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The Purposes of Tort Law

Article 10:101 of the Principles of European Tort Law Reconsidered

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Abstract: According to art 10:101 of the Principles of European Tort Law (PETL), tort law pursues two objectives: compensation and the prevention of harm. The following contribution argues that modern tort law pursues a much wider range of objectives. The author identifies a total of eleventh functions which interact and complement each other. He suggests for a future version of the PETL to explicitly mention the whole range of objectives. Naming the full range would facilitate the application of tort law and a teleological interpretation of its provisions, which is, alongside the grammatical interpretation, the most important method for legal interpretation in continental Europe.

I Introduction

Article 10:101 of the Principles of European Tort Law (PETL) on the 'Nature and purpose of damages' provides:

> **Art 10:101. Nature and purpose of damages**
> Damages are a money payment to *compensate* the victim, that is to say, to restore him, so far as money can, to the position he would have been in if the wrong complained of had not been committed. Damages also serve the aim of *preventing harm*.[1]

Damages and tort law in general[2] thus pursue two objectives according to the PETL: first and foremost, to fully compensate the victim for the loss suffered, and second, to prevent harm by stating that, under certain conditions, causing harm will trigger liability. According to the European Group on Tort Law's commentary to this provi-

1 Emphasis added.

2 *European Group on Tort Law, EGTL* (ed), Principles of European Tort Law – Text and Commentary (2005) art 10:101 no 5 (*U Magnus*).

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sion, 'compensation is the primary aim'[3] while prevention of harm is regarded as a secondary aim of tort liability. The official commentary further states that the PETL implicitly reject the idea that tort law has a punitive purpose by not mentioning this purpose in art 10:101 or any other article.[4]

However, if compensation is the primary aim of tort liability, much more efficient and less costly means than tort law are available to compensate victims. It has also been questioned by courts and academics in Europe whether prevention of harm is indeed an aim of tort law and that much depends, in this respect, on each single case and fact pattern.[5]

The following contribution argues that, if tort law is still an important area of private law today, this is because it pursues a whole range of different objectives.[6] The following analysis suggests a total of ten objectives, considers an eleventh, and rejects a twelfth potential function. It further suggests that a revised version of the PETL may very well mention the whole range of objectives that European tort law currently pursues.[7]

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3 *Magnus* (fn 2) art 10:101 no 4.

4 *Magnus* (fn 2) art 10:101 no 4.

5 See *AP Scarso*, The Concept of 'Compensation' in European Tort Law, in: H Koziol (ed), The Aims of Tort Law. Chinese and European Perspectives (2017) 27ff, no 25 with references to decisions of the Italian 'Corte di Cassazione'; see in academic opinion, eg *J Esser*/*H-L Weyers*, Schuldrecht, Band II, Besonderer Teil, Teilband 2: Gesetzliche Schuldverhältnisse (8th edn 2000) § 53 4. b) (at 137): 'Where accidents can be avoided through decent planning and organisation, the economic consequences of potential liability may indeed have a preventive effect'; on the other hand, 'in many hazardous situations which are difficult, if not impossible to foresee (eg road traffic accidents), the psychological prerequisites for an independent effect of tort liability – which would go beyond the fear of punishment or individual self-interest – are usually absent' (translated from German); *M Faure*, Economic Optimization of Tort Law, in: H Koziol (ed), Aims (supra) 79ff, no 42: 'Most of this empirical evidence shows that the deterrent effect of liability rules is often very context specific'.

6 See also *K Oliphant*, Promoting Social Harmony and Stability as an Aim of Tort Law, in: H Koziol, The Aims of Tort Law. Chinese and European Perspectives (2017) 139ff, no 6: 'Tort's aims are manifold and cannot be reduced to a single dominant objective'; *Esser*/*Weyers* (fn 5) § 53 3. (133): 'The discussion about the actual social functions of tort law has never progressed beyond individual attempts in Germany. Given the diversity of the fields of application of tort law, the functions cannot be the same' (translated from German).

7 For the starting point of the following thoughts, see also *M Infantino*, Protected Interests under the Principles of European Tort Law: Preserving the Past for Shaping the Future (in this volume) fn 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'; she identifies a need 'for a more transparent discussion about the functions of tort law', at I., and observes that we 'all have ... 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

Explicitly naming the full range of objectives would promote and facilitate a purposive (or teleological) interpretation of the PETL, which is, alongside the grammatical interpretation, the most important method for legal interpretation in continental Europe. Or, as *Helmut Koziol* put it: 'Knowledge of the tasks of tort law is [...] essential for a deeper understanding of this area of law and thus a prerequisite in particular for the teleological interpretation of the provisions, for filling gaps by analogy and for drawing the borderline with neighbouring areas'. It is indeed a fundamental difference if, for example, compensation is the primary aim or rather deterrence, or even punishment, of the tortfeasor.[8]

II Starting point: efficient and less costly alternatives to tort liability

The large majority of legal scholars and textbooks on tort law in arguably all European jurisdictions agree that *compensation of victims* is an important, if not the most important, purpose of tort liability.[9] In this respect, art 10:101 PETL is fully in line with the dominant opinion in European scholarship.

However, the law and economics approach teaches us that, in the absence of tort law, 'victims would probably be about as well compensated as they now are' and that 'certainly they could be'.[10] Compensation for personal injury would be, could be, and is indeed, in many European jurisdictions, already accomplished by

– social insurance (health insurance and accident insurance, the latter potentially covering also the victim's loss of earnings);

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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', at IX., and: '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. ... We lack wide-ranging studies about the reasons motivating people to adapt (or not) their behaviour as a response to the threat of liability. 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', at IX.1.

8 *H Koziol*, Introductory Remarks, in: idem (ed), The Aims of Tort Law. Chinese and European Perspectives nos 1, 5.

9 See eg *H Koziol*, Comparative Conclusions, in: idem (ed), Basic Questions of Tort Law from a Comparative Perspective (2015) no 8/146 (at 746): 'It is an acknowledged fact that the Continental European law of damages primarily has a compensatory function' (with numerous references); further references below (fn 17).

10 *S Shavell*, Economic Analysis of Accident Law (2007) 297f.

– complementary private insurance (so-called private *first party insurance*); and
– in some jurisdictions, by compensation funds covering particular risks (such as exposure to asbestos; medical malpractice; harmful pharmaceuticals; and terrorist attacks or other criminal offences).[11]

In Europe, social insurance is widespread and often mandatory. In many countries, further private complementary health and accident insurance can be purchased. Some jurisdictions in Europe, such as France, use compensation funds to cover particular risks; others do not, but could.[12]

Social and first party insurance avoid time-consuming and costly procedures for establishing fault, the victim's contributory negligence, or disputes about the scope and limits of strict liability, for example whether the damaging activity was particularly dangerous. Compensation is often paid out quickly and the victim avoids litigation against the tortfeasor or his or her insurer. If an accident victim receives compensation through such systems, he or she deals with his or her own insurer. This is usually infinitely less controversial than dealing with the tortfeasor him- or herself or the tortfeasor's liability insurer. All the victim has to prove is the damage suffered and – for accident insurance and compensation funds – the cause of the damage.

Receiving compensation promptly, without dispute and litigation, is a huge advantage of social and accident insurance, when compared to tort law. A US colleague has expressed this in the following terms: 'People don't litigate for fun. Lawsuits cost money. Worse, they are for most participants miserable experiences whether one wins or loses.'[13] An economist at the Massachusetts Institute of Technology (MIT) has expressed that '[there is] substantial deadweight loss involved in using the courts as a means to settle injury claims. Because all that [is] at stake [is] a transfer of money ..., all the costs associated with these cases (such as lawyers' fees and other court costs) [are] a waste to society.'[14]

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11 See for the situation in France *J-S Borghetti*, The Culture of Tort Law in France, Journal of European Tort Law (JETL) 2012, 158 at 164ff; *P Maulaurie*/*L Aynès*/ *P Stoffel-Munck*, Droit des obligations (12th edn 2022) no 17.

12 See for Germany *G Wagner*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch (hereinafter MünchKomm), Band 6: Schuldrecht – Besonderer Teil IV (§§ 706–853) (8th edn 2020) Vor § 823 nos 30, 31: 'In reality, tort law contributes very little to the compensation of personal injuries, because the majority of the damage costs are – at least initially – absorbed by public social security institutions. ... For the actual compensation of damages between the tortfeasor and the injured party, only a narrow corridor remains in the case of personal injuries' (translated from German).

13 *SC Yeazell*, Civil Procedure (6th edn 2004) 256, 259.

14 *J Gruber* (Massachusetts Institute of Technology, Department of Economics), Public Finance and Public Policy (7th edn 2022) 387. Gruber uses this argument to demonstrate the advantages of an em-

III A wide range of potential purposes and functions of tort law

The question then is why jurisdictions around the world still use tort law, rather than relying primarily or even exclusively on insurance systems. The answer to this question is that tort law pursues further important purposes and functions, alongside compensation and accident prevention. Tort law has indeed at least ten or even eleven such purposes and functions. Most of them apply to both fault-based and strict liability.

A Attribution of damage, liability as the counterpart to individual freedom to act

A first fundamental purpose is the attribution of damage. Not all damage can be shifted to a tortfeasor. Tort law determines the precise conditions under which a person shall be liable for damage suffered by another. It draws this line according to criteria such as fault or engaging in a particular dangerous activity, for example.[15] While social insurance and first party insurance compensate *any* damage suffered by the victim, provided it falls into the scope of these systems, tort law provides criteria that, once met, justify shifting the loss from the victim to the person claimed to be liable. In holding the individual responsible for his or her acts, responsibility in tort hereby is the counterpart to the individual's freedom to act.[16]

B Compensation of damage

The vast majority of courts and scholars, as well as art 10:101 PETL, recognise the compensation of damage as a purpose of tort law.[17]

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ployer's strict liability towards his employees and of insurance schemes, when compared to tort liability based on fault; see also *Faure* (fn 5) no 48 ff: 'Tort law compensates poorly and costly'.

15 See eg *G Wagner*, Deliktsrecht (14th edn 2021) 2ff (ch 1 no 4 ff); *Esser*/*Weyers* (fn 5) § 53 1. a) (p 129); MünchKomm/*Wagner* (fn 12) no 43.

16 *Maulaurie*/*Aynès*/*Stoffel-Munck* (fn 11) no 11; *Wagner,* Deliktsrecht (fn 15) 25f (ch 4 no 2 f).

17 For numerous references to case law, see the Yearbooks on European Tort Law of recent years, index: keyword 'functions of tort law'; for academic opinion, see eg *P Malinvaud*/*M Mekki*/*J-B Seube*, Droit des obligations (16th edn 2021) no 601; *F Werro*, La responsabilité civile (3rd edn 2017) no 6 with refs; *E Karner*, Prevention, Deterrence, Punishment, in: H Koziol (ed), The Aims of Tort Law. Chinese

Compensation is indeed another, second important function of tort law for damage which is not covered by social and sometimes also not by first party insurance. One example is the compensation of immaterial harm, which the social security systems in most jurisdictions do not compensate,[18] whereas in others they sometimes do.[19] Another example is the life-long loss of earning capacity of young victims. If a person permanently loses their earning capacity early in their career and has acquired only a small amount of pension entitlements, the life-long damage often exceeds the scope of social security coverage.[20] Finally, social insurance does not cover damage to property (whereas first party insurance may). It is in these cases that tort liability indeed still[21] plays an important role for the compensation of victims.[22]

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and European Perspectives (2017) no 1ff; for a critical view, see MünchKomm/*Wagner* (fn 12) no 43; *Wagner*, Deliktsrecht (fn 15) 25 (ch 4 no 1).

18 MünchKomm/*Wagner* (fn 12) no 31: 'The main issue is compensation for *pain and suffering*, which is missing on the catalogue of benefits provided by social insurance institutions' (translated from German).

19 See the Swiss Federal Act on Assistance to Victims of Crime, Victim Assistance Act (Bundesgesetz über die Hilfe an Opfer von Straftaten, Opferhilfegesetz), art 2 lit d) and e): 'Die Opferhilfe umfasst: ... d. Entschädigung; e. Genugtuung' (translation: 'Victim assistance includes: ... d. Compensation; e. Damages for immaterial harm (*Genugtuung*)'; according to art 4(1) of the Act, 'Victim assistance benefits are only granted permanently if the perpetrator or another obliged person or institution does not provide any or any sufficient benefits.' Pursuant to arts 22 and 23 of the Act, the rules of the Code of Obligations on the compensation of immaterial harm apply also to victim assistance provided by the State. Furthermore, under the Federal Act on Accident Insurance (*Loi fédérale sur l'assurance-accidents*), social accident insurance may also provide benefits for immaterial harm according to arts 24 and 25 of the Act; entitled are workers employed in Switzerland, certain unemployed persons, and certain persons benefitting from disability insurance, Art 1a of the Act. The benefits are granted in the event of an occupational accident, a non-occupational accident and an occupational disease, provided the victim suffers important and lasting injury, see art 6 of the Act. See eg *L Le Tendre*, L'atteinte à l'intégrité en droit des assurances sociales, in: C Chappuis/B Winiger (eds), Le tort moral en question (2012) 175–188.

20 MünchKomm/*Wagner* (fn 12) no 31.

21 The role of tort law has developed over the last decades and even centuries, with the increasing importance of insurance, see eg MünchKomm/*Wagner* (fn 12) no 30ff.

22 In most other personal injury cases, tort law defines, if at all, which insurer will ultimately carry the burden: 'The right of compensation for damage under private law becomes the "right of recourse" on behalf of insurance companies', MünchKomm/*Wagner* (fn 12) nos 31, 44 (translation from German); *H-L Weyers*, Unfallschäden (1971) eg at 401; *H Kötz*, Sozialer Wandel im Unfallrecht (1976) 26ff. In some jurisdictions, for the purpose of reducing costs, insurers form lump sum agreements with each other (Schadensteilungsabkommen), regulating compensation among insurers largely independently of tort law, MünchKomm/*Wagner* (fn 12) no 33 with further refs.

C Pronouncing a moral value judgement of the wrongdoer's behaviour; re-establishing an equilibrium between tortfeasor and victim (fault-based liability)

A third purpose focuses on fault-based liability. Liability based on fault implies a moral value judgement of the wrongdoer's behaviour. If the tortfeasor has not respected the required standard of care, he or she is somewhat 'guilty' of having caused the damage, rather than having behaved as expected and having avoided the damage. In the famous English case *Donoghue v Stephenson*, in which the House of Lords in its judicial capacity established 'negligence' as an independent, self-contained tort in English Common Law, Lord Atkin famously held that: 'The liability for negligence ... is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay'.[23]

The idea of blaming the tortfeasor for his or her faulty behaviour and of sanctioning socially undesirable behaviour is deeply rooted in society.[24] If one commits a fault and injures another, 'correction of the wrong may help to restore the moral balance between them'.[25] This aspect is to a remarkable degree independent of who eventually pays compensation, the tortfeasor or his or her liability insurer. Civil liability re-establishes a moral equilibrium between both parties that has been disturbed by the infliction of damage.

D Making the person that benefits from an activity pay for the costs that this activity imposes on others; internalising negative external effects and social costs

A fourth purpose focuses mainly on strict liability and the liability of professional parties, businesses and companies.

Tort liability has the potential of making the person that benefits from an activity pay for the costs that this activity imposes on others and on society as a whole. In economic terms: civil liability internalises negative external effects and social costs. It ensures that social costs generated by an activity become part of the costs of the person who is engaging in the activity, rather than falling upon third parties, or

23 *Donoghue v Stephenson*, 1932 [UKHL] 100; see eg *A Mullis/K Oliphant*, Torts (4th edn 2011) 87ff.

24 On the purposes of damages for immaterial harm over the centuries, see eg *L Heckendorn Urscheler*, Le tort moral, ses origins et son avenir en Europe, in: C Chappuis/B Winiger, Le tort moral en question (2012) 35–54.

25 *KS Abraham*, The Forms and Functions of Tort Law (4th edn 2012) 17; see also *RA Epstein*, Torts (1999) § 4.2.

upon society as a whole. These costs hereby become part of the calculation that the person interested in the activity shall consider before deciding whether it is worth engaging in that activity.

If, for example, a product causes damage to users or bystanders, holding the producer liable increases his costs. He then has two options: the first is to improve the safety of the product and avoid such damage in the future, which is beneficial to society. The other option is to pass the increased costs on to his buyers, which leads to a higher price of his products when compared to similar products of competitors who manufacture products free of defects. A higher price leads, in turn, to a competitive disadvantage of products which are prone to cause damage when competing with safer products.[26] Tort liability, together with the 'invisible hand of the market', may, ultimately, drive dangerous products out of the market, in favour of safer products. This is, again, a beneficial effect of tort liability.

Liability in tort (and in particular if independent of fault) thus has the potential to promote product safety or higher environmental standards, for example. It thereby generates beneficial effects to society as a whole. This effect would be entirely lost if the costs of damage and accidents fell upon the victim, and the victim took out first party insurance against such loss.

E Transferring the costs of damage to the party who can best avoid it (cheapest cost avoider)

Closely linked to the internalisation of negative external effects is a fifth purpose of tort law, which is transferring the costs of damage to the party who can best avoid it, or in economic terms, to shift the loss to the cheapest cost avoider. In the above example of a dangerous or defective product: it is the manufacturer of the product who is in the best position to make a product safer and avoid the costs of accidents, rather than the buyer for whom protective measures against the damage may be (very) costly.

26 See the concise and instructive reasoning of Justice *Irving Younger* in the New York case of *Bierman v City of New York*, Civil Court of the City of New York, 60 Misc 2d 497, 302 NYS 2d 696, reprinted in *T Kadner Graziano*, Comparative Tort Law (2018) 216ff.

F Allocating the damage to those who can best pass it on to the community of beneficiaries of that activity; spreading the loss

Along a similar economic line of reasoning, tort law has the potential, and sixth purpose, of allocating the damage arising from an activity to those who can best pass it on to the community of beneficiaries of that activity. It hereby socializes damage rather than putting the burden of the damage on one party's shoulders only.[27]

For example, in many jurisdictions, damage caused by a broken water main is shifted to the business operating the pipeline system, rather than burdening a single victim with the entire loss. The operator can then pass the costs on to the community of users who all benefit from the system. Hereby, each beneficiary carries the burden for a small fraction of the damage, whereas for a single person carrying the burden for the entire loss may be extremely onerous.

In the New York case of *Bierman v City of New York* of 1969, a US judge used the argument of 'cost-spreading', alongside the arguments of 'injury-prevention' and 'fairness', in a most remarkable judgment. He declared the City of New York liable for property damage which a lady living on her own had suffered to her apartment from a broken water main. The judge did so for the purpose of doing 'substantial justice'[28] being well aware that strict liability is, as a matter of law, available in the USA only under very limited circumstances.[29]

English and German law, for example, have introduced strict liability for damage caused by broken water mains in special legislation over the last decades,[30] thereby acting in full compliance with the above-mentioned rationales and purposes of tort liability.

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27 *Wagner*, Deliktsrecht (fn 15) 38f (ch 4 no 35 ff).

28 Judge Irving Younger, in: *Bierman v City of New York* (fn 26).

29 See eg The American Law Institute (ed), Restatement of the Law, Torts (Third), Liability for Physical and Emotional Harm, vol 1, §§ 1 to 36 (2013) § 20: liability for 'abnormally dangerous activities'.

30 Sec 209 of the English Water Industry Act 1991; § 2 sec 1 of the German Civil Liability Act (*Haftpflichtgesetz*). In other jurisdictions, strict liability is limited to the transport of *dangerous* substances such as mineral oil, natural gas, or any other liquid or gaseous fuel, see eg arts 1, 33 of the Swiss Federal Act on Pipelines for the Transport of Liquid or Gaseous Fuels, Pipeline Act (*Loi fédérale sur les installations de transport par conduites de combustibles ou carburants liquides ou gazeux*, LIPC); according to the general rule in art 58 of the Swiss Code of Obligations, the 'owner of a building or any other structure is liable for any damage caused by defects in its construction or design or by inadequate maintenance' (translation from German); see eg the case Kantonsgericht Sankt Gallen (*St Gallen Cantonal Court*), 23.2.2005, BZ.2002.44: no liability since the ruptured water main as such was not defective; extracts in English translation in *Kadner Graziano* (fn 26) 208f.

G Preventing (or deterring) harmful behaviour; providing incentives to avoid harm

A seventh purpose of tort liability, which overlaps with many other functions, is to prevent (or deter) harmful behaviour. By threatening potential tortfeasors with liability, tort law creates incentives to avoid causing harm. It thus 'creates incentives towards safety'.[31]

Some see accident prevention as a primary function of tort law and 'the chief purpose of the liability system today',[32] others, including art 10:101 PETL, regard it as a secondary function.[33]

Where tort liability is *fault-based*, it gives actors an incentive to avoid fault and the negative moral value judgement that comes with it. Actors have an incentive to comply with the required standard of care, avoid the damage and potential civil liability.

Where liability is *strict*, actors have an incentive to include in their calculation all costs which their activity generates for society, and for which they would be held liable in tort. If these costs exceed the benefits resulting for them from the activity, they have an incentive to either refrain from the activity, or engage in the activity at a lower level and only to the extent where the benefits still exceed the costs.

31 *Shavell* (fn 10) 297f; *Wagner*, Deliktsrecht (fn 15) 26 (ch 4 no 4 ff) at 27 (ch 4 no 8 ff); *Werro* (fn 17) nos 7, 11; *Koziol*, Basic Questions (fn 9) 8/163: 'it is broadly accepted that tort law also – as a side effect – has a deterrent function. The threat of a duty to compensate in the event of damage being caused undoubtedly provides a general *incentive to* avoid *inflicting damage*'; for nuanced views, see MünchKomm/*Wagner* (fn 12) no 65 with references to empirical evidence; *Esser*/*Weyers* (fn 5).

32 *Shavell* (fn 10) 297f; *Faure* (fn 5) nos 2ff, 26ff, 44ff; MünchKomm/*Wagner* (fn 12) no 46: 'The downgrading of the preventive function by the majority opinion in legal scholarship is in conflict with the trivial view, probably not disputed by anyone, that prevention of damage is better than compensation for damage', and, no 47 *in fine*: 'The decisive – and as far as can be seen the only – aspect that is able to normatively unite tort law under the present institutional conditions across all its areas of application is ... the preventive function' (translation from German).

33 See eg the German Federal Supreme Court of Justice (Bundesgerichtshof), 15.11.1994, BGHZ 128, 1, no 84f; German Federal Constitutional Court (Bundesverfassungsgericht) 8.3.2000, Az 1 BVR 1127/96, NJW 2000, 2187; *Koziol*, Basic Questions (fn 9) 8/147: 'the notion of *deterrence*, as an aim of the law of damages, is ... predominantly ascribed merely secondary significance'.

H Recognising that the victim's protected interests have been infringed

The eighth purpose concerns cases of non-material, immaterial or emotional harm. By awarding damages to victims, tort law *recognises* that a person's protected interests have been infringed and that the victim suffered such harm.

All jurisdictions are faced with claims brought by persons having lost, or having to deal with the severe, lasting injury of a loved one. The issue is dealt with in terms of *tort moral pour la perte d'un proche (ou sa grave blessure)*, *Angehörigen- oder Trauerschmerzensgeld*, *damages for bereavement* or (recently in Germany) *Hinterbliebenengeld*.[34]

In English and German discussion, it was said that no amount whatsoever can compensate the loss of a loved one.[35] The attempt to fix an appropriate award would be doomed to failure from the outset; trying to compensate would be pointless.

This argument misses the point. The reason is that the purpose of tort law in these cases is *not* compensation, and rarely prevention of harm, given that any decent person wishes to prevent killing or severely injuring another anyway. The first and foremost purpose of tort law in these cases is to *recognise the severe suffering* of the secondary victim through the award of damages for pure mental harm.[36]

Civil liability insurers confirm that paying out these amounts without dispute, and recognising the secondary victim's suffering, helps to create an atmosphere of decency and cooperation between the liability insurer and secondary victims, instead of burdening the relationship with dispute and conflict.[37] For insurers, this is particularly important in cases where the primary victim was not killed, but se-

34 See the English Fatal Accidents Act 1976, sec 1A (damages for bereavement); the Irish Civil Liability Act 1961, sec 47ff; § 4a Finnish Tort Liability Act; § 3–5 sec 2 of the Norwegian Compensatory Damages Act; art 446 § 4 Polish Civil Code; § 134 sec 3 Estonian Code of Obligations; § 2959 Czech Civil Code; art 180 Slovenian Code of Obligations; art 1391 secs 1 and 2 Romanian Civil Code; art 201 Serbian Law of Contracts and Torts Act; art 932 3rd sent Greek Civil Code; art 496 secs 2–4 Portuguese Civil Code; arts 47 and 49 of the Swiss Code of Obligations; § 844 sec 3 of the German BGB (since a reform of 2017); art 711 Japanese Civil Code; all reprinted in *Kadner Graziano* (fn 26) 343ff (with English translation and case law from further jurisdictions). See, last but not least, art 10:301 sec 1 sent 3 PETL and art VI.–2:202 Draft Common Frame of Reference (DCFR).

35 The argument was put forward during the parliamentary debate in England, in: *S Deakin*/*A Johnston*/*B Markesinis*, Markesinis and Deakin's Tort Law (7th edn 2013) 851f and frequently in Germany preceding the 2017 reform.

36 See already eg *Abraham* (fn 25) 18: 'the imposition of liability is a complex social practice that vindicates victims' need for recognition that they have been wronged'.

37 See *U Werwigk* in: H Schultzky, Schmerzensgeld für Angehörige – Bericht über das Fachgespräch am 29. November 2011 in München, Versicherungsrecht (VersR) 2011, 857 at 860.

verely injured and where long-term treatment needs to be organised, with secondary victims cooperating in the process. Last but not least, the recognition of his or her suffering is also beneficial to the health of the secondary victim him- or herself.

I Providing an entrance gate in private law for the protection of constitutional values

Tort law fulfils a ninth purpose by providing an entrance gate for the protection of constitutional values into private law. To give an example: in reaction to the horrors of World War II, the German *Grundgesetz* (Basic Law), which has the role of the Constitution, protects human dignity and personality rights in its arts 1 and 2. Shortly after the entry into force of the *Grundgesetz*, the German Federal Supreme Court of Justice recognised the right to one's personality as *sonstiges Recht*, protected by tort law against injury by any other private party.[38] For this purpose, the courts developed the theory of the *horizontal effect*, or *third party effect*, of constitutional rights. It is thus within the framework of tort law that personality rights and the protection of privacy are carefully balanced against other constitutional rights, such as the freedom of the press in private law. Tort law hereby 'defines and sets the boundaries between *individual freedom* and *liability* based on the current state of societal development'.[39] When defining the scope of tort law, a balance is sought 'between the legal recognition and protection of certain goods and interests on the one hand, and the freedom of action on the other; in this respect, tort law plays a central and crucial role for the development of society.'[40]

Following these developments in other jurisdictions, the legislator in Estonia, for example, included the right to one's personality explicitly in its Code of Obligations of 2002 in the catalogue of legal interests protected in tort (art 1045 sec 1 no 4).[41]

Personality rights and privacy are protected not only by national constitutions and many European tort law systems, but also by art 8 of the European Convention

38 Bundesgerichtshof (BGH) 25.5.1954, BGHZ 13, 334; BGH, 5.3.1963, Neue Juristische Wochenschrift (NJW) 1963, 902.

39 *Esser*/*Weyers* (fn 5) § 53 2. b) (translated from German).

40 *Esser*/*Weyers* (fn 5) ibid (translated from German).

41 In English translation: § 1045. Unlawfulness of causing damage. (1) Damage is unlawful in particular when it is caused by: (1) causing the death of the victim; (2) causing bodily injury or damage to the health of the victim; (3) deprivation of the liberty of the victim; *(4) violation of a personality right of the victim;* (5) violation of the right of ownership or a similar right or right of possession of the victim; (6) interference with the economic or professional activities of a person; (7) behaviour which violates a duty arising from law; 8) intentional behaviour contrary to good morals. [...] (*emphasis added*).

on Human Rights. The PETL do not yet mention personality rights and privacy in the catalogue of protected rights in art 2:102.[42] This could, and maybe should, be remedied in the future.[43]

J Providing a forum for the recognition of newly protected (private or public) rights and interests

Last but not least, and overlapping with the previous function, tort law frequently provides the forum for courts for the recognition of newly protected rights and interests. The case law on the protection of personality rights and privacy in the USA, France, and Germany is a prominent example.

In England, for example, the courts extended the tort 'breach of confidence' in the case of *Campbell v MGN* of 2004 to protect against the wrongful disclosure of private information.[44] The development in the UK occurred in the law of torts and was spurred by the Human Rights Act and the European Convention on Human Rights.

The new Chinese Civil Code, in force since 2021, dedicates its entire fourth out of its seven books to the protection of personality rights.[45]

Another, now classic example is the case law of the German Imperial Court of Justice and the German Federal Supreme Court on the intentional, unjustified interference with an established and operative business (*Eingriff in den eingerichteten und ausgeübten Gewerbebetrieb*), which may qualify as an infringement of an absolute right, protected under § 823 Sec 1 of the Civil Code (BGB).[46] The court has hereby opened the gates for the recovery of economic loss suffered by the victim, for example in cases of illicit calls for boycott against companies.

In an increasing number of jurisdictions, tort law is being used to protect the environment. To implement this protection in practice, the development goes hand in hand with an extension of legal standing for tort claims brought by environmen-

42 The PETL mention 'other personality rights' only in art 10:301, the PETL's provision on non-pecuniary damage.

43 In this sense also *J Knetsch*, Should Wrongfulness be Required or is Fault Enough? Arts 1:101, 4:101ff PETL (in this volume) at II.C.; for a critical view regarding this proposal, *Infantino* (fn 7) at VIII.

44 House of Lords, *Campbell v MGN Ltd*, 6.5.2004, [2004] United Kingdom House of Lords (UKHL) 22, [2004] 2 Appeal Cases (AC) 457, [2004] 2 All English Law Reports (All ER) 995.

45 According to art 995 of the new Chinese Civil Code, a violation of these rights leads to civil liability, see eg *Liming Wang*, Les points forts et les innovations du Livre sur les droits de la personnalité du Code civil chinois, La semaine juridique, supplément au no 29, 19 July 2021, at 50f.

46 Since the decision Reichsgericht, 27.2.1904, RGZ 58, 24 at 29; see also BGH, 9.12.1958, BGHZ 29, 65.

tal associations.[47] The development has been particularly remarkable, first, in France and Belgium, and recently in the Netherlands in, for example, the *Urgenda* and *Shell* cases.[48]

K Shifting illicitly acquired gains from the tortfeasor to the victim (or a third party)

So far, ten purposes of tort law have been identified. In some jurisdictions, but not in others, tort law is also being used for an eleventh purpose, which is the *shifting of illicitly acquired gains from the tortfeasor to the victim* (or to a third party). In case of infringements of personality rights and privacy by the tabloid press, the German Federal Supreme Court has awarded victims up to several hundred thousand Euros in damages. The Court argues that it is necessary to shift the illegally acquired benefits from the tortfeasor to the victim in order to protect the victim adequately. Otherwise, the tortfeasor could pay the victim and simply continue infringing their constitutionally protected rights.[49]

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47 See the French, Belgian, Dutch and Chinese materials reproduced in *Kadner Graziano* (fn 26) 499 ff; *M Kloepfer*, Umweltschutz als Aufgabe des Zivilrechts – aus öffentlich-rechtlicher Sicht, Jahrbuch des Umwelt-und Technikrechts 1990, 35 at 43: 'Private law appears indispensable where public environmental law – or its enforcement – has not prevented environmental damage. Liability for damage remains the core task of private law' (translated from German); for proposals to grant standing to environmental associations to bring damage claims see, *C Godt*, Haftung für ökologische Schäden: Verantwortung für Beeinträchtigungen des Allgemeingutes Umwelt durch individualisierbare Verletzungshandlungen (1996); *T Kadner Graziano*, Der Ersatz ökologischer Schäden – Ansprüche von Umweltverbänden (1995) with a proposal for regulation, reprinted in English in: *Kadner Graziano* (fn 26) 533–535. For the opposite view, see the Italian Corte di cassazione penale, sez III (Italian Supreme Court of Cassation, Sect. III), 27.5.2011, sentenza no 21311: 'Compensation for environmental damage of a public nature, regarded as an infringement of the public and general interest in the environment, is solely a matter for the State' (translation from Italian).

48 Hoge Raad (Supreme Court of the Netherlands), 20.12.2019, *Urgenda*, ECLI:NL:HR:2019:2007; Rechtbank Den Haag (District Court of The Hague), 26.5.2021, *Milieudefensie t Shell*, ECLI:NL:RBDHA:2021:5337 and 5339; for further issues for which tort law may (or may not) provide the forum for the recognition of newly protected rights and interests, see *Infantino* (fn 7).

49 BGH, 5.10.2004, NJW 2005, 215, at II.1., 2.d) (in English translation): 'The idea behind awarding monetary compensation following the severe infringement of an individual's personality rights is that without such a claim, many injuries to human dignity and honour would go without sanction and the legal protection of personality rights would suffer as a consequence. ... In cases where the injuring party has misused the personality of the claimant as a means of increasing circulation of its print media and has thereby pursued its own commercial interests, any profits gained through violation of the law should be taken into account by the court when deciding on the amount to be awarded. The award in such cases must be large enough to have a genuine preventive effect ...'.

Upon request of the victim, the Dutch Civil Code allows courts to estimate damages in line with the profit a tortfeasor has gained through their illicit behaviour (art 6:104 BW).

Courts in other European jurisdictions have refused to take illegally obtained benefits into consideration when fixing damages awards in tort law. This is notably the case for the courts in France.[50] The Swiss Civil Code uses the provisions on *Geschäftsführung ohne Auftrag, gestion d'affaires* (agency without authority) for the shifting of illegally obtained benefits in cases of infringement of personality rights, rather than using tort law for this purpose.[51]

L Punishing the tortfeasor?

The last potential purpose of tort law is also the most controversial one: *punishing the tortfeasor* for serious, inexcusable negligence or for deliberately taking the risk to cause harm to others.[52]

For a long time, punitive damages were considered incompatible with public policy on the European continent (and in many codified systems elsewhere). Recently, there has been some liberalisation in this respect.

In Croatia, for example, an Act of 2021 on the Protection of Authors' Rights and Related Rights allows, in the case of a wilful or grossly negligent infringement of an author's rights, the award of an amount twice the agreed or usual remuneration of the author, independent of any damage suffered.[53] Similar acts exist in many other

50 See eg, Cour d'appel de Toulouse, 25.5.2004, CCE no 1/2005, comm 17 (in English translation): '[A]ny profits made by the newspaper must be excluded from the assessment of compensation; compensation is not intended to sanction conduct, nor is it to act as a deterrent for press misconduct, but must be assessed in line with the victim's loss in accordance with the general principles of tort law'.

51 Art 28 and art 28a sec 3 of the Civil Code and arts 49, 419, 423 of the Code of Obligations; see also Bundesgericht, 7.12.2006 (*Schnyder v Ringier*), BGE 133 III 153, in English translation in *Kadner Graziano* (fn 26) 485ff.

52 For the situation in the USA, see eg *Abraham* (fn 25) 258 ff: 'Punitive damages are awarded in only a small percentage of cases, but the threat that they may be awarded probably has more impact than the small percentage of awards reflects. The states vary in their descriptions of the behaviour that warrants an award of punitive damages, but almost always behaviour more blameworthy than even gross negligence is … necessary. … [O]ver the past two decades, the US Supreme Court has reviewed punitive damages awards in a variety of cases in response to defendants' claims that excessive awards violate the Constitutional requirement of due process of law. … [I]n *State Farm Insurance Company* v. *Campbell* [2003], the Court quantified the second factor holding that … awards that are more than nine times greater than compensatory damages are, in effect, presumably unconstitutional'.

53 *M Baretić*, Croatia, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2021 (2022) 66, no 4ff with further refs.

countries. The courts in Hungary held in 2020 that, in case of an infringement of the protection of personal data, damages for immaterial harm (*solatium doloris*) in tort may have a punitive function.[54] The Polish Supreme Court held in 2020 that damages for the infringement of personality rights by media may serve a punitive function.[55]

The 2017 proposal for tort law reform in the French Civil Code[56] suggests introducing punitive damages in case of deliberate misconduct for the purpose of gaining a benefit.[57] The new Chinese Civil Code, in force since 2021, identifies two situations in which *punitive damages* may be awarded following intentional torts.[58]

In Europe, the issue often arises in procedures for recognition of US American damages awards. The Italian *Corte di Cassazione* had refused the recognition of foreign punitive damage awards in 2007 and 2012, arguing that damages in tort only

54 *A Menyhárd*, Hungary, in: E Karner/BC Steininger (eds), ETL 2020 (2021) 278, no 19ff with further refs.

55 *E Bagińska*/*P Wyszyńska-Ślufińska*, Poland, in: ETL 2020 (2021) 487, no 2ff with further refs.

56 Reform project of the law of civil liability, presented on 13.3.2017 by *J-J Urvoas*, Minister of Justice, Articles 1232 to 1299–3), in <http://www.justice.gouv.fr/publication/Projet_de_reforme_de_la_responsabilite_civile_13032017.pdf>; on this project: *J-S Borghetti*, L'avant-projet de réforme de la responsabilité civile, Commentaire des principales dispositions, Recueil Dalloz (D) 2016, 1442; *idem*, Un pas de plus vers la réforme du droit de la responsabilité civile: présentation du projet de réforme rendu public le 13 mars 2017, D 2017, 770; *P Brun*, Premiers regards sur l'avant-projet de réforme de la responsabilité civile, Recueil Lamy Droit Civil (RLDC) 2016/140, no 6221.

57 Without doubt 'one of the most noticed provisions' of the draft, see *Brun*, RLDC 2016/140, no 28; *Borghetti*, D 2016, no 47: 'the civil fine … is undoubtedly the most innovative and debatable provision of the preliminary draft' (translation from French). It states (in English translation): **Art 1266–1.** (1) In non-contractual matters, where the author of the damage has deliberately committed a fault with a view to obtaining a gain or a saving, the court may order him, at the request of the victim or the public prosecutor and by a specially reasoned decision, to pay a civil fine. (2) The fine shall be proportionate to the seriousness of the offence committed, the contributory capacity of the author of the damage and the benefits he has obtained. (3) The fine may not exceed ten times the amount of the profit made. If the person responsible is a legal person, the fine may be increased to 5 % of the highest turnover excluding tax achieved in France during one of the financial years closed since the financial year preceding that in which the fault was committed. (4) This fine is allocated to the financing of a compensation fund in relation to the nature of the damage suffered or, failing that, to the Treasury. (5) It is not insurable.

58 The relevant articles of the Chinese Civil Code provide (in English translation): **Art 1185.** Where an intentional infringement of another person's intellectual property rights caused harm to this person in serious circumstances, the victim shall be entitled to punitive damages. **Art 1207.** Where a product is manufactured or sold knowing that it is defective, or where effective remedial measures are not taken in accordance with the provisions of the preceding article, causing death or serious damage to the health of another person, the tortfeasor shall have the right to claim punitive damages.

serve a compensatory function as opposed to a punitive function.[59] In a much-noted decision of 2017, the Italian *Corte di Cassazione* overturned this reasoning.[60] A motorcycle racer had suffered serious personal injuries in a race in the USA due to a defect in his crash helmet. The helmet was produced by an Italian company and sold by a company in the USA. The American seller paid the victim a large amount of damages, arguably including punitive damages, and a court in Florida ordered the Italian producer to reimburse the US seller. The seller sought recognition of the judgment in Italy.

In its judgment, the Grand Chamber of the Italian Court of Cassation emphasised that recent Italian laws and court decisions applying them (such as a 2015 decision on the liability of company directors) allowed damages in tort law to have a punitive function. The Court held that punitive damages are now admissible in Italian law, provided that a legal provision (domestic or foreign) allows them, that there is a cap or ceiling guaranteeing predictability and that the award respects the principle of proportionality in light of the tortfeasor's conduct and the damage suffered.

French and Spanish courts have also held that the recognition of foreign punitive damages awards does not violate public policy, provided the amount is not disproportionate in relation to the damage suffered.[61]

59 Corte di Cassazione Civile (Court of Cassation, Civil Section), 19.1.2007, no 1183, Repertorio del Foro italiano (Rep Foro it) 2007, no 13; Corte di Cassazione (Court of Cassation), 8.2.2012, *Soc Ruffinatti v Oyola-Rosado*, no 1781/2012.

60 Cassazione civile, sezione unite, 5.7.2017, no 16601, reported by *E Bargelli*, Italy, in: ETL 2017 (2018) 310, nos 45–51.

61 French Cour de cassation (Court of Cassation), 1.12.2010, *Schlenzka & Langhorne v Fountaine Pajot SA*, no 09–13.303, D 2011, 423: 'le principe d'une condamnation à des dommages intérêts punitifs … n'est pas, en soi, contraire à l'ordre public, il est autrement lorsque le montant alloué est disproportionné au regard du préjudice subi et aux manquements aux obligations …' (translation: 'The idea of imposing punitive damages … is not, in and of itself, contrary to public policy except where the amount imposed by the court is not proportionate to the harm suffered by the victim and the failure of the tortfeasor to comply with the obligations he was required to perform …'); Spanish Tribunal Supremo (Supreme Court), *Miller Import Corp v Alabastres Alfredo, SL*, 13.11.2001, no 2039/1999. The acceptable proportion seems to be set at 1:1 by French courts and at 2:1 by the courts in Spain, see *C Vanleenhove*, Punitive Damages in Private International Law: Lessons for the European Union (2016) nos 514, 519. A similar position seems to prevail in *Greece*, see *M Requejo Isidro*, Punitive Damages from a Private International Law Perspective, in: H Koziol/V Wilcox (eds), Punitive Damages: Common Law and Civil Law Perspectives (2009) 247.

The majority of European jurisdictions are, however, opposed to admitting punitive damages if they pursue a truly punitive function.[62] The PETL are consequently also hostile to them.[63]

IV Conclusions

The PETL mention two purposes of tort law in art 10:101: compensation and the prevention of harm. Tort law pursues, however, a whole range of different objectives, which interact and complement each other. Eleven purposes of tort liability can be identified, and compensation and the prevention of harm are just two of them. Most purposes apply both to fault-based and to strict liability, few of them focus on one or the other liability regime.

It is submitted that most of these purposes are shared by many, if not all, European jurisdictions. They could thus very well be mentioned explicitly in a future version of PETL. It is true that some of the economic functions have only been marginally discussed in European legal scholarship so far.[64] This does not mean, however, that they do not play a key role in the reality and practice of European tort law.

In most European jurisdictions, punishing the tortfeasor is currently not recognised as an objective of tort liability in Europe. This latter purpose could thus be

62 See for *Poland*: Sąd Apelacyjny w Warszawie (Court of Appeal in Warsaw) 26.1.2012, I ACz 2059/11, quoted after Yearbook ETL 2012 (2013) at 21, nos 36–42; for *Germany*: Bundesgerichtshof, BGH (Federal Supreme Court of Justice), 4.6.1992, BGHZ 118, 312; in *Switzerland*, the Court of First Instance of Basel, confirmed by the Basel Court of Appeal, recognised a Californian decision awarding punitive damages, arguing that 'the main purpose of the punitive damages award was to compensate the claimant for unjust profit realized by the respondent, and that punishment played only a secondary role in the awarding of damages. ...', Zivilgericht Basel-Stadt (Basel Civil Court), 1.2.1989, in: BJM 1991, 31ff. According to scholars, '[i]t thus appears that Swiss courts will enforce a foreign award of punitive damages if they are primarily compensatory in nature', *Y Gotanda*, Supplemental Damages in Private International Law (1998) 203; see also *E Karner* in: H Koziol (ed), The Aims of Tort Law. Chinese and European Perspectives (2017) no 3, 11ff with refs; *Kadner Graziano* (fn 26) 489ff and references in fn 34; for the rationale, see eg *Esser*/*Weyers* (fn 5) § 53 4. b): 'this aim is not only largely unattainable under contemporary [European] tort law but also undesirable in the absence of the constitutional safeguards provided by our criminal law system, which would act to protect the tortfeasor' (translation from German); MünchKomm/*Wagner* (fn 12) no 48ff; *Werro* (fn 17) no 8; in comparative perspective *Koziol*, Basic Questions (fn 9) 8/157ff.

63 See above I; *Magnus* (fn 2) art 10:101 no 4.

64 See the comparative conclusions by *Koziol*, Basic Questions (fn 9) no 8/175; among the authors discussing economic arguments in detail are MünchKomm/*Wagner* (fn 12) nos 51–72; *Faure* (fn 5) no 1ff.

explicitly excluded in the PETL. The wording suggested in Sec 2 of the following proposal shall not exclude the recognition of foreign punitive damages awards that are primarily compensatory in nature or in situations where damage is difficult to calculate in economic terms (a classic example is damage to the environment).

V Proposal for amendment

Based on the above analysis, a revised provision on the purposes of tort liability could provide:

Purposes of Tort Law.

(1) Depending on the circumstances of the case and the system of liability applied, tort law pursues the following purposes:
   (a) attribution of damage and shifting loss from the victim to the tortfeasor according to well-defined criteria;
   (b) compensation of damage suffered by the victim;
   (c) measuring behaviour according to a required standard of care and sanctioning socially undesirable behaviour (fault-based liability);
   (d) internalising negative external effects and social costs by making the person that benefits from an activity pay for the costs of this activity;
   (e) transferring the costs of damage to the party who can best avoid it;
   (f) allocating the damage to the person that can best pass it on to the community of beneficiaries of that activity;
   (g) preventing harmful behaviour and providing incentives to avoid causing harm;
   (h) recognition that the victim's protected interests have been infringed;
   (i) protection of constitutional values by means of private law; and
   (j) providing a means for the recognition and protection of newly protected rights and interests.
   (k) Alongside other remedies, tort law may be used for the purpose of shifting illicitly acquired gains from the tortfeasor to the victim.

(2) Tort law does not pursue the aim of punishing the tortfeasor.