

Quantification of Moral Damages in Personal Injury Cases

Compensation Schemes in Selected Foreign Jurisdictions

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I. Monetary Compensation for Non-Pecuniary Loss?

A. Difficulties and Necessity of Compensation for Non-Pecuniary Loss

- The need of objective clues
- Sufficient protection of personality rights

B. The Dilemma of Incommensurability

- Protected interests without market value
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I. Monetary Compensation for Non-Pecuniary Loss?

C. The Function of Damages for Non-Pecuniary Loss

- Compensation
- Satisfaction?
 - eg Germany, Switzerland
 - Fault and the assessment of damages

D. Which Compensation is Just Compensation?

- The arbitrary assessment of the "first-case"
 - Equal treatment of equal cases
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II. Compensation Schemes in a Comparative View

A. Two Types of Assessing Damages

- Judicial Discretion
 - Tabular Compensation Schemes
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II. Compensation Schemes in a Comparative View

B. Countries relying on Judicial Discretion

- Austria
 - Germany
 - Switzerland
 - England and the US
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1. Austria

- § 1325 ABGB *angemessenes Schmerzengeld*
 - No fixed statutory sums, but “judicial tariffs” for bodily injuries
 - Day rates (*Tagsätze*) according to the level of pain
 - slight pain € 100
 - moderate pain € 200
 - severe pain € 300
 - Comparison of similar cases gains relevance the more severe the case
 - Highest Award: € 218,000 (OGH ZVR 2002/66 *Danzl*)
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1. Austria

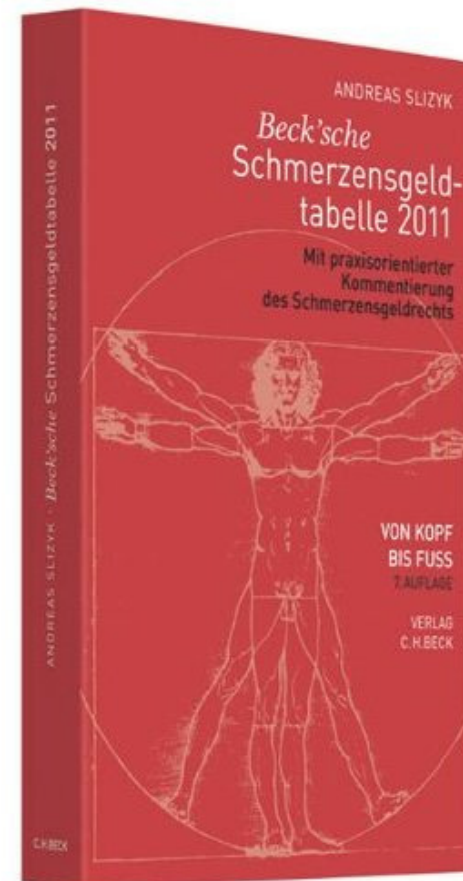
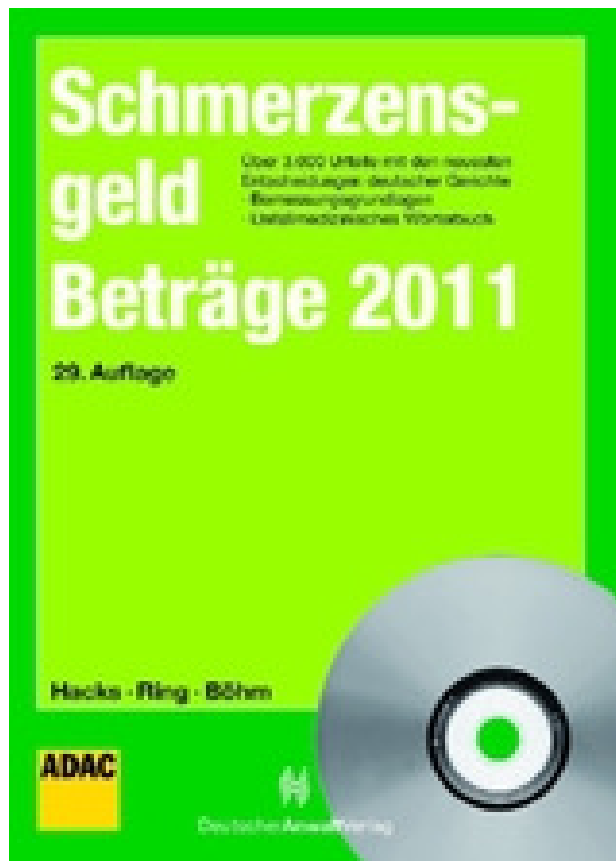
Danzl/Gutiérrez-Lobos/Müller, Das Schmerzensgeld, 9th ed (2008)



2. Germany

- § 847 BGB *Schmerzensgeld – billige Entschädigung in Geld*
 - Comparison of Cases
 - Compensation and Satisfaction
 - *Doppelfunktion des Schmerzensgeldes* (BGHZ 18, 149)
 - Highest Award: € 600,000 (OLG Jena VersR 2009, 1676)
 - *Hacks/Ring/Böhm*, Schmerzensgeld Beträge 2011, 29th ed (2010)
Slizyk, Beck'sche Schmerzensgeld-Tabelle 2011, 7th ed (2011)
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2. Germany



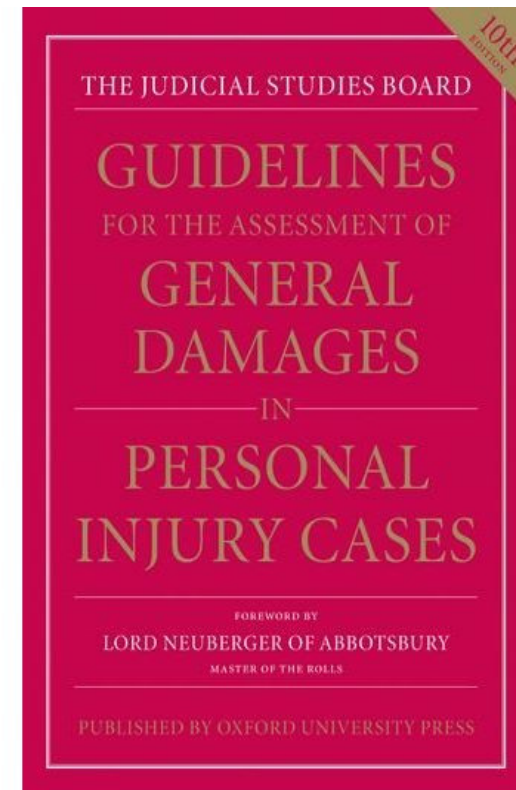
3. Switzerland

- Art 47 OR *Genugtuung*
 - Case Law: Comparison of Cases (BGE 132 II 117)
 - Recent cases are authoritative
 - No use of cases older than 25 years
 - Doctrine
 - Basic compensation
 - Supplementary compensation
 - Personal grievance
 - Impairment of life quality (family, profession)
 - Malicious intent of the tortfeasor
 - Highest award: approx. CHF 200,000 (€ 170,000)
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4. England and the US

A. England

- ❑ Comparison of cases
- ❑ Highest award: € 330,000
- ❑ Guidelines for the Assessment of General Damages in Personal Injury Cases, 10th ed (2010)



4. England and the US

B. United States

- Jury system leads to unequal assessment
 - Exorbitant compensation levels
 - Quadriplegia \$ 1 – 6 million
 - Loss of one leg below knee \$ 150,000 – 9 million
 - *Stephen D. Sugarman, A Comparative Law Look at Pain and Suffering Awards, 55 De Paul Law Review 2005-2006 p 399 ff*
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II. Compensation Schemes in a Comparative View

C. Countries relying on Tabular Compensation Schemes

- Italy
 - France
 - Spain
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1. Italy

- *Danno Biologico* (despite Art 2059 Codice Civile)
 - Legal standardisation of small injuries
 - *Microlesioni* (up to 9 % of permanent invalidity)
 - More severe injuries: Tables by regional courts
 - *Punto di invalidità*
Degree of invalidity X tabular amount
 - *Danno morale, Danno esistenziale?*
 - 11. 11. 2008, Corte di Cassazione Nr. 26972, 26973, 26974, 26975
 - Towards a uniform concept of non-pecuniary loss
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2. France

- *Le Déficit Fonctionnel Temporaire (DFT)*
 - up to € 600 a month in case of total handicap

- *Le Déficit Fonctionnel Permanent (DFP)*
 - Invalidation points X compensation amounts

Barème des Cours d'Appel d'AGEN, ANGERS, BORDEAUX, LIMOGES, PAU, POITIERS et TOULOUSE établi en janvier 2010.

TAUX d'I.P.P.	0-10 ans	11-20 ans	21-30 ans	31-40 ans	41-50 ans
1 à 5 %	1200 €	1100 €	1000 €	950 €	900 €
6 à 10 %	1400 €	1290 €	1180 €	1120 €	1050 €
11 à 15 %	1600 €	1480 €	1360 €	1290 €	1200 €
16 à 20 %	1800 €	1670 €	1540 €	1460 €	1350 €

2. France

- Eg victim, 20 years old, 8 % invalidity
 - Value of invalidity point € 1290
 - Total damages € 10,320 (€ 1290 X 8)

Barème des Cours d'Appel d'AGEN, ANGERS, BORDEAUX, LIMOGES, PAU, POITIERS et TOULOUSE établi en janvier 2010.

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6 à 10 %	1400 €	1290 €	1180 €	1120 €	1050 €

2. France

□ *Les souffrances endurées* (Damages for pain and suffering)

BAREME INDICATIF D'INDEMNISATION DES PREJUDICES PERSONNELS DES COURS D'APPEL D'AGEN, ANGERS, BORDEAUX, LIMOGES, PAU, POITIERS ET TOULOUSE

Très léger (1/7)	jusqu'à € 1 500
Léger (2/7)	€ 1 500 à 3 000
Modéré (3/7)	€ 3 000 à 6 000
Moyen (4/7)	€ 6 000 à 10 000
Assez important (5/7)	€ 10 000 à 25 000
Important (6/7)	€ 20 000 à 30 000
Très important (7/7)	€ 30 000 et plus

2. France

- *Le préjudice esthétique permanent*
 - *Le préjudice d'agrément*
 - *Le préjudice sexuel*
 - *Le préjudice d'établissement*
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3. Spain

- Road traffic liability act (LRCSCVM)
 - Uniform legal system
 - Table I, II: death of the victim
 - Table III, IV, V: permanent incapacity of the victim
 - Table VI: temporary incapacity of the victim
 - Basic compensation
 - Increased in different percentages depending on the victim's income
 - Lump sum for pecuniary and non-pecuniary loss
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III. Unification of Compensation?

A. Different amounts throughout Europe

(Amounts in € 1000s)

Data 2001

	Median	Range
Quadriplegia	92	15–250
Blindness	65	22–235
Leg Amputation	41	10–166
Arm Amputation	38	10–166
Deafness	31	7–124
Facial Burns	14	4–80

Source: *Sugarman*, 55 De Paul Law Review 2005-2006 p 412

NATIONAL RANKINGS (ONE TO NINETEEN) BY AMOUNT OF AWARD
BY INJURY AND OVERALL AVERAGE

	Burns	Deaf	Arm	Leg	Blind	Quad	Average
Ireland	1	4	1	1	1	1	1.5
England	2	5	3	3	3	3	3
Belgium	3	3	2	2	5	6	3.5
Italy	7	2	7	10	2	4	5
Luxembourg	6	1	5	5	6	9	5
Scotland	4	17	3	3	4	5	6
Germany	5	9	12	11	10	2	8
Netherlands	10	7	9	8	9	7	8
Liechtenstein	8	8	8	7	13	8	9
Iceland	9	12	10	12	8	13	11
Austria	12	15	11	9	15	10	12
Finland	11	10	13	14	11	14	12
France	15	14	6	6	18	11	13
Switzerland	17	6	14	13	12	16	13
Norway	13	13	18	16	7	12	13
Portugal	18	11	15	17	16	17	16
Denmark	14	18	17	15	17	18	17
Sweden	19	16	16	18	14	15	17
Greece	16	19	19	19	19	19	19

III. Unification of Compensation?

B. Reasons?

- Different compensation schemes
 - Different living standards
 - Different systems of social security
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III. Unification of Compensation?

C. Different Amounts in Similar Systems – Highest Awards

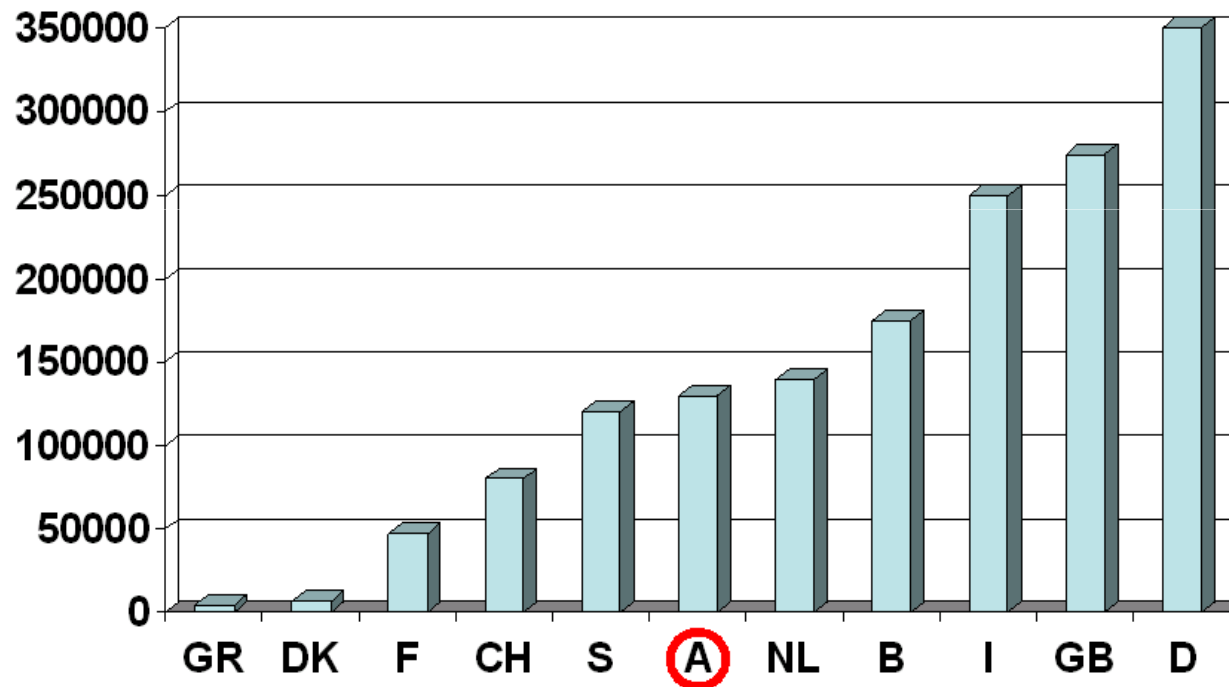
- Austria **€ 218,000** (OGH ZVR 2002/66 *Danzl*)
 - Quadriplegia caused by a wrong-way driver, permanent fear to die due to necessity of artificial respiration

 - Germany **€ 600,000** (OLG Jena VersR 2009, 1676)
 - Vigilant coma following a birth defect

 - Switzerland approx. **CHF 200,000** (€ 170,000)
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III. Unification of Compensation?

D. Ranking according to highest amounts



Source: *Reisinger*, ZVR 2008, 51

III. Unification of Compensation?

E. Evaluation of Injuries

- Are injuries evaluated equally in Europe?
 - Is the relative size of the awards the same?
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NATIONAL AWARD PROPORTION FOR EACH INJURY AS A
PERCENTAGE OF HIGHEST PREDICTED FOR EACH NATION

	Facial Burn	Deaf	Arm Loss	Leg Loss	Blindness	Quadriplegia
Austria	11	30	34	44	46	100
Belgium	23	58	54	56	73	100
Denmark	21	59	59	59	100	72
England	37	32	37	37	70	100
Finland	18	52	58	41	100	100
France	8	31	58	41	100	100
Germany	13	13	13	15	25	100
Greece	29	35	47	47	100	100
Iceland	21	42	53	44	100	100
Ireland	32	39	67	67	94	100
Italy	8	52	20	20	90	100
Liechtenstein	14	30	34	45	46	100
Luxembourg	26	100	41	51	96	85
Netherlands	12	29	32	37	58	100
Norway	11	40	28	28	100	100
Portugal	10	70	60	60	90	100
Scotland	19	14	42	42	77	100
Sweden	7	44	44	32	88	100
Switzerland	10	65	50	50	99	100

Source: *Sugarman*, 55 De Paul Law Review 2005-2006 p 406

III. Unification of Compensation?

Different Evaluation of Injuries

EUROPEAN “VERTICAL EQUITY”: RANGE OF AWARD PROPORTIONS (%) FOR FIFTEEN (OF NINETEEN) MIDDLE-RANKING NATIONS

Quadriplegia	85–100
Blindness	46–100
Deafness	29–65
Leg	28–60
Arm	28–59
Burns	10–26

Source: *Sugarman*, 55 De Paul Law Review 2005-2006 p 408

III. Unification of Compensation?

3. “Unification of Injuries”?

- *Guide barème européen d'évaluation des atteintes à l'intégrité physique et psychique*
- Proposal for a unification of the medical evaluation of the seriousness of an injury according to the impairment of daily life



IV. Final Remarks

- Compensation not Satisfaction
 - Different systems bear different risks
 - Tabular systems risk over-schematisation
 - Judicial discretion risks lack of uniformity
 - Clear Goal: Equal Treatment of Equal Cases
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Thank you for your attention!

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