

PEOPIL

The Pan-European Organisation of Personal Injury Lawyers

www.peopil.com



**PEOPIL RESPONSE TO THE EUROPEAN COMMISSION
CONSULTATION PAPER ON «*THE COMPENSATION OF
VICTIMS OF CROSS-BORDER ROAD TRAFFIC
ACCIDENTS IN THE EUROPEAN UNION*»**

MAY 2009

PEOPIL

The *Pan European Organisation of Personal Injury Lawyers* (PEOPIL) was founded in 1996 and formally established as a charitable entity in 1998 to improve and promote co-operation and communication between European jurisdictions in the field of personal injury law. The development and expansion of PEOPIL is recognition that the issues involved in personal injury litigation frequently extend beyond national boundaries and require an international perspective and knowledge.

Currently PEOPIL has about 550 members from jurisdictions within the European Union, Non-European Union jurisdictions within Europe and 5 jurisdictions outside Europe.

The aims of PEOPIL are:

- To develop co-operation and networking of personal injury lawyers within Europe;
- To promote access to the legal system for consumers suffering personal injury;
- To promote higher standards of care and safety for consumers;
- To promote proper and fair compensation for all personal injury victims;
- To support and encourage the exchange of information and knowledge

PEOPIL is interested in the harmonisation process which is being carried out by the European Commission and European Parliament. In this respect PEOPIL has formulated written submissions in response to matters, including the European Commission's Green Papers on Liability for defective products, Compensation of Victims of Crime, Proposals for a Fifth Directive on Insurance against Civil Liability in respect of the use of motor vehicles, on proposals for reform of Legal Aid, in response to the Commission's staff working paper on the rights of passengers in international bus and coach transport, and in respect of the European Parliament and the European Commissions proposals for "Rome II".

PEOPIL has received grants from the European Commission to fund its continuing work including research in Comparative Law under the Grotius Project and under the Framework **Programme for Judicial Co-operation in Civil Matters.**

1. COMPENSATION

PEOPIL, an as organisation whose membership comprises practising personal injury lawyers and academics in all the EC Member States as well as other European countries, considers that **OPTION 6** is the only permissible option, for the following reasons:

- the application of the law of the victim's residence, the "*lex damni*", is coherent and consistent with the applicable rule on jurisdiction for cross-border road traffic accidents laid down by Council Regulation [EC] No 44/2001, considering that: (a) Recital 25 to the preamble to the Fifth Motor Directive [2005/14/EC] stated that "*injured parties may bring legal proceedings against the civil liability insurance provider in the Member State in which they are domiciled*"; and (b) according to the decision of the European Court of Justice (Second Chamber) given on 13th December 2007 (Case C-463/06): "*The reference in Article 11(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to Article 9(1)(b) of that regulation is to be interpreted as meaning that the injured party may bring an action directly against the insurer before the courts for the place in a Member State where that injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State*";
- the policy grounds for granting the possibility for the injured victim to bring a claim for damages before the courts in the Member State where he is domiciled, namely certainty and access to justice of the victim and the convenience of the courts of the place where the victim is domiciled, strongly suggest also that the law governing the assessment of damages should be subject to the same reasoning, at least whenever the injured party brings proceedings against the road traffic insurer in the courts in the Member State where he is domiciled; if the rationale behind allowing the injured party to issue the proceedings in the

courts of his domicile is in order to guarantee him more favourable protection, such a rationale would largely be defeated if the judge hearing the claim would be required to determine all the issues governing the assessment of loss according to a foreign law which was both unfamiliar to the trial judge and required to be established and proven to the satisfaction of the court. The same policy considerations require that the Claimant should also be allowed to receive redress protection according to the law of the forum;

- By the Fourth Motor Insurance Directive (2000/26), European law established for the first time a substantive right to bring direct proceedings against a road traffic insurer; it is therefore appropriate that European law further specifies that this substantive (European) right should entitle the injured victim to claim compensation according to the law of the victim's domicile; the establishment of such a principle would not in itself require harmonisation of the applicable principles of tort law or the assessment of compensation as applied in cross-border cases, but would rather be a principle of insurance law; as a point of insurance law, all that needs to be identified is the interest to be insured, namely the loss and damage suffered by the Claimant as measured and determined by the courts of the victim's domicile; (it follows from the above analysis that whenever proceedings are brought in the courts of the Member State where the accident took place or the courts where the defendant is domiciled, that the victim should be able to rely on the applicable tort law granting him the best level of redress protection).
- In so far as the Consultative Document refers to other areas of personal injury, for example cross-border employers' liability claims and package holiday claims, given that the jurisdictional basis under regulation 44/2001 for allowing injured Claimants to sue in their home State is Articles 9 and 11 (which govern insurance issues), the appropriate legislative response should be to provide equivalent insurance protection for those categories of Claimant;

- OPTION 6 would avoid the inherent practical problems involved in relation to the application of foreign law to the assessment and calculation of loss and damage, where the trial judge is required to make a determination of what, according to the foreign law, are recoverable losses, the interaction between medical evaluation of injury and the judicial assessment of loss, how compensation is to be calculated in respect of non-pecuniary loss, and the interplay between compensation and social security benefits¹; these practical problems are already occurring in everyday practice;
- If the position remains as presently defined under Rome II, there is likely to be considerable lack of certainty as to how compensation is calculated according to foreign law; there is also likely to be increased cost arising out of satellite litigation and disputes as to which potentially applicable law applies, and the proper application of the principles contained in any applicable foreign law in cases which, had domestic principles applied, would have settled without reference to the courts
- moreover, OPTION 6, by enabling the victim to rely upon the law of the country where he is domiciled, has the advantage of giving him the opportunity of receiving a level of compensation which is likely to be perceived as fair and just according to the principles of the society where he lives; or at least the amount of compensation, calculated in accordance with the law of damages of the victim's domicile, should enable the victim to properly face the economic consequences of the harmful event in the country where he in fact has sustained the negative effects of the accident; in this respect, such compensation satisfies the primary and basic requirement of the principle of full compensation which is connected to

¹ For example, an English court may be called upon to assess the non-pecuniary losses sustained by a victim by reference to Italian law: apart from the difficulties that the English court will meet in understanding what are the requirements of Italian law and administering the peculiarities of the Italian compensation system (different categories of damages; diverse approaches to the proof of damage; differences in computing how secondary victims are able to claim compensation), the English judge will inevitably face the problem of combining Italian rules on the medical assessment of injuries with the approach of any medical expert witnesses giving evidence, considering that according to the Italian compensation system there is a close link between the medical assessment or scoring of injuries and the determination of monetary values established by the courts or set by other tariffs. An English medical expert has a completely different approach from an Italian medical expert and is not used to applying Italian methods to the medical assessment of the victim's injuries.

the social and economic circumstances applicable where the victim lives: the maxim *restitutio in integrum* is a mechanism by which compensation should fall to be calculated according to the levels perceived as full, fair and just by the victim's society²;

- PEOPIL takes issue with one element of Option 6. We disagree with the assertion that where the claim is settled collectively in the country of the accident, several foreign laws would have to be applied. According to the view of PEOPIL expressed above, the entitlement for an injured victim to sue in his own jurisdiction permits the Claimant to claim damages according to the law of that jurisdiction. Should claims be brought in the courts of the place of the accident, then normal tort principles of that jurisdiction would apply. To permit several claims to be issued in the courts of the place of the accident, involving Claimants domiciled in different member States could lead to different and potentially discriminatory treatment of similar losses. However, to protect injured victims from the risk of under compensation in circumstances where it is necessary for injured foreign Claimants to bring proceedings as part of multiple claims in the courts of the Member State first seised of the litigation, there should be a residual discretion permitting the Court seised to apply whichever rules on compensation best protect the victim (where it would otherwise be inequitable to the victim to apply the prevailing rules of the place of the accident). The general principle contained in recital (33) of Rome II requires the courts of the place of the accident to take into account all the relevant circumstances of the victim. Where an injured victim is entitled to greater levels of protection according to the law of the place of the accident, then the Claimant should be entitled to that benefit.³

² In *Heil v. Rankin* [2000] *PIQR* Q187 the English Court of Appeal stated that in determining what compensation for pain and suffering and loss of amenity is fair, reasonable and just the assessment must be made against the background of the society in which the Court makes the award.

³ Cf the wording of the discretion contained in the proposal put forward by the European Parliament in its Report of 6 July 2005 (P6_TA-PROV(2005)0284) that: "for the purposes of determining the type of claim for damages and calculating the quantum of the claim" the court should "apply the rules of the individual victim's place of habitual residence unless it would be inequitable to the victim to do so" (Article 3 (2)).

- finally, as to the other proposed options, PEOPIL considers that presently, there does not exist a sufficiently well-established and common legal background to permit legislative intervention by the European legislature, given the detailed provision for categories of recoverable loss in each member State, the differing methods of assessment (including criteria for medico-legal assessment and minimum levels of awards for general damages); the differences between the European systems of personal injury compensation are much greater than the points in common such that the domestic European legal systems are too far apart to contemplate unification or the application of minimum harmonisation standards to personal injury actions, whether in a cross-border context or more generally.

PEOPIL summarises its objections to the individual options below:

- Option 1 would represent an unnecessary delay, and would only rely on those cases which are determined at court. The majority of personal injury cases do not reach court. Further valuing the difference of outcome is highly problematic in determining what would have happened had a different appreciation or set of rules applied.
- Option 2 is unrealistic, particularly when viewing an expanded EU. The PEOPIL 2003 book *Personal Injury Compensation in Europe* (approximately 700 pages) covered 18 jurisdictions. The subsequent 2005 book covering Fatal accidents and Secondary victims was an additional 600 pages. Any basic information would represent an over simplification and would potentially mislead.
- Options 3, 4 and 5 would represent an unwarranted intrusion into the fields of civil procedure and remedy. The Consultation Paper recognises that every jurisdiction has fundamental divergences in approach. Quantification of loss and damage represents a complex interaction of principles in relation to normative justice, social security, insurance, an assessment of the social and economic circumstances of the Claimant, as well as the effects of the accident on that particular victim. Mandatory guidelines do not adequately

permit the trial judge to take into account these factors. As the Consultation paper recognises, where guidance or rules apply, there is relatively little room for taking into account the circumstances of each individual case. The Consultation Paper does not set out, on subsidiarity grounds, why such an approach is justified. For some jurisdictions, Options 3, 4 and 5 would not constitute minimum harmonisation but a fundamental re-writing of the principles applicable to the assessment and calculation of loss and damage.

- Option 5 is promulgated on the basis of minimum standards. This would not eradicate any difference between member States given that Member States would be free to permit increased awards. Such an approach would prevent the individualisation of awards for pain and suffering and loss of amenity. Such a head of loss requires the trial judge to assess the loss to the particular individual. Each claim is different; the circumstances of the individual Claimant are different. A loss of a finger will have a different impact for a manual labourer with no qualifications; an educated white-collar worker; or a professional who relies on use of the hand (say a concert pianist). Psychiatric injury cannot be quantified on a mechanistic basis. Similarly, valuing multiple injuries or disparate injuries cannot be done on a purely arithmetical (percentage) basis.
- Option 7 does not add any advantage over Option 6 in the circumstance where claims handlers are required to be established in the jurisdiction of the Claimant in any event, following the Fourth Motor Insurance Directive. The effect of Option 7 is likely to limit injured Claimants' access to justice in cases where Claimants are required to use the lawyers appointed by the First party insurer to make their claim, creating a potential conflict of interest.

2. LIMITATION PERIODS

PEOPIL is in favour of **OPTION 7**, which is consistent with the position already adopted by the European Parliament in 2007.

In particular, it should be noted that:

- presently and given the wide differences existing between European systems in relation to «*limitation law*» (common law countries apply this terminology) or «*prescription*» (this is the expression applied by civil law countries), the direct harmonization of Member States' limitation/prescription laws by means of a directive or a regulation is not advisable and is, at least to a certain degree, unrealistic; furthermore such level of approximation is likely to meet the justifiable opposition of at least some Member States in the light of the subsidiarity principle;
- however, there is a practical need for a common set of minimum standards operating in cross-border litigation claims, especially in the area of victims of personal injuries and fatal accidents; in particular, there is a clear and significant divergence in respect of limitation periods: not only national limitation time limits vary considerably between Member States, but there are also significant differences concerning: *a)* the commencement of the running of time; *b)* the concept of the “date of knowledge” of the person injured; *c)* the discretionary power of the courts to extend the commencement of the running of the limitation period beyond the date on which the accident accrued or the “date of knowledge” of the injured person (extension of the limitation period); *d)* the commencement of the running of time in the case of disabled persons and minors; *e)* the capacity to stop or interrupt the running of limitation; *f)* the burden of proof and evidence governing the expiry of limitation defence;
- the existence and extent of such divergences give rise to undesirable consequences for the victims of accidents in cross-border litigation, creating obstacles for injured individuals when exercising their rights both in Member States other than their own, and in cases in their own State when required to rely upon foreign law;

- the lack of uniform rules applying to trans-national accidents leads to under-protection of fundamental rights of injured victims and potentially creates an increased burden on Member State social security systems; moreover, there is a real need for legal certainty which is not guaranteed by laws governing the determination of the applicable foreign law; in this respect also potential defendants, including insurance companies, are affected by the present situation.

In the light of these considerations in 2005 PEOPIL drafted and promoted a detailed «***Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL CONCERNING LIMITATION IN RESPECT OF PERSONAL INJURY AND FATAL ACCIDENT CLAIMS IN CROSS-BORDER LITIGATION***», (see http://www.peopil.com/peopil/userfiles/file/EU-LIMITATION_REGULATION.pdf).

This PEOPIL proposal was taken into consideration by the European Parliament in the course of 2006. The European Parliament then passed on 1st February 2007 the “**EUROPEAN PARLIAMENT RESOLUTION WITH RECOMMENDATIONS TO THE COMMISSION ON LIMITATION PERIODS IN CROSS-BORDER DISPUTES INVOLVING PERSONAL INJURIES AND FATAL ACCIDENTS**” (2006/2014(INI)). This Resolution contains detailed recommendations on the content of the proposal requested by the European Parliament to the European Commission.

Accordingly, OPTION 7 is not only a desirable option, but it is the only feasible option, following the recommendations provided by the European Parliament and the PEOPIL proposal.

Attachments:

1. PEOPIL «*Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL CONCERNING LIMITATION IN RESPECT OF PERSONAL INJURY AND FATAL ACCIDENT CLAIMS IN CROSS-BORDER LITIGATION*»;
2. “EUROPEAN PARLIAMENT RESOLUTION WITH RECOMMENDATIONS TO THE COMMISSION ON LIMITATION PERIODS IN CROSS-BORDER DISPUTES INVOLVING PERSONAL INJURIES AND FATAL ACCIDENTS” (2006/2014(INI))

PEOPIL Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL CONCERNING LIMITATION IN RESPECT OF PERSONAL INJURY AND FATAL ACCIDENT CLAIMS IN CROSS-BORDER LITIGATION

Chapter I – Scope and interpretation

Article 1 – Material scope and application.

(1) This Council Regulation applies to:

- (a) any claim for damages arising from or suffered as a result of personal injury,
- (b) any claim in which, following the death of any person (“the primary victim”), damages are claimed by the heirs or the estate of the deceased in respect of personal injury (including fatal injury), loss or damage suffered by the primary victim irrespective of whether the death of the primary victim has been caused by the defendant’s conduct,
- (c) any claim in which, following the death of any person (“the primary victim”), damages are claimed by another person (“the secondary victim”) in respect of personal injury, loss or damage connected with or arising as a result of the death of the primary victim, suffered by the secondary victim,
- (d) any claim in which, following personal injury sustained by any person (“the primary victim”), damages are claimed by another person (“the secondary victim”) in respect of personal injury, loss or damage connected with or arising as a result of the injury to the primary victim suffered by the secondary victim, where the proceedings involve
 - (i) parties residing or domiciled in different Member States, or
 - (ii) a party residing or domiciled in a non-Community State, or
 - (iii) a choice between the laws of different countries.

(2) This Regulation does not apply to or affect any claim for damages made in criminal proceedings, which claims are subject to the applicable law of the Member State in which criminal proceedings take place.

(3) Any choice of law specified by this Regulation shall be applicable irrespective of whether such law is a law of a Member State.

Article 2 – Interpretation.

(1) In this Regulation:

- “claimant” includes any person claiming damages under the present Regulation; for these purposes a claimant may be either a primary victim or a secondary victim or an heir or an estate, or any person entitled to pursue a claim on behalf or as a representative of the claimant or as the claimant’s heir or estate;
- “competent court” is any court which is required to apply this Regulation;
- “damages” includes all kinds of damages recoverable under the law applicable to the claim;
- “damaging event” includes any event giving rise to a claim which falls within the material scope of the present Regulation;
- “defendant” includes any person, whether sued in a private or public capacity, against whom a claim is made for damages for personal injury including fatal injury;
- “extra-judicial proceedings” and “legal proceedings” includes arbitration, alternative dispute resolution, and any proceedings other than judicial proceedings enabling the parties to settle the dispute;

2

- “judicial proceedings” includes any proceedings in a court of law enabling the claimant to claim damages and including criminal investigation or criminal proceedings; this expression also includes preliminary proceedings necessary in order to start a judicial action;

- “personal injury” includes any disease and any impairment, whether temporary or permanent, of a person’s physical or mental condition, and “injury” and cognate expressions shall be construed accordingly;

- “primary victim” includes any person injured or killed as a result of an accident or a disease;

- “secondary victim” includes any person other than the primary victim injured or killed by an accident or disease who is entitled to claim damages by virtue of the law applicable to the case.

(2) For the purposes of this Regulation, a “limitation period” is the period of time after the expiry of which a defendant may present a complete defence to the claim by reason that a claim for damages has not been made within the limitation period.

Chapter II – Uniform rules

Section One

Limitation periods

Article 3 – General limitation period.

Except in cases where Articles 4, 5, or 6 apply, the general limitation period in respect of any claim falling within Article 1 shall be four years irrespective of the nature of the obligation, the cause of action, or the identity of the defendant.

Article 4 – Longer limitation period.

(1) Where the proper law applicable to the claim provides for a limitation period which is longer than four years, such longer limitation period shall apply.

(2) Where the expiry of the limitation period is relied upon by the defendant as a defence to the claim, the burden shall be upon the claimant to prove by proper evidence the existence of a longer limitation period in accordance with subparagraph 1.

Article 5 – Limitation period for a claim established by judicial proceedings or other legal proceedings.

(1) The limitation period for the enforcement of a claim for damages established by a final judgment shall be ten years.

(2) The same limitation period shall apply to the enforcement of a claim for damages established by an arbitral award or other instrument which is enforceable as if it were a final judgment.

Article 6 – Claims for damages not subject to limitation time.

Any claim for damages for personal injury or death caused by any of the following acts shall not be the subject of any limitation defence:

(a) acts committed by terrorists;

(b) torture;

(c) slavery.

Article 7 – Computation of limitation periods.

(1) In all cases within the scope of this Regulation the expiry of the limitation period shall occur on the last day of the limitation period.

(2) The relevant limitation period shall be computed in accordance with the regular calendar of the Member State in which the claimant issues proceedings.

(3) The day on which the cause of action arises is not counted for the purposes of the computation of the limitation period. The expiry of the limitation period occurs upon the expiry of the last moment of the final day of the limitation period.

(4) Where the final day of the limitation period falls on a recognised public holiday, the final day

shall be postponed to the following business day.

(5) In the case of the extension of a limitation period, the new limitation period shall be computed from the date of the expiry of the preceding limitation period.

Section Two

Commencement: the starting date

Article 8 – Beginning of the limitation period in personal injury cases.

(1) Except where Articles 9 and 10A(1) and (2) apply, the commencement of the applicable period provided in Articles 3 and 4 above shall start from:

- (a) the date on which the cause of action for personal injury accrued; or
- (b) the date of knowledge (if later) of the person injured.

(2) The date of knowledge is the date on which the person injured first had knowledge of the following facts:

- (a) that the injury, loss or damage in question was significant; and
- (b) that the injury, loss or damage in question was attributable in whole or in part to the act or omission which is alleged to give rise to the liability of the defendant; and
- (c) the identity of the defendant; and
- (d) if it is alleged that the act or omission was that of a person other than the defendant, the additional facts supporting the bringing of proceedings in respect of the liability of the defendant.

(3) For the purposes of this Article, a person shall be regarded as having knowledge of the fact that the injury, loss or damage is significant:

- (a) if he has knowledge of the full extent of the injury, loss or damage, or
- (b) if a reasonable person with the knowledge of the extent of the injury or damage of the injured person would consider it sufficiently serious to justify instituting proceedings in respect of the injury, loss or damage.

Article 9 – Beginning of the limitation period in the case of death of the primary victim: claims by the heirs or the estate.

(1) Where the primary victim dies before the expiry of the applicable limitation period provided for in Articles 3, 4 or 8 above, and irrespective of whether the death was caused by the defendant's conduct, the commencement of the applicable limitation period in respect of any claim for damages which survives for the benefit of the heirs or the estate of the primary victim shall start from:

- (a) the date of death; or
- (b) the date of knowledge (if later) of the heirs or the estate.

(2) The date of knowledge is the date on which the heirs or the estate first had knowledge of:

- (a) the facts which give rise to the claim, including the fact that the injury, loss or damage, or death in question is attributable in whole or in part to the act or omission which is alleged to give rise to the liability of the defendant; and
- (b) the identity of the defendant; and
- (c) if it is alleged that the act or omission was that of a person other than the defendant, the additional facts supporting the liability of the defendant.

(3) Where there are two or more persons for whose benefit a claim is made, the applicable limitation period shall apply separately in relation to each of them.

Article 10 A – Beginning of the limitation period in claims by secondary victims: fatal accidents.

(1) In the case of the death of the primary victim, the applicable limitation period provided for in Articles 3 and 4 above shall run from:

- (a) the date of death; or

- (b) the date of knowledge (if later) of the secondary victim.
- (2) For the purposes of subparagraph (1) the date of knowledge is the date on which the secondary victim first had knowledge of:
 - (a) the facts which gave rise to the claim, including the fact that the death is attributable in whole or in part to the act or omission which is alleged to give rise to the liability of the defendant;
 - (b) the identity of the defendant;
 - (c) if it is alleged that the act or omission was that of a person other than the defendant, the additional facts supporting the liability of the defendant.

Article 10 B – Beginning of the limitation period in claims by secondary victims: survival of the primary victim.

- (1) In the case of any other claim of a secondary victim other than as provided for in Article 10A the applicable limitation period provided in Articles 3 and 4 above shall run from:
 - (a) the date on which the cause of action accrued; or
 - (b) the date of knowledge (if later) of the person injured; or
 - (c) in respect of the secondary victim’s injury only, the date (if later) on which the secondary victim first had knowledge of the following facts:
 - (i) that his injury was significant;
 - (ii) that the injury in question was, in whole or in part, a consequence of the damaging event giving rise to the claim of the primary victim.

Article 11 – Constructive knowledge.

- (1) For the purposes of this Regulation, a person’s knowledge includes knowledge which he might reasonably have been expected to acquire:
 - (a) from facts observable or ascertainable by him, or
 - (b) where he has acted reasonably in seeking appropriate expert advice, from facts ascertainable by him with the support of such advice.
- (2) In determining for the purposes of this Article
 - (a) the knowledge which a person might reasonably have been expected to acquire, or
 - (b) whether a person has acted unreasonably in not seeking appropriate advice, his circumstances and abilities (so far as relevant) shall be taken into account.
- (3) Unless the claimant has acted unreasonably in not seeking advice from an expert, the claimant shall not be treated as having constructive knowledge of any fact which an expert might have acquired.
- (4) Where an expert has been consulted, the claimant shall not be deemed to have constructive knowledge of any fact or matter which the expert acquired but failed to communicate to the claimant, or any fact or matter which the expert failed to acquire.
- (5) Unless the claimant has acted unreasonably in not taking all reasonable steps to obtain legal advice, the claimant shall not be deemed to have constructive knowledge of whether particular facts or circumstances would, as a matter of law, give rise to a valid claim for damages.

Article 12 – Commencement of the limitation period for a claim established by judicial proceedings or other legal proceedings.

The limitation period provided in Article 5 begins to run from the date on which the judgment or arbitral award becomes final, or the other instrument becomes enforceable, but not before such time as the debtor is required to effect payment of the damages awarded or ordered to be paid.

Section three
Suspension

Article 13 – Suspension due to the conduct of the defendant.

(1) The running of the limitation period shall be suspended in any case where the defendant or any other person for whose acts or omissions the defendant is liable has deliberately or dishonestly or unreasonably or as a result of a mistake concealed the existence of facts or matters giving rise to the liability of the defendant, until such time as the concealment or mistake has been discovered or (if earlier) the claimant first had knowledge of the concealed facts or matters or the mistake (as the case may be).

(2) Where the defendant has deliberately or violently caused personal injury to

(a) his spouse, or

(b) his unmarried partner, or

(c) a minor living in the same household as the defendant

the running of the limitation period shall be suspended during any period of cohabitation between the primary victim and the defendant.

Article 14 – Suspension due to the pending of criminal proceedings.

(1) Whenever there are criminal investigations or proceedings pending in respect of the damaging event that gave rise to the injury, loss or damage, irrespective of whether the claimant has been informed of such investigations or proceedings, no limitation period under this Regulation shall run against the claimant until:

(a) a binding decision has been issued, or

(b) the investigations or proceedings have otherwise been terminated and the termination of such investigations or proceedings has been notified to the claimant, or

(c) such date as the claimant might reasonably have been expected to acquire knowledge of such termination.

(2) For the purposes of permitting a foreign claimant to acquire the knowledge of current criminal investigations or proceedings, each Member State shall

(a) establish or approve a national information centre responsible:

(i) for keeping a register of all criminal investigations or pending proceedings involving a foreign primary victim;

(ii) for providing written answers to reasoned requests for information made by or on behalf of a foreign primary victim or secondary victim or the information centre of another Member State within three months from the receipt of such a request.

(b) establish an obligation on national criminal investigating authorities to provide a written answer to any reasoned request for information made by or on behalf of a foreign primary victim or secondary victim or the information centre of another Member State within three months from the receipt of such a request.

Article 15 – Suspension due to the pending proceedings provided for in the Fourth Motor Insurance Directive.

No limitation period under this Regulation shall run against the claimant during any period of time in which there is outstanding a request or claim made by or on behalf of the claimant pursuant to the procedures provided for under Articles 5 and 6 of Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (the Fourth Motor Insurance Directive).

Section four
Interruption

Article 16 – Interruption of the running of the limitation period.

(1) The running of the limitation period provide for in Articles 3 and 4 shall be interrupted by any

of the following:

(a) the commencement of judicial proceedings; interruption is effective from the date of issue of the proceedings even where the court in which the claim has been started lacks competence or jurisdiction;

(b) any act of the claimant notified to the defendant having the purpose of commencing extrajudicial

proceedings with the aim of obtaining an instrument which is enforceable as if it were a judgment; interruption is effective from the date on which a request that the claim should be adjudicated upon is received by the defendant, even where such extra-judicial proceedings do not in fact take place;

(c) any act of the claimant notified to the defendant having the purpose of initiating negotiations; interruption is effective even where negotiations do not in fact lead to settlement of the claim;

(d) any other act of the claimant notified to the defendant informing the defendant of the fact of the claimant's claim for damages.

(2) For the purposes of subparagraph (1)(d) it is sufficient that a letter or any other similar written notification is sent to the defendant in which the claimant unequivocally claims compensation specifying, within the limit of his knowledge, the relevant circumstances of the case, the basis upon which the claimant holds the defendant liable and identifying the damage sustained.

(3) The letter or any other similar written notification provided for in subparagraph (2) shall be written in the language of the Member State where the defendant has his residence or domicile or place of business.

(4) The running of the limitation period shall also be interrupted by the acknowledgment of the claimant's right to claim compensation by the person against whom such right can be enforced.

(5) For the purposes of subparagraph (4) the defendant acknowledges the claimant's claim:

(a) by making part payment, or

(b) by the payment of interest, or

(c) by a written acknowledgment of liability, even where there is a dispute, whether as to part or the whole of the claim, by the defendant as to the extent of any loss or the quantification of any damages suffered.

Article 17 – Interruption of the limitation period in claims established by judicial proceedings or other legal proceedings.

The running of the limitation period provided for in Article 5 shall be interrupted by any act of execution or any other attempt to enforce a claim established by judicial proceedings or other legal proceedings.

Article 18 - Effect and duration of interruption.

(1) Except where subparagraphs (2), (4) and (11) below apply, a new limitation period of three years begins to run as a result of interruption.

(2) Where interruption has occurred by reason of Article 16 (1)(a), the limitation period provided for in Article 5 (1) does not begin to run until the judgment in the proceedings becomes final.

(3) Where interruption has occurred by reason of Article 16 (1)(a) and such judicial proceedings have been terminated prior to judgment, the new limitation period provided for in subparagraph (1) begins to run from the date on which the claimant knew or reasonably ought to have known of the termination of the judicial proceedings.

(4) Where interruption has occurred by reason of Article 16(1)(b), the new limitation period provided for in subparagraph (1) does not begin to run until the date on which the extra-judicial proceedings were terminated prior to the obtaining of an instrument enforceable as if it were a judgment.

(5) Where interruption has occurred by reason of Article 16 (1)(b) and an instrument enforceable as

if it were a judgment has been obtained, the limitation period provided for in Article 5(2) does not begin to run until such instrument becomes enforceable.

(6) In any case where the interruption has occurred by reason of Article 16(1)(a) or (b), the new limitation period begins from the date on which proceedings have been terminated.

(7) Where interruption has occurred by reason of Article 16(1)(c), the new limitation period provided for in subparagraph (1) begins to run one month from the date the defendant notified the claimant in writing of the termination of negotiations.

(8) Where interruption has occurred by reason of Article 16(1)(d), the new limitation period provided for in subparagraph (1) begins to run from the date on which the defendant received the claimant's letter of claim or any other similar written notification made by the claimant.

(9) For the purposes of subparagraph (8) the burden of proof that the letter of claim or any other written notification has been sent shall be on the claimant; the defendant shall be deemed to have received the claimant's communication within two weeks from the sending of the letter of claim or notification, unless the claimant proves that the defendant in fact received the letter or other notification within a shorter period of time or the defendant disproves the presumption of receipt.

(10) Where interruption has occurred by reason of Article 16(4) and the claimant has knowledge of the defendant's acknowledgment prior to initiating any of the actions specified in Article 16 (1), the new limitation period provided for in subparagraph (1) begins to run from the date on which the claimant knew of the defendant's acknowledgment.

8

(11) Where interruption has occurred by reason of Article 16(4) and the claimant has knowledge of the defendant's acknowledgment after initiating any of the actions specified in Article 16(1), the effect and duration of the interruption shall be assessed in accordance with subparagraphs (2), (3), (4), (5), (6) and (7).

(12) Where interruption has occurred by reason of Article 17, the limitation period provided for in Article 5 applies and begins to run again as a result of each act initiating execution or each reasonable attempt at execution undertaken by the claimant.

(13) Where there is more than one defendant, for the purposes of Article 16(4) the defendant's acknowledgment interrupts the running of limitation only against that particular defendant.

(14) Where the claimant is entitled to bring proceedings by way of direct action against an insurance company, the interruption of the running of limitation against the person liable or the person insured also has effect against the insurance company.

Article 19 – Interruption of the new limitation period.

The new limitation period provided for in Article 18(1) can only be further interrupted by the commencement of judicial proceedings.

Section five

Minors and Persons under disability

Article 20 – Minors.

(1) Where the claimant is under the age of 18 at the date when the damaging event occurred, any limitation period under this Regulation, shall be treated as expiring no earlier than the period of four years from the date on which the claimant attains the age of 18, unless the claimant lacks the necessary knowledge as defined in Section two.

(2) Where the claimant ("the relevant person") is under a disability on the date on which he attains the age of 18, the limitation period shall run from this date in all cases where the knowledge of the person who has responsibility for the affairs and supervision of the relevant person ("the responsible person") may be imputed to the knowledge of the claimant, except in cases where the claim is brought against the responsible person.

(3) Where the date of knowledge of the responsible person is determined before the relevant person

attains the age of 18, for the purposes of this subsection the date of knowledge shall be determined as at the date immediately following the date on which the relevant person attains the age of 18.

(4) For the purposes of this Article a person has responsibility for the affairs and supervision of the relevant person where:

(a) he is a member of the relevant person's family who has attained the age of 18 and is responsible for the day to day care of the relevant person; or

(b) he is a person appointed or entitled under the law applicable to the claim to conduct proceedings in the name of the relevant person.

Article 21 – Persons under a disability other than minors.

(1) Except where subparagraph (2) below applies, where the claimant (“the relevant person”) was under a disability on the date when the damaging event occurred, any limitation period under this Regulation shall be treated as starting from the date on which the relevant person ceased to be under a disability.

9

(2) Subparagraph (1) above shall not apply where the relevant person is still under a disability at the expiry of a period of ten years from the date of the damaging event, where

(a) there is a person (“the responsible person”) who has responsibility for the relevant person; and

(b) the responsible person is not a defendant to the claim.

(3) For the purposes of subparagraph (2) any limitation period under this Regulation shall run from the earlier of the following dates:

(a) the date of knowledge of the responsible person, or

(b) the date of knowledge of any person who subsequently acts in the capacity of the responsible person for the relevant person, or

(c) where the relevant person ceases to be under disability after the expiry of the ten year period, the date of knowledge of the relevant person,

but where any such date of knowledge is determined before the expiry of the ten year period, it shall be treated for the purposes of this subparagraph as falling on the date immediately following the end of the ten year period.

(4) A person is under a disability for the purposes of this Article where:

(a) he is unable by reason of mental disability to make decisions on matters relating to the cause of the claim concerned, or

(b) he is unable to communicate such decisions because of mental disability or physical impairment.

(5) In subsection (4) “mental disability” means a disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning.

(6) For the purposes of this Article a person has responsibility for the relevant person where:

(a) he is a member of the relevant person's family who has attained the age of 18 and is responsible for the day to day care of the relevant person; or

(b) he is a person appointed or entitled under the law of the Member State where the claim is brought or of the domicile of the Member State of the disabled person to conduct proceedings in the name of the relevant person.

Section six

Pleading the defence based on the expiry of the limitation period

Article 22 – Pleading the defence.

(1) For the expiry of the limitation period to have effect, the defendant must plead that fact as a defence.

(2) For the purposes of subparagraph (1) the defendant must plead the date when the defendant

alleges the limitation period expired, and all facts and matters relevant to the determination of the applicable limitation period.

(3) Where the expiry of the limitation period is not pleaded as a defence or lacks sufficient particularity as specified in subparagraph (2), the court is not entitled of its own motion to consider the defence.

Article 23 – Renunciation of the defence.

(1) The defendant is not entitled to rely upon the limitation defence where he has previously renounced the limitation defence.

(2) For the purposes of subparagraph (1) renunciation occurs in any case where the defendant has acted in a manner that is incompatible with an intention to take advantage of the expiry of the limitation period.

Article 24 – Nullity of agreement limiting limitation period.

Any agreement limiting the ability of the claimant to benefit from the rules provided in this Regulation or modifying or disapplying any of the provisions of this Regulation is void, unenforceable and cannot be pleaded to support any defence based on the expiry of the limitation period.

Article 25 – Evidence and Burden of proof.

(1) The defendant shall adduce in support of the defence provided for in Article 22 appropriate evidence within the limits of the defendant's knowledge taking into account all the circumstances of the case.

(2) Where it is alleged that the defendant or any other person for whom the defendant is liable has withheld information permitting the claimant to acquire the requisite knowledge provided for in Section 2 in circumstances where there was a duty to disclose such information to the claimant, irrespective of whether the duty existed by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision or whether the claimant had made a request for such information, the burden shall be on the defendant to prove that he had properly discharged his obligations to provide such information or that the claimant had not taken all reasonable steps to obtain the relevant information.

(3) All facts and matters falling exclusively within the subjective or objective knowledge of the claimant shall be proved by the claimant.

(4) In any case, whether in the course of judicial or extrajudicial proceedings, where the defendant pleads the limitation defence, the claimant shall be allowed a reasonable opportunity to adduce appropriate evidence and to rebut any new evidence relied upon by the defendant in order to challenge the limitation defence raised by the defendant under Article 22.

Section seven

Discretionary power of the court

Article 26 – Court's discretionary power.

(1) The competent court may direct that the defence provided for in Section six of this Regulation shall not apply in relation to the claim where it is satisfied, equitably having regard to -

(a) any prejudice which would be caused to the defendant if such direction were given, and
(b) any prejudice which would be caused to the claimant if such direction were not given,
that it would be unjust and unfair not to give such a direction.

(2) In acting under this Article the court must take into account:

(a) the length of, and reasons for, the delay on the part of the claimant;

(b) the effect of the passage of time on the ability of the defendant to defend the claim;

(c) the effect of the passage of time on the cogency of any evidence adduced or likely to be

adduced by the claimant or the defendant;

(d) the conduct of the defendant after the damaging event, including the extent (if any) to which he responded to requests reasonably made by the claimant for information or inspection for the purpose of discovering facts which were or might be relevant to the claim;

(e) the extent to which the claimant acted promptly and reasonably once he knew that he might be entitled to make the claim;

(f) the steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature, extent and quality of any expert advice he may have received;

(g) the steps, if any, taken by the defendant to obtain medical, legal or other expert advice and the nature, extent and quality of any expert advice he may have received;

(h) any alternative remedy or compensation effectively available to the claimant;

(i) the strength of the claimant's case, and

(j) any other relevant circumstances.

(3) The application of this Article must be pleaded by the claimant at the first hearing or within the first statement following reliance on the defence provided for in Article 22.

(4) For the purposes of subparagraph (3) the claimant shall be allowed to complete his evidence or adduce new evidence in order to support any application under this Article.

Section eight

Effects of a successful limitation defence

Article 27 – Effects.

(1) The defendant who successfully relies upon the defence based on the expiry of the limitation period shall not be liable to compensate the claimant for the damages claimed.

(2) The expiry of the limitation period does not extinguish any rights or actions connected with the claimant's claim, but only bars the enforcement of such a claim for damages.

Article 28 – Payment of damages in the case of the expiry of limitation period.

No recovery is allowed of any sums paid in fulfilment of a claim barred by the expiry of the relevant limitation period.

Section nine

Multiple claimants and multiple defendants

Article 29 – Multiple claimants.

(1) Whenever there is more than one claimant, the expiry of the limitation period shall be assessed separately in relation to each claimant.

(2) Where the defence under Section six is available against one or more of the claimants but not all the claimants, the defence shall not apply against those remaining claimants whose claims are not barred by Article 22.

Article 30 – Multiple defendants.

Whenever there is more than one defendant and where the defence under Section six is available against the claimant, Article 27 (1) above applies to each defendant in cases where each defendant is liable jointly or jointly and severally for the damages claimed by the claimant.

Chapter III

Miscellaneous provisions & Final clauses

Article 31 – Entry into force and application in time.

(1) This Regulation shall enter into force six months after its publication in the *Official Journal of*

the European Communities.

(2) This Council Regulation shall be binding in its entirety and directly applicable in all the Member States in accordance with the Treaty establishing the European Community.

(3) It shall apply to claims for damages arising out of any damaging event occurring after its entry into force.

Article 32 – Relationship with existing EC laws.

The provisions of this Regulation shall prevail over all previous provisions contained in any Council Regulation or Directive whenever any claim falls within the material scope of this Regulation.

Done at Brussels, [...].

P6_TA(2007)0020

Limitation periods in cross-border disputes involving personal injuries and fatal accidents

European Parliament resolution with recommendations to the Commission on limitation periods in cross-border disputes involving personal injuries and fatal accidents (2006/2014(INI))

The European Parliament,

- having regard to the second paragraph of Article 192 of the EC Treaty,
- having regard to Rules 39 and 45 of its Rules of Procedure,
- having regard to the report of the Committee on Legal Affairs (A6-0405/2006),

A. whereas in Europe there is a divergence in respect of limitation periods, the commencement of the running of time, the date of knowledge, the ability to interrupt or stop the running of time, the presentation of evidence and the assertion of the defence of the expiry of the limitation period,

B. whereas the extent of such divergence may give rise to undesirable consequences for the victims of accidents in cross-border litigation, placing obstacles in the way of injured individuals when they are exercising their rights in Member States other than their own, and in some cases potentially also their own State, and are required to rely upon foreign law,

C. whereas, in particular, the following issues arise in relation to trans-national accidents: in some countries minors and persons under a disability are not afforded any special protection in respect of the running of time for limitation purposes, and may thus lose rights to claim compensation which they would otherwise retain when injured in a Member State other than their own; in some countries the only way to stop the running of time for limitation purposes is to issue or serve proceedings: in cross-border litigation such an approach may give rise to problems since negotiations will necessarily take longer and an inability to prevent the limitation clock from continuing to tick may place the victim in the disadvantageous position of having to incur considerable costs at an early stage by issuing and serving proceedings before it becomes possible to conclude negotiations,

D. whereas, given the divergences in relation to limitation periods in trans-national personal injury cases, it might be appropriate for some principles to be laid down that are confined to essentials,

E. whereas the condition in Rule 39(2), that no proposal should be in preparation, is duly fulfilled,

1. Calls on the Commission to carry out an inquiry into the effects of the existence of differing limitation periods on the internal market, and particularly on citizens exercising

their freedoms under the Treaty. In particular, this study should seek to quantify the number of personal injury cases involving a cross-border element and assess any difficulties and/or hardship caused to injured parties as a result of the divergence of limitation periods, having regard to the issues set out in recital B;

2. Calls on the Commission to draw up a report on limitation periods following the evaluation of the study, dealing in particular with possible options ranging from a limited harmonisation of limitation periods to the use of a conflict-of-laws rule;

3. Requests the Commission, where appropriate, in the light of the inquiry carried out pursuant to paragraph 1 and after consulting Parliament, to submit to Parliament, on the basis of Article 65(c) and the second indent of Article 67(5) of the EC Treaty, a legislative proposal on limitation periods in respect of personal injury and fatal accident claims in cross-border litigation, following the detailed recommendations set out in the annex hereto;

4. Confirms that the recommendations set out in the annex hereto respect the principle of subsidiarity and the fundamental rights of citizens; calls on the Commission to verify carefully that the principle of subsidiarity and considerations of proportionality are stringently enforced; advises that particular attention be paid to ensuring that the least intrusive form of legislation is selected and to examining whether, for example, the problem might not be best resolved by introducing the country of origin principle;

5. Considers that the proposal requested must not have any financial implications;

6. Instructs its President to forward this resolution and the accompanying detailed recommendations to the Council and the Commission and to the parliaments and governments of the Member States.

ANNEX

DETAILED RECOMMENDATIONS ON THE CONTENT OF THE PROPOSAL REQUESTED

Recommendation 1 (as to the form and scope of the instrument to be adopted)

Parliament considers that principles governing limitation periods should be laid down in appropriate form, in so far as the Community possesses legislative competence in this area, for

damages claims:

- arising from or resulting from personal injury,
- brought by the victim's heirs, or
- brought by another person where the victim suffered personal injuries or had a fatal accident,

where the proceedings involve parties residing or domiciled in different Member States, or a

party residing or domiciled in a non-Community State, or a choice between the laws of different countries.

Recommendation 2 (as to the minimum content of the instrument to be adopted)

Length, computation, starting date, suspension and interruption of the limitation period

– The general limitation period should be four years irrespective of the nature of the obligation, the cause of action, or the identity of the defendant, except where the proper law

of the claim provides for a longer period, in which case the burden of proving the existence of that longer period is to be discharged by the claimant. The limitation period for enforcing a damages claim established by a final judgment or arbitral award should be 10 years. No limitation should apply to damages arising out of terrorist acts, torture or slavery.

– The limitation period should expire upon expiry of the last moment of its last day; it should

be computed in accordance with the official calendar of the Member State in which the claimant issues proceedings; and the day on which the cause of action arises should not be

counted. If a limitation period is extended, the new limitation period should be computed from the date of expiry of the preceding limitation period.

– The limitation period should start:

(1) from the date on which the cause of action for personal injury accrued or from the date of (actual or constructive) knowledge (if later) of the person injured;

(2) in the case of claims by heirs, from the date of death or the date of (actual or constructive) knowledge (if later) of the heirs of the estate;

(3) in the case of claims by secondary victims, from the date of death or the date of (actual or constructive) knowledge (if later) of the secondary victim (fatal accidents) or the date on which the cause of action accrued or the date of (actual or constructive) knowledge (if later) of the person injured (non-fatal accidents).

– The running of the limitation period should be suspended where the defendant has deliberately, dishonestly, unreasonably or as a result of a mistake concealed the existence of

facts or matters giving rise to the liability of the defendant. It should also be suspended during related criminal proceedings/investigations or where there is an outstanding request/claim under the Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (Fourth Motor Insurance Directive)¹.

– The limitation period should be interrupted by: the commencement of judicial proceedings;

any act of the claimant notified to the defendant having the purpose of commencing extrajudicial

proceedings; any act of the claimant notified to the defendant having the purpose of initiating negotiations; or any other act of the claimant notified to the defendant informing the defendant of the fact of the claimant's claim for damages.

Appropriate provisions should be included on pleading limitation, discretion of the court in applying the limitation period, the effects of successfully pleading limitation and multiple claimants/defendants.

In addition, Member States should be required to set up national information centres for keeping a register of all criminal investigations or pending proceedings involving foreign victims and for providing written answers to reasoned requests for information made by or on

behalf of foreign victims.

¹ OJ L 181, 20.7.2000, p. 65. Directive as amended by Directive 2005/14/EC (OJ L 149, 11.6.2005, p. 14).