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Liability of football clubs for supporters' misconduct. A study into the interaction between disciplinary regulations of sports organisations and civil law

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6 | The disciplinary standard and civil law – interaction, rationale and limitations

6.1 INTRODUCTION

Under certain circumstances, football clubs can on the basis of a contract or due to negligence be held liable for damage caused by supporters' misconduct. The question whether a club could also be held liable by virtue of a rule of strict liability similar to the rule in disciplinary law is relevant for a number of reasons.

First, the purpose of rules of strict liability is to improve the claimant's position by no longer having the right to compensation be dependent on the defendant's negligent conduct.¹ A rule of strict liability for clubs would increase the legal certainty for victims.

Secondly, strict liability would eliminate several difficulties in regard to establishing a breach of the standard of care. The burden of proof would no longer rest on the claimant and less room for factual interpretation of the standard of care would lead, again, to increased legal certainty for all parties involved. In addition, a rule of strict liability would also resolve the more theoretical issue of extending the notion of fault liability beyond its limits.

Finally, strict liability could potentially also resolve the problematic cases of the visiting club's liability and liability for damage outside the stadium. As mentioned above, visiting clubs generally are not in charge of ensuring safety in and around the stadium. As a result, their duty of care in regard to preventing supporters' misconduct is very limited in comparison with the duty of care that rests on the organising club. This leads to the somewhat peculiar situation in which the organising club can be held liable for the misconduct of visiting supporters. In addition, it can be envisaged that supporters from the visiting team will provoke or start riots with the aim of hurting the organising club. Strict liability of the visiting club for the behaviour of its own supporters – similar to the existing disciplinary liability – could potentially avoid this.

¹ Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 906-2 and 1001.

Approach

In addition to the practical reasons for looking into the application of the disciplinary rule in civil law already mentioned, another pertinent reason exists on a more conceptual level. As there is already a rule that addresses the same type of circumstance, though from a different angle and primary perspective, logic almost requires an investigation into the application of the disciplinary liability rule in civil law. Is there, however, also a systematic rationale? Are disciplinary liability and civil liability connected in any way? What are the issues that could prevent successful application of a strict liability rule in civil law – and can these be overcome? By all means, it would be desirable if the disciplinary strict liability rule were to be acceptable as a concept of strict liability in civil law as well. This way a club would not have to deal with two different liability concepts for the same situation and could potentially avoid systematic problems when individuals sue clubs for damages caused by their supporters.

In summary, this chapter will focus on answering whether the strict liability rule as laid down in the private regulations of football organisations can be transposed to civil law. First, Section 6.2 will examine to what extent private regulations – such as regulations created by sports organisations – can be applied in civil law and how they influence open standards such as the standard of care. Section 6.3 will then take a closer look at the rationale behind applying the specific rule of disciplinary strict liability in civil law. What does the rule encompass and how does this influence its application outside its original scope? In Section 6.4, a conceptual analysis of the matter of supporters' misconduct against the requirements of the various categories of strict liability that are present in the relevant legal systems will be carried out. Finally, Section 6.5 will discuss some opportunities and limitations of a civil-law strict liability rule in regard to the misconduct of supporters of the visiting team, damage caused outside the stadium and racist chanting.

6.2 THE INFLUENCE OF PRIVATE REGULATIONS ON THE STANDARD OF CARE

The sports sector is for a large part founded on private regulations.² Many of these regulations impose obligations and restrictions that the members of the specific sport need to adhere to. In the rulings available in regard to supporters' misconduct, courts regularly referred to privately-made rules, namely those laid down in security and disciplinary regulations created by national and international football federations.³ In light of this research, it is important to clarify the status of these rules in civil proceedings. Does a

2 See Chapter 2.

3 Chapter 5.3.3.

breach of a rule in private regulations lead to civil liability?⁴ Or in other words, to what extent can and should the private regulations of sports organisations be taken into consideration when determining the applicable standard of care?

6.2.1 Private regulations

Apart from sport, private regulations are an important instrument to regulate many other sectors in society. Nowadays, wide ranges of fields use private regulations, including environmental protection, professional services, banking and finance, telecom, e-commerce, food safety and, of course, sports. Across these sectors there are great differences in regard to the interference by national and increasingly EU law.⁵ In a number of fields, legislature even delegates regulation to private organisations.

One of the cited reasons behind the success of private regulations is that private organisations can often demand higher levels of expertise in their field than national legislature, potentially resulting in a higher standard of protection.⁶ Furthermore, compared to rules of national law, private regulations can generally be adapted faster to new innovations and circumstances.⁷

Although thus not a new phenomenon in itself,⁸ the discussion about private regulations and their position in private law is relatively recent and still being developed.⁹ This is further illustrated by the fact that neither the PETL nor DCFR pay much attention to this phenomenon. However, the influ-

4 Another commonly used term is self-regulation.

5 F. Cafaggi, 'Private Regulation in European Private Law', in: Arthur S. Hartkamp, Martijn W. Hesselink *et al.*, *Towards a European Civil Code. Fourth Revised and Expanded Edition*, Alphen aan den Rijn: Kluwer Law International 2011, pp. 91-126, p. 92.

6 Julia Black, *Rules and Regulators*, Oxford: Clarendon Press 1997, pp. 219-220. The EU is of the same opinion, recognising that 'legislation is often only part of a broader solution and that non-binding rules can be equally important for the attainment of a given objective'. European Commission, 'European Governance – A White Paper' COM (2001) 428, 25 July 2001, p. 20.

7 J.B.M. Vranken, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. Algemeen deel****, Kluwer 2005, § 91.

8 Julia Black, 'Constitutionalising Self-Regulation', *Modern Law Review* (59) 1996, p. 25.

9 An important starting point has been the European White Paper on governance: European Commission, 'European Governance – A White Paper' COM (2001) 428, 25 July 2001; F. Cafaggi, *Reframing Self-Regulation in European Private Law*, Kluwer Law International: the Netherlands 2006. See further F. Osman, 'Avis, directives, codes de bonne conduite, recommandations, déontologie, éthique, etc.: réflexion sur la dégradation des sources privées du droit', *Revue trimestrielle de droit civil* 1995, pp. 509-531; *Jahrbuch Junger Zivilrechtswissenschaftler* 2002, *Die Privatisierung des Privatrechts. Rechtliche Gestaltung ohne staatlichen Zwang*, Richard Boorberg Verlag: Stuttgart 2003; Anne Röthel, *Normkonkretisierung im Privatrecht*, Tübingen: Mohr Siebeck 2004; Christian Bumke and Anne Röthel (eds.), *Privates Recht*, Tübingen: Mohr Siebeck 2012; I. Giesen, *Alternatieve regelgeving en privaatrecht*, Deventer: Kluwer 2007.

ence of private regulations in the interpretation of the numerous open standards prevalent in civil law has been examined by a number of authors. Cafaggi explains that ‘standards defined by codes or guidelines are referred to by judges when filling the meaning of general clauses, such as the standard of care in tort law, the standard of performance in contractual undertakings, or fairness in unfair competition law’.¹⁰ Giesen formulates a similar thought as follows: ‘rules of private regulation are a reflection of the prevailing legal conviction (*rechtsovertuiging*) that help determine open standards such as reasonableness (*billijkheid*)’.¹¹

Through the interpretation of open standards in civil law, private regulations can thus become relevant for third parties who, while not bound by the regulations, can invoke these rules in civil proceedings. In this light, the question arises whether and to what extent the rules of football federations could be applied in cases of civil liability of football clubs for supporters’ misconduct. Clues to answering this question will be sought through analysing how the courts have applied private regulations from other fields as well as in sports.

In the following, relevant case law considerations will be analysed and used to illustrate the influence of private regulations from a number of different sectors on the scope of the standard of care. It will become apparent that in practically all jurisdictions, courts refer to and consider private regulations to help establish the concrete standard of care.

6.2.2 Technical and safety standards

Generally speaking, the courts in the relevant jurisdictions extensively use technical and safety standards incorporated into private regulations to determine the required standard of care in a particular case.¹²

In Germany, the general opinion on technical and safety standards is that they form valuable references to determine the standard of care in concrete

10 F. Cafaggi, ‘Private Regulation in European Private Law’, in: A.S. Hartkamp, M. W. Hesselink *et al.*, *Towards a European Civil Code. Fourth Revised and Expanded Edition*, Alphen aan den Rijn: Kluwer Law International 2011, pp. 91-126, p. 97.

11 I. Giesen, *Alternatieve regelgeving en privaatrecht*, Deventer: Kluwer 2007, p. 99.

12 For example, in a case regarding the safety of snow sport facilities, the Swiss Federal Supreme Court held that, ‘[a]ls Massstab zieht das Bundesgericht jeweils die von der Schweizerischen Kommission für Unfallverhütung auf Schneesportabfahrten ausgearbeiteten Richtlinien für Anlage, Betrieb und Unterhalt von Schneesportabfahrten (SKUS-Richtlinien) und die von der Kommission Rechtsfragen auf Schneesportabfahrten der Seilbahnen Schweiz herausgegebenen Richtlinien bei. *Obwohl diese Richtlinien kein objektives Recht darstellen, erfüllen sie eine wichtige Konkretisierungsfunktion im Hinblick auf die inhaltliche Ausgestaltung der Verkehrssicherungspflicht*’. BGE/ATF 130 III 193, cons. 2.3.

cases and act as minimum standards.¹³ One of the landmark cases in regard to private technical standards follows a sad accident. A little girl fell into a non-enclosed pond on a construction site in her neighbourhood, causing injuries from which she later died. In the procedure against the owner of the construction site and various contractors, the *BGH* considered standards from the DIN – the German Institute for Standardization – to be especially relevant to fill in safety standards.

”[N]ach ständiger Rechtsprechung des Senats spiegeln die DIN-Normen den Stand der für die betroffenen Kreise geltenden anerkannten Regeln der Technik wider und sind somit zur Bestimmung des nach der Verkehrsauffassung zur Sicherheit Gebotenen in besonderer Weise geeignet.”¹⁴

However, in subsequent case law it has been reiterated that the scope of the required standard of care in a specific situation is not only determined by such standards. According to the *BGH*, anyone creating a dangerous situation has to determine independently what measures are necessary to prevent damage to others. Relevant statutory or other rules do not provide conclusive behavioural standards with regard to the safeguarding of protected interests; rather, such rules help to determine the content and scope of the standard of care.¹⁵ Nevertheless, in regard to DIN standards it has been held that if these are not observed there is a rebuttable presumption that the damage is attributable to a breach of the standards, leaving it up to the defendant to prove that the damage is not due to a breach of the standards.¹⁶

The approach in English law is very similar.¹⁷ Mr Ward was severely injured when he fell backwards over a low balustrade on the balcony of the Ritz hotel after fainting. Since its renovation, the balustrade was lower than required by the British Standards Institute. In the first proceedings, Ward’s claim was dismissed. The judge considered that although on the facts the plaintiff’s fall would not have occurred if the balustrade had been of the height required by the British Standards, failure to observe a British Standard did not necessarily constitute a breach of the defendants’ duty of care to the plaintiff as their lawful visitor.¹⁸ On appeal, more weight was given to the relevant safety regulations.

13 Johannes Hager, *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Buch 2 Recht der Schuldverhältnisse*, Berlin: Sellier – de Gruyter 2009, § 823, no. E34; Gerhard Wagner, *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 5 Schuldrecht Besonderer Teil III. 6. Auflage*, München: Verlag C.H. Beck 2013, § 823, no. 361.

14 *BGH* 12.11.1996 – VI ZR 270/95, *NJW* 1997, 582, cons. II.1.b.aa.

15 *BGH* 13.03.2001 – VI ZR 142/00, *NJW* 2001, 2019, cons. 13.

16 *BGH* 19.04.1991 – V ZR 349/89, via: lexetius.com/1991,391, cons. 12.

17 C.T. Walton MA *et al.* (ed.), *Charlesworth & Percy on Negligence (13th ed.)*, London: Thomson Reuters 2014, no. 7-50.

18 *Ward v. Ritz Hotel (London)* [1992] P.I.Q.R. 315.

“[A]lthough British Standards were not legally binding, they were a guide which provided strong evidence as to the consensus of professional opinion and practical experience as to sensible safety precautions at their date of issue. The judge had given too little weight to the British Standard. D had not taken reasonable care for P’s safety”.¹⁹

Furthermore, subsequent English case law has maintained that the type and origination of a technical or safety regulation can make a difference as to whether following the rules offers a defence. However, if the regulation is the ‘result of careful work by an expert committee’ a judge can be ‘entitled to accept the evidence which led him to conclude that it remained the touchstone of reasonable standards’.²⁰

This latter case subtly touches upon the subject of the nature and legitimacy – or binding nature – of privately made rules, which has received quite some attention in literature on private and self-regulation.²¹ In short, with regard to certain regulations there are concerns as to their democratic nature, and thus to the justification of applying these rules in civil (or other) procedures. In regard to the regulations of football federations, the democratic nature of these rules is, however, safeguarded through the system of rule creation in association law.²² National football federations all have a vote in the general

19 *Ward v. Ritz Hotel (London)* [1992] P.I.Q.R. 315. Interestingly, in another case also involving a balcony balustrade the Swiss Federal Supreme Court came to a similar decision. Decision dated 16.06.1984 (Joos/Steiner), cons. 2a: “Die Beklagten bestreiten zu Unrecht, dass eine Balkonbrüstung (...) als fehlerhaft anzusehen ist (...). Entscheidend ist vorliegend, dass eine SIA-Empfehlung über das Ausmass solcher Geländeröffnungen missachtet worden ist. Dass es sich dabei nicht um Rechtsnormen handelt und die Empfehlung auch nicht zum Gegenstand einer baupolizeilichen Auflage gemacht worden ist, ändert daran nichts; solche Empfehlungen eines Fachverbandes gelten unbekümmert darum zum Ausdruck der üblicherweise zu beachtenden Sorgfalt.”

20 *Baker v Quantum Clothing Group Ltd*, [2011] 1 W.L.R. 1003, no. 101: “(..) [T]o follow a relevant code of practice or regulatory instrument will often afford a defence to a claim in negligence. But there are circumstances where it does not do so. For example, it may be shown that the code of practice or regulatory instrument is compromised because the standards that it requires have been lowered as a result of heavy lobbying by interested parties; or because it covers a field in which apathy and fatalism has prevailed amongst workers, trade unions, employers and legislators; or because the instrument has failed to keep abreast of the latest technology and scientific understanding. But no such circumstances exist here. The code was the result of careful work by an expert committee. As the judge said, the guidance as to the maximum acceptable level was “official and clear”. He was entitled to accept the evidence which led him to conclude that it remained the “touchstone of reasonable standards” for the average reasonable and prudent employer (..).”

21 I. Giesen, *Alternatieve regelgeving en privaatrecht*, Deventer: Kluwer 2007, p. 56ff; Julia Black, ‘Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World’, 54 *Current Legal Problems* 2001, pp. 103-147; Gregor Bachmann, *Private Ordnung. Grundlagen Ziviler Gesetzgebung*, Tübingen: Mohr 2006, p. 339; Gregor Bachmann, Legitimation privaten Rechts, in: Christian Bumke and Anne Röthel (eds.), *Privates Recht*, Tübingen: Mohr Siebeck 2012, pp. 207-227.

22 See Chapter 2.2.

assembly of the international bodies UEFA and FIFA. Individual football clubs have the same right in their respective national federations.

6.2.3 Professional standards

Apart from technical and safety regulations, a large number of liability cases revolve around professional regulations or standards. Most prevalent in this regard are medical professional standards, but professional regulations and codes of conduct from other sectors, such as finance and insurance, increasingly make their appearance in case law.

In contrast to the influence of the DIN standards, the position of medical professional regulations in relation to the standard of care is a more recent development in Germany.²³ However, although the development started later, at present the situation looks very similar. According to standing case law ‘instructions in guidelines of medical professional bodies or associations should not be blindly identified with the standard of care. Such guidelines do not replace the expert advice and cannot be adopted as the standard of care’.²⁴

In Switzerland too, it is held that the violation of private regulations *can* also constitute a fault in terms of art. 41 CO, as the recommendations from a professional association are considered the standard of necessary care.²⁵

Similarly, the approach in English law also follows this line of reasoning. Depending on the circumstances, professional rules can help to fill in the standard of care. However, the relevance of regulations will depend largely on their nature and level of detail.²⁶ In short, the more detailed the rules are, the more likely a breach of these rules is considered careless.

In comparison with Germany, England and Switzerland, the approach of courts in the Netherlands and France appears more progressive and will therefore be looked into in greater detail.

23 Hans Berndt Ziegler, ‘Leitlinien im Arzthaftungsrecht’, *Versicherungsrecht* 2003, pp. 545-549, p. 546; Reinhard Damm, ‘Wie wirkt „Nichtrecht“? Genesis und Geltung privater Regeln am Beispiel medizinischer Professionsnormen’, *Zeitschrift für Rechtssoziologie* 2009/1, pp. 3-22.

24 BGH 28.03.2008 – VI ZR 57/07, via: openjura.de; BGH 15.04.2014 – VI ZR 382/12, *VersR* 2014, 879. However, here too there is the rebuttable presumption of deviation from medical standards.

25 Roland Brehm, *Berner Kommentar, Bd. VI/1/3/1, Die Entstehung durch unerlaubte Handlungen*, Bern: Stämpfli Verlag AG 2013, no. 174ff.

26 J.L. Powell and R. Stewart, *Jackson & Powell on Professional Liability. Seventh edition*, London: Sweet & Maxwell 2012, no. 2-012.

6.2.3.1 Netherlands: towards a direct application of professional standards

Arguably the first case in which the Dutch *Hoge Raad* directly based civil liability on a private regulation resulted from a medical error. Against hospital protocol, a doctor omitted to provide his patient medication to prevent thrombosis after a knee operation. The patient developed thrombosis and brought a compensation claim before the courts. The *Hoge Raad* considered that as the protocol is based on the consensus between the hospital and doctors, they must adhere to the rules established by themselves.²⁷ The liability of the doctor was based exclusively on the violation of the protocol and thus on a private regulation.

With regard to other regulations, the Dutch highest court has shown some diverging decisions in terms of its application of private regulations. Nevertheless, the cases do show a seemingly growing importance of professional regulations and codes of conduct.

Kouwenberg/Rabobank, is a famous Dutch case regarding a bank's duty of care to warn its customers for the dangers of trading in stock options.²⁸ The bank acted contrary to private regulations, more precisely the 'rules for trading on the option market' (*Reglement voor de handel op de optiebeurs, RHO*), when it carried out orders while its client's coverage was not sufficient. The claimant argued that the bank breached its duty of care. According to the *Hoge Raad* the rule is a private regulation and subsequently does not meet the criteria to be considered as law in the sense upon which it can annul or overturn decisions of lower courts.²⁹ This entails that the regulation in itself cannot be a basis for liability. Nevertheless, the court does take the regulation into account when it determines the *extent* of the bank's duty of care, which in the end upholds the claim.

With regard to the Corporate Governance Code, which contains principles and best practice provisions that regulate relations between the management board, the supervisory board and the shareholders of all listed companies registered in the Netherlands, it has been held that it expresses the prevailing legal opinion in the Netherlands.

“Voor een oordeel in andere zin is onvoldoende steun te vinden in de wet en in de in Nederland heersende algemene rechtsovertuiging zoals deze onder meer tot uiting komt in de Nederlandse corporate governance code. (...) welke rechtsovertuiging mede inhoud geeft aan (i) de eisen van redelijkheid en billijkheid naar welke volgens art. 2:8 BW degenen die krachtens de wet of de statuten bij de vennootschap zijn betrokken zich jegens elkaar moeten gedragen, en aan (ii) de eisen die voort-

27 HR 02.03.2001, *NJ* 2001, 649 (Trombose), cons. 3.3.3.

28 HR 11.07.2003, *NJ* 2005, 103 (Kouwenberg/Rabobank).

29 See art. 79 RO (Statute on judicial organisation).

vloeien uit een behoorlijke taakvervulling waartoe elke bestuurder ingevolge art. 2:9 gehouden is.”³⁰

The court tentatively implied that legal opinions expressed in the Code have to be considered when interpreting open standards, such as reasonableness and fairness (*redelijkheid en billijkheid*) and social decency. However, in a number of summary proceedings decisions, the Dutch Commercial Division applied the Code directly and the company in question was forbidden to deviate from principle III.6 of the Code. An appeal from the company was dismissed by the *Hoge Raad*, which followed the Commercial Division’s reasoning.³¹ Subsequent case law of lower courts tends to follow the approach set out by the *Hoge Raad*, turning the Code into virtual ‘hard law’.³²

Following a recent case in the insurance sector, the shift towards direct application of private regulations has received quite a boost.³³ Insurance company Interpolis hired an investigation agency to carry out a personal investigation on their client who received benefits from disability insurance. The client was asked to provide information and to keep a diary and was observed – and filmed – for eight days. The investigation concluded that the client knowingly provided incorrect information to the company, which consequently ended the disability benefits and demanded repayment of the payments made as well as compensation of the costs related to the investigation. In the civil procedure, the code of conduct regarding personal research of the Association of Insurers plays a crucial role. The code was enacted to protect individuals against unnecessary infringements of their privacy and provides a framework for judicial review. According to the Court of Appeal, personal investigations such as the one at issue, in principle breach the right of privacy – thus constituting a fault – unless there is a lawful justification. In assessing the justification of the breach of privacy argued by the insurer, the Court closely reviews the code of conduct. Based on the rules in the code, the insurer should have taken other measures before resorting to the personal investigation. Furthermore, using the result of a breach of the code to its advantage is not reconcilable with the goal of self-regulation. As a result, the court considers that the insurer has acted unlawfully against its client and cannot rely on the evidence that it obtained illegally.³⁴

30 HR 13.07.2007, NJ 2007, 434 (ABN AMRO), cons. 4.4.

31 HR 14.09.2007, NJ 2007, no. 611 and 612 (Versatel II and III).

32 K.H.M. de Roo, ‘De Corporate Governance Code en het drijfzand van de open norm’, *Ars Aequi* 2015/257. The Dutch approach approaches that in Germany, where the Corporate Governance Code is incorporated into a Statute. According to Bachmann, with this solution part of the appeal and advantages such codes have to offer are lost. Gregor Bachmann, *Private Ordnung. Grundlagen Ziviler Regelungsetzung*, Tübingen: Mohr 2006, p. 46.

33 HR 18.04.2014, NJ 2015/20 (Achmea/Rijnberg) notes by M.M. Mendel and H.B. Krans.

34 Hof ‘s-Hertogenbosch 04.09.2012, ECLI:NL:GHSHE:2012:BX9465, cons. 36.

According to the court, the code is thus a “major embodiment of the balancing test, although not necessarily decisive”. The violation of the Code is deemed important, but also – ‘furthermore’ – the non-utilisation of alternative means of information gathering”.³⁵ The highest court, i.e. the *Hoge Raad* took a firm stand and held that, when an insurance company acts in breach of the code this constitutes an unjustified and therefore unlawful infringement of the privacy of the insured.

“Blijkens de inleiding is beoogd in de Gedragscode aan te sluiten bij bestaande wetgeving op het gebied van privacy, zoals de Wet bescherming persoonsgegevens en wetgeving over het (heimelijk) gebruik van camera’s. Gelet op inhoud en opzet van de Gedragscode, kan tot uitgangspunt worden genomen dat indien een verzekerder in strijd met de code handelt, sprake is van een ongerechtvaardigde en derhalve onrechtmatige inbreuk op de persoonlijke levenssfeer van de verzekerde.”³⁶

In legal literature, it has been suggested that the court has taken the debate further than was necessary and that it could have sufficed with the observation that the reasoning of the Court of Appeal was not merely based on a breach of the code.³⁷ Whether this case indeed solidifies the progressive approach regarding the direct application of private regulations remains to be seen. Nevertheless, indications in the affirmative are there.

6.2.3.2 France: progressive development reverted

Interestingly, French case law seemed to be developing in a similar direction before it was again reverted. Although the general opinion in French doctrine is that breaching a customary rule – such as professional standards and other private regulations – can result in a civil fault, it is often reiterated that this is not automatic and judges have a large measure of discretion in regard to these sources.³⁸ It must be pointed out that many professional regulations in France are enacted in the form of state decrees.³⁹

Nevertheless, the wordings of the highest courts suggest a compelling influence from privately made rules. In an often-cited case on medical pro-

35 Compare A.G. Castermans and C.P.L. van Woensel, ‘Juridische determinanten van een nieuw voedselbeleid’, *Ars Aequi* 2014/857, p. 864.

36 HR 18.04.2014, *NJ* 2015/20 (Achmea/Rijnberg) notes by M.M. Mendel and H.B. Krans, cons. 5.2.1.

37 A.G. Castermans and C.P.L. van Woensel, ‘Juridische determinanten van een nieuw voedselbeleid’, *Ars Aequi* 2014/857, p. 864.

38 Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d’indemnisation*, 10th édition, Dalloz 2014, no. 3792-1, 6759,6760; Geneviève Viney and Patrice Jourdain, *Traité de droit civil. Les conditions de la responsabilité (4e édition)*, Paris: LGDJ 2013, no. 461. Joël Moret-Bailly, ‘Règles déontologiques et fautes civiles’, *Recueil Dalloz* 2002, p. 2820ff. Also for rules of associations imposed on members.

39 Joël Moret-Bailly, ‘Règles déontologiques et fautes civiles’, *Recueil Dalloz* 2002, p. 2820ff.

fessional standards, the *Cour de Cassation* held that the appeal court was right to infer a *faute* following the breach of professional regulations in France.

“[S]uivant les directives ou conseils d’un praticien étranger, sans juger par lui-même de la nécessité d’effectuer ces travaux, ce comportement étant interdit par les règles déontologiques françaises; que de ces constatations et énonciations, la cour d’appel a pu déduire l’existence d’une faute professionnelle.”⁴⁰

As in the Netherlands, the Commercial Division of the *Cour de Cassation* has also directly based liability on the breach of professional standards. The Court considered that “la méconnaissance des règles déontologiques de la profession d’expert-comptable, (...) suffisait à établir que de tels agissements étaient constitutifs de concurrence déloyale.”⁴¹ This stance was confirmed in another case four years later.⁴² However, in 2013 the Court reverted this standing but controversial case law that considered that any breach of a professional regulation necessarily constitutes an act of unfair competition.⁴³

“un manquement à une règle de déontologie, dont l’objet est de fixer les devoirs des membres d’une profession qui est assortie de sanctions disciplinaires, ne constitue pas nécessairement un acte de concurrence déloyale.”

The Commercial Division thus follows the other Division of the *Cour de Cassation* where the majority of cases is characterised by the traditional approach that uses the regulations to help determine the standard of care rather than applying them directly.

6.2.4 Regulations of sports organisations

Apart from the more traditional sectors, where private regulations play an important role – such as the construction industry and the medical profession – private regulations of sports organisations have also been the subject of consideration in civil liability cases.

40 Cass. Civ.1 24.01.1990, n°87-18008, Bull. civ. I, n°25. See for a more recent example: Cass. Civ 1e, 29.11.2005, n°04-13805, Bull. civ.1, n°455.

41 Cass. Com. 29.04.1997, *Recueil Dalloz* 1997, p. 495, note Y. Serra. “Ignoring the professional rules of the accounting profession, (...) was sufficient to establish that such acts had constituted unfair competition”.

42 Cass. Com. 22.05.2001, n°95.14.909, “Les transferts de dossiers de certains clients s’étaient effectués en méconnaissance des règles déontologiques de la profession d’expert comptable, ce qui suffisait à établir que de tels agissements étaient constitutifs de concurrence déloyale.” See further: Joël Moret-Bailly, ‘Règles déontologiques et fautes civiles’, *Recueil Dalloz* 2002, pp. 2820-2824.

43 Cass. Com. 10.09.2013, n°12-19.356, *Semaine Juridique* 2013, p. 2013, note Jean-Marie Brignant.

Perhaps the most prevalent private regulations in relation to civil liability cases in sports are the FIS Rules for Conduct.⁴⁴ The FIS Rules are developed by the international skiing federation (FIS) and consist of ten rules that apply to all who use the slopes. Although the FIS Rules have not (yet) been applied directly as a ground of civil liability, they have long been utilised to specify the standard of care.

In 1967 on the Zeller Mountain, an accident between two skiers left one of them with a complicated broken ankle. In this case the German *BGH* presupposed that,

“die Pflichten, deren Verletzung durch den Beklagten in Betracht kommt, sind besondere Ausgestaltungen der allgemeinen Verhaltenspflichten. Ihr Inhalt geht für den Skifahrer auf einer befahrbaren Abfahrt dahin, sich so zu verhalten, dass er keinen anderen gefährdet oder schädigt”.⁴⁵

While referring to the FIS Rules, the court continues that in individual cases this means that the *Eigenregeln des Skiläufers* should be applied. Following a careful review of the facts the court concludes that both parties breached these duties and reduces the compensation by half.

In addition, courts in Switzerland, France and even the Netherlands have considered the FIS Rules when required to determine the standard of care in civil liability cases resulting from skiing accidents.⁴⁶ Interestingly, and contrary to the developments regarding other private regulations as outlined in section 2.3.1. above, the application of the FIS Rules in the Dutch case was less strict than can generally be observed in Germany and Switzerland.

Another example of the application of regulations from sports organisations are the jockey rules. During a horse race in France, a jockey quits charging his horse. He finishes in fourth place and receives a disciplinary sanction for not charging his horse all the way to the finish line in breach of the *Code des courses*.⁴⁷ Interestingly, the claim is brought by a gambler who argues the loss of a chance to win his bet on the horse in question as a result of the

44 See for example, Germany: BGH 11.01.1972, BGHZ 58, 40; Switzerland: BGE/ATF 118 IV 130; Even in the Netherlands, the FIS Rules have been subjected to consideration after a collision between two Dutch skiers who were on holiday in France, Hof Leeuwarden 26.06.2012, ECLI:NL:RBL EE:2011:BP5822.

45 BGH 11.01.1972, BGHZ 58, 40, cons. 17.

46 France: See for an overview, Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 6805; the Netherlands: Hof Leeuwarden 26.06.2012, ECLI:NL:GHLEE:2012:BW9768, cons. 8-9; Switzerland: see for an overview of decisions from lower courts, Hans-Kaspar Stiffler, *Schweizerisches Schneesportrecht* (3rd ed.), Bern: Stämpfli Verlag AG 2002.

47 Cass. Civ.2 04.051972, n°71-10.121 (Poincelet c. Luca), *Recueil Dalloz* 1972, p. 596, note Le Tourneau.

jockey's behaviour. The *Cour de Cassation* follow's the appeal court and confirms the gambler's claim.

“Mais attendu qu'après avoir observé, d'une part, que Poincelet avait fait l'objet d'une sanction de la part des commissaires de la Société d'encouragement pour l'amélioration des races de chevaux en France pour avoir insuffisamment soutenu sa monture à l'arrivée alors que l'article 68 du Code des courses interdit à un jockey, quelles que soient les circonstances, de cesser de soutenir un cheval qui lutte pour les places, d'autre part, que ledit Poincelet ne justifiait pas de l'excuse qu'il alléguait, l'arrêt constate que Scallywag était en troisième position lorsqu'à quelque distance de l'arrivée il n'avait plus été soutenu par son jockey et énonce que le manquement de ce dernier à l'obligation édictée par le texte précité avait perdu à Luca « une chance de réaliser des gains correspondant à ses paris”.⁴⁸

Interestingly, in this case, the court not only refers to the regulation, but also considers the disciplinary sanction imposed on the jockey to establish the fault.

Football regulations

The safety and conduct rules laid down in the regulations of football federations have also played a role in cases before several courts in Europe when they had to consider the liability of clubs following supporters' misconduct. In the French and German cases, which were discussed in Chapter 5.3.3., the safety regulations of the football federations were applied to determine the scope of the standard of care.

To reiterate shortly, in *Fuster/Olympique Lyonnais* the court held that by virtue of the regulation of the national federation the club had to ensure that no dangerous objects – such as rockets – were to enter the stadium. The use of such dangerous objects was considered to be customary, since it required a special prohibition in the rules of the National Football League; leaders *Olympique Lyonnais* therefore could perfectly predict it and committed negligence in failing to take sufficient measures to comply with this prohibition.⁴⁹ However, in addition to the regulations, the court also paid attention to – and independently determined – the insufficient means of security. According to annotator Collomb, although in principle sports regulations do not bind the judge – who is always free to determine independently whether the measures adopted met the standard of care – in practice, ignorance of a sports rule is often used by courts to establish a civil or criminal fault.

48 Cass. Civ.2 04.05.1972, n°71-10.121 (Poincelet c. Luca), *Recueil Dalloz* 1972, p. 596, note Le Tourneau.

49 TGI Lyon 25.06.1986 (Consorts Fuster c. L'Olympique Lyonnais et autre.), *La semaine juridique* 1990 II, no. 21510, note Pierre Collomb.

“Il est, bien sur, de principe que les règles sportives ne lient pas le juge toujours libre d’apprécier la suffisances des mesures adoptées. Néanmoins, il se produit en pratique une sorte d’attraction entre les règles sportives et les décisions des juges: la méconnaissance de la règle fédérale est couramment retenue pour établir la faute civile, voir pénale.”⁵⁰

Also in the German case from 2011, the court weighed the fact that stadium regulations and instructions from the federation acknowledged the risks of flaming objects, through a ban on carrying such items and also through special inspections of spectators.

“Sowohl die einzelnen Stadionordnungen als auch die Hinweise der Sportverbände tragen diesen Gefahren durch ein Verbot des Mitführens solcher Gegenstände als auch durch besondere Kontrollen der Zuschauer Rechnung.”⁵¹

In the Dutch case *Stichting BAN/ADO Den Haag* the claimant’s main argument was that by not reacting to the racist chants from its supporters the club breached the regulations of the national federation as well as its own.⁵² This is an interesting argument since these regulations, the internal rules of both the KNVB and ADO, are not set out to have external effect. In its decision the court discusses the numerous internal rules and regulations in great detail.

First, the court presupposes that it is the primary responsibility of a professional club to act against unwanted chants as this follows clearly from the applicable internal regulations.⁵³ It then continues by considering that according to social decency, the KNVB regulations and its own by-laws, ADO had the duty to take immediate action against the anti-Semitic chanting.

“Onder voormelde omstandigheid rustte op ADO – op grond van de maatschappelijke betamelijkheid, alsmede de KNVB-regels en haar eigen Huisregels – de plicht om onmiddellijk op te treden tegen de zich voordoende antisemitische spreekkoren.”⁵⁴

In short, the club was thus not held liable for the behaviour of its supporters, but for the fact that it remained passive and took no action in order to end the chanting, which constituted a breach of the applicable private regulations. In its concise decision, the court made it clear that a club is expected to abide by its own rules as well as the federation’s rules. It is interesting to note, however, that the KNVB did not intervene in order to force ADO to comply with

50 Pierre Colomb, note sous TGI Lyon 25.06.1986 (Consorts Fuster c. L’Olympique lyonnais et autre.), *La semaine juridique* 1990 II, no. 21510, § I, B.

51 OLG Frankfurt 24.02.2011 – 3 U 140/10, via: <<http://dejure.org/2011,2037>>, cons. 20.

52 Pres. Rb. Den Haag 09.08.2011, ECLI:NL:RBSGR:2011:BR4406, <www.rechtspraak.nl>.

53 Pres. Rb. Den Haag 09.08.2011, ECLI:NL:RBSGR:2011:BR4406, <www.rechtspraak.nl>, § 3.3.

54 Pres. Rb. Den Haag 09.08.2011, ECLI:NL:RBSGR:2011:BR4406, <www.rechtspraak.nl>, § 3.5.

the applicable regulations. Had the federation reacted, perhaps the case would not have been brought before the court.⁵⁵ This illustrates that with regard to the enforcement of rules of self-regulation, non-compliance does not always evoke a reaction.

6.2.5 Summarising remarks

Private regulations form an important tool in determining the applicable standard of care in concrete cases. The general stance of European courts as outlined above is perhaps best articulated in the Swiss *Berner Kommentar*.

“Dieser bonus pater familias hat sich in seinem täglichen Leben je nach den Umständen an verschiedene Regeln zu halten: Zuerst einmal an die gesetzlichen Vorschriften, bei deren Fehlen an allgemein anerkannte privatrechtliche Richtlinien, und bei deren Fehlen an die allgemeinen Vorsichtsregeln.”⁵⁶

From an interaction perspective, the apparent influence of private regulations on civil liability is perhaps not unexpected, but pertinent nonetheless. In all jurisdictions, judges have shown their preparedness to apply privately made rules, either to assist in establishing the standard of care or even directly, in which case a breach of a privately made rule establishes a civil fault. In short, compliance with private regulations is not optional.

According to Nolte, the extent and scope of the influence of private rules on state law standards will largely depend on whether and to what extent the self-regulating powers of the sports organisation in question are assessed by the state as viable and persuasive.⁵⁷ Following this train of thought, it can be argued that courts even have the obligation to take relevant football regulations into account.⁵⁸ They are the result of careful work by experts taking

55 In another case BAN demanded in court that the KNVB be ordered to take measures if chanting occurs during any matches of which it is the official organiser (such as Cup finals) subject to a penalty. However, the judge in preliminary relief proceedings considered that the case provided too limited a framework to foresee the first instance judgment regarding the question of whether (and to what extent) the chants are anti-Semitic and offensive and if so what actual measures should be adopted and enforced to end such chants. See Rb Midden Nederland 25.07.2014, KG ZA 14-357, via: rechtspraak.nl, ECLI:NL:RBMNE:2014:3170.

56 Roland Brehm, *Berner Kommentar, Bd. VI/1/3/1, Die Entstehung durch unerlaubte Handlungen*, Bern: Stämpfli Verlag AG 2013, art. 41 CO, no. 172b.

57 Martin Nolte, ‘Vereinbartes Recht am Beispiel der lex sportiva’, in: Christian Bumke and Anne Röthel (eds.), *Privates Recht*, Tübingen: Mohr Siebeck 2012, pp. 107-118, p. 117.

58 Also reflected in, *Baker v Quantum Clothing Group Ltd*, [2011] 1 W.L.R. 1003 cited above; as well as in J.B.M. Vranken, *Mr. C. Asser’s handleiding tot de beoefening van het Nederlands burgerlijk recht. Algemeen deel****, Kluwer 2005, § 83-84.

into account years of experience and the legitimacy and binding nature of the regulations are firmly safeguarded through their basis in association law.

This form of application of private regulations is an interesting development in light of the scope of the standard of care imposed on football clubs. It is quite likely that a breach of the regulations of football organisations – such as the obligation to prevent supporters from lighting fireworks or throwing missiles, which can be inferred from art. 16 (2) of the UEFA Disciplinary Regulations – will lead European courts to establish a breach of the standard of care. In line with developments in the Netherlands, it is not unimaginable that the standards expressed in the regulations will find direct application in Dutch courts.

6.3 APPLYING THE DISCIPLINARY STRICT LIABILITY RULE IN CIVIL LAW

We have already seen that disciplinary rules in many sectors can have an influence on the scope of the required standard of care and that this influence seems to be increasing – at least in certain jurisdictions.⁵⁹ However, in order to determine whether the disciplinary strict liability rule can also be applied in civil law as a separate basis for liability, it is important to analyse the rule in more detail.

6.3.1 The disciplinary strict liability rule deconstructed from a civil-law perspective

The disciplinary strict liability rule in the regulations of football federations is a peculiar rule. It constitutes both an implicit behavioural standard as well as an attribution component.⁶⁰ Across Europe the national football federations have created different versions of the rule.⁶¹ Arguably, the most important version remains the UEFA rule.

“1. Host associations and clubs are responsible for order and security both inside and around the stadium before, during and after matches. They are liable for incidents of any kind and may be subject to disciplinary measures and directives unless they can prove that they have not been negligent in any way in the organisation of the match.

⁵⁹ See Section 6.2 above.

⁶⁰ This attribution component sometimes differs for the organising and visiting club. As outlined in Chapter 4.1. UEFA and the Swiss Football federation distinguish between the organising and visiting club. However, this difference is discarded in many situations, including when spectators create damage.

⁶¹ For the exact formulations of the rule in the regulations of the different national and international football federations, see Chapter 4.1.

2. However, all associations and clubs are liable for the following inappropriate behaviour on the part of their supporters and may be subject to disciplinary measures and directives even if they can prove the absence of any negligence in relation to the organisation of the match:
 - a) the invasion or attempted invasion of the field of play;
 - b) the throwing of objects;
 - c) the lighting of fireworks or any other objects;
 - d) the use of laser pointers or similar electronic devices;
 - e) the use of gestures, words, objects or any other means to transmit any message that is not fit for a sports event, particularly messages that are of a political, ideological, religious, offensive or provocative nature;
 - f) acts of damage;
 - g) the disruption of national or competition anthems;
 - h) any other lack of order or discipline observed inside or around the stadium.”

In the complex wording of the rule, which distinguishes between general and specific forbidden acts in the two subsections, the dual nature can easily be overlooked. Looking solely at subsection 2, which accounts for a large part of the disturbances, the dual nature becomes more apparent.

On the one hand, the normative component of the rule focuses on a club's responsibility for the behaviour of third parties through the form of an imposed guarantee for order and security – which is premised in subsection 1. If one or more of the specific disorders laid down in subsection 2 arise, a breach of this guarantee is established. The disciplinary fault of the club thus seems based on the fact it did not prevent such disorders. Whether the disorders were practically preventable is, however, irrelevant.⁶²

On the other hand, it can be questioned whether the rule was really meant to constitute such a guarantee. In fact, more than a basis for liability for the club's own conduct, the rule is an attribution norm (*Zurechnungsnorm*) for faulty behaviour of its supporters or anyone who falls in the club's scope of risk.⁶³ From the landmark disciplinary case *Feyenoord/UEFA*, it can be derived that it is the latter interpretation that is to be preferred.⁶⁴ This interpretation was initially put forward by UEFA in the arbitration proceedings and was then applied by the CAS. When analysing the potential application of the rule in civil law, this interpretation will thus have to be kept in mind.

62 CAS 2007/A/1217 Feyenoord Rotterdam/UEFA.

63 Bastian Haslinger, *Zuschauerausschreitungen und Verbandssanktionen im Fußball* (diss. Zurich), Baden-Baden: Nomos 2011, p. 211.

64 CAS 2007/A/1217 Feyenoord Rotterdam/UEFA, cons. 7.1. See further Chapter 4.3.1.

6.3.2 The shared goal connecting disciplinary liability and civil liability

Although victims of supporters' misconduct can resort to basing a claim on contract or fault, both theory and practice show that this might not always suffice to adequately protect them – the necessary imposition of an almost absolute standard of care being the main stumbling block.⁶⁵ Despite its different primary angle, the disciplinary strict liability rule is the only existing legal tool that addresses the issue of liability of clubs for their supporters' misconduct.

Not many have addressed the connection between disciplinary liability and civil liability in an extensive manner.⁶⁶ The most pertinent contribution is from French scholar Jacques. According to this author, although they seem similar and bear a resemblance to each other, disciplinary liability is different from civil liability. Not only are the interests served by both distinct, each also has a different extent – with disciplinary liability often requiring compliance with stricter rules – and different addressees.⁶⁷ Taking a look at the interests served by both forms of liability, it can indeed be posited that in general the main goal of civil liability is to restore or compensate for damage suffered, whereas the main goals of disciplinary rules are internal reparation and prevention.⁶⁸ However, there is more to this than Jacques suggests.

In general, the goal of civil liability is to protect the *status quo ante* between private persons.⁶⁹ This protection comes about both through reparation (literally or by means of compensation) and prevention of deterioration of the status quo in specific cases.⁷⁰ The origin of protection of the status quo lies in the balance between the principles of *casum sentit dominus* and *alterum non laedere*. In other words, in principle losses lie where they fall, leaving the victim to bear its own loss, unless there is a specific reason to shift this loss.⁷¹ How-

65 See the relevant case law in Chapter 5.3.3.

66 The connection is rather mentioned in more general contributions on disciplinary law (for example J.S.L.A.W.B. Roes, 'Wat is tuchtrecht?', *WPNR* 2008/6778, pp. 919-92) or touched upon in contributions where the focus lies on private regulations in civil law (J.B.M. Vranken, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. Algemeen deel****, Kluwer 2005, § 85).

67 Ph. Jacques, 'Les rapports entre faute civile et faute disciplinaire', in: Pascal Ancel and Joël Moret-Bailly (eds.), *Vers un droit commun disciplinaire?*, Publications de l'Université de Saint-Étienne 2007, pp. 175-205, p. 181, 189ff.

68 See Chapter 2.7.

69 T. Hartlief, *Ieder draagt zijn eigen schade* (oratie Leiden), Deventer: Kluwer 1997, p. 15; S.D. Lindenbergh, *Schadevergoeding, Algemeen, Deel 1*, Mon. BW B34, Deventer 2008, pp. 7-9.

70 S.D. Lindenbergh, *Smartengeld* (diss. Leiden), Deventer: Kluwer 1998, p. 30.

71 T. Hartlief, *Ieder draagt zijn eigen schade* (oratie Leiden), Deventer: Kluwer 1997, p. 11.

ever, the reasons for shifting losses are continuously subject to change due to social and political movements.⁷²

Serving different functions, which have also changed over time, the ultimate goal of civil liability is not uncontroversial. Historically, civil liability law also had a retributive function to deter and reform, which is still visible in common law in the form of punitive damages.⁷³ Although the function of punishment is now largely left to criminal law, additional goals of civil liability include prevention, loss-spreading, loss allocation, and the recognition of the fact that one has suffered damage.⁷⁴

Of these additional goals, prevention is arguably the most important and widely accepted. It is the only other goal apart from compensation to feature in the Principles of European Tort Law. According to article 10:101 PETL, which governs the nature and purpose of damages:

Damages are a money payment to compensate the victim, that is to say, to restore him, so far as money can, to the position he would have been in if the wrong complained of had not been committed. Damages also serve the aim of preventing harm.

In the commentary on this provision it is explained that the aim of preventing harm means that by the prospect of the imposition of damages a potential tortfeasor is forced, or at least encouraged to avoid doing harm to others.⁷⁵

With regard to disciplinary rules, their primary goal is, indeed, to safeguard the interests or common objective of the group.⁷⁶ However, the strict liability rule for supporters' misconduct is different in this regard. It has been developed as an alternative solution to the problem that the federations cannot directly address the supporters themselves as they are not 'part of the group'. Therefore, sanctioning through the club is the only way to reach the supporters with the goal of prevention of future unsportsmanlike conduct of the supporters. Despite the fact that the focus of the disciplinary strict liability rule

72 R.C. Meurkens, *Punitive Damages. The Civil Remedy in American Law, Lessons and Caveats for Continental Europe* (diss. Maastricht), Deventer: Kluwer 2014, p. 148. T. Hartlief, *Ieder draagt zijn eigen schade* (oratie Leiden), Deventer: Kluwer 1997, p. 24. Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 609-1.

73 R.C. Meurkens, *Punitive Damages. The Civil Remedy in American Law, Lessons and Caveats for Continental Europe* (diss. Maastricht), Deventer: Kluwer 2014, p. 152.

74 For an overview on the functions of tort law, see R.C. Meurkens, *Punitive Damages. The Civil Remedy in American Law, Lessons and Caveats for Continental Europe* (diss. Maastricht), Deventer: Kluwer 2014, par. 6.2. However, it is also argued that compensation can still be seen and felt as punishment even if this is technically not a 'function'. See W.H. van Boom, 'Beter schadevergoedingsrecht begint bij een beter onderscheid', *NTBR* 2011/22.

75 PETL Text and Commentary 2005, Art. 10:101, comment 2, no. 3.

76 Dieter Reuter, *Münchener Kommentar zum BGB. Band 1 Allgemeiner Teil 6. Auflage*, Munich: Verlag C.H. Beck 2012, § 25, Rn. 18.

lies more on an external party (the supporter), the issue of compensation of damage incurred by 'other' third parties is generally not addressed in the regulations.⁷⁷

This is in line with the nature of disciplinary law. The fact that, in general, many of the rules and eventual sanctions have no regard for the eventual victims of the undesirable behaviour further illustrates the internal focus of disciplinary rules and reinforces the main goal of internal reparation and prevention.⁷⁸ According to Jacques, this even holds for sanctions in the medical and legal professions as these are imposed in the interest of all the members of said profession.⁷⁹ However, in this light one has to raise the question whether disciplinary rules – including those of the professions – have not also been developed to protect third parties such as clients and patients?⁸⁰ Disciplinary rules exist to safeguard the quality of services and trust in the professions. However, when third parties suffer damage as a result of bad quality service or negligent behaviour without there being consequences, this unequivocally impacts the trust in the profession, thus harming the interest of said group.

The same observation is relevant in regard to football federations, where non-compliance with the applicable regulations can easily lead to damage. In fact, the reason that federations impose the obligation to prevent missiles from being thrown, fireworks being set off, etc. is because these pose risks for people. Although not introduced as such, the surge in regulations regarding stadium safety following the Heysel and Hillsborough disasters further illustrates the focus on preventing harm.⁸¹ In addition, some rules even expressly refer to this goal. For example, the regulations of the FFF state that access to the stadium should be denied to any person in possession of pyro-

77 Only the regulations of the Dutch federation (KNVB) include a provision on damage, which according to the federation is applied in practice.

78 Ph. Jacques, 'Les rapports entre faute civile et faute disciplinaire', in: Pascal Ancel and Joël Moret-Bailly (eds.), *Vers un droit commun disciplinaire?*, Publications de l'Université de Saint-Etienne 2007, pp. 175-205, p. 192. See also Chapter 2.7.

79 Ph. Jacques, 'Les rapports entre faute civile et faute disciplinaire', in: Pascal Ancel and Joël Moret-Bailly (eds.), *Vers un droit commun disciplinaire?*, Publications de l'Université de Saint-Etienne 2007, pp. 175-205, p. 185-186.

80 Dutch author Roes does not agree with this outset, but acknowledges that this subsidiary goal has been developed over time and is now firmly present. J.S.L.A.W.B. Roes, 'Wat is tuchtrecht?', *WPNR* 2008/6778, pp. 919-927.

81 During the Heysel disaster on 29 May 1985, 39 people were killed and 600 injured when escaping fans were pressed against a collapsing wall in the Heysel Stadium in Brussels, Belgium, before the start of the 1985 European Cup Final between Juventus and Liverpool. The Hillsborough disaster took place on 15 April 1989 at a match between Liverpool and Nottingham Forest at Hillsborough Stadium, Sheffield, England. The lack of police control and overcrowding resulted in the deaths of 96 people and injuries to 766 others.

technic articles such as firecrackers, rockets or flares, as these can be generators of serious accidents.⁸²

In summary, an important secondary goal of disciplinary rules is to protect certain rights of parties that are not part of the group – or in other words; to prevent them from suffering harm. It became apparent above that this goal is also arguably one of the most important secondary goals of civil liability rules. Although disciplinary regulations thus pursue a different primary goal, it is difficult to argue that disciplinary liability and civil liability are unconnected.

6.3.3 The legitimacy of interaction between disciplinary law and civil law

Disciplinary sanctions following supporters' misconduct are imposed after virtually every round of European club football.⁸³ However, reparation of damage resulting from this misconduct is not addressed and victims have to pursue their claim separately before the civil courts. What influence do disciplinary regulations have on a civil procedure?

As outlined in Section 6.2 above, in their assessments the courts do take into consideration disciplinary regulations available. However, the fact that a disciplinary sanction is imposed does not systematically lead to civil liability.⁸⁴ In the majority of jurisdictions, disciplinary rules are not statutory rules and a breach therefore does not independently give rise to a civil fault.⁸⁵ Although disciplinary rules do form part of the legal order, the influence of proven disciplinary liability is currently limited to being a helpful tool for a court to motivate its decision.

82 Art. 129 (2) FFF, "L'accès au stade de toute personne en possession d'objets susceptibles de servir de projectiles doit être interdit, comme est formellement proscrite l'utilisation d'articles pyrotechniques tels que pétards, fusées, ou feux de Bengale, dont l'allumage, la projection ou l'éclatement peuvent être générateurs d'accidents graves."

83 See UEFA's disciplinary news index at <www.uefa.org/disciplinary>.

84 Vranken, however, has always wondered why the breach of a disciplinary rule does not lead to civil liability. J.B.M. Vranken, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. Algemeen deel****, Kluwer 2005, § 85.

85 See *a contrario* for example § 823 (II) BGB which implies that someone acts unlawfully and is liable for damage if he violates a statutory rule that aims to protect the claimant against the damage he has suffered. The *Cour de Cassation's* general standpoint is that violation of a disciplinary rule does not by itself justify the awarding of damages (see for example Cass. Civ. 1 04.05.1982, *Recueil Dalloz* 1983, somm. p. 378. Obs. Penneau). It should be noted that in France, the strict liability rule of the French Football Federation is an administrative rule. Breach of this rule could thus potentially give rise to liability based on the breach of a statutory duty (Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 904 and references cited.). However, there has not been a case to establish this precedent.

Reasons cited for not letting disciplinary regulations influence civil liability are for the most part grounded in the supposedly different goals.⁸⁶ However, as this argument has been diffused, perhaps the question should be rephrased. Considering the strong similarities of the functions and goals of both disciplinary regulations and civil liability, is it legitimate to hold on to barriers between these fields of law? In other words, are there valid reasons for disregarding disciplinary regulations based on rules that have been developed by private institutions such as football federations?

There are actually mainly arguments supporting the negative. First, the rules are valid from a disciplinary law perspective. They have been tested and applied in courts around Europe and in arbitration following responses to supporters' misconduct.⁸⁷ In these assessments, disciplinary rules are also influenced by concepts and rules of civil law⁸⁸ Furthermore, there does not seem to be opposition with regard to the influence of many other forms of private regulations. On the contrary, it is widely acknowledged that such rules influence civil law.⁸⁹ Civil liability law is susceptible to the context in which it operates.⁹⁰ With regard to supporters' misconduct, this context entails the accepted disciplinary liability of football clubs. There is no reason why the disciplinary rules of football federations should be looked at differently.

Finally, it is difficult to defend that lawmakers and judges should not be influenced by those who have taken the initiative to reflect upon law and created solutions for complex issues. Critical reflection is a necessary step in the process of good lawmaking. Holding on to barriers that were created in a time when supporters' misconduct was not an issue only leads to forced arguments against new solutions.

86 Ph. Jacques, 'Les rapports entre faute civile et faute disciplinaire', in: Pascal Ancel and Joël Moret-Bailly (eds.), *Vers un droit commun disciplinaire?*, Publications de l'Université de Saint-Étienne 2007, pp. 175-205, p. 198; J.S.L.A.W.B. Roes, 'Wat is tuchtrecht?', *WPNR* 2008/6778, pp. 919-927, § 2.3.

87 See Chapter 4.

88 Or administrative law, in the case of France.

89 Walter van Gerven and Steven Lierman, *Algemeen deel – 40 jaar later – Privaat- en publiekrecht in een meergelaagd kader van regelgeving, rechtsvorming en regeltoepassing*, Mechelen: Kluwer 2010, p. 148, no. 56. See further Section 6.2 above.

90 Or in the words of famous Dutch scholar Paul Scholten "It is in the facts themselves that law is to be found" ("*het recht ligt in de feiten*"). Paul Scholten, *Mr. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht. Algemeen deel**, Zwolle: W.E.J. Tjeenk Willink 1974, p. 9. Translation via digital Paul Scholten project: <<http://www.paulscholten.eu/research/article/english>>.

6.4 TOWARDS CIVIL-LAW STRICT LIABILITY FOR SUPPORTERS' MISCONDUCT

In order to determine whether the civil-law strict liability for supporters' misconduct fits in with the existing legal framework, this section will analyse the different forms of strict liability existing in civil law and their potential application to the issue of supporters' misconduct.

A brief look into the concept and development of strict liability in civil law will provide the necessary background for this analysis. Hereafter, the rule will be tested against the requirements of existing forms of strict liability in the different jurisdictions. The existing forms chosen are liability for the acts of others and liability for risk. Another main field or category that features rules of strict liability is liability for defective objects.⁹¹ The rationale behind this type of strict liability is that the supervisor of an object – whether a thing or grounds or premises – has the possibility to influence the state and security of the object. It could be argued with regard to liability of football clubs, that the stadium is such an object. However, considering the focus of the disciplinary rule as a rule of attribution of the behaviour of third parties, this category has been excluded.

6.4.1 Concept and development of strict liability

Strict liability is no straightforward concept and multiple ways are used to refer to it. In doctrine, strict liability is described as liability without fault (*responsabilité sans faute*), objective liability (*responsabilité objective, kwalitatieve aansprakelijkheid*), or risk liability (*Gefährdungshaftung*); the latter two meaning that liability is to be established independently from the defendant's conduct.⁹² It should, nevertheless, be noted that the majority of these 'strict liabilities' are based on the presumed fault of failing to supervise, which can be rebuttable. To escape liability, the defendant will have to disprove the presumed fault.⁹³

Fault is considered the cornerstone of tort liability and since the creation of the French Civil Code in 1804 fault has been a necessary requisite for liability in European civil-law systems.⁹⁴ However, since the end of the 19th century, increasing technical and industrial risks called for an extension of

91 See Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013 & Christian von Bar, *The Common European Law of Torts (Volume 1)*, Oxford: Clarendon Press 1998.

92 Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, p. 297. See further on strict liability from a comparative perspective: Christian von Bar, *The Common European Law of Torts (Volume 1)*, Oxford: Clarendon Press 1998, no. 97ff.

93 In Dutch law, the possibility of rebuttal is provided in the so-called '*tenzij clausules*' in the respective provisions.

94 See the country reports on fault in Pierre Widmer (ed.), *Unification of Tort Law: Fault*, The Hague: Kluwer Law International 2005.

the requirement of fault in light of the particularity of these dangers to arise without anybody's fault.⁹⁵ The most illustrating example of liability for a certain risk is probably the liability for car accidents. As briefly touched upon in the previous chapter, most European legal systems feature special provisions in which the owner of a car is held liable for the damage resulting from car accidents.⁹⁶ In England, damage caused by motor vehicles is dealt with under the traditional negligence liability. However, the standard of care is so high that it virtually has become strict liability.⁹⁷ Needless to say the car has not been the only invention whose use comes with an inherent great risk of damage. The creation of risk has since become a widespread justification to impose liability. The recognition of liability for dangerous activities is based on the idea that whoever benefits from such an activity should also bear the related losses.⁹⁸

In addition to increasing technical and industrial risks, advancements in the field of business led to the development of employer's liability. This liability is based on the idea that the employer should bear the losses that are related to the business as he is in a better position to control the risks than the employee.⁹⁹ Another argument is that it is easier for the victim to identify the employer as the tortfeasor and the risk of insolvency is also much lower when it is the employer that is held accountable.

In light of these developments, Van Dam explains the shift towards stricter liabilities as predominantly driven by policy reasons. "Tort law is about balancing the interests of individuals, private and public bodies. It distributes rights, duties and money."¹⁰⁰ As a result, a sense of justice and practical policy reasons influence the outcome of cases. The influence of policy is not limited to tort law. On the contrary, in sports disciplinary law, policy reasons have had a strong influence on decisions. An example can be found in the *PSV Eindhoven* case, where the CAS considered that if clubs were able to extricate themselves from any responsibility by claiming that they had taken all

95 Franz Werro and Vernon Valentine Palmer (eds.), *The Boundaries of Strict Liability in European Tort Law*, Durham, North Carolina: Carolina Academic Press/Bern: Stämpfli Publishers Ltd./Brussels: Bruylant 2004, p. 3; Bénédict Winiger, 'Strict Liability: What About Fault?', in: Helmut Koziol and Barbara C. Steiniger (eds.), *European Tort Law 2001*, Vienna: Springer Verlag 2002, p. 2; Konrad Zweigert and Hein Kötz, *An introduction to Comparative Law*, Oxford: Clarendon Press 1998 (translated from German by Tony Weir), p. 647.

96 See Chapter 5.3.2. France: *Loi n° 85-677 du 5 juillet 1985, tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation*; Germany: 1909 *Strassenverkehrsgesetz*; Netherlands: *Wegenverkeerswet (WVW)*; Switzerland: *Strassenverkehrsgesetz (SVG)/Loi fédérale sur la circulation routière (LCR)*.

97 *Nettleship v Weston* [1971] 2 QB 691, *Roberts v Ramsbottom* [1980] 1 WLR 823.

98 PETL Text and Commentary 2005, Introduction to Chapter 5.

99 Franz Werro and Vernon Valentine Palmer (eds.), *The Boundaries of Strict Liability in European Tort Law*, Durham, North Carolina: Carolina Academic Press/Bern: Stämpfli Publishers Ltd./Brussels: Bruylant 2004, pp. 393-394.

100 Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 609.

measures they could reasonably be expected to take to prevent any breach, and if supporters still manage to commit such an act, there would be no way of penalising that behaviour, even though it constituted a fault in itself.¹⁰¹ According to the CAS and UEFA, penalising the clubs for their supporters' misconduct through an 'indirect' sanction is the only way in which the football federation has a chance of achieving its objectives.

Before turning to an analysis of the applicability of a civil-law strict liability rule in cases of supporters' misconduct, some general points should be made in regard to the different jurisdictions.

French law features a conceptual approach to strict liability, which consists of two general 'judge-made' rules of strict liability for persons and for things based on the first sentence of art. 1384 CC.¹⁰² These rules are complemented by a number of specific rules of strict liability for animals, products, buildings, minors, employees, and – as mentioned above – motor vehicles. In contrast, a general rule of strict liability is absent from the other jurisdictions.

In Germany, specific rules of strict liability are only accepted for damage to body, health or property and are almost all the result of special acts.¹⁰³ Similarly, the Dutch Civil Code features a limitative number of 'objective liabilities' for specific persons and objects.¹⁰⁴ These liabilities do not require a personal fault or act of unlawfulness, but are based on one's relationship with the person or object. It must be noted that the provisions allow for exoneration if the defendant can prove that due care was exercised.¹⁰⁵

Swiss law is very similar in this respect; a number of objective liabilities (*Kausalhaftung*) with the possibility of exoneration are provided in the Code of Obligations, including liability for employees, animals and buildings.¹⁰⁶ In addition, more specific 'objective liabilities' that are based on the realisation

101 TAS 2002/A/423 PSV Eindhoven/UEFA, no. 15-16.

102 On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde.

103 Judges are not allowed to introduce strict liabilities for comparable risks, see: BGH 7.11.1974 – III ZR 107/72, BGHZ 63, 234.

104 Art. 6:169 – 6:179 BW. In addition to these, strict liability for motor vehicles is laid down in a special Act.

105 For example, art. 6:173 BW provides: 'A possessor of a movable thing which is known to constitute a special danger for persons or things if it does not meet the standards which, in the given circumstances, may be set for such thing, is liable if this danger materializes, unless, pursuant to the preceding Section (on fault liability) there would have been no liability if the possessor would have known of the danger at the time it arose.' (Translation: Hans Warendorf *et al.*, *The Civil Code of the Netherlands*, Alphen aan den Rijn: Kluwer Law International 2013.)

106 Art. 55-59a CO.

of a specific risk are laid down in special Acts, such as those on traffic transport, electric and nuclear installations, defective products etc.¹⁰⁷

Finally, in English law strict liability is a rarity. At present, there is only strict liability for defective products (based on the EU Directive), for animals and employees.¹⁰⁸ All other situations are governed by the tort of negligence.

6.4.2 Liability for the acts of others

The main goal of rules of strict liability for the acts of others is to protect third parties against the insolvency of the actual tortfeasor. In addition, it also directs the cost of the activity to the person who benefits from it.¹⁰⁹ The analogy between the disciplinary rule creating liability of clubs and civil liability for the acts of others has already been briefly touched upon in Chapter 4.¹¹⁰ According to Haslinger, both rules are grounded in the same goal: taking responsibility for the faulty acts of people in one's business or danger circle independent of one's own culpability.¹¹¹

In general, liability for the acts of another person is said to be based on one of two different notions.¹¹² First, one can be held responsible for having failed to supervise the person who committed the faulty act. In other words, failing to supervise a person with whom one has a special relationship qualifies as a personal lack of care. The notion of liability for a personal lack of care is predominant in the fields of liability of parents, teachers and other guardians. Secondly, in certain situations another person's conduct can be imputed to one as if it were his own. This is also called vicarious liability. The most important type of vicarious liability is employer's liability. In other words, this 'other' person has committed a fault for which they can themselves be held liable. Often, from the victim's point of view this still entails having to prove a fault liability, while for the defendant, this liability is strict. In other

107 Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, Intro. art. 41-61, no. 3. For an overview see: Alfred Keller *et al.*, *Dispositions de responsabilité civile (13^e édition)*, Bern: Stämpfli 2011.

108 The development of a more general strict liability rule, first applied in *Rylands v Fletcher* [1868] L.R. 3 H.L. 330, was brought to a halt in *Read v Lyons & Co. Ltd* [1947] AC 156. See further Anthony M. Dugdale and Michael A. Jones, *Clerk & Lindsell on Torts (19th edition)*, London: Sweet & Maxwell Ltd 2006, chapter 21.

109 Cees van Dam, *European Tort Law (2nd edition)*, Oxford University Press 2013, no. 1601-1.

110 See Chapter 4.4.3.

111 Bastian Haslinger, *Zuschauerausschreitungen und Verbandssanktionen im Fußball* (diss. Zurich), Baden-Baden: Nomos 2011, p. 176ff.

112 See similarly, Franz Werro and Vernon Valentine Palmer (eds.), *The Boundaries of Strict Liability in European Tort Law*, Durham, North Carolina: Carolina Academic Press/Bern: Stämpfli Publishers Ltd./Brussels: Bruylant 2004, p. 393ff. and Cees van Dam, *European Tort Law (2nd edition)*, Oxford University Press 2013, no. 1601ff.

words, once the fault of the ‘other’ person has been established, the employer cannot escape liability.

In the attempt to hold a club liable for the damage caused by supporters’ misconduct by basing a claim on either of the abovementioned forms of liability for others the following should be considered.

Liability for the conduct of children and mentally ill persons is based on the duty of supervision. The comparison of this liability to the potential liability of clubs for damage caused by supporters’ misconduct exposes a number of flaws. It cannot be reasonably argued that the club ought to supervise its supporters in the same way parents supervise their children. Most football supporters are of age and have civil capacity. Basing liability of the club on a personal fault on its behalf for failing to supervise the supporters would be systematically unjust.

In comparison, basing a claim on vicarious liability could be more promising. As outlined above, employer’s liability is based on the idea that it is the employer who should pay for the damages caused by activities that are for the benefit of his business. Provisions of liability for other auxiliary agents in Dutch and German law are based on the same idea, whereas in Swiss law, liability for other auxiliaries is covered by the provision on employer’s liability.¹¹³ The term ‘*auxiliaire/Hilfperson*’ in this latter provision is very broad and covers all those who are in a factual subordinate relationship with an employer.¹¹⁴

In France, the general rule of strict liability for others allows the courts to create new liabilities for the acts of persons in one’s care, which can only be escaped by *force majeure*.¹¹⁵ One of the most significant examples of the elaboration of the list of persons are the so-called ‘rugby cases’. In both cases, a rugby player was injured by a player from the other team during an amateur match. According to the *Cour the Cassation*, amateur sports clubs are liable for the faults committed by players during the game, which is justified by the fact that sports clubs have the power to organise, direct and control the activities of their members during the game.¹¹⁶ However, in the case where a rugby referee was attacked by a spectator, the court held that the club did

113 Germany: § 831 BGB; Detlev W. Belling, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse (Unerlaubte Handlungen 3)*, Sellier-De Gruyter 2012, § 831, no. 5; Netherlands: art. 6:171 BW; A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser’s handleiding tot de beoefening van het Nederlands burgerlijk recht 6-IV**, *De verbintenis uit de wet*, Kluwer 2011, no. 194, 199. Switzerland: Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 55 CO, no. 7.

114 Heinrich Honsell *et al.* (eds.), *Basler Kommentar, Obligationenrecht I (5th ed.)*, Helbing Lichtenhahn Verlag 2011, art. 55. no. 7-8. However, Swiss case law excludes liability of self-employed agents such as architects, lawyers and taxi drivers towards their clients.

115 Cass. Assemblée plénière 29.03.1991 (Blieck), *Recueil Dalloz* 1991, 324, note Ch. Larroumet.

116 Cass. Civ.2 22.05.1995 (UAP rt a. c/Rendeygues *et al.*); Cass. Civ.2 22.05.1995 (USPEG c/ Fédération française de rugby *et al.*), *JCP* 1995-II, 22550, note Jean Mouly.

not exercise control over the supporters in the same way as over its members.¹¹⁷ For this reason, Simon *et al.* state that evidently clubs cannot be held liable based on '*fait d'autrui*' for damage caused by supporters.¹¹⁸ Similar to this last view, in England liability for the acts of others cannot be established without an employment or agency situation.¹¹⁹

Despite their differences, all jurisdictions require the same two key elements: there must have been a subordinate relationship in which the principal exercised control and the act must have been committed in the course of the work or assistance.¹²⁰ Applying these criteria to the case of supporters' misconduct, it should be noted that allowing supporters to attend the match benefits the football club – both the organising and visiting club – which receives income from television rights and tickets. In addition, research also indicates that the presence of supporters is beneficial to a team during a match, especially to the home team.¹²¹ The colloquial name 'the 12th man' thus seems to be well-founded. Nonetheless, to qualify supporting a team in the stadium as 'work' or 'assistance', which is necessary to fulfil the requirements of the relevant provisions, seems to stretch things too far.

The second requirement – the existence of a subordinate relationship – is also not straightforwardly satisfied in the case of supporters' misconduct. Football supporters have no relation of dependence on the football club in the same sense employees or other auxiliary persons have on their employer or 'supervisor'. They are not obliged to observe instructions from the club based on a subordinate relationship. In general, it is the subordination criterion

117 CA Agen 09.02.1999, n°96001345 (Assoc. le club de rugby Le Vernet c/Bringuier *et al.*) see also Chapter 5.3.3.1.

118 G. Simon *et al.*, *Droit du sport*, Paris: Presses Universitaires de France 2012, p. 484. Unfortunately, this statement is not elaborated any further.

119 W.V. Horton Rogers, 'Liability for Damage Caused by Others under English Law' in: J. Spier (ed.), *Unification of Tort Law: Liability for damage caused by others*, The Hague: Kluwer Law International 2003, pp. 63-84, no. 14.

120 England: Anthony M. Dugdale and Michael A. Jones, *Clerk & Lindsell on Torts (19th edition)*, London: Sweet & Maxwell Ltd 2006, no. 6-04ff. France: Geneviève Viney and Patrice Jourdain, *Traité de droit civil. Les conditions de la responsabilité (4e édition)*, Paris: LGDJ 2013, no. 791-792. Germany: Detlev W. Belling, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse (Unerlaubte Handlungen 3)*, Sellier-De Gruyter 2012, § 831, no. 99, 123. Netherlands: A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-IV**, *De verbintenis uit de wet*, Kluwer 2011, no. 183-190. Switzerland: Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 55 CO, no. 6ff. See also art. 6:102 PETL.

121 Stephen R Clarke and John M. Norman, 'Home Ground Advantage of Individual Clubs in English Soccer', *The Statistician* Vol. 44/4, 1995, pp. 509-521. Barry Schwartz and Stephen F. Barsky, 'The Home Advantage', *Social Forces*, vol. 55/3, 1977, pp. 641-661, David Lavalley, John Kremer *et al.*, *Sport Psychology. Contemporary Themes*, New York: Palgrave Macmillan 2004, pp. 187-188.

that is decisive.¹²² If the supporter has obtained a ticket to the match he will be contractually obliged to observe instructions and also often explicitly forbidden to misbehave. Breaching these obligations can result in banning orders from a public authority or even criminal prosecution.¹²³

The question that will have to be answered is thus whether the contractual obligation of football supporters to behave qualifies as a subordinate relationship. In a penal law case in France, a candidate of an election campaign was declared to be the principal of one of his supporters who assaulted an opponent.¹²⁴ With the contractual obligation, the underlying principle of being responsible for someone over whom you have, to a certain extent, *control* and who *assists* you in your business endeavours can be construed with regard to football clubs and their supporters. However, considering the need to stretch two of the key elements of the standing rules of liability for the acts of others, it is a leap that European courts might – and perhaps also should – not be ready to take.

6.4.3 Liability for risk: a general strict liability rule

Strict liability for risk (or in German: *Gefährdungshaftung*) is regarded as the paradigm of strict liability.¹²⁵ The tortfeasor is responsible for having created a source of danger that led to the damage. The reasoning behind this liability is that whoever benefits from a dangerous activity should also bear the related losses.¹²⁶

It is not difficult to argue that football clubs participating in league and other official matches benefit from this activity and thus fall under the *ratio legis* of strict liability for risk. Furthermore, supporters' misconduct can be qualified as a danger in the sense that it is inherent to the activity and of such intensity that even very strict precautionary measures cannot eliminate it.¹²⁷

122 Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, n. 1607-3 and Christian von Bar, *The Common European Law of Torts (Volume 1)*, Oxford: Clarendon Press 1998, no. 191.

123 First implemented in England in 1999, a football banning order can be used to ban a certain individual from attending football matches both at home and abroad for a specific period. In addition, such banning orders can include the banning from using public transport on match days and from visiting other potentially violent places as well as the obligation to report to a police station during matches.

124 Cass. Crim. 20.05.1976, n°75-92036, <www.legifrance.fr>.

125 Franz Werro and Vernon Valentine Palmer (eds.), *The Boundaries of Strict Liability in European Tort Law*, Durham, North Carolina: Carolina Academic Press/Bern: Stämpfli Publishers Ltd./Brussels: Bruylant 2004, p. 400.

126 PETL Text and Commentary 2005, Introduction to Chapter 5.

127 See Section 4.2 above. This is not to say, however, that prevention should be regarded as humanly impossible.

At present, there is no general rule of strict liability for risk in any of the relevant jurisdictions that courts can apply in all types of situations or which could include the case of liability for supporters' misconduct. In England, Germany and Switzerland, there is strong reluctance to expand the reach of the existing rules of strict liability.¹²⁸ In the Netherlands, too, the list of strict liabilities provided by law is exhaustive. However, the general clause for fault liability provides that a person is liable for a tort 'if it is due to a cause for which he is *accountable pursuant to generally accepted principles*.'¹²⁹ This wording has the potential of a general clause for strict liability. However, the provision has not yet been used as such. Only in France have the two rules of strict liability seen constant development by virtue of the courts.

Although most national discussions remain stuck on the argument that strict liability is the prerogative of the legislator, the development of a general rule of liability for risk has been given ample thought in the different transnational projects in Europe.¹³⁰ The Principles of European Tort Law provide a general rule for strict liability for risk. In this light, it is interesting to note that the PETL working group, comprised of senior legal scholars from across Europe, is not at all opposed to expansion of strict liability by way of analogy.¹³¹

Looking at the latter, strict liability for supporters' misconduct falls under the scope of articles 1:101 and 5:101. According to article 1:101 (1):

"A person to whom damage to another is legally attributed is liable to compensate that damage."

Damage may be attributed in particular to the person: a) whose conduct constituting fault has caused it; or b) whose abnormally dangerous activity has caused it; or c) whose auxiliary has caused it within the scope of his functions.¹³²

Is organising a football match such an 'abnormally dangerous activity'? According to article 5:101 (2), an activity is abnormally dangerous if (a) it creates a foreseeable and highly significant risk of damage, even when all due care is exercised in its management and (b) it is not a matter of common usage. Again, the serious risk of supporters' misconduct at football matches is difficult to deny; even when proper precautions are taken. The existing case law – as

128 See Section 4.1. above.

129 Art. 6:162 (3) BW: 'Een onrechtmatige daad kan aan de daderworden toegerekend, indien zij te wijten is aan zijn schuld of aan een oorzaak welke krachtens de wet of de in het verkeer geldende opvattingen voor zijn rekening komt.' A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-IV**, *De verbintenis uit de wet*, Kluwer 2011, no. 121ff.

130 Both in the PETL, but also in the Draft Common Frame of Reference (DCFR).

131 See PETL Text and Commentary 2005, art. 5:102 (2) and comments, no. 3.

132 Art. 1:101 (2) PETL.

well as many more recent events that have not (yet) resulted in case law – make this blatantly obvious.¹³³

The question whether football matches are a matter of common usage is worth some consideration. In the commentary on article 5:101 PETL an activity is qualified as common usage “if it is carried on by a large fraction of the people in the community, the community thereby being those at risk under the circumstances”.¹³⁴ Based on this phrasing, it can be argued that football in a broad sense is a matter of common usage; it is the number one sport practised in Europe and the UEFA Champions League and EURO, and FIFA World Cup are followed by an enormous portion of the population.¹³⁵ However, organising a football match in a professional league is not as common, as is attending such a match.

With regard to causation, art. 3:101. PETL requires *conditio sine qua non*: “An activity or conduct is a cause of the victim’s damage if, in the absence of the activity, the damage would not have occurred.” This requirement is met for if the football match had not been organised, the damaging supporters’ misconduct would not have occurred. However, according to article 3:201 PETL, whether and to what extent damage may be attributed to a person depends on different factors. Such factors include, but are not limited to:

- a) the foreseeability of the damage to a reasonable person at the time of the activity, taking into account in particular the closeness in time or space between the damaging activity and its consequence, or the magnitude of the damage in relation to the normal consequences of such an activity;
- b) the nature and the value of the protected interest (Article 2:102);
- c) the basis of liability (Article 1:101);
- d) the extent of the ordinary risks of life; and
- e) the protective purpose of the rule that has been violated.

Taking into account these factors, it can be reasonably concluded that the damage can be attributed to the club. Most notably, it was foreseeable and in case of personal or property damage, the value of the protected interest is high. Furthermore, it is difficult to argue that suffering damage from supporters’ misconduct while attending a football match is an ordinary risk of life.

Finally, the PETL offers a defence against strict liability if the injury was caused by an unforeseeable and irresistible (a) force of nature (*force majeure*),

133 See Chapter 5.3.3.

134 PETL Text and Commentary 2005, art. 5:101 and comment, no. 8.

135 The 2014 FIFA World Cup showed record-breaking figures overall, with the final reportedly watched by over 900 million people worldwide. <<http://www.iptv-news.com/2014/07/world-cup-final-breaks-records-worldwide-for-tv-broadcasters/>>, accessed: 20 September 2015.

or (b) conduct of a third party. Although such defence might at first glance seem to discard a club's liability for supporters' misconduct, this is not the case. While consisting of conduct of a third party, supporters' misconduct at a football match is decidedly not unforeseeable or irresistible.¹³⁶

Fulfilling each of the criteria, it can thus be argued that organising football clubs can be held liable for damage caused by supporters' misconduct according to the provisions of the PETL. This can be taken as an indication that a rule of strict liability of football clubs for the damage caused by the misconduct of their supporters is justified and would not constitute an exotic animal in the transnational legal framework.

6.4.4 Strict liability and the expected safety standard – two sides of the same coin?

In general, strict liability rules cannot be seen in isolation from the relevant safety requirements and the standard of care. On the contrary, both concepts are intertwined.¹³⁷ In Dutch law, strict liability for defective objects (*kwalitatieve aansprakelijkheid voor gebrekkige zaken*) is defined in terms of *the requirements of safety that can be expected in the circumstances*.¹³⁸ The same holds for the definition in the EU Directive on product liability. The higher the expectations in regard to safety, the more logical strict liability becomes.

Strict liability for supporters' misconduct may be regarded in the same way. In civil law the rationale for such a rule may be found in the expected safety standard as well. Looking back at the rule in UEFA's disciplinary regulations, it can be derived from the wording that the highest level of safety is required and measures need to be taken to prevent incidents of any kind.¹³⁹ With regard to the specific acts covered under article 16 (2) of the UEFA Disciplinary Regulations, which include any acts of damage, apparently there

136 See on *force majeure* Chapter 5.2.2.2.

137 See also Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 1004.

138 J.H. Nieuwenhuis, 'De grenzen van de aansprakelijkheid voor gebrekkige zaken', *WPNR* 1983/5666, pp. 581-590, p. 587. The *Hoge Raad* used a similar wording in the landmark case *Wilnis* about a deficient dike. HR 17.12.2010 ECLI:NL:HR:2010:BN6236, *NJ* 2012, 155 (*Wilnis*) note by T. Hartlief, cons. 4.4.3: "Bij de eisen als bedoeld in art. 6:174 lid 1 gaat het om de eisen die men uit het oogpunt van veiligheid aan de desbetreffende opstal mag stellen. Daarbij spelen, zo volgt uit de wetsgeschiedenis, gedragsnormen als veiligheidsvoorschriften en in het algemeen aan een bezitter of gebruiker van die zaak te stellen zorgvuldigheidsnormen een belangrijke rol. De omstandigheid dat een opstal in algemene zin voldoet aan geldende veiligheidsvoorschriften, staat niet in de weg aan het oordeel dat de opstal (niettemin) niet aan bedoelde eisen voldoet en derhalve gebrekkig is in de zin van art. 6:174 lid 1."

139 Art. 16 (1) UEFA Disciplinary Regulations (2014 Edition).

is no amount of safety measures that justify the occurrence; the expectation from the sector is absolute safety.

The legitimacy of strict liability for supporters' misconduct can thus be sought in the assumption that it is up to the club to prevent its emergence. It can be argued that extreme security measures can be taken to prevent supporters' misconduct. For example, organising clubs could use airport security scanners to prevent dangerous objects from entering the stadium or even employ as many stewards as ticketed supporters so everyone can be supervised. Such measures may be economically or practically difficult for individual clubs to take, they are not humanly impossible. Despite extreme measures, supporters' misconduct can most likely not be completely ruled out. The fact that risks remain despite having taken all *proper* precautionary measures is part of the rationale of the concept of strict liability.¹⁴⁰

The question whether in civil law such an expectation of safety is reasonable, is a policy decision. However, the possibility of being held liable even when the required safety standard is practically unfeasible to attain is a fact of life which is accepted in many fields of law.¹⁴¹

6.5 OPPORTUNITIES AND LIMITATIONS OF A STRICT LIABILITY RULE FOR SUPPORTERS' MISCONDUCT

In the following, it will be analysed whether a civil-law strict liability rule can be an apt solution for those situations where contract or fault liability based on a breach of the standard of care do not apply, or only under exceptional circumstances. These situations are the liability of the visiting team, liability for damage outside the stadium, and liability for racist chanting.

6.5.1 Liability of the visiting club for damage inside the stadium

Visiting clubs generally do not have to worry about being held liable on account of contract or fault liability. This is not because they do not owe a standard of care. On the contrary, in terms of preventing supporters' misconduct, visiting clubs do have certain obligations.¹⁴² However, unless the visiting club remains passive in regard to those aspects where it can exercise a certain control – such as the organisation of transport or ticket sales – it is

140 Compare § 4.1 above. See also PETL Text and Commentary 2005, art. 5:101, comments, no. 4.

141 Including for example product liability and liability for traffic accidents.

142 See Chapter 5.4.1.

unlikely it will breach the standard of care.¹⁴³ Taking the example of Feyenoord, scholars unanimously agree that the club did everything it could to try and avoid problems during the away match in Nancy in 2006.¹⁴⁴ Obviously, these circumstances did not discard Feyenoord's disciplinary liability, but without strict liability in civil law, the club would escape civil liability.

However, there are valid reasons to question whether this does not result in an unreasonable disparity between the liability of the organising club and that of the visiting club. After all, it can be imagined that visiting supporters instigate disturbances with the aim of hurting the organising club. If they succeed in bringing in fireworks, for example, in the current stance of disciplinary and civil law, the organising club risks both sanctioning as well as civil liability whereas the visiting club only risks sanctioning.

Furthermore, visiting clubs are a necessary component of any football match. Without them there would be no 'dangerous activity' in the first place. It goes without saying that visiting clubs also receive significant benefits from partaking in this activity, even though they are not the official organiser.¹⁴⁵ Looking back at the PETL requirements evaluated above, strict liability of the visiting club for damage caused by its own supporters could very well be envisaged and thus serve as a solution to discard this disparity between the organising and the visiting club.

In Chapter 4 it became apparent that the disciplinary liability of clubs for supporters' misconduct appears in two distinct forms. First, the organising club is responsible for maintaining security and its liability is presupposed when supporters' misconduct arises. Secondly, both the organising club and the visiting club are strictly liable for (certain) acts of their own supporters. Taking clues from how the disciplinary liability of football clubs is organised, it is to be advised to take a similar approach in civil law.

This would give rise to the following picture. The organising club is to be held strictly liable for acts of its own supporters as well as on account of contract or tort for damage resulting from inadequate safety measures. However, the visiting club is strictly liable for (certain) acts of its own supporters. If these acts were made possible through inadequate organisation of the match, both clubs could be jointly liable towards the victim.

143 LG Koblenz 21.02.2003 – 411 C 367/03, *SpuRt* 2006, pp. 81-83, p. 82. See further Chapter 5.4.1.

144 See for example: Jan F. Orth, 'Gefährdungshaftung für Anhänger? Kritik an der CAS/TAS-Entscheidung Feyenoord Rotterdam N.V. vs. UEFA', *SpuRt*, 2009/1, pp. 10-13. Frank Bahners, 'Die Rechtmässigkeit von Verbandsstrafen gegenüber Fussballvereinen bei Zuschauerausschreitungen', *Causa Sport*, 2009/1, pp. 26-28; Jan F. Orth, 'Von der Strafe zur Massnahme – ein kurzer Weg!' in *SpuRt* 2013/5, pp. 186-190.

145 Visiting clubs receive TV income from the matches they play, regardless whether this is a home or away match.

6.5.2 Damage outside the stadium grounds

The inadequacy of liability based on a breach of the standard of care is perhaps the most apparent in situations where supporters' misconduct results in damage outside the stadium grounds. Nowadays, it is these situations that make the biggest headlines and create outrage among the general public.¹⁴⁶

Implementation of strict liability of football clubs covering these situations would most likely satisfy this indignation. However, would a strict liability rule for this situation be acceptable in light of the current legal framework?

Taking another look at the PETL criteria gives rise to the following image. To quickly restate; according to the PETL, damage may be attributed in particular to the person whose abnormally dangerous activity has *caused* it.¹⁴⁷ The *conditio sine qua non* is easily met, without the football match the misconduct and thus the damage would not have occurred. However, it can be doubted whether damage that occurred outside the stadium grounds and the abnormally dangerous activity in which both clubs partake – namely the organisation of a high-level football match – are sufficiently connected in order for the damage to be attributed to the activity.¹⁴⁸

To reiterate article 3:201 PETL, whether and to what extent damage may be attributed to a person depends on different factors. Such factors include, but are not limited to:

- a) the foreseeability of the damage to a reasonable person at the time of the activity, taking into account in particular the closeness in time or space between the damaging activity and its consequence, or the magnitude of the damage in relation to the normal consequences of such an activity;
- b) the nature and the value of the protected interest;
- c) the basis of liability;
- d) the extent of the ordinary risks of life; and
- e) the protective purpose of the rule that has been violated.

In terms of the foreseeability factor, both the time and space between a specific football match and the supporters' misconduct are problematic. This is especially true when damage occurs in the city centre, far away from the stadium, the day before the match, or all of the above, as was the case with the Feyenoord riots in Rome in 2015. Furthermore, it can be argued that when supporters' misconduct occurs outside the stadium, the football match is not the only cause. Another cause could be a lack of measures taken by public authorities or even provocation by such authorities.

146 See for example the many articles on the rampage of Feyenoord supporters before a Europa League match in February 2015 in Rome which damaged the 500-year-old Barcaccia fountain. Search words 'Feyenoord Rome fountain' provide over 100 results just in English and Dutch.

147 Art. 1:101(2) b PETL.

148 Compare PETL Text and Commentary 2005, art. 3:101, comment 5.

In conclusion, implementation of a strict liability rule in civil law for damage caused by supporters outside the stadium does not seem feasible in light of the current legal framework. Although it could be a desirable solution for victims, the further the misconduct is removed from the football match, the less reasonable it is that it will be considered part of the activity itself. Compensation for this type of damage should thus primarily be sought via the supporters themselves.

6.5.3 Liability for racist acts

Racist and discriminatory acts, mostly in the form of chanting, are almost impossible to prevent. If serious measures are taken on the basis of the applicable regulations, it is therefore unlikely that football clubs will be held liable on account of a breach of the standard of care.¹⁴⁹

In order to determine whether the strict liability rule in civil law could also be an apt tool to deal with this particular issue, a number of observations should be made.

First, it is worth remembering that the concept of strict liability was primarily developed to deal with the increased risks of damage that emerged in connection with society becoming industrialised and more complex. It is no coincidence that product liability remains the most universally accepted form of strict liability across Europe. In this light, it is difficult to imagine such liability being imposed for the racist or discriminatory acts of third parties.

Furthermore, some legal systems only allow for specific rules of strict liability for damage to body, health or property and are almost all the result of special acts.¹⁵⁰ Although injuries to one's personality rights¹⁵¹ in general can give rise to compensation, in the assessment of such damages all circumstances of the case have to be taken into account, but especially the scope of the protected interest.¹⁵² Whilst difficult to grasp in monetary terms, this protected interest of human dignity that is infringed by racist and discriminatory acts is very important.¹⁵³ However, it is difficult to argue that this great interest alone merits strict liability.

149 See further Chapter 5.4.3.

150 Judges are not allowed to introduce strict liabilities for comparable risks, see: BGH 07.11.1974 – III ZR 107/72, BGHZ 63, 234.

151 The term personality rights includes a range of aspects in regard to protection of the person, including human dignity, privacy, the right to free development of one's personality. See for an overview of this right in the different jurisdictions Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 706ff.

152 PETL Text and Commentary 2005, art. 10:301, comment 7-9.

153 PETL Text and Commentary 2005, art. 10:301, comment 6.

Although strict liability for racist acts does not seem feasible, national and international football federations can at least ensure that the club is held liable under the applicable disciplinary regulations and receives a sanction. This way, reparation of the harmed interest can – at least indirectly – still take place.

6.6 CONCLUDING REMARKS

Football clubs can be held liable for the damage caused by supporters' misconduct on various grounds. It has not been the goal of this chapter to put forward strict liability as a preferred course of action. Rather, the goal was to show that the evolution of strict liabilities allows for an additional – and perhaps more fitting – concept on which to base liability in a world that is becoming more and more complex every day.

It was established that there are many reasons for an attempt to transpose the disciplinary rule to civil law. First, private regulations, such as disciplinary regulations, form an increasingly important tool in determining the applicable standard of care in concrete cases. In all jurisdictions, judges have shown their preparedness to apply privately made rules, either to assist in establishing the standard of care or even directly, in which case a breach of a privately made rule establishes a civil fault. Secondly, disciplinary liability and civil liability are closely connected. An important secondary goal of disciplinary rules is to protect certain rights of parties that are not part of the group – or in other words; to prevent them from suffering harm. It became apparent above that this goal is also arguably one of the most important secondary goals of civil liability rules. In fact, the disciplinary liability rules and civil-law rules are in part related standards.

In examining the various categories of rules of strict liability, it became apparent that strict liability of the organising club for its supporters' misconduct would not constitute a foreign concept or systematic flaw in the majority of jurisdictions. However, whether a legislative effort is needed to introduce such a rule depends on the respective jurisdiction. In France and the Netherlands, there is room for the courts to take the initiative and develop such a rule on the basis of art. 1384 CC and art. 6:162 BW respectively. In England, Germany and Switzerland a statutory rule would, however, need to be enacted. Considering the broad catalogue of strict liabilities already existing in German and Swiss law, the introduction of new forms of strict liability will probably not face strong systematic reservations. However, the debate for a rule of strict liability for supporters' misconduct might only be launched after an unsatisfactory court decision.

In addition, in terms of damage caused by supporters from the visiting team, a strict liability rule similar to the one developed in disciplinary law could provide a useful addition to the system. Implementation of such a rule would discard the unreasonable disparity between organising and visiting

clubs. In addition, it could prevent visiting supporters from instigating disturbances with the aim of hurting the organising club. Strict liability is, however, not the solution to all problems. It proved unfeasible to apply the rule in situations where damage was caused outside the stadium or with regard to racist acts.