

# **Inherent Risk and Organisational Design in European Tort Law**

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## **Abstract**

*This paper is devoted to a complex set of issues relating to the functions of tort law in distinguishing acceptable and unacceptable risks. Often, such risks are brought about by deliberate organisational design choice. Legislature and courts are called upon to assess which of these design choices are acceptable and which are not.*

*By evaluating a number of recent legislative drafts and proposals I present an outline of what seems to be becoming a standard of ‘organisational liability’ for organisational failure. Moreover, I put forward a threefold typology of risks in tort law which seems to go a long way in categorizing tort law cases involving organisational design risks. Finally, I call the reader’s attention to the fact that tort law is in need of rational recalibration with regard to the ‘ranking of risks’, as it seems that some risks are inconsistently categorized as either acceptable or unacceptable..*

## **1. ‘Organisational design’ and European tort law**

Although the causative patterns of accidental deaths and injuries vary, in tort law the classical approach is to think of accidents as either the consequence of unfortunate hazard for which no one can be held responsible or the result of incidental moments of human negligence and momentary lapse of concentration for which tort law attributes responsibility. And indeed, some accidents for which tortious liability offers relief – such as traffic accidents – can usually be traced back to such individual errors.

However, if we look at personal injury litigation exclusively from this angle – injury being the result of chance events with an unfortunate and often unintended adverse outcome for which the law merely ascribes ex post responsibility – we are denied another view of this field. This alternative view on ‘organisational design’ is central to this paper.

Injury may well be the outcome of what I will refer to as ‘organisational design’. The concept of ‘organisational design’ refers to the processes, protocols, and procedures governing businesses, corporations, governments, agencies and other

formal groups. From this angle, accidents may well be the avoidable consequence of flawed organisational design and assigning liability for death and injury thus becomes a judicial appraisal of 'organisational design'. The negligent act of a nurse mistaking a used syringe for a clean one then is not so much the wrongful act of an individual but rather the wrongful omission of the hospital employing the nurse to install and enforce a specific safety procedure averting such mistakes. In this view, organisational design is at the heart of the accident causation.

Flawed organisational design is and should be subject to liability of the organisation. In tort law, there are many instances in which courts are called upon to evaluate organisational design. In cases where national courts consider organisations negligent in taking precautionary measures to avoid injury – ranging from slipping and tripping accidents to negligent exposure of employees to toxic substances – we can conclude that the organisational design at hand *failed*. Likewise, in strict liability for defective products one can derive from the 'reasonable consumer safety expectations' test under the 1985 Products Liability Directive<sup>1</sup> that a flawed product design or warning defect has serious implications for the design of the manufacturer's organisation itself.

In practice, the legal framework for evaluation of 'organisational design' may differ considerably. Fault-based liability and strict liability may be considered as very dissimilar in detail, but when it comes to organisational design such liabilities do seem to have a shared focal point: the organisational design may be declared *defective* in the sense that it is deemed *unacceptably unsafe* (it *failed*) and hence a source of tortious liability.

In this paper I will address some issues relating to organisational design. I will do so by analysing a number of recent legislative initiatives in Europe. These include the Principles of European Tort Law (PETL; drafted by the European Group on Tort Law), the French pre-proposal Catala (Avant projet Catala), the Austrian Draft (Entwurf Koziol c.s.), the Swiss pre-proposal (Vorentwurf Widmer/Wessner) and the Turkish Draft (Türk Borçlar Kanunu Tasarısı).<sup>2</sup>

These drafts and proposals are representative of the current approach to tort liability in Europe's tort law systems and may therefore be prototypical for future harmonization efforts in this field.<sup>3</sup> Moreover, these legislative initiatives have several remarkable features concerning organisational design and its failure. Firstly, some of these initiatives consider employer's liability for

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<sup>1</sup> Article 6 Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, as amended by Directive 1999/34/EC. Cf. art. 3 (3) (f) Directive 2001/95/EC of 3 December 2001 on general product safety.

<sup>2</sup> See generally Koch 2007, p. 107 ff.; Catala 2006, p. 1 ff.; Griss *et al.* 2006, p. 1 ff.; Büyüksagis 2006a, p. 330 ff.

<sup>3</sup> I will not address the need and feasibility of such harmonization at a European level.

wrongful behaviour by employees to be a strict liability rather than a fault-based liability. Indeed, although traditionally *individual failure* within organisations is considered to be a motive for imposing some semi fault-based vicarious liability on employers (either on the basis of ‘culpa in eligendo’ or some presumed failure to instruct and supervise),<sup>4</sup> both the PETL and the Projet Catala tend towards introducing pure and simple strict liability of the employing organisation for individual failure of employees.<sup>5</sup>

Secondly, and more fundamental is the acknowledgement in these legislative initiatives that individuals are part of an organisation and that such organisations owe them and others a duty to carefully contemplate the design of the organisation and its activities. For instance, with regard to professionals we can see that a special ‘level of liability’ is sometimes designed for organisational failure. Article 65 (3) of the Turkish proposal states:

*„He who employs someone in the course of his business, is obliged to compensate the damage that is caused to the employee in the operation of the business activities unless he can prove that the organisation is capable of preventing such damage from occurring.”*

Moreover, specific duties to avoid organisational design failure can be found in both the Swiss (‘Organisation der Unternehmung’; art. 49a), the French (‘default d’organisation’; art. 1353) and the Austrian proposals (‘Mangel im Unternehmen’; art. 1304) and under the PETL (‘Enterprise liability’; art. 4:202).<sup>6</sup>

Although it is doubtful that these prospective liabilities are very different from the actual current court practice under general rules of negligence, they do have a clear symbolic value. They underscore the central role that professional organisations play in society in both reducing accident risks and spreading personal injury losses. As such, these provisions signal that organisations are judged according to a higher standard of care and precaution than is applied to individuals’ acts. Note for instance that the Projet Catala explicitly expands the notion of wrongful behaviour from purely individual wrongdoing to ‘organisational failure’:

*La faute de la personne morale s’entend non seulement de celle qui est commise par un représentant, mais aussi de celle qui résulte d’un défaut d’organisation ou de fonctionnement. [art. 1353 Projet Catala; Wrongful conduct of a legal person is not restricted to conduct of a legal representative, but also includes conduct resulting from organisational negligence and actions]*

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<sup>4</sup> The Austrian proposal puts the burden of disproving fault and “culpa in eligendo” on the professional employer (art. 1306), as do the Swiss and Turkish Drafts.

<sup>5</sup> Art. 6:102 PETL (Liability for auxiliaries); art. 1359 Projet Catala. The French proposal even renders the employee a secondary liable person (art. 1359 (2) Projet Catala), which I feel is very logical.

<sup>6</sup> Generally on enterprise liability Wantzen 2007, p. 1 ff., in particular p. 43 ff. Cf. the American perspective put forward by George L. Priest (1985), p. 461 ff.

Naturally, legal systems have their own way of dealing with corporate wrongdoing, but nevertheless it is interesting to see that the French proposal moves away from individual error and puts the emphasis on what went wrong in the organisation. Framing organisations in terms of aggregates of individuals makes it possible to attribute certain wrongful organisational conditions – ranging from working conditions to supervision of product chains, and fatal omissions within hospitals – to the organisation rather than the individual. Note that the Austrian Draft has a specific provision dealing with liability for organisational design:

- § 1304. (1) Wer aus wirtschaftlichen oder beruflichen Interessen ein Unternehmen betreibt, haftet auch für den durch einen Mangel im Unternehmen, seiner Erzeugnisse und Dienstleistungen verursachten Schaden. Der Unternehmer haftet nicht, wenn er beweist, dass die zur Abwendung des Schadens erforderliche Sorgfalt angewendet wurde.*
- (2) Mangel ist jede Abweichung von dem Standard, der nach der Darbietung, dem Stand von Wissenschaft und Technik sowie den Verkehrsgewohnheiten beim Unternehmen, seinen Erzeugnissen und Dienstleistungen erwartet werden darf.*
- (3) (...)*

A similar approach is taken in article 4:202 PETL ('Enterprise Liability'), which provides:

- (1) A person pursuing a lasting enterprise for economic or professional purposes who uses auxiliaries or technical equipment is liable for any harm caused by a defect of such enterprise or of its output unless he proves that he has conformed to the required standard of conduct.*
- (2) „Defect” is any deviation from standards that are reasonably to be expected from the enterprise or from its products or services.*

In essence, these drafts provide an extra-contractual fault-based liability for defective products and professional services with a reversal of the burden of proof in respect of – what I would consider – conformity of the organisational design with objective expectancies. Such a fault-based liability in part fulfils a similar function as a strict liability would in the sense that the burden of proving force majeure and development risk are on the liable organisation.

Hereafter, we will see further examples of how the above-mentioned drafts and proposals deal with matters of organisational design. Special attention is given to so-called enterprise liability (cf. art. 4:202 PETL) and the liability for inherent risks of dangerous activities. This latter category of liability is to be found, e.g., in art. 5:101 PETL ('Abnormally dangerous activities'):

- (1) A person who carries on an abnormally dangerous activity is strictly liable for damage characteristic to the risk presented by the activity and resulting from it.*
- (2) An activity is abnormally dangerous if*
  - a) it creates a foreseeable and highly significant risk of damage even when all due care is exercised in its management and*
  - b) it is not a matter of common usage.*
- (3) A risk of damage may be significant having regard to the seriousness or the likelihood of the damage.*
- (4) (...)*

## 2. Three types of risk in tort law

Obviously, the creation of danger is an important starting point for assigning liability, either in combination with some level of negligence, defectiveness of an object or even merely the inherent danger of an activity itself. It seems that in this respect the abovementioned legislative initiatives distinguish – at least on a theoretical level – three patterns:<sup>7</sup>

1. Injuries which are left uncompensated and which originate from the inherent risks of legal activities. The injured party is considered to be the unfortunate victim of ‘daily’ or ‘ubiquitous’ risks, or his own free choice. From the outset others are not considered to bear responsibility, even though they may well be responsible (in part) for creating the risk at hand. One can for example have in mind a national inoculation program which saves many lives but which also causes a lethal allergic reaction among a fraction of the persons that are treated. Other examples include nuisance that does not surpass the level of unacceptability.
2. Injuries which are compensated through the tort law system by assigning liability for the inherent dangers of a perfectly acceptable organisational design. In such cases, the policy choice by legislature or court to grant compensation although the design itself is deemed acceptable may be based on the idea that the benefits of reducing the risk level by improving the organisational design measured in saved living years do not outweigh the cost thereof (provided such improvement is possible anyway). Compensation the so-called ‘residual losses’ is deemed appropriate.<sup>8</sup> In the inoculation scheme example, a legislative compensation scheme – be it in the form of a strict liability for the inherent risks of the scheme or in any other form – may well be the result of such balancing of cost and benefits.
3. Injuries which are compensated through the tort system because they were the result of irresponsible omission to take precautionary measures by the

<sup>7</sup> For a similar analysis, see Gilead 2005, p. 28 ff.

<sup>8</sup> This is what the German Legal doctrine refers to as ‘Residualschäden’. For a clear analysis, see Wagner 2003, p. 271 ff. Cf. Büyüksagis 2006b, p. 2. For a further theoretical underpinning, see, e.g., Esser 1941/1969, p. 69 ff.

person responsible for the source of danger (owners, users, operators, et cetera). This is the area where tort law compensates for reasons of negligence. Note that under continental legal systems, cases that fall under this category may well be subject to a strict liability where such liability attaches to a defective state of objects (products!), activities, et cetera.<sup>9</sup>

At this abstract level, dangers from organisational design can be qualified as either acceptable (nos. 1 and 2) or unacceptable (no. 3). Although in both categories 2 and 3 both the injured party is compensated, the legal justification for such compensation seems to differ considerably. It must be admitted, however, that the line between categories 2 and 3 may be a thin line. Traffic accidents for instance are the price that society is willing to pay for mobility and economic growth. This may a rationale for introducing a strict liability for traffic accidents caused by motor vehicles, but this rationale may also be transposed by courts into a semi-strict liability based on the fault principle.<sup>10</sup> Indeed, in concrete cases traffic accidents are usually the result of momentary inadvertence and loss of concentration. Therefore, much depends on how we look upon the risks of motorized traffic: the aggregate of individual wrongful behaviour or the price that society has to pay for aggregate individual loss.<sup>11</sup>

The same seems to be true for other risks. The risk of nuclear energy plants is covered by international treaties imposing a form of limited strict liability on operators. The rationale for this liability obviously is the inherent risk of nuclear catastrophe (which would place such liability in category 2) but in concrete cases there may well be an organisational failure at the heart of the chain of events leading to the accident (which would place the foundation for liability in category 3). Similar considerations apply to ski lifts that catch fire (Caprun) and fertilizer manufacturing plants that explode (Atofina Toulouse).

So theoretically it might well be feasible to discern category 2 from 3. Art. 5:101 PETL does so by assigning liability for foreseeable and highly significant risks which can materialize ‘even when all due care is exercised in its management’. In reality however, courts decide what the level of due care is and they thus decide where to draw the line between acceptable and unacceptable risks.<sup>12</sup> Moreover, if complainants cannot bring convincing evidence of the cause of the accident, courts may be unable to offer compensation if there is no strict liability available that can be applied. This may indeed be a further practical reason for imposing strict liability without clarifying the category it exactly covers.

<sup>9</sup> On the grey areas between fault-based liability and strict liability, see, e.g., Van Dam 2006, p. 113 ff.; Hartlief 1996, p. 201 ff.

<sup>10</sup> See, e.g., Jansen 2007, p. 22 ff.

<sup>11</sup> Cf. Schamps 1998, p. 881-882.

<sup>12</sup> See also art. 1362 *Projet Catala* which refers to activities ‘*meme licite*’ (activities allowed under public law regulation), art. 50 *Swiss Proposal* (‘selbst wenn es sich um eine von der Rechtsordnung geduldete Tätigkeit handelt’, referring to the legality of the underlying activity), § 1302 *Austrian Draft* (‘trotz Aufwendung der erforderlichen Sorgfalt’, which hints at a normative standard of conduct which may surpass public standards).

We can conclude that there may be grey areas between categories 2 and 3,<sup>13</sup> but as such, the division into three categories still seems to be helpful in finding the theoretical foundation of liability for risks in tort law. This raises the question whether tort law systems should not try to distinguish more clearly between categories 1, 2 and 3. I feel this issue deserves some consideration.

For instance, when courts are called upon to apply strict liability for defective products, it has to assess design safety. Let's assume for instance that a particular new design which is applied in a brand of children bicycles brings users a 20% increase in accident risk compared to other designs. A court may be called to judge whether this is an 'acceptably dangerous design' (which probably files the bicycle under category 1) or an 'unacceptable dangerous design' (which would file the bicycle design under category 3).

I feel that by trying to categorize the risks formed by organisational designs that are deemed acceptable to society and by distinguishing these from unacceptable organisational design failure, we could achieve a better understanding of the true reasons for both compensating victims and withholding compensation.

### 3. Liability for inherent risks of acceptable organisational design

Finding the dividing line between acceptable and unacceptable organisational design risk was considered to be a legislative task in as early as the mid and late 1800s. In this era some European jurisdictions considered the risks of newly invented Victorian machinery – steam boilers and engines – to be of an irrefutable but nonetheless acceptable nature. The legislative or judicial issue was merely whether there should be compensation for such inherent risks. Courts commonly adhered to a strict idea of corporate responsibility under fault-based liability (category 3 cases), leaving legislatures the task of devising statutory regimes for category 2 injuries. And some legislatures indeed rose to the occasion. Active legislators were to be found in German, Austrian and Swiss law, who created strict liability for such sources of increased danger in specific legislation ('Sondergesetze').<sup>14</sup> The French legislature was less active (if we exclude the exceptional Loi Badinter 1985 concerning motor vehicle accidents),<sup>15</sup> but this was compensated by a very extensive judicial interpretation of art. 1384 al. 1<sup>er</sup> Code Civil ('fait des choses').<sup>16</sup> In England and Wales both the legislature and the courts refused to introduce a general strict liability for sources of increased danger beyond the restrictive rule in *Rylands v Fletcher*.<sup>17</sup> The current legislative initiatives seem to choose a so-called general clause ('Generalklausel'), *i.e.*, a general standard for strict liability rather than well

<sup>13</sup> Cf. Schamps 1998, p. 860 who seems not to object against mixing category 2 and 3 cases as this improves the position of those suffering from injuries.

<sup>14</sup> Cf. V. Bar 1999, p. 366 ff.

<sup>15</sup> Other examples of strict liability under French law are to be found at Catala (2006), p. 161 fn. 1.

<sup>16</sup> Note that the concept of faits des choses does not only covers acceptable inherent risks but also the unacceptable defective state of the object.

<sup>17</sup> *Rylands v Fletcher* [1868 ] 3 L.R. 330. For an overview, see Zweigert & Kötz 1998, p. 646 ff.; Schamps 1998, p. 1 ff. Further references to be found at Van Boom 2005, p. 618 ff.

defined and readily applicable rules of strict liability. Such a ‘general clause’ pertaining to strict liability for dangerous activities is currently only in force in Italy and Portugal (although in those jurisdictions this liability seems to be a fault-based liability with a reversal of the burden of proof).<sup>18</sup>

#### 4. How rational is tort law in comparing risks?

In this section I will look with some detail into the legislative drafts under consideration and how they compare and categorize risks. For example, art. 5:101 PETL assigns strict liability for the inherent risks of ‘abnormally dangerous activities’ that create a ‘foreseeable and highly significant risk of damage’. Likewise, the other initiatives refer to activities with ‘potentialité remarquable’, which are ‘likely to do mischief’, and which pose a level of danger which is ‘bijzonder’, ‘qualifié’, ‘specifique’ ‘hoher’, ‘erhöhter’. These qualifications are all expressions of a certain level of risk that acts as a threshold for liability.<sup>19</sup>

Especially sophisticated is the theory behind the Austrian Draft, which distinguishes between strict liability for sources of *high danger* (“Quellen hoher Gefahr”) and fault-based liability with a reversal of burden of proof with regard to sources of *increased danger* (“Quellen erhöhter Gefahr”). The Draft thus categorizes:

<i>Quellen hoher Gefahr</i> (§ 1302)	<i>Quellen erhöhter Gefahr</i> (§ 1303)
Eine Quelle hoher Gefahr liegt vor, wenn eine Sache als solche, ihr gewöhnlicher Gebrauch oder eine Tätigkeit trotz Aufwendung der erforderlichen Sorgfalt das Risiko häufiger oder schwerer Schäden mit sich bringt. Quellen hoher Gefahr sind insbesondere Kernanlagen, Staudamme, Öl-, Gas- und Starkstromleitungen, Munitionsfabriken und -lager, ferner Luftfahrzeuge, Eisen- und Seilbahnen, Motorfahrzeuge und Motorboote sowie Bergbau und Sprengungen.	Eine erhöhte Gefahr kann insbesondere durch Tiere, Bauwerke, Motorfahrzeuge mit niedriger Höchstgeschwindigkeit oder Tätigkeiten wie Rad- und Schifahren mit höherer Geschwindigkeit hervorgerufen werden.

<sup>18</sup> See art. 493 (2) Código Civil Português (“Quem causar danos a outrem no exercício de uma actividade, perigosa por sua própria natureza ou pela natureza dos meios utilizados, é obrigado a repará-los, excepto se mostrar que empregou todas as providências exigidas pelas circunstâncias com o fim de os prevenir.”); art. 2050 Codice Civile (“Responsabilità per l’esercizio di attività pericolose”, dat bepaalt: “Chiunque cagiona danno ad altri nello svolgimento di un’attività pericolosa, per sua natura o per la natura dei mezzi adoperati, e tenuto al risarcimento, se non prova di avere adottato tutte le misure idonee a evitare il danno.”). Cf. V. Bar 1999, p. 374.

<sup>19</sup> Cf. Schamps 1998, p. 862 ff.

[There is a source of high danger if an object as such, its common use or an activity – even if performed with the necessary carefulness – causes a risk of frequent or serious. Sources of high danger are in particular nuclear plants, dams, oil, gas and high voltage cables and conduits, munitions factories and warehouses, as well as airplanes, railways, ski lifts, motor vehicles and motor boats and mining and blasting]	[An increased danger can be caused in particular by animals, building sites, motor vehicles with low maximum speed as well as by bicycling and skiing with high speed]
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The risk categorization introduced by the Austrian draft, raises the question whether it has filed the right cases under the right category. Would a building site really be less dangerous than a railway enterprise? Builders are more at risk of suffering accidents at work than railway employees are. Given the statistical odds of injuries involving railways and injuries sustained in the construction industry, it seems difficult to maintain that railways are the source of high danger and ‘Bauwerke’ merely a source of ‘increased danger’.<sup>20</sup>

Moreover, most accidents actually happen inside (finished) buildings. In particular, stairways are strongly associated with personal injury.<sup>21</sup> If that is the case, should we then not focus on buildings in general or staircases in particular as sources of high danger?

The examples show that the task of categorizing risks is indeed a difficult task. In fact, this was already illustrated by the ‘general clause’ of liability for dangerous activities in Portuguese and Italian legal systems. Consider for example the list of activities that were and were not deemed dangerous under these legal systems:<sup>22</sup>

<sup>20</sup> The EU statistics office Statline data (“Rail transport accidents in the European Union in 2005-2006”; Eurostat Data in Focus 2008/1) shows that in 2006 in Austria some 43 persons (in Europe: 1370 persons) were killed in railway operation (2 passengers, no staff, and therefore mostly others, e.g., at level crossings). Statline data also indicate that Austria had some 8.8 casualties per 100,000 employed in construction 2006. From an occupational injury point of view, we can say the occupational accident rate in building is generally speaking higher than it is in the transport sector. The number of fatal accidents is, however, relatively similar (discounting for unequal number of persons employed). See, e.g., Factsheet 19 (2001) “Work-related Accidents in the EU - the Statistical Picture (1998-1999)” by the European Agency for Safety and Health at Work, at [http://osha.europa.eu/publications/factsheets/19/factsn19-en.pdf#at\\_download/file](http://osha.europa.eu/publications/factsheets/19/factsn19-en.pdf#at_download/file).

<sup>21</sup> Cf. Baker 1992, p. 135; Templer 1992, p. 5 ff; Viscusi 1985, p. 530. Indeed, accident statistics in The Netherlands show that slipping and tripping accidents cause some 2500 fatalities (mainly among the elderly) whereas traffic accidents account for a ‘mere’ 996 fatalities. See Centraal Bureau voor de Statistiek 2003, p. 130.

<sup>22</sup> Examples referred to by V. Bar (1999), p. 377-378. See also the meandering case law by the Austrian Oberste Gerichtshof concerning ‘gefährliche unternehmerische Tätigkeit’, referred to by V. Bar (1999), p. 382-383.

Considered not dangerous	Considered dangerous
<ul style="list-style-type: none"> <li>• Operating a water conduit</li> <li>• Operating an automated teller machine</li> <li>• Plastering works</li> <li>• Operating aircrafts and trains</li> <li>• Trading gas liquids</li> </ul>	<ul style="list-style-type: none"> <li>• Operating a water conduit (sic!)</li> <li>• Manufacturing medicines</li> <li>• Storing personal data</li> <li>• Hunting</li> <li>• Offering horse riding lessons</li> <li>• Organising a fire works show</li> <li>• (nuisance caused by) the use of a drilling hammer</li> <li>• Burning garden trash near a main road</li> <li>• A manufacturing process in which environmentally dangerous substances escape</li> </ul>

The examples show that it is difficult to get a firm hold of the concept of risk and to rationally categorize cases appropriately. This is even more difficult under those regimes which hold that the abnormality of the danger is assessed having regard to both the seriousness and the likelihood of the damage. This means that the same category comprises both minor accidents with a high frequency and catastrophic accidents with low frequency.<sup>23</sup> Such blending of two extremes is to be found in the PETL, the Austrian, Swiss and Turkish Draft and the American Rest. 3d.<sup>24</sup>

Blending frequent and extraordinary events into one liability puts the catastrophic explosion of a munitions factory on par with a traffic accident, but the nature of such accidents differs considerably. From a societal point of view, they are incomparable: The causative mechanisms are distinct, the mass exposure is dissimilar, the consequences are totally different and the insurability is incomparable. Therefore, I find it unhelpful to think of these two extremes as belonging to the same category.<sup>25</sup> That is, unless one feels that the foundation of liability of both extremes is similar. Perhaps traffic accidents and munitions factory explosions are both ‘residual losses’ (compare category 2) and therefore the cost of acceptable risks. If that is the case, however, we should ask ourselves whether the mere concept of ‘risk’ has sufficient clarity to enable courts to decide which risks fit into this category.<sup>26</sup>

<sup>23</sup> Cf. European Group on Tort Law 2005, p. 106. Note that the French Avant projet Catala does not blend these two opposites into one liability: art. 1362 concentrates on « activités très risquées », catastrophic accidents affecting large numbers of persons (“affecter un grand nombre de personnes”).

<sup>24</sup> Art. 5:101 PETL; ALI 2005, p. 286-287 (Comment g). Art. 50 Swiss Draft; art. 70 Turkish Draft; art. 1302 (3) Austrian Draft.

<sup>25</sup> In a similar vein, Büyüksagis 2006a, p. 333; Büyüksagis 2006b, p. 5 ; Reischauer 2006, p. 398. Cf. Schamps 1998, p. 848-849; Cane 1999, p. 87-88. Contra: Apathy 2007, p. 209.

<sup>26</sup> See the critics referred to by Schamps (1998), p. 847-848, p. 854 ff.

## 5. Can activities *as such* be dangerous?

Danger is a multiple headed monster. In the Netherlands, some years ago some 28 people died as a consequence of a simple omission by a professional seller of bubble baths. He had his products on display at an exhibition which was visited by some 80.000 persons. He omitted, however, to add chloride to the water that he used in the baths on display and he thus unknowingly created Legionnaire's disease in the bath, with fatal consequences for some 28 visitors.<sup>27</sup>

In hindsight, we can say that the omission in the given circumstances was very dangerous indeed, but as such, the simple fact of not chlorinating the bath water in itself renders neither the water nor the bath dangerous. Only when you leave the water bubbling at a certain temperature, for a certain period of time and by exposing a certain population will the legionella bacteria develop and will the casualty number take on considerable proportions. So, it is the accumulation of activities and inactivity on the side of the salesman that causes the danger and its materialization.

Under the Austrian proposal, could the salesman be held liable under either § 1302 or § 1303 for a 'Tätigkeit' resulting in 'hoher or erhöhter Gefahr', under § 1304 for organisational failure, or merely under § 1295 for negligently creating this danger? Can we really decide whether a 'Tätigkeit' is dangerous 'als solche' without looking at the context of the damaging event?

Similar questions can be raised under the other legislative initiatives. It all depends on what we define as the relevant activity: the mere display of the bath or the sequence of events and omissions that actually happened in connection with this activity.

My main argument here is that the more careful legislative approach would be to have strict liabilities attached to *objects rather than activities*.<sup>28</sup> Naturally, courts will always run into borderline cases when using for instance 'dangerous substance' as a defining concept for strict liability, but at least then you recognize a borderline case when you see it. My fear is that the concept of 'dangerous activities' is too vague and may one day turn out to include activities such as providing French fries to overweight persons. Moreover, trying to distinguish between different levels of danger, as the Austrian proposal does, really proves to be very difficult.

In essence, the price of using vague concepts ('general clauses') is always paid in the form of a lower level of predictability. It is really a matter of more or less vagueness. I would prefer a legislative attempt at categorizing risks over a 'general clause' which endorse courts with the grave duty of categorizing.<sup>29</sup>

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<sup>27</sup> On this Dutch case see, e.g., Hengeveld 2007.

<sup>28</sup> Cf. Büyüksagis 2006b, p. 4-5.

<sup>29</sup> Contra: Widmer 2003, p. 174-175. Note that the Swiss Draft uses both techniques: specific statutory provisions for certain sources of increased danger and a 'general clause' in art. 50 OR. Cf. Schamps 1998, p. 850-851. See also Werro 2007, p. 90 and 97, who expresses doubts as to whether courts are indeed capable to build a consistent framework for evaluating risks.

At the end of the day, the vaguest of liabilities, fault-based liability for wrongful omission, will always be able to help out: in the Dutch case, the salesman was held to an objective and normative standard of conduct of a well-informed and reasonable bubble bath salesman. He failed this normative standard and was therefore at fault according to the objective fault requirement under Dutch law.

## 6. Is tort law addressing the right risks?

Do bubble baths *inherently* pose the risk of spreading Legionnaire's disease? This appears to be a silly question: it is not the object as such but the negligent behaviour of the operator in 'operating the bath' that causes the risk. But if that is the case, why then is a motor vehicle considered to be a source of inherent danger? Is this because accident statistics show that traffic is a major source of fatality? This may be a correct answer, but it is also a dangerous answer. If tort law derives its risk categorization from statistics, we may soon discover that tort law is in fact addressing the wrong risks by focusing on the 'exotic accident' in which causation is easy to prove and which proves to be statistically insignificant of accidents.

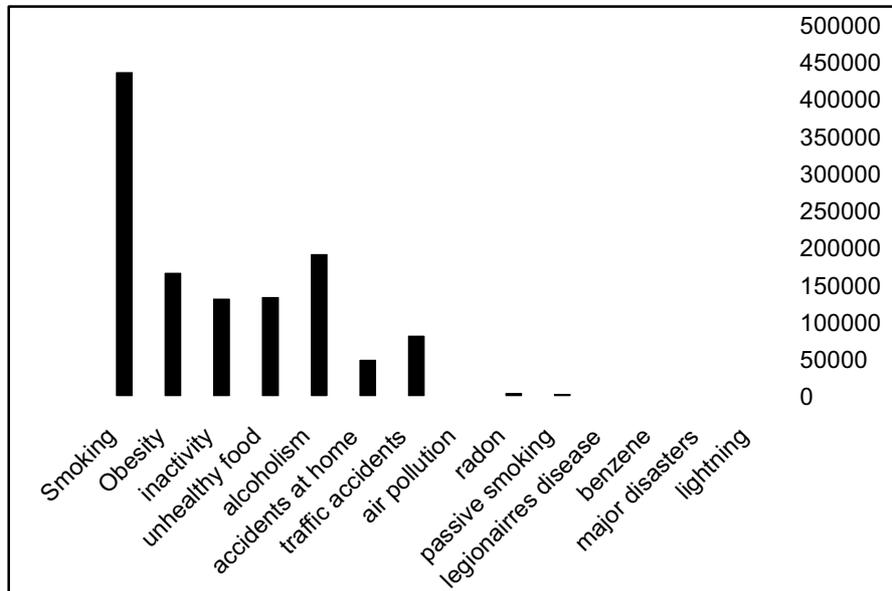
Figure 1 gives us some indication of sources of health risk (number of quality adjusted life years affected by a number of risks). Another way of looking at this is by measuring the total cost of health care in a given country and carving out the cost of accidents (which may serve as a crude proxy for measuring cases in which tort law could possibly play a role). According to this method, the cost of accidents seems to be negligible: some 3 % of Dutch health care cost relate to accidents.<sup>30</sup> Although not decisive evidence, these data may signal that tort law is not fully committed to the risks that society faces.

Whatever quantitative approach one would take to tort law, obviously these data are merely illustrative rather than decisive.<sup>31</sup> The general point I would like to make here is that if we use statistics to justify tort policy choices – e.g., to consider bubble baths as a source of liability for legionnaire's disease – then we may face the difficult task of explaining why other, statistically more significant sources of danger, are not subject to some form of liability.

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<sup>30</sup> Cf. Slobbe e.a. 2006.

<sup>31</sup> Moreover, such tables are time-limited in the sense that the calculations may vary with changing scientific and political insights in the true extent of certain risks. On that subject, see, e.g., Pieterman 2008, p. 309 ff.

**Figure 1 (source: De Hollander & Hanemaaijer 2003)**

Moreover, inherent risks are manifold. Knives cut, guns kill, staircases and windows make people fall, passive smoking causes lung cancer, selling alcohol causes accidents and (domestic) violence. Naturally, the chain of cause and effect are long stretched in all of these cases, and intermittent behaviour of others (possibly the victim himself) is involved, but from a statistical point of view these cases are not different from the risks of, e.g., motor vehicles. Note that I am not advocating inclusion or exclusion of these cases in a (strict) liability for dangerous activities. I am merely pointing out that even in tort law policy, rationality demands risk categorization according to an objective benchmark – which may be any objective data such as on the number of lives at stake, the impact on society or the seriousness of the injuries sustained. Such an objective method seems to be lacking. Obviously, tort law in the classical sense cannot properly address modern society's diffuse risks, such as health impairment caused by diffuse causative mechanisms.<sup>32</sup> It can do so only if there is some form of proportional liability in cases of uncertain causation. Resolving this issue is vital to Europe's future tort law.

## Conclusions

This paper has merely scratched the surface of a complex set of issues relating to the functions of tort law in distinguishing acceptable from unacceptable risks.

<sup>32</sup> On this issue, e.g., Meadow & Sunstein 2007, p. 1 ff. See also Van Boom 2006, p. 20 ff.

Often, such risks are brought about by deliberate organisational design choice. Legislature and courts are called upon to assess which of these design choices are acceptable and which are not.

By evaluating a number of recent legislative drafts and proposals I have presented an outline of what seems to be becoming a standard of 'organisational liability' for organisational failure. Moreover, I have put forward a threefold typology of risks in tort law which seems to go a long way in categorizing tort law cases involving organisational design risks. Finally, I have called the reader's attention to the fact that tort law is in need of rational recalibration with regard to the 'ranking of risks', as it seems that some risks are inconsistently categorized as either acceptable or unacceptable.

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