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The Impact of the PETL on National Legislation and Case Law – A Survey

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I Introduction

It is well known to most readers of this paper that it has now been almost 18 years since the presentation of the Principles of European Tort Law (PETL) in Vienna and almost 30 years since the European Group on Tort Law (EGTL) was established. Looking back over the years, one can become nostalgic, but, in a rigorous academic analysis, it is permissible to ask what all this work, sustained for so many years, has been for and what impact it has had on the advancement of tort law in Europe (and perhaps beyond). It is also worth considering whether attempts should still be made to develop a 2.0 version of PETL and whether it is still necessary to continue supporting the work of the Group in its endeavours or whether this is already a dead project and the EGTL is simply a zombie that has anomalously survived after the disappearance of the groups that worked on the harmonisation of private law in Europe since the 1980s.

More than ten years ago, I had the opportunity to write about the impact that the PETL had had on Spanish case law[1] in an attempt to establish that, at least in the Spanish case, it was not true what a report presented in 2009 to the French Senate stated by saying that the PETL, presented by the EGTL in Vienna in 2005, '... are merely a scholarly contribution to the unification of national laws and, even though they may influence reflections on the subject, they have nowhere received any application'.[2]

1 *M Martín-Casals*, The Impact of the Principles of European Tort Law (PETL) on Spanish Case Law (2010) 1 Journal of European Tort Law (JETL) 306.

2 Rapport d'information fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale par le groupe de travail relatif à la responsabilité civile, par MM Alain Anziani et Laurent Béteille, Sénateurs (no 558, Sénat, Session Ex-

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The European Tort Law Yearbooks of the European Centre of Tort and Insurance Law (ECTIL) and the Institute for European Tort Law (ETL) provide some references to the impact of the PETL on European national legislation and case law, but, on the one hand, national reporters, carried away by enthusiasm, may make some comparisons with the PETL that legislators and courts did not even think of, and on the other, bored by sheer repetition, may oversee references to the PETL when they start to become usual or common.

With all these caveats, this paper will refer first to some cases where the impact of the PETL on legislation seems clear and will deal afterwards with the impact of the PETL in the case law of the European Court of Human Rights (ECtHR) and national courts.

II Impact of the PETL on national legislation

A The impact of the PETL on several recent regulations and draft rules

As regards legislation, it is well known that the PETL had a strong impact on the Austrian draft for the reform of the law of damages, made public in 2005, just one month after the presentation of the PETL.[3] Although the draft was elaborated by a Working Group appointed by the Austrian Ministry of Justice, it was not an official draft of the Ministry or of the Austrian Government, but it was conceived to serve as the basis of a discussion of the reform. Since Helmut Koziol, a prominent founding member of the EGTL, also played a leading role in this Working Group, it is no surprise that, in many aspects, the Austrian draft is similar to the PETL.[4] However,

traordinaire de 2008–2009, enregistré à la Présidence du Sénat le 15 juillet 2009), 32, available online at <http://www.senat.fr/rap/r08-558/r08–5581.pdf> (last accessed: 1.9.2022).

3 *I Griss*/*G Kathrein*/*H Koziol* (eds), Entwurf eines neuen österreichischen Schadenersatzrechts (2006) 1–15.

4 On this draft, among many others, see *H Koziol*, Schaden, Verursachung und Verschulden im Entwurf eines neuen österreichischen Schadensersatzrechts, Juristische Blätter (JBl) 12 (2006) 768–786. This draft was followed by a critical draft (known as 'Gegenentwurf'), which can be found in *R Reischauer*/*K Spielbüchler*/*R Welser* (eds), Reform des Schadenersatzrechts III (2008). See also *G Wagner*, Reform des Schadensersatzrechts, JBl 130 (2008) 2–22 and, for a brief comparison, *BA Koch*, Die österreichische Schadenersatzreform im europäischen Kontext. Nationale und internationale Entwürfe im Vergleich, in: P Apathy et al (eds), Festschrift für Helmut Koziol (2010) 721–741, and *J Taupitz*/*C Pfeiffer*, Der Entwurf und der Gegenentwurf für ein neues österreichisches Schadensersatzrecht – eine kritische Analyse, JBl 132 (2010) 88–104.

the influence of the PETL on pre-legislative and legislative drafts has not been confined to this case.

Thus, for instance, the PETL were one of the sources of inspiration of the extensive regulation of tort liability in the new Romanian Civil Code, which entered into force on 1 October 2011.[5] In Slovakia, the draft of the new Civil Code presented in 2015 and modifying some parts of the Law of Obligations, including tort liability, was also significantly influenced, both in its structure and content by the PETL.[6] In Spain, the new statutory regime on the assessment of personal injury resulting from road traffic accidents passed by the Spanish Parliament in 2015,[7] which is probably one of the most important developments of Spanish tort law over the last two decades, also shows traits of the PETL's influence, as has been expressly recognised by the Spanish Supreme Court.[8] As noted by the Spanish reporter,[9] this is the case, for instance, regarding the circle of secondary victims or persons who are entitled to compensation in the case of death of a primary victim in a traffic accident. In keeping with the criterion adopted by art 10:301, para 1 PETL, which does not confine secondary victims to family members, secondary victims can also be 'close persons' (*allegados*), ie, persons who, irrespective of any family ties, had close ties of affection with the deceased primary victim. In order not to widen the circle too much, however, the Spanish rule requires that the close person lived with the deceased for at least five years immediately before his or her death.

A private draft for the reform of the Spanish Civil Code, presented in 2018 by the Spanish Association of Professors of Civil Law, and in which no member of the EGTL participated, has also benefitted from some of the solutions adopted by the PETL.[10] The draft devotes some 51 articles to tort law and, although no commentary to the draft has been published, its black letter rule or text of the provisions show a clear influence of the PETL in some articles.[11]

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5 *C Alunaru*/*L Bojin*, Romania, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2014 (2015) 502, no 67ff.

6 In this sense, *A Dulak*, Slovakia, in: E Karner/BC Steininger (eds), ETL 2015 (2016) 544, no 3.

7 Ley 35/2015, de 22 de setiembre, de reforma del sistema para la valoración de los daños y perjuicios causados a las personas en accidentes de circulación (Boletín Oficial del Estado [BOE] no 228, 23.9.2015). See *M Martín-Casals*, A new Spanish compensation scheme for death and personal injury resulting from road traffic accidents, in: J Potgieter/J Knobel/RM Jansen (eds), Essays in Honour of Johann Neethling (2015) 301–322.

8 STS 6.4.2016 (RJ 2016, 75653, reporter *Jose Antonio Seijas Quintana*).

9 *A Ruda*, Spain, in: E Karner/BC Steininger (eds), ETL 2015 (2016) 581, no 4.

10 *Asociación de Profesores de Derecho Civil* (APDC), Propuesta de Código Civil (2018) 862–876.

11 This is the case, for instance, of its 'General Rule' (art 5191–1) and of its rule on the attribution of liability (art 5191–2), which, in many aspects, resembles PETL's basic norm (art 1:101 PETL) or art 5191–5, on 'Scope of liability', which is almost a verbatim translation of art 3:201 PETL with the

In France, some projects dealing with the reform of French tort law have also taken the PETL into account. This attention to the PETL – together with the Draft Common Frame of Reference (DCFR) – was particularly intense in the François Terré Draft Proposal.[12] By contrast, although the 2017 project[13] includes rules which are similar to some contained in PETL, such as, for instance, the provisions on compensation for preventive expenses (art 1237 *Projet*, art 2:104 PETL) and for loss of use (art 1289 *Projet*, art 10:203 (2) PETL), it does not seem that they found their direct source of inspiration in the PETL.

B The case of the 2023 Belgian *Proposition de Loi*

In 2015, the Belgian Ministry of Justice initiated the process of drafting a new Civil Code and, in 2017, the Belgian government set up several reform Commissions.[14] Initially, the new Civil Code had to have nine Books, with Book 5 devoted to the Law of Obligations, which would also include the rules on non-contractual liability.[15] Currently, several books of this new Civil Code are already in force, forming the *nouveau Code civil*, which co-exists with the *ancien Code civil*, that is the books that have not yet been amended. Book 5 on the Law of Obligations, which came into force on 1 January 2023, however, does not include the rules on non-contractual liability, which were moved to Book 6 in 2021. On 8 March 2023, a *Proposition de Loi*

same heading. The provision on the so-called 'duty of required diligence' (art 5191–6) enumerates a set of criteria to establish fault which are similar to those included in art 4:102 (1) PETL. Finally, its provision on 'Proof of damage' (art 5192–2) contains a second paragraph, which is almost a word-by-word translation of art 2:105 PETL on 'Proof of damage'. By contrast, the draft deals very briefly with causation, does not mention proportional liability and does not even refer to loss of a chance, which is accepted by Spanish case law, in the context of either damage or causation

12 *F Terré* (ed), Pour une réforme du droit de la responsabilité civile (2011). For a general overview in English, *O Moréteau*/*A-D On*, France, in: E Karner/BC Steininger (eds), ETL 2012 (2013) 229ff and, in more detail, *O Moréteau*, The Draft Reforms of the French Tort Law in the Light of European Harmonization, 6 Journal of Civil Law Studies (2013) 759–801.

13 Available at <http://www.justice.gouv.fr/publication/Projet_de_reforme_de _la_responsabilite_civile _13032017.pdf> (last accessed: 22.8.2022).

14 Arrêté ministériel du 30 septembre 2017 portant création des Commissions de réforme du droit civil/Ministerieel besluit houdende oprichting van de Commissie tot hervorming van het burgerlijk wetboek, Belgian official journal of 9 October 2017, 15753 (MB/BS). With regard to family law and family property law, cf arrêté ministériel du 24 août 2018/Ministerieel besluit van 24 augustus 2018, Belgian official journal of 3 September 2018, 68204 (MB/BS).

15 *I Durant*, Belgium, in: E Karner/BC Steininger (eds), ETL 2019 (2020) 33, nos 1–17.

on Book 6 was introduced in the House of Representatives.[16] This text generally follows the 2018 *Avant-project*, slightly modified in 2019, and includes a very complete *exposé des motifs* and the black letter rule of the articles.

The *Proposition* is not only based on the evolution of Belgian case law and on debates of the Belgian legal scholarship, but on a very extensive comparative law analysis in which the PETL are repeatedly mentioned and, in some cases, acknowledged as the source of inspiration of a particular provision. This is the case, for instance, of para 2 of art 6.25 (*Basic rule*).[17] The commentary states that this provision establishes that damage which consists of the loss of an advantage arising from an unlawful act or activity attributable to the injured party cannot give rise to compensation and expressly declares that: '[T]his provision is directly inspired by article 2:103 PETL (*Legitimacy of damage*) which provides that "Losses relating to activities or sources which are regarded as illegitimate cannot be recovered"'.[18]

The commentary sometimes mentions the PETL together with provisions and case law of other countries, as in the case of the two instances of proportional liability that the *Proposition* establishes. In art 6.23, the *Proposition de Loi* provides for proportional liability in the case of loss of a chance[19] and in art 6.24 for the case of alternative causation.[20]

As regards loss of a chance, which in Belgian law is currently considered a damage that is distinct from the final damage suffered by the victim, the Commen-

16 Chambre des représentants de Belgique, 8 mars 2023, Proposition de Loi portant le livre 6 'La responsabilité extracontractuelle' du Code civil (déposée par M Koen Geens et Mme Katja Gabriëls) / Belgische Kamer van volksvertegenwoordigers, 8 maart 2023, Wetvoorstel houdende boek 6 'Buitencontractuele aansprakelijkheid' van het Burgerlijk Wetboek (ingediend door de heer Koen Geens en mevrouw Katja Gabriëls), Chambre 5e Session de la 55e Législature 2022-2023 – Kamer 5e Ziting van de 55e Zitingsperiode, DOC 55 3213/001, Bilingual text in French and Flemish (hereafter, Proposition de Loi).

17 Art 6.25. Règle de base: § 2. Un dommage qui consiste dans la perte d'un avantage trouvant sa source dans un fait ou une activité illicite imputable à la personne lésée n'est pas réparable.

18 Proposition de Loi (fn 16) 131.

19 Art 6.23. *Perte d'une chance.* Lorsqu'il n'est pas prouvé que la faute commise par la personne dont la responsabilité est invoquée est la cause du dommage, mais qu'il existe néanmoins une chance réelle que le dommage ne se serait pas produit si cette personne s'était comportée de manière licite, la personne lésée a droit à une réparation partielle du dommage en proportion de la probabilité que cette faute ait causé le dommage.

20 Art 6.24. *Causes alternatives.* Si plusieurs faits de même nature dont sont responsables des personnes différentes ont exposé la personne lésée au risque de survenance du dommage qui s'est effectivement produit, sans qu'il soit possible de démontrer lequel de ces faits a causé le dommage, chacune de ces personnes est responsable en proportion de la probabilité que le fait dont elle répond ait causé le dommage. Celle qui prouve que le fait dont elle répond n'est pas une cause du dommage n'est toutefois pas responsable.

tary refers to several practical problems related to this consideration of loss of a chance as distinct damage.

This is the case, for instance, of some case law that holds that damages for the loss of a chance of healing compensate for damage which is different from the actual loss of income due to the victim's incapacity for work resulting from personal injury. This means that an insurer who has compensated for loss of a chance is not subrogated in the rights of the insured against the person who caused damage to obtain reimbursement of what he has paid, with the consequence that the injured party may be compensated de facto for both types of damage. On the same consideration of loss of a chance as damage that is different from the final damage suffered by the victim, public insurers which have granted benefits to the victim cannot recover them from the liable third party since, legally, the possibility of recovery from third parties requires having compensated for damage resulting from illness, injury, functional disorders or death, but not from a distinct damage, which is what occurs when damage is qualified as loss of a chance.[21]

The commentary points out that the shift of loss of a chance from damage to a causal problem avoids 'the artificial detour via the conceptual notion of damage constituted by the loss of a chance'[22] and that proportional liability has not only been proposed for a certain number of cases by Belgian legal writing but also by the case law of some countries, the book on causation of the EGTL and arts 3:103 and 3:106 PETL.[23]

The second instance of proportional liability established in the *Proposition de Loi* is art 6.24, which concerns alternative causation, ie, the hypothesis in which different distinct facts are a possible cause of the damage, but it is not possible to prove, according to the established rules on proof, which of them was the actual cause of the harm. After a comparative analysis of rules of other countries that provide for solidary liability even in these cases, the draft stands for proportional liability in a rule that parallels art 3:103 PETL, which the commentary reproduces in full.[24]

21 Proposition de Loi (fn 16) 111.

22 Proposition de Loi (fn 16) 112.

23 Proposition de Loi (fn 16) 114, referring also to *J Spier* (ed), Unification of Tort Law: Causation (2000).

24 Proposition de Loi (fn 16) 117.

III The impact of the PETL on case law

Case law, overtly or covertly, has also not been immune to the influence of the PETL. Case law has occasionally quoted the PETL in judgments of the ECtHR and of countries such as Portugal, Lithuania, Italy, Poland, the Czech Republic, and The Netherlands. Because the impact of the PETL on Spanish case law occurred so early and has been broad and sustained over time, it deserves to be mentioned separately.

A The impact of the PETL on case law of the European Court of Human Rights

Although it seems that the PETL have not been quoted by any *ratio decidendi* or *obiter dicta* in any judgment of the ECtHR, they were extensively quoted in a dissenting and in a concurring opinion to two judgments issued in 2014.

1 The Yukos case

The dissenting opinion of Judge Hajiyev and Judge Bushev is a partial dissenting opinion to the decision of the Court in the case *Oao Neftyanaya Kompaniya Yukos*,[25] where Yukos went bankrupt as a result of proceedings of the Russian Federation, which charged Yukos with tax evasion for an amount of over USD 27 billion. Yukos filed a claim against the Russian Federation and, in a judgment delivered on 20 September 2011, the ECtHR held that there had been violations of art 6 of the Convention and art 1 of the Protocol No 1 (Right of Property).

Yukos sought compensation in the amount of € 37,981,000,000 in respect of pecuniary damage under art 41 of the Convention (*just satisfaction*) and further requested payment of £4,333,105 and USD 762,148 in respect of fees, costs, and expenses. In substance, the company argued that it would have survived had it not been for the violation of art 1 of Protocol No 1 in respect of the enforcement proceedings, that is, had it not been required to sell its main production subsidiary OAO Yuganskneftegaz, and had it been given ninety days to repay each debt and been permitted to sell less valuable assets. The applicant company submitted that the causal link between the violations found and its loss of the stated value had been established. By contrast, the Russian government held that no pecuniary loss was

25 ECtHR *OAO Neftyanaya Kompaniya Yukos v Russia*, 31.7.2014, no 14902/04, former sec 1.

caused to the company because there was no causal link between the violation of the Convention and the losses of the company.

The Court held that there was no causal link between the violation of art 6 of the Convention and the pecuniary losses suffered, but that that this causal connection existed both with regard to the violation of art 1 of Protocol No 1 on account of the retroactive imposition of the penalties for the years 2000 and 2001 and on account of the enforcement proceedings, and ordered total compensation of approx € 1,870 million, plus legal costs, to be paid to the shareholders of the former Russian oil giant Yukos.

The dissenting opinion contended that the judges had mentioned key facts which demonstrated that the applicant company would have been liquidated even without the disproportionate pressure on the enforcement by the State. Accordingly, it considered that the well-established *conditio sine qua non* rule, provided inter alia by art 3:101 PETL, spoke against compensation as did other rules also enshrined in the PETL, such as art 3:105 (Uncertain partial causation) and art 3:106 PETL (Uncertain causes within the victim's sphere).[26]

2 The Norwegian case

The second case where the PETL are extensively quoted is to be found in a concurring opinion in the case of the Oslo City Court *N.A. v Norway*,[27] dealing with personal injury caused by parents' ill treatment of their children. The parents had been acquitted of a crime by a criminal court, but were ordered by the same court to pay compensation of € 36,000 to child A and € 12,000 to child B for non-pecuniary loss.

The applicant considered that this involved a violation of the presumption of innocence enshrined in art 6.2 of the Convention. However, the Court held that this order to pay damages did not involve such a violation, among other reasons, because the possibility of awarding compensation in connection with criminal proceedings after acquittal could be justified by general reference to the 'interests of economy of procedure', or to 'a lesser strict burden of proof' or to 'a clear probability – civil standard of proof – that the applicant...had ill-treated...the children'.

In his concurring opinion, Judge Dedov agreed with the majority that there had been no violation of the presumption of innocence, but he considered that this must be decided on grounds other than those set out in the judgment. He held that tort

26 Ibidem, secs 24 and 26.

27 ECtHR *N.A. v Norway*, 18.12.2014, no 27473/11, sec 1.

law is normally based on other grounds when obliging a person who did not commit harmful acts to compensate damage. Such persons may not have been directly involved in the actions in question, but objective reasons exist which give rise to their liability (as this is the case, for instance, when an employer is liable for his or her employees' actions, or when an owner of dangerous equipment is liable for damage caused by that equipment to third persons).[28]

He considers that the ECtHR approach is not consistent with what the PETL provide and quotes in full arts 1:101 (Basic norm), 4:202 (Enterprise liability), 6:101 (Liability for minors and mentally disabled persons) and art 6:102 (Liability for auxiliaries). Additionally, he considers that liability is to be based on the positive obligation to protect the life and well-being of those who are under the control of third persons, and, in particular, that parents' liability is based on their obligation to take care of their children and that this approach is consistent with the duty under art 4:103 PETL (Duty to protect others from damage). In conclusion, Judge Dedov stated that the Oslo City Court was correct when it held that the grounds for liability of the parents is based on the fact that they did not 'prevent the acts of violence carried out against the children in regard to whom they had a duty of care'.[29]

B The PETL in the case law of further European jurisdictions

1 Portugal

An early national decision quoting the PETL is the 2009 judgment of the Portuguese Supreme Court.[30] A teacher submitted an application for an extraordinary evaluation in order to be recognised as a teacher with 'exceptional merit', which would have allowed him to earn a higher salary. The application was not accepted because an organ of the administration did not add the required information to the file. This information should have been provided by the defendant, who was the President of the School Board of Directors, and who intentionally omitted to provide it due to his troubled relationship with the applicant.

28 Ibidem, §§ 20–22.

29 Ibidem, § 22.

30 Portugal Supremo Tribunal de Justiça, 22nd October 2009 Chamber: 2nd, Number:409/09.4YFLS briefly commented by *AG Dias Pereira*, Portugal, in: H Koziol/BC Steininger (eds), ETL 2009 (2010) 503, nos 58–64. The original full version of the judgment can be found at <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/30c641e0939b3614802576ac005adfc3>.

The Court rejected the application of the loss of a chance doctrine since it considered that it was not proven that, had the information been added to the application file, the candidate would have been classified as 'excellent'. However, since the omission of information was intentional, the Court considered that the stress, anxiety, and sadness gave rise to non-pecuniary loss, which deserved compensation.

As regards the lack of causal link, the Court referred to art 3:101 PETL (*conditio sine qua non*) and considered that: 'the Principles from May 2005, which have been extensively referred to and commented upon in other countries, such as Spain, have been somewhat ignored in Portugal'. The Court considered that the PETL were worthy of attention since they emerge from 'an attempt carried out in Vienna, by renowned jurists from several countries, for the approximation of the understanding of matters of civil liability in the various countries of Europe'.

As regards the quantification of non-pecuniary loss, the Court referred again to the PETL, in this case to art 2:105 PETL (Proof of damage), which provides that: '[D]amage must be proved according to normal procedural standards. The court may estimate the extent of damage where proof of the exact amount would be too difficult or too costly.'

It is submitted that, perhaps, if more detailed research had been undertaken, the Court could have based the loss of a chance doctrine on art 3:106 PETL (Uncertain causes within the victim's sphere). However, this seems to be an isolated decision since no other decision quoting the PETL in Portugal has been mentioned to date.

2 Lithuania

The Lithuanian Supreme Court also cited the PETL at least on two occasions, both in 2015.

A first decision, concerning a decrease in the value of a building caused by a partly illegal construction of an overhead road linking two streets, decided along the same lines as the PETL. Quoting national legal scholarship and art 2:102 PETL on protected interests, it held that, although pure economic interests are protected by Lithuanian tort law, they are ranked lower in the hierarchy of protected interests and, for this reason, their scope of protection may be more limited. The Court emphasised that, in order to establish liability for pure economic loss, the factual circumstances of the case should involve either an intentional fault, or the fact that the defendant sought to further his own economic interests when the economic interests of the claimant were more important. The Court did not consider that

either of these criteria had been met under the facts of the case and concluded that pure economic loss was not to be compensated.[31]

In another 2015 decision, dealing with the claim of an employee who had suffered personal injury in a work accident, the Lithuanian Supreme Court held that the rules establishing employers' liability for damage *inflicted by an employee* (emphasis added) should be interpreted in favour of the victim and, accordingly, the company's liquidation did not shield the director of the company from liability. By expressly referring to art 6:102 PETL, dealing with liability for auxiliaries, and to its commentary, as a supplementary argument in support of its interpretation of the tort law provision of the Lithuanian Civil Code, it held that the company's director can be held personally liable for harm *caused to an employee* (emphasis added).[32]

Additionally, according to the national reporters, in its earlier case law, the Lithuanian Supreme Court also borrowed ideas from the PETL as it was developing the notion of causation under the Lithuanian Civil Code; however, no explicit reference to the PETL was made.[33]

3 Italy

The PETL are sometimes mentioned as an additional reason which, however, does not have any bearing on the final resolution of the case. This is the case, for instance, of the mention made by the Italian judgment of 22 June 2017 of the Third Chamber of the Italian Court of Cassation of the rule of the so-called *compensatio lucri cum damno* (art 10:1023 PETL [Benefits gained through the damaging event]),[34] although this did not resolve the existing controversy on the matter in Italian law, and which apparently was subsequently settled by four judgments of the United Sections issued on 22 May 2018.[35]

31 *UAB 'Lik 2' v Vilnius City Municipality*, Lithuanian Supreme Court (LSC) 8 January 2015, No 3K-3-8/2015: commented on by *S Drukteinienė/L Šaltinytė*, Lithuania, in: E Karner/BC Steininger (eds), ETL 2015 (2016) 349, nos 4–8.

32 *BD v MT*, LSC 26 October 2015, No 3K-7-328-248/2015, commented on by *Drukteinienė/Šaltinytė* (fn 31) nos 56–70.

33 *Drukteinienė/Šaltinytė* (fn 31) nos 56–70.

34 Cass 22 June 2017, no 15536, Compensatio lucri cum damno; Preliminary Order, commented on by *E Bargelli*, Italy, in: E Karner/BC Steininger (eds), ETL 2017 (2018) 310, nos 52–76.

35 See Compensatio, cumulo e «second best». Nota a Cass 22 maggio 2018, nn. 12567, 12566, 12565 and 12564, *R Pardolesi*, Il Foro Italiano, vol 143 (6) 2018, 1935–1941 and *A Venchiarutti*, Compensatio lucri cum damno: The Decisions of the Sezioni Unite of Italian Court of Cassation, European Review of Private Law (ERPL) 3–2020, 687–700.

More important has been a recent ruling of the Court of Cassation, issued in October 2022, on the matter of compensation for personal injury resulting from medical negligence.[36] The liability of the health facility was ascertained for the damage caused to the patient, a baby of a few months, who was negligently discharged prematurely from the emergency ward and who, consequently, suffered permanent personal injury due to an undetected infection. The court of first instance awarded a very large award in the form of a lump sum, but on appeal the lump sum was substituted by a monthly life annuity, pursuant to art 2057 cc.

The family did not agree with this ruling and insisted on the need to award a lump sum, as the judge of first instance had decided, which they considered more suitable for satisfying the care and assistance needs that the child would require throughout his life. Among other reasons, they objected, from a procedural point of view, that the injured party had not requested any conversion of the lump sum awarded into a monthly life annuity, so that the decision of the Court of Appeal did not correspond to the necessary request of the claimant.

However, the Supreme Court upheld the ruling of the Court of Appeal, among other reasons, because it considered that the Court of Appeal had not rendered an *extra petita* ruling. It held that the law does not subordinate the compensation in the form of an annuity to the request of the party and held that this decision could also be taken by the judge *ex officio*, as it was within his powers to opt for this solution. Moreover, it noted that both the PETL and the DCFR endorsed this decision. In the case of the PETL, it noted that art 10:102 provides that: 'Damages are awarded in a lump sum or as periodical payments, as appropriate, with particular regard to the interests of the victim', thus attributing to the judge the discretion to liquidate the damage through periodic payments or through a lump sum.' It added that the PETL specify in the Commentary to this provision that periodical payments can be particularly useful in the event of permanent personal injury, and that it appears appropriate that the sum due can be 'adapted to a worsening or an improvement of the situation of the victim'.[37]

4 Poland and the Czech Republic

In his 'Comparative Remarks' on the evolution of tort law in Europe in 2006,[38] Ken Oliphant noted that an area that had generated many decisions during that year

36 Corte di Cassazione, 25 October 2022, no 31527.

37 *U Magnus*, Commentary to art 10:102 PETL, no 4, 154.

38 *K Oliphant*, Comparative Remarks, ETL 2006 (2007) 499, no 27.

was compensation of non-pecuniary loss suffered by secondary victims, in particular in the case of survival of the primary victim. He pointed out that, in the course of its research, the European Group on Tort Law found that the majority of European legal systems allow an award of damages for non-pecuniary loss to relatives of direct (or primary) victims, and that some also do so in non-fatal cases, which was also an approach which a majority of the Group preferred and that was laid down in art 10:301 (1) PETL (Non-pecuniary damage), whose last sentence provides that: '[N]on-pecuniary damage can also be the subject of compensation for persons having a close relationship with a victim suffering a fatal *or very serious non-fatal injury*' (emphasis added). Ken Oliphant considered then, however, that the position of the Group was more optimistic than what the experience of some national jurisdictions allowed.[39]

Nevertheless, time seems to have shown that the PETL's position was in accordance with a trend that was perhaps only incipient at the time, but that has consolidated over the years. In this context, judgments of the Polish Supreme Court issued in 2018 and one of the Supreme Court of the Czech Republic issued in 2019 explicitly cite art 10:301 (1) PETL.

In 2018, three decisions of the Polish Supreme Court awarded compensation for non-pecuniary loss to relatives of seriously injured victims. The Court mentioned that there is a trend in other European countries to award compensation to relatives of seriously injured victims of torts. One of these decisions[40] even mentions art 10:301 para 1 PETL (as well as art 2 § 202 para 1 DCFR). The Yearbook's commentators to these decisions write that: 'In principle, we support the view that the entitlement to damages for non-pecuniary loss of close relatives of the direct victim of a tort should extend to cases where the victim suffered irreversible and grave injury (see art 10:301 para 1 PETL), but we consider that to determine the limits of such entitlement is a task that should be reserved to the legislature'.[41] In 2019, the doctrine of the violation of family bonds, which served as the grounds for compensation to the closest family members in non-fatal accidents, which had been approved of by three resolutions of the Civil Chamber of the Supreme Court on 27 March 2018, was questioned by a decision of 22 October 2019 by judges from the Extraordinary Control and Public Affairs Chamber (a new Special Chamber of the Supreme Court).

39 *Oliphant*, ibid.

40 *I Sąd Najwyższy* (Polish Supreme Court, SN) 27 March 2018, III CZP 60/17, OSNC1 2018/9, item 83: Compensating Relatives in Connection with Serious Personal Injury Suffered by a Direct Victim II CZP 36/17, commented on by *E Bagińska*/*I Adrych-Brzezińska*, Poland, in: E Karner/BC Steininger (eds), ETL 2018 (2019) 474, no 2ff, mentions explicitly the PETL.

41 *Bagińska*/*Adrych-Brzezińska* (fn 40), no 24 ff.

There were, however, serious doubts about the legality of the appointment of the judges in that Chamber of the Supreme Court.[42]

In the Czech Republic, reference was made to art 10:103 PETL in a judgment issued in 2019[43] on the occasion of the interpretation of § 2959 of the 2012 Czech Civil Code, which provides:

> § 2959. – Where death or especially serious harm to health is caused, the wrongdoer shall redress any mental suffering of the spouse, parent, or child of the injured party or other person close to him by means of a monetary sum fully compensating their suffering. If the compensation amount cannot be determined in this way, it shall be determined in accordance with the principles of equity.[44]

The Court stated that:

> 'It will usually be the most serious health damage, especially comatose states, severe brain damage or paralysis of a significant extent, ie, consequences comparable to the death of a close person, where the mental hardship of the secondary victims reaches a certain intensity. These are mental distress (sadness, despair, hopelessness, fear) associated with the knowledge that this person has been permanently excluded from most spheres of social life and has turned into a person suffering from an exceptionally unfavourable state of health'.

The Court added:

> 'Reference can also be made to the Principles of European Tort Law (PETL), which is the most important legal unification document in this area. Article 10:301 PETL refers to the claim of persons close to the victim who has suffered fatal or very serious non-fatal injury. It can be concluded from the wording of this article that non-fatal injury must be comparable in severity to that of a close person'.[45]

5 The Netherlands

The Urgenda Foundation, a Dutch NGO which aims to help enforce national, European and international environment treaties, brought a claim against the State,

42 I NSNZP 2/19, Monitor Prawniczy 2019/23, 1250 and <www.sn.pl> commented on by *E Bagińska*/*P Wyszyńska-Ślufińska*, Poland, in: E Karner/BC Steininger (eds), ETL 2019 (2020) 461, nos 58–64, who state that the decision cites a number of works of the European Group on Tort Law (on PETL) invoking their expressed doubts as well as the lack of uniformity in the European jurisdictions regarding the matter in question.

43 Supreme Court of the Czech Republic, 27 June 2019, File 25 Cdo 4210/2018: Liability towards Secondary Victims, commented on by *J Hrádek*, Czech Republic, in: ETL 2019 (2020) 105, nos 55–64.

44 In the translation included in *E Karner*/*K Oliphant*/*BC Steininger* (eds), European Tort law. Basic Texts (2nd edn 2018).

45 Quotations by *Hrádek* (fn 43) no **59**.

holding that the State would be acting unlawfully if it failed to reduce CO2 emissions and requested a court order requiring the State to reduce the greenhouse gas emissions by at least 25 % in 2020 compared to 1990 levels. On 24 June 2015, the District Court of The Hague ruled for the claimant and the Court of Appeal upheld this judgment on 9 October 2018. The State appealed to the Supreme Court and, finally, the Supreme Court ruled in favour of Urgenda on 20 December 2019.[46]

In his opinion, the Advocate General of the Supreme Court of The Netherlands mentioned a series of factors that had to be considered to assess fault and contended that similar factors were accepted in other legal systems. He affirmed that the Principles of European Tort Law (presumably, a reference to art 4:102 PETL) and the Oslo Principles on Global Climate Obligations contained similar assessment criteria. The Supreme Court, in its turn, held that, according to arts 2 and 8 European Convention on Human Rights (ECHR), the Netherlands is obliged to do 'its part in order to prevent dangerous climate change, even if it is a global problem', a duty that, inter alia, the Court considered was based on art 3:105 PETL (Uncertain partial causation), which provides that: '[I]n the case of multiple activities, when it is certain that none of them has caused the entire damage or any determinable part thereof, those that are likely to have [minimally] contributed to the damage are presumed to have caused equal shares thereof'.[47]

C The particular case of Spanish case law

The PETL and the EGTL are widely known in Spain. In his admission speech to the Murcia Academy of Legislation and Jurisprudence in 2011, A Salas Carceller, judge at the Civil Chamber of the Spanish Supreme Court, defined the EGTL as an 'intrepid group of civil law professors' that has authored elaborated postulates 'with a universal vocation, called upon to influence national legislators and case law'.[48] In his

46 For a brief follow up of the main details of this case through the different courts, see *JM Emaus*/*A LM Kierse*, The Netherlands, in: E Karner/BC Steininger (eds), ETL 2015 (2016) 401, nos 42–54; ETL 2018 (2019) 415, nos 55–72 and *E GD van Donguen*/*A LM Keirse*, ETL 2019 (2020) 409, nos 45–56.

47 Dutch Supreme Court 20 December 2019, ECLI:NL:HR:2019:2007, at 5.7.6, footnote 35. An English translation of the judgment can be found at <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12–2019.pdf> (accessed: 10.11.2022). See about this case, in more detail, *AG Castermans*, Principles of European tort law and the planet (Lecture of 23.9.2022). Genève: 'The Principles of European Tort Law, Where are the gaps and how to fill them, Conference in honour of Bénédict Winiger', University of Geneva (forthcoming, JETL 2024: A Rule on Liability for Damage to the Environment).

48 *A Salas Carceller*, Principios de Derecho Europeo de la Responsabilidad Civil (discurso leído el día 6 de mayo de 2011 en el acto de recepción como Académico de Número) (2011) 10.

response to this admission speech, A Reverte Navarro, Professor at the University of Murcia, pointed out that the strength of the PETL lies in the 'persuasion by reason of their authority as a result of a well-considered and well-done work'.[49]

It is no wonder, then, that not only has the Supreme Court quoted the PETL extensively since 2007, sometimes even using them as a *ratio decidendi*, but also the lower courts, most of the time following the dicta of the Spanish Supreme Court on the PETL, but rather often also on their own motion, ie, without following previous quotations by the Supreme Court.[50]

Since 2007, the Civil Chamber of the Spanish Supreme Court, with the exception of four years (2013, 2017, 2018 and 2022), has quoted the PETL at least once every year and, by the end of February 2023, the PETL have been quoted in at least twenty of its judgments. In the same period, the Spanish provincial Courts of Appeal have quoted the PETL in at least 320 decisions. Occasionally the PETL have been mentioned by other Chambers of the Supreme Court, such as the Military Chamber[51] and the Social Chamber, which, however, on most occasions has misquoted the PETL by confusing them with provisions actually included in the Principles of European Contract Law.

Over all these years, the idea that has spread in Spanish courts is that the PETL can be used to complement or integrate the currently sparse regulation of tort law in the Spanish Civil Code. In this sense, probably the most influential decision has been STS 17.7.2007[52], which applies the criterion of the 'relationship of proximity or special reliance between those involved' established in art 4:102 para 1 PETL as one of the complementary criteria to establish or to exclude fault.

In this decision, the Supreme Court held that: 'such criteria can be taken as a reference to integrate the laconic formulation of art 1902 CC [general clause on fault] and to complete the generally accepted integrating value of other provisions of the Code included in the chapter on the nature and effects of obligations, such as art 1104' when it refers both to the 'diligence required by the nature of the obligation and which corresponds to the circumstances of persons, time and place' and 'which would correspond to a *bonus pater familias* in order, thus, to set up a model of diligent conduct valid for most cases'.[53]

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49 *A Reverte Navarro*, Contestación al discurso (included in fn 48) 71, at 76.

50 See *Martín-Casals* (2010) 1 JETL 306 and some more recent indications in *A Ruda*, Spain, in: E Karner/BC Steininger (eds), ETL 2014 (2015) 601, no 54. For a very detailed account up to 2019, see *MA de las Heras García*, Tratamiento jurisprudencial de los Principios de Derecho Europeo de la Responsabilidad Civil, in: J Ataz López/JA Cobacho Gómez (eds), Cuestiones clásicas y actuales del Derecho de daños. Estudios en Homenaje al Profesor Dr. Roca Guillamón, 3 vols (2021) vol 1, 1801–1865.

51 See *A Ruda*, Spain, in: H Koziol/BC Steininger (eds), ETL 2010 (2011) 563, nos 23–30.

52 RJ 2007, 4895, reporter: *Francisco Marín Castán*.

53 See also *J Ribot/A Ruda*, Spain, in: H Koziol/BC Steininger (eds), ETL 2007 (2008) 541, nos 27–36, who remark that this dictum, on this point, places the PETL on the same level as the other articles of the

In this case P, together with other friends, had gone to have dinner at the home of D1, a couple with whom she had a close relationship. Since she knew the house well, when the hosts opened the door, she entered and walked into a corridor where the lights had been turned off and where she stepped on a small toy with wheels, fell over and suffered personal injury. D1 had underwritten a home multi-risk liability insurance with D2. P brought an action against D1 and their insurance company (D2) claiming compensation for the injuries suffered.

The Court of First Instance found for the defendant, but the Court of Appeal reversed and held the defendant liable. In this case the Supreme Court considered that 'the conduct of the claimant, who was received by the defendant's husband at the entrance of the house, but who headed straight on her own into the kitchen to see the co-defendant's wife, reveals a significant degree of proximity or special trust with her hosts with the result that the hosts could not be required to exercise the extreme care consisting in lighting the intermediate section of the corridor, in addition to the initial and final sections that were already lit, and removing every toy from this section of the corridor, no matter how small it was, since the characteristics of the toy in question have never been minimally described, except for the fact that it had wheels.'

As the Spanish reporters of the ETL have pointed out, it is doubtful whether the decision construes the relationship of proximity or special reliance between those involved established in art 4:102 para 1 PETL in the same sense as it is used in the PETL or in common law. However, the fact is that the Court grounds its decision on this criterion of the 'relationship of proximity or special reliance between those involved' established in the PETL, not to raise the standard of care but to lower it and exclude fault.[54]

This consideration of the PETL as a sort of modern *ratio scripta*, ie a pan-European legal doctrine of considerable prestige and doctrinal weight, has been used by the Supreme Court to reinforce interpretations in favour of victims, as in the case of the need to compensate victims for 'future expenses', ie for expenses incurred after consolidation of the injuries which, due to pressure from insurance

Spanish Civil Code. See also the enormous impact of this decision on the provincial Courts of Appeal in *de las Heras* (fn 50) 1815f, 1846 *et passim*. The same dictum can be found in a decision of the following year (STS 21.11.2008 [RJ 2009, 144], reporter *José Antonio Seijas Quintana*), which means that this doctrine of the Spanish Supreme Court is mandatory case law for lower courts.

54 See also *M Martín-Casals/J Ribot*, Spain, in: B Winiger/E Karner/K Oliphant (eds), Digest of European Tort Law. Volume 3: Essential Cases on Misconduct (2018) 621–623.

companies, had been excluded from the special legislation for automobile accidents in 2007.[55]

On other occasions, the Supreme Court has quoted provisions of the PETL which are similar to Spanish provisions established in new regulations, which, however, cannot be applied to accidents which occurred before the entry into force of the new rules – for instance, one decision from 2016 and another from 2019[56] regarding the recoverability of expenses for future replacement prostheses.

In this 2019 decision, the Supreme Court dealt with a traffic accident which occurred in 2011 and to which the new regulation established by the Act 35/2015, which provides for compensation of expenses for future replacement prostheses (art 115.1 LRCSCVM),[57] could not be applied due to the lack of a retroactive effect and, therefore, could not be applied to accidents which occurred before 1 January 2016. To overcome this obstacle, the Court considered that, although the 'old' 1995 compensation system (*baremo*) applicable to the case does not provide for compensation for these prostheses replacements, general case law recognises compensation for all the required expenses, since it understands compensation of personal injury 'in its integral sense of respect or restoration of the right to health'. Moreover, the Court held that the PETL, which can be applied to complement Spanish law when referring to pecuniary loss resulting from personal injury, provide that, in the case of personal injury, pecuniary loss includes 'loss of income, impairment of earning capacity (even if unaccompanied by any loss of income) and reasonable expenses, such as the cost of medical care' (art 10:202 PETL). Accordingly, the Supreme Court ordered the insurance company to pay € 459,000 to the claimant for expenses for replacements prostheses that the victim will require throughout his life.

At times, the Supreme Court has used the PETL as a sort of tort law handbook to confirm doctrines that are recent in Spanish case law but that now are well established, such as the distinction between causation and scope of liability (arts 3:101 and 3:201 PETL),[58] the consideration of loss of a chance as a case of proportional

55 This is the case, for instance of SSTS 22.11.2010 (RJ 2010, 1310, reporter *JA Xiol Rios*), 8.6.2011 (RJ 2011, 4401, *idem*), 27.5.2015 (RJ 2015, 2628 reporter *JA Seijas Quintana*), which quote art 10:202 PETL, dealing with pecuniary damage in the case of personal injury and death.

56 SSTS 6.4.2016 (RJ 2016, 75653, reporter *JA Seijas Quintana*) and 17.1.2019 (RJ 2019, 85, reporter *FJ Arroyo Fiestas*).

57 Art 115. *Prostheses and orthoses.* 1. The injured party is compensated directly for the amounts corresponding to the prostheses and orthoses that, according to the medical report, he requires throughout his life.

58 For instance, SSTS 2.3.2009 (RJ 2009, 3287, reporter *JA Xiol Rios*) (art 3:201 PETL) and 28.10.2021 (RJ 2021, 4877, reporter *JL Seoane Spiegelberg*), which mentions the 'conditio sine qua non' of the PETL [*sic*].

liability (art 3:106 PETL),[59] the meaning of non-pecuniary damage (art 10:301 PETL)[60] or the conditions to establish liability.[61] The PETL have also sometimes been wrongly quoted, as is the case of some decisions that attribute the duty of supervision established by art 6:101 PETL in the case of Liability for minors or mentally disabled persons to principals in the case of liability for their auxiliaries which, obviously, is not mentioned in art 6:102 PETL, which deals with Liability for auxiliaries and provides for vicarious liability.[62] However, this is an error, which very few decisions of the provincial Courts of Appeal have perpetuated.[63]

IV Conclusion

It is difficult to know exactly to what extent the PETL have influenced national legislation and case law. It would be pretentious to consider that all the draft provisions or new dicta in case law that match provisions of the PETL must have been inspired by the PETL. Tort law existed before the PETL and, in all likelihood, will also exist in some, hopefully, distant future, when the PETL have fallen into oblivion, and nobody remembers that the EGTL ever existed.

In the case of legislation, drafts are not always accompanied by long memoranda or preliminary notes explaining why the drafters have opted for the specific rules laid down in the draft. Moreover, the drafters of new draft codes are not always very keen to explicitly accept that a certain text has inspired the rules they propose. Something similar happens with case law. However, both in legislation and in case law, when sources of inspiration are quoted, the PETL tend to be one of them, if not the main one. Clear proof of the impact of the PETL on the national legislation and case law of European countries, to my knowledge, exists only in the cases referred to.

In any case, I think that it can be concluded that the PETL have not remained an academic exercise and, covertly or openly, and with more or less intensity, depending on the countries, the PETL have contributed to the advancement of tort law since their publication. For these reasons, I believe that the production of an updated PETL 2.0 is a task that should be encouraged and supported.

59 STS 22.1.2020 (RJ 99, 2020, reporter *JL Seoane Spiegelberg*), mentioning art 3:101 PETL.
60 STS 23.7.2021 (RJ 2021, 3583, reporter *JL Seoane Spiegelberg*), mentioning art 10:301 PETL.
61 STS 15.3.2021 (RJ 2021, 1641, reporter *JL Seoane Spiegelberg*), mentioning art 1:101 PETL.
62 See in this sense, SSTS 6.3.2007 (RJ 2007, 1828, reporter *E Roca Trías*; 3.10.10.2007 (RJ 2010, 1091, reporter *I Sierra Gil de la Cuesta* and 14.5.2010 (RJ 2010, 349, reporter *JA Seijas Quintana*).
63 *De las Heras* (fn 50) 1850 seems to have found only one: SAP A Coruña 22.2.2019 (RJ 2019, 112693, reporter *RJ Fernández-Porto García*).