CHAPTER 14

Reparation for Traffic Injuries in West Germany

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In 1962 there were more than one million traffic accidents in the Federal Republic of Germany (population: 54 million; number of automobiles: 9.5 million). Somewhat less than one-third of these accidents (308,140) caused personal injuries, and 14,088 persons were killed.1 According to some experts, West Germany's total expenses for traffic accidents, including proportionate expenses for police and the courts, amount to 4 - 5 billion marks ($1 billion - $1.25 billion) per year, compared to a federal budget of approximately 60 billion marks ($15 billion).2

These figures illustrate the economic importance of traffic injuries within the framework of the highly industrialized and prosperous West German society. How does the West German legal system respond to the challenge indicated by the figures mentioned?

A. TORT LIABILITY

1. Absolute Liability

The Road Traffic Law of 1952 (Strassenverkehrsgesetz),3 first enacted in 1909 under the title of Motor Vehicle Law (Gesetz

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1 Statistisches Jahrbuch für die Bundesrepublik Deutschland 1963, 373 ff.
über den Verkehr mit Kraftfahrzeugen),\(^4\) provides for strict liability in any case in which through the operation of a motor vehicle a person is killed or injured or a thing is damaged. The person made liable is the “holder” (Halter) of the vehicle, which means the person entitled to possession of it. Normally this is the owner, but in the case of a leased vehicle it may be the lessee.\(^5\)

However, the holder is not liable if the accident is due to an “unavoidable event,” as defined by Section 7(2) of the act, or if the vehicle was used without the knowledge or the will of the holder. Likewise, the act does not apply to injuries caused by automobiles that cannot drive faster than 20 kilometers per hour, nor to injuries of vehicle operators, nor to liabilities of “holders” to passengers unless the transportation was for consideration and in the course of the holder’s business.\(^6\) Furthermore, the liability imposed on the holder is limited in several regards. Only certain kinds of damages can be claimed: the costs of medical treatment, funeral expenses, lost income, and other expenses caused by the accident. Dependents of injured persons are not entitled to damages unless the injury was fatal.\(^7\) In contrast to the general German law of torts, the Road Traffic Law awards no compensation for pain and suffering or for the loss of services to which a third person might be entitled. In addition to these restrictions, the Road Traffic Law provides for maximum amounts of damages recoverable;\(^8\) these are:

(i) In case of death or injury to a single person a capital amount of 50,000 marks ($12,500) or an annuity of 3,000 marks ($750).

(ii) In case of death or injury to several persons caused by one and the same event, notwithstanding the limits specified

\(^6\) Road Traffic Law, sections 8 and 8a, as amended by B. G. B1. 1957. I. 710.
\(^7\) Id. §§ 10 and 11.
\(^8\) Id. § 12.
above, a capital amount totaling 150,000 marks ($37,500) or annuities totaling 9000 marks ($2250).

(iii) In case of damage to property, even if several things are damaged by the same event, 10,000 marks ($2500).

Finally, the act provides for a two year period of limitations, whereas the normal period for tort claims is three years.\(^{9}\)

Unlike the "holder" of an automobile, the driver is not, theoretically, under strict liability; he can escape responsibility if he can prove he was free of negligence.\(^{10}\) In practice, this divergence does not carry much weight. Since German courts (like the courts in many other countries) have imposed extremely stringent duties of care on the driver of a motor vehicle, the defendant is in an almost hopeless position when he endeavors to show that he complied with every single one of these duties. Consequently, in the overwhelming majority of cases the driver, as well as the holder, is liable for the consequences of a traffic accident. In substance his liability is limited by the very same provisions which have been sketched above.\(^{11}\)

2. General Law of Torts

By virtue of Section 16, the Road Traffic Law leaves undisturbed federal laws which authorize more extensive damages. The victim of a traffic accident may therefore invoke the general law of torts embodied in the German Civil Code of 1900. The pertinent provisions of the Code (Sections 823-853) provide for an elaborate system of liability to which limitations comparable to those of the Road Traffic Law are unknown.

The most significant advantage of suing under ordinary tort law is that it allows the injured party to recover damages for pain and suffering.\(^{12}\) Yet it must be borne in mind that the amounts

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\(^9\) Compare \textit{id.} § 14 with German Civil Code, § 852.

\(^{10}\) Road Traffic Law, \textit{supra} note 6, § 18.

\(^{11}\) \textit{Ibid.}

\(^{12}\) German Civil Code, § 847.
assessed by German courts as damages for pain and suffering—always separated from damages for actual losses—are surprisingly low compared to American standards. The highest amount adjudicated since the end of World War II is 50,000 marks ($12,500). In this case the plaintiff had suffered incredibly grievous injuries; the average damages for pain and suffering are substantially below the amount recovered in this instance.\textsuperscript{13}

In addition to the possibility of obtaining damages for pain and suffering, the plaintiff invoking the Civil Code provisions on torts is entitled to full indemnification for all his actual losses including any reduction in earning capacity or loss of promotion (Section 842). Normally the detriment to the plaintiff’s earning capacity is compensated in the form of annuities; only under special circumstances ("for good cause") may the plaintiff demand a lump sum.\textsuperscript{14}

The tort law of the German Civil Code is, however, dominated by the fault principle. Hence, the plaintiff who wants to base his action on these tort rules has to show that the defendant caused the accident through negligent conduct. To be sure, this burden of proof is considerably alleviated by the previously mentioned case law which has established far-reaching duties of care with respect to driving motor vehicles and similar activities. Still, the plaintiff claiming unlimited damages under the provisions of the Civil Code is in a less favorable position than the one who confines himself to an action under the Road Traffic Act.

One particular disadvantage of a tort action under the German Civil Code is the peculiar rule of Section 831 on vicarious liability. According to this provision an employer is not responsible for tortious acts of his employee if he can prove that he has exercised ordinary care in the latter's selection and superintendence. Although the courts have constantly intensified the requirements of

\textsuperscript{13} See the detailed list of more than 600 cases in Lieberwirth, Das Schmerzengeld (2d ed., 1961), 145 ff.

\textsuperscript{14} German Civil Code, § 843 (3).
evidence to be met by the employer, there are still numerous cases in which the necessary evidence can be supplied. This is particularly true of traffic injury cases. If an employer who is likewise the "holder" of a motor vehicle succeeds in establishing that he has complied with his duties under Section 831 of the Civil Code, he is liable only within the scope of the Road Traffic Law, even where his employee has caused injuries by negligently driving the employer's automobile. If the plaintiff has sustained losses in excess of the limits of the Road Traffic Law, the excess can be recovered only in an action against the driver. But the consequence is less important than it may appear because, as will be pointed out below, the driver's liability as well as the holder's is normally covered by compulsory insurance.

3. Comparative Negligence

If the victim of a traffic accident himself acted negligently and thus contributed to the accident, or to the harm resulting from it, this will mitigate the defendant's liability regardless of whether the action is based on the Road Traffic Act or on the Civil Code.\[^{15}\] Very rarely do German courts dismiss an action on account of contributory negligence; their usual reaction is to reduce proportionately the damages awarded.

B. Compulsory Liability Insurance

Before 1939 there was no nationwide statute establishing an obligation to take out insurance against the risks attributable to road traffic. If the holder and driver were both uninsured and financially unable to satisfy the victim's claims, the victim of a traffic accident would not succeed in collecting compensation, regardless of which one was liable. In order to avoid public burdens which might result from such instances, the Compulsory Insurance Law (Pflichtversicherungsgesetz) was enacted in 1939. Under this act the holder of any motor vehicle usually garaged in

\[^{15}\] Road Traffic Law, *supra* note 6, § 9; German Code, § 254.
Germany is obliged to take out liability insurance for himself and the authorized driver. At the same time, all insurance companies authorized to do business in Germany are under an obligation to write such insurance, unless extraordinary reasons set forth in an executive order supplementing the act justify the rejection of an offer. This ordinance also provides for minimum amounts of coverage below which the insurance taken out will be considered insufficient; at present these amounts range from 100,000 to 150,000 marks ($25,000 to $37,500) for personal injuries, varying with the type of vehicle in question.

Despite the explicit intention of the statute to protect the victims of traffic accidents more effectively, it does not give the injured party a direct action against the insurer. The victim or, in case of death, his next of kin can only sue the person responsible for the accident, but not the insurer. A judgment obtained against the tort-feasor is not immediately effective against the insurance company. But in all probability, the company will satisfy the judgment. If it does not, the injured party is entitled to garnishment of the defendant's rights under the insurance policy; after garnishment, the injured party may directly sue the insurer.

The duty to take out insurance is enforced not only by the threat of criminal penalties, but also by a rather simple administrative device. Everyone applying for an automobile license plate has to show that liability insurance for the holder and the authorized driver of the vehicle has been taken out, as required by the Compulsory Insurance Law. Hence, it is very unlikely that an accident will be caused by an automobile which has never been insured. However, the insurance once written may lapse because the insured ceases to pay the premiums. In this case the insurer is obliged to inform the competent agency, which will immediately withdraw the license plate. Should an accident have happened meanwhile or within one month after the insurer has notified the agency, German law furnishes a peculiar safeguard in the interest of the victim. Although the tort-feasor's
liability is actually not covered by the insurance, the company is
excluded from setting up this defense against the injured party. It
has to comply with the contractual conditions as if the contract
were still effective; afterwards it may recover against the insured.\textsuperscript{16}
Thus, the risk of the wrongdoer's insolvency is shifted to the
insurance company.

C. Sick-leave Pay

If a white-collar worker is incapable of working for reasons
for which he cannot be deemed responsible, he is entitled to a
continuance of his full salary as long as his incapacity does not
last more than a "relatively short period." In case of sickness, re­
gardless of whether it is due to an accident or not, the employee
has the right to continued payment of salary by the employer for
six weeks. A contractual clause excluding or limiting this right is
null and void.\textsuperscript{17} Collective agreements sometimes provide for a
more extended continuance of salary.

Departing from earlier cases, the German Supreme Court has
recently held that the sums thus received by the injured person
are not to be taken into account in assessing damages against a
person liable for the accident. On the other hand, the employer
may demand that the portion of his employee's damage claim
which corresponds to the employer's payment be assigned to the
employer.\textsuperscript{18}

Civil servants are entitled to a continuance of salary during
illness without any time limitation. But if a civil servant's in­
capacity amounts to a permanent disability, sick-leave pay will
cease and be replaced by a pension. If the civil servant has a
right of action for damages against a third person for causing the

\textsuperscript{16} Law on the Insurance Contract (Gesetz über den Versicherungsvertrag, R. G.
Bl. 1908. 263), § 158c, as amended by the Compulsory Insurance Statute, R. G.
Bl. 1939. I. 2223.

\textsuperscript{17} German Civil Code, § 616(2).

\textsuperscript{18} Bundesgerichtshof (June 19, 1952) 7 B.G.H.Z. 30; (June 22, 1956) 21
B.G.H.Z. 112.
disability, the state, or municipality has a right of subrogation with respect to the sick-leave salary which has been paid.\textsuperscript{19}

Employees who belong neither to the white-collar group nor to the civil servant group are not entitled to a continuance of their full wages in case of incapacity. Until 1957 these manual workers got nothing but their social security benefits. Since then their situation has been gradually improved. At present they are entitled to a payment supplementing their social security benefits in such a way that they receive 90 percent of their wages for a period of six weeks. But reform programs are under way aiming at a complete assimilation of the manual workers’ legal position to that of white-collar workers, as far as sick-leave pay is concerned.

D. INDUSTRIAL ACCIDENT INSURANCE\textsuperscript{20}

In Germany this type of Social Insurance was established as early as 1884. Originally serving as a means to protect workmen in some specified industries particularly exposed to the risk of accidents in the course of employment, it was later extended to several other industrial and nonindustrial types of enterprises. Today it covers all employees and even some categories of self-employed persons. Apart from accidents, a number of occupational diseases listed in an executive order are included.

This type of insurance is extremely important in relation to traffic accidents because accidents on the way to and from work are covered. During recent years there has been an annual average of 15,000 personal injuries arising from accidents of this type.

The benefits granted under the industrial accident insurance


\textsuperscript{20} For details and references to the pertinent provisions, see Bernstein, Schadensausgleich bei Arbeitsunfällen (Karlsruhe, 1963) 42 ff.
scheme are of various types. Medical treatment of all kinds as well as occupational therapy and rehabilitation are afforded in addition to pecuniary benefits. In case of temporary disability, the employee normally receives cash benefits to the same extent as if his disability were not due to an accident but constituted an ordinary illness. These benefits range from 65 to 75 percent of the employee’s salary, depending on the number of family members that he has to support. They are granted for a maximum of 78 weeks within a period of three years. As long as an employee gets the previously mentioned sick-leave pay from his employer (in the case of a white-collar worker, the first six weeks) he is not entitled to illness benefits. The payments to manual workers granted since 1957 are excluded from this rule because they are just a supplement to, not a substitute for, sickness benefits.

In case of permanent disability, German social accident insurance law accords a pension to the insured if the degree of disablement is at least 20 percent. The amount of the pension varies according to the degree of disability with a maximum of two-thirds of the disabled person’s last annual wages in the case of total disability. The “degree of disability” is not necessarily identical with the actual reduction of income in the particular case; rather, it is the detriment to earning capacity typically flowing from a given type of injury, regardless of whether this typical consequence has materialized in the instant case.

If on the way to or from his work a person is killed in a traffic accident, a death grant in the amount of 1/15 of the deceased person’s last annual wages, but at least 400 marks ($100), is accorded to his dependents. In addition to this, the widow is entitled to a pension in the amount of 3/10 of the last annual wage, and if she is more than 45 years old or has a child under 18, or if she is unable to work, in the amount of 2/5 of the last annual wage of the breadwinner. A widower has the right to a pension only if the deceased wife’s earnings were the family’s main re-
An orphan not older than 18 years receives a pension of 1/5 of the deceased parent's annual wages if one parent is still alive, and of 3/10 if both parents are dead. In certain circumstances even parents or grandparents of an accident victim are granted a survivor's pension. If the total amount of all pensions exceeds 4/5 of the insured person's last annual wages, each of them is reduced partially.

All benefits granted under the industrial accident insurance scheme are independent of negligence on the part of the insured person and of those who are entitled to benefits in case of his death. If, however, the person claiming a benefit has caused the accident intentionally, he is deprived of his right. This rule applies to the insured himself with the qualification that only conduct motivated by the desire for benefits, in contrast to merely intentional conduct, will result in defeating his rights.

A person who is liable for an accident on the basis of the law of torts cannot mitigate damages by reason of the benefits accruing to the injured party or his dependents under the industrial accident insurance scheme, but the organizations which pay the benefits are entitled to subrogation. Moreover, the liability of the employer and of a fellow-employee toward the insured and his next of kin is normally restricted to intentional misconduct. Where this rule applies, the injured party in most cases cannot recover anything in excess of the indemnification granted under the insurance scheme. Ordinary road accidents are, however, excluded from the rule mentioned. Employers and fellow-employees, like all other persons, are liable according to the general rules of tort law or according to the Road Traffic Statute.

The organizations charged with the administration of the industrial accident insurance scheme are Employers' Mutual Insurance Institutes financed by employers' contributions ranging from 1 to 2 percent of wages (with the exception of the mining industry where they are more than 10 percent).
E. OTHER FORMS OF SOCIAL SECURITY

1. Health Insurance

All manual workers and also white-collar workers with an annual salary of not more than 7920 marks ($1980) are covered by social security health insurance. This insurance is supplied by local, regional or enterprise funds, and financed by contributions of employers and employees, each paying 50 percent.

The cash benefits granted in case of sickness have already been discussed in connection with accident insurance. In addition to them, the insured as well as his spouse and his children are entitled to free medical treatment without time limitation. If the insured has to stay in a hospital, the cash benefits are reduced to 25 percent of the normal amount for a person without dependents, and to 66 2/3 percent for a person with one or more dependents to support, with 10 percent added for every further dependent up to a maximum of 100 percent.

If an insured dies, his family is entitled to a death grant in the amount of the deceased person's wages for 20 days with a minimum of 100 marks ($25).

Presently, about one half of West Germany's population is insured under the health insurance scheme. Considering that spouses and children of the insured are also entitled to medical treatment, the coverage is estimated at about 85 percent of the entire population. From this it follows that in most cases of traffic accidents the immediate needs for medical treatment are met by this type of social security. In the great majority of cases the loss of income is also partly covered by its benefits. The remaining part will usually be left uncompensated as long as there is no tort action available to the injured party, since most people covered by social health insurance do not take out additional private accident or health insurance. People not under the health

insurance scheme have, of course, to pay their doctor and hospital bills themselves. But since they belong predominantly to higher income groups, they can usually afford this; besides, most of them are privately insured.

2. **Pensions**

All manual workers are insured under the pension insurance scheme, but white-collar workers are covered only if they do not earn more than 15,000 marks ($3750) per year. Employers and employees contribute equally (each 7 percent of wages) to the pension insurance funds, which are organized as State Insurance Institutes for manual workers, and as a Federal Insurance Institute for salaried employees. Even various groups of self-employed persons, especially farmers, are compulsorily insured under a pension insurance scheme.

The system of benefits is highly complicated and its intricacies cannot possibly be pointed out here. Suffice it to observe that since a radical reform in 1957 the pensions granted have been annually raised and are on the whole rather adequate to present standards of living. It is also noteworthy that under the pension insurance schemes an insured person who has lost his employability before reaching 65 years of age is entitled to rehabilitation (vocational therapy, etc.) rather than to a pension, insofar as there is any chance of rehabilitation.

3. **Subrogation**

The organizations administering health and pension insurance schemes are entitled to subrogation to the same extent as are the Employers' Mutual Insurance Institutes which are charged with carrying out the accident insurance scheme. It follows that the benefits granted under the various schemes of social security do not alleviate the responsibility of tort-feasors. Indeed, the amount of damages may even be increased by the fact that an injured person is entitled to social security. This stems from a provision
in the Social Security Code empowering the social security organizations to claim damages on the basis of generalized values. Thus if an injured person has to go to a doctor, his social security organization may claim a certain sum specified in the Code even though the actual costs were below this amount. In the reverse situation, where the actual costs are higher than the generalized standards, the organization may claim them.

An injured person not covered by a social security scheme can, according to German law, never recover more than the actual expenses he has incurred except for compensation for pain and suffering. Although this results in a hardly justifiable discrimination against certain groups of tort-feasors and their liability insurers, the courts have upheld the provisions in favor of social security so long as the amount claimed does not differ substantially from the actual costs recoverable under ordinary tort rules.22 A difference of 50 percent has been held substantial, whereas 25 percent was considered irrelevant.

Where claims to which a social security organization is subrogated are covered by liability insurance, most cases are settled according to certain agreements between the insurance companies and those organizations. Comparable to a knock-for-knock agreement between two or more insurance companies, these agreements not only avoid litigation about the factual details of the case, but frequently prevent investigation. Distribution of losses is governed by percentages, and based on a rule of thumb.

F. ADDITIONAL SOURCES OF RELIEF

Due to the elaborate system of social security and its ample coverage, German private insurance other than liability insurance does not play a major part as a means of distributing losses originating from road accidents. Poor relief does not have any bearing worth mentioning.

1. Damage to Property

Where a third person's property is damaged through a car accident, compulsory liability insurance covers all claims for property damage. But damage to the driver's or the holder's own property, especially to the latter's car, is not included. The risk of damage to the vehicle can, however, be insured in the same policy. Only a minority of motorists takes out insurance with such comprehensive coverage, probably because premiums are rather high. In the absence of insurance cover, the owner of a damaged vehicle naturally has to pay the repair costs from his own pocket, if nobody else is liable. Under present economic circumstances this apparently does not give rise to great problems for many people. Even where another person can be held responsible, most car owners have their vehicles repaired long before they succeed in collecting from the other party or its insurance company. In fact, it would be unwise not to do so. Litigation may take quite a long time—usually one to three years—depending on whether appeal is taken from the first judgment or not. (All civil cases are tried without a jury and are open to appeal except where the amount involved on review does not exceed 50 marks—$12.50.) Even a settlement without litigation will usually require some months.

Insofar as damage to property is covered by insurance a corresponding claim to damages is subject to subrogation in favor of the insurance company.

2. Private Accident and Life Insurance

A person who is not within the purview of social security is likely to be covered by an accident insurance and/or by a life insurance contract. Whatever the injured person or his dependents receive on the basis of such a contract is not to be taken into account in assessing damages against a third person. The underlying theory is that the accident victim is entitled to payment from the insurance company merely on account of the premiums
paid from his own pocket and that he certainly did not intend thereby to further the tort-feasor’s interests.

Surprisingly enough, the German Supreme Court has held that the plaintiff’s damages are not mitigated by the fact that he has received the proceeds of a private accident insurance policy taken out by the defendant to cover losses of his passengers.\textsuperscript{23} The Court recognized that there might be exceptions to this rule (for example, where the defendant was obliged by contract to carry insurance for the plaintiff’s benefit, or perhaps in certain family relationships) but held such exceptions inapplicable to the case at bar, in which the injured person was a joint venturer with the defendant in conducting an autobus excursion. The holding seems hardly reconcilable with the probable intention of the parties.

Since there is no right to subrogation on the part of an accident or life insurer, the injured person or his dependents may well recover twice when benefits under an accident or life insurance contract coincide with a claim for damages.

G. CONCLUSION

It should be clear from the foregoing survey that the most urgent needs of traffic victims are relatively well taken care of under German law. All those who would probably not be able to pay high doctor or hospital bills from their own pockets are entitled to medical care free of charge. No employed person will sustain any substantial loss of income during the first six weeks after the injury.

There is also a well-established system of rehabilitation for victims of traffic accidents occurring at work, or when going to or coming from work. Injured persons outside of this group are less well off with respect to rehabilitation.

Severe permanent disability is a difficult problem under German law as well as under other legal systems. Often the detriment to earning capacity is not completely compensated.

Moreover, pain and suffering which aggravate a severely disabled person's situation are left uncompensated by the various social security schemes.

Tort law furnishes an important additional device for reparation of traffic injuries. But to a great extent it is a matter of good luck whether the injured can avail himself of this device. In many cases it merely functions as a means of redistribution of losses incurred by the social security organizations.