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Crime Victim Compensation in Germany – an Overview

Yasemin Körtek



Kapak Sayfasının Arkası – Bu sayfa boş bırakılmıştır.

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İç Kapak Sayfasının Arkası – Bu sayfa boş bırakılmıştır.

Alman Sosyal Hukukunda Şiddet Eylemi Mağdurlarının Tazminat Haklarına Genel Bir Bakış*

Özet:

1970'li yıllarında şiddet eylemi mağdurlarının uğradıkları zararların fail ve devletin sosyal güvenlik sistemi tarafından yetersiz telafisi ve bundan dolayı maddi sorunlar oluşması Alman kamuoyunda tartışmalara yol açmıştır. Şiddet eylemi mağdurlarının durumlarını iyileştirmek için kanun koyucu devletin kendi topraklarında ceza verme monopolundan dolayı halkını şiddet eylemlerine karşı koruma vazifesi ve eğer bu vazifeyi yerine getiremezse oluşan zararları telafi etme görevi olduğunu kabul ederek, 16.5.1976 tarihli şiddet eylemi mağdurları ve ailelerine sosyal tazmin verilmesini öngören yasayı çıkarmıştır. Bu sosyal tazmin yasası savaş mağdurları için ön görülen hizmetler ve gelirleri düzenleyen yasaya atıfda bulunmakta ve şiddet eylemi mağduru kişinin ve ailesinin sosyal güvenliğini güçlendirmektedir. 30 yılı aşkın bir süredir yürürlükte olmasına rağmen bu yasanın tanınmasına dair eksiklik olduğu tespit edilebilir.

Anahtar kelimeler:

Sosyal tazmin, Alman sosyal güvenlik sistemi, şiddet eylem mağdurları, maddi ve aynı yardım

Crime Victim Compensation in Germany – an overview*

Abstract:

In Germany, the insufficient compensation of crime victims by the offender and by the social security system of the State and, resulting from this, the financial distress of the persons concerned led to discussions in the 1970s. To improve the standing of crime victims the legislator accepted the duty to provide compensation when the state had failed to protect people against violence. This is due to the fact that on state territory and in any relevant domain the state has a monopoly regarding the combating of crime. Therefore, the Crime Victims Compensation Act was enacted, which came into force on 16 May 1976. The Crime Victims Compensation Act regulates the application of the system of benefits of the Federal War Victims Relief Act. Through this the social security of crime victims and their families is strengthened. Although the Crime Victims Compensation Act has been in force for over 30 years, there is still a lack of adequate information.

Keywords:

Social compensation, German social security system, crime victims, cash and non-cash benefits

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I. Introduction

The issue of inadequate compensation of crime victims is often subject of discussions, because even though compensation claims do exist the victims get into financial distress: Neither the claims for restitution against the offender nor benefits from private or statutory insurances can afford full compensation of damages to health including the (financial) consequences.¹

The responsibility to pay compensation lies primarily with the offender: In order to be compensated for damages caused by an act of violence, victims of violent crimes can claim in tort for damages under civil law, as well as for compensation for pain and suffering against the offender. In cases of death, surviving dependants can claim for pensions if the victim had been legally obliged to provide maintenance.² The injured person can enforce his claim for damage and for pain and suffering in civil proceedings.³ In addition, the adhesive procedure enables the injured person and the surviving dependants to pursue the claims for damages according to civil law in criminal proceedings.⁴ The advantage of the adhesive procedure is, for instance, that the victim is not burdened with the civil proceeding in addition to the criminal proceeding, and also that only one court deals with the case. But there are negative aspects, too. One point of critique is that the criminal proceeding is stressed with subjects of civil law; the other point of critique is that criminal principles apply for civil claims, and for this reason the possibilities of defence for the accused may be reduced. In practice, the adhesive procedure is of minor relevance.⁵

* Revised version of a presentation given at the International Conference for Victims Support 2008 Taipei/Taiwan on 14/11/2008.

¹ BT-Drs. (Bundestag printed paper) 7/2506 p. 8, 9.

² See §§ 823, 253 II, 844 Civil Code.

³ In cases where a person has been continually exposed to infringements the civil law offers possibilities of protection, too. Mainly the victim can file a suit with the objective of prohibition; one possibility would be the enforcement of a preliminary injunction, the other would be an action for injunction. In this context the *Protection Against Violence Act (Gesetz zum zivilrechtlichen Schutz vor Gewalttaten und Nachstellungen)* should be mentioned, which was launched on 11 Dec 2001 (Federal Law Gazette - BGBl. I p. 3513) and has been in force since 1 Jan 2002. This act establishes the legal basis for decrees of the civil court concerning the prohibition of harassment in cases of intentional and unlawful infringement of a person's body, health or freedom including the threat of such infringements, and in cases of stalking. The act also constitutes a basis for the claim concerning a temporary leaving of a joint accommodation if the injured person lives in the same household with the offender.

⁴ §§ 403-406d Code of Criminal Procedure (StPO).

⁵ See *Meyer-Gossner*, Strafprozessordnung, StPO, Kommentar, 50th Edition, München 2007, Vor § 403 recital 1 et sqq.

In many cases it will not be possible for the victim and their surviving dependants to obtain restitution from the offender.⁶ The offender will perhaps never be identified or the results of the police investigation will not provide sufficient evidence on who committed the crime. Even if the victim has obtained a judgement on damages, the offender may have no income or assets and will not be able to pay the damages in practice. Furthermore, the benefits provided by the social security system can be insufficient. Indeed, the victim can apply for social welfare benefits if - mainly in cases of permanent injury to health - despite the benefits from the statutory health insurance, pension insurance or accident insurance the damage cannot be fully compensated, or if the victim is not covered by the statutory health insurance, pension insurance or accident insurance. But social welfare provides social security only for a minimum level of subsistence and social welfare does not meet the special responsibility of the general public for crime victims.⁷

In the 1970s the dissatisfying situation for crime victims strengthened the cognition of the necessity of a statutory settlement.⁸ In 1976 the Crime Victims Compensation Act was launched and it came into force on 16 May 1976.⁹ According to the intention of the legislator the Crime Victims Compensation Act serves to save seriously affected crime victims from social decline by providing economical safeguards for cases of invalidity, helplessness or care dependency. Crime victim compensation has the function of assuring subsistence, because victims can get into unexpected distress day-to-day without it being their own fault, once a crime suffered has led to disability, helplessness or care dependency.¹⁰

State compensation of crime victims is justified by the argument that in the area of its territory and domain the state has a monopoly on the combating of crime and, therefore, the state is obliged to protect its citizens against criminal acts, especially against violence. If state protection fails, the state will be obliged to recompense the victims of violent crimes.¹¹ To justify the compensation of victims of violence by solely holding the state responsible for the failure in crime control raises the question as to whether state precautions can be expected to prevent crimes entirely; that is why crime victim compensation is based on the concept of a solidary responsibility on the part of society shown with persons who have suffered

⁶ *Weintraud*, Staatliche Entschädigung für Opfer von Gewalttaten in Großbritannien und der Bundesrepublik Deutschland, Baden-Baden 1980, p. 17.

⁷ *Schulz-Lüke/Wolf*, Gewalttaten und Opferentschädigung, Kommentar zum Gesetz über die Entschädigung für Opfer von Gewalttaten, Berlin/New York 1977, Introduction (p. 1, 2); *Kunz/Zellner*, Opferentschädigungsgesetz, Kommentar, 4th Edition, München 1999, Introduction (p. 11, 12).

⁸ On legislation history cf. *Weintraud*, p. 60 et sqq.

⁹ BGBl. I p. 1181. In the following, provisions without specification are those of the Crime Victims Compensation Act.

¹⁰ BT-Drs. 7/2506, p. 7; *Heinz*, Opferentschädigungsgesetz, Kommentar, Stuttgart 2007, part A para. 33.

¹¹ BT-Drs. 7/2506, p. 10; BSGE (Federal Social Court collection of cases) 49, 104, 105.

damage or with their dependants in the event that they cannot recover any or only insufficient damages from the offender.¹²

Systematically, the compensation of crime victims is allocated in the field of social compensation.¹³ The social compensation law is enshrined in § 5 Social Code Book I: Anyone who suffers health damage the consequences of which are accounted for by the state community in terms of special victim compensation or for other reasons in accordance with compensation law principles, has a right to measures necessary for the conservation, improvement and restoration of his health and of his capacities, as well as to an adequate economic benefit.¹⁴ The term “social compensation“ therefore serves to designate services that are to compensate for any consequences of injuries to health acknowledged to be in the special responsibility of the general public.¹⁵ The constitutional obligation of the legislator for the establishment and maintenance of social compensation law can be derived from the rule-of-law principle and the principle of social state.¹⁶ Social compensation is financed by governmental tax revenues.¹⁷

Indeed, social compensation law has, so far, not been codified in a separate Book pertaining to the Social Code; the relevant individual laws, however, are classified as particular sections of the Social Code according to § 68 nos. 7, 8 Book I.

¹² Cf. *Hase*, Soziales Entschädigungsrecht, in: *von Maydell/Ruland/Becker* (Eds.), Sozialrechtshandbuch, 4th Edition, Baden-Baden 2008, para. 5 (p. 1357); BSGE 52, 281, 287.

¹³ Traditionally the social security system is divided into three areas: social insurance (Sozialversicherung), social service (Sozialversorgung) and social welfare (Sozialfürsorge). While retaining this traditional systemization it should be considered that additional systems besides these three areas of social law exist. Cf. *von Maydell*, Das Sozialrecht und seine Stellung im Gesamtsystem, in: *von Maydell/Ruland/Becker* (Eds.), para. 11-14.

A more recent categorisation differentiates between social provision (particularly social insurance), social compensation (pensions and related benefits to war victims; victims compensation), social assistance (e.g. educational assistance) and social welfare.

¹⁴ The pension payments are listed under § 24 Social Code Book I.

¹⁵ BSGE 54, 206, 208; BVerfGE (Federal Constitutional Court collection of cases) 48, 281, 288.

¹⁶ *Zacher*, Das soziale Staatsziel, in: *Isensee/Kirchhof* (Eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band II, Verfassungsstaat, 3th Edition, Heidelberg 2004, § 28 para. 44, 45; *Kessler*, in: *Krahmer* (Ed.), Sozialgesetzbuch, Allgemeiner Teil, Lehr- und Praxiskommentar, Baden-Baden 2002, § 5 para 10.

Article 20 I GG: The Federal Republic of Germany is a democratic and social federation.

Article 28 I 1 GG: The constitutional order in the *Länder* must comply with the principles of a republican, democratic and social constitutional state within the meaning of this Basic Constitutional Law.

¹⁷ In the domain of crime victim compensation, Federal and *Länder Governments* share the costs. The Federal Government bears 40% of the expenses of the *Länder* for victim compensation.(§ 4 II).

On the basis of the occurrence of applications for compensation, a lack of adequate information can still be determined, although the Crime Victims Compensation Act has been in force for over 30 years. In 2007, 217.923 violent acts were registered in the federal territory. Only 23.404 applications for compensation were received, and hereof 10.012 applications were rejected. Only about 10-11 % of the crime victims applied for compensation.¹⁸

II. Entitlement to Maintenance According to the Crime Victims

Compensation Act

1. Preface

a. Scope of the Application

The *territorial* application of the Crime Victims Compensation Act covers the territory of the Federal Republic of Germany. This complies with the legislative aim to compensate for any failure of the German safety system.¹⁹ Furthermore, compensation is provided for crimes committed on ships or aircrafts which are entitled to carry the federal flag or the symbol of citizenship of Germany²⁰.

The scope of application of the act, as regards the *persons* affected, covers - apart from the victim - the surviving dependants, too. Also third persons who got hurt while repelling the attack are entitled to claim for compensation. In addition, the scope of application of the act covers indirectly damaged persons and the unborn life, that is, victims of prenatal violence are eligible for compensation.²¹ Foreigners from non-EU member states can claim for compensation if they have been legally residing in Germany for more than three years (§ 1 V). Furthermore, foreigners from third countries can obtain compensation if they are from countries that offer reciprocity, that is, the third country has a scheme in place which would compensate German nationals if victimised in that country (§ 1 IV). Concerning the nationals of EU member states, a reference to the judgement of the European Court of Justice in the

¹⁸ For comparison, in 2006, 215.471 violent acts were registered in the federal territory, 22.597 applications for compensation were received, 10.370 applications were rejected. Cf. the figures of the Weisser Ring e.V., available at: <http://www.weisser-ring.de>.

¹⁹ *Heinz*, part C § 1 para 52; BT-Drs. 7/2506, p. 13.

²⁰ Cf. § 4 Criminal Code.

²¹ *Heinz*, part C § 1 para 28 et sqq.; *Kunz/Zellner*, § 1 para 4, 5.

The cases of indirect damage, like the cases of *nervous shock*, are in dispute. But the Federal Social Court stated, at an early stage, in its decision from 7.11.1979 (BSGE 44, 98) that persons, who were injured indirectly, can claim for compensation according to the Crime Victims Compensation Act. In the respective case a mother was seriously shocked after receiving the message of her children's death as consequence of a crime.

“Cowan” case dated 2 Feb 1989²² should be made: Based on the prohibition of discriminatory practices the court stated that, concerning crime victim compensation, the discrimination of persons who have the freedom of movement according to European law is not allowed; they must have the same rights as the natives.

In the last years, the compensation of persons who were victims of crimes committed in foreign countries was under controversy because it means the suppression of the territory principle.²³ Currently, German persons victimised by terrorist attacks abroad can claim compensation from the *compensation fund for victims of acts of terrorism*. This possibility, however, is not designed as a legal right. Meanwhile a draft law has been introduced²⁴ and enacted²⁵ which stipulates that victims of crimes committed in foreign countries are to be compensated in accordance with the respective degree of damage caused.

The compensation systems of Member States of the European Union like Italy, Austria, Portugal, Sweden and France already provide measures for compensation for crimes committed outside their territories. The compensation systems in Italy, Portugal and France require citizenship status of the respective country, whereas Sweden requires permanent residence status in regard to personal injury caused by acts committed abroad. Austria provides compensation to citizens of Austria or of one of the Member States, if the respective person has his/her residence in Austria in terms of the freedom movement within the EU. The European Court of Justice decided in its judgement of 5 June 2008 (“Wood”, C-164/07) that the limitation (on the citizenship of the respective country) concerning the compensation for victims of crimes committed abroad constitutes an infringement of Article 12 I of the Treaty.

The new law is in line with the jurisdiction of the European Court of Justice, since it does not limit the compensation to Germans only, but also includes privileged foreigners (§ 1 V). In this respect, provisions remain in accordance with European Law. Furthermore the rights of foreigners who became crime victims in Germany during temporary stays of up to six months will be extended, in that they will entitle relatives up to the third degree to claim for compensation. According to current law foreigners who stayed in the country temporarily for

²² C-202/88, Slg. 1989, 195.

²³ See *Kauder*, Entschädigung für deutsche Opfer von im Ausland begangenen Gewalttaten, ZRP 2003, 402 ff.

²⁴ *Draft of a third law regarding the amendment of the Crime Victims Compensation Act (Entwurf eines Dritten Gesetzes zur Änderung des Opferentschädigungsgesetzes)*, BT-Drs. 16/12273.

²⁵ BGBl. I (2009) p. 1580.

up to six months can claim compensation if they are married to a German citizen or a privileged foreigner or are related by lineal descent (§ 1 VI no. 1).

As for the *temporal* validity of the act, compensation is to be granted for crimes which occurred after the date of commencement of the act (§ 10). Crimes which occurred before 16 May 1976 are to be compensated for in cases of hardship, namely, if in consequence of the damage the applicant has become seriously disabled, is in need and is domiciled or habitually resident in Germany (§ 10a).

The act is *not applicable* to damages which result from traffic offences (§ 1 XI). In such cases an application can be made to the Road Accident Fund, which is the compensation fund for damages resulting from car accidents. This compensation fund is an institution of the German automobile third party insurance companies according to § 12 of the Compulsory Insurance Act. Furthermore, no compensation is given for purely financial losses and no compensation is given for non-material damages.

b. Application of the Federal War Victims Relief Act

Pursuant to § 1 I 1, anyone who has suffered damage to one's health within the scope of the law or on a German vessel or aircraft due to an intentional²⁶, unlawful assault against himself or any other person or due to his lawful defence, will – due to the health-related and economic consequences and upon application – receive benefits, applicable *mutatis mutandis* to the regulations of the Federal War Victims Relief Act.²⁷ Accordingly, the system of benefits of the Federal War Victims Relief Act applies in accordance with the reference in the Crime Victims Compensation Act regarding the legal consequences.²⁸ The competent agencies for the provision of benefits based on the Crime Victims Compensation Act are the same agencies which are competent to administrate the Federal War Victims Relief Act, namely, the Federal States' war pension offices (§ 6).²⁹

The care for war victims is traditionally part of social compensation. However, crime victim compensation is not to be qualified as a claim to compensation against a public authority for

²⁶ Victims of crimes which were committed with negligence are not eligible for compensation.

²⁷ Also: intentional poisoning or to the leastwise negligent causing danger to life or physical condition in cases of crimes committed by means dangerous to public safety (§ 1 II).

²⁸ BT-Drs. 7/2506, p. 11.

The Federal War Victims Relief Act provides benefits for medical and occupational rehabilitation, compensatory payments, reimbursement of expenses and subsistence benefits (see § 9 Federal War Victims Relief Act).

²⁹ Cf. § 24 II Social Code Book I.

impairment of health.³⁰ By contrast, the benefit claims to pensions and related benefits for war victims have always been regarded as legally standardized claims to compensation against a public authority for impairment of health.³¹

c. Material Requirement: Intentional Unlawful Violent Attack

Concerning the *preconditions* of a claim for compensation, the *injury to health* has to be the result of an *intentional unlawful violent attack*. Compensation is not granted for criminal acts which do not cause harm to a person's physical integrity, such as fraud or burglary.³² Crime victim compensation serves to remedy a damage caused to a person's health including its consequences.

The necessity of an intentional violent attack is the central element of the definition. In the jurisdiction of the criminal courts an intentional violent attack is defined as an action against another person by force and with agonistic and hostile intent.³³ In earlier cases the Federal Social Court shared the definition of the criminal courts,³⁴ but later enlarged the meaning of this element of definition in its legal practice. One reason was that the respective definition caused problems in cases where the offender did not act by force, but committed the act by exploiting a confidential relationship, e.g. in cases of sexual abuse of children. In the two decisions dated 18 Oct 1995, the Federal Social Court stated that in such cases compensation is to be granted, because a violent act occurred even if the offender did not act by force; there is no reference to criminal law in the Crime Victims Compensation Act, so the question concerning the existence of a violent act is to be determined independently by the social courts. Therefore, an intentional violent attack is to be understood as a direct impact on the body of another person in a punishable way.³⁵

Of late, *mobbing* has gained importance in labour relations. Employees claim for damage based on mobbing in the workplace. The Federal Social Court dealt with mobbing cases in the decision dated 14 Feb 2001 and rejected the granting of compensation. It stated that mobbing is to be seen as a direct impact on the body of another person and therefore as a violent act in terms of social compensation law only in cases where the offender goes

³⁰ *Schulz-Lüke/Wolf*, § 1 no. 1; *Kunz/Zellner*, § 1 para. 1.

³¹ *Hase*, para. 3 (p. 1356); BSGE 1, 272, 275; BVerfGE 48, 281, 288.

³² BT-Drs. 7/2506, p. 10, 11.

³³ *Kühl*, Strafgesetzbuch, Kommentar, 26th Edition, München 2007, StGB, § 13 para. 6.

³⁴ BSGE 59, 46, 47.

³⁵ BSGE 77, 7; BSGE 77, 11.

E.g. intentional personal injury, homicide, sexual offences, maltreatment of children, malicious arson, offences causing nervous shock.

beyond the limits of tort, because compensation is to be granted only to persons who are victims of crimes; social compensation does not provide security for every risk resulting from the participation in society.³⁶

The current question now is *stalking*. Is stalking to be seen as a violent act according to the Crime Victims Compensation Act? The Higher Social Court of Lower Saxony and Bremen decided on 22 June 2006³⁷ that stalking is a violent act according to the Crime Victims Compensation Act, because in contrast to cases of mobbing stalking cases are punishable according to the Criminal Code and here the offender goes beyond the limits of tort.³⁸ Concerning stalking cases no decision has been made by the Federal Social Court as yet.

Since social compensation law does not seek to compensate any random damages caused, but only those whose origins the state holds special responsibility for, the principle of causality applies: There must be a causal connection between the action causing the damage (intentional unlawful violent attack) and the damage to health (e.g. injury of the left hand); Between the damage to health and the consequence of the damage (e.g. loss of the left hand) the probability of the causal connection suffices.³⁹

d. Exclusion from Compensation

The wrong behaviour of the victim can lead to the *exclusion* from compensation. Compensation *is not given* in cases where the victim caused the damage him-/herself and also in other cases of inequity (§ 2 I). Inequity is an indefinite legal concept.⁴⁰ In its jurisdiction the Federal Social Court has developed four cases: Compensation is unfair if the victim himself/herself had acted unlawfully before the violent act happened, or if the victim belongs to the group of alcohol and drug consumers and the violent act emerged from this environment, or if the victim entered into the dangerous situation consciously or frivolously, or if the social compensation would privilege the offender.⁴¹ Compensation *can be excluded* if the victim did not co-operate in the clarification of the violent act, e.g. did not report the offence to the police (§ 2 II). But the co-operation has to be reasonable; co-operation can e.g. be unreasonable in cases of criminal acts within the family or because of medical

³⁶ BSGE 87, 276.

³⁷ File number L 13 VG 7/05.

³⁸ See *Heinz*, part C § 1 para. 120.

³⁹ *Schulz-Lüke/Wolf*, § 1 no. 321, 339; *Kunz/Zellner*, § 1 para. 35 et sqq.

⁴⁰ *Kunz/Zellner*, § 2 para. 8.

⁴¹ BSGE 57, 168, 169; BSGE 49, 104, 110; BSGE 83, 62, 66; BSGE 89, 75, 78.

reasons.⁴² Within its discretion the agency has to consider the circumstances of the individual case, the interests of the victim and the interests of the public.⁴³

e. Formal Requirements and Legal Process

Benefits according to the Crime Victims Compensation Act are provided on application. There is no explicit time limit for making an application. Generally, payments are granted from the month in which the application is made. However, compensation can be granted in respect of the period before the application if the application is made within one year after the offence was committed.⁴⁴

If the agency rejects the application entirely or in part, the victim can file an objection within one month.⁴⁵ After filing an objection, the agency or rather the upper authority deals with the case again and can abolish the former decision. But if the competent authority rejects the objection, too, then the applicant can file an action within one month. The competent courts are the social courts (§ 7).⁴⁶ The competent agency must inform the applicant about the remedies regarding its decisions.

The administrative and the judicial social procedure are free of charge.⁴⁷

f. Relations to Civil Law

Compensation according to the Crime Victims Compensation Act does not depend on a claim for damages according to civil law. However, if the victim obtains compensation from the state, existing claims for damages according to civil law are transferred to the competent authority by law (§ 5). That is, the victim is no longer entitled to claim restitution from the offender, but the right to claim for non-material damages still exists.

⁴² *Kunz/Zellner*, § 2 recital 22; *Heinz*, part C § 2 para. 35.

⁴³ *Kunz/Zellner*, § 2 recital 19.

⁴⁴ § 1 I in conjunction with § 60 Federal War Victims Relief Act.

⁴⁵ It should be mentioned that obtaining benefits may not be the main interest of a victim. First of all the victim wants to obtain acceptance for the fact that something wrong has happened to her or him.

⁴⁶ See §§ 51 I No. 6, 78, 84, 87 Sozialgerichtsgesetz (Social Court Law).

⁴⁷ In cases of representation by a lawyer costs incur. Within the court procedure the victim can apply for legal aid. Legal aid will be granted if due to the personal and financial circumstances the plaintiff cannot bear the costs and if the action is likely to succeed. Within the administrative procedure the institution of legal advice must be mentioned, which will enable persons of limited means to consult a lawyer.

g. Relations to Social Insurance

The victim cannot claim for benefits according to the Crime Victims Compensation Act if the violent act qualifies as an occupational accident and therefore the *statutory accident insurance* or the *government officials' accident compensation* is applicable. The benefits according to the social compensation law are suspended. In such cases the victim obtains benefits from the statutory accident insurance, but if the benefits provided by the social compensation law are higher than the benefits from the statutory accident insurance the victim can apply for the difference.⁴⁸

The *statutory pension insurance* grants benefits for medical and occupational rehabilitation with the same intention as the social compensation law, namely, to remedy the damage to the earning capacity and to integrate the insured in the labour market. But these benefits are subsidiary to the rules of the social compensation law.⁴⁹

The *compulsory long term care insurance* was introduced in the German social security system in 1995.⁵⁰ The compulsory long term care insurance provides security for the risk of need for personal and nursing care. The benefits of the compulsory long term care insurance are subsidiary to the benefits of social compensation.⁵¹

In cases where the *statutory health insurance* has already provided medical care to victims who afterwards apply for compensation, the statutory health insurance has a right of recourse for their expenses if the damage to the health of the victim was accepted by the competent authority as the result of the violent act.⁵² In any case, the statutory health insurance provides medical services to crime victims at the expense of the competent authority according to social compensation law.⁵³

⁴⁸ § 1 I in conjunction with § 65 Federal War Victims Relief Act.

⁴⁹ § 12 Social Code Book VI.

⁵⁰ In long-term care insurance, insurance is mandatory: All those who are insured in statutory health insurance are members of social long-term care insurance and all those with health insurance in a private health insurance company or with special systems are members of private long-term care insurance (§§ 20, 23 Social Code Book XI). The benefits are fixed by law and are identical in both systems.

⁵¹ § 13 I no. 1 Social Code Book XI. The benefits of the statutory long-term care insurance depend on the extent of the need for care and they are granted irrespective of age, income and wealth.

⁵² Cf. e.g. BSGE 68, 248.

⁵³ Cf. § 1 I in conjunction with §§ 18c, 19 War Victims Relief Act.

2. Benefits Granted to the Victim

Substantially, the victim can apply for medical treatment, occupational rehabilitation, basic pension, supplement for spouses, nursing allowance, compensation paid for loss of career, compensatory pensions and supplementary benefits due to the care for war victims.

a. Medical Treatment

The injured person is entitled to curative treatment, in order to remedy, in particular, health disorders and resulting adverse effects on the ability to practice his profession and on earning capacity, to avert any aggravation of the condition, prevent the need for long-term care, cure physical discomforts and enable the person to be as comprehensively as possible included in life.⁵⁴ The scope of benefits of the social compensation law is, in essence, similar to that of the statutory health insurance (§ 27 I Social Code Book V). One important difference is that the benefits according to social compensation law are, to a large extent, provided without contribution whereas the statutory health insurance requires additional payments for healthcare or pharmaceutical products.⁵⁵ The victim is entitled to benefits like outpatient/inpatient medical care, medicine, health care products, dental treatment and sickness benefit if the victim is unable to work, to domestic help and benefits, special gymnastic exercises for people with disabilities, as well as to medical rehabilitation and even to travel costs related to medical treatment. The principle of benefits in kind applies, that means there is no cost refund. Benefits in kind are granted to the beneficiary without financial participation on his part.⁵⁶

A difference is made between ‘curative treatment’ and ‘treatment of the sick’. Curative treatment is generally granted for any injuries to health that have resulted from the damage. ‘Treatment of the sick’ means any further form of curative treatment granted for other medical conditions.⁵⁷ Hospital treatment, for instance, is granted to any person suffering from a degree of damage of at least 50, and to their spouses, children and other relatives who share a common household with the person, as well as to surviving dependants.

⁵⁴ See § 1 I in conjunction with §§ 10 et sgg. Federal War Victims Relief Act.

⁵⁵ See *Heinz*, part D para. 7 et sqq.

⁵⁶ § 1 I in conjunction with § 18 I Federal War Victims Relief Act.

⁵⁷ Treatment of the sick cannot be claimed, for instance, if the beneficiary draws an income that is above the gross annual earnings limit according to the compulsory health insurance (see § 1 I in conjunction with § 10 VII Federal War Victims Relief Act).

b. Occupational Rehabilitation

Programmes for participation in working life serve to remedy the damage to the earning capacity and re-integrate the crime victims into the labour market. The benefits for participation in working life are geared to appropriately compensate or alleviate the consequences of a damage in order to maintain or acquire an aptitude or an affinity for a profession in accordance with the profession hitherto exercised by the injured party. Measures include retraining, skill enhancement or further education. Granting of such benefits requires, among other things, the likely potential of the injured party to reach the aim of the benefits for participation in working life.⁵⁸ Provision is also made for benefits to the employer, such as training subsidies or integration allowances for employers.

c. Basic Pension

The basic pension serves to compensate for the additional expenses which result from an injury caused by a violent act.⁵⁹

Until recently, the granting and the amount of the basic pension depended on the respective reduction in earning capacity, i.e. the term 'reduction in earning capacity' is used to calculate the damage caused to the victims' health: If the reduction in earning capacity is determined to amount to at least 25 % and if the earning capacity remained continuously reduced for a period of at least six months, then the victim obtains the basic pension. But the Federal War Victims Relief Act was amended last in December 2007.⁶⁰ To avoid misunderstandings, namely, that compensation is limited to working life, the legislator has not used the term 'reduction in earning capacity' anymore since the last amendment.⁶¹ Instead, the term 'degree of damage' was introduced without causing any changes in material aspects, especially with regard to the preconditions. The granting and the amount of the basic pension with effect from 21 Dec 2007 depend on the degree of the damage caused to the health of the victim and the minimum degree is still fixed at 25, while the highest degree is 100.⁶² The amount is settled by law and is to be adjusted annually according to the income development

⁵⁸ See § 1 I in conjunction with §§ 26, 26a Federal War Victims Relief Act, §§ 1 et sqq. Regulation on the Care for War Victims (BGBl. I p. 80, 1979), §§ 33-38 Social Code Book IX.

⁵⁹ BT-Drs. 7/2506, p. 11.

⁶⁰ Law for the Amendment of the Federal War Victims Relief Act and of other regulations included in Social Compensation Law dated 13.12.2007, BGBl. I p. 2904.

⁶¹ See *Vogl*, Aktuelle Änderungen des Sozialen Entschädigungsrechts, Die Sozialgerichtsbarkeit (SGb), p. 583 et sqq.

⁶² § 1 I in conjunction with §§ 30, 31 Federal War Victims Relief Act.

of persons insured in the statutory pension insurance. Currently, the basic pension rates amount to:

| | |
|----------------------|-------|
| Degree of damage 30 | 120 € |
| Degree of damage 40 | 164 € |
| Degree of damage 50 | 221 € |
| Degree of damage 60 | 279 € |
| Degree of damage 70 | 387 € |
| Degree of damage 80 | 468 € |
| Degree of damage 90 | 562 € |
| Degree of damage 100 | 631 € |

The degree of the damage caused to the health of the victim can be raised if the victim is *notably affected in career terms*, for instance, if the victim cannot carry out his/her former job or the occupation the victim had intended to carry out before the crime occurred or any other equivalent job.

In cases of serious damages, which cannot be determined sufficiently by the degree of 100, *seriously disabled persons' supplements* can be granted in addition to the basic pension. This benefit is graduated into six levels:

| | |
|-----------|-------|
| Level I | 72 € |
| Level II | 150 € |
| Level III | 224 € |
| Level IV | 299 € |
| Level V | 373 € |
| Level VI | 449 € |

The degree of damage caused to the health of the victim is to be determined by medical report. Any reduction in mental or physical functions and with effect to every area of life is to be considered. The requirements which the medical experts should take into account in determining the degree of the victim's health damage are issued by the Federal Ministry of Labour and Social Affairs and are based on the decisions and recommendations of the medical expert advisory council. Up to now, and according to the jurisdiction of the Federal Social Court, these requirements are only expert opinions, but are to be considered as regulations below the level of a law in administrative and judicial procedure.⁶³ Since the last amendment the Federal Ministry has had the power to state the principles concerning the

⁶³ Established practice of the BSG (Federal Social Court), most recently BSG, decision dated 24 April 2008, ref. no. B 9/9a SB 10/06 R.

medical determination of the health damage caused to a victim and its degree by statutory order.⁶⁴

The basic pension, which is to be granted for life, is not income-related and it is not to be included in the assessment of other governmental benefits like welfare benefits, that means there will be no deduction.

At this point, a reference should be made to the pensions according to the statutory accident insurance. The regulations of the statutory accident insurance state that the injured person, injured in an occupational accident or by an occupational disease, can obtain a pension for lifetime. The amount depends on the reduction in earning capacity, which must be at least 20 %; furthermore, the reduction in earning capacity must have lasted for at least 26 weeks.⁶⁵ However, when the injured person enters retirement age the retirement pension from the statutory pension insurance will not be paid if the sum of the pension from the statutory accident insurance and of the statutory pension insurance exceeds a maximum amount, which is to be calculated by law.⁶⁶ In contrast the victim, who obtains a basic pension according to the social compensation law, can obtain a retirement pension at the same time without any further calculations.

d. Supplements for Spouses

Furthermore, disabled victims of a degree of health damage of at least of 50 obtain monthly paid supplements for spouses and life-partners to the amount of 69 €. In cases of divorce or invalidation of marriage the supplement is to be paid if the beneficiary takes care of a child.⁶⁷ Supplements for children can be granted if the victim does not obtain child benefit.⁶⁸ The premium for married couples and the children's supplement serve as an assurance of livelihood.⁶⁹

⁶⁴ § 1 I in conjunction with § 30 XVII Federal War Victims Relief Act. See Versorgungsmedizin-Verordnung, 10.12.2008, BGBl. I p. 2412

⁶⁵ § 54 Social Code Book VII.

⁶⁶ See § 93 Social Code Book VI.

⁶⁷ § 1 I in conjunction with § 33a Federal War Victims Relief Act.

⁶⁸ § 1 I in conjunction with § 33b Federal War Victims Relief Act.

The supplement for children will be paid in the amount of the statutory child benefit.

⁶⁹ See *Heinz*, part D para. 210.

e. Nursing Allowance

Nursing allowance is granted to persons who need help from third persons to maintain their livelihood.⁷⁰ Attendance supplement, which is not based on income or property, shall serve to enable the person in need of nursing care to procure the required nursing him- or herself.⁷¹

A precondition is *helplessness* for at least one month, that is, the injured person is in need of assistance with a series of periodic activities of daily life, e.g. acts of body care, eating, drinking, dressing or undressing. The beneficiary is also deemed ‘helpless’ in cases where help is necessary in terms of control or guidance, or where the person does not need permanent help, but the constant willingness to help. ‘Helplessness’ is not only to be determined by medical estimate. General experience of life and the particular circumstances must also be taken into consideration.⁷² It should be mentioned that ‘helplessness’ in terms of social compensation law is not defined in the same way as ‘in need for personal/nursing care’ in terms of the compulsory long term care insurance.⁷³ But with a view to compulsory long term care insurance the Federal Social Court - in its jurisdiction concerning the respective regulation of the Federal War Victims Relief Act - estimates the need of assistance according to the expenditure of time for the daily assistance: Daily expenditure of time for care services must amount to a minimum of two hours. In determining the helplessness it is not only the time care input that is decisive; other circumstances, too, are to be considered, e.g. the economical value of the necessary care (numbers of activities, inappropriate spreading of assistance).⁷⁴ The amount of the flat-rate benefit on the first level is 266 € per month. Depending on the severity of the health disorder the benefit can be

⁷⁰ § 1 I in conjunction with § 35 Federal War Victims Relief Act.

⁷¹ *Griep/Renn*, Pfllegesozialrecht, 4th Edition, Baden-Baden 2009, para. 231.

⁷² *Heinz*, part D para. 213.

⁷³ To give a complete account, the term “helplessness” in Social Code Book IX concerning disabled persons and in the Income Tax Act concerning tax advantages has the same meaning as in the field of social compensation law.

⁷⁴ BSGE 90, 185, 188, 189.

The compulsory long term care insurance requires that the diseased person must have been in need of assistance with respect to a series of periodic activities of daily life for at least six months. The need for personal/nursing care is to be determined in relation to the time a third person has to assist the diseased person in doing the periodic activities of daily life. The time is also decisive for the care level: There are three care levels, e.g. if the person concerned needs assistance for 90 minutes (hereof 45 minutes for the basic activities of daily living) per day then he or she belongs to care level I (§§ 14, 15 Social Code Book XI). In contrast, the Federal Social Court fixes the minimum limit for the assistance to two hours, because the determination of ‘helplessness’ applies to an enlarged scale. In summary, it should be mentioned that there are some differences between the benefits according to the compulsory long term care insurance and the social compensation law, but the benefits according to the compulsory long term care insurance are subsidiary to the benefits according to social compensation law (§§ 13 I, 34 I no. 2 Social Code Book XI).

increased up to level six. However, the law regulates that blind persons obtain nursing allowance according to not less than level III (645 €) and persons suffering from brain injury with a degree of damage of 100 obtain nursing allowance according to not less than level I. The benefit is also increased if the assistance is based on a contract and the appropriate payment to the third person for the assistance lies below the amount of the flat-rate benefit. Furthermore, the costs of institutional care are to be paid completely under partial deduction of the benefit payments, if the appropriate care could otherwise not be guaranteed.

The helplessness must be the result of the damage caused by the respective crime. Determining this causality can be difficult in cases where the victim also suffers from health disorders which are not the result of the crime but have caused helplessness, too. Therefore, concerning the determination of causality it is necessary for the health damage caused to the victim by the violent act, as regards the occurrence and dimension of the helplessness, to represent a nearly equivalent condition as any health disorders that are not associated with the results of the violent act.⁷⁵

f. Compensation Paid for Loss of Career

Compensation paid for loss of career serves to provide the pensionable injured person, whose income of a current or former occupation has been reduced due to the consequences of the damage, with a partial compensation. That is, the benefit compensates the loss of income as a consequence of the damage. It will amount to up to 42.5 % of the loss.⁷⁶ The reduction in earning capacity, the amount of the previous salary and the expected occupational development are decisive factors. The calculation is regulated by law in connection with the respective ordinance. Compensation for loss of career will be paid if causality can be established between the damage and the loss of income.⁷⁷

g. Compensatory Pension

Compensatory pension serves to provide injured persons with a guarantee to a certain income level and to keep them from becoming dependent on welfare benefits, if they cannot keep this income level for reasons beyond their control.⁷⁸ Injured persons with a degree of damage of at least 50 can apply for compensatory pensions if they are unable to work or just able to work on a limited scale because of their health disorder, old age or reasons beyond

⁷⁵ *Heinz*, part D para. 217.

⁷⁶ § 1 I in conjunction with § 30 III Federal War Victims Relief Act.

⁷⁷ In this field an extensive jurisdiction exists. See *Heinz*, part D para. 166 et sqq.

⁷⁸ *Heinz*, part D para 202.

their control. Depending on the degree of damage caused by the violent act to the health of the victim the amount of this flat-rate benefit ranges between 387 € and 631 €. ⁷⁹ Income will be deducted; the procedure is regulated by law in connection with the respective ordinance.

h. Supplementary Benefits due to the Care of War Victims

Supplementary benefits due to the care for war victims are qualified as special assistance in individual cases and are income and property related, but the amounts of exemption are favourable for the person concerned in comparison with the amounts of exemption which are to be considered in granting public welfare benefits. The Federal War Victims Relief Act and the respective ordinance contain particular regulations. The benefits include e.g. supplementary welfare allowance, welfare assistance to meet special contingencies of life, assistance during sickness, domestic help, help for the elderly, convalescence assistance, care assistance⁸⁰ and programmes for participation in working life.⁸¹

In the case of disputes the administrative courts are competent, that is, not the social, but the administrative courts decide on granting benefits due to the care for war victims (§ 7 II).

3. Benefits Granted to Surviving Dependants

Surviving dependants can apply for compensation if the victim died in consequence of the damage caused by the violent act. The provided benefits serve to compensate the loss of maintenance. The system of benefits of the Federal War Victims Relief Act applies in accordance with the reference in the Crime Victims Compensation Act regarding the legal consequences, that is, that surviving dependants of crime victims are entitled to benefits similar to those of surviving dependants of war victims (§ 1 VIII).

To bear the costs of a funeral, surviving dependants obtain *burial payment*. But benefits which are paid according to other statutory provisions for the same purpose must be deducted.⁸² In addition to the payment for the funeral the surviving dependants can obtain a *death grant* up to the triple amount of the benefits that the victim obtained last.⁸³

⁷⁹ § 1 I in conjunction with § 32 Federal War Victims Relief Act.

⁸⁰ Care assistance, such as payment of nursing care or other services of domiciliary care, generally correspond to the terms of social welfare benefits (§§ 61 et seq. Social Code Book XII). Also the definition of the need of long-term care, level of care and benefits are based on the relevant regulations of social welfare, which in turn are based on the arrangements made for statutory long-term care insurance.

⁸¹ § 1 I in conjunction with §§ 25 et seq. Federal War Victims Relief Act.

⁸² § 1 VIII in conjunction with § 36 Federal War Victims Relief Act.

⁸³ § 1 VIII in conjunction with § 37 Federal War Victims Relief Act.

Widows or widowers or life partners can obtain benefits also in the case of divorce, annulment or invalidation of marriage if the victim used to pay alimony. Pension payments are granted for as long as the surviving dependant would have been entitled to alimony from the deceased victim.⁸⁴ The right to *hospital treatment*, above all, serves to cure health disorders and to eliminate the resulting adverse effect on earning capacity, to avert any aggravation of the condition, prevent the need for long-term care and avert physical discomforts.⁸⁵ In addition, they can claim for *basic pension*. This monthly paid benefit amounts to 378 €. ⁸⁶ *Compensatory pension* can be granted to the widow or widower or life partner if half of the earning capacity has been lost, the age of 47 has been reached, or if the applicant takes care of a child or cannot work for other compelling reasons. Income is to be deducted; the compensatory pension can reach an amount of 419 € at the most.⁸⁷ Widows or widowers or life partners who can claim for compensatory pension can obtain *damage compensation*. Concerning the calculation, the income of the applicant is contrasted with half of the income representative of the occupational group the victim belonged to. Damage compensation is 42.5 % of the difference or, if it is more favourable, 30 % of the compared income of the victim.⁸⁸ Furthermore, widows or widowers or life partners can claim for monthly *care compensation* of at least 10 € if they have taken care of a victim who had been classified as helpless according to level II, for over ten years.⁸⁹ In cases where the victim did not die as a consequence of the health disorder caused by the violent act, widows or widowers or life partners can obtain *allowance* if the victim's earning capacity was impaired by the damage caused and the impairment affected the maintenance of the spouse. Income is to be deducted.⁹⁰ Finally, widows or widowers or life partners can apply for *supplementary benefits due to the care for war victims*, too. Income is to be deducted.

Orphans, that is, biological children, step children or foster children can obtain benefits until the age of 18, during apprenticeship/tertiary education until the age of 27 and above the age of 27 in cases of physical or mental infirmity. The benefits are similar to the benefits of widows, widowers and life partners, that is, orphans can claim for medical treatment, basic pension, compensatory pension, allowance and supplementary benefits due to the care for war victims. Concerning the amount of the pensions, it is to be differentiated between orphans and half-orphans. The basic pension for orphans amounts to 199 € and the basic

⁸⁴ § 1 VIII in conjunction with § 42 Federal War Victims Relief Act.

⁸⁵ See § 1 VIII in conjunction with § 10 IV Federal War Victims Relief Act.

⁸⁶ § 1 VIII in conjunction with § 40 Federal War Victims Relief Act.

⁸⁷ § 1 VIII in conjunction with § 41 Federal War Victims Relief Act.

⁸⁸ § 1 VIII in conjunction with § 40a Federal War Victims Relief Act.

⁸⁹ § 1 VIII in conjunction with § 40b Federal War Victims Relief Act.

⁹⁰ § 1 VIII in conjunction with § 48 Federal War Victims Relief Act.

pension for half-orphans amounts to 107 €. The compensatory pension and the supplementary benefits due to the care for war victims are income- and property-related.⁹¹

Last but not least, the surviving *parents* of the victim can obtain benefits if they are aged 60, incapable of working or unable to work for compelling reasons. Parents obtain medical treatment, supplementary benefits due to the care for war victims, and parents' pension. The supplementary benefits due to the care for war victims and the pensions are income- and property-related.⁹²

⁹¹ See § 1 VIII in conjunction with §§ 10 IV, 45-48, 25 et sqq. Federal War Victims Relief Act.

⁹² See § 1 VIII in conjunction with §§ 10 IV, 51, 25 et sqq. Federal War Victims Relief Act.

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