Within the European Union, harmonisation of motor insurance regulations facilitates the free movement of people and vehicles. With regard to bodily injury compensation, claim components such as “loss of earnings”, “assistance”, and “pain and suffering” are already recognised across Europe. However, assessment of and compensation for severe bodily injury claims can differ considerably across countries in Europe.

In this 2018 edition of our “Bodily injury landscape Europe” series we outline the main changes in motor liability since the last overview published in 2015. The series, put together by claims experts at Swiss Re, takes a look at recent regulatory developments in 13 European countries. It also provides an overview by country of compensation levels in severe bodily injury cases based on Swiss Re’s tetraplegia and fatality scenarios.

The tetraplegia claims scenario for 2017 shows that the differences in compensation levels across European countries continue to be large. Claims costs for the tetraplegia scenario have increased to EUR 21.8 million in the UK. This compares with figures of below EUR 1 million for countries like Denmark, Sweden and Hungary.

**Costs for assistance and care still loom large**

Compensation for assistance and care varies greatly from country to country. For the five countries with the highest levels of compensation, assistance and care amounts to more than 50% of the total. “Loss of earnings” is the second most important single claim component, reaching EUR 1 million in countries like the UK, Switzerland and Germany.

Differences across countries are also pronounced for pain and suffering. In Belgium, Italy and Spain in particular, pain and suffering makes up a considerable share of the total bodily injury compensation per country.
Motor insurance market developments in Europe

In today’s technology landscape, autonomous cars, telematics-based insurance and smartphone-induced distracted driving are the trends that are changing the motor insurance world – and capturing the most attention. These trends do not have a direct impact on the systems used for compensation of bodily injury to third parties, however. So, what is driving recent developments in bodily injury compensation in Europe? Two clear drivers are the reduction in the discount rate in some countries such as the UK, and far-reaching regulatory reforms in others such as the new Baremo in Spain. Also, bodily injury inflation from 2014 – 2017 varied considerably by country, from less than 5% per annum in some stable countries to more than 15% per annum in others. We highlight some of the most recent developments in bodily injury compensation in Europe here:

Discount rates for personal injury claims

The continuing low interest rate environment has led to a downward trend in discount rates impacting the present value of future cash flow. For instance, the decision to cut the discount rate from 2.5% to minus 0.75% in the UK effective March 2017 was not fully anticipated by the industry; the rate adjustment has adversely impacted motor reserves in particular and the motor business in general.

The new Spanish Baremo

The first compulsory compensation system for fatality or injuries in traffic accidents (the so called “Baremo”) was implemented in Spain in 1995. More than 20 years later, a panel of experts appointed by the Insurance Authority carried out an in-depth review of the system. In September 2016 the Spanish Parliament approved the new “Baremo” and it came into force on 1 January 2016. Within the first two years, it appears the reform has achieved what it set out to do: adjust compensation levels for fatality and severe injuries cases and reduce the level of fraud in frequent claims such as whiplash. In terms of compensation, the most noticeable changes affect prejudiced parties in case of fatality, and third-party assistance and loss of earnings in case of injuries. Prejudiced parties in case of death have been extended to close relatives and the regulation and level of compensation for third-party assistance and loss of earnings has been reviewed in line with the principle of full reparation of damage.

ECJ case C-162/13, Damijan Vnuk v Zavarovalnica Triglav d.d.

In 2007, Mr Vnuk was knocked off a ladder by a reversing tractor on a farmyard. The insurer Triglav refused to pay as the tractor was not being used as a vehicle but as a propulsion device (tractor). The Court of Justice of the European Union ruled that compulsory insurance extends to: (i) any use, (ii) consistent with normal function of vehicles, (iii) anywhere. The ECJ Vnuk Judgment is a final judgment directly applicable in all member states.

Motor & Terror

The recent terrorist attacks involving motor vehicles in many countries have dramatically highlighted a vulnerability of our society – one that can take a heavy human toll and cause very large losses. To find answers to the crucial questions concerning the insurance industry’s potential exposure via motor third party liability covers, Swiss Re has looked at the legal regulations in selected European countries in light of likely scenarios based on past experience. We have compiled the findings in a new publication entitled: “Terrorist attacks through the use of motor vehicles in selected European countries”.

For more information about the report, please contact your Swiss Re claims expert.
The legal and claims environment in the United Kingdom

Since we produced our last paper, much has happened in the motor liability personal injury arena in the UK. In this paper, we attempt to capture the main highlights.

Discount rate

In March 2017, the discount rate was cut to –0.75% from 2.5%. The previous rate had been in place since 2001 and while its review was somewhat overdue, the new rate took many by surprise. Some six months later, the Lord Chancellor committed to look at the rate again. We very much hope that the enabling legislation will be in place in the near future, followed by an early announcement of a new rate.

In the meantime, although –0.75% will continue to apply to all personal injury claims where there is an element of future loss, we expect insurers will continue agreeing settlements on a more favourable rate. The extent of any movement away from the current rate is somewhat limited where any settlement requires Court Approval.

Scottish Ministers announced a similar reduction, effective from 28 March 2017, but the Scottish Government has since announced it will legislate for a new discount rate under a Damages Bill before June 2018. The rate in Northern Ireland was 2.5% at the time of writing.

Roberts v Johnstone.

Perhaps a little appreciated consequence of a negative discount rate was the effect it would have on claims for future accommodation.

In Roberts v Johnstone (1989), the Court of Appeal decided that an injured claimant, who required a property to suit their needs, would not be entitled to claim the full capital cost of the property but, instead, the additional cost over the claimant’s lifetime, together with any costs incurred in adapting the property. In “Roberts”, the additional cost was assessed at 2% per annum. The House of Lords considered the annual cost again in Wells v Wells (1998), when it was decided that the additional annual cost should mirror the discount rate (3% at that time). The court favoured this approach because it was the same rate used for calculating future losses, allowing the Lord Chancellor to revise it when exercising his power under Section 1 of the 1996 Damages Act. When the Lord Chancellor reviewed and revised the discount rate to 2.5% in 2001, 2.5% was adopted in calculating accommodation claims.

Simply put, the calculation takes the value of the property required and from it is deducted the value of the claimant’s existing property. The result is then multiplied by 2.5%, which, in turn, is multiplied by the 2.5% multiplier. However, when the current negative discount rate of –0.75% is applied in place of 2.5%, the resulting value is negative. This means, in theory, the claimant receives no compensation towards the purchase of the new property, except for any conversion costs.

The issue is likely to be resolved through the courts at some future stage.
**Claims involving fatalities**

*Knauer (Widower and Administrator of the Estate of Sally Ann Knauer) v Ministry of Justice (2016)*

Judgment was handed down in February 2016 by the Supreme Court in *Knauer v Ministry of Justice* (2016). In departing from the decision in *Cookson v Knowles* (1978), the Supreme Court ruled that the multiplier for future losses of a deceased’s dependent should apply from the date of trial and not date of death. While recognising the importance of earlier case law, the Supreme Court highlighted that the compensation landscape had changed, including the introduction of the Ogden Tables in 1984 and the House of Lords judgment in *Wells v Wells* (1998), which endorsed the use of the Tables. As with a lower discount rate, the impact of this decision means higher awards for dependents seeking compensation for loss of financial support and services. In *Cookson* (now “old” law), a distinction was made between personal injury claims and dependency claims by the fact that the claimant is living at the time of settlement. In fatal accident claims, it is not known whether the deceased would have died anyway, for other reasons, before trial or settlement. Consequently, it was thought correct, in 1978, to apply the relevant multiplier at the time of deceased’s death.

In *Knauer* the Supreme Court confirmed a view expressed by the Law Commission in its 1999 report on Claims for Wrongful Death, namely the Ogden Tables addressed future losses only. Although the Ogden Tables allowed the multiplier for future losses to be discounted to reflect accelerated receipt of damages by the claimant, the court decided it was wrong to discount losses incurred between death and trial because the dependent claimant had not benefited from any accelerated receipt of damages.

The correct approach for calculating dependency, therefore, is not to discount pre-trial losses for accelerated receipt. However, the Supreme Court stated that past losses should be subject to a discount to reflect the risk that, had there been no accident, the deceased might have died anyway, for other reasons. Equally, the support enjoyed by the dependent might have ceased or reduced between the date of death and trial. The Supreme Court endorsed the suggested discounting method set out within the Ogden Tables.

This new methodology has had an inflationary impact on claims costs.

*Cameron v Hussain (1) and Liverpool Victoria (2) (2017).*

The Court of Appeal ruled that a motor insurers’ liability under Section 151 of the Road Traffic Act can include cases where the driver is identified only by description rather than by name. Claimants can therefore choose to bring a claim against the vehicle’s insurers rather than solely against the Motor Insurance Bureau (MIB) under the Untraced Driver’s Agreement.

The claimant’s vehicle was struck by a vehicle whose driver did not stop and was not identified. The claimant suffered personal injury. The registered keeper’s details were known as were the insurers of the vehicle. Believing the registered keeper to be the driver, the claimant issued proceedings against the keeper as well as the vehicle’s insurers, Liverpool Victoria. It transpired that the registered keeper was not the driver. Also the policyholder could not be traced and it was thought his details were fictitious.

The insurer denied liability on the grounds the policy did not cover the registered keeper and the driver had not been identified. Consequently, the claimant applied to substitute the name of the registered keeper to “the person unknown driving vehicle registration number Y598 SPS who collided with vehicle...”.

The District Judge dismissed the application and found for the insurers. The claimant was granted permission to appeal to the Court of Appeal.
The Court of Appeal ruled:
1. The claimant could make a claim under the MIB Agreement but that did not prevent the claimant from pursuing a claim against the unnamed defendant’s motor insurers.
2. In some cases it will be acceptable for a claimant to bring proceedings against an unnamed driver for damages.
3. An insurer’s liability under Section 151 of the Road Traffic Act applied irrespective of whether the policy covered the driver and irrespective of the driver’s identity, unless the insurer could demonstrate that it was either not on cover or should not have been on cover.

The claimant was permitted to amend their claim to cite an unnamed driver, if reference was made to both the vehicle involved and the location and time of the accident.

The insurer would have been entitled, under section 152(2)(a) of the Road Traffic Act, to avoid the policy on the grounds of fraudulent misrepresentation as to the existence of the purported insured, and to have obtained a relevant declaration to that effect. The insurer did not do so within the relevant time limit, however, and was, accordingly, liable.

**Billett v Ministry of Defence (2015).**
The Court of Appeal considered the application of Tables A to D of the Ogden Tables, which provide reduction factors that should be applied to the future loss of earnings multiplier. The reduction is intended to reflect contingencies other than mortality, including whether a claimant is disabled. The court had to decide how best to make an assessment of fair compensation for a claimant whose degree of disability was not accurately reflected by the available reduction factors.

The case went to the Court of Appeal because the claimant succeeded in persuading the lower court that Tables A to D should be used. The defendant appealed, maintaining that the lump sum approach advocated and endorsed in Smith v Manchester Corporation (1974) should be the preferred approach in this case.

The Court of Appeal upheld the Ministry of Defence’s (MOD) appeal, finding that the “Smith v Manchester” (1974) lump sum approach remained valid. This went against the judge’s findings at first instance who had decided the claimant was disabled by reference to the Ogden Tables test and had made an award based on a multiplier approach.

**Background**
The claimant had served in the armed forces until 2011. He claimed that during his military service he had sustained a non-freezing cold injury to his feet and less painful symptoms in his hands.

Sometime after sustaining the injury, the claimant was assessed by the Army as being fit for service. He left the Army in 2011 because he felt his ongoing symptoms had limited his career prospects and started a new job as a lorry driver. That remained his job at the time of the trial. Although he suffered no financial loss, the employment experts agreed his injury meant he was disadvantaged on the labour market for some types of work.

**First instance decision**
At first instance, the court decided the claimant was disabled by reference to the Ogden test but the degree of disability was at the “outer fringe”, although he satisfied the test since he was unable to work outdoors.

Using the Ogden Tables A and B to assess damages, the judge said the definition of disability was broad and covered those more seriously injured than the claimant. He thus felt that applying the reduction factor as set out in the tables would over compensate the claimant and so a further reduction was called for. In the circumstances, he chose the mid-point between the disabled and non-disabled multipliers. This meant the claimant was awarded close to GBP 100,000. The defendants appealed.
Giving the leading judgment of the Court of Appeal, Lord Justice Jackson thought it inappropriate to use the Ogden Tables because the claimant’s disability was at the “outer fringe” of the definition of disability. Also the disability did not affect the claimant’s ability to work nearly as much as it affected his life outside of work.

LJ Jackson said the judge at first instance was entitled to conclude the claimant was disabled, but the judge’s assessment of future loss of earning capacity, based on the Ogden Tables, was incorrect. The correct approach, in this case, was a broad lump sum assessment in accordance with “Smith v Manchester”. The Court of Appeal decided that damages for future loss of earning capacity should be GBP 45 000, which represented around 2 years’ earnings.

The Court of Appeal’s decision in favour of the MOD has important implications for defendants in personal injury actions since it could prove useful in arguing for lower damages where the claimant is suffering continued disablement at the “outer fringes”, where the disability might compromise their future employability.

Vnuk v Triglav.
The judgment handed down in this Slovenian case by the Court of Justice of the European Union in 2014 represents possibly a seismic change to UK motor insurance law.

The EU 6th Motor Insurance Directive requires all motorised vehicles to be compulsorily insured against third party risks, wherever they are being used for their normal function. The UK government has been exposed to “Francovich” damages for failing to fully implement the Directive into UK domestic road traffic law. The wording of Section 143 of the current Road Traffic Act (1988) only stipulates the requirement for insurance where the vehicle is used “on a road or other public place”, rather than “wherever the motorised vehicle is being used”. So, the 1988 legislation falls foul of the 6th Directive which, in theory, requires motor insurance for any type of motorised vehicle (sit-on lawnmowers, for example) used in any setting.

Recognising the challenges which this judgment presented, in June 2016 the European Commission published an impact paper, looking at a number of options including:

1. Accepting the “Vnuk” judgment, known as the “Comprehensive option”. The effect would be to make motor insurance compulsory for all motorised vehicles, irrespective of whether they are used on or off the road.
2. Amending the definition within the 6th Directive, whereby motor insurance would only be required for vehicles used in “traffic”. This limited definition is wider than the definition set out under Section 143 of the 1988 Road Traffic Act because “traffic” can occur away from “a road or other public place” but this option is less onerous than the “Comprehensive option”.

In December 2016, the Department for Transport issued a consultation paper on possible changes to the 1988 Act. Only the two options above were considered. The majority of respondents did not favour the “Comprehensive option”, believing it would result in such problems as increased fraud and increased untraced and uninsured driving.

Unfortunately any swift action, on the part of the European Commission (EC), was not forthcoming. It issued a further paper under its Regulatory Fitness and Performance programme (REFIT). The consultation period closed on 20 October 2017. Besides looking to address the consequences of the “Vnuk” judgment, the paper had an expanded remit to look at other issues such as 1) the mandatory provision of information by policyholders in respect of past claims 2) the need for guarantee funds, such as the MIB, to meet those claims where the defendant’s motor insurer is insolvent and 3) the adequacy of the minimum cover amounts and whether those amounts should vary according to the class of vehicle.
The EC will also consider if the Directive is likely to remain fit for purpose, given the development of autonomous vehicles. Implementing any changes the EC might make to the Directive may take considerable time, beyond that of the UK exiting the European Union. Unchartered waters await.

“Whiplash” and the Civil Liability Bill.
The intention of the Bill is to "to crack down on fraudulent whiplash claims" with a view to reducing motor insurance premiums by about GBP 35 per year.

The briefing notes to the 2017 Queen’s Speech say the Bill will “ban offers to settle claims without the support of medical evidence and introduce a new fixed tariff of compensation for whiplash injuries with a duration of up to 2 years.” The new Bill is expected to broadly mirror the whiplash provisions of Part 5 of the Prisons and Courts Bill, which was the intended legislation under the previous government.

As regards the proposed increase in the small claims track limit to GBP 5,000 for road traffic personal injury claims, the Ministry of Justice (MOJ) has confirmed this will still go ahead. The limit in respect of other personal injury claims will also increase, but to GBP 2,000. These increases will be introduced by way of a change to the Civil Procedure Rules.

Fixed recoverable costs
At the end of July 2017, LJ Jackson published his report on extending the Fixed Recoverable Costs regime to claims valued up to GBP 100,000. The report is now being considered by both the MOJ and the senior judiciary, followed by the MOJ holding a consultation on the report’s proposals. Legislation may not be necessary to give effect to any changes, which could happen sometime during 2018.

Likely changes
In the case of motor bodily injury claims, the report does not propose to change the level of fixed recoverable costs which conclude within the MOJ portal at either stage 2 or 3; however, the current regime for those claims settling outside the portal will change. Perhaps because it represents new territory, of greater interest is the level of fixed costs which will apply to motor personal injury claims valued greater than GBP 25,000 up to GBP 100,000.

These claims will fall into a new track called the “Intermediate Track”. Claims will be allocated to one of four bands within the new track depending on the issues at stake. Cases captured by this new track are likely to be settled more expeditiously than the multi-track. For example, any trial would not be expected to last longer than 3 days and the number of experts giving evidence will be no more than 2 each side.

Broadly speaking, the extent of recoverable costs where a case proceeds to trial will be:

Example 1 – where a case settles for GBP 50,000;
- Band 1 to include a 1 day trial – GBP 22,150 up to GBP 57,450 for a 3 day trial in Band 4

Example 2 – where a case settles for GBP 100,000;
- Band 1 to include a 1 day trial – GBP 29,650 up to GBP 68,450 for a 3 day trial in Band 4

Where a case is settled pre-trial, the extent of the recoverable costs will be significantly less.

LJ Jackson recommends these new costs are reviewed periodically, perhaps every 3 years, to ensure they keep pace with inflation. It will be interesting to see what behaviours result from this new track and the bands within it.
Life expectancy for claimants with a spinal cord injury

Early in 2017, “Spinal Cord”, the journal of the International Spinal Cord Society, published a paper on British survival rates, over the last 70 years, of those who have suffered a traumatic spinal cord injury. This updates the last study carried out in the 1990s.

The study looked at in excess of 5,000 patients across two spinal injury centres (Stoke Mandeville and Southport) between 1943 and 2010. It concludes that mortality rates have improved since 2010, after a flat period but, very unsurprisingly, remain well below those of the general population.

A synopsis of the report can be found on the website for the Buckinghamshire Healthcare NHS Trust.

Statutory funding and changes in legislation

The Children and Families Act took effect from 2014 and Part 3 of the Act impacts Local Authorities and sets out a new approach to disability and Statements of Educational Needs. It applies to all qualifying individuals from birth up to the age of 25. Previously, the cut-off age was 16.

From 1 September 2014, Educational, Health and Care (EHC) plans replaced Statements of Educational Needs and should identify and pull together, in one document, all of a claimant’s needs.

Under Section 30 of Part 3, Local Authorities have a duty to set out, within the EHC plan, information and resources available to a claimant locally. Section 48 of Part 3 gives the individual a right to request a personal budget - an amount of money necessary to secure the provisions identified in the EHC plan. As an example, the EHC personal budget might include home to school travel, personal care, respite breaks, equipment and disposables, therapy and educational support needs. It could be worth raising this with your own experts, should they not be aware.

Similarly, the Care Act took effect from 1 April 2015 and consolidates much of the previous legislation, case law, regulations and guidance relating to adult social care. This legislation gives the individual the right to request a care needs assessment irrespective of their financial situation and makes clear Local Authorities must disregard interim payments when determining eligible needs.

Section 15 of the Care Act 2014 introduces a cap on the amount of care an individual will be required to self-fund over their lifetime, but the cap will not be introduced until 2020 when the upper capital threshold will increase to GBP 118,000 from the current GBP 23,250 in respect of property.
One charging structure for social care also took effect from 1 April 2014, by virtue of the Care and Support (Charging and assessment of resources) Regulations 2014. The main provisions are:

- **Residential Care** – no change – Capital, interest and income, including any Periodical Payments, are all disregarded for means testing purposes.
- **Domiciliary Care** – If funds are managed by the Court of Protection then capital and interest are disregarded.
- **If funds are in Personal Injury Trust** – interest is taken into account for means testing purposes.
- **Periodical Payment Orders** – the Statutory Instrument confirms PPOs are to be disregarded for means testing purposes.

Defendants might want to give consideration to bringing these changes to the attention of their experts, should they not be aware.

**Scotland**

As mentioned, the discount rate in Scotland will be amended as part of the Damages Bill. The same Bill will also give courts the power to award Periodical Payments, thus aligning their powers with their counterparts south of the border.

The Justice Committee is also looking at the introduction of Qualified One Way Costs Shifting (QOCS) as well as Damage Based Agreements (DBAs). If passed, both will be enshrined in the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill.

The extent of recoverable legal costs is also coming under scrutiny and the Scottish Civil Justice Council is asking stakeholders for their views. This topic takes on particularly significant importance given the intended introduction of both QOCS and DBAs.
**Tetraplegia claim scenario**

30-year old male, married, single earner, 2 minor children, average income in dependent employment, severe spinal or head injury, no ventilation necessary, 100% disablement, no return to work, highest level of assistance/care

**Tetraplegia claim scenario 2017 – UK**

Source: Swiss Re
For more information, please contact our claims expert and country specialist for the UK:

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