

# Bénédict Winiger\*

## Introduction

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I feel very honoured that my colleagues, Thomas Kadner, Christine Chappuis and Doris Forster organised a conference in September 2022 at the University of Geneva on the occasion of me leaving our faculty and that the papers presented there have been published in two special issues of the *Journal of European Tort Law*. I would like to take this opportunity to thank my colleagues who participated in the conference and sacrificed their time to draft papers.

The editors' idea to create a dialogue between specialists from the 'outside world' and the members of the European Group on Tort Law (EGTL) follows a tradition initiated already before the publication of the *Principles of European Tort Law* (PETL) in 2005. Indeed, from the very beginning, the EGTL discussed its drafts with various groups of interested lawyers in order to test our ideas and improve our concepts.<sup>1</sup> Now, 18 years after the publication of the PETL, new reflection is particularly welcome as the EGTL is preparing a revision of its *Principles*.<sup>2</sup> The ideas proposed by our colleagues provide precious input for the ongoing work.

The papers presented here testify to the fact that the idea of drafting European *Principles of Tort Law* is largely approved by the scientific community.<sup>3</sup> Also, an in-depth analysis reveals that central concepts, such as protected interests,<sup>4</sup> fault<sup>5</sup> and the relationship between unlawfulness and fault<sup>6</sup> are still valid, albeit improvable.

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<sup>1</sup> European Group on Tort Law, *Principles of European Tort Law* (2005) 17 no 19.

<sup>2</sup> M Martín Casals, *The Impact of the PETL on National Legislation and Case Law – A Survey* (2023) 14 *Journal of European Tort Law* (JETL) 4.

<sup>3</sup> See in particular M Infantino, *Protected Interests under the Principles of European Tort Law* (Art 2:102 PETL) – Preserving the Past for Shaping the Future (2023) 14 JETL 42; BC Steininger, *Art 4:201 PETL: Revisiting the Grey Areas between Fault-Based and Strict Liability* (2023) 14 JETL 97.

<sup>4</sup> Infantino (2023) 14 JETL 42.

<sup>5</sup> M Hinteregger, *Art 4:102 Principles of European Tort Law – An Objective or Subjective Standard of Fault – Does the Difference Really Matter?* (2023) 14 JETL 71.

<sup>6</sup> J Knetsch, *Should Wrongfulness be Required or is Fault Enough?* Arts 1:101, 4:101ff PETL (2023) 14 JETL 73.

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Certain articles highlight the possible overlap between the PETL and other legal orders. Notably product liability, if well formulated in European directives, can offer a sufficient basis, making specific rulings in the PETL redundant.<sup>7</sup> Even for the rapidly growing issue of environmental liability, the Principles appear to offer an adequate basic norm, which can be complemented by more specific international rules.<sup>8</sup>

However, nobody would maintain that the PETL are perfect. One of the fundamental points relates to the purpose of damages. It is proposed to abandon the narrow definition of damages as a monetary payment to compensate the victim and to explicitly refer to a wider range of objectives in art 10:101 PETL.<sup>9</sup> Another point concerns the relationship between fault, a reversal of the burden of proof and strict liability. Though the 'continuum' between these three concepts is considered as a great achievement, the degrees of dangerousness and the criteria for the reversal of the burden of proof should be clarified.<sup>10</sup> It is also suggested that a new provision on the contractual limitations on tort law should be added to art 7:101 PETL.<sup>11</sup>

The 'main dish' is strict liability, as already highlighted in an older paper by Pierre Widmer.<sup>12</sup> Already in the first volume of this special issue, it was underlined that road traffic in particular should imperatively be subjected to a 'robust' strict liability regime.<sup>13</sup> The present volume includes a fully formulated basic principle on strict liability, combined with a catalogue of standard examples indicating to the judge the relevant aspects to be taken into account. This model follows the flexible system, which was also adopted in the PETL.<sup>14</sup>

In 2023, the EGTL, which agrees that strict liability is the most urgent issue to be revised, began drafting new provisions on strict liability, which will likely be submitted to external experts for review and suggestions for improvement. Other fields will be examined, notably those which have developed at a rapid pace over the

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<sup>7</sup> *P Machnikowski*, The Principles of European Tort Law and Product Liability (2024) 15 JETL 31.

<sup>8</sup> *AG Castermans*, The PETL and Corporate Liability for Greenhouse Gas Emissions: Duties and Remedies (2024) 15 JETL 63.

<sup>9</sup> *T Kadner Graziano*, The Purposes of Tort Law – Article 10:101 of the Principles of European Tort Law Reconsidered (2023) 14 JETL 23 with a norm proposal (41).

<sup>10</sup> *BC Steininger* (2023) 14 JETL 97.

<sup>11</sup> *P Pichonnaz*, Contractual Limitations of Liability and their Impact on Tort Claims (2024) 15 JETL 44, with a norm proposal.

<sup>12</sup> *P Widmer*, Some Reflections on the PETL and Proposals for their Revision (2024) 15 JETL 84.

<sup>13</sup> *K Ludwichowska-Redo*, Drive (back) into Lane 5:101? A Few Remarks on the Future of Road Traffic Liability within PETL (2023) 14 JETL 112.

<sup>14</sup> *C Oertel*, Strict Liability in the Principles of European Tort Law: The Black Hole and Central Building Site (2024) 15 JETL 4, with a norm proposal.

course of the last two decades. As the authors of the present articles show brilliantly, it will be challenging for the EGTL to identify how new problems may be resolved with the existing rules and where a reformulation or completion of the PETL is necessary.