European Commission

Compensation of victims of Cross-Border Road Traffic Accidents in the European Union

A response by the Association of Personal Injury Lawyers

May 2009

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims throughout the United Kingdom. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. Our members comprise principally of practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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Executive summary

APIL welcomes this consultation as an opportunity to ensure that negligently injured victims receive compensation that meets their losses, in both road traffic accidents (RTAs) and non-RTA cases. We support the adoption of option six with regard to compensation and option eight with regard to limitation, which would mean applying the law of the victim's country of residence in both cases.

Introduction

We welcome the opportunity to respond to the European Commission's consultation regarding compensation for victims of cross-border RTAs.

We hope the Commission will, as a result of this consultation process, redress the massive potential for victims to be under-compensated which has arisen as a result of Regulation (EC) 864/2007 ("Rome II").

This risk occurs because the regulation says the law of the country in which the damage occurred applies to the award of compensation, and to the limitation period for the processing of the claim. The award of compensation in one country may be calculated in such a way that does not cover the losses the injured person will suffer (including those ongoing losses which he will incur in his country of residence). This would, in our view, be under-compensation.

There is also a danger that the application of different limitation periods would mean that a person misses out on making a claim as he does not know that the time limit within which to make his claim is shorter than that in his own country.

We also hope that the Commission will use this opportunity to address the disparity that has apparently arisen between RTA and non-RTA cases. This anomaly occurs because of recital 33 which notes that where a victim is injured in an RTA, when quantifying damages "the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention." Given that this is a new law, it is by no means certain that it will ensure that a person's losses are met if they are injured in an RTA. A person's future loss of earnings may be, for example, not said to be actual losses, as a certain amount of speculation is involved in calculating these.

Despite this uncertainty (which we fear could lead to unnecessary litigation) it is generally understood by most of our members that this creates a different regime for RTA and non-RTA cases. We note that this consultation is also an RTA focused document. We can understand why, given that RTAs account for such a large proportion of all negligently caused injuries, especially those that occur outside the workplace. We do not believe, however, that this should prevent the Commission from considering the needs of victims who are otherwise negligently injured. A distinction shouldn't be made between personal injury victims based on the way they have been negligently injured.

The reforms that we support would bridge the gap between RTA and non-RTA cases, as well as address our serious concern about the potential for under-settlement.

As a general point, in addition to the other options for reform that we support and whatever the outcome of this consultation, we would welcome the provision of more information to people in cross-border situations. Ensuring people are aware of their rights is critical to ensuring that justice can be done.

Compensation awards

We support the introduction of option 6, to: "Apply the law of the country of the victim's residence "lex damni" to claims of visiting victims". We believe that to apply this option and to provide the victim with compensation that is based on the practice in the victim's country of residence is the most efficient and fair solution.

We agree with the principle that damages should compensate a person for their losses. Damages systems so often rely on country-specific factors such as state benefits or life expectancy predictions that the most accurate way to compensate a person for his loss is to base it on the system of the victim's country of residence.

Using state benefits as an example, victims could receive very different levels of compensation depending on their country of residence and the country in which the damage occurred. If a victim lives in a country where compensation awards are high but state benefits are low, and has an accident in a country where compensation awards are low but state benefits high, under Rome II the victim would suffer from the negative implications of this situation but not benefit from any of the positives such as high state benefits. Alternatively, if a victim lives in a country where compensation awards are low but state benefits high, and has an accident in a country where compensation awards are high and state benefits are low, the victim could benefit from both a high level of compensation and generous benefits. This could lead to cases of "double compensation". Neither of these situations accurately compensates a person for their losses.

In addition, certain countries' damages calculations may allow for the fact that the injured person will have to repay benefits or medical insurance payouts out of his damages and others may not. In England and Wales, for example, the Compensation Recovery Unit (part of the Department for Work and Pensions) recovers the sum of money paid out in certain benefits from the compensation an injured person receives. Furthermore, it is often a term of private medical insurance that the victim should repay the insurance company's outlay following a successful compensation claim. Another country's jurisdiction may not take this is in to account when calculating damages, because that country's damages systems effectively assumes that the injured person gets to keep any benefits or insurance payout received, and the injured person will receive less compensation as a result.

We therefore believe that damages can only be calculated fairly if courts apply the law of the victim's country of residence to do so, which has led us to support option six. This could easily be applied to both RTA and non-RTA cases to bridge the unjustifiable gap which has opened up.

Insurers may argue that option 6 is not affordable, but just like the victims who travel to other members states they are not just 'citizens' of their home countries but 'citizens' of Europe. Many operate across several European countries in any event. It will certainly be no more expensive for insurers in England and Wales who had to pay compensation on this basis before Rome II came in to force. In addition, the introduction of a rule whereby damages are awarded on the basis of the victim's country of residence may also save insurers transactional costs, as victims making a claim in their country of residence will not have to instruct foreign agents to calculate damages.

We can also see problems with the other proposed options. Waiting to see what happens as a result of recital 33 (option one) is to allow some of the EU's citizens to be used as guinea pigs in a system which is already known to be unsatisfactory.

Any system which seeks to standardise damages (options four and five) is unlikely to provide personal injury victims with accurate compensation for their losses. Injuries affect different people in different ways depending on such varied factors as age, gender, medical history, lifestyle etc. Compensation for pain and suffering (if such a category of damage can be recovered) must vary accordingly. Other specific losses such as earnings or compensation for healthcare costs also vary enormously. Attempting to standardise damages whilst ensuring people's losses are met is therefore inherently problematic. Setting minimum standards could also risk some levels of compensation being reduced to those levels.

Any attempt to harmonise laws regarding damages would be complex and in our view, unnecessary. Even the United States of America has not attempted to harmonise damages or litigation structures across its states. Guidelines (option three) too could create problems: these might be followed in one country but not another, causing more confusion than already exists. In addition, such guidelines might introduce recognised compensation items which are alien to some countries, creating difficulties and differences in their implementation.

Finally, with regard to compensation, proposals regarding use of a driver's own insurance policy (options seven and eight) are also flawed. Even if such policies were introduced, which would require a step change in the way that damages are recovered, no provision is made for pedestrians injured in RTAs.

Limitation

We believe that option eight is the best option for reform that is to "apply the limitation period according to the law of the country of the visiting victim's place of residence".

This would be of great benefit to the victim as it would ensure the law is easier to understand and be less of a barrier for victims seeking to make a claim. It could also prevent defendants and insurers from receiving the "windfall" that they would benefit from if injured people are prevented from making claims on a technicality because they are not aware of the law in the country they are visiting.

The reason limitation periods are imposed is so that too onerous a burden is not placed on defendants, of having to present a defence so long after the alleged act of negligence. None of the member state's limitation periods are so long as can be said to place such a burden on the defendant and so allowing the victim the benefit of clarity by applying the limitation period of his country of residence will not prejudice a defendant's case.

Finally, this would have the benefit of being consistent with the law on damages if option six is adopted with regard to this.

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