

European Commission

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



A response by the Association of Personal Injury Lawyers

September 2012

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. 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 practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has around 4,400 members in the UK and abroad who represent hundreds of thousands of injured people a year.

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; and
- 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:

Nigel Tomkins – APIL Treasurer;

Robert Webb- APIL Executive Committee Member;

John Spencer – APIL Executive Committee Member;

Katherine Allen- APIL Member

Any enquiries in respect of this response should be addressed, in the first instance, to: Alice Warren, Legal Policy Officer

APIL

3 Alder Court, Rennie Hogg Road

Nottingham NG2 1RX

Tel: 0115 958 0585; Fax: 0115 958 0885 E-mail: alice.warren@apil.org.uk

Executive Summary

APIL previously responded to the European Commission's 2009 Consultation regarding compensation of victims of Cross-Border Road Traffic Accidents (RTAs) in the European Union. We welcome the opportunity to submit a revised response, to ensure that victims of cross-border RTAs have access to justice. We support the adoption of option six with regard to damages - which would mean applying the law of the victim's country of residence; and whilst we previously supported adoption of option eight with regard to limitation, which would have meant applying the law of the victim's country of residence, we now believe that the correct route is to introduce a Europe-wide limitation period of four years for this kind of case.

Introduction

The Rome II Regulation has the potential to under-compensate, or indeed over-compensate, victims of cross-border road traffic accidents. This risk of unsuitable compensation occurs because the Regulation says that the law of the country in which the damage occurred applies to the award of compensation. Under-compensation will occur where the award of compensation in one country is calculated in such a way that it does not cover the actual losses the injured person will suffer. This could occur where, for example, compensation is awarded to a British person injured in a road traffic accident in Bulgaria, and thus damages are calculated according to Bulgarian law and the cost of obtaining care in that country. The cost of seeking adequate medical care in Bulgaria will be much lower than the cost of care and associated financial losses in Britain, therefore the injured British person will not be sufficiently compensated. On the other hand, a Bulgarian who is injured in a road traffic accident in Britain will get damages measured according to British law, which will most likely be over and above what they would need to cover the cost of care in their home country- therefore the insurers in this case will be paying out more compensation than is necessary. There is no reason why insurers should be over-compensating in one case, but under-compensating in another. This creates winners and losers and is therefore unjust.

There is also an issue regarding limitation periods. A person may miss out on the chance to claim what they rightfully deserve as compensation because they do not

realise that a shorter time limit applies in the country where the accident occurred, than in his own country.

APIL supports options that would help to address these issues. With regards to our comments on compensation, we wish to maintain our original stance- that option six is the best solution to adopt, namely that the law of the victim's home country should be applied to decide the level of damages to be awarded. Regarding limitation, we would like to revoke our previous suggestion that option 8 would be the most suitable course to take. This is because we believe that option 8 would cause problems if implemented, and the preferred route would be to have a universal European limitation period of four years.

In addition, we would like to reiterate the general point that whatever the outcome of the 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 maintain that the best option for compensation awards is option 6; that is, to apply the law of the country of the victim's residence - the *Harding v Wealands* approach. In that case, it was held to be "substantially more appropriate" to apply English law to the sum of damages to be awarded following a road traffic accident in New South Wales. It was held that damages are a question of remedy, not a question of liability; and once liability has been established in national law, it is acceptable to apply foreign law to quantify the damages available.

This is the most effective way of ensuring that victims are compensated for their losses, and are put back into the position they were in before the tort occurred. This is because many factors affect how a country decides the level of compensation to award in accident cases. There can be a relationship between compensation and state benefits, or certain countries' damages calculations may allow for the fact that the injured person will have to repay benefits or medical insurance pay-outs out of his damages and others may not. A point made by APIL previously is one relating to compensation and state benefits. 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 are 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 are 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.

APIL previously argued, and still maintains, that implementing option 6 would 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. Further, the introduction of a rule whereby damages are awarded on the basis of the victim’s country of residence may even save insurers money in transactional costs, as victims making a claim in their country of residence will not have to instruct foreign agents to calculate damages.

Those opposed to this option may question the ability of foreign insurers to pay the levels of compensation demanded by the English courts. However, there will always be problems with different levels of indemnity being applied across Europe, with levels of insurance policy coverage differing, but this is not something that can easily be solved. APIL still maintains that the fairest result for all would be to apply the law of the victim’s home state when assessing damages.

Limitation Periods

In 2009, APIL suggested that the best option to ensure that injured people were not disadvantaged due to differing limitation periods was option 8 - that the limitation period that should apply is the one of the victim’s country. It was thought that this would give the fairest result because the victim would not miss out on a chance to claim because the limitation period that applied was shorter than the one in their own country. There are huge disparities between the different countries’ limitation periods. Spain has a limitation period of one year for road traffic accidents, whereas France allows ten years for someone to bring a claim for pain and suffering. This obviously has the potential to lead to unfairness.

However, it is now suggested that the approach suggested in option 8 could create problems. If, for example, the limitation period of the victim's home country was much longer than the one of the country in which the accident occurred, arguments could be raised that the shorter limitation period should have applied, and the victim should have complied with that time period if they wanted to make a claim, as the legal system in that country is geared up to that limitation period. Therefore it is instead suggested that it would be clearer and fairer if there was a generalised Europe-wide limitation period of four years, which would be applicable to all cross-border road traffic accidents. This is something that the Pan European Organisation of Personal Injury Lawyers (PEOPIL) has recently proposed, and it is thought that this would achieve a fairer result than applying the limitation period of the victim's resident country. This would mean that it would be much clearer for people involved in cross-border road traffic accidents to know how long they would have to submit a claim, and there could be no argument from the other side that a different, shorter limitation period should have applied and therefore that the claim is invalid.

- Ends -

Association of Personal Injury Lawyers

- ▶ 3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX
- T: 0115 958 0585 ● W: www.apil.org.uk ● E: mail@apil.org.uk