Quantification of Moral Damages in Personal Injury Cases

Compensation Schemes in Selected Foreign Jurisdictions

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Deputy Director of the Institute for European Tort Law (ETL),
Austrian Academy of Sciences
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
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
II. Compensation Schemes in a Comparative View

A. Two Types of Assessing Damages

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

B. Countries relying on Judicial Discretion

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

Danzl/Gutierrez-Lobos/Müller, Das Schmerzengeld, 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)
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)
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

II. Compensation Schemes in a Comparative View

C. Countries relying on Tabular Compensation Schemes

- Italy
- France
- Spain
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
2. France

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

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

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

<table>
<thead>
<tr>
<th>TAUX d'I.P.P.</th>
<th>0-10 ans</th>
<th>11-20 ans</th>
<th>21-30 ans</th>
<th>31-40 ans</th>
<th>41-50 ans</th>
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</thead>
<tbody>
<tr>
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<td>1100 €</td>
<td>1000 €</td>
<td>950 €</td>
<td>900 €</td>
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<tr>
<td>6 à 10 %</td>
<td>1400 €</td>
<td>1290 €</td>
<td>1180 €</td>
<td>1120 €</td>
<td>1050 €</td>
</tr>
<tr>
<td>11 à 15 %</td>
<td>1600 €</td>
<td>1480 €</td>
<td>1360 €</td>
<td>1290 €</td>
<td>1200 €</td>
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<td>16 à 20 %</td>
<td>1800 €</td>
<td>1670 €</td>
<td>1540 €</td>
<td>1460 €</td>
<td>1350 €</td>
</tr>
</tbody>
</table>
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.

<table>
<thead>
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</thead>
<tbody>
<tr>
<td>6 à 10 %</td>
<td>1400 €</td>
<td>1290 €</td>
<td>1180 €</td>
<td>1120 €</td>
<td>1050 €</td>
</tr>
</tbody>
</table>
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
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
### III. Unification of Compensation?

#### A. Different amounts throughout Europe

(Amounts in € 1000s)

<table>
<thead>
<tr>
<th>Condition</th>
<th>Median</th>
<th>Range</th>
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<tr>
<td>Quadriplegia</td>
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<td>Blindness</td>
<td>65</td>
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<td>Leg Amputation</td>
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<td>Arm Amputation</td>
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<td>Deafness</td>
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<td>7–124</td>
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<td>Facial Burns</td>
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<td>4–80</td>
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### National Rankings (One to Nineteen) by Amount of Award by Injury and Overall Average

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<tr>
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<th>Burns</th>
<th>Deaf</th>
<th>Arm</th>
<th>Leg</th>
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</tbody>
</table>

III. Unification of Compensation?

B. Reasons?

- Different compensation schemes
- Different living standards
- Different systems of social security
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)
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?
### National Award Proportion for Each Injury as a Percentage of Highest Predicted for Each Nation

<table>
<thead>
<tr>
<th></th>
<th>Facial Burn</th>
<th>Deaf</th>
<th>Arm Loss</th>
<th>Leg Loss</th>
<th>Blindness</th>
<th>Quadriplegia</th>
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<tr>
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</tbody>
</table>

III. Unification of Compensation?

Different Evaluation of Injuries

European “Vertical Equity”: Range of Award Proportions (%) for Fifteen (of Nineteen) Middle-Ranking Nations

<table>
<thead>
<tr>
<th>Injury</th>
<th>Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Quadriplegia</td>
<td>85–100</td>
</tr>
<tr>
<td>Blindness</td>
<td>46–100</td>
</tr>
<tr>
<td>Deafness</td>
<td>29–65</td>
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<tr>
<td>Leg</td>
<td>28–60</td>
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<tr>
<td>Arm</td>
<td>28–59</td>
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<tr>
<td>Burns</td>
<td>10–26</td>
</tr>
</tbody>
</table>

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
Thank you for your attention!

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