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# Protected Interests under the Principles of European Tort Law (Art 2:102 PETL) – Preserving the Past for Shaping the Future

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**Abstract:** The paper examines gaps and potential amendments of art 2:102 of the Principles of European Tort Law (PETL) on the scope of protected interests in tort law, also in light of Prof Bénédict Winiger's teachings on the history of tort law. To this end, the paper starts by highlighting the many strengths of art 2:102 PETL, focusing in particular on its ability to capture continental European identity and its inherent flexibility, making it resistant to time and compatible with multiple interpretations. It then delves into what may be undertaken to further strengthen art 2:102 PETL. Rather than modifying the provision, the paper suggests that what is most needed is further empirical research about the real world of European tort laws and a more transparent discussion about the functions that tort laws do, and could, perform.

## I Introduction

To celebrate Bénédict Winiger and his wide-ranging scholarship is a great honour. It is also a daunting honour, given his intellectual stature and the breadth of the topic assigned to me by the organisers of this issue: art 2:102 of the PETL and the scope of protected interests in tort law.

Luckily, the organisers provided us with clear instructions on how to approach the topic, asking us to focus on gaps and/or potential amendments of the PETL provisions. In the following, I will follow these instructions by analysing the current and prospective role of art 2:102 PETL within the framework of continental European tort laws. But allow me to be clear from the beginning: I have little to say on possible amendments to art 2:102 PETL, which appears to me to be a uniquely flexible summary of continental European legal identities. What I think may be most fruitful lies behind and beyond the current text of art 2:102 PETL. I am referring to

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the need for further empirical research and for a more transparent discussion about the functions of tort law, along the lines of the work carried out in the last 25 years by the European Centre of Tort and Insurance Law (ECTIL) and, more recently, by the Institute for European Tort Law (ETL).[1]

To explain my point of view, I will first discuss, also in light of Winiger's teachings on the history of tort law, some of the many strengths of art 2:102 PETL, namely its ability to capture continental European identity (sections II-IV) and its inherent flexibility, making it resistant to time and compatible with multiple interpretations (sections V-VII). After discussing a few proposals for minor textual change (section VIII), I will delve into the reasons why I think additional research is needed (section IX). Before getting to this, though, I will start with some preliminary disclaimers about my ignorance vis-à-vis the PETL (section II).

## II Caveats

As the works of Winiger remind us, we are inevitably informed by our history and culture, both of which provide us with the lens through which we see the world. Since what we have been shapes what we are and how we think today, it is important that I preliminarily disclose a professional trajectory of mine that is likely to affect how I look at the PETL.

The disclosure is that I was involved neither in the works of the European Group on Tort Law (EGTL) on the PETL nor in the other scientific activities carried out in the past years by ECTIL and ETL, although I have always closely followed the work done by these groups, becoming greatly indebted to their monumental scientific work. My scientific tort upbringing has taken place under a different cultural and organisational framework – that of 'The Common Core of European Private Law' project,[2] one of the founders of which, Mauro Bussani, was my PhD mentor. One of the features of such a project is an ingrained scepticism towards attempts to harmonise European laws through codification, on the assumption that differences between European legal experiences, and especially between civil law and common law jurisdictions, runs as deep as our ignorance about them.

This is not the place to enter into such a debate. What I would like to emphasise is that, as an outsider to the EGTL, ECTIL and ETL, I may be missing much information about the intellectual and ideological background of the PETL. Some informa-

1 See, respectively, <http://www.ectil.org> and <https://www.oeaw.ac.at/etl/the-institute/about-us/>.

2 On the history and features of this project, see *M Bussani*/*M Infantino*/*F Werro*, The Common Core Sound: Short Notes on Themes, Harmonies and Disharmonies in European Tort Law (2009) 20 King's Law Journal 239–255.

tion is provided in the materials and commentaries explaining the PETL. For instance, the volume presenting the PETL clearly states that the PETL are based on a comparative overview of European legal systems, that their aim is to serve as a basis for the enhancement and harmonisation of the law of torts in Europe, that they are a result of compromises between the different views of the EGTL's members, and that they are intended to convey rules that, in some cases, restate the position of a majority of European legal systems and, in other cases, propose solutions that, although not corresponding to the majority of practice, were deemed to be the best by the drafters.[3] I do not have access to other information that may be useful to perform the task of prospectively assessing the contents of art 2:102 PETL. Is art 2:102 PETL meant to be descriptive of current European practice or should it be read prescriptively? If the latter, does art 2:102 PETL aim to encourage or limit litigation? Does it aim to maintain the status quo, to push for further developments, or to keep the floodgates shut? Is it addressed to European users or is it also thought to convey the European model beyond European borders?

All these questions, and others that may be raised, matter because, depending on the answers, the meaning and functions of art 2:102 PETL – and the related praise or criticism of the provision – may change. Letting the reader operate in the dark as to the answers to these questions is perhaps an intended feature of the PETL, aiming to leave room for alternative interpretations. Yet, this also implies that an outsider, such as myself, may read the provision through lenses (that are inevitably affected by their own background), which may be different from those assumed or wished for by the drafters of the PETL. I hope that, notwithstanding all possible misunderstandings, an outsider's view may still be useful.

## III A common core of protected interests?

Embracing an approach reminiscent of German tort law,[4] art 2:101 PETL defines damage as 'harm to a legally protected interest', whereby the following art 2:102 PETL sets out the hierarchy of protected interests and the factors that may affect their scope of protection.

At the top of the hierarchy are the rights to life, bodily or mental integrity, human dignity and liberty, which 'enjoy the most extensive protection' (art 2:102(2)). Property rights, including intangible property, enjoy 'extensive protection' (art 2:102 (3)), while 'protection of pure economic interests or contractual relationships may

**3** See *European Group on Tort Law* (EGTL), Principles of European Tort Law (2005) 14–16 nos 14–29.

**4** This is acknowledged by the PETL's drafters themselves: see EGTL (fn 3) 30 no 5.

be more limited in scope' (art 2:102(4)). Yet, the provision does more than merely listing the hierarchy of protected interests. As is well known, the PETL embraces the so-called 'flexible approach'[5] as the optimal balance between the need for legal certainty and the space for policy choices. Coherently with this premise, the factors affecting the scope of protected interests under art 2:101 PETL include the nature of the interest affected (art 2:102(1)), the proximity between the parties and the defendant's subjective state, especially in cases of pure economic loss (art 2:102(4)), the nature of liability (art 2:102(5)), the importance assigned to the defendant's freedom of action and the possible role of public policy (art 2:102(6)). Article 2:102 PETL thus takes a German-like perspective, according to which, the first inquiry in a tort law action is whether the plaintiff's alleged injury falls within the list of entitlements protected by tort law, and, eventually, whether the defendant's state of mind may lead to affirm liability notwithstanding the low rank assigned to the plaintiff's interest in cases of pure economic or contractual-related loss.[6]

Such an approach is ostensibly different from the one currently existing in many European jurisdictions, most notably in France and those following the French model. French statutory texts, scholarship and case law, although to different extents, do not rely on a pre-qualified list of protected interests, do not articulate 'pure economic loss' as a self-standing notion and do not regard 'intentional torts' as a special category.[7] Yet one cannot but agree with the PETL drafters[8] that, even in such countries, tort law gives priority to the protection of people's life, personality and property, that there are concerns in awarding compensation in cases of pure economic loss, and that the scope and extent of liability are consistently widened in cases of malicious acts.[9]

In a similar vein, the PETL drafters emphasise that 'something of the same nature [of art 2:102 PETL] is to be found in common law via the terminology of the duty of care, since a primary function of this duty is to identify the types of losses in respect of which liability is to be allowed, denied, or restricted'.[10] From this perspective, the notion of protected interest enshrined by (German law and) art 2:102 PETL can be seen as a functional equivalent to the common law notion of duty of care.

**5** EGTL (fn 3) 15 no 22.

**6** *BS Markesinis*/*J Bell*/*A Janssen*, Markesinis' German Law of Torts (5th edn 2019) 29.

**7** See, for all, *M Bussani*/*AJ Sebok*/*M Infantino*, Common Law and Civil Law Perspectives on Tort Law (2022) 11–14; *J Knetsch*, Tort Law in France (2021) 49–51, 150–151, 159–161.

**8** EGTL (fn 3) 33f, nos 12–14, 17.

**9** This conclusion is widely shared. See, among the many, *K Oliphant*, Comparative Report, in: B Winiger/E Karner/K Oliphant (eds), Digest of European Tort Law. Essential Cases on Misconduct (2018) 337–340, at 338.

**10** EGTL (fn 3) 30f no 5.

Undeniably, the English common law also shares with (German law and) art 2:102 PETL a presumption of non-recoverability of pure economic loss and intentional torts as a distinctive category.[11]

There is, therefore, no doubt that the general outline of art 2:102 PETL captures features that are widely shared among European jurisdictions. However, I would like to point out that a fundamental difference remains between the perspective embraced by the PETL (and by continental European jurisdictions) and that characterising English law and common law in general. In this difference lies another strength of the PETL, that is, their capacity to abridge contemporary *continental* European culture.

## IV Article 2:102 PETL and continental legal identity

A few historical and comparative observations may help substantiate this argument.

Under Roman law, different causes of actions, including that provided by the *lex Aquilia*, were available against specific kinds of aggression to persons and property.[12] Revisiting and substantially modifying Roman sources, the continental *ius commune* slowly elaborated a unitary vision of tort law as a remedy to the infringement of people's fundamental interests by strangers.[13] As early as the middle of the 17th century, Grotius already defined *Aquilian* responsibility as protecting not only property, but also life, body, honour and reputation.[14] That vision, although with substantial variations across countries, was later enshrined in national codifications and provided the legal basis around which subsequent developments have taken place – from the creation of collateral (public and private) mechanisms for the compensation of injury and the rise of the welfare state, to the progressive

**11** See eg *M Bussani*/*VV Palmer*, The liability regimes of Europe – their façades and interiors, in: M Bussani/VV Palmer (eds), Pure Economic Loss in Europe (2003) 139–141.

**12** *B Winiger*, La responsabilité aquilienne romaine: damnum iniuria datum (1997) 95–100; but also *J Sampson*, The Historical Foundations of Grotius' Analysis of Delict (2018) 35–61; *J Gordley*, The architecture of the common and civil law of torts: An historical survey, in: M Bussani/AJ Sebok (eds), Comparative Tort Law. Global Perspectives (2nd edn 2021) 160, 166–169; *E Descheemaeker*, The Division of Wrongs: A Historical Comparative Study (2009) 41–45; *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1996) 922–936, 975–993.

**13** *Winiger* (fn 12) 244–247; *Sampson* (fn 12) 13–24, 83–108; *Gordley* (fn 12) 185–192; *B Winiger*, La responsabilité aquilienne en droit commun : damnum culpa datum (2002) 213.

**14** *Grotius*, De Iure Belli, 2,17,2, at <https://www.dbnl.org/tekst/groo001bjad01_01/groo001bjad01_01_0062.php>.

legal empowerment of classes of people traditionally excluded from the legal system.[15]

One of the most evident results of such an evolution, besides the creation of a unitary regime (whether or not expressed in terms of a hierarchy of protected interests), is the remarkable shift of focus from the tortfeasor's damaging behaviour to the injured victim's condition – a shift that was already described in 1936 by Georges Ripert's famous statement that '*le droit moderne ne regarde plus du côté de l'auteur de l'acte, mais du côté de la victime*'.[16] In other words, on the European continent, tort law has come to be understood as a general remedy for the infringement of a *victim*'s interests, rather than as a source of selective duties of the *defendant* vis-à-vis the plaintiff.

In this viewpoint lies nowadays a distinctive character of the legal identity of continental European tort law. By departing from the ancient Roman legal perspective, continental European identity has also detached itself from the (historical and current approach of) English common law, which never articulated the notion of protected interests as a taxonomic category and rather has conceptualised torts around the tortfeasor's wrongful behaviour vis-à-vis specified classes of victims.[17] Although it may very well be that, at the functional level, the outcomes reached by the continental and English views coincide, the two views remain grounded in distinctively different ways of looking at tort law rules and remedies.

Against this framework, the choice of art 2:102 PETL to straightforwardly embrace the contemporary *continental* approach is both laudable and far-sighted.

From an intra-European perspective, this approach eases the internalisation of the PETL within continental jurisdictions, avoiding the costs associated with compromising with the common law – a compromise, which, in these post-Brexit times, appears less urgent than ever. From the extra-European point of view, the packaging in art 2:102 PETL of the gist of the continental approach in a clearly stated and easy-to-travel format promotes the external projection and global circulation of the civil law tradition. In a world of competing legal models in which dominant narratives and discourses often favour common law transplants over civil law ones, art 2:102 PETL and the PETL in general strengthen the capacity of continental Eu-

**15** This of course makes a very long story short. For a more detailed account, see for instance *M Lobban/J Moses*, Introduction, in: M Lobban/J Moses (eds), The Impact of Ideas on Legal Development (2012) 1, 11–19, 25–33; *M Martín-Casals* (ed), The Development of Liability in Relation to Technological Change (2010).

**16** *G Ripert*, Le régime democratique et le droit civil moderne (1936) 331.

**17** *Gordley* (fn 12) 174–179; *B Winiger*, La responsabilité aquilienne au 19ème siècle: damnum iniuria et culpa datum (2009) 467–475; *Descheemaeker* (fn 12) 189–199.

rope to dialogue with extra-European jurisdictions which have a civil law legacy in the Americas, in Africa, and in Asia.

## V Geographical varieties

Notwithstanding the distinctive ability of art 2:102 PETL to convey the gist of contemporary continental European tort law culture, and the general consensus about the hierarchy of interests it protects, the provision is subject to different readings throughout continental Europe.

Meanings assigned to notions such as 'life', 'bodily and mental integrity', 'human dignity' and 'liberty', 'property', and 'pure economic loss' vary greatly across and within jurisdictions, as much as they have greatly varied over time. Always and everywhere, the contours of these notions are bound, not only to legal constructions, but also to (often unverbalised) theories of justice, images of personal wholeness and visions of social bonds, which provide the context against which the interests protected by tort law are thought of and expressed.[18]

The ever-changing variety of the cultural contexts in which tort law is immersed explains why, even in today's Europe, similar injuries may be qualified differently, depending on the country in which the claim is grounded. For instance, the birth of a child with congenital defects that went undiagnosed because of medical negligence is nowadays thought of, under either contract or tort law, as an injury to the parents' life and right to self-determination;[19] yet, the same situation may also be seen as giving rise to an injury to the child's right not to be born with disabilities.[20] Giving birth to a healthy child because of a doctor's negligence in performing

**18** The point is often made by law-and-society scholars: see, among the many, *A Bloom*/*DM Engel*/*M McCann* (eds), Injury and Injustice. The Cultural Politics of Harm and Redress (2018); *M Galanter*, The Dialectic of Injury and Remedy (2010) 44 Loyola LA Law Review (Loyola LA L Rev) 1–10; but see also *M Bussani*/*M Infantino*, Tort Law and Legal Cultures (2015) 63 American Journal of Comparative Law (AJCL) 77–108.

**19** *BA Koch*, Wrongful Birth. Comparative Report, in: B Winiger/H Koziol/BA Koch/R Zimmermann (eds), Digest of European Tort Law. Essential Cases on Damage (2011) II, 932–935; *BC Steininger*, Wrongful Birth and Wrongful Life: Basic Questions (2010) 1 Journal of European Tort Law (JETL) 125–155.

**20** Cf Hoge Raad, 18 March 2005 (2006) Nederlandse Jurisprudence 606 (the so-called baby Kelly case) and Cour de Cassation, Assemblée plénière, 17 November 2000, 99–13.701 (2001) Juris-classeur Périodique I, 286 (later superseded by art L114-5 of the Code de l'action sociale et des familles; but see also Cour de cassation, civile, 1e, 15 December 2011, 10–27.473 (2012) Dalloz 12, holding that a child born with disabilities before the enactment of the said Code can claim damages from the doctor).

an abortion or a sterilisation procedure may be conceived as no damage at all,[21] or as a legally relevant harm, deemed either as an infringement of the autonomy and freedom of choice of the unwilling mother[22] or as an injury to the woman's health and body.[23] Loss of frozen eggs, sperm and human embryos by a hospital or clinic may be seen as a violation of their owners' right to property,[24] as an infringement of the holder's right of personality and self-determination,[25] or as no injury at all.[26]

But varying views of protected interests extend far beyond the highly contested field of human reproduction. For instance, the death of a beloved pet, negligently killed by a stranger, may be defined as property damage under French, Austrian and German law,[27] as an infringement of the personality of the pet owner under Greek and Italian law,[28] or as an infringement of no interest at all.[29] Or think of how the unfounded reassurance by an expert about the authorship of a painting, inducing a third party to pay a high sum for the painting, may give rise to an injury to the constitutional freedom to conduct an economic activity in Italy[30] but qualifies as an irrecoverable pure economic loss in Germany.[31]

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**21** For instance, this was the traditional position of Italian courts: see Corte di Cassazione, 8 July 1994, no 6464 (1995) Nuova Giurisprudenza Civile Commentata I, 1111 (now superseded by the case law mentioned in the footnote below).

**22** Corte di Cassazione, 24 October 2013, no 24109 (2014) Responsabilità civile e previdenza (RCP) 898; Corte di Cassazione, 5 February 2018, no 2675 (2018) RCP 639.

**23** Bundesgerichtshof (BGH), 8 July 2008, Case VI ZR 259/06 (2008) Neue Juristische Wochenschrift (NJW) 2846.

**24** See OLG Frankfurt, 14 January 1993, 15 U 68/91 (loss of frozen sperm; the decision was later reversed by the BGH's judgment quoted in the footnote below); cf with *Jonathan Yearworth & Ors v North Bristol NHS Trust* [2009] Court of Appeal, Civil Division (EWCA Civ) 37 (destruction of frozen sperm).

**25** Bundesgerichtshof (BGH, Sixth Civil Senate) 9 November 1993, BGHZ 124, 52 (loss of frozen sperm).

**26** ECtHR *Parrillo v Italy* [GC], 27.8.2015, no 46470/11 (refusal of a clinic to donate frozen embryos for research).

**27** Recovery for the infringement of property under the circumstances is allowed in France (*S Rowan*, France, in: VV Palmer (ed), The Recovery of Non-Pecuniary Loss in European Contract Law [2015] 226–228) and denied in Austria and Germany (*E Karner*/*BC Steininger*, Austria, ibid, 246f and *F Wagner-von Papp*, Germany, ibid, 236–240).

**28** *E Dacoronia*, Greece, in: VV Palmer (ed), The Recovery of Non-Pecuniary Loss in European Contract Law (2015) 228–229; *M Infantino*, Italy, ibid, 229–232.

**29** *H Koziol*, Value of Affection. Comparative Report, in: B Winiger/H Koziol/BA Koch/R Zimmermann (eds), Digest of European Tort Law. Essential Cases on Damage (2011) II, 749–752.

**30** Corte di cassazione, 24 May 1982, no 2765 (1982) Foro Italiano I, 2864.

**31** *M Reimann*, Germany, in: M Bussani/VV Palmer (eds), Pure Economic Loss in Europe (2003) 352–354. Although freedom is one of the rights protected by § 823 I BGB, the notion covers neither freedom of religion nor freedom to act, but is rather interpreted as referring to a person's freedom of movement: see *Markesinis*/*Bell*/*Jansen* (fn 6) 34.

## VI The time factor

The variability in the qualification of the relevant interests becomes even greater when one takes into account the time factor. Changing views about the notion of people's status, personhood and personality, and about the relationship between people, things and patrimonies, clearly have an impact on the appreciation of extra-contractual harms.

One of the clearest illustrations concerns the female condition. Regarding history in its *longue durée*, one can easily find that, until not so long ago, women were thought of as having diminished legal status, the relevance of which was mediated by the akin-to-property interests their fathers or husband held over their lives and bodies. In cases of a woman's 'seduction' (a polished legal word for what was often rape), the father/husband was allowed (that is to say, was the *only one* allowed) to sue his daughter's or wife's seducer for the damage that the latter caused to *his* honour or social status, rather than for the infringement of the woman's body and personality.[32] Still in the domain of personhood, one may think of how people in same-sex relationships have slowly moved from bearing zero significance in the tort law domain to be equated to family members in case of the death of one of the partners.[33] Some have proposed that the environment (or, in the words of the Supreme Court Justice William O Douglas, 'valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air'[34]) should be entitled to stand for their right not to be endangered or polluted, while recent criminalisation of violence against animals has led many to think that very soon, if not already today, animals themselves may qualify not only as fragments of their owners' patrimony or personality,[35] but as holders of rights and, in case of infringements of these rights, as tort law victims.[36] A similar trajectory is nowadays emerging for inanimate but 'smart' objects, such as robots and artificially intelligent ma-

**32** *Galanter* (2010) 44 Loyola LA L Rev 1–10, at 6; *DM Engel*, The Cultural Interpretation of Injury and Causation (2010) 44 Loyola LA L Rev 33–68, at 49. Even when women obtained the right to sue for themselves, 'seduction' was for a long time relevant only insofar as it diminished the woman's chances of getting married: see, still on these lines, Corte di Cassazione, 14 November 1975, no 3831 (1977) RCP 61.

**33** *C van Dam*, European Tort Law (2nd edn 2013) 367.

**34** *Sierra Club v Morton*, 405 United States Supreme Court Reports (US) 727, 741–743 (USSC 1972) (Douglas dissenting).

**35** See *C Chappuis*, Les nouvelles dispositions de responsabilité civile sur les animaux: Que vaut Médor? in: C Chappuis/B Winiger (eds), Le préjudice: une notion en devenir (2004) 15–37.

**36** *RL Cupp Jr*, Considering the Private Animal and Damages (2021) 98 Washington University Law Review 1313–1342 (2021); *G Wagner*, Robot, Inc.: Personhood for Autonomous Systems? (2019) 88 Fordham Law Review (Fordham L Rev) 591, 596–597 (2019).

chines, whose possible status as tortfeasors and – why not? – victims is envisaged by some and negated by many.[37]

As the case of robots and AI shows, the meaning assigned to injuries, protected interests and to their holders also depends on the way in which advancements in science, technology, and human ability to prevent harm has produced shifts in the understanding of accidents.[38] Much of the tort law we know today is the result of a paradigm shift where the injuries inflicted by technological advancements since the Industrial Revolution (be it factory machines, locomotives, cars, boilers, home products, medicines, vaccines) have ceased to be described as tragic misadventures and have instead been progressively reframed as avoidable accidents.[39]

Suffice it to think of how, in the last two centuries, discoveries of medical science have altered our knowledge of human health, and moved the line between unavoidable adversity and remediable medical injury, with the result that diseases that have always been considered mere misfortunes or the capricious acts of a malevolent God have started to appear instead as the outcome of an act or omission of some external agent who could have prevented or cured the disease itself.[40] It is actually our increased ability to medically interfere with pregnancy – through tests, abortions and sterilisations, cryopreservation of eggs, sperm and embryos, in vitro fertilisation, surrogate motherhood, etc – that has allowed us to see human reproduction no more as a casual and inexorable process leading to a child's birth, but rather as a mutable process, subject to human control and intervention and susceptible, when something goes wrong, to giving rise to tortious harms.[41] Before such advancements, nobody would have thought that the birth of a child or miscarriage of a foetus could give rise to a legally relevant harm.[42] Similarly, our improved scientific knowledge of the human body and the environment have highlighted causal relationships between certain events, such as exposure to toxic substances leading to cancer, and emissions of greenhouse gases contributing to climate change: increased knowledge has helped transform physical adversities into tortious inju-

**37** For this debate (which is currently entirely focused on robots and AI as possible tortfeasors), see *Wagner* (2019) 88 Fordham L Rev 591–612; *B Winiger*, Responsibility, Restoration and Fault (2018) 148–150.

**38** See the authors quoted above, fn 18, plus *M Chamallas*/*JB Wriggins*, The Measure of Injury: Race, Gender, and Tort Law (2010).

**39** See the authors quoted above, fn 15, as well as *K Graham*, Predicting the Future in Tort Law (2022) 62 Jurimetrics; *DG Gifford*, Technological Triggers to Tort Revolutions: Steam Locomotives, Autonomous Vehicles, and Accident Compensation (2018) 11 Journal of Tort Law 71–143.

**40** *Bussani*/*Infantino* (2015) 63 AJCL 77, 92–98; *Galanter* (2010) 44 Loyola LA L Rev 1, 4f.

**41** See, for all, *Chamallas*/*Wriggins* (fn 38) 129–137.

**42** See the cases mentioned above, fns 20–26.

ries and potentially recoverable damage.[43] Unsurprisingly, the increased digitalisation of the world we live in has equally given rise to new forms of attacks and new forms of entitlements, many of which – from the right to be de-enlisted by online search engines to the right to have personal data transferred only to foreign countries with adequate privacy safeguards[44] – would have simply been unthinkable 30 years ago.

The list of possible illustrations of the synchronic and diachronic variability of the notion of protected interests could go on. What I would like to stress is that the notion, on the one hand, is inherently pluralistic and dynamic, and, on the other hand, is always channelled by the invisible constraints arising out of the cultural framework of its users.[45] In this perspective, the fact that art 2:102 PETL is open to multiple interpretations looks like an unavoidable as well as a welcome feature, insofar as it allows the provision to keep abreast of the diverse and ever-changing contents of European continental tort laws.

## VII The beauty of textual ambiguities

In the vague meaning of the protected interests mentioned by art 2:102 PETL, therefore, lies another strength of the provision. After all, since Roman law, the history of continental European tort law has been made through the progressive stratification of doctrines and interpolations of a few fundamental documents. The ambiguous meaning of these documents offered a textual basis to imperceptible, slow, yet revolutionary paradigm shifts.[46] In this light, the inherent ambiguity of the interests

**43** Think of how studies about asbestos, drug-induced cancers and air pollution through carbon dioxide have allowed new classes of plaintiffs to pursue tort law litigation against new classes of defendants. On the relationship between science and the law, see *S Jasanoff* (ed), States of knowledge: The co-production of science and the social order (2004).

**44** See respectively Court of Justice of the European Union (CJEU) 3.5.2014, C-131/12, *Google Spain SL v Agencia Española de Protección de Datos*, ECLI:EU:C:2014:317, and CJEU 6.10.2015, C-362/14, *Schrems v Data Protection Commissioner*, ECLI:EU:C:2015:650.

**45** To illustrate further, nobody would today read 'life', 'bodily and mental integrity' and 'liberty' under art 2:102 PETL as referring to animals or robots, despite the fact that the only interest clearly belonging to humans under art 2:102 PETL is '*human* dignity'. Nobody, or very few, would read these same notions as including the right of people (as a collective) and of future generations to enjoy clear air, and even less as including the right of the air itself to be clean (although this seems to be the direction outlined by *Winiger* [fn 37] 2–3).

**46** See especially *B Winiger*, Le juge du voisin est-il fou ?: ou les vertus de la jurisprudence comparée, in: F Bellanger/J de Werra (eds), Genève au confluent du droit interne et du droit international (2012) 217, 220–221.

mentioned by art 2:102 PETL, combined with the flexible approach embraced by the PETL, has the merit of leaving enough room for divergent interpretations, both in space and time, and of making the provision compatible with a wide range of different readings of the interests protected by tort law.[47]

Let me provide some examples of what I mean by 'inherent ambiguity'. We all have an immediate understanding of what life, bodily and mental integrity, human dignity, liberty, property rights, pure economic interests and contractual relationships mean from a tort law perspective. Yet, beyond this generic consensus, views quickly diverge. Does 'life' under art 2:102 PETL include the life of the unborn? Provided that 'life' clearly covers cases involving the death of a living person, does it also refer to cases in which the defendant left the plaintiff in an irreversible comatose state, or is this case better described as an infringement of the plaintiff's 'bodily integrity'?[48] In the case of a child born with disabilities due to medical negligence in her delivery, does the child suffer damage to 'life', to 'bodily integrity' or 'human dignity', or no infringement at all? Do cases of eggs or sperm destruction fall under the protection of 'bodily integrity' or are they an instance of infringement to 'property'? Does the notion of 'bodily integrity' apply to cases of sexual harassment with no permanent physical damage, or should these cases fall under the notion of 'mental integrity' or 'human dignity'? Does the infringement of 'mental integrity' require a medical diagnosis of a psychiatric or psychological illness, or will severe discomfort suffice?[49] Does the notion of 'human dignity' cover the entire range of personality rights (as hinted by art 10:301 PETL), such as privacy?[50] Is 'human dignity' harmed in cases of infringement by States of the rights covered by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950, including, for instance, the right to a fair trial?[51] Could 'human dignity' be

**47** For a similar conclusion, see *B Winiger*, Les intérêts protégés par le droit de la responsabilité civile. Les clauses générales dans les projets européens, in: GRERCA (ed), Le droit français de la responsabilité civile confronté aux projets européens d'harmonisation (2012) 135, 137.

**48** On these cases, see *T Kadner Graziano*, Non-Pecuniary Damage without Harm. The Principles of European Tort Law and the Draft Common Frame of Reference, in: B Winiger/H Koziol/BA Koch/R Zimmermann (eds), Digest of European Tort Law. Essential Cases on Damage (2011) II, 702, 704–705 (implying that the comatose victim may suffer an impairment of her bodily or mental health under art 10:301 PETL).

**49** The issue is mentioned but left unresolved by the PETL commentary: EGTL (fn 3) 166 no 8.

**50** While the commentary to art 2:102 PETL excludes it (EGTL [fn 3] 31 no 5), the reference to personality rights contained in art 10:301 PETL seems to allow a broad interpretation of the notion (*T Kadner Graziano*, Les «Principes du droit européen de la responsabilité délictuelle» – forces et faiblesses, in: B Winiger (ed), La responsabilité civile européenne de demain (2008) 219, at 238).

**51** A similar question is raised by *T Kadner Graziano*, Comparative Tort Law: Cases, Materials and Exercises (2018) 61.

activated in cases of infringement by States of other international sources, such as the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) of 1979? Could 'human dignity' cover cases of unjustified low ratings of products and services offered by individuals? Does 'liberty' include the 'liberty from government's infringement of human rights', the 'liberty of developing one's personality', 'freedom of religion', and 'freedom to make contracts'?[52] Does 'property' (as loose as the term is in the comparative perspective) cover cases of infringement to commons, such as cultural and natural resources?[53] Is a 'property' interest harmed in cases of an enterprise losing its customers, of a YouTuber losing her followers and of an internaut losing his personal data?[54] When the victim of a tort receives less than full compensation by the tortfeasor, is she suffering an infringement of her 'property' or a 'pure economic loss'?[55] In the case that somebody makes a building temporarily unsafe, preventing the owner of an apartment from renting it, does the owner suffer an infringement of her right to 'property' or a pure economic loss?[56]

I do not have a clear answer to these and to other similar questions that may be raised as to the scope of the interests mentioned under art 2:102 PETL. My point is simply that all these questions, and many of their potential answers, are legitimate and can coexist under the current text of the provision, read through the lens of the other provisions and their scholarly commentaries. Far from being a weakness, the ambiguity of art 2:102 PETL is key to its success – that is, to its acceptance and resilience over time.

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**52** Such an interpretation would clearly go beyond the horizons envisaged by the drafters of the PETL, for whom 'liberty' seems to have the restrained meaning of 'freedom' under § 823 I BGB (see fn 31).

**53** Under the PETL, the answer seems negative: *T Kadner Graziano*, Environmental Damage. The Principles of European Tort Law and the Draft Common Frame of Reference, in: B Winiger/H Koziol/BA Koch/R Zimmermann (eds), Digest of European Tort Law. Essential Cases on Damage (2011) II, 998–999.

**54** As to the (uncertain) recoverability of damages in the above cases under the PETL, see *B Winiger*, Reliance and Expectation Loss. Comparative Report, in: B Winiger/H Koziol/BA Koch/R Zimmermann (eds), Digest of European Tort Law. Essential Cases on Damage (2011) I, 464, 468.

**55** According to the European Court of Human Rights (ECtHR), the answer may be injury to property: ECtHR *M.C. and Others v Italy*, 3.9.2013, no 5376/11, ECtHR: Report of the Judgments and Decision (ECHR) 248 (2013).

**56** The answer depends on the interpretation given to (art. 2:102 and) art 10:203 PETL, under which, in cases of damage to things, '[d]amages might also be awarded for the loss of use of the thing'. See EGTL (fn 3) 170 no 7.

## VIII Proposals for change?

Since the scope of art 2:102 PETL may be easily broadened or contained through interpretation, I see very few reasons to amend or update it.

It is true that perhaps a reform may be the occasion for revising some of the textual choices originally made by the drafters of the PETL. Kadner Graziano, for instance, has noted that the notion of 'human dignity' embraced by art 2:102 PETL seems to have a more limited meaning than the expression 'personality rights' under art 10:301 PETL, and that its relationship with the idea of protection of privacy and of the (many) other rights enshrined in the ECHR remains unclear.[57]

In spite of European divergences about the scope of protection of personality rights in general and of privacy in particular, there is indeed little doubt that the latter nowadays deserves a role in the European tort law hierarchy.[58] Similarly, and notwithstanding the different impact that the ECHR and the case law of the European Court of Human Rights (ECtHR) have had on domestic legal systems, it is undeniable that the ECHR and the judgments by the ECtHR have contributed to opening up the range of interests whose direct and indirect infringement by States can be pleaded in tort.[59] Equally undeniable, in this regard, has been in recent years the contribution of the European Union (EU) and the case law of the Court of Justice of the European Union (CJEU) in shaping personality rights, especially in the digital sphere, as well as the extra-contractual interests of individuals vis-à-vis States.[60]

Yet, I am not sure that the above developments mandate a reform of art 2:102 PETL. The expansion of the obligations of States vis-à-vis private parties, and the related broadening of the interests protected by tort law against their infringements by public powers, may more properly be covered by new provisions on State liability (if any), rather than by a modification of art 2:102 PETL.[61] The broadened range of entitlements that people have vis-à-vis their peers – from privacy to online

**57** *Kadner Graziano* (fn 50) 238.

**58** Cf *BC Steininger*, The Protection of Personality Rights in Comparative Perspective: Basic Questions, in: K Oliphant/Z Pinghua/C Lei (eds), The Legal Protection of Personality Rights: Chinese and European Perspectives (2018) 13–23; G Brüggemeier/A Colombi Ciacchi/P O'Callaghan (eds), Personality Rights in European Tort Law (2010); see also the CJEU's judgments quoted above, fn 44.

**59** *R Caranta*, Concluding Remarks: Towards Convergence? The Road beyond Institutional and Doctrinal Path-Dependence, in: G della Cananea/R Caranta (eds), Tort Liability of Public Authorities in European Laws (2020) 339, 349–351; *K Oliphant*, The Liability of Public Authorities in Comparative Perspective, in: K Oliphant (ed), The Liability of Public Authorities in Comparative Perspective (2016) 849, 850–854.

**60** *Oliphant* (fn 59) 850–854; *G Brüggemeier*, Tort Law in the European Union (2nd edn 2018).

**61** *Oliphant* (fn 59) 886–887 (concluding that '[i]t would [...] be premature as yet for the European Group to propose particular content for those principles').

reputational capital to horizontally enforceable human rights, coupled with everybody's increasing ability, in our contemporary societies, to inflict damage *inter absentes* and across borders, may justify replacing 'human dignity' with a broader expression, such as 'human rights, personality and privacy'. But an equally viable option would be to leave the text untouched and to let users decide how to read the notion of 'human dignity'. After all, as seen in the previous section, the meaning of the notion, regardless of how it is framed, will in any case lie in the eyes of the beholder.

## IX An agenda for further research

Ultimately, the choice of whether or not to update art 2:102 PETL depends on the vision of tort law one has and on the approaches to tort law one wishes to promote through the PETL. This is why I think that, rather than working on the text of art 2:102 PETL, it would perhaps be more important to deepen further our knowledge of the tort law world we are living in and discuss more openly the tort law world we would like to shape.

As continental European lawyers, we tend to show little interest in the actual way in which tort law works, and avoid any open display of our preferences for or against (dominant views on) legal rules, as if empirical attention and policy-oriented arguments would weaken the purity of technical legal reasoning.[62] We all have, however, assumptions about what tort law actually does (for instance, about whether there is too little or too much litigation) and about what tort law should do (eg, whether it should aim to only compensate or whether it could also perform a punitive function). Since those assumptions are neither empirically tested nor publicly disclosed, we often debate and operate in the dark both of the real world we are referring to and of the ideal world we are pursuing to promote.

Notwithstanding the quantity and quality of the research conducted in recent years by the EGTL, ECTIL and ETL, we still know very little about how, and to what extent, the above vision translates into practice. We also know little about the compatibility of our traditional views of tort law as a remedy against peer-to-peer invasion of a classic set of pivotal values with contemporary liquid and digitalised societies. In societies in which activities are increasingly complex and interconnected with one another, harm can spread rapidly and massively within and beyond na-

**62** As to the lack of empirical analysis, see *BCJ van Velthoven*, Empirics of Tort, in: MG Faure (ed), Tort Law and Economics I (2nd edn 2009) 453–490. As to the alleged neutrality of the legal discourse, see *G Frankenberg*, The Innocence of Method-Unveiled Comparison as an Ethical and Political Act (2006) 9 Journal of Comparative Law 222–258.

tional borders, social and economic inequalities widen and new interests (such as reputational capital, virtual identity, and intangible assets) become increasingly important.

I understand that filling such gaps and shedding light on the empirics and politics of European tort law go well beyond the scope of the PETL. Yet, the point remains that our empirically untested and privately kept assumptions silently inform and affect our (descriptive and prescriptive) understanding of tort law, including of art 2:102 PETL. Digging into the empirical reality of European tort laws and discussing more openly what we think about the functions of tort law, may therefore turn out to be fundamental to promoting whatever one wants the PETL to be, as the next two sub-sections will attempt to argue.

## 1 Empirical lacunae

In Europe, we are blatantly lacking data on a myriad of tort law features.

There is very little information, for instance, on the actual breadth of tort law litigation, making it completely unclear whether the problem is that too many or too few people sue.[63] We know very little about the average income of the people who sue (how many women, how many non-citizens?), leaving to speculation whether tort law is a truly universal remedy or whether it concretely lies at the services of our society's élites.[64] We know very little about what leads victims to pursue tort law remedies and what they really care about – whether it is money, the official recognition of their rights, revenge, an admission of guilt, an apology or a corrective action by the defendant, or something else.[65] We know very little about the size of damages awarded, even though everybody would agree that there is much differ-

**63** The question has been thoroughly explored by US literature (starting from the seminal works of *WLF Felstiner*/*RL Abel*/*A Sarat*, The Emergence and Transformation of Disputes: Naming, Blaming, Claiming... (1980–1981) 15 Law & Society Review 631–654), but much less in Europe. Cf, among the few, *C Quézel-Ambrunaz*, Le droit du dommage corporel (2022); *G van Dijck*, Should Physicians be Afraid of Tort Claims? Reviewing the Empirical Evidence (2015) 6 JETL 282–303 (2015); *R Lewis*/*A Morris*, Tort Law Culture: Image and Reality (2012) 39 Journal of Law & Society 562–592 (2012); *H Genn*, Paths to Justice: What People Do and Think about Going to Law (1999).

**64** Empirical studies carried out in the US have shown deep-rooted discrimination limiting women's and minorities' legal empowerment: see *Chamallas*/*Wriggins* (fn 38) 20–29; *CM Sharkey*, Dissecting Damages: An Empirical Exploration of Sexual Harassment Awards (2006) 3 Journal of Empirical Legal Studies 1–45.

**65** For some attempts to go in this direction, see *G van Dijck*, The Ordered Apology (2017) 37 Oxford Journal of Legal Studies 562–587; *N Brutti*, Legal Narratives and Compensation Trends in Tort Law: The Case of Public Apology (2013) 24 European Business Law Review 127–148.

ence between a *franc symbolique* and a seven-figure award. We lack wide-ranging studies about the reasons motivating people to adapt (or not) their behaviour as a response to the threat of liability.[66] We also know very little about the micro- and macro-consequences of tort law actions on prospective defendants' practices of damage prevention and cost-shifting, and on the overall social costs triggered by the tort law process.[67]

We know very little about these and many other data points, and yet we routinely discuss the scope and functions of tort law on the basis of our implied assumptions about the relevance of the above questions and about (what we think are) the right answers to them. To take but one example, those who believe that there is a litigation explosion generally fear excessive liability and litigation, and tend to read restrictively the list of interests that tort law should protect, and against whom. Those who embrace the view that tort law does too little for victims would more likely support an evolutionary reading of the range of interests protected by tort law, of the remedies available and of the functions that tort law rules may perform. In both cases, conclusions about what tort law does and should do are affected by empirically unchecked assumptions. More research about the real tort law world, I think, is urgently needed.

## 2 The prisms of functions

Strictly related to the need for additional knowledge about the empirics of tort law is a more transparent debate about the aims of European tort law in general, and of the PETL in particular.[68] In principle, such a debate may be seen as detached from the issue of the scope of protected interests. In practice, however, the debate about the aims of tort law (and of the PETL) is closely intertwined with the choice of what is recoverable harm, what entitlements tort law protects, who are the legitimate right-holders of these entitlements, what is their compensatory value and what is the remedy triggered by their infringement.

**66** A good illustration of this kind of work (in the US) is *JK Robbennolt*/*VP Hans*, The Psychology of Tort Law (2016).

**67** The same point is made by *J-S Borghetti*, The Culture of Tort Law in France (2012) 3 JETL 158–182, at 161, 177.

**68** The question of the aims has always been at the centre of the debate in the US, while it has been discussed tangentially in Europe. A major exception is *H Koziol* (ed), The Aims of Tort Law. Chinese and European Perspectives (2017).

On the basis of one's vision for tort law mechanisms and for the model that the PETL should promote within and outside Europe, one can adhere to different readings of art 2:102 PETL.

At one extreme, there are cautionary approaches, pursuant to which, tort law works strictly as a bilateral remedy for compensation of damage caused by peer-to-peer non-contractual infringements of high-stake values. Under such a view, there is limited space for collective actions, for claims involving infringements with little harm, and for tort law's intrusion into domains traditionally conceived of as pertaining to other areas of the law (such as family, contract, criminal, administrative and constitutional law).

At the other extreme, the provision is compatible with less conventional postures, according to which, the range of protected interests may be enlarged, the circle of claimants having standing may be broadened, the requirements of individual harm and seriousness of injury lowered, the sum awarded purely nominal, the span of possible remedies enriched, the hybridisation with other areas of law allowed. In other words, it would be possible to see tort law as 'public law in disguise',[69] that is, as an instrument focusing on societal as much as on individual needs, dealing with prevention and punishment alongside compensation, mandating consideration for the economic situations of the parties and for the macro-effects of judgments, and calling for policy factors to play an overt role in adjudication.[70]

Between the two extremes lies an array of other options.

I am aware that the 'public law in disguise' wording just mentioned may sound contrary to some peculiar features of continental European tort law, according to which, liability is an essentially bilateral, compensation-aimed remedy against infringement of basic entitlements. In particular, the 'public law in disguise' view may appear as an attempt to hybridise our model with features that are specific to the common law tradition (especially the American one), such as the possible punitive

**69** *L Green*, Tort Law Public Law in Disguise (1959–1960) 38 Texas Law Review 1–13 and 257–269.

**70** Such a reading would help reduce some of the well-known limitations of tort law as a typical bilateral remedy. When conceived in a bilateral way, tort law is discriminatory. It discriminates against victims who do not have access to justice or who have been injured by an unknown or poor tortfeasor, from those who have the resources to file a claim and who were lucky enough to be injured by an identified, wealthy defendant. But bilateral understandings of tort law also discriminate among wrongdoers, insofar as they only consider those who harmed somebody else, and let free all those who exposed others to a risk of damage, which, as a matter of chance, did not materialise. On these (and many other) paradoxes, see *MG Faure*, Economic Optimization of Tort Law, in: H Koziol (ed), The Aims of Tort Law. Chinese and European Perspectives (2017) 79–113, at 99–102; *G Parchomovsky/A Stein*, The Relational Contingency of Rights (2012) 98 Virginia Law Review 1313–1372, at 1352–1355 (2012); *J Coleman*, Risks and Wrongs (1992) 304–306; *T Nagel*, Mortal Questions (1979, reprinted in 2012) 29.

connotations of tort awards, the recognition of torts actionable per se, and the availability of collective forms of action.[71] One should nevertheless consider that common law traits, such as punitive damages, damages per se and class actions, exist in the US because they fulfil functions that continental European laws assign to many other domains, typically of a public nature – from criminal law and administrative enforcement, from compensation schemes to welfare institutions to mandatory and private insurance.[72] The role and significance of public law in continental Europe guarantee that embracing a public-oriented reading of tort law would not, in all likelihood, lead to an Americanisation of our way of remedying injuries.

Yet, my argument here is not about the vision to be preferred. Rather, my argument is that the text of art 2:102 PETL is broad enough to fit with alternative, if not conflicting, views about the functions of tort law and about the relationships between tort law and other institutions aiming to prevent or redress harm. Before updating or rewording art 2:102 PETL, it is therefore important to think about, and to openly discuss, the aim that tort law is meant to pursue and its position vis-à-vis other domains. This is all the more important in our contemporary societies, in which activities and relationships are increasingly complex, globalised and interconnected, in which science and technology constantly improve the ability of corporations, States and other actors to control risks and produce massive harm, even from a distance, and in which the digital economy is reshaping identities, labour and capital.[73] In light of these developments, which parallel those generated in the last two centuries by the industrial and post-industrial revolutions, it is imperative to talk more openly about the possible functions and priorities of tort law, and about its relationship with other institutions. A transparent dialogue about the objectives we would like tort law (and the PETL) to achieve would also help clarify the range of interests that could be included within the scope of protection of art 2:102 PETL.

Luckily enough, in our journey towards knowing more about what European tort law does and about what we want it to do, we can take Bénédict Winiger as a role model and continue to be inspired by his relentless quest for knowledge, his love of history, and his desire to understand better. Under his intellectual guidance, the future of the PETL and of European tort law cannot but be bright.

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**71** On these specificities, and on their distance from their European homologues, see *U Magnus*, Why is US Tort Law so Different? (2010) 1 JETL 102–124.

**72** *Magnus* (fn 71) 120 f.

**73** This has repeatedly been emphasised by the author celebrated here: see *Winiger* (fn 37) 1–3.