THE LEGAL POSITION OF THE ROAD VICTIM IN GERMANY *

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There were more than a million road accidents in Germany in 1965. The number of people killed in road accidents was 15,710, including those who died within 30 days of the accident. Injured numbered 432,770, 31% of them being seriously injured.

Comparison of these figures with those for 1964 shows that the number of casualties has declined, but the yearly and daily carnage on the road is still alarming and a grave problem.

With these facts and figures in mind this paper will deal with the legal position of the victim of a road accident in Germany, according to:

1. legal liability;
2. motor insurance law;
3. supplementary institutions and funds similar to the Motor Insurers' Bureau provisions in Great Britain.

1. Legal liability

1. 1.Strict liability

The fact that an automobile is a dangerous chattel which by appearing on the roads in ever growing numbers increases the risk of other users of the road being injured or killed was already officially recognised in Germany in the first decade of this century, and in 1909, with the passing of the Motor Vehicle Act, the Gesetz uber den Verkehr mit Kraftfahrzeugen dating from 3 May 1909, strict liability of the keeper of a motor vehicle for damage caused during its operation was established by statute.

1. 1. 1.Liability of the keeper of a motor vehicle

s.7 Road Traffic Act 1952 (Strassenverkehrsgesetz)

This important principle of absolute liability, after various amendments to the Act already mentioned, and a change of name, is to-day laid down in s.7. of the Road Traffic Act 1952 (hereafter called RTA), subs. 1 of which reads as follows:

> If a person is killed or injured (which includes the impairment of his health) or if property is damaged while a motor vehicle is being operated, then the keeper of that vehicle will be liable to the third party for the damage caused by the accident.

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* This paper forms the basis of an address given by Mr. Kammer when a party of law and economics students from Cologne University visited The Chartered Insurance Institute.

Before we deal with this important basis of a claim for damages and its exceptions, the sub-section quoted demands some further explanation.

1.1.1.1.Damage

The first constituent in an action based upon s.7 of the RTA 1952 is that there is damage inflicted upon a third party, be it the death of or personal injury to the third party or damage to his property.

1.1.1.2. Occurrence of damage while a motor vehicle is being operated

Secondly, this damage must have occurred while a motor vehicle was being operated. Motor vehicle as defined in s.1 subs.2 of the RTA comprises all vehicles running on land that are moved by machine power, and are not restricted to tracks; thus trolley-buses and tracked vehicles (caterpillar vehicles) come within the definition.

Operated also is a wide term. When a vehicle is being pushed on to the road (decision of the Oldenburg Court of Appeal, see DAR 1964, p.341) * or is being pushed before the engine has started, it is being operated in the meaning of s.7 subs.1 of the RTA. So also is a car parked on a sloping road with the motor turned off that starts rolling downhill and hits a road user. However if for instance a car which has been parked properly is pushed by playing children for fun this is not regarded as an operation of the vehicle.

If a driver stops a van he is driving and leaves it for a short while to fetch a sandwich from a girl friend living nearby (a case which the Federal High Court in Karlsruhe had to decide in 1955, see BGH in VersR 1955, p.345) the vehicle is being operated in the legal sense and the keeper is absolutely liable for damage caused in the driver's absence, because a short interruption of a journey cannot be regarded as a cessation of the operation of the vehicle. And if a motorist suddenly opens the door of his stationary car to get out and a cyclist runs into the door the accident has occurred while the car was operated (see decisions of the Munich Court of Appeal in VersR 1952, p.293 and the Stuttgart Court of Appeal in VersR 1955, p.335).

1.1.1.3. Who is the keeper of a motor vehicle?

If damage to a third party has been caused during the operation of a motor vehicle then by reason of s.7 RTA the keeper faces strict liability for the damage resulting from the infringement of the rights of another. In German law the keeper of a vehicle (an expression not used in English law) is the person who uses the vehicle on his own account and possesses the right of disposition of it. Thus the ownership of a car is no prerequisite to being the keeper of it, and the owner and the keeper of a vehicle can be and often are two different persons.

The term keeper is so wide that one who pays for the petrol for a car may be regarded as its keeper as the Hamm Court of Appeal (see VRS No. 5) decided in 1965. On the other hand a garage proprietor who after repairing

* A list of abbreviations appears at the end of the paper.

a vehicle not belonging to him made a test run to check the car, and in doing so fatally injured a pedestrian trying to cross the road, has not been held to be the keeper of the vehicle (see RGZ Vol.150, p.134).

1.1.1.4. The principle of adequate causality of the damage

Finally, strict liability of the keeper of a vehicle as stated in s.7 RTA 1952 further presupposes that there is a causal connection between the operation of a motor vehicle and the damage that occurs. According to a principle of German liability law this connection exists if the cause set in motion by the wrongdoer is generally capable of effecting the damage that occurs.

But damage which could not reasonably have been anticipated, which could not have been foreseen by 'the man on the Berlin bus', and improbable and irregular consequences, do not fall under this principle of adequate causality. Within these limits the wrongdoer is liable for such damage caused directly and indirectly. Therefore, if a road victim dies of his injuries in hospital because of the negligence of an attending doctor the tortfeasor is still liable for this death, as it is an indirect damage resulting from the road crash. But if a road victim dies as the consequence of a treatment which was not required because of the accident but was given incidentally in the course of an operation which itself was made necessary by the accident then there is no adequate causal connection between the road accident and the death (see decision of the BGH in DAR 1957, p.267).

1.1. 2. Limits of liability: s.12 RTA 1952

When the constituents of s.7 RTA that have been mentioned have been proved by the plaintiff the keeper of the vehicle is liable but only up to a limited amount of money. S.12 subs.1. RTA 1952 states that the maximum sum of money for which a keeper can be liable, irrespective of the factor of negligence on his part (that is absolutely liable) in respect of the death of or personal injury to a third party is 250,000,00 Deutschmarks (about £22,700) alternatively a yearly sum of 15,000,00 Deutschmarks (about £1,363) awarded as an annuity. The keeper's maximum liability for damage to a third party's property is a lump sum of 50,000,00 Deutschmarks (about £4,545).

Up to these maximum sums of indemnity a keeper, because of s.8a of the RTA 1952, also can be liable if a passenger is injured or killed, provided that this passenger was being transported for money by a commercial undertaking (such as an omnibus company run by a local authority).

In one case the Federal Post Office the keeper of a particular omnibus, was held not to be liable for the consequences of an accident to a passenger because the accident had occurred during a free trip made by post office employees to a wedding of one of their colleagues.

1.1.3. Exclusion of liability of the keeper: s.7 subs. 2 RTA 1952

Now that we have dealt with the rule of strict liability of a keeper of a motor vehicle for certain damage resulting from the operation of the

vehicle, according to the rule of law laid down in s.7 subs.1 of the RTA. 1952, we must also mention important exceptions which have been made because without them the absolute liability of a keeper of a lethal weapon (as the motor vehicle is often called) would be too comprehensive and thus possibly unfair.

In this connection part of subs.2 of s.7 RTA reads:

> The keeper is under no duty of compensation if the accident has been caused by an inevitable event which originated neither in a faulty condition of the vehicle, (as would the bursting of a worn tyre) nor in the failure of its equipment (as if the brake lights did not work or the steering suddenly got out of control).

The Road Traffic Act 1952 does not contain a definition of inevitable event, but in the subsection quoted three examples of such events are given. s.7 subs.2 paragraph 2 RTA 1952 reads:

> An event is assumed to be inevitable ...
>
> (a) if it has its origin in the behaviour of the injured person (no negligence is required on the part of the victim - see RGZ Vol.92, p.38); or
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> (b) if it has its origin in the behaviour of a third party not occupied with the operation of the vehicle (this would be the case if an accident is caused by a pedestrian or by a passenger travelling in the vehicle); or
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> (c) if it has its source in the behaviour of an animal (as if a dog unexpectedly jumps in front of a car)
>
> <u>provided that</u> in any of these three events both the keeper and the driver of the vehicle have exercised the reasonable care necessary in the respective circumstances.

An example of this particular duty of care required by statute from the keeper of a vehicle and from the driver respectively is a lawsuit decided by the Koblenz Court of Appeal (see DAR 1955, p.72). In this case a man was cycling on a country road which had a bad surface and was covered with stones of various sizes. Suddenly a saloon car overtook him at a speed of 20 to 30 m.p.h. As the car passed one of its rear wheels threw up a stone from the road. This stone hit the cyclist's right eye and injured it so badly that after a time it could do no more than differentiate between light and dark.

With a claim based on s.7 RTA 1952 the cyclist sued the keeper-driver of the vehicle for damages (loss of earnings) and asked the court for a declaratory judgment that the defendant would also be liable for all future damage resulting from the injury.

In giving judgment for the plaintiff the court held that this was not a case of an inevitable event, as the driver, who was also the owner and keeper of the car, had not exercised the care required by law in this particular situation. The court was of the opinion that the defendant should have reduced his speed considerably when approaching the cyclist. As he had not done so the accident could not be regarded as having been inevitable.

1. 1. 4. Liability in respect of damage caused by an unauthorised driver: s.7 subs. 3 RTA 1952

Subs. 3 of s.7 RTA 1952 is of great importance in respect of liability. It is stated there that if a vehicle is used by another person without the knowledge and consent of the keeper then this person, not the keeper, will be liable for damage caused while the vehicle is being so used. However, in such a situation the keeper of a vehicle is liable as well if its unauthorised use has been made possible through his fault or negligence. This would be so if the keeper had put the car into a garage which was not adequately locked or otherwise properly safeguarded against the entry of unauthorised persons (see decision of the Nuremberg Court of Appeal in NJW 1955 p. 1757), or if the keeper when leaving his car had not taken with him the ignition key. In 1962 the Federal High Court decided a case in which a keeper who had not locked the doors of his car properly was held liable for damage caused by an unauthorised person who used the car, even though an anti-theft device had been fitted to the steering column of the vehicle (see BGH in NJW 1962, p.1579).

However, exemption from this liability laid down in s.7 subs.3 RTA 1952 is enjoyed by anybody employed by the keeper for the operation of the vehicle and anybody who has been authorised by him to use it (as would be a hirer). A keeper cannot escape strict liability for damage caused by a permitted driver, and any exculpatory evidence that he might offer would be immaterial.

1. 1. 5. Liability of the permitted driver: s.18 RTA 1952

According to the RTA mentioned it is not only the keeper of a vehicle who can be held to be liable under the circumstances cited; in addition the driver may be liable for damage adequately caused. s.18, dealing with the driver's duty to compensate, says that a driver of a vehicle is liable for damage specified in s.7 of the Act if he is unable to prove that he has not been negligent. In other words, he is liable unless he can prove that the damage was not caused through his fault. This can be described as a liability for presumed negligence, rather than an absolute liability. Thus the driver unlike the keeper, does not have to prove that the accident was due to an inevitable event. All he has to prove is that the damage did not occur because of fault on his part.

1. 1. 6. Joint liability of keeper and driver: ss.840,421 German Civil Code (Burgerliches Gesetzbuch)

If the keeper and the driver of a vehicle are both liable according to s.7 and s.18 RTA 1952 respectively then they are co-debtors; a joint

liability is imposed upon them by s.840 of the German Civil Code, hereafter called 'the Code'. Further, either debtor is liable for the full amount of the debt (which of course the injured person is entitled to claim only once). This rule is expressed in s.421 of the Code.

It should be noted again that the strict liability laid down in the Road Traffic Act quoted applies only to certain damage and up to certain amounts of money . S.16 of the RTA 1952 says that liability under this Act does not exclude any further liability under other statutes.

1. 2. Legal liability as laid down in the German Civil Code

We come now to the law of torts as laid down in the Code.

1. 2. 1. S.823 subs. 1 German Civil Code

As regards tortious liability, especially liability because of fault including negligence, the most important section of the Code is s.823, subs. 1 of which says that

> everyone who deliberately or negligently impairs the life, body, health, freedom, property, or other absolute right of another person without lawful justification is obliged to compensate the injured party for the damage resulting from that tortious act.

It will be seen that this Code protects only certain attributes of a person, such as his freedom or health; no more general rule protecting a human being against any sort of culpable unlawful interference by another person exists in this or any other German statute. Thus, a road victim claiming damages under this s.823, subs. 1 of the Code has to prove:

> an act or omission on the part of the wrongdoer by which the damage was caused (there must be a causal connection between the act or omission and the damage); and
>
> an infringement of an absolute right protected by this section of the statute; the possession of a chattel, though not an absolute right by legal decision, has been included in this catalogue of protected rights of man); and
>
> that the wrongdoer is culpable, having acted either deliberately, wilfully, or negligently.

On the various constituents in a cause of action under s.823 subs. 1 of the Code we can refer to some extent to points mentioned earlier in discussing strict liability, for example, as regards the problem of reasonable foreseeability and the remoteness of damage; that is, the rule of adequate causality between the tortious act and the damage done.

Just a word on culpability. Although wilful intent has not been

defined by statute, negligence is defined in s.276 of the Code, which says:

> A person acts negligently if he breaches the common duty of care.

This phrase has been subject to much court interpretation.

1. 2. 2.Defences to an action brought under s.823 subs.1 of the Code

If the injured party has presented and proved his case then the defendant is liable unless he can prove that he had lawful justification (Rechtfertigungsgr for his act or omission that caused the harm, for instance by bringing the defence of volenti non fit injuria or distress (see s.s. 228, 904 of the Code) or by pleading that the action is statute-barred by the provisions on the limitation of an action (see - as regards the law of torts - s.852 of the Code).

Contributory negligence on the part of the injured person is taken into account both in the field of strict liability and where there is liability for fault. This is stipulated in s.254 of the Code and in s.9 of the RTA 1952 respectively.

1. 2. 3.Scope and Mode of Compensation

When s.823 subs. 1 of the Code says that the wrongdoer is liable for the damage which results from the tort, this damage can be the specific damage, for example actual bodily injury; or damage which is abstract,for example, loss of profits (lucrum cessans), which cannot be quantified specifically (see s.252 of the Code) or, future loss of earnings; or non-material damage like pain and suffering or pain caused by the loss of freedom of movement.

For this non-damage an adequate, reasonable sum of money may be claimed under s.847 of the Code, as a rule by the injured third party.

Unlike the RTA 1952, the Civil Code does not impose statutory limits of liability by stipulating certain maximum sums of money; and the amount of compensation is not affected by the question of whether the wrongdoer has acted wilfully or negligently.

As to compensation, the guiding principle is that of restitutio in integrum laid down in s.249 of the Code. This is modified in respect of personal injuries to and the death of a person and in respect of damage to another person's property; here the claimant can demand a monetary compensation instead (see s.249, second sentence, of the Code). When restitutio in integrum is not possible as when someone has lost an arm, the person legally liable must give compensation by means of payment of money; see s.251 subs.1 of the Code

1. 2. 4. Who can claim damages for a tort?

As a rule only the person directly injured can claim damages for both the direct and the indirect damage he has suffered. In the field of torts, however, there are certain exceptions to this principle.

According to s.844 subs. 2 of the Code some dependants can claim a pension because of loss of maintenance which they had received and were entitled to receive from a deceased road victim during his lifetime, and s.845 of the Code says that in the case of the death of or personal injury to a servant his master may be entitled to receive a pension for the loss of his services.

Persons who have been directly injured (see s.843 subs. 3 of the Code), persons who have suffered damage indirectly (see s.844 subs. 2 of the Code), and persons who can claim damages for loss of services are entitled to a lump-sum assessment only in exceptional circumstances, such as when the injured party needs a lump sum of money to open a business for his own support.

1. 2. 5. The keeper's liability for the acts of the driver

1. 2. 5.1. According to s.7 RTA 1952

We have seen that if the keeper of a vehicle was not driving it at the time of an accident then he has to prove that his permitted driver was exercising the reasonable care necessary in the circumstances. If he is successful he is freed from the liability dealt with in s.7 RTA 1952, if he is not successful he is liable for the damage caused by that driver. Under s.7 RTA 1952 any exculpatory evidence given by the keeper of the car generally cannot be based on the fact that he had carefully selected the driver.

1. 2. 5. 2. According to s.831 of the Civil Code

A similar provision in the field of liability for fault is s.831 of the Code, which holds a person who ordered another person to do something liable for all damage which the latter inflicts upon a third party without lawful justification when executing what he was told to do.

Such a principal (the Geschäftsherr) can escape liability for the damage done by his assistant (the Verrichtungsgehilfe)only by giving exculpatory evidence that he exercised reasonable care when selecting the wrongdoer and, if necessary, when supervising him at work. Thus if there is culpa in eligendo on his part he is liable. But if an assistant caused an accident though he exercised all the care necessary at the time of the accident then there is lawful justification on his part, and his principal does not have to prove that the driver-assistant was carefully selected and so not liable to cause an accident in any case. (see decision of the BGH in VersR 1957, p.519).

2. Motor Insurance Law:

2. 1.Duty to insure: s.1. of the Compulsory Motor Insurance Act, 1965 (Pflichtversicherungsgesetz)

Having dealt with stage one of the protection of the road victim in Germany, the statutory provisions of legal liability, we come to stage

two, motor insurance law.

It was not until 1939 that motor vehicle insurance was made obligatory, by the Compulsory Motor Insurance Act of that year (the Gesetz über die Einführung der Pflichtversicherung für Kraftfahrzeughalter dated 7 November 1939), which was replaced by the Compulsory Motor Insurance Act of 1965, hereafter called "the Act of 1965".

S.1. of the latter Act obliges every keeper of a motor vehicle or a trailer which is garaged within the boundaries of the Federal Republic of Germany to insure himself, the owner and the driver against liability for personal injuries and death, property damage, and other financial loss resulting from the use of the vehicle on public roads and public places.

2. 2.Exceptions from this obligation: s.2 of the Act of 1965

S.2 of the Act of 1965 lists a number of exceptions from this compulsory insurance; for example no duty to insure is laid upon the Federal Republic of Germany as a legal entity, the Länder, certain local authorities, and the keepers of certain vehicles whose maximum speed does not exceed 6 kilometers (about 4 mph) and certain machines used for work.

2. 3.Duties of the motorist

Breach of the statutory duty to insure has been made an offence (see s.5 of the Act of 1965). This compulsion to insure obliges insurance companies to effect insurance contracts with the keepers of motor vehicles.

If the insured has disclosed all material facts and has fulfilled all the contractual obligations (as to which also the General Motor Insurance Policy Conditions - Allgemeine Bedingungen fur die Kraftverkehrsversicherung, or AKB - dating from September 1965 are of great importance), so that the company cannot repudiate liability, then the company will indemnify the assured up to the sums insured against which vary according to the premium pa

2. 4. Statutory minimum amounts of insurance

As to a motorist's legal liability to a third party, specific minimum amounts of insurance are stipulated in Germany (see Appendix to s.4 subs. 2 of the Act of 1965). These are:

against liability for personal injuries and death of a third party - 250,000 DM (about £22,700):

against liability for damage to a third party's property - 50,000 DM (about £4,545):

against liability for 'pure or genuine financial loss', that is, loss which is neither directly nor indirectly related to the personal injury, death, or damage to the property of a third party - 10,000 DM (almost £900).

2. 5.Direct right of action against insurers

The most recent important change in German motor insurance law came through the introduction of a third party's direct right of action against the wrongdoer's insurer. The immediate cause for this fundamental change was the European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles dated 20th April 1959, which became law in Germany in 1965 (see the Gesetz zu dem Europäischen Übereinkommen vom 20 April 1959 über die obligatorische Haftpflichtversicherung für Kraftfahrzeuge published in the Federal Law Gazette (Bundesgesetzblatt), Part II, 1965, pp.281.

S.3 of the Compulsory Motor Insurance Act 1965 states that a third party also has a right of action for damages against an insurer, who is obliged to compensate the third party by payment of money.

When a road victim makes use of this action directe then the insurer and the insured are co-debtors; there is a joint liability imposed upon them by statute. As to this co-debt, s.3 paragraph 9 of the Act of 1965 stipulates that the insurer isliable alone as regards the relationship between the two debtors (though not as to the relationship to the third party), inasmuch as the insurer is liable to the insured because of the contractual relationship. When such a liability towards the insured does not exist (for example because the insurer has a right to repudiate liability) then both as co-debtors are liable to the third party, but in the relationship between the insurer and the insured only the latter is liable; however in the relationship of a co-debtor and the third party either debtor is generally liable for the full amount of the debt, whatever the legal position between them may be. Therefore it is no defence for an insurer to state against a third party's action for damages that he is entitled to repudiate liability fully or partiall; because of a breach of policy conditions by the insured (see s.3 paragraph 4 of the Act of 1965).

Further, any other fact which causes the policy to be void ab initio or which effects its cancellation can be pleaded by an insurer as a defence against a third party's direct action only if the tortious act was committed later than one month after the date on which the insurer notified the appropria authority of the situation (see s.3 paragraph 5 of the Act of 1965).

If the third party intends to sue insurers directly he has to notify them in writing within two weeks after the accident (see s.3 paragraph 7 of the Act of 1965).

When by a legally enforceable judgment the third party is not entitled to receive damages from the tortfeasor, the insured motorist, then this judgment is also effective in respect of the insurer of the latter (s.3 paragraph 8 of the Act of 1965).

3. Supplementary sources of compensation for road victims

We finally come to supplementary sources of compensation for a road victim.

For as long as there was no indemnity for road victims in hit-and-run cases where the wrongdoer remained unidentified, and where there was no policy of insurance and the tortfeasor was insolvent, there were loopholes in the protection of an injured party. To fill these gaps German motor insurers themselves undertook in 1955 to provide a source of compensation for such cases of hardship. Much as in the development of the Motor Insurers' Bureau in Great Britain and its M.I.B. Agreement of 1946, German motor insurers voluntarily formed an association registered in Hamburg under the name 'Aid for Road Victims' (Verkehrsopferhilfe e.V. Then insurers are members of the organisation and contribute to it by paying levies. By agreement between the registered association and the insurers the association is obliged to pay out money as compensation.

Since the passing of the Compulsory Motor Insurance Act 1965, a road victim, in certain circumstances cited in s.12 of this Act, has an effective right also to sue the Compensation Fund (Entschädigungsfonds). The Aid for Road Victims association in Hamburg was ordered by the government to carry out the tasks of this Fund, and has been doing so since January 1, 1966.

S.12 of the Act of 1965, outlining the Fund's jurisdiction, states that every person entitled to receive compensation from the keeper or the owner or the driver of a vehicle for personal injuries or death or damage to property resulting from the use of a motor vehicle or its trailer is also entitled to sue the Compensation Fund, provided that the vehicle cannot be traced or there is no insurance against liability to a third party in force as required by statute in favour of the keeper, the owner, and the driver of the vehicle.

This right to claim exists only in so far as the person entitled to compensation can get compensation from neither the keeper, the owner, and the driver, nor from an accident insurer, an association of liability insurers, or social insurance.

Compensation for non- material damage, for instance pain and suffering, is granted only in exceptional circumstances. There are special provisions for damages for damage to property (see s.12 subs. 2 of the Act of 1965).

4. SUMMARY

Some points should be kept in mind in connection with the legal position of the road victim in Germany. In a nutshell they are as follows:

There is absolute liability of the keeper of a vehicle under the Road Traffic Act 1952, but there are statutory monetary limits of liability.

There is unlimited liability under the German Civil Code when there is fault on the part of the wrongdoer, plus here the possibility to receive compensation for non-material damage.

Since 1939 motor insurance against liability for personal injury to or death of a third party, for damage to property of another, and for other financial loss has been compulsory.

There are statutory minimum amounts of insurance. Since 1965 there has been a direct right of action against insurers.

There is a compensation fund managed by the association Aid for Road Victims for certain cases of hardship, hit-and-run cases and those where no policy is in force.

5. Abbreviations:

BGH = Bundesgerichtshof = Federal High Court
DAR = Deutsches Autorecht = German Motor Vehicle Law (magazine)
NJW = Neue Juristische Wochenschrift = New Juridical Weekly (magazine)
RGZ = Entscheidungendes Reichsgerichts in Zivilsachen = Decisions of the Reichs High Court in Civil cases.
VersR= Versicherungsrecht = Insurance Law (magazine)
VRS = Verkehrsrechtssammlung = Survey of Road Traffic Law