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# Explanatory Report to the European Convention on Civil Liability for Damage caused by Motor Vehicles

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I. The European Convention on Civil Liability for Damage caused by Motor Vehicles, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Legal Co-operation (CCJ), was opened to signature by member States of the Council of Europe on 14 May 1973.

II. The text of the explanatory report prepared by the committee of experts and submitted to the Committee of Ministers of the Council of Europe, as amended and completed by the CCJ, does not constitute an instrument providing an authoritative interpretation of the text of the Convention, although it might be of such a nature as to facilitate the application of the provisions therein contained.

III. The texts of Resolutions (73) 8 and (73) 18, adopted by the Committee of Ministers of the Council of Europe on 22 March and 13 April 1973 respectively, on the proposal of the CCJ are also reproduced here. These resolutions concern on the one hand, the compulsory insurance of the liability established by the European Convention and, on the other, the position of foreigners as regards guarantee funds.

## Introduction

1. Road traffic causes a large number of accidents and it is to be feared that the number of accidents will continue to increase. The large number of traffic accidents and the circumstances in which they occur prompt the question whether existing systems of civil liability meet the needs of the situation or will continue to do so.

Also the motor vehicle, which has become one of the basic means of international transport, is subject to legal systems of liability which differ from one State to another.

Therefore, action is necessary in two ways: on the one hand, to improve the situation of traffic victims and to facilitate the settlement of claims, and, on the other hand, to unify the rules of the various States relating to the civil liability of motorists.

2. In 1965, the Irish delegation to the European Committee on Legal Co-operation (CCJ) raised the question of whether it would not be appropriate to abolish the "fault" principle in respect of compensation for damage caused by motor vehicles. At the VIth Conference of European Ministers of Justice, held in Berlin from 25 to 27 May 1966, the Irish delegation presented a brief report on this problem.

3. On the proposal of the CCJ, the question of the civil liability of motorists was included in the Intergovernmental Work Programme of the Council of Europe for 1966-67, and a committee of experts was created to study it. Later the committee of experts was authorised to prepare texts of a legal character. Finland, Spain, the Hague Conference on Private International Law, the International Institute for the Unification of Private Law and the Commission of the European Communities sent observers to the meetings of the committee. The European Insurance Committee and the World Touring and Automobile Organisation also participated in the work of the committee.

4. The committee of experts began by making a comparative study of the legislation on the civil liability of motorists in the member States. It found that the legislation in these States could be broadly divided into two groups:

(*a*) systems based on "fault", where the burden of proof is either on the victim (classical fault system) or on the defendant who, if he wants to exonerate himself, must prove that he did not commit a fault (system of presumption of fault);

(*b*) systems providing for liability without fault, i.e. where it is sufficient to establish a causal link between vehicle and damage (systems of presumption of liability and strict liability). This group could be sub-divided into different systems according to the defences available to the defendant (for example *force majeure,* intervention of a third party or fault on the part of the victim).

In this context, the committee examined, among other solutions, those put forward by Professor Tunc *(La sécurité routière* published by Dalloz, Paris 1966) who suggests that civil liability should be replaced by a type of accident insurance to be taken out by the owner of the vehicle. The victim of an accident (whether the driver of the vehicle or any other person) would obtain compensation for personal injuries directly from the insurer whatever the cause of the accident (except where the driver or victim had wilfully caused the damage, in which case he would lose all right to compensation). Compensation would also be paid for material damage suffered by persons outside the vehicle.

A comparative study on the different systems of liability was made by Professor Stark, member of the Swiss delegation; it is appended to this report.

5. In the light of this information, the committee examined the possibility of abandoning the fault system in respect of compensation for damage caused by motor vehicles.

The following arguments were put forward in favour of maintaining the fault system: the consideration that the system based on fault, with certain modifications, matches the most widely held moral convictions; that the maintenance of this system plays an important role in accident prevention to which public authorities and insurance companies attach great importance; the possibility of coping with the new problems of road traffic without having recourse to extreme solutions such as the abandonment of the notion of fault; the difficulty there would be in justifying such a reform in the field of road traffic while the principle of fault still remains in other equally important fields of law; and the consideration that fault systems can be operated without an undue amount of litigation, because the principles are well understood and not difficult to apply.

Contrary to this, numerous arguments were put forward in favour of abandoning the principle of fault and adopting a system of strict liability. They included the contradiction between the *de jure* and the *de facto* situation in many countries, which leads courts to stretch the notion of fault in order to compensate victims of accidents better; the argument that in the field of motor traffic the legal, moral and social considerations underlying the principle of fault are no longer justified; the general introduction of insurance which has reduced the consequences of liability for fault and facilitated the introduction of strict liability; the fact that the steady increase of road traffic has made it an everyday risk; the possible disproportion which may exist between the degree of fault and the damages which a person at fault may be required to

pay, and the fact that, under a system based on fault, the victim of an accident might not receive any compensation because fault on the part of the person causing the accident cannot be established; the consideration that a system based on fault has nowadays lost much of its importance for the prevention of accidents and that a system based on risk could play an equally important role (it was even argued that a system of liability does not play any preventive role); the consideration that the costs and delays of litigation are more evident under a fault system.

6. The committee did not want to give preference *a priori* to any one of these concepts. It decided to study the problems relating to civil liability of motorists, having as objectives to improve the situation of victims of road traffic accidents and to adopt a system likely to be acceptable to the greatest number of States.

Guided by these objectives, the committee prepared a draft convention which is based on the principle of risk.

Having regard to the present state of the law in Europe in this field, the committee felt that the system established by the Convention is preferable to that elaborated by Professor Tunc which presents aspects difficult for certain States to accept. The risk principle adopted by the Convention constitutes an appreciable advance over the fault principle from the point of view of a victim because by making it easier to identify the person liable it will secure a better protection for victims than a fault system and by taking into consideration the risk created by the vehicle will ensure some compensation in most cases (see paragraphs 22, 32 and 33 below).

7. Irrespective of the choice that might be made between the various possible bases for a system of civil liability, the committee, in amplifying the considerations set forth above, was anxious to stress the importance of an accident prevention policy for road traffic, although it was aware that the problems involved in implementing such a policy went beyond the limits of the legal sphere. The laws governing compensation for accidents might, however, influence accident prevention to some extent.

It seemed to some delegations that it was necessary to maintain and even increase a sense of personal responsibility on the part of the keeper or driver. They suggested that either new coercive measures, particularly in cases of drunken drivers, or administrative measures regulating more appropriately the conditions for the issue of driving licences or laying down suitable safety standards for vehicles using the roads might be envisaged.

Furthermore, it was pointed out that insurance premiums could be either increased or reduced, according to whether or not the vehicle insured had been the cause of accidents. Such variations in premiums would better reflect a just apportionment of the aggregate costs of accidents.

8. The committee has not dealt in the Convention with problems of insurance. However, it felt that it would be helpful if the liability provided under the Convention were covered as far as possible by compulsory insurance. Accordingly, it proposed that a recommendation be adopted on this question.

This recommendation invites the States to take all necessary measures to ensure that the liability established under the Convention is covered by compulsory insurance in a way which at least satisfies the requirements of the European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles of 1959. The committee realised, however, that the 1959 Convention does not deal with all aspects of civil liability. For instance, this Convention establishes liability with regard to members of the family for which there is no compulsory insurance by virtue of the 1959 Convention.

The committee felt that the costs of the reform proposed to States by the Convention would be very difficult to estimate; the acceptance of the economic consequences of this reform was essentially a political decision to be taken by the States.

9. Nothing in this Convention is intended to affect conflict of law rules. A court of a Contracting State which is determining an issue concerning liability for damage caused by a motor vehicle, which involves a foreign element, will remain competent to decide which national law to apply according to the conflict of law rules of that State. The problem of the law applicable in these cases is dealt with in the Convention on the Law applicable to Road Traffic Accidents prepared by the Hague Conference on Private International Law.

## Commentary on the provisions of the Convention

### Article 1

10. Article 1 specifies the obligations of the Contracting States.

The Contracting States undertake to bring their law into line with the provisions of the Convention. Each State will decide in what way this result will be achieved. No action will be required where a State's law is already in keeping with the provisions of the Convention.

11. Paragraph 2 obliges the States to transmit to the Secretary General of the Council of Europe any text adopted with a view to the application of the Convention. If no legislative action is to be taken because the law of the State (statute law or case law) already conforms with the provisions of the Convention or one of the options for which it provides and of which that State is availing itself, the State in question is required to submit a statement on the contents of its law on this matter.

### Article 2

12. This article defines the scope of the Convention, subject to the provisions of Articles 10 and 11.

13. Liability under the Convention is subject to two conditions: the damage must be "caused by the vehicle" which requires a causal link between the vehicle and the damage (see Article 4), and it must result from an accident "connected with traffic"; the latter expression was taken from the Hague Convention on the Law applicable to Road Traffic Accidents. The article does not give a definition for these expressions. The committee decided to leave their interpretation to the courts. The committee agreed, however, that the phrase "connected with traffic" should not be interpreted in a restrictive sense to imply, for instance, that the vehicle must in all cases be moving, but should be understood in a broad sense.

Regardless of whether the vehicle, at the time of the accident, is itself in use, the accident may be connected with the traffic in general and thus be covered by the article. This will be the case, for instance, if a vehicle is standing parked at the side of the road in such circumstances that it causes a collision, or if an unattended vehicle moves by itself from private grounds on to a road and thereby causes damage. According to the circumstances this may also be the case where damage is caused by the vehicle (or its equipment) during the loading or unloading of goods or passengers at the beginning, in the course of, or at the end of a journey. Another example is damage caused to a pedestrian on a footpath by the opening of a door of a parked vehicle.

Examples of cases where the Convention would normally not apply are an accident happening when a motor mechanic is repairing a stationary vehicle on the forecourt of a garage; and where the engine of a parked vehicle is being run, solely for the purpose of warming the passengers, and fumes from the engine harm them.

14. The expression "grounds open to the public" derives from the European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles. In the committee's opinion grounds are "open to the public" if the public has access to them, or is in fact using them, and if they are not reserved to certain categories of persons and steps are not taken to control entry. Where payment is required, the place may nevertheless be open to the public, provided the public has by right or in fact a general access, e.g. to a turnpike or a toll bridge. The same applies if a vehicle in contravention of traffic regulations enters an area reserved to pedestrians, e.g. a public park, pavements etc.

The expression "grounds open to the public" and the option referring thereto were inserted in Article 2 so as to enable States to adapt the Convention to their traffic rules.

15. Special mention was made of damage caused by vehicles taking part in motoring events such as those described as motor races or competitions for speed, reliability or skill in Article 4 (2) of Annex 1 of the 1959 Strasbourg Convention on Compulsory Insurance.

Many of the vehicles which take part in these events are not designed for use on the public highway and the very nature of this activity is contrary to, and not expected to conform to the normal rules of traffic. It is necessary to draw a distinction between damages caused by motor vehicles taking part in motor races or competitions on roads, tracks and circuits which are closed to the public, either permanently or temporarily, and in competitions held on public roads which are open to normal traffic. In the first case, if the Contracting State has limited the application of the Convention to roads or grounds open to the public, the Convention does not apply, and in the second case it does. To the extent that the grounds from which spectators watch these events are grounds which are open to the public, damage caused to persons in these grounds by a vehicle taking part in an event, even on a closed circuit, would also be inside the scope of the Convention.

In this context, it will, however, also be relevant to determine in each case whether the accident is connected with traffic and to what extent the victim has assumed an exceptional risk (see Article 12 (1) (d)).

**Article 3**

16. This article contains definitions of terms used in the Convention.

17. The definition in sub-paragraph (a) of paragraph 1 ("vehicle") derives from Article 1 of the two Vienna Conventions of 7 and 8 November 1968 on Road Traffic and on Road Signs and Signals.

The terms "vehicle" and "trailer" should, of course, be interpreted as including its equipment and accessories and having regard to paragraph 2 of Article 3 (which relates to trailers).

Paragraph (a) excludes expressly hovercraft and implicitly aircraft. But under Article 13 the Contracting States may apply the Convention to hovercraft, for instance when they "travel on the ground".

18. Sub-paragraph (b) of paragraph 1 contains the definition of "keeper" who, according to Article 4, is the person liable for the damage caused by the vehicle.

The committee thought it desirable that the Convention should give guidance on the person to be liable and not to leave it entirely to national legislation. Furthermore, it seemed desirable to designate a person who is easily identifiable. The presumptions contained in the definition meet this requirement. The keeper has been preferred to other persons, such as the owner, because by reason of his close relationship to the vehicle he is the most appropriate person. Several States have already adopted this system.

According to the third sentence, an occasional user who has taken possession of the vehicle illegally should be regarded as the keeper of that vehicle. When adopting this provision, the committee realised that in most cases it will be difficult for victims to recover damages from such illegal users themselves. Victims will, however, often be able, according to national law, to sue the original keeper if he was at fault or to obtain compensation from a guarantee fund.

The last sentence of the paragraph allows the Contracting States to adjust the definition contained in the Convention to the peculiarities of their own legal system.

In this connection, one delegation stated that under its law the occasional user of a vehicle would, under certain conditions, be considered to be the keeper of the vehicle even if he had not taken possession of the vehicle illegally.

19. Paragraph 2 which relates to "damage caused by a vehicle" complements in some degree the definition contained in paragraph (a). The definition in paragraph 2 excludes from the scope of the Convention accidents caused by trailers in other circumstances, for instance, when it is moved by hand or when it is parked after having been detached deliberately. The committee considered that a State wishing to apply the Convention to these cases could do so by virtue of Article 13.

**Article 4**

20. This article states the general principle of the civil liability of keepers of motor vehicles. This is a liability irrespective of fault. Only in the cases provided by the Convention will the keeper be exonerated wholly or partially from his liability for damage caused by the vehicle.

Paragraph 2 has been inserted in order to make allowance for the legislation of certain States which treat the insurer as liable and not the keeper of the vehicle.

**Article 5**

21. This article deals with contributory negligence. The use of two expressions "victim" and "persons suffering damage" is to make clear that not only the fault of the victim should be considered but also the fault of the person claiming damage, e.g. in the case of the death of the victim.

22. The committee decided not to lay down detailed criteria for the weight to be given to the fault of the victim. It preferred to leave this to the courts, which should thereby take account of the circumstances of the accident as described in Article 9.

This leaves also to the courts the question if and to what extent minor faults of the victim should be taken into account. The hope that Article 5 will be interpreted in a manner favourable to the victim is encouraged by the consideration that the courts will take into account the circumstances of the accident, including the inherent risk of the vehicle, and also the evolution of the jurisprudence in the different countries.

The related question if and to what extent a victim who has voluntarily exposed himself to an exceptional risk is entitled to claim damages has been dealt with in Article 12, paragraph 1 (d).

23. Paragraph 2 applies the rule of paragraph 1 in circumstances other than fault in which the keeper would have been liable for the damage, had it been suffered by a third party, e.g. when a person or animal for which that person is liable has contributed to the damage.

**Article 6**

24. This article deals with a case where there is an accident involving two or more vehicles and damage is caused by one or more of these vehicles to a person other than the keeper of a vehicle involved in the accident, i.e. a third party. Each keeper of a vehicle which caused damage to the third party is made liable for all the damage suffered by the third party.

25. Although a vehicle may be involved in an accident causing damage to a third party, that vehicle may not have caused damage to the third party. In such a case the keeper of the vehicle would not be liable to the third party.

If a keeper of a vehicle involved in an accident himself suffered damage, he would not be a third party for the purposes of this article; the liability of the other keepers to him would be governed by Article 7.

26. In order to compensate victims as completely and quickly as possible, the committee established the principle of the liability in full of the keepers causing the damage. As the victim is thus entitled to obtain full compensation from any of the keepers whose vehicles caused damage, the risk of insolvency or of the non-identification of a keeper is reduced. Paragraph 2 of the article contains a rule governing the apportionment of liability between keepers who are liable in full. The expression "joint and several liability" has not been used in the text so as to avoid any implication that certain technical rules associated with that expression in common law systems are entailed.

27. The liability in full provided for in paragraph 2 is to be interpreted in the light of Articles 8 and 10. It follows that, if the victim is a driver and the appropriate national law makes the provision envisaged in Article 10, paragraph 2, the keeper of the vehicle concerned will be exonerated. It follows also that, if a keeper other than one who is exonerated from liability by Article 10 is sued by the victim, he will not be liable, according to Article 8, for the share of the damages which would fall on the exonerated keeper apart from Article 10. Paragraph 2 is to be interpreted in the light of Article 9.

**Article 7**

28. This article deals with damage suffered by keepers, particularly in the case of collisions.

29. The committee decided not to lay down the principle of liability in full as the governing rule but considered that each keeper involved in an accident occurring between several vehicles and thus liable under Article 4 should be liable only for the share of damage for which he was answerable under the provisions relating to apportionment of liability (Article 9). This solution has the advantage of limiting recourse actions between keepers.

30. The last sentence of the article, however, enables the Contracting States to make provision for liability in full. This sentence has been drafted sufficiently widely ("may provide... for liability in full") to allow national legislation to adopt the system of full liability which it considers to be the most appropriate. It also allows the principle of liability in full to be applied to all the keepers without distinction, or only in respect of certain keepers. In any case, the practical consequences of the differences between liability in full and liability pro rata are to a considerable extent reduced by the provisions of Article 9.

**Article 8**

31. This article refers to cases where damage is suffered, as a result of an accident caused by several vehicles, by a person who is not entitled to claim compensation from one of the keepers of those vehicles. The cases are those provided for by Article 10 (damage to the driver, the vehicle or to things transported) and Article 12 (industrial accidents etc., assumption of risk etc.). Another case where a person suffering damage may not be entitled

to claim compensation is where there is a contract to that effect, provided that national law permits derogation by contract from the liability under the Convention.

In this case the other keepers are not liable to compensate that person for the share of the damages in respect of which that keeper is exonerated. For example, the owner of goods carried on a vehicle involved in an accident with another vehicle could not claim from the keeper of the other vehicle the share of damages in respect of damage to the goods which would be properly borne by the keeper of the carrying vehicle in the absence of Article 10. Another example would be a claim for compensation by an owner of a damaged vehicle who is not its keeper.

**Article 9**

32. Paragraph 1 of this article mentions circumstances to be taken into account in determining the contribution of the different vehicles which caused the damage, mentioned in the Articles 6, 7, 8 and in paragraph 3 of this article. It determines the way in which damages paid by the keepers to third parties and damage suffered by the keepers should be apportioned amongst them. The circumstances mentioned are those considered to be most important. They are, however, only mentioned by way of example.

In the law of most States this apportionment between the vehicles involved in an accident is at present based on fault only. In the view of the committee, fault should also in future be an important element. However, other circumstances should be taken into consideration, for instance the irregular behaviour of the vehicle due to circumstances other than fault, e.g. a defect of the vehicle, the intervention of a third party, the condition of the road etc.

33. Amongst the circumstances mentioned in paragraph 1 is the "inherent risk of the vehicle" which for the law of certain States is a new concept.

It exists already in the laws of some countries. In Swiss law, for instance where it has not been created by legislation, but by jurisprudence and by the courts-to put a vehicle on the road is considered as creating a "risk" for which the keeper is liable. The risk must not be considered only in respect of the other vehicle, however, but also in respect of the vehicle itself; while a motor-cycle is not dangerous for a lorry, it is dangerous for the motor-cyclist himself. A motor coach carrying passengers creates a special risk, not only for the other vehicles but also for itself.

In Swiss practice, the degree of danger of a vehicle is not fixed a priori according to the general characteristics of its construction (e.g. weight, speed, dimensions etc.); each case has to be considered on its merits. The characteristics of a vehicle are taken into consideration when they have had a special or decisive effect on the cause of damage. The special vulnerability of a motor-cyclist is considered to be of little consequence if, while travelling along slowly, he is hit by a fast car; the weight or power of a lorry is considered to be of little account if, in fog, a private car runs into it from behind. It is up to the Swiss courts to find out, by proceeding from a consideration of the general features of the vehicle to an evaluation of the actual case, the special elements of risk (i.e. the characteristics of a vehicle which had an influence on the cause or the extent of the damage), and to determine in the light of all the circumstances, the degree of risk which must be attributed to each vehicle involved in the accident.

34. The provision of paragraph 2 deals with the, probably exceptional, case that none of the circumstances referred to in paragraph 1 indicates a specific apportionment. In that case, the liability should be apportioned equally between the keepers who caused the damage. The same rule has been adopted in Swiss law (Article 61 of the Law of 19 December 1958). The effect of the rule is best illustrated by giving an example: if there are five vehicles involved, every keeper has to pay one fifth of the damage suffered by the four other keepers and consequently receives four fifths of his own damage.

The provisions of this article of course in no way prevent insurers from adopting more simple rules for the apportionment of certain damages as between them, as they have done in the past.

35. Paragraph 3 refers to the special case where the share of the damages to be borne by one of the keepers cannot be recovered wholly or partially because one of the keepers liable cannot be identified or has no adequate means and is not effectively covered by insurance (either because he is not insured or because the insurer is insolvent). The committee considered that "the insure?' meant the insurer of the civil liability of the keeper in question.

The expression "in proportion to the contribution of their vehicle to the damage" means that the share of compensation falling to be paid by the keeper in question shall be divided between the other keepers having regard to the proportion of the compensation they were originally liable to pay according to paragraph 1; e.g. if three vehicles contributed to the damage A for 50 % of the damage and B and C for 25 % each-and keeper B was insolvent, his share will be divided between the two others, two thirds falling on A and one third on C.

However, if a State limits the amount of compensation (see Article 12, paragraph 1 (a)), the provisions of paragraph 3 shall not be interpreted as entailing any departure from the limit.

**Article 10**

36. The first paragraph of this article deals with the relations between the keeper of a vehicle and the owner of that vehicle or of the goods transported by that vehicle where damage is caused to the vehicle itself or to the goods transported. It does not exclude claims by the owner against keepers of other vehicles. It has the effect of excluding from those relations the application of the Convention except in the case of personal effects of a person carried. The committee considered that the principle of risk, which is fundamental to the Convention, should not be applied to the liability of the keeper of the vehicle for damage caused to the vehicle-which creates the risk-or to damage to goods transported by the vehicle.

The committee considered that paragraph 1 applied equally to persons and things transported in the trailer.

37. In regard to damage suffered by the driver of the vehicle, paragraph 2 allows Contracting States to make an exception.

Some experts thought that no compensation should be granted to a driver who had caused the damage as otherwise civil liability insurance would in practice be transformed into accident insurance. Other experts regretted the adoption of this provision, even though optional, because it might prejudice professional drivers whose position in respect of the rules relating to their liability was being studied by other international organisations, in particular by the International Labour Organisation.

Members of the keeper's family are not precluded from benefit under this Convention.

**Article 11**

38. This article contains exceptions to the application of the Convention, the exceptions in paragraph 2 being optional.

39. The purpose of the exception provided for in paragraph 1 (a) is to exclude from the application of the Convention damage caused by a vehicle while being used for some other purpose than as a vehicle, e.g. if used while stationary as a source of motor power for a machine or electricity for lighting a house in the country. Certain contractors' plant (e.g. concrete mixers mounted on a lorry) when they are not on the road but are simply in use on a site are also outside the Convention.

40. Paragraph 1 (b) excludes all nuclear damage from the application of the Convention. A similar provision is to be found in Article 8 of the Convention relating to the Unification of Certain Rules concerning Collisions in Inland Navigation, signed at Geneva on 15 March 1960. The difference is that this Convention leaves it to the law or to the courts to give a definition of nuclear damage. The main reason for the exclusion is that the risk of nuclear damage is a very special risk which in most countries is very difficult to cover by normal motor vehicle liability insurance. Moreover, liability for nuclear damage is in most cases governed by special conventions or laws which make the operator of a nuclear installation exclusively liable for this kind of damage. Conflicts with those conventions and laws should be avoided. As a consequence of the provision of Article 13, the Contracting States may, however, extend the protection provided by this Convention to cases of nuclear damage.

41. The exception of paragraph 1 (c) follows the wording of Article 9 of the Paris Convention on Third Party Liability in the Field of Nuclear Energy.

42. Some experts considered that the exception provided for in paragraph 1 (c) was superfluous as, in the cases referred to in this sub-paragraph, the causal link between the vehicle and the damage would not exist and consequently the question would be covered by Article 4.

43. Paragraph 2 contains optional exceptions.

"Mopeds of low power and speed", included as an example in paragraph 2, were mentioned not because the committee wished to encourage the States to use the option in this respect, but because it was realised that there would be difficulties in some countries in subjecting them to the rule of strict liability, particularly as they were not registered.

Another category of vehicle besides those mentioned in the examples would be fair ground vehicles (such as dodgem cars). In many cases, however, damage caused by such vehicles would not come within the Convention because the accident would not be connected with traffic.

**Article 12**

44. Paragraph 1 of this article enumerates the subjects not dealt with in the Convention and referred to national law. However, this list should not be considered as exhaustive: the committee mentioned certain matters explicitly because consideration had been given to regulate these matters by the draft Convention, or because they were dealt with in other international conventions on civil liability.

45. As to paragraph (a), the committee thought it preferable not to specify in the Convention the nature of injuries giving rise to damages, in view of the difficulties of reducing the existing differences between national legislations in matters concerning the determination and definition of the elements of the injury (elements forming part of or not forming part of the estate of the injured person, material and immaterial injury etc.). The kind of damage giving rise to compensation is left to national law.

46. Equally the committee thought it advisable not to stipulate in the Convention any limit to the total sums awarded. Indeed, even assuming that all States were prepared to accept the principle of a limitation, the fixing of a uniform amount would run into considerable difficulty by reason of the different economic conditions prevailing in the various countries. In these circumstances it was considered preferable to leave this question to national legislation.

47. Paragraph 1 (b) refers partly to damages claimed by the victim against persons other than keepers, partly to the relationship (recourse actions) between a keeper liable under Article 4 and third parties. The background for this last provision is the fact that the keeper, because of his strict liability according to Article 4, cannot allege the contribution of a third person who is not keeper in order to exonerate himself wholly or partially from liability towards the victim.

48. Paragraph 1 (d) is complementary to Article 5 in the sense that it leaves an option to the States to assimilate to a victim at fault a victim who accepts the risk of damage in the cases mentioned in this paragraph.

On this subject one delegation stated that its government intended, when introducing the Convention into its national law, to provide that compensation would be awarded only in exceptional cases if the victim was himself driving or deliberately let himself be driven in the vehicle causing the damage, although he knew or was bound to understand that the vehicle had been criminally taken from the rightful keeper by an offence or that it was being used in connection with a crime or that the driver was driving illegally under the influence of alcohol or of another intoxicant or narcotic.

49. Paragraph 2 refers to two cases. The first is where injuries are caused to a third party concurrently by a person liable under the Convention (keeper of a vehicle) and another person (not a keeper) whose liability is also based on risk under national legislation (e.g. the owner of an animal, tramway, railway etc.). In such a case national law may provide that his liability and the apportionment in relation to the keeper is the same as if he were a keeper.

50. The second case is where the person strictly liable suffers damage, e.g. there is a collision between a vehicle for which there is liability governed by the Convention and a vehicle or another means of transport for which there is a strict liability under national law. The national law of each Contracting State may provide that Articles 7 and 9 shall apply to accidents in which such vehicles are involved. Thus, the damage suffered by the tram or train operator and keeper of the vehicle would be apportioned as if both persons were keepers.

It should be noted that, if a Contracting State does not make the provision envisaged by Article 12, paragraph 2, the question of damage suffered by persons made strictly liable will be dealt with under Article 5, paragraph 2.

51. Paragraph 3 leaves it to the law of each Contracting State to solve possible conflicts between provisions concerning workmen's compensation or social security and civil liability under this Convention, when such conflicts exist in respect of the relations between the keeper and the victim, on the one hand, and between the keeper and other keepers involved in the same accident, on the other hand. Among the questions to be considered in this context is the problem of the application of Article 8, paragraph 1.

**Article 13**

52. This article authorises the Contracting States to adopt rules more favourable to victims of traffic accidents.

The committee was actuated by concern to improve the rules of civil liability in cases of damage caused by motor vehicles, while taking into account to a certain extent various essential needs peculiar to the countries concerned. The committee did, however, leave it open to the Contracting States under the terms of Article 13 of the Convention to adopt rules more favourable to injured parties (except with regard to the relationship between responsible keepers, so that the balance of the Convention might be preserved in this last respect) and to apply the Convention to accidents, damage or vehicles other than those mentioned.

**Articles 14 to 20**

53. The final provisions (Articles 14 to 17, 19 and 20) were drawn up in accordance with the model approved by the Committee of Ministers of the Council of Europe for European Conventions and Agreements drawn up within the framework of this Organisation.

**ANNEX**

Brief comparative survey of the different bases for legal rules on compensation for damage caused by motor vehicle accidents

**Study by Professor E. Stark, Member of the Swiss delegation**

Motor vehicle accidents and the damage which results from them can be regarded as an inevitable consequence of our present way of life, inevitable in the same way as natural disasters. It may therefore be justifiable for the community to meet the victim's need for compensation. This is a *social insurance* measure, analogous to the care taken by a father to safeguard the welfare of his children, though in this case it is not clear why the victim of a traffic accident should alone benefit from social assistance, and not a person who falls down a slippery flight of steps. From the social point of view, a broken leg is still a broken leg whatever the cause; any discrimination on the basis of the cause seems unjust. Under this system the contribution of the victim to the damage is not taken into consideration, with the exception of extreme cases.

This system is reflected in all the proposals to replace civil liability by a social or similar insurance against accidents (the Tunc project etc.), i.e. against objective liabilities in general no account, or very little account, being taken of the causes contributing to the accident.

On the other hand, if motor vehicle accidents are not regarded as an inherent disadvantage of our way of life which must be accepted with fatalistic resignation, but are regarded as a consequence of the behaviour of the individuals responsible, then the *law on civil liability* takes the place of the social welfare approach, making the person who caused the damage either more or less directly-responsible.

Systems based on liability for causing damage correspond to a generally felt sense of justice.

In any legal system, liability does not arise from any cause whatever, but only from certain causes to which legal consequences attach. One of the major grounds for liability is *fault,* which creates obligations under all the systems of European law.

Furthermore, the legislation in a number of States views certain *risks* as grounds for rendering a person liable; a person creating a precisely defined source of specific dangers is held responsible for any consequences giving rise to damages. Underlying this approach is the idea that the creation of potential dangers should in fact be forbidden by the State. However, while certain risks have to be tolerated for economic or other reasons, the person creating them must in return pay for the damage which they cause. But besides the dangerous situation brought about by a particular cause, fault on the part of the persons involved in the accident must also be taken into consideration as a cause in law. It is in this respect that liability for risks created differs basically from objective liability based on considerations of social welfare.

On the basis of these three fundamental systems of indentification, the particular questions which may arise in relation to accidents involving motor vehicles are settled in the following ways:

*1. Exoneration from liability*

The system of *social insurance* compensation should not logically allow for any exoneration, since it is based not on the cause of the accident but on the resulting need for compensation. Nevertheless, projects of this kind make provision for exoneration in the case of malice of the victim (cf. the Tune project, Article 10).

*Liability for fault* disappears when the person involved has committed no fault which has a cause-and-effect relationship with the damage. The question of proof and the way in which the onus of proof is distributed of course plays an important part in this.

*Liability for risks created* disappears where the causal link between the cause which gives rise to liability (the use of a motor vehicle) and the damage is broken by *force majeure,* gross negligence committed by the injured party, or by a third party.

However, such exoneration is possible only if the keeper or the driver has committed no fault.

2. *Reduction of the indemnity*

Such reduction is in fact contrary to the system of compensation under *social insurance.* Nevertheless, the projects in question make provision for grounds on which the indemnity may be reduced. In the Tunc system, the judge may reduce it in view of the circumstances, particularly the victim's family obligations, in cases where the injured third party has been sentenced to at least two weeks' imprisonment.

In the system of *liability for fault,* the fault of the victim himself would appear to be the principal grounds for reduction. The rate of liability corresponds to the relation between the fault of the person causing the damage and the fault of the injured third party. Furthermore, some systems of law e.g. in Switzerland-provide for the possibility of a reduction in compensatory damages because of chance having contributed to the damage.

In the system of *liability for risks created,* the fault of the injured party i.e. any fault which appears significant in respect of the risk in question-is grounds for reduction of the indemnity.

*3. Indemnification of other keepers of vehicles (collisions between vehicles)*

Whether the injured third party is himself a motorist is irrelevant in the system of compensation under social insurance. In the system devised by Professor Tunc, the damage to the driver is indemnified by the insurer of the vehicle which he drives, regardless of whether or not he is involved in a collision (Article 6).

In the case of *liability based on fault,* the fault of the other driver is also taken into consideration as grounds for reduction, just as the fault of a pedestrian or cyclist. Where the other driver has committed no fault, the only fault being that of the person responsible for the damage, such damage is indemnified in full.

Where *liability based on risk is* concerned, the injured keeper's compensation is reduced because the fact of his vehicle being used is considered one of the causes of the accident. It is because of the risk created by the use of his vehicle that he is liable vis-à-vis third parties, even though he is not at fault. Consequently, he must accept this fact as grounds for reduction when he is himself an injured party. In addition, he must accept a reduction in proportion to his own fault, where applicable.

*4. Relationship with other causal liabilities*

This question arises when the persons involved in a traffic accident are causally responsible for the damage, not as keepers of motor vehicles but on other grounds (e.g. as keeper of an animal, a railway etc.).

The *social insurance* approach can satisfactorily solve this problem of several causes contributing to liability only if it replaces all the kinds of liability by social insurance. Article 15 of the Tunc project simply excludes other claims against cyclists and pedestrians, without mentioning keepers of animals or of a railway, for example.

Where liability depends on cause *(fault* or *risk created),* there is no difficulty. If another person who is causally liable is injured, his involvement in the accident for the cause of which he is liable is regarded as grounds for reduction. But if a third party is injured, the persons causing the accident are responsible in full for his damages and the indemnity paid is allocated among them in accordance with the principles of full (joint) liability.

5. *Calculation of damages*

The *social insurance* system implies a set pattern for compensation, while in the systems of *liability for fault and risk created* the factor considered is the actual damage, defined in accordance with the personal situation of each party.

*6. Limit of indemnity*

It is in keeping with all systems of *social insurance* that limits should be set on compensation. Thus the Tune system provides for a maximum income to be taken into account (Article 7 (c)) and for an uninsured portion for material damage (Article 9, paragraph 1).

These limits on liability are not present in the system of *liability based on fault*.

In the system of *liability for risk created*, any form of limitation is of course foreign to the system. But such limitation does play an important part in certain areas of law. Limitation to a maximum per person rather than to a maximum income to be taken into account can lead to injustices, in that a seriously injured person will be indemnified only for part of his damage, while another less seriously injured person, involved in the same accident and with the same income, will be fully compensated.

**Comparative table**

| | Social insurance/ Objective liability / Tunc and others | Liability for fault | Liability for risks created |
|---|---|---|---|
| Grounds for liability | Need | Fault | Risk created |
| Exoneration | None in theory; applicable in fact in case of wrongful intent by the injured party | No fault | Break in causal link as result of *force majeure* or gross negligence of injured party or a third party |
| Reduction | None in theory; applicable in fact in case of gross negligence of the injured party | Concomitant fault of injured party | Any concomitant fault of apparent practical significance |
| Collision with other vehicles | Each driver is compensated by his own insurance | Respective liability in accordance with fault | Account taken of the causes for which the different drivers are responsible |

| | Social insurance/ Objective liability / Tunc and others | Liability for fault | Liability for risks created |
|---|---|---|---|
| Involvement of other persons with causal liability | Problem unsolved, probably insoluble | Account taken of the causes for which the different drivers are responsible | Account taken of the causes for which the different drivers are responsible |
| Calculation of damage | Schematic | Assessed individually in accordance with actual circumstances | Assessed individually in accordance with actual circumstances |
| Limit of compensation | Maximum income taken into account, uninsured portion for material damage | None | Unnecessary and contrary to the system. However fairly widespread with maximum damage limits on total |

**RESOLUTION (73) 8**
on the compulsory insurance of the liability established by the European Convention on Civil Liability for Damage caused by Molor Vehicles

(adopted by the Committee of Ministers on 22 March 1973)

The Committee of Ministers,

Having regard to the European Convention on Civil Liability for Damage caused by Motor Vehicles;

Considering that it is desirable to guarantee the rights of traffic victims by compulsory insurance,

Recommends the governments of member States to take all necessary masures to ensure that the liability established under the European Convention on Civil Liability for Damage caused by Motor Vehicles is covered by compulsory insurance in a way which at least satisfies the requirements of the European Convention en Compulsory Insurance against Civil Liability in respect of Motor Vehicles.

**RESOLUTION (73) 18**
on the position of foreigners as regards guarantee funds

(adopted by the Committee of Ministers on 13 April 1973)

The Committee of Ministers,

Considering that the European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles has not yet come into force in all member States;

Considering that at the present tirne certain States do not allow foreigners to benefit from guarantee funds unless reciprocity is ensured;

Considering that this fact combined with the continuous increase in motor traffic across frontiers, means that a very large number of persons are, to a certain extent, deprived of protection since, as foreigners, they are unable to enforce against a guarantee fund rights to which only nationals are entitled,

Recommends the governments of member States, pending the coming into force of the Strasbourg Convention on Compulsory Insurance in all the member States, to extend on their territory the protection provided by their guarantee funds to nationals of and permanent residents in other member States, if necessary by the conclusion of bilateral agreements.