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XXXII. The Dynamics of Tort Law in Europe – Two Decades of Accumulated Experience

A. Introduction[1]

My last multi-year overview of significant developments in the tort laws of Europe was written in 2016 on the occasion of the 15th Annual Conference on European Tort Law.[2] Due to the pandemic, a follow-up report initially envisaged five years later for the 2021 conference and intended to cover the first two decades of said conference series was postponed to this year, which is why, technically, this paper is based on 21 volumes of the Yearbook on European Tort Law.[3] **1**

This conference series itself and the accompanying Yearbook publications need to be showcased upfront. Apart from insights into national legislation and academic writing, the reporters have so far submitted a grand total of more than 4,500 cases, which are presented not only in the Yearbooks, but also in our Eurotort database.[4] I dare claim that there is no other area of the law whose comprehensive comparative coverage across Europe matches this extraordinary achievement. **2**

1 This paper is based on an oral presentation at the Annual Conference on European Tort Law (ACET) on 22 April 2022. I would like to express my profound gratitude to all contributors to this volume who, in addition to producing their own country reports, generously supplied the data on the amounts awarded for immaterial harm, which was used for the comparative charts below no 58ff.

2 *BA Koch*, 15 Years of Tort Law in Europe: 15 Years of European Tort Law? in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2015 (2016) 704 (cited as '2016 report' in the following). Instead of repeating the citations referenced in that paper, I will merely cite the respective footnotes of said report in the following and then add new sources of the Yearbooks published thereafter, if applicable.

3 Citations to the various volumes of the European Tort Law Yearbook series will be reduced to the abbreviation ETL (European Tort Law), followed by the respective year concerned. The publication year was mostly the one immediately following, so ETL 2015, for example, was published in 2016. ETL 2007 appeared in 2009, however. The editors of volumes ETL 2001 to ETL 2010 were H Koziol and BC Steininger, ETL 2011 and ETL 2012 were edited by K Oliphant and BC Steininger, and since ETL 2013, the joint editors are E Karner and BC Steininger.

4 <http://www.eurotort.org>.

https://doi.org/10.1515/tortlaw-2022-0032

3 As unavoidable for such a long-term report, I will not be able to highlight all (not even all significant) legislation and case law reported over more than two decades. Instead, I will try to select a few snapshots of trends which stand out according to my own subjective analysis. Needless to say, I have to resume from where I left in 2016, which is why many trends identified then will still be relevant in today's extended overview. I will, however, prioritise developments ever since in the following.

4 One aspect that may be expected in this paper but will not be addressed is the Covid-19 pandemic. The reason why we could not meet at all in 2020 and only virtually in 2021 and 2022 has already left its mark also upon tort law practice, of course, if only by the adoption of at least temporary measures regarding the prescription of claims as well as the introduction or adjustment of vaccination compensation schemes.[5] However, while cases concerning State liability for lockdown measures or vaccination cases have already been filed and more are to be expected, it will take a while before they reach the respective supreme courts in a significant number of countries. It is therefore a topic to be expected for a future long-term comparative report and probably premature at this point.

B. Tort Law Legislation

5 The most obvious changes to tort law are brought about by legislators, and we have seen an abundance of new or amended statutory provisions over these past two decades, the introduction of entirely new or adjustments to existing legislative instruments, and even the recodification of entire civil codes or at least of the law of obligations as a whole in some countries.[6]

5 Cf eg *J Hrádek*, Czech Republic, ETL 2020, 94, no 13ff; *idem*, Czech Republic (91) no 14ff; *K Oliphant*, England and Wales, ETL 2020, 131, no 5; *W Wurmnest*/*J Kleinschmidt*/*S Gasche*, Germany (194) no 70ff (giving a preview of the broad range of cases we may see also in other jurisdictions in the years to come); *Z Tsolakidis*, Greece, ETL 2020, 250, no 1ff; *R Perry*, Israel, ETL 2020, 698, no 1ff; *C Alunaru*/*L Bojin*/*B Șerb*, Romania, ETL 2020, 535, no 1ff, *A Ruda*, Spain, ETL 2020, 612, no 1ff; *A Dulak*, Slovakia, ETL 2020, 580, no 5ff; *idem*, Slovakia (561) no 1ff. See also the contributions in E Hondius et al (eds), Coronavirus and the Law in Europe (2021) 321ff.

6 This was the case, for example, in Lithuania, Estonia, Slovenia, Croatia, Romania, Turkey, the Czech Republic, and Hungary (in chronological order of the entry into force). See the citations in fn 4–6 of the 2016 report (fn 2). Interestingly, the new Civil Code in Hungary was already reformed shortly after its introduction: *A Menyhárd*, Hungary, ETL 2016, 264, no 2ff.

1. Recodification of Entire Civil Codes or of the Laws of Obligations in General

In retrospect, it seems that the more dramatic the renewal of the law in the books appeared, the fewer changes it actually brought about, at least to the practice of tort law. On second thought, this may not be quite as surprising – after all, the task of replacing an entire civil code, for example, opens up so many battle grounds on so many levels in so many different areas of private law that the energy to completely rehaul one of its key parts may not suffice to actually achieve a revolutionary outcome in the end. **6**

The most recent example for such developments is Belgium, where a new civil code is on its way,[7] with some parts already in force.[8] However, while the original draft of the new tort law provisions[9] suggests an introduction of quite some important and laudable changes, it seems that the (justified) ambitions of the drafters were not fully appreciated by those who should now contribute to making this into law. It therefore remains to be seen how long it will take until Book 6 of the new Civil code will see the light of promulgation day, and how much of the original draft text will make it into law. **7**

This delay may come as a relief of sorts to neighbouring France, the motherland of the Belgian *Code civil*. A comprehensive reform of the law of obligations had started much sooner there, in the wake of the bicentennial of the *Code Napoléon*,[10] but still has not come to an end in the 'Journal officiel de la République française'. This is not apparent at first sight, though – after all, perhaps the most dramatic change from a comparative lawyer's perspective was the renumbering of the entire law of obligations and therefore also of its tort law provisions. What was previously to be found in art 1382ff *Code civil* is now in art 1240ff, thereby inter alia moving the famous (or notorious) art 1384 to 1242, the new place for the old liability for things (*responsabilité du fait des choses*). Still, it was really just a renumbering and not a rewording, deemed necessary in the sweeping 2016 recodification of the law of obligations that bypassed the law of delict at the time, **8**

7 On this project, see *I Durant*, Belgium, ETL 2019, 33, no 1ff.

8 Since 1 November 2020, the original code is now referred to as the 'ancien Code civil'. One of the parts already in force that is also relevant for the practice in tort law is Book 8 on evidence ('La preuve'). Also, rules on nuisance have been integrated into Book 3 on property law ('Les biens'), which entered into force on 1 September 2021: *I Durant*, Belgium, ETL 2020, 30, 1ff.

9 The text of the tort law draft can be found at <https://justice.belgium.be/sites/default/files/avant-projet_de_loi_-_voorontwerp_van_wet_-_livre_boek_5.pdf>.

10 See eg *P Catala*, General Presentation of the Reform Proposals, in: P Catala, Proposals for Reform of the Law of Obligations and the Law of Prescription (transl by J Cartwright and S Whittaker, 2005) <https://www.justice.gouv.fr/art_pix/rapportcatatla0905-anglais.pdf>) 9.

though.[11] The actual substantive reform of French tort law is still in the pipeline, however, despite occasional steps (more or less) forward as reported over the years.[12] While there are obviously more pressing matters at the moment, it is still deplorable that 'the initial enthusiasm ... has turned into a diffuse sense of consternation and faithlessness'.[13]

2. Reforms of the Law of Delict in Particular

9 The fate of reform projects focusing exclusively on tort law (as if that were not enough in and of itself, though) was equally mixed over these past two decades. While some countries succeeded in introducing even rather substantial reforms,[14] others stopped midway and failed to finalise more or less ambitious projects introduced and debated over the years covered by this report.[15] As with more comprehensive legislative projects mentioned earlier, we have therefore heard about reform plans in this conference series which were not always followed by a notification of completion of such initiatives in one of the subsequent years.

10 From a comparative perspective, perhaps the most interesting developments – a rollercoaster of tort scholars' emotions – concerned the Swiss reform draft, as already highlighted in 2016.[16] While it deplorably ultimately failed in Switzerland,[17] Turkey subsequently used significant parts of this draft as an inspiration to update its own tort law provisions accordingly.[18] It is ironic that the country into which the Swiss codification was transplanted in 1926 now has the more

11 *J Knetsch/Z Jacquemin*, France, ETL 2016, 191, no 1ff.

12 *J Knetsch/Z Jacquemin*, France, ETL 2016, 191, no 13ff; *idem*, France, ETL 2017, 187, no 1ff; *idem*, France, ETL 2019, 186, no 1ff; *idem*, France, ETL 2020, 178, no 1ff; *J Knetsch*, France (174) no 1f.

13 *J Knetsch*, France (174) no 2.

14 In the 2016 report (fn 2) fn 7–11, I had pointed to the reform acts in Germany (2002), Finland (2006), Latvia (2006), Scotland (2011), and Spain (2015).

15 2016 report (fn 2) no 9ff.

16 <https://www.bj.admin.ch/bj/de/home/wirtschaft/gesetzgebung/archiv/haftplicht.html>. For an overview of the draft, see *P Loser-Krogh*, Switzerland, ETL 2002, 407, no 1ff (with a translation thereof in the appendix at 423 ff).

17 *P Loser*, Switzerland, ETL 2008, 636, no 1. On a subsequent competitor project, 'OR 2020', see *idem*, Switzerland, ETL 2013, 673, no 8ff (with an English translation of the tort law proposals in the annex 696 ff); *idem*, Switzerland, ETL 2014, 648, no 7f.

18 *E Büyüksagis*, Turkey, ETL 2013, 755, no 1ff; *idem*, The New Turkish Tort Law (2012) 3 Journal of European Tort Law (JETL) 44 (with a translation of the tort law provisions in the appendix 90 ff).

advanced version of the original.[19] Like the Swiss draft, also an Austrian attempt at a full recodification of the tort law provisions of the ABGB was inter alia based on comparative analyses to support it, but the Austrian draft equally did not survive the fierce debates that it triggered.[20]

3. Tort Law Updates on a Smaller Scale

11 The fact that some countries aimed at a comprehensive reform of their laws of delict or even of their entire civil codes does not mean that legislators in other jurisdictions have ignored tort law entirely over the past decades. After all, there is an abundance of more or less far-reaching singular legislative interventions which have modernised the respective country's approach to allocate risks, in addition to necessary implementations of EU directives.[21]

12 Apart from State liability,[22] this affected such diverse aspects as compensation for the non-pecuniary loss of secondary victims,[23] prescription,[24] as well as environmental[25] and medical liability. In the last category falls the Italian *legge Gelli-Bianco*,[26] for example, the introduction of a no-fault medical liability regime in Lithuania,[27] or the inclusion of specific rules on medical treatment contracts

19 *E Büyüksagis*, (2012) 3 JETL 45f.

20 *BC Steininger*, ETL 2005, 118, no 1ff (translation of the draft at 142 ff); *idem*, ETL 2007, 134, no 1ff (with a translation of the revised draft at 158 ff), *idem*, ETL 2008, 108, no 1ff (translation of a counter-proposal at 138 ff).

21 Such as Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] Official Journal (OJ) L 349/1; see *BA Koch/T Thiede*, European Union, ETL 2014, 660, no 1ff. On the implementations of the Directive, see eg *G Christandl*, Comparative Remarks, ETL 2016, 694, no 5f (listing the merely six implementations at the time they had been due); *J Pehm*, Austria, ETL 2017, 1, no 1ff; *I Durant*, Belgium, ETL 2017, 25, no 7ff; *M Baretić*, Croatia, ETL 2017, 74, no 2ff; *J Hrádek*, Czech Republic, ETL 2017, 107, no 1ff; *J Lahe/I Kull*, Estonia, ETL 2017, 163, no 1ff; *W Wurmnest/M Gömann*, Germany, ETL 2017, 207, no 11f; *S Drukteinienė/L Šaltinytė*, Lithuania, ETL 2017, 360, no 1; *E Bagińska*, Poland, ETL 2017, 467, no 1f; *G Dugar*, Slovenia, ETL 2017, 563, no 19ff; *A Ruda*, Spain, ETL 2017, 595, no 1; or *E Dacoronia*, Greece, ETL 2018, 258, no 1.

22 See below C.2.b).

23 See below C.1.b).

24 *M Hogg*, Scotland, ETL 2018, 563, no 1ff; *P Loser*, Switzerland, ETL 2016, 623, no 1ff; *P Loser*, Switzerland, ETL 2018, 673, no 1ff. See also below C.3.

25 See below C.2.a).

26 *E Bargelli*, Italy, ETL 2017, 310, no 1ff.

27 *S Drukteinienė/L Šaltinytė*, Lithuania, ETL 2019, 359, no 1ff; *idem*, Lithuania, ETL 2020, 379, no 1ff.

into the German BGB, with the latter transcribing existing case law rather than innovating the rules.[28]

13 It is also interesting to note that a fierce debate in Germany at the beginning of the millennium as to whether and how small claims in tort law should be curtailed (with an eye specifically to whiplash injuries) ultimately failed there[29] but succeeded almost two decades later in England even though it was also 'extremely controversial' there as well.[30]

14 Furthermore, updates that significantly shape the practice of tort law do not necessarily originate on the floors of some legislative body. This is true in particular for guidelines and similar practice tools such as the Irish Personal Injuries Guidelines[31] or the Ogden Tables, the famous English tool for calculating lump sum awards for future pecuniary losses resulting from bodily harm and fatal injuries.[32]

15 Some legislative achievements reported over these past two decades seem worthy of adoption in other countries as well but unfortunately do not (yet) seem to inspire legislators elsewhere. One such example is the Apologies (Scotland) Act of 2016,[33] which 'has the simple, focused purpose of providing that in any civil legal proceedings … an apology made outside the proceedings (a) is not admissible as evidence of anything relevant to determination of liability in connection with the proceedings and (b) cannot be used in any other way to the prejudice of the person who made the apology.'[34] This would seem an important clarification in particular for medical malpractice cases throughout Europe, if only as an incentive to 'making amends' outside of litigation.[35]

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28 *F Wagner-von Papp*/*J Fedtke*, Germany, ETL 2012, 29, no 1ff.

29 The quite significant 2002 reform had initially foreseen a *de minimis* limit specifically targeting whiplash claims, but that aspect did not survive the legislative pipeline; on this reform otherwise see *J Fedtke*, Germany, ETL 2001, 229, no 1ff.

30 *A Morris*/*K Oliphant*, England and Wales, ETL 2018, 131, no 7ff.

31 The most recent edition was just adopted in March of 2021: <https://judicialcouncil.ie/assets/uploads/documents/Personal Injuries Guidelines.pdf>. See *E Quill*, Ireland (283) no 35ff.

32 The most recent (8th) edition of May 2021 can be found at <https://www.gov.uk/government/publications/ogden-tables-actuarial-compensation-tables-for-injury-and-death>.

33 *M Hogg*, Scotland, ETL 2016, 510, no 1f.

34 Cf eg the case presented by *I Durant*, Belgium (31) no 53ff.

35 This alludes to the 2003 report by the Chief Medical Officer of the English Department of Health, whose findings include that patients harmed during treatment primarily seek an explanation and/or an apology rather than monetary compensation: Department of Health (ed), Making Amends – A consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS (2003) 75: 'Nearly 60 % of respondents wanted an apology, explanation or inquiry into the cause of the incident. Only 11 % said that financial compensation was the most appropriate remedy. …'

4. Proposals for Harmonisation

In the first half of this two decades survey period, two substantial proposals to harmonise tort law in Europe were published, the 'Principles of European Tort Law' (PETL) by the European Group on Tort Law[36] and the 'Principles of European Law on Non-Contractual Liability Arising out of Damage Caused to Another' (PEL Liab Dam) by the Study Group on a European Civil Code.[37] While the Study Group no longer seems to be active, the European Group on Tort Law is currently preparing an update to their original draft.[38] **16**

The impact of neither of these two drafts can easily be measured. However, draft reform projects thereafter did at least consider them,[39] and several supreme court decisions took notice of the proposals.[40] **17**

5. Brussels Calling?

While those two drafts of 'Principles'[41] of the laws of delict in Europe were not meant to serve as a blueprint for a European instrument,[42] but rather as a basis for future work towards approximation, either on a national level or by the EU, it is obvious that the latter addressee has not heard that call yet.[43] It is not even clear **18**

36 *European Group on Tort Law*, Principles of European Tort Law. Text and Commentary (2005). The text of the PETL in various language versions can also be found at <http://www.egtl.org/Principles>.

37 *C von Bar* (ed), Principles of European Law on Non-Contractual Liability Arising out of Damage Caused to Another (PEL Liab Dam) (2009). This text was subsequently incorporated into the Draft Common Frame of Reference (DCFR) as its Book Six; see <https://www.law.kuleuven.be/web/mstorme/2009_02_DCFR_OutlineEdition.pdf>.

38 See the Group's website at <http://www.egtl.org>.

39 Cf eg *E Büyüksagis*, (2012) 3 JETL 46; *A Dulak*, Slovakia, ETL 2015, 544, no 1ff.

40 Cf eg the citations listed at <http://egtl.org/materials.html>. See also, eg, *S Drukteinienė/L Šaltinytė*, Lithuania, ETL 2015, 349, nos 4ff, 56ff; *E Bargelli*, Italy, ETL 2017, 310, no 52ff; *E Bagińska/I Adrych-Brzezińska*, Poland, ETL 2018, 474, no 2ff.

41 On this term, cf *R Zimmermann*, Principles of European Contract Law and Principles of European Tort Law: Comparison and Points of Contact, ETL 2003, 2 (no 6 f).

42 Cf eg *BA Koch*, The 'European Group on Tort Law' and Its 'Principles of European Tort Law', 53 American Journal of Comparative Law (Am J Comp Law) (2005) 189 (191).

43 This is obviously even more true for singular sightings of calls for a full-fledged European Civil Code replacing national equivalents; cf eg the Resolution of the European Parliament 'on action to bring into line the private law of the Member States', OJ C 158, 26.6.1989, 400f, requesting inter alia 'that a start be made on the necessary preparatory work on drawing up a common European Code of Private Law'; similarly in its 1994 'Resolution on the harmonization of certain sectors of

whether that would be the appropriate forum for such an interference with existing tort law cultures in Europe,[44] let alone whether and to what extent harmonisation would be desirable at all, whether it would be politically feasible and indeed work in practice. After all, the rather, well, mixed experience with the Product Liability Directive (PLD)[45] in its first decades was not encouraging in that respect.[46] This may have been at least one of the reasons why the Commission even expressly excluded the option to extend efforts to harmonise contract law to tort law at the beginning of the millennium.[47]

19 This does not mean that nothing of relevance for tort law happened in EU legislation over these past two decades. Perhaps the most significant legislative act adopted by the EU was the 2007 Rome II Regulation,[48] finally harmonising conflicts of tort laws to a considerable degree.[49] The European motor insurance scheme benefitting victims of traffic accidents has been updated multiple times since the turn of the millennium,[50] with the most recent amendments adopted in

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the private law of the Member States', OJ C 205, 25.7.1994, 518f. See also the Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM(2010) 348 final, where one of the proposed options for the legal nature of a future instrument was a 'Regulation establishing a European Civil Code'.

44 The 2012 ACET devoted a special session to the 'Cultures of Tort Law in Europe'; see the publication of the contributions thereto in (2012) 3 JETL 147ff.

45 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L 210/29, as amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 [1999] OJ L 141/20.

46 Cf eg *BA Koch*, European Union, ETL 2001, 473, no 1ff.

47 Communication from the Commission to the European Parliament and the Council – European Contract Law and the revision of the *acquis*: the way forward, COM(2004) 651 final, 11.10.2004, 11.

48 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40. See *BA Koch*, European Union, ETL 2007, 598, no 1ff. On the legislative steps towards the adoption, see *BA Koch*, European Union, ETL 2003, 435, no 1ff; *idem*, European Union, ETL 2005, 593, no 10ff; *idem*, European Union, ETL 2006, 487, no 3ff.

49 It is still deplorable that the by far most frequent cases of cross-border extra-contractual obligations – traffic accidents – are still not subject to a truly uniform regime in light of the Hague Traffic Accidents Convention, in force in almost half of the Member States and taking precedence over the Rome II Regulation according to its art 28 para 1. Also, the failure to adopt a conflicts regime for personality rights infringements in general and media delicts in particular is in urgent need of correction.

50 *BA Koch*, European Union, ETL 2002, 432, no 35ff; *idem*, European Union, ETL 2003, 435, no 25ff; *idem*, European Union, ETL 2004, 594, no 14ff; *idem*, European Union, ETL 2005, 593, no 3ff; *D Hinghofer-Szalkay*/*BA Koch*, European Union, ETL 2008, 647, no 1f; *BA Koch*, European Union, ETL 2018, 698, no 1ff.

2021.[51] Other means of transportation were addressed by some EU laws as well.[52] Specific loss scenarios arising out of infringements of data protection[53] or harmful anti-competitive conduct[54] were also tackled by the EU legislators.

However, in most recent years, some seismic activity can be sensed indicating **20** the possibility of at least some further steps towards harmonising at least some further aspects of delictual liability, including a face-lift of the PLD with a possible expansion of its scope.

This change of pace was clearly triggered by the evolution of technology. **21** Digital technologies in general and artificial intelligence (AI) in particular became priority topics for the Commission,[55] which invariably inter alia raised questions of how to deal with their possibly harmful side-effects, if only in order to provide for a predictable framework for the industries to proceed with their research in these fields. When the European Parliament published its 'Resolution on Civil Law Rules on Robotics' in 2017,[56] the political pressure on the Commission to act increased. In the following year, the Commission published a Staff Working Document on 'Liability for emerging digital technologies'[57] accompanying a Communication from the Commission to the other institutions on 'Artificial Intelligence for Europe'.[58] In the same year, the Commission set up an 'Expert Group on

51 Directive (EU) 2021/2118 of the European Parliament and of the Council of 24 November 2021 amending Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2021] OJ L 430/1.

52 See *BA Koch*, European Union, ETL 2001, 473, no 19ff; *idem*, European Union, ETL 2002, 432, no 9ff; *idem*, European Union, ETL 2003, 435, no 29ff; *idem*, European Union, ETL 2004, 594, no 17ff (aviation); *idem*, European Union, ETL 2009, 643, no 1ff (transportation by sea).

53 *BA Koch*, European Union, ETL 2012, 721, no 1f.

54 See *BA Koch*/*T Thiede*, European Union, ETL 2014, 660, no 1ff, and above fn 21 on the implementation of Directive 2014/104/EU.

55 Just think of the 'Digital Single Market' initiative prioritised by the Juncker Commission: *J-C Juncker*, A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change (2014) 4 (<https://ec.europa.eu/info/sites/default/files/juncker-political-guidelines-speech_en.pdf>). 'Excellence and trust in artificial intelligence' is one of the top priorities of the current Von der Leyen-Commission (<https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/excellence-trust-artificial-intelligence_en>), whose President wants to make 'Europe fit for the Digital Age': *U von der Leyen*, A Union that strives for more – My agenda for Europe (2018) 13f (<https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf>).

56 P8_TA(2017)0051. See also the EPRS study on 'A common EU approach to liability rules and insurance for connected and autonomous vehicles' at <http:// www.europarl.europa.eu/ thinktank/ en/ document.html? reference= EPRS_STU(2018)615635>.

57 SWD(2018) 137 final.

58 COM(2018) 237 final.

Liability for New Technologies', which had two sub-groups. While the first[59] was instructed to assess the PLD in light of the preceding (fifth) evaluation of this instrument,[60] the second formation had the more general task of examining 'whether and to what extent existing liability schemes are adapted to the emerging market realities following the development of the new technologies such as Artificial Intelligence, advanced robotics, the IoT and cybersecurity issues'.[61] This so-called 'New Technologies Formation' (NTF) published its final report in November 2019.[62]

22 The first (PLD) formation never produced a concluding document, and it initially appeared that they would not call for a substantive change to the black-letter text of the PLD itself.[63] However, the apparent reluctance of the Commission to update the PLD seems to have changed in the meantime, and a reform of the PLD as such is very likely at this point. The Commission launched a public consultation in 2021 on 'Civil Liability – Adapting Liability Rules to the Digital Age and Artificial Intelligence',[64] which inter alia expressly considered that 'the Product Liability Directive ... may ... need to be adapted'.[65] How far such changes will go, and whether previously disputed aspects of the PLD with no immediate relevance for new technologies specifically will also be reconsidered (such as the € 500 threshold for property damage or the development risk defence)[66] remains to be seen.

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59 The EGTL was an institutional member of this first formation of the Expert Group.

60 See the Commission Staff Working Document on the evaluation of the PLD, SWD/2018/157 final and *BA Koch*/*T Thiede*, European Union, ETL 2018, 698, no 9ff.

61 <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?do=groupDetail.groupDetail&groupID=3592>. The author was a member of this second formation.

62 <https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/JURI/DV/2020/01-09/AI-report_EN.pdf>. See a summary of the key findings in the following contributions by the report's drafters to a special issue of the JETL devoted to that report: *BA Koch*, Liability for Emerging Digital Technologies: An Overview (2020) 11 JETL 115; *P Machnikowski*, Producers' Liability in the EC Expert Group Report on Liability for AI (2020) 11 JETL 137; *C Wendehorst*, Strict Liability for AI and other Emerging Technologies (2020) 11 JETL 150.

63 Cf the minutes of this formation's meetings at <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?do=groupDetail.groupDetail&groupID=3592> (under the tab 'Meetings').

64 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12979-Civil-liability-adapting-liability-rules-to-the-digital-age-and-artificial-intelligence/public-consultation_en>.

65 See also the response by the European Law Institute (ELI) to said consultation at <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Response_to_Public_Consultation_on_Civil_Liability.pdf >.

66 Cf *BA Koch*, European Union, ETL 2006, 487, no 1f; *idem*, European Union, ETL 2011, 697, no 4ff and the Commission reports cited therein.

Another question mark remains – if the PLD were indeed to be amended, will it extend to AI, and, irrespective thereof, will there be another separate instrument addressing liability for AI, either as a standalone piece of legislation or complementing the new PLD? After all, the European Parliament already took a bold step forward in 2020 by proposing a full-fledged regulation (!) on liability for AI.[67] So far, the Commission has at least taken preparatory steps for such a possible instrument on liability for AI, inter alia by commissioning a study on the current responses to the risks of AI in the Member States' *leges latae*.[68] The next five-year report in this series will hopefully already know the outcome of these current developments. **23**

C. Select Tort Law Trends

As already mentioned in the introduction, the greatest achievement of this conference and book series is the massive collection of court decisions accumulated over more than two decades (in addition to the reports of all relevant legislation enacted throughout those years). Regular guests to the annual conference will share my own experience – it is fascinating how these annual reports gradually depict waves of themes sweeping through most jurisdictions covered. A problem raised before one court in one year may reappear in other countries in the following years, and what initially sounds like a singular novelty at first eventually turns into a European-wide trend, evidenced by a number of cases. **24**

1. Damage and Compensable Losses

a) Wrongful Birth – Wrongful Life – Wrongful Conception

The best example thereof were the problems known as 'wrongful birth', 'wrongful life', and 'wrongful conception', ie cases where prospective parents were deprived of their right to choose. While there were obviously some cases around Europe already before this series started, this set of ethically and dogmatically challenging questions became a recurring theme reappearing in every single volume of **25**

67 European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)).

68 *M Geistfeld/E Karner/BA Koch* (eds), Comparative law study on civil liability for artificial intelligence (2021, <https://data.europa.eu/doi/10.2838/66412>).

the Yearbook series, typically in multiple jurisdictions.[69] It was also featured in one of the special sessions of the ACET.[70]

b) Non-Pecuniary Loss of Secondary Victims

26 Another unmissable recurring theme which produced a still bigger wave of court decisions and even legislation is the question whether and to what extent secondary victims can be compensated for non-pecuniary harm they themselves incur because of the death or substantial bodily injury of the primary victim, who is typically a close family member.[71] The recoverability of such harm, in particular if

69 Since the 2016 report (fn 2, see no 23ff thereof for citations to earlier volumes), wrongful birth was at stake in the following cases, for example: *I Durant*, Belgium, ETL 2016, 21, no 65ff, 76ff; *E Bargelli*, Italy, ETL 2017, 310, no 19ff; *idem*, Italy, ETL 2018, 326, no 43ff; *E Bargelli*/*F Morello*, Italy (306) no 1ff, 33ff; *L Duarte Manso*/*F Almeno de Sá*, Portugal, ETL 2016, 459, no 52ff; *R Perry*, Israel, ETL 2019, 701, no 14ff. The question of wrongful life was addressed by *I Durant*, Belgium, ETL 2016, 21, no 44ff, 65ff; *idem*, Belgium, ETL 2018, 26, no 52ff; *L Duarte Manso*/*F Almeno de Sá*, Portugal, ETL 2016, 459, no 52ff.

70 The reports to this 2010 conference were published in Number 2 of JETL 2010: *BC Steininger,* Wrongful Birth and Wrongful Life: Basic Questions (2010) 1 JETL 125; *M Hogg*, Damages for Pecuniary Loss in Cases of Wrongful Birth (2010) 1 JETL 156; *E Bagińska,* Wrongful Birth and Non-Pecuniary Loss: Theories of Compensation (2010) 1 JETL 171; *A Ruda,* 'I Didn't Ask to be Born': Wrongful Life from a Comparative Perspective (2010) 1 JETL 204.

71 Since the 2016 report (fn 2, see the citations to no 30ff there), the following developments on this topic were reported: *J Pehm*, Austria, ETL 2017, 1, no 52ff; *S Nitsch*, Austria, ETL 2019, 1, no 55ff; *idem*, Austria, ETL 2020, 1, no 48ff; *I Durant*, Belgium, ETL 2020, 30, no 35; *V Tokushev*, Bulgaria, ETL 2018, 56, no 2ff (legislative limits on compensation for bereavement), 7ff, 17ff; *idem*, Bulgaria, ETL 2019, 58, nos 8ff, 15ff, 22ff, 41, 42; *M Baretić*/*I Kanceljak,* Croatia, ETL 2018, 70, nos 65ff, 73ff; *M Baretić*, Croatia, ETL 2019, 71, no 88ff; *idem*, Croatia, ETL 2020, 66, no 69ff; *idem*, Croatia (66) nos 10ff, 21ff; *J Hrádek*, Czech Republic, ETL 2018, 100, no 55ff; *idem*, Czech Republic, ETL 2019, 105, nos 55ff, 76ff, 104ff; *idem*, Czech Republic, ETL 2020, 94, no 115; *idem*, Czech Republic (91) no 85ff; *K Oliphant*, England and Wales, ETL 2020, 131, no 1ff (Fatal Accidents Act amendment); *J Knetsch*/*Z Jacquemin*, France, ETL 2019, 186, nos 41ff, 44f; *J Knetsch*, France (174) no 35ff; *J Kleinschmidt*, Germany, ETL 2020, 206, no 75ff (first cases on new bereavement damages scheme); *W Wurmnest*/*J Kleinschmidt*/*S Gasche*, Germany (194) no 67f; *E Dacoronia*, Greece, ETL 2018, 258, no 35ff; *idem*, Greece, ETL 2019, 248, no 53ff; *Z Tsolakidis*, Greece, ETL 2020, 250, no 58; *idem*, Greece (234) no 78ff; *A Menyhárd*, Hungary, ETL 2020, 278, no 4ff; *E Bargelli*, Italy, ETL 2016, 299, no 53ff; *A Bitāns*, Latvia, ETL 2019, 331, nos 101ff, 114ff; *S Drukteinienė*/*L Šaltinytė*, Lithuania, ETL 2019, 359, nos 48ff, 64ff, 86f, 88ff; *idem*, Lithuania, ETL 2020, 379, no 99ff; *K Tande*, Norway, ETL 2018, 442, nos 58ff, 89ff, 102ff; *E Bagińska*/*K Krupa-Lipińska*, Poland, ETL 2016, 431, no 40ff; *E Bagińska*, Poland, ETL 2017, 467, no 11ff; *E Bagińska*/*I Adrych-Brzezińska*, Poland, ETL 2018, 474, no 2ff; Poland (467) no 1ff (legislative amendment to the *Kodeks cywilny*, codifying the compensability of bereavement damages already acknowledged in jurisprudence

it was 'mere' bereavement and not the consequence of a (bodily or mental) injury of the secondary victim herself, was gradually admitted over the time span of this conference series in almost all jurisdictions, though in two countries only with (fairly recent) legislative intervention.[72]

27 Differences still remain, particularly with respect to the key question of who is eligible and what relation of proximity between the primary and the secondary victim is required. The amounts awarded are obviously also quite different in comparison.[73] Some jurisdictions reduce it to cases of fatal injuries of the primary victim, although that restriction is apparently in retreat – more and more countries also indemnify family members whose relatives survived, but only with severe injuries. The latter was also promoted by both of the two harmonisation projects mentioned earlier.[74]

c) Non-Pecuniary Loss of Legal Persons

28 Speaking of non-pecuniary harm – another theme which is actually still on the rise concerns the protection of personality rights of legal persons and whether these can be compensated for violations thereof. As long as these infringements lead to economic harm such as loss of profits, eg if the reputation of a company is smeared, which deters customers, the compensability of such damage will hardly be disputed.

29 It is still not equally clear whether legal persons can also suffer non-pecuniary harm and whether tort law needs to remedy this.[75] As the Spanish reporters to the second Yearbook stated:

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before); *C Alunaru/L Bojin*, Romania, ETL 2018, 533, no 26ff; *C Alunaru/L Bojin/S Căileanu*, Romania (520) no 21ff; *A Dulak*, Slovakia, ETL 2016, 538, nos 8ff, 14ff; *H Andersson*, Sweden, ETL 2017, 627, no 15ff; *S Friberg*, Sweden, ETL 2020, 642, no 63ff.

72 On Germany, see *J Fedtke*, Germany, ETL 2016, 214, no 1ff; *W Wurmnest/M Gömann*, Germany, ETL 2017, 207, no 1ff. On the Dutch legislation, see *J Emaus/A Keirse*, The Netherlands, ETL 2016, 393, no 2; *A Keirse/T Bouwman*, The Netherlands, ETL 2017, 412, no 1; *J Emaus/A Keirse*, The Netherlands, ETL 2018, 415, no 4f; *E van Dongen/A Keirse*, The Netherlands, ETL 2019, 409, no 1.

73 See the chart in the 2016 report (fn 2) at no 32.

74 Art 10:301 para 1 PETL; art 2:202 para 1 PEL Liab Dam.

75 See eg *V Wilcox*, A Company's Right to Damages for Non-pecuniary Loss (2016). The ECtHR has no doubts in this respect, though; cf eg ECtHR *Comingersoll S.A. v Portugal*, 6.4.2000, no 35382/97 (delay of proceedings, which according to the court, inter alia also caused the directors and shareholders inconvenience); *Société Colas Est et al v France*, 16.4.2002, no 37971/97 (violation of the applicant companies' right to respect of their premises); *Mirovni inštitut v*

> 'The existence of non-pecuniary loss for a company is a contradiction, as the loss of reputation that it could suffer in certain circumstances always causes an increase of costs, loss of earnings, etc. and all of them will be compensated with money. Obviously, a legal person cannot suffer anguish, anxiety or pain, which explains the difficulty in speaking of a notion of non-pecuniary loss including damage suffered by companies that finally have to be compensated with an amount of money.'[76]

30 Others have argued, for example, that it is not a company as such that feels pain or shame, but its officers on behalf of the company, and since the company acts through such officers, whose actions are attributed to the legal person, why should the emotions of these officers experienced in that function not equally count as the company's own sentiments?[77]

31 The trend is clearly towards increasingly recognising and therefore compensating non-pecuniary losses of legal persons,[78] as sympathy of courts increases for shielding corporations and organisations from defamation and similar infringements, which may have been boosted by the rise of the Internet and its multiplying effect of such wrongdoings.[79]

Slovenia, 13.6.2018, no 32303/13 (reported by *B Novak*, Slovenia, ETL 2018, 599, no 35 ff). Cf also *E Navarretta/E Bargelli*, Italy, ETL 2007, 373, no 20ff (Corte di cassazione, 4.6.2007, no 12429, which recognised the compensability of non-pecuniary losses of corporations and thereby justified earlier rulings in light of the – then – new approach towards non-pecuniary loss in general, which initially seemed to be restricted to natural persons in light of the focus on fundamental human rights). See also *E Dacoronia*, Greece, ETL 2010, 247, no 2ff ('It is well established in Greek theory and jurisprudence on the basis of the aforementioned provisions that not only physical persons but also legal entities are entitled to compensation for moral harm, as also the latter have a personality, the diminution of which can lead to [compensation for non-pecuniary damage].'); *idem*, Greece, ETL 2015, 247, no 8ff (cultural and religious identity of a church violated by defendant contractor who caused the collapse of a historic church building).

76 *M García Rubio/J Lete*, Spain, ETL 2002, 380, no 32.

77 Eg *M Fellner*, Persönlichkeitsschutz juristischer Personen (2007) 200ff. But cf *E Bagińska*, Poland, ETL 2009, 475, no 60ff.

78 Cf eg the first such case in Croatia, facilitated by the new Civil Obligations Act: *M Baretić*, Croatia, ETL 2015, 76, no 60ff.

79 Cases of the past five years include *I Durant*, Belgium, ETL 2016, 21, no 31ff (Constitutional Court confirming that legal persons can be awarded more than merely symbolic compensation for moral damage); *V Tokushev*, Bulgaria, ETL 2018, 56, no 23ff ('first in Bulgarian case law which unequivocally acknowledges the right of legal entities to receive compensation for non-pecuniary damage when their good name or reputation have been affected'), 30ff; *idem*, Bulgaria, ETL 2019, 58, no 27ff (Jehovah's Witnesses); *E Dacoronia*, Greece, ETL 2019, 248, no 36ff (unions lacking legal personality such as co-owners of a property have 'no emotional world or internal psychological system that could justify compensation for psychological harm'); *Z Tsolakidis*, Greece (234) no 50ff; *E Bagińska/I Adrych-Brzezińska*, Poland, ETL 2018, 474, no 58ff ('Pursuant to art 43 KC, the provisions concerning the protection of personal rights of natural persons apply to legal

Remaining differences between jurisdictions presumably originate in their respective conceptions of personality rights, leading to divergences on a more fundamental level.[80] There may be more consensus when it comes to specific personality rights such as the right to one's name, which can undoubtedly be exercised by a legal person as well. There are other personality rights which humans clearly enjoy but cannot (or at least should not) be protected for legal persons accordingly. As I already stated in my 2005 Comparative Report, it would be hard to bear if, for example, companies enjoyed a right to life which might ultimately preclude bankruptcy proceedings.[81] **32**

d) Fear of Harm as a Standalone Loss

As already highlighted in my 15-years report,[82] the recognition of claimants' fear of harm (without having incurred any actual damage yet) became increasingly relevant, and this is a continuing trend. The Dutch reporters in 2018, for example, pointed to 'the increasing attention given to "the fear of harm turning into standalone loss" (*angstschade*)' in academia and court practice.[83] This phenomenon shows twofold: first, courts are more and more willing to compensate claimants for the emotional (and therefore non-pecuniary) harm resulting from their fear of future losses, although the latter typically need to be substantial and concrete, such as dangers to life or bodily integrity. The novelty here is the move from secondary non-pecuniary losses (linked to a mental illness developing because of – justified – fear) to primary non-pecuniary harm ('fear as such'), similar to the developments regarding bereavement damages.[84] Second, also other ('traditional') losses are compensated, which moves the focus from damage to causation. The most prominent example for the latter is still the *Boston Scientific* ruling of the CJEU where inter alia the costs of preventive surgery to replace possibly defective pacemakers and implantable cardioverter defibrillators **33**

persons accordingly.'); *B Novak*, Slovenia, ETL 2016, 550, no 27ff (right of a legal entity to monetary compensation of non-pecuniary harm introduced by new Code of Obligations).

80 Cf eg the German notion of a general personality right ('allgemeines Persönlichkeitsrecht') as cited by *J Fedkte*, Germany, ETL 2005, 281, no 32ff.

81 *BA Koch*, Comparative Overview, ETL 2005, 602, no 21.

82 2016 report (fn 2) no 21f.

83 *J Emaus/A Keirse*, The Netherlands, ETL 2018, 415, no 73ff (pointing to a case dealing with the fear of earthquakes due to extraction of gas and presenting the Dutch academic debate in the following). See also, eg, *J Pehm*, Austria, ETL 2016, 1, no 18ff; *J Knetsch/Z Jacquemin*, France, ETL 2019, 186, no 21ff.

84 Above C.1.b).

were recognised as compensable under the PLD,[85] even though the court there misunderstood the dogmatic problem and still treated it as a matter of defining damage.[86]

2. Specific Liability Scenarios

34 This is not the place to showcase the full bandwidth of torts or bases of liability, or even some statistically dominant groups of cases such as traffic or medical liability, or even more specific topics such as cases involving animals.[87] Needless to say, there was an abundance of case law in all possible areas of tort law. Instead, I will only focus on a few very specific grounds of liability.

a) Environmental Harm and Sustainability

35 It may come as no surprise that liability for environmental harm is continuing to trend in tort law.[88] 'Fridays for Future' and similar more recent movements raising awareness of the imminent dangers of climate change in the public at large

85 CJEU 5.3.2015, joined cases C-503/13 and C-504/13, *Boston Scientific Medizintechnik v AOK Sachsen-Anhalt and Betriebskrankenkasse RWE*, ECLI:EU:C:2015:148, *BA Koch/T Thiede*, European Union, ETL 2015, 647, no 37ff.

86 Cf the court's reasoning in para 55: 'Article 1 and section (a) of the first paragraph of Article 9 of Directive 85/374 are to be interpreted as meaning that the damage caused by a surgical operation for the replacement of a defective product, such as a pacemaker or an implantable cardioverter defibrillator, constitutes "damage caused by death or personal injuries" for which the producer is liable, if such an operation is necessary to overcome the defect in the product in question.' However, the problem in those cases was that there was no proven defect at all, whereas the qualification of the costs of surgery as 'damage caused by ... personal injuries' should never have been in doubt. It was the causation of such undisputed personal injury that should have been at stake. By recognising the mere likelihood of a defect as (already) a defect within the meaning of the PLD (in para 43 of the ruling), the compensability of the harm resulting from such 'defect' should no longer have been an issue of interpreting art 9 PLD.

87 2020 alone produced several interesting cases involving animals, both as victims as well as injurers; see eg *S Nitsch*, Austria, ETL 2020, 1, nos 24ff, 32ff; *J Lahe/I Kull*, Estonia, ETL 2020, 153, no 2ff; *J Kleinschmidt*, Germany, ETL 2020, 206, no 63ff; *A Dulak*, Slovakia, ETL 2020, 579, no 10ff.

88 Cf the 2016 report (fn 2) no 37. Apart from the highlights mentioned in the following, see eg *M Baretić/I Kanceljak,* Croatia, ETL 2018, 70, no 1ff (new liability regime in the Environment Protection Act); *J Hrádek*, Czech Republic, ETL 2019, 105, no 8ff (amendments to Act on the Prevention and Remedying of Environmental Damage); *A Ruda*, Spain, ETL 2016, 582, no 1ff ('a very minor reform ... of the Act on the Integrated Prevention and Control of Pollution'), 17ff (a

clearly further boosted developments in the law as well, of course. As in the past, these not only include the aspect of compensable loss (by recognising environmental harm as such and by linking it to a specific claimant or to a representative group of claimants),[89] but also the grounds of liability.[90]

36 The most prominent example of the former kind is the addition of an entirely new chapter to the French tort law provisions in the *Code civil* (now arts 1246–1252)[91] in 2016,[92] defining pure environmental harm (*préjudice écologique*) in art 1247 and determining in art 1248 who may claim remedies. These are defined in art 1249ff, which could serve as a model also elsewhere – not only do these provisions confirm that restoration in kind is the primary remedy of choice, they also inter alia foresee that monetary compensation may be awarded to the State even if the latter is not the claimant.[93] Furthermore, irrespective of (and in addition to) any award of compensation, the judge may order the defendant to stop pollution and to prevent future harm (art 1252 *Code civil*).

37 The Dutch *Urgenda* litigation, culminating in the Hoge Raad ruling at the end of 2019,[94] was on top of the headlines not only in legal scholarship. The Dutch State was obliged to take measures to reduce greenhouse gases by 25 % by the end of 2020,[95] based on a violation of the UN Climate Convention and on the

rather questionable ending to the Prestige oil spill catastrophe at least before Spanish courts); *idem*, Spain, ETL 2018, 625, no 11 (draft bill on climate change).

89 Cf also *I Durant*, Belgium, ETL 2016, 21, no 31ff (Constitutional Court confirming compensability of moral damage to environmental association whose interests were adversely affected by illegal bird keeping of defendant).

90 The Annual Conference in 2017 devoted its special session to this topic; see the contributions thereto: *M Spitzer*/*B Burtscher*, Liability for Climate Change: Cases, Challenges and Concepts (2017) 8 JETL 137; *P Sutherland*, Obligations to Reduce Emissions: From the Oslo Principles to Enterprises (2017) 8 JETL 177; *J Spier*, The Oslo Principles and the Enterprises Principles: Legal Strategies to Come to Grips with Climate Change (2017) 8 JETL 218; *M Hinteregger*, Civil Liability and the Challenges of Climate Change: A Functional Analysis (2017) 8 JETL 238.

91 This is following the new numbering; when introduced these were art 1386-19ff.

92 *J Knetsch*/*Z Jacquemin*, France, ETL 2016, 191, no 4ff (statutory recognition of pure environmental damage as compensable loss).

93 Art 1249 para 2 Code civil states: 'En cas d'impossibilité de droit ou de fait ou d'insuffisance des mesures de réparation, le juge condamne le responsable à verser des dommages et intérêts, affectés à la réparation de l'environnement, au demandeur *ou, si celui-ci ne peut prendre les mesures utiles à cette fin, à l'État*.' (emphasis added).

94 *J Emaus*/*A Keirse*, The Netherlands, ETL 2015, 401, no 42ff (first instance); *idem*, The Netherlands, ETL 2018, 415, no 55ff (second instance); *E van Dongen*/*A Keirse*, The Netherlands, ETL 2019, 409, no 45ff (Hoge Raad).

95 A goal which was apparently successfully reached: <https://www.cbs.nl/en-gb/news/2022/06/urgenda-reduction-target-for-ghg-emissions-achieved-in-2020>.

State's duty to protect the lives and wellbeing of its citizens as protected by arts 2 and 8 ECHR. One can only concur with the Dutch reporters:

> 'This case has transformed Dutch climate change policy and inspired climate change cases in many other countries. The lesson to be learned is that courts can initiate change, provided that the other branches of government are willing to accept it.'[96]

38 The RWE litigation in Germany,[97] on the other hand, did not yet result in a ruling for the plaintiff, but unlike the *Urgenda* case, the setting there is much different, making the outcome in first instance less of a surprise.[98] After all, it was started by a single Peruvian farmer who had sued the German energy provider RWE to contribute to the cost of constructing a dam in his neighbourhood, which allegedly became necessary due to global warming, which in turn he claimed was to blame inter alia on RWE's actions in Germany. The amount he asks for is calculated as a percentage of the overall cost of the dam corresponding to RWE's contributions to global carbon dioxide emissions (0.47 %). It is not self-evident, to say the least, however, why it is the plaintiff individually who should collect monies for erecting a dam protecting the entire region,[99] and how the causation question can be resolved without ignoring the applicable German law[100] entirely. One has to wonder how filing such a case with rather limited chances to ultimately succeed[101] truly helps the global cause (as the *Urgenda* case presumably did), or whether it turns out to be counter-productive in the long run.[102]

39 Other not so promising developments were reported from Switzerland, where a bold legislative initiative to hold businesses accountable not only for violations of human rights, but also for the environmental harm they or their subsidiaries cause (both domestically and abroad) ultimately failed due to lack of sufficient support in the population.[103]

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96 *E van Dongen/A Keirse*, The Netherlands, ETL 2019, 409, no 56.

97 *J Fedtke*, Germany, ETL 2016, 214, no 5ff.

98 The case is currently pending before the court of appeals (OLG Hamm).

99 And even if he did, how will he (or his community) finance the remaining 99.53 % of the cost of the dam? Sue China as well (which, according to the same dataset the plaintiff relies on, accounts for a 30 times higher percentage of emissions)? Or the Saudi Arabian Aramco, which is the second largest polluter with 4.5 % of the cumulative global greenhouse gas emissions?

100 The plaintiff chose German law according to art 7 Rome II Regulation.

101 Cf the German reporter's assessment: 'This author would be surprised – if excited – should the appeal succeed.' *J Fedtke*, Germany, ETL 2016, 214, no 8.

102 See, however, the highly interesting Polish case presented above by *E Bagińska/P Wyszyńska-Ślufińska*, Poland (467) no 23ff.

103 *P Loser*, Switzerland, ETL 2018, 673, no 15ff; *idem*, Switzerland, ETL 2019, 659, no 2ff; *idem*, Switzerland, ETL 2020, 663, no 1f; *idem*, Switzerland (636) no 1ff. The initiative failed primarily

b) Public Authority Liability

In 2006, a special session of the Annual Conference discussed public liability.[104] One decade later, the European Group on Tort Law published its comparative study on State liability.[105] As Ken Oliphant noted in his introduction to this volume: **40**

> 'In the last decades, liability relating to public authorities ... has been one of the main focuses of development in and at the edges of tort law in Europe, with major reforms implemented or considered at national level, and a steady stream of major court decisions.'[106]

It is not an easy task to give an overview of the practice of public authority liability – after all, in some jurisdictions, medical malpractice in State-run hospitals is adjudicated in the administrative court system, in others, the State is the direct provider of healthcare to begin with. Furthermore, schools or other educational facilities may be public or private entities, rendering a comparison of cases dealing with harm caused or incurred by pupils a complicated task. State liability of the *Francovich* kind[107] and other variations of liability at EU level[108] are yet another specific breed which needs to be distinguished as well. **41**

Nevertheless, it is obvious that liability of the State or other public authorities has become an increasingly relevant part of tort law practice overall in the course of the past two decades, not only because of updates to or recodification of statutes governing State liability. The Eurotort database at present features about 600 cases dealing with harm caused in the course of the exercise of public **42**

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due to peculiarities of the Swiss referendum system – despite a (slight) majority in the overall population of 50.7 % (*Volksmehr*), the cumulative requirement of a majority in all cantons (*Ständemehr*) ultimately meant that a minority of the population decided about the fate of these plans.

104 See the following contributions thereto: *W van Boom/A Pinna,* Liability for Failure to Regulate Health and Safety Risks – Second-guessing Policy Choice or Showing Judicial Restraint? ETL 2005, 2; *J Fedtke,* State Liability in Times of Budgetary Crisis, ETL 2005, 42; *R Rebhahn,* Public Liability in Comparison – England, France, Germany, ETL 2005, 68; *A Scarso,* Tortious Liability of Regulatory Authorities, ETL 2005, 984.

105 *K Oliphant* (ed), The Liability of Public Authorities in Comparative Perspective (2016).

106 *K Oliphant*, Introduction, in: idem (ed), Liability of Public Authorities (fn 105) 1 (no 1).

107 ECJ 19.11.1991, joined cases C-6/90 and C-9/90, *Andrea Francovich et al v Italy* [1991] ECR I-5357; see *R Rebhahn*, Non-Contractual Liability in Damages of Member States for Breach of Community Law, in: H Koziol/R Schulze (eds), Tort Law of the European Community (2008) 179 (no 9/16 ff), on the evolution of this doctrine.

108 See eg my overview in *B Winiger/E Karner/K Oliphant* (eds), Digest of European Tort Law, Vol 3: Essential Cases on Misconduct (2018) 1/29 no 1.

authority. Already in my 2016 report, the footnote listing the cases of the first 15 years span over two pages.[109] The examples of case law and legislation ever since is also a rather extensive list.[110]

43 The reasons for this ongoing development are manifold, but one is left with the impression that the deep pocket argument perhaps remains at the forefront still of this expansion. If no one else is to blame, why not go after the State? That this mentality has grown in society could be experienced to the extreme over these past two years of the pandemic and will certainly generate food for future comparative reports and other studies.

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109 2016 report (fn 2) no 40ff (fn 92).

110 *S Nitsch*, Austria, ETL 2019, 1, no 4ff; *I Durant*, Belgium, ETL 2016, 21, no 16ff; *idem*, Belgium, ETL 2017, 25, no 21ff; *idem*, Belgium, ETL 2020, 30, no 3ff; *V Tokushev*, Bulgaria, ETL 2016, 61, nos 68ff, 72ff, 76ff; *idem*, Bulgaria, ETL 2017, 57, nos 4ff, 28ff, 32ff; *idem*, Bulgaria, ETL 2019, 58, nos 1ff, 33ff; *M Baretić*, Croatia, ETL 2019, 71, no 42ff; *idem*, Croatia (66) no 31ff; *J Hrádek*, Czech Republic, ETL 2016, 105, nos 47ff, 55ff, 86ff, 98ff; *A Morris*/*K Oliphant*, England and Wales, ETL 2018, 131, no 19ff; *K Oliphant*, England and Wales, ETL 2019, 131, no 6ff; *idem*, England and Wales, ETL 2020, 131, no 6ff; *J Lahe*/*I Kull*, Estonia, ETL 2016, 170, no 3ff; *P Korpisaari*, Finland, ETL 2016, 181, no 3ff; *idem*, Finland, ETL 2017, 175, no 22ff; *idem*, Finland (162) no 43ff; *J Fedtke*, Germany, ETL 2016, 214, nos 9ff, 14ff; *W Wurmnest*/*M Gömann*, Germany, ETL 2017, 207, no 36ff; *J Kleinschmidt*, Germany, ETL 2018, 221, no 50ff; *W Wurmnest*/*M Gömann*, Germany, ETL 2019, 205, no 43ff; *E Dacoronia*, Greece, ETL 2019, 248, no 43ff; *A Menyhárd*, Hungary, ETL 2016, 264, nos 17ff, 19ff; *idem*, Hungary, ETL 2017, 272, no 16ff; *idem*, Hungary, ETL 2018, 285, nos 13ff, 16ff; *idem*, Hungary, ETL 2019, 277, nos 8ff, 13ff; *idem*, Hungary, ETL 2020, 278, nos 10ff, 22ff, 38ff; *E Quill*, Ireland, ETL 2016, 276, no 5ff; *idem,* Ireland, ETL 2018, 299, nos 4ff, 8ff; *idem,* Ireland, ETL 2019, 289, no 4ff; *idem,* Ireland, ETL 2020, 302, nos 23ff, 26ff; *R Perry*, Israel, ETL 2020, 698, no 33ff; *E Bargelli*, Italy, ETL 2016, 299, no 7ff, 11ff; *idem*, Italy, ETL 2019, 314, nos 28ff, 44ff; *E Bargelli*/*G Puleio*, Italy, ETL 2020, 326, no 70ff; *A Bitāns*, Latvia, ETL 2017, 330, nos 1ff, 72ff, 105ff; *idem*, Latvia, ETL 2018, 344, nos 12ff, 18ff; *idem*, Latvia, ETL 2019, 331, no 79ff; *idem*, Latvia, ETL 2020, 349, no 33ff; *S Drukteinienė*/*L Šaltinytė*, Lithuania, ETL 2016, 341, nos 28ff, 71ff, 82ff; *idem*, Lithuania, ETL 2017, 360, nos 2ff, 35ff, 74ff, 93ff; *idem*, Lithuania, ETL 2018, 368, no 23ff; *idem*, Lithuania, ETL 2020, 379, nos 7ff, 28ff, 66ff, 83ff; *G Demajo*/*L Quintano*/*D Zammit*, Malta, ETL 2017, 393, no 40ff; *A Keirse*/*T Bouwman*, The Netherlands, ETL 2017, 412, no 57ff; *J Emaus*/*A Keirse*, The Netherlands, ETL 2018, 415, no 12ff; *E van Dongen*/*A Keirse*, The Netherlands, ETL 2019, 409, no 38ff; *E Bagińska*/*K Krupa-Lipińska*, Poland, ETL 2016, 431, nos 12ff, 19ff, 31ff; *E Bagińska*/*P Wyszyńska-Ślufińska*, Poland, ETL 2019, 461, no 2ff; *idem*, Poland (467) nos 23ff, 35ff, 43ff; *A Dias Pereira*/*M Martins*/*A Veloso Pedrosa,* Portugal, ETL 2017, 484, nos 25ff, 38ff; *C Alunaru*/*L Bojin*/*S Căileanu*, Romania, ETL 2019, 513, no 1ff; *idem*, Romania (520) no 2ff; *M Hogg*, Scotland, ETL 2018, 563, nos 24ff, 36ff, 43ff; *idem*, Scotland, ETL 2019, 542, nos 25ff, 58ff; *idem*, Scotland, ETL 2020, 557, nos 2ff, 35ff; *A Dulak*, Slovakia, ETL 2019, 569, no 5ff; *B Novak,* Slovenia, ETL 2016, 550, no 20ff; *G Dugar,* Slovenia, ETL 2017, 563, no 43ff; *idem*, Slovenia, ETL 2019, 581, nos 7ff, 14ff, 19ff; *idem*, Slovenia (571) nos 11ff, 14ff; *A Ruda*, Spain, ETL 2017, 595, nos 7ff, 10ff; *idem*, Spain, ETL 2019, 613, no 19ff; *idem*, Spain, ETL 2020, 612, no 8ff; *S Friberg*, Sweden, ETL 2018, 658, nos 1ff, 7ff; *P Loser*, Switzerland, ETL 2016, 623, no 78ff.

Some peculiar aspects of State liability are growing stronger within that category, in particular tortious liability of lawmakers for flawed legislation[111] or liability for court (even supreme court) rulings.[112] **44**

c) Financial Market Torts

In my 2016 report, the shockwave of the financial crisis that started in 2007 had not yet completely subsided, and courts were still struggling with clean-up work. By the time, case law against the key players had already accumulated.[113] The Annual Conference devoted a special session to the topic in 2013.[114] **45**

Needless to say, also the years ever since showed quite some activity in this field in the jurisdictions covered.[115] Nevertheless, I still think that from a dogmatic **46**

111 Cf eg *I Durant*, Belgium, ETL 2020, 30, no 3ff; *V Tokushev*, Bulgaria, ETL 2019, 58, no 1ff; *M Baretić*, Croatia, ETL 2019, 71, no 42ff; *A Menyhárd*, Hungary, ETL 2019, 277, no 8ff; *E Bargelli*/*G Puleio*, Italy, ETL 2020, 326, no 70ff; *A Bitāns*, Latvia, ETL 2017, 330, no 1ff; *idem*, Latvia, ETL 2018, 344, no 18ff (legislation).

112 While the latter is excluded by law in Austria, for example (§ 2 para 3 of the Austrian *Amtshaftungsgesetz* excludes liability for rulings by the Constitutional Court, the Supreme Court, and the Administrative Court), other jurisdictions have no problem with that; see eg *I Durant*, Belgium, ETL 2017, 25, no 21ff (negligence of the *Cour de cassation*); *A Menyhárd*, Hungary, ETL 2018, 285, no 13ff; *A Ruda*, Spain, ETL 2019, 613, no 19ff; see also *C Alunaru*/*L Bojin*/*S Căileanu*, Romania, ETL 2019, 513, no 1ff (compulsory insurance covering liability for judicial errors)

113 See the citations in fn 96-100 of the 2016 report (fn 2).

114 See the contributions thereto: *E Karner*, Tort Law and the Financial Crisis: Basic Questions (2013) 4 JETL 119; *P Loser*, Financial Crisis – The Liability of Banking Institutions (2013) 4 JETL 128; *A Scarso*, The Liability of Credit Rating Agencies in a Comparative Perspective (2013) 4 JETL 163; *D Nolan*, The Liability of Financial Supervisory Authorities (2013) 4 JETL 190; *J Spier*, Balancing Acts: How to Cope with Major Catastrophes, particularly the Financial Crisis (2013) 4 JETL 223.

115 See eg *I Durant*, Belgium, ETL 2018, 26, no 37ff; *M Baretić*, Croatia, ETL 2016, no 1ff (legislation); *S Bergenser*/*A Bloch Ehlers*, Denmark, ETL 2016, 131, no 2ff; *idem*, Denmark, ETL 2019, 130, no 2ff; *J Lahe*/*I Kull*, Estonia, ETL 2016, 170, no 20ff; *E Quill*, Ireland, ETL 2020, 302, no 14ff; *R Perry*, Israel, ETL 2016, 667, no 1f; *A Bitāns*, Latvia, ETL 2016, 313, no 11ff; *idem*, Latvia, ETL 2019, 331, no 21ff; *S Drukteinienė*/*L Šaltinytė*, Lithuania, ETL 2020, 379, no 52ff; *G Caruana Demajo*/*L Quintano*/*D Zammit*, Malta, ETL 2020, 410, no 2ff; *K Tande*, Norway, ETL 2016, no 10ff; *idem*, Norway, ETL 2017, no 1ff (draft legislation); *idem*, Norway, ETL 2020, 461, no 11ff (legislation); *E Bagińska*/*K Krupa-Lipińska*, Poland, ETL 2016, 431, no 59ff; *M de Oliveira Martins*/*A Dias Pereira*/*J Pinto Monteiro*, Portugal, ETL 2018, 501, nos 21ff, 36ff; *A Dias Pereira*/*M de Oliveira Martins*/*L Duarte Manso*, Portugal, ETL 2019, 487, no 47ff; *P Loser*, Switzerland, ETL 2016, 623, no 26ff; *idem*, Switzerland, ETL 2018, 673, no 39ff; *BA Koch*/*T Thiede*, European Union, ETL 2018, 698, no 44ff.

point of view, this is less of a distinctive category of cases inasmuch as the degree of novelty they bring to the overall analysis of tort law is rather limited. After all, we are dealing with more traditional (albeit pure economic) losses attributed according to fairly straightforward concepts.[116] However, when it comes to damage to the economy as such (whether reduced to a domestic market or beyond, all the way up to the world market), I doubt that tort law offers the proper toolbox to handle such cases, if only due to the sheer volume of losses and victims it would involve, let alone the complexity of identifying which conduct or activity led to which detrimental consequence.

d) Cyber Torts

47 Another set of problems singled out as a feature topic in an Annual Conference[117] are so-called cyber torts (even though the term itself is quite diffuse).[118] It goes without saying that such harmful activities have not abruptly stopped since the 2016 report,[119] where I had grouped them into a distinct category, though without being fully convinced that these deserve to be set apart as much.[120]

48 I had, however, conceded at the time (and still believe) that there are some unique features of such cases, which may ultimately justify discussing them separately from the run-of-the-mill tort cases. Just think of the complexity of proving causation, the potentially global effect of wrongdoings (both with respect to the number of victims as well as the harm inflicted upon each of them). Also, at least some of these cases resemble terrorism and other crime scenarios, where it is hard to identify or at least to get a hold of one of the culprits, which moves the compensation matter into the arena of secondary or even tertiary tortfeasors such as financers, facilitators, or the like.[121] Furthermore, while cyber torts may lead to conventional harm, it may also ruin data, and the classification of data losses and

116 2016 report (fn 2) no 45f.

117 *BA Koch*, Cyber Torts: Something Virtually New? (2014) 5 JETL 133; *S Hedley*, Cybertrespass – A Solution in Search of a Problem? (2014) 5 JETL 165; *M Schultz*, The Responsible Web: How Tort Law Can Save the Internet (2014) 5 JETL 182; *R Perry/T Zarsky*, Liability for Online Anonymous Speech: Comparative and Economic Analyses (2014) 5 JETL 205.

118 *Koch* (2014) 5 JETL 142ff.

119 New sightings include, eg, *S Nitsch*, Austria, ETL 2019, 1, no 26ff; *J Lahe/I Kull*, Estonia, ETL 2018, 176, no 4ff; *M Hogg*, Scotland, ETL 2020, 557, nos 28ff, 50; *B Novak*, Slovenia, ETL 2020, 587, no 19ff; *R Perry*, Israel, ETL 2020, 698, no 4ff; *A Ruda*, Spain, ETL 2020, 612, no 20ff.

120 2016 report (fn 2) no 48.

121 *Koch* (2014) 5 JETL 152ff.

alterations in tort law (or in private law as a whole) is still not settled in all jurisdictions.[122]

e) Liability for Emerging Digital Technologies, including AI

Linked to the former is a comparatively new category of liability issues (if only by name), which is being discussed at EU level, and which at least in part overlaps with the previous category of cyber torts.[123] **49**

As mentioned above when talking about pending legislative projects in Brussels,[124] recent years have shown increasing activity relating to liability for emerging digital technologies[125] in general and artificial intelligence in particular, at the latest once the European Parliament published its 2017 resolution.[126] There may not be a rush for legislation in the Member States yet, as most of them will presumably wait for a European solution (or at least for definitive signs whether one will come). However, singular steps have already been taken, eg, in the UK (even before Brexit was completed) with the introduction of the Automated and Electric Vehicles Act 2018[127] or in Germany with its amendments to the Road Traffic Act (*Straßenverkehrsgesetz*, StVG), also with an eye to self-driving cars.[128] **50**

Accidents involving automated vehicles are indeed the most likely scenarios where tort laws will be relevant in practice first,[129] even though the response on a **51**

122 Cf eg *C Wendehorst*, Liability for Pure Data Loss, in: E Karner et al (eds), Essays in Honour of Helmut Koziol (2020) 225; *BA Koch*, Dateischäden, in: Wilma Dehn et al (eds), Festschrift für Peter Bydlinski (2022) 545.

123 The topic should have been discussed at the 2020 Annual Conference, which unfortunately had to be cancelled due to the pandemic. The papers thereto, presenting the final report of the New Technologies Formation of the EU Expert Group on Liability for New Technologies, were nevertheless published in the JETL; see the citations above in fn 62.

124 Above no 21.

125 This term was coined by the Commission, eg in its Staff Working Document 'Liability for emerging digital technologies', SWD(2018) 137 final, giving the examples of 'the Internet of Things (IoT), Artificial Intelligence, advanced robotics and autonomous systems' (2).

126 Above fn 55.

127 *A Morris/K Oliphant*, England and Wales, ETL 2018, 131, no 1ff.

128 *W Wurmnest/M Gömann*, Germany, ETL 2017, 207, no 7ff; *W Wurmnest/J Kleinschmidt/S Gasche*, Germany (194) no 6ff.

129 Many other imaginable cases may primarily be handled via contractual liability or other compensation regimes (eg workers' compensation schemes), for example in healthcare applications or in factories with industrial robots. Apps and other purely digital applications will most likely require some contractual relationship between the potential victims and the developer and/or distributor.

national level will be identical to cases involving conventional cars, at least in those jurisdictions which resolve traffic accidents with strict liability regimes. After all, also at present, these are not triggered by some human conduct steering or operating the car, but by its mere involvement in the accident, leading to liability of its keeper (who can be non-human).[130] Other applications of AI are less likely candidates for classic tort cases as long as they do not cause traditional losses to the bodily integrity or to the property of their victims, which requires some sort of hardware controlled by AI that is able to impact in such a harmful way.[131] To what extent merely digital applications will be relevant in tort law practice is yet open to debate – apart from the fact that some of them will only cause pure economic loss, which is not recoverable in the same way as the aforementioned losses in some jurisdictions,[132] others will cause harm of a different kind. If AI is used in recruitment software, for example, any discriminatory outcome that may develop may raise questions of the loss of a chance and/or of emotional harm of those who have been deprived of a job opportunity, apart from triggering other sanctions.

52 The above-mentioned consultation launched at the end of 2021[133] not only focused on the PLD, but also (and independently) asked for guidance regarding liability for AI. As already indicated, it is at least imaginable that there will be a separate instrument dealing with liability for AI alongside a (possibly renewed) PLD,[134] even though it is highly unlikely that it will be in the form of a regulation as proposed by the European Parliament.[135] So while there is no case law yet (and possible use cases are still difficult to imagine, at least for the nearer future), there is a considerable degree of likelihood that there will be more to report in five years.

3. Prescription

53 Another trend that emerged over the past two decades is a new or at least modernised approach to prescription in the jurisdictions under survey, and it was one of the special topics of the Annual Conference already in 2008.[136] Several

130 Cf *E Karner/BA Koch*, Civil Liability for Artificial Intelligence. A Comparative Overview of Current Tort Laws in Europe, in: M Geistfeld/E Karner/BA Koch (eds), Comparative Law Study on Civil Liability for Artificial Intelligence (2021) 19, 67ff.

131 Cf fn 126.

132 See, eg, WH van Boom/H Koziol/CA Witting (eds), Pure Economic Loss (2004).

133 Above no 22, fn 63.

134 Above no 23.

135 Above fn 66.

countries introduced new legislation in that period.[137] The Eurotort database lists about 160 cases where the limitation of tort claims was at least one key aspect determining the outcome, with some reported over the past five years.[138] The European Group on Tort Law has finalised its project on the topic, culminating in its 2020 publication.[139]

Despite such high activity both in courts and in parliaments, it remains **54** remarkable how different prescription periods continue to be throughout Europe,[140] with no harmony yet in sight. While the duration of such time periods may seem random to some extent, this would speak even more in favour of some approximation at least in this regard. Still, this is not imminent, and efforts on the EU level have so far failed. The question raised in the 2016 report[141] whether the *Howald Moor* ruling of the ECtHR[142] will at least have an impact on the ten year period of art 11 PLD is also as yet unanswered.

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136 *R Zimmermann*/*J Kleinschmidt*, Prescription: General Framework and Special Problems Concerning Damages Claims, ETL 2007, 26; *F Fusco,* Commencement of the Prescription Period in Case of Damage Caused due to Omissions, ETL 2007, 79; *B Askeland,* Plurality of Liable Persons and Prescription of Recourse Actions, ETL 2007, 94; *I Gilead*, Economic Analysis of Prescription in Tort Law, ETL 2007, 112.

137 In addition to the countries listed in fn 85 of 2016 report (fn 2), see *W Wurmnest*/*J Kleinschmidt*/*S Gasche*, Germany (194) no 14ff (certain claims against criminal tortfeasors exempted from prescription); *E Bagińska*, Poland, ETL 2017, 467, no 3f (legislative amendment); *M Hogg*, Scotland, ETL 2017, 527, no 1ff; *idem*, Scotland, ETL 2018, 563, no 1ff; *P Loser*, Switzerland, ETL 2016, 623, nos 1ff , 71ff; *idem*, Switzerland, ETL 2017, 636, no 47ff; *idem*, Switzerland, ETL 2018, 673, no 1ff.

138 *J Pehm*, Austria, ETL 2016, 1, no 2ff; *I Durant*, Belgium, ETL 2020, 30, no 28ff; *M Baretić*, Croatia, ETL 2020, 66, no 23ff; *J Hrádek*, Czech Republic, ETL 2017, 107, no 112ff; *idem*, Czech Republic, ETL 2018, 100, no 84ff; *idem*, Czech Republic, ETL 2020, 94, no 68ff; *P Korpisaari*, Finland, ETL 2018, 188, no 3ff; *idem*, Finland, ETL 2019, 170, nos 18ff, 29ff, 34ff; *E Dacoronia*, Greece, ETL 2019, 248, no 39ff; *E Bargelli*/*G Puleio*, Italy, ETL 2020, 326, no 61ff; *E Bargelli*/*F Morello*, Italy (306) no 13ff; *G Demajo*/*L Quintano*/*D Zammit*, Malta, ETL 2018, 401, no 7ff; *idem*, Malta, ETL 2019, 391, no 19ff; *A Keirse*/*T Bouwman*, The Netherlands, ETL 2017, 412, no 17ff; *J Emaus*/*A Keirse*, The Netherlands, ETL 2018, 415, no 29ff; *E van Dongen*/*A Keirse*, The Netherlands, ETL 2019, 409, no 18ff; *idem*, The Netherlands, ETL 2020, 429, nos 38ff, 43ff; *idem*, The Netherlands (408) no 33ff; *E Bagińska*/*I Adrych-Brzezińska*, Poland, ETL 2018, 474, no 45ff; *A Ruda*, Spain, ETL 2019, 613, no 32ff; *P Loser*, Switzerland, ETL 2019, 659, nos 61ff, 70ff.

139 *I Gilead*/*B Askeland* (eds), Prescription in Tort Law. Analytical and Comparative Perspectives (2020).

140 Just see *I Gilead*/*B Askeland*, Analytical and Comparative Report, in: I Gilead/B Askeland (eds), Prescription (fn 139) 3 (no 138 ff).

141 2016 report (fn 2) no 39.

142 ECtHR *Howald Moor and Others v Switzerland*, 11.3.2014, nos 52067/10 and 41072/11. For more details on this ruling see *P Loser*, ETL 2013, 673, no 21ff.

D. Compensation for Immaterial Harm

1. Recent Developments Regarding Immaterial Harm

55 These past five years have shown quite some interesting changes to the laws and/or practice of indemnifying pain and suffering and other non-pecuniary losses in the jurisdictions covered.[143]

56 Perhaps the most remarkable change happened in Malta, where immaterial harm resulting from personal injuries was hardly compensated at all until very recently, despite legislative attempts to change that in the past.[144] In 2018, however, Malta introduced a new art 1045 to its Civil Code, which now foresees a maximum award of € 10,000, though in very limited cases.[145]

57 In some jurisdictions, the awards for non-pecuniary losses are monitored and effectively steered by recommendations or guidelines published regularly by the competent commissions for consistency reasons. Recent publications of such guidelines include Finland[146] and Ireland.[147]

58 In France, an interesting digital project to contribute to an approximation of awards was launched in 2020, the so-called DataJust database, which was conceived to process all decisions of the years 2017 to 2019 where personal injury was at stake. It should have provided courts with guidance to calculate compensation for future cases, ultimately replacing the various (and diverse) guiding tables

143 Cf also the long-term account of changing attitudes towards compensating immaterial harm in the Netherlands above: *E van Dongen/A Keirse*, The Netherlands (408) no 58ff.

144 *G Demajo/L Quintano/D Zammit*, Malta, ETL 2010, 383, no 1ff. See the summary of the developments until then, in particular the overview of the mixed practice also in light of an ECtHR Ruling in an asbestosis case, at *G Demajo/L Quintano/D Zammit*, Malta, ETL 2014, 369, no 98ff.

145 *G Demajo/L Quintano/D Zammit*, Malta, ETL 2018, 401, no 1ff. Cf also the authors' hesitation regarding the impact of this amendment: 'Although at first sight these amendments may appear to be a step forward, in that for the first time the right of the plaintiff in an ordinary tort action to recover damages for moral harm is acknowledged by statute, the position is not all that clear and, in some respects, it may be a case of "subtraction by addition".' (no 4).

146 *P Korpisaari*, Finland, ETL 2020, 326, no 7ff. The Personal Injury Commission (*henkilövahinkoasiain neuvottelukunta*) is a statutorily regulated body; the most recent 2020 guidelines are available in English at <https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/162880/Personal%20Injury%20comission%20Guidelines%202020_.pdf>.

147 *E Quill*, Ireland (283) no 35ff. In Ireland, the Judicial Council (composed of all Irish judges, see <https://judicialcouncil.ie/about-the-judicial-council/>) adopts the guidelines upon recommendation of a Committee of seven judges representing all jurisdictions. The current guidelines can be found at <https://judicialcouncil.ie/assets/uploads/documents/Personal Injuries Guidelines.pdf>.

currently in use.[148] However, the project seems to have stopped at the beginning of 2022, and it is unclear for now what will happen with the data already collected.[149]

2. Maximum Awards in Comparison

59 While it is impossible to provide comparative analyses of the amounts awarded for the manifold varieties of pecuniary losses, we at least try to keep track of the pay-outs for immaterial harm. However, any comparison is subject to major caveats (which therefore also apply to the information in the following). To begin with, the jurisdictions under survey have different concepts of non-pecuniary losses.[150] While it is safe to state that all include damages for pain and suffering, the inclusion of losses of amenities already blurs the picture, as some of the detriments may be calculated into an award categorised as material harm.[151] Also, independent separate categories may or may not be added to the grand total qualified as compensation for immaterial harm, including, for example, separately calculated awards for the violation of personality rights or independent heads of damage such as the Italian *danno biologico*.[152]

60 The amounts presented below were quoted by the reporters to this volume when asked about the highest possible award for immaterial harm in the most severe imaginable personal injury cases. Some reporters quoted ranges of amounts rather than a single figure due to the multitude of factors that evidently play a role. This is true for all jurisdictions, though – obviously, courts will primarily look at the specific circumstances of each case and take into account, for example, the age and other specific aspects of the victim's life before the accident. Some of the awards included into this overview are only available under

148 *J Knetsch*/*Z Jacquemin*, France, ETL 2020, 178, no 6ff.

149 <https://acteurspublics.fr/articles/exclusif-le-ministere-de-la-justice-renonce-a-son-algorithme-datajust>.

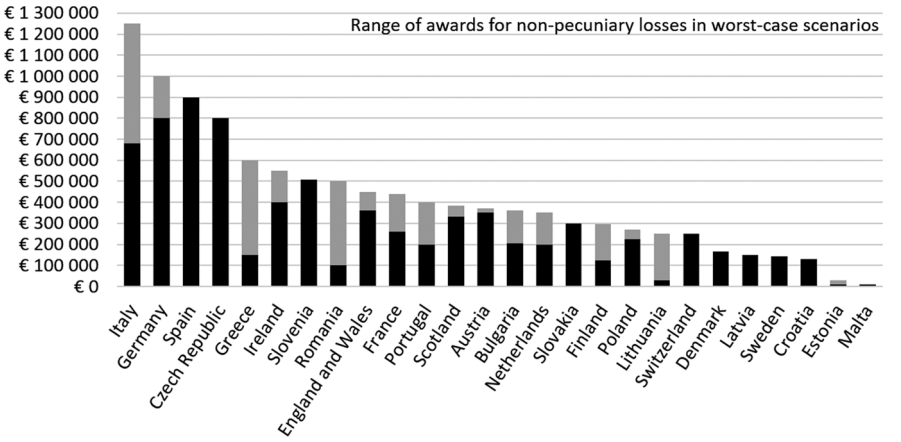
150 Cf eg *S Banakas*, Non-Pecuniary Loss in Personal Injury: Topography Architecture and Nomenclature in the European Landscape, 10 Journal of Comparative Law (2015) 291 (in particular 305 ff).

151 Cf the practice in Malta before the above-mentioned reform (no 55): '(W)hereas the courts have in the past been hesitant about expressly awarding moral damages in tort actions, there was no such hesitation in awarding damages for psychological harm in so far as such harm affected the plaintiff's earning capacity.' *G Demajo*/*L Quintano*/*D Zammit*, Malta, ETL 2018, 401, no 5.

152 See eg *R Zimmermann*, Comparative Report (Categories 11 – 13), in: B Winiger et al (eds), Digest of European Tort Law, Volume 2: Essential Cases on Damage (2011) no 13/30, and the cases reported in that volume in Categories 11ff.

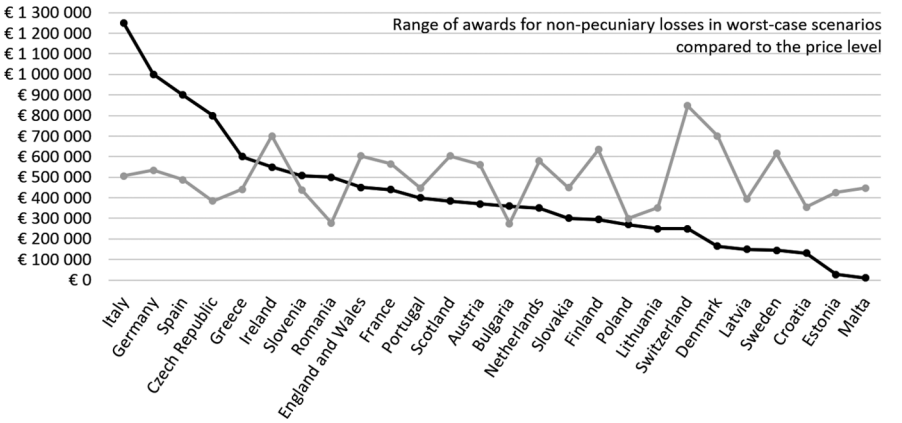
certain specific liability scenarios such as criminal conduct, intent or at least gross negligence.

61 Despite all those stipulations, it is still remarkable how far apart the lowest and the highest possible awards in Europe are. It is even more astonishing, though, that a certain alignment seems to have taken place over the past five years, leading to a rather solid median which a surprisingly high number of jurisdictions seem to acknowledge as adequate.



62 As in the 2016 report, the amounts just quoted are now put into perspective with the comparative price level indices in all these countries.[153] One traditional (though presumably no longer equally relevant) argument used in support of calculating compensation for pain and suffering was that the award would allow the victim to finance some alternative pleasures, which may help to out-balance the suffering sustained.

153 The data are taken from <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Comparative_price_levels_of_consumer_goods_and_services>. The price level figures derived from this website were multiplied by 5,000 in order to offer a direct comparison of the two lines in the same chart.



E. Outlook

As this conference series shows year after year, tort law is a dynamic area of the law, not only adapting to new challenges posed by real-life settings, but also adjusting the assessment of who should bear both old and new risks and of what is deemed 'just' compensation for the ensuing losses. **63**

If I had to summarise the developments of these past 21 years in one word, it would have to be 'more': more and new varieties of losses have been recognised as compensable, more claimants were held eligible to claim compensation, and the overall pay-outs clearly increased as well. Tort law throughout Europe has thereby become more victim-friendly, which is not meant as a judgement, but merely as a description of the overall trend. **64**

While no full-fledged harmonisation of tort law in the books is in sight (apart from some fine-tuning of the already existing product liability regime), it is nevertheless remarkable how certain solutions catch on eventually, even if it may take longer. The best example is the compensability of mere bereavement, which was gradually accepted in almost all jurisdictions covered, even though it ultimately took the legislator in some countries to take the leap. **65**

When I attended the very first conference in this series, I was not sure how the concept of listening to (at the time still only) 19 country reports in a row would work. I guess all regular guests of the Annual Conference know that my doubts were completely unfounded, even with now 30 reports on a single day. It is truly inspiring from the morning to the evening what kind of cases pop up all over Europe, and how courts resolve them. Returning attendees also see the bigger picture – what may appear curious in one year is suddenly mainstream in the next. **66**

67 It is to be hoped that this conference series will continue to provide us with inspiration and food for thought. As said at the beginning, I think every other academic working in a different field of the law envies us for what we have achieved over the past two decades and what will continue to grow out of this accumulated massive treasure trove of experience.