

# Indemnity Law in Germany: Developments in Legislation and Jurisdiction

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## I. Introduction

Over the past years -which are characterized by harmonization and unification across the European Union- the German law on damages provides an example for the persisting considerable differences between claims settlement systems across Europe.

This is most striking when we look at the settlement of Green Card claims. Quite a few European customers will have to resign to the fact that German law provides a considerably higher entitlement to compensation than the law of their home country. This applies in particular to customers from Southern European countries which in the process of Green Card claims settlement discover heads of damage which are completely unknown in their legal system.

## II. Principles of German indemnity law

In Germany, the **directly injured party** qualifies to be compensated for all damages incurred which can **reasonably be deemed a result** of the accident.

The **strict liability** of the party responsible for the accident is based on the general entitlement provided by § 823 section 1 of the German Civil Code (BGB).

This rule provides that a person who, willfully or negligently, injures life, body, health, freedom, property or other rights of another person is bound to compensate for any damages arising.

The infringement caused to the injured party must be attributable to the party causing the damage, and may involve either an action or unlawful omission on part of the injuring party. The action or omission must have been **necessary to produce** the effect.

Such attributability is restricted by the **notion of the protective purpose of this provision**. Under this notion, contributory negligence is only considered, if it falls under such protective purpose and the action was meant to prevent the danger which in fact occurred.

§ 823 section 2 of the German Civil Code (BGB) draws a parallel between the entitlement under section 1 of said provision and the liability of **a person** who infringes a statute intended for the protection of others. This is why both the rules of the German Road Traffic Act and those of the German Road Traffic **Licensing** Act are of practical relevance.

**Strict** liability of the vehicle owner is established § 7 of the German Road Traffic Act (StVG). This section stipulates that the owner of a vehicle shall be liable for any damage caused during the **operation of the vehicle**. Such operation can include both stationary and moving vehicles where they have an impact on the traffic situation.

Under § 7 section 2 of the German Road Traffic Act (StVG) the duty to compensate is excluded where the accident was caused by **force majeure**.

This is why the owner of a vehicle can avoid liability in the event of an accident **involving several vehicles** by proving that it was **inevitable** - § 17 section 3 of the German Road Traffic Act (StVG). An incident is deemed inevitable, where both the owner of the vehicle and the driver acted with reasonable care under the given circumstances – the so called "ideal driver".

According to § 7 of the German Road Traffic Act (StVG) the owner of a trailer is also liable; even if this trailer forms a unity with a tractor and the tractor is owned by another person .

The injured party can file his or her claims against both owners who are jointly liable. For their internal relationship it is necessary to clarify whether the tractor itself, or the tractor's driver, was responsible for the accident. This is generally the case where the trailer's operational hazard did not contribute to the cause of the accident and the tractor's owner is unable to prove that he is not liable.

A similar rule relating to the **driver's** duty to compensate is contained in § 18 of the German Road Traffic Act (StVG).

When assessing the extent of liability, a **potential contributory liability** of the other party must be considered. The **duty to compensate** and the **amount** of compensation depend on the **circumstances** of the case, including the extent to which the damage was predominantly caused by **one party** or the **other party**.

We must distinguish **between** objections to the cause of liability (e.g.: wrong conduct on behalf of the injured party) **and** objections to the

extent of the damage (i.e.: did the injured party use a seatbelt or wear a protective helmet which would have caused less serious injuries?).

Unlike the directly injured party, the **indirectly** injured party only has those claims which are expressly set forth in the law.

The governing rule here is § 844 of the German Civil Code (BGB). Section 1 of this rule covers third party claims for their refund of **funeral** expenses of a deceased, whereas section 2 covers the **support** of potential dependants.

Finally, another important aspect is that an indirect claimant assumes the position of a directly injured party by means of legal subrogation. With that in mind, it is worth mentioning that **Casco insurers** provide payments up front for the injured party, and **social security providers** fall under the legal subrogation rules of § 116 of the German Tenth Social Law Code (SGB X).

Under German legislation, with view to the vehicle owner's strict liability provided by § 7 section 1 of the German Road Traffic Act (StVG), also a **parked vehicle** is deemed "in operation" and hence in circulation.

### **III. Property damage**

#### **1. Repair costs**

To assess the amount of repairs, German proven practice uses either the **cost estimate of a garage** or –where major damage is involved- **an**

**expert's opinion.** The threshold for requesting an expert's opinion is generally an estimated **net** damage of **1,500.00 €**

a. Repair or compensation

The injured party can either opt for **repair** or compensation of the damage on the basis of an expert's opinion or cost estimate provided by the garage. This option is laid down in § 249 section 2 of the German Civil Code (BGB) which also rules out the refund of value added tax in the event of **fictional settlement**.

b. Constructive total loss

The constructive total loss has long been a hot issue in German legislation and practical settlement. However, some higher court decisions, including a German Supreme Court ruling, have formed a **prevailing opinion** that a vehicle is considered a constructive total loss, if the actual repair costs assessed by an expert would be more expensive than the replacement value after subtracting the salvage value. In this situation the injured party may choose one of the options provided under § 249 of the German Civil Code (BGB).

**The first option** is to claim the vehicle's replacement value minus salvage value from the insurer of the party responsible for the damage. This is the normal course of action. Normally, the expert gives the contact data of private persons or companies that have offered a salvage value for the damaged vehicle. The injured party can then contact such persons or companies and sell the vehicle and thus also realize the **salvage value**.

**The second option** is that injured party keeps his or her vehicle (for instance because they are used to it and feel safe in their car) and have it repaired despite the extensive damage.

Practical handling takes account of the **interest** which injured parties have in the **integrity** in that they are entitled to be refunded the repair costs up to **130% of the replacement value**. The salvage value is not deducted in this case.

In a case in which the repair costs **exceed** this threshold, it is not allowed to split the compensation into the amount up to 130%, which is refunded, and the **excess** to be paid **by the injured party**. In this case the injured party can **only** claim the replacement value. The salvage value is also not deducted.

This has been a very controversial issue. In view of the above court rulings, however, prevailing opinion now has it that in the event of constructive total loss the injured party can claim the 130% threshold **only if** the repair costs were actually paid or actual repairs exceeded the replacement value. This is generally deemed to be the case where repair costs amount to about 70% of the replacement value.

## 2. Expert's fees

The fees for obtaining an expert's opinion are based on a defined fee schedule. The fees vary within the minimum of 150 € and the maximum open end limit. In addition the actual work load of the expert is also

drawn into consideration when calculating the fees. In most cases expert's fees in Germany usually range from 300 € - 600 €.

### 3. Depreciation

The depreciation value is determined by expert opinion. It is either of mercantile or technical nature.

**Mercantile** depreciation is based on the fact that the vehicle has suffered damage by means of the accident and despite proper repair generally sells for less due to this accident. **Technical** depreciation applies in the event that the vehicle after repair has noticeable defects which cannot be mended or were inevitable in view of the type of repair selected.

If the expert regards the vehicle eligible for repair and applies a depreciation value, the owner of the vehicle can claim such depreciation from the insurer of the injuring party.

### 4. Towing costs

The injured party can claim refund of towing costs incurred for the transport of the vehicle to the **nearest** garage.

### 5. Disbursements

Another regular German head of damage is the accident disbursements flat rate. This flat rate is generally awarded to the injured party to cover costs such as postage, telephone and the like without being required to

specify the actual amounts incurred. The amount claimed and awarded varies within different regions of Germany. As a rule, the range is from 15.- € to 30.- €.

## 6. Rental car costs

The German rental car cost refund is regularly met with surprise by non-German colleagues and clients.

At the expense of the party which caused the damage, the injured party can use a rental car until replacement is obtained or for the duration of the repair of the vehicle. In addition a two-day period is granted for consideration as to how to proceed. Two basic conditions must be met by the injured party.

Under the **first condition**, the injured party is required to inquire rates from at least a number of rental car companies in his or her vicinity. The **second condition** suggests to rent a lower class vehicle to avoid later deduction for **not wearing down the own vehicle** which would have been used by the injured party had it not been unavailable due to the accident.

Up to this point, the facts and legal circumstances pose no major problems to all parties involved, but not so for the practice.

In most international accident cases, the injured party briefs a lawyer to handle the claims. From his long-standing practice such lawyer will generally cooperate with a regular rental car or expert. But if they are

aware that an **insurer is involved in the accident settlement**, their approach is quite different.

Instead of the customary rental car rate, the so-called **accident replacement rate** is applied which may considerably exceed the customary rental car rates.

For instance, an accident replacement rate of 150.- € to 170.- € per day may be charged for a standard Volkswagen GOLF which normally hires at 50.- € to 60.- € per day.

Rental car companies explain this excessively higher rate, which foreign insurers find difficult to understand, with the **high economic risk** involved. The rental companies argue that the facts and legal situation are generally unclear and by involving a foreign insurer additional delay would occur.

This expensive practice has been confirmed by the courts until last year. All attempts to find a different court approach have failed in the past.

**However last year** the Higher Regional Court of Düsseldorf ruled that **stricter requirements** were to apply to the accident replacement rate. The German Supreme Court upheld this decision. Furthermore it declared that the injured party -and hence the rental car company- is **required to prove** that application of the accident replacement rate was indeed necessary.

Therefore rental car companies are now required to **adequately justify** the application of the accident replacement rate focusing on the

**economic necessity** of such rate. Valid arguments include the risk of long-term prefinancing of rental car costs, the related loss of interest, or the risk of being unable to recover the claim where the insurer is not liable.

In the meantime the German Supreme Court has confirmed this rule in several other cases. Therefore its ruling in this matter can now be seen as constant jurisdiction.

## 7. Loss of use

As an alternative to a rental car, the injured party may claim **loss of use**. If the injured party opts not to use a rental car, he or she can claim the relevant daily rate for the duration of the repair.

The amount awarded in Germany for loss of use is based on dedicated **tables**. Every vehicle type and model is classified into a certain group. These groups range from “Group A” (e.g. DACIA Logan; daily rate 27,- €) to “Group L” (e.g.: MERCEDES-BENZ S-Class; daily rate 99,- €).

Generally no loss of use applies to vehicles that were built more than five years ago, since they have a lower value in view of their long service life. In these cases however the **cost of maintaining a replacement vehicle** is refunded which provides a considerably lower daily rate.

The loss of use compensation is a valuable alternative **both** for the injured party, who receives hard cash, **and** the responsible insurer who can save considerable sums for a rental car.

## 8. Lawyer's fees

The recovery of fees when retaining a lawyer to assert the claim is acknowledged by German Supreme Court rulings. At the early stage of filing the claims notice, the injured party is entitled to retain a lawyer, since in most cases **the extent and the amount** of the claim cannot be conclusively determined without sufficient legal knowledge.

The necessity to involve a lawyer was only **denied in isolated cases**. These were cases involving **minor losses** which were settled **without delay** by the responsible insurer due to clear-cut facts and unambiguous legal facts.

Lawyer's fees are based on the German Law for the Calculation of Lawyer's Fees (RVG). This law certainly makes it easier for a lawyer to earn a fee, and after about two years of its application, it is noticeable that the average earned fee is **higher** than before. On the other hand, this law is a major contribution to making lawyers **fees more transparent**.

## IV. Personal injury

For minor accidents, recoverable personal injury claims normally include **compensation for pain and suffering and medical treatment costs**. § 253 section 2 of the German Civil Code (BGB) provides that "...for an injury to the body or health ... a reasonable compensation in money may be demanded for any damage **that is not financial damage**".

## 1. Compensation for pain and suffering

Bearing in mind the German Supreme Court rulings, the compensation for pain and suffering has **two purposes**. First, such compensation is aimed at offering the injured party a **reasonable compensation** for the pain suffered and the lost social pleasure and enjoyment. In addition, it is intended as a **satisfaction**. The latter, however, plays a secondary role in the case of accidents, but has a major impact where intentional bodily injury or insult is concerned.

The injured party qualifies to be compensated for pain and suffering both under **tort** law and **strict** liability law. This, however, requires that one of the above injuries occurred and that it was caused by the preceding action.

Especially for whiplash injuries the question of cause continues to keep the courts occupied with usually long-term and costly cases.

For the benefit of the insurance industry, prevailing opinion over the past years has been that whiplash injury can **only** occur in a front or rear collision. This at least excludes cases where a side collision was the cause of the accident. On the other hand, some judges held that whiplash injury might be a likely consequence even at low speed impacts of about **10 km/h**.

In all cases where compensation for pain and suffering is requested for whiplash injury, both the cause and the physical condition of the claimant - with a particular view to preexisting medical conditions- deserve **most accurate** examination.

Generally, the injured party's lawyer claims compensation for pain and suffering in the region of the upper limit or more. Fortunately, German standards do not compare with the sums awarded for instance in the USA. The sums awarded in Germany for pain and suffering, are in line with the European average. The highest amount ever awarded being 500.000.- €.

An overly restrictive approach in the settlement process should be avoided **especially with regards to compensation for pain and suffering**. It is quite comprehensible that persons who have suffered an injury are **highly** sensitive, and the denial or severe cuts to the compensation sum might result in an unfavorable settlement atmosphere. On the other hand, a **positive** decision - which naturally must be within **appropriate limits** - may well cause the claimant to accept a denial or reduction for other heads of damage.

## 2. Medical treatment costs

Costs incurred to restore the general functions of body and mind are eligible for compensation. In addition to physician's and hospital fees, these include medical products and prescription charges as well as therapeutic and rehabilitation measures. Also the costs for alternative medical treatment are recoverable, **if** they are suitable to cure or at least improve the medical condition.

### 3. Impairment of working capacity

If the injured party is impaired in his or her working capacity due to the injury and has suffered a **concrete financial loss**, compensation for the impairment of working capacity applies.

This does **not only include lower earnings**, but **all economic impairments** which are a consequence of the impaired working capacity, for instance the loss of savings for own labor of a home builder, higher health insurance rates due to an increase in risk or the refund of the net wages for skilled help.

The decisive factor for assessing the financial loss is the **overall personal and financial situation of the injured party**.

### 4. Loss of earnings

Either the injured party itself or the **employer** is eligible to claim loss of earnings for the period of recovery. Partial compensation might apply in the event of contributory liability. Claims for the refund of social security contributions pass to the social security provider according to § 116 of the German Tenth Social Law Code (SGB X).

## **IV. Recourse of social security providers**

§ 116 of the German Tenth Social Law Code (SGB X) stipulates the legal subrogation of all claims for "compensation of damage to the insurer or social security provider, **if** benefits are eligible following an incident that

serve to indemnify for the **same type of damage** and refer to **the same period of time** as the compensation owed by the injuring party".

This is a genuine **legal assignment** situation. The transfer of the claim to the social security provider does not alter the **civil law** nature of the claim. All **objections or complaints** provided under civil law can also be raised against the social security provider.

As a rule, all compensation claims up to the insurance proceeds pass to the social security provider, **if and to the extent that** payments by the latter are in temporary and substantial relation to the damage. The time of transfer is the **occurrence** of the accident.

Common benefits and their practical handling which may have a major impact in **heavy casualty** cases are as follows:

#### 1. Medical treatment costs

Medical treatment costs include physician's fees, medical products and hospital costs. Recoverable expenses also include artificial limbs.

#### 2. Impairment of working capacity benefits

The impairment of working capacity benefits cover vocational aid, injury benefits, temporary allowances, pensions for a reduction in earning capacity and injury pensions by the industrial workers' compensation insurance carrier.

Compensation is generally paid in the form of a pension. However, practical experience has shown that **final lump-sum settlements** through **capitalization** are a reasonable option. Even if in isolated cases **considerable sums** may be involved, this seems the most realistic approach from an **economic point of view** - considering future risks.

### 3. Increased needs

Increased needs benefits of an injured party cover additional expenses for clothing, renovation or re-construction of the home, special diet and care as well as benefits according to the attendant care insurance.

Especially in cases of severe injuries such as paralysis, confining the injured party to a wheelchair, **substantial** modifications to the home are required.

### 4. Survivor's loss and funeral costs

If the injured party dies, the survivor's qualify for support and pension benefits under § 844 of the German Civil Code. This rule also provides the payment of reasonable funeral costs.