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. Claim 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 2015 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.

Recent legislative changes

The legal and claims environment in Belgium

- In Belgium, minimum coverage for compulsory motor third-party liability insurance (MTPL) is unlimited for personal injury and EUR 100 000 000 for damage to property.

- Influenced by France’s “Loi Badinter”, Belgian law provides for a system of automatic compensation to be paid by the motor vehicle liability insurer. Under this law, every victim must be compensated for bodily injury or death, and damage to clothing, with the exception of the driver of a motor vehicle who is himself injured. This regulation applies more specifically to pedestrians, cyclists and passengers in the insured vehicle.

- Class actions are possible in Belgium as of 1 September 2014. The prerequisite is that the damage for which compensation is claimed results from violation of a contractual obligation by the company or (one of) the regulations as specified by the law. The rules are intended to protect consumers. Traffic-related catastrophes, such as the multiple collision on the highway at Kruishoutem (27 February 1996), would probably not trigger collective redress actions in the future since they do not affect consumer rights.
Due to capacity overload, legal procedures can take 10–15 years (until a final ruling). Advance payments and out-of-court settlements are incentivised by legal interest charged on compensation and by global agreements reached within the community of Belgian insurers (Assuralia), such as the “Accelerated Compensation of Bodily Injury.”

Litigiousness and court awards have increased due to growing consumer awareness. This is similar to other countries in western and southern Europe. In motor insurance matters “legal expenses cover” has also had an impact. The cover is not mandatory, but it is very often taken out by car owners. 2010 saw 6,338 incoming civil and commercial litigious cases per 10,000 inhabitants in Belgium’s first instance courts. This is more than double the European average of 2,738 (Council of Europe 2012 report). More recent figures are not available at the time of writing but no significant change is expected for the time being.

Lawyers’ fees range from EUR 100 to 300 per hour. As of 1 January 2014 these fees are subject to 21% VAT.

Art. 446 of the Belgian Code of Civil Procedure states that lawyers determine their honorary fee with the modesty expected of their profession. Any contractual provision exclusively related to the outcome of proceedings is prohibited. Consequently contingency fees or “pacta de quota litis” are forbidden.

Compensation is determined by a court should parties fail to reach a settlement. The free appreciation of the judge remains a cornerstone, but courts cannot rule “ultra petita”. In the past, most courts had unofficial compensation scales. 1995 saw a first unique indicative table (IT/tableau indicatif) ratified by larger communities of magistrates. The aim was to use this as the basis to set compensation standards in respect of unsettled claims/loss heads. Ever since, the IT compensation scale has been reviewed and standard claim components adapted on a regular basis (tri-/quadriannual updates of the IT as of 1995).

Since 2012 Belgian magistrates have recommended that medical experts take three kinds of disability into account: “Incapacité Personnelle” (pain and suffering), “Incapacité Economique” (economic loss) and “Incapacité Ménagère” (loss of housekeeping). These replace the two previous categories: “Economic Disability” (“Incapacité”) and “Medical Invalidity” (“Invalidité”).

In previous IT versions (2008 and 2012), magistrates considered indexed annuities to be the most complete and adequate compensation for losses from permanent disability (PD). This preference is no longer included in the 2016 version. Magistrates appear to have adopted the insurance sector’s recommendation to consider the three compensation methods for future loss heads, without expressing any preference. The three methods are as follows:
- Indexed annuities: “... an indexed and eventually revisable annuity represents an adequate form of compensation ...”; “Such a compensation method is beneficial for the victim ...”.
- Capitalisation: “A second compensation method for future loss ...”.
- Lump sum: “The third way to compensate is to grant a lump sum amount”.

Regular screening reveals that in daily compensation practice, annuity payments (for loss of income and/or other losses resulting from PD) remain the exception.

In respect of capitalisation, successive editions of the IT have recommended discount factors to be used to calculate future loss components. According to the most recent IT editions, the discount rate should be 1% (instead of the previous successive rates of 4%, 3%, 2.50% and 2%). While in previous IT versions the judges recommended capitalising from 15% PD for future loss heads, this threshold is no longer included in the 2016 IT. It remains to be seen whether this will be interpreted by the market (certainly by lawyers defending injured victims’ interests) as a sign to opt for capitalisation for PD levels below 15% as well.
For lump sum compensation methods, magistrates also recommend amounts to be taken into account per point of PD. According to the latest IT, these vary according to the victim’s age: between EUR 1,220 per kind of disability to be compensated (up to 15 years) and EUR 165 (85 years and more).

In the case of agreed full and final settlement, claims cannot be reopened. Changes to compensation are not allowed unless the victim proves that the claimed additional head of indemnity was not included in the settlement agreement. The same applies in case of a final court decision. The victim can only return to the insurer/ to court when medical, tax or other reserves for the future have been explicitly granted and under the condition that (s)he proves these have come true. Of note are the clear increases in severe bodily injury (BI) cases in recent years. These increases are:
- in the number of claims where medical reserves for the future are stipulated in medical reports, explicitly claimed by victims’ lawyers and granted by court or agreed in out-of-court settlements, and
- in the proportion of cases where the victims seek to reopen their case (i.e. as a result of medical aggravation), several years after settlement.

Loss of earnings
- Compensation for loss of earnings in respect to PD is usually based upon gross salary less tax, but “reserves” are often granted if the amount is to be taxed afterwards. Loss of salary is calculated until retirement age and there is a possibility to claim compensation for loss of retirement pension or post-professional loss as from normal retirement age. The latter is currently still at 65 years (for victims as of a certain age), but has been increased to 67 years (for younger victims).

In Belgium there is subrogation in favour of social security carriers. Health insurance providers (“les mutualités”) mainly cover medical expenses and loss of income (capped), and systematically recover from third party liability insurers. The latter are obliged to inform the social security providers in advance of the final bodily injury settlement. Workers’ Compensation (WC) is also considered part of social security provisions, despite this sector being managed by private insurance companies. Recourse action from WC insurers is possible against third liable parties (or their insurers). Potential recourse against MTPL insurers has been extended by law to cases where the WC-victims are pedestrians, cyclists or passengers, provided that the insured motorised vehicle was “involved” in the accident.

Assistance, medication, and remainder
- Hospital costs currently amount on average to EUR 1,000 – 1,200 per day for intensive care and EUR 600 – 750 per day in other cases. Prices include all treatments and very much depend on the type of room (single rooms being more expensive than shared rooms).

Compensation for home care is usually based upon cost per hour. In the 2016 IT, magistrates recommend compensating this loss head “in concreto”. When determining hourly compensation for assistance from third persons (ATP), the following criteria are assessed: the need for support by a third person, their qualification, and the nature and extent of assistance. Both the 2012 and 2016 ITs refer to hourly rates: “In the absence of justifying documents, unqualified ATP might be compensated by an allowance of EUR 10 per hour”. In practice, this is translated as follows:
- Out-of-court settlements range between EUR 10 and EUR 15 per hour (an average of EUR 12.50) for non-specialised assistance (“active”). For “non-active” assistance (e.g. presence overnight), rates may be less than EUR 10 per hour.

That said, surprises can happen in court with rulings occasionally based upon higher amounts (up to EUR 23.50 per hour).

For care homes, costs per month vary between +/- EUR 2,500 for a retirement home and +/- EUR 10,000 for a specialised institution.
All necessary medication and prostheses (including adaptation of the victim’s home) are paid for by the third party liability insurer. The insurers work with averages of EUR 5,000 per year (paraplegia) and EUR 7,500 – 10,000 per year (tetraplegia) as estimates for prostheses and medical devices. The overall cost for home-adaptations, however, varies between EUR 50,000 and EUR 150,000.

For each of these loss heads, there is subrogation for social security carriers, be they health insurance providers or WC insurers. The VAPH (Vlaams Agentschap voor Personen met een Handicap), a semi-public organisation, can also be involved. The VAPH finances certain services and appliances, prostheses and adaptations, or grants a “Persoonsvolgend Budget” – an individualised budget – to pay for care and support from the victim’s own network, volunteers, individual assistants and professional carers. The VAPH has been fully subrogated in the rights of the beneficiary since 2002, and does not hesitate to use this against insurers of third liable parties (having caused the handicap). They have become more active in individual cases and tend not to recognise the usual caps applied “en droit commun”. MTPL insurers, on the other hand, strictly stick to these caps. Of note is that the Agence pour une Vie de Qualité (AVIQ), VAPH’s equivalent in the French-speaking part of Belgium, has also recently been granted a right of subrogation. It is likely that this authority will also be more active in individual MTPL claims.

### Pain and suffering

- In case of bodily injury, pain and suffering (“Incapacité Personnelle” as per the latest ITs, previously “Dommage Moral”) should be assessed separately. In recent decades, basic amounts have gradually increased. The latest development shows a tendency to grant indemnity based upon capitalisation of a daily amount (instead of lump sum):
  - Capitalisation has become the general rule for more severe BI cases.
  - This method might also be applied for less severe BI claims and its increased use is expected in the future (disappearance of 15% PD “threshold”).

- Usually a subdivision is made between 2 periods of time. The 2016 IT provides recommended amounts for most of the individual loss components:

  - For Temporary Disability (as from occurrence until recovery): EUR 34 per day during hospitalisation; EUR 28 per day following release from hospital, for 100% disability.

  - For Permanent Disability (as from consolidation of the injury/ies): A typical characteristic of Belgian compensation standards is the split into various sub-elements for this overall loss head, each of these being indemnified separately:

    1. **Pain and suffering stricto sensu (“Incapacité Personnelle”):**
      - Either by lump sum per percentage of PD (decreasing amount, depending on age), e.g.:
        - for victims up to 15 years old = EUR 1,220
        - for victims from 85 years old = EUR 165.
      - Or by capitalisation based on EUR 28 EUR per day in proportion to the degree of PD (since 2016 IT, no minimum PD threshold provided).

    2. **Damage to appearance (“Dommage Esthétique”):**
      Lump sum depending on severity (scale from 1 to 7) and age.

    3. **Sexual damage:**
      Lump sum for damage caused by loss of sexual activity, including loss of possibility to have children, necessity of caesarean and impact on partner’s sexual activity.

    4. **“Préjudice d’Agrément/Genoegenschade”**
      For deprivation of favourite sporting and other leisure activities.

    5. **“Dommage des proches/Schade door weerkaatsing”**
      Damage to closest relatives as a result of the victim’s suffering (usually but not exclusively for most severe injuries).
In case of fatality, pain and suffering is a separate loss-head (still labelled “Dommage Moral”). Levels of compensation largely depend on the degree of family connection with the victim. The 2016 IT proposes lump sums from EUR 1 500 per person for a grandparent or grandchild not living in the victim’s home and up to EUR 15 000 per person for a child living together with the victim or for the victim’s spouse/partner. If a connection can be proven, relatives not included in the current list (containing 13 different kinds of relatives) can also claim compensation. Each indemnity can be adapted by taking into account particular circumstances.

Compensation for loss of housekeeping

Awards for loss of housekeeping are usually granted. Compensation is based on EUR 20 per day (single person or family without children). This amount is increased by EUR 7 per child per day. The indemnity is an award per household and is split according to actual contributions (by default: 65% attributed to the female partner and 35% to the male). During Temporary Disability, the indemnity is granted per day and degree of disability. For PD, the capitalisation method may apply.

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.

An increasing number of victims will be compensated for future economic loss up to 67 years (instead of 65 years). There have also been significant increases in overall costs for prostheses and other medical devices (due to increases in sophistication), with current averages at EUR 10 000 per year.
30-year old male, married, single earner, 2 minor children, average income in dependent employment

This scenario also includes increases triggered by changes in the discount rate for capitalisation of future loss heads. The rates considered are identical to those in the tetraplegia scenario.

Compensation standards for pain and suffering have continued to develop. For example, the victim’s spouse can expect EUR 15 000 (recommendation in the 2016 IT). For children living with their parent(s), current compensation also amounts to EUR 15 000.

In this scenario, future economic loss also has to be compensated for an increasing number of victims up to 67 years (instead of 65 years).
For more information, please contact our claims expert and country specialist for Belgium

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