

EUROPEAN COMMISSION GREEN PAPER

**A EUROPEAN ORDER FOR PAYMENT PROCEDURE AND MEASURES TO
SIMPLIFY AND SPEED UP SMALL CLAIMS LITIGATION**

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

MAY 2003

The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has over 5300 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL does not generate business on behalf of its members.

Any enquiries in respect of this response should be addressed, in the first instance, to:

Annette Morris
Policy Research Officer
APIL
11 Castle Quay
Nottingham
NG7 1FW

Tel: 0115 958 0585

Fax : 0115 958 0885

E-mail : Annette@apil.com

A EUROPEAN ORDER FOR PAYMENT PROCEDURE AND MEASURES TO SIMPLIFY AND SPEED UP SMALL CLAIMS LITIGATION

1. APIL welcomes this opportunity to comment on the potential introduction of measures to simplify and speed up small claims litigation. In view of the remit of the association, and the expertise of its members, we are only able to comment on the issues insofar as they may relate to personal injury litigation.
2. Increased travel within member states means that the number of cross-border accidents resulting in cross-border personal injury claims has also increased. Cross-border personal injury claims naturally raise complex issues and it is important that the process of claiming compensation in these circumstances is as simple and as efficient as possible. It is vital that personal injury victims can gain access to the compensation to which they are entitled at the earliest possible stage and with the least amount of difficulty. As recognised by the Commission, there is an inherent danger that victims could be deterred from pursuing valid claims because the expense of obtaining a judgment against a defendant in another member state is disproportionate to the amount of money claimed and/or because of the practical difficulties that are likely to be encountered. This must be avoided wherever possible by seeking to ensure that the systems in place facilitate access to justice for personal injury victims.
3. For this reason, we agree that there is a need to address some of the issues raised in the context of the consultation paper. Whilst the Fourth Motor Insurance Directive will certainly help in respect of claims arising from motor accidents, problems will remain in relation to those and other claims. We are committed to resolving these issues, together with the Commission and other interested parties.
4. We must, however, proceed with caution and APIL is not convinced that the introduction of measures to simplify and speed up small claims litigation is necessarily the best way forward. One problem is that some personal injury

claims could inappropriately be caught within the streamlined procedures. The Commission states that “a claim which involves no major legal questions and where the factual situation is clear but which nonetheless has a high value can hardly be described as a small claim.” Equally, however, a personal injury claim with a low value but involving complex legal and factual questions should not be regarded as a small claim.

5. In addition, streamlined procedures often limit, either directly or indirectly, both legal representation and costs recovery. In the context of personal injury litigation, which usually involves complex legal and factual issues, this has a detrimental impact on the extent to which a victim can achieve access to justice.
6. Legal representation is essential in most, if not all, personal injury claims. A claimant seeking compensation for defective goods or a damaged vehicle can usually specify the value of his claim with little difficulty. In establishing the appropriate level of compensation, however, it is necessary to establish the severity of the injury and the likely prognosis. This requires medical evidence. Other complex issues, such as contributory negligence, may also arise in relation to liability. Even after settlement of the claim, issues relating to the recoupment of social security benefits may arise. In short, the law in relation to personal injury compensation is such that legal advice and assistance is required to assess whether or not the case would fall within the small claims procedure and secondly to facilitate settlement. Whilst streamlined and simplified procedures could help the victim to understand procedural issues more easily, he would still have difficulty in understanding substantive legal and evidential issues.
7. Whilst legal representation is theoretically available within all existing small claims procedures, the rules on costs recovery often mean that legal representation is not available in practice. This is recognised by the European Commission, which states that a significant limitation on the reimbursement of fees for lawyers could, in an obligatory small claims procedure, effectively result in a practical

exclusion of representation by a lawyer. This is the nature of the small claims system in England and Wales.

8. The effect of this is particularly unfair in the context of personal injury litigation. Personal injury victims usually bring their claims against insurance companies, which are well acquainted with the litigation process and which have no difficulty in paying for legal representation. A system which does not allow a victim to secure legal representation in practice produces a manifest inequality. The personal injury victim has a choice of either bringing the claim without representation against a represented insurer or can accept a substantial deduction in damages to pay for representation.
9. In summary, therefore, APIL would be opposed to the introduction of measures to simplify and speed up small claims litigation which, in effect, denied a personal injury victim of legal representation through the costs recovery system. In this situation, APIL would call for personal injury claims to be excluded. Alternatively, APIL would call for the introduction of a very low financial threshold for personal injury claims, as exists in England and Wales. In England and Wales, the small claims procedures in place for claims under £5000, only apply to personal injury claims with a value below £1000. It may be that APIL could support a small claims procedure which allowed for full costs recovery and legal representation but this would very much depend on the nature of the measures. We are aware that some would argue that simplified small claims procedures which provided for full costs recovery and legal representation would not, in fact, be simplified.
10. The other option discussed in the consultation paper is the introduction of optional, rather than obligatory, procedures for personal injury claims. Optional procedures could certainly remove some of the injustices of an obligatory procedure. It may, however, also lead to some confusion. Would a victim know, for example, which procedure was best suited to his claim. It would also be

important to ensure that the defendant could not force a claimant to pursue his claim using small claims procedures as a means of gaining a tactical advantage.

11. In conclusion, APIL agrees that personal injury claims should be dealt with as simply, efficiently and proportionately as possible. We must not forget that even those with low-value or less-complex cases should be able to gain access to justice to the same extent as those with high value and complex claims. This does not mean that all claims should follow the same procedures but it does mean that the procedures in place should allow all claims to be justly determined, regardless of value. In the context of personal injury claims, this means that victims should be able to secure legal representation both in theory and in practice. We must be careful that in seeking to improve access to justice in one way, that we do not lead to its' deprivation in another.