

Compensation for Personal Injuries in Road Accident Cases

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Note: The German law text has been translated into English as carefully as possible, however the author shall not be held responsible for errors in translation.

1. Applicable Law in Road Accident Cases

In general claims for compensation can be based on paragraph 823 BGB (Civil Code), which states:

(1) Wer vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatz des daraus entstehenden Schadens verpflichtet.

(2) Die gleiche Verpflichtung trifft denjenigen, welcher gegen ein den Schutz eines anderen bezweckendes Gesetz verstößt. Ist nach dem Inhalt des Gesetzes ein Verstoß gegen dieses auch ohne Verschulden möglich, so tritt die Ersatzpflicht nur im Falle des Verschuldens ein.

(1) Whoever wrongfully violates on purpose or by negligence the life, body, health, freedom or the legal rights of another has to compensate the damage thereby caused.

(2) The same obligation holds for one who violates a law aimed at protecting another person; is the violation of that law possible without any negligence, compensation will only be granted in case of negligence.

Especially for road traffic accidents caused by motorised vehicles and their trailers (including cars, vans, motorcycles etc.), for whom a registration is compulsory by law, claims can additionally be based on § 7 StVG (Road Traffic Act) and on § 18 StVG.

§ 7 Haftung des Halters, Schwarzfahrt (1) Wird bei dem Betrieb eines Kraftfahrzeugs oder eines Anhängers, der dazu bestimmt ist, von einem Kraftfahrzeug mitgeführt zu werden, ein Mensch getötet, der Körper oder die Gesundheit eines Menschen verletzt oder eine Sache beschädigt, so ist der Halter verpflichtet, dem Verletzten den daraus entstehenden Schaden zu ersetzen.

(2) Die Ersatzpflicht ist ausgeschlossen, wenn der Unfall durch höhere Gewalt verursacht wird.

(3) Benutzt jemand das Fahrzeug ohne Wissen und Willen des Fahrzeughalters, so ist er anstelle des Halters zum Ersatz des Schadens verpflichtet; daneben bleibt der Halter zum Ersatz des Schadens verpflichtet, wenn die Benutzung des Fahrzeugs durch sein Verschulden ermöglicht worden ist. Satz 1 findet keine Anwendung, wenn der Benutzer vom Fahrzeughalter für den Betrieb des Kraftfahrzeugs angestellt ist oder wenn ihm das Fahrzeug vom Halter überlassen worden ist. Die Sätze 1 und 2 sind auf die Benutzung eines Anhängers entsprechend anzuwenden.

§ 18 Ersatzpflicht des Fahrzeugführers (1) In den Fällen des § 7 Abs. 1 ist auch der Führer des Kraftfahrzeugs oder des Anhängers zum Ersatz des Schadens ... verpflichtet. Die Ersatzpflicht ist ausgeschlossen, wenn der Schaden nicht durch ein Verschulden des Führers verursacht ist.

§ 7 Liability of the vehicle holder, unauthorised vehicle use (1) If, through use of a motorised vehicle or trailer that is intended for use with a motor vehicle, a person suffers death, injury or adverse health effects or if material damage results, the holder of the vehicle is liable for compensation of damage caused.

(2) Liability is ruled out if the accident is caused by an force act of God.

(3) If the vehicle is used by a second party without the knowledge or permission of the holder, the second party will be liable for damages caused instead of the holder; the holder retains liability to the extent that the unauthorised vehicle use was enabled by his negligence. Clause 1 is not applicable if the vehicle user is employed by the holder to use the vehicle or if the holder/user expressly approves this use. Clauses 2 and 3 are equally applicable to vehicle trailers.

§ 18 Liability of vehicle driver (1) In cases of § 7 section 1, the driver of the vehicle or trailer is also liable. Liability is ruled out if the damage is not caused through negligence of the vehicle driver.

In these cases injured persons can direct claim against the liable person's insurer (§ 3 N° 1, 2 PflVG [Law about compulsory insurance of motorised vehicles])

§ 3 ...

1. Der Dritte kann im Rahmen der Leistungspflicht des Versicherers aus dem Versicherungsverhältnis und, soweit eine Leistungspflicht nicht besteht, ... seinen Anspruch auf Ersatz des Schadens auch gegen den Versicherer geltend machen. Der Versicherer hat den Schadensersatz in Geld zu leisten.

2. Soweit der Dritte nach Nummer 1 seinen Anspruch auf Ersatz des Schadens auch gegen den Versicherer geltend machen kann, haften der Versicherer und der ersatzpflichtige Versicherungsnehmer als Gesamtschuldner.

§ 3

1. A third party can exert a claim against the insurance company that results from the contractual obligations of the insurer irrespective of the contractual situation between insured and insurer. The insurer has to compensate these damages monetarily.

2. In as far as a third party's claim for damages based on N° 1 is directed at the insurer, the insurer and the liable party are jointly and severally liable.

For work-related accidents there is a special exclusion of liability in personal injury cases, unless the accident was caused intentionally by the liable party (§ 105 SGB VII [Social Law Code, 7th Book]):

§ 105 Beschränkung der Haftung anderer im Betrieb tätiger Personen

(1) Personen, die durch eine betriebliche Tätigkeit einen Versicherungsfall von Versicherten desselben Betriebs verursachen, sind diesen sowie deren Angehörigen und Hinterbliebenen nach anderen gesetzlichen Vorschriften zum Ersatz des Personenschadens nur verpflichtet, wenn sie den Versicherungsfall vorsätzlich ... herbeigeführt haben. ...

(2) Absatz 1 gilt entsprechend, wenn nicht versicherte Unternehmer geschädigt worden sind. Soweit nach Satz 1 eine Haftung ausgeschlossen ist, werden die Unternehmer wie Versicherte, die einen Versicherungsfall erlitten haben, behandelt, es sei denn, eine Ersatzpflicht des Schädigers gegenüber dem Unternehmer ist zivilrechtlich ausgeschlossen. Für die Berechnung von Geldleistungen gilt der Mindestjahresarbeitsverdienst als Jahresarbeitsverdienst. Geldleistungen werden jedoch nur bis zur Höhe eines zivilrechtlichen Schadenersatzanspruchs erbracht.

§ 105 Limitation of liability for other employees within a company

(1) Persons who cause an accident through work-related activity involving persons employed by the same company are liable for compensation to the damaged person, their relatives and survivors based on other laws only if the damage was intentionally caused.

(2) Section 1 is valid when damage is caused to uninsured companies. If liability is ruled out as per clause 1 the company is treated as an insured person who suffers damages unless the liability of the party causing damages is ruled out by civil law. For calculation of monetary compensation, the minimal annual earnings are taken as the annual earnings. The upper limit of monetary compensation is that laid by the damage claim according to civil law.

Although in Germany all motorised vehicles are obliged to be covered by a motor liability insurance, it is possible that in special cases motor liability insurance will not cover the damage. This might be in cases where the responsible party cannot be identified, the vehicle of the responsible party is not or no longer insured or the insurer becomes insolvent. In these cases the injured party can claim against a Guarantee Fund called "Verkehrsofferhilfe e.V" that compensates claims corresponding to the applicable minimum sums insured. If the responsible vehicle is not identified, personal injury claims are only paid if the payment is necessary due to extreme severity of the injury in order to avoid gross injustice.

So by German law liability in road traffic accidents is mainly connected to the holder, the driver (user) and their liability insurance, while claimant is the injured party (or insurance company), the owner or – in exceptional circumstances – the possessor of the car. These can be but are not necessarily the same person.

Illustration:

A businessman (holder) leases a car from a Leasing Company (Owner). This car is regularly used by his son (possessor), whose girlfriend (driver) drives him home after visiting a wine festival.

2. Strict Liability or Liability in Negligence

As shown above the *liability based on negligence* is laid down in § 823 BGB. Compensation based on a law aiming to protect another person (§ 823 section 2 BGB) refers mainly, in road traffic cases, to the provisions of the StVO (Road Traffic Regulation), the StVZO (Regulation Authorizing the Use of Vehicles for Road Traffic) and the StGB (Penal Code).

The basis for *strict liability* is par. 7 StVG. The holder of a motor vehicle or a trailer is liable for damages caused by every operation of the vehicle, even if he is not driving the car himself or the car is not at all consciously being driven at the time of accident (e.g. the driver has deceased by a stroke while driving, the car falls off a towing vehicle etc.). Liability of the holder is excluded only in cases of an act of God.

The driver of a registered vehicle is liable unless he can prove that the accident was not caused by his negligence.

The holder, the driver and their liability insurance are jointly and severally liable.

In as far as the claim is based on strict liability the compensation amounts to 600,000 € in case of death or injury of a person with a maximum annuity of 36,000 €. The maximum amount of compensation in case of several injured parties is 3,000,000 € per accident, the maximum annuity 180,000 €. The maximum amount of compensation for damages of property is 300,000 €.

If the claim is based on negligence there is no such limitation, though there may be a ceiling to actual insurance coverage.

3. Contributory Negligence

If the claim is based on liability due to negligence, contributory negligence in general causes a decrease of the compensation amount and may – in extreme cases – lead to total exclusion of compensation.

Contributory negligence may be based on the injured party exceeding legal speed limits, ignoring red traffic lights or driving while tired or under the influence of alcohol or drugs. Contributory negligence is also recognised if the injured party is involved in an accident that could have avoided by careful and attentive driving.

In as far as the claim is based on strict liability e.g. negligence could not be proven by either party, liability will be rated on *general operational danger* (“*Betriebsgefahr*”): Since operating a motor vehicle is *per se* a potentially dangerous act, the operation of every vehicle

brings with it abstract dangers. These abstract dangers increase with the speed, with the complexity of a certain manoeuvre (e.g. driving backwards or crossing a highway), with the manoeuvrability of the vehicle (e.g. motorcycle at high speed) etc. So in accident cases all these danger enhancing components of each of the vehicles and drivers involved in the accident are set against each other to reach a liability quotient for each party.

4) Total liability in accidents with more than two parties

If more than two parties are involved in an accident in general all parties are liable as joint debtors for damages that cannot be allocated to a certain driver or group of drivers. In as far as parts of the accident cause can be allocated to a particular driver even in these multi-party accidents liability will be separated on the base of contributory negligence and/or general operational danger.

However, if one party was initially able to avoid the accident but was subsequently pushed into the accident by another driver, he will be excluded from liability.

Being involved in an accident is a dangerous situation, which may cause another accident. In case the second accident is closely connected in time and site to the first accident, the person liable for the first accident is also liable for the damages caused by the second accident, unless he took adequate measures to avoid a second accident (BGH VersR 2004, pages 529, 530).

5) Statutory limitation period

The statutory limitation period begins with the end of the calendar year in which the injury has taken place and the injured party has been informed as to the level of injury and responsible parties. The limitation period runs out after 3 years.

Where the injured party is not informed about claims resulting from the accident, the statutory limitation period runs out after 30 years.

6) Suspension or interruption of limitation period

The limitation period is suspended during negotiations about the claims. The suspension ends a minimum of 3 months after the negotiations cease.

Suspension also is applied during legal proceedings, unless the claimant does not force the proceedings.

The limitation period will begin afresh if the liable party agrees to liability.

7) Possible extension to limitation period

By agreement between the liable party / liability insurance and the injured person the limitation period can be extended to a maximum of 30 years.

8) Transferability and inheritability

All claims are - referring to the lifetime of the injured party - transferable and inheritable.

9) Influence of social welfare law

Many compensational costs in personal injury cases are additionally covered by the social and private insurance system, especially health insurance, accident insurance, disability insurance and health care insurance. Since the costs can increase rapidly, in case of an injured employee who works in Germany the social insurance system will take over the costs and claim for reimbursement against the liability insurer.

Employees who are in the social insurance system are obliged to avail of services offered in this sector and are not permitted to seek privately offered services (e.g. for medical treatment or health care) that may be better but are more expensive.

Self-employed and other privately insured victims are well advised to let their insurance company take over the cost incurred rather than trying to claim from the liable party.

As said above, in work-related accidents the accident insurance will take over the personal injury claims, unless the accident was not caused intentionally. If the accident insurance per force takes over the compensation instead of the liable person, neither the liable party nor the insurance company will compensate for pain and suffering incurred.

10) Compensation of damages to property

Compensation can be claimed by the injured party for the amount required to restore the damaged vehicle to its former condition. If the repair causes an increase of value of the vehicle, the claim is reduced by this amount (i.e. "subtraction new for old").

If the vehicle has sustained such severe damages that the costs of repair exceed the difference between replacement value and the value of the remains, then only the difference between these values will be paid out to the owner. The included V.A.T. will only be reimbursed if the owner replaces the damaged car.

However, the liable party cannot limit the compensation to the difference between replacement value and value of the remains, if the value of the remains significantly exceeds the value of the car should it be junked (BGH NJW 1985, pages 2469, 2470). For example, with a new car of a replacement value of 20,000 € remains value of 18,000 € and repair costs of 3,000 € the full repair costs must be paid.

In as far as the owner wants to keep the severely damaged car nonetheless, the insurer reimburses the repair costs, if these do not exceed 130 % of the difference between replacement value and value of the remains.

Depending on age, mileage and condition of the vehicle depreciation in value due to the damage is compensated additionally to repair costs.

The costs of necessary expert reports, towing and car hire due to temporary loss of mobility, can be part of the compensation. Instead of the compensation of costs for a hired car the injured party can claim for loss of use with a daily rate between 27 € and 99 € depending on the type of vehicle used.

The fees for registration of a substitute/new car and for deregistration of the damaged car can be subject to compensation, as can loan financing to repair or buy another vehicle.

11) Compensation for pain and suffering

For pain and suffering the injured person can claim an equitable pecuniary compensation. The amount depends on the extent and severity of the injury, the period of treatment and the degree of handicap. The age of the injured person and the extent of liability of the responsible person also play a role. Even the way of dealing with the compensation claim by the liability insurance (e.g. unnecessary delay in accepting the liability and the payment) can influence the amount (See OLG Munich NZV 1993, 434).

This compensation can also be demanded if as a consequence of the accident the injured person is in permanent comatose state and suffers from a complete loss of perception.

Compensation for pain and suffering will not be granted for small injuries such as bruises and scratches.

Although there is no ceiling by law the German jurisdiction is reluctant to grant high amounts of compensation for pain and suffering. Up to now the highest amount of compensation for pain and suffering has been granted by the Landgericht Kiel (regional court of Kiel) which decided on a compensation for pain and suffering of 500.000 € and further monthly payment of 500 € granted to a 3-year old boy who became tetraplegic beyond the line mouth/ear so he could not even speak nor move (Landgericht Kiel – 6 O 13/03 – decision of 11.07.03, not published yet).

12) Compensation for psychological injuries

Compensation for psychological injuries is granted, if the injury is caused by the accident. This injury must not be based on an organic injury.

13) Compensation for increased financial needs

Compensation is paid for costs of health care, orthopaedic aids, diets and nursing staff.

If the injured person has a health insurance, these costs are mainly covered by the health insurance, who will claim reimbursement from the liability insurer.

The costs for corrective cosmetic surgery can be demanded

Even the costs of visits of close relatives to the hospital during convalescence can be claimed as compensation.

The inheriting persons of the deceased injured person are entitled to claim compensation for funeral expenses, if death results from the accident.

14) Costs for household assistance

Depending on the degree of disability the injured person can claim compensation for the costs of household assistance to alleviate the disability caused by the accident.

If family members undertake this increase in household work caused by disability arising from the accident equivalent costs of a household assistant will be reimbursed. The reimbursement will be based on the German Union Agreement for Federal Employees (BAT).

If no home assistance is necessary, a reasonable amount of compensation is paid, the amount of which is subject to negotiations.

15) Compensation for loss of income

If the injured party is not able to work after the accident, he or she will suffer loss of income.

An employee who has been in his job for more than one month will get full wage payments from their employer during the period of disability for approximately 6 weeks. After that period he or she will get a shortened (of about 70 % of the last earning) further payment for 78 weeks by the health insurance ("Krankengeld"). These payments by the employer and the health insurance have to be reimbursed to them by the liable party and/or its liability insurance. The difference of 30 % after the first 6 weeks and 100 % after 78 further weeks – has to be paid directly to the injured party by the liability insurance.

If the injured party is self-employed the loss of income caused by the accident must be calculated by an expert.

If the injured person is killed during or has died as a result of the accident, surviving dependants can claim damages from the liable party. The calculation will be based on the costs of maintenance of dependants at the time of death as laid down in family law. Since these costs differ even within Germany depending on regional standards of living, for dependants that are not resident in Germany the costs of maintenance should be connected to the costs of living at their place of residence, to the extent that the deceased would have been able to pay the sum should he have survived.

16) Compensation for small expenses

The injured party can claim compensation for postage, telephone, costs of visiting a lawyer or an expert and other costs as consequences of the accident in a lump sum between 15 € and 25 €. Higher sums have to be substantiated by evidence.

Interest has to be paid by the liable party either from the time that liability has been denied or 3 months after the first application for compensation (§ 158e VVG). ?? The interest rate is

connected to the rate of the claimant's credit or minimum 5 pt. above the Base Rate, fixed by the European Central Bank (http://www.bundesbank.de/presse/presse_zinssaetze.en.php), unless the claimant has not to pay higher interest rates due to the accident.

17) Compensation for damages in future

Referring to the limitation period lawyers should provide for compensation for eventual future damages. If this cannot be settled in an agreement about the claims or by paying a lump sum, the injured party should start legal proceedings to ensure the possibility of future claims by the court.

18) Costs of rehabilitation

Costs of rehabilitation are part of the compensation. If these costs are covered by an insurance of the injured party, the liability insurer will have to reimburse the costs.

If the injured person can no longer practice in his former occupation as a result of injuries sustained, the insurer has to pay the costs of a vocational retraining. The injured is obliged to take any gainful employment that can be expected of him.

If rehabilitation is required in Germany the Personal Injury Management, run by the liability insurance, takes over the rehabilitation by installing a case manager.

19) Sums covered by liability insurance

The minimum sums to be covered by the liability insurance are for bodily injury 2,500,000 € per injured person, for property damage 500,000 € and for financial loss 50,000 €. If three or more persons are killed or injured a total of 7,500,000 € has to be available per event (Annex to § 4 section 2 PflVG).

In practice the amounts of insurance policies are higher in most cases these usually cover for injury 8,000,000 € per damaged person and unlimited cover for material and financial loss.

20) Time schedule for a settlement

There is no fixed schedule for settlements. Usually the injured party and the insurer investigate liability and prospective costs before beginning negotiations. This may take some time especially in complicated claims, because the lawyers are regularly not allowed to look at the police reports and prosecutors' file until these investigations have been completed.

After looking into these investigation files negotiations may start; but in some cases payments are held back until proceedings of the criminal court are closed.

If the claims are made subject to civil court proceedings, the court also waits for the result of the criminal court proceedings. So in severe cases settlement may take some years.

Within a period of two weeks after the accident an injured person must register his claim against the liable person by informing the liability insurance of the latter that he wants to claim compensation. If the claimant starts court proceedings only against the liable party, he has to inform the liability insurance of the defendant immediately. If this does not occur, the liability insurer is not obliged to pay costs incurred (e.g. court and solicitor's fees) as a direct result of not being provided with timely information that could have deflected these additional costs.

If liability is accepted and the claimant has stated the amount of his claim, the insurance has to make an offer of compensation within three months, after which the insurance has to pay interest of 5 pts above the European Base Rate for the final compensation sum.

21) How to lodge a claim

If out-of-court-negotiations fail, the injured party has to lodge his claim at the court within whose jurisdiction the accident has taken place or – if the claimant decides to do so – at the court at the defendant's place of residence at the time of starting court proceedings.

If the sum of compensation claim does not exceed 5,000 € the claim has to be lodged at the local court (Amtsgericht). If the claim exceeds 5,000 € the claim has to be lodged at the regional court (Landgericht). The courts do not investigate the case independently, but rely on information provided by the parties. Only the experts who are consulted are chosen by the court and not by the parties. Nonetheless the parties can suggest a special expert.

In all court proceedings the monetary claim has to be defined exactly. Claims for pain and suffering are excluded from this requirement: Here the claimant must only define a minimum amount, leaving the final assessment to the court.

The losing party can appeal against decisions of local courts to the regional court, unless one or more parties of a road traffic accident claim are from foreign countries. In these cases and in cases of first decisions of the regional court the losing party has to appeal to the High Court.

Court proceedings at a German civil court except the local court (Amtsgericht) can only be lodged by a lawyer who is registered at a German court of that level.

22) Recovery of legal expenses and expert costs

Solicitor's fees have to be compensated by the insurer of the liable person based on the amount of compensation or percentage of liability. Solicitors' fees are based on RVG (Solicitors' Fees Act). With this law the lawyer's fees are connected to the amount of the claim and not to the amount of the lawyer's work in the case. Certainly lawyers are allowed to agree on higher fees with their clients, but these higher fees are in general not recoverable.

In out-of-court settlements the fees of solicitors from other countries are usually capped by the fees taken down in the RVG.

In court proceedings solicitor's fees are recoverable, if they are necessary. If a party's residence is in a foreign country a mandate of solicitors of that country is held for necessary

(OLG Hamburg - 8 W 61/00 – decision of 02.03.2000/not published), so that their fees are recoverable without capping by the fees laid down in the RVG (Amtsgericht [local court] Waiblingen – 9 C 2292/02 – decision of 15.01.2004/not published)

Expert costs have to be compensated or reimbursed by the insurer of the liable person based on the percentage of liability.

Court fees have to be reimbursed by the insurer, if the injured party wins legal proceedings.

Abbreviations

BAT	Bundesangestellten-Tarifvertrag	Union Agreement for Federal Employees
BGB	Bürgerliches Gesetzbuch	Civil Code
BGH	Bundesgerichtshof	Federal Supreme Court
NJW	Neue Juristische Wochenschrift	Weekly juristic periodical
NZV	Neue Zeitschrift für Verkehrsrecht	Monthly juristic periodical about Road Traffic Law
OLG	Oberlandesgericht	High Court
PfIVG	Pflichtversicherungsgesetz (Gesetz über die Pflichtversicherung für Kraftfahrzeughalter)	Law about Compulsary Insurance for Users of Motorised Vehicles
RVG	Rechtsanwalts-Vergütungs-Gesetz	Solicitor's Fees Act
SGB VII	Sozialgesetzbuch VII. Buch	Social Law Code, 7 th Book
StGB	Strafgesetzbuch	Penal Code
StVG	Straßenverkehrsgesetz	Road Traffic Act
StVO	Straßenverkehrsordnung	Road Traffic Regulation
StVZO	Straßenverkehrs-Zulassungs-Ordnung	Regulation Authorizing the Use of Vehicles for Road Traffic
VersR	Versicherungsrecht	Juristic periodical about insurance laws and claims