



# Moral Damages – A Comparative European Perspective

Ulrich Werwigk, Bucharest, 2013-03-18





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# Introduction

- Moral damages – definition
- Key Facts

## Moral Damages in MTPL Claims



### Moral Damages:

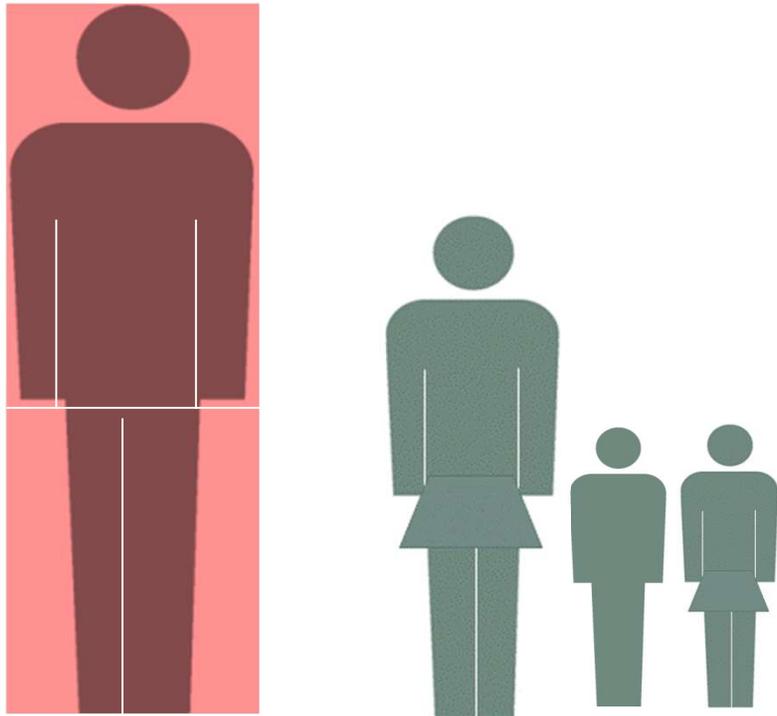
- ❑ Pain & suffering of the injured (respectively additional disfigurement)
- ❑ Non-material compensation for relatives

### Material (non-moral) Damages:

- ❑ Medical costs (medical treatment – ambulant and hospital, rehabilitation)
- ❑ Loss of Earnings during medical treatment and later
- ❑ Care costs and assistance (monthly period, calculated on hourly or daily rates)
- ❑ Additional needs (prosthesis, wheelchair, conversion of flat, additional medical expenses, housekeeping loss)
- ❑ Funeral costs
- ❑ Alimony to family members (spouse, children)
- ❑ Lawyer and court costs

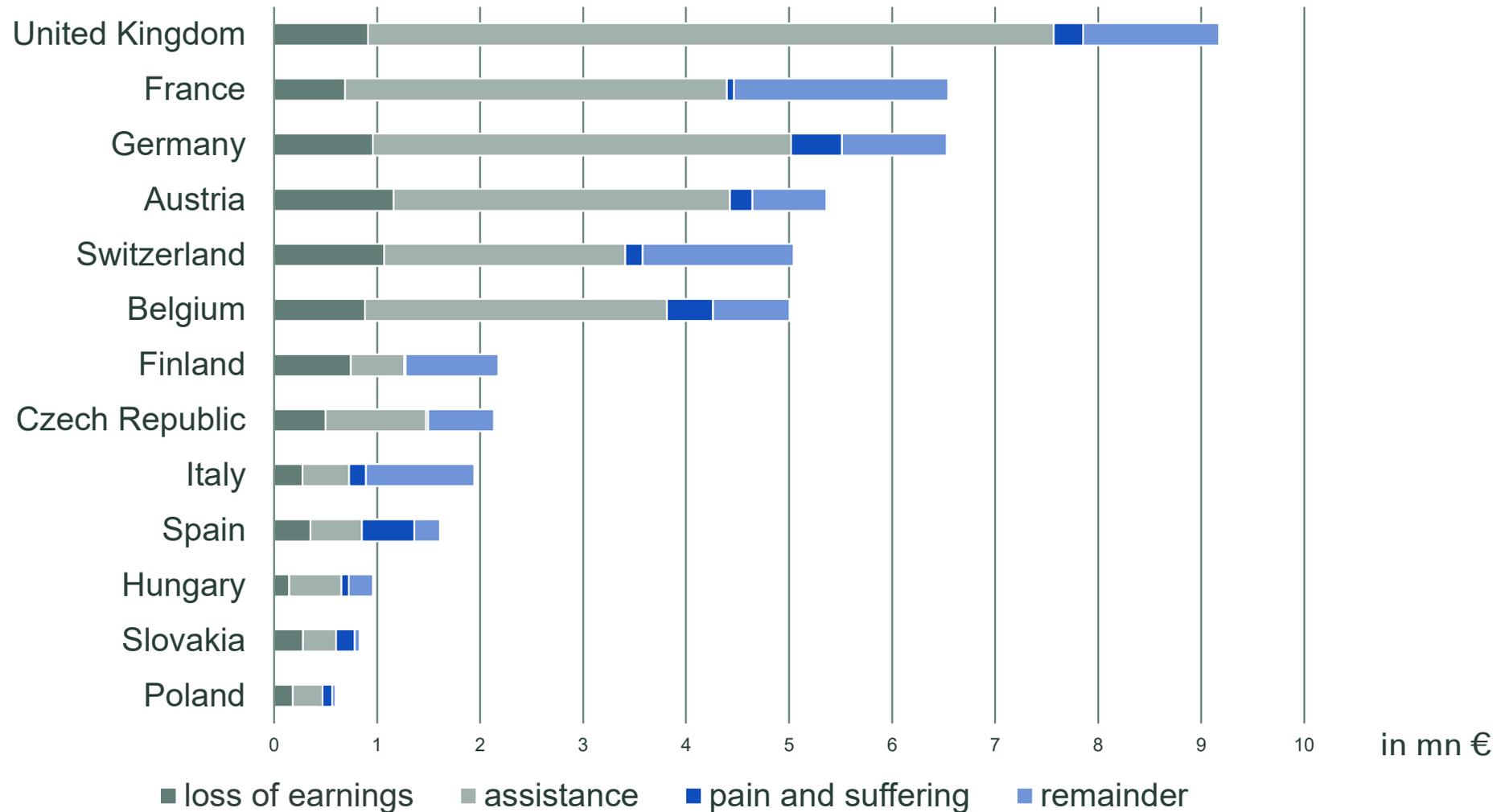
# Swiss Re Bodily Injury Claims Landscape - Benchmark Case -

## Hypothetical victim – Tetraplegic



- 30-year-old man
- Wife without own income
- 2 children (aged 2 and 5)
- Average income from dependent employment
- Severe spinal or head injury; no ventilation necessary; remains 100% disabled; cannot return to work
- Highest assistance level
- Cost components: loss of earnings, assistance, pain & suffering, remainder

# Swiss Re Bodily Injury Claims Landscape European Comparison 2010





# Moral Damages – Legal Concepts –

- Pain & Suffering (incl. Harm of Social Status)
- Compensation of Relatives



## European Legal Landscape

- Heterogeneous picture and different national law in the European states due to the individual national history, traditions , socio-economic systems and living standards etc.
- Different national legal solutions, even in countries with similar legal order (no complete listing in the following)
  - statutory law clause with leading decisions, e.g. Austria, Germany, Poland, Netherland, Switzerland
  - classical case law, in UK
  - point systems (Slovakia/CZ) or tables – Barema in Spain and Belgium, regional High Court tables in Italy
  - special law – Loi Badinter in France
- Different amounts under different legal systems, but also between countries on the same legal order legal decision can differ.

## Principles of European Tort Law - PETL

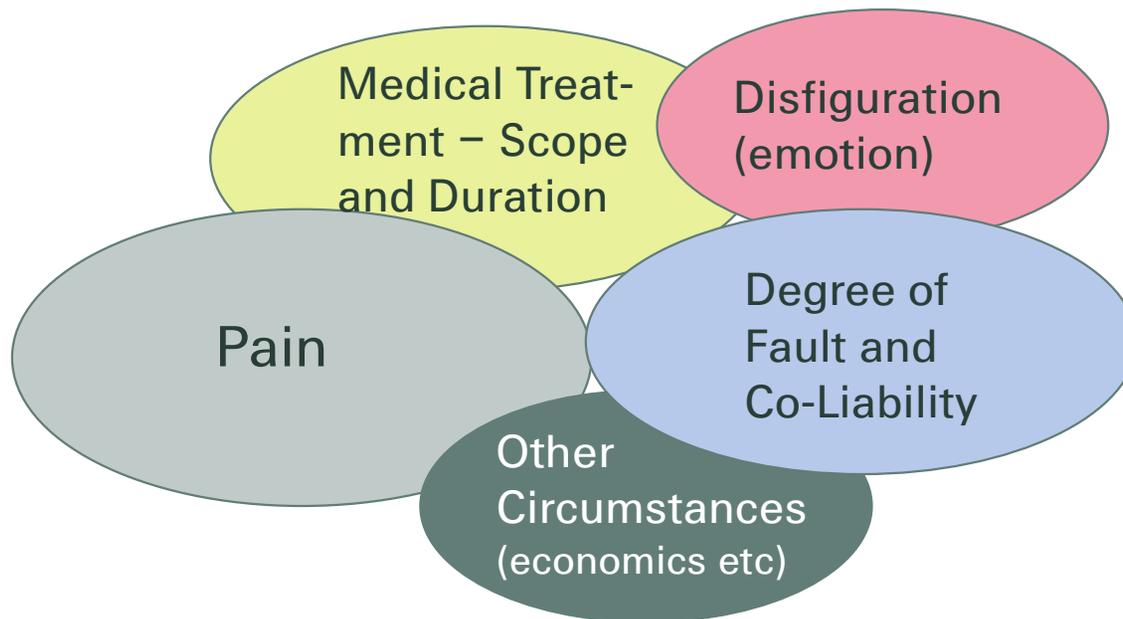
### ■ Non-Pecuniary Damage – Sect. 3 Art. 10:301:

"(1) Considering the scope of its protection (Article 2:102), the violation of an interest may justify **compensation of non-pecuniary damage**. This is the case in particular where the victim has suffered **personal injury**; or injury to human dignity, liberty, or other personality rights. Non-pecuniary damage can also be the subject of compensation for persons having a **close relationship** with a victim suffering a fatal or very serious non-fatal in-jury.

(2) In general, in the assessment of such damages, **all circumstances of the case**, including the **gravity, duration and consequences** of the grievance, have to be taken into account. The degree of the **tortfeasor's fault** is to be taken into account only where it **significantly contributes** to the grievance of the victim.

(3) In cases of personal injury, non-pecuniary damage **corresponds to the suffering of the victim and the impairment of his bodily or mental health**. In assessing damages (including damages for persons having a close relationship to deceased or seriously injured victims) **similar sums should be awarded for objectively similar losses.**"

## Pain & Suffering – Legal Aspects and Components



- Severity of bodily injury, physical and mental suffering, long term effects of violation, emotional impact, victim's age, tortfeasor's behavior and fault,
- Duration of pain and medical treatment are of high influence, also long term effects as disfiguration, paraplegic etc.,
- Contributory negligence of the victim can reduce the claim,
- Aspects influence court jurisdiction in case law systems as well as the application of tables used in particular in Southern European countries.



## German - Legal Situation and Practice

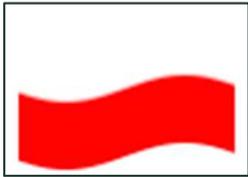
Swiss Re



- Basic rule for Pain & Suffering in § 253 BGB (German Civil Code), § 11 StVG (German Traffic Law)
  - moral damages with monetary compensation will be granted only in cases legally determined (para 1)
  - where compensation has to be paid to a victim for bodily injury ... an equitable compensation can be claimed for moral damages (para 2)
- Pain & Suffering is a strict personal right and can only be claimed by the victim, restricted consciousness due to accident does not reduce the compensation (BGH VersR 1993,327); the claim can be legally passed to heirs.
- Pain & Suffering should be paid as one amount in cash, but in special cases it can be split in fixed amount (cash) and future payments (mostly at birth defects).
- Pain & Suffering amounts are revisable by the court, final decision legally in the discretion of the judge – no binding to fixed tables etc., but in accordance with leading jurisdiction of the Supreme Court (Bundesgerichtshof) and comparable cases (reports in ADAC tables).
- Delayed settlement can increase the compensation in a range of EUR 15k – 30k (regular court practice).



- Basic rule for Pain & Suffering in § 1325 ABGB (Civil Code), § 13 EKHpflG (Train and Vehicle Liability Code)
  - in case of wilful or negligent bodily injury the tortfeasor ... has to pay also adequate compensation for pain and suffering
- Pain & Suffering is also a strict personal right and can only claimed by the victim; the claim can be legally passed to heirs.
- OGH extended the claim for moral damage also to close relatives in cases of fatality (OGH ZVR 2001,73ff) and where the victim sustained severe bodily injuries caused by intention or gross negligence (OGH ZVR 2005,61f) – further extension were strictly declined.
- Pain & Suffering amounts are revisable by the court, final decision legally in the discretion of the judge – no binding of the judge except leading jurisdiction of higher courts (Oberste Gerichtshof – OGH)
  - highest amount awarded by courts since 2001 is around EUR 217k; OGH is now accepting inflation on this amount which concludes finally in EUR 280k (OGH 24.08.2011-3 Ob 128/11)

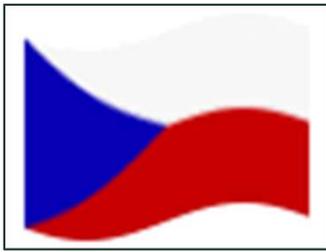


## Polish - Legal Situation and Practice

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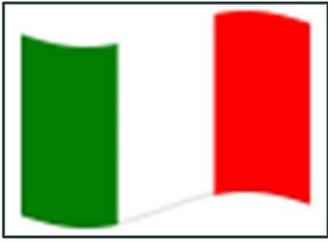


- Art 445 para 1 Polish Civil Code stipulates compensation of moral damages for
  - sustained by infringement of health integrity and bodily injury (para 1),
  - can be legally passed to heirs after prior acknowledgement or pending at court (para 3)
- Pain & Suffering is also a strict personal right and can only be claimed by the victim.
- Pain & Suffering amounts are revisable by the court, final decision legally in the discretion of the judge.
- Polish Supreme Court referred to the key elements of moral damages (Pain & suffering) in 2004 (30.01.2004 – OSN 2/2005) – see slide 10
  
- Polish Supreme Court pointed out
  - *"... damages for non-pecuniary losses serve the purpose of compensation, thus they may not be symbolic or excessive in relation to the damage affected. The quantum of damages must be reasonable and correspond to the current living conditions of average member of the society"*
  - precedents and similar cases provide a guideline of adequate compensation and prevent highly disproportional awards



## Czech Republic – Legal Situation and Practice

- Czech Republic is in a transition period; new Code Civil passed Parliament and will enforce from 01.01.2014
- Current legal prescriptions in art. 444 CC
  - differentiate between compensation of pain and harm of social status (para 1) and
  - entitled the legal authority (para 2) to issue a point system for the assessment of compensation (Decree 1965 and 2001) which were skipped by the Supreme Court in 2005 (US 350/03).
- CZ Supreme Court strongly refers to the components mentioned above and the right of the judge for final decision.
- New law refers to a general clause which entitles the victim to claim for compensation of moral damages caused by the injuries similar to the German model.
- Slovakia in comparison introduced point system for pain & suffering and harm of social status after irregularities with the jurisdiction in 2000 – limitation of the highest amount to EUR 100k which can be doubled by 2<sup>nd</sup> adjuster up to a maximum of EUR 250k.



## Italy – Legal Situation and Practice

- Italy abandoned differentiation between moral and material damages after decision of the Cassation Court in 2008 in favour of qualification as property and personal damage.
- Personal damage is determined by the category of "danno biologico" and the outstanding importance of absolute rights, protected by the constitution, of life and unrestricted conduct of life, health, family life and right of education.
- Personal damage of road victim
  - "danno biologico" / duration of medical treatment and handicap – schedules of compensation of various high courts (well known Milan and Rome)
  - subjective impact of the injury – increase of "danno biologico" for 10% up to 40%
  - can be passed only if the victim survives for minimum 3 days.
- Personal damage of relatives as "danno biologico" (iure proprio)
  - destruction of family life as infringement of an absolute right; can be claimed by parents, children, spouse and partners, also partly if separated or divorced;
    - parents, children, spouse and partners from EUR 154k to 304k/person;
    - grandparents and siblings from EUR 30k to 120k/person.
  - plus potential own "danno biologico" for posttraumatic stress disorder
- Legal system excludes hereby considerably demands for care and assistance etc.

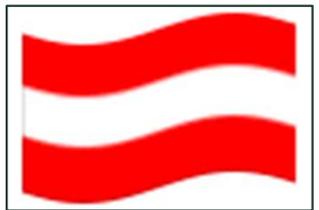


## Compensation of Moral Damages of Relatives



### ■ In German law

- in case of fatality relatives have no right to claim for moral damages, but
- where the shock is qualified as direct impairment of the health (illness) compensation can be claimed by the inflicted person (BGH NJW 1971,1883)



- **Austrian Supreme Court** understand § 1325 ABGB also as legal basis for the compensation of moral damages of close relatives in case of fatality (OGH ZVR 2001, 73f) and where the victim sustained severe injuries caused by intention or gross negligence (OGH ZVR 2005, 61f) – close relationship requires



- strong emotional and partly economic relationship and
- is not limited to family members, also partnership is included

- **Polish Civil Code** grants compensation of moral damages of relatives of the deceased in art 446 CC for

- moral harm of closest relatives (para 4), worsening of living standards (para 3) and periodical payments for subsistence (para 2).



- **Czech Republic Civil Code** prescribes exact amounts for payments in art. 444 CC para 3 – see below -



## Final Overview about Moral damages

	Pain & Suffering Bodily Injury of Victim	Relatives
Austria	Highest court (OGH) award with T€ 218 in 2001; adjusted by inflation now T€ 280	Only close relatives; regular amounts T€ 15-20.
Germany	Highest court amounts with T€ 600 in case of birth defects; MTPL lower.	No claim due to fatality; but own claim in case of "Schockschaden"
Poland	In market the average around T€ 50; in severe cases T€ 150 – 180.	Legal right in the average T€ 10 -15
Czech Republic	Highest court award (not in force) T€ 650; market practice significant below depending severity T€ 250 – 350.	Legally prescribed: T€ 9,4 spouses, partners and childs; T€ 6,8 siblings and T€ 3,3 unborn child
Italy	Depending from "danno biologico" and hereof 25-50%; in the average between T€ 225 to T€ 400 for severe injuries	Spouse/partner/parents/ children: T€ 154 to 304; grand parents/siblings: T€ 30 to 120.

## Conclusions

- The way to find the right amount of compensation of moral damages is primarily a national legal issue - what is the Romanian legal tradition and ratio for
  - differentiation of moral and material damages
  - the scope of moral damages and
  - the quantum of the potential award.
- European models can give an indication but the simple transfer will not be the solution – neither from legal tradition nor from the economics
  - consider: high compensations require high premiums.
- Romanian Street Victim Funds started the search for a Romanian solution in his study "Guidelines fro Compensation of Moral damages", 2012.



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