Statement From a Continental European Perspective

Willem H. van Boom

In: H. Koziol et al. (ed.), Product Liability – Fundamental Questions in a Comparative Perspective (World Tort Law Society series), Berlin: De Gruyter 2017, p. 574-592

1 Introduction

This contribution offers some brief reflections on the thought-provoking chapter 'Comparative Conclusions' by Helmut Koziol. The author does two things in his contribution. First, he more or less argues that theories of law and economics are of no use to the legal analysis of tort law. Since I am not a law and economics scholar, I feel no need to defend the economic analysis of law (assuming I were able to do so) but I do want to share my impression that law and economics is not always adequately represented in the comparative conclusions. More to the point, however, is that it seems that some of the concepts and arguments used by Koziol are completely in line with mainstream positive economic analysis. Indeed, he uses concepts such as internalisation of externalities, loss spreading arguments,[1] and behavioural consequences of under-deterrence and over-deterrence in ways similar to law and economics literature. For instance, Koziol acknowledges that product liability may have unwholesome effects on corporate behaviour, eg over-deterrence and under-deterrence, where the former may stifle innovation and the latter may decrease product quality.[2] This is not to say that Koziol is a law and economics scholar in disguise. What it does mean, however, is that we need to focus on the substance of his narrative rather than the appearance.

The second and main issue that Koziol addresses concerns the 'ideal product liability regime'. He underlines the need for a coherent and balanced system of product liability and attempts to develop a logical rationale for the introduction of strict liability, on the basis of which he then distinguishes the types of cases which should fall inside the scope of product liability from those which should not. Particular emphasis is also on the position of 'innocent bystanders' in relation to the 'risk community' of manufacturer and (indirect) buyers. Moreover, Koziol explicitly asks whether certain services should not be included in the ideal regime for product liability.

My contribution mainly focusses on the second issue raised by Koziol, concerning his ideas on a coherent and balanced system of product liability. First, I present an outline of the general issues that have to be considered when addressing the objectives and functions of product liability (section II). Then I summarize Koziol's position and review his attempt at developing foundations for a coherent and balanced system of product liability (section III). For the fact that my reflections are at times sketchy and sometimes outright Eurocentric, I apologise in advance. Before I turn to the heart of the matter, let me state one limitation of the scope of this chapter. As I see it, the emphasis in the comparative conclusions is mostly on 'consumer damage' (sc, death, personal injury and property damage suffered by natural persons not acting in a professional or business capacity).[3] Business to business damage is hardly discussed.

---

1 Comparative Conclusions no 13/30 and no 13/66.
2 Comparative Conclusions no 13/27 ff.
3 See also the definition of 'damage' under art 9 of the European Product liability Directive (Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States

2 Issues to Consider

2.1 Objectives and Functions of Product Liability

When the judiciary or the legislature introduce rules on product liability, they do so with one or more particular fairness objectives in mind. Whether a highest court decides to beef up the general duty of care standard of tort law when manufactured products are involved or the legislature decides to introduce a dedicated victim-friendly regime for particular products, there is always a fairness objective at play. The objective may be to remedy the low probability of success for deserving claimants under the pre-existing fault-based liability regime. Or it may be to eliminate or reduce obstacles to proving what happened and why it happened or to restore some imbalance between end user and manufacturer or simply to intervene after a particularly salient incident failed to be resolved fairly. The bottom line is that the introduction of legal rules, however open-textured, vague or strict, marks the aspiration of the rule-maker to reach certain fairness objectives in society.

Such fairness objectives of a particular product liability regime may be analysed by positive (descriptive) analysis and by normative (prescriptive) analysis. A positive analysis merely asks:

a) what are the chosen policy objectives of the rules or regime introduced

b) what legal instruments (tools such as remedies) does it use to reach these objectives, and

c) how effective are these legal instruments in achieving these objectives and at what cost? If not, are there alternative instruments available which are more cost-effective?

The first question concerning the chosen objectives seems simple enough: one ‘merely’ needs to assess what the institution introducing the new rule or regime had in mind. Yet, in reality several complications may arise. What if the legislature did not spell out the overriding objectives of the regime introduced? What if the objectives are literally spelled out and seem to point in one direction but all the other evidence (eg, the instruments chosen to attain the objective) points in another direction? And what if the objectives are ambiguous, contradictory or irreconcilable? In such cases, a legal scholar could truthfully report that the stated objectives are obscure or unintelligible and conclude that a next step is in order. This next step may be the construction of a hypothetical scenario: *what if* the objectives were so and so?

When looking more closely at the possible objectives of a product liability regime, there are roughly two opposing views:

d) liability as an instrument for prevention of injury by defective products

e) liability as an instrument of compensation, that aims at offering pecuniary redress to victims foriujj8 suffering injury from defective products

These two positions will be referred to as *prevention* vs *compensation*. Obviously, these concepts need further specification. For instance, what does prevention in the particular context actually entail? Does the objective of prevention have a specific scope or does it also aim at general deterrence? Does it mean to completely eradicate *all* accidents involving (defective) products or to *optimise* the number of accidents involving products (that is to say: by minimising the avoidable and societally unacceptable accidents at

---

concerning liability for defective products, amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999).

acceptable costs to society)? The latter approach chimes well with those who see a liability system as a 'tax' forcing tortfeasors to internalize the 'negative externalities' of putting defective products on the market. And what instruments are used to achieve this objective of prevention: ex ante monitoring and injunctions, ex post punitive damages? Mere optimisation may imply the use of monetary incentives for manufacturers to internalize negative externalities whereas the objective of complete eradication may imply the use of harsher sanctions.

In Europe, I think that in the eyes of legislative policymakers and courts the main objective of product liability is compensation. Indeed, there is a culture of reliance on state-run public authorities supervising markets and a culture of using both criminal and administrative law sanctions for steering corporate behaviour, regulating product quality and warranting consumer product safety. This goes a long way in explaining the fundamental difference between the European Union and the USA as far as the role of product liability is concerned. Product liability in Europe is in many ways a far less important instrument for attaining prevention objectives than it seems to be in the USA.[4]

There are multiple factors that explain these differences.[5] In some cases, the financial rewards for lodging a product liability claim – if and when awarded or settled – seem to be much larger in the USA given the possibility of punitive damages. These are awards not for compensatory purposes but purely for deterrence purposes. In Europe, 'punitive damages' as a concept is virtually non-existent. Instead, in European legal thinking the deterrence function of 'punitive damages' is usually considered to be part of criminal and administrative law sanctions (eg, fines and incarceration). Furthermore, the role product liability actually plays in compensating victims depends greatly on the national context in which the liability regime operates. In some countries, public health insurance schemes and social security may be more important sources of 'compensation' than is liability law. Contextual factors such as thresholds for access to justice (eg, availability of mass litigation instruments, court fees, contingency funding of claims) also influence the relevance of liability as a compensation system. For instance, the existence of a class action procedure allows the amalgamation of product liability claims and offers victims of defective products increased leverage to vindicate their rights. Also, a factor that may well explain a lower frequency of product liability cases in Europe is the existence of social security arrangements fulfilling the basic financial needs of victims of defective products. Obviously, the extent of these arrangements varies from Member State to Member State but on average there is some form of 'safety net' for the unemployed, the injured and incapacitated. For example: most European countries have a more or less comprehensive state-run medical care system which is either fully regulated and state-funded or at least fairly accessible to all citizens (eg, through mandatory state insurance coverage) irrespective of income or the cause of the need for medical treatment. Thus, the necessity to use the liability system to cover essential medical expenses in case of injuries caused by a defective product is less pressingly felt in Europe than in the USA.[6]

Thus, Koziol rightly points out that, *de lege lata*, product liability in the USA has deterrence and compensation as primary objectives whereas the European approach is mostly focussed on compensation. Moreover, the USA legal system makes use not only of punitive damages but also applies a number of powerful instruments such as the class action procedure and discovery procedure which, combined with substantive product liability, may also boost the chances of compensation for deserving cases. This is not

---

4 Cf M Polinsky and S Shavell, 'The Uneasy Case for Product Liability' (2010) 123 Harvard L. Rev. 1437 ff.

5 Among the many differences are the absence of juries in (most) European civil court litigation and – in some countries – the prohibition of contingency fee remuneration for solicitors.

6 Cf Jane Stapleton, Restatement (Third) of Torts: Products Liability, an Anglo-Australian Perspective, 39 (1999-2000) Washburn L.J. 2000, 363 ff. Please note that this does not mean that all European countries have a 'free-for-all system' which covers medical expenses or that (long-term) care costs are fully borne by the state, the collective or the taxpayer. There is variation, obviously, but my assessment is that on the whole, European states offer more in terms of a 'safety net' to their citizens than the USA does.

the place to review the evidence on how the USA product liability system actually plays out in practice, but it seems that the chances of obtaining compensation in deserving cases may be higher there than in European legal systems. In part, this is caused by the unappealing prospect presenting to manufacturers of going to court in clear-cut product liability cases. Settling may be wiser. For instance, USA consumers caught up in the 2016 Volkswagen emission software fraud scandal have been offered compensation far quicker and more profusely than consumers anywhere else in the world. What does this tell us about the effectiveness of tort systems which focus on compensatory goals?

Besides the *prevention* vs *compensation* debate, there is the question of whether product liability serves other, less straightforward *functions* such as fact-finding, learning lessons for the future or as regards attributing moral reproach or public accountability concerning past behaviour. For example, the law may consider it relevant that liability procedures can be used to identify causes of unnatural death and accidental injury and disease. If finding out what caused injuries to victims is one of the aims of the legal system, it needs to address the fact-finding procedure: does the law ensure that the objective truth is put on the table, does it allow in-depth analysis of company records by use of a discovery procedure or does it allow litigants to rely on one-sided rules on burden of proof or even to withhold or destroy key evidence without substantial consequences?

2.2 Instruments and Modelling Effects

In the positive analysis of the legal regime on product liability, a further question is how (cost-)effective the legal instruments used are in achieving the set objectives. At this stage, some sort of empirically informed theory of corporate and human behaviour is indispensable. Law and economics tries to provide such theories. From a lawyer's perspective, the *limitations* of such theories lies in the fact that they reduce complexity by modelling. To an economics scholar, this attempt at reduction is in fact the strength of the model.

In some versions of the economic analysis of law, the model of human and corporate action is an approximation of reality at best. According to rational choice theories,[7] actors are presumed to have a clear intransient understanding of their preferences and to deliberately act upon these preferences in light of consciously collected and perfectly processed information. Also, these theories tend to ignore nuances and details by focussing on the main drivers of deliberative action: striving for attaining preferences at lowest cost. For a model of corporate action this may mean that cost minimisation and profit maximisation are the main drivers. Such a model may well be accurate to predict behaviour as long as the *correct* parameters 'costs' and 'profits' are used: however, 'costs and benefits' to individuals and companies may mean so much more than just the direct pecuniary costs and profits.

Looking at the instruments for achieving the objectives behind product liability can be an enlightening exercise. For instance, imagine a product liability regime which has prevention of avoidable product defects as the main objective but at the same time only allows the award of compensatory damages in case of injury. In a crude economic analysis the expected business costs of accident avoidance are offset against the expected cost of compensating potential victims and if the former costs are higher than the latter, the manufacturer will not have any incentive to incur the extra costs of avoidance. Here, the prediction may be that the instrument of compensatory damages will not effectively steer corporate behaviour towards prevention as long as the expected cost of compensating victims is lower than the cost of prevention. This is nothing more than a behavioural analysis: it *models* the behaviour of the actors involved and how law

---

[7] Far from being a monolith, rational choice theories come in different forms and shapes with varying degrees of abstraction from real-life behaviour. See, eg, R.B. Korobkin and T.S. Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics', Cal. L. Rev. 2000, p. 1051-1144.

influences (or not) their behaviour. It should be noted, however, that models of behaviour are just that: models. And as the expression goes, all models are wrong but some are useful.[8] A model can be useful as long it adequately predicts behaviour. So, what if manufacturers in practice do not merely take the mere pecuniary cost of compensating victims into account but also the expected reputational cost of negative publicity surrounding liability proceedings? If in practice these additional costs tip the balance towards prevention, then the predictive accuracy of the model is low. My personal conviction is that this does not tell us that the approach of modelling itself is inferior. What it tells us is that the analysis can benefit from the refinement of the parameters used in the model.

2.3 The Need for Regulatory Context

From this brief overview it becomes apparent that product liability could be defined in broader terms including issues of prevention, deterrence, attribution and accountability. However, according to mainstream European legal thinking, product liability mainly serves as a gateway to monetary compensation for inflicted injuries. In this view, other branches of the law such as criminal law and administrative regulations are concerned with regulating the minimum safety requirements of products and with punishing deviance. Indeed, if one looks at the current European legal landscape one can see that liability is merely one leg of the legal environment relevant to manufacturing of products. There are extensive rules and regulations at both national and EU level on 'high trust, high risk' products such as foodstuffs, pharmaceutical products, chemicals, cosmetics, machineries and toys. In that respect, the existing liability regimes are to be seen as a small cog in the bigger wheel of EU products regulation.[9]

As an example, product liability needs to be read in conjunction with the General Product Safety Directive (GPSD 2001).[10] The GPSD lays down general principles of responsible manufacturing practices and places manufacturers under a duty to ensure that the products they place on the market, are safe (art 3 GPSD). In art 2, the Directive defines 'safe product' as:[11]

> 'any product which, under normal or reasonably foreseeable conditions of use including duration and, where applicable, putting into service, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons, taking into account the following points in particular:
>
> (i) the characteristics of the product, including its composition, packaging, instructions for assembly and, where applicable, for installation and maintenance;
>
> (ii) the effect on other products, where it is reasonably foreseeable that it will be used with other products;
>
> (iii) the presentation of the product, the labelling, any warnings and instructions for its use and disposal and any other indication or information regarding the product;
>
> (iv) the categories of consumers at risk when using the product, in particular children and the elderly.'

Moreover, art 3 (3) GPSD provides that the conformity of a product to the general safety requirements shall be assessed by taking into account, eg, the state of the art and technology, and the reasonable consumer

---

8 George Box & Norman R. Draper, Empirical Model-Building and Response Surfaces, John Wiley & Sons 1987, p 424.

9 See on the interplay between tort and regulation generally W.H. van Boom, M. Lukas, C. Kissling (eds.), Tort and Regulatory Law, Tort and Insurance Law vol. 19, Vienna/New York: Springer 2007.

10 Directive 2001/95/EC on General Product Safety.

11 Cf art 3 (1) Draft Consumer Product Safety Regulation (COM(2013) 78 final).

expectations concerning safety.[12] Thus, the GPSD explicitly builds on the concept of defectiveness used in art 6(1) EU Product Liability Directive.[13] The obvious difference is that the GPSD is mostly enforced by means of administrative and criminal law whereas the national implementation of the EU Product Liability Directive is mostly considered to be part of the national tort law systems.

The relevance of this regulatory context is that a breach of a statutory duty concerning product safety in itself may already constitute a ground for liability, apart from any specific rules on product liability. Presumably, a number of civil law jurisdictions acknowledge that the breach of a statutory duty constitutes a wrongful act which is imputable in case of fault. This means that the regulatory regime provides the backbone for evaluating manufacturer behaviour in tort and that any additional rules on product liability may become relevant only when such regulatory rules were complied with.

2.4 Normative Analysis of Product Liability

So far, we have only dealt with the positive (descriptive) analysis of product liability regimes. As it turns out, the objectives of such regimes range between the outer extremes of pure compensation and full deterrence objectives. The legal instrument used for attaining either objective is mostly a form of damages – compensatory, restitutionary or punitive. We also noted that the context of the substantive rules on product liability should not be ignored. The context of civil procedure and the regulatory framework for product safety standards and product recall need to be considered as well.

The normative (prescriptive) analysis of product liability concerns itself with the question of which product liability regime is 'the best for society'. If we refer to 'the best', we may mean the most fair, equitable and balanced system. Therefore, this label 'the best' presumes an external standard of evaluation. We must first agree on what constitutes 'the best' before we can perform a normative analysis.[14]

Koziol takes a firm position on what he feels should be the objectives of product liability. He rejects the idea of prevention as primary objective and instead focusses on compensation of damage as the main objective. In his view, prevention may be a welcome side effect but it certainly is not the core objective. Also, Koziol argues that the law of damages should not be abused to serve all sorts of regulatory goals: damages should merely compensate not steer, deter or punish.[15]

According to Koziol, the level of liability should be *reasonable* (no 30): not too strict and not too lenient, taking all interests involved into account such as victim protection, freedom of enterprise and society's interests.[16] Reasonableness requires that overstretching of responsibilities is avoided since it may cause incentives to shirk responsibilities (and, I hasten to add, an incentive to cover up, deny, commit fraud and leave no witnesses). Reasonableness also includes, so Koziol argues, a duty for users to take responsibility for their own actions. I suspect that here a balance is envisaged between the manufacturer's responsibility not to produce defective products and the end user's responsibility not to act carelessly in using products.

---

12 Cf art 6 (2) Draft Consumer Product Safety Regulation (COM(2013) 78 final).

13 'A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account (...)'.

14 The difference between a normative and a positive analysis is that with the latter we do not apply an *external* theory of fairness, equity or societal efficiency but merely look at what the policymaking legislature or judiciary itself formulated as 'the best for society'.

15 Comparative Conclusions no 13/78 ff.

16 Comparative Conclusions no 13/30-31. In the abstract, this position seems to be in line with the EU Product Liability Directive which alludes to the 'fair apportionment of the risks inherent in modern technological production' (preamble recital 2).

On an abstract level, this call for reasonableness and a balance between the legitimate interests of end users, manufacturers and society at large, sounds appealing. It may even chime well with law and economics scholars. However, the devil is in the details of what actually constitutes 'reasonableness'. In fact, I find it hard to identify factors that constitute reasonableness without having a firm understanding of why compensation is an objective in itself rather than merely an instrument of achieving the objective of prevention. Ultimately, we cannot escape the question of the objective that underpins the compensatory remedy. Since product liability regimes do not simply offer compensation to everyone who suffers injury while using a product, there is a need for a further criterion. This is usually found in the requirement of defectiveness of the product, which may mean that the product is 'unacceptably dangerous', falls below a 'reasonable safety expectation' or a similar standard. It is this requirement that clarifies the normative foundations of product liability. An example may clarify this point. Imagine a pharmaceutical product which is used to inoculate children against a debilitating disease. There is an extremely small risk that the product causes an allergic reaction and there is no way in telling beforehand who will suffer this reaction. Is this a defective product, assuming there was no safer alternative available, there was ample warning for the risk of allergic reaction and the societal benefits of the product by far exceed the burden on the allergic individual? If the liability system finds that the product is not defective, it uses a straightforward risk-utility test for evaluating defectiveness. If it finds that this excessive burden on the allergic victim should be shifted onto the manufacturer – who can spread this risk among the risk community – then the word 'defectiveness' starts to mean something entirely different. Then it has become an instrument of distributive justice rather than 'mere' corrective justice.

3 Search for Justification and Coherence

3.1 Fitting Product Liability into the Legal System

In his search for a coherent foundation for a product liability system, Koziol rightly identifies several anomalies and unjustifiable differences in the treatment of seemingly similar cases. To mention just a few: why does strict liability not apply to B2B claims? Why are defective services not included? Why are small entrepreneurs (craftsmen, home farmers, C2C claims) not excluded? Why are only movable products included and not buildings and bridges? Why are there different regimes for pharmaceuticals, medical products etc? Why does it not include liability of designers, contractors, wholesale sellers?[17] Obviously, there can be historical *explanations* for these anomalies and differences. Koziol is less interested in explanations than in *justifications*. Therefore, he understandably relies on principles of equal treatment and logical systematization instead of an historical legal analysis.[18]

In his quest for coherence, Koziol reviews potential foundations for product liability such as consumer protection, a contractual approach towards product liability, a strict liability approach and enterprise liability. Koziol dismisses 'consumer protection' as a firm justification for product liability.[19] I agree that 'protection' as such cannot be considered a serious contender since there is little logic in finding the justification for protection in protection itself. The concept of protection begs the question: protection of whom *against what and for what reason*?

Koziol also addresses the interplay between product liability and contract law. Here, we find that there is quite some variation between the legal systems.[20] Some legal systems attach great value to the doctrine of

---

[17] Comparative Conclusions no 13/38.
[18] Comparative Conclusions no 13/40-41; no 13/78 ff.
[19] Comparative Conclusions no 13/74.
[20] Comparative Conclusions no 13/51.

privity while others happily extend the contractual relationship to include indirect buyers with such sales contract doctrines as 'implied warranty' and 'latent defects'. Again others effortlessly blend contractual and extra-contractual doctrines.[21] On a side note, it may be relevant to take into consideration that the classical distribution channels via contract chains (from manufacturer to distributor, wholesale seller and retailer to end user) are making way for modern business practices used by some manufacturers to directly tie in consumers. Take, for example, the sale of a new motor vehicle or a computer device. The end user is more often than not connected directly to the manufacturer (or its national distributor subsidiary) by accepting maintenance provisions, registering in guarantee schemes, acceding to customer schemes, accepting terms and conditions of licences and even by signing up for software updates. This development confirms the need for a robust product liability regime which bridges the contract / tort divide.

Koziol proposes to include services in the framework for defective products so that manufacturers of industrially produced goods and services are treated the same.[22] On an abstract level, it makes good sense to develop an all-encompassing framework since in modern society it is becoming more and more difficult to distinguish between injuries caused by physical objects on the one hand and 'non-material objects' such as defective software and business processes generally on the other.[23] On closer inspection, however, this may turn out to be easier said than done. What should an overarching framework for defective services and products look like and how would it interact with contract law, notably the law of (consumer) sales and services? And how should the defectiveness requirement be formulated?

Koziol works from the starting point that physical objects are sold on the basis of obligations of result and that services are rendered on the basis of obligations of means.[24] He is quick, however, to put these differences in a nuanced perspective: in practice, they may be more gradual rather than fundamental. Koziol advocates the inclusion of strict liability for defective services in cases where the aspect of the defective service relates to an obligation of result. Here, an example is given which concerns a defective medical appliance used by a physician in performing his duty vis-à-vis the patient. For this example to work, we first have to imagine that all kinds of practical obstacles in various jurisdictions do not exist. We need to assume that this is a case governed by private law and indeed by tort law. Then, we need to see that Koziol probably treats contractual obligations of result and extra-contractual strict liability as interchangeable. This may be more apt for some civil law systems than for others. In some civil law systems there is a strict difference between contractual and delictual imputation and concurrence of contract and tort are not allowed. Also, the imputation of non-performance of contractual obligations of result to the debtor may rest on distinct grounds, eg fault, statutory grounds for imputation or an open standard of reasonableness, fairness or good faith. This may or may not coincide with grounds for (statutory) strict liability in tort. Furthermore, in the context of the medical appliance example, solutions under either a contract law regime or a delictual liability regime are concerned with the attribution of responsibility for defective *objects*. In some jurisdictions, there may be (strict) liability of either (or both) the manufacturer or the *keeper or professional user* of the defective object involved, which makes coordination between rules of product liability and concurring strict liabilities all the more important. In short, treating tangible objects and services on a par with each other may in terms of challenge be equivalent to entering a swamp…

---

[21] Comparative Conclusions no 13/43 ff., no 13/70 ff. See on 'implied warranty' as a source of strict liability (in contract) also Introductory Lecture no 1/9 ff. Koziol refers to the 'warranty approach' a reliance-based liability but from the context I deduce that the word 'expectation' is more apt; in that sense, art 6 EU Product Liability Directive is also geared towards the protection of consumers' 'reasonable expectations' concerning safety levels in the product.

[22] Comparative Conclusions no 13/98.

[23] To go even one step further, one could even argue that a product liability regime should include protection against unreasonably unsafely designed financial products.

[24] Comparative Conclusions no 13/107 ff.

3.2 Fault, Risk or Enterprise

As far as the choice between fault-based and strict liability[25] is concerned, Koziol postulates that misconduct is the rule and the strict liability is the exception.[26] Problems with fault-based liability per se do not justify the introduction of a special regime dedicated to consumer damage by defective products.[27] In fact, strict liability for products protecting anyone other than the direct counterpart in contract is at odds with the foundations of tort and contract law, or so Koziol argues, since it does not fit harmoniously in either the contractual or delictual liability system.[28]

Koziol goes on to investigate whether strict product liability is justified. One of the stops he visits is enterprise liability. The main idea of enterprise liability – which as such, I should add, is non-existent in some civil law systems – is that the enterprise should bear the risks concomitant with the prospect of profit-making. Art 4:202 PETL embraces this concept by setting forth a combination of liability for corporate breach of duty of care with a reversal of burden of proof and an extended vicarious liability for 'auxiliaries'. In the opinion of Koziol, enterprise liability constitutes a so-called 'risk community' where the enterprise is presumed to be at fault and which allows the loss befallen on a small portion of the end users of the product to be spread over all consumers.[29] Koziol essentially argues that in a adequately working market, the enterprise thus has an incentive to minimize the frequency and cost of accidents.[30] Thus understood, enterprise liability goes a long way to underpinning product liability but nevertheless Koziol finds that it cannot serve as a justification for strict liability, nor can it justify the inclusion of third, non-contracting parties ('innocent bystanders') as protected under product liability.

3.3 What do we Mean When we use the Word 'Defective'?

Although the European Product Liability Directive merely refers to reasonable safety expectations of consumers, in legal doctrine there is a tendency to use the threefold distinction derived from the American Restatement on Torts (Product Liability) between design defects, manufacturing defects and warning defects.[31] This taxonomy is highly enlightening for didactic purposes; moreover, it forces us to distinguish between:

f) manufacturing defects where specific items for some reason do not comply with the overall level of safety that the design offers (the infamous Ausreißer, outliers, lemons, runaways)

g) (deliberative) choices in design where the residual risk is inherent to the entire product series

h) a lack of relevant instruction and warning which could adequately prevent certain inherent risks from materializing.

---

[25] The concept of strict liability ('non fault-based liability') is defined as 'liability independent of any contractual relationship between victim and producer and regardless of any fault and based on defectiveness of goods' (Comparative Conclusions no 13/53). Note that the concept of strict liability is sometimes also used to denote *contractual* liability without fault and without recourse to the 'force majeure' defence.

[26] Comparative Conclusions no 13/32 ff. See also Introductory Lectureno 1/16, no 1/22 ff.

[27] Comparative Conclusions no 13/24.

[28] Comparative Conclusions no 13/37 ff.

[29] See also Introductory Lecture no 1/22.

[30] Comparative Conclusions no 13/67.

[31] See, eg, Foerste/Graf von Westphalen, Produkthaftungshandbuch, 3d ed. München: Beck 2012, § 48, no. 22 ff.; J-S Borghetti, La responsabilité du fait des produits, Paris: LGDJ 2004, p. 445 ff.; Micklitz/Stuyck/Terryn (eds), Cases, Materials and Text on Consumer Law, Ius Commune Casebook series, Oxford: Hart Publishing 2010, p. 461 ff.

This threefold categorisation is appealing and could easily be fitted into the 'reasonable consumer expectation' test, if we assume that consumers may reasonably expect runaways not to occur and should reasonably expect product design not to be completely accident-proof. This makes 'runaway' cases easy to decide: we merely assess the intended design and anything that deviates from that design is a defective item. The design defects are more difficult to assess since they are in need of an objective standard which distinguishes between acceptable and unacceptable inherent product risks. Consumer can fall from bikes, cut someone with a knife, choke on toys, suffer allergic reactions from dyes and crash their cars. The risk is inherent and perhaps alternative design could reduce or remove the risk. But at what cost? And are these costs reasonable? Should the user of the product not be left the autonomy to act more or less carefully? Can courts demand alternative design? Are they equipped to assess the societal costs of current design and the benefits of alternative designs? These are typically the issues that come to the fore when discussing design defects.

Although the European Product Liability Directive does not refer to any test other than the consumer expectation test, it is sometimes argued that within this expectation framework, a cost-utility test needs to be applied when evaluating the safety of the design. This test bears resemblance to the *Learned Hand* formula.[32] In essence, the *Learned Hand* formula states Burden < Probability * Damage → Negligence. Hence, a product design is defective if the overall *Risk (= Probability * Damage)* outweighs the (societal) *Burden of Precaution*, and the manufacturer nevertheless does not take these precautions. In essence, judging design revolves around the following factors: the source of danger to health or safety, the magnitude of the chance that this danger will materialize, the feasibility and burden of taking precautionary measures or using an alternative, the benefits of the alternative, and the acceptability of the overall risk. In previous publications, I have argued that this factor-approach in design evaluation is not limited to product design but should also be applied to basically all deliberative design activity, be it for products, services or procedures.[33]

On a side note, it is worth mentioning that the definition of defectiveness under the European Product Liability Directive was substantially widened in a ground-breaking 2015 ruling.[34] The ruling concerned the medical cost of replacing pacemakers and implantable cardioverter defibrillators. Experts had decided that the product series at hand suffered from a latent condition which might or might not become manifest in individual devices. Obviously, if experts decide that a whole series of vital medical devices is too dangerous to remain in the human body, even when it is uncertain whether an individual device will actually fail, the only gateway through which the series can be declared 'defective' is by deciding that a potential defect in (unidentified) individual items constitutes a defect in the entire series. This is exactly what the ECJ did. First, it declared that the safety requirements with regard to such medical devices are particularly high in the light of their function and the vulnerable situation of patients using such devices.[35] The potential lack of safety which would give rise to liability stems from the abnormal potential for damage which those products might cause to the person concerned. Against this background the ECJ held:

> "Accordingly, where it is found that such products belonging to the same group or forming part of the same production series have a potential defect, it is possible to classify as defective all the products in that group or series, without there being any need to show that the product in question is defective" (no 41).

---

[32] United States v. Carroll Towing Co. 159 F.2d 169, p. 173.

[33] W.H. van Boom, Structurele fouten in het aansprakelijkheidsrecht. (inaugural lecture Tilburg University), Den Haag: BJu 2003; cf Willem H. van Boom, Inherent Risk and Organisational Design in European Tort Law, 108 Zeitschrift für Vergleichende Rechtswissenschaft (2009), p. 118-133. See also Erdem Büyüksagis and Willem H. van Boom, Strict Liability in Contemporary European Codification: Torn Between Objects, Activities, and Their Risks, 44 Georgetown Journal of International Law 2 (2013) 609-640.

[34] ECJ 5 March 2015, ECLI:EU:C:2015:148 (Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt — Die Gesundheitskasse (C-503/13), Betriebskrankenkasse RWE (C-504/13)).

[35] ECJ 5 March 2015, ECLI:EU:C:2015:148 at no. 39.

So, this essentially means that *the risk* of defectiveness *in itself* may constitute defectiveness under the Directive. The patient does not have to prove that 'his' device is defective but merely that the series as a whole carries a potential defect which causes an unreasonably high manifestation risk. Since the ECJ also classified the 'recall cost' for consumers (the costs relating to the replacement of the defective product) as damage under the operation of the Product Liability Directive, the scope of this decision is quite wide.[36]

Koziol proposes a different taxonomy of defects. He arrives at his taxonomy via a classification of various sources of strict liability. Strict liability in his view is mostly based on inherent dangerousness: strict liability for inherent dangers of nuclear installations, aircraft, railways, motor vehicles, pipelines etc.[37] Koziol calls this the "general abstract dangerousness of things and facilities" where the inherent danger is not controllable by reasonable care. Here, the liable party is considered to enjoy the benefits of the object and should therefore also bear the risk.[38] Koziol argues that the risk of runaway product defects is effectively *also* an inherent uncontrollable risk of modern production: things may go wrong, even if the manufacturer does his utmost to produce his products carefully.[39]

Koziol argues that the dangerousness from a defective product may usually not be considered very high since it is unlikely that many defective products in fact bring about serious damage or increase the frequency of such damage considerably. However, in some cases the 'runaways' exceed the threshold and thereby constitute defectiveness.[40] I am not convinced that the frequency of injuries due to design defect is lower than those due to 'runaways'. In any event, the Koziol proposal leads to a narrow scope for strict liability: 'runaways' (a risk unavoidably associated with technological production methods) are included in the regime but distinguishable design and instruction defects are outside the strict liability regime. These latter defects derive from human conduct and are therefore avoidable. They should be judged according to normal fault-based standards of liability, or so Koziol argues. I have my doubts as to the 'avoidable' versus 'unavoidable' dangers. At a general level, most accidents would be avoidable if we adopted more stringent processes and procedures and invested a lot more resources in avoidance than we currently do. Avoidability is a matter of priority-setting. My guess is that this 'theoretical avoidability' applies to both design and manufacturing defects.

Nevertheless, the distinction that Koziol makes resonates with § 2 of the American Restatement 3d on Torts (Product Liability) and comparable approaches, according to which the failure to adopt a reasonable product design given the foreseeable benefits and risks associated with that design as compared to a safer alternative leads to liability.[41] With the test as proposed by Koziol, courts would test the reasonableness of the design and thereby the acts and actions (*behaviour*) of the manufacturer rather than the runaway nature of an *object*. If this is what the proposal is about, I have no fundamental objections against this approach. Yet, I see little additional benefits in the proposed two-fold categorisation as compared to the threefold

---

36 ECJ 5 March 2015, ECLI:EU:C:2015:148 at no. 50.

37 Comparative Conclusions no 13/33 ff, no 13/55.

38 See also Introductory Lecture no 1/20. I must confess that I am somewhat sceptical about the 'profit principle' as a foundation for strict liability. The question is whether this 'principle' is a genuine justification for strict liability or an opportunistic and hollow catchphrase. For instance, legislative proceedings may allude to this 'profit principle' as the foundation for introducing strict liability for a particular source of danger but may at the same time resist calls to introduce strict liability for comparable sources posing a similar risk. In fact, the introduction of legislation in this area may be the result of a dreadful incident and the absence of legislation may be the consequence of stakeholder lobbying. So, however fancy the words used by the legislature when introducing a particular strict liability regime for a particular risk, they do not mean that equal risks will be treated identically. The political trade-offs may vary, as may the influence of political pressure groups or the available capacity in the insurance markets. So, disheartening and perhaps even cynical as it may sound, whenever strict liability lies within the legislature's realm, we should not expect much from 'profit principles' and equal treatment. The ugly truth is that strict liabilities in any given jurisdiction may well be a mixed bag of historical accidents rather than a well-considered set of coherent and balanced rules.

39 Comparative Conclusions no 13/87 ff.

40 Comparative Conclusions no 13/55 ff.

41 Comparative Conclusions no 13/61.

distinction between design defects, manufacturing defects and warning defects. More importantly, however, I would still need further information on how the criteria for fault-based liability for faulty design would play out. On balance, I think it would not make much difference whether we called a test for unacceptably dangerous design a test for strict liability for a defective object or fault-based liability for making the design unacceptably dangerous. In both approaches, the main focus is on the reasonableness of the choices made in the design process. Thus, whether we apply some form of cost-utility balancing or the Learned Hand approach under the heading of fault-based liability, strict liability or even the 'reasonable consumer expectation' test, I feel it should not change the outcome itself. That is why I agree that product liability rules should try to distinguish (although it may not always be easy in practice) between design defects and 'runaways' due to the manufacturing errors. I could imagine that the evidentiary burden would be placed on the manufacturer: if someone suffered injury due to a product, such injured person would only need to submit that the product was defective. Then, it would be up to the manufacturer to prove that the specific product at hand was not a 'runaway', that the cause of the injury lies in the manufacturer's conscious choice of design and that, on balance, this design choice was reasonable.

3.4 Who is in and who is out?

A key issue in Koziol's proposal is the distinction he makes between the end user who is part of the chain of contracts between himself and the manufacturer and the so-called 'innocent bystander', defined as someone who suffers injury due to a defective product but who was not the (indirect) buyer of the product. This 'bystander' is not part of the so-called 'risk community', that is the community of actors involved in the commercial chain from manufacturing to consumption. These actors collectively 'pay' into the 'fund' for product liability. The 'fund' can be relied upon by this community but there is no convincing reason to let others profit, so Koziol argues. Bystanders have no reasonable ground for expecting manufacturers to provide safety as a buyer would have and should therefore not be offered the protection of product liability.[42] Bystanders would only be allowed to claim on the basis of the general principles of tort law. Koziol does accept, however, that individuals close to the buyer/end user, such as family members, should benefit from the protection of product liability.[43]

I do not find the 'risk community' an appealing concept to demarcate who is in and who is out. Strictly speaking, there is no justification for including family members into the risk community. Also, practically speaking, for an injured person to prove (s)he was part of the risk community, there would need to be evidence of some contractual relationship with, eg, a retailer. Absent this evidence, strict liability would not be applicable. This may lead to deserving claimants who cannot prove the existence of such a contract being turned away. Moreover, the use of the 'risk community' concept as a founding principle for strict liability forces us to consider the contractual nature of the liability. If contributing to the 'risk fund' through a contractual relationship is the gateway to strict liability, we would somehow base the liability on a contractual involvement. That raises the question of whether parties should not be left free to exclude this liability altogether, for instance as a *quid pro quo* for a lower price. Furthermore, would the concept of risk community in effect not lead to an indemnity insurance arrangement? And if so, are there no cheaper options than the tort law system for such an arrangement? Finally, if we embrace the risk community concept, we should also pause and stop to think of *the context* of product liability in a particular legal system. Would it mean that 'bystanders' would look for other (strict) liabilities in tort or contract? If the legal system involved allows the injured party to claim in contract from the retailer irrespective of his fault, would this not let the manufacturer go off the hook without good reason? All in all, I think that the exclusion of bystanders is neither preferable nor practically feasible.

---

[42] Comparative Conclusions no 13/97, no 13/114 ff.
[43] Comparative Conclusions, no 13/121.

3.5 Final Observations

I much enjoyed reading the comparative conclusions by Prof. Koziol. Yet, I was not sure whether I was reading a genuine positive analysis of the various legal systems or a guidebook for building a normative framework for the ideal structure of product liability. I suspect mostly the latter. When reading the taxonomy offered by Koziol, I was reminded by earlier work I undertook on Dutch tort law some years ago.[44] There, I tried to synthesize seemingly disparate types of tort liability into one concept of liability for 'flawed organisational design', whereby legislatures and courts would assign liability for the products, services, processes, protocols and procedures that make up the deliberative behaviour of organisations (loosely defined as corporations, public authorities and state entities). Note that in this analysis the concept of 'product' defined as a tangible (manufactured) object was transposed into the underlying (organisational) behaviour of planned action. I found that the common denominator with distinct sources of liability was that organisations were held liable for risks caused to health and safety by deliberative decisions in the designing and developing of property, products, protocols, processes and procedures or any other structured process within an organisation. I argued that these distinct doctrines of liability for 'unacceptably unsafe' products, services, processes, protocols and procedures could be unified in an overarching theory of liability for defective organisational design which more or less ignored the traditional bifurcation of fault-based and strict liability. In some respects, Koziol embarks on a comparable exercise by reformulating the product liability framework and by introducing different classifications of forms of defectiveness. This exercise provides ample food for thought. I personally found the idea of risk community vs bystanders a challenging concept; the fact that I remain unconvinced naturally does not affect my appreciation.

[44] See fn 33.