

European Civil Liability Law Outside Europe: The Example of the Big Three: China, Brazil, Russia

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I. INTRODUCTION

The wealth of Western societies is grounded on the division of labour, on mechanisation and on technical innovation.¹ This process of societal modernisation, however, has its dialectics. The growth of knowledge is accompanied by the growth of uncertainty about possible

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1. Cf. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776); EMILE DURKHEIM, *DE LA DIVISION DU TRAVAIL SOCIAL* (1893); THE CRITIC: KARL MARX, *DAS KAPITAL. KRITIK DER POLITISCHEN ÖKONOMIE* 3 vols. (1867/1885/1895).

risks created by this scientific and technological progress.² Complexities and contingencies are thus becoming the characteristics of the so-called modern risk society.³ Risk society is just the other side of the coin of knowledge society. One does not exist without the other. The reaction of civil liability law on this fundamental process is ambivalent.⁴ The private law of the 19th century still celebrated the result of the political revolution: the universality of private autonomy (Maine's "from status to contract"). Its equivalent in liability law was individual fault (Jhering's "no obligation for damages without fault"). In the meantime the industrial revolution undermined the societal basis of this natural law legacy. Once the complexities and contingencies of industrialisation had come to the fore, then fault turned out to be an inappropriate category to cope with technical risks generated by (incorporated) enterprises. Liability law had to face the depersonalisation of injurious processes and activities.

On the one hand, 'law' answered to the challenges of the new risks of industrial society by inventing and introducing new elements into the legal system:

- social security (a substitute for liability);
- enterprise liability for organisational 'fault' (with and without reversal of the burden of proof);
- strict liability (as an alternative to fault);
- liability insurance (loss spreading);
- ex ante administrative regulations of technical risks by public authorities/agencies.

On the other hand, it adhered in its core area to the old-fashioned concept of fault. The fine-tuning of the old personal fault liability and new forms of stricter liability, of old civil codes with judge made case law and newer statutory law did not happen. The landscape of liability law in continental Europe remained a patchwork. Recent reform initiatives—on the national and EU level—try to cure this malaise.⁵ In

2. See, inter alia, NIKLAS LUHMANN, *SOZIOLOGIE DES RISIKOS* (Berlin de Gruyter 1991); Gotthard Bechmann (ed.), *RISIKO UND GESELLSCHAFT* (Opladen, Westdeutscher Verlag 2d ed. 1997).

3. Cf. ULRICH BECK, *RISIKOGESELLSCHAFT. AUF DEM WEG IN EINE ANDERE MODERNE* (Frankfurt, Suhrkamp 1986); Ulrich Beck, *Die Politik der Technik—Weltrisikogesellschaft und ökologische Krise*, in W. . . Rammert (ed.), *TECHNIK UND SOZIALTHEORIE* 261 ff. (Frankfurt, Campus 1998).

4. The focus is restricted here to the continental European civil law regimes and their non-European heirs abroad. Common law is not encompassed.

5. See, especially, EUROPEAN GROUP ON TORT LAW (ed.), *PRINCIPLES OF EUROPEAN TORT LAW* (Vienna, Springer 2005); Christian von Bar/Eric Clive/Hans Schulte-Nölke (eds.), *DRAFT*

the meantime the dialectics of societal modernisation have reached countries such as China, Brazil and Russia.

Risk society has become a global phenomenon. Thus it is worth the attempt to take a look at how these three large countries, all rooted in European civil law, have come to grips with the legal challenges by the risk society in their recent codifications of liability law.⁶

II. CHINA

On 26 December 2009, a new Act on Civil Liability Law (Act) was adopted by the Standing Committee of the Eleventh National People's Congress and promulgated by order of the President of the People's Republic of China. It came into force on 1 July 2010.⁷ In this way, 100 years of Chinese history of receiving continental European private law have come, to a large extent, to their conclusion.

A. General Part

The first four chapters of the Act mostly concern the general part of liability law. The Act starts with a very Chinese objective: This Law is formulated “in order to protect the legitimate rights and interests of parties in civil law relationships, clarify the delictual liability, prevent and punish delictual conduct, and promote the social harmony and stability.” (Art. 1). Compared to the three goals of civil liability law—compensation for loss, prevention of injury, and, where indicated, punishment of the responsible causer of the injury⁸—the overarching political objective of Chinese liability law is the promotion of social harmony.

COMMON FRAME OF REFERENCE, BOOK VI: NON-CONTRACTUAL LIABILITY ARISING OUT OF DAMAGE CAUSED TO ANOTHER (Munich, Sellier, European Law Publishers 2009). For the national reform initiatives, see Bénédict Winiger (ed.), LA RESPONSABILITÉ CIVILE EUROPÉENNE DE DEMAÎN—EUROPÄISCHES HAFTUNGSRECHT MORGEN (Geneva, Schulthess 2008) (containing texts and comments).

6. For more detailed information, see GERT BRÜGGEMEIER, MODERNISING CIVIL LIABILITY LAW IN EUROPE, CHINA, BRAZIL AND RUSSIA. TEXTS AND COMMENTARY (Cambridge, CUP 2011).

7. The English text is available in Gert Brüggemeier, *id.*, pt. 3, ch. A/I, and on the Web site of the Chinese government. On this, see G. Brüggemeier, *Das neue Gesetz über das Haftungsrecht der VR China*, HAFTUNG UND VERSICHERUNG (HAVE) 207 (2010); Helmut Koziol/Zhu Yan, *Background and Key Contents of the New Chinese Tort Liability Law*, 1 J. EUR. TORT L. (JETL) 328 (2010). On the Chinese liability law before the 2009 Act, see *Hailing Shan, China*, in *International Encyclopaedia of Laws*, Sophie Stijns (ed.), TORT LAW, vol. 1, at 47 (The Hague, Kluwer Int'l 2005).

8. On punitive damages in product liability, *cf.* Art. 47 and below in text.

Article 2 sets out the basic structure of this law of liability. The Act follows the BGB's model of the law of delict with its distinction between 'grounds of liability' (*Haftungsgrund*) and 'consequences of liability' (*Haftungsausfüllung*).⁹ The fundamental ground of liability is an attributable injury to rights and interests protected by civil law. Article 2, paragraph 2 lists important examples of protected rights and interests: life, health, honour, right to one's own image, right to private life, property, right to the use of things, patent and copyright law, etc. This non-exhaustive, open approach of Chinese (and Japanese) liability law represents an innovative adaptation of the BGB concept.

The basic grounds for attribution are wrongful conduct and *mise en danger*. Wrongful conduct (fault) is still treated as the principal ground of liability (Art. 6). Presumptions of fault and cases of non-fault liability are construed as exceptions ("to the extent that the Act provides for this"), although they already account for the majority of grounds of liability in the Act.¹⁰

Noteworthy in our context is the regulation of employer's and employee's liability. The employer is solely liable for the delicts of the employee (Art. 34). This applies equally to the injury to third parties as well as to the injury to colleagues at work. To this end, the company will have to take out employers' liability insurance. As in Russian law, there is no provision for the external liability of employees.¹¹

In contrast, certain *businesses which open their premises to the public* like shopping malls, airports, etc., and enterprises organising mass events are directly externally liable for the organisational shortcomings of their managers (*enterprise liability* under Art. 37). This seems to concern a part-regulation of the affirmative duty to procure safety.¹² The same rule of direct liability applies to educational institutions whose pupils suffer injury when attending the kindergarten or school (Arts. 38, 39).

B. Risk-Related Provisions

The 'special part' of the Act concerns product liability, liability for keepers of motor vehicles, medical liability, environmental liability, liability for particularly high risks, liability for keepers of animals and for

9. Ostensibly, it follows the present version of Art. 709 of the Japanese civil code.

10. See below in the text (Part II.B).

11. On this, see below (Part IV).

12. The German model for this is the so-called Verkehrssicherungspflichten. On this, see GERT BRÜGGEMEIER, *HAFTUNGSRECHT. STRUKTUR, PRINZIPIEN, SCHUTZBEREICH* 519 ff. (Heidelberg, Springer 2006).

intangible objects.¹³ All these provisions encompass a deviation from the fault principle of Article 6.

1. Product Liability

Prior to the passing of the new Act, Chinese product liability was governed by a specific public law enactment, the Act on Product Quality (PQA) from 1993, last amended in 2000. The Articles 41-47 of the new law have more or less adopted the liability provisions of the PQA, but for further details one has to go back to this special legislation.

With the adoption of the PQA product liability regime, the legislature has also embodied its inconsistencies. This is particularly evident in the relationship between the basic Articles 41-43. According to Article 41, the manufacturer is liable for damage caused by his defective product. The scope of protection extends to harm to persons and damage to other things.¹⁴ The terms ‘product’ and ‘defect’ are not defined in the new Law; one must have regard to the PQA. ‘Products’ are considered to be movable things that are manufactured and processed, and intended for sale.¹⁵ This definition is clearly preferable to the broad definition of ‘product’ in Article 2 of the EU Product Liability Directive (‘every movable thing’). ‘Defects’ are unreasonable risks to the safety of the human body or property of others.¹⁶ Negative deviations from an applicable technical standard will be considered a defect. The new Law does not specify who is a ‘manufacturer’. According to prior opinion, only the producer of the final product fell under the definition of ‘producer’, not the provider of raw material or components. So-called quasi-manufacturers are also considered to be producers. The manufacturer is liable under Article 41, independently of fault.

The distributor or the seller is not considered a manufacturer and, according to Article 42, paragraph 1, is not subject to strict product liability. Distributors are retailers and wholesalers, including importers. In principle they are liable only if the product defect is attributable to the fault of the distributor (Art. 42, para. 1). Article 42, paragraph 2, however, provides for the strict liability of distributors under exceptional circumstances, namely if they are unable to identify either the producer or the supplier. This is comparable to EU product liability rules.

13. The liability of motor vehicle keepers, of animal keepers, and for intangible objects is not discussed further. In this respect, it is worth referencing again the text of the Act. See the official Web site of the Chinese government.

14. § 41(1) Act on Products Quality (PQA).

15. § 2(2) PQA.

16. § 46 PQA.

At this point, however, some inconsistency in Chinese product liability law comes up. Contrary to the previous understanding, the basic norm of product liability appears to be neither Article 41 nor Article 42—but Article 43, paragraph 1: “Where any harm is caused by a defective product, the victim may require compensation to be paid by the manufacturer of the product *or* the seller of the product.” This would mean that everyone in the supply chain of a defective product is liable to the injured party, independently of fault, if the injured party can prove that he/she suffered a loss as a result of a defective product. Accordingly, both manufacturer and distributor are strictly and jointly liable! Ceilings to liability are not provided. The manufacturer cannot even escape liability by proving that the defect did not exist before the product went into circulation (but see § 41 (2) PQA). As with the liability of the seller mentioned above (Art. 42), this aspect would only be relevant to the internal apportionment of liability, that is for the final distribution of the damage between the parties in the supply chain. This internal apportionment or redress is then only additionally regulated in Article 43, paragraphs 2 and 3. In this way, the manufacturer subject to the claim can have redress against the distributor in the event of the latter's fault. The distributor who is subject to a claim and who is not at fault, can have redress against the manufacturer of the product. The risk of insolvency of the party responsible for the product defect is thus no longer borne by the plaintiff but the defendant who the injured party decides to sue. Article 44 expands the list of the potential addressees of redress to include the freight handlers, warehouses, etc., if the product defect was caused by their fault.

The new product liability law is silent on *development risks*. According to § 41 (2) no. 3 PQA, the manufacturer can escape liability if it can prove that the defect could not be discovered with the “scientific and technical know-how of the time the product entered into circulation.” This corresponds to the international standard.¹⁷ The rule from the PQA has been acknowledged by the new Law. The legal gap resulting from the non-liability for development risks is filled by delictual liability in respect of product monitoring. If a subsequent (undiscoverable) defect is exposed, the manufacturer and the seller are under an affirmative duty to

17. Among the major industrial states, as far as can be seen, only Russia extends liability to development risks, albeit limited to consumer goods (Art. 14, para. 4 Russian Act on the Protection of Consumer Rights). See below in the text. In the United States, asbestos cases are exceptionally placed under a strict liability regime.

warn and, where indicated, to recall the product,¹⁸ or to engage in other collective measures. There is liability for failing to respond in a timely and appropriate fashion (Art. 46).

The final point to be made on the new rules of product liability is the appearance of *punitive damages*¹⁹ (Art. 47).²⁰ If “despite positive knowledge of a defect” a product is further produced or further distributed, the manufacturer or the distributor may be liable both for compensatory damages and in the case of death or serious injury to health for punitive damages. The Act does not contain any more detailed specifications. Neither the criteria for the establishment of the amount nor the designated limits, nor even the insurability of punitive damages are detailed. Compulsory liability insurance regimes tend in China to insure against punitive damages, as long as this is not expressly prohibited.

2. Medical Liability

The new Chinese Law does not provide for the equal treatment of product manufacturer and service provider liability to be found in the Brazilian Consumer Defense Code²¹ and in the liability provisions of the Russian civil code.²² One area of service provision is however given special concern, namely, liability for injury through medical treatment (Arts. 54-64).

The starting point is the liability of a medical institution, most commonly a hospital, for the injury to patients through medical malpractice (Art. 54). Medical negligence is defined, however, without mentioning the term itself,²³ as the failure to observe (medical) standards at the time of diagnosis and treatment (Art. 57). Three points are to be noted: the channelling of liability to the medical institution meets the

18 Concerning the recall of products a lot of specific administrative regulations have been passed in the PR of China.

19. Cf. the recent comparative account of Helmut Koziol/Vanessa Wilcox (eds.), *PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVE* (Vienna, Springer 2009).

20 This was not yet embodied in the PQA but could already be found in the Consumer Protection Act of 1993 (Art. 49).

21 See below in the text (Part III.C).

22. Arts. 1095 ff. CCRF; see also Mathias Reimann, *Liability for Defective Products and Services: Emergence of a World Standard?*, in Int'l Acad. of Comp. L. (ed.), *CONVERGENCE OF LEGAL SYSTEMS IN THE 21ST CENTURY: GENERAL REPORTS DELIVERED AT THE XVIITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 367 ff* (Brussels 2006).

23. The third Draft still read: ‘non-attendance of the care which corresponds to the standard of the medical profession at the time of the treatment. The place of treatment and the skill of the institution and of the medical personnel had to be taken into account’ (Art. 57, para. 2).

basic requirements of employer liability (Art. 34); any personal liability of the medical staff seems to be excluded; and the inclusion of organisational fault of the hospital, to which we shall return later. Finally, it is worth mentioning that, regardless of the existence of a medical treatment contract, medical liability is generally subsumed under non-contractual civil responsibility.

Article 54 governs the classic cases of medical maltreatment, while Article 55 is dedicated to the new area of incorrect medical disclosure. The doctor's affirmative duty of disclosure is detailed and separately regulated for standard and special treatments. If the medical personnel breach this duty of disclosure and the patient is injured by the subsequent treatment, the medical institution is liable in damages even if there is no maltreatment (Art. 55, para. 2). However, the mere violation of the duty of disclosure, where the subsequent treatment does not lead to damage to health, cannot be compensated. The corresponding injury to patient autonomy remains without consequences. Article 55 represents a remarkably innovative legislative step, illustrating that one can provide reasonable delictual solutions for medical maltreatment and inadequate disclosure without becoming embroiled in the Germanic tangle with 'unlawfulness'.²⁴

Under certain circumstances, 'fault of the medical institution' will be presumed, namely, in cases of breach of public regulations, concealment of acts of treatment and falsification or destruction of treatment records (Art. 58). More interesting than the actual content of this provision is the term "fault of the medical institution". As has already been recognised in Article 54, this establishes a novel liability on the part of the hospital institution for "organisational fault". This cannot be overemphasised as it fills a serious gap in the codified law of delict in the medical sphere. Internationally, a gray area of quasi-strict enterprise liability for "organisational fault" has developed between liability for personal fault and strict liability for permitted risky activities.²⁵ This enterprise liability is quasi-strict if it is connected to the presumption of "organisational fault". Such a case is governed by Article 58. In practice, the majority of hospital liability incidences are cases of organisational liability in matters ranging from hygiene conditions in

24. Keyword: bodily injury doctrine (Körperverletzungsdoktrin). *Cf.*, inter alia, BRÜGGEMEIER, *supra* note 12, at 470-511.

25. *See* ANNELIESE MATUSCHE-BECKMANN, *DAS ORGANISATIONSVERSCHULDEN* (Tübingen, Mohr Siebeck 2001). However, here we are not concerned any longer with personal liability for individual wrongful behaviour but with depersonalised liability for inadequate structures and processes—enterprise liability as 'organisational fault' liability.

hospitals to “beginner operation”²⁶ to “wrong side surgeries”, to name just a few examples.²⁷ It now stands as a third pillar in Chinese medical law alongside hospital’s liability for maltreatment and inadequate disclosure by the personnel.

Organisational liability is not limited to hospitals, public venues, organisers of mass activities and educational institutions.²⁸ As a general phenomenon of enterprise liability for defective conditions and processes, it is part of the general provisions discussed above alongside employer’s liability for employees’ and officers’ delicts (Art. 34).²⁹

3. Liability for Environmental Pollution

Liability for environmental pollution arises in two clearly differentiated situations: the responsibility for pollution-related injury to legally-protected individual interests, and the liability for causing pure environmental damage (damage to biodiversity or ecological damage).³⁰

The relevant provisions of the new Chinese Law are Articles 65-68, but it is not completely clear what they are about. Article 65 is extremely broad: ‘Where any harm is caused by environmental pollution, the polluter shall assume tort liability.’ The language of this norm is only clear to the extent that it establishes strict liability. (Article 124, the corresponding provision of the earlier General Principles of Civil Law (GPCL) of 1986 relating to environmental protection, still provided for quasi-fault liability by focusing on the violation of respective statutory provisions.) Since we are not dealing here with specific risks,³¹ this seems to take the form of an ‘absolute liability’. That would be unusually comprehensive, going beyond the traditional strict liability, and would have no international equivalent. Liability is only excluded in cases of *force majeure* (Art. 29) and of intentional self-infliction of damage (Art. 27). Article 65 is possibly best understood as a type of blanket provision, the content of which will be fleshed out by the various

26. BGH, 27.9.1983, BGHZ 88, 248.

27. See on this Dieter Hart, *Organisationshaftung und Medikationssicherheit. Krankenhausorganisation als Gegenstand der Arzthaftung*, in LIBER AMICORUM GERT BRÜGGEMEIER 345 ff. (Baden-Baden, Nomos 2009); K.O. BERGMANN/H.F. KIENZLE, *KRANKENHAUSHAFTUNG* (2d ed. 2003).

28. Cf. Art. 37.

29. See generally BRÜGGEMEIER, *supra* note 12, at 119-84.

30. For a comparative European account, see Marianne Hinteregger (ed.), *ENVIRONMENTAL LIABILITY AND ECOLOGICAL DAMAGE IN EUROPEAN LAW* (Cambridge, CUP 2008); cf. Michel Faure (ed.), *DETERRENCE, INSURABILITY, AND COMPENSATION IN ENVIRONMENTAL LIABILITY* (Vienna, Springer 2003).

31. Cases of ‘highly dangerous activities’ are set out in the ninth chapter; cf. below in the text.

individual environmental protection statutes. At this point, Article 65 specifically provides that other special provisions on liability, for example in environmental protection statutes, are to prevail.

In addition, Article 65 supposedly covers not only individual damage caused by environmental pollution, but also ecological damage. This is not apparent from the text of the Act. At any rate, such a complex matter cannot easily be properly dealt with in this way.³² The way to regulate ecological damage must be, as in the EU model,³³ through the implementation of special laws, which govern, *inter alia*, potential claimants (government agencies, NGOs, etc.), ways of assessing the damage, the different forms of restoration and compensation. Last but not least, *causation* between the environmental pollution and the individual damage or the ecological damage is presumed (Art. 66).

4. Particularly High Risks

In the liability law of most new civil codifications one finds a general clause of strict liability for particularly serious hazards.³⁴ In the West, the beacon has been the three American Restatements of Torts;³⁵ in the socialist countries, it was Article 404 of the Russian Civil Code of 1922.³⁶ The Chinese legislature has taken a different path in the ninth chapter of the Act. It includes a general clause on “highly dangerous operations” (Art. 69) and provides additionally for individual cases of high risk: nuclear facilities, civil aviation, highly inflammable fuels or explosives and other certain dangerous activities.³⁷ In the case of damage, the operator is liable independently of fault (Art. 74). For the loss or abandonment of highly dangerous materials the owner is responsible. In the case of unlawful possession, the unlawful possessor is liable. The keeper is nonetheless liable, if he has culpably made the unlawful possession possible. If the victim came into the zone of danger without permission, the liability of the keeper can be reduced if it had secured the source of danger properly (Art. 76).

32. *Cf.*, *inter alia*, JULIANE KOKOTT/A. KLAPHAKE/S. MARR, ÖKOLOGISCHE SCHÄDEN UND IHRE BEWERTUNG IN INTERNATIONALEN, EUROPÄISCHEN UND NATIONALEN HAFTUNGSSYSTEMEN (2003); Eckard Reh binder, *Ersatz ökologischer Schäden*, NATUR UND RECHT (NuR) 103 (1988).

33. *Cf.* EC Environmental Liability Directive, 2004/35/EC, OJ L 143/56 of 30.4.2004, amended 2006, OJ L 102/15.

34. See, especially, Art. 1079 CCRF; Art. 927 para. único BCC; for a comparative treatise, see MICHAEL R. WILL, QUELLEN ERHÖHTER GEFAHR (Munich, C.H. Beck 1980).

35. RESTATEMENT OF TORTS vol. 3, §§ 519-520 (1938); RESTATEMENT (SECOND) OF TORTS vol. 3, §§ 519, 529 (1977); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM vol. 1, § 20 (St. Paul, MN, ALI Publ. 2010).

36. On this, see below in the text.

37. *Cf.* already the list in Art. 123 of the General Principles of Civil Law of 1986.

III. BRAZIL

The new Brazilian Civil Code (BCC), the successor of the civil code of 1916, was endorsed by both chambers of the Congress and was promulgated at the beginning of 2002. It came into force on November 1, 2003. The BCC is the first complete civil law codification of the 21st century. The structure of the new BCC does not differ dramatically from that of its predecessor of 1916. It similarly contains a General Part with three books (*personae, res, actiones*) and a Special Part with books on the law of obligations, enterprises, property, family and succession. Within the law of obligations, Title IX on Civil Liability is divided into two sections: grounds of liability (Arts. 927-943) and consequences of liability (Arts. 944-954).³⁸ Among the grounds of liability four cases are of interest: fault liability, general strict liability, product and service liability, and liability for others.

A. *Fault Liability*

As under the Russian code of 1996, the new Brazilian liability law is dominated by two general clauses, one pertaining to fault liability (Art. 927 in conjunction with Arts. 186 and 187 BCC) and another to strict liability (Art. 927 § único BCC).

The general clause on fault-based liability was already contained in the 1916 BCC.³⁹ Accordingly, it is not surprising that its structure remains bound to the natural law tradition of the great codifications of the 19th century. Article 927 provides: ‘Anyone who, through an illicit act, . . . causes damage to another is obligated to repair it.’ This builds on the notion of delict or illicit act in Art. 186 of the General Part.⁴⁰ The overall concept of ‘illicit act’ still refers to the culpable, reasonable individual, who has through his/her wrongful conduct injured the rights or legally protected interests of another.

Article 186 follows the type of delict featured in the German BGB: The culpable conduct must violate the rights of others (or their legally protected interests) and cause damage.⁴¹ Differently from § 823 (1)

38. The English text is available in BRÜGGEMEIER, *supra* note 6, pt. 3, ch. B/I, and in LESLIE ROSE, *THE BRAZILIAN CIVIL CODE IN ENGLISH* (Rio de Janeiro, Renovar 2008).

39. It was then somewhat inappropriately located in the General Part as a definition of a civil wrong/an illicit act (Art. 159, para. 1).

40. General Part, Book III under the heading of ‘Juristic Acts’: ‘A person who, by voluntary act or omission, negligence or imprudence, violates rights and causes damage to another, even though the damage is exclusively moral, commits an illicit act.’

41. Under the old general clause of Art. 159, para. 1, the focus was on the culpable violation of rights or on culpable damage.

BGB—but similar to the Japanese (1896) and the old (1930) and new Chinese law—there is no attempt exhaustively to define the protected rights and/or interests. The damage can be economic or non-economic (*dano moral*).

Fault in Article 186 is largely synonymous with negligence. Negligence as a kind of fault is neither defined here in the context of a civil wrong, nor—so far as is obvious—elsewhere in the BCC. Unlawfulness is (rightly) not explicitly mentioned as a pre-requisite of negligence liability.

B. Strict Liability

The pre-eminent innovation of the new BCC liability law is a general clause on strict liability. Additionally three conventional grounds of no-fault liability have been maintained: keepers of animals (Art. 936), building owners (Art. 937), and the inhabitants of buildings from which things fall or are thrown (Art. 938). Special historically-developed instances of strict liability for technical risks, for example in the law of railway transport, remain untouched.

In the foreground, there is now the general clause on strict liability, Article 927 § único BCC: ‘The obligation to repair the damage will exist, regardless of fault, in the cases specified by law or when the activity normally carried out by the person who caused the damage entails, by its nature, risk to the rights of others.’⁴² The exact formulation of such a general clause of strict liability can vary from legal order to legal order. The general basic idea is (or ought to be) to capture the novel risks of industrial-technical development. Next to the traditional concept of danger, which was based on endangerment through animals and natural occurrences, and the danger caused by wrongful human conduct, the modern notion of risk is developed here.⁴³ In other words, in Article 927 § único we are concerned with endangerment through complex machines and processes which are not fully controllable or whose risks are unknown or contingent. Such an approach is based more or less implicitly on the French *théorie du risque* and the German concept of *Gefährungshaftung*. Classic cases of such technical innovations were the emergence of industrialisation (steam engine, mining, steel, chemistry) and the development of traffic (railway, steamboat, automobile,

42. The English translation by Rose, *supra* note 38, is here misleading. Art. 927 § único speaks of a causer of damage (‘autor do dano’) and not of ‘a person’ (‘pessoa’!) who caused the damage by his/her (risky) activity.

43. See LUHMANN, *supra* note 2.

aircraft).⁴⁴ These phenomena were also partly brought under the remit of strict liability by special laws in Brazil, albeit slightly later due to its retarded industrialisation.

A noteworthy exception to this is the automobile, which next to steam navigation could become an important paradigm case of the general clause's application. It goes without saying that this holds true for novel risks as, e.g., presented by offshore oil drilling.

The extraordinary broad scope of Article 927 § único is astonishing. Whilst the US Restatements, which in this respect represent the model for the European reform initiatives,⁴⁵ tend to be more limited (e.g., to 'abnormally dangerous activities'),⁴⁶ and the Russian and Chinese strict liability laws are restricted in a similar way by the words 'increased risk' or 'high danger', Article 927 § único mentions only 'risks'. This is innocuous if the Brazilian judiciary and academic scholarship subsequently interpret this term in a manner that is consistent with the above mentioned theory, that is as high-risk activity.

Pursuant to the Code, there is no difference in the scope of protection under fault-based and risk-based (strict) liability. Both pecuniary and non-pecuniary loss can be compensated on the basis of Article 927 § único. There are no upper limits (caps) to liability. Exceptions to liability like *force majeure* are not mentioned but are applicable in the usual way.

C. Product and Service Liability

Product liability is only mentioned in one provision the new BCC (Art. 931). Strict liability for defective products and services is primarily regulated by special rules of the Consumer Defense Code of 1990 (CDC).⁴⁷ Article 931 contains a catch-all provision for strict liability in the rare cases not covered by the CDC, that is, when non-consumers are the damaged parties. In the DCD, the term 'consumer' encompasses every private or commercial end user of a product or service (Art. 2 CPA). This is, internationally, an extraordinarily wide formulation of the consumer concept. The class of non-consumers consists only of participants in the production and manufacturing chain, in which the trader forms the last link. If there is an instance of product liability between these links, strict liability under Article 931 BCC is applicable.

44. See generally Wolfgang Ernst (ed.), *THE DEVELOPMENT OF TRAFFIC LIABILITY* (Cambridge, CUP 2010).

45. See *PRINCIPLES OF EUROPEAN TORT LAW*, *supra* note 5, art. 5:101.

46. See references *supra* note 35.

47. Gesetz Nr. 8078/1990: Lei de Defesa do Consumidor: tit. I, ch. 2, § II (Arts. 12-25).

The concepts of product and service are also very widely-defined: ‘Product is any movable or immovable, material or immaterial asset;’⁴⁸ ‘service is any activity offered in the consumer market subject to remuneration, including those of (a) banking, financial, credit and insurance nature, except those resulting from a labor relation.’⁴⁹ The inclusion of financial services necessarily leads to the conclusion that pure economic loss is recoverable under the CPA; Articles 12 and 14 of which speak of damage which is caused by defective products and services respectively. To that extent, the Brazilian law goes much further in its application than the EU product liability directive of 1985, although it echoes the European enactment in respect of the concept of the defect and the potentially liable parties. A product is defective when it ‘does not offer the expected safety, subject to consideration of the relevant circumstances’.⁵⁰ Though the BCC liability for services was probably inspired by the proposal for a European Directive on the liability of service suppliers of 1991 (subsequently withdrawn),⁵¹ the concept of defect has been adopted largely unchanged.⁵² This leads to problems of demarcation between a defect and negligence, which also arise in Russian consumer protection law.

Service providers and product manufacturers are the addressees of strict liability. An importer is put in the same position as a manufacturer. Liability is excluded (i) if it is proved that the product was not placed on the market or the service was not performed, (ii) if there is an absence of any defect in the merchandising or the performance of the service, and (iii) if the cause of the damage was the fault of a consumer or a third party. For traders, as in EU law, there is a subsidiary liability in cases in which the manufacturer or importer cannot be identified.⁵³ In addition, a type of fault-based liability is foreseen for improper handling of perishable goods.

For service providers there is a proviso in respect of independent professional advisors, for example established doctors, lawyers in private

48. Art. 3 § 1 CPA.

49. Art. 3 § 2 CPA.

50. Art. 12 § 1 CPA. The three instances, known from Art. 6, para. 1 EU Product Liability Directive, are listed as examples.

51. Cf. Proposal of EC Directive on Liability of Service Suppliers, OJ C 12/8 of 18.1.1991 (withdrawn 1994). See generally ULRICH MAGNUS/HANS WOLFGANG MICKLITZ, LIABILITY FOR THE SAFETY OF SERVICES (Baden-Baden, Nomos 2006).

52. Art. 14 § 1 CPA.

53. Art. 13 CPA.

practice, etc. They are liable for fault pursuant to the general clause of Article 927 BCC.⁵⁴

In respect of known product dangers, corresponding instructions for use must be given. In instances where *development risks* become known, the product manufacturer or service provider is obliged to inform the respective authorities and to warn the end-user through widely advertised notices. Where this duty is not fulfilled, the party will apparently be liable under Article 927 BCC.

D. Enterprise Liability and Liability for Others

Between personal fault liability and strict liability for technical risks there is a lacuna which can be filled by a general quasi-strict enterprise liability—specifically a business liability for presumed ‘organisational fault’. The narrower the interpretation of the two general clauses, the larger the lacuna becomes. The Chinese law of 2009 acknowledges this quasi-strict liability explicitly in respect of hospitals.⁵⁵ In Russian law, it falls under the general liability for presumed fault.

Brazilian liability law seems not to follow this path. It orientates itself according to the conventional legal notion of ‘liability for others’; whilst nevertheless featuring some surprising new emphases. The relevant provision (Art. 932) governs the following four cases of responsibility for the damaging behaviour of other persons as types of quasi-strict or strict liability:⁵⁶

- liability of employers for damage caused by their employees in the context of their employment;
- liability of parents for damage caused by their minor children living with them;
- liability of tutors and caretakers for damage caused by children and wards in homes; and
- liability of hoteliers for damage to third parties caused by their guests.

First, Article 932 BCC contains the classic model of vicarious liability, according to which the employee must have engaged in wrongful conduct when acting in the scope of his/her employment. It leads to joint and several liability of employer and employee. The fault-free liability of parents for minor children, however, explores new territory. In Europe, it is only in the new French jurisprudence that we

54. Art. 14 § 4 CPA.

55. Arts. 54, 58 ChinAct.

56. The fifth case (gratuitous enjoyment of the benefits of a felony) is neglected here.

find a comparator.⁵⁷ The hotel proprietor's liability is peculiar to the Brazilian law. It has its roots in the no-fault liability of innkeepers (*caupones*) in Roman law. The employer or hotelier who has paid compensation is granted a right to recourse (Art. 934).

IV. RUSSIA

The new civil code of the Russian Federation (CCRF) was adopted by the State Duma in several stages at the end of the last century and after the turn of the century. Part I (General Provisions and Ownership) of 30 November 1994 became effective on 1 January 1995; Part II (Obligations) of 26 January 1996 on 1 March 1996; Part III (Succession and Conflict of Laws) of 26 November 2001 on 1 March 2002 and Part IV (Intellectual Property) of 19 December 2006 on 1 January 2008. Chapter 59 of Part II ('Obligations as Consequence of Causing Harm') contains the law of non-contractual liability.⁵⁸ The chapter is divided into four sub-sections with a total of 37 articles. The extensive first sub-section addresses the fundamental questions of liability; amongst them are the grounds of liability. These include, in Articles 1064 and 1079, the two characteristic elements of Russian non-contractual liability law: the general clauses on fault and strict liability. Sub-sections 2-4 focus on personal injury, liability for products and services, and on non-pecuniary loss.

A. *Liability for Presumed Fault*

Article 1064 contains the basic norm. It remains bound to the French tradition in the history of the Russian law of delict. Paragraph 1 is framed as a general clause similar to Article 1382 of the French civil code. In essence it reads: *damage to another shall be compensated by the person who caused it*. Thus, the Russian legislator, unlike the Japanese, Chinese and Brazilian legislators, does not follow the German BGB-like model of delict which differentiates between grounds and consequences of liability. Here, the focus is on the general term

57. Cass. civ., 19.2.1997 (Bertrand), D. 1997, 265.

58. The English text is available in WILLIAM E. BUTLER, *THE RUSSIAN CIVIL CODE* (London, Wildy, Simmons & Hill 2010) and on the official Web site of the Russian Federation, www.russian-civil-code.com. Cf., inter alia, CORNELIA S. WÖLK, *DAS DELIKTSRECHT RUBLANDS* (Frankfurt, Lang 2003); *Commentary by Christopher Osakwe*, in *RUSSIAN CIVIL CODE* pts. 1-3: text and analysis 177-320 (Moscow, Wolters Kluwer 2008); HIROSHI ODA, *RUSSIAN COMMERCIAL LAW* 339 ff. (Boston, Martinus Nijhoff Publ'g, 2d ed. 2007); Donald D. Berry, *Tort Law, Including the Tort Liability of the State*, in William Simons (ed.), *PRIVATE AND CIVIL LAW IN THE RUSSIAN FEDERATION* 211 ff. (Leiden/Boston, Martinus Nijhoff Publ'g 2009).

‘damage’, not on the infringement of rights or legally protected interests. However, Russian adherence to the French approach is tarnished by the addition of the requirement that the damage must be caused ‘to the person or the property of an individual, . . . (or) to the property of a juridical person’. This leaves unanswered the problem of the compensability of pure economic loss and excludes non-pecuniary personal interests like honour, dignity and privacy.⁵⁹

Contrary to the French model, however, neither intent nor negligence are mentioned in Article 1064, paragraph 1. Fault is only mentioned in paragraph 2: A party that has caused damage in the sense of paragraph 1 shall be relieved from compensation if he or she provides evidence that the damage was not caused through his or her fault. In other words, Article 1064 provides for a general reversal of the burden of proof for negligence. There is no possibility of exculpation if one of the cases of strict liability is present, such as that provided in Article 1079 in particular.⁶⁰ Fault comprises intent and negligence.⁶¹

The meaning of intent is not enlarged upon. Civilist fault is largely equated with negligence, which is defined in contract law under Article 401 paragraph 1.⁶²

This ‘liability for causing damage’ of the CCRF resembles in name only the law of delict of the European codifications of the 19th century. It is in fact a general quasi-strict liability as I have suggested, with regard to the liability of enterprises, in my writing.⁶³ The Russian liability law goes beyond that, covering also the personal liability of individuals. As already mentioned at the start, this is in line with Russian legal tradition since the Civil Code of 1922 and maintained in all its subsequent amendments.⁶⁴ Although induced by the ideological discussions on the

59. The protection of the latter is now for the first time dealt with outside of the liability law section in Part I, ch. 8 (‘Nonmaterial Values and their Protection’) of the CCRF (Arts. 150-152-1).

60. Art. 1064, para. 2, sent. 2 CCRF.

61. Art. 401, para. 1 CCRF.

62. ‘A person is considered not to be at fault (!) if under that degree of care and circumspection which was required of him according to the nature of the obligation and the conditions of commerce, he took all possible measures for the proper performance of the obligation.’

63. See, inter alia, GERT BRÜGGEMEIER, COMMON PRINCIPLES OF TORT LAW. A PRE-STATEMENT OF LAW 117 ff. (London, BIICL 2004); BRÜGGEMEIER, *supra* note 12, at 117-84; BRÜGGEMEIER, *supra* note 6.

64. The law of delict of the 1922 civil code comprised only 13 articles, including two general clauses: (i) liability for damages resulting from presumed negligence (Art. 403)—and (ii) strict liability for harm through sources of increased danger (Art. 404). The concept of presumed negligence in Art. 403 may be explained by the fact that liability here was originally designed as a sort of causer’s liability. Three defences were then available. The causer of the

role of the state and law in the early days of the Soviet Union, this is in fact a remarkable step in the emancipation of civil liability law from the natural law influences of the 18th and 19th centuries which continue to affect Western and Central European codifications to this day. It also enhances the functional difference and independence of private liability law from penal law. The prerequisites of (insurable) monetary compensation of losses among private law subjects are indeed different from those for a criminal offence which is prosecuted and sanctioned by the sovereign state power (e.g., by imprisonment). The focus of civil liability under Russian codes from 1922 onwards is appropriately on causation of damage and shifting of loss.

B. Strict Liability for Sources of Increased Danger

This stance is emphasized by the second basic norm of the CCRF's liability law. Article 1079 contains a *general clause of strict liability for sources of increased danger*.⁶⁵ This norm, too, has its origin in the Civil Code of 1922 (Art. 404), whose roots go back to 19th century's Czarist Russia. Art. 404 merely had given unadulterated expression to the principle based on these historic casuistic regulations: the beneficiary of a hazardous commercial enterprise also has to bear its risks. This is an indigenous main feature of Russian liability law—unbroken in spite of dramatic changes in the political system—which represents an earlier and more accentuated model compared to the line of US American Restatements of Torts⁶⁶ and the—as yet unfinished—central European reform discussion of the second half of the 20th century.⁶⁷ The new Article 1079 mentions the following examples of sources of increased danger: use of means of transport (railroad, steamship, automobile, aircraft), high tension electric power, atomic energy, explosive

damage was able to exclude liability by proving (i) that he/she had not been able to avoid the damage, (ii) that he/she had been authorised to cause the damage or (iii) that the damage had been caused through intent or gross negligence on the part of the injured party. It was not until 1938 that lack of negligence was explicitly included in the first category of defence. Art. 404 contained a special strict liability for persons and enterprises whose activities were connected with increased danger to their surroundings. It did only not apply in cases (i) of *force majeure* and (ii) of intentional or grossly negligent self-inflicted damage. See ALEXANDER DE FARIA E CASTRO, *DIE MERKMALE DER UNERLAUBTEN HANDLUNG IM SOWJETISCHEN ZIVILRECHT* (Tübingen/Basel, Erdmann 1969); LASZLO SOLYOM, *THE DECLINE OF CIVIL LIABILITY 195-229* (Rockville, Md., Sijthoff & Noordhoff 1980).

65. Cf. WILL, *supra* note 34, at 193-232.

66. Cf. references *supra* note 35.

67. Cf., inter alia, ERNST VON CAEMMERER, *REFORM DER GEFÄHRDUNGSHAFTUNG* (Berlin, de Guyter 1971); Hein Kötz, *Gefährdungshaftung*, in Bundesminister der Justiz (ed.), *GUTACHTEN UND VORSCHLÄGE ZUR ÜBERARBEITUNG DES SCHULDRECHTS* vol. II, at 1779 ff. (Cologne, Bundesanzeiger Verlag 1981).

substances, virulent poisons, etc. This list is not exhaustive. The courts are free to subsume other risky activities under Article 1079.

Liability lies with the operator of the source of increased danger. In the case of damage the operator can only be relieved of responsibility if he/she can prove that the damage was caused by *force majeure* or by intent on the part of the victim. If the source of increased danger was unlawfully appropriated by the possessor, it is the latter who is liable for the damage. If the proprietor has facilitated the unlawful seizure through fault of his own, he is jointly and severally liable for the damage together with the unlawful possessor.⁶⁸

C. *Liability for Products and Services*

All three states under scrutiny here first designed their product liability law within the ambits of special legislation which came into effect at roughly the same time (i.e., in the 1990s). This national consumer protection legislation reflected the spirit of the UN Guidelines of 1985.⁶⁹ The basic features of these provisions on product (and service) liability were afterwards transferred to the respective civil codes.⁷⁰

The rules of modern Russian products liability law are thus embodied in two overlapping statutory regimes, namely Articles 1095-98 CCRF and the Consumer Protection Act of 1992 (CPA).⁷¹ The provisions of Art. 14, paras. 1-3 and 5 CPA correspond with the articles of the CCRF. In the event of a conflict between the two legal regimes the rules of the CPA prevail.

The Russian product liability law is remarkably different in various respects from the product liability rules of the EU Directive, which has come to be regarded in the meantime as a role model internationally. To begin with, the rules are not limited to products (i.e., manufactured, movable goods). Instead, like the Brazilian consumer protection law, they aim to create a uniform, extra-contractual no-fault liability regime for products *and* services.⁷² Neither the term 'product'⁷³ nor the term

68. Art. 1079, para. 2 CCRF.

69. Cf. David Harland, *The United Nations Guidelines for Consumer Protection*, 10 J. CONSUMER POL'Y 245 (1987).

70. An exception is insofar the Brazilian civil code, which does not take over provisions on product liability.

71. In its version of 5.12.1995. On this in general, see, inter alia, Thierry Bourgoignie (ed.), *CONSUMER PROTECTION IN RUSSIA. PROCEEDINGS OF A CONFERENCE HELD IN MOSCOW DEC. 1994* (1995); Norbert Reich, *Consumer Protection in Countries of Emerging Markets: The Example of Russia*, 19 J. CONSUMER POL'Y 1 (1996).

72. Cf. comprehensively Reimann, *supra* note 22, 367 ff.

‘service’ is defined in the CPA. Article 1095 CCRF uses the terms ‘good’, ‘work’ and ‘service’. This terminology makes it clear that any object of a contract of sale,⁷⁴ work⁷⁵ or service⁷⁶ is in principle covered by the no-fault liability under Articles 1095-98 and under the CPA. Also included are thus construction works, (i.e., buildings), as well as transport of goods and persons, medical treatment, tourist services and financial services.⁷⁷ However, the no-fault liability only refers to consumer goods/works and consumer services (*consumption purpose*). There is a slight difference in the meaning assigned to ‘consumer’ in the CPA and its meaning in the CCRF. Pursuant to Article 1 CPA, a consumer is only a human being using the product or service for ‘exclusively personal (domestic) needs’. In contrast, under Article 1095, paragraph 2 CCRF enterprises and public authorities can also fulfil the ‘consumption purpose’.⁷⁸ At any rate, the acquisition of goods/works and the ‘purchase’ of services for commercial (‘entrepreneurial’) purposes fall under the basic norm of Article 1064 and therefor under the umbrella of enterprise liability with presumed ‘organisational fault’. One might say that this restriction of the scope of application to consumer-business relationships makes the Russian model *de facto* more ‘European’ than the EU product liability regime itself because the latter, according to the EC’s legal situation at the time—consumer protection as both an objective and a basis of competence in EC law—should have likewise been limited to consumer goods. Instead, the focus on consumer goods was shifted somewhat clandestinely to the sphere of law of damages where the compensability of property damage is restricted to damage to consumer goods.⁷⁹

Under Article 1095 CCRF and Article 14 CPA, the principal liability requirement is a defect of the good, work or service. The term ‘defect’ is defined in Article 1 CPA for contractual and non-contractual

73. Irritatingly enough, the term ‘product’ is used in the CPA throughout as a generic term comprising ‘result of work’ and ‘service’. *Cf.* especially the provision on liability: Art. 14 CPA.

74. Arts. 454-566 CCRF.

75. Arts. 702-768 CCRF.

76. Arts. 779-783 CCRF. This distinction between work and services contracts corresponds to the BGB law’s *Werkvertrag* and *Dienstvertrag*. Its roots go back to Roman law. *Cf.* M KASER/ROLF KNÜTEL, *RÖMISCHES PRIVATRECHT* § 42 (Munich, C.H. Beck, 19th ed. 2008).

77. *Cf.* the list in Art. 779, para. 2 CCRF.

78. An example given by Christopher Osakwe, *supra* note 58, at 297: A television set purchased for resale purpose would be a commercial use; a television purchased for the purpose of entertaining clients or employees would be a non-commercial use.

79. Art. 9 lit. b, EU Product Liability Directive. Consumer goods are, however, the restricted scope of the Directive 1999/44/EC of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, OJ L 171/12 of 7.7.1999.

purposes. Defect in the liability law context is a product's lack of 'safety for the consumer's life, health, property and to the environment under normal conditions of its use, storage, transportation and disposal'. Obviously this is meant as an objective standard which comprises defects in design, construction and production. Defective consumer information is dealt with separately.⁸⁰ It has been shown in the past, not least by the discussions in the EU and the failure of the EC Services Liability Directive of 1990,⁸¹ that it is problematic to use an identical definition of 'defect' with regard to both corporeal products and intangible services. In the case of services having no tangible outcome, particularly medical treatment,⁸² transport of persons and goods, and legal and financial consulting, a defect is tantamount to objective (organisational) negligence.

The defect of the product or the service must have resulted in injury to the life, health or the property of a person. Property damage must be to a thing other than the defective product itself. This scope of protection is in line with international standards. If the liability of suppliers of services is to comprise financial and non-financial services alike, one would have expected some rules on the compensability of pure economic losses but none is to be found in the legislative texts. The Russian law provides no ceilings for strict product and service liability.

Compensation of moral damage, however, can only be claimed by the consumer and any other injured party if the manufacturer or service supplier is at fault, or for presumed organisational fault.⁸³

Liability lies with the enterprise, the manufacturer of the product and the provider of the service. The term 'manufacturer' remains ambiguous.⁸⁴ The importer is not mentioned. The seller of the product is also subject to the no-fault liability regime (Art. 1096, para. 1), which again differs from the EU product liability model, but is in line with Chinese⁸⁵ and US product liability law.⁸⁶

There is no reference, positive or negative, in the Code to the *development risk* problem, and no mention of any post-marketing duty to

80. Cf. Arts. 1095, 1096, para. 3 CCRF.

81. Proposal EC Directive on Liability of Service Suppliers of 9.11.1990, OJ C 12/8 of 18.1.1991 (withdrawn 1994).

82. For a regulation of (non-contractual) medical liability, see now Arts. 54-64 Chinese Act of 2009 and above in the text.

83. Art. 15 CPA.

84. Art. 1 CPA defines manufacturer insignificantly as an enterprise 'manufacturing products for sale to consumers'.

85. See above in the text.

86. Cf. RESTATEMENT (THIRD) ON TORTS: PRODUCT LIABILITY (St. Paul, MN., ALI Publ. 1998); DAVID OWEN, PRODUCTS LIABILITY (St. Paul, MN., Thomson/West, 2d ed. 2008).

monitor one's products. In the first instance one can revert to the CPA which explicitly includes liability for development risks in cases of 'exclusively personal (domestic)' consumption. Article 14, paragraph 4 CPA, which has no equivalent in the CCRF, reads: '(a) manufacturer shall be liable for harm caused to the consumer's life, health or property as a result of the use of materials . . . irrespective of whether or not at the time of such manufacture the level of scientific and technological knowledge could help to reveal the specific attributes of such goods.'

V. SUMMARY

The article began with the statement that division of labour, mechanisation and technical innovation were the bases of wealth of modern industrial countries. As a result of these processes liability law was no longer preoccupied with individual wrongdoings and with dangers caused by wild animals or tangibles falling from buildings. To the fore came accidents caused by organisational shortcomings of industrial processes and risks created by industrialisation and technical development (steam engines, mining, steel, means of transport, etc.). The civilian tradition of Roman law did not offer answers to these new challenges. In hindsight, solutions were found in quasi-strict enterprise liability (for 'organisational fault') and in (general or special) headings of strict liability for technical risks. These two elements may be regarded as the contribution of liability law to the law of modern risk society. The latter, however, comprises more aspects, including especially a bulk of *ex ante* safety regulations by public law, and insurance. This article scrutinizes how the law of such powerful second-generation industrial societies like Russia, China and Brazil react to these challenges in their recent codifications.

It was in the aftermath of the October Revolution that Soviet Russian law broke in the most dramatic way with the bourgeois principle of fault (moral responsibility) as the foundation of liability. The civil code of 1922 focused exclusively on stricter forms of channelling liability to the causal source of the injury. It contained two general clauses for causing harm, one for causation by human conduct, the other for causation by failure of technical devices (high risks). The first clause soon developed into a ground of liability for presumed fault/negligence. Truly revolutionary at its time in the early 20th century, nowadays, nearly 100 years later, it can be considered as a model of 21st century liability law. The two characteristic elements of the civil law of risk society are present: quasi-strict enterprise liability for presumed 'organisational

fault',⁸⁷ and strict liability for high risks. Both general clauses are complemented by classic vicarious liability of employers for (presumed) faulty acts of their employees.

The Brazilian law has analogies in structure, but differs in content from the Russian law. It, too, is characterised by two general clauses. With these two general clauses—one an old-fashioned personal fault liability, and the other a strict liability for 'risks'—it combines the laws of the two worlds of the 19th and the 21st century. Unlike most other legislative attempts to tackle the problem of strict liability by restraining its scope of application, the risk category here remains extremely indeterminate and leaves much discretion to the courts. Brazilian liability law acknowledges no-fault vicarious liability for damage caused to others, and is explicitly strict with regard to parents' liability for their minor children.

The Chinese law follows a different path. It is characterised by a rather depleted personal fault principle and a broad variety of grounds of stricter liability for commercial activities—from enterprise liability of public venues and organisers of mass events, to hospital liability for presumed 'organisational fault', to far-reaching strict products liability. Highly risky activities are governed by a general clause, but supplemented by specified grounds of strict liability for technical devices. The environmental liability remains rudimentary.

Strict products liability, which grew out of (implied) warranty and enterprise negligence law, is dealt with separately as a special case in all three legal systems. However, whether the uniform treatment of strict products *and* services liability in the Brazilian and Russian law will stand the test of time remains to be seen.

Summarising the summary, one can state that there is a significant move towards stricter forms of liability in the legal regimes under scrutiny. The clarification of remaining complex doctrinal problems, such as the relationship between quasi-strict enterprise liability and risk-related strict liability and—within the latter—between special grounds and a general clause solution, is left to academic reflection and to further legal development.

At any rate, new actors have entered the legal scene and delivered innovative and challenging contributions to the emerging law of risk society. European juristic academia has to take them into serious consideration. After the turn of the 21st century, the international

87 Although still closely interwoven with personal liability for individual negligence.

discourse on non-contractual liability—law of delict and torts—has definitely become global.