INTERNATIONAL ASSOCIATION OF JUDGES

AUSTRIAN REPORT

Second Study Commission

Subject:

DAMAGES FOR PERSONAL INJURY

Part I – General questions

1a. Does your system of law have any rules governing damages for personal injury? If so, what do they provide?

Section 1325 ABGB (Austrian Civil Code) reads:

»Anyone who inflicts bodily injury to another, has to pay the costs of treatment of the injured as well as the loss of earnings, or, if the injured becomes unable to work, also the future loss of earnings, and, on request, also has to pay adequate damages, according to the circumstances as found by the court, for pain and suffering.«

§ 1325 ABGB is aimed at the protection of the integrity of the human body, i.e. body integrity as a whole. Therefore one can categorize violations of body integrity into injuries bringing about an anatomical (e.g. amputation of a foot, loss of an organ), functional (loss of senses like blindness or deafness), mental (reduction of the mental capacity) or psychic deficit (e.g. depressions).

Pursuant to § 1325 ABGB the tortfeasor has to pay the costs of treatment, loss of earnings and damages for pain and suffering.

Costs of treatment are all expenses which were incurred because of the injury and which (as opposed to ordinary expenses not related to the accident) were incurred with an intent to cure or mitigate the consequences of the injury.

The costs of treatment include the costs for medical supplies and prosthetics, costs of visits of close relatives, costs of assistance provided by relatives and costs of a maid or nurse, costs for increased needs because of the accident, such as the procurement of a specially equipped car or apartment for handicapped people.

The loss of earnings can either be calculated on an actual basis (i.e. the difference between the previous income and the future income) or in abstracto (i.e. based on the objective reduction or loss of the ability to earn money). The plaintiff has to opt for one of the two possibilities. A loss of earnings is actual damage, not a loss of an expected gain. The loss of earnings has to be calculated in such a way that the victim is in the same financial situation (after taxes) he would be in in case he had been able to continue working in his prior
occupation. A special case of loss of earnings is the so-called abstract pension. According to the case law, such an abstract pension is to provide both a compensation and security for the victim. Its purpose is to provide a compensation for the victim because he/she has to take greater efforts both physically and mentally in order to avoid an actual loss of earnings. It is intended to enable the victim to save money in case he/she later loses his/her job because of the injury. Thus, the abstract pension is intended to provide security for the victim because he/she is likely to face more difficulties in finding a new job than other applicants without an injury in case he loses the prior job because of his injury. Also, the abstract pension compensates the victim for needing more energy for his work compared to another employee without injury.

The damages for pain and suffering are a compensation for all suffering the victim undergoes because of the injury. Physical and mental suffering have to taken into account together. For the determination the duration and intensity of the pains, the severity of the injury and the impairment of the state of health as well as the negative impact on the victim's life have to be taken into account. Under the case law neither the social position nor the economic situation of the victim or the tortfeasor are to be taken into account.

Recent developments in the law have led to an extension of the scope of application of damages for pain and suffering. Originally these claims were only dealt with in § 1325 Civil Code. More recently a number of special liability statutes also provide for damages for pain and suffering, referring to the respective provisions in the Civil Code (e.g. Railroads and Vehicles Liability Act, Product Liability Act, Criminal Procedure Compensation Act).

1b.Is non-patrimonial (non-pecuniary) compensation limited to cases provided by law?

Generally, non-pecuniary damages are awarded only if the law expressly provides for non-pecuniary damages (see supra 1a).

In the Austrian law of damages pecuniary and non-pecuniary damages generally are of equal importance. Non-pecuniary damages (damages for personal injury) are not generally given greater importance by the Civil Code, but are easier to claim because they can be claimed also in cases of simple negligence without restriction. On the other hand, pecuniary damages (actual damages or loss of gains) depend on the gravity of fault on part of the tortfeasor. In addition, case law and doctrine limit the compensation of pecuniary damages in that generally damages are not awarded for so-called »pure« economic loss.

2.Which are the criteria to distinguish patrimonial and non-patrimonial damage? What are the consequences of the distinction if it exists?

See item 1b.

3a. What are the primary aim and the general principle of the law of damages for personal injury (e.g. prevention, sanction, distributive function, adequate compensation)?

The claim for damages primarily is intended to provide compensation for the loss suffered by the victim (compensation function).

Particularly important is also the principle of prevention, both on an individual and on a general level: If an unlawful and culpable act results in an obligation to pay damages, this will
lead to greater efforts on part of the tort-feasor in the future to avoid the infliction of torts in the future (individual prevention).

In addition, the law of damages is an incentive for everybody to avoid the commission of torts in general (general prevention).

Only for that part of the law of damages which is based on the principle of fault, the concept of sanctioning unlawful conduct is also relevant. Thus, the amount of damages to be paid depend on the gravity of fault of the tort-feasor. In so providing, the Austrian Civil Code does not mingle damages and sanctions, because the overall aim is always compensation of the damages inflicted. The law attempts to take into account the gravity of fault in determing the amount of damges to be compensated; thus, the law in determining the scope of liability gives due regard to the gravity of the reasons for such liability.

A sanction can reasonably only be imposed if the tortfeasor can be blamed for an unlawful and culpable act. In case the tortfeasor is liable regardless of fault, this has nothing to do with sanctioning the tortfeasor's conduct. This is also true for strict liability.

3b. Do different forms of damages for personal injur es exist (e.g. compensatory, exemplary, punitive damages)?

See item 1a.

4. Does your system of law recognize different categories of damages for personal injury, particularly:

   - physical pain

   See items 1a and 5a.

   - mental suffering due to permanent loss of abilities
   - sentiments of fear (e.g. the worry caused by the fear of developing cancer)

   See items 1a and 5a.

   These types of mental suffering generally accompany, or are a consequence of, physical injuries. They constitute a separate disadvantage for the injured. Compensation for mental suffering does not require that they constitute an independent (separate) illness or require medical treatment. Rather, generally they are the consequence of an injury and have to be distinguished from the injury as such; they are termed »mental consequences of an injury« by the courts.

   The court – based on the overall circumstances of the case – normally will be able to determine these damages in light of the judges' experience; no evidence has to be heard, nor are specific allegations necessary in order to take mental suffering into account in determining the damages for pain and suffering. Rather, the court will take judicial notice of mental on its own motion.

   - mental suffering due to false imprisonment
The relevant norms are contained in the Constitutional Act on the Proctection of Liberty and the Criminal Proceedings Compensation Act of 2005.

The special connection to the damages awarded for pain and suffering pursuant to section 1325 Civil Code results from that the Austrian Supreme Court usually, particularly when dealing with damages requested based on Article 5 ECHR for a detention in violation of the provisions of the ECHR, refers to these claims as »special claims for pains«. Again, like in case of § 1325 Civil Code, the criteria for determining the amount of these non-pecuniary damages are duration and intensity of the impairment of the mental and physical situation of the victim, his sensitivity and his range of psychic reactions, but not his social position, which generally is irrelevant.

In determining the amount of non-pecuniary damages awarded for false imprisonment, the courts normally use the amounts awarded for light physical pains of the same duration, i.e. EUR 100 to 120 per day (see supra item 5a).

- mental suffering due to damage to intangible rights of personality

The right of privacy is a consequence of the general »right of personality«. An unlawful and culpable violation of privacy can result in an award of damages.

§ 1328a Civil Code reads:

»Who unlawfully and culpably violates the sphere of privacy of another person or reveals or uses facts of the sphere of privacy of another person, has to compensate the damages resulting from such action (pecuniary damages).

In case of substantial violations of the sphere of privacy, e.g. if facts are used in way which can expose the victim to public shame, the damages also include a compensation for the mental suffering (non-pecuniary damages)«.

The responsibility for a violation of privacy committed by the media is governed exclusively by the provisions of the Media Act.

- mental suffering caused by the death of a close relative

See items 1a and 5a.

According to the current case law of the Supreme Court, the obligation to pay damages in case of a shock (provided such shock is an illness in the medical sense) because of the death of a close relative is triggered by the special intensity of the damages suffered or – in case of particularly grave fault on part of the tort-feasor – by the special gravity of the underlying culpable act. The claim for damages in case of the death of a relative is a direct claim and not a claim derived from the deceased.
What methods are used to assess the non-patrimonial damage? Are there any statutory rules on sums to be awarded (e.g. minimum, maximum sums)? Are there any judicial tariffs?

The judge has to determine the damages for pains and suffering according to his own conviction, based on an assessment on the overall circumstances of the case. The damages for pain and suffering are designed to compensate for all pains the victim already suffered or is likely to suffer in the future. Generally, the court awards a one-time payment, i.e. a lump sum which cannot be increased or supplemented at a later point of time.

For determining the amount awarded for pain and suffering, physical pains are divided into four categories, i.e. light, medium, strong and extreme pains.

Pains are deemed light if the injured is able to forget his pains, to distract and divert himself; he can even work, but he is not free of pain.

In case of medium pains the injured is still able, to a large extent, to detach himself from his pains, in spite of significant pains he is willing and able, e.g. to read a book, to watch TV or to have visits.

Strong pains are characterized by the pains dominating the victim in a way that in spite of medical efforts he is unable to detach himself from his severe suffering; he cannot distract himself and cannot enjoy anything.

Extreme pains are rare and usually only of a short duration; here in addition to the strong pains the severe type of injury (polytrauma) and the experience of treatment in an intensive care unit are taken into account.

In determining the damages for pain and suffering, the »damages for pain and suffering«, published since 1990 for all court districts are an invaluable assistance, but they cannot be used as a method to actually calculate the damages for pain and suffering. Currently, Austrian courts award EUR 100 to EUR 120 per diem for light pains, EUR 200 to 250 for medium pains and EUR 300 to 350 for severe pains. In case of light or medium injuries, where the physical aspects of the injury prevail, these published figures are extremely helpful, whereas their importance as guidelines is smaller the more severe the injuries and the lasting consequences are.

Since the body, for purposes of determining damages for pain and suffering, has to be treated as a whole, there is no separate calculation of damages for physical and mental pains, particularly since they regularly overlap. Therefore, it is not necessary to claim separate damages for the physical and mental pain and suffering resulting from the injury, nor will the court award separate damages for these two types of pain and suffering. Under well-established case law the so-called daily amounts for mental pains cannot be equated with those for physical pains, nor can the compensation to be awarded for the two types of pains just be added to one another.
5b. According to your system of law, which circumstances should be taken into consideration in assessing non-patrimonial loss (e.g. nature, intensity and duration of the injury and/or suffering; individual circumstances of the victim; social position; financial situation)?

See items 1a and 5a.

5c. What is the role of an expert appointed by the court in assessing non-patrimonial loss?

In determining medical facts, particularly in determining the duration and intensity of pains suffered by the victim, the court practically always needs an opinion of a medical expert on the injury and the pains brought about by the injury as well as on any possible later consequences of the injury in the future. Every such expert opinion has to deal with three questions, the kind of injury, duration and intensity (severity) of the physical pains brought about by the injury (including an opinion as to whether the intensity of future pains can already be determined) and on any later continuing consequences of the injury.

In addition, in case there are expert opinions of several experts (i.e. a surgeon and a neurologist) the experts have to opine as to to what extent the pains determined by them overlap with the pains determined by the other expert and, if necessary, whether injuries of like severity had occurred if the injured had used a safety belt or helmet. The determination of the actual damages awarded for pain and suffering, based on the findings of fact on the injury and pains is a question of law. Therefore it falls in the exclusive competence of the judge, not of the expert. Therefore, the expert must not opine on this issue.

II - Cases

6. A defective product harms V, a 25-year-old woman. Her right eye is severely injured (the sight is reduced to 50%). What kind of non-patrimonial (non-pecuniary) damages is she entitled to?

She is entitled to the claims discussed supra 1a.

7. A, a 20-year-old student, suffers severe brain injuries. He is reduced to a living dead. Are his parents who take care of him entitled to a compensation for their mental suffering?

Yes. See items 1a, 4 und 5a.

8. A, a publisher publishes an article, which contains many untrue and offending statements of B's life. B sues for compensation. When assessing the non-patrimonial loss does it make any difference if B is a rock star, a politician or an unknown citizen?

See item 4.

Liability for violations of the sphere of privacy by media is only governed by the provisions of the Media Act (»Mediengesetz«).

The Media Act provides a claim for compensation for the insult, defamation, ridicule or slander, for violations of privacy and for the protection of the identity in special circumstances, for a violation of the presumption of innocence and for a protection against an unauthorized publication. This is a special civil law claim for compensation intended to
compensate the inflicted non-pecuniary damage, i.e. a kind of damages for pain and suffering, which is determined by the criminal court according to the provisions of the Code of Criminal Proceedings.

Additional claims under civil law (such as revocation or an injunction against untrue or offending statements) are not affected by this statute.

According to the case law, in determining non-pecuniary damages, neither the social position nor the economic situation of the victim or the tortfeasor are to be taken into account.

9. A who is slightly injured in a car accident misses a trip to Australia he had booked recently. Is he entitled to a compensation because he was prevented from enjoying his holiday (non-pecuniary damages)?

No.

10. A's house is burgled and he cannot sleep for months after the event. Is he entitled to monetary compensation of his distress?

Yes. See the answers to items 1a, 4 und 5a.

III

11. Are there any proposals for reform of the legislation governing damages for personal injury?

In Austria a complete reform of the law of damages is envisaged.

12. What points would you wish to discuss in greater detail?

See supra item 5a.

13. What subject do you suggest for the next meeting?

Remedies against unfair trade practices.

Ronald Kunst