CAMBRIDGE

Cambridge University Press
0521846137 - Compensation for Personal Injury in English, German and Italian Law: A Comparative Outline
Basil Markesinis, Michael Coester, Guido Alpa and Augustus Ullstein
Excerpt
More information

1 Introduction

Preliminary observations

Cross-border claims for personal injuries are becoming more and more common, particularly within the European Union. Furthermore, we know from our personal experience that European nationals and/or residents increasingly join, or seek to join, class actions in the United States of America. This tendency leads to a need to know more about the law in Europe including, of course, English law. Thus, though this book is not about American law, it makes allusions to it where this is likely to be useful to both American lawyers using it and Continental European lawyers aware of the fact that they must constantly guard against the danger of thinking that they understand the law in the USA because they usually know something about English law.

Despite the growing importance of this subject, we believe that there is a dearth of material available to practitioners in any of these jurisdictions to assist them both in advising their clients as to the heads of damage recoverable in other countries and/or the level of damages which they might expect to be awarded. It is the objective of this book to fill that gap in sufficient (but not excessive) detail and we attempt this in chapters 2 to 5. If the transnational trend we alluded to above continues, we intend to flesh out our account further in a future edition.

In this work we have deliberately limited the scope to compensation for personal injury. Fatal accident damages is a very large subject in itself and would, we feel, either overburden a book of the size which we intend or compel contributors to reduce what they say on particular topics to a level which is unlikely to be really useful. Again, however, references to this branch of the law of damages do occasionally appear in our text, especially where this seemed to be required by the narrative.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
0521846137 - Compensation for Personal Injury in English, German and Italian Law: A Comparative Outline
Basil Markesinis, Michael Coester, Guido Alpa and Augustus Ullstein
Excerpt
More information

To make this material more intelligible, and also satisfy our purely academic interest in developing suitable ways to present foreign law to national readers, we have included a fairly long introduction. In it, we have attempted to set our material in the wider context of tort law. We thus address eight, wider, issues in the hope that it will assimilate the foreign learning into the narrative of the text and explain to 'foreign' observers its background. This is especially necessary whenever we encounter 'peculiarities' found in one system alone. These wider issues we approach from the point of view of English, German and Italian law though we stress from the outset that here, and elsewhere in the book, *not all subdivisions and headings are entirely appropriate (or of equal importance) to the three systems under comparison*. A closer synthesis, largely concerned with methodological issues, will be attempted in chapter 6 in the form of comparative conclusions. There we shall, again, pick up on some of the themes found (mainly) in this (but also other chapters) and refer in greater detail to the structural differences which make it impossible to cover in each system, in an equal and precise manner, the various subtopics discussed in this book. This is a point of considerable importance and one which national lawyers must come to terms with early in this study of 'foreign' law.

The problem of terms, concepts and language

English law

With regard to damages the common law uses a multitude of terms: general and special, nominal and substantial, contemptuous and aggravated, compensatory and punitive, liquidated and unliquidated, pecuniary and non-pecuniary, past and future. These terms are not always understood in the same way even by common lawyers themselves; and, as we shall see, do not always have exact equivalents in other systems. This second consequence not only makes the comparative exposition of different laws difficult; it can also make the comparison of awards misleading since often one may not be comparing 'apples with apples' but 'apples with oranges'. The common law terms are often side-products of pleading rules and the use of juries in civil law trials (now almost extinct in the English but not the American common law) may have nothing to do with policy decisions taken at the level of substantive law. Two sets of such terms will make our point; and the picture will be further clarified in the account that will follow in chapters 2 to 4.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
0521846137 - Compensation for Personal Injury in English, German and Italian Law: A Comparative Outline
Basil Markesinis, Michael Coester, Guido Alpa and Augustus Ullstein
Excerpt
More information

'Special damage' is thus what the plaintiff must prove as part of his cause of action in torts which are not torts actionable *per se*.[1] This will include quantifiable lost earnings up to the trial, damaged property (e.g., the plaintiff's damaged clothing) and other out-of-pocket expenses. As indicated, this distinction between special damages (as defined above) and general damages, which are the damages which are 'presumed to flow' from the wrong complained of (and include future lost earnings) is important for pleading purposes, but also has consequences for the purposes of calculating interest.

'Aggravated' and 'exemplary' damages form another heading which may cause some concern to civilians. What they have in common is that they represent a way of enhancing the award of the successful plaintiff. They also seem to frequent largely (but not entirely) the same areas of tortious liability such as defamation and false imprisonment. But the similarities end there. For the aggravated award augments the plaintiff's *compensatory*[2] amount by taking into account the aggravated injury caused to the plaintiff's 'feelings of dignity and pride'. On the other hand, exemplary damages require one to look at the tortious incident from the optic of the defendant who is deemed to be particularly opprobrious, thus deserving a form of (civil) punishment. Notwithstanding this attempt to maintain a clear conceptual differentiation between these two notions, the fact that they overlap may, in some specific areas of tort law, make the differences between common law and civil law less pronounced than it appears to be if compared at a purely dogmatic level.

German law

German law does not draw the line between past and future losses, or between special and general damages, but rather between damages which

[1] Contemporary Continental European lawyers – and we shall henceforth refer to them as 'civilians' (and their law as civil law) to contrast them with the common lawyers and the common law – will regard a tort that does not include damage among its essential ingredients (tort actionable *per se*) as a paradox. Nonetheless, it is one which is easily explained once one realises that in the case of these torts (such as trespass to the person, land or libel) the prime aim of the law is to vindicate legal interests and not just compensate harm caused by the defendant. This is an acknowledged function of tort law in Continental legal systems, too (for Germany, e.g., see RG 15 February 1927, RGZ 116, 151, 153; BGH 25 November 1986, BGHZ 99, 133, 136). Needless to add, however, if damage has been caused, damages will follow.

[2] Not surprisingly, therefore, some judges have argued that the increased pain and suffering of the plaintiff should be reflected in his general damages: see *Kralj* v. *McGrath* [1986] 1 All ER 54, approved in *A.B.* v. *South West Water Services Ltd* [1993] QB 507.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
0521846137 - Compensation for Personal Injury in English, German and Italian Law: A Comparative Outline
Basil Markesinis, Michael Coester, Guido Alpa and Augustus Ullstein
Excerpt
More information

can be compensated (and 'repaired') once and for all by a single sum of money (*restitutio in integrum*, § 249 II, 251 BGB), and continuing losses or costs of living which will accompany the victim's life for the (foreseeable) future (§§ 842, 843 BGB). If damages of the first category (e.g., the acquisition of a wheel-chair) are not yet compensated at the time of the court decision, they are 'future damages', based on § 249 II BGB. And if continuing needs of the victim (e.g., care) have been met already before the decision is rendered, they are 'past losses', but recoverable under § 843 I BGB (just like the care necessary in the future). It becomes obvious, however, that – as a matter of fact – the bulk of future damages belongs to the realm of §§ 842, 843 BGB.

Non-pecuniary losses are commonly referred to as '*Schmerzensgeld*', a not very precise and unofficial short-hand term for what the statute calls 'non-pecuniary damage' (§ 253 BGB). The danger of translating '*Schmerzensgeld*' as pain and suffering must thus be avoided since the German term encompasses additionally such well-known common law headings of damage as 'loss of amenity', 'disfigurement', 'loss of expectation of life' etc. But the notion has also, from early times, been taken to include the 'satisfaction' of the victim for what has been done to him;[3] and the 'deterrent function' of '*Schmerzensgeld*' has also been stressed by the BGH in mass media cases involving the invasion of the privacy of celebrities.[4] In such cases, therefore, the notion comes close to the concept of 'punitive damages'.

The concept of a *'damage per se' (danno biologico)* is rarely discussed in Germany, but is, in fact, not totally unknown. According to the Code, a 'damage' is to be assessed by the comparison of the situation *quo ante* and the situation after the injury. Where pecuniary damage is involved, the monetary award that will be made to the plaintiff becomes a simple matter of calculation, the point of reference being either the costs of repair (*restitutio in integrum*, § 249 BGB) or – where repair is not possible or sufficient – the economic loss of the victim (§ 251 BGB). The problem of non-pecuniary damage is, in general, solved by pursuing the ideas of 'fair compensation' and 'satisfaction' (atonement), which provide some guidelines for the pecuniary compensation of non-pecuniary losses (see p. 62). But these concepts fail to produce satisfactory results where, because of a fundamental destruction of the victim's body and personality, fair compensation is

[3] BGH 6 July 1955, BGHZ 18, 149, translated in Basil Markesinis and Hannes Unberath, *The German Law of Torts: A Comparative Treatise* (4th edn, Oxford 2002), p. 981 (henceforth referred to as *GLT* followed by the appropriate page number).

[4] BGH 15 November 1994, NJW 1995, 861; OLG Hamm 25 July 1996, NJW 1996, 2870; see also BVerfG 8 March 2000, NJW 2000, 2187; *GLT*, pp. 472–7; cf. p. 22 and p. 64.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
0521846137 - Compensation for Personal Injury in English, German and Italian Law: A Comparative Outline
Basil Markesinis, Michael Coester, Guido Alpa and Augustus Ullstein
Excerpt
More information

not possible and the victim cannot feel any satisfaction. In cases such as these, the BGH has, not without some tergiversations, come to acknowledge that there must be another, specific type of 'damage' which is independent of pecuniary losses or the personal perception of the victim.[5] The severe physical impairment as such is the legitimating and decisive factor for the assessment of damages which is not treated as a conventional and paltry amount but, on the contrary, is treated as a substantial heading of damages.[6] It is, however, still unclear whether this will remain a narrowly construed exception in German law or the first example of an emerging new concept of a 'damage per se'.[7]

Tort law (*Deliktsrecht; Recht der unerlaubten Handlungen*) refers only to the relevant provisions of the BGB (§§ 823–853) which are based on the fault principle (notwithstanding some statutory modifications and exceptions). Apart from the BGB, however, there exist many specialised statutes which also provide for compensation for harm caused irrespective of fault e.g., in cases involving public traffic, nuclear energy, product liability etc. A general term, more appropriate for these types of harm, is '*Haftungsrecht*'.[8]

Italian law

Italian law does not draw a clear line between past and future losses[9] or between special and general damages. The parallel thus seems to be more with German than English law. Rather, its main distinction is between damages which result from non-performance of obligations (*danno contrattuale*) and damages which result from a tort (*danno extracontrattuale*) – a distinction which, of course, is not unknown in both English and German law.

The measure of damages arising from breach of contract includes the loss sustained by the creditor (*danno emergente*) and lost profits (*lucro cessante*), insofar as they are a direct and immediate consequence of the

[5] 'Eine eigenständige Fallgruppe, bei der die Zerstörung der Persönlichkeit durch den Fortfall oder das Vorenthalten der Empfindungsfähigkeit geradezu im Mittelpunkt steht', BGH 13 October 1993, BGHZ 120, 1 = NJW 1993, 781, 783 = *GLT*, pp. 997–9.

[6] In the aforementioned case the amount thus awarded was DM50,000 in the form of a lump sum and a further DM500 per month for the duration of the victim/plaintiff's life.

[7] Christian von Bar, *Gemeineuropäisches Deliktsrecht* II, no. 16–22 argues in favour of the latter alternative.

[8] Adherence to this terminology is breaking down in practice.

[9] We use the term here in the English sense. In Italian law (unlike French law for example) future loss, in the sense of loss of a chance, is not compensated as such. The problems raised by these cases are dealt with as problems of causation. See, e.g., Corte di Cassazione 6 February 1998, no. 1286, Foro it., 1998, I, 1917.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
0521846137 - Compensation for Personal Injury in English, German and Italian Law: A Comparative Outline
Basil Markesinis, Michael Coester, Guido Alpa and Augustus Ullstein
Excerpt
More information

performance or delay (*danno immediato e diretto*) (article 1223 Civil Code, cod. civ.). If the non-performance or delay is not caused by the fraud or malice of the debtor, compensation is limited to damages that could have been foreseen at the time the obligation arose (*danno prevedibile*, article 1225). If damages cannot be proved in an exact manner, they are equitably liquidated by the judge (*liquidazione equitativa del danno,* article 1226). At this level, then, the differences with English and German law are not significant. As this, and the next chapters, will show, however, the differences in the tort area are greater.

In tort cases special rules apply. The basic distinction between patrimonial and non-patrimonial damages, found in the other two legal systems, is also known to Italian law. The way, however, these are treated in practice has varied over the years. This will become increasingly obvious as the presentation of our materials unfolds.

Damage arising from loss of earnings is patrimonial loss and is equitably estimated by the judge according to the circumstances of the case (article 2056 cod. civ.). When a personal injury is of a permanent nature, the liquidation of the injury can, if the judge so decides, be in the form of a life annuity which takes into account the conditions of the parties and the nature of the injury (article 2057). But the injured party can demand specific redress when this is wholly or partially possible (article 2058 sect. 1) and is not excessively burdensome on the defendant (article 2058 sect. 2).[10] Unforeseen damages are also liquidated (*danno imprevedibile*) in the same way. We discuss these rules in greater detail in chapter 4.

Non-patrimonial (i.e., non-pecuniary) damage (*danno morale*) can also be awarded but only in cases provided by *the law* (article 2059 cod. civ.). The italicised words were, for a long time, interpreted narrowly to refer only to criminal law. So, if there was no violation of the criminal law, moral damages were not awarded. This approach did not meet with universal approval; but it survived more or less intact until recent times. Most recently, however, the highest courts of Italy, taking their cue from some judgments of lower courts, decided to liberalise the law. Thus, *in the context of fatal accident action*, they held that the claimants, 'relatives' of the deceased, could claim moral damages for their pain and suffering even in the absence of a crime. The first court to sanction this departure from older orthodoxy was the Supreme Court in a judgment delivered on

[10] In specific types of cases (not relevant to the subject matter of this book), special laws may decree that the compensation may take the form of specific redress or restoration. This, e.g., is the case where art. 18 of the Law on Environmental Damage is applicable (Law no. 349 of 8 July 1986).

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
0521846137 - Compensation for Personal Injury in English, German and Italian Law: A Comparative Outline
Basil Markesinis, Michael Coester, Guido Alpa and Augustus Ullstein
Excerpt
More information

31 May 2003;[11] and, a few weeks later, it was followed by the Constitutional Court in its own decision of 11 July 2003. The evaluation of the damages, expressly described as non-patrimonial but moral, would henceforth be undertaken on the basis of all the relevant circumstances including the closeness of the family relationship, the cohabitation with the primary victim, the size of the affected family, way of life, the age of the primary victim and the age of the relatives.

In the domain of personal injury (*danno alla persona*) some further comments are necessary to take into account an important innovation that took place in the 1970s.

In Italian law, health is looked at in a comprehensive manner so as to include injury to the body as well as the psychological consequences (*danno psicofisico*) which flow from such injury. This is seen as a subjective right (*diritto soggettivo*) protected by the Constitution (articles 2 and 32 Cost.). Due to a very long, complicated and controversial debate, which mainly took place in the 1970s between academic lawyers and judges, a new concept of damage to the person was created by case law. This is known under the untranslatable heading of *danno alla salute* or *danno biologico* – a notion which refers to any interference with the psycho-physical health of the claimant which is presumed to be actionable if affected adversely. This, then, is a third heading of damages which is awarded besides *danno patrimoniale* and *danno morale*.

Danno biologico, as described above (and discussed in greater detail in chapter 2), was originally awarded only to victims of traffic accidents. Subsequently, however, it was extended to victims of accidents at work and then, finally, it was awarded to other types of situations (e.g., damages caused by defective products, tobacco inhalation, etc.).

Apart from the general rules provided by the Civil Code, many special statutory rules govern specific circumstances or relationships. Indicatively one could mention the following: compulsory insurance for civil liability arising from the use of vehicles;[12] work-related accidents and occupational diseases;[13] rail, sea and air transport;[14] circulation of defective

[11] Decision no. 8828 has, thus far, only been published on the Internet, 11 July 2003, no. 233. See: www.cortecosttuzionale.it

[12] Law no. 990 of 24 December 1969, art. 18 ff.; Law no. 39 of 26 February 1977, art. 4; Law no. 57 of 5 March 2001; Law no. 273 of 12 December 2002.

[13] Law no. 144 of 17 May 1999; Legislative Decree no. 38 of 23 February 2000; Legislative Decree no. 202 of 19 April 2001.

[14] Warsaw Convention of 12 October 1929, implemented by Law no. 841 of 19 May 1932; Bern Convention of 21 February 1961 implemented by Law no. 806 of 2 March 1963.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
0521846137 - Compensation for Personal Injury in English, German and Italian Law: A Comparative Outline
Basil Markesinis, Michael Coester, Guido Alpa and Augustus Ullstein
Excerpt
More information

products[15]and social security[16] law. There are nowadays also special rules which govern damage from vaccination and terrorist attacks for which no compensation is provided but only a simple indemnity. One feature of (some of) these statutes is that they may provide 'caps' to damages awarded under them. But no such capping of damages awarded under the Civil Code is possible.

The impact of history: juries, non-juries, academic writers

English law

The eminent Cambridge legal historian William Maitland encapsulated the theme of this subsection perfectly when he wrote that 'the forms of actions we have buried, but they rule us from their grave'.[17] The medieval writ system thus left the common law still bearing the marks of the nominate torts. The shaping of the early common law by practitioners rather than academics (as is the case with Continental European law) has also meant that English law has avoided wide formulations and generalisations such as those to be found in the modern civil codes. Finally, the adoption of the jury trial in the later Middle Ages also shaped English procedure and evidence and left an important mark on the law of damages.

It is with this last point that we are concerned here; and it is not an insignificant one either. For anything that pertained to damages was within the province of the jury and this meant two things. First, if the judges wished to exercise some kind of control over the case before it left their hands and went to the jury, they had to develop notions and devices that could help them achieve this aim. In the law of occupiers' liability, the distinction between different types of entrants, owed different types of duty, was just such an invention which came about in the late nineteenth century. More important was the subsequent 'invention' of the notion of duty of care which helps demarcate the range of relationships and interests protected by the law and which helped stop cases reaching juries (or full trial) for the better part of the twentieth century.

The second consequence of jury trial was the absence, for a very long time, of any legal rules and principles concerning the law of damages. This led to uncertainty, unpredictability and the lack of a corpus of law defining the principles of the law of damages. Growing realisation of the

15 Presidential Decree no. 224 of 24 May 1988, art. 11.
16 Law no. 222 of 12 June 1984.
17 A.H. Chaytor and W.J. Whittaker (eds.), *The Forms of Action at Common Law* (CUP, 1963), p. 2.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
0521846137 - Compensation for Personal Injury in English, German and Italian Law: A Comparative Outline
Basil Markesinis, Michael Coester, Guido Alpa and Augustus Ullstein
Excerpt
More information

need for consistency and comparability in awards thus led the Court of Appeal in *Ward* v. *James*[18] to rule that juries should no longer be used for the assessment of damages save in very exceptional cases.[19] Lord Denning MR, delivering the judgment of the full Court of Appeal, justified this as follows:

> recent cases show the desirability of three things. First *accessibility*: In cases of grave injury, where the body is wrecked or the brain destroyed, it is very difficult to assess a fair compensation in money, so difficult that the award must basically be a conventional figure, derived from experience or from awards in comparable cases. Secondly, *uniformity*: There should be some measure of uniformity in awards so that similar decisions are given in similar cases; otherwise there will be great dissatisfaction in the community, and much criticism of the administration of justice. Thirdly, *predictability*: Parties should be able to predict with some measure of accuracy the sum which is likely to be awarded in a particular case, for by this means cases can be settled peaceably and not brought to court, a thing very much to the public good. None of these three is achieved when the damages are left at large to the jury.

It will be noticed that while the first two reasons given for the change are related to what could be called the 'fairness' of the awards, the last is a purely 'administrative' argument, though no less important for that. For it is this consistency which makes it possible to proceed to settlement out of court and thus expedites the administration of justice.

A second change of some importance to the law of damages came with *Jefford* v. *Gee*,[20] where it was held that judges must assess separately damages payable: (a) for accrued pecuniary loss; (b) for non-pecuniary damages; and (c) for damages for loss of future earnings. This threefold division was largely dictated by the passing of the Administration of Justice Act 1969, which made it obligatory for courts to award interest in any case

[18] [1966] 1 QB 273 at 299–300.

[19] There is, according to s. 69(1) of the Supreme Court Act 1981, a prima facie right to a jury trial in cases of fraud, malicious prosecution, false imprisonment and, of course, defamation. But s. 69(3) has been seen as strengthening further this presumption against jury trial since it gives a judge the right to deny a jury trial if the case will require a 'prolonged examination of documents or accounts or any scientific . . . investigation which cannot be made with a jury'; see *H* v. *Ministry of Defence* [1991] 2 QB 103. Recent decisions of the Court of Appeal to intervene in jury awards have struck a further blow to the unfettered powers which juries enjoyed in the past. See, in particular, Lord Woolf's judgment in *Thompson* v. *Commissioner of Police of the Metropolis* and *Hsu* v. *Commissioner of Police of the Metropolis* [1998] QB 498, where clear and thorough guidelines where given on the matter of jury instruction.

[20] [1970] 2 QB 130.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
0521846137 - Compensation for Personal Injury in English, German and Italian Law: A Comparative Outline
Basil Markesinis, Michael Coester, Guido Alpa and Augustus Ullstein
Excerpt
More information

in which judgment[21] was given for more than £200, all or part of which consisted of damages in respect of personal injury or the death of a person. *Jefford* v. *Gee* was, therefore, the case that elaborated the principles of the award of interest, and it did so by dividing the heads of damages as above. After some hesitation, these principles were confirmed in *Pickett* v. *British Rail Engineering* Ltd[22] and the position is as follows: (a) special damages (i.e., pre-trial losses) carry interest at half the usual short-term rate; (b) for non-pecuniary damages the interest on damages is at a more modest rate – currently 2 per cent;[23] finally (c) future pecuniary losses carry no interest since they have not materialised at the time of the trial.

The final change was firmly established in *George* v. *Pinnock*,[24] where it was accepted that the parties themselves had a right to know how the judge arrived at his final figure. The older practice, therefore, of allowing an appeal only where the total figure was erroneous, was deemed to be incorrect. Nowadays, therefore, the most common ground for overturning an award is if there is an error in one of its component parts; and this, typically, consists of the trial judge having failed to consider whether there is an overlap between different headings of damages with the result that the plaintiff has been enriched.[25]

German law

In terms of structure, the draftsmen of the BGB tried to steer a middle course between the casuistic approach of the Roman law (and English common law) on the one hand, and the vague general clauses of the French Civil Code (articles 1382, 1383). Thus, three basic tort provisions of the BGB (§§ 823 I, 823 II, 826) mirrored the status quo of the late nineteenth century, though they remained open to new developments in the future.

[21] This power of the court to award interest on a judgment meant that if the defendant paid his debt any time between the commencement of the proceedings and the giving of judgment he escaped having to pay interest at all. Now, however, as a result of s. 15 of and Sch. 1 to the Administration of Justice Act 1982 the courts are given power to award interest on any debt outstanding when the writ is issued.

[22] [1980] AC 136.

[23] *Birkett* v. *Hayes* [1982] 1 WLR 816; *Wright* v. *British Railways Board* [1983] 2 AC 773.

[24] [1973] 1 WLR 118.

[25] Thus, see, *Harris* v. *Harris* [1973] 1 Lloyd's Rep. 445, CA (future loss of earnings and loss of marriage prospects); *Clarke* v. *Rotax Aircraft Equipment Ltd* [1975] 1 WLR 1570 (loss of earning capacity and loss of future earnings). It is doubtful, but probably not finally settled, whether there can be an overlap between pecuniary and non-pecuniary losses. See Lord Scarman's obiter dictum in *Lim Poh Choo* v. *Camden and Islington Area Health Authority* [1980] AC 174 at 192.

© Cambridge University Press www.cambridge.org