Compensation for personal injury in Western Europe

Principles, practice and recent developments in the field of non-pecuniary loss in eight countries

by **Paul Szöllösy,** Dr. iur., former Head of Swiss Re's Claims Department, Zurich*

1. Differing principles of liability and standards of compensation in the European countries

Paul Szöllösy

Who is responsible for damage that has occurred through human error and how, in particular, reparation can be provided for the consequences of bodily injury or the death of a person are questions that are answered differently in every country, even within Europe. There is widespread agreement on the principle that whoever is culpable of causing damage to another party is obliged to compensate. The stage of development of the society, economics and technology, as well as the traditions and aspirations of national law, are the decisive factors here. Increased efforts have nevertheless been made recently by international organisations, and in particular by the European Community (EC), to bring about legal approximations, in the tort law sectors also, of the European countries. The most important example of this is the EC Directive on Products Liability of 12.7.1985, which has in the meantime been implemented into the national law of most of the West-European countries.

In the traffic accident sector, the European Agreement on compulsory Liability insurance for motor vehicles of 20.4.1959 and also the three EC Directives on Motor Vehicle Liability insurance (of 24.4.1972, 30.12.1983 and 14.5.1990) have settled the questions of compulsory insurance and minimum insurance protection in the member states of the European Community. The efforts to make civil law liability for damages caused by motor vehicles uniform have, however, met with little success up until now.

Neither the so-called Strasbourg Agreement of 14.5.1973, which aimed at the uniformity of substantive liability norms, nor the Draft Resolution of a sub-committee of the European Council, published in 1973, on the harmonisation of the regulations on compensation assessment in the case of personal injury were ratified or observed by the European countries.

* Revised version of a lecture given at the Danish, the Swedish and the Norwegian Sections of AIDA in April 1994. Some bibliographical references are included in the text or in the footnotes. For a more detailed bibliography cf. Paul Szöllösy, *Compensation for personal injury in Western Europe*, edited by the Swiss Reinsurance Company, Zurich 1992, p. 105—110.

Although the varying liability regulations strongly influence compensation practice, and certainly also the amount of compensation awarded for personal injury, the liability bases will only be treated briefly in this study, with reference to some particular features of the liability arrangements in question. The main aim of the study is to demonstrate the differences in the concept and calculation of personal injury, and its compensation, in eight West European countries. More specifically, the following will be examined, on the basis of the law and practice of the country in question:

— what counts as non-pecuniary damage (pain & suffering, etc.) and which damages, in principle, have to be compensated for;

— what amounts are awarded for non-pecuniary damage in case of personal injury and what factors are determining for the level of compensation.

2. Germany

2.1. Principles of tort liability

The foundations of compensation in the case of bodily injury or death are given in the German Civil Code (Bürgerliches Gesetzbuch or BGB) on the one hand, and by a range of particular laws relating to liability on the other. The principle embodied in § 823 BGB states: Whoever causes harm to another person by a wrongful and tortious act is liable to provide compensation.

The general regulations of the BGB on the type and extent of the compensation (§§ 249—251), loss of profit (§ 252) and the non-pecuniary loss (ideeller Schaden) (§ 253) basically apply to all claims for compensation, independent of the grounds for liability. For personal injury from tortiously inflicted disability or death, they are complemented by the regulations in §§ 249, 842 ff. These prescribe the following independent heads of damages:

1. Costs of medical care (§ 249, sentence 2);

2. Detriment due to loss or diminishment of earning capacity (§§ 842, 843);

3. Impairment of economic progress (§ 842);

4. Increase of needs (§ 843);

5. In the case of death: Funeral expenses and loss of right to support (§ 844);

6. Compensation for services lost (§ 845);

7. Non-pecuniary losses (compensation for pain and suffering, § 847).

The rules governing claims for damages in the various liability laws are similar, but there are also deviations from the BGB; the strict liability adopted in the liability laws is also limited in various ways. The injured party as a rule cannot claim for pain and suffering in the case of liability without fault, and the annuity or lump sum compensation to be paid by the liable party is partially limited in terms of amount. Liability limitations in terms of amount exist in §§ 9 f of the Liability law (Haftpflichtgesetz), § 33 of the Air traffic law (Luftverkehrsgesetz), § 31 of the Nuclear law (Atomgesetz), § 12 of the Road traffic law (Strassenverkehrsgesetz or StVG), and also according to § 88 of the Medicine law (Arzneimittelgesetz), in force since 1.1.1978, § 10 of the Product Liability law (Produkthaftungsgesetz), which came into force on 1.1.1990, and § 15 of the Environmental Liability law (Umwelthaftungsgesetz), in force since 1.1.1991.

2.2. Damage and compensation in the case of bodily injury

Although any impairment of a protected interest, including bodily injury, impairment to health, damage of "spiritual" (non-pecuniary) property, such as honour, freedom or credit, counts as "damage", an important legal distinction is made between pecuniary and non-pecuniary damage. Pecuniary damage is

damage to property; it represents the difference between two property situations: that which would now exist without the event that is the reason for the liability and that which actually exists. It deals, therefore, with economic property, while "non-pecuniary damage" is which cannot be measured by money. For this, monetary compensation can only be claimed in certain cases defined by law.

2.3. Pain and suffering (Schmerzensgeld)

In the case of bodily injury or impairment to health (as also in the case of offence against freedom), the injured party — but not relatives of the injured party or of the deceased — is entitled to claim "fair monetary compensation" for the non-economic damage (§ 847 BGB). All types of non-pecuniary damage are indemnified through this pain and suffering (Schmerzensgeld) compensation. According to a fundamental decision of the Federal Court (Bundesgerichtshof, BGH) on 6th July, 1955, the claim to pain and suffering has a double role: primarily a compensation function, but then in addition also a satisfaction function, in the framework of which the negligence of the tortfeasor is to be taken into account.

A peculiarity of German law is that compensation for pain and suffering can be awarded in the form of a lump sum and/or an annuity.

The level of compensation for pain and suffering awarded by German courts exceeds by far that usually granted in Austria, Switzerland, the Scandinavian countries and Holland. The foreign observer is also struck by the constant increase in the amounts that have quite noticeably left the development of the price index behind them in the last 8—10 years. The highest pain and suffering amounts (lump sum and annuity capitalised) awarded by the courts for most severe bodily injury (such as skull and brain trauma, spinal cord injury) show the following increases: 1982: DM 250,000, 1984: DM 300,000, 1986: DM 329,000, 1988: DM 360,000. In March 1990, it became known that the district court (Landgericht) of Oldenburg had awarded DM 500,000 in compensation for pain and suffering to a four year-old, paraplegic girl. The district court of Hanau had awarded a DM 300,000 lump sum to a 22 year-old man, who was also paraplegic, already on 23.6.1988, with a monthly pension of DM 500 as pain and suffering compensation in addition. The top amount of DM 600,000 has finally been awarded in 1993.

Information and tables on the grounds, function, rating criteria and forms of pain and suffering compensation, as well as the level of pain and suffering awarded, can be found in the work of a number of authors[1].

According to the wording of the BGB, § 847 para. 1, sentence 2, the claim to pain and suffering compensation was not transferable and only inheritable if legally acknowledged or pending. Through a new law of 17.3.1990 however, sentence 2 of § 847 of the BGB was deleted with effect from 1.7.1990, so that pain and suffering is now freely inheritable.

3. Great Britain (England and Wales)

3.1. Principles

The United Kingdom of Great Britain and Northern Ireland consists of a group of islands, each with its own historical development, which also gives rise to differences in

1) The most detail is probably given by Hacks/Ring/Böhm; a new edition of their work appears about every two years, also Geigel, p. 126 ff, mn. 1—47; Hellwig, p. 9 and Appendix I; Wussow/Küppersbusch, p. 65 ff, mn. 188—222. According to Hacks/Ring/Böhm, p. 61 ff, in 1989/90, pain and suffering compensation awarded (as a lump sum settlement) amounted to between DM 100 (in the case of whiplash to the lumbar spinal column with incapacity to work for 3 days) and DM 500,000 (see above). In the case of loss of a leg (amputation in the upper thigh area) e.g. the pain and suffering compensation amounted to between DM 90,000 and 120,000.

legal bases and systems. In contrast with England and Wales, Scotland's legal system was hardly affected by Roman law. Even legal terminology is not uniform. For example, damages for solatium or feelings are awarded in Scotland and these may be loosely described as the equivalent of pain and suffering and loss of amenity in England and Wales. According to English law, only the spouse or the parents of the deceased can claim a rather symbolic pain and suffering award, called bereavement, in the case of fatal accidents, whereas a Scottish law of 1976 grants such a claim, referred to as Loss of Society, within a wider framework, also to the children of the deceased. On the other hand, the compensation awards in Scotland in the case of personal injury are generally lower than the compensatory sums set in similar cases by English courts.

In this study, we will restrict ourselves to tort law in *England and Wales*. Firstly, the fundamental differences between the continental European and the Anglo-Saxon legal systems should be indicated. In the Anglo-Saxon legal sphere, civil law was not codified — as was particularly the case in France with the Code Civil. A range of legal forms that have developed over centuries continue to be absolutely central to compensatory practice. To a far greater extent than on the continent, English law is based on earlier legal decisions (precedents), which form guidelines not only for the bases of liability, but also for the damage assessment.

3.2. Damage and compensation in the case of bodily injury

English legal practice does not recognise a sharp difference between pecuniary and non-pecuniary damage. In the case of bodily injury, both the resulting pecuniary and non-pecuniary disadvantages are in principle to be compensated in the same manner. What counts as damage, how it is to be assessed and to what extent it is to be compensated are all determined according to the guidelines laid down by court practice.

For a long time, the principle applied that only those immediately affected were entitled to a claim to compensation in the case of bodily injury. Since the ruling of the House of Lords (as the highest appellate court) in 1982, close relatives of the injured party or deceased who were not injured themselves may also have a valid claim to compensation if they have also experienced the accident of their relative and have thus suffered from shock damage (nervous breakdown, depression, personality changes) which goes beyond "the usual extent of grief and sorrow". More recent rulings clarify the prerequisites and limits of the claim of the indirectly injured party. Only close relatives who have particularly strong ties with the injured party or deceased and who either saw their relative's accident or experienced it immediately afterwards are entitled to claim[2].

An important principle is that the compensation should, as far as possible, offset the damage completely, but should not be of a punitive nature. The judge is free to set a lump sum as compensation without giving an account of how he evaluated the individual loss elements. On the other hand, he is obliged to take comparable cases of precedence into consideration in the recognition and assessment of the various heads of damages. On the bases of precedents, he usually has to give compensation for the following heads of damages:

a) Special Damages, i.e. the actual pecuniary loss suffered between the date of the accident and the date of settlement or judgement.

2) Simply seeing the accident on television is not sufficient, cf. Alcock vs Chief Constable of South Yorkshire Police (Hillsborough disaster), The Times, 29.11.1991, p. 31.

b) General Damages, all non-pecuniary damages already suffered or to be expected, as well as economic damages that will probably arise in the future:

— Pain and suffering and loss of amenities, mental distress, anguish and loss of recreational ability

— Loss of future earnings or earning capacity or loss of support; future expenses.

3.3. Non-pecuniary damage

For physical and mental pain, loss of enjoyment in life and other non-pecuniary disadvantages, the judge frequently sets a lump sum under the heading "Pain & Suffering and Loss of Amenities". Here, he takes into account both precedents set in previous cases and also the actual circumstances of the injured party, in particular his age, profession and physical constitution. He takes particular note of the impairment to normal family life or — mainly in the case of young women — prospects of marriage.

The loss of one of the five senses, impairment of the plaintiff's sex life, lost enjoyment in craftwork or artistic activities or hobbies and lost pleasure in holidays are the basis for a claim for compensation for reduction of enjoyment of life or loss of amenities. Under the Administration of Justice Act 1982, the court also has to take into account awareness of a considerably reduced life expectancy as a non-pecuniary disadvantage in the assessment of pain and suffering.

Compensation for non-pecuniary disadvantages is always awarded as a lump sum, according to the actual circumstances and the value of money at the date of the judgement. The age of the injured party and his life expectancy are important assessment factors if the pain or impairment of life are long-lasting. This applies just as much to an unconscious plaintiff as to one who is sentient.

3.4. Compensation in the case of death

In the case of death, close relatives can claim a type of pain and suffering (bereavement, loss of society, solatium) according to the Damages for Bereavement (England and Wales) Order 1990. The amount is, however, set uniformly at £ 7,500 and is thus very insignificant in comparison with the compensation of the economic loss.

3.5. Date of damage assessment

According to an important regulation, the damages are to be calculated as they appeared at the time of the last judicial hearing. For General Damages interest is awarded from service of writ to trial at a rate of only 2%.

3.6. Amounts

As already discussed above (section 3.2), the English judge frequently thinks in terms of global compensatory sums and does not clearly separate the pecuniary and the non-pecuniary damages from one another. The amounts awarded in compensation in the case of injury or death to those with direct claims have increased constantly in recent years. This is only partially attributable to inflation of prices and salaries. The fact that the increase in the compensatory sums is considerably higher than the rise in inflation can be traced back, above all, to a more recent tendency, which has been described by some authors as "more socialistic than legal", since it is influenced far too much by the expectations of the public and also by foreign — particularly American — examples.

The following maximum amounts were awarded for both pecuniary and non-pecuniary losses in the most severe personal injury cases:

Date	Court	Amount £	Plaintiff	Type of liability
a) Bodily injury				
16.12.85	High Court London	580,547	Miss Brightman	Motor vehicle liability
December 1985	High Court London	679,264	Mrs. Thomas	Doctor's & Hospital liability
29.7.90	High Court London	1,571,282	J. Lambert	Municipal liability
21.12.90	High Court London	1,200,000	H. Cassel	Medical malpractice
December 1991	High Court London	1,650,000	A. Tombs	Medical malpractice
6.7.92	High Court London	1,400,000	Rosie Johnson	Motor car liability
1.2.94	High Court Manchester	1,550,000	Linda Withington	Medical malpractice
14.3.94	High Court Birmingham	3,400,000	Christine Leung	Motor car liability
b) Death				
1985	(Source: Kemp & Kemp, III-27-102/1)	204,790	Robertson (Widow + 3 sons)	Motor vehicle liability
14.1.91	High Court London	920,000	Houghton (Widow)	Motor vehicle liability
20.11.91	legal settlement (The Times, 21.11.91)	"more than 1,000,000"	Wren (Widow + 3 sons)	Railway liability

The above total amounts awarded in the case of bodily injury include compensation for non-pecuniary damages (pain & suffering and loss of amenity) to a level between £ 60,000 and 110,000. In an exceptional Product liability case (Cook vs Engelhard, 1987), the injured party, who was completely paralysed after heart failure at the age of 29, received £ 130,000 for pain and suffering, a level that was considered to be extremely high in 1987. Top amounts of £ 100,000 to 150,000 must currently (1994) be expected in the case of very severe brain damage or tetraplegia. Considering the record £ 3.4 million total (pecuniary & non-pecuniary) damages awarded in March 1994, compensation for pain and suffering could even exceed the £ 150,000 mark.

4. France

4.1. Principles of liability

Under the French civil law code of 1803/1804 (the Code Civil, also referred to as the Code Napoléon), tort liability in France is based on negligence. According to articles 1382 and 1383 C.C., any person who is responsible for causing damage to another deliberately or due to negligence is obliged to compensate the injured party. In addition, article 1384 C.C. contains certain regulations on the presumption of liability of parents, employers, craftsmen and the owner or user of an object (gardien).

"Law No. 85-677 of 5th July, 1985 to improve the situation of victims of road accidents and to accelerate compensation procedure" was named after its initiator the "Loi Badinter" and came into force on 1st January, 1986. It introduced strict, objective liability of the owner or driver of the vehicle for damage caused by a motor bike, motor cycle, car, lorry or other land motor vehicle or their trailers — with the exception of the railway and trams.

The law also contains procedural regulations in the interest of accelerated and fair compensation of traffic accident victims. For example, the Liability insurer of the vehicle involved in the accident (if several are involved, this also applies to the other insurers concerned) has to submit a compensation

offer to the injured party or the legal heirs of the deceased within eight months of the accident. If the consequences of the accident are not yet assessable, a provisional offer has to be made.

Any insurer who does not abide by the deadline arranged for the offer of compensation or for the payment of an agreed or awarded compensatory amount is subject to a penalty. This consists of an increase in the statutory interest rate of 50 to 100%. Moreover, the insurer can be obliged to pay an additional amount of at most 15% of the indemnity award to the "Fonds de garantie automobile", should the compensatory amount offered by him later be ruled by a judge to be manifestly inadequate.

4.2. Damage and compensation

No legally relevant distinction is made between the pecuniary, economic loss (préjudice patrimonial) and non-pecuniary detriment (préjudice extra-patrimonial).

Whoever suffers an impairment of his goods or of his bodily integrity can, on the basis of article 1382 ff Code Civil, claim compensation for the loss inflicted, whatever its nature.

4.3. Compensation for non-pecuniary damage

According to French legal conceptions, disadvantages of a non-pecuniary, "moral" nature[3] provide the injured party, and in some cases also near relatives of a severely injured or deceased party, with a right to claim appropriate compensation under various headings. Although the borderlines between the individual loss elements are blurred, the following non-pecuniary damage categories allowing compensation have developed in practice:

— Pain and suffering (pretium doloris, according to the most recent description: indemnisation des souffrances endurées) serves to compensate for physical pain, especially (but not exclusively) that endured by the injured party up until the "consolidation" (stabilization) of his state of health. The medical expert has to evaluate the severity of the pain according to a 7-step system (from "very slight" to "most considerable"), taking into account the type and severity of the injuries, the number and length of hospital stays, the number and painfulness of surgical operations, plaster casts, length of medical rehabilitation and the like[4].

— Disfigurement (préjudice esthétique: aesthetic damages) gives the right to appropriate compensation, which is usually determined separately, with particular consideration of the sex, age, marital status and profession of the injured party. The sums awarded are about equal to those in the case of pain and suffering, but can exceed these if there is very severe disfigurement.

— Loss of enjoyment of life or loss of amenities of a normal life (préjudice d'agrément) is a separate category for the non-pecuniary disadvantages that result from a permanent impairment of physical or mental integrity. In the assessment of the compensation, the following are taken into consideration: interference in private and family life, the impossibility for the injured party to take part in sporting, artistic or social activities or to read, the loss of the sense of taste or smell and a feeling of inferiority. Interference in one's sex life

3) Préjudice extra-patrimonial, sometimes also called "préjudices moraux à caractère personnel". The latter title stresses the personal character of the claim, which excludes the right of recourse (subrogation) of the social insurance carriers as regards this head of damages. Cf. in particular Lambert-Faivre, p. 132 ff; Le Roy, Nos. 128 ff, 157 ff, 230 ff.

4) According to statistics conducted, pain and suffering amounts awarded in the years 1989-93 were, in the least severe cases, approx. FFr. 3,000, and in the most severe cases, approx. FFr. 250,000-500,000. Cf. Moretti/Evadé, p. 12 ff.

and impotency are also included here, though this type of disadvantage is sometimes regarded and indemnified as a further, independent head of damages. The sums granted for préjudice d'agrément attained, in the most severe cases, approx. FFr. 400,000 to FFr. 500,000.

Apart from a quite exceptional and thus unrepresentative case of infection with the Aids virus, in which the Court of Appeal in Paris granted the extremely unusual sum of FFr. 2,300,000 for "préjudice d'agrément" to the injured party on 7.7.1989, the highest amount of compensation finally awarded so far for all non-pecuniary disadvantages put together was FFr. 1,500,000[5].

— Individual awards specify still further non-pecuniary loss types, which take the disadvantages into account separately or together with others in the measurement of the compensation, such as for example préjudice juvénile (the effects of a physical disability which hit a young person particularly hard, and the impossibility of joining in games and sports with friends) or préjudice d'établissement (reduced prospects of marriage, family union destroyed).

— The non-pecuniary loss suffered by the close relatives (parents or spouse) of an injured party with a view to his condition and pain justifies, in exceptionally severe cases, the granting of compensation (préjudice moral de caractère exceptionnel).

— Finally, in the case of death, the next of kin of the deceased have, in principle, an own right to claim compensation for the "moral damages", the "loss of affection" (préjudice moral, préjudice d'affection) which they suffer because of the loss of a person who was dear to them (la perte d'un être cher). According to this now established practice, the spouse, parents and children of the victim, and exceptionally also brothers and sisters and grandparents, are entitled to make this claim[6].

The practice is not uniform as regards whether the claim to compensation in the case of "moral" damages can be inherited. The pain and suffering that the deceased could claim due to the pain suffered before his death is generally seen to be inheritable, even if it was not claimed by the person entitled to do so. What is disputed, on the other hand, is whether the heirs can claim compensation awarded to the injured party for other non-pecuniary disadvantages (basically for préjudice d'agrément) if the deceased lost consciousness in the accident and did not regain it before his death.

4.4. Date of damage assessment — Form of compensation

The damages for bodily injury are calculated as on the day on which the court responsible for the question of fact pronounces its judgement.

Interest on arrears (intérêts moratoires) is owed from the pronouncement of the judgement at the statutory rate of interest[7]. If a delay in the settlement of legitimate claims for compensation is attributable to the tortfeasor, then the court can also fine him compensatory interest (intérêts compensatoires), which is calculated from a point determined by the court between the day of the accident and the day of the judgement.

5) Orléans, 18.5.93; cf. Moretti/Evadé, p. 24 f; Lambert-Faivre, p. 137 f.

6) The right to claim was disputed in the legal practice before 1973 and is still disputed today in theory, cf. Lambert-Faivre, p. 186 ff; Le Roy, Nos. 230 ff. The amounts awarded show evidence of caution: spouses and parents receive up to about FFr. 200,000, other plaintiffs between FFr. 10,000 and 100,000 for their "moral damages".

7) This varies between 8% and 10% (since 1.1.1992: 9.69%).

A French judge is free to decide whether he wishes to set the compensation in the form of a lump sum, an annuity or in a combination of both forms. He is also not bound by the motion in court here.

In the vast majority of cases of bodily injury or death, the compensation owed by the tort-feasor for future loss takes the form of a lump sum settlement.

5. Belgium

5.1. Principles of liability

Within the framework of common law, the Belgian civil code (Code Civil), based on the French "Code Napoléon" of 1803/1804, contains the fundamental provisions for civil liability. Articles 1382 ff of the Code Civil oblige anyone who, through his wrongful act is causing harm to another person, to compensate for these losses (article 1382); he is liable not only for the damage caused by his actions but also for that which occurred due to his negligence or carelessness (article 1383). Along with the basic rule on liability through negligence, there are also provisions in the Code Civil on liability without fault, in particular in article 1384 on the liability of the owner (gardien).

Strict liability (independent of negligence) was introduced by special legislation in the fields of mining accidents (law of 12.7.1939), the transportation and storage of gas products (law of 12.4.1965), toxic waste (22.7.1974), oil pollution (20.7.1976), for damage through impairment of the ground water level (1.1.1977), for the operation of aircraft (14.7.1966), for fire accidents and explosions in public buildings (law of 20.9.1979) and for nuclear accidents (law of 22.7.1985).

Belgian practice does not follow French law which, firstly, using article 1384 of the Code Civil, construed a presumption of negligence and, since 1930, an increased presumption of liability of the driver or owner of the vehicle involved in a traffic accident. Also, no law so far has established strict liability for the operation of a motor vehicle in Belgium.

5.2. Damage and compensation

The Belgian Civil Code does not make any distinction between economic loss (préjudice matériel) and non-pecuniary disadvantages (dommage moral). Since the fundamental ruling of the Supreme Court of 17th May 1881, compensation for the non-pecuniary damage has taken place in the same way as that for the pecuniary loss.

5.3. The non-pecuniary damage

5.3.1. In the case of bodily injury

According to Belgian law, the injured party can claim compensation for various types of "moral" damages (dommages moraux):

— Pain and suffering (pretium doloris) for physical and mental pain (dommage moral) suffered during temporary incapacity to work. This is assessed on the basis of a uniform rate, graduated according to the length of hospital treatment and the incapacity to work.

— Compensation for the non-pecuniary disadvantage caused by permanent incapacity to work, consisting of: disfigurement (préjudice esthétique), loss of enjoyment of life and amenities (préjudice d'agrément), impairment in the social or sexual sphere, as a young person, etc. The court is free to set the compensation sum for these disadvantages as it sees fit, but bearing in mind the amounts awarded in similar cases. In practice, an abstract "point value" frequently serves as a guideline, i.e. a lump sum is calculated per point of disability.

— With a degree of disability of 1 to 10%, it is usual in the Flemish parts of the country for lump sum compensation to be awarded for the

resulting pecuniary and the non-pecuniary damages, measured according to points of disability (dommage matériel et moral confondu par point d'I.P.)[8].

— Parents may claim indemnity in the case of most severe, lasting injury to their child, for "vue de souffrances d'un être cher" (awards may amount to BFr. 500,000 to each parent).

5.3.2. In the case of death

Pain and suffering compensation for the pain that the deceased suffered in a conscious state in the period between the accident and death can be claimed by his inheritors (préjudice ex haerede).

"Moral" damage (dommage moral) due to loss of a near relative can be claimed by those people who were particularly attached to the deceased in an affectionate way. This is generally presumed for next-of-kin, though proof to the contrary (e.g. in the case of a broken marriage) is authorised. The level of compensation depends to a great extent on whether the plaintiff lived in the same household as the deceased or not.

Parents who have lost their child, children who have lost their father or mother, husbands and wives who have lost their spouse and brothers and sisters who have lost their brother or sister are entitled to claim for reparation. Depending on the circumstances, the moral damage from the loss of a partner can also be recognised in the case of people living together or engaged. Other relatives may receive indemnification under special circumstances[9].

5.4. Form of compensation

The judge is free to decide upon the form of the compensation as he sees fit.

The compensation of non-pecuniary damages almost always takes place through the payment of a lump sum.

5.5. Date of damage assessment — Interest

The judge has to calculate the damages as on the day on which the judgement is passed.

The interest on arrears is paid on the compensation sum awarded at the statutory rate of interest (since 1.8.1986: 8%) from the day of the judgement until the settlement of the amount ruled.

6. The Netherlands

6.1. Principles of liability

After decades of preparation, the old Civil Law Code (BW) enacted in 1838 and based on the French Code Civil, has gradually been replaced in the Netherlands since 1970 by the provisions of the New Civil Law Code (*Nieuw Burgerlijk Wetboek*, abbreviated to NBW). The parts of the NBW that came into force on 1.1.1992 also include Book 6: General Section on Liability Law, in which there are new regulations on the content and extent of the

8) For compensation of non-pecuniary disadvantages in the case of bodily injury, the following average amounts can currently (early 1994) serve as a reference:

During temporary incapacity to work (or the period of acute illness), pain and suffering of BFr. 1,500 to BFr. 1,800 for each day in hospital, and after leaving the hospital, BFr. 1,200 per day of complete incapacity to work.

In the case of lump sum compensation for the economic and non-pecuniary consequences of low-grade (1—10%) reduction of working capacity, BFr. 30,000 to 50,000 per point.

9) For the non-pecuniary damages in the case of death, approximately the following average amounts were awarded in 1993:

Loss of a spouse: BFr. 250,000
Loss of a father or mother: BFr. 80,000-150,000
Loss of the father and the mother: BFr. 300,000
Loss of a child living in the same household: BFr. 150,000
Loss of a child not living in the same household: BFr. 75,000
Loss of a brother or sister
- in the same household: BFr. 50,000
- not in the same household: BFr. 35,000
Loss of fiancé(e): BFr. 100,000.

duty to compensate (articles 95—110) and the principles of liability, in particular of liability for wrongful acts (articles 162—197). The essential features of the liability system applying up to that time, based on article 1401 ff of the (old) Civil Code, were retained; the most important basis for liability is still negligence. However, the general regulation of article 6:162 NBW links the liability to the illicit action committed against another person: the person to whom this "can be ascribed" is liable to compensate for the damages suffered by others in this way.

Even very slight negligence obligates compensation. The behaviour of a child under fourteen years of age cannot, however, be ascribed to the child as an action.

In various sections, the NBW prescribes more severe liability, based upon presumption of fault, or even strict liability.

6.2. Damage and compensation

There is no definition of the concept of damage to be found either in the old nor in the new Civil Code. According to a fundamental ruling of the Supreme Court, damages include both pecuniary (vermogenschade) and also non-pecuniary damage (immateriele schade).

According to the NBW, the duty to provide compensation exists explicitly both for the economic damages as well as for the "other disadvantages"; for the latter, however, only insofar as the law provides for a claim to compensation (article 6:95).

6.3. Pain and suffering

As already mentioned, the concept of damage includes the economic and also the non-pecuniary loss. These are indemnified by pain and suffering compensation (smartegeld). However, only the injured party himself has the right to claim pain and suffering; relatives of the injured party or the deceased may not — as in the Latin countries or in Switzerland — make their own claims on the basis of non-pecuniary injury suffered indirectly, by repercussion.

However, if the injured party dies before the loss settlement and he had expressed the intention, after the accident, of claiming pain and suffering compensation, then this claim can be inherited.

Pain and suffering is measured particularly taking into account the type and severity of the injury, the intensity of the pain that has occurred and is still to be suffered and the extent of the permanent disability. Until 1988, the highest pain and suffering amount for complete disability determined by a lower instance was NFl. 200,000 (which, however, in the concrete case, was reduced to NFl. 140,000 in view of the contributory negligence of the injured party). In 1988 and 1991, however, some rulings introduced pain and suffering amounts which were considerably higher than those previously awarded in the most severe cases. In one case, an award of NFl. 250,000 was made, and in another, NFl. 300,000 (Court of Appeal, Amsterdam, 27.6.1991). For the total loss (amputation) of a leg or an arm, about NFL. 80,000 were awarded lately.

There is no scale, nor are there binding guidelines generally applied by the courts to determine pain and suffering. However, attention is paid to the tabular compilation of the lawyer Th. K. van der Veen, published every three years as a special "Smartegeld" issue of the Verkeersrecht journal. The publication also contains index figures to re-evaluate the pain and suffering amounts previously awarded. It is evident here that the increase in the figures up to about 1988 generally followed the development of prices, but that it has recently exceeded these.

6.4. Form of compensation

It is at the judge's discretion whether the compensation takes the form of periodic benefits or a lump sum. In practice, however, a

lump sum is awarded to the injured party almost without exception.

7. Italy

7.1. Bases

The legal foundations for tort liability are provided in Italy by the Codice Civile (C.C.) of 1942. Article 2043 contains the basic regulations on liability with negligence. In addition, various provisions of the Civil Code assign a presumption of fault, as for example article 2054, paragraph 1, on the part of the driver and owner of a motor vehicle in the traffic sector. Moreover, articles 2049, 2051—2053 and 2054, paragraph 4, introduce strict liability for certain circumstances and sectors.

According to the law and legal practice, distinction is made between the following loss categories:

a) Pecuniary damage (article 1223 C.C.)

b) Non-pecuniary damage (article 2059 C.C.)

— danno morale, pretium doloris: physical pain or mental distress

— danno estetico: aesthetic damage, disfigurement, scarring

— danno alla vita di relazione: impediment of professional competitiveness, impairment in the social, sporting and cultural spheres.

According to more recent practice, however, the last two categories "danno estetico" and "danno alla vita di relazione" are settled by compensation for the type of damage described below:

— Danno biologico: impairment of physical or mental integrity and damage to health as such (regardless of economic effects).

7.2 The danno biologico

Since about 1985, the Italian courts have adopted a new, most important head of damages in personal injury cases, the so-called danno biologico, as particularly the permanent consequences, though also the temporary ones, of an impairment of physical or mental integrity are called in Italian. According to this quite recent practice, the injured party is entitled to claim adequate compensation for the "biological impairment" to his integrity caused by the injury, in addition to his loss of earnings and his expenses. The physical/mental integrity should not merely be regarded as the ability to earn, but also as the capacity to develop in the physical, intellectual, cultural and social spheres. This therefore means particularly non-pecuniary disadvantages that can occur and are to be indemnified separately from the reduction in earning capacity. Sometimes, however, the dividing line between non-pecuniary and economic disadvantages is blurred and the compensation for danno biologico then also has to indemnify certain material loss elements that cannot be determined by figures.

Although there has been no uniform tariff for the assessment of indemnification up to now, several courts have adopted the practice of the Tribunale di Genova of using the treble amount of the annual social security pension as a basis for calculation for the danno biologico. Recently, a few courts have, in addition, started increasing the annual amount — set by the state — of the social security pension as they see fit and using the treble amount of the sum increased in this way as the basis of calculation[10]. From this, an annual amount

10) In this way, the Civil Court in Rome, in its ruling of 27.2.1991, took L. 16,468,800 as the basis for calculation, although the treble amount of the state social security pension would only have amounted to about L. 11 million. — Other courts go still further and set the compensation for the danno biologico according to a "point value" of disability set entirely at their discretion, which has been around L. 4—6 million in recent years. A drastic increase in the previously used (abstract) scales occurred in a ruling of the Tribunale di Milano of 2.7.1991, which set L. 15 million as the "point value" and, on the basis of this, then awarded the record sum of L. 1,125 million to the 27-year old, medically 75% disabled injured male for the danno biologico.

corresponding to the degree of anatomical/functional ("medical") disability of the injured party is calculated as the basis for compensation. This base value is then multiplied by the multipliers according to the mortality tables used by the Social Security System (dating back to 1922 and based on an interest rate of 4,5%.) Those in favour of this method quote the equality principle embodied in articles 3 and 32 of the constitution, stating that the integrity of every person is to be rated equally highly and that every person's injury is to be indemnified on the same basis.

7.3. The danno morale

In addition to compensation for pecuniary damage and the danno biologico, the injured party and also the next of kin of the deceased are entitled to claim compensation for non-pecuniary damage — danno morale: physical pain and mental distress. The distinction between pecuniary and non-pecuniary damage used to be of greater importance, according to earlier law, than it is today. A prerequisite for entitlement to pain and suffering was, according to article 2059 C.C., a criminal offence (reato) of the liable party. The amounts awarded to the injured party could be as much as L. 150 million in the case of very severe injury. In the case of death, the surviving spouse and under-age children of the deceased each received about L. 50 million, the parents about L. 25—30 million each; in the case of death of an under-age child, the parents received L. 40—50 million each.

Important changes can now be seen in this sector: in two recent court rulings in Rome and Milan, the previously inconceivably high sum of L. 500 million was awarded as pain and suffering (danno morale). Moreover, according to the draft of a bill of 29.1.1992 on the reform of compulsory Liability insurance for motor vehicles, the existence of a claim to pain and suffering is no longer linked to a criminal offence by the liable party; liability according to civil law is therefore adequate as a precondition.

7.4. Interest

The tortfeasor — or in practice, his Liability insurer — has to pay interest on arrears on the compensation sum amounting to 10% if he fails to make an appropriate offer of compensation to the injured party within 60 days of receipt of his written claim and then to make the corresponding payment within 15 days of acceptance of the offer.

8. Austria

8.1. Principles of liability

The General Civil Code (Allgemeines bürgerliches Gesetzbuch or ABGB of 1811, with three partial amending laws in 1914—16) on the one hand, and the liability laws on the other contain the underlying regulations on damage and compensation in the case of bodily injury or the death of a person. The basic principle is liability based on fault (§ 1295 ABGB), but the legal code also prescribes cases of no fault liability. The particular regulations on the duty to provide compensation in the case of bodily injury or death (§§ 1325—1327) apply to every case in which the liability is based on the ABGB, independent of the reason for liability. The liability laws that introduce strict liability in various sectors limit this liability, at the same time, to certain maximum amounts and contain some provisions on the types of damage that form the subject of the duty to compensate.

8.2. Compensation in the case of bodily injury

To a considerable extent, Austrian practice is modelled on the theory and practice of the Federal Republic of Germany (cf. sections 2.2, 2.3, above).

However, in compensation practice there are also independent Austrian solutions that

deviate from the German ones. Notable examples are in particular the institution of the "abstract annuity", and in connection with this the role of the "hindrance to progress in life", the disfigurement compensation (which takes into consideration both pecuniary and non-pecuniary damage elements) and finally the measurement of a part of the pain and suffering according to assessments of periods of suffering of varying intensity.

Disfigurement gives the injured person the right to claim compensation "especially if this person is female", and if progress in life can be hindered by the disfigurement (§ 1326 ABGB).

Disfigurement is, according to jurisdiction, any considerable, disadvantageous change in the outer appearance of the injured party; this is not to be understood from the medical viewpoint, but according to outlook on life. It does not necessarily have to be outwardly visible or striking. The claim according to § 1326 ABGB requires, however, that the disfigurement suffered could be a hindrance to the injured party's capacity to make progress in life; evidence of the mere possibility of disability or of a reduction in marriage prospects is sufficient. The courts see the disfigurement compensation as indemnification for pecuniary damage, but authorise an abstract loss calculation. In practice, this sometimes leads to pecuniary and non-pecuniary components being taken into account, particularly in the case of reduced prospects of marriage. "A reduction in the possibility of marriage is a disadvantage that to some extent lies in the area between pecuniary and non-pecuniary damage" (Schwimann, § 1326, mn. 17). Disfigured men also have the right to make this claim.

The level of compensation is measured according to the degree of disfigurement, impairment to progress in life and prospects of marriage. In the last ten years, the courts have awarded sums between ASch. 5,000 and ASch. 250,000 as disfigurement compensation.

8.3. Pain and suffering (Schmerzengeld)

According to § 1325 ABGB, the tortfeasor pays the injured party, on demand and in addition to compensation for pecuniary damage, "pain and suffering compensation appropriate to the circumstances". Pain and suffering is neither a fine nor a penalty, but instead is compensation for the non-pecuniary damage that occurs in connection with bodily injuries. It should provide the injured party with certain amenities to compensate for all sensations of pain of a physical and mental nature and for the loss of enjoyment of life. The pain and suffering is also paid in strict liability cases and is in priciple inheritable.

In the assessment of pain and suffering, the type and severity of the bodily injury, the intensity and period of the pain and the impairment to the state of health of the injured party are determining factors. According to more recent practice, the degree of negligence of the tortfeasor is insignificant in the assessment of pain and suffering; on the other hand, in the case of contributory negligence on the part of the injured party, his claim is reduced by the share of contributory negligence. Although courts are in favour of a global assessment, in practice a so-called daily rate system *(Tagessatzsystem),* i.e. the determination of pain and suffering according to periods with pain of varying intensity, has taken root. The medical expert establishes the periods of intense, medium and slight pain for which the graduated "daily rates" are awarded. There is, in addition, the sum intended as compensation for loss of amenities, for awareness of the permanent impairment and so on. The total amounts awarded or settled out of court as pain and suffering in the last ten years vary between ASch. 1,000 and ASch. 1,250,000.

According to Jarosch-Müller-Piegler (p. 185), the maximum amounts awarded in published rulings in the period between 1959 and 1985 rose from ASch. 100,000 to ASch. 1,000,000, thus increasing tenfold in 25 years. This upward trend has, however, apparently slowed down in recent years[11].

9. Switzerland

9.1. Principles

The foundations of tort liability in Switzerland are contained in particular in the Swiss Code of Obligations (Schweizerisches Obligationenrecht or OR). Article 41 of the OR lays down the basic principle of liability for fault: "Whoever causes damage unlawfully to another, whether intentionally or due to negligence, is obliged to indemnify this other person."

Individual regulations in the Swiss Civil Code (Schweizerisches Zivilgesetzbuch or ZGB) and in the OR, but in particular a range of special liability laws, provide for liability independent of fault (strict or causal liability) for certain situations, businesses or activities.

Articles 45, 46 and 47 of the OR define the heads of damages that the person liable for a tortiously inflicted death or personal injury has to pay.

According to theory and to practice, the pecuniary damage is to be strictly separated from the non-pecuniary detriment (immaterielle Unbill).

To compensate for such non-pecuniary prejudice, the OR, article 47 provides for the payment of a "satisfaction sum" (Genugtuung), with certain preconditions:

"In the case of death of a person or bodily injury, the judge may award an appropriate sum as reparation to the injured party or the relatives of the deceased, after assessing the particular circumstances."

Most special laws that provide for strict liability in particular sectors refer to the general regulations of the OR, including article 47 on the subject of reparation (Genugtuung).

9.2. Reparation of non-pecurinary damage (Genugtuung)

Whereas in other countries — in particular Belgium and France — the injured party can claim compensation for the non-pecuniary damage he has suffered under various headings, according to Swiss law, any type of non-pecuniary disadvantage is covered by the payment of a uniform reparation sum (Genugtuung). The concept of reparation (Genugtuung) thus approaches that of English pain and suffering, German Schmerzensgeld, Austrian Schmerzengeld and Dutch Smartegeld and also includes compensation for the non-pecuniary consequences of disfigurement or deformation, for which separate reparation is provided in a number of countries (for example, in Belgium, Denmark, Finland, France, Italy and Sweden, and in some cases, also in Austria). The award of reparation (Genugtuung) in Switzerland is, according to the above-quoted article 47 and also article 49 of the OR, linked with certain, relatively strict prerequisites:

a) a person's death or bodily injury and/or

b) severe violation of personal rights (such as freedom, honour, etc.)

c) "special circumstances".

11) Up until the end of 1991, the highest pain and suffering award established in court amounted to ASch. 1,100,000. — A ruling of the Supreme Court *(Oberster Gerichtshof* in Vienna) of 27.11.1991 (2 Ob 55/91) that became known in February 1992 approved the awarding of a new maximum sum of ASch. 1,200,000 as pain and suffering to a 26 year-old injured person who, as a result of severe skull and brain injuries with "massive brain contusion", was paralysed on one side and made permanently incapable of work and in need of nursing care. — The combined maximum amount of ASch. 1,800,000 for disfigurement and pain & suffering has, however, been granted by the Supreme Court on 14.1.1993.

In contrast to the law of the German-speaking European countries, Swiss law allows the next of kin of the deceased to claim reparation (Genugtuung) from the liable third party, after the French model.

The following are considered to be next of kin: Spouse, parents, children, brothers and sisters living in the same household and, in special cases, the fiancé(e).

Under the "special circumstances" referred to in article 47 of the OR, a certain degree of severity of the injury is required in practice. Not every case of bodily injury or damage to health gives a claim to reparation (Genugtuung), but only that with lasting impairment or a long, painful healing process.

The question of whether the reparation (Genugtuung) requires fault of the liable party was already settled by the Swiss Federal Court decades ago: liability independent of fault on the part of the tortfeasor is enough to form the basis for a claim for reparation (Genugtuung).

In the view of the Federal Court, article 49 of the OR — which no longer makes any reference to negligence in its new version - is the general legal principle and article 47 of the OR, regulates the special case of bodily injury or death. Predominant negligence on the part of the injured party thus does not exclude the award of (reduced) reparation (Genugtuung), just as is the case as regards the economic damage.

According to less recent practice, fault on the part of the tortfeasor was, however, the most important factor in assessment of the reparation (Genugtuung) amount. More recent rulings place the main emphasis on the pain suffered by the claimant. This development is to be welcomed. Thus, the Genugtuung reparation in Swiss law today hardly still has the function of "satisfaction", but rather the purpose of procuring for the injured party, through a monetary payment, an amenity to offset physical pain, mental distress, reduced enjoyment of life and generally for impairment of life.

The previously rather cautious practice of the Swiss courts, both as regarded the level of reparation (Genugtuung) and also the prerequisites for entitlement to claim, has changed somewhat since 1980. In three rulings, we encounter the statement that the Federal Court is aiming "to set the reparation (Genugtuung) amounts in severe cases of non-pecuniary impairment considerably higher than before, in order, on the one hand, to take more account of monetary devaluation and, on the other, to allow the cantonal courts to evaluate the various degrees of non-pecuniary injury in an extended framework and a more differentiated manner."

In 1970, SFr. 18,000 Genugtuung reparation was awarded for the loss of a spouse and this amount then applied for about ten years practically unchanged as the upper limit. In 1980, the Genugtuung reparation in a similar case was raised to SFr. 30,000, and already in 1982 to SFr. 35,000. Today, sums of between SFr. 40,000 and SFr. 50,000 are to be expected.

The Genugtuung reparation amounts awarded to other relatives of the deceased are graduated according to the degree of the relationship of the surviving party to the deceased (Graduation theory or "Stufentheorie": Hütte, Die Genugtuung, 0/2 and I/26 f.). The closer the relationship and the more shared the way of life (such as a common household), then the closer the relationship is assumed to be and the suffering caused to the relatives by the death will be assessed higher. However, proof of a differing state of affairs is permissible; the actual circumstances should always decide the issue.

According to Hütte (loc.cit., 0/3), Genugtuung reparation sums awarded to one parent in the case of loss of a child were between SFr. 9,000 and SFr. 35,000 in the period between 1984 and 1989. SFr. 30,000 to SFr. 40,000 are to be expected to-day.

In the case of the loss of one parent, the children each received amounts between SFr. 10,000 and 20,000. Two children who lost both parents were each awarded SFr. 25,000 by the Cantonal Court of the Valais in 1984.

The same amount, SFr. 25,000, was received by a woman whose fiancé was killed through severe negligence on the part of a drunken driver.

For the loss of a sister or brother, usually only brothers or sisters who lived in the same household can claim Genugtuung reparation; in the period 1986—89, the amounts ranged from SFr. 7,000 to SFr. 12,000.

The Genugtuung reparation amounts set in the case of bodily injury are listed in the study by Hütte, quoted above, which includes an analytical description of cases and is brought up to date periodically. It also contains tabular classifications, according to type of injury. According to this, in the period between 1984 and 1989, amounts ranging from SFr. 1,000 (in the case of dislocation of the knee with 2 weeks in hospital and about 5 months of incapacity to work: Court of Appeal (Appellationshof) Berne, 27th May, 1987) to SFr. 100,000 and SFr. 110,000, for injuries with the worst permanent consequences, were awarded[12].

An important change in court practice was brought in by the Federal Court's ruling of 11th March, 1986, in which a father who had suffered from shock due to the accidental death of two sons and had become disabled was granted an Genugtuung award. Two further rulings of 22nd April, 1986 established that this (Genugtuung) award for non-pecuniary damage cannot be denied simply on the grounds that reflex-type shock does not constitute an adequate basis for a claim. Consequently, in the first such case, a Genugtuung award for non-pecuniary damage amounting to SFr. 40,000 was made to the husband of a severely injured woman (while his wife had already received a Genugtuung award of SFr. 60,000). Theory and practice previously agreed that, in the case of bodily injury, only the injured party could claim such an award for non-pecuniary damage. The entitlement to claim of the next of kin indirectly affected by the reflex influence of the injury has been recognised for a long time by French and Belgian law, but represents an innovation for Swiss law.

The claim to Genugtuung reparation is basically inheritable and transferable. A precondition for the inheritance is, however, that the person entitled to claim has expressed his intention to assert claims before his death.

9.3. Form of compensation

It is at the discretion of the judge whether the compensation for bodily injury or death takes the form of an annuity or a lump sum; the judge "determines the type and size of compensation for the damage that has occurred" (article 43 OR). In practice, a lump sum is awarded to the injured party in Switzerland almost without exception, both in and out of court.

9.4. Date of damage assessment

The damage from bodily injury or death is basically to be calculated on the day of the award. Consequently, interest of 5% can be claimed on the lump sum that was established as compensation from this point on.

The Genugtuung reparation is basically due from the day of the accident (and bears interest from this date), but is to be assessed according to the value situation on the day of the award.

12) The amount of SFr. 110,000 has, up to now, only been awarded by the Federal Court in a particularly tragic case (a woman's face being ruined): BGE 112 II 131 of 29.4.1986. In out-of-court settlements, SFr. 130,000 to SFr. 150,000 are currently the highest amounts fixed for most severe injuries (tetraplegia, complete blindness, very severe burns); cf. Hütte, Die Genugtuung, 0/4; A. Keller II, p. 123.

10. Conclusions

Economic, social and political circumstances, diverging social security and national health provision systems and especially considerable differences in standard of living lead to substantial divergence in compensation practice in the countries of Western Europe, despite similarities in the most important basic principles.

Obviously, the standard of living or the average income per head of population is a fundamental factor as regards the level of compensation. If we compare, in the following tables, the level of per-head Gross Domestic Product with that of the compensation amounts for non-pecuniary loss that we have calculated for the same countries, then the influence of the standard of living on the "compensation level" is strong, though to a varying degree, depending on the characteristics of the compensation practice of the country in question.

We believe it would be false to call for a general standardisation or unification of compensation assessment in the case of personal injury in the various countries. What would be desirable is an approximation of principles and methods of damage assessment in Western Europe. In the interests of fair compensation practice, pecuniary loss due to bodily injury or death would be separated consistently from non-pecuniary damage.

For non-pecuniary disadvantages, i.e. pain, disfigurement, loss of amenities and the like, adequate compensation should be paid. Since it is not possible to express the individual value of such disadvantages in monetary terms, an objective, abstract calculation formula could be applied here and this could be standardised, at least in the West European countries. The type and severity of the injury, the degree of permanent disability and the loss of amenities of the plaintiff should be the focus here.

Despite certain flaws, it seems to us that the European compensation system works well on the whole. Reforms with a tendency to adapt the compensation practice of the West European countries to one another are indeed desirable. We believe, however, that a European compensation system should continue to build on three corner-stones: social insurance (cover of basic needs), liability law (cover for that part of the damage which exceeds the social benefits) and private insurance (individual cover, even operative without a liability claim). Liability law certainly still has important tasks to accomplish in the coming decades.

Appendix

Examples comparing assessment of compensation for non-pecuniary loss in case of personal injury in eight Western European countries

Case no. 1

Maria N., daughter of a practising doctor, was the victim of a serious road accident at the age of 19, which was caused solely by fault of the opposing driver. Just a few weeks before, the injured had finished her secondary education. She had no intentions of studying further, was not employed and had no firm prospect of future work. According to her statement, she would have looked for a commercial position after a planned trip abroad.

In the accident she suffered a fracture to the vertebra C7 and spinal cord injury, spent one and a half years in hospitals, including two weeks in a specialised clinic in the USA for a thorough examination. The treatment and rehabilitation could only slightly improve her condition, which can today be seen as stationary. Permanent damage: paraplegia (incomplete tetraplegia); the injured, at only 21 years of age, is completely disabled and needs permanent help and care for about 12 hours daily.

Case no. 2

Henry F., unskilled plant worker, 34 at the time of the court decision, suffered brain damage and partial paralysis in an accident three years ago, for which the manufacturer of a faultily constructed machine is fully liable. He spent about six months in hospital, can now only move in a wheelchair and relies on the help of family members or external nurses for certain tasks of daily life (time required estimated at around four hours daily). According to the medical report, the earning capacity of the injured party is permanently reduced by 80%; however, despite the remaining ability to work, he has not been able to find a job since the accident. It is assumed that this condition will no longer change considerably.

Case no. 3

Malcolm P., skilled worker (fitter in a power station), died at the age of 36 following one year of sickness which also made him incapable of work, caused by a faulty medicinal treatment (overdose), for which the doctor and chemist are liable for damages. He was survived by his widow of the same age, who only occasionally worked part-time, as well as three children aged 14, 11 and 6. It can be assumed that at least the eldest child will go into higher education. The trial took place three years after his death.

Case no. 4

Marisa M., schoolgirl, was severely burned on her thorax, left arm, left breast and both legs, at the age of sixteen in a hotel, due to negligence of a waiter who spilt a pan containing hot oil. She was subsequently hospitalised for seven weeks and later had to undergo two painful plastic surgery operations. Medical experts rate her physiological degree of disability, i.e. the impairment of her physical integrity, at 25%. She was able to continue her education after an interruption of six months; at the time of the trial she is 22 and a student of architecture. A reduction of her earning capacity is not provable. However, she alleges that her career progress is hindered, that she is disadvantaged on the labour market and has increased needs.

* * *

A comparison of the highest amounts of compensation awarded for non-pecuniary damage in the various West European countries could be useful and interesting. Table no. 3 gives a summary of the maximum compensation sums granted to the injured party for non-pecuniary disadvantages of all kinds in the case of very severe, but unintentional, bodily injury. Only amounts determined in a regular court procedure by a final judgement or according to the general guidelines applied in practice were considered. Compensation which, in view of the unique circumstances of the case, is out of the ordinary and therefore cannot be considered to be representative has been omitted.

We do not recommend an undifferentiated consideration of compensation amounts that vary in level according to country. In the Latin countries, non-pecuniary detriment is not always distinguished from pecuniary damage, and particularly in Spain, Italy and even in Great Britain, high pain and suffering amounts also serve as cover for certain, not precisely ascertainable types of economic loss.

Table No. 1
Level of compensation for non-pecuniary loss (arising out of personal injury) in eight European countries, on the basis of 4 model cases (1993)

— Amounts converted into 1000 Swiss francs as per 31.3.1994 —

Case No.	France	Germany	England	Belgium	Italy	Switzerland	Austria	Netherlands
1: quadriplegic girl (21) 100% disabled	380	424	300	350	262	190	175	189
2: plant worker (34) 80% disabled (brain injury)	286	254	201	222	175	100	109	113
3: plant fitter (36) killed (one year sickness)	154	55	16	49	197	120	19	8
4: schoolgirl severely burned (at trial: 22, student)	230	148	253	124	66	70	91	60
Total in 1.000 SFr.	1050	881	770	705	700	480	394	370
Total in original currency (in 1000)	4225	1040	365	1710	800'000	480	3265	490

Table No. 2
Exchange rates

(Medium rates as per 31.3.94, Neue Zürcher Zeitung 2./3.4.94)

DM	100	=	SFr.	84.75
£	100	=	SFr.	211.00
FFr	100	=	SFr.	24.85
BFr	100	=	SFr.	4.12
NFl	100	=	SFr.	75.40
L.	100	=	SFr.	0.0875
ASch	100	=	SFr.	12.07
DKr.	100	=	SFr.	21.60
NKr.	100	=	SFr.	19.50
SKr.	100	=	SFr.	18.10

Table No. 3
Highest amounts awarded in practice to an injured party for non-pecuniary loss in the case of very severe bodily injury (Position: 1993)

Country	Name of non-pecuniary damage		Amounts in original currency 1982	Amounts in original currency 1993	Amounts (1993) converted into SFr.*
Germany	Schmerzensgeld	DM	240,000	600,000	508,000
Italy	Danno morale	L.	75,000,000	500,000,000	437,000
Belgium	Dommage moral, Pretium doloris, Préjudice esthétique, Pretium voluptatis	BFr.	3,750,000	10,000,000	412,000
France	Pretium doloris, Préjudice esthétique, Préjudice d'agrément, Préjudice sexuel et d'établissement	FFr.	500,000	1,500,000	373,000
Great Britain	Pain & suffering, Loss of amenity	£	70,000	148,000	312,000
Netherlands	Smartegeld	NFl.	100,000	300,000	226,000
Austria	Schmerzengeld	ASch.	1,000,000	1,500,000**	181,000
Switzerland	Genugtuung	SFr.	100,000	150,000	150,000

* Medium exchange rates of 31.3.94
** Without the disfigurement compensation which can amount to ASch. 300,000 in special cases.

Table No. 4
Level of compensation for non-pecuniary loss in 4 model cases 1993

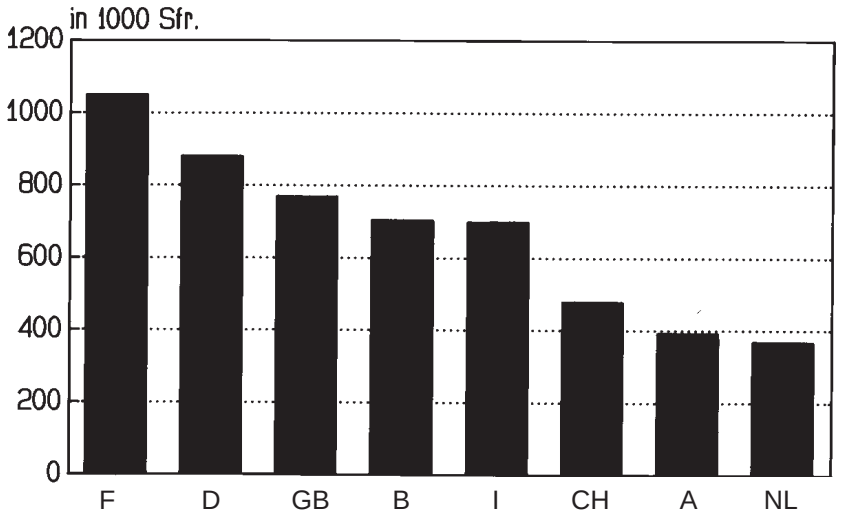

Table No. 5
Gross domestic product per head in eight West European countries (1991, source: OECD)

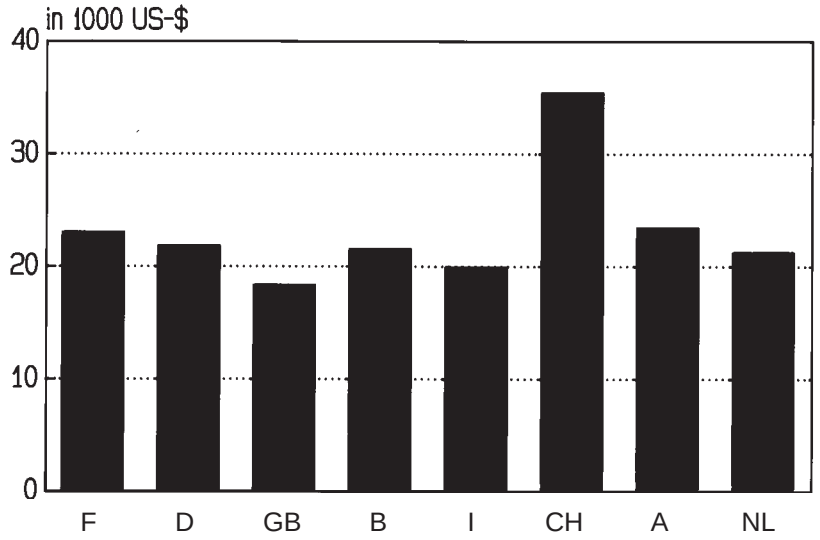

Table No. 6
Highest amounts awarded to an injured party for non pecuniary loss (1982—1993)