

Major Claims – Personal Injuries A German Perspective

Ulrich Werwigk, European Traffic Law Days, 04-10-2018



Table of Contents / Agenda

- German Traffic Law Days in January 2018
- Major Claims – Personal Injuries – Claims Topics
- Major Claims – Indemnification – Mitigation – A Legal and Judicial Perspective –

German Traffic Law Days in January 2018



German Traffic Law Days 2018 – Major Claims – Personal Injuries

- Definition of major claim in personal injuries
 - German Statistic Authority – more than 24 hours hospital treatment,
 - simply monetary determination,
 - violation of life essential organs, brain injuries or of specific bones or joints as e.g. ankle,
 - life-threatening injuries and
 - permanent personal, social or professional restrictions

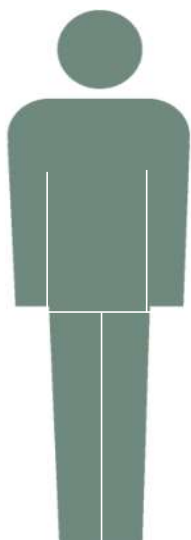
- Requirements of health treatment and care and limits of compensation
 - medical and social view – avoid the gap between “medical and rehabilitation measures” (German model of workmen’s compensation insurance)
 - legal settings – from a victims’ and insurers perspective
 - recommendation => apply the model of workmen’s compensation



Pictures source: BG Klinik Ludwigshafen

Major Claims – Personal Injuries – Claims Topics

Major Claims Personal Injuries – Casestudies



Casestudy A

- turning left, a car driver hit an oncoming biker who sustained severe brain and bodily injuries), the back-passenger on the bike died
- the injured biker is 35 years old, married (no own income), two children, due to the consequences of the accident and his injuries he suffered tetraplegia and needs lifelong highest level of care and assistance 24/7
- the deceased front-passenger lived with his girlfriend and their common 2 year old son in an unmarried relationship
- loss components:
 - pain and suffering, medical treatment and care / assistance, loss of earnings, additional needs
 - bereaved compensation, child support

Casestudy B

- car driver lost control of his car and collided with a tree, the 3 year old young son in the back of the car sustained severe brain and bodily injuries (tetraplegia)
- due to the severity of the injuries of his son the father resigned from his job and took over care and assistance 24/7 of his son, coordination of nursing, from his age of 6 he demands a yearly Delphine therapy in Puerto Rico (inclusive his and his wife's costs)
- variation: son 18 years at the date of accident, would have become a successful doctor as his father
- addit. specific loss components
 - medical treatment, care and assistance, additional needs
 - loss of earnings – potential career aspects

Major Claims – List of Potential Topics and Claims

- **pain & suffering**
 - severity of injury, extent of medical treatment, suffered pain, awareness of pain and suffering
- **medical treatment & rehabilitation**
 - hospital and ambulant medical treatment and rehabilitation
 - special therapeutical measures
 - measures for professional reintegration
- **assistance & care**
 - scope of assistance and care / at home, at social activities and events (e.g. theatre, sports etc.)
 - coordination and care / family's contribution
- **loss of earnings**
 - salaried employee vs. self-employed person
 - current income and potential career developments
 - retirement damage
- **additional needs**
 - conversion of home for the needs of a handicapped person
 - adaption of car
 - auxiliary means for life, rehabilitation etc.
- **contingency**
- **compensation of relatives in case of fatalities**
 - nervous shock
 - reasonable compensation (below level of nervous shock)
 - support for close relatives as partner, children etc.

Major Claims - Basics of Compensation und German Law

Sect. 249 BGB (German Civil Code)

(1) A **person who is liable** in damages must **restore the position** that would exist if the circumstance obliging him to pay damages had not occurred.

(2) Where **damages are payable for injury to a person** or damage to a thing, the obligee may **demand the required amount in lieu of restoration**. When a thing is damaged, the monetary amount required under sentence 1 only includes value-added tax if and to the extent that it is actually incurred.

Sect. 253 BGB (German Civil Code)

(1) Money may be demanded in compensation for any damage that is **not pecuniary loss** only in the cases stipulated by law.

(2) If damages are to be paid for an **injury to body, health, freedom or sexual self-determination, reasonable compensation in money** may also be demanded for any damage that is **not pecuniary loss**.

Sect. 843 BGB (German Civil Code)

(1) **If the earning capacity of the injured person** is eliminated or reduced as the result of an injury of body or health or if his needs are increased, then the injured person is to be given damages **by payment of an annuity**.

(2) ...

(3) In lieu of the annuity, the injured person may demand a **lump sum settlement if there is a compelling reason** for doing so.

(4) The claim is not excluded by the fact that another person must provide the injured person with maintenance.

Sect. 251 BGB (German Civil Code)

(1) To the extent that restoration is not possible or is not sufficient to compensate the obligee, the person liable in damage must compensate the obligee in money.

(2) The person liable in damages may compensate the obligee in money if restoration is only possible with **disproportionate expenses**. ...

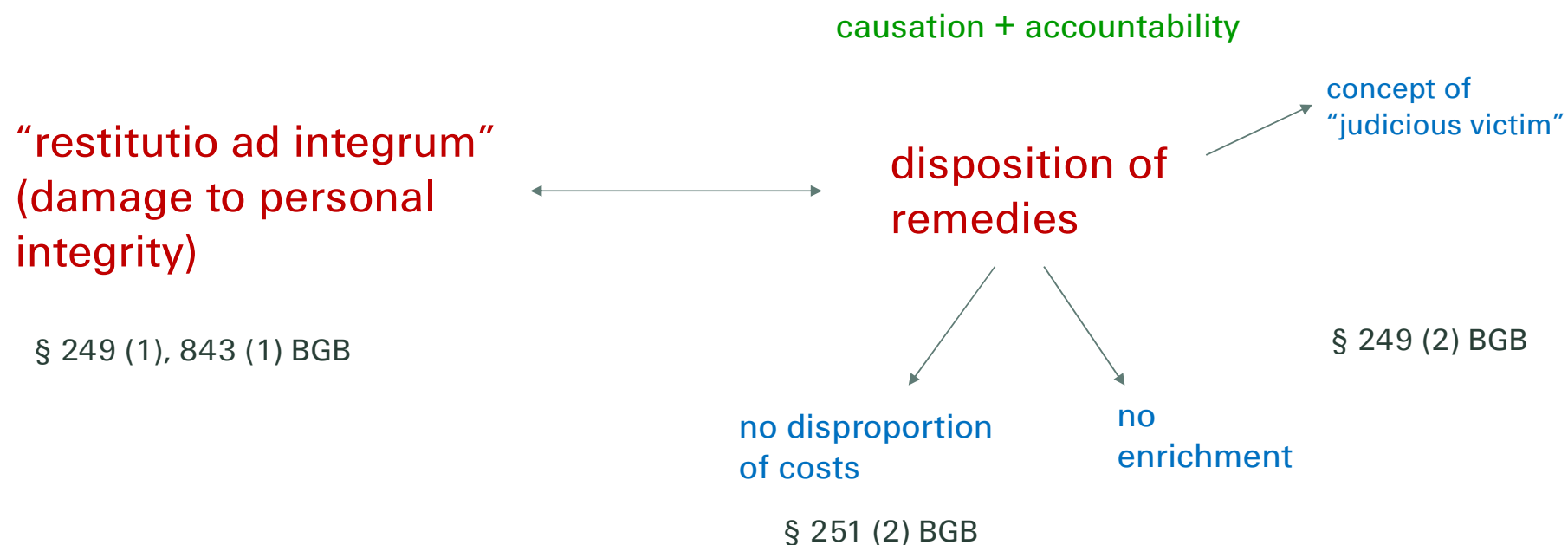
ect. 844 BGB (German Civil Code)

1) In case where death is caused, the person liable in damages must reimburse the costs of funeral... .

2) If the person killed provide **maintenance for (a) person** and if the third party has .. been deprived of this right to maintenance, then the person liable in damages must give the **third party damages by payment of an annuity** ... also ...where the third party at the time of injury had been conceived but not yet born

(3) The person liable must give the **surviving dependants** ... in a close relationship .. **for the emotional distress a reasonable damages by payment**. A close personal relationship is assumed, if the surviving dependant was the spouse, partner, parent or child of the deceased.

Major Claims – Personal Injuries – Legal Principles of Compensation



Major Claims – Indemnification – Mitigation – A Legal and Judicial Perspective –

Major Claims – List of Potential Topics and Disputable Claims

- pain & suffering
 - severity of injury, extent of medical treatment, suffered pain, awareness of pain and suffering
- medical treatment & rehabilitation
 - hospital and ambulant medical treatment and rehabilitation / level of medical treatment (normal health insurance vs higher private standard)
 - special therapeutical measures
 - measures for professional reintegration
 - workshop for handicapped
 - special cosmetic surgery
 - Delphine therapy
- assistance & care
 - scope of assistance and care / at home, at social activities and events (e.g. theatre, sports etc.)
 - coordination and care / family's contribution
 - 24/7 permanent coordination of care, nurses etc.
 - all costs at home
- loss of earnings
 - salaried employee vs. self-employed person
 - current income and potential career developments / the injured 3 year old dun would have become a successful surgery as the father was
 - retirement damage
- additional needs
 - conversion of home for the needs of a handicapped person / additional home for nurses
 - adaption of car / additional claim for adaption of motorbike
 - auxiliary means for life, rehabilitation etc.
 - additional holidays (reha) and accompany of family members on holidays
- compensation of relatives in case of fatalities
 - nervous shock
 - reasonable compensation (below level of nervous shock)
 - support for close relatives as partner, children etc.

Major Claims – Costs of Care or Workshop for Handicapped – German Federal Court of Justice (Supreme Court)

=> costs of the workshop were higher than private care at home

- “ these expenses are used to compensate for accidental increased needs § 843 (1) BGB and are necessary to enable the plaintiff (injured party) to be able to return to work as before the accident. They do not burden the liable party unreasonably and must be reimbursed... ”
- BGH 23.08.1990 – VI ZR 307/90, VersR 1992, 459



Source: German Federal Court of Justice

Major Claims – Medical Treatment and Rehabilitation –

- Medical treatment, rehabilitation and care costs (24//) are usually no disputable issues in major claims as far as no very special features are given
- In a decision of 1977, the Federal Court of Justice (BGH 01.12.1974-BeckRs 2010, 07379) had to decide on costs of removing an accident scar – the court dismissed the claim
 - as the damage to beauty had already been compensated with the compensation and emphasized in addition
 - that the overriding interest in integrity can not be measured by the yardstick of cost-effectiveness, but
 - also the injured party must not exploit the damage without limits.
- Therapeutical measures
 - normal therapeutical measures are part of the medical treatment and hence to be indemnified
 - specific treatments as Delphine therapy in Florida are more difficult
 - the remuneration might depend on the actual positive effect and available comparable therapeutical measures locally



Major Claims – Care at Home and by Family in German Jurisdiction

- Care at home vs. residential care
 - no preference for cheaper residential care (OLG Bremen VersR 1999, 1030 w. ref. to BGH)
- Care by the family or relative and the extent of remuneration
 - all real efforts of care
 - to be distinguished from normal family welfare, as normal attention of parents for their child (BGH 22.11.1988, NJW 1989, 766)
- Additional efforts by family for care coordination (24/7)
 - acceptable in a normal and reasonable extent (OLG Bremen ididem)
 - not for exaggerated amounts as e.g. monthly income of € 6.000



Major Claims – Children as Victims of Motor Accidents

- Family care at home vs. residential care
 - also same principles are applicable as in other case
 - due to the specifics of children as victims, courts often allow exceptions in specific severe cases and accept also loss of earnings of a father who cares for his severely injured and permanently handicapped child after an accident – the court declined the objection of disproportion (OLG Bamberg 28.06.2005, VersR 2005,1593)
- Anticipation of realistic and expected loss of earnings
 - usually accepted from the age of 18 / 25
 - estimation of future professional career
 - age of the child at the date of accident
 - social environment of the child and family
 - social status and development of the child before and after the accident



Source: Swiss Re

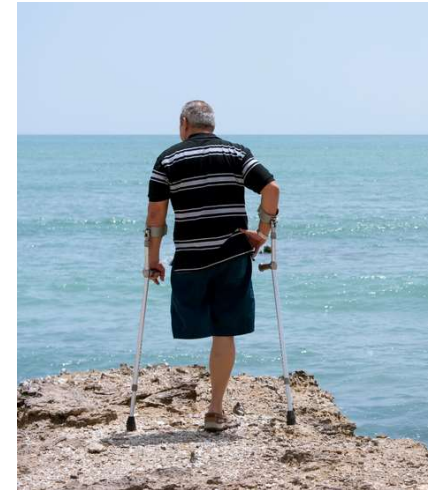
Major Claims – Contributory Negligence

Sect. 254 BGB (German Civil Code)

(1) Where **fault on the part of the injured person contributes** to the occurrence of the damage, **liability in damages** as well as the extent of compensation to be paid **depend on the circumstances** in particular **to what extent the damage is caused** mainly by one or the other party.

(2) This **also applies** if the fault of the injured person is limited to failing **to draw the attention** to the obligor to the danger of **unusually extensive damage**, where the obligor neither was nor ought to have been **aware of the danger, or the failing to avert or reduce the damage**. ...

- applied in the causation of loss and also on the side of indemnification
- less possibilities for application in major claims of severe bodily injury claims
- in normal bodily injury claims (minor severe cases) of broken legs, contusions, whiplash etc. this seems more likely as real healing is possible



Source: Swiss Re

Case- and Reha-Management

*“With music back
to my 2nd life”
– Stefan T.,
Bavaria, Germany*



Source: Stefan Tiefenbacher



www.tiefenbacher-music.de



Legal notice

©2018 Swiss Re. All rights reserved. You are not permitted to create any modifications or derivative works of this presentation or to use it for commercial or other public purposes without the prior written permission of Swiss Re.

The information and opinions contained in the presentation are provided as at the date of the presentation and are subject to change without notice. Although the information used was taken from reliable sources, Swiss Re does not accept any responsibility for the accuracy or comprehensiveness of the details given. All liability for the accuracy and completeness thereof or for any damage or loss resulting from the use of the information contained in this presentation is expressly excluded. Under no circumstances shall Swiss Re or its Group companies be liable for any financial or consequential loss relating to this presentation.