

RESPONSE OF THE PAN EUROPEAN ORGANISATION OF PERSONAL INJURY LAWYERS (PEOPIL) TO THE PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE RIGHTS OF PASSENGERS IN BUS AND COACH TRANSPORT AND AMENDING REGULATION (EC) No 2006/2004 ON CO-OPERATION BETWEEN NATIONAL AUTHORITIES RESPONSIBLE FOR THE ENFORCEMENT OF CONSUMER PROTECTION LAWS.

1. This is the Response of the Pan European Organisation of Personal Injury Lawyers (PEOPIL) to the proposal published by the Commission on 4th December 2008.¹
2. The proposed Regulation is drafted on the basis of two significant principles, namely that the purpose of the Regulation is to ensure a high level of protection for passengers that is comparable with other modes of transport and wherever they travel and that full account should be taken of the requirements of consumer protection in general (see preamble, first paragraph).
3. In fact, for the reasons set out below,
 - the proposed Regulation does not provide a high level of protection for passengers
 - the level of protection provided does not compare with the level of legal protection provided in relation to other modes of transport or more generally with the protection provided in most domestic law systems.

Reduced Protection in Comparison with EU Rail Passengers

4. It is clear that the proposed Regulation models its provisions on the provisions contained in Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations ("the Rail Passengers' Regulation"), published in the Official Journal L 315/14 of 3 December 2007.

¹ COM (2008) 817 final (2008/0237(COD)).

5. In the Rail Passengers' Regulation there is contained the following provisions:

Article 11

“Liability for passengers and luggage”

“Subject to the provisions of this Chapter, and *without prejudice to applicable national law granting passengers further compensation for damages*, the liability of railway undertakings in respect of passengers and their luggage shall be governed by chapters I, III and IV of Title IV, Title VI and Title VII of Annex I.” (emphasis added)

6. Under Title IV of Annex I, under the heading Liability of the Carrier, there are various provisions setting out the basis for liability in case of death of or personal injury to passengers, and the damages to be awarded in case of death and personal injury. At Article 29, under the heading Compensation for other bodily harm, it is further stated: “National law shall determine whether and to what extent the carrier must pay damages for bodily harm other than that for which there is provision in Articles 27 and 28.” (Article 27 governs damages in case of death and Article 28 governs damages in case of personal injury).
7. Part (but not all) of the text to be found in Articles 27 and Article 28 of Annex I of the Rail Passengers' Regulation (but not Article 29) is repeated in the current provisions of the proposed Regulation at draft Article 7.
8. It is clear that the provisions for compensation provided under Regulation 1371/2007 establish minimum requirements of compensation and that those provisions expressly foresee greater levels of protection to be provided by national law. In particular there is scope for awards of damages for non-pecuniary loss in relation to the injury sustained by the victim and expanded scope for claiming compensation beyond the particular restrictions contained in the specific articles dealing with damages in case of death and damages in case of personal injury.

9. On the other hand, the draft Regulation makes no reference or provision in respect of the award of compensation in respect of non-pecuniary loss for pain, suffering and loss of amenity arising by virtue of the fact of having suffered a personal injury, or any entitlement to claim bereavement damages in relation to a fatal accident.
10. The proposed Regulation contains no express reference to the fact that the proposal constitutes a minimum level of harmonisation which permits greater protection under national law. In particular, the draft preamble at paragraph (18) suggests Community measures may be adopted in circumstances where it is not possible for protection to be achieved by the Member States. It is not understood on what basis that assertion is made and the explanatory memorandum provides no substantive evidence to support such a contention.
11. Were the draft Regulation to represent harmonisation by reference to minimum levels of protection then both the preamble and the substantive provisions of the Regulation should indicate that to be the case (as the Rail Passengers' Regulation does). Rather the provisions of the proposed Regulation suggest that instead what is conceived is total harmonisation of the necessary provisions providing liability. If it is intended that the draft Regulation should represent merely minimum standards of harmonisation, then there is no reason to remove the clauses which were present in the Rail Passengers' Regulation, cited above, and express provision should be incorporated to that effect.

Reduced Protection in comparison with Domestic Laws

12. Further, the provisions in draft Article 7 represent a restricted view of the right to damages when compared with most developed systems of personal injury compensation throughout the EU.
13. Whereas it is accepted that the provisions in the draft Regulation repeat provisions contained in Regulation 1371/2007 which are themselves taken from the Convention concerning international carriage by rail which incorporates uniform rules concerning the contract for international carriage of

passengers and luggage by rail (CIV), such provisions set out a minimum standard of harmonisation where liability accrues on a no fault basis.

14. However, the proposed scheme for harmonisation of damages for bus and coach passengers contained in draft Article 7 will represent a reduction in protection for many victims under national law, for the following reasons:
15. (1) The most significant omission is the failure to make any provision for the award of compensation for non-pecuniary loss.
16. (2) In relation to the award of compensation for pecuniary loss, reference to the words “necessary costs” in draft Article 7² will represent an increased threshold of proof in order to establish that particular costs have been incurred.
17. Most jurisdictions do not specify such a high burden of proof before expenses caused by death or injury are recoverable. The normal threshold for recovery of pecuniary loss is whether such costs have been reasonably incurred as a consequence of the accident. A threshold of necessity may well lead to failure to recover compensation which in other cases would generally be awarded throughout the European Union. For example, medical treatment may in theory be available under a subsidised system of national healthcare but in practice not available at the time that the victim requires treatment. In those cases such victims are entitled reasonably to incur private healthcare costs in order to obtain treatment at the time and at the venue that is reasonable for them. If a threshold of necessity were to be applied the Courts may well take the view that the reasonable costs were not necessary costs because in theory it is possible for such treatment to be obtained under the national healthcare system.

² “In the event of the death of a passenger, the damages in respect of the liability provided for in Article 6 shall comprise: (a) any necessary costs following the death, in particular the cost of transporting the body and the funeral expenses;” (draft Article 7(1)(a)); “In the event of personal injury or any other physical or mental harm to a passenger, the damages shall comprise: (a) any necessary costs, in particular those of treatment and of transport;” (draft Article 7(2)(a)).

18. (3) The right of dependency in a fatal accident claim stated at draft Article 7 (3) of the proposed Regulation identifies that compensation is payable where there is a legal duty to maintain the person who is deprived of support as a consequence of the death of a passenger. This provision is to be contrasted with the provisions in Article 27 of the Rail Passengers' Regulation where it is stated that "The rights of action for damages of persons whom a passenger is maintaining without being legally bound to do so, shall be governed by national law."
19. It is quite clear that the proposal in draft Article 7 (3) refers to dependency in cases of death where there is only a legal duty to provide a dependency rather than a moral duty where a relationship of dependency existed in circumstances where the individual was not obliged by law so to provide.
20. Draft Article 7 (3) again does not represent the normal position found throughout the European Union; in many cases whether there is a dependency depends on whether prior to death the deceased maintained the beneficiary and provided that person with support which, as a result of the death, that person has lost giving rise to an entitlement to make a claim.
21. The present draft also assumes that the underlying reason why a relationship of dependency exists is based upon a financial rationale. In some civil law jurisdictions the existence of a relationship of dependency arises as a consequence of a familial relationship, being based on evidence of a bond of love and affection. The relationship arises as a matter of right to family life, not of pecuniary obligation.
22. Insofar as draft Article 7 constitutes total harmonisation of the right to claim damages against a bus or coach undertaking, than the level of protection provided is not set at a high level of protection but rather represents a basic

minimum level of protection that is available across the European Union in any event.³

23. Such protection constitutes neither a full nor an effective remedy.
24. In cases where an injured Claimant has recourse to other European instruments, for example protection under Directive 90/314/EEC on package travel, package holidays and package tours, then he or she will receive significantly greater levels of protection. The European Court of Justice, in case C-168/00, Leitner [2002] ECR I-2631, upheld the entitlement of a Claimant to receive compensation for non-pecuniary loss arising from the non-performance or improper performance of the services constituting a package holiday in respect of loss of enjoyment, in addition to the compensation due as a result of suffering food poisoning.
25. In relation to package holidays (which often include travel by coach or bus), the European legislature has made provision for full and adequate compensation in respect of the improper performance of the contract for services provided to a consumer. There is no policy reason why an equivalent level of protection cannot be provided more generally to consumers of transport services (not part of a package holiday or package tour) involving travel by coach or bus.

Proposed EP amendments

26. Amendment 20 seeks to introduce amendments to align the system of harmonisation with the regime established under the Motor Insurance Directives. PEOPIL opposes such an approach.
27. The regime applicable in relation to compulsory motor insurance regulates matters separate from the applicable legal regime against the alleged

³ For details of the right to compensation both in respect of personal injury and in relation to fatal accidents the reader is referred to the comprehensive surveys published by PEOPIL in Marco Bona and Philip Mead (Editors) Personal Injury Compensation in Europe (2003) and Marco Bona, Philip Mead and Siewert Lindenberg (Editors) Fatal Accidents and Secondary Victims (2005).

tortfeasor. The application of the current maximum ceiling (established under the Motor Insurance Directives) in relation to an insured risk where the insured person responsible for purchasing the policy and paying the premium is a private party buying cover for the likely transport of up to say 4 or 5 persons in one vehicle cannot be translated or carried over to the new regime and applied to a commercial undertaking who is in business (for profit) to convey up to 50 persons in one vehicle. The foreseeable result will be that individual victims on a coach who have suffered injury and are part of a multiple claim for damages for personal injury will have their individual claims capped in circumstances where the bus or coach operator is commercially in a better position to afford to pay for the relevant insurance cover. The balance of risk falls on the consumer as the weaker party for no objective justification. PEOPIL recommends the removal of the collective ceiling of cover for passengers injured in a bus or coach accident.

Conclusions and Recommendations

28. PEOPIL recommends that the provisions contained in draft Regulation 2006/2004 should be established as basic minimum levels of compensation without prejudice to rights under national law to greater compensation in relation to damages for non-pecuniary loss, damages for loss of dependency, and damages for pecuniary loss which are more generous than those set out in the draft Regulation.

29. PEOPIL strongly recommends that the draft Regulation be amended to expressly incorporate the missing provisions contained in Regulation 1371/2007 at Article 11 of that Regulation and Article 29 of Annex I.