

Policy Department C
Citizens Rights and Constitutional Affairs

**FULL COMPENSATION OF VICTIMS OF CROSS-BORDER
ROAD TRAFFIC ACCIDENTS IN THE EU:
THE ECONOMIC IMPACT OF SELECTED OPTIONS**

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Directorate-General Internal Policies

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Executive summary

Cross-border road traffic accidents raising jurisdictional issues represent about 1% of road traffic accidents in the EU27. The direct costs of these accidents can be set at approximately €450 million yearly, of which €150 million are due to medical expenses and damage to property, whereas €300 million represent loss earnings and foregone production. If one also takes into account the indirect costs of cross-border road traffic accidents, namely the physical and psychological consequences for victims and their relatives, the total economic impact of those accidents amounts to about €1.04 billion annually. Several cross-border road traffic accidents create a risk of undercompensation of the non-resident victim, due to differences in the standard of living as well as in the calculation of the *quantum* of damages in member states. The problem of victims' undercompensation in the event of a cross-border traffic accident has so far been approached mostly under the aegis of the proposed harmonisation of European Tort Law, especially within the debate on the "Rome II" regulation on non-contractual obligations. Already during first reading, the European Parliament proposed to address this issue by mandating the application of the law of habitual residence of the victim when assessing the *quantum* of damage awards.

In this study, we assess the economic impact of existing and *de lege ferenda* options to solve the problem of undercompensation. We identify the countries most concerned, defined as those countries where the problem of victims' undercompensation is more likely to emerge. These countries are, according to our analysis, Spain, Greece, Cyprus and Austria. However, in one case – i.e. Austria – judges seized to assess the *quantum debeatur* already take into account what the victim would have obtained as compensation in his/her own country of habitual residence. In the other three countries, the damage award may be significantly lower than in other jurisdictions, especially when the victim's country of habitual residence is located in Northern Europe.

We identify five main options in addition to the "zero option" (or "do nothing" option).

- ***Option 1: judges apply the law of habitual residence of the victim to assess the quantum of the claim;***
 - Option 1a: judges apply the same headings of damages that would be applied in the country of habitual residence of the victim;
 - Option 1b: judges apply also the economic values normally attached to such headings of damage.
- ***Option 2: judges apply the 'principle of ubiquity.'***
- ***Option 3: relying on common principles for the assessment of damages.***
 - Option 3a: European Disability Rating Scheme (EDRS)
 - Option 3b: EDRS + corrective factors (income, standard of living, etc.)
 - Option 3c: Harmonisation of damage awards at EU level.
- ***Option 4: coverage through the third-party insurance of the victim.***
- ***Option 5: creation of a European fund for victims of cross-border traffic accidents.***

Most of these options are aimed at achieving the same goal: solving the problem of victim's undercompensation. However, Options 3a and 3b (European Disability Rating Scheme) are not suited to achieve full *restitutio in integrum*, and are conceived mostly to ensure convergence in the medical practice of assessing bodily injury at EU level.

We find that Option 1 potentially pursues the objective of securing *restitutio in integrum* for victims of cross-border road traffic accidents, at the same time avoiding cases in which a victim is overcompensated after incurring an accident in a country where damage awards are greater, also due to that country's higher standard of living. However, such option also creates several problems in terms of adaptation of existing practices in national courts – with national judges having to get familiar with foreign legislation; and in terms of expected increase in insurance premia in countries with lower income and lower damage awards.

Compared with this option, we discard option 2 (“principle of ubiquity”) as strictly dominated by Option 1. Such option, as a matter of fact, leaves undercompensated victims in the same position as in Option 1, but creates the possibility of overcompensation for victims in countries where awards are greater than occurs in the victim's country of habitual residence.

In contrast, Options 4 and 5 provide solutions based on insurance policies, which are worth discussing as means to achieve *restitutio in integrum* for victims of cross-border road traffic accidents without imposing significant and burdensome adaptations in the way such claims are dealt with by national judges and medical experts. In particular, Option 4 would create substantial problems in terms of availability of third-party insurance for all victims of cross-border road traffic accidents, especially as far as weak traffic participants (pedestrians, minors, elderly, disabled persons) are concerned. Option 5 is the most far-reaching: we provide a thought experiment that allows for the creation of a European Compensation Fund through contributions from insurance policies EU-wide, and discuss potential procedural problems that may emerge.

Overall, we assess the following impacts for each of the options:

- Impact on victims;
- Impact on insurance companies and insured motorists;
- Impacts on national court proceedings;
- Administrative burdens for citizens, firms (insurance companies), EU and national administrations.

As the goal of the initiative at hand (i.e. achieving full compensation of victims of cross-border road traffic accidents) is already set, we mostly rely on cost-effectiveness as the type of analysis to be undertaken.

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1 Introduction: available data on cross-border road traffic accidents

Road traffic accidents represent a large percentage of accidents taking place in Europe every year and claim about 45,000 lives annually. According to estimates provided by the European Commission and by Eurostat (CARE), road accidents in the EU15 cost €45 billion per year. Such costs can be broken down in €15 billion for medical care, police involvement and vehicle repairs, and €30 billion in lost economic production due to fatalities or injuries. A 2001 report covering the EU15 established that this figure should be complemented with the indirect costs of road traffic accidents, namely physical and psychological consequences on victims and their relatives: if one takes into account those costs for all reported accidents, this results in an estimated annual economic impact of €104 billion.¹

As acknowledged by the European Commission in 2005, it is actually “very difficult to draw accurate statistics on the number of accidents occurring in Member States and falling under the scope of the Directive”. The cross border factor makes it “difficult to assess the exact number of accidents involving ‘visiting victims’ ... Moreover, the collection of statistical data of this kind is not centralised at national or at Community level”.²

There is a remarkable lack of data on cross-border road traffic accidents. The only publicly available information is found in the following studies:

- A study completed in 2000 for the European Commission by the Austrian *Kuratorium für Schutz und Sicherheit* found that mortality risk from injuries is highly increased for non-domestic tourists. The study – which, however, was based on a very limited set of data for the EU15 – estimated an average injury mortality of non-domestic tourists of 170 fatalities per 100.000 person-years of exposure, of which 132 fatalities were due to road accidents. This translated into an estimate of approximately 3.000 non-domestic tourist fatalities per year in the EU15 due to road traffic accidents.³ Road traffic accidents account for approximately 5% of all non-fatal and 40% of fatal unintentional injuries in the EU15. In 2001, in Austria 19% of fatal traffic accidents involved tourists, whereas the corresponding figure for France was 7.5%, and for Greece 3.2%. More recent data are available for Germany, where in 2004, 9,200 out of 450,000 road traffic accidents involved foreigners with habitual residence outside Germany. This makes up to 2% of road traffic

¹ These data were reported in the 2001 White Paper “*European transport policy for 2010: time to decide*” and are based on Commission Communication on Priorities in EU road safety – progress report and ranking of actions, COM (2000) 125 final, 17.03.2000. In Annex 2 of the Communication, the estimated direct and indirect costs of road traffic accidents in the EU15 is of €162 billion; however, this figure also includes items that are not relevant for the purpose of this study. In 2004, the World Health Organization estimated that the overall cost of road traffic accidents is about 1.4% of the EU’s GDP. However this figure is extrapolated by averaging the costs of road traffic accidents in 11 high-income during the 90s and more recent figures are not available. For further details, see WHO (2004), *World report on road traffic injury prevention*.

² Commission Staff Working Document addressed to the European Parliament and to the Council on certain issues relating to Motor Insurance, SEC (2005) 1777, 19.12.2005.

³ Such figures cannot be used as a basis for our analysis for several reasons: first, because they are based on data from the 1990s; secondly, because tourist injuries considered in the dataset include injuries caused by the tourists themselves. In other words, the figures reported do not give an adequate estimate of how many non-residents are actually *victims* of a road traffic accident.

accidents involving a cross-border dimension.⁴ Furthermore, according to Irving Mitchell, there are 6,000 new cases each year involving British citizens injured in Europe.⁵

- A consultation of National Statistical Offices and Police Authorities conducted by the Authors of this study led to starkly different results: Austrian figures for 2005 show that 13.5 % of road traffic casualties concerned foreign victims, including pedestrians and car passengers; however, this number also includes injuries caused by foreigners themselves. Data from the Belgian Federal Police for 2005 and 2006 state that approximately 5% of accidents with corporal damage have a cross-border component; the Estonian Road Administration reported that 1.5% of accidents in 2006 involved foreign victims, while the Polish Police estimates that 0.6 % of accidents are caused by foreign drivers. The different ways of classifying the cross-border dimension of road traffic accidents does not allow any accurate comparability of figures.
- A possible way to minimize disparities in the classification of cross-border cases would be to focus only on the number of foreign deaths as a percentage of all road traffic fatalities in a given country. Here again, data are available only in a few countries and in some cases the nationality of the victim is not reported by the relevant authorities. From reported figures it emerged that foreigners represented 2.3% of road traffic fatalities in Cyprus in 2006, 13.2% in Austria in 2005, while Estonia reported no cross-border fatalities in 2006 and only one case in 2005. Here again, it is difficult to draw any reliable inference on the number of cross-border cases for the whole EU.
- Finally, both the Pan-European Organisation of Personal Injury Lawyers (PEOPIL) and representatives of the insurance sector estimated that less than 1% of road traffic accidents in Europe raise jurisdictional issues. This estimate, based on the direct experience of personal injury lawyers, will be adopted as a reference, conservative figure in the remainder of this study.

Against this background, we can estimate that the magnitude of the direct social cost of cross-border road traffic accidents is approximately €450 million, of which about €150 million would be due to medical care and damage to property, whereas €300 million are due to loss of earnings and other losses of economic production. This figure, however, does not include pain and suffering by victims and their close relatives, nor other categories of loss such as loss of amenity, loss of consortium, and – where applicable – loss of physical or mental integrity. In line with the estimated magnitude of these costs, as reported above, we estimate the total direct and indirect costs of cross-border road traffic accidents at approximately €1.04 billion.

In this study, we address the problem of undercompensation of losses incurred by victims of road traffic accidents abroad. The underlying problem is that the current application of the *lex loci delicti commissi* creates situations in which the victim and his/her close relatives are not fully compensated for the losses incurred due to a road traffic accident abroad, as was recalled in several occasions by the European Parliament. Accordingly, we do not look at the social cost of cross-border road traffic accidents *per se*: the magnitude of the problem at hand is confined to the amount of damages that are not awarded to victims as a result of a cross-border road traffic accident, thus leaving them in a situation of undercompensation.

The problem of undercompensation of victims of cross-border road traffic accidents is, of course, most likely to arise if the law of the country where the accident occurs does not lead to a satisfactory damage award for the victim and his/her close relatives. The main factors that affect such likelihood are of both a legal and socio-economic nature, such as:

⁴ In Germany, another 41,000 road accidents involved foreigners resident in Germany. This figure, however, should not be taken as representative of cases involving jurisdictional issues, as the application of both *lex damni* and *lex loci* would lead to the application of German law.

⁵ These cases, however, are not limited to road traffic accidents, but include, for example, products liability accidents.

- *The standard of living of the country where the accident occurs*: countries where the standard of living and the purchasing power are below the EU average would tend to have lower insurance premia and lower damages awards in case of accidents.
- *The liability regime*: some countries require that the victim strictly proves the negligent behaviour of the offender before damages can be awarded by the judge. In other countries, offenders can escape liability due to rather flexible escape clauses. Finally, a few countries apply almost absolute strict liability rules (e.g. France, Germany, Italy, Belgium), or provide for immediate redress thanks to an extensive social security system (e.g. Sweden).
- *The criteria for calculating damage*. For example, irrespective of the standard of living, in some countries the headings of damages considered by a judge only provide for partial restoration of the victim's condition before the accident occurred. In other countries, non-material damages are not compensated, whereas some countries apply standardised tables for the compensation of damages, which hardly achieve *restitutio in integrum*. Finally, some countries still apply maximum caps for damage awards, especially in the case of non-pecuniary damages, although this problem would arguably be solved in the future by the implementation of the Fifth Motor Insurance Directive.
- *Availability of insurance*: in a limited set of countries (e.g. Bulgaria, Ireland), the percentage of uninsured vehicles is still significant. This can affect the prospects for a non-resident victim to obtain full compensation for serious damages, as most often tortfeasors would not be in the position to pay the amount required for *restitutio in integrum*.

The remainder of this study is organised as follows. Section 2 contains a short methodological note; section 3 illustrates the legal framework at EU and international level, with specific reference to the choice of law in private international law. Section 4 surveys the liability rules and the criteria used for determining the *an* and the *quantum* of damages awarded in the EU27 for personal injury or fatality occurred in the case of a road traffic accident. Section 5 summarises the main findings of our survey and contains two summary tables. Section 6 discusses available data to determine which jurisdictions are most likely to create concerns as regards the undercompensation of victims of cross-border road traffic accidents, with special emphasis on the award of non-pecuniary losses. Section 7, in turn, identifies available options that are likely to address the problem at stake, and assesses the economic impact and the overall cost-effectiveness of the proposed application of the *lex damni*, and of selected alternative options. Section 8 concludes.

2 Methodology

The present study focuses on the economic impact of five alternative options identified for the purpose of solving the problem of the undercompensation of victims of cross-border road traffic accidents in the EU27. For each option, the following methodological approach is applied:

- the analysis covers *different categories of costs*, in order to take into account the impact of the proposed solution on all the parties involved (i.e., victims, insurers, insured motorists, judicial system and medical experts). Where appropriate, administrative costs are also included in the analysis;
- benefits are evaluated with respect to the option's potential of *achieving the goal of restitutio in integrum* for the victims of cross-border road traffic accidents;
- impacts in terms of costs and benefits are compared, with the aim to *identify the most cost-effective approaches in light of the regulatory problem at hand* (i.e., solving the problem of victims' undercompensation). Given the limited availability of data, in many cases our estimates are based on theoretical considerations drawn from relevant law and economics literature on road-traffic accidents and cross-border torts;
- results are provided in the form of *qualitative information* and/or *quantitative data*;

- *a consultation of relevant stakeholders was undertaken for each of the selected options*, especially in light of the limited availability of data on cross-border cases. For each issue, we identified the most suitable stakeholders to consult, including industry operators, lawyers, relevant national bodies, and sectoral organisations;
- we provide *a summary table for each option*, highlighting the different impacts in terms of costs and benefits;
- a final section, with a comprehensive summary table, *compares the proposed options with the “zero option”*, i.e. the application of the *lex loci* for determining the type and the amount of damages to be awarded to the victim of a cross-border road traffic accident.

3 Legal and regulatory framework at international and EU level

The need to ensure a more coherent legal framework for the compensation of personal injury resulting from cross-border road traffic accidents has been raised within the broader initiative on the harmonisation of the legal framework for non-contractual obligations in Europe, and particularly in the debate on the so-called “Rome II” regulation, recently agreed between the European Parliament and the Council of Ministers.⁶ Even more generally, the idea of achieving further harmonisation (or, as was authoritatively defined, “Europeanisation”⁷) of European private law – even culminating in proposals to create a European Civil Code⁸ – has ranked high on the agenda since the 1980 Rome Convention on the law applicable to contract law disputes.

A degree of convergence between tort legislations in Europe is already observable, to a certain extent, due to initiatives undertaken by networks of lawyers (e.g. PEOPII-Grotius, the “Tilburg Group”, the “Trier 2000 Group”, the “Hamburg Group”, etc.), but also to official documents by the Council of Europe and decisions by the European Court of Justice and the European Court of Human Rights. The 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms* makes direct reference to the principle of *restitutio in integrum* as the criterion to be adopted in awarding compensation for personal injury, framed as a breach of a Human Right, and explicitly covers both pecuniary and non-pecuniary damages.⁹ Also the Charter of Fundamental Rights of the European Union, signed in Nice in 2000, specifies the need to achieve uniform protection of civil rights for all European citizens.¹⁰ Furthermore, the European Court of Human Rights has developed through its case law a broad definition of non-pecuniary damage, which also includes compensation to close relatives for loss of family life or “loss of consortium”.¹¹ Finally, the Council of Europe has also played an important role in the harmonisation process in respect of various areas of the protection of individuals against unlawful acts causing personal injury or death.¹²

In the 1990s, initiatives such as, *i.a.*, Council Directive 85/374/EEC of 25 July 1985 on liability for defective products, but also analogous initiatives in the fields of sales of goods and associated guarantees¹³, package travel, working environment and motor insurance have contributed extensively to the convergence of legislation on contractual and non-contractual liability in EU member states. More recent initiatives that are worth being mentioned are the Council Directive relating to compensation to crime victims, adopted on 29 April 2004 and in force since 1 January 2005; and the European Parliament’s recent “Resolution with recommendations to the Commission on limitation periods in cross-border disputes involving injuries and fatal accidents”, adopted on 1 February 2007, which advocates for the reduction of the starkly different limitation periods existing in member states’ tort legislation, which hamper injured individuals in the exercise of their rights in Member States other than their own in case of cross-border accidents, or in all other cases where a foreign law applies.

⁶ For further details, see Press Release IP/07/679, *European Union brings in harmonised rules on law applicable to civil liability*, of May 16, 2007, available at: <http://www.europa.eu/rapid/pressReleasesAction.do?reference=IP/07/679>.

⁷ See Zweigert, K., & Kötz, H. (1998), *An introduction to Comparative Law*, 3rd ed., Clarendon Press, Oxford; Snyder, F. (Ed.) (2000), *The Europeanisation of Law – The Legal Effects of European Integration*, Oxford, Hart Publishing.; Werro, F. (Ed.), *L’Européanisation du droit privé vers un code civil européen?*, Fribourg; and Bona, M. (2003), *Towards The “Europeanisation” Of Personal Injury Compensation? Contexts, Tools, Projects, Materials And Cases On Personal Injury Approximation In Europe* (published in *Personal Injury Compensation in Europe*, edited by Marco Bona & Philip Mead, Deventer, Kluwer).

⁸ European Parliament (1989), OJ C 158/400.

⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 41 (former Article 50).

¹⁰ See European Charter of Fundamental Human Rights, OJ C 364, 18.12.2000, at p. 1.

¹¹ For an excellent survey, see Bona, M. (2003), *cit.*

¹² Examples include the various conventions and recommendations in the field of road traffic accidents (e.g., the European Convention of 20th April 1959 on the compulsory insurance of motor vehicles; the European Convention of 14th May 1973 on liability for damages caused by motor vehicles).

¹³ Directive 1999/44/EC of 25 May 1999, OJ L 171, 7/7/1999, p.12.

As regards road traffic accidents, private international law rules are found in the Hague Convention of 4 May 1971, entered into force on 3 June 1975. The Convention addresses the choice of the applicable law in case of cross-border litigation on losses caused by road traffic accidents, by clarifying at Article 3 that in such cases, “the applicable law is the internal law of the State where the accident occurred” (*lex loci delicti commissi*). The application of *lex loci*, however, is hardly satisfactory by victims having their habitual residence in countries with high standard of living; such victims face poor compensation when injured in an accident occurred in a country with poorer standard of living, or with more narrow criteria for assessing damage.¹⁴

At EU level, already during the 1970s action was taken to approximate the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to purchase third-party insurance coverage against such liability.¹⁵ Directive 88/357/EEC of the Council adopted provisions on the coordination of laws, regulations and administrative provisions relating to direct (non-life) insurance and laying down provisions to facilitate the effective exercise of freedom to provide services. Later, the Fourth Motor Insurance Directive partly filled the gap between *lex loci* and *lex damni* by generalising (at Article 3) the right to take direct action against the insurance undertaking covering the responsible person against civil liability. Such a right is in addition to the right of action against the (allegedly) negligent driver; and the liability of the insurer is co-extensive with the liability of the driver.¹⁶ The Fourth Directive confirms that, in the event of a dispute on the choice of applicable law, *lex loci* must be applied.¹⁷

The Fourth Motor Insurance Directive acknowledges the difficulties for foreign victims having to deal with a foreign legal system, foreign language, unfamiliar claims settlement procedures, and unreasonable delay.¹⁸ It raised the possibility that a satisfactory solution “might be for the injured parties suffering loss or injury as a result of a motor vehicle accident falling within the scope of this Directive and occurring in a state other than that of their residence to be entitled to claim in their Member State of residence”.¹⁹ Accordingly, the Directive provided for minimum levels of compulsory insurance throughout the EC and simplified mechanisms for claiming against European drivers from “abroad” through the requirement that “claims representatives” be appointed by motor insurers in each state.²⁰

Furthermore, the Fifth Motor Insurance Directive²¹ further strengthens the legal protection of victims of road traffic accidents by providing that “the minimum amount of cover for personal injury should be calculated so as to compensate fully and fairly all victims who have suffered very serious injuries”, and mandating a minimum amount of cover of: a) for personal injury claims, EUR 1,000,000 per victim or EUR 5,000,000 regardless of the

¹⁴ The UNIDROIT Principles for International Commercial Contracts (1994) contain some provisions on damages and personal injury losses. Article 7.4.2., for example, provides for full compensation (*restitutio in integrum*) “for harm sustained as a result of the non-performance”, which includes “any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm”. In addition, such principles specify that compensation includes non-pecuniary losses, physical suffering and emotional distress.

¹⁵ Directive 72/166/EEC.

¹⁶ The insurer would probably, under the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, have to be sued in its domicile, the place where the policy was written, or the place where the accident happened. From the point of view of the claimant, the last 2 are very likely to be “abroad”.

¹⁷ Directive 2000/26/EC of 16 May 2000, OJ L 181, 20/7/2000, p. 65.

¹⁸ *Id.*, Preamble paragraph 6.

¹⁹ *Id.*, Preamble paragraph 11.

²⁰ *Id.*, Article 4.

²¹ Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005 amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles, OJ L 149, 15.06.2005, p. 14.

number of victims; and b) in the case of damage to property, EUR 1,000,000 per claim, whatever the number of victims.²²

Finally, the first set of amendments proposed by the Parliament on the draft Rome II Regulation – which, once in force, will prevail over the Hague convention – reaffirmed, for road traffic accidents involving personal injury, that the applicable law for determining liability issues would be the law of the country where the accident occurred (*lex loci*); however, the Parliament proposed that the applicable law for determining the *quantum* of damages be the law of the victim’s country of habitual residence (*lex damni*), unless this would be inequitable. In February 2006, the Commission published its amended proposal by rejecting the Parliament’s amendment: the main reason for rejecting the proposal was the uncertainty that could be caused by the application of two different sets of rules for the determination of liability and for assessing the *quantum debeatur*. The Commission agreed with Parliament on the need to consider how to achieve a more uniform approach to applying foreign law in the courts of the Member States, but considered that it would be too early to introduce such a rule, as “most member States would not be able to apply the rule as they do not have proper structures in place to enable the courts to apply the foreign law in this way”.²³ On May 15, 2007 Members of the European Parliament and of the Council agreed on a common draft of the regulation stating that when damage occurs, the *lex loci* will apply, unless the parties both have their habitual residence in another country, in which case the law of that country will apply. It was also agreed that the Commission would present a detailed study on those issues by the end of 2008.²⁴

Against this background, legal systems in the EU member states still differ noticeably: the landscape of legislation on personal injury was defined as a “tower of Babel of definitions” and a “damage lottery” by authoritative commentators.²⁵ The major differences can be grouped in three main categories:

- *Liability*: criteria used to determine the liability for harm caused by a road traffic accident vary amongst member states, with some countries (most civil law countries, including France, Germany, Belgium, Italy, Spain, the Netherlands, Austria) adopting strict liability rules²⁶; and other countries (e.g. the UK, Cyprus, Ireland, Malta, Romania) relying on fault-based rules. In addition, even in countries that have adopted a strict liability, the legal rule regime varies significantly: for example, under the French *Loi Badinter* the driver is deemed liable for all harm caused by his vehicle without any fault, and without any defence of *force majeure* and with significant restrictions to the defence of contributory negligence; whereas the German *Straßenverkehrsgesetz* contains a risk liability provision (*Gefährdungshaftung*) providing for a more flexible interpretation of contributory negligence, although some further restrictions to such defence have been introduced since August 2002, especially for children under 10 years of age. In other jurisdictions, escaping liability is easier than in these two countries.

²² *Id.*, Article 2, amending Article 1 of the second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ L 8, 11.1.1984, p. 17).

²³ See the Explanatory Memorandum attached to the European Commission’s amended proposal, COM(2006)83 Final, 21.2.2006, at p. 7.

²⁴ Press Release IP/07/679, *cit.*

²⁵ Busnelli F.D. (2001), *Prospettive europee di razionalizzazione del risarcimento del danno non economico*, in *Danno e responsabilità*, pp. 5-6. (2001); and Atiyah, P. (1997), *The Damages Lottery*, Hart Pub., Oxford.

²⁶ Most often, these countries include motor vehicle operation in the category of “risky” activities, warranting at least a reversal of the burden of proof (so-called “relative” strict liability). This means that the liability of the offender is presumed, unless the latter proves – depending on the formulation of the rule – that the accident did not occur as a result of negligent behaviour; that the accident was caused events that he or she could not control (*force majeure*); or that the accident was caused by negligence or intentional behaviour of the victim. Such proof is normally termed “escape clause”.

- *Assessment of the damage award*: although most EU countries allow for full compensation of past, actual, and future losses (*restitutio in integrum*) including both pecuniary and non-pecuniary damages, in practice the level of damages awarded may vary quite significantly. As will be explained in more detail below, the upper limit on compensation differs considerably from one country to another – for example, it is unlimited in France, it reaches € 9.6 million in Denmark, € 600,000 in Poland and € 127,823 in Estonia. Compensation is likely to be higher in countries such as the UK or Ireland when compared to countries where the risk of incurring a road traffic accident is higher – such as in the so-called “SEC belt” of Southern and Eastern European countries.²⁷ A comparative study done in the UK in 2003 found that the range of damages in respect of the instantaneous death of a 20-year-old legal secretary ranged from only funeral expenses (Finland) to £176,368 (Italy).²⁸ Significant past initiatives in this field include the proposal to establish a “European Disability Rating Scale” by the CEREDOC, with the backing of the Rothley Group, discussed by the Parliament in 2003.²⁹
- *Limitation periods*: legal systems in the EU27 differ noticeably as regards limitation periods for exercise of individual rights, ranging from 3 to 30 years. The extent of such divergence may give rise to undesirable consequences for the victims of accidents in cross-border litigation, creating obstacles for injured individuals when exercising their rights in Member States other than their own, and in some cases potentially also their own State, when required to rely upon foreign law. A Resolution adopted by the European Parliament on 1 February 2007 called on the Commission “to carry out an inquiry on the effects of differing limitation periods on the internal market”, which “should also seek to quantify the number of personal injury cases involving a cross-border element”.³⁰ Accordingly, the issue of limitation periods will be dealt with only marginally in the present study.

Differences in member states’ legal systems as regards the assessment of the *quantum* of damages become particularly significant in the case of cross-border traffic accidents. As was authoritatively pointed out, differences in legislation in the member states “can be of almost dramatic importance to European citizens ... Due to the different levels of protection in the national tort law systems and the related regimes of third party liability insurance, it can be of crucial importance for the whole of the rest of the victim’s life and those of his relatives, in both financial and personal respects, whether the accident took place one hundred meters in front of, or beyond a given (often not even manifest) national border”.³¹

²⁷ See e.g. the Final Report of the “SEC Belt project”, available at <http://www.etsc.be/secbelt.php>.

²⁸ See Holmes, M. and McIntosh, D. (2003), *Personal Injury Awards in EU and EFTA Countries* (Kluwer Law).

²⁹ See below, Section 4, for a description of this proposal.

³⁰ European Parliament resolution with recommendations to the Commission on limitation periods in cross-border disputes involving personal injuries and fatal accidents (2006/2014(INI)), 1 February 2007.

³¹ See von Bar, C. and Drobnig, U. (2003), *Study on Property Law and Non-Contractual Liability as they relate to Contract Law*, submitted to the European Commission Directorate General on Health and Consumer Protection (SANCO B5-1000/02/000574).

4 Overview of legal rules on liability for personal injury in the EU27

In what follows, we survey the criteria used for the attribution of liability and the award of compensation for personal injury arising from road traffic accidents in each of the EU member states. Apart from considering whether *restitutio in integrum* is the reference criterion for the quantification of damages, we address in more detail the issue of pecuniary and non-pecuniary losses, and the application of maximum caps to damages awarded for specific types of injuries. Where possible, we also comment on existing caselaw as well as on the legal treatment of legal and medical expenses.

4.1 Austria

Articles 1325-1327 of the *General Civil Code of Austria* (ABGB) lay down the principal basis upon which a claim for damages for personal injury may be made. Article 1325 specifies that a person who causes bodily harm to another person shall bear the expenses of the cure of the person injured, compensate him for loss of profits, or where the injured person is made incapable of earning a livelihood for the lost future gains, and moreover pay him at his request compensation for his suffering, in accordance with the particular circumstances of the *case*. The main criterion used to determine the amount of compensation is to return damaged goods to their former state (“status quo”) or at least into a similar or equal state to that which would have existed had the tortious act not occurred. If compensation in kind is impossible or impracticable, then financial compensation shall be awarded. In particular, non-pecuniary losses shall be compensated by an award of monetary damages. The victim or the heirs of the deceased who has suffered fatal injury are entitled to claim damages.

Both pecuniary damages (“*Vermögensschaden*”) and non-pecuniary damages (*ideeller Schaden*) can be claimed. Pecuniary damages include: a) the treatment expenses incurred by the injured person; b) lost profits or loss of future earnings (if the injured person is incapacitated from earning a livelihood); and c) the costs of medical treatment (if the costs are affordable based on the standard of living of the injured person).

On the other hand, non pecuniary losses include: a) pain and suffering of the injured and of close relatives (including the spouse and other family members) that have suffered illness as a consequence of the accident; and b) compensation for harm suffered due to death of a close relative. Compensation of pain and suffering is independent of the nature of the negligence, and is normally provided as a lump-sum payment following an overall assessment of the amount to be awarded (so-called *Globalbemessung*). Compensation for non-pecuniary damages may even be awarded where a person has had to face a risk to life or to health. The impact on the person must be severe. The fact that an injured person is in a state of unconsciousness does not have the consequence that he/she no longer qualifies for compensation for pain and suffering. “*Schmerzensgeld*” is granted for pain and suffering even for times of unconsciousness in the same way as for long term suffering due to severe brain damage.

Personal injury (*Körperverletzung*) includes any impairment of physical or (severe) mental integrity, including anxiety and insomnia. However, any mental impairment consisting only of feelings of “unease” (“*Unbehagen*”) was for a long time not classified as personal injury (“*Körperverletzung*”) and therefore the courts did not grant compensation.

As regards the *quantum* of non-pecuniary damages – quantified *ex* article 1325 ABGB according to the duration and the intensity of pain and suffering – there are no statutory limits. Ivo Greiter (2006) reports the maximum amounts which have been awarded by Austrian courts as €120 daily for light pain, €220 daily for moderate pain, €350 daily for severe pain and €400 daily for extreme pain.

For what concerns compensation for the victim’s death, where an accident does not lead to the immediate death of the victim, the injured person normally has a right to claim compensation for all pain and suffering, even though the victim was unconscious or in a coma for the whole period

between the accident and the date of death (Art. 1325 ABGB). Nevertheless, to date the Austrian legal system has not recognised any right to compensation for the loss of life itself.³² A claim for compensation for pain and suffering can be brought after the death of the victim by his heirs. In these cases, loss of maintenance can be claimed by the victim's children, parents, grandparents and spouse.

In a decision issued on 16 May 2001, the Austrian Supreme Court recognised the right to compensation for pure emotional suffering ("*reine Trauer*") due to the loss of a close relative, which did not lead to impairment to health according to Art. 1325 ABGB. At present, the average amount of compensation claimed for pain and suffering for the loss of a loved one is between approximately Euro 7,250 and 18,200. Although benefits resulting from the accident (saved maintenance, saved expenses) are deducted from the damages payable to the victim, no deduction in respect of benefits is made from non-pecuniary damages.

When assessing damages suffered by a foreign victim an Austrian court has to take into consideration what the victim would have earned in his own country. The loss of income or medical and nursing costs, where the victim has received medical treatment in his own country, has to be considered according to the respective foreign standards.

4.2 Belgium

Articles 1382 to 1386 of the Belgian Civil Code impose an obligation to provide for full compensation for damage caused unlawfully (i.e. where a legitimate interest has been harmed), without reference to the circumstances of the damage (whether the type of accident or cause of action), the degree of negligence, or the economic position of the parties. The notion of damage and damages has been developed by the Supreme Court, the Belgian Court of Cassation, which always left it to the discretion of the trial judge to determine the existence of damage and to calculate its *quantum*, the judgment being based on the evidence adduced by the plaintiff and the defendant. The principle of *restitutio in integrum* fully applies, and – although Article 1382 initially did not cover such category – was extended over time also to non-tangible (non-pecuniary) losses: however, in Belgium the aim of compensation for non-pecuniary losses is not that of restoring the *status quo ante*, but to console the victim. As recalled by De Kezel (2006), compensation for non-pecuniary damages thus has to be "fair", not "full".

In Belgium there are no statutory limits on compensation, either with regard to the type of recoverable losses, nor with respect to the amount of damages. Pecuniary losses in the case of bodily injury are economic losses which flow from the incapacity of the injured person to work, or which arise out of an invalidity or disability (e.g. medical and nursing costs, costs of care and assistance provided by third parties, loss of earnings). Heirs of the deceased may claim compensation for the funeral expenses which they have incurred. Dependants who were, or would have been reliant on the deceased for support may claim compensation for loss of support.

Pecuniary damages awarded cover temporary loss of earnings and actual loss of earning capacity, and are determined with the aid of an appointed medical expert, in charge of assessing the percentage of temporary/permanent impairment and disability and the residual capacity to work of the injured person. Methods used by courts to assess the *quantum* of damages are based on the victim's annual income prior to the accident, or on percentage sums based on the amount of disability certified by the medical expert. Medical costs (provided that they are reasonable) are covered by the Health Insurance and by first party insurers which have then redress against the tortfeasor; in case some actual losses are not recovered by the victim, the latter may seek redress directly from the defendant.

³² However, Greiter (2006), reports that it may only be a question of time until compensation for a shortened life is recognised.

Compensation for non-pecuniary damages may be claimed for physical pain, mental pain and suffering, for disfigurement, the loss of enjoyment of life and for damage to sexual function. Another type of loss which ought to be mentioned is the breach of a personality right. Secondary victims may claim compensation for the loss of a partner or a relative and for the pain resulting from witnessing the suffering of a close relative (“*pretium affectionis*”). The amount of compensation is determined by the judge at the date of trial. For the compensation of non-pecuniary damages, a “national indicative table” is used since 1997 and revised every two years.

In case of death, no compensation is awarded for the mere loss of a human life. In addition, no compensation for pain and suffering is awarded in case the victim was always in a coma between the accident and the death. Amounts compensated for pain and suffering before dying are reported by De Kezel: in one case where the victim had tried to escape from a car while drowning, the court awarded €1,250 for pain and suffering; in a case where the victim was seriously injured in a fire accident and was in great pain for 5 days, an overall award of 2,500 € was granted. In another case, where the victim had died after 36 months after the accident, a lump sum payment of €25 per day was awarded. Finally, when the victim was aware of his reduced life expectancy but died after four years from the date of the accident, an overall compensation of €1,250 was awarded.

Claims by secondary victims for loss of maintenance or loss of social life are decided on the basis of a non-binding National Indicative Table. This includes a damage award of €10,000 in case of death of a husband/wife/unmarried partner; €5,000 in case of death of a fiancé, €3,750 in case the victim is a partner separated but not divorced; €7,500 for the death of a parent if living under the same roof, and €3,750 if not; €10,000 for the loss of a child that was living under the same roof, €5,000 if not, and €2,500 for the death of a foetus; and lower amounts for the loss of brothers/sisters, step-father/step-child, and a grandparent or grandchild, parent-in-law and son/daughter-in-law.

These rules apply also to foreigners, insofar as Belgian law is applicable.

4.3 Bulgaria

According to Bulgarian law, the principal basis upon which a claim for damages may be made is laid down in the article 45 to 54 of the General Civil Law – Law of Obligations and Contracts. Under the provision of article 45, if a person intentionally or by negligence causes damage, he or she must do the necessary to restore the situation in which the victim was before the damage occurred (*restitutio in integrum*). The scope of damages includes both pecuniary and non-pecuniary losses, which according to article 52 is subject to the equitable assessment of the judge.

According to the Bulgarian Insurance Code, Article 267, the insurer under the obligatory *Third Party Liability Insurance of Motorists* shall cover the liability of the insured for the damage inflicted to third persons, including pedestrians, cyclists, and other participants in the road traffic; damages that are related to the possession or the use of a motor vehicle, including non-material and material damages as a result of corporal injury or death; damages caused to someone else’s property; benefits forgone which are a direct and immediate result from damage, and the expenses reasonably made in relation to the claim, including the legal expenses adjudged as burden on the insured person.

Non-pecuniary damages (pain and suffering) resulting from caused death, disability, health deterioration etc., may be compensated on the grounds of tort liability as set in Art. 52 and Art. 45 of the Law of Obligations and Contracts. In those cases the court would rule on the moral damages based on equity and deliberating not only on the scope of the compensation and the types of sufferings for which such compensation is awarded, but also on the line of persons that may have legitimate claim for such incurred damages. According to the jurisprudence as unified by the mandatory interpretative resolutions of the Supreme Court, presumably interested parties, that may initiate such a claim, could be: the closest relatives and the persons in factual relationships resembling those of adoption and marriage. All other persons claiming damages from death,

disabilities etc. of another person would have to prove how the loss/injury incurred to another person has affected them. Given the present legal standards in Bulgaria, only medical expenses following and in direct relation to the damage can be recovered. A claim is lost by limitation after 5 years.

4.4 Cyprus

Cyprus tort law is effectively common law. It is largely codified into a statute, the Civil Wrongs Act (Cap. 148), which is interpreted according to 'English law' principles, and common-law torts have since been introduced into Cypriot law. A special legislation of relevance also exists, notably the Motor Vehicles (Third Party Insurance) Law of 1990. The principal basis for personal-injury claims over traffic accidents is the *negligence tort* – as elaborated in Sections 51 – 55 of the Civil Wrongs Act and the case law. Ascertainment of contributory negligence will reduce damages accordingly.

There are no special rules for foreign victims. If the defendant is uninsured, the plaintiff will petition the Motor Vehicles Insurance Fund (M.I.F.) for recovery, and the Fund will in turn go after the tortfeasor for recovery.

Damages awarded are distinguished into general damages and special damages. Both pecuniary and non-pecuniary losses are covered.

General damages are presumed to follow from the wrong complained against. They cover physical injury, pain and suffering, loss of amenity of life, loss of future earnings. There has been a steady increase in the sums awarded as general damages, "a tendency which reflects greater sensitivity towards human pain, the agony of disabled persons and distress due to being marginalized from the usual human activities" to quote Supreme Court *dicta*.³³ General damages will depend on the person's age (a younger person will be awarded higher damages), social status, etc.

Special damages correspond to particular harm which the plaintiff must prove. These are damages that the law will not infer from the nature of the act, as they are of exceptional nature. Examples of special damages that may be claimed are expenses for the reparation or replacement of the vehicle, the use of a rental car in the meantime, the replacement of clothing or other personal items damaged in the accident, hospital and medical expenses, the costs of transportation abroad (in complex medical cases), and expenses arising from the victim's death.

Future expenses (for example, plastic surgery after burns suffered) are dealt with under general damages.

Special damages must be claimed specially and proved strictly. Court hearings on special damages can be excruciating as each claimed amount must be accurately certified. As regards the medical harm claimed, both parties may employ doctors as their expert witnesses, leading to a doctors' trial.

In principle, the court may also award *exemplary damages* (punitive damages), in cases where the defendant's conduct was so mischievous as to merit such punishment.³⁴ However, it is improbable to have exemplary damages awarded in a traffic accident case.

There is no statutory limit on damages. A scale of amount of damages per claim has been developed by court practice.

The limitation period for tort claims is two years after the act.³⁵ Special rules in the Limitation of Actions Law as to the commencement, or suspension, of the limitation period must also be considered. In cases of bodily harm or death, the judge has the discretion not to apply the limitation rule for a maximum of five additional years, considering the reasons for the delay in filing the suit, including the inability of the claimant, the conduct of the parties in collecting the required evidence,

³³ *Mavropetri v Louca* [1995] 1 CLR 66, at 74 citing past cases.

³⁴ *Papakokkinou and others v Kanther* [1982] 1 CLR 65.

³⁵ Section 68 of the Civil Wrongs Act.

and the consequences as to the reliability of testimony.³⁶ However, the Motor Vehicles (Third Party Insurance) Law, as modified in 2006 provides an absolute time limitation of three years since the accident: this limitation is effective with regard to liability by the tortfeasor's insurer, but the tortfeasor may still be sued under the general provisions.³⁷

4.5 Czech Republic

Part VI, Section I and II of the Czech Civil Code³⁸, entitled "Liability for damage", is the basic source of principles in the area of law that could be described as the Czech law of torts. There are four basic elements: duty and breach of that duty (often combined together and considered as one), causation and damage. Textbooks generally add the criterion of "fault" as another element, either in the form of intention or negligence.³⁹ As far as general liability for damage is concerned, fault is presumed and the person accused of committing a tort has to prove that he did not cause the damage. In other, specified cases, the standard of liability is stricter for the tortfeasor, or even absolute (strict) liability applies.

As regards the provisions on damages for personal injury, compensation can be awarded for pain and suffering and for future "social handicap" (Art. 444 of the Civil Code), for loss of earnings both during working disability and after (Art. 445 to 447 of the Civil Code), for loss of pension (Art. 447a of the Civil Code) and for medical expenses (Art. 449 par. 1 of the Civil Code). No punitive damages are awarded in the Czech Republic.

As regards the amount of compensation sought, this has to be specified by the plaintiff from the very beginning and the judge may under no circumstances award more than the plaintiff asks for (though he may lower, that is mitigate, the damages). Of course, medical expenses and lost earnings may be calculated more or less easily and accurately. Not so compensation for pain, suffering and future "social handicap" under Art. 444 of the Civil Code. Till January 1, 2002 this payment was calculated according to Regulation No. 32/1965 Coll., on Reimbursement for Pain, Suffering and Future Social Handicap, as subsequently amended, accompanied in each case with an expert medical report. This Regulation was a target of constant complaints and criticism from the plaintiffs as its basic principles gradually became rather out-dated and unjust, especially in the 1990s, in consequence of which the compensation awarded to the plaintiff was sometimes ridiculously low or even negligible.

Therefore, a new regulation was passed, Regulation No. 440/2001 Coll., which preserved the basic formula for calculating compensation (i.e. a specified number of "marks" per injury, as determined by an expert medical report, multiplied by a certain amount of money, as provided for by the Regulation) but amended or removed some of the most unjustifiable provisions. For example, the equivalent for one mark is no longer 30 CZK but four times as much, there is no longer a set limit to the total amount of compensation the plaintiff may recover, and certain limitations upon the very entitlement to compensation have been removed as well.

However, it needs to be emphasized that even in cases decided according to the "old" Regulation No. 32/1965 Coll. courts have sometimes awarded damages far exceeding the basic amount as calculated according to the law. This apparently seemed proper especially in cases where the accident itself happened during the period of operation of the Regulation No. 32/1965 Coll., and therefore the case had to be decided according to the "old" law, but the case was dealt with by the courts already during the time of operation of the new Regulation No. 440/2001 Coll.

³⁶ Section 8A of the Limitation of Actions Law, added by section 2 of Law 108(I) of 2002.

³⁷ Section 22 of the Motor Vehicles (Third Party Insurance) Law, as amended by section 2 of Law 168(I) of 2006.

³⁸ Statute No. 40/1964 Coll., Civil Code, as subsequently amended.

³⁹ Občanské právo hmotné, svazek II., V. Knapp, M. Knappová, J. Švestka, J. Dvořák, A. Macková, J. Mikeš, S. Radvanová, CODEX Bohemia, Praha 1998, str. 334.

Czech personal injury cases normally go to trial, as a settlement is not often reached. This, however, does not hold true for automobile accident cases because of the compulsory liability insurance system. In this particular area of the law of torts, insurance plays a very important role: a lot of evidence is presented during the trial itself, mostly expert medical reports (as well as revision reports and medical committee reports) or the testimony of lay witnesses. Every fact has to be proven unless expressly admitted by the opposing party, so if the defendant remains silent on a certain issue, it cannot be taken as admitted by him. This also considerably protracts the proceedings. Act no. 168/1999 Coll., sets the limit (for insurance compensation) for injuries to health at CZK 35 million, and for material damages at CZK 18 million. (as of May 1, 2004). There have been cases where the compensations reached tens of millions.

As to the costs of the litigation, the winning party recovers not only the court fee (if it is the plaintiff who wins) but also the attorney's fees, though not the actual amount paid to the attorney on the basis of their private agreement, but rather a compensation calculated according to law.⁴⁰ In some cases this proves advantageous but usually it does not cover the actual amount the party has had to pay to his lawyer.

4.6 Denmark

The Danish 1984 Tort Liability Act applies in all cases where there is tortious liability for personal injury, and irrespective of the type of liability. It does not contain provisions on liability, which must be established by reference to case law, or, in certain circumstances, to legislation. The nature of liability whether based on negligence, strict liability or any other basis – does not affect the application of the Act.⁴¹ In addition, the law on compensation for personal injuries is regulated by Law No. 463 of 7th June 2001, as subsequently amended. Although the Danish tort law is based on the principle of full compensation for pecuniary damages, the 1984 Tort Liability Act introduces a fairly standardised framework for the quantification of damages, in particular as far as non-pecuniary losses are concerned. Therefore, as recalled by Von Eyben (2006), the general principle of full compensation cannot be considered as a guideline in Denmark. The court's discretionary power in determining the *quantum* of compensation has been replaced by fixed rules which have the advantage of facilitating the calculation of damages before trial, for settlement reasons.

Pecuniary losses include: (a) damages for medical expenses and the like, (b) damages for temporary loss of earnings, and (c) damages for any permanent loss or impairment of earning capacity. Non-pecuniary losses are related to temporary pain and suffering and are set at a specific daily amount (which in 2002 was €18). Such damages are awarded if the injured person has been subjected to medical treatment during the period of temporary impairment. Maximum damages are also set at approx. €6,900.

As regards permanent disability (including permanent non-pecuniary consequences of the accident), damage claims can be filed whenever the percentage of disability exceeds 5%. It is important to recall that in Denmark damages for mental injury are awarded only when resulting from a bodily injury. Damages are obtained by multiplying the percentage of permanent disability by a specific amount (close to €800 in 2002).

Normally, the victim's income will serve as basis for calculating compensation for temporary or permanent loss of capacity to work; however, the law foresees some restrictions to the amount of compensation that can be awarded: in the case of personal injury, the primary victim will be able to seek compensation up to a maximum amount specified every year (being approximately €850,000 in 2001); furthermore, the survivors will likewise not obtain full compensation for the loss of a breadwinner.

⁴⁰ Regulation No. 484/2000 Coll., as subsequently amended.

⁴¹ Consolidated Act No. 599 of 8 September 1986, as amended

In case of fatal accident, there is a general right to claim compensation pursuant to § 12 of the 2001 Liability for Compensation Law; spouses, unmarried partners and children under the age of 18 (or 24 where the child is living at home and still in education), and parents who receive support from their children enjoy a privileged status to claim compensation. The Liability for Compensation Law (§ 12) allows the refund of reasonable burial expenses. However, the Danish legal system does not recognise any right to compensation for non-pecuniary losses in connection with the death of another.

The fairly standardised provisions of Danish Law do not allow judges to take any account of the amount of damages that could be recovered by a foreign victim in his or her own country.

4.7 Estonia

The following damages are normally compensated by the National Traffic Insurance Fund:

- the cost for medical treatment and the income not received, and
- moral damages when an organ or limb is lost. Compensation of moral damages is limited to a maximum of 5000 Kroons (€320).

Compensation for other damages can be claimed from the party that caused the accident.

There are no special conditions for foreigners. Action can be initiated up to a limit of 3 years since the accident occurred.

4.8 Finland

Provisions governing the compensation of personal injuries are found in Chapter 5, sections 2, 3, 4, 4a and 6 of the Tort Liability Act (412/1974) ("*Vahingonkorvauslaki, Skadeståndslagen*"). According to the Finnish *Compensation Act* (§5), the *quantum* of damages for personal injury is based on the principle of full compensation, covering both pecuniary damages (e.g. medical care, loss of earnings, care and support provided) and non-pecuniary damages (e.g., pain and suffering, temporary and permanent disabilities etc.). Courts apply some standardised criteria for quantification (e.g. compensation of funeral expenses is fixed) and can reduce the amount of damages in case the victim was negligent and partly contributed to causing the accident (comparative negligence rule). The Compensation Act stipulates that compensation should be awarded for loss of earnings and incurred expenses. However, as reported by Backström (2006) the legislation provides no practical rules on how to calculate such losses.

As regards non-pecuniary losses, only direct victims can recover damages. The heirs of the victim can only *continue* a claim commenced by the primary victim before his death *iure successionis*. Reduced capacity to work and earn a livelihood is included in the *quantum* of non-pecuniary damages, together with mental disturbance and exposure to significant threats/risks. In 1999, however, the Tort Liability Act was amended to allow the close relatives of a victim to claim damages related to their anguish (Chapter 5 section 4a), but only if the death was caused intentionally or by gross negligence, and if the award of damages is considered reasonable in view, *i.a.*, of the relationship existing between the claimants and the victim.

4.9 France

Following the landmark judgment by the *Cour de Cassation* in *Desmares*, the French legal system introduced a strict liability regime for road traffic accidents with the *loi n. 85-677 du 5 juillet 1985*, also known as *Loi Badinter*.⁴² Under the provisions of the law, the driver or keeper of a motorized vehicle is deemed liable for all harm caused by the vehicle without any fault, and without any defence of *force majeure* and with significant restrictions to the defence of contributory negligence,

⁴² See *Desmares*, Civ. 2e 21.07.1982 D. 1982, 449.

especially when victims are pedestrians, minors (below 16 years old), elderly (over 70 years old) or disabled persons (below 20% of the normal working capacity). In all the latter cases, only intentional contributions (i.e. suicide attempts) will be taken into account. Moreover, contributory negligence that resulted in personal injury will lead to a reduction of the liability of the driver only in a restricted number of cases, e.g. when the victim's behaviour was the only cause (*cause exclusive*) of the accident and was extremely careless (*faute inexcusable*).

For what concerns the *quantum debeatur*, Article 1382 of the French Civil Code provides for the principle of full compensation ("*principe de réparation intégrale*") for personal injuries in case the harmed interest is legitimate. The judge cannot award compensation for injuries that have not been claimed by the victim. Assessment is traditionally based on objective considerations (medical expenses, loss of income, occupational disability, permanent total or partial incapacity) and subjective considerations (pain, aesthetic detriment and loss of amenity). Compensation may be considered as "satisfactory", since it is difficult to determine the intrinsic value of a non-economic injury such as the loss of a limb or paralysis. The judge must decide what sum is adequate exercising his discretion. Very often medical experts are appointed to assess damages. In any event, the burden of proof rests on the plaintiff (art. 1315 of the Civil Code).

For what concerns pecuniary losses, both the *damnum emergens* – injury sustained, consequential losses and expenses – and the *lucrum cessans* – i.e. loss of earnings and other benefits which the injured person would have received but for the accident – can be compensated. In principle, the measure of damages or pecuniary loss will reflect the exact amount of money which the victim has lost, or has spent, in consequence of the injury. The victim may be awarded compensation for temporary loss of earnings (*incapacité temporaire totale*). Loss of future earnings is generally the main item of financial loss and is estimated by the judge by contrasting the position of the victim before and after the accident. One of the most common methods for calculating the losses is the *calcul au point*: the court requests experts to specify the percentage of incapacity of the victim and then multiplies such percentage figure by specific values attributed to each percentage point of incapacity to obtain a measure of the claimant's periodic loss. The values are extracted from specific tables and do not take into account the claimant's annual earnings and their possible modification following the accident. The *calcul au point* may be replaced by a more "personalised" approach, known as the *évaluation in concreto* where damages are assessed by the judge on the basis of the circumstances of the case at stake. Then a percentage figure linked to the victim's degree of incapacity is applied to his/her annual earnings to obtain the annual loss of earnings.⁴³ In any event, the Court has considerable freedom in assessing losses.

The award of non-pecuniary damages is interpreted quite broadly in France and there are virtually no limits on the recoverability of non-pecuniary damages in Article 1382 of the Civil Code. Non-pecuniary losses include elements such as *pretium doloris* (which includes mental suffering, fear, anxiety, neurosis); loss of amenity (*préjudice d'agrément*). Contrary to what occurs in other EU countries, there are no compulsory tables for the estimation of damage based on the degree of disability. Even when the victim is insured, he or she retains the right to claim full compensation against the tortfeasor "on top of" the sum received by the insurance company.

In case of death of the injured person, his/her heirs or close relatives may receive compensation for funeral expenses, moral harm (automatically presumed for persons that can demonstrate a blood tie with the deceased), outstanding costs and economic loss after deducting the claim of the welfare bodies. In particular, apart from cases where the relationship between the claimants and the primary victim was particularly close, proof of non-pecuniary damages must be provided.

These rules apply regardless of the nationality of the victim: the French legal system provides for a full application of *lex loci*.

⁴³ For further details, Cannarsa M. (2002), *Compensation for Personal Injury in France*, p.15-16.

4.10 Germany

The basic principles of German personal injury law are enshrined in §823(1) of the BGB and in the second law amending the legislation on damages (“2. *Schadenrechtsänderungsgesetz*”). The latter rule specifies, *i.a.*, that the right to claim damages for non-pecuniary loss is based on §253(2) of the BGB, which requires “reasonable compensation in money”.⁴⁴

With specific regard to road traffic accidents, §12(1) of the Road Traffic Act (“*StVG*”) defines the monetary limits for ‘no-fault’ accidents. According to § 7 (1) of the StVG, the owner of a motor vehicle involved in an accident can be held liable for damages simply because he put the motor vehicle on the road. However, while it is currently still possible to avoid liability by proving that the accident was inevitable, the proposed modification provides that in future, liability can only be avoided if the accident was due to *force majeure*.⁴⁵ From this definition alone, it becomes clear how difficult it will be for a motorist to avoid liability.

For what concerns the award of damages, German law does not draw the line between past and future losses, or between special and general damages, but rather between damages which can be compensated (and ‘repaired’) once and for all by a single sum of money (*restitutio in integrum*, § 249 II, 251 BGB), and continuing losses or costs of living which will accompany the victim’s life for the (foreseeable) future (§§ 842, 843 BGB). If damages of the first category (e.g., the acquisition of a wheel-chair) are not yet compensated at the time of the court’s decision, they are ‘future damages’, based on § 249 II BGB. And if continuing needs of the victim (e.g., care) have been met already before the decision is rendered, they are ‘past losses’, but recoverable under § 843 I BGB (just like the care necessary in the future). It becomes obvious, however, that – as a matter of fact – the bulk of future damages belongs to the realm of §§ 842, 843 BGB.

Pecuniary losses include all accident-related expenses, such as, e.g., the need to purchase a car with automatic transmission or other additional facilities, the cost of a special diet, electronic writing equipment, domestic help, increased expense for heating (for example in a burns case), increased wear of clothing (for example in respect of amputations), medical costs, etc. The main headings of pecuniary loss are: a) reduction of earning capacity and incurring of expenses; b) loss of earnings (based on the salary of the victim prior to the accident compared to the current income); c) medical and nursing costs and other expenses.

As regards non-pecuniary losses (§253 BGB), they are commonly referred to as *Schmerzensgeld*, a term which encompasses pain and suffering but is in no way limited to it. Headings such as loss of amenity, disfigurement, loss of expectation of life etc. are included in *Schmerzensgeld*. As reported by Kuhn (2006), non-pecuniary losses in Germany serve a dual function: a) compensation for physical, emotional and mental impairment; and b) comfort, which depends on the degree of fault of the tortfeasor. There are no fixed compulsory tables to which judges must refer to when determining the amount of damages to be awarded. Also, benefits from private insurance do not affect the right to claim full compensation from the tortfeasor.

For fatal accidents, compensation for loss of a human life is not normally awarded. Compensation for pain and suffering is granted when death occurred a few hours (e.g. three) after the accident. Amounts awarded for pain and suffering before death are reported by Kuhn (2006): for example, the KG Berlin (Court of Appeal in Berlin) awarded €2,400 where the victim survived one day;

⁴⁴ The calculation of compensation for personal injury is further based on the case law of the Federal Supreme Court (“*BGH*”), Higher Regional Courts (“*OLG*”), Regional Courts (“*LG*”) and Local Courts (“*AG*”). Claims in the field of social security can be assessed based on the case law of the Federal Social Court (“*BSG*”), Regional Social Courts (“*LSG*”) and Social Courts (“*SG*”).

⁴⁵ German courts have ruled that *force majeure* is an external event brought about from outside by forces of nature or the act of a third party, which is unforeseeable according to human understanding and experience, which cannot be prevented or rendered harmless with reasonable economic effort, even when applying the utmost care reasonably to be expected under the circumstances of the case, and which does not occur so frequently as to make it something which has to be reckoned with (e.g. Federal Court of Justice, “*Versicherungsrecht*” 1988, pages 910 and following).

where a victim survived an accident in an artificial coma for 10 days the OLG Hamm held that €14,000 would be adequate compensation. The OLG Koblenz ruled that damages for pain and suffering of €6,000 were sufficient where the victim lost consciousness immediately after the accident and did not regain consciousness before his/her death eight days later. Where a victim survived for 3 to 4 weeks, according to the OLG München damages for pain and suffering should amount to between €5,000 and €20,000. In the case of survival for five months the OLG München awarded damages of €25,000. The OLG Oldenburg in a case where a victim survived for 3½ months awarded damages for pain and suffering of €17,500.

Where the victim was the sole income earner in the family or partnership, his dependants are entitled to claim compensation for loss of support. Calculation of compensation for loss of dependency is based on several factors, which include the net income of the victim (less any necessary expenditure incurred in earning the income), the fixed costs of the household, the number of persons entitled to support, the individual needs of those entitled to support, and the pensions of the surviving dependants. Under §253 BGB, secondary victims can claim non-pecuniary damages for pain and suffering in case of severe impairment: no tables are used.

In the case of cross-border road traffic accidents, the *lex loci* fully applies. This also means that victims will be able to fully recover their lawyers' fees even if this would not have been possible in their country of habitual residence.

4.11 Greece

In Greece, no specific legal provision exists for claiming damages for personal injuries, but basic provisions are contained in the Civil Code, at Artt. 928-933. As a result, both pecuniary and non-pecuniary losses are fully recoverable in principle.

Liability for pecuniary losses is defined at articles 928-929 of the Civil Code. Compensation includes all medical costs, past losses and loss of future earnings. In case of fatality, liability covers all costs caused by the accident, including burial expenses. Where death is not instantaneous, lack of earning capacity and medical treatments prior to death are covered, and can be claimed by close relatives, which can also act as primary victims in case they suffered a shock.

Article 932 of the Civil Code defines non-pecuniary losses, which are payable only if the victim has incurred bodily injury: as reported by Manolkidis (2006), neurosis or psychosis have little chances of being interpreted as bodily injury, whereas "simple grief or hurt feelings do not qualify".⁴⁶ At the same time, shock at the death of a relative may be considered as a bodily injury where the reaction goes beyond the "normal" manifestation of sorrow such as tears and despondency and shows a trauma of the psyche. Anxiety, where it develops into a chronic condition, may also be considered a medical condition. A simple impairment of well being does not give rise to pecuniary or non-pecuniary damages with the exception of a claim for non-pecuniary damage for family grief in cases of bereavement after a fatal accident.

No upper limit is set to the amount of non-pecuniary damages. Article 932 leaves open a wide discretion to the judge in determining the equitable level of non-pecuniary compensation. There are no statutory rules or tables indicating levels of awards, nor any other tables drafted by other bodies which the courts follow.

In case the victim is insured, he or she has a claim both against the person responsible for the injury, and against the insurance company.

⁴⁶ Manolkidis, in *PEOPIL Web Guidebook*, at 49.

4.12 Hungary

As a general rule on liability, the Hungarian Civil Code adopts a fault-based provision at Section 339 of the Hungarian Civil Code (1959), which states that: “A person who causes damage to another person in violation of the law shall be liable for such damage. He shall be relieved of liability if he is able to prove that he has acted in a manner that can generally be expected in the given situation.” This is a uniform rule applicable to both contractual and non-contractual liability and was considered a great achievement of the current code.⁴⁷ However, the Civil Code also introduced absolute, no-fault liability in cases of damage arising from the otherwise lawful activities of the so-called “dangerous enterprise” – a concept that developed in the second part of the 19th century with the railway transport industry, and was later extended to other sectors, including the operation of motor vehicles.

In this respect, Section 345 of the Code provides that: “(1) Anyone carrying on activity involving increased danger is duty bound to compensate from damage resulting therefrom. Exclusion or reduction of liability is null and void; this prohibition does not apply to damage caused to objects. (2) The person shall be relieved from liability upon proof that the damage was caused by an unavoidable event beyond the scope of the extremely dangerous activity.” Under the rule of Section 345, the mere fact that the plaintiff suffered an accident and injury is sufficient to make the “dangerous enterprise” liable, notwithstanding that its function remained within the normal course of usual lawful conduct. It is enough for the plaintiff to prove that the damage occurred in consequence of using the services provided by the defendant; but the defendant will be exonerated on counterproof of an extraneous cause.

Such rule is currently considered as a strict liability rule⁴⁸, although it is most often applied as “relative strict liability” or, better, a liability rule based on fault, but with reversed burden of proof. As explained by Szakats (2001), “court decisions seem to consider it as the formulation of the rule of liability based on fault, a parallel one to the rule on strict liability and to other special rules on liability”. The practice developed that section 339 could be applied in a subsidiary way in causes covered by other rules of delictual liability. Thus, a claim for damages may be enforced under the general rule of section 339, as the limitation period is longer than under § 345.⁴⁹ One example of recent case in which the rule under §345 was applied to the operation of a motor vehicle is the decision of the Hungarian Supreme Court on the strict liability for an accident caused by vehicle which had been parked but started moving.⁵⁰

As regards the notion of damage, as stated in Section 355 of the Civil Code, “by way of compensation, the loss of value in the property of the injured person and the loss of profit sustained as a consequence of the damaging act, as well as the indemnification of expenses needed for the reduction or elimination of the financial and non-financial losses shall be given.” As a consequence, damages that can be recovered include any loss that a person suffers to his person or his property in the course of a damaging event, and covers: a) material damage – further divided in actual damage (i.e., loss in value of the injured party’s property), warranted expenses (expenses necessary for the reduction or elimination of material or non-material loss, including medical expenses) and lost income (e.g. lost wages); b) non-material damage may occur when the unlawful conduct violates rights attaching to the injured party’s person.

Since 1990 courts have ordered payment for non-pecuniary damages more frequently (Szakats, 2001). The rule and criteria applied appear similar to the award of the French *dommage moral*. In

⁴⁷ However, on considering these matters for the new (draft) code, the view was taken that the conditions of liability should be different in the case of contractual and of non-contractual liability and so the new code will differentiate between these situations.

⁴⁸ A Harmathy "Contracts and Torts", in *Introduction to Hungarian Law* (Kluwer, The Hague, 1998) 95-120, 97.

⁴⁹ *Id.*, at 115 and following.

⁵⁰ BH 2005 no. 54 (Supreme Court, Legf. Bír. Pfv. III. 21.868/2001), reported by Menyhárd (2005).

the opinion of a learned Hungarian jurist⁵¹: “The formulation of the rules of liability [in the Code] is so general that cases can only be decided on the basis of a careful analysis of previous court decisions. These are of great relevance not only from the point of view of law, as the limits to free action are set in this way, but at the same time the way of reaction by means of delictual liability can be characteristic of the state.”

Pursuant to Section 359 (1) of the Civil Code: “if the extent of damage cannot be precisely calculated, even if only in part, the person responsible for causing the damage can be compelled by the court to pay a general indemnification that would be sufficient for providing the aggrieved person with full financial compensation.” This general indemnification is intended as a compensation for non calculated damages and its amount is calculated by the court on the basis of equitable criteria. Under a mandatory guideline of the Civil Senate of the Supreme Court (Guideline No. 49 of the Civil Senate of the Supreme Court, abbreviated as PK 49) difficulties in the attribution of compensation can be considered as significant only if they arise in connection with the calculation of the amount of damages. The court may rule only that the extent of damage cannot be precisely calculated when all possible evidence to establish the amount of damages has been collected.

In summary, Court practice has a highly decisive importance in interpreting claims on strict liability in Hungary. The Civil Code contains no definition on “activity involving increased danger” and “unavoidable event”, thus the court has to decide in every individual case by analysing the facts and the actual activity. Although no maximum sums for damage awards exist, Hungarian courts do not easily award high amounts of damages and convincing evidence is required to prove loss of profits. The limitation period for ordinary damage claims is five years.

4.13 Ireland

In Ireland, the rights of victims of a road accident are mostly defined by the Constitution, by national and EU legislation and by legal precedents, which are enforceable in line with the doctrine of *stare decisis*. The main principle endorsed by Irish Courts is “full compensation”, which is perfectly in line with the principle of *restitutio in integrum*. Although the *quantum* of damages is decided by the judge, in the case of fatal accidents there is a fixed sum granted by Statute to the immediate family and dependants for their grief and suffering.

Irish law provides for two separate categories of damages: a) special damages (cost of medical treatment, material losses and loss of earnings); and general damages (including physical and mental pain suffered by the victim). Both categories can be further subdivided in past and future damages in the calculation performed by the judge. Criteria followed by judges in the determination of the amount of damages to be awarded are “reasonableness” and “obligation to minimise a claim”: this also means that judges normally do not scrutinise in-depth the facts of the case when awarding “general damages”, but calculate the amount to be awarded as reasonable compensation.

If the primary victim dies the principle of *action personalis moritur cum persona* applies and thus heirs are not entitled to claim the losses incurred by the deceased. On the other hand, if death occurs for reasons that differ from the defendant’s conduct, Sections 6 and 7 of the 1961 Civil Liability Act provide for the survivability of actions vested in the deceased, but only as far as pecuniary losses are concerned.

Secondary victims that can be classified as dependants of the deceased can claim pecuniary losses for funeral and other expenses and for damages that the courts considers as proportioned to the injury resulting from the death to each of the dependants. This includes the loss of all pecuniary benefits and the loss of benefits reducible to monetary terms. Actual annual losses include the deceased’s actual income at time of death, his prospects of advancement in his career, and fringe

⁵¹ Harmathy (1998), *cit.*, at 117

benefits (including pension rights). Damages are calculated taking into account the working life expectancy of the deceased and the life expectancy of the dependents and above all the portion of the deceased's income that was actually spent on the dependants.⁵²

As reported by Schütte (2006), “foreign victims claiming in Ireland find themselves in a slightly different position compared with Irish citizens”; this occurs as the entitlement to general damages is decided at the discretion of the Judge and is based on the normal levels awarded in the Republic of Ireland.

4.14 Italy

In Italy, the general rules on liability for tort are embedded in the Civil Code at articles 2043 (general rule on non-contractual liability or *lex aquilia*), 2056 (calculation of pecuniary losses) and 2059 (non-pecuniary damages). Apart from these provisions, the criteria adopted for compensation of personal injuries have been entirely built upon case law. The general principle of *restitutio in integrum* is fully applied, also to non-pecuniary losses; its concrete application rests on the following criteria: a) equal treatment/equal compensation (Article 3 of the Italian Constitution); b) need to take into account the peculiar facts of the specific case; c) remedies must be proportionate to the tort.

A compulsory tariff scheme has been introduced in Italy for compensation of the so-called “danno biologico” after Laws n. 57/2001 and n. 273/2002.

As regards the recovery of pecuniary losses, as already recalled, the principle enshrined in Article 2056 of the Civil Code applies: accordingly, the damages must be equitably estimated according to the circumstances of the case – and often, with the help of a consultant appointed by the judge (*consulente tecnico d'ufficio*). Equitable assessment must however be considered in relation with Article 4 of Law n. 39/1977, which requires that “*when considering for compensation purposes the consequences of temporary or permanent invalidity on the income arising from employment independent of its qualification, such income is determined in the case of employment on the basis of earned income increased by tax-exempted income and deductions imposed by the law, and in the case of self-employment on the basis of the highest net income among yearly income declared by the victim during the last three years for the purposes of tax ... or, in the cases provided by law, on the basis of the employer's certificate*”. This article also requires that “*income to be taken into consideration for compensation purposes must not be lower than three times the minimum yearly social pension*”, an amount that was set for the year 2002 at EUR 288.91. Italian law provides for the compensation of past and future medical expenses of all kinds, provided that there is proof of causation – i.e. that such expenses were made necessary by the occurrence of the accident, and that they were necessary and useful.

For what concerns non-pecuniary losses, Italian law has developed the rather broad concept of “danno biologico” – i.e. loss of physical and/or mental integrity – which contains several categories of damage (aesthetic, loss of sexual function, loss of earnings, impairment to social and family life, loss of hobbies, sporting ability etc.). In addition, Italian courts also award damages for the loss of quality of life (*danno esistenziale*), non-pecuniary losses for infringement of rights protected by the legal system; and pain and suffering (*danno morale*) under the provisions of article 2059 of the Civil Code. Non-pecuniary damages must be determined equitably by the judge, following the advice of a medical expert. In assessing the *quantum* of loss of mental/physical integrity, judges must abide by the principles of “uniformity in basic monetary values” (which provides for equality of treatment), but also “elasticity” and “flexibility” (which ensure that damages are calculated on the basis of the peculiarities of the case). Many local courts have adopted their own tables for quantifying such losses based on disability scales.

⁵² See Sweetman J. E., *PEOPIL – Web guidebook 2*, p.44 - 50.

Compensation for pain and suffering (*danno morale*) is often quantified as a proportion of the loss of physical/mental integrity – between 25% and 50%. On the other hand, the assessment of loss of quality of life is entirely discretionary, with the only exception of minor injuries, ranging from 1% to 9% of permanent invalidity from road accidents (so-called *micropermanenti*), which are the subject of statutory tables under the provisions of Article 5 of Law n. 57/2001.

As occurs in other legal systems, insured victims retain the right to seek full compensation against the tortfeasor; in addition, insurance payments cannot be taken into account in the assessment of damages.

In case of death of the primary victim, his/her heirs can claim both pecuniary and non pecuniary losses sustained by the deceased between the date of the accident and death. In addition heirs can claim damages for the loss of life, but the latter are seldom awarded. While non-pecuniary damages are not applicable in case of immediate death, if the deceased has survived for a certain period of time, damages range between 100€ and 4,000 € per day of life, depending upon the consciousness of the primary victim, the person's age, the length of the period between the accident and death, and, most importantly, the discretion of the court.

Damages claims for secondary victims are essentially based on case law as they are not explicitly foreseen by law. Pecuniary damages can be claimed for burial and funeral expenses and past and future loss of pecuniary support. Assessments are left to judicial discretion: in general for the death of the breadwinner it is generally assumed that his or her dependants were receiving between 2/3 and 3/4 of the deceased's income. In the case of a couple without children, it is generally assumed that the surviving spouse was benefiting from about 1/3 or 1/2 of the deceased's income; this measure can be reduced to a 1/4 if the surviving spouse was also earning a significant income. The final sum, after the above-mentioned deductions, is multiplied by the number of years between the date of the accident and the deceased's likely retirement. Secondary victims may also claim compensation for past and future pecuniary losses arising from the impact of the death of a loved one on their own health, working activities and expenses sustained in assisting the primary victim.

Non pecuniary losses fall under three headings: 1) "*danno biologico-psichico*" (proven loss of physical and/or mental integrity following the death of a family member); 2) "*danno morale da lutto*" (moral and physical suffering, pain, grief and sorrow, and mental and emotional distress caused by the death of the primary victim: no specific evidence required for close family members); 3) "*danno esistenziale*" (negative changes in the life of the secondary victim; the non-pecuniary loss of the relationship with the primary victim).

The *quantum* of secondary victims' *danno biologico-psichico* is established with the same criteria applicable to the primary victim. For the *danno morale da lutto* many local courts have adopted their own tables to determine basic monetary values. The latter differ widely from one court to the other: e.g., for death of a parent, a child below 18 received in 2003 a compensation of € 177,596 in Rome, between € 77,500 and € 186,000 in Florence and € 97,665 in Turin.⁵³

Foreign victims of road traffic accidents are entitled to claim full compensation before an Italian court; courts generally do not take into account the amount of compensation that the victim would have received in his or her country of habitual residence.

4.15 Latvia

In Latvia, injured persons shall claim compensation of losses due to personal injuries and damages caused to their property from an insurance company, which has insured the civil liability of a guilty person in accordance with the provisions of the Mandatory Civil Liability Insurance of Owners of Motor Vehicles Law (MCVL)⁵⁴ and the Cabinet Regulations on calculation of the amount of

⁵³ Bona M., *PEOPIL – Web guidebook 2*, p.54-57.

⁵⁴ The MCVL was adopted by Latvian Parliament (the *Saeima*) on 7 April 2004 and came into force on 1 May 2004.

compensation.⁵⁵ A person is entitled to claim losses on the basis of the Civil Law of the Republic of Latvia (CL), only if the amount of losses exceeds the limit of insurer's liability in accordance with the procedures specified by the MCVL and the Cabinet Regulations on calculation of the amount of compensation or if the mentioned losses are not compensated by an insurance company. In both cases, the victim is entitled to claim not only indemnity covering actual damages suffered, but also full satisfaction covering the loss of profit and eliminating all the effects of the injury. In this respect, one can say that Latvian law is based on the principle of *restitutio in integrum*.

According to Section 19 (1) MCVL, in addition to the property losses caused to a person in a road accident, the insurance company shall compensate the victim for the material losses due to: (i) medical treatment; (ii) temporary incapacity for employment; (iii) loss of ability to work; and (iv) death. Compensation due to the death of a provider shall be paid to children, including adopted children, brothers, sisters and grandchildren, a widow (widower) who is unable to work, parents or grandparents who are unable to work, as well as a widow (widower) who is unable to work if the family has children up to the age of eight years or a disabled child; and other dependent family members who are to be considered as such in accordance with the Law On State Pensions.

Upon setting in of an insurable event, an insurer that has insured the civil liability of the owner of a motor vehicle causing the losses shall cover losses without exceeding the limit of insurer liability: a) for indemnification of personal losses – up to 250 000 Lats (approx. 356,000 EUR) for each injured person; and b) for indemnification of property loss – up to 70 000 Lats (approx. 100,000 EUR) irrespective of the number of third persons. Claims for property losses can be raised until one year from the setting of an insurable event, while the limit for claiming personal losses is of three years (art 38 MCVL).

Non-material losses caused to an injured person include pain and mental suffering due to: a physical trauma of the injured person, the crippling or disablement of the injured person, the death of a provider, dependant or spouse or Group I disability of a provider, dependant or spouse. In accordance with the 2005 Cabinet Regulations, the amount of compensation for pain and mental suffering caused to a person by a road accident is:

- from 20 to 400 LVL for physical trauma, depending on the seriousness of bodily injuries;
- from 25 to 250 LVL for crippling or disablement depending on their level;
- 100 LVL to each dependant as a compensation for pain and mental suffering caused by the death of a provider, dependant or spouse.

The insurer is however not bound to compensate, *i.a.*, foregone profit due to a road traffic accident. In addition, there is no coverage for *force majeure*, for damages caused by the victim intentionally or with gross negligence, for losses caused by an unidentified motor vehicle, etc.

Under civil law, claims for compensation of losses are governed by sections 1776-1792, 2347-2351 and 1635 of Latvian Civil law (CL). The general rule for compensating personal injury under the Latvian CL is fault, but strict liability is foreseen in cases of risky activities, including transport. In these cases, tortfeasors can escape liability only if they prove *force majeure* or that the victim contributed to the accident intentionally or with gross negligence. Future losses can be compensated in case of permanent disability and loss of capacity to continue the current employment. If someone is at fault for the death of a person, he or she shall compensate the heirs of the deceased for medical treatment and burial expenses. If the deceased had a duty to maintain someone, such duty shall pass

⁵⁵ On 18 December 2004 Cabinet Regulations Nr. 1008 "Provision on calculation and order of calculation of an amount of insurance compensation for material losses caused to a person" came into force. They also determine which documents shall be presented by an injured person to an insurance company in order to receive compensation. The amount of insurance compensation and the procedure for the calculation of non-material losses caused to a person are set in Regulations Nr. 331 dated 17 May 2005.

over to the person who is at fault for his or her death. The amount of such compensation shall be determined pursuant to the discretion of a court; the age of the deceased, his or her ability to earn a living at the time of death, and, finally, the needs of the person for whom compensation is to be determined. If the latter has adequate means of livelihood, the duty to provide compensation shall cease.

In any event, there is no statutory limit to the amount of compensation.

Claims regarding illegal damage to property are covered by provisions of Sections 1776 -1792 CL. In particular, Section 1779 CL provides that everyone has a duty to compensate for losses they have caused through their acts or failure to act. In order to get compensation for losses, an applicant shall prove that the following conditions are met: (i) respondent's unlawful act or failure to act, (ii) losses (according to the provisions of section 128 (2) 4) of the Civil procedure law of the Republic of Latvia an applicant shall provide for an amount of losses and their calculation), (iii) casual link between unlawful acts and losses.

Compensation of non-pecuniary losses is based on section 1635 CL, which provides that every delict, that is, every wrongful act *per se*, as a result of which harm has been caused (also moral injury), shall give the person who suffered the harm therefrom the right to claim satisfaction from the infringer, insofar as he or she may be held at fault for such act. Moral injury is understood as physical or mental suffering, which results from unlawful acts committed to the non-financial rights or non-financial benefits of the person who suffered the harm. Moral injury shall be proved by the person who suffered the harm:⁵⁶ for road traffic accidents, a person shall prove a wrongful act, the moral injury and the casual link between act and injury. The amount of the compensation is determined by the court on a case-by case basis. To date the case law is relatively limited, given that the right to claim compensation for moral suffering came into force only on March 1, 2006.

The law does not provide for any special criteria for foreign victims.

4.16 Lithuania⁵⁷

The new Lithuanian Civil Code entered into force in July 2001. Articles 6.245-6.304 of the civil code regulate, *i.a.*, non-contractual liability. The following types of damage can be recovered under Lithuanian legislation: a) damage caused by death or by personal injuries, including non-material damage; and b) damage to, or destruction of, any item of property. The liability is governed by the principle of *restitutio in integrum*, *i.e.* all damage (including non-pecuniary damage) resulting from a death or personal injury can be recovered without any limitations. According to the provisions of the Civil Code, in case both damages and penalty are awarded (e.g. LTL 100,000 of damages and LTL 50,000 of penalty), the whole amount of the award will equal to LTL 100,000, as penalty is included in damages but not added to the latter.⁵⁸

The Lithuanian system is based on fault, defined at Art. 6.248 Civil Code as failure to behave "with the care and caution necessary in the corresponding conditions". Art. 6.250(2) of the Civil Code also states that "Non-pecuniary damage shall be compensated only in cases provided for by laws. Non-pecuniary damage shall be compensated in all cases where it is incurred due to crime, health impairment or deprivation of life, as well as in other cases provided for by laws [...]". Non-pecuniary damage is defined rather broadly at Article 6.250, as "a person's suffering, emotional

⁵⁶ It is only presumed if the unlawful acts are expressed as criminal offences against a person's life, health, morals, inviolability of gender, freedom, honour, dignity or against the family, or minors.

⁵⁷ Based on "Issues and Tendencies of Development of Lithuanian Tort Law" presentation by Dr. Vytautas Mizaras, 15-16 September 2005, Vilnius.

⁵⁸ For further details, see Law Firm Saladzius & Partners, *Product Liability 2006- Lithuania*, available at: <http://www.iclg.co.uk/>

experiences, inconveniences, mental shock, emotional depression, humiliation, deterioration of reputation, diminution of possibilities to associate with others, etc., evaluated by a court in terms of money”.

4.17 Luxembourg

In Luxembourg, the tort law or *Droit de la responsabilité civile* provides for full compensation of damages for personal injury in case of breach of a legally protected interest. The rule applied by the Luxembourg Court is the same applied in France under Articles 1382-1383 of the Civil Code. According to Article 432 of the Civil Code, medical experts can be appointed by Courts to assess personal injury damages – such opinion being non-binding upon judges.

Pecuniary losses that can be recovered include damage to goods, *damnum emergens* (present losses) and *lucrum cessans* (future losses), plus all expenses incurred as a result of the accident.

Non pecuniary damages include compensation for breach of a human right and for pain and suffering (*préjudice pour douleurs endurées*), physical integrity (*part morale de l'atteinte à l'intégrité physique*), sexual problems, scarring, disabilities, loss of sporting capacity, etc. No specific rules or *ad hoc* restrictions are in place for assessing the *quantum* of non-pecuniary damages recoverable.

As in many European civil law systems, the fact that the victim was insured at the time of the accident does not affect his or her ability to claim full compensation from the tortfeasor.

In case of death of the primary victim, his/her heirs are entitled to recover both pecuniary and non-pecuniary losses suffered by the deceased between the accident and death. In addition, members of the close family of the deceased can seek compensation for the loss of earnings (not applied if the deceased is a child), funeral expenses (full compensation in the case of death of a child; compensation of the loss resulting from the accelerated payment of these expenses for the loss of a parent). Non-pecuniary damages are assessed on the basis of a medical expertise and are paid as a lump sum. Despite the lack of statutory limitations, the Courts themselves established the limits for the compensation of non-pecuniary damages between 15,000 and 20,000 euros. If the secondary victim lost more than one relative in the accident, the compensation can be increased.⁵⁹

4.18 Malta

In Malta, liability in tort is based on the concept of fault. Section 1031 of the Maltese Civil Code lays down the fundamental principle that every person shall be liable for damage which occurs through his fault. According to section 1032, a person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence and attention of a bonus paterfamilias (i.e. a reasonable person). Section 1033 of the Civil Code further provides that “Any person who, with or without intent to injure, voluntarily or through negligence, imprudence, or want of attention, is guilty of an act or omission constituting a breach of the duty imposed by law, shall be liable for any damage resulting therefrom”.

In the case of liability in tort, the amount of damages due to the plaintiff is calculated with respect to the loss actually suffered by the plaintiff, including expenses incurred and loss of earnings, and loss of future earnings. The underlying principle is that of *restitutio in integrum* as explained by Maltese Courts in several cases, including the 2001 decision by the First Hall Civil Court in *Elmo Insurance Agency Limited noe et vs Martin Saliba*.

The quantum of damages which may be awarded according to the Maltese Civil Code in the case of tortious responsibility is regulated by section 1045: “The damage which is to be made good by the

⁵⁹ For further details, Kronshagen A., *PEOPIL –Web guidebook 2*, p. 61-65.

person responsible in accordance with the foregoing provisions shall consist in the actual loss which the act shall have directly caused to the injured party, in the expenses which the latter may have been compelled to incur in consequence of the damage, in the loss of actual wages and other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused. The sum to be awarded in respect of such incapacity shall be assessed by the court, having regard to the circumstances of the case, and particularly, to the nature and degree of incapacity caused, and to the condition of the injured party". The actual loss which the act directly causes to the injured party together with the expenses which the injured party has to sustain as a consequence of the damage and the loss of actual wages and other earnings are referred to collectively as *damnum emergens*. The loss of future earnings, on the other hand, is referred to as *lucrum cessans*.

4.19 The Netherlands

The Dutch Civil Code (*Burgerlijk Wetboek, BW*) governs personal injury cases at Articles 6:95-6:110. Such rather flexible provisions apply to both contractual and non-contractual obligations. According to articles 6:95 and 6:96 BW, all pecuniary losses (*vermogensschade*) must be compensated, including harm to goods, to the person or their interests protected by the law. In this respect, the principle of *restitutio in integrum* fully applies.

However, significant exceptions to the principle of full compensation apply in the Netherlands: a) the right to recover non-pecuniary damages (*immateriële schade*) is subject to significant restrictions; b) the tortfeasor is bound to compensate the victim only for damages that he or she directly caused (article 6:98 BW); c) *restitutio in integrum* does not generally apply to third parties or even to secondary victims (close relatives, etc.); d) judges may reduce damages calculated through the principle of full compensation if they deem the result unacceptable; e) article 6:100 BW allows the legislature to impose ceilings for certain types of liabilities, especially in order to avoid that the amount of compensation exceeds what could be reasonably recovered by insurance.

More in detail, pecuniary damages that can be recovered include the cost of recovery; the cost of long-term invalidity (e.g. medicines, nursing, special diets, etc); loss of earnings and other pecuniary damage. Both the victim and any third party who has incurred costs on behalf of the victim resulting from the injury may make a claim.

As regards non-pecuniary losses, articles 6:106 BW and 6:97 BW give the courts a wide margin of discretion in assessing the amount of non-pecuniary damages (*smartengeld*). Judges are not bound by the normal rules of evidence: when they deem the facts to be sufficiently clear they can proceed to find that non-pecuniary damage has been suffered and to quantify equitably the amount of damages (Article 6:106). In practice, as reported by Lindenbergh and Verburg (2006) the quantum of non-pecuniary damage is often based on an expert opinion on the severity of the injury of the victim. In general, it is fair to conclude that the right to obtain *smartengeld* in the Netherlands is more limited than what occurs in other neighbouring countries such as France.

In case of insured victims, the Dutch Supreme Court has established that payments received from the insurance company does not constitute collateral benefit, and as such should not be deducted from the damage award. However, in the case of fatalities, private insurance payments received by third parties are normally deducted in full.

In case of death of the primary victim, all his/her rights of a patrimonial nature, including the right to claim damages, are passed on to the heirs. This rule is sufficient for pecuniary damages while heirs can claim non-pecuniary damages only when the deceased had previously notified the defendant his/her intention to claim for such losses. The liability of the tortfeasor with respect to the primary victim must be established for damages to be claimable.

Following the death of the primary victim, relatives can claim pecuniary losses (i.e., loss of support and funeral expenses), while non-pecuniary damages related to the harm caused by the loss of a relative cannot be claimed under the current system. However there are other grounds to claim such

damages, following two relevant cases of the Dutch Supreme Court. In particular a non pecuniary damage can be awarded on the basis of Article 6:106(1)(b) DCC (affliction to a person). Such a claim may be permitted where mental injury exists, although the existence of psychological harm needs to be proven. In general, this will only be the case where a recognized psychiatric illness exists. According to the same article, the amount of damages should be assessed on grounds of equity. In practice, judges carry out such assessment by comparing the nature and severity of the injuries with other cases in which non-pecuniary damages have been awarded.⁶⁰

These rules fully apply also to foreign victims.

4.20 Poland

Polish law has a very broad notion of tort: “everybody who by his fault caused a damage to another person is obliged to redress it”. Causing damage to human health or property is an unlawful act, and lack of due diligence amounts to negligence. Under Polish law, compensation always includes pecuniary damages, while non-pecuniary damages can be recovered only when an express provision allows it. Pecuniary damages include both actual damage (*damnum emergens*) and lost profits (*lucrum cessans*).

Under Polish tort law, compensation can be claimed for damages to property and personal injury. Compensation for personal injury covers both pecuniary damages (all expenses related to the injury, such as costs of medical treatment and maintenance, lost income, and the cost of training for a new occupation) and non-pecuniary damages specified in the Civil Code. Compensation for non-pecuniary losses depend on the Court’s discretion, but any refusal to grant them must be adequately motivated.

In case of fatal accident, an annuity is foreseen for the secondary victims that the deceased was supporting (by duty and voluntarily). The court may also grant appropriate compensation to the closest family members of the deceased if the death of the primary victim deteriorated their living standard. There is no maximum limit on recoverable damage.⁶¹

Polish law differentiates between cases of strict liability and cases in which liability is based on fault. Strict liability applies to road traffic accidents caused by operation of vehicles as “risky activity”: liquidation of damages is governed by the provisions of articles 433-435⁶², and covers damages of the functioning of the human body and result in death or bodily injury (physical or mental), and the material damages to property. Compensation covers lost property and profits lost as a result of the accident. In the case of road traffic accidents, under strict liability, the tortfeasor can escape liability if he or she proves either *force majeure* or contributory negligence on the side of the victim.

To determine the amount of the compensation, the permanent health damage of the victim is first calculated (e.g. degree of disability or damage to the outer appearance; length of the illness, length of the suffering, of treatment, re-habilitation, level of pain of the treatment, age and the sex of the victim, its perspectives and possibilities in the future, living standards in the area of residence of the victim, etc.). Relevant caselaw on damage compensation under Art. 445(1) of the Polish Civil Code includes cases in which factors such as the intensification of suffering, length of illness, degree of disability, sustainability of the results of the accident and the consequences of the health damage for the private and social life have been taken into account⁶³; other cases have clarified the scope of

⁶⁰ See Verburg R., *PEOPIL – Web guidebook 2*, p. 66-74.

⁶¹ See also, Lovells, *Product liability 2006 – Poland*, available at: <http://www.iclg.co.uk/>

⁶² Article 436 is applied to compulsory civil responsibility insurances with a slight modification where exceptionally the rule of guilt is applied instead of the responsibility on the basis of risk.

⁶³ Wyrok S.N. z dnia 10.06.1999 II UKN 681/98.

physical and mental suffering⁶⁴; current conditions and average standard of living of society in connection to the residence and social status of the victim⁶⁵; economic changes in a given country (standard of living)⁶⁶ and many others. In one case, in 1987, it was also affirmed that a person that has nervous breakdown as a result of the news of injury or death of a close relative cannot claim compensation.⁶⁷

Relevant cases on the amount of compensation to be determined have also clarified maximum limits for compensation of damages, which are to be awarded in a proportionate manner on the basis of the injury occurred. For example, a 1977 judgment on 15-months old child that incurred a 100% disability as a result of a tram accident stated that compensation *ex art 445* had to be exceptionally high in that case (i.e. 150.000 zlotys), but that usually for the total and permanent disability of a person the amount of the compensation should not exceed 100.000 zlotys.⁶⁸ In a 1972 judgment, it was established that compensation exceeding 50.000 zlotys can be awarded only in extraordinary cases, meaning when the injury is particularly serious: total blindness, loss of both legs, paralysis.⁶⁹ On year later, it was clarified that compensation should equal 50.000 zloty or even higher if the permanent consequences of the body injury or health breakdown are of the kind that excludes the victims from normal life, especially because of the impossibility of leaving their premises.⁷⁰

Significant case law exists in Poland as regards compensation of pecuniary and non-pecuniary losses sustained by close relatives of a victim. For example, a 1998 case addressed the issue of lowering of living standards (necessary condition) and in the feeling of being harmed and lonely, as well as the lack of mental and health support. Such conditions should lead to some form of expression in pecuniary terms in order to lead to an award of indemnity or pension.

Unfortunately, compensation by insurance companies sometimes significantly differs from the amounts established by the case law: insurance companies often limit damage compensation to the degree of the permanent health damage multiplied by a defined amount of money without taking into account all the other factors mentioned by the case-law.

The limitation period for claims under the fault-based law of tort and under the strict product liability provisions is three years from the day when the injured party learned or – acting with due diligence - could have learned about the damage and the identity of the person liable for it. A claim in tort becomes time-barred after ten years from the event that caused the damage, regardless of whether the damage has manifested itself within that time.

4.21 Portugal

The Portuguese Civil Code contains the basic provisions for the award of damages at articles 562-572 (*Obrigaç o de indemnizaç o*), which apply irrespective of the type of liability. The principle of *restitutio in integrum* is adopted, and whenever full compensation is impossible, insufficient or excessive, an equitable sum can be awarded *in lieu* of calculated damages.

Pecuniary losses that can be recovered by the claimant include (documented) expenses for treatment, other costs (e.g. care), loss of earnings (which include the *per te de chance*), and losses due to permanent disability.

Non-pecuniary losses can be recovered only in case of “serious losses deserving legal protection” and are awarded by judges with an equitable assessment (Article 496(3) of the Civil Code). No tables or other criteria for the quantification of damages are reportedly in use.

⁶⁴ Wyrok S.A. z dnia 03.11.1994 III APr 43/94.

⁶⁵ Wyrok S.N. z dnia 22.04.1985 II CR 94/85.

⁶⁶ Wyrok S.N. z dnia 18.01.1984 I CR 407/83.

⁶⁷ Wyrok S.N. I CA z dnia 13.10.1987r. IV CR 266/87.

⁶⁸ Wyrok S.N. z dnia 22.08.1977 II CR 266/77. Amounts in Zlotys are referred to 1977 values.

⁶⁹ Wyrok S.N. z dnia 03.05.1972 I CR 106/72

⁷⁰ Wyrok S.N. z dnia 09.03.1973 I CR 55/73

In Portugal, insured victims will see their damages reduced by the amount of payments received by the insurer (Article 566 of the Civil Code, *teoria da diferença* or *compensation lucri cum damno*).

If the primary victim dies, his heirs can recover the pecuniary and non pecuniary losses suffered by the deceased. In addition, a compensation for the loss of the right to life is awarded independently from the circumstances of death (e.g. immediate death, death after a certain period of time): its amount is calculated on an equitable basis and Courts have gradually increased it: the Oporto Court of Appeal on 15 May 2001 awarded Esc. 10,000,000.00 (approximately 50,000 euros) to a woman aged 32; the Supreme Court of Justice on 5 July 2001 awarded Esc. 8,500,000.00 (approx. 42,500 euros) to a man aged 28; the Supreme Court of Justice on 15 January 2002 awarded 50,000 euros to a man aged 24.⁷¹

Damages awarded by Courts to the close relatives of the deceased range between 7,500 and 30,000 euros. No statutory limit is foreseen for non-pecuniary damages.

As regards foreign victims, no distinction exists as regards the applicable law.

4.22 Romania

The Romanian Civil Code⁷² is largely based on the French Code Civil, and French court judgments as well as opinions of outstanding academic jurists are frequently looked at by Romanian judges when confronted with an intricate problem. Articles 998-999 of the Civil Code establish that any person, who by its faulty acts causes damages to another person, shall be obliged to repair such damage. Faulty acts include both the commission of an act and the omission to perform an act. The standard applied to assess the occurrence of a faulty behaviour is the concept of *bonus pater familias*, which is the standard of care of a diligent and prudent person.

The plaintiff must prove that destruction of property and any injury which resulted from the defendant's fault caused a material loss measurable in terms of money.⁷³ Further, the plaintiff may assert moral damage by mental and physical suffering caused by the accident. The problem of compensation for moral damages has been very controversial until recently, as the former socialist regime conceived compensation only for losses linked to the work of an individual.⁷⁴

When damage has been established, further proof is required to show that there is a clear causal link between the defendant's act or omission and the damage caused to the plaintiff. In other words that the defendant's conduct led to the damage, the destruction was the direct consequence of it, and the defendant was responsible for it. Even when it is proved that the defendant was negligent or committed a fault, if the causal relationship is uncertain and not proved, the plaintiff's claim will be dismissed.

4.23 Slovakia

The Slovak Civil Code (*Občiansky zákonník*, hereinafter "OZ" - Act 40/1964, as subsequently amended) governs the general provisions for non-contractual liability, which also apply to road traffic accidents. Under Slovak law, there are two types of liability, either subjective or objective, depending on whether the fault is required to be implied in an infringement. The general regime included in the Civil Code is based on fault. In case the damage is partly caused by the plaintiff, the

⁷¹ Da Costa Basto A., *PEOPIL – Web guidebook 2*, p.79.

⁷² Codul Civil, ss 998-1006.

⁷³ Burian, above n 17.

⁷⁴ As reported by Tuca Zbârcea & Asociatii in *Product Liability 2006 – Romania*, available at <http://www.iclg.co.uk/>, "In 1952, the Supreme Court ruled that "no material compensation may be granted for moral damages", grounding such decision on the inconsistency between socialist fundamental principles which consider as the main source of revenue, the work rendered by man, on the one hand and speculative gains deriving from an allegedly moral damage, on the other hand. Gradually, corrections to this position have been attempted which allowed a limited grant of non-pecuniary damages for those asserting moral damages".

damages would be apportioned (OZ, § 441). The Civil Code also contains a general obligation for persons threatened by damage to adequately intervene to avert damage (OZ, § 417).

Under the case law, the term “damage” is defined as a loss of property suffered by the plaintiff.⁷⁵ Under the Civil Code (OZ, § 442), damage consists of two compounds:

- Actual damage (*damnum emergens*) – *i.e.*, economic damage, including decrease of existing property of the injured party. Such damage represents economic values needed to restore the status of property before the occurrence of damage or provide pecuniary compensation to the injured party.
- Loss of profit (*lucrum cessans*) – *i.e.*, the injured party is also compensated with respect to profit he or she would have gained if no infringement had occurred. Loss of profit may also include interest, e.g. bank interest.

Where damage involves damage to property, the latter must be determined according to the price of the property damaged at the time when the damage occurred. When determining this price, one should take into account legally determined or acquisition prices and should also consider amortisation or appreciation of the property.

Non-material damage is not included in the definition of damage under Slovak law.

4.24 Slovenia

The Slovenian Code of Obligations (*Obligacijski zakonik*) of 2001 states as a general rule that whoever causes damage is liable to compensate it (§131).⁷⁶ Strict liability is provided for the damage caused by dangerous activities or by dangerous things, as well as in other cases, specified by the Act (Art. 131(2) of OC). The damage which occurs in connection with a dangerous thing or dangerous activity is presumed to be caused by such a thing or such an activity (Art. 149 of OC). This also determines a reversal of the burden of proof, which is placed on the tortfeasor.

In 2005, the Crime Victims’ Compensation Act was passed in Slovenia. It was published in November 2005 and entered into force on 1 January 2006. Although this Act was passed in order to transpose the Directive of the European Council from 2004 regulating compensation for crime victims, it clarified significant aspects of provisions applicable to tort law. In particular, it defines types of pecuniary and non-pecuniary damage that can be recovered by victims under tort law, as well as the amount of damages. As reported by Lampe (2005), the so-called tort law multiplication table is no longer an informal result of legal practice, but framed by legal provisions. Types of damage under this Act are classified in the following categories: a) bodily distress or damage to health; b) mental suffering; c) loss of alimonies; d) health expenses; e) funeral expenses; f) damage to property; g) trial expenses. Damages for pecuniary and non-pecuniary losses are awarded according to the specific circumstances of each case.

Beside the casuistic rule, the Act also sets some special circumstances that have to be taken into consideration when awarding the damages. The most important type of damage – bodily distress or damage to health – is categorized according to degrees of distress into the following categories:

- light cases - damages are awarded in the frame of € 50 to € 500;
- moderate cases - damages are awarded in the frame of € 100 to € 1,000;
- serious cases - damages are awarded in the frame of € 250 to € 2,500;
- very serious cases - damages are awarded in the frame of € 500 to € 5000;
- extremely serious cases - damages are awarded in the frame of € 1,000 to € 10,000.

⁷⁵ Case R 55/1971. In: Lazar, J. a kol., *Základy občianskeho hmotného práva 2* (Iura Edition, 2002), p. 240.

⁷⁶ *Obligacijski zakonik – OZ* [Code of Obligations – CO]; Ur. l. RS, No. 83/2001. This code replaced the old *Zakon o obligacijskih razmerjih – ZOR* [Act on Obligations], Ur. l. SFRJ, No. 29/78.

Characteristics of each criterion are not defined by the Act, however the Act requires that the Ministry of Health and the Ministry of Justice jointly adopt a special sub-legislative act and regulate the characteristics of the mentioned types of damage.

Mental suffering can be awarded up to a limited amount of € 10,000. According to the Act, damages are awarded on the basis of the circumstances of each case and of the degree and duration of the mental suffering. The Act (art. 10) here clearly points to tort law provisions of the Code of Obligations, but the Code is also silent on the degrees of mental suffering. Therefore, results of continuous legal practice come into focus. Compensation for loss of alimonies can be awarded according to the Act as a lump sum corresponding to the amount set by special social law provisions for state pensions. This type of damages can be awarded only if the applicant is not entitled to income from either a state pension or disability insurance. The awarded damages are limited to an amount of € 20,000.

The amount of health expenses can be established according to the special provisions on compulsory health insurance. These damages can be awarded only if the applicant is not entitled to expenses according to health insurance. The same is true also for burial expenses: they can be awarded only if the applicant is not entitled to burial expenses according to health insurance. Moreover, burial expenses can only be reimbursed to the person who sustained them.

Damage to property can be compensated as a special type of pecuniary loss up to a limited amount of € 500. Damage to property is defined only as *damnum emergens* limited to the victim's clothes and objects for personal use that the victim wore or used at the time the crime was committed. The exception to this rule is that the Commission has to award full compensation to damaged orthopaedic and other aids for invalids.

As regards secondary victims, the Code of Obligations (article 201) provides that in cases of "extreme invalidism" parents, spouses and children are entitled to compensation for mental suffering.

An important case was decided by the Supreme Court on an issue related to bodily injury in traffic accidents in 2004.⁷⁷ The applicant had suffered severe bodily injury (fracture of left thigh bone and ankle), and suffered limited mobility of his left knee and one leg was 4 cm shorter than the other. A number of operations also left several scars on his left leg. His long medical treatment was painful and caused much inconvenience and traumas. He also suffered a non-pecuniary loss for decreased life activities. He could not continue his education. The applicant wanted to become a salesman. Instead of that he is only able to perform easier jobs in a sitting position. Eventually he opened a video store. Regardless of his injury he remained very sociable. He got married just before the judgment of the Supreme Court. These facts are very important for the legal qualification of the case. The second applicant was the young man's wife; the applicant's mother also sued for compensation. As reported above, under Article 201 of the Code of Obligations the crucial question is whether her son was in a state of "extreme invalidism".

The district court had awarded the applicant as well as his mother compensation. It based its decision on art. 201 and awarded an amount of € 5,100 to the latter for the non-pecuniary loss suffered. After the appellate court had changed the prior decision, the claimants filed a request for revision by arguing that the applicant's mother was indeed suffering non-pecuniary loss due to the invalidity of her son. Notwithstanding evidence that the invalidity of the claimant was at least serious, and the mother was experiencing a status of anxiety and pain, the Supreme Court rejected the demand for revision, by arguing that the health conditions of the applicant could not be defined as "extreme invalidism" and no scope for compensation of close relatives under article 201 was to be found in the facts of the case, as the claimant was anyway able to lead a social life.

In summary, it emerged quite clearly that application of article 201 of the Slovenian Code of Obligations is extremely rare, as the provision is interpreted very narrowly.

⁷⁷ Supreme Court, II Ips 307/2004. Reported by Lampe (2005).

4.25 Spain

In Spain, the legal regime applicable to personal injury claims for road accidents is different from the general tort law. For what concerns road traffic accidents, Law 30/1995 (*Ley de ordenación y de supervisión de los seguros privados*, hereinafter “LOSSP”) introduced a compulsory tariff system for the assessment of personal or bodily injury, leaving no possibility for judges to depart from the tables or to assess damages using other criteria.⁷⁸ The Constitutional Court has confirmed that, where in relation to certain accidents (specifically road traffic accidents) an injured person receives different levels of compensation from those levels which apply in respect of general civil liability, such a disparity does not breach the principle of equality. The Spanish reform in this field led to a hectic debate and reportedly did not contribute to solve the problem of extremely inconsistent decisions by courts as emerged from the previous SEAIDA systems in force since 1991; as a result, Spanish judges award extremely variable and unpredictable amounts of damages for similar cases. Authoritative commentators have defined the Spanish regime as a “lottery”, and have denounced the extremely low and variable level of damage awards for personal injury in Spain as opposed to other European member states.⁷⁹

The LOSSP distinguishes between bodily injury, pecuniary and non-pecuniary damages, although all three categories are subject to the same tariff regime (Martín Casals, 2002). The law also applies the same regime of contributory negligence both to legally capable and incapable individuals – an issue that was fiercely opposed by some legal commentators, who would have preferred the establishment of a category of “privileged victims” in line with the French *Loi Badinter* (Nocco, 2005). Damages are awarded as lump sum (capital) payments.

The scheme introduced by the LOSSP is differentiated for the cases of death, temporary and permanent disability. For all three cases, the scheme provides for “basic compensation values” and a number of “corrective factors”. Main parameters considered are: a) the age of the victim (five classes); b) the *lucrum cessans* (for example, four levels of income are specified); c) family status and number of close relatives; and d) other exceptional circumstances. For example, in case the disability reaches 75%, a complementary sum is awarded as immaterial damage. And in case of serious injuries which require constant care, relatives can be compensated for the related costs and for the significant loss/alteration of family and social life. Importantly, pain lacks independent categorisation: accordingly, it is (insufficiently) compensated under the “basic compensation value”, functioning at best as a factor for determining the severity of the physiological loss.

The system introduced by the LOSSP has faced several problems, mostly due to the uncertain outcome of the quantification of damages, the absence of a link with actual losses incurred, and the reliance on the income level of the victim. Even more importantly, Spanish courts have long been doubtful on the binding nature of the tables annexed to the LOSSP. The Spanish Supreme Court initially addressed the issue in an *obiter dictum*, by stating the non-binding nature of the tables/tariffs. Later, on June 29, 2000, the Spanish Constitutional Court (*Tribunal Constitucional*) has reaffirmed the binding nature of the tables, as well as the compatibility of the LOSSP with the Spanish Constitution. The *Tribunal* only declared the unconstitutionality of the rule that mandated the application of the tables to the determination of the *lucrum cessans* in cases of temporary disability where no contributory negligence is found on the side of the victim. But the *Tribunal* did not address similar rules provided for in the LOSSP for permanent disability or death. In practice, loss of earnings in these cases is very poorly compensated.

In the case of insured victims, payments received are not deducted by the amount of damages recovered.

The LOSSP applies to all victims irrespective of their nationality or place or residence.

⁷⁸ See also Regulation (*Real Decreto*) 7/2001 of 12 January 2001 and law 34/2003, which amend the LOSSP.

⁷⁹ See, e.g., McIntosh and Holmes (1992); Martín Casals (2002, 2003); Medina Crespo (2000); and Nocco (2005).

In case of death of the primary victim, compensation to the heirs is created *iure proprio nec hereditatis*, as the primary victim, being dead, is not entitled to claim any losses. As loss of life does not per se give rise to the right to claim damages, a distinction is made between the cases of immediate death of the primary victim and those where his/her death occurs after a certain amount of time (in practice, at least one month). Only in the second case, the heirs will be able to inherit the right to compensation for the physical and financial losses that the victim developed in the timeframe between the accident and death.

Close relatives are entitled to claim pecuniary (funeral and burial expenses, loss of income) and non pecuniary damages for the death of the primary victim. The group of aggrieved parties is identified by the means of a rebuttable presumption in respect of emotional or personal losses: normally such identification is based on the emotional ties existing within a family rather than on blood ties as in other countries. There are no statutory limits to the amount of damages that can be compensated.⁸⁰

4.26 Sweden

The 1972 Swedish Damages Act distinguishes between personal injury, property damage and pure economic loss. Despite the absence of a specific legal provision, the principle of *restitutio in integrum* has always been respected. The legislature has the right to introduce limits on the right of personal injury victims to claim compensation; this has been done by the introduction of special rules concerning the mitigation of damages. However, this is not considered to be a significant issue in Swedish tort law. In principle, the amount of compensation which can be awarded is unlimited in respect of any type of accident.

Pecuniary losses are assessed on the basis of the “difference method” (equal to the *Differenzmethode* in German law), under which the victim is entitled to recover the difference between the income she would have earned absent the accident and the income he or she actually obtained and is likely to earn after the accident. This also means that medical expenses are compensated, but when national insurance covers the expenses (as often happens in Sweden) no claims are admissible for these costs incurred. Also persons close to or connected with the victim are entitled to recover damages.

For what concerns non-pecuniary damages, the Swedish system distinguishes between physical and mental suffering of temporary or permanent nature, including particular consequences caused by the injury. The definition is very broad and encompasses most of the mental and physical suffering and acute illness, including bodily defects and other persistent suffering and discomfort, limitations to bodily movement and agility, deafness, complete or partial loss of sight, smell or taste, speech impairments, reduced potency, infertility, difficulties adapting in leisure activities, worries about complications arising from the injury, the reactions of other persons, general difficulties experienced at work due to the injury, the need for increased effort in reaching deadlines or goals at work, the increased strain in undertaking housework or similar work, loss of quality of life etc. The amount of compensation is to a large degree standardised, based on tables drawn up each year by the Traffic Injuries Authority (*Trafikskadenämnden*).

In case of death of the primary victim, the Damages Act establishes that the heirs of the victim can claim all the losses suffered by the deceased before death such as the loss of income and the costs incurred between the injury and the death. Pecuniary losses can be claimed even if the victim did not initiate any proceeding; conversely, non pecuniary losses can only be claimed if the deceased had initiated a procedure after the accident. In that case, the condition of the victim between the injury and the death will be the determining basis for claiming damages for pain and suffering. In any event, the amount of losses that can be claimed is strictly linked to the situation existing before the death of the primary victim. The longer the victim lives, the higher the amount of damages that

⁸⁰ For further details, see Medina Crespo M. and Medina Alcoz M., *PEOPIL – Web guidebook 2*, p. 87-92.

can be claimed especially as medical costs are concerned. The identity of the heirs is established by the Swedish Inheritance Code of 1958.

Secondary victims (spouse, partner of any sex living together for at least 2-3 years, children and other dependent persons) can claim losses after the death of the primary victim for pecuniary damages (loss of pecuniary support and funeral and burial expenses). Secondary victims that can also claim non pecuniary damages are determined by the judge on a case by case basis.⁸¹

There are not statutory limits to the amount of damages that can be claimed.

As regards the treatment of foreign victims, as reported by Dufwa (2006), “it might happen that courts take into consideration what the victim would get in his/her country or other factors concerning the victim’s national origins”.

4.27 UK

The UK system for the award of personal damages is mostly based on caselaw. In 1992, the Judicial Studies Board has published non-binding “Guidelines for the Assessment of General Damages in Personal Injury Cases”, which set out criteria to be used in the assessment the magnitude of damages to be awarded. The Guidelines have then been updated, and the eighth edition was published in 2006. In addition to caselaw, statutory law such as the Damages Act 1996; the Social Security (Recovery of Benefits) Act 1997; the Law Reform (Personal Injuries) Act 1948, the Supreme Court Act 1981; and the County Courts Act 1984 contain additional provisions, mostly related to the quantification of interest.

In the UK legal system, the principle of full compensation is generally respected, as confirmed by the House of Lords in *Wells v. Wells* (1998).⁸² Limitations exists in the case of contributory negligence, and claimants are under a general duty to act with due care to mitigate their losses.

Victims can claim both pecuniary losses and personal losses (under the heading of “general damages”). Victims are entitled to full compensation for the financial losses suffered; when calculating future loss of earnings, the multiplier/multiplicand approach should be applied, taking into account the case law on loss of a chance. Where future pecuniary loss must be determined, Courts consider the available evidence, make an assessment of what the future holds and award damages accordingly. In some cases, it may only be possible to assess the future on the basis of a “loss of a chance” as to what might happen.⁸³

Personal losses includes non-pecuniary losses (pain and suffering, loss of amenity of life, loss of reputation, mental distress, physical inconvenience, discomfort, etc.), which are characterised by the non-susceptibility of direct measurement in money.⁸⁴ In this area, Courts have developed different rules/precedents, such as the *Smith v. Manchester* rule for compensating injured people who are already back at work or will return to work for the increased risk, in case the injured person loses his or her job in the future⁸⁵; or the wider discretion used for “loss or impairment of bodily integrity” when both a serious physical injury and other sources of prejudice for everyday activities occur after the accident (Munkman, 1996). Pain and suffering are compensated provided that the victim is actually in the condition of feeling the pain, and is thus based on a subjective test; whereas the loss of amenity of life is normally based on an objective test (Giliker-Beckwith, 2001). In

⁸¹ See Sandell H., *PEOPIL –Web guidebook 2*, p.93.

⁸² *Wells v Wells* [1998] 3 WLR 329

⁸³ There are two competing lines of authority. One line of authority suggests that the burden of proof in civil claims is “on the balance of probabilities”. The other line of authority is that the “balance of probabilities” test only applies to past pecuniary losses, and in relation to future pecuniary losses the Court needs to take into account the percentage chance of certain events occurring or not occurring in the future.

⁸⁴ See, e.g. Lord Diplock in *Wright v. BRB* (1983).

⁸⁵ Lewis R., McNabb R., Robinson H., and Wass V. (2003), *Loss of earnings following personal injury: do the courts adequately compensate injured parties?*, The Economic Journal, Vol. 113, issue 491 page F568, November.

practice, both pain and suffering and loss of amenity are determined as a *unicum*, often referred to as *PSLA*, whereas the second component is normally awarded a greater importance, and is linked to consideration of age, gender, profession and other activities of the victim. Overtime, UK courts have developed an informal table system for quantifying *PSLA*, which reaches a maximum of approximately £200,000 in particularly serious cases.

In the UK, the rule of *stare decisis* does not apply to the quantification of damages. This allows for high flexibility in the determination of the *quantum debeatur*. Against this background, the activity of the Court of Appeal in London and the publication of the “Guidelines for the Assessment of General Damages in Personal Injury Cases” have contributed to a large extent in increasing the harmonisation of damage awards by courts. In 1999, the Law Commission published a study on damages for personal injury, concluding that damages for *PSLA* – especially for serious personal injury – should have been increased by 50%-100% compared to then-current levels. After the publication of the study, in *Heil v. Rankin* Lord Woolf M.R. endorsed an increase in the level of damage awards for serious injuries, by announcing an increase up to one third for damage awards greater than £10,000. Following Lord Woolf’s opinion in *Heil v. Rankin*, in case of serious injuries with award at £150,000, as in the case of tetraplegia or severe brain damage, the amount had to be increased by a third to £200,000; and between £10,000 and £150,000 there was a progressive increase from 0 to 33.3% so that, for example, in the middle of the range, an award of £80,000 is to be increased by 17 per cent to about £95,000.

Foreign victims are subject to the same rules as outlined above, with the exception of rules on taxation in some cases.

In case of death of the primary victim, his/her heirs can claim both pecuniary (based on the expenses and lost income between the accident and death) and non pecuniary damages (depending on the severity and duration of the symptoms, awarded damages ranged from no award in case of immediate death to £40,000 – 60,000 when death occurred after 6 months and 4 years) damages on behalf of the deceased. In addition, the relatives of the victim can claim pecuniary damages for funeral expenses and the loss of future support. Only a limited class of relatives (the spouse of the deceased; the parents of a legitimate unmarried minor; and the mother of an illegitimate unmarried minor) can claim damages for bereavement losses. Their amount is fixed as follows:⁸⁶

- Deaths before 1 April 1991 - £3,500
- Deaths after 1 April 1991 and before 1 April 2000 - £7,500
- Deaths after 1 April 2002 - £10,000.

In Scotland, both patrimonial losses and *solatium* for pain and suffering can be recovered. Damages awards for pain and suffering are assumed to be slightly lower than what occurs in England and Wales. The principles of Scots Law and of the law of Delict apply to all victims of accidents within the Scottish jurisdiction irrespective of nationality.

In case of death of the primary victim, the only claims allowed with respect to the death are those of the deceased’s relatives. These include pecuniary (loss of support, calculated as the actual amount of support that was habitually received, including likely increases in support) and non pecuniary damages (grief, and sorrow; distress and anxiety; loss of non patrimonial benefits arising from the deceased’s society and guidance). There are no statutory limits to claims, however as far as loss of support is concerned, if the surviving spouse is working his/her income will be added to the potential income of the victim and discounted by a percentage of the sum in order to represent the maintenance which would have been spent solely for the benefit of the deceased. The net figure so calculated, less the earnings of the husband/wife who survived, represents the loss of dependency. A “multiplier” figure based on the figures contained in the Ogden tables is then applied by reference to the deceased’s life expectancy at the date of death.

⁸⁶ See Gardner C. et al., *PEOPIL – Web guidebook 2*, p. 19.

If the death occurs only after a certain amount of time, the deceased's right of action is passed on to his heirs even if no proceeding had been started. If action had been taken, claims for non-pecuniary damages cannot be transferred with the exception of pain and suffering when the victim was aware and suffered for the inflicted damages. Loss of earnings can only be compensated until the day of the death.⁸⁷

5 Differences in liability rules and damage awards

As regards the attribution of liability, EU member states can be divided in three large groups: a first group includes most civil law countries, which adopted strict liability rules for cases of risky activities, including the operation of motor vehicles. Secondly, common law countries such as the UK and Ireland, but also Cyprus, Malta, Portugal and Romania apply a fault-based rule, which requires that the victim proves the negligence or intent of the tortfeasor, the occurrence of damage and the causal link between the defendant's behaviour and the damage occurred. Thirdly, Scandinavian countries – particularly Sweden – have initially introduced strict liability rules (since the 1950s), and have then replaced or integrated such rules with a system based on extensive insurance coverage of damages.

Within each group, as already recalled, legal rules may vary widely. For example, civil law countries where a strict liability rule is applied adopted significantly different rules, especially as regards the scope of the escape clause and the treatment of contributory negligence. For example, in **Austria** liability is excluded in case of unavoidable accident (§9 (1) EKHG), and contributory negligence on the part of the injured person is often taken into account to apportion the damage (§ 7 EKHG).

In **Germany** there is no liability where there is *force majeure* (para 7(2) StVG), and a contributory fault on the part of the victim leads to a reduction in liability or, as the case may be, a complete immunity (§9 StVG). In addition, since 2002 children up to 10 years of age lack tortious capacity, and their contributory negligence does not lead to any reduction of liability on the side of the offender.

In **Italy**, article 2054 of the Civil Code provides for a strict liability regime for the circulation of motor vehicles, and the escape clause provided in this article is interpreted quite narrowly by Courts, to the extent that escaping liability ex article 2054 was authoritatively defined a "*probatio diabolica*".⁸⁸

Also countries such as the **Czech Republic, Greece, the Netherlands, Hungary, Poland** and **Slovenia** apply strict liability rules with a (partial) defence of contributory negligence, although court practice has led to diverging interpretation of cases – besides *force majeure* – where the liability of the offender can be reduced according to the negligent behaviour of the victim.

When compared with these national experiences, France, Sweden and Belgium exhibit remarkable peculiarities, for differing reasons. On the one hand, according to the **French Loi Badinter** the victim cannot be met with a defence of *force majeure*, nor with a defence of *fait d'autrui*.⁸⁹ The only basis on which the carrier is freed from liability is a *faute inexcusable* on the part of the victim. The rule is applied in an even stricter way when victims are pedestrians, minors (below 16 years old), elderly (over 70 years old) or disabled persons (below 20% of the normal working capacity). This makes up for an almost absolute strict liability regime.

⁸⁷ For further details, Logan A., *PEOPIL – Web guidebook 2*, p.83.

⁸⁸ See G. Alpa, quoted in Comandè, G. and Domenici, R. (2005), *La valutazione delle macropermanenti*, ETS, p.26.

⁸⁹ Artt. 1 and 2 of *Loi* no. 85-677 of 5 July 1985.

On the other hand, **Sweden** adopted strict liability for road traffic accidents since the 1950s, but the system has been *de facto* replaced since 1975 by an extensive no-fault insurance system for all road accident victims. In the case of bodily injury suffered in motor accidents, the first tier of compensation is paid in the form of co-ordinated benefits through the social insurance system, through pension funds, or through sickness payments by employers. At the second stage (the tort stage) the social insurance benefit payments are deducted from the tort damages awarded. Thus, tort damages represent a small proportion of total compensation paid and are largely in respect of non-economic loss. Where another driver is alleged to have caused the accident, the insurance company that settles the claim with its insured can invoke its right of subrogation to pursue reimbursement from the negligent driver's insurance company.

Finally, in **Belgium** the system is still based on the principle of liability for *faute* (fault). In addition, fault of the victim which contributes to the occurrence of damage leads to a sharing of the liability between the victim and the tortfeasor (contributory negligence), so that the victim cannot receive complete compensation from the tortfeasor.⁹⁰ However, Courts limited the possibility of considering the contributory fault of persons suffering damages in road traffic to instances in which the claimant intentionally caused the accident. Against this background, the provider of liability insurance for the vehicle that caused the accident is required to pay for the damage even if the policyholder is not deemed to be at fault (Art. 29bis de la loi du 21 novembre 1989 relative à l'assurance obligatoire de la responsabilité en matière de véhicules automoteurs). This essentially makes up for a combination of personal liability insurance and third-party accident insurance.

Differences exist also as regards the right for secondary victims to claim damages before a court. For example, in many countries – including Austria, Italy and France –when passengers are killed, their close relatives have a claim for compensation for bereavement; but the same does not occur in Germany and the Netherlands, and in the UK such a claim is recognised only in restricted circumstances – loss of society and relatives (*loss of consortium*) was substituted by a fixed amount for bereavement by the *Administration of Justice Act* of 1982. More generally, only in some jurisdictions the concept of “pain and suffering” has been gradually interpreted as not necessarily arising from a previous or existing physical injury.⁹¹

5.1 Award of damages

Also based on the liability and insurance regimes, countries have adopted different criteria for the calculation of the *quantum debeatur*. Almost all EU countries can be said to rely on the principle of *restitutio in integrum*, with the notable exception of **Spain**, where the complex system put in place by Law 30/1995 introduced a compulsory tariff system for the assessment of personal or bodily injury, leaving no possibility for judges to depart from the tables or to assess damages using other criteria.⁹² The Spanish system applies in a fully automatic way, and as such does not take into account any specific possibility to assess whether the damage award would fully compensate the primary or secondary victim for the loss suffered.

Other, significant differences exist as regards the assessment of the *quantum* of damages, especially for what concerns the headings of damages awarded as pecuniary loss and the *an* and the *quantum* of non-pecuniary damages awarded by judges. For example:

⁹⁰ The rule is different in case the victim is a minor up to 15 years of age. In this respect, Belgian law follows the example of French *Loi Badinter*.

⁹¹ See Comandè, G. (2006), *Towards a Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States*, Temple Int'l & Comp. Law Journal, Vol. 19, No. 2, January.

⁹² Ley de ordenación y de supervisión de los seguros privados (hereinafter “LOSSP”).

- In **Austria** the maximum amounts which have been awarded by Austrian courts for non-pecuniary damages are €120 daily for light pain, €220 daily for moderate pain, €350 daily for severe pain and €400 daily for extreme pain.⁹³
- In **Belgium**, in case of fatal accidents no compensation is awarded for the mere loss of a human life. In addition, no compensation for pain and suffering is awarded in case the victim was always in a coma between the accident and the death. Amounts compensated for pain and suffering before dying are reported by De Kezel⁹⁴: in one case where the victim had tried to escape from a car while drowning, the court awarded €1,250 for pain and suffering; in a case where the victim was seriously injured in a fire accident and was in great pain for 5 days, an overall award of €2,500 was granted. In another case, where the victim had died after 36 months after the accident, a lump-sum payment of €25 per day was awarded. Finally, when the victim was aware of his reduced life expectancy but died after 4 years from the date of the accident, an overall compensation of €1,250 was awarded.
- In **Denmark**, damages for personal injury are obtained by multiplying the percentage of permanent disability by a specific amount (close to €800 in 2002). In case of accidents with unknown or insured motor vehicles, the injured party can claim damages from the Danish Motor Insurance Bureau, which can be held directly liable. The Danish law provides some restrictions on the amount of compensation that can be awarded: in the case of loss of earning capacity, the primary victim will be able to seek compensation up to a maximum amount specified every year (being approximately €850,000 in 2001); likewise, the dependents are not likely to obtain full compensation for the loss of a “breadwinner” with very high income.
- In **Germany**, for the case of fatal accidents compensation for pain and suffering (*Schmerzensgeld*) is granted when death occurred a few hours (e.g. three) after the accident. Amounts awarded for pain and suffering before death are reported by Kuhn⁹⁵: for example, the KG Berlin (Court of Appeal in Berlin) awarded €2,400 where the victim survived one day; where a victim survived an accident in an artificial coma for 10 days the OLG Hamm held that €14,000 would be adequate compensation. The OLG Koblenz ruled that damages for pain and suffering of €6,000 were sufficient where the victim lost consciousness immediately after the accident and did not regain consciousness before his/her death eight days later. Where a victim survived for 3 to 4 weeks, according to the OLG München damages for pain and suffering should amount to between €5,000 and €20,000. In the case of survival for five months the OLG München awarded damages of €25,000. The OLG Oldenburg in a case where a victim survived for 3½ months awarded damages for pain and suffering of €17,500.
- In **Italy**, compensation for pain and suffering (*danno morale*) is often quantified as a proportion of the loss of physical/mental integrity – between 25% and 50%. On the other hand, the assessment of loss of quality of life is entirely discretionary, with the only exception of minor injuries, ranging from 1% to 9% of permanent invalidity from road accidents (so-called *micropermanenti*), which are the subject of statutory tables under the provisions of Article 5 of Law n. 57/2001. A compensation fund for road-accident victims was created since 1969 to ensure that victims of traffic accidents are compensated (only for personal injury) even when the vehicle could not be identified; back in 1993, the Supreme Court of Appeal (*Corte di Cassazione*) ruled that even in case of cross-border road traffic accidents, the right to compensation is independent of the existence of an equivalent fund in the victim’s country.⁹⁶

⁹³ Non-pecuniary losses include: a) pain and suffering of the injured and of close relatives (including the spouse and other family members) that have suffered illness as a consequence of the accident; and b) compensation for harm suffered due to death of a close relative. See Greiter, I., *PEOPIL Web Guide Book 1*.

⁹⁴ *PEOPIL Web Guidebook 2*.

⁹⁵ *Id.*

⁹⁶ Cass., 10 February 1993, point 1681, *Foro it.* 1993, I, p. 3067.

- In **Poland**, a 1977 judgment on 15-months old child that incurred a 100% disability as a result of a tram accident stated that compensation *ex art 445* of the Polish Civil Code had to be exceptionally high in that case (i.e. 150,000 zlotys), but that usually for the total and permanent disability of a person the amount of the compensation should not exceed 100,000 zlotys.⁹⁷ In a 1972 judgment, it was established that compensation exceeding 50,000 zlotys can be awarded only in extraordinary cases, meaning when the injury is particularly serious: total blindness, loss of both legs, paralysis.⁹⁸ On year later, it was clarified that compensation should equal 50,000 zloty or even higher if the permanent consequences of the body injury or health breakdown are of the kind that excludes the victims from normal life, especially because of the impossibility of leaving their premises.⁹⁹
- In **Portugal**, non-pecuniary losses can be recovered only in case of “serious losses deserving legal protection” and is awarded by judges with an equitable assessment (Article 496(3) of the Civil Code). No tables or other criteria for the quantification of damages are reportedly in use. Insured victims will see their damages reduced by the amount of payments received by the insurer.¹⁰⁰
- In **Sweden**, within the co-ordinated benefits system, compensation is provided for loss of income, whereas disability is compensated by an annuity payment or by a lump sum payment in the case of smaller loss. Compensation for non-economic loss, including pain and suffering and disfigurement and disadvantage, is paid during the period of acute sickness in accordance with standardised tables. To ensure fairness and uniformity in compensation for personal injury, compensation tables are regulated by the government.¹⁰¹ In cases involving serious personal injury, insurance companies in Sweden are obliged to obtain an opinion from the Road Traffic Injuries Board, regarding the assessment of compensation, before entering into a settlement with the injured party.¹⁰²
- In the **UK**, following Lord Woolf’s opinion in *Heil v. Ranking*, in case of serious injuries with pecuniary damage award at £150,000, as in the case of tetraplegia or severe brain damage, the amount had to be increased by a third to £200,000; and between £10,000 and £150,000 there was a progressive increase from 0 to 33.3% so that, for example, in the middle of the range, an award of £80,000 is to be increased by 17 per cent to about £95,000.¹⁰³

When compared to these countries, other countries seem to award much lower (or no) amounts, especially for non-pecuniary damages. In particular:

- In **Malta** and **Slovakia**, non-material damages (pain and suffering) are not included in the definition of damage under civil law.¹⁰⁴
- In **Romania**, back in 1952 the Supreme Court ruled that “no material compensation may be granted for moral damages”. Gradually, however, corrections to this position have been

⁹⁷ Wyrok S.N. z dnia 22.08.1977 II CR 266/77. Amounts in Zlotys are referred to 1977 values, and are in no way aligned with current values.

⁹⁸ Wyrok S.N. z dnia 03.05.1972 I CR 106/72

⁹⁹ Wyrok S.N. z dnia 09.03.1973 I CR 55/73

¹⁰⁰ Article 566 of the Civil Code, so-called *teoria da diferença*, or compensation *lucri cum damno*.

¹⁰¹ The tables are based on previous judgments passed by the courts or by the RTIB and are continuously modified in accordance with the general rise in the standard of living, the development of money values, and changing medical opinion of the injury’s degree of seriousness.

¹⁰² As most personal injuries arising from traffic accidents in Sweden do not result in a disability they are settled directly by the insurance companies without referral to the Road Traffic Injuries Board.

¹⁰³ See *Heil v. Ranking*, [2000] 3 All ER 138, [2000] 2 WLR 1173, [2000] PIQR Q187. For a comment, see Lewis, R. (2001), *Increasing The Price Of Pain: Damages, The Law Commission And Heil v Rankin*, *Modern Law Review*, 64 (1).

¹⁰⁴ In Slovakia, the Civil Code also contains a general obligation for persons threatened by damage to adequately intervene to avert damage (OZ, § 417)

attempted which allowed a limited grant of non-pecuniary damages for those asserting moral damages.¹⁰⁵

- In **Slovenia**, bodily distress or damage to health is categorized according to degrees of distress into different categories, ranging from light cases (damages are awarded in the frame of € 50 to € 500) to extremely serious cases (damages are awarded in the frame of € 1,000 to € 10,000). Mental suffering can be awarded to a limited amount of € 10,000. Compensation for loss of alimonies can be awarded according to the Act in one sum in the amount set by special social law provisions for state pensions. This type of damages can be awarded only if the applicant is not entitled to income from either a state pension or disability insurance. The awarded damages are limited to an amount of € 20,000. Damage to property is capped at €500.
- In other countries, very low amounts are awarded: these include **Estonia** (max. € 320) or **Lithuania** (max. € 500).

In addition, in all EU member states liability for personal injury and damage to property is complemented and integrated by compulsory third-party insurance. However, minimum insurance varies noticeably among member states; on the one hand, it is virtually unlimited in most Western and Northern European countries; on the other, coverage is particularly low in some of the new member states. For instance, in **Latvia** the minimum limits are approximately € 14.000 for material damage and in the range of € 16.000 for personal injury. **Hungary** for example set a limit of approximately € 1.9 million for material damage and € 1.1 Million per person for personal injury. In the **Czech Republic**, Act no. 168/1999 Coll. sets the limit (for insurance compensation) for injuries to health at CZK 35 million (€1.25 million), and for material damages at CZK 18 million (as of May 1, 2004).

As already recalled, while the Second Motor Insurance Directive required Member States to provide for an insurance requirement covering at least 350,000 ECU per victim in the case of personal injury, the Fifth Directive almost doubles that amount (even if adjusted by inflation) to €1,000,000. The other figures were multiplied by ten: the optional overall cap of 500,000 ECU per accident was raised to €5 million per claim, the new minimum coverage for property damage was put up to €1,000,000. In order to provide for a smooth transition, the new limits will not necessarily take effect immediately, but shall be gradually introduced within five years from the date of the Directive's implementation if the Member States so decide. The new limits will then be updated every five years in line with the European Index of Consumer Prices (EICP). Once the new limits have become mandatory, all the countries applying maximum caps to compensatory awards that do not comply with the Fifth Directive will not be able to apply such caps.¹⁰⁶ Table 2 at the end of this section summarises the minimum and maximum amounts covered by insurance in selected EU member states; while table 3 illustrates the effects of the Fifth Motor Insurance Directive on minimum insurance coverage in some countries.

Finally, in principle, all European jurisdictions allow the recovery in tort of medical expenses and costs necessitated by personal injury, on the basis that pecuniary losses are to be compensated in full. The recoverability of any particular item of expense is universally subject to a test of reasonableness. Some countries do not allow recovery of luxury services in hospital (e.g. France), whereas in others (e.g. Austria and Germany) plaintiffs are entitled to the cost of treatment to the standard they enjoyed by reason of their economic position and standing before the accident, even where this means first class care. In France and Germany, any damages awarded for time spent in

¹⁰⁵ The problem has been partially solved pursuant to the fall of communism in Romania, as the award of compensation for moral damages has been acknowledged by various post-communist statutes.

¹⁰⁶ See the ECJ Decision in *Daniel Fernando Messejana Viegas v Companhia de Seguros Zurich SA and Mitsubishi Motors de Portugal SA*, Case C-66/02, ruling that Article 1(2) of the Second Motor Insurance Directive "precludes national laws which provide for a number of types of civil liability applicable to road-traffic accidents laying down, in respect of one of them, maximum amounts of compensation that are lower than the minimum amounts of cover laid down by that article."

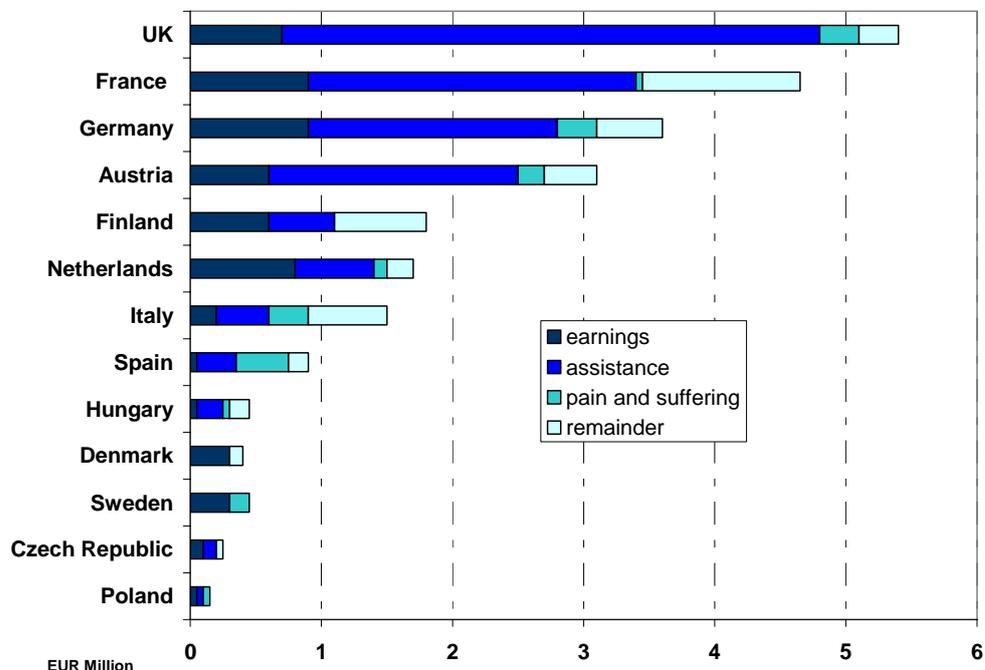
hospital may be reduced by a daily amount representing the patient's savings on meals. Similar provisions exist in Sweden, Austria and Belgium. In France and Belgium visiting expenses are recoverable either in the victim's action or directly by the third party.

5.2 A thought experiment

The best way to illustrate the differences existing in EU member states as regards the award of damages for personal injury or fatal accidents is to describe what amount of damages would be awarded in different countries for the same type of accident. As already recalled in the introductory section, a comparative study done in the UK in 2003 found that the range of damages in respect of the instantaneous death of a 20 year old legal secretary ranged from only funeral expenses (Finland) to £176,368 (Italy).¹⁰⁷

A similar exercise is provided by Swiss Re (2004), which takes as benchmark an accident occurred to a 30-year old man, with unemployed wife, two children aged 2 and 5, an average income in dependent employment, which remains 100% disabled due to severe spinal or head injury, requiring no ventilation but highest assistance levels. The levels of indemnity calculated for this theoretical case in 13 EU member states are shown below in Figure 1. As is clearly visible in the figure, the compensation in Poland – although including loss of earnings, assistance and pain and suffering – would be less than 3% of the amount awarded in the UK. Of the 13 countries analysed by Swiss Re, the top four are countries where assistance is included in the amount of damages. To the contrary, in Denmark and Sweden reimbursement of assistance expenses is provided mostly through social insurance systems, and is not included in the indemnity figure. In addition, the “remainder” category reportedly includes lawyers' fees, costs for adapting accommodation, or compensation for reduced social integration (as occurs, for example, in Italy).

Figure 1 – indemnity for 100% disability of a 30-year old married man



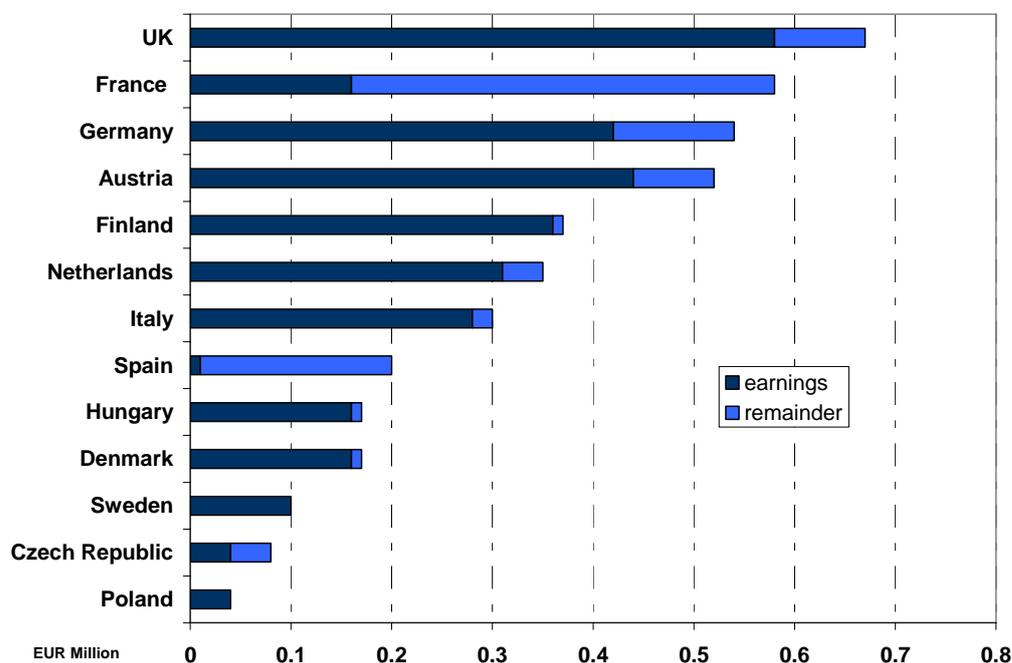
When the four headings of damage are analysed separately, it emerges that:

¹⁰⁷ Personal Injury Awards in EU and EFTA Countries (Kluwer Law, 2003)

- Spain, Poland and Hungary are the countries where loss of earnings is most poorly compensated, whereas in France and Germany such heading leads to the most substantial awards.
- In Poland, Czech Republic, Hungary, Italy, Spain, Finland and the Netherlands the awards for medical assistance are much lower than in Austria, Germany, France and UK. In Denmark and Sweden, as already explained, medical assistance is not included in the damage award.
- As regards pain and suffering, the set of countries analysed can be divided in three groups: a) Denmark, Finland, the Czech Republic, Poland and France exhibiting low levels of compensation; b) the Netherlands, Sweden and Austria allow for higher awards; and c) in Italy, Germany, UK and – most notably – Spain the award for pain and suffering is higher than in other countries.
- France, Italy and Germany award significant damages in the “remainder” category, including lawyers’ fees, costs for adapting accommodation, or compensation for reduced social integration.

A similar situation occurs when it comes to death indemnities, as depicted in Figure 2 below, which assumes that the deceased was in the same condition as the person considered for Figure 1. As shown in figure 2, in countries like Poland, Hungary and the Czech Republic the indemnity for death of a 30-year old married person earning a normal income is much lower than in countries such as France, Italy, the Netherlands and UK. Some countries mostly or exclusively provide for calculation of lost earnings, whereas in Spain, as recalled in Section 2.2. above, compensation for loss of earnings is normally very low.

Figure 2 –indemnity for death of a 30-year married person with two children



5.3 Applicable law

The description of legal regimes for the attribution of liability and the assessment of the *quantum* of damages shows remarkable differences between member states. This also implies that EU citizens suffering personal injury as a result of an accident in another EU country will hardly receive the same compensation they would have been granted in their home countries, if the *lex loci delicti commissi* applies. In this respect, most of the EU member states actually apply the law where the

accident occurred when attributing liability and also when deciding on the *quantum* of damages. This is actually the rule prescribed at article 3 of the Hague Convention of 4 May 1971 on the law applicable to traffic accidents, according to which “[t]he applicable law is the internal law of the State where the accident occurred”. Article 8(4) of the Convention further specifies that the law of the state where the accident occurred specifies not only the basis and extent of liability, but also the kind and extent of damages to be awarded.

The Hague convention was ratified only by approximately half of the member states. Only Austria, Belgium, Czech Republic, France, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Slovakia, Slovenia and Spain to date have officially ratified its text, including the provision that mandates the application of the *lex loci*. In any event, most of the other countries apply *lex loci*, with some exceptions:

- In Austria, courts have to take into consideration what the victim would have earned in his own country. The loss of income or medical and nursing costs, where the victim has received medical treatment in his own country, has to be considered according to the respective foreign standards.
- In Belgium and Sweden, the level of award the victim would have obtained in his or her own country is sometimes taken into account by judges.

A more flexible interpretation of the choice of law emerged in the UK, where the applicable law is selected according to part III of the Private International Law (Miscellaneous provisions) Act 1995. An example is the leading UK case *Boys v Chaplin* [1971] AC 356, in which the plaintiff had been injured in a traffic accident (with another UK resident) in Malta. By the law of Malta, as explained above, non-economic damage (pain and suffering, loss of amenity) was not actionable. Only financial loss was compensable. The plaintiff brought proceedings in England and one of the questions raised by the appeal was whether the rule excluding liability for non-economic damage was part of the substantive law of Malta or concerned only the remedies which a Maltese court could provide. Lord Hodson, Lord Wilberforce and Lord Pearson agreed that the rule was part of the substantive law of tort liability. In Malta, causing non-economic damage was not an *injuria*; not an actionable wrong. Lord Hodson said that “questions such as whether loss of earning capacity or pain and suffering are admissible heads of damage must be questions of substantive law. The law relating to damages is partly procedural and partly substantive, the actual quantification under the relevant heads being procedural only”.¹⁰⁸

Tables 1 and 2 below summarise the peculiarities of legal regimes

¹⁰⁸ Id., at p 379

Table 1 – Legal regimes for road traffic accidents in the EU27

Country	Liability regime	Pecuniary damages (primary victim)	Non pec. damages (primary victim)	Pecuniary damages/death (close relatives)	Non pec. Damages/death (close relatives)	Living with an injured person
Austria	Strict L. (relative)	Treatment expenses Lost profits & loss future earnings Costs of medical treatment <i>Limits: NO</i>	Pain & suffering (Risk to life or health) <i>Limits: NO (case-law: €120-€400 daily)</i>	Loss of maintenance funeral and related costs <i>Limits: NO</i> Inherit claims of the deceased if death is not immediate	Pain and suffering (<i>case law: €7,250 - 18,200</i>) Inherit claims of the deceased if death is not immediate	Costs of care (must be claimed by primary victim)
Belgium	Fault-based with reversal burden of proof very narrowly interpreted	Medical & nursing Loss of profits <i>Limits: NO</i>	Pain & suffering Disfigurement Enjoyment of life Sexual function <i>Limits: NO, but tables</i>	Funeral expenses Loss of support <i>Limits: NO</i> Inherit claims for losses suffered before death by the victim	Loss of a relative Suffering from witnessing <i>Limits: NO, but tables</i> Inherit claims of the deceased if death non immediate	Costs of hospital visits Adaptation of home Lost income Pain & suffering (only for parents or children)
Bulgaria	Fault-based	Medical expenses Lost benefits (direct cause) Legal expenses <i>Limits: NO</i>	Pain & suffering <i>Limits: NO</i>	Medical expenses Lost benefits <i>Limits: NO</i>	Pain & suffering <i>Limits: NO</i>	
Cyprus	Fault-based	<u>General damages</u> (presumed) Loss of future earnings <u>Special damages</u> (to be proved) Medical expenses Treatment expenses	<u>General damages</u> (presumed) Pain & suffering Loss of amenity of life	<u>General damages</u> (presumed) Loss of future earnings <u>Special damages</u> (to be proved) Medical expenses		

Country	Liability regime	Pecuniary damages (primary victim)	Non pec. damages (primary victim)	Pecuniary damages/death (close relatives)	Non pec. Damages/death (close relatives)	Living with an injured person
		<i>Limits: NO, scales</i>	<i>Limits: NO, scales</i>	Funeral expenses <i>Limits: NO, scales</i>		
Czech Rep.	Strict L. (relative)	Medical expenses Loss of earnings Loss of pension Court fee (winning party) Attorney fee (winning party) <i>Limits: NO</i> <i>For insurance compensation: CZK 35 m for health damages; CZK 18m for material damages</i>	Pain & suffering Social handicap <i>Limits: NO</i>			
Denmark	Strict L. (relative)	Medical expenses Temp. loss of earnings Permanent loss of earnings <i>Standard criteria</i>	Temp. pain & suffering (€18/day in 2002)	Burial expenses Loss of support (only if dependant) Inherit claims of the deceased	NO Inherit claims of the deceased	
Estonia	Strict L. (relative)	Medical expenses Loss of income <i>Limits: NO</i>	Moral damages <i>Limit: approx. 320 €</i>	Medical expenses Loss of income	Moral damages <i>Limit : approx. 320 €</i>	
Finland	Strict L. + comparative negligence	Medical expenses Loss of earnings Care and support <i>Limits: NO, standard criteria</i>	Pain & suffering Temp. & perm. Disability Mental disturbance <i>Limits: NO, standard criteria</i>	Funeral expenses Loss of maintenance <i>Limits: NO, standard criteria</i> Inherit claims of the deceased for period between injury and death	NO Inherit claims of the deceased only if he/she started proceeding	

Country	Liability regime	Pecuniary damages (primary victim)	Non pec. damages (primary victim)	Pecuniary damages/death (close relatives)	Non pec. Damages/death (close relatives)	Living with an injured person
France	Strict L. (almost absolute)	Medical expenses Loss of income <i>Limits: NO</i>	Pretium doloris Aesthetic detriment Loss of amenity <i>Limits: NO</i>	Loss of support for dependants Funeral and related costs <i>Limits: NO</i> Inherit claims of the deceased for period between injury and death	Mental suffering <i>Limits: NO</i> Inherit claims of the deceased for period between injury and death	Non pecuniary damages (to be proven)
Germany	Strict L. + comparative negligence	Accident related expenses Medical costs Loss of earnings <i>Limits: NO</i>	Pain & suffering Loss of amenity Disfigurement <i>Limits: NO</i>	Funeral costs Loss of support for dependants <i>Limits: NO</i> Inherit claims of the deceased	Only for severe impairment of very close relatives <i>Limits: NO</i> Inherit claims of the deceased (depends on lengths and condition of survival)	Loss of support Caring costs
Greece	Strict L. + comparative negligence	Medical costs Past and future earnings <i>Limits: NO</i>	<u>Only if bodily injury</u> <i>Limits: NO</i>	Funeral expenses Loss of income <i>Limits: NO</i> Inherit claims of the deceased for period between injury and death	Shock (death) if considerable as a bodily injury, Moral damage for very close relatives <i>Limits: NO</i> Inherit claims of the deceased only if trial ongoing before death	

Country	Liability regime	Pecuniary damages (primary victim)	Non pec. damages (primary victim)	Pecuniary damages/death (close relatives)	Non pec. Damages/death (close relatives)	Living with an injured person
Hungary	Strict L. (relative)	Medical expenses Loss of earnings <i>Limits: NO</i>	<u>Dommage moral</u> <i>Limits: NO</i>			
Ireland	Fault-based	<u>Special damages:</u> Medical treatment Material losses Loss of earnings <i>Limits: NO</i>	<u>General damages:</u> Physical and mental pain <i>Limits: NO</i>	Funeral Other damages & expenses Loss of benefits <i>Limits: NO</i> Inherit pecuniary claims of the deceased only if different cause of death	Grief (<i>fixed and automatic</i>)	Loss of consortium
Italy	Strict L. (relative)	Medical expenses Loss of income <i>Limits: NO</i>	Loss of physical/mental integrity (<i>danno biologico</i>) Loss of quality of life (<i>danno esistenziale</i>) Pain & suffering (<i>danno morale</i>) <i>Limits: NO, tables for danno biologico and danno esistenziale for minor injuries</i>	Burial and funeral costs Loss of income Personal loss of income if death had consequences on health or work of relatives <i>Limits: NO</i> Inherit claims of the deceased for period between injury and death	Danno biologico-psichico Pain and suffering Negative changes of life (<i>danno esistenziale</i>) <i>Limits: NO, tables</i> Losses sustained by the deceased only if he survived for a certain time (<i>100€-4000€/day of life</i>)	Pecuniary losses Danno biologico Danno morale Danno esistenziale

Country	Liability regime	Pecuniary damages (primary victim)	Non pec. damages (primary victim)	Pecuniary damages/death (close relatives)	Non pec. Damages/death (close relatives)	Living with an injured person
Latvia	Strict L. (relative)	<u>Insurance law:</u> Medical expenses Loss of ability to work Temporary loss of income <i>Limit: approx. 356,000 € per injured person, approx. 100,000 € for property losses</i> <u>Civil law:</u> Medical expenses Lost income Future income losses (only if permanent disability) <i>Limits: NO</i>	<u>Insurance law:</u> Pain and suffering <i>(depending on the type of injury : 20 LVL to 400 LVL)</i> <u>Civil law:</u> Moral injury (to be proven by the victim) <i>Limits: NO</i>	<u>Insurance law:</u> Loss of pecuniary support <u>Civil law:</u> Medical treatment Burial expenses Support for dependants Loss of property <i>Limits: NO</i>	<u>Insurance law:</u> Pain and suffering : 100 LVL for each dependant	
Lithuania	Fault-based	Bodily damage Property damage Penalty damages <i>Limits: NO</i>	Pain & suffering Deterioration of social life <i>Limits: NO</i>			
Luxembourg	Strict L. (relative)	Incurred expenses Present & future losses <i>Limits: NO</i>	Pain & suffering Breach of human right Physical integrity <i>Limits: NO</i>	Loss of earnings Funeral expenses <i>Limits: NO</i> Inherit losses suffered by the deceased after accident	Yes <i>Limit: €15,000 -20,000</i> Inherit losses suffered by the deceased	Loss for extra work Emotional loss
Malta	Fault-based	Expenses incurred Loss of past & future earnings <i>Limits: NO</i>				

Country	Liability regime	Pecuniary damages (primary victim)	Non pec. damages (primary victim)	Pecuniary damages/death (close relatives)	Non pec. Damages/death (close relatives)	Living with an injured person
Netherlands	Strict L. (relative)	Medical expenses Loss of earnings Other pecuniary losses Harm to goods <i>Limits: NO</i>	Only harm directly caused <i>Ceilings by case law</i>	Loss of support Funeral expenses Incurred costs <i>Limits: NO</i> Inherit right to claim losses	<u>No restitutio in integrum</u> Only for recognized mental injury <i>Practically non awarded</i> Inherit right only if deceased started proceedings	Costs that the primary victim could claim + physical & mental injury of the relative
Poland	Strict L. (relative)	Medical treatment Loss of present & future income Training for new occupation <i>Limits: NO</i>	Pain & suffering <i>Limits: NO</i>	Loss of support for dependents <i>Limits: NO</i>	Suffering <i>Limits: case law</i>	
Portugal	Fault-based	Medical expenses Loss of earnings Loss due to permanent disability <i>Limits: NO</i>	Only in case of serious losses deserving legal protection <i>Limits: NO</i>	Inherit claims of the deceased (<i>case-law: between € 7,500- 30,000</i>)	Loss of the right to life (<i>case law: c.ca €50,000</i>) <i>Limits: NO</i> Inherit claims of the deceased	
Romania	Fault-based	Losses that can be monetized <i>Limits: NO</i>	Moral damages <i>Limited in case-law</i>			
Slovakia	Fault-based	Medical expenses Loss of past & future income Lost property <i>Limits: NO</i>	NO			

Country	Liability regime	Pecuniary damages (primary victim)	Non pec. damages (primary victim)	Pecuniary damages/death (close relatives)	Non pec. Damages/death (close relatives)	Living with an injured person
Slovenia	Strict L. (relative)	Health expenses Damage to health Trial expenses Loss of alimonies (<i>max: € 20,000</i>) Damage to property (<i>max: €500</i>)	Mental suffering (<i>max: € 10,000</i>) Decreased life activities (<i>case-law</i>)	Funeral expenses (only if not covered by health insurance)		Mental suffering only in case of extreme invalidism RARE!
Spain	Strict L. + contributory negligence	Bodily injury Lost income <i>Tables</i>	Immaterial damage <i>Depends on level of injury: tables</i>	Loss of earnings (<i>very low!</i>) Funeral expenses Inherit claims of deceased only if he/she survived for at least one month	Grief <i>Limits: NO</i>	Costs of serious injury Costs for alteration of family/ social life <i>Limits</i>
Sweden	Strict L. + full insurance coverage	<u>During recovery:</u> Medical expenses (unless covered by national insurance) Lost income <u>After recovery:</u> Loss of income <i>Limits: NO, tables</i>	<u>During recovery:</u> Pain & suffering <u>After recovery:</u> Disadvantage & incapacity Specific inconvenience <i>Limits: NO, tables</i>	Funeral & burial costs Loss of pecuniary support Inherit claims of deceased after injury	Grief (<i>case law</i>) Inherit claims of deceased after injury only if he/she started proceedings	Some cases: hospital visits Costs included in the primary victim's claim
UK	Fault-based	Medical expenses Loss of income <i>Case by case</i>	Pain & suffering Loss of amenity <i>Informal tables: max £200,000</i>	Loss of future support Expenses incurred Inherit claims of deceased	Bereavement losses (<i>fixed £ 10,000 after 1/4/2002</i>) Inherit claims of deceased (only if survived for some time)	Costs of caring and other expenses must be included in the primary victim's claim

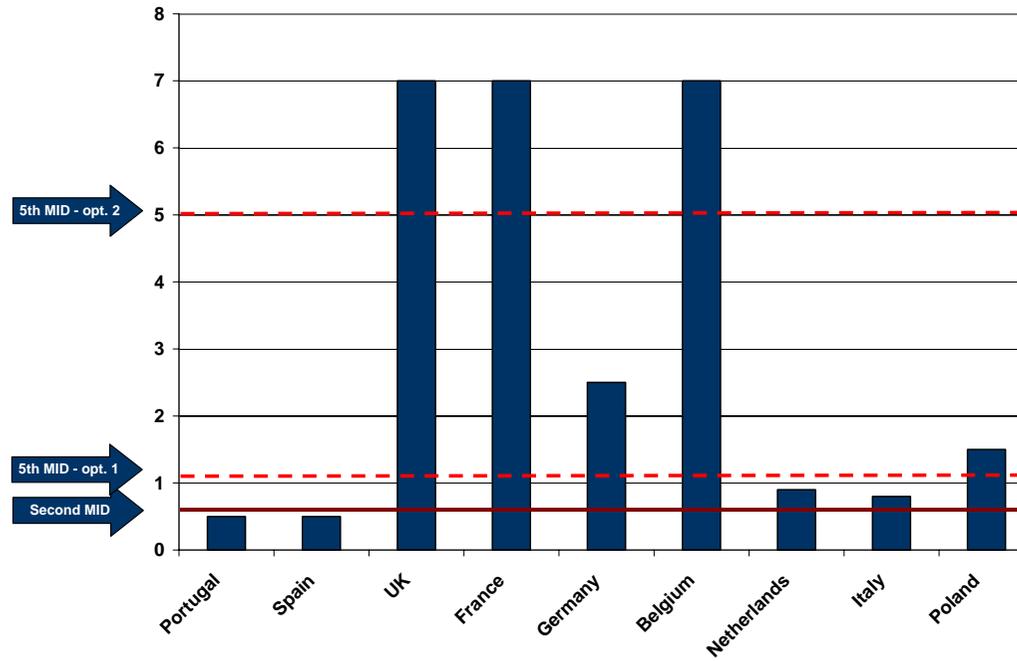
Table 2 – Minimum insurance coverage in selected EU member states

1. Sums insured	Austria	Belgium	Bulgaria	Czech Republik	Denmark	Estonia	Finland	France	Germany	Greece
<i>Minimum sums insured stipulated by law for:</i>										
- Bodily injury	€ 1,090,093	Unlimited	€15,380/person; €25,633/event	€ 582,006	€ 10,896,117	€ 351,492/person	Unlimited	Unlimited	€ 2.5m/person € 7.5m/event	€ 500,000
- Material damage			€ 10,253	€ 161,668	€ 2,152,331	€102,252	€ 3,300,00	€ 460,000	€ 500,000	€ 100,000
Sums commonly applied	€ 3m € 6m € 10m		As above	€ 582,006/€ 161,668 (50%) € 1.6 m/€1.6m (50%)	As above			Unlimited	Unlimited (bodily) varies for material	Unlimited; € 8m/person
2. Obligatory insurance	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
% of uninsured vehicles	0.50%	1%	40%		less than 1%		0.01%	Less than 0.5%	0.50%	3%
3. Claims handling										
<i>Direct claims</i>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<i>Direct claims settlement</i>	No	Yes	No	No	No	No	Yes	Yes	No	Yes
- for bodily injury claims up to		n.a.					Unlimited	n.a.		n.a.
- for material damage claims up to		€ 7,500					Unlimited	€ 6,100		€ 6,000
Share of participating insurers		98%						99%		90%

1. Sums insured	Hungary	Ireland	Italy	Netherlands	Poland	Slovakia	Slovenia	Spain	Sweden	UK	
<i>Minimum sums insured stipulated by law for:</i>											
- Bodily injury	€ 1,233,203	Unlimited € 114,276 BI: unlimited PD: Unlimited (private) € 114,276 (commercial)	€ 774,685	€ 907,560	€ 600,000	€ 454,350/person € 119,566	€ 153,663 € 102,293	€ 350,000/person n		Unlimited	
- Material damage	€ 2,055,338								€ 100,000	€ 33,198,694	€ 408,030
Sums commonly applied	As above				€ 2,268,901	As above			Unlimited		As above
2. Obligatory insurance	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	
% of uninsured vehicles	3.00%	10-13%	1%	0.018	0.015			0.045	1.00%	5%	
3. Claims handling											
<i>Direct claims</i>	Yes	No	Yes	Yes	No	Yes	Yes	Yes	No	No	
<i>Direct claims settlement</i>	No	No	Yes	No	No	No	No	Yes	Yes	No	
- for bodily injury claims up to			n.a.					n.a.			
- for material damage claims up to			Unlimited					€ 96,000			
Share of participating insurers			0.95					95%	100%		

Source: Munich Re (2003)

Figure 3 – New minimum insurance coverage according to the Fifth Motor Insurance Directive



Source: Partner Re (2006)

6 Countries most concerned

In the previous sections, we have described the main differences in the legal treatment of personal injury and damage to property when resulting from a road traffic accident. A major purpose of this study is to address the specific issue of cross-border road traffic accidents. Accordingly, the first issue we deal with in this section is whether available data suggest that the number of cross-border road traffic accidents is really significant.

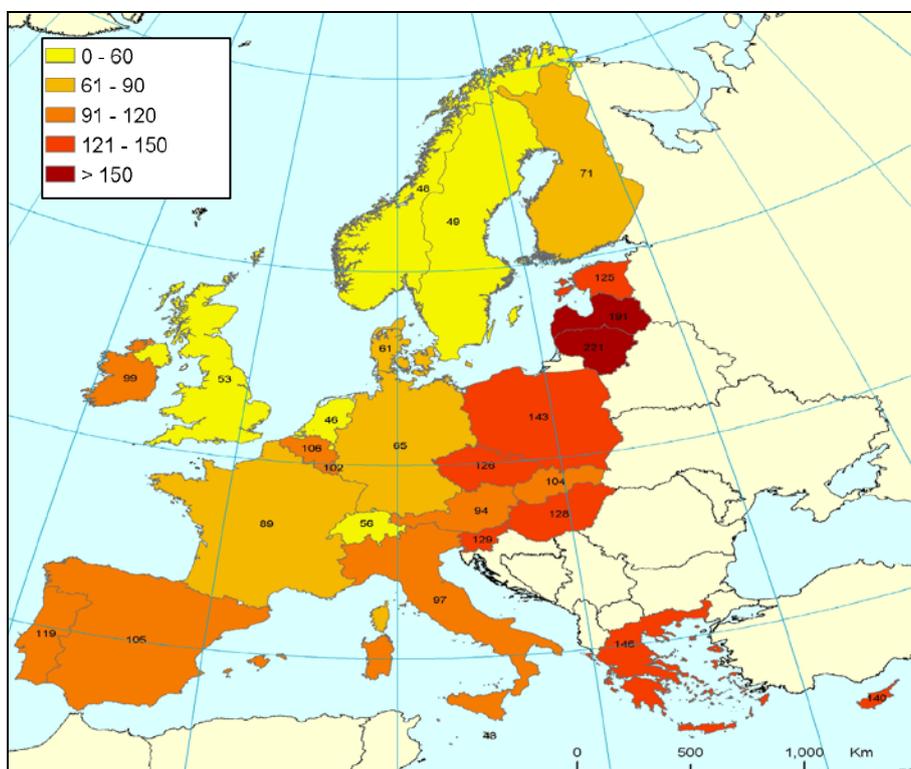
In this section, we assess which countries can be deemed as being most concerned by the issue of cross-border road traffic accidents. In doing so, we interpret countries most concerned as those countries where the problem of undercompensation of victims of cross-border road traffic accidents is more likely to emerge, if the *lex loci delicti commissi* is applied. We then selected those countries based on the following criteria:

- the likelihood that a non-resident citizen will be involved in a road traffic accident in a given country; and
- the likelihood that, if an accident occurs in a given country, the victim will be a non-resident person.

6.1 Likelihood of an accident occurring

Figure 3 below shows the number of road fatalities per million inhabitants in the EU25 member states in 2005, according to the Eurostat CARE database. In addition to the data reported in Figure 3, we add figures from the two new entrant member states. In 2004, for every million inhabitants Bulgaria had 121 killed on a road accident, whereas Romania had 109.¹⁰⁹

Figure 4 – Road fatalities per million inhabitants in the EU25, 2005



Source: Eurostat - CARE (2006) and national databases

¹⁰⁹ See OECD, *Country Reports on Road Safety Performance*, September 2006.

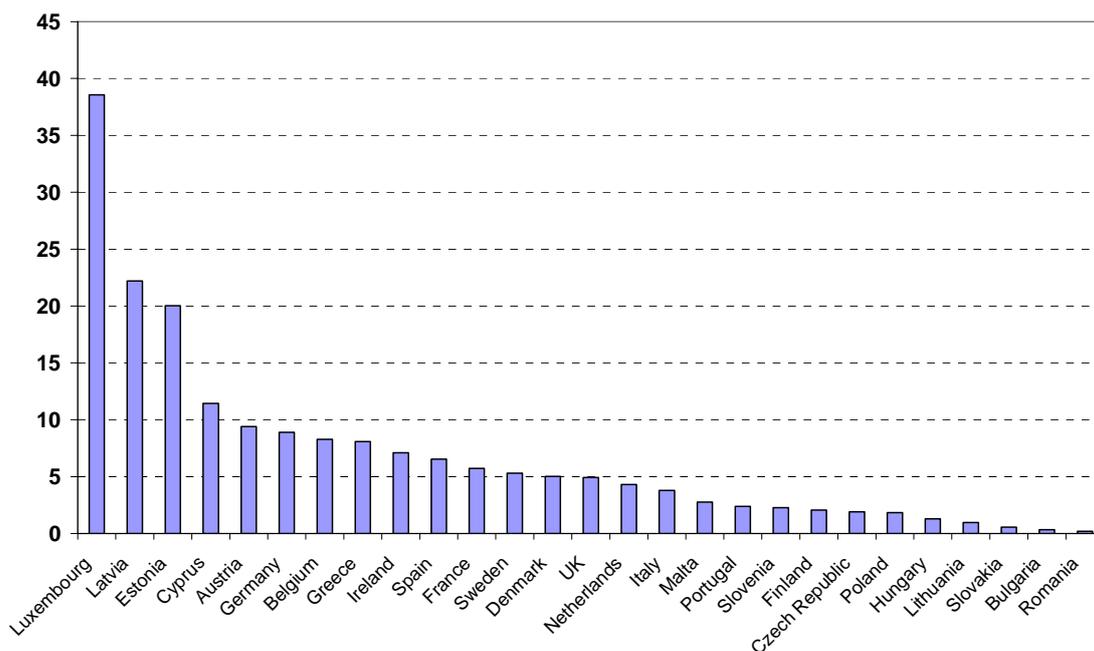
Based on these indicators, Lithuania and Latvia would be the countries most concerned, with Poland, Greece and Cyprus exhibiting very high rates. In Western Europe, Portugal, Spain and Belgium exhibit a high incidence of road fatalities. As shown in the figure, countries where the damage award is normally higher – such as the Scandinavian countries, the Netherlands, UK, Ireland, Germany and France – such as also exhibit a lower riskiness for non-resident drivers.

6.2 Flows of non-resident citizens in the EU27

Countries most concerned by the problem of cross-border road traffic accidents are, of course, those countries with a greater stock and flow of non-residents, be that for temporary stay, tourism or business travel reasons. In the previous section, we addressed the question: how likely it is that a non-resident travelling in an EU member state is victim of a road traffic accident? To the contrary, in this section we tackle a different issue: how likely is it that an accident in a given EU member state involves a non-resident person as victim?

Looking at available data on the stock and flow of non-nationals is the only possibility to answer this question. Figure 4 below illustrates the percentage of non-nationals on total population in the EU27. Countries such as Luxembourg, Latvia and Estonia exhibit high percentages of non-nationals, with Cyprus, Austria, Germany Belgium and Greece also deserving mention.

Figure 5 – Stock of non-nationals in the EU27, 2004

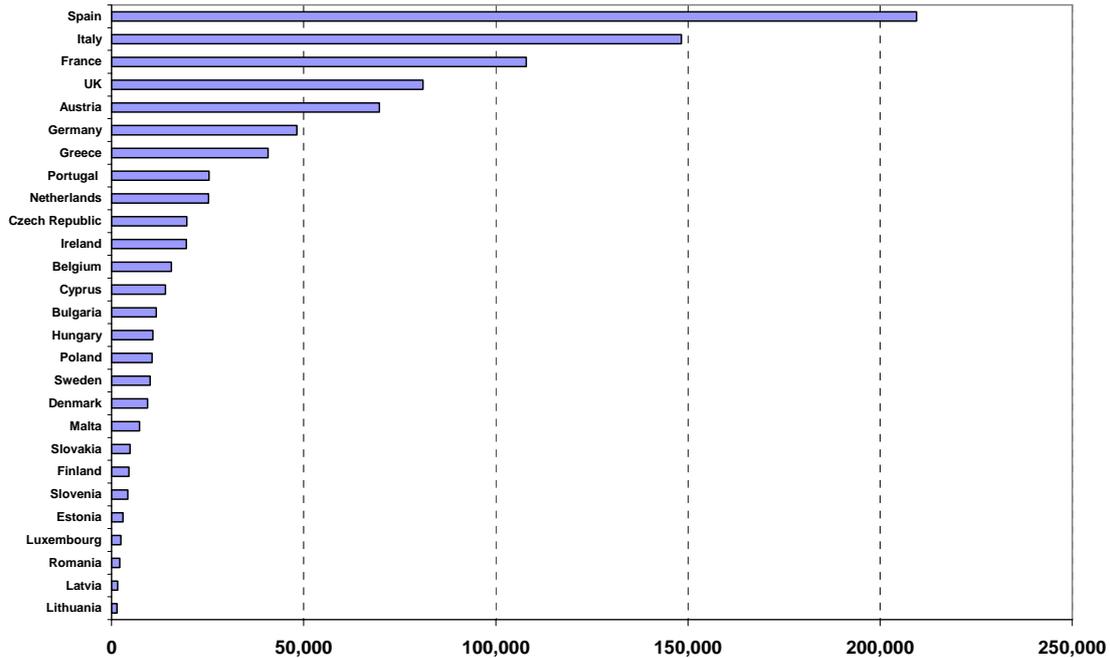


Source: Own elaboration on GEDAP, *Foreign Population Overview*, 2000 - 2004.

However, looking only at the stock of non-nationals would provide only a partial picture of the problem at hand. Data on nights spent by non-residents in EU member states also provide a picture of the flow of tourists and business travellers in each EU country, and thus provide information on the relative presence of non-residents in each of the EU27. Figure 5 below provides data from Eurostat (2007).

As is shown in the picture, Spain, Italy, France, Austria, UK, Germany and Greece are countries that host the highest number of tourists, here expressed in number of nights. As already recalled, these figures include both business and leisure travellers.

Figure 6 – Nights spent by non-residents in the EU27 (thousands)



Source: Eurostat pocketbook, *Tourism Statistics* (2007)

Finally, in order to establish a relationship between the country of destination and the country of origin, we show in Figure 6 the most preferred destination for most of the EU member states. Again, Spain is the preferred destination for most nationals of Northern European countries. As reported by Eurostat (2006), citizens of 9 of the 23 countries for which data were available preferred Spain as their main destination, with percentages ranging between 36% for Portugal and 12% for Denmark. French, Portuguese and many Northern European citizens preferred Spain as their main destination abroad. France was the favourite destination for travellers from four countries, Germany for tourists from three and Italy for citizens of two European countries. Czech Republic and Slovakia prefer each other as their respective main destinations, though at a low percentage.

Figure 7 – Country of preference by outbound tourists per country



Source: Eurostat, *Inbound and Outbound Tourism in the European Union*, Statistics in Focus, 5/2006.

6.3 Likelihood of disparities in damage award

Based on the evidence reported in the previous sections, we are able to identify those countries that raise most significant concerns in terms of the likelihood of significant differences in the *quantum* of damages between the *lex loci* and the *lex damni*. These countries certainly include the Baltic States, Hungary, the Czech Republic, Slovakia, Slovenia, Bulgaria, Romania and Poland. For example, in Hungary or Czech Republic, the indemnity for personal injury or death is not likely to exceed 10% of what a UK resident would be awarded in his or her own country.

However, also in other countries, such as Spain, Portugal, Greece, Cyprus, Belgium, Italy and the Netherlands the *quantum* of damages is likely to be lower than what a UK, a German or French victim would be awarded in his/her own country. Among these countries, some are countries with a relatively high rate of road fatalities and a large number of inbound visitors. For this reason, these countries are more likely to qualify as countries “most concerned” for the purposes of this study.

6.4 Countries most concerned

Based on the analysis of the EU27 on the three criteria identified – road safety, non-resident inflow and likelihood of low damage award – we have built a relative ranking of countries in order to observe the relative likelihood of a problem of cross-border road traffic accident. This ranking is illustrated in table 1 below.

Table 3 – Average ranking

	Road safety	Stock of non-nationals	Inbound tourism	Average ranking
Greece	3	8	7	6.00
Cyprus	5	4	13	7.33
Spain	14	10	1	8.33
Austria	19	5	5	9.67
Latvia	2	2	27	10.33
Belgium	13	7	12	10.67
France	20	11	3	11.33
Germany	22	6	6	11.33
Estonia	9	3	23	11.67
Italy	18	16	2	12.00
Portugal	11	18	8	12.33
Ireland	17	9	11	12.33
Czech Republic	8	21	10	13.00
Luxembourg	16	1	24	13.67
UK	24	13	4	13.67
Poland	4	22	16	14.00
Hungary	7	23	15	15.00
Slovenia	6	19	22	15.67
Bulgaria	10	26	14	16.67
Netherlands	27	15	9	17.00
Lithuania	1	24	26	17.00
Denmark	23	13	18	18.00
Sweden	25	12	17	18.00
Slovakia	15	25	20	20.00
Malta	26	17	19	20.67
Finland	21	20	21	20.67
Romania	12	27	25	21.33

Source: own elaboration

Table 1 reports the average score of each of the EU27 for the criteria we have illustrated in previous sections. For each criterion, a score of “1” would mean that the country at stake is the most “concerned”; whereas a score of “27” indicates the least concerned. As shown in the right column of the table, the countries most concerned by the problem of cross-border road traffic accidents are Greece, Cyprus, Spain and Austria.

However, the legal regime and court practice in the four countries differ in many respects.

- In Austria courts seized to assess the *quantum* of damages have to take into account what the victim would have been awarded in his/her own country. This is not the case in Greece, Cyprus and Spain. Available statistics on traffic accidents in Austria show a decrease from 2004 to 2005, from 878 to 768. Also injury accidents decreased from 42,657 in 2004 to 40,896 in 2005. No updated estimates are available as to the number of accidents that involve non-resident victims.
- In Spain, the introduction of the LOSSP has resulted in many cases of poor compensation of loss of earnings, and reliance on the principle of *restitutio in integrum* is questioned by some commentators, give the wide application of standard tables which take only partially into account the actual and future income of the victim. In addition, pain and suffering is not categorised separately, and accordingly often insufficiently compensated.
- In Greece, non-pecuniary losses are strictly limited to bodily injuries; this leads to a lack of compensation for grief and suffering, which in turn jeopardises the full restoration of the victim’s condition before the accident.
- In Cyprus, the award of general damages has been increasing overtime, as observed in the case *Kyriakos Mavropetri v. Georgiou Louca*.¹¹⁰ However, special damages – as confirmed in *Emmanuel and Another v. Nicolau and Another*¹¹¹ – are not inferred from the nature of the act,

¹¹⁰ *Kyriakos Mavropetri v. Georgiou Louca* (1995) 1 CLR 66, p. 74.

¹¹¹ *Emmanuel and Another v. Nicolau and Another* (1977) 1 CLR 15, p. 34.

and must be “claimed specially and proved strictly”.¹¹² These damages include medical expenses and expenses occurred after the victim’s death.

Overall, the main problem in the four countries seems to lie in the award of non-pecuniary damages, more than in the compensation for pecuniary loss. Apart from this, especially in Greece and Cyprus the level of award will reflect the relatively low standard of living in these countries compared to Northern European countries such as the UK, France, Germany, Belgium and the Netherlands. In three of the four countries (excluding Austria), the average income of a non-resident victim is not taken into account by courts, which can lead to undercompensation – i.e. failure to realise a *restitutio in integrum* – whenever the victim is resident in a country with a higher standard of living.

¹¹² See Neocleous, A. (2000), *Introduction to Cyprus Law*, Yorkhill, at 573.

7 Assessment of the economic impact of selected options

This section contains an assessment of the potential economic impact of selected alternative options aimed at solving the problem of undercompensation of foreign victims in cross-border road traffic accidents. We discuss the principle of *lex loci delicti commissi* as the standard choice of law in case of cross-border road traffic accidents in EU member states, and potential alternative choices of law. In addition, we compare this solution with alternative options, which can solve – at least in principle – the problem of undercompensation of victims of cross-border road traffic accidents, especially when such accidents take place in one of the countries most concerned.

Before we illustrate the results of our analysis, it is worth recalling that the main problem tackled by this study is the undercompensation of foreign victims: in other words, we will not directly address the cases of personal injury suffered by individuals in their home country and caused by a foreign driver, as undercompensation in those cases is, in principle, prevented by the Green Card system to which all EU member states adhere.¹¹³

We compare the following options:

- *Option 1: judges apply the law of habitual residence of the victim to assess the quantum of the claim;*
- *Option 2: judges apply the ‘principle of ubiquity’;*
- *Option 3: judges rely on common principles for the assessment of damages;*
- *Option 4: injury is covered through the third-party liability insurance of the victim;*
- *Option 5: creation of a European compensation fund for victims of cross-border road traffic accidents.*

As shown in the previous sections, in many civil law countries, the choice of a strict liability rule for road traffic accidents makes up for an exception to the general principle of fault-based liability for torts (*lex aquilia*). This choice results most often in a reversal of the burden of proof, coupled with a contributory negligence and more or less stringent escape clauses, sometimes even requiring a *probatio diabolica*, or even the impossibility of escaping liability when the accident was caused by *force majeure* or by events that were beyond the direct control of the offender. These rules are the results of a trade-off between the need to secure that victims of road traffic accidents are fully compensated in the event of a personal injury, and the need to ensure that traffic participants face efficient incentives to behave diligently, by internalising (almost) all the negative externalities arising from their negligent behaviour.¹¹⁴

Typically, strict liability rules such as those applied in France or – to a lesser extent – Germany and Italy award a priority to the first objective: by prescribing that victims should be compensated even when the tortfeasor was not at fault, these rules tilt the balance in favour of the victim, especially if *restitutio in integrum* is applied when assessing the *quantum* of damage award. A strict liability rule, by partly lifting up the victim’s burden of proof, facilitates access to justice for victims of road

¹¹³ The Green Card system, created in 1953 and covering 44 countries, has a double function: 1) to ensure that Third Party victims of road traffic accidents do not suffer from the fact that injuries or damage sustained by them were caused by a visiting motorist rather than a motorist resident in the same country; 2) to avoid the need for motorists to obtain insurance cover at each of the frontiers of the countries which they visit. For further information: <http://www.cobx.org/public/NXhomeFre-Public.htm>.

¹¹⁴ On this aspect, see for example, Michaels R. (2006), *Two Economists, Three Opinions? Economic Models for Private International Law – Cross-Border Torts as Example*, in Basedow, Jurgen and Kono, Toshiyuki, Eds. *An Economic Analysis of Private International Law*, pages 143-184. The author points out that the application of the law of the place of conduct (*lex loci*) is usually justified “with the injurer’s interest: he knows where he acts and can be expected to know and comply with the law of that place, but not with the (potentially multiple) laws of places where his conduct may cause injuries”. Conversely the application of the *lex damni* focuses on the protection of the victim: “unlike the injurer, the victim cannot control for conducts and effects, so he should be able to rely on the protection of his home law”.

traffic accidents, and reduces costs for the administration of justice. In turn, overly strict rules can prove over-deterrent for potential offenders, who will be called to compensate damage even if they were not at fault.¹¹⁵

As a matter of fact, cross-border traffic accidents impose a series of costs on the various parties involved. More specifically, victims and their relatives sustain medical expenses and other costs such as the loss of present and future income and psychological damages; insurance companies and insured motorist instead, bear the cost of cross-border accidents in terms of damage compensation and insurance premia; finally, the judicial system and medical experts also bear some costs in order to handle the cross-border cases that are referred to them. As it will emerge from the analysis below, these cost categories are potentially in conflict and reducing one type of costs may have a negative impact on another cost category. For example, reducing costs for victims might increase expenditure for potential tortfeasors and vice versa, and this result is strongly influenced by the choice of the applicable law to establish the *an* and the *quantum* of damages. In the law and economics literature, the most efficient rule of law is the rule that minimises the sum of all categories of costs; in this respect, efficiency is one of the two overarching goals of accident law, the other being justice – i.e., fair compensation.

A full description of the main findings of the law and economics literature on road traffic accidents and corresponding liability rules would fall outside the scope of this study¹¹⁶: however, it is worth recalling that such literature clarified the nexus existing between the type of liability rule chosen by the legislature, the availability of significant insurance coverage, and the amount of damages awarded by judges. More in detail, it can be fairly stated that strict liability rules, which mostly aim at securing victims' compensation, should not lead to over-deterrence as regards the behaviour of potential traffic offenders, especially when it comes to bilateral accidents. This may arguably lead to lower damage awards if compared to a full-fledged fault-based liability rule, where tortfeasors pay damages only when their behaviour was below the threshold of negligence. For example, the possibility of awarding exemplary damages in the UK or Ireland is coupled with damage awards which normally lie above the average compensation in other jurisdictions where only *restitutio in integrum* is applied – e.g. France, or Germany.

At the same time, both damage awards to victims of road traffic accidents and insurance coverage of resulting damages significantly depend on the relative standard of living in the country concerned. A full convergence of insurance premia in the EU27 would thus not be feasible: typically, in some Central and Eastern European countries, insurance premia are much lower than in most Western European member states, reflecting the relative differences in the standard of living, and this despite the average riskiness of roads.

The above considerations lead to two main conclusions: the type of liability rule, level of insurance premium for motor third-party liability and extent of damage awards are closely interrelated, and are functional to the sustainability of the overall road traffic system in each country. Separating these three elements is not an easy task, and should be approached with extreme care.¹¹⁷

In the following sections, we assess the proposed options, with particular focus on their potential to achieve the goal of *restitutio in integrum* for victims of cross-border road traffic accidents and the impact that each option has on the costs sustained by the different parties involved in a cross-border road traffic accident. More specifically, as our main concern is that of ensuring that foreign victims

¹¹⁵ In the law and economics literature, a defence of contributory negligence is normally considered as a desirable integration to strict liability rules, as it provides efficient incentives for the victims to behave diligently.

¹¹⁶ See, e.g. Shavell, S. (1987), *An Economic Analysis of Accident Law*, Harvard University Press; for a concise explanation, see also Skogh, G. (2006), *Coverage of Accidental Damage: First-party versus third-party insurance from a Law and Economics standpoint*, 4th Liability Insurance Forum, Munich, available at http://www.munichre.com/publications/302-02703_de.pdf?rdm=1596.

¹¹⁷ A different case emerges when countries with comparable level of income apply diverging criteria for compensating victims: here, differences in damage awards would simply amount to a “choice of law” problem, and the need to secure full compensation can be dealt with independently of issues related to the local economy.

of road traffic accidents are granted full compensation, the analysis aims at identifying cost-effective ways to fully cover the costs directly sustained by the victim and his/her relatives as a result of the accident. Hence, we estimate the impact that each option exerts on the costs borne by all involved parties, namely insurers and insured motorists, the judicial system and medical experts.

Our analysis takes into account, *i.a.*, the **transaction costs** deriving from the cross-border dimension of the traffic accidents at stake, such as the additional expenses incurred by the involved parties to reach an agreement that reconciles different national legal systems. Moreover, we include in the analysis the **administrative burdens** arising from some of the proposed solutions, in line with Community guidelines on impact assessment. Finally, the analysis will take into account the “**time costs**” linked to each option, *i.e.* the potential time lag between the occurrence of the accident and the compensation of damages to the victim: as a matter of fact it may happen that a considerable amount of time passes between these two events, causing a reduction in the net present value of the awarded compensation.

7.1 *A simplified illustration of a cross-border case*

Before we start assessing the impact of the proposed options, it is worth providing a simplified illustration of what happens between the occurrence of a cross-border accident and the moment of damage compensation. This will allow us to highlight the various elements that influence the chances of reaching full compensation of the damages sustained by the victim.

Following a road traffic accident, the injured party presents a claim to the tortfeasor’s insurer in order to receive damage compensation for the injuries sustained. Once the claim is introduced, the tortfeasor’s insurer has three months time to propose compensation to the victim for settling the case in conformity with the requirements of the *lex loci*.¹¹⁸ If the offer is acceptable for the victim or his/her representatives, the case is settled through the insurance system.¹¹⁹ Conversely, if the victim or his/her representatives find the proposed compensation unfair, the case is litigated in the country where the accident occurred. When this happens, a number of additional factors, such as the difference between applicable legal systems and the need to rely on additional legal and medical expertise, come into play and influence the final outcome of the case. For example, a victim often needs to hire two lawyers, one in his/her country of residence and one in the country where the accident took place, to ensure that his/her interests are correctly represented: these additional legal costs can sometimes be extremely significant, to the extent that a victim may even have an incentive to settle the case even when he/she finds the settlement offer too low. As reported by one consulted lawyer, in some cases legal fees may be higher than the damages awarded and these expenses are seldom fully compensated.¹²⁰

Moreover, referring a cross-border case to the judicial is likely to considerably increase administration costs for all parties involved because of the need to reconcile different legal and medical approaches: as a result, litigation may be much lengthier than settlement, thus causing additional problems and costs for the victim and his/her relatives.

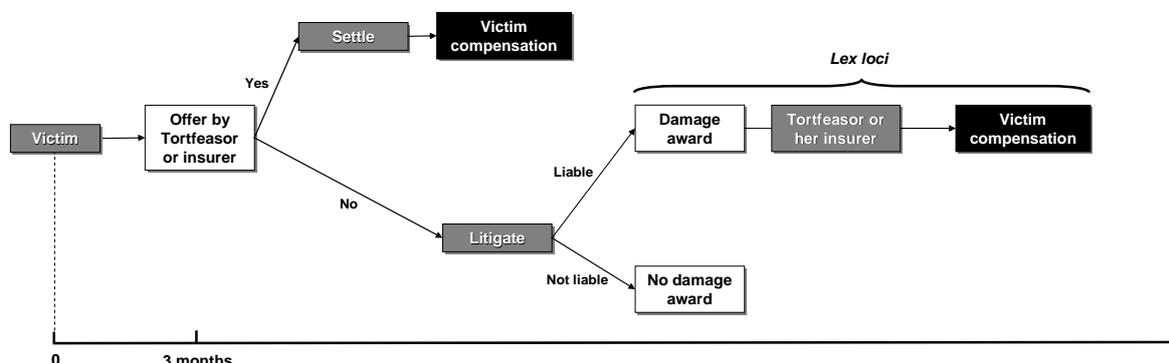
The figure below illustrates the various phases described above.

¹¹⁸ This time limitation is foreseen by the Fourth Motor Insurance Directive.

¹¹⁹ In this respect, the possibility for the injured party to take direct action in his home country against the claims representative of the tortfeasor’s insurer (introduced by the Fourth Directive) represents a tangible improvement in the solution of cross-border cases.

¹²⁰ For example, the fees of the local lawyer are sometimes compensated, while the fees of the lawyer from the country of residence of the victim are seldom taken into account. Some insurance policies foresee the coverage of the legal expenses that may arise after an accident: however, this possibility is not always available and some argue that it may have the unwanted effect of increasing cases of litigation. On this latter aspect, see European Commission, DG Internal Market (2006), *Public Consultation on Motor Insurance: Claims Representatives and Legal Expenses – Results*.

Figure 8 – Different stages of a cross-border case according to the existing system



As reported by some of the consulted stakeholders, and as widely acknowledged also in the empirical literature on torts, the percentage of litigated cases is relatively limited and extra judicial agreements between the parties are often reached in order to avoid complex cross-border trials.¹²¹ In this respect, various factors are likely to influence the victim’s decision to refuse the settlement proposed by the tortfeasor’s insurer and refer the case to the judicial: the difference between the proposed settlement and the damage award that could be obtained if the trial is successful, the probability of winning the trial, and the overall costs of the proceeding, from lawyer’s fees to time costs linked to the expected duration of the trial.

More specifically, the victim’s pay-off deriving from a settlement through the insurance system is given by the difference between the amount of the proposed settlement (S) and the costs incurred (C_s) to reach an agreement with the tortfeasor’s insurer. Conversely, the victim’s pay-off for referring the case to the judicial corresponds to:

$$p(D) - C_c$$

where p is the probability of winning the trial, D is the expected damage award according to the *lex loci* and C_c is the cost of bringing the case to court (e.g., lawyer’s fees, consultation of experts).

Hence, the victim will opt for the judicial solution whenever the latter delivers a higher payoff than accepting the settlement proposed by the insurer, namely when¹²²:

$$p(D) - C_c > (S - C_s)$$

Note that, almost by definition, $D > S$, $p < 1$ and $C_c > C_s$. As a result, as litigation costs skyrocket in cross-border cases, parties will often have an incentive to settle, even if S falls short of *restitutio in integrum*. In addition, when the probability of winning at trial is not high, parties may refrain

¹²¹ Insurers’ representatives claim that 99.9% of the cases are settled amicably between the parties.

¹²² Note that the probability of obtaining the insurance settlement is not indicated as it is equal to 1 (i.e., there is no uncertainty in this solution as the damage award is known *ex ante* and corresponds to the insurer’s offer).

from litigating the case, and will accept even very low settlement offers.¹²³ To the contrary, the severity of the injury often tilts the balance in favour of litigation: cases of severe personal injury resulting in a permanent handicap of the victim are seldom settled before trial, given that the proposed compensation often fails to cover the long term costs of medical care in these situations. Countries such as Finland and Germany face the long term and unpredictable consequences of severe injuries by coupling damage compensation with rehabilitation programmes that gradually decrease the dependency of the victim and thus the burden of the accidents on the economic system as a whole.¹²⁴ However, these solutions are applied at the national level and may not solve the problem of cross-border cases.

7.2 Application of the “*lex damni*” for assessing the quantum

The main goal behind the proposal to mandate that judges apply the “law of habitual residence of the victim” is straightforward: in the context of European integration, and given the overarching goal of ensuring the free circulation of persons, exposing EU citizens to the risk of significant undercompensation for injuries occurring in cross-border road traffic accidents is not acceptable. For such reason, without imposing the full application of the law of habitual residence when it comes to attributing liability, judges seized to calculate damages may be required to consider the legal rule that would be applied to the victim in his/her own country.

This proposal can be interpreted in at least two different ways:

Option 1a Judges apply the criteria and the headings of damage provided for in the victim’s home jurisdiction: in this case, only the procedural steps followed by the judge in calculating the damage would change, thus following the *lex damni*.

Option 1b Judges consider the level of damage award the victim would have obtained had the accident occurred in his/her own country: under this option, judges would have to calculate compensation based on the specific definition of damages in the country of habitual residence of the victim, but also based on the amounts normally awarded in that country for the type of injury suffered.

The two options are very different. As an example, assume that a road traffic accident occurs in country A – where only pecuniary damages are awarded – but the victim *V* has his/her habitual residence in country B – where non-pecuniary damages are awarded, including loss of amenity and mental distress. Under the latter option, judges should be called to calculate the damage according to the more comprehensive definition of damage provided for in country B, where the loss is sustained (*lex damni*), instead of merely awarding pecuniary damages (*lex loci delicti*) as in the former option.

7.2.1 Option 1a

The first option requires that the seized judge knows the details of the legal regime applicable in country *B*, with exclusive reference to the way damages are calculated. This would require, at a minimum, the drafting of a reference handbook for national judges for the purposes of facilitating

¹²³ Also the two-way fee shifting (“English”) rules applied in almost all EU countries can discourage plaintiffs from litigating the case. We do not consider this issue in this study.

¹²⁴ For example, the Finnish approach strongly relies on insurance and is directed to minimize the importance of lawyers and courts in the system. In case of accident the motor liability insurance is the primary payer. This system is coupled with a law on rehabilitation: before deciding what to claim for the permanent loss of income, the potential for rehabilitation of the victim must be evaluated by insurers. Rehabilitation provides an incentive to insurers given that if the victim’s conditions improve, this reduces the long term costs of care. Statistics show that 15% of victim end up earning more after the accident and rehabilitation programme than before the accident. In general 65% of victims find a new occupation. The savings brought about by this system amount to about 159.000 € per rehabilitee. These figures were presented by Janne Jumppanen, Director of the Finnish Green Card Office, during the *Congress on Severe Personal Injuries* Organised by the Institute for European Traffic Law in Paris, on April 20, 2007.

them in applying criteria enacted in foreign legislation; as is widely acknowledged, EU member states apply a “tower of Babel” of legal definitions, and often also identical headings of damages hide widely different notions, interpretations and corresponding awards. There is no such thing as a common language or even a *koiné dialectos* in this field. In addition, medical experts appointed for calculating the damage would have to be trained in assessing types of damages that are not normally calculated in country *A* – for example, loss of amenity. Finally, if country *A* does not allow for compensation of close relatives, judges and medical experts would also have to get familiar with the headings of damages under which such relatives qualify for compensation under the legislation applicable in country *B*. To sum up, costs for the judicial system and medical experts would be increased by this option, while there would still be some room for under or overcompensation of victims if foreign concepts are not correctly applied by the seized judge or if standards of living in country *B* are not adequately taken into account.

A precise estimation of the additional costs generated by this option is difficult to provide; however, some personal injury lawyers reported that the application of the *lex damni* to quantify the damages would result in a small increase of costs for the judicial system and for medical experts.

Under this option, insurance companies would also need to get familiar with foreign concepts in order to propose adequate settlements in cross-border cases. In this respect, the Fourth Motor Insurance Directives introduced the possibility for the victims of an accident occurred abroad to bring legal proceedings against the civil liability insurer in the member state in which they are domiciled (*additional jurisdiction*): as pointed out by some insurance companies, this provision could facilitate the application of the *lex damni*.

The other costs generated by this option are directly linked to damage compensation and to insurance premia paid by motorists: as reported by some members of CEA, cost increases would be relatively limited given that most accidents involve foreign victims from neighbouring countries that often apply similar levels of compensation.¹²⁵ However, the impact of this option would be more significant in countries with lower standards of living, where insurance coverage is lower and damage compensation is sometimes capped by insurance policies.¹²⁶ In principle, a limited increase in the average premium in those countries could solve the problem, as the percentage of cross-border road traffic accidents is estimated to be around 1% of all accidents. Nonetheless, some stakeholders in Portugal, Denmark, Greece and the Czech Republic pointed out that increase in premia may result in higher levels of uninsured driving in some countries.

In any event, as anticipated above, this option would not guarantee that *restitutio in integrum* is achieved when country *A* has a relatively lower standard of living and lower damage awards than country *B*. Being involved in a road traffic accident in country *A* or *B* would still make a big difference for the victim *V*. In addition, the length of proceedings under this option is likely to increase because of complex assessment required from all parties involved, and in particular from the seized judge and medical experts: as a timely settlement is also a component of fair compensation, this aspect should not be underestimated.

These considerations are summarized in the table below.

¹²⁵ CEA (Comité Européen des Assurances) is the European insurance and reinsurance federation. Through its 33 member bodies, including national insurance associations, CEA represents all types of insurance and reinsurance undertakings, be they pan-European companies, monoliners, mutuals or SMEs. CEA represents undertakings which account for approximately 94% of total European premium income.

¹²⁶ As a matter of fact, the cases that are most likely to end up in court under this option are those where the victim lives in a member state with significantly higher standards of living in comparison to those of the country where the accident occurred, or when the tortfeasor’s insurance policy includes caps on damage compensation. As a result, the settlement proposed by the tortfeasor’s insurer would appear unfair to the victim, *i.e.* not in line with the expected damage awards according to the *lex damni*. To anticipate potential future expenses, insurers in countries with lower standards of living or where damage compensation is capped would have to raise premia for insured motorists.

Table 4: Impacts of option 1.a

Costs						Benefits
Judicial costs	Medical experts	Transaction costs	Time costs	Insurance costs	Administrative costs	Potential to achieve <i>restitutio in integrum</i>
Limited increase (need to get familiar with a foreign system)	Limited increase (need to get familiar with a foreign system)	Medium increase (involvement of many players from different systems - information costs)	Significant increase (need to apply a different legal system)	Limited increase. (stronger impact for insurers and insured motorists in countries with lower standards of living or insurance caps)	No impact (no additional administrative structure or burdens)	Not achieved (standards of living in the victim's country of residence are not taken into account)
↑	↑	↑↑	↑↑↑	↑↑		

7.2.2 Option 1b

To the contrary, the second option is more suited to achieving full compensation for *V*, regardless of whether the accident occurred in country *A* or *B*. Also this option, however, creates some concerns.

In terms of administrative costs, judges would not only have to get to grips with existing legislation/caselaw in country *B* for the purpose of correctly applying the corresponding headings of damage; they would also need to consider the relative standard of living of *V* in country *B* in order to successfully determine fully compensatory damages. This, in turn, also applies to medical experts appointed to assess physical injury or mental distress. In addition, also legislation and average awards for close relatives may have to be taken into account, depending on the specific legislation enacted in country *B*. The same type of evaluation would also have to be undertaken by the tortfeasor's insurer in order to propose an adequate settlement. Depending on insurance legislation and practice in country *A*, the impact of such option may be felt mostly by the tortfeasor or by all insured citizens. If sums insured and the terms of policy do not cover the (sometimes extremely) higher costs of having to fully compensate *V*, then additional damages will have to be compensated directly by the tortfeasor and in some cases even by the victim if the former does not manage to cover all damages: as in option 1a above, these are the cases that are most likely to require a judicial solution with a potential extension of the timeframe for solving the case.

If, on the contrary, insurance covers all damages, insurance companies will take into account expected higher costs by increasing insurance premia. The impact of this option on insurance companies would probably be more substantial than under the previous scenario: in particular, if we assume that – also as a result of the new minimum coverage introduced by the Fifth Motor Insurance Directive – insurance companies cover the damage, this may lead to an increase in third-party insurance premia in countries with lower levels of income and damages awarded.¹²⁷ This option, however, would in principle pursue the objective to ensure *restitutio in integrum* for the victim *V*.

In summary, also based on the new rules introduced by the Fifth Motor Insurance Directive, it seems that the application of the *lex damni* for cases of cross-border road traffic accidents, coupled with a need to secure *restitutio in integrum*, would not come without costs and legal problems, nor without expected increases in insurance premia in countries with relatively unsafe roads and (often) low levels of income.

¹²⁷ The explanation lies in the expected level of claims received by insurance companies and the corresponding expected costs for indemnities. An insurance company in country *B*, foreseeing increased costs for compensating damages to foreign victims, will increase the premium accordingly.

Table 5: Impacts of option 1b

Costs						Benefits
Judicial costs	Medical experts	Transaction costs	Time costs	Insurance costs	Administrative costs	Potential to achieve restitutio in integrum
Medium increase (need to get familiar with a foreign system and case law)	Medium increase (need to get familiar with a foreign system and case law)	Medium increase (involvement of many players from different systems - information costs)	Significant increase (need to apply a different legal system and case law)	Limited increase (stronger impact for insurers and insured motorists in countries with lower standards of living or insurance caps)	No impact (no additional administrative structure or burdens)	Fully achieved (except if third party insurer of the tortfeasor or the tortfeasor does not cover all real costs)
↑↑	↑↑	↑↑	↑↑↑	↑↑		

7.3 The ‘principle of ubiquity’

Under the so-called principle of ubiquity, the applicable law is that which is more favourable to the victim as between the law of the place of the harmful event and the law of the place of injury. Under the assumption that EU institutions aim at full compensation of victims of cross-border road traffic accidents, this provision may be taken into consideration. However, under this option:

- The situation of undercompensated victims in countries that award lower damages would remain substantially unaltered compared to the previous option. As a matter of fact, in both cases the most favourable legal regime for the victim (i.e., the *lex damni*) would apply;
- Victims of road traffic accidents in a country with higher level of income and damage awards than their home country would be overcompensated with respect to what they would have obtained in their country of habitual residence;
- Insurance companies in low-damage countries would have to take into account the need to cover significantly greater damage awards, corresponding to cases in which their clients cause damage to victims that have their habitual residence in a country where damage awards are substantially higher, leading to an increase in insurance premia or in the decision not to cover this risk, where possible.

To sum up, we believe that this option would ultimately bring about greater uncertainty, also from the legal viewpoint. First of all, the victim or his/her representative would have to establish which law is most favourable and this may require a thorough study and comparison of two (often very diverse) legal systems. Secondly, once the best system has been identified, the potential uncertainties in the application of foreign legal concepts underlined above would remain if the system is that of the *lex damni* while the seized judge is more familiar with the *lex loci*. Finally, transaction costs coupled with the potential lengthy solution of the case might reduce its potential to achieve fair compensation. For such reasons, we discard this option as being dominated by option 1 above.

One consulted personal injury lawyer suggested that the victim should be free to choose the *forum* for settling the case as this might increase the chances of getting fair compensation: however this approach would have the same shortcomings of the ubiquity principle. In addition, it may lead to forum shopping, arbitrage and overcompensation, and create other inefficiencies in the system, such as the need to increase insurance premia for covering potential excessive transfers from tortfeasors to victims.

7.4 Relying on common principles for the assessment of damages

An alternative option for achieving more satisfactory compensation of victims of cross-border road traffic accidents would imply reliance on a common set of principles for the calculation of the *quantum debeat*, to be agreed upon at EU level. This option would still rely on the *lex loci* for assessing and quantifying damages, but should also reduce differences among levels of compensation within the EU. This latter aspect is consistent with the Charter of Fundamental Rights of the European Union, signed in December 2000, which calls for harmonisation of the protection of civil rights in terms of the available compensatory remedy.

Several sub-options can be considered, including:

Option 3a A European disability rating scale such as the one proposed at the European Parliament in 2003 by CEREDOC with the backing of the Rothley Group. This proposal contained a clinical assessment of the degree of disability that any single injury will cause. Thus, for example, post-traumatic stress disorder (PTSD) is rated as causing between 12% and 20% disability, the amputation of a big toe at 6%, etc. The Annex to the draft Parliament Resolution makes clear that where there is more than one injury the overall rating is not necessarily the sum of individual ratings.

Option 3b A European reference list of damage awards for specific types of injuries. This could be coupled with corrective factors that mirror the relative standard of living, tax and social security coverage in each of the member states;

Option 3c Harmonisation of the level of awards between member states for each type of loss. This option would award priority to achieving uniformity of civil rights enjoyed by all EU citizens, by securing compensation for victims irrespective of their country of habitual residence.

Sub-options 3a and 3c have already been extensively discussed by scholars and practitioners. As regards the European Disability Rating Scale, implementing such an option would take some time, especially since assessment of bodily injury is performed in widely diverging ways in EU member states. As reported by Haque, “personal injury lawyers in the UK will have to markedly re-adjust the way they assess injuries”.¹²⁸ Moreover, according to some practitioners, such a standardised *barème* would fail to take into consideration a person’s unique circumstances, especially as regards pain and suffering and other non-pecuniary damages; accordingly, it was argued that a standardised *barème* would be biased towards compensating injuries that are “medically identifiable”, and would be applied “more on the basis of costs rather than protecting the interests of injured victims”.¹²⁹ However, these critiques do not amount to a complete rejection of the idea of standardising disability rating schemes: they only mean that the exclusive use of such a *barème* would fail to achieve *restitutio in integrum*, and would have to be integrated by additional awards by national judges based on headings of damages that can be compensated under national laws.

Sub-option 3b shares the same limits of sub-option 3a. In addition, it further standardises awards in terms of actual sums of money, adjusted for the standard of living of the victim in his/her own country of residence. This option would reproduce the flexibility of awards obtained under the French *Barème Rousseau* or the Italian tables for the *calcolo a punto*, in which identical disability ratings lead to widely diverging awards in different regions of the same country.¹³⁰ Also in this case, however, *restitutio in integrum* would not be achieved, as the full standardisation of awards for specific types of injuries would not solve the problem of cross-border litigation, nor would allow judges to take fully into account the peculiar interests of the victim.

¹²⁸ Haque, M. (2005), *Harmonisation of personal injury law in the EU*, available at <http://www.crownofficechambers.com/cvs.asp?id=69>.

¹²⁹ See the comments by the Law Society of England and Wales (2004) and those of the Italian Association of Personal Injury Lawyers (2004), both available online at www.dannoallapersona.it.

¹³⁰ See, for Italy, Cass. 18/9/95, Sez. III, N°9828.

Sub-option 3c also has to be discarded, as it would not achieve the goal of *restitutio in integrum* if not “on average”, contrary to any principle of corrective justice. As was observed by a commentator, such an option would “disregard the inherent diversity in each member state arising from different standards of living, taxation and social security systems” and “would achieve relative inequality rather than relative uniformity”.¹³¹

In summary, none of the three sub-options above would ensure decisive progress towards the full compensation of victims of road-traffic accidents, especially if such common principles are compulsory. To the contrary, the adoption of a non-binding *barème* may provide a useful reference for lawyers and judges wishing to attribute a disability rating to certain types of bodily injuries. Such an assessment would still need to be coupled with existing legal provisions to allow a careful consideration of the peculiarities of each case. In addition, adopting common principles would not automatically guarantee that such principles are always uniformly interpreted and applied across member states: hence, a risk of unfair compensation is inherent to this solution.

On a general note, the establishment of common principles for assessing damages would undoubtedly raise costs for the judicial system and for medical experts in the short term, as the *barème* would have to be agreed upon at the EU level and subsequently adopted by each national system.¹³² In the long run, cost patterns would probably stabilize and decrease significantly as soon as judges and medical experts automatically refer to the *barème* to assess damages. Consulted stakeholders could not quantify the magnitude of those additional expenses, as the latter would mainly depend on the system that would be adopted: however, the majority confirmed the probability of a short term increase, followed by a decrease in the long term. Finally, the judicial system and medical experts should foresee some additional long-term costs for updating the *barème* whenever living conditions or medical possibilities to treat victims change overtime.

Conversely, the adoption of a *barème* would have positive impacts on insurers and insured motorists, as the application of relatively uniform and predictable criteria to assess damages would facilitate the ex-ante evaluation of overall insurance costs in the case of cross-border road traffic accidents. As pointed out by some members of CEA, this solution may also harmonize the compensation of non pecuniary damages and ensure an equal treatment of victims in the EU.¹³³ Regarding the quantification of impact, responses ranged from no significant variation to a possible 10% to 30% increase in costs for insurance premia depending on the basis of quantification established by the common principles.

Relying on common principles for the assessment of damages could potentially result in reduction of transaction costs, given that all parties involved would use the same approach to evaluate damages. This in turn may have a positive impact on the timeliness of compensation, as the existence of common principles creates an incentive for the tortfeasor’s insurer to propose a settlement in line with the expectations generated by the *barème* and thus close the case shortly after the accident. Even when the proposed settlement is not satisfactory and the case is referred to court, the use of common principles is still likely to accelerate the solution of the case.¹³⁴ However, as stated before, complex and severe cases would probably be penalised by the adoption of common principles and a judicial solution would still remain the best means to ensure a fair compensation of the victim in such cases. Hence, all cost and time reductions generated by this option should not

¹³¹ Haque (2005), *cit.*

¹³² In this respect the European Disability Rating Scale could serve as a starting point but would still have to be refined in order to overcome the limits highlighted above.

¹³³ One of the consulted personal injury lawyers pointed out that the system would still be unfair and difficult to apply if the common principles are only introduced for cross-border cases and not for national ones. This would lead judges to apply different criteria each time within the same forum, if the link between this option and the applicable national law is not clearly established *ex ante*.

¹³⁴ Besides the cases of unfair settlement proposals, victims may have an incentive to refer the case to court whenever the *lex loci* foresees higher damage compensation than the one deriving from the application of the *barème* and the case law of the *forum* at stake indicates that there is a high probability to win the case.

only be confronted with the initial set up costs for the judicial and medical experts but also, and above all, with the potential that this solution offers in terms of achieving *restitutio in integrum* for victims of cross-border accidents.

These considerations are summarised in the table below.

Table 6: Impacts of option 3

Costs						Benefits
Judicial costs	Medical experts	Transaction costs	Time costs	Insurance costs	Administrative costs	Potential to achieve restitutio in integrum
<p>Significant increase <i>in the short term and potential need for adjustments.</i></p> <p>Significant decrease <i>in the long run</i></p> <p>↑↑</p>	<p>Significant increase <i>in the short term and potential need for adjustments.</i></p> <p>Significant decrease <i>in the long run</i></p> <p>↑↑</p>	<p>Low <i>(all involved parties rely on common principles)</i></p> <p>↓</p>	<p>Low <i>(use of common principle, even for cases referred to the judicial)</i></p> <p>↓</p>	<p>Slight increase <i>(in countries with lower insurance coverage. In some cases premium increase of 10%-30%)</i></p> <p>Long run reduction of settlement costs</p> <p>↑</p>	<p>No impact <i>(no additional administrative structure or burdens)</i></p>	<p>Not fully achieved, <i>(especially for non pecuniary damages)</i></p>

7.5 Coverage through the third-party liability insurance of the victim

In previous sections, we often hinted at the decisive role insurance can play in the compensation of damages for torts. The law and economics literature has extensively debated the relative merits of achieving compensation through third-party or first-party insurance as opposed to traditional tort law remedies.¹³⁵ A potential option for achieving full compensation of victims of cross-border road traffic accidents may rely on the role of the third-party insurer of the victim. Reliance on the first party insurer of the victim would also be a possibility: however, first party insurance coverage is neither extremely well-spread nor compulsory in European Member States. Conversely, there are higher chances that potential victims are covered by third-party liability insurance especially in the framework of the Motor Insurance Directives.

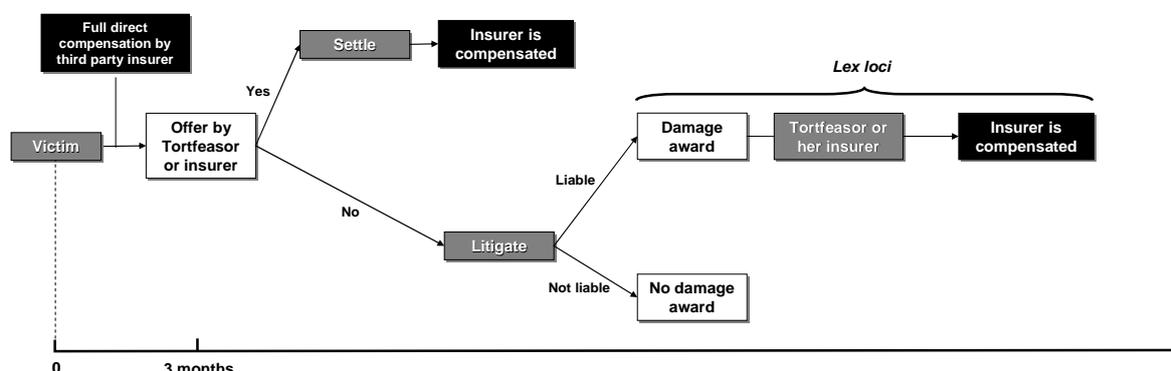
On the basis of these considerations, the proposed option would be based on a thought experiment relying on the following assumptions. First, cross-border road traffic accidents reportedly represent less than 1% of road traffic accident Europe-wide, and are estimated at 2% in countries with substantial outbound tourism (e.g. Germany). Secondly, such accidents have a greater likelihood of occurring in countries “most concerned”: in at least three of these countries (Spain, Greece, Cyprus) the level of damage award is normally lower than in countries such as the UK, Germany, France, Belgium or the Netherlands; but greater than awards in most of the new member states.

According to the proposed option, the third-party insurer of the victim would initially cover the expenses for damages suffered after the accidents and then would have a subrogation right on the third-party insurer of the tortfeasor or, if the latter is unknown, rely on the system for the coverage of accidents caused by uninsured vehicles in the country where the accident took place. This approach would not alter the existing regime based on the *lex loci* for assessing damages; at the same time, however, the victim would be compensated as if the accident had occurred in his/her country of residence.¹³⁶ Figure 8 below shows the sequence of actions and payments under this option.

¹³⁵ See again, Skogh (2000), *cit.*

¹³⁶ One stakeholder pointed out that this approach may be in contrast with the victim’s right to take direct action against the insurance company of the tortfeasor. In fact, the proposed option would not undermine this right but would rather

Figure 9 – Direct compensation and subrogation by the victim’s third-party insurer



Based on these considerations, one could assume that the costs for the third party insurer of the victim having to secure coverage of losses arising from cross-border road traffic accidents would not be substantial, and could be recovered either through a generalised small increase in premium levels (*pooling solution*), or through the setting of a higher premium for insured persons travelling abroad (*separating solution*).¹³⁷ Such increase in premia would be needed as third-party insurance companies would anticipate the risk of not recovering paid indemnities through subrogation in the victim’s rights against the claims representative of the third-party insurer of the tortfeasor. However, as cross-border road traffic accidents with foreign victims only account for a small percentage of total accidents, increases in premium levels would probably be relatively small and confined to high income countries.

The majority of CEA members expect this option to have a neutral impact on costs and some pointed out that this approach could be more consumer-friendly and the most cost-effective for insurers when it comes to settle claims. Only two respondents anticipated a possible increase of insurance premia (up to 30% in one case), depending on the specific insurance policy at stake.

Some insurers in Spain, Portugal and Greece suggested that a combination of this option with the adoption of common principles may further facilitate the compensation of cross-border damages: however, this approach would introduce the risk of undercompensation, a pointed out before, in particular for non pecuniary losses.

Transaction costs would be very low if this option is adopted, and certainly lower than the status quo, as the majority of cases would be entirely handled by the insurance system. Moreover, damage compensation would be granted more rapidly than what is currently happening, given that victims would be directly compensated by their own third-party insurer in their home country.¹³⁸ As a

provide an additional guarantee for the victim in those cases where the tortfeasor’s insurer would not compensate the real amount of the damages sustained because the insurance policy is capped. A similar case arises in consumer law, for products liability (Directive 85/374/EEC). The fact that the consumer can seek contractual redress from the seller of a good, although the (non-contractual) liability is attributable to the producer, does not undermine the consumer’s general right to damage compensation.

¹³⁷ See, *i.a.*, Rothschild, M. and Stiglitz, J. (1976), *Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information*, The Quarterly Journal of Economics, Vol. 90, No. 4, pp. 629-649

¹³⁸ Critical situations may occur if the victim’s insurance policy is capped and offers a limited coverage of damages sustained in comparison to what could be awarded according to the *lex loci*. The likelihood of a case being referred to court in the country where the accident occurred in order to obtain greater damage award will mainly depend on the probability of winning the trial.

result, the impact of the cross-border dimension would be minimised for the victim, given that once the case is settled, differences between regimes and damage headings would be solved internally by the insurance system.

One consulted personal injury lawyer pointed out that litigation costs may increase with this option, as the victims would first have to establish their damages with their third-party insurer and the latter would subsequently have to do the same with the insurer of the tortfeasor. We expect this problem to be relatively limited for cases involving victims from neighbouring countries with similar insurance coverage; when differences in coverage are present, the degree of litigation will essentially depend on how damages are compensated by the third-party insurer of the victim. Moreover the new insurance requirements introduced by the Fifth Motor Insurance Directive should minimise the differences in damage compensation across Europe.

Some stakeholders mentioned that insurance companies have undergone several re-adaptations of their *modus operandi* in order to comply with the Fourth Motor Insurance Directive. The impact of such changes in terms of costs is not fully known yet and it is likely that adding a new requirement, such as the creation of a mutual compensation system in the case of cross-border road traffic accidents, would require some time to be absorbed by insurance companies, especially in terms of administrative costs. On the other hand, in some countries the proposed option already exists, and several insurance companies have established mutual compensation mechanisms: this constitutes a positive signal regarding the feasibility of the proposed option in terms of transaction costs both for insurers and insured motorists.

Further impacts of this option would be:

- a) the approximation of *restitutio in integrum* for victims of cross-border road traffic accidents with the exception of pedestrians and cyclists, who would still not be covered by this option. However, a combination of this option with the provisions of the Fifth Motor Insurance Directive could alleviate this problem;
- b) the reduction of the costs of administering justice – as widely acknowledged in the law and economics literature, an insurance system is normally less costly to administer than a legal regime based on tort law; and
- c) national judges and medical experts would not have to get to grips with compensation criteria used in other jurisdictions.

Table 7: Impacts of option 4

Costs						Benefits
Judicial costs	Medical experts	Transaction costs	Time costs	Insurance costs	Administrative costs	Potential to achieve restitutio in integrum
Very low (reliance on insurance system)	Very low (reliance on insurance system)	Very low (reliance on insurance system and minimisation of litigation costs)	Very low (reliance on insurance system and direct compensation by third-party insurers)	Slight or no increase (up to 30% depending on the insurance policy at stake, and mostly in high-income countries)	Slight increase (set-up and maintenance of the mutual compensation system)	Fully achieved (Pedestrians and cyclists will be covered only with Fifth Motor Insurance Directive.)
↓↓	↓↓	↓	↓	↑	↑	

7.6 Creation of a European compensation fund for victims of cross-border road traffic accidents

A final option to be considered is the creation of an EU-wide fund aimed at ensuring adequate redress for undercompensated victims of cross-border road traffic accidents, funded through contributions raised from insurance premia (the “EU Fund”).

As stated in the introduction, the expected magnitude of the total direct and indirect costs of cross-border accidents in the EU is likely to be around 1.04 billion euros per year. Hence, in the worst case scenario (i.e., if none of the cases can be settled by other means) the EU Fund should cover that amount. However, this figure should be narrowed down by excluding the cases that are successfully settled through the insurance system and by considering that even when a case is brought to court, part of the damages awarded according to the *lex loci* are compensated by the tortfeasor’s insurer or directly by the tortfeasor. As a consequence, the EU Fund would only be used to cover the remaining uncompensated damages, for example when damage awards in the victim’s country of residence are much higher than in the country where the accident occurred. On the basis of anecdotal evidence gathered among consulted stakeholders, one could assume that the percentage of uncompensated damages amounts to 45% of the total direct and indirect costs of cross-border road traffic accidents, i.e. to about 468 million euros.

An estimation of the impact on insurance premia can be built as follows¹³⁹: first, there are approximately 250 million vehicles in the EU27, which are all in principle subject to compulsory third-party insurance. As a result, we assume that there are 250 million insurance policies, although at widely different conditions and cost. Assume that the average price for an insurance policy is €500. Then, applying a limited 0.8% increase in insurance premia (i.e., € 4) would allow raising the annual sum of 1 billion euros to be devoted to (full) compensation of cross-border road traffic accidents in the worse case scenario. For the reasons stated above it is quite probable that a much smaller increase would be sufficient to cover the very limited percentage of cases where no alternative settlement is possible. As suggested by other commentators a moderate increase of 0.5% corresponding to an average €2.5 would already offer an annual amount of 625 million euros.¹⁴⁰

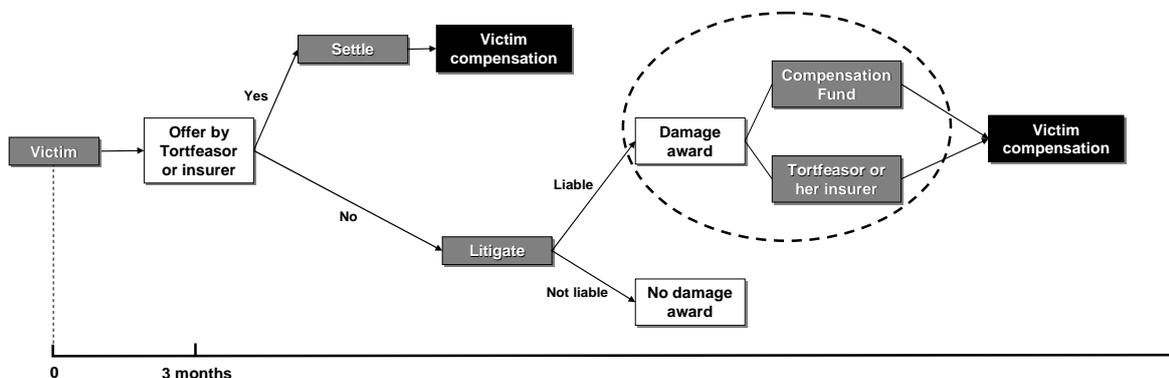
The “EU Fund” would ensure *restitutio in integrum* for victims of cross-border road traffic accidents, given that victims would receive the same amount of damage compensation as if the accident occurred in their home country. Hence, disparities between levels of compensation would remain linked to existing differences in the type and the *quantum* of damages awarded in each

¹³⁹ For this example, see the comment by F. Lione, President of Assinfort Europe, available at http://www.aduc.it/dyn/dilatua/dila_mostra.php?id=82832&L1=10.

¹⁴⁰ Lione F., *cit.*

member state, but all cases of undercompensation due to the cross-border dimension of the accident would be eliminated.

Figure 10 - Functioning of the “EU Fund”

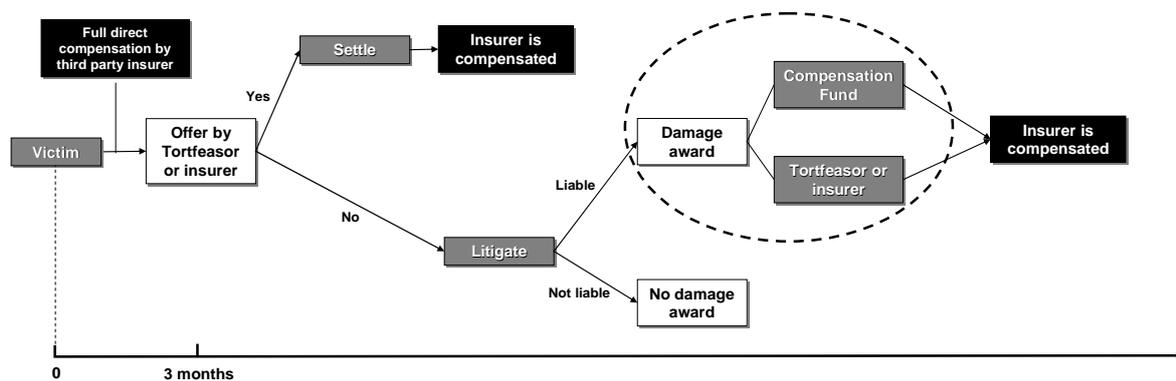


The benefits of the “EU Fund” should nonetheless be compared with the administrative costs of setting up and maintaining such a system. In particular, administrative costs are likely to be very high: not only the “EU Fund” would have to be created, but its functioning mode would also have to be carefully appraised. For example, the different magnitude of damage awards and their link with local standards of living might require a dedicated system to weigh the contribution that insurance companies from different Member States would have to transfer into the fund. Weighting criteria might also be needed to establish the amount of contributions coming from the countries most concerned by cross-border road traffic accidents. Moreover, mechanisms would have to be designed to establish how victims receive awarded damages (lump sums, annuity, etc.) and adequate solutions should be established to deal, inter alia, with cases of fraud or unsatisfactory compensation. As pointed out by many consulted stakeholders this option would be very complex and would introduce inconsistencies with the existing Green Card system and the Motor Insurance Directives. While insurer’s representatives stressed the potential inefficiencies and costs stemming from the creation of an “EU Fund”, personal injury lawyers warned that this option might increase litigation. Finally, this option would not become concretely available in the short term, with a significant delay in the solution of the problem of undercompensation of victim of cross-border road traffic accidents.

This option may be combined with some of the solutions proposed above, potentially alleviating some of the problems highlighted. For example, the “EU Fund” could be easily coupled with options 3 and 4: as a matter of fact, the third-party insurers of the victims would be in a better position to claim compensation from the EU Fund than actual victims, as well as to settle claims within the EU Fund. Hence, the EU Fund could be used mainly to compensate third-party insurers whenever their right of subrogation *vis-à-vis* the third party insurer of the tortfeasor does not guarantee a full recovery of paid indemnities. This way, costs for insurance companies and insured motorists would be more limited given that the number of cases that cannot be settled through the mutual compensation system proposed in option 4 would only concern a portion of the (already limited) number of cross-border road traffic accidents. However, if the rules for recurring to the Fund are not correctly specified *ex ante*, potential uncertainties may hamper mutual compensation mechanisms between third-party insurers and lead to an excessive use of the Fund. In any event,

this combined solution would ensure that victims are compensated as if the injury occurred in their country of residence; moreover, the reduction of costs for the judicial and medical experts brought about by the reliance on insurance systems would be preserved. Administrative costs would still exist to set up and maintain the system, and their magnitude would depend on the functioning of the proposed compensation mechanism: for example, the “EU Fund” could be created as a periodic clearance structure/scheme embedded in the compensation mechanism. However, this option was not supported by consulted stakeholders. Figure 10 below illustrates the functioning of option 5b.

Figure 11 – Victim’s compensation by third-party insurer and activation of EU fund



Given that the combination of the “EU Fund” with option 4 would not eliminate the disparities between the type and *quantum* of damages awarded in each member state, one could also envisage the introduction of a set of common principles (such as in option 3) and correction mechanisms based on the average level of awards in the member states involved. This solution would not only achieve *restitutio in integrum* for the victims but would also foster a gradual harmonisation of damage compensation within the EU. However, as in the case of option 3 above, there may be a risk that non-pecuniary losses and the specificity of each case are overlooked if common principles excessively focus on quantifiable damage headings. Moreover, this solution would also generate significant administrative costs to set up the Fund, a mutual compensation system between third-party insurers and to agree on the common principles.

In any event, the centralisation of claims in an “EU Fund” according to one of the three modalities presented above would lead to the following impacts:

- a) the approximation of *restitutio in integrum* for victims of cross-border road traffic accidents;
- b) the reduction of the costs of administering justice – as widely acknowledged in the law and economics literature, an insurance-based system is normally less costly to administer than a legal regime based on tort law; and
- c) the avoidance of the need, for national judges, to get to grips with compensation criteria used in other jurisdictions.
- d) the gradual development of a common set of principles for compensating victims for the breach of a Human Right in the EU27;
- e) the contribution of all insurance companies (and all EU citizens) to tackling the problem of cross-border road traffic accidents;

f) the need to set up an EU Fund, which may be costly to administer in an efficient way. In this respect the combination of the “EU Fund” with option 4 might reduce the costs of the proposed centralized approach, event though this possibility was not widely supported by consulted stakeholders.

The costs and benefits of the three variants of option 5 are summarised in the table below.

Table 8: Impacts of option 5

5a. “EU FUND”						
Costs						Benefits
Judicial costs	Medical experts	Transaction costs	Time costs	Insurance costs	Administrative costs	Potential to achieve restitutio in integrum
<p>Low <i>(reliance on insurance system)</i> Potential increase <i>if dispute resolution is attributed to the judicial</i></p> <p>↓ / ↑</p>	<p>Low <i>(reliance on insurance system)</i> Potential increase <i>if dispute resolution is attributed to the judicial</i></p> <p>↓ / ↑</p>	<p>Significant increase <i>(if litigation is frequent and conflict resolution is attributed to the judicial)</i></p> <p>↑↑↑</p>	<p>Significant increase <i>(if functioning of the Fund not correctly designed)</i></p> <p>↑↑↑</p>	<p>High <i>(increase for insurers in case of litigation. Premium increase between €2.5 and 4€ annually)</i></p> <p>↑↑</p>	<p>High <i>(Considerable set-up and maintenance costs)</i></p> <p>↑↑</p>	<p>Fully achieved</p>
5b. “EU Fund” and direct compensation by third-party insurers						
Costs						Benefits
Judicial costs	Medical experts	Transaction costs	Time costs	Insurance costs	Administrative costs	Potential to achieve restitutio in integrum
<p>Very low <i>(reliance on insurance system)</i></p> <p>↓↓</p>	<p>Very low <i>(reliance on insurance system)</i></p> <p>↓↓</p>	<p>Increase <i>(reliance on insurance system may minimize costs, but would leave room for uncertainty)</i></p> <p>↑</p>	<p>Very low <i>(reliance on insurance system and direct compensation by third-party insurers)</i></p> <p>↓</p>	<p>High <i>(Premium increase between €2.5 and 4€ annually)</i></p> <p>↑</p>	<p>High <i>(Considerable set-up and maintenance costs of mutual compensation system and EU Fund)</i></p> <p>↑↑</p>	<p>Fully achieved</p>
5c. “EU Fund” + compensation system by third party insurers + common principles						
Costs						Benefits
Judicial costs	Medical experts	Transaction costs	Time costs	Insurance costs	Administrative costs	Potential to achieve restitutio in integrum
<p>High <i>(Considerable increase in the short term; decrease in the long term)</i></p> <p>↑↑</p>	<p>High <i>(Considerable increase in the short term; decrease in the long term)</i></p> <p>↑↑</p>	<p>Increase <i>(reliance on insurance system and common principles may minimize costs, but would leave room for uncertainty)</i></p> <p>↑</p>	<p>Low <i>(all parties rely on common principles, even for cases referred to the judicial)</i></p> <p>↓</p>	<p>High <i>(Considerable increase in the short term; decrease in the long term)</i></p> <p>(↑) ↓</p>	<p>Very high <i>(Considerable set-up and maintenance costs of the Fund and mutual compensation, adoption of common principles)</i></p> <p>↑↑↑</p>	<p>Fully achieved</p>

8 Summary of findings

As anticipated above, this final section compares all the proposed options, (including the new alternatives) with the current situation that foresees the application of the *lex loci* for determining the type and the amount of damages to be compensated to victims of cross-border road traffic accidents. For each case impacts on the different stakeholders are reflected, as above, in the different cost categories and benefits are intended as the potential that each option has of approximating the *restitutio in integrum* for victims of cross-border accidents. Option 2 (principle of ubiquity) is not included in the table as it has been discarded as dominated by other solutions.

In comparison to the current situation, option 1 would slightly increase costs for seized judges and medical experts, as they would both need to get familiar with the law of the victim's home country in order to quantify damages. In the case of option 1b, this cost increase would be more important, given that seized courts would also have to take into account foreign case law. The impact of options 1a and 1b on insurers and insured motorists would be fairly limited and would mainly concern countries with lower standards of living or where insurance policies include caps to damage compensation. Furthermore, options 1a and 1b are likely to further increase transactions costs, as several parties from different legal systems would have to interact to reach an agreement after a cross-border accident. A similar impact can be expected for time costs linked to the length of trials. However, in contrast with the *status quo*, option 1b has the potential to achieve *restitutio in integrum* for victims of cross-border accidents.

Compared to the zero option, the adoption of common principles to assess damages (option 3) would initially raise (switching) costs for the judicial and for medical experts. However, a decrease in costs should be expected in the long run, once such principles are in place and applied by courts. Under option 3, insurance premia may be subject to a 10-30% increase in some cases, depending on the basis for quantification established by the common principles. To the contrary, transaction and time costs would decrease, as all parties involved would rely on a common set of rules. As with current situation, option 3 would still leave room for cases of undercompensation, especially for non pecuniary damages if the latter are not adequately accounted for by the common principles.

Under option 4, costs for the judicial and for medical experts would be significantly reduced in comparison with the *status quo*, as cross-border cases would be mainly solved through the insurance system. This feature would also reduce transaction costs and time costs. Costs for insurers and insured motorist would be higher than in the current situation, in particular in high income countries, given that insurers would anticipate the risk of not recovering paid indemnities from liable parties located in countries with lower standards of living. Option 4 would also require some moderate administrative costs to set-up and maintain a mutual compensation system between insurers. In principle, this option would guarantee that victims of cross-border accidents obtain a full compensation of the damages sustained, thus improving the current situation.

The creation of an "EU Fund" (option 5a) would, in principle, reduce costs for medical experts and the judicial, thanks to an increased reliance on the insurance system. In comparison with the zero option, a potential cost increase for those players should only be envisaged if the case is referred to courts. On the other hand, option 5a would result in a slight increase (on average, between 2.5€ and 4€) of current insurance premia in order to finance the Fund. Transaction and time costs would also increase under this option, as administering a centralized "EU Fund" is likely to increase litigation. Finally, significant administrative costs should be foreseen in order to set up and manage the Fund. Hence, the full compensation of damages guaranteed by option 5a would not come without significant costs.

Option 5b may partially mitigate this problem, while guaranteeing that *restitutio in integrum* is achieved. By relying on third-party insurers, option 5b would decrease costs for the judicial and medical experts in comparison to the zero option. In principle, this approach would diminish transaction costs and time costs; however if the functioning of the Fund is not clearly established *ex ante*, option 5b would create uncertainties and jeopardise potential savings under this cost

categories. Finally, insurance premia would still increase between €2.5 and €4 in some countries, and insurers would have to bear significant administrative costs for setting up and maintaining a mutual compensation system that does not currently exist.

Finally, under option 5c the judicial and medical experts would have to bear the initial additional cost of establishing common principles to assess damages: however, once such principles are in place, costs for judges and medical experts would be reduced in comparison with the zero option, as the system would be managed by insurers. In this respect, insurance companies would have to sustain significant administrative costs to set up a mutual compensation system and manage the Fund. However, the use of common principles would also bring about greater predictability of expenses for insurers and a reduction of costs in the long run. Impact on transaction and time costs would depend on the rules that regulate the system: if such rules leave room for uncertainty in the attribution of competences, transaction and time costs would probably increase. Finally, insurance premia would probably increase between 10% and 30% in some countries in order to comply with the common principles. In contrast with the current situation, option 5c would achieve full compensation for the victims of cross-border road traffic accidents.

Table 9: summary of impacts of individual options

Options	Impacts				
	Costs for judicial and medical experts	Costs for insurance and insured motorists	Transaction and time costs	Admin costs	Restitutio in integrum
“Zero option”	No <i>lex loci</i> is applied in case of trial	No <i>Average insurance premium: 500 €</i>	High especially as lawyers fees are concerned	Not applicable No new structure needed	Not achieved <i>Undercompensation</i> of approximately 468 million euros
Option 1.a <i>Criteria and headings as in the victim’s country</i>	Slightly higher Need to get familiar with foreign legal systems	Limited Increase of premia in countries with lower standards of living or damage caps	Higher Interaction of players from different systems, longer trials	Not applicable No new structure needed	Not achieved Undercompensation
Option 1.b <i>Criteria, headings and damage awards as in the victim’s country</i>	Higher Need to get familiar with foreign legal systems and caselaw	Limited Increase of premia in countries with lower standards of living or damage caps	Higher Interaction of players from different systems, longer trials	Not applicable No new structure needed	Achieved
Option 3 <i>Common principles</i>	Mixed Considerable increase in the short term, significant decrease once system in place	Mixed Cases of 10-30% premium increase in the short term, lower in the long run	Decrease Due to reliance on common principles by all parties	Not applicable No new structure needed	Partly achieved Potential undercompensation of non-pecuniary damages
Option 4 <i>Coverage through third-party insurers</i>	Very low Reliance on insurance system	Limited increase Especially in high income countries	Decrease Reliance on insurance system and reduction of judicial costs	Moderate increase Set-up and maintenance costs	Achieved
Option 5a <i>“EU Fund”</i>	Low Reliance on insurance system, potential increase if dispute resolution left to judicial	Slight increase for insured motorists premium increase between €2.5 and 4€ annually	Increase Especially in case of litigation. Trials may be lengthier	Significant increase Substantial set-up and maintenance costs	Achieved Risk of low compensation if fund not correctly set up
Option 5b <i>“EU Fund” + coverage through third-party insurers</i>	Decrease Reliance on insurance system	Slight increase for insured motorists premium increase between €2.5 and 4€ annually	Increase Reliance on insurance system Increased uncertainty	Significant increase Initial set-up and maintenance of Fund & mutual compensation system	Achieved
Option 5c <i>“EU Fund” + coverage through third-party insurers + common principles</i>	Mixed Increase in the short term, significant decrease once system in place	Mixed Short-term increase (up to 10%-30%) Decrease in the long run due to predictability	Increase Reliance on insurance system Increased uncertainty	Significant increase Initial set-up of Fund, mutual compensation system and definition of common principles	Achieved Risk of undercompensation of non-pecuniary damages

9 Conclusions

Cross-border road traffic accidents represent, according to recent estimates, approximately 1% of overall road traffic accidents in Europe. Most of these accidents potentially create a risk of undercompensation of the non-resident victim, due to difference in the standard of living as well as in the calculation of the *quantum* of damages in the EU27. The problem of victims' undercompensation in the event of a cross-border traffic accident has so far been approached mostly under the broader aegis of the need to achieve further harmonisation in European Civil Law. Most recently, the European Parliament has proposed to address this issue by mandating the application of *lex damni* when assessing the quantum of damage awards. Authoritative European groups of lawyers – such as PEOPIIL – seem to favour the gradual convergence of principles of damage compensation through comparative law.

In this study, we identified the countries most concerned as those countries where the problem of undercompensation has the greater likelihood of emerging with significant frequency. These countries are, according to our analysis, Spain, Greece, Cyprus and Austria. However, in one of these countries – i.e. Austria – judges already must take into account what the victim would have obtained as compensation in his/her own country of habitual residence. In other countries, the level of damage award may be significantly lower than in other jurisdictions, especially when the victim's country of habitual residence is located in Northern Europe.

After a description of the problem's main legal underpinnings, we identified five main options in addition to the "zero option" (or "do nothing" option). Option 1 – the application of the law of habitual residence of the victim – potentially pursues the objective of securing *restitutio in integrum* for victims of cross-border road traffic accidents, at the same time avoiding cases in which a victim is overcompensated as it was involved in an accident taking place in a country where damage awards are greater, also due to that country's higher standard of living. However, such option also creates several problems in terms of adaptation of existing practices in national courts – with national judges having to get familiar with foreign legislation; and in terms of expected increase in insurance premia in countries with lower income and lower damage awards.

Compared with this option, we discarded option 2 ("principle of ubiquity") as strictly dominated by Option 1. Option 3 and its sub-options ("relying on common principles at EU level") would not reach the goal of achieving full compensation for the victims, and can increase administrative costs in the short term. A full harmonisation of damage awards seems neither likely nor desirable. In contrast, options 4 and 5 provide solutions based on insurance policies, which may be worth discussing as means to achieve *restitutio in integrum* for victims of cross-border road traffic accidents without imposing significant and burdensome adaptations in the way such claims are dealt with by national judges and medical experts.