PEOPIL

The Pan-European Organisation of Personal Injury Lawyers

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PEOPIL'S RESPONSE

TO THE RECOMMENDATIONS TO THE COMMISSION ON A EUROPEAN DISABILITY SCALE - 2003/2130 (INI)[?]

January 2004

[?] This paper condensates the views already expressed by PEOPIL in its SUBMISSION TO THE EUROPEAN COUNCIL, EUROPEAN COMMISSION, EUROPEAN PARLIAMENT, «*PERSONAL INJURY COMPENSATION & HARMONISATION PROCESS - A CRITICAL OPINION ON THE GUIDE BAREME EUROPÉEN D'ÉVALUATION DES ATTEINTES A L'INTÉGRITÉ PHYSIQUE ET PSYCHIQUE PROPOSED BY CEREDOC AND ON TRIER 2000's RECOMMENDATION TO THE EUROPEAN COMMISSION, THE EUROPEAN PARLIAMENT AND COUNCIL FOR A DIRECTIVE ON PERSONAL INJURY COMPENSATION*» (JULY-SEPTEMBER 2003).

PEOPIL'S VIEWS

ON THE PROPOSAL FOR A EUROPEAN DISABILITY RATING SCALE

1) PRELIMINARY REMARKS ON HARMONISATION

The real issue is not whether harmonisation should take place, but whether there should, at this stage, be a legislative intervention in the field of personal injury damages at the European Union level, and, if so, to what extent.

PEOPIL agrees that "*it is desirable to reduce existing divergences between the law and practices of member States in this field*" (Committee of Ministers of the Council of Europe, Resolution (75) 7), and considers that this is even more true today as a result of the new political and social conception of the European Union. The question now is how to achieve such a goal and whether, in respect of personal injury compensation, we should go any faster in our approach to harmonisation.

The current primary focus of the European Legislature is not upon the unification of substantive law, but the harmonisation of the procedural frameworks for civil actions and access to justice, especially in the field of cross-border litigation[1].

In this respect, the **European Commission** appears to be fully aware of the difficulties of harmonising compensation systems and, in particular, provisions specifically concerning personal injury damages[2].

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[1] In relation to harmonisation by means of the unification of substantive law governing personal injury by the European Union, it should be recognised that the *Treaty of Amsterdam* has given new impetus to the approximation of private law by the European legislature. However, it is also necessary to stress that the Treaty correctly concentrates on two basic elements: *1)* private international law (namely the promotion of the compatibility of the rules in the Member States concerning conflicts of laws and of jurisdiction); *2)* the law of civil procedure (namely cross-border service of judicial and extra-judicial documents; cooperation in obtaining evidence; and the promotion of the compatibility of the rules of civil procedure applicable in the Member States, where necessary) (in particular see EC Treaty, new Article 65).

[2] For example, in the *Green Paper* «*Compensation to crime victims*» (September 2001, COM (2001) 536 final) the Commission expressly outlined such difficulties in relation to the harmonisation of the concept of "immaterial damages": *"The question … arises whether a common definition of immaterial damages … should be introduced. At the very least a general principle should be considered, for example, that compensation should cover pain and suffering and other immaterial damages. However, going further seeking to introduce a definition of what such compensation should cover could be very difficult in view of the differences between Member States. To make an explicit reference to that the compensation is to be assessed in the same way as under national tort could be an option, although not much would be achieved in terms of uniform application, considering the differences between such laws between the Member States*". The same difficulties were stressed in relation to the approximation of assessment approaches: *"Complications arise in relation to compensation for pain and suffering and other immaterial damages … it would probably not be possible to set any common guiding principles for determining the actual amount of compensation for such losses, in spite of the risk of unfair effects. This assessment will therefore have to be left to each Member State …".*

PEOPIL finds that **this approach by the European Treaty and the European Commission to the issue of harmonisation of substantial law in the field of personal injury compensation should be kept as it is, at least at the present moment**. The approximation of substantive law relating to personal injury compensation cannot indeed be seen as the primary focus for harmonisation by means of legislation. The harmonisation/unification of rules concerning heads of recoverable damages, the criteria for medical assessment of bodily or mental injury, and the levels of awards should be confined to the last step of a process which needs to proceed through various different developments and stages which still have to take place.

Presently, there does not exist a sufficiently well-established and common legal background to permit legislative intervention by the European legislature in respect of specific detailed provision for categories of recoverable loss, methods of assessment (including criteria for medico-legal evaluation) and minimum levels of awards for general damages[3].

The differences between the European systems of personal injury compensation are much greater than the points in common: the **European legal systems are too far apart to contemplate unification or minimum harmonisation straight away**.

2) CRITICISM TO THE PROPOSAL FOR A EUROPEAN DISABILITY RATING SCALE

PEOPIL does not criticizes the proposed "barème européen" in respect of the scientific background of the values indicated for the assessment of the injuries. In particular, PEOPIL does not question whether the values suggested by the "barème européen" are too low or too high: lawyers do not have any specific competence to enter into medical-legal evaluation issues[4].

What goes under criticism is the idea that, at this stage, such medical scales could constitute a tool for harmonisation and, in particular, that they should be contemplated by an European recommendation or should constitute the basis of a legislative intervention by European legislator[5].

[3] See *Personal Injury Compensation in Europe*, BONA & MEAD (EDS), Kluwer, Deventer, 2003.
[4] However, some Italian medical-experts contacted by PEOPIL in order to receive an opinion on this specific issue have noticed that, comparing the values of the so called "barème européen" with the main medical scales privately published in Italy by groups of experts, some of the values are lower and some others are higher than the Italian standards. Criticism has been expressed by those medical experts contacted by PEOPIL on the evaluation of psychiatric injuries in respect of the ranges used.
[5] In this respect see the response by APIL, the Association of Personal Injury Lawyers, November 2003, 9-12.

PEOPIL criticise the approach followed by the proposal for a European medical scale firstly because the so called "barème européen" does not take into account the problem of divergences and wrongfully assumes that there is a common way of conceiving the role of medical experts.

Because of the **wide divergences between Member States in respect of the medical evaluation approach**[6], **the idea of a European disability rating scale, which should be applied in all Member States based upon a system of percentage points for each category of physical or mental impairment, would amount to a significant imposition and would be contrary to a methodological approach to harmonisation**.

Moreover, from a **methodological point of view**, harmonisation should involve in its process all Member States, while the "barème européen" was drafted only by medical experts belonging to France, Italy, Belgium, Spain and Portugal. No medical experts from other Member States were involved. In so far, there is a **manifest lack of contribution to such baréme**, which deprives it of any chance of constituting a valid tool for harmonisation. Indeed, **harmonisation process must involve all Member States**, specially when it aims to end into legislative provisions or other forms of recognition by European legislative bodies.

There is also a problem of **transparency**: the proposed Medical scale aims to gain an official recognition without going through a large **debate and consultation process**, which is absolutely necessary and, in the end, strictly compulsory. In this last respect, PEOPIL also finds quite arguable that a relative small group of medical experts, covering only some Member States, is able to fully represent the complexity of European redress systems.

Harmonisation process would not benefit from giving a recognition to the "barème européen" which is not possible to call "européen" in the sense that it represents the common core of European approach to medical evaluation of the injuries.

Moreover, another crucial point of the proposed European disability rating scale is that it is consciously part of a wider project of harmonisation, which is the«*Recommendation to the European Commission, the European Parliament and Council for a Directive on personal injury*

[6] For example, in England the Law Commission has recently rejected *"reforming the law by greater reliance being placed on medical 'scores'"*, LAW COMMISSION, Damages for Personal Injury: non-pecuniary loss, HMSO, London, 1999, p. 93 (Law Com no. 257). See BONA, *Comparative report on personal injury compensation in Europe*, in BONA & MEAD (EDS.), *personal injury compensation in Europe*, Kluwer, Deventer, 561-563, 595-599.

compensation», proposed in Trier 1 (2000) at the conference entitled «*Rationalisation of the medico-legal assessment of non-economic damage*». The redress system suggested by such Recommendation as a model for all Member States may be criticized in many respects[7].

The adoption of the measures proposed by such initiative are unrealistic because it would compel most Member States to fundamentally alter their redress systems as well as the laws of procedure and evidence. Moreover, it would empower national legislators to reduce courts' discretionary power in assessing personal injury damages, where most of Member States have an unlimited approach to the courts' discretionary power in assessing the *quantum* of non-pecuniary damages.

Such changes are neither justified by the present scope of the European legislature's plans nor by a serious methodological approach to unification/harmonisation. At this stage, unification of personal injury law on damages would necessitate "reinventing the wheel": an approach which PEOPIL considers should be studiously avoided, at least at the present moment. Indeed any such intervention would need significant justification to overturn considerations of subsidiarity and proportionality.

3) CONCLUSIONS

PEOPIL considers that at this stage **the main focus for the involvement of the European legislature should be** :

1) to **facilitate and improve the protection and rights of redress of injured victims in the context of cross-border litigation;**
2) to **create the necessary common legal foundation or basis for the further development of the process of harmonisation.**

PEOPIL therefore adopts the following conclusions as general guidelines towards the harmonisation of personal injury compensation systems:

a) It is desirable to reduce the existing divergences between the laws and practices of Member States in the area of personal injury law, but the process of the approximation

[7] The proposal by "Trier 1 Group" would involve the following: 1) adoption of a harmonised medical standard; 2) adoption of unified rules for the attribution of values to apply to the medical standard; 3) adoption of common rules for the application of judicial discretion; 4) adoption of unified rules on the admissibility and relevance of expert evidence; 5) adoption of unified rules in relation to the training of experts.

of laws in this field will need to go through several different stages. In this respect, the last stage of such a process should be harmonisation by the establishment of minimum rules on the recoverable categories of non-pecuniary loss, and minimum levels of non-pecuniary awards. PEOPIL recommends that the European Commission, the European Parliament, the European Council and the Council of European Union first concentrate on those areas capable of developing a suitable common legal framework, having regard in particular to the management of personal injury claims in the context of cross-border litigation.

b) At this stage, legislative unification of Member States' personal injury laws on damages by the promulgation of detailed rules is not appropriate. In particular, there is at present no grounds nor any readily identifiable and legitimate need for unified rules in respect of the following aspects: categories of recoverable non-pecuniary damages; medico-legal assessment of personal injuries; methods for the monetary assessment of non-pecuniary losses; levels of awards for non-pecuniary losses; interest; the interaction between the provision of social security and compensation under any system of civil liability.

c) Instead, PEOPIL considers that:

c.1) each Member State's personal injury law should otherwise be allowed to develop by judicial decision-making in the context of competition between Member States' compensation systems;

c.2) legislative provision by the European legislature should aim *1)* to facilitate the protection of victims in cross-border litigation, and *2)* to create suitable conditions for the development of a common legal background for the purpose of furthering the harmonisation process.

d) thus, PEOPIL firmly suggests that no official recognition, by means of a recommendation or by any other mean, shall be given to the «*Guide barème européen d'évaluation des atteintes à l'intégrité physique et psychique*» proposed by CEREDOC and "Groupe Rothley", as well as the «*Recommendation to the European Commission,*

***the European Parliament and Council for a Directive on personal injury compensation*», proposed in 2000 by "Trier 1 Group" shall not be implemented.**