⁶ A new Russian civil code was produced based on the 'Fundamental Principles of Civil Legislation' of the USSR and its Republics. The Civil Code of the Russian Federation (CCRF) comprises four parts, the last of which came into force in 2008. Liability law is found in Part II¹⁵⁷, from 26th January 1996, which came into force on 1st March 1996.¹⁵⁸

a) Quasi-Strict Liability

§ 1064 embodies the basic norm of liability for fault. It remains bound to its French origins in the history of the Russian law of delict. Paragraph 1 contains in its core a general clause *à la* Art. 1382 of the *Code Civil*: A person who damages another must compensate the damage. It centred on the unified concept of damage – not the injury of a legally protected interest. The purity of the French approach is diluted by the addition of the defining phrase, 'damage to the person or to the property of a person (natural or legal)'. Thereby, immaterial personal values are excluded, which are governed outside of the law of delict in Part I by §§ 150-152-1 CCRF. Anyway, what matters is an injury to legally protected interests and resultant loss. The ground for liability of § 1064 (1) is the causing of personal or property damage or of pure economic loss.

In contrast to the French model, neither intention nor negligence is mentioned in § 1064 (1). Fault features in para. (2): Whoever causes damage in the sense of (1) must show that he was not at fault. No exculpation is required where one of the cases of no-fault liability like the strict liability in § 1079 obtains.¹⁵⁹ Fault comprises intention and negligence.¹⁶⁰ Intention is not discussed further, not even mentioned. Civil fault is largely equated with negligence for which a definition can be found in § 401(1) CCRF (law of contract).¹⁶¹

¹⁵³ V. Gsovski, *Soviet Civil Law. Private Rights and Their Background under the Soviet Regime*, 1948, pp. 485-517; A. de Faria e Castro, *Die Merkmale der unerlaubten Handlung im sowjetischen Zivilrecht unter Berücksichtigung ihrer historischen Entwicklung*, 1969; B. Rudden, *Soviet Tort Law*, 42 N.Y.U.L. Rev. 583, 597 et seq. (1967); L. Sólyom, *The Decline of Civil Liability*, 1980, pp. 195-229.

¹⁵⁴ On the complex subject of 'liability and insurance' under Soviet law cf. J.N. Hazard, *Personal Injury and Soviet Socialism*, 65 Harv. L. Rev. 545 (1952); B. Rudden, *Soviet Insurance Law*, 1966.

¹⁵⁵ Cf. especially §§ 88-94 of the Fundamental Principles of Civil Legislation of the USSR and its Republics of 1961 and the succeeding civil code of 1964.

¹⁵⁶ Art. 1 of the Constitution of the Russian Federation of 1993 states that Russia is „a democratic, federate state governed by the rule of law and with a republican form of governance”. Cited from Butler, *Russian Law*, p. 811.

¹⁵⁷ Chap. 59: Obligations from Causation of Damage.

¹⁵⁸ An English version of the complete Civil Code can be found on the website www.russian-civil-code.com and in print, inter alia, in W. Butler, *Civil Code of the Russian Federation*, 2010. – On the law of delict cf. Wölk, *Das Deliktsrecht Russlands*, pp. 119; H. Oda, *Russian Commercial Law*, 2d edn. 2007, pp. 339-352.

¹⁵⁹ § 1064 (2) sen. 2 CCRF.

¹⁶⁰ § 401 (1) CCRF.

¹⁶¹ “A person is considered not to be at fault [!] if under that degree of care and circumspection which was required of him according to the nature of the obligation and the conditions of commerce, he took all possible measures for the proper performance of the obligation.”

This 'liability for fault' of the CCRF shares only its name with the European codifications of the 19th Century. In fact, this fault liability regime with a regular reversal of the burden of proof for fault reveals a *quasi-strict liability* (which has been set down by the author as a general rule for enterprise liability¹⁶²). Russian liability law goes further and extends it to the personal liability of citizens. This corresponds (as emphasised above) with Russian legal tradition since the post-revolutionary Civil Code of 1922, and has been maintained in all subsequent reforms.

Partly evoked by ideological discussions about the role of law in the young USSR, this remained a noteworthy step in the emancipation of civil liability from natural law influences of the 18th and 19th Centuries, which resonate in West and Central Europe to this day. The functional difference and independence of liability law from criminal law is underscored. The (insurable) compensation of damages in money in private law has other preconditions than the state-sovereign sanctioning of a criminal act through, for example, personal imprisonment. The sharp focus of the CCRF's liability law is on causation of damage and on loss distribution.

b) Strict Liability

The second basic norm of Russian liability law is § 1079. It contains a general clause on strict liability for sources of heightened risk.¹⁶³ This norm too can be traced back to the Civil Code of 1922 (§ 404), whose precursors originate in the 19th Century. § 404 gave unadulterated expression to the principle which was at the bottom of these casuistic provisions of Tsarist law: The user of a hazardous activity must bear its risks. Therefore, despite political-systemic upheaval we have here an unbroken autochthonous tradition of Russian liability law, which is historically older than the sequence of the American Restatements of Torts¹⁶⁴ and still more progressive than the recent central European proposals for tort law reform.¹⁶⁵

As sources of heightened danger in the modern § 1079, the following were introduced: Technical modes of transportation (railway; steamship; car; aircraft); high voltage electricity; atomic energy; explosives; lethal poisons; etc. The owner or operator of these sources of greater danger is liable. It can exonerate itself in the case of a damage causing incident only where it can bring the evidence that there was an intervening *force majeure* or that the victim intentionally assumed the risk of harm.

3. Characterisation

It was in the aftermath of the October Revolution that the Soviet civil law dramatically broke free of the fault principle as a basis for extra-contractual liability which had up to that point determined European and US law. The liability law of the civil code of 1922 established exclusively stricter forms of liability on the injuring party. It contained two general clauses of liability for the causing of damage.¹⁶⁶ The first developed into a general liability for presumed fault; the second became a strict liability for sources of heightened hazard (especially industrial risks).

¹⁶² Brüggemeier, *Haftungsrecht*, 2006, pp. 117; id., *Modernising Civil Liability Law*, pp. 70; id., *Verschuldenshaftung, Unternehmenshaftung, Gefährdungshaftung*, in *Festschrift H. Rüßmann*, pp. 265.

¹⁶³ For more detail on this subject cf. Will, *Quellen erhöhter Gefahr*, pp. 193-232.

¹⁶⁴ On liability for 'ultrahazardous' or 'abnormally dangerous activities' see above in the text.

¹⁶⁵ Cf. European Group on Tort Law (ed), *Principles of European Tort Law*, 2005; C. v. Bar/E. Clive/H. Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference, Book VI: Non-Contractual Liability Arising out of Damage Caused to Another*, 2009, pp.395.

¹⁶⁶ This structure has a parallel to the law of delict of the new Brazilian Civil Code of 2002. For a version of the Code in English cf. L. Rose, *The Brazilian Civil Code in English*, 2008; see also Brüggemeier, *Modernising Civil Liability Law*, pp. 197.

Truly revolutionary for their time, these rules could today, almost a century on, serve as a model of liability law for the 21st Century. Both characteristic paths of liability law of the 'risk society' are present: quasi-strict liability for businesses¹⁶⁷ and strict liability for technical risks. The latter, inter alia, encompasses a unique coherent regime of liability for all technical modes of transportation. Furthermore, both principles are not to be found in some subsidiary provisions or diffuse case law, but are in the very heart of the civil code. They furnish the best conditions for the elaboration of a concise scientific doctrine of strict liability or *Gefährdungshaftung* as an integral component of personal injury law of the 'risk society'. That said, there is still room for improvement also in Russian law.

¹⁶⁷ Enterprise liability for systemic fault is also covered by § 1064. Individuals' fault liability should be separated as a third track (without reversal of the burden of proof for fault).

IV. Conclusion

It is not by coincidence that the jurisprudence of civil liability law is internationally clinging on the grand old tradition of the Roman and natural law's responsibility for fault, as it has classically been framed in the French civil code of 1804: liability for one's wrongful act; liability for the wrongful acts of others (servants/children); and some special cases of no-fault liability for things (animals/buildings). If one leaves this classic world of individual responsibility and starts envisaging the different world of industrial modernity and its law of liability, the classical model soon loses its appropriateness. An irritating variety of depersonalised 'stricter' forms of enterprise liability has been developed, both openly and calmly, by special legislation and by case-law. In part liability has been substituted by insurance, e.g. state social insurance. Balancing of probabilities and risk absorption by the best loss spreader have replaced the fault rationale. As far as physical injuries by the materialisation of technical risks are concerned the law of delict has in continental Europe been replaced by insurance schemes or liability law operates in the meantime *like* an insurance system. Finally compensation of damages ends as a loss distribution by collectivities (*via* damage division agreements between insurers). In last resort the general public pays twice – as taxpayers and as customers of products and services. The advantage is that neither the business risk-taker nor the fortuitous risk exposed victim is left with the full burden of the damages or losses. Perhaps the US torts system is haunted by so many crises because it is farther away from this hotchpotch of insurance coverage and depersonalised responsibility than continental Europe. With respect to the law in the books the Russian law seems to be best of all and most attuned to the legal challenges of industrialisation. A 'grand theory' of the mixed liability law of the industrial modernity or 'risk society' is not in sight. Systematising the chaos resembles the clean-up of *Augeas'* stables by *Hercules*. But *Hercules* may prove to be *Godot*.

