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## 5 | Harmonising tort law Exploring the concept of fault

*Pieter De Tavernier & Jeroen van der Weide* <sup>■</sup>

### 1 150 YEARS IN SEARCH OF FAULT: THE MATTERHORN TRAGEDY

After a tragic event, breaking news, headlines from newspapers and opinion papers often start with a twofold question: First: what really happened? And second: who was at fault or who is to blame? Sometimes, these questions do not get a clear and convincing answer. Let us illustrate this with the following event, which was commemorated on the 14<sup>th</sup> July 2015, during the drafting process of this article.

In 1865, one hundred and fifty years ago, an international expedition of French, Swiss and English climbers conquered the Matterhorn, the well-known mountain that reigns in splendid isolation above Zermatt, in the Swiss Pennine Alps. During the descent, the English climber Douglas Hadow, who afterwards was considered as the most inexperienced of the group, ‘knocked over his aid and foot placer, the Chamonix guide Michel Croz. The next man up the rope, the Rev. Charles Hudson, was dragged from his feet and so, in turn, was Lord Francis Douglas. All of them fell to their deaths. Only three people survived the tragedy: the Englishman Edward Whymper and the two Zermatt guides Old Peter and Young Peter Taugwalder, because the Englishman and Old Peter had planted themselves firmly to try and take the strain, but the thinner rope Old Peter had tied between himself and Douglas broke midway between the two.’<sup>1</sup>

After the tragedy, a persistent discussion arose about the mistakes that had been made during the descent. For instance, in the *Alpine Journal*, Arnold Lunn, a famous English climber, wrote about the tragedy:<sup>2</sup>

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1 See <<http://www.independent.co.uk/news/matterhorn-conqueror-cleared-over-fatal-falls-1248170.html>>.

2 A. Lunn, ‘Whymper Again’, *Alpine Journal* 1966, pp. 228-235 and available at <[http://www.alpinejournal.org.uk/Contents/Contents\\_1966\\_files/AJ%201966%20228-235%20Lunn%20Whymper%20Again.pdf](http://www.alpinejournal.org.uk/Contents/Contents_1966_files/AJ%201966%20228-235%20Lunn%20Whymper%20Again.pdf)>.

‘Whymper did not accuse Taugwalder of deliberately using a weak rope; he dealt with the awkward fact that such a rope was used. The Official Enquiry had also to deal with this; it was such an obvious difficulty that any Enquiry would have been badly *at fault* had it been slurred over. If Lunn will read our remarks on the roping he will see that we agree that Croz was *not blameless* in the matter, nor can Hudson, Douglas or Whymper be wholly excused of varying degrees of *blame*. But Old Peter was the main offender.’

Till now, the answer to the question what really happened during the tragic event of 14 July 1865, as well as the elucidation of the blameworthiness of one or more of the members of the expedition, has remained a subject of fierce debate in books, magazines and newspapers.<sup>3</sup>

## 2 THE NOTION OF FAULT IN THE YEAR 2015

### 2.1 Fault in common parlance and in the legal dictionaries

The frequent use of the notion of fault – sometimes disguised in terms such as ‘blame’ or ‘wrong’ – after the occurrence of a tragedy, is striking. Some illustrations: ‘That rioting in Baltimore? It’s all Our *Fault*’.<sup>4</sup> Or: ‘Police: Cyclist *at fault* in crash that killed him’.<sup>5</sup> And: ‘Dubai climbing wall was ‘no one’s *fault*’, says manager’.<sup>6</sup> This brings us to the inevitable question: what does ‘fault’ actually mean?

Both in common parlance as well as in legal dictionaries, fault is defined in many different ways. In the Cambridge Dictionary, we discovered a quite impressive list of meanings:

‘(1) a mistake, especially something for which you are to blame; (2) a weakness in a person’s character; (3) a broken part or weakness in a machine or system; (4) in sport and some other games: a mistake made by a player who is beginning a game by hitting the ball; (5) to have done something wrong: her doctor was at fault for/in not sending her straight to a specialist and (6) to criticize someone or something, especially without good reasons: he’s always finding fault with my work.’<sup>7</sup>

3 See e.g. M. Taugwalder, *Die Suche nach der Wahrheit. 150 Jahre Erstbesteigung Matterhorn vom 14. Juli 1865*, Visp: Rotten Verlag 2015, 204 p. H. Taugwalder & M. Jaggi, *Der Wahrheit näher* (Taschenbuch), Aarau: Glendy Verlag 2015, 220 p.; R.W. Clark, *The Day the Rope Broke: The Tragic Story of the First Ascent of the Matterhorn*, Mara Books 2008, 216 p. and <<http://www.merian.de/magazin/matterhorn-schweizer-gipfel-tragoedie.html>>.

4 See <<http://www.nationalreview.com/article/417638/debunking-obamas-bilious-baltimore-babble-michelle-malkin>>.

5 See <<http://www.burlingtonfreepress.com/story/news/local/2015/08/03/police-blame-cyclist-fatal-crash/31088263/>>.

6 See <<http://www.thenational.ae/news/uae-news/dubai-climbing-wall-fall-was-no-ones-fault-says-manager>>.

7 See <<http://dictionary.cambridge.org/dictionary/english/fault>>.

With regard to legal dictionaries, Black's Law Dictionary gives us, in its 6<sup>th</sup> Edition, no less than eight (!) definitions of fault:

'(1) negligence; an error or defect of judgment or of conduct; (2) any deviation from prudence, duty, or rectitude; (3) any shortcoming, or neglect of care or performance resulting from inattention, incapacity, or perversity; (4) a wrong tendency, course, or act; (5) bad faith or mismanagement; (6) neglect of duty; (7) breach of a duty imposed by law or contract; or (8) an act to which blame, censure, impropriety, shortcoming or culpability attaches.'

In its 7<sup>th</sup> edition, these definitions are condensed into a couple of information-packed entries. According to this version, fault is either '[a]n error or defect of judgment or conduct', or 'any deviation from prudence or duty resulting from inattention, incapacity, perversity, bad faith, or mismanagement.'<sup>8</sup> A quite kaleidoscopic picture.

## 2.2 The legal notion of fault in tort law: issues to be questioned

In this article, we focus on the notion of fault in tort law. Three issues will be examined. First: what is the role of fault in tort law? Second: how *is* fault legally defined and how *should* it be defined? And third: how does the assessment of fault take place: with an objective or with a subjective yardstick?

Taking into consideration the aims of this BWKJ project, we start with a brief description of the concept of fault in the Dutch Civil Code (DCC) (§ 3). After an overview of the achievements and the ongoing attempts to harmonise European tort law, in the context of which the notion of fault is challenged (§§ 4-5), we continue with the examination of the concept of fault in the three most representative jurisdictions of the European Union (England, France, Germany), in a recent recodification (Estonia) and in a number of harmonisation (the PETL and the DCFR) and reform (the French Projet Terré and the Revision of the Swiss Code of Obligations 2020) proposals (§ 6). This analysis takes place, of course, in comparison with the aforementioned Dutch approach. In order to make some points of discussion more concrete, we have selected the liability for damage caused by minor children as *Leitmotiv* of our *exposé*.

We have pursued the following aims. First of all, we will try to make a clear choice between the different notions of fault that circulate under (Dutch) tort lawyers. Secondly, we would like to demonstrate that, despite some points of convergence, there are still considerable differences between the aforementioned sources with regard to the examined notion of fault. Perhaps in the future some points of convergence, as well as the cautious choices we formulate

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8 A. Calnan, 'The Fault(s) in Negligence Law', *Southwestern Law School Working Paper No. 0712*, available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=975695](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=975695)>.

in this paper, could serve as reference point for the harmonisation of European tort law.

### 3 THE NOTION OF FAULT IN DUTCH TORT LAW: A SHORT OVERVIEW

In the Dutch Civil Code, with regard to tort law, the notion of fault surprisingly appears in just six (!) provisions. In the first of these provisions, art. 6:162 DCC, fault refers to the legal appreciation of the actor, the (subjective) blameworthiness of the tortfeasor (in Dutch: *schuld*). In the second of these provisions, art. 6:185 DCC, fault refers to circumstances that have contributed to the damage and which can be attributed to the person suffering the loss (one of these circumstances being fault in the meaning of (subjective) blameworthiness). In the other provisions, the articles 6:169, 6:170, 6:171 and 6:172, fault (in Dutch: *fout*) refers to the combination of both the appreciation of the act of the tortfeasor (the wrongful nature of the act or, in Dutch, *de onrechtmatige daad*), and to one<sup>9</sup> of the grounds of attributability of the act to the tortfeasor (the blameworthiness or, in Dutch, *de schuld*). It is in the latter sense that Willem van Boom, Professor of private law at Leiden University, has defined the notion:<sup>10</sup>

‘This might lead to the following definition of fault: the legal blameworthiness of the person committing a wrongful act that *could* and *should* have been avoided.’

Under the second definition of fault, i.e. the wrongful act that can be attributed to the tortfeasor, Dutch academics remain divided about the pertinence of the distinction:<sup>11</sup>

‘in most cases it is unnecessary (and sometimes even impossible) to isolate the actor from its act. In nine out of ten cases, condemning the act leads to condemnation of the actor. Whenever wrongfulness has been established, the fault requirement will usually not present any difficulties.’

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9 According to art. 6:162, par. 3 DCC, an unlawful act can be attributed to the defendant not only if it is due to his fault (*schuld*), but also if it is due to ‘a cause for which he is accountable by law or pursuant to generally accepted principles (*verkeersopvattingen*).’ See C.H. Sieburgh, *Toerekening van een onrechtmatige daad* (diss. Groningen), 2000, p. 262.

10 W.H. van Boom, ‘Fault under Dutch Law’, in: P. Widmer (ed.), *Unification of Tort Law*, The Hague: Kluwer Law International 2005, p. 170.

11 Van Boom 2005, p. 170.

Cees van Dam agrees:<sup>12</sup>

‘It should be emphasized that the two aspects (conduct and person) are very much intertwined.’

We will, later in this article, express an opposite point of view: when we use the concept of fault, this term should only mean that the tortfeasor is legally to blame for his wrongful act. Therefore, fault requires that the conduct of the tortfeasor is subjectively wrongful. Fault should only be defined as legal blameworthiness (*schuld*) and not as an attributable wrongful act (*fout*).

With regard to the assessment of fault, Dutch scholars are divided about the yardstick that should be used in establishing whether the tortfeasor acted negligently (objective or subjective assessment). Those who hold the idea that one should not distinguish wrongfulness from attributability, argue that unlawfulness is ‘subjectivised’, because the defendant’s specific characteristics are taken into account.<sup>13</sup> We do not agree with them. Wrongfulness and attributability are two distinct requirements of tortious liability. The first ‘hurdle’ for liability – wrongfulness (*onrechtmatigheid*) – must provide the answer to the question whether the tortfeasor *should* have acted in a different way. The test of wrongfulness is objective. The second ‘hurdle’ for liability – attributability based on fault (*schuld*) needs to be assessed in a subjective way: *could* the actor, when we take his personal characteristics into account, have acted in a different fashion.<sup>14</sup>

Under Dutch law, it is important to mention that, with regard to the objective element of wrongfulness (*onrechtmatige daad*) and the subjective element of blameworthiness (*schuld*) with regard to damage caused by children, the legislator has opted for a specific solution.<sup>15</sup> ‘If the wrongful act has been committed by a child under the age of fourteen, the child itself is immune for liability (art. 6:164 DCC); instead his parents can be held (strictly) liable, provided that the child’s act would have resulted in liability of that child, had he been older than thirteen (art. 6:169 DCC).’<sup>16</sup>

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12 C. van Dam, *European Tort Law*, Oxford: Oxford University Press 2013, p. 235.

13 C. van Dam, *Zorgvuldigheidsnorm en aansprakelijkheid. Een rechtsvergelijkend onderzoek naar plaats, inhoud en functie van de zorgvuldigheidsnorm bij de aansprakelijkheid voor letsel- en zaakschade*, Deventer: Kluwer 1989, no. 99.

14 Sieburgh 2000, pp. 259-161. Compare Van Boom 2005, pp. 169 and 172.

15 Van Boom 2005, p. 171.

16 Van Boom 2005, p. 171.

4 'FAULT' IN CONTEXT: THE PROCESS OF HARMONISATION, RECODIFICATION AND REFORM OF TORT LAW IN EUROPE

How does the Dutch notion of fault relate to the notion of fault that circulates in other jurisdictions and in existing unification or reform proposals? This question cannot be answered without painting the picture of recent developments that tort law, and thus fault, has gone through in Europe during the last decades.

A More Coherent European Contract Law; an Action Plan (2003).<sup>17</sup> The way forward (2004).<sup>18</sup> Towards a European Civil Code.<sup>19</sup> The call to harmonise the area of tort law fits into a broader trend of harmonisation initiatives that should lead to a more coherent European system of private-law rules or even a European Civil Code. By some legal scholars and notably also the British House of Lords, the Draft Common Frame of Reference (DCFR)<sup>20</sup> published in 2009 was seen as a blueprint of a (future) European Civil Code.<sup>21</sup>

The most far-reaching harmonisation initiatives took place in the field of contract law. The so-called Lando group started at the end of the 1970s and in 1995 presented the first part of the Principles of European Contract Law (PECL).<sup>22</sup> The PECL were a source of inspiration for the proposal for a Regulation on a Common European Sales Law (CESL) that was launched by the European Commission on 11 October 2011.<sup>23</sup> The withdrawal of this proposal in December 2014 by the European Commission in its Work Programme for

17 Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law; an Action Plan (2003/C 63/01), OJ 2003, C 63/1.

18 Communication from the Commission to the European Parliament and the Council, European Contract Law and the revision of the acquis: the way forward, Brussels 11 October 2004, COM(2004) 651 final.

19 A.S. Hartkamp et al., *Towards a European Civil Code*, Nijmegen: Ars Aequi Libri 2011.

20 C. von Bar & E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*. Full Edition. Volume 1-6. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), München/Oxford: Sellier European Law Publishers/Oxford University Press 2009/2010.

21 House of Lords, European Union Committee, Twelfth Report, European Contract Law: the Draft Common Frame of Reference, available at < <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldcom/95/9502.htm>>.

22 O. Lando & H. Beale (eds.), *Principles of European Contract Law (Parts I and II)*, Prepared by The Commission on European Contract Law, The Hague: Kluwer Law International 2000; O. Lando et al. (eds.), *Principles of European Contract Law (Part III)*, Prepared by The Commission on European Contract Law, The Hague: Kluwer Law International 2003. The PECL are also called the 'Lando Principles'.

23 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels, 11 October 2011, COM(2011) 635 final, 2011/0284 (COD), available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF>>.

2015<sup>24</sup> led to a – temporary? – stagnation in the process of unification of (European) contract law.<sup>25</sup>

Failure or success? Although both the PECL and the DCFR served as a source of inspiration for and influenced the case law of the European Court of Justice (ECJ) and that of the Member States,<sup>26</sup> a political Common Frame of Reference (CFR) is still out of reach.

In this article, we will turn a blind eye to contract law and focus on the harmonisation of tort law. With regard to the feasibility of such a harmonisation, we will examine a series of sources, namely (1) the existing tort law of some EU member States (e.g. Estonia, France, Germany, the Netherlands and England), (2) the Principles of European Tort Law (PETL)<sup>27</sup> published in 2005 by the European Group on Tort Law and Book VI of the DCFR (Non-contractual liability out of damage caused to another) and (3) two reform proposals (the French *Projet Terré* and the Revision of the Swiss Code of Obligations 2020). This examination will make it clear that some aspects of tort law tend to converge, while at the same time profound differences continue to exist.

In contrast with the PETL and the DCFR, the *Projet Terré* and the Revision of the Swiss Code of Obligations (OR 2020) deserve a short presentation, before starting our exploration of the concept of fault.

The French *Projet Terré* forms a part of a movement to reform the French law of obligations, including tort law. A first reform proposal, *The Avant-projet de réforme du droit des obligations et du droit de la prescription*, the so-called *Projet Catala*,<sup>28</sup> was submitted to the French Minister of Justice on the 22<sup>nd</sup> September 2005. The *Projet Catala* constitutes a comprehensive reform proposal

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24 See item 60 of Annex 2 (List of withdrawals or modifications of pending proposals) to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2015, A New Start, Strasbourg, 16 December 2014, COM(2014) 910 final, available at <[http://ec.europa.eu/atwork/pdf/cwp\\_2015\\_withdrawals\\_en.pdf](http://ec.europa.eu/atwork/pdf/cwp_2015_withdrawals_en.pdf)>.

25 See, however: <[http://europa.eu/rapid/press-release\\_MEMO-15-4920\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-4920_en.htm)> and E. Clive, Rebirth of EU contract law proposal, available at <<http://www.epln.law.ed.ac.uk/>>

26 ECJ: Opinion of AG Trstenjak in Case ECJ 17 April 2008, C-404/06 (Quelle); Opinion of AG Poiares Maduro in Case ECJ 10 April 2008, C-412/06 (*Hamilton/Volksbank Filder eG*). Dutch case law: Opinion of AG Timmerman in Case Dutch Supreme Court 26 September 2008, ECLI:NL:HR:2008:BD7598; Opinion of AG Timmerman in Case Dutch Supreme Court 11 July 2008, ECLI:NL:HR:2008:BD2406; Opinion of AG Huydecoper in Case Dutch Supreme Court 13 November 2009, ECLI:NL:HR:2009:BJ8724; AG Langemeijer, in Case Dutch Supreme Court 1 April 2011, ECLI:NL:HR:2011:BP1475. See also District Court Zutphen 3 November 2010, ECLI:NL:RBZUT:2010:BQ0980; District Court 's-Hertogenbosch 24 June 2010, ECLI:NL:RBSHE:2010:BN0636.

27 European Group on Tort Law, *Principles of European Tort Law. Text and Commentary*, Wien: Springer 2005. Also available at <[www egtl.org](http://www egtl.org)>.

28 Named after Pierre Catala, Professor Emeritus at the Université Panthéon Assas Paris 2.

of the general part of the law of obligations.<sup>29</sup> Five years later, in 2010, a bill (*proposition de loi*) was presented in the French Senate by Laurent Bételle. This bill only relates to tort liability<sup>30</sup> and is based on the tort liability section of the Projet Catala. The Projet Terré, the subject of our examination of the concept of fault, was proposed in 2008 and 2011 by an academic group, led by François Terré, just like Pierre Catala, a Professor Emeritus at the Université Panthéon Assas Paris 2.<sup>31</sup> His research group submitted two draft proposals, the first to reform the law of contract<sup>32</sup> and the second to reform the law of tort.<sup>33</sup> Both were prepared with the cooperation of the Ministry of Justice under the aegis of the Academy of Moral and Political Sciences, of which Terré is a distinguished member.<sup>34</sup> The Terré Group took into account both the PETL and the DCFR.<sup>35</sup> With regard to the above-mentioned reform proposals, it must be emphasised that, until today, 'the reform of French tort law is not yet on the French political agenda.'<sup>36</sup>

In the Swiss OR 2020,<sup>37</sup> scholars of all Swiss Law faculties, supported by the Federal Department of Justice and the Swiss Institute of Comparative Law,<sup>38</sup> have reviewed the provisions of the General Part of the Swiss Code of Obligations currently in effect and adapted it to current developments.<sup>39</sup> The draft was published in 2013 and will be the basis for an official revision of the General Part of the Swiss Code of Obligations. Parliamentary work has already started.<sup>40</sup>

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29 O. Moréteau, 'French Tort Law in the Light of European Harmonisation', *Journal of Civil Law Studies*, 2013, p. 762. The Avant-projet is available in English at <[http://www.justice.gouv.fr/art\\_pix/rapportcatala0905-anglais.pdf](http://www.justice.gouv.fr/art_pix/rapportcatala0905-anglais.pdf)>.

30 Proposition de loi portant réforme de la responsabilité civile, Sénat, no. 657 (9 July 2010), available at <<http://www.senat.fr/leg/ppl09-657.html>>.

31 It should be emphasised that the Projet Terré is not a prolongation of the Projet Catala. Both Projets are to be considered as *competitive* drafts.

32 F. Terré, *Pour une réforme du droit des contrats. Réflexions et propositions d'un groupe de travail*, Paris: Dalloz 2009, 310 p.

33 F. Terré, *Pour une réforme du droit de la responsabilité civile*, Paris: Dalloz 2011, 224 p.

34 Moréteau 2013, p. 763.

35 O. Moréteau, 'France', in H. Koziol and B.C. Steininger (eds.), *European Tort Law*, Wien: Springer 2005, p. 226.

36 B. Fauvarque-Cosson, *The French Contract Law Reform in a European Context*, online available at <<http://eltelawjournal.hu/french-contract-law-reform-european-context/>>.

37 Code des obligations suisse 2020. Projet relatif à une nouvelle partie générale, available at <<http://or2020.ch>>.

38 The project is chaired by the professors Claire Huegenin and Reto M. Hilty, both professors at the Universität Zürich.

39 P. Loser, 'Revision of the Swiss Code des Obligations (Schweizerisches Obligationenrecht, OR) – A Vision for the Revision of the General Part', in: *European Tort Law Yearbook* 2014, Volume 3, Issue 1, p. 675.

40 Loser 2014, p. 675.

## 5 A CLOSER LOOK AT THE EUROPEANISATION OF TORT LAW

### 5.1 EU Directives, EU Regulations and the influence of the decisions of the ECJ and the ECHR

The trend of ‘Europeanisation’ of tort law is set at two different levels. In the first place by way of EU Directives and Regulations. Although this legal framework of directives and regulations applies mainly in the area of contract law, to a certain extent also tort law is subject to this type of harmonisation. An important example is the Product Liability Directive of 25 July 1985 that created a regime of strict liability for defective products.<sup>41</sup> Another example is the Unfair Commercial Practices Directive of 11 May 2005 that regulates and harmonises unfair business-to-consumer commercial practices in the internal market.<sup>42</sup> In addition to the harmonisation of substantive law rules, the European Union has become very active in the unification of private international law rules. An important example is the Rome II Regulation on the law applicable to non-contractual obligations that has applied since 11 January 2009.<sup>43</sup>

Secondly, in terms of harmonisation, the tort law systems of the several EU Member States are influenced by the decisions of the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR). The European Convention on Human Rights (ECHR)<sup>44</sup> protects a basic catalogue of human rights. The right to life (art. 2 ECHR) is the most fundamental human right. According to art. 2 ECHR everyone’s life shall be protected by law. However, due to the case law of the ECtHR, converging developments occur in the area of the protection of private and family life (privacy). On a vertical and horizontal level, art. 8 ECHR ensures that the right to respect for private and family life, home and correspondence is not violated by the State, fellow citizens or companies. In its famous decision in the case *Von Hannover v Germany* (No. 2)<sup>45</sup> the European Court of Human Rights applied five considerations for balancing the right to respect for private life (art. 8 ECHR) against the right

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41 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ 1985, L 210/29.

42 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ 2005, L 149/22.

43 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199/40.

44 The Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, available at <[http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)>.

45 ECtHR 7 February 2012, nos. 40660/08 and 60641/08 (*Von Hannover v Germany* (No. 2)). See also ECtHR 24 June 2004, no. 59320/00 (*Von Hannover v Germany* (No. 1)) and ECtHR 19 September 2013, no. 8772/10 (*Von Hannover v Germany* (No. 3)).

to freedom of expression (art. 10 ECHR), such as whether the published information (photos) contributes to a debate of general interest.<sup>46</sup>

Since the fundamental rights of the ECHR are primarily vertically effective (relationship State/individual) they lack direct horizontal effect. Nevertheless the basic human rights of the ECHR can be effective in horizontal relations (individual/individual or corporation) but only in an indirect manner.<sup>47</sup> Examples of this so-called ‘indirect horizontal effect’ could be found in national case law related to open standards such as good faith and fair dealing (contract law) and the required standard of due care (tort law). In its decision of 9 January 1987, NJ 1987, 928 the Dutch Supreme Court ruled that a violation of art. 8 ECHR is considered to be a tortious act according to the open, required standard of due care that underlies art. 1401 of the old Dutch Civil Code (currently: art. 162, Book 6 Dutch Civil Code).

Another example of indirect horizontal effect at a national level is the decision of the Dutch Supreme Court of 12 December 2003, ECLI:NL:HR:2003:AL8442; NJ 2004, 117.<sup>48</sup> A dental surgeon cuts one of his fingers during an operation and is brought into contact with the patient’s blood. The patient is possibly HIV infected. Can the dental surgeon force the patient to supply blood for an HIV test? In its decision the Dutch Supreme Court balances the fundamental rights of privacy and bodily integrity of the patient (articles 10 and 11 Dutch Constitution) against the individual interest of the dental surgeon to prevent possible damage. Subsequently the Supreme Court rules that the underlying general principle of reasonableness and fairness<sup>49</sup> requires that a patient, after finishing medical treatment, should take all necessary measures to prevent his dental surgeon from suffering damage. This includes the patient’s (forced) participation in a blood test.

According to art. 267 Treaty on the Functioning of the European Union (TFEU) the European Court of Justice has jurisdiction to give preliminary rulings on references from national courts concerning the interpretation of EU acts

46 Other relevant viewpoints are: (i) how well-known is the person concerned and what is the subject of the report?; (ii) the prior conduct of the person concerned; (iii) the content, form and consequences of the publication; (iv) the circumstances in which the photos were taken.

47 See for instance C. Mak, *Fundamental Rights in European Contract Law. A comparison of the impact of fundamental rights on contractual relationships in Germany, the Netherlands, Italy and England* (diss. University of Amsterdam) 2007, available at <<http://dare.uva.nl/document/2/52678>>; O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party. A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions* (diss. Utrecht) 2007, available at <[file:///F:/Downloads/full%20\(1\).pdf](file:///F:/Downloads/full%20(1).pdf)>; G. Brüggemeier, A. Colombi Ciacchi & G. Comandé (eds.), *Fundamental Rights and Private Law in the European Union*, Cambridge: Cambridge University Press 2010; G. Brüggemeier, A. Colombi Ciacchi & P. O’Callaghan (eds.), *Personality Rights in European Tort Law*, Cambridge: Cambridge University Press 2010.

48 Available via <[www.rechtspraak.nl](http://www.rechtspraak.nl)>.

49 See artt. 2 and 248, Book 6 DCC (Law of obligations/Contract law).

such as Directives or Regulations. More specifically in the area of tort law art. 340, par. 2 TFEU is of great relevance. The provision deals with the non-contractual liability of EU institutions for damage caused. Art. 340, par. 2 TFEU reads as follows:

‘In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.’

In order to create a liability under art. 340, par. 2 TFEU there must be a wrongful act of the Union, the applicant must have suffered damage, and there must be a causal link between the wrongful act and the damage that has occurred. However, the exact meaning of the provision is still unclear. The term ‘common’ probably means that the principle is accepted in a sufficiently large number of Member States.

The ‘general principles common to the laws of the Member States’ to which art. 340, par. 2 TFEU refers served as a starting point in the development of Member State liability for the breach of EU law. On this basis the ECJ developed a form of harmonisation by way of a three-layered framework of requirements for liability. In the famous *Francovich* case,<sup>50</sup> the ECJ ruled that on the basis of the national tort law rules a Member State is liable for the infringement or violation of EU law when: (i) the result prescribed by the directive should entail the grant of rights to individuals; (ii) it should be possible to identify the content of those rights on the basis of the provisions of the directive; (iii) there is the existence of a causal link between the breach of the State’s obligation and the loss and damage suffered by the injured parties.<sup>51</sup>

Since the two types of unification that we briefly addressed in this section are not the main theme of this paper, we will not go into further detail at this point.

## 5.2 Further steps to harmonise tort law: the long way to Tipperary

During the First World War, the world famous song ‘It’s a long way to Tipperary’ symbolised the longing for home of every soldier.<sup>52</sup> The song is an expression of a wish that is attainable and unattainable at the same time. The restrained views on the important issue of how a more coherent and/or harmonised European private law should be achieved, can be illustrated by

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50 ECJ 19 November 1991, Joint cases C-6/90 and C -9/90, ECR 1991, I-5357 (*Francovich and Bonifaci v Italy*).

51 Van Dam 2013, pp. 39-44.

52 See [https://en.wikipedia.org/wiki/It%27s\\_a\\_Long\\_Way\\_to\\_Tipperary](https://en.wikipedia.org/wiki/It%27s_a_Long_Way_to_Tipperary). Tipperary is a town and civil parish in County Tipperary, Ireland.

a book that has recently been published. In his book, which is entitled ‘The Struggle for European Private Law. A Critique of Codification’, the British scholar Leone Niglia ‘investigates the position of codifiers and their discontents in the shadow of the codification strategy pursued by the European Commission (...).’<sup>53</sup>

Does this observation mean that the harmonisation efforts undertaken by the drafters of the PETL and the DCFR should be abandoned, particularly in the field of tort law? We do not think so. Although there are many arguments that plead against harmonisation of tort law.

Let us start with the enumeration of some pros. *First*, a single European tort law might help to achieve a common area for free movement of goods, capitals and people.<sup>54</sup> Helmut Koziol, the famous Austrian tort law scholar from Vienna, writes:<sup>55</sup>

‘The rationale for harmonisation is that differences between the legal systems hinder commercial cross-border transactions in Europe. Entrepreneurs who offer their wares or services in other Member States are disadvantaged in comparison with competitors who are only active nationally, because while domestic providers only have to inform themselves of the legal frameworks in their own legal system, a foreign provider is forced to inform itself about a legal system that diverges from its domestic law and to comply with it.’

*Second*, ‘a harmonised tort law regime would minimise the risk of European businesses’ forum shopping in search of the jurisdiction with the lowest quality and liability standard, thus fending off pressures on states to engage in a race to the bottom.’<sup>56</sup> *Third*, a harmonisation ‘would facilitate courts’ handling of transboundary torts, decrease the length and complexity of transnational litigation and guarantee more uniformity between judicial outcomes.’<sup>57</sup>

However, the pros have not been supported by everyone. A *first* counter-argument is that there is no empirical evidence supporting the allegation that

53 L. Niglia, *The Struggle for European Private Law. A Critique of Codification*, Oxford: Hart Publishing 2015.

54 U. Magnus, ‘Towards European civil liability’, in: M. Faure, J. Smits and H. Schneider (eds.), *Towards a European ius commune in legal education and research*, Antwerpen: Maklu 2002, pp. 206-207. See about this pro: M. Bussani & M. Infantino, ‘Harmonization of Tort Law in Europe’, in: *Encyclopedia of Law and Economics*, New York: Springer 2014, p. 3.

55 H. Koziol, ‘Harmonising Tort Law in the European Union: Advantages and Difficulties’, *ELTE Law Journal* 2013/1, pp. 73-74, available via < <http://eltelawjournal.hu/harmonising-tort-law-in-the-european-union-advantages-and-difficulties/> >.

56 M. Faure, ‘How law and economics may contribute to the harmonisation of tort law in Europe’, in: R. Zimmermann (ed.), *Grundstrukturen des Europäischen Deliktsrechts*, Baden-Baden: Nomos 2003, pp. 47-51. See about this pro: Bussani & Infantino 2014, p. 3.

57 Regulation (EC) No 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), recitals nos. 16 and 20. See on this pro: Bussani & Infantino 2014, pp. 3-4.

fragmentation of tort laws affects the free circulation of people and goods<sup>58</sup> and the establishment and movement of businesses in Europe.<sup>59</sup> *Second*, we should also give consideration to the costs of harmonising tort law, such as the difficulty of changing existing rules of tort law and the abolition of regulatory competition.<sup>60</sup> *Third*, it has been argued that ‘any top-down harmonisation effort would put into circulation rules foreign to the tradition and heritage of some (...) legal traditions involved’.<sup>61</sup> *Fourth*, the idea of harmonisation of tort law will have to face the same critics that were directed against a harmonised contract law (cf. the arguments raised against a Common European Sales Law), such as the lack of competence of the EU to harmonise private law,<sup>62</sup> the political legitimacy of its drafters and the desirability of a European Civil Code in general.<sup>63</sup>

Keeping in mind the above-mentioned pros and cons, the *desirability* of harmonising tort law remains highly controversial. Yet even those who would like to continue the efforts towards such harmonisation should be aware of the following question, dealt with in the following section: is tort law harmonisation *feasible*?

## 6 IS TORT LAW HARMONISATION FEASIBLE? AN EXPLORATION OF THE CONCEPT OF FAULT

It is beyond doubt that fault-based liability is still a cornerstone of European tort law. However, when we take a closer look at the concept of fault in the current European jurisdictions, the PETL, the DCFR and two current reform proposals (the French *Projet Terré*<sup>64</sup> and the Revision of the Swiss Code of Obligations 2020), it becomes clear that unifying tort law is a race with many hurdles that must be taken. In our research of the similarities and differences in the legal sources examined with regard to the notion of the fault of the tortfeasor, several issues will be discussed. Some of them were already a subject

58 Faure 2003, p. 44. See on this counter-argument Bussani & Infantino 2014, p. 4; W.H. van Boom, ‘Harmonizing Tort Law. A Comparative Tort Law and Economics Analysis’, in: M. Faure (ed.), *Tort Law and Economics* (Vol. 1 of the Encyclopedia of Law and Economics, 2nd ed.), Cheltenham: Edward Elgar 2009, pp. 442-443.

59 T. Hartlief, ‘Harmonizing of European Tort Law. Some critical remarks’, in M. Faure, J. Smits and H. Schneider (eds.), *Towards a European ius commune in legal education and research*, Antwerpen: Maklu 2002, pp. 225-236.

60 Faure 2003, p. 36. See about this counter-argument Bussani & Infantino 2014, p. 4.

61 Bussani & Infantino 2014, p. 4.

62 Cf. the discussion about art. 114 TFEU and the questionable competence of the European Union to introduce an optional instrument with regard to contract law.

63 Magnus 2002, pp. 208-212. See about this counter-argument Bussani & Infantino 2014, p. 4.

64 F. Terré (ed.), *Pour une réforme du droit de la responsabilité civile*, Paris: Dalloz 2011, p. 224.

of comparative research by the European Group of Tort Law (EGTL) in 2005.<sup>65</sup> Since the publication of that research project (the volume 'Unification of tort law: fault'<sup>66</sup>), the PETL and the DCFR, two model texts that 'represent the best reflection of contemporary approaches to, and developments in, the field of European tort law',<sup>67</sup> have been published, together with the aforementioned reform proposals in France and Switzerland. That brought us to the idea that an update of issues of fault liability was desirable.

In the following sections, we will review the most important questions of the EGTL project of 2005, namely: What is the role and importance of fault in establishing tort liability (relationship between liability based on fault and strict liability) (§ 6.1)? Is there a statutory or otherwise generally accepted definition of fault? (§ 6.2) What kind of yardstick has to be used in establishing fault? (§ 6.3)

The issue of liability for damage caused by children will form an illustration of the quite abstract theories that circulate within the European Union with regard to the concept of fault in tort law.

## 6.1 The role and importance of fault liability<sup>68</sup>

### 6.1.1 Examination of the existing law and the existing reform proposals

In a recent article about the harmonisation of tort law,<sup>69</sup> Helmut Koziol, the Director of the European Centre of Tort and Insurance Law in Vienna, provides us with a very clear outline of the differences between the existing jurisdictions with regard to the role of fault liability. According to Koziol, these differences must be seen in relation to the aims that tort law wants to satisfy. In some

65 European Group of Tort Law, *Principles of European Tort Law. Text and Commentary*, Wien/ New York: Springer, 2005, 282 p.

66 P. Widmer (ed.), *Unification of Tort Law: Fault*, The Hague: Kluwer Law International 2005, p. 391.

67 J. Lahe, 'The Concept of Fault of the Tortfeasor in Estonian Tort Law: A Comparative Perspective', *Review of Central and East European Law* 2013, p. 142.

68 In this section, we describe the dichotomy of fault-based liability versus strict liability, without giving a definition of fault in the legal sources we have explored. At this stage of our contribution, we do not formulate an opinion about the definition of fault we prefer to be used in view of a future harmonisation of tort law. As already mentioned in the introduction to our contribution, several definitions of fault circulate, such as: fault as identical with wrongfulness, fault as identical with blameworthiness or fault as a combination of both wrongfulness and blameworthiness. On the issue of the distinction between fault-based liability and strict liability, we refer to the interesting contribution by J. Lahe, *Forms of Liability in the Law of Delict: Fault-Based Liability and Liability without Fault*, available at <[http://www.juridicainternational.eu/public/pdf/ji\\_2005\\_1\\_60.pdf](http://www.juridicainternational.eu/public/pdf/ji_2005_1_60.pdf)>.

69 H. Koziol, 'Harmonising Tort Law in the European Union: Advantages and Difficulties', *ELTE Law Journal* 2013/1, available via <<http://eltelawjournal.hu/harmonising-tort-law-in-the-european-union-advantages-and-difficulties/>>.

European countries, the emphasis is more on corrective justice. In English law, for instance, the emphasis is on 'the principle of the rule 'casum sentit dominus', which expresses the idea that the person who suffers damage must, in principle, bear his damage himself. There must be particular reasons to justify allowing the victim to pass the damage on to another person', writes Koziol.<sup>70</sup> One of the consequences of that policy is that fault in the English law of torts is generally based upon the fault of the defendant. Or, 'fault takes multiple guises in tort, but fault there must be'.<sup>71</sup> The English legal system is therefore very reluctant to recognise strict liability.<sup>72</sup>

In France, by contrast, tort law is essentially victim-oriented and thus emphasises the idea of distributive justice.<sup>73</sup> Also in the French *Projet Terré*, strict liability rules remain important.<sup>74</sup> However, fault-based rules appear in several tort law provisions, for instance with regard to the requirement of wrongfulness<sup>75</sup> and the issue of liability of parents for damage caused by their children.<sup>76</sup> Moreover, some existing strict liability regimes are maintained, though with extra requirements. Thus, the general provision of liability for movable objects is limited to physical and psychological harm,<sup>77</sup> which is a substantial reduction of the scope of the *Jand'heur II* jurisprudence of the French Supreme Court,<sup>78</sup> through which the liability for things was turned from a rebuttable *faute* into one of strict liability.<sup>79</sup>

With regard to the Revision of the Swiss Code of Obligations 2020, particular liability regimes are planned to become stricter,<sup>80</sup> for instance the liability of commercial enterprises.<sup>81</sup> Furthermore, a general provision for strict liability of persons carrying out particularly dangerous activities will be

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70 Koziol 2013, p. 80.

71 H.V. Horton Rogers, 'Fault under English Law', in: P. Widmer (ed.), *Unification of Tort Law: Fault*, The Hague: Kluwer Law International 2005, p. 65.

72 Koziol 2013, p. 82.

73 Koziol 2013, p. 80.

74 Terré 2011, p. 163 ff.

75 Art. 5 *Projet Terré*: '*La faute* consiste, volontairement ou par négligence, à commettre *un fait illicite* (...).'

76 Terré 2011, p. 155: '*La responsabilité parentale* redevient une véritable responsabilité du fait d'autrui, à savoir *une responsabilité personnelle* de l'auteur du dommage (...).'

77 Art. 20 *Projet Terré*: '*Le gardien* répond de plein droit de l'atteinte à l'intégrité physique ou psychique d'une personne causée par le fait de la chose corporelle dont il a la garde'. See Moréteau 2013, p. 772.

78 Cour de Cassation ch. réun. 13 February 1930, *DP* 1930, I. 57, comm. Ripert, S. 1930, I. 121, comm. Esmein.

79 Van Dam 2013, p. 60.

80 See art. 59 Swiss Code of Obligations 2020: 'A commercial enterprise is liable for the damage caused in connection with the enterprise's activity, unless it proves that the organisation of the enterprise was suitable to avoid such damage'.

81 Loser 2014, p. 676.

introduced.<sup>82</sup> With this provision, the Swiss draft takes up an idea of the general revision of tort law of 2000 that has failed,<sup>83</sup> because of the fact that such a general provision for dangerous activities met with great resistance from politics and businesses.<sup>84</sup>

What about the role and importance of ‘fault’ in the PETL and the DCFR? According to Title III, Chapter 4 (Liability Based on Fault) the basic condition of tort liability under the PETL is the liability based on fault. Art. 4:101 PETL reads as follows:

‘A person is liable on the basis of fault for intentional or negligent violation of the required standard of conduct.’

Chapter 5 (Strict Liability), Title III of the PETL addresses those forms of liability which are not based on fault, but are ‘strict’ in the sense that they cover various types of risk leading to no-fault liability, such as abnormally dangerous activities (art. 5:101 PETL)<sup>85</sup> or other categories of strict liability (art. 5:102 PETL). An interesting question can be raised about the relevance of fault-based liability and the proportion of cases in practice that are resolved according to strict-liability rules.<sup>86</sup> With regard to that question, the PETL Commentary of 2005 argues that the basis of liability is not intended to be in a descending hierarchy. This means that fault liability is not considered as the fundamental category of liability and that all other forms of liability should be seen as exceptions: both areas of liability exist side by side.<sup>87</sup>

The same consideration that fault-based liability and strict liability are two equally important forms of liability goes for the DCFR. The basic rule of art. VI. – 1:101 DCFR starts from the assumption that each and every claim for reparation requires the presence of three fundamental elements: (i) damage (Chapter 2), (ii) accountability (Chapter 3) and (iii) causation (Chapter 4).<sup>88</sup> Subsequently, Book VI of the DCFR contains three grounds for being held

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82 ‘Article 60. D. Absolute liability

1. A person who carries out a particularly dangerous activity is liable for the damage resulting from the realisation of the characteristic risk of this activity.

2. A particularly dangerous activity is an activity which, because of its nature or the nature of the used substances, equipment or forces, is particularly suited to cause frequent or severe damage even if due diligence has been applied.’

83 Art. 50 Avant-Projet de loi fédérale (Révision et unification du droit de la responsabilité civile, par P. Widmer et P. Wessner, available at <<https://www.bj.admin.ch/dam/data/bj/wirtschaft/gesetzgebung/archiv/haftpflicht/vn-ber-f.pdf>>): ‘La personne qui exploite une activité spécifiquement dangereuse est tenue de réparer le dommage dû à la réalisation du risque caractérisé que celle-ci comporte, même s’il s’agit d’une activité tolérée par l’ordre juridique.’

84 Loser 2014, p. 676.

85 Example: blasting a building in a developed area of the city.

86 Lahe 2013, p. 149.

87 Lahe 2013, p. 145.

88 Von Bar 2008, p. 35.

accountable for damage caused to another: (i) intention (art. VI – 3:101), (ii) negligence (art. VI – 3:102), (iii) accountability without intention or negligence (art. VI – 3:201 *et seq.*). Contrary to the PETL, the DCFR does not make a clear distinction between the tortious conduct and the accountability. The basic rule of art. VI – 1:101, Book VI DCFR brings together in one norm liability for intention, liability for negligence and liability without intention or negligence. According to art. VI – 3:101, a person acts intentionally when he deliberately causes such damage, while negligence (art. VI – 3:102) is at hand when the tortfeasor does not meet the required standard of care. Despite the avoidance of the notion of fault in the DCFR, the basic norm of art. VI – 1:101 DCFR shows that fault-based liability constitutes an important ground for liability, but not in a hierarchically higher position than strict liability.

What is the role of fault in the recently enacted Estonian Law of Obligations Act (Estonian LOA)?<sup>89</sup> Art. 1043 Estonian LOA states that a person who unlawfully causes damage to another must compensate the victim for the damage if the tortfeasor is at fault in causing the damage or is liable pursuant to the law.<sup>90</sup> In an interesting comparative study about the concept of fault of the tortfeasor, Lahe refers to a 2007 judgment of the Estonian Supreme Court,<sup>91</sup> ruling that the element of fault is the last one to be checked in the context of assessing general tort liability. Before that assessment, the judge has to verify that the tortfeasor had caused damage and that his act was unlawful. The author continues with the assertion ‘that the question of the fault of the tortfeasor does not play a crucial role in Estonian tort law. Most liability disputes are decided via the hurdles of causation and wrongfulness’.<sup>92</sup>

### 6.1.2 Fault liability versus strict liability? The case of parental liability

Let us now give a concrete illustration of the importance and the role of fault liability with regard to a specific issue. We have chosen the issue of liability of parents for damage caused by their minor children.<sup>93</sup> This topic makes it perfectly clear that the existing and proposed tort law regimes in Europe differ to a great extent. Four models could be distinguished as far as the liability of parents for damage caused by their minor children is concerned.

<sup>89</sup> The Estonian Law of Obligations Act, in Estonian and English, is available at <[http://www.legaltext.ee/en/andmebaas/paraframe.asp?loc=text&lk=et&sk=en&dok=X30085K2.htm&query=collateral&tyyp=SITE\\_X&ptyyp=l&pg=1](http://www.legaltext.ee/en/andmebaas/paraframe.asp?loc=text&lk=et&sk=en&dok=X30085K2.htm&query=collateral&tyyp=SITE_X&ptyyp=l&pg=1)>.

<sup>90</sup> Lahe 2013, p. 144.

<sup>91</sup> Estonian Supreme Court 31 May 2007, no. 3-2-1-54-07. The decisions of the Supreme Court are available in Estonian at <<http://www.riigikohus.ee>>.

<sup>92</sup> Lahe 2013, p. 144.

<sup>93</sup> See on this topic M. Martin-Casals (ed.), *Children as tortfeasors*, Wien: Springer 2006, 476 p. and M. Martin-Casals (ed.), *Children as victims*, Wien: Springer 2007, 320 p.; Van Dam 2013, pp. 493-497; H. Koziol (ed.), *Basic Questions of Tort Law from a Comparative Perspective*, Wien: Jan Sramek Verlag 2015, pp. 798-801.

Under the first model, there is no specific rule for parental liability and the victim of the damage caused by a child has to prove the parents' fault and the causal connection with the harm (e.g. England).<sup>94</sup> Under the second regime, the parental liability (fault) is presumed, but the parents or those in charge of the minor may be exonerated when proving that they exercised reasonable care and diligence in the child's supervision and education (e.g. Germany, Switzerland and Estonia). Under the third model, persons in charge of minors are strictly liable (e.g. France). Finally, under the fourth model the parental liability is a mixture of fault liability and strict liability (e.g. the Netherlands).

Since the majority of legal systems operate under the second model of the rebuttable presumption, the drafters of both the PETL and the DCFR agreed upon this model as a common denominator. As art. 6:101 PETL<sup>95</sup> clearly points out, the fault-based liability of parents or persons in charge of minors is presumed and exoneration is possible if the duty of care to supervise children was performed in an adequate way. The DCFR follows the same path.<sup>96</sup>

'As far as parental liability is concerned, we decided, after a long discussion, not to opt for liability without intention or negligence. We thought that the mere fact that a parent has a child is simply not enough as a ground of accountability in the law on liability for damage.'

However, art. VI. – 3:104 DCFR sets a clear age limit. According to par. 1 of art. VI. – 3:104, parents or other persons obliged by law to provide parental care for a person under fourteen years of age are accountable (and liable) for the causation of legally relevant damage where that under-age person has caused the damage by conduct that would constitute intent or negligence if it were the conduct of an adult. Parents and other persons providing parental care are excused for the causation of damage if they show that there was no defective supervision of the person causing the damage. At this point, the DCFR also makes use of the defence mechanism of the rebuttable presumption. Although art. VI. – 3:104(1) DCFR prescribes parental liability regarding torts committed by children under fourteen years of age, this does not mean that the parents of children between fourteen and seventeen years of age are not liable for the torts committed by their children.<sup>97</sup> The liability of parents may also be invoked with regard to damage caused by children in the said age

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<sup>94</sup> See Van Dam 2013, p. 496 and p. 499.

<sup>95</sup> Art. 6:101 PETL reads as follows: 'A person in charge of another who is a minor or subject to mental disability is liable for damage caused by the other unless the person in charge shows that he has conformed to the required standard of conduct in supervision.'

<sup>96</sup> Von Bar & Clive 2009/2010, p. 3435.

<sup>97</sup> Lahe 2013, p. 158.

gap, provided that the victim proves that the parents failed to fulfil their supervisory obligations.<sup>98</sup>

The Estonian LOA makes a distinction between provisions governing liability for torts committed by minors who lack fault capacity and for torts committed by minors who have full fault capacity. With respect to the first category of minors, art. 1053(1) LOA reads as follows:

‘The parents or curator of a person under 14 years of age shall be liable for damage unlawfully caused to another person by the person under 14 years of age regardless of the culpability of [the] parents or curator’

With regard to the second group of minors, art. 1053(2) LOA prescribes that ‘the parents or curator of a person of 14 to 18 years of age shall also be liable for damage unlawfully caused to another person by the person of 14 to 18 years of age regardless of the culpability of the parents or curator, unless they prove that they have done everything which could be reasonably expected in order to prevent the damage.’ Compared to the parental liability rules in the DCFR and the PETL with regard to the regulation of parental liability for children younger than fourteen, the Estonian LOA is remarkably strict. Lahe gives the example of a child of four years of age that plays with matches and causes a fire. According to the LOA, the parents of the child will be liable regardless of whether they did anything objectionable in connection with the incident.<sup>99</sup> With regard to torts committed by a minor with full fault capacity, a precondition is that the minor is liable for the damages, whereas in the DCFR, a child of thirteen years old could potentially not be liable for causing damage if the conduct causing the damage would not be objectionable for a child of the same age. The same kind of behaviour by an adult may be objectionable, which would be sufficient for invoking parental liability under the DCFR.<sup>100</sup>

According to French law, art. 1384, paragraph 4 Civil Code holds that a father and a mother, insofar as they exercise parental authority, are jointly and severally liable for damage caused by their minor<sup>101</sup> children who live with them. The parents only have the defence of an external cause and the victim’s contributory negligence.<sup>102</sup> Until 1997, parental liability was based on a rebuttable presumption of fault in the education (*faute d’éducation*) and

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98 Lahe 2013, pp. 158-159. Art. VI. – 3:104(1) DCFR reads as follows: ‘Parents or other persons obliged by law to provide parental care for a person under fourteen years of age are accountable for the causation of legally relevant damage where that person under age caused the damage by conduct that would constitute intentional or negligent conduct if it were the conduct of an adult.’

99 Lahe 2013, pp. 159-160.

100 Lahe 2013, p. 161.

101 According to French law, minors are children under the age of 18 (art. 388 of the French Civil Code).

102 Van Dam 2013, p. 493.

the supervision (*faute de surveillance*) of their child.<sup>103</sup> In the famous *Bertrand* decision of the French Supreme Court of 19 February 1997,<sup>104</sup> this defence was struck out and replaced by a general strict liability rule.<sup>105</sup> Compared to, for instance, the rules of parental liability as embedded in the DCFR, the parental liability according to art. 1384, paragraph 4 Civil Code, is exceptionally strict, because the liability of the father and the mother is not only triggered when the child has committed an unlawful act (*acte objectivement illicite*), but also when the child's conduct was the direct cause of the damage suffered by the victim (*un acte qui soit la cause directe du dommage invoqué par la victime*).<sup>106</sup> This solution has been criticised by several French authors,<sup>107</sup> who consider the rule that makes parents strictly liable for *any* damage caused by their child, regardless of his or her fault, especially problematic. One of them, Jean-Sébastien Borghetti of the Université Panthéon-Assas (Paris II), has argued that the rule is rather counter-intuitive and difficult to accept on the basis of common conceptions of fairness.<sup>108</sup>

'How can it be that damage caused by the normal behaviour of an adult will not give rise to any liability, whereas, if it is caused by a child's normal behaviour, liability will ensue? Therefore, it was no surprise that the *Projet Terré* suggests suppressing this rule and a return to the older rule,<sup>109</sup> whereby parents should only be liable for damage caused by their child's tortious conduct.'

Let us end this section, in which we have illustrated the great variety of existing and proposed tort law regimes in Europe, with the following question.<sup>110</sup>

'Should a future harmonised tort law follow the classical model that makes parents only liable for damage caused by the – objectively negligent – behaviour of their children if the parents can be held accountable for misconduct themselves, above

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103 Van Dam 2013, p. 494.

104 Cour de Cassation 2e ch. civ. 19 February 1997, *D.* 1997. 265, comm. Jourdain, *JCP* 1997, II. 22848, comm. Viney, *RTDC civ.* 1997, 668.

105 The *Projet Terré* continues this strict liability regime in art. 14: 'Sont responsables de plein droit du fait du mineur: – ses père et mère, en tant qu'ils exercent l'autorité parentale (...).'

106 Cour de Cassation ass. plén. 13 December 2002, *D.* 2003.231, comm. Jourdain; *Yearbook on European Tort Law* 2002, 199, comm. Brun. See on this landmark decision the comparative case comments in *EPRL* 2003 (11) 5, pp. 691-751.

107 See e.g. J.-S. Borghetti, 'Liability of Children as well as Persons with Reduced Abilities and the Notion of Fault. Statements by Country Reporters. France', in: H. Koziol (ed.), *Comparative Stimulations for Developing Tort Law*, Wien: Jan Sramek Verlag 2015, pp. 112-113; see on these critics Van Dam 2013, p. 494.

108 Borghetti 2015, pp. 112-113; Koziol, *Basic Questions of Tort Law from a Comparative Perspective* 2015, p. 799.

109 See art. 13 *Projet Terré*, 'Dans tous les cas, cette responsabilité n'a lieu que lorsqu'est caractérisé un *délit civil* au sens du présent chapitre.'

110 Koziol, *Basic Questions of Tort Law from a Comparative Perspective* 2015, p. 799.

all for a breach of their supervision or at least child-rearing duties,<sup>111</sup> or can justification be found for how French law imposes a strict liability upon parents and only frees them from liability in case of force majeure?’

So far parliamentary initiatives in the Netherlands<sup>112</sup> and Belgium<sup>113</sup> in that sense have remained without success.

There are surely arguments in favour of the French approach. A strict parental liability can indeed be objectively justified by the fact that it corresponds to the general basic tendency to focus primarily on the compensation of the victim. The French system is good in accomplishing this aim.<sup>114</sup> Furthermore, the risk of damage that emanates from children can surely be used as an argument in favour of strict parental liability.<sup>115</sup> Finally, the transaction costs are low. Claims for damages are handled by insurance companies<sup>116</sup> which treat such claims on a rational basis, defending them only when this seems worthwhile. Because the requirements for liability of the parents are so weak, there is little scope for defence.<sup>117</sup>

However, as the French system contrasts sharply with those of other European jurisdictions, we must also examine the disadvantages of strict liability of parents. First, and we agree with this criticism, tort law is not only concerned with a redistribution of damage costs (= distributive justice) but also aims at preventing accidents from occurring in the future (= corrective justice). In terms of incentives to educate their children towards prudent behaviour and supervise them accordingly, the problem with the French system is not strict liability by itself, but liability insurance. Parents who know that any damage caused will be covered by an insurance company<sup>118</sup> will have little incentive to take precautions to avoid harm being caused by their chil-

111 Koziol, *Basic Questions of Tort Law from a Comparative Perspective* 2015, p. 798.

112 Initiatiefvoorstel Verruiming aansprakelijkheid voor gedragingen van minderjarigen vanaf veertien (Proposal to Extend the Age Limit for Liability for Minors), Documents of the Second Chamber of Parliament (2009-2010), No. 30 519.

113 Wetsvoorstel tot invoering in het Burgerlijk Wetboek van een objectieve aansprakelijkheid van de ouders voor de schade veroorzaakt door hun minderjarige kinderen (Proposal to Introduce a Strict Liability of Parents for Damage Caused by Their Minor Children), Documents of the First Chamber of Parliament (2010), No. 5-48/1.

114 G. Wagner, ‘Final Conclusions: Policy Issues and Tentative Answers’, in M. Martin-Casals (ed.), *Children in Tort Law. Part II: Children as Victims*, Wien/New York: Springer 2007, p. 295.

115 Koziol, *Basic Questions of Tort Law from a Comparative Perspective* 2015, p. 800.

116 We must keep in mind that a large majority of families (in the Netherlands approximately 80%) have insurance policies that cover the liability of parents and children. These policies are not compulsory, but are quite intensively promoted and the premiums are low.

117 Wagner 2007, p. 295.

118 In cases when there is no liability insurance or where the insurance policy does not cover all the damage that resulted, as can happen in particular when the sums involved are very large, Koziol proposes an unlimited *social liability insurance* for damage caused by children, financed by the general public: Koziol, *Basic Questions of Tort Law from a Comparative Perspective* 2015, p. 801.

dren.<sup>119</sup> Furthermore, strict parental liability treats children like ‘a source of danger which the ‘owner’ keeps at his peril, while children should be seen as human beings and be treated as such.’<sup>120</sup> Finally, the argument that strict liability is balanced by a cheap liability insurance does not always apply, because such insurance is not obligatory, not every household has such an insurance and insurance companies limit cover to a certain maximum sum. When there is no insurance, the parents will be subject to the full harsh burden of the very strict liability.<sup>121</sup>

We think that a compromise can be found in the Dutch Civil Code (DCC).<sup>122</sup> Art. 6:164 DCC states that children under the age of fourteen cannot be held liable for their own personal conduct. In these cases, parents are strictly liable, on two conditions: that the child’s conduct was not an omission, and that it was objectively negligent.<sup>123</sup> In case of torts committed by children between the ages of fourteen and sixteen, parents are subject to a presumption of fault.<sup>124</sup> Once the child is sixteen years old, no special rule applies, so parents are only liable on grounds of the general fault-based liability norm.<sup>125</sup> At the end of our contribution, we will formulate a proposal that can be considered as a regime of liability for damage caused by children that is, even slightly adapted, strongly inspired by the aforementioned Dutch approach, being a layered system.

## 6.2 The definition of fault in the legal instruments explored

In connection with our main findings in § 6.1, two questions should be answered: (1) *Is* fault defined in the sources examined? (2) How *should* fault be defined in a future harmonised tort law instrument?

Most of the legal instruments analysed do not have a statutory definition of fault. For instance, there is no definition of fault in the French Civil Code. The French legislator has left the interpretation of *faute* to the courts and the

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119 Wagner 2007, p. 296.

120 Wagner 2007, p. 296.

121 Koziol, Basic Questions of Tort Law from a Comparative Perspective 2015, pp. 800-801.

122 See N. Ferreira, ‘The harmonisation of private law in Europe and children’s tort liability: A case of fundamental and children’s rights mainstreaming’, *International Journal of Children’s Rights* 2011, p. 588.

123 That is that the same conduct of the child adopted would be considered a tortious act if it had been that of an adult: art. 6:169(1) DCC.

124 Art. 6:169(2) DCC. According to case law, parents can easily rebut this presumption, in the light of the difficulty to control the behaviour of youth of this age. See e.g. Dutch Supreme Court 9 December 1966, *NJ 1967/69*, note GJS (*Joke Stapper*).

125 Art. 6:162 DCC.

doctrine.<sup>126</sup> In England, lawyers do not speak in terms of a general concept of fault, but in terms of negligence and intentional wrongdoing as separate categories.<sup>127</sup> Even in Germany, there is no general statutory definition of fault (*Verschulden*) as such. But the Bürgerliches Gesetzbuch (BGB) makes it clear that the meaning of fault is, such for instance in the PETL, twofold. It is constituted by the two categories of intentional (*Vorsatz*) and negligent (*Fahrlässigkeit*) behaviour. *Fahrlässigkeit* is defined in § 276(2) BGB as the omission of due care (*Außerachtlassen der im Verkehr erforderlichen Sorgfalt*).<sup>128</sup>

The Swiss OR 2020 does not use the term fault, but only indicates in art. 46<sup>129</sup> that a person who infringes upon a duty of care without justification is liable for damages. The proposal makes no distinction in definition between unlawful and careless behaviour.<sup>130</sup> Neither does the Estonian LOA give a definition of fault. Art. 1043 LOA<sup>131</sup> just stipulates that:<sup>132</sup>

‘A person (tortfeasor) who unlawfully causes damage to another person (victim) shall compensate for the damage if the tortfeasor is *culpable* of causing the damage or is liable for causing the damage pursuant to the law.’

There are exceptions, however. For instance, the French Projet Terré defines fault in art. 5:

‘La faute consiste, volontairement ou par négligence, à commettre un fait illicite. Un fait est illicite quand il contrevient à une règle de conduite imposée par la loi ou par le devoir général de prudence et de diligence.’

This means that fault, according to the Projet Terré, corresponds to the (objective) requirement of wrongfulness (*illicéité*), and not to the notion of attributab-

126 Many legal writers have tried to fill this gap. So did Planiol, who defined fault as the violation of a pre-existing duty (*la violation d'une obligation préexistante*). This vague definition is frequently referred to and means that *faute* is not only the breach of a statutory duty which amounts to fault, but also the infringement of general duties, such as the duty to behave, in all circumstances, in a careful and diligent way (*le devoir général de prudence et de diligence*): see S. Galand-Carval, 'Fault under French Law', in: P. Widmer, *Unification of Tort Law: Fault*, The Hague: Kluwer Law International 2005, p. 92.

127 Horton Rogers 2005, p. 69, with reference to the remark by Lord Atkin in *Donoghue v. Stevenson* [1932] AC 562: 'The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa" (...).'

128 U. Magnus & G. Seher, 'Fault under German Law', in: P. Widmer (ed.), *Unification of Tort Law: Fault*, The Hague: Kluwer Law International 2005, p. 105.

129 A. General Provisions. I. Conditions of Liability.

130 Loser 2014, pp. 675-676.

131 Compensation for unlawfully caused damage. Art. 1043 LOA reads as follows: 'A person (tortfeasor) who unlawfully causes damage to another person (victim) shall compensate for the damage if the tortfeasor is culpable of causing the damage or is liable for causing the damage pursuant to law.'

132 Lahe 2013, p. 144.

ility (*imputabilité*), which, in the Project, is only used as the title for a series of strict liabilities for the acts of others, e.g. the strict liability of the parents for the wrongful acts of their children.<sup>133</sup>

While the PETL ‘embraces’ the concept of fault, the DCFR – according to one of its main drafters, Professor Christian von Bar – ‘deliberately avoided the notions of fault and strict liability.’<sup>134</sup> According to the Commentaries on the PETL (art. 4:101), the term fault is used as a comprehensive term, embracing intent as well as negligence. Thus, according to art. 4:101 PETL and its Commentaries, the meaning of the term fault is twofold. It covers both intentional or deliberate and negligent acts of violation of the required standard of conduct.<sup>135</sup> Contrary to the regulations under the PETL, the DCFR carefully avoids the notions of fault and strict liability. The comments on the DCFR remain silent at this point. In his article entitled ‘Non-Contractual Liability Arising out of Damage Caused to Another under the DCFR’ Professor Christian von Bar sheds some light on this issue:<sup>136</sup>

‘In the basic rule we have deliberately avoided the notions of ‘fault’ and ‘strict liability’. Both would have been misleading in our view because negligence does not require fault in a moral sense and also because a liability, once arisen, is always strict in nature.’

As we will explain in the next section and as we have already pleaded for in a former edition of BWKJ dedicated to the ‘reasonable person’ (*de maatman*),<sup>137</sup> when we use the concept of fault, this term should only mean that the tortfeasor is legally *to blame* for his wrongful act. Therefore, fault requires that the conduct of the tortfeasor is *subjectively* wrongful. Fault should only be defined as *legal* blameworthiness (*schuld*) and not as an attributable wrongful act (*fout*).<sup>138</sup> That brings us to the discussion to what extent wrongfulness and fault are to be seen as distinct requirements and, if a distinction is to be

133 Projet Terré, § 4. De l’imputation du dommage causé par autrui.

134 C. von Bar, ‘Non-Contractual Liability Arising out of Damage Caused to Another under the DCFR’, *ERA Forum* 2008, p. 35.

135 The concept of the ‘required standard of conduct’ is described in art. 4:102 PETL. In here the ‘reasonable person’ (man or woman) is the central figure. Therefore, in order to establish a fault-based liability according to the PETL two requirements have to be fulfilled: (i) an intentional or negligent act; (ii) violation of the required standard of conduct. See also P.C.J. De Tavernier & J.A. van der Weide, ‘De maatman in het onrechtmatige daadsrecht: onderzoek naar enkele regels van soft law’, in: A.G. Castermans *et al.* (eds.), *De maatman in het burgerlijk recht* (BWKJ 24), Deventer: Kluwer 2008, pp. 119-148.

136 Von Bar 2008, p. 35.

137 De Tavernier & Van der Weide 2008, pp. 130-131.

138 In the same sense for Belgium: Cour de Cassation 13 October 1999, *Arr. Cass.* 1999, p. 528; Cour de Cassation 16 February 1984, *Arr. Cass.* 1983-84, p. 750 and *Pas.* 1984, I, 684.

made, what yardstick – an objective or a subjective one – is to be used when assessing the fault of the tortfeasor.<sup>139</sup>

### 6.3 THE YARDSTICK IN ESTABLISHING FAULT: OBJECTIVE OR SUBJECTIVE?

#### 6.3.1 *Objective or subjective assessment of fault: the debate*

In order to deal with the objective or subjective assessment of fault, we need to make a clear statement about the requirement of wrongfulness. Although the concept of wrongful conduct is in the heart of each fault-based (and sometimes also strict-based<sup>140</sup>) liability system,<sup>141</sup> different things have been said about this term and its relation to fault has been the subject of intense debate. It is not our ambition to reiterate this entire matter, referred to by Van Dam as ‘the mystery only the Germans dare to speak openly about’.<sup>142</sup> Why not try to build a harmonised European tort law on what Koziol calls a threefold division into clearly distinguished terms, so that the debate could focus on the resolution of the real issues behind the terminology? According to Koziol, ‘the threefold division into factual elements of the offence (*Tatbestandmäßigkeit*), breach of a duty of care and subjective blameworthiness reflects practical necessity and is ultimately significant in this respect even in legal systems that only base the decision on fault and do not openly recognise the notion of wrongfulness, for example French law.’<sup>143</sup> Therefore, we welcome his idea to completely avoid the ambiguous expression of wrongfulness and talk about factual elements of the offence (impairment of a protected interest),<sup>144</sup> negligence (breach of an objective duty)<sup>145</sup> and fault (subjective blameworthiness).<sup>146</sup>

What does this all precisely mean? Firstly, we propose that negligence, as a breach of an *objective* duty, should no longer be subjectivised, because such a test ‘would not provide a clear enough forewarning of what kind of care will be expected.’<sup>147</sup> Therefore, we do not agree with art. 4:102(2) PETL, stating that ‘the above standard may be *adjusted* when due to age, mental or

139 See on this topic e.g. H. Koziol, ‘Liability Based on Fault: Subjective or Objective Yardstick?’, *Maastricht J. Eur. & Comp. L.* 1998, pp. 111-128.

140 See for Switzerland: P. Widmer, ‘Switzerland. Function and Relevance under Swiss Law’, in: H. Koziol (ed.), *Unification of Tort Law: Wrongfulness*, The Hague: Kluwer Law International 1998, p. 115 ff.

141 H. Koziol, *Basic Questions of Tort Law from a Germanic Perspective*, Wien: Jan Sramek Verlag 2012, p. 172.

142 Van Dam 2013, p. 138.

143 Koziol, *Basic Questions of Tort Law from a Comparative Perspective* 2015, p. 783.

144 Result-based.

145 Behaviour-related.

146 Koziol, *Basic Questions of Tort Law from a Comparative Perspective* 2015, p. 784.

147 Compare Sieburgh 2000, p. 259.

physical disability or due to extraordinary circumstances the person cannot be expected to conform to it’.

Secondly, we defend the idea that fault must be interpreted as being subjective. When we decide whether someone has been at fault, we do take the tortfeasor’s personal characteristics into account.<sup>148</sup> Does all this sound very revolutionary? We do not think so. It is merely a plea for a mere terminological and structural clarity, in order to make court decisions in tort law more coherent, so that more predictability and thus legal certainty in this complex area in private law can be achieved. With regard to our home country, the Netherlands, we would therefore welcome judges weighing the act (*should* the actor have acted differently?) and the actor (*could* the actor have acted in a different way?) in two stages. We do not agree with those who think that the aforementioned two aspects (the conduct and the person) can be mixed up.<sup>149</sup>

Thirdly, the assessment of the question whether the tortfeasor *should* have acted differently, will no longer deal with the concept of fault, but becomes part of the second hurdle in establishing liability, the breach of an *objective* duty. Here, *distributive* justice is at play. This means that expressions like ‘faute objective’ as used in French law,<sup>150</sup> should not be used anymore. The question whether someone *could* have acted differently, must be assessed in two steps. Firstly: is there tortious capacity?<sup>151</sup> Secondly: was the tortfeasor able to behave in conformity with his or her capacity?<sup>152</sup> Here, *corrective* justice is at play.

### 6.3.2 Subjective or objective yardstick: the case of the personal liability of children

Now, what are the consequences of our proposal for the personal liability of children? The existing and proposed solutions to the liability for their own conduct differ ‘to an extent that is almost unbelievable.’<sup>153</sup> Indeed, the image of the existing and proposed legal rules and provisions is really kaleidoscopic. Therefore, let us first present some examples taken from the instruments we have analysed. In most of these instruments, even when an objective test of

148 See Sieburgh 2000, p. 261; P. Widmer, ‘Comparative Report on Fault as a Basis of Liability and Criterion of Imputation’, in: P. Widmer, *Unification of Tort Law: Fault*, The Hague: Kluwer Law International 2005, pp. 357-358.

149 Compare Van Boom 2005, p. 170.

150 Galand-Carval 2005, p. 90.

151 Compare with the concept of *Deliktsfähigkeit* in current German tort law and the notion of *toerekeningsvatbaarheid* under Belgian law.

152 Compare with the concept of *Steuerungsfähigkeit* in current German tort law.

153 H. Koziol, ‘Liability of Children as well as Persons with Reduced Abilities and the Notion of Fault. Comparative stimulations’, in: H. Koziol (ed.), *Comparative Stimulations for Developing Tort Law*, Wien: Jan Sramek Verlag 2015, p. 105.

fault is the rule, a particular position is taken for children.<sup>154</sup> Then, we will formulate a personal choice between the existing and proposed alternatives.

In relation to tort liability of children, Section 1, Chapter 3, Book VI of the DCFR contains two provisions. These provisions can be found in the same Section as the provisions on intention and negligence. Art. VI. – 3:103 deals with issues of intention and negligence on the part of persons under eighteen. Art. VI. – 3:103 DCFR distinguishes between children and juveniles aged seven to seventeen (par. 1) and children under the age of seven (par. 2). Par. 2 of art. VI. – 3:103 provides for an age limit whereby children under seven years of age are not accountable for causing damage intentionally or negligently. A significant aim of the rule of art. VI. – 3:103 DCFR, par. 2 is to safeguard children from premature financial burdens through liability for damage caused by them.

According to par. 1 of art. VI. – 3:103 DCFR, persons aged seven to seventeen are accountable for causing legally relevant damage. This accountability only exists in so far as the person involved does not exercise such care as could be expected from a reasonably careful person of the same age in the circumstances of the case. Subsequently, par. 3 of art. VI. – 3:103 DCFR contains a counterweight to the rules of both preceding paragraphs. Paragraphs 1 and 2 of art. VI. – 3:103 do not apply when the person suffering the damage cannot obtain reparation from another and liability to make reparation would be equitable having regard to the financial means of the parties and all other circumstances of the case.

Certain jurisdictions, such as Austria,<sup>155</sup> Germany,<sup>156</sup> the Netherlands<sup>157</sup> and the Estonian LOA<sup>158</sup> have decided on a determined (or presumed) limit of age below which a tortfeasor cannot be held liable<sup>159</sup>

In the PETL this model has not been followed. The PETL adopts a so-called 'flexible system'.<sup>160</sup> The question whether or not a person had sufficient insight into or control of his or her behaviour has to be answered from case

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154 Van Dam 2013, p. 269.

155 § 153 ABGB fixes the limit at 14 years. However, the presumption is rebuttable, so that the plaintiff may prove that, in a concrete situation, a younger child had enough capacity of discernment to justify its individual liability: H. Koziol, 'Fault under Austrian Law', in: P. Widmer (ed.), *Unification of Tort Law: Fault*, The Hague: Kluwer Law International 2005, pp. 14-15.

156 No liability for children under 7 (§ 828 par. 1 BGB; see U. Magnus & G. Seher, 'Fault under German Law', in: P. Widmer (ed.), *Unification of Tort Law: Fault*, The Hague: Kluwer Law International 2005, p. 107.

157 Tortious immunity up to 14 years of age: art. 6:164 BW.

158 Art. 1052(1) LOA provides that all children under the age of fourteen are deemed to lack fault capacity: see Lahe 2013, p. 146.

159 See P. Widmer, 'Comparative Report', in: P. Widmer (ed.), *Unification of Tort Law: Fault*, The Hague: Kluwer Law International 2005, p. 344.

160 European Group of Tort Law, *Principles of European Tort Law. Text and Commentary*, Wien/New-York: Springer 2005, p. 80.

to case, according to the mental development of that person. This is also the case with regard to Belgian law.<sup>161</sup>

A liability on grounds of equity has been chosen in the Swiss OR 2020. Art. 57 OR 2020 reads as follows:

‘B. Haftung urteilsunfähiger Personen. 1 Wenn es der Billigkeit entspricht, kann das Gericht auch eine urteilsunfähige Person, die Schaden verursacht hat, zum Ersatz verurteilen.’<sup>162</sup>

This liability depends on the financial means of the child and the needs of the victim.<sup>163</sup>

From a comparative perspective, the French system of personal liability of children occupies a particular position. In 1984, the Cour de Cassation had to decide about a 7-year-old boy who deliberately bumped into another boy in a school playground, as a consequence of which the latter hit a bench and was seriously injured.<sup>164</sup> The French Supreme Court held the 7-year-old boy liable, because his conduct could be qualified as a fault regardless of whether he has reached the age of discretion.<sup>165</sup> The Cour de Cassation decided that the standard of reference that had to be applied to the case was not a child of the same age but an adult, *le bon père de famille*.<sup>166</sup> What do we think about this opinion?

The French approach might be considered as ‘interesting and instructive’,<sup>167</sup> because concerns about the imposition of liability on children who have not reached the age of discretion might be alleviated by the fact that such liability has little practical significance, as the victims tend to only pursue an action against their parents.<sup>168</sup> The French rule of liability of *infantes* (very young children) should also be interpreted in relation to the tort law culture of France that generates as much compensation as possible for a victim for the damage he has suffered. In other words, it fits in with the French articulation of distributive justice. Furthermore, in most cases the risk of damage caused by minors is covered by liability insurance.<sup>169</sup> Finally, legal systems that show regard for the restricted capacity of children provoke a contradiction by refusing to take the subjective abilities of other persons into account.<sup>170</sup>

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161 H. Cousy & D. Droshout, ‘Fault under Belgian Law’, in: P. Widmer (ed.), *Unification of Tort Law: Fault*, The Hague: Kluwer Law International 2005, p. 37.

162 B. Liability of persons lacking capacity. 1 On grounds of equity, the court may also order a person who lacks capacity to compensate for the damage he or she has caused.

163 Compare with the German provision of § 829 BGB; see Van Dam 2013, p. 270.

164 See Van Dam, 2013, p. 273.

165 Cour de Cassation 2e ch. civ. 12 December 1984, *Gaz. Pal.* 1985, 235.

166 Van Dam 2013, 273.

167 Koziol, *Comparative Stimulations* 2015, p. 106.

168 Koziol, *Comparative Stimulations* 2015, p. 106.

169 Koziol, *Comparative Stimulations* 2015, p. 106.

170 Koziol, *Comparative Stimulations* 2015, p. 143.

On the other hand, however, it cannot be denied that the legal position of young children can be severely threatened if their liability is not covered by a liability insurance.<sup>171</sup> Applying an objective standard is not in the interest of young children, because they are not able to meet the standard of the reasonable adult *bonus pater familias*.<sup>172</sup> It has also been argued that 'leaving (child) tortfeasors with extremely limited economic resources and depriving them of the possibility of carrying on their lives in a way held compatible with European societies' and legal systems' values and minimum standards, may also constitute a violation of their fundamental rights, namely the rights to human dignity, development of personality, equality, private autonomy, minimal livelihood, maximal development, and special protection of children'.<sup>173</sup>

We agree with Koziol that, in view of a future harmonisation of European tort law with regard to liability for damage caused by children, two alternatives exist:<sup>174</sup>

'On the one hand in developing the French system of a combination of children's (...) liability for objectively wrongful behaviour without taking regard of subjective capacity (...), combined with social liability insurance and redress against supervisors in case of negligent supervision. On the other hand, the traditional system (...) of taking into regard of subjective capacity of children (...) in combination with a general subjective notion of fault, also in regard to adults (...) and, thus, not only with regard to children.'

We believe that the second option is to be preferred. However, being aware of the majority of jurisdictions and scholars who nowadays continue to defend the idea of an objective assessment of fault, a 'third way' may be considered in order to find a solution for what Van Dam calls the dilemma between emotional objections to the liability of children on the one hand (the element of corrective justice) and the desirability of liability of children to protect victims (the element of distributive justice).<sup>175</sup>

That compromise might be found in the adoption of the rules on liability for damage caused by children as laid down in the Dutch Civil Code. The Dutch solution combines strict liability of parents until a certain age and the presumed fault of parents at a later age, with the lack of fault of children until a certain age and children's tortious liability according to the general fault-based liability standard at a later age.<sup>176</sup> This might be an interesting path to follow. However, in view of the existing age limits in the current legal

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171 Koziol; *Comparative Stimulations* 2015, p. 140.

172 Van Dam 2013, p. 269.

173 Ferreira 2011, p. 582.

174 Koziol, *Comparative Stimulations* 2015, pp. 145-156.

175 Van Dam 2013, p. 269.

176 Ferreira 2011, p. 588.

systems (from the age of seven in Germany until the age of fourteen in Estonia), fixing the limit of children's personal liability at the age of twelve seems more realistic in an attempt to harmonise the existing rules. Moreover, with an age limit of twelve, the insurability of the risk (low premiums) would be easier to maintain, bearing in mind the statistics with regard to criminal behaviour committed by minors over that age. But let us stay prudent: many scholars are not in favour of fixing children's liability at a certain age. 'While the concept of legal certainty can be used for the use of rigid age limits', writes Koziol, 'the counterarguments would seem to outweigh this concern: this concerns subjective imputation and as the personal development of children varies considerably and in diverse situations very different powers of discernment are required, rigid age limits thus lead to results which in individual cases cannot be objectively justified.'<sup>177</sup>

## 7 CONCLUSION

In this paper we have drawn some lines for a future harmonised tort law with regard to (a) the importance of fault liability, (b) the definition of fault and (c) the assessment of fault by a well-determined yardstick.

- (a) Illustrated by the case of parental liability we showed that the existing and proposed tort law regimes in Europe differ to a great extent. At both ends of the tort law spectrum, regimes of fault liability and strict liability could be found. In our paper we did not aim to provide an answer to the question whether strict liability rules should, in certain cases, replace existing fault liability rules. The choice of mere strict liability regimes rather than preserving classical fault liability approaches is just a matter of policy: should tort law focus exclusively on distributive justice (strict liability), or is corrective justice (fault liability) the fundamental goal?
- (b) In order to overcome the existing catastrophic Babylonian confusion about the meaning of the concept of fault in the harmonisation and reform projects examined, we reiterated an opinion in this contribution that we defended already seven years ago in this BWKJ series.<sup>178</sup> Fault should only be defined as legal blameworthiness. An unfortunate confusion of the concept of fault with the concept of wrongfulness<sup>179</sup> or with a combination of wrongfulness and blameworthiness should be avoided. By taking

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<sup>177</sup> Koziol, *Comparative Stimulations* 2015, p. 792.

<sup>178</sup> De Tavernier & Van der Weide 2008, pp. 119-148.

<sup>179</sup> For a future harmonised tort law, we propose to delete the concept of wrongfulness and to replace it by the twofold requirement of (1) the proof of the factual elements of the offence (impairment of a protected interest) and (2) negligence (breach of an objective duty).

Dutch law into consideration we therefore proposed in this paper to use the current concept of fault only in a strict sense of attributability, that is to say blameworthiness, or in Dutch: *schuld* (art. 6:162 DCC). Moreover, according to our opinion, the word 'fault' as used in the articles 6:169, 6:170, 6:171 and 6:172 DCC – referring to a combination of wrongfulness and attributability – should be replaced by 'a wrongful act that can be attributed to the tortfeasor'. Our proposal implicates that we cannot identify with a series of soft law and reform proposals, such as the DCFR, in which the concept of fault has been carefully avoided, or the *Projet Terré*, in which the concept of fault converges with the concept of negligence. Acceptance of our proposal will lead to a terminological shift of the Dutch Civil Code provisions into which the concept of fault is incorporated.<sup>180</sup> However, we would like to emphasise that we do not aim to adjust the requirements for tortious liability in general.

- (c) Against the background of the kaleidoscopic image of both the definition of fault and its assessment, we have proposed that the concept of fault must be interpreted in a subjective way. In case of the liability of children, we therefore do not adhere to the French approach that does not take the tortious capacity and the blameworthiness of children into consideration. This leads us to the following question. Do we prefer to leave the assessment of the tortious capacity to judicial discretion, or do we give preference to a rigid age limit that excludes the liability of a child? We prefer the latter solution, but by taking the insurability of the risk of damage caused by the child into account, we propose to replace the current limit of fourteen years of age by that of twelve years of age. In this case legal certainty and predictability should prevail over *Einzelfallgerechtigkeit*.

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<sup>180</sup> With the exception of art. 6:162 DCC, where fault is used in the sense of blameworthiness (*schuld*).

