TOWARDS THE “EUROPEANISATION” OF PERSONAL INJURY COMPENSATION?
CONTEXTS, TOOLS, PROJECTS, MATERIALS AND CASES ON PERSONAL INJURY APPROXIMATION IN EUROPE


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1. Introduction.


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History shows that in Europe the foundations of the law of obligations and, in particular, of personal injury compensation are based on a long-standing common cultural matrix. Going as far back as the heritage left by Roman Law, the experience of the first universities in the 12th century, *jus commune* or *usus modernus pandectarum*, are a good example and an interesting indicator of the existence of common roots in relation to compensation for damages arising from the violation of health and bodily integrity. This is the origin of the development of the fundamental modern idea by which personal injury victims are entitled to be awarded compensation for non-pecuniary losses. This basic concept, which is today central to most European legal systems, was introduced by natural jurists, in particular by Samuel von Pufendorf (*Ius Naturae et Gentium, 1672*). Another example of the common matrix is the well-known fact that the French Civil Code and the German BGB have long influenced most continental jurisdictions with respect to the law of obligations and the law of damages.

However, despite these common roots and despite the circulation of legal ideas and some interesting examples of convergence towards common operational approaches, until recently personal injury law has been seen as a matter of exclusive national competence, strictly linked to national needs and the financial sources available for delivering compensation to victims. Moreover, in the past each jurisdiction has developed the view that personal injury compensation is essentially a social question which must reflect the peculiar “morality” of the national legal system, thus what takes place outside national borders is basically irrelevant. Besides cultural differences and broad divergences in the practical administration of justice, this traditional approach perfectly explains the present diversity across Europe in respect of the redress protection of victims. In the final analysis, today’s differences are the outcome of separate national development, national legislatures’ political choices and the development of autonomous ways of conceiving personal injury compensation, although this does not mean that the circulation of redress models and court decisions among different countries have not had an influence. Starting in the 1970s the exchange of ideas concerning the compensation of personal injuries has increased and the present situation shows that national systems are, even if with some resistance, open to the transplant of other ideas, although the concrete results of this new approach are still quite limited.

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The differences between European compensation systems clearly emerge from the comparative report as well as from the national reports. In particular, to summarise up the findings of the PEOPIL-Grotius Research Group, there are substantial differences between Member states, not only with regard to non-pecuniary losses (in particular the compensation of secondary victims, fatal accident claims, the recoverability of mental consequences and the method of assessing monetary values for such losses) but also in respect of the basic structural components of each country’s compensation approach. This includes the rules governing civil liability (in particular concerning the question of the burden of proof), limitation law (limitation periods, dies a quo, requirements for stopping the running of limitation periods, protection of minors and disabled persons), civil procedure, the medical experts’ contribution to the evaluation of damages, the role and political power of insurance companies, and the interaction between the liability system and other alternative sources of compensation such as social security systems. These are all factors which still vary widely from one country to another. Furthermore, the quality of the service rendered by courts and other compensation schemes, the degree of specialisation of lawyers and judges in personal injury litigation, victims’ access to justice, the approach then by insurance companies in respect of settlements, can all be added to the long list of factors that determine the mechanisms whereby personal injury victims are compensated, and the divergences between the member States. Moreover, as has already been stated, each system of compensation deeply reflects the socio-economic background in which it operates, including the cost and standard of living. Sometimes redress systems are also the outcome of society’s pressure and interest in this field, because “there can be no doubt that the injuries and the legal claims to which they give rise are of great significance to society”.

Thus, at present the value and practical enforcement of personal and civil rights, such as health, physical/mental integrity, life and personality, is highly differentiated and far from being an absolute concept throughout Europe. This, of course, appears clearly when we compare the levels of awards for non-pecuniary losses. But the differences are not to be found only in the sums commonly awarded in each jurisdiction and a comparative study based on the divergence of such awards would be highly misleading as well as incomplete. The divergences are much more complex and deeper than the simplistic consideration that compensation in one Member State is at a lower or a higher level than compensation in another. The divide between jurisdictions is much more marked and, in the end, is determined, as in all other fields of private law, “by the strong

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technicalities of law and legal science, by the subtle and capillary distinctions which are the result of a bimillenary legal evolution.\(^6\)

Nevertheless, besides the differences, the comparative overview and national reports demonstrate that there are also some points in common and various areas of convergence. Differences and points in common, as will be pointed out later, are now being studied much more than in the past, for at least two different purposes: on the one hand, there is a practical need on the part of lawyers dealing with the expanding reality of cross-border litigation to develop a better understanding of how national systems deliver compensation; on the other hand, the debate on whether or not, or indeed how different legal systems should be harmonised, has been growing impressively, encouraging deeper and wider-ranging comparative studies of divergences and points in common among European countries in respect of personal injury victims.

In particular, the political scenery in Europe has now changed significantly and, as a consequence of such evolution and, especially within the context of the European Union, European countries are now facing many questions including the possibility of Europe-wide harmonisation (or the so-called “Europeanisation”) of private law\(^7\), including liability issues and personal injury law\(^8\).


Thus, before analysing the various problems involved in harmonisation (can harmonisation take place? Is it desirable? To what extent? Should harmonisation cover only procedural issues or also the substantive law of damages? Who should harmonise national laws? Should convergence be left to work on the ground floor of the national courts or to emerging common jurisprudence?) a preliminary step which is also the correct approach and appropriate for the purposes of this research (namely understanding the situation today) is to clarify what is effectively happening in Europe in relation to personal injury compensation, and how the harmonisation debate is developing. In particular, it is useful to describe the interaction between the European Union and the Council of Europe on one hand and, on the other hand the national systems, since, as will emerge from the following paragraphs, the process of convergence has already under-gone some interesting developments which should enable the issue of harmonisation to be analysed from a much more realistic and concrete point of view. It should also be noted that these developments offer reference points, materials, and ideas which are not only relevant for academics, but are also of great interest for practitioners.

1.1.1. Preliminary remarks on the impact of the European Institutions on personal injury compensation.

As we point out in sections 3 and 4 of this chapter, the European Union and the Council of Europe have already influenced national laws on liability and European tort lawyers’ thinking. Treaties, Conventions, Regulations and Directives have been introduced in such areas as liability for defective products, liability arising from package travel contracts, liability for medical devices, and in the field of employers’ liability not only in respect of the traditional sector of accidents and diseases at the workplace, but also in relation to sexual discrimination and other topics typical of labour law (working hours, dismissals, etc.). Road traffic accidents and transport cases have also been the subject of specific legislative provisions at a European level, as well as environmental liability. Moreover, the law of damages has, at least to some extent, been affected by European provisions as well as by decisions of the European Court of Justice (ECJ) and, in particular, by

the European Court for Human Rights (ECtHR), which is the Institution most closely involved in the development of a common core of European liability law and law of damages.

Thus the so-called “Europeanisation” of private law is already taking place in respect of personal injury law: the impact of European Institutions in this respect is clear, even if this process has only involved specific areas of liability law. Moreover, as regards with the law of damages, apart from some interesting decisions by the ECtHR, it has been confined to a few marginal provisions, or to some non-binding proposals for harmonisation of personal injury damages. Surprisingly these have been ignored by the majority of legislatures, courts, legal scholars and lawyers (see in particular the Resolution (75) 7, Compensation for physical injury or death adopted by the Committee of Ministers of the Council of Europe in 1975).

It is true that the “Europeanisation” of private law by the European Institutions and courts is not only carried out by means of legislation and judicial decisions; achievement of a higher degree of common private law within the European jurisdictions is being actively supported by these Institutions by supporting networks between European lawyers, conferences and seminars, and research projects on the study of private law and the development of the awareness of other European legal systems.

In this context, in 1989 the European Parliament called for the elaboration of a European Civil Code⁹, which has encouraged debate on the future of private law and increased European integration in the field of tort law¹⁰. Legal academics are very active in this debate, as is demonstrated in the next section. Another example of a harmonisation policy developed by the European Institutions are the numerous programmes financially supported and encouraged at the European level, in particular, the initiatives organised by the European Commission such as the Grotius programme to which this research project belongs: the Grotius programme encourages exchanges between legal practitioners in order to stimulate the reciprocal sharing of knowledge of legal and judicial systems and to facilitate judicial co-operation between member States. This represents a very positive approach by the European Institutions in favour of legal training, exchange programmes and research projects, since approximation cannot take place without, as a preliminary fundamental step, the development and solidification of a common legal culture and a common jurisprudence.

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1.1.2. The role of jurisprudence and practitioners towards a European dimension of national private laws: research projects, publications and proposals for legislative initiatives in the field of personal injury.

The debate on the approximation of Member States’ private laws, including the field of remedies and particularly compensation, has been encouraged and actively supported by academics and practitioners alike. In the field of personal injury, as well as academics, also practitioners have in recent years developed an increasing interest and activism in such a debate. In this respect PEOPIL plays an important role, as is clear from the present research project. The contribution of legal scholars and practitioners to the debate on harmonisation issues has taken different forms:

1) comparative studies on tort law and personal injury claims;

2) research projects and studies on the possible tools for further harmonisation of private law and their feasibility (in this respect the debate on a European Civil Code is at the forefront);

3) proposals, recommendations and suggestions for harmonisation of personal injury compensation across Europe;

4) practitioners’ books dealing with cross-border litigation.

In particular, in recent years there has been considerable comparative research and studies undertaken in relation to liability law and personal injury compensation in Europe, taking into account the various implications flowing from the contributions of the European Institutions and future perspectives for harmonisation.

The research groups carrying out comparative studies focused on tort law and personal injury law in Europe, as well as on future perspectives for integration are: the European Group on Tort law (formerly known as the “Tilburg Group”), founded in 1993 by Professor Jaap Spier and

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directed by Professor Helmut Koziol; this group cooperates with the *European Centre of Tort and Insurance Law (ECTIL)*, an independent incorporated association based in Wien; the other leading initiative is that co-ordinated by Prof. Christian von Bar which, unlike the first group, has conducted research on tort law within a project aimed at a European Civil Code; last but not least, with this publication, the PEOPIL Research Group joins the list of leading groups engaged in comparative studies in the field of personal injury law. In addition to these groups, the Trento «Common Core of European Private Law» project lead by Ugo Mattei and Mauro Bussani should be mentioned which has inspired the work of other similar projects and which carries on comparative research studies also covering liability issues.

These groups make a significant contribution to improving the knowledge and understanding of the European legal systems, enriching the debate on harmonisation with the information needed for a better analysis of future perspectives. These contributions of course may give rise to new scenarios surrounding the harmonisation debate, but their basic goal is to develop ideas, to exchange information, to improve the knowledge of different legal systems, and in the end to bring European personal injury lawyers towards common ways of legal thinking.

Besides the groups mentioned above, teams of academics, lawyers, medical experts and insurers have been proceeding in a different direction by drafting concrete proposals for legislative initiatives to be undertaken by the European Union. This is the case of two groups, the group of academics directed by Italian Professor Francesco Donato Busnelli and the group of medical experts conducted by Belgian Professor Pierre Lucas, both known as the “Trier 2000 Group” or “Rothley Group”; these two groups, as we will see below, have drafted a Recommendation to the European Commission, the European Parliament and Council for a Directive on personal injury compensation; the Recommendation was launched at the congress «Rationalisation of the medico-legal assessment of non-economic damage» held in Trier at The Academy of European Law (ERA) on 8th and 9th June 2000. On 25th May 2003 the group of medical experts directed by Prof. Pierre Lucas, supported by CEREDOC (Confédération Européenne d’Experts en Evaluation et Réparation du Dommage Corporel), launched the «Guide barème européen d’évaluation des atteintes à

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13 The final aim of the group is to draft a collection of Principles of European Tort Law similar to the Principles of European Contract Law that are now being drafted by the European Contract Law Commission ("Lando Commission").

14 www.ectil.org The aim of this group is to seek a common law for Europe without the necessity to lay down principles in formal legal texts, such as a European Civil Code. On the activity of this group see MARTÍN CASALS, M., *Reflexiones sobre la elaboración de unos principios europeos de responsabilidad civil*, in Ponencias 2° Congreso Nacional, edited by Asociación Española de Abogados especializados en responsabilidad civil y seguro, Granada, 2002, pages 1-22.


17 The two groups are supported by Willy Rothley, Vice-President of the European Parliament’s Legal and Internal Market Committee.
l’intégrité physique et psychique». Such groups are of course something more than the initiatives mentioned above: the drafting of legislative proposals obviously involves political and economical choices. Here there is a clear choice for legislative approximation; there are also obviously precise strategies underlying the adoption of certain solutions instead of the many other available alternatives. In this respect it should also be noted that it is not by chance that such groups are supported by insurance companies.

Last but not least, it should be mentioned that practising lawyers, through their daily involvement in increasingly frequent cross-border litigation and exchange activities, are developing common attitudes towards personal injury compensation: through the work of practising lawyers the circulation of redress models from one jurisdiction to another is growing to an extent. In this respect the Pan-European Organisation of Personal Injury Lawyers plays an essential role: the activities organised by PEOPIL (publications, seminars, congresses) encourage lawyers from different countries to confront and discuss practical problems which they meet daily in the course of their profession, stimulating comparisons and common solutions.

This current vitality among academics and lawyers represents the real motor of future developments towards further approximation and convergence, given that “the law of Europe cannot be unified by sporadic texts”, but “what we need is to ‘Europeanize’ the way lawyers think, write, and learn”\(^\text{18}\).

### 1.2. The levels and context of personal injury harmonisation.

At present in Europe we are witnessing the approximation/uniformisation of legal culture and laws within the area of personal injury on, at least, three different levels:

- **The national context (legislature, courts and academics);**
- **The Council of Europe and European Court of Human Rights;**
- **The European Union.**

It should be noted that the three levels at which harmonisation is taking place are not separate at all; on the contrary, there is high degree of interaction and interplay between them. Indeed, the approximation of different legal systems into a common dimension organised under the

umbrella of single institutions, with political and judicial functions, is always built on a massive exchange of ideas and input amongst such institutions, political and economical elites and the judicial activism of national legislature, courts and scholars. This is clearly what is taking place in Europe.

A good example of this interplay between different levels of approximation is provided by the interaction between the Council of Europe and the European Commission in relation to the harmonisation of product liability: at the same time as the European Commission put forward its first draft for what was to become Directive 85/374, the Council of Europe approved the European Convention on Products Liability in regard to Personal Injury and Death of 27 January 1977. The two documents were in many respects similar. Further more obvious examples are of course the promulgation and implementation of European Directives and their incorporations into the national legal systems.

Moreover, it should also be remembered in this context that the approximation of the law of damages is also taking place at an International level. Reference here is made to the UNIDROIT Principles for International Commercial Contracts (1994)\(^\text{19}\), which contain interesting principles, at least for the purposes of the harmonisation debate, concerning the law of damages and also, though marginally, personal injury losses. For example, Article 7.4.2. (Full compensation) states that: “(1) The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both 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. (2) Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress”. Further, Article 7.4.3. (Certainty of harm) provides: “(1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty. (2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence. (3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court”.

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\(^{19}\) Set up in 1926 as an auxiliary organ of the League of Nations, the International Institute for the Unification of Private Law (UNIDROIT) was, following the demise of the League, re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT Statute. The Institute is an independent intergovernmental organisation with its seat in the Villa Aldobrandini in Rome. Its purpose is to study the needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States. At present, UNIDROIT has 59 member States: Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, China, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Holy See, Hungary, India, Iran, Iraq, Ireland, Israel, Italy, Japan, Luxembourg, Malta, Mexico, Netherlands, Nicaragua, Nigeria, Norway, Pakistan, Paraguay, Poland, Portugal, Republic of Korea, Romania, Russian Federation, San Marino, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, United Kingdom, United States of America, Uruguay, Venezuela, Yugoslavia (Federal Republic of).
2. The approximation of personal injury laws at the national level.

It is important to point out that, at present, the approximation of liability rules and, in particular, the law of damages is taking place through the work of the national courts and jurisprudence, in particular through “conscious or unconscious legal borrowings”20, through legal transplants, through confrontation and exchange of information, and as a result of cross-border litigation. In particular, approximation at the national level is today built upon the practical “comparative work”21 of courts, academics and practising lawyers, and, in some instances, also of national legislatures.

Such comparative work is essentially based on the circulation of legal solutions and models22. In this respect, for example, during the early 1980s the French approach to the assessment of non-pecuniary losses arising from personal injuries, the “calcul au point”, was considered by Italian and Belgian courts and academics as a model to be copied and imported. In Luxembourg, the French Cour de Cassation is frequently referred to in every day-practice and has a great impact on national courts. Moreover, in Luxembourg the courts frequently rely on foreign medical experts from France, Germany or Belgium. Spanish jurisprudence and legal writers refer with impressive frequency to French and Italian models23. An exchange of ideas takes place amongst the jurisprudence in Nordic countries. Portuguese and Greek case law frequently make reference to other legal systems, such as the German, Swiss, French and Italian systems. Another good example is the field of medical negligence, in which the practice of copying and circulating legal solutions among Member States is producing significant common results in national court decisions: for example, the German model of “faktischen Vertragsverhältnisse” and “social Leistungspflichtung” was taken into account by the Italian Supreme Court in determining the contractual liability of doctors employed by public hospitals24. A recent example comes from the English Law Commission’s proposals for law reform in the field of personal injury and fatal accidents: the Law Commission’s report takes into account the experiences of other European

21 On the role of comparative law in the process of European integration, the practical tools provided by comparative law and the references made by national courts to foreign case law, see the recent study by SOMMA, A., L’uso giurisprudenziale della comparazione nel diritto interno e comunitario, Giuffrè, Milano, 2001.
jurisdictions (mainly France and Germany), in showing that the circulation of models throughout
the Member States is actual and tangible.

3. Harmonisation at the Council of Europe level.

3.1. Harmonisation of substantive law on liability and personal injury damages: the
role of the Council of Europe and the European Court of Human Rights.

The Council of Europe\(^{25}\) has long 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. Examples include the various conventions and recommendations in the field of road
traffic accidents (the European Convention of 20\(^{th}\) April 1959 on the compulsory insurance of
motor vehicles; the European Convention of 14\(^{th}\) May 1973 on liability for damages caused by
motor vehicles) and in relation to environmental damage. In 1977 the European Convention on
Product Liability in regard to Personal Injury and Death of 27 January 1977 anticipated EC
Directive 85/374. A significant role has also been played by the European Convention on the
Compensation of Victims of Violent Crimes, adopted on 24\(^{th}\) November 1983: this Convention
introduced basic principles for the harmonisation of social security schemes for crime victims, and
has had a considerable impact on national legislation of many states.

3.1.1. Compensation under the ECHR system.

However, the most important achievement and contribution by the Council of Europe to the
creation of a common background in the field of tort law is, without doubt, the system regulated by
the European Convention for the Protection of Human Rights and Fundamental Freedoms
(1950). The compensation regime created by the European Convention for the Protection of
Human Rights and Fundamental Freedoms is mainly regulated by Article 41 (ex Article 50) of the
Convention: “If the Court finds that there has been a violation of the Convention or the protocols
thereto, and if the internal law of the High Contracting party allows only partial reparation to be

\(^{25}\) The Council of Europe was created at the end of the Second World War for the purpose of promoting European unity,
protecting human rights and facilitating social and economic progress. The Council is a separate body from the
European Union. At the moment there are 40 members of the Council of Europe: namely, Albania, Andorra, Austria,
Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary,
Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Netherlands,
Norway, Poland, Portugal, Romania, Russia, San Marino, Slovak Republic, Slovenia, Spain, Sweden, Switzerland,
Turkey, Ukraine and United Kingdom.
made, the Court shall, if necessary, afford just satisfaction to the injured party.”

Therefore compensation for personal injury damage under the European Convention scheme is built upon the following basic principles:

1) the assessment of liability is directly connected with the breach of a Human Right: in other words, the liability of Contracting States is determined by comparing the national legislation or decision of a national court with the Human Rights and Freedoms granted by the Convention;

2) pecuniary and non-pecuniary damages arising from a breach of a Human Right are recoverable on the basis of the link between the infringement of a fundamental right and the right to claim compensation;

3) the monetary assessment of damages is based on the principle of “just satisfaction”, which basically corresponds to the principle of restitutio in integrum.

3.1.2. Contribution of the ECtHR to the approximation of national tort laws.

The contribution of the European Court of Human Rights (ECtHR) to the harmonisation process is largely as follows:

- the Council of Europe system promotes throughout Europe an approach to liability law which is based on the close link between liability and the violation of fundamental rights;
- the ECtHR’s case law provides a large number of precedents by which it is possible to assess whether certain legislature, administrative or judicial measures taken by a Contracting State comply with the rights guaranteed by the European Convention;
- such case law stimulates national courts to law-making in accordance with the constitutional background of the ECtHR’s approach;
- the ECtHR itself delivers principles of direct concern to the assessment compensation for personal injury damage, even if, as we will see, it is still hard to establish general principles, in particular in relation to criteria for the assessment of non-pecuniary losses.

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27 See for example ECtHR, Papamichalopoulos v. Greece, 31 October 1995, Ser. A No. 330-B.

28 The contribution of the ECtHR to “the emergence of a common European tort law” is described by VAN GERVEN, W., LEVER, J., & LAROCHE, P., Cases, Materials and Text on National Supranational and International Tort Law, Oxford, Hart Publishing, 2000, at 931-945.
3.1.3. The ECtHR’s Personal Injury Law.

In relation to damages, it has been noted that the ECtHR has not yet developed a rationalised set of principles. In particular, the *English Law Commission* and *Scottish Law Commission* correctly pointed out the “absence of clear principles ... as to when damages should be awarded and how they should be measured”\(^{29}\). The reason for this lack of EctHR case-law can be found in the subsidiary role of the European Court in relation to compensation issues (see Article 41 of the Convention). Furthermore, there are several other reasons: 1) the Strasbourg Court does not apply a strict doctrine of precedent\(^{30}\); 2) the ECtHR case law clearly reflects the various divergences among European countries in respect of the calculation of damages; 3) the composition of the Court is a mix of judges from different countries, thus it is difficult for the court to have a uniform approach to the question of damages; 4) the importance of issues concerning recoverable losses and their monetary assessment is generally underestimated by the EctHR, which concentrates much more on the issue of violation\(^{31}\); 5) the ECtHR does not appear to be fully aware of the extent of its role in the harmonisation of European legal culture.

However, in relation to the issues concerning the compensation of personal injury damages, it should be noted that the ECtHR case law offers a wide range of interesting precedents:

- the ECtHR does not limit the compensation of mental injuries to recognised psychiatric disorders: under ECTHR case law, non-pecuniary loss is recoverable for “transient emotional disturbance, consisting mainly of manifestations of anxiety through a range of symptomatic behaviours”, as well as “feelings of frustration and injustice” (see for example *T.P. and K.M. v. United Kingdom*, 10\(^{th}\) May 2001)\(^{32}\);

- the Strasbourg Court compensates for the “loss of relationship” (or “loss of consortium”), that is the non-pecuniary loss of love, companionship and support which occurs to the victim when a relationship between the victim and a member of his or her family (for example, a parent and a child) is disrupted in consequence of a breach of Article 6 (Right to

\(^{29}\) *Damages under the Human Rights Act 1998*, Law Com No. 266, Scot Law Com No. 180, at 19-23.

\(^{30}\) See also *Damages under the Human Rights Act 1998*, Law Com No. 266, Scot Law Com No. 180, at 19-23.

\(^{31}\) This is also the reason why awards by the Strasbourg Court are generally quite low. It should also be noted that the ECtHR tends to see the recognition of the violation itself as efficient and exhaustive satisfaction for the victim, in many cases appearing to consider compensation as something merely added to such recognition.

"a fair trial" or Article 8 (Right to respect for one’s private and family life) of the Convention.\(^{33}\)

3.1.4. The impact of the European Convention and ECtHR case law on national laws: future perspectives for harmonisation in relation to the link between Human Rights and the right to compensation.

The national reports have demonstrated that up until now the impact of the European Convention and ECtHR’s case law on the national courts in respect of personal injury has been quite limited. There appear to be several reasons for this: 1) most national compensation systems have already established a link between constitutional rights and the right to claim compensation, thus there is no need to make reference to Convention rights; furthermore, most Member States have a constitutional system of review governing personal injury law; 2) recourse to the Strasbourg Court is quite limited and generally takes place in cases which fall outside the traditional area of personal injury; 3) the case law of the ECtHR is still limited in respect of personal injury law and does not contain any specific principles concerning the assessment of damages; 4) the Strasbourg court and the Council of Europe are still to form their own view concerning their role in the process of harmonisation of personal injury damages; 5) many Member States have a compensation system which is much more advanced in respect of the protection of personal injury victims, especially in relation to the levels of awards (in particular, a comparison between national awards and ECtHR awards shows that the levels of awards under ECtHR are lower than most Member States’ awards); 6) there is also a lack of knowledge among European personal injury lawyers of ECtHR case law; 7) National judges and lawyers are un-aware of the influence they can exert on the development of Convention jurisprudence.

This framework may change in the near future depending upon whether the ECtHR decides to undertake a more significant role in the development of a common European tort law in respect of compensation issues. Nevertheless, in this respect, it is quite evident that the ECtHR will encounter various difficulties in deciding the direction that should be taken in harmonising the law of damages: at this stage the European legal systems are too far apart to contemplate unification or minimum harmonisation straight away; moreover, from a comparative perspective, there is no single national compensation system which constitutes a sufficiently prestigious model throughout Europe to become a model for the ECtHR. However, there is no doubt that the Strasbourg Court is the European institution which is best placed to develop a way forward.

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[^33]: W. v. United Kingdom, A 136-C (1988), 13 EHRR 453. The case concerned the decision of a local authority to place the applicant’s child, who was in the care of the local authority, in a foster home with a view to adoption.
3.2. Harmonisation of personal injury compensation: Resolution 7-75 of the Committee of Ministers of the Council of Europe.

On 14th March 1975, at its 243rd meeting, the Committee of Ministers of the Council of Europe adopted a proposal for the approximation of personal injury law in Europe, Resolution (75) 7, Compensation for physical injury or death («Résolution (75) 7 relative à la réparation des dommages en cas de lésions corporelles et de décès»)\textsuperscript{34}, which was the first and most authoritative attempt yet seen to harmonise personal injury compensation in Europe. In the words of the Resolution itself, this non-binding document “sets out the principles which may constitute a harmonisation of the present laws of member States in the case of compensation for damage for physical injury or death”: “the resolution will contribute in directing the flow of ideas and legislative change of States in the matter”. The Resolution “aims in particular at preventing States, without any special reason, from departing in legislative and judicial reforms from the principles it sets out”.

The compensation system introduced by the Resolution was indeed, at the time it was adopted, an advanced model and still contains several interesting principles. In this respect it should be noted that the Resolution contains principles of compensation which are modern and reasonably, favourable to the victims’ right to claim compensation. For example, the category of “mental suffering” specifies various recoverable injuries including “complaints and disorders such as malaises, insomnia, feelings of inferiority, diminution of pleasure in life due notably to the inability to engage in certain pleasurable activities” (Principle 11). Such mental suffering is recoverable also by the father, mother and spouse of a primary victim who survives an accident, where the suffering is of “an exceptional nature” (Principle 13).

Unfortunately, the Resolution ignored for a long time by national courts and academics. However, some jurisdictions are now starting to make reference to the Resolution\textsuperscript{35}, indicating that there are signs of a greater sensitivity shown by national courts and academics to the issue of harmonisation. This late discovery of the Resolution by national lawyers might lead to a “second life” for this document, thus it still might be the case that, 25 years later, the Resolution will become

\textsuperscript{34} COU NSEIL DE L’EUROPE, Réparation des dommages en cas de lésions corporelles et de décès, Strasbourg, 1975.

what it aimed to be: a basic consensus document valid as a starting point for further developments towards the approximation of personal injury law in Europe.


The E.U./E.C. Institutions have played an important role in the process of harmonisation. There already exist a considerable number of provisions affecting, directly or indirectly, personal injury litigation\textsuperscript{36}. It seems realistic to predict that such a role will increase in the near future. The following general remarks on the European institutions involved in harmonisation may help to describe the present situation and illuminate future progress.

4.1. The approach of the E.U. legislature to the harmonisation of private law.

Traditionally, the E.C. legislature has had limited competence in relation to the harmonisation of national substantive laws. In respect of liability issues, this competence was restricted to a few areas, such as consumer protection and other specific areas directly affecting the operation of the common market or the free movement of persons and goods. Nevertheless, some important provisions have been approved in this context: for example, Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products\textsuperscript{37}.

The situation has now changed markedly. Since enactment of the Single European Act 1986 the concept of a “European judicial area” has been developing fast. In 1993 the Maastricht Treaty incorporated under Title VI judicial co-operation in civil matters as an area of common interest for Member States of the European Union. The Treaty of Amsterdam then gave new impetus to the approximation of private and procedural law by the European legislature: this Treaty concentrated on two basic aspects: 1) private international law (namely, the promotion of compatible rules applicable in the Member States concerning jurisdiction and the conflict of laws); 2) the law of civil procedure (the system of cross-border service of judicial and extra-judicial documents; cooperation in taking evidence; and the promotion of the compatibility of rules on civil procedure applicable in the member States, where necessary) (in particular see EC Treaty, new Article 65). Therefore, at this stage the primary purpose of the European Legislature has not, at least in theory, been the unification of substantive law such as the law of personal injury damages, but of the procedural

\textsuperscript{36} See paragraph 4.3.
framework of civil actions and access to justice, especially in the field of cross-border litigation. This objective has been confirmed by the Heads of State and Government at the European Council of Tampere (October 1999). At that meeting three main priorities for European action were agreed: 1) better access to justice; 2) mutual recognition of judicial decisions; 3) increased convergence in the field of procedural law.

Within this new context, the European Commission has adopted, among others, the following proposals: the Green Paper «Legal aid in civil matters: the problems confronting the cross-border litigant» (February 2000) 38; a proposal for a Council Directive to improve access to justice in cross-border disputes (January 2002) 39; a Green Paper on Alternative Dispute Resolution (ADR); and a Green Paper on «Compensation to crime victims» (September 2001) 40. Furthermore, on 28th May 2001 the European Council adopted Regulation (EC) No. 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters 41, which aims to improve, simplify and accelerate cooperation between courts in the taking of evidence. With regard to the service of documents, on 29 May 2000, the Council adopted Regulation (EC) no. 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters: this Regulation makes it possible to improve and accelerate proceedings.

As may be seen, most of these actions concern procedural issues and mainly affect cross-border litigation, but it is quite obvious that, if approved, such provisions will also have a significant impact on domestic litigation. A new approach to cross-border litigation will affect lawyers’ ways of thinking, and by this means will achieve further “Europeanisation” of legal culture.

Besides these activities, the European legislature is now promoting a wide range of initiatives directly concerning substantive law, including personal injury compensation. An example is the recent «Proposal by the European Commission for A Directive of the European Parliament and of the Council amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/ECC, 90/232/ECC and Directive 2000/26/EC on Insurance against Civil Liability in respect of the use of Motor Vehicles» 42. This Proposal, if approved, would build on the 4th Directive which introduced a direct cause of action for road traffic victims against insured companies 43 by requiring mandatory

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42 COM (2002) 244.
insurance cover for accidents caused by the operation of motor vehicles in the case of injury to pedestrians and cyclists irrespective of cost.

Moreover, this approach to harmonisation/unification may change in the future, especially as a result of the application of the Charter of Fundamental Rights of the European Union. Indeed, uniform human rights may lead to uniform civil rights, giving rise to a strong legal argument for the harmonisation of the protection of such rights in terms of the available compensatory remedies.

4.2. The European Court of Justice’s approach to the approximation of laws.

The European Court of Justice has also played an essential role in the process of harmonisation of private law. However, in respect of personal injury compensation its role appears to be quite limited, since at present its case law only covers the few areas covered by the restricted number of Directives concerning the protection of personal injury victims. Some recent decisions of the European Court of Justice in relation to the approximation of national liability rules concerning Product Liability are of interest.

In the case of Maria Victoria Gonzalez Sanchez v Medicina Asturiana SA (25 April 2002)\textsuperscript{44} the Court was asked to determine whether Article 13 of Council Directive 85/374/EEC (on Liability for Defective Products)\textsuperscript{45} should be interpreted as meaning that the rights conferred under the legislation of a Member State upon the victims of damage caused by a defective product can be limited or restricted as a result of the transposition of the Directive into domestic law. In answer to the question submitted by the Spanish Court, the European Court of Justice noted that “the reference in Article 13 of the Directive to the rights which an injured person may rely on under the rules of the law of contractual or non-contractual liability must be interpreted as meaning that the system of rules put in place by the Directive, which in Article 4 enables the victim to seek compensation where he proves damage, the defect in the product and the causal link between that defect and the damage, does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects”. The European Court continued, however: “conversely, a system of producer liability founded on the same basis as that put in place by the Directive and not limited to a given sector of production does not come within any of the systems of liability referred to in Article 13 of the

\textsuperscript{44} The claim before the referring Spanish Court concerned the compensation for damage allegedly caused in premises belonging to the defendant in the course of a blood transfusion.

\textsuperscript{45} Article 13: “This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified”.
Directive. That provision cannot therefore be relied on in such a case in order to justify the maintenance in force of national provisions affording greater protection than those of the Directive”. The Court of Justice then ruled as follows: “Article 13 of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products must be interpreted as meaning that the rights conferred under the legislation of a Member State on the victims of damage caused by a defective product under a general system of liability having the same basis as that put in place by the Directive may be limited or restricted as a result of the Directive's transposition into the domestic law of that State”.

Another interesting precedent is the judgment in Commission of European Communities v. French Republic (25 April 2002). The Commission claimed that the French Republic had failed to fulfil its obligations under the Product Liability Directive: by including damages of less than EUR 500 in Article 3 of Law No 98-389 of 19 May 1998 on liability for defective products; by providing in Article 8 thereof that the supplier of a defective product is to be liable in all cases and on the same basis as the producer; and by providing in Article 13 thereof that the producer must prove that he has taken appropriate steps to avert the consequences of a defective product in order to be able to rely on the grounds of exemption from liability provided for in Article 7 (d) and (e) of Council Directive 85/374/EEC. In the French Government's view, the Directive was to be interpreted in the light of the growing importance of consumer protection within the Community, as reflected in the latest version of Article 153 EC Treaty. In particular, the French position was that the wording of Article 13 of the Directive, which uses the term “rights”, shows that it does not seek to prevent achievement of a higher national level of protection. The analysis by the French Government, it was agreed, was also borne out by the fact that the Directive itself enabled Member States to depart in certain respects from the rules which it laid down. Despite such arguments, the Court of Justice declared that the French Republic had failed to fulfil its obligations.

The Court of Justice came to similar conclusions in the case of Commission of European Communities v. Hellenic Republic (25 April 2002), declaring that “by not making provision in the national legislation transposing Council Directive 85/374/EEC ... concerning liability for defective products for the threshold of EUR 500 referred to in Article 9(b) of the Directive, the Hellenic Republic has failed to fulfil its obligations under that provision”.

All these decisions show that according to the case law of the European Court a higher level of protection provided by national law must be sacrificed for the purposes of harmonisation. It also demonstrates that: 1) the possible future approximation of personal injury damages involves several risks, especially for those countries which provide victims a high degree of protection; 2) the
European legislature’s approach to the harmonisation of personal injury damages should be based on minimum standards (this was the approach followed by Resolution 7-75 of the Committee of Ministers of the Council of Europe).

4.3. The harmonisation of liability: the experience of special liability regimes, standards of conduct and causes of action through EC directives.

The European legislature has already played a significant role in the harmonisation of several specific areas concerning personal injury litigation. In particular, it should be noted that the impact of E.U. legislation on personal injury consists of provisions introducing special regimes of civil liability or provisions providing new standards of conduct to be taken into account when determining liability under national substantive law.

4.3.1. Special regimes of liability.

The following directives have introduced special regimes of liability affecting personal injury:


- **Council Directive 90/314/EEC of 13 June 1990** on package travel, package holidays and package tours: this Directive introduced a special regime of liability by which the organiser and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organiser and/or retailer or by other suppliers of services, without prejudice to the right of the organiser and/or retailer to pursue those other suppliers of services.

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46 See Philip Mead, Chapter Two, in this book.
The liability scheme introduced by the Directive on Liability for defective products is based on a strict liability approach which is relative, not absolute, since the plaintiff must prove not only the causal link between the product and the damage, but the causal relationship between the defect and the damage (see Article 4).

Article 1 states that “The producer shall be liable for damage caused by a defect in his product”. Under Article 4 there is a reversal of the burden of proof: “The injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage”.

Article 7 provides that: “The producer shall not be liable as a result of this Directive if he proves:

(a) that he did not put the product into circulation; or
(b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards; or
(c) that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business; or
(d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or
(e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered; or
(f) in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product”.

In the U.K., Directive 85/374 was implemented by the Consumer Protection Act 1987. A controversial provision of this Act was Section 4 (1) (e), which introduced the “product development risk” defence as follows: “4. Defences. (1) In any civil proceedings by virtue of this [Act] against any person (‘the person proceeded against’) in respect of a defect in a product it shall be a defence for him to show - … (e) that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control”.

In relation to Section 4 (1) (e), in 1995 the Commission of the European Communities brought proceedings against the United Kingdom for a declaration that, by failing to take all the measures necessary to implement Council Directive 85/374/EEC of 25 July 1985, in particular
Article 7(e) thereof, the United Kingdom had failed to fulfil its obligations under the Directive and under the EC Treaty. In particular, the Commission argued that the “product development risk” defence in Section 4 (1) (e) did not comply with Article 7(e) of the Directive 85/374, since the United Kingdom legislature had broadened the defence under Article 7(e) to a considerable degree and had converted the strict liability imposed by Article 1 of the Directive into mere liability for negligence. The European Court dismissed the Commission’s application. The Court put forward its own interpretation of the Directive, stating that in order for a producer to incur liability for defective products under Directive 85/374, the victim does not have to prove that the producer was at fault; however, in accordance with the principle of fair apportionment of risk between the injured person and the producer set forth in the seventh recital in the preamble to the directive, the producer has a defence where he can prove certain facts exonerating him from liability, including “that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered”. Whilst the producer has to prove that the objective state of scientific and technical knowledge, including the most advanced level of such knowledge, without any restriction as to the industrial sector concerned, was not such as to enable the existence of the defect to be discovered, in order for the relevant knowledge to be successfully pleaded against the producer, that knowledge must have been accessible at the time when the product in question was put into circulation. On the basis of these considerations the European Court held that the United Kingdom provision to the effect that the producer has a defence where he can prove that the state of such knowledge was “not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control” was not manifestly contrary to that Community rule. In the view of the European Court, the argument that such a national provision permits account to be taken of the subjective knowledge of a producer taking reasonable care, having regard to the standard precautions taken in the industrial sector in question, selectively stresses particular terms used in the provision without demonstrating that the general legal context of the provision at issue failed effectively to secure full application of the Directive.

An interesting recent decision of the European Court in respect of the Directive on product liability is Henning Veedfald v. Århus Amtskommune. This case concerned a claim for damages following an unsuccessful kidney transplant operation performed in a Danish public hospital. Mr Veedfald was due to undergo a kidney transplant operation at Skejby hospital. After a kidney had been removed from the donor (in this case the victim’s brother) it was prepared for transplantation by flushing with a specific perfusion fluid, which proved to be defective; a kidney artery became

50 10 May 2001, Case C-203/99.
blocked, making the kidney unusable for transplantation. The fluid had been produced in the laboratories of another hospital, Århus District Hospital, and prepared with a view to its use in the Skejby hospital. Amtskommune was the owner and manager of both hospitals. Mr Veedfald claimed damages from Amtskommune, who denied liability on the basis that it had not put the product into circulation and that the product had not been manufactured for an economic purpose, since the two hospitals concerned were funded entirely from public funds. Mr Veedfald brought proceedings before the Vestre Landsret (Western Regional Court), Denmark, against the refusal to pay compensation. After his action was dismissed, he appealed to the Højesteret, which, being unsure as to the proper interpretation of Danish law in the light of the provisions of the Directive, decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

1) “Must Article 7(a) of Council Directive 85/374/EEC of 25 July 1985 be construed as meaning that a defective product is not put into circulation if the producer of the defective product, in the course of providing a specific medical service, produces and uses the product on a human organ which, at the time when the damage occurred, had been removed from a donor's body in order to be prepared for transplant into another person's body, with resulting damage to the organ?”;

2) “Must Article 7(c) of Council Directive 85/374/EEC of 25 July 1985 be construed as meaning that a publicly owned hospital is free from liability under the Directive for products produced and used by that hospital in the course of providing a specific publicly financed service to the person suffering injury and in respect of which that person has not paid any consideration?”.

In response to these questions, the European Court held as follows:

1) “Article 7(a) of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products is to be interpreted as meaning that a defective product is put into circulation when it is used during the provision of a specific medical service, consisting in preparing a human organ for transplantation, and the damage caused to the organ results from that preparatory treatment”;

2) “Article 7(c) of Directive 85/374 is to be interpreted as meaning that the exemption from liability where an activity has no economic or business purpose does not extend to the case of a defective product which has been manufactured and used in the course of a specific medical service which is financed entirely from public funds and for which the patient is not required to pay any consideration”.
4.3.2. Special standards of conduct.

Besides the mentioned special regimes of liability, EU Legislation provides a wide range of standards of conduct that are relevant to personal injury claims and, in general, to the process of harmonisation within this area. The harmonisation of statutory duties is a key element in the common approach taken by national courts to personal injury litigation. In particular, there are several EU provisions, implemented by the Member States, which personal injury lawyers should consider in the course of their activity. First of all, there are a considerable number of provisions imposing standards of conduct and specific duties on employers in the field of health and safety. The main reference point in this respect is Directive 89/391/ECC on health and safety, the Framework Directive. Article 5 (1) of this Directive contains the fundamental obligation that the employer has the duty “to ensure the health and safety of workers in every aspect related to the work”. Secondly, the following directives should be considered: Directive 90/385/ECC on Active Implantable Medical Devices, which covers all powered implants or partial implants left in the human body such as a heart pacemaker, and Directive 93/42/ECC on Medical Devices, which covers different kinds of devices ranging from first aid bandages to blood collection bags. Article 2 of Directive 93/42/ECC imposes an obligation on Member States to “take all necessary steps to ensure that devices may be placed on the market and put into service only if they do not compromise the safety and health of patients, users and, where applicable, other persons when properly installed, maintained and used in accordance with their intended purpose”.

4.3.3. Future perspectives on the harmonisation of liability laws.

As set out above, the harmonisation of personal injury law in respect of liability issues is directly connected with the development by the EU legislature of common obligations and standards of conduct. It is reasonable to predict that in the near future the European legislature will move forward by means of new directives introducing new standards of conduct. For example, there is already considerable debate concerning the protection of employees against harassment at the workplace. On the other hand, it is more difficult to predict whether new special regimes of liability will be introduced. Nevertheless, in this respect there are some signs arising from the debate on the «Proposal by the European Commission for A Directive of the European Parliament


52 See in particular European Parliament Resolution on Harassment at the Workplace, 2001/2339 (INI)
and of the Council amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/ECC, 90/232/ECC and Directive 2000/26/EC on Insurance against Civil Liability in respect of the use of Motor Vehicles» that indicate that the European legislature is considering a uniform regime of liability in the field of road traffic accidents. Moreover, a Proposal for a Directive on the liability of suppliers of services, which would impact medical negligence litigation, has already been drafted by the European Commission, even if, at the time it was promulgated, the reaction from the Member States was quite negative.


Past and present limits on the European legislature’s competence to harmonise the substantive law of personal injury damages are the reason for the lack of general or specific compensation principles or guidelines under European law. The E.U. legislatures’ approach to compensation for non-pecuniary losses has been that compensation for non-pecuniary damages should be governed solely by national law. This is for example the approach followed by Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of Member States concerning liability for defective products. Article 9 of this Directive states that:

“For the purpose of Article 1, 'damage' means:
(a) damage caused by death or by personal injuries;
(b) damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 ECU, provided that the item of property:
   (i) is of a type ordinarily intended for private use or consumption, and
   (ii) was used by the injured person mainly for his own private use or consumption.
This Article shall be without prejudice to national provisions relating to non-material damage”.

4.4.1. The limited role of the European Court of Justice: case-law on personal injury damages and fatal accidents.

The approach of the European Court of Justice entirely reflects the EU Legislature’s approach by leaving compensation issues to the national courts. This approach to the issue of

53 COM (2002) 244.
damages is well described in the case of Henning Veedfald v. Århus Amtskommune\textsuperscript{55} in which, in relation to Article 9 of the Council Directive 85/374/EEC, the European Court held as follows:

1) “Article 9 of Directive 85/374 is to be interpreted as meaning that, save for non-material damage whose reparation is governed solely by national law and the exclusions detailed in that article as regards damage to an item of property, a Member State may not restrict the types of material damage, resulting from death or from personal injury, or from damage to or destruction of an item of property, which are to be made good”;

2) “The national court is required, under Directive 85/374, to examine under which head the circumstances of the case are to be categorised, namely whether the case concerns damage covered either by point (a) or by point (b) of the first paragraph of Article 9 or non-material damage which may possibly be covered by national law. The national court may, however, not decline to award any damages at all under the Directive on the ground that, where the other conditions of liability are fulfilled, the damage incurred is not such as to fall under any of the foregoing heads”.

However, there are a few interesting decisions of the European Court which are relevant to the impact of European law on national personal injury laws. The first case is Marshall v. Southampton and South-West Hampshire Area Health Authority (No.2)\textsuperscript{56}: here the European Court held that the statutory cap on compensation for sex discrimination contained in the Sex Discrimination Act 1975 was contrary to the Equal Treatment Directive. Interpreting Article 6 of the Directive, the European Court held that the objective “is to arrive at real equality of opportunity and cannot therefore be attained in the absence of measures to restore such equality when it has not been observed”, thus where “financial compensation is the measure adopted in order to achieve the objective … it must be adequate in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full”\textsuperscript{57}.

Another relevant decision is the case of Simone Leitner and TUI Deutschland GmbH & Co. KG\textsuperscript{58}, concerning the interpretation of Article 5 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours. The Leitner family booked a package holiday (all-inclusive stay) with TUI at a club in Turkey for a period of two weeks. About a week after the start of the holiday, Simone showed symptoms of salmonella poisoning. The illness, which lasted beyond the end of the holiday, took the form of a fever of up to 40° C over several days, circulatory difficulties, diarrhoea,

\textsuperscript{55} ECJ, 10 May 2001, Case C-203/99.
\textsuperscript{56} Marshall v. Southampton and South-West Hampshire Area Health Authority (No.2) [1993] I.R.L.R. 445.
\textsuperscript{57} This precedent forced the English Government to remove the cap on compensation: Sex Discrimination and Equal Pay (Remedies) Regulations 1993 (S.I. 1993 No. 2798) Reg 2.
\textsuperscript{58} ECJ, 12 March 2002, Case C-168/00.
vomiting and anxiety. Her parents had to look after her until the end of the holiday. Moreover, many other guests in the club also fell ill with the same illness and presented the same symptoms. Simone Leitner, through her parents, brought an action for damages in the sum of ATS 25 000. The Austrian court of first instance awarded the claimant only ATS 13 000 for the physical pain and suffering (“Schmerzensgeld”) caused by the food poisoning and dismissed the remainder of the application, which was for compensation for the non-material damage caused by loss of enjoyment of the holidays (“entgangene Urlaubsfreude”). The national court considered that, if the feelings of dissatisfaction and negative impressions caused by disappointment must be categorised, under Austrian law, as non-material damage, they cannot give rise to compensation because there is no express provision in any Austrian law for compensation for non-material damage of that kind. The claimant appealed to the Landesgericht Linz, which concurred with the court of first instance insofar Austrian law was conserved, but considered that the application of Article 5 of the Directive could lead to a different outcome. In that connection, the Landesgericht cited Case C-355/96 Silhouette International Schmied [1998] ECR I-4799, paragraph 36, where the European Court had ruled that, while a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual, a national court is required to interpret the provisions of national law in the light of the wording and the purpose of the directive so as to achieve the result it has in view. The national court observed in addition that the German legislature had adopted legislation expressly concerning compensation for non-material damage where a journey is prevented or significantly interfered with and that in practice German courts do award such compensation. Taking the view that the wording of Article 5 of the Directive was not precise enough to draw from it any definite conclusion as to non-material damage, the Landesgericht Linz decided to stay proceedings and to refer the following question to the Court for a preliminary ruling: “Is Article 5 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours to be interpreted as meaning that compensation is in principle payable in respect of claims for compensation for non-material damage?”.

Before the European Court, the European Commission first pointed out that the term “damage” is used in the Directive without any restriction, and that, specifically in the field of holiday travel, damage other than physical injury is a frequent occurrence. The Commission then noted that liability for non-material damage is recognised in most Member States, over and above compensation for the physical pain and suffering traditionally provided for in all legal systems,

59 “... In the matter of damages arising from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited in accordance with the international conventions governing such services. In the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited under the contract. Such limitation shall not be unreasonable”.

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although the extent of that liability and the conditions under which it is incurred vary in detail. Lastly, all modern legal systems attach ever greater importance to annual leave. In those circumstances, the Commission maintained that it was not possible to interpret restrictively the general concept of damage used in the Directive and to exclude from it as a matter of principle non-material damage.

The European Court of Justice held that “it is not in dispute that, in the field of package holidays, the existence in some Member States but not in others of an obligation to provide compensation for non-material damage would cause significant distortions of competition, given that, as the Commission has pointed out, non-material damage is a frequent occurrence in that field”. Secondly, the Court observed that “the Directive, and in particular Article 5 thereof, is designed to offer protection to consumers and, in connection with tourist holidays, compensation for non-material damage arising from the loss of enjoyment of the holiday is of particular importance to consumers”. In the light of these considerations the European Court ruled that “Article 5 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours is to be interpreted as conferring, in principle, on consumers a right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday”.

The above decision shows that the European Court, at least so far as Council Directive 90/314/EEC is concerned, distinguishes between two heads of non-pecuniary loss: 1) non-pecuniary losses arising from personal injury; 2) non-material damage other than non-pecuniary damage for personal injury (physical pain and suffering). This distinction may also become a general model for national courts.

Finally, the only case in which the European Court directly dealt with compensation for personal injury is Leussink-Brummelhuis v. Commission. On 7 April 1978 Mr. Leussink, a Commission official on Commission business, was being driven by another Commission official on a German motorway in a car belonging to the Commission, when the vehicle went out of control, rolled over several times and came to a stop against a signpost beside the motorway. According to a technical expert’s report, the accident occurred because the tread came away from a tyre. The report mentioned a number of possible causes, some of which could be attributable to poor maintenance or inadequate inspection of the vehicle or to negligent use. As the European Commission was best placed to provide evidence enabling the Court to establish which of those factors caused the detachment of the tread and as the Commission did not offer any evidence, the European Community was held liable on the basis of Article 288 (2) EC Treaty for non-material damage leading to personal injury.

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resulting from a breach of a duty of care against one of its civil servants. In particular, Mr. Leussink suffered very serious injuries including fractures to the skull and ribs, bruised abdomen and lungs with consequent infection, loss of his right eye and injury to his left eye, loss of his senses of smell and taste, loss of strength in his left arm and loss of six square centimetres of tissue from his skull. He was in a coma for three months. Mr. Leussink was awarded an amount of BEF 2 million. The decision of the European Court was as follows:

“The information provided to the Court justifies the finding that the extremely serious injuries sustained by Mr. Leussink have had consequences which were not only economic, particularly as far as his family and social relationship are concerned. Such consequences constitute non-material damage giving rise to entitlement to compensation. … As the Court has held in its judgment of 2 October in Case 152/77 Miss B v. Commission [1979] ECR 2819, psychological and non-physical consequences must be taken into account when determining the rate of invalidity under the insurance scheme provided for by the Staff Regulations. A breakdown of the rate of invalidity (75 per cent) shows that this was indeed done in this case. Besides the percentages adopted for the impairment of Mr. Leussink’s hearing, sense of smell and sense of taste, a rate of 10 per cent was fixed for psychological and non-physical injury. That rate corresponds to compensation of almost BEF 1,000,000. However, in view of the extreme gravity of the non-economic consequences which the accident has had for Mr. Leussink, the Court considers it equitable to award him additional compensation of BEF 2,000,000 together with interest thereon at the rate of 8 per cent per annum from the commencement of the action on 23 May 1984”.

It is interesting to note that this decision demonstrates the European Court using its wide discretionary power in awarding non-pecuniary damages. It should also be noted that the claims of Mr. Leussink’s spouse and children for compensation for the effects of the accident and its sequelae, particularly of a psychological nature, were dismissed because their damage was “indirect”:

“Although there can be no doubt about the reality of those effects or about the existence of a link with the accident, they are nevertheless the indirect result of the injury suffered by Mr. Leussink and do not constitute part of the harm for which the Commission may be held liable in its capacity as employer. This is borne out by the fact that the legal systems of most Member States make no provision for compensating such effects”.
As correctly noted by Van Gerven, Lever, and Laurouche, the findings of the European Court in respect of Mr. Leussink’s dependants’ claims were remarkably strict; furthermore, the comparative assertion made by the European Court was inaccurate. At present, many Member States (for example, France and Italy) permit redress protection for dependants even in cases where the primary victim survives.

4.4.2. Future perspectives for the harmonisation of damages at the E.U. level.

The European Commission appears to be fully aware of the difficulties of harmonising compensation systems and, in particular, provisions specifically concerning personal injury damages. For example, in the Green Paper «Compensation to crime victims» (September 2001) the Commission expressly outlined such difficulties in relation to the harmonisation of the concept of "immaterial damages":

"The question … arises whether a common definition of immaterial damages … should be introduced. At the very least a general principle should be considered, for example, that compensation should cover pain and suffering and other immaterial damages. However, going further seeking to introduce a definition of what such compensation should cover could be very difficult in view of the differences between Member States. To make an explicit reference to that the compensation is to be assessed in the same way as under national tort could be an option, although not much would be achieved in terms of uniform application, considering the differences between such laws between the Member States".

The same difficulties were stressed in relation to the approximation of assessment approaches:

"Complications arise in relation to compensation for pain and suffering and other immaterial damages … it would probably not be possible to set any common guiding principles for determining the actual amount of compensation for such losses, in spite of the risk of unfair effects. This assessment will therefore have to be left to each Member State …".

Thus at present the European Commission appears to be against developing any further legislative approximation of the law of personal injury damages.

On the other hand, some groups of academics, medical experts and insurers are lobbying for a Directive on personal injury damages. A example already mentioned is the Recommendation to the European Commission, the European Parliament and the Council proposed by “Trier 2000

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Group” at the conference entitled «Rationalisation of the medico-legal assessment of non-economic damage», held in Trier at The Academy of European Law (ERA) on 8th and 9th June 200063. Another example is the «Guide barème européen d’évaluation des atteintes à l’intégrité physique et psychique», drafted on 25th May 2003 by the group of medical experts directed by Prof. Pierre Lucas and supported by CEREDOC (Confédération Européenne d’Experts en Evaluation et Réparation du Dommage Corporel). However, although such draft recommendations may be of some interest from an academic point of view and surely stimulates the debate on approximation, such a scheme may be criticized in many respects. The idea of a medico-legal scale, which should be applied in all Member States based upon a system of percentage points for each category of physical or mental impairment, would amount to a significant imposition where, as outlined in the comparative report, there are marked divergences between Member States in respect of the medical evaluation approach. The use by the “Trier 2000 Group” (or “Rothley Group”) of medical scales and guidelines for the assessment of non-pecuniary losses arising from bodily and/or mental impairment is so closely inspired by the French, Belgian, Italian and Spanish systems, that the adoption of such proposals would effectively involve grafting Italian/French principles of personal injury law onto the pre-existing systems of all other Member States. This would cause considerable trouble for such States, without taking into account the predictable costs involved in such operation.

Furthermore, proposals such as that by the “Trier I group” are based upon an underlying philosophy which it is quite difficult to adhere to. On the one hand, Professor Busnelli, who lead the working group that drafted the proposal, in justification of the need for such legislative harmonisation talks of the “anarchy resulting from the comparative analysis of the different European systems”, “the Tower of Babel of definitions” and the “lottery of criteria for compensation” at the European level64, but, as shown in the comparative report (see in particular Chapter 1, paragraph 2.2.5), national compensation systems are today far from being a “damages lottery ” and anyway present divergences among legal redress systems are not in themselves a negative factor nor can they be defined as “anarchy”; otherwise we would have to accept that all comparative studies would inevitably lead to the same result. It is incorrect, from the point of view of comparative law, to label divergences among systems as “anarchy”. It is also an excessively critical approach to define the need for harmonisation as a “battle” against divergence and the “uncontrolled expansion of non-economic damages”. First of all, European legal systems are far from being “uncontrolled” (see in this respect the comparative report); secondly, approximation

63 The BUSNELLI, F.D., Prospettive europee di razionalizzazione del risarcimento del danno non economico, in Danno e responsabilità, 2001, pages 5-11.
64 BUSNELLI, F.D., Prospettive europee di razionalizzazione del risarcimento del danno non economico, in Danno e responsabilità, 2001, pages 5-6.
should not be a (political) knockout “battle” against one approach in favour of another, but the final step, given the right background, of a prudent and meditated process taking into account and fully respecting the existing diversity of legal systems. On the other hand, no justification has been produced, apart from political or policy rationales which run counter to the interests of injured victims and the level of protection that generally characterise the goals of the European legislature, for the introduction on a Europe-wide basis of a legislative limit to the exercise of judicial discretion when assessing awards for general damages. The adoption of such a system would involve a change from the fundamental principle of full compensation expressly recognised in the Nice Charter to some form of (limited or defined) indemnification using methods for the assessment of damages diametrically opposed to the approach followed at present by most Member States. Any consideration of the harmonisation of medical scales or the criteria for the assessment of non-pecuniary losses should be left to the last stage of any approximation process, rather than be imposed from the start. Moreover, in respect of the recommended action suggested by the “Trier I Group”, it should not be forgotten that the European Community ought to exercise every competence attributed to it by the Member States in full respect of the principle of subsidiarity and of the principle of proportionality.

4.5. The harmonisation of social security schemes and the European Commission’s Green paper on State Compensation to Crime Victims.

The Green Paper on «Compensation to crime victims» (September 2001) demonstrates that the European Commission does not limit the scope of harmonisation to compensation based on liability, but has a wider view, taking into account the direct role of the Member States in the protection of personal injury victims. Nevertheless, the debate from the Green Paper has seen considerable divergence among the Member States in relation to the future steps which should follow the European Commission’s initiative, and it is still uncertain whether the proposals contained in the Green Paper will lead to the adoption of common minimum standards in a relatively short time.

4.6. Cross-border litigation and questions arising from the applicable law: simplification and harmonisation of procedural issues.

65 The necessity to seriously take into consideration the principle of subsidiarity has been recently noted by FAURE, M., Toward a harmonized Tort Law in Europe? An Economic Perspective, in Maastricht Journal of European and Comparative Law, 2001, Volume 8, No. 4., page 349.
As mentioned above, at this stage the primary goal of the European legislature has been the unification of the procedural framework of civil actions and access to justice, especially in the field of cross-border litigation. In this context, among other initiatives the European Commission has recently adopted a preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations, provided for by the Vienna Action Plan (point 40(b)) and the Mutual Recognition Programme (point II.B(3)). Article 3 - General rule of the preliminary draft of the proposal states:

“The law applicable to a non-contractual obligation arising out of a tort or delict shall be the law of the country in which the loss is sustained, irrespective of the country or countries in which the harmful event occurred and irrespective of the country in which the indirect consequences of the harmful event are sustained. Where the author of the tort or delict and the injured party have their habitual residence in the same country when the tort or delict is committed, the applicable law shall be the law of that country”.

The issue of applicable law is undoubtedly important and should be taken into account by the European legislature specifically personal injury victims. In particular, at present victims involved in transnational accidents, at least those involved in serious accidents, may not receive “full and fair compensation”. First of all, given the wide divergence in relation to medical evidence and medical assessment of injuries, foreign rules of admissibility and the substantive content of medical evidence may present a real hurdle and additional cost for the injured victim. Secondly, where foreign law applies, the levels of compensation may not reflect the true losses the injured person has in fact incurred in the state of domicile. In particular, a victim’s compensation should take into consideration the interaction of laws in relation to insurance cover, social security benefits and compensation in the state of domicile or the state of the accident; where this does not take place, the consequence may lead to under-compensation of the victim.

5. Conclusion: a prudent approach to future harmonisation.

To sum up, it seems clear that European jurisdictions are already experiencing the process of approximation of liability law and the law of damages at different levels (not only legislative approximation, but also convergence from below): thus harmonisation of personal injury compensation is not something strictly relegated to academic disputes, but there are already several concrete and tangible relevant results, and more are to come. In particular, the approximation process is likely to undergo further development in the near future, encouraged by different factors
such as lawyers’ increased knowledge of national compensation systems, the increasing circulation of redress models among European states through the “comparative work” of national courts and jurisprudence, the need to improve cross-border litigation and, last but not least, the input from the European Institutions and courts such as that at Strasbourg. Recent experience also shows that within the field of personal injury compensation there are already some groups lobbying for harmonisation and producing proposals that force national jurists and lawyers to abandon their traditional provincialism and become active in the harmonisation process. Furthermore, legislation in force aimed at harmonising Member States calls for further steps as, for example, may be argued in the case of the 4th Motor Insurance Directive, which has just come into force.

Harmonisation can also bring benefits and improvements as appears from the decisions of the Strasbourg court as well as the relevant European Directives and decisions of the European Court of Justice67. Such developments are clearly apparent to practising lawyers facing daily problems involved in cross-border litigation.

The real question then is how we should approach the future of “Europeanisation” of personal injury law. Approximation is desirable indeed, but it is also desirable to support it in the appropriate and correct way, without transforming harmonisation into a losing “battle” against the present wide divergence; a battle which would involve high cost in most countries and, at the end of the day, for European citizens. This does not mean that the approach to harmonisation issues should be restricted to the mere study of differences and common denominators: indeed, the role of European personal injury lawyers who believe in the value of the European integration process should be characterised by a creative aspiration to improve the protection and equal treatment of European citizens. The goal of equal treatment obviously demands the harmonisation of legal systems. Nevertheless, activism is useless and counterproductive if it is not correctly managed.

First of all such activism should be integrated by the application of the proper skills and knowledge of what we aim to harmonise and the risks involved by approximation:

“Knowledge of all relevant elements and factors at play seems indeed crucial in proposing no matter what European legal integration …which aspires to beyond both the nationality and the personal agendas of the decision-makers involved in it. In fact any legal integration implies producing rules which are new for all, or at least for some, of the legal actors in the systems concerned. Implementation of such rules requires a class of interpreters – judges, practitioners, scholars – acquainted with the new rules and with their rationales. The absence of this knowledge in the short term, as well as (in the long term) the strength of

deeply rooted traditions in respect of different concepts, notions and their interrelations, may lead every ‘integrative’ effort, not to mention a codification, to a dead end.\(^ {68}\)

The first preliminary step then is to develop the knowledge required by reasoned harmonisation. In order to achieve this goal in relation to the area of personal injury, it is necessary for the following to be established: further comparative research; a European database on national personal injury case laws and legislation; a European Journal of Personal Injury Law in order to develop a common culture in this field; general and specialised courses and exchanges for practising lawyers, judges and academics concerning the protection of personal injury victims; and conferences on personal injury compensation across the Member States.

Harmonisation is also a question of sensitivity and prudence. Approaching approximation involves a high degree of respect for the present divergences and, in particular, a considered understanding of the reasons underlying the existing differences. Generally, divergence is a sign of preferences expressed by national redress systems and one should tread carefully when considering the consequences and risks involved in forcing a jurisdiction to take new paths. For example, as has been noted in relation to the question of harmonising compensation of non-pecuniary losses, “here one should be very careful in calling for harmonisation. First of all, the benefits of harmonisation in that area should be made clear; secondly it is very likely that the costs of harmonisation will be huge and thirdly, harmonisation in those cases could lead to a paternalistic measure and to disrespect for the preferences of citizens.”\(^ {69}\)

Such considerations make it very necessary to handle with care national systems’ preferences and, at the present stage, given the current wide divergence, they should lead to the conclusion that, instead of a legislative approximation of personal injury law, it would be much more appropriate and functional for the goals of harmonisation to give national systems more time to develop further convergence themselves by adjusting their preferences to the process of European integration. Hence it would be desirable for national legislatures to recognise the value of foreign legal systems when approaching law reform in this area, likewise judge-made law should be encouraged in making more extensive use of comparative law.\(^ {70}\) In other words, each Member State’s personal injury law should develop, through the use of comparative law and through judicial decision-making in the context of competition between Member States’ compensation models.

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\(^ {70}\) “The adjudicating body, the courts, must ... play a leading part. They should be encouraged not only to refer to comparative law in their decision-making in domestic cases, but also to give comparative law a specifically European emphasis”, Von Bar, C., The Common European Law of Torts, Volume I, Oxford University Press, Oxford, 1998, pages 414-415.
Moreover, this approach, based on non-statutory approximation of personal injury law, appears to adhere much more closely to the subsidiarity principle and to the current limits of the E.U. legislature’s competence for legislative initiatives in the field of personal injury compensation.

The process of approximation of laws in this field will still need to go through several different stages. Harmonisation by establishing statutory common minimum rules concerning the compensation of pecuniary and non-pecuniary loss, followed by the setting of minimum levels of non-pecuniary awards, should be the last step of a process that will require its own time to develop a suitable common legal background for future legislative intervention. Given the diversity of the systems, and the different treatment of evidence and civil procedure across Europe, to attempt to harmonise issues such as the medical assessment of physical and/or mental injury, and the applicable criteria for the assessment of damages is not desirable at this stage. Such harmonisation would involve the effective transplant of general civil procedural laws which would likely cause as much disruption as benefit to the integration process.